Counterpoint:

In Defense of Plain Language

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How ironic that, in support of his thesis, Mr. Armstrong should use a will-drafting example involving the phrase *per stirpes*! In reading over Mr. Armstrong's anecdote, I reached precisely the opposite conclusion on two counts.

First, I would say "hats off" to the client who insisted that her will be written in words that she could understand. This is particularly important where, as here, the matter involves the will's dispositive provisions. Is it too much for a client to ask that she understand who gets what, and on what conditions? It must have taken some gumption on the client's part to insist on clarification, in the face of an apparent assurance that this wasn't really necessary or even desirable. Based on my reading of wills and trusts over a number of years, my sense is that too many lawyers are adherents of the Allstate school of drafting. ("You don't understand it? Don't worry — you're in good hands.")

Second, *per stirpes* is a textbook example of legalese that seductively suggests certainty but actually can produce ambiguity and litigation. Suppose, for example, that A's will bequeaths property "to my descendants per stirpes." A has two children: B (who has two children) and C (who has four children). There is no problem as to meaning if one child predeceases A but the other child survives: the descendants of the deceased child take the one-half share the child would have taken had he survived.

But what if both of A's children predecease her? In this factual setting, the term *per stirpes* has been given two very different meanings by the courts (and in some cases by legislatures). Under what is sometimes called a "strict per stirpes" construction, the shares are always divided at the child level even if there are no living takers at that level. This was the definition used by Mr. Armstrong in redrawing his client's will. Under this interpretation, B's two children would take one-fourth each, and C's four children would take one-eighth each. Under another definition of

per stirpes, the shares are divided at the first generational level at which there are living takers. Under this construction, the shares would be divided at the grandchild level, and each grandchild would take a one-sixth share.

The states are about equally divided in three camps concerning what *per stirpes* means in this situation. Three camps? Yes, because several states have no authority on the issue. In these states, litigation would be required to construe the term.[1] This is the situation in Texas, where I teach and practice.

So, hats off to Mr. Armstrong's client once again. With her insistence, the will was drafted to avoid this possible constructional problem. The 44 words that Mr. Armstrong added aren't superfluous at all. They produced both clarity and client understanding.

More generally, Mr. Armstrong's arguments are unpersuasive for three reasons.

First, he fails to distinguish between two levels of so-called "legalese." On the one hand are true terms of art that cannot really be reduced to common language. To the examples given by Mr. Armstrong (*res judicata, laches,* and *proximate cause*) I would add, from the law of wills, *marital deduction, unified credit, qualified terminable-interest property, unused portion of my generation-skipping transfer tax exemption*, and *spendthrift restrictions.* (These are the only terms of art I could find in a tax-planned will I recently prepared; creating six trusts, it is 16 letter-size pages, counting the signature page and the self-proving affidavit.)

On the other hand are all the inessential legalisms that clutter so much mediocre drafting (*such* and *said* as demonstrative adjectives, *same* as a pronoun, *aforesaid, whereas, hereinabove,* and the like). One of my favorites, which I have seen several times, occurs when a will identifies the testator's spouse by name and then, in several later provisions, refers to "my said wife, the aforesaid Mary Brown." That leads one to wonder: How many

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1. *See, e.g.*, Lombardi v. Blois, 40 Cal. Rptr. 899 (Cal. Ct. App. 1964) (in which the construction given to *descendants per stirpes* determined whether one set of grandchildren took one-seventh or one-eighth shares of $40 million).

wives did the testator have, that he had to make such particularized references to Mary?

Second, Mr. Armstrong seems to believe that the criterion for successful drafting is whether the document ends up being litigated. If that is to be our touchstone, the legal profession is in very serious trouble. We ought to be drafting "workable" documents — contracts, say, that our clients can both understand and apply in everyday life. In urging that it is "immaterial" whether clients can understand drafted documents, Mr. Armstrong espouses what should be a discredited view.

Third, Mr. Armstrong would just as soon make it harder even for lawyer readers. True, he recognizes that, as Holmes said, a good piece of drafting must "exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."[2] But the effect of addressing one's documents primarily to some mythical judge — and not the ordinary person on the street — is that the meaning becomes more obscure to judges and lawyers as well as to ordinary people.

What supports the idea that legalese — as opposed to the small subcategory comprising terms of art — has redeeming value? The canard is based almost entirely on generalizations and off-the-point anecdotes. We ought to simplify whatever is simplifiable. If the writing cannot genuinely be simplified, and the difficult terms are legally necessary, then they must be terms of art. And we can quite happily live with language that cannot be further simplified.

When we rigorously engage in this type of simplification, we enhance not only our clarity but also, invariably, our content. The truth is that clear, simple drafting is less subject to misinterpretation than legalistic drafting. The myth to the contrary is merely the bad drafter's flimsy rationalization that the drafting is not so bad.[3]

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2. Paraiso v. United States, 207 U.S. 368, 372 (1907).

3. *See* J.A. Clarence Smith, *Legislative Drafting: English and Continental*, 1980 STAT. L. REV. 14, 19.