Fifth Edition

WILLS, TRUSTS, AND ESTATES

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PREFACE

This book is designed for use in a course in decedents' estates and trusts, and as an introduction to estate planning. Our basic aim in this fifth edition remains as before: to produce not merely competent practitioners in the estates and trusts field, but lawyers who think critically about problems in family wealth transmission and compare alternative solutions. We seek to educate policy analysts as well as estate planners.

The first edition of this book appeared in 1972. Glancing at it, we are struck not by the similarities, of which there are, of course, many, but by the enormous changes that new developments in this field have dictated. 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. Then imaginative scholars began to ventilate this ancient law of the dead hand, challenging assumptions and suggesting judicial and legislative innovation to simplify and rationalize it. New types of wealth, such as pension and tax-deferred savings, were created. Medical science complicated matters by creating varieties of parentage and death-deferring machines unheard of 25 years ago. And legal malpractice in drawing wills and trusts arrived with a bang. The ensuing changes in both law and practice have been many, and they are far from over.

The use of trusts to transmit family wealth has become commonplace, not only for rich clients, but also for those of modest wealth. During the last quarter of a century lawyers have come to regard the trust as the best solution to all sorts of client problems. As a result, trusts have proliferated. 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 fiduciary obligation—with its attendant duties to beneficiaries—has be-

come the most useful and important principle in our society for managing resources of all types, public as well as private.

Taxation of donative transfers has changed dramatically. The unlimited marital deduction is now a central feature of estate planning. In 1986, Congress enacted the generation-skipping transfer tax, implementing a policy of taxing away about half of millionaires' wealth each generation. This new tax is having a profound effect on estate planning for the very rich.

Throughout the book we emphasize the basic theoretical structure and the general philosophy and purposes that unify the field of donative transfers. 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). So too we have omitted old technical learning and disappearing distinctions of little contemporary importance. 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 of thought inherited from the past.

Although we organize the material in topical compartments rather precisely fit together, we have also sought a more penetrating view of the subject as a staggering tapestry of humanity struggling to merge dreams with reality. Every illustration included, every behind-the-scenes peek, every quirk of the parties' behaviour 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.

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 for students preparing themselves to counsel clients in the twenty-first century. In a changing reality the human drama abides.

John Langbein, Mark Reutlinger, and Jeffrey Sherman have sent us invaluable suggestions for improving the book, for which we are much indebted. Our production manager, Margaret Kiever of UCLA Law School, assembled the manuscript on her word processor with incompa-

rable skill. We cannot imagine how we could have brought about the thorough renovation of the earlier edition without her. Alistair Nevius and Barbara Rappaport, of Little, Brown and Co., have edited the manuscript and inserted the illustrations with intelligence and care. For this assistance, we are most grateful.

Jesse Dukeminier
Stanley M. Johanson

October 1, 1994

Editors' note: Throughout the book, footnotes to the text and to opinions and other quoted materials are numbered consecutively from the beginning of each chapter. Some footnotes in opinions and secondary authorities are omitted. Editors' footnotes added to quoted materials are indicated by the abbreviation: — Eds.

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