

BOOK REVIEW

An Introduction To Estate Planning. ROBERT LYNN. West Publishing Co., St. Paul, Minn., 1975: Pp. xii, 273.

"Let's choose executors and talk of wills"—Richard II

It is rare that a law book appears that is short, clear, well written, precisely presented for a selected, limited purpose, that is without padding and pseudo-scholarship, erudite, not recondite. Professor Robert S. Lynn of the College of Law of Ohio State University has written a book of this order that presents for ready apprehension the salient materials in that vast area known as estate planning, which includes gifts, inter-vivos and testamentary; concurrent interests; insurance; insurance trusts; regular private trusts; charitable trusts; social security and veterans benefits; and estate and gift taxation. Professor Lynn is to be commended for not writing superficially in order to gain coverage. In that event, the book would have been worthless. Nor has he burdened his text with so much detail as to blot out the ribs of the subject; the planning features. What he has done is to exclude any items that are of secondary importance in order to treat well the primary problems. He assumes that his readers are intelligent and will use the information supplied by the book to do further research in treatises, services, especially the Tax Management Service of the Bureau of National Affairs, articles, and of course, cases and statutes of the single jurisdiction of most interest to each reader with a careful eye on the Uniform Probate Code,¹ provisions of which are pending in the New Jersey Legislature, and on parallel provisions of the New York Estates, Powers and Trusts Law. This book will doubtless be in demand by practitioners as well as by law students. It should take its place with other summaries that have become classics such as: Brown's treatise on personal property;² Corwin's introduction to the Constitution;³ Gellhorn's introduction to the administrative process;⁴ Hall's principles of criminal law;⁵ Moyni-

¹ For a comparison of selected aspects of present New Jersey law with the parallel provisions of the Uniform Probate Code see Diab, *New Jersey and the Uniform Probate Code*, 2 SETON HALL L. REV. 323 (1971).

² R. BROWN, *THE LAW OF PERSONAL PROPERTY* (2d ed. 1955).

³ E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (12th ed. 1958).

⁴ E. GELLHORN, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* (1972).

⁵ J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960).

han's introduction to real property;⁶ and Spitz on future interests.⁷

While there are a few shortcomings to the book, these can be pointed out quickly. The emphasis belongs rather to the riches in the volume. Professor Lynn employs no charts such as those that are so helpful as in Professor William J. Bowne's volume on estate planning.⁸ Charts and tables are a necessity in estate planning so that the novice can see as well as read about the following situations: an estate of a married person who takes advantage of the marital deduction, contrasted with a similar estate planned without the use of that deduction; the formula of using two trusts, one of which permits, through the use of the non-general power of appointment, the settlor's estate to avoid a tax liability upon the death of the surviving spouse, contrasted with transfers that do not use the formula; the difference in the total tax liability of an estate, on the one hand, that must bear full estate taxes and, on the other, an estate that mitigates this burden by the proper use of the more favorable gift tax rates; and the comparative tax advantages that accrue to an estate that includes charitable gifts as distinct from the heavier assessments on an estate that the testator transmits to private persons only. In addition, there is not enough discussion on the tax problem of charitable gifts, even though Professor Lynn does give a good common law treatment of charities; of the *cy pres* problem; of the device of the gift to a charity followed by a gift over to another charity, which permits the gift to escape the reach of the Rule Against Perpetuities; and of the Mortmain Acts. He fails to illustrate adequately the new uni-trust and annuity concepts ushered in by the Tax Reform Act of 1969. Moreover, his remarkably cogent remarks on simultaneous death would be improved by charts illustrating the differences to be expected in situations when the Uniform Simultaneous Act applies and in those when it does not, as well as the variations to the Act that are commonly used in drafting.

On the favorable side is a remarkably clear presentation of gifts, with the superb example of *In re Estate of Claus*⁹ and the curious decision by the United States Supreme Court in *United States v. Chandler*,¹⁰ which held that a decedent's physical delivery of a United States Bond, Series E, was not enough, absent a formal

⁶ C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962).

⁷ E. SPITZ, AN ELEMENTARY TREATISE ON CONDITIONAL AND FUTURE INTERESTS IN PROPERTY (1912).

⁸ W. BOWNE, SAVINGS THROUGH ESTATE PLANNING (1936).

⁹ 93 Ohio L. Abs. 308, 197 N.E.2d 898 (Ct. App. 1963).

¹⁰ 410 U.S. 257 (1973).

reissuance of the bond to another person, to exempt the bond from decedent's gross estate. New Jersey readers will wish to add to this section of the book the well known state supreme court decision of *Foster v. Reiss*,¹¹ concerning the question of gifts, with its opinion by Chief Justice Vanderbilt and minority opinion by Justice Jacobs.

Equally good, and much more important, is Professor Lynn's treatment of trusts, with his exposition of the private trust, including the pour-over will with reference to a trust; the insurance trust; the charitable trust; the honorary trust; the Totten trust, and the spendthrift trust, including the discretionary trust and the support trust. The constructive trust and the resulting trust, both of which arise by operation of law are, of course, not part of planning (except to avoid them) and, except for brief mention, have been properly excluded from the text.

The highwater mark of the book, best demonstrating its author's mastery, is the material on future interests, with its noble treatment of powers of appointment and the Rule Against Perpetuities. Some observers consider the course in future interests to rank with those in federal jurisdiction and conflicts of law as one of the three best vehicles with which to test the acumen of students to handle semantic problems; to draw sharp distinctions in the legal positivist tradition; and to solve problems within the game theory of jurisprudence. In any event, it is unfortunate that too many courses in wills and trusts overlook future interests, with the excuse that the future interest course is or ought to be a special offering, an attitude not overly subscribed to in all law schools. The gift and estate tax courses have to treat powers, the Rule Against Perpetuities, reversions, life estates, remainders, and their counterparts in equity, that is trusts. But, here again, too often the instructors in these courses, submerged by the codes, assume a knowledge of the students that is frequently inchoate. Sad also is the gradual elimination from the first-year property course of the estates-and-interests in land materials that once supplied the intellectual climax to the beginning stage of the curriculum.¹² There is a Philistine attitude towards future interests as exemplified by Dean Thomas L. Shaffer's appalling observation:

¹¹ 18 N.J. 41, 112 A.2d 553 (1955). For an analysis of *Foster* see Ireton, *Personal Property*, 10 RUTGERS L. REV. 300 (1955).

¹² For some suggestions on the first-year property course see Smith, Book Review, 22 RUTGERS L. REV. 198 (1967); Smith, Book Review, 70 YALE L.J. 1404 (1961).

Future interests, including perpetuities, is an overrated subject. It seems to retain its prominent place in law study because it is a superb intimidator, and because any law teacher who gives the subject enough effort and attention to understand it demands a return on his investment. I have never met a practicing lawyer who thought he understood future interests.¹³

It would seem wiser to view future interests as a subject that is as important to the process of wealth transmission as a base is to a three-piece combo, and with the respect shown to it by the late Professor Philip Mechem who, reviewing a book by a master, Professor Richard B. Powell, nevertheless cautioned against an overindulgence in the subject:

It is a matter of common knowledge that Future Interests is not properly a course but an obsession, and that teachers of it in time develop a complex, akin perhaps to the Jehovah-complex, which leads them to think that the law school exists for the sole purpose of teaching Future Interests.¹⁴

Professor Lynn eschews fanaticism and gives a plain presentation of the useful elements to this intriguing and sometimes arcane legal phenomenon. In addition, the book includes good accounts involving insurance, fiduciary administration and, of course, the federal estate and gift taxes, although it does not attempt a comparable study of state inheritance taxes.

Three quotations will illustrate the pith of Professor Lynn's learning:

Just as there can be no private express trust unless there is identifiable trust property, there can be no charitable trust unless there is identifiable subject matter of the trust.¹⁵

Concerning the Rule Against Perpetuities, he states:

Do not create gifts extending to the third generation unless the testator is willing to treat like kinds of persons in an unequal way.¹⁶

Finally, as to administrators, executors, and trustees:

It is undeniably true that persons have made an excellent living acting as fiduciaries Even so, an inexperienced person should not accept fiduciary responsibility lightly. . . . [T]he task might result in altogether unexpected personal liability if a loss of estate or trust property occurs that is attributable to a failure of the

¹³ T. SHAFFER, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 230 (1972).

¹⁴ Mechem, Book Review, 19 *IOWA L. REV.* 146, 149 (1933). In 1958, Mechem wrote his own casebook, entitled *Future Interests*.

¹⁵ R. LYNN, *AN INTRODUCTION TO ESTATE PLANNING* 156 (1975).

¹⁶ *Id.* at 224. See also R. LYNN, *THE MODERN RULES AGAINST PERPETUITIES* (1966).

fiduciary to meet the standards on fiduciary conduct imposed by law. In short, being named personal representative of an estate or trustee under a trust instrument should not invariably be viewed as leading to a windfall. In a particular case, the result might be otherwise.¹⁷

In addition to the skill with which this book is put together, Professor Lynn has shown an awareness that the law school curriculum is undergoing a rather drastic change in that phase of the law that can conveniently be called donative transactions, wealth transmission, or usually, estate planning. Recently, the Harvard Law School has reorganized this branch of legal learning. Professor David Westfall within the past two years has written of these Harvard changes that the course in Estate Planning

is designed for students who have had a course in the Federal Income Tax but none in estate and gift taxation and no more than an introductory acquaintance with the law of decedents' estates, trusts, wills, and future interests. In a more leisurely era there often were required courses in each of these last four subjects. Today, at the Harvard Law School, Trusts alone remains but as an elective course. Students' only other exposure to these four areas is in Property.¹⁸

Based on the foregoing statement and with the evidence of the revisions in many law schools, it is evident that insofar as the problem of inheritance is concerned, the main course of the future will be a multi-ingredient capsule called estate planning. Professor Lynn's book makes this transition easier, and much more pleasant.

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¹⁷ R. LYNN, AN INTRODUCTION TO ESTATE PLANNING 156 (1975).

¹⁸ *Preface* to D. WESTFALL, ESTATE PLANNING PROBLEMS at xvii (1973).

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