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THE COURSE IN ESTATE PLANNING AT NOTRE DAME

William D. Rollison*

There are more notions as to how estate planning should be handled in law schools than there are in connection with any other subject or group of subjects in law school curriculums. This is no doubt due to different opinions as to the nature of estate planning and as to what the content of the course should be. The purpose of this dissertation is to describe how the course is handled at the Notre Dame Law School, in the light of the history of the subject, its nature, and the demands of law school schedules.

Estate planning, in regard to its use on any fairly extensive scale, had its origin in English feudalistic society; it arose because of the legal and social conditions of the time. Estate planning is primarily and ordinarily concerned with the posthumous disposition of property; the property owner resorts to estate planning for some reason or reasons to be found in the legal and social order of his generation.

At an early date, and during feudalism, we find several reasons advanced (in the Preamble to the Statute of Uses) for the planning of estates, to the extent that the law then permitted estate planning. By the use of various devices, "heirs" were unjustly disinherited; lords lost their wards, marriages, reliefs, harriots, escheats, and aids; men lost their tenancies by curtesy, women their dower. Such are the recorded purposes of estate planning at the time of enactment of this statute.¹ Property owners having transferable interests did not like primogeniture and the preference of males to females in the law of inheritance; they did not like the feudal taxes; and some sought to bar dower or curtesy of the surviving spouse (that is, the share of the surviving spouse). These purposes exist today. A property owner, planning his estate under existing laws, may not like the provisions of the statutes on descent and distribution, or he may prefer a different division for some reason or reasons. He may be interested in trying to evade or reduce death duties. He may want to bar, reduce, or enlarge the share of his surviving spouse as otherwise provided by law. Due to the growing complexity of the legal order, reasons for estate planning exist today that have no counterpart in the feudal society.²

Feudal law on conveyancing and a feudal aristocracy contributed to, if they were not the sole reason for, the vanishing of testamentary power over land at common law prior to 1540 (the date of the first wills statute in England). This power was partially restored in 1540 and more fully restored in 1660, with the abolition of military tenures.³ With the vanishing of testamentary power over land a new device arose from the ruins that was quite effective

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1 See 1 ROLLISON, CASES AND MATERIALS ON ESTATE PLANNING 66 (1959), hereafter referred to as CASES AND MATERIALS.

2 See a discussion of some of these reasons in Thornburg, *Recent Books on Estate Planning*, 36 NOTRE DAME LAWYER 162 (1961).

3 1 CASES AND MATERIALS 89-92.

in estate planning — namely, the use.⁴ Its use in connection with a will, in equity, gave rise to the power of appointment. Powers of appointment ordinarily constitute a part of the course in future interests. The use is the forerunner of the trust. The significance of the use in estate planning is indicated by Coke's remark that "all landed property in the kingdom" was either directly or indirectly regulated by it.⁵

The restoration of testamentary power over land, the abolition of feudal tenures and their incidents, and the Statute of Uses, gave a new turn to estate planning. New estates and new methods of conveyancing arose; the use became the trust. Today, the picture is complicated by developments in the law of partnerships, corporations and life insurance. New taxes, such as inheritance, estate, income and gift taxes, have given a stimulant to estate planning.

Man's desire to project himself posthumously into the future, and to control the ultimate destination of his property and the destinies of his donees, gave rise to the law of future interests. One historical phase of this was manifested in the early days of feudalism; other phases were developed upon the passing of feudalism. The attempt at posthumous control takes two forms: One is an attempt to restrain alienation; the other is creation of a limitation to take effect in the future.

It is with this historical development in mind that I prepared my selection of *Cases and Materials on Estate Planning*.⁶ The subjects forming the major part of this book are wills, trusts and future interests. I have included some material on life insurance,⁷ deeds, and contracts,⁸ to give a more complete scope to the course. An attempt is made not merely to *unite* wills, trusts and future interests in one book, but to *integrate* as much as possible. I believe that the law student should begin thinking of these subjects as a unit, while he is learning the basic principles of each, as they are more closely connected than any other group of subjects in law school curriculums. I believe that the use of this method will vindicate my opinion on this approach.

Obviously, when several separate subjects are united in one course, practical factors must be considered — schedule limitations, time limitations, electives, and vested interests of professors handling these subjects. We have had no difficulty as to any of these considerations at Notre Dame. While my book has some material on taxation, I did not attempt any great coverage of this subject.⁹ I have included material on inheritance taxes, not found in any other book.¹⁰ Some material on income, estate and gift taxes is included; but no attempt is made to cover these fields, because of the scope thereof, and for the reasons listed above. A large part of the curriculum for one year is taken over by uniting wills, trusts and future interests. This is not to deny the im-

⁴ *Id.* at 62-65.

⁵ *Id.* at 65.

⁶ An outline of the contents of the two volumes of the work and a brief explanation of the approach taken is contained in Rollison, *Estate Planning: An Integration of Wills, Trusts and Future Interests*, 34 NOTRE DAME LAWYER 294 (1959).

⁷ 2 CASES AND MATERIALS 792-811.

⁸ *Id.* at 776-892.

⁹ See, e.g., the discussion of tax liability in the use of powers of appointment, 2 CASES AND MATERIALS 704-06.

¹⁰ *Ibid.*

portance of taxation in estate planning. But a line simply has to be drawn somewhere in uniting the subjects involved in estate planning; I chose to draw that line by not attempting to cover the material on taxation, and I doubt if any law school will find it to be feasible to include coverage of taxation in an integrated course of this nature.

To think of estate planning *only* in terms of tax planning simply does not coincide with practical experience. Such thinking may come from the introduction of the term "estate planning," which took place after the enactment of the 1948 Internal Revenue Code. There is no doubt but that estate, gift, and inheritance taxation have given an impetus to estate planning; but practical experience demonstrates that many estates are planned without regard to death duties, or, at least, that taxation is not a dominant motive in designing them.

Estate planning cuts across many fields in the law — corporations, partnerships, conveyancing, estates, gifts, contracts, life insurance, conflict of laws, wills, trusts, future interests, procedure, and taxation. Today, we can include pension plans and social security in the list. It is quite obvious that no one is going to attempt to deal with all of these subjects in one course. Wills, trusts, and future interests are ordinarily identified with estate planning; life insurance and taxation run a close second place. If we should include these five subjects in one course, it would necessitate such a cursory discussion that the law school graduate would know very little about anything connected with them. The choice suggests the constantly recurring problem in education as to whether the student should learn less and less about more and more, or more and more about less and less.

It is my opinion that the student's job, in the course in estate planning, is to obtain information and to learn how to use it. I believe, further, that wills and trusts should be dealt with from the functional approach. I am convinced that the student should think of wills, trusts, and future interests as a unit; it is upon this basis that I prepared my casebook. I deal with drafting and the practical aspects of the problems involved in the material as I proceed in the course. I can see no practical advantage in mere drafting, without any objectives. The formal, conventional parts of a will are fairly easy to master. Even if they are not necessary, they may be useful at various times. The essential parts of a will must be prepared to accomplish the client's objectives, and this within legal limitations. Without an adequate background, based upon a knowledge of the legal rules and principles applicable, an effective plan cannot be prepared. Any plan, of any extent, must be integrated. A savings clause may be of no practical import.

There is no merit in simplicity as such, though some think otherwise. The law prescribes no limit to the number of words in a will or trust, such as we might have in an essay assignment. The formalities in instituting a will or a trust must be complied with. The student's job is to acquire these skills. To be able to draft an estate plan, in possible contingencies, the student should have adequate knowledge in the other fields of the law that may apply.

Professor Roger Paul Peters, who handles our courses on taxation, and

I conduct a will drafting project. About one-third of our students participate in this. We prepare a set of facts involving many of the ramifications in estate planning — especially tax problems. An estate plan has to be prepared from the standpoint of saving or avoiding death duties, involving, as a part of the project, reasons and drafting. This year we intend to have the whole class devote some time to a consideration of at least one of these plans.¹¹ Such

11 The following is the 1961 drafting project problem. Each participant is to assume that the law of his home jurisdiction governs the problem, and the corporation involved is assumed to be one organized under the law of that jurisdiction.

Joseph M. Tucker was born in South Bend in 1903. He has resided there all his life. He married Alice M. Pierce in 1928 and they have been living together since that time. Mrs. Tucker is also a native of South Bend. They have three children: Henry, born in 1929; Margaret, born in 1932; Thomas, born in 1936. During World War II Joseph was for a time in military service. He has two life insurance policies, upon his life, each of the face value of \$50,000; in each he has reserved the right to change the beneficiaries named. One is made in favor of his wife as beneficiary, and in the other his estate is made beneficiary. Neither contains a double-indemnity clause. He has paid all of the premiums out of his earnings. The optional settlement provisions in the policy payable to his wife provide that the proceeds of the policy are to be retained by the insurer, that the insurer is to make monthly payments of interest to his wife, in case she should survive him, and, in case she should die while the settlement is in effect, or not outlive the insured, the amount due on the proceeds is to be divided among the insured's then living children, and she is given in the policy the right to make withdrawals from the proceeds but only on given interest payment dates.

Joseph and Alice own jointly a house and a lot in South Bend. This property cost \$34,975 when they bought it in 1953. There is no mortgage on the property. They also own jointly a Cadillac acquired for cash in 1957 (1957 model) and a Studebaker 4-door Lark Sedan, 1960 model. Both cars are in good condition.

The furniture, (including piano, television set, pictures, household appliances, china, linens, silverware) has been acquired from time to time since Joseph and Alice were married. A few items were given to them by friends and relatives, but most of the items were purchased out of funds supplied by Joseph. The value of the furniture and other contents of their residence is approximately \$4,000.

Joseph owns a pocket watch given to him by his father many years ago. It is worth at least \$100. He also owns a diamond ring worth about \$300. Alice owns a diamond necklace and a diamond ring, each worth \$500.

Henry and Thomas are both gainfully employed. Henry is married and has one child, Mark, age 3. Thomas and Margaret are unmarried and live with their parents.

Joseph and Alice maintain a joint checking account in the First Bank and Trust Company, South Bend. A balance of about \$5,000 is maintained. They also have a savings account in the same bank which shows a balance of \$6,425.63.

In 1946, Joseph and certain associates caused to be organized the South Bend Supply Corporation under the laws of Indiana. The company has been prosperous since its inception. There are 100,000 shares of capital stock outstanding. Joseph owns individually 55,000 shares. Alice owns individually 5,000 shares. The other shares are held by persons not related to the Tucker family. The earnings after taxes per share are as follows:

1947 — \$2.98	1948 — \$3.42	1949 — \$3.39
1950 — 3.28	1951 — 3.39	1952 — 3.56
1953 — 4.02	1954 — 4.09	1955 — 4.16
1956 — 4.06	1957 — 3.49	1958 — 4.09
		1959 — 4.60

Estimated earnings per share for 1960 amount to \$4.75.

The Company has paid a dividend of 25 cents per share each quarter since it began operations. No shares have ever been sold. The Company is engaged in wholesale operations, supplying machinery and equipment to manufacturers, contractors, and merchants.

Joseph is president and chairman of the board of the corporation. In 1959 he received a salary of \$40,000 and a bonus of \$5,620.50, based on the gross sales of the corporation. His salary for 1960 will amount to \$45,000, and he may reasonably expect to receive a bonus of at least \$6,000.

Joseph and his wife own a 600-acre farm as joint tenants. There is a house, barn, machine shed, and some other out-buildings on this farm — all well-kept and in good condition. All of the buildings cost \$30,000 to erect, 10 years ago. The land is assessed for real estate taxation at \$300 per acre. For federal estate tax purposes, land in the vicinity has been valued at \$600 per acre, but sales have generally been for \$800 or \$900 per acre. Joseph's wife knows nothing about farming. The farm is operated by a tenant, and has

procedure is realistic. However, I can see no advantage to repeating the process in a seminar each week. Obviously, seminar discussion is no substitute for the orthodox method of acquiring a knowledge of the basic rules and principles of the subjects involved in estate planning; it is the practical application of knowledge.

In addition to the will drafting project, we conduct a seminar for two evenings each year. We have been fortunate the past three years in being able to have someone interested in an estate plan to act as client—one who is willing to give the students some practical experience, at the same time realizing they cannot practice law. This is the nearest thing to real practice that a law student gets in his legal education. Both the seminar and the will drafting project serve to give the students the *feel* of planning an estate.

It is my opinion that simply to unite wills and trusts in one course is doing only a part of the job that ought to be done. While this does meet some of the objectives noted earlier in this discussion, it does not eliminate the overlapping and duplication involved in handling future interests separately—a luxury that the modern law school schedule cannot afford. While some of the problems that arise in future interests do not arise in wills or trusts, many do; and there is no doubt about the close relation of future interests to wills and trusts. The advantage in one professor handling these courses as a unit cannot be overestimated. I believe that the use of my book will justify the arrangement and content of the course that I have made and the utility of integrating these subjects in one course, handled by one professor, so as to give the continuity that should exist.

been producing an annual net profit of approximately \$25,000. Thomas is attending Purdue University, and is specializing in the field of agriculture. The other children of Joseph are not interested in farming. Joseph bought this farm 10 years ago for \$500 per acre, giving back a mortgage for \$200,000, paying down \$100,000. The amount due on this mortgage is \$150,000, at 6 per cent interest.

Joseph had a coronary occlusion in 1958. Alice has had little business experience and he does not wish to place her in a position where she will have the burden of making business decisions.

He hopes that his sons will continue the business represented by the South Bend Supply Corporation but he believes that they are still too young to be given important positions in the business. He hopes that his daughter will make a suitable marriage but does not wish her to be obliged to be wholly dependent on her future husband or anyone else. He wishes his wife to have security of income after his death.

He wishes to make provision for his grandson and any other grandchildren he may have in the future. He believes that his wife should receive or have control over most of the income from the property he may have at death, but he does not think it necessary for her to own such property without restriction. He would like to have his wife to be in the position of determining how much each child should have so that she may retain some control over their conduct, but he would also like to have each child share equally in such property at their mother's death, unless she should determine otherwise; and if she should not determine otherwise, he would like to have the share of any child who predeceases her to go to the children of such child, if there be any living at such time.

Mr. Tucker also stated that, to the extent that it is advisable for the purpose of conserving the property for his family, regarded as a whole, he would be willing to allow considerable discretion to his wife, because he has great confidence in her judgment with respect to looking after the best interests of the children.

There are no dependents or relatives other than those mentioned to be considered. Joseph is desirous of making a testamentary gift of approximately \$25,000 to Notre Dame.

He also wishes to keep the control of the South Bend Supply Corporation in his family.