10050964-0002
ISBN 978-1-5438-2446-9
90000
9 781543 824469

SITKOFF
DUKEMINIER

WILLS,
TRUSTS,
AND
ESTATES

Eleventh Edition

SITKOFF
DUKEMINIER

Aspen Casebook Series

WILLS, TRUSTS,
AND ESTATES

Eleventh Edition

Wolters Kluwer

Wills, Trusts, and Estates

ASPEN CASEBOOK SERIES

WILLS, TRUSTS, AND ESTATES

ELEVENTH EDITION

ROBERT H. SITKOFF
Austin Wakeman Scott Professor of Law
John L. Gray Professor of Law
Harvard University

JESSE DUKEMINIER
Late Maxwell Professor of Law
University of California, Los Angeles

Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Design by Keithley & Associates, Inc.

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-2446-9

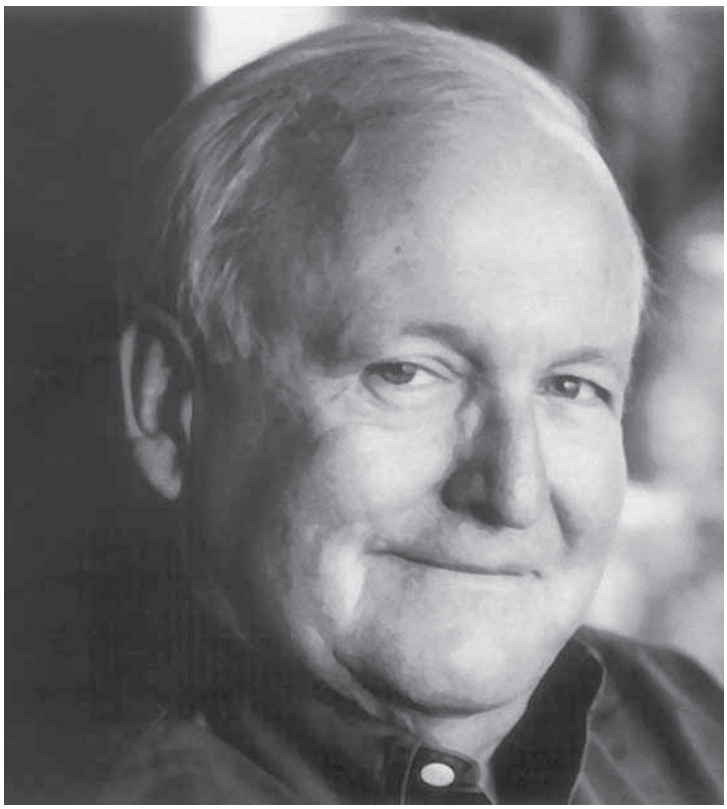
Library of Congress Cataloging-in-Publication Data

Names: Sitkoff, Robert H., author. | Dukeminier, Jesse, author.
Title: Wills, trusts, and estates / Robert H. Sitkoff, Austin Wakeman Scott Professor of Law, John L. Gray Professor of Law, Harvard University; Jesse Dukeminier, Late Maxwell Professor of Law, University of California, Los Angeles.
Description: Eleventh edition. | New York: Wolters Kluwer, [2022] | Series: Aspen casebook series | Includes bibliographical references and index. | Summary: "Casebook for law students in a Wills, Trusts, and Estates course"—Provided by publisher.
Identifiers: LCCN 2021042019 (print) | LCCN 2021042020 (ebook) | ISBN 9781543824469 (hardcover) | ISBN 9781543824476 (ebook)
Subjects: LCSH: Wills—United States. | Estate planning—United States. | Future interests—United States. | Trusts and trustees—United States. | LCGFT: Casebooks (Law)
Classification: LCC KF753.D85 2022 (print) | LCC KF753 (ebook) | DDC 346.7305/2—dc23
LC record available at https://lccn.loc.gov/2021042019
LC ebook record available at https://lccn.loc.gov/2021042020

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.



JESSE DUKEMINIER, 1925–2003

For John Langbein, with admiration and abiding gratitude.
—RHS

SUMMARY OF CONTENTS

CONTENTS

LIST OF ILLUSTRATIONS

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 three years after publication of the sixth edition, necessitating succession of authorship for this book. Robert H. Sitkoff, a new coauthor in the seventh edition who assumed sole responsibility (trusteeship?) for this book in the ninth edition, continues as the lead author in this eleventh 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 eleventh edition remains as before: to produce not merely competent practitioners, but lawyers who think critically about problems in family wealth transmission.

This edition carries forward the two-color interior and robust program of photos, documents, and other images of the prior edition. Case squibs and extraneous references have been resisted. Every chapter begins with an organizing statement of themes. As always, we have endeavored to preserve the essential character of the book, which 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 estate plan 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 these problems difficult and interesting is the "worst evidence" posture of probate procedure whereby the best witness is dead by the time the court considers these matters. Chapter 6 introduces the trust, which can be used for 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 topics: 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 succession 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 probate. Imaginative scholars began to ventilate this ancient law of the dead hand, challenging assumptions and suggesting judicial and legislative innovation to simplify and rationalize. Medical science complicated matters by creating varieties of parentage unheard of a generation earlier. Legal malpractice in drafting 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 and the difficulty of in-person will execution during the COVID-19 pandemic.

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 to problems in drafting and construing trust instruments. The teachings of modern portfolio theory and the shift from land to financial assets for wealth accumulation has put pressure on the law of trust administration, which evolved in simpler times. In contemporary American trust practice, fiduciary obligation has replaced limits on the trustee's powers as the primary 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 radical change in the rights of creditors 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 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, philosophy, and purposes—in particular, freedom of disposition—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 evolution and the 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 practice concerns 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 sandcastles, are essential to being a counselor at law. 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 helpful questions, comments, or other assistance we thank Gregory Alexander, Albertina Antognini, Julia Belian, David Blankfein-Tabachnick, Jim Blase, Daniel Bogart, Alexander Boni-Saenz, Lad Boyle, Karen Boxx, Thomas Brennan, Bruce Brightwell, Patricia Cain, Elizabeth Carter, Eric Chaffee, Eric Claeys, Bridget Crawford, Barry Cushman, Robert Danforth, Michael Doran, James Edelman, Tammi Etheridge, Dave Fagundes, Steven Fast, Steven Feder, Matthew Festa, Lynn Foster, Wayne Gazur, Mark Glover, Iris Goodwin, Katheleen Guzman, Victoria Haneman, Howard Helsinger, Tanya Hernandez, David Herzig, Michael Higdon, David Horton, Stanley Johanson, Bruce Johnson, Gordon Jones, Robert Katz, Daniel Kelly, Diane Klein, Kristine Knaplund, Nina Kohn, Maureen Kordesh, John Langbein, Jason (Kye Joung) Lee, Barbara Lock, Samuel Long, Ray Madoff, Celestine Richards McConville, Andrea McDowell, Nancy McLaughlin, Julia Meister, Stephanie Middleton, Ann Murphy, Stephen Murphy, Bradley Myers, Ljubomir Nacev, Katherine Pearson, John Plecnik, John Pottow, Eric Rakowski, Anne-Marie Rhodes, Jay Rosenbaum, Ezra Rosser, Randy Roth, Christopher J. Ryan Jr., Ronald Scalise, Kent Schenkel, Jeffrey Schoenblum, David Seipp, Carla Spivack, Stacey-Rae Simcox, John Sprankling, Eva Subotnik, Gus Tamborello, Allison Tait, Joshua Tate, Lee-ford Tritt, Emily Taylor-Poppe, Charles Ten Brink, Lawrence Waggoner, Claire Wright, and Judith Younger.

We owe a particular debt of gratitude to John Morley and Max Schanzenbach, who provided extensive comments on early drafts of nearly every chapter; to Stephanie Willbanks, who assisted with tax matters throughout the book; and to the students in the Trusts and Estates course at Harvard in Spring 2021, who beta tested the manuscript. Lisa Lilliott Raydin and the Faculty Research and Information Delivery Assistance team at the Harvard Law Library provided crucial library and research support, and Clara Carvalho e Silva, Madelyn Chen, Benjamin Fleshman, Lindsey Foster, Eliza Green, Aaron Hsu, Brianna Johnson-King, Joseph Marcus, James Mulhern, Jackson Shaw, Elizabeth Lauren Yonkoski, and Eric Zilber provided superb research assistance.

Two final expressions of gratitude are in order. First, Molly Eskridge processed seemingly endless rounds of manuscript and proofs with breathtaking efficiency and indefatigable good cheer. Second, Troy Froebe and his colleagues at The Froebe Group executed the production process with grace, focus, and sound judgment.

Robert H. Sitkoff
Jesse Dukeminier, 1925-2003

September 2021

Editors' note: All citations to state and federal statutes and regulations are to such authorities as they appeared on Lexis or Westlaw at the date given. Citations to the current Scott treatise — Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts — are given as Scott and Ascher on Trusts with the edition and date noted parenthetically. 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.

Conflicts disclosure: In accordance with Harvard Law School's policy on conflicts of interest, Robert Sitkoff discloses certain outside activities, one or more of which may relate to the subject matter of this book, at https://helios.law.harvard.edu/Public/Faculty/ConflictOfInterestReport.aspx?id=10813.

ACKNOWLEDGMENTS

BOOKS AND ARTICLES

American Bar Association (ABA), excerpts from Model Rules of Professional Conduct. Copyright © 2020 by the ABA. Reprinted by permission. All rights reserved.

American College of Trust and Estate Counsel (ACTEC), Commentaries on the Model Rules of Professional Conduct (5th ed. 2016). Copyright © 2016 by the American College of Trust and Estate Counsel. Reprinted by permission. All rights reserved.

American Law Institute, Restatement (Third) of Property (1999, 2003, 2011); Restatement (Third) of Restitution and Unjust Enrichment (2011); Restatement (Second) of Trusts (1959); Restatement (Third) of Torts: Liability for Economic Harm (Council Draft No. 4, 2016); Restatement (Third) of Trusts (2003, 2007, 2012). Copyright © 1959, 1999, 2003, 2007, 2011, 2012, 2016 by the American Law Institute. Reprinted by permission. All rights reserved.

American Law Institute & Uniform Law Commission. Uniform Probate Code (1969, 1990, 2019); Uniform Trust Code (2000). Copyright by The American Law Institute and the National Conference of Commissioners on Uniform State Laws. Reproduced with permission. All rights reserved.

Ascher, Mark L., Austin Wakeman Scott & William Franklin Fratcher. Scott and Ascher on Trusts, Sixth Edition. Copyright © 2019 by Wolters Kluwer Legal & Regulatory. Reprinted by permission. All rights reserved.

Brooke, James, A Web of Money, Drugs, and Death, N.Y. Times, Mar. 18, 1997, at A12. Copyright © 1997 by the New York Times. Reprinted by permission. All rights reserved.

Cramer, Maria, A Patriarch Leaves No will and the home he meant for his Cambridge family may be lost, Boston Globe, Feb. 6, 2019. Copyright © 2019 by the Boston Globe. Reprinted by permission. All rights reserved.

Dukeminier, Jesse, & James E. Krier, The Rise of the Perpetual Trust, 50 UCLA L. Rev. 1303 (2003). Copyright © 2003 by Professor Krier and the UCLA Law Review. Reprinted by permission. All rights reserved.

Fortin, Jacey, His Tattoo Said "Do Not Resuscitate." Doctors Wanted Another Opinion, N.Y. Times, Dec 4, 2017. Copyright © 1997 by the New York Times. Reprinted by permission. All rights reserved.

Frank, Robert, Shutting Out the Kids from the Family Fortune, Wall St. J. (May 10, 2011). Copyright © 2011 by Dow Jones, Inc. Reprinted by permission. All rights reserved.

Hirsch, Adam J., & William K.S. Wang, A Qualitative Theory of the Dead Hand, 68 Ind. L.J. 1 (1992). Copyright © 1992 by Indiana Law Journal. Reprinted by permission. All rights reserved.

Howard, John N., Profile in Optics: Leonard Thompson Troland, Optics & Photonics (June 2008). Copyright © 2008 by Optics and Photonics. Reprinted by permission. All rights reserved.

Jacobs, Deborah L., George Clooney Makes Estate Planning Sexy, Forbes (Feb. 23, 2012). Copyright © 2012 by Forbes. Reprinted by permission. All rights reserved.

Jacobs, Julia, Britney Spears Conservatorship Case Heads Back to Court, N.Y. Times, February 9, 2021. Copyright © 2021 by the New York Times. Reprinted by permission. All rights reserved.

Kelly, Daniel B., Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications, 82 Fordham L. Rev. 1125 (2013). Copyright © 2013 by Professor Kelly. Reprinted by permission. All rights reserved.

Klick, Jonathan, & Robert H. Sitkoff, Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off, 108 Colum. L. Rev. 749 (2008). Copyright © 2008 by Columbia Law Review. Adapted by permission. All rights reserved.

Landers, Ann, Column (May 23, 2002). Copyright © 2002 by the Esther P. Lederer Trust. Reprinted by permission of Creators Syndicate, Inc. All rights reserved.

Langbein, John H., Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, 38 ACTEC J. 1 (2012). Copyright © 2012 by Professor Langbein and ACTEC. Reprinted by permission. All rights reserved.

_____ , Rise of the Management Trust, Tr. & Est., Oct. 2004, at 52. Copyright © 2004 by Professor Langbein and Penton Media, Inc. Reprinted by permission. All rights reserved.

_____ , Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489 (1975). Copyright © 1975 by Professor Langbein and Harvard Law Review. Reprinted by permission. All rights reserved.

_____ , The Twentieth-Century Revolution in Family Wealth Transmis-sion, 86 Mich. L. Rev. 722 (1988). Copyright © 1988 by Professor Lang-bein. Reprinted by permission. All rights reserved.

Lindgren, James, The Fall of Formalism, 55 Alb. L. Rev. 1009 (1992). Copyright © 1992 by Professor Lindgren. Reprinted by permission. All rights reserved.

McNamee, Stephen J., & Robert K. Miller, Jr., The Meritocracy Myth 43, 50-52 (4th ed. 2018). Copyright © 2018 by Rowman & Littlefield. Reprinted by permission. All rights reserved.

National Conference of Commissioners on Uniform State Laws (NCCUSL), excerpts from: the Uniform Probate Code (1969, 1990, 1993, 1997, 1998, 2008, 2010, 2019); the Uniform Prudent Investor Act (1994); the Uniform Trust Code (2000, 2003, 2004, 2005, 2010, 2020). Copyright © 1969, 1983, 1986, 1990, 1993, 1994, 1997, 1998, 2008, 2010, 2012 by NCCUSL. Reprinted by permission. All rights reserved.

Newcomb, Alyssa, Gay Man Told to Marry Woman or Son Would Lose Inheritance, ABC News (Aug. 20, 2012). http://abcnews.go.com/US/gay-man-mary-woman-son-loseinheritance/ story?id=17043550. Copyright © 2012 by ABC News. Reprinted by permission. All rights reserved.

Perez, Evan & Ariane de Vogue, Couple Seeks Right to Marry. The Hitch? They're Legally Father and Son, CNN.com, Nov. 3, 2015. Copyright © 2015 by CNN. Reprinted by permission. All rights reserved.

Posner, Richard A., Economic Analysis of Law (9th ed. 2014). Copyright © 2014 by Richard A. Posner. Reprinted by permission. All rights reserved.

Ross, Alice, Jedi Order Fails in Attempt to Register as Religious Group, Guardian (Dec. 19, 2016). Copyright © 2016 by Guardian News & Media Limited. Reprinted by permission. All rights reserved.

Schanzenbach, Max M., & Robert H. Sitkoff, The Prudent Investor Rule and Market Risk: An Empirical Analysis, 14 J. Emp. Legal Stud. 129 (2017). Copyright © 2017 by Professors Sitkoff and Schanzenbach. Reprinted by permission. All rights reserved.

Sitkoff, Robert H., The Lurking Rule Against Accumulations of Income, 100 Nw. U. L. Rev. 501 (2006). Copyright © 2006 by Professor Sitkoff. Adapted by permission. All rights reserved.

_____ , Trust Law as Fiduciary Governance Plus Asset Partitioning, in the Worlds of the Trust 428 (Lionel Smith ed. 2013). Copyright © 2013 by Professor Sitkoff. Reprinted by permission. All rights reserved.

Sitkoff, Robert H., & Max M. Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 Yale L.J. 356 (2005). Copyright © 2005 by Yale Law Journal and Professors Sitkoff and Schanzenbach. Reprinted by permission. All rights reserved.

Snow, Kate, & Rich McHugh, Mariecar Frias and Imaeyen Ibanga, Frozen Sperm Still Viable Decades Later, ABC News (Apr. 10, 2009). http://abcnews.go.com/GMA/OnCall/story?id=7303722&page=1#.UEdnIKRYtD4, Copyright © 2009 by ABC News. Reprinted by permission. All rights reserved.

Spivack, Carla. Killers Shouldn't Inherit from Their Victims . . . Or Should They?, 48 Georgia L. Rev. (2013). Reprinted by permission. All rights reserved.

Waggoner, Lawrence W., From Here to Eternity: The Folly of Perpetual Trusts, Univ. Mich. L. Sch. Pub. L. & Legal Theory Research Paper No. 259 (2012). Copyright © 2012 by

Professor Waggoner. Reprinted by permission. All rights reserved.

_____ , The UPC Authorizes Notarized Wills, 34 ACTEC J. 83 (2008). Copyright © 2008 by Professor Waggoner and ACTEC. Reprinted by permission. All rights reserved.

Waters, Richard & Chris Nuttall, One Negative Too Many for Kodak, Financial Times, Jan. 20, 2012. Copyright © 2012 by Financial Times. Reprinted by permission. All rights reserved.

Yerak, Becky, Though There Was a Will, Fifth Third Found a Way to Save Boots, Chi. Trib. (Apr. 4, 2012). Copyright © 2012 by the Chicago Tribune. Reprinted by permission. All rights reserved.

PHOTOGRAPHS AND ILLUSTRATIONS

42 East 74th Street, New York, N.Y. (2012). Photograph. Courtesy of Bridget Crawford.

Bank window and parking space at issue in *Weber*. Photograph. Courtesy of Debra A. Buseman.

Barnes Foundation Gallery. Photographs. Copyright © 2017 by the Barnes Foundation. Reproduced by permission. All rights reserved.

Bentham, Jeremy (Auto-Icon). Photograph. Courtesy of Matt Brown / Flickr.

Biblis, Chris and Stella. Photograph. Copyright by Jeffery Salter. Reproduced by permission. All rights reserved.

Bishop, Princess Bernice Pauahi. Photograph by H.L. Chase. Copyright by the Bishop Museum. Reproduced by permission. All rights reserved.

Black, Justice Hugo. Photograph. Copyright by Everett Collection Historical / Alamy Stock Photo. Reproduced by permission. All rights reserved.

Blattmachr, Jonathan, and king salmon. Photograph. Courtesy of Jonathan Blattmachr.

Block, Sophie, and Max. Photograph. Courtesy of Frank Dover and Brent Bernell.

Bogert, George Gleason. Photograph. Courtesy of the University of Chicago Library, Special Collections.

Bonds, Barry. Photograph. Copyright © 1992 by Craig Fuji / AP Photo. Reproduced by permission. All rights reserved.

Boots the cat. Photograph. Courtesy of Andrew Hayes, Vice President, Public Relations, Fifth Third Bank, Chicago, IL.

Buck, Beryl. Photograph. Courtesy of the Marin Community Foundation.

Buffet, Warren, and Bill and Melinda Gates. Photograph. Copyright © 2006 by Spencer Platt / Getty Images. Reproduced by permission. All rights reserved.

Cantil-Sakauye, Tani Gorre. Photograph. Copyright © 2010 by Robert Galbraith / Reuters / Alamy. Reproduced by permission. All rights reserved.

CartoonStock. Cartoons by Roy Delgado, Paul Kinsella, and Harley Schwadron. Copyright by CartoonStock. Reprinted by permission. All rights reserved.

Casner, A. James. Photograph. Courtesy of Art and Visual Materials, Historical and Special Collections, Harvard Law School Library.

Dalianis, Chief Justice Linda Stewart. Photograph. Courtesy of the New Hampshire Supreme Court.

Decanting a bottle of wine. Photograph. Copyright by Andrew Safonov / Shutterstock. Reproduced by permission. All rights reserved.

Divine, Father. Photograph. Copyright © 1954 by Bettmann Collection/Getty Images. Reproduced by permission. All rights reserved.

Duke, Doris. Photograph. Copyright © 2000 by Stringer / Hulton Archive / Getty Images. Reproduced by permission. All rights reserved.

Esposito, Nino, and Drew Bosee. Photograph. Copyright © 2015 by Jared Wickerham / Wick Photography. Reproduced by permission. All rights reserved.

Evander, Kerry I. Photograph. Courtesy of Judge Evander.

Fournier, George. Photograph. Courtesy of Richard D. Solman.

Goodson, Courtney Hudson. Photograph. Courtesy of Justice Goodson.

Gray, Horace. Photograph. Copyright by Kean Collection / Getty Images. Reproduced by permission. All rights reserved.

Gray, John Chipman. Photograph. Courtesy of Art and Visual Materials, Historical and Special Collections, Harvard Law School Library.

Gray, John Merrill "Jack," III, and his father John. Photograph. Courtesy of Jack Gray.

Harrison, Marcelle. Photograph. Boston Globe, Feb. 6, 2019. Photo Credit: Jessica Rinaldi / Globe Staff. Reproduced by permission. All rights reserved.

Harrison, New Jersey. Photographs of 304 Harrison Avenue and 317 Harrison Avenue (2012). Courtesy of Daniel Rayner.

Helmsley, Leona, and her dog, Trouble. Photograph. Copyright © 2008 by Splash News/ Newscom. Reproduced by permission. All rights reserved.

Hershey, Milton S., and orphan boys. Photograph. Copyright by the Hershey Community Archives. Reproduced by permission. All rights reserved.

Houston, Whitney. Photograph. Copyright by the Pictorial Press Ltd / Alamy Stock Photo. Reproduced by permission. All rights reserved.

Jaworski, Leon. Photograph. Copyright © 1973 by AP Photo. Reproduced by permission. All rights reserved.

Kennedy, Joseph P., Joseph P. Kennedy, Jr., and John F. Kennedy. Photograph. Copyright © 1938 by AP Photo. Reproduced by permission. All rights reserved.

Kenyon, Lord. Illustration. Courtesy of Art and Visual Materials, Historical and Special Collections, Harvard Law School Library.

Kuralt, Charles, and Elizabeth (Pat) Shannon. Photograph. Copyright © 1999 by AP Photo. Reproduced by permission. All rights reserved.

Landers, Ann. Photograph. Copyright by Esther P. Lederer Trust and Creators Syndicate, Inc. Reproduced by permission. All rights reserved.

Langbein, John H. Photograph. Courtesy of the Yale Law School Office of Public Affairs and Professor Langbein.

Langdale, Lord (Henry Bickersteth). Photograph. Courtesy of Art and Visual Materials, Historical and Special Collections, Harvard Law School Library.

Leach, W. Barton. Photograph. Courtesy of Art and Visual Materials, Historical and Special Collections, Harvard Law School Library.

Lee, Jason. Photograph. Courtesy of the Oregon State Archives.

Love, Susan. Photograph. Copyright © 1996 by Kevork Djansezian / AP Photo. Reproduced by permission. All rights reserved.

Manville, Tommy, and two female friends. Photograph. Copyright © 1938 by Bert Morgan / Premium Archive / Getty Images. Reproduced by permission. All rights reserved.

Markowitz, Harry M. Photograph. Courtesy of Professor Markowitz.

Marshall, Margaret H. Photograph. Courtesy of Martha Stewart and Harvard Law School.

Marsman, Captain T. Frederik (Cappy). Photograph. Courtesy of the Webber Archives, Dana Hall School, Wellesley, MA.

Miller, Wiley. Cartoon. Copyright © 2007 by Wiley Ink / Andrew McMeel Publishing. Reproduced by permission. All rights reserved.

Mullarkey, Mary J. Photograph. Courtesy of Justice Mullarkey.

Musmanno, Justice. Photograph. Copyright © 1950 by Leonard McCombe / Time & Life Images / Getty Images. Reproduced by permission. All rights reserved.

The New Yorker Collection. Cartoons by Peter Arno © 1940, 1942; Pat Byrnes © 2001, 2009; Roz Chast © 2007; Frank Cotham © 2010; Dana Fradon © 1986; Pia Guerra © 2019; William Hamilton © 2001, 2001; Edward Koren © 2011; Arnie Levin © 2000; Warren Miller © 1981; Frank Modell © 1972; Paul Noth © 2013, 2017; Barbara Smaller © 2000, 2005; Michael Shaw © 2005; Christopher Weyant © 2014; Bill Woodman © 1988. Reproduced by permission of the Cartoon Bank, a division of Condé Nast. All rights reserved.

Paternity test kit. Photograph. Courtesy of Identigene, LLC.

Photo. "An Unconscious Patient with a DNR Tattoo." Published in The New England Journal of Medicine, November 30, 2017. Reproduced by permission. All rights reserved.

Photo. "A 74-Year-Old Woman Reportedly Gave Birth to Twins, May be the oldest Ever to Give Birth." Cover Asia Press. Reproduced by permission. All rights reserved.

Posner, Richard A. Photograph. Reproduced by permission of Judge Posner.

Powell, Cleo Elaine. Photograph. Copyright © 2011 by Steve Helber / AP Photo. Reproduced by permission. All rights reserved.

Rees, Stu. Cartoon. Copyright by Stu's Views. Reproduced by permission. All rights reserved.

Roosevelt, Franklin Delano. Photograph. Copyright © 1953 Mary Evans Picture Library / Alamy Stock Photo. Reproduced by permission. All rights reserved.

Rosenblatt, Albert M. Photograph. Courtesy of Judge Rosenblatt.

Roth, Alvin E. Photograph. Courtesy of Professor Roth.

Rothko, Mark. Color Reproduction of "Number 22" (1949). Copyright © 1998 by Kate Rothko Prizel & Christopher Rothko / Artists Rights Society (ARS), New York. Reproduced by permission. All rights reserved.

Rothko, Mark. Photograph. Copyright © 1961 by Apic / Hulton Archive / Getty Images. Reproduced by permission. All rights reserved.

Rush, Loretta. Photograph. Courtesy of Justice Rush.

Scott, Austin Wakeman. Photograph. Courtesy of Fabian Bachrach and Art and Visual Materials, Historical and Special Collections, Harvard Law School Library.

Sears, Leah. Photograph. Courtesy of Justice Sears.

Seattle, Washington, northwest corner of Third Avenue and Columbia Street (2013). Photograph. Courtesy of Ben Goffe.

Simes, Professor Lewis M. Photograph. Courtesy of the University of Michigan Law School.

Smithers, Adele C., and Derek Jeter. Photograph. Copyright © 2006 by G. Gershoff / Wire Image / Getty Images. Reproduced by permission. All rights reserved.

Smithers Alcoholism Center, Rehabilitation Unit, 56 East 93rd Street, New York City. Courtesy of the Christopher D. Smithers Foundation, Inc.

Spears, Britney. Photograph. Copyright © 2002 by dpa picture alliance / Alamy Stock Photo. Reproduced by permission. All rights reserved.

Smithers, R. Brinkley. Photograph. Courtesy of the Christopher D. Smithers Foundation, Inc.

Stamos, Theodoros. Photograph. Copyright © 1950 by Alfred Eisenstaedt / Time & Life Pictures / Getty Images. Reproduced by permission. All rights reserved.

Stoker, Steven Wayne. Photograph. Courtesy of Danene Pradia.

Strasberg, Lee. Photograph. Album/Alamy Stock Photo. Reproduced by permission. All rights reserved.

Sullivan, Mary T. Photograph. Courtesy of Justice Sullivan. Copyright by George Peet.

Sullivan, Sherri B. Photograph. Courtesy of Judge Sullivan.

Tanneberg, Marvin. Cartoon. Copyright © 1966 by Playboy. Reproduced by permission. All rights reserved.

Wachtler, Sol. Photograph. Courtesy of Judge Wachtler.

Waggoner, Lawrence. Photograph. Courtesy of Professor Waggoner.

Wilkins, Herbert P. Photograph. Courtesy of Boston College Law School.

Will and knife used to make will on tractor fender in Estate of Harris. Photographs. Courtesy of On Campus News, University of Saskatchewan, Canada.

Woodward, Lauren, and children. Photograph. Copyright by Amy Sweeney / Salem Evening News. Reproduced by permission. All rights reserved.

Yahuda, Abraham S. Photograph. Courtesy of the National Library of Israel.

Yoda in *The Empire Strikes Back*. Photograph. Copyright by Lucasfilm / Atlaspix / Alamy Stock Photo. Reproduced by permission. All rights reserved.

Wills, Trusts, and Estates

CHAPTER 1

INTRODUCTION: FREEDOM OF DISPOSITION

American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property.

RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (Am. Law Inst. 2003)

THIS BOOK IS ABOUT the law of *gratuitous transfers*. Our focus is on the transfer of property at death, known as *succession*. We examine *probate* succession by *will* and *intestacy*, and *nonprobate* succession by inter vivos trust, pay-on-death contract, and other *will substitutes*. The American law of succession, both probate and nonprobate, is organized around the principle of *freedom of disposition*. We therefore begin in this chapter by considering the nature and scope of that principle.

American succession law embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems. For example, American law allows a property owner to exclude her blood relations and to subject her dispositions to ongoing conditions. The right of a property owner to dispose of her property at death on terms that she prescribes has come to be recognized as a separate stick in the bundle of rights called property.

To be sure, freedom of disposition is not absolute, not even within the permissive American tradition. The law protects a donor's spouse and creditors, allows for the imposition of transfer taxes such as estate and gift taxes, and imposes a handful of anti–dead hand public policy constraints such as the Rule Against Perpetuities. For the most part, however, the American law of succession facilitates rather than regulates implementation of the decedent's intent. Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent.

We begin in Section A by considering the policy of freedom of disposition, its rationale, and the extent to which it is a constitutional imperative. In Section B, we consider the mechanics of succession, including the basic organization of probate

administration and nonprobate modes of transfer. Finally, in Section C, we consider issues of professional responsibility in succession matters.

A. THE POWER TO TRANSMIT PROPERTY AT DEATH

Lawrence M. Friedman
Dead Hands: A Social History of Wills, Trusts, and Inheritance Law
3-4 (2009)

The whole edifice of the law of succession, legally and socially, rests on one brute fact: you can't take it with you. Death is inevitable, fundamental, and definitive. When people die, everything they think they own, everything struggled, scrimped, and saved for, every jewel and bauble, every bank account, all stocks and bonds, the cars and houses, corn futures or gold bullion, all books, CD's, pictures, and carpets — everything will pass on to somebody or something else. A certain amount can be spent on a funeral or a fancy coffin. A person can ask for, and get, an elaborate headstone and can buy a policy of "perpetual care" for the grave. People can, if they wish, be buried still wearing their favorite ring or a wedding band, or dressed in their favorite clothes. But these are incidentals.[1] . . . In the end, even the mightiest pharaoh probably took nothing at all to the other side.

"Just so you know, I'm taking all this with me into the afterlife."
Frank Cotham/The New Yorker Collection/The Cartoon Bank

This rite of passage, this transfer of goods at death, has tremendous social and legal importance. The transfer takes different forms in different societies, and in different times. There is no single name for the process. Here, . . . we call it *succession* — a shorthand way of summing up social processes and institutions and their legal echoes, which govern the way property moves from generation to generation and to the living from the dead. "Succession" includes the law of wills, the law of intestacy, the law of trusts (for the most part), the law of charitable foundations, the law concerning "death taxes," and even some aspects of an arcane field of law that lawyers call the law of future interests.

Obviously, when you die, you lose control in any literal sense. But human law can, and does, open the door to a certain amount of post-mortem control. The dead hand rules, if we let it, from beyond the grave, at least up to a point. The simplest way this is done is through a *will*, in which you have the right, if you follow certain formalities, to

1. How about being buried while riding one's favorite motorcycle? *See* Nina Golgowski, Ohio Man Is Buried Riding His Harley-Davidson Motorcycle in Extra-Large Grave, N.Y. Daily News, Jan. 31, 2014. — Eds.

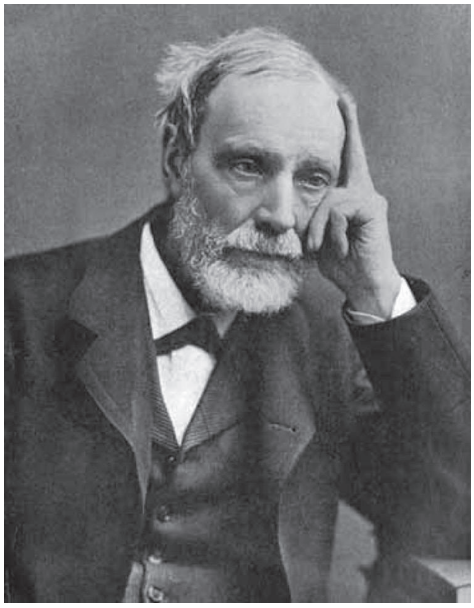
specify who gets what when you die[;] . . . or, if there is no will, a body of rules of law, the law of *intestate succession*, gives you (by default) an estate plan. . . .

Succession . . . is a social process of enormous importance. In a rich country, the stock of wealth that turns over as people die, one by one, is staggeringly large. In the United States, according to one estimate, some $41 trillion will pass from the dead to the living in the first half of the twenty-first century. This figure has been disputed, and an argument rages among economists as to the exact amounts—all the way from "only" $10 trillion to the high estimate of $41 trillion.[2] But no matter who is right, clearly we are dealing with immense amounts of money.

1. Freedom of Disposition and the Dead Hand

The Restatement (Third) of Property aptly summarizes the central role of *freedom of disposition* in American law as follows:

> The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please. . . .
>
> American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property. The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention.
>
> American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law. . . .
>
> Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations.[3]



Sir Arthur Hobhouse

American law grants a person wide latitude to control the disposition of her property at death—what critics call "dead hand" control. More than 140 years ago, Sir Arthur Hobhouse argued famously against the "cold and numbing influence of the Dead Hand" thus:

---

2. In 2014, the researchers behind the $41 million estimate updated their model and estimated a wealth transfer of $59 trillion between 2007 and 2061. *See* John J. Havens & Paul G. Servish, A Golden Age of Philanthropy Still Beckons: National Wealth Transfer and Potential for Philanthropy (2014).—Eds.

3. Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1 cmts. a, c (Am. Law Inst. 2003).

> What could be more irrational than to maintain that each generation shall be considered more competent to foresee the needs of the coming one than that one, when arrived, is to see them? . . .
>
> What I consider to be not conjectural, but proved by experience in all human affairs, is, that people are the best judges of their own concerns; or if they are not, that it is better for them, on moral grounds, that they should manage their own concerns for themselves, and that it cannot be wrong continually to claim this liberty for every Generation of mortal men.[4]

The idea that property should be under the control of the living has a distinguished pedigree in American thought. Thomas Jefferson put the point, which he considered "self evident," as follows: "[T]he earth belongs in usufruct to the living; . . . the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when himself ceases to be, and reverts to the society."[5]

As a matter of positive law, however, history has settled the question differently. The American law of succession strongly embraces the principle of freedom of disposition.[6] The breadth of freedom of disposition in American law is unique among modern legal systems. Professor Ray Madoff explains:

> Americans are largely free to impose whatever conditions they want, and their plans can often be imposed for as long as they want, even in perpetuity. . . . [M]ost countries limit the ability of people to direct their property after death by imposing systems of forced succession, which require that a large portion of their property (commonly up to 80 percent) be given to family members in designated shares. Even those countries that lack [forced succession] nonetheless grant courts the power to diverge from the instructions left in a person's will in order to effectuate a fairer distribution of a person's estate. This is unlike American law, where freedom of testation is paramount and the courts have no power to deviate from a person's will.[7]

In the American legal tradition, freedom of disposition at death is curbed only by wealth transfer taxation (see Chapter 15); the forced share for a surviving spouse (see Chapter 8); rules protecting creditors (see pages 49, 471); and a handful of venerable public policy constraints such as the Rule Against Perpetuities, the rule against trusts for capricious purposes, and the rule against restraints on alienation. In recent years, even these limits have been weakened, most strikingly by legislation in more than half the states that repeals the Rule Against Perpetuities to validate perpetual trusts (see Chapter 14 at page 916).

---

4. Arthur Hobhouse, The Devolution and Transfer of Land, *in* The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property 184-85 (1880).

5. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 6 The Works of Thomas Jefferson 3, 3-4 (Paul Leicester Ford ed., 1904).

6. *See* Robert H. Sitkoff, Trusts and Estates: Implementing Freedom of Disposition, 58 St. Louis U. L.J. 643 (2014).

7. Ray D. Madoff, Immortality and the Law: The Rising Power of the American Dead 6-7 (2010).

Crucially, no limit on freedom of disposition at death arises from the interest of an expectant beneficiary in receiving a future inheritance. To the contrary, the American law of succession is organized around the *donor's* freedom of disposition. A *donee's* interest in a future inheritance is a mere expectancy (see page 70), one that derives from the donor's freedom of disposition and that remains subject to the donor's change of mind.

Shapira v. Union National Bank

315 N.E.2d 825 (Ohio C.P. 1974)

HENDERSON, J. This is an action for a declaratory judgment and the construction of the will of David Shapira, M.D., who died April 13, 1973, a resident of this county. . . .

The portions of the will in controversy are as follows:

> *Item VIII.* All the rest, residue and remainder of my estate, real and personal, of every kind and description and wheresoever situated, which I may own or have the right to dispose of at the time of my decease, I give, devise and bequeath to my three (3) beloved children, to wit: Ruth Shapira Aharoni, of Tel Aviv, Israel, or wherever she may reside at the time of my death; to my son Daniel Jacob Shapira, and to my son Mark Benjamin Simon Shapira in equal shares, with the following qualifications: . . .
>
> (b) My son Daniel Jacob Shapira should receive his share of the bequest only, if he is married at the time of my death to a Jewish girl whose both parents were Jewish. In the event that at the time of my death he is not married to a Jewish girl whose both parents were Jewish, then his share of this bequest should be kept by my executor for a period of not longer than seven (7) years and if my said son Daniel Jacob gets married within the seven year period to a Jewish girl whose both parents were Jewish, my executor is hereby instructed to turn over his share of my bequest to him. In the event, however, that my said son Daniel Jacob is unmarried within the seven (7) years after my death to a Jewish girl whose both parents were Jewish, or if he is married to a non Jewish girl, then his share of my estate, as provided in item 8 above should go to The State of Israel, absolutely.

The provision for the testator's other son Mark, is conditioned substantially similarly. Daniel Jacob Shapira, the plaintiff, alleges that the condition upon his inheritance is unconstitutional, contrary to public policy and unenforceable because of its unreasonableness, and that he should be given his bequest free of the restriction. Daniel is 21 years of age, unmarried and a student at Youngstown State University. . . .

CONSTITUTIONALITY

Plaintiff's argument that the condition in question violates constitutional safeguards is based upon the premise that the right to marry is protected by the Fourteenth Amendment to the Constitution of the United States. . . . In Loving v. Virginia, 388 U.S. 1 (1967), the court held unconstitutional as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment an antimiscegenation statute under which a black person and a white person were convicted for marrying.

In its opinion the United States Supreme Court made the following statements, 388 U.S. at 12:

> There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause. . . .
>
> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. . . . The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

From the foregoing, it appears clear, as plaintiff contends, that the right to marry is constitutionally protected from restrictive state legislative action. Plaintiff submits, then, that under the doctrine of Shelley v. Kraemer, 334 U.S. 1 (1948), the constitutional protection of the Fourteenth Amendment is extended from direct state legislative action to the enforcement by state judicial proceedings of private provisions restricting the right to marry. Plaintiff contends that a judgment of this court upholding the condition restricting marriage would, under Shelley v. Kraemer, constitute state action prohibited by the Fourteenth Amendment as much as a state statute.

In Shelley v. Kraemer the . . . Supreme Court held that the action of the states to which the Fourteenth Amendment has reference includes action of state courts and state judicial officials. Prior to this decision the court had invalidated city ordinances which denied blacks the right to live in white neighborhoods. In Shelley v. Kraemer owners of neighboring properties sought to enjoin blacks from occupying properties which they had bought, but which were subjected to privately executed restrictions against use or occupation by any persons except those of the Caucasian race. Chief Justice Vinson noted, in the course of his opinion at page 13: "These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements."

In the case at bar, this court is not being asked to enforce any restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance. If the facts and circumstances of this case were such that the aid of this court were sought to enjoin Daniel's marrying a non-Jewish girl, then the doctrine of Shelley v. Kraemer would be applicable, but not, it is believed, upon the facts as they are. . . .

[T]he right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by either the Ohio or the United States constitution. . . . It is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children. . . . This would seem to demonstrate that, from a constitutional standpoint, a testator may restrict a child's inheritance. The court concludes, therefore, that the upholding and enforcement of the provisions of Dr. Shapira's will conditioning the bequests to his sons upon their marrying Jewish girls does not offend the Constitution of Ohio or of the United States.

Public Policy

The condition that Daniel's share should be "turned over to him if he should marry a Jewish girl whose both parents were Jewish" constitutes a partial restraint upon marriage. If the condition were that the beneficiary not marry anyone, the restraint would be general or total, and, at least in the case of a first marriage, would be held to be contrary to public policy and void. A partial restraint of marriage which imposes only reasonable restrictions is valid, and not contrary to public policy. . . . The great weight of authority in the United States is that gifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable.

Plaintiff contends, however, that in Ohio a condition such as the one in this case is void as against the public policy of this state. In Ohio, as elsewhere, a testator may not attach a condition to a gift which is in violation of public policy. . . . Plaintiff's position that the free choice of religious practice cannot be circumscribed or controlled by contract is substantiated by Hackett v. Hackett, 150 N.E.2d 431 (Ohio App. 1958). This case held that a covenant in a separation agreement, incorporated in a divorce decree, that the mother would rear a daughter in the Roman Catholic faith was unenforceable. However, the controversial condition in the case at bar is a partial restraint upon marriage and not a covenant to restrain the freedom of religious practice; and, of course, this court is not being asked to hold the plaintiff in contempt for failing to marry a Jewish girl of Jewish parentage. . . .

It is noted, furthermore, in this connection, that the courts of Pennsylvania distinguish between testamentary gifts conditioned upon the religious faith of the beneficiary and those conditioned upon marriage to persons of a particular religious faith. In Clayton's Estate, 13 Pa. D. & C. 413 (Pa. Orphans' Ct. 1929), the court upheld a gift of a life estate conditioned upon the beneficiary's not marrying a woman of the Catholic faith. In its opinion the court distinguishes the earlier case of Drace v. Klinedinst, 118 A. 907 (Pa. 1922), in which a life estate willed to grandchildren, provided they remained faithful to a particular religion, was held to violate the public policy of Pennsylvania.[8] In *Clayton's Estate*, the court said that the condition concerning marriage did not affect the faith of the beneficiary, and that the condition, operating only on the choice of a wife, was too remote to be regarded as coercive of religious faith. . . .

The only cases cited by plaintiff's counsel in accord with [plaintiff's contention] are some English cases and one American decision. In England the courts have held that partial restrictions upon marriage to persons not of the Jewish faith, or of Jewish parentage, were not contrary to public policy or invalid. Hodgson v. Halford (1879 Eng.) L.R. 11 Ch. Div. 959. Other cases in England, however, have invalidated forfeitures of

8. In In re Estate of Laning, 339 A.2d 520 (Pa. 1975), the court stated that the *Drace* case was correctly decided on the grounds that the testator sought to require his grandchildren to "remain true" to the Catholic religion, and that enforcement of a condition that they remain faithful Catholics would require the court to determine the doctrines of the Catholic church. "Such questions are clearly improper for a civil court to determine." The court also upheld a provision in Laning's will that a gift be distributed to certain relatives who held "membership 'in good standing'" in the Presbyterian church. The court construed this provision to require only a formal affiliation with the specified church, avoiding improper inquiry into church doctrine. — Eds.

similarly conditioned provisions for children upon the basis of uncertainty or indefiniteness. . . . Since the foregoing decisions, a later English case has upheld a condition precedent that a granddaughter-beneficiary marry a person of Jewish faith and the child of Jewish parents. The court . . . found . . . no difficulty with indefiniteness where the legatee married unquestionably outside the Jewish faith. Re Wolffe, [1953] 2 All Eng. 697.[9]

The American case cited by plaintiff is that of Maddox v. Maddox, 52 Va. (11 Grattan's) 804 (1854). The testator in this case willed a remainder to his niece if she remain a member of the Society of Friends. When the niece arrived at a marriageable age there were but five or six unmarried men of the society in the neighborhood in which she lived. She married a non-member and thus lost her own membership. The court held the condition to be an unreasonable restraint upon marriage and void. . . . The court said that with the small number of eligible bachelors in the area the condition would have operated as a virtual prohibition of the niece's marrying, and that she could not be expected to "go abroad" in search of a helpmate or to be subjected to the chance of being sought after by a stranger. . . .

In arguing for the applicability of the Maddox v. Maddox test of reasonableness to the case at bar, counsel for the plaintiff asserts that the number of eligible Jewish females in this county would be an extremely small minority of the total population especially as compared with the comparatively much greater number in New York, whence have come many of the cases comprising the weight of authority upholding the validity of such clauses. There are no census figures in evidence. While this court could probably take judicial notice of the fact that the Jewish community is a minor, though important segment of our total local population, nevertheless the court is by no means justified in judicial knowledge that there is an insufficient number of eligible young ladies of Jewish parentage in this area from which Daniel would have a reasonable latitude of choice.[10] And of course, Daniel is not at all confined in his choice to residents of this county, which is a very different circumstance in this day of travel by plane and freeway and communication by telephone, from the horse and buggy days of the 1854

9. In In re Tuck's Settlement Trusts, [1978] 1 Ch. 49 (Eng.), a trust was set up by the first Baron Tuck, a Jew, for the benefit of his successors in the baronetcy. Anxious to ensure that his successors be Jewish, he provided for payment of income to the baronet on the condition that he be Jewish and married to a Jewish wife. The trust also provided that in the event of a dispute the decision of the Chief Rabbi of London would be conclusive. The court held that the conditions were not void for uncertainty. Lord Denning was of the view that if there was any uncertainty, it was cured by the Chief Rabbi arbitration clause. The other two judges declined to reach that issue. The question—who is a Jew—remains controversial even in Israel. *See* Noah Feldman, Who Is a Jew? Israel's Supreme Court Expands the Answer, Bloomberg Opinion (Mar. 2, 2021), available at https://perma.cc/2Q36-WLG8.—Eds.

10. The American Jewish Yearbook of 1976 estimates the Jewish population of Youngstown, Ohio, to be 5,400 in 1974. Taking into consideration other U.S. census data about the male-to-female ratio and the ages of the population in Youngstown, we estimate that about 500 Jewish females were in the 15 to 24 age group. If this estimate is correct, do you think Daniel had "a reasonable latitude of choice"?—Eds.

Maddox v. Maddox decision. Consequently, the decision does not appear to be an appropriate yardstick of reasonableness under modern living conditions.

Plaintiff's counsel contends that the Shapira will falls within the principle of Fineman v. Central National Bank, 175 N.E.2d 837 (Ohio App. 1961), holding that the public policy of Ohio does not countenance a bequest or device conditioned on the beneficiary's obtaining a separation or divorce from his wife. Counsel argues that the Shapira condition would encourage the beneficiary to marry a qualified girl just to receive the bequest, and then to divorce her afterward. This possibility seems too remote to be a pertinent application of the policy against bequests conditioned upon divorce. . . . Indeed, in measuring the reasonableness of the condition in question, both the father and the court should be able to assume that the son's motive would be proper. And surely the son should not gain the advantage of the avoidance of the condition by the possibility of his own impropriety.

Finally, counsel urges that the Shapira condition tends to pressure Daniel, by the reward of money, to marry within seven years without opportunity for mature reflection, and jeopardizes his college education. It seems to the court, on the contrary, that the seven year time limit would be a most reasonable grace period, and one which would give the son ample opportunity for exhaustive reflection and fulfillment of the condition without constraint or oppression. Daniel is no more being "blackmailed into a marriage by immediate financial gain," as suggested by counsel, than would be the beneficiary of a living gift or conveyance upon consideration of a future marriage — an arrangement which has long been sanctioned by the courts of this state.

In the opinion of this court, the provision made by the testator for the benefit of the State of Israel upon breach or failure of the condition is . . . significant . . . [because] it demonstrates the depth of the testator's conviction. His purpose was not merely a negative one designed to punish his son for not carrying out his wishes. His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine. But it is the duty of this court to honor the testator's intention within the limitations of law and of public policy. The prerogative granted to a testator by the laws of this state to dispose of his estate according to his conscience is entitled to as much judicial protection and enforcement as the prerogative of a beneficiary to receive an inheritance.

It is the conclusion of this court that public policy should not, and does not preclude the fulfillment of Dr. Shapira's purpose, and that in accordance with the weight of authority in this country, the conditions contained in his will are reasonable restrictions upon marriage, and valid.

NOTES

1. Incentive Trusts. A conditional bequest such as the one in *Shapira* is today more typically made in a trust (see Chapter 6), sometimes called an *incentive trust*. Anecdotal evidence suggests that such trusts are more often focused on ensuring that a beneficiary does not adopt a frivolous lifestyle than encouraging religious observance or marriage to a preferred mate. As the investment guru and billionaire Warren Buffett

put it, the "perfect" legacy for one's children is "enough money so that they would feel they could do anything, but not so much that they could do nothing."[11] There is in fact some evidence that inherited wealth is associated with reduced workforce participation.[12] Enter the incentive trust. Professor Joshua Tate explains:

> The conditions that incentive trusts might impose can be divided into three broad categories. First are conditions that encourage the beneficiaries to pursue an education. Second are conditions that provide what might be termed moral incentives: incentives that reflect the settlor's moral or religious outlook or promote a particular way of living. Some of these conditions try to encourage the beneficiaries to contribute to charitable causes, while others discourage substance abuse or promote a traditional family lifestyle. Finally, there are conditions designed to encourage the beneficiaries to have a productive career . . . . Provided that these incentives do not violate public policy, courts generally will enforce them.[13]

Tate reports that some practitioners recommend "provisions that pay out a certain amount of money from the trust for every dollar that the beneficiary earns on her own." Others disagree, worrying that hardwiring a trust with inflexible provisions might frustrate the settlor's purpose. For example, what if the beneficiary is injured or suffers a debilitating illness? What if the beneficiary stays at home to care for young children or an ill relative? Should a court have the power to authorize deviation from the donor's instructions if doing so would further the purpose of the trust in light of unanticipated changes in circumstances? We take up trust modification in Chapter 10.

Serial husband Tommy Manville in his bathrobe with two female friends (c. 1938)
Bert Morgan/Premium Archives/Getty Images

Sometimes a poorly drafted conditional bequest backfires, producing perverse results never intended by the donor. In *Shapira*, the court was unimpressed with the argument that the provision at issue would encourage Daniel "to marry a qualified girl just to receive the bequest, and then to divorce her afterward." But is the idea of marrying for money really so farfetched? Consider this report:

> [T]he living can usually concoct schemes to outsmart the dead. Mr. Train recalled the saga of Tommy Manville, playboy heir to the Johns-Manville fortune. To prod him to settle down, according to Mr. Train, Mr. Manville's trust guaranteed him

11. Richard I. Kirkland, Jr. & Carrie Gottlieb, Should You Leave It All to the Children?, Fortune, Sept. 29, 1986, at 18.

12. *See* David Joulfaian, The Federal Estate Tax 121-32 (2019) (summarizing studies).

13. Joshua C. Tate, Conditional Love: Incentive Trusts and the Inflexibility Problem, 41 Real Prop. Prob. & Tr. J. 445, 453 (2006); *see also* Victoria J. Haneman, Incorporation of Outcome-Based Learning Approaches into the Design of (Incentive) Trusts, 61 S.D. L. Rev. 404 (2016).