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Legal Education: Estate Planning -- An Integration of Wills, Trusts, and Future Interests

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LEGAL EDUCATION

ESTATE PLANNING — AN INTEGRATION OF WILLS, TRUSTS AND FUTURE INTERESTS. By William D. Rollison.* — Six years ago Dean Joseph O'Meara of the Notre Dame Law School assigned Wills, Trusts and Future Interests to me and asked me to teach these subjects as *one course*. His idea was that these courses should be integrated. I was, and am, in entire agreement with this plan. Those who are familiar with these subjects know that integration is the most desirable way in which to handle such closely related fields.

It is fairly obvious that due to the interrelation of these subjects there is considerable overlapping of material in the separate casebooks dealing with them. By integrating these subjects, the overlapping and duplication can be eliminated. It is preferable for one professor to handle these subjects, since it would be difficult for two or three professors in these fields to integrate them. It is also preferable that the professor who handles the course have had practical experience in estate planning.

The course is designated "Estate Planning," which seems more desirable than "Wills, Trusts and Future Interests," or any other name. Estate planning is not something new, though this phrase probably owes its origin to the 1948 Internal Revenue Code, dealing with Estate and Gift Taxes. This may explain why some attorneys think of estate planning in terms of tax saving or tax avoidance. Actually, estate planning on a comparatively large scale existed in England prior to the Statute of Uses; and the Preamble to this statute, which set forth the purposes of estate planning at that time, shows that many of the objectives of estate planning have not changed but are very much the same today as they were over four hundred years ago.

Estate planning involves knowledge and how to use the knowledge — a knowledge that in a particular case may include many subjects. The primary task of the law student is to obtain this knowledge. As I treat the subject in the Notre Dame Law School curriculum, the practical aspects of estate planning are dealt with along with the substantive aspects of Wills, Trusts and Future Interests. In one or two meetings of the class each year, the practical aspects of a particular problem in estate planning are considered by the students, to give a more complete picture than by considering special phases in class from time to time. It is not felt that a weekly seminar, dealing with a prepared set of facts, is desirable. It is now envisioned that a realistic meeting be conducted in which the students plan the estate of a person who has consulted with me and is willing to see what the students do. The professors who teach Property and Estate and Gift Tax also have a part in such meetings.

Estate planning can, and often does, cut across many fields of the law, such as Estates, Life Insurance, Corporations, Partnerships, Conveyancing and Taxation. We do not include Taxation in the course in Estate Planning, mainly for practical reasons. Then, there is not such interrelation of this subject with Wills, Trusts and Future Interests as there exists between the latter three subjects. Obviously, the inclusion of all courses that have a relationship to Estate Planning in one course is unthinkable.

When Dean O'Meara asked me to teach Wills, Trusts, and Future Interests, he also requested that I prepare a selection of cases and materials integrating the three subjects. The outline of the completed manuscript is set forth herein. This manuscript which, if published in book form, will total about two thousand or twenty-one hundred pages, is not an attempt to answer all questions in this area, but does, I believe, represent the first attempt at integration of these related materials. While extensive, the work could be published in one large volume, or perhaps in two. Presently, three volumes are being used in the course at Notre Dame.

The outline of the manuscript is as follows:

* Professor of Law, Notre Dame Law School.

PART I
THE LAW'S OWN ESTATE PLAN
 (Statutory Estate Plan; Nontestamentary Succession)

Chapter 1: *History of Intestate Succession*

- SECTION 1. DESCENT
- SECTION 2. DISTRIBUTION
- SECTION 3. IN THE UNITED STATES

Chapter 2: *Posthumous and Pretermitted Heirs; Shifting of the Inheritance*

- SECTION 1. POSTHUMOUS HEIRS
- SECTION 2. PRETERMitted HEIRS

Chapter 3: *Unworthy Heirs*

- SECTION 1. LEGISLATION
- SECTION 2. MURDERER
- SECTION 3. UNFAITHFUL SPOUSE

Chapter 4: *Inheritance by: Adopted Children; Illegitimates*

- SECTION 1. ADOPTED CHILDREN
- SECTION 2. ILLEGITIMATES

Chapter 5: *Inheritance by: Persons Civilly Dead; Aliens*

- SECTION 1. PERSONS CIVILLY DEAD
- SECTION 2. ALIENS

Chapter 6: *Rights of the Surviving Spouse*

- SECTION 1. AT COMMON LAW
- SECTION 2. STATUTORY PROVISIONS
- SECTION 3. IMPACT OF FEDERAL ESTATE TAX
- SECTION 4. ELECTION BY SURVIVING SPOUSE
- SECTION 5. POWER OF ONE SPOUSE TO DEFEAT EXPECTANT SHARE OF OTHER SPOUSE
- SECTION 6. ANTENUPTIAL TRANSFER OF PROPERTY
- SECTION 7. ANTENUPTIAL AGREEMENTS
- SECTION 8. POSTNUPTIAL AGREEMENTS

Chapter 7: *Release, or Transfer, of Expectancies*

- SECTION 1. RELEASE
- SECTION 2. TRANSFER

PART II
INSTITUTING ESTATE PLANS: TRUSTS AND WILLS

Chapter 1: *History of Trusts; Definitions; Distinctions*

- SECTION 1. HISTORICAL INTRODUCTION: USES AND TRUSTS
 - A. Definition, Nature and Origin of the English Use (forerunner of trust)
 - B. Creation of a Use
 - C. Uses in Estate Planning During Feudalism
 - D. The Statute of Uses (1535)
 - E. Construction and Operation of the Statute of Uses
 - F. Evolution of Trusts
 - G. Development of the Law of Trusts in the United States
- SECTION 2. DEFINITIONS; ELEMENTS OF AN EXPRESS TRUST
- SECTION 3. EXPRESS TRUSTS DISTINGUISHED FROM OTHER RELATIONS
 - A. A Trust Distinguished From a Bailment

- B. A Trust Distinguished From a Agency
- C. A Trust Distinguished From a Debt or Contract
- D. A Trust Distinguished From an Executorship
- E. A Trust Distinguished From an Equitable Charge
- F. A Trust Distinguished From a Guardianship

Chapter 2: *History of Wills; Definitions; Distinctions; Classifications*

SECTION 1. HISTORICAL INTRODUCTION: WILLS AND TESTAMENTS

- A. In England
- B. In the United States

SECTION 2. DEFINITIONS; KINDS OF WILLS

SECTION 3. DISTINCTIONS

- A. A Will Distinguished From a Gift Causa Mortis
- B. A Will Distinguished From a Deed
- C. A Will Distinguished From a Trust
- D. A Will Distinguished From a Contract

SECTION 4. SPECIAL TYPES OF WILLS

- A. Holographic (or, Olographic) Wills
- B. Nuncupative Wills
- C. Joint and Mutual Wills
- D. Conditional Wills

Chapter 3: *Capacity to Institute an Estate Plan; Wills and Trusts*

SECTION 1. AGE

SECTION 2. COVERTURE

SECTION 3. ALIENAGE

SECTION 4. CONVICTION OF CRIME

SECTION 5. MENTAL CAPACITY

Chapter 4: *Undue Influence, Fraud and Mistake*

SECTION 1. UNDUE INFLUENCE

SECTION 2. FRAUD

SECTION 3. MISTAKE, AMBIGUITY, ERROR

Chapter 5: *Institutional Requisites*

SECTION 1. INTENT (Trust Intent; Animus Testandi)

SECTION 2. CONSIDERATION; DELIVERY; NOTICE; ACCEPTANCE; KNOWLEDGE OF CONTENTS

SECTION 3. SUBJECT MATTER OF A TRUST

SECTION 4. WHAT MAY PASS BY WILL

SECTION 5. BENEFICIARIES

- A. Necessity of
- B. Settlor as Sole Beneficiary
- C. Unborn Person
- D. Discretion in Trustee to Name
- E. Church
- F. Wife; Husband; Widow
- G. Estate
- H. Honorary Trust
- I. Unincorporated Association
- J. Heirs or Next of Kin of Grantor or Settlor
(Common Law Rule Against Remainder to Heirs of Conveyor)
- K. Heirs of Life Tenant
(Rule in Shelley's Case)
- L. Grant or Devise to a Person and His Children
(The Resolutions in Wild's Case)

- M. Designation of by Reference to a Nontestamentary Act
- N. Members of a Class
 - 1. What Constitutes a Class Gift
 - 2. Determination of Membership
 - 3. Class Gifts to "Heirs," or "Next of Kin"
 - 4. Lapse Statutes — Whether Applicable to Class Gifts
 - 5. Application of Rule Against Perpetuities to Class Gifts
- O. Statutory Restrictions on Beneficiary Designations
- P. Testamentary Direction to Employ
- Q. Incidents of the Beneficiary's Interest
- SECTION 6. FORM AND MANNER OF EXECUTION**
 - A. Statutes
 - B. Writing or Memorandum; Integration; Incorporation by Reference
 - C. Signing by Testator
 - D. Witnesses to a Will; Number and Competency of
 - E. Publication; Acknowledgment; Request to Witnesses to Sign: Wills
 - F. "in the presence of"
 - G. Order of Signing by Testator and Witnesses
 - H. Animus Attestandi; Subscription or Signature of Witnesses
 - I. Republication and Revival of Wills
 - 1. Statutes
 - 2. Republication
 - 3. Revival

PART III

OPERATION AND TERMINATION OF ESTATE PLANS

Chapter 1: *Operation of Estate Plans*

- SECTION 1. PROBATE AND CONTEST OF WILLS; JURISDICTIONAL PROBLEMS IN ESTATE ADMINISTRATION**
 - A. Historical Development of Probate and Administration in England
 - B. Necessity and Effect of Probate and Administration
 - C. Probate, and Contest, Proceedings
 - D. Jurisdictional Problems
 - 1. Jurisdiction of the Federal Courts
 - 2. Equity Jurisdiction
 - 3. Death as a Jurisdictional Fact
 - 4. Assets as a Jurisdictional Fact
 - 5. Ancillary Administration
 - 6. Conflicts of Venue
 - E. Revocation of Decree of Probate Court
- SECTION 2. FIDUCIARIES**
 - A. Classes of Fiduciaries
 - B. Appointment, Qualification, and Removal of Fiduciaries
 - C. Where the Same Person is Appointed Executor and Trustee
- SECTION 3. MANAGEMENT OF A DECEDENT'S ESTATE**
 - A. Expenses, Repairs, Improvements, Fees and Commissions
 - B. Inventory and Appraisal
 - C. Collection, Protection and Preservation of Assets
 - D. Personal Representative's Control over Decedent's Estate
 - E. Presentation and Allowance of Claims Against Decedents' Estates
 - F. Payment of Claims Against the Estate of a Decedent
 - G. Distribution and Settlement of Decedents' Estates
 - 1. Advancements
 - 2. Release, or Transfer, of Expectancies
 - 3. Operative Incidents of Legacies and Devises in the Settlement and

- Distribution of Decedents' Estates
 - a. Classification of Legacies and Devises
 - b. Lapse
 - c. Ademption, Satisfaction, Increase and Interest
 - d. Abatement and Priorities; Marshaling of Assets
 - e. Exoneration and Contribution
 - f. Refunding
 - g. Retainer
 - h. Renunciation by Distributees
- 4. Accounting and Distribution

SECTION 4. ADMINISTRATION OF TRUSTS

- A. Scope of Trustee's Powers
- B. Deviation from Terms of Trust
- C. Delegation of Powers
- D. Repairs and Improvements
- E. Sales, Mortgages, Pledges and Leases
- F. Investments
- G. Allocation and Apportionment of Benefits and Burdens, as Between Successive Beneficiaries
- H. Loyalty
- I. Accounting
- J. Trustee's Compensation and Right to Reimbursement

Chapter 2: *Revocation, Modification and Termination of Estate Plans*

A. TRUSTS

SECTION 1. REVOCATION AND TERMINATION OF TRUSTS

B. WILLS

SECTION 1. STATUTES

SECTION 2. REVOCATION BY PHYSICAL ACT TO INSTRUMENT

SECTION 3. REVOCATION BY SUBSEQUENT INSTRUMENT

SECTION 4. REVOCATION BY OPERATION OF LAW

SECTION 5. DEPENDENT RELATIVE REVOCATION

PART IV

FUTURE INTERESTS; GIFTS IN ESTATE PLANNING; CONSTRUCTIVE AND RESULTING TRUSTS; CONTRACTS AND DEEDS IN ESTATE PLANNING; LIFE INSURANCE IN ESTATE PLANNING

A. FUTURE INTERESTS

Chapter 1: *Definitions and Classification of Future Interests*

SECTION 1. DEFINITIONS

SECTION 2. RIGHT OF ENTRY FOR CONDITION BROKEN (Power of Termination) AND POSSIBILITY OF REVERTER

SECTION 3. REVERSIONS

SECTION 4. REMAINDERS

A. Defined and Classified

B. Vested Remainders

C. Contingent Remainders

D. Cross Remainders

E. Alternative or Contingent Remainders With a Double Aspect

SECTION 5. EXECUTORY INTERESTS

Chapter 2: *Perpetuities and Restraints on Alienation*

SECTION 1. RULE AGAINST PERPETUITIES

A. Historical Development

- B. General Aspects
- C. Applicability to Various Types of Interests
 - 1. Possibility of Reverter
 - 2. Right of Re-Entry (Power of Termination)
 - 3. Options
 - 4. Class Gifts
 - 5. Charitable Gifts
 - 6. Powers of Appointment
- SECTION 2. RULE AGAINST DOUBLE POSSIBILITIES
- SECTION 3. STATUTORY VARIATIONS OF THE COMMON LAW RULE AGAINST PERPETUITIES
- SECTION 4. TRUSTS FOR ACCUMULATION
- SECTION 5. RESTRAINTS ON ALIENATION
 - A. Fee Simple
 - B. Life Estate
 - C. Spendthrift Trusts
 - D. Blended Trust
 - E. Support Trust
 - F. Discretionary Trust
 - G. Protective Trust

Chapter 3: *Powers of Appointment*

- SECTION 1. DEFINITIONS AND CLASSIFICATIONS
- SECTION 2. EXERCISE OF POWER OF APPOINTMENT
 - A. Capacity of Donee to Exercise Power of Appointment
 - B. Delegation of Power of Appointment; Creation of New Power
 - C. Creditors' Claims
 - D. Rights of Surviving Spouse of Donee
 - E. Mode of Exercise
 - F. Duty to Exercise
- SECTION 3. NONEXCLUSIVE POWERS AND ILLUSORY APPOINTMENTS
- SECTION 4. EXTINGUISHMENT, LAPSE, RELEASE, RENUNCIATION
- SECTION 5. TAX LIABILITY
 - A. State Inheritance Taxes
 - B. Estate and Gift Taxes

B. GIFTS IN ESTATE PLANNING

Chapter 1: *Charitable Gifts*

- SECTION 1. HISTORICAL AND GENERAL CONSIDERATIONS
- SECTION 2. CHARITABLE PURPOSES
 - A. Advancement of Religion
 - B. Advancement of Education
 - C. Relief of Poverty
 - D. Promotion of Health
 - E. Governmental or Municipal Purposes: Purposes Beneficial to the Community
- SECTION 3. ADMINISTRATION AND APPLICATION OF CHARITABLE ESTATES (Prerogative and Judicial Cy Pres)
- SECTION 4. RESTRAINT ON ALIENATION BY CHARITY
- SECTION 5. ACCUMULATIONS FOR THE BENEFIT OF CHARITY
- SECTION 6. CHARITABLE GIFTS IN ESTATE PLANNING

Chapter 2: *Gifts Causa Mortis*

- SECTION 1. ESSENTIALS AND INCIDENTS OF GIFTS CAUSA MORTIS

C. RESULTING AND CONSTRUCTIVE TRUSTS

Chapter 1: *Resulting Trusts*

- SECTION 1. TERMINATION OR FAILURE OF AN EXPRESS TRUST
- SECTION 2. VOLUNTARY CONVEYANCE
- SECTION 3. TRUSTS RESULTING FROM SUPPLYING OF CONSIDERATION

Chapter 2: *Constructive Trusts*

- SECTION 1. INTERFERENCE WITH TESTAMENTARY PURPOSE
- SECTION 2. PROMISE OF DEVISEE OR LEGATEE TO BENEFIT A THIRD PERSON
- SECTION 3. ACQUISITION OF PROPERTY ON OR BY BREACH OF CONFIDENCE
- SECTION 4. PROMISE OF GRANTEE TO HOLD FOR OR RECONVEY TO GRANTOR OR TO CONVEY TO A THIRD PERSON
- SECTION 5. MISREPRESENTATION BY GRANTEE

D. CONTRACTS AND DEEDS IN ESTATE PLANNING

Chapter 1: *Contracts*

- SECTION 1. ANTENUPTIAL CONTRACTS
- SECTION 2. POSTNUPTIAL CONTRACTS
- SECTION 3. PARTNERSHIP CONTRACTS
- SECTION 4. CONTRACT TO MAKE, OR NOT TO REVOKE, A WILL

Chapter 2: *Deeds*

- SECTION 1. DEED RESERVING A LIFE ESTATE
- SECTION 2. DEED RESERVING TO GRANTOR POWER TO REVOKE
- SECTION 3. DEED RESERVING A LIFE ESTATE; DECLARATION OF TRUST BY GRANTEE
- SECTION 4. ESCROW ARRANGEMENTS
- SECTION 5. DEED IN CONSIDERATION OF GRANTOR'S SUPPORT
- SECTION 6. TRANSFER OF A LIFE ESTATE WITH POWER OF DISPOSAL

E. LIFE INSURANCE IN ESTATE PLANNING

- SECTION 1. PROMISE OF BENEFICIARY TO TRANSFER PROCEEDS TO ANOTHER
- SECTION 2. DISPOSITION OF PROCEEDS BY WILL
- SECTION 3. CHANGE OF BENEFICIARY BY WILL
- SECTION 4. INSURANCE TO LIQUIDATE CORPORATE INTEREST
- SECTION 5. INSURANCE TO LIQUIDATE PARTNERSHIP INTEREST
- SECTION 6. QUALIFICATION OF INSURANCE PROCEEDS FOR MARITAL DEDUCTION