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

William D. Rollison

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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:

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* Professor of Law, Notre Dame Law School.
LEGAL EDUCATION

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
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. Reproduction and Revival of Wills
      1. Statutes
      2. Reproduction
      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. RESTRANTS 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

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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