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*SITKOFF  
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WILLS, TRUSTS,  
AND ESTATES

*Tenth  
Edition*



Wolters Kluwer  
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ASPEN CASEBOOK SERIES



# WILLS, TRUSTS, AND ESTATES

TENTH EDITION

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Harvard University

**JESSE DUKEMINIER**

Late Maxwell Professor of Law  
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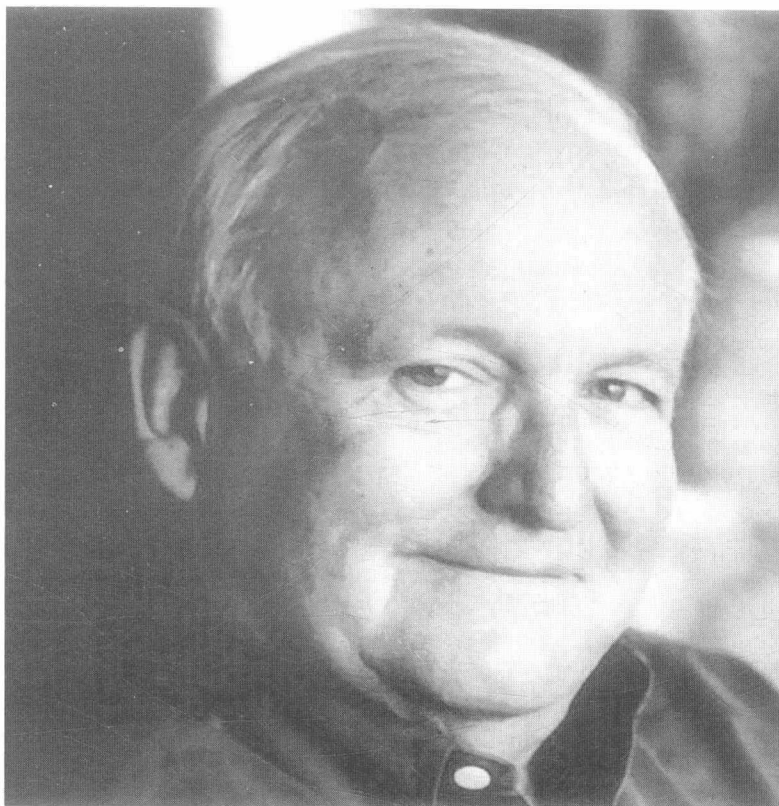


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JESSE DUKEMINIER, 1925-2003

For Tamara, my partner and heir apparent.  
I will be forever grateful that you agreed to integrate our household  
production functions and to sponsor joint franchisees.

—RHS



## 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 nearly fifteen years ago, three years after publication of the sixth edition, necessitating succession of authorship for this book. With this tenth edition, that process continues. Robert H. Sitkoff, a new coauthor in the seventh edition who assumed sole responsibility (trusteeship?) for this book in the ninth edition, becomes the lead author in this tenth 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 basic aim in this tenth 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.

This tenth edition carries forward the redesign of the book that we undertook for the ninth edition. This edition thus has a two-color interior and a robust program of photos, documents, and other images. Case squibs and extraneous references have been resisted. Every chapter begins with a statement of its themes and how they tie into the broader themes of the book as a whole. As always, 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 (Chapter 5, on construction) of a will. 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 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 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—and more is yet to come, such as to address the rise of electronic or digital wills.

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 nature 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 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 recourse 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 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, drafter, or advocate, is an important figure in the *dramatis personae*.

For their sage advice on this revision, we thank Kevin Bennardo, Karen Boxx, Patricia Cain, Elizabeth Carter, Bridget Crawford, Barry Cushman, Judith Daar, Robert Danforth, Charles Donahue, Stephen Dycus, Steve Fast, David Feder, Todd Flubacher, Mark Glover, Iris Goodwin, Howard Helsinger, David Herzig, Steven Horowitz, David Horton, Elizabeth Kamali, Daniel Kelly, Diane Klein, Kristine Knaplund, Terry Kogan, John Langbein, Ray Madoff, Solangel Maldonado, F. Philip Manns, Goldburn Maynard, Ben McFarlane, Nancy McLaughlin, Ljubomir Nacev, Alan Newman, David Orentlicher, Benjamin Orzeske, Katherine Pearson, Jeff Pennell, John Plecnik, Andrzej Rapaczynski, Thomas Robinson, Amy Ronner, Randy Roth, Jeffrey Schoenblum, Paul Secunda, David Seipp, Thomas Simmons, Gary Spitko, Carla Spivak, Palma Strand, Max Straus, Eva Subotnik, Joshua Tate, Lee-ford Tritt, Suzanne Walsh, Judith Younger, Howard Zaritsky, and Diana Zeydel.

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

April 2017

*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 2016 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.

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## SUMMARY OF CONTENTS

<i>Contents</i>		xiii
<i>List of Illustrations</i>		xxvii
<i>Preface</i>		xxxiii
<i>Acknowledgments</i>		xxxvii
Chapter 1	INTRODUCTION: FREEDOM OF DISPOSITION	1
Chapter 2	INTESTACY: AN ESTATE PLAN BY DEFAULT	63
Chapter 3	WILLS: FORMALITIES AND FORMS	141
Chapter 4	WILLS: CAPACITY AND CONTESTS	263
Chapter 5	WILLS: CONSTRUCTION	325
Chapter 6	TRUSTS: CHARACTERISTICS AND CREATION	385
Chapter 7	NONPROBATE TRANSFERS AND PLANNING FOR INCAPACITY	439
Chapter 8	LIMITS ON FREEDOM OF DISPOSITION: PROTECTION OF THE SPOUSE AND CHILDREN	519
Chapter 9	TRUSTS: FIDUCIARY ADMINISTRATION	587
Chapter 10	TRUSTS: ALIENATION AND MODIFICATION	695
Chapter 11	TRUSTS: CHARITABLE PURPOSES, CY PRES, AND SUPERVISION	759
Chapter 12	TRUSTS: POWERS OF APPOINTMENT	807
Chapter 13	TRUSTS: CONSTRUCTION AND FUTURE INTERESTS	845
Chapter 14	THE RULE AGAINST PERPETUITIES AND TRUST DURATION	887
Chapter 15	WEALTH TRANSFER TAXATION	929
<i>Table of Cases</i>		983
<i>Author Index</i>		993
<i>Index</i>		999





# CONTENTS

<i>List of Illustrations</i>	xxvii
<i>Preface</i>	xxxiii
<i>Acknowledgments</i>	xxxvii
Chapter 1 INTRODUCTION: FREEDOM OF DISPOSITION	1
A. The Power to Transmit Property at Death	2
Lawrence M. Friedman, <i>Dead Hands: A Social History of Wills, Trusts, and Inheritance Law</i>	2
1. Freedom of Disposition and the Dead Hand	3
<i>Shapira v. Union National Bank</i>	5
2. Justifying Freedom of Disposition	16
a. The Donor's Prerogative	16
Adam J. Hirsch & William K.S. Wang, <i>A Qualitative Theory of the Dead Hand</i>	16
Daniel B. Kelly, <i>Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications</i>	18
b. Concentrations of Wealth	19
Wojciech Kopczuk, <i>What Do We Know About the Evolution of Top Wealth Shares in the United States?</i>	20
Edward N. Wolff & Maury Gittleman, <i>Inheritances and the Distribution of Wealth or Whatever Happened to the Great Inheritance Boom?</i>	21
c. Human and Cultural Capital	22
Stephen J. McNamee & Robert K. Miller, Jr., <i>The Meritocracy Myth</i>	22
d. A Question of Tax Policy?	25
3. From Feudalism to a Constitutional Right	29
4. Posthumously Created Property Rights	33
<i>Shaw Family Archives Ltd. v. CMG Worldwide, Inc.</i>	33
B. The Mechanics of Succession	40
1. Probate and Nonprobate Property	40
2. Probate Terminology	41
3. Probate Administration	44
a. Opening Probate and Choice of Law	44
b. Common Form and Solemn Form Probate	45
c. Formal and Informal Probate	45
d. Supervised and Unsupervised Administration	46
e. Barring Creditors	47
f. Closing the Estate	47
4. Can Probate Be Avoided?	49