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How to Avoid Probate by Norman F. Dacey

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

The mere suggestion that the means to prescribe medicines be placed in the hands of the general public because many physicians are incompetent and charge excessively for writing prescriptions would certainly cause public outrage. Yet, *How to Avoid Probate,* by non-lawyer Norman F. Dacey, does just that in the field of trusts and estates. It places forms for the creation of trusts and the arrangements for settling estates on perforated pages for any member of the public who is willing to expend $4.95 for the book, tear out the pages, and fill in the blanks. The consequences for the estates of those who do so may be just as dire as for patients who mixed and prescribed today's miracle drugs for themselves.

To show the American probate system at its worst, Mr. Dacey tells of dishonest appraisers, guardians, and judges and indicates that up to twenty percent of a small estate may be expended in probate expenses alone. These selected examples do indeed drive home the point to which nearly all lawyers accede—probate is too expensive and too time-consuming. However, Mr. Dacey's object is not to reform the probate process but to tell his readers how to avoid it.

The "inter vivos" or living trust is the legal concept Mr. Dacey chooses as the device for avoiding probate. The basic pattern of eighteen of the twenty-three trusts suggested by Mr. Dacey is that the owner executes a declaration of trust, declaring himself trustee of his property and providing at his death for a successor trustee to pay over the property to the named beneficiaries. The person executing the declaration of trust retains all powers in respect to the trust property providing at his death for a successor trustee to pay over the property to the named beneficiaries. The person executing the declaration of trust retains all powers in respect to the trust property during his lifetime. The trust form provides:

> 2. I reserve unto myself the power and right . . . to collect any rental or other income which may accrue from the trust property and, in my sole discretion as trustee, either to accumulate such income as an addition to the trust assets being held hereunder or pay such income to myself as an individual.
>
> 3. I reserve unto myself the power and right at any time during my lifetime to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of the beneficiary and without giving notice to the beneficiary. The sale or other disposition by me of the whole or any part of the property held hereunder shall constitute as to such whole or part a revocation of this trust.[1]

[1] DACEY, HOW TO AVOID PROBATE 20 (1965).

As if the language of the trust forms left any doubt as to the meaning of these provisions, the author explains to the reader:

> Bear in mind that we are speaking here of a *revocable* trust. The property-owner can cancel it at any time or amend it—to change the beneficiary, for example. The existence of the trust does not alter in the slightest degree the right and privilege of the property-owner to sell or otherwise dispose of the property in any way he chooses during his lifetime.[2]

In order to permit the reader to create inter vivos trusts with abandon, Mr. Dacey provides separate trusts, and duplicates, for each type of property that a man has—real estate, bank accounts, mutual fund shares, stocks, personal effects and interest in an unincorporated business.

Unfortunately for all concerned, these trusts are not worth severing the perforations to obtain. They are nullities. Their sole effect and intent is to provide for distribution of property at death. For centuries the law has required such distribution to be accomplished with formalities, so as to avoid uncertainty, lessen chances of undue influence, and encourage thought by those wishing to provide for the disposition of property at death. As the grand old man of trusts, Professor Scott, has said:

> If indeed the settlor reserves power to deal with the trust property during his lifetime as he likes, the trust seems clearly testamentary. Thus if the owner of property declares himself trustee to dispose of the property in any way he chooses as long as he lives, and provides that, if he has not otherwise disposed of the property during his lifetime, it is to be held upon his death for a designated beneficiary, the trust is testamentary and invalid unless the requirements of the Statute of Wills are complied with.[3]

Issue can also be taken with some specific points the author makes about the inter vivos trust. For example, he states that creditors of the settlor cannot reach the assets of a revocable, inter vivos trust. In most, if not all jurisdictions, the creditors can reach the beneficial interest of the settlor—in Mr. Dacey's trust, the reserved life estate. In several jurisdictions creditors of the settlor of a revocable trust can reach all assets of the trust. Furthermore, in presumably all American jurisdictions, if a settlor of a revocable trust becomes bankrupt, his trustee in bankruptcy must revoke the revocable trust and thereby make the assets available to creditors.

The law of trusts has always had to strain to admit revocable trusts to the ranks of valid trusts. This has been accomplished primarily in

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[2] *Id.* at 16.
[3] SCOTT, TRUSTS § 57.6 (abr. 1960).

cases where the trustee was an independent person or institution distinct in interest and control from the settlor. The law of trusts cannot and should not change so as to recognize the validity of the type of revocable trust which Mr. Dacey proposes.

In addition to the separate trusts, the author suggests an omnibus estate plan—the "Dacey Trust." The individual sets up such a trust by entering into a declaration of trust with a bank, whereby the bank is made trustee. The bank is also made beneficiary of life insurance policies which, with other property, primarily mutual fund shares, are transferred to it. The right of revocability and the right to receive income are retained by the settlor. The appointment of an independent entity, and the formalities required of the settlor before he can regain property placed in the trust, suggests that the "Dacey Trust" is valid. However, as an estate planning device to save taxes, this practice is a complete failure because it forecloses to its settlor the possibility of avoiding estate taxes by creating irrevocable trusts of which the settlor is not life beneficiary.

Furthermore, the author is quite vague as to the fees which would be paid to the bank as trustee. He states that the trustees will not "ordinarily make any annual charge during your lifetime since they have no duties to perform." The trust, however, imposes a number of lifetime duties on the trustee. In spite of the author's suggestion to keep trying banks until you find one that will charge only a nominal fee, it seems unlikely that many trust companies would be willing to accept and administer the Dacey Trust gratuitously—especially if the settlor is active in adding and withdrawing property. If the bank were to charge the prevailing rate, the annual fee for the $300,000 estate used by the author for exemplary purposes would be $900. For a forty year old man who lives to be sixty-five, this is $22,500, not to mention the annual and termination fee that will be charged after the settlor's death. This is a rather large expense for someone whose sole purpose in setting up the trust is to avoid probate expense; in fact, it is $300 more than Mr. Dacey suggests at the beginning of the book as the probate expenses of a $300,000 estate. Since Mr. Dacey still suggests leaving a will, certain probate expenses will also be incurred, raising the total expenditure even further above the expenses the trust is established to avoid.

Most of Mr. Dacey's suggestions will only result in pecuniary loss to his readers through sacrifice of tax savings which could have been obtained by the execution of certain types of irrevocable trusts and through fees paid to attorneys to unscramble estates cursed by invalid or uncertain trusts. At least two suggestions, if followed, might con-

stitute or encourage the commission of criminal fraud and result in fines or even imprisonment. First is the suggestion in relation to those states in which safe deposit boxes of deceased persons can be opened only by a representative of the probate court or a state inheritance tax appraiser:

> In states having such requirements on safe deposit boxes, it may be desirable for husband and wife to have two boxes. His property is deposited in her box and her property in his box. Under this arrangement, when the deceased husband's deposit box is opened, no property belonging to him is to be found—it's all in his wife's box, to which she has ready, unquestioned access.[4]

It does not take a prophet to divine the consequences of such a scheme in case of marital difficulties, the need of the widow to have access to her own property at her husband's death, or the failure of the widow to include all of her husband's property in her safe deposit box on tax returns.

The second suggestion also speaks for itself in suggesting criminal fraud and loss from theft:

> A used car frequently has a very limited sale value, and the trouble and expense of going through the probate process in order to dispose of it is way out of proportion to that value. Be careful, then, that you don't force your estate into probate just because of your automobile.
>
> On the back of nearly all automobile registration certificates is a place where you are to sign if you sell the car or turn it in on a new one. Sign it—now. 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."[5]

One wonders why the author, who purports to be so familiar with the *faults* of the probate system, does not mention the *purpose* of probate—the need at death to find out exactly what a man owns, what he owes, and what is owed to him to insure that creditors and debtors as well as heirs, legatees, and tax collectors are fairly treated. No other legal institution or concept can fully satisfy this need, and the process is only made more difficult by the person who follows Mr. Dacey's advice and indiscriminately pronounces the magic word "trust" over his assets. In view of the rapid turnover rate of a man's assets in our present economy, it is staggering to think of the problems of inventory and tracing which would arise, should the person using any of Mr. Dacey's trusts not carefully declare a new trust and keep copious records each time he sells, gives away, or trades-in an old asset and obtains a new one.

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[4] DACEY, *op. cit. supra* note 1, at 11.
[5] *Id.* at 237.

The properly employed inter vivos trust is, of course, a helpful, frequently-used and estate planning device, that in this day of emphasis on trusts and estate planning in law schools, bar journals, and continuing legal education programs, is familiar to both lawyers and laymen. Yet, Mr. Dacey has the gall to state:

> Few laymen know about a living trust. Indeed, only a small proportion of attorneys know about it or understand its use. At least half of the attorneys who *do* know of it will either deny that knowledge or strongly advise against its use. The inter vivos trust, you see, is exempt from probate. Most attorneys derive a substantial proportion of their income from seeing the estates of deceased clients through probate. Seriously, now, do you expect them to tell you how to avoid probate? I would put the proportion of attorneys who know about and recommend the inter vivos trust at less than 1%.[6]

One wonders how Mr. Dacey reached his figure. The book establishes one statistic beyond question, however. At least one of "America's leading estate planners" does not fully understand the concept of an inter vivos trust.

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TRAUMA AND THE AUTOMOBILE. Edited by William J. Curran and Neil L. Chayet. Cincinnati: W. H. Anderson Company, 1966. Pp. 475. $14.50.

A book which is a composite of articles by many authors usually fails for lack of continuity and a central theme. *Trauma and the Automobile* is, for the most part, an exception.

Fifty thousand dead, one million injured, and two billion dollars property damage each year, and rising each year, reads like the statistics of an international holocaust; however, these are the figures for yearly automobile accidents in the United States. Little wonder, then, that Curran and Chayet of the Boston University Law-Medicine Institute have made the reduction or even the stabilization of such figures the central theme of this book.

Believing that past approaches to the problem have tended to place the blame on one of three causes—the driver, the vehicle, or the highway—the editors state that what is presently lacking is a joining of forces so that the problem can be attacked from all sides. The book, therefore, is a compilation of articles. It is divided into

[6] *Id.* at 13.