



TEXAS SOUTHERN UNIVERSITY
THURGOOD MARSHALL SCHOOL *of* LAW

WILLS, ESTATES & TRUSTS

[LAW 650]

SYLLABUS

FALL 2021 & SPRING 2022

PROFESSOR

MCKEN V. CARRINGTON

**SUPPLEMENT
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STATUTES - EXCERPTS

UNIFORM PROBATE CODE
TEXAS ESTATES CODE
TEXAS PROPERTY CODE
TEXAS INSURANCE CODE
TEXAS FAMILY CODE
UNIFORM TRUSTS CODE

SUPPLEMENT TO CHAPTER 1	PART I
SUPPLEMENT TO CHAPTER 2	PART II
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THE PROFESSOR

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LOCATION: Law School Building Room 204

OFFICE HOURS: TWTH 12-1 & 2 - 3 PM - Please feel free to stop by at other times when I am in the office.

Delivery of Instruction

Because students have different learning styles, there are three delivery methods of instruction in the class.

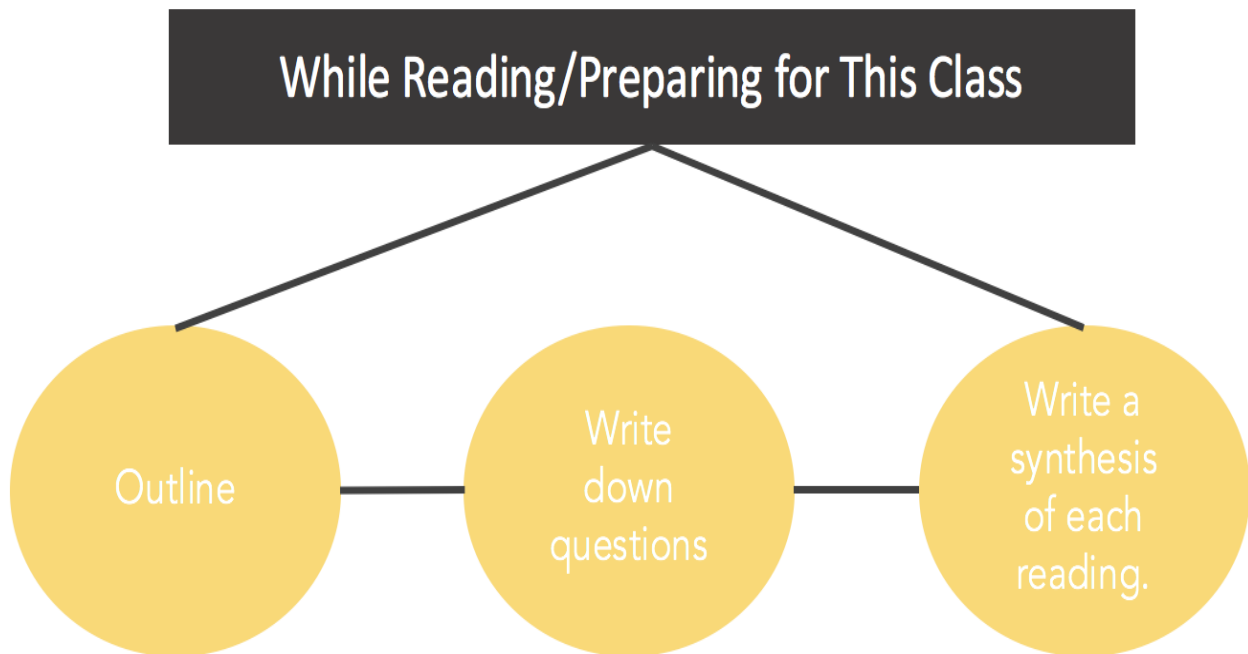
<p style="text-align: center;">Technology</p> <p style="text-align: center;">Please be properly registered to utilize Blackboard.</p>	<p>The class has a very active Blackboard presence.</p> <ul style="list-style-type: none"> ➤ Course materials are posted daily to Blackboard. Weekly examinations are also posted there.
<p style="text-align: center;">Problem-Based Learning</p> <p style="text-align: center;">A student-centered pedagogy where students learn about a subject through the experience of solving a problem.</p>	<p>The Course Supplement contains over 150 problems, case notes and comments. Including:</p> <ul style="list-style-type: none"> ➤ Excerpts from the Texas Estates Code, Texas Trust Code, Texas Family Code, Texas Property Code, supplementary cases and text notes. The casebook contains the statutory excerpts from the Uniform Probate Code. <p>You not need purchase the Texas Estate Code the Uniform Probate Code, the Internal Revenue Code, or the Texas Trust Code.</p>

Class Lectures	Coverage of The Material is fast paced
<p>Class lectures focus on materials from two sources:</p> <ol style="list-style-type: none"> 1. The Casebook National Cases Uniform Statutes 2. Supplement Texas Cases & Statutes 	<p>For example:</p> <ol style="list-style-type: none"> I. We begin a new topic with a subject matter with a case in the casebook... II. We transition to the Uniform Code... III. Finally, we transition the Texas Code and/or statute.

Success in this class is predicated on your ability to focus on problem-solving using your understanding of the law in all four sources:

1. National cases
2. Uniform Codes
3. Texas Codes

Challenging indeed, but possible if you focus and prepare!



COURSE BOOKS & MATERIALS

1. **Casebook:** Dukeminier/Sitkoff: Wills, Trusts & Estates [10th Ed., 2017].
2. *Purchase a new Connected eBook and gain access to all the learning tools available on [CasebookConnect](#):*
3. *Option 1:* Casebooks and coursebooks are **40% off the print list price** when you choose the digital-only Connected eBook. Purchase the digital-only Connected eBook from [WKLegaledu.com](#), and you'll get access to the online ebook and learning tools immediately on [CasebookConnect.com](#).
4. *Option 2:* Purchase a **new print book** from the campus bookstore, [WKLegaledu.com](#), or other online retailers. Using the access code inside your book, register your product at [CasebookConnect.com](#) and start using the ebook and learning tools.
5. **Supplement:** The Supplement to be purchased at Kwik Kopy Printing (a/k/a Copy Club) 4001 San Jacinto & Cleburne (713) 526-6364 contains excerpts from the Texas Estates Code, Uniform Probate Code, Uniform Trusts Code, Texas Family Code, Texas Property Code, supplementary cases and text notes.
6. **Optional reading:** Johanson – Texas Estates Code Annotated

COURSE DESCRIPTION & OBJECTIVES

DESCRIPTION:

Wills and Trusts LAW 650 (4 Hours) also called Wills, Estates and Trusts is about the gratuitous succession of property through decedents' estates and trusts in estate planning. The "wills and estates" component of the course covers the disposition of property for persons who do not make a will, community property and protection of spouse and children, execution and revocation of wills, capacity and contests, and construction primarily under post-execution events. The "trusts" component of the course introduces characteristics and creation; planning for incapacity; fiduciary administration, alienation and modification, charitable purposes cy pres, and supervision.

OBJECTIVE:

Course Goals: Students will learn the highly specialized law and procedure of the gratuitous transfer of wealth. Upon completion of this course, the student will be qualified to enter professional work as a beginning probate or wills-drafting lawyer or elementary estate planner. In addition, the student will be able to write an essay demonstrating core legal knowledge of the following Bar Examination subjects: (1) intestate distribution; (2) wills, including the formalities of execution, testamentary capacity, undue influence, and fraud; (3) estate administration, (4) will substitutes, such as gifts and joint tenancies, insurance, pension plans; (5) trusts, including methods of creation, types, and administration, (6) the taxation of capital gains, estates and gifts, and (7) planning for incapacity.

STUDENT LEARNING OUTCOMES

Part I – Introduction:

The student will be able to Know:

- The limitations to the testator/donor of testation/donation
- A lawyer's duty to a client in will-drafting and estate planning
- The Nature of Property ownership classifications into probate, and non-probate
- The elements of a simple will

The student will be able to do:

- Write correct answers to problems in the blank pages in the supplement on limitations to testamentary power.
- Complete the first revision of the will in the Casebook problem.
- Outline Part 1 of the Course

Part II – Intestacy as an alternative to a Will:

The student will be able to know:

- The inheritance rights of out-of- wedlock children, adopted children and persons adopted as adults
- The distinctions in property distributions per stirpes, per capita and per capita at each generation.
- The rights of creditors upon the death of the debtor
- Identify the various techniques of estate administration and apply them
- Explain the procedures involved in Texas Independent Administration
- Determine the most advantageous method of administering a particular estate
- Relate the requisites of attested will execution in Texas, New York and Uniform Code
- Apply the legal tests for mental capacity, insane delusion and undue influence, fraud and duress
- Write a Texas Bar Examination Essay on insane delusion, undue influence and mental capacity.
- How to handle an essay on intestate distribution
- The methods of will-revocation
- Prepare a revised and updated will
- How to draft a living will, health care directive, and durable power of attorney.
- Rules of marriage or divorce after a will is executed in two different jurisdictions
- Articulate the rights of a child who is born or adopted after the will is executed
- Determine how property is distributed when a beneficiary dies before the benefactor.
- Recite estate planning alternatives for a simple estate
- Specify the rules that apply to the creation of a trust
- Determine when a trust is more advantageous than a will
- Classify trusts between the following: resulting, express and constructive
- Classify trusts between the following: revocable/pour-over will and testamentary trust

- Classify trusts between the following: spendthrift trust and support trust and trusts for the state supported
- Classify trusts between the following: charitable trusts and private trusts
- Recite the duties of a trustee
- Recite the liability of a trustee who breaches its duty

GRADING

- **Formative assessments:** Frequently, there is a quiz or an essay on the subject matter covered during a prior period. Students who make less than 70% can re-write all the answers to the examination giving true answers and converting the false answers to true ones. Those below 50% will be raised 60%. Those between 60% and 70% will be raised to 80% and those with 80% and above will be raised to 90 - 95%. After each assessment, answers are posted on Blackboard.
- **Summative evaluation-** Final examination - Three hour traditional comprehensive law school examination consisting of True/False; multiple-choice, and essays.
- Through Blackboard examination postings, the assessments inform students of their level of professional development. The summative assessments is also formative because it is posted on Blackboard before the final grade is reported to the registrar. During this period you are encouraged to contact me regarding your numerical grade.
- There are some 15 separate items of evaluation. This is sufficient to reveal evidence of your understanding of the subject matter of the course.
- Please note that the above items represent the criteria that I consider to assess your work and levels of quality. I do not consider attendance as a positive factor; however, under the rules, your grade will be lowered if you fail to meet the attendance rules.
- **Examinations:** There are several examinations in this course. The final examination is valued at approximately 60 - 75 % of the grade of the course. The format will be primarily true/false, multiple choice and essays. The other approximately 25 - 40 % of your final grade is based on weekly quizzes, personal outlines and various writing assignments.
- **Class preparation and recitation** - You can be graded on your class recitation up to five percent of the grade. You will seldom be called on randomly. I will attempt to call on students whose names begin with A at the beginning of the semester to perform the role of class experts for the first class and the expert system will operate on a sequential basis. Students who are unprepared, absent, or non-responsive can lose up to 5% of the final grade. In addition, class participation also means that the problems in the Supplement must be completed in writing and the answers must be available for my inspection.
- **Class Outlines:** Students are required to compose separate course outlines for each part of the course as set forth in the syllabus. Such outlines are to be the work product of the individual student without reference to commercial outlines or similar work of others. I

have classified the outlines as part of the formative evaluation of the course. As such, they are a part of your grade

- **Outcome:** The information you learn in this course can start you on the way to becoming an Estate planner.
- **Accommodations:** See http://www.tsulaw.edu/student_affairs/accomodations.html

PARTICIPATION, ATTENDANCE & PROFESSIONALISM

- **Class Participation Revisited:** Students whose names begin with A can be expected to perform the role of class experts for the first class and the expert system will operate on a sequential basis. Students who are unprepared, absent, or non-responsive will lose up to 5% of the final grade. In addition, class participation also means that the problems in the Supplement must be completed in writing and the answers must be available for my inspection. Failure to follow this requirement may result in the loss of up to 5% of the final grade.
- **Attendance:** Mandatory. Class meets in Room 202 and on-line at 8 AM - 10:AM on Tuesdays and Thursdays. A student who misses more than 7 classes is subject to a grade reduction. You do not have to inform me of your absences or give any explanation for them. I may give no other notice to you that you are in danger of a grade reduction.
- **Class Setting:** The will be offered as hybrid classes. What this means is that it will be offered both in-person and online. In order to observe appropriate social distance protocols, the Law School classrooms have significantly reduced seat capacity.
- **Professionalism:**
All work presented for a grade must be the original work of the student who presents the work. All items presented will be checked for their originality. So, too, will the bar examination answers.
See http://www.tsulaw.edu/student_affairs/docs/plagiarism.pdf
See http://www.tsulaw.edu/student_affairs/rules.html

TEXAS SOUTHERN UNIVERSITY
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ACADEMIC CALENDAR 2021- 2022

FALL SEMESTER 2021

First Day of Class	Monday	August 16, 2021
Last Day to ADD/DROP	Wednesday	August 18, 2021
Labor Day (NO CLASSES)	Monday	September 6, 2021
<i>Purge of all unpaid course selections</i>	Wednesday	September 15, 2021
Mid Term Examinations	Mon - Fri	October 11-15, 2021
Last Day to Drop a Class with W grade	Friday	November 5 2021
Last Day of Classes	Tuesday	November 23, 2021
First Year Professors' Grades due	Tuesday	November 23, 2021
Reading Period (NO CLASS)	Wednesday	November 24, 2021
Thanksgiving Holiday November 25-26, 2021		Thurs-Friday
Reading Period (NO CLASS)	Sat-Sun	November 27-28, 2021
Final Examinations	Mon -Fri	November 29-Dec 10, 2021
Commencement	Saturday	December 11, 2021

SPRING SEMESTER 2022

TBA
Policies & Procedures
Course Rules

Use of Laptops: The use of laptops or any other internet access electronic device during class session is limited to the course materials. We use Blackboard as our educational technology platform. Please familiarize yourself with the features on the platform prior to the first day of class. Purchase a new Connected eBook and gain access to all the learning tools available on [CasebookConnect](#):

Attendance [Revisited]: Mandatory. Class meets 2PM – 2:50 PM MTWTh. A student who misses more than 7 classes will receive a grade reduction. You do not have to inform me of your absences or give any explanation for them. I may give no other notice to you that you are in danger of a grade reduction.

In-Class Conduct: You must turn off all of your cell phones or pagers during class. No side talk (amongst students) of any kind is permitted while the Professor is teaching or calling the class roll. You must not leave the classroom before the end of the class lecture (except to the rest room) unless prior permission is sought and received from the Professor. A violation of any of the above rules would result in the violating student(s) being charged with an absence for each time the violation occurs at the discretion of the Professor.

PART I. INTRODUCTION

#1 Restrictions on Testamentary Power

All students should read the **Glossary of Terms** set out on Blackboard. This will assist you in understanding the materials discussed in the first week of class and beyond.

Although the materials on the D&S casebook pp. 1-39, is important, our class discussion will concentrate on pages 1-19 – the Shapira case and the notes following the case. Then, we answer the questions on Shapira in the Supplement from Professor Johanson.

Supplement Part I p. 2 – Additional problems on Shapira

The Bachelor (1999) – “This is a “conditional bequest” film (i.e., the beneficiary wins the gift only if the condition is performed). If Chris O’Donnell’s character doesn’t get married by his 30th birthday, he will lose his family fortune of \$100 million. The movie was panned upon release, but the condition states a clear time of performance and legal subject matter. Additionally, the film features hundreds of women in wedding gowns, including Rene Zellweger, angrily chasing O’Donnell throughout San Francisco. What’s not to like?” **Scott R. Zucker, Esq.** is the owner of **The Zucker Law Firm PLLC**

Scope of today’s class discussion: Introductory remarks concerning scope and administration of course.

#2 Professional Responsibility in Will Drafting and Estate Planning

D&S pp.51- 62

Supplement, Part I, pp. 3 -5 (top of the page).

The Rainmaker (1997) – While the main plot involves some David vs. Goliath insurance matter, this movie is a sentimental favorite because the young attorney’s first case is to draft a will. Based on the John Grisham novel.

Scope of today’s class discussion:

In today’s class, we discuss Daniel Shapira’s constitutional argument, and begin discussion of his “public policy” argument. We will complete our consideration of Daniel Shapira’s “public policy” argument, beginning with the problems at Part I, page 2 of the Supplement. We will then consider Simpson v. Calivas (Page 52): attorney liability for malpractice and the status of the “privity of contract” defense (i) in general, and (ii) in Texas.

Note: Texas follows Barceló v. Elliot, 923 S. W. 2d 575 (1996) (referenced in your Supp. Part 1, P. 4). Accordingly, you are required to pull and read this case for class discussion. But See Belt v. Oppenheimer, 192 S.W. 3d 780 (2006), Barceló does not bar suit brought on behalf of deceased client by his estate’s personal representative for injury suffered by the client’s estate and Smith v. O’Donnell that holds that the personal representative of the estate may sue the decedent’s attorney for the advice given during the course of estate planning.

#3-4. The Estate Planning Problem of Howard and Wendy Brown
D&S 40-44 & 496-498, Supp. Part I, pp. 6-11 and the
Howard and Wendy Brown problem on Blackboard.
D&S [Casebook] pp. 40-44 & 496-498 [The Transfer on Death Deed] (top of the page)

Scope of assignment #3 class discussion: Complete discussion of Heyer v. Flaig and the “social setting” hypo. Utility of “termination” letter set to client after will and other documents are signed; see Bourland letter at Supp. p. 8-13. Begin critique of Howard Brown’s letter found in the problem and his current will (p. 2). Discussion will begin with the problems on p 3. [However, we will not discuss the problems relating to Article FIRST of the will (“just debts” clause) at this time.] In reading over Howard’s will, consider these questions: Does the will cover all of the reasonably foreseeable contingencies that it ought to cover? Are there any “holes” in the will? Are there ethical problems in our dual representation of both Howard and Wendy in preparing their wills? See the Bourland engagement letter, Supp. p. 8, 9.

Scope of assignment #4 class discussion: Continue our critique of Howard Brown’s current will. Concept of “nonprobate assets” – which of the assets on the Brown balance sheet [pp.8, 9] will be governed by the terms of Howard’s will? Classification of Assets as Probate and Non-probate property.

READING ASSIGNMENT PART II

INTESTACY - DEFAULT FOR LACK OF A WILL

#5 Intestate Distributions in the Brown Estate - UPC State

D&S pp. 63-76 - Intestacy in a UPC jurisdiction
Brown Estate Planning Problem on Blackboard pp. 1-9.
Outline the Code on pages 69-71

NOTE: During the first several weeks of the course, some of the assignments as with today's assignment include citations to a number of statutes. You must outline these statutes in your notes before the particular class. This will enhance your comprehension of the class discussion.

Scope of Assignment #5: Any more questions about our first revision of Howard Brown’s will? Further discussion of distinction between probate and nonprobate assets. What distribution if Howard Brown dies intestate in Colorado, survived by Wendy and the children? [UPC 2-102 page 69] Will distribution of Howard’s remainder interest in Delaware real property be governed by the Colorado intestacy statutes? (See 2nd to last ¶ on casebook page 45). What distribution if, instead, Wendy dies intestate in Colorado, survived by Howard and the children?

#6A Exempt Property Set Aside, Family Allowance, Homestead and Transfer on Death Deeds:

D&S pp 40, 497 - 498, 562-563, Texas Homestead - Supplement Part II pp. 26-30

Scope of assignment #6A: What is the impact of the (i) Colorado UPC, (ii) exempt property set-aside statutes on the distribution of Howard's intestate estate? What is the effect of the family allowance on intestate distributions? On the exempt property set asides and the family allowance, we will take a brief look at the text on pp. 562-3, but we will concentrate on the Texas materials assigned above.

**#6B Intestate Distributions in the Brown Estate
Community Property State (Idaho)**

D&S pp 520-522, 553-556. Howard and Wendy Brown Problem - (revisited in Idaho).
D&S page 69, footnote 16 referring to UPC §2-102A)

Scope of assignment #6B: Intestate succession in a community property state. We will begin with a review of basic community property principles: D&S pp. 519-522, 553-556 and Supp. Part II pages 4-23. Which items on the Brown balance sheet (pp.8-9) would be characterized as community property, and which would be characterized as separate property? Then: What intestate distribution under Idaho law if Howard dies intestate? (See footnote 16 on p. 69). Idaho is a CP state that has enacted the UPC.

We will then consider some basic principles of the Texas community property system [it is important that you read Supp. Part II pp. 3-7] focusing on the topics addressed in the problems at Supp. Part II pp. 22-27: the inception of title rule; claims that arises when Community Property is expended to enhance the value of Separate Property and fraud on the community.

#7 Intestate Distributions in the Brown Estate in Texas

Transfer on Death Deed - 40, 497-498

Texas Intestate Succession laws - Tex. Est. Code §§ 201.001; 201.002; 201.003;

Fraud on the community - Texas Fam. Code § 7.009 (Statutory Supplement)

Scope of assignment #7: Transfer on Death Deed - 40, 497-498. After finishing discussion of CP claims and conversion agreements, we will consider the status of survivorship estates of community property in Texas. [Supp. pp. 12-14] Discussion of why, in Texas, Howard and Wendy Brown's residence would not be entitled in joint tenancy. Then, Then: What intestate distribution under Texas law if Howard died intestate survived by Wendy? If Wendy died intestate survived by Howard? [Texas Estates Code §§ 201.001; 201.002; 201.003] On Wendy's intestate death survived by Howard, what are Howard's rights under Texas' "probate homestead" laws? If Howard asserts a homestead right of occupancy, who has to pay property taxes and casualty insurance premiums and make mortgage payments? [Supp. 26-30]

#8. Intestate Distribution among Descendants & Collateral Kin

D&S pp. 70-72, 81-104, 109-111. Omit Problems in Note p. 86.

Supp. Part II-31 (top of the page -35]

Scope of assignment #8: Inheritance by descendants and collateral kin. Suppose that Howard dies, then Michael dies, and then Wendy dies intestate; would Andy (Michael's non-marital child) inherit from Wendy? [See D&S pp. 108-109]. Then, inheritance by descendants and more remote kin under the UPC [§§ 2-102, 2-105, 2-106, 2-107]. What's the difference between classic (strict) per stirpes, per capita with representation (modern per stirpes), and per capita at each generation? [D&S pp. 79-82]

Recommended reading: pp. 110-122 (sperm bank case) to see the kind of world we are heading for. Although we will not discuss these materials in class, here's a good question: How should we draft Howard's and Wendy's will to cover this possible source of "posthumous children"?

#9 Adoptions & Non-marital and Posthumous Children

D&S pp. 90--102, 102-110 (middle of the page)

UPC 2-114 thru 2-119

#9B Will-Drafting Problems in Making Gifts to Descendants

D&S pp.874-876.

Scope of assignment #9 We will finish our discussion of inheritance by descendants and collateral kin. Then look at adult adoptions - then: our first revision of Howard Brown's will made an alternate gift, if Wendy does not survive, to Howard's "descendants per stirpes." The first revision of Wendy's will would read the same way. Suppose that (years from now) Howard dies, then Michael dies, and then Wendy dies and this will (first revision) still in place. Would the gift to Wendy's "descendants" include an adopted grandchild? What if, shortly before he died, Michael had adopted Candace, his live-in girlfriend? Would the gift to Wendy's "descendants" include Candace?

If all three of Wendy's children had predeceased her, how would the distribution to "descendants per stirpes" be made among the grandchildren? Then: How the intestacy laws treat posthumous children [D&S pp 107-110]

#10A Simultaneous Death

D&S pp. 76-79 (before Descendants).

Supp. Part II. 35-36

Scope of assignment #10A: Any questions about our second revision of Howard Brown's will with "descendants"?] and simultaneous deaths. Operation of the "120-hour rule" [UPC 2-104 and 2-107] in general, and with respect to community property in particular.

#10B Advancements, Prohibited Beneficiaries, Disclaimers

D&S pp. 122-124, 127-137

UPC 2-109

Tex. Ins. Code § 1103.151, 1103.152 [Statutory Supplement]

Scope of assignment #10B: What are advancements at common law and advancement by statute? The inheritance rights of an heir who wrongfully brings about the death of the testator. How are disclaimers treated for inheritance purposes? I do not have enough time to cover disclaimers. Please review Texas Property Code § 240 [Texas Statutory Supplement]

READING ASSIGNMENT PART III
WILL A PROBATE ADMINISTRATION
BE REQUIRED IN THE BROWN ESTATE?

#11-12. The Probate Process

First day:

D&S pp. 40-51

Supp. Part III, p. 3 -23 (thru the problems on 22-23)

Second day:

383 – 384 (Exoneration of Liens).

TEC §§308.051, 308.053,

UPC 2-607

TEC §255.301

TEC §§355.151, 355.152, 355.153, 355.154

Supp. Part III, p. 23-27

Scope of assignment #11: The estate administration process: We will walk through the forms at Supp. Part III, p. 3-9. Role of personal representative [Supp. Part III, p. 10-14]; Creditor's claims – effect of *Tulsa Professional Collections v. Pope* on non-claim statutes in Illinois, under the UPC, and in Texas; all considered in the context of the Fred Friendly problem, Supp. P. 22.

Scope of assignment #12: Unsecured creditors' claims continued. Then, how secured claims are handled [Cessna Finance; TEC § 355.151-4]. Do you understand the different consequences that turn on whether the secured creditor elects "matured secured claim" status rather than "preferred debt and lien" status? Then, specific bequests of encumbered property and the "exoneration of liens" doctrine.

#13-14. Is Probate Necessary?

First Day:

D&S pp. 48-51

In considering Problem 1, casebook p. 50, we shall first assume that the \$10,000 mutual fund account is in the name of "Aaron and Martha Green, as joint tenants with right of survivorship."

Supp. Pp. 27-33.

TEC §§ 252.001; 202.002, 202.009; 202.201; 202.202; 301.002; 256.001; 256.204, 205.001; 205.007; 453.004

Second day:

Supp. pp. 34-46.

TEC §§ 256.001, 256.201; 257.001; 257.051; 257.052; 257.053; 257.054

Scope of assignment #13: Aaron Green problem, D&S p. 50. If the \$10,000 mutual fund account on balance sheet is in joint and survivor form, can we save Martha Green legal fees by not probating Aaron Green's will, and not having Martha appointed as executor with letters testamentary? Can we wind up Aaron's affairs informally, without any involvement in the probate court? See TEC §§ 252.201; 256.001. Can we use the affidavit form at Supp. III-32 to get new certificate of title for the Ford?

Scope of assignment #14: Continuation of Aaron Green problem. Can we have an informal family settlement if \$5,000 savings account is in joint and survivor form, and if (as in Problem 1c, p. 50 Csbk.) real property was titled in Aaron Green's name? If not, how should we proceed? Can we use a "small estate administration" affidavit (TEC §§ 205.001; 205.007)? Probate the will as a muniment of title? (TEC §§ 257.001; 257.051; .052; 257.053; 257.054). How does the Statutory Heirship Proceeding (TEC §§ 202.002, 202.201) differ from a muniment of title probate? Is a non-statutory affidavit of heirship a way to clear title if real property was titled in Aaron Green's name?

#15 Supervising the Representative's Actions:

D&S p. 46-48 – The Uniform Probate Code approach

Supp. Part III pp. 47-55, including TEC §§ 4001.001-4001.005; 402.001; 403.051; 403.059; 404.004; 405.007; 405.009

Scope of assignment #15: In this class we will summarize and review alternatives to formal court-supervised estate administration, concentrating on Texas independent administration procedures. As for Problem, Supp. III-54-55: What (if anything) can we do for Phil and Mary, who have strong suspicion that their brother Sam is doing bad things as independent executor?

READING ASSIGNMENT PART IV.

EXECUTION OF WILLS

#16-18. Execution of Attested Wills

First day:

Strict Compliance

D&S pp. 141-157 (thru. Delayed Testation. 157)

Supp. Part IV pp. 4-7 (thru. 254.003)

Second day:

From Strict Compliance to Substantial Compliance

D&S pp. 152-176 (Top of the page).

Supp. Part IV pp.7-11 (begin with 256.151)

Third day:

From Substantial Compliance and Harmless Error

D&S pp. 177-198 (Top of the page).

Scope of assignment #16: Three Will Types (based on execution formalities): 1) Attested – core formalities; 2) Notarized; and 3) Holographic: Why Homer Miller’s will (p. 149) was denied probate; what was the problem? Weren’t all the ritual, evidentiary and protective functions (p. 144) in fact satisfied? If so, did the court reach a correct result? If attorney who prepared the will were sued for negligence, should he have been held liable if “privity of contract” had been rejected as a defense in the jurisdiction? Would Groffman’s will have been validly executed if the controlling law were UPC §2-502? Groffman’s will have been validly executed if the controlling law were UPC §2-502?

Scope of assignment #17: From Strict Compliance to Substantial Compliance: Interested Witness and Purging Statutes (157-158); the strong desirability of following a formal ritual in supervising the execution of wills (pp. 158-160). ~~In discussing what it takes to prove up a will in probate (TEC § 256.151-153) we will consider attestation clauses and self-proving affidavits at TEC § 251.101-106) and in the UPC jurisdiction;~~ curative doctrine thru ad hoc relief from strict compliance – *In re Pavlinko Estate* and *In re Snide*. The assignment will begin the discussion of modern trends in this area: the Substantial compliance doctrine and Revised UPC’s “dispensing power”).

Scope of assignment #18- Substantial Compliance to Harmless Error Rule: D&S pp. 176-197 (Top of the page). The Harmless Error Rule UPC 2-503; *In re Estate of Hall*; *In Re Probate of the Will of Macool*; Writings, Documents and Electronic or Digital Wills; *In re Estate of Javier Castro* - Problems 1 and 2 Supp IV 14 Texas statute is identical to UPC 1990 on page 144 of casebook

Brewster’s Millions (1985) – Conditional bequest movie #3. Richard Pryor plays a man who will inherit his great uncle’s \$300 million estate if he completely spends \$30 million in 30 days. While the conditions were stated in significant detail, they were presented to Pryor by video will, which is not enforceable in any U.S. state.

#19-20. When will Contest is a Possibility
[Capacity and Contest]
D&S pp. 263--281, 281-309.
Supp. Part IV: pp 14 (middle of the page) -16 (top of the page)

Scope of assignment #18: Test for mental capacity, insane delusion and Undue influence. Was the Strittmater case (p. 274) correctly decided?

Scope of assignment #19: In *Lipper v. Weslow*, p. 300; How would you (the now-better prepared TMSL future attorney) grade the job that Attorney Frank Lipper did in anticipating a will contest, quite aware (it appears) that his mother’s will was likely to be contested? What about the fact that Frank Lipper drafted his mother’s will? How effective was Lipper’s use of a no-contest clause in his mother’s will? What steps would you have taken to reduce the likelihood that Sophie Block’s will would be contested? As for “no contest” clauses, what explains the radically different approaches of Florida and New York as to the validity of such clauses? The Mississippi Supreme Court thought that Dan Shell (the attorney who prepared Fannie Moses’ will, p. 290) should have done more when he interviewed the client. Comment?

20 Wills made through Fraud and Duress
D&S pp. 310- 324
(Probate exception to Federal Jurisdiction)

Scope of assignment # 20: The remedies available when a will is procured by fraud and duress. Would Latham v. Father Divine and Pope v. Garrett be decided the same today as in the 1948 and 1949?

#21-22. Holographic Wills
D&S pp. 198-216
Supp. Part IV: pp 11-17
Oral will – page 142 footnote 4

Scope of assignment #21-22: We will discuss under what circumstances, if any, would an attorney ever rely on the use of a holographic will or codicil? We will continue this assignment by taking a look at conditional wills and the Gonzalez and Kuralt cases.

#23 Components of Wills - Integration, Incorporation by Reference, Acts of Independent Significance

D&S pp. 240-255
Supp. Part IV pp. 17-20
Contracts relating to wills pp. 255-260

Scope of assignment #23: We will consider quickly the doctrines of integration, republication by codicil, incorporation by reference, and facts of independent significance; how they differ and how they affect the components of a will. In doing so, we will concentrate on the notes on page 255

#24 Will construction - Reformation of Mistakes in Will Drafting

D&S pp. 341-351; 373-374; 381-384
Supp. Part IV pp. 20-21
UPC 2-805

Scope of assignment #24: We will consider the current legal trend for jurisdictions by statutes to authorize modification or reformation of wills to address administrative issues, achieve the testator's tax objectives, qualify a beneficiary for governmental benefits, or correct a scrivener's error. We will also consider construction problems also arise in the events of abatements, adempments and exonerations.

#25 Revocation

First Day:

D&S pp. 217-229

UPC § 2-503 (p. 177)

Supp. Part IV pp. 21-25

#26 Partial Revocation by Physical Act & Revival of Wills

Second Day:

D&S pp. 229-239

Scope of assignment #25: What are the methods of revoking a will, and under what circumstances is a will presumed revoked? In *Thompson v. Royall* (p. 219), did the court reach the correct result? A just result? Shouldn't the court have (i) dispensed with the statutory formalities when the evidence was so clear, or (ii) imposed a constructive trust, or (iii) imposed liability for tortious interference with expectancy? The last ground requires clear and convincing evidence."

Scope of assignment #26: What is the effect of interlineations (cross-outs and write-ins) on the face of a will after will has been signed and witnessed? Can Testator partially revoke will by physical act, as by crossing out a clause after will has been signed and witnessed? And what the heck is dependent relative revocation? What fact settings give rise to possible application of the doctrine, and why is DRR sometimes referred to as the "Second best solution doctrine"?

#27-28. Elderly Concerns:

First day:

D&S pp. 498-517

Supp. pp. 38-55

Second day:

Supp. pp. 55-78

Movies - The Descendants

Scope of assignment #27 - 28: What steps might Margaret Brown (Howard's 63-year-old mother) take to cover the contingency that she may suffer a disabling illness or injury? Would it be advisable for her to execute a durable power of attorney? A Designation of Guardian before Need Arises? A living will? A medical power of attorney? We may discuss the Texas versions of each of these forms in the context of assignments in Casebook.

READING ASSIGNMENT PART V

CHANGES IN CLIENTS FAMILY AFTER WILL'S EXECUTION

#29. Marriage or Divorce after the Will is executed

[Light coverage] D&S pp. 238-240 bottom of the page (UPC 2-804), 486-493, 571-574

Tex. Family Code § 9.301, 9.302

UPC § 2-804, 2-301.

Supp. Part V, pp. 5-6

Scope of assignment #29: Suppose that a testator writes a will that benefits his or her spouse and then they are divorced; what is the effect of the divorce on the will? What is the effect on a life insurance policy on which the insured had named his spouse (now a former spouse) as beneficiary? What if the will names the former spouse's child (testator's stepchild) as a beneficiary? What is the effect of a divorce on any gifts to the stepchild? We will examine UPC §2-804.

What is the effect of marriage following a will's execution? What are the new spouse's rights if he or she is not mentioned under the will? What other rights may the new spouse have in the decedent's estate? We will begin by examining UPC §2-301, and then look at Texas law.

#30. Elective Share Statutes

Spousal Protections - Elective Share Statutes

D&S pp. 520-525, 528-532, 535 -544

Supp, pp-6-8

Scope of assignments #30: Purpose and policy of elective statutes. To what extent (i) should, (ii) do elective share statutes apply to non-probate transfers--in particular, to revocable trusts created by the deceased spouse? After reviewing court-developed responses to the question (including *Sullivan v. Burkin*, p. 528) and briefly discussing the statutory responses (p. 535), we will concentrate on the UPC's "augmented estate" approach in context of the problems in Supplement.

#31. Birth or Adoption of Child after Will is executed

D&S pp. 564-566, 569 (bottom of the page) 574(bottom of the page) -585.

Supp. p. 9 - 11

Scope of assignment #32: What protection is given to a child is born to or adopted by the testator after the testator executed his will? We will consider this question in the context of the typical pretermitted child statute (*Gray and Azcunce* -note 2 page 580) and Texas pretermitted child statute We will then consider briefly the will-drafting problems that are raised by statutes that apply to existing children as well as after-borns.

#32-33A. Death of Beneficiary before Death of Testator: And-Lapse Statutes

D&S pp. 351-368 (thru note 5), 76-78 (Simultaneous Death revisited)

Scope of assignments #32-33A: If a will beneficiary dies during the testator's lifetime, what are the "default" rules that apply if the will does not cover this contingency? In this assignment, we will address the scope and operation of so called anti-lapse statutes, and the interplay of the "120-hour rule," and the rules that apply if the beneficiary who predeceased the testator was a residuary beneficiary? What is the result if a will expressly disinherits an heir but there is a partial intestacy for some reason?

#33B-34. Death of Beneficiary of Class Gift before Death of Testator

D&S pp. 368-374.

Supp, pp. 15-18.

Scope of assignment #33B-34: we will meet the “class gift” rule of construction. How do the courts treat a gift to a class (“children,” “my nephews and nieces,” etc) if a member of the class “class” predeceases the testator, and how does that contrast with the treatment of bequests to individually named beneficiaries? How do you determine when the “class gift” rule of construction applies? When does (should) the class gift rule, supposedly based on presumed intents, give way to expressions of intent in the testator’s will?

#35- 36. Class Closing Rules

First day: D&S pp. 881 (rule of convenience) -885 Omit Case 23 and 24 (pp. 883).

Second day: D&S pp. 401-402 (Lux v. Lux). In discussing the Lux case, while our focus will be on the class closing issue, several other issues are raised by the case.

Scope of assignment #35: If a will makes a gift to a “class” of beneficiaries, what happens if someone who meets the class description is born after the time set for making distribution of the property? Who is included in a gift to a class; when does the class “close”? (Herein of the rule of construction known as the rule convenience”) We will review some principles in the law of future interest: What happens if a class member holding a future interest dies during the lifetime of the life tenant? When is a future interest a remainder interest, and when do we call it a reversion? When is a remainder vested, and when is it contingent? When is a vested remainder indefeasibly vested, vested subject to open, and vested subject to total divestment? How do you value future interests for tax purposes? For the latter, see Supp. VIII pp. 3-7.

Scope of assignment #36: What effect of “precatory” language (e.g., “express desire) in a will? [pp. D&S pp. 402-403.]

PART VI

DOES THE BROWN ESTATE CALL FOR “TAX PLANNING”?

#37 User-Friendly Will Drafting

Supp. Part VI, pp. 4-27.

Scope of assignment #37: Read and reflect on the Professor’s observations in the Supplement on “user-friendly will drafting,” which the Professor will amplify by lecture. I will cover this subject in 30 minutes

#38-39 The Gross Estate: Property Owned at Death; New Basis at Death Rule

First day: Supp. pp.29-33 (thru ¶ 5 on p. 33), 35 (¶¶ 7-9 only), 45 (Computation of the Tax) -46, 58 -60 (new basis at death).

D&S pp. 929-930, 936-948

Second day: Supp. pp. 40 (¶ 2 and ¶ 3), 44 (¶ 5 only), 75 (Problem 5).

Introductory note on tax materials: This first assignment into the Supplement is rather jumpy-sorry about that. I have tried my best to allot the assignments on these tax materials in digestible portions. For those of you who have never had a tax course, this stuff is on the heavy side. In your first time through this assignment, your comprehension rate may not be all that great. That is why I suggest-no, I am telling you-that you should read it again. The good news is that (i) that chart on the top of page 47 plus the one on page 32 are pretty useful, and (ii) all of this stuff will come into focus as we cover the problems beginning on p. 58.

After you have read the assigned materials in the Supplement, read TEXTBOOK pp. 929-930 and 936-941 for further background information. Despite frequent changes in our transfer tax laws, the casebook text remains useful for a further understanding of the basic principles of transfer taxation. (It ought to be; the 9th edition was just published!) However, aside from several cases set out in the casebook, we will concentrate on the materials in the Supplement (which, by the way, I have had to revise annually).

Scope of assignment #38: Does the Brown estate calls for “tax planning”? In order to consider that issue, we need to understand some basic principles of the federal estate tax and the federal gift tax. As for the “gross estate” (the estate tax base), see the chart on p. 46-47. After some preliminary comments on the uncertain status of the estate tax, we will take up Problem 1 on at p. 56, and compute the projected estate taxes Sarah Smith’s estate. With Problem 3, we will (i) see how the federal gift tax is computed, (ii) learn what it means when we say that the gift tax is computed on the basis of “cumulative: lifetime gifts, and (iii) discover that no one (except the mega-wealthy) pays gift taxes any more. With Problem 4 on p.57 we will gain an understanding of the “adjusted taxable gift” rule.

Scope of assignment #39: What transfers are caught by the “within three years of death” rule of § 2035? Why are life insurance policies on the list? Then, what do need to know about “basis” for income tax purposes, and the “new basis at death” rule?

Inclusion of community property in the gross estate, and application of the “new basis at death” rule to community property - Why do lawyers in community property states really like the number “1014 (b) (6)?

#40-41. The Federal Gift Tax

D&S pp. 930 (Annual Exclusion)-942 (thru Note 2)

Supp. pp. 48-61; pp. 35-36(¶ 6)

Scope of assignment #40: In this assignment, we will compare the treatment of gifts by spouses in a common law state (“split gifts by spouses in a community property state. We will also explore the scope of the § 2503 (e) unlimited exclusion for tuition and medical payments. Then: When is an interest a “present interest” for purposes of the annual exclusion? Can we extend a Section 2503(c) Trust for Minors beyond age 21 when the statute says that (to be eligible for annual gifts) the trust must terminate at age 21? [We will cover the above issues in about 30 minutes, focusing on Problems 1-4 on pp. 54-56. This means that if we began this Gift Tax assignment at the beginning of the class hour, we will also get into a discussion of the Cristofani case, TEXTBOOK p. 936].

Scope of assignment #41: In Cristofani, how did the court come around to recognizing seven annual exclusions, when the trust gave the five grandchildren contingent future interests? Why didn’t the Internal Revenue Service appeal the Cristofani case, which the Service thinks was very wrongly decided? Why does the Service think the decision *Crummey v. Commissioner* was...crummy?

When are “Crummey withdrawal” clauses used in estate planning: In Crummey-type trusts designed to secure annual exclusions? In Extended Section 2503 (c) trusts? In irrevocable life insurance trusts?

#42 Federal Estate Taxation of Life Insurance

D&S pp. 947-948. (The problems in the casebook are reproduced in the Supplement.)

D&S pp. 135-140 (disclaimers)

Supp. pp. 62-69

Scope of assignment #42: [This assignment will be covered in about 35 minutes.] On your own, you are to familiarize yourself with the basic principles applicable to term versus cash value life insurance, and some of the policy features that are commonly encountered (pp. 62-65). With the problems in the Supplement at p. 71, we will explore how (and when) life insurance is taxed under the estate tax, and [with Problem 3 (a)] we will take a preliminary look at the use of disclaimers in estate planning.

#43-44 The Unlimited Marital Deduction and Marital Deduction Formula Clauses

D&S pp. 967-974, 970-971. Omit all problems in casebook.

Supp. pp. 40-43 (thru ¶3), 69-73

Scope of assignment #43-44: We will see the original purpose of the marital deduction (as enacted in 1948) was to provide parity in the tax treatment of marital property for residents of community property states and non-community property jurisdictions. We will then see that the purpose of the current unlimited marital deduction is based on an altogether different policy: Transfers from one spouse to the other spouse should not be taxed; the tax should be deferred until the death of the surviving spouse. With the Clark problem (p. VI-66), we will encounter the “estate-stacking” problem raised by an “all my property to my spouse” will. We will then examine how a marital deduction formula clause [Article 5, p. VI-66] operates to produce the optimum marital deduction, by automatically adjusting to values as finally determined for estate tax purposes. Finally, we will compute the initial funding of the Residuary (“Bypass”) trust created by Herman Clark’s will.

#45 Bypass Trusts: Powers of Appointment and how they are taxed

D&S pp. 962-967, 973

Supp. pp. 37-39 (¶ 10), 70-71.

Note: The assigned text at p. 964 includes discussion of the “\$5,000 or 5%” invasion power. Unlike the discussion of the ascertainable standard invasion power, which is very important, we will not cover (and you are not responsible for understanding) the “5 or” power, which raises issues that are beyond the scope of this course.

Scope of assignment #45: In this assignment, we will see that §2041, under which property subject to a general power of appointment is includible in the gross estate, sets the outer limit on the interests can be given to a trust beneficiary (e.g., a spouse or a child) without causing the trust principal to be included in the beneficiary’s gross estate. Does the Residuary Trust in Clark’s will [Article 6, p. VI-66] qualify as such a “bypass trust”? We will pay particular attention the HEMS “ascertainable standard” exception to the general power of appointment rule, and what language is (or is not) covered by the exception. This will call for a careful reading of Vissering (p. 964) and the cases discussed and distinguished therein.

#46-48 What Interests Qualify for the Marital Deduction; Marital Deduction Trusts

First day: D&S pp. 967-975.

Supp. pp. 43 (¶4)-46, 76

Second and third days: D&S pp. 962 (QTIP trust exception), 970-971. Supp. pp. 77-83

Scope of assignment #46: At today’s class, we will focus on interests that qualify-and interests that do not qualify-for the marital deduction. We will take a close look at the all-important nondeductible terminable interest rule and its exceptions, most notably the “time of survival

exception.” We will then focus on interests that could be employed to qualify for the marital deduction before 1982 (and which can still be used today): outright dispositions, estate trusts, and “(b) (5)” marital deduction power of appointment trusts.

Scope of assignments #47-48: Over two classes, we will take a close look at QTIP-qualified terminable interest property-trusts, and gain an understanding of how a QTIP election operates to defer estate tax on the trust property until the surviving spouse’s death. What terms must a trust contain in order to be QTIPable? When is it appropriate to make a partial QTIP election and how should such a partial election be expressed?

#49-51A. Community Property Issues

First day: Supp. pp. 83-85 (thru Problem 7a), 94-99.

Supp. Part II, pp. 7-8, pp.15-16.

Second and third days:

D&S pp. 558-560

Supp. pp. 85 (Problem 8)-92

Supp. Part II, p. 22

Scope of assignment #49: What rules govern the characterization of life insurance policies (as separate or community property) in California? In Texas? Estate taxation of life insurance policies that are characterized as community property. Does the noninsured spouse who predeceases the insured spouse have a devisable interest in a community property policy? What are the estate tax consequences if the noninsured spouse predeceases? What issues arise if community funds are used to pay the premiums on a life insurance policy that is characterized as the separate property of one spouse?

Scope of assignment #50-51A: What are the marital property implications and estate tax consequences of property brought from a common law jurisdiction to a community property state? Herein of quasi-community property. Does one spouse have the power to make gifts of community property without the other spouse’s consent...in California? In Texas?

#51B-52. Howard and Wendy –Review of Life Insurance Beneficiary Designations

D&S pp. 471, 472, Supp. pp. 103-107

Tex. Est. Code §254.004

Tex. Insurance Code §1104.021 (page S-35 of Supplement)

Scope of assignment #51B-52: If Howard wants to settle the proceeds of his life insurance policies in a revocable trust, how do we address the problem that the insurance policies are community property, and Wendy will be the transferor (for tax purposes) of her one-half interest in the proceeds? How should we handle Wendy’s ability to revoke the trust after Howard’s death? What problems are raised if, instead, Howard names “the trustee named in my will” as policy beneficiary?

The policies currently name “the insured’s children” as alternate beneficiaries. Any problems with that? (Hint: Yes, there are problems; and in identifying them we’ll apply the “does it make sense” test.)

**PART VII
TRUSTS**

PART A – TRUSTS: CHARACTERISTICS AND CREATION

1. Introduction to the Law of Trusts

D&S pp. 385-408 Top of the page.

Scope of class discussion: In this class, we discuss the origin of trusts with a focus on the Private Express Trust, sources of law, vocabulary, typology, uses, and bifurcation of ownership. In addition, we contrast the private express trust in its form as an equitable life estate rather than the legal life estate at common law. What are Business Trusts? How is American Trust law different than foreign trust law?

2. Trust Creation Part I - D&S pp. 408-437

Scope of Class discussion: **1. Intent to Create a Trust:** a. Testamentary Trust, b. Deed of Trust - *Jimenez v. Lee*; **2. Declaration of Trust:** *Hebrew University Ass'n v. Nye (1961)* 409; *Hebrew University Ass'n v. Nye (1966)*; **3. Trust Property:** *Unthank v. Rippstein*; **4. Ascertainable Beneficiaries - The Beneficiary Principle** 418, *Clark v. Campbell* 419. **5. Pet and Other Noncharitable Purpose Trusts - In re Searight's Estate.** **6. Written Instrument:** a. Oral Inter Vivos Trusts of Personal Property - Uniform Trust Code § 407 page 429 - *In re Estate of Fournier . Secret Testamentary Trusts and the Wills Act* 433, *Olliffe v. Wells* 433; *Oral Inter Vivos Trusts of Land and the Statute of Frauds* 436

#3 Will substitutes/Nonprobate Transfers:

D&S: 440- 465

Uniform Trust Code § 603

Fulp v. Gilliland

Uniform Trust Code § 602

Patterson v. Patterson

The Subsidiary Law of Wills

State Street Bank and Trust Co. v. Reiser

Clymer v. Mayo

Scope of class discussion: “In this chapter [7 of the casebook], we examine revocable inter vivos trusts, life insurance and other pay-on-death and transfer-on-death contracts, pension plans and retirement accounts, and other legal arrangements that have the effect of passing property at death outside of probate. Taken together, these *will substitutes* constitute a nonprobate system of private succession that competes with the public probate system-and private succession is winning. More wealth passes by way of will substitutes than by probate.”

#4 Will substitutes/Nonprobate Transfers::

D&S: 466-493

Scope of class discussion: Revocable Trusts in Contemporary Practice: The Pour-Over Will; Statutory Validation of a Pour Over into an Unfunded Revocable Trust; Deathtime Considerations; Lifetime Considerations.

PART B – TRUSTS: FIDUCIARY ADMINISTRATION

From the casebook: The purpose the law of fiduciary administration is to induce the trustee to adhere to the terms of the trust and to act prudently and in good faith in the best interests of the beneficiaries. Trustees are subject to primary fiduciary duties of *loyalty* and *prudence* and to a host of subsidiary duties such as keeping adequate records and disclosing information about the trust to the beneficiaries. A trustee who is found to be in breach may be removed from office, and the beneficiaries will be entitled to remedies that include disgorgement of any profit by the trustee and compensatory damages. These remedies are meant to deter breach, to make the beneficiaries whole, and to prevent unjust enrichment of the trustee. Casebook 587.

5 From Limited Powers to Fiduciary Administration]

D&S pp. 587-596, 596- 611

From Conveyance to Management

Rise of the Management Trust

Trustees' Powers -All powers that unmarried competent owner - UPC § 815 (a); uneconomic trust - 414(a), delegation - 807

Fiduciary Governance

Scope of class discussion: Powers of the trustee: UPC 815 (a) A trustee, without authorization by the court, may exercise: (1) Powers conferred by the terms of the trust; or unless limited by the terms of the trust: All powers over the trust property that an unmarried competent owner has over individually owned property; Other powers appropriate to achieve the proper investment, management, and distribution of the trust property. The exercise of a power is subject to the fiduciary duties prescribed by this subchapter.

Duties of the Trustee:

D&S pp. 596- 611

Duty of Loyalty:

Hartman v. Hartle

In re Gleeson's Will

In re Rothko

Scope of class discussion: From the casebook By making a transfer in trust rather than outright, a settlor ensures that the property will be managed and distributed in accordance with his wishes as expressed in the terms of the trust. A trust allows the settlor to postpone important decisions about the investment and distribution of the trust property. Instead of imposing inflexible instructions in advance, the settlor may empower the trustee to decide how the property should be invested and distributed in light of changing market conditions and the beneficiaries' circumstances."

#6 Duty of Prudence UPC 2-804

D&S 611-667

The Distribution Function [D&S 611-624]

Discretionary Distributions

Marsman v. Nasca

Sole, Absolute, or Uncontrolled Discretion

Exculpation Clauses

Mandatory Arbitration

The Investment Function - From Legal Lists to the Prudent Investor Rule:

D&S 624-652 - Omit the article - Schanzenbach & Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis* pages 626-630]

Uniform Prudent Investor Act §§ 1, 2, 3, 4

Recurring Problems in Applying the Prudent Investor Rule

The Duty to Diversify and Inception Assets -*In re Estate of Janes*

Compensatory Damages for Imprudent Investment: The Terms of the Trust -*Wood v. U.S. Bank, N.A*

#7 Duty of Prudence Part II -The Custodial and Administrative Functions

D&S p. 654-667

Duty to Collect and Protect Trust Property

Duty to Earmark Trust Property

Duty Not to Mingle Trust Funds with the Trustee's Own

Duty to Keep Adequate Records of Administration

Duty to Bring and Defend Claims

Trustee Selection and Divided Trusteeship

Choosing a Trustee

Delegation by a Trustee

Uniform Trust Code § 807

Division by a Settlor

Co-Trustees

Power of Appointment

Directed Trusts

Private Trust Company

Scope of class discussion: The custodial function involves taking custody of the trust property and properly safeguarding it. The administrative function involves recordkeeping, bringing and defending claims held in trust, accounting and giving information to the beneficiaries, and making tax and other required filings.

#8 Duty of Impartiality- Uniform Principal and Income Act & Duty to Inform

D&S pp. 667-691

Due Regard and the Terms of the Trust

The Principal and Income Problem - *In re Heller, Uniform Trust Code* § 803

Duty to Inform and Account: -*Uniform Trust Code* § 813

Responding to a Request for Information

Uniform Trust Code § 105

Wilson v. Wilson

Affirmative Disclosure - *Allard v. Pacific National Bank*

Accountings and Repose

Judicial Accountings

Syllabus

Informal Accountings and Release

Scope of class discussion: If there are one or more beneficiaries whose interests are not in perfect alignment, how is a trustee to sort between the conflicting interests of multiple beneficiaries? Although conflicts can arise among concurrent beneficiaries, impartiality problems are more common, as in *Howard*, among current and successive beneficiaries. The Uniform Trust Code sets forth specific requirements on distributions of income and principal between the income beneficiaries and the remainderman. A beneficiary is entitled to information reasonably related to her interest in the trust, and indeed a trustee is under a duty to make affirmative, advance disclosure of significant developments in the administration of the trust. A trustee who makes an accounting, moreover, is protected from liability to the extent that the factual basis for any subsequent claim was disclosed in a report or an accounting to which the beneficiary failed seasonably to object.

PART C-ALIENATION OF THE BENEFICIAL INTEREST & MODIFICATION

#9 Alienation of the Beneficial Interest

D&S pp. 695-714

Discretionary Trusts

Pure Discretionary Trust

Support Trust

Discretionary Support Trust

Collapsing the Categories

Uniform Trust Code § 504

Protective Trusts

Spendthrift Trusts

Uniform Trust Code §§ 502, 503

Scheffel v. Krueger

Self-Settled Asset Protection Trusts

Federal Trade Commission v. Affordable Media, LLC

Scope of class discussion: This class considers the extent to which a settlor may impose a restraint on alienation of a beneficial interest – that is, the asset protection features of modern trust law.

#10 Trusts for the State Supported, Modification

D&S pp. 724- 727

Trusts for the State Supported: a) Self-Settled Trusts, b) Trusts Created by Third Parties

Scope of class discussion: A person qualifies for Medicaid and public support benefits only if the person has few financial resources. The asset and income thresholds that will disqualify an applicant vary from state to state. In determining whether an applicant is under the disqualifying threshold, the question sometimes arises whether a trust in which the applicant has a beneficial interest should be counted as a resource available for the support of the applicant. Federal law draws a distinction between (a) *self-settled trusts* (generally included when assessing financial need) and (b) *trusts created by third parties* (generally not included).

Modification and Termination

D&S pp. 727- 750

1. Consent of the Beneficiaries

a. English Law

b. **The *Claflin* Doctrine**

In re Estate of Brown

c. **The UTC and the Restatement (Third) of Trusts**

Uniform Trust Code § 411

2. Deviation and Changed Circumstances

a. Traditional Law

b. Extension to Dispositive Provisions

Uniform Trust Code § 412

In re Riddell

c. Tax Objectives

3. Trust Decanting - *Harrell v. Badger*

Scope of class discussion: “American law has traditionally recognized only two grounds for modification or termination of a trust without the settlor's consent: (1) by consent of all the beneficiaries if the modification or termination is not contrary to a *material purpose* of the settlor (the *Claflin* doctrine), and (2) *changed circumstances* not anticipated by the settlor that would defeat or substantially impair the accomplishment of the purposes of the trust (the *equitable deviation* doctrine).⁷⁷ Recent law reform has somewhat liberalized the *Claflin* and deviation doctrines, but in most states they remain tied to the probable intent of the settlor. By contrast, more than half the states have also come to recognize *trust decanting*, which is less obviously limited by the settlor's actual or probable intent. In a decanting, a trustee who has a discretionary power to distribute the trust property uses that power to distribute the property to a new trust with revised terms.”

Trustee Removal:

D&S pp. 750-757

Uniform Trust Code § 706

Davis v. U.S. Bank National Association

Scope of class discussion: “Trustee removal has traditionally been understood as a remedy for breach of trust. In modern law, however, trustee removal is more freely granted, effectively as a modification of the trust, sometimes in circumstances that reveal a tension between the intent of the settlor and the wishes of the beneficiary. The difficulty is in giving the trustee enough leeway to carry out the settlor's wishes without protecting lackadaisical or ineffective administration.”

Part D CHARITABLE PURPOSES, CY PRES, AND SUPERVISION

#11 Charitable Purpose

D&S pp. 760-776

Charitable Purpose

Syllabus

Shenandoah Valley National Bank v. Taylor

Scope of class discussion: Unlike a private trust, which must be for the benefit of one or more ascertainable beneficiaries (see page 418), a charitable trust must be for one or more *charitable purposes*. The necessity of a charitable purpose, as compared to an ascertainable beneficiary, is the fundamental distinction between a private and a charitable trust.

Cy Pres and Deviation

1. Cy Pres
 - a. Illegal, Impossible, or Impracticable
In re Neher's Will
 - b. Wasteful
San Francisco Chronicle: The Buck Trust
2. Deviation
Philadelphia Story: The Barnes Foundation
Movie: The Art of the Steal <http://www.imdb.com/title/tt1326733/>
3. Discriminatory Trusts

#13 . Enforcement of Charitable Trusts

D&S pp. 782-790

1. Traditional Law
2. Settlor Standing
Smithers v. St. Luke's-Roosevelt Hospital Center
3. Local Politics
The Sweetest Place on Earth: Hershey's Kiss-Off
4. Persons with a Special Interest in the Trust
5. Federal Supervision
Hawaii Journal: The Bishop Estate

Scope of class discussion: "Under traditional law, a settlor does not have standing to enforce a charitable trust unless she retains an interest in the trust property. Instead, the state attorney general, as *parens patriae*, has primary responsibility for enforcing charitable trusts. In most states, the trustee of a charitable trust must make regular reports to the attorney general, who is a necessary party in any litigation involving the trust. The Restatement (Second) of Trusts summarizes thus: A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin." *Casebook*

#13 . Powers of Appointment

D&S pp. 807-820, 842-844

1. Terminology and Relationships
 - a. The Parties
 - b. Creation
 - c. General and Non-general Powers

- d. Time and Manner of Exercise
 - e. Ownership Equivalence
 - f. A Fiduciary Power of Appointment?
2. Tax Considerations
 - a. General and Non-general Powers
 - b. Flexibility Without Estate Tax Liability

3. Creditor Rights

Irwin Union Bank & Trust Co. v. Long

Failure to Exercise a Power of Appointment

1. General Power
Uniform Powers of Appointment Act § 310
2. Non-general Power

Uniform Powers of Appointment Act § 311

Scope of class discussion: “The primary reason for using a power of appointment is to build flexibility into an estate plan, but tax planning and asset protection are close seconds.¹ If a power is drafted in accordance with the federal tax code and the state law of creditor rights, the property subject to the power will not be treated as belonging to the donee for tax purposes or for claims of the donee's creditors. No income, estate, or gift tax will be levied on the donee or her estate, and no creditor of the donee will be able to reach the appointive property, by reason of the power or its exercise. Accordingly, the law and practice norms regarding powers of appointment-including the basic terminology-are deeply intertwined with federal tax and local debtor-creditor law.” *Casebook*

“Under traditional law, if the donee of a *general* power of appointment fails to exercise it, the appointive property passes to the takers in default of appointment. If there is no valid gift in default of appointment, the property reverts to the donor or the donor's estate.” *Casebook*

PART VIII

WHAT THE BROWNS’ ATTORNEY NEEDS TO KNOW ABOUT “ESTATES” AND “FUTURE INTERESTS?”

#1 Possessory Estates; Reversionary Interests

D&S pp. 845-852; Supp. Part VII, pp. 1-7

#2 Remainders, Executory Interests

D&S pp. 847-853; Supp. Pp. 7-13

#3 Rule against Perpetuities: Basic Principles

D&S pp. 887- 896; Supp. Pp. 14-22

#4 Required Certainty of Vesting: The “What Might Happen” Rule

D&S pp. 896-899 . Supp. 22-24, 30-33 (thru Prob. 8); Texas Property Code §112,036

#5 Charitable Trusts and the Rule against Perpetuities Saving Clause

D&S pp. 760-768, 899-901; Supp. Pp. 33 (Problem 9) – 34, 27-30