

# **Decedents' Estates**



# Decedents' Estates

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Cases and Materials

FIFTH EDITION

**Raymond C. O'Brien**

PROFESSOR EMERITUS

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# Summary of Contents

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Contents	ix
Preface	xxvii
Acknowledgments	xxxv
Note on Editing	xxxvii
<b>Chapter 1 • An Introduction</b>	<b>3</b>
I. A Family Affair	4
II. Estate Planning Considerations	9
III. Government's Role	12
IV. Attorney's Role	21
V. Client's Role	24
<b>Chapter 2 • Intestate Succession</b>	<b>29</b>
I. Public Policy of Succession	30
II. Establishing a Pattern	32
III. The Surviving Spouse	44
IV. Share of Heirs Other Than a Surviving Spouse	50
V. Heirs: Changing Definition of Family	63
VI. Simultaneous Death	159
VII. Assignment of Expectancy	167
VIII. Disclaimer: Release and Renunciation	170
IX. Advancements	181
<b>Chapter 3 • The Last Will and Testament</b>	<b>183</b>
I. Categories of Wills	185
II. Statutory Formalities	195
III. Intentionalities	221
IV. Revocation	282
V. Revival	294
<b>Chapter 4 • The Meaning of Words</b>	<b>301</b>
I. Incorporation by Reference	302

II. Facts of Independent Significance	312
III. Legal List	313
IV. Plain Meaning Versus Ambiguity	321
V. Contracts and Wills	350
VI. Ademption and Exoneration	362
VII. Lapse	381
<b>Chapter 5 • Restraints on Transfer of Wealth</b>	<b>397</b>
I. General Public Policy	399
II. Protection of Issue	422
III. Protection of Spousal Persons	429
IV. Administration	460
<b>Chapter 6 • Utilizing Future Interests</b>	<b>469</b>
I. Interests Held by the Settlor	469
II. Interests in Persons Other Than the Settlor	476
III. Analytical Principle	477
IV. Survival	486
V. Heirs, Descendants, Issue	494
<b>Chapter 7 • Creation, Classification, and Utilization of Trusts</b>	<b>505</b>
I. Elements of a Valid Trust	507
II. Classification of Trusts	572
III. Modification and Termination	688
IV. Prudent Administration of Trusts	706
V. Class Gifts	770
VI. Powers of Appointment	792
<b>Chapter 8 • Planning for Incapacity</b>	<b>865</b>
I. Planning Options	867
II. Entitlement Programs	944
III. Long-Term Housing Payment Options	950



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# Table of Contents

---

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Preface to the Fifth Edition	xxvii
Acknowledgments	xxxv
Note on Editing	xxxvii
<b>Chapter 1 • An Introduction</b>	<b>3</b>
I. A Family Affair	4
A. Will Substitution: Non-Probate Transfers	7
B. Testate Succession: Probate and a Valid Last Will and Testament	8
C. Intestate Succession: Probate and a State’s Statutory Formula	8
II. Estate Planning Considerations	9
A. Taxation	9
B. Public Policy	11
III. Government’s Role	12
A. Constitutional Guarantee	12
B. Procedural Responsibilities	13
<i>Tulsa Professional Collection Services, Inc. v. Pope</i>	13
Virginia Code Annotated (2024)	17
IV. Attorney’s Role	21
<i>Simpson v. Calivas</i>	21
Notes	23
Problem	23
V. Client’s Role	24
A. The Aging of America	24
Linda Searing, <i>In an Aging U.S., More Than Half</i>	
<i>of Adults Are Caregivers</i>	24
Raymond C. O’Brien, <i>Private Caregiver Presumption</i>	
<i>for Elder Caregivers</i>	24
B. Portfolio of Assets	25
Brad Davidson, <i>Unique Asset Administration</i>	25
C. Diversity of Wealth Transfer Devices	26
R. Hugh Magill, <i>The Changing Face of American Wealth</i>	26
Imaan Moughal, <i>The Role of Artificial Intelligence in the</i>	
<i>Future of Estate Planning</i>	26

D.	Planning for Incapacity	27
	Lawrence A. Frolik & Bernard Krooks, <i>Planning for Later in Life</i>	27
	Raymond C. O'Brien, <i>Creating a Trust Through Delegation</i>	27
	Michael Gilfix, <i>The Quality Home Care Crisis</i>	27
	Nancy Simm, <i>Selecting the Best Fit in Long-Term Care Coverage</i>	28
	Mark Schumacher, <i>The Need for a Trust-Level Investment Policy Statement</i>	28
<b>Chapter 2 •</b>	<b>Intestate Succession</b>	<b>29</b>
I.	Public Policy of Succession	30
II.	Establishing a Pattern	32
	Uniform Probate Code (2019)	36
	Maryland Code, Estates and Trusts (2024)	40
	United Kingdom Inheritance (Provision for Family and Dependents) Act 1975 (2022)	43
III.	The Surviving Spouse	44
	New York Domestic Relations Law (2024)	45
	<i>In re Estate of McKown</i>	45
	Notes	49
IV.	Share of Heirs Other Than a Surviving Spouse	50
	A. Issue	51
	B. Collaterals	52
	C. Methods of Distribution	52
	1. Old Uniform Probate Code (1969)	52
	2. New Uniform Probate Code (2019)	53
	§ 2-106. Representation.	55
	Notes	56
	3. Strict Per Stirpes	57
	4. Next of Kin	58
	Problem	58
	D. The Last Resort: Escheat to the State	59
	<i>Board of Education of Montgomery County v. Browning</i>	59
	Notes	62
	Massachusetts General Laws (2024)	63
V.	Heirs: Changing Definition of Family	63
	A. Non-Marital Relationships	63
	<i>Byrne v. Laura</i>	64
	Notes	75
	Problem	76
	B. Relatives by the Half-Blood	76
	C. Relatives by Adoption	77

1. Statutory Stranger Adoption	77
Uniform Probate Code (2019)	79
Virginia Code Annotated (2024)	79
<i>Monty S. v. Jason W.</i>	80
Notes	85
2. Statutory Stepparent Adoption	86
Problem	87
3. De Facto Parentage	87
Uniform Parentage Act (2017)	87
Uniform Probate Code (2019)	88
<i>In re Guardianship of Madelyn B.</i>	88
Notes	96
4. Equitable Adoption	97
<i>Lankford v. Wright</i>	97
Notes	101
5. Statutory Adoption by Relatives	102
Uniform Probate Code	102
D. Non-Marital Issue	103
Isabel Goddard & Carolina Aragao	
<i>A Growing Share of Americans Say They’ve Had Fertility Treatments or Know Someone Who Has</i>	103
Raymond C. O’Brien, <i>Assessing Assisted Reproductive Technology</i>	103
1. How Do You Establish Paternity and Maternity of a Child?	103
Uniform Parentage Act (2017)	103
2. Who May Bring an Action to Establish Maternity or Paternity?	105
Uniform Parentage Act (2017)	105
3. How May the Court Protect the Best Interests of the Child?	105
Uniform Parentage Act (2017)	105
<i>Wingate v. Estate of Ryan</i>	107
Notes	117
<i>Reese v. Muret</i>	118
Notes	125
Larry Lee Hillblom, Co-Founder of DHL	126
Problem	126
E. Alternative Means of Establishing Parenthood	127
Raymond C. O’Brien, <i>Assessing Assisted Reproductive Technology</i>	127
Centers for Disease Control and Prevention	
<i>ART Success Rates</i>	128

1.	Establishing Parenthood through Consent	128
	<i>In re Marriage of Buzzanca</i>	128
	Notes	132
	Raymond C. O'Brien, <i>The Immediacy of Genome Editing and Mitochondrial Replacement</i>	132
2.	Establishing Parentage through Surrogacy	133
	<i>In re Paternity of F.T.R.</i>	133
	Notes	141
	Uniform Parentage Act (2019)	141
3.	Establishing Parentage through Posthumous Conception	144
	<i>Woodward v. Commissioner of Social Security</i>	144
	Notes	156
	California Probate Code (2024)	157
	Uniform Parentage Act (2017)	157
	Problem	158
VI.	Simultaneous Death	159
	<i>Janus v. Tarasewicz</i>	160
	Notes	165
	Uniform Probate Code (2019)	166
VII.	Assignment of Expectancy	167
	<i>Scott v. First National Bank of Baltimore</i>	167
	Notes	169
VIII.	Disclaimer: Release and Renunciation	170
	Uniform Probate Code (2019)	170
	Internal Revenue Code (2024)	173
	<i>DePaoli v. C.I.R.</i>	173
	Problem	181
IX.	Advancements	181
	Uniform Probate Code (2019)	182
<b>Chapter 3 • The Last Will and Testament</b>		<b>183</b>
	A Little Background	184
I.	Categories of Wills	185
A.	Statutory and Form Wills	185
B.	Nuncupative Wills	186
C.	Holographic Wills	186
	Uniform Probate Code (2019)	187
	<i>In re Kimmel's Estate</i>	187
D.	Notarized Wills	188
	Uniform Probate Code (2019)	189
	<i>In re Estate of Hall</i>	189
	Notes	191
E.	Witnessed Wills	192
	California Probate Code (2024)	192
	Notes	193

F. Electronic Wills	193
Uniform Electronic Wills Act (2019)	193
Notes	194
II. Statutory Formalities	195
Irene Sherwyn Cooper, <i>Rebutting the Presumptions of Due Execution and Testamentary Capacity</i>	195
A. Presence	195
<i>Stevens v. Casdorff</i>	195
Notes	200
B. Signature	201
<i>In re Estate of Wait</i>	201
Notes	206
<i>Taylor v. Holt</i>	206
Problem	209
C. Witnesses	210
1 Wiggins, Law of Wills & Trusts in N.C. § 3:11 (5th ed. 2023)	210
Uniform Probate Code (2019)	210
New York Powers & Trusts Law (2024)	210
California Probate Code (2024)	211
D. Compliance Devices	212
1. Substantial Compliance	212
<i>In re Alleged Will of Ranney</i>	212
Uniform Probate Code (2019)	218
2. Self-Proved Will	219
Notes	219
Uniform Probate Code (2019)	220
3. Changing Jurisdictions	220
Uniform Probate Code (2019)	220
III. Intentionalities	221
A. Testamentary Intent	222
<i>In re Estate of Beale</i>	222
Problem	226
B. Testamentary Capacity	227
<i>Barnes v. Marshall</i>	227
Notes	232
Sharon L. Klein, Sandra D. Glazier, Thomas M. Dixon & Thomas F. Sweeney, <i>Confronting Undue Influence in Your Practice?</i>	235
Uniform Probate Code (2019)	235
C. Delusion	236
<i>In re Hargrove’s Will</i>	236
Notes	241

D. Undue Influence	242
1. Family	243
<i>Haynes v. First National State Bank of New Jersey</i>	243
2. Sexuality	257
<i>In re Will of Moses</i>	257
Notes	267
E. Fraud	268
<i>In re Roblin's Estate</i>	268
<i>Latham v. Father Divine</i>	271
BILL DEDMAN & PAUL CLARK NEWELL, JR., EMPTY MANSIONS (2013)	275
F. Tortious Interference with an Expectancy	276
Diane J. Klein, "Go West, Disappointed Heir": <i>Tortious Interference with Expectation of         Inheritance — A Survey with Analysis of State         Approaches in the Pacific States</i>	276
<i>Schilling v. Herrera</i>	277
Notes	282
IV. Revocation	282
A. Physical Act	283
Uniform Probate Code (2019)	283
Notes	283
<i>Thompson v. Royall</i>	284
Notes	287
Uniform Probate Code (2019)	287
<i>Harrison v. Bird</i>	288
Notes	289
Problem	290
B. Subsequent Instrument	290
<i>In re Wolfe's Will</i>	290
Notes	292
C. Revocation by Operation of Law	292
Uniform Probate Code (2019)	292
Notes	294
V. Revival	294
A. Revoking the Revoking Will	295
Uniform Probate Code (2019)	295
Notes	295
B. Dependent Relative Revocation and Mistake	296
<i>Carter v. First United Methodist Church of Albany</i>	296
Notes	299
C. Republication by Codicil	300
D. Re-Execution and New Will	300

<b>Chapter 4 • The Meaning of Words</b>	<b>301</b>
I. Incorporation by Reference	302
<i>Clark v. Greenhalge</i>	302
Notes	307
<i>Estate of Nielson</i>	307
Problem	311
II. Facts of Independent Significance	312
Uniform Probate Code (2019)	312
Notes	312
Uniform Probate Code (2019)	312
III. Legal List	313
Uniform Probate Code (2019)	313
<i>In re Last Will and Testament and Trust</i>	
<i>Agreement of Moor</i>	313
Notes	320
Problem	320
IV. Plain Meaning Versus Ambiguity	321
A. Latent and Patent Ambiguity	322
<i>In re Estate of Russell</i>	322
Notes	330
B. Plain Meaning Rule and Mistake	330
<i>In re Pavlinko's Estate</i>	330
<i>Estate of Gibbs</i>	336
<i>Erickson v. Erickson</i>	340
Restatement (Third) of Property: Wills and	
Other Donative Transfers (2003)	348
Uniform Probate Code (2019)	348
Uniform Trust Code (2023)	349
Notes	349
V. Contracts and Wills	350
A. Contrasting Claims	350
<i>Markey v. Estate of Markey</i>	350
Uniform Probate Code (2019)	354
California Probate Code (2024)	354
B. Disclaimers by Spouses	355
<i>In re Estate of Davis</i>	355
Notes	359
Uniform Premarital and Marital Agreements Act (2012)	361
VI. Ademption and Exoneration	362
A. Ademption by Extinction	363
<i>McGee v. McGee</i>	363
<i>Wasserman v. Cohen</i>	368
Notes	371

Uniform Probate Code (2019)	371
Problem	373
B. Ademption by Satisfaction	373
Uniform Probate Code (2019)	373
C. Exoneration of Debts	374
Uniform Probate Code (2019)	374
<i>In re Valma M. Hanson Revocable Trust</i>	374
VII. Lapse	381
<i>Estate of Kehler</i>	381
Problem	383
A. Intent of the Testator	384
B. Simultaneous Death	385
C. Relatives	385
D. Time Applicability	386
E. Class Gifts	386
<i>Dawson v. Yucus</i>	386
<i>In re Moss</i>	391
F. Non-Probate Transfers	394
Uniform Probate Code (2019)	394
G. Powers of Appointment	395
Uniform Probate Code (2019)	396
<b>Chapter 5 • Restraints on Transfer of Wealth</b>	<b>397</b>
I. General Public Policy	399
A. Common Law Restraints	399
<i>Clark v. Office of Personnel Management</i>	399
Notes	404
Uniform Probate Code (2019)	405
<i>Shapira v. Union National Bank</i>	406
Notes	413
Restatement (Third) of Property (Wills & Don. Trans.) (2003)	414
B. Statutory Restraints	414
<i>McKinney v. Richitelli</i>	414
Notes	420
Problem	421
II. Protection of Issue	422
<i>In re Estate of Laura</i>	422
Notes	425
Uniform Probate Code (2019)	426
Herbert E. Nass, <i>Father Does Not Always Know Best</i>	427
Karen Donovan, <i>Michael Crichton's Posthumous Child</i>	428
Problem	429



III. Protection of Spousal Persons	429
A. Who Is a Spouse?	429
B. Spousal Taxation at Death	430
<i>Shelfer v. Commissioner</i>	431
C. Pretermitted Spouse	437
<i>In re Estate of Shannon</i>	437
Notes	441
Uniform Probate Code (2019)	441
California Probate Code (2024)	442
Problem	442
D. Statutory Entitlements	443
Raymond C. O'Brien, <i>Integrating Marital Property into a Spouse's Elective Share</i>	443
1. Social Security	444
2. Employee Retirement Income Security Act of 1974	444
3. Homestead	445
4. Family Maintenance	445
5. Exempt Property	446
6. Dower or Curtesy	446
7. Universal Succession	446
E. The Right to Elect	446
1. Support or Ownership	447
2. Time for Election	447
3. Who May Elect	448
4. Community Property States	448
5. Common Law (Separate) Property States	450
6. Distribution of Property at Divorce and at Death	450
7. Common Law Illustrations of Spousal Elective Rights	452
F. Judicial Models for Reform	452
1. Historical Reference	452
2. Illusory Transfers	453
3. Objective Factors	454
G. Statutory Models for Reform	454
1. Fixed Percentage of Augmented Estate	455
2. Length of Marriage Percentage of Augmented Estate	456
3. The Equitable Model	459
IV. Administration	460
A. Limitations: Probate Versus Non-Probate Transfers	460
B. Administrative Process	461
1. Venue	461
2. Personal Representative	461
3. Statute of Limitations	462
4. Informal and Formal Probate	462

5. Information	462
6. Inventory and Appraisalment	463
7. Administration Powers of Personal Representative	463
8. Notice to Creditors	463
9. Payment of Claims	464
10. Closing the Estate	464
11. Tax Considerations	465
C. Professional Responsibility	465
<i>Hotz v. Minyard</i>	465
<b>Chapter 6 • Utilizing Future Interests</b>	<b>469</b>
I. Interests Held by the Settlor	469
<i>First National Bank of Bar Harbor v. Anthony</i>	470
Notes	473
A. Reversion	475
B. Possibility of Reverter	475
C. Right of Reentry	476
II. Interests in Persons Other Than the Settlor	476
A. Remainders	476
B. Executory Interests	477
III. Analytical Principle	477
A. Anti-Lapse	479
B. Vesting	480
<i>Clobberie's Case</i>	481
C. Class Gifts	481
D. Powers of Appointment	482
E. Rule Against Perpetuities	484
IV. Survival	486
<i>Security Trust Co. v. Irvine</i>	486
Notes	490
Problem	490
A. Substitute Takers	491
Uniform Probate Code (2019)	491
B. Anti-Lapse	492
Uniform Probate Code (2019)	492
Notes	493
V. Heirs, Descendants, Issue	494
<i>Estate of Woodworth</i>	494
Notes	502
Uniform Probate Code (2019)	503
<b>Chapter 7 • Creation, Classification, and Utilization of Trusts</b>	<b>505</b>
I. Elements of a Valid Trust	507
A. Settlor	508

Uniform Trust Code (2018)	508
Notes	508
<i>In re Pulitzer's Estate</i>	509
Notes	517
B. Trustees	517
1. Private and Corporate Trustees	517
Uniform Trust Code (2018)	517
Notes	519
Charles A. Redd, <i>The Most Disrespected Decision in Estate Planning</i>	520
Lawrence M. Friedman, <i>The Dynastic Trust</i>	520
John H. Langbein, <i>The Uniform Prudent Investor Act and the Future of Trust Investing</i>	521
John H. Langbein, <i>The Contractarian Basis of the Law of Trusts</i>	522
Trisha W. Hall & Gregory J. Weinig, <i>Serving as Trustee Without a Safety Net</i>	522
2. Directed Trusts: Trust Protectors	523
Uniform Directed Trust Act	523
<i>Minassian v. Rachins</i>	524
Notes	530
Raymond C. O'Brien, <i>Creating a Trust Through Delegation</i>	531
C. Beneficiaries	531
1. Private Trusts	532
Uniform Trust Code (2018)	532
<i>Clark v. Campbell</i>	532
2. Charitable Trusts	535
Uniform Trust Code (2018)	535
<i>Register of Wills for Baltimore City v. Cook</i>	536
Steve Biever, <i>Giving USA 2023 Report Insights</i>	543
Laura Coy, <i>Themes and Trends on the Rise in Philanthropy</i>	543
Al W. King III, <i>Does a Perpetual Trust Need a Perpetual Private Foundation?</i>	543
3. Honorary Trusts	544
Al W. King III, <i>Frequently Overlooked Trust Planning Considerations</i>	544
William A. Drennan, <i>Leona Helmsley: The Queen of Probate &amp; Property? Practical Drafting Tips from Her Majesty's Will</i>	544
Uniform Trust Code (2018)	544
Uniform Probate Code (2019)	545

	<i>In re Searight's Estate</i>	545
	Notes	549
	Problem	550
D.	Property: Ascertainable and Contractual	550
	Uniform Trust Code (2018)	550
	<i>Brainard v. Commissioner of Internal Revenue</i>	551
	Notes	553
	<i>Unthank v. Rippstein</i>	554
	<i>Speelman v. Pascal</i>	558
E.	Intent: Precatory and Purpose	561
	Restatement (Third) of Trusts (2023)	561
	Uniform Trust Code (2018)	562
	<i>Jimenez v. Lee</i>	562
	<i>The Hebrew University Association v. Nye</i>	567
	Notes	571
II.	Classification of Trusts	572
A.	Mandatory Trusts	572
B.	Discretionary Trusts	572
	<i>Marsman v. Nasca</i>	572
	Uniform Trust Code (2018)	580
	Kim Kamin, <i>Ethical Considerations in Thorny Trusteeships</i>	581
	Alexander A. Bove, Jr., <i>The Death of the Trust</i>	581
C.	Grantor/Crummey Trusts	582
D.	Oral Trusts	583
	Uniform Trust Code (2018)	583
	New York Estates, Powers & Trusts Law (2024)	583
	<i>Goodman v. Goodman</i>	584
	Notes	588
E.	Resulting and Constructive Trusts	589
	<i>Hieble v. Hieble</i>	589
	Restatement (Third) of Trusts (2003)	593
	Notes	593
F.	Spendthrift Trusts	594
1.	Traditional Spendthrift Trusts	594
	Uniform Trust Code (2019)	594
	Al W. King III, <i>Frequently Overlooked Trust Planning Considerations</i>	595
	<i>Bacardi v. White</i>	596
	Notes	601
	Problem	601
2.	Domestic Self-Settled Asset Protection Trusts	602
	<i>In re Mortensen</i>	602

Alaska Statute (2024)	610
Notes	611
Edward D. Brown & Hudson Mead, <i>Divorce and the Self-Settled Trust</i>	612
Mark Merric & Daniel G. Worthington, <i>Best Situs for [Domestic Asset Protection Trusts] in 2023</i>	613
Daniel G. Worthington, Mark Merric, Ryan L. Thomas & John E. Sullivan, <i>Which Trust Situs is Best in 2020?</i>	613
G. Charitable Trusts	614
1. Public Policy and Charities	614
<i>Estate of Wilson</i>	614
Notes	620
Brie Williams, <i>The Next Chapter in Giving</i>	621
Susan Colpitts & Wistar Morris, <i>The Prudent Philanthropist</i>	621
Robert F. Sharpe, Jr., <i>The Philanthropic Age Divide</i>	622
Al W. King III, <i>Tips From the Pros</i>	622
2. Monitoring of Charities	622
<i>In re Milton Hershey School Trust</i>	622
Notes	636
3. Taxation and Charities	637
<i>Putnam v. Putnam</i>	639
Notes	641
H. Pour Over Trusts	642
Uniform Probate Code (2019)	643
I. Revocable Inter Vivos Trusts	644
<i>Clymer v. Mayo</i>	644
Notes	653
<i>Committee on Professional Ethics v. Baker</i>	654
<i>State Street Bank &amp; Trust Co. v. Reiser</i>	663
Notes	667
Uniform Probate Code (2019)	667
J. Dynasty Trusts	669
Rhode Island General Laws (2024)	669
<i>In re Estate of Feinberg</i>	669
Notes	670
Lawrence W. Waggoner, <i>From Here to Eternity: The Folly of Perpetual Trusts</i>	671
Al W. King III, <i>Does a Perpetual Trust Need a Perpetual Private Foundation?</i>	672
Notes	672
K. Non-Probate Contracts	672

1. Payable-on-Death Contracts	673
<i>Estate of Hillowitz</i>	673
Notes	674
<i>Cook v. Equitable Life Assurance Society</i>	675
2. Multiple Party Bank Accounts	679
<i>Franklin v. Anna National Bank of Anna</i>	679
Notes	681
Uniform Probate Code (2019)	682
3. Totten Trusts	683
<i>Green v. Green</i>	683
Notes	687
4. Joint Tenancy	687
III. Modification and Termination	688
A. Settlor	689
<i>Connecticut General Life Insurance Co. v. First National Bank of Minneapolis</i>	689
Notes	691
B. Beneficiaries	693
<i>Adams v. Link</i>	693
Notes	696
Matthew P. D’Emilio, <i>Don’t Overlook a Trust’s Material Purpose</i>	697
Problem	697
C. Trustee	698
<i>McNeil v. McNeil</i>	698
Notes	702
Uniform Trust Code (2018)	703
Restatement (Third) of Trusts (2003)	704
Problem	705
IV. Prudent Administration of Trusts	706
A. Defining Prudence	706
<i>In re Estate of Janes</i>	706
Notes	711
Uniform Prudent Investor Act (1994)	711
John H. Langbein, <i>Uniform Prudent Investor Act and the Future of Trust Investing</i>	713
Mark Schumacher, <i>The Need for a Trust-Level Investment Policy Statement</i>	713
Problem	713
<i>Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust</i>	714
Notes	721
B. Sole Interest: Loyalty, Earmarking, and Commingling	721

Uniform Trust Code (2018)	721
<i>In re Estate of Hines</i>	722
Notes	726
Restatement (Third) of Trusts (2007)	727
Restatement (Second) of Trusts (1959)	727
John H. Langbein, <i>Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?</i>	727
Problem	728
C. Impartiality	729
1. Power to Allocate	729
<i>Citizens &amp; Southern National Bank v. Haskins</i>	729
Notes	734
Uniform Principal and Income Act (2008)	736
Notes	736
Uniform Fiduciary Income and Principal Act (2018)	737
2. Unitrust Option	739
<i>In re Heller</i>	739
Notes	743
D. Delegation	744
<i>Shriners Hospital for Crippled Children v. Gardiner</i>	744
Notes	748
Restatement (Third) of Trusts: Prudent Investor Rule (2007)	748
Uniform Prudent Investor Act (1994)	749
Uniform Trust Code (2018)	749
E. Disclosure	750
<i>Merrill Lynch, Pierce, Fenner &amp; Smith, Inc. v. Cheng</i>	750
Notes	753
Uniform Trust Code (2018)	753
F. Record Keeping	754
John H. Langbein, <i>Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?</i>	754
<i>Stark v. United States Trust Co. of New York</i>	755
Notes	763
G. Socially Responsible Investing	764
Uniform Prudent Investor Act (1994)	764
<i>Blankenship v. Boyle</i>	764
Notes	770
V. Class Gifts	770
A. Increase of Class	772
<i>In re Evans' Estate</i>	772
Notes	775
<i>Harris Trust and Savings Bank v. Beach</i>	777

	Uniform Probate Code (2019)	784
	Notes	785
	Raymond C. O'Brien, <i>The Momentum of Posthumous Conception: A Model Act</i>	785
B.	Decrease of Class	786
	<i>Usry v. Farr</i>	787
	Uniform Probate Code (2019)	791
	Notes	792
VI.	Powers of Appointment	792
A.	Elements of a Valid Power	793
	<i>Estate of Vissering v. Commissioner</i>	796
B.	Exercise of a Power	799
	<i>Beals v. State Street Bank &amp; Trust Co.</i>	799
	Notes	806
	Problem	807
C.	Scope of a Power	807
	<i>In re Carroll's Will</i>	807
	Notes	811
D.	Ineffective Exercise	811
	<i>Loring v. Marshall</i>	813
E.	Release of a Power	817
	<i>Seidel v. Werner</i>	817
	Uniform Powers of Appointment Act (2013)	821
F.	Rights of Creditors	822
	<i>Irwin Union Bank &amp; Trust Co. v. Long</i>	822
	Notes	825
VII.	The Rule Against Perpetuities	825
A.	Public Policy	825
B.	Statement of the Rule	827
1.	Standing at the Creation of the Instrument	828
	<i>Cook v. Horn</i>	828
2.	Is There Any Possibility?	830
	<i>Dickerson v. Union National Bank of Little Rock</i>	831
	Notes	833
	<i>Ward v. Van der Loeff</i>	835
	Notes	837
	<i>Brown v. Independent Baptist Church of Woburn</i>	838
	Notes	840
C.	Application to Class Gifts	841
	<i>American Security &amp; Trust Co. v. Cramer</i>	842
	Notes	846
D.	Application to Powers of Appointment	847
	<i>Industrial National Bank of Rhode Island v. Barrett</i>	848
	Notes	853



<i>Second National Bank of New Haven v.     Harris Trust &amp; Savings Bank</i>	853
Notes	859
E. Savings Clauses	860
F. Reformation Devices	860
1. Wait and See	860
2. Cy Pres	861
G. Uniform Statutory Rule Against Perpetuities (USRAP)	861
<b>Chapter 8 • Planning for Incapacity</b>	<b>865</b>
VIRGINIA MORRIS, HOW TO CARE FOR AGING PARENTS	867
I. Planning Options	867
A. Making Arrangements	867
B. Anatomical Gifts	871
Uniform Anatomical Gift Act (2009)	871
Notes	874
C. Durable Power of Attorney	874
Uniform Power of Attorney Act (2006)	874
Notes	885
Raymond C. O’Brien, <i>Creating a Trust Through         Delegation</i>	886
Florida Statutes Annotated (2024)	886
<i>Franzen v. Norwest Bank Colorado</i>	887
Problem	892
D. Guardianship	893
Uniform Probate Code (2019)	893
<i>In re Maher</i>	895
Notes	901
MERYL GORDON MRS. ASTOR REGRETS: THE HIDDEN BETRAYALS OF A FAMILY BEYOND REPROACH	902
Notes	903
Problem	903
E. Conservatorship	904
WAYNE M. GAZUR & ROBERT M. PHILLIPS ESTATE PLANNING: PRINCIPLES AND PROBLEMS	904
Uniform Probate Code (2019)	905
Notes	907
F. Health Care Decisions	907
Uniform Health-Care Decisions Act (2023)	910
Notes	912
California Probate Code (2024)	913
Advance Health Care Directive	913

Conservatorship of Wendland	919
Notes	936
Problem	938
G. Interment of the Body	939
<i>Cohen v. Guardianship of Cohen</i>	939
Notes	943
Uniform Probate Code (2019)	943
II. Entitlement Programs	944
A. Social Security	944
BLANCHE WEISEN COOK	
ELEANOR ROOSEVELT: VOLUME 2, THE DEFINING YEARS, 1933–1938 (1999)	944
Lawrence A. Frolik & Bernard A. Krooks, <i>Planning for Later Life</i>	946
B. Medicare	946
Notes	948
Raymond C. O’Brien, <i>Private Caregiver Presumption     for Elder Caregivers</i>	948
C. Medicaid	949
III. Long-Term Housing Payment Options	950
A. Self-Pay Option	950
Michael Gilfix, <i>Aging in Place</i>	950
Letha Sgritta McDowell, <i>Legislative Update for Seniors</i>	951
B. Long-Term Care Insurance Option	952
Nancy Simm, <i>Selecting the Best Fit in Long-Term     Care Coverage</i>	952
Henry Montag & Bill Boersma, <i>What Advisors     Should Know About Hybrid Long-Term     Care Policies</i>	952
Les Masterson & Jason Metz, <i>How Much Is Long-Term Care     Insurance?</i>	953
C. Medicaid Spenddown Option	954
<i>Lopes v. Department of Social Services</i>	954
Notes	958
Table of Cases	961
Index	981

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# Preface to the Fifth Edition

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The evolution of decedents' estates continues, illustrated by the changes to this series of casebooks, the first of which was published in 2006. The publication of the fifth edition corresponds with the introduction of artificial intelligence, an increasing number of individuals utilizing assisted reproductive technology, blended families, and alternative definitions of parentage, thereby acknowledging that a child may have more than two parents. 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 prompts a number of statutes and statutory revisions, including, for example, the Uniform Cohabitants' Economic Remedies Act (2021), the Uniform Parentage Act (2017), and the Uniform Premarital and Marital Agreements Act (2012), all discussed in this casebook. The Uniform Probate Code has also removed terms that it now considers outdated, such as "maternal" and "paternal" grandparents, distinguishing between "half-blood" and "whole-blood" relatives, and "genetic" parents. Language has evolved correspondingly with the law.

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). Impartiality on the part of the trustee is better facilitated by the Uniform Fiduciary Income and Principal Act (2018). And the Uniform Powers of Appointment Act (2013) provides substance to an important tool of estate planners, often working in states that have very little statutory or case law on powers of appointment.

Other statutory enactments may be a result of the COVID epidemic, but regardless of the cause, they are garnering attention. For example, the Uniform Electronic Estate Planning Documents Act (2022), which relates to documents other than wills, complementing the Uniform Electronic Wills Act (2019), which has been adopted by nearly every state. And corresponding with estate administration in the digital age, there is now a Revised Uniform Fiduciary Access to Digital Assets Act (2015).

Not surprisingly, 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 2019, the Uniform Fraudulent Transfer/Voidable Transaction Act (2014), the Uniform Prudent Management of Institutional Funds Act (2006), the Uniform Principal and Income Act (1997), and the Uniform Prudent Investor Act (1994). Undoubtedly, an increasing number of statutes will be proposed to address the ever-changing fiduciary landscape.

Throughout this casebook there are illustrations of the impact of Americans living longer, and age never arrives alone. Increasingly, there are concerns over testamentary capacity, susceptibility to delusion, undue influence, and overall, how to ensure the client's true intent, as well as the professional responsibility of the estate attorney. Elder abuse has reached epic proportions, most often associated with durable powers of attorney, and guardianship/conservatorships. Attorneys must be cognizant of interfamily dynamics, how best to protect the estate from future litigation, and frankly, in this modern interstate age, which situs offers the best protection against contest and exorbitant attorney fees. Choice of law decisions prompt self-settled asset protection trusts, dynasty trusts, elimination of local taxation, and limits on contest by disappointed heirs. These issues are illuminated through the use of facts documented in cases provided in this casebook, cases that can magically transfer the professor and the student into a factual human situation that explores both the law and personal (human) options.

As we continue into the Twenty-First Century, any course on decedents' estates illustrates how the landscape has been transformed from testamentary transfer, to inter vivos trusts and the continuing proliferation of non-probate transfers, such as joint tenancy and contractual benefits. Another example of transformation is the easing of the "harsh formalism" of ancient formulae, the ability to disclaim inheritance and elective share through prenuptial agreements, and the ubiquity of health care directives and durable powers of attorney. The Rule Against Perpetuities is irrelevant in most states, made more so by the ability of estate planners to move a trust corpus into states that have abolished the Rule. Yet, surprisingly, today's new Gilded Age of wealth has generated calls for a return to the age of the Rule, limitations on the accumulation of wealth. And finally, those who remember the heyday of future interests are surprised to witness the discounting of the word "survivor," or also to permit 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, separate 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 in many states, but at the federal level only among the uber-rich. And the human desire to make a difference in life remains the same, evidencing itself in philanthropic gifts, plus 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 a government's public policy seeking an orderly, efficient and fair administration of wealth transfers.

A final but inevitable factor, expressed in each of the four previous editions of this casebook, is the reality that at some point in time, each person who amasses wealth will become a decedent. No matter what legal changes have occurred, strategies adopted, or taxes imposed and paid, each person is amassing a decedent's estate that will one day transfer to others. In assembling the material for this casebook, choosing cases and Problems, writing Notes, and incorporating code provisions, a purposeful effort has been made to concentrate on the modern adaptations of inter vivos estate planning, but acknowledgement is made for what has gone before, plus the things that remain the same. Hopefully the users of this casebook will recognize and appreciate this balance in the following themes illustrated throughout this casebook.

First, my primary concern is to make this book a good teaching vehicle. To facilitate this, I 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 I hope that the Tool Bar will assist in providing a comprehensive overview from which the professor will be able to start, make reference throughout, and refer for a summary at the conclusion. Also, I have painstakingly chosen cases with fact patterns that invite interest, creativity, and debate. Good cases make good classes.

A second theme of the book is informational. While I do provide commentary and problems in the Notes, far more often the Notes explain, elaborate on the case, and highlight what is important. Furthermore, students and professors have embraced the Internet, which is even available during class. Therefore, this casebook has more than a few Internet addresses. Also, there are international references provided, furnishing a glimpse into such arenas as spousal rights and fiduciary administration in foreign countries. Finally, you will find a teaching device that may be used to teach some of the material — what is referred to as the “Analytical Principle.” This is a tool, consisting of time frames and points of reference, which may be used to explain complicated issues such as lapse, pretermitted heirs and spouses, powers of appointment, class gifts, vesting, and the Rule Against Perpetuities. This device is explained in Chapter Six: Utilizing Future Interests, but its applicability will be illustrated primarily in Chapter Seven: Creation, Classification, and Utilization of Trusts. The Analytical Principle offers students a visual connection with the material discussed, it can assist in understanding in a spatial fashion. Should you choose to use it, it is meant to be a resource for understanding.

A third theme is the purposeful inclusion of excerpts from articles authored by national 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 prescient insights 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 fourth 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 this casebook are various code provisions, including a number of state and uniform statutes, some 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 a state's statute. Although the statutes may lack the factual context, including the creative drama of decisional law, they are the indisputable first step in any analysis of the issue presented.

This casebook is divided into eight chapters. Chapter One: An Introduction, introduces the student to the issues that will arise in the succeeding chapters. Initially, the "A Family Affair" concerns a typical blended family confronting death, parent incapacity, multiple forms of wealth transfer, and how the government, attorneys, and the family's personal decisions will interconnect. The family factually portrayed confronts a reoccurring dilemma in modern society—how to plan for incapacity, successfully transmit wealth to others, and address the consequences of postponing decisions. The first chapter is where the student is likely to be first introduced to the significance of non-probate transfers in the transmission of wealth, the struggle between state and federal tax entities, responsibility for caretaking, the distinction between federal and state taxation, artificial intelligence, and the possibility that attorneys may be held liable for negligence in preparing an estate plan. Eventually, when the book ends with Chapter Eight: Planning for Incapacity, we will revisit all 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 for whom you accept responsibility. Increasingly, as is demonstrated in the first chapter, the goal of estate planning is to plan for what may be many years of incapacity and assisted living.

Chapter Two: Intestate Succession, is traditional, statutory, and yet very modern. If you died 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. The Uniform Probate Code has undergone a revision in part to codify the recognition that today a person may have more than two parents.

After establishing the pattern of distribution of wealth, when there is neither a Last Will and Testament nor a valid non-probate substitute, the material in chapter two explores how spouses, issue, and parentage status affect the distribution of

wealth under intestate statutes. Science has increased opportunities for parenthood and heirs. Yet, who is an issue of whom? This is modern dilemma. And 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 intent. 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 nonprobate transfers, not wills, and a less rule-oriented society have tempered the strict application of formalities. Instead, today, the rules are softened 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 where 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. And once we have mastered valid execution of the will, with all of its competing interests, we discuss revocation and revival of revoked wills. So too, this chapter is very often 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, plus incorporation by reference. Likewise, extrinsic evidence may be admitted for latent and patent ambiguities. But 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 wineskins, precipitating good class participation. This chapter offers a chance to explore textualism and intent.

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 we 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. And since your spouse is also your economic partner, she or he is entitled to part of any wealth amassed during marriage, something that you cannot disparage without that spouse's consent. Constitutional rights form a good preparation for these restraints, such as the state's 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 various models providing for augmenting the estate for election by a surviving spouse 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, purporting 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 I 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 the breadth and length seems justified to assemble all of the trust material in one place. Grouping permits a comprehensive approach to the topic. 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 included complement the statutes, and practice concerns are emphasized 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, ten distinctive trusts are highlighted 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 provides cases and materials considering what constitutes prudent performance, the duty of loyalty, reporting requirements, and how to maintain impartiality between income and remainder beneficiaries. And 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, there is commentary from practitioners and scholars in the field.



Finally in Chapter Seven, three legal constructions, which rest upon the initial validity of trusts, are provided. 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). But 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. Then, 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, providing an opportunity to choose a favorable situs to utilize tax exemptions and unlimited duration, thereby enabling dynasty trusts or perpetual trusts. There is pushback against this, and material is provided so as to prompt discussion.

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, identifying and locating documents pertinent to the estate, the utility of a will, the consequences of intestate succession, the necessity of using 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. And so as to provide for personal dignity and privacy, so as 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 this chapter provides factual context. Increasingly, as Americans age, the issues presented in this chapter will dominate the lives discussed throughout 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.

The Fifth Edition of this casebook results in part from past contributions of Professor Michael T. Flannery, and the current contributions of Michael J. Hyatt and Samantha Winter, whose research and editorial assistance were invaluable. Thank you all.

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# Note on Editing

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Some text, footnotes, and citations have been edited to make the cases 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 corresponding with the original source. All omissions are indicated with an appropriate ellipses symbol to indicate that material has been omitted.



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# Table of Cases

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---

- 198.73 Acres of Land, More or Less,  
United States v., 62
- A.R.R., In re Paternity of, 125
- A.Z. v. B.Z., 153
- Acevedo, People v., 900
- Achilles v. New England Tree Export  
Co., 752
- Ackerman v. Union & New Haven  
Trust Co., 694
- Adams v. Hospital, 533
- Adams v. Link, 693**
- Adams, In re Estate of, 163
- Addison v. Metro. Life Ins. Co., 404
- Adickes v. Kress & Co., 617
- Adoption of (See Name of Adoptee)
- Adye v. Smith, 533
- Ahrens v. Jones, 272, 273, 274
- Akeley, Estate of, 328
- Akin v. Warner, 578
- Alberts, Estate of, 455
- Alburger v. Crane, 726
- Alburn, Estate of, 295
- Alco Gravure, Inc. v. Knapp Founda-  
tion, 632
- Alderson v. Alderson, 70
- Allen v. Dalk, 319
- Allen v. Stewart, 577, 578
- Alper v. Alper, 255
- Alter's Appeal, 334
- Amadi A., In re, 132
- Ambrose v. United States, 673
- American Security & Trust Co. v.  
Cramer, 842**
- Americans for the Arts v. Ruth Lilly  
Charitable Remainder Annuity  
Trust, 714**
- Amerige v. Attorney Gen., 802
- Ames v. Hall, 648
- Amory v. Meredith, 804
- Anderson v. General Grinding Wheel  
Corp., 164
- Anderson v. Liberty Lobby, 725
- Anderson, Estate of, 74
- Andrews v. New Britain National Bank,  
590
- Angelia P., In re, 933
- Ansley v. Pace etc., 734
- Application of (See Name of Applicant)
- Arlington Trust Co. v. Estate of Wood,  
22
- Armington v. Meyer, 733
- Armstrong v. Barber, 777
- Arneman v. Arneman, 587
- Ascher v. Cohen, 665
- Ashburner v. MacGuire, 366
- Atkinson, Estate of, 310
- Atkinson, Petition of, 685
- Auditor's Will, Matter of, 516
- Avery v. Brantley, 417
- Axelrod, Estate of, 439
- Baby E.A.W., In re Adoption of, 942
- Baby M., Matter of 138
- Bacardi v. White, 596**
- Bachmann v. Reardon, 569
- Badenhop, In re Estate of, 255

- Baierl v. McTaggart, 137  
Bailey, Matter of 901  
Baker, Estate of, 309, 310  
Baker's Will, In re, 250, 251  
Baldwin, Estate of, 746  
Baltimore & O. R. Co. v. Glenn, 168  
Bank v. Frost, 816  
Bank of N.Y., Matter of 707, 709, 760  
Bank of the West v. Superior Court 70  
Barber v. Superior Court, 922, 923, 924,  
931, 936  
Barksdale v. Pendergrass, 289  
**Barnes v. Marshall, 227**  
Barnes Foundation, Commonwealth v.,  
629  
Barnes, Estate of, 328, 329  
Barnum v. Fay, 579  
Barrett v. Barrett, 452  
Barritt v. Tomlinson, 798  
Barrows v Jackson, 618  
Barter's Estate, In re, 424  
Bartlett v. Sears, 854, 857  
Bartling v. Superior Court, 925, 931  
Basore, Estate of, 439  
Bassett v. Shoemaker, 725  
Baumgart, In re Trust Fund Created  
Under Terms of Last Will and  
Testament of, 726  
Baxter v. State, 908  
Baybank Harvard Trust Co. v. Grant,  
369  
Bayreuther v. Reinisch, 273  
Beach, Estate of, 760  
**Beale, In re Estate of, 222**  
**Beals v. State Street Bank & Trust Co.,**  
**799**  
Beatty v. Guggenheim Exploration Co.,  
273  
Beaumont v. Feld, 339  
Beldon, Estate of, 327, 328  
Bennett, Estate of, v. Commissioner,  
175  
Berger v Estate of Berger, 901  
Berman v. Karvounis, 61  
Berman v. Sandler, 640  
Bethal v. Franklin, 943  
Biester, Application of, 627  
Birnbaum v. Birnbaum, 742  
Black v. Maxwell, 197  
Black, Estate of, 311  
Blackstone v. Althouse, 388  
Blaiberg, Re, 411  
Blair v. Ing, 172  
Blake v. Union & New Haven Trust Co.,  
344  
Blake's Will, In re, 249, 250, 251  
Blanco v. Velez, 273  
**Blankenship v. Boyle, 764**  
Blatt, In re, 252  
Blodget v. Delaney, 576  
Blunt v. Taylor, 533, 534, 535  
**Board of Education of Montgomery**  
**County v. Browning, 59**  
Bob Jones University v. United States,  
841  
Boeck, Will of, 339  
Boggs v. Boggs, 444  
Bohms v. Bohms, 140  
Bolton, In re Will of, 491  
Borgman v. Borgman, 678  
Boston Safe Deposit & Trust Co. v.  
Boone, 579  
Boston Safe Deposit & Trust Co. v.  
Painter, 801  
Boston Safe Deposit & Trust Co. v.  
Park, 305, 306  
Bostwick v. Hurstel, 369, 370, 805  
Bouvia v. Superior Court, 925, 931  
Bowen v. Hoxie, 148  
Bower, Estate of, 309  
Boyd, Estate of, 500  
Boyden v. Stevens, 576  
Brackin v. Brackin, 598, 599  
**Brainard v. Commissioner of Internal**  
**Revenue, 551**  
Brammer v. Taylor, 197



- Brashear v. Puget Sound Power & Light Co., 586
- Braun, In re, 252
- Breeden v. Stone, 242
- Brennan's Estate, 188
- Brenzikofer, Estate of, 74
- Brett M. v. Vesely, 81
- Brian W. v. Superior Court, 929
- Broadway National Bank v. Adams, 688
- Brockett v. Jensen, 591
- Bronstein v. Prudential Ins. Co. of America, 647
- Brookline, Town of, v. Barnes, 637
- Brooks, In re Estate of, 190
- Brown v. Brown, 590
- Brown v. Harper, 77
- Brown v. Independent Baptist Church of Woburn, 838**
- Brown v. Laird, 890
- Brown, Matter of 819
- Browne v. Cassidy, 588
- Bruner v. GC-GW, Inc., 316
- Bryant v. Bryant, 889, 890
- Bryen's Estate, In re, 335
- Bubnis v. Apfel, 957
- Buboltz v. Busingh, 282
- Buck v. Guaranty Co., 417
- Bucknam v. Bucknam, 598
- Bullotta, In re Estate of, 294
- Bumbaugh v. Burns, 746
- Bump v. Barnett, 658
- Burbank v. Stevens, 569
- Burgess v. Your House of Raleigh, Inc., 417
- Burke, Matter of 268
- Burnison, Estate of, 329
- Burton v. Wilmington Parking Auth., 616, 617
- Busch, Estate of, v. Ferrell-Duncan Clinic, Inc., 15
- Bush v. Schiavo, 937, 938
- Butler, Estate of, 440
- Butner v. United States, 608
- Buzzanca, In re Marriage of, 128**
- Byrne v. Laura, 64**
- Byron, Ex Parte, 480
- Cabot Corp. v. Baddour, 145
- Califano v. Webster, 615
- Cameron v. Lewis, 264
- Canal Elec. Co. v. Westinghouse Elec. Corp., 145
- Candee v. Connecticut Savings Bank, 570, 571
- Cann v. Van Sant, 488
- Caravan Mobile Home Sales v. Lehman Bros. Kuhn Loeb, 752
- Carlin v. Helm, 784
- Carlson v. Richardson, 73
- Carlton's Estate, In re, 186
- Carole L., In re, 901
- Carr v. Carr, 49
- Carrier v. Carrier, 763
- Carroll's Will, In re, 807**
- Carter v. First United Methodist Church of Albany, 296**
- Carter, Estate of, 325
- Carter, Matter of Will of, 319
- Carver v. Wright, 488
- Casey, Estate of, v. Commissioner of Internal Revenue, 889
- Cassidy v. Truscott, 148, 149
- Castaneda v. Dura-Vent Corp., 71
- Castell v. Togg 339
- Castor v. Bernstein, 309
- Cedar Cove, Inc. v. Stanzione, 112
- Central Hanover Bank & Trust Co., 760
- Central State Griffin Memorial Hospital, State ex rel., v. Reed, 13
- Central Trust Co. of New York v. West India Improvement Co., 560
- Chambers v. Byers, 99
- Chase, In re, 252
- Chatterjee v. King, 92, 93, 95
- Chavez, State v., 179
- Cheatham v. Burnside, 261

- Cheryl, Paternity of, 153  
 Chretien v. Company, 91, 92  
 Christian, Estate of, 310  
 Churchill's Estate, In re, 335  
 Churick, In re Estate of, 250, 251  
 Ciampa v. Bank of America, 641  
**Citizens & Southern National Bank v. Haskins, 729, 747**  
 Citizens & Southern National Bank v. Orkin, 734  
 City Bank Farmers Trust Co. v. Cannon, 673  
 City Bank Farmers Trust Co. v. Charity Organization Soc., 673  
 City Bank Farmers' Trust Co., Commissioner v., 856  
 City of (See Name of City)  
 Civil Rights Cases, 616  
 Claflin v. Claflin, 696  
 Clapp v. Ingraham, 665  
 Clark v. Brooklyn Hgts. R.R. Co., 900  
 Clark v. Astrue, 957  
**Clark v. Campbell, 532**  
**Clark v. Greenhalge, 302**  
 Clark v. Jeter, 116  
**Clark v. Office of Pers. Mgmt., 399, 400, 401, 402**  
 Clark, Matter of 708, 760, 762  
 Clarkson v. Whitaker, 718  
 Claveloux v. Bacotti, 279  
 Clayton, Estate of, v. Commissioner, 434  
 Clayton's Estate, In re, 409, 410  
 Clearfield, Town of, v. Cushman, 136, 139  
 Cline v. Festersen, 74  
**Clobberie's Case, 481, 771**  
**Clymer v. Mayo, 370, 644**  
 Coast Bank v. Minderhout, 327  
 Coates, Estate of, 846  
 Cobb v. Gramatan Natl. Bank & Trust Co., 708  
 Cobb v. Standard Drug Co., 725  
 Cobbs v. Grant, 925  
**Cohen v. Guardianship of Cohen, 939**  
 Coins' Will (Fortner v. Coins), In re, 262  
 Coleman v. Offutt (In re Estate of Coleman), 178  
 Collier v. Lindley, 538, 539  
 Collins v. Collins, 734  
 Colonial Trust Co. v. Brown, 857  
 Commerce v. Ritter, 833  
 Commissioner v. (See Name of Defendant)  
**Committee on Professional Ethics v. Baker, 654**  
 Committee on Professional Ethics & Conduct v. Conzett, 658  
 Commodity Futures Trading Comm'n v. Heritage Capital Advisory Services, Ltd., 752  
 Commonwealth of (See Name of Commonwealth)  
 Commonwealth v. (See Name of Defendant)  
 Comstock v. Smith, 832  
 Condee v. Trout, 784  
**Connecticut General Life Insurance Co. v. First National Bank of Minneapolis, 689**  
 Connecticut Junior Republic v. Sharon Hospital, 344, 345, 346, 347, 348  
 Connecticut Trust & Safe Deposit Co. v. Hollister, 857  
 Conservatorship of (See Name of Conservatee)  
 Consolidated Partners Inv. Co. v. Lake, 608  
 Consumer Party of Pennsylvania v. Commonwealth, 628  
**Cook v. Equitable Life Assurance Society, 675**  
**Cook v. Horn, 828**  
 Coolidge v. Loring, 640  
 Cooling v. Security Trust Co., 490  
 Corbett Estate, 382  
 Corkery v. Dorsey, 576

- Cortes v. Fleming, 44  
Costello v. Costello, 516  
Crawley v. Kendrick, 789  
Crawshaw, Estate of, 840  
Crescenta Valley Moose Lodge v. Bunt, 70  
Croft v. Alder, 261, 262, 263, 264, 266  
Cross, In re Estate of, 959  
Crummey v. Commissioner, 583  
Cruzan v. Director, Missouri Dept. of Health, 925, 926, 933  
Cullen v. Chappell, 569  
Culliton v. Beth Israel Deaconess Med. Ctr., 156  
Curtis v. Brown, 512  
Curtiss, Matter of 708  
Cyfers v. Cyfers, 307, 360  
Czepiel v. Czepiel, 344
- D.L.H., In re, 907  
D.W. v. R.W., 127  
Dague v. Piper Aircraft Corp., 353  
Daley v. Boroughs, 233  
Dana v. Gring, 576  
Dane v. Walker, 652  
Darilek, Estate of, 308  
Dart v. Dart, 168  
Daum v. Inheritance Tax Commission of Kansas, 941, 942  
Davis v. Early Constr. Co., 586  
Davis v. Margolis, 591  
Davis, In re, 249, 251, 252, 253  
**Davis, In re Estate of, 355**  
**Dawson v. Yucus, 386**  
De Bueno v. Castro, 890  
De Ladson v. Crawford, 694  
De Prins v. Michaelles, 667  
Dean v. Dean, 590  
Dean v. First National Bank, 857  
Dean v. Rounds, 365  
Deane, Matter of 801  
DeHart v. DeHart, 101  
DeKowin v. First National Bank of Chicago, 780
- Del Tufo v. Township of Old Bridge, 113  
Delaware Trust Company v. Delaware Trust Company, 487, 488  
Demaris' Estate, In re, 199, 200  
Denegre v. Walker, 512  
**DePaoli v. C.I.R., 173**  
Derryberry, In re Marriage of, 44  
DeWitt v. Duce, 280  
Diaz v. Rood, 169  
**Dickerson v. Union National Bank of Little Rock, 831**  
DiCristofaro v. Beaudry, 366  
Dill v. Boston Safe Deposit & Trust Co., 579  
Dillman v. Dillman, 488  
Dillon v. Dillon, 598  
Dinwiddie v. Baumberger, 598  
Disciplinary Counsel v. Galinas, 268  
Distefano v. Commonwealth, 179  
Dixon Nat'l Bank v. Morris, 681  
Doane, Estate of, 328, 329  
Dodge, Estate of, 495  
Dodson v. Culp, 592  
Dolan, In re, 252  
Dollander v. Dhaemers, 783  
Dominici, Estate of, 325  
Donnellan, Estate of, 324, 325  
Donner, Matter of 707, 708, 709, 710  
Dowd v. Tucker, 591  
Doyle v. United States, 798  
Drabick, Conservatorship of, 921, 922, 923, 924, 925, 927, 929, 930, 931, 934, 936  
Drace v. Klinedinst, 410  
Drew v. Wakefield, 534, 535  
Drury v. Drury, 780, 781  
Duke, Estate of, 330, 439  
Dumaine v. Dumaine, 664  
Dyer v. Siano, 839  
Dyslin v. Wolf, 779

- E.A. Williams, Inc. v. Russo Dev. Corp.,  
114
- Early v. Arnold, 534
- Easter, Estate of, 494, 495, 501, 502
- Ebeling v. Voltz, 281
- Eberhardt's Estate, In re, 296
- Eddy v. Colonial Life Insurance Co.,  
724
- Edgerly v. Barker, 858
- Edgeter v. Kemper, 538
- Edson v. Bartow, 272
- Egelhoff v. Egelhoff, 402, 403, 404
- Ehrlich, In re, 210
- Elisa B. v. Superior Court, 92, 93, 95
- Ellis, Estate of, 907
- Engle v. Seigel, 349
- Engle, Commissioner v., 434
- Erickson v. Erickson, 340, 349, 598**
- Eslick v. Wodicka, 205
- Espinosa v. Sparber, Shevin, Shapo,  
Rosen & Heilbronner, 300
- Estate of (See Name of Deceased)
- Estes v. Estes, 556
- Esther Wiggins Bertling Trust, In re,  
493
- Eustace v. Dickey, 816
- Evans v Abney, 617, 618
- Evans v Newton, 619
- Evans v. Giles, 779, 781
- Evans v. Newton, 408
- Evans v. Ockershausen, 843
- Evans, Matter of, 273
- Evans' Appeal, 286
- Evans' Estate, In re, 772**
- Evarts v. Davis, 148
- Everhard et al., Trustees v. Brown, 548
- Ex Parte (See Name of Relator)
- Eyer v. Beck, 783
- Eyerman v. Mercantile Trust Co., 398
- F.T.R., In re Paternity of, 85, 133**
- Fairbairn, Matter of, 673
- Fairchild, Matter of, 615
- Falk v. Hoffman, 273
- Fann v. Fann, 204
- Farm Family Cas. Ins. Co. v. Town of  
Rollinsford, 91, 95
- Farmers' Loan & Trust Co. v. Winthrop,  
560, 561
- Farmers' Loan and Trust Co. v. Mor-  
timer, 818, 821
- Farrell v. Mentzer, 586
- Fasano v. Meliso, 571
- Faus v. Pacific Elec. Ry. Co., 70, 71
- Faya v. Almaraz, 60, 61
- Feinberg, In re Estate of, 413, 669, 670**
- Feldstein v. Harrington, 225
- Felhofer, In re Estate of, 445
- Fenske, In re Trust Created for, 705
- Ferguson v. Winston, 121, 122, 123,  
124
- Fetters v. Fetters, 360
- Fiddler, People v., 165
- Fiduciary Trust Co. v. First Natl. Bank,  
666, 801, 803, 804, 805
- Fiduciary Trust Co. v. State St. Bank &  
Trust Co., 816
- Fiel v. Hoffman, 404
- Field v. Mayor of City of New York,  
560
- Figueiredo-Torres v. Nickel, 61
- Fincher, Estate of, 68
- Fineman v. Central National Bank, 412
- First Alabama Bank v. Webb, 519
- First Galesburg Nat'l Bank & Trust Co.  
v. Robinson, 472
- First Nat'l Bank in Fairmont v. Phillips,  
60, 98, 99
- First Nat'l Bank of Bar Harbor v.  
Anthony, 470**
- First Nat'l Bank v. Commissioner, 797
- First Nat'l Bank v. Tenney, 472
- First Pa. Mortgage Trust v. Dorchester  
Sav. Bank, 306
- First Union Nat'l Bank of Fla., N.A. v.  
Frumkin, 529

- First Universalist Society of North  
Adams v. Boland, 839, 840
- First Virginia Bank v. United States,  
798
- Fisk's Appeal, 591
- Fitton, Matter of, 377
- Fitts v. Powell, 651, 652
- Flagg Bros. v Brooks, 15, 617, 618
- Flemm, In re, 179
- Flint, Matter of, 760
- Florida Bar, In re, 660
- Foley, In re Estate of, 121
- Food Employees v Logan Plaza, 617
- Ford, In re Estate of, 101
- Ford, Matter of, 673
- Fourth Nat'l Bank of Columbus v.  
Brannon, 790
- Foxworth, Estate of, 310
- Foy v. Greenblott, 925
- Frame, Matter of, 710
- Frankenberger v. Schneller, 273
- Franklin v. Anna National Bank of  
Anna, 679**
- Fransen Construction Co. v. Industrial  
Commission, 163
- Franzen v. Norwest Bank Colorado,  
887**
- Frazier v. Goudschaal, 92
- French v. Old South Society in Boston,  
839
- French, Estate of, 309
- Friedman v. Friedman, 68
- Frye v. Loring, 804, 814, 815
- Fulton Trust Co. v. Trowbridge, 344
- Fults, In re Estate of, 48, 49
- Furia, Estate of, 101
- G.L.V., In re Adoption of, 87
- Ga Nun v. Palmer, 673
- Gaess v. Gaess, 694
- Gafney v. Kenison, 533
- Gage v. Gage, 424
- Galloway v. Babb, 533
- Gallup v. Bailey (In re Gossett's Estate),  
179, 180
- Ganter, Matter of Estate of, 451
- Gardiner, In re Estate of, 744
- Gardner v. Hancock, 98
- Gardner v. McNeal, 365, 367, 368
- Gardner v. Vanlandingham, 489
- Gardner v. Viall, 366
- Garrison v. Little, 539
- Garvin, Matter of, 710, 711
- Garwood, In re Estate of, 725, 726
- Gaskill v. United States, 797
- GE Solid State, Inc. v. Director, Div. of  
Taxation, 112
- Geer v. Winds, 339
- Gellert v. Livingston, 249, 250
- Gendron & Plaistek, Matter of, 93
- Gentry, In re Estate of, 232
- George v. Braddock, 539
- Geramifar v. Geramifar, 99
- Giat v. SCI Funeral Services of Florida,  
LLC, 943
- Gibbs, Estate of, 336**
- Gilbert Miller Testamentary Shelter Tr.  
& Est. of Miller, Matter of, 588
- Gilbert v. Gilbert, 596
- Gill, State v., 112
- Gillis v. Smith, 265
- Gilman v. Bell, 824
- Gilman v. McArdle, 673
- Gilmore v. City of Montgomery, 617
- Girard Trust Co. v. Commissioner of  
Internal Revenue, 541
- Givens v. Rose, 718
- Glass v. SunTrust Bank, 714
- Glasscock v. Layle, 368
- Glick v. Knoll (In re Estate of Glick),  
178, 179
- GNB III Trust, Matter of, 728
- Golden Gate National Senior Care, LLC  
v. Dolan, 892
- Goldfarb's Estate, Matter of, 516
- Goldman v. Rubin, 724

- Gonzales v. Oregon, 908  
Good, Matter of, 718  
Goodale v. Mooney, 533  
Goodhue v. Clark, 533  
**Goodman v. Goodman**, 584, 586  
Goodwin v. James, 21  
Goossen v. Estate of Standaert, 136  
Gordon v. Gordon, 409, 648  
Goree, Estate of, v. Commissioner, 175  
Gorey v. Guarente, 148  
Grant v. Long, 71  
Gray v. Richardson, 146  
Gray's Will, In re, 335  
**Green v. Green**, 683  
Green, Estate of, 440  
Green, In re, 468  
Greenfield Sav. Bank v. Abercrombie,  
578  
Greenough v. Osgood, 802  
Greenwich Trust Co. v. Tyson, 665  
Griffith v. First National Bank, 733, 734  
Grinker (Rose), Matter of, 897  
Groves v. Culph, 339  
Guarino v. Fish, 807  
Gustafson v. Svenson, 651  
Guzak, Matter of Estate of, 680
- Hackett v. Hackett, 410  
Hageman v. Cleveland Trust Co., 648  
Hagerty v. State, 408  
Hahn, Matter of, 707  
Haines v. Allen, 539  
Hale v. Groce, 22  
Haliski, State v., 112  
Hall v. Hall, 72  
Hall v. Hancock, 149, 151  
Hall v. Wiggin, 534  
Hall, Estate of, 329  
Hall, In re, 367  
**Hall, In re Estate of**, 189  
Hammond v. Lummis, 569  
Handy v. Shearer, 782  
Hanley v. Fernell, 366
- Hanney v. Clark, 590, 591  
Hardesty v. Hardesty, 48  
Hardy v. Smith, 652  
**Hargrove's Will, In re**, 236  
Harlan v. Lee, 724  
Harriman v. Harriman, 533  
Harrington v. Pier, 533  
**Harris Trust & Savings Bank v. Beach**,  
777, 778  
Harris Trust & Savings Bank v. Jackson,  
777, 779  
Harris v. Cato, 557  
Harris, In re, 409  
**Harrison v. Bird**, 288  
Harvey v. Mazal Am. Partners, 900  
Haskell v. First Nat. Bank, 72  
Haskell, Matter of, 819  
Haskew v. Haskew (In re Haskew's  
Estate), 180  
Haslam v. de Alvarez, 365  
Haslund v. City of Seattle, 587  
Hatten, Matter of Estate of, 75  
Hayes v. State, 316  
Hayes, In re Estate of, 680  
Haymer, In re, 163  
**Haynes v. First National State Bank of  
New Jersey**, 243  
Hazen v. American Security & Trust  
Co., 842, 844  
Heap v. General Motors Corp., 309  
Heard's Estate, In re, 732  
Heath v. City of Cleveland, 406  
**Hebrew University Association v. Nye**,  
567, 571  
Hecht v. Superior Court, 147  
Hechtman v. Nations Title Ins. of New  
York, 528  
Heinzman v. Whiteman, 677  
**Heller, In re**, 739  
Helmar, Estate of, 309  
Hennefer v. Butcher, 70  
Henry v. Henry, 388  
Hewitt, Estate of, 308

- Heyer v. Flaig, 22  
**Hieble v. Hieble, 589**  
 Higgins v. Ripley, 155  
 Hill v. Deal, 233  
**Hillowitz, Estate of, 673**  
 Hills v. Travelers Bank & Trust Co., 694  
 Hilton v. Kinsey, 845  
 Hinds v. McNair, 472  
**Hines, In re Estate of, 722**  
 Hittell, Estate of, 329  
 Hodel v. Irving, 12  
 Hodgson v. Halford, 411  
 Hofing v. Willis, 781  
 Hohndorf v. Watson, 81  
 Hojem v. Kelly, 586  
 Holden, In re Estate of, 181  
 Holland v. Taylor, 678  
 Holman v. Ryon, 724, 725  
 Holmes v. Burchett, 901  
 Holt v. Wissinger, 568  
 Holyoke Natl. Bank v. Wilson, 576, 578  
 Hopkins, Matter of, 801  
 Hopper, In re, 249, 251, 252  
 Hotmar v. Lowell H. Listrom & Co.,  
     752  
**Hotz v. Minyard, 465**  
 Houghton v. Dickinson, 150  
 Houston v. Coram, 789  
 Howard v. Batchelder, 855, 856, 857  
 Howard v. Cotten, 297  
 Howard v. Hunter, 297  
 Howard, Estate of, v. Commissioner,  
     433, 436  
 Howe v. Hodge, 859  
 HSBC Bank USA, N.A., In re, 711  
 Hubbell, Matter of, 708  
 Hudson v. Davis, 718  
 Hull v. Adams (Ill. 1948), 777, 779, 781,  
     782, 783  
 Hull v. Adams (Mass. 1934), 664  
 Hulse v. Juillard Fancy Foods Co.,  
     327  
 Humphreys v. Humphreys, 367  
 Hunt v. Superior Court, 924  
 Hunter v. United States, 799  
 Hurst v. Hilderbrandt, 833  
 Hurtado v. State of California, 131  
 Hutcherson v. Ariz. Health Care Cost  
     Containment Sys. Admin., 958  
 Hutchings v. Miner, 673  
 Hutchins v. Hutchins 273  
 Igoe v. 1199 SEIU Health Care Employ-  
     ees Pension Fund, 444  
 In re (See Name of Party or Matter)  
 In re Adoption of (See Name of Adop-  
     tee)  
 In re Alleged Will of (See Name of  
     Deceased)  
 In re Estate of (See Name of Deceased)  
 In re Guardianship and Conservator-  
     ship of (See Name of Ward)  
 In re Guardianship of (See Name of  
     Ward)  
 In re Last Will and Testament and Trust  
     Agreement of (See Name of  
     Deceased)  
 In re Marriage of (See Name of  
     Spouse)  
 In re Paternity of (See Name of Child)  
 In re Testamentary Trust Established by  
     Last Will and Testament of (See  
     Name of Decedent)  
 In re Trust Created for (See Name of  
     Beneficiary)  
 In re Trust Fund Created Under Terms  
     of Last Will and Testament of (See  
     Name of Deceased)  
 In re Trust of (See Name of Settlor)  
 In re Will of (See Name of Deceased)  
 In the Matter of (See Name of Party or  
     Matter)  
 Indenture of Trust Dated January 13,  
     1964, In re, 602  
 Indiana Dep't of State Revenue v.  
     Nichols, 377

- Industrial Nat'l Bank of Rhode Island v. Barrett, 848**  
 Industrial Nat'l Bank v. Rhode Island Hospital, R.I., 851  
 Industrial Trust Co. v. Saunders, 850  
 Infant R., In re, 837  
 Inlow v. Henderson, Daily, Withrow & DeVoe, 352  
 Insurance Com'r of West Virginia, State ex rel., v. Blue Cross Blue Shield of West Virginia, 553  
 Insurance Rating Bd. v. Commissioner of Ins., 647, 648  
 International Reform Federation v. District Unemployment Compensation Bd., 542  
**Irwin Union Bank & Trust Co. v. Long, 822**  
 Isham v. Post, 760  
 Island Car Wash, Inc. v. Norris, 467, 468  
 Ithaca Trust Co. v. United States, 797  
 Iwen, In re, 907
- J.B. & J.G., In the Matter of, 90, 94  
 J.P., In re, 96  
 J.R.W. ex rel. Jemerson v. Watterson, 117  
 J.W., In re, 96  
 Jablonski, Matter of Estate of, 550  
 Jackson v Metropolitan Edison Co., 617  
 Jackson v. Rupp, 941  
 Jacksonville, City of, v. Jones, 599  
 Jacobs v. Whitney, 489  
 Jamison v. Jamison, 261  
**Janes, In re Estate of, 706, 720**  
**Janus v. Tarasewicz, 160**  
 Jaycee B. v. Superior Court, 131  
 Jee v. Audley, 834  
 Jeffers Estate, 802  
 Jenkins v. Johnson, 117  
 Jerrido, In re Estate of, 178, 179  
 Jessica W., In re, 93
- Jimenez v. Lee, 562**  
 John J.H., In re Guardianship of, 902  
 John Richards Homes Bldg. Co. L.L.C., In re, 445  
 Johns v. Montgomery, 512  
 Johnson v. Calvert, 129, 130, 138  
 Johnson v. Johnson, 296  
 Johnson v. Outlaw, 264  
 Johnson v. Zoning Board of Appeals, 591  
 Johnson, Estate of, 308, 309  
 Johnston v. Scott, 673  
 Jones Memorial Baptist Church v. Brackeen, 627  
 Jones v. Holliday, 557  
 Jones v. Jones, 577  
 Jose v. Pacific Tile & Porcelain Co., 72  
 Joyner, Estate of, v. Joyner, 421  
 JP Morgan Chase Bank, N.A., In re, 711  
 Judith T., Matter of, 904, 905  
 Jull's Estate, In re, 334  
 Juran v. Epstein, 71, 72
- K.A.H., In re, 86  
 K.W. v. J.S., 126  
 Kaiser Aetna v. United States, 12  
 Kamp, In re, 252  
 Kane, Matter of Estate of, 424  
 Kantor, In re, 214  
 Karpfen v. Karpfen, 49  
 Kasmer v. Guardianship of Limner, 941  
 Kay v. Kay, 49  
 Kearns, Estate of, 328  
 Keenan v. Butler, 351  
**Kehler, Estate of, 381**  
 Kelly v. Scott, 167  
 Kennedy v. Titcomb, 90, 91  
 Kent v. Klein, 592  
 Kerwin v. Donaghy, 665  
 Keviczky v. Lorber, 274  
 Kewley v. Dep't of Health & Human Servs., 401



- Keybank National Association v.  
Hanns, 420
- Keyhea v. Rushen, 925
- Keys v. Keys, 168
- Kidwell v. Rhew, 426
- Killey, Estate of, 760
- Kimmel's Estate, In re, 187**
- King v. Talbot, 711, 760
- King, In re Estate of, 442
- King's Will, In re, 334
- Kingsbury, Estate of, 943
- Kinney v. Shinholser, 172
- Kirchberg v. Feenstra, 616
- Kirchman v. Commissioner, 432
- Kirksey v. Jernigan, 941
- Kleinwort Benson North America, Inc.  
v. Quantum Financial Services,  
Inc., 670
- Knight v. Margate, 256
- Knight v. Pottgieser, 782
- Knupp v. District of Columbia, 349
- Kohler's Estate, In re, 746
- Kolacy, Matter of Estate of, 147
- Kolodney v. Kolodney, 577
- Krakauer, In re, 252
- Kreuzer, In re Estate of, 859
- Kriedel v. Krampitz, 568
- Krog v. Hafka, 389
- Kruvant v. Mayor & Council Tp. of  
Cedar Grove, 256
- Kunkler, Estate of, 329
- Kurtz, Estate of, 439
- Kushinsky, In re, 252
- Kuzma v. Peoples Trust & Sav. Bank,  
Boonville, 352
- L.W.K. v. E.R.C., 150, 151
- Ladd v. Estate of Kellenberger, 99
- Lalli v. Lalli, 177
- LaMont's Estate, In re, 215
- Langan v. Cheshire, 297
- Langston v. Langston, 349
- Lankford v. Wright, 97**
- Lathan v. Father Divine, 271**
- Latouf's Will, In re, 834
- Laura, In re Estate of, 422**
- Laux v. Freed 326
- Layton, Estate of, 501
- Le Sourd v. Leinweber, 779, 781
- Leathers v. Binkley, 204
- Leboce, S.A. v. Merrill Lynch, Pierce,  
Fenner & Smith, Inc., 752
- Lechowicz v. Costco Wholesale Corp.,  
636
- Ledingham v. Bayless, 169
- Lee v. Lee, 233
- Lee v. Ullery, 232
- Lefkowitz, In re, 444
- Legg v. Commonwealth, 126
- Lehigh Valley R.R. Co. v. Woodring,  
552
- Lehman v. United States, 798
- Lehner, In re Estate of, 251
- Leib v. Merrill Lynch, Pierce, Fenner &  
Smith, Inc., 752
- Lesniak v. Budzash, 112
- Lessard v. Lessard, 418
- Leubuscher v. Commissioner of  
Internal Revenue, 541
- Lewis v. McCullough, 232
- Lewis v. Washington Metropolitan Area  
Transit Authority, 753
- Lewis's Estate, 538
- Liapis' Estate, 620
- Lieberman, Matter of, 409
- Liberty Title and Trust Co. v. Plews, 760
- Liddle, Estate of, 496, 497, 498, 500
- Lieberman v. Employers Ins. of  
Wausau, 253
- Life Insurance Co. of North America v.  
Ortiz, 688
- Lightfoot v. Davis, 273
- Lillian F. v. Superior Court, 922
- Linson v. Johnson, 47, 48
- Lipe v. Farmers State Bank of Alto Pass,  
681

- Lloyd Corp. v Tanner, 617  
 Lockwood v. Adamson, 148, 149  
 Loeser v. Talbot, 640  
 Lofton v. West, 402, 403  
 Logotheti v. Gordon, 233  
 LoGuidice, Matter of, 901  
 Lonergan v. Estate of Budahazi, 290  
**Lopes v. Department of Social Services, 954**  
 Loring v. Clapp, 816  
**Loring v. Marshall, 813**  
 Loring v. Morse, 814  
 Lovett v. Peavy, 733, 734  
 Loving v. Virginia, 407  
 Lowell v. Kowalski, 149, 151  
 Lowrance, In re Estate of, 163  
 Lucas v. Hamm, 826  
 Lucas v. Lucas, 598  
 Lugar v. Edmondson Oil Co., 15, 616  
 Lujan v. Defenders of Wildlife, 627  
 Lunsford, In re Estate of, 415  
 Lutz, In re, 586  
 Lyford v. Laconia, 535
- MacKay, In re Estate of, 423  
**Madelyn B., In re Guardianship of, 88**  
 Magoun v. Illinois Trust and Savings Bank, 409  
**Maher, In re, 895**  
 Maheras, Estate of, 268  
 Mahoney, In re Estate of, 404  
 Maierhofer, Estate of, 378, 380  
 Majors v. Majors, 292  
 Malleiro v. Mori, 186  
 Malley v. Malley, 685  
 Malone v. Hobbs, 285  
 Mancine, In re Marriage of, 77  
 Marcus, State v., 116  
 Mark C.H., In re, 902  
**Markey v. Estate of Markey, 350, 352**  
 Markwardt v. Zurich Am. Ins. Co., 136  
 Marsh v. Alabama, 617  
 Marshall v. Amerisys, Inc., 278
- Marsman v. Nasca, 572**  
 Marti, Estate of, 328  
 Martin B., In re, 785  
 Martin, In re, 933, 934  
 Martineau, In re Estate of, 58  
 Marvin v. Marvin, 64, 68, 69, 70, 74  
 Mason v. Rhode Island Hospital Trust Co., 695  
 Massachusetts Co. v. Berger, 666  
 Massachusetts Inst. of Technology v. Loring, 813, 815, 816  
 Masters v. Masters, 339  
 Matter of (See Name of Party or Matter)  
 Matter of Estate of (See Name of Deceased)  
 Matter of Will of (See Name of Deceased)  
 Maytag v. United States, 797  
 McArthur v. Scott, 489  
 McCart, In re Estate of, 891  
 McCarthy v. Pieret, 674  
 McConnell, In re Estate of, 61  
 McCormick v. State, 81, 83  
 McCray, Estate of, 328  
 McCune, In re, 628  
 McCurdy v. McCallum, 305  
 McCutcheon v. Brownfield, 591  
**McGee v. McGee, 363**  
 McGill, Matter of, 273  
 McGullam v. Cedar Graphics, Inc., 955  
 McIntyre v. McIntyre, 297, 298, 299  
 McKay, Estate of, v. Davis, 179  
 McKellar v. Harkins, 179  
 McKenzie, Estate of, 496, 497, 498, 499, 500, 501, 502  
**McKinney v. Richtelli, 414, 415**  
**McKown, In re Estate of, 45**  
 McLeod v. McLeod, 360  
 McMahan v. Newtown Savings Bank, 571  
 McMurray v. Stanley, 556  
**McNeil v. McNeil, 698**

- McPherson v. McPherson, 735  
Mearkle Estate, 802  
Meek v. Perry, 261  
Meinhard v. Salmon, 273  
Melendez, State v., 942  
Mennonite Bd. of Missions v. Adams,  
16, 17  
Mercer Home for Disabled Clergymen  
of the Presbyterian Faith, Re, 512  
Merchants Nat'l Bank v. Commissioner,  
797  
Merchants Nat'l Bank v. Merchants  
Nat'l Bank, 148  
Merchants Nat'l Bank v. Morrissey, 665  
Merin v. Maglaki, 112  
**Merrill Lynch, Pierce, Fenner & Smith,  
Inc. v. Cheng, 750**  
Merten v. Nathan, 136  
Mertz v. Guaranty Trust Co., 512  
Meyer v. Nebraska, 407  
Michoud v. Girod, 724, 726  
Mild's Estate, In re, 746  
Milhoan v. Koenig, 232  
Milk Commission v. Food Stores, 417  
Miller v. United States, 798  
Miller, Estate of, 735  
Miller's Estate, 339  
Mills v. Habluetzel, 115  
**Milton Hershey School Trust, In re,  
622, 623, 626, 629**  
Milton Hershey School, In re, 636  
**Minassian v. Rachins, 524**  
Miner, Estate of, 495, 501, 502  
Minot v. Parker, 534  
Mississippi Univ. for Women v. Hogan,  
616  
Modern Brotherhood v. Matkovitch,  
677  
Moffatt v. Heon, 369  
Moholt v. Dean Witter Reynolds, Inc.,  
752  
Monarco v. Lo Greco, 71, 73  
Monday v. Vance, 556  
Money v. Office of Pers. Mgmt., 401  
**Monty S. v. Jason W., 80**  
Mooney v. Northeast Bank & Trust Co.,  
473  
**Moor, In re Law Will and Testament  
and Trust Agreement of, 313**  
Moore v. Adkins, 890  
Moose Lodge No. 107 v. Irvis, 616, 617,  
618  
Moran, In re Estate of, 163, 165  
Morgan v. Commissioner, 797  
Morgan v. Indep. Drivers Ass'n Pension  
Plan, 890  
Moriarity v. Moriarity, 282  
Morris v. Okla. Dep't of Human Servs.,  
958  
Morrison, Conservatorship of, 936  
Morristown, Town of, v. Woman's Club,  
112  
Morse v. Kraft, 691  
**Mortensen, In re, 602**  
Morvay v. Hanover Insurance Co., 21  
Moseley v. Goodman, 339  
Moses v. Moses, 592  
Moses v. Zook, 410  
**Moss, In re, 391**  
**Moses, In re Will of, 257**  
Moss' Trusts, Re, 411  
Mosser v. Darrow, 725  
Mowry, Estate of, 429  
Mueller, In re Estate of, 404  
Mullane v. Central Hanover Bank &  
Trust Co., 14, 16, 17  
Mulli v. Mulli, 72  
Munoz, People v., 889  
Murgic v. Granite City Trust & Savings  
Bank, 680  
Murphey's Estate, In re, 538  
Murphy, Estate of, 74, 329  
Mutual Life Insurance Co. v. Arm-  
strong, 403  
Myers, In re Estate of, 451

- National Academy of Sciences v. Cambridge Trust Co., 577, 578
- National Bank of Columbus v. Bran-non, 790
- National Bank v. Snodgrass, 409
- National Shawmut Bank of Boston v. Joy, 148, 665
- Needham v. Hamilton, 22
- Neidler v. Donaldson, 409
- Nelson v. Schoonover, 941
- Nelson's Estate, In re, 488, 489
- Neuman, In re, 249
- Nevil's Estate, In re, 630
- New England Trust Co. v. Paine, 579
- New England Trust Co. v. Sanger, 646
- New Jersey Builders, Owners & Managers Ass'n v. Blair, 217
- New Jersey Div. of Youth Services v. M.W., 421
- New Jersey Nat'l Bank & Trust Co. v. Lincoln Mortgage & Title Guaranty Co., 512
- New Jersey Title Guarantee & Trust Co. v. Dailey, 849
- Newburgh v. Arrigo, 114
- Newbury, Town of, v. N.H. Fish & Game Dep't, 91
- Newhoff, In re Will of, 745
- Newman v. Dore, 453
- Newman, Estate of, 496
- Newton v. Seaman's Friend Soc'y, 304, 305
- Nexon v. Boston Safe Deposit and Trust Co., 664
- Nichols v. Allen, 533
- Nichols v. Suiter, 294
- Nielson, Estate of, 307**
- Nixon, Commonwealth v., 629
- Noble v. Beach 329
- Nofziger v. Holman, 327
- North Ford, In re Estate of, 101
- Northcraft, In re Testamentary Trust Established by Last Will and Testament of, 698
- Northern States Power Co. v. Nat'l Gas Co., Inc., 140
- Northern Trust Co. v. Porter, 852
- Northern Trust Co. v. Wheeler 784
- Novak v. Cobb County-Kennestone Hosp. Auth., 939
- Noyes v. Parker, 845
- Nye v. Blyth Eastman Dillon & Co., 753
- O'Brien v. O'Brien, 451
- O'Connell v. Gaffney, 389, 390
- O'Connor v. Murphy, 327
- O'Hara, Matter of, 272
- O'Steen v. Estate of Wineberg, 587
- Obergefell v. Hodges, 44, 429
- Ogle v. Fuiten, 22
- Old Colony Trust Co. v. Rodd, 576, 577
- Oldham v. Oldham, 49
- Olliffe v. Wells, 535
- Olmsted, Estate of, 308
- Olson v. Town of Fitzwilliam, 95
- Olver v. Fowler, 75
- Organized Charities Ass'n v. Mansfield, 569
- Osgood, In re Estate of, 424
- Osguthorpe, Matter of Estate of, 282
- Ostrander, In re Marriage of, 117
- Oteze Fowlkes v. Adamec, 957
- P.M. v. T.B., 85
- Pacholder v. Rosenheim, 409
- Pacific Nat'l Bank v. Windram, 665
- Packard v. Illinois Trust & Savings Bank, 512
- Pappas v. Pappas, 593
- Parkhurst, In re Guardianship and Conservatorship of, 907
- Parsons v. Bristol Dev. Co., 324, 327, 495
- Pate, Matter of, 760
- Paternity of (See Name of Child)
- Patterson's Estate, In re, 499
- Patton v. Patton, 408
- Paul v. Layne & Bowler Corp., 73

- Paul, Estate of, 439  
Pavan v. Smith, 96  
**Pavlinko's Estate, In re**, 330  
Peadro v. Peadro, 388, 389, 780  
Peirce, In re, 367  
Peiter v. Degenring, 694, 695, 696  
Pelham's Will, In re, 499  
Pellegrini v. Breitenbach, 641  
Pendergrass, In re Will of, 98  
Pennsylvania v. Board of Directors of  
City Trusts of the City of Philadel-  
phia, 408  
Pennsylvania, Commonwealth of, v.  
Brown, 619  
People v. (See Name of Defendant)  
Peoples Savings Bank v. Webb, 685  
Pericles, Estate of, 448  
Peters, In re Estate of, 216, 217  
Peterson v. Littlejohn, 586  
Peterson v. Peterson, 735  
Petition of (See Name of Petitioner)  
Pettig v. Estate of Webb, 589  
Petty, In re Estate of, 215  
Phalen v. United States Trust Co., 673  
Phillippe v. Shapell Industries, 71, 72  
Phipps v. Palm Beach Trust Co., 517  
Pickett v. Brown, 115  
Pinkham v. Blair, 533  
Pitman v. Pitman, 804  
Pitts v. Halifax Country Club, Inc., 306  
Platt, Estate of, 324  
Plitt v. Plitt, 489  
Podberesky v. Kirwan, 620  
Poisl, Estate of, 439  
Pond v. Pond, 640  
Porch v. Farmer, 297  
Porporato v. Devincenzi, 71, 74  
Portsmouth v. Shackford, 533  
Post, In re Trust of, 721  
Potter v. Smith, 725  
Poulos v. Poulos, 369, 371  
Powell, United States v., 798  
Powers v. Steele, 151  
Powers v. Wilkinson, 148, 151  
Prager, Estate of, 449  
Pratt v. Bishop, 418, 419  
Prendergast v. Drew, 571  
Prendergast v. Walsh, 366  
Prentis v. United States, 181  
Prescott v. Wordell, 665  
Prince v. Barrow, 734  
Proprietors of Church in Brattle Square  
v. Grant, 839  
Provident Trust Co. v. Osborne, 255  
Prudential Insurance Co. v. Spain, 163  
Pruner's Estate, In re, 629  
PSI Energy, Inc. v. Roberts, 720  
Public Service Electric & Gas Co., State  
v., 62  
**Pulitzer's Estate, In re**, 509, 721  
Purdy v. Lynch, 707, 708  
**Putnam v. Putnam**, 639, 640, 648,  
652  
Quinby's Will, Matter of, 516  
Quinn v. Tuttle, 824  
R.D., In re, 78  
R.J.S. v. Stockton, 117  
R.M.Z., In re Adoption of, 86  
R.R.C. v. D.G.C., 117  
Raftopol v. Ramey, 138, 141  
Raines v. Byrd, 627  
Rains v. Belsh, 925  
Randall v. Bank of America N.T. & S.A.,  
472  
**Ranney, In re Alleged Will of**, 212  
Ransdel v. Moore, 272  
Ray v. Simmons, 686  
Raymond v. Davis' Estate, Matter of,  
513  
Re (See Name of Party or Matter)  
Realty Growth Investors v. Council of  
Unit Owners, 890  
Redke v. Silvertrust, 70  
**Reese v. Muret**, 118  
**Register of Wills for Baltimore City v.**  
**Cook**, 536

- Rehabilitation Association of Virginia v. Kozlowski, 946  
 Reitman v Mulkey, 616, 617  
 Relph, Estate of, 308  
 Remick v. Merrill, 533  
 Rendell-Baker v Kohn, 617  
 Reynolds v. Reynolds, 590  
 Rhode Island Hospital Trust Co. v. Bateman, 850  
 Richards v. Humphreys, 369  
 Richardson v. Adams, 640  
 Richardson v. Denend, 587  
 Riddle v Memorial Hosp., 900  
 Riggs v. Palmer, 274, 402  
 Rippeth v. Connelly, 62  
 Rittenhouse's Will, In re, 249, 250, 251  
 Ritter, United States v., 666  
 Roberts v. Southwest Community Health Servs., 178  
 Roberts v. Ward, 94  
 Robertson v. Saadat, 158  
 Robinette v. Hunsecker, 445  
 Robinson v. Colebrook Savings Bank, 22  
 Robinson v. Delfino, 682  
**Roblin's Estate, In re, 268**  
 Rodrigues v. Rodrigues, 155  
 Rodriguez v. Bethlehem Steel Corp., 131  
 Roe v. Patton, 96  
 Rogers v. Office of Pers. Mgmt., 401  
 Rogers v. Rogers, 733  
 Rogich v. Dressel, 587  
 Roos v. Morrison, 278  
 Rosenberg, In re Estate of, 269  
 Rosenthal, Matter of, 821  
 Ross, In re Marriage of, 118, 119, 121, 123, 124  
 Rothko, Matter of, 708, 748  
 Rothschild v. United States, 181  
 Royce v. Estate of Denby, 424  
 Rubano v. DiCenzo, 92  
 Rule, Estate of, 327  
 Rumbin v. Utica Mut. Ins. Co., 955, 957  
 Ruotolo v. Tietjen, 384  
**Russell, In re Estate of, 322**  
 Ruth v. First Nat. Bank of Atlanta, 789  
 Rutledge v. Fishburne, 489  
  
 S.J.L.S. v. T.L.S., 86  
 S.N.V., In re, 92  
 Safe Deposit & Trust Co. v. Robertson, 598  
 Safe Deposit & Trust Co. v. Sheehan, 859  
 Salmonski, Estate of, 325  
 Salvador M., In re, 94  
 San Diego County Council, Boy Scouts of America v. City of Escondido, 632  
 Sanders v. Yanez, 77  
 Sanderson v. Sanderson, 360  
 Sargavak, Estate of, 325, 328  
 Sarte v. Pidoto, 253  
 Saueressig, Estate of, 201  
 Sayre's Will, In re, 498, 499, 500  
 Schalla v. Roberts (In re Estate of Schalla), 179  
 Scherer, In re Estate of, 102  
 Schiavo, In re Guardianship of, 937  
**Schilling v. Herrera, 277**  
 Schleif's Estate, 516  
 Schloendorff v. Society of New York Hospital, 925  
 Schlotterer, Estate of, v. United States, 798  
 Schneider, Estate of, v. Finmann, 23, 300  
 Schneider, In re Estate of, 680, 681  
 Schofield v. Cleveland Trust Co., 665  
 Schunk, In re Estate of, 404  
**Scott v. First National Bank of Baltimore, 167**  
 Scott, Matter of, 615  
 Seader, In re Estate of, 101  
 Seaman, Matter of, 409

- Seamen's Society v. Hopper, 237  
**Searight's Estate, In re, 545**  
Second Bank-State St. Trust Co. v.  
    Pinion, 370, 647, 666  
Second Bank-State St. Trust Co. v. Yale  
    Univ. Alumni Fund, 650, 801, 804  
**Second National Bank of New Haven**  
    **v. Harris Trust & Savings Bank,**  
    826, 853  
**Security Trust Co. v. Irvine, 486**  
Seibert, Estate of, 71, 73  
**Seidel v. Werner, 817**  
Serrano, In re Estate of, 461  
Service Employees Internat. Union,  
    Local 18 v. American Building  
    Maintenance Co., 72  
Shaff, In re Estate of, 198, 199  
**Shannon, In re Estate of, 437**  
**Shapira v. Union National Bank, 406**  
Sharrow v. State Farm Mutual, 61  
Shattuck v. Burrage, 665  
Shearin v. Brown, 101  
Shearin v. Reid, 422  
Shearson Hayden Stone, Inc. v. Leach,  
    752  
Sheedy v. Roach, 535  
Sheehan v. N.H. Dep't of Resources &  
    Economic Dev., 92  
Sheehan v. Sullivan, 933  
Sheldon, Estate of, 439  
**Shelfer v. Commissioner, 431, 434, 435**  
Shellenbarger, In re Estate of, 421  
Shelley v Kraemer, 407, 617  
Shoaf v. Shoaf, 419  
**Shriners Hospital for Crippled Chil-**  
    **dren v. Gardiner, 744, 745, 747**  
Sidor v. Kravec, 169  
Silverstein's Will, In re, 409  
Simar v. Canaday, 273  
Simches v. Simches, 640  
Simenstad v. Hagen, 134, 137, 139  
**Simpson v. Calivas, 21**  
Sisson v. Jankowski, 24  
Skinner v. Oklahoma, 407  
Slee v. Commissioner, 541  
Slepkow v. McSoley, 685  
Smiley v. Citibank, 434  
Smith v. Dean, 264  
Smith v. Neikirk, 215  
Smith v. Smith, 179  
Smith v. Withey, 726  
Smith, Estate of, 310, 440  
Smock, In re, 254  
Snetsinger v. Montana University  
    Systems, 430  
Sniadach v. Family Finance Corp., 15  
Snider v. Burks, 289  
Snow v. Durgin, 533  
Sojourner v. Sojourner, 264  
Sondra S. v. Jay O., 155  
Soper, In re Estate of, 690  
Sorensen, People v., 129  
South Whitehall Township Police  
    Service v. South Whitehall Town-  
    ship, 628  
Southern Ry. Co. v. Howerton, 353  
SouthTrust Bank of Alabama N.A. v.  
    Winter, 290  
Sowell, Estate of, v. Commissioner, 797  
**Speelman v. Pascal, 558**  
Spitzer, Estate of, 309  
Springfield Safe Deposit & Trust Co. v.  
    Stoop, 816  
SSI Med. Servs., Inc. v. State, 113  
Stack, Will of, 339  
Stafford v. United States, 798  
Standard Fire Ins. Co. v. Marine  
    Contracting and Towing Co., 468  
Stanford, Estate of, 496, 497, 500, 502  
Stang, In re Estate of, 680  
Stanton v Stanton, 615, 616  
**Stark v. United States Trust Co. of New**  
    **York, 755**  
State ex rel. (See Name of Relator)  
**State Street Bank & Trust Co. v. Reiser,**  
    663

- State Street Trust Co. v. Kissel, 665  
 State v. (See Name of Defendant)  
 Steele v. Robinson, 833  
**Stevens v. Casdorff, 195**  
 Stickney, Estate of, 308  
 Stifel Fin. Corp. v. Cochran, 316  
 Stiles v. Brown, 289  
 Stites v. Gray, 779, 781  
 Stone v. Forbes, 804  
 Stormont, In re Estate of, 300  
 Stout v. Stout, 512  
 Stover v. Stover, 677  
 Stowe v. Smith, 22  
 Stowers v. Norwest Bank Indiana, 377  
 Strates v. Dimotsis, 726  
 Strauss v. Strauss, 388  
 Streeton, Estate of, 308  
 Strohm v. McMullen, 388, 390  
 Strong v. Strong, 344  
 Sturm v. Routh, 231  
 Suchy v. Hajicek, 591  
 Sullivan v. Burkin, 454, 650  
 Sullivan v. Roman Catholic Archbishop  
     of Boston, 651  
 Sullivan v. Sullivan, 552  
 Sumners, In re Marriage of, 47  
 Supeck, Estate of, 62  
 Susan Fixel, Inc. v. Rosenthal & Rosen-  
     thal, Inc., 278  
 Swan, Matter of, 615  
 Swift v. Hiscock, 578  
 Sykes Estate, 382  
 Sylvester v. Newton, 664  
 Szemple, State v., 112  
  
 Taft v. Stearns, 305  
 Taggart, Matter of, 440  
 Tammy, Adoption of, 151  
 Tamposi Associates, Inc. v. Star Market  
     Co., 22  
 Tannehill v. Finch, 74  
 Taylor v. Hoag, 539  
**Taylor v. Holt, 206**  
  
 Taylor v. McCowen, 325  
 Taylor, State ex rel., v. Guilbert, 408, 409  
 Tedford v. Gregory, 124, 125  
 Teegarden v. Ristine, 718  
 Terry v Adams, 617  
 Teubert's Estate, In re, 197  
 Texaco, Inc. v. Short, 15  
 Thayer v. Wellington, 840  
 Thomas F. Rogers, Inc. v. Hochberg,  
     571  
**Thompson v. Royall, 284**  
 Thompson v. Soles, 98  
 Thompson v. Thompson, 412  
 Thompson v. Thornton, 534  
 Thor v. Superior Court, 925, 927  
 Tillinghast, In re, 367, 368  
 Timberlake v. Munford, 790  
 Tobey v. Moore, 839  
 Todd v. Munson, 590  
 Toni 1 Trust v. Wacker, 612  
 Toronto Gen. Trusts Co. v. Chicago, B.  
     & Q. R. Co., 64 Hun, 512  
 Torregano, Estate of, 324  
 Torres-Echavarria, United States v., 956  
 Totten, In re, 687  
 Town of (See Name of Town)  
 Towne v. Cottrell, 424  
 Tramel v. Schrader, 436  
 Travers, Estate of, 289  
 Treloar, In re Estate of, 425  
 Treto v. Treto, 96  
 Trimble v. Gordon, 151  
 Trimworks, State v., 316  
 Trosch v. Maryland Nat'l Bank, 648  
 Trott, In re, 902  
 Trustees of Amherst College v. Ritch,  
     272  
 Trustees of South Newmarket Method-  
     ist Seminary v. Peaslee, 533  
 Tulare Irr. Dist. v. Lindsay-Strathmore  
     Irr. Dist. 924  
**Tulsa Professional Collection Services,  
     Inc. v. Pope, 13, 464**



- Turner v Danker, 901  
Turner v. Freed, 76
- Union & New Haven Trust Co. v.  
Taylor, 852  
Union Pacific Railway Co. v. Botsford,  
924  
United States National Bank of Port-  
land v. Snodgrass, 409  
United States v. (See Name of Defen-  
dant)  
Universal Sales Corp. v. California etc.  
Mfg. Co., 325  
**Unthank v. Rippstein, 554**  
**Usry v. Farr, 787**  
Utilities Comm. v. Edmisten, Atty. Gen-  
eral, 417
- V.L. v. E.L., 77  
Valley Forge Historical Society v.  
Washington Memorial Chapel, 630  
**Valma M. Hanson Revocable Trust, In  
re, 374**  
Van Arsdale v. Hollinger, 929  
Van Beeck v. Sabine Towing Co., 256  
Vanderbilt v. Commissioner of Internal  
Revenue, 541  
Varrell v. Wendell, 533, 535  
Vaupel v. Barr, 268  
Vicinity v. Roxbury Home for Aged  
Women, 839  
Vicki Bagley Realty, Inc. v. Laufer, 724  
Viewcrest Coop. Ass'n v. Deer, 587  
Vincent v. Rix, 560  
**Vissering, Estate of, v. Commissioner,  
796**  
Volunteers of America v. Peirce, 388
- Wagner v. Bischo, 468  
Waisbren v. Peppercorn Productions,  
Inc., 70  
**Wait, In re Estate of, 201, 208**  
Walker v. Treasurer & Recr. Gen., 802  
Wallin, In re Estate of, 62  
Walsh v. Gillespie, 369  
Walsh v. Walsh, 70  
Walsh's Will, In re, 849  
Ward v. New York Life Ins. Co., 673  
**Ward v. Van der Loeff, 835**  
Ward v. Ward, 590  
Ware v. Gulda, 665  
Warman, In re Estate of, 373  
Warner v. Warner, 169  
Washburn v. Beatt Equip. Co., 587  
Washington v. Glucksberg, 907  
**Wasserman v. Cohen, 368**  
Waterbury v. Munn, 597  
Watkins, Matter of, 455  
Watts v. Watts (N.H. 1975), 94  
Watts v. Watts (Wis. 1987), 136, 140  
Waverley Trust Co., In re, 148  
Weaver v. Hollis, 401  
Weber v. Aetna Cas. & Sur. Co., 115  
Week's Estate, In re, 250  
Welch v. Flory, 577  
Welch v. Morse, 814, 816  
Weld v. Weld, 512  
Wellman v. Carter, 840  
Wells Fargo Bank v. Title Ins. & Trust  
Co., 496, 497, 499, 500, 501, 502  
Wells v. Ellis, 790  
Wells v. Wells, 418, 419  
Wendland v. Superior Court, 921  
Wendland, Conservatorship of, 919,  
929, 930, 931, 934, 935  
West Coast Hospital Association v.  
Florida National Bank, 598  
Weston, Matter of, 710  
Whalen v. Prosser, 279  
White v. Bacardi, 596  
White v. Rankin, 565  
White v. Smith, 857  
White, Matter of, 236  
Whitely v. New Mexico State Personnel  
Bd., 178  
Wieczorek, Matter of, 901

- Wiegand v. Barnes Foundation, 630  
Wilbur v. Portland Trust Co., 855  
Wilk v. Vencill, 71  
Wilkins v. Wilkins, 321  
Will of (See Name of Deceased)  
Willey v. Mayer, 889  
William B. Tanner Co. v. Estate of  
Fessler, 15  
William Penn Parking Garage, Inc. v.  
City of Pittsburgh, 627, 628  
Williams v. Blue Cross Blue Shield of  
N.C., 416  
Williams v. Williams, 45  
Williams, State v., 116  
Williford v. Williford, 420  
Willingham v. Matthews, 404  
Willis v. Barrow, 366, 367  
Willson, Estate of, 325  
**Wilson, Estate of**, 325, 501, **614**, 620,  
841  
Wilson v. Anderson, 98  
Wilson v. Behr, 409  
Wilson v. Fulton National Bank, 829  
Wilson v. Warner, 591  
Wilson v. Wilson, 448  
Windsor, United States v., 429  
**Wingate v. Estate of Ryan**, 107  
Woerz v. Schumacher, 710, 711  
Wolcott's Petition, 846  
**Wolfe's Will, In re**, 290  
Womersley, Estate of, 325  
Wong v. Wong Hing Young, 179  
Wood v American Security and Trust  
Co., 820  
Wood v. Rabe, 591  
Wood's Estate, In re, 334  
Woodberry v. Bunker, 576  
**Woodward v. Commissioner of Social  
Security**, 144  
**Woodworth, Estate of**, 494  
Woollard's Will, Matter of, 849  
Worcester Bank & Trust Co. v. Sibley,  
804  
Wrenn v. Harris, 155  
Wright v. Gooden, 488  
Wright v. Robert & St. John Motor Co.,  
557  
Wright, In re, 365, 368  
Wulf v. Ibsen, 84  
  
Ximenez, Matter of, 516  
  
Yopp v. Batt, 82  
Young v. Whitehall Co., 417  
Young v. Young, 560  
Young, In re, 418  
  
Zengerle, Estate of, 680