

Gratuitous Transfers

Professor Joseph Dodge

Fall 2009

Note: The page numbers of the first assignments refer to the new edition of the course book.

Preliminary Syllabus

GRATUITOUS TRANSFERS (Fall 2009)

Prof. Joseph Dodge

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Class Meetings: M, W, Th 9:30 – 10:45. Room: Rotunda 107.

Office Hours: M, W, Th: after class to 11:45; Tu: 9:30-11:45; or, just drop by any afternoon

Prerequisites: There are no prerequisites apart from first-year Property.

Materials: The required texts are:

- (1) Dukeminier, Johanson, Lindgren & Sitkoff, *Wills, Trusts & Estates* (8th ed. 2009) (Aspen),
- (2) West 2009 Florida Probate Code (West), and
- (3) E-mail distributions (to be made from time to time)

Note that you will need the hot-off-the-presses 8th edition. The 7th edition will not do.

Coverage: This is a course on the American law of wills, estates, and trusts (including powers of appointment). Doctrine in this area varies from state to state. Doctrine (especially in the area of wills) tends to be based on statute, rather than the common law. To give focus to this course, and also to improve skills of statutory analysis, the main “source of law” used in this course will be the Florida Probate Code (and related provisions), **no earlier than the 2008 edition**. Although the Dukeminier et al. coursebook sets out various provisions of the Uniform Probate Code, as well as cases (and statutory provisions) from assorted jurisdictions, these should be viewed as illustrative of possible approaches to legal issues that might be said to implement, modify, or challenge the solutions provided by the Florida Probate Code. However, no attempt will be made to systematically survey Florida case law.

This course does not cover the federal estate, gift, and generation-skipping taxes. Nor does this course deal with the income taxation of estates, trusts, and beneficiaries. This course deals with the gratuitous transfer of property, and does not cover such related

areas as guardianships, agency arrangements, investment vehicles (other than trusts and estates), personal investment management strategies, health care directives, powers of attorney, rules relating to the adoption, protection, and welfare of children, divorce and separation, and programs for the elderly and disabled (such as Medicare, Medicaid, and Social Security).

Aside from being “subject matter” course, this is also a course in dealing with the language used in statutes and (especially) legal instruments. To some extent, then, this is a course in the “interpretation” of texts, which is a legal skill that transcends categories of legal doctrine. *The student should pay close attention to the language used in the Florida statutes and the legal instruments dealt with in the cases and problems.*

The law of estates and trusts is perhaps unique among private law subjects in being a principal locus of “fiduciary law,” meaning the law governing the powers, duties, and liabilities of agents (estate representatives and trustees, as well as attorneys) who implement gratuitous transfers of the transferor for the benefit of the transferees.

Fiduciary law adds an extra dimension beyond traditional principles governing property, contracts, and torts.

Objectives: The course objective is develop your ability to bring controlling and/or persuasive legal authority and argument to bear on the solution of problems involving gratuitous transfers and their implementation. This task involves the interplay among: (1) identifying, developing, and/or creating relevant facts, (2) issue spotting and structuring, (3) marshalling doctrinal authority, and (4) invoking relevant policy norms.

Another (but related) course objective is to impart the culture of estates and trusts law practice. A sound and realistic approach to the practice of estates and trusts law emphasizes how the lawyer is supposed “to do it right,” that is, to ascertain and carry out the wishes of the client in a way that *avoids* (or at least minimizes) legal (and family) problems, since estate and trust litigation generates heavy costs that usually operate to deplete the “pot.” Gratuitous transfers, by their nature, are not inherently adversarial and do not involve arms-length bargaining between the transferor and transferees. However, apart from greed and spite, legal conflicts can arise because of the agency posture of fiduciaries, and the peculiar flavor of fiduciary law also influences practice.

Preparing for Class: Much class time will be devoted to the Problems in the Dukeminier et al. text. The text and (Florida) statutes should be viewed as the “raw material” for such problem solving. The idea is to mimic law practice as much as possible: you start off knowing a little about the subject, and you do research on the particular problem, except that here much of the research is already done for you by having been presented in the currently-assigned text (as well as previously-covered text and class discussion). *You are expected to research, on your own, any relevant statutory material in the Florida Probate Code book.*

Attendance: Attendance is, of course, required according to ABA rules. Excessive non-attendance can cause an “administrative drop.” If you cannot attend class, you

should send me a brief e-mail in advance briefly setting forth the reason for your absence.

Examination: There will be a conventional sit-down final exam, about 3 hours in length. Most questions will either be Multiple Choice or of the Short Answer Essay type. The questions will mostly involve problems similar to those in the text or to hypotheticals discussed in class. Unless otherwise stated, your answers should be based in the first instance on the Florida Probate Code. *Accordingly, the Florida Probate Code, as annotated in your own handwriting, is allowed in the exam, which is otherwise “closed book.”*

You will be graded on your ability to apply law to facts or to solve transactional problems. You will obtain no credit for merely reciting or paraphrasing rules of law. (For this reason, I don’t recommend student aids.)

Refusing to answer a question in class (or by answering “pass” or “I don’t know” or playing dumb) will result in one or more points being subtracted from the raw exam score.

Good (as opposed to frequent) oral performance in class can result in an addition of raw points.

Sequence of Coverage: The following material will be covered in the Dukeminier et al. text in the order set forth below. The sequencing is unconventional insofar as the topic of fiduciary (trust) administration is dealt with early in the course. The topic of fiduciary administration is perhaps the most distinctive feature of this body of law and, if deferred to the end of the course (as would otherwise be the case), would be covered in undue haste.

Pace: The assignments (set forth below) are grouped by topic, not class session. Some topics will require more than one class session, and a few might require less. Nevertheless, it is suggested that you prepare on a topic-by-topic (rather than class-by-class) basis. If a topic needs more than one class session, simply review the reading for the portion of the topic that hasn’t been covered in class.

TOPICS:

Setting the Stage

1. Setting the stage: Preface and pp. 1-38 of the 8th edition of the Dukeminier (et al.) text, but omit *Hodel v. Irving* on pp. 3-8, which held that the “right to pass on property” [to one’s heirs or legatees] was a “property right” that fell within the “Takings Clause” of the 5th Amendment to the U.S. Constitution, and omit the material from the middle of p. 10 to the end of section 1 on p. 16.

2. To probate or not to probate: 38-49

3. Intestacy: 71-97. (This is the first unit that entails consultation of the Florida statutes.)

4. Rights and powers of heirs and legatees: 135-157