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Teaching Trusts and Estates

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Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 *St. Louis U.L.J.*643 (forthcoming, 2014), available at [SSRN](#).



[Phyllis C. Taite](#)

Professor [Robert Sitkoff](#)'s article, *Trusts and Estates: Implementing Freedom of Disposition*, provides practical information and addresses major themes for professors teaching trusts and estates including intestacy, wills, trusts and planning for incapacity. It is a wonderful primer for professors and students new to the area of estates and trusts. For the more seasoned professors, Professor Sitkoff provides policy questions that will certainly provide an opportunity for healthy debates amongst the students. There are only a handful of articles that explicitly address trusts and estates pedagogy; this article does not simply summarize the curriculum, but rather it encourages law faculty to think in a big picture way about the overarching issues. As such, it is an important contribution to the scholarly literature.

Professor Sitkoff suggests that the subject be viewed through the lens of “freedom of disposition,” in contrast to the more traditional approach that usually proceeds according to methods of succession (probate succession by will and intestacy, and non-probate succession by inter vivos trust, pay-on-death contract, and other such will substitutes). While recognizing there are limitations on the freedom of disposition, he convincingly argues that law and policy start with this premise and that our analysis of them should also start that way. The priority, in a property transfer transaction, is placed on the intent of the transferor over the putative rights of the recipient of the property, whether the property passes via intestacy, will, trust, or nonprobate transfer.

The article starts with a discussion of intestacy and how intestacy statutes are based on the probable intent of the typical decedent. Professor Sitkoff explains the need for legislators to update intestacy laws to deal with evolving societal norms and changing family dynamics. For instance, same sex couples are recognized as a family unit yet most intestacy statutes do not adequately address property disposition from same sex couples to each other because they may not be legally married. Further, because only one parent may have a blood relationship to a child, most intestacy statutes would exclude that child from inheriting from the other parent. In situations such as these, the intestacy statutes do not reflect the probable intent of the testator.

In cases where the decedent has made a will, the law imposes measures to ensure a will is authentic and made voluntarily to protect the freedom of disposition. In the early era of the Wills Act, certain wills were denied probate if the will violated any of the formalities, even if it was clear the testator made the will voluntarily. What purpose is served by denying a will that clearly reflects a testator's intent or not revoking a will that testator clearly intended to revoke? Over time, legislatures have altered the laws to provide a greater balance between following formalities (ensuring authenticity) and honoring a testator's intent (freedom of disposition). Professor Sitkoff also discusses how trusts have become the primary source for passing property at death. Trusts

perfectly embody freedom of disposition as the trust instrument determines the trustee's action and dictates when and how a beneficiary will receive distribution(s). He explains the creation and effective use of trusts, and introduces nonprobate transfers, also known as will substitutes. More wealth passes by will substitutes than wills and will substitutes are testamentary in nature. As such, should will substitutes be subjected to the Wills Act? Should will substitutes be subjected to subsidiary law of wills such as elective share, simultaneous death, divorce and antilapse the same as their wills counterparts?

By making transfers in trust, a settlor creates a situation in which a trustee will take control of and manage the trust property. The trustee has the responsibility of managing, investing and distributing trust property for the benefit of the beneficiaries. Because the trustee may have no beneficial interest in the trust, the fiduciary duties are designed to compel the trustee to act in the best interest of the beneficiaries—otherwise, beneficiaries would be at the mercy of any trustee mismanagement. Fiduciary duties are designed to protect the interests of the beneficiaries, but Professor Sitkoff points out that a trust is still an exercise of the settlor's freedom of disposition. As such, should the settlor's intent or purpose, regarding the trust, take priority when doing so would not be advantageous for the beneficiary? For instance, should a settlor have the freedom to abolish the duty to diversify when the risk of loss is shouldered by the beneficiary?

Finally, wealth transfer taxation is an important limitation of the freedom of disposition. Initially, the role of transfer taxation was strictly for raising revenue, then after World War I, it shifted to combating wealth inequality. The gift tax was implemented to prevent estate tax avoidance by transferring property inter vivos, and the generation skipping transfer tax was implemented to ensure taxation at each generation. How much should tax policy affect or limit freedom of disposition? Professor Sitkoff ends the discussion with what I perceive as a challenge for us to enter the debate regarding the proper scope of transfer tax policies when balanced against the freedom of disposition—the foundational premise of property transfers.

Overall, this article provides an insightful overview of the topics found in a typical trusts and estates course. The policy questions encourage engaged pedagogy. I enjoyed reading it and will require it for my students.

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