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Recent Books on Estate Planning

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TAXATION OF LIFE INSURANCE AND ANNUITIES. By Samuel J. Foosaner.

Chicago: Callaghan & Company, 1960. Pp. 380. $15.00. The web of federal taxation becomes more and more complex, and its entanglement of life insurance and annuities has reached such proportions that it is certainly deserving of a separate treatise. As Mr. Foosaner points out, in 1954 alone there were over 3,000 changes made by Congress in the Internal Revenue Code, a substantial number of which pertained to life insurance and annuities. When this figure is compounded by the applicable Treasury regulations, Internal Revenue Service rulings and the myriad case decisions, the web becomes, as Mr. Foosaner suggests, a snare of entrapment.

In this regard, cognizance must be taken of the fact that virtually all questions pertaining to the federal taxation of life insurance and annuities must be considered from three viewpoints, viz., the income tax, the estate tax, and the gift tax. Regrettably for the practicing attorney, and perhaps fortunately for the academician, the author has elected to follow the traditional method of considering each tax separately in its application to the various forms of life insurance and annuities, rather than interrelating the three taxes in their application to specific problems. Thus, for example, the author treats the income tax consequences of annuities in Chapter 3, the estate tax consequences of annuities in Chapter 11, and the gift tax consequences of annuities in Chapter 12, and the reader is required to consult all three chapters in order to determine the total overall effect of federal taxation on annuity contracts.

Nonetheless, such an approach has its counterbalancing advantages. It permits the author to formulate and enunciate principles of general applicability and, as Mr. Foosaner suggests, "to cover the basic historical background . . . and thoroughly review the prior and existent law." This approach is particularly helpful to the reader who is attempting to synthesize the past and present law in an attempt to determine the future approach to problems in federal taxation in this field.

Of special assistance to the neophyte in the field of life insurance and annuities is Mr. Foosaner's succinct analysis of the legal and practical distinctions and effects of the various types of policies and contracts currently in vogue. Thus, aside from the primary consideration of this treatise, viz., the analysis of federal taxation, the author has presented a concise review of the existing forms and variations of life insurance and annuity contracts. For example, in the forepart of Chapter 3, the author considers and discusses the current forms of annuity contracts such as (1) single premium immediate annuities, (2) single premium deferred annuities, (3) annual premium deferred annuities, (4) joint and survivorship annuities, (5) joint and survivorship annuities with a term certain, (6) retirement income annuities, and (7) various forms of refund annuities. Again, in Chapter 4, the author gives similar consideration to endowment policies.

The author has been most liberal in presenting numerous and frequent examples and illustrations throughout this treatise. Whenever a "picture" would be better than a "thousand words," Mr. Foosaner does not hesitate to use the shortcut. This is especially true where a complicated mathematical formula is under consideration.

Part I of Mr. Foosaner's work, consisting of seven chapters, deals with the application of federal income tax law to life insurance and annuities. In the first chapter, the author considers the general rules pertaining to the exemption of life insurance proceeds from federal income taxation where such proceeds are payable in a lump sum by reason of the death of the insured. However, if insurance proceeds are held by the insurance company "under an agreement to pay interest thereon," such interest is taxable income. Furthermore, the 1954 Code treats a

* This is the second of a three-part series. (Ed.)
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beneficiary of installment proceeds in basically the same manner as though he had received the proceeds in a lump sum and had invested those proceeds in an annuity contract, and the portion of each installment attributable to the interest factor is taxable income, determined in accordance with regulations, subject to the single exception of a surviving spouse of the insured who is entitled to exclude the first $1,000 of the portion of the installment payments which are treated as taxable interest. It is to be noted that this exclusion granted to the surviving spouse applies even where the beneficiary elects the installment option after the death of the insured, provided that the insurance policy permitted such an election.2

In Chapter 2, the author gives consideration to an important exception to the general rule which exempts life insurance proceeds from federal income taxation when payable in a lump sum. Where a life insurance contract has been transferred for a valuable consideration to a person other than the insured, the excess of the proceeds received over the cost is usually taxable. However, the 1954 Code liberalized this exception by admitting of transfers "for consideration" to a partner or a partnership of which the insured is a member and to a corporation in which the insured is a shareholder or officer. These liberalized exclusions facilitate business transactions, especially where the insured is currently uninsurable or of an age rendering the risk more costly. A little known tax snare, to which the revised Code did not extend tax shelter, catches the unwary in a situation such as the following: The insured's employment as an officer of Corporation A, which owns a policy of insurance on his life, terminates. Corporation A offers to sell this policy to the insured for its then interpolated terminal reserve value. The insured, however, realizes that if the policy is purchased by him, it will be includible in his estate for federal estate tax purposes. Therefore, and without considering the impact of income taxes, the insured caused his wife to buy, pay for, and receive ownership of the policy by direct absolute assignment to her from Corporation A. Assume she paid $10,000 for the policy to Corporation A and that, before further premium payment by her, the insured dies and his widow receives $100,000 as the policy death proceeds. She has $90,000 of ordinary taxable income in that year. Unfortunately, the Code did not extend its protective shield in favor of a spouse of the insured, who receives a transfer of insurance for consideration on the life of the other spouse.

In Chapter 3, Mr. Foosaner discusses the income tax treatment of annuity contracts and a new approach adopted by the 1954 Internal Revenue Code. Under the 1939 Code, the annuitant was taxable each year on three per cent of the aggregate consideration paid for the annuity contract. The balance of each annual payment was tax exempt until the total amount so excluded equalled the consideration paid. Thereafter, the total of each annual installment was included in the annuitant's gross taxable income. The 1954 Code provides, in general, that a portion of each installment payment will be excluded from gross income, such portion to be based upon the ratio between the investment in the contract and the expected return. The application of these general rules and their various ramifications are abundantly illustrated in this chapter.

In Chapter 4, the author considers the endowment policy and its hybrid nature, which exempts amounts paid by reason of the death of the insured under section 101(a)(1) of the 1954 Code, and taxes amounts paid other than by reason of the death of the insured under section 72 of the 1954 Code, the latter amounts being taxed in much the same manner as an ordinary annuity, if taken as an annuity.

The author in Chapter 5 discusses the income tax treatment of dividends received under a life insurance or annuity contract. Generally, dividends received prior to maturity or surrender of the contract represent a return of premiums in excess of the cost of carrying the policy and, where the premiums are not deductible for income tax purposes, such dividends constitute a partial return of the pre-

2 Katharine C. Pierce, 2 T.C. 832 (1943), aff'd 146 F.2d 388 (2d Cir. 1944).
miums and are not taxable. However, dividends on annuity contracts are exempt from income tax only if received prior to the date the annuity starts. If received after such date, they are includible in gross income.

In Chapter 6, Mr. Foosaner considers sales, surrenders and exchanges of policies and the income tax consequences of such transactions. Of paramount interest is the question of whether or not there is a "taxable event" under such circumstances, and, if so, whether the gain or loss is "ordinary" or "capital." By indirection, the 1954 Code conceives that life insurance, endowment and annuity contracts are "capital assets." Nevertheless, the revenue authorities have consistently taken the position that the surrender of a contract of life insurance or endowment does not constitute a "sale or exchange." The courts, without exception, have accepted this view. Therefore, when a life insurance or endowment policy is surrendered for its cash value, the gain, if any, will consist of the excess of the cash sum over the cost of the contract, with such excess sum being taxable as ordinary income. A measure of relief is provided where the proceeds are taken in a lump sum, since the tax may be determined as though the payment had been received ratably in the taxable year in which received and the two preceding taxable years.

In Chapter 7, the author discusses the deductibility of premiums by either an individual or a business enterprise. Also considered is whether or not premium payments by an employer for insurance on the life of an employee are to be considered as taxable income to the employee.

Part II, consisting of Chapters 8 through 11, deals with the application of federal estate tax law to life insurance and annuities. In Chapter 8, Mr. Foosaner reviews the historical patterns of the estate tax in its application to the proceeds of life insurance payable to the decedent's estate upon his death. Prior to the 1942 Code, proceeds of insurance on the life of the decedent which were "receivable by the executor" were not entitled to the $40,000 exemption which was available where such proceeds were received by other named beneficiaries and, therefore, it was necessary to determine what proceeds were actually "receivable by the executor." The Revenue Act of 1942 repealed the $40,000 exemption, and this question has lost most of its significance.

In Chapter 9, the author considers the estate tax as it applies to life insurance proceeds payable to a named beneficiary. Prior to 1954, the "premium test" was the primary criterion for determining whether or not such proceeds were includible in the gross estate of the decedent-insured. If the insured paid the premium, directly or indirectly, the proceeds of the policy were includible in his estate in the same proportion that the total premiums paid by the insured bore to the total premiums paid for the insurance policy. Section 2042 of the 1954 Code eliminated this test and now requires such proceeds to be included in the gross taxable estate only where the decedent at his death possessed any of the "incidents of ownership," exercisable either alone or in conjunction with any other person. Mr. Foosaner then considers the meaning of "incidents of ownership" as interpreted by Treasury regulations, Internal Revenue Service rulings, and various case decisions. Included in his discussion are whether or not any of the following rights or powers are considered to be such "incidents of ownership": (1) Power to change the primary beneficiary, (2) power to change the contingent beneficiaries, (3) right to surrender or cancel the policy, (4) right to pledge the policy for a loan, (5) power to elect the manner in which the proceeds are to be paid after the insured's death, (6) right to receive dividends and (7) reversionary interests.

In Chapter 10, the author discusses the additional obstacles which must be considered where the decedent-insured has assigned a life insurance policy in an attempt to avoid the federal estate tax. First, such an assignment must meet the test imposed by section 2038 of the 1954 Code, which includes in the gross taxable estate of the decedent any property which the decedent had transferred during his lifetime where the enjoyment thereof was subject to his power to alter, amend,
revoke or terminate. Second, the proceeds of a policy so assigned will be included in the gross taxable estate of the decedent if it is made in "contemplation of death" as that term is used and defined for all property in section 2035 of the 1954 Code.

As heretofore mentioned, Chapter 11 deals with the application of federal estate tax law to annuities.

In Part III, consisting of Chapters 12 and 13, the author considers the federal gift tax. As he indicates, this tax must be construed in conjunction with the estate tax, or in the language of the courts "in pari materia," since the gift tax law was enacted to prevent taxpayers from divesting themselves of property which would have been subject to the estate tax had the gift not been made. The biggest problem in this area is the question of valuation of gifts, which is considered in Chapter 13. In general, the value of a gift of an insurance policy is measured by its interpolated terminal reserve value at the date of gift. However, where the policy is a single premium contract, or a paid-up insurance policy, the gift tax value is the cost of replacing such contract as a new but identical policy issued by the same insurer at the attained age of the insured on the date of the gift. Frequently, the last mentioned rule results in a very sizeable gift in relation to the death proceeds of the policy.

The use of insurance as a subject matter for proposed gifts in estate planning represents a formidable method for the diminution of federal estate tax. For example, if a gift policy has an interpolated terminal reserve value on the date of the gift of $10,000, but calls for death proceeds of $100,000, the donor has eliminated from his estate $100,000 of gross valuation through the medium of a gift of only $10,000. Interesting questions arise where there is an attempt to assign, by gift, a group life insurance contract on the life of the employee-donor. Equally interesting is the effort of some employees to assign their interest in split-dollar arrangements calling for joint participation between the insured employee and the employer. These fringe programs offer a multitude of perplexing legal and tax problems, many of which are unresolved, even by text writers indulging in the luxury of opinion.

Most of the current treatises on federal taxation of life insurance and annuities are to be found in piecemeal fashion via short articles in periodicals such as those suggested in the bibliography of Mr. Foosaner's work, or they are found in loose-leaf services such as Rabkin and Johnson, Federal Income, Gift and Estate Taxation, or William J. Casey, Life and Insurance Plans. It is indeed a welcome sight to have a treatise on this subject in textbook form in the capable manner written by Mr. Foosaner.

James F. Thornburg*
Edward J. Gray**

Estate and Trusts. By Gilbert T. Stephenson. New York: Appleton-Century-Crofts, Inc., 1960. Pp. xii, 441. $6.00. This small book is a revised and rewritten edition of a work first published in 1949 and revised in 1955. This edition is designed to preserve and to present all the material in the original edition, as well as to present new material. In an attempt to make this edition adequate, up-to-date, and adapted to the differing needs of those with various backgrounds and objectives in the field of estates and trusts, Mr. Stephenson has perhaps sacrificed detail for generalities, and documentation for references; but in so doing he has nonetheless accomplished what he set out to do, viz., he has produced a concise and enlightening contribution to estate planning. Due to its enlarged scope, this edition has been divided into four parts.

Part I, entitled Disposition of Property in Estates and Trusts, presents the ways

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in which property in estates and trusts passes from owner to receiver. It covers property passage by operation of law, i.e., in intestacy; by will; by gift in trust during the donor’s lifetime; and by the grant-and-exercise of a power of appointment.

The first two chapters, “Property and Property Interests,” and “Intestate Distribution,” consist principally of definitions; in the third chapter, “Distribution by Will,” the author delves into freedom to devise. Mr. Stephenson asserts that the power to dispose of property by will is a power granted by the state and not a power inherent in the citizen himself; it is his opinion that the disposition of property by will is a privilege and not an inalienable right.1 His thoughts are in accord with holdings in the supreme court of his own state.2 However, there is strong support for a minority view (which is not mentioned in this text) that the right of inheritance and the right of testamentary disposition are natural rights which, while they may be regulated, may not be entirely destroyed or abolished.3 Courts have questioned whether the state is entitled, legally, to take, directly or indirectly, all of an owner’s property when he dies;4 it might have been advisable not to entirely disregard these arguments. Perhaps the question is moot, as one distinguished professor of the law has stated:

Whether the transmission of property upon the death of the owner to his descendants or to the beneficiaries under his will rests on inherent right such as the state cannot abolish or on a mere privilege which the state may accord or deny, the right is not self-enforcing, and it must be expressed or regulated by statute; so the question of whether the right is a natural right or is a right that depends on positive law is an academic question. The levying of succession or inheritance taxes and the regulation of the right are not a denial of the right, but they are rather a recognition of an existing right.5

Chapter 6, “The Trust as a Dispositive Device,” and the six chapters which follow, are devoted to a discussion of testamentary and inter vivos trusts, insurance trusts, employees trusts, charitable trusts and corporate trusts. The author, noting that there are many characteristics common to all trusts, devotes one chapter to an introduction of the trust as a dispositive device. He then passes on to the characteristics common to personal trusts, and, finally, to the characteristics more or less peculiar to each particular kind of trust.

In Part II, Administration of Property in Estates and Trusts, Mr. Stephenson discusses the unavoidable period of time during which property must be in the hands of and under the administration of someone other than the owner or the receiver, and other related questions. For the property of a decedent the period may be at most a year or two; a minor’s property will be controlled during his minority; an incompetent person, during his incapacity (which may mean his lifetime); the beneficiary of a personal trust or the appointee under a power of appointment, during the period permitted by the applicable rule against perpetuities; the beneficiaries of a charitable trust, during unnumbered generations. The quality of the disposition of property, as discussed by Mr. Stephenson in Part I, depends partly upon the terms of the instrument of gift — the applicable law, the will, or the trust instrument — and partly upon the person or persons through whom it passes from owner to receiver. This makes the discussion of the administration of the property, and of fiduciaries, natural or corporate, an essential part of his text.

Chapter 13, “Fiduciaries,” is introductory and descriptive. It presents the principal capacities in which persons serve in a fiduciary relationship. In the following chapter the author makes a pertinent inquiry regarding the observance of

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1 Text at 36-37.
2 Pullen v. Commissioners, 66 N.C. 361 (1872).
5 Rollison, Wills 3 (1939).
fiduciary principles, and the difference between the standard of conduct required of a lay fiduciary and that of a professional fiduciary or a trust institution.

In Part III, Planning Disposition and Administration of Property, the author notes that none of the recognized dispositive devices is self-operative. None of the persons—known under the general name, fiduciaries—is a volunteer. Of course the property owner has the privilege of selecting his own dispositive device; but if he does not do so, the law will select one for him. So with the selection of the fiduciary. The selection of his dispositive device and his fiduciary is, essentially, planning the disposition and administration of property, and is commonly called estate planning. As one well-known authority has observed, "Estate planning is necessary to help secure the orderly and open transmission of wealth."\(^6\) This text represents a dedication to that proposition.

In Chapter 21, "Estate Planning," Mr. Stephenson points out that the disposition and planning the administration of property are not separate activities, even though so treated in this text. In the next chapter, "Tax Considerations," the author avoids detailed discussion of the federal, state and local taxes related to trusts and estates. But Chapter 24, "Planning Administration of Property," contains an interesting summary of the issues in the "pouring over" problem.\(^7\)

Part IV, Illustrative Instruments of Disposition and Administration, presents four hypothetical instruments: (1) a will, (2) an inter vivos trust agreement, (3) a personal insurance trust agreement and (4) a business insurance trust agreement. They are illustrative of many of the points discussed in the three preceding parts of this text.

For the person who wishes to carry his study of a particular topic further, there is appended to each chapter a suggested collateral reading list with abbreviated citations, and at the end of the text there is a comprehensive bibliography in which the citations of collateral reading are given in full.

William J. Gerardo

RECENT BOOKS ON FAMILY LAW


Introduction

The aim of this survey is to inform the practicing lawyer of recently published books on family law which may be of use to him in his everyday work. The emphasis

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\(^6\) Friedman, The Role of the Wills Course in the Modern Curriculum, 13 J. LEGAL ED. 196 (1960).

\(^7\) Text at 365-66.
is upon the problems of divorce, separation, and ensuing proceedings. No attempt has been made to review books which do not deal with the legal aspect of the field. Foremost in the reviewer's mind has been the consideration that the lawyer who reads the survey is interested in finding out what books will be of practical use to him.

The books are arranged from the comprehensive to the specific, and from the technical-legal to the general. Hence those books which deal with the whole field of family law are put first; those which deal with more particular aspects thereof, such as those dealing with divorce, separation, and child support, appear later. The last two books reviewed discuss a problem peculiar to Catholics and those who represent them: the Canon Law.

**Family Law.** By C. Clinton Clad.

This is one of a number of paperback handbooks published by the Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. Their purpose is to keep the practicing attorney abreast of developments which have occurred since he got out of law school, especially in those fields in which he does not specialize. *Family Law* covers its field from marriage (Chapter II) to divorce (Chapter XV), and everything in between. The approach is conversational, with continual reference to the author's practical experience. There are few citations, and those which appear are there merely by way of example—the book is not, nor is it intended to be, a research tool. It is partly informational, partly argumentative, always interesting. The theme might be stated as "how best to use the law as it is."

Some of the chapter titles are: "Marriage," "Adoption," "Separation by Agreement," and "Jurisdiction for Divorce." About the only possible area of family law not covered is that of parental responsibility for children's tortious and criminal acts, which probably belongs somewhere else anyway. Otherwise, the field is blanketed.

Each chapter contains a discussion of the tax aspects of the particular topic involved. Thus the discussion of divorce contains a full coverage of the responsibilities of the parties for paying taxes on the various "splits" of the marital property involved, including the income tax problems which are involved in deciding what portions of the husband's payments are going to be denominated "alimony" and what portions "support." This treatment of tax aspects as they crop up, rather than in a separate chapter—or a separate book—is handy and helpful. No exhaustive disquisitions on the "technicalia" of taxation are presented; the author contents himself with pointing out in some detail the areas in which tax considerations arise.

Also of interest and importance are the practical hints found in each chapter. Although, as the author says, "there are limbos in the practical practice of family law which defy polite discussion," there is no point in ignoring the more dog-eat-dog aspects. Thus he goes into some detail in talking about the negotiation of separation and divorce agreements, and about the handling of seriously contested divorce actions.

The book is replete with "check lists." Especially good is a two-and-one-half-page list of items of importance in framing a workable separation agreement. (Last item on the list: "Who is to pay the attorneys?") Other "check lists" include a compilation of the methods of insuring sufficient evidence of genuine change of domicile to avoid a contest of one's migratory divorce. After observing that "it is unethical for a lawyer to counsel a change of domicile for the purpose of a divorce," Mr. Clad notes that a lawyer "certainly may advise the client as to the difficulties

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2 Id. at 136.
of proof of changed residence" and then lists 14 points to be considered in establishing the change to the satisfaction of the court! One can imagine the tension-charged moment in the office while the lawyer is waiting for his client to ask about changing residence, lest the lawyer have to advise him (unethically) of the possibilities available. However, it is probably candid to present the check-list, and it is undoubtedly helpful. The author lists, for instance, such rarely-thought-of items as erasing one's name from the local voting register, selling one's cemetery lot, and buying only a one-way ticket to the new domicile.

The discussion of divorce is notable for its sensitive treatment of the policy issues with which the field is fraught. Mr. Clad notes that, regardless of popular feeling that divorce ought to be made rather easy upon proof of an unworkable marriage (and one wonders about widespread currency of this view), social and religious factors make it highly unlikely that any legislature will tamper extensively with the existing setup, which he says is in about the same state of confusion as was prohibition law in the 1920's. In at least partial justification of the present complex and somewhat hypocritical American divorce law, Mr. Clad suggests that perhaps divorce ought to be kept hard to get in the interests of social stability. While this is undoubtedly true, the sensitive observer can hardly help inquiring whether it makes sense to rely on outdated legal conceptions to make divorce difficult. This causes divorce to be denied to those who probably ought to get it most — witness the doctrine of recrimination. A more selective method of making divorce hard to get would be perhaps more satisfactory. As one alternative, Mr. Clad appends to his work the text of a proposed Uniform Divorce Law prepared by the National Association of Women Lawyers, which is founded on the idea that "the continuance of a marriage between two parties which has become unbearable to the parties, may be unfair to the children, if any, and may be of no value to the State."

At the end of the text is a list of forms, including sample antenuptial and separation agreements, sample property settlements, and required papers for various proceedings. The book suffers from the lack of an index. In a volume this size, an index is almost a necessity for quick and easy reference. However, since the book is intended more to be read cover-to-cover and to be used only occasionally for reference, users will probably not be greatly inconvenienced by this deficiency. To the lawyer who only occasionally deals with family law, the book ought to be helpful. To the specialist, it offers a challenging collation of up-to-date law in readable form, with extensive discussion of policy issues, for a night's reading.

**Law of Marriage and Divorce Simplified.** By Richard Mackay.

A letter from the publisher accompanying this little book states that it has sold 400,000 copies since it was first printed in 1940. It offers a convenient way of avoiding a lot of hunting through the statute books; this may explain the large sale.

The book consists of an eight-part division of the law of marriage and divorce, with one-page descriptions of each field, followed by a table of the statutory provisions of each state dealing with the topic. The statutes are not set out verbatim, but simply described. For instance, the divorce section contains a state-by-state listing of residence requirements and grounds for divorce. For those who need quick and easy access to this sort of information, this book is an ideal source.

One caveat may be mentioned. There are misleading characteristics which might be overlooked by the casual user. The book deals only with statutes, without mention of decisional law. For example, in the state-by-state listing of grounds for separation, the book states that in Minnesota, there is "no statutory right to separation." This is strictly true; the legislature abolished the old divorce *a mensa et thoro* in 1933. However, the jurisdictional statutes still provide for an action of "separate

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3 Ibid.
4 Id. at 226.
5 MACKAY, LAW OF MARRIAGE AND DIVORCE SIMPLIFIED 46 (3d ed. 1960).
maintenance; the state supreme court has held that in the absence of a statute, equity may award separate maintenance to a wife who "justifiably" moves out on her husband, and a decision which came down after the abolition of the old limited divorce held that the statute did not abolish "separate maintenance." Hence, for all practical purposes, one can get a separation in Minnesota.

Except for the aforementioned strict adherence to statutory provisions, the book gives a complete picture of the current state of the technical requirements for marriage, separation, divorce, and annulment.

The Divorce Handbook. By Florence Haussamen and Mary Anne Guitar.

The Divorce Handbook is just that. In their introduction, the authors, two free-lance writers, address the volume to "the thousands of men and women who, each year, decide to get a divorce." It attempts to give a complete picture, in layman's terms, of the divorce situation in this country today. They devote considerable attention to divorce counseling agencies, attorney-client relations, grounds for divorce, defenses, and the like. The book also contains a rather cloying description of the local culture of Reno, for the benefit of those who might be interested in a migratory divorce in a congenial clime.

The Handbook is extremely well-written, better perhaps than any other book here surveyed. The tone is suggestive of Woman's Home Companion, of which Mary Anne Guitar is former Senior Editor for Articles. Its description of divorce law is liberally laced with a refreshing layman's (or laywoman's) viewpoint on certain of the less intelligible phases of present-day law, such as the "doctrine of discrimination," on which the authors write:

The legal philosophy here seems to be that they [the parties] deserve each other and must remain bound in what one writer has termed "holy deadlock."

There is a trend in some states toward awarding a divorce to the person least in fault. This kind of decision calls for some fancy judging. While such free-wheeling prose may strike the more reverent law student as vaguely sacrilegious, it is undeniably entertaining. And there is something to be gained from any informed lay criticism of the law, which often supplies in perceptivity and common sense what it may lack in legal accuracy.

Certain aspects of the book might result in misunderstandings between a lawyer and his client, should the client happen to read the book literally. For example, in discussing the problem of the migratory divorce, the authors say that "the law does not frown on so-called migratory, or foreign, divorce per se." Whatever may be the strict legalities, the fact remains that some lawyers consider it unethical to advise a client to change domicile to obtain a divorce, since it will involve some degree of misrepresentation of domiciliary intent to a foreign court, even though, in individual instances, the foreign court may be only too willing to fictionalize the domiciliary requirements. The authors ought to have taken note of this difficulty, since a client whose lawyer opposes migratory divorces might think him archaic, on the basis of what is said in this book.

Some may quarrel also with the fundamentally amoral approach to divorce used in the Handbook. It must be noted, however, that the authors intend to leave decisions up to the reader and choose an approach best suited to this end. Early

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6 MINN. STAT. ANN. § 518.09 (1947).
7 Pye v. Magnuson, 178 Minn. 531, 227 N.W. 895 (1929).
8 Bliss v. Bliss, 208 Minn. 84, 293 N.W. 94 (1940).
10 Id. at 83.
11 Id. at 121.
12 See, e.g., CLAD, FAMILY LAW 136 (1960); DRINKER, LEGAL ETHICS 122 (1953).

Drinker presents the view that there is nothing wrong with counseling a change in domicile to evade state restrictions on remarriage after divorce; the fact that it was considered necessary for the New York County Committee to rule on this question shows that there are ethical problems in the whole area which give pause to thoughtful attorneys.
in the book they take note of the various social and religious aspects of divorce and suggest ways in which prospective "divorcers" (authors' term) can obtain guidance on the moral aspects of their actions. This is all that can be expected. The book is not a theology text.

One of the best features of the work is its common-sense explanation of legal terms and of evidentiary requirements. Collusion, condonation, and connivance are distinguished and elaborated in understandable English, devoid of legalese. The devious operations of the doctrine of unclean hands are explained—as well as possible—so that the prospective litigant may avoid sinning himself right out of court.\(^\text{13}\) At each stage of the discussion, well-chosen examples taken from the reports are expanded. The authors pay the law the courtesy of not condemning without specific examples. Though they agree with the statement that divorce procedure is a "rotten mess,\(^\text{14}\) they take care to expand on what they consider its messy aspects and are generous in explaining the legal conceptions underlying what they view as absurdities.

At the end of the book is a sensitive exploration of the immediate social effects of a divorce. Who keeps the mutual friends? How soon can a divorcer begin to socialize? How best to get the word around that one is free? These are problems no court ever deals with, and the discussion here is frank and fruitful. The exposition of the emotional aspects of the post-divorce period is especially good, and might well help the "divorcer" who feels "alone in the world" to find appropriate psychological aid, both within herself (or himself) and from professional counsel.

One wonders how this helpful work might reach those at whom it is aimed. It is difficult to imagine someone who is contemplating a divorce going out and getting a book on the subject. Who keeps the mutual friends? How soon can a divorcer begin to socialize? How best to get the word around that one is free? These are problems no court ever deals with, and the discussion here is frank and fruitful. The exposition of the emotional aspects of the post-divorce period is especially good, and might well help the "divorcer" who feels "alone in the world" to find appropriate psychological aid, both within herself (or himself) and from professional counsel.

One wonders how this helpful work might reach those at whom it is aimed. It is difficult to imagine someone who is contemplating a divorce going out and getting a book on the subject. Conversely, those who have already been divorced will not be interested in most of the information here. There are some portions—notably the general explanations of divorce law and evidence—which might be of definite value to an actual or potential litigant. In fact, it would help a lot if all clients were as well advised as this book's readers by the time they came into their attorney's office. Those things which some might consider inaccuracies in the book are due more to deliberate avoidance of multifarious details than to any error of the authors. If the attorney explains to his client that the law differs from state to state, it might not be a bad idea at all to have him browse through this work before the divorce proceedings. If nothing else, the discussion of defenses might save the client from seriously and perhaps irretrievably compromising the action.

Other parts of the book are less useful. The explanations of the various divorce mills now grinding, the tabular charts of the state divorce laws, and such like, will be of little interest to the average litigant, who is restricted pretty much to his own jurisdiction by finances. Those who can seriously contemplate six weeks or more in a foreign jurisdiction will probably have more detailed advice on the subject than is contained here.

**INTERSTATE ENFORCEMENT OF FAMILY SUPPORT (THE RUNAWAY PAPPY ACT).**

By William J. Brockelbank.

This short work by the Idaho Uniform Law Commissioner is aimed at anyone who must enforce support duties against defendants who have fled the jurisdiction. Although the book as a whole is directed to attorneys and social workers, it ought to be equally useful to a judge.

The Uniform Reciprocal Enforcement of Support Act was released by the Commissioners on Uniform State Laws in 1950. Since then it, or substantially

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13 For an amusing and thought-provoking discussion of the whole field of matrimonially unclean hands by a recognized scholar see Gaffree, Some Problems of Equity 73-84 (1950).

14 Haussamen and Guitar, op. cit. supra note 9, at 16. The authors ascribe this vivid characterization to the American Bar Association.
similar legislation, has been enacted in all the states. Hence the scheme it erects is, to all intents and purposes, universal. Although the act is often called the “Runaway Pappy Act,” it allows for the interstate enforcement of all legally imposed duties of family support. Either private parties entitled to support or state agencies which have been supporting the defendant’s dependents may avail themselves of the act; it extends, for instance, to alimony payments, though these are possibly not “support” in the strict sense of the word.

The party entitled to the support initiates proceedings by filing in an appropriate court of his jurisdiction (called the “initiating” state) a petition setting forth the facts of the case and such information as will help the court to find the defendant. The court, if it finds that the petition sets forth facts from which a duty of support could be found, and that a court of another state may obtain jurisdiction over the defendant or his property, must forward copies of the papers to the other court (called the “responding” court). Upon receiving the necessary papers, the responding court must undertake to obtain jurisdiction over the defendant or his property. The local prosecuting officer is charged with responsibility “diligently to prosecute” the action. Should the defendant answer the complaint with a defense (Mr. Brockelbank notes that seven out of 10 defendants do not), a hearing is held, at which depositions of the plaintiff may be admitted. The result of this action is a support order issued by the court against the defendant, much the same as would be the result of an action where both parties were resident in the responding jurisdiction.

The act also provides for rendition of those accused of the crime of nonsupport in other states, and for interstate registration of support orders. The latter provision is made necessary because, as the author states, support orders are not usually final, and are hence not within the ambit of “full faith and credit.”

It ought to be mentioned that the Act with which Mr. Brockelbank deals is the 1950 Act as amended by the Uniform Laws Commission up to 1958. Some of these amendments are material, and the practitioner has no guarantee that his local legislature has adopted them.

Mr. Brockelbank’s book falls into two halves. The first is a section-by-section analysis of the Act; the second is a collection of forms. The text covers about 85 pages, and is extensively annotated to all jurisdictions. Since the act is only 10 years old, there are not too many cases to be noted. It would appear that the publishers plan to put out pocket parts to keep the book up to date.

It is difficult to describe the author’s approach. On the one hand he is trying to provide a technical manual for people who have need to enforce support duties; on the other he is trying to urge upon the reader and the courts’ interpretations of various sections of the act. He is a member of the Uniform Laws Commission; his opinion is entitled to considerable weight. On certain points his interpretations are appealing; in fact one wonders why the act does not explicitly deal with the situation he posits. However, the interpretive arguments tend to get in the way, and some are of dubious legal validity. For instance, the author suggests that to impose upon a fleeing defendant the duties of support he might have under the laws of the state from which he fled would be an insidious way to inhibit free movement among the states, and hence would be unconstitutional under the rationale of Edwards v. California. Thus, one supposes, a defendant father of an illegitimate child born in Minnesota could flee that state to Missouri and be protected by the Constitution from having to support his offspring. This seems unreasonable, especially where the sole purpose of the move was to avoid the duty to support the child.

16 Id. at 70.
17 Id. at 29.
18 314 U.S. 160 (1941).
19 The table at page 30 lists support duties for all states.
The book is extensively annotated; it is conveniently arranged; it is replete with charts and forms to cover almost every conceivable phase of a support action, from letters to recalcitrant husbands, to sample orders to sheriffs ordering levy on defendant's property.

**WITH THIS RING.** By Judge Louis H. Burke, with The Gordons.

This book describes an approach to marital problems only a lawyer could devise. Its story ought to be of peculiar interest to members of the profession.

Judge Burke was, during the period of time covered by his book, a judge of the Conciliation Court of Los Angeles. He is at the present time presiding judge of the Los Angeles Superior Court. The Conciliation Court, the subject of the book, is a curious type of forum which deals only with people who are parties to divorce or separation actions. The object of the court is to try to get the parties back together again. To do this, the court employs conferences, counselors, and a device—invented by Judge Burke—called the Reconciliation Agreement.

This agreement is drawn up by the parties themselves upon a decision to try to get along together. Each party subscribes under possible contempt penalties. The agreement sets out in detail the elements of the settlement which has been arrived at, down to such minutiae as the type and quantity of alcoholic beverages the husband is going to drink, the tone of voice the parties will use in speaking to one another, and the frequency of intercourse.

This is perhaps a cold approach to marriage, but it contains an application of a precept of legal wisdom as old as the common law: "People remember what they write down." Judge Burke had found in his conciliation work that interviews with couples in distress were more likely than not to end up in a passionate outpouring of words of repentance and promises of improvement, which would be forgotten as soon as the parties got home. Thus whatever was achieved by the Conciliation Court was often undone by human nature.

After a year of such frustrations the judge, while mulling over the idea that marriage was a contract, was seized with the thought that it could be made explicit like any other agreement. So many of the couples before him misunderstood the elements of the marriage contract. Perhaps a written contract would help.

*With This Ring* is a collection of fictionalized episodes, drawn from Judge Burke's counseling experience, which illustrate the marital problems which gave rise to the various clauses now incorporated into the Reconciliation Agreement. Well-chosen and grippedly told, the stories present a pleasant contrast to the sere tone of the usual case history. They make good reading and—what is more—good sense. Some of the problems are as old as the Wife of Bath; others are the peculiar fruit of easy credit and modern times. The wife who bargains with her body to get her husband to vacuum the house or opens six charge accounts to get revenge; the husband who beats his wife or plays around with the office girls—all are in this book; all find expression in the dignified clauses of the agreement.

Each couple's agreement is now put together from a group of more-or-less standardized clauses worked out from experience to have clarity and penetration of language. Each couple's agreement reflects their peculiar problems and sets forth the solutions which have been agreed upon, in language as frank and explicit as possible. Once the parties sign the agreement it is given the force of a court order. Several parties to agreements have been put in jail for wilful breach, but Judge Burke notes that the use of contempt powers is exceedingly rare.

How successful has this approach been? Judge Burke notes that in a two-year period over 40 per cent of the marriages which came before the court were reconciled. When one remembers that these marriages were in such serious trouble that they had been taken to a divorce court, the figure becomes even more significant. The marriages saved included parents of over 2,000 children. The savings here in terms of human misery and juvenile delinquency alone are great.
This legalistic approach to such delicate problems may not be every man's cup of tea. Undeniably there is something clumsy and bludgeon-like about putting the power of a court behind an agreement, say, to take one's wife to dinner once a week. Nevertheless, the idea seems to work, and it is worth looking into by those whose work is the preservation of marriages.

Appended to the book, incidentally, is the full text of all the clauses which are presently part of the Reconciliation Agreement. A casual reading turns up almost any problem one cares to name which can arise from the married state. They are worth reading if for no other reason than that their affirmations constitute a rough instruction for marriage.

To the lawyer or judge whose first thought when confronted with a divorce situation is to reconcile the parties, this book offers wise, practical suggestions as to how to go about it. To the general reader it provides compelling reading about people with deep personal problems, from which he may draw insight into his own.

The Sacred Canons. By John A. Abbo and Jerome Hannan;
Nullity of Marriage. By Frank J. Sheed.

These books share a common subject—the Canon Law of marriage and divorce; this discussion deals with The Sacred Canons only insofar as it deals with matrimony.

The Sheed work, though small, offers a concise and accurate explanation of the Catholic law of marriage and annulment. Although the title purports to deal only with nullity, it is the hallmark of a conceptualist system that one cannot speak of the negation of a concept without first talking about the concept itself.

Tersely stated, annulment is the process of discerning whether two people are married to one another. It is perhaps trite to reiterate that a declaration of nullity is in no sense a divorce, but merely a finding that no marriage ever existed. The only way two Catholics who purport to be married can secure release from their "bonds" so as to be able to remarry is through the annulment process. Hence it may be of great importance to the lawyer who deals with divorce cases to be aware of the circumstances under which his Catholic clients might be entitled to canonical as well as civil relief. In appropriate cases the lawyer will be able to assist his client toward peace of mind as well as a civil divorce decree.

There are reasons other than the merely practical for studying the canon law of marriage. Since the full roundedness of the concept "marriage" is so essential to the canonical determination of its existence, studying the law improves one's understanding of the nature of matrimony. And it is fascinating to watch a civil-law system work itself out, in a manner entirely different from that of the casuistic common law.

The marriage law of the Catholic Church is set out in Canons 1012 to 1143 of the Codex Iuris Canonici. Although The Sacred Canons does not contain a translation of the Latin text of the Canons, it is nevertheless a full-dress commentary along the lines of the civil jurisprudents, with a complete exposition of each canon and citations to the relevant authorities.

The Sheed work is an exposition of the matrimonial canons, but does not follow the order and arrangement of the Codex. Mr. Sheed's arrangement is more conducive to study of the important points of the law, since the canons themselves must deal with a good many corollary considerations which are not really relevant to the general discussion.

In reading The Sacred Canons one is struck immediately with the difference between the canon-law approach and the common-law approach. Where common law texts are useless unless annotated to the relevant cases, such an exposition as The Sacred Canons is annotated to the writings of the best authors on the subject; presumably, once written, it becomes an authority itself, to be cited and used in court. The distinction between "primary" and "secondary" authority, which the
common law makes so much of, is not specially relevant to the canon law. Where the common lawyer cites to a case, the canonists cite to a writer—or, rarely, to the statute itself.

The common lawyer reading this canonical work (or, one would suppose, any others) is struck with a vague feeling of insecurity. Things seem to be so “arguable.” Where is the case law? Where, in other words, is the “word”? Quite probably a canonist would feel the same way when confronted with the Key Number System. While the common law undoubtedly provides for greater certainty in the instance where one can find a “case” which exactly covers his facts, the canonical system has the advantage of having been worked out coherently on an over-all basis, rather than having been left to the demands of individual litigants. Thus by reference to the great writers the canonist can find out with fair certainty how a situation which has not been previously decided will be judged.

Finally, the canon law differs fundamentally from secular law in that it makes moral certainty the standard for the validity of judgments. For instance, a declaration of canonical nullity which is based on false testimony is no good, if the falsity is known to one or both of the parties; it is good—formally at least—as to those parties who do not know of its false basis. Regardless of what the judgment says, it is the moral situation of the parties which is determinative. At common law the reverse is true. In the interests of social stability, the common law judgment is good until overturned by a competent court, regardless of what one of the parties might know about a material perjury. The liar may suffer, but his lying does not in and of itself change the fact of judgment. The common law cannot allow the validity and enforceability of judgments to depend upon the individual conscience; the canon law, by its very nature, can hardly do otherwise.

Mr. Sheed’s work begins by setting out briefly the canonical incidents of marriage—its indissolubility and its sacramental character: From this he proceeds to an examination of the prerequisites, and the effect of their absence upon the validity of the marital status. He divides the “grounds of nullity” into four categories:

A. What was agreed to was not marriage.
B. The parties were not free to marry:
   i. at all.
   ii. each other.
C. The parties did not agree freely.
D. The parties did not observe the due form.

Under the first heading, he discusses the case where one or both of the parties did not intend the marriage to be permanent—the “companionate” or “terminable” marriage. In this case, the “marriage” is a nullity because the requisite contractual intent was not present. As a matter of interest, Mr. Sheed notes that it was upon this ground that the marriage of Guglielmo Marconi was annulled. He had entered the marriage upon the condition that he would not interfere with his wife’s seeking a divorce.

Under the heading “The parties were not free to marry,” Mr. Sheed discusses the various canonical impediments which make a marriage either invalid or illicit. The third category covers the various considerations of “defective consent”—duress, fraud, etc. The last category is rather less important, since failure to observe the due form is rare in civilized society, and in uncivilized society the form is usually not so rigorously insisted upon.

Throughout the book, Mr. Sheed uses a sort of dialectic, comparing and contrasting the canon law with relevant decisions from New York and England as representative common-law jurisdictions. This is a most useful method of discussion, as it points out the sources of confusion which are likely to arise where secular law and church law use the same words to denote different concepts.

—20 SHEED, NULLITY OF MARRIAGE 21-3 (2d ed. 1959).
After full elaboration of the positive law, Mr. Sheed turns to argument. Ostensibly to illustrate the finer points of the law of defective consent, he sets out in an appendix the text of the opinion of the Roman Rota in the Consuelo Vanderbilt-Duke of Marlborough annulment case. One suspects that the real reason for the inclusion of this opinion is to demonstrate that canon law is a genuine legal system, and not merely a way rich Catholics get a divorce.

The Vanderbilt-Marlborough opinion is interesting. The ground alleged for annulment was metus reverentialis, "reverential fear," inducing or coercing consent. In this case, Miss Vanderbilt was forced into marriage by her socially ambitious mother. After she had been married for 10 years, to the Duke of Marlborough, and had borne him two children, she left him and got a legal separation. Fifteen years later, she brought suit in the church courts to have the marriage declared null. It was so declared by the Roman Rota on the grounds that Mrs. Vanderbilt's coercion of her daughter prevented Consuelo from freely consenting to the match.

The aspect of this case which most strikes the eye of the common lawyer is the fact of cohabitation for 10 years after the challenged marriage ceremony. The facts would seem to cry for the application of a doctrine of ratification or estoppel. It is indeed hard to imagine how Miss Vanderbilt could not have known her marriage was coerced; yet she continued to live with the Duke, and bore his children. Not so, says the Rota. One cannot presume the knowledge of canonical impediments in women.

Whatever the persuasive force of the Vanderbilt opinion, there are more convincing supports for Mr. Sheed's arguments about annulments. He notes, for instance, that an average of only 35 to 40 decrees of nullity are granted yearly by the Roman Rota; that the expense of an appeal to Rome is only from $100 to $500; that proceedings in forma pauperis are freely available. Against these facts he compares divorces granted in the United States in 1956—382,000. If nullity is the "Catholic divorce," there are few such divorces.\(^{21}\)

*The Sacred Canons,* on the other hand, is not for the ordinary law library. The law it discusses is not everyday law for anyone but the few canon lawyers in the country. Its treatment of the matrimonial canons, while thorough and complete, will not add significantly to what has been said by Mr. Sheed. The book is notable, though, in its many references to the secular law of the United States, especially with regard to matrimonial impediments. Where the authors deal with American secular law, they discuss it in terms of its agreement with or contravention of the natural law, especially the natural right to marry. Hence miscegenation statutes, say the authors, are a usurpation of authority and in contravention of natural rights as applied to baptized persons. This discussion might conceivably be of value to one whose client wished to contract such a "miscegenistic" marriage.

*Joseph P. Summers*

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\(^{21}\) *Id.* at 124-27.