

**MASSACHUSETTS SCHOOL OF LAW at ANDOVER**

**SYLLABUS FOR WILLS AND TRUSTS-- Fall 2023**

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**Text**: see bookstore list.

The course book is Wills, Trusts and Estates, by Sitkoff and Dukeminier (Aspen Publishers, 11th ed., 2021, but the 10th edition is fine). Students will be responsible for the reading assignments set forth below and as may be assigned in class from time to time, as well as for supplemental handouts and all ethical and other issues raised in the readings and class discussions. We will also be discussing the Massachusetts Uniform Probate Code (MUPC) and Massachusetts Uniform Trust Code (MUTC).

A high degree of preparation for class and participation in class discussion are expected. Assigned reading for each class must not only be read, but also thoroughly thought through prior to class. Problems presented in the reading should be studied for purposes of self-testing and enhancement of understanding in preparation for class discussion. Some problems, or variations thereon, will be discussed in class, as will original hypotheticals. Think through the questions presented in this syllabus. Get an understanding of public policy and its rationale. All law derives therefrom.

The objective of this course is to introduce to the student the basic concepts of wills and trusts, and therefore, estate planning and probate administration. The course is intended to provide students with an appreciation of the myriad of issues and their interrelation, as well as with a sufficient working knowledge of same, to enable the student to approach an estate planning or probate problem with confidence, to recognize issues, and to know how to find answers. Some tax issues will be pointed out during the course to make the students aware and wary of them.. Do well, and we will have even more fun when you enroll in my online Drafting Wills & Trusts course in the Spring semester.

**No. Assignment**

 **Introduction**

1. Read Pages 1-39: The Power to Transmit Property at Death

What justification is there for a policy of allowing transfers at death?

 Do decedents have a justifiable expectation of giving?

 Do family members have a justifiable expectation of receiving?

 What, if any, social goal is furthered by permitting transfers upon death?

 Do we have a right to transmit property at death, or just a privilege which the State may

 limit, or deny entirely?

 What are the ways that a decedent can pass property upon death?

 What limitations may the State place upon the power to transmit?

2. Read 40-51: The Mechanics of Succession

 and 51-62 *plus* Miller v. Mooney, 431 Mass. 57 (2000): Professional Responsibility

 The Mechanics of Succession

 Learn the terminology.

 Understand the probate process. That is what "probate avoidance planning" seeks to

 avoid.

 Should it be avoided? Is it a bad process? How can one avoid it?

 Does it have benefits and are those benefits lost by probate avoidance planning?

 When is probate necessary?

 We will see more as we proceed.

 Professional Responsibility

 Who is the client?

 To whom does the attorney owe a duty?

 Can an attorney have more than one client in the same case?

 Can the attorney fulfill duties to more than one client in the same case?

 Are interests of parties to whom the attorney owes a duty the same?

 What can happen when interests differ?

 How does an attorney self-protect?

 **Intestacy**

3. Read pages 63-90

 What is an "heir"?

 Is a spouse an heir? What is a spouse under federal law, under state law?

 What happens when spouses die simultaneously? What if one survives the other by a

 minute?

 Where do children come in? Are all children equal? Should that matter?

4. Read pages 90-127

 What is a child for inheritance purposes?

 Should a foster parent be allowed to inherit from her foster child that she raised if the

 foster parent never formerly adopted the child?

 Can childhood status for inheritance purposes be manipulated, by a descendent, by the

 legislature, by the courts, by medical science?

 How long should distribution of a parent's estate be held up pending determination as to

 who qualifies as a child for inheritance purposes?

 When is a lifetime gift to a child a gift and when is it an inheritance?

 Distinguish among guardianship, conservatorship, custodianship and trusts.

 What are the pros and cons of each?

 Is there a best way to leave property to a child? What factors should be considered?

5. Read pages 127-162

 Forfeiting vs. relinquishing an inheritance.

 Why should I lose my inheritance just because I caused my parent’s death?

 What if it was an accident? What if it was intentional, but not premeditated?

 But Dad was suffering and he was going to die anyway!

 What is a disclaimer; how does it work; and, when may we use it?

 **Wills**

 How should a will be executed?

 What is the big deal about signing anyway? Why have witnesses to the signing?

 What does it mean to witness a will?

 Who qualifies as a witness and who does not? Why?

6. Read pages 162-197

 How strict should we be with signing and witnessing a will?

 What can go wrong with signing and witnessing, and what can be done about it?

 What is a notary and what function does the notary serve?

7. Read pages 197-231

 There is an exception to everything, or how to get around will execution formalities;

 holographic wills. Is this so? What is a holographic will? Note the history of the law.

 What is a holographic will’s key element?

 Now that we can create a will, how do we revoke it? What is the key element here?

8. Read pages 231-262

 What happens to a will once it is revoked?

 What constitutes the will?

 May a will be composed of multiple parts?

 What may be included and what not? Some say timing is everything!

 What is a codicil? How does it work?

 Is it a codicil or is it a replacement will? How do we tell?

 Can I bind myself to make or not revoke a will?

 What law applies: Law of wills or law of contracts?

 What qualifies as a binding contract?

 Can the contract be undone (in effect) without breaching it?

9. Read pages 263-288

 How much capacity is necessary to make a valid will?

 How is capacity measured? What can affect capacity?

 How easy is it to challenge a will on a claim of lack of capacity?

 How do you protect a client's will against a claim of lack of capacity on the part of the

 testator?

 What is influence? When is it "undue"? How do we measure degrees of "undue"?

 How can a client's will be protected against a claim of undue influence on the testator?

10. Read pages 288-317

 More on undue influence: Other perspectives.

 What is view of law on undue influence?

 Who has burden of proof on issue of undue influence?

 What may/should a lawyer do ethically to carry out the wishes of a client?

 What must a lawyer not do to the client?

 What is duress? How do we distinguish it from undue influence?

11. Read pages 317-351

 What is fraud in the procurement of a will?

 What does the will mean; how do we construe the will?

 Are we restricted to just the language contained in the will?

 When, if at all, may we go outside the will?

 What is a "mistake"? What do we do about mistakes?

 What justifies looking outside the will for the testator's intent when the whole thrust of

 the law of wills is to have the testator's wishes fully expressed in the will?

 Is this good policy or bad?

 What is happening to the law of wills?

12. Read pages 351-384

 What happens to a bequest when the named legatee predeceases the testator: changes in

 legatees and the requirement of survivorship.

 What can a lawyer do to avoid the problem?

 Are legislative default rules the answer?

 Who benefits under the anti-lapse statute?

 What is a class and how are its members treated?

 The only constant sometimes is change.

 What happens when testator's property changes between time of signing the will and

 testator's death? Does legatee get anything?

 **Trusts**

13. Read pages 385-418

 Now for the good stuff: Trust me!

 What is a trust? What are its elements? What is its function?

 How does the trust compare to the legal life estate with remainder interest and to custodianship?

 What is the key element?

 Is the trustee responsible for anything? Does the trustee have liability for the trustee's action? To whom may the trustee be liable?

 What protections are there for a trustee, i.e. what limitations are there on a beneficiary's right or

 opportunity to hold a trustee accountable?

 Without funding (property identified to the trust relationship), there is no trust!

 Remember the key element in identifying property to the trust.

 What is “property”? What “property” may be used to fund a trust?

14. Read pages 418-453

 How do we know who is a beneficiary?

 How definite do we have to be in identifying beneficiaries?

 What about pets? Who is going to care for Fifi?

 Do trusts have to be in writing?

 When do they have to? When not?

 **Nonprobate Transfers and Planning for Incapacity**

 Can we avoid the probate process?

 How can we do so? What tools do we have to do so?

 What is a revocable trust, and does it avoid probate?

15. Read pages 453-478

 Why is a revocable trust not a testamentary instrument requiring probate?

 What law applies to revocable trusts? Why?

 How are revocable trusts used?

 What is a pour-over will? How does it work? What does it do? When do we want to use it?

What about P.O.D.’s on life insurance? Testamentary?

16. Read pages 478-510

 What about P.O.D.’s on retirement accounts, brokerage accounts?

Are they testamentary? Do they require the formalities of testamentary instruments?

 Is probate court encountered only at death? How might we encounter probate court during life?

 Can we avoid probate during life? Do we want to? What are the pros and cons?

 What is a power of attorney? What is a durable power of attorney?

 What is it for? How does it work?

 What powers should be included in it?

 Who should be named the agent (attorney-in-fact)?

 Is the power of attorney a safe tool to use?

**Limits on Freedom of Disposition: Protection of the Spouse and Children**

17. Read pages 519-553

 Can we disinherit our spouses?

 Should the surviving spouse have a claim against the estate of the deceased spouse?

 Does State have the power to limit one's disposition of his estate by requiring a share for the

 surviving spouse?

 Is there a taking for which compensation is due per rationale in Hodel vs. Irving?

 What is the elective share? How is it measured? Can the right to an elective share be waived?

 How?

18. Read pages 553-585

 What is community property?

 If my state is a separate property state, do I have to worry about community property laws?

 Can we disinherit our kids, or do kids have a right to their parents' estate?

 What do we do when children are not included in the will?

 Was the omission intentional? What if not? Is there liability for testator's attorney?

 **Trusts: Fiduciary Administration**

19. Read pages 587-624

 Where does the trustee fit into all of this? What are the duties of a trustee?

 What is the trustee dealing with?

 What is loyalty? To whom is the duty of loyalty owed?

 How do we deal with a breach of loyalty after the fact?

 Can the trust be made whole? What is the remedy?

 What should a non-breaching trustee do when he learns that his co-trustee intends to breach the duty of loyalty?

 What does it mean to be a beneficiary? What are the beneficiary’s rights?

 What do rights of beneficiary mean for the trustee? What are the trustee’s duties?

 May a beneficiary be passive about his rights and still be entitled to them?

 Does the trustee have a duty to actively look out for the beneficiary, or just react?

20. Read pages 624-657

 How are assets of the trust to be invested?

 What guides the trustee in investment decisions?

 What other functions must the trustee perform?

 What risk of liability does the trustee run?

 How does the trustee protect trust property?

 Is the beneficiary entitled to know what the trustee is doing with the trust property?

 What is the duty to inform and account to beneficiaries?

 Why is there that duty?

 What are the correlative rights of the beneficiaries?

 Does the beneficiary have any duty in this regard?

21. Read pages 657-686

 Who should be trustee?

 May trustee duties be divided up? How?

 What are the interests of the various beneficiaries?

Are they the same or different? Do they compete?

How does the trustee address competing interests?

 More on trustee accounting.

 May the trustee withhold information from the beneficiaries? What information?

22. Read pages 686-724

 How does the trustee protect him/herself?

 **Trust: Alienation and Modification**

 Creditor protection planning: Can we protect client's property from client's creditors?

 Can we protect trust property from the creditors of the trust beneficiaries?

 What needs to be done to effect creditor protection?

 Are all creditors created equal? Why allow any creditor protection?

23. Read pages 724-757

 Asset protection planning for the elderly to avoid nursing home spend down

 Is an irrevocable trust irrevocable? Who may modify or terminate an irrevocable trust? How?

 Is court involvement necessary? Is it advisable? What factors are important?

 Can a trustee be removed from office? Must there be grounds for removal?

 Who may remove a trustee? Should it be easy or difficult to remove a trustee? Why?

 Who should be trustee? What is a trust protector?

 **Trusts: Powers of Appointment**

24. Read pages 807-844

 Learn the terminology.

 What is a power of appointment? Distinguish limited powers from general powers.

 Distinguish testamentary powers from lifetime powers.

 Distinguish a power over property from ownership of property.

 May donee of general power be forced to exercise power: more need for creditor protection?

Be wary to whom powers are given and be aware that powers are everywhere.

 How is a power of appointment created? How do we distinguish between creation of a power

 over property and a transfer of ownership in property?

 Can there be a combination of both? What is a power coupled with an interest?

 How do powers of appointment work?

 Must a power be exercised? Must it even be accepted? Why might one not wish to keep it?

 How do you get rid of it if it is not wanted?

 How do you exercise it if you keep it?

 What if you keep a power but do not exercise it?

 What is a taker in default?

 **Trusts: Construction and Future Interests**

25. Read pages 845-869

 Future interests: What trusts are all about! Learn the terminology.

 What future interests are there? Whose are they? When/how do they become vested in interest or in possession?

 What is a rule of construction? Why do we have them?

 What is the law attempting to accomplish through rules of construction?

 What planning opportunities are presented?

 What if we do not plan carefully?

 When is the beneficial interest in a trust vested?

 Must an interest in trust be vested to be able to transfer it?

 Must a beneficiary survive to time of possession to be vested?

26. Read pages 869-894

 Who has what right to a beneficial interest when a gift is to a class?

 Look at the gift and look at the class. Be sure to say what you mean and mean what you say.

 When does a class member get her share of the loot: the class closing rule.

 Are all members of a class treated the same?

 What does the law seek to achieve? Why?

 **The Rule Against Perpetuities and Trust Duration**

 Further limitations on the duration of future interest, or getting the loot distributed sooner: the Rule Against Perpetuities (RAP). What is it? Why do we have it?

27. Read pages 894-928

 Is RAP good policy still? How is it applied? Remember, most anything is possible.

 Does closing the class save the gift from a violation of the Rule Against Perpetuities?

 What else is needed?

 How does the Rule Against Perpetuities affect powers of appointment?

 Consider when power is exercisable and how that factor affects validity of the power.

 Distinguish general powers from special powers.