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CONTEMPORARY TRUSTS AND ESTATES—AN EXPERIENTIAL APPROACH

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INTRODUCTION

How can the teaching of trusts and estates integrate policy, practice, doctrine, and centuries of tradition?

When the four of us decided in 2008 to collaborate on a Trusts and Estates casebook, we came with different backgrounds, perspectives, and biases. One of us is primarily a tax professor who also works with a law firm practicing estate planning. He had developed extensive problems and exercises for teaching Trusts and Estates that became the starting point for what we did with the book. Another focuses on family status in Trusts and Estates and on gender issues in other work—she had eschewed published casebooks to develop her own materials that combined cases with policy. A third writes on a range of trusts and estates topics and brings a trust law background to her work on the regulation of charities. And the fourth co-author combines gender, professional responsibility, and legal theory in her approach. Our different backgrounds led to a rich blend of old and new—practical and doctrinal—in the book.

As we developed our proposal, we realized that we all had in common a profound appreciation for the pedagogy advocated by the *Carnegie Report*,[1] which counsels that legal education should integrate "theoretical and practical legal knowledge and professional identity."[2] As the *Carnegie Report* notes,

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1. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter *Carnegie Report*]. The Report had been issued the year before we began our collaboration.

2. *Id.* at 13.

training to become a lawyer should include an introduction to practice and an exploration of professionalism as well as an analysis of legal doctrine.[3]

With this shared vision in mind, we integrated our differing approaches to teaching Trusts and Estates, with a goal of creating a textbook that combines opportunities to develop legal analysis, judgment, and perspective with practice skills. We sought to focus simultaneously on: (1) the theoretical foundations, exploring core trusts and estates concepts and using traditional case analysis; and (2) practical applications of the material, incorporating challenging problems and innovative exercises that require students to analyze the values and skills associated with being a professional. Consequently, we developed problems and exercises that allow—or perhaps more accurately require—students to apply the law to the facts. In the current vernacular, we wished to develop "practice-ready" attorneys through an experiential approach to the subject matter.

At the same time, we each had varying levels of (dis)comfort with the extensive use of problems. Recognizing that some professors might also be unfamiliar with this method, we developed an in-depth teachers' manual complete with sample forms and extensive PowerPoint slides, both of which guide the professor through the material and help in handling the "start-up" costs of teaching from a new book. Having now taught from the first edition and earlier drafts more than a dozen times (among the four of us) and having solicited comments from professors who adopted the book and from students who have used it, we have learned much about the complexities and tensions—and pedagogical successes—in balancing the teaching of practical skills with doctrine.

In this reflection on teaching Trusts and Estates, we first discuss how the *Carnegie Report* structures our approach, with particular attention to the need for a new type of pedagogy in the trusts and estates area, and then turn to challenges and joys of implementing this approach in the classroom.

I. THE *CARNEGIE REPORT*—AND WHY IT WORKS FOR TRUSTS AND ESTATES (AND EVERY OTHER COURSE)

In 1992, the *MacCrate Report* advocated that lawyers appreciate the importance of their role as problem-solvers.[4] Fifteen years later, the *Carnegie Report* expanded that goal. The *Carnegie Report* was a response to the perception among those in the practicing bar that law schools were moving in the wrong direction, toward more theory and less practical study.[5] One of its

3. *Id.* at 8.

4. AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 141–51 (1992).

5. *Carnegie Report*, *supra* note 1, at 7.

core observations about legal education was that law schools relied "heavily" on the pedagogical method of the "case-dialogue."[6] The *Report*'s authors suggest a balanced approach so that the teaching of legal doctrine is integrated with issues of practice and the development of professionalism.[7] In this way, the *Report* posits, students are more likely to appreciate the complexity of real clients. Through this integrative approach, the *Report* suggests that students will be better prepared for the actual situations they may confront in legal practice.

Developing new approaches to teaching practice and professionalism allows these issues to be taught outside of the clinical setting: fewer than five percent of all law schools require that students take a clinical course, and most students graduate without having taken one.[8] While the problem and exercise[9] method we have adopted in our book is not a substitute for the type of hands-on, supervised client representation that clinics offer, it does teach students analytical and practical skills, albeit in a different context.

II. THE PRACTICE OF TRUSTS AND ESTATES LAW

Students often expect that trusts and estates classes will involve boring cases detailing the formalities attendant to will execution on behalf of wealthy, entirely uninteresting, dead people. That *might* have been the primary focus seventy-five years ago, but not any longer. Once students discover that trusts and estates practice involves family, death, and money[10]—the basic elements of gossip—students decide that both the subject area and the course are fun. Students also realize that the law will affect them personally, even if they do not practice in the area, and that personalization of the course helps maintain their interest.

The practice of trusts and estates law is one of the most hands-on, client-intensive fields of law. More than many areas of practice, it involves getting to know intimate details about clients, their finances, and family: is the family functional or dysfunctional; are some children more deserving than others and are any in trouble with creditors or drugs; are there secrets such as nonmarital children that one spouse has kept from the other; should special provisions be made for disabled children or a family member dealing with drug abuse or

6. *Id.* at 186.

7. *Id.* at 8.

8. Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437, 448 (2013).

9. As discussed *infra* in Section V, problems are more focused on a specific topic, while exercises involve a broader range of topics and skills.

10. As we emphasize in our classes, trusts and estates law does not affect only wealthy individuals. The nonprobate revolution means that almost all workers have signed some type of beneficiary designation form. Moreover, even people with no financial assets almost certainly have some digital assets and may have emotional mementos of value to them or to others.

mental illness; are the client's investments doing well or poorly; are taxes a critical concern; are certain members of the family likely to contest the will if they do not inherit what they think they deserve, and so on?

All of these characteristics of trusts and estates practice provide opportunities to engage the students. We use descriptive text, statutes, excerpts from articles and cases, and lots of problems, questions, and exercises to do so.[11] Part of the challenge is to convey to students the dynamic nature of the law and the possibilities for ongoing law reform, as well as the subject matter's applicability to new and different families who may—or may not—have traditional forms of wealth. Litigation skills are important, but more important is knowing what to expect from litigation, which serves as a guide to improve planning in the hope that litigation does not happen. Given the number of malpractice cases brought by disgruntled beneficiaries and heirs, students must also learn the nuances of applying the rules of professional responsibility in an estate planning context. Due to the nature of the subject matter, the course is well-suited for the use of extended hypotheticals, role-playing, and drafting exercises. We enjoy using these tools to help students understand and navigate the complexities of the material and the practice of trusts and estates law.

III. CHANGES IN TRUSTS AND ESTATES LAW

Our efforts to craft our pedagogical approach were based, in part, on new developments from both within the field of trusts and estates and from the outside. Probate law and trust law derive from centuries old doctrines. Changes to the doctrines were slow because changes to society and the composition of the family were slow. But in recent years, the pace of change in the law has accelerated to keep up with societal changes; unmarried parents giving birth to children, unmarried partners forming families, multiple marriages creating blended families, spouses divorcing, parents abandoning their children, and children abusing their elderly parents. The many changes in family structure create challenges for lawyers and, therefore, for law students. Interpreting doctrines or statutes based on an evolving social structure requires that students not only learn the doctrines but also learn how to analyze and apply them to changing circumstances.

Integrating practical and skills-based material into the basic course, consequently, not only hones legal analysis but also gives students a better appreciation for how they can apply those legal concepts to the diverse fact patterns that they may confront in practice. Learning how to respond to actual facts, in turn, provides a feedback loop that improves legal analysis and,

11. Of course, we recognize that we are not the only trusts and estates casebook authors to use problems.

regardless of whether students even think about a trusts and estates issue once the course ends, the process of "thinking like a lawyer" sticks with them.

IV. OUR BASIC STRUCTURE

In order to prepare students for the changing landscape of laws and social structures, we wanted not only to provide the basic information, but also to devote more time to building on, interpreting, and using the rules and doctrines. We employ a variety of tools throughout the book to explore the nuances, exceptions, and changing rules.

The book does, of course, rely on some of the traditional ways of teaching doctrine. After all, what would a casebook be without cases? As casebook authors know well, the selection of cases is a time-consuming art form; it can sometimes feel like the proverbial search for the needle in the haystack: clear, but interesting facts, careful exploration of the evolution of the doctrine, well-explained reasoning, and sensible results. To avoid the frustration of teachers and students alike, we have tried to edit out peripheral matters and have generally selected cases that present the majority view (we do, however, want to make sure that students understand the dynamic nature of the law, the potential for variations among states, and the possibility of creative lawyering so we occasionally include dissenting opinions or cases that show the minority approach). While the cases in which judges bend doctrine to reach a result that fits with the judge's sense of what is best for the family are often amusing, we limit the number of these oddball cases because they tend to be confusing and distracting for students—and take away precious time from our focus on the experiential side of the course. In keeping with the fact that there have been dramatic changes in society recently, we have also sought to include cases of a more recent vintage rather than some of the older cases with which students may have trouble relating.

Much of probate law and, increasingly, trust law is statutory. We chose to focus primarily on the Uniform Probate Code (UPC) and the Uniform Trust Code (UTC) rather than the myriad state statutes. We assume that some professors using the book will want to use the statutes from their own states in addition to and as a counterpoint to the uniform statutes (some of us do this as well). Nonetheless, we chose to emphasize the uniform laws in the casebook for several reasons: (1) they are the law in a growing number of states, (2) students are mobile and will not necessarily practice in the state in which they attend law school, (3) the provisions of both have influenced statutes in states that have not adopted them, and (4) they have codified the common law in many respects, presenting precise, comprehensive, and easily accessible guidance. The book includes sections from the UPC and the UTC in the text, so that students can refer easily to the statutes and do not need to buy a separate selected statutes book, a savings that students uniformly appreciate.

The ability to interpret and analyze statutes is an important skill for law students to practice, and the course provides ample opportunities to teach statutory construction. The changing nature of statutes provides an opportunity to discuss policy issues and opportunities for lawyers to be involved in law reform. The book occasionally includes an example of a state statute that differs from the uniform act version to raise policy questions and to remind students that the law in this area is anything but standardized. Also, exercises throughout the book ask students to find statutes and forms from different jurisdictions to provide the basis for class discussion about why and how states vary in their approaches to statutory law. For example, we have exercises in the chapter discussing intestacy that ask the students to find and copy the statute for the state in which they grew up or where they intend to practice and describe to the class or to the person sitting next to them the intestate rights for a surviving spouse or other heir based on several sets of facts.

With the removal of the privity barrier to malpractice suits in many states and given the number of lawsuits against estate planning lawyers,[12] a trusts and estates practice also requires an appreciation of professional responsibility rules. The book is, therefore, attentive to the professional responsibilities of estate planning lawyers and includes repeated references to and quotations from the Model Rules and the relevant commentary from the American College of Trust and Estate Counsel.[13] Students need to appreciate that the role of an estate planner includes advising clients on issues that go well beyond the specific legal issue presented in drafting a particular provision or document. For example, an exercise in the first chapter asks students to consider the lawyer's role as a counselor when a client favors one child over another or wants to exclude a family member based on the client's personal beliefs. Also, professional responsibility matters are presented throughout the book in context; thus, issues associated with dual representation are discussed in the introductory chapter, while the dilemmas of a drafting attorney who is a beneficiary or fiduciary are discussed in the wills chapter.

During the discussion of each doctrinal topic, we use many examples and articles or case excerpts for elucidation. Like our decision to incorporate the statutes into the text, our choice to present the law of trusts and estates in a straightforward manner saves students the cost of having to buy additional study guides. More importantly from a pedagogical perspective, it preserves time for classroom discussion of the problems and exercises without the distraction of outlier material. Students have consistently commented upon the

12. More than ten percent of all malpractice claims are filed in the trusts and estates context. AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2008–2011 27 (2012).

13. AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 2006).

accessibility of the writing and the frequent use of examples, well-edited cases, and articles as strengths of the book.

V. QUESTIONS, PROBLEMS, AND EXERCISES

The unique feature of the book, however, is its experiential approach to help the students test their understanding and develop the skills needed to handle work for clients. We provide three types of learning vehicles designed to help students grapple more deeply with the topics covered in the book, challenging them to apply the doctrine they have learned to the facts—questions, problems, and exercises.[14] While not all of us used problems, much less exercises, in our Trusts and Estates teaching before writing the casebook, we all do now, albeit in different ways (and with different levels of comfort). New users of the casebook sometimes tell us they are a little intimidated when it comes to using problems and exercises because they do not think of themselves as skills teachers. We reassure them that the skills we are teaching are no different from those taught in any other "doctrinal" course: how to analyze legal holdings and apply them in a new context.[15]

A. Questions

Questions raise issues for general discussion and may require students to think about policy, about the rationale behind a rule, or about their own personal views about a topic. They are intended primarily for self-reflection, but may also be used by the professor as a springboard for class discussion. We ask quite a few questions but probably fewer than many other casebooks because we wish to allow time for the problems and exercises.

B. Problems

Problems drill down on a particular statute or rule and require the students to apply what they have learned to a hypothetical fact pattern. A typical set of problems might describe a testator and a set of documents and ask the students to determine whether the documents constitute a valid will. The problems might, for example, test execution formalities, integration, incorporation by reference, or revocation. We may ask students to work in a group to develop one set of answers, or we may review answers together in class.[16] Our students are more engaged, more willing to volunteer in discussion, and more ready to respond when asked (at least most of the time).

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14. *See* Tracy A. Thomas, *Teaching Remedies as Problem-Solving: Keeping it Real*, 57 ST. LOUIS U. L.J. 673, 676 (2013) (identifying "three key components of a problem-based class: problem, cases, and lecture.").

15. *See id.*

16. In the next section, we provide various methods for teaching exercises, and these methods can be adapted for using problems.

When we review problems in class, we often find that students will ask additional questions, wondering what would happen if a fact pattern changed or wondering why the statute directs the outcome in a particular way. A student may become more engaged in the history and policy developments of particular doctrines because the student recognizes that the outcome under a particular rule does not make sense. For example, in discussing dependent relative revocation, a doctrine that allows a court to give effect not to the will the testator wanted but to the next best will,[17] a student will often wonder aloud about this result. A discussion can then lead to better understanding of the development of substantial compliance and harmless error as strategies to enable courts to validate a testator's intended will and not the next-best substitute.

C. Exercises

Exercises ask the students to try something—draft a will, interview a client, write a memorandum explaining an estate plan, role-play a will execution ceremony, or interpret trust provisions. A professor can require students to prepare and turn in exercises, either as graded work or to review in class. Alternatively, a professor can use the exercise prompt as a vehicle for discussion in class. For example, a client counseling exercise works equally well as a role-play or a topic for class discussion. Students might be asked to role-play an interview with a client, or the class could discuss the steps that would be taken in structuring an interview. Either way the students have to engage with the material beyond simply reading, listening, and outlining.

Yes, exercises do take time, and it is daunting to contemplate grading fifty to seventy-five of them. We have found ways to engage students experientially without excessive use of class time (or of the professor's time). Many exercises require students to draft letters, portions of documents, amendments to documents, and the like. While professor grading and feedback is quite useful to students, an alternative means for handling exercises is class discussion, sometimes followed by self-grading or colleague-grading. Additionally, peer-grading is a valuable experience in and of itself as it forces each student to think through the critical features of the assignment and the quality of writing by another person. To ensure that students complete the exercise, some of us award a small number of points (five out of a total of 100 for the course) for completion of a particular assignment. Our experience has been that students take the exercises seriously even if the points do not depend on the quality of the effort.

17. *See* Julia E. Swenton, *The Missing Piece: The Forgotten Role of Testator Intent in the Application of the Doctrine of Dependent Relative Revocation in Oklahoma*, 59 OKLA. L. REV. 205, 206–07 (2006).

Beyond written exercises, we encourage the use of role-plays. The instructor can ask all students to prepare for the role-play, and then randomly call on a few to serve as the interviewers or advisers. For example, in the introductory chapter, students are asked about their approach to representing a married couple in estate planning and to developing some of the introductory hellos, preliminary fact-gathering, and professional responsibility issues. We have similar exercises in several of the chapters, including the tax chapter where we ask the students to discuss basic tax planning matters with the clients based on a hypothetical financial profile.

Another way to lessen professor time but still take advantage of the experiential approach is to use small group discussions during class. For some exercises, one student (or members of a small group) acting as an attorney is asked to explain something to another student or students, acting as the clients. For example, we have an exercise in the intestacy chapter that demonstrates to students the difficult skill of translating legalese into layperson terms. Each student is asked to look at the intestacy statute for the state where the student grew up or intends to practice. The exercise requires that each student be prepared to describe to the class or another student the intestate share for a surviving spouse if the decedent spouse was also survived by an adult child from his first marriage, two minor children with the surviving spouse, a mother, and a brother. The benefit of the small groups is that all students have a chance to participate; the benefit of role-playing in front of the class is that the professor can help in role-modeling the appropriate discussion.

One of us has used a midterm project as a way to test the trust material while giving the students an opportunity to work with documents. The project, which is graded, consists of several documents, including some combination of a revocable trust, a pour-over will, a second will, a letter, and other documents. The revocable trust or the second will create at least one continuing trust. The students must answer approximately seven questions based on an extensive fact pattern, with changes that affect the family over time. The students have two weeks during the middle of the semester to work on the midterm project. Students have reported positively that they found the project to be an excellent way to learn the trust material. With ample time to review the material in the context of the questions, they can identify weak spots in their understanding and do the additional work necessary to address any confusion before the mad scramble at the end of the semester. The students also appreciate having approximately one-third of the course material excluded from the final exam, and for some students the lack of time pressure for that portion of the grade helps with stress. The disadvantage of the midterm is that students must find time in the middle of the semester to complete the work, and the professor must find time to grade the projects. The project counts for approximately one-third of the points for the course, and the professor has managed to return the projects two weeks after the projects are due. The professor uses a model

answer to provide feedback, with minimal individual comments, but each project must be graded. Even with a page limit of ten pages, the work of grading projects for a large class is daunting.

Another of us has required students to prepare the basic documents of estate planning (a will, durable power of attorney for financial matters, a durable power of attorney for health matters, and a living will) for themselves, anticipating what may be their lives in the near future with respect to family and finances. The students really appreciated leaving the course with all their estate planning documents ready for signature and witnessing. Next time, this professor plans to have each student do all the documents for another student, giving the students the experience of interviewing and information-gathering in addition to drafting. The client/student can choose either to provide facts that correspond to her own life, or, if she feels uncomfortable disclosing intimate details to a classmate, develop a set of simulated facts (perhaps those of a friend or family member).

VI. THE E-BOOK

Our publisher has made our book available as an e-book. One of us adopted the e-book the first time she taught the course, and found the e-book to be very flexible. It allows the professor to reorder the chapters and even delete sections within a chapter. With an e-book, the professor can annotate the e-book, using comment boxes, and hyperlinks to internet resources like YouTube videos. For example, a link to a YouTube video on the various methods of reproductive technology was a very effective tool to bring students up to speed on differences in that process that affect how the law may treat ART[18] children differently based on how they were conceived. If a professor uses the e-book, it becomes important to have all students adopt it. If a professor is taking the time to annotate the book with his or her unique insights or information found on the web, then it is important for all students to have access to that additional material. In the absence of universal adoption, some students may perceive that others are getting an advantage.

A downside of e-books is that some students are not comfortable with them. One of the most interesting aspects of using the e-book was that there were still a number of students who much preferred purchasing a hard copy, even though the cost was higher. This was a testament to the durability of the traditional casebook. It also poses a challenge in terms of universal use of the e-book. In addition, e-books require a lot of upkeep, similar to authoring a blog

18. ART stands for assisted reproductive technology. *See* Amy L. Komoroski, *After* Woodward v. Commissioner of Social Services*: Where do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297, 309 (2002). *See also Assisted Reproductive Technologies: The Future is Now*, YOUTUBE, https://www.youtube.com/watch?v=zhemDZ3G9dw (last visited Jan. 11, 2014).

or launching a website. Once the professor begins annotating, the professor will feel compelled to keep up those annotations. A way to alleviate this potential problem is to use a moderate amount of annotation in the beginning of the course in order to gauge one's own interest in doing this and the time commitment the annotations will take.

Despite a few downsides, e-books are clearly the wave of the future, and we appreciate that the book is available in this format. It gives students and professors a chance to engage new technology and amplify the content of the book in a way that resonates with the current generation of law students.

VII. COURSE COVERAGE

The book is structured to be used in different ways by different professors. One of us teaches the course as a four-credit course, two of us have only three credits, and the fourth has taught it both ways. We each make different decisions about what to cover. The book intentionally includes more material than can be covered even in a four-credit course, so that professors can decide what to cover and students will have the additional material as a resource. For example, one of us does not cover the tax chapter in the trusts and estates course but uses the chapter to provide an overview of estate and gift taxation in her estate planning course. Another of us provides a brief overview of tax early in the semester, so that students understand why nonprobate transfers, trusts, and wills provide different benefits in structuring an estate plan.

The other significant change we have made concerns the order of the material. Traditionally, law school casebooks that deal with trusts and estates start with the rules for wills and move to the law of trusts because that is how the doctrines developed historically. Our book addresses the field in a more chronological way. We talk first about estate planning generally, including how to define family members, then we discuss nonprobate transfers and trusts, which tend to be used and become effective during people's lives, and then we examine wills. An advantage of this order is that the students engage the trust material earlier in the course, before end-of-semester fatigue sets in. The disadvantage is that some topics—capacity is an example—must be described briefly in connection with trusts with the promise of more in-depth discussion later in the semester. After a period of adjustment to this new order, three of us are enthusiastic about it and one continues to teach wills first.

CONCLUSION

Our students—and the adopting professors with whom we have spoken—have been overwhelmingly enthusiastic about the book and our approach to integrating doctrine and practice. Admittedly, the disgruntled students are not likely to complain directly to us, but given the anonymity of grading and student evaluations, the level of enthusiasm surprised us. Students like the fact

that the book provides the doctrine in an intellectually challenging, yet relatively clear manner, so that students can spend more time applying the rules. In our teaching, we have found that students seem to have a better grasp of the material and perform better on exams. As an added bonus, more students than ever have told us that they had never considered trusts and estates as a potential career but after taking the course they understand just how interesting the material actually is and are interested in practicing in the area. In addition, we enjoy engaging with the material on the different levels of jurisprudence and practice.

As the authors of the *Carnegie Report* noted: "Greater coherence and integration in the law school experience is not only a worthy project for the benefit of students; it can also incite faculty creativity and cohesion."[19] That is exactly how the four of us view this book project—as an opportunity to work collaboratively with each other and with many other colleagues around the country who enjoy teaching Trusts and Estates. We hope to spark the kind of community the authors of the *Carnegie Report* describe, where the practice of teaching is the basis for shared insights that yield tangible benefits for our students and our field.

19. William M. Sullivan et al., *Summary: Educating Lawyers: Preparation for the Profession of Law*, CARNEGIE FOUNDATION 11 (2007), http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf.