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Neill H. Alford, Jr.

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BOOK REVIEWS

The Psychology of Testation

DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH. By Thomas L. Shaffer. New York: Dunellen Publishing Co., 1970. Pp. ix, 292. \$7.95.

For the decade 1960-1970, any available prize for the most stimulating product of interest to estate planners by an individual writer certainly should go to Dean Thomas L. Shaffer¹ for "*Death, Property, and Lawyers*." This is an imaginative and stimulating book. A practicing lawyer who gives close attention to Dean Shaffer's work should be aided in evaluating his relationships with his estate planning clients. Even if this lawyer cannot be brought to a detailed evaluation, he at least will be brought to the threshold of introspection.

Dean Shaffer does not attempt to unravel the whole "psychological story" in estate planning; instead he concentrates upon the themes of death attitudes and the related transference problems. He has not provided all the answers, but his work is reminiscent of the archaeologist who clears the brush around a Mayan temple before the temple can be explored. Dean Shaffer has cleared a path, pointed the way, and demonstrated the effectiveness of interdisciplinary psychological techniques in exploring the human elements of estate planning. This includes the undefined and yet to be analyzed psychological problems of the various formal decision-makers associated with the estate planning process, such as legislators and judges.

Thurman Arnold has familiarized us with a "folklore of capitalism."² There is also a "folklore of estate planning," although many professional planners of estates, like capitalists, are loath to admit that they are trapped by myth. The estate planner assumes that the testator desires tax economy, an efficient and economical administration of his estate, and some degree of control over his children for their welfare. We thus find estate plans, and the instruments in execution of them, forced

1. Shaffer has recently been appointed Dean of Notre Dame Law School.
2. T. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

into a common format. Individual programs emerge like a parade of identical hedgehogs, bristling with devices to repel the tax collector. Likewise, the powers of fiduciaries are described almost identically in every will and trust instrument. Each trust is equipped with a spendthrift clause to protect unwary wives and children.

The "folklore testator" probably is visualized by the estate planner much like the picture of the "propositus" so vividly engraved in those family diagrams in *Coke on Littleton*. The testator is viewed as wearing a sad and resigned expression, probably because he has visions of the beyond. His figure has that agonized demeanor suggesting that he has just been racked; or perhaps Coke and some of his colleagues merely have been doing some estate planning for this fellow and all have agreed that he should die intestate.

While Dean Shaffer's book may not attain the fame of "Folklore of Capitalism," the author, by skillful use of the empirical method and by a prudent and imaginative employment of interdisciplinary talent, has begun the task of stripping away the myth surrounding the attitudes and desires of the perplexed humans concerned with the disposition of their estates. He has brought within reach a "psychology of testation." His book is important for the avenues of research that are suggested by his techniques for inquiry and by the questions impliedly raised in his examination of death topics as well as for his excellent use of clinical psychological materials in defining and appraising attitudes towards death.

The things estate planners tend to assume their clients desire probably are corollaries of the estate planner's concept of the imaginary "average testator"—a person who never has existed and never will. If, during our consultation, we plan without patient and searching inquiry into the client's desires, we neither stimulate him to necessary thought nor evaluate thoroughly those suggestions that he haltingly puts before us. We may finish our work for him with a "folklore plan," a "folklore will," and a number of "folklore trusts," which the client probably will accept with a vague and uncomfortable feeling of dissatisfaction.

This reviewer does not suggest that lawyers intentionally ignore human elements in estate planning. But lawyers often lack both the time to review and evaluate their experiences with estate planning clients and the psychological or psychiatric training to probe this experience very deeply. They thus tend to rely upon the folklore of testation as a guide.

Chapters One (Introduction), Four, Five, and Six of Dean Shaffer's

book have been published as law review articles. Although each of these chapters has been rewritten for the purpose of inclusion in this work, and although Chapter One contains a good synopsis of the materials, there is a lack of cohesion throughout the book. This is not remedied by the central theme of death present in each chapter except Chapter Seven. This difficulty in cohesion probably could not have been overcome without a complete redistribution of material and does not detract significantly from the individual excellence of each of the chapters. One feature of the book, however, uses this somewhat segmented approach to its best advantage. There are comprehensive notes at the end of each chapter and, at the end of the book, an excellent collection of sources pertinent to his topic. A reader certainly can be stimulated to explore the additional sources.

Part I of the book, entitled "Death," is new. Chapters Two and Three contained therein are important because they demonstrate possible techniques for empirical inquiry into the psychology of testation but probably should have been presented in an appendix to the book. The reader makes an easier transition if he moves from Chapter One to Chapter Four and then on through the materials.

In Chapter Two, entitled "Death in the Courtroom," Dean Shaffer relates the responses of trial judges at a judicial conference when confronted in a controlled experiment with demonstrative evidence concerning death, indecency, and pain. The judges were shaken, and repulsed, by what they saw—as most people would be if they did not habituate civilian or military charnel houses. All that can be concluded from Chapter Two, however, is that death is likely to sharpen the discrimination of a judge toward the accuracy of evidence. He also is more likely to be concerned with his role as an umpire in handling this evidence at trial rather than with his role in building a complete appellate record.

The techniques used in putting the judges through their paces are interesting, but a complete study of the psychology of testation will require an examination of the death attitudes of all decision-makers dealing with the testamentary process—judges, legislators and administrative officers. A judge's attitudes about the value of life may well have ramifications in his decisions concerning the estates of decedents. These predispositions, in turn, perhaps may be understood only when culture patterns concerning death are understood. The matter is infinitely complex.

Chapter Three, "Death in the Living Room," illustrates the use of

a "sensitivity training group" or "encounter group," a technique that may become important in empirical research concerning death attitudes. The participants, with the exception of Dean Shaffer and his wife, were all law students and wives, and the "encounter" reflects a rather youthful outlook on death. The same system could be used for lawyers, judges, and capitalists with major estates, if these more experienced members of the community could be persuaded to lend themselves to such an experiment.

Dean Shaffer's conclusions from the "encounter group" session are not surprising. Death attitudes are different for different people and are ambivalent in character, as shown by the following sample of expressed attitudes: After a loved one's death, he is distant but still significant; there is a hostility towards death with both an aggressive and a defensive reaction to it; religious solutions to problems of death play a relatively minor role in death attitudes; death is faced by making life more meaningful. These are mainly the perspectives of youth, but the techniques by which the perspectives were identified seem generally applicable.³

In Part II, entitled "Death, Property and Giving," Dean Shaffer concentrates upon the psychology of testation principally as it bears upon counselling the client. Chapter Four, "Values Destroyed by Death," is of immediate relevance to estate planning, and in Chapter Five the author uses taped client interviews conducted by his students—again with young people as both counsellors and clients—to analyze death, personality and the relationship between the client and his property. In these two chapters the author emphasizes that the lawyer-counsellor should have "therapeutic" or "developmental" goals in counselling clients concerning values destroyed by death. He correctly states:

Clients in "estate planning" are invited into a relation with property which is probably new to them and which may be unsettling. Death is a part of this confrontation and death is an unpleasant fact to modern man. With death as his focus, the client experiences property as a part of his person which is immortal. Confrontation with property as immortal is carried out in a context of giving in the client's life, maybe giving *of* his life, because property is a personal part of his life. Death in this atmosphere is no less inevitable than it is anywhere else; it is here being planned for, however, which is both encouraging and traumatic. Planning for death is encouraging because modern man is attracted to the idea of plans which will organize his future life for him, but traumatic because it involves planning for death and personal death is a thought modern man will do almost anything to avoid. (p. 72).

3. Appended to this Chapter is a questionnaire developed by Dr. Edwin Shneidman, the "suicidologist." The reader can answer this questionnaire and thus determine his attitudes towards death; and by answering is brought, in a sense, into participation with the "encounter" group.

The reviewer does not agree that a lawyer should have a therapeutic goal in estate planning as a principal aim. Naturally, no one wants the client to leave the law office with the gongs of doom reverberating in his ears. Furthermore, law schools are now beginning to provide some training in psychology and psychiatry to their students, and, perhaps, in future years a lawyer will be better equipped for work for which now only doctors and professional religious advisers tend to be qualified. Admittedly, we are forcing lawyers to adapt their skills to all sorts of social services. But death is an intensely private matter for many people and lawyers should not undertake the demolition of the individual's defenses when the lawyer is not qualified to predict the nature of the individual's response when the defenses are destroyed. Attitudes towards death interrelate with many other attitudes. The man who unravels the skein should have a sure feel for what he is doing.

It is often difficult, of course, to persuade a client to think about his own death, for, as Dean Shaffer points out, he thinks about death as a survivor. Even when the client's thoughts can be directed toward his own demise it is very difficult to persuade him to think about events in the weeks or months following his death. He can imagine the relatively distant future but not the needs of his family and community immediately after his departure.

These observations upon therapeutic counselling are not intended to detract from the general merit of Chapters Four and Five. When we understand the values destroyed by death we can stimulate their recognition by the client. Hopefully, we can provoke thought about how these values might best be preserved in his particular planning context. The response of the client must be stimulated and the lawyer must be able to interpret what he hears. The materials in Chapters Four and Five will prove useful in attaining these ends. Much can be accomplished in this context by cooperation between behavioral scientists and lawyers in improving the effectiveness of client counselling through developing insights concerning the responses of both lawyers and clients.

In Part III, entitled "The Psychology of Testation in the Judicial Process," Dean Shaffer shifts to the perspective of the judicial decision maker. In continuing death as a principal theme, Chapter Six, "Psychological Autopsies in Judicial Opinions," examines the judicial efforts to apply the "contemplation of death standard" in section 2035 of the Federal Estate Tax Law.⁴ Hopefully, section 2035 and all of Dean Shaf-

4. INT. REV. CODE OF 1954, § 2035.

fer's problems concerning it will disappear soon with the adoption of a single tax table for all transfers subject to federal taxation. As long as these problems remain with us, however, they provide happy examples for the psychological analyses of Dean Shaffer and his colleagues. The author organizes this chapter around three hypothetical cases that he develops skilfully. He then locates the criteria of these judicial decisions in a psychological *post mortem* scheme developed by Dr. Edwin Shneidman to be used for death certification in suicide cases. This permits lucid and helpful comment on each case through analyses by Drs. Redmount and Feifel, clinical psychologists collaborating in this chapter with Dean Shaffer, and by comments by Dean Shaffer.

The author's discussion of transference in Chapter Seven is the most sophisticated dissection of the concept of undue influence that the reviewer has read. Apart from the obvious applications of the materials in litigation, a *caveat* seems clear for the lawyer who embarks upon therapeutic counselling in estate planning. The "unconscious" influence cases analyzed by Dean Shaffer are particularly difficult to handle in litigation and seem to the reviewer typical of situations likely to be produced in therapeutic counselling by lawyers.

This book provides numerous starting points for a teacher or student, or even a lawyer or judge, who is not engaged in estate planning counselling, but who has an interest in estate planning or litigation on a scholarly level. A psychology of death or a psychology of testation, for example, will never be rounded out until changes in attitudes are examined through time, because neither the attitude of the client nor the attitudes of his community are static. Death must be considered not only in the perspective of the individual but also as a cultural concept. Various studies may prove useful here, such as the studies undertaken by Professor Hick of the University of Edinburgh into the theology of death.⁵ Between the time an estate is planned and the time the plan operates, the attitudes of the client about death may change significantly, and the ability to predict this change in attitude may prevent obsolescence in the plan. We need to know the relationship between the client's death attitude and the provisions he insists be placed in a will and the effect that testamentary disposition within a client's family has upon his will-making responses. Certainly Dean Shaffer has opened up a Pandora's box—yet nothing but benefits are likely to fly from this one.

NEILL H. ALFORD, JR.*

5. Professor John H. Hick delivered the James W. Richard Lectures in Religion at the University of Virginia in 1969 on the topic "The Theology of Death." His lectures will be part of a major work on this subject to be published.

* Henry L. and Grace Doherty Charitable Foundation Professor of Law, University of Virginia. B.A. 1940, The Citadel; LL.B. 1947, University of Virginia; J.S.D. 1966, Yale.