To Praise Testator's Speech

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David Horton, *Testation and Speech*, 101 **Geo. L.J.** 61 (2012).

Professor David Horton argues that testation is a form of expressive speech that may raise Constitutional concerns. In doing so, he reminds us of a basic reality—a will that disposes of property is also the will of an individual speaking to his or her family, friends, and community. Legal trends that emphasize efficiency over the testator's individual voice are troubling.

Horton begins by examining three traditional analogies used by courts in deciding trust and estates cases—property, contract, and corporate law. In describing each analogy, Horton notes that none of these is spot on, there is an ill fit associated with each. This provides the intellectual space for other theories and perspectives, including speech. Horton acknowledges that his conceptualization of testation as Constitutional speech is also not a perfect fit; nevertheless it offers an intriguing lens through which to view some difficult cases and doctrines.

Testation and Speech considers history. The Roman origins of wills reveal a rich pattern of individual expression. These were public documents read aloud at civic gatherings. Over time, as laws, taxes, and lawyers became more involved in the estate planning process, the expressive voice of the individual testator arguably became less clear, though never silenced.

Testamentary expressive speech continues today, which Horton classifies in two ways—patent expressions (such as conditional bequests, gifts for purpose, and unusual commands) and expressions embedded in distribution plans. Patent expressions are well known to estate planning attorneys who at times need to counsel clients from including libelous statements in their wills. That such statements in a will can give rise to a libel claim underscores the testament-as-speech argument. Conditional gifts – such as involved in the highlighted Feinberg "Jewish clause" case[1]—similarly confirm the expressive potential of a will. That many testators do not use these well-known provisions does not undermine the expressive speech function for those who do.

On the other hand, all testators dispose of their property. Horton believes the disposition of property can be an implied form of expressive speech—it communicates in concrete fashion the feelings and judgments the testator has made about the property and beneficiaries. It bears particular significance for two reasons. First, the disposition expresses the testator's individuality at death—a time that carries great weight and moment for the testator as well as those who survive her. Second, the disposition is also comprehensive, the sum total of feelings and property. It is quite sobering for all involved. One quibble I had with the article is in this section. The conclusion that the three quarters of testators who divide their property equally among their children reveal little in their estate plans sounds off to me. Can it be that such a dispositive plan is equally expressive as a plan that orders disparate treatment? Those testators may simply be expressing equal love and affection for all their children, prodigals and stars alike.

Horton next tackles the policy implications of testation as speech. This is the novel and insightful crux of his article as he implicates a role for First Amendment free speech scrutiny as well as a return to the traditional emphasis on testator's intent in close cases.

If testation is viewed as expressive speech, then certain legislative and judicial limits on testamentary freedom could raise First Amendment concerns. While the contours of First Amendment protection are "notoriously elusive," a provision in a testator's will (e.g., the "Jewish clause") can be self-expression, contribute to the marketplace of ideas, and be a form of political speech; all of which values undergird classification of speech for First Amendment purposes.

Undue influence is troubling because many cases proceed from leaving property to nonrelatives, instead of the perceived norm of family. This plays out in case law as well as in legislation. California has a new statute that presumptively invalidates donative transfers from a "dependent adult" to a nonrelative paid caregiver. If such bequests are viewed through the lens of expressive speech, those bequests may similarly be a "ringing exercise of autonomy," add to the marketplace of ideas, and arguably address "matters of public concern." The statute and the doctrine may need to be rethought.

More troubling under his analysis are two UTC principles—the "benefit–the–beneficiaries" rule and that some doctrines are mandatory regardless of the settlor's intent. The "benefit–the–beneficiaries" rule has generated much scholarly discussion but Horton's expressive speech concern adds another perspective from which to ponder the new rule's scope. He prefers an application that begins with, or at least takes into account, the settlor's intent. More fundamentally he questions the need for the rule's existence because traditional doctrines of modification and administrative deviation address the same issues of waste and loss that the rule ostensibly addresses.

A will can be more than merely a transfer of property, and when it is, a testator's expressive speech should be valued, respected, and not dismissed as an inefficiency in wealth transmissions. Horton's article is intellectually provocative, and it provides a new perspective on the endlessly fascinating issue of what people say, do, and mean in their wills.

1. In re: Estate of Feinberg, 919 N.E.2d 888 (Ill 2009).

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