

Spring 2006 Newsletter

Message from the Chair

E. Gary Spitko (Santa Clara University)

Thanks to all who attended the Section's program at the AALS Annual Meeting in Washington, D.C. in January. The panelists focused on the topic "Inheritance Law and the Empirical Scholar." By the time you read this, a podcast of the program should be available on the AALS web site – www.aals.org/am2006/.

Professor Mary Louise Fellows (University of Minnesota) began the program by remembering the contributions to our field made by Professor Richard Wellman, who passed away last June. Professor Wellman's work has had a profound impact on modern inheritance law. Professor Wellman served as the Chief Reporter for the 1969 Uniform Probate Code, and was the driving force behind the widely enacted Uniform TOD Security Registration Act. Later in the program, Professor Fellows shared her thoughts on designing and securing funding for empirical survey research in inheritance law and also on several areas in which empirical scholarship might prove most helpful to the NCCUSL and ALI with respect to inheritance law reform.

Professor Michael Heise (Cornell University) gave an "outsider's" view on the underdeveloped opportunities for empirical work in the donative transfers area. Professor Heise also spoke about the pros and cons of publishing empirical scholarship with peer review journals.

Professor Justin Levinson (University of Hawai'i) gave an insightful talk on conducting empirical scholarship generally and also on collaboration by law professors with non-law-professor social scientists doing empirical work.

Professor Ray Madoff (Boston College) discussed her ongoing empirical research (with Professor James Andreoni of the University of Wisconsin) testing the hypothesis that the all-or-nothing nature of will disputes acts to discourage private settlement and encourage parties to seek judicial resolution of their dispute. Professor Madoff also spoke on securing funding for empirical research in inheritance law.

Finally, Professor Robert Sitkoff (Northwestern University and New York University) discussed some of his empirical projects (with co-author Professor Max Schanzenbach of Northwestern) that investigate the effect on trust fund location and administration of recent trust law reforms such as the abolition of the rule against perpetuities and the adoption of the prudent investor rule. Professor Sitkoff also spoke about how to fit one's empirical research design with the legal policy question under study.

Our Section's business meeting followed the program. During the business meeting Professor Sitkoff was elected to the Section's Executive Committee. Rob has assumed the responsibility of preparing the Section's newsletter. Rob and his wife Tamara also recently assumed the responsibilities of proud parents. Their daughter Deborah Eve Sitkoff was born February 8, 2006. Congratulations Rob and Tam!

On behalf of the entire Section, I want to express appreciation to Professor Ron Chester (New England School of Law) for the outstanding job he did last year as our Section Chair. Ron will remain on the Executive Committee during the 2006-07 academic year and will be a valuable resource to me as I assume the role of Section Chair. Also continuing on the Executive Committee this year are Tom Gallanis (Washington & Lee University), and Ray Madoff. Last year, Ray did a terrific job producing our Section's newsletter. Tom will serve as Program Chair this year and has already begun planning the 2007 AALS Section program. Please feel free to contact any of us if you have comments or suggestions regarding Section programs or activities. Our email addresses: gspitko@scu.edu, gallanist@wlu.edu, madoffr@bc.edu, robert.sitkoff@nyu.edu, and rchester@faculty.nesl.edu.

A final note: There is an email listserv for members of the Section. To subscribe, visit <http://lists.washlaw.edu/mailman/listinfo/donativetransfers/>.

Message from the Program Chair Tom Gallanis, Washington & Lee

Members are encouraged to attend the Section's program at the next AALS annual meeting, which will be January 3-6, 2007, in San Francisco. The date and time of the panel has not yet been set.

The panel's theme is "New Perspectives on the Law of Trusts." The panel will emphasize what we can learn about trust law from various interdisciplinary perspectives. The speakers will be:

- Gregory Alexander (Cornell), on legal history;
- Jeffrey Schoenblum (Vanderbilt), on comparative law/transnational perspectives;
- Robert Sitkoff (NYU), on law and economics; and
- Tanya Hernandez (Rutgers-Newark), on critical race theory.

Each speaker will highlight a few of the insights that have already been gained from that interdisciplinary perspective and offer tips and advice for T&E scholars who might be interested in working from that perspective but haven't done so yet. The aim of the panel is to encourage and facilitate additional interdisciplinary scholarship.

Members' News

Gerry Beyer was appointed the first Governor Preston E. Smith Regents Professor of Law at the **Texas Tech University School of Law**. Beyer also published *Wills and Estates: Cases and Materials* (5th ed. 2006); *Texas Estate Planning Statutes—2006 Student Edition* (2006); and *Wills & Trusts*, 58 SMU L. Re. 1205 (2005). In addition, Beyer maintains the Wills, Trusts, and Estates Blog (http://lawprofessors.typepad.com/trusts_estates_prof/), a part of the Law Professors Blog Network.

Jeffrey Cooper has been appointed Associate Professor of Law at **Quinnipiac**, where he will teach Trusts & Estates and Estate & Gift Tax, beginning Fall 2006. Cooper's article, "Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective," will be published in Volume 33 of the *Pepperdine Law Review* (forthcoming 2006).

Wendy Gerzog (Baltimore) published Recent Estate and Gift Tax Developments, 19 Quinnipiac Prob. L. J. 59 (2005), and the following Tax Notes articles: Return to Senda: Order Determinative for FLP Discounts, 110 Tax Notes 791 (Feb. 13, 2006); Donovan and Davis: Two More Lottery Cases, 110 Tax Notes 543 (Jan. 30, 2006); Kelley: A Green Light for FLPs, 109 Tax Notes 1467 (Dec. 12, 2005); Lurie: A Need for Better Laid Plans, 109 Tax Notes 671 (Oct. 31 2005); Duty of Consistency and Marital Deduction: Horse and Carriage, 108 Tax Notes 1463 (Sept. 19, 2005).

Kris Knaplund's (Pepperdine) article, "Grandparents Raising Grandchildren and the Implications for Inheritance," will be published in Volume 48 of the *Arizona Law Review* (forthcoming 2006).

Paula Monopoli (Maryland*) will be Visiting Professor of Law at the George Washington University Law School for the 2005-2006 academic year, teaching Property and Estates & Trusts. In addition, Monopoli will be participating in the upcoming *Yale Law Journal* symposium entitled "The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law: A Symposium on Executive Power," where she will present her forthcoming article, "Gender and Executive Activism," 116 Yale L.J. (forthcoming 2006). Monopoli also has another article, "Nonmarital Children, Inheritance and the Constitution," forthcoming in Volume 57 of the *Alabama Law Review* (2006).

* In the Fall 2005 newsletter Professor Monopoli was erroneously reported as being at the University of Baltimore. The Executive Board apologizes for the error. —Ed.

In January and February of 2006, **Alan Newman (University of Akron)** testified before the Civil and Commercial Law Committee of the Ohio House of Representatives, and before the Judiciary Committee of the Colorado House of Representatives, in connection with their consideration of bills to enact versions of the Uniform Trust Code.

Robert Sitkoff has accepted a tenured appointment as Professor of Law at **New York University** effective Fall 2006. Sitkoff, who is currently Associate Professor of Law at **Northwestern**, visited NYU in Fall 2005.

In recognition of her work on the adoption of the Oregon Uniform Trust Code, **Valerie Vollmar (Willamette)** received the Oregon State Bar President's Membership Service Award in December 2005. Vollmar is the first member of the bar to receive this award twice, having previously received it in 1989. Vollmar has also given a host of interviews to various media outlets regarding the Supreme Court's decision in *Gonzales v. Oregon* (physician-assisted suicide), and *Jurist* published her commentary on the case in its February 1, 2006 issue.

Lawrence Waggoner (Michigan) reports that the fourth edition of *Family Property Law: Wills, Trust, and Future Interests*, co-authored with **Gregory Alexander (Cornell)**, **Mary Louise Fellows (Minnesota)**, and **Thomas Gallanis (Washington & Lee)**, will be published in April, in time for Fall or Summer classes. In addition, Waggoner has written "Rev. Proc. 2005-24 and the UPC Elective Share," a University of Michigan Working Paper available online at <http://ssrn.com/abstract=794552> and <http://law.bepress.com/umichlwps/olin/art58>, which criticizes the IRS's treatment of the UPC elective share.* Finally, the treatment of powers of appointment in the Restatement Third of Property, for which Waggoner is the Reporter and **John Langbein (Yale)** is the Associate Reporter, is to be submitted for approval at the ALI annual meeting in May. If approved, the segment on powers of appointment will be combined with the previously approved segment on class gifts and published in 2007 as the third volume of the Restatement.

Mentors Available, Mentors Wanted **Wendy Gerzog, University of Baltimore**

Mentors are available to help with questions about teaching and scholarship. If you are interested in being matched with a mentor, or if you are an experienced professor who is willing to mentor, please e-mail Professor Gerzog (wgerzog@ubalt.edu) with your name, email address, and the area(s) in which you would like a mentor or are available to be a mentor (e.g., wills, trusts, and estates; estate and gift tax; estate planning; etc.).

* The IRS has since announced that it is reconsidering Rev. Proc. 2005-24. Writes Waggoner: "I take no credit for this, as I do not know whether IRS even saw the article before it made its decision to reconsider. An ACTEC Task Force probably gets the credit for turning the IRS around. By letter from the Joint Editorial Board for Uniform Trust and Estate Acts, however, my article has now been drawn to the attention of the IRS in the hope that if the Service issues a new Rev. Proc., the new one will give an accurate account of the UPC elective share."

**Looking Back:
Reflections on 30 Years of Teaching Wills, Trusts, and Estates***
Susan F. French, UCLA

When I started teaching back in 1975, trusts and estates—and property, too—focused heavily on future interests and the Rule Against Perpetuities. My first year of teaching, I even had a separate course devoted to advanced future interests which followed the basic wills course in the upperclass curriculum.

My approach back then, which I expect was pretty common, was to spend a lot of time in first-year property on the development of the estates system in English law—including the impact of the Statute of Uses. When I started working to update the Casner & Leach property casebook in the early 1990s, there were still problems that required students to analyze the effect of conveyances before and after 1537! In the upperclass course, I began with the full-blown system of present estates and future interests in its late 19th or early 20th century form—complete with destructibility of contingent remainders, the Rule in Shelley’s Case, and the doctrine of worthier title.

At both levels, I placed a lot of emphasis on proper classification of interests—fee tail, fee simple absolute, the three defeasible fees; vested, contingent, subject to open, subject to complete divestment; contingent remainders, executory interests, possibilities of reverter and rights of entry. In the first-year course, I relied on endless examples of hypothetical conveyances and diagrams that reminded me of diagramming sentences in seventh-grade English. I recommended exercise books published by other property professors for students who struggled. The whole subject had the feel of a jigsaw puzzle used to train (torment?) young minds rather than something vital and useful in the modern world. In the trusts and estates course,** the cases gave real context to future interests, but the way we taught still had a very formal and somewhat anachronistic feel due in part to the age of so many of the cases in the casebooks.

At some point it occurred to me that teaching medieval land law was probably better left to legal-history courses and that widespread abandonment of the destructibility doctrine had left no important distinction between contingent remainders and executory interests. From that point on, I increasingly shifted to a modern functional approach to the use of estates in land in my property course and changed the focus in the upperclass course from classification of future interests to the conditions attached to them. Determining whether there is a condition imposed on a future interest and when and how it will operate is much more fruitful than asking whether it is a remainder or executory interest.

* This essay, which was prepared at the editor’s request, is based on Professor French’s remarks at the Symposium on Trust Law in the 21st Century at Cardozo. –Ed.

** I have taught the course both as “trusts and estates” and as “wills and trusts.” The change of name had nothing to do with the content of the course—it just reflected the different name assigned to it by different institutions. Whatever the name, I have never included much about estate (probate) administration except in the context of principles of fiduciary administration.

Teaching the Rule Against Perpetuities used to occupy a lot of time and energy in both property and trusts and estates courses. Adoption of wait and see by the ALI, then USRAP, and the very recent abolition of the Rule in so many states, have caused major changes in what I teach. As each change reduced the severity of the consequences of violating the Rule, I cut back the amount of time I devoted to it. From the three weeks I once spent, I have now come down to about two days—most of it devoted to use of savings clauses, the importance of putting a time limit on options, and selecting the state where you want to locate a long-term trust.

Over the last 30 years, both the approach and the content of my courses has changed considerably. From the early emphasis on historical development and formal classification, my approach has shifted to modern uses and functional analysis. The content of the wills, trusts and estates course has changed to include much more trust law than it used to.* I now include material on both charitable trusts—which have become much more fun with the Buck Trust, Bishop Estate, and Barnes Foundation cases—and trust administration. I used to regard trust administration as peripheral, but I now regard it as a central part of the course—important both for theory and for practice.

The wills, trusts, and estates course has also changed in that we no longer have to spend as much time as we used to in trying to distinguish between testamentary and intervivos transfers, and explaining how a pour-over into an unfunded life insurance trust could be valid in the absence of the Uniform Testamentary Additions to Trusts Act. Widespread acceptance of nonprobate at-death transfers means that I now give most of my attention to adapting wills rules to will substitutes. Other changes to the course include the addition of elder abuse, Medicaid eligibility, reproductive technologies, and rights of domestic partners, and now, the self-settled asset-protection and perpetual, dynasty trusts.

Much has changed in the trusts and wills field since I began teaching in 1975. The most exciting change of all is the increased intellectual vitality of the field. When I began, this was an intellectual backwater—constitutional law, civil rights, and the like occupied center stage in the academic world. There was some activity, to be sure—the UPC, perpetuities reform, beginning recognitions of the nonprobate revolution—but things were pretty quiet. Today this field has really come alive—witness the gathering for the Trust Law for the 21st Century conference organized by Stewart Sterk and Melanie Leslie at Cardozo in September, 2005, and the recently inaugurated LSN Journal, WILLS, TRUSTS, & ESTATES LAW ABSTRACTS.** It's a great time to be teaching Wills & Trusts!

* This may not be true at some schools which had a separate trust course that over time got folded into the wills and trusts course, but there wasn't any separate trust course where I was teaching.

** To submit papers or abstracts, visit www.ssrn.com. To subscribe to the Wills, Trusts, and Estates journal, visit <http://hq.ssrn.com/jourInvite.cfm?link=wills-trusts-estates>. Send questions to robert.sitkoff@nyu.edu. -Ed.

Selected Publications

Becker, David M. Eroding the common law paradigm for creation of property interests and the hidden costs of law reform. 83 Wash. U. L.Q. 773 (2005).

Beyer, Gerry. Wills & Trusts. 58 SMU L. Rev. 1205 (2005).

Bishow, Lauren E. Note. Death and taxes: the family limited partnership and its use in estate planning after the Third Circuit's ruling in Estate of Thompson v. Commissioner, 382 F.3d 369, 3d Cir. 2004. 50 Vill. L. Rev. 1183.

Blumenthal, Susanna L. The deviance of the will: policing the bounds of testamentary freedom in nineteenth-century America. 19 Harv. L. Rev. 959 (2006).

Brown, Richard Lewis. Undeserving heirs?--The case of the "terminated" parent. 40 U. Rich. L. Rev. 547 (2006).

Calabresi, Steven G. The Terri Schiavo Case: In Defense Of The Special Law Enacted By Congress And President Bush. 100 Nw. U. L. Rev. 151 (2006).

Chester, Ronald. Improving Enforcement Mechanisms in the Charitable Sector: Can Increased Disclosure of Information be Utilized Effectively? 40 New Engl. L. Rev. 447 (2006).

Chong, Adeline. The common law choice of law rules for resulting and constructive trusts. 54 Int'l & Comp. L.Q. 855 (2005).

Donaldson, John E. and Danforth, Robert T. The Virginia Uniform Trust Code. 40 U. Rich. L. Rev. 325 (2005).

Gerzog, Wendy. Recent Estate and Gift Tax Developments. 19 Quinnipiac Prob. L. J. 59 (2005).

Goodwin, Iris J. Donor standing to enforce charitable gifts: civil society vs. donor empowerment. 58 Vand. L. Rev. 1093 (2005).

Houston, Michael R. Comment. Estate of Wall v. Commissioner: An answer to the problem of settlor standing in trust law?

Johnson, J. Rodney. Wills, trusts, and estates. 40 U. Rich. L. Rev. 381 (2005).

Leslie, Melanie B. In defense of the no further inquiry rule: a response to Professor John Langbein. 47 Wm. & Mary L. Rev. 541 (2005).

Leslie, Melanie B. Trusting trustees: fiduciary duties and the limits of default rules. 94 Geo. L.J. 67 (2005).

Litman, Donna. The interrelationship between the elective share and the marital deduction. 40 Real Prop. Prob. & Tr. J. 539 (2005).

Medlin, Alan S. The impact of significant substantive provisions of the South Carolina Trust Code. 57 S.C. L. Rev. 137 (2005).

Nenno, Richard W. Planning with domestic asset-protection trusts: part II. 40 Real Prop. Prob. & Tr. J. 477 (2005).

Newman, Alan. Spendthrift and discretionary trusts: alive and well under the Uniform Trust Code. 40 Real Prop. Prob. & Tr. J. 567 (2005).

Robinette, J.M. Note. Wills--holographic wills and testamentary intent--extrinsic evidence is inadmissible to prove testamentary intent for holographic wills lacking words of disposition. (Edmundson v. Estate of Fountain, No. 03-1459, 2004 WL 1475423, Ark. July 1, 2004.) 27 U. Ark. Little Rock L. Rev. 545 (2005).

Schmolka, Leo L. Passive activity losses, trusts, and estates: the regulations (if I were King). 58 Tax L. Rev. 191 (2005).

Schweizer, Heinrich. Settlor's intent vs. trustee's will: The Barnes Foundation case. 29 Colum. J.L. & Arts 63 (2005).

Sherman, Jeffrey. Prenuptial agreements: a new reason to revive an old rule. 53 Clev. St. L. Rev. 359 (2005-06).

Sitkoff, Robert H. and Schanzenbach, Max M. Jurisdictional competition for trust funds: an empirical analysis of perpetuities and taxes. 115 Yale L.J. 356 (2005).

Sitkoff, Robert H. The Lurking Rule Against Accumulations of Income. 100 Nw. U. L. Rev. 501 (2006).

Storrow, Richard F. Rescuing Children From The Marriage Movement: The Case Against Marital Status Discrimination In Adoption And Assisted Reproduction. 39 U.C. Davis L. Rev. 305 (2006).

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This Newsletter is a forum for the exchange of points of view. Opinions expressed herein are not necessarily those of the Section and do not necessarily represent the position of the Association of American Law Schools.*

* Except for this disclaimer, which the AALS requires. -Ed.