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John V. Orth

University of North Carolina at Chapel Hill-School of Law, jvorth@email.unc.edu

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WHAT TO DO WITH WHAT'S LEFT BEHIND

JOHN V. ORTH*

*Thou know'st 'tis common; all that lives must die,
Passing through nature to eternity.¹*

*As he came forth of his mother's womb, naked shall he return to go as he
came, and shall take nothing of his labour, which he may carry away in his
hand.²*

The need for a course in trusts and estates is succinctly explained in the great sources of Western civilization—Shakespeare and the Bible. Everyone will die, and dead people cannot take anything with them.³ Just about every element of the course begins with these inescapable facts—which is why I was amused to see a student's comment on a recent course evaluation: "I wish he wouldn't talk so much about death."⁴

Perhaps the student had been misled by the title of the course, which like the caption on a modern life insurance policy skillfully elides the fact that it is all about death. Calling the course Trusts and Estates presents another truth-in-labeling problem because it gives pride of place to the trust, which is not considered in depth until halfway through the semester. In fact, the logical progression of the subject tracks the history of the law of succession: intestacy, wills, only then trusts—and many other legal arrangements besides.⁵

* William Rand Kenan, Jr. Professor, University of North Carolina School of Law. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. 1977, Harvard University.

1. WILLIAM SHAKESPEARE, *HAMLET* act. 1, sc. 2 (Burton Raffel ed., Yale Univ. Press 2003) (1603).

2. *Ecclesiastes* 5:15 (King James).

3. It is tempting to say that dead people cannot own anything, but to the extent they could during life make legal arrangements concerning succession to their property at death, their ownership might be said to outlive them. Cf. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 309 (1753), available at http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf (commenting that without civil society "[a]ll property must . . . cease upon death," but that "the universal law of almost every nation . . . has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it . . . the municipal law of the country then steps in, and declares who shall be the successor.").

4. Anonymous Student Evaluation (on file with author).

5. Inheritability of land was established in England by about 1100. See THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 524 (5th ed. 1956). Divisibility

But there is a deeper problem: there is no American law of succession, just as there is no American law of property, despite the classic multi-volume treatise of that name.⁶ The federal structure of the United States means that each state, within the generous limits set by the U.S. Constitution, has its own law of intestacy, wills, and trusts. Perhaps in no other area of the law is there so much diversity among the states on so many significant issues.⁷ But no law school with national or regional ambitions can limit itself to teaching only local law.

Even to attempt to teach local law and nothing else is doomed because no state's law is like the biblical law of the Medes and the Persians, "which altereth not."⁸ States change their law of succession, today more frequently than ever. As a consequence of the federal union, states can compete with one another for legal business, sometimes to provide better results, sometimes simply to attract immigrants or clients.⁹ Retirees may be lured by the prospect of low (or nonexistent) state estate or inheritance taxes, while wealthy individuals may be encouraged to put their trust funds in the hands of local banks and their lawyers. The recent race to allow self-settled spendthrift trusts—known in polite circles as asset protection trusts (APTs)—comes to mind.¹⁰ And in our mobile society, estate lawyers must be prepared to deal with title to property located in other states or with dispositive instruments executed elsewhere. Even a student determined to practice in only one jurisdiction must be given some sense of foreign law and the possibility and likely direction of change in local law.

Not only does the student deserve more than a mere recital of then current local rules, the professor has a need to teach more. Teaching the rules and nothing but the rules is uninteresting. The story is told of an Oxford law professor, appointed at the height of the French Revolution, who quickly gave up teaching and scholarship while still collecting the emoluments. A charitable

followed with the adoption of the first Statute of Wills, 1540, 32 Hen. 8, c. 1 (Eng.). *Id.* 587. Trusts arose out of the medieval use, *id.* at 598–99, but the popularity of trusts (and other legal arrangements) as "will substitutes" developed only in the last half of the twentieth century. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

6. *See* AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES (Andrew James Casner ed., 1952).

7. To the extent real property is involved, some diversity among the states may be inevitable because succession to real property is governed by the law of the situs. In addition, there is no commercial need that the law of gifts of personal property, whether inter vivos or testamentary, unlike the law of commercial transactions, be uniform. These conditions are sufficient but not necessary causes of the wide diversity that exists among the states.

8. *Daniel* 6:8 (King James).

9. *See* JOHN V. ORTH, REAPPRAISALS IN THE LAW OF PROPERTY 95–103 (2010).

10. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 380 (2005).

historian has suggested that he and his students realized that even the slightest criticism of existing law was dangerous under the circumstances—think of American academics during the Cold War—but that the study of law without discussing any possible legal change was boring.¹¹

Today, of course, a teacher of Trusts and Estates can abandon any attempt to teach the law as it is in any given jurisdiction. Indeed, the variety of state rules on almost every topic in the course encourages this approach. How, for example, is one to teach about the elective share when a leading casebook posts the prominent warning: “*Caution*. There is no subject in this book on which there is more statutory variation than the surviving spouse’s elective share.”¹²

At one time, the solution was to teach the common law, as gathered from state court decisions reduced to black letter in the Restatement of the Law of Property.¹³ As academic dissatisfaction with traditional rules developed, re-Restatements appeared. A Second Restatement of Donative Transfers succeeded the first, and a Third the Second.¹⁴ The National Conference of Commissioners on Uniform State Laws (NCCUSL)—now renamed the Uniform Law Commission (ULC)—offers a variety of uniform acts, particularly the Uniform Probate Code (UPC) (1969, revised 1989, 1990, 2008),¹⁵ which seemed to provide a basis for instruction. But again version followed version as second and third thoughts—complete with a confusing renumbering of sections and ever more complicated provisions—compromised their pedagogical usefulness.¹⁶ To paraphrase the poet, the Commissioners

11. HAROLD GREVILLE HANBURY, *THE VINERIAN CHAIR AND LEGAL EDUCATION* 83 (1958) (At the time “schemes for legal reform [in England] were quiescent, and the study of law without the cogitation of ideas for its improvement is indeed jejune. The reason for this quiescence may be expressed in three words, ‘the French Revolution’, which was at its height in 1793.”) (referring to James Blackstone, son of the famous Sir William Blackstone, Vinerian Professor of English law at Oxford from 1793 to 1824).

12. JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 478 (8th ed. 2009).

13. For an example of the attitude of earlier law professors, see JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 756 (Ronald Gray ed., 4th ed. 1942) (“[I]t is a serious thing deliberately to break away from the consensus of the English-speaking world on this subject.”) (criticizing Chief Justice Charles Doe’s decision in *Edgerly v. Barker*, 31 A. 900 (N.H. 1891)). See also JOHN PHILLIP REID, *CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE* 127–32 (1967).

14. *RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS* Table of Cross-References Between First and Second Restatement (1983); *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* Parallel Tables Showing Corresponding Restatement Third and Restatement Second Section Numbers (1999).

15. *Acts: Probate Code*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code> (last visited Jan. 10, 2014).

16. See ORTH, *supra* note 9, at 134–35.

seem to aspire to be “the unelected legislators of the world,”¹⁷ complete with the legislators’ penchant for constant tinkering.

Rather than bring the promised uniformity in the law, the uniform acts bring to mind Voltaire’s description of the Holy Roman Empire: “neither holy, nor Roman, nor an empire.”¹⁸ They are not acts unless adopted; they have not been adopted unaltered by very many states;¹⁹ and they are frequently revised by their drafters, oftentimes after being adopted in one or more states.²⁰ Thus, the Uniform Disclaimer of Property Interests Act (UDPIA) (1999, revised 2006, 2010)²¹ has been widely adopted but also widely modified.²² The Uniform Gifts to Minors Act (UGMA) (1956, revised 1966)²³ has been succeeded by the Uniform Transfers to Minors Act (UTMA) (1983, revised 1986),²⁴ and the Uniform Management of Institutional Funds Act (UMIFA) (1972)²⁵ has been succeeded by the Uniform Prudent Management of Institutional Funds Act (UPMIFA) (2006).²⁶ Offered as the “best thinking” at the moment of what the law should be, the uniform acts turn the old Oxford professor’s dilemma on its head: teaching only what the law should be, not what it is. Limiting classroom instruction to the latest iteration of the Restatement or uniform acts condemns the law professor to teaching “law” that is not the law in any given jurisdiction. At least the common law as expressed in state court decisions was once the law somewhere.

A few years ago, after thirty years of teaching property law at the University of North Carolina, I had the revealing experience of teaching a couple of bar review classes on North Carolina Wills and Trusts. In seven or eight hours, I was expected to cover material that takes over fifty hours of class time in law school. The only way this could be done, of course, was by uninterrupted lecturing. Goodbye, Socrates. Goodbye, cases—except for a few

17. Cf. PERCY BYSSHE SHELLEY, A DEFENCE OF POETRY 90 (Mrs. Shelley ed. 1904) (1821) (“Poets are the unacknowledged legislators of the world.”).

18. VOLTAIRE, *ESSAI SUR LES MOEURS ET L’ESPRIT DES NATIONS* 267 (1756) (“ni saint, ni romain, ni empire.”).

19. See *2012–2013 Guide to Uniform and Model Acts*, UNIFORM LAW COMMISSION 33–36, http://www.uniformlaws.org/Shared/Publications/GUMA_2012web.pdf (last visited Jan. 10, 2014).

20. See *Acts: Probate Code*, *supra* note 15.

21. UNIF. DISCLAIMER OF PROP. INTERESTS ACT (amended 2010).

22. See Adam J. Hirsch, *The Code Breakers: How States Are Modifying the Uniform Disclaimer of Property Interests Act*, 46 REAL PROP. TR. & EST. L.J. 325, 325 (2011).

23. *Transfers to Minors Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Transfers%20to%20Minors%20Act> (last visited Jan. 10, 2014).

24. *Id.*

25. *Prudent Management of Institutional Funds Act Summary*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=Prudent%20Management%20of%20Institutional%20Funds%20Act> (last visited Jan. 10, 2014).

26. *Id.*

bloodless hypotheticals and some questions actually asked on prior bar examinations. Gone was the luxury of considering what would be “for best in the best of all possible worlds.”²⁷ What the students needed to know (and fast) was what the rule is now in one particular state. No time was available to consider alternatives; little time to consider why it is as it is. This was teaching local law with a vengeance!

Reviewing prior bar examination questions revealed that the examiners had a tendency to focus on those local rules that differed from the general rule. Not theme and variations, as in law school, but just the one variation. I suppose this ought to have been no surprise. After all, the candidates for admission to the bar were seeking a license to practice in a particular state. But it highlighted a problem with teaching Trusts and Estates in law school. Some of the obscure rules and exceptions that I had barely mentioned in class were being tested on the bar examination. For example, to provide a complete answer to one question, students had to have learned that North Carolina, seemingly alone among the states, allows nuncupative wills of an unlimited amount of personal property—and how to probate such a will.²⁸ My casebook had covered the subject in a solitary footnote, dismissing nuncupative wills as “extremely rare,” “[t]ypically . . . used only to devise personal property of small value (say, up to \$1,000).”²⁹ Nothing to draw the students’ attention, but unless they had picked up the local rule during the hectic weeks of the bar review course, their answers would be incomplete.

So, what to do with the local law that has been left behind in law school? Obviously, it is being outsourced to commercial bar review courses. As mentioned above, law school cannot be—and should not be—one long bar review course. Too limited and too boring. Not unaware of the stigma attaching to “teaching to the bar exam,” I do think candor requires us to recognize the consequences for our students of ignoring actual state law. It is hardly sufficient piously to recite that while in law school students should familiarize themselves with the law as it is in the particular state “in which they intend to practice.”³⁰ It is unrealistic to imagine they have the time, given everything else expected of them in law school, and anyway they know it is not going to be tested on the final examination in the course. What is more, many

27. Cf. VOLTAIRE, *CANDIDE OU L’OPTIMISME* vi–vii (1759) (“Tout est pour le mieux dans le meilleur des mondes possible.”).

28. See N.C. GEN. STAT. § 31-3.5 (1953) (nuncupative will); *id.* § 28A-2A-10(a) (manner of probate of nuncupative will); see also *In re Garland’s Will*, 76 S.E. 486 (N.C. 1912).

29. DUKEMINIER, SITKOFF & LINDGREN, *supra* note 12, at 226 n.2.

30. *Id.* at 72 (“Because the law of intestacy is not exactly the same in all details in any two states, it is essential that [law students] become familiar with the intestacy statutes of the state in which they intend to practice.”).

(perhaps most) second-year law students do not know where they “intend to practice” until they get an offer to practice somewhere.

Where does this leave teachers of Trusts and Estates—or, more particularly—where does it leave me? Like any law professor, I am better at asking questions than answering them. But to me, it suggests that I should remind the students early and often that there are a variety of local rules on every topic in the course and that I should present each topic in such a way that it highlights the questions that would require local research. It also indicates that I need to pay more attention to the law as it is in the states, particularly in the state in which a majority of my students might actually practice. At least I should regularly use local law as an example of what the law really is in some jurisdiction. The presumed “ideal” answer need not be ignored, but its identification should be accompanied with a realistic appraisal of its incidence in the real world. In other words, the fact of diversity in state law should be as present in the course as the fact of human mortality.