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Problems and Materials in Federal Estate And Gift Taxation. By Ralph S. Rice.

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BOOK REVIEW

PROBLEMS AND MATERIALS IN FEDERAL ESTATE AND GIFT TAXATION. By Ralph S. Rice. St. Paul, Minnesota: West Publishing Co. 1966. Pp. 504. \$9.50.

The materials available for teaching a course in federal estate and gift taxation¹ were somewhat limited prior to the publication of Professor Rice's volume. The only other full treatment of the subject matter is that of Dean Warren and Secretary Surrey,² which was published in 1961. Dean Griswold³ and Professor Bittker⁴ devote 200 and 378 pages respectively to federal estate and gift taxation, no doubt in response to the traditional view that federal taxes constitute a unified body of learning to which a student should be introduced in one course.⁵ However, none of these materials, prepared by authors whose contributions to the teaching of federal income tax are both monumental and significant, is conducive to teaching the kind of estate and gift tax course I would prefer. Therefore, I awaited my first experience with Professor Rice's materials with some anticipation. On the whole, my students and I enjoyed using them.⁶

Professor Rice's volume is somewhat unusual for a law school coursebook in two ways. First, it is a planning-oriented problem method coursebook not easily adapted to other teaching methods. Second, it is divided not only by subject matter, but also into forty-five sessions which Professor Rice considers of appropriate length and difficulty for fifty-minute class periods.⁷ Four additional sessions deal with the peculiar aspects of estate planning in community property jurisdictions.⁸ Each session is followed by three to six prob-

¹ Whether such a course should in fact be taught is discussed below. See text accompanying notes 22-31 *infra*. The answer to that question does not affect the real necessity with which teachers are faced when handed the course by the curriculum committee.

² W. WARREN & S. SURREY, *CASES AND MATERIALS ON FEDERAL ESTATE & GIFT TAXATION* (1961).

³ E. GRISWOLD, *CASES ON FEDERAL TAXATION* (6th ed. 1965).

⁴ B. BITTKER, *FEDERAL INCOME, ESTATE AND GIFT TAXATION* (3d ed. 1964).

⁵ Chommie, Book Review, 116 U. PA. L. REV. 358, 362 (1967).

⁶ The reviewer used Professor Rice's book during the 1966 Summer Session at the University of Louisville to teach a two-hour course in a five-week session. The course met three nights a week for one hour and forty minutes. Thus, some comments may not be appropriate for more leisurely and less concentrated doses.

⁷ R. RICE, *PROBLEMS AND MATERIALS IN FEDERAL ESTATE AND GIFT TAXATION*, xi (1966) [hereinafter cited as R. RICE].

⁸ Professor Rice suggests that the instructor select the sessions appropriate to that

lems intended to constitute the bulk of the class discussion. I found that the time allocation was accurate in most of the sessions. Instructors may wish, however, to discuss only the most challenging two or three problems of each session in class, thereby gaining time for a fuller treatment of them.

Professor Rice's book is designed for a three-hour course. He suggests the omission of fifteen particular sessions for a two-hour course.⁹ His choice of omissions is proper, since these sessions involve post-death planning,¹⁰ or deal thoroughly with collateral matters already treated.

The first five sessions are introductory, and include a summary introduction to estate, gift and inheritance taxes; the use of gifts in estate planning; income tax problems relating to inter vivos transfers; and the broad outlines of the gift tax. Sessions Six to Ten encompass the gift tax and the advantages of gifts in estate planning. The following fifteen sessions, which can safely be characterized by Professor Rice's title to session 2, "The Donor Who Won't Let Go," consider the income, estate, and gift tax aspects of various conditional and partial gifts. Most of these selections consider the use of gifts in trust, and involve the strings commonly retained by donors, such as administrative powers, beneficial interests, reversions, and the power to change the interests of trust beneficiaries. Also considered is the use of accumulative and multiple trusts. Sessions Twenty-six and Twenty-seven deal with charitable gifts, and Twenty-eight and Twenty-nine present materials on the tax aspects of marriage and divorce. The succeeding nine sessions cover the manner of holding property, insurance, and the special problems of family businesses. Three sessions deal with the marital deduction, and one with stepped-up basis. There are five sessions related to post-death planning, and the book concludes with a consideration of the problems of will drafting.

Professor Rice's book is highly useful because interspersed in the above sessions are considerations of the income tax. Indeed, the income tax is as important to the book as either the estate or the

type of jurisdiction in which he is teaching. It is also possible to assign both sessions dealing with the same problem and compare them in class.

⁹ R. RICE, *supra* note 7, at xii.

¹⁰ I omitted some of the suggested sessions entirely, and assigned others to be read collaterally. In a two-hour course, you must march with the scheduled sessions or run the risk of not covering the marital deduction, as it is treated in the penultimate sessions recommended. A sufficient cushion is provided in a three-hour course.

gift tax. There is a relatively complete treatment of the Clifford rules¹¹ relating to the attribution of trust income. A somewhat sparser introduction to ordinary rules of trust taxation is also provided. The assignment of income cases¹² receives a whole session, ambitiously entitled "The Income Tax and Estate Planning."¹³ Income tax considerations loom large in the session entitled "Selecting Specific Properties for Gifts."¹⁴ There is discussion of the section 264 denial of deductions for interest on loans incurred to purchase life insurance or annuities.¹⁵ Income tax consequences of split dollar insurance are treated,¹⁶ as well as income in respect of a decedent,¹⁷ charitable deductions,¹⁸ taxation of gain on transfer of appreciated property to a spouse in a divorce settlement,¹⁹ and other income tax matters.²⁰

As can be seen by the foregoing summary, Professor Rice's title promises considerably less than his coursebook delivers. The title promises only materials in federal estate and gift taxation. A more appropriate title would be "Materials on the Federal Tax Aspects of Estate Planning."²¹ From the point of view of the curriculum, the coverage of income tax material in a course in estate and gift tax is quite proper, and Professor Rice's coursebook is the first work embodying this integrated viewpoint for estate and gift tax.²²

Traditionally, the law school courses were tightly compartmentalized and methodologically identical. From the days when Christopher Columbus Langdell began using the case method,²³ pedagogical attention was fixed on the litigation process as the zenith of legal

¹¹ INT. REV. CODE of 1954, §§ 671-78.

¹² *Helvering v. Horse*, 311 U.S. 112 (1940); *Blair v. Comm'r*, 300 U.S. 5 (1937); *Lucas v. Earl*, 281 U.S. 111 (1930). *Harrison v. Schaffner*, 312 U.S. 579 (1941) is also referred to by the inclusion of the holding of that case in REV. RUL. 55-38, 1955-1 CUM. BULL. 389, which the author uses. *White v. Fitzpatrick*, 193 F.2d 398 (2d Cir. 1951) is set forth in session XIX, dealing with leasebacks.

¹³ R. RICE, *supra* note 7, at 25-36.

¹⁴ *Id.* at 78-96.

¹⁵ *Id.* at 178-79, 181-82, 343-46.

¹⁶ *Id.* at 179-81.

¹⁷ *Id.* at 418-32.

¹⁸ *Id.* at 217-40.

¹⁹ *Id.* at 252-57.

²⁰ *Id.* at 257-68, 295-96, 334-41, 343-47, 358-59, 364-67, 440-49.

²¹ A similar type of tax planning course was suggested in Lowndes, *Problems in Teaching Tax Law: Tax Law Encountered in Other Fields of Law*, 13 J. LEGAL ED. 481 (1961).

²² Except A. CASNER, *ESTATE PLANNING* (1961), a book too vast in scope for a course in estate and gift taxation.

²³ For a description of the case method, rationale, and early history, see A. SUTHERLAND, *THE LAW AT HARVARD*, 174-80 (1967).

endeavor. One result of this myopia was the disintegration of a transaction into its component parts for separate study in the course to which each part pertained.

This view now seems as antique as Langdell's eponym because, in many fields, planning and negotiation are additional skills so pervasive as to require law school development. Federal estate and gift taxation is a paradigm, since the planning so greatly dwarfs the litigation aspects of the subject. This is not to say that rigorous case analysis is discarded, for without it planning and negotiating skills would be rendered as vain as Ozymandias' pretentiousness.²⁴ Nevertheless, the trend is toward transaction planning which develops case analysis and collects the various legal considerations appropriate to planning the particular problem. This collection crosses traditional subject matter lines and renders them less useful.

The effect of this trend has been toward the consolidation of courses. Nowhere is this more apparent than in the field of estate planning. Traditionally, this subject touches on wills, trusts, future interests, federal income tax, federal estate and gift tax, and state and local taxation.²⁵ Many schools have condensed wills and trusts into one course, often reducing the number of semester hours allocated to it from a total of six to as few as three.²⁶ Some schools have added future interests material to form a course called "Gratuitous Transfers,"²⁷ which is the non-tax analogue to Professor Rice's book and might well be called "Non-tax Aspects of Estate Planning." Offering such a course has been justified on the ground that the general practitioner meets many small estates that require no major tax

²⁴ P. B. SHELLEY, *POETICAL WORKS* 546 (1929).

²⁵ To a lesser degree, work in corporations is necessary when considering estate planning aspects of family businesses.

²⁶ See, e.g., *BULLETIN OF YALE LAW SCHOOL* 34 (1967), which lists a three-hour estates course covering intestate succession, wills, trusts, and gifts. In some years, an additional course in Fiduciary Administration is offered.

On the other hand, the consolidation could be due to a lack of interest (or sex appeal) in the traditional approach to the subject matter. See Friedman, *The Role of the Wills Course in the Modern Curriculum*, 13 J. LEGAL ED. 196 (1960). He ascribes the demise of wills to the decline of courses that do not involve issues of contemporary society or relate to other disciplines. The fact that it is a self-contained body of study that is useful (quaere: how useful is the average wills course?) to the practicing attorney is not enough.

²⁷ See, e.g., *BULLETIN OF DUKE UNIVERSITY SCHOOL OF LAW* 35 (1967), which lists a six-hour package of wills, trusts, and future interests called Property II and III. A casebook has been developed for such a course that includes some red flags in the field of federal taxation. A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, *CASES AND MATERIALS ON GRATUITOUS TRANSFERS* (1967) [hereinafter cited as A. GULLIVER].

work.²⁸ However, a combination of these two courses, taught preferably through the problem method, would give the student a firm foundation in estate planning. Such a course could be taught in seven or eight semester hours, as long as the student is not required to do substantial drafting work. In this way, one of the dangers of a planning course concentrating on tax is avoided. Students often develop the feeling that tax considerations should be the only ones that motivate planning decisions. Professor Rice points out this fallacy,²⁹ but I fear that his words are lost in the tax-oriented consideration of the rest of the book.³⁰ He also demonstrates the impact that state law in the area of trusts and wills can have on the tax results of particular planning alternatives.³¹ This simply reinforces my conclusion that a unified course in estate planning should be offered rather than the present piecemeal situation.

Professor Rice's coursebook is only appropriate to the kind of course he teaches—the planning, problem method course, which forces the student, in advance of the class, to focus his attention on particular problems in relation to the materials.³² Class discussion primarily involves these problems.

The following advantages of the problem method have been advanced:

- (1) it approximates the lawyer's approach to law;
- (2) it affords the student training in planning and advising;
- (3) it broadens the range of matters open to the student's consideration by including nonlegal materials and encouraging combinations of material from different courses;

²⁸ A. GULLIVER, *supra* note 27 at ix. Quaere whether these estates require much major trust, wills or future interests work either. E.W. Howe's comment that "there are few grave legal questions in a poor estate" is still applicable.

²⁹ R. RICE, *supra* note 7, at ix.

³⁰ See, e.g., *id.* at 97-100. Although he tries to point out some basic non-tax considerations, Professor Rice's main thrust is tax planning.

³¹ See, e.g., *Hays' Estate v. Comm'r*, 181 F.2d 169 (5th Cir. 1950), as cited in R. RICE, *supra* note 7, at 113; *United States v. Powell*, 307 F.2d 821 (10th Cir. 1962), as cited in R. RICE, *supra* note 7, at 149; *Estate of King*, 37 T.C. 973 (1962), as cited in R. RICE, *supra* note 7, at 151. The much-noted recent case of *Estate of Borax v. Comm'r*, 349 F.2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966) is one in which a state court construction of a term used in the tax statute was disregarded. For a discussion of this somewhat different problem, see A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 1049-73, 1121-41 (1965).

³² REPORT OF THE COMMITTEE ON TEACHING METHODS, 1 PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 198, 202-04 (1966) [hereinafter cited as REPORT].

(4) it increases the effectiveness of instruction in areas where case law is inadequate; and

(5) it provides a stimulus to student interest, particularly in connection with longer written assignments.³³

When taught properly, the problem method can incorporate many of these advantages. However, there is a tendency when teaching by the problem method (which Professor Rice's book accentuates) to narrow the class discussion to the preassigned problems. When the principal subject for class discussion is the material assigned in advance, it tends to be mind-contracting. The student is not forced to read material and inquire, "What are the implications of this case, statute, committee report, etc., on the body of knowledge in the field? How can it be used?" Instead, he is handed the problem ready-made, and his work is done when he has solved it. Granted, this is what the practicing attorney does, but I doubt that it is better training for the law student than a more open-end inquiry. Professor Rice recognizes this problem and suggests corrective measures.³⁴ Nonetheless, the coursebook makes this procedure difficult by providing more than enough discussion in the problems to consume the entire session.

Whether the problem method equals or exceeds in value the Socratic method of teaching probably depends on the type of problem method used. There are almost as many variations of the problem method as there are professors using it.³⁵ These variations can be divided into three types depending on the problems posed in the coursebook and their class use. The first is simply the written posing of the instructor's questions for class.³⁶ In this respect, the only way in which the problem method differs from the usual law school class method is that the students have the questions in advance and are spared the necessity of ascertaining for themselves what questions should be asked about the materials. A second type presents short hypothetical variants of the materials presented in case or text form.³⁷ Again, the only difference is that the students are given the hypotheticals rather than being forced to guess at them. Professor Rice's book falls into this class. For example, the material in the

³³ *Id.* at 207-11.

³⁴ R. RICE, *supra* note 7, at xii.

³⁵ REPORT, *supra* note 32, at 202-03.

³⁶ See, e.g., P. AREEDA, ANTITRUST ANALYSIS, ¶¶ 210, 213 (1967).

³⁷ See, e.g., *id.* at ¶¶ 211-12, 214, 216.

session entitled "Power to Change Beneficiaries' Interests"³⁸ consists of text adapted from another of his books,³⁹ and the case of *Joseph Goldstein*.⁴⁰ Following the session, there are six problems.⁴¹ Five present possible gifts situations where the donor retains some powers. In each case, the student is asked to consider the income, estate and gift tax consequences of the particular hypothetical transaction set forth. Only one full problem and an addendum to a second actually put the student in a planning position.⁴² The planning required is no more than might normally be asked without advance warning in any law class on the subject.

In summary, my difficulty with these two variations of the problem method—the instructor's questions and the short hypothetical—as a revolutionary development is that they do not significantly differ from ordinary class procedure. All they do is limit the student's breadth of thought. They permit the coverage of a larger amount of material by giving the student advance notice of the exact questions for discussion, thus eliminating certain time-consuming practices,⁴³ but I wonder if the game is worth the proverbial candle?

A third type of problem method is one that is more similar to the practice of law. Here the student is given a set of facts and a goal to reach. The problem should be somewhat extensive to permit the student to live with it for at least several weeks. Unsatisfactory lines of solution may be suggested to demonstrate the choice between possible techniques. Perhaps the best problem is one for which no perfect solution may be devised. The student's task is to select the best of several imperfect alternatives for his client after thoroughly analyzing the legal and practical aspects of each. An example of this type of problem method is provided by Professor Herwitz's *Business Planning* materials.⁴⁴ In terms of the rationale underlying the use of the problem method, this third type of course most nearly gains that method's advantages. It most directly puts the student into a lawyerlike problem, immerses him in planning and advising, and stimulates his interest. In terms of the other two advantages, giving the student a broad range of considerations to bring to bear on the

³⁸ R. RICE, *supra* note 7, at 125-38.

³⁹ R. RICE, *FAMILY TAX PLANNING* 260-75 (1960, Supp. 1967).

⁴⁰ 37 T.C. 897 (1962).

⁴¹ R. RICE, *supra* note 7, at 138-39.

⁴² *Id.*

⁴³ See P. AREEDA, *supra* note 36, at xi.

⁴⁴ D. HERWITZ, *BUSINESS PLANNING* (1966).

subject matter and teaching more effectively those courses where case law is inadequate, I suspect that either of the three types of problem methods is equally effective.

Estate planning is a subject that easily lends itself to such longer problems. By varying the family situations, jurisdictions, and assets, one can analyze most problems through a few well-drafted situations. For example, Professor David Weaver⁴⁵ has drafted three problems for use in an estate planning seminar. They concern estate planning for a doctor at three stages in his career—ages 30, 45, and 60. The problems raised constitute a checklist on estate planning, even including problems of a family retail business. This kind of problem would provide more of the satisfactions of the problem method than Professor Rice affords.

To say, however, that Professor Rice did not write the book I would like him to have written is to say very little. The important question is how good a pedagogical tool is the book he *has* written. Inevitably, in a problem method coursebook, this depends on the quality of the problems and the reading reproduced. Professor Rice's problems fall within the second class of the problem method—short hypotheticals. They can be further divided into two types. One type comprises problems for which an unambiguous answer is supplied in the text, cases, statute, or regulations.⁴⁶ These problems are designed as a check on the student's preparedness for the meatier problems. Often they review materials covered in previous sessions to recall them to mind for succeeding problems. This type is primarily for student benefit and may be omitted from class discussion.⁴⁷ The other type, and the best source of class discussion, concerns problems which fall within the grey areas of the law, or areas where cases and regulations collide. Many of these problems lead to lively classroom discussion. Particularly good has been Professor Rice's inclusion of the text of a document whose construction is necessary to solving the problem.⁴⁸ This gives the students an awareness of the difficulties of drafting without undertaking extensive drafting themselves. For example, the problem cited in footnote 48 concerns alimony provisions, and asks the student to consider substitute language if he is unsatisfied with it. Unfortunately, the inclusion of the first or "look-

⁴⁵ Professor of Law, George Washington University Law School.

⁴⁶ See, e.g., R. RICE, *supra* note 7, at 115.

⁴⁷ Professor Rice's inclusion of these black letter problems is deliberate. *Id.* at x-xi.

⁴⁸ See, e.g., *id.* at 250-51.

it-up" type of problem gives students the impression that there are clear answers for all the problems. They must be disabused of that notion.

The notion that uncontroverted answers exist is augmented by Professor Rice's text. He uses text very effectively in emphasizing the large variety of variations on a single theme. Each text paragraph has its own topic heading, which greatly facilitates its use. Most of these textual materials are adapted from *Family Tax Planning*⁴⁹ to provide a hornbook statement of the law. In many areas, this fills the bill well. However, in areas where the law is in flux, the use of text obstructs the student's efforts because the text does not tend to consider the purposes and policies of the law. This derives from Professor Rice's view on policy:

Emphasis on Policy. In this work there is little direct emphasis on the confusion, inconsistencies, private shelters and public incompetence reflected in the tax law. As problem after problem unfolds, it is all the teacher can do to inspire a belief in students that not all legislators or administrators are afflicted by the occasional cowardice and self-advancement evident in some. Students soon learn that peculiarities of tax laws often must be explained by the less amiable facts of human nature. The fact is that legislative statesmanship and administrative devotion to the public fisc by and large is at a very high level in the tax field, considering the inherent deficiencies of the democratic process. While personally pressing for reform, the academician may do well to emphasize accomplishment, rather than shortcomings, here.⁵⁰

His viewpoint seems based on the assumption that policy is only significant in terms of reform. What of the use of policy, as demonstrated by legislative history, in the construction of a statute? There, policy should have a significant role in measuring the legislation's scope. Disregard of this removes the teleological basis for law and makes prediction far more difficult because we can only argue from the plain meaning of the words of the statute, regulation, or case. A lawbook cannot successfully ignore policy in that sense, and Professor Rice, despite his declaration, inevitably allows for considerable policy discussion in his problems. However, there is no material pointing toward such a discussion.

The materials in the coursebook are generally well chosen. Pro-

⁴⁹ R. RICE, *FAMILY TAX PLANNING* (1960, Supp. 1967).

⁵⁰ R. RICE, *supra* note 7, at xi-xii.

fessor Rice combines leading cases⁵¹ with the kinds of horrors that have been standard casebook fare for half a century⁵² to form a good complement for his text. He uses more legislative history than is customary for coursebooks, an improvement which other authors might note.⁵³ Occasionally, I thought a case set forth at length could have been safely digested, but generally the materials were well edited.

It is difficult to quarrel with the material an author has chosen to exclude. There is only so much time in a course, and subject matter preferences often reflect a personal evaluation of the relative importance of different materials. The book might appeal to more teachers (or reduce any deemed necessity for preparing outside materials) if some considerations were included of foreign problems and handling of pensions. With the acceleration of the mobility of capital, more lawyers are likely to find themselves with problems of foreign assets or domestic assets of alien decedents.⁵⁴ A session on the subject would be useful. Likewise, most estate planning today must take into consideration some type of pension provision, either corporate, H.R. 10, governmental, or educational. Although one session is devoted to annuities,⁵⁵ another on pensions would enhance the book.

Unlike some coursebooks that also function as deskbooks,⁵⁶ only one aspect of Professor Rice's work would be useful outside the academic community. After each session, he includes a bibliography of articles on the subject matter of the session, which is a useful starting place for research.

Technically, the book would be easier to use if all cases were indexed under both plaintiff's and defendant's names, and if the non-case material were indexed.

In summary, Professor Rice has made a valuable contribution to

⁵¹ E.g., *United States v. Stapf*, 375 U.S. 118 (1963), as cited in R. RICE, *supra* note 7, at 409.

⁵² E.g., *United States v. Powell*, 307 F.2d 821 (10th Cir. 1962), as cited in R. RICE, *supra* note 7, at 140.

⁵³ E.g., R. RICE, *supra* note 7, at 25.

⁵⁴ This increased contact has led to an acceleration in our conclusion of estate tax treaties. They are now likely to be patterned largely after the Organization for European Cooperation & Development Model Convention. *OECD Draft Double Taxation Convention on Estates and Inheritances* (1966). See *Remarks of Stanley Surrey before the National Foreign Trade Council*, P-H TAX TREATIES ¶ 110,006 at 110, 116.

⁵⁵ R. RICE, *supra* note 7, at 356-69.

⁵⁶ E.g., W. BISHOP, *INTERNATIONAL LAW* (1962).

the teaching materials available in the field. It is the only manageable coursebook available for a course in the tax aspects of estate planning. Professor Rice's book is not, in my opinion, the best possible coursebook. However, until the arrival of Candide's best of all possible worlds, it is the best available for a course in federal estate and gift taxation, and I will use it again when next I teach the course.

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