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The End of Probate

Author : Stewart Sterk

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John Martin, [Reconfiguring Estate Settlement](#), 94 *Minn. L. Rev.* 42 (2009).

In the nearly 50 years since Norman Dacey's *How to Avoid Probate* first hit the best seller list, law reformers have responded by making probate easier, faster, and less expensive – especially for families with modest means and modest needs. These legal reforms, however, have barely made a dent in the use, and growth of probate avoidance devices. In a recent article, [Reconfiguring Estate Settlement](#), 94 *Minn. L. Rev.* 42 (2009), John Martin suggests replacing the probate system with a non-judicial registration system. Although his proposal builds on the UPC and other reform statutes, Professor Martin contributes some new insights – not the least of which is that any reform effort may be doomed if it retains the “probate” label.

Professor Martin describes the UPC's flexible system for administration of estates, which allows interested parties to calibrate their contact with the judicial system to match their need for judicial protection, and also catalogs the small estate procedures enacted in states that have not adopted the UPC. Despite the availability of these modern probate systems, lawyers and their clients continue to seek out non-probate alternatives. Why is this a problem? Because, as Professor Martin points out, probate avoidance generates unnecessary expenditures on bypass devices and encourages unscrupulous peddling by “trust mills” that prey on fear of the probate process. In addition, the proliferation of probate avoidance devices requires co-ordination, and creates unexpected difficulties when the co-ordination is less than perfect.

To combat these difficulties, Professor Martin suggests replacing the probate system with a registration system. When a decedent dies, an interested party could file either a will or, if there appears to be no will, an affidavit of heirship, with a registrar in a newly created Office of Estate Registration. The registrar's duties would be similar to those of a clerk charged with recording real property deeds: the registrar would check to make sure the document, on its face, complies with the necessary formalities, and would then accept the document for registration. If, as is usually the case, there is no dispute over distribution of the estate and no need for administration, there would be no further governmental involvement; the beneficiaries would simply take the assets to which they were entitled. If administration were needed, the personal representative named in the will (or, if there is no will, the representative appointed according to statutory priority) would receive the equivalent of letters testamentary, and would perform the usual functions of collecting assets and dealing with liabilities. In the ordinary case, neither judicial oversight nor any sort of accounting would be necessary. There will never be any formal closing of the estate. Of course, there will be a small minority of cases in which judicial intervention might be necessary, but Professor Martin suggests that intervention should come only at the initiation of an interested party, not as a matter of routine.

Professor Martin's registration system resembles in many respects the UPC's informal probate provisions. There are, however, two significant differences. The first is the name: Professor Martin would banish the word probate from the system, in large measure so that lawyers can inform their clients that they can avoid probate without using revocable trusts or other probate-avoidance devices. In light of the fear and loathing “probate” engenders in the population at large, this suggestion is an ingenious one, worthy of incorporation into any reform system.

The second significant difference involves confidentiality. In Professor Martin's system, the content of wills would not be a matter of public record; instead, content would be available only on a “need to know” basis. In this respect, Professor Martin would bring the law of wills closer to the law of inter vivos trusts, in part to eliminate one reason parties might opt for revocable trusts rather than wills. For two reasons, I'm not persuaded of the wisdom of this

approach. First, especially with respect to real property, the contents of a will may be important to prospective purchasers (and their title searchers) for a long time. Suppose, for instance, a will leaves real property to one of decedent's children. The children themselves – the only parties interested in decedent's estate – simply register the will and divide up the property in accordance with decedent's instructions. When, a decade later, the child who inherited the real property seeks to sell it (or dies), how is a prospective purchaser to know whether the child's title is good? So long as the will is a matter of public record, the purchaser can be confident about the state of title; if the will is confidential, doctrine will have to develop some other mechanism for title assurance. That, in turn, leads to my second objection to confidentiality: so long as the will is confidential for some purposes and not for others, litigation will arise about who is entitled to see the will – engendering costs that have the potential to exceed any tangible benefits.

Debate about the wisdom of confidentiality, however, should not obscure Professor Martin's more important objective: bridging the gap between inter vivos and testamentary transfers. With a registration system in place, there would be little reason for a person to create a trust merely to avoid the probate system; instead, a person would create a trust only when there was a significant reason to divide legal from beneficial title. Professor Martin believes – perhaps correctly – that removing the sharp distinctions between probate and nonprobate transfers would provide legislators with an impetus to harmonize the substantive law of gratuitous transfers, removing some of the anomalies present in current doctrine.

Estates lawyers as a group are a conservative lot. Whether they can banish “probate” from their vocabulary is an open question. Professor Martin's article suggests that there is good reason to try.

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