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Book Survey: Recent Books on Estate Planning -- A Practical Perspective

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Wormser's Guide to Estate Planning. By René A. Wormser. Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1958. Pp. ix, 175.

Mr. Wormser introduces his book with a statement of objectives entitled, "A Preface Short Enough to Read" — and we might add, "Important Enough to Reread." The existing literature of estate planning, explains Mr. Wormser, largely "tells the reader *how* to get to various ends; very little of it helps the reader to decide where he wants to go."[1] By author's design, therefore, "This book is concerned principally with *objectives*."[2]

Accordingly, in this particular treatise, Mr. Wormser, the lawyer, retreats from the ponderous footnotes and comforting citations customarily indulged in by his profession. In writing this book, he is René, the man—professional writer, cultured speaker, artist and, above all, jolly fellow and humble purveyor of bland Republicanism. Here René, the man, is preoccupied with inflation. Here Mr. Wormser, the technical artisan, has become more concerned with the philosophy of "time" than with the precision of fine watch making.

Although of more than mild interest to the professional practitioner in the area of estate and tax planning, this book is scarcely designed as a source book for those who are entrusted with the refinement of broad estate ideals into the detailed execution of ideas. For the lawyer who seeks the refuge of a form book, the safety of a check list against his own inexperience, or an expedient substitute for research, a different text must be sought (even though it may well be derived from the same author). However, for the lawyer who would depart from his customary "great thinking in matters of small thought"; who, at least in a portion of his professional being, would like to explore ideas rather than act as a mere scrivener who painstakingly adopts and adapts the settled notions of others—this work becomes the estate planner's book of revelation.

If it rightfully may be complained that Mr. Wormser has used a wide angle lens to picture the broad expanse of aspirations and inspirations of the man with an estate to plan, it also must be admitted that the man with an estate to plan, when thus inspired, is very likely to hire the services of a microscopic technician, *i.e.*, a lawyer, to pinpoint his problems and their solution. Since Mr. Wormser, therefore, is talking to the man with an estate to plan, he is gently nudging a client in the direction of your office. Believe me, your "well-to-do" client probably has read, even reread, this book, and he may well consider himself burdened by a "ne'er-do-well" lawyer if you have neglected his idea of required reading. Portions of this book appeared in *U.S. News and World Report* in 1958, and, accordingly, the work has been widely celebrated and read by businessmen of means. Thus, this book is true pocketbook reading for the lawyer.

In the initial chapter, the book treats "The Investment Problem." Fundamentally, Mr. Wormser's observations in this area relate to the problems of planning *for* an estate rather than the problems inherent to the planning *of* an estate. However, the two problems are necessarily interrelated since the type and nature of investments may well influence the post mortem position of an estate. Moreover, the type of investments to be considered, on an ante-mortem basis, not only varies with the age of the individual, but often is at variance with the requirement of the beneficiaries on a post mortem basis. It is frequently charged, and we believe accurately, that a lawyer does not accomplish his maximum potential of usefulness in merely

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1 Text at v.

2 *Ibid.*

planning an existing estate. Perhaps even more is accomplished where the lawyer, consulted with respect to wills and estate plans, is alert to income tax savings potentials and other devices of family advantage during the lifetime of the client. Throughout this chapter Mr. Wormser finds himself concerned and disturbed with the problems of inflation and possible hedges against inflation through investment media. Although he favors insurance as a basic investment, especially for the young father, it seems that he permits inflation to prejudice his judgment regarding the validity of this investment.[3] Since no other acceptable method of creating an estate, in advance of actually being possessed of one, has yet been devised, life insurance remains a basic requirement for a multitude of objectives. The mere fact that inflation may require more dollars for the ultimate security of a family does not depreciate the worth of life insurance. It merely indicates that more insurance is required to meet the problems of inflation. In addition, insurance may well be secured by the wife or other intended estate beneficiaries in such manner that the insurance proceeds are free of federal estate tax in the estate of the husband. The savings in federal estate tax alone, in many instances, is sufficient to offset the magnitude of present or potential inflation. Under the caption of "The Investment Problem," Mr. Wormser points to our changed conditions and the advisability of "living boldly" in the matter of investment, especially during the earlier period of one's economic life. He also treats of such matters as the variable annuity, investment selection problems, special investment situations, the problem of investing in one's own business, and the relationship of tax savings to investment potential. Perhaps the most significant observation in this area is that if one invests or builds his fortune largely in his own business, it is as important to have a planned method for getting out of business as it was to have the opportunity for getting into business. At related Chapters 2 and 3, Mr. Wormser addresses himself to the fundamentally personal problem of the occupation to be pursued by the client and of the guidance of children in their occupational training. There is much to be said for a serious consideration of occupations in that certain occupations at this time, such as those of the professional person acting as an independent contractor, afford very little or no opportunity for capital gains taxes within the ambit of the occupational field itself. Retirement plans, including deferred compensation, both qualified and non-qualified, likewise are considered, as well as the extremely personal problems inherent to an unplanned and abrupt retirement.

At Chapter 4, the tricky legal problem of domicile is considered. Most lawyers are thoroughly familiar with the multiple death taxes of the various states which can arise as a result of an improperly established and evidenced domicile. Perhaps too little emphasis has heretofore been placed upon the necessity for accumulating positive evidence as to domicile, and avoiding a multiplicity of conflicting evidence in respect thereof, in advance of death. Of course there is the allied problem of selecting a geographic area of domicile favorable to the climate of such estate planning problems as the death and gift taxes imposed by a given state and the extent or limitation of the statute of perpetuities in the state, and allied considerations. Although these problems are well known to the average practitioner in this field, perhaps insufficient emphasis has been placed on them by the layman whose ultimate problem it is not only to establish, by positive, convincing and unequivocal evidence, the place of his domicile but also to select intelligently a place to live. The problem, of course, has become exaggerated in recent years as a result of our increasingly migratory habits, our penchant for the acquisition of residential property to accommodate the seasons, and our sudden departure from our place of original residence at the time of retirement, a departure normally made in haste and repented at death.

Mr. Wormser devotes 36 pages, at Chapter 5, to "Objectives in Planning for Your Wife." The initial sub-topic is captioned "What Kind of Wife Have You?" Although this undoubtedly is a topic of salient inquiry for both the client and his

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3 Mr. Wormser answers this comment in a *Review of the Review,* 36 NOTRE DAME LAWYER 166 (1961).

lawyer, many of us find that, under normal circumstances of at least temporary domestic tranquility, the wife insists on being present at estate planning discussions involving her husband's property. We agree with Mr. Wormser that these questions require answers and involve estate planning issues of paramount importance, issues which too frequently are neglected in favor of standard devices and forms of wills and in the rush to obtain maximum death tax savings.

Mr. Wormser then treats the usage of irrevocable trusts, including accumulation trusts, the use of the marital deduction for maximum estate tax savings, and the saving of a second and subsequent tax at the ultimate demise of the surviving spouse. The problem of "common disaster" and its effect upon the marital deduction likewise is given consideration. The utilization of special powers of appointment, the advantages and disadvantages of jointly held property by the spouses and the advantages of "wife" insurance likewise are treated.

Mr. Wormser quite properly emphasizes the necessity, under today's laws of taxation, as well as under practical considerations, for obtaining requisite information with regard to the respective estates of the spouses, and the need for tailoring wills and other estate planning forms in accordance with the property holdings of the parties. In this connection, the author offers this salutary advice: "If your wife has an estate of her own, it should be planned in coordination with yours. You must consider not merely what would happen if you die first, but also what would be the situation if she were the first to die."[4] This is a prerequisite of all good estate planning.

Following his acknowledged plan for considering "Objectives," Mr. Wormser proceeds at Chapter 6 to a consideration of "Objectives for Your Children." Consideration again is given to the special problems concerning each child for whom planning is being done and likewise with respect to grandchildren. The problems of discrimination among children and among grandchildren, and as between children and grandchildren, are considered. The omnipresent problem of "spoiling the child" with sudden donations of substantial principal receives its full and warranted attention. Mr. Wormser well and adequately considers the matter of custodial gifts (a helpful but much misused device), the advantages under the gift tax law of so-called minority accumulation trusts, the usages of Clifford style short term trusts, and possible trusts for the carrying of insurance. These thoughts and brief analyses of established tax saving devices represent stimuli which will bring the client to your office. The ghost of Clifford will ride again unless we, as practitioners, are thoroughly versed in the modern usages of the Clifford style of trusts.

Second only to a preoccupation with the problem of inflation in its relationship to estate planning, Mr. Wormser concerns himself with the problem of "the forgotten woman," viz., the daughter-in-law. He suggests that by the use of appropriate sprinkling or spraying clauses under testamentary or inter vivos trusts, a substantial flexibility is granted which will redound both to the tax and other economic advantage of all family members within the unit to be benefited, including "the forgotten woman." This treatise on children, grandchildren, and their families represents the best known analysis of the problems presented, the objectives to be obtained, and the solutions for those objectives.

At Chapter 7, Mr. Wormser deals with charitable giving under the title "Objectives for the Charitably Inclined." His principal theme is set forth in the opening sentences of this chapter: "When private charity ceases, the government will take over. When the government takes over, I fear for the condition of our society."[5] This chapter is largely devoted to the problems of "what to give" with tax advantage, the usages of charitable foundations and trusts of both a permanent and temporary character, the advantages of the charitable remainder (such as has recently been celebrated in the now famous Notre Dame life income plan), the advantages derived

4 Text at 69.
5 *Id.* at 94.

in exchanging property for a charitable or private annuity, and the usage of charitable entities as a device for continuing control of a private business which otherwise might be subjected to forced liquidation for the payment of death taxes. Many estate planners are now turning their primary attention to the use of charitable devices as a medium for the preservation of estates. Frequently income tax savings derived from inter vivos charitable undertakings can be used to offset the gift tax consequences of private distributions to one's family. Death tax savings often enable the preservation of the estate through the rather simple medium of diverting estate income for a term of years to charitable purposes. This is the era of "selfish giving," the age when the giver truly receives more from the gift than does the object of his beneficence. We can only hope that Mr. Wormser's next literary effort will confine itself to this source of estate planning as the subject currently is deserving of intensive and extensive treatment.

In Chapter 8, Mr. Wormser reviews the usages of a family enterprise under post mortem conditions, including such topics as redemptions under Section 303 of the Internal Revenue Code for the purpose of draining away, on a non-taxable basis, an earned surplus account to the extent of defraying death taxes, administration costs, etc. Many other suggestions for the continuation or the liquidation of the business of the family enterprise likewise are considered, as well as the ante mortem benefits which may accrue from a family enterprise. He considers at this point such problems as those presented by the use of restricted stock options, the utilization of profit sharing and pension arrangements, the benefits to be achieved in "split-dollar" life insurance arrangements, and other similar devices. Mainly, however, the problem remains, in the planning of an average business man's estate which is largely invested in a family enterprise, of how to get out of business without the impediments of forced liquidation with its consequent shrinkage.

Mr. Wormser, at Chapters 10 and 11, translates the entire subject matter of his book into the problems of the lawyer and other professional persons dealing in estate planning in obtaining the requisite information to enable a thorough and objective analysis and plan. He proceeds with a test analysis of a prospective estate, very much as the lawyer is required to do when confronted with the practical problem of translating the basic concepts of estate planning into the realities of a will and complementary documents. This portion of the book represents reading for lawyers and should be a source of intensive study. Moreover, it is likely that the layman reading Mr. Wormser's book will have convinced himself, as a result of these particular chapters, that he not only requires attention, but requires the attention of an able and qualified lawyer.

At Chapter 9, Mr. Wormser boldly states—and, we believe, correctly states—the respective assistance which a series of advisers can afford a client in respect to his estate planning. Mr. Wormser considers the position of the accountant, the insurance underwriter, the investment adviser, the banking house fiduciary and, being a lawyer, above all, the lawyer, in projecting and consummating estate plans. He emphasizes and re-emphasizes, with pragmatic acumen, the fact that no adviser, however well equipped by training and experience, can reason in a vacuum. Good estate planning necessarily presupposes facts against which to plan. No estate planning undertaking is better than the facts assembled as a prelude to the plan. In no sense is Mr. Wormser's book a series of home remedies. It does not suggest what the business man of means should do in the planning of his estate; it emphasizes only that which he should consider. Above all, Mr. Wormser, in having addressed his book to the laity, stimulates interest in estate planning at the point of origin, viz., with the man who has an estate to plan or to plan for. In this effort Mr. Wormser is a sort of modern Robin Hood who is stimulating the rich to scatter a little of their belongings among the good, the poor and the deserving, viz., us lawyers!