Table of Contents

Preface xxix Acknowledgments xxxi

Chapter 1: Introduction to the Law and Practice of Trusts		
ar	nd Estates	1
Α.	Overview	2
В.	The Legal System Governing Trusts and Estates	5
C.	Testamentary Freedom	6
	Feinberg v. Feinberg	8
D.	Introduction to Trusts and Estates Legal Practice	12
	1. The Different Roles of Trusts and Estates Practitioners	12
	2. The Demands and Rewards of Trusts and Estates Practice	14
Ch	apter Summary	15
Аp	plying the Concepts	15
Tru	usts and Estates in Practice	16
Cł	napter 2: Intestacy	19
A.	Introduction	19
В.	Share for Surviving Spouse	21
	1. Who Is a Spouse?	21
	Legally Married Spouses	22
	Common Law Spouses	22
	Putative Spousehood	23
	In re Ober	24
	Civil Unions & Domestic Partnerships	28
	Cohabitants	28

	2. Share of Surviving Spouse	28
	Non-UPC Share of Surviving Spouse	29
	The UPC Share of Surviving Spouse	30
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	34
	Nonmarital Children	38
	Adopted Children	41
	Fiduciary Trust Co. v. Wheeler	44
	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. Modern Per Stirpes (1969 UPC/Modified Per Stirpes)	52
	Steps for Establishing the Modern Per Stirpes Share	52
	Steps for Finding the Result for Exhibit 2.13 Under Modern Per Stirpes	52
	In re Estate of Donald J. Evans	53
	3. Per Capita at Each Generation—(1990 UPC)	56
	Steps for Establishing the Per Capita at Each Generation Share	57
	Steps for Finding the Result for Example 2.13	58
F.	Reducing the Intestate Share for Advancements	58
Ch	apter Summary	60
Аp	plying the Concepts	61
Tru	usts and Estates in Practice	63
Cŀ	napter 3: Creation of Wills	65
UI	lapter 3. dieation of wills	03
A.	Legal Requirements for the Testator	66
	1. Age and Mental Capacity	66
	2. Testamentary Intent	67
В.	Legal Requirements for Execution of a Formal Will	67
	1. The Writing Requirement	68

	Table of Contents
2. The Signature Requirement	68
In re Estate of Javier Castro	70
3. The Witness Requirement	73
Interested Witnesses	74
The Logistics and Timing of Signing	75
Estate of Ray Merle Burton	76
The Self-Proved Will	79
The Notarized Will	81
4. Publication	82
C. Legal Requirements for a Holographic Will	82
In re Estate of Melton	84
D. What Constitutes the Will?	89
1. Integration	89
2. Acts of Independent Significance	90
3. Including Additional Non-Attested Documents	91
4. Republication by Codicil	92
E. Relaxing the Formalities	93
1. Substantial Compliance	93
Estate of Ray Merle Burton	94
2. Harmless Error	96
In re Macool	98
F. Choice of Law	103
G. Common Provisions in Wills	103
Signing the Will	106
Chapter Summary	107
Applying the Concepts	108
Trusts and Estates in Practice	109
Chapter 4: Amendment and Revocation of Wills	111
A. Introduction	112
B. Revoking a Will by Writing	112
1. Express Revocation in Writing	112
2. Revocation by Inconsistency	113
3. Using Codicils to Revoke or Amend Will Provisions	113
C. Revoking a Will by Physical Act	114
1. Formalities Required for Revoking a Will by Physical Act	115

xiii

	2. Which Physical Acts Cause Revocation	115
	In re Will of Powers	116
	3. Presumption of Proper Revocation of Lost Will	118
	Johnson v. Fitzgerald	119
D.	Partial Revocation of a Will	121
	1. Partial Revocation or Amendment by Writing	121
	2. Whether Partial Revocation by Physical Act is Effective	122
E.	Automatic Will Revocation Due to Changed Circumstances	122
	1. Divorce and Marriage	123
	2. Birth or Adoption of Descendants	124
	3. Cy Pres and Charitable Bequests	125
F.	Dependent Relative Revocation and Revival of Wills	125
	1. Dependent Relative Revocation	125
	In re Estate of Virginia E. Murphy (Rocke v. American Research	
	Bureau)	126
	2. Revival of Revoked Wills	132
G.	Contractual Wills	133
	1. Contracts to Make a Will	133
	Matter of Attea	135
	2. Contracts Not to Revoke a Will	138
	3. Nonprobate Alternatives to Will Contracts	138
Ch	apter Summary	139
Аp	plying the Concepts	139
Tru	usts and Estates in Practice	141
Cł	napter 5: Wills—Construction and Interpretation	143
A.	Ambiguity and Mistake	144
	1. The Plain Meaning Rule	144
	2. Interpreting Ambiguous Language	144
	Patent Ambiguity	145
	Latent Ambiguity	145
	Modern Approach to Ambiguity	145
	3. Reforming a Will to Fix a Mistake	146
	Mistake	146
	Estate of Duke	148
В.	What Does "Survive" Mean?	151
	1. Survival When Will Is Silent on Meaning of "Survive"	152
	2. Time of Death	153

		Table of Contents
C.	Beneficiaries Who Fail to Survive	154
	1. Lapse	154
	2. Anti-Lapse Statutes	155
	No Contrary Intent	156
	Related to the Testator	157
	Descendants	157
	3. Class Gifts	157
	Estate of Tolman v. Jennings	159
D.	Changes in Property	162
	1. Abatement	162
	2. Ademption	163
	Identity Theory	163
	Changes in Form, Not Substance	163
	Intent Theory in Non-Ademption Statutes	164
	Satisfaction	166
	Accessions and Non-Ademption	166
	In re Estate of Magnus	168
	3. Exoneration	170
E.	Apportionment	170
F.	Disclaimers	171
G.	Forfeiting Property Due to Bad Behavior of Beneficiary	172
	1. Killing of Testator by Beneficiary or Heir	172
	2. Abuse of Testator by Beneficiary	174
Ch	apter Summary	174
Ap	plying the Concepts	175
Tru	sts and Estates in Practice	177
Ch	napter 6: Will Contests	179
A.	Legal and Mental Capacity	179
	Legal Capacity Age Requirement	180
	2. Mental Capacity	180
	In re Estate of Ryan	181
	3. Insane Delusion	184
	In re Estate of Zielinski	186
B.	Undue Influence	189
	1. The Test of Undue Influence	189
	Mueller v. Wells	190
	2. Evidentiary Burden-Shifting in Undue Influence Litigation	196

XV

xvi

C.	Fraud, Duress, Mistake, and Tortious Interference with	
	an Expectancy	197
	1. Fraud	198
	2. Duress	198
	3. Mistake	199
	4. Tortious Interference with an Expectancy	199
D.	Improper Observation of Will Execution Formalities	200
E.	Standing to Contest and No-Contest Clauses	201
	1. Standing to Bring a Will Contest	201
	2. No-Contest Clauses	201
	Parker v. Benoist	202
	3. Planning to Avoid a Will Contest	207
Ch	apter Summary	208
Аp	plying the Concepts	208
Tru	usts and Estates in Practice	209
•	anning for Incapacity	217
A.	Introduction to Will Substitutes/Nonprobate Transfers	218
B.	The Most Common Forms of Will Substitutes	219
	1. Life Insurance	219
	Hillman v. Maretta	221
	2. Pensions/Retirement Plans	225
	3. Nonprobate Bank and Brokerage Accounts	226
	Single-Party Accounts	227
	Multiple-Party Accounts	227
	Matter of Corcoran	231
	4. Concurrently Owned Real Property	233
	5. Inter Vivos Trusts	235
	Why Use Nonprobate Transfers?	
D.	•	235
	Planning for Incapacity	235 236
	•	

	Table of Contents	xvii
Agent's Responsibilities	238	
Matter of Ferrara	240	
Agent Liability	243	
Uniform Power of Attorney Act	244	
Dealing with Digital Assets	244	
Four Categories of Digital Assets	245	
Agents Versus Conservators	245	
2. Health Care Decisions During Incapacity	246	
Advance Medical Directives	246	
Chapter Summary	249	
Applying the Concepts	249	
Trusts and Estates in Practice	250	
Chapter 8: Family Protection	253	
A. Overview of the Two Marital Property Systems	254	
1. Community Property	255	
2. Common Law Property	256	
B. The Elective Share	257	
1. The Development of the Elective Share	257	
In re Estate of Thompson	259	
2. The Contemporary UPC	263	
C. Waiving the Elective Share	264	
In re Estate of Shinn	266	
D. Protecting Against Unintentional Disinheritand	ce 271	
1. Pretermitted/Omitted Spouse	271	
2. Omitted Children	272	
Protecting the Omitted Child	272	
Gray v. Gray	273	
Omitted Child Statutes	277	
The UPC Approach	277	
The New Hampshire Approach	278	
Chapter Summary	278	
Applying the Concepts	279	
Trusts and Estates in Practice	280	

Chapter 9: Creation of Trusts		281
A.	Trust Terminology	281
	1. Beneficiaries	282
	2. Mandatory and Default Rules	283
	3. Types of Trusts	283
	Inter Vivos or Testamentary	283
	Private or Charitable	283
	Revocable or Irrevocable	283
	4. Presumption of Revocability Under the UTC	284
	5. Merger	284
	6. Resulting Trust	284
	7. Constructive Trust	285
В.	Elements of a Trust	285
	1. Valid, Legal Purpose	286
	2. Competent Settlor	286
	Irrevocable Inter Vivos Trusts	287
	Revocable Trusts	287
	3. Trustee	287
	Choosing a Trustee	288
	Acceptance	289
	Resignation	289
	4. Intent to Create a Trust	290
	Inter Vivos Gift in Trust or Ownership Retained	290
	Intent to Create a Trust or Gift with Explanatory or Precatory	200
	Language	290
	In re Estate of Bolinger	291
	Transfer into Trust or Promise to Make a Gift in the Future	296
	5. Property (aka Corpus or Res)	297
	6. Beneficiary	298
	Identifiable Person or Class	299
	Clark v. Campbell	299
	Honorary Trust	301
	Trust for a Purpose	301
	Trust for an Animal	302
C.	Formalities 1. Oval Trusts of Paragraph Property.	303
	Oral Trusts of Personal Property Oral Trusts of Peal Property	303
	2. Oral Trusts of Real Property	304
	Partial Performance	304

	Table of Co	ntents
	Constructive or Resulting Trust	304
	Gregory v. Bowlsby	305
	3. Secret and Semi-Secret Trusts to Be Given Effect at Death	308
D.	Revocable Trusts	308
	1. Structure of a Typical Revocable Trust	309
	2. Funding a Revocable Trust	309
	3. Advantages of a Revocable Trust	311
	4. Disadvantages and Misconceptions	311
	5. Rules that Differ from Rules Applicable to Other Trusts	312
E.	Charitable Trusts	312
	1. Charitable Purpose	313
	2. Modification of Charitable Trusts	314
	Cy Pres	314
	Deviation	315
	3. Enforcement of Charitable Trusts	315
	Attorney General	315
	Donor	316
	Special Interests Doctrine	316
Ch	apter Summary	316
Аp	plying the Concepts	317
Tru	usts and Estates in Practice	319
Cł Tr	napter 10: Rights of Beneficiaries and Creditors in ust Property	325
A.	Common Standards of Trust Distribution	326
	1. Mandatory and Discretionary Distribution Provisions	326
	Example of Trust with Both Mandatory and Discretionary Provisions	327
	2. Support and Maintenance	327
	Ascertainable and Nonascertainable	327
	Example of Trust with Distribution Standard for Support and Maintenance	328
	3. Education	328
	4. Emergency	329
	Emergency—Trustee's Decision Not to Distribute Upheld	329
	Emergency—Trustee Should Distribute	329

5. Welfare and Best Interests

xix

330

B.	Trustee's Exercise of Discretion	330
	1. Reasonableness and Good Faith	331
	Examples of Good Faith and Reasonableness	332
	2. Should the Trustee Consider a Beneficiary's Other Assets?	332
	3. Duty to Inquire	333
	Marsman v. Nasca	334
	4. What If the Trustee Is a Beneficiary?	339
	Example of a Trust for a Second Spouse	340
C.	Rights of Creditors	340
	Law on Creditors Not Uniform	341
	1. Creditors of a Beneficiary Who Is Not the Settlor	341
	Mandatory Distributions	341
	Discretionary Distributions	341
	How Does a Creditor Get Paid?	341
	Existing Creditors of the Settlor	342
	Spendthrift Clauses	342
	Exceptions to Spendthrift Clauses	343
	Shelley v. Shelley	344
	2. Creditors of a Beneficiary Who Is the Settlor	348
	Revocable Trusts	348
	Irrevocable Trusts	348
	Foreign and Domestic Asset Protection Trusts	349
	Domestic Asset Protection Trusts—Alaska's Statute	349
Ch	apter Summary	351
Аp	plying the Concepts	352
Tru	ists and Estates in Practice	353
Cł	napter 11: Fiduciary Duties and Modification and	
	rmination of Trusts	357
A.	Fiduciary Duties	358
	History of Fiduciary Duties Involving Investments	358
	Mandatory or Default Rules?	359
	1. Duty of Obedience	359
	2. Duty of Loyalty	359
	Self-Dealing—Transactions for the Trustee's Personal Account	360
	Example: Self-Dealing	361

Conflicts of Interest—Transactions Involving Personal or Bu Relationships	usiness 361
Example: Conflict of Interest	362
Authorization of Self-Dealing and Conflicts of Interest	362
Hosey v. Burgess	364
Sole Interests or Best Interests?	367
3. Duty to Inform and Report	367
Categories of Beneficiaries	368
4. Representation	369
5. Duty of Impartiality	370
Example: Duty of Impartiality	370
6. Duty of Care	371
Protecting Trust Property	371
Investing Trust Property—the Prudent Investor Rule	371
In re Trust Created by Inman	373
7. Investments, Trust Accounting, and the Duty of Impartiality	376
Income and Principal	376
Some Investments May Be More Likely to Generate Income	
Principal	377
Duty of Impartiality Affects Investment Decisions	377
The Uniform Principal and Income Act	377
8. Remedies for Breach	378
9. Removal of a Trustee	378
10. Trust Director	379
Modification and Termination	380
1. Revocable Trusts	380
Can a Will Revoke a Trust?	381
What If the Settlor Loses Capacity to Revoke?	382
2. Irrevocable Trusts	382
Building Flexibility into a Trust	382
Termination According to the Terms of a Trust	383
Modification or Termination with the Settlor's Consent	383
Modification or Termination by Beneficiaries Without the S Consent	Settlor's 383
Material Purpose Doctrine	383
Modification or Termination Due to Changed Circumstanc	
In re Riddell	387

B.

xxii Table of Contents

Modification to Fix a Mistake	390
Additional Modification Provisions in the UTC	391
3. Decanting	391
Chapter Summary	393
Applying the Concepts	393
Trusts and Estates in Practice	395
Chapter 12: Powers of Appointment	399
A. What Is a Power of Appointment?	399
1. General Terminology	400
Testamentary Power of Appointment	400
Presently Exercisable Power of Appointment	400
General Power of Appointment	401
Nongeneral Power of Appointment	401
Power of Withdrawal	402
Exclusionary Power of Appointment	402
Nonexclusionary Power of Appointment	402
Specific Reference	402
Specific-Exercise Clause	403
Blanket Exercise Clause	403
Blending Clause	403
2. Distinguishing Between a Power of Appointment and Fiduciary Power	403
B. Creating a Power of Appointment	404
C. Exercising a Power of Appointment	405
1. Parsing Powers of Appointment	406
Residuary Blending Clause with Blanket Exercise—Does It Satisfy a Specific Reference Requirement?	407
Motes/Henes Trust, Bank of Bentonville v. Motes	407
3. Can a Powerholder Exercise the Power by a "Pure" Residuary Clause?	411
Cessac v. Stevens	412
4. What Is Required for Substantial Compliance?	415
In re Estate of Carter	416
5. Exercise in Further Trust	419
6. Rule Against Perpetuities and Powers	420
Problems with Appointees	420

	Table of Co	ontents
	Exercise in Favor of Impermissible Appointees	420
	BMO Harris Bank N.A. v. Towers	421
	7. Predeceased Appointees	424
	8. Selective Allocation	425
D.	Release, Failure to Exercise, and an Express Statement of Nonexercise	426
	1. Who Gets the Property?	427
	Takers in Default Stated	427
	No Takers in Default Stated	427
	Capture	428
	2. Contract to Exercise a Power	428
E.	Rights of Creditors	430
	1. Be Careful About Tax Consequences!	431
Ch	apter Summary	431
	plying the Concepts	432
	ists and Estates in Practice	434
	d Estates	435
A.	The Identity of the Client, Malpractice Litigation, and Liability to Non-Clients	436
	Who Is the Client in Estate Planning and Estate Administration?	436
	2. Common Grounds for Malpractice	436
	3. Duties to Non-Clients and the Privity Defense	438
	O'Bryan v. Cave: Appellate Brief	439
В.	Competence and Diligence	442
	In re J. Sinclair Long	445
C.	Attorney-Client Communications	449
D.	Fees	450
E.	Confidentiality	451
	Professional Ethics Opinion of the Florida Bar Opinion 95-4	454
F.	Conflicts of Interest	459
	Cooner v. Alabama State Bar	462
G.	Client Capacity	464
Ch	apter Summary	465
Applying the Concepts		

Trusts and Estates in Practice

xxiii

468

Chapter 14: Estate Administration and				
	e Probate Process	471		
A.	Actions Before Commencing Administration	471		
	1. Determine the Personal Representative	472		
	2. Establish the Client Relationship	473		
	3. Weigh Costs and Benefits to Determine Whether Probate Is Necessary	473		
	4. Small Estate Administration or Informal Probate	474		
	5. Determine Whether Estate is Testate or Intestate	475		
	6. Cremation or Burial of Decedent and Planning for Surviving Minors	475		
В.	Authorizing the Personal Representative	476		
	1. Petition for Letters and Grant of Letters	476		
	2. Bond (Surety) for Personal Representative	479		
	3. Notice	479		
	4. Removal, Replacement, or Succession of Personal Representatives	480		
	In re Estate of Mason D. Robb	481		
C.	Probate the Will (Testate Administrations Only)	483		
	1. Petition to Probate the Will	484		
	2. Notice Requirements	484		
	3. Proving the Will (and Self-Proved Wills)	484		
	4. Order Admitting Will to Probate	485		
D.	Managing the Assets and Inventory	485		
	1. Possession and Control of Assets	485		
	2. Opening Estate Accounts	486		
	3. Filing Inventory and Appraisal	486		
	4. Liquidation and Investment of Assets	487		
	5. Periodic Accountings and Partial Settlements	488		
E.	Managing Creditors' Claims and Taxes	488		
	1. Publication of Notice to Creditors	489		
	2. Personal Notice to Creditors	490		
	Tulsa Professional Collection Services v. Pope	490		
	3. Responding to and Disputing Claims	495		
	4. The Insolvent Estate	496		
F.	Family Protection and Postmortem Planning	496		
	1. Elective Share	496		
	2. Omitted Spouse and Children	496		
	3. Homestead, Personal Property Set-Aside, and Family Allowance	497		
	4. Disclaimer	498		

		Table of Contents
G.	Nonprobate and Tax Matters	499
H.	Fees for the Attorney and Personal Representative	499
	Andrews v. Gorby	500
I.	Closing the Estate: Distribution, Final Settlement, and Dischar	ge
	of the Personal Representative	504
	1. Distribution	505
	2. Final Settlement	505
	3. Discharge of the Personal Representative	506
	4. The Termination of the Estates	506
Ch	apter Summary	506
Аp	plying the Concepts	508
Tru	ists and Estates in Practice	509
Chapter 15: Introduction to Federal Estate and Gift Taxes		511
A.	The Federal Gift Tax	512
	1. Taxable Gifts	512
	2. The Annual Exclusion from Gift Tax	513
	Estate of Maria Cristofani, Deceased, Frank Cristofani, Executor v. Commissioner of Internal Revenue	514
	3. Additional Exclusions and Deductions from Gift Tax	518
	4. Calculating Gift Taxes	519
В.	The Federal Estate Tax	520
	1. Transfers Included in the Estate Tax Base	522
	Estate of Russell Badgett, Jr., Deceased, Bentley Badgett, Jr	·.
	Executor v. Commissioner of Internal Revenue	524
	2. The United Transfer Tax Credit and the \$11 Million Exemption	528
	3. The Marital Deduction and Portability	528
	4. The Charitable Deduction and Other Deductions	529
	5. Calculating Estate Taxes	529

C. The Generation-Skipping Transfer Tax

3. Calculating the GST Tax

1. Efficient Use of Lifetime Gifts

D. Estate-Planning Techniques

1. Forms of Generation-Skipping Transfers

2. Exemptions, Deductions, and Exclusions from the GST Tax

XXV

530

530

531

531

531

532

XXVi Table of Contents

2. Efficient Use of the Marital Deduction and Unified Credit	533
Michelle Bandy et al. v. Alexandra Clancy	534
3. Valuation Planning	539
4. Charitable Giving Techniques	539
5. Other Wealth Management Planning Strategies	540
Chapter Summary	
Applying the Concepts	
Trusts and Estates in Practice	

Glossary 545

Table of Cases 559

Index 561