PREFACE

AS TRUSTS AND ESTATES LAWYERS, we are in the business of succession. This simple truth was brought home to us in a deeply personal way with the unexpected passing of Jesse Dukeminier three years after publication of the sixth edition, necessitating succession of authorship for this book. Robert H. Sitkoff, a new coauthor in the seventh edition who assumed sole responsibility (trusteeship?) for this book in the ninth edition, continues as the lead author in this eleventh edition. Jesse continues as a posthumous coauthor. James Lindgren and Stanley M. Johanson remain coauthors emeritus.

Wills, Trusts, and Estates is designed for use in a course on trusts and decedents' estates. Our basic aim in this eleventh edition remains as before: to produce not merely competent practitioners, but lawyers who think critically about problems in family wealth transmission.

This edition carries forward the two-color interior and robust program of photos, documents, and other images of the prior edition. Case squibs and extraneous references have been resisted. Every chapter begins with an organizing statement of themes. As always, we have endeavored to preserve the essential character of the book, which traces back to Jesse's wit, erudition, and playfulness.

We begin in Chapter 1 by examining the organizing principle of freedom of disposition. Chapter 2, on intestacy, examines the estate plan provided by law for those who do not make a will or use will substitutes. Chapters 3, 4, and 5, on wills, examine the problem of establishing the authenticity (Chapter 3, on formalities), the voluntariness (Chapter 4, on contests), and the meaning (Chapter 5, on construction) of a will. What makes these problems difficult and interesting is the "worst evidence" posture of probate procedure whereby the best witness is dead by the time the court considers these matters. Chapter 6 introduces the trust, which can be used for a probate or a nonprobate transfer, and which is the centerpiece of contemporary estate planning. Chapter 7 examines the will substitutes and the system of private, nonprobate succession that has emerged as a competitor to public succession through probate. Chapter 8 examines what limits, if any, the law should impose on freedom of disposition by will or by will substitute for the protection of a surviving spouse or children. In Chapters 9 through 14 we return to the law of trusts to consider some more advanced topics: fiduciary administration (Chapter 9), alienation and modification (Chapter 10), charitable trusts (Chapter 11), powers of appointment (Chapter 12), construction of future

interests (Chapter 13), and the Rule Against Perpetuities (Chapter 14). We close in Chapter 15 with a survey of the federal wealth transfer taxes.

Since the 1960s, the law of succession has undergone a thorough renovation. Initially, the change was brought on by a swelling public demand for cheaper and simpler ways of transferring property at death, avoiding probate. Imaginative scholars began to ventilate this ancient law of the dead hand, challenging assumptions and suggesting judicial and legislative innovation to simplify and rationalize. Medical science complicated matters by creating varieties of parentage unheard of a generation earlier. Legal malpractice in drafting wills and trusts arrived with a bang. The nonprobate revolution, with its multitude of will substitutes, provided a system of private succession that began to compete with the court-supervised probate system. Scholars, science, malpractice liability, and market competition have been a potent combination for driving law reform, of which there has been much in the last generation—and more is yet to come, such as to address the rise of electronic or digital wills and the difficulty of in-person will execution during the COVID-19 pandemic.

The use of trusts to transmit family wealth has become commonplace, not only for wealthy clients, but also for those of modest wealth. In expanding, trust law has annexed future interests and powers of appointment, reducing these two subjects to problems in drafting and construing trust instruments. The teachings of modern portfolio theory and the shift from land to financial assets for wealth accumulation has put pressure on the law of trust administration, which evolved in simpler times. In contemporary American trust practice, fiduciary obligation has replaced limits on the trustee's powers as the primary mechanism for safeguarding the beneficiary from abuse by the trustee. Meanwhile, the burgeoning tort liability of modern times has spawned an asset protection industry and radical change in the rights of creditors against beneficial interests in trust.

Taxation of donative transfers has also changed dramatically. The unlimited marital deduction, which permits spouses to make unlimited tax-free transfers to each other, is a central feature of estate planning. In 1986, Congress enacted the generation-skipping transfer tax, implementing a policy of wealth transfer taxation at each generation. This tax, like an invisible boomerang, has delivered a lethal blow to the Rule Against Perpetuities.

Throughout the book we emphasize the basic theoretical structure, philosophy, and purposes—in particular, freedom of disposition—that unify the field of donative transfers. We focus on function and purpose, not form. To this end, we have pruned away mechanical matters (such as a step-by-step discussion of how to probate a will and settle an estate, which is essentially local law, easily learned from a local practice book). At the same time, we have sought the historical roots of modern law. Understanding how the law became the way it is illuminates its evolution and the exasperating peculiarities inherited from the past.

Although we organize the material in topical compartments, we have also sought a more penetrating view of the subject as a tapestry of humanity. Trusts and estates practice concerns people and their most intimate relationships. Every illustration included, every behind-the-scenes peek, every quirk of the parties' behavior has its place as a piece of ornament fitting into the larger whole. Understanding the ambivalences

of the human heart and the richness of human frailty, and realizing that even the best-constructed estate plans may, with the ever-whirling wheels of change, turn into sandcastles, are essential to being a counselor at law. There is nothing like the death of a moneyed member of a family to show persons as they really are—virtuous or conniving, generous or grasping. Each case is a drama in human relationships and a cautionary tale. The lawyer, as counselor, drafter, or advocate, is an important figure in the dramatis personae.

For helpful questions, comments, or other assistance we thank Gregory Alexander, Albertina Antognini, Julia Belian, David Blankfein-Tabachnick, Jim Blase, Daniel Bogart, Alexander Boni-Saenz, Lad Boyle, Karen Boxx, Thomas Brennan, Bruce Brightwell, Patricia Cain, Elizabeth Carter, Eric Chaffee, Eric Claeys, Bridget Crawford, Barry Cushman, Robert Danforth, Michael Doran, James Edelman, Tammi Etheridge, Dave Fagundes, Steven Fast, Steven Feder, Matthew Festa, Lynn Foster, Wayne Gazur, Mark Glover, Iris Goodwin, Katheleen Guzman, Victoria Haneman, Howard Helsinger, Tanya Hernandez, David Herzig, Michael Higdon, David Horton, Stanley Johanson, Bruce Johnson, Gordon Jones, Robert Katz, Daniel Kelly, Diane Klein, Kristine Knaplund, Nina Kohn, Maureen Kordesh, John Langbein, Jason (Kye Joung) Lee, Barbara Lock, Samuel Long, Ray Madoff, Celestine Richards McConville, Andrea McDowell, Nancy McLaughlin, Julia Meister, Stephanie Middleton, Ann Murphy, Stephen Murphy, Bradley Myers, Ljubomir Nacev, Katherine Pearson, John Plecnik, John Pottow, Eric Rakowski, Anne-Marie Rhodes, Jay Rosenbaum, Ezra Rosser, Randy Roth, Christopher J. Ryan Jr., Ronald Scalise, Kent Schenkel, Jeffrey Schoenblum, David Seipp, Carla Spivack, Stacey-Rae Simcox, John Sprankling, Eva Subotnik, Gus Tamborello, Allison Tait, Joshua Tate, Lee-ford Tritt, Emily Taylor-Poppe, Charles Ten Brink, Lawrence Waggoner, Claire Wright, and Judith Younger.

We owe a particular debt of gratitude to John Morley and Max Schanzenbach, who provided extensive comments on early drafts of nearly every chapter; to Stephanie Willbanks, who assisted with tax matters throughout the book; and to the students in the Trusts and Estates course at Harvard in Spring 2021, who beta tested the manuscript. Lisa Lilliott Raydin and the Faculty Research and Information Delivery Assistance team at the Harvard Law Library provided crucial library and research support, and Clara Carvalho e Silva, Madelyn Chen, Benjamin Fleshman, Lindsey Foster, Eliza Green, Aaron Hsu, Brianna Johnson-King, Joseph Marcus, James Mulhern, Jackson Shaw, Elizabeth Lauren Yonkoski, and Eric Zilber provided superb research assistance.

Two final expressions of gratitude are in order. First, Molly Eskridge processed seemingly endless rounds of manuscript and proofs with breathtaking efficiency and indefatigable good cheer. Second, Troy Froebe and his colleagues at The Froebe Group executed the production process with grace, focus, and sound judgment.

Robert H. Sitkoff
Jesse Dukeminier, 1925-2003

September 2021

Editors' note: All citations to state and federal statutes and regulations are to such authorities as they appeared on Lexis or Westlaw at the date given. Citations to the current Scott treatise — Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts — are given as Scott and Ascher on Trusts with the edition and date noted parenthetically. Citations to Blackstone's Commentaries are to the facsimile of the first edition of 1765-1769 published in 1979 by the University of Chicago Press. Footnotes are numbered consecutively from the beginning of each chapter. Most footnotes in quoted materials have been omitted. Many citations in quoted materials have been omitted without indication or have been edited for readability. Editors' footnotes added to quoted materials are indicated by the abbreviation: — Eds.

Conflicts disclosure: In accordance with Harvard Law School's policy on conflicts of interest, Robert Sitkoff discloses certain outside activities, one or more of which may relate to the subject matter of this book, at https://helios.law.harvard.edu/Public/Faculty/ConflictOfInterestReport.aspx?id=10813.