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Book Reviews

BOOKS REVIEWED

From Failing Hands: The Story of Presidential Succession. By John D. Feerick. New York: Fordham University Press. 1965. Pp. xvi, 368. $6.95

From modest beginnings the office of Vice President of the United States grew slowly in stature until the end of World War II, when it suddenly expanded in importance and national attention. While the great tragedy of November 22, 1963, crystallized interest as never before in the subject of Presidential succession, students and officials of government for generations have been concerned with the organic law designed to insure the orderly transfer of authority upon the death, resignation or removal of the President from office, or his inability to discharge the powers and duties of the office.

This book tells a story which has deep interest for every thinking American. In a clear and nontechnical style we are at once reminded of the thirty-seven years—over twenty per cent of its history—during which this nation has been without a Vice President and of the dangerous political shoals which were narrowly avoided for a total period of more than one year during the disabilities of Presidents Garfield, Wilson and Eisenhower.

Article II, section 1, clause 6 of the Constitution of the United States is a curious mixture of grammar and of two related but different subjects. This portion of the Constitution attempts to treat in a single sentence, with a paucity of words and dubious punctuation, "[o]f The Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office . . . ." Even though presidential succession under the authority of this provision has always been fixed by acts of Congress, with varying provisions from time to time, there is a frightening constitutional deficiency as to what occurs upon total disability of the President.

Chairman Emanuel Celler of the Judiciary Committee of the House once characterized the kindred but independent subjects of presidential succession and disability as a "[t]horny political thicket most difficult to penetrate." The author of *From Failing Hands* has long been a distinguished student and writer in this area. Less than one month prior to the death of President Kennedy he published an excellent article in the Fordham Law Review entitled "The Problem of Presidential Inability—Will Congress Ever Solve It?" Therein he prophesied that "[S]ince we have a young, able and healthy President, all indications are that the issue will remain dormant until another disability crisis confronts the country."

From Failing Hands contains by way of appendix the American Bar Association Conference Consensus on presidential succession and inability. Purely as a footnote to the book and its author, it should be recorded that a highly satisfactory and permanent solution to these problems, patterned generally along the lines of the Consensus, is well on its way to reality. In the form bills[1] introduced by Senator Birch Bayh and Congressman Celler, we are on the threshold of a proposed twenty-fifth constitutional amendment for action by the states. The adoption of this amendment will be an enduring monument to Mr. Feerick for the extremely important part he played in its conception and formulation.

From Failing Hands is extremely good and worthwhile reading.

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1. S.J. Res. 1, 89th Cong., 1st Sess. (1965); H.R.J. Res. 1, 89th Cong., 1st Sess. (1965).

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Boardman's Estate Management and Accounting. By Elliot L. Biskind and John F. Scanlon. New York: Clark Boardman Co., Ltd. 1965. Pp. xxxi, 1801. $35.00 looseleaf binder.

The title of this handsome, hefty[1] volume promised much to estate practitioners who have been without serious aid on fiduciary accounting since the last supplement to Dodge & Sullivan's *Estate Administration and Accounting* in 1950. But the work, despite its many virtues, is disappointing.

There are superior sections on domicile,[2] the small estates act,[3] fiduciary commissions,[4] claims against estates,[5] especially including the support obligation,[6] the surviving spouses' right to elect against the will[7] and the "Dead Man's Statute."[8] There are three useful charts which show the scheme of intestate descent and distribution for decedents dying under three different and recent laws. Some of these sections are "too good," in the sense that a one-volume work cannot afford the extensive (and thus imbalanced) treatment given these topics at the expense of others of more day-to-day utility.

The foreword promises a "handbook on estate management and accounting,"[9] which is precisely what is needed—and not given. The work purports to cover a range more suitable to the eight and nine-volume works in this field. The better parts, mentioned above, are scholarly and academic; the balance is largely cursory and tends to avoid rather than explain the nastier problems. The practical guidance connotated by the term "handbook" is rarely given.[10]

An important test of a law book's utility is the quality of its index—and this index is very bad. By and large, the indexer merely re-sorted the sections with no comprehension of the text and often no comprehension of the heading. The publisher (a *legal* publisher) cut a big corner here to the detriment of the bar. Examples are scattered below.

In the extensive treatment accorded domicile,[11] there is no reference to its basic jurisdictional significance, which is referred to only under the expression "residence" in the preceding chapter on jurisdiction; nor does the index supply the necessary cross-reference. This is an important example of the book's poor organization. Domicile is significant only in the jurisdictional sense; but the book contains almost nothing on the problems of jurisdiction over nonresidents except to quote the bare-bones statute.[12] A minor exception is the paragraph "Locality of Debts Affecting Jurisdiction" (indexed under "debts" but not under "jurisdiction!").

Jurisdiction may be based on the existence of property within the state and property

1. Seven pounds, at five (deductible) dollars per pound.
2. Biskind & Scanlon, Boardman's Estate Management and Accounting (1965) ch. II.
3. Id. ch. V.
4. Id. ch. XI.
5. Id. ch. XII, pt. II.
6. Id. § 170.
7. Id. §§ 195-97.
8. Id. ch. XVIII.
9. Id. at iii.
10. One example, however, is the suggestion that an executor, presented by the family with an unreasonably large funeral bill, pay a "reasonable" portion on account, disclose the matter in his account, acquiesce in any objections and let the court decide. Id. § 169.
11. Id. ch. II.
12. N.Y. Surr. Ct. Act § 45.

includes a cause of action for wrongful death. This oft-recurring problem is mentioned in the "General" section[13] under "Types of Fiduciaries."[14] It is not indexed under "jurisdiction"; there is no index entry for nonresident and the "wrongful death" entry refers one to "action" which contains a sub-head "wrongful death as property of deceased." Nothing as to its jurisdictional importance! Surely the bar deserves better than this of such eminent legal publishers. Yet, on the comparatively minor question of grounds for disqualification of a fiduciary we have several full pages of text.

Perhaps the most striking example of imbalance is the section on insurance as an estate asset.[15] Over two thirds of over one page of text treats of industrial insurance which is "usually for a small amount." The section is silent on the important questions of liability for death taxes, on insurance and recovery of insurance proceeds for this purpose or the recurring problems of insurance assigned as collateral for decedent's loan (from a bank versus from the insurer), or of insurance made payable to a debtor as "beneficiary."

I have mentioned above that the sections on the right of election are quite good. The section on the "Form of Notice" (of election)[16] is an example of the flashes of thoughtlessness which enliven the book. The six-line text says *nothing* about the form (and a sample form would have been quite useful here). It discusses only the *service* of the notice. The indexer entered it under "Notice," under subhead "O," for "of right of election, form," although there is no form! Perhaps this helps explain the author's need to advise, in their forward, that "the general index is unusually complete and comprehensive."[17]

The topical organization of the book escapes the writer's understanding, even allowing for the necessarily subjective grouping of the *major* subdivisions (chapters). One example: in the space of thirty-eight pages are scattered five tiny subsections dealing with "unknown" parties.[18] The treatment is necessarily fragmentary and the basically defective index frustrates even the most benign. There are no index entries for "unknown" or "missing" persons. One of these sections is indexed under "D" (for "distributees"), one under "C" (for "citation") with two subheads under "W" for "when names of party unknown" and again for "when whereabouts of party unknown" (this is "completeness" with a vengeance!). One section dealing with guardians for unknowns is apparently unindexed (not under "parties," "unknown," "missing," "guardian," "citation" or "distributees"), and the same is true of two other subsections. The writer recalls a domestic who described her activities as "rearranging the dust." The index does not do even that well.

Section 328.01 is entitled "Contents of Decree" but contains no sample language. Section 332 is entitled "The Discharge Clause" (of a Decree). It is indexed, of course, under "discharge" and not under "decree"! Why this separate, tiny section is one of the book's many pleasant mysteries.

Mysterious also is section 355.01[a] quoted here in its entirety:

Distinction re Investments By a Trustee and By an Executor or Administrator. While an executor or administrator is required to make the funds in his possession

13. Biskind & Scanlon, op. cit. supra note 2, § 28.
14. Ch. III.
15. Id. § 151.
16. Id. § 195.04.
17. Id. at viii.
18. Id. §§ 316.01(6), 318, 322.04, 329.01 (11), (12).

productive until the funds are needed either to pay debts and administration expenses or to make distribution, the trustee must invest and reinvest the funds in his possession during the entire term of the trust if the will so provides, or if the rights of beneficiaries so require. He need not nor may he concern himself with the size of the estate or the reasonableness of the terms of the will with respect to payment of income or principal.

The main concern of all types of fiduciaries is the propriety and legality of investments. [Footnote to section 222 on investment of trust funds.]

The thought content of the quoted section eludes me. Section 222, referred to in the footnote, is little more than a full-length quote of the statute regulating trust investments, but does provide some needed comic relief: "The trustee . . . should make investments . . . with two cardinal aims. The first is regard for the safety of the corpus . . . the second criterion is as high an income as possible. He may never speculate. . . ." Indeed no trustee should be without this "handbook"!

The book contains its share of doubtful law. Thus, "when the estate is reasonably substantial it is advisable to appoint two, and sometimes three, executors . . . ." If the executors could subdivide their liability, a certain unmeritorious rationale might attach to this statement. As the law stands, however, each executor is fully and severally liable and the writer has never heard it suggested that the size of an estate is a factor in determining the proper number of fiduciaries. Of course, if it is *independently* wise to have three fiduciaries, a larger estate may be better able to absorb the added commissions.

Sections 187.03 and 187.05 imply or state that a fiduciary can pay his lawyer for keeping the fiduciary's routine books and for preparing his schedules of account—a proposition wrong in most cases, and dubious in the rest. The fiduciary is paid to keep records and prepare accounts and, except in unusual circumstances, he cannot force his trust to pay a lawyer *again* to do this nonlegal work. It is true that in recent years accounting schedules are sometimes so complex that a lawyer can properly assist, especially if litigation is foreseen. But this book does not attempt to discuss this sensitive question on the merits and it is a question which needs thorough analysis.

The sample federal estate tax return selected is simplistic and avoids all problems. The face of the official (reproduced) schedule showing the method of reporting securities is uninformative. This is corrected by the official instructions on the reverse of that schedule (also reproduced), courtesy of the Internal Revenue Service, not the authors. The entry on sample item nine of Schedule O ($ 430,000) is erroneous; it should be $ 386,000.

Section 311 states that a receipt and release for a residuary bequest "may be as detailed as the parties desire." This is a dangerous statement indeed, evading the important body of law on what constitutes "disclosure" sufficient to bind the releasor (who usually does not have fiduciary or legal training—a vital factor).

The volume shows evidence of overly hasty assembly. The court forms are photostats of filed papers, not chosen to expose difficult problems; the New York estate tax return is not completely filled in (a serious omission); the schedules running to page 1565 are interrupted by an unrelated form and the typed-in reference to the page of their continuation is erroneous. Although the book is silent on probate procedures and will drafting, a photostat of a dangerous will is gratuitously tossed into the appendix—dangerous because it not only contains a marital deduction "formula" far too abbreviated for this complex area of law, but also incorporates by reference the Internal Revenue Code of 1939! In addition, the will's tax apportionment clause is de-

fective in that it leaves open the allocation of taxes on nonprobate assets. For the authors' own protection the first annual supplement should request the reader to disregard this will until a post-1939 sample can be prepared.

The book's omissions are serious. Of prime importance is its failure to go into the thorny question of proper allocation of corporate distributions between trust principal and income. This problem plagues every trustee day and night. It is a difficult area to synthesize and discuss, but for thirty-five dollars it should have been done—in depth. The need is crying. Other important omissions, whole or partial, include the equitable relief the surrogate is empowered to give; gifts to minors; waivers of commissions; the criteria for selecting corporate fiduciaries; texts of forms such as receipts and releases; the purpose of New York estate tax "waivers" and the method of obtaining them; discussion of the problems involved in making principal invasions and in "sprinkling" trust income and principal.

About one sixth of the total pages are devoted to estate taxes and fiduciary income taxes, both federal and New York. In general these sections are quite good for a work of this type and size but the complexity of tax law and especially of the fiduciary income tax is such that abbreviated treatment is dangerous. The very large number of excellent tax services and treatises constitute tacit acceptance of this view, and it would thus seem that the tax sections might well be omitted altogether and the space devoted to a fuller, more even and more thoughtful treatment of the nontax problems which daily confront the fiduciary. For example, the notoriously complex "throwback rules" are disposed of in less than three small pages which are largely a summary of the statute. Such brevity cannot be of help to a fiduciary with a question of any complexity in this area.

It may be objected that the general practitioner needs the economy and convenience of a one-volume work containing tax as well as nontax information. But tax law cannot be de-complicated, and defective or incomplete information is never an economy. Pamphlets of the Practicing Law Institute provide very superior and concise studies of federal income, estate and gift taxes for fiduciaries in a format of great convenience.[19] A one-volume work on estate management and accounting should, in this era of tax-sophistication, confine itself to nontax matters which need a good treatise and forego competition with the numerous, specialized tax publications which are readily available to every practitioner, through the law libraries if not by purchase.[20]

The authors are to be criticized for inserting examples of fiduciary income tax problems taken verbatim from the treasury regulations, without even making adjustment for recent changes in the law. Photostating public records is not to be deemed scholarship. A more professional approach would have been to cite the regulations and set forth a new example illustrative of problems not covered by the regulations.

Despite the foregoing criticisms (especially of basic matters such as the all-

19. Craven, The Gift Tax (1963); Lewis, The Estate Tax (1964); Michaelson, Income Taxation of Estates and Trusts (1963).

20. Warren's Heaton, Surrogates' Courts, (6th ed. 1963) (7 volumes) devotes one full volume to federal and New York estate taxes; Jessup Redfield, Surrogates Law and Practice (rev. ed. 1947) (9 volumes) devotes one volume to each of these two estate taxes. Mertens, Law of Federal Estate and Gift Taxation (1959) is in seven volumes. All of these works are supplemented annually. A one-volume work cannot possibly treat of this subject in 1801 small pages in a manner useful to a fiduciary.

important index and the peculiar and extreme unevenness of scholarship) the authors must be complimented for their careful and detailed study of the elective right of the surviving spouse, which continually troubles executors.[21] Herein will be found the limitations on the elective right; the methods of asserting it, of releasing or waiving it and of revoking a notice of election. The burdens of proof in a contest over the validity of an election also receive competent treatment. Here is no simplistic treatment: an important topic is considered concisely and thoroughly from a practical viewpoint which will be of continuing value to the user of the book. Similar comment can be made especially of the chapter on the small estates act and on claims against the estate.

In conclusion, it may be said that this volume will add little to the knowledge or convenience of the estate and trust specialist who may be presumed to have easy access to the larger works in this field. The general practitioner will find, in most instances, that the book will provide a preliminary answer to most basic questions, but the search must be conducted via the table of contents, not via the index. For problems of more than routine complexity, resort must be had to the larger works, except that questions relating to domicile, "small estates," the right of election, claims against the estate, the Dead Man's Statute, commissions and the support obligation are answered in depth. In the tax area, the general practitioner should use the book with caution; for the several omitted topics, he must look elsewhere.

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21. Biskind & Scanlon, op. cit. supra note 2, §§ 195-197.04.

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