

## **INFLUENCING THE BEHAVIOR OF HEIRS - PROVIDING NON-BINDING INFORMATION**

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*“Try not to become a man of success, but rather become a man of value.”*  
Albert Einstein

If the true starting point of estate planning is “To Protect and Preserve Family,” then clients and their advisors need to do more than just draft standard form documents. As estate planners, we constantly advise our clients to make sure they have properly planned for incapacity and death. Unfortunately, our focus often begins and ends with the execution of proper documents and the titling of assets. We may fail to make sure the client’s family and decision makers have adequate information about the client’s values, hopes, assets, liabilities and intents. The incapacity or death of a family member is always a traumatic event. But the emotional turmoil and family pain is often magnified by the resulting confusion over the plans, assets and desires of an incapacitated or deceased family member. The mental foggy that accompanies the family’s trauma is exasperated by the inability or reluctance to make basic decisions - because of the lack of basic information.

There are a number of documents that clients should consider to provide comfort and support to families upon death or incapacity. These documents can provide “Information in a Time of Confusion” and help minimize the types of inadvertent mistakes which often occur in these times of turmoil.

Ethical Wills. In deciding how to influence heirs, one solution is an Ethical Will.<sup>1</sup> It’s roots lie in the Old Testament oral tradition of passing on wisdom to the next generation, called a “*tzava’ah*.” An Ethical Will is a document designed to do one of more of the following:

- Impart the wisdom and values of one generation to the next.
- C Describe life changing events. For example, a grandfather may provide a discussion of his experiences (e.g., surviving World War II) and how it impacted his life.
- C Tell a family of life’s choices, mistakes and successes and the lessons learned.
- C Provide family ancestral heritages and histories.
- C Provide favorite scriptures, poetry and sayings.
- C Provide insights to family and planners on why and how the client developed his or her estate plan.

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<sup>1</sup> Barry K. Baines, “The Ethical Will: Reviving a Biblical Tradition and Applying it to Retirement Planning,” *Journal of Retirement Planning*, June 1999. This article provides practical advice in writing your own ethical will. See also: Kathleen M. Rehl, “Help Your Clients Preserve Values, Tell Stories and Share the ‘Voice of Their Hearts’ Through Ethical Wills,” *J. Prac.Est.Plan.*, July 2003; “Josephine Turner, “Estate Planning: Ethical Wills,” found at [http://edis.ifas.ufl.edu/BODY\\_FY536](http://edis.ifas.ufl.edu/BODY_FY536); Robert Flashman, Melissa Flashman, Libby Noble and Sam Quick, “Ethical Wills: Passing on Treasures of the Heart,” found at [www.ces.ncsu.edu/depts/fcs/pub/1998/wills.html](http://www.ces.ncsu.edu/depts/fcs/pub/1998/wills.html)

An ethical will is not a form document. It has no set format or required content. Instead, it is designed to accommodate the unique personalities, family structure, values and thoughts of one generation for the next. Perhaps one of the best description is: *“Ethical wills are windows into the souls of those who write them. It is this that makes them so cherished by family members from generation to generation.”*<sup>2</sup>

One author has indicated three principal purposes of an Ethical Will:<sup>3</sup>

- C Leaving an Intangible Legacy
- C Personal Satisfaction
- C Aiding the Estate Planning Process

#### **Materials on Ethical Wills and Family Mission Statements**

- ☛ Barry Baines, Ethical Wills: Putting Your Values on Paper (M.D. Presus Publishing 2002). Available at [www.ethicalwill.com](http://www.ethicalwill.com) along with other books and materials on Ethical Wills.
- ☛ Jack Riemer and Nathaniel Stampfer, So That Your Values Live On: Ethical Wills and How to Prepare Them, (Jewish Lights Publishing 1991).
- ☛ Elaine Tiller, Ethical Wills, Spiritual Bequests, (Baptist Senior Adult Ministries, Washington DC1996)
- ☛ Craig E. Aronoff and John L. Ward, Family Business Sourcebook (Omnigraphics, 1992).
- ☛ Craig E. Aronoff and John L. Ward, Developing Family Business Policies: Your Guide to the Future (Family Enterprise Publishers).
- ☛ Stephen Covey, The Seven Habits of Highly Effective People, (Simon and Schuster 1989).
- ☛ Stephen R. Covey, How To Develop a Family Mission Statement, Audio Book (Covey Leadership Center 1996)

Family Mission Statement. Similar to an Ethical Will is a Family Mission Statement. However, while the Ethical Will tends to focus on values and life’s experiences , the Family Mission Statement tends to be more practical - discussing how the family should conduct itself in the future. It may also serve as a benchmark for acceptable and unacceptable behavior in the family. For example:

- ☛ The statement may discuss how a family business will be maintained: *“...unless disabled or retired at a normal retirement age, any family member receiving benefits from the business must be actively employed in the business and no family member is assured employment...”*
- ☛ It may be a statement of a newly married couple of differing ethic or religious backgrounds discussing how their children will be raised.
- ☛ It may describe how a step-family will conduct itself.

Unlike the Ethical Will which a client creates on their own and then imparts to family, the Family Mission Statement must be developed with the input of all family members who will be impacted by its terms. If they are not a part of the process of developing the statement, it is less likely the family will observe it’s requirements and perspectives.

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<sup>2</sup> Elaine Tiller, quoted in Turner, Id.

<sup>3</sup> Kevin H. Crehnshaw, “Ethical Wills: A Memory That Keeps on Giving,” found at [www.aces.edu/urban/metronews/vol2no2/ethical.html](http://www.aces.edu/urban/metronews/vol2no2/ethical.html)

Helpful Information: Go to the Franklin Covey website at [www.franklincovey.com/missionbuilder/index.html](http://www.franklincovey.com/missionbuilder/index.html) to develop your own Family Mission Statement.

Family Love Letter. Many guardians and personal representatives have reviewed a client's well-drafted estate planning documents, but been befuddled when they could not readily access basic information about the client's assets, liabilities, insurance coverages, burial plans, and advisors. The Family Love Letter<sup>4</sup> is designed to provide basic information to family about assets, liabilities, and personal desires upon death or incapacity.

Family Meetings. Once a client has completed an estate plan, should heirs be told of its contents?<sup>5</sup> Obviously, the disclosure or non-disclosure of information will influence the subsequent actions of beneficiaries. There are sound arguments supporting such disclosure, including:

- It allows children to know how the parent's estate plan will impact their own estate plans. For example, if a parent creates a generation skipping trust with a spray power for the benefit of both children and grandchildren, the children and their advisors need to take the trust into account in their own planning, especially if the trust grants a power of appointment to a child. As a further example, suppose an irrevocable life insurance trust grants a child/trustee the right to appoint a successor trustee. If the child has no knowledge of the terms of the trust, the child may fail to make the necessary appointment.
- The disclosure allows children to react to the plan. For example, a daughter might have a substantial estate of her own or be facing a divorce and ask her parents to pass her inheritance through a generation skipping trust. However, the heir's reaction may not be what the client may have hoped, particularly if an inheritance is restricted. As a consequence, the decision to disclose should be predicated upon the personality of the child, the manner that the inheritance will pass and the willingness of the client to deal with potential conflicts with heirs.
- Disclosure may lessen the chance and success of an attack by an heir after the client's demise. If the child knew of the disposition pattern and did not object, the courts may be less willing to entertain a later challenge. Moreover, if children knew how the estate was structured before the death of the parent, they may have had time to accept the unpleasant outcome and not raise a challenge.
- The passage of particular assets are prone to create conflicts and a discussion of the client's desires may reduce the potential for conflict. For example, passing a family business to both those inside and those outside the business will inevitably create conflicts between the two groups. The client should address the ownership and management of the family business with family before death, to reduce the possibility of

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<sup>4</sup> John J. Scroggin, "The Family Love Letter," J. Prac.Est.Plan., January 2003. A copy is also available at [www.scrogginlaw.com](http://www.scrogginlaw.com).

<sup>5</sup> Roberta Lee-Driscoll and Richard E. Vodra, "How Much Should Beneficiaries Know in Advance?" J. Prac. Est. Plan. (March 1999).

later family fights.

There are also significant reasons not to make disclosure:

- The ownership of assets and decisions about their transfer are exclusively the right of the parents. Allowing children to think they have a right to challenge a parent's dispositions may create unnecessary conflicts. For example, suppose a husband is in his second marriage. He has adult children from the prior marriage and a minor child from the current marriage. Because of the prior benefits (or possible estrangement) provided to the adult children, he intends to pass a larger percentage of the estate to the minor child. Disclosing this decision may create conflicts between the adult children and their father, step-mother and half-sibling.
- Clients are often concerned that providing children information about how much they will inherit will take away the ambition of children to create their own wealth. If a son expects to inherit several million dollars, will it hinder his drive and ambition for himself?
- Some clients will provide partial disclosure. For example, telling the children the general disposition of their estate, but providing minimal information about the value of assets.
- Sometimes disclosure is an indirect attempt to control an heir. By telling a child what they will inherit and then threatening to take it away if the child's behavior does not meet the parent's expectations (e.g., visiting the parent enough, spending the child's money as the parent directs) is a pre-mortem ruling from the grave. It is also destructive to relationships.
- Estate planning is a process, not a conclusion. It changes over the course of the client's life as assets, laws and family situations change. Decisions which were made early in the process will not necessarily remain a part of a later estate plan. If early disclosure is made, the client may feel obligated to continue the disclosure for later changes, including those which may be unpleasant for heirs (e.g., locking a spendthrift child's assets in a generation skipping spendthrift trust). Moreover, given the increasing life expectancies of Americans and the potential reduction in government social benefits, clients may use substantial assets to support their retirement instead of passing them to heirs.

<p><u>Helpful Information:</u> Review the questionnaire developed by James Gottfurcht that helps evaluate how people are psychologically connected to their wealth. See the article, at <a href="http://www.psychologyofmoney.com/articles.htm">www.psychologyofmoney.com/articles.htm</a></p>
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Non-Binding Nature. The principal disadvantage (some would say advantage) of these approaches is that they are not binding on family members. They tend to be broad statements of hopes, desires and intents or provide specific factual information, but do not generally provide a legal mechanism to create incentives for proper behavior, or place restrictions on heirs who violate the precepts of the documents. As a consequence, many clients have examined more formal restrictions to influence the legacy they leave behind.