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How to Avoid Probate. by Norman F. Dacey.

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BOOK REVIEWS

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

The practicing lawyer is urged to buy this book and keep it in his library; he may need it some day in a lawsuit over one or another of the forms it contains. Its author is a mutual fund dealer who has a strong dislike for lawyers and all their works and pomps, especially in estate matters.¹ He urges the public to keep their estates out of courts (and out of the hands of lawyers) and purports to show them how to do it.

Mr. Dacey comes out swinging. He attacks the delay, publicity and expense of "probate,"² with particular reference to the practice of appointing appraisers in Connecticut and special guardians in New York. This reviewer knows nothing of the Connecticut system, and the abuses which can exist in the special guardian system as practiced in New York will find no defense here, but some of Mr. Dacey's haymakers are near the belt line. For example, it is rather disingenuous to cite³ the results of "an up-to-date survey" (by whom?) to ascertain the average time required for "probate" of an estate, in which the possible choices were "less than six months," "six months to one year," "one to two years" and "two to *five* years," and which showed "overwhelmingly" that most estates fell into the last category: of course they did—a federal estate tax return cannot be prudently filed until more than one year after death (since it may be advisable to use the one-year alternate valuation date)⁴, and federal audit thereafter will frequently extend final settlement past the second year; the result is that most estates of any size necessarily require two to *three* years for estate tax settlement, *whether they pass through a probate court or not*; a category of two to five years is—not to put too fine a point upon it—loaded. Mr. Dacey also prints⁵ a table from "a leading legal reference service" (which is too modest to be identified?) showing estimated costs of estate administration which are substantially higher than those in this writer's experience (which is chiefly limited to Western New York). However, there is no doubt that Mr. Dacey scores some points, and even if we protest that the situation is not as bad as he says it is, the public may well answer us with Hamlet: "O, reform it altogether!"⁶

Mr. Dacey then proceeds to detail his methods of avoiding probate. The basic device, or in his more colorful language, the "legal wonder drug," for this purpose, is the inter vivos trust. Mr. Dacey suggests that an individual can

1. On the other hand, he has great affection for mutual funds—the book is enlivened by occasional hymns of praise to these securities and the men who manage them.

2. This term is used to include the entire process of estate administration, testate or intestate.

3. P. 6.

4. Int. Rev. Code of 1954, § 2032.

5. P. 6.

6. Act III, Scene 2.

use an inter vivos trust to pass his house, his bank accounts, his mutual funds (for which, as noted above, Mr. Dacey has unbounded enthusiasm), his securities and other assets to the natural objects of his bounty on his death, without having them pass through a probate court. He does this by using the forms provided in duplicate (and with tear-out perforations) throughout the book. He need not consult an attorney⁷: "Any sensible person who reads [the forms] thoughtfully several times and checks his understanding of them with another person should have no difficulty."⁸

The forms for these various assets consist of a declaration of trust for the benefit of a named beneficiary (the intended heir); the grantor reserves to himself the right to receive all the income from the trust property during his lifetime, and to amend or revoke the trust at any time—in fact, sale or other disposition of the corpus by the grantor constitutes an automatic revocation. On the grantor's death, a named successor trustee (who is also the beneficiary unless the latter is an infant) is to transfer the trust property to the beneficiary. In this way, the grantor succeeds in passing property on his death by an instrument which need not be admitted to probate.⁹

The reader who has begun to mutter about "illusory transfers" should recall that there is authority to support a trust for a named beneficiary, even though the grantor reserves to himself a life interest and the power to amend or revoke, and even though the trust is created merely by a declaration of trust.¹⁰

But these individual declarations of trust are just a warm-up for the grand design which is really close to Mr. Dacey's heart: a device which our author tells us others "have been kind enough to designate as a 'Dacey Trust.'¹¹ This trust is dedicated to the proposition that banks make fine trustees for custodial and distribution purposes, but that they are inferior as investment managers to mutual funds, which are attracting "more and more of the top-notch investment brains of the country."¹² In order to combine the spectacular benefits of mutual fund ownership with the more humdrum services of trust companies, while at the same time avoiding probate, Mr. Dacey's readers are advised to proceed as follows:

1. Purchase mutual fund shares and declare an inter vivos trust of the

7. Who, our author informs us, probably knows nothing about inter vivos trusts, or if he does will not recommend them out of greed for the estate fees he would lose. P. 13.

8. P. 331.

9. Mr. Dacey does not claim, of course, that use of these trusts avoids estate taxes. On the other hand, he fails to warn the reader that he probably (if he is a "fiduciary" see Int. Rev. Code of 1954, § 7701(a)(6); Treas. Reg. § 301.7701-6 (1960)) must file income tax returns for each of these trusts which has annual gross income of \$600 or more. Int. Rev. Code of 1954, § 6012(a)(4).

10. *Roberts v. Roberts*, 286 F.2d 647 (9th Cir. 1961); Restatement (Second), Trusts § 57, and comments; 1 Scott, Law of Trusts § 57.6 (2d ed. 1956); cf. *Matter of Brown*, 252 N.Y. 366, 169 N.E. 612 (1930); *Irving Bank—Columbia Trust Co. v. Rowe*, 213 App. Div. 281, 210 N.Y. Supp. 497 (1st Dep't 1925). *But cf.* *Matter of Cerchia*, 279 App. Div. 734, 108 N.Y.S.2d 753 (1st Dep't 1951).

11. P. 129.

12. Pp. 129-30.

type described above, except that a bank (rather than the intended heir) is named as beneficiary and successor trustee on death.

2. Amend life insurance policies to name the same bank (as trustee under the "Dacey Trust" described below) as beneficiary.

3. Draw a will (form supplied, plus script¹³ for due execution), leaving residence and personal effects to the wife, but securities and cash to the bank as trustee under the "Dacey Trust."¹⁴ If any question arises about the legality of the pour-over from the will into the "Dacey Trust," there is no need to consult a lawyer: "check this point with the trust officer at your local bank."¹⁵

4. Fill out the form of "Dacey Trust" included in the book. This is a form of revocable inter vivos trust under which the bank receives the life insurance policies (and perhaps other property) as trustee. Upon the grantor's death the bank receives the life insurance proceeds, together with the mutual fund shares from the declaration of trust, and the assets bequeathed to it by the will. The bank then establishes two trusts for the wife: a marital deduction trust with general power of appointment, and a residuary trust. The grantor's funeral and administration expenses, and his estate taxes, can be paid from the latter trust. The bank is *directed* to make all investments in shares of a named mutual fund, using the services of a named mutual fund dealer. "In most instances, this is the same dealer through whom he purchased shares during his lifetime."¹⁶

Such a trust, if properly drawn and executed, seems to be valid.¹⁷ A question might be raised about the declaration of trust of the mutual fund shares (a principal asset of the estate, as Mr. Dacey envisages it) under which these shares are to pass to the trustee. It was stated above¹⁸ that authority can be found to support such a trust. It should be pointed out, however, that Mr. Dacey's declarations of trust touch the outer limits: they could be vulnerable to attack by a disappointed kinsman who contended that the complete power over the trust property which the grantor retains during his lifetime under these declarations renders them invalid.¹⁹

13. Which may remind Gilbert & Sullivan lovers of the Oath of the Jurymen in "Trial by Jury."

14. Apparently these assets *will* pass through probate.

15. P. 133.

16. P. 135. Compare Mr. Dacey's animadversions on lawyers who name themselves trustees in wills they draw, and who profit from a "gentleman's agreement" to be retained as estate attorney in cases where they have named a bank as executor at p. 9.

17. The revocable inter vivos trust is, of course, a useful estate planning tool, and can help to save administration expenses at the time of death. It can also, however, lead to more trouble and expense during lifetime than it saves on death, and should only be entered into after careful consideration of all the factors. The trust instrument should, of course, be tailored to the situation of the individual grantor. See Casner, *Estate Planning—Avoidance of Probate*, 60 Colum. L. Rev. 108 (1960).

18. See text at note 10 *supra*.

19. See 1 Scott, *op. cit. supra* note 10, § 57.6 at 476-77. Such litigation in New York will require a probing of the somewhat Delphic *per curiam* opinion in *Matter of Cerchia*, 279 App. Div. 734, 108 N.Y.S.2d 753 (1st Dep't 1951), which seems to cast doubt on the validity of such a declaration. Counsel retained to attack the instrument may find useful Mr. Dacey's statement (p. 99) that "their registration [in this case, securities] under the

Moreover, all of these forms must be properly filled in and properly executed. If they are filled in by a lay grantor without the help of a lawyer—as Mr. Dacey invites his readers to do²⁰—there is obviously danger of defective execution, and while these forms may not be held to be testamentary documents by the courts, they share with wills one unfortunate characteristic: defects tend to show up when it is too late to correct them. Mr. Dacey pooh-poohs this objection and says lawyers make mistakes too, but it is to be feared that the combination of a sophisticated form and a lay draftsman will produce an unintended result—if not outright invalidity—more often than Mr. Dacey thinks.

This book will disappear from the best-seller lists, but we can expect its forms to begin turning up in our courts in the near future, and to continue there for some years to come. Whatever their theoretical validity, it is certainly predictable that they will be a source of extensive—and expensive—litigation, which may one day bring lawyers to lift their voices in a paraphrase of the old toast:

“To the probate avoider, let’s drink to his dust,
Who for four ninety-five makes his own Dacey Trust.”

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INSIDER TRADING AND THE STOCK MARKET. By Henry G. Manne. New York: The Free Press, 1966. Pp. xiii, 274. \$6.95.

The action commenced by the S.E.C. in 1965 against Texas Gulf Sulfur Company and certain of its directors, officers and employees¹ has caused a great concern and uncertainty with regard to the legality and liability of corporate insiders, *i.e.* directors, officers and employees and others, trading in a corporation’s shares when they are in possession of information not generally available to the investing public.

declaration of trust will not alter in the slightest degree your right to do with them as you wish during your lifetime.”

20. He does concede that a lawyer may be needed to amend an existing trust, but “if he’s worth his salt, it’s not more than a twenty-minute job.” P. 242.

1. S.E.C. v. Texas Gulf Sulfur Co., 258 F. Supp. 262 (S.D.N.Y. 1966). This case is concerned with trading in the corporation’s stock by insiders prior to public disclosure of a substantial ore find in the Trimmins Ontario area. The S.E.C. complaint was based on Rule 10b-5 and requested injunctive relief, rescission and restitution. The lower court decision, which has been appealed, accepted a limited part of the S.E.C.’s contention as to insider liability, held substantially against the S.E.C.’s position on the facts and dismissed the action against the company and ten or twelve individual defendants. This decision did not deal with questions concerning the remedies to be applied to the two defendants found in violation.