

WILLS and TRUSTS

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COURSE SYLLABUS

The course book is Wills, Trusts and Estates, by Sitkoff and Dukeminier (Aspen Publishers, 11th ed., 2022). 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).

Attendance at class is imperative. Class starts earlier than is usual for evening classes – namely, 5:45 p.m. and continues to 7:25 p.m. (the required 1 hour and 40 minutes for a four credit course). Students are expected to be on time. While volunteers in class will be called upon, students will be called at random to further ensure attendance and participation, both of which are mandatory.

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, but gift and estate taxation is not a tested part of the course.

While the preferred time to ask questions is in class, I shall be available also by email and phone. If I am not available at the moment, we will schedule a time to talk. All students are welcome to call me at my office or e-mail me as needed. This is a four-credit course, and therefore, much material will be covered. All of the material builds upon what goes before it, so integrate and relate new material with old as you proceed. Remaining up to date with all work is imperative for success. As in any endeavor, the benefit to be derived from this course is directly proportionate to the effort that is put into it; and, the combined effort of all students will enhance the opportunity for success on the part of each student. Best wishes to all.

No. Assignment

Introduction

1. Read Pages 1-40: 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 41-53: The Mechanics of Succession and 53-64 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 65-92

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 92-129

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 126-167

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 167-205

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 205-239

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?

8. Read pages 239-269

What is the key element for there to be revocation of a will?

What circumstances cause revocation or partial revocation of a will?

Is the key element still present or thrown out?

Can we protect against automatic revocation or partial revocation?

What happens to a will once it is revoked? Is it revoked? Can we undo revocation?

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 271-317

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 can we tell?

Who has burden of proof on issue of undue influence?

How does issue of undue influence come into the client/attorney relationship?

What may/should a lawyer do ethically with regard to client's will/estate plan?

What must a lawyer not do with the client?

What can we do to avoid undue influence challenges to the client's will?

10. Read pages 318-358

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

Where does fraud enter the picture in wills formation? What are its forms?

What is tortious interference in the making of a will? Is it a viable claim?

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?

11. Read pages 359-394

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

12. Read pages 395-424

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?

13. Read pages 424-447

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?

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

14. Read pages 449-480

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?

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?

15. Read pages 480-520

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

16. Read pages 529-564

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?

17. Read pages 564-597

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

18. Read pages 599-622

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?

19. Read pages 622-660

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?

20. Read pages 660-680

What other other custodial and administrative duties does a trust have?

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?

21. Read pages 680-699

More on trustee accounting.
May the trustee withhold information from the beneficiaries? What information?
How does the trustee protect him/herself?

Trusts: Alienation and Modification

22. Read pages 701-732

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?

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

23. Read pages 724-765

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 817-851

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 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?

25. Read pages 852-880

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

What is a taker in default?

Trusts: Construction and Future Interests

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 880-910

Who has what right to a beneficial interest when a gift is to a class?
Look at the gift and look at the class. 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

27. Read pages 910-938

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

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.

28. Review

What are your questions?
What are you having difficulty with?
Come to class prepared to ask questions.