



TEXAS SOUTHERN UNIVERSITY
THURGOOD MARSHALL SCHOOL *of* LAW

WILLS, ESTATES & TRUSTS
[LAW 650]

SYLLABUS

FALL 2017 & SPRING 2018

PROFESSOR
MCKEN V. CARRINGTON

**SUPPLEMENT
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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.

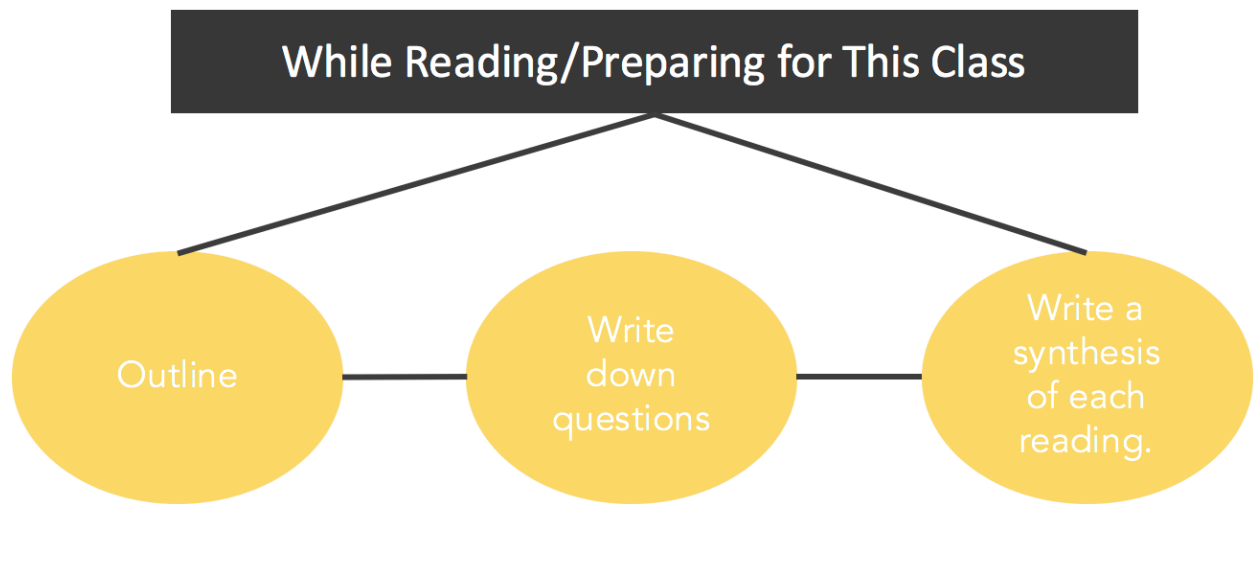
<p style="text-align: center;">Technology</p> <p style="text-align: center;">Please be properly registered to utilize Blackboard.</p>	<p>The class has a very active Blackboard presence.</p> <ul style="list-style-type: none"> ➤ Virtually all lectures are posted on the day of the lecture. They are set to expire after one week.
<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 do not need to purchase the Texas Estate Code the Uniform Probate Code, the Internal Revenue Code, or the Texas Trust Code.</p>

<p>Class Lectures</p> <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>Coverage of The Material is fast paced</p> <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.
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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 statutes
3. Texas cases
4. 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. **Supplement:** The Supplement to be purchased at Kwik Kopy Printing (a/k/a Copy Club) 4001 San Jacinto & Cleburne contains excerpts from the Texas Estates Code, Texas Trust Code, Texas Family Code, Texas Property Code, supplementary cases and text notes.
3. **Optional reading:** Johanson – Texas Estates Code Annotated & Tate – A Texas Companion to Wills, Trusts & Estates.

COURSE DESCRIPTION & OBJECTIVES

DESCRIPTION:

The short-form title for this four-hour course is Wills & Trusts. The identical course is often called Trusts & Estates or Wills, Estates and Trusts. However, a more apt description of the course is the gratuitous transfer of wealth, both testamentary (at death) and intervivos (in life). Several areas of law intersect the discipline; including property, probate, estate planning, transfer taxation, income taxation, fiduciary, and family law.

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 Texas 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.
 - Write a memorandum comparing and contrasting Texas' law on the lawyer's duty in the states of Maryland and New Hampshire
 - Complete the first revision of the will in the Casebook problem.
 - Produce a weekly outline in your own handwriting
 - Self-evaluate the confusing aspect of the materials and how you overcome it
-

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.
- Recite the trend to modernization of will requirements, holographic wills, and mistakes
- Relate the Texas methods of will-revocation
- Prepare a revised and updated will
- Draft a living will, health care directive, and power of appointment.

- Compare the Texas and New York rules of marriage or divorce after a will is executed
- 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.
- Perform gift tax, estate tax and capital gain calculations
- Apply the income, estate and gift tax rules that apply to the gratuitous transfer of wealth
- Determine and calculate the correct income, estate and gift taxes upon property transfers
- Recite estate planning alternatives for a simple estate
- Determine the tax advantages associated with the laws of gratuitous transfers of wealth
- Analyze the advantages of the timing of a gratuitous transfer – life time or at death
- 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
- Write a Texas Bar Essay on Texas law of Trusts

Student will be able to do the following:

- Compare and contrast Texas property disposition law with that of the uniform statutes
- Calculate intestate distributions under the Uniform Code and the Texas Estates Code
- Write a Texas Bar Examination essay on intestate distribution
- Apply the Texas rules of beneficiary/benefactor deaths in quick succession

GRADING

Assessment - criteria- referenced, formative, and summative

(From Prof. Carolyn Grose)

- Drafting skill: Drafting skill of a will, power of attorney, living will aka Directive to Physician, revision of will, and probate court pleadings.
- Formative assessments help teachers know whether their coverage of a topic is sufficient or whether they need to review the material again or present it in a different manner. Frequently, there is a quiz on the subject matter covered during the prior week. 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 70% will be raised to 70% and those with 70% and above will be raised to 90%. One day after each quiz, the answers are passed out in class and the scores subsequently posted on Blackboard.
- Authentic assessment is that which confronts students with “real life” challenges like the Bar Examination questions as well as cases and problems from the supplemental course book.
- The six to eight Bar Essay questions measure deep insight into the law
- Summative evaluation- Final examination – Three or four hour traditional comprehensive law school examination consisting of True/False; multiple-choice, and the Bar Examination-type essays.
- Through Blackboard examination postings, the assessments inform students of their level of professional development. The summative assessments is also be formative because it is posted on Blackboard before the final grade is reported to the registrar. During this period you are encourage to contact me regarding your numerical grade.
- There are some 20 separate items of evaluation. This is sufficient to reveal evidence of your understanding of the requisites of the course.
- Please note that the above items represent the only 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.
- Also note that theses assessments reveal and distinguish those who really understood the materials from those who only seemed to do so. If you closely follow your serial grades posted on Blackboard, you will be clear on the reasons behind your mistakes as a learner.

- **Examinations:** There are several examinations in this course. The final examination is valued at approximately 60 - 65 % of the grade of the course. The format will be primarily true/false, multiple choice and essays. The other approximately 15 - 30 % of your final grade is based on weekly quizzes, personal outlines and various writing assignments.
- **Class preparation and recitation** – You will be graded on your class recitation up to five percent of the grade. You will be called on alphabetically, not randomly so that you will have sufficient notice to be prepared to recite. 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
- **Class Outlines:** Students are required to compose separate course outlines on the Trusts as well as the Wills & Estate Portion of the Course. Such outlines are to be the work product of the individual student without reference to commercial outlines or similar work of others. Each outline constitutes 5% of the course grade and are due three days after the conclusion of that portion of the course. An electronic version is required to be examined to ensure that the product is not plagiarized.

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 1PM – 1:50 PM or 3 PM-3:50 P.M 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.

- **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



**THURGOOD MARSHALL SCHOOL OF LAW
TEXAS SOUTHERN UNIVERSITY ACADEMIC CALENDAR 2017**

FALL SEMESTER 2017 (SEVENTY DAYS OF CLASSES)

Orientation	Monday-Friday	August 14-18, 2017
First Day of Class	Monday	August 21, 2017
Last Day to ADD/DROP	Friday	August 25, 2017
Labor Day (NO CLASSES)	Monday	September 4, 2017
<i>Purge of all unpaid course selections</i>	Thursday	September 20, 2017
Mid Term Examinations	Mon – Fri	October 16-20, 2017
Veterans Day (NO Classes)	Friday	November 10, 2017 (tentative)
Thanksgiving Holiday	Thurs – Fri	November 23-24, 2017
Last Day of Classes	Thursday	November 30, 2017
Last Day to Drop a Class	Thursday	November 30, 2017
First Year Professors' Grades due	Thursday	November 30, 2017
Reading Period (NO CLASS)	Friday-Sunday	December 1-3, 2017
Final Examinations	Mon – Fri	December 4 -Dec. 15, 2017
Commencement	Saturday	December 16, 2017

SPRING SEMESTER 2018 (SEVENTY DAYS OF CLASSES)

School Opens	Tuesday	January 2, 2018
First Day of Class	Monday	January 8, 2018
Last Day to ADD/DROP	Friday	January 12, 2018
M L K Holiday (No Classes)	Monday	January 15, 2018
<i>Purge of all unpaid course selections</i>	Wednesday	February 7, 2018
President's Day Holiday (No Classes)	Monday	February 19, 2018
Mid Term Examinations	Mon – Fri	March 5– 9, 2018
Spring Break	Mon – Fri	March 12 – 16, 2018
Good Friday (No Classes)	Friday	March 30, 2018
Last Day of Classes	Wednesday	April 25, 2018
Last Day to Drop a Class	Wednesday	April 25, 2018
First Year Professors' Grades due	Wednesday	April 25, 2018
Reading Period (No Classes)	Thur. – Sun	April 26 - 29, 2018
Final Examinations	Mon- Fri	April 30 – May 11, 2018
Hooding Ceremony	Friday	May 11, 2018
Commencement	Saturday	May 12, 2018

Please note that the calendar events and /or dates are subject to change.

TMSLAW REGISTRAR

Approved 5/31/2017

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. Violations of this rule will result in the termination of the use of the device for the semester.

Attendance [Revisited]: Mandatory. Class meets 1PM – 1:50 PM or 3 PM-3:50 P.M 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.

READING ASSIGNMENTS

PART I. INTRODUCTION

#1 Restrictions on Testamentary Power

All students must read the **Glossary of Terms** set out in the pages at the end of the Syllabus. This will assist you in understanding the materials discussed in the first week of class and beyond.

D&S pp. 1-39, however, 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.

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

DS&L pp.51- 62

Supplement, Part I, pp. 3 -13.

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
[Problem of Howard and Wendy Brown – Supplement Appendix]
D&S 40-44.**

Supp. Part 1, pp. 8-13 (revisited).

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 (Handout p. 1) 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/revisit A v. B on page 57-62 and 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

DO THE BROWNS REALLY NEED WILLS? INTESTACY AS AN ALTERNATIVE TO A WILL

#5-6A Intestate Distributions in the Brown Estate - UPC State

D&S pp. 63-76, Problem pp. 8-9

Homestead 562-563, Supp. Part II, p, 27-31

We will just take a quick glance to see the scope of Texas' liberal exempt personal property statutes:

Texas Estates Code [EC] §§ 353.051; 353.052; 353.053, 353.101; 353.102; 353.105;
353.152

Texas Property Code §§ 42.001-42.002, [Statutory Supplement].

***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 would be well advised to study and 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?

What is the impact of the (i) Colorado UPC, (ii) Texas 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 statutory scheme.

Lecture #6A:

Exempt Property Set Aside, Family Allowance, Homestead, and Community Property in Texas. Also transfer on death deeds: Texas Estates Code Chapter 114.

Scope of assignment #6A:

First, we consider the Texas legislature's [2015] deed upon death method of land transfer. Further discussion of exempt property set aside statutes and operation of the Texas statutes. Impact of family allowance, page 555, and operation of the Texas statutes, Texas Estates Code [TEC] §§ 353.051; 353.052; 353.053, 353.101; 353.102; 353.105; 353.152

#6B-7 Intestate Distributions in the Brown Estate – Community Property State

Howard and Wendy Brown Problem - (Problem I revisited in a community property state).519-528, 553-560.

D&S page 69, footnote 16 referring to UPC §2-102A) Intestate Distribution in a UPC Community Property State (Idaho)

Joint tenancies - TEC §§ 101.002; 111.001; 111.002; 112.051; 112.052; 112.152 [Statutory Supplement]

Texas Marital Estates - Texas Family Code §§ 3.401 thru 3.402, and §§4.202, 4.203, 4.206 [Statutory Supplement]

Supplement, Part II: pp. 4-22, 22– 27.

For second class under this assignment:

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

Texas Homestead laws: 102.002; 102.003; 102.005; 102.006

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

Scope of assignment #6B:

Intestate succession in a community property state. We will begin with a review of basic community property principles [Csbk. pp. 519-528, 553-560); Supp. Pp 4-22]. 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? Idaho is a CP state that has enacted the UPC. (See footnote 16 on p. 69).

We will then consider some basic principles of the Texas community property system [it is important that you read Supp. Part II pp. 4-22] focusing on the topics addressed in the problems at Supp. pp. 22-27: the inception of title rule; claims that arises when CP is expended to enhance the value of SP and fraud on the community.

You are to read the Note on Howard Brown's Varoom mutual fund (Supp. P. 25-27) but class discussion will be limited to my asking one of today's Daily Experts whether he or she has any questions about this weird stuff.

Scope of assignment #7:

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; Texas Estates Code §§101.002; 111.001, 112.051; 112.052; 112.152] Discussion of why, in Texas, Howard and Wendy Brown's residence would not be entitled in joint tenancy. Then, Transfer on Death Deed – Texas Estates Code Chapter 114. Then: What intestate distribution under Texas law if Howard died intestate survived by Wendy? If Wendy died intestate survived by Howard? [TPC §§ 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. 27-31; TEC §§ 201.001; 201.002; 201.003; 102.002; 102.003; 102.005; 102.006]

#8. Intestate Distribution among Descendants & Collateral Kin

D&S pp. 70-72, 79-90, 107-111. Omit Problems in Note p. 86.

EC §§ 201.001; 201.057; 201.051; 201.052; 201.054; 201.101

[Reproduced at Supp. Part II-33-34] Texas Family Code §§160.201, 160.204

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, TEC § 201.051-201,054; Texas Family Code § 160.201, 160.204. Then, inheritance by descendants and more remote kin under the UPC [§§. 2-102, 2-105, 2-106, 2-107] and in Texas [TEC §§201.001; 201.051; 201.152; 201.053; 201.101]. 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"?

#9A Adult Adoptions & Posthumous Children

D&S pp. 94-95, 99-102, (notes 2 and 3), 109-110
Supp. Pp 36 – 39

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

D&S pp.874-876.
Supp. pp. 34 - 35.

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 109-110]

#10A Simultaneous Death

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

TEC §§. 121.052; 121.053; 121.101; 121.152; 121.153
Supp. p.40 - 42

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” [TEC 121.052, 121.053] in general, and with respect to community property in particular.

#10B Advancements, Prohibited Beneficiaries, Disclaimers

D&S pp. 122, 123-124

EC § 201.151; 201.152, 201.058

Tex. Ins. Code § 1103.151, 1103.142 [Statutory Supplement]

Supplement Part VII pp.13 -16 [The Henry Case]

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.

WILL PREPARATION

#16-17. Execution of Attested Wills

First day:

D&S pp. 141-152 (thru. Note on p. 152)
Supp. Part IV pp. 4-6 (thru. 254.003)

Second day:

Proving will execution & Curative doctrines in Texas:
D&S pp. 152-157, 158 -162, 170-178 (Top of the page).
Supp. Part IV pp. 6-9 (begin with 256.151); 10-14

Scope of assignment #16:

Why Homer Miller's will (p. 149) was denied probate; what was the problem? Weren't all Gulliver & Tilson's 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? TEC §251.051? Groffman's will have been validly executed if the controlling law were UPC §2-502? TEC §251.051? Begin discussion of the three Texas cases on curative doctrines pages 10-14

Scope of assignment #17:

Complete the three Texas cases on curative doctrines. We will finish discussion of the problems following Casdorff, and then consider the strong desirability of following a formal ritual in supervising the execution of wills (pp. 159-160). 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 (TEC § 251.101-106). The assignment will close with a discussion of modern trends in this area: What's the difference between the Substantial compliance doctrine and Revised UPC's "dispensing power"? (Ranney, Hall, notes following).

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.

#18-19. When will Contest is a Possibility

D&S pp. 263-4, 273-281, 281-305.
TEC §§55.001; 251.002; 254.003; 254.005; 256.204

Texas will context cases - Supp. Part IV pp. 14-22

Scope of assignment #18:

Test for testamentary capacity; insane delusion. I have omitted the testamentary capacity cases in the casebook (pages 266-273). Instead, we will use the case in the Supplement Part IV, pages 16 – 17. Was the Strittmater case (p. 274) correctly decided?

Scope of assignment #19:

Undue influence – Rothermel V. Duncan – [The Texas law on undue influence – three elements in Texas undue influence case [Supplement Part IV, pages 20 – 22]. 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? (Supp. IV-14). 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. 314-321, 324

(Probate exception to Federal Jurisdiction)

Scope of assignment # 20:

The remedies available when a will is procured by fraud and duress. Would Pope v. Garrett be decided the same today as in the 1948?

#21-22. Holographic Wills

D&S pp. 198-217 Omit: Notes and Question pp. 201-202

Supp. Part IV pp. 22-28

TEC §§ 251.052; 251.107; 256.154

Then Note 3, p. 204 on conditional wills.

Supp. Part IV pp. 26-27 on Texas conditional/contingent wills

Oral will – page 142 footnote 4

Scope of assignment #21-22:

We will discuss some of the most commonly encountered issues raised by holographic wills, concentrating on the problems raised by George Gunn's one-liner (Supp. p. 23). Then, 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. Also, we consider the law on Texas conditional wills.

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

D&S pp. 240-255

TEC § 255.001; 255.002; 255.003

Supp. Part IV pp. 29-31

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 problems in the Supplement

#24 Will construction – Reformation of Mistakes in Will Drafting & Judicial Modification of Wills

D&S pp. 169 (bottom of the page) -174

D&S pp 333-335 (through Note 4)

Supp. Part IV pp. 31-32

Judicial modification of wills – Supplement pp. 34-35

Scope of assignment #24:

Under what circumstances will a court allow the introduction of extrinsic evidence (including oral testimony) to clarify the meaning of words in a will? What is the scope of the “plain meaning” rule? What is the difference between (and court's treatment of) latent and patent ambiguities? When is the language in a will, although somewhat vague, sufficiently clear (or not sufficiently clear) in identifying the beneficiaries, and what should the courts do about it?

In 2015 Texas law authorized “judicial 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

#25 Revocation

D&S pp. 217-225

D &S pp. 226-231

Partial Revocation by Physical Act: D &S p. 231
(up to but not including Note).

TEC §§ 253.002, 256.156

UPC § 2-503 (p. 177)

Supp. Part IV pp. 32-34 (thru. Problem 6)

Supp. Part IV pp. 35 -37

Dependent Relative Revocation

D&S pp. 231-235

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 tortuous interference with expectancy?

The last ground requires clear and convincing evidence.” Also, 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”?

#26-28. Elderly Concerns:

First day:

D&S pp. 498-513

Second day:

Supp. pp. Supp. Pp.39-78

Movies – The Descendants

Scope of assignment #26 - 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 (UPC 2-804), 485-493, 571-571

TEC §§ 123.001; 123.002; 123.052; 123.053; 123.151; 751.053

Tex. Family Code § 9.301, 9.302

UPC § 2-804, 2-301.

Supp. Part V, pp. 2-5

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 begin by examining TEC §123.001; 123.002, and then look at 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

D&S pp. 520-525, 528-532, 535 (statutory reform)

Supp. Part V, 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. 574 (bottom of the page) -585. Omit UPC provision on pp. 575-576

TEC §255.051-056.

Supp. Part V. pp. 9 – 11 (middle of the page)

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 Texas pretermitted child statute (TEC

§255.051-056.). 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: Anti-Lapse Statutes

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

TEC §§121.051-053; 121.001; 121.101; 121.102; 121.152; 121.153; 251.002; 254.003; 255.151-154

Supp. pp. 11-14

Scope of assignments #33-34A: 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. 368-373 (diagram).

TEC §255.151-154

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) -875 Omit Case 23 and 24 (pp. 883).

Supp. Part V. pp 19-20.

Supp. Part VIII, pp. 3-7

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. 402-3.]

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 TEXAS TRUSTS

PART VII A – THE EIGHT ELEMENTS OF TRUST CREATION AND VALIDITY

#1 Elements of Trust Creation I

Parties to a Trust – Settlor, Trustee and Beneficiary

Trust Creation Definitions: Texas Trusts Code: 113.004 (2), (4), (14), (17), (18)

Introduction to Trusts: D&S pp. 385-387; **Trust Nomenclature and Use:** D&S pp. 391 – 393

Texas law on the Settlor: Capacity: Sec. 112.007; **Settlor as trustee:** Sec. 112.008 (c);

Reservation of interests and powers by settlor: Sec. 112.033; **Spendthrift provision invalid** 112.035 (d); **Methods of creating trust:** Sec. 112.001

Texas Law on the Trustee: Capacity: Sec 112. 008; **Role in the formation of a trust - Acceptance by trustee:** 1) Signature constitutes acceptance; Sec 112.009; 2) Exercise of power and performance of duties constitute acceptance; 3) Exceptions when actions are taken but do not constitute trustee actions; 4) No Liability without acceptance; 5) When the alternate becomes trustee.

The Beneficiary Principle: D&S pp. 418-429.

Texas Beneficiary Statutes: 1) Acceptance is presumed: Sec. 112. 110 (a); 2) Merger: Sec. 112.034; 3) Rule Against Perpetuities: Sec. 112.036; 4) Reformation of interests violating rule against perpetuities - Texas Property Code Sec. 5.043.

Supplement Part VII. Pp. 3–5

Scope of class discussion: This lecture introduces the private express trust, with three of the eight elements for the creation of a private express trust. After some introductory remarks involving the materials on pages 385-393, class discussions will begin with the textual materials at the bottom of page 418 - the parties to an express trust. Then, animals as beneficiaries and the need for definite beneficiaries; followed by the Texas Trust Code statutes on the creation of express trusts.

#2 Elements of Trust Creation II – (The Remaining Five other elements)

Second Day: Property, Delivery, Lawful purpose & Writing Requirement

1) **Intention to Create a Trust:** D&S pp. 401-403; Texas Trusts Code Sec. 112.002; and Texas case law - Supplement Part VII. p 6, 7

2) **The Trust Property Requirement:** Texas Trusts Code Sec. 111.004 (12), (17); **Necessity for Trust Property** - Sec. 112.005; and Texas case law Supplement Part VII. Pp. 8-10.

3) **The Trust Delivery Requirement:** 112.001; D & S pp. 408-414;

4) **The Writing Requirement:** Statute of Frauds: Sec. 112.004; D & S pp. 408-414

5) **Lawful Purpose:** Sec. 112.031; Supplement Part VII. Pp. 10, 11

Scope of class discussion: The remaining elements of trust creation are discussed. How do we know that what the testator wanted to do was to create a trust rather than making an outright gift or devise? What magic words are needed and what words are insufficient to create a gratuitous transfer; then, the absence or presence of trust property. The delivery requirement from the Texas Trust Code; then the writing requirement; lawful purpose' trust validity and exercises

PART VII B – TYPES OF TRUSTS

#3 A Trusts based on how created - Express, Resulting, and Constructive

The Resulting trust: D&S pp. 417 - Note # 4

The Constructive trust – D&S pp. 313-314

Bars to Succession: D&S pp. 131-135

Texas Constructive Trust case law/forfeiture: Supp. Part VII p. 13-16

Scope of class discussion – Part I: This class compares and contrasts the types of trusts depending on the method of trust creation. Does a settlor create a resulting or constructive trust? When is a Purchasing Money Resulting Trust presumed? What is the difference between a constructive trust and a forfeiture in depriving a prohibited beneficiary from receiving an inheritance?

3 B Will Substitutes] Revocable Trusts & Pour-over wills.

The Revocable Trust: D&S pp. 444-447

Revocable Trusts & Pour-over wills: 466-471

The Canales Revocable Trust & Pour-over will: Supp. Part VII p. 8

Statutory Provisions: Supp. Part VII p. 16

Scope of class discussion – Part II: What are the advantages of a revocable trust and a pour over will over the will that contains a trust (i.e. the testamentary trust)?

#4 Alienation of the Beneficial Interests – Discretionary & Support Trusts

Exculpatory Clauses: D&S p. 620-622; Supp. Part VII pp.17, 18

Discretionary and Support Trusts: D&S pp. 696-703, Supp. Part VII p. 19-24

Scope of class discussion: This class looks at the limitations of absolute discretion conferred on a trustee and exculpation clauses as well as whether beneficiaries of self-settled trusts and trusts created by third parties can qualify for government benefits such as Medicaid.

#5- Alienation of the Beneficial Interests - Spendthrift Trusts

D&S pp. 703-712, 134-135; Supp. Part VII pp. 25-28

Scope of class discussion: This class considers the rights of creditors against trust property when a settlor has limited such rights. What is a “spendthrift clause,” and when are they useful? We will also do the problems beginning on page 23 and 25. In addition, the protection of assets from levy and judgment creditors

#6 Self-Settled Asset Protection Trusts and Special Needs Trusts

Self-Settled Asset Protection Trusts: D&S pp. 712 - 714; 721 (bottom of the page – 724 (top of the page)

Special Needs Trusts: D&S pp. 724 – 727; Supp. Part VII pp. 29, 30

Texas Property Code 142 – See Statutory Supplement

#7 Modification of Trusts. Termination of Trusts

D&S pp. 727- 732; 734-750

Supp. Part VII pp. 31— 33 -Texas Statutory Provisions – Statutes and Problems:

Scope of class discussion: This class considers the circumstances under which the terms of a trust can be changed. Then, what happens to the assets in a trust upon modification and termination of the trust- Does the Settlor’s mandate trump the desires of the beneficiaries?

#8 & 9 - Charitable Trusts

D&S pp. 759-772, 776-781; 782-792

Supp. Part VII pp. 33 -37

Movie: The Art of the Steal

<http://www.imdb.com/title/tt1326733/>

Scope of class discussion: Class discussion begins with the charitable purpose rule. Rule against Perpetuities and charitable trusts and reformation of trust when a specific charitable purpose can no longer be accomplished. Rule against Perpetuities & Role of the Attorney General

Part VII C ADMINISTRATION OF TRUSTS

#10 Powers and Duties of the Trustee

Powers of the Trustee: D&S pp. 591 (Bottom of the page) -593

Duty of Loyalty: D&S pp. 596 - 611

Supp. Part VII pp. 38-40

Scope of class discussion: Class discussion will concentrate on the problems in the Supplement. In addition, the fiduciary's duty of loyalty: i.e. to avoid conflicts of interest (ROTKO page 602) and self-dealing (Hartman pg. 596). The general duties of a trustee (TTC 113.051 – 113.055) will not be discussed in class.

#11 Uniform Principal and Income Act

D&S pp. 663-667

Supp. Part VII pp. 41-45

Scope of class discussion: The Texas Trust Code sets forth specific requirements on distributions of income and principal between the income beneficiaries and the remainderman. It follows the Uniform Principal and Income Act (UPIA)

#12 Duty of Prudence, Prudent Investor Rule and Sub-rules

D&S pp. 611-654; Supp. Part VII pp. 46-48

Scope of class discussion: Prudent investor rule; standard of care; portfolio Strategy; risk and return objectives, diversification, impartiality, investment costs, reviewing compliance, delegation of investment and management functions.

#13. Trustee Liability to Beneficiaries & Liability of Beneficiaries to Trustee

D&S pp. 750, 751; Supp. Part VII pp. 48-51

Scope of class discussion: What remedies are available for the breach of trusts by trustees? What is surcharge?

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

Glossary of Terms (Nomenclature)

Testator: Person who executes a will.

Probate: (literal translation: “to prove”): Court proceeding in which: (i) it is judicially determined that the decedent left a validly executed will (or that the decedent died without a will and his intestate heirs are determined), (ii) a personal representative (called an executor if named in a will, an administrator if appointed by the court from a statutory list of preferred next of kin) is appointed to administer the decedent’s estate and wind up the decedent’s affairs, and (iii) letters testamentary (if an executor) or letters of administration (if an administrator) are issued by the court, showing the personal representative’s authority to represent the estate in dealing with third parties.

Strictly speaking, you probate the decedent’s will and then you administer the decedent’s estate. However, the entire process is commonly referred to as the “probate process,” involving a “probate administration.” While it may not be technically correct, this terminology is widely used.

The principal duties of a personal representative are to (i) take possession and control of the assets that comprise the estate, (ii) give notice to creditors and pay creditors’ claims, (iii) Satisfy the tax authorities, and (iv) distribute the remaining estate to the will beneficiaries or heirs.

Intestate distribution rules apply when (i) the decedent **left no will** (or the decedent’s will was not validly executed), (ii) the decedent left a valid will but the will does not make a complete disposition of the estate (resulting in a **partial intestacy**), or (iii) an heir successfully contests the will on the ground of lack of testamentary capacity or undue influence, and the **will is denied probate**.

Heirs: Persons who take by intestate succession (who take by “descent”).

Beneficiaries (also called **devisees** or **legatees**): Persons who take under a will. At common law, one devised real property, and bequeathed money or personal property. This distinction is no longer made. A will can say “I devise,” “I bequeath,” “I give,” or “I leave”—all of these terms mean the same thing, and can be employed to make testamentary gifts of both real property and personal property.

Specific devise or bequest: Gift of a specific asset; only that asset can satisfy the gift. “I devise [Blackacre] [my Steinway piano] to my son John.”

Demonstrative legacy [rarely encountered]: Gift of a general dollar amount to be paid from a specific source. “I bequeath \$25,000, to be paid out of the proceeds of the sale of my Exxon stock, to Sally.”

General legacy: Gift of a general dollar amount that is payable out of the general assets of the estate and does not require the delivery of any particular item of property in satisfaction of the gift. “I bequeath the sum of \$10,000 to my nephew Ned.”

Residuary gift: Gift of all of the estate that remains after expenses of administration and debts have been paid, and after all specific and general legacies have been satisfied. “I give all of the rest, residue and remainder of my estate to my wife Wendy.”

Codicil: A later amendment or supplement to a will. A codicil must be executed with the same formalities as a will.

Nonprobate assets: Interests in property that pass at death, but which are not subject to disposition by will or intestate succession, and are not part of the estate for estate administration purposes. Major types (also called non-testamentary assets): (i) Property passing by **right of survivorship** (joint tenancy, tenancy by the entirety, joint and survivor bank account—one joint tenant cannot devise her interest in a joint tenancy property, because title automatically and immediately passes by right of survivorship to the survivor); (ii) property passing by contract (life insurance proceeds, employee death benefits, etc.), where a contract governs the naming and changing of beneficiaries; (iii) **property held in trust**, including a revocable trust, where the trust instrument names the beneficiaries; and (iv) property over which the decedent held a **power of appointment**.

Uniform Probate Code: Unlike the Uniform Commercial Code (which has been enacted in every jurisdiction with very few if any local law variation) and the Uniform Partnership Act (which has been enacted in nearly every state), only about one-third of the states have enacted the Uniform Probate Code. Moreover, as is shown in the table on page UPC-8 (near the front of the Supplement, immediately after the Texas statutes), of the 18 states that are regarded as “UPC states,” only the bellwether state (sic of Hawaii has enacted the UPC in its entirety).

There are actually two Uniform Probate Codes—the original UPC promulgated in 1970, and the Revised Uniform Probate Code promulgated in 1990 and then revised in 1995. Several states that enacted the original UPC stayed with that version, apparently deciding that some of the more *avant garde* provisions of the Revised UPC were too rich for their taste. However, a number of states (including Texas) have “cherry-picked” the Uniform Probate Code, enacting a handful of UPC provisions thought to be useful.

Independent administration (Texas), non-intervention will (Washington), and unsupervised administration (Uniform Probate Code) are procedures under which the major steps in the administration of a decedent’s probate estate are taken with

little or no court involvement, substantially reducing the costs, complexities and delays that often are encountered under the **court-supervised administration** rules found in many states (called in Texas a **dependent administration**). In some states (most notoriously, California and Ohio), the probate procedures are so cumbersome and costly, requiring prior court approval for even routine transactions, that **revocable trusts** are widely used as will substitutes in order to avoid a probate administration.

A trust created by a will is called **testamentary trust**. A trust created during lifetime is called an **inter-vivos trust**. The person who creates an inter-vivos trust is called the **settlor** (or **grantor**).

Guardianship: A minor or incapacitated person can own property, but does not have the legal power to deal with the property. In this situation, it is often necessary to appoint a guardian for the minor or incapacitated adult in probate court proceedings. A guardianship contemplates two distinct roles (although in most cases the same person serves in both roles).

Guardian of the person has the duty of care, control and possession of the **ward**, and the duty to provide clothing, food and medical care to the ward. A guardian of the person serves much the same role as a custodial parent appointed by the court in a divorce proceeding.

Guardian of the estate has the right and duty to manage the ward's property, enforce the ward's obligations, and bring or defend legal actions by or against the ward. In some states, a guardian of the estate is called a **conservator**. In all states, a guardianship (or conservatorship) administration involves substantial court supervision and involvement, much like a dependent or court-supervised administration of a decedent's estates.

Custodianship: We won't talk much about these in this course, but... All states have enacted the **Uniform Transfers to Minors Act** ("UTMA") or similar legislation. The UTMA provides a convenient mechanism for parents, grandparents, etc., to make gifts to a minor child or grandchild that (i) qualify for the \$14,000 "annual exclusion" under the federal gift tax, and (ii) eliminate the need to appoint a guardian or conservator to manage the property. If Granny wants to make a gift of Microsoft stock to her grandson Gary, with the stock to be managed by her daughter (and Gary's parent) Carol Jones, all she needs to do is to have the stock certificate registered in the name of "Carol Jones, custodian for Gary Hones, under the Texas [or other state] Uniform Transfers to Minors Act." The UTMA gives the custodian statutory powers to sell, manage, etc., the property until the custodianship terminates at age 21 (Texas and many states) or age 18 (several states).

Joint tenancy (“joint tenancy with rights of survivorship”): A form of concurrent ownership in which, on the death of one of the joint owners, title passes by right of survivorship to the survivor. In theory, there can be three or more joint tenants, but joint tenancies invariably involve two persons. Joint tenancies can exist with respect to personal property such as securities (*e.g.*, AT&T common stock) and real property (*e.g.*, farmland in Iowa, a house in Illinois). (As we will see in Assignment #7, for reason of history joint tenancies of real property are virtually never encountered in Texas). Joint tenancies are never created by intestate succession, and are rarely (if ever) created by will.

Taking title in joint tenancy for, involves a gift unless the parties make equal contributions to the property’s acquisition. If Mom pays \$100,000 to buy Blackacre and takes title in the form of “Mom and Son, as joint tenants with right of survivorship,” Mom has made a gift of an undivided one-half interest in Blackacre to Son.

Joint and survivor bank account: If Mom deposits \$100,000 in a “Mom and Son, and on the death of one of us title to the account shall vest in and belong to the survivor,” no gift is involved (the gift is “incomplete” for gift tax purposes) because Mom can revoke the disposition by withdrawing the amount on deposit at any time. A gift will occur only if and when Son withdraws more from the account than he deposited into the account.

Tenancy by the entirety: A survivorship estate that can exist only between a husband and wife. This common-law estate is still recognized in several non-community property states. Unlike the right of survivorship in a joint tenancy, the right of survivorship in a tenancy by the entirety is non-severable: If one spouse transfers or encumbers his interest without the other spouses’ joinder, the right of survivorship is not extinguished. By contrast, one joint tenant can partition the tenancy (converting it into a tenancy in common) by transferring his or her interest to a third party, in which case the remaining tenant and the third party would be tenants in common.

Tenancy in common (also called **co-tenancy**): A form of concurrent ownership that doesn’t involve a right of survivorship. Each tenant in common (“cotenant”) owns an undivided fractional interest in the property. Unlike a joint tenancy (under which the joint tenants must always have equal shares), cotenants may (and often do) have unequal shares. Nearly all co-tenancies are created by wills (*e.g.*, “I devise Blackacre to my three children, Al, Betty and Carl, in equal shares”), gifts, or intestate succession (*e.g.*, where Al, Betty and Carl inherit their parent’s estate).

What is meant by an **undivided interest**? If two sisters own an 80-acre tract of land as tenants in common, each with an undivided one-half interest, we don’t (and can’t) say that one sister owns “the north 40” and the other owns “the south 40.” No; each

owns a one-half interest in the entire 80 acre tract. Each cotenant (even one with, say, an undivided 1/20 interest) has the right to occupy the entire property, as long as he or she does not exclude the other cotenants' coequal right of occupancy. (Because of this rule, a co-tenancy relationship can get sticky if the parties don't get along!) A cotenant may bring an action to partition the tenancy in common at any time, in which case the property will be partitioned "in kind" (if feasible—*e.g.*, a 900-acre tract is divided into three individually-owned 300-acre tracts) or, more frequently, by judicial sale (in which the net sale proceeds are divided among the cotenants in proportion to their interests). If a cotenant dies, his interest passes by will (if he left a will) or by intestate succession, and his successors become tenants in common with the remaining cotenants.

The nine **community property** states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. (What the other states call community property is called "marital property" in Wisconsin). In these states, the salary and wages of either spouse is community property. Property owned by either spouse before the marriage and property acquired by a spouse during the marriage by gift, devise [will] or descent [intestate succession] is that spouse's **separate property**. Beyond these basic definitions, there are widespread variations in the nine states' community property laws.

Lawyers in most states who don't know much about community property think it is something like a tenancy in common. It is not. A tenant in common can transfer his undivided interest to a third party, but a spouse cannot make an inter vivos transfer of "my one-half interest" in community property. During the marriage, only the entire interest in community property passes by will or by intestate succession. The surviving spouse retains her one-half community interest.

The non-community property states are sometimes called **common law states** with respect to marital property. In these states, a husband's salary and wages (and assets acquired therewith) are his property, and a wife's salary and wages (and assets acquired therewith) are her property. In these states, we don't refer to assets as one spouse's "separate property," because that presupposes the need to distinguish it from something else, and there is no "something else." Property is either "his" or "hers" (unless some form of concurrent ownership such as a joint tenancy is involved).

Capital gain is realized if a person sells an asset for a profit. If Ollie buys 1,000 shares of Acme common stock at \$40/share, his cost basis in the stock is \$40/share, or \$40,000. "Basis" is not a property law concept; it is an income tax accounting concept. If Ollie later sells his Acme stock at \$90/share, he will have realized a capital gain of [\$90,000 net sale proceeds - \$40,000 basis =] \$50,000. Under current federal income tax law, as a general rule capital gain is taxed at a maximum rate of 15 percent. If, on the other hand, Ollie sells the Acme stock at \$30/share, he will have realized a capital loss of [\$40,000 basis - \$30,000 net sale proceeds =] \$10,000. (Circumstances

in which capital losses can be deducted for income tax purposes are a concern of the Federal Income Tax course, not this course).

If a person owns (say) real estate and makes capital improvements on the property (*e.g.*, puts on a new roof, or installs a central air conditioning unit), the result is an upward **adjustment to basis** for the cost of the improvements. If a person takes income tax depreciation deductions on an asset that is used in a trade or business (*e.g.*, rental property, or machinery), the result is a downward adjustment in the asset's basis for capital gain purposes. These adjustments to basis will affect the amount of capital gain (or loss) realized on any subsequent sale of the asset. (Fortunately for us, issues involving adjustments to basis are the domain of the Federal Income Tax course. In this course, any discussion of these issues will involve an asset's cost basis and something called the "new basis at death" rule—more on that later).

Equity: The difference between an asset's fair market value and the amount of any encumbrance on the property. If Louise owns a house whose value is \$280,000, but the house is subject to a mortgage lien that secures a note whose balance \$90,000, Louise's equity in the house is [$\$280,000 - \$90,000 =$] \$190,000.

Mortgage lien: An interest in property that provides security for the payment of a debt. Suppose that Mort buys a house for \$300,000. He makes a down payment of \$30,000 and borrows the remaining \$270,000 from Bank, with the loan to be paid in installments over 30 years. In order to obtain the loan, Mort will have to (i) sign a note (on which he is personally liable) for the \$270,000 balance, and (ii) give Bank a mortgage deed that gives the lender a **security interest** in the property. (On these facts, we would call it a "30-year mortgage"). The note provides that if the borrower ("mortgagor") defaults on the loan by failing to make timely installment payments, Bank (the "mortgagee") can **foreclose** on the mortgage by having the property sold.

In a transaction such as the one described, where a secured loan is used to acquire property, the mortgage is called a **purchase money mortgage**. In Texas and several other states, the security interest is sometimes in the form of a **deed of trust**. The difference in terminology (mortgage versus deed of trust) relates only to the procedures under which a foreclosure sale will be held—the details of which are not a concern of this course. If the security interest ("lien") is acquired in connection with personal property (*e.g.*, a loan to buy a new Buick), it is usually called a **chattel mortgage**.

Several years down the road, Mort defaults on his mortgage payments at a time when the balance on the note is \$235,000. Bank forecloses on the mortgage (resulting in a forced sale of the house), and the house sells for \$210,000 (net after payment of expenses of the foreclosure proceeding). Bank applies the \$210,000 to the debt, but it is still out \$25,000. Because Mort was personally liable on the note, Bank is entitled

to a **default judgment** in the amount of \$25,000 and can enforce that judgment against any nonexempt property owned by Mort.

Situs rule: The laws of the state in which the decedent was domiciled at death govern the disposition of the decedent's personal property (both tangible and intangible), regardless of where that property is located. For real property, however, the laws of the decedent's domicile apply only to land located in that state. Under the situs rule, only the courts in which the land is located can determine the ownership of land within that state. The courts of one state cannot adjudicate the ownership and transfer of land located in another state (commonly referred to as "foreign" real property). Thus, if Donny died domiciled in Texas (or some other state) but owned real property located in (*e.g.*) Illinois, while the primary probate administration of Donny's estate will be in Texas (or other state), in order to determine and establish the ownership interests of Donny's successors to the Illinois land it will be necessary to bring out **ancillary administration** proceedings in the Illinois county in which the land is located.