



ASPEN CASEBOOK SERIES



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# WILLS, TRUSTS, AND ESTATES

NINTH EDITION

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**JESSE DUKEMINIER**

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University of California, Los Angeles

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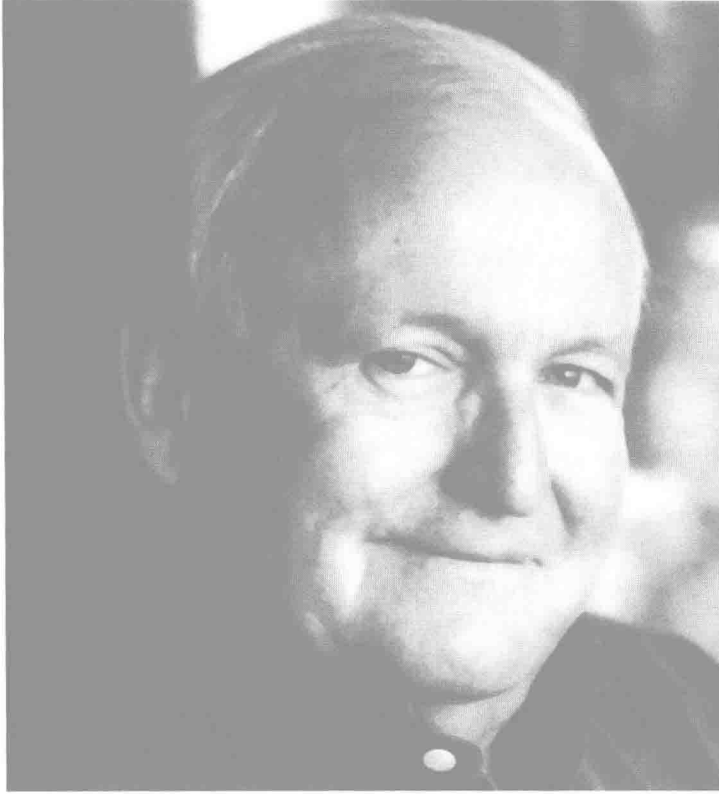
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JESSE DUKEMINIER, 1925-2003

For my father, Samuel Sitkoff, my first trusts and estates teacher.

Thanks to you I was the only kid in the neighborhood who  
knew the meaning of *per stirpes*, *residuary estate*, and *fiduciary duty*.

—RHS



## LIST OF ILLUSTRATIONS

### Chapter 1

Cartoon by Frank Gotham (“Just so you know, I’m taking all this with me into the afterlife.”)	2
Sir Arthur Hobhouse (photograph)	3
Tommy Manville (photograph)	10
Judge Richard A. Posner (photograph)	11
Cartoon by Alex Gregory (“Sure I play hard, but I also inherit hard.”)	11
Justice Hugo L. Black (photograph)	15
Franz Kafka (photograph)	15
Boots (photograph)	16
Cartoon by Pat Byrnes (“Researchers say I’m not happier for being richer, but do you know how much researchers make?”)	18
Karl Marx (painting)	19
Cartoon by William Hamilton (“It’s a little less amusing when you hear your kids calling it ‘the death tax.’”)	21
Figure 1.1: Growth in Real After-Tax Income from 1979 to 2007	23
Cartoon by Barbara Smaller (“Meritocracy worked for my grandfather, it worked for my father, and it’s working for me.”)	25
Justice Sandra Day O’Connor (photograph)	29
Marilyn Monroe (photograph)	36
Arnold Schwarzenegger (photograph)	40
Bill Cosby (photograph)	41
Cartoon by Harley Schwadron (“Daddy doesn’t know why birds migrate. Ask me about ways to avoid probate.”)	49
Figure 1.2: The Fall of the Privity Defense	56

### Chapter 2

Cartoon by Stu Rees (“Do you think a lot about death?”)	65
Professor Lawrence W. Waggoner (photograph)	67
Figure 2.1: Summary of the UPC Intestacy Provisions	69
Figure 2.2: Legal Recognition of Same-Sex Couples (2012)	72
Figure 2.3: Diagram of family pedigree	81

Figure 2.4: Diagram of family pedigree	82
Figure 2.5: Diagram of family pedigree	83
Figure 2.6: Diagram of family pedigree	84
Figure 2.7: Diagram of family pedigree	84
Figure 2.8: Table of Consanguinity	86
Figure 2.9: Diagram of family pedigree	87
Ella Wendel (photograph)	89
Ida Wood (photograph)	89
Henrietta Garrett (photograph)	89
The Brady Bunch (poster)	90
Belcourt Castle (photograph)	96
John Goodman and Heather Hutchins (photograph)	97
Cartoon by Roz Chast (“The Couple Who Adopted an Adult Child”)	99
Doris Duke (photograph)	102
Justice Leah Sears (photograph)	106
Kitty Oakes (photograph)	108
DNA paternity test kit (photograph)	111
Margaret H. Marshall (photograph)	113
Michayla and Mackenzie Woodward, with their mother Lauren Woodward (photograph)	115
Chris and Stella Biblis (photograph)	119
Surrogate Renee R. Roth (photograph)	120
Dr. Susan Love (photograph)	125
Laci and Scott Peterson (photograph)	139
Figure 2.10: Diagram of family pedigree	141
Justice Ruth Bader Ginsburg (photograph)	143

### Chapter 3

Figure 3.1: Comparison of Statutory Formalities for Formal Wills	149
The Seal of the Clan Dunbar	156
Bank lobby (photograph)	157
The window and parking space at issue in <i>Weber</i> (photograph)	160
McCabe’s signature by mark	161
The will in <i>Taylor v. Holt</i>	162
Mr. Meeson’s Will (drawing)	164
Justice Musmanno (photograph)	174
Chief Judge Sol Wachtler (photograph)	177
Professor John H. Langbein (photograph)	179

Disputed will of Ronald Ferree	181	Alice Paul (photograph)	277
Figure 3.2: Harmless Error Rules States (2012)	185	Spicer Breeden's holographic will	278
The first three pages of the unattested joint in <i>Hall</i>	186	Rose and Jim Lakatos (photograph)	287
The last two pages of the unattested joint in <i>Hall</i>	187	Cartoon by J.B. Handelsman ("This will surely be disappointing to many meek people. The legacy has been successfully contested, and it is now the arrogant who are to inherit the earth.")	292
Louise Macool's handwritten note	191	The townhouse at 42 East 74th Street (2012) (photograph)	298
Unsigned "rough" draft of Louise Macool's new will	192	Sophie and Max Block, fishing in Galveston, Texas (photograph)	301
Professor Theodore W. Dwight (illustration)	195	Leon Jaworski (photograph)	305
Figure 3.3: Holographic Will States (2012)	197	Cartoon by Peter Arno ("My goodness! Your dear old uncle seems to have left everything to <u>me</u> .")	308
The will in Estate of Harris and the knife used to make the will (photograph)	202	Brooke Astor (photograph)	309
The will in Estate of Gonzalez	203	George Washington (painting)	312
The donor card in Estate of Southworth	206	Father Divine (photograph)	314
The will in Williams v. Towle	207		
Kuralt's 1989 holograph	210		
Elizabeth (Pat) Shannon and Charles Kuralt (photograph)	211	<b>Chapter 5</b>	
Kuralt's 1997 letter to Shannon from the hospital	212	Chief Justice Rugg (painting)	330
The 2003 handwritten note in Minton v. Minton	215	Page 3 of the will of Ruth N. Cole	333
The 2005 will of Wayne Stoker	221	304 Harrison Avenue (2012) (photograph)	338
Steven Wayne Stoker (photograph)	222	317 Harrison Avenue (2012) (photograph)	338
Body Heat (poster)	232	The relevant portions of Eugenia Herceg's 1997 and 1999 wills	345
The first of the two pages at issue in <i>Rigsby</i>	242	Cartoon by Robert Mankoff ("What do you mean, 'Have your lawyer call my lawyer'? . . . you are my lawyer!")	350
The second of the two pages at issue in <i>Rigsby</i>	243	The front of Thelma L. Russell's holographic will	352
The revised dispositions in <i>Nielson</i>	244	The relevant portion of petition for probate in <i>Russell</i>	353
Cartoon by Barbara Smaller ("If I could pick just one keepsake, I think it would be the mutual funds.")	247	Figure 5.1: Diagram of family pedigree	358
The bottom half of the will in Johnson v. Johnson	250	Figure 5.2: Diagram of family pedigree	358
The page at issue in <i>Berry v. Tribble</i>	251	Figure 5.3: Diagram of family pedigree	359
William Jennings Bryan (photograph)	252	Figure 5.4: Diagram of family pedigree	359
Leo E. Strine, Jr. (photograph)	253	Figure 5.5: Diagram of family pedigree	372
The memorandum in <i>Moor</i>	254	Figure 5.6: Lapsed Devises: A Summary	373
Cartoon by Playboy Magazine (" . . . and to my faithful valet, Sidney, whom I promised to remember in my will—'Hi there, Sidney'—!")	257		
Justice Cleo Elaine Powell (photograph)	259	<b>Chapter 6</b>	
		Figure 6.1: From the Use to the Trust	386
		King Henry VIII (painting)	387
		Professor Austin Wakeman Scott (photograph)	388
		Professor George Gleason Bogert (photograph)	388
		Figure 6.2: Uniform Trust Code States (2012)	389
		Figure 6.3: Trust Typology	391
		Cartoon by Leo Cullum ("My only crime, Denise, was loving you too much. That and embezzling your trust fund.")	395
<b>Chapter 4</b>			
Cartoon by Frank Modell ("His will reads as follows: 'Being of sound mind and disposition, I blew it all.'")	270		
Cartoon by Ed Arno ("I now pronounce you both legally insane.")	271		
Eugen Bleuler (photograph)	276		

Judge Jason Lee (photograph)	404	Justice Herbert P. Wilkins (photograph)	521
Ann Landers (photograph)	407	Cartoon by Barbara Smaller (“In lieu of a pre-nup we decided just to label everything.”)	537
Professor Yahuda (photograph)	409	Barry Bonds (photograph)	540
Lee Strasberg (photograph)	420	The waiver of the right of election at issue in <i>Reece</i>	541
Cartoon by Royston Robertson (“It’s unorthodox, I know, but old Mrs. Featherstone has left her entire estate to her immediate family.”)	424	Exhibit A from the premarital agreement at issue in <i>Reece</i>	542
Leona Helmsley with her dog, Trouble (photograph)	426	Cartoon by Barbara Smaller (“It’s just as easy to love a man with a pension as to love a man without one.”)	554
George Fournier (photograph)	428	Cartoon by Leo Cullum (“Everything I have, son, I have because your grandfather left it to me. I see now that that was a bad thing.”)	557
Subsequently discovered note in <i>Fournier</i>	430	Jack Gray and his father John (photograph)	569
Chief Justice Horace Gray (painting)	431	Anna Nicole Smith with her son, Daniel, and her newborn daughter, Dannielynn (photograph)	573
The Rev. Wells (painting)	432		
<b>Chapter 7</b>		<b>Chapter 9</b>	
Woodrow V. Lesikar (photograph)	446	Justice Benjamin N. Cardozo (photograph)	587
Woody Lesikar and the No. 1 Business Charter Jet (advertisement)	447	Mark Rothko (photograph)	595
Figure 7.1: Unified Estate Planning via Revocable Trust	463	Theodoros Stamos (photograph)	596
Patty Hearst (photograph)	466	Captain T. Frederik Marsman (Cappy) (photograph)	604
Norman F. Dacey, How to Avoid Probate! (book cover)	467	Judge Learned Hand (photograph)	610
Cartoon by Michael Shaw (“No, but I can tell you the meaning of whole or term life insurance.”)	470	The South Sea Company Stock Bubble (graph)	615
The will of Douglas Cook	472	Mark Twain (photograph)	617
The will and IRA agreement at issue in <i>Nunnenman</i>	481	Figure 9.1: Trust Assets Held in Stock and in Government Bonds (1986-2006)	618
The handwritten note at issue in <i>Nunnenman</i>	482	Figure 9.2: Average Annual Total Returns by Asset Class (1926-2011)	619
Justice Clarence Thomas (photograph)	485	Professor Harry M. Markowitz (photograph)	620
Justice Stephen Breyer (photograph)	487	Cartoon by Leo Cullum (“I was spreading some risk around, and apparently it all wound up in your portfolio.”)	624
Figure 7.1: Transfer-on-Death Deed for Real Property States (2012)	494	Rodney B. Janes (photograph)	626
Groucho Marx (photograph)	496	Kodak Stock Price (1973-1980) (graph)	628
The power of attorney at issue in <i>Kurrelmeyer</i>	499	Kodak bankruptcy filing (2012)	631
Terri Schiavo (photograph)	505	Cartoon by Bill Woodman (“Thank you, Bentley. We get the picture.”)	632
Orville M. Richardson (photograph)	507	Figure 9.3: Variance in Capital Lost Plus Interest	636
Professor Alvin E. Roth (photograph)	509	The entry of judgment in <i>Wood</i> on remand	642
		Cartoon by Roy Delgado (“Things to Do: I. Delegate....”)	651
		Judge Darleen Ortega (photograph)	658

Judge Albert M. Rosenblatt (photograph)	664	<b>Chapter 12</b>	
The northwest corner of Third Avenue and Columbia Street (2013) (photograph)	669	Lord Justice Fry (illustration)	803
Leonard T. Troland (photograph)	681	Judge Kerry I. Evander (photograph)	817
		The power of appointment at issue in <i>Timmons</i>	817
<b>Chapter 10</b>		The exercise of the power at issue in <i>Timmons</i>	818
William Angus Drogo Montagu (photograph)	690	The trust provisions at issue in <i>Brown</i>	822
Justice Samuel F. Miller (photograph)	695	<b>Chapter 13</b>	
Cartoon by William Hamilton (“Typical trust-fund red from a vanity vintner.”)	702	Table 13.1: Classification of Future Interests	834
Figure 10.1: Asset Protection Trust States (2012)	704	Professor Lewis M. Simes (photograph)	842
Jonathan Blattmachr and a king salmon (photograph)	705	Sir Edward Coke (painting)	843
KenKut plastic wrap dispenser and a wrapped plate of strawberries (photograph)	707	Figure 13.1: Antilapse Rules for Future Interests in Trust (2012)	857
Charles Ponzi (photograph)	707	Figure 13.2: Diagram of family pedigree	865
Lord Langdale (painting)	718	<b>Chapter 14</b>	
Justice Walbridge A. Field (photograph)	719	Professor John Chipman Gray (photograph)	878
Joseph Pulitzer (photograph)	725	The sixth Duke of Norfolk (painting)	879
USS Enterprise (photograph)	731	Lord Chancellor Nottingham (painting)	879
Judge Sherri B. Sullivan (photograph)	738	George Clooney and The Descendants (poster)	881
		Lord Kenyon (painting)	885
<b>Chapter 11</b>		Rajo Devi, holding her daughter, with her husband Bala Ram (photograph)	886
Figure 11.1: Top Ten U.S. Grant-Making Foundations by Endowment	744	Joseph P. Kennedy, Joseph P. Kennedy Jr., and John F. Kennedy (photograph)	891
Figure 11.2: Top Ten U.S. University Endowments	744	Professor W. Barton Leach (photograph)	892
Dr. Albert Barnes (photograph)	763	Professor A. James Casner (photograph)	892
An Exhibit in the old Barnes Foundation Gallery in Merion (photograph)	765	Chief Justice Mary J. Mullarkey (photograph)	893
An Exhibit in the new Barnes Foundation Gallery in Philadelphia (photograph)	765	Wells Fargo advertisement	897
Senator Augustus O. Bacon (photograph)	767	Figure 14.1: Perpetual Trust States (2012)	898
The Smithers Alcoholism Center (drawing)	770	Benjamin Franklin (painting)	915
R. Brinkley Smithers (photograph)	771	Wellington R. Burt (photograph)	916
Eliot Spitzer (photograph)	773	<b>Chapter 15</b>	
Adele C. Smithers and Derek Jeter (photograph)	777	President Franklin D. Roosevelt (photograph)	920
Milton S. Hershey and the Orphan Boys (photograph)	780	Figure 15.1: Calculation of the Estate Tax	937
Princess Bernice Pauahi Bishop (photograph)	786	Cartoon by Martha Campbell (“For those with particularly ungrateful children, the inheritance tax can be a comfort.”)	938
IRS Form 990	790	Judge Betty Fletcher (photograph)	965
Bill Gates, Melinda Gates, and Warren Buffett (photograph)	793	Figure 15.2: State Estate and Inheritance Taxes	977



## 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 ten years ago, three years after publication of the sixth edition, necessitating succession of authorship for this book. With this ninth edition, that process continues. James Lindgren, a new coauthor in the seventh edition, now formally retires from authorship, joining Stanley M. Johanson as a coauthor emeritus. Robert H. Sitkoff, the other new coauthor in the seventh edition, now assumes full responsibility (trusteeship?) for this book.

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

With this ninth edition, we have undertaken a complete redesign of the book. This edition has a two-color interior and a vastly expanded program of photos, case documents, and other images. Case squibs have been almost completely removed, and extraneous references have been pruned away. Every chapter begins with a statement of its themes and how they tie into the broader themes of the book as a whole. Our goal in the redesign was to reinvigorate the book, making it easier for instructors to use and even more engaging for students. At the same time, we have endeavored to preserve the essential character of the book, which of course 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 disposition 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 of a will (Chapter 5, on construction). What makes this problem difficult and interesting is the "worst evidence rule" of probate procedure, whereby the best witness is dead by the time the court considers such matters. Chapter 6 introduces the trust, which can be used to effect 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 substantial competitor to the system of 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 the

surviving spouse and children. In Chapters 9 through 14 we return to the law of trusts to consider some more advanced issues: 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 intestacy and of wills 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 expensive probate. Imaginative scholars then began to ventilate this ancient law of the dead hand, challenging assumptions and suggesting judicial and legislative innovation to simplify and rationalize it. Medical science complicated matters by creating varieties of parentage unheard of a generation earlier. Legal malpractice in drawing 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.

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 largely to problems in drafting and construing trust instruments. The teachings of modern portfolio theory and the shifting locus of wealth from land to financial assets has put pressure on the law of trust investment and administration, which evolved in simpler times. In contemporary American trust practice, fiduciary obligation has replaced limitations on the trustee's powers as the principal mechanism for safeguarding the beneficiary from mismanagement or abuse by the trustee. Meanwhile, the burgeoning tort liability of modern times has spawned an asset protection industry and with it radical change in the rights of creditors to trust assets.

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 now 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 and the general philosophy and purposes 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 continuing evolution and the sometimes 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 is

a field concerned fundamentally with 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 sand castles, are essential to being a *counselor* at law, as opposed to being a mere lawyer. 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, draftsman, or advocate, is an important figure in the *dramatis personae*.

For their sage advice on this revision, we thank Ellen Aprill, Mary Sarah Bilder, Karen Boxx, Ronald Chester, Jeffrey Cooper, Bridget Crawford, Barry Cushman, Alyssa DiRusso, Jim Dwyer, Daniel Ebner, Tom Eisele, Steve Fast, Noah Feldman, Miranda Fleischer, Susan French, John Goldberg, Randall Gingiss, Mark Glover, Iris Goodwin, Howard Helsinger, Adam Hirsch, David Horton, Richard Hyland, Bruce Johnson, Andy Kaufman, Daniel Kelly, Diane Klein, Kristine Knaplund, Terry Kogan, Andrew Kull, John Langbein, Ray Madoff, Bruce Mann, Robert McLeod, John Morley, Ann Murphy, David Orentlicher, Alan Oxford, Katherine Pearson, John Plecnik, Amy Ronner, Kerry Ryan, Kent Schenkel, Frank Schiavo, Jeffrey Schoenblum, Frederic Schwartz, Thomas Schweitzer, David Seipp, Henry Smith, Gary Spitko, Carla Spivack, Palma Strand, Joshua Tate, Terry Turnipseed, Sarah Waldeck, Reid Kress Weisbord, Peter Wendel, and Tess Wilkinson-Ryan.

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Three other groups of people need mention. First, Eric Holt, Carol McGeehan, and Peter Skagestad at Aspen brought rich intelligence and sound judgment to the project. Second, Troy Froebe and Meri Keithley developed and then executed the new design, which proved a greater challenge than any of us had expected, but they were more than equal to the task. The beauty of the pages that follow speaks for itself. Finally, we thank our partners, David Sanders and Tamara Sitkoff, for their patience and support in bringing out this new edition.

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

May 2013

*Editors' note:* All citations to state and federal statutes and regulations are to such authorities as they appeared on Lexis or Westlaw at year-end 2012 unless stated

otherwise. The current edition of the legendary Scott treatise, Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* (5th ed. 2006-2010), is cited throughout as *Scott and Ascher on Trusts*. 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 [http://www.law.harvard.edu/faculty/COI/2012\\_Sitkoff\\_Robert.html](http://www.law.harvard.edu/faculty/COI/2012_Sitkoff_Robert.html).



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