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How To Avoid Problems With Your Will, by Robert A. Farmer; Probate Can Be Quick and Cheap, by William F. Fratcher

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BOOK REVIEWS

HOW TO AVOID PROBLEMS WITH YOUR WILL. By Robert A. Farmer & Associates. New York: Arco. 1968. Pp. 106. \$4.95.

PROBATE CAN BE QUICK AND CHEAP. By William F. Fratcher. New York: Pageant Press. 1968. Pp. xi, 106.

Part of the financial success of Dacey's *How To Avoid Probate* was perhaps due to the choice of the title. Two recent but dissimilar books have titles in a similar vein. These are *How To Avoid Problems With Your Will*, by Robert A. Farmer and Associates, and *Probate Can Be Quick and Cheap* by Professor William F. Fratcher. *How to Avoid Problems With Your Will* is written in laymen's language and is in effect a short, simplified hornbook on wills. *Probate Can Be Quick And Cheap*, on the other hand, is a scholarly work devoted primarily to summarizing the English procedure for the administration of trusts, decedents' estates, and the estates of infants and mental incompetents.

Professor Fratcher's primary conclusion in *Probate Can Be Quick And Cheap* is that American probate administration can be simplified and made less expensive by adopting some features of the English procedure. This conclusion is dramatically supported by this language in the preface to his book:

When an Englishman dies, leaving an estate worth 14,000 dollars, his widow can, within three weeks after his death, secure ownership of the estate by making a single half-hour visit to a District Probate Registry near her home, signing three printed forms, and paying a fourteen-dollar fee, without ever going near a court. When an American man dies, leaving as estate worth 14,000 dollars, his widow is unlikely to be able to secure ownership of his estate in less than a year and then only by attending, personally or through a lawyer, numerous hearings in a probate court and paying fees and other expenses amounting probably, to a hundred times the expense of the English widow.

The success of Dacey's book reflects a widespread belief among laymen that attorneys overcharge, particularly in the probate area. Professor Fratcher's demonstration that the English system of probate is simpler and cheaper indicates that it is time for the American Bar to

reform probate practice. A key feature of the English system is independent administration. Apart from the granting of probate or administration, the personal representative in England can collect the assets, pay off the claims, and distribute the assets without ever going to a court for approval of his actions. Only in the case of controversy with an interested party is the personal representative in England likely to go to court. While he can petition a court for advance approval of his actions even in the absence of controversy, Professor Fratcher indicates that this is rarely done. On the other hand, any interested party can petition the court to have the personal representative produce an inventory or an accounting in court, if, for example, the interested party wished to lay the foundation for an action against the personal representative. While court supervision of the administration of a decedent's estate is possible under English law, this procedure is expensive and time-consuming. The alternative usually resorted to in England is substitution of a judicial trustee for the personal representative in lieu of detailed court supervision of an incompetent or dishonest personal representative.

While there have been some jurisdictions in this country which have permitted independent administration, it has not been a widespread practice. However, drafts of the Uniform Probate Code contain a provision permitting independent administration, as well as supervised administration when an interested party requests such supervised administration and shows need for it. At least in those cases in which a corporate fiduciary is involved, there seems to be little reason for court supervision. The financial standing of the fiduciary is perhaps the greatest protection that the beneficiaries of the estate can have, and the efforts by many attorneys in such instances to keep a trust from becoming a court trust reflect their conviction that routine court accounts are both an unneeded protection and an unnecessary expense. The widespread adoption of independent administration would lessen the amount of work and thereby enable the various bar associations to reduce fee schedules for probate work.

How To Avoid Problems With Your Will is one of a series of books dealing with law prepared by Robert A. Farmer and Associates for laymen. It is of little use to a lawyer, except possibly as a bar review aid for one who had not studied wills. The book is of necessity generalized, since it does not discuss the law in various states, except occasionally when certain exceptional doctrines are pointed out. The book is accurate and a layman interested in learning about legal doctrines pertaining to wills can gain some knowledge from reading it, although not an in-depth understanding. Despite the title, this book is not a "how-to-do-it" guide enabling a layman to write his own will. In fact the preface clearly stresses

the necessity of consulting an attorney to draft a will and stresses that this job is not for a layman. The authors of the book are attorneys who show no animosity toward the Bar such as is expressed in Dacey's book.

Although given a "how to avoid" title, the book is not written from a planning viewpoint, except to the extent that knowledge of substantive doctrines provides a background for planning. It doesn't discuss the need for adequate administrative powers and flexibility in provisions so that fiduciaries can adjust to changed circumstances. While the trust device is discussed—in slightly more than one page—the reader is not made aware of its versatility.

Reading this book suggested to this reviewer that a suitable short manual supplied by a lawyer in advance of a conference could be very useful to a client who is planning a new will. Drafting a will inherently involves estate planning, and generally the will is the most crucial document in an estate plan. A guide describing various concepts such as trusts, life estates, remainders, spendthrift clauses, staggered distributions of corpus, special and general powers of appointment, powers to consume and to advance, five per cent powers, accumulation trusts, spray powers, powers governed by ascertainable standards, discretionary powers, advisory powers, life insurance trusts, equitable charges, revocable trusts, etc., can help the testator formulate an informed intention as to his estate plan. A considerable amount of communication is needed between the attorney and the client so that the client has knowledge of the wide range of choices available for use; and while an interplay between the attorney and a client in a series of conferences over successive drafts can bring out many of these things, a primer on estate planning and the use of trusts would be valuable and perhaps save time. One short manual which comes close to meeting this end is *The Truth About Probate And Family Financial Planning*, by William J. Casey. It also emphasizes the financial planning that is almost inevitably pertinent in estate planning.

A manual which summarizes in laymen's language some of the tools of the lawyer, indicates some of the tax complications and gives a realistic indication of the problems which can be encountered in the administration of an estate might tend to reassure laymen that a competent attorney who can use such a range of concepts should earn significant compensation. There are actually two key times in estate work when the lawyer can merit significant compensation. One is when he drafts the estate plan, the will, and other documents, and the second is in handling the post-mortem tax and estate planning. In many cases, by making of tax elections, choice of taxable periods, and timing of distributions, a competent attorney can save the estate and the beneficiaries more than the amount of his compensation. The reviewer believes that many general

practitioners and many older attorneys (those most likely to have accumulated a large drawer of wills) educated before the advent of modern law school tax courses do not have a background to do effective post-mortem tax and estate planning and in a sense these attorneys are overpaid in probate work regardless of how many hours of work they expend. One answer to this lack of knowledge about post-mortem tax planning is continuing legal education and also a recognition by the Bar of specialization.

With the furor over Dacey's book, it behooves the Bar to rethink the question of compensation received for representing estates. The very existence of minimum fee structures, based upon a percentage for the size of a particular estate, should be reconsidered. Two individuals may have the same total gross estate, but be totally dissimilar in terms of the amount of work taken to collect the assets, pay the claims, and distribute the property. One decedent might be salaried but own a large block of a single listed security acquired when a family business was merged into a large corporation. The administration of his estate would involve a small fraction of the time and effort involved in the estate of a deceased entrepreneur with the same total wealth which was diversified in a number of closely-held businesses and investments, with many executory contracts for the purchase and sale of property outstanding at the time of death, and with, perhaps, even a sole proprietorship which had to be operated for a period of time to conserve its value. Payment of the same fee under a percentage compensation is incongruous—indeed it is likely that there is inadequate compensation in one and a gross overcharge in the other. By what authority should the legal profession average out the compensation between estates of such dissimilar character?

The wide variation in the work required in estates of the same size is not the only argument against percentage compensation in probate work. Another problem is the distinction between assets in the probate estate and assets which are subject to inclusion in the gross estate for federal estate tax purposes. Often the most time consuming matter in the administration of an estate will be the determination of the federal estate tax liability arising from property not in the probate estate. With considerable justification, many attorneys and bar associations have moved towards basing percentage compensation for the attorney upon the amount in the gross estate for federal estate tax purpose rather than upon the assets in the probate estate. (Is there a conflict of interest if an attorney receives a larger fee for agreeing with the Internal Revenue Service to a higher value for assets in the gross estate?)

However, there are strong arguments against treating all assets in the gross estate exactly the same. For instance, life insurance proceeds

paid to a named beneficiary, or jointly held property passing by way of survivorship typically will present less of a problem to the attorney than an asset in the probate estate which is inventoried, sold, and the sales proceeds used for paying claims. Moving toward the federal estate tax gross estate as a measure of compensation does have the advantage of enabling the attorney to view with lessened self-interest some probate avoidance devices. For instance, an attorney who advises a client to create a revocable trust, thus reducing the probate estate, will thereby reduce his prospective compensation for representing the estate under a percentage of probate estate compensation schedule. Therefore he has a conflict of interest in advising the client to create a revocable trust. However, if the percentage compensation is based on the gross estate for federal estate purposes this conflict of interest is removed, and the attorney is in a better position to advise the use of revocable trusts and of various other probate avoidance techniques. It is vital to the long-range interests of the Bar that trust officers and others not believe, particularly with some justification, that attorneys oppose probate avoidance because it threatens a source of their income. Indeed, because of the principal role played by lawyers in our society this furtherance of trust in lawyers is vital for society itself.

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