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Norman F. Dacey: How to Avoid Probate

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HOW TO AVOID PROBATE. By Norman F. Dacey. New York: Crown Publishers, Inc. Pp. 361. \$4.95.

The probate system is a conspiracy, says Norman F. Dacey, under which a helpless, unprotected public is subjected to tribute in the form of unwarranted cost and delay. The participants in this conspiracy are the judges, the lawyers, the legislators, the politicians, the newspapers and the banks. It works something like this:

When you die, a probate judge will appoint two complete strangers to appraise your estate. The political boss of your town may have called the judge and said: "You remember old Joe Green, don't you, over in the 5th district? Joe's out of a job and has had a lot of hard luck lately. He needs a little help. Give him an appraisership." Two such "old Joe Greens" will be appointed as appraisers of your estate. . . .

Dacey continues:

Because to end it would require legislative action—and the state legislatures of America are controlled by lawyer-members who have a vested interest in continuing the system exactly as it is. They see to it that non-lawyer legislators get occasional appraiserships to keep them happy—and silent.

Why don't crusading newspapermen disclose the facts? In 90% of American communities, there is but one newspaper. A check of the probate court records will disclose that juicy appraiserships go regularly to two or three key men on the newspaper. They see to it that nobody bites the hand that is feeding them.¹

Having diagnosed the illness, Dacey now produces his "legal wonder drug," which turns out to be the well known, but moderately used, inter-vivos trust. The drug is most effective if self-administered without benefit of counsel. One simply thumbs through the 238 pages of forms (half of which are duplicates for purposes of making carbon copies); finds the form which suits his need; tears it out along the perforated edge; fills in the blanks; crosses out that which is not applicable; writes in that which would be appropriate (always being sure to initial the changes unless the alterations become extensive, in which case one

1. DACEY, HOW TO AVOID PROBATE 8 (1965).

should retype the form) ; then executes the document in accordance with instructions contained. Presto! It's done! You have followed Dacey out of the wilderness into "no probate land."

Mr. Dacey has lost an opportunity to be of service to the Bar and public. There are abuses in the probate system in some jurisdictions, and these always should be pointed out. But his blanket indictment of all persons connected with probate leads one to the conclusion that the author was not interested in painting a true picture. His book superficially treats a complex area of law. The good points are lost because of half-truths, unmentioned dangers, and the failure to treat taxation problems. The book must be condemned heartily, since it is written without any sense of responsibility to the legal and financial interests of the user.

Dacey has a form for many kinds of inter-vivos trusts. These include receptacles for the title to your home, bank accounts, mutual funds, securities, life insurance, your proprietorship, your personal effects, and your closely held corporation. He encourages the indiscriminate use of individual trustees, preferably a relative or friend. Nowhere does he warn the trustee about the duties of investment and perservation, of accounting to beneficiaries, of filing federal and state tax returns and penalties for failure to do so, of the dangers of commingling assets, or of the very real personal liability of a trustee. His forms provide that the trustee shall act without bond, even though individuals are acting as trustees. He ignores effective tax planning and lifetime programs of gifts under proper circumstances.

In chapter fourteen, Dacey invites the reader to challenge the Treasury Department. He mentions a few of the benefits and the ease of entering into a ten-year Clifford trust. What he says is true, but it is not one-tenth of what ought to be said. There is no hint that Clifford trusts have been upset in hundreds of cases; that federal income tax benefits depend to a great extent upon state law; that an effective tax avoidance program under a Clifford trust may be effective in one jurisdiction, and that the same document may not be effective in another jurisdiction; that you should now be prepared for an audit of your return; that a "Gift Tax Return" may be required. If Dacey were truly responsive to his reader's interests, chapter fourteen in its present form would not have been included in the book.

In the form "Declaration of Trust" for the placing of one's home into an inter-vivos trust, Dacey includes not only the home, but in addition "*all furniture, fixtures and real and personal property situated therein.*" Then he would have you, the reader, record this deed. By this deed,

the whole world (particularly the beneficiaries) will know where the grantor wishes his home to go upon his death, disregarding the family arguments this grantor may become involved in, in addition to ignoring the probable arguments after the grantor's death over what constitutes the "personal property situated therein."

Typical of Dacey's instructions to a form is the following:

Note that the instrument specifies that the named beneficiaries are to receive "*in equal shares, or the survivor of them/per stirpes.*"

Now, think carefully: If you have named your three brothers with the understanding that if one brother predeceases you, his children are to receive his share, cross out "*or the survivor of them*" and initial it. If that is not what you want—if for example, you prefer that the share of your deceased brother be divided by your two surviving brothers, cross out "*per stirpes*" and initial it. Remember, you must cross out "*or the survivor of them*" or "*per stirpes*"—one or the other. (Emphasis added.)

Dacey fails to warn these many trustees and beneficiaries about the obligation to file "Federal Estate Tax Preliminary Notice" and "Federal Estate Tax Return." But these items should not be mentioned, since there are penalties involved, and knowledge of this on the part of the reader may frighten him sufficiently to send him to his attorney for advice. With respect to inheritance taxes, he says:

Heirs should be instructed to compute carefully any taxes due (if necessary, retaining the services of an accountant to assist in such computation) and transmit a check for such taxes to the appropriate state authority with an appropriate tax return, including an inventory.²

In chapter eighteen, the author instructs every car owner to execute the title to his motor vehicle now, so that when he dies his wife will merely walk to the registration office with the signed title and transfer it into her name without having to (a) forge his signature, or (b) apply to the court for letters of administration. This appears to be a clear invitation to fraud against taxing authorities and creditors. He is not concerned about the lost or stolen vehicle and the signed title.

The inter-vivos trust is a valuable tool in estate planning. Its use is often effective in the minimization of costs and taxes. The indiscrimin-

2. *Id.* at 15.

ate use of this vehicle by laymen without professional advice will lead ultimately to heartbreak and additional costs for many families. It will take decades to measure the damage this book has done to the public, but, even then, there will be no adequate way to measure it.

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