

Decedents' Estates

Decedents' Estates

Cases and Materials

FOURTH EDITION

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*I have sometimes thought that the emphasis on facts and procedure
instead of generally applicable substantive rules provided us with a vertical
rather than a horizontal legal education.*

Justice John Paul Stevens
THE MAKING OF JUSTICE 54 (2019)

For
Nicholas James Williams
because there is so much more than chintz
ROB

For
John F. Dobbyn
the kindest person I will ever know
MTF

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Preface

The evolution of decedents' estates continues. The first edition of this casebook was published in 2006 but was written mostly in 2005. The changes during this time have been significant. With the publication of the fourth edition, we illustrate societal changes, including same sex marriage, an increasing number of individuals utilizing assisted reproduction technology, and the continuing increase in the percentage of nonmarital cohabiting couples. While these changes seem to be issues related solely to family law, they impact inheritance, elective share, and often the distribution of trust benefits. Indeed, the interaction between family law and inheritance prompted a revision of the Uniform Parentage Act (2017), which now is gender neutral, contains updates on surrogacy developments, and requires Artificial Reproductive Technology (ART) clinics to ask gamete donors if they want identifying information to be shared with the resulting children when he or she reaches 18 years of age.

Societal and judicial developments also have found expression in recent legislation. For instance, the trustee's ability to "decant" one trust into another is now codified in the Uniform Trust Decanting Act (2015). Likewise, delineating the duties of a "trust protector" is now formulated in the Uniform Directed Trust Act (2017). In an effort to better promote uniformity in the power to adjust between income and principal so as to maintain impartiality, there is an updated Uniform Fiduciary Income and Principal Act (2018). Also, corresponding with estate administration in the digital age, there is now a Revised Uniform Fiduciary Access to Digital Assets Act (2015).

An increasing number of states have adopted the Uniform Trust Code (2000), which testifies to the greater use of trusts nationally and internationally. Working in tandem with the Code are the Uniform Probate Code—revised in 2008—the Uniform Powers of Appointment Act (2013), the Uniform Fraudulent Transfer/Voidable Transaction Act (2014), and the Uniform Premarital and Marital Agreements Act (2012). The Uniform Trust Code offers a series of default rules whenever the terms of the trust are absent or ambiguous.

Uniform legislation has an effect on ancient practices adjusting to modern usage. For example, these codes specify that wills can become valid through notarization alone, proposed expansive non-biological heirship, and a new formulation of a spouse's elective share. Self-settled asset protection trusts flourish among the states, as do decanting statutes. An increasing number of older Americans use charitable

remainder unitrusts and dynasty trusts, prompted, in part, by a substantial increase in the federal estate tax exemption.

Undoubtedly, the increasing longevity of Americans and the concomitant wealth in these older clients prompt legal issues pertaining to standards of capacity, as well as choice and payment options for long-term care. Attorneys must be cognizant of interfamily dynamics, undue influence, fraud, tortious interference with expectancies, and delusion. As with the first three editions of this casebook, our goal is to offer cases that magically transfer the professor and the student into a factual human situation that explores both the law and personal options.

As we continue into the Twenty-First Century, any course on decedents' estates is best characterized by the creation of *inter vivos* trusts, the continuing 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. The once all-pervasive power of the Rule Against Perpetuities continues to wane, and 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 clear and convincing extrinsic evidence to change the plain meaning of words.

Some elements in decedents' estates remain the same. For example, taxation of estates remains among a few states, no matter what the federal outcome. Taxation has always been the tail that wags the dog, and this concern remains at the state level and at the federal level among the super-rich. 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 and mausoleums. Remaining the same, too, is the public policy of any government that seeks to provide an orderly, efficient, and fair administration of wealth transfer.

A final inevitability factor, expressed in each of the three previous editions of this casebook, 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 occurred, strategies have been adopted, or taxes have been imposed and paid, each person is amassing a decedent's estate that will one day transfer. 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, the focus is on meeting the needs of future decedents. In assembling the material for the book, choosing cases and problems, 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 continue to place 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, make reference throughout, and refer to as a summary at the conclusion. We have painstakingly chosen cases with fact patterns that invite interest, creativity, and debate. We believe that good cases make good classes!

A second theme of the book is informational. While we do provide questions and problems in the Notes, far more often we explain, elaborate on the case, and highlight what we think is important. Furthermore, students and professors have embraced the Internet, which is even available during class. Therefore, the casebook has more than a few Internet addresses. We hope you will utilize the international references provided, furnishing a glimpse into such arenas as spousal rights and fiduciary administration in foreign countries. Finally, we offer a device 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. We use it to explain complicated issues such as lapse, powers of appointment, class gifts, vesting, and the Rule Against Perpetuities. We explain it in Chapter Six: Utilizing Future Interests, but its applicability will be shown in Chapter Seven: Creation, Classification, and Utilization of Trusts. Because we believe it offers students a visual connection with the material discussed, we believe it can assist in understanding. We hope that it provides you with a good resource.

A third theme is our purposeful inclusion of excerpts from articles authored by practitioners of decedents' estates. Many law schools and state bar associations are demanding that new attorneys have a familiarity with the law that makes them what is termed "practice ready." Current and insightful suggestions from women and men practicing at some of the finest law firms and investment companies in the nation provide a glimpse into practice throughout this casebook.

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 casebook are various code provisions, such as a number of state and uniform statutes, many from community property states. Of course, individual cases will discuss various state statutes in the context of decisions rendered. Admittedly, often cases were included because of the extensive discussion generated by 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 students to the issues that will arise in the succeeding chapters. Initially, we provided "A Family Affair," which concerns a family confronting death, parent incapacity, multiple forms of wealth transfer, and how the government, attorneys, and the family's own decisions will interconnect. The family portrayed confronts a reoccurring dilemma in modern society—how to plan for incapacity and transmit wealth to others. How to address this issue invites what is to come in all the

succeeding chapters. But the first chapter is where students are likely to 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 attorneys may be held liable for negligence. Eventually, when we end the book with Chapter Eight: Planning for Incapacity, we will revisit the issues introduced in this first chapter. In the last chapter, we will also introduce Medicare, Medicaid, Social Security, and the challenge of how to pay for long-term care for yourself or those you love. Increasingly, as is demonstrated in the first chapter, the goal of estate planning is to plan for many years of incapacity and assisted living.

Chapter Two: Intestate Succession, is traditional, statutory, and yet very modern. If you were to die without making any arrangements for the transfer of your wealth, how would you want your property disbursed? Every state has an intestate statute defining heirs; this is both traditional and statutory. But extensive consideration is given to the changing definition of the American family; the 2015 introduction of same sex marriage is one illustration; another is the increasing utilization of assisted reproductive technology by persons wishing to become parents. After establishing the pattern of distribution of wealth, the material in chapter two explores how, when there is neither a Last Will and Testament nor a valid non-probate substitute, spouses, issue, and parentage status affect the distribution of wealth under intestate statutes. Science has increased opportunities for parenthood and heirs. Who is an issue of whom? This is very modern. The most recent revisions to the Uniform Parentage Act, in tandem with the Uniform Probate Code, have introduced new elements. Although the concepts discussed in this chapter will have applicability to other forms of wealth transfer, this chapter provides the opportunity for students to discuss simultaneous death, assignment of expectancies, and disclaimers.

Chapter Three: The Last Will and Testament details the traditional and modern application of the rules meant to safeguard a testator's last wishes. We will examine the different types of wills and then explore the formalities and intentionalities needed to execute each. These rules have deep historical significance, but technology, the preference for transfers other than wills, and a less rigorous society have tempered the strict application of formalities. Instead, today, the rules are complemented with doctrines of substantial compliance and primary intent. All of the pomp and circumstances of days-gone-by, with witnesses and lots of signatures in stuffy law offices, now may be reduced to a simple notary public signature. Progress? This is the chapter in which we seek to balance the old against the new, the evolution of presence at execution, how much influence is undue, and, in an aging population, how do we define testamentary capacity? The cases illustrate the vagaries of the human condition. Once we have mastered valid execution of the will, with all of its competing interests, we discuss revocation and revival of revoked wills. This chapter is the subject matter of bar examinations.

Chapter Four: The Meaning of Words offers the opportunity to make a "fortress out of the dictionary." The law has accepted facts of independent significance and

also incorporation by reference. Likewise, extrinsic evidence may be admitted for latent and patent ambiguities. However, legal lists and exoneration are evolving, as are ademption and accessions. Likewise, the law regarding contracts to make wills is fairly settled, but commentators have suggested, and offered legislation, proposing changes to the rules addressing mistaken plain meaning and the distribution of property when there has been a lapse in persons or property. Comparing the age-old rules with the new exigencies is like pouring new wine into old bottles, precipitating good class participation. This chapter offers a chance to explore textualism and evolution.

Chapter Five: Restraints on Transfer of Wealth challenges the premise discussed in Chapter One—that persons have a right under the Constitution to pass their property to others at death. In chapter five, students learn that there are restraints upon that right. For example, you cannot create a trust that promotes lawlessness, and you cannot mistakenly overlook your issue, marital or nonmarital. Since your spouse is also your economic partner, she or he is entitled to part of the wealth amassed during marriage—something that you cannot disparage without that spouse’s consent. Constitutional law is a good preparation for these restraints. This chapter adds another restraint—the bureaucratic process that describes the cumbersome restraint upon wealth transferring through the probate process. The costs, forms, delays, taxes, administration, and contests can be a bureaucratic nightmare. Finally, because spouses have a right to property amassed during marriage, we discuss elective share. 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 the need for change. Indeed, the 2008 revision to the elective share provisions of the Uniform Probate Code, which seeks to integrate marital property considerations into distribution of property at death, offers good discussion opportunities.

Chapter Six: Utilizing Future Interests provides an explanation of the words, phrases, and constructions that have divided “vested” from “possession” for hundreds of years. Anticipating the next chapter, devoted exclusively to trusts, this chapter provides definitions, cases, and the Analytical Principle, which may be used to chart the interests that pass under anti-lapse statutes, class gifts, powers of appointment, vesting, and the Rule Against Perpetuities. Rather than study the material in a vacuum, the cases and statutes illustrate what is necessary to use future interests in estate planning instruments. Much of this material was discussed in property classes, for better or for worse, so what we provide here is the practical application of those words and phrases, applicable 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 the breadth and length was justified to assemble all of the trust material in one place. Grouping permits a comprehensive approach to the topic. It is essential to understand the five elements of a trust. Because of the modern importance of trusts, there are many statutes included in the chapter: the Uniform Trust Act, Uniform Trust Decanting Act, Uniform Directed

Trust Act, and the Uniform Fiduciary Income and Principal Act, to name a few. The cases we include complement the statutes, and we emphasize fiduciary responsibility with excerpts from leading practitioners in the field. Too often, courses on decedents' estates neglect to illustrate types of trusts common to estate planning. Instead, we discuss ten distinctive trusts and five non-probate contractual arrangements that provide modern utilization, placing the material firmly in the context of what occurs each day in law offices and wealth management firms throughout the United States. Likewise, modification and termination of trusts have historical roots and, therefore, have rules, but more modern statutes have made substantial inroads, offering a discussion as to preference and, more importantly, professional responsibility.

Trust administration has become a career for many attorneys. Chapter seven offers cases and materials considering what constitutes prudent performance, the duty of loyalty, and how to maintain impartiality between income and remainder beneficiaries. 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. Likewise, we provide commentary from practitioners and scholars in the field.

Finally in chapter seven, we discuss three legal constructions that rest upon the validity of trusts. These constructions 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, especially with the introduction of the Uniform Powers of Appointment Act (2018). However, the Rule Against Perpetuities offers a considerable challenge because of its changing status among the states. Speculation suggests 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 in the material provided. However, 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 illustrative state statutes abolishing the Rule. We provide sufficient material to offer a discussion on the impact of the Rule's abolition, including dynasty trusts or perpetual trusts.

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 was learned between then and now. For example, the utility of a will, the consequences of intestate succession, the necessity of clear language, the avoidance of unreasonable restraints upon beneficiaries, and the use of trusts to provide for care and support. With 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 and privacy, and to ease 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, and we seek to provide context through famous lives, such as Brooke Astor. Increasingly, we believe that the issues presented in this chapter will dominate the lives discussed in the issues presented in previous chapters. None of us get out alive, and between now and then, we need to plan for incapacity and death.

As you use this book, we welcome your comments and suggestions. We wish to express our deep appreciation to many who contributed to this enterprise. Especially, we are grateful to our student research assistant, Thomas J. Garrity III, for his prompt and expert editorial assistance in the preparation of this casebook.

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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.

