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THE "ESTATE PLANNING" COUNSELOR AND VALUES DESTROYED BY DEATH

Thomas L. Shaffer*

To be of assistance to you I will put aside myself—the self of ordinary interaction—and enter into your world of perception as completely as I am able. I will become, in a sense, another self for you—an alter ego of your own attitudes and feelings—a safe opportunity for you to discern yourself more clearly, to experience yourself more truly and deeply, to choose more significantly.

—Carl R. Rogers¹

Lawyers who advise clients and draft documents in the "estate planning" practice are counselors in more than the traditional legal sense. They are also counselors in the therapeutic or developmental sense. They live with their clients an experience which results in change and in choice. They are companions in another man's world. They ought to be among those professionals addressed by Dr. Rogers, and by another teacher of counselors:

The counselor who grounds his efforts in a developmental theory of human possibilities can approach any of the tasks that may confront him with a feeling that he knows what it is that he is trying to accomplish. He can deal with clients who have problems and those who do not, clients who are anxious and those who appear serene and confident. He can formulate a reasonable objective for counseling in the case of a person of limited intelligence . . . or for a person of many gifts and unlimited opportunities. He is equally comfortable with the counseling that is "therapy" and the counseling that is not.²

Lawyers show little concern about the therapeutic counseling that goes on in an "estate planning" client's experience. Counseling literature which is available for the legal profession is not focused on the psychology of testation.³ The legal-counseling or "human relations" literature is helpful because it gives lawyers some understanding of the way people react to law and to law offices, but it falls short of information or guidance, or inspiration, on the narrower and more specific aspects of planning for one's death with property.

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¹ C. ROGERS, *CLIENT-CENTERED THERAPY* 35 (H. Mifflin ed. 1965).

² L. TYLER, *THE WORK OF THE COUNSELOR* 32 (3d ed. 1969).

³ The following articles are the best documentation that can be offered: Shaffer, *The Psychology of Testation*, 108 *TRUSTS AND ESTATES* 11 (1969), is a brief introduction to the project; Shaffer, *Will Interviews, Young Family Clients, and the Psychology of Testation*, 44 *NOTRE DAME LAW* 345 (1969), reports the results of participant-observation of will interviews; T. Shaffer, *A Conversation on Death*

Clients in "estate planning" are invited into a relation with property which is probably new to them and which may be unsettling. Death is a part of this confrontation, and death is an unpleasant fact to modern man. With death as his focus, the client experiences property as a part of his person which is immortal. Confrontation with property as immortal is carried out in a context of giving in the client's life, maybe even giving of his life, because property is a personal part of his life. Death in this atmosphere is no less inevitable than it is anywhere else; it is here being planned for, however, which is both encouraging and traumatic. Planning for death is encouraging because modern man is attracted to the idea of plans which will organize his future life for him, but traumatic because it involves planning for death and personal death is a thought modern man will do almost anything to avoid. The evidence for these generalizations is developed below.

The testamentary experience is death-confronting, novel, and taboo-defying. For that reason it is probably much more vivid in the mind and heart of the client than lawyers who go through the experience every day suppose it to be. Taboo-defying experiences usually tend to be vivid. People going through them tend to be upset.⁴ People who are able to go through their upsetting experiences in the company of a competent, comfortable, accepting professional, however, come out more aware of their lives, more reconciled to what is real in their lives, and better able to make choices and to develop. The question here is not whether the lawyer is a counselor in this relationship—he cannot avoid being a counselor. The question is whether the lawyer realizes what he is doing, is able to accept what it involves for himself and for his client, and has the wisdom and courage to be a helpful companion.

I believe that the client who receives the professional legal service he seeks in this "estate planning" relationship will leave the law office having faced death realistically, and having faced his property and his

(unpublished manuscript) is an attempt to use the basic encounter group as a research tool; other phases, in process, include the psychological post-mortems performed by judges in undue-influence will cases and in decisions under the INT. REV. CODE of 1954, § 2035 (gifts in contemplation of death). I am grateful for the helpful suggestions given me by my friend, Eugene Thomas; by my colleague, Professor Robert E. Rodes, Jr.; by Mr. James M. Corcoran, Jr., of the Evanston, Illinois Bar; by Dr. Herman Feifel of the Veterans Administration Hospital, Los Angeles; by Dr. William Coulson of the Center for Studies of the Person, LaJolla, California; by Dr. Edwin S. Shneidman; and by Dr. Robert S. Redmount.

⁴ CLUES TO SUICIDE (E. Shneidman & N. Farberow ed. 1957); DEATH AND IDENTITY (R. Fulton ed. 1965); THE MEANING OF DEATH (H. Feifel ed. 1959); Feifel, *Death*, in TABOO TOPICS 8, 11 (N. Farberow & G. Allport ed. 1963); Dr. Robert Lifton's work on A-bomb survivors note 13 *infra*; Dr. Shneidman's and Dr. Feifel's recent periodical work cited notes 16, 56, and 65 *infra*.

loved ones in the context of his own death. It seems to me that the "estate planning" experience is one way the client can be helped in his personal reconciliation to death, a reconciliation which comes about partly because he is encouraged to be realistic about death, and partly because he reflects on the fact that his property gives him a limited, temporary immortality. "You can't take it with you," is a maxim of the law of property as well as a *memento mori*. The maxim has in it a consoling corollary, a promise of influence after death, which is the psychological center of "estate planning."

Most lawyers would like to know more about how clients feel in law-office encounters with death, property, and giving. The immediate source of experience and information should be psychology—research psychology as well as therapeutic psychology. However, psychology has not concerned itself with the substance of the law; what is usually called "law and psychology" as an interdisciplinary area of study is confined to border areas—insanity as a criminal defense, testamentary capacity, civil commitment to mental institutions. The task of developing psychological models which reach the substance of law itself, and the dynamics of lawyer-client relationships, is one psychologists have not taken up. It is left to reflective lawyers and law professors to find psychological models and apply them to our professional lives. I attempt to do this, on the question of "estate planning" clients and their attitudes toward death, in this article.

There has been a substantial amount of recent psychological scholarship on attitudes toward death; it is a new area in that science, but an area which has taken on remarkable impetus in the last decade. None of this research has examined the psychology of will preparation, which I call the psychology of testation, but some of the data is closely enough related to testation to justify a bold layman's attempt to relate it to the law office. This article discusses one relevant example of the new data—a research project on "values destroyed by death"—and offers some conjecture, some modest field testing, and some comparisons with other psychological studies and with the life of lawyers. The latter part of the article suggests a few devices for legal-psychological research in the psychology of testation and some parallels between therapeutic counseling and testamentary counseling.

I. THE DIGGORY-ROTHMAN MODEL

In 1961, James C. Diggory and Doreen Z. Rothman, a teaching psychologist and a clinical psychologist, published the results of a study applying a simple death-attitude, sentence-completion test to 563 casually-selected respondents.⁵ My present venture is an attempt to com-

⁵ Diggory & Rothman, *Values Destroyed by Death*, 63 J. ABNORMAL & SOCIAL PSYCH. 205 (1961), in *DEATH AND IDENTITY* 152 (R. Fulton ed. 1965).

pare the Diggory-Rothman test and its results with some of the factors that are involved in the death-property-giving relationship and with my own empirical test. The purpose of this effort is to determine whether death attitudes in testation have characteristics of their own.⁶

Diggory and Rothman asked several hundred people the following question:

Here are seven consequences of death. Would you please indicate the one that seems to you worst, or most distasteful.

- A. I could no longer have any experiences.
- B. I am uncertain as to what might happen to me if there is a life after death.
- C. I am afraid of what might happen to my body after death.
- D. I could no longer care for my dependents.
- E. My death would cause grief to my relatives and friends.
- F. All my plans and projects would come to an end.
- G. The process of dying might be painful.

These seven possibilities, labeled "values destroyed by death" in their project, may not exhaust all of the reasons for death anxiety, but they are at least a respectable attempt in that direction. My present interest is to inquire how each of these values relates to the feelings of a client preparing for the post-mortem disposition of his property-personality.

At several points in the article I compare the Diggory-Rothman findings, and other psychological findings, with some observations I made using the Diggory-Rothman questionnaire on an audience which had gathered to hear me talk about "estate planning." I also make some additional comparisons with data gathered during will interviews conducted by my students in a clinical drafting and planning project, and reported in detail elsewhere.⁷

II. APPLICATION OF THE DIGGORY-ROTHMAN MODEL TO WILLS CLIENTS

A. Cessation of Experience

The first question is whether wills clients are likely to be concerned about the fact that death will end their experiences. In the Diggory-Rothman results, a significant number of respondents chose this "A" answer. Their response in this first category was higher than their "E" (grief), "F" (projects), and "G" (fear of pain) answers, and was especially high among single-divorced persons. It tended to be higher in the highest of three economic sub-groups than in the two lower sub-groups. Protestants responded to "A" more than Catholics did,

⁶ With this objective in mind, my empirical test was designed to ask a number of ethnographic questions not found in the Diggory-Rothman study. The additional questions were pointed toward family and economic data, recent deaths in the family, and the reasons for the subject's interest in wills.

⁷ See Shaffer, *Will Interviews, Young Family Clients, and the Psychology of Testation*, *supra* note 3.

and Jews more than Protestants. It was the first choice among persons who listed their religion as "other" or "none."⁸

My impression is that this level of response to death as the cessation of experience would not be maintained where the subject speaks in reference to the preparation of wills. Wills clients would probably tend to focus more on care for dependents, or on cessation of projects, or even on bodily deterioration, than they would on cessation of experience. Diggory and Rothman suggest this when they analyze "A" (experience) and "F" (project) as concomitant.⁹

The testamentary device would perhaps appear to clients as a method to *prolong experience* through continuation of projects, provision of support, or maintenance of a bodily surrogate in the form of a monument or perpetually-cared-for gravesite.¹⁰ The wills client, because his confrontation with death involves also a consideration of his property, may tend to regard his property as representing and, in effect, immortalizing him. "The possessed object as possessed is a continuous creation. . . . If I turn away from it, it does not thereby cease to exist; if I go away, it *represents* me in my desk, in my room, in *this* place, in the world."¹¹ That thought may not occur as readily to a person who is unexpectedly asked what he dislikes about death. My test of this hypothesis indicates virtually no response to the "A" answer, in comparison with a heavy response to the "D", "F", and "G" answers.¹²

Some reports on infantile formation of death attitudes suggest that the survival of environment—including property—is one of the ways in which the idea of personal termination becomes bearable.¹³ Hug-Hellmuth¹⁴ reports on an Austrian child who has just begun to think of his own death. "When all people are dead," he asked his mother, "will the earth be removed, and will the architects tear down the houses 'till there is just grass again. . . ?" This is a desolate way to look at death. Presumably adults accommodate themselves to death by thinking that the houses—*our* houses—will not be torn down. The thought of property surviving one's death makes the idea of death

⁸ Diggory & Rothman, *supra* note 5, at 157.

⁹ *Id.* at 159.

¹⁰ See Sheridan, *Power to Appoint for a Non-Charitable Purpose: A Duologue or Endacott's Ghost*, 13 DEPAUL L. REV. 210 (1964).

¹¹ J. SARTRE, *EXISTENTIAL PSYCHOANALYSIS* 133 (H. Barnes transl. 1953).

¹² One of 32 persons in my group chose the "A" answer, but that person, in disregard of instructions, chose another answer ("D").

¹³ See, e.g., Lifton, *On Death and Death Symbolism: The Hiroshima Disaster*, 27 PSYCHIATRY 191 (1964), in *PEACE IS POSSIBLE* 14 (E. Hollins ed. 1966); Lifton, *Psychological Effects of the Atomic Bomb in Hiroshima—The Theme of Death*, 92 DAEDALUS 462 (1963).

¹⁴ Von Hug-Hellmuth, *The Child's Concept of Death*, 34 PSYCHOANALYTIC Q. 499, 509 (1965).

itself more bearable. The wills client, who is thinking about his property in a death context, also takes a view of his own death which is property related. On the other hand, the man who is stripped of property is likely to be more desolate about death than the man who has no possessions. Here, in a poignant example, is part of a picture-story response from a schizophrenic, suicidal patient who has been describing how the picture-figure plans to jump from a bridge:¹⁵

He walks over, still feeling his liquor, still full of self-pity, now he's up ready to jump off. Says, "Gee whiz, this is quite a drop," and his mind answers him, "Yes, it is." And he has quite a battle with himself. Says he's got to stop now, I've invested money in this, I've given away my cigarettes, spent my last money for drink and all that.

It may be possible to say that a person who is stripped of property is partially dead—that his act of stripping away property is itself a form of what Menninger would call focal suicide.¹⁶

A part of the idea of property as accommodation to death is the thought that property is power.¹⁷ That may explain why the schizophrenic patient thought his character, who had given away all of his property, might as well jump. That is why, as Jung said, the process of sloughing away "the whole phantasmagoria of earthly existence [is] an extremely painful process."¹⁸

One of the things a wills client learns is that death will not rob him of power. In death, he may possess "powers, qualities, and advantages not possessed in the living state."¹⁹ In the realm of power, therefore, death may be a "last step forward."²⁰ For this reason, psychologists who conclude that preparation of wills increases fear of death²¹ may be

¹⁵Shneidman & Lane, *Psychologic and Social Work Clues to Suicide in a Schizophrenic Patient*, in CLUES TO SUICIDE 170, 179 (E. Shneidman & N. Farberow ed. 1957).

¹⁶K. MENNINGER, MAN AGAINST HIMSELF 46-7, 314-5 (1938). The "partial-death" phenomenon is described in E. Shneidman's works, especially *The Deaths of Herman Melville*, an unpublished address at Williams College, Sept. 15, 1966. An illustration is the denouement in I. SINGER, *THE MAGICIAN OF LUBLIN* (E. Gottlieb & J. Singer transl. 1960), in which the central figure chooses an ascetic form of partial death by walling himself up in a prayer cell in his back yard. Cases decided under INT. REV. CODE OF 1954, § 2035 (gifts in contemplation of death) often seem to me to illustrate partial death by property transfer.

¹⁷An illustration of this thought is the development of the trust in 19th century American law. See Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964).

¹⁸C. JUNG, MEMORIES, DREAMS, REFLECTIONS 290-91 (A. Jaffe ed., R. Winston & C. Winston transl. 1963).

¹⁹Wahl, *Suicide as a Magical Act*, in CLUES TO SUICIDE 22, 27 (E. Shneidman & N. Farberow ed. 1957).

²⁰K. EISSLER, *THE PSYCHIATRIST AND THE DYING PATIENT* 54 (1955).

²¹Christ, *Attitudes Toward Death Among a Group of Acute Geriatric Psychiatric Patients*, in DEATH AND IDENTITY 146, 149 (R. Fulton ed. 1965). See B. GLASER & A. STRAUSS, *AWARENESS OF DYING* 123 (1965), which reports a similar attitude among hospital personnel.

wrong. Data obtained from my will-interview study indicates that will-preparation actually reduces fear of death²² and has a constructive or even therapeutic effect on death anxiety. Shneidman quotes the following passage from *Moby Dick* which seems to illustrate precisely this point:²³

It may seem strange that of all men sailors should be tinkering at their last wills and testaments. . . . After the ceremony was concluded upon the present occasion, I felt all the easier; a stone was rolled away from my heart. Besides, all the days I should now live would be as good as the days that Lazarus lived. . . . I survived myself. . . .

There are, of course, other possible explanations for the apparent fact that wills clients find death less related to cessation of experience than other research subjects. It may be, as the *Moby Dick* quotation also suggests, that the testamentary context has the effect of postponing the prospect of death into an indefinite future. This possibility has been affirmed by my will-interviews. In addition, other evidence indicates that patients who are aware that they are terminally ill have more difficulty accommodating themselves to a pathetic last illness than they have accommodating themselves to death, because they "think of the time of dying as farther away than indicated by the warnings they have received."²⁴ In fact, detailed, mundane, and totally illogical plans for the future are a means of escaping or perhaps repressing death anxiety.²⁵ Feifel's evidence indicates that property-planning is part of the way that psychological relief comes about. Feifel found that seriously ill people want to know when they are going to die, "in order to 'Settle my affairs,' and to 'Make various financial and family arrangements.'"²⁶ Of course those subjects were expressing opinions from some relative safety. Where death is more imminent, it is possible that persons lose their accustomed concern with property²⁷ and

²² E. SHNEIDMAN, *supra* note 16. Death anxiety is almost universal, so that one can speak of reducing it as a general goal of enlightened humanism. See S. FREUD, S. FERENCZI, K. ABRAHAM, G. SIMMEL & E. JONES, *PSYCHO-ANALYSIS AND THE WAR NEUROSES* (1921); E. SOUTHARD, *SHELL-SHOCK AND OTHER NEUROPSYCHIATRIC PROBLEMS* (1919); Golding, Atwood & Goodman, *Anxiety and Two Cognitive Forms of Resistance to the Idea of Death*, 18 *PSYCH. REP.* 359 (1966); Teicher, "Combat Fatigue" or *Death Anxiety Neurosis*, 117 *J. NERVOUS AND MENTAL DISEASE* 234 (1953), in *DEATH AND IDENTITY* (E. Shneidman & N. Farberow ed. 1957).

²³ E. Shneidman, *supra* note 16.

²⁴ B. GLASSER & A. STRAUSS, *supra* note 21, at 80. See also Pollack, *Suicide in a General Hospital*, in *CLUES TO SUICIDE* 152, 159 (E. Shneidman & N. Farberow ed. 1957).

²⁵ B. GLASER & A. STRAUSS, *supra* note 21, at 134-35; K. EISSLER, *supra* note 20, at 176, gives the case of a woman dying from cancer who gained apparent distraction in planning a malpractice suit against her physician.

²⁶ Feifel, *supra* note 4, at 11.

²⁷ Joseph, *Transference and Countertransference in the Case of a Dying Patient*, 49 *PSYCHOANALYSIS & PSYCHOANALYTIC REV.* 21 (1942).

substitute for it either a somatic indifference or a frantic and defensive attachment to mundane concerns.²⁸

Thus, psychological evidence, some research, and some speculation combine to suggest that the testamentary experience is a relatively hopeful confrontation with death. Property is part of personality, and personality is involved with property in the life of a wills client. His seeing death in relation to property and the survival of property-personality robs death of some of its stark power.

B. Life After Death

Diggory and Rothman found that very few respondents related their death to a fear about eternity. Their level of "B" responses (the worst or most distasteful consequence of death is that I am uncertain as to what might happen to me if there is a life after death) fell between "4" and "5" on a scale ranging from "1" (very high response) to "7" (lowest response). The only subgroup in their study which chose "B" at a significantly higher level were Roman Catholics, whom they found to rate at about "3."²⁹

Assuming the validity of their general conclusion—that this "B" value is not a principal factor in death anxiety—I question the validity of their lesser conclusion that Catholics find it more imposing than other religious groups.³⁰ Surveys more heavily controlled than theirs, and some carefully-conducted experimental research, leave the question of relation between death attitudes and religious belief in some doubt.³¹ With this qualification, my test of the Diggory-Rothman con-

²⁸ See generally Lifton, *supra* note 13. Lifton outlines both kinds of reaction. I. SINGER, *supra* note 15, is a literary example of a sort of ascetic somatization. L. TOLSTOY, *The Death of Ivan Ilyitch*, in *THE DEATH OF IVAN ILYTICH AND OTHER STORIES* 1 (1923), includes one example of frantic activity (rearranging furniture); L. TOLSTOY, *Three Deaths*, in *id.* at 72, gives another (travel). See generally Rhudick & Dibner, *Age, Personality, and Health Correlates of Death Concerns in Normal Aged Individuals*, 16 *J. GERONTOLOGY* 44 (1961), in *DEATH AND IDENTITY* 123, 130 (R. Fulton ed. 1965).

²⁹ Diggory & Rothman, *supra* note 5.

³⁰ I also doubt that the religion-related differences they found on the "A" response (cessation of experience) are as significant as they think they are.

³¹ See, e.g., S. ANTHONY, *THE CHILD'S DISCOVERY OF DEATH* 75-78 (1940) (The author's classic study of formation of attitudes toward death in childhood suggests that anxiety toward death can be kept at a minimum, except in extreme circumstances, when the person takes a position settling the question of death. The author adds that agnostic children have compensating psychic activity to provide security for death anxiety.); Alexander & Adlerstein, *Death and Religion*, in *THE MEANING OF DEATH* 271, 275-82 (H. Feifel ed. 1959) (The authors, using detailed psychological testing, found that religiously-oriented male college students are more willing to talk about death, but concluded that the differences are less related to variance in doctrine than to the security which results from

clusions on wills clients produces about the same result they report³² on anxiety toward eternity.

C. Dissolution of Body

Diggory and Rothman report the "C" response (the worst or most distasteful consequence of death is that I am afraid of what might happen to my body after death) as the least significant "value destroyed by death." This low level of response was uniformly maintained among their sub-groups and is in accordance with the results of my test of their conclusions on will subjects.³³ Most of us appear to be relatively unconcerned about what will happen to our bodies after death, even though we usually are concerned about what happens to our property. Perhaps the reason for this is that our property continues to live while our bodies do not.

The so-called Harlequin Complex is an element in attitudes toward the body and death which is not suggested by these survey results but which deserves mention. Harlequin is a mythical conception of death as a dark lover. The relatively universal tradition out of which he comes is a wedding in poetry of Thanatos and Eros (which conceives

having settled the question.); Christ, *supra* note 21, at 150 (The author's work with geriatric-psychiatric patients showed no correlation between religion and fear of death.); Jeffers, Nichols & Eisdorfer, *Attitudes of Older Persons Toward Death: A Preliminary Study*, in *DEATH AND IDENTITY* 142 (R. Fulton ed. 1965) (The authors, using more sophisticated devices on older subjects, found some correlation between religious belief and willingness to answer negatively the question "Are you afraid to die?", but they also found equal correlation between fear of death and low intelligence quotients or limited Rorschach responses.); Kastenbaum, *Time and Death in Adolescence*, in *THE MEANING OF DEATH* 99, 109-10 (H. Feifel ed. 1959) (The author found that religiously-oriented adolescents are more willing to talk about death.). *But cf.* Fulton, *Death and the Self*, 3 *J. RELIGION & HEALTH* 359 (1964) (the author indicates that the fact of willingness to discuss death may or may not demonstrate less fear of death.); Swenson, *Attitudes Toward Death Among the Aged*, in *DEATH AND IDENTITY* 105 (R. Fulton ed. 1965) (The author, using an essay-writing scheme, associated religion-related differences more with intensity of religious activity than with doctrine.).

³² Three of 34 answers (two if duplications are eliminated) chose "B"; all three were women, two married, one a recent widow. One had two children, one had three children, and one had none. One was in my younger sub-group (less than 49), the others in the older (over 65) sub-group; one was a recent widow and all three had lost at least one parent (two had lost both parents). Their testamentary interest was evenly divided—one had an informational reason, one had a reason related to death consequences, and one gave no reason.

³³ Only two of the respondents—less than 7 per cent—chose the "C" answer (the worst or most distasteful consequence of death is that I am afraid of what might happen to my body after death). Both were in the middle age group one was in the middle and one in the upper wealth-estimate group; one was married with children, and one single; each of them had lost both parents. The Diggory & Rothman results, *supra* note 5, were similar.

of Thanatos as erotic). McClelland, the principal scholar of the complex, raises his question this way:³⁴

In view of the widespread fear of death, it is surprising to come across a person, usually a woman, who not only does not fear death but actually appears to be looking forward to it with a sense of excitement. The possibility both thrills and attracts her, at the same time that it frightens her. Yet often the thrill seems as strong as the fear, in much the same way that it is for a person who is about to make a ski jump or a very high dive. Such reactions do exist, particularly among women, and they are a challenge to the psychologist interested in how people actually react, as opposed to how they are supposed to react according to philosophy, religion, or psychoanalysis.

He gives literary examples which range from Homer to traveling players in the Middle Ages, Romeo and Juliet, and Zilboorg's *History of Medical Psychology*—along with several clinical examples. One factor involved in the Harlequin Complex as it relates to the present inquiry into the psychology of testation is that, in McClelland's formulation of it, the death-lover is not unattractive and therefore might not be a relevant consideration in questions relating to the distasteful consequences of death. Another factor is that the logic of the complex is a sort of psychosemantic logic in which the body is conceived of as surviving, at least throughout Harlequin's seduction. Diggory and Rothman found that women choose the "C" answer more than men do,³⁵ which tends to suggest Harlequin's presence because "women value themselves more in terms of their physical attractiveness."³⁶ A final possibility is that the Harlequin Complex may introduce some ambivalence into anxiety concerning pain.

D. Dependents

My general impression is that wills clients find the "D" answer (the worst or most distasteful consequence of death is that I could no longer care for my dependents) more compelling than any other. This comes from empirical analysis of will interviews, and from my observation that clients show greatest concern about death when it is focused on the members of their families. Property and considerations of support give death a special focus in the client's mind.³⁷ I would therefore, expect wills clients to respond more heavily to "D" than the Diggory-Rothman respondents did. This impression was confirmed in my test of wills clients. I found 46 percent of them chose the "D" answer (33 percent of the men and 56 percent of the women; with some-

³⁴ McClelland, *The Harlequin Complex*, in *THE STUDY OF LIVES* 94 (R. White ed. 1963).

³⁵ Diggory & Rothman, *supra* note 5, at 155.

³⁶ A. COHEN, *DELINQUENT BOYS: THE CULTURE OF THE GANG* 137-47 (1955).

³⁷ See Shaffer, *Will Interviews, Young Family Clients, and the Psychology of Testation*, *supra* note 3.

what higher choices of "D" among younger subjects).³⁸ The Diggory-Rothman scale put the "D" response at "4"—which is in the middle of the scale ranging from "1" to "7". They found this response higher in sub-groups under age 39 and highest in age groups between 40 and 55. It ranked especially high among men, Protestants, lower income groups, and among married and single-divorced respondents.³⁹

Freud laid the basis for an economic theory of the family in *Civilization and Its Discontents*. Freud's theory is that as soon as it became an advantage for man to have a fellow worker around it became an advantage to have the fellow worker under the same roof—partly for sexual reasons in the male and partly for support reasons in the female and her children.⁴⁰ Family and family-support are therefore linked at a fairly radical point in Freudian theory, a theory which appears to be borne out by the Diggory-Rothman finding that support is the most common death-concern among men.⁴¹ Additional evidence is found in the anthropological distinction between rights of inheritance in communal (family) property and acquired property⁴² as well as in other anthropological indications that the family is legally and economically a unit, a res,⁴³ and in the following relatively unlikely source:

Peter Stouffer's study *Communism, Conformity and Civil Liberties*,⁴⁴ attempted, in part, to determine whether there was a national anxiety-neurosis about communism, but much of the anxiety he found

³⁸ Sixteen (14 omitting duplication)—the most numerous group (46 percent omitting duplications)—chose consequence "D." Two of these were men (representing 33 percent of the men answering), 14 were women (representing 56 percent of the women answering). Eight were in the young age group (under 49)—of a total of 11 in that group. Seven were between the ages of 50 and 65; one was older than 65. This answer was chosen by three of the six people who had experienced recent deaths of relatives and by two of the three who had recently lost a spouse. Of the total who had both parents living (five), two chose this answer. Two of the persons who chose this answer were childless—out of a total of six childless persons who answered the questionnaire. Eight of the 16 "D" answers listed their testamentary interest as general information; six had testamentary interest related to death consequences; and two did not indicate what their testamentary interest was. Of these 16 respondents, five estimated their wealth as upper middle class, seven chose middle class, and three chose lower middle class.

³⁹ Diggory & Rothman, *supra* note 5.

⁴⁰ S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 54-72 (J. Reviere transl. 1930).

⁴¹ Diggory & Rothman, *supra* note 5.

⁴² J. GOODY, *DEATH, PROPERTY AND THE ANCESTORS* 305 (1962).

⁴³ M. MAUSS, *THE GIFT; FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 48 (I. Cunnison transl. 1954). Applications of this concept to mourning rites are worked out in J. GOODY, *supra*, note 42, and in R. HERTZ, *DEATH AND THE RIGHT HAND* 122 n.68, 131 n.144 (R. Needham & C. Needham transl. 1960).

⁴⁴ All of the data discussed in this paragraph may be found in P. STOFFER, *COMMUNISM, CONFORMITY AND CIVIL LIBERTIES* 60-69 (1963).

(whether neurotic or not) concerned family support. Stouffer asked 4,930 people what they worried about most. Forty-three percent of the answers fell into what he called a personal-family-business category, of which responses he gave 27 examples. My analysis of these examples is that 13 expressed direct concern about family support and most of the other 14 expressed support-related concern about employment or business. Twenty-four percent of his answers expressed concern about health. Thirty percent expressed concern about "other personal problems"; he gives 20 examples, of which 13 are, in my judgment, family-support-related and four self-support-related. Eight percent of his respondents expressed concern about world affairs; he gives 11 exemplar responses, each reflecting concern about what will happen to family members if a war begins. Only one percent of his respondents mentioned communism.

The maintenance of a support relationship is therefore of crucial human concern from all three points of view—psychological, anthropological and attitudinal. Loss of that support relation would obviously diminish the range and quality of the human life which lost it. To draw a firm distinction between property disposition and provision of support, as at least one psychological researcher does,⁴⁵ seems naive. Maintaining the support relationship after death is a principal way in which the lawyer's testamentary services promise reconciliation with unavoidable death. Lawyers apparently do this by concentrating the client's attention on what Shneidman calls the "post-self."⁴⁶

There are two sides to this point. First, as a behavioral observation: The indefinite provision of support, support which will continue even after the provider is dead, is a step toward immortality. Second, the provision of support is a moral imperative. Moral breadwinners provide for their dependents, and it is therefore immoral for them to refuse to do so, or to neglect their support duties. *And* this moral imperative is applicable even after the breadwinner is dead. One of the things he should do for his family is make present provision for their support in the event of his death. A practical, "how-to" article for life

⁴⁵ Burton, *Death as Countertransference*, 49 *PSYCHOANALYSIS & PSYCHOANALYTIC REV.* 39 (1962).

⁴⁶ Shneidman's fascinating study of the life and literature of Herman Melville relates the post-self directly to the part of the family most directly involved in support—children:

The self or ego relates to the core of one's active functioning, his cognitive and emotional masterings and maneuvers in the present life; the *post-self*, on the other hand, refers to the ways in which one might live on, survive, or have some measure of impact or influence after the event of his own physical death—for example, through one's children E. Shneidman, *supra* note 16.

insurance salesmen, written by a psychologist, outlines a method for exploiting this moral imperative:⁴⁷

The prospect buys because he will feel guilty—and thus uncomfortable if he doesn't buy. No one knows how much life insurance is sold on the basis of arousing feelings of guilt in the prospect's mind, but it must be a considerable percentage.

It would appear that life insurance is a product that is particularly suited for the guilt arousal type of approach. This is true because life insurance is presumably bought partly or wholly for the family's protection.

The emotional content of the moment of sale is more inspiring than the salesman's manipulation of guilt alone would suggest. To the prospect, the emotional content is also a means to *present* security because of the feeling that whatever is right about this moment is not going to change.

The wills client's confrontation with death in the context of support is therefore a principal means to his finding comfort in the testamentary experience. This comfort is engendered by his satisfaction in having performed a moral duty and by the less tangible feeling that he has done something which will stabilize the future and rob death of its ability to threaten him with his own hungry children.

E. Grief to Others

The concern wills clients show for dependent support may be misleading. It may suggest that the testamentary context *creates* concern about loved ones. I doubt that the experience *creates* anxiety, but it may be that the property relationship involved in testamentary planning shifts existing anxiety toward concern for support rather than toward concern at causing grief. The Diggory-Rothman response to "E" (the worse or more distasteful consequence of death is that my death would cause grief to my relatives and friends) was the highest in their survey. The "E" response was highest in all age groups under 40, women, Protestants, Catholics, upper and middle economic subgroups and single (not divorced or widowed) persons.⁴⁸ My test of the Diggory-Rothman results on wills clients, however, indicates a much lower level of response on "E" and a much higher response on "D."⁴⁹

⁴⁷ Briggs, *The Psychology of Successful Persuasion*, CHARTERED LIFE UNDERWRITER J., April 1968, at 51, 53-54. After I presented some of the data in this paper to an estate-planning council in October 1968 one of the audience, a veteran life insurance underwriter, told me that he finds the following story very effective on potential customers: Several years after a valued client of his died the underwriter met the dead man's son on the street. In the course of their conversation, the son said "I wish I had known my father better. You know, after eleven years, he's still sending us money."

⁴⁸ Diggory & Rothman, *supra* note 5.

⁴⁹ Three persons chose answer "E" (the worst or most distasteful consequence of death is that my death would cause grief to my relatives and friends). All of these were in the middle age group; all were women; all were married and had

Support is perhaps a dominant testamentary motive—even though, outside the testamentary context, support concern may not dominate as much as one would think.⁵⁰

Concern at causing grief resembles concern for support in all respects except one: It does not involve property and material security. At the simplest level, a concern at causing grief is sensitivity to pain in someone who is loved. Lester's study of suicidal adolescents,⁵¹ for instance, indicates that a principal deterrent to suicide is concern for friends. A chivalrous academic might expect to find sensitivity more often in women. Feldman and Hersen⁵² found evidence of this. The

children. Two of them had lost both parents; one had lost her mother recently. The third had lost her mother, but not recently. Two of the three estimated their wealth as middle class; one chose lower middle class. One possessed a consequence-related testamentary interest, one an informational interest, and one did not indicate her interest.

⁵⁰ Shneidman & Farberow, *Genuine and Simulated Suicide Notes, Appendix*, in *CLUES TO SUICIDE* 197-215 (E. Shneidman & N. Farberow ed. 1957). Shneidman and Farberow, as a part of their study of suicide, selected 33 notes left by successful suicides and matched the persons who wrote them with live subjects chosen for their similarity in sex, religion, economic status and so on. They asked these matched respondents to prepare suicide notes. This produced 33 "real" notes and 33 "pseudo" notes. Although it was no part of their study, it is interesting, and mildly contradictory of my suggestion, to examine those notes for a testamentary context—to ask, in other words, whether people who are really facing death are more concerned with testamentary disposition than people who are only pretending that they face death. Of the total of 66 notes in the study, 15 attempt to make some testamentary disposition; 12 of these 15 (80 percent) are genuine. Sixteen notes express concern for dependent support, but of those only seven (44 percent) are genuine. To state it most accurately: In a group of people made up equally of those who are facing death and those who are pretending to face death: (1) those who express testamentary concern are, four times out of five, those who really face death; and (2) of those who express support concern (24 percent), less than half are really facing death. This might suggest that persons facing immediate death are less concerned with support than with making wills. There is, in other words, more to the testamentary context than support. There is an element of prolonged mortality, perhaps, which is broader than material obligation. There is room, for example, for an expression of concern at causing grief.

However, the Shneidman-Farberow study was made on subjects who faced or pretended to face death. Wills clients undoubtedly confront death in some way, but I think it too strong to say that they face death. The comparison of moods and moments that testamentary consideration of suicide notes presents may mislead, because we are talking about clients in a law office who expect to survive their experience with a lawyer. It is probably still correct to conclude, generally, that the values represented by the "D" answer (support concern) loom larger in a testamentary context than the values represented by the "E" answer (grief concern).

⁵¹ Lester, *Attempted Suicide and Body Image*, 66 *J. PSYCH.* 287 (1967).

⁵² Feldman & Hersen, *Attitudes Toward Death in Nightmare Subjects*, 72 *J. ABNORMAL PSYCH.* 421 (1967).

corollary of their findings was supported sociologically by Stouffer's discovery that men are more concerned with money than women are.⁵³

Is it possible that these alternatives—concern for pain in women, and concern for property in men—are more alike than they seem? There may be some recondite consequences suggested in the "D" and "E" answers which would suggest that the same emotions are involved in choosing a "D" (property) answer in a testamentary context that are involved in choosing an "E" (concern for pain) answer in a more hypothetical context.

Anthony⁵⁴ found that, to children, the most frightening consequence of death was separation, especially separation from their mothers, and that a child's death fantasies often involve his mother's death disguised as his own. If mothers are able to sense this sort of complex anxiety in their children—and much of Anthony's data came to her from the observations of mothers—it is possible that the "E" response will occur in mothers who are concerned at causing psychic disturbance to their children.⁵⁵ This plausible anxiety in a parent does not seem to contrast significantly with the anxiety a parent feels at the possibility of his children being without material support. In fact, the first form—the "D" form—may be something that is characteristic of fathers, and the second—the "E" form—something that is characteristic of mothers. The two things might, therefore, simply be specific parental applications of the dolorous process of burdening others by one's death and dying.⁵⁶

⁵³ P. STOFFER, *supra* note 44, at 137. See Tolor & Reznikoff, *Relation Between Insight, Repression-Sensitization, Internal-External Control and Death Anxiety*, 72 J. ABNORMAL PSYCH. 426 (1967); but cf. Rhudick & Dibner, *supra* note 28, at 124.

⁵⁴ P. STOFFER, *supra* note 44, at 62, 136-37.

⁵⁵ Guilt is a usual part of the grief reaction. It is also part of one's contemplation of his own death that he feel guilty because those he loves will experience grief when he dies. See generally Lifton, *supra* note 13; see also DEATH AND IDENTITY 181-329 (R. Fulton ed. 1965) (containing a number of essays on grief management).

⁵⁶ Burton, *supra* note 45, at 8, reports the results of questioning an experimental group of psychiatrists, and a control group of ministers, as follows: Would as many people miss me if I were to die today as I would miss if they were to die today? Nearly 20 percent of the psychiatrists (and one of the ministers) thought that more people would miss them than they would miss. About six percent of the psychiatrists (16 percent of the ministers) had the opposite opinion; 47 percent of the psychiatrists (32 percent of the ministers) thought they would be missed about as much as they would miss. Regardless of what those results say about the effects of religious practice on humility—see note 31 *supra*—they say something on death anxiety among physicians. See Feifel, *Physicians Consider Death*, PROCEEDINGS OF THE 75TH ANNUAL CONVENTION, AMERICAN PSYCHOLOGICAL ASSOCIATION, 201 (1967).

The differences between women and men in this respect can probably be exaggerated. In both sexes, classical psychological theory relates anxiety at causing pain to relationships with the parent, a subject which becomes immediately complicated by the theory of generation reversal. Even old people might feel anxiety at causing grief in others, in their children for instance, because older persons tend to maintain their children as parent-figures.⁵⁷ It is demonstrable that parents rely for emotional support on their children and that parental attitudes toward children are not as majestic as the stereotypes suggest.⁵⁸ Finally, a *younger* subject's anxiety at causing pain to his parents may be readily explained without alluding to complex theories.⁵⁹

At an even less pleasant level, concern at the grief caused by one's death may be a disguise for real apprehension at growing old, ill and dependent,⁶⁰ and for a concomitant resentment of those who appear to be young and well and likely to live on.⁶¹

⁵⁷ S. FREUD, *BEYOND THE PLEASURE PRINCIPLE* 67-69 (J. Strachay transl. 1959); E. JONES, *PAPERS ON PSYCHO-ANALYSIS* 407-12 (Beacon ed. 1961); T. REIK, *LISTENING WITH THE THIRD EAR: THE INNER EXPERIENCE OF A PSYCHOANALYST* (1948).

⁵⁸ Bloch, Silber & Perry, *Some Factors in the Emotional Reaction of Children to Disaster*, 113 *AM. J. PSYCH.* 416, 420 (1956) (a "dissociative-demanding response" on the part of parents).

⁵⁹ It is possible also that causing grief is, in the subject's mind, a pleasant result of death. Tom Sawyer, who attended his own funeral, had that experience, illustrating a form of psychosemantic logic. See W. HOCKING, *THE MEANING OF IMMORTALITY IN HUMAN EXPERIENCE; INCLUDING THOUGHTS ON DEATH AND LIFE* 60 (1957); Shneidman & Farberow, *The Logic of Suicide*, in *CLUES TO SUICIDE* 31, 33 (E. Shneidman & N. Farberow ed. 1957). The dynamics of this sort of logic are an important emotional factor in studies of suicide, and are doubtless also relevant to attitudes toward normal death. See *id.*; Lester, *supra* note 51; K. MENNINGER, *supra* note 16, at 18. Singer's novel, *The Magician of Lublin*, provides an example, when the principal character contemplates with some ambivalence the devastating effect his death will have on his wife:

She would not live through the shock, Yasha knew—she would wither and flicker out like a candle. More than once he had seen a person die of heartbreak simply because they no longer had any reason to stay alive.

I. SINGER, *supra* note 16, at 93.

⁶⁰ See generally Joseph, *supra* note 27; Lifton, *supra* note 13.

⁶¹ K. EISSLER, *supra* note 20, at 131-33; E. VAN DEN BERG, *THE PSYCHOLOGY OF THE SICKBED* 46 (1966). In L. TOLSTOY, *The Death of Ivan Ilyitch*, *supra* note 28, at 56, Ivan looks upon his solicitous wife "brimming with life" in his sickroom: "He hated her with all the strength of his soul, and her touch made him suffer an actual paroxym of hatred of her." See generally *DEATH AND IDENTITY* 89-104 (R. Fulton ed. 1965).

It is interesting to compare that frequently-identified syndrome with the situation where everyone in the environment is ill or dying, and therefore relatively willing to participate in mutual support. R. FOX, *EXPERIMENT PERILOUS; PHYSICIANS AND PATIENTS FACING THE UNKNOWN* (1959), is a remarkable, book-

A final factor that may be involved in "E" answers, and that would differentiate them from "D" answers, is a simple disgust at the conventional engines of mourning.⁶² There is a vast difference between grief and conventional pretense to grief. One of Hug-Hellmuth's child-subjects, for instance, reported to her sister that their grandmother was dead. "Why aren't we sad?" she asked. Her sister replied, "Wait a bit, as soon as the black dresses come, we'll be sad."⁶³ If that exchange had been foreseen by the grandmother, she might have found it unpleasant. There is a universal human aspiration for a dignified death⁶⁴ which is somehow timely and welcome,⁶⁵ and even to human growth as death approaches. It is possible that conventional grief is seen as inimical to that aspiration.⁶⁶

Some of these explanations for the choice of "E" answers are emotionally similar to explanations for the choice of "D" answers. Diggory's and Rothman's conclusions⁶⁷ contrast goal-striving answers ("A," "D," and "F") with answers which suggest passive effects of death ("C," "G," and "E"). It seems to me, however, that concern for grief in

length study of the experimental ward of a hospital, in which all patients were seriously ill and many were terminal. See also B. GLASER & A. STRAUSS, *supra* note 21; Zinker & Fink, *The Possibility of Psychological Growth in a Dying Person*, 74 J. GEN. PSYCH. 185 (1966), applies this principle to support and therapy from family and hospital staff. An early example of the effects of mutually supportive behavior in death-anxiety situations is reported in E. SOUTHARD, *supra* note 22, at 685.

⁶² Crown, O'Donovan & Thompson, *Attitudes Toward Attitudes Toward Death*, 20 PSYCH. REP. 1181 (1967). See generally DEATH AND IDENTITY, 181-329 (R. Fulton ed. 1965).

⁶³ Von Hug-Hellmuth, *supra* note 14, at 512.

⁶⁴ That is the philosophical point of L. TOLSTOY, *supra* note 61, although "individual death" rather than "dignified death" might better describe his point. See W. HOCKING, *supra* note 59; K. EISLER, *supra* note 20. In J. BALDWIN, TELL ME HOW LONG THE TRAIN'S BEEN GONE 11 (1968), the principal character, an actor, has a heart attack on the stage and is thought to be dying; his concern as he is carried to the ambulance is that he may not be himself when he dies:

I had not showered, I had not removed my makeup, I had not got my own face back. The face I was wearing itched and burned, I wanted to take it off. My hair was still full of cream I used to make it grey. . . . No one would recognize me where I was going; I would be lost. "Oh, Pete," I muttered, I moaned, and I could not keep the tears from falling. "Please wash my face."

⁶⁵ See Shneidman, *Orientations Toward Death: A Vital Aspect of the Study of Lives*, 2 INT'L J. PSYCH. 167 (1966), and the discussion following, at 190-97, by Weisman, Menninger & Sato. The last of these is especially relevant in its discussion of the death of Gempo Yamamoto: "Usually ripe fruits fall down unintentionally, but this fruit fell down intentionally, being ripe enough."

⁶⁶ Zinker & Fink, *supra* note 61. See K. EISLER, *supra* note 20, at 95-99, discussing the death mask of Beethoven.

⁶⁷ Diggory & Rothman, *supra* note 5, at 160.

others might in some circumstances be as goal-striving and as dependent-related as concern for supporting one's family. This latter thought suggests that a distinction between support concern and grief concern is hard to maintain, especially in the testamentary context.

F. End to Projects

Wills clients are more concerned about providing support than they are at causing grief. This is true even though their emphasis might be reversed if they were asked about death in the absence of a testamentary environment. One might expect a similar reversal of emphasis when concern at causing grief is compared with concern at having to leave work undone. This does not appear to be the case, however, in the Diggory-Rothman study. Their respondents chose the "F" answer (the worst or most distasteful consequence of my death is that all my plans and projects would come to an end) more often than any other except the "E" (causing grief) answer. Their response to "F" was notably high among sub-groups of teenagers, people between the ages of 25 and 39, people expressing no religious belief, and people in the middle economic class. It was the highest from single-widowed respondents.⁶⁸ My results with wills clients were similar, although the overall choice of "F" by my audience was lower than theirs.⁶⁹

A client's projects may be regarded as the material manifestation of his life, because a man is what he does. In a Sartrean sense, "If I create a picture, a drama, a melody, it is in order that I may be at the origin of a concrete existence."⁷⁰ This can certainly be true, on a vaster scale, of entire human lives. Lifton's study of the atomic-bomb survivors led him to conclude that there is a⁷¹

sense of immortality through one's creative works or human influences—one's writing, art, thought, inventions, or lasting products of any kind that have an effect upon other human beings. Certainly this form of immortality has particular importance for intellectuals conscious of participating in the general flow of human creativity, but applies in some measure to all human beings in their unconscious perceptions of the legacy they leave for others.

⁶⁸ *Id.*

⁶⁹ Four of my 34 answers were "F." Two of these were in the middle age group; two were in the older group. Two were men and two women. (This represented a disproportionately high number of male answers, but the male sample was very small.) None of them had experienced recent death; two of the four had lost one or both parents; none had lost a spouse; two of the four were childless. Two considered themselves upper middle class, one middle and one lower. Two had consequence-related testamentary interest and two had informational testamentary interest.

⁷⁰ J. SARTRE, *supra* note 11, at 93.

⁷¹ Lifton, *On Death and Death Symbolism: The Hiroshima Disaster*, *supra* note 13, at 27.

Lifton illustrates the point with the Japanese movie *Ikuru*. The movie, which resembles in its human dynamics Tolstoy's story, *The Death of Ivan Ilyitch*, deals with a man who achieves immortality through his last great project—the construction of a park for children.⁷²

A man's projects may seem to be property-related in the sense that property is wealth as well as project. In this sense attachment to property is, at least superficially, at cross purposes with death.⁷³ Man without possessions is either inconceivable or miserable. Possessions are both a part of personality, and a means of immortality.

It seems to me that property as project and property as property are psychologically similar, so that a man's projects tend to define his life, and when they are finished he may be nearly ready to say that his life is complete.⁷⁴ In a "composite tape" from the American Academy of Psycho-Therapists, containing more than 300 psycho-therapy sessions, the patient, a young wife and mother, begins at last to accept herself and her role as constructive and worthwhile. She expresses the security this realization gives her by saying "I have been good for something—now I can die." This lady expressed the mood of my point: projects, which always involve *some* project-property, are a way to turn life into an individual performance. It is in this sense that "art's greatest office is to outwit death";⁷⁵ this is why Ivan Ilyitch temporarily escaped the tyranny of imminent death by moving furniture around. I suspect that even wealthier clients tend to look upon their investments, their businesses, and their family possessions more as projects than as digits in computing wealth.

G. *Fear of Pain*

Do people as wills clients express more or less fear of pain in death than people outside the testamentary context? Diggory and Rothman reported a relatively high incidence of "G" answers (the worst or

⁷² *Id.* at 30; Wunder, *My Most Unforgettable Character*, THE READER'S DIGEST, June 1962, at 83, makes a similar point about the last months of the late Senator Robert Taft.

⁷³ Here is E. M. Forster making, through a character in *Howard's End*, the point that if we didn't have death we would have to invent it:

Miss Schlegel, the real thing's money and all the rest is a dream.

You're still wrong. You've forgotten Death.

[Leonard could not understand:] If we lived forever what you say would be true. But we have to die, we have to leave life presently. Injustice and greed would be the real thing if we lived forever. As it is, we must hold to other things, because Death is coming. I love Death—not morbidly, but because He explains. He shows me the emptiness of Money. Death and Money are the eternal foes. Not Death and Life. Never mind what lies behind Death, Mr. Bast, but be sure that the poet and the musician and the tramp will be happier in it than the man who has never learnt to say 'I am I.' E. FORSTER, *HOWARD'S END* 272 (1943).

⁷⁴ K. EISSLER, *supra* note 20.

⁷⁵ Gill, *The Theatre, Aren't We Lucky*, 43 THE NEW YORKER, Feb. 10, 1968, at 86.

most distasteful consequence of death is that the process of dying might be painful). They rated this response at "3" on their "1" to "7" scale, and noted that the "G" response was especially high in the 20-24 age sub-group, among women, among Catholics and Jews, among the upper and lower wealth levels (but not the middle level), and among unmarried-engaged people.⁷⁶ My test of their results on wills clients yielded a much lower response to "G."⁷⁷

Fulton's conclusions from a rather straightforward attitudinal survey were that more people express fear of the act of dying than of death itself.⁷⁸ This distinction is elsewhere difficult to detect, however, and may be even difficult to maintain. I assume this difficulty explains why Diggory and Rothman put the "G" response in a survey of death attitudes. It would seem, superficially, that fear of pain is an illegitimate "consequence of death," because dead people apparently feel no pain. Furthermore, pain as a peril of existence has two significant qualities death does not have: it is more or less avoidable and it is something most people have experienced. The reason for leaving a fear-of-pain response in the survey is probably that the distinction between death and pain, however easy to maintain verbally, is psychologically difficult.⁷⁹ This difficulty seems to persist generally, even though a few cases of exceptional suffering, actual or prospective, may suggest that fear of pain is more intense than fear of death.⁸⁰

The identification of death and pain is consistent with Freudian theory. Freud held that death cannot be analyzed from experience⁸¹ and concluded that death was not a promising subject for psychological research.⁸² Death anxiety in Freudian analysis is often the persistence of infantile castration anxiety, i.e., anxiety at bodily mutilation.⁸³ Infantile anxiety is of course the parent of adult anxiety—"in

⁷⁶ Diggory & Rothman, *supra* note 5.

⁷⁷ Three of my respondents chose answer "G." All were women; one did not list her age, one was in the younger group, and one in the middle. One had recently lost her father; two had lost both parents and one had lost neither parent; one had lost a child. Two had large families of children. Their testamentary interest was consequence-related in two of three cases, information-related in the third. Each of the three wealth-estimates was represented.

⁷⁸ Fulton, *supra* note 31.

⁷⁹ See Bloch, Silber & Perry, *supra* note 58.

⁸⁰ Pollack, *Suicide in a General Hospital*, in *CLUES TO SUICIDE* 152, 159 (E. Shneidman & N. Farberow ed. 1957).

⁸¹ C. JUNG, *supra* note 18, at 156.

⁸² Lifton, *On Death and Death Symbolism: The Hiroshima Disaster*, *supra* note 13, at 26-27.

⁸³ S. FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 86-89 (J. Strachey transl. 1965); S. FREUD, *TOTEM AND TABOO* 153 (J. Strachey transl. 1950). C. Jung, *supra* note 18, at 14-15, explains essentially the same idea as a fear of being devoured. See E. JONES, *PAPERS ON PSYCHO-ANALYSIS* 438-95 (Beacon ed. 1961).

our innermost soul we are still children and we remain so throughout life."⁸⁴ Concern for bodily integrity and freedom from pain and concern for death, are therefore theoretically inseparable, and that, too, defends including a pain question on a death questionnaire.

These two elements may even be physiologically significant. A substantial body of clinical literature is presently being developed which indicates that the body tissues signal their own end by foreseeing death, even in cases involving accidents⁸⁵ and devastating disease.⁸⁶ Jung relates a number of such premonitions in his own life and in the lives of those close to him.⁸⁷ Somewhat similar are findings on the needs of persons who are in fact dying, whether or not they consciously know it or admit it.⁸⁸ Further support for the relation between death and one's adjustment to his body is found in Rhudick and Dibner's⁸⁹ demonstration that health is a more crucial concern for the old than for the young, and Alexander, Colley and Adlerstein's⁹⁰ findings that death concern is higher among the unhealthy.

A third observation about concern for pain as a part of death attitudes is that our society tends to regard age and illness in the same way it regards death. Age and illness are often painful. Even when they are anesthetic, they share with pain an involvement in the deterioration of the body. To a substantial extent these states of existence share, in our social attitudes, some of the horror of death; it is therefore probably relevant to consider them as part of death and to conclude that the anxiety they inspire is related to and maybe even part of death anxiety.⁹¹

⁸⁴ S. FERENCZI, *SEX IN PSYCHO-ANALYSIS* 61 (Dover ed. 1958).

⁸⁵ Weisman & Hackett, *Predilection to Death*, in *DEATH AND IDENTITY* 293 (R. Fulton ed. 1965).

⁸⁶ K. EISSLER, *supra* note 20, at 131-33; see Hutschnecker, *Personality Factors in Dying Patients*, in *THE MEANING OF DEATH* 237 (H. Feifel ed. 1959); Richter, *The Phenomenon of Unexplained Sudden Death in Animals and Man*, in *THE MEANING OF DEATH* 302 (H. Feifel ed. 1959).

⁸⁷ C. JUNG, *supra* note 18.

⁸⁸ Zinker and Fink found, for instance, that a dying person's need for safety and physical security tends to grow and that his need for self-esteem tends to diminish. Zinker & Fink, *supra* note 61. Florence Joseph's touching clinical analysis of a dying cancer patient shows many of the same conclusions in a more personal context and illustrates, too, that her patient was aware of her death and planned for it, even though she never discussed it and possibly never consciously admitted it. Joseph, *supra* note 27.

⁸⁹ Rhudick & Dibner, *supra* note 28.

⁹⁰ Alexander, Colley & Adlerstein, *Is Death a Matter of Indifference?*, in *DEATH AND IDENTITY* 82 (R. Fulton ed. 1965).

⁹¹ See VAN DEN BERG, *supra* note 61; Fulton, *The Sacred and the Secular: Attitudes of the American Public Toward Death, Funerals, and Funeral Directors*, in *DEATH AND IDENTITY* 89, 104 (R. Fulton ed. 1965):

These are seven ways in which wills clients experience death anxiety in the testamentary experience. Some of them—e.g., provision of support for loved ones and continuation of life projects—are especially significant in the practice of “estate planning.” Lawyers who understand these anxieties are able to help their clients leave the law office realistically consoled by the discovery that law provides ways to feed one’s children, to continue one’s business, and to rob death of some of its ability to frighten the living.

III. BEYOND THE DIGGORY-ROTHMAN MODEL

A. Parental Death, Child Death, Recent Death

Diggory and Rothman assembled ethnographic data from a wide variety of sub-groups, but apparently did not determine which of their subjects had recently experienced a death in the family, or which had children. My replication of their study indicates that people who have lost both parents tend to show less concern about dependent support than people who have one or both parents living, that people who have children tend to be more concerned about dependent support than about abandoning their projects, and that the response of childless people differs from the response of parents in other respects. Where the respondent had experienced a recent parental death, my results indicated a peculiarly high level of concern for dependent support and for the continuation of projects.⁹² Unfortunately, I was unable to determine whether people who have experienced the death of a child react to the Diggory-Rothman question in a peculiar way.

Consideration of the recent-death aspect of the psychology of testation is especially important, because a death in the family is often what

When we reflect upon the fact that some of the aged in this country are no longer welcome in the homes of their children and are no longer secure in the belief that with age comes respect, we can appreciate why they would uproot themselves from their families, friends, and their established place in the local community and flee in unprecedented numbers to retirement cities and other locales on the Pacific Coast which are literally as well as figuratively on the edge of American society. By denying their children or other relatives the opportunity to give them the gift of the funeral at their deaths, they give vent to their hostility and resentment toward a society that has rejected them.

⁹² Here is a table on parental death:

	One Parent Dead	Both Parents Dead	One Parent Recently*
A (3%)	10%	0	0
B (9%)	10%	12%	0
C (6%)	0	12%	0
D (46%)	60%	41%	67%
E (9%)	10%	12%	33%
F (12%)	10%	6%	0
G (9%)	0	12%	0

* Within past three years.

motivates clients to consult lawyers for wills.⁹³ Death in the family has a momentous effect on most human lives. The classical theoretical explanation of this is probably contained in Jung's paper *The Significance of the Father in the Destiny of the Individual*,⁹⁴ in which he analyzes four cases of parental death which caused serious neurosis. An archetype which is central in Jungian analysis is of the father who embodies both a demon and a god, and whose death, as he shows, has profound effects in the life of the child.⁹⁵

There is a good deal of empirical corroboration for this theory in recent studies. In the Bloch-Silber-Perry⁹⁶ study of the after-effects of the 1953 Vicksburg tornado, for instance, it was found that serious psychological effects from having seen *friends* mauled or killed in the storm were virtually nil, but that serious effects from having seen the same things happen to members of one's family were common. Eleven of 12 children studied in the latter category were seriously disturbed, as compared with no significant disturbance in those who saw friends injured or killed. Other studies have demonstrated that grief reactions often take the form of seriously anti-social action,⁹⁷ including juvenile delinquency,⁹⁸ suicide,⁹⁹ and radical behavior in which the actor himself virtually dies.¹⁰⁰ This behavior will not necessarily follow immediately on the family death. It may be delayed for months, for years, or for a lifetime.¹⁰¹ Delay seems especially likely where the death involved is of the patient's mother.¹⁰² One clinical report

⁹³ I make this observation from experience and from discussing with my brothers at the bar what it is, in their experience, that causes clients to come to lawyers for the preparation of wills.

⁹⁴ Jung, *The Significance of the Father in the Destiny of the Individual*, in FREUD AND PSYCHOANALYSIS (R. Hull transl. 1961).

⁹⁵ Compare *id.* with Jackson, *Grief and Religion*, in THE MEANING OF DEATH 218 (H. Feifel ed. 1959).

⁹⁶ Bloch, Silber & Perry, *supra* note 58.

⁹⁷ Shoor & Speed, *Death, Delinquency and the Mourning Process*, in DEATH AND IDENTITY 201 (R. Fulton ed. 1965).

⁹⁸ *Id.*; see generally DEATH AND IDENTITY 181-329 (R. Fulton ed. 1965); Fulton, *supra* note 31.

⁹⁹ Lindemann, *Symptomatology and Management of Acute Grief*, in DEATH AND IDENTITY 186 (R. Fulton ed. 1965).

¹⁰⁰ Volkart & Michael, *Bereavement and Mental Health*, in DEATH AND IDENTITY 272 (R. Fulton ed. 1965).

¹⁰¹ Stern, Williams & Prados, *Grief Reactions in Later Life*, in DEATH AND IDENTITY 240 (R. Fulton ed. 1965).

¹⁰² Barry, *Significance of Maternal Bereavement Before Age of Eight in Psychiatric Patients*, 62 ARCHIVES OF NEUROLOGY AND PSYCHIATRY 630 (1949), in DEATH AND IDENTITY 206 (R. Fulton ed. 1965); see Hilgard, Newman & Fisk, *Strength of Adult Ego Following Childhood Bereavement*, in DEATH AND IDENTITY 259 (R. Fulton ed. 1965).

even affirmed a strong personal relationship remaining between mother and child for years after the mother's death.¹⁰³ Among the milder and more common effects of parental death are a heightened concern about one's own death¹⁰⁴ and heightened dependence on the surviving parent or on parent figures.¹⁰⁵

Anthropology also presents some interesting corroboration. Among the LoDagaa of Western Africa,¹⁰⁶ for instance, the death of a child under the age at which he begins to walk and talk is not considered the death of a person. This practice is a curious result of high infant mortality and of the fact that the community's emotional and psychological energy cannot be stretched far enough to cover all infantile deaths. The solution is to reclassify the deceased infant as not a human being. Hertz reported similar customs among Pacific Island cultures,¹⁰⁷ and Blauner reported like behavior during certain periods in French history.¹⁰⁸ Where social custom will not guarantee against radical grief behavior, custom may have to compromise. Among the LoDagaa, for instance, it is customary to restrain mourners at funerals, so that they will not mutilate themselves or commit suicide.¹⁰⁹ This follows an elaborate hierarchical structure in which the strength of the material with which one is tied relates directly to the closeness of his relationship to the decedent.¹¹⁰ This would not, theoretically, be necessary at the brief, simple "funerals" of dead infants, but the custom is to restrain mothers in that situation and, as Goody demonstrates, often with good reason.¹¹¹

All of this indicates that a key question in the will interview is whether the client has recently experienced death in his family. If he has, or if some remote death in the family still exerts an influence over his life, his death anxieties will tend to be stronger, probably less rational, and more focused on human relationships. These feelings can usually be brought out in the will interview if the lawyer is patient and understanding. If they are brought out, and brought to bear on the client's testamentary decisions, the anxiety they cause will be reduced. This is an important aspect of the system of legal counseling which is suggested more fully below.

¹⁰³ Stern, Williams & Prados, *supra* note 52.

¹⁰⁴ Feldman & Hersen, *supra* note 52.

¹⁰⁵ See Hilgard, Newman & Fisk, *supra* note 102.

¹⁰⁶ J. GOODY, *supra* note 42, at 149, 208-09, 253-54.

¹⁰⁷ R. HERTZ, *supra* note 43, at 84, 151 n.328, 131 n.144.

¹⁰⁸ Blauner, *Death and Social Structure*, 29 *PSYCHIATRY* 378 (1966).

¹⁰⁹ J. GOODY, *supra* note 42, at 69, 87.

¹¹⁰ See *id.* at 87-88.

¹¹¹ *Id.* at 90-94.

B. Testamentary Interest

It was interesting to ask wills clients why they sought the testamentary services of a lawyer. I thought that the answers to this inquiry might demonstrate whether the testamentary motive correlates with values destroyed by death and whether the Diggory-Rothman approach is useful for research in the psychology of testation. Their replies indicate a tentative answer to each of my reasons for asking the question.

Approximately half of my audience said they were interested in wills for reasons of general information—*e.g.*, “general interest” or “to know legal matters pertaining to them.” The remaining half expressed interests which seemed to relate to the consequences of death outlined in the Diggory-Rothman question. These answers are not so numerous that they cannot be quoted here:¹¹²

To stop a family fight.

I have two sons and I would like to protect their future, should I die before they are able to care for themselves.*

For my own benefit.

To be sure of an equitable distribution of my property.

So I'll know more about what to do for ourselves.*

Disposal of my estate.*

Might leave house and land to children.

Would like to avoid having my estate probated; also, no misunderstanding among the children.

To avoid probate.

To help my husband.

Have had good intention toward making a will and as yet have not done so. Maybe this is the shock I need.*

Interested in disposal of things and property accumulated.

To see that my possessions are disposed of the way I will it.

To leave money where it will be used well.

Because I do not know anything about them and they are necessary.*

To protect ourselves and children.*

Exactly half of the respondents used answers to the will-interest question which seem to indicate an attitude toward the consequences of death. Six of these do not appear to correlate with answers chosen in the death-consequences part of the questionnaire. Two explanations may be given for this. First, the respondent may be using this question to add another answer. Duplication and oral comments

¹¹² Answers with asterisks are those which seemed to correlate with the response given by the same person on values destroyed by death.

from persons filling out the questionnaire indicate that many people experienced difficulty isolating a single attitude toward death, preferring instead to choose two or three.

Another explanation arises from the obvious fact that the wills-interest question asks for more information than the death-consequence question. Interest in testation involves more than the fact of death; it also involves a man's relationship to his property and his attitude toward giving it away. Several of the answers to my question exhibit a property-related concern, but relatively few exhibit a family concern. In cases where the wills-interest answer seems to tend more toward concern for property, the respondent may be related to his property in a personal way, *i.e.*, the respondent views the property as an extension of himself. He is interested in a will, therefore, because he wants to extend himself through his property past his own death. Why else a concern for *himself* in connection with a will ("for my own benefit" or "to see that my possessions are disposed of the way I will it")? Thus, the Diggory-Rothman test is not adequate if will-interest is the subject of inquiry, because more is involved than a value destroyed by death. What may be involved instead is a way of preserving an ownership value from the ravages of death.

IV. PROSPECTS FOR RESEARCH AND COUNSELING

A. Research

Lawyers know very little about wills clients and about the dynamics of their relationships with lawyers. Available research information is not directed to this professional situation. Useful information which is available is hidden in an incredible variety of technical psychological journals. Researchers in the legal profession have done little of significance about counseling psychology and literally nothing about counseling in the testamentary context. What then are the prospects for gathering helpful information for lawyers on the human content in "estate planning"?

Feifel has categorized the human phenomena involved into "verbally-expressed attitudes toward death, fantasy notions, and below-the-level-of-awareness ideas."¹¹³ The first of these appears to be fully available to legal researchers and the second and third are promising for interdisciplinary cooperation with behavioral scientists.

Much of the significant research on verbally-expressed death attitudes has been basically observational. Lifton's important work on the A-Bomb victims is probably the most recent example.¹¹⁴ Hug-

¹¹³ Unpublished address by H. Feifel, *Attitudes Toward Death: A Psychological Perspective*, at the University of Minnesota, May 18, 1967.

¹¹⁴ See authority cited note 13 *supra*.

Hellmuth's small, classical observation of a single child's growing awareness of death¹¹⁵ is another. Even Anthony's work on the orthopsychology of death,¹¹⁶ which involves story completion testing and intelligence evaluation, is fundamentally a matter of gathering information compiled by the mothers of the children who were research subjects.

Some research on the human content in estate planning would therefore involve observational projects. Previous studies such as Fox's work in the experimental ward of a hospital and Glaser and Strauss's study of death in a general hospital suggest that some of the observational research might become very elaborate.¹¹⁷ There are opportunities for less elaborate studies, however. The continued relevance of smaller studies as a research tool is demonstrated by the Feldman-Hersen study of nightmares,¹¹⁸ the Block-Silber-Perry interviews following the Vicksburg tornado,¹¹⁹ and the sensitive generalization from particular cases which is evidenced by Barry's study on grief reaction.¹²⁰ Regardless of the degree of elaborateness of the research study which is conducted, part of what the lawyer will learn may involve nothing more than opening his eyes to an awareness of the human content which is involved in the counseling context. I discovered this with respect to will interviews of young family clients.¹²¹

Although behavioral scientists could benefit from collaboration with lawyers, survey research of a more technical nature might arguably be left to them.¹²² For instance, Feifel's second and third categories which involve analysis of fantasies and extraction of reactions below the level of consciousness, call for more technical proficiency than a legal researcher is likely to possess. The lawyer's role in this sort of research is best limited to collaboration and especially to the encouragement of psychological researchers to interest themselves in legal relationships such as the relationship between a man and his property.

¹¹⁵ Von Hug-Hellmuth, *supra* note 14.

¹¹⁶ S. ANTHONY, *supra* note 31.

¹¹⁷ Fox's work in the experimental ward of a hospital suggests something of the law office, as does the Glaser and Strauss study of death in a general hospital. R. FOX, *supra* note 61; B. GLASER & A. STRAUSS, *AWARENESS OF DYING* (1965).

¹¹⁸ Feldman & Hersen, *supra* note 52.

¹¹⁹ Block, Silber & Perry, *supra* note 58.

¹²⁰ Barry, *supra* note 16.

¹²¹ See authority cited note 3 *supra*.

¹²² Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in *LAW IN A CHANGING AMERICA* 56, 63 (G. Hazard ed. 1968):

Does not the failure of law and social science to mix more zestfully require some explanation from the social science side too? Why has not the law as phenomena seemed of sufficient interest to the social scientist to move him to put *his own* questions to it and to study it not as law but as part of his study of society? *Id.*

The promise of such an inter-disciplinary approach based on collaboration is exciting.

A final avenue of research consists of examining existing information in secondary literature and in data which has been compiled for other purposes. The Viennese school of psychiatry developed a classical example of this type of research in its work on war neuroses.¹²³ Enough research has been done recently¹²⁴ with probate records to suggest their value as a tool for modern legal-psychological research on testation.¹²⁵ Shneidman and Farberow's work with suicide notes¹²⁶ suggests a project in this area. They used notes left by successful suicides which were on file with public authorities in Los Angeles. They "matched" these real notes with pseudo notes written by living people chosen to resemble the suicides. Could a similar comparison be done with wills? Suppose, for example, that a legal researcher compiled a random selection of wills from a representative set of probate records, matched the testators with living persons who resembled them, and conducted in-depth testamentary interviews of the living subjects. Would the comparison between testamentary results be useful in measuring the result of careful counseling in the testamentary context? Shneidman's work on death certification¹²⁷ focuses on what he refers to as the psychological autopsy. It has been developed as part of an effort to put human content and scientific objectivity into death certification. Shneidman demonstrated this device by showing in detail how he would investigate the death of Captain Ahab. If Herman Melville can provide a suitable subject for the psychological autopsy, imagine what something as common to lawyers as appellate judicial opinions might provide for the psychology of testation.

Research suggested by this discussion depends on lawyers being receptive to psychological insight. Intellectual curiosity among lawyers would uncover a great deal of information in the presently inadequate psychological literature. At present the literature of law

¹²³ See authority cited note 22 *supra*.

¹²⁴ See, e.g., Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963).

¹²⁵ Consider the psychological autopsy suggested by a claim my students and I discovered in the probate records of the Elkhart County, Indiana, circuit court: An agreed claim for \$185 to one Margaret Yoder, for:

carrying six or seven buckets of coal a day from basement to heating stove, emptying commonetts, digging paths in snow in winter, keeping kerosene [sic] lights filled, making beds, carrying water in, doing the shopping, moping [sic] and washing of windows, checking on decedent two or three times a day and other similar services.

The claim was computed at \$5.00 a day for 37 weeks.

¹²⁶ Shneidman & Farberow, *supra* note 50.

¹²⁷ Shneidman & Lane, *supra* note 15; Shneidman, *Orientation Toward Cessation: A Reexamination of Current Modes of Death*, 13 J. FORENSIC SCI. 33 (1967).

and psychology is exhausted in considerations of litigation. With help from psychological literature, lawyers could not only become more aware of useful information around them, but also more communicative about it. The opportunity for legal research in this area, and for stimulation of inter-disciplinary research through collaboration with research psychologists, is a literally untouched opportunity for new information and new guidance for the entries we make into the lives of our clients.

B. Counseling

Counseling wills clients is a matter of human empathy for a man who is being forced to confront his own death.¹²⁸ There is little literature available concerning the testamentary counseling relationship itself. Valuable analogy may be found, however, in Carl Rogers' description of successful, client-centered counseling:¹²⁹

1. The individual comes for help.
2. The helping situation is usually defined.
3. The counselor encourages free expression of feeling in regard to the problem.
4. The counselor accepts, recognizes, and clarifies these negative feelings.
5. When the individual's negative feelings have been quite fully expressed, they are followed by the faint and tentative expressions of the positive impulses which make for growth.
6. The counselor accepts and recognizes the positive feelings which are expressed, in the same manner in which he has accepted and recognized the negative feeling. In this type of situation, insight and self-understanding come bubbling through spontaneously.
7. This insight, this understanding of the self and acceptance of the self is the next important aspect of the whole process. It provides the basis on which the individual can go ahead to new levels of integration.
8. Intermingled with this process of insight—is a process of clarification of possible decisions, possible courses of action.
9. Then comes one of the fascinating aspects of such therapy, the initiation of minute, but highly significant positive actions.

These are only the first nine of 12 steps described by Rogers. The purpose of the three remaining steps, which I would not claim for a wills lawyer, is to lead the client to a final state of "integrated positive action" and a relaxation of dependence on the counsellor. It is quite enough for lawyers to aspire to the "minute but highly significant" moment when the client finds relief in seizing the future through his property. This future includes his own death, of course, but I believe that one way the client reconciles himself to death is by making death

¹²⁸ K. EISSLER, *supra* note 20, and B. GLASER & A. STRAUSS, *supra* note 21 discuss principally the difficult therapeutic relationship between physicians and dying patients. I think there is probably helpful analogy in their experience, but the testamentary client is not normally facing death. The cultural change from the day when will preparation was part of dying is a part of the "seizing the future" solution to the problem of death. See note 130 *infra*.

¹²⁹ Address by Carl Rogers, Dec. 11, 1940, in E. PORTER, *AN INTRODUCTION TO THERAPEUTIC COUNSELING* 174 (1950).

a part of his life. This is accomplished when the client plans for death's consequences to his property-personality and to his family.¹³⁰

Testamentary application of the first five steps in Rogers' scheme is a matter of the client's expressing the real reasons he wants to make a will. My study of will-interviews indicates that these reasons will probably be negative. An illustrative, but not exhaustive, listing of the client's true feelings is presented below. The accompanying quoted language illustrating these feelings is from my tape-recorded young-family client interviews¹³¹ and from the answers to my questions discussed above, on why people came to hear me talk about wills.

1. He is aware that he might die suddenly. (Young-family client: "What if something happens, supposing, now, when we're going home, there. You know, something happened now.")

2. He is aware that his children might be orphaned. (Young-family client: "It's so—kind of a sad discussion to think who would take care of them. . . .") (Member of audience said he was interested in wills because "I have two sons and I would like to protect their future should I die before they are able to care for themselves.")

3. He is aware that he has liabilities, or projects that must be carried on, and he hopes that supporting persons will carry them on. (Young-family client: Q. "Do you have insurance on your land contract?" A. "No, because I'm sure, if anything happens to us, that her folks will take care of it.")

4. He is afraid that the delays of the law will complicate the support of his family. (Young-family client: "There's a possibility that, if I would just turn over everything to Hanna's parents, that money would be a long time in making that step. . . . It would be tied up for some time.")

5. He is aware that property which is especially significant to him will somehow survive his death. (Young-family client: ". . . as long as the jewelry and the paintings and the art objects go to my daughter. Or my son. The rest of it—I don't care.") (Members of my wills audience said they were interested in wills "for my own benefit" or "to help my husband.")

6. He is aware that his death will sever the expression of his love for his children. (Young-family client: "What would happen to the children immediately? Who would take care of them? Would the state throw them into an orphanage?")

¹³⁰ I am indebted for the "seizing the future" insight to Father John Dunne, C.S.C., of the Theology Department at the University of Notre Dame. The thought is part of the development of his "solutions to the problem of death". See J. DUNNE, *THE CITY OF THE GODS* (1965).

¹³¹ Shaffer, *Will Interviews, Young Family Clients, and the Psychology of Testation*, *supra* note 3.

7. He senses that the survival of his property-personality alone will not prevent the family strife that he feels he could prevent if *he* were there. (Members of my wills audience said they were interested in wills in order "to stop a family fight," or "to be sure of an equitable distribution of my property," or "to leave money where it will be used well," or so that there would be "no misunderstanding among the children.")

8. He fears that the mysterious machinery of probate will do harm to *him* unless he plans for it. Probate may be part of the mystery of death, and planning may be seen as a way to penetrate the mystery. (Members of my wills audience said they were interested in wills "so I'll know more about what to do for ourselves" or "because [I] would like to avoid having my estate probated" or "because I do not know anything about them and they are necessary" or "to protect ourselves and children.")

Testamentary counselling is a matter of helping the client to accept, recognize, and clarify these negative feelings. My observation of will interviews in my own practice, in my students' work, and in the practice of other lawyers, is that this critical beginning is evaded as long as possible and occurs very late in the typical will interview. I have also observed, however, that the interview does not become genuine or meaningful until the reasons for the will are expressed. Therefore, at the very least, lawyers should refuse to aid and abet the process of evasion. Ideally lawyers should act positively toward guiding the client to an early and frank realization of the fact that his death is involved in testamentary counseling. I believe that both of these objectives can be accomplished by the reflective system of counseling that Rogers suggests—which is fundamentally a matter of listening closely and empathically to what the client says and of exhibiting to him that what he says and feels is understood.

Once the reasons are expressed, the session often becomes positive. The client can begin to feel and express what he hopes to gain from the lawyer's services. This corresponds to Rogers' fifth, sixth and seventh steps. I have found that young-family clients eventually come to a realization that their small wealth must be applied for minor children, if both parents should die while they have minor children. In addition, the young-family clients come to realize that the surrogate parents they chose must have broad discretion. As a result, the clients come to emphasize in their judgment the support of their children over less realistic objectives such as college education. This is a dogma in planning property settlement—that first things must come first.¹³² The moment in which a client understands this sort of

¹³² Shaffer, *Nonestate Planning*, 42 NOTRE DAME LAW. 153 (1966).

priority and focuses his reasoning around it is suggestive of what Rogers experiences when his psychotherapy patient's "insight and self-understanding come bubbling through." Here is an example from a young-client interview:¹³³

If you are going to put into the terms of the trust that . . . the last four thousand dollars . . . must be given to each one for their college education. . . . [That] may bind the trustee in a way that is not very good for things you can't foresee now. [Better to] allow the person who has the property to use it more or less as you would, you know, as things come up, he has a chance to do things more or less as if he were their parents. . . .

Another client in that project ended the interview by thanking the students who helped him; he expressed with some satisfaction the decision that he wanted to revoke his present will which set up rigid guardianships for minor children and make a new one. It is important to notice that the clients themselves should arrive at these realizations and these decisions. This can be accomplished when their counsellors are patient, accepting, and gentle.¹³⁴ I believe that this kind of lawyer-client relationship produces a positive experience for clients. It is, to paraphrase Rogers, one of the fascinating aspects of being a lawyer.

V. CONCLUSION

There are two ways in which consideration of the preceding discussion should be helpful to the practicing attorney. One is that behavioral information should help lawyers to realize how their clients feel, especially about death and the values that death will destroy. Psychology presents a significant amount of information on the subject and promises to develop more as the decade-old effort to explore death as psychologically significant continues in the hospitals and laboratories commanded by that science. The other source of value, less tangible than the first, is a matter of a counseling attitude, an openness, which is more affective than systematic.

Although most lawyers do not realize the influence they exert on clients, the realities and values of the client's situation are heavily influenced by the verbal and non-verbal reactions of the lawyer to what the client says. "The selection of value and facts should then largely dictate the conceptual and idea framework that helps to set the direction for both problem and solution," according to Dr. Red-

¹³³ Shaffer, *Will Interviews, Young Family Clients, and the Psychology of Testation*, *supra* note 3.

¹³⁴ Feifel, *supra* note 56, suggests that physicians are afraid of death—and even that infantile anxieties about death may account for their deciding to be physicians. Compare T. REIK, LISTENING WITH A THIRD EAR: THE INNER EXPERIENCE OF A PSYCHOANALYST 84-87, 90-98, 399-410, 414-17 (1948), with B. GLASSER & A. STRAUSS, *supra* note 21. Might there be some parallel in the legal profession, or at least in that part of it that is attracted to estate planning?

mount.¹³⁵ "The counselor needs logical skills and he needs to develop an experimental mode of inquiry if he is to perceive and organize the realities and possibilities in a party's situation most effectively."

This suggests a number of attitudes in testamentary counseling. One is an "experimental mode of inquiry," which is a search for feelings and attitudes as well as for information. It cannot be fulfilled with a fill-in-the-blanks system of will interviews, and lawyers who insist on operating their wills practice as if they were taking driver-license applications should get into another line of work.

The "experimental mode of inquiry" also excludes narrow value systems which reflect what the lawyer thinks the client should do with his property. At the very least, an openness to the client's own feelings and values about property and family requires that the lawyer realize that he communicates his values and attitudes to the client, whether he wants to or not. It may be that a life-estate trust for the client's wife is, in the lawyer's opinion, a poor idea. But the value of the idea should be tested against the way the client feels about his wife, about—for instance—her remarriage after his death, and about her ability to plan for and support their children. It should not be based on a moral absolute which represents the lawyer's own feelings and values:¹³⁶

Poor legal counseling, with the adumbrated view of facts and highly parochial, legalistic conceptions of experience, may be particularly ill-suited to preventive means of dealing with experience. Failures of perception and a restricted range of information and understanding may make the prediction of other than very narrow issues quite hazardous and unreliable. The lawyer who is not "counseling-oriented" has the opportunity and perhaps the disposition to be more effective in highly identified matters that require correction. He is less likely to handle well somewhat unidentified matters that require future planning.

Affectively significant counseling equipment is not altogether the result of attitudes, nor is it altogether the result of study and preparation. Both sensitivity and information seem to be required, and, although this is not the place for a comprehensive discussion of the process of making counselors from lawyers, it may be helpful to suggest two avenues to more skillful counseling.

One is study. The literature of counseling, suggested in the introduction of this article, and in Professor Freeman's excellent case-book,¹³⁷ is readily available to lawyers. Other "helping professions" (medicine, nursing, social work) have been aware of it, and have been systematically developing their own versions for decades. The legal profession has, meanwhile, neglected its ancient claim to the title "counselor." That neglect should be redressed in law-school curricula

¹³⁵ Redmount, *Humanistic Law Through Legal Counseling*, 2 CONN. L. REV. 98, 101 (1969).

¹³⁶ *Id.* at 112.

¹³⁷ H. FREEMAN, *LEGAL INTERVIEWING AND COUNSELING* (1964).

and in the professional reading of those in the practicing profession.

The other avenue is an affective openness, a candor, that is probably inconsistent with the image of lawyers as tough-minded, relevance-centered, masters of order.¹³⁸ If, for example, the "estate planning" lawyer thinks it a poor idea to set up support trusts for wives, and an even poorer idea to attempt to restrict a widow's ability to remarry, rapport would probably be advanced by his candid admission of his feelings and some expression of an honest interest in his client's reaction to them.

I find that the best interpretations come out of what is actually transpiring in the relationship, where both are in the grip of the same complex, which seems to travel back and forth. The implication of the foregoing is that the relationship itself is central and that the desired objectivity, individuality and understanding come out of the actual experience, rather than out of some presumed knowledge or objectivity (intellectual or feeling) in the analyst.¹³⁹

If the lawyer expresses his negative feelings obliquely (by, say, making faces or shaking his head), the client perceives an obstacle between him and his counselor that he cannot deal with. Candor, and sympathetic interest, are what Rogers was talking about when his ideal counselor said to the client that he wanted "to enter into your world of perception as completely as I am able . . . become in a sense, another self for you . . . an alter ego of your own attitudes and feelings . . ." ¹⁴⁰ That is a sound and lofty aspiration for the "counselor at law."

¹³⁸ See generally Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972 (1961).

¹³⁹ Spiegelman, *Some Implications of the Transference*, in FESTCHRIFT FOR C.A. MEIER 5 (R. Verlac ed. 1965). Dr. Spiegelman's personal experience with candor in analysis is analogically helpful:

I somewhere decided to abandon myself to this process of openness and follow the flow of talk, imagery, impulse going on in myself as well as the patient. I found it necessary to acknowledge my personal involvement and to speak out of what came to me . . . I found . . . that I had to go farther in even coming out with my reactions when they seemed to be immoral, unaesthetic, inopportune, untherapeutic (from any rational standpoint), indeed, at times all wrong. I expected this, after all, from my patient. How often my reactions matched what was going on in the patient was startlingly high and this encouraged me to proceed in this manner. When there was a matching experience, one could interpret (and thus raise into consciousness) what the actual transference situation was at the moment. Even when I was alone in my reaction, I found that there was no great loss, but that I, too, was shown to be human, limited, have complexes, and not be responding to the patient or the collective unconscious, but to my own complexes. I recall, for example, revealing a fantasy of mine to a patient which contained some infantile sexual material and found, to my chagrin, that her own fantasies were of a more adult kind. When she, characteristically, would then berate herself for being unconnected and inadequate, I was able to point out that it was my own infantility and that, in this instance, she was far more grown up than I was. This was enormously beneficial for a person who tended always to see others as better, more advanced, etc., than herself and proved to be freeing for a greater openness to herself. *Id.* at 4-5.

¹⁴⁰ See text accompanying note 1 *supra*.