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Probate Can Be Quick and Cheap Trusts and Estates in England

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Probate Can Be Quick and Cheap: Trusts and Estates in England. WILLIAM F. FRATCHER. New York: Pageant Press. 1968. Pp. xii, 106. $3.50.

Among the many suggestions received by the New York Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates was one that the Commission consider the modern English system of administration of estates rather than patch up the 17th century English system with which New York still struggles. Regrettably, and in spite of other manifest accomplishments of the Commission,[1] this suggestion was not acted upon, and it is even possible that it was not fully understood. Now that Professor Fratcher's article in the *New York University Law Review*[2] has been expanded into a book of modest size, no lawyer concerned with probate reform need be uninformed as to the main outlines of the modern law in England. Perhaps the next such commission in New York State may be alerted to the problem; from past experience it may be appointed around 1995![3]

With his strong background as both Research Director for the Special Committee on Revision of the Model Probate Code of the American Bar Association and Reporter for the Uniform Probate Code, Professor Fratcher went to England on a Ford Foundation Law Faculty Fellowship to examine the English law of estates. In his resulting comparative study, the first chapter takes up the law of trust administration. What will be most startling here to the American lawyer is the absence of any important distinction under most circumstances between the administration of a testamentary trust, once the will has been probated and the trustee has been appointed, and an inter vivos trust. The former is not normally supervised by a court any more than the latter, provided no aggrieved party invokes the court's jurisdiction. Another innovation is the Public Trustee, "a trust corporation sole with power to act, when so appointed, as executor, administrator, judicial trustee and trustee . . . ."[4] The Public Trustee is a lawyer earning £4,175

1 *See* NEW YORK TEMP. STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, FIFTH REPORT, 1966 N.Y. Leg. Doc. No. 19, and earlier annual reports.

2 Fratcher, *Fiduciary Administration in England*, 40 N.Y.U.L. REV. 12 (1965).

3 The general examination of the law of estates in New York prior to that of the Temporary State Commission authorized in 1961 was by the Commission to Investigate Defects in the Laws of Estates, authorized in 1927. *See* NEW YORK STATE COMM'N TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES, COMBINED REPORTS FOR THE YEARS 1928-1933 (repr. ed. 1935).

4 P. 11.

per year with a staff of thirty-eight; his office has accepted trusts on a fee basis aggregating £659 million and may not decline to act because of the small size of any given estate. The powers of all trustees in England are broader than in many American states, sometimes even though attempts to limit such powers may appear in the governing instrument.

Those American lawyers who view guardianships as juicy political plums will be startled to learn that in English practice the parent or nominee of the parent is usually appointed for an infant interested in a trust and that a salaried public officer acts for a mentally incompetent party as well as for unborn and unascertained beneficiaries.

Estates of Decedents, the second chapter, describes how a will is probated in court or how letters of administration are issued for intestate succession. The chapter then points out that, contrary to the American experience,

> In the great bulk of English estates there are no judicial proceedings after the grant of probate or administration. The personal representative simply collects the assets, pays claims and expenses of administration, distributes the residue to the persons entitled under the will or the intestate distribution statutes and secures discharges from the distributees.[5]

Yet persons taking property so administered are protected just as are persons taking after the judicially supervised administration which occurs in virtually all American states.

Perhaps most terrifying is Professor Fratcher's observation that such independent administration in England "may be, and quite frequently is, carried out without the employment of a lawyer. Consequently it is much cheaper, simpler and quicker than a judicially supervised administration."[6] Administration under the supervision of the court is available but seems to be avoided usually because of the delay and expense. The modern English system does make probate and administration quick and cheap without wandering into Dacey's legal quicksands of attempting to avoid probate entirely.[7]

The third chapter, Estates of Infants, begins aptly:

> In the days of Sir Edward Coke guardianship of the estates of infants was an important, confused and thoroughly unsatisfactory part of the common law of property. In most of the United States the law relating to guardianship of the property of infants is equally

5 P. 52.

6 P. 62-63 (footnote omitted).

7 *See* N. DACEY, HOW TO AVOID PROBATE (1965).

> important, confused and unsatisfactory. In modern England the rules of law governing guardianship of the property of infants are still confused and unsatisfactory but they are no longer important because the current statutes, court rules and judicial practice remove virtually all substantial property of infants from their ambit.[8]

How this is done is surprisingly simple. Infants in England can no longer own legal estates in land, only beneficial interests in a trust of land, and infants rarely acquire legal title to personalty by succession. Rather, they acquire an interest as beneficiary with the personal representative as trustee. Substantial inter vivos gifts to infants are normally made to a trustee rather than to the infant directly. No lucrative guardianships for the politically faithful!

The fourth chapter, Estates of Mental Incompetents, describes an area of the law codified in great detail in 1959 and in subsequent administrative rules. Although the governing agency is called the Court of Protection, it much more resembles an administrative agency in which proceedings are conducted in chambers, and much of the court's business is carried on by mail. Although these procedures might, to an American lawyer, seem to lack many of our safeguards for persons alleged to be incompetent, at least they are inexpensive. Much of the representation is not even by a lawyer; rather, it is directly undertaken by the person acting on behalf of the incompetent—his receiver.

A cogent point made in the brief, final chapter, Summary and Comparisons, is the contrast between the unified law and centralized court supervision of estates throughout England and the wild dispersal of administration of estates in three thousand counties in the United States operating under fifty different brands of law.

What is needed next is a popularization of Fratcher's thesis to reach the despairing laymen who made Dacey's *How To Avoid Probate* a best seller. Yes, *Probate Can Be Quick and Cheap,* if laymen insist, though lawyers resist.

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8 P. 73 (footnotes omitted).

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