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Adam J. Hirsch

University of San Diego School of Law, ahirsch@law.fsu.edu

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TEACHING WILLS AND TRUSTS: THE JURISDICTIONAL PROBLEM

ADAM J. HIRSCH*

Anyone preparing to teach Wills and Trusts faces a dilemma when choosing a jurisdictional perspective. Most of the rules found in the inheritance field are a matter of state law, and most of that law nowadays finds expression in local statutes. In the nineteenth century, only a few discrete areas of the inheritance field—the rules of intestacy, the rules of formalization, spousal rights—were codified.¹ The subsequent movement toward “statutorification”² swept up inheritance law, along with many other categories of doctrine; today every state has its own probate code, invariably supplemented by common-law rules, but covering large swaths of terrain previously governed by judge-made law.³ Scholars examining the general movement toward statutorification have emphasized its tendency to entrench rules.⁴ Another subtler, and less remarked, consequence of the movement has been to encourage pluralism, unleashing centrifugal forces once lawmakers in individual states, freed from the moorings of precedent and from a common-law jurisprudence that valued interjurisdictional conformity, began innovating and fiddling.⁵ Those forces have caused inheritance law in the United States to become increasingly diversified.

This state of affairs leaves Wills and Trusts professors in a quandary. To attempt to cover the law of all fifty states would be hopeless. But to teach the law of any one state seems hopelessly narrow. This problem doubtless arises

* Professor of Law, University of San Diego School of Law. M.A. 1979, J.D. 1982, Ph.D. 1987, Yale University.

1. See, e.g., Adam J. Hirsch, *Inheritance: United States Law*, in 3 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 235, 235–37 (Stanley N. Katz ed. 2009).

2. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

3. For a legislative tally of all 50 state probate codes, see *Uniform Probate Code (UPC) Adoption By The States*, ABA, http://www.americanbar.org/content/dam/aba/publications/litigation_committees/trust/50-state-probate-code-survey.authcheckdam.pdf (last visited Jan. 8, 2014).

4. See, e.g., CALABRESI, *supra* note 2, at 1–7; GRANT GILMORE, THE AGES OF AMERICAN LAW 95–96 (1977).

5. See CALABRESI, *supra* note 2, at 74, 76–77 (hinting at the phenomenon); Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379 (2008).

for professors teaching in other areas, too, but it is particularly acute in the inheritance field.

For professors teaching at “regional” law schools, the pluralistic turn of Wills and Trusts could invite a narrowing of perspective. I spent years teaching at a law school where a large majority of graduates went on to practice in-state. One of my colleagues there made a career-long practice of teaching, and testing on, the state’s probate code—transforming the class, in effect, into an expanded bar-review course. If nothing else, this approach simplifies the task of the professor (and of the students). It also serves the purpose of preparing students for the state bar examination, and for local practice thereafter. Indeed, by encouraging all of its professors to follow suit, a law school can seek to establish a local reputation for high bar-passage rates, doubtless a selling point for a program competing with other regional law schools for in-state students.

For any law school with larger aspirations, though, the downside of this approach is obvious. To teach locally encourages students to think locally—to play the part that their professors assign to them. And, for those students who do get the opportunity to practice in another jurisdiction, the value of a state-based Wills and Trusts course decreases—possibly a subtle disincentive for graduates who wish to practice in the field to seek out opportunities beyond the state where they studied. When I arrived at my current law school, I was told unequivocally that the administration would prefer that I *not* emphasize local law. Needless to add, the notion of teaching a localized Wills and Trusts course within any one of the top, nationally-recognized law schools would be outlandish. Upon graduation, its students will scatter among the states, making a focus on any one state’s law, including that of the state where the law school happens to be located, pointless and arbitrary.

An alternative approach—equally narrow in one sense, but broader in another—is to concentrate on, and to test on, the “model” laws of Wills and Trusts.⁶ The field is fortunate to have at its disposal two up-to-date Restatements: the Restatement (Third) of Trusts, and the Restatement (Third) of Property, completed in 2005 and 2010, respectively.⁷ These are paralleled by two modern Uniform Acts: the Uniform Trust Code, promulgated in 2000, and the Uniform Probate Code, whose revised substantive article dates to 1990, with significant amendments in 2008.⁸ These products are highly integrated. The reporter for the revised Uniform Probate Code doubled as reporter for the

6. One current casebook is geared to this approach. See THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS (5th ed. 2011).

7. RESTATEMENT (THIRD) OF TRUSTS (2005); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (2010).

8. UNIF. TRUST CODE, 7C U.L.A. 362–74 (amended 2010); UNIF. PROBATE CODE, 8 pts. 1–3 U.L.A. (amended 2010).

Restatement (Third) of Property, and he strove “to try to make [them] . . . consistent with one another.”⁹ Likewise, “[t]he Uniform Trust Code was drafted in close coordination with the writing of the Restatement Third [of Trusts].”¹⁰

By teaching the model laws, a professor can again emphasize a single, coherent body of law, while at the same time eschewing localism. The difficulty remains that, in so doing, the Wills and Trusts course becomes, to a certain degree, detached from reality. Although the Uniform Probate Code has proven influential in some pockets of the field—notably with regard to its intestacy provisions—thus far only sixteen, mostly smallish, jurisdictions have adopted substantial parts of either the current or an earlier version of the Code.¹¹ The “big four” states, California, Florida, New York, and Texas, all continue to go their own way.¹² What is more, even the sixteen adopters have seen fit to tinker with, or to omit, many of the Code’s provisions.¹³ Some of the Code’s less popular sections are scarcely in effect anywhere, turning up in only tiny handfuls of states.¹⁴ To teach such rules as *law* makes little sense, at least in a doctrinal course. The Uniform Trust Code has proven a more popular product, but even it is confined to half the states, among them only one of the “big four”—Florida—where local lawmakers tinkered to such an extent that they renamed their handiwork the Florida Trust Code.¹⁵

Largely keyed in their third iterations to the Uniform Acts, the Restatements feature similar attributes. These products “purport to state an authoritative *or recommended* view of current American common law,”¹⁶ as well as statutes in some instances, “[a]s is increasingly true of Restatement

9. Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727, 732 (2012).

10. UNIF. TRUST CODE prefatory note, 7C U.L.A. 364, 366 (amended 2010).

11. These are: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. *Uniform Probate Code (UPC) Adoption By The States*, *supra* note 3.

12. *Id.*

13. Massachusetts, the most recent state to adopt the Uniform Probate Code as an omnibus act in 2012, nevertheless left out several of the Code’s more controversial provisions: its disclaimer law and its harmless-error power, among others. *See* MASS. GEN. LAWS ANN. ch. 190B, §§ 2-503, 2-801 (West 2012). The reporter has complained about local tinkering, but the practice continues. *See* John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 878–79 (1992).

14. For example, the Uniform Probate Code’s modern antilapse provision appears in its original form in some five states, as tallied by the Restatement. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 statutory note 1 (1999).

15. FLA. STAT. ANN. § 736.0101 (West 2013).

16. Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CALIF. L. REV. 1877, 1881 (2000) (emphasis added) (writing as reporter for the Restatement (Third) of Trusts).

work.”¹⁷ In progressive editions, the Restatements have grown more and more aspirational,¹⁸ sometimes even taking positions contrary to judicial doctrine that is accepted today by overwhelming numbers of courts.¹⁹ In the process, the Restatements’ authority has waned, and they are cited less and less frequently in the case law.²⁰ Courts know better than to accept reflexively the third Restatements as distillations of existing law.²¹ In a few instances, the reporters’ zeal in pressing their innovations appears to have prompted misrepresentations that call for added caution. For example, in the course of endorsing the “harmless error” doctrine for wills, the reporter claims that the Restatement (Third) of Property is “aligned with [the] modern trend.”²² In truth, only six jurisdictions have adopted a full-blown version of the doctrine—scarcely a trend.²³ Moreover, some ideas propounded in the Restatements have no prospect of ever becoming law. For instance, the Restatement (Third) of Property offers up major revisions of the law of future interests.²⁴ To my mind, these revisions would make a great deal of sense, yet they could never realistically dislodge the formulations that have remained entrenched in Anglo-

17. RESTATEMENT (THIRD) OF TRUSTS foreword (2003).

18. For an exploration of the trend, see David A. Thomas, *Restatements Relating to Property: Why Lawyers Don’t Really Care*, 38 REAL PROP. PROB. & TR. J. 655, 657–75 (2004).

19. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.7 cmt. a (“this section reverses the common-law rule”).

20. A search of the Westlaw database finds that the Restatement (Second) of Property: Donative Transfers, promulgated between 1983 and 1992, has been cited in a total of eighty-seven state and federal cases. After sixteen years, this Restatement project began to be superseded by the Restatement (Third) of Property: Wills and Other Donative Transfers, promulgated between 1999 and 2010, and now operative (at least in part) for fourteen years. Thus far, the Restatement (Third) has been cited in a total of only fifty-five state and federal cases. Professor David Thomas found that the modern Restatements of property have proven far less influential, as measured by case citations, than the equivalent Restatements of tort and contract. See Thomas, *supra* note 18, at 656 & n.1.

21. See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888, 902 (Ill. 2009) (“We have not yet had reason to consider whether any section of the Restatement (Third) of Trusts . . . is an accurate expression of Illinois law”). Restatements have been adopted as de facto common law, however, in two jurisdictions: the Virgin Islands and the Northern Mariana Islands. Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 425–46 (2004).

22. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b.

23. HAW. REV. STAT. ANN. § 560:2-503 (LexisNexis 1996); MICH. COMP. LAWS ANN. § 700.2503 (West 1998); MONT. CODE ANN. § 72-2-523 (1993); N.J. STAT. ANN. § 3B:3-3 (West 2005); S.D. CODIFIED LAWS § 29A-2-503 (1995); UTAH CODE ANN. § 75-2-503 (West 1998). See also *supra* note 13 (remarking the failure of Massachusetts—the most recent state to adopt the Uniform Probate Code—to enact the doctrine).

24. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS div. VII (2011).

American law for centuries on end.²⁵ In this and other areas, the Restatements have become, in the words of one critic, “academic exercises . . . [with] little influence on the actual daily application and administration of the law,”²⁶ very like portions of the Uniform Probate Code, and less the “handy resources for trust and estate lawyers”²⁷ that they are supposed to be. The model laws can usefully be taught, but not as representative of current Wills and Trusts doctrine.

Concentration on the model laws would make sense only in a pure policy course. Those laws may gain acceptance somehow, somewhere, sometime, but they are not the law of the present. To focus on them in a Wills and Trusts course today represents an indulgence that only professors at the most elite law schools could contemplate.

This still leaves the possibility of teaching what Professor Melvin Eisenberg dubbed “national law,” to wit, “statements of and about law in general terms, divorced from particular jurisdictions.”²⁸ Casebooks typically adopt this approach. It presents a challenge in the inheritance field, where national law remains about as decentralized as law can be. But casebooks and courses can still present majority rules as indicative of our national inheritance law.

In my judgment, such an approach remains impoverished, in that it fails to communicate the richness of alternatives, the thousand flowers (mixed with a few poisonous weeds) that have blossomed in this heterogeneous region of the legal landscape.

Which brings me to my own preferred, albeit idiosyncratic, approach to the jurisdictional problem. In my Wills and Trusts course, I strive to broaden my exploration of national law by elaborating—or, when appropriate, briefly outlining—the range of doctrinal options that exists among the states. Where the options are binary, or even ternary, I take the time to teach each one, even if one of them dominates the field: for instance, with regard to the problem of lapsed bequests, where the beneficiary named under a will predeceases the testator, I teach both the modern remain-in-the-residue rule and the traditional no-residue-upon-a-residue rule, even though the second of these hangs on by a

25. Nonetheless, hope springs eternal. See Lawrence W. Waggoner, *What's in the Third and Final Volume of the New Restatement of Property that Estate Planners Should Know About*, 38 ACTEC J. 23, 28–33, 42–45 (2012) [hereinafter Waggoner, *Restatement*]. Parts of this division of the Restatement are based upon a reform proposal propounded over forty years ago, to no avail, by the reporter. See Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729 *passim* (1972).

26. Thomas, *supra* note 18, at 695.

27. Waggoner, *Restatement*, *supra* note 25, at 45.

28. Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. ST. U. L. REV. 1229, 1230, 1232 (2002).

thread today, in only eight jurisdictions.²⁹ I do so not because the no-residue-upon-a-residue rule is doctrinally important in American law. Plainly, it no longer is. Its significance rather is *didactic*. By teaching both majority and minority rules, one can elucidate to students that the majority rule, even if it reigns supreme, is not written in stone—and one can do so in a concrete way (so to say), by demonstrating that alternatives do exist, however seldom seen. In other words, by identifying alternative rules, the professor lays the predicate for a policy discussion, giving students the opportunity to compare actual, alternative rules, to contemplate their relative virtues and vices, and perhaps even to think creatively about other alternatives not yet adopted or contemplated by lawmakers anywhere.

Of course, in those regions of the law of Wills and Trusts (not few in number) where an even greater wealth of doctrinal alternatives exists, this approach becomes too time-consuming to pursue comprehensively. Identification of such pluralisms is itself significant, but here the only realistic choice open to the professor is between generalization and teaching local law. One can, for example, point out that some states *augment* the intestacy rights of whole-blooded relatives over half-blooded relatives, without delving into all of the myriad ways that different states do so. Again, this recognition can suffice as an entryway to a policy discussion of whether half-blooded relatives should be amalgamated with or distinguished from whole-blooded relatives in an intestacy scheme, again rendering the legal dichotomy concrete, but in a more generalized way.

Finally, and perhaps a trifle pedantically, I strive to add a statistical component to my presentation by indicating the actual or approximate number of states that take one or another approach to each topic within the field of Wills and Trusts. That is difficult to do as concerns areas that continue to be governed by judicial doctrine but relatively easy to do with respect to rules that have been codified. Many sections of the Restatement (Third) of Property include “statutory notes” tallying local variations, sometimes with minor inaccuracies and in need of updating,³⁰ but helpful for present purpose; and, of course, Westlaw’s statutory data-base represents another invaluable source of information on this score. Obviously, the point of this exercise is not for students to learn how many states have adopted each alternative, let alone what states have adopted which ones, but simply to give students a rough idea of which alternatives predominate, and the extent to which they do so.

Testing also requires clarification in connection with this approach. It seems inappropriate to test students on a singular national law when one has enriched it with a discussion of alternatives. My solution is to ask students to

29. For a summary of the history, see Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1468–69 (2013).

30. See, e.g., *id.* at 1460 n.185.

prepare themselves to do either of two things: either to *apply* a specific rule set out in a statutory excerpt included in the hypothetical problem that I compose, operative only for purposes of that problem, or, in the absence of such a statutory excerpt, to work out the solution under the principal alternative rules, assuming no single rule prevails. But I also emphasize that I will call upon students to apply alternative rules only in those areas where no more than two alternatives exist—otherwise, the exercise becomes too complicated.

Finally, let me add that the academic tension between the general and the particular in this field is not inescapable. Given sufficient time, one can take both approaches simultaneously. At least when teaching at a regional law school, I end the discussion of national doctrine and policy with respect to each and every topic that I cover by indicating, for the students' edification and *not* for purposes of the final examination, which option lawmakers in "our" state have adopted. That way, those students who do wind up practicing in-state have a body of doctrinal information at their disposal to which they can always refer back, for purposes of bar review or beyond, without regionalizing the course in the bargain.

