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BOOK REVIEWS

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THE MARITAL DEDUCTION AND THE USE OF FORMULA PROVISIONS. By Richard B. Covey. (The Bobbs-Merrill Company, Inc. 1966. Pp. 115. $7.50).

The estate tax marital deduction is an estate tax deduction allowed with respect to property passing from a decedent to his surviving spouse.[1] Due to the fact that the amount of this deduction is limited to one-half of the decedent's adjusted gross estate, the utilization of this deduction is perhaps the most important and critical tax aspect of estate planning.

To the extent that a surviving spouse receives less than one-half the decedent's adjusted gross estate, the full potential marital deduction is not realized, and the estate tax may be unnecessarily high. On the other hand, amounts passing to the spouse in excess of one-half the adjusted gross estate are not deductible and may be taxed in the estate of the spouse as well as that of the decedent, resulting in double taxation. In order to avoid the high tax cost of providing too little or too much for the surviving spouse, special dispositive provisions have been devised which insure that the property passing to a surviving spouse will precisely equal the maximum allowable marital deduction. This book is a detailed and comprehensive explanation and analysis of such special dispositive provisions, which are known generally as "marital deduction formula provisions."

Mr. Covey begins with the assumption that although formula provisions are used in planning the great majority of substantial estates, most lawyers using such provisions do not have a satisfactory understanding of their operation. There are several accepted formula provisions, and although any of them will probably result in the maximum allowable marital deduction, income tax aspects and non-tax consequences of the various provisions may in a given case be very different. For this reason it is important that the use of a formula provision in a client's will not be a matter of habit; it should instead be a matter of informed selection, based upon the facts of the particular case and upon an understanding of the relative estate tax, income tax, and non-tax characteristics of the various formulas available.

The basic types of formula provision are the "legacy" or "pecuniary" formula and the "fractional share" formula. A legacy

1. INT. REV. CODE OF 1954, § 2056.

provision is a gift of an *amount* to be determined in a specified manner, and is a non-residuary gift. A fractional share provision, however, is a gift of a fractional part of the residue itself, and is a true residuary disposition. Although Mr. Covey treats several variations of these basic provisions, including interesting hybrid and "short-cut" formulas, the primary alternatives remain a gift of the right to receive a certain amount on the one hand, and a gift of a share of all the assets constituting the residuary estate on the other. This distinction in the inherent natures of the legacy and fractional share formulas causes their results to vary widely when considering such problems as allocation of income during administration, allocation of gains and losses, and distributions of estate property in kind.

While we may be inclined to think of marital deduction formula provisions only with regard to their inclusion in wills, they are equally applicable to revocable trust indentures. Such revocable trusts are being ever more frequently used as a substitute for a will, and the use of formula provisions in such trusts has received special consideration in this book. Of particular note are the income tax considerations arising from the fact that in such situations the taxable entity is a trust rather than an estate.

In a short appendix the reader will find suggested forms to implement various types of formula provisions, and suggested administrative clauses to resolve potential problems of allocation. While it would hardly be appropriate to copy the provisions thus provided directly into an instrument (this is not a form book), they do demonstrate clearly and comprehensively the matters set forth in the text and should be helpful as a guide in drafting.

Although the choice and drafting of formula provisions is a matter of estate planning, the administration of the estate may involve decisions which will depend upon the type of formula involved. The election of an alternate valuation date[2] and the election to claim administration expenses as an income tax deduction[3] are two examples. In deciding whether to exercise such elections, the decedent's representative must consider the type of formula in effect and should anticipate the possibility of problems concerning the allocation of tax benefits between marital and non-marital beneficiaries.

2. Int. Rev. Code of 1954, § 2032.
3. Int. Rev. Code of 1954, § 642(g).

In this book Mr. Covey has explored thoroughly the tax and non-tax aspects of the selection and administration of marital deduction formula provisions. Although it is a short book and therefore handy for reference purposes, it contains a great deal of useful information and should be studied rather than read.

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LAW AND PSYCHOLOGY IN CONFLICT. By James Marshall. (The Bobbs-Merrill Company, Inc. 1966. Pp. 111. $5.95).

Conformity has been a favorite whipping boy of our novelists, dramatists, psychiatrists and sociologists since the young man in the gray flannel suit made his appearance on the American scene. Now it seems, conformity in one form or another is what makes our jury trial system the haphazard mechanism that it frequently is. Everybody at a trial, according to Mr. Marshall, tries to do what is expected of him, and the result is a verdict based not upon what happened but upon a fantasy on which the witnesses, lawyers, judge and jurors have collaborated.

Mr. Marshall does not perhaps use the word conformity but what he finds to be impeding the search for truth at each step of litigation is basically that—the psychological need to avoid conflicts with other members of one's group and with one's own predelictions. Even at the moment of observing a physical occurrence or hearing a verbal exchange, the unconscious selective processes of the potential witness are already at work. His own experiences in similar transactions lead him to immediate conclusions as to what he is observing—"That fellow is coming into the intersection too fast."—"My friend is finally selling his horse."—and everything that might be in conflict with what he believes is happening is simply not observed or is at once rejected, all in complete honesty. This happy faculty, plus the well known inability of even the most perceptive person to perceive perfectly, makes eye witnesses to varying degrees unreliable before they even enter the court room.

But the distortion of reality does not stop there, according to Mr. Marshall. Whatever nagging doubts the witness might have had as to what he had seen or heard are discarded, again honestly, when he is called to testify for one side or the other in the ensuing litigation. Since he is testifying *for* one of the parties, he knows that he is expected by all concerned to support that party's factual position, and he does so, agreeing as fully as possible with all suggestions by the lawyer for "their side" and defending himself adroitly in cross-examination by their adversary. Any dissonance in his recollection of the facts he is testifying to is rejected, mentally blocked out by the new objective of winning a case for the side that is now clearly perceived to be in the right.

The process of reaching a "just" conclusion, as distinguished from a factually sound one, is then taken over by the jury after of course being shaped and sharpened by skillful lawyers. As to

the functioning of the jurors, Mr. Marshall develops an interesting point that jurors are actually the key witnesses in a trial since they are called upon to perceive, remember, interpret and later recount to themselves all of the testimony which they have heard from the witness chair. This is far more than reasonably can be expected of them, and what they actually do, as human beings, is to remember and use what accords with their idea of justice in the case and to discard what is out of harmony with the facts they want to use.

Mr. Marshall's studies have led him to the conclusion, shared by many, that the judge's instructions to the jury at the conclusion of a trial have very little effect on their deliberations, except perhaps to give some individual juror ammunition for a jury room argument. He quotes Judge Jerome Frank: "It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could, merely from listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words."[1]

The final stage in the avoidance of psychological conflicts comes in the jury room, where conformity is definitely the word. The law demands consensus, and the jurors, no radicals or queer ducks they, find a patriotic satisfaction in complying. Qualms of conscience when divided by twelve become very light indeed.

Mr. Marshall's final summary of our hallowed American jury trial is this:

> It is a Kafkaesque world in which people testify to what they neither saw nor heard accurately, nor recalled nor communicated fully, and in which victory was an end in itself, and men and women compromised to reach a decision which they based upon partially understood testimony, partisan arguments and abstract judicial charges. Life and liberty, property and reputation are staked on bets or guesses as to what really happened.[2]

This is a fascinating book and probably an important one. Certainly it contains sufficient demonstration of its main thesis that the law as presently administered does not take sufficient notice of established psychological truths and that its processes permit, and even invite, the perversion of objective fact for partisan ends. But what to do about it? Aside from suggesting a few

1. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 95 (1966).
2. *Id.* at 106.

neither new nor revolutionary changes in the rules of evidence, the only concrete recommendation which Mr. Marshall offers is for joint research by lawyers and social scientists as to the reliability of evidence which depends upon observation and recollection, and a search for techniques to improve that reliability. If, as he says, the law has always resisted such joint endeavors, it is time that such resistance cease. But the non-scientist lawyer must still be forgiven for harboring a slight doubt that any "technique" will ever be discovered for making the testimony of witnesses reliable, that is unless the part which the social scientists will undertake in this project is the recasting of human nature.

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AN ESTATE PLANNER'S HANDBOOK. By James F. Farr. (Little, Brown and Company. Third Edition, 1966. Pp. 663. $15.00).

The first edition[1] of this excellent work went to press in 1948, too soon to include in the text a discussion of the Marital Deduction Act of 1948,[2] the provisions of which have so dominated estate planning theory since that date. The second edition[3] was published in 1953. Of course the Internal Revenue Code of 1954 followed hard upon that publication, changing the names and numbers of the tax provisions, as well as making a number of significant changes in the substantive law. Now we are presented with the third edition by Mr. Farr. We might voice with Horatio the concern that "this bodes some strange eruption to our state."[4]

Although no doubt vexing to the authors, these tax amendments following the publication of earlier editions did not detract in any major respect from the utility of the work. More than any other study of estate planning, the Shattuck and Farr book has been faithful to the always expressed, but often forgotten, caveat that tax considerations should be of secondary importance in planning a client's estate.[5] At every point, the focus of this book is on responsible planning of a sound program of lifetime and testamentary arrangements that will protect the family and benefit the society of which the family is so important a part. Throughout the three editions, the central theme is a philosophy of estate planning which, if adhered to, will permit the planner to take pride in his craft, as one ministering to important needs in our society and contributing to the strength of that society. Practiced in this spirit, estate planning is a specialist's art that shares in the highest ideals of the lawyer's calling.

Thus, the third edition would be useful even if it merely brought up to date developments in the law of taxation, includ-

1. The first edition was by Mayo Adams Shattuck of the Boston bar and was reviewed in 62 HARV. L. REV. 344 (1948).

2. Now contained in INT. REV. CODE OF 1954, §§ 2056, 2513, 2523. The 1948 Act also introduced the joint return for spouses, now INT. REV. CODE OF 1954, § 2. An amusing commentary on the importance of the marital deduction for estate planning is found in the index to the book reviewed herein, "Estate planning. *See* Marital Deduction." See FARR, AN ESTATE PLANNERS HANDBOOK 649 (3d ed. 1966).

3. The second edition was by Mr. Shattuck and Mr. Farr. It was reviewed in 9 TAX L. REV. 366 (1954).

4. Hamlet, Act I, Sc. I, line 69.

5. It is illuminating how few of the cases in the Table of Cases are tax cases. See Farr, *Op. cit. supra* note 2, at 607-20.

ing the changes in numbering of the tax provisions. Mr. Farr has gone beyond this. He has preserved the best of the previous editions, while adding new material of value to the practitioner. The splendid introductory chapter and the beginning of chapter III on the use of insurance are preserved almost verbatim from earlier editions. The young lawyer who appreciates the wisdom of these insights can do much to serve friends of his own age, while beginning to develop a modest estate practice. Also preserved and improved is the useful interplay between the text[6] and the illustrative forms with commentaries thereon.[7] Additions and amendments have been made here where Mr. Farr thought the passage of time added new perspective. Even after an excellent law school training, a young member of the bar is somewhat at a loss to draft a will and understand exactly what he is doing. Armed with chapter V of this book and the forms in Appendix A, together with some reference to the peculiarities of local law, the young lawyer could perform very creditably.

This is not to suggest that the only or the primary utility of this book is to serve the young lawyer; it is perhaps indispensable to the specialist in estate planning. The work is now so well known to the lawyer specializing in this art and to the trust officer and the insurance underwriter, that no further word is necessary other than to point out that a new edition has appeared. Perhaps no other work contains so incisive a discussion of the need for careful drafting of the provisions for management of an estate or trust.[8] Like its predecessors, the third edition discusses at length the need for broad investment powers, and includes an essay on the history and importance of the Massachusetts "prudent man" rule.[9]

Perhaps it is to the general practitioner, who does some estate planning but does not work primarily in that area, that the book should have the most appeal. Here he can find a sound philosophy for approaching his task, and at the same time find answers to most of the vexing questions in preparing an estate plan. As Mr. Farr himself acknowledges, Professor Casner's more detailed study[10] is indispensable to the practitioner who is dealing with intricate estate planning problems, especially if he is working

6. Farr, *Op. cit. supra* note 2, at 1-341.
7. *Id.* at 344-572.
8. *Id.* at 165-219.
9. *Id.* at 573.
10. CASNER, ESTATE PLANNING (3d ed. 1959).

close to the danger areas of taxation. In these areas cognizance must be taken of the latest developments in the law, and the annual steady growth of the Casner supplement bears witness to the difficulty of keeping abreast.[11] Mr. Farr's book is aimed at helping the practitioner who is working on the more modest estate, one in which the tools that may be utilized have been tested by time and judicial decision.

The author repeats from the earlier editions the strict demands made upon the professional who wishes to provide competent estate planning advice. To be called an estate planner, he says, an individual must be a skilled draftsman, must be learned in several branches of the law, including "the broad trends and the precise rules of taxation,"[12] and must be familiar "not only with the actual administration of portfolios and insurance, but also with the essentials at least of accountancy."[13] The author adds that "the mere statement of the foregoing elementary requisites of honest profession as an estate planner demonstrates how very few in numbers such persons must be."[14] Thus, Mr. Farr concludes that the practice of estate planning requires calling on the skills of the insurance underwriter, the accountant, and the trust officer, as well as the lawyer. Mr. Farr believes that the lawyer should be capable enough to captain the "estate planning team."

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11. CASNER, ESTATE PLANNING (Supp. 1966). The 1966 supplement contains 1088 pages.

12. Farr, *Op. cit. supra* note 2, at 6.

13. *Ibid.*

14. *Ibid.* This recalls to mind the passage in Jane Austen, *Pride and Prejudice,* THE COMPLETE NOVELS OF JANE AUSTEN page 25 (Modern Library, New York):

> [Mr. Darcy] 'But I am very far from agreeing with you in your estimation of ladies in general. I cannot boast of knowing more than half-a-dozen, in the whole range of my acquaintance, that are really accomplished.'
>
> 'Nor I, I am sure,' said Miss Bingley.
>
> 'Then,' observed Elizabeth [Bennett], 'you must comprehend a great deal in your idea of an accomplished woman.'
>
> [Mr. Darcy] 'Yes, I do comprehend a great deal in it.'
>
> 'Oh! certainly,' cried his faithful assistant [Miss Bingley], 'no one can be really esteemed accomplished who does not greatly surpass what is usually met with. A woman must have a thorough knowledge of music, singing, drawing, dancing and the modern languages, to deserve the word; and besides all this, she must possess that certain something in her air and manner of walking, the tone of her voice, her address and expressions, or the word will be but half-deserved.'
>
> 'All this she must possess,' added Darcy, 'and to all this she must yet add something more substantial, in the improvement of her mind by extensive reading.'
>
> [Miss Elizabeth Bennett] 'I am no longer surprised at your knowing *only* six accomplished women. I rather wonder now at your knowing *any.*'

Because of the breadth of the lawyer's viewpoint and his relative freedom from bias, this is a worthy desideratum, but the role is a difficult one to fill. Lawyers must rise to the challenge if the bar is to retain a major role in the preparation of wills and trust instruments. The history of the law indicates too well that tasks which lawyers fail to fill with professional competence may be lost to other professions. Both in law school training and in continuing legal education,[15] programs are now available to help the bar to meet its responsibilities. The Farr book makes a valuable contribution to carrying out this mission. No work with which I am familiar provides in so concise an expression the insights which a lawyer needs to become a worthy captain of the estate planning team.

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15. See PRACTICING LAW INSTITUTE, PLI PROGRAM MATERIALS, ESTATE PLANNING AND ADMINISTRATION (1966); JOINT COMM. ON CONTINUING LEGAL EDUCATION, AMERICAN LAW INSTITUTE AND AMERICAN BAR ASS'N, COURSE MATERIALS ON LIFETIME AND TESTAMENTARY ESTATE PLANNING (1961); CAL. CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING (1965).