

THE PLANNING AND DRAFTING OF WILLS AND TRUSTS

SECOND EDITION

**By
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**Mineola, New York
THE FOUNDATION PRESS, INC.
1979**

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Library of Congress Catalog Card Number: 78-61496

University Textbook Series

July, 1978

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**In happy tribute to Kurt F. Pantzer and my brothers
of the Sycamore Room, 1961-63**

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PREFACE

This is a book for the study of wills, trusts, future interests and a bit of taxes (what I call "property settlement"), in a clinical context. I hope many students and lawyers, and non-legal professionals, will find it interesting to read and useful as a handbook. Beyond that, I use it, and recommend it, in teaching—in one or both of two ways:

First, I think it can be used as a text, in lieu of or in addition to doctrinal books on the law of wills. Its bias as a text is that it approaches the subject, chronologically and logically, the way a practicing lawyer approaches it—that is: (1) first he meets, interviews, advises, and counsels his client; (2) next he considers what law he needs to know; (3) then he considers what the instruments he drafts are to say and how they are to say it; (4) then he makes, with his clients, the planning and drafting decisions necessary to do the job.

Second, I hope to use the book as a handbook for teaching the new combined courses in this field in a functional way. I plan to teach and evaluate the course in terms of what lawyers do with the things they learn in it. In that connection, these points from my portion of the 1970 annual report of the Committee on Teaching Methods, Association of American Law Schools, may illuminate some of my biases:

* * *

"Student disenchantment with property law, the pressure of new subjects, and interest in more efficient teaching, combined, a generation ago, to produce courses and textbooks which amalgamated the law of wills, fiduciary administration, and trusts. These courses have commanded from two to four semester hours of credit, have often been required (or considered essential), and are more amalgamated than tied together in sequence."

* * *

"The materials and motivation for summary treatment of the law of the dead seem, therefore, to be present. The organization of courses parallels an ambivalence about amalgamation suggested by the casebooks. Some teachers attempt to teach the entire area in a relatively global fashion; some prefer to break it into segments which resemble the traditional courses but which are shorter and less detailed."

* * *

"Teachers report growing reliance on problems and textual material and declining reliance on appellate opinions."

PREFACE

* * *

"Several teachers have found it possible to use commercial textbooks in some cases with special supplementary materials. Others have prepared their own materials."

* * *

"Methods in condensed courses tend away from case analysis and toward either problems or lectures. (Both methods relate to a preference for textual material for student study.)"

* * *

"Law schools have a duty to the profession to give each graduate a minimum preparation in this field, if only because there is not a lawyer in the world who doesn't think he can draft a will. It is, in that respect, almost unique among the professional activities in which our students will be involved."

"The minimum preparation which this duty contemplates can be accomplished in approximately fifty class hours. It is probably best done with textual material, problem-lecture-oriented classes, and some clinical work (that is, some attempt to organize facts and draft instruments)."

I conclude from my own survey that there is growing interest among teachers in this field in assigning planning and drafting projects as part of their courses. This book is most of all meant to be a student aid in that kind of modern teaching.

Part One tries to put the clinical project in a functional context. The lawyer here begins work with a client. What is that client like? What emotions and fixations accompany the visit to a law office? How do lawyers react to clients who come in for wills? How can the experience be a growing, human experience for both lawyer and client? Chapter One, which I call a prelude on counseling, deals with these questions. It suggests classroom devices I have used with success in exploring and discussing them. It continues (in Chapter 2) with special consideration of the skills one needs to work with bereaved (*i. e.*, probate) clients, and concludes (in Chapter 3) with an interview and discussion involving a client who was both a will client and a bereaved client.

Part Two deals with the tools lawyers use in this field—the doctrines, distinctions, and devices that are brought to bear in wills and trusts. It considers wills, trusts, future interests (perpetuities), death taxation, and the language of drafting.

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Part Three presents the array of clients one may expect to meet in this sort of law practice:

- The “simple will” client who, like a wealthier contemporary, may wish to make general, specific, and charitable legacies and who doesn’t have enough money to afford incomplete or ambiguous legal drafting.
- The “non-estate” client who needs contingent trust arrangements for minor children, but who is otherwise not wealthy enough to invite elaborate draftsmanship. Modern alternatives for the non-estate client make this work almost a complex sub-specialty in itself.
- The wealthy client who can afford and may want tax-oriented planning and drafting, maybe even to the point of dynasticism.
- The gray-area, older client who may or may not have enough money to justify tax-oriented planning and drafting but who wants it anyway.

It has seemed best to me to delve thoroughly into each of these clients—to consider all of the more obvious alternatives, and to suggest heavily annotated forms for them. The educational objective is to consider every step in the process in its functional setting, and to locate the step in terms of client counseling and good drafting and legal theory. There are eight forms, most of them annotated in detail, with alternative provisions. Chapter 12 also develops community-property alternatives in some detail, and the other chapters point up community-property considerations.

To satisfy in somewhat clearer detail the need for discussion of theory, I have added two appendices. The first appendix lists the text of representative statutes in seven principal areas of modern reform. The second appendix presents five additional clients for planning-drafting assignment or for discussion.

The book is somewhat eccentric (even irreverent). I wrote it that way on purpose because I have finally decided that teachers and writers, including myself, are more interesting, and probably even teach better, if they let their interests and biases and curiosities show a little.

Many friends and colleagues have helped with the raw material for this book. I am particularly grateful to my students at Notre Dame, at the University of California, Los Angeles, and at the University of Virginia; to Mr. James M. Corcoran, Jr., of the Evan-

PREFACE

ston, Illinois, Bar; to Mr. Michael Cunningham, Notre Dame Law School, who helped with the manuscript and proofs and who prepared the index for the first edition; to Messrs. Michael Gahan and Thomas Botkin, who performed those tasks and many others for the second edition; to Nancy Shaffer; to Mrs. Michael Robert Kessler of Los Angeles; and to Mrs. Nancy Wesolowski and Mrs. Karlene Hamilton at Notre Dame.

T.L.S.

Notre Dame, Indiana
November, 1971
July, 1978

ACKNOWLEDGMENTS

I am grateful to Mr. James M. Corcoran, of the Evanston, Illinois, Bar, author, and to his publishers, for permission to use substantial portions of two articles:

The Contingent Insurance Trust—A Hidden Bonanza for Minor Children, 55 Illinois Bar Journal 596 (1967); and

Planning for the Older Client; reproduced with the permission of The Practical Lawyer, 4025 Chestnut Street, Philadelphia, Pa. 19104. This article appeared in the April 1969 issue, Volume 14, No. 4, pp. 13-38.

I am grateful to publishers of material of mine which has appeared in article form, and which has been revised and is used here:

Book Review, 61 Kentucky Law Journal 538 (1971);

Men and Things: The Liberal Bias Against Property, 57 American Bar Association Journal 123 (1971);

Book Review, 39 Notre Dame Lawyer 356 (1964);

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Nonestate Planning, 42 Notre Dame Lawyer 153 (1966);

Life Insurance Proceeds in Trust, Res Gestae, July, 1966, p. 9;

A Classroom Will Form for Wealthy Clients; reprinted from Trusts and Estates, May, 1970, p. 384; copyright Communication Channels, Inc., 461 Eighth Avenue, New York, N.Y. 10001;

Confidential Relationship, Undue Influence, and the Psychology of Transference, 45 Notre Dame Lawyer 197 (1970);

Modern Fiduciary Powers Statutes, 58 Illinois Bar Journal 654 (1970);

Fifty Estates in Elkhart County, Res Gestae, September, 1969, p. 22.

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