

# Understanding Trusts and Estates

CAROLINA ACADEMIC PRESS UNDERSTANDING SERIES

- Understanding Administrative Law, 6e**  
William Fox, Jr.
- Understanding Alternative Dispute Resolution**  
Kristen Blankley and Maureen A. Weston
- Understanding Animal Law**  
Adam Karp
- Understanding Antitrust and Its Economic Implications, 6e**  
E. Thomas Sullivan and Jeffrey Harrison
- Understanding Bankruptcy, 3e**  
Jeffrey Ferriell and Edward Janger
- Understanding California Community Property Law**  
Jo Carrillo
- Understanding Capital Punishment Law, 4e**  
Linda Carter, Ellen Kreitzberg,  
and Scott Howe
- Understanding Civil Procedure, 5e**  
Gene Shreve, Peter Raven-Hansen,  
and Charles Geyh
- Understanding Civil Procedure:  
The California Edition**  
Walter W. Heiser, Gene Shreve, Peter Raven-  
Hansen, Glen Earl Weston, and Charles Geyh
- Understanding Civil Rights Litigation, 2e**  
Howard M. Wasserman
- Understanding Conflict of Laws, 4e**  
William Richman, William Reynolds,  
and Chris Whytock
- Understanding Constitutional Law, 4e**  
John Attanasio and Joel Goldstein
- Understanding Contracts, 3e**  
Jeffrey Ferriell
- Understanding Copyright Law, 6e**  
Marshall Leaffer
- Understanding Corporate Law, 4e**  
Arthur Pinto and Douglas M. Branson
- Understanding Corporate Taxation, 3e**  
Leandra Lederman and Michelle Kwon
- Understanding Criminal Law, 7e**  
Joshua Dressler
- Understanding Criminal Procedure:  
Vol. 1: Investigation, 7e**  
Joshua Dressler, Alan C. Michaels,  
and Ric Simmons
- Understanding Criminal Procedure:  
Vol. 2: Adjudication, 4e**  
Joshua Dressler and Alan C. Michaels
- Understanding Disability Law, 2e**  
Mark C. Weber
- Understanding Election Law  
and Voting Rights**  
Michael R. Dimino, Bradley A. Smith,  
and Michael E. Solimine
- Understanding Employee Benefits Law**  
Kathryn Moore
- Understanding Employment Discrimination  
Law, 2e**  
Thomas Haggard
- Understanding Employment Law, 2e**  
Jeffrey M. Hirsch, Paul M. Secunda,  
and Richard Bales
- Understanding Environmental Law, 3e**  
Philip Weinberg and Kevin Reilly
- Understanding Estate and Gift Taxation**  
Brant Hellwig and Robert T. Danforth
- Understanding Evidence, 4e**  
Paul Giannelli
- Understanding Family Law, 4e**  
John Gregory, Peter N. Swisher,  
and Robin Wilson
- Understanding Federal and  
California Evidence**  
Paul Giannelli
- Understanding Federal Courts and  
Jurisdiction, 2e**  
Linda Mullenix, Martin H. Redish,  
and Georgene Vairo
- Understanding Federal Income Taxation, 5e**  
J. Martin Burke and Michael Friel
- Understanding The First Amendment, 6e**  
Russell L. Weaver

- Understanding Immigration Law, 2e**  
Kevin R. Johnson, Raquel Aldana, Ong Hing,  
Leticia Saucedo, and Enid Trucios-Haynes
- Understanding Insurance Law, 5e**  
Robert H. Jerry, II and Douglas Richmond
- Understanding Intellectual Property Law, 3e**  
Donald Chisum, Tyler T. Ochoa, Shubha  
Ghosh, and Mary LaFrance
- Understanding International Business and  
Financial Transactions, 4e**  
Jerold Friedland
- Understanding International Criminal  
Law, 3e**  
Ellen S. Podgor and Roger S. Clark
- Understanding International Law, 2e**  
Stephen McCaffrey
- Understanding Jewish Law**  
Steven Resnicoff
- Understanding Juvenile Law, 5e**  
Martin Gardner
- Understanding Labor Law, 4e**  
Douglas E. Ray, Calvin William Sharpe,  
and Robert N. Strassfeld
- Understanding the Law of Terrorism, 2e**  
Erik Luna and Wayne McCormack
- Understanding the Law of Zoning and  
Land Use Controls, 3e**  
Barlow Burke
- Understanding Lawyers' Ethics, 5e**  
Monroe H. Freedman and Abbe Smith
- Understanding Local Government, 2e**  
Sandra Stevenson
- Understanding Modern Real Estate  
Transactions, 4e**  
Alex M. Johnson, Jr.
- Understanding Negotiable Instruments and  
Payment Systems**  
William H. Lawrence
- Understanding Nonprofit and Tax Exempt  
Organizations, 2e**  
Nicholas Cafardi and Jaclyn Cherry
- Understanding Partnership and  
LLC Taxation, 4e**  
Jerold Friedland
- Understanding Patent Law, 3e**  
Amy Landers
- Understanding Products Liability Law, 2e**  
Bruce L. Ottley, Rogelio Lasso, and  
Terrence F. Kiely
- Understanding Property Law, 4e**  
John Sprankling
- Understanding Remedies, 3e**  
James Fischer
- Understanding Sales and Leases of Goods, 3e**  
William H. Henning, William H. Lawrence,  
and Henry Deeb Gabriel
- Understanding Secured Transactions, 5e**  
William H. Lawrence, William H. Henning,  
and R. Wilson Freyermuth
- Understanding Securities Law, 6e**  
Marc I. Steinberg
- Understanding Taxation of Business Entities**  
Walter Schwidetzky and Fred B. Brown
- Understanding Torts, 5e**  
John Diamond, Lawrence C. Levine,  
and Anita Bernstein
- Understanding Trademark Law, 3e**  
Mary LaFrance
- Understanding Trusts and Estates, 6e**  
Roger W. Andersen and Susan Gary
- Understanding White Collar Crime, 4e**  
J. Kelly Strader



# Understanding Trusts and Estates

SIXTH EDITION

**Roger W. Andersen**

PROFESSOR OF LAW EMERITUS  
UNIVERSITY OF TOLEDO COLLEGE OF LAW

**Susan N. Gary**

ORLANDO J. AND MARIAN H. HOLLIS PROFESSOR  
UNIVERSITY OF OREGON SCHOOL OF LAW



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2018  
Carolina Academic Press, LLC  
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Andersen, Roger W., 1948- author. | Gary, Susan N. author.  
Title: Understanding trusts and estates / Roger W. Andersen and Susan Gary.  
Description: Sixth edition. | Durham, North Carolina : Carolina Academic Press, LLC, [2018] | Series: The understanding series | Includes bibliographical references and index.  
Identifiers: LCCN 2017052812 | ISBN 9781531003715 (alk. paper)  
Subjects: LCSH: Trusts and trustees--United States. | Inheritance and succession--United States. | Estate planning--United States.  
Classification: LCC KF730 .A86 2018 | DDC 346.7305/2--dc23  
LC record available at <https://lccn.loc.gov/2017052812>

eISBN 978-1-53100-372-2

Carolina Academic Press, LLC  
700 Kent Street  
Durham, North Carolina 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

*To Kyanne, for Zoe, Barney, and Emmalyn.*

R.W.A.

*To Alec, Richard, and George.*

S.N.G.





# Contents

---

Preface to the Sixth Edition	xv
How to Use This Book	xvii
Table of Authorities	xix
<b>Chapter 1 · Lawyers, Estates, and Trusts</b>	<b>3</b>
§1 Serving the Living	3
§2 An Overview of Intergenerational Wealth Transfer	4
[A] Probate	5
[1] The Process	5
[2] Is Probate Necessary?	8
[B] Lifetime Transfers	8
[1] Trusts	9
[2] Other Lifetime Transfers	9
[C] The Uniform Codes and the Restatements	10
<b>Chapter 2 · Intestacy</b>	<b>13</b>
§3 Introduction	13
§4 Spouses and Partners	15
[A] Statutes that Protect All Children, at the Expense of the Spouse	16
[B] Statutes that Give the Spouse Everything, if the Descendants are the Spouse's Descendants	17
[C] The UPC Does Some Fine Tuning	17
§5 Other Family Members	19
[A] Qualifying to Take	19
[1] Nonmarital Children	19
[2] Adopted Children	20
[3] Children of Assisted Reproduction	22
[4] Half-Bloods	24
[5] Degree of Relationship	25
[B] Allocating Shares	26
[1] The Problem	26
[2] <i>Per Capita</i>	27
[3] Representation: Strict <i>Per Stirpes</i>	27
[4] Representation: <i>Per Capita</i> with Representation	28
[5] Representation: <i>Per Capita</i> at Each Generation	28
<b>Chapter 3 · Wills</b>	<b>31</b>
§6 Introduction	31
§7 Creation	32
[A] The Mental Element	32
[1] Intention	32

[2] Capacity	32
[3] Undue Influence	34
[4] Fraud	37
[5] Tortious Interference with Expectancy	38
[6] Planning Considerations	38
[a] Structural Elements	39
[b] Conduct	43
[B] Execution	44
[1] The Policies	45
[2] A Typical “Statute of Wills”	46
[a] In Writing [Usually]	46
[b] Signed [At the End?]	47
[c] By the Testator or Another	48
[d] Attested in the Testator’s Presence	48
[e] By Competent Witnesses	50
[f] Some Other Rules	52
[g] Attestation Clauses and Self-Proving Affidavits	52
[3] Holographs	53
[4] Mistake in Execution	55
[a] Traditional Law	55
[b] Substantial Compliance	56
[c] Excusing Harmless Error	58
[d] Working with the Doctrines	59
[5] The Execution Ceremony	61
§ 8 Components	61
[A] Integration	61
[B] Incorporation by Reference	63
§ 9 Revocation	64
[A] By a Writing	65
[B] By Physical Act	66
[C] By Operation of Law	68
[D] Revival	68
[E] Dependent Relative Revocation (Ineffective Revocation)	70
[F] Options for Safeguarding Wills	73
§ 10 Contracts Regarding Wills	74
<b>Chapter 4 • Trusts</b>	<b>77</b>
§ 11 Introduction	77
§ 12 Creation	79
[A] Intent	80
[B] Trust Property	81
[C] Beneficiary	84
[D] Trustee	87
[E] The Problem of Revocability	88
[F] Formalities (and Constructive and Resulting Trusts)	91
§ 13 The Size of a Beneficiary’s Interest	93
[A] Discretionary and Support Trusts	93
[B] Alienability	96
[1] Voluntary Transfers	96

[2] Involuntary Transfers: Creditors' Claims	97
§ 14 Modification and Termination	102
[A] By Settlers	102
[1] Reserving Powers to Modify	102
[2] Beneficiaries' Consent	104
[B] By Beneficiaries	105
[1] Material Purpose	105
[2] Indestructible Trusts	107
[C] By Courts	107
[1] Reformation for Mistake	107
[2] Equitable Deviation	108
§ 15 Charitable Trusts	108
[A] Charitable Purposes	109
[B] Modification (Deviation and Cy Pres)	110
§ 16 Trusts and Pour-Over Wills	112
<b>Chapter 5 · Other Nonprobate Devices</b>	<b>115</b>
§ 17 Lifetime Gifts	115
§ 18 Joint Interests	118
[A] Real Property	118
[B] Personal Property [Especially Bank Accounts]	119
§ 19 Transfer on Death Deeds	121
§ 20 Life Insurance and other Contracts	122
§ 21 Retirement Funds	123
<b>Chapter 6 · Planning for Incapacity</b>	<b>127</b>
§ 22 Property Management	127
[A] Conservatorship	128
[B] Durable Powers of Attorney	129
[C] Long-Term Care Insurance	131
§ 23 Health Care Decisionmaking	132
<b>Chapter 7 · Changing the Share</b>	<b>135</b>
§ 24 Advancements and Gifts in Satisfaction	135
[A] Advancements	135
[B] Satisfaction	137
§ 25 Misconduct	138
[A] Constructive Trusts	138
[B] Statutes	139
§ 26 Assignments of Expectancies	141
§ 27 Disclaimers	142
<b>Chapter 8 · Protecting the Family</b>	<b>145</b>
§ 28 Disinherited Spouses	145
[A] Community Property	146
[B] Dower	148
[C] The Right to Elect	148
[1] Traditional Approaches	149
[a] Capturing Nonprobate Assets	149

[2] Weaknesses in the Traditional System	153
[3] The Uniform Probate Code	155
[a] The Original Augmented Estate	155
[b] A Partnership, a Support Floor, and a Marital Portion	156
[4] Incompetent Spouses	160
[D] Migrating Couples	162
[E] Agreements Waiving Marital Rights	163
§ 29 Omitted Family Members	165
§ 30 Charitable Gifts	170
§ 31 Public Policy Limits	170
<b>Chapter 9 · Present and Future Interests</b>	<b>175</b>
§ 32 Why Bother?	175
§ 33 Present versus Future Interests:	
Dividing Time	176
§ 34 Present Interests	177
[A] Fee Simple Absolute	177
[B] Defeasible Fees	178
[C] Life Estate	182
[D] Fee Tail	185
§ 35 Future Interests	185
[A] In the Grantor	185
[B] In Grantees	186
[1] Executory Interests	186
[2] Remainders	186
[a] Vested Remainders	187
[b] Contingent Remainders	190
[c] Vested or Contingent?	194
§ 36 Putting It Together	196
<b>Chapter 10 · Powers of Appointment</b>	<b>199</b>
§ 37 The Basics	200
[A] Postponed Decisionmaking	200
[B] The Players	200
[C] Classification of Powers	201
[1] Permissible Donees	201
[2] Method of Exercise	201
[D] Estate Tax Treatment	202
[E] Who Owns the Property?	202
§ 38 Creating Powers	205
§ 39 Exercising Powers	205
[A] Getting It Done	205
[B] Problems of Scope	208
[C] Failure to Appoint	211
§ 40 Drafting Powers of Appointment	212
<b>Chapter 11 · Problems of Interpretation</b>	<b>215</b>
§ 41 Introduction	215
[A] The Donor's Intention [?]	215

[B] Mistake and Extrinsic Evidence	216
[1] Patent and Latent Ambiguities	216
[2] Interpretation or Reformation?	219
§ 42 Independent Significance	221
§ 43 Class Gifts	222
[A] What Is a Class?	223
[B] When Does a Class Close?	224
§ 44 Special Cautions	226
[A] “To Delison and His Children”	226
[B] “If Dorthea Dies Without Issue”	227
[C] “To Vernon’s Youngest Grandchild”	229
[D] “To Joyce’s Heirs” or “To My Heirs”	229
[1] Identifying Heirs	230
[2] “To Joyce for Life, Remainder to Her Heirs”: The Rule in Shelley’s Case	232
[3] “To Joyce for Life, Remainder to My Heirs”: The Doctrine of Worthier Title	232
[E] “To Linda’s Issue” or “To Linda’s Children”	234
[1] Allocating Shares	234
[2] Identifying Takers	235
§ 45 Changes after Drafting: People	237
[A] Arrivals	238
[B] Departures	238
[1] Divorce of the Donor	238
[2] Death: The Need for Survivorship	241
[a] Survival: Simultaneous Death	242
[b] Surviving the Donor: Lapse	243
[c] Future Interests: Surviving Until Possession?	250
§ 46 Changes after Drafting: Property	257
[A] Classification of Gifts	257
[B] Increases	259
[C] Ademption	260
[D] Abatement and Exoneration	264
<b>Chapter 12 · The Rule against Perpetuities</b>	267
§ 47 Introduction	267
§ 48 A Framework for Analysis	268
§ 49 Crazy: If <i>Anything</i> Can Go Wrong	273
[A] Fertile Octogenarians	273
[B] Unborn Spouses	275
[C] Administrative Contingencies	276
§ 50 Class Gifts	276
[A] All or Nothing	277
[B] Subclasses	280
[C] Per Capita Gifts	281
§ 51 Powers of Appointment	282
[A] General Presently Exercisable Powers	282
[B] General Testamentary and Special Powers	282
[1] Validity of the Power	283

[2] Validity of the Appointed Interests	283
[C] Takers in Default of Exercise	285
§ 52 Savings Clauses	286
§ 53 Reform	288
[A] Wait and See	289
[B] Reformation	291
[C] The Rise of the Dynasty Trust and Repeal of the Rule	292
<b>Chapter 13 · Problems of Administration</b>	<b>295</b>
§ 54 Introduction	295
§ 55 Relationships with Beneficiaries	296
[A] The Duty of Loyalty	296
[1] Fiduciary-Beneficiary Conflicts	297
[a] Self-Dealing	298
[b] Other Conflicts of Interest	299
[2] Impartiality	300
[a] Investment Strategy	301
[b] Taxes	301
[c] Principal-Income Allocation	302
[B] The Duty to Inform and Report	305
§ 56 Managerial Issues — Duty of Care	307
[A] Investments	307
[1] The Traditional “Prudent Man”	309
[2] The Prudent Investor	310
[B] Other Managerial Duties	313
[C] Liability for Contracts and Torts	314
§ 57 Drafting: Powers and Duties	315
[A] Legislation	316
[B] Language in the Document	316
§ 58 Remedies	321
<b>Chapter 14 · A Sketch of Federal Wealth Transfer Taxes</b>	<b>325</b>
§ 59 Introduction	325
§ 60 A Unified System	326
§ 61 The Gift Tax	329
[A] What Is a Gift?	330
[B] The Annual Exclusion	331
§ 62 The Estate Tax	332
[A] The Gross Estate	333
[1] Basic Elements	333
[2] Stepped-Up Basis	336
[B] The Marital Deduction	336
[C] A Portable Exemption	338
§ 63 The Generation-Skipping Transfer Tax	339
<b>Chapter 15 · Looking Ahead</b>	<b>341</b>
<b>Table of Cases</b>	<b>343</b>
<b>Index</b>	<b>351</b>

# Preface to the Sixth Edition

---

In this edition, Roger Andersen welcomes Susan Gary to the continuing effort to help students both understand and appreciate this fascinating area of law. Her work makes it possible to keep a contemporary face on some of the fundamental questions that have faced families from the beginning. This volume takes into account recent developments while retaining the approach of earlier editions. Some sections have been restructured to better handle the law's changes, and text examples have been revised.

We acknowledge with appreciation the insights we have gained from the co-authors of our respective casebooks: Ira Bloom, Jerome Borison, Naomi R. Cahn, and Paula A. Monopoli.

Special thanks to Biz and Davis and the whole team at Carolina Academic Press for their insights and efforts in shepherding the project through the production process. Susan Gary thanks Ben Molloy, University of Oregon law student, for his research assistance.

Most importantly, on the personal side, Roger Andersen thanks his wife, Kyanne, for her continuing understanding of his need to stay involved in projects like this, and to their children, in part for their having provided him with grandchildren, to whom he could dedicate this edition. Susan Gary thanks her husband, Alexander Murphy, and their children, Richard and George.





# How to Use This Book

---

This textbook is designed to help law students understand their Trusts and Estates courses. Law professors may find it a source of ideas for classroom or research. Practicing attorneys may also find it useful if they are new to the subject or have been away from it for some time. The text's structure allows different ways of using the book in different situations.

If you are a law student using the book as a regular supplement to your casebook, try reading the text and ignoring the footnotes until you need more examples or greater depth. You will find that the organization here differs from your casebook in various particulars. Scanning the Table of Contents or using the Index should help you find the relevant sections.

If you are consulting the book with a particular problem in mind, start with the Index or one of the tables (Cases, UPC or UTC). This book uses as examples many of the cases found in popular casebooks. Because details should enrich your understanding, read the footnotes after you have read the text and have a basic sense of a topic.

If you are studying for finals, start by reading the Table of Contents, to get a sense of the whole. Then concentrate on the text, but be sure to scan the footnotes for those that cross-reference to other sections of the book. These references help identify the interconnections holding the subject together.



# Table of Authorities

---

The list below gives the short forms used for material cited frequently in this text.

## 1. Statutes

IRC—Internal Revenue Code, 26 U.S.C. § 1 et seq. (current).

UPC—Uniform Probate Code (current).

UPC (pre-1990)—Uniform Probate Code (earlier versions).

UTC—Uniform Trust Code (current).

## 2. Single-Volume Texts

Atkinson—Thomas E. Atkinson, *Law of Wills* (West 2d ed. 1953).

Bergin & Haskell—Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* (Foundation Press 2d ed. 1984).

Bogert—George T. Bogert, *Trusts* (West 6th ed. 1987).

Cribbet & Johnson—John E. Cribbet & Corwin W. Johnson, *Principles of the Law of Property* (Foundation Press 3d ed. 1989).

Haskell—Paul G. Haskell, *Preface to Wills, Trusts and Administration* (Foundation Press 2d ed. 1993).

Kurtz—Sheldon F. Kurtz, *Moynihan's Introduction to the Law of Real Property* (West 2015).

Powell & Patrick J. Rohan, *Power on Real Property (One-Volume Edition)* (Matthew Bender 1968).

Simes—Lewis M. Simes, *Law of Future Interests* (West 2d ed. 1966).

## 3. The Restatements

Rest. Prop.—Restatement of Property.

2d Rest. Prop.—Restatement (Second) of Property: Donative Transfers.

3d Rest. Prop.—Restatement (Third) of Property: Wills and Other Donative Transfers.

Rest. Trusts—Restatement of Trusts.

2d Rest. Trusts—Restatement (Second) of Trusts.

3d Rest. Trusts—Restatement (Third) of Trusts.