

Dacey: How to Avoid Probate

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is reminded of those photographs of the Nazi death-camp atrocities—they are sickening, yet they have a strange, somewhat frightening fascination. The book can be a totally unnerving vicarious experience for the squeamish.

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How to Avoid Probate. BY NORMAN F. DACEY. New York: Crown Publishers, Inc., 1965. Pp. 341. \$4.95.

Reference to the "legal racket" and other similar disparaging remarks fail to increase Mr. Dacey's stature as an author or an estate planner. The vast majority of lawyers, doctors, teachers and other professionals are highly competent and respected although there may be a few who fail to maintain the professional and ethical standards expected of them. Confronted with unsatisfactory medical advice from one doctor, most people would visit another. Any suggestion that they read a medical book to diagnose and cure their own illness would be met with doubt and derision. Yet, Norman F. Dacey advocates that his elementary notebook of forms and inadequate explanations provides a sufficient basis from which to plan an estate for the care of one's family and the protection of assets accumulated over a lifetime.

The omissions and inadequacies of this book are frightening. Dacey is primarily concerned with avoiding probate costs and his publication is only secondarily concerned with the devolution of property or the security of one's family. Although an ill-conceived estate plan can be the cause of unnecessary federal estate tax payments far in excess of the most outrageous probate charges, there is virtually no tax guidance in this chronicle.

Probate has a purpose. It gives creditors the opportunity to collect their debts. Heirs are assured of receiving their rightful legacy. The estate assets are protected from improper use of investment. Dacey's trusts will not eliminate all or even most of the necessary costs involved in the post-death administration of an estate. Taxes must still be computed and paid, disputes must be resolved, creditors must be paid, titles must be cleared, and assets must be traced. These "probate-type expenses" will not be erased by merely drafting a trust document.

A basic estate planning tool is the use of marital deduction and residuary trusts to protect the heirs and reduce estate taxes. Yet, Dacey virtually skips over the marital deduction. Only a small minority of the myriad of trusts he would have one create make use of this elementary tax saving device. Although Dacey claims that his notebook is not particularly concerned with taxes, he lists probate fees for estates ranging from \$50,000 to \$10,000,000. Tax planning should be part of estate planning for any married person with a net estate in excess of \$120,000.

Assume a man leaves \$200,000 to his wife in a living trust and at the time of her death, the same \$200,000 is passed on to her children. The failure to use a properly constructed marital deduction and residuary trust could cost this family over \$27,000 in unnecessary estate tax payments while in Illinois the total estimated probate costs for these two estates would be approximately

\$12,000. Even if his trusts eliminated all probate costs, which they do not, the Dacey plan would be excessively expensive.

A well drafted living trust can be a valuable estate planning device for some persons, but a basic form, with the slight variations provided by Dacey, cannot possibly satisfy the needs of all people. The illogic of stereotyping the future needs of all individualizing into one basic mold should be apparent. An estate plan is very personal. It serves to protect one's family in the most economical way. Placing primary emphasis on reducing probate costs is similar to buying a new car with tread worn tires. The result of both could be disastrous.

Fortunately, Dacey points out many of the inherent deficiencies in his book, but his failure to explain the importance of these deficiencies is inexcusable. By his own admission, Dacey has not analyzed the extent to which the marital deduction should be used; or whether property should be left outright or in trust; or whether the trust should include powers of invasion or provisions covering the distributions or retention of principal; or whether a closely held business should be liquidated at death; or who should serve as executors or trustees; or whether the wife should get all or a part of the income for life; or whether specific bequests should be made to certain beneficiaries. He even admits these questions have legal implications, although he feels anyone with "good judgment" can handle them. That is absurd.

Dacey overlooks many other problems. Should all children be treated equally or should there be the flexibility to favor one child over another based on ultimate needs? Should a beneficiary have the power to appoint his trust interests to his children if he feels that would be beneficial? Should someone have the power to appoint successor trustees or should the decedent's judgment be followed regardless of future events? Should a trustee have only the limited powers given him by Dacey? Can one plan an estate without considering State Law? (Dacey makes no attempt to do this.) Should the decedent appoint guardians? Should the tax consequences of simultaneous deaths be left unanalyzed?

There is no need to establish a separate trust for each asset as Dacey recommends. It is more sensible and logical to place all assets under the roof of one coordinated trust document. Properly drawn, this document could take maximum advantage of the marital deduction and permit an organized estate plan. Except for isolated personal assets, most people look to the total value of their estate, not the type of asset involved. The status of a closely held business must be analyzed before death so proper plans can be made to continue or dispose of it at the owner's death. There is no reason to burden the grantor with filing separate income tax returns for each income-producing asset when one return might suffice.

It is not possible to discuss charitable bequests or reversionary trusts, as Dacey does, without having a sophisticated knowledge of taxes. The Internal Revenue Code devotes seven specific sections to matters which must be considered in establishing reversionary trusts and each section has to be carefully considered if a reversionary trust is to be effective. The intricacies of these sections are barely mentioned by Dacey.

The invalidity of this tome is further highlighted by the author's admission

that some people might mis-execute his forms but he still feels that will provide a better balance than forms prepared by lawyers. No lawyer would be satisfied with anything short of a perfectly executed document. The further admission that his tear-out sheets are not perfect but are legally correct is of little consolation. Legal case books are full of legally correct documents that failed to express the signator's intent.

The author's epilogue closes with the statement that he did not attempt to exhaustively explore every aspect of the problem of estate administration in America. He felt it was sufficient to merely set forth basic facts to prevent the reader from being exploited by the probate system.

An honest and accurate epilogue would have told the reader that each person's estate plan must be tailored to his needs. The best plan can only be developed by discussing the matter with an attorney. The attorney must analyze his client's needs and suggest the best alternatives available to satisfy those needs. The tax savings afforded by these alternatives should be explained and probate costs will also be considered. If an inter vivos trust is recommended, it should be well drafted and tailored to the individual.

A number one selling book cannot be ignored even though any competent estate planner would find it virtually useless. Its popularity should point out to the bar that the public has not been properly educated on the advantages and necessity for proper estate planning. If the book alerts its readers to the need for such planning, it will serve a purpose. Total reliance on this kit could, unfortunately, jeopardize the security of the user's family and be needlessly expensive.

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An Estate Planner's Handbook. By JAMES F. FARR. Boston: Little, Brown & Co., Third Edition, 166. Pp. 663. \$15.00.

This book was not intended to be a scholarly treatise on the complexities of estate planning, but rather it was designed to be a statement of the fundamental principles with some emphasis on tax implications which will be of service to anyone desiring to obtain a speaking acquaintance with this important subject. Although the treatment of the various principles was necessarily brief, those having a more serious interest in estate planning will find this book to be a valuable tool as it is well footnoted and provides a ready reference to the current authorities in the different areas.

The term "estate planning" was in some disrepute during the earlier years of use as it was somewhat commercialized and practiced by people who were not qualified or licensed to perform this service. It also grew up with the unfortunate connotation that it was primarily a method of tax avoidance. Today, however, it is a generally accepted fact that the professional estate planner is a specialist in his field as he must have a thorough knowledge of the laws pertaining to wills, trusts and estates. In addition, he must be a skilled and concise draftsman, understand the broad trends and precise rules of taxation, and have a familiarity with the actual administration of fiduciary portfolios and insurance.