

DUKEMINIER
JOHANSON
LINDGREN
SITKOFF

WILLS, TRUSTS,
AND ESTATES

*Seventh
Edition*

ASPEN
PUBLISHERS

Seventh Edition

WILLS, TRUSTS, AND ESTATES

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111 Eighth Avenue, New York, NY 10011
www.aspenpublishers.com

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Aspen Publishers
Attn: Permissions Department
111 Eighth Avenue, 7th Floor
New York, NY 10011-5201

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 0-7355-3695-3

Library of Congress Cataloging-in-Publication Data

Wills, trusts, and estates / Jesse Dukeminier . . . [et al.]. — 7th ed.

p. cm.

Rev. ed. of: Wills, trusts, and estates / Jesse Dukeminier, Stanley M. Johanson. 6th ed. c2000.

ISBN 0-7355-3695-3 (hardcover : alk. paper)

1. Wills — United States — Cases. 2. Estate planning — United States — Cases. 3. Future interests — United States — Cases. 4. Trusts and trustees — United States — Cases. I. Dukeminier, Jesse.

II. Dukeminier, Jesse. Wills, trusts, and estates.

KF753.A7D8 2005

346.7305 — dc22

2005007687

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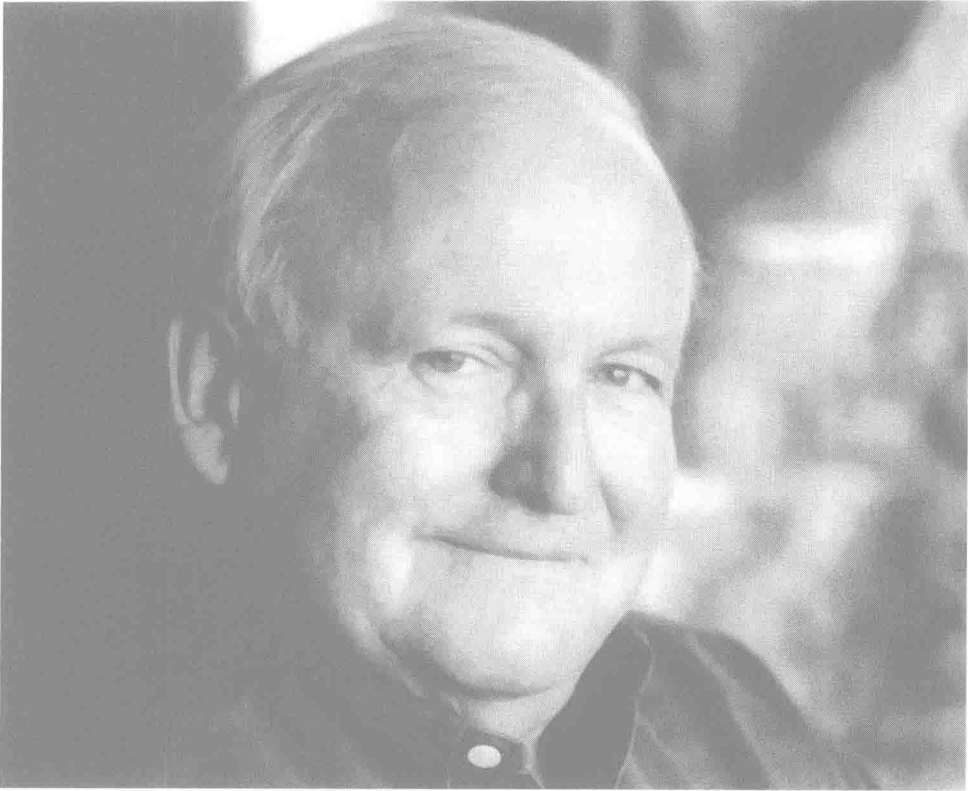
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For Jesse Dukeminier,
teacher to us all



Jesse Dukeminier, 1925-2003

PREFACE

As trusts and estates lawyers, we are in the business of succession. The passing of Jesse Dukeminier in April of 2003 reminds us of this reality in a deeply personal way. In this seventh edition, we begin the process of authorship succession with James Lindgren and Robert H. Sitkoff joining the book.

Wills, Trusts, and Estates is designed for use in a course on trusts and decedents' estates and as an introduction to estate planning. Our basic aim in this seventh edition remains as before: to produce not merely competent practitioners in the trusts and estates field, but lawyers who think critically about problems in family wealth transmission and compare alternative solutions. Trusts and estates is a vibrant field whose difficult policy questions demand careful consideration.

Since the 1960s, the law of wills has been undergoing 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 and death-deferring machines unheard of a generation ago. And legal malpractice in drawing wills and trusts arrived with a bang. Scholars, science, and malpractice liability are a potent combination for driving law reform.

The use of trusts to transmit family wealth has become commonplace, not only for rich clients, but also for those of modest wealth. In expanding, the law of private trusts has annexed the law of future interests and powers of appointment, reducing these two subjects largely to problems in drafting and construing trust instruments. The teachings of modern finance 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. As a result, the fiduciary obligation has eclipsed limitations on the trustee's powers as the principal device 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 nascent but radical change in the rights of creditors to trust assets.

Taxation of donative transfers has changed dramatically. The unlimited marital deduction — which permits spouses to make unlimited tax-free gifts and bequests 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, is delivering potentially lethal blows to the Rule against Perpetuities. In 2001, Congress enacted legislation that phases out the federal wealth transfer taxes by 2010, but then in 2011 these taxes will revert to their pre-2001 form. Surely this will not be Congress's last word on the subject.

Throughout the book we emphasize the basic theoretical structure and the general philosophy and purposes that unify the field of donative transfers. We are interested in function, 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 historical roots of modern law. Understanding how the law became the way it is illuminates both the continuing growth of the law 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. 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 attorney.

As we said in the first edition of this book, in 1972:

In this book we deal with people, the quick as well as the dead. There is nothing like the death of a moneyed member of the family to show persons as they really are, virtuous or conniving, generous or grasping. Many a family has been torn apart by a botched-up will. Each case is a drama in human relationships — and the lawyer, as counselor, draftsman, or advocate, is an important figure in the *dramatis personae*. This is one reason the estates practitioner enjoys his work, and why we enjoy ours.

This observation remains true today. In a changing reality the human drama abides. Trusts and estates is a field concerned fundamentally with people.

For their sage advice on this revision, we thank David Becker, Karen Boxx, Eric Chason, Ronald Chester, Judith Daar, Joseph Dodge, Susan French, Philip Hamburger, Howard Helsing, Adam Hirsch, Kenneth Joyce, Robert Katz, John Langbein, Ray Madoff, Bruce Mann, Geoffrey Manne, Alan Newman, Richard Primus, Randy Roth, Jeffrey Sherman, Ethan Stone, and Joshua Tate. In addition, we must single out two colleagues: Stephanie Willbanks for her assistance with tax matters throughout the book and her taking the lead in revising Chapter 14, and Helene Shapo for her ongoing encouragement and stimulation. We owe a great debt to Georgia Alexakis, Ericka Schnitzer, Jeremy Sitkoff, and Cathy Yu for superb research assistance, and to Kathryn Hensiak and Amy Mangan for additional research support. We thank Melody Davies, Sarah

Hains, Eric Holt, Carol McGeehan, and Carmen Reid at Aspen for bringing rich intelligence and sound judgment to this project. Finally, we thank our partners, David Sanders, Gerrie Johanson, Valerie Lindgren, and Tamara Sitkoff, for their support — both substantive and emotional — in bringing out this new edition.

Jesse Dukeminier, 1925-2003

Stanley M. Johanson

James Lindgren

Robert H. Sitkoff

January 2005

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ACKNOWLEDGMENTS

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ESTATES

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*Chapter 14 was revised for the Seventh Edition principally by Stephanie J. Willbanks, Professor of Law at Vermont Law School.

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