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THE "NON-BARRABLE" SHARE: SOME COMMENTS REGARDING A REAPPRAISAL

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SECTION 18 of the Decedent Estate Law has become a Pandora's box, from which confusion and its companion, litigation, have been released. Moreover, Section 18 does not always do the job it was designed to do. A serious reappraisal seems in order, in the light of present day economic and social conditions, not only of the mechanics of Section 18, but of the purposes and objectives to be obtained by a "non-barrable" share as well. Does hope still remain in the section?

WHY A "NON-BARRABLE" SHARE?

Any contemplation of Section 18 should be divorced from emotion, but from the very nature of the relationships involved this is difficult to do. An image readily conjured is that of the aged, loving and loved wife who suddenly finds herself a forlorn and destitute widow. But in reality, Section 18 is probably not needed or used when the couple has lived together in a normal, non-antagonistic relationship.[1] It can certainly be presumed that, in such a case, the husband will do his best to provide for his widow.[2] The problems raised by the May-December romance or by plans formulated around estate tax considerations are easily solved by the waiver of the right of election.[3] Section 18 is gen-

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[1] The rapidly growing field of estate planning is based extensively on this hypothesis.

[2] The extensive use of the estate tax marital deduction, in INT. REV. CODE OF 1954, § 2056, and N.Y. TAX LAW § 249-s(3), verifies this conclusion. Of course the author is aware that widowers also have a right of election. In the interest of simplicity, however, and in view of the author's difficulty in finding another suitable synonym for "surviving spouse," the wife will be used, for illustrative purposes, as the survivor. This happens most of the time anyway.

[3] N.Y. DECED. EST. LAW § 18(9).

erally called into play, however, when the relationship of the parties has deteriorated to the stage that the husband has little or no love or affection for his wife, but not to the stage that the wife has forfeited her rights, as by divorce, separation and so forth. Of course, the situation should not be ignored where the mere existence of Section 18 makes a loving husband more generous than he otherwise would be. On the other hand, the estate tax marital deduction probably exerts a greater influence in this area than does Section 18. In any event, should it be a policy of the law to compel a husband to be more liberal towards the widow than the needs of the situation and natural love and affection dictate? On balance, it would appear that Section 18 is called into play by the widow, who, as a wife, had a strained relationship with her husband.

In addition, in evaluating the policy considerations behind Section 18, modern social welfare legislation and the trend in private retirement and pension plans should form part of the background. These are factors which were unknown to the architects of Section 18. In 1930, the wife had no interest in the husband's earned income, at least in so far as it was spent. Social Security [4] and some private employee plans [5] are, however, forms of enforced savings of earnings in which the wife does acquire an interest. For example, Social Security survivor's benefits are available to the widow, if the deceased had earned income in a covered occupation. In most cases where Section 18 would have any significance this would amount to a monthly tax-free income of $81.40 for a surviving widow at age sixty-five.[6] This amount is payable regardless of the wishes of the decedent.[7] In addi-

[4] The Federal Insurance Contributions Act, INT. REV. CODE OF 1954, §§ 3101-25, imposes a tax on the covered employee based on his earnings.

[5] Clearly this would be so if the plans are contributory. It might also be true of non-contributory plans if it could be shown that wages were affected by the plan.

[6] Social Security Act § 202(e), 42 U.S.C.A. § 402(e) (Supp. 1957). The provisions for a surviving widower are contained in Social Security Act § 202(f), 42 U.S.C.A. § 402(f) (Supp. 1957). In the case of the widower, he must have been supported by the wife. The widow may receive benefits in a lesser amount at age 62. Social Security Act § 216(a)(2), 42 U.S.C.A. § 416(a)(2) (Supp. 1957).

[7] The amendments made in 1957 repealed the former requirement that the wife be living with the husband at the time of his death, Pub. L. 85-238,

tion, many private pension plans provide for payments either in a lump sum or in the form of an annuity to survivors of a deceased employee. At times, the plan automatically designates the relationship necessary to participate in the benefits, in a manner somewhat similar to the intestacy provisions of Section 83, and the employee has no say in the matter.[8] The same is usually true of employer-contributed group insurance. These programs have, in effect, given a surviving spouse an interest in the deceased's earnings apart from Section 18, and may also have lessened the seriousness of the problem in the case of widows of deceased recipients of earned income.

Of course, the question remains as to the compulsory share of excess earnings, unspent and saved, which must be made available to the survivor.

In conclusion, then, the situation in which Section 18 has the greatest impact and which deserves the major consideration is that of the somewhat estranged spouse of a person who is or has become the owner of property capable of producing income. But this is precisely the area where the husband can, most easily, defeat the "non-barrable" share by inter vivos transfers and the form of the ownership of property. Section 18 has never fairly faced up to this problem.

In the light of these considerations, the evaluation must be made. Should the surviving spouse receive a compulsory share in the estate? If the answer is "no," of course, our discussion can cease. But, if the determination is that a "non-barrable" share is socially desirable, the further questions of the size of the share and the prevention of evasion must be resolved.

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§ 3(c). The requirement of living together remains for the lump sum payments, however. Social Security Act § 202(i), 42 U.S.C.A. § 402(i) (Supp. 1957).

The 1957 amendments also provide that the survivor's insurance benefits are payable if the parties were not validly divorced under local law at the time of death. Social Security Law § 216(h)(1), 42 U.S.C.A. § 416(b)(1) (Supp. 1957). Thus the grounds for forfeiture of benefits have been reduced. *Cf.* N.Y. DECED. EST. LAW §§ 18(3)-(5).

[8] *Cf.* Meldram & Fewsmith, Inc., 20 T.C. 790 (1953); U.S. Treas. Reg. § 1401-1(b)(4); Rev. Rul. 54-398, 1954-2 CUM. BULL. 239.

THE SHARE

As has been pointed out in Surrogate Cox's article, inflation has caught up with Section 18. No matter how wealthy the husband, the will can provide that the widow is to receive no more than $2,500 outright—a modest figure that could stand re-evaluation. The balance of the survivor's "Section 18 intestate share" may be placed in trust for the widow for life. Thus a husband with a Section 18 estate of $307,500 (a substantial administered estate by any standards), survived by a widow and child, can provide by will that the widow is to receive $2,500 in cash and a life interest in a trust of $100,000.[9] Since this equitable life estate is a "terminable interest" which does not qualify for the estate tax marital deduction,[10] the corpus of the trust will have to bear its portion of the estate taxes, absent some direction to the contrary in the will.[11] Since the corpus of the trust would bear the brunt of approximately one-third of the total estate tax of over $64,000,[12] it would be reduced to approximately $79,000.[13] Assuming a liberal return of four per cent after commissions, the surviving spouse would receive a yearly taxable income of only $3,160. Is this enough? For the widow of a comparatively wealthy husband does this amount to a substantial disinheritance? But consider the situation, discussed above, in which Section 18 has its greatest impact.

On the other hand, in determining the compulsory share, Section 18 at present makes no allowance for provisions made for the spouse outside the probate estate; as for example, insurance, inter vivos gifts, or even Social Security or private pension plans. Thus under that section, a widow would have a right of election even though insurance proceeds payable

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[9] N.Y. DECED. EST. LAW § 18(1)(d).

[10] INT. REV. CODE OF 1954, § 2056(b); N.Y. TAX LAW § 249-s(3)(b).

[11] N.Y. DECED. EST. LAW § 124(2).

[12] The exact figure for the federal estate tax is $64,200.

[13] The $2,500 in cash would qualify for the marital deduction. Thus the taxable estate for federal purposes would be $305,000 and under § 124 of the Decedent Estate Law the share of the taxes borne by the trust would be

$$\frac{100{,}000}{305{,}000} \times 64{,}200 \text{ or } \$21{,}049.18.$$

to her far exceed any "Section 18 intestate share." This is a consideration which should be re-examined.

Thus far, in considering the mechanics of the "non-barrable" share, difficulties have merely been raised and no solution offered. They are matters of policy. One aspect of the percentage of the "Section 18 intestate share" must be raised which demands revision as a matter of justice.

As presently constructed, Section 18 provides that the minimum a surviving spouse can receive, in trust or otherwise, is the Section 83 intestate share with a ceiling on this minimum of one-half the Section 18 probate estate.[14] Since this ceiling will always be reached unless the decedent is survived by issue,[15] this provision results in the widow's share in the estate being reduced if the decedent is survived by a child, regardless of the amount actually devised or bequeathed to the child. In all cases, except when a step-child is in the picture, a widow will be penalized under Section 18, simply because she bore a child. The sponsors of the legislation undoubtedly had in mind the normal situation where the decedent would leave the excess of his property over the Section 18 share to his children, but no such requirement is embodied in the section; except in the case of unmentioned and unprovided for after-borns,[16] there is no "non-barrable" share for issue.[17] Thus, presently, collaterals and friends [18] can profit at the expense of both widow and child.

There appears to be no justification for reducing the surviving spouse's share simply because of the birth of issue. If the issue are provided for, that is another matter. Since children have a natural claim to a father's bounty, the solu-

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[14] N.Y. DECED. EST. LAW § 18(1), § 18(1)(a).

[15] In every other case, the intestate share of a surviving spouse under N.Y. DECED. EST. LAW § 83 is in excess of 50% of the estate.

[16] N.Y. DECED. EST. LAW § 26.

[17] An interesting case dealing with the interaction of N.Y. DECED. EST. LAW § 18 and § 26 is *In re* Vicedomini, 285 App. Div. 62, 136 N.Y.S.2d 259 (1st Dep't 1954). The will, which did not mention after-borns, gave half the decedent's estate to his wife and the other half to collaterals. A child was later born and shortly thereafter the testator died. The widow cleverly elected to take against the will. The after-born and the widow completely cut out the collaterals.

[18] They could possibly include a person with whom the decedent had engaged in a meretricious relationship.

tion to this difficulty would not appear to lie in increasing the surviving spouse's share to one-half in all cases.

As a compromise therefore, it is suggested that in any revision of Section 18, the share be stated as: *one-half of the estate (as hereinafter defined), reduced, but not below one-third of such estate, by amounts devised or bequeathed (or deemed to be devised and bequeathed)* [19] *to the children of the deceased, and such persons as legally represent the children if any of them have died before the deceased.*

This provision would not decrease the freedom of testation below the presently accepted standard of one-half of the Section 18 estate, but would prevent a windfall of free testation arising from the birth of issue.

AVOIDANCE OR EVASION

Linked inescapably with the mechanics of Section 18 and the percentage of the share is the question—share of what? This problem has plagued the courts and has led to the creation of the concept of "illusory transfer" which has ebbed [20] and flowed [21] since its formulation in *Newman v. Dore.*[22] On the one hand, assets forming part of the estate, testamentary dispositions, are subject to the "non-barrable" share, either in intestacy under Section 83, or testacy under Section 18. On the other hand, assets completely transferred by the decedent during his lifetime are not subject to the "non-barrable" share. Transfers which have characteristics in between these extremes have led to the battles between widow and "donee."

Again the question must be posed: is the "non-barrable" share worth having? If it is, how much protection should be afforded to the surviving spouse? If it is, isn't it hypocritical to permit transfers wherein the donor retains effective dominion and control during his lifetime, such as, for example, by Totten Trust, to stand up against the attack of the widow?

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[19] The parenthetical phrases could be inserted, if, as suggested later, the scope of the estate subject to the § 18 election is broadened.

[20] Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951).

[21] Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941).

[22] 275 N.Y. 391, 9 N.E.2d 966 (1937).

Estate tax collectors faced a somewhat similar problem in determining what assets should be the measure of the estate as computed for tax purposes. The law framed a solution based on real ownership [23] rather than the niceties of legal title.[24]

A somewhat similar approach for the solution of Section 18 problems appears to have been begun in *Newman v. Dore*,[25] but it never matured into a system. Perhaps a reason for this is that a government treasury is better organized and more effective than disinherited spouses. But probably the most significant consideration which stunted this growth is that Section 18 was rooted in the past and was an offspring of dower and curtesy, common-law property rights, which it replaced. It was the natural and logical thing, then, for the courts to look to common-law property and title concepts to determine the scope of the section.[26] Estate taxation, however, like Venus, burst on the scene without any readily determinable ancestry.

Of the two, the tax approach is the much to be preferred.[27] Section 18 already accepts the theory that it is the wealth of the husband which determines the amount that the surviving spouse may take.[28] Why should wealth be restricted to legal wealth and not include real wealth although technical title is in someone else? If the husband enjoys the benefits of the property up until the time of his death, the widow would seem to be entitled to use the value of this property as a measuring rod in determining the size of her "non-barrable" share.

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[23] INT. REV. CODE OF 1954, §§ 2036-40.

[24] See, *e.g.*, Helvering v. Hallock, 309 U.S. 106 (1940).

[25] *Compare:* "Perhaps 'from the technical point of view such conveyance does not quite take all that it gives, but practically it does.'" Newman v. Dore, 275 N.Y. 371, 381, 9 N.E.2d 966, 969 (1937), *with:* "It is hard to imagine that respondent felt himself the poorer after this trust had been executed. . . ." Helvering v. Clifford, 309 U.S. 331, 336 (1940) (an income tax case).

[26] In Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941), the decedent had conveyed real property to his sons reserving to himself a life estate. The court upheld the transfer as against attack by the widow on the ground that the decedent had divested himself of an interest in real estate "in accordance with the essential forms of law." *Id.* at 32, 32 N.E.2d at 780.

[27] It has already been advocated. See Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936).

[28] It is a *percentage* of his estate.

Accepting the principle that the real wealth of the decedent should be the key consideration, however, raises the further question as to the standards to be employed in determining real wealth.

Under existing law, the label "illusory" has been placed only on transfers made by the husband wherein he has reserved 1) a life estate, and 2) a power to revoke, and 3) broad powers of management.[29] Even the existence of these three elements has not always resulted in such a characterization.[30] An acceptance of the tax analogy would, however, make the presence of either one of the first two types of interests a basis for the inclusion of the property within the measuring rod of "non-barrable" share.[31] In addition, it would cover transfers made in contemplation of death,[32] apparently overlooked at present by Section 18, annuities,[33] joint interests,[34] property subject to the exercise of a power of appointment,[35] and the proceeds of some life insurance.[36]

Whether the limits of Section 18 should be the same as those employed for tax purposes or whether they should be contracted or expanded is a policy decision which the legislature can and ought to make. The courts, hampered by other considerations, for example the Banking Law in *Matter of Halpern*,[37] have been unwilling to draw the line. There is precedent for legislative specification of the scope of the protection to be afforded a surviving spouse. In answer to prob-

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[29] Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); Mac Gregor v. Fox, 280 App. Div. 435, 114 N.Y.S.2d 286 (1st Dep't 1952), *aff'd without opinion*, 305 N.Y. 576, 111 N.E.2d 445 (1953).

[30] Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951); Inda v. Inda, 288 N.Y. 315, 43 N.E.2d 59 (1942). RESTATEMENT, TRUSTS § 57 (2d ed., Tent. Draft No. 4, at 1, 1957), approved at the 1957 meeting of the American Law Institute, adopts this position.

[31] INT. REV. CODE OF 1954, § 2036 (life estate); *id.* §§ 2036(a)(2), 2038 (power to change the beneficial interests or to alter, amend or revoke). The mere retention of broad powers of management would apparently not be enough. Reinecke v. Northern Trust Co., 278 U.S. 339 (1929).

[32] INT. REV. CODE OF 1954, § 2035. The tax concept is far broader and more inclusive than the common-law gift causa mortis. United States v. Wells, 283 U.S. 102 (1931).

[33] INT. REV. CODE OF 1954, § 2039.

[34] *Id.* § 2040.

[35] *Id.* § 2041.

[36] *Id.* § 2042.

[37] 303 N.Y. 33, 100 N.E.2d 120 (1951) (involved § 239(2) of the New York Banking Law which expressly recognizes Totten Trusts).

lems raised by the courts,[38] Section 18(1)(h) was added in 1936 to provide an enumeration of administrative controls which may be exercised by the fiduciary of a Section 18 life estate.[39]

Legislative definition of the property to be included within the Section 18 estate without regard to common-law property concepts would not be a departure from the policy originally formulated by *Newman v. Dore.* It has the advantage, difficult to obtain through court decisions, on the one hand, of considerably broadening the protection afforded the surviving spouse and, on the other, of perhaps benefiting other beneficiaries of a decedent's largesse. Since property in which the decedent had retained some dominion or control would be included within the measuring rod of the "non-barrable" share, the amount of such property already in the hands of the surviving spouse as a result of the husband's death would also be included in the measure of the actual share of the surviving spouse. For example, certain insurance proceeds received by the surviving spouse might be includible in the Section 18 estate and thus would also be considered as received by her in satisfaction of her share. As an uncomplicated illustration: the widow of a decedent dying without issue would have no right of election if he devised and bequeathed all his property, valued at $20,000, to his mother but had owned a life insurance policy in the amount of $20,000 payable to his wife: if the other property had a value of $40,000, the Section 18 estate would amount to $60,000 and the widow would have the right to receive $10,000 of this other property.

Again, unfortunately, the solution of one problem, the amount of the "non-barrable" share, creates a new one—who pays it? Again, unfortunately, there is no adequate judicial solution available. *Matter of Halpern* seems to regard "illusory" as synonymous with testamentary, and its all-or-nothing approach would not be applicable to a transfer which is effective except for determining the share of the surviving spouse.

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[38] Matter of Curley, 245 App. Div. 255, 280 N.Y. Supp. 80 (2d Dep't), *aff'd without opinion,* 269 N.Y. 548, 199 N.E. 665 (1935).

[39] See Draftsman's Note following N.Y. DECED. EST. LAW § 18 (1949).

Help, however, can again be obtained from statutory provisions dealing with the estate tax. Section 124 of the Decedent Estate Law contains detailed rules for the resolution of the essentially similar problem of who shall pay the estate tax when the gross tax estate contains assets which are not subject to administration. In general, absent directions to the contrary, each person who receives property subject to the tax bears his pro-rata share of the tax and the fiduciary is given the power to collect this share from any person benefited, even though the assets are not subject to administration.[40]

This solution seems a fair and rational one. It is based on economic reality, as is the determination of the share itself, rather than upon technicalities of title or priorities of classes of devises and bequests. Moreover, it embodies the present rule of abatement when an election is made against the provisions of a will [41] and merely extends it to property outside the estate which is used for computing the share of the surviving spouse. As in the case of the payment of estate taxes, the directions of the decedent as to the manner of payment should be respected, as far as possible.[42] For example, a decedent may wish all of his stock in a closely held corporation to pass intact to his son.

INTESTACY

The courts have wrestled with the problem of "illusory transfers" in cases of intestacy.[43] In view of the purpose behind the existence of Section 18, namely, a conscious decision that some provision ought to be made for the surviving spouse, there seems to be no reason for limiting the area of protection to cases of testacy. After all, intestacy may often be the result of a positive choice to let the provisions

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[40] N.Y. DECED. EST. LAW § 124.

[41] Matter of Byrnes, 149 Misc. 449, 267 N.Y. Supp. 627 (Surr. Ct. 1933); *In re* Getz, 115 N.Y.S.2d 18 (Surr. Ct. 1952).

[42] *Cf. In re* Boschen, 137 N.Y.S.2d 8 (Surr. Ct. 1954).

[43] *Cf.* Schnakenberg v. Schnakenberg, 262 App. Div. 234, 28 N.Y.S.2d 841 (2d Dep't 1941); Murray v. Brooklyn Sav. Bank, 258 App. Div. 132, 15 N.Y.S.2d 915 (1st Dep't 1939). A similar problem exists if the decedent has left all his probate property to his wife but has made inter vivos transfers attacked as "illusory." *Cf.* Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951).

of Section 83 operate.[44] In any event the need for protection is the same, and the same property should form the base for the computation of the surviving spouse's share.

Of course, when certain inter vivos transfers are to be included in the measure of a surviving spouse's intestate share, some upper limit will have to be imposed on the percentage of the share. A disposition of property wherein the donor retains dominion and control is, after all, a disposition for some purposes [45] and there is no reason why it should fail completely as would be the case if the husband died survived only by a spouse and remote collaterals, and no percentage limitation were imposed.[46] Therefore, it is suggested that the "non-barrable" share in intestacy be the greater of 1) the ordinary share under the existing provisions of Section 83, or 2) if any property, which is not part of the ordinary estate of the decedent, is deemed to have been owned by him at the time of his death by reason of the decedent's dominion and control, one-half of the total estate with these assets included in the measure, reduced, but not below one-third of such estate, by the value of the property included in such estate passing to the issue of decedent.[47]

Such a provision would preserve the basic pattern and make the necessary correlation between the rights of the surviving spouse in cases of testacy and intestacy.

IN SHORT

As can be seen, Section 18 has proved inadequate to protect the surviving spouse, even though a determination has been made that such protection is necessary. The fault does not lie with the courts necessarily because of the background of the section and the problem of "who gets what" when a transfer is labeled illusory. Legislation is the only satisfactory solution. And if the interest of the surviving spouse is not deemed a sufficient reason for amendment, clarity of law certainly should.

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[44] Consider the formalities required to revoke a will. N.Y. DECED. EST. LAW § 34.

[45] The instrument giving rise to the inter vivos transfer has many of the elements of a will.

[46] The surviving spouse would take it all. N.Y. DECED. EST. LAW § 83(4).

[47] See text at note 15 *supra*.