BOOK REVIEW


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Wealth transmission is unlikely to be nominated by many as a candidate for the most popular area of law study. Whether treated in a number of courses under separate titles or in a single integrated course, it is commonly perceived to be a ponderous collection of esoteric rules of law and tax gimmicks, of real interest only to the prospective specialist who hopes to serve the very rich. That perception is not wholly without foundation. Modern cases litigated to the appellate level do tend to involve large amounts of money, and the view that estate planning is synonymous with tax avoidance is widely held. There is, unfortunately, more than a kernel of truth in one student’s recent tongue-in-cheek description of my nine o’clock Transmission of Wealth course. “Four times a week,” he said, “we get up in the middle of the night to talk about some little old lady who died with thirty million dollars.”

Family Wealth Transactions is a recent addition to the growing literature of teaching materials designed for use in an integrated wealth transmission course. The first order of business for Professors Dukeminier and Johanson is to destroy the impression that this is a field only for specialists. As the two cases¹ in their introductory chapter so forcefully demonstrate, it is rather a field in which virtually every lawyer is perceived by the public, and, hence, expected, first by the bar examiners and later by the courts, to have at least a basic competence. The fact is—and the authors supply statistical evidence to confirm it—that the overwhelming majority of people have absolutely no need for the complex tax-oriented estate planning supplied by the specialist. What people do need, and what the non-specialist lawyer must be adequately prepared to give, is knowledgeable and impartial assistance in estate planning in its broadest sense—the application of a person’s resources to the ends he wishes to achieve, in the most expeditious and least expensive way.

The most striking feature of Family Wealth Transactions is its

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first 278 pages. One must progress nearly one-quarter of the way through the book before he encounters any discussion of the law of wills, trusts and future interests. The authors recognize early on that the lawyer plays a nonexclusive role in the wealth transmission process, and that by invitation only. The effective fulfillment of whatever role the lawyer is called upon to play depends on a thorough understanding of the environment in which he must operate. The preliminary material is designed to provide that understanding, and, of it, only the chapter on intestacy could be considered standard fare in a book of this kind. Three additional topics, all significant in the total process, are discussed at length.

Most casebooks give short shrift to the administration of estates; Family Wealth Transactions devotes a fifty page chapter to the subject. The authors do not examine the details of the probate system, which vary widely from state to state and which are better and more easily learned in practice. What they do examine is the system itself—its objectives, its costs, its abuses and some proposals for its reform. They observe that the avoidance of administrative costs is no less an estate planning objective than is the avoidance of taxes, and is, in smaller estates, frequently far more significant. With two carefully selected cases they subject to critical examination the nearly sacred proposition that a testator may choose his own executor. To my knowledge, no other casebook frontally addresses these issues. The allegation, by Dacey and others, that the probate system unjustifiably benefits lawyers at the expense of heirs and legatees is a serious indictment indeed. The law school classroom is a proper forum for its discussion.

A novel and completely textual chapter discusses three resources that constitute the primary basis of financial security for millions of families. The first of these, social security, is not property and the amount and beneficiaries thereof are not within the control of either the lawyer or his client. Nevertheless, the current maximum family benefit approximates the return from a $100,000 portfolio of tax-free bonds. An intelligent approach to an estate plan surely cannot ignore its existence. Similarly, employee benefit plans, some of which provide substantial lump-sum death benefits and almost all of which permit beneficiary designations, could be a significant part of the total picture that an estate planner must comprehend.

The third resource in this group, life insurance, is clearly a form of property which is subject to the same planning techniques as any other asset. Indeed, it is the most significant asset in millions of moderate size estates. Notwithstanding that fact, one finds almost nothing about life insurance in most wealth transmission casebooks. Good in-

Insurance agents are professional estate planners, but they are also salesmen. A lawyer who has a basic familiarity with life insurance is in a position to render an important service as an informed and impartial advisor. In twenty-four pages of discussion the authors effectively deal with such matters as the determination of the amount of coverage, the differences in types of policies and the selection of settlement options. If the ability to serve his clients is to be the test of a lawyer’s effectiveness, I suspect that the material in these twenty-four pages will prove infinitely more useful than a similar amount of space devoted to the destructibility of contingent remainders.

The final topic considered in the preliminary portion of *Family Wealth Transactions* is taxes—federal estate and gift taxes and state death levies. While the inclusion of such material in this kind of book is not unprecedented, its placement before any discussion of wills, trusts and future interests is unique. I do not share the view of many that the estate and gift tax structure is incomprehensible to a student who has not yet wrapped his mind around such matters as revocable trusts, contingent remainders and powers of appointment. On the contrary, it has been my experience that much of the trust and future interest material cannot be adequately comprehended without prior exposure to the tax considerations that motivate the complex dispositions involved.

There is an even more important reason for the early treatment of tax matters. An understanding of the tax structure is needed not only to achieve tax economies but also to identify situations where tax considerations should be subordinated. The desirability of saving taxes must be weighed against the increased complexity, administrative inconvenience and strained personal relationships that may result from tax-oriented dispositive schemes. Tax planning, is of course, one of the facets of estate planning—but only one.

The final section of *Family Wealth Transactions*, constituting about three-quarters of the book, covers almost all those topics one would expect to find in separate courses in wills, trusts and future interests. There is one significant omission—trust administration; and one welcome addition—community property. There is a particularly well done seventy-five page chapter on the classification of estates which sets forth the rules, explores their consequences, and evaluates their modern utility. Where this material is adequately covered in the first-year property course, the chapter will provide a useful review. Where, as seems to be the recent trend, only cursory attention is devoted to estates in the first year, the chapter will prove invaluable.

The authors have purposely excluded trust administration from their coverage in an effort to keep their book within manageable proportions. While sympathizing with their problem, I disagree with their conclusion. It is the estate planner, not the trust administrator, who
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recommends the creation of trusts, their structure and the selection of trustees. It seems to me that these determinations cannot properly be made without an understanding of how trusts operate. In particular one ought to appreciate the nature of the unique relationship between beneficiaries and trustees and the peculiar tensions between income beneficiaries and remaindermen.

Furthermore, the fiduciary relationship is one which pervades many areas of the law outside of the wealth transmission field. A legal education which did not include an intensive examination of that relationship would, I believe, be less than complete. For better or worse, that examination has traditionally taken place in the trusts course, and, unless and until the corporations people or others volunteer to take up the burden, I would hate to see it not included in some course in which there is likely to be a substantial enrollment.

In their chapter entitled "Restrictions on the Power of Disposition: Protection of the Family," the authors devote fifty pages of cases and text to the community property system. Those of us far from the Mexican border might be tempted to omit this material—a procedure which even the authors suggest. To do so wholly would, I think, be a mistake. As a practical matter, many of our students may end up practicing in community property states. Even those who don't will, in our mobile society, increasingly encounter clients migrating between common law and community property jurisdictions. There is an additional reason of a different order. I have long believed that the way most married couples feel about their property is more accurately reflected by the community property system than by common law concepts of separate ownership. The modern judicial and statutory substitutes for dower and curtesy have never really proved wholly satisfactory. An important reason, I believe, is that the common law system does not distinguish the surviving spouse of a lifetime marriage from the widow or widower of a brief marriage late in life. There is a vast and perceived difference in the justice of the claim of the surviving spouse in each of these fact situations. Community property law, with its distinction between property brought into the marriage and property accumulated during the marriage, gives recognition to this difference. I suspect that elective share statutes, including the augmented estate concept of the Uniform Probate Code, will continue to pose troublesome problems. There is, perhaps, much we can learn from our friends in the West.

The authors have made a most prodigious effort to treat wealth transmission as a single field of law and not as several distinct books bound within a single cover. While the content of their substantive law materials is not significantly different from other casebooks, their organizational scheme attempts to group concepts by their functional equivalence rather than their doctrinal similarity.
The best example of their effort is a single chapter on the formalities of non-will transfers in which they discuss the creation of trusts, multiple-party bank arrangements, joint tenancies, insurance and annuity contracts, conditional deeds, and gifts. The strength of this presentation is that, by facilitating the comparison of each type of transfer with the others and all with the will, it focuses attention on the sometimes irrational disparity of requirements to accomplish essentially identical objectives.

In a similar but, I think, less successful melange, they group in a single chapter a host of legal doctrines which have as their common aim the restriction of a person's freedom to do what he pleases with his property. This thread becomes somewhat tenuous as a connection between the Slayer's Act and spendthrift trusts, but these and many others are included along its length.

Another omnibus chapter, entitled "Securing the Transferor's Intent," deals with a variety of constructional problems ranging from the Doctrine of Worthier Title to ademption. No one can gainsay that the stated objective of rules of construction is the determination of what someone meant from the evidence of what he said. Arraying these rules side by side may well be the most dramatic way to assess how well that objective has been satisfied. Whether it is a viable pedagogical technique is an unanswered question for me.

A chapter entitled "Building Flexibility into the Estate Plan?" deals with powers of appointment, including powers to invade principal. It occurs to me that this might be an appropriate place to deal with powers of investment and allocation between principal and income, a topic not otherwise covered and, consistent with the authors' functional approach, properly covered here. The book concludes with a chapter on charitable gifts and one on, what else, the rule against perpetuities.

Law professors thrive on anomalies and there is surely no field of the law more rife with anomalies than wealth transmission. Professors Dukeminier and Johanson take a back seat to no one in their ability to identify irrationality. As early as page twelve they ask the reader to distinguish a mere expectancy from a contingent remainder under circumstances where the interests are identical in every practical respect. Their favorite authority is Lewis Carroll, whom they cite so frequently that their book might be appropriately subtitled Jess and Stan in Probateoland. Their juxtaposition of principal cases, their note cases and their imaginative hypotheticals combine to highlight the areas of the law that make little sense today, if, indeed, they ever did. Such drama is well calculated to alert the student to the pitfalls which beset his path. Family Wealth Transactions will undoubtedly help many to find their way through the labyrinth of wealth transmission law for the mutual benefit of their clients and themselves.

But if it does nothing more, royalties notwithstanding, I suspect
that the authors' aspirations will not be wholly fulfilled. Their dis-
cussion of the probate system, alluded to earlier, is an invitation for
constructive procedural reform. Many areas of the substantive law,
teeming with irrationality, are no less in need of revision. Such change,
if it is to come, will necessarily be effectuated by lawyers who have
not only mastered the system and profited from their mastery, but
who will be motivated to devote some of their talents and energies
toward rationalization for the benefit of all. I will be surprised if
*Family Wealth Transactions* does not spark that motivation in more
than a few.
EXPERIMENTATION WITH HUMAN BEINGS. BY JAY KATZ.

Paul D. Rheingold†

Heavy books make hard reviewing, or so they say. And books which are exhaustive of their subject make it unprofitable to repeat what they say or even to risk repetition by affecting intellectual discussion of the "big issues" they raise. Katz' Experimentation with Human Beings is the big book which, in 1159 pages of double columns and small type, says it all, and handsomely, on the practical ethics of human research experimentation.

The book presents a set of gothic tales about deliberate and unconsidered subjection of man to risky medical research. Readers will encounter such true events as:

— a Texas physician telling women that he is testing a new oral contraceptive on them when in fact he gives them a sugar pill (with ten pregnancies resulting)\(^1\)

— "volunteer" prisoners in Alabama subjected to a blood letting program, causing many cases of hepatitis and deaths due to improper oversight\(^2\)

— the administration of live cancer cells to terminal patients at a Brooklyn hospital\(^3\)

— using mentally defective children as guinea pigs in testing a new antibiotic\(^4\)

— MER/29, a new drug, withdrawn from the market after the discovery that the manufacturer had concealed tests which showed that the drug was highly toxic\(^5\)

— a lawsuit by a young lad who was told that a small cut would be made in his arm in a test, but who suffered a cardiac arrest when a catheter was pushed through his heart into his lungs\(^6\)

— Nazi doctors experimenting with the effects of freezing on the human body.\(^7\)

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\(^1\) J. Katz, Experimentation with Human Beings 791 (1972).

\(^2\) Id. 1041.

\(^3\) Id. 9.

\(^4\) Id. 962.

\(^5\) Id. 936.

\(^6\) Id. 569. Halushka v. University of Saskatchewan, 52 W.W.R. 608 (1965). This is the only appellate case dealing with the tort liability of the experimenter for injuries from a new drug or therapy.

\(^7\) J. Katz, supra note 1, at 292; United States v. Karl Brandt, The Medical Case, I & II Trials of War Criminals Before the Nuremberg Military Tribunals (1948).
This is not a textbook, but a casebook, of course, and not a law casebook of the ordinary sort. It is filled with hundreds of readings from every possible source—judicial decisions, statutes, law reviews, medical journals, congressional transcripts, FDA press releases, newspaper articles, even works of fiction—which might yield readable raw material on the subject of experimentation. These raw materials are tied together by a series of commentaries by Professor Katz which preface each section of the work. These commentaries, more often than not in the form of highly pertinent but hard-to-answer questions of the Hart and Wechsler type, serve as well to set the readings into focus.

Although the book's primary focus is on medical experimentation, Dr. Katz conceives of the topic of experimentation in its broadest light, encompassing sociological (the Chicago jury studies) and psychological research (sensory deprivation studies) and worker safety (black lung disease). The medical topics are a combination of some of the classical instances of human experimentation (Lord Haldane's testing new chemicals on his body) and some of the most topical. Such current medical-moral-legal problems are covered in detail as test tube babies, donation of body organs, transplantations, peer review committees, euthanasia and genetic tinkering.

In consulting these materials, one is drawn over and over again to a few basic themes—themes which have been fundamental to man for centuries: who has the right in society to conduct experiments on other human beings; what quality of a "consent" do we want from the subject; for what purposes may medical research be carried on; how much are we to defer to the one denominated "expert"; and, finally, how much governmental oversight of research is needed or to be tolerated.

The author, Jay Katz, is a psychiatrist on the faculty of Yale Law School. He has collaborated over the years with Yale law professors on a number of quite valuable interdisciplinary books and articles. In those works, as in this one, he makes good use of his medical, psychiatric and psychoanalytic training. That he has become a legal thinker as well is readily apparent from the design of the present book. Indeed, in reading through this book, one must continually remind himself that Dr. Katz is not also a lawyer (psychiatrists may choose to regard this comment as a legal chauvinist remark).

This is complemented by an extensive and valuable subject index and table of authors, books and articles at the end. It is interesting to note that the one book previously to appear on the law of medical experimentation is not cited: CLINICAL INVESTIGATION IN MEDICINE (J. Ladimer & R. Newman eds. 1963).

See, e.g., J. Katz, J. Goldstein & A. Dershowitz, PSYCHOANALYSIS, PSYCHIATRY AND LAW (1967); J. Goldstein & J. Katz, THE FAMILY AND THE LAW (1965). These are both casebooks, similar in style to that of the present work.
Yet, ever the true psychiatrist, Dr. Katz refrains from explicitly stating his own attitudes toward experimentation with humans. He does mention in an introductory remark that his interest in the field arose when he first read transcripts of the trials of the Nazi doctors at Nuremberg; from this his interest widened to all of experimentation. The origin of Dr. Katz' interest seems to explain both his motivation to produce this mass of materials and his attitude toward the subject matter. It is impossible for anyone to read through the assembled data without recognizing the shocking extent to which the medical profession has failed to protect the subjects of its experiments. Time and again the materials return to the theme of the physician who, in reporting in a reputable medical journal on a study he has done, reveals without apparent realization of wrongdoing, that he has subjected humans to the risks of mental and physical injury without obtaining any sort of reasonable consent from them. Whether a fan of big government or not, one is finally impelled to favor increased societal oversight of the research process.

The size of this book must be dealt with. It is so heavy that one cannot hold it in his hand. It would take at least a week to read it from cover to cover. For what use is such a tome intended? Lawyers or doctors? Students or practitioners? As a practicing lawyer who has taught a law-medicine seminar at several law schools, I first approached this book in terms of law school use. In a thirty-hour seminar on medico-legal problems, I generally teach one hour on experimentation, and then only as an aspect of medical malpractice. Even if one were to offer a semester-length course or seminar on experimentation, one would probably end up assigning no more than a quarter of the book. Medical schools, much as they should teach physicians-to-be something about their responsibilities regarding research or innovative techniques, do not teach this subject.

The practicing lawyer who gets one case involving experimentation, in its administrative law, tort or criminal law aspect, will prefer to reach for a book that gives him the answers, not one which poses the questions. We know that he should use the approach adopted in this book, but the lawyer has many cases and he cannot charge his client for a week's time in learning the background law and morals involved in the case. All said and done, a work that is truly comprehensive on its subject may limit its own usefulness.

A book without direct, practical use may nonetheless be of great

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10 In the area of "informed consent," there has been some real advance in the time since writing this book. A series of cases, beginning with Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972), have worked a revolution in this malpractice doctrine, dispensing with expert testimony as to the standard to be applied. In effect, the physician is to reveal all of the risks which a reasonable patient would expect to know about the proposed treatment. See also Cobbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); Wilkinson v. Vesey, — R.I. —, 295 A.2d 676 (1972). But see also Karp v. Cooley, 349 F. Supp. 827 (S.D. Tex. 1972).
value. Just as no one reads the dictionary from A to Z, no one (but reviewers) may read this book through. But the lawyer, doctor or other student of human behavior will dip into these materials profitably to learn the fundamental problems in the field of medical research. It is good to know, actually, that it is all here.
BOOKS RECEIVED


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