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Introduction

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ESTATE PLANNING SYMPOSIUM

INTRODUCTION

by

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IT GOES without saying that the general practitioner today must know his way around a subject which, for want of a better term, is called "estate planning." (The term is inadequate because it fails to cover coordinated lifetime planning.) Interest in the subject, however, should not be confined to the general practitioner. Most specialists in the law today need to be reasonably well informed in estate planning in order to discharge their own specialized functions adequately. The tax specialist must be able to integrate his tax saving schemes into a complex of other estate planning factors. The corporate lawyer may do his client a grave injustice if his advice on the organization, reorganization and manipulation of business ventures does not take estate planning into account. Indeed, it is difficult to think of a specialty in the law which can be pursued with full effectiveness without some knowledge of the field of estate planning.

It has become a vast field, evidenced by the great volume of literature on the subject which has collected, constantly amplified by a flow of books, services, articles and commentaries. When I first started to write and lecture in this area in the late thirties, I could give a reasonably full "course" on estate planning to a bar association in two or three hours. Now, three hours may be hardly adequate to cover properly even a small part of the field.

How has this come about? Political, social and economic changes which took place principally during the thirties and forties introduced many new problems, both in one's social and financial planning during life and in the planning of one's eventual estate. The increasing element of paternalism in government played its part in making planning more complex. Encouraged by permissive legislation, industry has been induced to follow suit with paternal

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measures in the area of executive pay plans and pension and profit-sharing schemes. To take best advantage of the benefits of governmental and private paternalism, and at the same time to avoid the accompanying social and financial pitfalls, has elicited the ingenuity of thoughtful lawyers.

Coincident with other changes in our society, our tax system began to be used by administrations and legislators, no longer for merely fiscal, but now also for sociological ends. The rates of our progressive scale taxes were increased — and to virtually confiscatory percentages at the top. This was in some measure to increase the income of the federal government so that it could do things for the people which they were allegedly unable to do or inept at doing for themselves. It was partly also to “soak the rich.” In this latter objective, the system has failed completely and has become perhaps the principal generator of expansion in estate planning.

Far from logical to begin with, our tax system, bent to sociological objectives under the guidance of social (pseudo) scientists who called themselves “social engineers,” has given birth to a rather unfortunate war. On one side have been the lawyers who have sought to find legal ways to avoid harshness inserted in the tax laws. On the other side have been the legislators and the administrations, seeking to plug up each so-called “loop-hole” which clever lawyers have discovered. The result has been a hodge-podge of legislation grown up like Topsy, and so complex that no single lawyer knows or could know all the tax law. In this conflict between what might be called the tax-and-estate-planning-bar and the government, the latter has won skirmish after skirmish but has not won the war. Far from preventing tax avoidance, the government, by introducing complexity after complexity in the law, has perennially opened up new loop-holes and stimulated thoughtful men to find new mechanisms and new methods to minimize taxation.

A most regrettable feature of this process has been that the tax-saving schemes devised by the bar have been of most benefit to the rich, so that the net sociological result of the effort of the government to achieve sociological ends has been to penalize the precious middle class which, for the most part, must pay its taxes without benefit of legal avoidance schemes.

In turn, the harshness and illogicalness of our tax system has prompted widespread tax evasion, so widespread, indeed, that it might be said that the majority of our people of even average means cheat at least moderately. For this, the government is largely responsible, in having given the impression that it is the people's enemy

in the tax field. There have been many bitter denunciations of the harshness of the rates, of the inequity of their application, of the social immorality of the system, and of its interference with the right of privacy. Such bitter criticisms have found sympathetic listeners.

Inflation has played its part in producing complexity. Indeed, an automatic annual increase in our income, gift and estate tax rates has taken place through the impact of inflation. Legislators seem to have been wholly blind to the devastating effect of this squeeze between the progressive rate system and inflation, as well as to the confiscatory nature of the capital gains tax when it seizes part of what is a false "profit"—*i.e.*, an increase in mere dollar value through inflation. Why there has been no great public outcry against the "squeeze" I cannot understand, unless it is that we have become so inured to and seduced by paternalism that we have lost that feeling of independence, freedom and individualism which made our country great. But consciousness of the squeeze has prompted a greater desire for tax-saving schemes, a desire to which lawyers have been willing to apply themselves. They have burned midnight oil to devise ingenious schemes. These have repeatedly frustrated the government in its attempt to enforce the presumed letter of the law, and it has retaliated, from time to time, by promoting changes in law.

And so, there has developed a massive and unbelievably complex and obscure tax system, containing clause after clause beyond the easy understanding even of the Internal Revenue Service itself and utterly impossible for a layman to comprehend without highly skilled technical assistance, and perhaps not even then.

It is a shifting and dangerous field for the practitioner. Regulations uttered by the government are sometimes as obscure as the text they are meant to interpret. Courts decide and reverse themselves, and differ from district to district. There is constant threat of new and revised legislation and, with it, the immoral threat that a change in law may be applied retroactively. Rulings may sometimes be obtained from the Internal Revenue Service, but it seems to grow more and more reluctant to tell the anxious practitioner whether a proposed plan will be contested or not. To advise what seems to be an entirely legal and proper plan to a client without the benefit of a favorable ruling, risks litigation, and when the step proposed is an irrevocable one, the hazard is great. These are not easy days for the tax practitioner nor for the adviser in estate planning nor, indeed, for their clients.

In all of this (which may truly be called a mess) there has been so much necessary concentration on tax-saving that an attention to

basic human objectives has been lost in the process. Mechanism after mechanism is adopted which perhaps violates what should be proper social and human objectives adjusted to the needs and welfare of selected beneficiaries. Let me illustrate with the use of mechanisms for "saving the second tax."

In an anxiety to save a second estate tax impact on the death of a primary beneficiary, he is often made a mere pensioner, in effect, and prevented from exercising initiative and independent judgment. My purpose in using this illustration is not to discourage the proper saving of a second tax but to introduce what I believe should be the keynote of intelligent planning today, *flexibility*. It is possible to design a trust which can save that second tax and still leave enough room for change and adjustment so that the primary beneficiary is not a mere pensioner but can exercise independence and initiative if he should care to do so.

Flexibility is essential not only to create a proper adjustment between tax-saving and the attainment of carefully selected human objectives, but particularly because we live in a constantly and sometimes rapidly changing society.

Of course, one must know what to be flexible about and how to accomplish it. The lawyer who, today, is not reasonably well informed in the field of life-and-estate planning does justice neither to himself nor to his clients.