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WILLS, TRUSTS,
AND ESTATES

*Eighth
Edition*



Wolters Kluwer

Law & Business

ASPEN PUBLISHERS

Eighth Edition

WILLS, TRUSTS, AND
ESTATES

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*Late Maxwell Professor of Law
University of California, Los Angeles*

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Wolters Kluwer
Law & Business

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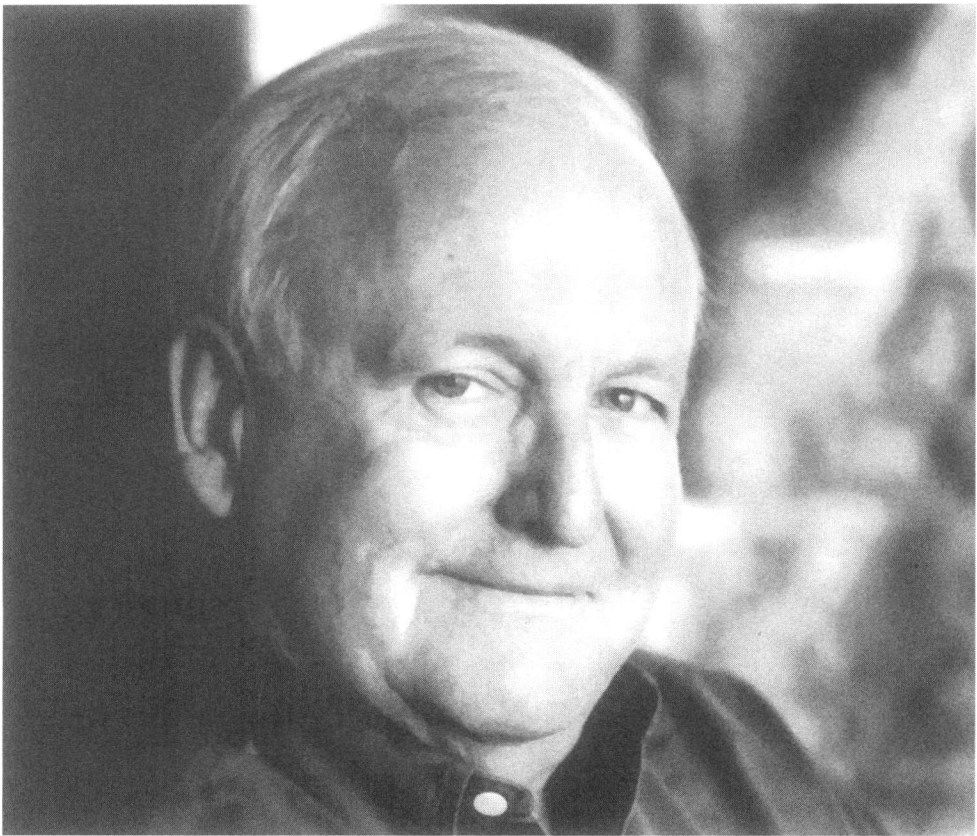
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For David Sanders,
who inspired Jesse Dukeminier,
who inspired the rest of us.



Jesse Dukeminier, 1925-2003

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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 in April 2003, necessitating the succession of authorship for this book. With this eighth edition, that process of succession continues. Stanley M. Johanson, who has been serving in an emeritus capacity, now formally retires from authorship. Robert H. Sitkoff and James Lindgren, new coauthors in the seventh edition, assume full responsibility for this revision. Jesse remains the first author, however, and with good reason. Much of the wit, erudition, and playfulness of the book belongs to Jesse, whose importance to us and to the field cannot be overstated.

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 eighth edition remains as before: to produce not merely competent practitioners in trusts and estates, but lawyers who think critically about problems in family wealth transmission and are able to compare alternative solutions.

Since the 1960s, the law 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 rich 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 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 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 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, has delivered a potentially lethal blow 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. Further legislation, striking a new compromise, seems likely in the near future.

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. 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 Jesse and Stan 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 and their relationships.

For their sage advice on this revision, we thank Jane Baron, Jerry Borison, Karen Boxx, Evelyn Brody, Eric Chason, Ronald Chester, Jeff Cooper, Bridget Crawford, Judith Daar, Alyssa DiRusso, Tom Eisele, Miranda Fleischer, Bradley Fogel, Frances Foster, Susan French, Martin Fried, Gail Frommer, Susan Gary, Wayne Gazur, Randy Gingiss, Howard Helsing, Adam Hirsch, David Horton, Richard Hyman, Bruce Johnson, Kenneth Kettering, Diane Klein, Kris Knaplund, John Langbein, William LaPiana, Michael Lewyn, Ray Madoff, Bruce Mann, Nancy McLaughlin, Fran Miller, Alan Newman, Craig Oren, Eric Rakowski, Laura Rosenbury, Ron Scalise, Max Schanzenbach, Kent Schenkel, Jeffrey Schoenblum, Frederic Schwartz, Helene Shapo, Gary Spitko, Jeffrey Stake, Joshua

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Jesse Dukeminier, 1925-2003

Robert H. Sitkoff

James Lindgren

April 2009

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