Table of Contents

Preface xxxi Acknowledgments xxxiii

1
1
5
6
8
12
12
13
15
15
16
19
10
19
21
21 21
21 21 22
21 21 22 22
21 21 22 22 23
21 21 22 22 23 25
21 21 22 22 23 25 28
21 21 22 22 23 25 28

C.	Share to Children, Descendants, and Parents	32
	1. Just Who Is a Child?	33
	The Marital Presumption	33
	Special Circumstances: Assisted Reproduction & Posthumous	
	Children	33
	Astrue v. Capato	35
	Nonmarital Children	38
	Adopted Children	39
	Fiduciary Trust Co. v. Wheeler	4 4
	Foster Children & Equitable Adoption	46
	2. Just Who Is a Parent?	47
D.	Share to Other Relatives — and Escheat	48
E.	The Representation Models	49
	1. Strict Per Stirpes	51
	Steps for Establishing the Strict Per Stirpes Share	51
	Steps for Finding the Result for Exhibit 2.13 Under Strict Per Stirpes	51
	2. Modified Per Stirpes	52
	Steps for Establishing the Modified Per Stirpes Share	52
	Steps for Finding the Result for Exhibit 2.13 Under Modified Per Stirpes	52
	3. The 1969 UPC	53
	4. Per Capita at Each Generation — (1990 UPC)	53
	Steps for Establishing the Per Capita at Each Generation Share	54
	Steps for Finding the Result for Exhibit 2.13	54
	In re Estate of Donald J. Evans	55
F.	Reducing the Intestate Share for Advancements	58
Ch	apter Summary	60
	plying the Concepts	61
Tru	usts and Estates in Practice	63
Cł	napter 3: Creation of Wills	67
A.	Legal Requirements for the Testator	68
	1. Age and Mental Capacity	68
	2. Testamentary Intent	69
В.	Legal Requirements for Execution of a Formal Will	69
	1. The Writing Requirement	70
	2 The Signature Requirement	70

	Table of Contents
In re Estate of Javier Castro	72
3. The Witness Requirement	75
Interested Witnesses	76
The Logistics and Timing of Signing	77
Estate of Ray Merle Burton	78
The Self-Proved Will	81
The Notarized Will	83
4. Publication	84
5. Electronic Wills	84
C. Legal Requirements for a Holographic Will	85
In re Estate of Melton	87
D. What Constitutes the Will?	92
1. Integration	92
2. Acts of Independent Significance	93
3. Including Additional Non-Attested Documents	93
4. Republication by Codicil	94
E. Relaxing the Formalities	95
1. Substantial Compliance	95
Estate of Ray Merle Burton	96
2. Harmless Error	98
In re Macool	99
F. Choice of Law and Conflict of Laws	104
G. Common Provisions in Wills	105
Signing the Will	108
Chapter Summary	109
Applying the Concepts	110
Trusts and Estates in Practice	111
Chapter 4: Amendment and Revocation of Wills	113
A. Introduction	113
B. Revoking a Will by Writing	114
Express Revocation in Writing	114
2. Revocation by Inconsistency	115
3. Using Codicils to Revoke or Amend Will Provisions	115
C. Revoking a Will by Physical Act	115
1. Formalities Required for Revoking a Will by Physical Act	116

XIII

xiv Table of Contents

	2. Which Physical Acts Cause Revocation	117
	In re Will of Powers	117
	3. Revocation of Electronic Wills	120
	4. Presumption of Proper Revocation of Lost Will	121
	Johnson v. Fitzgerald	122
D.	Partial Revocation of a Will	12 4
	1. Partial Revocation or Amendment by Writing	124
	2. Whether Partial Revocation by Physical Act is Effective	124
E.	Automatic Will Revocation Due to Changed Circumstances	125
	1. Divorce and Marriage	125
	2. Birth or Adoption of Descendants	127
F.	Dependent Relative Revocation and Revival of Wills	127
	1. Dependent Relative Revocation	127
	In re Estate of Virginia E. Murphy (Rocke v. American Research	
	Bureau)	128
	2. Revival of Revoked Wills	134
G.	Contractual Wills	136
	1. Contracts to Make a Will	136
	Matter of Attea	137
	2. Contracts to Not Revoke a Will	140
	3. Nonprobate Alternatives to Will Contracts	140
Ch	apter Summary	141
Аp	plying the Concepts	142
Tru	usts and Estates in Practice	143
Cł	napter 5: Wills—Construction and Interpretation	147
A.	Ambiguity and Mistake	148
	1. The Plain Meaning Rule	148
	2. Interpreting Ambiguous Language	149
	Patent Ambiguity	149
	Latent Ambiguity	149
	Modern Approach to Ambiguity	150
	3. Reforming a Will to Fix a Mistake	150
	Mistake	150
	Estate of Duke	152
В.	Requiring Survival to Receive Property from a Decedent	155

l a	n	Δ	Λt	Cor	ıtΔr	1tc

C. Beneficiaries Who Fail to Survive	158
1. Lapse	158
2. Anti-Lapse Statutes	159
Why Have Anti-Lapse Rules?	160
No Contrary Intent	161
Related to the Testator	162
Descendants	162
3. Class Gifts	162
Estate of Tolman v. Jennings	164
D. Changes in Property	166
1. Abatement	167
2. Ademption	168
Identity Theory	168
Change in Form, Not Substance	168
Intent Theory in Non-Ademption Statutes	169
Satisfaction	171
Accessions and Non-Ademption	171
In re Estate of Magnus	173
3. Exoneration	175
E. Apportionment	176
F. Disclaimers	176
G. Slayer Statutes, Abuse, and Forfeiting Property by Wrongdoe	ers 177
1. Killing of Testator by Beneficiary or Heir	178
2. Abuse of Testator by Beneficiary	179
Chapter Summary	180
Applying the Concepts	181
Trusts and Estates in Practice	182
Chapter 6: Will Contests	185
A. Legal and Mental Capacity	185
1. Legal Capacity Age Requirement	186
2. Mental Capacity	186
Reynolds v. Steene	187
3. Insane Delusion	192
In re Estate of Zielinski	194
R. Undue Influence	197

xvi Table of Contents

1. The Test of Undue Influence	197
Mueller v. Wells	198
2. Evidentiary Burden-Shifting in Undue Influence Litigation	204
C. Fraud, Duress, Mistake, and Tortious Interference	
with an Expectancy	205
1. Fraud	205
2. Duress	206
3. Mistake	206
4. Tortious Interference with an Expectancy	207
D. Improper Observation of Will Execution Formalities	207
E. Standing to Contest and No-Contest Clauses	208
1. Standing to Bring a Will Contest	208
2. No-Contest Clauses	209
Parker v. Benoist	209
3. Planning to Avoid a Will Contest	214
Chapter Summary	215
Applying the Concepts	215
Trusts and Estates in Practice	216
Chapter 7: Nonprobate Transfers and	
Planning for Incapacity	223
A. Introduction to Will Substitutes/Nonprobate Transfers	224
B. The Most Common Forms of Will Substitutes	225
1. Life Insurance	225
Hillman v. Maretta	227
2. Pensions/Retirement Plans	231
3. Nonprobate Bank and Brokerage Accounts	233
Single-Party Accounts	233
Multiple-Party Accounts	233
Matter of Corcoran	237
4. Concurrently Owned Real Property	240
5. Inter Vivos Trusts	241
C. Why Use Nonprobate Transfers?	241
D. Planning for Incapacity	242

	Table of Contents	xvii
1. Financial Planning	243	
Powers of Attorney	244	
Agent's Responsibilities	245	
Matter of Ferrara	246	
Agent Liability	250	
Uniform Power of Attorney Act	250	
Dealing with Digital Assets	251	
Categories of Digital Assets	251	
Agents Versus Conservators	252	
2. Health Care Decisions During Incapacity	253	
Advance Medical Directives	253	
Chapter Summary	255	
Applying the Concepts	256	
Trusts and Estates in Practice	257	
Chapter 8: Family Protection	259	
A. Overview of the Two Marital Property Systems	260	
1. Community Property	261	
2. Common Law Property	262	
B. The Elective Share	263	
1. The Development of the Elective Share	263	
In re Estate of Thompson	265	
2. The Contemporary UPC	270	
C. Waiving the Elective Share	270	
In re Estate of Shinn	272	
D. Protecting Against Unintentional Disinheritance	277	
1. Pretermitted/Omitted Spouse	277	
2. Omitted Children	278	
Protecting the Omitted Child	278	
Gray v. Gray	279	
Omitted Child Statutes	283	
Chapter Summary	284	
Applying the Concepts	285	
Trusts and Estates in Practice	286	

xviii Table of Contents

Cł	napter 9: Creation of Trusts	287
A.	Trust Terminology	287
	1. Beneficiaries	288
	2. Mandatory and Default Rules	289
	3. Types of Trusts	289
	Inter Vivos or Testamentary	289
	Private or Charitable	289
	Revocable or Irrevocable	290
	4. Presumption of Revocability Under the UTC	290
	5. Merger	290
	6. Resulting Trust	291
	7. Constructive Trust	291
B.	Elements of a Trust	291
	1. Valid, Legal Purpose	292
	2. Competent Settlor	293
	Irrevocable Inter Vivos Trusts	293
	Revocable Trusts	293
	3. Trustee	294
	Choosing a Trustee	294
	Acceptance	295
	Resignation	296
	4. Intent to Create a Trust	296
	Inter Vivos Gift in Trust or Ownership Retained	297
	Intent to Create a Trust or Gift with Explanatory or Precatory	
	Language	297
	In re Estate of Bolinger	298
	Transfer into Trust or Promise to Make a Gift in the Future	303
	5. Property (aka Corpus or Res)	304
	6. Beneficiary	305
	Identifiable Person or Class	305
	Clark v. Campbell	306
	Honorary Trust	308
	Trust for a Purpose	308
	Trust for an Animal	309
C.	Formalities	310
	1. Oral Trusts of Personal Property	310
	2. Oral Trusts of Real Property	311

	Table of Contents	xix
Partial Performance	311	
Constructive or Resulting Trust	311	
Gregory v. Bowlsby	312	
3. Secret and Semi-Secret Trusts to Be Given Effect at Death	315	
D. Revocable Trusts	315	
1. Structure of a Typical Revocable Trust	315	
2. Funding a Revocable Trust	316	
3. Advantages of a Revocable Trust	318	
4. Disadvantages and Misconceptions	318	
5. Rules Unique to Revocable Trusts	319	
E. Charitable Trusts	319	
1. Charitable Purpose	320	
2. Modification of Charitable Trusts	321	
Cy Pres	321	
Deviation	322	
3. Enforcement of Charitable Trusts	322	
Attorney General	322	
Donor	323	
Special Interests Doctrine	323	
Herbst v. Univ. of Colo. Found.	324	
Chapter Summary	327	
Applying the Concepts	328	
Trusts and Estates in Practice	330	
Chapter 10: Rights of Beneficiaries and Creditors		
in Trust Property	335	
A. Common Standards of Trust Distribution	336	
1. Mandatory and Discretionary Distribution Provisions	336	
Example of Trust with Both Mandatory and Discretionary		
Provisions	337	
2. Ascertainable and Nonascertainable	337	
Example of Trust with Distribution Standard for Education	337	
3. Support and Maintenance	338	
Matter of Katherine E. Reece Trust	339	
4. Education	343	
5. Emergency	343	

Emergency — Trustee's Decision Not to Dis	stribute Upheld 344
Emergency — Trustee Should Distribute	344
6. Welfare, Happiness, and Best Interests	344
B. Trustee's Exercise of Discretion	345
1. Reasonableness and Good Faith	346
Examples of Good Faith and Reasonablen	ess 340
2. Should the Trustee Consider a Beneficiary's	Other Assets? 347
3. Duty to Inquire	347
Marsman v. Nasca	348
4. What If the Trustee Is a Beneficiary?	354
Example of a Trust for a Second Spouse	354
C. Rights of Creditors	355
Law on Creditors Not Uniform	355
1. Creditors of a Beneficiary Who Is Not the So	ettlor 356
Mandatory Distributions	356
Discretionary Distributions	350
Spendthrift Clauses	35%
Exceptions to Spendthrift Clauses	358
Shelley v. Shelley	359
2. Creditors of a Beneficiary Who Is the Settlo	r 363
Revocable Trusts	363
Irrevocable Trusts	363
Foreign Asset Protection Trusts	364
Domestic Asset Protection Trusts	365
Chapter Summary	367
Applying the Concepts	367
Trusts and Estates in Practice	369
Chapter 11: Fiduciary Duties and Modi	ification and
Termination of Trusts	371
A. Fiduciary Duties	372
History of Fiduciary Duties Involving Inve	stments 372
Mandatory or Default Rules?	373
1. Duty of Obedience	373
2. Duty of Loyalty	373
Self-Dealing — Transactions for the Truste	e's Personal Account 374

Table of Contents	xxi
-------------------	-----

		Example: Self-Dealing	375
		Conflicts of Interest — Transactions Involving Personal or	
		Business Relationships	375
		Example: Conflict of Interest	376
		Authorization of Self-Dealing and Conflicts of Interest	376
		Hosey v. Burgess	378
		Sole Interests or Best Interests?	381
	3.	Duty to Inform and Report	381
		Categories of Beneficiaries	382
	4.	Representation	383
	5.	Duty of Impartiality	384
		Example: Duty of Impartiality	384
	6.	Duty of Care	385
		Protecting Trust Property	385
		Investing Trust Property — The Prudent Investor Rule	385
		In re Trust Created by Inman	387
	7.	Investments, Trust Accounting, and the Duty of Impartiality	390
		Income or Principal?	390
		Some Investments May Be More Likely to Generate Income or Principal	391
		Duty of Impartiality Affects Investment Decisions	391
		The Uniform Principal and Income Act	391
	8.	Remedies for Breach	392
	9.	Removal of a Trustee	392
	10.	Trust Director	393
В.	Mo	dification and Termination	394
	1.	Revocable Trusts	394
		Can a Will Revoke a Trust?	395
		What if the Settlor Loses Capacity to Revoke?	396
	2.		396
		Building Flexibility into a Trust	396
		Termination According to the Terms of a Trust	397
		Modification or Termination with the Settlor's Consent	397
		In re Trust Under Deed of Garrison	398
		Modification or Termination by Beneficiaries Without the	
		Settlor's Consent	403
		Material Purpose Doctrine	403
		Modification or Termination Due to Changed Circumstances	405

xxii Table of Contents

In re Riddell	406
Modification to Fix a Mistake	410
Additional Modification Provisions in the UTC	410
3. Decanting	411
Chapter Summary	412
Applying the Concepts	413
Trusts and Estates in Practice	415
Chapter 12: Powers of Appointment	417
A. What Is a Power of Appointment?	417
1. General Terminology	418
Testamentary Power of Appointment	418
Presently Exercisable Power of Appointment	418
General Power of Appointment	419
Nongeneral Power of Appointment	419
Power of Withdrawal	420
Exclusionary Power of Appointment	420
Nonexclusionary Power of Appointment	420
Specific Reference	420
2. Clauses that Exercise a Power	421
Specific-Exercise Clause	421
Blanket-Exercise Clause	421
Blending Clause	421
3. Distinguishing Between a Power of Appointment and Fiduciary Power	421
B. Creating a Power of Appointment	422
C. Exercising a Power of Appointment	423
Parsing Powers of Appointment	424
 Residuary Blending Clause with Blanket Exercise — Does It Satisfy a Specific-Reference Requirement? 	425
Motes/Henes Trust, Bank of Bentonville v. Motes	425
3. Can a Powerholder Exercise the Power by a "Pure" Residuary Clause?	429
Cessac v. Stevens	430
4. What Is Required for Substantial Compliance?	433
5. Exercise in Further Trust	434
6. Rule Against Perpetuities and Powers	435

Tabl	le of Contents	xxiii
Problems with Appointees	435	
Exercise in Favor of Impermissible Appointees	435	
BMO Harris Bank N.A. v. Towers	436	
7. Predeceased Appointees	439	
8. Selective Allocation	440	
D. Release, Failure to Exercise, and an Express Statement of Nonexer	cise 441	
1. Who Gets the Property?	442	
Takers in Default Stated	442	
No Takers in Default Stated	443	
Capture	444	
2. Contract to Exercise a Power	444	
E. Rights of Creditors	445	
Chapter Summary	446	
Applying the Concepts	447	
Trusts and Estates in Practice	449	
Chapter 13: Professional Ethics in Trusts and Estates A. The Identity of the Client, Malprestics Litization, and Liability to	451	
A. The Identity of the Client, Malpractice Litigation, and Liability to Non-Clients	452	
1. Who Is the Client in Estate Planning and Estate Administration?	452	
2. Common Grounds for Malpractice	452	
3. Duties to Non-Clients and the Privity Defense	454	
O'Bryan v. Cave: Appellate Brief	455	
B. Competence and Diligence	458	
In re J. Sinclair Long	462	
C. Attorney-Client Communications	465	
D. Fees	466	
E. Confidentiality	468	
Professional Ethics Opinion of the Florida Bar Opinion 95-4	471	
F. Conflicts of Interest	476	
Cooner v. Alabama State Bar	478	
G. Client Capacity	480	
Chapter Summary	481	
Applying the Concepts	482	

484

Trusts and Estates in Practice

XXIV Table of Contents

Cł	napter 14: Estate Administration and	
	e Probate Process	487
A.	Actions Before Commencing Administration	487
	1. Determine the Personal Representative	488
	2. Establish the Client Relationship	489
	3. Weigh Costs and Benefits to Determine Whether Probate Is Necessary	489
	4. Small Estate Administration or Informal Probate	490
	5. Determine Whether Estate Is Testate or Intestate	491
	6. Cremation or Burial of Decedent and Planning for Surviving Minors	491
В.	Authorizing the Personal Representative	492
	Petition for Letters and Grant of Letters	492
	2. Bond (Surety) for Personal Representative	495
	3. Notice	495
	4. Removal, Replacement, or Succession of Personal Representatives	496
	In re Estate of Mason D. Robb	497
C.	Probate the Will (Testate Administrations Only)	499
	1. Petition to Probate the Will	500
	2. Notice Requirements	500
	3. Proving the Will (and Self-Proved Wills)	500
	4. Order Admitting Will to Probate	501
D.	Managing the Assets and Inventory	501
	1. Possession and Control of Assets	501
	2. Opening Estate Accounts	502
	3. Filing Inventory and Appraisal	502
	4. Liquidation and Investment of Assets	503
	5. Periodic Accountings and Partial Settlements	504
E.	Managing Creditors' Claims and Taxes	504
	1. Publication of Notice to Creditors	505
	2. Personal Notice to Creditors	506
	Tulsa Professional Collection Services v. Pope	506
	3. Responding to and Disputing Claims	511
	4. The Insolvent Estate	511
F.	Family Protection and Postmortem Planning	512
	1. Elective Share	512
	2. Omitted Spouse and Children	512
	3. Homestead, Personal Property Set-Aside, and Family Allowance	512
	4. Disclaimer	514

	Table of Contents	XXV
G. Nonprobate and Tax Matters	514	
H. Fees for the Attorney and Personal Representative	515	
Andrews v. Gorby	516	
I. Closing the Estate: Distribution, Final Settlement, and Discharge of the Personal Representative	520	
1. Distribution	520	
2. Final Settlement	521	
3. Discharge of the Personal Representative	521	
4. The Termination of the Estate	521	
Chapter Summary	522	
Applying the Concepts	523	
Trusts and Estates in Practice	525	
Chapter 15: Introduction to Federal Estate and		
Gift Taxes	527	
A. The Federal Gift Tax	528	
1. Taxable Gifts	528	
2. The Annual Exclusion from Gift Tax	528	
Estate of Maria Cristofani, Deceased, Frank Cristofani Executor v. Commissioner of Internal Revenue	5, 530	
3. Additional Exclusions and Deductions from Gift Tax	534	
4. Calculating Gift Taxes	535	
B. The Federal Estate Tax	536	
1. Transfers Included in the Estate Tax Base	538	
2. The Unified Transfer Tax Credit: The Exemption Budget for Tax-Free Transfers	540	
3. The Marital Deduction and Portability	541	
4. The Charitable Deduction and Other Deductions	541	
5. Calculating Estate Taxes	542	
C. The Generation-Skipping Transfer Tax	543	
1. Forms of Generation-Skipping Transfers	543	
2. Exemptions, Deductions, and Exclusions from the GST Ta	x 543	
3. Calculating the GST Tax	544	
D. Estate-Planning Techniques	544	
1. Efficient Use of Lifetime Gifts	544	
2. Efficient Use of the Marital Deduction and Unified Credit	546	
Michelle Bandy et al. v. Alexandra Clancy	547	

xxvi Table of Contents

3. Valuation Planning	552
4. Charitable Giving Techniques	552
5. Other Wealth Management Planning Strategies	553
Chapter Summary	553
Applying the Concepts	554
Trusts and Estates in Practice	555

Glossary 557 Table of Cases 571 Index 573