

# **Decedents' Estates**

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# **Decedents' Estates**

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## **Cases and Materials**

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*This book is dedicated to  
Walter Wadlington,  
teacher, mentor, friend.*  
ROB

*This book is also dedicated to  
Kerry and Sadie,  
my love and my family.*  
MTF



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# Preface

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Decedents' estates may harken the reader to a time when courses on wills, trusts, and estates focused on the execution of Wills, the intestate status of heirs, and the vagaries of disappointed legatees. There was such a time, but as the Twenty-First Century begins, any course on decedents' estates is more aptly characterized by the creation of inter vivos trusts, the proliferation of non-probate transfers, the easing of the "harsh formalism" of ancient formulae, the disclaimer of inheritance and contest through prenuptial agreements, and the casting of lifelines as an ever-increasing generation of older persons plans for incapacity. Any student-or professor-never would have predicted that states would limit the Rule Against Perpetuities, or abolish it altogether. No one would have predicted that academics would tinker with the share of a pretermitted heir, discount the word "survivor," or rationalize the introduction of extrinsic evidence to change the plain meaning of words. All of these things have come to pass, but a few things have remained the same. For example, no matter what the federal outcome, taxation of estates has always been the tail that wags the dog, and even amidst the lessening grip of federal levies, the states remain vigilant in collection of gift, estate, and inheritance taxes. And the human desire to make a difference in life remains the same, evidencing itself in gifts to charity, educational trusts for children, spousal trusts, and a myriad of trusts to provide "care, comfort and support" for everyone and everything, including pets. Remaining the same is the public policy of any government that seeks to provide an orderly, efficient, and fair administration of wealth transfer.

A final factor that has remained the same, and is consistently present in each generation but is often averted, is the reality that, at some point in time, each person seeking to transfer wealth will become a decedent. No matter what legal changes have taken place, no matter what strategies have been adopted, and no matter what taxes have been imposed and paid, each person is amassing a decedent's estate. Even though we are conscious observers of the scene and realize that inter vivos transfers and planning options are the focus of the modern course material, this is the reason why we chose the title for this book. In assembling the material for the book, choosing cases, writing the Notes, and incorporating code provisions, we have made a purposeful effort to concentrate on the modern adaptations of inter vivos planning, but we are ignoring neither our indebtedness to what has gone before, nor the things that have remained the same. We hope that the reader will recognize and appreciate this balance in the following themes.

First, our primary concern is to make this book a good teaching vehicle. To facilitate this, we have placed a Tool Bar at the start of each chapter, hoping that this will allow for a brief introductory summary before entering the thicket of material. Often students miss the forest for the trees, and we hope that the Tool Bar will assist in providing a comprehensive overview from which the reader will be able to start, refer to throughout, and summarize at the conclusion. We have painstakingly chosen cases with fact

patterns that invite interest, creativity, and debate. Good cases make good classes! We wrote the Manual for Teachers to assist with these cases, integrate the code provisions, and explain interconnectedness.

A second theme of the book is informational. While we do ask a few questions in the Notes, far more often we explain, elaborate on the case, and highlight. And while we believe in the practice of providing students with problems, we prefer to allow the cases or the professor to present the problems. The Manual for Teachers contains many former exam questions with feedback provided. Furthermore, students and professors have embraced the Web—it is even available during class. Therefore, the casebook has many Web addresses. There is a Table of Web Sites, and the Web addresses throughout the material provide the students and the professors with a chance to update statistics, view forms, and obtain further sources and information. Plus, we hope you will utilize the many international statutes provided, which furnish a glimpse into such arenas as spousal rights and fiduciary administration in foreign countries. Finally, we offer a device that we have used to teach some of the material—what we refer to as the “Analytical Principle.” This is a tool that consists of time frames and points of reference, and is used to explain complicated issues such as lapse, powers of appointment, and vesting. We explain it in Chapter Six: Utilizing Future Interests, but its applicability will be shown in Chapter Seven: Creation, Classification, and Utilization of Trusts.

A third theme of the casebook is confrontational—to incorporate into the text the thorny issue of estate and gift taxation. We have omitted a separate chapter on taxation, preferring instead to place Tax Considerations throughout the casebook. Some of these Tax Considerations consist of material presented in Notes, and some are cases, but each offers a glimpse into the interrelationship between the material being studied and taxation. We think this must be confronted in any course on decedents’ estate. Professors wishing to avoid taxation issues may utilize a syllabus that consistently omits these considerations. We hope that others will find the inclusion of taxation to be a dose of reality for students, acknowledging that many of our trusts are premised on avoiding incidents of ownership that will subject the estate to taxation, or structured so as to achieve income or gift tax benefits. Admittedly, some of the tax cases are complicated and unfamiliar, but we think that modern planning for decedents must accommodate their presence and utility.

The final theme inculcated throughout the chapters is statutory construction analysis. Too often students become imbued with a lopsided appreciation for the common law to the detriment of statutory interpretations. To address this, included within the text are various code provisions, such as the international codes previously mention and a number of state and uniform statutes, many from community property states. For example, there are numerous references to both the older and the newer version of the Uniform Probate Code. Also, we find that the Uniform Trust Code has increasing application, as well as the Uniform Prudent Investor Act and the Uniform Health Care Decisions Act. Repeated reference will be made to these, and more individualized attention will be given to the Uniform Parentage Act, the Uniform Premarital Agreement Act, the Uniform Simultaneous Death Act, and the Uniform Statutory Rule Against Perpetuities Act. Of course, individual cases will discuss other state statutes in the context of decisions rendered, and admittedly, sometimes these cases were included because of the extensive discussion by the court of the state’s statute. Although the statutes may lack the factual context, including the drama, of decisional law, they are the indisputable first step in any analysis.

The casebook is divided into eight chapters. Chapter One: An Introduction, introduces the student to the issues to arise in the succeeding chapters. We have provided you with “A Family Affair,” which concerns a family confronting death, incapacity, wealth transfer, and how the government, attorneys, and the family’s own decisions will interconnect. The clients that are factually portrayed confront a reoccurring dilemma in modern society—how to plan for incapacity and transmit wealth to others. Addressing this will invite what is to come in all the other chapters. But this is the chapter where the student is likely to first be introduced to the significance of non-probate transfers in the transmission of wealth, the struggle between state and federal tax entities, the overwhelming effort to avoid either gift or estate taxes, and the possibility that they may be held liable for negligence.

Chapter Two: Intestate Succession, is traditional, statutory and yet is very modern. Every state has an intestate statute defining heirs—this is both traditional and statutory—but extensive consideration is given to the changing definition of family in American society. After establishing the pattern of distribution of wealth when there is neither a Last Will and Testament nor a non-probate substitute, the chapter explores how spouses, issue, and the biological revolution has affected status and the distribution of wealth under intestate statutes. Same-sex partners are achieving increasing status as spouses, and science has increased opportunities for parenthood and heirs. Who is an issue of whom? This is very exciting! And although they will have applicability to other forms of wealth transfer, this chapter provides the opportunity for students to discuss simultaneous death, assignment of expectancy, and disclaimers. These, too, are traditional, but private ordering and non-probate opportunities provide modern applicability.

Chapter Three: The Last Will and Testament, details the historical rules meant to safeguard the Testator’s last wishes. We will examine the different types of Wills and then explore the formalities and intentionalities needed to execute any of them. When faced with many historical precedents establishing the validity of Wills, it is interesting to introduce the students to the modern doctrines of substantial compliance and primary intent. This is the chapter in which we seek to balance the old against the new, the evolution of presence at execution, and how much influence is undue. These cases mirror the human condition. And once the students have mastered professional execution with all of its competing interests, we discuss revocation and revival of Wills. As with execution, we have sought to balance the old with the new.

Chapter Four: The Meaning of Words, invites the students to become attorneys and to make a “fortress out of the dictionary.” The law has accepted facts of independent significance and incorporation, but legal lists and exoneration are evolving. Likewise, the law regarding contracts to make Wills is fairly settled, but commentators have suggested, and offered legislation, proposing changes to the rules addressing mistake and the distribution of property when there has been a lapse. Comparing the age-old rules with the new exigencies is like pouring new wine into old bottles and precipitates good class participation. But our objective is to provide the grist by offering a chance to explore textualism and evolution.

Chapter Five: Restraints on Transfer of Wealth, confronts the student with a premise they learned in Chapter One—that they have a right under the Constitution to pass their property to others at death. But in this chapter, we learn that there are restraints upon that right. For example, you cannot create a trust that promotes lawlessness, you

cannot simply forget your issue, and since your spouse equivalent is your economic partner, she or he has a right to part of the wealth amassed prior to death. These restraints are the ones that students expect, fresh from classes on constitutional law. But we also address a final restraint—the bureaucratic process that will offer considerable restraint upon transfer at death. The costs, forms, delays, taxes, administration, and contests can be a bureaucratic nightmare. Finally, extensive treatment is provided for spouse equivalents. The listing of statutory entitlements available to a spouse equivalent who is able to benefit is a valuable reminder of public policy’s attentiveness to committed unions. And the statutory and judicial models to provide for augmenting the estate for election by a surviving spouse equivalent are meant to promote dialogue about public policy’s deficiencies and changes.

Chapter Six: Utilizing Future Interests, provides an explanation of the words, phrases, and constructions that have divided “interests” from “possession” for hundreds of years. Anticipating the next chapter, which is devoted exclusively to trusts, this chapter provides definitions, cases, the Analytical Principle that may be used to chart the interests that will pass under anti-lapse statutes, class gifts, powers of appointment, the Rule Against Perpetuities, and vesting. Rather than study the material in a vacuum, the cases and statutes seek to provide what is necessary to use future interests in estate planning instruments. Students will have had an introduction to this material in their first-year property classes, for better or for worse, so what we provide here is the practical application of those words and phrases to trusts and what goes into them.

Chapter Seven: Creation, Classification, and Utilization of Trusts, is the longest chapter in the casebook, but we thought it was justified to assemble all of the trust material in one place to provide a comprehensive approach to the topic. We think it essential that the students understand the five elements of a trust. The cases complement the statutes, and we have sought to distinguish gifts and highlight fiduciary responsibility. We are particularly pleased with the extensive Notes concerning trusts for pets, as these are far more common than anyone may think.

If the five elements of a trust are traditional, the ten classifications of trusts that are provided present the modern evolution. Please note the grantor, dynasty, and pour-over trusts, all of which are part of the modern estate planning scheme. These ten trusts and the five non-probate contractual arrangements are meant to provide the student with modern applicability, placing the material firmly in the context of what occurs each day in law offices. We anticipate that these classifications will prompt interesting class discussion. Likewise, modification and termination of trusts have historical roots and, therefore, rules, but more modern statutes have made substantial inroads, which offers a discussion as to preference and, most importantly, professional responsibility.

Too often, trust administration is given little attention. Yet, in speaking with trustees, there is extensive consideration given to what is prudent, the duty of loyalty, and how to maintain income for beneficiaries and still maintain principal for remainder beneficiaries. Additionally, how should a trustee invest, repair, sell, or administer the trust property? These issues are discussed under powers of the trustee, and appropriate statutory guidelines are provided.

Finally, in Chapter Seven, we discuss three legal constructions that rest upon the validity of trusts, they are: class gifts, powers of appointment, and the Rule Against Perpetuities. With class gifts and powers of appointment, it is possible to present the rules pertaining to definition, scope, and validity, but the Rule Against Perpetuities offers a

considerable challenge because of its changing status. It is possible to speculate that the Rule began to lose its binding force when states sought to ameliorate its harshness with doctrines such as wait and see, second look, and cy pres. These are all explained. But when states, and eventually the Uniform Probate Code, adopted the Uniform Statutory Rule Against Perpetuities, extending wait and see to ninety years, it was possible to imagine eliminating the Rule completely. Some states have done so. We provide a state statute abolishing the Rule. Goodness! This provides an opportunity to discuss the public policy behind the Rule. Hopefully, having learned about trusts in the same chapter, it will all come together.

Chapter Eight: Planning for Incapacity, offers an opportunity to return to the family affair presented in the first chapter, and then to discuss options in light of what has been learned between then and now. For example, students will have thought about and discussed the utility of a Will, the consequences of intestate succession, the necessity of clear language, the avoidance of restraints, and the use of trusts to provide for care and support. That done, practicality demands assessment of resources and, specifically, payments from entitlement programs such as Social Security, Medicare, and Medicaid. So as to provide for personal dignity, privacy, and easing the burden on family members, there are state forms and cases concerning durable powers, health care decision delegation, and the powers of conservators and guardians. The facts of these cases command headlines. These are pertinent issues to persons of every age, and the cases provide a good context.

As you use this book we welcome your comments and suggestions. We wish to express our deep appreciation to so many who contributed to this enterprise. Although any errors are our own, we wish to acknowledge our former decedents' estates professors, John L. Garvey and Neill Alford. Also, the grace, friendship, and exactitude of the late Jesse Dukeminier provide inspiration. And finally, we thank all of our present and former students who contributed more than they know and more than we can acknowledge.

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## Note on Editing

Some text, footnotes, and citations have been edited to make the cases we have included more manageable and relevant to the teaching tools applicable to a three- or four-credit course. The footnotes that are included contain the original footnote numbers from the original source. All omissions are indicated with an appropriate ellipses symbol to indicate that material has been omitted.