

**Wills and Trusts
Laws 6104**
University of Colorado Law School
Spring Semester 2012
(Monday/Wednesday 9:30-10:50 AM, Wolf 204)
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Course Materials.

1. GARY, BORISON, CAHN & MONOPOLI, CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES (Aspen Publishing, 2011), ISBN 978-0-7355-8927-8 (There is no statutory supplement because the casebook reproduces all necessary statutes, and the syllabus fills in any remaining gaps.); and
2. Materials posted on TWEN.

Please register early on the TWEN website for this course so that you can receive email notices and have access to course materials posted on the TWEN site. However, if you drop this class, please delete your enrollment on TWEN as soon as possible.

Office Hours.

2:30-3:30 PM, Tuesdays and Thursdays. I am also available to meet at other times by appointment. I welcome communication by email as well.

Class Attendance.

Starting Monday, January 23, I will begin taking daily attendance by distributing a class list for you to sign. I will retrieve it approximately 10 minutes into the class, such that later arrivals will be considered absent. You are required to attend at least 80 percent of our classes, which means 21 of our 27 regularly scheduled classes (I assume that everyone is present for the first day). If you do not, I will lower your final course grade by at least five (5) points. However, in addition to the reduction described in the preceding sentence, I reserve the right also to impose in cases of excessive absenteeism: (i) an additional 2-point per absence reduction in your final course grade for each absence in excess of six (6); or (ii) the “20% Rule” prescribed by Law School Rule § 3-3-1, with the result that you would be unable to take the final examination for the course and will receive a failing grade for the course. Please note that the absences record begins with the second class, even if you add this course to your schedule after that date. I may also raise grades for sustained and exceptional class participation throughout the semester.

The attendance requirement applies regardless of your other commitments such as to dependents, family deaths, jobs, brief illness, job interviews, weddings, legal aid clinic appointments, or religious ob-

servance. The six (6) permitted absences (i.e., three weeks of class) provide adequate flexibility to reasonably accommodate for those other commitments. This means you must plan ahead and save your permitted absences for when you need them, as well as keep some “in reserve” for life’s unexpected and unplanned events.

Final Examination.

The final examination time will be three to four hours. The examination will cover the entire course. It could be structured as a mixed essay and multiple-choice questions final, or possibly all mixed essay, or all multiple choice. Last year the exam was divided two-thirds multiple-choice and one-third essay. To the examination you may bring your casebook, syllabus, class notes and personal outlines, simple calculator, and any emails or postings from me (except for past exams and sample answers). You may not bring copies of my past exams (and any sample answers I may have provided), treatises, hornbooks, nutshells, commercial outlines, or any other student study aids. **Only students who appear on the seating chart are eligible to take the final exam.**

Short Writing Assignment.

I have identified four “Group Exercises” (see #s 5, 10, 13, & 16). Those will be presented in class, but to meet the writing requirement, you must submit one of the four exercises in writing on or before the day the exercise is presented. I will grade them on a pass/fail basis, provided that a “fail” entails a reduction of five (5) points from the final course grade. These are intended to be very short assignments of no more than 1-3 pages in length.

Assignments (all page numbers refer to the casebook unless otherwise noted).

The law of wills, and increasingly that of trusts, is highly statutory. Consequently, this course focuses on reading and interpreting statutes. The casebook includes the text of almost all of the statutes we need, so the page assignments in absolute page counts appear to be long at times, reflecting the length added by the statutory excerpts. Indeed, the casebook is a traditional casebook married to a statutory supplement.

1. **January 18, 2012.** Donor’s intent; probate; testamentary freedom; ethical concerns.

Read pp. 1-8; do problem 3 on p. 4; read 53-56 (be prepared to discuss the will); 8-12; 838-849; do the problem set on TWEN (examine the personal property affidavit posted there; it has a role in the problems); read 12-18; do the exercise on p. 31.

Colorado has adopted the Uniform Probate Code, but not the Uniform Trust Code. Colorado has adopted a comprehensive “Disposition of Last Remains Act.” See CRS § 15-19-101 through 109.

2. **January 23, 2012.** Ethics and malpractice.

Read pp. 19-30; do the exercise on p. 30 and the problem on p. 31; read 31-40; 51-52; do Q. 3 and the exercise on p. 40.

3. **January 25, 2012.** Defining children.

Read pp. 57-65; do the problem on pp. 64-65; read 65-70; do the problems on p. 70; read 70-80; do the problems on pp. 74 & 76; read 76-92; do the problems on p. 87 & 91 (for the problem on p. 91, one must, in part, refer to UPC §2-104(a)(2) which is not in the book but which can be found on the NCUSL website or at Colo. Rev. Stat. §15-11-104(1)(b) below).

15-11-104 Requirement of survival by one hundred twenty hours--individual gestation

(1) For purposes of intestate succession and exempt property. . . :

...

(b) An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives one hundred twenty hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived one hundred twenty hours after birth, it is deemed that the individual failed to survive for the required period.

4. **January 30, 2012.** Interpreting class gifts; parent; spouse.

Read pp. 92-103; do the problem set posted on TWEN and the problem on p. 103; 103-115; do the problems on pp. 115-116.

5. **February 1, 2012.** Intestate succession.

Read pp. 117-122; 124- 125; 128-136; do problem 2 on pp. 135-136 (compute ONLY the surviving spouse's share); read 137-159; do problems 1-3 on pp. 155-158.

Group Exercise I (drafting): How would you draft the language for the exercise on p. 150?

Shares of Heirs Other Than a Surviving Spouse

The Colorado version of UPC § 2-103 was amended to address the inheritance rights of a “designated beneficiary” (which could include unmarried partners). See CRS § 15-11-103(1) below. The Colorado Designated Beneficiary Agreement Act is found at CRS §§ 15-22-101 through 15-22-112, and the details are beyond our scope. In general, the Act addresses a number of areas beyond intestate succession, including rights to appointment as a conservator or personal representative, as a proxy decision-maker, and standing for wrongful death claims. This is not in the UPC.

CRS § 15-11-103. Share of heirs other than surviving spouse

Any part of the intestate estate not passing to the decedent's surviving spouse under section 15-11-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

(1) To a designated beneficiary who was designated by the decedent to be his or her designated beneficiary for purposes of intestate succession pursuant to a designated beneficiary agreement that has been executed and recorded

with a county clerk and recorder as provided in article 22 of this title; except that, if the decedent has surviving children, then the designated beneficiary shall receive one-half of the intestate estate and the surviving children shall receive one-half of the intestate estate;

(2) To the decedent's descendants per capita at each generation;

[The balance of 15-11-103 tracks the UPC and is omitted.]

Colorado is among the relatively few states that adopted the UPC system for determining shares of descendants known as per capita at each generation. However, Colorado did this by replacing the phrase “by representation” with “per capita in each generation” directly in Colorado’s version of UPC § 2-103, rather than relying on the definition in §2-106, as the UPC does in more subtle fashion.

This Isn’t Just About Intestate Succession Definitions

Intestate succession language is important in the larger context of wills and trusts. The pivotal section is UPC § 2-709, which is part of Part 7 of the UPC “Rules of Construction Applicable to Wills and Other Governing Instruments.” Please read the excerpt on p. 151 and compare it to the Colorado version below. The UPC has only two options, per stirpes (in a subsection not reproduced in the excerpt) and its favorite, per capita at each generation. The Colorado legislature tinkered with the language so there are more possibilities under Colorado law, and one must be careful in using the terminology. So, what are the options under the Colorado provision? Well-crafted instruments (which include wills or trusts) often use internal definitions of terms such as “representation.”

CRS § 15-11-709. By representation; per capita at each generation; per stirpes

...

(2) **Per capita at each generation.** If an applicable statute or a governing instrument calls for property to be distributed “per capita at each generation”, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

(3) **Per stirpes.** If a governing instrument calls for property to be distributed “per stirpes”, the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(4) **Deceased descendant with no surviving descendant disregarded.** For the purposes of subsections (2), (3), and (5) of this section, an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

(5) **By representation.** For all governing instruments executed before, on, or after July 1, 1995, unless the governing instrument provides otherwise, the following definition of “by representation” shall apply: If “by representation” is called for, the property is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share and the share of each deceased descendant in the same generation is divided among his or her descendants in the same manner.

Will Substitutes

6. **February 6, 2012.** Advancements; nonprobate transfers.

Read pp. 159-165; do problem 1 on p. 164; read 167-195.

Advancements

Regarding advancements, Colorado adds the following, “belt and suspenders” language, to UPC § 2-109:

CRS § 15-11-109(4) An heir who has received from the intestate estate more than his or her share shall in no case be required to refund, except as otherwise provided by section 15-11-203 [defining the spouse’s elective share].

However, neither the UPC nor the common law requires advancements to be repaid, unless the recipient participates in the “hotchpot” described in the official comment to UPC § 2-109.

TOD Deeds

The book at pp. 194-195 refers to a real estate will substitute called a “transfer on death deed” (TOD Deed). Since 2004, Colorado law permits a “beneficiary deed” that follows the TOD Deed concept:

CRS § 15-15-402(1) . . . title to an interest in real property may be transferred on the death of the owner by recording, prior to the owner’s death, a beneficiary deed signed by the owner of such interest, as grantor, designating a grantee-beneficiary of the interest. The transfer by a beneficiary deed shall be effective only upon the death of the owner. . . .

(2) The joinder, signature, consent, or agreement of, or notice to, a grantee-beneficiary of a beneficiary deed prior to the death of the grantor shall not be required. Subject to the right of the grantee-beneficiary to disclaim or refuse to accept the property, the conveyance shall be effective upon the death of the owner.

(3) During the lifetime of the owner, the grantee-beneficiary shall have no right, title, or interest in or to the property, and the owner shall retain the full power and authority with respect to the property

§ 15-15-405(1) An owner may revoke a beneficiary deed by executing an instrument that describes the real property affected, that revokes the deed, and that is recorded prior to the death of the owner. . . .

7. **February 8, 2012.** Coordination of will substitutes.

Read pp. 195-210; 212-218; do problems 1-6 on pp. 206-207; do Question 1 on p. 217; do the problem on p. 218.

Trusts

8. **February 13, 2012.** Elements of a trust (purpose, settlor, trustee).

Read pp. 221-242; do Question 1 on p. 232; do the problem on p. 235; do problems 1-3 on pp. 241-242. Read the irrevocable trust form posted on TWEN as Orange Book Form 17. The “Last Will and Testament of Marjorie M. Black” reproduced at pp. 582-597 contains a pourover clause as well as an elaborate testamentary trust. Review that instrument and compare its length to the Michael Jackson will (at pp. 53-56) we looked at in Assignment #1.

9. February 15, 2012. Elements of a trust (intent, corpus, beneficiary).

Read pp. 242-268; do Q. 4 on p. 247; do Q. 2 on p. 254; do problems 1-3 on pp. 259-260; do problems 1-3 on p. 262; do questions 1 & 2 on p. 268.

10. February 20, 2012. Formalities; Exculpatory Clauses; Mandatory Rules; Revocable Trusts.

Read pp. 269-287; do Q. 1 & 2 on p. 273; do Q. 1 on p. 275 & Q. 5 on p. 276; do the problem on p. 286. Read the revocable trust form posted on TWEN as Orange Book Form 13B and the pourover will posted on TWEN as Orange Book Form 10 (the Michael Jackson will is a pourover will; see pp. 53-56).

Group Exercise II (short letter to client): Do the exercise on p. 286.

11. February 22, 2012. Fiduciary Duties-Part I (loyalty; information).

Read pp. 289-317; do Q. 3 on p. 297; do the question and problems on pp. 309-310; do the problems on p. 317.

12. February 27, 2012. Fiduciary Duties-Part II (prudence; impartiality).

Read pp. 317-342; do problems 1-3 on pp. 340-342.

Colorado adopted the Uniform Prudent Investor Act effective in 1995. CRS tit. 15 art. 1.1. Colorado adopted the 1997 Uniform Principal and Income Act, effective in 2001, replacing earlier versions of the same. CRS tit. 15 art. 1 pt. 4. That said, there are many transitional rules and elections to be considered. Colorado law permits unitrusts.

13. February 29, 2012. Distribution Standards.

Read pp. 343-366; do the problems on pp. 356-357; do the problems on pp. 365-366.

Group Exercise III (drafting): Do the exercise on p. 366, focusing just on drafting the standard for distributions.

14. March 5, 2012. Creditor Rights.

Read pp. 367-384; do problem 1 on pp. 379-380 and the exercise on p. 380.

Spendthrift trusts are lawful in Colorado. *Snyder v. O'Conner*, 81 P.2d 773 (Colo. 1938). Find the spendthrift clause in Orange Book Form 17 posted on TWEN.

15. March 7, 2012. Modification and Termination.

Read pp. 384-400; do the problem on p. 387; do Q. 1 on p. 394; do problem 1 on p. 399.

16. March 12, 2012. Powers of Appointment.

Read pp. 401-433; do problems 1 & 2 on pp. 405-406; do problem 1 on p. 433.

Group Exercise IV (drafting): Do the exercise on p. 412.

A Colorado statute adopted in 1967 defines the creation, release, and exercise of powers of appointment. CRS tit. 15 art. 2. In Colorado, one must first consult the statute. In a case on point, the Court of Appeals followed the traditional rule of the Restatement (Second) concerning creditor recourse to a general power of appointment described on pp. 429-430. *University Nat'l Bank v. Rhoadarmer*, 827 P.2d 561 (Colo. App. 1991), *cert. denied*, 1992 Colo. LEXIS 269.

Wills

17. March 14, 2012. Will Formalities.

Read pp. 443-472; do the problem on p. 450; do Q. 3 on p. 453; do the questions and problems on p. 465; do the problem on p. 467. Read the simple will form posted on TWEN as Orange Book Form 6.

The Colorado UPC provision on will execution resembles that at p. 447. The Colorado statute, however, states a modified rule for witnesses with the addition of the italicized language:

CRS § 15-11-502(1)(c). . . Signed by at least two individuals, *either prior to or after the testator's death*, each of whom signed within a reasonable time after he or she witnessed either the testator's signing of the will as described in paragraph (b) of this subsection (1) or the testator's acknowledgment of that signature or acknowledgment of the will. .

(4) For purposes of this section, "conscious presence" requires physical proximity to the testator but not necessarily within testator's line of sight.

18. March 19, 2012. Holographs; Curing Errors.

Read pp. 472-510; do problem 2 on pp. 487-488; do the question on p. 509.

The Colorado UPC provision on harmless error is like that at pp. 494-495 with the following additions (in italics):

CRS § 15-11-503

(2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse.

(3) Whether a document or writing is treated under this section as if it had been executed in compliance with section 15-11-502 is a question of law to be decided by the court, in formal proceedings, and is not a question of fact for a jury to decide.

19. March 21, 2012. Interpreting the will.

Read pp. 513-533; do the problem on pp. 519-520; do the problems on pp. 523-524. Read the personal property memorandum posted on TWEN as Orange Book Form 12.

Spring Break

20. April 2, 2012. Interpreting the will; substitute gift statutes; ademption; accessions; abatement.

Read pp. 533-561; do problems 1-5 on pp. 547-548; do problem 1 on pp. 555-556; do problem 1 on p. 561.

Colorado added to UPC § 2-603(b)(3) the italicized language below, giving a drafter express direction on how to avoid the grasp of 2-603:

CRS § 15-11-603(2)(c) For purposes of this part 6, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. *The use of language such as "and if he does not survive me the gift shall lapse" or "to A and not to A's descendants" shall be sufficient indication of an intent contrary to the application of this section.*

UPC § 2-706 is an anti-lapse statute for a number of will substitutes. Its provision on words of survivorship are parallel to those in 2-603(b)(3). However, the Colorado General Assembly, in adopting 2-706, eliminated its application to important asset classes. *"This section shall not apply to wills; beneficiary deeds; insurance or annuity policies; or pension, profit sharing, retirement, or similar benefit plans."*

UPC §§ 2-603 and 2-706 protect descendants of deceased stepchildren donees from lapse, but Colorado omits them.

Regarding ademption under the UPC, Colorado adopted the 1990 version of § 2-606 but not its 1997 amendment presuming in favor of ademption. Therefore, Colorado still presumes against ademption. CRS § 15-11-606(1)(f).

21. April 4, 2012. Apportionment; survival; disclaimers.

Read pp. 561-578; do the problem on pp. 573-574; do the problem on pp. 577-578.

The Survival Requirement

Only "survivors" usually take from a decedent. UPC §§ 2-104 (syllabus for assignment # 3) and 2-702, p. 571, require clear and convincing proof of survival by at least 120 hours (5 days) in cases of deaths occurring close together. The first section, 2-104, applies to intestacy and other statutory situations. The second, 2-702, applies to wills, joint tenancies, life insurance, and other will substitutes. Both sections provide that each decedent is deemed to have predeceased the other except for joint tenancy, where each is

deemed to survive the other. The UPC § 1-201(18) definition of “governing instrument” (pp. 42-43) is crucial to understanding the sweep of this section.

22. April 9, 2012. Revocation; revival.

Read pp. 599-631; do problems 1 & 2 on p. 602; do problems 1 & 2 on pp. 604-605; do problems 1-4 on p. 631.

Does UPC §2-804 or 2-803 apply to irrevocable trust beneficiaries?

23. April 11, 2012. Will contests.

Read pp. 632-653.

24. April 16, 2012. Family Protection-Part I.

Read pp. 655-674; do the problems on p. 662 and p. 674. Read the community property agreement for a migrating couple posted on TWEN as Orange Book Form 24.

Colorado’s elective share and augmented estate provisions differ in many particulars from corresponding UPC provisions, but the basic scheme is the same. That said, while the UPC approaches the problem with multiple sections, Colorado combines many of them in a single, very long, section, CRS § 15-11-202. Colorado adopted the 1990 UPC’s sliding scale concept for the elective share amount based on duration of the marriage (described at p. 673). But Colorado’s scale is more generous, rising from 5% after one year to 50% after ten years. CRS § 15-11-201.

25. April 18, 2012. Family Protection-Part II.

Read pp. 675-688; do problems 1-3 on pp. 685-686; do the problem on p. 688.

26. April 23, 2012. Family Protection-Part III.

Read pp. 688-715; do problems 1 & 4 on p. 703; do exercises 1 & 2 on pp. 715-716.

27. April 25, 2012. Incapacity.

Read pp. 719-739; 745-749; 758-763; do the exercise on p. 763.
