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A Possible Answer to Probate Avoidance

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The subject I want to discuss this evening should not be a topic for post-banquet speech making. It concerns the law of succession to property at death. The topic should be as dull as the alphabet.

But, succession, or probate as it's more likely to be called, is currently quite controversial. This fact, though possibly useful to would-be speech makers, is unfortunate. There should not be any controversy about the rules protecting individual freedom in regard to personal savings. The fundamental principles; e.g., the premise of private property that a decedent's unused savings should go as he indicates in his will, or to his heirs if he leaves no will, are not disputed or disputable. Nor can the troubles of the area be attributed to contentiousness of survivors and other claimants. Wills are rarely challenged, and the occasional challenges are usually unsuccessful. Creditors of decedents, protected in many situations by security or insurance, if not by survivors concerned about family credit ratings, are not a notable source of controversy. Indeed, the controversy arises from the charge that we have more rules than we need.

Perhaps the presence of elaborate rules and procedures causes survivors to forego natural contentiousness. Perhaps we should accept the ponderousness of our system as the price for desirable tranquility. Still, there are other explanations for lack of disputes, which seem particularly applicable to small estates. Inheritance is a family matter. We are quite accustomed to the idea that an estate owner is free to dispose of his savings as he pleases. Hence, when there is something to inherit, the recipient gets money he should not have counted on. It's like a voluntary tax refund. The old warning against looking gift horses in the mouth has a message about the attitude of inheritors. Moreover, any economic advantage one set of survivors might gain over another by stirring up trouble, would be countered in most cases by displeasure and resentment from persons who usually will be relatives or close acquaintances, rather than strangers. In sum, therefore, many of the usual components in succession tend to lead survivors to resolve any differences privately and amicably.

At some point, however, the size of the inheritance becomes large enough to induce would-be successors to disregard various environmental restraints in an effort to get something, or to get more. Whether this phenomenon exists in fact, or only in the minds of would-be decedents and their fiduciaries, is problematical. In either event, persons counseling owners of substantial estates are not likely to agree that survivors will not be contentious or that they will be able to resolve their differences without outside assistance. To them, a complex system of succession may tend to prevent problems before they become serious.

Nonetheless, in estates of the size most frequently encountered, the picture should be one of peace and harmony. Paradoxically, however, the factors in modest estates which should indicate legal tranquility appear to have contributed indirectly to the current hue and cry about probate. In any event, it is clear that we have a controversy about probate law. It is identified by the words AVOID PROBATE. Mr. Norman Dacey, author of *How to Avoid Probate,* struck a raw nerve, as he learned to his delight, when his paperback of about 50 pages of text and 291 pages of duplicated forms ran first on the nonfiction best seller list in the early months of 1967. Total sales of this expensive packet of legal forms has passed 670,000. Dacey's charges were pretty specific and pretty serious. They include: *1)* that probate law is archaic; *2)* that probate procedure is needlessly complex and exists principally for the benefit of lawyers and probate judges; *3)* that as a result, succession through probate is terribly time consuming and costly; and *4)* that lawyers cannot be trusted to give sound estate planning advice because of conflict of interest—that is, the conflict between what's good for the client, and the lawyer's interest in probate fees.

His advice was explicit and alarming. Do not trust the law of succession. Opt out. Avoid probate by the use of self-declared trusts of various assets and by use of joint tenancy designations.

Unfortunately from the view of those who dislike Dacey's charges, there is much in them that cannot be denied. This is particularly true as we focus on the estate of modest size and the relationships most commonly encountered in succession. Probate laws in almost all of our

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states, including some with recently adopted codes, are undeniably obsolescent. For example, intestacy laws almost everywhere continue to divide estates between the spouse and children of a decedent even though this pattern hasn't made sense since the family farm ceased to be the dominant feature of American family organization a couple of generations ago.

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Moreover, modern probate procedures are best explained by reference to colonial times. Then, our rule which assigns personal property of decedents to publicly appointed local officials at least served to protect local interests against unwanted claims from afar. This ancient starting point explains a heritage which haunts probate procedures in many states today—that the administration of an estate requires a judicial proceeding. The assumption is as doubtful as it is costly. The burden it imposes on succession has become more apparent as the Supreme Court has made lawyers realize that easy judicial notices via publication or posting cannot be trusted as due process if better notice is possible. The absurdity of the assumption is nowhere more apparent than in our crowded cities where low paid probate clerks go through the motions of checking receipts against items of expenditure listed in accounts of personal representatives. One coming on such a scene from abroad might assume that outlays of public moneys rather than private family distributions were involved. However, he would soon learn that routine big-city probate audits are superficial affairs which serve best to remind us how futile it is to use public offices to check private family transactions.

This is not to say that the probate situation is the product of a conspiracy by lawyers against the public, as Dacey suggests, or that probate laws do not work very well in many situations. Rather than a conspiracy, what we have is the natural product of understandable conservatism in regard to changes of basic law. Coupled with this, we have a situation in which the basic law works well for persons of wealth who know that their affairs involve values which may invite trouble unless there is careful planning. These persons, whose affairs tend to be unusual, are rarely bothered by rules designed for the average person because they see to it that custom-made charters govern their estates.

But there is a vacuum of consumer interest in regard to the laws which impact most directly on the person whose estate is very modest and whose affairs are average. This vacuum has been principally responsible for the neglect of our estates' codes. Legislatures respond to pressure. Decedents obviously pose no political problems, nor do the more thoughtful prospective decedents who can protect themselves by planning. Survivors tend to be happy with their windfall. Hence, probate laws have remained largely unchanged for generations, because the groups principally concerned with them—the lawyers and probate court officials—have found that they work very well for what they see to be the important cases; e.g., the big estate where planning occurs, and the bitterly contested case. Moreover, these professionals are paid to make rules work, rather than to question or to change them. Finally, until recently at least, there has been almost no pressure for change. In a sense, the legal profession has demonstrated its technical proficiency by making the old laws work as long and as well as they have.

If, as I have suggested, probate laws which work unjustly for the average person are the product of history and historic indifference, one might expect that better legislation would appear rather quickly in this day of rising emphasis on estate planning. The combination of steadily rising levels of affluence, complex federal and state tax laws with burdensome rates, and more and more public awareness of the advantages of planning which our burgeoning estate planning industry has generated, has made hundreds of thousands of persons newly conscious of their estates.

With the aid of paid and free advice, they are learning that succession via probate runs directly against such usually desired objectives as privacy in regard to family property matters, avoidance of delay in transmission at death and avoidance of periods of artificial non-liquidity following death. Joint estates, life insurance, living trusts, and various extra-legal devices which avoid the shortcomings of probate are being utilized with steadily increasing frequency. Still, probate substitutes involve some personal and legal inconveniences when compared to the will. And, many people are sufficiently resentful about being pushed toward probate-avoiding devices by bad law that they would gladly support legislative correction of the probate problems even though they also may move to protect themselves.

But, new statutes to correct probate problems are not going to be promoted or written by laymen. Lawyers must do the job and most other lawyers must support the results. How do lawyers view the probate problem? That is the question!

My premise in regard to probate reform is that Dacey is simply wrong in suggesting that lawyers will not support probate law changes. There are too many reasons why lawyers should jump at the chance to get probate laws on a modern track. Let me elaborate.

Traditionally, the principal service of lawyers in relation to the succession process has involved the counseling of personal representatives and survivors. There are no better clients. But, the importance of this role is shrinking in direct correlation to the extent to which individuals are using devices to avoid probate. Of course, an important new role for lawyers, garbed in the catchy words "estate planning," has developed. These words

used to mean will drafting. But, much modern estate planning is likely to center around non-probate devices. Indeed, if the sales of Dacey's books are any indicator, we should accept that many laymen may shy away from use of a will. Surely, the layman is interested in substitutes. Seeing that the lawyer has no insurance, mutual investments, or joint accounts to sell, the layman is likely to believe that the lawyer can meet his estate planning needs only where the estate is large enough to warrant use of a trust.

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Of course, if laymen also realized that lawyers might assist them with small trusts using family trustees, as well as with many other devices, and that, indeed, a lawyer is an expert in probate avoidance, the problem I'm concerned about would not be so severe. And, I'm told that a good deal of new interest in estate planning by lawyers has been stimulated by the Dacey furor. But, lawyers also concede that much of this business probably would have come to them anyway. And, any wide-spread discussion of the law of estates, whether it is focused on the inadequacy of present rules, or on the advantages of a new code, would probably have its effect in moving people to law offices.

I conclude, therefore, that the new "avoid probate" emphasis in estate planning works in several ways to discourage persons from using lawyers as estate planners. First, it is related to charges that the law is defective and that lawyers are responsible for the defects. Second, it has deprived lawyers of their best known stock-in-trade for estate planning—the will. Third, it has made lawyers appear to be useful only in regard to estates of unusual size and complexity.

Most estates are not of unusual size and complexity, at least as far as estate owners are concerned. The practicing bar surely should be concerned with any trend which might indicate that most estate owners will understand they need some planning, but also may imagine that lawyers have little to offer them.

One of the most disconcerting aspects of this trend is that lawyers may not be the professional to whom the young family man, whose estate is still quite small, may turn first in his search for assistance in financial planning. By the time this kind of person gets to a lawyer, his affairs have become complicated and much untangling becomes necessary. Worse, he may not get to the law office at all.

As a service industry, we can't afford a posture that makes us appear useless to the average man. The other side of the coin is equally disconcerting. It is that present trends are shrinking the area of utility of estates lawyers to the point where their livelihoods may depend on continuance of a few relatively narrow provisions of our federal tax laws.

On a somewhat more mundane level, when lawyers do participate in modern estate planning, the shift in the timing and character of their service means that they are working more for estate accumulators than for estate inheritors. There are significant differences between these groups in regard to their tolerance for legal fees. If put to a choice, wouldn't lawyers prefer to be employed by inheritors? If so, there is additional reason for skepticism about the proposition that the lawyer's role in modern estate planning will make him uninterested in probate law reforms.

So, probate law dilemmas are lawyer's dilemmas. The probate controversy should not embarrass us—it should delight us. It has given us a great opportunity to solve some old problems. It remains to be seen, however, whether lawyers will make the proper response to the probate controversy. In some instances to date, lawyer organizations have moved in exactly the wrong way. Consider the action of the New York County Bar Association. That group sued to enjoin distribution of the Dacey book in New York on the ground that the author was engaged in the illegal practice of law. This action, having the effect of saying the public shouldn't read matters lawyers do not want them to hear, simply tended to prove Dacey's charges that the bar would do whatever it could to keep the public from learning something about probate. Even if the suit in New York had resulted in a lawyer victory, which it did not, the practicing bar in general was seriously damaged by this emotional outburst. As you can imagine, the litigation was publicized to the hilt by Mr. Dacey.

A somewhat more typical reaction by various lawyers has been to write and speak of the danger of following the Dacey form book approach to probate avoidance. In the main, these pieces have done a good job of discrediting Mr. Dacey's advice concerning how probate is to be avoided. But, the reasoned answer sometimes seems to interest a smaller circle than the emotional attack.

Moreover, many lawyer responses to Dacey's charges fail to offer the layman a practical solution to his estate problem. The usual message has been either that probate is not so bad after all, or that only lawyer drawn trusts are safe. But, once they take a look, persons can see for themselves that probate routines are expensive and senseless as applied to the ordinary estate. Also, the advice that everyone should see a lawyer is increasingly impractical. Owners of ordinary estates are the ones who have been so frightened by the turmoil about probate. Many of these persons, being newly arrived in the status of having enough to worry about, do not know any lawyer. The suggestion that they find one is troublesome, too. It sounds expensive. Lawyers are busy and the general practitioner who serves the walk-in trade is becoming hard to find. Even if the layman with a modest estate can locate an estates lawyer, more likely than not he will encounter a product of recent law school and CLE em-

phasis on estate planning oriented around federal tax problems. If so, he may end up with a monstrous estate plan which will be worth its price only if all of his relatives suddenly die without plans and he is later wiped out in an airline accident causing gobs of double indemnity and travel insurance to fall into the pot.

These observations suggest the parameters of the probate problem. Obsolete laws and outmoded administrative institutions threaten to trap estates lawyers and to strip them of their traditional and principal function. Interest in estate planning for persons with complex affairs has diverted professional attention so that the loss of customary function does not appear to be as alarming as reflection suggests may be the case. To correct the problem, major and meaningful steps must be taken to restore the confidence of the owner of small estates in the probate system. But, lawyers must offer the solutions. The general area of probate has been of such pervasive importance to lawyers for so long, that the process of getting lawyers to concede that the present system is defective, and to apply their energies vigorously to its correction, stirs up professional doubts and emotions that threaten to render the bar impotent in the matter.

Hopefully, the rapidly maturing Uniform Probate Code may provide some answers if it is approved by the Uniform Law commissioners when they give it final consideration this July. The project which is producing the Code is one for which every lawyer may claim credit. Originated by subcommittees of the American Bar Association, financed almost entirely by lawyers' bar dues and gifts channeled through the American Bar Foundation, the project has been active since late 1962. Because it was well underway long before Mr. Dacey touched the public's sensitivity, it offers an explicit rejection of the charge that lawyers will never act on their own to sweep away probate dead wood. Moreover, the major features of the evolving Code will provide an affirmative, professionally considered response to the major complaints about existing law.

Let me become more specific. The heart of the Code is its system of probate administration. The basic scheme here is not very original, but it may be both useful and acceptable. The idea is to offer the various major features of the different probate systems presently followed in our fifty states, as options, in a single system. Thus, under the draft Code, it will be possible for persons representing an estate to secure probate of a will very promptly after testator's death by application to a non-judicial official of the probate court. Only a mandatory five-day delay to permit family coordination and to discourage races is involved. Probate without notice which permits a will to be put into effect without being finally adjudicated is an old and respected feature in many states which have long permitted what is usually called "common form probate." However, if the parties desire a binding adjudication of the will's validity, the draft Code offers an appropriate, optional procedure. Either non-notice, or formal probate can occur without administration. But, if persons want to collect and transfer assets, administration will be a practical necessity because only an appointed representative can protect transfer agents and others.

An executor or an administrator in intestacy may be appointed with no more fuss than is required to probate a will, just as it is true in many states today. After securing letters, a personal representative under the Code becomes a kind of statutory trustee with the necessary powers and protections to permit him to accomplish the entire job of collecting assets, paying debts, selling land or intangibles as needed to raise necessary cash, and distributing the estate to the successors. If desired, all of these steps can be handled without further court orders. Again, however, isolated adjudications to answer particular questions or general orders settling accounts are available as desired.

The Code accepts the proposition that the probate court's proper role in regard to settlement of estates is to answer questions which parties want answered rather than to impose its authority when it is not requested to see that otherwise peaceful settlements are correct. This idea, though it would change the law in Indiana, is not novel in American probate law. Pennsylvania procedures and practice have long sanctioned settlement of estates without any activity by public offices or officials other than common form probate and routine issuance of letters. New Jersey procedures are similar. New York's surrogate courts have little to do with personal representatives after appointment. In Georgia, Texas, and Washington, wills effectively can provide that the probate court shall not supervise the work of executors, and all well-drawn wills in these areas routinely so provide.

The draft code rejects the feature of existing law which tends to compel every married person to make a will or employ a will substitute.

But, the draft Code offers the option of supervised administration which features, like the present Indiana Code, the necessity of a court-ordered distribution of assets to close the judicial proceedings which are deemed to have been initiated by probate and issuance of letters. All that is required is that some interested person request supervision by the court and that a need for it exists.

What's new about the procedural package? In a sense, nothing is new because each procedure has its tested counterpart somewhere among the states now. But, the extension of familiar, easy procedures to intestate estates and the presence in the Code of clear options to handle various steps in testate or intestate administration, with or without court orders, will offer new advantages in procedure for every state.

In two other respects, however, the draft code offers somewhat newer ideas for improvement of succession in the United States. The most important is a new basic pattern of succession to intestate estates left by married persons. The old system, found almost everywhere in this

country, divides between spouse and children of intestate decedents. The Code alters this so that the first $50,000 will pass to the spouse, and any excess over $50,000 will be divided between spouse and children. There is a variation from this pattern if all children are not the children of both the decedent and the surviving spouse. The new pattern is deemed to reflect what an overwhelming majority of married persons want. An impressive amount of data shows quite clearly that married persons of ordinary means do not want their estates divided between their spouse and children. If the children are young, expensive guardianships result from a parent's death without a plan. If the children are grown, their heirship may well reduce the spouse's share below what should be provided for predictable needs. Moreover, reducing the surviving spouse's share in favor of children deprives the survivor of a degree of control over children's inheritances which may be useful to bolster ties when problems of old age might strain the relationship.

Thus, the draft code rejects the feature of existing law which tends to compel every married person to make a will or employ a will substitute.

This new pattern of heirship, coupled with efficient procedures for intestate estates, should tend to reduce pressures on persons of modest means to make wills *or* avoid probate. In a sense, the Code offers a statutory estate plan which should be wholly satisfactory for most persons of modest means who have no unusual testamentary wishes. Thus, the drafts offer the legal profession an answer to the question of how to accommodate the large bulk of estate owners without diverting professional attention from the increasing demands of persons with complex affairs. It will be much easier to give advice about intestacy than to mass produce wills. Moreover, we will have some assurance that the unadvised will not be so badly treated by the law as to damage the public image of property institutions.

Second, the new Code, if widely adopted, will go far to reduce the problems of planning via wills for persons who own property in several states. Estate planning by will and testamentary trust presently is handicapped in regard to persons who may change residences from one place to another, or who would invest in land in more than one state. Lawyers, who are so important to persons who prefer to manage their own affairs, should vigorously support uniformity of estate law because it will increase the range and value of the planning devices which lawyers are uniquely well equipped to handle. Also, lack of uniformity of estate law may be pushing persons who anticipate moving about these United States toward nationally managed investment pools, and the pre-packaged estate plans which go with them. I have no quarrel with these arrangements if they are preferred over owner-controlled investments *on the merits.* We should see, however, that individualized ownership is not unduly handicapped by legal anachronisms.

The Uniform Probate Code thus offers some positive answers to current probate dilemmas. Properly explained and properly used by lawyers assisting survivors, it will offer a much easier answer to worried owners than Mr. Dacey's. It would go something like this: "Relax; keep your property for yourself; inheritance is safe and, like any alternative, as cheap or expensive as your survivors and creditors make it." Shortened, the message might simply be: "Save your money. Probate is O.K."

The new Code would let lawyers carry out this kind of promise to the public. When survivors of a decedent who did not avoid probate seek legal counsel, the attorney will find it easier to give efficient service, for many of the old procedural drawbacks are gone. The Code makes it possible to avoid public disclosure of assets of a decedent. Court-appointed appraisers are eliminated. Probate bonds, which every testator avoids when he can, will not be needed unless demanded by survivors. Awkward, judicial sales of real estate should become a thing of the past.

The legal system will offer protection, but will not force it. As a corollary of less required paperwork and fewer adjudications, legal fees in individual cases may go down, but if general confidence is restored in the probate system the over-all effect should be a marked increase in the number and size of estates in which lawyers may be involved.

Still, there are substantial risks that the Code will not become the answer to probate avoidance. The principal worry lies in the difficulty of marshalling lawyer opinion behind the project. There are some who believe that the probate controversy is a tempest in a teapot and that it would be a mistake to undo settled law in response to the new found public interest in estates. I am convinced, however, that these views are wrong. In my five years of work on the Code, I have heard from dozens of laymen, and I've discussed these matters with lawyers from every part of the country. Most lawyers concede that the law needs to be improved. The public wants a change of law. If there's doubt on any point, it relates simply to whether lawyers will react affirmatively to the obvious demand for change.

> Present trends, if unchecked, dictate that **probate avoidance** will become the main road . . . (and) suggest that estates law and lawyers will become increasingly irrelevant to the ordinary person's estate problems.

Much of the pressure for change has been tempered so far by publicity to the effect that the Uniform Code project would result in significant improvement. The word has been: "Be patient. We are working on it." If the organized bar disappoints the public and follows the advice of the "stand-patters" on this one, it will be inviting a new and serious wave of anti-lawyer opinion which I, for one, do not believe it can afford. Moreover, it will be missing a golden opportunity to get public support for law changes that are badly needed in order to get the will, the lawyer's stock-in-trade, back into the circle of approved methods for handling many estate planning demands.

It remains to be seen whether we lawyers can agree on

anything so pervasive and so important to the general practice of law as this project. If we can, and *if* we use the resulting new law intelligently, we'll have our answer and that of the public to the probate avoidance controversy. If we cannot, we won't block changes in probate law and practice. Present trends, if unchecked, dictate that *probate avoidance* will become the main road with wills and intestacy becoming infrequently encountered by-ways. Present trends also suggest that estates law and lawyers will become increasingly irrelevant to the ordinary person's estate problems. Our failure to agree on a useful new Code won't change these trends. It will prove only that lawyers as a group are so incapable of constructive reform that they cannot even agree on changes which seem necessary to the perpetuation of the profession as we have known it. I, for one, am not ready to believe that this will be the case.

IMPACT OF COMPUTERS, from page 12

although this statement might contain what some would term a "parade of horribles," it is not intended in any way to suggest that I oppose or even have reservations about the desirability of computerization in the credit data field. The obvious efficiencies and economies in time and money that will accrue should benefit all users of credit information. Moreover, I firmly believe that one consequence of the recent debate over computers and privacy will be a recognition of the need to develop procedures for exploiting the new technologies while at the same time safeguarding the fundamental right of a citizen to be let alone. Thus, I have every confidence that the credit data network of the future will more adequately protect individual Americans from unwarranted invasion of their privacy than the existing information systems seem to do. My objective in this statement simply has been to explore the possibilities of the future and highlight those sensitive areas that require continued vigilance by this Subcommittee and the other governmental organizations charged with the development and enforcement of this nation's antitrust and related policies.

In conclusion, I would like to reiterate my gratitude to the Subcommittee for its invitation to appear here today and voice what I admit to be highly tentative observations about computers, credit bureaus, and competition. I hope that in some small measure I have contributed to these extraordinarily worthwhile hearings, which to me represent a very desirable recognition by the Congress of the need to study the manifold ways in which the new technologies affect our society.

PUBLIC EMPLOYEES, from page 13

are actually hunting bigger game. Their real target may be strikes of every kind. The present preoccupation with public employee strikes could be just a temporary tactic. Obviously, the best place to start an anti-strike campaign is where strikes have never been recognized as lawful. Discussing the problem of strikes in general would take me far beyond the subject of strikes in public employment. But a couple of points are worth emphasizing.

The strike, or more precisely the threat of the strike, has oiled the machinery of private collective bargaining for a long time, enabling groups of workers to meet their employers on equal footing. In this sense the strike has served a valuable social function. Nevertheless, we may be entering a new era, in which resort to the strike, at least in certain industries, is simply too costly to the public at large to allow the unfettered use of this particular weapon.

It has quietly been accepted, for instance, that the country cannot afford a nation-wide railroad strike. There has not been such a strike since right after World War II. When one loomed in 1967, Congress quickly passed a statute providing for a type of compulsory arbitration to forestall a shutdown. In our increasingly interdependent industrial society, strikes in various basic industries could become as intolerable as strikes on the railroads. Alternative devices for handling labor disputes such as compulsory arbitration, may come into play more and more. If the parties cannot reach agreement themselves, a government tribunal may step in and impose a binding settlement.

So drastic a change in our traditional system of free collective bargaining should not be instituted without a clear showing of grave need. For my purposes here, however, the important lesson is that the possible prohibition of work stoppages in critical industries has nothing to do with public employment as such. If a line must be drawn between permissible and forbidden strikes, it should be drawn according to the actual economic and social impact on the community, and not according to the "public" or "private" status of the strikers.

Ultimately, laws depend for their effectiveness upon voluntary acceptance by the vast majority of the decent persons in the groups regulated. Without such acceptance, the police and the courts are powerless to uphold the law, as our experience with prohibition proved. We see another demonstration of this truth when the words on the statute books were defied by a highly respectable, normally law-abiding group—public school teachers. In my view, the teachers were basically right. The law should not forbid them to strike merely because they are public employees.