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# Book Reviews

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## BOOK REVIEWS

DOCUMENTS AND DATA FOR ESTATE PLANNING. By Lawrence X. Cusack<sup>1</sup> and Thomas J. Snee.<sup>2</sup> Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1963. Pp. xvii, 476. \$15.00. This is a companion to the authors' 1959 "how to" book, *Principles and Practice of Estate Planning*.<sup>3</sup> Their purpose is to create in the reader's law office "a procedural system, illustrated at each step by checklists, worksheets, specimens of documents and forms, and supplemented with tables and formulae most frequently of use in estate planning."<sup>4</sup>

What are here denominated check lists are almost invariably full of valuable reminders on points to be covered in client interviews and preliminary drafting. They are necessarily more detailed than many situations require, but it is difficult to believe that the authors have overlooked any significant reminders for more complicated estates. The "estate analysis checklist,"<sup>5</sup> for instance, covers ten printed pages. The "will execution checklist,"<sup>6</sup> a sort of outline for execution conferences, is a superb review-in-advance to assure a valid execution, and to prepare, if preparation is altogether possible, for the occasionally inevitable contest suit. This latter form presents a number of super-security devices which no lawyer could afford to use for all, or even a significant number, of testators, but which could be invaluable in a difficult situation. A "will execution affidavit,"<sup>7</sup> for instance, is recommended (without comment), probably for the occasional cases where the witnesses are not dependable.<sup>8</sup> The authors also suggest a "will execution memorandum"<sup>9</sup> as a record of what went on at the execution conference. This short record could be invaluable in a contest suit, especially where it is not the lawyer's practice to keep a diary of his daily activities.

There are a number of other relatively rare situations which these forms attempt to meet. The bequest to a member of a religious order, who may have taken, or be planning to take, a vow of poverty, is an interesting example. The authors' forms provide a substitutional gift to the legatee's order which assures an estate tax charitable deduction and, for the religious order at least, avoids the dismay which the Society of Jesus must have felt after the Court of Appeals' decision was rendered in *Estate of Barry v. Commissioner*.<sup>10</sup> If the client is interested in a gift-over to someone in the family, rather than a substitutional gift, the authors' forms will require a certain amount of tailoring.

The forms are generally useful in all jurisdictions. There are some local qualifications; for example, the forms contain provisions for a spendthrift trust<sup>11</sup> which will have to be adapted to local law<sup>12</sup>; their inter vivos directions to a trustee to

1 Member of the New York Bar.

2 Cameron Professor of Law, Fordham University School of Law.

3 SNEE AND CUSACK, *PRINCIPLES AND PRACTICE OF ESTATE PLANNING* (1959), referred here to as *PRINCIPLES AND PRACTICE*.

4 Text vi.

5 Text 5-14.

6 Text 319.

7 Text 321.

8 Professor Leach suggests a combination of the "will execution affidavit" and the "will execution memorandum" as a precaution in cases where contest is a possibility. LEACH, *CASES AND TEXT ON THE LAW OF WILLS* 46-47 (2d ed. 1960).

9 Text 322.

10 311 F.2d 681 (9th Cir. 1962), *affirming* 34 T.C. 160, held that a gift to "John Barry, S.J.," was not, for federal estate tax purposes, a gift to the Society of Jesus, even though the testator was aware of a contract between John Barry and the Order which required John Barry to surrender to the Order any property he received by way of legacy. The forms on this subject are at Text 235, 344.

11 Text 113.

12 Their validity, for instance, is in doubt in Pennsylvania and Ohio. *North Side Deposit Bank v. Clark*, 110 Pittsburgh Legal Journal 110 (1963); *Payer v. Orgill*, 191 N.E.2d 373 (Comm. Pl. Ohio 1963); *Sherrow v. Brookser*, 189 N.E.2d 90 (Ohio 1963). And, even in juris-

accumulate income until a beneficiary reaches age 30<sup>13</sup> may run afoul of local limitations.<sup>14</sup> The same observations can be made about *in terrorem* will clauses<sup>15</sup> and very broad fiduciary powers.<sup>16</sup> These are not precisely criticisms; it is probably impossible to draft forms on these touchy areas which could enjoy universal validity and still approximate what the client wants. On the other hand, there is in the book apparently only one form, a suggested certificate of incorporation for a charitable foundation in New York,<sup>17</sup> which is confined to the state of the authors' practice, and that is undoubtedly inserted as example rather than for imitation.

The check list part of the book features a thorough "summary of proposed will"<sup>18</sup> which ought to prove a time saver. It allows client and lawyer to discuss will provisions from an outline until all major planning questions are answered; then, and only then, need drafting begin.

Check list, memorandum and will forms contain provisions for burial and monument erection<sup>19</sup>; all of these assume testamentary direction. Funeral provisions in a will, or in a document kept with a will, are in danger of being not only useless but troublesome. Wills are traditionally not read to the family until the testator has been buried, and directions in the will which disagree with a decision the family has already made and carried out are apt to disrupt harmony during the mourning period. If the testator's wishes on burial have been communicated more informally, and *inter vivos*, as they must be if they are going to be carried out, there seems little purpose in putting them in a will.

One of the most valuable features is a thorough set of tables and formulas for estimating tax and settlement costs; three chapters are devoted to this information, and they cover all of the expectable arithmetic — gift and estate tax rates, savings from using marital deduction and *inter vivos* gifts, charitable gift advantages, etc., along with life expectancy and annuity valuation, and even the valuation of good will in business estate planning.

A no-comment format, pursuant to which forms and check lists are presented without qualification, footnote or caveat, is probably the book's most serious weakness. The authors might answer that they have treated of all relevant subjects in their 1959 book, and that their bibliographies refer to numerous reliable authorities, but the answer is insufficient to a lawyer who uses one of these forms unaware of pitfalls known only to the specialist. The book is after all, impliedly directed to general practitioners.<sup>20</sup>

There is no such thing as a purely formal form; each of these involves complicated substantive legal and tax considerations, and, at least in the most subtle

dictions which permit spendthrift trusts, there are varying attitudes toward principal, accumulated income and special claimants, such as support and alimony judgment creditors. See *Meyer v. Reif*, 217 Wis. 11, 258 N.W. 391 (1935); *Todd's Ex'rs v. Todd*, 260 Ky. 611, 86 S.W.2d 168 (1935); *Young v. Easley*, 94 Va. 193, 26 S.E. 401 (1897); RESTATEMENT (SECOND), TRUSTS § 155(2). The authors suggest the use of these provisions and analyze their tax consequences at PRINCIPLES AND PRACTICE 157, 291-98 and 324.

13 Text 81.

14 The statutes are analyzed at NEWMAN, TRUSTS 130-41 (2d ed. 1955); see also 1 SCOTT, TRUSTS § 62.11 (2d ed. 1956), and BOGERT, LAW OF TRUSTS § 53 (4th ed. 1963).

15 Text 367:

I hereby direct that if any person entitled to any devise . . . shall directly or indirectly contest the probate of this will . . . the devise, bequest or other benefit granted in favor of such person . . . shall immediately thereupon be revoked . . . and the property . . . shall thereupon pass to (blank).

See ROLLISON, WILLS 377-83 (1939); 1 ROLLISON, CASES AND MATERIALS ON ESTATE PLANNING 364, 367 (1959); ATKINSON, WILLS 408-10 (2d ed. 1953).

16 Text 119-20.

17 Text 236.

18 Text 309.

19 Text 291, 307, 334.

20 Text *v-vi*.

areas, the reader is entitled to a red flag now and then. The inter vivos trust provisions for minor support under Section 2503(c) of the Internal Revenue Code of 1954 are a good example.<sup>21</sup> The authors have provided for the minor's premature death and for corpus distribution to the minor's estate, or, in the alternative, as he may appoint, and, in default of appointment, by way of gift-over. Some comment on this latter device might be useful, lest the busy drafter fail to reflect how useless a gift to a minor's estate will probably be and how unlikely it is that a minor will exercise a power of appointment, even if local law will let him exercise it.<sup>22</sup> The gift-over in the event of the premature death of the beneficiary of a minor support trust is a limited but significant estate planning loophole, at least important enough to deserve a footnote, if the authors were offering footnotes, which they are not.

Much the same criticism could be made of the no-comment policy as it bears on the book's formula and fractional-share marital deduction gifts<sup>23</sup>; on broad fiduciary powers clauses<sup>24</sup>; on *in terrorem* will contest clauses<sup>25</sup>; and on provisions for trust accumulation.<sup>26</sup>

Two clauses, one in an inter vivos trust form, and one in a will form, "request" the "selection" of legal counsel by the client's trustee or executor. The language confirms that the authors know, and assumes that the readers know, that a direction to employ attorneys is not binding on the fiduciaries.<sup>27</sup> But they say nothing about enforceability, consistent with the no-comment policy. That would be excusable if the only infirmity were enforceability, and if both clauses were not questionable under Canon 27 of the Code of Ethics of the American Bar Association.<sup>28</sup> It is not improper to include this sort of provision in a will, at the client's request, but early opinions from official committees indicated the strongest sort of insistence that the idea of employing the drafter as the executor's attorney originate in the client's mind,<sup>29</sup> and the most recent informal opinion<sup>30</sup> on the subject does not remove that qualification.<sup>31</sup> The provision is proper only if these precautions are observed:

21 Text 156-57.

22 A minor probably cannot exercise the power if he is not competent to execute the instrument designated as the means of exercising the power. See SIMES, FUTURE INTERESTS 199-201 (1951).

23 Text 278.

24 Text 119.

25 Text 367.

26 Text 81.

27 1 ROLLISON, CASES AND MATERIALS ON ESTATE PLANNING 262 (1959), which reprints an edited version of *In re Wallach*, 150 N.Y. Supp. 302, 164 App. Div. 606 (1914), *aff'd* 215 N.Y. 622, 109 N.E. 1094 (1915), with annotations.

28 CANONS OF PROFESSIONAL ETHICS, Canon 27 (West 1957):

It is unprofessional to solicit professional employment by . . . personal communications . . . not warranted by personal relations. . . .

29 AMERICAN BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, No. 210, p. 423; Nos. 263A, 264A, 265A and 266A, p. 641 (1957), especially No. 263A, p. 641, which emphasizes that the clause is proper only "where the client himself desires this." See OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS ASS'N, No. 60, p. 26 (1956): "[T]here is no essential or inherent impropriety in inserting such a provision at the request of the client."

30 Informal Opinion No. 602 of the Standing Committee on Professional Ethics of the American Bar Association, printed at 49 A.B.A.J. 565 (1963):

It is not improper for a lawyer preparing a will to include at the request of the testator a direction to the executors that such attorney be employed as attorney for the estate; but such a provision is not binding on the executors.

31 Canadians apparently consider the clause unethical in any event. ORKIN, LEGAL ETHICS 104-05 (1957), quoting, without translation, *St. Denis v. Thibodeau*, (1929) S.C.R. 346, and paraphrasing the opinion: "It is improper, to say the least, for a notary who draws a will to include in it a provision that he is to be employed by the executors of the testator for the carrying out of the will."

1. The client must be advised that it is not binding on the executor.<sup>32</sup>
2. The "request" can be used properly only where "the testator himself desires" and where he, not the lawyer drawing the will, suggests its use.<sup>33</sup>
3. This should be regarded as in effect a legacy to the lawyer and the client should be warned to obtain independent legal advice on the subject, and possibly even have the request made in a codicil drawn by another lawyer.<sup>34</sup>

These are important qualifications. Given the authors' no-comment policy, it would probably have been better to omit these clauses from their forms. They cannot be used unless the client suggests their use, and caution may require referring the client to another lawyer to have the request carried out. They have, therefore, very little utility in a set of office forms which, the author suggests, are to be duplicated and filed under a code system, for routine use.<sup>35</sup>

The ethical problems presented in the employment clauses are soluble with a minimum of footnoting, but another of the authors' suggestions seems to me to raise even more serious ethical objections. In their earlier work on the substantive law of estate planning, the authors said: "(A)n estate plan should not be regarded as static. When completed, it should be a flexible charter for the future, but always subject to modification in the light of changing circumstances."<sup>36</sup> To carry out the principle, they recommend that "the lawyer arrange with the client [at the time of execution] for the periodic and systematic review of the plan and will."<sup>37</sup> They now present, in furtherance of this objective, two suggested forms for letters from a lawyer to a client for whom he has drawn a will.<sup>38</sup> (It is not entirely clear whether the letter is to be sent only to present clients, or to any person for whom the lawyer has drawn a will.) Neither form has a fictional date, but the date of the book, and references in one form to a will executed in 1961 suggest that the letter is to be written about two years after the client, or former client, has executed his will.<sup>39</sup> Both letters make initial reference to "our practice of periodically reviewing clients' wills and estate planning."<sup>40</sup> Both letters then refer to changes in facts which affect the estate plan or will under consideration, refer to enclosed legal memoranda and conclude, respectively, with these final paragraphs:

If you feel that any of the matters mentioned herein indicates a meeting, we shall be glad to meet with you at your convenience.<sup>41</sup>

and:

If you will let me know whether you wish any revision made, I would be pleased to draft a codicil or new will and send it to you for your consideration.<sup>42</sup>

The practice of writing letters to will clients (even assuming that the present

32 DRINKER, *LEGAL ETHICS* 94 (1953): "[I]t should be clearly explained to the testator that it will not be binding on the executor, who will be free to choose his own counsel. . . ."

33 Note 29, *supra*; see *OPINIONS OF THE COMMITTEES, supra* note 29, at 26.

34 DRINKER, *op. cit. supra* note 32:

If [the circumstances] are such that the lawyer might reasonably be accused of using undue influence, he will be wise to have the provision inserted in a codicil drawn by another lawyer.

See CASNER, *ESTATE PLANNING* 1301, n. 215 (3d ed. 1961). Orkin's analysis of the Canadian standards appears to demand this. ORKIN, *op. cit. supra* note 31. See AMERICAN BAR ASS'N, *op. cit. supra* note 29, No. 266A, p. 641:

In such cases, as well as in cases where the testator desires to name the lawyer as executor or trustee or leave him a legacy, the lawyer should consider having the testator submit the will to another lawyer prior to its execution.

35 Text 103, 165.

36 *PRINCIPLES AND PRACTICE* 344.

37 *Id.* at 343.

38 Text 45, 325.

39 Text 45.

40 Text 325. The form at 45, which is a broader review, begins: "In line with our practice of periodically reviewing our estate planning recommendations. . . ."

41 Text 46.

42 Text 326.

existence of the lawyer-client relationship is certain) is at least just short of solicitation of legal business. Even where the practice was heavily qualified, the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyer's Association has doubts about it:

Such suggestion would have at least the savor of solicitation condemned by the Penal Law and by the Code of Ethics, and an answer [on the propriety of the practice] in the affirmative might open the door to other forms of solicitation.<sup>43</sup>

The Committees sanctioned the practice, where there has been "a change of fact or of law which would defeat the client's testamentary purpose as expressed in the will,"<sup>44</sup> but warned that it is unethical for the lawyer to make "the suggestion that the client call"; he must be free to retain another attorney if he wants to.<sup>45</sup> The lawyer must, according to another opinion from the same authority, "not go further than to point out the reasons which he feels make it desirable for the testator to consider the matter."<sup>46</sup> Both of these forms go beyond that boundary. One suggests that the client call; the other suggests that the client respond to the lawyer's offer to draft a new will or codicil. In neither case is the lawyer's letter prompted by a specific event endangering the estate plan, and in both cases the suggestion that the lawyer be employed comes from the lawyer.

Even if the lawyer is certain his addressee is still a client, there is nothing in either of these forms to suggest that the client has requested this service, or that the lawyer has come upon a change of law or fact which demands his notifying the client of danger to the estate plan.<sup>47</sup> Ethics require one or the other circumstance.<sup>48</sup>

The most serious objection to the "periodic review letter" is, however, an ethical objection only in part — the fact that the letter either assumes the lawyer knows all of the facts necessary to give intelligent supplementary advice, or requests that the addressee give that information to the lawyer. The authors leave their reader no choice; he must either violate Canon 27 by requesting that the client use his legal services, or he must give bad advice on insufficient facts. The occasions on which committee opinions have been given on this subject presuppose that the lawyer has come across a fact or a change in the law which endangers an estate plan of his creation.<sup>49</sup> Then they conclude that the lawyer may warn his client, or former client, of the danger. Beyond that, he cannot ethically suggest that the client, or former client, see him about protecting against the danger. He cannot ethically request information on which to give a general reviewing opinion. But, certainly, common sense forbids his giving an opinion on the basis of insufficient information; he must first request the information the Canon prohibits his requesting.

The authors' system will work and be ethical only if the client asks the lawyer for a conference preliminary to advice, or initially employs the lawyer to review his

43 OPINIONS OF THE COMMITTEES, *op. cit. supra* note 29, No. 554, pp. 311-13.

44 *Ibid.*

45 *Ibid.*

46 *Id.*, No. 231, p. 114.

47 In OPINIONS OF THE COMMITTEES, *op. cit. supra* note 29, No. 231, p. 114, approval of the practice is given where "circumstances have changed since the execution of the will, so as to make it apparent that the will, as drawn, may not carry into effect the wishes of the testator." At *Id.*, No. 554, p. 311, the approval is given only when there has occurred any change of law or fact which would defeat the client's testamentary purpose as expressed in the will. Much the same qualification is expressed in AMERICAN BAR ASS'N, *op. cit. supra* note 29, No. 210, p. 423, and a supplementary opinion of the Committee on Professional Ethics of the New York County Lawyer's Ass'n, No. 454 (mimeo., not dated), conditions approval on "changes in the law or in the client's affairs which may have consequences of which the client should be advised."

48 DRINKER, *op. cit. supra* note 32, at 254, expresses similar reservations. The language of Canon 27 *op. cit. supra* note 28 ("not warranted by personal relations") clearly imposes even greater restriction where the addressee is not a present client. See also opinion No. 491 of the Committee on Professional Ethics of the New York County Lawyers Ass'n (mimeo., not dated).

49 Note 47, *supra*.

will at stated intervals. The authors apparently attempt to reach a client request by including check lists, former opinions from their files and other paraphernalia,<sup>50</sup> and suggesting a conference. In my opinion, the suggestion contravenes Canon 27 in letter and spirit, and the dilemma in these forms is more than a matter of insufficient explanation; it is difficult to see how it could have been avoided with any amount of footnoting.<sup>51</sup>

Professor Leach has suggested a significantly different way of dealing with the review situation, one which is based upon initial employment for periodic review. His memorandum of a final estate planning conference indicates what his lawyer would do:

It was recommended to testator that on each anniversary of the execution of this will:

1. This office write to Testator, asking what changes in the family and property of the Testator have taken place in the previous year and whether Testator desires any changes in the dispositions of the will;
2. This office review the will in the light of changes in the tax laws and other laws with a view to recommending changes which are advisable for legal reasons.

Testator accepted these recommendations. Appropriate notations have been made in the memorandum book of the partner in charge and in the records of the file clerk.<sup>52</sup>

Here the client has requested an annual review of his estate plan, at a time when the lawyer-client relationship clearly exists,<sup>53</sup> and the situation is one in which diligence requires that the lawyer point out the possibility of future danger to the estate plan.<sup>54</sup> The suggestion of employment in Professor Leach's form still, unfortunately, comes from the lawyer; I would feel more comfortable about it if it were less blatant. But it comes at a time when all of the client's interests, and all of the information essential to the protection of those interests, are in the lawyer's hands. And it has the further virtue of assuring that advice given in the future will be given on adequate knowledge of the facts.<sup>55</sup>

The second most serious criticism that might be made of the book is its uncritical use of legalese. E. B. White once wrote, "I honestly worry about lawyers.

#### 50 Text 45:

There may, however, have been intervening developments affecting your affairs with which we are not familiar. Accordingly, we suggest you consider the matter yourself by reviewing the enclosed summary of your present Will and by rereading our estate planning report dated February 15, 1961 and the accompanying schedules. In addition, we suggest you look over the enclosed Periodic Review Checklist. If it then appears that there has been any material change, we will be pleased to evaluate the effect on your estate planning.

The "Periodic Review of Estate Plan: Checklist" is set out at 43-44.

51 The letter may be somewhat like the "annual legal check-up." But the only ethical way to carry on promotion of the "annual legal check-up" beyond one's present clients is through a bar association. The opinion of the American Bar Ass'n Committee on Professional Ethics, No. 307, dated May 26, 1962, stresses the fact that the bar association may here do something that individual lawyers cannot do:

Lawyers as individuals may not ethically permit their names to be identified with such promotion. They may not point out the need for such a checkup to those who are not their regular clients, except by means of bar association sponsored pamphlets available in their offices for taking.

This is repeated in full at 48 A.B.A.J. 753 (1962), and printed in part in a report in American Bar News, May 15, 1962, p. 6.

52 LEACH, *op. cit. supra* note 8, at 252-53.

53 Informal Opinion No. 602, *op. cit. supra* note 30; Committee on Professional Ethics, New York County Lawyer's Ass'n, Opinion No. 454 (mimeo., not dated).

54 Note 47, *supra*.

55 IN PRINCIPLES AND PRACTICE, at 343-44, the present authors suggest that the lawyer periodically review the wills and estate plans of clients, even if the clients do not request review. (And, of course, absent request from the client, the lawyer can never be positive that the lawyer-client relationship still exists.) This may be a good idea, but it is likely to be a crippled review in any case where the lawyer cannot be confident of his command of facts affecting the estate plan. In any event, it is of no value to the client (and, therefore, of no value to the lawyer either) unless it is communicated.

They never write plain English themselves, and when you give them a bit of plain English to read, they say 'Don't worry, it doesn't mean anything.' They're hopeless. . . ."<sup>56</sup> Professor Snee and Mr. Cusack are far from hopeless, but their form book would have been shortened by a dozen pages if they had deleted the illegitimate adjective "said," and reduced by half the instances of "whereas" and "thereof." Legalese in testamentary drafting must, and should, remain an eternal puzzle to the average liberally educated client. Does a valid testamentary document have to be entitled "Last Will and Testament of John" instead of "Will of John"? And must John "make, publish and declare" his will and "give, devise and bequeath" things? Does the "what's left" after specific bequests have, inevitably, to be dealt with as "rest, residue and remainder"?

One of the authors' sentences, containing dispositive provisions for a trust instrument, covers 34 printed lines and contains 383 words.<sup>57</sup> In practice the form will become even more complicated because additional contingencies will have to be considered and more names inserted than the one or two they provide for. A trust power clause contains 161 words and is not even a complete sentence.<sup>58</sup>

The authors may not realize it, but their form book is an essay on three levels of law-office rhetoric: (1) Lawyer's Legal English, (2) Lawyer's English English, and (3) English. The forms suggest, for instance, a letter from a father to his son, occasioned by the father's decision to give the son securities and real property. The letter says: "I have decided to start you on the right road by making the following gifts. . . ."<sup>59</sup> That's English. Two pages later the authors recommend a form for a deed of gift; it says:

KNOW ALL MEN BY THESE PRESENTS, That I (blank), the undersigned, residing at (blank), County of (blank), State of (blank), and sole owner of all right, title and interest in and to the following described property, DO HEREBY irrevocably and absolutely give, assign and transfer to (blank), residing at (blank), County of (blank), State of (blank), all of my right, title and interest in and to said property, namely. . . .<sup>60</sup>

In the letter, when the son wants to acknowledge receiving the gifts, he signs his name under the words "accepted and receipt acknowledged. (date)." But when he does it officially, he has to say:

The undersigned does hereby accept the aforesaid gift subject to the terms and conditions above set forth and does hereby acknowledge the receipt of the above described property this (blank) day of (blank), 19 (blank). (L.S.)

That's Lawyer's Legal English, as is another form, some four pages later, which says "NOW, THEREFORE, THE Donor does hereby irrevocably and absolutely give, assign and transfer to the Donee an interest in the net income which the Donor now is, or may hereafter be, entitled to receive during his lifetime."<sup>61</sup> Finally, there is the Lawyer's English recommended to a client for a second letter of gift occurring later in the book.<sup>62</sup> The client there forwards to a foundation "all of my right title and interest in and to the following" (securities and a painting), noting that "said shares and painting are hereby given to you for your corporate purposes, irrevocably and absolutely." No one but a displaced person from Utopia, where they have no lawyers, would have any doubt about the identity of the ghost who wrote that letter.

56 THE SECOND TREE FROM THE CORNER 87 (1953).

57 Text 108.

58 Text 64.

59 Text 74.

60 Text 76.

61 Text 78. There is little doubt that the letter itself is sufficient documentary evidence of gift as to personal property, given appropriate stock transfers when the property is securities. As to real estate, admittedly, a New York practitioner has to abide an archaic conveyancing statute, N.Y. REAL PROP. LAWS § 258. The parallel provision in Indiana requires, for a warranty deed, only the words "A.B. conveys and warrants to C.D. for the sum of . . ." IND. STAT. ANN. § 56-115 (Burns 1961).

62 Text 221.



The three levels of language are always identifiable, but not easily put in categories in terms of the task at hand. A letter from the testator to his fiduciaries, for instance, is in English:

I have today executed a will in which I have named the first of you as a co-executor and co-trustee with my wife and the City Trust Company. I have named the second of you as successor to the first.

\* \* \*

Thus, you and your co-fiduciaries are at liberty to make whatever decision seems to be best at any time in the light of all of the circumstances.<sup>63</sup>

(It is not entirely clear why English can be used in addressing fiduciaries, but Lawyer's English has to be used in addressing a charitable donee. It probably has something to do with the English Mortmain Acts.)

The vitality of Lawyer's English, when one considers the eventual death of Law French, is not easy to understand.<sup>64</sup> Dispositive instruments, to a greater extent than business contracts and corporate forms, have retained a level of legalese which betrays a black magic theory of drafting — an inarticulate fear that everything the relatively uneducated nineteenth century lawyer used had cabalistic significance which, although the modern is incapable of understanding it, is vital to the document's success. Law, according to this theory, is witch-doctoring with a pencil, and drafting is half exposition and half ritual.

The authors, doubtless, have abjured all black magic. They probably understand every word they use. What accounts for the survival of Lawyer's Legal English in that case? Habit, possibly, and, more likely, the vague feeling that clients cannot appreciate something they understand.<sup>65</sup> But client understanding is the most conclusive argument for using English instead of Lawyer's Legal English and Lawyer's English English. Many of these documents — business agreements, foundation bylaws, inter vivos and testamentary trust instruments — have offices far beyond disposition. They are charters for human conduct,<sup>66</sup> which must (or should) be used routinely by lay fiduciaries, beneficiaries and contract parties. Lawyers who insist on filling these documents with the unreadable should at least give their clients, and their clients' associates, a guidebook to assure adherence to directions which, in a better world, they might read for themselves. All else failing, and assuming the rise to prominence of a form book writer with the learning of Professor Snee and Mr. Cusack, and the daring of Voltaire, the documents could be written in English.

Thomas L. Shaffer\*

<sup>63</sup> Text 316.

<sup>64</sup> It survives in the best families. See CASNER, *ESTATE PLANNING*, Appendices I, II and III (3d ed. 1961), and LEACH, *CASES AND TEXT ON THE LAW OF WILLS*, ch. XI (2d ed. 1960). But there are some rays of light. See Trachtman, *Maxims For Estate Planners*, 1963 U. ILL. L. FORUM 123, 127.

<sup>65</sup> Gottlieb, *Teaching English in a Law School*, 49 A.B.A.J. 666 (1963), contained obvious recommendations, built upon obvious premises. It provoked two letters to the *Journal's* editor, 49 A.B.A.J. 814 (1963). Mr. Joseph B. Restifo, of the Philadelphia Bar, wondered if command of English in law graduates would not prove a disadvantage:

Chances are that they will be employed by lawyers whose years of practice have taught them that a lawyer's letter should read like this: "enclosed herewith please find copy of Answer in the above-captioned case, the original of which has been duly filed of record." Woe betide the junior associate who would suggest the slightest revision of such models of legal sentences.

Mr. Paul Ritter, Winter Haven, Florida, a former bar examiner, thought the sentences read in bar examination answers, while poor, "were no worse than many of the published judicial opinions that are said to make up the body of the law." See also Rossman, *The Lawyer's English*, 48 A.B.A.J. (1962), reprinted at Case and Comment, September-October, 1962, p. 36. The Notre Dame Law School offers its students instruction in English and has done so for years.

<sup>66</sup> See Trachtman, *op. cit. supra* note 64, at 126: "Your task is to write the dispositive and administrative provisions in such a way that the . . . trustees will do best what they are capable of doing well."

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## BOOKS RECEIVED

### CONSTITUTIONAL LAW

THE SUPREME COURT REVIEW. Edited by Philip B. Kurland.

Chicago: The University of Chicago Press, 1963. Pp. 356. \$6.50.

### FAMILY LAW

READINGS IN ADOPTION. Edited by I. Evelyn Smith.

New York: Philosophical Library, Inc., 1963. Pp. 532. \$7.50.

### INTERNATIONAL LAW

PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS. By John B. Whitton and Arthur Larson.

New York: Oceana Publications, Inc., 1964. Pp. 305. \$8.50.

### LEGAL ETHICS

CLINICAL INVESTIGATION IN MEDICINE: LEGAL, ETHICAL AND MORAL ASPECTS. Edited by Irving Ladimer and Roger W. Newman.

Boston: Law-Medicine Research Institute, Boston University, 1963. Pp. 517. \$5.95.

### PHILOSOPHY

THE LANGUAGE OF THE LAW. By David Mellinkoff.

Boston: Little, Brown and Company, 1963. Pp. 526. \$12.50.

### PROCEDURE

APPELLATE COURTS IN THE UNITED STATES AND ENGLAND. By Delmar Karlen.

New York: New York University Press, 1963. Pp. 357. \$6.00.

The Art of Summation. Edited by Melvin Block.

New York: New York State Association of Trial Lawyers, 1963. Pp. 394.

### TRADE REGULATIONS

BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT. By Albert E. Sawyer.

Boston: Little, Brown and Company, 1963. Pp. 514. \$22.50.