



## PREFACE

**A**S TRUSTS AND ESTATES LAWYERS, we are in the business of succession. This simple truth was brought home in a deeply personal way with the unexpected passing of Jesse Dukeminier, 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 twelfth 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 aim in this twelfth 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 introduced in the ninth edition. Case squibs and extraneous references have been resisted. Each chapter begins with an organizing statement of themes and relevant policies. 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 questions difficult and interesting is the "worst evidence rule" of probate procedure under which 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 is the centerpiece of contemporary estate planning. Chapter 7 examines 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 more advanced topics: fiduciary administration (Chapter 9), alienation and modification (Chapter 10), charitable trusts (Chapter 11), powers of appointment (Chapter 12), construction and 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 — and more is yet to come, such as to address the rise of electronic or digital wills and the growing problem of conflict of laws in trusts and estates.

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 those 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 have put pressure on the law of trust administration, which evolved in simpler times. In American trust practice today, 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, readily ascertained from a local practice book). At the same time, we have sought the historical roots of modern law. Understanding the evolution of the law illuminates the exasperating peculiarities inherited from the past.

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 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*.

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*Robert H. Sitkoff*  
*Jesse Dukeminier, 1925-2003*

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*Editors' note:* All citations to state and federal statutes and regulations are to such authorities as they appeared on Lexis or Westlaw in Spring or Summer 2025. Maps and other state surveys are likewise current through Spring or Summer 2025. 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 cleaned up 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://perma.cc/MHC6-R69R>.