

Language and Law:

Precatory Language

What is precatory language?

Black's Law Dictionary defines precatory words as "words of entreaty, request, desire, wish, or recommendation, employed in wills, as distinguished from direct and imperative terms." Precatory words used in a will "ordinarily import entreaty, recommendation, or expectation, rather than any mandatory direction."

When language is "advisory" rather than "mandatory," a trust is not established, but rather a gift that is conditional on the exercise of discretion by the holder of the property (often the executor). Precatory words are expressions by a settlor of desire, wish, recommendation, assurance, request, or the like, and do not naturally import to most persons a legal obligation.

Does precatory language create a legally binding trust?

The law has gone through three phases with respect to whether precatory language is binding:

Phase I: The Early Rule: Precatory Words are Powerful

Phase II: The Transition: Precatory Words are Weakened

Phase III: The Modern Rule: Precatory Language is Hit or Miss (Heavy on the Miss)

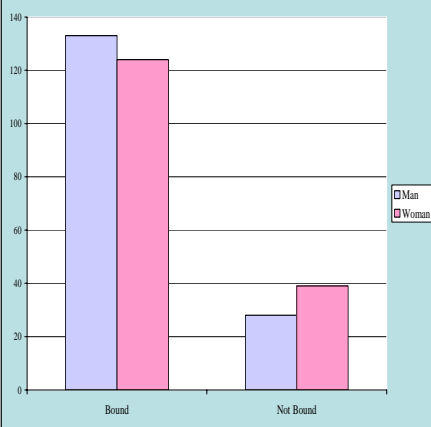
Under modern law in most states, courts attempt to determine whether the testator intended to create a trust. The relative strength or weakness of the language the testator chose is one important factor that courts consider. Sometimes a trust is found, but in many cases, it is not.

Is precatory language "heavy on the miss" because it is "light on the mister"? Keep reading!

Does the modern rule on whether precatory language creates a trust have any determinacy?

Courts have from time to time expressed some frustration with the lack of determinacy of the "rule" on precatory trusts. One appellate judge commented, "... the construction to be placed upon one instrument is of little value as a precedent in aid of the construction of another. And this is particularly true of cases involving the existence or nonexistence of a precatory trust, for previous decisions only serve to illustrate the application of general rules of construction of wills, which, after all, is a matter of impression as to the maker's intention made upon the mind of a court considering the will itself with the circumstances surrounding its execution. Each case must of necessity, therefore, depend more or less upon its own peculiar facts." *In re Sowash's Estate*, 217 P. 123 at 126-127 (Cal.App. 1 Dist. 1923).

When a donor uses precatory language, she descends into a legal no-mans'-land, in which the instructions may be enforceable or may be disregarded. Unlike direct and explicit trusts, which are enforced according to their terms, grants using precatory language must submit to a variable and unpredictable court analysis regarding whether the language was backed by intent to create a trust.



He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills

"I don't mind living in a man's world as long as I can be a woman in it."

Marilyn Monroe (1926-1962)

Language, Gender, and the Law:

Men, Women, and Precatory Language

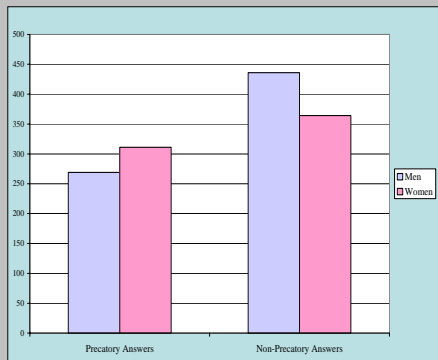
Given that men and women tend to use different language, and given that the language one chooses is critical to whether a trust is established, might the current law on precatory language impact men and women differently?

To answer this question, 324 subjects from a nationally representative sample (obtained from a market research company) answered questions about their preferences in language used in wills.

Subjects were asked about their own preferences, and were also asked to identify language in wills as more likely to be used by a man or more likely to be used by a woman. Subjects were also asked whether they would prefer that their executor be legally bound by the language they used.

Key findings:

- Women are more likely to use precatory language than men. A chi square analysis of the data showed a difference with a greater than 97% confidence level.
- People identify certain words (ask, desire, recommend) as strongly feminine and other words (compel, instruct) as strongly masculine. Chi square analyses of the data showed a difference with a greater than 99.9% confidence level.
- People who intend not to legally bind their executors are more likely to choose precatory words. A chi square analysis of the data showed a difference with a greater than 97% confidence level.
- Women are slightly less likely than men to prefer that their executors be legally bound, but the difference was not statistically significant.



Language and Gender:

The Social Psychology of Word Choice

Males and females exhibit different behavior on several key measures, beginning in childhood and persisting through adolescence and adulthood. One such measure is the gender difference in language use and ability.

Verbal Differences in Gender: Early Childhood

Differences in the ways that males and females use language appears very early in life – perhaps nearly as soon as we begin to speak. Research suggests that boys and girls as young as 14 to 20 months may have different capacities to learn emotional or expressive language: specifically, that female children may have advanced ability to learn. Other studies have shown that girls between the ages of one and five years are more proficient in language skills than boys.

Verbal Differences in Gender: Adulthood

Judith Hall has pointed out that as adults, women are more "verbally skilled," make more "socioemotional contributions" in small group, and are more empathetic. Men, on the other hand, appear to have superior skills quantitatively, visiospatially, and in their ability to detach themselves cognitively from their surroundings.

A meta-analysis (by Anthony Mulac) of published psychological research identified several ways in which men and women use different language. Among other factors:

- Men are more likely to:
- make references to quantity
 - use judgmental adjectives
 - use directives (tell someone what to do)
 - make reference to themselves.

- Women are more likely to
- use intense adverbs
 - refer to emotion
 - use longer sentences
 - use negations and hedges,
 - ask questions.

Overall, men and women's language differs on four categories:

- Direct vs. Indirect
- Succinct vs. Elaborate
- Personal vs. Contextual
- Instrumental vs. Affective

Why are there differences

in the language men and women use?

Social-Developmental Theories: Girls and boys are socialized differently, by their parents and caregivers as well as peers.

Evolutionary Theories: Men evolved better spatial skills as hunters, while women evolved better communication skills as gatherers.

Hormonal Theories: Prenatal hormones affect brain development and cognitive function.

Biological Theories: The anatomy of male and female brains are different. Furthermore, males and females use different parts of their brains to perform language-related tasks.

