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How to Avoid Probate!, by Norman F. Dacey (1965)

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BOOKS

BOOKS REVIEWED

HOW TO AVOID PROBATE! By Norman F. Dacey. New York: Crown Publishers, Inc. 1965. Pp. 341. \$4.95.

This flamboyant bit of hokum is aimed to gratify those who, with Carl Sandburg, can hear "the hearse-horse snicker hauling a lawyer away."¹

The author, billed as "America's best-known professional estate planner," presents himself as the friend in need and indeed of all who would insure to their posterity the goods of the earth. With righteous wrath, and in accents reminiscent of Billy Sunday (perhaps with a trace of P. T. Barnum), Dacey promises the means of delivery from the curse of "probate"—which he depicts as a sort of war of all against all, in which testator and beneficiary alike are pursued by a scabrous horde composed mainly of grasping lawyers and corrupt judges,² but to which he admits many professional fiduciaries at least in the status of camp followers.³

Drawing largely from Connecticut probate practice (perhaps the black sheep of American systems of judicial administration), he exhibits a bleak procession of embezzling attorneys, often criminally conspiring with judges of probate,⁴ who in turn are seen to "lick their chops"⁵ at the smell of such unexpected luxuries as an ancillary administration. Mortal combat is joined with the "expense, delay and publicity"⁶ of probate, which these malefactors have brought about. The nobility of the cause apparently justifies liberal resort to exaggeration,⁷ half-truth,⁸ and non-factual assertion.⁹

¹ Why is there always a secret singing

When a lawyer cashes in?

Why does a hearse horse snicker

Hauling a lawyer away?

Sandberg, *The Lawyers Know Too Much*, in COMPLETE POEMS OF CARL SANDBERG 189 (1950).

² Pp. 5-9.

³ Pp. 9, 133.

⁴ Pp. 5-9.

⁵ P. 5.

⁶ P. 6.

⁷ "The practice of most lawyers tends to orbit around a specific bank. Every client who seeks to set up a bank trust will be directed to that particular bank by the lawyer drawing his will." P. 9.

"Many probate judges earn more than the governors of their states." P. 7.

⁸ The author asserts that it usually takes from two to five years to administer an

To free the reader from the clutches of the probate system, the author presents, under the whimsical motto "Administer Your Own Estate," a purported course in estate planning, complete with forms for translating theory into practice (naturally, without the advice of counsel).

It may seem strange to "review" a book of this kind in the pages of a scholarly journal. The reviewer's concern, however, is not with its value as an intellectual product, but with the fact of its appearance and popularity (it is claimed to have sold over 500,000 copies), its possible unhappy consequences, and the relation of all of these to the public responsibilities of the legal profession. From inquiries received by the reviewer from both students and members of the bar, as well as from the attention the book has generally received in the press, it seems obvious that the book and its thesis have claimed a large readership and already have caused some embarrassment to the general reputation of the bar, and in some cases to individual lawyer-client relationships. Of greater consequence, even a superficial analysis of Dacey's recommendations, and particularly of his forms, discloses potentialities for injury to the undiscerning reader which, judging from the irenic and apologetic public utterances of attorneys to date, have been far too little appreciated by the profession. Finally, but perhaps most important, public response to the book, however uninformed, reflects the existence of legitimate grievances, and raises issues as to the responsibility for their continued existence, which the bar can no longer afford to neglect.

I. THERE'S MADNESS IN HIS METHOD

It is important to summarize the author's thesis and something of his method to provide a basis for assessing their potentialities for public mischief.

The principal thesis of the book is perhaps best summed up by the author's statement that "probate procedure is a scandal, a form of tribute levied by the legal profession upon the estates of its victims,

estate, P. 6, but does not mention the part played by tax proceedings in causing this delay.

"The Bar maintains that the sole qualification for the preparation of instruments such as are contained in this volume is possession of a law degree." P. 331.

⁹ "I would put the proportion of lawyers who know about and recommend the inter vivos trust at less than 1%." P. 13.

"I know of no instances of successful attack by a third person upon the legality or validity of a living trust." P. 14.

"In the view of some lawyers, any attempt to pass property other than under a will amounts to a criminal conspiracy. . . ." *Ibid.*

both living and dead."¹⁰ As a result, "probate" must be avoided at all costs. To do this, he tells us, three devices may be used—joint ownership, life insurance, and the revocable inter vivos trust.¹¹

Except, perhaps, as to residential realty, joint ownership is to be discouraged because of the danger of the "blocking" of joint accounts by taxing authorities.¹² In this connection, the author is also prompt to advise of the inconvenience caused by the access of tax appraisers to joint safe deposit boxes. The remedy, however, is simple. A husband and wife may have two boxes. "His property is deposited in her box and her property is in his box. Under this arrangement, when the husband's box is opened, no property belonging to him is found—it's all in the wife's box, to which she has ready, unquestioned access."¹³

The utility of life insurance, at least in its protective aspect, is recognized. But the author recommends, more or less invariably, that a trust be created as a repository for the insurance.

The author's truelove, of course, is the revocable inter vivos trust—"a magic key to probate exemption—a legal wonder drug."¹⁴ And to this love he is true indeed. There is nothing in heaven or earth that might not better realize its destiny, if placed in a revocable inter vivos trust. The bulk of the book shows the reader how to do this. It recommends a trust for the home,¹⁵ a trust for life insurance,¹⁶ a trust for bank accounts,¹⁷ trusts for close corporation stock,¹⁸ for *unincorporated* businesses,¹⁹ and for *personal effects*.²⁰ As to most of these it is suggested that the settlor make himself trustee, and designate a beneficiary as successor trustee, to take over upon the death or incapacity of the settlor.

The crowning jewel of the system is a device which the author

¹⁰ P. 7.

¹¹ P. 10.

¹² P. 11.

¹³ *Ibid.*

¹⁴ P. 13.

¹⁵ P. 16.

¹⁶ P. 126.

¹⁷ P. 47.

¹⁸ P. 125.

¹⁹ P. 225.

²⁰ P. 213.

The motor vehicle is the only important kind of property for which the author does not recommend an inter vivos trust. Here he suggests the simple expedient of endorsing the title or registration certificate in blank, so that "if anything happens to you, your spouse or other family member can take it down to the Motor Vehicle Department and freely transfer it to another name without having to forge any signature or apply to the probate court for 'letters testamentary.'" P. 237. It is not suggested, however, that the "family member" disclose that the certificate was delivered after the grantor's death.

modestly styles the "Dacey Trust."²¹ The Dacey Trust is flexible enough to contain about anything you may want to put in it. It may be used alone, or in conjunction with one or more of the more specialized trusts as a receptacle for their distributions. Its unique and indispensable feature is a mandatory instruction to the trustee to liquidate the trust estate immediately upon the death of the settlor, and convert substantially all of the investment into mutual fund shares. Since the trust may be substantial, the author grudgingly admits the need, in some cases, to appoint a professional fiduciary, although it's emphasized that the settlor may first have to haggle to knock down exorbitant fees.²² The direction to convert to mutual funds is an expression of the author's ill-concealed suspicions concerning the diligence and investment competence of bank trust personnel. To relieve the trustee of the last measure of investment discretion, it is suggested that the investment should ordinarily be made in the shares of a *single mutual fund named by the settlor*.²³

The principal argument for the pervasive use of the trust device is that it avoids probate. But the author does not neglect to explain with enviable clarity its utility for frustrating creditors and defeating marital rights, though he reproves the naughtiness of harboring such intent.²⁴

The author of course recognizes that the settlor will need a will to dispose of assets which by mischance have not found their way into a trust. Though he says that the will is important, he apparently doesn't think it *very* important, because he tells the reader that "if there is something in a will which is not correct, you may cross it out and/or write in a few words to make it correct. Be sure to initial the change."²⁵

The inadequacies of the author's central conception of planning hardly need comment. Like any simplistic system, it bears little relation to reality—the reality in this case being the recalcitrant fact that the only good estate plan is prepared after consuming a great deal of scratch paper, and after detailed and often tedious study of the needs and objectives of a specific testator.

The suitability of the trust device to the kind of property involved

²¹ P. 129 *passim*.

²² P. 133.

²³ Form DT-17, at p. 143.

²⁴ P. 14.

²⁵ P. 273. This instruction may be intended to relate only to errors discovered prior to execution (and is bad enough advice even in that context). But such a limitation is not stated, and would not be inferred by a legally untrained reader.

(*e.g.*, unincorporated businesses) is totally ignored. So are such trust expense factors as the need for bookkeeping, tax accounting and the preparation of returns, which, added to the cost of creating a trust, often make it impractical in small estates. The problem of maintaining purchasing power, probably the most intransigent negative factor confronting the would-be settlor, is resolved through a *deus ex machina*, the mutual fund.

Neither the scurrility of Dacey's book nor the ineptitude of its conception are themselves a cause of concern. Popularizations of legal subjects have been with us at least since colonial times. They range from thoughtful treatises (such as Wormser's very useful manuals in estate planning) to trashy pulps abounding in deceptive oversimplification and plain nonfact. The best of such manuals furnish a depth of background which enable the perceptive reader to participate actively and constructively in the planning of his affairs. The poorest, while of little use, are of no great harm. They are usually too general to induce much reliance. At worst, they produce misconceptions which the practicing lawyer must help his client unlearn, occasionally at the cost of some irritation to their relationship.

The Dacey book however, is more than a legal popularization. It not only provides a wealth of misinformation, but goes on to furnish a "do-it-yourself kit" for its practical implementation. Over fifty tear-out forms are provided in duplicate, for the creation and modification of various dispositions by trust, will, and deed. Order blanks are furnished, by which additional copies of the forms can be obtained at prices ranging from one to four dollars a pair. The reader is urged to use these forms to create his own estate plan, which he is assured can be done without recourse to counsel. Displaying some prescience, the author tells us:²⁶

As to the forms in this volume, there will be a certain amount of nit-picking—something was omitted here, something else might have been expressed differently there, no provision was made for this or that contingency, etc. There are few things in this world that cannot be improved upon, and no claim is made that the instruments herein provided cannot be made more nearly perfect. *They are legally correct, however, and may be employed with complete assurance that they will serve the readers' purposes well.*

After taking up the author's gauntlet, and itemizing a few obvious

²⁶ P. 331. (Emphasis added.)

problems generated by his instruments and the accompanying instructions, the reader may judge whether they are rightly classified as "nits."

II. A SYLLABUS OF ERRORS

Certain obvious occasions for disaster permeate the whole system. A disregard of required formalities is one of them. The instruction for "correcting" wills has already been mentioned. Perhaps more basically, no serious attempt is made to integrate the instruments into a common plan, or to show how this can be done. Without departing from the letter or spirit of the text, a reader might well execute a half-dozen trusts and a will, producing a mosaic exhibiting no recognizable dispositive purpose.

Tax considerations are hardly recognized. The theory and practice of the Clifford trust covers two pages mainly anecdotal.²⁷ The existence of the gift tax is recognized in a few isolated references, each not exceeding a paragraph.²⁸ The marital deduction is considered mainly in four brief paragraphs in the annotation to the form for the "Dacey Trust."²⁹

No account is given of variations in local law, and there is rarely any recognition that such differences exist. Perhaps the outstanding example of this failing is a pristine innocence of community property. Nowhere is it so much as mentioned.

The effect of these and other inadequacies may be sharpened by examining them in the context of a specific transaction. The forms and instructions for creating a trust of the settlor's residence³⁰ are perhaps more carefully drafted than most, and their objectives are simpler. The following are among the more obvious problems generated by these forms. The list is by no means exhaustive.

(1) The recommended form of the transaction includes a declaration of trust, and a deed from the settlor to the trustee (usually himself). With respect to the description, the instructions say simply: "Enter the description of your property as it appears in the warranty deed or quitclaim deed under which you acquired it."³¹ Consider the adequacy of this instruction for the lay draftsman, if his title deed contains elaborate recitals or exceptions, or if he acquired his title by probate.

²⁷ Pp. 189-90.

²⁸ Pp. 182, 206, 336.

²⁹ P. 134.

³⁰ Pp. 16-47.

³¹ P. 17.

³² P. 47.

(2) The instructions note the need for the spouse to join in the execution of the *deed*, in certain listed jurisdictions, by reason of the existence of dower or curtesy.³² No mention is made of the similar need in community property states, nor are these states contained in the list. Although the *declaration of trust* begins "I am the owner of certain real property,"³³ nothing is said about the wife's joinder, and there is no place for her signature.

(3) The declaration of trust conveys "said real property—and all furniture, fixtures, and real *and personal property* situated therein."³⁴ One may hope that the settlor won't die with cash or securities tucked away in his drawer. This problem is not the only complication. Though it is mentioned that the reference to personal property may be stricken, the author fails to point out the *need* to modify this form if the settlor is also using the separate trust for personal chattels recommended elsewhere in the text.³⁵

(4) The trust declaration limits the property, simply, to the "use and benefit of [the ultimate beneficiary]."³⁶ *The grantor does not reserve a life estate or income interest, but merely a power to revoke, or to invade or accumulate income*, with the apparent effect that any income not invaded is accumulated. The instrument provides that in the event of the settlor's incapacity, the beneficiary becomes the trustee. In such event it would seem that, since the settlor is unable to exercise his power to invade, it may be difficult, should the beneficiary not consent, to compel the application of income for his support. (This failing is not limited to the trust for real estate. In some of the others, it is even more serious since the power to invade income is reserved to the settlor *only in his capacity as trustee*.³⁷

(5) The residential trust contains no provision as to the payment of death taxes on the trust estate. Some of the other instruments which do contain tax clauses are not mutually consistent. For example, the "Dacey Trust" provides that *all* death taxes are payable from it.³⁸ The will forms, on the other hand, provide that taxes allocable to property passing under the will are payable from the probate estate.³⁹

(6) Many of the instruments contain instructions as to the inclusion or deletion of language which are well nigh impenetrable. One of the

³² Form DT-1, at p. 19.

³⁴ *Ibid.*

³⁵ Pp. 213-23.

³⁶ Form DT-1, at p. 19.

³⁷ Form DT-7, at p. 63.

³⁸ Form DT-17, § B 2(b), at p. 139.

³⁹ Form W-1, at p. 281.

real estate trusts, for example, contains a limitation "for the use and benefit of my children natural not/or adopted, in equal shares or the survivor of them, per stirpes."⁴⁰ The settlor is required to wade through this maze and achieve the intended effect by striking out the words he does not want.⁴¹

(7) To change beneficiaries, the author recommends revocation of the old trust, and the execution and recording of a new trust.⁴² But he says nothing about changing the deed, which of course, is still of record and incorporates the old trust by express reference.

It is submitted, on the basis of above sampling, that disaster almost inevitably awaits the intrepid settlor who accepts Mr. Dacey's invitation to plan his own estate. The already extensive circulation of these forms suggests that the author, contrary to his stated purpose, may have nourished the probate bar (and the trial bar as well) for years to come.

III. WOE TO YE LAWYERS

What has all of this to do with the responsibility of the legal profession? An obvious conclusion, of course, is that the organized bar should (even at the risk of accusations of "sour grapes"), give more energetic warning than it so far has, of the reefs and shoals that await those who would avoid probate by Mr. Dacey's formula.

Certain other conclusions, while less obvious, are of greater consequence in the long run. The popularity of the Dacey book can't be explained merely in terms of the age-old public suspicion of lawyers. It reflects a specific irritation with the delay and expense encountered in the operation of that part of our legal system, substantive and procedural, which regulates the devolution of property on death.

It is axiomatic that no part of the law is more archaic than property law. It is probably equally plain that no part of property law is more archaic than the law of succession. Substantively, in nearly every state the scheme for the distribution of personal property represents only slight modification of the English Statute of Distributions of 1670⁴³ which itself was primarily a codification of the practice of the ecclesiastical courts then of several centuries' standing. Our system for the delineation of marital rights, in many states, is haunted by still

⁴⁰ Form DT-4, at p. 37.

⁴¹ P. 35.

⁴² P. 239.

⁴³ 22 & 23 Car. 2, c.10.

viable ghosts of common law dower and curtesy, and its incidence depends more on chance than policy. In almost every state, the testamentary formalities prescribed in the English Statute of Frauds⁴⁴ remain substantially unchanged, and their continuing utility unexamined. Our law setting the limits of testamentary freedom (perpetuities, mortmain, etc.), has been almost unchanged for two centuries.⁴⁵ On the procedural side, things are, if anything, worse. The basic outlines of our present day probate practice were already visible in the thirteenth century.⁴⁶ Change has been consistently in the direction of progressive complication. In our own country the suppression, at least in our early history, of a system of separate probate courts, has caused our probate procedure, which in the great majority of cases relates to nonadversary situations, to develop in patterns of ever-increasing analogy with the litigation-oriented procedures of law and equity.

The importation of adversary procedures into the law of probate has saddled the devolution of property with requirements of notice, pleading, service of process, appraisal, accounting, and guardianship, far beyond what is needed for the protection of beneficiaries.⁴⁷ The system is not only needlessly expensive, but also regressive. Since it is often not much more work to administer a large estate than a small one, the proportionate burden of expense (including court costs, executors and attorneys' fees, guardianships, etc.), is a great deal higher in the small estate. While costs (excluding taxes) for the administration of a 1,000,000 dollar estate, in the absence of complicating factors, will often be under five per cent of the net estate, similar costs with respect to a 50,000 dollar estate may well run to ten per cent and, if the estate runs into complications, considerably more.

That the costs of probate are excessive, and that this fact is widely recognized by the profession, can hardly be denied in view of the ingenuity increasingly expended by both practicing attorneys and legal writers in inventing devices for avoiding probate. The use of the *inter vivos* trust for this purpose has been extensively explored and is today

⁴⁴ 29 Car. 2, c.3 (1677).

⁴⁵ The rule against perpetuities as enunciated originally in *The Duke of Norfolk's Case*, 3 Ch. Cas. 1 (1682), and the syllogistic rigidity engrossed upon it by such cases as *Jee v. Audley*, 1 Cox 324 (Ch. 1787), have barely been scathed by modern efforts at legislative reform.

⁴⁶ See generally SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* (1963), especially ch. V.

⁴⁷ For a comprehensive analysis, in a context of the law of the State of Washington, of the exaggerated emphasis accorded the policy of beneficiary protection, and a cogent appeal for a drastically improved system of common-form probate, see Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33 (1966).

a basic tool of the skillful estate planner.⁴⁸ But it is both curious and unfortunate that, while much effort has been devoted to adapting to testamentary objectives, devices originally intended for very different purposes, very little has been done to improve the efficiency of the institutions primarily intended for that purpose. While the reform of civil procedure has proceeded apace in the last two decades, probate has been largely untouched. Without the guidance furnished elsewhere by the Federal Rules, most probate reforms have been superficial, limiting themselves to the correction of abuses in such matters as the appointment of appraisers and guardians but leaving untouched the basic adversary premise on which the system rests.⁴⁹ It's popular these days to twit the negligence lawyer, in whose domain the costs of settlement equal, if they do not exceed, the compensation paid to the injured. But there's been little effort to explain why it should cost a man 5000 dollars to pass 50,000 dollars to his wife and children on his death. Perhaps this question can't be answered. The fact that it is asked must spur increasing efforts of bench and bar supported by basic scholarship to produce long overdue reforms.

But Rome wasn't built in a day and, pending reform, existing systems must be made to work as well as possible. In this connection there seem to be two common failings. The most serious is one of public relations. In many ways I think the public is more disturbed by the delay, than by the expense, of probate. The beneficiary is sometimes in need. Even if he is not, he can't understand why it should take up to several years to pay him money to which he is clearly entitled and which, more often than not, he has made plans to spend. Yet there is no part of his practice in which the harried lawyer is more tempted to procrastinate, especially if he handles probate matters only occasionally. Since substantive rights in this area are rarely lost through delay, it is easy to adopt the consoling attitude that the beneficiary will, after all, get his money—that his legacy is something of a windfall—and on these grounds to put off the tedium of account preparation, or whatever, to the quiet afternoon that rarely comes. Regardless of diligence, however, the devolution of property on death

⁴⁸ Perhaps the most comprehensive general discussion of the utility of the inter vivos trust for the avoidance of probate is found in Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960). This article, and the incorporation of its tenets in Professor Casner's treatise on Estate Planning, have been highly influential in encouraging increased use of this device.

⁴⁹ The draft Model Probate Code is no doubt a step in the right direction, but its basic approach seems superficial. It still gives inordinate weight to considerations of beneficiary protection.

(whether by probate or otherwise), will often be slow. This is due more to defects in our tax machinery than to our probate practice. In any estate in the federal tax bracket, it will seldom be advisable to file the return in less than a year, since only in this way can the benefits of alternate valuation be realized. And notwithstanding prompt filing, tax examiners, state and federal, are infamously slow in making their final assessments, before which an executor or trustee must often be reluctant to distribute.

In view of the seeming inevitability of delay, many practitioners have found that a great deal can be gained by making, at the outset of an administration, a *realistic* estimate of the problems to be encountered and the probable time that will elapse before distribution. They then communicate these facts to the beneficiaries *by letter*, together with a detailed explanation of the procedures that must be observed and any special problems that may be anticipated. The beneficiary may cuss the system, but will rarely cuss the attorney, who he will see is doing everything that can be done. He may also avoid spending his money before he receives it, to the considerable relief and advantage of everyone concerned. A brief quarterly status report will generally maintain the attitude of confidence. Such a program takes no more time than would otherwise be spent answering increasingly insistent calls from the client, in response to which the same information will be imparted, but which will then be interpreted by the client as a self-serving excuse. The practice has a collateral benefit of requiring a degree of advance analysis and scheduling that will itself tend to expedite the course of administration. Despite the obvious utility of such a practice, I believe it is rarely observed except by those who work extensively the field of estate administration.

Finally, there is a troublesome unevenness in professional competence in the probate field. The procedure is unique, varies greatly in detail from state to state, and often depends extensively on unwritten local customs. Largely for these reasons it has not been generally emphasized in law school curricula. It is not uncommon for a novice to take two or three years to administer an estate which an expert could have distributed in six or eight months. Much would be accomplished by the increased promotion by the organized bar of programs of continuing legal education in the field of estate administration.

In summary, it is submitted that there are indeed deficiencies in the practice and procedures of estate administration, though not of the

kind or scope suggested by Mr. Dacey, and that the following correctives are long overdue:

1. Increased collaborative efforts by bench, bar, and legal scholars, to devise and effectuate basic reforms of our systems of probate procedure, directed at reducing the time and expense of administering estates. In this connection, thought should be given to reforms in tax administration that would enlarge the opportunity of executors to make partial distributions.
2. An increased recognition on the part of the bar, individually and collectively, of the need for improving communication with clients and with the public in this area.
3. Expanded educational programs for practitioners in the skills required for the expeditious administration of decedents' estates.

Unless and until these efforts are undertaken, it may be expected that Mr. Dacey will have a ready audience for his views and perhaps even a ready market for his forms.

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