

**Fundamentals of Trusts and Estates
Third Edition**

**Teachers' Manual for
2011 Transfer Tax and Intestacy
Supplement**

by

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Note to teachers:

Pending the completion of our new 4th Edition, to be available for your review in Spring, 2012, we have prepared supplements to those sets of material that have changed most since the 3rd Edition. For convenience we combine that material into one supplement.

For Chapter 1, you'll find a new section on federal wealth transfer taxes. After Congress revised transfer taxes in late 2010, we prepared an abbreviated supplement for immediate use in January, 2011. We've now had time to revise the tax material to include new problems and updates for supplemental reading. This set replaces the earlier tax supplement.

For Chapter 2, there is a revised set for issues revolving around the parent-child relationship, with special attention to children of assisted reproductive technology.

You'll find new PowerPoint slides in a single file, with the two sections separated by a blank slide.

§1.03 Federal Wealth Transfer Taxes

Trying to say a little bit about tax is a risky business. We do it because tax considerations drive so many of the estate plans students will see in the course. With this background, students may better understand why clients chose particular approaches. On the other hand, you can safely skip or delay this topic. When necessary to understanding the substantive issue of a case later in the text, we provide a brief explanation of the tax issue.

Our goal for this section is to help students learn enough of this material so that they appreciate how little they know. That way they can take advanced courses to learn more, or they will at least be more likely to spot tax problems and refer clients to (or consult) tax specialists. This might also be a good time to mention how hard it is for lawyers and clients when Congress is unable to agree upon even an intermediate-term approach.

A. A Unified System

B. The Gift Tax

Page S5, Question. The question raises both technical tax issues (lawyer competency) and professional ethics. Regarding the tax issues, the lawyer should know that the gift tax annual exclusion under IRC § 2503(b) is indexed for inflation. Also, a parent who furnishes necessary support for a child will not be deemed to be making a gift because the discharge of a support obligation is treated as consideration in money or money's worth. *See* Rev. Rul. 68-379. Whether there is a tax (and ethics) problem depends on whether Alicia owes Elizabeth a support obligation.

If Elizabeth is a minor, it should not be necessary to file a gift tax return since none is required if the total gifts to a donee are under the gift tax annual exclusion amount. *See* IRC § 6018. As a result, the ethics issue is avoided.

If, however, the blouse was a gift of a non-support item, then a gift tax return would be required. Although ignoring individual gifts may be common, a lawyer participating in that practice would probably be committing fraud by understating the size of the year's gifts. Ethical violations also loom. *See* Model Rules of Professional Conduct Rule 1.2 (d) (a lawyer shall not counsel a client to engage in conduct the lawyer knows is criminal or fraudulent); ABA Comm. on Professional Ethics and Grievances, Formal Op. 85-352 (a lawyer may not advise a client to take a position on a tax return unless the position is one that the lawyer in good faith believes is warranted in existing law or can be supported by a good faith argument for an extension, modification or reversal of existing law).

C. The Estate Tax

1. The Gross Estate

This section introduces the gross estate concept. Perhaps the most important basic point is how the gross estate is larger than the probate estate. Students resist the distinction. Figure 1-4 may help.

2. The Marital Deduction

The new portability feature of the marital deduction simplifies planning by eliminating the need for A-B trusts justified only for tax reasons. (They may still be useful in other contexts, as where there's a second marriage.)

Page S8, Problem. This is the first of several problems designed to alert students to the difficulties of representing spouses or other partners. Waivers of confidentiality protect lawyers from the risk later conflicts of interest.

You might also consider four basic models identified in Teresa Stanton Collett, *The Ethics of Representing Husbands and Wives*, 50 Elder Law Advisory 1 (May 1995):

- (1) One lawyer represents both parties separately. The lawyer treats each member of the couple as a separate client and keeps confidences as between them. The biggest danger here probably is the conflict with the obligation to give a client enough information to make informed decisions. Information one client wants to keep in confidence may be critical to the other's ability to make an informed decision.
- (2) One lawyer represents the family unit. The analogy here is to representing an organization. The lawyer keeps or reveals confidences consistent with the lawyer's view of the best interests of the family. The risk is that the lawyer, as guardian of the family, may not have all of the information, or may not understand the history, or may favor one

family

member.

- (3) Separate lawyers represent each person. Here we avoid the conflicts, but may get in the way of adequate sharing of information. By its structure, the whole project may become more adversarial than either party would want. Costs are likely to be higher.
- (4) One lawyer represents both clients "jointly." This probably is the most common, and most-widely endorsed, approach. Both clients waive their rights to confidentiality at the outset. Anything either one tells the lawyer can go to the other. Here the lawyer can seek to bring together all views and achieve a consensus. Without the pledge of confidentiality however, there may be a reluctance to share information. Also, because one lawyer represents both, the danger of favoritism remains. This is a good place to stress the importance of putting lawyer-client agreements in writing.

D. The Generation-Skipping Transfer Tax

This discussion lets students know the tax is out there and gives teachers the opportunity to develop more details if they have time.

Page S9, Problem 1(a).

Harry's Gross Estate

Probate estate.	\$10,000,000
§ 2033 (property owned at death) Life insurance (Harry paid)	<u>100,000</u>
§ 2042 (incidents of ownership) [Mother's trust not included, because Harry only had a special power]	
GROSS ESTATE TOTALS	10,100,000

Page S9, Problem 1(b). Harry's taxable estate with everything going to Wilma:

[Note that the problem unrealistically assumes no administrative expenses or debts.]

Gross Estate	10,100,000
-marital deduction.	<u>-10,100,000</u>
TAXABLE ESTATE	0

Page S9, Problem 2. Here we illustrate the importance of the portability feature. As long as Harry's estate filed Form 706, Wilma's executor can elect to use whatever's left of his unified credit (here, everything). [Again, no expenses or debts make the math easier.]

Wilma's Taxable Estate –

H's probate estate, now Wilma's	10,100,000
Life insurance money, now cash	<u>100,000</u>
GROSS ESTATE	10,200,000
TAXABLE ESTATE	10,200,000
HARRY'S EXEMPTION EQUIVALENT.....	5,000,000
WILMA'S EXEMPTION EQUIVALENT.....	5,000,000
AMOUNT SUBJECT TO TAX.....	200,000

Page S9, Problem 3. Over the last few years, LexisNexis has developed a series of books combining hard copy and online material to give teachers new opportunities to introduce (surprise!) skills and values coverage into their courses. Roger Andersen and Karen Boxx teamed up to provide the materials appropriate to this course. They are designed to accommodate different levels of teacher involvement. In particular, each project has a “self-assessment” feature that can limit your role to assigning a project and (if desired) checking to see that it has been completed. Students can be on their own to compare their solutions to the project-specific samples provided online. Of course, you can also bring those projects into your class discussions, as appropriate to your needs. Alternatively, you might use the S&V materials to satisfy the student desire (and need) for practical knowledge while also covering doctrine you don't have time for in the classroom.

Page S10, Selected References.

Marc S. Bekerman & William P. LaPiana, Carryover Basis? Have We Learned from History?, 19 Prob. & Prop. 38 (Nov/Dec 2005). This article looks ahead at likely problems dealing with the end of a step-up system and offers suggestions for things to do now to make it easier.

Zoe Prebble & John Prebble, The Morality of Tax Avoidance, 43 Creighton L. Rev. 693 (2010). In a wide-ranging discussion, a New Zealander and an Australian add bring a British Commonwealth perspective to the question. They define “tax avoidance” not to mean any planning to reduce taxes, but rather "contriving transactions and structures that reduce tax in ways that are contrary to the policy or spirit of the legislation." Bottom line: just because it is

legal doesn't make it moral. You might want to foreshadow the similar question that arises in the context of individuals planning so they can qualify for Medicaid.

John R. Price, *In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning*, 62 U. Miami L. Rev. 735 (2008). The title says it all, honoring a colleague whose work is still reflected in this casebook and manual.

Intestacy Supplement –

NOTE on 2008 UPC Inflation Adjustments: In 2008 the UPC was amended to provide 50% inflation adjustments.

On page 46 of the text, homestead allowance was increased to \$22,500 and the exempt property allowance was increase to \$15,000.

On page 47 of the text, the amounts in Section 2-102(2)-(4) were increased to \$300,000, \$225,000 and \$150,000, respectively.

B. Descendants

1. Non-marital Children

You might want to note that the courts have struggled with two competing policies. On the one hand they want to avoid penalizing children because of their status; on the other hand, they want to have some assurance that the child in question and the man in question are indeed related. With DNA testing, the second element is becoming easier as a scientific matter, so other legally-imposed requirements are increasingly harder to justify despite the Supreme Court's effort in *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001) (upholding extensive paternity proof requirements).

Page S13, Selected References

Martha F. Davis, *Male Coverture: Law And The Illegitimate Family*, 56 Rutgers L. Rev. 73 (2003). Davis argues that a convergence of race, sex, and class bias has sustained a system in which non-marital fathers are less likely to have the rights and obligations of parenthood. She calls for legislative reform.

Kathleen R. Guzman, *What Price Paternity?*, 53 Okla. L. Rev. 77 (2000). Guzman criticizes Oklahoma's intestate statute for unfairly favoring mothers over fathers.

Paula A. Monopoli, *Nonmarital Children and Post-death Parentage: A Different Path for Inheritance Law?*, 48 Santa Clara L. Rev. 857 (2008). Monopoli distinguishes the family law regimes for establishing the parent-child relationship (applicable during life) with rules needed in the context of intestacy. Given the different goals, “a simplified model to determine legal parentage in post-death cases” may be appropriate.

Kate Schuler, *The Liberalization of Posthumous Paternity Testing—Expanding the Rights of Illegitimate Children*, 17 Quinnipiac Prob. L. J. 150 (2003). Schuler argues that posthumous testing is appropriate if a test “would likely connect the decedent to the illegitimate child.”

2. Adopted Persons

You might start this discussion by asking the students to identify the key parties. Of course, there is the adoptee. On one side are genetic parents and relatives of the genetic parents and on the other side are adoptive parents and relatives of the adoptive parents. Students should understand that inheritance questions can flow in both directions on both sides of the larger family tree.

Page S16, Question 1. Should inheritance be limited to situations in which the adoptee was “raised” by the adopting parent? Compare our discussion of Problem 2 on text page 524, which raises a similar issue in the context of interpreting a document.

Page S16, Question 2. To what extent should our re-definitions of “spouse,” tie to our conceptions of “step-parent”?

Page S16, Question 3. Traditional statutes would give Peggy’s estate to Roxanne, but in this situation, it might be wise to skip a generation. The problem is designing a system that is tailored to protect someone like Jason without having it also apply to a variety of other foster-parent-like situations that are not as close. In the cited article, Knaplund argues that fact-finding in individual cases is too cumbersome; she would rely upon gifts, wills and trusts. Perhaps an arbitrary “grandchild exception” could be created if the grandchild had been raised in the grandparent’s household for a certain amount of time.

Page S16, Problem 4. This is a nice way to remind students to keep looking for analogies. See the Higdon article cited below.

Page S16, Problem 5. Our mistake; we pasted once too many (or cut once too few). This repeats 3 above.

Page S16, Problem 1(a). Bob can inherit from Doug under UPC § 2-119(b)(2).

Page S16, Problem 1(b). Doug cannot inherit from Bob. Under UPC § 2-119 (a) & (b)(2), the non-custodial genetic parent and his family are cut off from the child.

Page S16, Problem 1(c). Statutes generally do not directly cover the relative rights of adoptive parents. Presumably, we would treat the first adoptive parent as a genetic parent for the purpose of interpreting the statute.

Page S16, Problem 1(d). Under UPC §2-119(b), only adoption by the spouse of a genetic parent changes the general rule.

Page S16, Problem 1(e). This question prompts students to examine the scope of their own state's domestic partnership statutes, if any.

Page S17, Problem 2. This variation on the prior problem makes two changes. First, Doug has died before the adoption. Second, the question is whether Bob can inherit from Doug's parent (through his genetic parent). Bob can inherit under UPC § 2-119(b).

Page S17, Problem 3. Here we have an adoption within the family, but outside of the stepparent context. The UPC extends the "stepparent exception" to other "relatives" [descendants of grandparents] and their spouses. UPC §§ 2-115(9), 2-119(c). Sam's relationship to his grandfather is left intact.

Page S17, Selected References.

Jason C. Beekman, *Same-sex Second-parent Adoption and Intestacy law: Applying the Sharon S. Model of "Simultaneous" Adoption to Parent-child Provisions of the Uniform Probate Code*, (Sharon S. v. Superior Court, 73 P.3d 554, 2003.) 96 Cornell L. Rev. 139 (2010). Beekman analyzes the difficulties faced by same-sex couples when one partner wants to adopt the other's child.

Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 Wake Forest L. Rev. 223 (2008). Higdon would adapt the equitable adoption doctrine to cover informal situations common to modern families.

Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*. 48 Ariz. L. Rev. 1 (2006). Knaplund concludes that the best available solutions are ones that still rely upon the grandparent to think about the problem: gifts, wills, and trusts.

Peter Wendel, *Inheritance Rights and the Step-partner Adoption Paradigm: Shades of the Discrimination against Illegitimate Children*. 34 Hofstra L. Rev. 351 (2005). Wendel would extend the stepparent exception to step-partners.

Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg into a Round Hole*. 43 Creighton L. Rev. 815 (2010). Wendel argues that the law should

distinguish between various situations when an adult is adopted. Sometimes a person was raised in the family or had other close ties as a minor, but not adopted until adulthood. Here a parent-child relationship is usually contemplated. In other adult adoption situations, an adult-adult relationship is contemplated (e.g., a same-sex relationship where marriage is not an option). The consequences of the adoption should vary, depending on the situation.

3. Children of Assisted Reproduction

Page S18, *Finley v. Commissioner, Social Security Administration*

Amy and Wade Finley froze embryos created from her eggs and his sperm. About a year after he died, she had two of the previously frozen embryos thawed and transferred into her uterus, resulting in a single pregnancy. After the child was born, Amy filed a claim for mother's and child's Social Security benefits. Denied claims and various appeals led to the federal district court asked the Arkansas Supreme Court whether the child could inherit under Arkansas law (and thus under federal law qualify for the Social Security benefits). Amy argued that the child was “conceived” when the egg was fertilized while Wade was still alive, thus qualifying as an heir. Since Arkansas had no statute dealing with the issue, the court declined to define “conceived” so broadly and denied the claim.

The case offers a brief description of two technologies (see footnote) and gives students another concrete example of the problems posed when legislatures can't (or won't) resolve policy issues created by societal changes.

In addition to the cited student note, see Flannery, Michael T., *The Intestacy Rights of a Child Created as an Embryo by In Vitro Fertilization During the Parent's Marriage, but who Is Implanted in the Mother's Womb After the Father's Death: *Finley v. Astrue* (AR Sup. Ct. 2008)*. LexisNexis Expert Commentary (March 10, 2011).

Page S25, Question. A parent-child relationship would have been created under UPC §§ 120(d),(e), & (k). Wade was the husband of the birth mother; a birth certificate named him; the baby was in utero within 36 months.

Page S25, Problem.

Note that Leslie might be either male or female; challenge students who assume either one. They might have learned these basic facts from a written file and now be starting their own investigation by interviewing family members.

This problem gives students the opportunity to work through – and beyond – UPC § 120. Start looking for written evidence: a birth certificate [subsection (e)] or a signed document [subsection (f)(1)]. The problem's primary purpose is to focus attention on the “functioned as a

parent” language of subsection (f)(2). That, in turn, leads us back to the definition in UPC § 2-115(4). The official comments to that definition provide a checklist of evidence to develop:

The term “functioned as a parent of the child” is derived from the Restatement (Third) of Property: Wills and Other Donative Transfers. The Reporter’s Note No. 4 to § 14.5 of the Restatement lists the following parental functions:

Custodial responsibility refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

Decisionmaking responsibility refers to authority for making significant life decisions on behalf of the child, including decisions about the child’s education, spiritual guidance, and health care.

Caretaking functions are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

(a) satisfying the nutritional needs of the child, managing the child’s bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child’s personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child’s physical safety, and providing transportation;

(b) directing the child’s various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child’s needs for behavioral control and self-restraint;

(d) arranging for the child’s education, including remedial or special services appropriate to the child’s needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

Parenting functions are tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined [above], and all of the following additional functions:

(a) providing economic support;

(b) participating in decisionmaking regarding the child's welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.

Ideally, a parent would perform all of the above functions throughout the child's minority. In cases falling short of the ideal, the trier of fact must balance both time and conduct. The question is, did the individual perform sufficient parenting functions over a sufficient period of time to justify concluding that the individual functioned as a parent of the child. Clearly, insubstantial conduct, such as an occasional gift or social contact, would be insufficient. Moreover, merely obeying a child support order would not, by itself, satisfy the requirement. Involuntarily providing support is inconsistent with functioning as a parent of the child.

The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned as a parent of the child inherits from

the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individual whom the child claims functioned as his or her parent.

Page S25, Selected References.

Amanda Horner, *I Consented to do What?: Posthumous Children and the Consent to Parent After-death*, 33 S. Ill. U. L.J. 157 (2008). Horner recommends requiring written consent to after-death parenthood.

Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 Real Prop. Tr. & Est. L.J. 393 (2008). Knaplund focuses on questions surrounding the parentage of children conceived after the death of the gamete provider and surveys the varying approaches in different jurisdictions.

Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 Geo. Mason L. Rev. 403 (2009). Lewis critiques a variety of approaches and encourages legislatures to balance “the competing interests of the state, the posthumously conceived child, other living heirs, and the father's wishes to procreate, or not procreate, another child after his death.”

Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally-Based Approach to Parent-Child Property Succession*, 62 SMU L. Rev. 367 (2009). Tritt argues that in moving beyond blood relationships to define “family,” estates law should beware of tracking too closely the approaches of family law. They have different goals: family law emphasizes the best interests of the child, whereas estates law emphasizes testamentary freedom.

Morgan Kirkland Wood, *It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 Ga. L. Rev. 873 (2010). This note reviews recent developments and identifies surviving partners, deceased parents, and the decedent’s other children as among those parties whose interests can get lost in the tendency to focus only on the posthumously conceived child.

C. Half-Bloods

This section alerts students to the fact that, in some jurisdictions, a half-blooded relationship can work to the disadvantage of the half-blood. Note that the relationship can extend beyond siblings (the text’s example) to other collaterals.

Page S26, Selected Reference.

Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family*. 58 SMU L. Rev. 137 (2005). Brashier argues that the increasing incidence of half-blooded relatives in our society mandates that we rethink the “half should be treated as whole” approach. He favors giving probate courts discretion to shape intestate shares in half-blood situations.

D. Stepchildren

As combined families become increasingly more common, the status of stepchildren continues to draw more attention. Under the UPC and the laws of some states, stepchildren have inheritance rights, usually as a last resort before escheat.

Page S27, Question. This question works well as a commentary entry where students can talk in private about their personal experiences. As a list of factors for determining which step-children should qualify, you might consider the discussion of whether domestic partners should have inheritance rights or what it takes to “have functioned as a parent” for purposes of the assisted reproduction issues.