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PROBATE CAN BE QUICK AND CHEAP: TRUSTS AND ESTATES IN ENGLAND By William F. Fratcher. New York: Pageant Press, Inc., 1968. Pp. 106. $3.50.**

Despite its *Reader's Digest* title, this book is not a folksy polemic of dramatic atypical examples. Rather, it is a painstaking detailed description of the English system of trust and estate administration. Its conclusion, that "probate can be quick and cheap," is surely accurate, for the English do handle probate much better than we do. While they have improved upon their seventeenth century procedure, most United States jurisdictions have not. We simply adopted the English procedure as of that distant time and have done little or nothing about it since. Fortunately, in the early 1960's when drafting of the Uniform Probate Code began, the leaders of that effort were at least aware of English practice. Although the drafters drew heavily upon the Model Probate Code of 1946 for the substantive law of wills and intestacy, they turned for the procedural aspects to the English practice and to the practices of Texas and Washington.

Having spent a year abroad studying and observing the English practice, Professor Fratcher brought to the Uniform Code reporters, of whom he was one, a thorough appreciation and documentation of the English system. The most important characteristic of that system, so different from most American jurisdictions, is the complete separation of contentious from non-contentious probate, and its correlative feature of involving judges only in contentious matters. Finding a somewhat similar procedure in the "independent" and "non-interven-

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** As the author acknowledges in his preface, "most of the contents of this book were published originally in the New York University Law Review." The book in fact is a nearly verbatim reproduction of the original article, *Fiduciary Administration in England*, 40 N.Y.U.L. REV. 12 (1965). The fact of re-publishing is not a criticism but a compliment. Dressed up with a catchy title, the book will perhaps reach a lay audience ready to be persuaded that probate reform is feasible, and, as this reviewer sees the matter, that reform can come by the enthusiastic adoption of the Uniform Probate Code, which in its procedural article strongly resembles the English system. See text accompanying notes 1, 2, 15, *infra*.

tion" administrations of Texas and Washington, the reporters drafted the procedural article, article III, firmly on a composite base of English and Texas-Washington practice.[1]

How in English practice this separation of non-contentious probate from contentious probate actually works, and how well it works, is the subject of Professor Fratcher's book.[2] To make the matter clear, Professor Fratcher also describes the course of fiduciary administration in three related fields: trusts, estates of infants, and estates of incompetents. Of necessity, his book begins with a description of trust administration because the administration of decedents' estates so heavily depends upon it.

The grounding of the modern English law of trust and estate administration is in the statutes of 1925. In that year four remarkably comprehensive and significant statutes were enacted: the Settled Land Act, the Trustee Act, the Law of Property Act, and the Administration of Estates Act.[3] Although these statutes are very detailed, the significant aspect of the first three of these is the breadth of powers given to trustees. The significant feature of the fourth statute, the Administration of Estates Act, is that the personal representative is in effect made a trustee and given nearly the same range of powers and roughly the same form and degree of accountability as are trustees in the other three statutes.[4] Consistent with granting this

1. The Texas procedure is described in Woodward, *Independent Administrations Under the New Texas Probate Code*, 34 TEXAS L. REV. 687 (1956) and Woodward, *Some Developments in the Law of Independent Administrations*, 37 TEXAS L. REV. 828 (1959). The Washington procedure is described in Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33 (1966). A few other states, notably New Jersey and Pennsylvania, apparently have also achieved a substantial separation of contentious from non-contentious probate. See Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 471 (1970).

2. Compare the reviewer's article on Washington's non-intervention executor, in its demonstration that the Washington procedure has largely failed to achieve the separation of contentious from non-contentious probate, despite its early promise. The history and causes of that failure are there explored. Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33 (1966).

3. Respectively, 15 and 16 Geo. 5, cc. 18, 19, 20 and 23 (1925). Although these and other English statutes of that year effected a massive reform in property law, they also served, as their preambles stated, to "consolidate" several previous enactments by which various reforms had been accomplished.

4. The principal mechanism is to provide in the Administration of Estates Act that the personal representative holds real property in "trust for sale" and personal property in "trust to call in sell and convert to money" and in the Trustee Act that its provisions apply also to personal representatives. Administration of Estates Act 1925, 15 and 16 Geo. 5, c. 23, § 33; Trustee Act 1925, 15 and 16 Geo. 5, c. 19, §§ 12-33.

trustee status, the Administration of Estates Act provides that the devolution of title to the decedent's property, both real and personal, is to the personal representative, not to the heirs or devisees.[5]

Since the personal representative was so firmly designated a trustee with title and extensive powers, it was relatively easy to consider him capable of closing the decedent's affairs unaided by the court, and certainly not dependent upon specific court authorization for each of the various detailed steps to be taken in the process. Thus the administrative machinery necessary to supplement the powers of the personal representative was made relatively uncomplicated, and, for the ordinary non-contentious estate, was located outside the courts.

The first and probably most important functions of the administrative process are to establish the testate or intestate status of the decedent and to appoint a personal representative. In England both of these matters are handled by the Probate Registrar either in his principal office in London or in any of the 26 district offices about the country. For estates not exceeding £1000 in probate assets and £3,000 in non-probate but taxable assets (*e.g.* survivorship accounts), the application can also be made to a "customs or excise" office. This office then forwards the application to a district registry.

The proceeding in the Registry Offices is quite simple, particularly in establishing the testacy status. When handled by solicitors it is usually done by mail, but in about one-fifth of the estates it is handled in person, without the aid of a solicitor. If any person objects, or if it appears that more than one application has been submitted, the Registrar will initially try to resolve the problem, but he does so only on the basis of the documents before him. These may include affidavits from various persons if the matter is at all complicated or factually uncertain or disputed. If he is in doubt, or if any person is aggrieved by his determination, the matter can be transferred to the court for resolution.

In the absence of such a court transfer the personal representative

5. This feature was not new; personal property historically was considered to pass directly to the personal representative; the devolution of real property was statutorily so specified in 1897. Land Transfer Act of 1897, 60 and 61 Vict., c. 65, § 1. For a detailed history, particularly of the complexities with respect to personal property, see Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 Mo. L. Rev. 107 (1943).

thereafter proceeds very much on his own. If he wishes to immunize himself from liability to creditors he may publish a notice to them, giving not less than two months for submitting claims. He can, however, pay creditors with or without publishing notice and receiving formal claims. He also settles the estate duty and thereupon distributes the assets. In this subsequent phase, as in the initial testacy and appointment phase, any person aggrieved may transfer any point of contention to the court for resolution. In an extreme case, he may ask for and obtain a completely supervised administration, but apparently this is almost never done in practice. A person complaining of an incompetent or dishonest personal representative may obtain the appointment of a new representative rather than merely the supervision of the incumbent representative.

The entire process even for large estates is very speedy in comparison to United States standards. Even though English law requires that the estate duty return be filed and the calculated amount paid before the letters can be issued, the personal representative is usually appointed within a few weeks from the date of death,[6] and the entire estate is usually distributed within a year.[7] However, unlike the typical United States administrative period, the English are not burdened by the alternate valuation date, a delaying factor present in United States estate tax law.[8] For the estate above the $60,000 exemption in the United States this feature automatically means that the personal representative waits until after that alternate date before preparing his estate tax return. He then has three months in which to file the return and pay the tax shown due. Until very recently the consequent delay was very substantial, for the alternate date had been one year after the decedent's death. Congress now, however, has moved the date to six months after death, retaining the same three-month period thereafter for filing the return and paying the tax.[9] If

6. Burrows, *Estate Administration in England*, 99 Tr. & Est. 888, 889 (1960): two or three months for the "small or normal-sized estate." The Financial Secretary to the Treasury estimates the interval between death and payment of estate duty as between three and four months. REPORT OF THE COMMISSIONERS OF HER MAJESTY'S INLAND REVENUE FOR THE YEAR ENDED MARCH 31, 1963, CMND. NO. 2283, at 176 (1964) [hereinafter cited as INLAND REVENUE REPORT].

7. Burrows, *supra* note 6, at 891.

8. The English do not consider their lack of an alternate valuation date to be an unqualified benefit. *See* Burrows, *supra* note 6, at 888.

9. INT. REV. CODE of 1954, § 2032, *as amended*, Pub. L. No. 91-614 (Dec. 31, 1970).

state legislatures will now change their death tax laws, moving their due dates correspondingly closer to the date of death, this will substantially reduce the contribution of the alternate valuation date to the time required for probate administration, leaving other factors such as non-claim periods to be determinative of the total time required.

Professor Fratcher's assertion that "probate can be cheap" is not explicitly shown or documented,[10] yet it seems reasonably apparent. For example, about one-fifth of the probate administrations are handled without the assistance of a solicitor at all. In such cases the only expense is the Registrar's fee, which for estates of modest size is one-tenth of one percent of the total asset value. When either the Public Trustee or a corporate executor acts as the personal representative, the fees are comparable to those for administering a trust, again not very large by United States standards.[11] Most unfortunately,

Although the principal reason for the change was the transient benefit to the public treasury, the incidental reduction in time required for probate administration was also urged in justification. H.R. REP. No. 1635, 91st Cong., 2d Sess. 1 (1970). House Bill 213, under consideration in the current Washington legislative session, would correspondingly advance the due date for inheritance tax six months.

10. This omission is probably the book's greatest deficiency, since the cost of probate in the United States is a major reason for public resentment and attempts at avoidance. Precise cost data useful for comparison would have been most helpful.

11. W. FRATCHER, PROBATE CAN BE QUICK AND CHEAP: TRUSTS AND ESTATES IN ENGLAND 60, text accompanying n.318 (1968) [hereinafter cited as FRATCHER]. The following scale is set out *Id.* at 12, text accompanying nn. 65-66:

acceptance		1% of corpus up to £25,000, decreasing percentage of excess
	plus	
annual fee		1½% of first £2,500 of income, decreasing percentage of excess
	plus	
sale and purchase fees		approximately ¼ of 1% of value

Comparable Seattle-King County (Washington) probate practice, to the reviewer's knowledge and understanding, is generally as follows:

first	$5,000	5%	of corpus
next	5,000	4%	of corpus
next	10,000	3½%	of corpus
next	180,000	3%	of corpus
next	300,000	2½%	of corpus
excess		2%	of corpus

with the following modifications: that portion of the fee attributable to the administration of community property (of which the whole is subject to the administrative process) is reduced by 25%; life insurance up to $40,000 payable to others than the "estate" is not included in the corpus; property passing by survivorship is included in the corpus only to the extent contributed by the decedent. This comparison is more fully discussed in Fletcher, *supra* note 1, at 34, nn.4 and 5 and accompanying text.

Professor Fratcher does not deal at all with solicitors' fees. One can assume, however, that they are much less than the usual attorneys fees incident to United States probates, primarily because the work is so much less. The principal problems in the non-contentious case are probably with respect to the estate duty and the very informal, mostly-by-mail grant of letters to the personal representative. Once the letters are granted, the administrative process can be carried out largely without the solicitor's participation.

One cannot, of course, simply take the English experience and transpose it to the United States expecting that the time and expense factors will be reduced to English comparables. Certainly there are differences, of which two deserve particular mention. The first of these pertains to larger estates, whose total assets exceed the $60,000 basic exemption of the United States estate tax. For those the tax law will virtually guarantee a 9- to 12-month minimum probate period, because of the six-month alternate valuation date, the 9-month due date, and the time subsequently required for official action, including possible audit, and receipt of closing letter.

The other important difference is that in England the probate process is much more widely used than in the United States. Indeed, Professor Fratcher asserts that "it is necessary to secure a grant of probate or administration in the case of virtually every decedent's estate, no matter how small."[12] Actually the number of administration grants per year in England is only about half the number of persons dying in the same period, and although there is no positive data indicating that the other 50% of the decedents left little property worthy of attention, that is probably the case.[13] On the other hand, probate studies in the United States show a much lower ratio of probates to deaths, running from about 15% to a high of about 40%.[14]

12. FRATCHER, *supra* note 11, at 37.

13. Professor Fratcher gives the number of grants of administration for the fiscal year ending March 31, 1963 at 306, 204, taken from the INLAND REVENUE REPORT for that period. That report also gives the total number of deaths for the same period: 620,000. INLAND REVENUE REPORT, *supra* note 6, at 177.

14. a) Powell and Looker, *Decedents' Estates, Illumination from Probate and Tax Records*, 30 COLUM. L. REV. 919, 923 (1930), show a range from approximately 23% to approximately 30% over the years 1920-1929 for two New York counties including New York City.

b) Ward and Beuscher, *The Inheritance Process in Wisconsin*, 1950 WISC. L. REV. 393, show approximately 30% for five studied years, 1929, 1934, 1939, 1941, and 1944. An additional 12% consisted of brief clearance-type proceedings for joint tenancy "termina-

It is difficult, however, to draw any confident conclusion concerning the significance of this second difference. It may well be, for example, that the one-fifth of the English probates handled without solicitor participation are most nearly matched in the United States by decedents' estates that do not go through probate at all. Yet, even if this were true, it does not mean that the affairs of the United States counterparts were handled with less total cost to the persons beneficially interested. Much less does it answer the question whether the decedent who thus "avoided probate" achieved a disposition of property that was really desired rather than one chosen primarily because of fears of the "costs and delays of probate."

Professor Fratcher fails to provide clear answers to these questions. Some, of course, are presently unanswerable, for there is little data about the persons who avoid probate but who nevertheless effect a distribution of substantial property. It is obviously too severe to fault Professor Fratcher's book for failure to make a complete comparative cost-benefit analysis of English and United States probate procedures. Indeed, the only particular that ought really to have had better treatment is the range of fees for solicitors' services incident to probate. Surely the conclusion can be drawn that if the principal features of the English system were adopted in the United States, costs would decrease, since the time required of the solicitor would be much, much less than for the lawyer in the typical United States proceeding.

The Uniform Probate Code drafters saw that they should take only the best of the English system,[15] and this they have done. They strictly observed the division between contentious and non-contentious probate; they provided for an administrative official, a Registrar, to

tions" and for "descents of land." Since this study excluded the 20-and-under age group, the percentage given is higher than would be true if all deaths were included.

c) Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963), shows approximately 15% for Chicago. Since this study excluded the 19-and-under age group, the percentage given is higher than would be true if all deaths were included.

d) For King County, Washington, where Seattle is located, the reviewer is informed by appropriate officials of statistics indicating approximately 42% for the years 1964 and 1966.

15. Professor Richard V. Wellman, Chief Reporter, has written extensively and well in explaining the background of the Uniform Probate Code and the means it employs to effect the separation of non-contentious from contentious probate. *See, e.g.*, Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970).

handle the non-contentious matters; and they provided the same conceptual devolution for real property as they did for personal property. They added better notice to all persons possibly concerned with the decedent's affairs and estate; they chose not to adopt the intestate provisions making the personal representative a trustee for minors; and they provided that the devolution of all property operates, conceptually speaking, directly to the ultimate takers upon the moment of the decedent's death rather than to the personal representative. Although there will not be the utter compulsion upon a taker to "go through probate" as the English seem to require with respect to 50% of its decedents, the Uniform Probate Code does make the process easier and quicker, and it should make it much less expensive.

Professor Fratcher's writing style suffers from a most annoying and marked pedantry. His book is wonderful for its detail, every bit ringing with authenticity and footnote documentation; but only in most scattered instances does Professor Fratcher generalize, compare with U.S. practice, or even argue for the merits of the English system. Only in his concluding chapter, all too short, does he try to draw together his conclusions and expand on a few of his comparisons with United States practice.[16] For most of it, however, the reader is left to draw his own inferences. Perhaps the United States lawyer can make his own, reasonably accurate generalizations; but certainly for a lay reader the book will, by its very bulk of undifferentiated detail, obscure the principal point, that indeed the English system is better and that we, too, can improve our probate system, by a discriminating adaptation of English practice.

16. How much more fruitful would have been a conclusion comparable to Professor Browder's in his recent article comparing English and United States testamentary dispositions, in which he thoughtfully and imaginatively shows the interplay between the substantive law and the form of disposition it produces and then relates the differences between the typical testamentary patterns in each of the two countries to those differences in the underlying property law. Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1357-60 (1967).