

## REVIEWS

---

ESTATE PLANNING CASES, STATUTES, TEXT AND OTHER MATERIALS. By A. James Casner. Boston: Little, Brown and Company, 1953. Pp. xxxv, 540, Supplement 126. \$10.00.

THE only thing that keeps the publication of this book from being big news is the book itself. It is the product of at least six years of experimentation by one of the country's most distinguished property professors; it is the first coursebook out in the much publicized field of estate planning; it has a potential market limited only to the nation's population of law schools; it has powerful backing from those professional groups who usually confine their contacts with legal education to criticism—all the ingredients of scholarship, originality and public acceptance which should mark it as a rare and influential contribution to the teaching literature of the law.

It is not. In fairness to Professor Casner nowhere in the book does he indicate that he intended it to be. He starts out by denying the newness of the subject matter, thereby giving the back of his hand to those who would have the world believe that estate planning is the new religion and they the only prophets. "Estate planning has been a function of lawyers for centuries. . . . The nature and scope of these advantages have changed from time to time through the years, but it can surely be said that proper estate planning has always made a contribution to the financial welfare of a person's family and to the preservation of the family wealth."<sup>1</sup> He appears only incidentally interested in capturing a national market. In compressing a huge, sprawling subject into 497 pages (excluding the appendices and pocket supplement) he has had to make countless adjustments, playing up certain features of the material, playing down others, and omitting still others. Of necessity his selection has had to be based on his own teaching needs rather than on an attempt to satisfy the requirements of any and all who may some day use his book. His treatment, perhaps because the subject will permit no other, is more in the nature of a brief general survey than a traditional casebook. It is, in short, a book of modest dimensions designed for part time use in an advanced property course.

At one time Professor Casner apparently had in mind doing considerably more.<sup>2</sup> What made him change his plans? And what are the chances of future

---

1. P. v.

2. Professor Casner had this to say on the subject: "It is my belief that the proper arrangement and selection of material in connection with each phase of the course as outlined here will not only give the student an adequate knowledge of wills, future interests, trusts, and related matters, but will do so in the framework in which he will have to employ such knowledge in the future." Note, "An Estate Planning Course as a Substitute for Wills, Trusts, and Future Interests," appended to Leach, *Property Law Taught in Two Packages*, 1 J. LEGAL ED. 28, 62-3 (1948).

authors effecting a more comprehensive coverage? In providing tentative answers to these questions the book reveals much about the movement of which it is the first representative. Estate planning for the curriculum is a development of recent origin, dating from the period of revitalization in legal education which followed the war. Up to now it has been more talk than solid achievement. But the talk has been so unreservedly enthusiastic that the least which has come to be expected of it is a minor revolution in important areas of the curriculum. Its most optimistic advocates see in it a cure for all the ills which beset the traditional estate courses—a formula for replacing existing dryrot with a streamlined program wherein property and tax law are put into context and the problems and atmosphere of the law office are recreated in the classroom. Such has been the appeal of this campaign that a simple description of an estate planning course, appearing a few years back in the magazine *Trusts and Estates*, could evoke a flood of letters from presumably busy lawyers, trust officers, and insurance men of a volume and tone sufficient to make the editors of *Life* magazine proud.<sup>3</sup>

Nobody could reasonably be expected to deliver on the promises made in this buildup. Estate planning is not a subject which can be easily reduced to precise definition and thereby given the substance and purpose required of teaching materials. The problem is not unlike organizing a coursebook on litigation. Where is the beginning? Where the end? And, for that matter, what is to go in between? Even in practice, where the term "estate planning" originated and currently enjoys such popularity, its meaning is obscured by the indiscriminate use made of it. Anybody who has ever drafted a simple will or sold a policy of life insurance is, by his own claim, a member of the fraternity. Professor Casner sets his planners apart from the crowd by assuming estates substantial enough to have tax problems. Estate planning refers to the lawyer's activity in obtaining for his client and his client's family the maximum financial enjoyment and security at the minimum (primarily tax) cost. A breakdown into the details with which such a book must deal includes planning information, techniques, and point of view. Each of these poses a difficult problem for those who would bring the subject into the curriculum.

The planning specialist must be familiar with the intricacies of tax, property, insurance, conflicts, business, and domestic relations law. This puts the author to an election. Either his course is to be a substitute for half the basic courses in the curriculum or only a supplement to them. Is it to be feast or famine? The first alternative, aside from its obvious effect of disrupting vested interests within the faculty, would make a course of wholly unmanageable size. The second comes dangerously close to leaving little or nothing out of which to make any course at all.

Professor Casner attempts a middle course. Basic property, income tax, and trust law are left to other courses. In this regard he makes no exception for wills and future interests, the subjects traditionally taken up in the third-

---

3. Harsch, *Law School Course in Practical Estate Planning*, 90 *TRUSTS AND ESTATES* 292 (1951). The letters appear *id.* at 436-42, 503-4, 567-8, 635-6.

year property course. By relying on outside materials for detailed instruction in each, he is able to maintain his planning pattern in balance. While much of the substance is seemingly gone, he is not prepared to concede it all: "this work is designed to be self-sufficient for the development of estate planning though the student has had no previous training in insurance, conflict of laws, or estate and gift taxation."<sup>4</sup> The book is not heavily burdened by the assumption of the first two subjects. A certain number of conflicts questions are unavoidable, but they are now settled in a fairly predictable way by ancillary administration, reciprocal state exemption statutes (which protect intangibles in some measure from multiple taxation), and the like. The "big" conflicts problems, unlike the "big" tax and property problems, are, for most estates, fortunately rare. Every estate, particularly where tied to a partnership or closely held corporation, requires insurance. But the lawyer need not rely exclusively on his own judgment; competent insurance people stand eager to assist him. Within these limits the three chapters on conflicts, one on choice of law problems and the other two on the states' jurisdiction to levy death and income taxes, and the chapter on insurance settlements are sufficient to acquaint the student with the problems involved.

It is the treatment of estate and gift taxation which puts to challenge the justification for a book of this kind. Estate planners tend to be on the defensive when asked about their attitude toward taxes. Their disclaimers would be more convincing if their writings were not so heavily tax-oriented. For instance here, were the tax materials, particularly those pertaining to the estate tax, removed, the substantial body of the book would be gone. An impressive table of contents bearing for the most part property labels suggests otherwise. But upon examination, much of what seems to have been promised melts away. The chapters on intestate succession, wills, future interests, administrative provisions, and selection of the fiduciary are extremely spare, dealing in the broadest generalities with a few of the more important problems for which the planner must be on his guard. The bulk of the book takes up the major dispositive devices, including revocable, non-revocable, and amendable trusts, gifts, life insurance, employee benefits, concurrent estates, powers of appointment, gifts to spouses (the marital deduction), charitable gifts, and transfers of business interests. Four of these chapters are almost exclusively tax. As for the rest, the tax materials provide the real meat; property considerations, existing primarily as the wrapping, intrude now and again by way of text, statute, insurance form or, infrequently, a case.<sup>5</sup>

Where is such a book to fit into the curriculum? Inasmuch as the tax materials have undergone no apparent transformation in their new setting, the student with previous tax background must find much of this a rehash of old stuff. The author, perhaps in recognition of this fact, has used cases sparing-

---

4. P. vi.

5. The author reverses this emphasis in the chapter on Powers of Appointment. He is probably saved, thereby, from having to resort to outside materials for the examination of this subject.

ly.<sup>6</sup> While this may be a boon to the student, it puts a heavy burden on the instructor who must do something with his teaching time. To fill the gap, Professor Casner poses at regular intervals problems designed to test the application of the points covered and to require analysis of the hypothetical estate plans set out in the supplement. These are good problems: short, useable, and instructive. They are not, however, a substitute for the challenge of new materials.

There is an alternative. Professor Casner suggests that the book might be used without and presumably in lieu of a course in estate and gift taxation. He himself apparently does not use it in this way and for good reason.<sup>7</sup> The book covers too much ground in too short a space (less than 500 pages) to permit any one area of law being set out with the completeness of detail required for its separate study. The chapter on the marital deduction is as good an exposition of that subject as can be found anywhere. But difficult problems involving the application of Internal Revenue Code Sections 811(c), (f) and (g) are tossed off by means of textual notes, a few regulations, and problems. The gift tax as a backdrop to the estate and income taxes is never really developed except in the area of revocable or amendable transfers. A more serious deficiency is in the book's own orientation. Taxes are posited exclusively against a property background. There is neither room nor logical place for considerations of tax policy or judicial-legislative history. Yet today, it is generally conceded that any practitioner who would manipulate these taxes with success must understand them in just such a context.<sup>8</sup>

A book for all its repetitiousness can be justified for the new insights which it imparts. This might have been the case here, planning being as much a matter of technique as it is of knowledge. The planner must, as a minimum, understand and evaluate the human factors in the equation; he must be able to elicit discreetly, but firmly, information which is sometimes so sacred that a man will not confide it to his wife; he must lead, without coercing, the client into making only the reasonable dispositions of which his estate is capable; and above all he must have the technical competence to draft the instruments necessary to give effect to the plan. Training in techniques of this kind has a way of being largely futile, depending as it does on artificially simulated conditions and on generalized approaches which may or may not conform to

---

6. I count thirty-four, nine of which appear in the chapters on conflict of laws. Assuming that he is not going to rely heavily on cases, some of his selections seem curiously out of balance. Why, for instance, include two cases on gift tax exclusions and two on whether a charitable remainder is deductible when subject to an outstanding life estate plus a power under specified circumstances to invade the corpus? Both of these points could easily be reduced to text leaving more room for fuller explanations of less obvious subjects.

7. His students have presumably had a thorough grounding in the subject by way of WARREN AND SURREY, *FEDERAL ESTATES AND GIFT TAXATION* (1952).

8. Paul, Book Review, 60 *YALE L.J.* 573, 575 (1951). The two outstanding case books in the field put great emphasis on this aspect of the subject. BITTKER, *ESTATE AND GIFT TAXATION* (1951); WARREN AND SURREY, *FEDERAL ESTATE AND GIFT TAXATION* (1952).

the style of the law office in which the student ultimately practices. Professor Casner tacitly concedes as much. Except in the supplement, he makes no effort to humanize the materials by orienting them to the problems of hypothetical property owners.<sup>9</sup> His organization proceeds along more traditional lines based on the technical forms of transfer. There are no exercises in drafting. It is his hope that the student will acquire a measure of drafting facility by detecting planted mistakes in the instruments which appear in the supplement. His faith is not strong, or, as he comments, "In the final analysis, one becomes a good draftsman only by doing a great deal of drafting."<sup>10</sup> The same might be said with equal force of all planning techniques.

In writing this book Professor Casner has performed two services. He has made available a good sourcebook for the third-year student who wants to pull together his tax and property law in preparation for practice.<sup>11</sup> He has in addition demonstrated that estate planning is not a subject readily adaptable to the curriculum. His experience should give pause to future authors who would duplicate his program. If this be a loss, the curriculum may well be the better for it.

The objective here is to bridge the gap between office and classroom—a frank admission that the significance of this area of the law is vocational and should be treated that way. It is small wonder that the practicing bar, so often critical of the law schools for their alleged failure to teach the practical skills, should be delighted. Essentially, estate planning is an attempt to make peace with these critics on their own terms. This is not to cite Professor Casner's book, intentionally limited as it is, as being subversive of the best interests of legal education. Nevertheless it does represent one distinguished scholar's stamp of approval on a movement which, if it assumes more comprehensive forms, potentially is subversive of those interests.

Much has been written of the modern law school's obligation to train more than technical craftsmen. Dispute arises as to what that product is to be. He may be styled a "national leader at all levels of authority"<sup>12</sup> or a "policy-maker for the ever more complete achievement of the democratic values"<sup>13</sup> or just a plain lawyer. The point is that these goals are not antithetical, nor do they require different systems of training. The student, whatever his future may hold, should spend his years in law school thinking and asking as many questions about the law—what it is and what it might be—as his own and his instructors' capabilities will allow. It is to the credit of the law schools that

---

9. Originally he had in mind juxtaposing the estates of a stupid lout by the name of W. Barton Intestate and a crafty fellow known as A. James Testator. This battle of giants never materializes. See Casner's note to Leach, *Property Law Taught in Two Packages*, 1 J. LEGAL ED. 28, 63 (1948).

10. P. 6.

11. It would be interesting in this connection to know just how much time Professor Casner gives to this book in class as against time devoted to outside materials on future interests.

12. Leach, *Property Law Taught in Two Packages*, 1 J. LEGAL ED. 28, 29 (1948).

13. Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 206 (1943).

in offering this opportunity they have seen their strength and played to it. The gap between school and office must inevitably exist. Is it not also a vital factor which has permitted the law schools to develop a distinctive type of educational experience?

Vocational courses would sacrifice the objective approach to train for a specific job from a specific point of view. The result must of necessity be a narrowing of the student's perspectives at the very time that they should be expanding. What, for instance, of the estate planner's attitude toward taxes? He has been described as a "mental prisoner of the views and interests of clients."<sup>14</sup> Should a law school course assume, directly or indirectly, to accelerate the occupational attitudes which this description implies? The student, even if he may someday in fact become a planner, deserves a better fate. His basic understanding will be more complete if for once in his career he has viewed tax and property law from the point of view of an objective observer who has at his disposal a wide range of perspectives including planning.

An estate planning approach is likely to win most of its adherents from among those who are dissatisfied with the existing estate courses. Critics of the present system make three points: (1) the basic estate courses (wills, trusts, and gifts) are allocated too much time out of a jam-packed curriculum; (2) existing arrangements, based on the forms of transfer, perpetuate rigid and unrealistic divisions in the subject matter; (3) the courses tend toward excessive preoccupation with details quite out of line with their intellectual content. It does not follow from these criticisms that the only justification for continuing these subjects in the curriculum is their vocational importance.

One possible solution here would be to combine the most important features of the various subjects into a single course, cut to size by reducing much of the detail to text. Such a course, designed for use in the first year, would have as its objective the study of attitudes, judicial, legislative, and general, toward the gift-making process. Specifically it would first introduce and locate in the proper policy context the substantive limitations which are now imposed upon the process (taxes, rule against perpetuities, statutes designed to protect the family, and restraints on antisocial gifts) and, second, examine the privilege of alienation as it actually operates with the will, gift, trust, insurance, or right of survivorship. At an early stage in his law school career the student would acquire a preliminary understanding of the total impact of the subject. He would have as well a framework within which the later, specialized estate courses (including perhaps some form of planning) would assume unity and meaning.

In short, Professor Casner's book is designed to be both the practitioner's friend and a contribution to the teaching materials of the law. Actually it falls between the two objectives. It has limitations as a lawyer's desk book, and, by trying to solace the profession, it fails to satisfy the scholarly demands of the law school.

ELIAS CLARK†

14. Paul, *The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377, 387 (1950).

†Associate Professor of Law, Yale Law School.