

# American Association of Retired Persons (AARP) Study

The American Association of Retired Persons (AARP) commissioned a two-year study conducted by attorneys on probate titled *A Report on Probate: Consumer Perspectives and Concerns*. The AARP study, published in 1990, is one of the most comprehensive and perceptive analyses of the probate system done to date, and it deserves far more credit and publicity than have been given it.

This study produced some very convincing evidence that the probate process is inflicting undue strain and emotional and financial duress on the unsuspecting public. It also presented a strong message that consumers should be educated about the evils of probate and about simple alternatives to avoid it.

Sadly, after publishing this revealing study about probate practices, AARP did little to publicize the existence of this excellent document. Thus, thousands of retired people—those need-

ing the advice the most—failed to learn about the horrors and financial consequences of the tactics being used by the Will and Probate attorneys.

The AARP study made a very significant comment about Wills versus Living Trusts:

Generally, it costs more to set up a living trust than to draft a *will*. But the cost for drafting a trust can be less in the long run than the combined cost of an inexpensive *will* and the ensuing expense of probate. . . . Those who go to an attorney and merely ask for a *will* may get less, and pay more, than they bargained for.

## EXTRACTS FROM THE AARP STUDY

The following paragraphs present important information contained in the AARP study.

### The Purpose of Probate Is to Pay Creditors

The AARP Study quoted Professor John Langbein of the University of Chicago, who wrote in a *Harvard Law Review* article, "Many of the details of American probate procedure, as well as much of its larger structure, would not exist but for the need to identify and pay off creditors. These procedures are indispensable, but . . . only for the most exceptional cases. In general, creditors do not need or use probate."

The AARP study went on to say, "Langbein surveyed several retail companies and found that credit departments for major stores do not read legal newspapers for information about deceased debtors. One credit officer, reported Langbein, estimates that 95 percent of these outstanding debts are paid at the initiative of the survivors. The debts of the other 5 percent, usually involving unmarried persons, get paid after collections personnel inquire about the account."

Professor Langbein continues, "Even creditors who traditionally use probate are now beginning to question the system's usefulness. . . ." The AARP study stated, "Provided that family members can agree on how to divide the deceased person's property, and pay the deceased's debts, there is little need for probate."

### Education Is Needed

The AARP study made some very strong recommendations that consumers be educated about the evils of probate and simple alternatives. Specifically, the study recommended that "aging organizations should provide information to older consumers about estate-planning issues, including (1) information about the procedural and cost problems of probate . . . [and] (2) information about alternatives to probate such as living trusts. . . ." The study also recommended that "state and local bar associations should require members of the probate bar, when drafting a will, to disclose the estimated cost of the eventual probate proceeding. . . . Clients should be informed of any percentages currently charged for probate and how this might affect the assets they intend to pass to survivors."

### Probate Avoidance Is Common

The AARP document stated, "The use of alternative methods of succession, that is, of transferring property after death, appears to be growing. The popularity of living trusts, [and] joint tenancies, . . . give evidence that many people would rather side-step the cost, delay, and lack of privacy in probate court. These efforts to avoid probate appear to be warranted. The potential for unfair fees in an unnecessary proceeding is reason enough to seek alternatives."

The AARP study found that a startling 90 percent of all the estates of widows and widowers age 60 and above will go through probate. This practice is the obvious result of spouses holding property in joint tenancy (or, where applicable, in community property) with the survivor taking all. The two prime disadvantages of this approach are that the decedent spouse's \$1 million federal estate tax equivalent exemption is thrown away, and even though probate can be avoided on the first to die, it cannot be avoided on the estate of the surviving spouse.

### Probate Is a "Cash Cow" for Attorneys

The AARP study noted that "John McCabe, the Legislative Director for the National Conference of Commissioners on Uniform State Laws, once remarked, 'The probate process has been a cash cow for attorneys. Small law firms pay their basic office expenses with probate fees.' And one attorney sardonically notes that probate practice traditionally has been a 'guaranteed retirement annuity program' for attorneys. Small firms and solo practitioners in probate practice do more than pay the phone bills with these fees. They make a good living on them."

According to AARP, "Many attorneys in smaller firms have built lucrative practices handling probate for the modest estates of the middle class. Indeed, small firms dominate probate practice. In one state, the results . . . show that law firms with fewer than ten attorneys handled 80 percent of the probate cases, and nearly half of those went to solo practitioners. In another state, small firms handled fully 95 percent of probate cases."

Nationally, the AARP study projects the combined cost of attorney and personal representative fees to be nearly \$2 billion annually. Attorney fees alone could constitute more than \$1.5 billion of that amount. In addition, probate generates hundreds of millions more for bonding companies, appraisers, and probate courts themselves.

### **The Will Is the Attorney's Ticket to Probate**

The AARP report found that "attorneys lay the groundwork for their probate practice by writing *wills*. Some use *wills* as a 'loss leader.' [They] write *wills* cheaply as a way to generate other business [specifically, future probate business]. . . . When the client later dies, the same attorney, or another member of the firm, probates the *will* at a fee high enough to recover any money lost on the earlier discount."

The American Association of Retired Persons study noted that ". . . the American Bar Association (ABA) identified two problems this practice ['loss leader' *wills*] creates for consumers. The first, the committee wrote, is that the practice of charging 'less than a reasonable fee [for drafting a *will*] may lower the quality of planning work done and thereby results in a disservice to the client.' Second, attorneys 'may be tempted to charge the estate a higher than appropriate fee to compensate for the bargain given on . . . the [will] drafting work.' Thus, consumers may not get a *will* that meets their estate planning needs, and in the end the attorney's fee could be excessive to compensate for the earlier bargain."

The AARP report stated that its "results are consistent with another study, in which 43 percent of the attorneys surveyed reported that their probate business derives from deceased persons for whom they wrote a *will*. The AARP document pointed out that ". . . the client who goes to a general practice lawyer for estate planning services may get a *will* because a *will* is what the attorney knows best, not because a *will* best suits the client. . . . [In fact], the attorney may never mention that living trusts exist." A case in point is a client who went to an attorney in the state of Washington and specifically

requested a Living Trust and, \$1,800 later, received a *will*.

### **A Different Estate-Planning Option**

The AARP study noted that "another issue related to the ABA committee's concern about low-quality estate-planning work is whether attorneys actively inform their clients about estate-planning options other than wills. The living, or inter vivos, trust can be a reasonably priced alternative to a will and it avoids probate altogether."

### **While Unnecessary, Probate Is Both Time-Consuming and Costly**

As the AARP study put it, ". . . probate is costly and time consuming. Nationally, probate fees—for attorney and personal representative services alone—could cost \$2 billion or more each year. . . ." In contrast, our studies indicate that a more realistic, current figure is \$14 billion.

The AARP report analyzed three states—California, Wisconsin, and Delaware—as the most representative of the three different methods of charging probate fees nationwide. The study found that the average time in the probate process was one year and three months, and the average cost of probate consumed 5 to 10 percent of the gross estate. (Gross estate is the total value of your estate prior to any reduction for liabilities such as mortgages or loans.)

The AARP document stated that "In some cases, attorney's fees consume 20 percent or more of estate value. This is especially true of small estates. For the estates of the middle class, attorney and personal representative fees can deplete the assets by as much as 10 percent even in uncomplicated cases."

It further states, "Aside from the cost, probate is time consuming. With redundant reporting requirements, and flexible 'deadlines' that are often unenforced or ignored, probate frequently lasts more than a year. (In one state, probate requires notification to every possible heir by right of intestacy, regardless of what the will specifies: This is an incredibly unnecessary burden placed upon any estate.)"

The AARP report determined that "probate's procedures and protections, even with recent reforms, are inappropriate for all but the most

exceptional cases. And, attorney's fees in connection with probate work are unreasonable."

### **Original Premise Confirmed**

The AARP study convincingly affirms the initial premise of the first edition of *The Living Trust*—that probate is unnecessary! If the only function of probate is to pay creditors who

aren't using the process in the first place, then probate is an obsolete system foisted upon an unwitting public for the sole purpose of lining attorneys' pockets—and \$2 billion dollars annually in probate fees is a tempting gold mine for far too many attorneys. (We estimate that the Will and Probate attorney's fees are closer to \$14 billion dollars annually.)