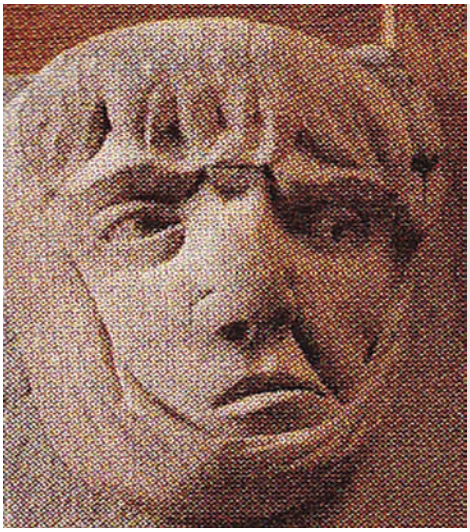


Word Processors, Estate Planning and the Impact of Modernism

Jack Davidson

If you were a stonecutter in the 1870's in New York you were probably an immigrant of English, Scottish, Irish, Italian or German extraction. You also stopped and took a break from your work at about 10 am to have a bucket of beer. Architects at the time would frequently note on their plans simply where an ornamentation on the facade of a brownstone should appear, and they left it to these same highly skilled stonecutters to design and carve the embellishment. Perhaps sometimes fueled by the bucket of beer, these stonecutters frequently sculpted eccentric figures such as portraits of friends with bandaged faces or a man thumbing his nose at his neighbors.

After reading about the efforts of Ivan Karp, art dealer and collector, to save these nineteenth-century American ornamenti, I keep thinking about how much estate planning has changed since my arrival in Vermont in 1970.

I view attorneys who draft wills and trusts as architects. But in those days there were a fair number of stonecutters as well. Wills could be fun to read and many had personalities. Alas, like New York architecture, we went from Victorian adornment to modernism of glass and steel pretty much overnight. I believe the rapid transition was caused by the word processor, which then enabled the widespread use of form books.

In 1971 I accompanied a client to see his attorney in Chester, Vermont. I expected a routine will signing, a timely return to Brattleboro and dinner at home. "Have you read the Will?" asked the attorney. "Yes. You left out my middle initial", said the client. "Well, my secretary is here and she will retype the Will" responded the attorney. So much for a timely return to Brattleboro. Thus was the world of estate planning before the word processor.

Form books ~ that is, a collection of well-drafted trusts and wills ~ were readily available then. In fact, we started distributing the Northern Trust form book to Vermont attorneys during the early 70's. However, word processors were not. You could buy an IBM Display Writer for $12,000, but that was more than what many Vermont attorneys made in a year.

Those attorneys who could afford a row of secretaries tended to use form books. They were also the ones who handled clients needing tax planning, that is, estates valued above the federal exemption of $60,000, which represented approximately 5% of Vermont estates at the time. The rest seemed to rely on documents that they had cobbled together over the years, perhaps under the belief that less is more.

Wills and trusts were understandably shorter then. They seemed more personal as well. Perhaps the customization was more evident simply because the multiple pages of boilerplate language had not yet arrived to hide the few paragraphs that actually disposed of property. Or perhaps our legal documents are now almost exclusively the creation of the architect embracing modernism, and we simply have fewer stonecutters practicing law. We no longer seem to find interesting clauses like the famous "To my cousin Ralph, whom I promised to remember in my Will, Hi Ralph".

At the Trust Company of Vermont, we don't prepare wills or trusts. We review them. Our clients select their own attorneys and our role is to assist in the process of designing plans that meet their objectives. We also work in the background with the attorney and provide forms and suggested language, if needed. Most of the attorneys in Vermont who specialize in estate planning have developed their own forms using well-designed form books as their guide. So now, for the most part, we focus on the customization of the form and the translation of the plan to the client.

Our clients frequently ask why it was necessary for the attorney to produce a 40-page trust. Much of the language found in a trust is to cover contingencies that have been time-tested but are unlikely to be needed. Now that the language is easy to produce with our word processors, why not use it?

Regardless of the length of the document, we tend to find, on average, less than two pages that require our attention. Our focus is usually on the tax-oriented marital deduction clauses and the provisions for distribution to family members. It is in these two areas where the benefits and drawbacks of the computer-generated form are most evident. Form books tend to have biases, and frequently the sheer volume of words hide the stress points where important decisions need to be made.

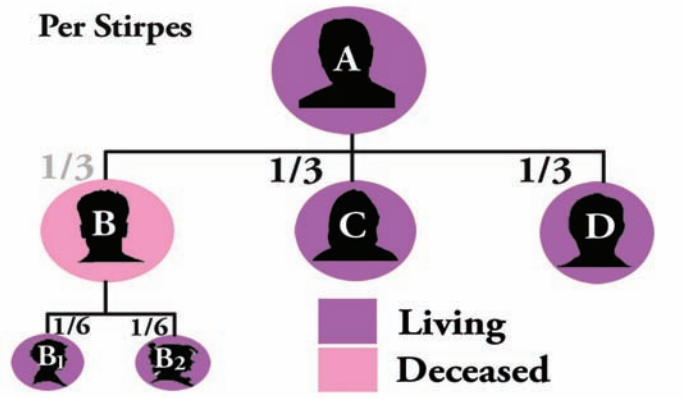
Before form books, we tended to find harmless errors. "I leave my child's share in trust and the trustee shall pay the share: 1/3 at age 30; 1/3 at age 35; 1/3 at age 40. The correct version is: 1/3 age 30, ½ the balance at age 35; the balance at age 40.

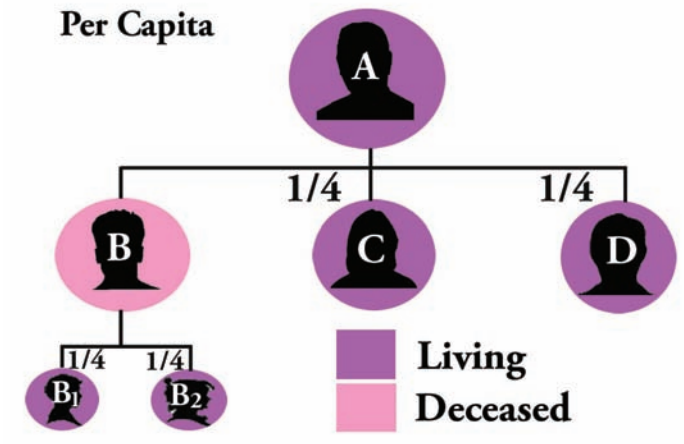
After the widespread availability of form books and word processors, some frequent errors disappeared and new ones appeared. A form book could get infected and the infection could last for years. Sometime in the late fifties, a draftsman came up with a way to minimize capital gains on funding the marital trust. The IRS subsequently cracked down on it and issued Revenue Procedure 64-19, denying the marital deduction if you used his specific language. We are still finding this violation today.

Recently I had lunch with a prominent and very knowledgeable estate planning attorney. Bragging about my forensic abilities to seek out this obscure virus, I stated that it really wasn't that important because the IRS would never catch the violation of 64-19. He then reminded me that he was the IRS attorney who audited me thirty years ago. *Oops.*

The two biases that stand out are *per Stirpes* distributions and a preference for bloodlines. The former will have a great deal to do with whether your children think kindly of you at the first Thanksgiving following your demise and the latter whether your daughter in-law will think kindly of you. The disposition to children and grandchildren and spouses may have a dramatic impact on whether your legacy will promote lasting family harmony.

I have found over the years that children tend to think *per Stirpes* but the parents tend to occasionally think *per capita*. What does this mean? Per stirpes (its Latin translation is "by branch" of the family) means that if you have three children and two grandchildren, each child will receive one third of your estate. If a child fails to survive, his or her issue will take the share the child would have received if living. *Per capita* (Latin for "per head") describes the creation of a share for each descendant regardless of his or her place on the family tree.





Frequently, we see parents creating educational trusts for grandchildren on a per capita basis and this does not seem to cause family tension. But if you leave your estate per capita, or if you have different percentages passing to your children, you may not fully appreciate the impact on sibling relationships. One of the more difficult challenges in estate planning is choosing among childrens' individual needs at the expense of family harmony.

From my experience, most children think that the decision of a sibling to have more children should not diminish their share, and this is amplified if a child has no children. Similar sentiments have been expressed regarding the tax-motivated $13,000 annual exclusion gifts, which may include grandchildren and spouses.

Most form books make it easy to go *per Stirpes* and make you work to go *per capita*. And I think that is good. We should give very careful consideration to any provisions that do not treat children equally. The form book also defaults to a bloodline preference and I don't think that is a good idea.

Many trusts have generation-skipping objectives. Thus, a child's share is held in trust for life and then provides for distributions to that child's issue upon death or the age of majority. Frequently absent are provisions for the child's spouse. Most form books make it easy to follow bloodlines and hard not to. There is no break built in to remind the attorney to raise this issue.

It seems most trusts and wills today are very much like modern architecture. The possible loss of individuality and personality is a small price to pay for the comprehensiveness of the architecture of a "scalable trust". Brownstones tended to be 3 stories high, but modernism accommodates 3 stories or 60 stories. Scalability is important because if the tax law or the value of your estate changes quickly, your document adapts to the change. That said, I would like to leave you with a quote from the French statesman, Georges Clemenceau, after touring a very modern building. He commented: "It's all very nice, but what sort of ruins will it make?"

Thanks to John Freeman Gill, "Ghost of New York", June 2010, The Atlantic, and Robert S. Gallagher, "Wreker, Spare That Frieze!", American Heritage Magazine, August 1967, particularly for the Clemenceau quote.