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Landmark Papers on Estate Planning, Wills, Estates and Trusts

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BOOK REVIEW

Landmark Papers on Estate Planning, Wills, Estates and Trusts

(Winard Ed.). Vol. I: Estate Planning, pp. 1-534; Vol. II: Wills and Estates, pp. 537-1008; Vol. III: Trusts, pp. 1009-1482. Prentice-Hall, 1968. \$59.95.

The editor believes there is "need for a clear and bold approach to permit the practitioner—general practitioner or specialist—a direct key to answers to his legal, practical and drafting problems in the related fields of Estate Planning, Wills, Estates and Trusts."¹ Implicit in this statement seems to be the assumption that no such "direct key" has been provided heretofore in the works of Casner and others. How does the editor propose to produce such a key where those who have gone before him have failed? He has "broken down the interrelated subject matter into four component parts and culled from the available literature articles which might be characterized as 'Landmark Papers' covering each specific essential and current sub-category in the subject matter of this specialty."²

Breaking down an interrelated subject matter into four parts sounds like a formidable, if not an impossible, task. What "clear and bold approach" does the editor have here? Volume I on Estate Planning consists of eighteen articles which either have "Estate Plan," "Estate Planners" or "Estate Planning" in their titles or at least avoid the use of "Wills," "Estates" and "Trusts."³ This simplistic method of classification was not as successful in Volume II on Wills and Estates, which has thirteen articles in whose titles appear such terms as "Wills," "Testamentary," "Specific Devise," "Estates," "Estate Income," "Estate Taxes," "Probate" and "Guardians of Property."⁴ As might be expected, of the

¹ Vol. I, p. v.

² Later on there is a caveat. "In some instances papers which are not truly 'Landmark Papers' have been selected to fill gaps in the over-all concept of making available to the reader a compendium or compilation of available intelligence in the fields of law and practice intended to be covered." *Ibid.*

³ Trachtman, *Maxims for Estate Planners*; Weinstock, *Stock Purchase Agreements*; Sutter, *Partnership Estate Planning Problems*; A.B.A. Subcommittee on Estate and Tax Planning, *Non-Probate Assets in Estate Planning*; Power, *The Law and the Surviving Spouse*; Polasky, *Marital Deduction Formula Clauses in Estate Planning—Estate and Income Tax Considerations*; MacKay, *Life Insurance in the Estate Plan*; Oates, *Insurance for Estate Settlement Charges*; Young, *Estate Planning and the Tax Structure*; Bolich, *The Power of Appointment: Tool of Estate Planning and Drafting*; Rollison, *Co-Ownership of Property in Estate Planning*; Swihart, *Federal Taxation of Community Property*; A.B.A. Subcommittee on Estate and Tax Planning, *Effect of State Lines on Estate Planning*; Halbach, *Post-Mortem Estate Planning*; Rothman, *How to Use Pension and Profit Sharing Benefits in Estate Planning*; Ross, *The Private Annuity as a Tax Minimizing Instrument*; A.B.A. Subcommittee, *Aspects of Uniform Gifts to Minors Act*; A.B.A. Subcommittee on Estate and Tax Planning, *Perpetuating Family Business Through Estate Planning*.

⁴ Ives, *Suggestions for Modern Will Drafting*; A.B.A. Committee on Succession, *Will Contests*; Reed, *No-Contest Clauses in Wills*; Slough, *Testamentary*

twenty-one articles in Volume III on Trusts, this term or "Trustees" (sometimes in the singular) shows up in eighteen of the titles.⁵ In the remaining four the editor had to settle for "Fiduciary,"⁶ "Cy Pres"⁷ and two titles which could apply to transfers in trust as well as others.⁸

Looking just at the titles listed in the preceding footnotes, it is easy to find articles included in the second and third volumes which would qualify under any generally accepted definition of estate planning. Unless a large number of points are to be given for a physical separation of the articles into three volumes, each with its own table of contents, and a highly inadequate index at the end of the third volume, it is impossible to confer on the editor a passing grade for his attempt to achieve even a three part breakdown. What the editor has successfully achieved, whether intentionally or not, is a separation into fifty-six parts of an interrelated subject matter by selecting that number of articles, none of which were originally written for this particular publishing venture. Such an endeavor could be expected to and has resulted in both a dupli-

Capacity: Evidentiary Aspects; Houston, Transfers to the "Estate" of a Named Person; Touster, Testamentary Freedom and Social Control—After-born Children; Kurlander, Gift and Estate Tax Consequences of Separation and Divorce; King, Pitfalls in Trust and Probate Practice; A.B.A. Committee, Administration and Distribution of Decedents' Estates; A.B.A. Committee, Tax Aspects of Decedents' Estates; Lauritzen, Apportionment of Federal Estate Taxes; Ryan, Exoneration of the Specific Devise at the Expense of the Residue; Reinstein, Estate Tax Aspects of Intervivos Conveyances in Contemplation of Death—Inclusion in Gross Estate; Boyd, The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates; Lauritzen, Estate Income During Administration—Who Owns It—Who Pays the Tax—What to Do About It; Smith, Tax Consequences of a Gift in Contemplation of Death by a Joint Tenant or a Tenant by the Entirety; Fratcher, Powers and Duties of Guardians of Property.

⁵ A.B.A. Subcommittee on Trust Administration and Accountability of Trustees, *Outer Limits of Trustee Powers*; Fourth Report of N.Y. Temporary Commission of Estates, *Successor Trustee*; A.B.A. Committee on Estate and Tax Planning, *Testamentary Trusts for Income Tax Savings*; Flickering, *A Trustee's Nightmare: Allocation of Stock Dividends Between Income and Principal*; Halbach, *Problems of Discretion in Discretionary Trusts*; A.B.A. Subcommittee of Committee on Trust Administration and Accountability of Trustees, *Polyjurisdictional Inter Vivos Trusts, What Law Governs?*; Scott, *Spendthrift Trusts and the Conflict of Laws*; Scott, *Participation in a Breach of Trust*; Schneider, *How the Estate Tax Applies to Inter Vivos Trusts for Minors*; Martin, Sinclitico and Miller, *Increasing Charitable Contributions Through the Use of Trusts*; Yohlin, *The Short-Term Trust—A Respectable Tax-Saving Device*; Lauritzen, *Super Support Trusts—Or How to Set Up a Trust to Pay Income to Minor Children Without Taxing the Income to the Settlor*; Newman, *Perpetuities, Restraints on Alienability, and the Duration of Trusts*; A.B.A. Committee on Trust Administration and Accountability of Trustees, (I) *Responsibility of Investment Advisors and Trustees* (II) *Operation of Family Business*; Smith, *Changing Concepts of Trust Investment Policy*; A.B.A. Subcommittee of Committee on Trust Administration and Accountability of Trustees, *Settling the Trustee's Accounts: Why, When, How, and Where?*; Hammerman, *Foreign Situs Trusts—Defining the Undefined*.

⁶ King, *Protecting a Fiduciary from Personal Liability*.

⁷ Fisch, *Changing Concepts and Cy Pres*.

⁸ Fisch, *Restrictions on Charitable Giving*; Halbach, *Creditors' Rights in Future Interests*.

cation of materials in a number of areas plus fragmented or incomplete treatment of others.

Repetition can be illustrated by a comparison of the fourth, eleventh, thirty-first and thirty-fourth articles. The fourth deals with planning problems where a client owns non-probate as well as probate assets and, after a general treatment of the advantages and dangers of owning non-probate assets, launches into a twelve-page discussion of survivorship tenancies. Separated from the fourth by six articles on such diverse topics as protection of the surviving spouse, marital deduction formula clauses, life insurance, a critique of the tax structure affecting estate planning, and powers of appointment, the eleventh article presents a twenty-five page treatment of co-ownership in estate planning. Two articles covering the same subject could be justified if they dealt with enough different issues or presented differing approaches on debatable topics but it is then incumbent upon the editor and publishing staff to provide adequate research tools for the attorney seeking discussion of a limited matter. This work provides, as previously mentioned, only a table of contents at the beginning of each volume restricted to the articles contained in that volume plus a so-called "index" at the end of the third volume. If, for example, an attorney sought information on the advisability of owning a family car in joint tenancy, he could start with the table of contents in the first volume. Where the headings were used by the author to divide up the original article they have been reproduced in the table of contents,⁹ so when the attorney reached the fourth article, "Non-Probate Assets in Estate Planning," he could then check the headings under this title and would find "Survivorship Tenancies." This portion of the article might be read and, if so, no discussion of the family car would be found. By continuing on through the maze of intervening topics in the table of contents the attorney would come to the eleventh title and under it a heading "Co-ownership of automobiles." But if the attorney were interested in the problem of a transfer in contemplation of death by a joint tenant, the headings under both the fourth and eleventh titles do not refer to this matter. While the fourth has no heading referring to taxes and the eleventh does, this matter is actually discussed briefly in the fourth article but not in the eleventh. It is questionable whether the attorney would have continued through the table of contents in the second volume but, had he done so, he might have guessed from the title of the thirty-first (which has uninformative head-

⁹ Where the author failed to use headings, none appear in the table of contents and the reader can be in for a surprise if he relies merely on the title of the article. E.g., the third article is merely listed by its title: "Partnership Estate Planning Problems." Trying to ascertain something about the content of this article from the index reveals the title is used as the index heading and the subheadings in the index are not helpful. The reader has no safe alternative but to read the article to find out the limited estate planning problems discussed therein.

ings) and the title of the thirty-fourth clearly indicates more detailed discussion of his tax problem. The attorney's only "alternative" is to work through the index at the back of the third volume. If he looked under "Joint Tenancy" on the family car problem he would find a cross reference to the eleventh article which is indexed under its title and a subheading on co-ownership of automobiles. But if the point researched is covered in the fourth rather than the eleventh article, unless he thinks of looking under "Non-probate assets" or has noted that articles may be indexed under their titles and goes back to the table of contents, the index is of no help in getting a lead to the joint tenancy discussion in the fourth article. On the tax problem previously referred to, he would obtain no help from the "Joint Tenancy" index heading, the thirty-first article shows up only under "Inter vivos conveyances in contemplation of death" with subheadings which successfully conceal any reference to joint tenancy, and the thirty-fourth article is indexed only under "Contemplation of Death" with joint tenancy subheadings.

An inadequate treatment of an important area would show up, for example, where an attorney tried to use this work for guidance on how to draw a power of appointment trust which would qualify for the estate tax marital deduction. If he looked in the index under "Marital deduction" he is referred only to a seventy page discussion of formula clauses. If he checked under "Testamentary trusts" he is sent to a seventeen page treatment on using such trusts to obtain income tax savings. If he broadens out his generalizing to "Federal estate taxes" he is greeted with a fifty-eight page discussion on apportionment of federal estate taxes. Under "Will drafting," if he checks even the sub-headings, he would find "Marital deduction share of, description of" and a reference to three pages of an article, only about one of which is pertinent on the type of trust he is concerned with.

As an example of how fragmentation of the subject matter may be dangerous for the unwary, consider the thirty-sixth article on "Protecting A Fiduciary From Personal Liability," the leadoff article in the volume on trusts. One of the suggestions offered for protecting a trustee from breach of trust is to give him discretion in determining what constitutes income and principal and have his decision binding on interested parties. Fortunate the reader may be who turns to the following article, "Outer Limits of Trustee Powers," before acting on the advice given in the thirty-sixth article. The thirty-seventh at least has a general discussion of tax problems to be considered in drafting administrative provisions, followed by a detailed description of various fiduciary duties under state law which limit the permissible exercise of a trustee's administrative powers, no matter how broadly stated in the governing instrument.

The problem for the prospective buyer of this set is whether these

fifty-six articles are worth sixty dollars to him, a little more than a dollar an article when considered quantitatively. Qualitatively, some of the articles are worth more than others. The more valuable articles include reprints of reports made by various committees of the Real Property, Probate and Trust Law Section of the American Bar Association and this, of course, lessens the value of this work for members of that section. Of the remainder, a number are listed as revised and updated since their original publication elsewhere. One may be permitted to wonder if the amount of updating does not vary substantially. Thus, the second article was originally published in 1962 but, as revised and updated in this work, contains no tax citations later than 1960; the third article was originally published in 1958 and contains one decision and one revenue ruling of more recent vintage; and so on.

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