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Fraud on the Widow's Share

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FRAUD ON THE WIDOW'S SHARE

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FRAUD ON THE WIDOW'S SHARE

by

W. D. MACDONALD

Foreword

by

GEORGE E. PALMER

Ann Arbor
UNIVERSITY OF MICHIGAN LAW SCHOOL
1960

To the memory

of

DONALD MACDONALD

and

LEONARD EARLE BARBER

Foreword

Most American states are committed to the view that a widow who has been economically dependent on her husband is entitled to a share of his estate. For a long time dower protected the widow of a man of property since his property usually was land, but this is no longer the case. The modern forced share statute, by which a widow may elect to take against the will and receive a share approximating her intestate share, serves to protect her against disinheritance by will but has provided inadequate protection against inter vivos gifts. The problem has grown with the increased use of inter vivos trusts, and is particularly pressing in a country where marriage settlements have not been customary. Although the other side of the matter has not been much discussed until the present study by Professor Macdonald, the inflexible nature of the forced share legislation sometimes operates to give protection when none is needed.

The case law built around the election statutes is unsatisfactory, as this book amply demonstrates. The doctrines developed with respect to inter vivos gifts have been difficult to apply and insufficient in any event to achieve the statutory objective. This is through no fault of the judges—they have been forced to work with statutes that are simply not adequate to the needs of the situation. It has been apparent for some time that there should be serious exploration of the possibility of better legislation. Professor Macdonald's study is an important contribution to the whole topic, with its careful analysis of the cases and the policies involved, but its greatest value comes from the illumination of the legislative problem. His suggested Model Act deserves the careful attention of state legislatures and other groups interested in improvement of the law.

GEORGE E. PALMER

Preface

This study seeks the answer to a troublesome question: What should be done about gratuitous inter vivos transfers in alleged "evasion" of the widow's statutory share? My thesis is that the statutory share should be replaced by the type of decedent's family maintenance legislation found in the British Commonwealth, and that this legislation should be buttressed with anti-evasion provisions.

Inter vivos "evasions" seem to be a permanent and increasingly serious concomitant of our forced share system. Part I, dealing with matters of policy, explores the chief aggravating factors. These factors include the high rate of remarriage, which induces transfers to children of a prior marriage; the increasing popularity of gratuitous inter vivos property transmission; and the inflexible nature of the typical statutory share.

The remainder of Part I is devoted to the search for a criterion with which to judge the work of the courts. The evasion cases pose a disturbing conflict of values — an intellectual Gethsemane. For the widow, there must be some protection against her husband's inter vivos transfers; otherwise she has no real protection against disinheritance. For the transferee, there must be some defense against the widow's claim; else he has no security of title. And the husband should be able to plan his estate with *some* degree of predictability; otherwise, as was urged somewhat extravagently in a Missouri case, "men with bad hearts or lungs or white in their hair must cease to trade . . . because . . . the way is open for a wife to follow every transaction and void it." [1] Accordingly, I try to identify the community values implicit in the statutory

[1] Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 1162, 130 S.W.2d 611, 618 (1939).

share and other protective measures, to relate these values to the broader values found in the well-being of the American family, and to weigh them all against the cost to the community if the widow is permitted to set aside inter vivos transfers. In other words, security for the surviving spouse, which is assumed to be the chief aim of the statutory share, is considered in the light of the community's interest in the welfare of the family; and the "family welfare" values are balanced against the values in freedom of alienation and security of title. My conclusion is that the solution to the evasion problem lies in a working compromise. This compromise involves the acceptance of three principles: (a) protection against disinheritance of the widow and children should be restricted to meritorious claims for maintenance; (b) if the estate assets are inadequate the courts should have discretion to require contribution from the transferee of any unreasonably large transfer; and (c) in determining the amount of contribution, the courts should weigh the "reliance interest" of the particular transferee. For lack of a better term I call these principles the "maintenance and contribution" formula. Under the formula there can *be* no "evasion" problem when the claimant fails in her maintenance application. Interference with inter vivos transfers is restricted to alleviation of family need, and only after consideration of the legitimate expectations of the transferee.

Inchoate dower and the ancient custom of London receive separate treatment, in Part II, because of their influence on the cases relating to evasions of the statutory share. These cases are covered in Part III, which comprises the main portion of the book. As an aid to the practicing lawyer the decisions are analyzed in terms of doctrine, of the persuasive evidentiary factors, and of the individual dispositive devices. The study is concerned mainly with postnuptial devices; but antenuptial transfers and spouses' rights in contracts to make a will are also examined in separate appendixes. The decision in each case is also tested in the light of the maintenance and contribution formula.

The over-all case study indicates that the statutory share legislation is far too insensitive to adjust the varying family claims and obligations stemming from a remarriage. Many inter vivos "evasions" consist of understandable attempts by the decedent to provide for the children of his first marriage. The desire to follow the equities has engendered a tragi-comic disorder of doctrine, particularly in jurisdictions where the equities supposedly play no part in the decisional process. This doctrinal confusion impedes predictability. To be sure, the factual analysis of each individual case suggests that in the main the courts *do* tend to follow the equities: in other words, the decisions usually approximate the result that would be reached under our formula. These findings, however, are not decisive; many cases contain insufficient data to gauge the state of the equities. Nor can we say that the findings indicate that there is no need for legislative reform. What they do show is that the need for reform is more urgent in some states than in others. For example, some courts reject the widow's claim against *any* transferee, regardless of the merits of that claim.

Part IV examines various proposals for legislative change and concludes with a suggested model statute. The statute is based on the British Commonwealth decedent's family maintenance legislation, augmented by anti-evasion provisions.

I began sustained work on the manuscript in the summer of 1951, while on the faculty of the University of Florida. The manuscript was accepted by the University of Michigan in the spring of 1956 as a thesis in partial fulfilment of the requirements for the degree of Doctor of the Science of Law. The book includes subsequent cases and developments to the end of May 1958.

The views expressed in the book are my own. However, I am greatly indebted to the invaluable counsel of my thesis committee, consisting of Professors Simes (Chairman), Shartel, and Palmer. Professor Niehuss (now Vice-President and Dean of Faculties) was a member of the committee in the early stages. It is also a pleasure to record my appreciation

of the many helpful suggestions made by others: in particular, by the members of the law faculty of the University of Florida, by Joseph Laufer, Director of the Harvard-Israel Co-operative Research Project, and by Professor William J. Pierce of The University of Michigan Law School. Mrs. Ila R. Pridgen, law librarian at the University of Florida, bought or borrowed needed books and reports. All drafts of the manuscript were typed by the secretarial staff of the University of Florida College of Law. I was fortunate in having the painstaking editorial services of Miss Virginia Ruland and Miss Alice Russell, of the staff of the Michigan Legal Publications. And finally, for tolerance in the last few years, my thanks to my wife.

W. D. MACDONALD

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PART I

MATTERS OF POLICY

CHAPTER 1

The Existing Confusion

This chapter will present the broad outlines of the problem of the widow's elective share. It will attempt to identify the social and other pressures that are at the root of the problem; and, finally, it will attempt to determine whether or not those pressures are of a permanent nature. My conclusion is that the problem is serious: the number of actual evasions, if not the volume of litigation, is likely to increase.

1. JUDICIAL CONFUSION

Inchoate dower is no longer the main protection against disinheritance of the widow. Contrived in a feudal economy, dower succeeds only when wealth means land. In our modern era the average decedent's estate is comprised chiefly of personalty. Cash, credits, securities – these are the main assets. Hence most American jurisdictions now give the widow a statutory share in the husband's personalty as well as in his realty. A similar protection is generally afforded the widower. The usual provision is that the surviving spouse, if dissatisfied with the terms of the will, may elect to take his or her intestate share in the estate of the deceased spouse. A surprising number of states still retain inchoate dower; but even these states supplement it with a "forced" share of personalty.

Protective legislation of this sort is a popular mandate. It caters to the needs of the widow. The policy is wholesome. But the beauty of the forced share is only skin-deep; protection is announced, but it is not given. The widow's share applies only to the property in the "estate" of her deceased husband. Inter vivos transfers are not affected. In some extreme cases, where the husband transferred *all* his property

inter vivos, the widow has received a segment of zero. And the statutory ineptitude is aggravated: by accepted procedures the husband can "give" all his property and yet in substance retain it. Revocable inter vivos trusts, bank-account trusts, joint bank accounts, United States savings bonds — these and similar devices all achieve the same effect. A legal "interest" is transferred inter vivos: in actuality the husband is the real owner until death.

The silence of the legislatures on the problem of inter vivos "evasions" has imposed a heavy responsibility on the courts. Theirs has been the difficult task of identifying and formulating the policy of the community with respect to the decedent's inter vivos transfers. Thorough-going protection to the widow [1] necessitates infringement on the decedent's inter vivos transfers; but this infringement, carried to the extreme, entails an impracticable "inchoate dower" in personalty. In the circumstances, it is no wonder that the cases reflect acute judicial indecision. In fact, the entire topic is "intensely undefined." The case-law is cluttered with meaningless doctrine. There is talk of "illusory" transfers, "absolute" transfers, "fraudulent" transfers, "colorable" transfers, of "good faith," of a "factual showing of reality" — a host of baffling criteria. There is uncertainty as to whether the widow may set aside inter vivos transfers, and there is uncertainty as to rationale. As has been said of that conglomerate of nutriment, the Scottish haggis, there is here fine confused feeding to be had.

Assume that a particular inter vivos transfer is otherwise valid; in other words, that it is a valid transfer aside from

[1] Since the forced share usually is available to both spouses it is obvious that a similar problem occurs in connection with transfers by the wife in evasion of the rights of the surviving husband. The American evasion cases appear to treat transfers by a decedent wife on the same basis as transfers by a decedent husband. It seems clear, however, that a more convincing case can be made for protection of the widow (see pp. 24–29, *infra*); hence the discussion will proceed on that basis. On the other hand, there would appear to be no reason why a legislature should not extend like protection to the widower.

any question of the widow's rights. The cases involving transfers of this sort [2] fall into two groups: those that concede the widow a chance to invalidate the transfer and those that refuse to concede her any possible cause of action that is based on her "rights" under the statutory share. Turning to the first group of cases, we may for convenience make an arbitrary subgrouping. One subgroup tests the validity of the transfer by the degree of "control" retained by the decedent over the *res* of the transfer. The other subgroup inquires into the "intent" (motive) with which the transfer was made. But this generalization, once made, must immediately be qualified. The validity of a given transfer depends on a variety of uncertainties. The courts themselves are not clear as to the precise significance of the "control" and "intent" tests. The fuzziness of these tests is no doubt due in part to the judicial tendency to follow the equities but to announce the decision in terms of "control" or "intent." These equities, in addition to retention of control and intent to disinherit, include the amount of property transferred, proximity of the transfer to the date of death, relationship of the donee, treatment of the decedent by the claimant, independent wealth of the claimant, and the like. To summarize, the cases leave an impression of *ad hoc* compromise, couched in elusive doctrine.

There can be no serious criticism of a test that weighs all the circumstances, considers all the equities. Where fraud is concerned, a flexible rationale is desirable. Indeed, risk is involved in attempting a specific definition of fraud: delineation facilitates evasion. But many courts are quite uninterested in all the circumstances of the case; and others, although seemingly giving decisive weight to the equities, persist in speaking as if the only factor they are concerned with is retention of control or the decedent's motive. These aspects of the case-law imply that some confusion exists as to the basic policy underlying the widow's claim, with serious conse-

[2] Hereafter referred to simply as "evasion" cases.

quences: when the rationale stresses a single factor, the widow's share may be defeated by apt draftsmanship. A revocable trust will probably be sustained against the widow, an irrevocable trust will be completely invulnerable. Moreover, predictability is adversely affected by cases that disguise the *ratio decidendi.* The legitimate expectations of the husband may be defeated – in some instances perhaps where the widow has no real need for economic protection.

And there is equal cause for concern in the decisions that bar the widow from *any* claim against an otherwise valid inter vivos transfer. Until 1951 it had apparently been the view of the New York courts and of the New York bar that a Totten trust, *i.e.,* a bank account trust, could not be utilized to defeat the widow's statutory share. In that year, however, the New York Court of Appeals stated, in *Matter of Halpern,*[3] that a Totten trust was not "illusory" as such and that it could not be reached by the widow. Although the court may have been thinking solely of Totten trusts,[4] the implications of this rationale are clear, and they cut deep: the election statutes are to be construed strictly. In plain language, they apply solely to testamentary transfers. If anything is to be done about inter vivos transfers, it is to be done by the legislatures, not the courts. Let us assume for the moment that the basic goal of the statutory share is to provide economic assistance to the widow. Is that goal likely to be furthered by the rationale of the *Halpern* case?

2. Accelerating Increase in Litigation

Is the evasion problem likely to become more critical? The facts are disturbing. Looking first at surface phenomena, we find that cases involving attempts to evade the statutory share have seriously increased in number in recent decades. Set out below is an analysis of two hundred and sixty-three evasion

[3] In re Halpern's Estate, 197 Misc. 502, 96 N.Y.S.2d 596 (Surr. Ct. 1950), *modified and aff'd,* 277 App. Div. 525, 100 N.Y.S.2d 894 (1st Dep't 1950), *aff'd,* 303 N.Y. 33, 100 N.E.2d 120 (1951).

[4] *Infra,* Chap. 9.

cases in terms of the date of the case. The cases affected comprise practically all of the cases dealing with postnuptial transfers.[5] The analysis indicates that the sharpest increase in litigation has occurred in the last quarter of a century, during the period when inter vivos transmission of wealth has become decidedly popular. Nor can it be said that the increase in litigation [6] is entirely attributable to the natural increase in population. The country's population has a little more than doubled since 1900; [7] but in the same period the evasion cases have increased more than fourfold.

	Favoring Spouse	Favoring Donee	Total
Before 1850	6	6	12
1850–1874	11	6	17
1875–1899	14	17	31
1900–1909	5	14	19
1910–1919	5	14	19
1920–1929	4	13	17
1930–1939	9	23	32
1940–1949	19	29	48
1950–May 1958	25	43	68
Total	98	165	263

It may be seen that of a total of two hundred and sixty-three cases, two hundred and three, or 77 per cent, have been

[5] The list of cases used in this chronological analysis is the same list that is used in Chapter Eleven, *infra,* for an analysis from the viewpoint of the equities. From this list, which appears as Table C, *infra,* p. 387, some dozen cases were excluded, although technically dealing with postnuptial "evasions." In each instance, for one reason or another, I did not think it feasible to earmark the decision as inherently favoring or disfavoring the surviving spouse. Also excluded were cases dealing with antenuptial transfers and cases dealing with spouses' rights in contracts to make a will. The criteria for exclusion of cases are set out at p. 147, *infra.* Table E, *infra,* p. 379, contains a complete list of all cases dealing with postnuptial transfers, including the few cases excluded from Table C.

[6] It is still too early to gauge the over-all influence of the Halpern case (see *infra,* p. 126), but the fact that its rationale forecloses the widow may induce a decrease in litigation. Forty-four cases were noticed in the period from 1952 to May 1958, of which twenty-eight favored the donee.

[7] Census figures show a population, in 1900, of 75,994,575; in 1950 the population was 150,697,361. See 22 ENCYCLOPEDIA BRITANNICA 732. As of September 1, 1958, the provisional estimate, including Armed Forces overseas, was 174,595,000. Bureau of the Census, Series P 25, No. 184 (October 10, 1958).

decided since the turn of the century; and one hundred and forty-eight cases, or 56 per cent, have been decided since 1930.[8] To repeat, more than half of the cases have been litigated in the last quarter of a century. Moreover, sixty-eight cases, or more than one-quarter of the total number, have occurred in the present decade up to May 1958.[9]

The figures also reveal that the courts are not as liberal to the surviving spouse as they were formerly. In the nineteenth century the spouse was the favored litigant in thirty-one cases, as opposed to twenty-nine cases favoring the donee. By the turn of the century, however, this trend was reversed. From 1900 there is a pronounced tendency to sustain the validity of the transfer. Until 1940 the ratio is a little more than two to one in favor of the donee; from 1940 on the ratio favoring the donee is slightly less than two to one.

Nor can we assume that the modern trend against the surviving spouse is indicative merely of the fact that in two out of every three evasion cases the spouse does not *deserve* to win, i.e., that the equities are against her. Relevant in this respect is Chapter Eleven, where the cases are examined to determine whether or not each particular decision is consistent with the individual equities of the case. The equities are considered to be with the spouse only when she could establish (a) that she was in financial need at the time of the application, and (b) that the inter vivos transfer was unreasonably large under the circumstances prevailing at the time of the transfer. The results of this study show that the surviving spouse is not faring as well in twentieth century cases as in the

[8] By coincidence, the year that the statutory share legislation was enacted in New York.

[9] The total number of evasion cases is not large. But there may be more there than meets the eye. The great bulk of an iceberg lies under the surface; so may these cases betoken widespread evasion of marital obligations. It is probable that many cases are never reported. An appeal may not be taken; or the case may be settled before appeal or even before suit. The chances of success would be slim in many instances—as, *e.g.*, where the transfer was by way of outright gift or irrevocable trust in a "control" jurisdiction, or, for that matter, any sort of an inter vivos transfer in a "reality" jurisdiction.

nineteenth century. Consider, for example, the cases that involve an unreasonably large transfer, or one that probably was unreasonably large. Of the eighty-five cases concerned, fifty-nine, or 69 per cent, were decided since 1900. This tends to show that the decedent spouse is no more malevolent nowadays than in the nineteenth century: it will be recalled that 77 per cent of *all* evasion cases have occurred since 1900. Nevertheless, the box score for judicial reaction to unreasonably large transfers [10] indicates that present-day courts are probably more apt to sustain such transfers.[11] Of the twenty-six unreasonably large transfers occurring in the nineteenth century, only six, or 23 per cent, were sustained. Since 1900, however, twenty-four out of fifty-nine, or 41 per cent, of these transfers have been sustained.[12]

The increasing volume of cases is significant. Litigation is at best an inadequate gauge of unlitigated evasions, but at least it is suggestive of many such evasions. We are put on notice of the possibility that the community values implicit in the statutory share are not being achieved.

[10] As to cases in which the surviving spouse won, although the equities dictated otherwise, see Table C, *infra.*

[11] CASES INVOLVING "UNREASONABLE" OR "PROBABLY UNREASONABLE" TRANSFERS

	Invalid	Valid	Total
Before 1850	4	3	7
1850–1874	8	1	9
1875–1899	8	2	10
1900–1909	4	2	6
1910–1919	5	4	9
1920–1929	0	3	3
1930–1939	7	4	11
1940–1949	10	6	16
1950–May 1958	9	5	14
Total	55	30	85

[12] Is there any relation between this trend and the emancipation of modern woman? Do present-day courts believe that women, as a class, have achieved economic parity with men? Such a generalization is easy to make, probably unwarranted.

3. Aggravating Factors

It is possible, if not probable, that in the future the number of "evasions," both reprehensible and otherwise, will seriously increase. Too many forces in our modern way of life tend to undermine the frail structure of the statutory share. These forces are diverse — moral, social, economic, legal; and a quantitative analysis is impracticable. We can speculate, however, on the relative importance of the major factors, which would include the following: (a) increase in family disharmony, (b) growing popularity of inter vivos property transmission, and (c) the arbitrary nature of the statutory share itself.

(a) *Increase in Family Disharmony.* How secure is the institution of the family [13] in the United States? Do marriage, the home, and children occupy the same firm place in the hearts of Americans as in the early days? The answer to this question should throw some light on the probable percentage of evasions. If the home is happy, it is unlikely that the husband will evade his family responsibilities. If the home is unhappy, the husband may be tempted to disinherit his wife. Family disharmony, of course, is difficult to assess.[14] The

[13] "The time has passed, it is believed, when the lawyer must preface his reference to a doctrine of social science by apologetic demonstration of the general relevance of the social sciences to legal problems." Julius Stone, Book Review, 5 J. Legal Educ. 373, 376 (1953). A forerunner in this approach in the field of succession law is Cavers, "Change in the American Family and the Laughing Heir," 20 Iowa L. Rev. 203 (1935).

[14] "Divorce is an effect, not a cause. It is a symptom, not the disease. It is safe to assert, except in the most attenuated institutional sense, that divorce never broke up a single marriage. It is adultery, cruelty, desertion, drunkenness, incompatibility, the decay or transfer of affection, and the like that destroy marriages. Divorce never occurs until after the marriage has been completely wrecked—sometimes not until many years after." Lichtenberger, Divorce, A Social Interpretation 16 (1931).

The popular excuse for the high divorce rate is the stress and tension of modern living. Jensen, The Revolt of American Women 182–3 (1952). *Cf.* Jacobs and Goebel, Cases on Domestic Relations 384 (1952). Indicative of the "tensions" in modern living is the high U. S. suicide rate of 16,000 to 22,000 a year, with 100,000 failures. 75 per cent of the failures are women. Jensen, *supra,* at 202.

In general, on family disharmony, see Zimmerman, The Family of

interpretation of the available statistics may vary with the length of each sociologist's foot. In consequence, and out of prudence, the following discussion will deal in generalities.

In attempting to estimate the extent of American family disharmony, we are immediately struck by the rising American divorce rate. Twentieth-century statistics indicate an uptrend in dissolutions caused by divorce, and a downtrend in dissolutions caused by death.[15] Until the last few years it was possible to state that the divorce rate has averaged a three per cent increase each year since the War Between the States.[16] It has leveled off substantially since 1946; [17] and there have been predictions that it will continue to decrease. On balance, however, the over-all picture presents a more or less steadily rising rate. The figures do not flatter us. As Zimmerman pointed out in 1949: "By the turn of the Twentieth Century, although the divorce rate was relatively low (one for each eleven marriages) as compared to the present it was higher than the total of all the divorce rates in the European countries, from which most of the American people

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TOMORROW (1949); Burgess, "The Family in a Changing Society," 53 AM. J. SOCIOLOGY 417 (1948); Gruenberg, "Changing Conceptions of the Family," 251 ANNALS AMER. ACAD. POL. & SOC. SCI. 128 (1947); Haber, "The Effects of Insecurity on Family Life," 196 *id.* 35 (1938); Mowrer, "War and Family Solidarity and Stability," 229 *id.* 100 (1943); Murdock, "Family Stability in Non-European Cultures," 272 *id.* 195 (1950).

[15] Stat. Bull., Metropolitan Life Ins. Co., Nov. 1949; see also SUMMARY OF MARRIAGE AND DIVORCE STATISTICS: UNITED STATES 1950 (Nat'l Office Vital Stat., Special Report, Oct. 29, 1952).

Is there a link between the increase in divorce rates and the gradual increase in longevity? The longer persons live the more chance there is to "get on each other's nerves." For figures on longevity, see note 23, *infra.*

[16] Burgess, "The Family in a Changing Society," 53 AM. J. SOCIOLOGY 417 (1948).

[17] Stat. Bull., Metropolitan Life Ins. Co., Aug. 1949. See also Worldwide Increase in Divorce, *id.,* Apr. 1949. The general upward trend has been acute in England and Wales since the end of World War II. The divorce ratio in England and Wales is now about one half of ours, whereas 35 years ago it was only one-fiftieth of what we were then experiencing. The world-wide disruptive effect of war on family life is evident. See also note 23, *infra.*

came. Since then, particularly during the past decade, it has advanced to something like one divorce for every three marriages. . . . Divorce is almost now as frequent as it was in the fateful third century preceding the spread of the Christian religion among western people." [18]

At first glance, the divorce rate appears to have no direct bearing on the possible percentage of evasions of the forced share. In divorce there is a clean break, property-wise: the divorced wife loses rights of succession. For our purposes, however, the significance of the divorce rate lies not in the figures *per se* (appalling though they are), but in the high rate of remarriage that follows divorce. There has been a marked increase in the frequency of remarriage since the turn of the century.[19] This is particularly true in the case of divorced persons.[20] They tend to remarry with some promptness; indeed, the chances of remarriage for the divorced person are greater

[18] Zimmerman, THE FAMILY OF TOMORROW 2 (1949).

[19] "Altogether, in somewhat more than one out of every six families, either the husband or wife had been previously married." Stat. Bull., Metropolitan Life Ins. Co., April 1951. "There are also definite indications that a considerable portion of the divorced lost little time in remarrying. This may be inferred from the fact that although about 5,500,000 persons were divorced from 1940 through 1946, the number of divorced persons who had not remarried increased by only a little more than 500,000 during this period," *Id.*, Mar. 1948.

[20] "Persons married more than once now constitute a larger proportion of the total number of married couples, despite a decline in widowhood at the younger ages. The explanation . . . lies in the remarriage of divorced persons . . . among whom the remarriage rate is very high. . . . [In] the age range 25 to 34 years, for example, somewhat more than three-fifths of them were remarried according to the figures for 1940, as compared with about one-half in 1910. . . . As a consequence . . . wives who have been married more than once are relatively more frequent at present than at any time in the past half century or longer; they now represent about one out of every eight married women in our country." Stat. Bull., Metropolitan Life Ins. Co., Jan. 1949.

"Individual states differ markedly in the proportions of the single, divorced, and widowed among those getting married. . . . These geographic variations reflect a number of factors, including the age and marital composition of the population, differences in attitudes towards divorce among various religious groups, and—even more important—the diversity in our marriage and divorce laws." Stat. Bull., Metropolitan Life Ins. Co., June 1953.

than the chances of marriage for the unmarried person.[21] The propensity to remarry strengthens with advancing age, for both the widowed and the divorced. This desire of older people to "have another go at it" is clearly shown by the remarriage statistics set out in Appendix A.[22] Possibly the increase in remarriages may be ascribed in part to the fact that nowadays people are living longer[23] and that they move about the country more than formerly.[24] In any event, we are probably justified in assuming that many remarriages are marriages of convenience, motivated by the desire for companionship or security. To be sure, the chances of success in the second and succeeding marriages appear to be about the same as in the average first marriage.[25] A substantial number are unsuccessful, however, probably due to the same intrinsic personality difficulties that led to the first divorce. And the presence of children by a former marriage is a complicating factor even when the remarriage is a successful one. Children under eighteen are involved in probably one half of all divorces and annulments.[26] The evasion cases afford striking

[21] "Among women, the chances are about one in two for the spinster of 30, the widow of 33, and the divorcee of 45. In other words, the chances of marriage in each sex are as good among the divorced of 45 as among the single of 30." Stat. Bull., Metropolitan Life Ins. Co., May 1945.

[22] *Infra,* p. 331. And see Glick, "First Marriages and Remarriages," 14 AM. SOCIOL. REV. 726 (1949).

[23] "The average length of life in the United States increased to a new high of 68.5 years in 1951. This is a gain of 3.7 years in a decade and of 19.3 years since 1900–1902, when the average length of life was 49.2 years. Thus, the expected lifetime of the average American has been lengthened by almost 40 per cent since the beginning of the century. For white females, the expectation of life at birth in 1951 was as high as 72.6 years, compared with 66.6 years for white males; the corresponding figures for the nonwhite population were 63.7 years and 59.4 years, respectively." Stat. Bull., Metropolitan Life Ins. Co., June, 1954; see also Stat. Bull., Apr., Sept., Nov., 1953.

[24] In 1948 and 1949, about one out of every five adults in the country changed residence. See Stat. Bull., Metropolitan Life Ins. Co., May 1950.

[25] *E.g.,* more than one fifth of the remarried husbands stay married at least 20 years. Stat. Bull., Metropolitan Life Ins. Co., April 1949.

[26] See Table 15, VITAL STATISTICS OF THE UNITED STATES 83 (1952). Divorces involving children are on the increase. They are concentrated

corroboration of the understandably human desire to make provision for one's own children.[27] A choice between the children and the second wife usually favors the children; and, as was mentioned earlier, frequently the children will receive inter vivos transfers of most of the husband's assets.[28]

It is possible to rationalize the divorce figures in disparagement of the evasion problem. The argument runs this way: if divorce is so easily and so frequently obtained,[29] it follows that those who remain married are probably content with their current spouses and that evasions of the statutory share will hence be relatively few in number. There is some merit to this contention. The great majority of husbands will not attempt to evade their marital responsibility. If this were not so, marriage as an institution could not survive. No law can endure that flouts human nature. The husband's common-law duty of support, for example, has had a long and ef-

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in the early years of marriage. Fully two-thirds of the children affected by divorce are under age 10. The relative frequency of divorce for couples with minor children was little more than one-half that for couples without minor children at the time of divorce. Stat. Bull., Metropolitan Life Ins. Co., Feb. 1950.

Widows with children seem to be at a disadvantage in remarrying. Stat. Bull., Metropolitan Life Ins. Co., Aug. 1952.

[27] See Chap. 10, text at note 34, *infra*.

[28] It is of course probable that many children of a former marriage will be of adult age at the time of the parent's remarriage. This would not appear to be a deterrent to the making of gifts to children of a former marriage. The sentimental attachment to one's own children will survive most remarriages, particularly when the second marriage is one of convenience.

A more important deterrent to inter vivos evasions, when there has been a remarriage, is the existence of an antenuptial contract. Such a contract is not unusual when the parties marry for convenience; and if the second wife thereby waives her forced share privileges there will of course be no problem of evasion. But it is not clear that the contract will always bar the statutory share. See Appendix D, note 3.

[29] As Westermarck, 3 THE HISTORY OF HUMAN MARRIAGE 377 (1922), has indicated, loose divorce laws do not necessarily connote a breakdown in the institution of marriage. The low Swedish divorce rate, for example, considered in conjunction with the very liberal Swedish grounds for divorce, indicates that there may be no connection whatsoever between the divorce rate and the legal grounds for divorce. On the other hand, it cannot be denied that in the United States there is a frighteningly high turnover in marriage partnerships. If this indicates anything, it indicates marital disharmony.

fective validity because responsible monogamy is in general esteem. But the fact that most husbands do support their wives (at least, in those marriages that do not end in divorce) has never been urged as a reason for scrapping the common-law duty of support. There are always some recalcitrant members in any community. And we may assume that there will probably continue to be many first marriages in which one spouse or the other will be tempted to evade the statutory share legislation. Disharmony may exist between husband and wife without serious thought of a divorce. Marriages may survive under conditions that run from (a) a monotonous coexistence under the same roof to (b) an irreconcilable separation; and yet divorce may be unsought for many reasons: consideration of the children's happiness; fear of community censure; religious convictions; pride in the preservation of appearances; sheer inertia; or even a perverse sense of loyalty. For diverse reasons a marriage may be merely a shared legal status, without happiness, without respect. Ironically, our present succession laws tend to discriminate against the wife who for some reason or another does not press her grounds for divorce. If she does so, she perhaps may obtain a property settlement. But if she practices conciliation, cooperation, restraint, she is at the mercy of her husband's inter vivos transfers. At his death she may find no property in his "estate."

To recapitulate, the high divorce rate is accompanied by a high rate of remarriage. These remarriages are often motivated more by convenience than by romantic affection. The natural object of the husband's inter vivos bounty will be children of a former marriage. And marital disharmony may lead to inter vivos "evasions" even when the spouses do not seek a divorce.

(b) *Popularity of Inter Vivos Property Transmission.* It is probably safe to say that inter vivos devices now comprise a large and ever-growing portion of all gratuitous transfers. The statistics about them are meagre, but this assumption

seems justified in the light of modern conditions. To begin with, inter vivos transfers are easier to effect now that the greater part of our total wealth is composed of personalty. The corporation, the trust, freely assignable choses – these and other devices ensure a wide diversity and flexibility in the media in which wealth may be held and transferred. In the early days wealth meant land – stable, enduring, seldom transferred other than at death. Inter vivos transmission was abnormal. But in our time wealth is found in liquid intangibles. Transferability is the *sine qua non;* and ease in alienation [30] tends to promote a greater percentage of inter vivos transfers.

Secondly, survivorship devices have emerged as an effective substitute for the will. In a recent article [31] Gilbert Stephenson notes a significant increase in joint ownership, particularly in joint ownership of homes and joint bank accounts. The increase in joint ownership of homes he ascribes to a desire to minimize taxes, to save probate expenses, and to keep the home intact. Convenience in family banking explains the increase in joint bank accounts. Joint registration of War Bonds has stimulated increase in joint ownership of all property; and the special requirements of persons in military service has led in many cases to joint ownership of the entire property of families concerned. A further contributing factor is the natural advantage of expediting payment of the decedent's property to his beneficiaries at his death. Joint ownership eliminates the time-lag (and expense) that occurs between death and eventual distribution under the auspices of the probate court.

Thirdly, the heavy impact of modern death duties dis-

[30] The demands of convenience have led to ease in transfer of land. For example, deeds and mortgages merely require written evidence of intent; "title" in sales of land need only be "marketable," not foolproof; and curative acts help to minimize the effect of antiquated recordation systems. *Cf.* Basye, "Streamlining Conveyancing Procedure," 47 MICH. L. REV. 935, 1097 (1949).

[31] Stephenson, "Joint Ownership of Property," 25 TRUST BULL. 25, 31–32 (1945).

courages testamentary transmission. Conversely, the lower rate on the gift tax stimulates inter vivos gifts to relatives and to charities.

Fourthly, the comparatively recent growth of "estate planning" is causing greater awareness of the benefits to be derived from inter vivos transmission. The man of modest means, for example, will find that he — as well as the man of wealth — can use the revocable inter vivos trust to advantage. Indeed, the main components of the average man's holdings are usually transmitted by an inter vivos device: the family home and the family bank account by survivorship; life insurance and United States savings bonds by contract. And undoubtedly in recent years the high cost of living and of education has induced many fathers to make an early advancement of a portion of their wordly goods. This assumption finds corroboration in the fact that a large proportion of the evasion cases concern transfers to children, particularly to children of a prior marriage.[32]

To summarize, the pattern of American property donation has changed since the original forced share statutes were enacted. No longer can it be said that transmission of wealth will in all cases coincide with death. Inter vivos transfers are now the rule, not the exception. This suggests that there should be an increasing community concern for the security of the transferee's title. Effective protection for the widow will involve ever-increasing interference with the legitimate expectations of both the decedent and the transferee. Thus we may expect the "evasion" problem to give greater trouble in the future to the courts and to the community.

(c) *Arbitrary Nature of the Statutory Share.* It is possible that much of the evasion litigation is occasioned by the arbitrary, mechanical operation of the forced share statutes. As we shall see later,[33] the existing legislation pays no attention to the widow's need, and but casual attention to the merits

[32] *Infra,* Chap. 10, text at note 35.
[33] *Infra,* Chap. 2, text at note 3.

otherwise of her claim. It is immaterial in the statutes that the widow has independent means, or that she has already been adequately provided for by the decedent's inter vivos transfers; and it is only in limited instances that her share will be barred by "misconduct." [34] Naturally, most husbands will try to prevent a widow from taking an elective share that she neither needs nor deserves.

Consider a typical "evasion" situation. The husband has children by a prior marriage. The wife may also have children by a prior marriage and perhaps a little money of her own. If the husband's children are adults, there will possibly be unpleasantness with the stepmother. In all probability the husband will wish (a) to provide his widow with sufficient income to continue her present standard of living and (b) to leave the principal to his own children. Naturally, he will not wish to leave the principal to the widow, since at her death it would in all likelihood go to *her* children or relatives. And, naturally, he will carry out his plan by inter vivos disposition; otherwise the widow may elect a statutory share. In these circumstances the dictates of sentiment and of common sense foster inter vivos transfers. "Evasion" here is laudable, not reprehensible.

4. Conclusion

Predictions as to the present or future gravity of the evasion problem are at best speculation: too many extra-legal factors are involved. It seems safe to say, however, that the statutory share legislation shows serious signs of wear. A brittle edifice, it is assailed by two powerful forces, (a) the increasing instability in the American family and (b) the popularity of devices for controlled lifetime giving. There is a greater incentive for making inter vivos transfers; there is a wider selection of practicable devices. Greater temptations: deft new expedients. The cumulative effect of these forces is to make the statutory share less effective unless protection is

[34] *Id.*, text at note 18.

given against inter vivos transfers, and, at the same time, to render interference with inter vivos transfers intolerable if permitted to a widow in automatic fashion. It is this state of affairs that has led some courts to place subconscious stress on the "equities"; that has led other courts to deny *any* claim of *any* widow; and that probably will continue to aggravate the evasion problem so long as the statutory share legislation remains in its present form.

CHAPTER 2

Basic Policy Considerations: The Need for Restraints on Disinheritance

1. METHODOLOGY [1]

Our findings in Chapter One indicate that the "evasion" problem is, on the surface at least, a serious one. It would appear that "something must be done." Should something be done? If so, what? No decision can be made unless we ask further questions in the present chapter. What are the community values [2] involved in restraints on disinheritance of the widow, and how important are they? How does financial aid to the widow relate to the over-all welfare of the surviving family? Is there any justification for the commonly held belief that women, particularly widows, own the bulk of the country's wealth? Can the security of the surviving family be ensured by utilizing other legal or extra-legal controls that achieve the desired community goals without infringing on freedom of property transmission?

In Chapter Three we shall try to reckon the cost of adequate family protection; for example, how important is it to the community that the decedent be given complete freedom to make testamentary and inter vivos gifts? Chapter Four suggests a formula for reconciling the family protection value with the "reliance interest" of the transferee. Finally, in Part 3, we shall examine the case-law to determine whether or not the desired community goals are being achieved by existing judicial doctrine.

[1] I am indebted to the ideas found in Shartel, OUR LEGAL SYSTEM AND HOW IT OPERATES 434–594 (1951); Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 YALE L. J. 203 (1943); Lasswell, "The World Revolution of Our Time, a Framework for Basic Policy Research," Hoover Institute Studies, Series A: General Studies, No. 1 (1951).

[2] Or "goal," or "purpose," or "interest."

2. The Statutory Share [3]

(a) *Typical Provisions.* As mentioned earlier, the statutory (or "forced") share normally guarantees the surviving spouse a specified fraction of the "estate" of the deceased spouse. This share may be elected ("forced") regardless of the terms of the will. In most states [4] the share is specifically or by implication based upon the net estate.[5] The phrase "estate" is significant. For one thing, it ensures the widow a share in the husband's personal property as well as in his realty. In another aspect, however, it breeds confusion: in literal terms it restricts the forced share to property that forms part of the husband's estate for purposes of administration. Inter vivos transfers, in theory, are unaffected.

There is some variety in the statutory provisions. The amount recoverable may include: (a) the intestate share; [6] (b) the intestate share limited to a defined amount or fraction of the estate; [7] (c) a share in the realty only;[8] (d) a combina-

[3] On the historical development and significance of the statutory share, see Simes, Public Policy and the Dead Hand 12–31 (1955). See, in general, Simes, Model Probate Code §§31 and 32 and pp. 258–63 (1946); 3 Vernier, American Family Laws §§189, 216 (1935); 4 P-H Wills, Est., & Trusts Serv. §2371 (Dower), §2732 (Curtesy), §2734 (Widow's and Children's Allowances), §2735 (Election of Widow or Surviving Spouse).

[4] The community property states, which are in a special category, are as follows: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The provisions differ from state to state, and generalizations are hazardous. To oversimplify, we may say that community property is the property that has been earned by either spouse during the marriage. The other spouse acquires immediately an undivided half-interest in the community. The decedent spouse cannot deal with the other spouse's interest by will, and it is not part of his estate. Since community property is of limited application, we shall, for the most part, restrict our discussion to the remaining American states. On transfers in "fraud" of the surviving member of the community, see Chap. 20, note 21, *infra.*

[5] But see Fla. Stat. §731.34 (1957).

[6] *E.g.,* N.C. Gen. Stat. §30–2 (1950).

[7] *E.g.,* in Massachusetts the surviving spouse may elect to take the estate assets up to a value of $10,000, and the income for life in any surplus over that amount. Mass. Ann. Laws c. 191, §15 (1955).

[8] *E.g.,* Georgia restricts the widow to dower in the realty, or to a "child's part" in the realty. Ga. Code Ann. §§31–101, 31–110(3) (1952).

tion of a share in personalty and inchoate dower; [9] (e) a limited right to elect;[10] (f) nothing.[11]

The extent of the share usually varies with the number of children involved. Thus, if no children survive, the widow may receive one half or even all of the estate; but in the event of children surviving she may be relegated to a "child's share," which may be a third, or even less, depending on the number of surviving children.[12] Aside from this mechanical variation, the over-all picture is one of fixed, unalterable, arbitrary portions. Relief is standardized; no attention is paid to individual equities or unusual circumstances.

There are, of course, some isolated instances of flexibility. A Vermont statute provides that the surviving spouse may take, out of the intestate property or upon waiving the will, such part of the personalty "as the probate court assigns . . . according to his or her circumstances and the estate and degree of the decedent, which shall not be less than a third, after the payment of the debts, funeral charges, and expenses of administration." [13] In Mississippi there is a proviso that the wife may not elect against the will if her separate estate is equal to the share of the realty and personalty that she would take under the will.[14] A comparable provision exists

[9] *E.g.*, Fla. Stat. §731.34 (1957).

[10] *E.g.*, in New York the surviving spouse may not elect if the will gives him or her $2500 and the income for life from a trust fund the corpus of which equals the difference between the share in the will and the intestate share. N.Y. Dec. Est. Law §18.

[11] *E.g.*, North Dakota, South Dakota.

[12] Thus in Nebraska the intestate share of the surviving spouse is limited to one-fourth, "if the survivor is not the parent of all the children of the deceased and there be one or more children, or the issue of one or more deceased children surviving." Neb. Rev. Stat. §30–101 (1943).

[13] Vt. Rev. Stat. §§3018–19 (1947).

[14] Miss. Code Ann. §670 (1942). If the wife's separate estate is less than her share in the will the deficiency may be claimed from the estate in amounts set out in the statute. If the wife is the beneficiary of her husband's life insurance she must consider it as part of her separate estate. Osburn v. Sims, 62 Miss. 429 (1884). This is not so if she took the proceeds as sole heir. O'Reily v. Laughlin, 92 Miss. 1, 45 So. 19 (1907).

Legislation of this sort would not appear to be suitable for modest

in Alabama.[15] South Carolina sloughs off the excess over one fourth of the net estate when testamentary gifts are made to mistresses or illegitimate children.[16] In the main, however, the pattern is one of unyielding rigidity.

The wife is the favored spouse. A number of states have no forced share for the husband,[17] but the wife seems to be provided for in all states but North Dakota and South Dakota.

In slightly less than one half of the states where community property does not prevail, the share is barred by the misconduct of the spouse. But statutes of this sort are of limited and, in some respects, uncertain application.[18] Desertion without cause is their common denominator; but some of the statutes require adultery — or even a bigamous marriage. In many of the evasion cases the conduct of the surviving spouse has been reprehensible, but does not amount to "desertion." Naturally, this conduct will stimulate inter vivos transfers by the husband, and the widow will attack the transfers as being in "evasion" of her rights.

The statutory share almost inevitably entails a lump sum payment. No thought is given to the possibility — indeed, the probability — that the widow will be inexperienced in money matters and that the lump sum will soon be dissipated.[19] The comparatively recent New York statute [20] is an exception. It encourages the testator to leave the widow an amount equivalent to her intestate share in trust for her life,

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estates. It would be unfair to a widow with minor children, when the separate estate is limited. Similar hardship would ensue to a widow with no children, when her husband leaves a small estate which, combined with her own separate property, is not enough to sustain her.

[15] Ala. Code Ann. tit. 34, §§42, 43 (1940). United States bonds payable to husband or to husband or wife have been considered a part of the wife's separate estate, even though purchased by the husband. Chambless v. Black, 250 Ala. 604, 35 So.2d 348 (1948).

[16] S.C. Code §19–238 (1952).

[17] *E.g.*, Florida. See 3 Vernier, AMERICAN FAMILY LAWS §216 (1935).

[18] Simes, MODEL PROBATE CODE 263–67 (1946).

[19] Cahn, "Restraints on Disinheritance," 85 U. PA. L. REV. 139, 144 (1936).

[20] N.Y. Dec. Est. Law §18.

or as a legal life estate or annuity for life. But even in New York the husband has the power to denude his "estate" by inter vivos transfers; and even if he leaves a substantial trust for the widow, there is no effective protection for the children: the widow may die during the minority of the children, thus cutting off the income.

(b) *Apparent Aims.* It seems reasonably clear that the immediate goal of the statutory share is to provide economic assistance to the surviving spouse — for our purposes, the widow. In the oft-quoted words of a comparatively recent legislative report: "There is a glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death." [21]

The need for protection is obvious. By the marital vows the wife assumes her natural role of homemaking and the husband undertakes to "provide" for the home. If many years later the husband disinherits his family, the widow must then undertake both roles — homemaker and provider. By that time, however, she is one of the disadvantaged: she is much older; she lacks the practical or professional skills that would have been hers had she preferred a career to marriage; and by now she may have the distracting responsibility of rearing minor children. And disinheritance of the family may entail more serious consequences than the loss of material comforts. For the widow, it means a loss of "face," of prestige. She can no longer keep up with the Joneses; in fact, she cannot even approximate her former standard of living. For the children, who depend on the widow, the consequences are perhaps more drastic, in terms of potential harm to the community. Society is concerned that they, as future citizens, receive proper food, adequate dental and medical care, and educational opportunities commensurate with individual talent and inclinations. Disinheritance makes it more

[21] The Reports of the Commission to Investigate Defects in the Laws of Estates, New York Legislative Document No. 69, p. 86 (1930).

difficult for the widow to carry out these family responsibilities. And for both the widow and children this may result in a lowering of morale, with consequent harm to the family's role in character-building.[22] This in turn injures the community, for the community is essentially a collection of families. The virtues inculcated by a happy family life are the virtues that support democracy: tolerance, integrity, a sense of responsibility. The welfare of the family is the welfare of the state.

3. Women's Wealth

It is frequently asserted nowadays that women own the great bulk of the country's wealth.[23] This assertion cannot be ignored. It would appear that effective protection for widows requires intrusion on the husband's freedom of inter vivos alienation. This means that appropriate legislation will be expensive, in terms of community convenience; it can be justified only if the need is great. We may well ask, then, if the emancipation of modern woman [24] has in turn led to her

[22] In some cases the family ties may be strengthened by adversity; but these are probably rare instances—occurring in spite of, and not because of, disinheritance.

[23] *E.g.*, "between sixty and seventy per cent": The Saturday Review of Literature, Mar. 12, 1949, p. 18; "nearly 70 per cent of the investment funds": "Women in the Dough," American Magazine, Mar. 1948, p. 112; "80 per cent of the wealth": Florida Times-Union, (Jacksonville) Mar. 4, 1954, p. 4, col. 7; see "A Woman Banker Looks at Women and their Money," 30 Independent Woman 99 (Apr. 1951).

[24] On the proposed constitutional amendment guaranteeing complete equality of the rights of men and women, see Murrell, "Full Citizenship for Women: An Equal Rights Amendment," 38 A. B. A. J. 47 (1952) (pro), and Brophy, "An Equal Rights Amendment: Would It Benefit Women?" 38 A. B. A. J. 393 (1952) (con). For early legislative protection against disinheritance of the widow, see Morris, Studies in the History of American Law 155–64 (1930). On modern legislation affecting the American family, see "Sex, Discrimination, and the Constitution," 2 Stan. L. Rev. 691, 697–712 (1950). On inheritance as a factor of decreasing importance in promoting family obedience, see Herkheimer, "Authoritarianism and the Family Today," in Anshen, The Family: Its Function and Destiny 359, 361 (1949). In general, see Groves, The Contemporary American Family 564 (2nd ed. 1947); Murdock, Social Structure (1949); Cohen, "Social Security and Family Stability," 272 Annals Amer. Acad. Pol. & Soc. Sci. 117 (1950); Tauber

economic independence. If this should be the case there would be no necessity for new legislation. It would be preferable to retain the statutory share as it now exists, and to let the widow of the future take her chances with the court.

The status of women has been bettered in many respects since the present forced share statutes were introduced. As far as the power to own property is concerned, the liberation is all but complete. But a statement that women are entitled to separate property can have no significance without considering the extent of the average woman's separate property.[25] Here we encounter myth, conjecture, half-truth. The park-bench philosophy that "women own the country" probably stems from, or is fed by, two facts of modern life: (a) the institution of inheritance favors women, for the simple reason that women live longer; and (b) more women are working than ever before.

Not much is known about women's wealth.[26] What little is known [27] indicates that a few women own great wealth but

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and Eldridge, "Some Demographic Aspects of the Changing Role of Women," 251 *id.* 24 (1947); Zimmerman, "The Family and Social Change," 272 *id.* 22 (1950).

[25] In fact, we cannot even rely on averages. Even if the average were high, it would mean only that *many* needed no protection, not that *all* were without need of a forced share.

[26] We know very little about the total distribution of wealth or the manner in which it is transferred. Doane, THE ANATOMY OF AMERICAN WEALTH (1940); see references collected in McDougal and Haber, PROPERTY, WEALTH, LAND 107, 108 (1948).

[27] At midsummer 1956 prices, women had "an approximate equity of $100 billion in common and preferred stock. They have about half of the $110 billion in savings accounts, about half the $66 billion in government bonds. . . .

According to a recent survey made for the New York Stock Exchange, the largest single group in the occupational breakdown of all stockholders . . . is *Housewives and Non-employed Females.* There are almost three million in that category, and they make up 34.2 per cent of the 8,630,000 stockholders of record. . . ." Hamill, "Women and Business," FORTUNE, Oct. 1956, p. 149. It must be borne in mind, however, that some men register their securities in their wives' name for tax or business protection purposes.

Figures compiled by the insurance companies indicate that women own 20 per cent of the life insurance issued in any year, but their policies are seldom for more than $1,000; and, although modern woman inherits more than 75 per cent of the death benefit payments, "there

that the average woman has modest means.[28] She owns a limited amount of capital, if any, and her income is barely at the subsistence level. If the woman is married, most of her earnings probably go into the family budget. It follows that the average widow [29] will require financial assistance from her

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are reasons to believe that, on the average, these net her relatively small amounts." Adams, "Women's Wealth, BARRON'S Dec. 18, 1950, p. 7, col. 4.

More women are working than ever before. The 21 million women in the U.S. labor force in 1956 comprised a third of all women over 14, and 30 per cent of all married women. Hamill, "Women and Business," FORTUNE, Aug. 1956, p. 173. The most significant increase is from the ranks of the older married women. In 1920 fewer than 20 per cent of married women in the 45 to 54 years age group were working; in 1956 45 per cent were at work. "Working, rather than being at home (except during the years when the children are young) has become the 'natural' thing to do." *Id.*, July, 1956, p. 92. But women do not earn as much as men. "There are fewer than 40,000 U.S. women . . . who earn as much as $10,000 a year (less than 0.2 per cent of all the women who work for a living) and this figure includes actresses, movie stars, buyers, and some of the professional women, as well as women executives." *Id.*, June, 1956, p. 106.

See also "Women as Workers (A Statistical Guide)," Women's Bureau Report, (U.S. Dep't of Labor) July 1952. On decedents' estates, see "Where Trusts Business is going, as recorded in the Probate Records of Los Angeles County," TRUST BULL. 1940, p. 5. But *cf.* Doane, THE ANATOMY OF AMERICAN WEALTH 13, 14 (1940).

[28] Some humorous statistics on the reaction of the sexes to the emancipation of women may be found in a survey—"Women in America," FORTUNE, Aug. 1946.

[29] Statistical bulletins of the Metropolitan Life Insurance Company reveal these current trends in widowhood:

> 1. *Increase in numbers:* "As a result of the marked decline in mortality, the *proportion* widowed in the population has been decreasing at every period of life. Nevertheless, the *number* of widows in our country has been mounting rapidly, because the population at the older ages has been growing and because mortality has improved more rapidly among women than among men. In 1935 there were 7.4 million widows in the United States, compared with 5.7 million in 1940 and less than 4 million in 1920. Thus, between 1920 and 1953 the number of widows rose by almost 90 per cent, while the adult female population showed a gain of 63 per cent" (Stat. Bull., Jan. 1955). "Currently, about 660,000 marriages are broken by death each year. In two-thirds of these families the wife is the surviving spouse. Fifty years ago the corresponding proportion was close to one-half. . . . Only if the wife is at least

husband's estate.[30] The great wealth of a few women should not preclude community protection to the average married woman. The very fact of marriage puts her at an economic disadvantage. After all the raptures over the fine new woman's world,[31] the facts of life remain: Nature has given to woman a vital task to perform for society. She has the responsibility, during the productive period of her life, of child-bearing, child-rearing, and homemaking.[32] We deal here not with those who evade that responsibility, the single or the divorced, but with the wife who remains with her husband to the end. By that time it is, for most, too late to secure a job providing adequate support. If these premises are sound, our succession laws should be so drafted as to ensure adequate

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five years older than her husband are the odds against her being widowed" (Stat. Bull., Sept. 1953).

2. *Emphasis on the older ages:* "Whereas in 1920 little more than one third of the widows . . . were at ages 65 and over, in 1953 the proportion was more than one half" (Stat. Bull., Jan. 1955).

The median age at which wives enter widowhood is about 56 years. However, a significant number are much younger when their family life is disrupted by the death of the husband; almost one quarter of the new widows each year are under age 45" (Stat. Bull., Sept. 1953).

3. *Emphasis on urban areas:* Between 1940 and 1953 the number of widows in urban areas rose by 44 per cent. In 1953 ". . . widows constituted 13.7 per cent of all women living in urban areas, 11.2 per cent of those in rural nonfarm areas, and only 8.5 per cent of the women residing on farms. This situation suggests that many widows in rural areas who do not remarry, especially the younger and middle-aged, soon move to urban centers" (Stat. Bull., Jan. 1955).

4. *Emphasis on the nonwhite population:* "In the country as a whole in 1950, the proportion widowed at ages 45–54 was 22.8 per cent among the nonwhite women and 9.9 per cent among the white; at ages 65–74 the proportions were 60.6 and 44.9 per cent, respectively. Moreover, young widows are much more common among the nonwhite women. Of all the nonwhite widows in 1950, no less than 19.2 per cent were at ages 14–44, compared with 7.3 per cent for the white woman" (*Ibid.*)

[30] *But cf.* Cavers, "Change in the American Family and the 'Laughing Heir,'" 20 IOWA L. REV. 203, 204 (1935).

[31] *Cf.* Evans, THE SPOOR OF SPOOKS, 146–56 (1954).

[32] *But cf.* Warne, "The Reconversion of Women," 8 CURRENT HISTORY 200 (Mar. 1945).

support to deserving widows, even if this necessitates some degree of interference with her husband's gratuitous inter vivos transfers.

4. Support of the Surviving Family: Other Devices

The fact that the chief goal of the statutory share is uninterrupted family support points to the gravity of the evasion problem. But we cannot fully assess the gravity of the problem until we have given some thought to the other expedients used by society to ensure family support. No sleep need be lost over evasions of the statutory share if its basic goal may legitimately be attained by other controls that do not infringe on inter vivos transfers.

Our American community uses many devices to ensure financial assistance to the surviving family. Some of these expedients involve public welfare, such as widows' pensions, and relief payments. Others, including the statutory share, attempt to minimize the necessity for public welfare by tapping the most logical source of revenue—the decedent's property. Most devices of this sort operate as restraints on the decedent's testamentary transfers—for example, homestead legislation (in some instances); family allowances; legislation restricting testamentary gifts to charity; and statutory and judicial doctrines concerning mental incompetency, undue influence, and fraud. Allied to these protective devices is preferential treatment in death duties, as, for example, the marital deduction and gradation of inheritance taxes according to the degree of relationship to the decedent. A relatively small group of controls affects the decedent's privilege of making inter vivos transfers, as, *e.g.*, inchoate dower, homestead legislation (in some instances), and judicial doctrines aimed at preventing evasions of inchoate dower and the statutory share.

We need not consider public-welfare devices; the husband who has the means to do so should bear primary responsibility for his family's support. Preferential treatment in death

duties has some merit,[33] but it affects only the larger estates. Inchoate dower will be discussed later, in Chapter Six.

(a) *Homestead.* Most American states, by constitution or by statute, make the family dwelling place immune to the claims of the husband's creditors. Indigenous to the United States, the homestead legislation shows community solicitude for the family; continuance of the home is viewed as a more basic need than enforcement of creditors' claims.[34] This community judgment is based on one or more, or perhaps all, of the following factors: (a) tangible community benefit: less public funds needed for welfare and allied purposes; (b) intangible community benefit: family solidarity, particularly in periods of economic stress, enhances the general morale; (c) sentimental regard for the home; and (d) solicitude for debtors, owing to their large number and voting power.

The protection is restricted to the premises used as a home. Moreover, it is effective only against debts that have been incurred by a person who factually is the head of a family. In keeping with its basic philosophy, it is not affected by the death of the head of the family; it continues for the benefit of the widow and minor children. In point of fact, in some states the wife and minor children may have indefeasible property interests in the homestead. The husband may not be able to make an inter vivos conveyance of the home without the wife's consent; and on his death the homestead may be claimed as an "estate" by the widow and perhaps by the children. And this homestead legislation has still another facet: it may effect an exemption from property taxation.[35]

To the extent that the homesteader cannot devise the home away from the family the homestead protection is a valuable adjunct to the statutory share. But homestead does not play a large part in the total scheme of protection against disin-

[33] The relevance of the federal estate tax to our problem is discussed, *infra,* pp. 276–278.

[34] Chattel exemption laws antedate homestead legislation. Comment, 46 YALE L. J. 1023, 1024 (1937).

[35] Crosby and Miller, "Our Legal Chameleon, the Florida Homestead Exemption: 1–111," 2 U. FLA. L. REV. 12 (1949).

heritance of the surviving family. Many testators do not own a home: most urban families live in rental property. And some of the homestead provisions afford immunity only up to a designated monetary value, which may be quite low — as *e.g.*, $1,000.[36] Further, the husband may defeat the homestead protection by abandoning the homestead in his lifetime.

(b) *Family Allowances.* Family allowance legislation,[37] sometimes referred to as the widow's allowance or the year's support, constitutes another important supplement to the statutory share. The family allowance provides temporary maintenance for the surviving family, pending distribution of the decedent's assets. But for this protection the delay entailed in probate and administration may operate as a real hardship to the needy family. By express wording or by implication, the protection usually is restricted to the surviving spouse [38] and children. Generally it is restricted to personalty, up to a prescribed limit. Specified articles, *e.g.*, clothing and furniture, may also be awarded. A few states exclude from the estate assets a certain amount of money or other property and award it outright to the widow. The amount of the family allowance usually is free of claims of the creditors of the deceased spouse. In the absence of a controlling provision in the statute, the allowance, being considered an administrative expense, is generally held not to be deductible from the widow's distributive share, and may be taken regardless of the terms of the will. But, ironically, the courts have been inclined to uphold a provision in the will that would prevent the widow from taking both the allowance and a share in the will. The rationale here appears to be that the share in the will is in the nature of a windfall, hence the testator is at liberty to attach a restrictive condition to the legacy.[39]

[36] 3 Vernier, AMERICAN FAMILY LAWS 628–34, 638–63 (1935).
[37] 4 P-H WILLS, EST., & TRUST SERV. ¶2734.
[38] In some states only the widow.
[39] *Contra,* Andros v. Flournoy, 22 N.M. 582, 166 Pac. 1173 (1917); see Annots. 4 A.L.R. 387 (1917); 140 A.L.R. 1220 (1942).

Normally the amount awarded will vary with the size of the estate, the size of the family, and its former standard of living. Frequently a top limit is prescribed.[40] But even where no monetary limit is fixed the amount awarded will be limited judicially to reasonable support for a brief period. To summarize, the family-allowance protection is limited in amount and temporary in nature.

An exception to the usual restrictions is found in Maine. The Maine legislation[41] seems innocuous enough, except that no top limit is prescribed and the widow may be granted, on "final probate" of the will, a "final reasonable allowance from the personal estate, according to the degree and estate of her husband and the state of the family under her care."[42] On occasion, this legislation has been administered quite liberally. In one case an award of $75,000, on complaint by one of the heirs as being excessive, was increased to $85,000. The husband's estate was in the neighborhood of "five to six hundred thousand dollars."[43] The widow, significantly, had been the second wife. Her dower was "normal," and the share given her in the will "was disproportionately inade-

[40] *E.g.*, in Florida the limit is $4200. Fla. Stat. §733.20(1)(d)(i)(1957).
[41] Me. Rev. Stat. Ann. Chap. 156, §§14–19 (1954).
[42] *Id.* at §16.
[43] Gilman v. Gilman, 53 Me. 184 (1865). The court stated:

> "All the attendant and accompanying circumstances are to be considered,—the ages of the husband and wife,—the length of their cohabitation,—whether a first or second marriage,—the number of children of each and of both,—that is, by former marriages or by their joint union,—the wealth of the husband,—the estate of the wife in her own right,—any antinuptial [sic] agreements,—their performance or non-performance,—the treatment of each to the other,—the health, place of residence and necessary expenditures of the wife,—the family under her charge and whatever other circumstances may address themselves to a sound judicial discretion, and may enable the Court to approximate as nearly as possible to exact justice to all whose interests may be involved in its judgment. . . . No rule can be established in advance as to the relative weight of any particular fact, for it cannot be foreknown how far it may be modified by the other facts with which it is indissolubly connected."

For later proceedings, see 54 Me. 537 (1867).

quate." The court stated, however, that the allowance could be made "without infringing on the rights of others." [44] This phrase hints at solicitude for beneficiaries of the will as a potential restriction on the allowance. A recent case has emphasized that the allowance need not be restricted to "provision for needs that are temporary and immediate as such as are presently foreseeable" and that "an allowance is available to provide means for a widow additional to what she would receive as her distributive share." [45] In general, however, the Maine legislation has been administered in a conservative fashion.[46] It is more akin to the standard American family-allowance statute than to the "family maintenance" legislation of the British Commonwealth.[47]

(c) *Legislation Restricting Testamentary Gifts to Charity.* Found in about one quarter of the American states, legislation of this type operates as a form of family protection. The statutes either limit the amount of the estate that can be transferred, or invalidate the bequest if the will was made in too close a proximity to death.[48] The purpose is to protect the surviving family, not to discriminate against charities. A common provision is that the statute does not apply unless designated close relatives survive. In fact, in the absence of a statutory directive, it is probable that the gift would stand even if the close relatives do survive, provided they do not

[44] 53 Me. 184, 194 (1865).

[45] Perkins et al., Appellants, 141 Me. 137, 141, 39 A.2d 855, 857 (1944). In this case the widow in addition to her intestate share received an allowance of $2000 out of an estate of approximately $8000. No children survived. The award was sustained over the protests of the husband's parents, who had urged that the award should be reduced because the widow was self-supporting. *But cf.* Helt v. Ward, 128 Me. 191, 146 Atl. 439 (1929). In general, see Hussey v. Titcomb, 127 Me. 423, 144 Atl. 218 (1929); Walker v. Walker, 83 Me. 17, 21 Atl. 176 (1890); Dunn v. Kelley, 69 Me. 145 (1879); Kersey v. Bailey, 52 Me. 198 (1863); Cooper, Petitioner, 194 Me. 260 (1841).

[46] Note, 53 HARV. L. REV. 465 (1940).

[47] "Decedent's family maintenance" legislation differs from the American family allowance legislation both in scope and in function. See Chap. 21, *infra.*

[48] Atkinson, WILLS §35 (2nd ed. 1953); Bordwell, "The Statute Law of Wills," 14 IOWA L. REV. 1, 196 (1929).

object to the gift.[49] But the protection is of a doubtful efficacy. These statutes may be evaded even more easily than the statutory share legislation. Evasive devices that have been sanctioned include inter vivos trusts [50] and testamentary gifts to an individual who has a moral obligation to give to the charity.[51] On the other hand, these evasions are perhaps not so reprehensible as are evasions of the statutory share. The donee in the statutory share cases may or may not be a deserving person; but gifts to charities accomplish a worthwhile purpose: they help to alleviate want and ignorance, and they ease the tax burden.

(d) *Lapse.* A mild degree of family protection is afforded by anti-lapse statutes, which may be found in most American jurisdictions. These statutes prevent a lapse when the legatee or devisee, being a child or other issue of the testator, predeceases him and leaves issue. But the surviving spouse has been held to be excluded even under a statute which refers to "relatives"; and, in any event, the statutes do not come into play if a "contrary intent" is expressed in the will.[52]

(e) *Revocation by Operation of Law.* At common law a man's will was revoked "by operation of law" if followed by marriage and birth of a child. This rule is still in effect in many American jurisdictions; and there is a legislative tendency to declare that marriage alone is sufficient to effect a revocation.[53] The protection is more apparent than real. If the husband's goal is disinheritance, we have seen that the widow is vulnerable to her husband's inter vivos transfers; and, as for the children, they are not even adequately protected against testamentary transfers.

[49] See, *e.g.*, Taylor v. Payne, 154 Fla. 359, 17 So.2d 615 (1944); also see Annot., 154 A.L.R. 677 (1945).

[50] Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938); see Annot., 118 A.L.R. 475 (1939); also see President of Bowdoin College v. Merritt, 75 Fed. 480 (C.C.N.D. Cal. 1896).

[51] Bickley's Estate, 270 Pa. 101, 113 Atl. 68 (1921); see Leaphart, "The Use, as Distinct from the Trust, a Factor in the Law Today," 79 U. PA. L. REV. 253 (1931); note, 16 KY. L. REV. 333.

[52] Mechem, "Some Problems Arising under Anti-Lapse Statutes," 19 IOWA L. REV. 1 (1933).

[53] Atkinson, WILLS §85 and references cited therein.

(f) *Statutory Protection to Children.*[54] In most American jurisdictions a child may be completely disinherited if the will shows sufficient evidence of that intent. It is only when the disinheritance is unintentional that many states have legislation giving the child the share that he or she would take on intestacy.[55] This callous indifference of the American legislatures to the welfare of children contrasts sharply with the solicitude shown in the civil law "reserved portion," in the United Kingdom and Commonwealth decedent's family maintenance legislation, and in the ancient custom of London. There would appear to be as much if not a greater need for protection of the minor children as of the surviving spouse. Possibly the omission is based on the supposition that the surviving spouse will provide for the children. Normally this assumption will be correct; but what if no parent survives? [56] To be sure, some few states permit the county, in civil suit, to recover for the child's support from the estate and distributees; and most jurisdictions provide some relief in small estates either by way of the infrequent legislation that awards the widow and minor children the entire estate under a certain sum, or by the common provision for exempt housing or chattels, and by allowances pending distribution.[57] Indirect restraints on disinheritance may also be found in the legislation invalidating testamentary gifts to charities; in the threat of an unnatural will being invalidated for lack of testamentary capacity or for undue influence; in the advice of the testator's attorney; and in the censure of the community. The absence of concerted pressure for remedial legislation possibly suggests that most parents are solicitous of their children's welfare. But the fact remains: the American

[54] "Our law does not prevent a father from disinheriting his child: a circumstance which has been invaluable to our dramatists. . . ." A'Beckett, COMIC BLACKSTONE 98 (2d ed. 1887).

[55] Atkinson, WILLS §36 and the literature therein cited.

[56] This situation was anticipated by the Florida legislature in 1949. See Fla. Stat. §733.20(l)(j) (1957) (court may award support up to age 18, limited by the amount of intestate share); note, 3 U. FLA. L. REV. 232 (1950).

[57] Note, 53 HARV. L. REV. 465, 470–71 (1940).

legislation, for one reason or another, permits disinheritance of minor children.

5. Summary

It seems clear that the various controls that we have discussed cannot and do not purport to perform the same function as the statutory share. It seems clear also that the statutory share itself is not doing a good job. In fact, the entire legislation in this field needs revision. The public policy is admirable: homesteads, family allowances, the statutory share, all evince the traditional American sentiment in favor of preservation of the home. But its benevolence is uncoordinated. It is doubtful if the American community is using the best legislative formulas. The older devices (dower, homestead) are of limited efficiency, being geared to real estate. The flexible protection (family allowance) is, in general, temporary, inadequate; and the main protection (the statutory share) is so inflexible that it incites evasion.

CHAPTER 3

Basic Policy Considerations: The Cost of Restraints on Disinheritance

1. INTRODUCTORY REMARKS

We have seen that *effective* restraints on disinheritance necessitate interference with both the power of testation and the power to make inter vivos transfers. How important to the community is the decedent's liberty of property transfer and the donee's security of title?

From generation to generation there is a continual transmission of wealth. Wealth commands most material things: power, position, security. And it is in the nature of man to transmit the tokens of wealth to the next generation. Nowadays these tokens are manifold; and the choice of token is dictated by personal convenience, or by expectation of maximum yield. But human nature is unchanged. Wealth is still coveted, used for the same personal ends, and then handed to the next generation. Under our modern capitalistic economy it has long been considered that there should be unfettered transmission of all types of property, whether land, tangible personalty, or choses in action. This freedom applies to transfers for consideration and to gifts. Transfers for consideration, the life blood of trade, concern us here only indirectly. As a general rule a transfer for consideration implies a fair exchange, so that in theory the widow is not injured, property-wise. Widows, of course, can reach this type of transfer if they are entitled to inchoate dower; and there probably will always be litigation over the adequacy of the consideration that has been paid to take a transfer out of the gift category. But our chief concern is with the gratuitous transaction, whether by way of will, intestacy, gift *causa mortis,* or by one of the many forms of inter vivos transfer.

The community derives a variety of benefits from liberty of property transfer.[1] It expresses a basic democratic notion of freedom of individual action; otherwise there would be an unhappy citizenry. It stimulates exertion by donors; this provides an accumulation of investment capital which is necessary for productive enterprise. Basically the motives of the donors coincide with the welfare of the community. The average husband desires the economic well-being of his wife and children. Likewise with charitable contributions: these gifts help the community as they reduce the amount of public funds that otherwise would be needed for a healthy body politic.

In brief, freedom to transmit wealth is a desirable community policy. It contributes to the happiness of the citizen and helps to increase the total economic product of the state. But it is obvious that community welfare requires some restriction on liberty of property transmission. The claim of the surviving family is but one example.[2]

2. Freedom of Testation [3]

It is sometimes stated that man has a natural right to freedom of testation, and that it is an inevitable concomitant

[1] The literature on theories of inheritance may be found in Cahn, "Restraints on Disinheritance," 85 U. Pa. L. Rev. 139, 145, note 19 (1936), and in McDougal and Haber, Property, Wealth, Land 324 (1948).

[2] Other claims include:

(a) Taxation of testamentary and inter vivos transfers, ostensibly for revenue, but also as a means of promoting social harmony by prevention of undue concentration of wealth. See pp. 276–278 *infra*.

(b) Protection of creditors' rights.

(c) Control of property by the living, as a curb on the "dead hand" and to ensure that wealth remains in reasonable circulation: rule against perpetuities, rules against suspension or prohibition of the power of alienation, rule against prolonged indestructibility of trusts.

[3] At the outset we must distinguish between testation and inheritance. Absolute freedom of testation (or, as it is sometimes called, of bequest) implies the unhampered discretion in a property owner to dispose of his property at death. Inheritance, though technically limited to in-

of democracy, of capitalism, of western civilization. There is a subtle attractiveness to a generality of this sort. Seeming a plausible one, it may beguile the gullible.

The fact is that over the centuries freedom of testation has been the exception rather than the rule. To begin with, in primitive times there was little transmission of wealth, either at death or inter vivos.[4] Inheritance can be of no significance when all the wealth is owned by the group or clan or tribe. The group never dies. To be sure, the personal trinkets, utensils, or weapons belong in a sense to the individual, and in many cases go with him to the grave, but the herd and the land are owned by the group. The need and urge for transmission of wealth comes only with the emergence of private property and degrees of kinship. Regulation of transfers at death becomes a social necessity. Rules must be prescribed, if only to prevent family squabbles and internecine warfare; and assurance must be given to creditors that debts will be paid. But it is significant that the rules of intestacy precede the creation of the modern will.[5] The will is not a universal institution in the early legal systems; it emerges late in the history of the law of succession.

Eventually we have stirrings of discontent with the rules of intestacy. Forerunners of the modern will appear: the

testate succession, may be described generally as the receipt of a decedent's property, either under intestate distribution or in accordance with the will. The continental legitim is an example of an absolute "right" of inheritance. Restrictions on inheritance are uncommon. Favored by Bentham, they were also used temporarily in the early communist regime in Russia. Holman, "The Law of Succession in Soviet Jurisprudence, A Survey," 21 IOWA L. REV. 487 (1936). For the literature on proposals to limit the right of collateral succession, see Cavers, "Change in the American Family and the 'Laughing Heir,'" 20 IOWA L. REV. 203, 204, note 2 (1935). For restrictions on aliens in the United States, see Atkinson, WILLS 93–95 (2d ed. 1953).

[4] Noyes, THE INSTITUTION OF PROPERTY 550, 551 (1936); Beaglehole, "Ownership and Inheritance in an American Indian Tribe," 20 IOWA L. REV. 304 (1935); Cairns, "The Explanatory Process in the Field of Inheritance," 20 IOWA L. REV. 266 (1935).

[5] For the literature on the history of the English law of intestacy, see GROSS, "The Medieval Law of Intestacy," in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 723, 724, note 1 (1909).

post-obit gift, the early form of irrevocable *donationis mortis causa,* adoption, and the plebian mancipatory will. These devices are not sharply differentiated; in many cases they blend, the one into the other. And it is of interest that when the will does come, it is frequently the result of factors unrelated to succession to property. For example, superstition may play a part, among the lettered and the unlettered. The wishes of the dead may be respected as the command of a spirit that, if provoked, may do evil. It is generally assumed that the Roman will had a religious origin.[6] And in sixteenth-century England, when the will of realty was finally permitted, the motivation, in part at least, was social: [7] feudal insistence on dominance of the male heir was no longer in keeping with contemporary family notions.

Indeed, it is probable that through the centuries freedom of testation has been used more as an instrument of family protection than as a weapon of disinheritance.[8] Maine pointed out long ago that in Roman law "it would rather seem as if the Testamentary Power were chiefly valued for the assistance it gave in *making provision* for a Family, and in dividing the inheritance more evenly and fairly than the Law of Intestate Succession would have divided it." [9] We encounter the same phenomenon in modern continental law.

[6] McMurray, "Liberty of Testation and Some Modern Limitations Thereon," 14 ILL. L. REV. 96, 102 (1919).

[7] The preamble to the Statute of Wills, 32 Hen. VIII, Chap. 1, states that for lack of a will of realty Englishmen "cannot . . . conveniently keep and maintain their hospitalities and families, nor the good education and bringing up of their lawful generations, which in this realm (laud be to God) is in all parts very great and abundant, . . ." and that personalty is insufficient "to discharge their debts, and after their degree set forth, to advance their children and posterity. . . ."

Statute of Wills, 32 Hen. VIII, Chap. 1. For the text of the statute, see Reppy and Tompkins, HISTORY AND STATUTORY BACKGROUND OF THE LAW OF WILLS 188–190 (1928).

[8] *Cf.* Brissaud, A HISTORY OF FRENCH PRIVATE LAW 621–22 (1912), 3 Cont. Legal History Series.

[9] Maine, ANCIENT LAW 233 (1912 ed.). On the significance of an increase in the proportion of wills in any locality, see Powell and Looker, "Decedents' Estates, Illumination from Probate and Tax Records," 30 COLUM. L. REV. 919, 927 note 15 (a) (1930).

We are told that there are comparatively few wills in France, even in connection with the disposable portion. "The small proportion of Frenchmen who make wills," say Amos and Walton, "is perhaps an indication that the legal rules of succession are considered satisfactory." [10] And Unger [11] has recently suggested three examples of this thesis in the history of English succession law: (a) the custom of London [12] and (b) the Statute of Wills in 1540 (both of which aimed at providing more family protection than was afforded under existing rules of intestacy); and (c) the new system of intestate succession established in the Administration of Estates Act, 1925, which is stated to have been based on an investigation of a large number of English wills.[13]

To conclude, there can be no quarrel with the partial restraint on testation that is found in the statutory share. But it should be more flexible, more sensitive to individual need. In some instances the designated fraction may be too small, as, *e.g.,* when the particular widow needs *all* of the estate. In other instances the fraction may be far too liberal.

3. Freedom to Make (and to Retain) Inter Vivos Gifts

Restraints on a husband's power to make gratuitous inter vivos transfers necessarily inconvenience the husband himself, the donee, and any transferee [14] from the donee. As far as the community is concerned, the inconvenience to the husband is of no moment if the widow's claim is meritorious. But regardless of the merits of the widow's claim the inconvenience to the donee may be a serious matter, both to the donee and to society. True, the donee is a volunteer; but a volunteer may in some circumstances suffer a real hardship

[10] Amos and Walton, Introduction to French Law 338 (1935).

[11] Unger, "The Inheritance Act and the Family," 6 Mod. L. Rev. 215 (1943).

[12] See *infra,* Chap. 5.

[13] Unger, *supra* note 11, at 222.

[14] In §1(e) of the suggested model statute, Chap. 22 *infra,* "transferee" includes the original transferee (donee) and "any immediate or remote" taker therefrom who does not pay value.

if the donated property is taken away from him. And the mere existence of the widow's potential claim entails certain consequences that are harmful to the community. It casts an unsettling cloud on the subject-matter of the gift — hampering its productive use, discouraging improvements, and restricting its marketability.[15] When the donee finds a buyer, the buyer may have *his* worries. Did he pay "value," for instance; otherwise he is not a purchaser for value without notice.

The uncertainty affects each of the three parties. The husband wants to plan his estate with assurance that his wishes will be carried out; and the donee and his transferee are entitled to a reasonable security of title. The uncertainty may not cause a "flight of capital" [16] into another jurisdiction that has a more predictable if not a more equitable rule; neither can we say that the legal profession will suffer; but one thing seems clear — tension between the widow and the transferees is all but inevitable. Nor can the uncertainty be eliminated merely by clarification of the law. No one can predict with complete assurance that any particular wife will survive her husband, undivorced.

Being human, any donee eventually tends to depend upon the economic or other advantages occasioned by the gift. The greater the dependence, the greater the injury if he is suddenly bereft of his benefits. And, as a general rule, we may also state that the larger the time-lapse between the date of the transfer and the date of the husband's death, the greater the infringement on the donee's legitimate "reliance interest" when he is called upon to return the subject matter to the widow. The "reliance interest" is also stronger where the donee had some moral or other claim on the husband's bounty.

The strength or degree of the donee's "reliance interest" will also depend on the type of transfer employed by the

[15] *Cf.* 6 AMERICAN LAW OF PROPERTY §26.3 (1952).
[16] See p. 87, *infra*.

decedent. Generally speaking, a "reliance interest" based on mere lapse of time would be negligible when the property was received only at the husband's death, as, for example, in a gift *causa mortis,* or by way of life insurance. Inter vivos gifts made sometime before death are in a different category. Similarly, the donee who has been receiving the income from the property during the decedent's lifetime is more likely to be hurt than a donee whose interest commenced only at the decedent's death. And the "reliance interest" will normally be higher with respect to an irrevocable trust than with respect to a revocable trust.

To recapitulate, restraints on a husband's inter vivos transfers adversely affect the community's interest in the donee's security of title. The harm to the particular donee depends on the extent of his "reliance interest." This interest varies with the donee. It is affected by a number of factors, including lapse of time and the type of transfer.

CHAPTER 4

Basic Policy Considerations: Conclusion

The discussion in the preceding chapters has indicated that societal concern for the surviving family justifies complete restraint, if necessary, on freedom of testation, and some restraint on freedom of inter vivos alienation. We have seen also that restraints on inter vivos transfers involve substantial inconvenience to the community. This means that restraints on inter vivos transfers should be tolerated only when the surviving family is in need and its claim is meritorious [1] and only after due regard has been paid to the reliance interest of the donee and his transferee. In other words, there must be a compromise of these conflicting interests, engineered by flexible judicial controls. I believe that the compromise can best be made by legislation that embodies three related principles, set out here in broad outline.[2]

First, the restraint on freedom of testation should be restricted to alleviation of demonstrated need during widowhood and during the minority or period of dependence of children. The equity courts should have discretion to determine the amount necessary for reasonable support [3] of each applicant, and to fix the mode of payment. As soon as this principle is given legislative sanction part of the evasion problem will disappear. No longer will a husband be forced to make inter vivos transfers in order to prevent an unworthy widow from taking an automatic statutory share. Moreover, reasonable advancements to children will be im-

[1] A widow, for example, may be in need but nevertheless be "unworthy"; see *infra,* Chap. 21, text at note 12.

[2] Certain points, marked by footnotes, are explained in detail in succeeding chapters in conjunction with the case study. The principles under discussion are given formal expression in the suggested model statute, *infra,* Chap. 22.

[3] Chap. 21, *passim.*

mune from attack, regardless of the type of inter vivos transfer that was involved. Evasion litigation will be restricted to cases where the equities are in doubt, or clearly in the petitioner's favor.

Second, the courts should be given discretion to require contribution from any inter vivos transferee, and to apportion the amounts payable by the several transferees. If protection against evasion is to be effective, all types of inter vivos "transfer" must be affected.[4] No given type of transfer should be made immune by statute merely because it is a type of transfer that normally induces a strong reliance interest. Inter vivos gifts and irrevocable inter vivos trusts, for example, must be affected by the statute; otherwise a husband could transmit an unreasonably large portion of his assets by arrangements of this sort.

Third, care must be taken to safeguard the community interest in security of title, as well as the reliance interest of the individual donee. Complete protection is of course impossible, but the following provisions would remove much of the uncertainty:

(a) No donee should be liable for contribution unless his "gift" was unreasonably large,[5] under the circumstances prevailing at the time of the transfer. The most important circumstances would, of course, be the relative size of the gift and the purpose of the gift. Under this test, for example, an advancement to support a child of a prior marriage would in most instances be immune from attack. The petitioner should have the burden of proving that the transfer was unreasonably large.

(b) The petitioner should be barred from a claim for contribution from a particular donee if she signed a waiver [6] in his favor, with or without compensation.

[4] *But cf.* Simes, PUBLIC POLICY AND THE DEAD HAND 30 (1955). See Chaps. 12–16, *infra,* for the application of this principle to the individual dispositive devices.

[5] See Chaps. 10–11, *infra, passim;* also see Chap. 22, *infra, passim.*

[6] See the suggested model statute, Chap. 22, §17(b), *infra.*

(c) Claims for contribution from a donee should be subject to cut-off provisions [7] that bear some relation to the "reliance interest." For example, a revocable trust made more than three years before the decedent's death should entail liability for contribution, whereas suits with respect to an inter vivos gift made before that time probably should not be permitted.

For convenience in expression I shall refer to these general principles as the "maintenance and contribution" formula. I believe that this formula expresses the ideal reconciliation of adequate family protection with the "reliance interest" of the donee. Accordingly, it will be used in Part Three as the criterion for judging the work of the American courts in the evasion cases. The need for corrective legislation is less urgent if the courts, despite the lack of legislative directive, are in substance espousing the principles implicit in our formula.

[7] *Id.* §8.

PART II

SOME LESSONS FROM THE PAST

CHAPTER 5

The Custom Of London

Before looking at the case-law, we must delve into the past. Some attention must be given to two particular instances of restraint on a husband's inter vivos transfers. I refer to the custom of London and to inchoate dower. A knowledge of both institutions is needed if we are to grasp all the implications of the case-law. Moreover, it should help to disabuse us of any notion that the statutory share is sacrosanct. Reverence for the home and the family naturally inspires affection for the legal institutions that protect the family. We should guard against these becoming enshrined in their own right. Changes in this field cannot and should not be made overnight; but history reveals that these protective institutions may in time lose touch with prevailing realities.

1. NATURE OF THE CUSTOM

The early English will,[1] which dealt only with personalty, was subservient to the claims of the family. I speak of the latter half of the 12th century, the time of Glanville, which for the layman may roughly be identified with the days of chivalry, of Ivanhoe, Robin Hood, Richard the Lion-Hearted, and the Third Crusade. By that period the surviving wife and children had protection which bears a striking resemblance to the modern American statutory share. Some-

[1] On pre-conquest institutions, we grope for knowledge. Toward the end of the Anglo-Saxon period a union of the post obit gift (gift after death) and the *verba novissima* (death-bed statement) produced an embryonic "testament" of personalty, called the *cwide* (written statement). Pollock and Maitland doubt its similarity to the modern will; see 2 Pollock and Maitland, HISTORY OF ENGLISH LAW 319–21 (2nd ed. 1905). Page is not so dubious; see 1 Page, WILLS 23–33 (3rd ed. 1941). The pattern is less discernible in restrictions on testation; see Pollock and Maitland, *op. cit. supra* at 394.

times known as the "legitim," it is commonly referred to today as the custom of London, having survived in that city longer than elsewhere. Under the custom of London a testator, leaving a surviving wife and children,[2] could not dispose of more than one third of his personal property. One third was the "wife's part," one third the "child's part" ("bairn's part" in Scotland), and the other third the "dead's part." [3] One half could be disposed of if the wife was the sole survivor; likewise if the children alone survived. This protection to the widow was thoroughly entrenched. At the beginning of the next century it received incidental recognition in the Great Charter at Runnymede.[4] There is even some authority to the effect that if her husband consented the widow could dispose of her interest by will.[5]

Enforcement originally was by means of the common-law writ *de rationabili parte bonorum.* In the thirteenth century, however, the church obtained jurisdiction over things testamentary, an assignment that was to last for some six hundred years until its jurisdiction in civil matters was removed in 1856. For all practical purposes the everyday jurisdiction over the "reasonable parts" soon went to the ordinary; the common-law writ became a thing of only occasional use.[6] Suit would be brought in the church courts against the executor, the man with the "goods."

Whence came this custom? [7] It is not clear. We are told

[2] Mary Bateson, editor of 21 PUBLICATIONS OF THE SELDEN SOCIETY: BOROUGH CUSTOMS, states (introd. xcvi–ii) that it was not until the time of Bracton that the children received a third; until then the heir (eldest son) took all of the third. She writes of borough customs, but it is of course possible that the "law of the land" in those early times was comprised substantially of borough customs and like imitations thereof.

[3] 2 Pollock and Maitland, *op. cit. supra* note 1, at 348.

[4] MAGNA CARTA Chap. 26 (1215), cited in 2 Pollock and Maitland, *op. cit. supra* note 1, at 350. But the common law courts did not always feel that the reference in Magna Carta amounted to an express sanction of the custom, *id.*, at 355.

[5] 3 Holdsworth, HISTORY OF ENGLISH LAW 550 (6th ed. 1934).

[6] Pollock and Maitland, *op. cit. supra* note 1, at 352.

[7] The child's part was subject to advancements, at least those made on the marriage of the child. Jenks v. Holford, 1 Vern. 61, 21 Eng. Rep. 151 (Ch. 1682). It could also be barred, if the child was of age, for

that it probably has no known Anglo-Saxon or Norman antecedents.[8] From here on in we have supposition. It is easy to generalize on the origin of legal institutions and doctrines; but the tracing process too often proceeds from doubtful premises to the attractive conclusion. Whether the custom originated solely or in part in local custom, in Roman Law,[9] in ancient family rights,[10] in a notion of community of goods between husband and wife,[11] or from other sources, we cannot be sure. We can only speculate. The significant thing is that

valuable consideration. Lockyer v. Savage, 2 Eq. Ca. Abr. 272, 22 Eng. Rep. 230 (Ch. 1733). The custom did not apply to grandchildren. Fowke v. Hunt, 1 Vern. 397, 21 Eng. Rep. 953 (Ch. 1686); Northey v. Strange, I.P. Wms. 341, 24 Eng. Rep. 416 (Ch. 1716). A jointure of land would, if so stated, have the effect of barring the widow's customary share, as well as dower. This was not regarded as "breaking into the custom; for the freeman might at any time during his life, even in his last sickness, have invested his personal estate in the purchase of land, which would defeat the custom and stand good [citing Frederick v. Frederick, 1 P. Wms. 711 (Ch. 1721)] though the freeman should at the same time have said, that he did this on purpose to defeat the custom. And as this (if the purchase was real) would have held good to bar the custom, surely the case could not be worse, where such agreement for making the purchase was for a valuable consideration, and part of the marriage articles." Parker, L. C., in Babington v. Greenwood, 1 P. Wms. 530, 532–3, 24 Eng. Rep. 503 (Ch. 1718); also see Hancock v. Hancock, 2 Vern. 665, 23 Eng. Rep. 1033 (Ch. 1710).

A premarital settlement of personalty, without mentioning the custom, was held to be in bar of the custom in Lewin v. Lewin, 3 P. Wms. 15 (Ch. 1727); regarding land, see Hancock v. Hancock, *supra*. The share under the custom was subject to the testator's debts. Rider v. Wagner, 2 P. Wms. 328, 335 (Ch. 1725).

"If a Freeman of London dies without issue, his wife is intitled by the custom of the moiety of her Husband's personal Estate in value, but not in Specie." Kitson v. Robins, 2 Eq. Ca. Abr. 555, 22 Eng. Rep. 466–67 (1709).

[8] Pollock and Maitland, *op. cit. supra* note 1, at 349. *But see* Bateson, *op. cit. supra* note 2, at xcvi–ii: "That the division in thirds was known to the Normans cannot be doubted; it is established on evidence more complete than that which vouches for its existence among the Anglo-Saxons; the probability, however, is that it was a custom common to both races." Miss Bateson was a disciple of Maitland's, and her statement was made in 1906, a year after publication of Pollock and Maitland's HISTORY OF ENGLISH LAW.

[9] There appears to be no definite evidence. In general, on the Roman institutions, see pp. 279–281, *infra*.

[10] *But cf.* notes 2, 8, *supra*.

[11] Pollock and Maitland, *op. cit. supra* note 1, at 349. But we are told later in the same volume that English law at an early date refused to adopt the custom of community. *Id.* at 402.

it existed, and on a national scale. It continued on a country-wide basis until early in the fourteenth century [12] and in a substantial part of the country until the close of the seventeenth century.[13]

2. Reasons for Obsolesence

Why did the custom linger longer in some parts of the country, and why in the end did it fade away? The answer to the first question probably lies in the variations in practice in the different ecclesiastical courts.[14] But the reasons for the disappearance of the custom are largely a matter of conjecture.[15] Our sketchy knowledge of the custom is re-

[12] 3 Holdsworth, History of English Law 552 (6th ed. 1934). Although its universal application ended in the fourteenth century, it would appear that the tripartite arrangement continued as a plan of intestate succession for some time thereafter.

[13] It continued in the northern province of York until abolished in 4, 5 Wm. & Mary, Chap. 2 (1692); see also 3 Anne, Chap. 5 (1703); in Wales until 1696 (7, 8 Wm. 3, Chap. 38) and in London in 1734 (11 Geo. I, Chap. 18). Joseph Gold, in "Freedom of Testation, the Inheritance (Family Provision) Bill," 1 Mod. L. Rev. 296, 298 (1938), says that the custom apparently survived in Chester until 1925. *But cf.* Burn, *op. cit. infra,* note 15, at 584, who states that the custom of York did not extend to Chester. And see the remarks of the Master of the Rolls in Pickering v. Stamford, 3 Ves. Jr. 332, 337–38, 30 Eng. Rep. 1038, 1041 (1797), referring to the case of a testator who apparently had thought that his wife was entitled to a forced share of his personalty: "There may be some reason for it; for he lived in the county of Cheshire, which is part of the province of York; and a vulgar error prevailed, that the custom of York goes through the whole province. The Legislature [*i.e.,* Act of 1692] themselves fell into it by reserving to the citizens of York and Chester the customs of those cities; the latter of which has no custom. When by another act [Act of 1703] they repealed that as to the city of York, they left Chester just as it was by the first act. That custom of York, never attached upon any part of the province, that was not so at the time of Henry VIII; and Chester was annexed since that period." Also see 1 Bright, Husband and Wife 302 (1850).

[14] 3 Holdsworth, *op. cit. supra* note 5, at 554–56.

[15] We can sympathize with Burn's tongue-clucking over an early text writer's discussion of the statute that ended the custom in London: "But with regard to the city of London, by some fatality, he hath recited the statute—so imperfectly, that if he did understand it himself, it is impossible the reader should understand it from his manner of expressing it; but it is plain he did not understand it. . . ." 4 Burn, Ecclesiastical Law 566 (9th ed. 1842).

flected in the variety of these conjectures. Pollock and Maitland [16] refer to the indifference of both spiritual and temporal courts, and to the fact that the church would gain legacies by restoring freedom of testation.[17] Holdsworth [18] feels that the common-law lawyers were concerned with the logical inconsistency between giving the husband title to the wife's personalty and restricting the right of testation; and that these views would naturally be of more influence in the southern province. Burn [19] finds the explanation in the improved position of the younger children. Rheinstein speculates on the inconvenient delays in settlement of estates that would be involved in continuing a forced share for children: in an age of colonial expansion and slow communications, this might tie up administration for some years.[20] Possibly the longest view is that taken by Unger, who traces the decline of the custom to the "improved system of intestate succession" [21] available to that part of the country which did not follow the custom. The implications of Unger's thesis have been dealt with earlier.[22]

Probably each of these circumstances was a contributing factor. It would appear that its obsolescence was inevitable. Restrictions on wills of personalty were becoming unpopular. In particular, the City of London was finding that many men of substance, living and doing business in the City, were refusing "to become freemen of the same, by reason of an ancient custom with the said city, restraining the citizens and freemen of the same from disposing of their personal estates by their last wills and testaments." [23] And the spirit of the

[16] *Op. cit. supra* note 1, at 355.

[17] And see Dainow, "Limitations on Testamentary Freedom in England," 25 CORNELL L. Q. 337, 342–44 (1940).

[18] *Op. cit. supra* note 5, at 554–56.

[19] *Op. cit. supra* note 15, at 564–66.

[20] Rheinstein, CASES ON DECEDENTS' ESTATES 59–60 (2d ed. 1955).

[21] Unger, "The Inheritance Act and the Family," 6 MODERN L. REV. 215, 220–22 (1943).

[22] Discussed, *supra* p. 41.

[23] Recited in 11 Geo. I, c. 18 §1(1724).

time was intolerant of curbs on the individual.[24] England in the sixteenth and seventeenth centuries was on the march, economically and politically. The beheading of Charles I was but a startling symbol of the new liberty in affairs, in ideas. When "England set the world ablaze," the rise of empire not only necessitated but also stimulated a free field for the self-reliant.

3. Case Law

The cases under the custom of London portray a determined judicial enforcement of the basic protective policy. The plaintiff succeeded in practically all reported cases. The grounds for attack were more extensive than under the modern statutory share cases. The popular test merely required the plaintiff to prove that the transferor "had not entirely dismist [sic] himself" [25] of the property in his lifetime. Thus in *Smith* v. *Fellows* [26] a reservation of the rents and profits in a voluntary deed of a leasehold impelled the court to declare that the property "still continued in . . . the husband, and of consequence is subject to the custom." [27] We shall see later that such a transfer will usually be upheld, as against the widow's claim, under the prevailing American

[24] Cahn, "Restraints on Disinheritance," 85 U. Pa. L. Rev. 139, 140 (1936). Cahn expresses disbelief of the theory that the "continual incursions of the Scots" accounted for the long survival of the custom in the province of York. For a' that an' a' that, at least one other legal institution may be laid to the blue bonnets that came over the border: ". . . in the marches of Scotland some hold of the King by cornage, that is to say, to winde a horne, to give men of the countrie warning, when they heare that the Scots or other enamies are come or will enter into England." 1 Co. Lit.* 106 b. See also Pusey v. Pusey, 1 Vern. 273, 23 Eng. Rep. 465 (1684).

[25] Turner v. Jennings, 2 Vern. 612, 23 Eng. Rep. 1000 (1708).

[26] Smith v. Fellows, 2 Atk. 62, 26 Eng. Rep. 435 (1740).

[27] *Id.* at 63; *accord,* Hall v. Hall, 2 Vern. 277, 23 Eng. Rep. 779 (1692), where the court stated that if "[the husband] has it in his power, as by the keeping of the deed . . . or if he retains the possession of the goods, or any part of them, this will be a fraud upon the custom." Strong dicta to the same effect may be found in Tomkyns v. Ladbrooke, 2 Ves. Sen. 591, 28 Eng. Rep. 377 (1755); also see Randall v. Willis, 5 Ves. Jr. 262, 276, 31 Eng. Rep. 577, 586 (1800) (marriage settlement case).

case-law.[28] Factors that help the plaintiff under the modern statutory share cases *a fortiori* received a like or stronger emphasis in the cases under the custom. Thus proximity to death [29] and the proportion of the total holdings that were transferred inter vivos [30] are important, though perhaps not decisive,[31] criteria. One cryptic case under the custom, *City* v. *City*,[32] purports to say that a voluntary assignment, neither possession nor "interest" being retained, would be vulnerable to the wife's claim, and has been cited for this startling proposition, without comment, by some American authorities.[33]

[28] *Infra,* pp. 184–186. American cases that discuss the custom of London, directly or inferentially, include the following: Ford v. Ford, 4 Ala. 142 (1842); Tucker v. Tucker, 29 Mo. 350 (1860), 32 Mo. 464 (1862); Stone v. Stone, 18 Mo. 392 (1853); McLaughlin v. McLaughlin, 16 Mo. 242 (1852); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891); McCammon v. Summons, 2 Disn. 596 (Ohio 1859); Norris v. Barbour 188 Va. 723, 51 S.E.2d 334 (1949); Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850); Lightfoot v. Colgin, 19 Va. (5 Munf.) 42 (1813); *cf.* Crain v. Crain, 17 Tex. 80 (1856) (forced share of children).

[29] In Turner v. Jennings, 2 Vern. 612, 23 Eng. Rep. 1000 (1708) the court said that a husband's transfer in trust, retaining life estate in "the greatest part of his personal estate . . . when he was languishing, and but a little before his death, . . . ought to be looked upon as a donatio causa mortis [and] that either the custom must be entirely given up, or this deed must be looked upon, as made in fraud of the custom . . ."; also see Tomkyns v. Ladbrooke, 2 Ves. Sen. 591, 594–95, 28 Eng. Rep. 377, 381 (1755) ("Here was a man aged seventy-two, had a dangerous and a flattering distemper [apparently the gout], had a fit of it then," and executed "a will and a deed both at the same time (as it seems), and dies in two days. This is a case as to the custom of a very suspicious nature . . ." and ". . . an act done in illusion of the custom. . . .").

[30] Turner v. Jennings, *supra* note 29.

[31] Reservation of some "interest" in the property appears to be the basic test. No cases were found involving a large outright transfer (no "interest" being retained) made shortly before death; but the indications are that such a transfer would not prevail against the custom. See Tomkyns v. Ladbrooke, *supra* note 29, at 595.

[32] City v. City, 2 Lev. 130, 83 Eng. Rep. 483 (K.B. 1675). In Ambrose v. Ambrose, 1 P. Wms. 321, 24 Eng. Rep. 407 (1716), it was held that when *H* bought land in name of *X*, *X* giving declaration of trust after *H's* death, this defeated the custom of London.

[33] *E.g.,* Walker v. Walker, 66 N.H. 390, 392, 31 Atl. 14, 15 (1891); see Cahn, "Restraints on Disinheritance," 85 U. PA. L. REV. 139, 153, note 47 (1936). *But see* Stone v. Stone, 18 Mo. 389, 393 (1853) (citing Fonblanque); Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850); Lightfoot v. Colgin, 19 Va. (5 Munf.) 42 (1813).

But it is doubtful if the case was ever considered authoritative in England. The other cases under the custom stress reservation of possession or interest,[34] or the testamentary [35] aspect of the transfer. Some of the cases contain dicta inferentially repudiating [36] the doctrine in question; and in two cases doubt is expressed as to the accuracy of the reporter of the *City* case.[37]

Are the precedents under the custom of any value in pondering our latter-day problems, or are they outmoded, to be classed with frankalmoign, deodand, and the high-button shoe? The question merits careful thought, as the determined judicial support [38] of the basic protective policy of the custom is in sharp contrast to the legalistic attitude taken by many of the modern decisions on evasions of the statutory share.

The early American courts paid close attention to the case-law under the custom, but there was a division of opinion as to the relevance of that case-law.[39] Some courts distinguished

[34] Turner v. Jennings, 2 Vern. 612, 23 Eng. Rep. 1000 (1708) (court also stresses proportion of estate transferred and proximity to death); Smith v. Fellows, 2 Atk. 62, 26 Eng. Rep. 435 (1740); also see Randall v. Willis, 5 Ves. Jr. 262, 276, 31 Eng. Rep. 577, 585–86 (1800).

[35] Tomkyns v. Ladbrooke, 2 Ves. Sen. 591, 28 Eng. Rep. 377 (1755); Edmundson v. Cox, 2 Eq. Ca. Abr. 275, 22 Eng. Rep. 233 (1716); Coomes v. Elling, 3 Atk. 676, 26 Eng. Rep. 1188 (1747). See also Fairebeard v. Bowers, 2 Vern. 201, 23 Eng. Rep. 731 (1690) (confession of judgment payable three months after death).

[36] Hall v. Hall, 2 Vern. 277, 23 Eng. Rep. 779 (1692); Coomes v. Elling, *supra* note 35; Turner v. Jennings, *supra* note 34; see the remarks of Macdonald C.B., in Jones v. Martin, 3 Anst. 882, 889–90, 145 Eng. Rep. 1070, 1072 (1796) (marriage covenant).

[37] Jones v. Martin, 3 Anst. 888, 890, 145 Eng. Rep. 1070, 1072 (1796) ("The note in 2 Levins is too loose to be much relied on. . . .") *Cf.* Tomkyns v. Ladbrooke, *supra,* note 35, at 595: "Levinz, though a good lawyer, was sometimes a very careless reporter." The *City* case was referred to, but not followed, in Smith v. Fellows, *supra* note 34.

[38] *E.g.,* Tomkyns v. Ladbrooke, *supra* note 35, at 592. "I must not make a decree to defeat that custom." But it is possible, ironically, that under the custom, as well as nowadays, the key to successful evasion lay in careful draftsmanship: "Indeed if the gift to the wife had been made by the husband to trustees, for the separate use of the wife in possession, this might have been of a different consideration, and I should be inclined to think such gift was good. . . ." Coomes v. Elling, 3 Atk. 676, 679–80, 26 Eng. Rep. 1190 (1747).

[39] *Compare* Lightfoot's Ex'rs v. Colgin, 19 Va. (5 Munf.) 42 (1813),

it on the dubious reasoning that under the custom the widow and children took as creditors.[40] To be sure, there are some references to the widow and children being in a preferred position as "creditors." [41] For that matter, the widow is similarly designated under some of the American cases.[42] But dissatisfaction may be found even in the older English cases with the "creditor" analogy; [43] and it seems safe to say that the wife and children took their customary shares only after debts had been paid.[44] Another more plausible theory stressed the more exacting interpretation of the Wills Act to be found in the cases under the custom.[45] The "testamentary" label would strike down many types of inter vivos transfer in the days of the custom. Whether the courts would be motivated more by concern for the formalities of the Wills Act than for the plight of the family is a moot point.

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and Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850) *with* Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891).

[40] *E.g.*, see the various opinions in Lightfoot's Ex'rs v. Colgin, *supra* note 39, at 62, 74–76, 81; *but cf.* the remarks of Brooke, J. at 67.

[41] *Cf.* Fairebeard v. Bowers, 2 Vern. 201, 202, 23 Eng. Rep. 731, 732 (1860).

[42] See *infra*, Chap. 17.

[43] "[I]n some cases the child of a freeman is said to be a creditor: but that is only an analogous expression." Tomkyns v. Ladbrooke, 2 Ves. Sr. 591, 595, 28 Eng. Rep. 377, 379 (1755).

[44] Read v. Duck, Prec. Chan. 409, 24 Eng. Rep. 183 (1715).

[45] *Cf.* the comment in Jones v. Martin, 3 Anst. 888, 890, 145 Eng. Rep. 1070, 1072 (1796), that the custom of London cases "will all be found upon examination to have proceeded on the ground that the bequests were in their nature testamentary, not absolute and irrevocable." For an enlightened approach to the Wills Act today, see Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L. J. 1 (1941). On the "testamentary" factor in the American cases, see Chap. 7:1.

Some of the cases under the custom involve successful attempts by some of the children to set aside an inter vivos transfer by the father to another child, or to grandchildren, *e.g.*, the *Tomkyns* and *Turner* cases. These cases belong to the "fraud" category, however, and apparently were not considered to be an informal application of the doctrine of advancements, or, more appropriately, satisfaction. An "advancement," under the custom, usually operated to bar any participation in the estate. Many of the "advancement" cases may be found in 2 Eq. Ca. Abr. 263–74, 22 Eng. Rep. 222–32. And see Elbert, "Advancements: I," 51 MICH. L. REV. 665, 671–73 (1953); Fifoot, HISTORY AND SOURCES OF THE COMMON LAW, TORT AND CONTRACT 30 (1949).

And the cases under the custom may be distinguished on another count. They were decided under an older economy, when interference with inter vivos property transmission would not have the drastic consequences that it has today. The custom of London endured for some six hundred years – roughly from 1100 to 1700. Probably not many gratuitous inter vivos transfers of personalty were made in the early and middle stages of that period. The reported cases that concern evasions all occur within the last century of the custom – most of them in the early eighteenth century. Even under the emergent "market pattern" [46] of the latter period the total volume of gratuitous alienations would not approach the comparative turnover today. The community would suffer no particular inconvenience from restrictions on a decedent's relatively infrequent gratuitous inter vivos transfers; and it would be an easy and natural consequence to subordinate the privilege of inter vivos alienation to the claims of the family.

In brief, the harsh inflexible doctrines of the case-law under the custom are ill-suited to modern conditions. As we saw in Part I, *supra,* the same may be said about either the custom of London itself or its modern equivalent, the American statutory share.

[46] *Cf.* Polanyi, THE GREAT TRANSFORMATION, 56–57 (1944).

CHAPTER 6

Inchoate Dower[1]

1. IN ENGLAND

In the early days of the common law women were disadvantaged. "In the camp, at the council board, on the bench, in the jury box there is no place for them," say Pollock and Maitland.[2] The prevailing economy hinged on male tenure as a source of feudal dues and fighting men. The dominance of the husband ensured the dependence of the wife. As to realty, primogeniture made it unlikely that she would own any land in her own right. Even if she did, the husband's estate during coverture [3] entitled him to the rents and profits of all the wife's present freehold estates. The husband could sell his interest, and it could be taken by his creditors. She was not an heir, as far as the husband's realty was concerned. And even under the custom of London [4] she was entitled only to one third of what few chattels the husband owned.

[1] For an account of the origin and development of common law dower, see Haskins, "The Development of Common Law Dower," 62 HARV. L. REV. 42 (1948); also see Plucknett, A CONCISE HISTORY OF THE COMMON LAW 507–8 (1936); Rabinowitz, "The Origin of the Common Law Warranty of Real Property and of the Inchoate Rights of Dower," 30 CORNELL L. REV. 77 (1945); Sayre, "Husband and Wife as Statutory Heirs," 42 HARV. L. REV. 330 (1929). For an account of dowry, dower, and *morgive* (morning-gift) in early German law, see Huebner, A HISTORY OF GERMANIC PRIVATE LAW, 624–26 (1918), 4 Continental Legal History Series. A remnant of the Germanic "morning gift" is found in the ancient French requirement that the marriage be consummated before the wife obtains her dower. This apparently was abandoned by the sixteenth century, although one custom required that the wife should put her foot into the bed. Brissaud, A HISTORY OF FRENCH PRIVATE LAW 773, note 5 (1912), 3 Continental Legal History Series.

[2] Pollock and Maitland, HISTORY OF ENGLISH LAW 485 (2nd ed. 1905).

[3] This estate terminated on the birth of a child born alive capable of inheriting, in which event the husband acquired an estate by the curtesy initiate; 2 Bl. Comm.* 126. On the wife's death this would become consummate, a life tenancy.

[4] Discussed, *supra,* Chap. 5.

The husband, as such, was entitled to all her chattels upon marriage: he was the owner in law and in fact.[5] And he obtained her choses in action if he reduced them to possession.

But this very exclusion of the woman meant that the widow and, because of primogeniture, also the younger children would, on the husband's death, be destitute. And thus, paradoxically, dower flourished in the face of feudalism. The community concern for the economic protection and social standing[6] of the surviving family was strong enough to counterbalance other powerful factors, including: (a) the primary function of land in supplying troops for armies; (b) the interest of the heir; (c) the interest of the lord in wardship of land where the heir was an infant; and (d) the ancient principle that succession to land depended on blood relationship.

The dower protection, as it finally evolved, was a life interest in one third of the lands[7] of which the husband had been seised, in fee or in tail, at any time during the marriage.[8]

[5] The wife could keep her paraphernalia (personal clothing and adornments), but only if the husband had not previously alienated them. 3 Holdsworth, HISTORY OF ENGLISH LAW 527 (5th ed. 1942).

[6] Sometimes the "dowager" was allocated a "dower house," a modest home on the estate, where she would live the rest of her days. Haskins, *supra* note 1, at 47.

[7] If the husband had no land, it apparently was possible to bar dower in any after-acquired realty by endowing the wife in his chattels *ad ostium ecclesiae* (at the church door), 2 Bl. Comm.* 132; Digby, HISTORY OF THE LAW OF REAL PROPERTY 129 (5th ed. 1897). Dower in chattels was in disuse by the reign of Henry IV (1399–1423), a victim of the thirteenth century *risorgimento* in trade. 3 Holdsworth, *op. cit.*, at 190. A purely sentimental touch still lingers in the words of the marriage service: "With all my worldly goods I thee endow."

For an explanation of the legislative "bloomer" that inferentially established inchoate dower in personalty in Florida, see "Final Report of the Probate Committee," 7 FLA. S. B. A. JOUR. 7 (1933). The error was corrected by subsequent amendment.

[8] For the technical incidents of common law dower, see 2 POLLOCK and MAITLAND 420–26; 3 Holdsworth, *op. cit.*, 189–97; 1 American Law of Property §§5.1–5.49 (1952); Note, "Inchoate Dower Today," 96 U. PA. L. REV. 677 (1948). The wife's interest was until the husband's death a protected expectancy known as "inchoate dower"; and on his death it was known as "consummate" dower, although she did not get her estate in the land until it was formally assigned.

The strength of the widow's interest lay in its immunity to the husband's inter vivos transfers, even where the transferee had taken for value without notice. It could not be defeated by devise, and it could not be reached by the husband's creditors.

It was the feature of interference with inter vivos transfers that constituted the early strength of inchoate dower; and it was the same feature that led to its ultimate defeat. With the economic awakening of the thirteenth century dower came gradually into conflict with the burgeoning policy of freedom of property alienation. The history of the English land law became a tale of ceaseless attrition on direct and even indirect restraints on alienation. The persistent effect of this policy, in conjunction with the diminishing importance of land, was eventually to cause dower to fall into desuetude.[9] Until the advent of decedents' family maintenance legislation,[10] two decades ago, it could be said that "The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole a better disposition

[9] The utility of dower was seriously affected by the prevalence of conveyances to the use of the husband in the 15th and 16th centuries. Equity refused to declare dower in the use. After the Statute of Uses, 27 Hen. 8, c. 10 (1535), it was possible to avoid dower by both legal and equitable jointures. 2 Bl. Comm.* 136. For an account of these and other devices used to defeat dower see 3 Holdsworth, *op. cit.*, 195–97; 2 Tiffany, REAL PROPERTY, §527 (3d ed. 1939). The end came in 1834 (3,4 Wm. 4, c. 105) when Parliament declared the wife's dower to be defeasible by deed as well as by will, with dower surviving only in estates of which the husband died intestate. The latter protection was formally eliminated by Lord Birkenhead's legislation in 1925, 15 Geo. 5, c. 23, §48 (1925).

[10] Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6 Chap. 45, as amended by the Intestates' Estates Act, 1952, 15 & 16 Geo. 6, 1 Eliz. 2, c. 64. This legislation, which is discussed, *infra,* Chap. 21, affects testamentary transfers only.

to the property of the dead, and more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law." [11]

2. In the United States

In this country, however, inchoate dower still permits the widow to exact a "stereotyped and inflexible" distribution. To be sure, in the last century many states abolished the wife's inchoate interest, and restricted dower to the real estate owned at death. And there has been other legislative tinkering. Thus we may find in various states that the fraction has been upped to one half, that the interest has been changed to a fee instead of the common-law life estate, that the interest may not extend to lands sold on judicial sale, and that the non-resident spouse may be excluded. But the plain fact is that in one form or another inchoate dower is still retained in a substantial majority of the non-community property states.[12]

And yet the disadvantages that led to the abolition of inchoate dower in England over a century ago weigh heavily in this country. To begin with, dower is an irritating fetter on inter vivos alienation of land. From the viewpoint of the seller, his wife's consent must be obtained formally. This may be difficult where the wife bears her husband ill-will. She may even have left him, with her whereabouts unknown. There may be factual and legal doubts as to her mental competence, even though she may not be confined in an institution. If she is institutionalized, legal proceedings may be necessary in order to sell the land to raise money for maintenance. And, from the purchaser's viewpoint, there is always the possibility of dower being claimed by the wife of a party

[11] Cockburn, C. J., in Banks v. Goodfellow, (1870) L.R. 5 Q.B. 549, a case dealing with testamentary capacity.

[12] Simes, Model Probate Code §31 (1946); 2 Powell, Real Property ¶217 (1950); 3 Vernier, American Family Law §189 (1935); 1 P-H Wills, Est. & Trust Serv. ¶2731; *cf.* 1 Glenn, Fraudulent Conveyances and Preferences 241 (1940).

in the chain of title.[13] This possibility may exist for an indefinite time after the death of the husband concerned.[14] If a wife refuses to release her dower, it may mean court proceedings to compensate the purchaser or possibly loss of the sale. The existence of intricate legal questions as to the existence of dower,[15] combined with factual and legal doubts as to the validity of a particular "marriage" [16] in the chain of title, may require costly title searches or title insurance. It is perhaps fair to state that inchoate dower adversely affects the price of real estate, and to that extent defeats its own protective purpose.

And there are other doubts as to whether or not the protection is effective. Presumably its chief merit is to prevent the husband from selling the land against his wife's will. But if the husband takes legal advice, he may in some states defeat dower by sleight-of-hand conveyancing, or by taking title in a corporate name. And the wife is in an unenviable situation if her improvident husband needs her consent in order to convey a marketable title. If, for example, he wants to sell the farm, the combined pull of sentiment and necessity is against her holding out either for (a) no sale or (b) sale with a portion of the purchase price set aside immediately for her maintenance after his death.

Finally, inchoate dower is unsatisfactory when tested under the maintenance and contribution formula.[17] There is no criterion of need. In consequence, the infringement on the reliance interest of the donee – and also of the bona fide

[13] 2 Tiffany, REAL PROPERTY 377 (3d ed. 1939).

[14] In many states dower must be elected within a prescribed period after publication of notice to creditors. Nevertheless, there may be instances when no publication has been made or administration initiated.

[15] See, *e.g.*, Melenky v. Melen, 189 N.Y. Supp. 798, 198 App. Div. 66 (4th Dep't 1921); 21 COL. L. REV. 821 (1921); 35 HARV. L. REV. 206 (1921); 8 VA. L. REV. 51 (1921); *cf.* Note, "Why Not Abolish Dower in Ontario?" 17 FORTNIGHTLY L. J. 242, 245 (1948).

[16] Thus, common law marriages where permitted, marriages occurring after one of the parties has secured a questionable divorce, conflict between a common law marriage and a ceremonial marriage, and the like.

[17] Discussed, *supra*, Chap. 4.

purchaser – may in the individual case be quite unwarranted. Under the formula too much protection for the widow is as objectionable as none at all.[18]

Why does inchoate dower still persist, in spite of these drawbacks? Professor Rheinstein [19] views it as a manifestation of the tendency of American legislatures to prefer debtors to creditors, to subordinate urban interests to rural interests. He points out that the dower exemption affects claims against a decedent's estate and also judicial sales in the husband's lifetime.[20] Thus the family is protected as to land other than the homestead; and the amount received by the wife at the judicial sale (as the equivalent of the present value of her dower expectation) can be used by the family to make a fresh start. This theory receives additional strength when we consider that realty usually comprises a large portion of the total holdings of the average rural family. Moreover, there is probably less family disharmony in rural areas, and consequently fewer attempted evasions of the dower interest. On the other hand, there are a number of jurisdictions whose laws are inconsistent with Professor Rheinstein's thesis. For example, inchoate dower apparently is abolished [21] in Georgia, Mississippi, South Dakota, Tennessee, Vermont, and Wyoming; no protection appears to be given against judicial sales in Indiana, Iowa, Kansas, Minnesota, and Nebraska. Probably the survival of inchoate dower may be attributed to a combination of reasons. Not the least of these reasons is the inertia of state legislatures, especially when it comes to toppling an ancient institution that purports to protect the home and family.

[18] Inchoate dower can co-exist with decedents' family maintenance legislation, but the combination is not ideal. See *infra*, p. 301.

[19] Rheinstein, CASES ON DECEDENTS' ESTATES 68 (2d ed. 1955).

[20] On the problem of present computation and payment of the widow's inchoate dower on sale by lien creditor, see Re Lesperance, (1927) 4 D.L.R. 391, 61 O.L.R. 94. This case occasioned a mild controversy between "Amicus Curiae" and "Amicus Amici" in 5 CAN. B. REV. 773 (1927) and 6 *id.* 176 (1928).

[21] By the same token, inchoate dower is still retained in Ontario, the "creditor" province of Canada.

PART III

THE CASE LAW

CHAPTER 7

Tests Based On Retention Of Control

PRELIMINARY REMARKS

The evasion cases may be examined from several points of view. The available literature [1] tends to organize the material in terms of underlying rationale: thus the cases are assigned to pigeon-holes labelled "illusory," "colorable," "fraud," "completeness of the transfer," and the like. But the cases may also be organized in terms of (a) the evidentiary factors that seem to influence the courts, (b) the type of dispositive device that is involved, (c) historical development, either country-wide or within a single state, or (d) the apparent trend of authority in each individual state. I will look at the cases from all of these viewpoints, with stress on the first three. Discussion of rationales is imperative; as far as the courts are concerned, these rationales purport to be decisive. An enquiry into the persuasive evidentiary factors will permit us

[1] Simes, PUBLIC POLICY AND THE DEAD HAND, Chap. 1 (1955); Cahn, "Restraints on Disinheritance," 85 U. PA. L. REV. 139 (1936); Sykes, "Inter Vivos Transfers in Violation of the Rights of Surviving Spouses," 10 MD. L. REV. 1 (1949); Comment, "The Present Status of 'Illusory' Trusts," 44 MICH. L. REV. 151 (1945). Also see: Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947 (1949) (Pennsylvania law); Bensing, "Inter Vivos Trusts and the Election Rights of a Surviving Spouse," 42 KY. L. J. 616 (1954); Brewster, "Restriction on Testation in Kentucky," 46 KY. L. J. 133, 144–61 (1957); Hayes, "Illinois Dower and the 'Illusory' Trust: The New York Influence," 2 DEPAUL L. REV. 1 (1952); King, "A Reappraisal of the Revocable Trust," 19 ROCKY MT. L. REV. 1 (1946); Klein, "Recent Developments in the Right of Election of Surviving Spouse," N. Y. L. J. May 13, 14, 15 (1953); Klein, "Recent Developments in the Right of Election," 17 QUEENS BAR BULL. 109 (1954); Rea, "Election to Take the Statutory Share," 29 ROCKY MT. L. REV. 506, 525–56 (1957); Comments: "Illusory Transfers in New York," 37 CORNELL L. Q. 258 (1952); 5 U. PITT. L. REV. 78 (1939); Notes: 16 BROOKLYN L. REV. 229 (1950); 27 N. Y. U. L. REV. 306 (1952) (excellent discussion of suggestions for statutory reform); 3 SYRACUSE L. REV. 129 (1951); Annotations: 49 A.L.R.2d 521 (1956), 157 A.L.R. 1164 (1944), 112 A.L.R. 649 (1938), 64 A.L.R. 466 (1930).

to determine the extent to which the courts appear to follow the principles of the maintenance and contribution formula. Do they, for example, pay any heed to the relative size of the property transferred? Moreover, any decision on the necessity and the practicability of remedial legislation demands analysis in terms of the various dispositive devices that may be employed by the practicing attorney. These devices differ in social function, in popularity, and in the "reliance interest" normally induced in the donee. Each device poses its own problems.

The evolution of certain rationales will be noted where deemed significant. Likewise, the law of a particular state may merit separate treatment, as, e.g., where the courts of that state have enunciated a distinctive rationale.

The decisions favoring the surviving spouse frequently utilize some variation of the "control" rationale. This rationale stresses the degree of control retained by the decedent over the assets that were transferred. The reasoning is simple: the more control exercised over these assets, the more it is apparent that the decedent in substance owned the assets at his death — hence the forced share should attach. Consider a revocable inter vivos trust: if the right to the income for life is retained, coupled with such control over administration of the trust as to constitute the trustee a mere "agent," the trust is testamentary; the spouse would win. But if the court be disinclined to strike down the entire trust as an invalid "testamentary" instrument, the spouse may still win if she can persuade the court to declare the trust void or vulnerable because it is "quasi-testamentary," or "illusory," or "not an absolute transfer," or because it involves retention of "dominion," or has some other attribute of the control rationale. Most of these terms have meanings that change with the context. Moreover, the usage may vary with the "tug of new equities." [2]

[2] *Cf.* Cardozo, THE GROWTH OF THE LAW 66, 67 (1924).

1. Testamentary Transfers

The widow's elective rights affect any assets belonging to the decedent's estate. It follows that the property involved in a testamentary transfer will "feed" the elective share. This suggests a twofold enquiry: (a) what constitutes a testamentary transfer and (b) to what extent should the "testamentary" concept be utilized as a weapon against inter vivos evasions of the forced share? Our discussion will center on the revocable inter vivos trust, for there the evasion problem is acute.

The popularity of the trust stems from its suitability for flexible, controlled inter vivos benevolence. It is also simple in operation. In its most common form the settlor transfers property to a trustee, reserves the income for life and the power to revoke, designates the persons who are to take the principal on the settlor's death, and possibly retains some degree of control over administration of the trust. The settlor achieves most of the advantages of a will without suffering its accompanying disadvantages. With no appreciable loss of control, the settlor can acquire in his lifetime an advisory management service that will be continued after his death; he avoids the expense, delay, and publicity of probate proceedings; he may provide against emergencies during his lifetime, such as practical or legal incapacity to handle his own affairs; and the trust is less vulnerable than a will would be to successful attack by disappointed relatives. Although the tax-collector and the creditor may encroach, the trust is still the most useful device in the estate planner's repertory.[3] It is to be expected that we hear much of the trust in the evasion cases.

Under the orthodox approach, a trust becomes testamentary when the settlor reserves "not only a beneficial life estate and a power to revoke and modify the trust but also such

[3] Shattuck, "Some Practical Aspects of the Problems of the Alterable and Revocable Inter Vivos Trust in Massachusetts," 26 B. U. L. Rev. 437–445 (1946).

power to control the trustee as to the details of the administration of the trust that the trustee is the agent of the settlor, . . ." [4] As far as the surviving spouse is concerned, it is immaterial that such a trust happens to be formalized as a will. If the *animus testandi* was present at the time of execution, she wins *qua* will. If the *animus testandi* was lacking, she still wins: it would be an invalid testamentary disposition, and the property concerned would form part of the decedent's estate.

It will be recalled that under the custom of London the English courts felt that the retention of any interest, even that of possession, would be sufficient to brand the trust or deed a testamentary transfer. This harsh approach may be found in many of the older American evasion cases,[5] and its rationale has been used, perhaps inadvertently, in some of the more modern evasion cases. But our conception of a testamentary transfer has changed with the years. An inter vivos trust, for example, is no longer considered testamentary (for purposes unconnected with spouses' rights) merely because the power to revoke is retained. By the same token, in the evasion cases, we find that it is usually in the older decisions that the surviving spouse prevails on the "testamentary" ra-

[4] RESTATEMENT, TRUSTS, §57. Two clues are given. We are told that "The intended trust is not testamentary merely because the settlor reserves power to direct the trustee as to the making of investments or the exercises of other particular powers, or power to appoint a substituted trustee." And apt draftsmanship is considered helpful: "Thus, if the transfer to the trustee was by a deed formally executed and recorded, the conclusion that the trustee was also the agent of the settlor would be less likely to be drawn than if the transfer were less formally evidenced."

[5] Some early cases proceeded on the reasoning that revocability was a distinguishing characteristic of a testamentary instrument, *i.e.*, one that would thereby be subject to the widow's share. See, *e.g.*, Lightfoot's Ex'rs v. Colgin, 19 Va. (5 Munf.) 42 (1813); Gentry v. Bailey, 47 Va. (6 Gratt.) 595, 604 (1850): "Two circumstances must concur to render the gift testamentary in its nature; one is, that it is not to be substantially effective until his death; and the other is, that the husband does not divest himself of the capacity to recall it, . . ." *Cf.* Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914); Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Cochran's Adm'x v. Yeiser, 294 Ky. 585, 172 S.W.2d 226 (1943).

tionale.[6] In some of these cases, of course, the purported transfer was quite palpably an agency arrangement. But there is a disconcerting tendency in some evasion cases to use

[6] The "testamentary" attack has been successful, whether as the sole rationale or as one of several, in a number of cases: Fleming v. Fleming, 194 Iowa 71, 184 N.W. 296 (1921) (agreement regarding family insurance business); Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939) (revocable trust); Hill's Estate, 15 D.&C. 699 (Pa. 1931) (declaration of trust); Bickers v. Shenandoah Valley Nat. Bank of Winchester, 197 Va. 145, 88 S.E.2d 889 (1955), *rehearing denied* 197 Va. 732, 90 S.E.2d 865 (1956) (revocable unfunded insurance trust); Norris v. Barbour, 188 Va. 723, 51 S.E.2d 334 (1949) (bond payable after death). *Cf.* Stouse v. First Nat'l Bank of Chicago, 245 S.W.2d 914, (1952) (non-evasive); Bowles v. Rutroff, 216 Ky. 557, 288 S.W. 312, (1926) (bank stock; widow barred by statute of limitations); Brown v. Crafts, 98 Me. 40, 56 Atl. 213 (1903) (delivery of personal property with power of attorney permitting re-delivery); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891) (stock); MacGregor v. Fox, 280 App. Div. 435, 114 N.Y.S.2d 286 (1st Dep't 1952), *aff'd without opin.* 305 N.Y. 576, 111 N.E.2d 445 (1953) (revocable trust); Estate of Brown, 384 Pa. 99, 119 A.2d 513 (1956) (revocable unfunded insurance trust, under Pa. Stat. Ann. tit. 20, §301.11, discussed *infra,* p. 138); Vederman Estate, 78 D.&C. 207 (Pa. 1951) (under same statute); In re Lonsdale's Estate, 29 Pa. 407 (1857) (bonds); Alexander v. Zion's Sav. Bank & Trust Co., 2 Utah 2d 317, 273 P.2d 173 (1954) (revocable trust; antenuptial).

In the following cases the "testamentary" attack was unsuccessful: United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); West v. Miller, 78 F.2d 479 (7th Cir.) *cert. denied,* 296 U.S. 633 (1935) (trust, revocable only by another with settlor's consent); Ford v. Ford, 4 Ala. 142 (1842) (irrevocable trust); Burton v. Burton, 100 Colo. 567, 69 P.2d 307 (1937) (note); Phillips v. Phillips, 30 Colo. 516, 71 Pac. 363 (1903) (deed with delayed delivery); Stewart v. Stewart, 5 Conn. 317 (1824) (trust); Haskell v. Art Institute, 304 Ill. 393, 26 N.E.2d 736 (1940) (gift of paintings; facts extreme); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945) (revocable trust); Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944) (joint savings account; facts extreme); In re Estate of Sides, 119 Neb. 314, 228 N.W. 619 (1930) (note, to be cancelled at death); In re Galewitz' Estate, 206 Misc. 218, 132 N.Y.S.2d 297 (Surr. Ct. 1954) (option on stock owned at death); In re Kalina's Will, 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945), *appeal dismissed,* 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946) (U.S. savings bonds); In re Deyo's Estate, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing to follow* Deyo v. Adams, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942) (U.S. savings bonds); In re Lorch's Estate, 33 N.Y.S.2d 157 (Surr. Ct. 1941) (joint bank account, commercial); Pinckney v. City Bank Farmers Trust Co., 249 App. Div. 375, 292 N.Y. Supp. 835 (3d Dep't 1937) (revocable trust); Morrison v. Morrison, 99 Ohio App. 203, 132 N.E.2d 233 (1955) (irrevocable declaration of trust); In re Rynier's Estate, 347 Pa. 471, 32 A.2d 736 (1943) (judgment notes); Beirne v. Continental Equit. Trust Co., 307 Pa. 570, 161 Atl. 721 (1932) (re-

the phrase "testamentary" as a synonym for the popular evasion rationales, as, e.g., "illusory," "colorable," "fraudulent," and the like.[7] This practice is unfortunate. Taken at face value, it would stop the widow from complaining of *any* otherwise valid inter vivos transfer. Moreover, if the court in question is motivated more by concern for the widow than for the Statute of Wills, its effect is too drastic. The defeasance would be total; the trust beneficiaries would lose all, not merely the widow's "share" in the trust corpus. Protection to the surviving spouse would then involve an unwar-

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vocable trust); Benkart v. Commonwealth Trust Co., 269 Pa. 257, 112 Atl. 62 (1920) (revocable trust); Windolph v. Girard Trust Co., 245 Pa. 349, 91 Atl. 634 (1914) (revocable trust); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891) (revocable trust); Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1887) (revocable declaration of trust); Smith v. Deshaw, 116 Vt. 441, 78 A.2d 479 (1951) (trust); Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933) (joint bank account). *Cf.* Harber v. Harber, 152 Ga. 98, 108 S.E. 520 (1921) (deed); Burns v. Turnbull, 37 N.Y.S.2d 380 (Sup. Ct. 1942), *rev'd mem.*, 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep't 1943), *reargument granted,* 267 App. Div. 986, 48 N.Y.S.2d 453 (2d Dep't 1944), *aff'd on reargument mem.*, 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep't 1944), *motion to dismiss appeal denied,* 294 N.Y. 809, 62 N.E.2d 240 (1945), *aff'd without opinion,* 294 N.Y. 889, 62 N.E.2d 785 (1945) (trust; question left open); Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N.Y. Supp. 92 (1st Dep't 1905), *modified and aff'd,* 185 N.Y. 485, 78 N.E. 359 (1906) (charitable trust).

And see the following nonevasion cases: Church of Jesus Christ v. Scarborough, 189 F.2d 800 (10th Cir. 1951) (contract); DeLeuil's Ex'rs v. DeLeuil, 255 Ky. 406, 74 S.W.2d 474 (1934) (declaration of trust); Goodrich v. City Nat'l Bank & Trust Co., 270 Mich. 222, 258 N.W. 253 (1935) (revocable trust); Hall v. Mutual Life Ins. Co., 201 Misc. 203, 109 N.Y.S.2d 646 (Sup. Ct. 1952), *rev'd,* 282 App. Div. 203, 122 N.Y.S.2d 239 (1st Dep't 1953) (life insurance); In re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122 (1st Dep't 1951), *aff'd without opinion,* 304 N.Y. 598, 107 N.E.2d 87 (1952) (trust).

An executed transfer of realty is perhaps less vulnerable to attack. See, *e.g.,* Kelly v. Parker, 181 Ill. 49, 54 N.E. 615 (1899) (nonevasive).

[7] A line of Missouri cases, for example, brands a transfer as testamentary if made in expectation of death with intent to defraud the surviving spouse. Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939); Rice v. Waddill, 168 Mo. 99, 67 S.W. 605 (1902); Tucker v. Tucker, 29 Mo. 350 (1860), 32 Mo. 464 (1862); *contra,* Wanstrath v. Kappel, 354 Mo. 565, 190 S.W.2d 241 (1945), 356 Mo. 210, 201 S.W.2d 327 (1947), *aff'd,* 358 Mo. 1077, 218 S.W.2d 618 (1949) (revocable trust with considerable control retained held defeasible by widow but not testamentary). For the Missouri law see p. 114–116, *infra.*

ranted interference with the settlor's deliberate benevolence to the inter vivos donees. It should not be necessary to burn the house down to get heat.

The community values implicit in protection of the family against disinheritance do not coincide with the values involved in the Statute of Wills. We have seen that family protection is a desirable community goal. But can we say that the Statute of Wills is a pillar of democracy? Over a decade ago Gulliver and Tilson, in a provocative analysis, suggested that the various Wills Act formalities have three functions — ritualistic, evidentiary, and protective.[8] The ritual-function is required because some type of ceremony is needed to impress the transferor with the significance of his donative actions and statements, and to justify the court in concluding that they were deliberately intended to be operative. The evidence-function is to provide a satisfactory guarantee against subsequent lapse of memory, fraud, and the like. The protection-function — Gulliver and Tilson regard its value and effectiveness as dubious — is to safeguard the testator at the time of the execution of the will against undue influence or other imposition. The not unreasonable conclusion is reached that "an intended transfer should be sustained if the facts show substantial performance of the ritual and evidentiary functions, whatever may be the particular method of securing that performance." Certainly, an inter vivos trust should not be defeated solely because it was not formalized as a will. And if the Statute of Wills is of doubtful relevance in this connection, it is an even cruder weapon when misused to protect the surviving spouse.[9]

[8] Gulliver and Tilson, "Classification of Gratuitous Transfers to Take Effect at Death," 51 YALE L. J. 1 (1941). *Cf.* Comment, "Trusts Which Substitute for Wills," 51 NW. U. L. REV. 113 (1956).

[9] An eminent critic has stated that Gulliver and Tilson "underestimate . . . the dangers which the elimination of administration proceedings through substitute transactions implies for creditors, the public treasury and forced heirs." Rheinstein, CASES ON DECEDENTS' ESTATES, 778 (2d ed. 1955). Nevertheless, Professor Rheinstein would probably agree that the forced heir would be ill served if her sole chance to reach

2. Illusory Trusts

(a) *Newman* v. *Dore*. The vicissitudes of the illusory trust doctrine in New York form a melancholy commentary on the ineptitude of the typical American forced share. The New York forced share had an auspicious inception. Enacted in 1930,[10] it was considered a significant advance in succession law. In brief, the 1930 reforms abolished dower and curtesy,[11] made the spouses reciprocal heirs,[12] and provided the surviving spouse with an election to force his or her intestate share against the will.[13] No election could be made if the testator "devised or bequeathed in trust an amount equal to or greater than the intestate share, with income thereof payable to the surviving spouse for life." [14] On paper the scheme appeared to presage a new era of practical protection for the surviving spouse.[15] A contemporary writer declared that "although curtesy and dower are abolished, the act is socially significant because of the increased protection which it gives to the husband and wife in lieu of their prior rights." [16] This statement was technically accurate; but it shortly became apparent that the "increased protection" lay more in appearance than in actuality. The forced share, by completely ignoring the evasion problem, proved itself vulnerable to inter vivos depletion of the decedent's estate. One of the most effective devices, of course, proved to be the revocable inter vivos trust. Although there was some early

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an inter vivos transfer lay in having it declared totally void as being testamentary.

[10] It was the first major revision in 100 years, and was enacted only after lengthy deliberation; see The Reports of the Commission to Investigate Defects in the Laws of Estates, N.Y. Legislative Document No. 69 (1930).

[11] N.Y. Real Prop. Law §§189, 190.

[12] N.Y. Dec. Est. Law §83.

[13] N.Y. Dec. Est. Law §18.

[14] N.Y. Dec. Est. Law §(1)(b).

[15] Twyeffort, in "The New Decedent Estate Law of New York," 6 N. Y. U. L. Q. Rev. 377, 386–87 (1928–29), suggests that the main concern was for the widow.

[16] Laube, "The Revision of the New York Law of Estates," 14 Cornell L. Q. 461, 463 (1929).

uncertainty,[17] it was thought that the matter was clarified by the leading case of *Newman* v. *Dore*.[18] There the husband created a testamentary trust under which his widow was the beneficiary of a life interest in one third of all his property. By the terms of the new law [19] this prevented the widow from electing against the will. Three days before his death, however, and with the intent to defeat the widow's statutory rights,[20] he created an inter vivos trust of *all* his property. He retained the power to revoke and the income for life; and the powers granted to the trustees were made "subject to the settlor's control during his life," and could be exercised "in such manner only as the settlor shall from time to time direct in writing." [21] The widow was given no beneficial interest whatever. The Court of Appeals sustained the widow's attack. The husband's motive in making the transfer, said the court, is immaterial: "the only sound test . . . is whether it is real or illusory. . . . [We must ask] whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer." [22] By "illusory" the court apparently contemplated neither a sham transfer, i.e., lacking the *animus donandi,* nor a testamentary transfer, in the orthodox use of that term: [23] "We assume, without deciding, that except for the provisions of section 18 of the Decedent Estate Law the trust would be valid." [24] What did concern the court, however, was that the settlor retained the power to control the trustees, as well as the income for life and the power to revoke. Such a conveyance, it said, "from the technical point of view . . . does not quite take all that it gives, but practically it does." [25] In sum, excessive control is decisive; intent (motive) is immaterial.

[17] See cases cited in note 92, *infra.*
[18] 275 N.Y. 371, 9 N.E.2d 966 (1937).
[19] N.Y. Dec. Est. Law, §18(1)(d).
[20] 275 N.Y. 371, 375, 9 N.E.2d 966, 967 (1937).
[21] *Id.* at 377, 9 N.E.2d at 968.
[22] *Id.* at 379, 9 N.E.2d at 969.
[23] See *supra,* text at note 4.
[24] 275 N.Y. 371, 380, 9 N.E.2d at 969.
[25] *Id.* at 381, 9 N.E.2d at 969, quoting from a statement of Chief

The illusory trust doctrine, as popularized by *Newman* v. *Dore,* received a partial setback from the *Halpern* case in 1951. As mentioned earlier,[26] the New York Court of Appeals decided in the *Halpern* case that a Totten trust is not illusory *per se.* The *Halpern* case, which is the cause célèbre of the "reality" rationale, will be discussed in detail in Chapter 9.[27] There we shall consider whether or not the court intended an outright repudiation of the illusory trust doctrine. Before the *Halpern* case had been decided, however, the illusory trust doctrine had spread to other states.[28] It deserves special study, regardless of its ultimate fate in New York.

(b) *The Ohio Cases.* The Ohio case law is of special interest, not only as an extreme example of the illusory trust doctrine but also as an illustration of changing judicial reaction to the trust device.

At the turn of the century the Ohio courts apparently considered the revocable inter vivos trust to be an unwelcome usurper of the functions performed by a will.[29] Thus, in *Worthington* v. *Redkey,*[30] decided in 1912, the court mentioned the power of revocation as one of a number of objectionable features in a trust that it declared void.[31] In

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Justice Holmes in Leonard v. Leonard, 181 Mass. 458, 461, 63 N.E. 1068, 1069 (1902).

[26] See *supra,* Chap. 1, text at note 3.

[27] *Infra,* Chap. 9:1.

[28] For list of cases, see note 74, *infra.*

[29] See Rowley, "Living Testamentary Dispositions and the Hawkins Case," 3 U. CIN. L. REV. 361 (1929): Goldman and DeCamp, "When Is a Trust Not a Trust?" 16 U. CIN. L. REV. 191 (1942).

[30] 86 Ohio St. 128, 99 N.E. 211 (1912).

[31] The court does not state squarely that the power of revocation is sufficient to defeat the validity of the trust. In fact, the court seems unwilling to hinge its decision on any single factor, preferring instead a pious catalogue of sins: the "ambiguity" of the reference to "my trustee," the reserved power of revocation, the probability that the attorney was acting merely as "agent" for the donor (so that on the death of the principal the agency would terminate, and thus the charities could take nothing), and the feeling, hinted but not expressly stated, that the transaction was an ungentlemanly attempt to evade the formalities of the Wills Act.

Union Trust Co. v. *Hawkins,* decided in 1929,[32] the administrator sought to recover the corpus of the decedent's revocable inter vivos trust. A degree of discretion had been given to the trustee. In the first hearing, unreported, the Supreme Court of Ohio set the trust aside, as an invalid testamentary disposition. This decision was reversed, on the rehearing, by a majority of the court. Although the reasoning of the *Redkey* case was approved,[33] the court felt itself bound by an amendment to section 8617, Ohio General Code.[34] Doubts cast by the *Hawkins* case on the common-law validity of revocable trusts in Ohio were not dispelled until 1938, in *Cleveland*

[32] 121 Ohio St. 159, 167 N.E. 389, 73 A.L.R. 190 (1929).

[33] 121 Ohio St. 177–78, 163 N.E. at 394.

[34] At the time of the execution of the first trust agreement in the Hawkins case this section provided: "All deeds of gifts and conveyance of goods and chattels, made in trust to the use of the person or persons making them, shall be void and of no effect."

In 1921 (before the execution of the supplementary agreement in the Hawkins case), the section was amended to add the following:

> ". . . but the creator of a trust may reserve to himself any use or power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend, or revoke such trust, and such trust shall be valid as to all persons, except that any beneficial interest reserved to such creator shall be subject to be reached by the creditors of such creator, and except that where the creator of such trust reserves to himself for his own benefit a power of revocation a court of equity, at the suit or any creditor or creditors of the creator, may compel the exercise of such power of revocation so reserved, to the same extent and under the same conditions that such creator could have exercised the same."

On this amendment see Rowley, "Living Testamentary Dispositions and the Hawkins Case," 3 U. CIN. L. R. 361 (1929), referring to it as "essentially a creditors statute." See also King, "A Reappraisal of the Revocable Trust," 19 ROCKY MT. L. R. 1, 9 (1946). A note in 5 OHIO ST. L. J. 269, 271 (1939) states: "At the time of the *Redkey* decision, the trust companies in Ohio were administering a great many living trusts, the validity of which would be denied if ever tested in the courts on the basis of the *Redkey* case. To avoid this contingency, the trust companies exerted sufficient pressure on the legislature to secure an amendment to section 8617 of the General Code. . . . Since this amendment made only trusts for the *exclusive* use of the creator void, if the trust provided that the property go to another after the death of the settlor it was not for the exclusive use of the settlor and therefore not void, and an entering wedge was created whereby the court could modify its ruling in the *Redkey* case."

Trust Co. v. *White.*[35] Further doubts, however, arose from dicta in *Woodside Company* v. *Narten,* in 1941.[36] And the uncertainty was heightened by *Central Trust Co.* v. *Watt,* decided in the same year.[37] Here the court split three ways on the validity of a trust which reserved the income for life, the power to revoke, and the power to veto and to "direct" the trustee in matters of investment and management.[38]

[35] Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938). But this case is not as strong as it is sometimes considered, as the trust concerned could be revoked only with the approval of the trustee. Judge Matthias was the only member of the court left of the members who had decided the Hawkins case. He had voted to renounce the common-law validity of the revocable trust in the Hawkins case, but voted for its validity in the White case.

In Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E.2d 119 (1939), a trust was upheld in which the settlor reserved the net income and right to occupy the real estate, the trustee being relieved from payment of taxes and insurance and required to secure the settlor's written approval of all sales and purchases. It was also held, however, that Section 8617 would permit the plaintiff creditors to revoke the trust only in the lifetime of the settlor. Three judges, Weygandt, C.J., Williams and Myers, J.J., dissented, presumably on the ground that the trust was invalid. This construction of Section 8617 is perhaps questionable, but it is in keeping with the confusion surrounding that unhappily worded provision. Thus Alexander, "Certain Problems Confronting Creditors When a Revocable Trust Accomplishes Succession," 31 MICH. L. REV. 449, at 467 (written before the decision in the Schofield case): *"It is to be noted that the statute* (Section 8617) *makes no reference to the situation after death of the settlor,* yet this is the statute upon which the court expressly based its decision in Union Trust Co. v. Hawkins."

[36] Woodside Company of Nevada v. Narten, 138 Ohio St. 469, 35 N.E.2d 777 (1941). The court was composed of Weygandt, C.J., and Williams, J. (both of whom dissented in the Schofield case), Hart, J. (who concurred in the Schofield case), and Turner, Zimmerman, and Bettman, J.J. (none of whom were in the court which decided the Schofield case). Matthias, J., who had concurred in the Schofield case, did not participate. The settlor had reserved the income for life, the power to revoke in whole or in part, and the power to withdraw principal. In deciding the case on another issue, the court said: "After a study of the facts in the instant case the members of this court find a difference of opinion among themselves as to whether a valid trust was created, and since the ultimate judgment herein will not be affected thereby, this question will not be discussed further."

[37] Central Trust Co. v. Watt, 139 Ohio St. 50, 38 N.E.2d 185 (1941).

[38] Hart, J. upheld the trust, explaining that the control was really retained for the welfare of the beneficiaries. Zimmerman and Bettman, J.J., concurred, as also did Williams, J., in a separate opinion. Wey-

During this period of judicial unrest over the revocable trust there occurred the famous evasion case of *Bolles* v. *Toledo Trust Co.*[39] In that case the husband executed three inter vivos trusts. The first trust in point of time (No. 328) irrevocably transferred $110,000 in insurance and $1,000 in stock, for the benefit of a daughter, with the settlor taking in the event of the daughter's incapacity. The second trust (No. 331) was revocable and comprised securities worth $4,000. The husband reserved the right to the income for life, and for payments of principal if required. After the settlor's death the trustee was to pay the settlor's wife $500 monthly for life, with the trustee having discretion to give her additional sums if needed. Surplus funds beyond the amount needed to provide the widow's payments were to be transferred to Trust No. 328. All payments to the widow under trust No. 331 were to be cancelled, and the trust "terminated," in the event that she elected not to take under the will.

The third trust (No. 520) was made in 1930, and was also revocable. It covered securities of an approximate value of $80,000. Income (and principal if needed) was payable to the husband for life. Upon the husband's death, the corpus was to be transferred (partly intact and partly liquidated) to Trust No. 331, to be "thereafter treated as a part of that trust." In 1928, on the same day on which Trust No. 331 was executed, the husband made his will. The wife was given certain chattels. The residue of realty and personalty went to the Trust Company as trustee of Trust No. 331. The will stated that the provisions made for the wife in the will and with the Trust Company were to be "in lieu of all her rights, claims and estates given to her by law, by way of dower or otherwise."

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gandt, C.J., Turner and Matthias, J.J., dissented, branding the transaction as a "mere agency" (p. 73). The trust instrument in the Watt case was executed prior to the amendment to Section 8617, so that the amendment played no part in the case.

[39] 144 Ohio St. 195, 58 N.E.2d 381, 157 A.L.R. 1164 (1944).

To summarize: the insurance ($110,000) went to the daughter under Trust No. 328. The widow received an annuity of $500 per month (and more, if needed for support) from Trust No. 331 ($4,000), as fed by Trust No. 520 ($80,000) and the residuary estate under the will. But if the widow spurned the will, she would be bereft of her trust interest.

The background information, as brought out in previous litigation,[40] indicated that the equities favored the widow. The parties were married in 1920, she at the time being a widow with two minor children. In 1921 a daughter was born, the beneficiary of the trust mentioned above. It appeared that Mr. and Mrs. Bolles "lived together in a seemingly harmonious relationship until his death." [41] Mrs. Bolles' former husband had left her a substantial amount of property. In addition, Mr. Bolles had rented a safe-deposit box from the Toledo Trust Company, in which he had deposited securities, purchased with his own money, worth approximately $216,215. When the box was opened after his death the securities stood in his own name and were contained in a folder inscribed with his name. In subsequent probate-court proceedings, however, Mrs. Bolles introduced evidence which later led the Supreme Court to remark that "there can be little doubt that he intended his wife to have the securities and thought he had effectuated such desire." [42] Nevertheless, the court held that the securities should form part of the estate assets for administration purposes, stating that Mrs. Bolles had failed to prove a sufficient delivery to constitute a valid gift; [43] and, in a later proceeding, the court failed to respond to the suggestion that Bolles had held the securities in trust for his wife.[44]

Finally the widow brought the present suit, arguing that the two revocable trusts should be declared void as bogus

[40] Bolles v. Toledo Trust Co., 132 Ohio St. 21, 4 N.E.2d 917 (1936).
[41] *Id.* at 23, 4 N.E.2d at 918.
[42] *Id.* at 30, 4 N.E.2d at 921.
[43] *Id.* at 31, 4 N.E.2d at 921. The holding is criticized in note, 4 OHIO ST. L. J. 134 (1937).
[44] Because of res judicata. 136 Ohio St. 517, 27 N.E.2d 145 (1940).

testamentary dispositions, or at least held defeasible to the extent of the widow's statutory share. The court agreed. Although holding the trusts to be otherwise valid [45] under section 8617, it stated that "such trusts may not be used as a device to deprive the widow of her distributive share of the property possessed by her husband at the time of his death. To the extent that such an arrangement, if allowed to stand, would deprive the widow of her distributive share of property, it is voidable at the instance of the widow." [46] And later this statement is made: "Trusts No. 331 and No. 520, taken in connection with the contemporaneous execution of the will and trust No. 331 and the value [47] of the *res* prior to testator's death in the respective trusts are illusory as to the widow's rights." [48] Apparently the court felt that Trust No. 331, although not technically a testamentary disposition, gave the settlor such enjoyment of his property during his

[45] Note that the assumption of the court in the Halpern case (*infra,* pp. 122–123) that the trust in Newman v. Dore (*supra,* pp. 75–76) was not "real" could not be made with reference to the trusts in the Bolles case. There are repeated statements that trusts 331 and 520 were valid aside from the widow's rights (see, *e.g.,* 144 Ohio St. 226). Such a holding would of course be expected because of statutory recognition of revocable trusts in Ohio, in §8617. Under the Halpern test, as applied to Ohio under present §8617, the widow would have lost.

[46] 144 Ohio St. 195, 213, 58 N.E.2d 381 at 390. See also 144 Ohio St. at 210–11, 58 N.E.2d at 389–90.

[47] The court seems impressed with the fact that until Bolles' death "trust No. 331 remained, as apparently it was his intention for it to so remain during his lifetime, wholly inadequate for the purpose for which it was established" (*id.* at 212, 58 N.E.2d at 390). The point of this reference to the inadequacy of Trust No. 331 is not clear. The court purports elsewhere to minimize "intent" as a criterion (*id.* at 215, 58 N.E.2d at 391); and, in any event, it is apparent from the evidence that if Bolles had any intent at all it was to make generous provision for his wife. Both the will and trust No. 331 ($4,000) were made in 1928, with the residue of the will to "pour over" into the trust in order to produce the annuity of $500 per month. Trust No. 520 ($80,000) was executed in 1930. The safety deposit box was opened in 1931. Bolles visited the box 48 times before his death on August 8th, 1933. Certainly he intended to give his wife the $216,000 in securities in the box. It also seems to be clear that he was not attempting to defraud his wife; firstly, because of the safety deposit box episode, and, secondly, because of the generous annuity from the two trusts in question.

[48] *Id.* at 229, 58 N.E.2d at 397.

lifetime that it amounted to an unfair deprivation of the widow's right to elect against her husband's "will." This may be seen from the statement that the *Newman* case "is illustrative of the fact that where a widow is given certain rights by statute she may not be deprived thereof by her husband," [49] and that "irrespective of the husband's intention, if the effect of the device resorted to is such as to cut down or deprive the widow of the right given her under [the forced share] such device is voidable when challenged by the widow." [50]

The actual decision is not unreasonable, in view of the peculiar circumstances in the case. The rationale, however, is no more than a variation of the "control" test, in spite of the broad language suggesting that the widow may invade any device, the effect of which is to "cut down or deprive" her of her elective rights. That language must be read in the light of repeated references to the settlor's retention of "dominion" over the trust *res*.[51] Such "dominion," considered in connection with the settlor's quasi-testamentary arrangements, renders trusts Nos. 331 and 520 illusory with reference to the widow. But "illusory" is a term with new implications. It now seems possible to state that an inter vivos trust in Ohio, in some undefined circumstances, may be illusory merely because of the retention of the power to revoke.[52] The apparent criterion is the quasi-testamentary nature of trusts Nos. 331 and 520.[53] Also relevant, it would seem, is the existence of factual control, whether or not formally reserved.[54] But financial need on the part of the surviving spouse, which one would suppose to be all-important, is not

[49] *Id.* at 214, 58 N.E.2d at 391.

[50] *Id.* at 215, 58 N.E.2d at 391.

[51] *E.g., id.* pp. 212, 226, 58 N.E.2d 390, 396.

[52] Very little formal control was retained by the settlor. *Id.* at 198–99, 58 N.E.2d at 384–85, and see notes 64 and 78, *infra.*

[53] See discussion, *supra,* p. 81. *And cf.* Cochran's Adm'x v. Cochran, 273 Ky. 1, 15, 115 S.W.2d 376 (1938); Rudd v. Rudd, 184 Ky. 400, 406, 214 S.W. 791 (1919).

[54] See 144 Ohio St. 195, 224–26, 58 N.E.2d 381, 395–96 (1944). Also see note 78, *infra.*

mentioned; we know that the widow had been left half the stock in her former husband's company, but we do not know its value, nor do we know the value of Bolles' estate.

The indecisive nature of the *Bolles* case left the legal profession in a quandary: did the case stand for the proposition that *all* revocable inter vivos trusts were *per se* illusory — or should the decision be authoritative only with respect to the particular facts? [55] These doctrinal uncertainties contributed to the furor that attended the later case of *Harris* v. *Harris*.[56] In this case the husband in 1939 transferred in trust 100 shares of a corporation in which there were but five stockholders, each owning 100 shares. At the time of execution the *res* was worth $40,000; at the date of settlor's death, in 1942, it was worth $75,000.[57] The wife was not mentioned. The settlor reserved the income for life, the power to revoke, and the power to deliver additional securities. The trustee was given no authority to sell, invest, or reinvest; and his authority to vote the stock was "virtually nullified by a further provision authorizing the trustee to enter into a trust agreement with the remaining four stockholders whereby all of the stock of the corporation was to be surrendered and one certificate issued in the joint names of the trustee and the four other stockholders, all five to be designated as trustees thereof. This was done. "As a result," says the court, ". . . there no longer was any stock standing in the name of the original trustee alone, and, of course, he alone could vote no

[55] Nor was predictability aided by the appearance in the Bolles case of some of the usual overworked "evasion" clichés: "not an absolute transfer," "merely colorable," "made with a fraudulent intent." Bolles v. Toledo Tr. Co., 144 Ohio St. 195, 213, 215, 58 N.E.2d 381, 390, 391 (1944).

[56] Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd*, 147 Ohio St. 437, 72 N.E.2d 378 (1948). The Ohio Fiduciaries Research Association filed a lengthy brief as *amicus curiae* in the Harris case, and also participated in that capacity in the oral argument in court. The Bolles case had in the meantime received adverse comment: King, "Reappraisal of the Revocable Trust," 19 ROCKY MT. L. REV. 1 (1946).

[57] The inventory value of the assets in the estate (excluding the *res* of the inter vivos trust) was $75,186.46.

stock in that capacity. In spite of the new trust agreement [58] the plaintiff's husband continued to serve as the president at a salary of $20,000 per year and as director of the corporation; and until his death he made the same use of his property as he had done previous to the execution of the trust agreements, while the trustee attended no meeting of the stockholders, attended no meeting of the board of directors, and at no time did he examine the books of the corporation. As well stated by the Court of Appeals . . . 'the record shows that Harris, the settlor, engaged in the business of operating the company, along with the other stockholders, and that the activities of his trustee were of a minor character.' " [59]

The husband's will was executed in 1940, and contained no provision for the wife other than a sum not to exceed $5,000 annually. This sum, however, was to be derived from a testamentary trust which "obviously could produce income amounting to but a mere fraction of the $5,000." [60]

The widow, having elected to take against the will, brought action to have the inter vivos trust declared either void or vulnerable. The Courts of Appeals reversed the trial court's dismissal of the plaintiff's petition. The Supreme Court, by a four to three vote, agreed that "the plaintiff's husband retained such dominion and control over the corpus of the trust estate as to make the trust ineffective to deprive the plaintiff of her interest in the assets thereof as the surviving spouse." [61] Weygandt, C.J., in delivering the majority opinion, led off with a sweeping endorsement of the "rule of law" of the *Bolles* case, as exemplified in the first three paragraphs of the syllabus in that case.[62] Referring to the argument of counsel

[58] Entered into on May 15, 1939, three days after the execution of the first agreement. Seemingly Harris' wife, the plaintiff, had no knowledge of either trust agreement until after her husband's death; whereas the wives of each of the remaining four stockholders were informed at the time of the execution of the new trust agreement.

[59] 147 Ohio St. 437, 441, 72 N.E.2d 378, 380 (1948).

[60] *Id.* at 437, 72 N.E.2d at 378.

[61] *Id.* at 442, 72 N.E.2d at 380.

[62] These paragraphs from the syllabus in the Bolles case are as follows:

"1. A husband may dispose of his personal property during his lifetime without the consent of his wife, but a husband may

for the defendants that these paragraphs were *obiter dicta* and incorrect, Weygandt, C.J., stated summarily that "it is unnecessary to restate the rationale of the court." [63] He concluded that the combination of the right to income, the power to revoke, and the other circumstances [64] mentioned above was so similar in effect to the facts in the *Bolles* case as to demand that a similar decision be reached. Turner, Bell, and Sohngen, J.J., concurred.

The dissent of Matthias, J., (concurred in by Hart, J.) turns on the proposition that the widow could win only by establishing that the inter vivos trust was void as "creating an agency." He stated that the *Hawkins* case and the *White* case "are still the law [65] in this state and particularly so in view of

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not bar his widow of her right to a distributive share of any property which he owns and of which he retains the right of disposition and control up to the time of his death.

"2. Section 8617, General Code, which provides that a revocable and amendable living trust 'shall be valid as to all persons' except creditors, does not deprive the settlor of all dominion over the trust res so that a widow electing to take under the statute of descent and distribution is barred from claiming a distributive share of the property in such trust.

"3. The transfer of property to a trustee under an agreement whereby the settlor reserved to himself the income during his life with the right to amend or revoke, is valid by virtue of Section 8617, General Code, but under such a trust agreement settlor does not part absolutely with the dominion of such property and his widow electing to take under the statute of descent and distribution may assert her right to a distributive share of the property in such trust at settlor's death."

[63] 147 Ohio St. 437, 440, 72 N.E.2d 378, 380 (1948).

[64] In the Bolles case little control over administration was formally reserved, but the decision stressed failure to relinquish absolute "dominion." The majority opinion in the Harris case, naturally, commented on the fact that the settlor in that case did ". . . a number of additional things that are important in determining the question of dominion over the trust *res*." These "additional things" are analyzed in the application for rehearing, beginning at p. 10.

[65] Presumably he is referring to the statement in the Hawkins case to the effect that §8617, as amended, validated revocable inter vivos trusts; surely he cannot be referring to the unfortunate remarks in that case regarding the common law invalidity of inter vivos trusts. It will be recalled that Matthias, J., voted with the majority that held the trust void at common law in the Hawkins case but voted to hold the trust

the provisions of Section 8617. . . ." [66] He concluded that Section 8617 sustained the Harris trust, whereas in the *Bolles* case "the entire plan . . . was testamentary in character." [67] In other words, for Matthias, J., reasoning of this sort assumes that an inter vivos trust must be totally black or entirely white. And we encounter the same black-white gambit in the more closely reasoned dissent by Zimmerman, J.[68] Inter vivos trusts, he says, are valid because of the *Hawkins, White,* and *Watt* cases, as well as because of Section 8617; [69] he rejects the *Bolles* view that a trust can be valid and yet voidable by the widow.[70]

In summation, the questions raised by the decision in the *Bolles* case were left unanswered by the *Harris* case. The majority opinion in the *Harris* case does little more than affirm the *Bolles* case, but the dissenting opinions reveal a fundamental difference of opinion [71] in the Ohio judiciary as to whether or not a surviving spouse may set aside the decedent's inter vivos transfers. This difference of opinion is

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valid in Cleveland Trust Co. v. White, 134 Ohio St. 1, 15 N.E.2d 627 (1938). See note 35, *supra.*

[66] 147 Ohio St. 437, 442, 72 N.E.2d 378, 380–81 (1948).

[67] *Id.* at 444, 72 N.E.2d at 381.

[68] It was also used by the New York Court of Appeals in the Halpern case; see *infra,* Chap. 9, text at note 39.

[69] §8617, of course, does not preclude the widow from attacking an inter vivos trust. Strange that the dissenting judges in the Harris case did not urge the *"expressio unius"* rule, *viz.,* that in singling out creditors rights §8617 inferentially excludes the widow. It will be recalled that the court in the Bolles case stated that the widow occupies a higher position than a creditor, thus distinguishing the Schofield case, *supra* note 35.

[70] Zimmerman, J., stated that he did not "join with the majority [in the Bolles case] a principal reason being that he considered the second and third paragraphs of the syllabus incompatible with the expressions of this court in previous cases." *Cf.* discussion on "extent of defeasance," *infra* p. 128.

[71] Apparently it still continues: see In re Estate of Morrison, 159 Ohio St. 285, 289, 112 N.E.2d 13, 15 (1953). The exact point was not in issue in other recent Ohio evasion cases: Guitner v. McEowen, 99 Ohio App. 32, 124 N.E.2d 744 (1954) (joint bank account); MacLean v. J. S. MacLean Co., Ohio Prob., 123 N.E.2d 761 (1955), *appeal dismissed in part,* 133 N.E.2d 198 (1955) (gift); Morrison v. Morrison, 99 Ohio App. 203, 132 N.E.2d 233 (1955) (irrevocable declaration of trust).

understandable. The uncompromising severity of either viewpoint makes the other all the more intransigent. The majority opinion in the *Harris* case would permit the widow to invade *any* revocable inter vivos trust, regardless of her financial need, and (apparently, but we cannot be sure) regardless of her equities. This unrealistic approach, although it may not result in a "flight of revocable trust capital from Ohio," [72] constitutes an unreasonable fetter on inter vivos trusts. On the other hand, the dissenting opinions would necessitate rejection of the widow's claim in *any* instance, also regardless of her financial need or other circumstances.

3. Conclusion

The illusory transfer test, based on excessive control, is not without merit. The widow's concern is with testamentary transfers, since the election statutes restrict her to the property comprising the decedent's estate. Testamentary transfers are tested in terms of control. On this criterion, if the widow is to be permitted to reach other than testamentary transfers, it would have to be transfers which are quasi-testamentary, i.e., in which an unreasonable (albeit not such as to require the "testamentary" label) degree of control was retained.[73] The reason is simple: if a husband in substance en-

[72] This was predicted at pp. 54, 55 of the brief filed by the Ohio Fiduciaries Research Association as *amicus curiae* in the Harris case.

[73] Another popular "weasel word" in the evasion cases is "dominion." Webster's New International Dictionary (2d ed. 1954) defines it as "the power of governing and controlling; independent right of possession, use, and control. . . ." "Dominion" appears in the second "Kerr" passage, *infra*, p. 99. The older cases tended to identify retention of possession with "dominion": *e.g.*, Smith v. Hines, 10 Fla. 258 (1863–4) (retention of possession of slaves); Flowers v. Flowers, 89 Ga. 632, 15 S.E. 834 (1892); Gentry v. Bailey, 47 Va. (6 Gratt.) 595, 604 (1850) (dictum) (retention of possession in a revocable trust would make the trust testamentary because the "dominion" over the res continues unlimited). Later cases use the phrase, in describing illusory transfers, as being synonymous with "control"; see, *e.g.*, Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd*, 147 Ohio St. 437, 72 N.E.2d 378 (1947); *cf.* In re Kellas Estate, 40 N.Y.S.2d 655 (Surr. Ct., 1943), *aff'd*, 267 App. Div. 924, 46 N.Y.S.2d 884 (3rd Dep't 1944), *aff'd on other grounds*)

joys and "owns" his property until he dies, he is under a moral if not a legal obligation to let the widow share. Put in other words, if the widow can participate in that property which the husband owned "in the eyes of the law," so should she be entitled to that which he owned in substance. Or the eyes of the law should be opened wider. If testamentary transactions are tested by "control," it is only natural that the test for quasi-testamentary ("illusory") transfers should speak the same language.[74]

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293 N.Y. 908, 60 N.E.2d 34 (1944); Thomas v. Louis, 284 App. Div. 784, 786, 135 N.Y.S.2d 97 (3d Dep't 1954).

[74] Cases using the illusory transfer doctrine include the following: Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); MacGregor 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); Application of Barasch, 267 App. Div. 830, 45 N.Y.S.2d 790 (2d Dep't 1944), *reargument denied sub. nom.* In re Barasch's Estate, 267 App. Div. 905, 47 N.Y.S.2d 486 (2d Dep't 1944); President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S.2d 375 (Sup. Ct. 1939), *modified,* 260 App. Div. 174 and 954, 21 N.Y.S.2d 232 (2d Dep't 1940); Bolles v. Toledo Trust Co., *supra* note 73; Hayes v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926) (also colorable). *Cf.* Gillette v. Madden, 280 App. Div. 161, 112 N.Y.S.2d 543 (3rd Dep't 1952); Radecki v. Radecki, 279 App. Div. 1137, 112 N.Y.S.2d 764 (4th Dep't 1952); Getz v. Getz, 101 N.Y.S.2d 757 (Surr. Ct. 1950); In re Cohen's Will, 90 N.Y.S.2d 776 (Surr. Ct. 1949); In re Kellas Estate, *supra,* note 73; Estate of Rosenfeld, N. Y. Sur., N. Y. L. J. 9 Feb., 1939, 1 P.H. Unreported Trust Cases, ¶25,275. The same transfer may be "illusory" with respect both to the wife's rights under a separation agreement and her rights under section 18 of the New York Decedent Estate Law. In the former situation she sues as a creditor. In re Sanchez' Estate, 58 N.Y.S.2d 230 (Surr. Ct. 1945). Also see Bitzenberg v. Bitzenberg, 360 Mo. 70, 78–79, 226 S.W.2d 1017, 1022 (1950) (dictum that an antenuptial transfer was illusory); Courts v. Aldridge, 190 Okla. 29, 120 P.2d 362 (1941) (antenuptial; held "illusory," and other colorful adjectives).

A recent Virginia case uses "illusory" as a synonym for "testamentary." Bickers v. Shenandoah Valley Nat. Bank, 197 Va. 145, 88 S.E.2d 889, 895, 897 (1955), *rehearing denied,* 197 Va. 732, 90 S.E.2d 865 (1956), 42 VA. L. REV. 256 (1956).

In the following cases the transfer was held not to be illusory: Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952) (joint tenancy; Van Devere v. Moore, 243 Minn. 346, 67 N.W.2d 664 (1954) (sale at low price); Schmidt v. Rebhann, 108 N.Y.S.2d 441 (Sup. Ct. 1951), *complaint dismissed on merits,* 117 N.Y.S.2d 840 (Sup. Ct. 1952) (transfer of apartment building); Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (Sup. Ct. 1948), *aff'd without opinion,* 274 App. Div. 1036, 85 N.Y.S.2d 917 (1st Dep't 1949) (U. S. savings bonds and joint bank account). *Cf.*

Nor can it be said that the illusory transfer test is open to the charge of being too unpredictable. Of course, there are various degrees of control over administration of a trust – but not too many.[75] To initiate or veto investments, sales, and the like; to act as co-trustee; to vote stock; to "use, occupy, manage, control, improve and lease the land in any manner and for any purposes he might desire"; [76] to state that the trustees' powers are to be exercised "in such manner only as the settlor shall from time to time direct in writing." [77] These and other phrases constitute reasonably plain guidemarks on the road to complete ownership. The courts should have little difficulty in defining what is permissible. To be sure, a settlor may have factual control without its legal counterpart; [78] subtleties of conveyancing may disguise actual

United Building and Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950); In re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122 (1st Dep't 1951), *aff'd without opinion,* 304 N.Y. 598, 107 N.E.2d 87 (1952); Burtt v. Riley, 260 App. Div. 899, 22 N.Y.S.2d 972 (3d Dep't 1940), *motion for leave to appeal denied,* 260 App. Div. 976, 24 N.Y.S.2d 159 (3d Dep't 1940); Schenectady Trust v. Seward, 21 N.Y.S.2d 815 (Sup. Ct. 1940). Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S.2d 648 (3d Dep't 1939), *motion for leave to appeal denied,* 256 App. Div. 1026, 11 N.Y.S.2d 547, *aff'd without opinion,* 281 N.Y. 760, 24 N.E.2d 20 (1939). Also see Weeks v. Weeks, 265 App. Div. 942, 38 N.Y.S.2d 583 (2d Dep't 1942); In re Barthold's Estate, 171 Misc. 625, 13 N.Y.S.2d 346 (Surr. Ct. 1939).

On the illusory trust doctrine in New York since the Halpern Case, see pp. 124–127, *infra.*

[75] RESTATEMENT, TRUSTS §185 (1935) makes a distinction between powers of control retained by the settlor that are of a fiduciary nature—and therefore subject to enforcement by the court—and those other broader powers which are said to be for the benefit of the settlor alone, and over which the court has consequently no jurisdiction. In a leading case in which the settlor was given almost complete powers of control, Cardozo, J., remarked that "his discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust." Carrier v. Carrier, 226 N.Y. 114, 712, 123 N.E. 135, 858 (1919). Significantly, no power to revoke had been reserved in that case. The distinction under discussion has apparently never been considered in connection with the problem of deciding when a trust becomes testamentary.

[76] Kelly v. Parker, 181 Ill. 49, 54 N.E. 615 (1899).

[77] Newman v. Dore, 275 N.Y. 371, 377, 9 N.E.2d 966 (1937).

[78] A distinction should be made between control as retained and control as exercised. We are concerned only with the former. Formal re-

ownership. For instance, an irrevocable trust may by prearrangement be revocable. But that is the job of equity: to distinguish the essence from the externals.

There is, however, a disturbing lack of logic in the control rationale, which affects both the Restatement "testamentary" test and the illusory trust test. These tests effect an unrealistic deëmphasis of the power to revoke. Standing alone, or in combination with retention of the income for life, this power is not deemed to constitute excessive "control." [79] It is only when the power to revoke and the retention of income for life are combined with extreme control over administration that the transfer will be deemed testamentary or illusory. And yet of the three factors mentioned, it is the power to revoke that gives the settlor the greatest substantial control.[80]

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tention of control does not necessarily mean that actual control will be exercised. A settlor may retain ironclad control, paper-wise, but he may rely utterly on the trustee's experience. That is the trustee's job: to administer. Contrariwise, a settlor who has retained only the power to revoke and the income may in actuality dominate the trustee. In Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944), apparently the settlor's only formal "control" in trust No. 520 lay in the power to revoke and to change or restrict the trustee's powers. The trustee was thus in complete administrative control, and in charge of investments. We are told, however, that the settlor used this trust as "kind of a trading account, giving . . . instructions to sell certain stocks or purchase certain stocks." In fact, it was argued for the widow that Bolles could control the administration of the trust by a telephone call or a mere nod of the head. Transcript of record, p. 19.

Continued practical control may also be exercised when the grantor continues to live in the house that has been conveyed. *Cf.* Schmidt v. Rebhann, 108 N.Y.S.2d 441 (Sup. Ct. 1951), 117 N.Y.S.2d 840 (Sup. Ct. 1952) (transfer of apartment house few weeks before death to decedent and another as joint tenants with right of survivorship held not illusory). Also see Smith v. Smith, 22 Colo. 480, 46 Pac. 128 (1896); Goewey v. Hogan, 102 N.Y.S.2d 339 (Sup. Ct. 1951).

[79] *But cf.* Newman v. Dore, *supra* note 77; Bolles v. Toledo Trust Co., *supra* note 78.

[80] The decisive influence of the power to revoke is brought out in the following evasion cases: United Building & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946) (trust); Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905) (trust); Bee Branch Cattle Co. v. Koon, 44 So. 684 (Fla. 1949) (trust); Williams v. Collier, 120 Fla. 248, 162 So. 868 (1935) (trust); Smith v. Hines, 10 Fla. 258 (1863–4) (bill of sale); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944) (trust); Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914) (trust deed);

Having the power to recapture the assets, to administer the *coup de grâce,* it would seem that the settlor has all the control he needs over both the trust assets and the trustee. Is it fair to say, with reference to the trustee, that the possibility of loss of business acts as a sword of Damocles suspended in the area of the corporate ledgers? [81] Possibly not. Possibly its power to coerce can be exaggerated. The trustee's duty is to act for the best interests of the beneficiaries, regardless of the consequences. In most jurisdictions, upon revocation of the trust, the trustee would lose only the future commissions on income; he would receive his commission on principal upon

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Radecki v. Radecki, 279 App. Div. 1137, 112 N.Y.S.2d 764 (4th Dep't 1952) (deed); Spafford v. Pfeffer, 179 Misc. 867, 870, 39 N.Y.S.2d 831 (Sup. Ct. 1943), *appeal dismissed by default,* 67 N.Y.S.2d 488 (2d Dep't 1947) (deed); Krause v. Krause, 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 32 N.E.2d 779 (1941) (deed); Morrison v. Morrison, 99 Ohio App. 203, 132 N.E.2d 233 (1955) (trust); Bolles v. Toledo Trust Co., *supra* note 78 (trust); Longacre v. Hornblower & Weeks, 83 D.&C. 259 (Pa. 1952) (joint tenancy). *Cf.* Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952); Whalen v. Swircin, 141 Neb. 650, 4 N.W.2d 737 (1942); Thomas v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97 (3d Dep't 1954); In re Cohen's Will, 90 N.Y.S.2d 776 (Surr. Ct. 1949); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd,* 147 Ohio St. 437, 72 N.E.2d 378 (1947).

A line of Virginia cases stresses irrevocability. In Lightfoot's Ex'rs v. Colgin, 19 Va. (5 Munf.) 42 (1813) the settlor transferred a large part of his personalty in trust, reserving a power of sale. The court assumed that the trust was irrevocable and sustained the transfer. Also see Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850) (power to sell with accountability for proceeds unless substitute asset purchased); Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909). *But see* Bickers v. Shenandoah Valley Nat'l Bank, 197 Va. 145, 88 S.E.2d 889 (1955), *rehearing denied,* 197 Va. 732, 733, 90 S.E.2d 865, 866 (1956).

[81] In re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122, (1st Dep't 1951), *aff'd without opinion,* 304 N.Y. 598, 107 N.E.2d 87 (1952), in which a revocable trust was held not to be testamentary although the settlor was a co-trustee. Van Voorhis, J., dissented, stating that a settlor who was co-trustee could be "assured of having his own way," because if thwarted he could revoke the trust. He reiterated the following excerpt from the respondent's brief: ". . . It is almost a uniform practice for a corporate co-trustee, not only to conform to the necessity of consulting its individual settlor-co-trustee as to investments, etc., but on any difference of opinion between them to abide by the settlor's judgment, providing it is within the realm of prudence." *Id.* at 159, 108 N.Y.S.2d at 129.

termination of the trust.[82] And from the settlor's viewpoint, in addition to the extra commissions, the cost of revocation will be increased by state taxes on the transfer of securities, and in isolated instances by a revocation fee.[83] Nevertheless, the settlor may by prearrangement with the trustee have the commission reduced in order to minimize the cost of revocation; or he may include a provision that the trustee is to account only to the settlor. Despite the high cost of revocation, the fact remains that "a settlor who has reserved a power of revocation . . . has an interest which is, in effect, equivalent to ownership." [84] Complete ownership is at all times attainable by a stroke of his own pen.[85]

[82] Under a pay-as-you-go scheme, of course, the trustee would lose all further commissions on both principal and income.

[83] As in Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S.2d 648 (3d Dep't 1939), *motion for leave to appeal denied,* 256 App. Div. 1026, 11 N.Y.S.2d 547, *aff'd without opinion,* 281 N.Y. 760, 24 N.E.2d 20 (1939).

[84] Scott, "The Effects of a Power to Revoke a Trust," 57 HARV. L. REV. 362, 366 (1944).

[85] It is probable that most settlors consider themselves to be in actuality the owner of the property in a revocable trust. "A simple explanation of most of this testimony is that Kerwin knew that he had reserved the power to alter, amend or revoke the trust agreements, and concluded that that reserved power left him substantially the master of the trust property." Kerwin v. Donaghy, 317 Mass. 559, 570, 59 N.E.2d 299, 306 (1945).

There are other areas of the law in which the power to revoke a trust may be deemed to equate ownership. The most obvious example, which we need not labor, lies in the tax field. Creditors, by statute in some jurisdictions, may reach the trust corpus if the power to revoke was retained. See Scott, *supra* note 84, for a list of the statutes. For a discussion of the Ohio statute, see Alexander, "Certain Problems Confronting Creditors When a Revocable Trust Accomplishes Succession," 31 MICH. L. REV. 449 (1933); and see Schofield v. Cleveland Trust Co., 135 Ohio St. 328, 21 N.E.2d 119 (1939), decided after Alexander's article was written, discussed *supra* notes 35, 69. In the absence of a statute it is doubtful if a creditor could take advantage of the power to revoke, unless, of course, the trust was a fraudulent conveyance, or the settlor was also the beneficiary. Further, when the settlor of a revocable trust consents to a breach of trust, the fact that the settlor has the power to revoke prevents the beneficiaries from surcharging the trustee. Scott, *supra* note 84; see City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674 (1943), *reargument denied,* 293 N.Y. 858, 59 N.E.2d 445 (1944), *aff'g,* 264 App. Div. 429, 35 N.Y.S.2d 870, 265 App. Div. 863, 38 N.Y.S.2d 245 (1942). Presumably the reasoning is that the

And there is another unfortunate aspect of the illusory transfer doctrine. Most courts, even in jurisdictions that purport to follow the doctrine, do not practice what they preach. An analysis of the evasion cases reveals a significantly high correlation between the result actually reached and the result dictated by the apparent "equities" in the case.[86] In other words, the courts, consciously or otherwise, are influenced by factors other than mere retention of control. But the courts already committed to the "control" rationale naturally tend to announce the decision in terms of the control factor.[87] In many cases violence has been done to the doctrine in order to square the result with the doctrine.[88] The

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power to revoke puts the settlor in the driver's seat, hence his wishes should prevail; otherwise he would be put to the needless expense of revocation, and creation of another trust.

[86] See Chap. 11, *infra.*

[87] The New York cases of the pre-Halpern era naturally regarded control as a definitive factor. See, *e.g.,* Goewey v. Hogan, 102 N.Y.S.2d 339 (Sup. Ct. 1951) (deed); Spafford v. Pfeffer, 179 Misc. 867, 39 N.Y.S.2d 831 (Sup. Ct. 1943), *appeal dismissed by default,* 67 N.Y.S.2d 488 (2d Dep't 1947) (transfer of farm); Steixner v. Bowery Sav. Bank, 86 N.Y.S.2d 747, (Sup. Ct. 1949) (Totten trust); Marano v. LoCarro, 62 N.Y.S.2d 121 (Sup. Ct. 1946), *aff'd,* 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946) (transfer of shares in realty company); Burns v. Turnbull, 37 N.Y.S.2d 380 (Sup. Ct. 1952), *rev'd mem.,* 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep't 1943), *reargument granted,* 267 App. Div. 986, 48 N.Y.S.2d 453 (2d Dep't), *aff'd on reargument mem.,* 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep't 1944), *motion to dismiss appeal denied,* 294 N.Y. 809, 62 N.E.2d 240, *aff'd without opinion,* 294 N.Y. 889, 62 N.E.2d 785 (1945) (trust); Krause v. Krause, 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div., 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 32 N.E.2d 779 (1941) (Totten trust); Schnakenberg v. Schnakenberg, 176 Misc. 312, 27 N.Y.S.2d 270 (Sup. Ct. 1941), *aff'd,* 262 App. Div. 234, 28 N.Y.S.2d 841 (2d Dep't 1941) (trust); Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S.2d 648 (3d Dep't 1939), *motion for leave to appeal denied,* 256 App. Div. 1026, 11 N.Y.S.2d 547, *aff'd without opin.,* 281 N.Y. 760, 24 N.E.2d 20 (1939) (trust); Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937) (inter vivos trust); *cf.* Clavin v. Clavin, 41 N.Y.S.2d 377 (Sup. Ct. 1943), *aff'd,* 267 App. Div. 760, 45 N.Y.S.2d 937 (1st Dep't 1943) (antenuptial transfer; weird discussion of illusory trust doctrine).

[88] Substantial control existed, and was referred to, in the following cases in which the transfer was sustained: William v. Williams, 40 Fed. 521 (C.C.D. Kan. 1889) (transfer of *all* of husband's property to unlawful "wife"); Bullen v. Safe Deposit & Trust Co., 177 Md. 271, 9 A.2d

ensuing confusion in the case-law certainly does nothing to further the basic legislative policy. If anything, it constitutes a hazard for the husband who attempts to make an equitable inter vivos distribution to his children, particularly if the children are of a prior marriage. In other words, the estate planner cannot rely on the courts to say what they mean, or to mean what they say.

That courts following the "control" rationale *do* pay heed to other factors is exemplified by the *Newman* case itself. Despite its earlier strong protestations to the contrary,[89] the court seems interested in indications of fraudulent intent on the part of the husband.[90] The ultimate decision to label the husband's inter vivos trust "illusory" does not come until near the end of the judgment. The final paragraph justifies the decision by speaking of the husband's patently fraudulent intent. The trust, says the court, was "intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed." [91] And the concluding sentences

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581 (1939) (transfer of life insurance policies in trust); Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N.W.2d 458 (1942) (trust); Mitchell v. Mitchell, 177 Misc. 1050, 32 N.Y.S.2d 839 (Sup. Ct. 1942), *rev'd,* 265 App. Div. 27, 37 N.Y.S.2d 612 (1st Dep't 1942), *aff'd,* 290 N.Y. 779, 50 N.E.2d 106 (1943) (life insurance); Beirne v. Continental-Equitable Trust Co., 307 Pa. 570, 161 Atl. 721 (1932) (trust); Windolph v. Girard Trust Co., 245 Pa. 349, 91 Atl. 634 (1914) (trust).

Substantial control may also exist when the decedent spouse has transferred money into a joint bank account. Thus in Inda v. Inda, 32 N.Y.S.2d 1001 (Sup. Ct. 1941), *aff'd without opinion,* 263 App. Div. 925, 32 N.Y.S.2d 1008 (4th Dep't 1942), *aff'd,* 288 N.Y. 315, 43 N.E.2d 59 (1942), it was admitted throughout that because the husband kept the bank book and drew interest he had retained complete control. This type of transfer is usually sustained, however. See *infra,* Chap. 14:2.

Evidence of complete control is also irrelevant with reference to U.S. savings bonds. In re Kalina's Will, 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945), *motion to dismiss appeal granted by default,* 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946), discussed *infra,* p. 226.

[89] 275 N.Y. 371, 379, 9 N.E.2d 966, 968 (1937).

[90] See *id.* p. 378, 9 N.E.2d at 968, to the effect that the reserved rights "had no other purpose and substantially had no other effect" and also the last two sentences in the opinion, *id.* p. 381, 9 N.E.2d at 970: "In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near."

[91] *Id.* at 381, 9 N.E.2d at 969.

refer to (a) the proximity of the transfer to the date of death and *semble* (b) the fact that the husband transferred all his property: "In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near." [92]

[92] *Ibid.* In 1936 the First Department had used language that placed strong emphasis on intent to frustrate the statutory share: Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep't 1936). The husband, a few months before death, had transferred substantially all his property, either by way of absolute transfer or by Totten trust, and with retention of a life interest. The court stated that husbands and wives may not "strip themselves of their property for the sole purpose of depriving those that the statute intended to protect of their right to inherit" (*id.* at 122, 286, N.Y. Supp. at 817). Untermyer, J., dissented vehemently on the ground that the term "fraud" is meaningless "when applied to a disposition by the absolute owner of property which is intended to prevent it from benefitting a party who has acquired no interest therein." *Id.* at 125, 286 N.Y. Supp. at 821. The case apparently was settled before it reached the court of appeals; see 46 YALE L. J. 884, 885, note 3 (1937); *cf.* Hellstern v. Gillett, 1 P.H. Unreported Trust Cases, Para. 25, 233 (N.Y. 1937) (decided before the court of appeals decision in Newman v. Dore, *supra* note 89); In re Kellas' Estate, 40 N.Y.S.2d 655, 663, *aff'd,* 267 App. Div. 924, 1006, 46 N.Y.S.2d 884, *aff'd on other grounds,* 293 N.Y. 908, 60 N.E.2d 34 (1944).

Similar emphasis may be found in Schnakenberg v. Schnakenberg, 176 Misc. 312, 27 N.Y.S.2d 270 (Sup. Ct.), *aff'd,* 262 App. Div. 234, 28 N.Y.S.2d 841 (2d Dep't 1941). The resulting confusion in the lower courts is indicated by Burns v. Turnbull, 37 N.Y.S.2d 380 (Sup. Ct. 1942), *rev'd mem.,* 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep't 1943), *reargument granted,* 267 App. Div. 986, 48 N.Y.S.2d 453 (2d Dep't 1944), *aff'd on reargument mem.,* 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep't 1944), *motion to dismiss appeal denied,* 294 N.Y. 809, 62 N.E.2d 240 (1945), *aff'd without opinion,* 294 N.Y. 889, 62 N.E.2d 785 (1945). Here the wife executed a trust eleven weeks before death. She designated herself as one of the two trustees, retained the power to appoint trustees and remove them, retained the power to revoke, and retained "exclusive control over the management of the trust funds." The trial court, in upholding the trust, went to some pains to emphasize that motive should be irrelevant, citing Newman v. Dore, but concluded by stating that since there was "no proof to show the settlor's state of mind at or before the trust's execution. . . . [C]onsequently it cannot be decided that her act in setting up the trust was not in good faith." The Second Department reversed, holding the trust void as being illusory, with no mention of the intent factor, or of the trial court's trenchant remarks on the necessity of preserving freedom of alienation. The Court of Appeals affirmed without opinion. In re Galewitz Estate, 206 Misc. 218, 223, 132 N.Y.S.2d 297, 302 (Surr. Ct. 1954), speaks also of "intent" and "fraud," citing, *inter alia,* both the Newman and the Halpern cases. But the decision of the Third Department in Thomas

But the main defect of the illusory transfer doctrine is a more serious one than a lack either of logic or consistency.[93] The test is too narrow. To say that the sole criterion of evasion is excessive control is to suggest that we must ignore all the other circumstances in the case. But if we ignore the other circumstances — the other "equities" — we may end up by deciding that a certain transfer is "illusory," and thus an evasion, even though common sense tells us it was *not* an evasion. Assume that H, a husband, is worth $40,000. Is not H's widow more seriously injured by an irrevocable inter vivos trust of $30,000 (non-illusory) than by a revocable inter vivos trust, with retention of control, of $3,000 (illusory)? [94] Should

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v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97 (3rd Dep't 1954), raises doubts, not only on the relevance of the "intent" factor to the Newman v. Dore doctrine but also on the validity of the doctrine itself. See Chap. 9, note 21, *infra*.

[93] Authority may even be found for the proposition that *any* retention of control would be fatal to the validity of the transfer, *e.g.*, Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887). The *Rabbitt* case is probably not authoritative today in Maryland; see Maryland cases listed in Table E, *infra*, p. 406. Conversely, some cases hold for the widow even though the transfer was irrevocable, *e.g.*, Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep't 1936); Lonsdale's Estate, 29 Pa. 407 (1857). For an outline of the elements of "control" in a transfer of land, *cf.* Courts v. Aldridge, 190 Okla. 29, 120 P.2d 362 (1941) (antenuptial transfer).

Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939) illustrates the "joint control" that is obtained when the settlor appoints himself as a co-trustee. Here the trustees had the power to manage, invest and reinvest, and the settlor had the income and the power to revoke. The widow was permitted to defeat this trust, but the court used the traditional Missouri test of intent to defraud, in anticipation of pending death. The court stated that for practical purposes the arrangement was testamentary: "We think it is apparent from the evidence that deceased realized he would not be able to exercise the power of revocation, use the joint control, nor live to enjoy this income." *Id.* at 1161, 130 S.W.2d at 617. This statement raises a question: if a transfer of substantially all a man's assets is made shortly before his death, at the expense of his deserving widow, of what relevance is the existence or otherwise of either or all of the income, power to revoke, control? Would not the trust in Newman v. Dore have been equally flagrant, equally a violation of the spirit of the forced share, if it had contained *none* of these factors?

[94] Under section 8 of the suggested model statute, in Chap. 22, the claimant would not be permitted to attack an *irrevocable* trust if it was made more than three years before death.

we not consider the *size* of the transfer, as well as retention of control? And why not consider the motive, among other factors? In rejecting intent ("motive") the court in the *Newman* case quoted Mr. Justice Holmes: "when an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."[95] What Holmes had in mind, of course, was that a transaction that does not infringe the letter of a statute may nevertheless be invalidated because it is repugnant to the basic legislative policy. Implicit in this notion is the not unreasonable assumption that in deciding whether a particular transaction is offensive to the spirit (as opposed to the letter) of a statute, all relevant circumstances must be considered. The court in the *Newman* case quite properly acknowledged that it should interpret legislation[96] so as to effectuate the purpose of the legislation (in this case to "increase protection of the surviving spouse"). This does not amount to "judicial legislation." But it was unfortunate that the court stressed retention of "control" and ignored other important factors such as the relative amount transferred, the relationship between the decedent and the donee, the financial circumstances of the widow, and the like.

Moreover, fraud should be fought with the net, not with the sword. A broad, flexible coverage is preferable to emphasis on a single point; for fraud, as the old tag goes, wears many faces. To become too specific in defining fraud (or "evasion") serves only to sharpen the wits of the transferor's counsel.

[95] Bullen v. Wisconsin, 240 U.S. 625, 630–31 (1915). In this case the Supreme Court upheld the imposition of the Wisconsin inheritance tax on an inter vivos transfer of securities to an Illinois trustee. Holmes stated that the court below "was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute. . . ."

[96] Involving in the Newman case a liberal interpretation of the word "estate."

CHAPTER 8

Tests That Stress The Motive For The Transfer

A number of decisions purport to test the validity of the transfer by reference to the decedent's "intent." Paradoxically, the very elusiveness of the "intent" concept has led most of the jurisdictions normally using that rationale to adopt a test that in practice pays more attention to the equities of the case than to the transferor's intent. The evidentiary factors that receive stress vary with the jurisdiction, as also does the degree of stress.

Before turning to the "intent" test and its variations, however, we will find it useful to examine some concepts that confuse the case-law in general, and the "intent" cases in particular. I refer to the ubiquitous passage from Kerr on Fraud and Mistake, and to the uses that are made of the term "fraud."

1. ORIGIN AND SIGNIFICANCE OF THE "KERR" PASSAGES

The groping attempt of an early writer to establish a working rule in the evasion field is partially responsible for our present-day confusion. A note in Kerr on Fraud and Mistake,[1] 1872 edition, had this to say: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband be *bona fide,* and no right is

[1] At p. 220. This edition has notes on American cases, by Orlando F. Bump.

reserved to him, though made to defeat the right of the wife, it will be good against her."

It will be noticed that this passage, which I shall label passage "A," purports to make four separate points: the transfer must be (a) *bona fide;* and it cannot be (b) merely colorable, or (c) attended with circumstances indicative of fraud on the rights of the wife, or (d) one in which a right is reserved. As we shall see later, the first three points sound very much like the modern "reality" test. The fourth point perhaps reflects the then prevailing views of the nature of a testamentary instrument. The cases cited for passage "A" are all cases in which the transfer was upheld.[2] In some of them possession was retained; in none was there a retention of the power to revoke.

Immediately following passage "A" is this sentence, which I shall call passage "B": "If the disposition of the property by the husband is a mere device or contrivance by which, not parting with the absolute dominion over the property during his life, he seeks at death to deny his widow the share in his estate which the law assigns to her, it will be ineffectual against her." Passage "B" apparently was intended as a qualification of passage "A." [3] It introduces a fifth notion, to wit,

[2] Stewart v. Stewart, 5 Conn. 317 (1824) (voluntary deed of all husband's realty; rationale: there can be no fraud when wife had no right); Dunnock v. Dunnock, 3 Md. Ch. 140 (1852) (separate maintenance; bill of sale of slaves with payment of consideration and transfer of possession); Cameron v. Cameron, 10 Smedes & M. 394 (Miss. 1848) (irrevocable deed of trust of slaves and other personalty, but retention of possession and control); Holmes v. Holmes, 3 Paige 363 (N.Y. 1832) (husband purchases realty from his son at a price greatly exceeding its value); Lightfoot v. Colgin, 19 Va. (5 Munf.) 42 (1813) (irrevocable deed of trust of slaves, retention of possession; dissenting judge urges custom of London cases, pointing out that both "control" and "intent" present).

[3] The claimant prevailed in all three cases cited by Bump for passage "B," *viz,* Hays v. Henry, 1 Md. Ch. 337 (1848); Reynolds v. Vance, 48 Tenn. 294 (1870) (intent, as qualified by "reasonableness"); Thayer v. Thayer, 14 Vt. 107 (1842) (intent; custom of London cases cited, containing the phrase "contrivances to evade the custom"). The second passage appears also in 30 C.J. *Husband and Wife* 524 (1923); 41 C.J.S. *Husband and Wife* 419 (1944); 13 R.C.L. *Husband and Wife* 1088 (1916.)

intent ("motive"), as indicated by the phrases "device," "contrivance," and "[transfer] by which . . . he seeks to deny his widow . . . [her] share." [4] The phrase "not parting with the absolute dominion" tends to reaffirm the caveat expressed in passage "A" that any reservation of a "right" would permit the widow to have the transfer set aside. Thus we find in the few lines of the two Kerr passages all three of today's popular rationales: (a) retention of control, (b) motive for the transfer, and (c) the "reality" of the transfer.

That both passages were influenced by the custom of London cases may be seen from *Hays* v. *Henry*,[5] cited by Kerr as authority for passage "B." In that case retention of possession was referred to as a "badge of fraud"; [6] and both passages concerned appear in the case almost verbatim. The modern courts, as well as the early courts, have utilized these passages to suit their convenience. Sometimes both will be quoted; [7] but usually the cases sustaining the widow's claim will quote merely passage "B," [8] and cases rejecting the claim will quote merely passage "A." [9] Nor is there any con-

[4] Dictum that this notion applies to antenuptial transfer cases: Geiger v. Merle, 360 Ill. 497, 510–11, 196 N.E. 497, 503 (1935), *cert. denied*, 296 U.S. 630 (1935). For antenuptial transfers, see Appendix C, *infra*.

[5] 1 Md. Ch. *337 (1848); see also Crain v. Crain, 17 Tex. 80 (1856) (extensive discussion of custom of London cases).

[6] Citing Smith v. Fellows, 2 Atk. 62, 26 Eng. Rep. 435 (1740); Hall v. Hall, 2 Vern. 276, 23 Eng. Rep. 779 (1692).

[7] Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905) (transfer of bonds valid although interest for life retained; both passages quoted); Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940) (valid; "reality" test); Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905) (valid); Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887) (invalid; collusion, retention of possession; both passages quoted, citing Hays v. Henry).

[8] Headington v. Woodward, 214 S.W. 963 (Mo. 1919) (invalid: "intent"); Newton v. Newton, 162 Mo. 173, 61 S.W. 881 (1901) (invalid; "intent"); Hays v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926) (invalid; illusory and colorable); *cf.* Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1940) (antenuptial transfer by husband to his sister, who acted as a "mere depository" of the funds); Manikee's Adm'x v. Beard, 85 Ky. 20, 2 S.W. 545 (1887) (invalid; "intent"); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891) (invalid; "intent"; custom of London cases cited).

[9] Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912) ("bona fide" transaction; not colorable because absolute and irrevocable);

sistency with respect to the "reservation of a right" phrase. It is only in the earlier cases that there is any disposition to penalize a mere retention of possession.[10] This factor should of course be irrelevant under modern conditions. But retention of the power to revoke was always regarded as significant.[11]

In summary, the two passages from Kerr appear to stem from the cases under the custom of London. Both passages contain qualifications, unrealistic by modern standards, on retention of a "right" or of an "interest." Although usually quoted separately, the passages were apparently intended to be interdependent. Thus the American evasion jurisprudence began with a hodge-podge rationale that stressed the "reality" of the transfer but which also referred to "control" and to the "intent" of the transferor. This wonder-mixture from Kerr is the staple fare of many a modern judicial offering. Needless to say, we encounter it frequently in decisions using the "intent" rationale.

2. Meanings of the Word "Fraud"

As might be expected, the catch-all phrase in the evasion cases is "fraud." A representative sampling of the cases indicates that the phrase has almost as many meanings as there are sands in the sea. The more common usages are as follows:

1. *"Fraud," as used with relation to antenuptial, or "eve of marriage" transfers.*[12] Here the phrase is employed in the

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Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908); Padfield v. Padfield, 78 Ill. 16 (1875) (intimation that power to revoke would make transfer "only colorable," apparently with passage "B" in mind); Small v. Small, 56 Kan. 1, 42 Pac. 323 (1895); Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953) ("reality"); Moedy v. Moedy, 130 Colo. 464, 276 P.2d 563 (1954); *cf.* Geiger v. Merle, 360 Ill. 497, 196 N.E. 497 (1935), *cert. denied,* 296 U.S. 630 (1935) (antenuptial agreement); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891) ("reality"); Young's Estate, 202 Pa. 431, 51 Atl. 1036 (1902) (no "intent").

[10] *E.g.,* Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887).

[11] *E.g.,* Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912).

[12] See Appendix C, *infra.*

more conventional sense of misrepresentations inducing detrimental reliance. For example, a prospective husband, having informed his fiancee that he owns certain real estate, conveys it secretly to another person just prior to the marriage. "Fraud," in this more culpable sense, is used also in connection with (a) transfers to evade alimony, and (b) transfers in anticipation of a reconciliation between spouses who have been separated.

2. *"Fraud," meaning a sham transfer.* A conveyance that is not operative as between the parties thereto will of course have no effect on the widow's rights.[13]

3. *"Fraud," or "actual fraud," as sometimes used to qualify the "reality" test.*[14] Perhaps these expressions refer to shams, but usually their meaning is obscure.[15]

4. *"Fraud," meaning intent to evade the widow's rights.* Some courts purport to test the validity of a transfer by reference to evasive intent. If the motive is to deprive the widow of her share, it is fraud. But most of these courts qualify this test in practice by stating that there is no fraud if the transfer was reasonable under the circumstances, regardless of the motive.[16] The cases using this "intent" test will be examined in detail later in this chapter.

5. *Fraud on the marital right.*[17] This term is used with

[13] The purported transfer in this situation is also said to be colorable; *infra,* p. 133.

[14] Conversely, another popular cliché is there can be no fraud when the wife has no "present interest" in her husband's property. An early example of this reasoning is found in Stewart v. Stewart, 5 Conn. 317 (1824); and it appears expressly or by implication in most of the more recent cases that deny relief to the surviving spouse.

[15] See, *e.g.,* the Pennsylvania cases, discussed *infra,* pp. 140–144. And the expression may be found in connection with an "intent" rationale. Thus in Estate of Sides, 119 Neb. 314, 324, 228 N.W. 619, 623 (1930), the court stated that reasonable gifts would be sustained "[I]n the absence of *positive fraud* (italics supplied). On the Sides case, see *infra,* text at note 33.

[16] "Motive" (described as "fraud") bobs up in individual cases in states whose courts purport to reject motive. See, *e.g.,* the New York cases, chiefly antedating Newman v. Dore, set out in Chap. 7, note 92.

[17] *Cf.* MODEL PROBATE CODE §33, *infra,* Chap. 19:2; Maryland cases, Table E, *infra.*

reference both to antenuptial and to postnuptial transfers. When it has reference to the postnuptial transfers, the transfer may or may not be accompanied by evidence of evasive intent on the part of the transferor.[18] In fact, for lack of a better term we could say that this expression approximates constructive fraud.[19] Frequently it represents a decision reached by a judicial process that is influenced by a variety of evidentiary factors, some of which may not even be referred to in the opinion.

3. The "Intent" Test

(a) *Introductory Remarks.* As might be expected, the courts have not been meticulously exact in referring to the "intent" factor. Consider the leading case of *Newman* v. *Dore,* in which the court tells us that "motive or intent is an unsatisfactory test of the validity of a transfer of property," [20] then announces a new rationale couched in terms both of motive and intent.[21] In ordinary usage "intent" denotes deliberate design or purpose, i.e., to make a transfer, whereas "motive" refers to the incentive that prompts such a transfer.[22] Thus the husband may intend to evade the forced share, but from a justifiable motive: e.g. that he thought he had already made a generous inter vivos provision for his wife, as was seen in *Bolles* v. *Toledo Trust Co.*[23] Probably all courts

[18] See, *e.g.,* the Kentucky cases, *infra,* section 3(4).

[19] That "fraud" depends on the reasonableness of the transfer, see Bee Branch Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949); Smith v. Hines, 10 Fla. 258 (1863–4); *cf.* Williams v. Collier, 158 So. 815 (1935), 120 Fla. 248, 162 So. 868 (1935). That it is a relative term, see Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914); *cf.* Stice v. Nevin, 344 Ill. App. 642, 101 N.E.2d 873 (1951); Boyle v. Smyth, 248 Ill. App. 57 (1928); York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922) ("fraud" not defined, but reasonable provisions otherwise for widow mentioned); Garrison v. Spencer, 58 Okla. 442, 160 Pac. 493 (1916) (transfer upheld even though *all* of husband's separate estate transferred); Farrell v. Puthoff, 13 Okla. 159, 74 Pac. 96 (1903).

[20] 275 N.Y. 371, 379, 9 N.E.2d 966, 968 (1937).

[21] "[W]hether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer." *Id.* at 379, 9 N.E.2d at 969. Also see p. 75, *supra.*

[22] Webster's New International Dictionary (20th ed. 1949).

[23] See *supra,* Chap. 7, text at note 39.

would concede that no inter vivos transfer would be valid for any purpose unless the execution thereof is accompanied by a determination ("intent") that is should be legally binding, and effective according to its terms. A "sham" transfer is objectionable because, being counterfeit or feigned, it lacks the requisite donative intent. When there *is* donative intent, the courts disagree, however, as to the relevance of the motive of the transferor; and the confusion is accentuated by the use in and out of context of such phrases as "intent," "motive," "fraud," "illusory," "colorable," "good faith," and the like.

Many cases purport to say that intent ("motive") is irrelevant.[24] Other cases explicitly [25] or by implication [26] use the

[24] "Intent" was given some stress in Brownell v. Briggs, 173 Mass. 529, 530, 54 N.E. 251, 252 (1899). The intent (motive) factor was declared irrelevant, however, in subsequent Massachusetts cases; *e.g.,* Roche v. Brickley, 254 Mass. 584, 150 N.E. 866 (1926); and in Kerwin v. Donaghy, 317 Mass. 559, 571, 59 N.E.2d 299, 306 (1945); the Brownell case, on the intent aspect, was declared "no longer controlling." See also Ascher v. Cohen, 333 Mass. 397, 131 N.E.2d 198 (1956); Redman v. Churchill, 230 Mass. 415, 119 N.E. 953 (1918); Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904) (wife puts her property out of husband's reach "with grim determination"). Another determined wife was successful in the delightful case of Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944). Said the court: "It is evidence in favor of the creation of a present interest in Patrick [a brother in Ireland] that without it the purpose of his sister Mary to keep the deposits out of her estate and to defeat any inheritance by her husband . . . could not be accomplished." The Massachusetts cases are also discussed, in connection with the "reality" rationale, in Chap. 9, note 3.

[25] Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902); Van Devere v. Moore, 243 Minn. 346, 67 N.W.2d 664, (1954); Goewey v. Hogan, 102 N.Y.S.2d 339 (Sup. Ct. 1951); Spafford v. Pfeffer, 179 Misc. 867, 39 N.Y.S.2d 831 (Sup. Ct. 1943), *appeal dismissed,* 67 N.Y.S.2d 488 (2d Dep't 1947); Windolph v. Girard, 245 Pa. 349, 91 Atl. 634 (1914); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891).

[26] United Bldg. and Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); Gillette v. Madden, 280 App. Div. 161, 112 N.Y.S.2d 543 (3d Dep't 1952); Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (Sup. Ct. 1948); *aff'd without opinion,* 274 App. Div. 1063, 85 N.Y.S.2d 917 (1st Dep't 1949); *accord,* Hirschfield v. Ralston, 66 N.Y.S.2d 59 (Sup. Ct. 1946); *cf.* Clavin v. Clavin, 41 N.Y.S.2d 377, 379 (Sup. Ct. 1943), *aff'd without opinion,* 267 App. Div. 760, 45 N.Y.S.2d 937 (1st Dep't 1943) (antenuptial transfer); Inda v. Inda, 32 N.Y.S.2d 1001 (Sup. Ct. 1941), *aff'd without opinion,* 263 App. Div. 925, 32 N.Y.S.2d 1008 (4th Dep't

reasoning, popularized in *Newman* v. *Dore,* that the only "intent" which is revelant is the intent to divest in "good faith," and also that "there can be no fraud where no *right* of any person is invaded." [27] Less extreme are those cases that consider "intent" to be irrelevant unless the transfer is "colorable," [28] or attended with circumstances indicative of "fraud," [29] or coupled with retention of some rights in the property transferred.[30] Some cases state that "intent," i.e., motive, is relevant if coupled with collusive participation by the donee; [31] and other cases intimate it would be decisive if coupled with collusion.[32]

1942), *aff'd,* 288 N.Y. 315, 318, 43 N.E.2d 59, 61 (1942) (if a valid joint tenancy is created, "the actual intent . . . makes no difference"); Robb v. Washington & Jefferson College, 103 App. Div. 327, 349, 93 N.Y.S. 92 (1st Dep't 1905), *modified and aff'd,* 185 N.Y. 485, 78 N.E. 359 (1906); Courts v. Aldridge, 190 Okla. 29, 120 P.2d 362 (1941) (antenuptial transfer).

[27] Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940).

[28] See the Colorado cases, *infra,* p. 135; Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (Sup. Ct. 1948), *aff'd without opinion,* 274 App. Div. 1036, 85 N.Y.S.2d 917 (1st Dep't 1949). In De Noble v. De Noble, 331 Pa. 273, 277, 200 Atl. 77, 79 (1938), the court said: "In determining the question of intent, actual fraud is the indispensable foundation and is not established merely by proving that the husband's purpose is to deprive the wife of her distributive share in his estate as widow. . . . Such fraud would exist, for example, if the transfer were a colorable one, the husband retaining a *concealed* interest in the property" (italics supplied).

[29] In re Rynier's Estate, 48 LANC. L. REV. 475, *aff'd,* 347 Pa. 471, 32 A.2d 736 (1943).

[30] Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940); Brown v. Fidelity Trust Co., 126 Md. 175, 94 Atl. 523 (1915); Hays v. Henry, 1 Md. Ch. 337 (1848); MacGregor v. Fox, 280 App. Div. 435, 437, 114 N.Y.S.2d 286, 287–88, (1st Dep't 1952) (purporting to follow Newman v. Dore, but stating that the reservation of enumerated rights "made plain her intention to take away from her spouse his contingent expectant estate"; Schmidt v. Rebhann, 108 N.Y.S.2d 441 (Sup. Ct. 1951), *complaint dismissed on merits,* 117 N.Y.S.2d 840 (Sup. Ct. 1952); Marano v. LaCarro, 62 N.Y.S.2d 121, *aff'd,* 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946); *cf.* Dunnock v. Dunnock, 3 Md. Ch. 140 (1852).

[31] Jaworski v. Wisniewski, 149 Md. 109, 131 Atl. 40 (1925) (retention of control also mentioned); Potter v. Braum, 294 Pa. 482, 144 Atl. 401 (1928).

[32] Brewer v. Connell, 30 Tenn. 343 (1851); London v. London, 20 Tenn. 1 (1839); *accord,* In re Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894).

As mentioned at the beginning of the chapter, the courts that place formal emphasis on the decedent's motive tend in practice to be governed by the equities of the case. Naturally, these courts have found it convenient to describe "intent" by reference to its objective manifestations. Some or all of the circumstances of the transfer will be weighed before reaching a conclusion as to the validity of the transfer. The conclusion, however, is announced in the language of the "intent" factor. We may use as an example the Nebraska case, *In re Estate of Sides.*[33] Here the testator made inter vivos gifts of about one half his estate to children of a former marriage, in each instance taking a note bearing interest at 4 per cent, the note to be cancelled at his death. The court construed it to be an absolute inter vivos gift, with reservation of a 4 per cent annuity. As such, said the court, it was not testamentary, and would be valid unless "the gift was made by the father with the intent to defraud his surviving widow and was made under such circumstances as to amount to fraud, either actual or constructive, against her under the laws . . . of Nebraska."[34] As to "fraud," the court stated that "substantially all authority is to the effect that the question of good faith is controlling. If the transfer of personal property by the husband during his lifetime is a mere device and means by which he retains to himself the use and benefit of the property during his lifetime, and at his death seeks to deprive the widow of her distributive share, it is to be regarded as fraudulent as to the wife."[35] Similar language occurs in many other cases,[36] and generally has led to a test

[33] 119 Neb. 314, 228 N.W. 619 (1930); *cf.* Bestry v. Dorn, 180 Md. 42, 22 A.2d 552 (1941), and subsequent Maryland cases through Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954). See Table E, *infra.*

[34] 119 Neb. 314, 321, 228 N.W. 619, 622 (1930).

[35] *Id.* at 323, 228 N.W. at 622. The court cites Allen v. Henggeler, 32 F.2d 69 (8th Cir. 1929). The Allen case, however, is merely a tax case in which the cryptic statement is made that a husband may deal with his own property without his wife's consent, with some statutory limitations ". . . and, perhaps, he cannot give away or dissipate property in fraud of her." *Id.* at 72.

[36] See discussion p. 99, *supra.*

centered on "good faith divestment," i.e., excluding questions of motive. In the *Sides* case, however, the court said that on the issue of fraud "the burden of proof is upon the surviving widow to establish by a preponderance of the evidence that, in making these gifts to his children, the father was actuated by *bad motive and fraudulent intent,*[37] and that the entire transaction was a mere device by which he sought to defraud her." [38] Scrutinizing the decedent's motive, the court found no fraud, in view of "the relationship of all the parties; the amount of the Sides estate and its history . . . the value of the gifts; the time and manner of making them and the extent to which the children participated." [39]

The court in the *Sides* case, then, would have us look at the equities. If the transfer is reasonable (e.g., in this instance,

[37] Italics supplied.

[38] 119 Neb. 314, 323, 228 N.W. 619, 622 (1930). The court cites Knull v. Arman, 110 Neb. 70 (1923), but the *Knull* case dealt with evidentiary rules in deciding whether a transfer from testator was a gift or a loan and did not refer to the problem under discussion.

[39] 119 Neb. 314, 323, 228 N.W. 619, 622–23 (1930). The sympathies of the court may be discerned from the following gallantry: "It is but natural to assume that in the closing days of his life this old man, in memory, returned often to the scene of his early struggles and lingered long with the devoted young wife who so willingly surrendered herself to every demand of poverty and young romance. Here again, no doubt, were rekindled the smoldering fires of parental devotion. Inspiration was not lacking, and these gifts appear to have been prompted by generous motives arising naturally from the relationship of parent and child. Under all the circumstances, it cannot be said that these gifts were unreasonable, but rather they appear to have been in complete accord with the natural inclinations of the human heart. In the absence of positive fraud, such [gifts] will not be disturbed." 119 Neb. at 324, 228 N.W. at 623.

In an early Ohio case, McCammon v. Summons, 2 Disn. 596 (Ohio 1859) the court, making some liberal deductions from the custom of London cases (see p. 54, *supra*) analogized the wife's claim to that of a quasi creditor, and held that a husband could not defeat his wife's rights by a deed in trust of all his personalty to grandchildren. The court intimated the wife would prevail even if the deed has been delivered and irrevocable, as the evidence indicated it had been executed with intent to defeat the wife's rights. The equities in the McCammon case were apparently against the wife, but her claim was upheld although the court's sympathy lay with the "heart-broken man . . . separated from his wife." *Id.* at 600. Compare, however, the later Ohio cases, *supra,* Chap. 7, in text following note 39.

to provide for children of a former marriage), there is no "intent," no fraud. But if a husband were to give "the other woman" a substantial part of his estate, to the detriment of a deserving wife, it would appear that on the *Sides* case rationale the transfer could be set aside; whereas under the "good faith" test of *Newman* v. *Dore* it would be valid, unless such control was retained as to render it "illusory"; and under the "reality" doctrine of the *Halpern* case it would clearly be valid.

(b) *Variations of the "Intent" Test.* Emphasis on the equities of the case in determining the decedent's "intent" appears in varying form in a number of jurisdictions. Vermont, for instance, appears to pay some heed to the equities; but New Hampshire seems to have slipped into a more subjective approach. The Tennessee cases, chiefly older ones, approximate something like the rule in the *Sides* case, at least with reference to realty. Kentucky raises a presumption of "intent" (or "fraud") in certain circumstances; and the Missouri cases speak of "intent" in terms, *inter alia,* of the proximity of the transfer to the date of death.

(1) The Vermont Cases. The Vermont cases portray a long history of judicial indecision on the significance of "intent." The earliest case is *Thayer* v. *Thayer,* in 1842.[40] Here the court drew analogies from the custom of London and permitted the widow to prevail against a voluntary transfer of the husband's property, made in his last sickness, in trust for his children by a former marriage. The husband had taken a lease on the property that was conveyed. The rationale is not entirely clear, but the court stresses the "bad faith" (motive) of the husband.[41] Half a century later, in *Nichols* v. *Nichols*[42] a transfer for some consideration was held to be

[40] 14 Vt. 107 (1842).

[41] "[I]f her claims to dower are to depend upon the caprice of the husband, and to be superseded by his conveyance, concocted and executed *mala fide,* and without consideration, our statutory provision might well receive our severest animadversion." *Id.* at 119. *Cf.* Green v. Adams, 59 Vt. 602, 10 Atl. 742 (1887) (transfer to avoid alimony).

[42] 61 Vt. 426, 18 Atl. 153 (1889).

inoperative against the wife's marital rights, the court stating that the passage of consideration "is of no importance if the deed in fact was made with . . . fraudulent intent. . . ." In concluding, the court remarked that "the intent to defeat the marital rights of the oratrix by both grantor and grantees in the deed in question is necessarily presumed from their knowledge that such rights would be defeated by the conveyance. Both are presumed to have intended the natural results of their acts." In other words, intent to defraud is governing and need not be proved — it will be presumed.

In *Dunnett* v. *Shields*,[43] however, the court stated that there should be no presumption of fraud in these cases. Such a rule, it said, "would make the validity of the transfer depend upon an *implied* intent, while the true rule is that it is only an *actual* intent to defeat the wife's rights that vitiates it." And this rejection of the Nichols rule was repeated in *Patch* v. *Squires*,[44] the court going so far as to say that "The presumption is in favor of innocence and not of guilt." [45] Although the *Patch* case purports to reiterate the "actual intent" rule, there is some indication that the intent to defeat the wife's rights will not be considered culpable if the transfer is a reasonable one under the circumstances.[46] In other words, "intent" may well be a mere shorthand symbol for a judicial conclusion that in reality has been reached by considering other factors in addition to motive.

(2) The New Hampshire Cases. New Hampshire, of all the jurisdictions under discussion, comes the closest to evolving a purely subjective theory. Oddly enough, an early New

[43] 97 Vt. 419, 123 Atl. 626 (1924).
[44] 105 Vt. 405, 165 Atl. 919 (1933).
[45] *Cf.* Tillison v. Tillison, 95 Vt. 535, 116 Atl. 117 (1922).
[46] "The plaintiff had not lived with or supported his wife for over twenty-six years. The money came to Mrs. Patch by gift from her mother. The donees were her kin who had lived in her household, and some, if not all, were caring for her in her illness. The chancellor might well, as he probably did, apply to all the facts and circumstances this test: Would the ordinary person in Mrs. Patch's situation have made the gifts in question?" (citing Evans v. Evans, 78 N.H. 352, 100 Atl. 671, 672). 105 Vt. 405, 411, 165 Atl. 919, 921 (1933).

Hampshire case, *Walker* v. *Walker,*[47] used a subjective test that hinged on an enquiry into the reasonableness of the transfer. And in *Evans* v. *Evans* [48] the court, although using a subjective test, qualified it with the statement that the transfer would be illegal, "no matter what his purpose for making the gift may have been, if making it when, as, and for the purpose he did, was an *unreasonable* [49] thing to do." But this dalliance with "reasonableness" was stopped by *Ibey* v. *Ibey,*[50] in 1947. In that case a husband bought United States savings bonds, payable at death to children and grandchildren. The trial court found intent to deprive the wife of her distributive share. The widow was given a constructive trust on the bonds, to the extent of the distributive share; and the court went out of its way to state that gifts of husbands are not "subject to any standard of reasonableness apart from the matter of fraudulent intent. In so far as *Evans* v. *Evans* . . . applied such a separate test, it is overruled."

(3) The Tennessee Cases. Tennessee is one of the few states having a statute affecting our problem. Enacted originally in 1784, it states that "Any conveyance made fraudulently to children or others, with an intent to defeat the widow of her dower, or distributive share, shall be voidable, and such widow shall be entitled to dower in the land so fraudulently conveyed, as if no conveyance had been made." [51]

An early case intimated that under the Act "every conveyance founded merely upon meritorious consideration is as much fraudulent and void against the widow as if the fraudulent intention were established by positive proof." [52] This as-

[47] 66 N.H. 390, 395, 31 Atl. 14 (1891).

[48] 78 N.H. 352, 100 Atl. 671 (1917).

[49] Italics supplied.

[50] 93 N.H. 434, 43 A.2d 157 (1945), *exceptions overruled,* 94 N.H. 425, 55 A.2d 872 (1947).

[51] Tenn. Code Ann. §31-612 (Williams 1956). §31-613 confers similar rights on the husband. §31-601 gives the widow dower in the land "of which her husband died seized."

[52] Hughes v. Shaw, 8 Tenn. 314, 323 (1827). The Hughes case also makes this interesting statement: "The effect of the proof increased in proportion to the amount of the estate conveyed, compared with the

sertion is akin to the view of the Vermont court, in the *Nichols* case, that intent may be presumed. In *McIntosh* v. *Ladd,*[53] however, the court expressly repudiated this notion, on the ground that it would force those claiming under the transfer to show that it was "fair, and for a valuable consideration." Moreover, the court suggested that the reasonableness of the transfer would bear on the question of the decedent's "intent." The act of 1784, it said, was not meant to affect "*bona fide* gifts, whereby the husband actually and openly divests himself of his property, and the enjoyment of it in his lifetime, in favor of children and others, thereby making, according to his circumstances and the situation of his family, a just and reasonable present provision for persons having meritorious claims on him, and with that view, and not with the view to defeat, nor for the sake of diminishing, the wife's dower." [54]

In *Reynolds* v. *Vance* [55] a conveyance of all the husband's realty to his children was held, under the test of *McIntosh* v. *Ladd,* to be subject to the wife's claim. The deed mentioned a consideration of $3,000 but actually was only for $300; there was provision for immediate possession by the grantees, but the husband retained possession for eight years until death; and the deed, although acknowledged for recording, was not recorded until after the husband's death.[56]

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amount retained." *Id.* at 319. Another early case, Brewer v. Connell, 30 Tenn. 343 (1851), stated that if the donee participates in the fraud the transaction is void as to the wife, even if the donee paid a fair price for the land. *Cf.* London v. London, 20 Tenn. 1 (1839). As to participation by the donee, see *infra,* Chap. 10:2(e).

[53] 20 Tenn. 445 (1840).

[54] *Id.* at 451, quoting from Littleton v. Littleton, 1 Dev. & Bat. 330 (N.C. 1835), and stating that the Supreme Court of North Carolina is "a court of at least equal authority with our own upon the construction of this statute."

[55] 48 Tenn. 294 (1870).

[56] Presumably in Tennessee nowadays retention of possession or life income would not prevent a deed from being operative, either as to realty or personalty.

Under the Tennessee statute the objectionable transfer is not void in toto but only "void as to the right . . . protected. . . ." Rowland

No modern authority appears to exist concerning personalty in Tennessee. An 1850 case, *Richards* v. *Richards*,[57] held that the widow is without a remedy. There she was precluded from alleging the decedent's fraud, even though the transfer was made without consideration and for the purpose of excluding her. Whether or not the *Richards* case would be followed today is problematical.

(4) The Kentucky Cases. The Kentucky cases started off with stress on "intent," apparently as determined by reference to the reasonableness of the transfer. In *Manikee's Adm'r* v. *Beard*[58] the husband left, in contemplation of his death, all his personalty to his children. Although the court stated that reasonable gifts to children would normally be in order, the widow prevailed in this case because of the intent to defraud, coupled with or accentuated by proximity to death and the secrecy of the transaction. That the widow's dower interest in the husband's land would be sufficient to support her was deemed irrelevant.[59]

In *Murray* v. *Murray*[60] the husband depleted his estate with some antenuptial transfers made with the wife's knowledge, and with substantial postmarital transfers made without the wife's knowledge. Both types of transfer were to children of the husband's former marriages. The court, in holding for the widow, reiterated in substance the test enunciated in the *Beard* case: "The Court must look to the condition of the parties and all the attending circumstances in judging of the transaction. It should take into consideration the amount of the husband's estate, the value of the advancements, the time within which they are made, and all other

v. Rowland, 34 Tenn. 350, 351 (1855); *cf.* Jarnigan v. Jarnigan, 80 Tenn. 232 (1883) (decree from bed and board held not to bar widow's claim); Mulloy v. Young, 29 Tenn. 198 (1859) (estoppel).

[57] 30 Tenn. 294 (1850).

[58] 85 Ky. 20, 2 S.W. 545 (1887).

[59] But in Weber v. Salisbury, 149 Ky. 327, 148 S.W. 34 (1912), the fact that the wife was adequately provided for in a gift causa mortis and in other respects led the court to hold that the gift causa mortis was not intended to defeat the wife's rights.

[60] 90 Ky. 1, 13 S.W. 244 (1890).

indicia which will serve to determine the intention accompanying the transaction. If, however, a gift or voluntary conveyance of all or the greater portion of his property be made to his children by a former marriage without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a *prima facie* case of fraud arises, and it rests upon the beneficiaries to explain away such presumption." [61]

In *Payne* v. *Tatem* [62] the court declared that this "presumption" might be overcome by evidence of reasonable advancements to children by a former marriage,[63] or of assistance by the first wife in amassing the husband's fortune, coupled with a promise by the husband to the first wife to provide for the children.[64] In short, the Kentucky cases speak of "intent" or "fraud" as controlling, but admit that a working case or presumption is established if substantial gifts have been made to children without the wife's knowledge. The presumption may be overcome if the equities favor the validity of the transfer, as, e.g., where the transfer is not unreasonably large in view of the moral claim of the donee.

In *Benge* v. *Barnett* [65] the husband gave forty-five per cent of his personalty then owned to his brother and sister. There was no evidence of his intention or purpose in making these gifts. The court purported to find his intention by referring to his "acts and deeds," in particular to the fact that his will sought to exclude the wife from the remaining personalty. In

[61] The court awarded the widow a fixed sum, out of the money transferred after the marriage, plus his estate at death, less "what would have been reasonable advances to the children." *Id.* at 9, 13 S.W. at 246. *Accord,* Wilson v. Wilson, 23 Ky. L. Rep. 1229, 64 S.W. 981 (1901); Gibson v. Gibson, 12 Ky. L. Rep. 636 (1890).

[62] 236 Ky. 306, 33 S.W.2d 2 (1930) (gift of $4,000 out of total personal estate of $4600 to daughter by former marriage).

[63] Fennessey v. Fennessey, 84 Ky. 519, 2 S.W. 158 (1886), cited for this point, is an antenuptial transfer case in which the first wife had contributed substantially, by her "skill and industry," to the husband's fortune. As to antenuptial transfers, see Appendix C, *infra.*

[64] *Cf.* Goff v. Goff's Ex'rs, 175 Ky. 75, 193 S.W. 1009 (1917) (antenuptial transfer).

[65] 309 Ky. 354, 217 S.W.2d 782 (1949).

sustaining the widow's claim, the court stated that the presumption of fraud would not be raised merely by the fact that the bulk of the estate was transferred without the wife's knowledge: all the facts of the case must be considered. We may conclude from the *Benge* case that the presumption of fraud is to be raised automatically only when the donee is the decedent's child. This is curious, as one would suppose that transfers to persons other than children would normally be more reprehensible as far as the widow is concerned.[66]

(5) The Missouri Cases. The Missouri legislature has recently enacted the following statute:[67]

1. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

2. Any conveyance of real estate made by a married person at any time without the express assent of his spouse, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse (if the spouse becomes a surviving spouse) unless the contrary is shown.

This statute is almost as vague as the corresponding section of the Model Probate Code.[68] Undoubtedly the existing case-

[66] In Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938), a man of 60 with 5 children by a former wife met a "talented and refined lady" of 40. He was then worth about $100,000. By a series of ingenious transfers to the children he managed to die with an estate of only $500. Held, a "gross fraud" on the wife's marital rights. *Cf.* Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1940) (antenuptial transfer).

[67] Mo. Ann. Stat. §474.150 (1955), 21 Mo. L. Rev. 151, 165–68 (1956).

[68] Discussed *infra,* p. 273. On the credit side, the statute makes it clear that a device which is "testamentary" as to the widow is not void *in toto.* Some of the early Missouri cases use this term in the same sense that it is used in the custom of London cases; thus a mere retention of possession would render the transfer "testamentary," *e.g.,* Tucker v. Tucker, 29 Mo. 350 (1860), *later hearing,* 32 Mo. 464 (1862); Brandon v. Dawson, 51 Mo. App. 237 (1892); and there was a finding in the *Merz* case that the trust was "testimentary" [*sic*] in character.

law will be persuasive in interpreting the phrase "fraud of the marital rights." The rule of a long line of Missouri cases emphasizing motive is set out in *Merz* v. *Tower Grove Bank and Trust Co.*[69] In that case the husband, worth about $400,000, shortly before his death transferred $20,000 to his brother. He also transferred $330,000 into a revocable trust, appointing himself one of the trustees. He reserved the income for life, with $200 monthly thereafter to his wife and the same amount to his brother, and the remainder to "other persons." The trust was executed with death impending and for the express purpose of evading his wife's statutory rights. The husband was advised that the trust agreement was "bullet proof."

The trial court permitted the wife to invade the trust to the extent of her share, but the higher court held the trust void *in toto,* stating that "The general rule of law (long in effect in this state) is that a conveyance of property by the husband without consideration and with the intent and purpose to defeat his widow's marital rights in his property, is a fraud upon such widow and she may sue in her own right, and set aside such fraudulent conveyance, and recover the property so fraudulently transferred, to the extent of her interest therein." In repudiation of the "good faith divestment" rule of *Newman* v. *Dore,* the court declared: "We adhere to the rule as applied by this court. We hold that the general rule with reference to voluntary transfers of property in contemplation of immediate death, and with the intent and purpose to defeat, and therefore to defraud, the widow of her marital rights, applies to the transfer of property by the trust instrument in this case."

Is "contemplation of death" (whatever that means[70]) a *sine qua non* in the Missouri cases? Before the *Merz* case

But see Wanstraph v. Kappel, 354 Mo. 565, 190 S.W.2d 241 (1945), *aff'd,* 356 Mo. 210, 201 S.W.2d 327 (1947), *reaff'd in part,* 358 Mo. 1077, 218 S.W.2d 618 (1949).

[69] 344 Mo. 1150, 130 S.W.2d 611 (1939).

[70] See discussion, *infra,* pp. 148–154.

we probably could answer in the affirmative,[71] with the caveat that the decedent at the time of the transfer need not necessarily be in "the very article of death." [72] But the court in the *Merz* case seems more concerned with the total picture than with any one aspect. In arriving at the decedent's "intent" the court weighed a variety of factors, including the amount that was transferred, as well as the time before death.[73] This broad approach is also followed in the recent case of *Potter* v. *Winter*,[74] although the court continues to speak of "contemplation of impending death." [75] The new legislation, which came into effect after the *Potter* case, is commendable in that it omits any reference to contemplation of death. The problem remains with the courts.

[71] Straat v. O'Neil, 84 Mo. 68 (1884) (expectation of death and intent to defraud); Tucker v. Tucker, *supra,* note 68 (widow prevails when transfers made 14 to 18 months before death, in feeble health, in anticipation of death, and with intention to defeat wife's rights); Stone v. Stone, 18 Mo. 390, 393 (1853) (widow prevails against deed "made in immediate anticipation of death, and with a view to prevent the widow's right to dower attaching"); Davis v. Davis, 5 Mo. 111, 114 (1838) (deed of slaves within 2 months of death, made in conjunction with will and with intent to defeat widow's rights held by "the deep searching justice of the chancellor, with his argus eyes," to be defeasible by widow); Brandon v. Dawson, *supra,* note 68 (must be testamentary in character—*e.g.,* retention of possession—and with view to defeating the wife's claim); *accord,* Hastings v. Hudson, 359 Mo. 912, 224 S.W.2d 945 (1949); Dyer v. Smith, 62 Mo. App. 606, 610 (1895) (transfer made by husband "in the sere and yellow leaf"); *cf.* Rice v. Waddill, 168 Mo. 99, 67 S.W. 605 (1902); Newton v. Newton, 162 Mo. 173, 61 S.W. 881 (1901).

In Headington v. Woodward, 214 S.W. 963 (Mo. 1919), the wife conveyed land by secret unrecorded deeds delivered almost 5 years before death, retaining possession for life. The husband continued to care for the lots, even investing some of his own money for that purpose. Held, void as to the widower.

[72] Rice v. Waddill, 168 Mo. 99, 67 S.W. 605 (1902).

[73] After outlining the circumstances in some detail the court declared: ". . . we cannot presume a fraudulent intent, but it may be inferred when it is a legitimate deduction from all the facts and circumstances in evidence in a given case." 344 Mo. 1150, 1160, 130 S.W.2d 611, 616 (1939).

[74] 280 S.W.2d 27 (Mo. 1955).

[75] *Id.* at 36

4. Conclusion

The utility of the "intent" test depends on the willingness of the courts to pay open attention to all the circumstances of the case. When the sole criterion is "intent," with no avowed enquiry into the objective manifestations of that "intent," the test is unsatisfactory. The outcome of litigation is far too unpredictable. We are told that "the devil himself knoweth not the mind of man." The task is even more difficult for the secular observer. It is unlikely that there will be much reliable evidence. The transferor is dead; the parties to the litigation naturally will not have a detached point of view.[76] Uncertainty, contradictions, the vagaries of fallible memory, the promptings of greed – these may be expected. And the confusion cannot entirely be laid to the possible self-interest of the witnesses. The desire to evade the statute may be praiseworthy or deplorable, depending on the circumstances. Many motives may inspire an inter vivos gift, including the urge to benefit children and the prudent dictates of estate planning. In many cases it will be difficult to distinguish malice to the widow from benevolence to the children. To conclude, the desire to evade the statute may be the sole motive, may be one of several motives, or may not exist at all.

The unsettling effect on the donee is obvious. Under most tests, of course, the donee is subject to eventual attack by the widow. Under the strict "intent" test, however, this attack may be made on the basis of evidence to which the widow alone had access. Further, the apparent motive at the time of the transfer may take on new meaning in the light of later events. A particular transfer, apparently quite reasonable in the early halcyon state of the marriage, may acquire sinister overtones ten years and one hundred marital quarrels later.

[76] Similar problems exist in connection with contracts to leave property at death, when self-interest may cause "the expectation of inheritance to ripen into a contract."

There is, of course, considerable merit to the "intent" test when the courts that use it make avowed enquiry into all the circumstances. This is tantamount to deciding the case on the "equities"; it comes close to the maintenance and contribution formula.[77] And these courts are not without some excuse in using the term "fraud" or "intent" to describe the ultimate decision. If "fraud" were not used, it would be necessary to invent another term to take its place. Just as assumpsit was a convenient remedy to use in the early actions to prevent unjust enrichment, so has "fraud" proven to be a handy phrase to connote evasion of the forced share.[78]

The real criticism that can be made of the courts using the "intent" test is not that they employ "intent" or "fraud" as a "verbal formalism," as some writers have complained, but that frequently they confuse the label with the contents.[79] Far too often do the courts indicate that their real concern is with the decedent's actual intent; far too many courts state that reference to the equities of the case is a secondary enquiry, to be made only where there is no evidence of "actual intent." [80] Perhaps this is only to be expected. Expression of the court's decision in terms of the decedent's intent puts an unnecessary and misleading emphasis on that factor. The decedent's motive should be relevant, but it need not necessarily be essential to the widow's case. Her need may be acute even when the husband acted from the best of motives, i.e., in the belief that she had already been adequately provided for.[81] Conversely, when the equities favor the donee the widow should lose even though the decedent has openly

[77] Discussed *supra,* Chap. 4.

[78] *Cf.* Norwood v. Norwood, 207 Ga. 148, 60 S.E.2d 449 (1950) (undue influence).

[79] *But cf.* In re Sides' Estate, 119 Neb. 314, 228 N.W. 619 (1930), discussed *supra,* pp. 106–108.

[80] *E.g.,* Benge v. Barnett, 309 Ky. 354, 217 S.W.2d 782 (1949).

[81] *Cf.* Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944), discussed *supra,* Chap. 7, text at note 39.

expressed his intent to "evade" the statutory share. The maintenance and contribution formula would assent to the finality of no one factor, but to the relevance of all factors.[82] The "intent" test comes close to this ideal, but not close enough.

[82] Moreover, it is geared to decedent's family maintenance legislation instead of the statutory share.

CHAPTER 9

Tests Based On The Reality Of The Transfer

Considerable popularity is being attained by the theory that a transfer is immune from the widow's attack if it has "factual reality," or "reality," as we shall call it. A transfer has "reality," under this theory, if it has inter vivos validity aside from any question of the rights of the widow. The only transfers subject to the widow's attack, on this reasoning, are sham transfers or testamentary transfers. In other words, she cannot impugn any transfer that is operative, inter vivos, between the parties thereto, or, as it is sometimes said, which was "complete," [1] or in which the transferee obtained a "present interest" [2] in the subject matter of the transfer as soon as the transfer was made. The equities of the case — in theory, at any rate — are irrelevant.[3]

[1] *E.g.*, Matter of Halpern, 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951); Haskell v. Art Institute, 304 Ill. App. 393, 404, 26 N.E.2d 736, 741 (1940); see Small v. Small, 56 Kan. 1, 15, 42 Pac. 323, 327 (1895); Lines v. Lines 142 Pa. 149, 21 Atl. 809 (1891). A transfer has also been said to be valid if it is "absolute": *e.g.*, In re Kilgallen's Estate, 204 Misc. 558, 561, 123 N.Y.S.2d 827, 830 (Surr. Ct. 1953); *cf.* Bolles v. Toledo Trust Co., 144 Ohio St., 195, 213; 58 N.E.2d 381, 391 (1944). Likewise a case may be said to turn on whether the transferees took a "vested interest": *cf.* Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N.W.2d 458 (1942).

[2] *E.g.*, Stewart v. Stewart, 5 Conn. 317 (1824); Pruett v. Cowsart, 136 Ga. 756, 72 S.E. 30 (1911); *cf.* Bickers v. Shenandoah Valley National Bank, 197 Va. 145, 88 S.E.2d 889 (1955), *rehearing denied,* 197 Va. 732, 733, 90 S.E.2d 865, 866 (1956). The expression "present interest" is not accurate: frequently a future interest will pass.

[3] Massachusetts liberally provides the surviving spouse with the first $10,000 of the estate, (Mass. Laws Ann. chap. 191, §15) but is apathetic about inter vivos evasions. In Kerwin v. Donaghy, 317 Mass. 559, 571, 59 N.E.2d 299, 306 (1945) the court said that "[I]n this Commonwealth a husband has an absolute right to dispose of . . . all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share

1. The Halpern Case

Of all the "reality" decisions, the *cause célèbre* is the recent *Halpern* [4] case in the New York Court of Appeals. This case is significant for two reasons. It condoned the Totten trust as a weapon of disinheritance; and it cast disquieting doubts on the validity of the entire illusory transfer doctrine.

In the *Halpern* case the husband by his will in 1939 made his wife executrix and sole beneficiary. He separated from her in 1946. During 1946 and 1947 he opened four savings bank accounts in his own name in trust for an infant grandchild. He died in 1948 leaving an estate of about $3,300, exclusive of the Totten trusts. Several deposits had been made in the accounts, but no withdrawals; and the balance at his death approximated $14,000. The husband had in no way disaffirmed or revoked the trusts. There was evidence that he had informed several people that he wanted the grand-

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. . . by virtue of a waiver of his will. That is true even though his sole purpose was to disinherit her. . . . The right of a wife as a distributee stands no higher than the similar right of a child."

The ultimate in the "present transfer" reasoning is reached in Redman v. Churchill, 230 Mass. 415, 119 N.E. 953 (1918). Here the husband about a year before his death transferred the greater part of his personalty (at least $50,000) to himself as executor of his mother's will. His purpose was to exclude his wife. Presumably he was a substantial beneficiary under his mother's will; his own will left the residue of his estate "or over which I have, under the will of my mother or otherwise, the power of distribution" in trust for his children. The widow received by will one-third of the realty and personalty "standing in my name," which amounted only to $825.69. Held, the widow could get no share of the $50,000, there being no "legal fraud" on her because he had the right to dispose of his property during his lifetime without her consent; and, since the transfer was "real," it "passed the title" to himself as executor.

On powers of appointment see pp. 252–258, *infra*. The Massachusetts cases are also discussed, in connection with the "intent" rationale, in Chap. 8, note 24.

[4] In re Halpern's Estate, 197 Misc. 502, 96 N.Y.S.2d 596 (Surr. Ct. 1950), *modified*, 277 App. Div. 525, 100 N.Y.S.2d 894 (1st Dep't 1950), *aff'd*, 303 N.Y. 33, 100 N.E.2d 120 (1951). The Halpern case occasioned many notes and comments. Some of the better ones include: 52 Col. L. Rev. 284 (1952); 37 Cornell L. Q. 258 (1951) (excellent); 40 Geo. L. J. 109 (1951); 50 Mich. L. Rev. 783 (1952); 27 N. Y. U. L. Rev. 306 (1952) (suggestions on statutory reform; excellent); 25 N. Y. U. L. Rev. 920 (1950) (trial opinion); 3 Syracuse L. Rev. 129 (1951).

daughter to "have his bankbooks." Three of the bankbooks were found in his safe-deposit box at his death. The fourth was apparently handed to the grandchild's mother before his death.[5] The widow, as executrix, began discovery proceedings to recover the accounts on the ground that they were illusory transfers.

The Surrogate Court, stating that there was no proof of any act on the part of the testator which made the trusts irrevocable,[6] held the trusts illusory; and, as *Burns* v. *Turnbull*[7] had said that an illusory transfer is a nullity, the estate was thus deemed entitled to all of the accounts. The First Department of the Appellate Division affirmed, but pointed out that to declare a Totten trust entirely void merely to give the widow a portion would amount to overruling the Totten trust doctrine. Totten trusts being *sui generis,* serving a useful purpose, and easily divisible, it was concluded that they should be defeasible only to the extent of the widow's share.

The majority opinion in the Court of Appeals stated, curiously, that both courts below had found the trusts illusory, "not on any proof that they lacked actuality or reality, but solely because they were made for the purpose of keeping the widow from collecting [her] share. . . ."[8] It then proceeded to repudiate the test that actually had been followed by the lower courts, declaring that "There is nothing illusory about

[5] 303 N.Y. 33, 37, 100 N.E.2d 120, 121 (1951). *But cf.* concurring opinion, *id.* at 41, 100 N.E.2d at 124.

[6] 197 Misc. 502, 504, 96 N.Y.S.2d 596, 598 (Surr. Ct. 1950). A comment in 37 CORNELL L. Q. 258 (1951) speculates that the "trusts" could have been ruled irrevocable, either because of the statement to the child's mother that the bank books were "for" the child or because of the apparent delivery of the fourth bank book.

[7] 37 N.Y.S.2d 380 (Sup. Ct. 1942), *rev'd mem.,* 266 App. Div. 779, 41 N.Y.S.2d 448 (2nd Dep't 1943), *reargument granted,* 267 App. Div. 986, 48 N.Y.S.2d 453 (2nd Dep't 1944), *aff'd on reargument mem.,* 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep't 1944), *motion to dismiss appeal denied,* 294 N.Y. 809, 62 N.E.2d 240 (1945), *aff'd without opinion,* 294 N.Y. 889, 62 N.E.2d 785 (1945).

[8] 303 N.Y. 33, 37, 100 N.E.2d 120, 122 (1951). The lower courts apparently relied solely on the reasoning that "a Totten trust is an illusory transfer," 277 App. Div. 525, 528, 100 N.Y.S.2d 894, 898 (1st Dep't 1950).

a Totten trust as such." [9] Professing to apply the so-called *Newman* v. *Dore* test of "good faith divestment," the opinion stated that Totten trusts are valid if "real and not merely colorable or pretended." [10] The *Newman, Krause,* and *Burns* cases, all cases involving trusts that the Court of Appeals had held illusory, were distinguished on the ground that "in each of those cases the finding of illusoriness was made on a factual showing of unreality, and not solely because the transfers operated to, and were intended to, defeat the widow's expectancy." [11] The *Krause* [12] case, which courts [13] and commentators [14] had understood to categorize Totten trusts as illusory *per se,* was specifically distinguished on the ground that there the decedent "had never intended that his Totten trust, made in favor of his daughter who lived in a foreign country and from whom he had not heard in years, would have any real effect, or that the money should ever go to the faraway daughter." [15]

The concurring opinion declared that the rights of the surviving spouse depend upon suit being brought by the surviving spouse individually and in compliance with the terms

[9] 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951).

[10] *Id.* at 37, 100 N.E.2d at 122.

[11] *Id.* at 38, 100 N.E.2d at 122.

[12] 285 N.Y. 27, 32 N.E.2d 779 (1941).

[13] *E.g.,* Steixner v. Bowery Sav. Bank, 86 N.Y.S.2d 747 (Sup. Ct. 1949). For other cases see comment, 37 CORNELL L. Q. 258, 260 (1952); *cf.* Estate of Black, 64 York 166, 73 D.&C. 86 (Pa. 1950).

[14] *E.g.,* Note, 52 COLUM. L. REV. 284, 285 (1952).

[15] 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951). This seems a large assumption, even though four of the judges in the Halpern case were on the court that decided the Krause case: Loughran, C. J., Lewis, Desmond, and Conway, J. J. Aside altogether from the Krause case, the court in the Halpern case seems on questionable ground when it says that "unreality" of this sort existed in Newman v. Dore (remainder of trust going to a favorite niece) or in Burns v. Turnbull (remainder to a daughter by a previous marriage). The trial court in the Turnbull case, 37 N.Y.S.2d 380, 388 (1942), in speaking of the wife's inter vivos transfer to a daughter by a previous marriage, stated: "There was logic in what she did. . . . The settlor may have concluded that her husband and son would not need her property, whereas [the donee] having no other means of support, would. There are many hypotheses consistent with the good faith of settlor."

of the statute. On this reasoning the widow would lose; she had brought the action in her capacity as executor, and without filing a notice of election within the required six months period.[16] Both opinions stated that the order of the Appellate Division would have to be affirmed, since no appeal therefrom had been taken by the infant beneficiary. Both opinions, then, are dicta.

The first thing to notice about the *Halpern* case is that it is indecisive.[17] Nowhere is there an express repudiation of the illusory trust doctrine of *Newman* v. *Dore*. Instead, we have some cryptic references to the *Newman* case, seemingly linking it with the "reality" doctrine.[18] Moreover, three of the seven members of the court, Judges Lewis, Conway, and Froessel, based their opinion solely on procedural grounds. This means that the "reality" rationale is found in dicta of a bare majority of the court. Technically, this reduces the persuasive force of the decision.[19] Nor can we rule out the possibility of eventual refinement or change in the court's views, because of a change in the personnel of the court.

Nevertheless, the case does much to undermine the "control" rationale of *Newman* v. *Dore*. Both opinions may be mere dicta; but their considered, deliberate tone may well persuade later courts — in New York and elsewhere — to adopt the "reality" rationale.[20] For in the *Halpern* case the phrase "illusory" takes on a new meaning. Whereas in the *Newman* case it connotes excessive control, in the *Halpern*

[16] This is inconsistent with earlier cases permitting suit when the surviving spouse had no right to elect—*e.g.*, Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937) (widow left required fractional amount of the estate); Burns v. Turnbull, *supra,* note 7 (intestacy); Marano v. LoCarro, 62 N.Y.S.2d 121 (Sup. Ct. 1946), *aff'd without opinion,* 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946).

[17] In this respect the *Halpern* case is similar to other *causes célèbres* in the evasion field. Newman v. Dore, for example, was vague in doctrine, and expressly declined any attempt "to formulate any general test"; but later courts evolved from it a controlling rationale.

[18] *E.g.*, 303 N.Y. 33, 39, 100 N.E.2d 120, 123 (1951).

[19] *Cf.* Dubuque v. Illinois Cent. R.R., 39 Iowa 56, 80 (1874).

[20] *Infra,* text at notes 25-31.

case it refers to a lack of *animus donandi.*[21] Under *Newman* v. *Dore* an inter vivos device might be valid, aside from the widow's rights, and yet still be subject to the widow's share; under the reasoning of the *Halpern* case, if the device is valid aside from the widow's claim, the widow has no claim. Says the majority opinion: "There is nothing illusory about a Totten trust as such." But nothing could be more "illusory," in the "control" sense of *Newman* v. *Dore,* than a Totten trust. The retention of almost complete control earmarks it for what it is – a specifically bequeathed bank account. The only rational explanation of the statement quoted above is that the Court of Appeal is using "illusory" in a fresh sense. The bird with a broken pinion never flies as high again; similarly, the doctrine of *Newman* v. *Dore,* while not specifically rejected, at least as to devices other than Totten trusts, is not as strong as it used to be.

What influence has the *Halpern* case had on subsequent decisions? To attempt an answer to this question we must consider both Totten trusts, and devices other than Totten

[21] 303 N.Y. 33, 38, 100 N.E.2d 120, 122. This, of course, is not what courts and commentators had assumed the "illusory trust" doctrine to mean; and, although the matter is not free from doubt, in all probability it is not what the court in the Newman case had in mind. That court stressed the retention of control, stating: "We assume, without deciding, that except for the provisions of section 18 . . . the trust would be valid," 275 N.Y. 371, 380, 9 N.E.2d 966, 969 (1937); *cf.* Hayes, "Illinois Dower and the Illusory Trust: The New York Influence," 2 DE PAUL L. REV. 1, 16 (1952).

Under the Halpern case reasoning the husband's intent to disinherit his wife is relevant, but only insofar as it assists in furnishing proof of the *animus donandi.* Thomas v. Louis, 284 App. Div. 784, 786, 135 N.Y.S.2d 97, 99 (3rd Dep't 1954); *but cf.* Hoffman v. Hoffman, 144 N.Y.S.2d 855, 856 (Sup. Ct. 1955) (deed to spouse). Prior to the Halpern case the New York courts formally eschewed the "intent" factor, in practice often used it as ballast: In re Schurer's Estate, 157 Misc. 573, 284 N.Y.S. 28 (Surr. Ct. 1935), *aff'd without opinion,* 248 App. Div. 697, 289 N.Y.S. 818 (1st Dep't 1936) (mere "constructive fraud" contrasted with "an element of fraud which is so blatant that it is impossible to ignore it"); Mottershead v. Lamson, 101 N.Y.S.2d 174 (Sup. Ct. 1950) (presumption of fraud if a major portion of estate without knowledge of wife goes to children by a previous marriage). In one case "intent" was the *ratio decidendi:* Bodner v. Feit, 247 App. Div. 119, 286 N.Y.S. 814 (1st Dep't 1936). See also Chap. 7, note 92, *supra.*

trusts. The Totten trust cases are examined in detail in a later chapter,[22] but a brief summary will be useful at this point. Subsequent lower-court decisions in New York have uniformly followed the lead given in the *Halpern* case. Recent decisions from other states involving bank account trusts appear to be restricted to Maryland and Pennsylvania. In neither jurisdiction has the *Halpern* case resulted in any change of rationale. Maryland uses what amounts to a "reasonableness" test; [23] and Pennsylvania is now governed by legislation that permits invasion of "revocable" transfers by the surviving spouse.[24]

On transfers other than Totten trusts the outlook is still indecisive. It will be recalled that the *Halpern* case brought a new connotation to the phrase "illusory": under the pre-Halpern decisions it meant real, but voidable because of retained control, but the majority in the *Halpern* case used it as synonymous with "sham," i.e., lacking reality for any purpose. At least three subsequent decisions contain language that directly or inferentially adopts the *Halpern* version.[25] But two of these cases are not strictly evasion cases: one deals with fraud on inchoate dower,[26] the other does not involve a surviving spouse.[27] The third case was a trial decision permitting a widow to prevail against a contract to make a will, on the reasoning that the widow's elective rights would reach such an exercise of the "power of testamentation." [28] Conversely, the New York Appellate Division, Third Department, has

[22] *Infra,* Chap. 13:4.

[23] *E.g.,* Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954). For a list of Maryland cases see Table E, *infra.*

[24] *Infra,* Chap. 9, text at note 74.

[25] Van Devere v. Moore, 243 Minn. 346, 67 N.W.2d 664 (1954); In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954); In re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122 (1st Dep't 1951), *aff'd without opinion,* 304 N.Y. 598, 107 N.E.2d 87 (1952).

[26] Van Devere v. Moore, *supra,* note 25.

[27] In re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122 (1st Dep't 1951).

[28] In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954).

not only referred to retention of control [29] as connoting illusoriness, but also has stated that "The doctrine announced in *Matter of Halpern's Estate* . . . applies to Totten trusts and not to conveyances of real property." [30] Finally, a recent lower-court decision [31] dealing with transfer of stock contains language broad enough to cover both the Newman version ("illusory transfers . . . during his lifetime are perfectly legal") and the Halpern version ("He could either give it away . . . or he could equally well transfer it to dummies, without actually depriving himself of control").

Policy-wise, the "reality" rationale (as exemplified by the reasoning of the *Halpern* case) is open to serious criticism. This rationale precludes *any* judicial assistance to the widow, even when need is established. Her only hope is to show that the transfer was defectively executed, that it was a sham, or that it was testamentary. This means that the widow in New York has been deprived of effective protection against disinheritance, at least as far as Totten trusts are concerned. It is ironic that the new doctrine has specific reference to the Totten trust. The "poor man's will" may now be used to hurt the poor man's widow.

For all its shortcomings, the illusory trust doctrine, as popularized by *Newman* v. *Dore,* has at least the virtue of

[29] Gillette v. Madden, 280 App. Div. 161, 162, 112 N.Y.S.2d 543, 545 (3d Dep't 1952). But mentioned in the same breath was intent not to have an "actual change of title until death." The case involved the sufficiency of a complaint. *Cf.* Thomas v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97 (3d Dep't 1954). Here the court held a deed "illusory," citing Newman v. Dore, Krause v. Krause, and Gillette v. Madden; but from the context the court may have considered the deed a sham, since "the purported transfer was, by agreement of the parties, to be completely ineffectual until after the death of the grantor, and subject to recall or revocation until then." See MacGregor 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), discussed by Dean Niles in 1952 ANNUAL SURVEY OF AMERICAN LAW 572; In re Kilgallen's Estate, 204 Misc. 558, 123 N.Y.S.2d 827 (Surr. Ct. 1953); Radecki v. Radecki, 279 App. Div. 1137, 112 N.Y.S.2d 764, (4th Dep't 1952).

[30] Gillette v. Madden, *supra,* note 29, at 163, 112 N.Y.S.2d at 545–46.

[31] Galewitz v. Walter Peek Paper Corp., 145 N.Y.S.2d 402, 404–05 (Sup. Ct. Spec. Term, 1955).

sympathy with the stated purpose of the statutory share. To be sure, the illusory trust doctrine is too narrow: [32] under it the widow may recover too much or nothing at all from the transferee, depending on the happenstance of retained "control." But even within those confines there is some slight room for the play of judicial discretion. Grossly extreme transfers, such as the eleventh-hour trust in the *Newman* case, would not prevail against the judicial philosophy that protection based on testamentary transfers should extend to transfers that are almost, if not exactly, testamentary. Under the doctrine of the *Halpern* case, however, even retention of excessive control [33] is irrelevant, provided the transfer is not testamentary.

As in the case of harsh decisions in other fields of the law, the reaction to the *Halpern* case may result in remedial legislation. Bills have already been introduced in New York, without success.[34] The matter is on the agenda of the New York Law Revision Commission, though not presently under active consideration.

2. Extent of Defeasance [35]

A favorite gambit of some courts and commentators is to argue the "logical impossibility" [36] of a trust being illusory as to the wife but valid for all other purposes. A similar judicial ploy is to state that a transfer valid – or "complete"

[32] See *supra,* Chap. 7, text at note 93.

[33] To be sure, subsequent New York cases involving devices other than Totten trusts do refer to "control"; but these references may indicate that Newman v. Dore still governs these devices, rather than that "control" or the "equities" may be relevant under the Halpern doctrine.

[34] Atkinson, "Succession," 1952 Annual Survey of American Law, 599.

[35] The defeasance problem is taken up here because of the strong dictum on the point in the Halpern case. Logically the problem should be discussed in conjunction with either the control rationale or the intent rationale.

[36] Comment, "Illusory Transfers in New York," 37 Cornell L. Q. 258, 259 (1951).

or "absolute" [37] – for one purpose must be valid for all purposes. On this reasoning a transfer defeasible by the widow is cancelled *in toto*. But the logic of total defeasance, when used in conjunction with the "control" or "intent" theories, is open to question. Examples abound elsewhere of instruments that are valid for formal purposes but defeasible, or "voidable," [38] at the instance of an aggrieved party, i.e., contracts voidable for fraud in the inducement and inter vivos transfers that may be reached by creditors.

The "all black or all white" reasoning, however, received a fresh impetus from the famous dictum in the *Halpern* case: "We see no power in the courts to divide up such a Totten trust and call part of it illusory and the other part good." [39] From one viewpoint, this dictum is quite acceptable. Assuming that the court in the *Halpern* case was adopting the "reality" rationale, there could be no question of partial defeasance; indeed, the question cannot arise when the widow has no cause of action stemming from her elective share. From another viewpoint, however, the dictum is unfortunate. From the context it probably was designed to support the notion that defeasance should be *in toto* even when the widow *does* have a cause of action, as e.g., in a jurisdiction where the "intent" theory is used, or, as in the Appellate Division decision in the *Halpern* case, where the "control" thinking prevails. It must be remembered that until the *Halpern* case was decided the New York courts had been fully committed to the "control" rationale, as seen in their espousal of the illusory trust doctrine; moreover, the Court of Appeals had never before specifically ruled on the defeasance problem.[40] The dictum in the *Halpern* case thus shuts the damper

[37] *Cf.*, passage "A" of the Kerr "fraud" test, *supra*, Chap. 7, text at note 1.

[38] See an excellent article: Levin, "The Varying Meaning and Legal Effect of the Word 'Void,'" 32 MICH. L. REV. 1088, 1108 (1934).

[39] 303 N.Y. 33, 40, 100 N.E.2d 120, 123 (1951).

[40] In Newman v. Dore the point was ignored, possibly because the disposition under the will and under the inter vivos trust apparently was practically identical; see Note, 2 SYRACUSE L. REV. 378, note 3

on flickering attempts in the lower New York courts to adopt the partial defeasance doctrine.[41] It would be a pity if this dictum were to be followed by other jurisdictions already committed to the "control" or "intent" thinking.

The total defeasance notion misconceives the nature of the widow's claim.[42] She complains that the transfer prevents her from obtaining her statutory share. Although willing to concede that the transfer has "reality," she wants her fractional cut. More she cannot use; she is bound by the election statute.[43] To decree total defeasance results in unnecessary

(1951). In Krause v. Krause, the lower court had awarded partial defeasance. On appeal the question was deferred, since distribution had to await the probate of the will. 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 33, 32 N.E.2d 779, 781 (1941). In Burns v. Turnbull the court affirmed, without opinion, an Appellate Division holding which had cancelled an illusory inter vivos trust in its entirety. 37 N.Y.S.2d 380 (Sup. Ct. 1942), *rev'd mem.,* 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep't 1943), *reargument granted,* 267 App. Div. 986, 48 N.Y.S.2d 453 (2d Dep't 1944), *aff'd on reargument mem.* 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep't 1944), *motion to dismiss appeal denied,* 294 N.Y. 809, 62 N.E.2d 240 (1945), *aff'd without opinion,* 294 N.Y. 889, 62 N.E.2d 785 (1945). Defeasance in toto had the effect of thwarting settlor's intent to prefer a child of her first marriage over a child of her marriage with the plaintiff husband.

[41] President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S.2d 375 (Sup. Ct. 1939), *modified on other grounds,* 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940); Steixner v. Bowery Savings Bank, 86 N.Y.S.2d 747 (Sup. Ct. 1949); *cf.* Pichurko v. Richardson, 107 N.Y.S.2d 365 (Sup. Ct. 1951); Getz v. Getz, 101 N.Y.S.2d 757 (Surr. Ct. 1950) (both cases following the Appellate Division opinion in the Halpern case); Marano v. LoCarro, 62 N.Y.S.2d 121 (Sup. Ct. 1946), *aff'd without opinion,* 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946) (transfer set aside "to the extent of her intestate share"). As to antenuptial transfers, see Rubin v. Myrub Realty Co., 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep't 1935). *But cf.* Clavin v. Clavin, 41 N.Y.S.2d 377 (1943), *aff'd,* 267 App. Div. 760, 45 N.Y.S.2d 937 (1st Dep't 1943).

[42] Defeasance of any sort, partial or total, involves difficulties. Partition may not be feasible, as in, *e.g.,* a closely held family business, when the widow is inexperienced. And liquidation may not always be economically advisable, as with, *e.g.,* potentially valuable paintings. These problems point up the wisdom of careful estate planning; if the widow is adequately provided for in the will she probably will not litigate.

[43] In some jurisdictions her statutory share is a specified fraction, *e.g.,* in Florida, one third. In other states she may be entitled to her in-

loss to the beneficiaries of the inter vivos transfer and a possible gain for the "laughing heirs." [44] The effect of total defeasance on the Totten trust is such as to destroy much of its everyday utility as a "poor man's will." To be sure, in most instances the beneficiaries of the inter vivos transfer are children of the decedent spouse,[45] who would probably take their intestate share in the excess over and above the widow's statutory share.[46] But the "total defeasance" cases show no disposition to restrict the operation of the doctrine to transfers of this sort.

A substantial body of cases decree partial defeasance.[47] As is

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testate share. If in these other states she is the sole heir, total defeasance would result in any event—a factor that may or may not be a subconscious influence on the court concerned with the evasion litigation.

[44] The devastating effect of total defeasance may in practice militate against the widow's chances of recovery in close cases when the beneficiaries of the inter vivos transfer are not also heirs of the decedent.

[45] See *infra,* Chap. 10:2(d).

[46] But the children probably would not participate if the decedent left a will which gave the residue to an outsider. See *supra,* Chap. 2:4(f).

[47] Smith v. Smith, 22 Colo. 480, 46 Pac. 128 (1896); Fleming v. Fleming, 194 Iowa 71, 184 N.W. 296 (1921), *writ of error dismissed,* 264 U.S. 29 (1924); Ibey v. Ibey, 93 N.H. 434, 43 A.2d 157 (1945), *exceptions overruled,* 94 N.H. 425, 55 A.2d 872 (1947); Baker v. Smith, 66 N.H. 422, 23 Atl. 82 (1890); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd,* 147 Ohio St. 437, 72 N.E.2d 378 (1947); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); Estate of Black, 64 York 166, 73 D.&C. 86 (Pa. 1950) (under Pa. Stat. Ann. tit. 20, §301.11 (1950) (donees also heirs); *cf.* Hatcher v. Buford, 60 Ark. 169, 29 S.W. 641 (1895) (*semble;* gift causa mortis); Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887) (dower assigned); Hays v. Henry, 1 Md. Ch. 337 (1848). For the Kentucky cases see p. 112, *supra.* For the Missouri cases see p. 114, *supra;* also see note 48, *infra.*

Many cases use the ambiguous phrase "invalid as to the widow" or some similar expression. Seemingly this phrase implies that the transfer is vulnerable to attack only by the surviving spouse; but the consequences of a successful attack are not always discernible from the case as reported. In some instances we may assume total defeasance. Thus in Sanborn v. Lang, 41 Md. 107 (1874) a deed was "declared null and void so far as wife is concerned, and she may be relieved against the same." In the Sanborn case, however, the transfer was probably a sham, since a power of attorney was given donor, by donee, to dispose of the property. *Cf.,* Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891). Under Tenn. Code Ann. §31-612 (1955) it would seem that assignment of dower results merely in partial defeasance, even though the cases

to be expected, however, these decisions are pretty well restricted to jurisdictions following the "intent" or "control" rationale. Indeed, it is only with reference to "intent" jurisdictions, e.g., Missouri [48] and Kentucky,[49] that we can say with assurance that partial defeasance is the weight of authority. The sensible approach of these jurisdictions in this respect is in keeping with their willingness to seek a working compromise [50] between the respective interests of the widow and the transferee, as, e.g., by weighing the "equities" of the case.

3. "Colorable Transfers

(a) *In General.* The term "colorable," as employed in the evasion cases, means all things to all men. It has been used to connote shams; it may signify "real" transfers that are made without the knowledge [51] of the surviving spouse; it may be a synonym for "illusory," as used with reference to "real" transfers in which the decedent retained undue con-

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refer to the deed in question as being "void," *e.g.*, London v. London, 20 Tenn. 1 (1839) (conveyance "declared void"; wife assigned dower). For the Tennessee cases see p. 110, *supra*. In some cases the expression "void as to the widow" clearly refers to partial defeasance, *e.g.*, Rice v. Waddill, 168 Mo. 99, 113, 67 S.W. 605 (1902); but in many cases the point will not be clear one way or the other, *e.g.*, Smith v. Lamb, 87 Ark. 344, 112 S.W. 884 (1908); Brownell v. Briggs, 173 Mass. 529, 54 N.E. 251 (1899); *cf.* Nichols v. Nichols, 61 Vt. 426, 431, 18 Atl. 153, 154 (1889) ("inoperative as against the oratrix and her rights of dower"; presumably results in partial defeasance).

[48] See cases discussed, *supra*, p. 114. In Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939), the trial court decreed partial defeasance, but on appeal the Supreme Court of Missouri ordered defeasance in toto. The judgment does not purport to change the Missouri "partial defeasance" rule, but intimates that the equities may dictate total defeasance. In the Merz case the conduct of the trust company was considered reprehensible.

[49] See cases discussed, *supra*, p. 112.

[50] A parallel compromise is exemplified in actions to set aside transfers by the decedent in fraud of creditors. The creditors prevail only if the estate assets are insufficient, and then only to the extent of the claim. As was pointed out by the Appellate Division in the Halpern case, defeasance in this instance is partial, not total. *Cf.* the example of partial defeasance under the civil law, *infra*, p. 284.

[51] See the early Colorado cases, *infra*, pp. 135–136.

trol,[52] or merely the power to revoke; [53] and ofttimes it is tossed in for makeweight effect, with no ascertainable meaning — a bit of harmless garbage from the law digests.[54] For most men, on most occasions, however, a "colorable" transfer signifies a sham: either no transfer at all, or one accompanied by some secret agreement between the parties that negates any *animus donandi* on the part of the donor.[55]

[52] Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952) (joint tenancy); Van Devere v. Moore, 243 Minn. 346, 67 N.W.2d 664 (1954); *cf.* Smith v. Hines, 10 Fla. 258 (1863–4) (bill of sale for slaves, secrecy, possession retained until death); In re Leiman's Estate, 116 N.Y.S.2d 658 (Surr. Ct. 1952), *aff'd without opinion,* 281 App. Div. 764, 118 N.Y.S.2d 750, (2d Dep't 1952) *motion for leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (2d Dep't 1953); Courts v. Aldridge, 190 Okla. 29, 120 P.2d 362 (1941) (antenuptial transfer). *But see* Harber v. Harber, 152 Ga. 98, 108 S.E. 520 (1921).

A transfer that is a nullity is sometimes referred to as being "illusory"; *cf.* In re Kellas' Estate, 40 N.Y.S.2d 655, 663 (Surr. Ct. 1943), *aff'd,* 267 App. Div. 924, 1006, 46 N.Y.S.2d 884, 293 N.Y. 908, 60 N.E.2d 34 (1944); Estate of Rosenfeld, N. Y. L. J., 9 Feb. 1939, 1 P-H Unreported Trust Cases, ¶25,275 (Surr. Ct. 1939); see Thomas v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97 (3rd Dep't 1954).

[53] *E.g.,* Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953) (deed). In Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944) a revocable inter vivos trust of all the husband's property, with considerable control retained, was held both *colorable,* (citing Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1940)), and *illusory,* (citing Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937)). The court did not purport to distinguish between *colorable* and *illusory. See* Padfield v. Padfield, 78 Ill. 16, 18–19 (1875); Sederlund v. Sederlund, 176 Wis. 627, 634–5, 187 N.W. 750, 752–53 (1922). *But see* Bestry v. Dorn, 180 Md. 42, 22 A.2d 552 (1941).

[54] *E.g.,* Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 71, 100 N.E. 1049 (1913), *rehearing denied,* 55 Ind. App. 40, 102 N.E. 282 (1913) (gift causa mortis held "colorably absolute," therefore testamentary); McGee v. McGee, 26 N.C. 77 (1843) (continued enjoyment of land after conveyance; held, colorable, and "express fraud" under the then prevailing statute). A note in 16 BROOKLYN L. REV. 229, 246 (1950), discusses the term "colorable" in connection with antenuptial transfers.

[55] Mendez v. Quinones, 78 F. Supp. 744 (D.C.P.R. 1948) modified *sub. nom.* Mendez v. Mendez, 176 F.2d 849 (1st Cir. 1949) (transfer of assets to purported business); Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940) (deed to aunt, reconveyance to husband on condition that if the land should go to the wife or children, by agreement or "by any legal proceedings or order of court," it would revert to the aunt's estate); Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1940) (antenuptial transfer of bank deposits, donee acting as a "mere depositary" of

Thus, colorable transfers are transfers that have no "reality," and can best be discussed in conjunction with the reality doctrine.

A typically colorable ("sham") arrangement would be a secret deed, handed over by the husband to the obliging friend or relative whose name appears as "grantee." The parties have previously agreed that the husband may demand the return of the deed at his pleasure, in particular if his wife should predecease him. If also it is agreed that the deed in

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the money and issuing checks on request); Brown v. Crafts, 98 Me. 40, 56 Atl. 213 (1903) (gift, with donee redelivering the property to the husband and signing power of attorney giving the husband power to manage, sell, and use it "as though it were his own property"). *Cf.* Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Murray v. Murray, 90 Ky. 1, 13 S.W. 244 (1890); Lockhart v. Dickey, 161 La. 282, 108 So. 483 (1926); Wellington v. St. Paul, Minneapolis & Manitoba Ry., 123 Minn. 483, 144 N.W. 222 (1913); Jiggitts v. Jiggitts, 40 Miss. 718 (1866); Lusse v. Lusse, 140 Mo. App. 497, 120 S.W. 114 (1909); Bodner v. Feit, 247 App. Div. 119, 123, 286 N.Y. Supp. 814, 818 (1st Dep't 1936) (dissenting opinion).

A line of Kansas cases states that the only restriction on the husband is that the transfer be not "merely colorable." From the context the courts in these Kansas cases probably have "shams" in mind; literally, they say that any reservation of an interest in the property concerned renders the transfer colorable: *e.g.,* Poole v. Poole, 96 Kan. 84, 90–91, 150 Pac. 592, 595 (1915); also see Williams v. Williams, 40 Fed. 521 (C. C. D. Kan. 1889); Small v. Small, 56 Kan. 1, 42 Pac. 323 (1895); Osborn v. Osborn, 102 Kan. 890, 172 Pac. 23 (1918). The Osborn case stresses retention of the power to dispose of the property. *Quaere:* what about the power to revoke?

Massachusetts seems committed to the reality test, *supra* note 3; and a recent case used "colorable" in the sense of lacking reality: Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945). Earlier usage was ambivalent but probably referred to lack of reality. Roche v. Brickley, 254 Mass. 584, 150 N.E. 866 (1926); Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904).

"Colorable" was assured longevity if not lucidity by its appearance in passage "A" of the Kerr test, *supra,* p. 98. Probably it was there intended to denote a sham. At any rate, this seems to be the usage of modern courts that regurgitate the Kerr phraseology: Cheatham v. Sheppard, 198 Ga. 254, 31 S.E.2d 457 (1944); Haskell v. Art Institute 304 Ill. App. 393, 26 N.E.2d 736 (1940); Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908). *Cf.* Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937) (antenuptial); Flowers v. Flowers, 89 Ga. 632, 15 S.E. 834 (1892); Blodgett v. Blodgett, 266 Ill. App. 517 (1932), *transferred,* 343 Ill. 569, 175 N.E. 777 (1931) (confession of judgment); Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905).

no circumstances is to be legally effective, the transfer is clearly "colorable." If the deed is to become effective only at the husband's death, it probably is still a nullity,[56] unless it can be sustained as a will, in which event the wife, if she survives, may claim her elective share.

Hayes v. *Lindquist* [57] illustrates a colorable transfer of personalty. In that case the husband caused shares in the family corporation to be transferred to his sister. She redelivered the securities to her brother, who kept them until his death in a safe-deposit box to which they both had access. Holding for the widow, the court labelled the transfer to the sister "colorable and illusory." It pointed out that "The manifest plan of her brother and herself was to have this property so held that it could be claimed by either as circumstances required, and the gift to her was not complete."[58]

(b) *The Colorado Cases.* As Holmes has said, "a word is the skin of a living thought." Its meaning will change with the generations. This is exemplified by the Colorado cases on "colorable" transfers.

The Colorado cases start in 1896 with *Smith* v. *Smith.*[59] In that case the husband transferred all his realty by deeds made about four years before death. The husband and the grantees contrived to keep the wife in ignorance of the deeds, and they were not recorded until the day before death. The aged widow was left penniless. The court castigated the husband for his "heartlessness and inhumanity." The transfers, it said, were "merely colorable"; and it quoted with approval passage "A" of the "Kerr" test. We noted in an earlier chapter that this passage purports to exclude "intent." [60] In the *Smith* case, however, the stress on the collusive nature of the transfer indicates partiality to the intent rationale.[61] It is significant

[56] *Infra,* Chap. 12:1.
[57] 22 Ohio App. 58, 153 N.E. 269 (1926).
[58] *Id.* at 64, 153 N.E. at 271.
[59] 22 Colo. 480, 46 Pac. 128 (1896), *reconsidered,* 24 Colo. 527, 52 Pac. 790 (1898).
[60] *Supra,* Chap. 8, text at note 1.
[61] Because of the husband's flint-hearted conduct it is of course pos-

also that there was no agreement between the parties that would deny "reality" to the transfer; "colorable," for this court, merely connotes secrecy. That this secrecy must involve collusion, that there must be "participation in fraudulent conduct by the grantee," is reiterated in *Phillips* v. *Phillips*.[62] In that case a father prepared deeds giving property to his daughters, but he retained the deeds for several years. He delivered them about seven or eight months before his death, and the deeds were recorded at the time of delivery. Counsel for the widow claimed that the conduct of the daughters in permitting their father to retain possession was indicative of a "fraudulent or collusive compact." The court agreed, but said that the "suspicious circumstances" could be explained in this case as a natural transaction between father and children. In *Grover* v. *Clover* [63] the court endorsed and followed the "colorable" test of the *Smith* case. No mention was made of the collusion aspect of the *Smith* case rationale, but the "intent" factor apparently still remained an essential ingredient.[64]

The change in emphasis comes with *Ellis* v. *Jones,* in 1923.[65] Although formally retaining the "colorable" test, the court made it clear that intent to defraud is irrelevant. "How can one fraudulently deprive another of that of which he may lawfully deprive him?" asks the court. Thus "colorable" has now nothing to do with collusion, with participation by the donee, with motive; it concerns shams, mere pretenses — "counterfeit, feigned, having the appearance of truth (Webster) — not really intended as a deed." [66] The death blow to secrecy as a factor comes with *Wilson* v. *Lowrie,*[67] where,

sible that the transfer would have been labelled colorable even if there had been no collusion.

[62] 30 Colo. 516, 71 Pac. 363 (1903).

[63] 69 Colo. 72, 169 Pac. 578 (1917); see comment, 26 ROCKY MT. L. REV. 180, 183 (1954).

[64] 69 Colo. 72, 75, 169 Pac. 578, 579 (1917).

[65] 73 Colo. 516, 216 Pac. 257 (1923).

[66] *Id.* at 517, 216 Pac. at 258; see also Hammond v. Hammond, 91 Colo. 327 (1932); Taylor v. Taylor, 79 Colo. 487, 247 Pac. 174 (1926).

[67] 77 Colo. 427, 236 Pac. 1004 (1925).

in line with the *Ellis* case's repudiation of intent, the court said it was irrelevant that the widow neither knew about nor consented to the transfers.[68]

To summarize, the Colorado cases reflect a gradual change in the meaning of the term "colorable." Originally denoting a secret transfer with intent to disinherit, it now signifies a sham, a transfer that is not "real," no transfer at all. A "real," i.e., non-colorable, transfer is valid against the surviving spouse regardless of secrecy or retention of a life estate.[69] To all this we add a caveat: when the equities strongly favor the surviving spouse, *perhaps* she may be permitted to defeat a "real" transfer.[70] A reluctance to divorce the equities from the evasion cases may be sensed from the recent case of *Thuet* v. *Thuet*.[71] In that case, although the inter vivos transfer was sustained,[72] the court not only reiterated passage "A" of the "Kerr" test – which, as we have seen, may mean anything, but at least it mentions "circumstances indicative of fraud upon the rights of the wife" – but also made specific inquiry as to whether the declared intent of the decedent "was her true intent, or whether it was merely a scheme by which to make disposition of the property after her death contrary to the provisions of our statute concerning wills. . . ." The court concluded that "Such intent, as would appear from the circumstances, was equitable. . . ." [73]

[68] *Accord,* Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953).

[69] Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956); *Cf.* Moedy v. Moedy, 130 Colo. 464, 276 P.2d 563 (1954) (divorce); Bostron v. Bostron, 128 Colo. 535, 265 P.2d 230 (1953) (divorce); Million v. Botefur, 90 Colo. 343, 9 P.2d 284 (1932). But a deed of land must not be subject to revocation or "recall." Thuet v. Thuet, *supra,* note 68; see discussion of deeds, *infra,* Chap. 12:1.

[70] *Cf.* 26 ROCKY MT. L. REV. 180 (1954). The writer of this comment frequently uses "colorable" and "illusory" (in the "excessive control" sense of Newman v. Dore) as synonyms.

[71] 128 Colo. 54, 260 P.2d 604 (1953).

[72] The equities in the Thuet case favored the transferee.

[73] 128 Colo. 54, 59, 260 P.2d 604, 606 (1953); *cf.* Burton v. Burton, 100 Colo. 567, 570, 69 P.2d 307, 309 (1937); Norris v. Bradshaw, 96 Colo. 594, 597, 45 P.2d 638, 639 (1935) (dictum that transferee's participation in the fraud would be relevant).

4. The Pennsylvania Cases

Pennsylvania has an important new statute [74] dealing with our problem. It states, in part:[75]

> "(a) In general. A conveyance [76] of assets by a person who retains a power of appointment by will,[77] or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to

[74] Pa. Stat. Ann. tit. 20, §301.11 (1950) (Estates Act of 1947), as amended 1956, Feb. 17, P.L. (1955) No. 347, §4.

[75] Material added in 1956, in addition to the last sentence of subsection (a), includes the following:

". . .

"(c) Election against other conveyances. A spouse electing under this section also must elect to take against the will, if he is a beneficiary thereunder, and against all other conveyances within the scope of subsection (a) of which he is a beneficiary."

(d) Procedure. The election to treat a conveyance as testamentary shall be made in the same manner as an election to take against the will. If there is a will, such election shall be made within the same time limitations as an election to take against the will. If there is no will, such election shall be made within one year of the conveyor's death, and the orphan's court, on application of the surviving spouse made within such period, may extend the time for making the election. It can be made only if there has been no forfeiture of the right to make an election. The court having jurisdiction of the deceased conveyor's estate shall determine the rights of the surviving spouse in the property included in the conveyance."

[76] §301.1 defines a conveyance as "an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation."

[77] The widow prevailed against such a device, In re Trust of Diedel, 32 D.&C. 685 (Pa. 1938).

A statutory note to Pa. Stat. Ann. tit. 20, §301.11 (1950) explains that the phrase "power of appointment" was used, instead of "general power of appointment," to prevent the section being evaded "by creating special powers giving the right to appoint to a class including everyone but the spouse or some other designated individuals." A companion statute, Pa. Stat. Ann. tit. 20, §180.8 (c) (Wills Act of 1947) states: "The surviving spouse upon an election take against the will, shall not be entitled to any share in property passing under a power of appointment given by someone other than the testator whether or not such power has been exercised in favor of the surviving spouse and whether or not the appointed and the individual estates have blended." On powers of appointment generally, see pp. 252–258, *infra*.

> the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor.[78] The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."

As far as the designated types of transfer are concerned, the statute represents a distinct change in policy. Before the statute was enacted the widow had little, if any,[79] protection against such transfers. Now she may invade transfers in which the specified degree of "control" has been retained. And the Pennsylvania courts have conceded the influence of the statute in determining the validity of a particular transfer (of a type covered by the statute) made prior to the effective date of the act. Thus, in *Black's Estate* [80] a lower court had to consider the validity of Totten trusts created by a husband before the act came into effect. Noting that there had been no previous evasion case in Pennsylvania clearly ruling on Totten trusts, and that the Restatement of Trusts had recently taken a stand in favor of spouses' rights, the court implemented "the policy evidenced by the new . . . act" by holding for the widow. "By such circuity of legal ratiocination it was possible to confer upon the widow the full benefits of the new statute while at the same time holding that the statute did not apply." [81] A dictum in a recent

[78] A statutory note explains that the proviso favoring income beneficiaries was "included for two reasons: (1) It might prove harsh to withdraw income from persons who have been receiving it. (2) It seemed proper to permit the surviving spouse to share in property of which the decedent had the beneficial enjoyment at his death, but not to permit a sharing in property over which the decedent retained control but which he did not enjoy beneficially."

[79] *Infra,* text at note 83.

[80] 73 D.&C. 86 (Pa., 1950).

[81] Note, by Judge E. L. Van Roden, "Rights of Surviving Spouse to Share in Assets Transferred by Decedent in His Lifetime," 58 DICK. L. REV. 70, 77 (1953). Judge Van Roden wrote the decision in Black's Estate. See also In re Graham's Estate, 3 D.&C. 2d 218, 42 Del. Co. 9, 4 Fiduc. 467 (1954); Del Conte v. Luca, 2 D.&C. 2d 130 (1954).

Supreme Court case substantiates the not unreasonable assumption that Totten trusts are covered by the statute.[82]

As far as the devices not affected by the statute are concerned, the Pennsylvania case law strongly favors the "reality" test. As one writer has said, "It is only the stupid husband, who, against his wishes, would be forced to allow his wife to share in his personalty." [83] The motive for the transfer is, it would seem, quite irrelevant; all that is required is a "good faith" divestment. Frequently cited in that connection is the following: "The good faith required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife but to the intent to divest himself of the ownership of his property." [84]

But even in the Pennsylvania cases we find vague caveats about "intent," "fraud," and "actual fraud." It is unclear whether or not these refer to (a) sham transfers,[85] (b) transfers in evasion of the widow's inchoate dower rights, or (c) some primordial power of equity to punish excessive guile or vindictiveness, or to prevent the widow from being left destitute. The classic early example of this phraseology is in *Hummel's Estate,* where the court declared that "no case has gone so far as to sustain a voluntary obligation given and received with intent to defraud the wife's rights." [86] At one time it

[82] In re Iafolla's Estate, 380 Pa. 391, 396, 110 A.2d 380, 382 (1955). It was also intimated that the statute might catch pre-1947 Totten trusts when the settlor dies *after* the effective date of the statute. In a Totten trust, said the court, the beneficiary obtains no "vested" interest, merely an expectancy; consequently the transfer was not "effective" until after the date of the statute.

[83] 5 U. PITT. L. REV. 78, 87 (1939).

[84] Benkart v. Commonwealth Trust Co., 269 Pa. 257, 112 Atl. 62 (1920).

[85] *Supra,* Chap. 9:3(a).

[86] 161 Pa. 215, 217, 28 Atl. 1113, 1115 (1894). See Windolph v. Girard, 245 Pa. 349, 366, 91 Atl. 634, 639, (1914) (motive of wife was "not to defraud"); In re Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902) (no fraud if the transaction reasonable); Potter v. Braum, 294 Pa. 482, 144 Atl. 401 (1928) (stressing collusion); In re Davies' Estate, 102 Pa. Super. 326, 330, 156 Atl. 555, 556 (1931); (gift several years before death held valid "provided collusion to defraud the wife was not established"); *cf.* Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1903) (collu-

was thought that doubts as to the relevance (or otherwise) of the decedent's motive or of participation by the donee had been dispelled by *Beirne* v. *Continental-Equitable Trust Co.*,[87] which was decided in 1932; but those doubts have been somewhat revived by a series of recent cases involving obligations payable at death.

In *Rynier Estate*[88] the wife executed sealed judgment notes, payable to her brother, and delivered them to a third party. The notes were "not to be exercised until after my death." The seal in Pennsylvania imports consideration; but lack of consideration would apparently be irrelevant.[89] What counts is that in Pennsylvania this type of transfer is not deemed testamentary.[90] The lack of consideration, combined

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sive judgment); Young's Estate, 202 Pa. 431, 441, 51 Atl. 1036 (1902). *But see, e.g.*, Benkart v. Commonwealth, 269 Pa. 257, 259, 112 Atl. 62 (1920), which, curiously, cites Young's Estate; Lines v. Lines, 142 Pa. 149, 165, 21 Atl. 809 (1891).

[87] 307 Pa. 570, 161 Atl. 721 (1932). A revocable inter vivos trust with income reserved for life was sustained against the widow, although it was made with the "declared purpose" of excluding the wife. The trustee had "exclusive control" of the assets. The majority of the court said that the fraudulent intent stressed in Young's Estate is not shown merely by proving a purpose to exclude the widow (citing the Windolph case); nor is the matter affected by retention of the income for life or the power to revoke. Kephart, J., in a strong dissent, *id.* at 580, 161 Atl. at 724, stated that to remove the wife's protection is "against the best interests of society." Distinguishing earlier cases either on the ground that irrevocable gifts or transfers with no intent to defraud were involved, he lamented: "Indeed, unless such facts as those outlined in this case are sufficient to show fraudulent intent, then that intent cannot be shown, and such expressions as 'It is true a fraudulent intent will defeat a gift,' and 'Good faith is essential,' are mere words and mean nothing." *Id.* at 588, 161 Atl. at 727. The view of the majority in the Beirne case was approved in DeNoble v. DeNoble, 331 Pa. 273, 277, 200 Atl. 77, 79 (1938), with the caveat that "fraud" might exist if "the transfer were a colorable one, the husband retaining a concealed interest in the property."

[88] In re Rynier's Estate, 48 LANC. L. REV. 475, *aff'd*, 347 Pa. 471, 32 A.2d 736 (1943).

[89] Proof of consideration would strengthen the case for the transferee; proof of lack of consideration merely indicates a gift which under the "reality" theory would prevail against the widow.

[90] The decedent of course can thwart the ultimate collection of the note by becoming insolvent, or by giving away his property before his death. *Quaere:* would this make the note "revocable" under the 1947

with postponement of collection until death, makes the motive blatantly in evidence; but the court in the *Rynier* case brushed aside any question of "fraud" or motive, apparently, but not specifically, relegating these concepts to transfers that are not intended to be operative, i.e., sham.[91]

In *Cancilla* v. *Bondy* [92] the husband executed a bond for $10,000, payable at death and secured by a mortgage on realty valued at $7,500. He later executed another [93] bond and mortgage for $3,000 on the same property. Both transactions were in favor of a grandson, who gave no consideration. After the husband's death the mortgages were assigned. The assignees then foreclosed, having given the widow appropriate notice. It was not until over a year later that the widow elected against her husband's will and brought a bill in equity to enforce her dower rights. The court refused her claim, on the ground that she should have raised her defence in the foreclosure proceedings; but it stated that otherwise she would have prevailed, since the execution of the mortgages was "a patently crude attempt to destroy plaintiff's dower rights in the property and was a poor subterfuge for a will. . . ." [94]

The *Cancilla* case is of course quite consistent with the

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legislation? As to the validity of the transfer of the husband's own note, payable at death, see *infra*, Chap. 16:1.

[91] 347 Pa. 471, 474, 32 A.2d 736, 738 (1943) (citing the Windolph, Beirne, and DeNoble cases). *Cf.* Mornes Estate, 79 D.&C. 356 (Pa. 1951). In an earlier hearing in the Mornes litigation the court sustained, apparently with reluctance, an inter vivos revocable trust expressly designed to disinherit the wife. The trust, having been enacted prior to the 1947 legislation, was not affected thereby. Mornes v. Lawrence Sav. & Trust Co., 8 LAWRENCE L. J. 163 (1949).

[92] 353 Pa. 249, 44 A.2d 586 (1945).

[93] The second bond and mortgage stated that "should the mortgagor at any time during his lifetime make sale of the mortgaged premises so that he may use the proceeds thereof for his own maintenance and support, that [the bond and mortgage] . . . shall be absolutely void." If the transaction had been entered into subsequent to the 1947 legislation, would not the widow have had an alternative ground of attack, *i.e.*, that this was a revocable transfer?

[94] 353 Pa. 249, 253, 44 A.2d 586, 588 (1945). *But cf.* Estate of Donald C. Kerr, 38 Del. Co. Rep. 205 (Pa. 1951); Note, 58 DICK. L. REV. 70, 71 (1953).

Rynier case, because of the wife's inchoate interest in realty.[95] Of significance, however, is the court's statement, after having rejected "motive" as a factor in gifts of personality,[96] that "in the case of his personal property, he cannot make a fraudulent gift of it in contemplation of death, and thereby defraud his wife's statutory rights as his widow" (citing *Hummel's Estate* and *Young's Estate*).[97] In brief, it is not yet entirely clear that Pennsylvania is fully committed to the "reality" test, with reference to inter vivos devices not affected by the 1947 legislation.[98]

Before closing this review of the Pennsylvania law, tribute must be paid to the framers of the 1947 statute. This statute is a great step in the right direction, and undoubtedly affords a real measure of protection to the widow.

I doubt, however, that this type of statute is the best solution to the evasion problem.[99] It diverges too sharply from

[95] In Pennsylvania the widow's inchoate dower may be defeated by judicial sale of the husband's bona fide creditors. Bridgeford v. Groh, 306 Pa. 566, 574, 160 Atl. 451, 453 (1932). One would expect this encroachment on the dower interest to come not from the courts but from the legislatures, but the Pennsylvania approach has also been followed in Florida. In re Hester's Estate, 28 So.2d 164 (1947), 21 FLA. L. J. 152 (1947).

For a case in which the wife was permitted to intervene during the husband's lifetime, see Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1903); *cf.* Howard v. Flanigan, 320 Pa. 569, 184 Atl. 34 (1936).

[96] 353 Pa. 249, 252, 44 A.2d 586, 588 (1945).

[97] *Id.* at 253, 44 A.2d at 588. It will be recalled that Hummel's Estate requires participation by the donee. Smigell v. Brod, 366 Pa. 612, 614–15, 79 A.2d 411, 413, (1951), has a dictum that a husband can dispose of his personalty in Pennsylvania, without joinder, except for "actual fraud," citing the Cancilla case. *Cf.* Overbeck v. McHale, 354 Pa. 177, 179, 47 A.2d 142 (1946) (antenuptial transfer); Estate of Kerr, 1 Fiduc. 239, 38 Del. Co. 205 (Pa. 1951), commented on in Note, 58 DICK. L. REV. 70, 71 (1953).

[98] Brégy offers some cold comfort to the widow: perhaps Hummel's Estate is still the law in determining (as against the next of kin) the spouse's share in what is left after the notes have been paid. BRÉGY, INTESTATE, WILLS AND ESTATES ACTS OF 1947, 5858 (1949). See Note, 55 DICK. L. R. 69, 72 (1950) (referring to Hummel's Estate as "a more satisfactory statement of the law"); comment, "Gifts of Personal Property as Limited by the Rights of the Wife," 5 U. PITT. L. REV. 78, 89 (1939).

Feeser Estate (No. 2) 88 D.&C. 241 (Pa. 1954) followed the Cancilla case without dealing specifically with our problem.

[99] On suggestions for legislative reform, see Part IV, *infra*.

the maintenance and contribution formula outlined in Chapter 4. Flexibility is lacking. In one respect, the statute provides inadequate protection; in another respect, it provides too much protection. On the first count, the statute assumes that the natural reluctance of husbands to surrender control of their assets will preclude most non-revocable "evasions." But is a stony-hearted husband apt to eschew these devices, particularly in the later years of life? Such a man has a fairly wide selection of permissible transfers.[100] He may continue to enjoy his property by retaining the income for life; and it has been suggested that "even principal can be kept available by giving a disinterested trustee power to use it for the settlor's benefit."[101] Moreover, there undoubtedly will be occasions when the claim of the particular surviving family will be more persuasive than that of an income beneficiary whose interest is protected under the present Pennsylvania statute.[102] The family need should supersede the normal "reliance interest" of a stranger. On the second count, the present combination of Pennsylvania statutes may give a particular widow *unwarranted* protection. She may be financially independent because of her own wealth or because of the inter vivos or testamentary benevolence of the decedent; nevertheless she is permitted to invade the designated types of transfer. These transfers are subject to an unnecessary fetter.

[100] Brégy, *op. cit. supra,* note 98, 5855–5883. The 1956 amendment excluding life insurance, "whether payable in trust or otherwise," was foreshadowed by Estate of Brown, 384 Pa. 99, 119 A.2d 513 (1956); *cf.* In re Auch's Estate, 70 Montg. 370, 68 York 137 (Pa. 1955). On United States savings bonds, see In re Graham's Estate, 42 Del. Co. 9, 4 Fiduc. 467, 3 D.&C.2d 218, (Pa. 1954); *but see infra,* Chap. 15:1.

The act clearly affects revocable inter vivos trusts; *cf.* Ballantyne Estate, 1 Fiduc. 445, 67 Montg. 314, 65 York 148 (Pa. 1951); McKean Estate 71 D.&C. 429 (1950), *aff'd,* 366 Pa. 192, 77 A.2d 447 (1951), 24 TEMP. L. Q. 488 (1951) (trust executed before the statute); Vederman Estate, 78 D.&C. 207, 210 (Pa. 1951). In Longacre v. Hornblower & Weeks, 83 D.&C. 259 (Pa. 1952) a lower court permitted the widow to treat as testamentary (as to one half thereof) her husband's declaration of joint tenancy with right of survivorship.

[101] Brégy, *op. cit. supra,* note 98, at 5882.

[102] See note 78 *supra.*

CHAPTER 10

The Individual Equities

1. PRELIMINARY REMARKS

This chapter is concerned with the factual circumstances that the courts appear to find persuasive.[1] Some jurisdictions, for example, stress the proximity of the date of the transfer to the date of death. For convenience, I shall call these circumstances "equities." The main purpose of the chapter is to describe the part played in the case-law by each particular equity. How many cases, for example, have stressed "proximity to death," and to what degree? This quantitative analysis should give us a clearer picture of the case-law. It will be accompanied, wherever appropriate, by a discussion of the wisdom of placing emphasis on a particular factor, either by the courts or in remedial legislation.

Even the casual reader of the evasion cases cannot fail to notice that some courts have been influenced — avowedly or otherwise — by the equities. This phenomenon, of course, is observable chiefly in cases decided in "intent" jurisdictions, where stress is laid on such factors as the proportional amount of property that was transferred and the proximity of the transfer to the date of death. But it may also be found — to a lesser degree, and certainly with less conscious stress — in cases using the "control" rationale. And even in the "reality" jurisdictions the decision on whether or not the decedent had the requisite *animus donandi* may sometimes be colored by the equities of the case.

The task of pinpointing the equities is not an easy one. The temptation to overgeneralize is ever present. The diffi-

[1] In Chapter 11 I will attempt to determine the extent to which the decisions actually reached coincide with the decisions that would have been dictated by the individual equities.

culty is that the courts are not in the habit of careful delineation of all the facts. This reluctance to particularize seems odd in a body of law dealing with "fraud." But the explanation is simple. Being committed to a doctrinaire emphasis on a given single factor, as, e.g., the decedent's "intent," the degree of "control" retained, or the "reality" of the transfer, many courts probably feel, with some justification, that the equities are in theory irrelevant. Under the illusory trust doctrine of *Newman* v. *Dore,* for example, the sole inquiry is as to retention of excessive control. In theory, it matters not that the decedent transferred the bulk of his estate or that his widow has been left destitute. And even in the "intent" jurisdictions the reluctance to particularize makes it difficult for those coming later to find a pathway. Although several evidentiary factors are admittedly relevant, the necessity of expressing the final decision in terms solely of the "intent" factor undoubtedly causes a tendency to slight the other factors.

I use the term "major equities" to denote those factors that at one time or another, in one jurisdiction or another, have been considered a necessary part of the claimant's case — by way of proof or disproof.[2] No one "minor equity" is particularly significant *per se.* But the combined effect of the known minor equities may be decisive when they all tug in the same direction. Then it is that we may find aberrations in formal doctrine. And, absent a long-standing judicial sanctification of the particular doctrine, the chances of predicting the result of a case increase with the weight of the equities. In *Sederlund* v. *Sederlund,*[3] for example, in which the husband transferred some nine tenths of his personal property, the decision to sustain the transfers appears quite proper in view of the following circumstances: (a) moral obligation of the decedent to nine children by a former marriage, (b) the widow had

[2] In Kentucky, for example, the size of the transfer and the relationship of the donee are relevant. See *supra,* Chap. 8:3(b)(4).

[3] Wis. (1922). In Chaps. 10 and 11, as well as in Tables A, B, and C, each evasion case is mentioned so frequently that the citations therein will include only the state and date.

been married to the decedent for only two years, and (c) "the property distributed [comprised] . . . the earnings of the deceased and his former wife and their children." [4]

The cases that were analysed include all cases involving postnuptial transfers in which a decision was reached on the merits. Also analysed were those cases decided on points of procedure or pleading — e.g., whether the plaintiff has stated a sufficient cause of action — in which the court takes a stand on the evasion question.[5] The last-mentioned factor also justified inclusion of several cases involving fraud on inchoate dower. No case was included that dealt solely with spouses' rights in contracts to make a will,[6] with antenuptial transfers,[7] or with transfers in evasion of the privileges entailed in alimony,[8] maintenance,[9] or community property.[10] These excluded cases are referred to as related cases; the cases under analysis are described simply as evasion cases. Two hundred and sixty-three evasion cases were found. They are set out in Table C,[11] in which each case is classified according to the holding and to the apparent state of the equities. They are also set out in Table E,[12] in which the cases are classified according to states. Table E also contains a list of important related cases.

2. The Major Equities

(a) *Proportion* [13] *of Decedent's Property Included in the Transfer.* As is to be expected, this factor receives more

[4] The opinion does not divulge the widow's financial circumstances. She had one child by the decedent.

[5] On this criterion about a dozen cases were excluded as having no significant content, although obviously involving inter vivos evasions; *e.g.*, Blush v. McQuade, 47 N.Y.S.2d 450 (Sup. Ct. 1944); Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1903).

[6] See Appendix D, *infra.*

[7] See Appendix C, *infra.*

[8] See text, Chap. 17, at note 13.

[9] *Ibid.*

[10] See Chap. 20, at note 21.

[11] *Infra,* p. 387.

[12] *Infra,* p. 406.

[13] The proportion is determined as of the date of death instead of at the time of the transfer. In all but a few cases it made no difference which date was chosen.

stress than any other. In fact, it is so important that we can do justice to it only by examining each individual evasion case from that particular viewpoint. To avoid a duplication of effort that examination will be made in Chapter 11, in conjunction with the inquiry into the over-all influence of the equities.

(b) *Proximity of the Transfer to the Date of Death.* The date of the transfer is stated, or may be deduced, in only one hundred and sixty-seven cases. In other words, approximately one third of the two hundred and sixty-three evasion cases fail even to mention this factor. The cases mentioning the factor are set out in Table A.[14] The breakdown is as follows:

		Cases	Total
Probably within few days, although not clear	Invalid	3	
	Valid	3	6
Within one week	Invalid	8	
	Valid	3	11
One week to one month	Invalid	3	
	Valid	8	11
One to three months	Invalid	4	
	Valid	11	15
Three to six months	Invalid	3	
	Valid	11	14
Six to twelve months	Invalid	5	
	Valid	12	17
One to two years	Invalid	12	
	Valid	12	24
Two to three years	Invalid	4	
	Valid	16	20
Three to four years	Invalid	7	
	Valid	11	18
Four to five years	Invalid	5	
	Valid	7	12
Five to ten years	Invalid	8	
	Valid	9	17
Over ten years	Invalid	4	
	Valid	7	11

[14] *Infra,* p. 379. A few cases concern several transfers effected by different inter vivos devices, *e.g.,* Krause v. Krause, N.Y. (1941) (deed and Totten trust). These cases are identified with the transfer that received the most attention in the judgment. Some cases also involve several transfers effected by the same inter vivos device. These cases are identified with the transfer occurring the longest time before death. To that extent these multiple-transfer cases are weaker or stronger than portrayed, depending on the point of view. As mentioned earlier, "invalid" or "valid" does not necessarily mean a decision on the merits. See *supra,* text at note 5.

SUMMARY

Cases Examined	263
Cases in which factor mentioned	176 (67%)
Total invalid	66 (37.5%)
Total valid	110 (62.5%)
Total transfers within three years	118 (67%)
Total invalid	42 (36%)
Total valid	76 (64%)
Total invalid transfers	66
Within three years	42 (64%)
Over three years	24 (36%)
Total valid transfers	110
Within three years	76 (69%)
Over three years	34 (31%)
Total transfers within ten years	165 (94%)

The "proximity to death" factor is doctrinally irrelevant in jurisdictions that do not use the "intent" rationale; possibly this may explain why the factor is not even mentioned [15] in a little over a third of the cases. As far as the cases mentioning the factor are concerned, the over-all picture reveals no particular stress on proximity to death. This point may be proved by reference to the grouping of the "invalid" cases. These cases are by no means clustered in the time-periods occurring close to death. Forty-four per cent of these cases concern transfers made more than two years before death. Moreover, the time-periods in which the "invalid" transfers outnumber the "valid" transfers follow a capricious pattern, showing an inconsistent relationship to the proximity factor. We are not surprised to find that the spouse wins as often as she loses when the transfer is made within one week of death. Oddly enough, however, she wins almost as often as she loses when the transfer is made between five and ten years before death. This inconsistency is even more pronounced in the cases in which the donee has prevailed. The donee wins more often than he loses in all time-periods from one week up to

[15] It receives occasional stress; see, *e.g.*, Poole v. Poole, Md. (1916) (14 years); *cf.* West v. Miller, Fed. (1935) (transfer not in "contemplation of death").

one year before death; [16] but the figures are equal in the one to two year period.

The plain fact is that the proximity factor plays a relatively minor role in the case-law. In this respect the case-law follows the maintenance and contribution formula. Under the formula the proximity factor is relevant, but by no means decisive; the main enquiry is whether the transfer was unreasonably large under the circumstances. Obviously, a transfer made close to death might be quite reasonable, e.g., a modest gift to children of a former marriage. On the other hand, an unreasonably large revocable trust should be vulnerable even though made five years before death. In brief, we are concerned more with *amount* than with time.

The foregoing discussion may throw some light on the test proposed in Section 33 (b) of the Model Probate Code: "Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary." [17] Disregarding for the time being the difficulties raised by use of the word "fraud," our figures show that the time limit of two years is unrealistic as applied to the existing case-law. Further, the emphasis on the proximity factor is unfortunate from the viewpoint of both the donee and the widow. For the donee, it means that he is prejudiced by the mere fact that the transfer occurred within two years of death — a circumstance that should be of minor relevance in determining liability to the widow. For the widow, it means that she is prejudiced with reference to transfers occurring prior to the two-year period. She may still prove "fraud" — whatever that may be — but the implications are that she would have a more difficult job on her hands. The figures indicate that she would have been

[16] Of the sixteen cases involving transfers that clearly or probably were made within a week of death, six favored the donee.

[17] §5(a)(1) of the statute recommended by the 1939 Report of the Commission on Revision of the Laws of North Carolina Relating to Estates utilizes a one year period; see p. 334, *infra*.

under this handicap in forty-four per cent of the decided cases.[18]

To be sure, we find a correlation between the proximity factor and the result of the case in the "intent" jurisdictions. The Missouri courts,[19] for example, usually state that the transfer must be in "contemplation" or in "apprehension" of death; and most of the "invalid" transfers in that state were made within a few months of death. We concluded earlier [20] that intent to defraud the surviving spouse is an unsatisfactory test, since it is provable only by reference to objective factors – of which the most important is the relative size of the transfer. Thus the emphasis on "intent" serves to confuse the issue. But even when intent to defraud is the sole criterion of liability it is unrealistic to stress proximity to death, or "contemplation of death" as indicative of fraudulent intent. A husband intending to defraud his wife will normally put his plan into execution before he has any acute awareness of impending death. In point of fact, the more recent evasion cases usually deal with transfers that occurred some time before death. This phenomenon may be due in part to the rising popularity of estate planning, which encourages deliberate lifetime giving. At any rate, most of the cases involving transfers made within a few months of death are, in the main, older cases. Moreover, as pointed out above, the figures set out above indicate that the transfer occurred *more* than two years before death in forty-four per cent of the cases.

Further, the phrase "contemplation of death" is ambiguous. It could mean any one of, or a combination of, the following: (a) mere proximity to death, without awareness thereof; (b) awareness of impending death; and (c) testamentary intent, in connection with an inter vivos transfer made in good health but designed to have post-mortem effect; for

[18] To extend the presumptive period to three years would help the widow, harm the donee.

[19] See *supra,* Chap. 8:3(b)(5).

[20] *Id.,* sec. 4.

example, an inter vivos trust with income retained for life. The fact that the transfer occurred in proximity to death does not necessarily indicate awareness of death,[21] or, for that matter, testamentary intent.[22] Probably the phrases "contemplation of death" and "apprehension of death" have primary reference to either or both of the latter two factors.[23] But neither of these two factors necessarily entails subjective intent to defraud the widow. The transfer may have been inspired by a variety of motives, whether or not including malevolence to the surviving spouse. The most obvious of these motives are sheer benevolence to the donee; a sense of responsibility to the donee, e.g., when the donee is an infant child by a prior marriage, or a person who has been financially dependent on the transferor; and a feeling of obligation to the donee, stemming from past injuries to the

[21] The state of the transferor's health is mentioned with some frequency: *e.g.,* Re Wrone's Estate, N.Y. (1941) (transferor in good health for a man of his years; held, valid); see Gentry v. Bailey, 47 Va. (6 Gratt.) 594, 606–607 (1850). In Sturgis v. Citizens National Bank, Md. (1927), the transfer was made about five years before the decedent was killed in an accident; held, valid.

[22] The "apprehension of death" phrase has received little judicial analysis. Apparently it functions more as a vague cut-off test than as a criterion of intent, *i.e.,* no suit may be brought by the widow if the transfer was made at a time when there was no apprehension of death, whatever that means. See Wahl v. Wahl, Mo. (1947). As far as transfers occurring in apprehension of death are concerned, the courts seem to have been interested more in the size of the transfer than in the "apprehension" factor. In Missouri most of the "invalid" transfers occur within a few months of death, and they are accompanied both by awareness of death and testamentary intent. *But cf.* Resch v. Rowland, (Mo. 1953) in which there was fraud on inchoate dower, the court stating that "a conveyance does not necessarily have to be made in contemplation of death if it in fact be made to defraud the wife of her dower"; and see the following Kentucky cases in which the transfer was held invalid: Payne v. Tatem (1930) (2 years before death); Cochran's Adm'x v. Cochran (1938) (a little over three years); Wilson v. Wilson (1901) (eight years).

[23] Note that these two factors are independent. True, if the transferor was aware of death he probably made the transfer with testamentary intent. But the converse does not hold; indeed, many inter vivos transfers, made in good health, are concerned with the contingencies of death. On parallel difficulties in the tax field see Lowndes and Rutledge, "An Objective Test of Transfers in Contemplation of Death," 24 TEXAS L. REV. 134 (1946).

donee by the decedent. A transfer made with any of these motives may quite conceivably be made in awareness of death or with testamentary intent, with no concomitant intent to defraud the widow.[24] The transfer may of course have the incidental effect of pauperizing the widow; and only a dullard could fail to be aware of that fact. But here again the significant factor is the relative size of the transfer. To say that a man will be presumed to know that large inter vivos transfers will harm his widow is only another way of saying that he should not be permitted to make unreasonably large transfers to her prejudice. To phrase this thought in terms of his assumed intent is but to add an unnecessary and confusing factor.

The proximity factor is, of course, not entirely irrelevant. A *large* transfer has more serious consequences to the widow if made in close proximity to death than if made at an earlier time. The wife's standard of living normally depends on the capital and income of her husband; and when the transfer occurs close to death the drop in her standard of living (as a widow) is that much more sudden, more cruel.[25] The proximity factor is thus of some relevance, particularly under a family maintenance legislative scheme. But the relatively greater significance of the size of the transfer — and, to single out another equity, the reliance interest of the donee — makes it unwise to place special emphasis on the proximity factor.

Although unsuitable as a criterion, the proximity factor has another and more useful significance. The reliance interest of the donee requires a cut-off period. In other words, transfers occurring more than a specified number of years before the decedent's death should be immune to the widow's

[24] Probably most inter vivos transfers are made in the last decade or so of the transferor's life. But this indicates an awareness of the contingencies of death, not necessarily an awareness of impending death, or intent to defraud the widow.

[25] Likewise, the closer to death the transfer was made, the longer the lifetime ownership by the transferor; and the longer the lifetime ownership, the greater the quasi-testamentary nature of the transfer, particularly if income or control was retained. See pp. 87–88, *supra*.

claim. The greater the lapse of time between the transfer and the date of death, the more the donee should be justified in relying on the security of his title. The drop in the widow's standard of living, occasioned by a large transfer in close proximity to death, has its counterpart – perhaps less poignant, but nevertheless real – in the hardship to the donee, years after receipt of the property, if he is forced to return it to the widow or to contribute to her support. From the donee's viewpoint, there comes a time when he should be able to consider the property to be free of the widow's claim. This reliance factor is recognized in the model statute [26] by provision for a cut-off period of three years when no beneficial interest is retained in the property that was transferred, and of ten years when such an interest was retained. Transfers occurring within the stated periods before death are tested by the maintenance and contribution formula, with the proximity factor being relevant but not decisive. Transfers occurring prior to the cut-off dates entail no liability for contribution.

The practicality of the stipulated cut-off dates is of course a matter of opinion. The figures set out above, however, suggest that the contemplated dates should not cause undue hardship. Sixty-seven per cent of all cases in which the proximity of the transfer to the date of death may be deduced concern transfers made within three years of death; and ninety-four per cent concern transfers made within ten years of death.

(c) *Provision by the Decedent for the Surviving Spouse.* This factor is mentioned in many decisions, whether with [27]

[26] Suggested Model Decedent's Family Maintenance Statute §8, *infra,* Chap. 22.

[27] Smith v. Smith, Colo. (1896); Bee Branch Cattle Co. v. Koon, Fla. (1949); Williams v. Collier, Fla. (1935); Smith v. Hines, Fla. (1863); Hoeffner v. Hoeffner, Ill. (1945); Boyle v. John M. Smyth Co., Ill. (1928) (*semble*); Delta & Pine Land Co. v. Benton, Ill. (1912); Benge v. Barnett, Ky. (1949); Weber v. Salisbury, Ky. (1912); Wilson v. Wilson, Ky. (1901); Whittington v. Whittington, Md. (1954); Mushaw v.

or without [28] conscious stress. In the cases that emphasize the factor the decision usually turns on the "reasonableness" of the transfer, with the size of the provision made for the spouse being quite persuasive. The number of these cases is greater than might be suspected from perusal of the evasion literature, in which the usual methodology is to analyze the cases by rationale or by the type of transfer. Even Sykes, who tacitly assumes that a variety of factors may influence the Maryland courts, states of this factor that it "seldom appears explicitly in other jurisdictions." [29]

It is probable that the factor occurs in cases other than those noted below, and that it is not alluded to by these courts because it is not generous enough to be meaningful, or because the court is committed to an approach that in theory

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Mushaw, Md. (1944); Whitehill v. Thiess, Md. (1932); Rose v. Union Guardian Trust Co., Mich. (1942); Trabbic v. Trabbic, Mich. (1905); Potter v. Winter, Mo. (1955); Wahl v. Wahl, Mo. (1947); Merz v. Tower Grove Bank & Trust Co., Mo. (1939); In re Sides' Estate, Neb. (1930); Evans v. Evans, N.H. (1917); Hart v. Hart, N.Y. (1949); President and Directors of Manhattan Bank v. Janowitz, N.Y. (1940); Marine Midland Trust Co. v. Stanford, N.Y. (1939); City Bank Farmers Trust Co. v. Miller, N.Y. (1938); McGee v. McGee, N.C. (1843); MacLean v. J. S. MacLean Co., Ohio (1955); York v. Trigg, Okla. (1922); Mornes v. Lawrence Sav. & Trust Co., Pa. (1949); Reynolds v. Vance, Tenn. (1870); McIntosh v. Ladd, Tenn. (1840); Hughes' Lessee v. Shaw, Tenn. (1827); Lightfoot's Ex'ors v. Colgin, Va. (1813); *cf.* Metropolitan Life Insurance Co. v. Baker, 107 F. Supp. 1 (D. C. N. D. Texas 1952) (community property); Matter of Schacter, N.Y. (1944). *Contra:* Fleming v. Fleming, Iowa (1921) (factor deprecated); Ibey v. Ibey, N.H. (1945) (standard of "reasonableness" rejected).

[28] Cheatham v. Sheppard, Ga. (1944); De Leuil's Ex'ors v. De Leuil, Ky. (1934); Allender v. Allender, Md. (1951); Bullen v. Safe Deposit & Trust Co., Md. (1939); Poole v. Poole, Md. (1916); Roche v. Brickley, Mass. (1926); Wanstrath v. Kappel, Mo. (1949); Stone v. Stone, Mo. (1853); Sanborn v. Goodhue, N.H. (1853); Schmidt v. Rebhann, N.Y. (1952); Harris v. Harris, Ohio (1947); Bolles v. Toledo Trust Co., Ohio (1944); Dunnett v. Shields, Vt. (1924); Hall v. Hall, Va. (1909); Sederlund v. Sederlund, Wis. (1922); *cf.* Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937) (antenuptial transfer); Cooke v. Fidelity Trust and Safety-Vault Co., Ky (1898); Mark v. Mark, 145 Ohio St. 301, 61 N.E.2d 595, 160 A.L.R. 608 (1945).

[29] Sykes, "Inter Vivos Transfers in Violation of the Rights of Surviving Spouses," 10 MD. L. REV. 1, 13 (1949).

precludes any consideration of the reasonableness of the transfer. A glance at the footnoted cases reveals that the factor is referred to with some frequency even in the so-called "reality" jurisdictions, e.g., Massachusetts and Kansas. A court that denies recovery to the widow on doctrinaire reasoning may wish to salve its conscience by allusion to this factor, without committing itself to the proposition that the break of the equities should determine the decision.

To be significant for purposes of our discussion, the provision need not necessarily have been large: just what was reasonable under the circumstances.[30] And it may have been testamentary [31] or inter vivos. In most cases it was inter vivos; a husband who is disposed to evade his marital obligations will normally employ inter vivos devices in order to circumvent the wife's right of election. In the usual evasion case the pecuniary value of the widow's testamentary share is slight. In large estates, for which legal advice has probably been obtained, the comparative value is higher, perhaps because the legal profession is coming to realize that the only completely foolproof bar to evasion litigation is to give the widow enough to make it not worth her while to attack the inter vivos transfers.

(d) *Relationship of the Donee.* One hundred and eighty-five (70%) of the two hundred and sixty-three evasion cases mention the relationship, if any, between the donee and the decedent. The cases are set out in Table B,[32] in which the cases favoring the surviving spouse are italicized. As used here, the term "donee" excludes both the decedent and the surviving spouse when either spouse was given a life estate in the subject matter of the transfer. It also excludes the decedent in the several cases in which he purchased an annuity. "Children" includes grandchildren. The breakdown is as follows:

[30] *E.g.,* Kernan v. Carter, 132 Md. 577, 104 Atl. 530 (1918).
[31] Kernan v. Carter, *supra,* note 30.
[32] *Infra,* p. 383.

	Favoring Spouse	Favoring Donee	Total
(a) Decedent's children by a prior marriage..	30	33	63
(b) Decedent's children, not clear whether of his last marriage or a prior marriage....	11	20	31
(c) Decedent's children, of the last marriage..	2	9	11
(d) Close relatives (parent, brother, nephew)..	15	30	45
(e) Distant relatives (uncle, cousin, in-law, etc.)	2	3	5
(f) Non-relatives	4	13	17
(g) Non-relatives (*semble*)	1	6	7
(h) Charity	3	3	6
	68 (37%)	117 (63%)	185[33]

These figures indicate that the motivation for an inter vivos "evasion" is likely to be concern for children.[34] The largest single group of cases deals with transfers to children of a prior marriage: of the one hundred and eighty-five cases in which the relationship factor appeared, ninety-four, or slightly more than one half, involve transfers to children who clearly or presumably were children of a prior marriage.[35] If we include the eleven cases involving children of the last marriage, we find one hundred and five cases, or fifty-seven per cent, involve transfers to the decedent's children, whether of his last marriage or of a prior marriage. In "evasions" of this sort the motive is natural, and humane; indeed, not to "evade" would be abnormal.[36] Consider the personal equation whenever a man with children of his own makes a

[33] The cases in Table B total one hundred and eighty-five, but two cases appear twice: Aybar's Estate, N.Y. (1952), and Leiman's Estate, N.Y. (1952). In these two cases the transfers were to several donees, falling in separate categories.

[34] The relationship factor does not have a decisive bearing on the result of the case. For example, we would expect the children of a prior marriage, in category (a), to win most of their cases: but they lost almost as many cases as they won. Ten of the thirty cases in which they lost were decided in Kentucky and Missouri, where the courts openly consider the equities. See Table B, *infra.*

[35] In other words, categories (a) and (b).

[36] In Williams v. Collier, Fla. (1935), the court referred to a trust for grandchildren by a previous marriage as being for a "laudable purpose." Although children in this country receive little protection against disinheritance, it is a curious anomaly that in many states the widow's forced share is cut down if children survive. See *supra,* Chap. 2, text at note 12.

second marriage. Usually it will be a marriage of convenience.[37] Would not the normal husband so situated consider himself obligated merely to provide his widow with maintenance for life or until remarriage? Would he not prefer that the bulk of his property – including the remainder after the widow's life estate – go to his own flesh and blood? [38] Surely he would. And surely he would attempt an inter vivos "evasion."

These figures also support [39] our working hypothesis that the relative increase in American family disharmony presages an increase in "evasions" of the statutory share.[40] They indicate that the property affected by the widow's elective share will frequently be more than she deserves, and that in many cases "evasion" should be condoned, not censured. We need a fresh approach to the over-all problem of family protection. From the legislative viewpoint, the widow's elective rights should be tailored to her individual need; the statute should

[37] Remarriages are by no means the sole cause of "evasions." By way of a spot check on the cases involving transfers to donees other than children of a prior marriage, consider category (d) (close relatives). In only eight of the forty-five cases do we know for certain that either or both of the parties had been married more than once. Most of these cases are fairly recent: Van Devere v. Moore, Minn. (1954); National Shawmut Bank v. Cumming, Mass. (1950); Bee Branch Cattle Co. v. Koon, Fla. (1949); Hastings v. Hudson, Mo. (1949); Rynier's Estate, Pa. (1943); Murray v. Brooklyn Sav. Bank, N.Y. (1939); Kelley v. Snow, Mass. (1904); and Hummel's Estate, Pa. (1894).

[38] Children of a prior marriage probably have a more persuasive equity as against the claimant stepmother than have children born of the marriage between the decedent and the claimant, although this generalization is of small consequence if the equities in the individual case favor the widow. In Burton v. Burton, Colo. (1937) the court stressed the pull of blood relationship (children of former marriage) over "a wife in name only, of some twenty months, whom [decedent] did not greatly trust." Also see Williams v. Collier, Fla. (1935) ("the decedent being under no obligation to arrange the disposition of his personal property so as to benefit his widow's heirs to the detriment of his own"); Sederlund v. Sederlund, Wis. (1922); *cf.* Dickerson's Appeal, Pa. (1887).

[39] But not overwhelmingly so. Of the ninety-four cases in groups (a) and (b), forty-two have occurred during or since 1930, twenty-seven during or since 1945. For a chronological analysis of *all* evasion cases see p. 9, *supra.*

[40] *Supra,* p. 10.

contain a policy directive to the courts on the problem of inter vivos evasions; and the directive should require the courts to consider *all* the circumstances of the case. Until this is done, the widow in the remarriage cases may receive too much or too little under the "control" doctrine (depending on the circumstances), and will get nothing (which may or may not be what she deserves) under the "reality" doctrine.

(e) *Participation by the Donee.* A number of cases have made a curious restriction on the widow's claim: she must prove that the donee[41] participated in the fraud. This peculiar requirement probably stems from the cases under the statutes of Elizabeth, dealing with conveyances in fraud of creditors.[42] No doubt in the typical evasion case the donee *does* "participate"; but the circumstance, when it occurs, usually occasions no judicial comment.[43] The decisions that require the participation factor generally use the "intent" rationale,[44] and they tend to rely on other cases that involve

[41] By "donee" is meant, of course, the ultimate beneficiary. Thus in the trust cases we are concerned with participation by the beneficiary, not the trustee. In at least one case, however, the court went out of its way to condemn the part taken by the corporate trustee in arranging an allegedly "bullet-proof" transfer, Merz v. Tower Grove Bank & Trust Co., Mo. (1939).

[42] Speaking of the grantee in the creditor cases, Glenn says that "notice of an evil purpose may differ from participation. Notice may mean carelessness only. . . ." (Glenn, 1 FRAUDULENT CONVEYANCES AND PREFERENCES, §251 (1940). If the purchaser for value had mere knowledge he may be guilty only of "constructive fraud," as distinguished from "actual fraud." Although he will still lose the property to the creditor he may in some instances receive compensation for maintaining the property while it was in his hands. The donee, however, having paid no consideration, will lose the property to the creditor even though he took it in good faith.

[43] *E.g.,* Cheatham v. Sheppard, Ga. (1944); In re Kilgallen's Estate, N.Y. (1953); Marano v. LoCarro, N.Y. (1946); *cf.* Goewey v. Hogan, N.Y. (1951); Bodner v. Feit, N.Y. (1936) (mentioned in both majority and dissenting opinions, as bearing on "intent"). *But cf.* Clavin v. Clavin, 41 N.Y.S.2d 377 (Sup. Ct. 1943), *aff'd,* 267 App. Div. 760, 45 N.Y.S.2d 937 (1st Dep't 1943), an antenuptial transfer in which the court intimated that "participation" is an essential factor in the illusory trust doctrine.

[44] But it is not required in Kentucky and Missouri, the two main "intent" jurisdictions; *e.g.,* Tucker v. Tucker, Mo. (1862) (jury finds no collusion yet widow wins on "intent" test).

either alimony or antenuptial transfers.[45] It seems to be immaterial whether or not the participation benefitted the donee. In the normal case the donee will of course derive some benefit.[46]

The great majority of the evasion decisions do not require participation by the donee. Indeed, the requirement seems out of place in the evasion field. If adequate consideration has been paid for the transfer the widow has no claim of any sort; the husband having received a fair exchange, the widow is not injured.[47] Absent inchoate dower, the community's

[45] The Colorado cases have flirted with the requirement; see p. 136, *supra*. In Rabbitt v. Gaither, Mo. (1887) a minority of the court stated that participation is necessary. The majority stated that there was participation, without ruling on the necessity therefore. The court cited Feighley v. Feighley, 7 Md. 537 (1855) (alimony); see also Jaworski v. Wisniewski (1925). Later Maryland cases (see Table E, *infra*) ignore the requirement, but "participation" factually was not present in these cases. The most recent Maryland case leaves the point open: Whittington v. Whittington, 205 Md. 1, 12, 106 A.2d 72, 77 (1954). The factor was stressed in Hummel's Estate, Pa. (1894); *cf.* Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1903) (collusive judgment bill); Potter Title and Trust Co. v. Braum (1928); Divilbiss Estate, 13 Pa. Dist. R. 503 (1904) (purchase of realty in name of children); In re Davies Estate, (1931). Hummel's Estate was cited with approval in a recent lower court dictum: Elias v. Elias, 16 Fayette Leg. Jour. Pa. (1953).

Dicta favoring the requirement may also be found in Dorrough v. Grove, 257 Ala. 609, 610, 60 So.2d 342, 343 (1952) (antenuptial); Wright v. Holmes, Me. (1905); In re Sides' Estate, Neb. (1930); *cf.* Maruska v. Equitable Life Assur. Soc. of United States, 21 F. Supp. 841 (D. Minn. 1938) (alimony, husband died before suit).

[46] In some cases the widow may be able to have the transfer set aside as being "colorable"; see *supra*, Chap. 9:3.

[47] *But cf.* Brewer v. Connell, Tenn. (1851), which seems to say that a widow may even upset conveyances for consideration. There appears to be no authority for this proposition in the Tennessee statute dealing with fraud on dower, discussed p. 110, *supra;* see Reynolds v. Vance, Tenn. (1870). The real explanation of the Brewer case lies in the facts, which smack of the Little Orphan Annie comic strip. Brewer "became exasperated" at his wife, threatened to "inflict stripes" on her, and was "addicted to intoxication," in consequence of which he was jailed. The widow filed a bill for divorce and alimony, and secured an injunction "to prevent the transfer of his property in fraud of the rights of his wife." The defendant Connell was a magistrate who knew the facts and had announced that Brewer ought to be put in jail, and that "if he was brought before him, he should go to jail without bail." Notwithstanding this, and knowing of the alimony suit, Connell went bail

interest in the donee's security of title precludes the widow from choosing to inherit one type of property (that which the husband sold) instead of another type (the consideration received by the husband). As far as voluntary transfers are concerned, the widow is hurt whether or not the donee participates. The gravamen of her complaint is that the husband has failed to provide post-mortem support. He injures her to the same extent whether he burns his money, makes a collusive transfer, or gives it to a person who is unaware of his design. In each instance the widow's need is the same. She should be able to recover without being subjected to the difficult and irrelevant task of proving the donee's state of mind. The donee cannot complain, as he was receiving a handout in any event.

3. The Minor Equities

(a) *For the Claimant:*

(1) Moral Claim of Widows in General. Some of the older cases urge the moral claim of widows. Thus *Thayer* v. *Thayer*[48] states that "the husband is bound, by the law of God and man, to provide for her a support during his own life, and, upon his death, the moral duty does not end. He should provide for her so long as she lives." And in *Stone* v. *Stone*[49] it was said of the widow's claim to her husband's personalty that "The principle is an important one, and, however harsh its application in the present instance may be, we deem it too essential to the preservation of the right of dower of widows in their deceased husband's estates, to suffer it to be overthrown, *even in a case which has no merit to commend it.*"[50] But nowadays counsel for the widow would be better

for Brewer, took a deed of trust for indemnity and then purchased the *res* of the trust from Brewer, paying a fair price. Brewer, who all this time had been declaring his intent to disinherit his wife, then hung himself.

[48] 14 Vt. 104, 118 (1842).

[49] 18 Mo. 389, 391 (1853).

[50] Italics supplied. See also Grover v. Clover, Colo. (1917); Smith v.

advised to stress some equity of the individual client, as, for example, that she helped the decedent to accumulate his property,[51] and that she is now destitute. True, the statutory share implies a moral obligation of the husband to provide support for his widow; but a moral obligation is easy to invoke, hard to enforce. Cases like the *Thayer* case and the *Stone* case are offset by decisions adopting a strict interpretation of the election statutes. For example, a line of Kansas and Massachusetts cases states that the courts cannot venture beyond the bare words of the statute: a share in the decedent's "estate" means what it says.[52]

(2) Whether or not Claimant Helped Accumulate Decedent's Estate.

> "Many a wife", said an Iowa court a generation ago, "has been a faithful helper in the building of great fortunes. Many a wife, by economy and self-denial, has been a strong factor in the building. Yet we are asked to say that this wife, who has done faithful service and practiced self-denial for 36 years, that something might be left for declining years, must be left penniless. These are some of the features that bring [joint tenancy] into disfavor, and show that it

Smith, Colo. (1896); Beck v. Beck, Iowa (1884); Bolles v. Toledo Trust Co., Ohio (1944) quoting Doyle v. Doyle, Jr., 50 Ohio St. 330, 34 N.E. 166; Sanborn v. Lang, Md. (1874); *cf.* Smith v. Northern Trust Co., Ill. (1944); Blankenship v. Hall, Ill. (1908); Headington v. Woodward, Mo. (1919); Beirne v. Continental-Equitable Trust Co., Pa. (1932) (dissent of Kephart, J.); Krause v. Krause, N.Y. (1941) (dissent of Harris, J.). For strong views on the subject, at a time when the husband acquired the wife's personalty upon marriage, see Hughes' Lessee v. Shaw, Tenn. (1827); and, emphasizing baser motives, see Walker v. Walker, N.H. (1890): "Marriage is the equivalent of a pecuniary consideration. . . . The plaintiff's right to her distributory share of her husband's large estate, and which is quite likely to have been one of the inducements to her marriage with him, is therefore in the nature of an actual purchase of that right. . . ."

[51] See *infra*, text at note 53.

[52] In Small v. Small, Kan. (1895), the unsuccessful widow had a strong moral claim, having brought up the five children of husband's previous marriage during 29 years of marriage; *cf.* Osborn v. Osborn, Kan. (1918); Kerwin v. Donaghy, Mass. (1945). In Poole v. Poole, Kan. (1915), the court differentiated evasion cases from cases involving transfers in fraud of alimony and separate maintenance.

cannot be made to defeat a wife's claim under the statute." [53]

Similar views have been expressed in other cases.[54] The factor also receives indirect emphasis in those cases that characterize the widow as a volunteer, as contrasted with the contribution of the donee.[55] On the other hand, some claimants have succeeded even though the court has commented on the fact that the claimant did not contribute to the decedent's estate.[56]

(3) Abandonment of Claimant by Decedent. In many cases the parties were separated before the inter vivos transfer was effected. The question of fault is as a rule not mentioned, or, if it is mentioned, has not been determined.[57] In point of

[53] Fleming v. Fleming, 194 Iowa 71, 81, 174 N.W. 946, 950 (1921). The widow prevailed. The dissenting judge retorted, at p. 102, 174 N.W. at 958, "But even the best wife is entitled to no more than such provision as the legislature has seen fit to make for her. Conceding everything to the quality of the plaintiff as the wife, that throws no light on whether this contract signed by her husband is or is not enforceable." See *infra,* Chap. 15, text at note 46.

[54] Williams v. Williams, Fed. (1889); Payne v. Tatem, Ky. (1930); In re Sides Estate, Neb. (1930); *cf.* Murray v. Murray, Ky. (1890); Beirne v. Continental-Equitable Trust Co., Pa. (1932) (dissent of Kephart, J.).

[55] *E.g.,* In re Sutch's Estate, Pa. (1902), in which the court stressed the moral claim of children by first marriage who had helped build up family truck farm, and who "saw the new wife step into their mother's place, and a possible new family about to enjoy the fruits of their labor."

On the independent wealth of the donee, as an equity in the claimant's favor, *cf.* Payne v. Tatem, Ky. (1930); *but cf.* Osborn v. Osborn, Kan. (1918).

[56] Osborn v. Osborn, Kan. (1918); Brown v. Crafts, Me. (1903). In Hastings v. Hudson, Mo. (1949) (a paralyzed widower prevailed against the transferees of his wife's property, practically all of which the wife had obtained by her own exertions and by inheritance from her "closely-knit" family. Other "chimney-corner" equities that were disregarded: marriage late in life, bad blood between wife and daughter of husband; fact that donees had provided money for wife when she was ill).

[57] In re Halpern's Estate, N.Y. (1951) (separation late in the marriage, fault not clear; widow loses); Newman v. Dore, N.Y. (1937) (separation shortly before death; fault disputed; widow wins); Beirne v. Continental-Equitable Title and Trust Co., Pa. (1932) (desertion, fault disputed; widow loses).

fact, desertion [58] by the decedent, or a threat of desertion,[59] is certainly not an essential part of the claimant's case; probably it is not even relevant. Of course, if the transfer complained of is in fraud of the wife's potential alimony claim, the wife — suing as a widow — will have a much stronger case.[60]

It is possible that a transfer by a deserted wife would have greater chances of being sustained, although there is no clear statement to this effect in the cases.[61]

(4) Reprehensible Conduct by Decedent. Decedent's reprehensible treatment of the claimant (other than desertion) is mentioned frequently.[62] In the main, the factor is indecisive. It does, however, constitute a popular makeweight argument.

[58] In re Lorch's Estate, N.Y. (1941) (separation for 9 years before death apparently without sufficient fault on wife's part to bar her from election; widow loses); *cf.* Wooton v. Keaton, Ark. (1925) (widow and three children lose out to mistress with whom husband had lived for thirty-six years before death); Roche v. Brickley, Mass. (1926) (thirteen year separation; widower loses); Williams v. Evans, Ill. (1895). *But see* Smith v. Hines, Fla. (1863–4) (husband deserts, leaving wife destitute; widow wins); Brownell v. Briggs, Mass. (1899); Hays v. Henry, Md. (1848); *cf.* Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1903).

[59] Murray v. Brooklyn Savings Bank, N.Y. (1939) (unhappy marriage; husband threatened desertion: widow loses); Brewer v. Connell, Tenn. (1851) (threat of desertion: widow wins).

[60] Presumably she should sue also as a creditor: see p. 259, *supra;* Haskell v. Art Institute, Ill. (1940) (separation late in marriage, wife's suit for separate maintenance pending at husband's death; widow loses).

[61] *Cf.* Roche v. Brickley, Mass. (1926).

[62] *Claimant wins:* Smith v. Smith, Colo. (1896) (aged infirm widow left "absolutely penniless"); Lonsdale's Estate, Pa. (1857) (*"mania a potu"*); Brewer v. Connell, Tenn. (1851) (emphasis on coarse, brutal conduct of husband to wife, personal violence, intoxication, unjust accusations). For dogged determination, consider the husband in Merz v. Tower Grove Bank and Trust Co., Mo. (1939), who, seeking a "bullet-proof" plan, had to be given whiskey on one of his visits to the trust company, to "brace him up." *Claimant loses:* Blankenship v. Hall, Ill. (1908) (husband disinherits mentally incompetent wife; she loses as to personalty); Malone v. Walsh, Mass. (1944); *cf.* Lines v. Lines, Pa. (1891).

On the other hand, there is no particular consistency in the cases in which the decedents' conduct was blameless. *Claimant wins:* Wilson v. Wilson, Ky. (1901); Mushaw v. Mushaw, Md. (1944); Bolles v. Toledo

(b) *For the Donee*

(1) Moral Claim of Donees. The cases abound with references to the superior moral claim of the donee over the widow. These references deal not only with donees in general,[63] but also with particular classes of donee, e.g., children,[64] and with the individual donee concerned in the litigation. Allusions to the equities of a particular donee [65] are quite common. These equities include the circumstance that decedent had always "preferred" [66] the donee, or that the donee had cared for,[67] or given financial support, or its equivalent,[68] to the decedent. In some of the cases the donee is a bigamous second wife,[69] usually with the equities in her

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Trust Co., Ohio (1944); Reynolds v. Vance, Tenn. (1870). *Claimant loses:* Bullen v. Safe Deposit & Trust Co., Md. (1939); *cf.* Thuet v. Thuet, Colo. (1953).

[63] The superior claim of *any* donee is of course implicit in the "reality" doctrine.

[64] Smith v. Hines, Fla. (1863–4); Samson v. Samson, Iowa (1885); National Shawmut Bank v. Cumming, Mass. (1950) ("strong family ties"); In re Estate of Sides', Neb. (1930); Sanborn v. Goodhue, N.H. (1853) ("tender and almost helpless offspring"); Matter of Halpern, N.Y. (1951); Marine Midland Trust Co. v. Stanford, N.Y. (1939); Lightfoot's Ex'rs v. Colgin, Va. (1813); *cf.* Jones v. Jones, 213 Ill. 288, 72 N.E. 695 (1904) (antenuptial); Daniher v. Daniher, 201 Ill. 489, 66 N.E. 239 (1903) (antenuptial); Crain v. Crain, Tex. (1856) (children as "forced heirs").

[65] Poole v. Poole, Md. (1916) ("The child will be more benefitted by this arrangement than if . . . the deed set aside").

[66] *E.g.,* Bee Branch Cattle Co. v. Koon, Fla. (1949); Wahl v. Wahl, Mo. (1947). *Cf.* Hummel's Estate, Pa. (1894).

[67] *E.g.,* Ellis v. Jones, Colo. (1923); Patch v. Squires, Vt. (1933).

[68] Thuet v. Thuet, Colo. (1953); Whitehill v. Thiess, Mo. (1932); Mitchell v. Mitchell, N.Y. (1943); Re Wrone's Estate, N.Y. (1941); Potter Title and Trust Co. v. Braum, Pa. (1928); In re Sutch's Estate, Pa. (1902); *cf.* Kirk v. Kirk, 340 Pa. 203, 16 A.2d 47 (1940) (antenuptial). On the widow's right to set aside contracts to make a will, see Appendix D, *infra.*

[69] Williams v. Williams, Fed. (1889) (parties had lived together twelve years, the woman helping the "husband" to accumulate his property); Ford v. Ford, Ala. (1842) (imputation of fraud countered by "a high moral obligation" to provide for bigamous second wife and child by her); Holmes v. Mims, Ill. (1953) (donee a bigamous wife, who helped build up joint earnings in undertaking business, taking care of ". . . the bodies of the ladies and babies"); *cf.* In re Leiman's Estate, N. Y. (1952). *But cf.* Hays v. Henry, Md. (1848) (transfer to mistress set aside).

For a discussion of a shift in the legal concept of the family under the British family maintenance legislation, see p. 294, *infra.*

favor. Cases in which the court sets aside the transfer in the face of attractive equities in the donee are relatively infrequent.[70]

(2) Source of Decedent's Property. Some cases draw attention to the fact that the property transferred to the donee came originally to the decedent from the family or ancestors of the donee.[71] In the absence of extraordinary equities in the donee, as, e.g., the fact that the donee supplied a substantial proportion of the consideration with which the decedent acquired the property, there appears to be no reason why this factor should have any bearing in the evasion cases. The factor does not receive undue emphasis, even in those cases sustaining the validity of the transfer. Nevertheless, it is inconsistent with the improved property position of the modern wife. The statutory share legislation, in conjunction with the Married Women's Property Acts, announces a community preference for the claim of the wife — and widow — over that of the relatives of the original owner of the property concerned. What if no transfer had been made by the decedent? Would the original donor's relatives have an enforceable claim against the decedent's estate, a claim not possessed by the donor himself? Surely not.

It is of course a different matter if the property concerned can be proven to have been owned by the donee, or to have been acquired by the decedent with consideration supplied

[70] *But see, e.g.,* Payne v. Tatem, Ky. (1930); Hastings v. Hudson, Mo. (1949). In the Hastings case the court sustained the wife's transfer of her own property to her "closely-knit" family of brothers and sisters who had provided money when she was ill and who had "worked like thunder in the hot summer time" to accumulate what was considered "community" property.

[71] In re Estate of Sides, Neb. (1930) (claimant loses); Patch v. Squires, Vt. (1933) (claimant loses); *cf.* Murray v. Murray, Ky. (1890); Morrison v. Morrison, Ohio (1955). An 1826 Georgia statute, referred to in Flowers v. Flowers, 89 Ga. 632, 15 S.E. 834 (1892), stated that a husband could defeat the wife's dower right by conveyance during marriage "except such lands as the husband may have become possessed of by his intermarriage . . ."; also see Harber v. Harber, Ga. (1921); Pruett v. Cowsart, Ga. (1911). *But see* Cochran's Adm'x v. Cochran, Ky. (1938); Wilson v. Wilson, Ky. (1901); Stone v. Stone, Mo. (1853).

by the donee. The outright ownership cases give little trouble.[72] Likewise the donee should win his case if he can prove that he supplied a substantial part of the consideration.[73] In the latter circumstances the transfer may perhaps also be said to acknowledge and carry out a purchase money resulting trust.

(3) Remarriage of Claimant. Under the British Commonwealth family maintenance legislation[74] this factor is of course quite relevant. The claimant's case being based on need, her payments will cease upon remarriage. Under the American scheme of automatic statutory shares we are concerned with the claimant's remarriage only if it takes place before the evasion litigation has been decided; and in the rare case in which this occurs it seemingly is quite irrelevant. Thus in *Smith* v. *Hines*[75] the widow prevailed even though she had already remarried. The court stressed the fact that no provision had been made for her by the decedent. No inquiry was made into her financial need.

The four cases in which this factor was noticed were, oddly enough,[76] all older cases. In three of them the widow lost, but this is probably mere coincidence. In each of these three cases the donees were children of a prior marriage.[77]

(4) Miscellaneous. Several cases sustaining the validity of the transfer have referred to the fact that the property transferred by the decedent wife was accumulated from her own

[72] Vosburg v. Mallory, Iowa (1912) (gift causa mortis of "cow money" that donee had previously given decedent; held, valid); In re Cohen's Will, 90 N.Y.S.2d 776 (Surr. Ct. 1949) (donee's money in decedent's bank account; "what I got here belongs to Hymie"; transfer valid).

[73] Holmes v. Mims, Ill. (1953) (undertaking business); Hoeffner v. Hoeffner, Ill. (1945) (apartment building); Bestry v. Dorn, Md. (1941) (leasehold); Whitehill v. Thiess, Md. (1932) (realty); Melinik v. Meier, Mo. (1939) (joint bank account); *cf.* Harmon v. Harmon, Ark. (1917); Thuet v. Thuet, Colo. (1953); Gentry v. Bailey, Va. (1850). *But cf.* Hays v. Henry, Md. (1848).

[74] See *infra*, Chap. 21.

[75] Fla. (1863–4).

[76] See discussion on remarriages, *supra*, Chap. 1, text at note 19.

[77] Sanborn v. Goodhue, N.H. (1853); McIntosh v. Ladd, Tenn. (1840); Lightfoot v. Colgin, Va. (1813).

savings.[78] The courts have noted in some cases that the decedent transferred the property to children of his first marriage in furtherance of a promise made to his first wife.[79]

(c) *General*

(1) Claimant's Financial Position. The American "forced share" legislation awards the surviving spouse an automatic share of the decedent's estate, regardless of the claimant's financial position. It is immaterial that the claimant possesses independent means.[80] The evasion decisions, however, make frequent references to the claimant's poverty or need,[81] in sustaining the claim; and, less frequently, to her independent means,[82] in refusing the claim. This phenomenon is of course to be expected in the "intent" jurisdictions, where the claimant's independent means would have some bearing on the

[78] *E.g.,* In re Kilgallen's Estate, N.Y. (1953); *cf.* Moyer v. Dunseith, N.Y. (1943); Beirne v. Continental-Equitable Trust Co., Pa. (1932) (dissent of Kephart, J., at p. 586, 161 Atl. at 726).

[79] *E.g.,* Estate of Sides, Neb. (1930); *but cf.* Rice v. Waddill, Mo. (1902).

[80] *Cf.* Bolles v. Toledo Trust Co., Ohio (1944) (transfer invalid); Sturgis v. Citizens National Bank, Md. (1927) (transfer valid); *see* Patterson v. McClenathan, Ill. (1921).

[81] *E.g.,* Smith v. Smith, Colo. (1896).

[82] Bullen v. Safe Deposit & Trust Co., Md. (1939); Dunnett v. Shields, Vt. (1924); *cf.* Williams v. Williams, Fed. (1889); In re Aybar's Estate, N.Y. (1952); Mitchell v. Mitchell, N.Y. (1943); Whitehill v. Thiess, Md. (1932) (referring to antenuptial transfers). *Contra,* Manikee v. Beard, Ky. (1887). See Ala. Code Ann. tit. 34 §42 (1940): "If any woman having a separate estate survive her husband, and such separate estate, exclusive of the rents, incomes, and profits, is equal to, or greater in value than her dower interest and distributive share in her husband's estate, estimating her dower interest in his lands at seven years' rent of the dower interest, she shall not be entitled to dower in, or distribution of her husband's estate." §43 states that "If her separate estate be less in value than her dower, as ascertained by the rule furnished by the preceding section, and her distributive share, so much must be allowed her as, with her separate estate, would be equal to her dower and distributive share in her husband's estate, if she had no separate estate." These sections apply to antenuptial transfers, Anderson v. Lewter, 232 Ala. 375, 168 So. 839 (1936); and they also apply even if the wife is the sole distributee, Chambless v. Black, 250 Ala. 604, 35 So.2d 348 (1948); *Quaere:* what about postnuptial evasion cases? See also Miss. Code Ann. §670 (1942), *supra,* Chap. 2, note 14.

reasonableness of the transaction.[83] The factor is usually not mentioned in cases decided under the "control" or "reality" rationales. For that matter, the average widow does not possess independent means.[84] Regardless of rationale, however, counsel for the donee may be expected to urge the independent means of the claimant, if only to distinguish cases that intrinsically may have been based on the hardship that otherwise would occur to the claimant.[85] Certainly the claimant with independent wealth [86] does not present as appealing a case as the indigent widow and particularly so when the family allowance statute is limited in scope.[87]

(2) Claimant's Treatment of Decedent. It might be supposed that the claimant's treatment of the decedent would be irrelevant, aside from the limited grounds for disqualification found in the statutory share itself.[88] Surprisingly enough, the relationship between the claimant's conduct and her chances of success appears to be closer than might be expected.[89] Seemingly the factor has some sort of haphazard in-

[83] *But cf.* Manikee v. Beard, Ky. (1887).

[84] See *supra,* Chap. 2:3.

[85] In Lines v. Lines, 142 Pa. 149, 156, 21 Atl. 809 (1891) costs were awarded to the unsuccessful claimant. The state reporter furnishes the following excerpts from the master's report:

> "My personal opinion is that this is a case of hardship upon this plaintiff, and the eloquent addresses of her counsel upon the barbarity of the law which permits a man to deprive his family upon his decease of a fair allowance for their support, were unanswered and are unanswerable. All through this report I have been restrained from the doing of equity by reason of the rigid rules of law, which equity in this case must follow; and now, as the costs can be disposed of upon equitable principles, I will avail myself of the opportunity and save the plaintiff from their payment."

(p. 156). And see the dissenting judgment of Kephart, J., in Beirne v. Continental-Equitable Trust Co., Pa. (1932), *passim.*

[86] This factor would preclude relief under a "family maintenance" type of statute, see *infra,* Chap. 21.

[87] See *supra,* Chap 2:4(b).

[88] See *supra,* Chap 2, text at note 18.

[89] *Claimant's conduct reprehensible; loses:* Speaker v. Keating, Fed. (1941) (wife, separated from, and apparently not supported by husband for 30 years, disinherits him); Ford v. Ford, Ala. (1842) (husband abandons wife forty years before his death, gives property to woman

fluence. Certainly counsel for the plaintiff does not *harm* his case – even in "reality" jurisdictions – if he directs the court's attention to any benevolence extended to the decedent by the claimant.

(3) Unpleasantness between the Spouses. As might be expected, the cases contain frequent references to unpleasant relations between the spouses. These references generally are made without conscious stress, usually by way of explanation of why the transfer was made. Evidence of this sort plays little part in influencing the decisions.[90] Nonetheless, it seems to be an unavoidable concomitant of evasion litiga-

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who married him in ignorance of previous marriage; court stresses high moral claim of second "wife" and fact that real wife had since had two illegitimate children); Schmidt v. Rebhann, N.Y. (1952) (court stresses fact that husband, separated, had made no "show of attempt of re-establishment of the home"); Patch v. Squires, Vt. (1933) (fact that widower had not lived with or supported wife for twenty-six years prior to her death considered relevant); *cf.* Holmes v. Mims, Ill. (1953) (transfer to bigamous "wife" sustained); York v. Trigg, Okla. (1922) (obstreperous wife loses).

Claimant's conduct good; wins: Fleming v. Fleming, Iowa (1922) ("faithful service and practiced self-denial for 36 years"); Sanborn v. Lang, Md. (1874) (comment on widow's faithful performance of duties; "no moral justification or excuse" for decedent's conduct); *cf.* Burns v. Turnbull, N.Y. (1945).

In some cases the claimant lost in spite of exemplary conduct. These cases may generally be explained on doctrinal grounds, the equities being considered completely irrelevant; *e.g.,* Small v. Small, Kan. (1895); Windolph v. Girard Trust Co., Pa. (1914). And cases are not lacking in which the claimant has prevailed even though not litigating with "clean hands": Smith v. Northern Trust Co., Ill. (1944); Jaworski v. Wisniewski, Md. (1925); Rabbitt v. Gaither, Md. (1887); London v. London, Tenn. (1839); *cf.* Thayer v. Thayer, Vt. (1842); *and see* Guitner v. McEowen, Ohio (1954) (widow had "fulfilled all her obligations as a dutiful consort"; loses).

[90] *E.g.,* Cheatham v. Sheppard, Ga. (1944) (husband transfers family home; widow alleges husband's sister poisoned his mind against her; widow loses); Leonard v. Leonard, Mass. (1902) (spouses lived in same house but not on speaking terms; husband furnished wife with no supply of food, refused to let her help him in his serious illness; widow loses); Lightfoot's Ex'rs v. Colgin, Va. (1813) (husband "had an unfavorable opinion of his wife, and she having also displeased him by refusal to relinquish her dower right in some lands"; widow loses); *cf.* Moedy v. Moedy, Colo. (1954); Manikee's Adm'r v. Beard, Ky. (1887); Vosburg v. Mallory, Iowa (1912); Bestry v. Dorn, Md. (1941); Walker v. Walker, N.H. (1914).

tion. The threat of open air linen-washing has strategic effect; the actual washing conceivably may influence the judicial process. And the existence of disharmony is not always apparent from the written opinion. In *Rose* v. *Union Guardian Trust Co.*,[91] for instance, the opinion makes no mention of this factor; [92] but the record contains numerous – and conflicting – references.[93]

Bitterness between the parties may also serve to bolster proof of intent to defraud, in jurisdictions in which the latter factor is relevant. In *Dyer* v. *Smith* [94] the court admitted direct evidence that the husband "would rather see his house in ashes" than see the widow take it, and also commented on evidence of inharmonious relations. The widow prevailed.[95]

The fact that the spouses became reconciled after the transfer was made seems to have no particular weight.[96]

(4) Disparity in Age between the Spouses. This factor, which is mentioned in many cases, often contributes to the unpleasantness that sparks the inter vivos transfer. The younger party in these "disparity" cases appears always to be

[91] Mich. (1942).

[92] Similarly in the leading case of Newman v. Dore, N.Y. (1937), the opinion is silent as to this factor but the record reveals bitter feeling between the parties–with neither party being entirely blameless.

[93] For example, at p. 11 the widow alleged that she "well and faithfully performed the duties of a wife"; that "their married life was happy and free from misunderstandings and disagreements"; and that she nursed him solicitously before death. On the other hand, at p. 33 *et seq.*, the donee testified that the widow and her daughter constantly quarrelled with and verbally abused the husband, making his life miserable and unhappy, that plaintiff's daughter once threw a glass of water at donee, the wife berating the husband when he attempted to intervene.

[94] Mo. (1895).

[95] *Cf.* Flowers v. Flowers, Ga. (1892). Here the court stated that intent is irrelevant, then promptly ruled that evidence as to family disturbances between the husband and wife is admissible as "tending to show a motive for endeavoring to defeat dower without parting with dominion and real ownership."

[96] Sturgis v. Citizen's National Bank, Md. (1927) (ten year estrangement, five year reconciliation; widow loses); DeNoble v. DeNoble, Pa. (1938); *cf.* Jaworski v. Wisniewski, Md. (1925) (ten year reconciliation after quarrel leading to transfer by wife; widower wins).

the woman.[97] The more clearly the young widow seems to have been a "gold-digger," the more appealing of course are the equities for the donee, particularly if the donee is the child of a former marriage.[98]

(5) Duration of the Marriage. In a number of cases the claimant prevailed, although she had married the decedent but a short time before his death.[99] Some of these cases may be explained on doctrinal grounds, e.g., that retention of control is all-important.[100] And it is possible in any given case that on balance the equities may favor such a claimant.[101] In a jurisdiction in which the equities play any part, however, it is probable that the shorter the marriage, the more unfavorable are the claimant's chances of success.[102] When the parties have not long been married the claimant has had no time to help accumulate the decedent's estate,[103] and an inter

[97] *Widow younger, prevails:* Brown v. Crafts, Me. (1903) (forty year disparity); Wanstrath v. Kappel, Mo. (1949) (thirty years); Rice v. Waddill, Mo. (1902) (thirty-four years); Newman v. Dore, N.Y. (1937) (plaintiff young, husband slightly under eighty); *Widow younger, loses:* Harber v. Harber, Ga. (1921) (twenty-one years); Poole v. Poole, Kan. (1915) (twenty-two years); *cf.* Murray v. Brooklyn Savings Bank, N.Y. (1939).

[98] As in, *e.g.,* Poole v. Poole, Kan. (1915).

[99] Cochran's Adm'x v. Cochran, Ky. (1938) (three years); Rudd v. Rudd, Ky. (1919) (two years); Brown v. Crafts, Me. (1903) (late in husband's life); Marano v. LoCarro, N.Y. (1946) (seven months); Bodner v. Feit, N.Y. (1936) (one year); *cf.* Goewey v. Hogan, N.Y. (1951) (fact that marriage kept secret for many years held irrelevant).

[100] *E.g.,* Marano v. LoCarro, *supra,* note 99.

[101] *E.g.,* Cochran's Adm'x v. Cochran, *supra,* note 99.

[102] In Burton v. Burton, 100 Colo. 567, 569 (1937) the court stated: "The true explanation of Burton's transfers is presumably furnished by the facts that he married this woman late in life, that the relationship had existed for but twenty months, that she had never been a wife to him, . . ." In Potter v. Braum, Pa. (1928) a sixteen year old girl married a widower "well advanced in age." They lived together only three months. Held, transfers valid. In Sederlund v. Sederlund, Wis. (1922) the court sustained the husband's transfer of most or all of his personalty. Mentioned as one reason for the decision was the fact that he had been married to the claimant, his second wife, "but a short period of time" (although time enough to have a child by her). Also see Wright v. Holmes, Me. (1905).

[103] See p. 162, *supra.*

vivos transfer seems more reasonable, especially if it is to children of a prior marriage.[104]

(6) Sex of Claimant. We have seen that the election statutes appear to favor the widow.[105] In states in which both spouses have election privileges, however, the evasion cases appear to make no distinction between widows and widowers as claimants. On the other hand, there is no such inclination to exalt the moral claim of the widower as it exists with reference to the widow.[106]

(7) Whether Decedent was Testate or Intestate. It is possible that the *Halpern* case of 1951 has tolled the bell for the illusory trust doctrine in New York. But there was a warning bong of the gong a decade before that. In 1939, only two years after *Newman* v. *Dore,*[107] the First Department decided in *Murray* v. *Brooklyn Savings Bank* [108] that illusory trusts could be attacked only if the decedent died testate. If the husband died intestate, said the court, the widow takes under the intestacy statute (Section 83 of the Decedent Estate Law) with no more right to set aside inter vivos transfers than any other distributee. And as for her rights under Section 18, that section permits her to renounce, i.e., gives her a forced share, only as against a *will.* There being no will, she is no better off than the other distributees; there is "no distinction in the quality of their expectancies . . . ." [109]

The restriction developed in the *Murray* case is rare, and it has since been repudiated in New York.[110] This is fortunate,

[104] In re Sutch's Estate, Pa. (1902).

[105] See p. 23, *supra.*

[106] *Cf.* Vosburg v. Mallory, Iowa (1912); Malone v. Walsh, Mass. (1944); Wright v. Holmes, Me. (1905); Moyer v. Dunseith, N.Y. (1943); In re Aybar's Estate, N.Y. (1952) (claimant a disabled war veteran; loses). For figures on the claimant's sex, p. 174, *infra.*

[107] 275 N.Y. 371, 9 N.E.2d 966 (1937).

[108] 169 Misc. 1014, 9 N.Y.S.2d 227 (Sup. Ct. 1939), *rev'd* 258 App. Div. 132, 15 N.Y.S.2d 915 (1st Dep't 1939).

[109] 258 App. Div. at 134, 15 N.Y.S.2d at 918.

[110] The leading cases are discussed in Steixner v. Bowery Sav. Bank, 86 N.Y.S.2d 747, 750 (Sup. Ct. 1949). See also Schneider and Landesman, " 'Life, Liberty—and Dower'—Disherison of the Spouse in New York," 19 N. Y. U. L. Q. Rev. 343, 353–60 (1942); Note, 16 Brooklyn L. Rev. 229, 233–39 (1950).

because the widow's privileges should not depend on whether or not the husband died testate. It should be immaterial that the jurisdiction concerned gives the widow no power to renounce her intestate share.[111]

Parenthetically, the cases indicate that the husband bent on "evasion" shows no partiality for either testacy or intestacy. A check on one hundred and fifty evasion cases, chosen at random, provides the following figures: [112]

Decedent testate, or probably so	73 (48.66%)
Decedent intestate, or probably so	70 (46.66%)
Not clear	7 (4.66%)
	150

[111] Some states permit the widow to renounce her intestate share: *e.g.*, Fla. Stat. §731.34 (1957). This is also the legislative tendency under the British Commonwealth "family maintenance" jurisdictions; see p. 292, *infra*. *Cf.* Note, 58 DICK. L. REV. 70, 74 (1953).

[112]

1. Decedent died testate	72
2. Point not clear, but decedent probably was testate	1
3. Decedent died intestate	51
4. Point not clear, but decedent probably was intestate	19
5. Point not clear, one way or the other	7
	150

These figures indicate a higher proportion of testacy in the evasion cases than in the usual run of decedents' estates. The reason may lie in the frequency with which legal advice is sought before deciding on the appropriate "evasive" device, which in turn would lead to a will for the remaining property. Intestacy is of course more likely to occur where no lawyer is consulted.

CHAPTER 11

Role Of The Equities In The Judicial Process

My purpose in this chapter is to estimate the influence of the equities in the evasion cases. In this inquiry I am not concerned with theories put forward in the cases themselves. My interest lies in the actual judicial process, not in the formally announced *ratio decidendi.* The courts purport to be guided by the decedent's "intent," or by the "illusoriness" or "reality" of the transfer. My working hypothesis is that these terms have a broader, more flexible connotation than might be suspected at first glance. I am interested in the possibility that these terms or criteria are not decisive *per se;* that they relate to or are governed by the equities of the case; and that the decision in each case, ostensibly based on motive, retention of control, or "reality," actually is based on the equities. To test this hypothesis I examine the facts of each case to ascertain the result that in my opinion would have been reached on a balancing of the equities. The suggested result on this approach is compared with the reported result. I find a significantly high correlation between the decisions actually reached and the decisions that would be dictated by the equities.

The term "equity" is of course more significant in the plural than in the singular. The strength of a given factor or "equity" may be found only in the interplay of all the circumstances. We must examine, for example, the claimant's need, the size of the transfer, and the moral claim of the donee. If this examination indicates that the inter vivos transfer was a reasonable one, it may be said that the "equities" favor the donee — in other words, that the *fair* decision, on the particular facts, would be for the donee.

Admittedly, the "reasonableness" of a given inter vivos transfer is a matter of opinion. The human variable cannot be eliminated from the selective process. What seems reasonable to A may appear unreasonable to B; what A would choose as an "equity," B might dismiss as a mere irrelevancy. It depends on the point of view. My point of view was the maintenance and contribution formula.[1] Under the formula the widow cannot be heard to complain about the inter vivos transfer unless first she persuades the court that the decedent did not make reasonable provision for her. If she clears this hurdle she may then ask the court to require contribution from the donee of any transfer that was unreasonably large under the circumstances prevailing at the time of the transfer. The more important circumstances are the relative size of the transfer and the moral claim, if any, of the donee.

Considerable difficulty was encountered in attempting this factual analysis. The courts are not in the habit of making a careful delineation of the facts. Rarely is there a statement of the financial position of the surviving spouse, the relative size of the transfer, or other material circumstances. Usually the reference to these factors is by way of window-dressing, for make-weight effect.

Two hundred and sixty-three cases were found to be relevant.[2] These cases were divided into two groups, according to whether the actual result in the particular case favored the surviving spouse or the donee. Each group was split into five subgroups, found below, based on my judgment as to the result that would be dictated by the equities. "Unreasonable"[3] means that in my opinion the transfer should not have

[1] See pp. 44–46, *supra*. See also suggested model statute, *infra*, p. 299.

[2] The criteria for determining the relevance of a case are outlined, *supra*, p. 147.

[3] A transfer may be "unreasonable" even though made from laudable motives. Thus a transfer that seemed reasonable when made may turn out to be unreasonably large if some provision for the surviving spouse fails to have legal effect, *e.g.*, when an inter vivos gift to the surviving spouse is invalid for lack of delivery, as in Bolles v. Toledo Trust Co.,

been sustained, i.e., that the equities favored the surviving spouse. "Reasonable" means just the opposite. "Probably unreasonable" or "probably reasonable" indicates some indecision on my part as to the state of the equities, with the balance of probability pointing one way or the other. "Not clear" means that I could not make up my mind, in most cases because of insufficient facts. The cases as classified are set out in Table C.[4]

A. *Cases Favoring Spouse*		
1. Unreasonable	20	
2. Probably unreasonable	37	
3. Reasonable	2	
4. Probably reasonable	8	
5. Not clear	31	
Total	98	
Consistent with the "equities," or not clearly inconsistent	88	(90%)
Inconsistent	10	(10%)
Sharply inconsistent	2	(2%)
B. *Cases Favoring Donee*		
1. Reasonable	33	
2. Probably reasonable	53	
3. Unreasonable	6	
4. Probably unreasonable	21	
5. Not clear	52	
Total	165	
Consistent with the "equities," or not clearly inconsistent	138	(84%)
Inconsistent	27	(16%)
Sharply inconsistent	6	(4%)

SUMMARY

Total cases	263	
Consistent with the "equities," or not clearly inconsistent	226	(86%)
Inconsistent	45	(14%)
Sharply inconsistent	8	(3%)

Admitting again that these figures are derived from my own classification of the cases, and that another person using

Ohio (1944). A decision for the spouse in these circumstances may frustrate the expectations of the decedent; but the decedent should be entitled to rely on his transfers being immune from the widow's claim only when she has been effectively provided with adequate support. Aside from this unusual situation, however, the "reasonableness" of a transfer is determined from the circumstances prevailing at the time of the transfer.

[4] *Infra*, p. 387.

the same criteria might reclassify any given case, the figures suggest several interesting conclusions.

First, notice that the correlation between the actual decisions and the equities is more sensitive when the surviving spouse wins (90%) than when she loses (84%). In other words, there are more cases in which the surviving spouse loses when she should win than in which she wins when she should lose. This means that most decisions that do not follow the equities are inimical to the surviving spouse. This phenomenon is not unexpected. The legislatures have not yet clearly indicated that the policy of ensuring financial support for the surviving spouse is strong enough to encroach on freedom of inter vivos alienation. Assuming the validity of our policy conclusions, as expressed in the maintenance and contribution formula, this points to the advisability of a policy directive to the courts by the legislatures.

Second, jurisdictions that use or have used the "reality" doctrine show a relatively high proportion of decisions at variance with the equities. These decisions are found under the following classifications: "unreasonable" and "probably unreasonable" (when the actual decision favors the donee), and "reasonable" and "probably reasonable" (when the actual decision favors the spouse). Here is the breakdown: New York, nine; Pennsylvania, seven; Ohio, four; Massachusetts, three; Illinois, Kansas, and Mississippi, two each; and Connecticut, Kentucky, Maine, Maryland, Missouri, Oklahoma, Tennessee, and Virginia, one each. Notice that nineteen of these thirty-four atypical decisions were decided in but three states, namely New York, Pennsylvania, and Massachusetts. The 1951 *Halpern* case decision in New York means that there will probably be more of these inequitable decisions in that jurisdiction, particularly if the "reality" doctrine is extended to transfers other than Totten trusts. The outlook is a little better in Pennsylvania, however, where the 1947 legislation openly recognizes the evasion problem and attempts to cope with it.

Third, one receives the over-all impression that the courts are muddling through to sensible results. The high correlation between actual decisions and sensible decisions suggests — if we exclude the possibility of a phenomenal coincidence — that the courts *do* place great emphasis on the equities of the case. With some courts, e.g., Kentucky and Missouri, the emphasis is openly acknowledged; with others it is inarticulate, perhaps subconscious. To the reader, it is deducible from the facts — not observable in the *ratio decidendi.*

Let us concede [5] that the courts do a fair job, under the circumstances. But can we be sure that the community values implicit in the statutory share are being achieved? Sometimes yes; sometimes no. It depends on the court concerned. Courts using the "intent" rationale seem in general to follow the equities; but there is confusion as to the significance of the decedent's motive and of the proximity of the date of the transfer to the date of death. Courts using the "control" rationale occupy a medium position: they have some room for exercise of discretion, but it is not enough and is unrelated to the equities. Courts using the "reality" rationale have no room for maneuver; as far as the surviving spouse is concerned, an inter vivos transfer is sacrosanct. Notice from our figures on the atypical decisions that few are rendered by courts using the "intent" rationale, but many occur in courts that have been or are using the "reality" rationale. Accordingly, the need for legislative reform seems more acute in "reality" jurisdictions, less pressing in "intent" jurisdictions.

Nor should the need for legislation be deprecated because the atypical decisions are few in number. The litigated transfers are probably but a fraction of the unlitigated transfers. No doubt many actual evasions remain unchallenged. Litigation is expensive, regardless of jurisdiction or of prevailing doctrine. And the possibility of undesirable publicity on

[5] The fairly large proportion of cases in the "not clear" category detracts somewhat from the value of the figures.

family matters may militate against litigation in a few cases, probably stimulates settlement in many more cases. Moreover, cases not appealed are in most instances not reported.

Individuals in the community conduct their affairs in reliance on, and in deference to, the apparent state of the case-law. In a jurisdiction that uses the "reality" rationale an indigent widow faced with an otherwise valid but unreasonably large inter vivos transfer will be deterred from litigation and probably barred from a settlement.[6] To that extent, the statutory share, as interpreted by the courts, is not doing its community job. As a corollary, we also may criticize decisions that permit a widow, who has no financial need, to set aside a transfer merely because too much "control" was retained. Decisions of this sort unduly minimize the values implicit in freedom of alienation (looking at the transfer from the viewpoint of the transferor), and in security of title (looking at it from the viewpoint of the transferee).

In summation, the equities appear to play a leading role in the judicial process. That role is more decisive when it is openly acknowledged, as in most "intent" jurisdictions. Jurisdictions employing the "control" and "reality" rationales are in more urgent need of remedial legislation. The inarticulate judicial tendency in these jurisdictions to follow the equities is too haphazard a phenomenon to ensure that community values in this field are realized. There should be a legislative endorsement of the principles of the maintenance and contribution formula.

[6] The relatively high rate of litigation in such "intent" jurisdictions as Kentucky and Missouri may be explained in part by the fact that the equities are relevant, and thus meritorious claims have a better chance of success.

CHAPTER 12

Deeds And Gifts

PRELIMINARY REMARKS

Chapters 12 through 16 deal with the individual dispositive devices. No study of the evasion cases would be complete unless the cases are considered from this viewpoint. The significance of a given decision depends in large part on the device under litigation. These devices differ in function and in social and economic utility. Thus we should expect a gift causa mortis to be more vulnerable to the widow's claim than would be an irrevocable trust; the "reliance interest" of the transferee is slight in the first example, normally higher in the latter example. Similarly, the donee of an inter vivos gift is more likely to be harmed by "invasion" by the widow than is the beneficiary of a United States savings bond payable on death. Each device poses its own problems. Those problems must be investigated before we can decide on the precise language of statutory reform.

Chapters 12–16 are concerned with postnuptial devices. Antenuptial transfers are dealt with in Appendix A, *infra.* Contracts to make a will are covered in Appendix B, *infra.* There is, of course, an affinity between postnuptial transfers, antenuptial transfers, and contracts to make a will. Each of these transactions operates to deplete the amount of property available for the support of the widow; litigation over widow's rights in each transaction usually concerns second or third marriages; and each transaction raises questions about the community values implicit in protection against disinheritance of the surviving family. Nevertheless, separate treatment seems to be warranted for the two latter transactions. Antenuptial transfers involve fraud in the traditional sense of active or implied representations inducing

reliance. The question of spouses' rights in contracts to make a will invariably concerns antenuptial contracts; and, even when the contract is postnuptial, the transaction is not a voluntary one: consideration is needed. Accordingly, neither transaction is affected by the provisions of the model statute in Chapter 22.

1. Deeds

Probably most practicing lawyers at one time or another have had to consider the legality of a deed that actually is not to take effect until death. The following skeletal fact situation illustrates the problem as it usually arises in the evasion field. A husband, living with his second wife, makes a voluntary conveyance of all his realty to his children by a former marriage. The husband reserves a life estate and continues to deal with the land as if he still owns it. The deed is kept secret from the wife and is not recorded by the children until after the father's death. Omitting the question of homestead protection (where the family home is involved) or inchoate dower (where still in effect), does the widow have any rights in the land?

Such a deed may really be a sham transaction, depending on the remaining facts. As we saw in Chapter 9,[1] to establish that it is a sham (or "colorable"), the widow would need to show that the grantor and grantee did not consider the deed to be effective between themselves. Such a situation would arise, where the husband might say, in effect, to the children: "Well, if the old girl survives me, this is it – record it right after my death; but if she dies before I do then I'll take it back." The deed would have inter vivos validity, however, if the arrangement was so stated: "You take this, and it's yours whether my wife predeceases me or not: but, to save trouble, let us keep it quiet – don't record it until I die." Here the parties intend the deed to have immediate effect.

[1] See *supra,* Chap. 9:3(a).

The deed will probably be deemed testamentary [2] whenever the power to revoke is formally retained. Nor is it material that the power to revoke was retained in substance only. For example, in one case the surviving spouse prevailed when the decedent spouse procured a power of attorney from the donee. The power of attorney was signed in advance of the deed, and authorized the decedent "to sell and convey, mortgage or otherwise dispose of the property." [3] In many evasion cases, however, the evidence is inconclusive as to whether or not the power to revoke or recall was retained, or whether or not the deed was intended to have inter vivos effect between the parties. This may perhaps explain the confusing tendency of the courts to describe these transactions as being both "colorable" (meaning void) and "illusory" (meaning, in most instances at least, valid for ordinary purposes but defeasible by the widow).[4]

The evasion decisions are not as numerous as might be expected.[5] As with the cases involving other inter vivos devices, they exhibit an inarticulate tendency to balance the equities.[6]

[2] When a deed is to take effect on delivery it generally will not be deemed testamentary, in the absence of a clause stating that the deed covers all property owned at death, or (perhaps) in the absence of a revocation clause. Atkinson, WILLS, §43 (2d ed. 1953); 3 AMERICAN LAW OF PROPERTY §§12.65, 12.66. As to the effect of a clause stating that a deed is not to take effect until death, see notes: 17 MICH. L. REV. 413 (1919), 32 VA. L. REV. 148 (1945), Annot., 31 A.L.R.2d 533 (1953).

[3] Sanborn v. Lang, 41 Md. 107, 117 (1874); *accord,* Jaworski v. Wisniewski, 149 Md. 109, 131 Atl. 40 (1925) (deed to straw man, reconveyance of life estate, with power to sell both life estate and remainder); Brownell v. Briggs, 173 Mass. 529, 54 N.E. 251 (1899); *cf.* Thomas v. Louis, *infra,* note 4.

[4] *E.g.,* Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953); *cf.* Thomas v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97, 98 (3rd Dep't 1954); see also Hoffman v. Hoffman, 144 N.Y.S.2d 855 (Sup. Ct. 1955) (deed to spouse).

[5] Possibly because counsel for the surviving spouse considers the immunity of most deeds to be self-evident. The existence of inchoate dower serves also to narrow the field.

[6] The following cases are in addition to those otherwise noted. (a) *Cases favoring the surviving spouse.* Newton v. Newton, 162 Mo. 173, 61 S.W. 881 (1901); Dyer v. Smith, 62 Mo. App. 606 (1895); Mottershead v. Lamson, 101 N.Y.S.2d 174 (Sup. Ct. 1950); Brewer v. Con-

A deed that has "reality" would be effective against the widow in any jurisdiction that purports to employ that rationale.[7] Retention of possession or of a life estate would thus be immaterial,[8] provided, of course, delivery has been effected.[9]

The widow may prevail, of course, under either the "control" or "intent" rationales. Indeed, she may win even though the decedent did not formally reserve the power to revoke, either explicitly or in substance. For example, in *Gillette* v. *Madden,*[10] a widower alleged that four months be-

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nell, 30 Tenn. 343 (1851); London v. London, 20 Tenn. 1 (1839); Hughes' Lessee v. Shaw, 8 Tenn. 314 (1827); *cf.* Jiggitts v. Jiggitts, 40 Miss. 718 (1866) (widow prevails as to dower because of inadequate consideration, under unusual Mississippi dower statutes); Weeks v. Weeks, 265 App. Div. 942, 38 N.Y.S.2d 583 (2d Dep't 1942) (*mem. opin.*); Jarnigan v. Jarnigan, 80 Tenn. 232 (1883). See also Rowland v. Rowland, 34 Tenn. 350 (1855) (extent of defeasance); Crain v. Crain, 17 Tex. 80 (1856), 21 Tex. 790 (1858) (children's forced share). (b) *Cases favoring the donee:* Cheatham v. Sheppard, 198 Ga. 254, 31 S.E.2d 457 (1944); Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E.2d 684 (1945); Whitehill v. Thiess, 161 Md. 657, 158 Atl. 347 (1932); Mitchell v. Mitchell, 177 Misc. 1050, 1051, 32 N.Y.S.2d 839 (Sup. Ct. 1942), *rev'd,* 265 App. Div. 27, 37 N.Y.S.2d 612 (1st Dep't 1942), *aff'd without opinion,* 290 N.Y. 779, 50 N.E.2d 106 (1943); In re Huntzinger's Estate, 48 Sch. L. R. 18 (Pa. Orph. 1952); *cf.* Million v. Botefur, 90 Colo. 343, 9 P.2d 284 (1932); Sorrels v. Sorrels, 162 Ga. 734, 134 S.E. 767 (1926) (transfer to avoid alimony, husband dying before litigation); Pruett v. Cowsart, 136 Ga. 756, 72 S.E. 30 (1911); Feighley v. Feighley, 7 Md. 537 (1855) (alimony); Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902) (not a voluntary deed); Radecki v. Radecki, 279 App. Div. 1137, 112 N.Y.S.2d 764 (4th Dep't 1952) (*mem. opin.*); Neville v. Sawicki, 44 O.L. Abs. 408, 64 N.E.2d 685 (Ohio App. 1945), *aff'd,* 146 Ohio St. 539, 67 N.E.2d 323 (1946).

[7] Osborn v. Osborn, 102 Kan. 890, 172 Pac. 23 (1918); Garrison v. Spencer, 58 Okla. 442, 160 Pac. 493 (1916); Farrell v. Puthoff, 13 Okla. 159, 75 Pac. 96 (1903); *cf.* Moedy v. Moedy, 130 Colo. 464, 276 P.2d 563 (1954); Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922) (delivery two years before husband meets second wife).

[8] Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908) (recorded just before death); Ellis v. Jones, 73 Colo. 516, 216 Pac. 257 (1923). But a few older cases intimate that retention of *any* right, even of possession, would invalidate the deed, *e.g.,* Flowers v. Flowers, 89 Ga. 632, 15 S.E. 834 (1892) (deed valid); *cf.* McGee v. McGee, 26 N.C. (4 Ired.) 77 (1843) (deed invalid).

[9] Stewart v. Stewart, 5 Conn. 317 (1824).

[10] 280 App. Div. 161, 112 N.Y.S.2d 543 (3rd Dep't 1952); see Goewey v. Hogan, 102 N.Y.S.2d 339, 341, (Sup. Ct. 1951); *cf.* Courts v. Aldridge, 190 Okla. 29, 120 P.2d 362 (1941) (deeds of all husband's realty three

fore death his wife had conveyed away her realty, and that the transfer was illusory because she had thereafter continued to exercise dominion and control, and also because the deed was not intended to take effect until death. The New York court held that a cause of action was stated. The *Halpern* case was distinguished on the ground that it applies only to Totten trusts; and *Krause* v. *Krause* [11] was distinguished on the ground that in the *Krause* case "no retention of power appeared on the face of the deeds." And in *Hastings* v. *Hudson* a Missouri court invalidated a deed when, although no life estate had been retained, the property had been "dealt with in the same manner after the transfer as it had been before." [12] Decisions like the *Gillette* case and the *Hastings* case defy analysis. Certainly the mere retention of a life estate is not the critical factor. All we can say is that in cases of this sort the widow's chances are good, but not a sure thing, if any two or more of the following factors are in her favor: (a) the equities are on her side,[13] (b) the decedent retained practical control or management of the realty involved, and (c) if the transaction was kept secret. These three factors are stated in the order of their probable importance. It might be supposed that secrecy would be irrelevant,[14] as being the normal thing when there is bad blood between the spouses. But some courts regard secrecy, particularly lack of recordation, as reprehensible. Said a Missouri court:

"The lack of courage to submit a matter involving

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weeks before second marriage; court delineates the factors constituting undue retention of control); *but cf.* Harber v. Harber, 152 Ga. 98, 108 S.E. 520 (1921) (life estate reserved, grantor to have full "control" and receive rents and profits; held, valid).

[11] 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 32 N.E.2d 779 (1941).

[12] 359 Mo. 912, 924, 224 S.W.2d 945, 950 (1949); see Smith v. Smith, 22 Colo. 480, 46 Pac. 128 (1896) (actual control; recordation one day before death); *but cf.* Phillips v. Phillips, 30 Colo. 516, 71 Pac. 363 (1903), discussed *supra,* Chap. 9, text at note 62.

[13] *Cf.* Schmidt v. Rebhann, 108 N.Y.S.2d 441 (Sup. Ct. 1951) *complaint dismissed on merits,* 117 N.Y.S.2d 840 (1952).

[14] *E.g.,* Jones v. Somerville, 78 Miss. 269, 28 So. 940 (1900); also see Glass v. Glass, 86 So.2d 346, 348 (Miss. 1956) (separate maintenance).

mutual interest to mutual consideration is an index to the state of mind of the grantor to which the maxim that secrecy is a badge of fraud has peculiar application." [15]

2. Gifts

(a) *Preliminary Remarks.* In our discussion of inter vivos gifts it is doubly important that we have a clear appreciation of the basic policy behind the statutory share. In the first place, the difficulty of using the traditional evasion theories to carry out that policy is accentuated in the gift cases. A mechanical application of those theories may unduly prejudice the widow. The "reality" test, for example, which bars the widow from *any* recovery, has had a long association with the gift cases. "Who so ignorant," said a judge well over one hundred years ago, "as not to know that a husband may dispose of his chattels during the coverture without his wife's consent, and freed of every post mortem claim by her; . . ." [16] And the "control" test (as best exemplified in the illusory transfer doctrine) is illogical when applied to gifts. Excessive retention of control [17] is not possible (in form, at least), because the donor lacks the power to revoke.[18] The gift, to be valid, must be "outright," or "absolute," to use terms frequently found in the cases to denote a transfer that will defeat the widow.

[15] Headington v. Woodward, 214 S.W. 963, 967 (Mo. 1919); also see Sanborn v. Lang, 41 Md. 107 (1874); Brownell v. Briggs, 173 Mass. 529, 54 N.E. 251 (1899); Hastings v. Hudson, 359 Mo. 912, 224 S.W.2d 945 (1949); Gillette v. Madden, 280 App. Div. 161, 112 N.Y.S.2d 543 (3rd Dep't 1952); Goewey v. Hogan, 102 N.Y.S.2d 339 (Sup. Ct. 1951); Reynolds v. Vance, 48 Tenn. 294 (1870).

On secrecy as an element in the Colorado cases, see *supra,* Chap. 9:3(b); Note, 45 Mich. L. Rev. 914, 916 (1947).

[16] Gibson, J., in Ellmaker v. Ellmaker, 4 Watts 89, 91 (Pa. 1835).

[17] If the gift is made close to death the donor has of course, retained "control" of the property concerned during most of his lifetime. As used in the evasion cases, however, "control" refers to powers formally retained in the instrument effecting the gift. See Chap. 7, *supra* at note 4.

[18] Except in certain limited situations, *e.g.,* engagement rings. *Cf.* Note, 12 Modern L. Rev. 380 (1949).

The requirements for making a gift are not onerous. There must be a donative intent; and there must be delivery, either of the subject matter or of a deed of gift. Retention of a life estate, or of possession, is permissible. For the husband who is determined to thwart his wife, the inter vivos gift involves the minimum in formalities, in legal fees, in taxes.[19] In brief, the only practical restraint on gifts appears to lie in the cupidity of mankind, in the natural reluctance to surrender title beyond recall.[20] But when death looms, when the husband is "in the sere and yellow leaf," [21] even this instinct fails. Then it is that transfers are made solely with a view to post-mortem distribution. In the words of a Missouri court:

> "Counsel . . . argue . . . that these deeds and gifts were not testamentary in their nature, but when we consider the age of Columbus T. Rice, that he had been stricken already with paralysis, and his numerous other afflictions, and his own declaration that he did not expect to live a year; that he was constantly in the care of physicians and that within less than six months before his death he had given his children and son-in-law practically the whole of his estate, whereas previous to that time he was known to be parsimonious and close-fisted and had been exceedingly meagre in his gifts to his children, we cannot avoid the conclusion that this sudden and unusual exhibition of generosity was the result of

[19] Epstein, "Inter Vivos Transfers: Gifts, Joint Ownerships, and Contemplation of Death," 1949 U. ILL. L. FORUM 18 (1949).

[20] In some cases the claimant prevailed simply because the alleged donor failed to observe the requirements for making a gift; *e.g.*, In re Waggoner's Estate, 5 Ill. App. 2d 130, 125 N.E.2d 154 (1955); In re Kellas' Estate, 40 N.Y.S.2d 655 (Surr. Ct. 1943); *aff'd*, 267 App. Div. 924, 1006, 46 N.Y.S.2d 884 (3rd Dep't 1944), *aff'd on other grounds*, 293 N.Y. 908, 60 N.E.2d 34 (1944); In re Youngerman's Estate, 38 N.Y.S.2d 646 (1942).

If the husband gives away an excessive amount of property the wife —if she moves fast enough—may have the transfers set aside in the husband's lifetime as being in fraud of her potential maintenance or alimony claim. *Cf.* Comment, "Donations Omnium Bonorum (Article 1497)" 6 LA. L. REV. 98 (1944).

[21] Dyer v. Smith, 62 Mo. App. 606, 610 (1895).

> his expressed conviction that his days were numbered, and being thus warned of the approach of death he determined to distribute the estate which he could not hope to enjoy much longer." [22]

And there is another reason for emphasizing basic policy factors. In a jurisdiction committed to either the "reality" or the "control" theory, a court may be tempted to assist a needy widow by tinkering with the rules concerning delivery. The very flexibility of those rules makes this solution an easy but an unfortunate one.[23] Our concept of delivery is now broader, more sophisticated than the early materialistic insistence on physical transfer.[24] Transfer of a deed of gift, or of a symbol, as indicative of the *animus donandi,* affords

[22] Gantt, J., in Rice v. Waddill, 168 Mo. 99, 118, 67 S.W. 605, 609 (1902).

[23] In Hamilton v. First State Bank, 254 Ill. App. 55, 59 (1929), a decedent procured two certificates of deposit payable "to the order of myself or Carrie Kern [a child of a former marriage] or the survivor of them on the return of this certificate properly endorsed." He retained the certificates in his own possession until death. In sustaining the widow's claim, the court stated: "Under the circumstances of the case it is wholly immaterial whether it was an attempted gift or whether it was the result of a contractual relation. In either event it was an attempted transfer without consideration and apparently for the purpose of defeating the marital rights of the widow. We are of the opinion that the transaction was not a perfect gift nor was it the creation of a joint tenancy." It is cases of this sort that make the evasion jurisprudence so tantalizing. Is the court enunciating an "intent" test? Or are we to assume (a) that the transfer was an unreasonable one, and (b) that the court is deciding the case on the reasonableness factor? Or are we to assume that the transfer was ineffective, entirely aside from the rights of the widow? The law on this last point is not clear. One would expect that a valid joint tenancy was created: see Hemingway, "Joint Tenancy in Bank Accounts," 10 CHI-KENT L. REV. 37, 44 (1931); but there is authority, in the non-evasion cases, refusing recovery to the survivor when a certificate of deposit provides for payment in the alternative to two or more payees; Annot., 171 A.L.R. 522 (1947). As to the evasion cases on joint tenancy and joint bank accounts, see pp. 212–220, *infra.*

[24] Holdsworth, 3 HISTORY OF ENGLISH LAW, 354–58 (5th ed. 1942); Mechem, "The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments," 21 ILL. L. R. 341, 457, 568, (1926); *New York Law Revision Commission Act, Recommendation and Study Relating to Gifts of Personal Property Without Delivery,* Reports, 1943, pp. 95–126.

room for professional ingenuity.[25] And delivery may be made to a third party, to be handed over to the donee at the donor's death. Here the court may sustain the transaction, as a trust, or nullify it, as an agency.[26] And if delivery of the *res* is effected, but operation of the gift postponed until the death of the donor, its validity may hinge on the court's willingness to describe the contingency as a condition subsequent instead of a condition precedent,[27] or to apply the label of gift causa mortis instead of gift inter vivos. What must be kept in mind is that the policy concerning widow's support has nothing to do with the policy that is concerned with the rules on the normal validity of gifts. The modern concept of delivery expresses a community decision that gifts may be made with a maximum of convenience, provided there be a clear manifestation of donative intent. That concept should not be narrowed merely to assist the widow. What is needed is a reconsideration of the rules dealing with widow's rights.

(b) *Evasion Cases.* A list of evasion cases dealing with inter vivos gifts may be found in Table D, where the cases are classified as to the party that prevailed and also as to the type of property involved.[28] As far as the "reality" test is concerned, an inter vivos gift is of course valid [29] even though a

[25] As to future interests in personalty, see Simes and Smith, LAW OF FUTURE INTERESTS, §§351–71; Uniform Property Act, §3 (UNIFORM LAWS ANN., Vol. 9A, 252 (1951)).

[26] Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L. J. 1, 21 (1941).

[27] *Ibid.* 22, 23.

[28] *Infra,* p. 401.

[29] Harris v. Spencer, 71 Conn. 233, 41 Atl. 773 (1898); Whidden v. Johnson, 54 So.2d 40 (Fla. 1951); Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940); Samson v. Samson, 67 Iowa 253, 25 N.W. 233 (1885); Poole v. Poole, 96 Kan. 84, 150 Pac. 592 (1915); Small v. Small, 56 Kan. 1, 42 Pac. 323 (1895); Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905); Poole v. Poole, 129 Md. 387, 99 Atl. 551 (1916); Redman v. Churchill, 230 Mass. 415, 119 N.E. 953 (1918); Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902); Cranson v. Cranson, 4 Mich. 230 (1856); In re Schurer's Estate, 157 Misc. 573, 284 N.Y. Supp. 28 (Surr. Ct. 1935), *aff'd without opinion,* 248 App. Div. 697, 289 N.Y. Supp. 818 (1st Dep't 1936); York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922); Garrison v. Spencer, 58 Okla. 442, 160 Pac. 493 (1916); Sederlund v.

life estate be retained. Likewise it matters not that a deed of gift [30] was employed, with retention of possession [31] or of a life estate.[32] Similarly, motive is irrelevant.[33] To be sure, many cases purporting to utilize the "reality" theory add the caveat that there must be no "fraud." [34] But "fraud," in this context, may be a will-o'-the-wisp.[35] Probably most courts using the word have in mind a sham transaction, lacking reality. Even the word "illusory" is used with some frequency to denote a sham.[36]

The surviving spouse has prevailed against an inter vivos gift in a substantial body of cases.[37] Some of these cases use the illusory transfer theory, despite the seeming lack of logic in applying the "control" reasoning to inter vivos gifts. The cases favoring the surviving spouse may be placed in two groups:

Sederlund, 176 Wis. 627, 187 N.W. 750 (1922); *cf.* Sanborn v. Goodhue, 28 N.H. 48 (1853) (trust).

Note that the purchase of real estate may be used as a device for transferring personalty: Holmes v. Holmes, 3 Paige 363 (N.Y. 1832) (purchase of son's real estate at a price far beyond its value, with mortgage back not to be collected until death; held, valid).

[30] York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922); Garrison v. Spencer, 58 Okla. 442, 160 Pac. 493 (1916). Cases in which a deed of gift was held invalid as against the surviving spouse include the following: Stone v. Stone, 18 Mo. 389 (1853); Davis v. Davis, 5 Mo. 111 (1838); *cf.* Tucker v. Tucker, 29 Mo. 350 (1860), 32 Mo. 464 (1862) (trust); Nichols v. Nichols, 61 Vt. 426, 18 Atl. 153 (1889).

[31] *E.g.,* Garrison v. Spencer, *supra,* note 32.

[32] Wahl v. Wahl, 200 S.W.2d 597 (Mo. App. 1947), *appeal transferred,* 357 Mo. 89, 206 S.W.2d 334 (1947); *cf.* Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905); In re Sides' Estate, 119 Neb. 314, 228 N.W. 619 (1930).

[33] *E.g.,* In re Kilgallen's Estate, 123 N.Y.S.2d 827 (Surr. Ct. 1953); *cf.* Sawyer, "Gifts of Personal Property as Limited by the Rights of the Wife," 5 U. PITT. L. REV. 78, 88–90 (1939) (urging a return to the "intent" rationale in Pennsylvania).

[34] Sawyer, *supra,* note 18.

[35] *Supra,* pp. 140–143.

[36] Hayes v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926), discussed *supra,* p. 135; also see Leonard v. Leonard, 181 Mass. 458, 63 N.E. 1068 (1902).

[37] The burden is on the claimant to show that the subject-matter of the gift was the decedent's own property; Lindsey's Executor v. Lindsey, 313 Ky. 171, 230 S.W.2d 441 (1950).

(a) Decisions acknowledging frankly that the claimant wins because of the "unreasonableness" of the gift. For example it may be recalled that a line of Kentucky cases utilizes the following doctrine:

> "If . . . a gift or voluntary conveyance of all or the greater portion of his property be made to his children by a former marriage without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a *prima facie* case of fraud arises, and it rests upon the beneficiaries to explain away such presumption." [38]

(b) Decisions purporting to emphasize one or more of the following factors:

(i) intent, i.e., motive [39]

(ii) secrecy [40]

[38] Murray v. Murray, 90 Ky. 1, 13 S.W. 244 (1890). For discussion of the Kentucky cases, see pp. 112–114, *supra*. See also the following cases: (a) *Transfer Invalid:* Smith v. Hines, 10 Fla. 258 (1863–4); (b) *Transfer Valid:* Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914); Wahl v. Wahl, 200 S.W.2d 597 (Mo. App. 1947); *appeal transferred,* 357 Mo. 89, 206 S.W.2d 334 (1947); In re Sides' Estate, 119 Neb. 314, 228 N.W. 619 (1930); Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922); *cf.* Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952).

In sustaining the claim of the surviving spouse, some of the Missouri cases comment on the fact that *all* of the decedents' property was transferred; *e.g.,* Dyer v. Smith, 62 Mo. App. 606 (1895); Newton v. Newton, 162 Mo. 173, 61 S.W. 881 (1901); *cf.* Rice v. Waddill, 168 Mo. 99, 67 S.W. 605 (1902) (all but a "mere pittance"). In general, see p. 114, *supra.*

[39] See discussion of the Missouri cases, pp. 114–116, *supra;* also see Smith v. Lamb, 87 Ark. 344, 112 S.W. 884 (1908) (four days before death; some evidence of consideration); Wilson v. Wilson, 23 Ky. L. Rep. 1229, 64 S.W. 981 (1901); *cf.* Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Manikee v. Beard, 85 Ky. 20, 2 S.W. 545 (1887); Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894); Nichols v. Nichols, 61 Vt. 426, 18 Atl. 153 (1889). *But see* In re Sides' Estate, 119 Neb. 314, 228 N.W. 619 (1930); *cf.* Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922).

[40] Hastings v. Hudson, 359 Mo. 912, 224 S.W.2d 945 (1949); Rice v. Waddill, 168 Mo. 99, 67 S.W. 605 (1902). *But see* Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922). For a discussion of the secrecy factor, in connection with the early Colorado cases, see p. 135, *supra.*

(iii) proximity to death [41]

(iv) retention of possession, or of a life estate.[42]

The cases stressing retention of possession usually involve a continuation of active management or control.[43] To illustrate, we shall consider two cases involving a gift of an interest in a business. In *Marano* v. *Lo Carro* [44] the husband transferred ninety-nine of the one hundred shares in his own real estate company. Nevertheless, he continued to sign corporate checks, and drew some for his own use; managed the business; represented the company in negotiations; retained the corporate books and documents, and rendered no accounting to the donee, who in point of fact did not actually arrange for the issuance of shares to himself until after decedent's death. The inter vivos transfer — presumably valid aside from the widow's claim — was effected in a "written contract" that had been executed either just prior to or just subsequent to the marriage. The transfer was held "illusory."

[41] See the line of Missouri cases set out in Chap. 8, note 68, *supra;* Smith v. Lamb, 87 Ark. 344, 112 S.W. 884 (1908).

[42] Smith v. Hines, 10 Fla. 258 (1863–4); Tucker v. Tucker, 29 Mo. 350 (1860), 32 Mo. 464 (1862). In Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891) the decedent surrendered his stock certificates and took new certificates in the name of his sons. He informed them of the "gift," without particularizing as to the securities or the amount, and took a power of attorney from them enabling him to collect the dividends, some of which he retained for his personal use. Two years before his death he transferred the certificates to a lawyer to hold in trust for the sons, but on the same terms as before. Held, invalid as to the widow, because a "mere device or contrivance" to "have the enjoyment and control of it for life." *But see* Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940) (gift of paintings to art institute upheld though made 3 months before death with possession retained for a year under a "lease," and with blatant intent to cut out wife); Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952); Estate of Sides, 119 Neb. 314, 228 N.W. 619 (1930) (gift of money, taking back negotiable notes to be cancelled on donor's death).

[43] See Hastings v. Hudson, 359 Mo. 912, 924, 224 S.W.2d 945 (1949); *cf.* Mendez v. Quinones, 78 F. Supp. 744 (D.C.P.R. 1948), *modified sub. nom.* Mendez v. Mendez, 176 F.2d 849 (1st Cir. 1949); Rudd v. Rudd, 184 Ky. 400, 214 S.W. 791 (1919) (transfer of money and notes, "subject to the control and demands of decedent"; held, invalid).

[44] 62 N.Y.S.2d 121 (Sup. Ct. 1946), *aff'd without opinion,* 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946).

In *Allender* v. *Allender*,[45] however, a Maryland court upheld a gift in which comparable control was retained. Here the husband surrendered his shares in a close corporation, and had them reissued in the joint names of himself and his children by a former marriage. The donees were unaware of the transfer until his death; and in the meantime he voted the stock and drew dividends. After flirting with the "degree" test, i.e., "reasonableness," although not so-called, the court stated that "the fact that the joint interest in the key stock of the decedent and his children was by law severable . . . was not such a reservation of dominion or title to the key stock as amounted to a violation of the widow's rights." [46]

The gift cases are an illogical lot, inexplicable in terms of prevailing rationales. As mentioned earlier, a semblance of order may be discerned if we scrutinize the apparent equities in each case. From that viewpoint the *Allender* case makes sense, as the transfer was probably reasonable in the light of known circumstances. On the other hand, the state of the equities in the *Marano* case is not clear: the transfer was substantial in amount, but the claimant married the decedent only seven months before his death.[47]

The model statute suggested in Chapter 22 affects all types of transfers, including inter vivos gifts, with avowed attention to the equities. The reliance interest of the donee, normally quite substantial in the gift cases, has salient recognition in the "cut-off" provisions. A three year cut-off date applies to transfers in which the decedent retained no substantial beneficial interest in the subject matter of the transfer; otherwise, the period is ten years.[48]

[45] 199 Md. 541, 87 A.2d 608 (1952).

[46] *Id.* at 550–51, 87 A.2d at 612. See Table D, *infra,* for further cases on a gift of an interest in a business.

[47] For an analysis of the equities in the evasion cases as a whole, see Chap. 11, *supra.*

[48] Suggested Model Decedent's Family Maintenance Statute, §8, *infra,* Chap. 22.

3. Gifts Causa Mortis [49]

A gift causa mortis is a revocable [50] inter vivos gift of personalty, made in apprehension of death [51] and for testamentary purposes. Under any solution to the evasion problem this juridic hybrid is peculiarly vulnerable to the widow's claim. It is very like a will, not only in its revocability but in other respects. The property passing by gift causa mortis is subject to the creditor's claim — assuming an insufficiency of assets in the estate [52] without any need to prove intent to defraud creditors. Also, on a perhaps questionable analogy to the doctrine of lapse, the gift causa mortis fails if, as is unlikely, the donee does not outlive the donor.

And yet the prescribed formalities pertain to the law of gifts; thus delivery is required. The orthodox view is that title passes immediately, subject to defeasance by subequent acts and conditions such as claims of creditors, revocation, recovery of the donor, prior death of the donee. This notion as

[49] In general, see Pomeroy, Equity Jurisprudence §§1146–51 (4th ed. 1918); Schouler, "Oral Wills and Death-bed Gifts," (1886) 2 L. Q. Rev. 444; Mechem, "Delivery in Gifts of Chattels," 21 Ill. L. Rev. 341, 356 (1926).

Gifts causa mortis (*donationes causa mortis*) were well known in Roman law. Delivery was required in the early law. Later on, however, this requirement was relaxed in some respects; and Justinian enacted that *donationes causa mortis* should be classified as legacies for almost all purposes. Inst. 2, 7, 1, translated 2 Scott, Civil Law, 49 (1932). In general, see Buckland, Text Book of Roman Law 253–58, (2d ed. 1932); Buckland, Manual of Roman Private Law 150–52, (1925); Radin, Roman Law 392–95, (1927); Scrutton, Roman Law and the Law of England, 92 (1885); Bordwell, "Testamentary Dispositions," 19 Ky. L. J. 281, 286 (1931).

[50] The notion of revocability is in most cases academic, since changes of heart are unlikely before death; and if the donor recovers the gift is automatically rendered inoperative.

[51] Sports note: a Missouri court labelled a certain transfer a gift causa mortis even though the decedent went fishing several times after making the transfer. This, said the court, merely shows that "the ruling passion is strong in death." Kerwin v. Kerwin, 204 S.W. 925, 926 (Mo. App. 1918).

[52] The property transferred may be of considerable value, and need not be of tangible personalty. Thus the doctrine has been applied to commercial paper, securities, insurance policies, bank books and the like.

to the time of passage of title is a corollary of the view that the applicable formalities are those of gifts, not wills. Otherwise, if title passed at death, the formalities of the Wills Act would apply.

As far as cases dealing squarely with spouses' rights are concerned, the courts show no over-all bias in favor of either the surviving spouse or the donee. Cases favoring the spouse [53] tend to stress the resemblance to a will. Cases favoring the donee [54] emphasize the niceties of property law. Thus we find this statement in *Vosburg* v. *Mallory:* [55]

> The donor at his decease is held to be already divested of his property in the subject of the gift, so

[53] Railey v. Railey, 30 F. Supp. 121 (D. C. D. Col. 1939) (only to extent that estate funds insufficient to meet widow's claim); Hatcher v. Buford, 60 Ark. 169, 29 S.W. 641 (1895); Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913); *rehearing denied,* 55 Ind. App. 75, 102 N.E. 282 (1913); Baker v. Smith, 66 N.H. 422, 23 Atl. 82 (1891) (partial defeasance); Kerwin v. Kerwin, 204 S.W. 925 (Mo. App. 1918); *cf.* Smith v. Lamb, 87 Ark. 344, 112 S.W. 884 (1908) (bill of sale four days prior to death; gift causa mortis theory not mentioned in case); Manikee v. Beard, 85 Ky. 20, 2 S.W. 545 (1887) (factual situation similar to that of a gift causa mortis); Dunn v. German-American Bank, 109 Mo. 90, 18 S.W. 1139 (1891); Jones v. Brown, 34 N.H. 439 (1857); Huber's Estate, 25 Pa. Co. Ct. 370 (1901), *aff'd,* 21 Pa. Super. Ct. 34 (1902) (gift causa mortis not proven; strong dicta in original hearing regarding wife's rights).

In some cases the surviving spouse has prevailed against transfers that closely resembled gifts causa mortis, without any judicial comment on the resemblance; *e.g.,* Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940); Manikee v. Beard, 85 Ky. 20, 2 S.W. 545 (1887); Nichols v. Nichols, 61 Vt. 426, 18 Atl. 153 (1899); Thayer v. Thayer, 14 Vt. 107 (1842).

There is a line of Missouri cases that stresses the "contemplation of death" factor, apparently without insisting on the technical requirements of a gift causa mortis. The Missouri cases are discussed, *supra,* p. 114. Note particularly Stone v. Stone, 18 Mo. 390 (1853); *but cf.* Brandon v. Dawson, 51 Mo. App. 237 (1892) (caveat regarding proof of intent to defraud).

[54] Vosburg v. Mallory, 155 Iowa 165, 135 N.W. 577 (1912); Weber v. Salisbury, 149 Ky. 327, 148 S.W. 34 (1912) (surviving spouse otherwise reasonably provided for); Lambert v. Lambert, 117 Me. 471, 104 Atl. 820 (1918) (*quaere* if "fraud"); Marshall v. Berry, 13 Allen (Mass.) 43 (1866); Chase v. Redding, 13 Gray 418, 422 (Mass. 1859); *cf.* Wilson v. Lowrie, 77 Colo. 427, 236 Pac. 1004 (1925); In re Clark's Estate, 149 Misc. 374, 376, 268 N.Y. Supp. 253, 255 (1933) (tax case); Brunson v. Brunson, 19 Tenn. 627 (1838) (advancements).

[55] 155 Iowa 165, 135 N.W. 577 (1912).

> that no right or title in it passes to his personal representatives . . . that the wife may thereby evade the provision of the statute, which disables her from depriving her husband of more than half of her personal estate by her will . . . may be equally urged against any disposition of it in her lifetime. . . . If the legislature intended that the wife should be restricted in this respect, it would have been so declared.

In the *Vosburg* case the equities favored the donee; and the court stated that it reached its "satisfactory conclusion," because "no fraud was intended. . . ." The saving clause "no fraud being intended" is found in a few other cases.[56] Here again we usually have no clue as to whether fraud refers to shams, to malicious transfers, or to some other sort of transfer.

It should not be assumed from the foregoing that the courts are indifferent to the quasi-testamentary nature of the gift causa mortis. There are a number of additional cases in which the donee prevailed on the apparent reasoning that the transfer concerned was a gift inter vivos instead of a gift causa mortis.[57] One senses from these cases that many of the courts concerned were quite willing to concede that a gift causa mortis would *per se* be vulnerable to the widow's claim.

It is possible that the cases in the last-mentioned group are decided essentially on the equities of the individual case. Certainly the distinction between a gift inter vivos and a gift causa mortis is a thin one. But we cannot be sure. The necessary factual data are not always given; and the alleged rationale tends to evade the issue.

[56] *E.g.*, Lambert v. Lambert, 117 Me. 471, 104 A. 820 (1918); Brandon v. Dawson, 51 Mo. App. 237 (1892).

[57] In some cases the surviving spouse lost because the instrument was deemed not to be a gift causa mortis. West v. Miller, 78 F.2d 479 (7th Cir. 1935), *cert. denied*, 296 U.S. 633 (1935) (inter vivos trust); Harmon v. Harmon, 131 Ark. 501, 199 S.W. 553 (1917) (equities against surviving spouse); Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912) (inter vivos trust); *cf.* Stark v. Kelley, 132 Ky. 376, 113 S.W. 498 (1909) (gift by bachelor); In re Kilgallen's Estate, 204 Misc. 558, 123 N.Y.S.2d 827 (Surr. Ct. 1953); Sanborn v. Goodhue, 28 N.H. 48 (1853) (inter vivos trust); York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922) (deeds and contracts).

A similar criticism may be made of some of the cases directly favoring the spouse. We find an unrealistic stress on the time at which "title" is said to pass. As was said by an Indiana court:

> There is authority for the statement that a gift *causa mortis* vests title in the donee conditionally at the time of delivery and that where the doner dies without revoking such gift, the vesting of the property relates back to the time of the delivery thereof; but on the other hand, there is abundance of authority to the effect that a donor who makes a gift *causa mortis* remains seized or possessed of the property until death, within the meaning of a statute giving dower in personal property of which he dies seized.[58]

Policy-wise, gifts causa mortis should receive just about the same treatment as gifts inter vivos. Certainly the gift *causa mortis,* of all transfers, should not be immune to the widow's claim. As was said in *Crawfordsville Trust Co.* v. *Ramsey,* "we do not think that 'modern business' will have to do very frequently with *gifts* made in *extremis* by a donor who gives because he knows and fully realizes that he is affected with a disease from which he *cannot* recover, the gift being conditioned on the event of his death . . . because the donor . . . learns that his widow may defeat the [will] to the extent of her one third interest therein." [59] Nor has the donee any justifiable complaint. His reliance interest is thin, as his "ownership" is conditional and necessarily of short duration. Indeed, if other things are equal the lack of any reliance interest should militate against such a donee. Under an equitable marshalling of the assets he could be called on for contribution to the widow in advance of other inter vivos transferees.

But other things may not be equal. There may be situations when the donee of the gift causa mortis should prevail

[58] Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 70, 100 N.E. 1049, 1060 (1913); but most of the cases cited for this proposition did not involve a surviving spouse. *Cf.* Jones v. Brown, 34 N.H. 439 (1857).

[59] 55 Ind. App. 40, 78, 102 N.E. 282, 283 (1913).

even over the spouse, as where the decedent thereby effected reasonable settlement on dependent children of a prior marriage. And in no event should the spouse win if she has no need. In a word, the gift causa mortis cases should be decided by the maintenance and contribution formula. The equities should be the avowed basis of decision. On this approach there would be no excuse for employing the "title" phraseology to describe the result; nor would it be possible to defeat a meritorious claim by calling the transfer a gift inter vivos, instead of a gift causa mortis.

By way of postscript, may an irrevocable trust be considered a gift causa mortis? The problem stems from the fact that in some jurisdictions an irrevocable trust is virtually impregnable, as far as the widow is concerned.[60] A gift causa mortis may, of course, be made in trust, in which event the rules as to gifts causa mortis would apply.[61] But could an irrevocable trust, when made in contemplation of death, possibly be characterized as a gift causa mortis? Fonblanque, in discussing the custom of London cases, felt that a deed made while the grantor is languishing "ought to be looked upon as a *donatio causa mortis.*" [62] Lacking the power to revoke, however, or an arrangement that the trust be subject to a condition subsequent of termination upon the recovery of the settlor, it would appear that the widow would not get far on the gift causa mortis analogy.[63] Indeed, in a cryptic

[60] See *infra,* Chap. 13:3.

[61] Bogert, 1A TRUSTS AND TRUSTEES, §142, note 17 (1951); and see Baker v. Smith, 66 N.H. 422, 23 Atl. 82 (1891).

[62] Quoted in Stone v. Stone, 18 Mo. 390, 392 (1853).

[63] Reservation of the income for life and any degree of control over administration would also tend to negative consciousness of impending death.

In Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912), a transfer of shares of stock, in trust for a granddaughter, was taxed as being in contemplation of death. In holding that it was not a gift causa mortis, the court stated that "a gift, although made in contemplation of death, is a gift *inter vivos,* if the donor manifests an intention that the gift shall be absolute, irrevocable and effective *in praesenti,* cannot be questioned." *Cf.* Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905)

Colorado decision the court sustained a transfer in trust "causa mortis" that had been made with intent to deprive the widow of her inheritance.[64]

(irrevocable trust of bonds, made while husband allegedly "in a low state of health," sustained against widow).

[64] Wilson v. Lowrie, 77 Colo. 427, 236 Pac. 1004 (1925); but there is no discussion of the sense in which "causa mortis" was used.

CHAPTER 13

Trusts

1. REVOCABLE INTER VIVOS TRANSFERS IN TRUST

Forty-two cases were noticed that appear to be directly in point. In a little more than one half of these cases (to wit, twenty-three) the decision favors the trust beneficiary over the surviving spouse.[1]

[1] *Favoring spouse.* Grover v. Clover, 69 Colo. 72, 169 Pac. 578 (1917); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Hays v. Henry, 1 Md. Ch. 337 (1848); Wanstrath v. Kappel, 354 Mo. 565, 190, S.W.2d 241 (1945), 356 Mo. 210, 201 S.W.2d 327 (1947), *aff'd,* 358 Mo. 1077, 218 S.W.2d 618 (1949); Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939); MacGregor 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); Burns v. Turnbull, 37 N.Y.S.2d 380 (Sup. Ct. 1942), *rev'd mem.,* 266 App. Div. 779, 41 N.Y.S.2d 448 (2d Dep't 1943), *reargument granted,* 267 App. Div. 986, 48 N.Y.S.2d 453 (2d Dep't 1944), *aff'd on reargument mem.,* 268 App. Div. 822, 49 N.Y.S.2d 538 (2d Dep't 1944), *motion to dismiss appeal denied,* 294 N.Y. 809, 62 N.E.2d 240 (1945); *aff'd without opinion,* 294 N.Y. 889, 62 N.E.2d 785 (1945); Schnakenberg v. Schnakenberg, 176 Misc. 312, 27 N.Y.S.2d 270 (Sup. Ct. 1941), 262 App. Div. 234, 28 N.Y.S.2d 841 (2d Dep't 1941); President and Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S.2d 375 (Sup. Ct. 1939), *modified on other grounds,* 260 App. Div. 174, 954, 21 N.Y.S.2d 232 (2d Dep't 1940); Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); Darrow v. Fifth Third Union Trust Co., 139 N.E.2d 112 (Ohio Com. Pl. 1954); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd,* 147 Ohio St. 437, 72 N.E.2d 378 (1947); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381, (1944); Estate of Brown, 384 Pa. 99, 119 A.2d 513 (1956) (unfunded life insurance trust); In re Pengelly's Estate, 374 Pa. 358, 97 A.2d 844 (1953); Vederman Estate, 78 D.&C. 207 (Pa. 1951); Bickers v. Shenandoah Valley Nat. Bank, 197 Va. 145, 88 S.E.2d 889 (1955), *reh. denied,* 197 Va. 732, 90 S.E.2d 865 (1956) (unfunded life insurance trust); *cf.* In re Ford's Estate, 279 App. Div. 152, 108 N.Y.S.2d 122 (1st Dep't 1951), *aff'd without opinion,* 304 N.Y. 598, 107 N.E.2d 87 (1952) (nonevasive); Blush v. McQuade, 47 N.Y.S.2d 450 (Sup. Ct. 1944); O'Brien v. City Bank Farmers Trust Co., Sup. Ct., N. Y. L. J. (15 Dec. 1936), 1 P-H Unreported Trust Cases, ¶25,244.

Favoring trust beneficiary. Burnet v. First Nat'l Bank, 12 Ill. App. 2d 514, 140 N.E.2d 362 (1957); Stice v. Nevin, 344 Ill. App. 642, 101 N.E.2d

Detailed analysis of these revocable trust cases may be found under the general discussion of evasion rationales.[2] When the court adheres strictly to the "reality" rationale, as in the Massachusetts cases,[3] the trust beneficiary will prevail. Under the "illusory trust" rationale ("real," but vulnerable to the spouse's claim), the result is not entirely predictable. In theory, the spouse must demonstrate that the decedent retained excessive control; in actuality, the equities play a large part in the decision-making process. Under the "intent" rationale the equities are avowedly relevant, usually decisive. Under the proposed model statute,[4] revocable trusts are treated exactly as any other revocable transfer.

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873 (1951); Boyle v. John M. Smyth Co., 248 Ill. App. 57 (1928); Wheelock v. Wheelock, 97 Ind. App. 501, 187 N.E. 205 (1933); De Leuil's Ex'rs v. De Leuil, 255 Ky. 406, 74 S.W.2d 474 (1934); Brown v. Fidelity Trust Co., 126 Md. 175, 94 Atl. 523 (1915); Ascher v. Cohen, 333 Mass. 397, 131 N.E.2d 198 (1956); National Shawmut Bank of Boston v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945); Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904); Roche v. Brickley, 254 Mass. 584, 150 N.E. 866 (1926); Seaman v. Harmon, 192 Mass. 5, 78 N.E. 301 (1906); Stone v. Hackett, 12 Gray 227 (Mass. 1858); Potter v. Winter, 280 S.W.2d 27 (Mo. 1955); Walker v. Walker, 66 N.H. 390, 31 Atl. 14 (1891); Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S.2d 648 (3rd Dep't 1939), *motion for leave to appeal denied,* 256 App. Div. 1026, 11 N.Y.S.2d 547, *aff'd without opinion,* 281 N.Y. 760, 24 N.E.2d 20 (1939); Ballantyne Estate, 1 Fiduc. 445, 67 Montg. 314, 65 York 148 (Pa. 1951); McKean Estate, 71 D.&C. 429 (1950), *aff'd,* 336 Pa. 192, 77 A.2d 447 (1951); Mornes v. Lawrence Sav. & Trust Co., 8 LAWRENCE L. J. 163 (Pa. 1949); Beirne v. Continental-Equitable Trust Co., 307 Pa. 570, 161 Atl. 721 (1932); Windolph v. Girard Trust Co., 245 Pa. 349, 91 Atl. 634 (1914); Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891); Dunnett v. Shields, 97 Vt. 419, 123 Atl. 626 (1924); In re Steck's Estate, 275 Wis. 290, 81 N.W.2d 729 (1957); *cf.* Exchange National Bank of Winter Haven v. Smith, 4 So.2d 675, 676 (Fla. 1941) (amendable insurance trust); Pond v. Sweetser, 85 Ind. 144, 150 (1882) (conflict of laws); Matter of Fields, 193 Misc. 777, 84 N.Y.S.2d 645 (1948), *modified,* 276 App. Div. 835, 1082, 93 N.Y.S.2d 267 (1949), *modified and aff'd,* 302 N.Y. 262, 97 N.E.2d 896 (1951); Hochster v. City Bank Farmers Trust Co., 260 App. Div. 712, 24 N.Y.S.2d 110 (1st Dep't 1940), *aff'd without opinion,* 288 N.Y. 588, 42 N.E.2d 600 (1942); Stefano v. First National Bank, 29 WESTMORELAND Co. L. J. 49, *exceptions overruled, id.,* 191 (Pa. Com. Pl. 1947) (50 year trust).

[2] See *supra,* Chap. 7:2.

[3] *Supra,* note 1.

[4] Suggested Model Decedent's Family Maintenance Statute, *infra,* p. 299.

2. Revocable Self-Declarations of Trust

Seemingly there has been very little litigation concerning spouses' rights in this type of transfer. Two cases were noticed, in both of which the beneficiary prevailed.[5]

Lack of litigation does not necessarily mean that malevolent husbands shun such a device. In "reality" jurisdictions,[6] for instance, it may or may not be in common use.[7] Technically impervious to the widow's claim, it has the added advantage of great control and secrecy. Where the jurisdiction concerned purports to follow the "control" or "intent" rationales, however, the revocable self-declaration of trust would be a risky transfer for the husband to employ. Probably most counsel would advise against it, particularly when the equities run in favor of the potential widow.

3. Irrevocable Inter Vivos Trusts

Most of the evasion cases involving this type of transfer favor the trust beneficiary, whether the decedent makes a self-declaration of trust or a transfer in trust. In cases where the trust is not clearly irrevocable the cases are fairly well balanced.[8] Where the trust is clearly irrevocable, however, the

[5] United Building & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W. D. Ark. 1946); Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1887). *But cf.* Application of Cerchia, 279 App. Div. 734, 108 N.Y.S.2d 753 (1st Dep't 1952) (*semble* surviving spouse not involved).

The spouse prevailed in Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep't 1936), but the dissenting judge pointed out (p. 123) that "The complaint does not allege that the trusts were revocable. . . ."

[6] Pennsylvania could be so classified, at least at the time of Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64 (1887).

[7] *Cf.* Farkas v. Williams, 3 Ill. App.2d 248, 121 N.E.2d 344, (1954) *rev'd*, 5 Ill.2d 417, 125 N.E.2d 600 (1955) (no surviving spouse).

[8] (a) *Favoring spouse.* Kratli v. Booth, 99 Ind. App. 178, 191 N.E. 180 (1934) (*semble* irrevocable, but decided on basis of fraud in nondisclosure of all facts before securing wife's concurrence); Stone v. Stone, 18 Mo. 390 (1853); Thayer v. Thayer, 14 Vt. 107 (1842) (*semble* irrevocable).

(b) *Favoring beneficiary.* Wilson v. Lowrie, 77 Colo. 427, 236 Pac. 1004 (1925) (transfer in trust "causa mortis"; *semble* irrevocable); Stewart v. Stewart, 5 Conn. 317 (1824); Small v. Small, 56 Kan. 1, 42

spouse has prevailed in relatively few cases.[9]

We may presume that counsel for the transferor will be quick to advise use of the irrevocable trust, once it has received judicial sanction as an evasive device. It may be more than coincidence that the cases favoring the beneficiary tend to cluster in a few states, and that in two of those states —

Pac. 323 (1895); Estate of Sides, 119 Neb. 314, 228 N.W. 619 (1930); *cf.* Pond v. Sweetser, 85 Ind. 144 (1882).

[9] (a) *Favoring spouse.* City Bank Farmers Trust Co. v. Miller, 163 Misc. 459, 297 N.Y. Supp. 88 (Sup. Ct. 1937), *aff'd without opinion,* 253 App. Div. 707, 1 N.Y.S.2d 640 (1st Dep't 1937), *motion for leave to appeal granted,* 253 App. Div. 880, 2 N.Y.S.2d 798 (1st Dep't 1938), *rev'd,* 278 N.Y. 134, 15 N.E.2d 553 (1938) (with power of appointment); Bodner v. Feit, 247 App. Div. 119, 286 N.Y. Supp. 814 (1st Dep't 1936) (apparently irrevocable: see dissent, *id.* at 123, 286 N.Y. Supp. at 818; *cf.* 46 YALE L. J. 884, note 1 (1937); 50 HARV. L. REV. 529 (1937)); Hill's Estate, 15 D.&C. 699 (Pa. 1931) (one day before death); *cf.* Peterson v. Anderson, 218 Minn. 383, 16 N.W.2d 185 (1944) (conveyance by trustee in fraud of dower of beneficiary's wife); McCammon v. Summons, 2 Disn. 596, 600 (Ohio 1859) (statement that immaterial whether revocable or irrevocable); Appeal of Miskey, 107 Pa. 611, 629 (1883) (undue influence, drunkenness; absence of a power of revocation "is a circumstance which throws the burden of proof upon the party taking the benefit, and in the absence of proof of a distinct intention to make the gift irrevocable, if the other circumstances of the case require it, the conveyance will be set aside"); Norris v. Barbour, 188 Va. 723, 51 S.E.2d 334 (1949).

(b) *Favoring beneficiary.* Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905); Ford v. Ford, 4 Ala. 142 (1842); Richard v. James, 133 Colo. 180, 292 P.2d 977 (1956); Bee Branch Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949); Williams v. Collier, 120 Fla. 248, 162 So. 868 (1935); Patterson v. McClenathan, 296 Ill. 475, 129 N.E. 767 (1921); Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912) (informal irrevocable trust, *semble* income reserved for life, held not a gift causa mortis); Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895); Ginn's Adm'x v. Ginn's Adm'r, 236 Ky. 217, 32 S.W.2d 971 (1930) (imperfect gift enforced as a trust); Smith v. Corey, 125 Minn. 190, 145 N.W. 1067 (1914); Cameron v. Cameron, 10 Smedes & M. 394 (Miss. 1848); Morrison v. Morrison, 99 Ohio App. 203, 132 N.E.2d 233 (1955) (self-declaration of trust); Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909); Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850); Lightfoot's Ex'rs v. Colgin, 19 Va. (5 Munf.) 42 (1813); *cf.* West v. Miller, 78 F.2d 479 (7th Cir. 1935), *cert. denied,* 296 U.S. 633 (restricted power of revocation); Haulman v. Haulman, 164 Iowa 471, 145 N.W. 930 (1914) (antenuptial transfer); Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N.Y. Supp. 92 (1st Dep't 1905), *modified and aff'd,* 185 N.Y. 485, 78 N.E. 359 (1906) (amendable inter vivos trust held not to contravene New York statute prohibiting certain testamentary gifts to charity).

Florida and Virginia[10] — most of the evasion litigation is concerned with irrevocable trusts.

There is some justification for protecting the beneficiary of an irrevocable trust. When a transfer has been made beyond hope of recall, it can truly be said to have an "absolute" quality, an air of finality; the beneficiary's reliance interest is greater than if the power to revoke had been retained.

But the irrevocable trust is not sacrosanct: it is a creature of equity. An unreasonably large transfer should not attain automatic immunity simply because it is irrevocable. The emphasis should be on the *relative size* of the transfer, not on its form. For example, an unreasonably large transfer made shortly before death flouts the forced share whether it be revocable or irrevocable. When death looms, of what avail is the power of revocation? What cared the settlor in *Newman* v. *Dore*[11] that he had this power, having made a definitive transfer in his last mortal days? Would not any Ohio lawyer, for example, under similar circumstances, guard against insertion of a revocation clause? The control rationale, which is unrealistic regardless of the time of the transfer,[12] becomes mere pedantry when applied to transfers made close to death.

Moreover, the trappings of irrevocability may cloak a secret arrangement that the trust be revocable at will,[13] or revocable — or even automatically terminated — in the event the wife predeceases the husband. We must remember that the "trustee" may well be one of the inter vivos donees, not a corporate fiduciary; and the acquiesence of the beneficiaries may be secured by money, or the glimmer thereof. These arrangements lie in the borderland between revocable trusts and "colorable" transfers; and, if the facts can be proven as stated, the widow should prevail.[14] But how to get the proof?

[10] See cases cited, *supra,* note 2.

[11] 275 N.Y. 371, 381, 9 N.E.2d 966, 970 (1937) discussed, *supra,* pp. 74–76.

[12] See Chap. 7:3, *supra.*

[13] As to the revocability of an "irrevocable" power of attorney, see MacGregor v. Gardner, 14 Iowa 326 (1862).

[14] Irrevocable trusts made in close proximity to death of course invite a charge of undue influence; e.g., Burton v. Burton, 100 Colo. 567, 69

The widowed stepmother may face a wall of conspiracy. Human nature is not always pretty: some of the evasion cases show degrees of Legree. Difficulties of this sort point to the advisability of putting irrevocable trusts under our statutory formula.[15]

4. Bank Account Trusts

The best known type of bank account trust is the Totten trust.[16] This device received its baptism, if not its birth,[17] in the celebrated dictum in *Matter of Totten:* [18]

> "A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of dis-

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P.2d 307 (1937) (irrevocable transfer seventeen days before death, while "seriously ill," sustained; marriage late in life; nature of transfer not clear); see Appeal of Miskey, 107 Pa. 611 (1883); *cf.* Hill's Estate, 15 D.&C. 699 (Pa. 1931).

[15] Revocability is relevant, however, under the "cut-off" provisions in § 8, Chap. 22, *infra.*

[16] Variations of the Totten trust, involving no presumption arising from the mere form of the deposit, are described in Clark, "Totten Trusts in Connecticut," 29 Conn. B. J. 1 (1955).

[17] For the early history of the Totten trust see Scott, Trusts §58.2 (2d ed. 1956); 87 U. Pa. L. Rev. 847 (1939). In general, see Larremore, "Judicial Legislation in New York," 14 Yale L. J. 312 (1905); Moynihan, "Trusts of Savings Deposits in Massachusetts," 22 B. U. L. Rev. 271, 286 (1942); Oleck, "Bank Account Trusts: Should They Be Presumed to be Fraudulent?" 91 Trusts and Estates 39 (1952); Slusser, "Recent Developments in the Tentative Trust Doctrine; Influence of Civil Code s.2280 on the California Law," 28 Calif. L. Rev. 202 (1940); J. Vaughan, "Developments in Totten Trusts," 130 N. Y. L. J. 160, 166; Williams, "Totten Trusts and the Test of the Validity of a Challenged Transfer," 126 N. Y. L. J. 374 (6 Sept. 1951). On Totten trusts in the Chicago area, see Hayes, "Illinois Dower and the 'Illusory' Trust," 2 DePaul L. Rev. 1, 23 (1952).

[18] Matter of Totten, 179 N.Y. 112, 125–26, 71 N.E. 748, 752, 70 L.R.A. 711 (1904).

> affirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." [19]

This device is more often found in savings bank accounts than in commercial bank accounts and is also known as a "savings bank trust," a "bank account trust," or a "tentative trust." It is a judicial compromise. The poor man can dispose of his modest account without hiring a lawyer; and his estate will not incur liability for withdrawals made after the "trust" is established. There is a rebuttable presumption of intention to establish a revocable "trust" for the designated beneficiary, arising from the mere form of the deposit.[20] If the donee can prove intent to create an irrevocable trust, he will be entitled to recover withdrawals before death.[21] Otherwise, he is entitled to the balance at the depositor's death, provided the trust was not revoked.

The bank account trust is said to have originated in some states because of limitations on the size of accounts.[22] This stimulated the opening of further accounts in the same bank in "trust" for another party. Other motives are to conceal assets, to avoid rules restricting interest rates, to attempt to avoid taxation, or to make an avowedly testamentary disposition. The figures indicate that it is a popular substitute for the expense, delay, and publicity of testamentary transmission.[23] As Surrogate Wingate remarked in the *Reich* [24]

[19] On how the beneficiary establishes his case, see Oleck, *supra,* note 17, at 39. On revocation, see Annot. 38 A.L.R.2d 1244 (1954).

[20] Scott, p. 478; Restatement, Trusts §58, comment a (1935). On the necessity for notice see Day Trust Co. v. Malden Sav. Bank, 328 Mass. 576, 105 N.E.2d 363 (1952); Brucks v. Home Fed. Sav. & Loan Ass'n, 36 Cal.2d 845, 228 P.2d 545 (1951); 50 MICH. L. REV. 1124 (1952).

[21] Scott, p. 483. *Semble* notice to the beneficiary of the mere existence of the trust will not make it irrevocable; Moran v. Ferchland, 113 Misc. 1, 184 N.Y. Supp. 428 (1920); In re Ingels Estate, 372 Pa. 171, 92 A.2d 881 (1952), noted in 26 TEMP. L. Q. 468–70 (1953), 14 U. PITT. L. REV. 627–29 (1953); *cf.* Restatement, Trusts, §58, comment a (1935). Delivery of the passbook may make the trust irrevocable, unless explained otherwise: Matter of Totten, *supra,* note 18, at 126, 71 N.E. at 752; Matter of Smith, 177 Misc. 601, 31 N.Y.S.2d 603 (Surr. Ct. 1941).

[22] Note, 39 DICK. L. REV. 37–42 (1934).

[23] It is also said to be popular with women, *ibid.*

[24] Matter of Reich, 146 Misc. 616, 618, 262 N.Y. Supp. 623, 626 (1933).

case, "its enunciation is but another evidence of the attempt of the courts to conform the law to the customs of the community." [25] The great practical advantages of the device indicate a social and business utility that ensures its continued use. Savings accounts are becoming of increasing importance in the estate of the average person, perhaps secondary only to the family home and insurance.

If any inter vivos device appears to be testamentary, it is the Totten trust. Its everyday utility absolves it from the requirements of the Wills Act, but it is subservient to the claim of the undertaker,[26] the creditor,[27] the personal representative.[28] As far as the surviving spouse is concerned, until the *Halpern* case came along, it was popularly and not unreasonably understood that a Totten trust was illusory *per se*.[29] This thinking was reflected in the addition of a comment to the Restatement of Trusts in 1948, permitting the surviving spouse to "reach" a Totten trust.[30] In view of the recent New York Court of Appeals decision in the *Halpern* case,[31] however, it is not at all clear that the Restatement view represents prevailing judicial opinion. Under the *Halpern* test we are concerned merely with the "reality" of the Totten

[25] For figures on the use of the device in Massachusetts, see Moynihan, "Trusts of Savings Deposits in Massachusetts," 22 B. U. L. REV. 271, 272 (1942); Seymour v. Seymour, 85 So.2d 726 (Fla. 1956).

[26] Matter of Reich, *supra,* note 24.

[27] Scott, §58.5; Oleck, "Bank Account Trusts: Should They be Presumed to be Fraudulent?" 91 TRUSTS AND ESTATES 39 (1952); see "Matter of Workmen's Compensation Board of State of New York" (Furman), 126 N. Y. L. J. 8 (2 July 1951).

[28] Scott, §58.5, In re Aybar's Estate, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952).

[29] *E.g.,* Krause v. Krause, 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 32 N.E.2d 779 (1941). Also see text, *supra,* Chap. 9:1.

[30] Restatement, Trusts, §58, comment cc (1935); *cf.* Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 YALE L. J. 1, 36–37 (1941).

[31] Discussed, *supra,* Chap. 9:1.

trust, i.e., whether it was intended to be legally operative.[32] The widow is relegated to the status of a mere legatee.[33]

Looking at the entire group [34] of bank-account trust eva-

[32] In re Leiman, 116 N.Y.S.2d 658, 660 (Surr. Ct. 1952), *aff'd without opinion,* 118 N.Y.S.2d 750, 281 App. Div. 764 (2d Dep't 1952), *leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (1952); also see Gulliver and Tilson, *supra,* note 30, at 38.

[33] *Cf.* In re Zern's Estate, 138 N.Y.S.2d 894 (1954). In matter of Nelson's Will, 200 Misc. 3, 106 N.Y.S.2d 427 (1951) a husband and wife, pursuant to " contract or agreement," executed joint and mutual wills which gave the survivor a life estate, and which also provided that after the death of both the balance would go to designated legatees. It was held that Totten trusts made by the surviving husband, after his wife's death, would be set aside in favor of the designated legatees under the joint and mutual wills. The court stated that the survivor had become a "trustee" for the beneficiaries: but surely the case for the legatees sounded in contract, not in trust? On contracts to make a will, see Appendix D, *infra.*

[34] *Transfer Valid: Maryland:* Whittington v. Whittington, 205 Md. 1, 106 A.2d 72 (1954) (to A in trust for A and B, subject to withdrawal by either, survivor to take all); Mushaw v. Mushaw, 183 Md. 511, 39 A.2d 465 (1944). *New York:* In re Zern's Estate, 138 N.Y.S.2d 894 (Surr. Ct. 1954); In re Friesing's Estate, 123 N.Y.S.2d 207, (Surr. Ct. 1953); In re Phipps' Will, 125 N.Y.S.2d 606 (Surr. Ct. 1953); In re Aybar's Estate, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952); Matter of Leiman, 116 N.Y.S.2d 658 (Surr. Ct. 1952), *aff'd without opinion,* 281 App. Div. 764 (2d Dep't 1952), *leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (2d Dep't 1953); In re Freistadt's Will, 104 N.Y.S.2d 510 (Surr. Ct. 1951), *aff'd,* 278 App. Div. 962, 105 N.Y.S.2d 995 (2d Dep't 1951), *rev'd,* 279 App. Div. 603, 107 N.Y.S.2d 466 (2d Dep't 1951) (reversal of earlier stand, in view of the Halpern case; case sent back to the surrogate for further evidence); In re Halpern's Estate, 197 Misc. 502, 96 N.Y.S.2d 596 (Surr. Ct. 1950), 277 App. Div. 525, 100 N.Y.S.2d 894 (1st Dep't 1950), *aff'd,* 303 N.Y. 33, 100 N.E.2d 120 (1951); In re Naydan's Estate, 107 N.Y.S.2d 701 (Surr. Ct. 1951); In re Prokaskey's Will, 109 N.Y.S.2d 888 (Surr. Ct. 1951); Matter of Ward, 279 App. Div. 616 (2d Dep't 1951); Murray v. Brooklyn Savings Bank, 169 Misc. 1014, 9 N.Y.S.2d 227 (Sup. Ct. 1939); *rev'd,* 15 N.Y.S.2d 915 (1st Dep't 1939); In re Schurer's Estate, 157 Misc. 573, 284 N.Y. 28 (Surr. Ct. 1935), *aff'd without opinion,* 248 App. Div. 697, 289 N.Y. 818 (1st Dep't 1936); In re Yarme's Estate, 148 Misc. 457, 266 N.Y. Supp. 93 (Surr. Ct. 1933), *aff'd without opinion,* 242 App. Div. 693, 273 N.Y. Supp. 403 (2d Dep't 1943); *cf.* In re Shortle's Estate, 206 Misc. 35, 130 N.Y.S.2d 233 (1954); In re Purcell's Will, 200 Misc. 643, 107 N.Y.S.2d 955 (Surr. Ct. 1951); In re Cohen's Will, 90 N.Y.S.2d 776, 779 (Surr. Ct. 1949) (money in account earned by beneficiary; dictum that a Totten trust as such is illusory and that any revocable transfer is illusory); Matter of Schacter, 1 P-H Unreported Trust Cases, ¶25,451, N. Y. L. J., 13 Jan. 1944 (Surr. Ct. 1944); In re McCann's Estate, 155 Misc. 763, 281 N.Y. Supp. 445 (Surr. Ct. 1935); In re Clark's Estate, 149 Misc. 374, 268 N.Y. Supp. 253 (Surr. Ct. 1933)

sion cases, we find that most decisions are from New York. This is to be expected in view of the popularity of the Totten trust in that important jurisdiction, as well as the doctrinal confusion in its courts. Until *Newman* v. *Dore* was decided, in 1937, the New York courts sustained the Totten trust against the claim of the surviving spouse.[35] In fact, the opinion of Surrogate Henderson in *Matter of Schurer* (in 1935) [36] reads not unlike the majority opinion in the Court of Appeals in the *Halpern* case. The *Halpern* case appears to have killed any chance of a Totten trust in New York being "illusory" in the *Newman* v. *Dore* sense. Although technically dictum, the *Halpern* case has been followed consistently in subsequent lower-court decisions involving Totten trusts.[37]

Under the *Halpern* doctrine the burden is on the personal representative to "make a factual showing of unreality." [38] A recent lower court decision calls attention to the fact that the court in the *Halpern* case mentioned "proof that the transfers were intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed." [39] This ambiguous phrase, however, was bor-

(tax case). *Transfer Invalid: New York:* Pichurko v. Richardson, 107 N.Y.S.2d 365 (1951) (before Court of Appeals decision in the Halpern case); Getz v. Getz, 101 N.Y.S.2d 757 (Surr. Ct. 1950); Steixner v. Bowery Savings Bank, 86 N.Y.S.2d 747 (Sup. Ct. 1949); Application of Barasch, 267 App. Div. 830, 45 N.Y.S.2d 790 (2d Dep't 1944), *reargument denied,* 267 App. Div. 905, 47 N.Y.S.2d 486 (2d Dep't 1944); Krause v. Krause, 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd,* 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified,* 285 N.Y. 27, 32 N.E.2d 779 (1941); Hellstern v. Gillett, 1 P-H Unreported Trust Cases, ¶25,233, N. Y. L. J. 7 April 1937 (Sup. Ct. 1937); *cf.* Matter of Nelson, *supra,* note 33; Matter of Barthold, 171 Misc. 625, 13 N.Y.S.2d 346 (Surr. Ct. 1939). *Pennsylvania:* In re Krasney's Estate, 7 Fiduc. 403 (Pa. Orph. 1957); Del Conte v. Luca, 2 D.&C. 2d 130 (Pa. 1954); In re Graham's Estate, 42 Del. Co. 9, 4 Fiduc. 467, 3 D.&C. 2d 218 (Pa. 1954); Estate of Black, 64 York 166, 73 D.&C. 86 (Pa. 1950); *cf.* In re Iafolla's Estate, 380 Pa. 391, 110 A.2d 380 (1955).

[35] See cases, note 34, *supra.*

[36] Note 34, *supra.*

[37] *Ibid.*

[38] In re Zern's Estate, 138 N.Y.S.2d 894 (Surr. Ct. 1954).

[39] *Id.,* at 895; In re Shortle's Estate, 206 Misc. 35, 130 N.Y.S.2d 233, 234 (Surr. Ct. 1954).

rowed from *Newman* v. *Dore,*[40] and probably stems from the second passage of the *Kerr* test.[41] Certainly the court in the *Halpern* case had no thought of espousing the intent rationale. What it had in mind was shams. As far as intent (motive) is concerned, the very intent to defeat the widow's inheritance is now exalted: the more vindictive the husband's conduct the greater the likelihood that the husband intended to benefit the donee, i.e., that the transfer was "real." [42] Nor would the secrecy of the transaction appear to be relevant: a bank account trust may quite naturally be a matter solely between the depositor and the bank.[43]

It is difficult to envisage the equities playing any part in a case decided on the *Halpern* test. To be sure, the court in *Naydan's Estate* [44] referred to the reasonableness of the provisions made for the widow, as bearing on the decedent's intent "to make [the] transfer completely effective." But it would be rash to assume that the *unreasonableness* of the provisions for the widow would dictate a finding of lack of factual reality.[45]

The possibility of hardship [46] to the surviving spouse may be sensed from two recent lower-court decisions. In *In re Leiman's Estate* [47] the beneficiaries of several Totten trusts

[40] Matter of Halpern, 303 N.Y. 33, 38, 100 N.E.2d 120, 122 (1951).

[41] See *supra,* Chap. 8, text at notes 3 and 4.

[42] Vindictiveness toward the wife could also, of course, stimulate a "colorable" arrangement between the decedent and the donee. In other words, the "minus" from the widow does not always result in a "plus" to the donee. The transfer is not real if there is no "plus" to the donee.

[43] The fact that the intended beneficiary was not notified of the existence of the account would be relevant in determining the existence of the *animus donandi,* as in the case of any gift or trust, but would certainly not be decisive. Geographical remoteness of the "faraway" beneficiary, alluded to by Desmond, J., in the Halpern case, seems of questionable relevance.

[44] 107 N.Y.S.2d 701, 703 (Surr. Ct. 1951).

[45] *But cf.* Note, 37 CORNELL L. Q. 258, 267 (1951).

[46] *But cf.* Scott, p. 360, note 3.

[47] In re Leiman's Estate, 116 N.Y.S.2d 658 (Surr. Ct. 1952), *aff'd without opinion,* 118 N.Y.S.2d 750, 281 App. Div. 764 (2d Dep't 1952), *leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (2d Dep't 1953).

were the husband's mother, his sister, and the woman with whom he had been living for some fifteen years before his death. The Surrogate commented that "In every Totten trust the depositor has indicated his intent that the beneficiary have the fund at his death by the very act of making the designation." The result in the instant case, he continued, "is unfortunate because the surviving spouse is thereby deprived of her statutory share in over $8,000 which the decedent had an absolute right to use for his own benefit throughout his lifetime, and the estate subject to administration is virtually nil." [48] In *In re Aybar's Estate* [49] two Totten trusts were upheld against the surviving husband, a disabled war veteran who had been declared incompetent. To be sure, in each of these cases the equities were not entirely with the claimant; [50] but under the *Halpern* dogma the surviving spouse is rebuffed, though she may be an indigent saint.

[48] 116 N.Y.S.2d 658, 660 (1952).

[49] In re Aybar's Estate, 203 Misc. 372, 116 N.Y.S.2d 720 (Surr. Ct. 1952).

[50] In the Leiman case, a separation fifteen years before death; fault not stated. In the Aybar case the incompetent surviving spouse had an estate of $7000, and a government pension "which adequately provides for his needs."

CHAPTER 14

Survivorship Devices

1. JOINT TENANCY IN REALTY

In the few cases involving this arrangement, the transfer was sustained.[1] In these cases the equities favored the transferee. In *Hoeffner* v. *Hoeffner*,[2] for instance, there were factors militating against the widow as well as points in favor of the surviving joint tenant. At the time the spouses were divorced, the wife had received a substantial sum from her husband. After the divorce, the husband sold an apartment building, taking back a purchase money mortgage. The couple again married each other. Subsequently, the mortgage was foreclosed, with the deed being made out to the husband and his daughter as joint tenants. In sustaining this transfer against the widow's claim, the court stressed the fact that the transferee (the daughter) had furnished the money with which the husband had originally purchased the property. Likewise, in *Schmidt* v. *Rebhann* [3] the equities appeared to be against the claimant, in this case a widower. He had separated from the decedent after a year of marriage and had not attempted a reconciliation for the more than nine years that preceded her death. The transferee was a woman friend who had cared for and performed services for the decedent.

Survivorship devices such as joint tenancy are in great general use. Creation of a joint tenancy with right of sur-

[1] *But see* Mottershead v. Lamson, 101 N.Y.S.2d 174, 176 (Sup. Ct. 1950). Here the court held that the surviving husband had stated a cause of action to have the wife's transfer of her realty into joint tenancy set aside as illusory "since, by the joint tenancy created, the decedent had an undivided half interest in the premises which could be alienated, together with a potential right to the entire estate. . . ." See also the cases concerning partnership interests, *infra,* pp. 231–235.

[2] 389 Ill. 253, 59 N.E.2d 684 (1945).

[3] 108 N.Y.S.2d 441 (Sup. Ct. 1951), 117 N.Y.S.2d 840 (1952).

vivorship is still possible in most states; [4] and there are indications that such an arrangement has mushroomed in popularity [5] in recent years, especially in its personal property manifestations.[6] One great advantage of joint tenancy, for example, is that the property concerned passes to the surviving tenant free of the requirements of probate and administration.

Policy-wise, however, the popularity of this device for "nonevasive" purposes should not excuse its occasional use as a weapon for evasion of the widow's share. The "reliance interest" of the surviving tenant is normally insufficient to preclude application of our statutory formula. The donee does not obtain the decedent's interest until the decedent's death; and the donee may predecease the decedent, with the entire interest accruing to the decedent. This uncertainty as to the potential "double or nothing" interest of the donee tends to discourage improvements and sales by the donee in the lifetime of the decedent.

Under our statutory formula the surviving tenant would be

[4] Joint tenancy has not always been popular. The early common law favored it "because the divisible services issuing from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied, by joint tenancy, as they must necessarily be upon a tenancy in common." (2 Bl. Comm. *193). With the passing of feudalism joint tenancy fell into disfavor. The hardship to heirs and creditors of the joint tenant engendered a presumption of tenancy in common. Most American states adopted a presumption against the *jus accrescendi,* the right of survivorship; and some state legislatures abolished joint tenancies. See in general, Atkinson, WILLS 164–72 (2d ed. 1953).

[5] But joint tenancy is no longer regarded with starry-eyed approval in estate planning. It does not necessarily decrease death duties or post-mortem publicity. Basye, "Joint Tenancy, a Reappraisal," 30 CALIF. S. B. J. 504 (1955); Knecht, "Joint Ownership Reappraised," 88 TRUSTS & ESTATES 416 (1949); Marshall, "Joint Tenancy, Taxwise and Otherwise," 40 CALIF. L. REV. 501 (1952); Rudick, "Federal Tax Problems Relating to Property Owned in Joint Tenancy and Tenancy by the Entireties," 4 TAX L. REV. 3 (1948).

[6] Stephenson, "Joint ownership of property" (Study No. 7, Third series—Studies in Trust Business), 25 TRUST BULL. 25 (1945). See discussion, *supra,* pp. 16–17. *Cf. Report of the Committee on Community Property and Jointly Held Titles to Real Property,* 1952 Proceedings of the American Bar Association Section of Real Property, Probate and Trust Law, p. 40.

liable for contribution up to the value of the entire property.[7] The donee's contribution would, of course, first be gauged on the value of the property passing by survivorship; then, if that proves insufficient, on the value of the entire property. Where land was purchased jointly by the decedent and the surviving tenant, the widow's claim would be restricted to the amount of property attributable to the consideration paid by the decedent spouse.[8]

2. Joint Bank Accounts

The failure of the American courts and legislatures to develop a coordinated approach to the evasion problem is clearly apparent from the cases dealing with joint bank accounts. The joint bank account, like the Totten trust, is a "poor man's will"; [9] yet it has proved well-nigh invulnerable to attack by the poor man's widow.

Most states have legislation authorizing transmission of funds, free of probate and administration, by means of a joint bank deposit with appropriate words of survivorship.[10] Ab-

[7] A statute that merely affects revocable transfers would restrict the widow's claim to the decedent's interest in the property. In Longacre v. Hornblower & Weeks, 83 D.&C. 259 (Pa. 1952) the 1947 statute Pa. Stat. Ann. tit. 20, §301.11 (1950) discussed *supra,* p. 138, was held applicable to a joint tenancy established by the husband even though no power of revocation was formally reserved. The court said that such power inheres at common law; and the widow was held entitled to treat the joint tenancy as testamentary to the extent of one half thereof.

[8] The widow's claim catches only voluntary transfers. See Suggested Model Decedent's Family Maintenance Statute §1(d), *infra,* Chap. 22.

[9] On the substantive law aspects, see Havighurst, "Gifts of Bank Deposits," 14 N. C. L. Rev. 129 (1935); Katzenstein, "Joint Savings Bank Accounts in Maryland," 3 Md. L. Rev. 109 (1939); Kepner, "Joint and Survivorship Bank Account," 41 Calif. L. Rev. 596 (1954); Rutledge, "Joint Tenancy in Washington Bank Accounts," 26 Wash. L. Rev. 116–24 (1951); Slater, "Joint Accounts and Trusts Created by Bank Deposits," 2 Brooklyn L. Rev. 27 (1932); Willis, "Nature of a Joint Account," 14 Can. B. Rev. 457 (1936); Notes, 53 Colum. L. Rev. 103 (1953); 3 Chitty's Law J. 17 (1953).

[10] Stephenson, "Joint Ownership of Property with Right of Survivorship, 25 Trust Bull. No. 1, 25 (1945); 1 P-H Wills, Estates, and Trusts Service ¶1014; 45 Bank. Law J. 733, 813, 897; Note, 32 Ill. L. Rev. 57, 63 (1937).

sent such legislation, there is no presumption that a deposit by a spouse in the name of himself and a third party will constitute the third party a joint owner; in fact, there is some uncertainty [11] as to the doctrinal basis of the survivor's claim. It is hard to find an inter vivos gift when there has been no delivery of the pass book. And the lack of clear intent to create a trust militates against use of the trust doctrine. Nevertheless, a few courts have validated the transaction on one or the other, or a combination,[12] of these two theories. A more plausible rationale is that the privilege of survivorship springs from a contract between the two parties concerned and the bank, whether or not a joint estate be created thereby.

The printed form usually states that A or B may make withdrawals during A's lifetime; but there may be a written or oral understanding that only A may withdraw, that only B may withdraw, or that neither A nor B may withdraw.[13] Frequently, the joint bank account is merely an arrangement of convenience to enable the donee to withdraw the funds of the account from time to time for the benefit of the decedent.[14] Probably the normal case, however, is one in which the depositor has access to the account and intends to retain access until death.[15]

[11] Due in part to lingering vestiges of the real property origin of the device.

[12] In Sturgis v. Citizens National Bank of Pocomoke, 152 Md. 654, 137 Atl. 378 (1927), the language used was "John T. M. Sturgis and Montrue B. Faulke, in trust for both, joint owners, subject to the check of either, balance at the death of either to go to the survivor." No signature card was ever procured for the donee. Held, valid as against the widow. Also see cases cited in Atkinson, WILLS, 167–69 (2d ed. 1953).

[13] See discussion of these alternatives in comment by Austin W. Scott, Jr., "Joint Bank Accounts—Gifts and Transfers in Trust," 24 ROCKY MT. L. REV. 133 (1951).

[14] Thus in Estate of Dean, 68 Cal. App. 2d, 155 P.2d 901 (1945) the object of the depositor was to have a representative who would have access to the box during her illness, and also in the event of her death; see also Note, 37 ILL. B. J. 212 (1948).

[15] "Dearie, I have opened a joint account in the Morristown Trust Company with you and you may draw on it to the full amount, but if you do, I will give you hell." Morristown Trust Co. v. Capstick, 90 N.J. Eq. 22, 24, 106 Atl. 391, 392 (1919).

Regardless of theory – and sometimes in spite of theory – the courts have been tolerant of the joint bank account. We may expect this attitude to continue as long as the device performs a useful and popular function.[16] This may explain, although it cannot justify, the judicial reluctance to permit invasion of the account by the surviving spouse.

The widow's chances are slim, unless she can demonstrate that the account lacked "reality," or that it was testamentary.[17]

[16] See p. 16, *supra*. It is a common practice for banks to encourage the use of this device when new accounts are opened, particularly when a husband and wife are concerned; and the bank clerks concerned may be unaware of the legal implications of a joint bank account; see Comment, 32 CALIF. L. REV. 301, 310 (1944). It is possible that many people have the mistaken notion that they gain immunity from inheritance taxation or post-mortem publicity; see note 5, *supra*.

[17] *Favoring the surviving "tenant," as against the surviving spouse:* Holmes v. Mims, 1 Ill. 2d 274, 115 N.E.2d 790 (1953) (joint account accumulated by earnings of husband and "bigamous" second wife); Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944); Whittington v. Whittington, 205 Md. 1, 106 Atl.2d 72 (1954) (husband transfers accounts in trust for himself and donee, as joint owners, with equal withdrawal privileges and right of survivorship; passbooks retained); Sturgis v. Citizens National Bank of Pocomoke, 152 Md. 654, 137 Atl. 378 (1927) (terms of the account similar to terms in the Whittington case, *supra*); Stewart v. Barksdale, 63 So.2d 108 (Miss. 1953) (savings and loan association; either party given right to withdraw in whole or in part); Melinik v. Meier, 124 S.W.2d 594 (Mo. App. 1939) (evidence that the donee had deposited some of his own money); Lorch's Estate, 33 N.Y.S.2d 157, 168, (Surr. Ct. 1951); Hart v. Hart, 194 Misc. 162, 165, 81 N.Y.S.2d 764 (Sup. Ct. 1948), *aff'd without opinion,* 274 App. Div. 1036, 85 N.Y.S.2d 917 (1st Dep't 1949); In re Sturmer's Estate, 277 App. Div. 503, 101 N.Y.S.2d 25 (4th Dep't 1950) (commercial accounts); Inda v. Inda, 32 N.Y.S.2d 1001 (Sup. Ct. 1941) *aff'd without opinion,* 263 App. Div. 925, 32 N.Y.S.2d 1008 (4th Dep't 1942), *aff'd,* 288 N.Y. 315, 43 N.E.2d 59 (1942); Matter of Glen, 247 App. Div. 518, 288 N.Y. Supp. 24 (1st Dep't 1936) (joint bank account between husband and husband's brother sustained as against widow, claiming under contract by husband to will her four-fifths of his estate); Guitner v. McEowen, 99 Ohio App. 32, 125 N.E.2d 744 (1954); Orth v. Doench, 309 Pa. 240, 163 Atl. 450 (1932); Patch v. Squires, 105 Vt. 405, 165 Atl. 919 (1933) (equities strongly in favor of validity); *cf.* Milewski v. Milewski, 351 Ill. App. 158, 114 N.E.2d 419 (1953) (maintenance proceeding); Estate of Morstatt, N. Y. L. J. 1 Feb. 1952, 4 P-H Wills, Trust, & Estates Service, ¶2885.35 (Surr. Ct. 1952); Matter of Perlmutter, 199 Misc. 330, 98 N.Y.S.2d 968 (Surr. Ct. 1950); Estate of Jagodzinska, 52 N.Y.S.2d 341 (Surr. Ct. 1945) *modified,* 272 App. Div. 660, 74 N.Y.S.2d 628 (4th Dep't 1947) (commercial account; no surviving spouse); Matter of Kalina, 184

The New York case of *Inda* v. *Inda*[18] is typical. Here the husband died leaving a wife and ten children. Five years before death he had opened two savings bank accounts: one in the name of a fictitious person and his daughter-in-law, entitled "joint account, either or the survivor may draw"; the other in the names of a fictitious person and the son, "pay to either or the survivor of them." The trial court found that the husband "always treated these accounts as his own sole property," that he retained the pass books and that he never intended to divest himself of ownership. Nevertheless, the provisions of the New York banking law were held to govern;[19] the deposit in the statutory form was deemed con-

Misc. 367, 370, 53 N.Y.S.2d 775, 778 (Surr. Ct. 1945) *appeal dismissed,* 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946) (dicta).

There appears to be no case permitting the spouse to set aside or invade an otherwise valid joint bank account. Whenever the spouse does prevail, it is on the ground that the account lacked "reality." Hamilton v. First State Bank, 254 Ill. App. 55, 59 (1929) (certificates of deposit; see Chap. 14, note 17, *supra*); Inda v. Inda, *infra,* note 18 (widow prevails as to joint account in commercial bank; no appeal); Matter of Mooney, *infra,* note 24.

[18] Inda v. Inda, 32 N.Y.S.2d 1001 (Sup. Ct. 1941), *aff'd without opinion,* 263 App. Div. 925, 32 N.Y.S.2d 1008 (4th Dep't 1942), *aff'd,* 288 N.Y. 315, 43 N.E.2d 59 (1942), noted in 27 CORNELL L. Q. 569 (1942), 52 YALE L. J. 656 (1952).

[19] The New York statute dealing with joint deposits in savings banks in the stipulated form declares that on the death of one of the parties the presumption of joint tenancy is conclusive. N.Y. Banking Law, §239(3). No such presumption exists for deposits in commercial banks; *id.* §134(3); see also *id.* §394(1). "[T]he husband must be careful whether he deposits his account in the bank with the brass doors or in the bank with the bronze doors." Note, 27 CORNELL L. Q. 569, 573 (1942). Frequently state legislation of this sort has been passed at the instance of banks, merely to protect them in the event of payment to the survivor. But these statutes tend to buttress the judicial predilection in favor of the right of survivorship; *cf.* Dyste v. Farmers & Mechanics Savings Bank, 179 Minn. 430, 435, 229 N.W. 865, 867 (1930). Notwithstanding the provisions of the local Banking Act equity could impose a trust, in the widow's favor, on the donee of any unreasonably large inter vivos transfer; *cf.* cases dealing with United States savings bonds, *infra,* p. 227; also see note, 52 YALE L. J. 656, 659 (1943).

In the Inda case, note 18, *supra,* the widow prevailed as to a third account, not in a savings bank. There being no "conclusive" presumption here, the decedent was deemed not to have intended to establish a joint account—probably because he retained the passbook. *But cf.* In re Lorch's Estate, 33 N.Y.S.2d 157 (Surr. Ct. 1941), where a similar transfer was sustained against attack by the surviving spouse.

clusive evidence of the intention of both depositors to vest title in the survivor.

Unreasoning application of the "reality" doctrine to joint bank accounts is found even in jurisdictions that avowedly use the "control" rationale when dealing with revocable inter vivos trusts. It will be recalled that the highest court in Ohio has twice permitted a widow to reach such transfers, even when the decedent had not made excessive formal retention of control over administration of the trust.[20] In each case the power to revoke, coupled with the income for life, was deemed to give the decedent such "control" and "dominion" over the trust *res* as to bring the transfer within the policy ambit of the elective share. But it would seem that the policy underlying the Ohio elective share varies with the type of transfer concerned. Where the joint bank account is employed, the emphasis shifts to the "reality" of the transfer, not to retention of control. A case in point is the recent Court of Appeals decision in *Guitner* v. *McEowen*.[21] Here the decedent husband established a joint savings account in the name of himself and his sister, with right of survivorship. The account was sustained against the widow, seemingly on the reasoning that a device effective for other purposes is effective against the widow. The court noted that the account was "irrevocable," and that "the delivery of the passbook was further evidence . . . that decedent did not retain any control or interest in the account at variance with the terms under which it was opened." Nevertheless, evidence was also admitted that the decedent said to the donee "you or I, any one, can draw that money"; and the president of the bank testified that the decedent could have withdrawn the funds without presentation of the passbook. In these circumstances, the distinction between a revocable trust and a "poor man's

[20] Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944) (discussed pp. 79–83, *supra*); Harris v. Harris, 79 Ohio App. 443, 74 N.E.2d 407 (1945), *aff'd*, 147 Ohio St. 437, 72 N.E.2d 378 (1947) (discussed pp. 83–87, *supra*).

[21] 99 Ohio App. 32, 124 N.E.2d 744 (1954).

will" seems a thin one. In either instance the decedent has effective control.[22]

The widow may of course have the account set aside as being testamentary if no interest is created in the donee until death. This result has been reached where the co-tenant had no right of withdrawal until the death of the depositor.[23] And, even if the right of withdrawal is granted, the widow may still be able to prove that the arrangement lacked "reality" – that there was no intent to confer a benefit on the other party.[24] "We cannot close our eyes," said a judge over half a century ago, "to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership." [25] In considering intention, the relation and dealings between the parties will be relevant, as well as evidence indicating a purpose other than to benefit the claimant co-depositor.[26] The merits of the widow's claim – *qua* widow – should be irrelevant; any heir has a like privilege of demonstrating lack of "reality."

Nashua Trust Co. v. *Heghene Mosgofian,*[27] although not involving a surviving spouse, is instructive. Here the bank's form indicated that both parties were to sign the signature

[22] In the Guitner case the decedent did not have the exclusive power to "revoke"; both the decedent and the surviving joint tenant could have withdrawn the funds in the decedent's lifetime: whereas in the Bolles case the trust could have been revoked only by the settlor. This distinction, however, does not seem material enough to preclude application of the "control" doctrine to joint bank accounts. *But cf.* In re Lorch's Estate, 33 N.Y.S.2d 157, 168 (Surr. Ct. 1941).

[23] *Cf.* Onofrey v. Wollifer, 351 Pa. 18, 40 A.2d 35, 155 A.L.R. 1074 (1944) (surviving spouse not involved).

[24] *E.g.,* Matter of Mooney, N. Y. L. J. 9 Oct. 1950, 2 P-H Wills, Estates, & Trusts Service, ¶1282, *appl'n for rehearing denied,* 102 N.Y.S.2d 416 (Surr. Ct. 1950) (savings account and checking account).

[25] Andrews, J., in Beaver v. Beaver, 117 N.Y. 421, 430, 22 N.E. 940, 942 (1889).

[26] For citations to cases involving these factors, see Note, 53 COLUM. L. REV. 103, 107, note 34 (1953).

[27] Nashua Trust Co. v. Mosgofian, 97 N.H. 17, 79 A.2d 636 (1951), noted in 25 TEMPLE L. Q. 388 (1952); also see Cournoyer v. Monadnock Savings Bank, 98 N.H. 385, 102 A.2d 910 (1953) (survivor living in Canada).

cards. But the decedent supplied neither the signature nor the address of the co-depositor, nor did he inform the co-depositor of the existence of the account. The co-depositor, his brother, lived in Turkey, and was left a part interest in the account by the decedent's will. It was held that the brother did not receive any inter vivos interest in the account.[28]

3. Joint Safe-Deposit Box

There appears as yet to be no case involving this device as a means of defeating the widow's share, either as an extra-legal and unsanctioned substitute for a will, or on the doubtful theory that a survivorship interest is created.[29] We may attribute the dearth of litigation to prudence on the part of the decedent spouse. If legal advice is taken, the opinion is likely to be that the joint safe-deposit box is neither "bullet-proof" [30] nor even worth the risk, in view of the variety of

[28] Kenison, J., dissenting, urged inter vivos validity on a third party contract basis. With unusual candor, he remarked:

> "Joint bank deposits payable to the survivor are in extensive use today by persons of small means who wish a designated relative or a member of the family to own the deposit at their death although the donor retains the bankbook, and makes all the deposits and withdrawals. In most cases where there is litigation, the results show the common denominator to be one of frustrated intention. . . . Either the deceased depositor has not done enough to satisfy the classical doctrine of a gift *inter vivos* or, if he has, he is charged with violating the Statute of Wills. Refreshing exceptions to this result have been few and far between. . . . One reason for this situation is that the doctrine of gifts *inter vivos* is not flexible enough to work effectively when applied to the modern joint bank account as used today. The only successful surviving depositor is very apt to be the one that this court does not get its hands on."

97 N.H. 17, 21, 79 A.2d 636, 639 (1951). See also Murray v. Gadsen, 197 Fed. 2d 194 (D.C. Cir. 1952) (extensive discussion of the joint bank account device); Whalen v. Milholland, 89 Md. 199, 43 A. 45, 44 L.R.A. 208 (1899).

[29] *But cf.* Hayes v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926) (colorable transfer).

[30] As was mistakenly said of the revocable trust by the corporate fiduciary in Merz v. Tower Grove Bank and Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939).

other expedients that achieve the desired result with a minimum of loss of control or income. The device merits a brief examination, however: it may be a battleground of the future; and it exemplifies the strain placed on the statutory share by the development of new social usage, new substitutes for the will.

The joint safe-deposit box has come into use only in the last century. It has probably displaced the "strongbox" as a repository of valuables. But legal doctrine has not yet adjusted to this new phenomenon.[31] Does the fact that articles are found in a safe-deposit box shared by the decedent and another indicate that title is in the survivor? Probably not: but can we be sure? The relationship between the co-depositors and the bank smacks of a bailment or a rental arrangement. Nevertheless, the banks and other institutions in the business of "renting" these boxes usually require the applicants to sign a card loosely referred to as a "joint tenancy" card.[32] The object, of course, is to protect the bank from liability when it releases the contents, particularly in the event of death of one of the "tenants." The card generally provides for access by either party and by the survivor, and may in addition contain language of joint tenancy. The cases to date have been reluctant to find a joint tenancy, even when the language of joint tenancy is used.[33] This is sensible, as it is likely that in the usual case neither the co-lessees nor the bank clerk fully appreciate the significance of the fine-print terminology on the card.[34] And serious difficulties occur if the incidents of joint tenancy are to be applied to property that was in the box for a short period, then withdrawn and pos-

[31] In general, see an excellent annotation in 14 A.L.R.2d 948 (1950) by R. F. Martin; Atkinson, WILLS, 160, (2d ed. 1953).

[32] See Comment, 32 CALIF. L. REV. 301 (1944) distinguishing between "joint access" cards, joint tenancy cards, and cards merely stating the parties are "co-renters."

[33] See cases cited in Atkinson, *op. cit., supra,* note 31, pp. 166–67.

[34] "An inquiry as to the ideas of safe deposit clerks in various banks in the Bay area was undertaken by the writer. Not one of them could tell the incidents of a joint tenancy." Comment, 32 CALIF. L. REV. 301, 310 (1944).

sibly sold to third parties. The chief doctrinal difficulty lies in finding the requisite element of "delivery" in creating a gift to the co-lessee; but a few cases have held that the arrangement is evidence of a gift to the surviving co-lessee.[35] There is little legislation on the topic.[36]

The case of *Lowry* v. *Florida National Bank of Jacksonville,*[37] although not involving a surviving spouse, shows how the evasion problem might arise. The decedent, a man in his sixties, wished to give property to the daughter of a friend, without the publicity attendant on giving her a legacy. Stating that he thought he could "work something out," he later handed to the claimant daughter an envelope containing a number of coupon bonds. He then rented a safety-deposit box in the name of the claimant. He was deputized to enter the box, and both parties had a key. The envelope, bearing the claimant's name, was placed in the box, and the claimant did not again enter the box until decedent's death seven years later. In the meantime, decedent had used the box for other purposes and had clipped the coupons. The court held that the claimant's title to the bonds had been established.[38]

The ultimate judicial reaction to this everyday practice is not yet known. Strong and strange medicine it is that declares a joint tenancy solely on the basis of the language in the card supplied by the banks.[39] To condone defeasance of the widow's share on that doctrinal basis would be even less defensible.

[35] See Annot., 14 A.L.R.2d 948 (1950). Further difficulties may ensue if the parol evidence rule is applied to prevent the parties concerned from explaining their actual understanding of their conduct. 1944 ANNUAL SURVEY OF AMERICAN LAW 839; 1949 *id.* 741; Kahn, "Joint Safe Deposit Boxes," 37 ILL. B. J. 212 (1949).

[36] *Cf.* Mich. Stat. Ann. §23.1123 (title to contents is unaffected; either "renter" may remove contents).

[37] 42 So.2d 368 (Fla. 1949).

[38] In this case the language of the rental card does not appear to have been a factor. The trial court, although "impressed with the frankness and sincerity of the witness," had held the physical delivery of no consequence since not intended to be effective until the death of the donor.

[39] *Cf.* Annot. 14 A.L.R.2d 948, 954 (1950). *But cf.* Atkinson, 167.

CHAPTER 15

Contractual Devices

1. UNITED STATES SAVINGS BONDS

United States savings bonds,[1] introduced only two decades ago,[2] constitute a convenient "evasive" device. The Treasury Regulations provide that the bonds may be registered in the names of natural persons in three forms: (a) in the name of one person as sole owner; (b) in the name of two, but not more than two, persons as co-owners; and (c) in the name of one person payable on death to one, but not more than one, other designated person as beneficiary.[3] These last two forms are effective substitutes for a will.[4]

Under the co-ownership form either co-owner may secure payment of the bond on his separate request without the signature of the other co-owner; and upon payment to either co-owner "the other person shall cease to have any interest in the bond." [5] A bond may be reissued during the joint lives of both co-owners only upon their joint request and under designated circumstances.[6] This prevents a husband from defeating his wife's rights by reissuance when the bond was issued originally in their joint names. On the other hand, he can still achieve his purpose by cashing the bond. Moreover, he can always buy bonds in the name of himself and a person

[1] Known also as Baby Bonds, War Savings Bonds, Defense Savings Bonds, and Security Bonds.

[2] A 1935 amendment to the Second Liberty Bond Act authorized the Secretary of the Treasury to issue savings bonds in such manner and subject to such terms and conditions as he may prescribe. 49 Stat. 21, Chap. 5, §6, Feb. 4, 1935, 31 U.S.C.A. 757 C.

[3] 31 Code Fed. Regs. §315.4 (Supp. 1958).

[4] But see Knecht, "Joint Ownership Reappraised," 88 TRUSTS & ESTATES 416, 418 (1949).

[5] 31 Code Fed. Regs. §315.60(a) (Supp. 1958).

[6] 31 Code Fed. Regs. §315.60(b) (Supp. 1958).

other than his wife, whether he uses the co-ownership form or the beneficiary form. On the death of either co-owner, the survivor "will be recognized as the sole and absolute owner of the bond." [7]

When the bond is issued in beneficiary form, it may be cashed by the registered owner "as though no beneficiary had been named in the registration." [8] But the bond may not be reissued so as to eliminate or change the beneficiary without her consent.[9] Similarly, under this form the only way to defeat the interest of a beneficiary without her consent is to cash the bond.

Some of the early cases on savings bonds adopted a narrow construction of the Treasury Regulations, and held against the surviving beneficiary. The *Deyo* case [10] is instructive in this regard because it also involved the right of the surviving spouse. In the *Deyo* case the husband had some four years before marriage invested $7000 in savings bonds, the beneficiary at death being his sister. The widow, suing as executrix, claimed the bonds as estate assets. The court held that the complaint stated a good cause of action, reasoning that the Treasury Regulations were merely for the convenience of the federal government in determining "to whom the government may make payment of the bonds and thereby relieve the government of suits and claims or controversies." [11] Accordingly, under the laws of New York, the bonds were deemed invalid as a gift because of lack of delivery, and invalid as a will because of lack of testamentary formalities. On this view, of course, it was unnecessary to rule on the widow's rights under the New York forced share.

To remove doubts caused by this decision, and acting on

[7] 31 Code Fed. Regs. §315.61(c) (Supp. 1958).
[8] 31 Code Fed. Regs. §315.65(a) (Supp. 1958).
[9] 31 Code Fed. Regs. §315.65(b)(2) (Supp. 1958).
[10] In re Deyo's Estate, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing to follow* Deyo v. Adams, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942).
[11] 178 Misc. 859, 861, 36 N.Y.S.2d 734, 736 (1942).

the recommendation of the New York Law Revision Commission,[12] the New York Legislature passed the following statute:

> "Where any United States savings bond is payable to a designated person, whether as owner, co-owner or beneficiary, and such bond is not transferable, the right of such person to receive payment of such bond according to its terms, and the ownership of the money so received shall not be defeated or impaired by any statute or rule of law governing transfer of property by will or gift or an intestacy. . . ." [13]

In a later proceeding in the *Deyo* litigation Surrogate Foley referred to the new legislation and ruled that "the form of registration of the bonds is sufficient to vest title of the proceeds in the surviving beneficiary. . . ." [14] Stating that public policy should encourage recognition of the rights of the designated beneficiary, he found a "present interest" in the beneficiary at the time the bonds were purchased. This "present interest," he said, "may rest in contract,[15] and is . . . somewhat analogous to the rights of a beneficiary under an insurance policy, a beneficiary under a trust agreement or a beneficiary of a Totten trust." [16] The suggestion that the Regulations relate solely to protection of the government was castigated as a "mere play on words," producing a result that "certainly was never contemplated either by the Treasury Department or by the millions of purchasers of these bonds." [17] Most courts now recognize the binding effect of the Treasury Regulations, either on the contract theory or on the

[12] 1943 Leg. Doc. No. 65(N); 1943 REPORT, RECOMMENDATIONS AND STUDIES, p. 636.

[13] L. 1943, Chap. 632, §1, N.Y. Pers. Prop. Law. §24. Similar statutes have been enacted in California, Michigan, Washington, and Wisconsin. See Note, 1947 WISC. L. REV. 447.

[14] 180 Misc. 32, 35, 42 N.Y.S.2d at 387, 383 (1943).

[15] *Id.* at 40–1, 42 N.Y.S.2d at 387–88 (1943).

[16] *Id.* at 42, 42 N.Y.S.2d at 388.

[17] *Id.* at 42, 42 N.Y.S.2d at 387. For later proceedings in the Deyo litigation, see 182 Misc. 459, 48 N.Y.S.2d 419 (Sup. Ct. 1944).

power of the federal government to borrow money and to control the terms of its obligations.[18]

Many of the cases involving spouses' rights are from New York; and the New York cases uniformly deny the widow's claim.[19] We should notice that these cases do not always involve a direct attack by the widow under Section 18 of the Decedent Estate Law; and, in general, the equities are either not referred to or not clearly with the widow.[20] In *Matter of Kalina,*[21] however, the widow raised the issue squarely, in a

[18] Jones, "United States Savings Bonds, Series E, F, and G," 11 MD. L. REV. 265, 266 (1950); Note, 52 YALE L. J. 917 (1943). In general, see Gammon, "War Savings Bonds and State Succession Laws," 17 TENN. L. REV. 928 (1943); 1943 ANNUAL SURVEY OF AMERICAN LAW 604; Notes, 48 MICH. L. REV. 1038 (1950); 32 MINN. L. REV. 158 (1948); 4 MONT. L. REV. 61, 70 (1943); Annots. 173 A.L.R. 550 (1948); 168 A.L.R. 245 (1947). Most, but not all, courts have followed the regulations in prohibiting attempted transfers of the bonds either by way of gift inter vivos or gift causa mortis. For the view that the regulations do not in spirit prohibit a gift causa mortis, see Notes, 61 HARV. L. REV. 542 (1948); 38 MINN. L. REV. 401, 403 (1954). As to gifts inter vivos, see Note, 6 ALA. L. REV. 104 (1953).

[19] Estate of Morstatt, N. Y. L. J. 1 Feb. 1952, 4 P-H Wills, Trusts & Estates Service (Surr. Ct. 1952); Matter of Sturmer, 277 App. Div. 503, 101 N.Y.S.2d 25 (4th Dep't 1950); Superat v. Dylawski, 196 Misc. 707, 93 N.Y.S.2d 40 (Sup. Ct. 1949), *aff'd without opinion,* 277 App. Div. 969, 99 N.Y.S.2d 930 (1st Dep't 1950) (widow loses on alimony claim also); Hart v. Hart, 194 Misc. 162, 81 N.Y.S.2d 764 (Sup. Ct. 1948), *aff'd without opinion,* 274 App. Div. 1036, 85 N.Y.S.2d 917 (1st Dep't 1949); Matter of Kalina, 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945). *appeal dismissed by default,* 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946); Matter of Deyo, *supra,* note 10; Matter of Karlinski, 180 Misc. 44, (Surr. Ct. 1943), noted in 56 HARV. L. REV. 1006 (1943), 43 COLUM. L. REV. 260 (1943); *cf.* In re Staheli's Will, 57 N.Y.S.2d 185, (Surr. Ct. 1945), *aff'd without opinion,* 271 App. Div. 788, 66 N.Y.S.2d 271 (2d Dep't 1946) (nonevasive); Matter of Amols, 184 Misc. 364, 47 N.Y.S.2d 636 (Surr. Ct. 1944); Matter of Hager, 181 Misc. 431, 45 N.Y.S.2d 468 (Surr. Ct. 1944) (not clear whether or not surviving spouse involved).

[20] In the Deyo case, *supra,* note 10, for example, the bonds had been purchased a few years before the marriage and the marriage took place less than a year before the husband's death. Surrogate Foley also noted that the beneficiary was the decedent's sister, and stated that contracts for the benefit of third parties are recognized by the courts nowadays, "especially . . . where the beneficiary is a close relative." 180 Misc. 32, 40, 42 N.Y.S.2d 379, 387 (1943). In Hart v. Hart, *supra,* note 19, reasonable provision had been made by the decedent for the claimant spouse.

[21] 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945), *appeal dismissed by default,* 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946). The Kalina case was followed in Graham Estate, 3 D.&C.2d 218 (Pa. 1954).

case where her husband had given her the bare minimum in a small estate. The bonds were held not to be "illusory," on the ground that a "present interest" passed to the beneficiary. This "interest" was analogized to the interest passing in a joint savings account, as distinguished (in those pre-*Halpern* days) from that which passes under a Totten trust. Likewise, said the court, savings bonds are not testamentary; and it refused to read into the 1943 legislation [22] "a legislative intent to make a further exception in favor of a surviving spouse." Significantly, the court remarked that it was "naturally aware that the result here reached gives judicial approval to another medium by which the expectant rights of a spouse may be curtailed or even destroyed. It is only the latest to receive judicial consideration. . . . The remedy lies with the Legislature alone." [23]

But authority may be found in other jurisdictions for imposition of an *in personam* decree against the beneficiaries, in favor of the surviving spouse. In *Ibey* v. *Ibey* [24] the decedent husband purchased savings bonds payable at death to a son and two grandsons. The widow claimed that this was a fraud on her marital rights. Said the court: "The widow is entitled to what she has lost, but otherwise the bonds are payable in accordance with their terms. The measure of damages is what the widow would have gained if the bonds had been made payable to the decedent's estate. To this extent the bonds or their proceeds are subject to a constructive trust in favor of the plaintiff, if fraud is found." [25] Oddly

[22] See note 13, *supra.*

[23] 184 Misc. 367, 372, 53 N.Y.S.2d 775, 779–80 (1945).

[24] 93 N.H. 434, 43 A.2d 157 (1945), *exceptions overruled,* 94 N.H. 425, 55 A.2d 872 (1947).

[25] *Id.* at 436, 43 A.2d at 159, 31 Code Fed. Regs. §315.20(a) (Supp. 1958) states that no judicial proceeding will be recognized if it "would defeat or impair the rights of survivorship conferred . . . upon a surviving co-owner or beneficiary." Is imposition of a trust in favor of the widow consistent with this regulation? Presumably so; certainly the court in the Ibey case made that assumption, since it referred in passing to the section as it appeared in 1938. 93 N.H. 434, 436, 43 A.2d 157, 159 (1945).

enough, the *Ibey* case is one of the few evasion cases in which the standard of "reasonableness" is categorically rejected.[26] For this court, the decedent's motive is the touchstone.[27]

Authority for the widow may also be found by analogy in the cases dealing with inter vivos transfers in evasion of a contract to make a will.[28] In *Union National Bank* v. *Jessell* [29] the spouses executed a joint will providing for changes by mutual consent and stating that on the death of the survivor all the property of both of them should accrue to a trust created under the will. When the wife died the husband invested $30,000 in savings bonds (Series G), naming his three children as beneficiaries. The husband's executor requested a declaratory judgment. The court declared that the children must surrender the bonds for redemption, and pay the proceeds over to the husband's executor to become part of the trust. The Treasury Regulations, said the court, "do not prevent the declaration of a resulting trust in bonds purchased in fraud of marital rights." [30]

[26] At the new trial the bonds were again "adjudged to have been purchased in fraud of the plaintiff's marital rights," 94 N.H. 425, 55 A.2d 872, 873 (1947). The Supreme Court of New Hampshire then overruled exceptions by the defendants. *Id.* at 425, 44 A.2d at 872. The Ibey case seems to be cited as holding entirely against the widow in 1 Scott, TRUSTS §57.5 (2d ed. 1956) and in Scott, "The Law of Trusts, 1941–1945," 59 HARV. L. R. 157, 176 (1945).

[27] The court admitted evidence that at various times from a month before the purchase of the bonds to within six months afterwards the decedent said in substance "I will fix it so that you, Maude, won't get any part of my estate." 93 N.H. 434, 437, 43 A.2d 157, 159 (1945).

[28] See Appendix D, *infra*, p. 366; *cf.* Petersen v. Swan, 239 Minn. 98, 57 N.W.2d 842 (Minn. 1953). In the Petersen case the decedent wife, entrusted by her husband with the joint marital savings, had purchased savings bonds for her mother. The court placed the burden on the mother to show that the bonds had been purchased with funds belonging to the wife.

As to bonds other than savings bonds, see Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905) (state bonds; valid); Lonsdale's Estate, 20 Pa. 407 (1857) (bonds secured by mortgages; invalid); Norris v. Barbour, 188 Va. 723, 51 S.E.2d 334 (1949) (delivery, eleven years before death, of a bond for $20,000 payable one year after death; invalid).

[29] 358 Mo. 467, 215 S.W.2d 474 (1948).

[30] *Id.* at 475, 215 S.W.2d at 477. *Accord,* Anderson v. Benson, 117 F. Supp. 765 (D.C. Neb., 1953); Chase v. Leiter, 96 Cal. App. 2d 439, 215

A commentator has stated that the chief goals of the savings bond program are "to halt inflation through encouraging private savings and to spread ownership of the national debt." [31] But pursuit of these worthy goals does not and should not necessitate the denial of a deserving widow's claim for support.[32] The point is vital, because savings bonds are obviously designed for the small investor.[33] Undoubtedly

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P.2d 756 (1950); *cf.* Olsen v. Olsen, 189 Misc. 1046, 70 N.Y.S.2d 838 (1947); Rohn v. Kelley, 156 Neb. 463, 56 N.W.2d 711 (1953), *cert. denied,* 75 Sup. Ct. 68 (1953); Makinen v. George, 19 Wash.2d 340, 142 P.2d 910 (1943) (resulting trust in favor of the real purchaser).

In Katz v. Driscoll, 86 Cal. App.2d 313, 194 P.2d 822 (1948) the rights of creditors were involved. The court stated that the Treasury regulations "are not intended to confer on the beneficiary the right to retain permanently the proceeds from the bonds irrespective of fraud or any illegality in the manner in which the bonds were obtained. To hold otherwise would, in effect, say that the treasury regulations not only guarantee payment to the named beneficiary, but, thereafter, when he receives the proceeds, follow him around indefinitely, and, like a protective halo, render him completely immune from any ordinarily legitimate claims thereto." *Id.* at 322, 194 P.2d at 828. *Cf.* Estate of Lundwall, 242 Iowa, 430, 46 N.W.2d 535 (1951) (confidential relationship; noted, on the evidentiary questions involved, in 37 IOWA L. REV. 299 (1952)); Reynolds v. Reynolds, 325 Mass. 257, 264, 90 N.E.2d 338 (1950); In re Laundree's Estate, 195 Misc. 754, 91 N.Y.S.2d 482 (1949), *rev'd,* 277 App. Div. 994, 100 N.Y.S.2d 145 (2d Dep't 1950); In re DiSanto's Estate, 142 Ohio St. 223, 231, 51 N.E.2d 639, 642 (1943) ("There is no question in this case of a transfer in fraud of creditors or the widow").

In Succession of Geagan, 212 La. 574, 33 So.2d 118 (1947) in which the widow was given judgment for the amount of her community property interest in savings bonds, the court stated: "In modern times, when movable property may and often does constitute the great bulk of the wealth, the husband should have no more right to dispose of movables gratuitously without the consent of his wife than he has to dispose of immovables. It appears to be a matter of sufficient importance to warrant the Legislature's giving this provision of our law serious consideration." *Id.* at 599, 33 So.2d at 126. A useful note in 22 TUL. L. REV. 650 (1948) contrasts this decision with decisions denying the widow's rights against the beneficiaries of her husband's life insurance. Also see Oliphint v. Oliphint, 219 La. 781, 54 So.2d 18 (1951); Comments, 9 LA. L. REV. 147, 184–86 (1949); 8 LA. L. REV. 571 (1948).

[31] Note, 38 MINN. L. REV. 401, 402 (1954).

[32] See discussion of community values, *supra,* pp. 24–29.

[33] "In planning this security a primary objective was to avoid a recurrence of one of the unpleasant aftermaths of the first World War. Then, you will recall, many who had purchased Treasury Bonds to help finance the war found their bonds sinking well below par on the

they comprise a significant portion of the holdings of the average man of modest means, perhaps ranking next to the family home, life insurance, and the joint bank account as a medium for holding and transferring family wealth.[34]

Under existing Treasury regulations the widow cannot attach the bond before payment or reissuance.[35] The model statute suggested in Chapter 22, however, would permit the widow to seek contribution from the surviving beneficiary or co-owner. The court would also have the power to enjoin transfer of the bond or dispersal of its proceeds.[36]

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market. To prevent this from happening again a non-marketable bond was offered—one that would not be subject to the vagaries of speculation. To emphasize non-marketability and insulate further against market fluctuations the new bonds were also made non-transferable and their use as collateral was prohibited. At the same time, the bonds were made easily redeemable by their owners at fixed and readily ascertainable values. The result was a security which was safe for the inexperienced investor. . . ." Lynch, "Legal Problems Affecting the Use of Saving Bonds in Estate and Trust Planning," PROCEEDINGS OF THE SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, AMERICAN BAR ASSOC. 13 (1948).

[34] In predicting that savings bonds are not as likely to be employed as an evasive device as the Totten trust, a recent writer refers to them as "cumbersome," and states that "[T]he amount of government savings bonds that one person may purchase in any one year is limited by statute and this method again involves tying up money in a device which is not as liquid as a Totten trust." Comment by Norman Penney, 37 CORNELL L. Q. 258, 268, note 60 (1952). It is true, of course, that with the Totten trust the husband is not vulnerable to *ex parte* depletion of the fund, as is the case with savings bonds held in co-ownership, and to that extent the Totten trust, in jurisdictions where it is authorized, affords more control to the "fraudulent" spouse. But to pursue the comparison further is as unprofitable as the enquiry into whether it takes more mental capacity to make a contract than to make a will. It all depends on the circumstances. Five thousand dollars looms large in a small estate. Given the desire to evade the statutory share, there is nothing particularly "cumbersome" about savings bonds, either in buying them or in cashing them; and the limitations on holdings are not oppressive. 31 Code Fed. Regs. §315.10 (Supp. 1958).

[35] A legislature that adopted the Suggested Model Decedent's Family Maintenance Statute, see Chap. 22, could also clarify the rights of the surviving spouse by amending any existing legislation that protects the rights of beneficiaries of the bonds. For instance, §24 of the New York Personal Property Law (*supra*, note 13) would need the same exemption for the surviving spouse as is now provided for payment of creditor's claims and estate taxes.

[36] See §13.

2. PARTNERSHIP

At common law the deceased partner's interest in the partnership assets passed to the surviving partners. They took as quasi-fiduciaries, however, for purposes of winding up the partnership. Any surplus after payment of partnership liabilities was returned to the estate of the deceased partner, and the widow then took her distributive share.[37] These provisions of the common law appear, in substance, in the Uniform Partnership Act, adopted in two thirds of the states.[38]

Let us assume that the decedent partner had entered into an arrangement with the other partners that on the death of any partner the survivors would be entitled to the interest of the decedent.[39] Seemingly the decedent's widow has no complaint if this arrangement was on a bona fide "buy and sell" [40] basis; the consideration paid by the surviving partners would enure to her benefit. Occasionally, however, the partners provide that they hold the partnership assets as joint tenants with the right of survivorship; or they may agree that on the death of any partner his interest in the partnership

[37] Crane, PARTNERSHIP, §§83, 86 (2d ed. 1952). The widow's right to inchoate dower, where such an interest still exists, depends on whether the jurisdiction concerned follows the "pro tanto" theory of equitable conversion of partnership realty into personalty—in which event the realty would be considered personalty only for settlement of partnership affairs, and thereafter would be considered realty for purposes of administration of the decedent's estate, the widow then taking dower—or the English "out-and-out" theory of equitable conversion, in which event the widow would be denied dower. 3 AMERICAN LAW OF PROPERTY, §14.16 (1952); Edmonds, "Problems in Administration of Partnership Assets," [1951] U. ILL. L. FORUM 507.

[38] Uniform Partnership Act, §25(2)(d) and (e); *id.*, §26.

[39] These agreements are generally held not to be testamentary. See cases cited in Atkinson, WILLS, 166 (2d ed. 1953). *But cf.* Thomas v. Byrd, 112 Miss. 692, 73 So. 725 (1916).

[40] Frequently this arrangement is funded with insurance on the lives of the partners; and it may have complicated administration and tax consequences. Blackwell, "Contracts for the Purchase of Property or an Interest in a Business from a Decedent's Estate," 27 N. C. L. REV. 81 (1948); Darlington, "Buy and Sell Provisions of Partnership Agreements," 29 ORE. L. REV. 286 (1950); Edmonds, *supra*, note 37, 519–22; Matthews, "Estate Tax Consequences of Agreements for the Sale of a Partnership Interest Effective at the Partner's Death," 26 TEXAS L. REV. 729 (1948).

assets will "belong" to the surviving partners.[41] An arrangement of the first type is exemplified in *Hirsch* v. *Bartels*.[42] In that case the decedent, while a bachelor, formed a partnership in 1933 with two others, to deal in merchandise. The articles stipulated that the partnership would "continue until the death of two of the members . . . and at the death of the second of these . . . the business [should] belong to the surviving one . . ."; also that "should one die and two remain, then the two survivors [should] each receive a half and upon the death of two, the third [should] receive the whole . . . ." The decedent married in 1941, and he died in 1949. The court ruled that the partners had intended a joint tenancy with right of survivorship. "Appellant has asked," said the court, "whether the articles of partnership were void as contrary to public policy where they will in effect preclude the widow from taking her dower interest. It seems to us the act of the legislature making such an agreement legal, hence such a situation possible, is a complete answer."[43] The *Hirsch* case is significant, as the Florida legislature and courts have in the main displayed solicitude for the widow.[44] To be sure, the "transfer" in the *Hirsch* case

[41] Arrangements of this sort are usually found in close family relationships, *e.g.*, husband and wife (where permitted); father and son; but not normally between brothers, as in the Fleming case, *infra*, note 46.

[42] 49 So.2d 531 (Fla. 1950).

[43] *Id.* at 532.

[44] The other Florida evasion cases stress, *inter alia*, the reasonableness of the financial provisions for the widow, *e.g.*, Smith v. Hines, 10 Fla. 258 (1863–4), (widow wins: not reasonably provided for); Williams v. Collier, 120 Fla. 248, 162 So. 868 (1935), (widow loses: "apparently ample provision" made for her); Bee Branch Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949), (widow loses: reasonably provided for). By way of statutory protection, the widow has inchoate dower in addition to her forced share in the husband's personalty owned at death, Fla. Stat. Ann. §731.34 (1957); her dower and forced share take precedence over her husband's creditors and the expenses of administration, Fla. Stat. Ann. §731.34 (1957); and all accident and life insurance policy proceeds payable by reason of an insured's death are free of debts and claims against him if the insured is survived by either his spouse or child or both, unless these proceeds are actually assigned or bequeathed to a creditor or creditors, Fla. Stat. Ann. §222.13 (1957). Unlike the rule prevailing in all but nine or ten states, this last-mentioned benefit

took place some ten years [45] before the marriage: but the language of the opinion seems broad enough to cover post-nuptial transfers.

Fleming v. *Fleming*,[46] an Iowa case, is unusual both in length [47] and in the spirited – if not acidulous – opinions rendered by a divided court. The litigation concerned the following agreement made by four brothers carrying on an insurance business:

> "2d. That upon the death of either one of the undersigned, the property then owned by the said partnership, including all property standing in the names of the individual partners which embraces said stock [48] in Fleming Brothers, Incorporated, shall be and become the property of the surviving brothers of the said partnership . . . ." [49]

Upon the death of one of the partners, his widow claimed her distributive share in the partnership assets. The majority opinion sustained the widow's claim. "In view of the legal status of the wife," it said, "in view of the relationship which she sustains to her husband, in view of those provisions of

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applies even if the insurance is made payable to the insured's estate (*ibid.*).

[45] But it did not obtain legal sanction until just before the marriage. At the time the partnership was formed Florida did not permit survivorship in joint tenancies. In 1941, however–approximately two months before the marriage–Florida restored the privilege of survivorship if "the instrument creating the estate shall expressly provide for the right of survivorship. . . ." Fla. Laws Chap. 20954 (1941). The court concurred in the view of the chancellor "that the agreement was ratified by the partners after the amendment was enacted, when they continued to operate under it, before and after the marriage . . . for many years until the former's death." 49 So.2d 531, 532 (Fla. 1950).

[46] 194 Iowa 71, 174 N.W. 946, 180 N.W. 206, 184 N.W. 296 (1921) *writ of error dismissed,* 264 U.S. 29 (1924).

[47] The proceedings in the Supreme Court of Iowa occupy fifty-three pages of the state reports. The usual evasion case rarely runs over four or five pages.

[48] ". . . This corporation issued to each of the brothers stock in equal parts . . . and each undertook to assign his stock by writing his name on the back thereof, without naming the assignee, and deposited it in a receptacle which it is claimed was under the control of all four of the brothers." 194 Iowa 71, 84, 174 N.W. 946, 951 (1919).

[49] *Id.* at 78, 174 N.W. at 948–49.

statute that protect and guard her interest during his life and after he is dead, it would seem to be against the policy of the law, expressed in the statutes, to permit men to legally get together and agree with each other that, upon their death their wives and children shall receive no portion of the estate which they spent their lives in accumulating. It is a clear fraud on the marital rights of the wife." [50] At first glance these sentiments seem admirable, but somewhat later, as stated by the dissenting judge, "one finds a qualm of unrest suggested, such as sometimes follows too enjoyable a banquet." [51] The court takes it for granted that "the policy of the law" may be defeated by apt draftsmanship on the part of the decedent. The opinion slithers like a serpent to avoid labeling the partners' agreement a joint tenancy: it is assumed that a survivorship device will defeat the widow. In holding for the widow the court thus feels obliged to announce these curious propositions:

(1) No joint tenancy can arise out of a commercial enterprise.[52]

(2) The partner's agreement was in any event not a joint tenancy, because only the four original partners were involved: there was no transfer to a fifth party, nor was there any grant to the brothers by a fifth party.[53]

(3) If anything, it is a contract to make a will; the widow can prevail against a will, likewise with a contract to make a will.[54] Moreover, the widow's need, although referred to

[50] *Id.* at 81, 174 N.W. at 950.

[51] *Id.* at 90, 174 N.W. at 953. Salinger, J., dissenting, took the opposite—and equally arbitrary—view that the partners had entered into a joint tenancy and that the resulting right of survivorship would defeat the widow's claim.

[52] *Id.* at 82, 174 N.W. at 950. *But cf.* Hirsch v. Bartels, 49 So.2d 531 (Fla. 1950) discussed, *supra,* p. 232.

[53] *Id.* at 104, 180 N.W. 206, 207 (1920).

[54] *Id.* at 107, 180 N.W. at 208. As to spouses' rights in contracts to make a will, see appendix D, *infra,* p. 366. In Matter of Karlinski, 180 Misc. 44, 43 N.Y.S.2d 40 (Surr. Ct. 1943) the surrogate stated that "in the absence of proof that the contract was intended to operate as a substitute or subterfuge for a will, and made for the purpose of defeating the right of the widow under section 18 of the Decedent Estate

obliquely,[55] is not examined with care; in consequence, the decision may have been unduly favorable to the widow. As a corollary, it may have been unnecessarily harsh on the surviving partners. The court awarded the widow an interest in the partnership business, in spite of an offer of generous support by the partners.[56] Ten years later the parties were still litigating the nature of the widow's interest.[57]

The difficulties occasioned by the mechanical jurisprudence of the *Fleming* case could be avoided by application of the maintenance and contribution formula. The result would hinge on the widow's need and the "reasonableness" of the transfer,[58] not on the label applied to the transfer. The surviving partners might well be called upon to contribute to the widow's maintenance, but there would be no unwarranted interference with the partnership business.

3. Life Insurance

Life insurance may be described as a contract to pay a named or ascertainable sum on the death of a person. As such, it is not considered testamentary; [59] and neither is the

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Law, the interest of the decedent in the partnership belongs to the surviving partner." The case involved $150 in war savings bonds. On reargument the beneficiary's right to the bonds was sustained, on similar (but more meandering) reasoning to that used in Matter of Deyo, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing to follow* Deyo v. Adams, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942) discussed, *supra,* pp. 224–226. *But see* Buehrle v. Buehrle, 291 Ill. 589, 126 N.E. 539 (1920) (widow permitted to invade partnership assets).

[55] It is hinted at in 194 Iowa 71, 81, 174 N.W. 946, 949–50 (1919), but receives no detailed attention.

[56] *Id.* at 107, 108, 180 N.W. 204, 208 (1920).

[57] 211 Iowa 1251, 230 N.W. 359 (1931).

[58] Suggested Model Decedent's Family Maintenance Statute, §§2–4, *infra,* Chap. 22.

[59] Vance, Insurance 673 (3rd Ed. 1951). Legislation was enacted recently in New York to dispel doubts caused by a lower court decision labelling as testamentary a supplementary contract arising out of an optional mode of settlement in a matured policy. Hall v. Mutual Life Ins. Co. of New York, 201 Misc. 203, 109 N.Y.S.2d 646 (Sup. Ct. 1952), *rev'd,* 282 App. Div. 203, 122 N.Y.S.2d 239 (First Dep't 1953). On the lower court opinion see 1952 Annual Survey of American Law, 329. See also Land, "Life Insurance Option Settlements—Trusts or Debts,"

insurance trust, an arrangement in which the policy itself or its proceeds is held in trust.[60] Life insurance may function as a form of investment, aided by options which permit the insured to surrender the policy for its cash value and also to obtain loans either for cash or for payment of premiums. Primarily, however, it is a device for achieving family security. In the vast majority of cases life insurance owned by the husband [61] will be used for family support – payable to the widow, to the widow and children, to the children alone, or to the estate. And the goal of family protection is furthered by the statutes which exempt life insurance proceeds from the claims of creditors.[62] These statutes, to be found in all states, were passed originally to protect the wife and family.[63] Most of them impose no monetary restriction on the amount of exempt insurance that may be carried.

When we look at the evasion cases, however, life insurance is revealed as a potential weapon of evasion.[64] The decedent may take out a policy for that express purpose, or he may

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42 COLUM. L. R. 32 (1942); *cf.* White v. White, 212 S.C. 440, 48 S.E.2d 189 (1948) (life insurance not part of husband's estate under South Carolina "mistress" statute); Bynum v. Prudential Ins. Co. of America, 77 F. Supp. 56 (E.D.S.C. 1948).

[60] Smith, PERSONAL LIFE INSURANCE TRUSTS, 73–82 (1950). *But see* Bickers v. Shenandoah Valley National Bank, 197 Va. 145, 88 S.E.2d 889 (1955), *rehearing denied,* 197 Va. 732, 90 S.E.2d 865 (1956), noted in 31 N. Y. U. L. REV. 697 (1956); 42 VA. L. REV. 256 (1956); also see Note, "The Testamentary Nature of Revocable Inter Vivos and Life Insurance Trusts–Liberalizing Legislation in Wisconsin," 1956 WISC. L. REV. 313.

[61] As distinguished from business insurance taken out by others on the life of the husband.

[62] Vance, INSURANCE, §124 (3rd ed. 1951); *cf.* Arnold, "Life Insurance as an Asset Available to Creditors in Maryland," 6 MD. L. REV. 275 (1942).

[63] The legislative tendency has been to extend the protection to include any beneficiary. In some states it even includes insurance payable to the insured's estate, annuities, and the disability benefits under insurance policies.

[64] The insured may designate as payee one who has no insurable interest in the insured's life, provided the beneficiary was not an active and moving party in securing the issuance of the policy. In Texas, however, the beneficiary must have an insurable interest. *Cf.* Patterson, "Insurance Law During the War Years," 46 COLUM. L. REV. 345, 360–62 (1946).

assign or change beneficiary rights on existing policies. Two fairly recent cases are illustrative of the general problem.

In *Mitchell* v. *Mitchell* [65] the husband changed the beneficiary rights on his insurance policies, aggregating $48,000, from his estate to his mother. The trial court invalidated the transfers as being illusory and also as constituting a "fraud" on the wife. The "fraud" lay in the finding that she had become reconciled with him on the strength of his statement that he had not made any change in his insurance. In holding life insurance illusory the court compared it with the Totten trust, stating that when the assured can change beneficiaries, the rights of those beneficiaries "are contingent and revocable; they do not vest until the death of the assured or settlor." [66] Needless to say, this opinion was of interest to the insurance business; and the New York State Association of Life Underwriters, as *amicus curiae,* filed a brief on the appeal. The First Department reversed. It found that the insurance had nothing to do with the reconciliation; and there was nothing illusory about the change in beneficiaries, it said, since the assured had an "absolute right" to do so under his contract of insurance. Moreover, the court drew attention to the reasonableness of the transaction. The decedent had given the widow $7,000 in cash on the day of his suicide; he left a net estate of $9,000; and the donee had supported the decedent as a child. The Court of Appeals affirmed without opinion.

In *Bullen* v. *Safe Deposit & Trust Company,*[67] the decision was also against the spouse, and likewise the equities ran against her.[68] The husband had made a revocable declaration of trust involving a substantial amount of life insurance. He retained control of the policies, including the power to

[65] 177 Misc. 1050, 32 N.Y.S.2d 839 (Sup. Ct. 1942), *rev'd,* 265 App. Div. 27, 37 N.Y.S.2d 612 (1st Dep't 1942), *aff'd without opinion,* 290 N.Y. 779, 50 N.E.2d 106 (1943).

[66] 177 Misc. 1050, 1052, 32 N.Y.S.2d 839, 842 (1942).

[67] 177 Md. 271, 9 A.2d 581 (1939).

[68] The insurance aggregated $146,000; the widow received by gift or operation of law $150,000.

change beneficiaries. Said the court: "the wife has not a statutory interest in her husband's life insurance merely by reason of his retaining the right to change the beneficiary, and the right to exercise complete dominion and control over it . . . ."

The surviving spouse has prevailed in several instances, but these cases have some distinguishing factors. In a New York case, *Weisman* v. *Metropolitan Life Insurance Co.*,[69] the decedent named his wife as beneficiary and gave her the policies. Later, he recovered the policies from her to obtain a loan thereon; and in contemplation of a reconciliation with her, he agreed in writing to make her the beneficiary "unreservedly." Subsequently he assigned the policies to another. The widow's claim was upheld. Likewise, in *Reiss* v. *Reiss*,[70] a lower court in New York ruled in the widow's favor when the husband had changed beneficiaries in violation of a settlement agreement. In denying a motion to dismiss the wife's action the court made the interesting statement that the decedent's conduct was "a violation of Section 18 of the Decedent Estate Law." Neither the *Weisman* case nor the *Reiss* case was specifically overruled in the *Mitchell* case.[71] But the *Weisman* case (and possibly the *Reiss* case) may be distinguished on its facts; and certainly the dictum in the *Reiss* case has little weight in view of the later holding in the *Mitchell* case.[72]

On the whole, then, we may say that the courts appear to take it for granted that life insurance is immune to the widow's attack; [73] and, aside from the *Mitchell* and *Bullen*

[69] 7 N.Y.S.2d 565 (Sup. Ct. 1938), *aff'd without opinion,* 256 App. Div. 914, 10 N.Y.S.2d 414 (1st Dep't 1939).

[70] 166 Misc. 274, 2 N.Y.S.2d 358 (Sup. Ct. 1937).

[71] *Supra,* note 65.

[72] *But cf.* Application of Barasch, 267 App. Div. 830, 45 N.Y.S.2d 790 (2d Dep't 1944), *motion for reargument denied without opinion,* 267 App. Div. 905, 47 N.Y.S.2d 486 (2d Dep't 1944) (favoring widow, but facts obscure, and no discussion).

[73] Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937); Moskowitz v. Equitable Life Assur. Soc. of the United States, 252 App. Div. 75, 297 N.Y.S. 45 (1st Dep't 1937); Estate of Kerr, 1 Fiduc. Rep. 239,

cases, the point has excited little judicial discussion. But it would be unwise to assume that the matter is settled. It happens that no case has as yet arisen in which the equities clearly favor the surviving spouse. Doctrine, in the evasion cases, ofttimes will defer to the exigencies.[74] Moreover, in some of the insurance cases the "transfer" was by way of an assignment or pledge as collateral for a loan.[75] This circumstance

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38 Del. Co. Rep. 205 (Pa. 1951); Benkart v. Commonwealth Trust Co., 269 Pa. 257, 112 Atl. 62 (1920); *cf.* Exchange Nat. Bank of Winter Haven v. Smith, 4 So.2d 675 (Fla. 1941); Milewski v. Milewski, 351 Ill. App. 158, 114 N.E.2d 419 (1953); Matter of Smith, N. Y. L. J. 20 Dec. 1939, 1 P-H Unreported Trust Cases, ¶25,288 (Surr. Ct. 1939); Auch's Estate, 70 Montg. 370, 68 York 137 (Pa. 1955); American Trust & Banking Co. v. Twinam, 187 Tenn. 570, 216 S.W.2d 314 (1948). *But cf.* Estate of Brown, 384 Pa. 99, 119 A.2d 513 (1956) (unfounded life insurance trust).

In Wissner v. Wissner, 89 Cal. App.2d 759, 201 P.2d 874 (1949), *rev'd,* 338 U.S. 655 (1950), 18 GEO. WASH. L. REV. 587 (1950), the widow lost to her husband's mother, the designated beneficiary of a National Service Life Insurance Policy. But other types of family claims have prevailed against veteran's benefits: In re Guardianship of Bagnall, 238 Iowa 905, 29 N.W.2d 597 (1947) (disability compensation, war risk insurance, and bonus paid to mentally incompetent veteran held vulnerable to alimony claim); Gaskins v. Security–First National Bank of Los Angeles, 30 Cal. App. 2d 409, 86 P.2d 681 (1939) (mentally incompetent veteran's war risk insurance and compensation; children's support); Hodson v. New York City Employees' Retirement System, 243 App. Div. 480, 278 N.Y. Supp. 16 (1935) (maintenance for abandoned wife and minor child); Hallis v. Bryan, 166 Miss. 874, 143 So. 687 (1932) (disability compensation, alimony); Schlaefer v. Schlaefer, 112 F.2d 177, 130 A.L.R. 1014 (D.C. Cir. 1940) (alimony); Annots. 130 A.L.R. 1014 (1941), 106 A.L.R. 669 (1937), 11 A.L.R. 123 (1921). *But cf.* Brewer v. Brewer, 19 Tenn. App. 209, 84 S.W.2d 1022 (1933) (incompetent veteran's compensation and war risk insurance; support and maintenance).

[74] But not always in accord with the maintenance and contribution formula. And insensitivity to the criterion of need may also be observed in those cases that perhaps award the widow *too much.* For example, life insurance payable to the widow is usually not charged against her statutory share. In re Schulman's Will, 115 N.Y.S.2d 169, 172 (1952); In re Perlmutter's Will, 199 Misc. 330, 98 N.Y.S.2d 968 (Surr. Ct. 1950); *cf.* In re Weil's Estate, 73 N.Y.S.2d 370 (Surr. Ct. 1947). *But cf.* Johnson v. Remy, 220 F.2d 73 (5th Cir. 1955); Buehrle v. Buehrle, 291 Ill. 589, 126 N.E. 539 (1920).

[75] Fleming v. Fleming, 194 Iowa, 71, 184 N.W. 296 (1921); Chamberlin v. First Trust & Deposit Co., 172 Misc. 472, 15 N.Y.S.2d 168 (Sup. Ct. 1939); Matter of Kelley, 160 Misc. 421, 289 N.Y. Supp. 1079 (Surr. Ct. 1936); *aff'd,* 251 App. Div. 847 (2nd Dep't 1937). In general, see a valuable comment, "The Assignment of Life Insurance as Collateral Security for Bank Loans," 58 YALE L. J. 743 (1949); Bloys, "Collateral Assignments of Life Insurance Policies," 1 C. L. U. J. 61 (1946).

should militate against the widow's chances, as the husband's "estate" would have been augmented by the loan.

Life insurance as a method of disinheritance is not entirely practicable. It involves loss of immediate income; [76] and, as time goes by, the medical restrictions tighten, and the rates increase. Nevertheless, a husband may use this device to remove property from his estate, while retaining the right to liquidate or borrow on the policy and to change beneficiaries. The statutory share is no better off in this respect than is the civil law légitime. "The weedy growth of the law of insurance," says Daggett, "really emasculates some of the ancient provisions for forced heirship. . . . The jurisprudence of France and Louisiana has maintained the right of the individual to defeat the laws of forced heirship upon the theory that the insured never possessed the death benefit himself, and consequently, that it was not part of his succession, except when made payable to his estate." [77]

The arguments for protecting life insurance from the widow's claim are not entirely convincing. To urge the "functional nature" or "social utility" of the device seems inappropriate; the primary function of life insurance is to

[76] As to annuities, see p. 242, *infra*.

[77] Daggett, "General Principles of Succession on Death in Civil Law," 11 TULANE L. REV. 399, 405 (1937). Several views are followed when the husband pays for the premiums out of community property and designates someone other than the widow as beneficiary. In California, and probably in Washington, the widow can recover one half the proceeds. In Louisiana the widow apparently has no remedy. In Texas and other community property states she can recover the proceeds if the evidence discloses that the beneficiary had no moral claim on the decedent, and that the amount of community funds expended for premiums was unreasonably out of proportion to the remaining community funds. *Cf.* Metropolitan Life Ins. Co. v. Baker, 107 F. Supp. 1 (D.C. N.D. Texas 1952), in which the widow's claim was rejected, in the absence of "fraud." The opinion is indecisive as to whether or not "fraud" would require misrepresentation, but it is significant that the court noted that the widow was beneficiary on another policy and "received the home and other property." In general, see 1 DeFuniak, COMMUNITY PROPERTY, §123 (1943); Huie, "Community Property Laws as Applied to Life Insurance," 18 TEXAS L. REV. 121 (1940); notes, 32 TEXAS L. REV. 608 (1954); 18 TULANE L. REV. 487 (1944); Annot. 17 A.L.R.2d 1118 (1951)

provide an estate to take care of the widow and family.[78] Nor should there be any legitimate fear that if the widow be permitted to invade, so should "creditors": the basic purpose of the statutes exempting insurance from creditors is to protect the *family*. Moreover, life insurance forms a substantial proportion of the total holdings of many decedents, especially among decedents of modest means.[79] In many instances life insurance proceeds will be the only property left.

Occasionally the suggestion is made that life insurance be amenable to the widow's claim to the extent that the insurance is includible in the decedent's gross estate for federal estate tax purposes.[80] Some writers have advocated restricting her recovery either to the extent of the premiums paid by the husband,[81] or the cash surrender value at death.[82] I believe that my statutory formula is preferable, because it does a better job of reconciling the opposing interests. For one thing, the reliance interest of the insurance beneficiary will be weighed. Normally, of course, his reliance interest will be low, since he does not receive the insurance proceeds until the decedent's death.[83] For another thing, the "need" criterion should help the decedent to plan his estate. He can

[78] Inconvenience to the insurance companies could be alleviated by legislation similar to that which permits banks to pay with impunity to the survivor in a joint bank account—or even legislation permitting payment of the insurance proceeds into court if the company should be served with a notice of pending maintenance application. *Cf.* Grossman, "Problems Of The Insurer When Attempted Change Of Beneficiary Is Incomplete, Irregular Or Of Doubtful Validity." 13 B. U. L. REV. 391 (1933).

[79] It has been estimated that insurance proceeds constitute nearly four-fifths of the property left by decedents. Stephenson, LIVING TRUSTS, 64 (2d ed. 1937), cited in Smith, PERSONAL LIFE INSURANCE TRUSTS 9 (1950).

[80] Under this plan the widow would be defeated if the husband paid the premiums but retained none of the "incidents of ownership." Int. Rev. Code of 1954, §2042.

[81] *E.g.*, Note 27 N. Y. U. L. REV. 306, 315, note 63 (1952).

[82] Note, 16 BROOKLYN L. REV. 229, 244 (1950).

[83] In some instances it might be more equitable to exact contribution from another inter vivos transferee. The insurance beneficiary's contribution would in any event be measured by the widow's need, not by some predetermined fraction of the insurance proceeds.

preclude invasion of his insurance by the widow if he leaves her adequate support. Under the plans suggested above, however, the widow could invade regardless of need, and regardless, indeed, of other inter vivos benefits, including insurance, already given her by the decedent.

4. Annuities

Annuities involve payment of a lump sum to the insurance company in return for annual payment by the company of a definite sum to the annuitant or to a designated beneficiary, payable during the life of the annuitant.[84] The contract may or may not provide for minimum aggregate payments, to be made to a designated beneficiary in the event of the prior death of the annuitant. When the consideration paid by the annuitant was based on a recognized annuity table the contract will be sustained even though the annuitant did not live to receive the first payment.

It is apparent that the average annuitant is thinking of himself, not of his family. Nevertheless, annuities have played a very minor part[85] in evasion litigation – the leading roles being taken by popular substitutes for the will. The widow should have a justifiable complaint if her husband, as annuitant, contracted for death benefits in an amount that was unreasonably large.[86] Absent any death benefits, however,

[84] But there are variations: the annuitant may pay in premiums instead of a lump sum; the company may make payments monthly (not yearly) and over a stated period of years (not for life); the annuity may be for one person or the contract may provide annuities for a group. Group annuities ordinarily make no provision for death benefits. Vance, Insurance §200 (3rd ed. 1951).

[85] Annuities have become popular only in the last quarter-century, beginning with the depression of the thirties.

[86] *But cf.* Penn. Mutual Ins. Co. v. Fields, 81 F. Supp. 54, 57 note 2, (S.D. Cal. 1948), *aff'd,* 178 F.2d 200 (9th Cir. 1949). The comedian, W. C. Fields, purchased a single premium insurance policy "in the nature of an annuity," with death benefits payable to his brother and sister. His widow, having established that the premium had been paid with community property while he was domiciled in California, was awarded one half of the proceeds on Field's death. Much of the judgment is occupied with the question of domicile. The trial judge stated,

the widow's rights, *qua* widow, are questionable. She should have attacked the annuity in the husband's lifetime, in conjunction with divorce or maintenance proceedings.

But what if the wife had no knowledge of the annuity, or her husband died before suit could be brought? The latter contingency occurred in *Maruska* v. *Equitable Life Assurance Society*.[87] Here the purchase price was obtained partly from the decedent's personalty and partly by sale of the homestead. The wife's consent to sale of the homestead was procured by fraud. She brought suit in her own name, and also as administratrix, to recover damages against the insurance company and another for conspiring to defraud her of her marital interest in her husband's property. In granting the widow's motion to have the case remanded to a state court the Federal court was careful to point out that it was not concerned with the "real merits" of the suit. It did intimate, however, that although the widow might have the transfer of the homestead set aside, she had no real case as to the transfer of the personalty, as "the husband has absolute power to dispose of his personal property, providing that no fraud be committed against his wife's marital rights. See Smith v. Wold, 125 Minn. 190, 145 N.W. 1067." [88] The word "fraud" in this dictum is equivocal; but the references to *Smith* v. *Wold* [89] may have some significance. That case used the word "fraud" to connote an unreasonably large inter vivos transfer of personalty, stating that "a court cannot say with minute exactness just how much the husband may give away without subjecting himself to a just charge of fraud." [90] We may speculate that a widow would have some chance of prevailing against an

parenthetically: "I am convinced that, *absent actual fraud,* a gift of the character here involved, could be made, under the common law by a husband legally domiciled in a common law state."

[87] 21 F. Supp. 841 (D. Minn. 1938).

[88] *Id.* at 842. The court indicated that the widow was not a "creditor" because she had not instituted a suit for divorce or separate maintenance before her husband's death.

[89] This case is also reported *sub. nom.* Smith v. Corey.

[90] 125 Minn. 190, 192, 145 N.W. 1067, 1068 (1914).

unreasonably large annuity purchased close to the husband's death, particularly if the insurance company was aware of the circumstances at the time the contract was made.

5. Employee Death Benefits

There is very little authority on the power of a surviving spouse to set aside or invade beneficiary rights under retirement plans, pension schemes, profit-sharing and stock-purchase agreements, and other types of employee benefits. These devices originated, for all practical purposes, with the entry of the insurance companies into the employee benefit field in the last few decades; and they have achieved enormous popularity in the last few years.[91]

In *Moyer* v. *Dunseith* [92] a surviving husband contended that his wife's designation of her mother as beneficiary under the Teachers' Retirement Fund was an illusory transfer. The wife had taught for a good portion of her life. Sixteen days before death she changed the beneficiary rights from her mother to her sister. The court stated that retirement benefits resemble neither the Totten trust nor life insurance, and rejected the widower's claim.

Since the *Moyer* case was decided the New York legislature has enacted Section 24a of the Personal Property Law.[93] This

[91] ". . . upwards of 10 million people are now covered by privately supported pension plans which hold funds totaling about $17 billion." Dunckel, "Pension Trusts for Millions," 93 Estates & Trusts 284 (1954).

[92] 180 Misc. 1004, 46 N.Y.S.2d 360 (Sup. Ct. 1943), *aff'd without opinion*, 266 App. Div. 1008, 45 N.Y.S.2d 126 (2d Dep't 1943).

In Gristy v. Hudgens, 23 Ariz. 339, 203 Pac. 569 (1922), the husband, a member of an employees' benefit association, changed beneficiary rights about a year before his death from his wife to a twelve-year old girl, not a member of his family. The transfer was sustained even though the benefits had been purchased out of community property, because no "fraud" had been shown. See Chap. 20, note 21; *cf.* Callahan v. Mooney, 190 Misc. 736, 72 N.Y.S.2d 924 (Sup. Ct. 1947) (fraud, undue influence); Fischer v. Fischer, 24 N.J. Super. 180, 93 A.2d 788 (1952) (wife held not entitled to invade husband's policemen's pension fund for alimony).

[93] New York Laws, Chap. 820 §1 (1952).

provision purports "to remove any uncertainty which may exist as to the validity of a designation of a beneficiary . . . under a pension, retirement or employee profit-sharing plan or under an annuity or a contract supplemental to an annuity or life, accident or health insurance policy." [94] As was the case with its companion Section 24, dealing with United States savings bonds, Section 24a makes no mention of the rights of the surviving spouse. Undoubtedly Section 24a will also be construed to preclude any attack by the surviving spouse.[95] The need for corrective legislation is apparent.

[94] New York Law Revision Commission, Leg. Doc. (1952) No. 65 C; 1952 Report, Recommendations and Studies, p. 166.

[95] See In re Deyo's Estate, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing* to follow Deyo v. Adams, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942), discussed, *supra,* p. 224.

CHAPTER 16

Miscellaneous

1. OBLIGATIONS OF THE DONOR PAYABLE AT HIS DEATH

Transfers of this sort, unless supported by consideration, are usually unenforceable *per se,* entirely aside from the question of "evasion" of the widow's rights.[1] Suppose that a husband, wishing to disinherit his wife, executes a sealed note for $1,000. The note is payable at his death, and he delivers it to the named payee. It would appear that no enforceable inter vivos right or "interest" passes to the donee unless (a) there is consideration, or (b) the state concerned is one of the relatively few jurisdictions that considers a seal to be conclusive evidence of consideration,[2] or that has adopted the Model Written Obligations Act, which sanctifies a mere intention to be bound.[3] Lacking consideration, no contract right or enforceable chose in action is created. The law of

[1] Reinhart v. Echave, 43 Nev. 323, 185 Pac. 1070, 187 Pac. 1006 (1920); Tissue's Estate, 64 Pa. Super. 141 (1916) (notes given a "short time" before death); *cf.* Jones v. Westcott, 150 Atl. 50 (N.J. 1930); Snayberger's Estate, 62 Pa. Super. 390 (1916) (payable six months after death); BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW, 548 (7th ed. 1948); Atkinson, WILLS, 198 (2d ed. 1953); Note, 25 CORNELL L. Q. 119 (1939).

[2] *E.g.,* Krell v. Codman, 154 Mass. 454, 28 N.E. 578, (1891) (covenant to pay a certain sum six months after death); *cf.* Patterson v. Chapman, 179 Cal. 203, 176 P. 37, 2 A.L.R. 1467 (1918) (instrument acknowledging a debt); Uniform Commercial Code, §3-113 (1952). §28 of the Negotiable Instruments Law might prevent enforcement of the sealed note even in jurisdictions in which the seal is conclusive on the matter of consideration. See BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW, 298 (7th ed. 1948).

[3] "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." Model Written Obligations Act, §1. This act was proposed in 1925 but to date has been adopted only by Pennsylvania, in 1927. 9A Uniform Laws Annotated, 419 (1951); *cf.* Uniform Commercial Code, §§1-107, 2-209 (1952).

gifts is no help; the chose being a nullity, of what effect is physical delivery? Nor could the note be considered an informal deed of gift of a future interest in the money, unless a definite amount was set aside or earmarked.[4] It is possible, of course, to create a future interest in money; [5] but the common practice is to use a trust, and here also segregation of the funds would be required.[6]

A note or obligation that is valid between the parties concerned may nevertheless be invalid as to the widow.[7] Litigation on the latter point would be decided in accordance with the governing "evasion" rationale.[8] As far as jurisdictions using a "control" or "intent" test are concerned, the obligation payable at death may be a risky device for the husband

[4] Smith v. Peacock, 114 Ga. 691, 40 S.E. 757 (1901); 38 C.J.S. *Gifts* (1943); *cf.* Woodward v. Woodward, 222 Iowa 145, 268 N.W. 540 (sundry "papers"); Ferry v. Bryant, 19 Tenn. App. 612, 93 S.W.2d 344 (1935) (attempted trust). A gift of the decedent's own check would also be unenforceable against his estate.

[5] In future interests parlance, if not in workaday experience, money is not a "consumable." *Cf.* Simes and Smith, LAW OF FUTURE INTERESTS, §369, note 89 (2d ed. 1956).

[6] *Cf.* Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947, 5857 (1949).

[7] The principles that govern the substantive law validity of a note payable at death, as well as its vulnerability to the widow, would also appear to be applicable to a note payable at a certain time, executed by the decedent spouse in anticipation of death. *Cf.* Note, 25 CORNELL L. Q. 119 (1939).

[8] (a) *Favoring spouse:* Wilson v. Wilson, 23 Ky. L. Rep. 1229, 64 S.W. 981 (1901) (actual misrepresentation with reference to related antenuptial transfers); Feeser Estate (No. 2), 88 D.&C. 241 (1954); *cf.* Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894) (widow cannot recover against donees since they were not "privies to the fraud," but widow can be compensated out of the estate); Norris v. Barbour, *infra,* note 9. Also see Dillard v. Dillard, 269 S.W.2d 769 (Mo. 1954) (nonevasive). (b) *Favoring donee:* In re Sides' Estate, 119 Neb. 314, 228 N.W. 619 (1930) (money transferred, donees give back notes to be cancelled at death); Mornes Estate, 79 D.&C. 356 (Pa. 1951); In re Rynier's Estate, 48 Lanc. Rev. 475, *aff'd,* 347 Pa. 471, 32 A.2d 736 (1943); *cf.* In re Fritz's Estate, 135 Pa. Super. 463, 5 A.2d 601 (1939), 25 CORNELL L. Q. 119 (1939) (antenuptial transfer; payable in seven years).

Notes or other obligations entered into with a view to defeating inchoate dower are in a special category. Perhaps transfers of this sort would not be viewed as seriously in a state in which inchoate dower can be defeated by other means. The Pennsylvania cases on notes payable at death are discussed, *supra,* pp. 141–143.

to use. For example, consider *Norris* v. *Barbour*.[9] Here the husband delivered to a trustee a bond in the sum of twenty thousand dollars, payable one year after his (the husband's) death. The proceeds were to be applied according to the provisions of the trust, which had been executed the same day as the bond. The husband died eleven years later; and the payment of the bond would exhaust available personalty. The court was willing to concede the validity of the obligation as between the parties, the seal affording a conclusive presumption of consideration. "But," said the court, "the present suit is not one between the parties to the contract." Equity, it declared, may enquire into the substance of a transaction in order to prevent a fraud:

> "We hold that the right given by our statutes to a widow to share in the surplus of her deceased husband's personal estate cannot be defeated by so simple a device as this, where he retains up until the time of his death full ownership and enjoyment of his personal property, and merely executes and transfers to a trustee his bare promise under seal, unsupported by an actual consideration, to pay to the trustee after his (the husband's) death . . . a sum of money equivalent to the corpus of his personal estate, or the major portion thereof. In substance, such a device is but a legacy in disguise. . . . It operates as a fraud upon and is void as to the rights of the widow, and in equity will be set aside at her instance." [10]

It is unlikely that the Virginia court was purporting to rule that *all* voluntary "transfers" may be defeated by the widow; probably the court was more concerned with retention of excessive "control" than with lack of consideration.[11] Earlier

[9] 188 Va. 723, 51 S.E.2d 334 (1949).

[10] *Id.* at 740, 741, 51 S.E.2d at 341.

[11] The court stated that the husband retained full *ownership* of his personalty, *id.* at 740, 51 S.E.2d at 341. This is inaccurate, since the donee of the bond received an inter vivos gift of a chose in action, enforceable at death; and under the "reality" rationale this would suffice to defeat the widow. Notice that the decision in the Norris case is consistent with the equities.

in the opinion there was specific mention of a line of Virginia decisions that condone an irrevocable trust, with retention of income for life, as an "evasive" device.[12] It is hornbook law that no consideration is needed to establish a valid trust — hence emphasis on irrevocability points to a "control" rationale. Viewed in this light, a sealed note, although valid as between the payor and payee, is objectionable because of retention of practical economic control. In a trust device the money passes to the trustee; but merely to sign a note leaves the principal in the undisturbed possession of the donor, subject to the normal attrition of everyday living, even of insolvency. Lacking the earmarking process that is involved in a declaration of trust or that accompanies a deed of gift, it is probably the extreme example of a valid "evasive" device. True, it has "reality"; but what could be thinner? [13]

Under the maintenance and contribution formula the widow would prevail against otherwise valid obligations payable at death only when she can prove need. Likewise, under either that formula or the usual "control" test, the widow has no ground for complaint if the obligation is supported by fair consideration.[14]

2. Purchase by Decedent, Title in Name of Another

In these transactions, when the decedent supplied all the consideration, the "transfer" is in substance a gift by the decedent to the person in whose name the title was placed. The amount represented by the purchase price, instead of being given directly to the donee, has been converted into a different form of wealth, and given to the donee in its new form.[15]

[12] *E.g.*, Hall v. Hall, 109 Va. 117, 63 S.E. 420 (1909).

[13] See discussion of contracts to make a will, Appendix D, *infra*.

[14] See Suggested Model Decedent's Family Maintenance Act, §1(d), *infra*, Chap. 22.

[15] (a) *Favoring spouse:* Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887); Resch v. Rowland, 257 S.W.2d 621 (Mo. 1953); *cf.* Knights v. Knights, 300 Ill. 618, 133 N.E. 377 (1921) (antenuptial); Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1894); Jaworski v. Wisniewski, 149 Md. 109, 131 Atl. 40 (1925) (deed by wife to X, with reconveyance to wife for life,

When the property purchased is personalty,[16] the transfer will no doubt be sustained, as would any other gift, under the "reality" rationale. In all probability it will also be sustained under both the "control" and the "intent" [17] rationales, unless the equities run strongly with the surviving spouse.

In most cases involving this device a life estate has been retained by the decedent. This factor is immaterial, since a life interest may be reserved with impunity even when the property involved is transferred direct to the donee. But the transfer is of uncertain validity, particularly under the control or the intent rationales, when the decedent also retained the power to dispose of the property. Even so, the equities may dictate its validity. In *Whitehill* v. *Thiess* [18] the husband deserted his family, leaving the wife with five young children to support. The children eventually went to work, turning their earnings over to the mother. Seven years before her death the mother purchased property "for and during the term of her natural life only with full power in the said Mary C. Thiess to lease, mortgage, deed or in any otherwise encumber the property absolutely and after her death and with-

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wife having power to mortgage, lease, sell, or devise, and in default thereof remainder to children); Hays v. Henry, 1 Md. Ch. 337 (1848) (title in name of mistress, reconveyance to husband in trust).

(b) *Favoring donee:* Ford v. Ford, 4 Ala. 142 (1842); Wooton v. Keaton, 168 Ark. 981, 272 S.W. 869 (1925); Osborn v. Osborn, 102 Kan. 890, 172 Pac. 23 (1918); Whitehill v. Thiess, 161 Md. 657, 158 Atl. 347 (1932); Trabbic v. Trabbic, 142 Mich. 387, 105 N.W. 876 (1905) (mortgage); Crecelius v. Horst, 89 Mo. 356, 14 S.W. 510 (1886); *cf.* Hoeffner v. Hoeffner, 389 Ill. 253, 59 N.E.2d 684 (1945); Kirkpatrick v. Clark, 132 Ill. 342, 24 N.E. 71 (1890); Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884); Charest v. St. Onge, 332 Mass. 628, 127 N.E.2d 175 (1955); Seaman v. Harmon, 192 Mass. 5, 78 N.E. 301 (1906) (bona fide purchaser); Burtt v. Riley, 260 App. Div. 899, 22 N.Y.S.2d 972 (3rd Dep't 1940), *motion for leave to appeal denied,* 260 App. Div. 976, 24 N.Y.S.2d 159 (3rd Dep't 1940); York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922); Sellers v. Gibney, 51 LANC. L. REV. 383 (Com. Pl. Pa. 1949); Richards v. Richards, 30 Tenn. 294 (1850).

[16] Or realty, where inchoate dower does not exist. *Cf.* Wooton v. Keaton, 168 Ark. 981, 272 S.W. 869 (1925).

[17] *E.g.,* Resch v. Rowland, 257 S.W.2d 621 (1953).

[18] 161 Md. 657, 158 Atl. 347, 79 A.L.R. 373 (1932).

out the exercise of the aforesaid power then . . . [to the children]." After the wife's death it was held that the widower had no right in the land. The court conceded that "perhaps in strict law the money which was turned over by the children to the mother became her money." Nevertheless, it said, "the arrangement of title would seem to have been a reasonable and just one, in view of the source of the purchase money, and the common purpose for which the children's earnings were turned over to the mother. . . . The rightfulness of the arrangement from the point of view of fairness to the children . . . seems to us to save it from being a wrong upon the husband. . . ." [19]

We assign a special category to cases where the asset purchased is realty, in jurisdictions still retaining inchoate dower. Here the widow has a useful talking point: a contingent property right would have been acquired *during* the marriage, but for the transfer in question.[20] Even here the decisions do not uniformly favor the widow. In *Ford* v. *Ford*,[21] for instance, a purchase of realty in the name of a bigamous second wife and the children of the affair was sustained as against the legally named spouse. The equities in this case were against the claimant spouse.

The widow has a better case if she can prove that the purchase price was obtained from the sale of other realty owned by the husband, and that she joined in the sale in order

[19] *Id.* at 661, 158 Atl. at 348. Whenever an abandoned wife purchases property, fairness to the children might dictate the same holding as in the Whitehill case even when the children, being infants, made no contribution to the purchase price.

[20] See *e.g.*, Rowe v. Ratiff, 268 Ky. 217, 104 S.W.2d 437 (1937); *cf.* Redmond's Adm'x v. Redmond, 112 Ky. 760, 66 S.W. 745 (1902); Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947, 5860-1 (1949). The suit may be brought in the lifetime of the husband. Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884).

[21] 4 Ala. 142 (1842); *cf.* Patterson v. Patterson's Ex'r, 15 Ky. L. Rep. 755, 24 S.W. 880 (1894); Spears v. James, 319 Mich. 341, 29 N.W.2d 829 (1947). In Kirkpatrick v. Clark, 132 Ill. 342, 24 N.E. 71 (1890) the court stated that "dower in lands which the wife does not yet own is an interest to which the husband has neither a legal, equitable or moral right, and the wife is entirely at liberty to so manage her purchases made with her own means, if she can, as to prevent his acquiring such right."

to bar her dower.[22] And, of course, her chances are excellent if the release of dower was obtained by actual misrepresentations on the part of her husband.[23]

3. Powers of Appointment

The genius of the power of appointment is that it imparts flexibility to voluntary property transmission. A property owner is said to create a power of appointment when he gives another person the power to determine the recipients of the property, or the shares that they are to take.[24] A typical example is a family settlement in which the husband bequeaths property to his widow for life and also gives her the power, in her will, to determine the remaindermen. The husband here is said to be the donor of the power, and the widow is the donee. The husband may also create a power in himself — as where he transfers property in trust, reserving a life estate and the power to appoint the remainder. Powers are classified as general or special. A power is general, for our purposes, when the donee has the power to appoint to himself or to his estate. The power is called special when the donee's appointment is limited to a group not unreasonably large, which does not include himself or his estate. The manner in which the general power may be exercised determines the extent of the donee's interest in the property. If the power is to be exercised by will, the donee of course may not appoint during his lifetime; but if it may be exercised inter vivos or by will the

[22] *E.g.*, Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1894); Resch v. Rowland, 257 S.W.2d 621 (Mo. 1953); *but see* Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884); Osborn v. Osborn, 102 Kan. 890, 172 Pac. 23 (1918).

[23] Kober v. Kober, 324 Mo. 379, 23 S.W.2d 149 (1929) (misrepresentations by husband in procuring release of wife's dower, followed by purchase of realty in name of children with life estate in husband); also see 1 American Law of Property, §§5.32-37 (1952).

[24] *Cf.* 3 Restatement, Property, §318 (1940); Simes and Smith, Law of Future Interests, §871, (2d ed. 1956). This description excludes a power of sale, power of attorney, power of revocation, power to cause a gift of income to be augmented out of principal, the honorary trust, and the discretionary trust.

donee may appoint to himself at any time: his interest approaches virtual ownership.[25]

The flexibility afforded by the power of appointment is desirable. Wealth does the most good when the recipients are deserving; the power of appointment serves both the community and the donor by giving the donor a longer time in which to gauge the merit and the need of potential donees. Moreover, under the present federal estate tax regulations, it is more profitable to *give* the widow a power of appointment than to use it against her. When employed in the "marital deduction trust" [26] the power of appointment results in substantial tax savings, and in this respect it operates as a mild deterrent to disinheritance of the widow. But if the husband is more concerned with defeating the widow's share than with tax savings the power of appointment will suit his purpose quite well indeed.

When the donee of a general testamentary power created by another does not appoint to himself or his estate, his surviving spouse is not permitted to take her forced share in the appointive property.[27] This result flows from automatic application of the "relation back" doctrine: the exercise of the power is attributable to the instrument that created the power – and the appointee takes title from the donor, not from the donee.[28] It is immaterial whether or not the power was exercised. There appear to be no "evasion" cases involving general powers exercisable inter vivos, where, as we have seen, the donee of the power is substantially the owner of the

[25] 5 AMERICAN LAW OF PROPERTY, §23.4 (1952); Scott, "The Effects of a Power to Revoke a Trust," 57 HARV. L. REV. 362, 366 (1944). For further discussion of the various classifications of powers of appointment, see Simes and Smith, LAW OF FUTURE INTERESTS, §§874–79 (2d ed. 1956).

[26] Int. Rev. Code of 1954, §2056.

[27] Kate's Estate, 282 Pa. 417, 128 Atl. 97 (1935); *cf.* Fiske v. Fiske, 173 Mass. 413, 53 N.E. 919 (1899); Krause v. Jeannette Investment Co., 333 Mo. 509, 62 S.W.2d 890 (1933); Matter of Rogers, 250 App. Div. 26, 293 N.Y. Supp. 626 (2d Dep't 1937), *leave to appeal denied,* 274 N.Y. 642 (1937); Huddy's Estate, 236 Pa. 276, 84 Atl. 909 (1912).

[28] Simes, "The Devolution of Title to Appointed Property," 22 ILL. L. REV. 480 (1928).

appointive property. Probably not many powers are exercisable inter vivos; the donee of such a power is subject to pressure from potential appointees.[29] But the Restatement of Property takes the stand that even here the surviving spouse should lose.[30]

Nor is the widow's position materially improved where the husband created a power of appointment in himself. In *City Bank Farmers Trust Co.* v. *Green*,[31] for example, a second wife failed to reach the appointive property, although she had apparently been completely disinherited after nine years of marriage. No mention is made of her financial position. The husband had created an irrevocable trust three years before the second marriage, the income going to his first wife for her life, with the husband retaining a general testamentary power of appointment over the remainder. In rejecting the widow's claim [32] the court utilized the "relation back" doctrine, referring to the decedent as a "mere conduit." Moreover, it said that creation of the power by the husband in himself "is no different than if a third person had created the power and made the testator the donee of it." [33]

[29] On the other hand, a power that is exercised inter vivos may qualify for the lower gift tax rate.

[30] RESTATEMENT, PROPERTY, §332 (2) (1940).

[31] 160 Misc. 370, 289 N.Y. Supp. 473 (1936).

[32] The husband had created a second inter vivos trust; *semble* the widow lost as to this trust also.

[33] 160 Misc. 370, 289 N.Y. Supp. 473 (1936); *cf.* Cameron v. Cameron, 10 Smedes & M. 394 (Miss. 1848); Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850); In re Steck's Estate, 275 Wis. 290, 81 N.W.2d 729 (1957); also see In re Burchell's Trust, 278 App. Div. 450, 105 N.Y.S.2d 431 (1st Dep't 1951). *But cf.* Brownell v. Briggs, 173 Mass. 529, 54 N.E. 251 (1899).

In 1931 Marilyn Miller, who had a few years previously been making approximately $260,000 per year, transferred in trust some $82,000. Her obvious purpose was to guard against her own extravagance. The trustee was to pay her $500 weekly until the principal was reduced to $5000, upon which event the trust was to be terminated and the principal distributed to the settlor. If the settlor died before that event the trustee was to dispose of any remaining principal as she should by will appoint, or, in default of appointment, to the persons who would take under New York intestacy distribution. Her will, made four years before the trust, disposed of her property to named relatives, and, naturally, it mentioned neither the trust nor her husband, whom she had married almost a year before executing the trust. The husband re-

But some support for the widow's claim may be found in Pennsylvania. Recent legislation in that state permits the widow to reach the appointive property when the power was created by the decedent spouse himself.[34] Indeed, there was some authority in the widow's favor even before the legislation was enacted.[35]

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nounced the will and sought to reach the corpus of the trust. The trial court found no fraudulent intent to deprive the husband of his statutory share. Therefore, said the court, in those days before Newman v. Dore, the appointed property was not part of the wife's estate. The husband was in substance disinherited, since there were insufficient assets in the estate to pay creditors. He had been supported by her during coverture, and she had given him, inter vivos, "some $65,000." (278 N.Y. 134, 142, 15 N.E.2d 553, 554 (1938).) The Court of Appeals reversed, but on the ground that the settlor had created a reversion in herself (which would pass as part of her estate, permitting the widower to share) and not a gift in remainder to her distributees. City Bank Farmers Trust Co. v. Miller, 163 Misc. 459, 297 N.Y. Supp. 88 (Sup. Ct. 1937), *aff'd without opinion,* 253 App. Div. 707, 1 N.Y.S.2d 640 (1st Dep't 1937), *motion for leave to appeal granted,* 253 App. Div. 880, 2 N.Y.S.2d 798 (1st Dep't 1938), *rev'd,* 278 N.Y. 134, 15 N.E.2d 553 (1938).

The surviving spouse of the donee of a power of appointment does not get dower or curtesy in the appointive property unless, of course, the donee of a general power appoints the property to his own estate. Hakalau v. De La Nux, 35 Hawaii 59 (1942) (curtesy); Hatfield v. Sohier, 114 Mass. 48 (1873) (curtesy); Matter of Davies, 124 Misc. 541, 209 N.Y. Supp. 296 (Surr. Ct. 1925), *aff'd without opinion,* 215 App. Div. 750, 212 N.Y. Supp. 796, (4th Dep't 1925), *aff'd,* 242 N.Y. 196, 151 N.E. 205 (1926) (widow did not appeal from lower court's denial of her dower); Barr v. Howell, 147 N.Y. Supp. 483 (1914); *cf.* Chinnubee v. Nicks, 3 Porter 362 (Ala. 1836); Ray v. Pung, 5 Madd. 310, 56 Eng. Rep. 914 (1821), *id.,* 5 B. & Ald. 561, 106 Eng. Rep. 1296 (1822). *But cf.* Link v. Edmonson, 19 Mo. 487 (1854); Peay v. Peay, 2 Rich. Eq. 409 (S.C. 1844).

[34] Penn. Stat. Ann. tit. 20, §301.11 (1950) (Estates Act of 1947), discussed, Chap. 9:4. It has been suggested that under this statute "the only case where the reservation of a power to appoint by deed could possibly be attacked by the surviving spouse is where such a power is unlimited and remains unexercised at the settlor's death." Brégy, INTESTATE, WILLS AND ESTATES ACTS OF 1947, 5863 (1949). But the surviving spouse may not reach the appointive property when the power was given by someone other than the testator. Pa. Stat. Ann. tit. 20 §180.8 (1950).

[35] *Cf.* Diedel's Trust, 32 D.&C. 685 (1938) (no gift over in default of appointment); Potter v. Fidelity Insurance Trust and Safe Deposit Co., (No. 2), 199 Pa. 366, 370, 49 Atl. 86, 87 (1901) (opinion below adopted on appeal); also see Boyle v. John M. Smyth Co., 248 Ill. App. 57, 78, 87 (1928).

Our study of the community goals implicit in the claim of the surviving spouse indicates that the maintenance and contribution formula should cover powers of appointment. A device that permits delayed beneficence promotes family welfare — and consequently the welfare of the state — but not when it leaves the deserving widow destitute.[36] The recent upsurge in estate planning has undoubtedly stimulated the use of powers of appointment. As more and more of those powers are exercised, the plight of the surviving spouse may well stand in sharper focus. The tax-collector [37] and the creditor [38] have protection appropriate to their needs; why not the widow? [39] To say that she must lose because the appointed property does not pass through the decedent's estate is to beg the question. Her claim for support should be judged on its merits, and on its *individual* merits.

There is no particular difficulty in applying our statutory formula to powers created by the decedent himself. We simply expand the definition of "transfer" to include the ex-

[36] Compare the spouse's right to invade a spendthrift trust for support. Griswold, SPENDTHRIFT TRUSTS, 390–1, (2nd ed. 1947); see the Socratic machine-gunning by McDougal in "Future Interests Restated: Tradition versus Clarification and Reform," 55 HARV. L. REV. 1077, 1104–15 (1942).

[37] The exercise or non-exercise of a general power created after October 21, 1942, is taxed in the donee's estate. For tax purposes a general power is defined, with certain exceptions, as "a power which is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate." Int. Rev. Code of 1954, §2041. For a discussion of the tax aspects see the articles set out in the bibliography in 5 AMERICAN LAW OF PROPERTY, §23.8 (1952).

[38] Creditors of the donee may reach the appointive property when a statute so permits, when the donee exercises a general power, when the transferor retains a life estate and a general power of appointment, when the transfer amounts to a fraud on creditors; and a trustee in bankruptcy may exercise powers that the donee could have exercised for his own benefit. Simes and Smith, LAW OF FUTURE INTERESTS, §§944–46, 1082 (2d ed. 1956), 5 AMERICAN LAW OF PROPERTY, §23.14–19 (1952), 3 RESTATEMENT, PROPERTY, §§328–31 (1940, Supp. 1948); *cf.* McDougal, "Future Interests Restated: Tradition versus Clarification and Reform," 55 HARV. L. REV. 1077, 1106–15 (1942).

[39] *Cf.* Leach, "Powers of Appointment," 24 A. B. A. J. 807 (1938).

ercise, non-exercise (where persons take in default of appointment), release, or lapse of a power of appointment.[40]

Powers created by a person other than the decedent necessitate separate treatment. A person who gives the husband a power of appointment is under no obligation to provide for the husband's widow. Indeed, if such an obligation were to be imposed the donor could evade it by giving the husband merely a life estate with fixed remainders in persons other than the widow, or simply by giving the power to a person other than the husband. Nor do we have a complete analogy in the wife's power to invade her husband's spendthrift trust. There the husband has enjoyment of income; here he may in fact have neither enjoyment of income nor power to appoint to his wife. In brief, the widow's maintenance privileges in this area depend on the donor of the power. She has a legitimate claim only when the donor made it possible for the decedent donee to make provision for his widow out of the appointive property. In these circumstances the maintenance and contribution formula should affect a general power of appointment.

What if the creator of the power stipulates that it may be exercised by the decedent only in conjunction with another person? For example, that other person might be the creator himself, or some other person having an adverse interest in the appointive property. For our purposes, a person would have an adverse interest if he could exercise the power in favor of himself or his estate, whether or not after the decedent's death he "may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor. . . ." [41] The applicant for maintenance should be excluded in these instances because the creator of the power did not give the decedent complete discretion to appoint the property to his

[40] Suggested Model Decedent's Family Maintenance Statute, §1(d), *infra*, Chap. 22.

[41] Int. Rev. Code of 1954, §2041(b)(C)(ii).

own dependents. The dependent should prevail, however, if she happened to be the person with the "adverse interest."

Under the maintenance and contribution formula, as expressed in the Suggested Model Decedent's Family Maintenance Statute,[42] any property received by the widow from her husband, whether by an inter vivos disposition, will, exercise of power of appointment, or otherwise, would be considered in determining her need. Under the existing forced share legislation, however, a diversity of results are reached when a widow renounces a will in which the husband exercised a power of appointment wholly or partially in her favor. It all depends on the wording of the particular statute; but in most cases the widow will not be permitted to retain the benefit conferred by the power of appointment.[43]

[42] *Infra,* Chap. 22.

[43] That the surviving spouse cannot retain the appointed benefit: Fiske v. Fiske, 173 Mass. 413, 53 N.E. 916 (1899); that the benefit can be retained: Huddy's Estate, 236 Pa. 276, 84 Atl. 909 (1912). But a later Pennsylvania case held that the benefit could not be retained when the decedent disposed of the appointed property and his own property as a common "blended" fund. Kates's Estate, 282 Pa. 417, 128 Atl. 97 (1925); and this rule has been clarified and expanded by statute to include cases in which the husband had not blended the property. Pa. Stat. Ann. tit. 20, §180.8(c) (1950). On these and similar problems see Phelps, "The Widow's Right of Election in the Estate of her Husband," 37 MICH. L. REV. 236, 401, 412–20 (1939); Simes and Smith, LAW OF FUTURE INTERESTS, §947 (2d ed. 1956); AMERICAN LAW OF PROPERTY, §§5.41, 23.22 (1952); also see 1 RESTATEMENT, PROPERTY, §332(2) (1940).

CHAPTER 17

Can The Widow Be Treated As A Creditor?

Property conveyed by voluntary transfer in fraud of creditors is vulnerable to the creditor's claim to the same extent as if it were still in the hand of the debtor.[1] If the transferee participated in the fraud the creditor's remedy is available even when the transfer was for consideration.[2] In addition to instances in which she actually *is* a creditor, the spouse may also attain that status in divorce and maintenance matters.[3] Why not, then, treat the surviving spouse as a creditor for purposes of attacking inter vivos "evasions"?

The suggestion is not without merit. We saw earlier[4] that vital community values are involved in financial protection to widows. And precedents are not lacking for preferring family needs to creditors' claims: homestead and family allowances have priority; inchoate dower is preferred in most

[1] Glenn, 1 FRAUDULENT CONVEYANCES AND PREFERENCES, §§58–62b (1940). As to trusts, *cf.* RESTATEMENT, TRUSTS, §156(c) (1935); RESTATEMENT, PROPERTY, §328 (1948 Supp.); Scott, "The Effect of a Power to Revoke a Trust," 57 HARV. L. REV. 362, 372, 374 (1944).

[2] Conveyances in fraud of creditors will not be set aside if the grantee is a purchaser for value without notice of the fraud. 27 C.J. *Fraudulent Conveyances*, §§474, 526–36 (1922). On the necessity for proof of participation by the donee in transfers in fraud of creditors, see Annot. 17 A.L.R. 728 (1922); also see, *supra*, Chap. 10, text at note 41.

[3] For example, the divorce statutes in some states permit her to set aside any conveyance made by her husband to prevent her from obtaining alimony. Glenn, *op. cit. supra*, note 1, §93C. Aside from such statutes the wife may act as a creditor in reaching conveyances of her husband that are in fraud of her right to accrued alimony. Most cases extend her the protection of the fraudulent conveyance statute; there is also authority to the effect that she is assisted by the general equity powers. *Id.*, §377. The remedy is available even before the divorce suit is instituted, and she may enjoin threatened transfers. Similar protection is afforded a wife who secures a judgment on accrued installments under a maintenance agreement.

[4] *Supra*, Chap. 2.

instances, the statutory share [5] in some instances. But the shoe is on the other foot when we consider protection against evasion. The three last-named devices are of uncertain value in the present state of the evasion case-law. As some courts have pointed out, the widow receives less actual protection than does the prospective bride (antenuptial transfer doctrine), the wife during coverture (common-law duty of support), and the divorced wife (alimony). Consider, for example, the plight of the married woman when her husband has deserted her prior to making the objectionable inter vivos transfer. Assuming that a divorce is either not feasible or not desired, it is of course possible that she can enforce the common-law duty of support. But there is no guarantee as to support after the husband's death; and the probabilities are that the average widow needs more support than does the average wife.[6]

On the other hand, the community values involved in the widow's claim differ from those involved in payment of creditors' claims. Different social goals should be enforced by different machinery. It seems clear that no fraudulent conveyance should be permitted to thwart collection of a legitimate creditor's claim; but not all inter vivos "evasions" should be amenable to the widow's claim. Her power to invade should depend on her need. Unnecessary encroachment on security of titles would also ensue if the widow, suing as a creditor, would be permitted to upset "collusive" transfers for consideration.

The judicial pronouncements on the point do not favor the widow. It is true that the custom of London cases [7] regard the widow as at least a quasi-creditor. It will be remembered however that the cases under the custom were much more liberal to the wife than are the more modern cases. This liberality may have been in compensation for the limited

[5] *E.g.*, Fla. Stat. §731.34 (1957).
[6] See discussion, *supra*, Chap. 2:3.
[7] See *supra*, Chap. 5:3.

property rights of married women during the long period of the custom.[8] Statements that the widow is a creditor may also be found in the cases involving antenuptial transfers. These cases involve the element of actual deception. Possibly the courts in the antenuptial transfer cases are more sympathetic to the plaintiff's claim than are the courts in the postnuptial evasion cases. It is arguable, of course, that the wife should receive the same legal protection regardless of whether the transfer induced or followed the wedding.

Many cases contain statements that the widow is a creditor,[9] or a quasi-creditor,[10] or even that she should be put in a more favored position than creditors.[11] These cases, however, by and large are either antenuptial transfer cases,[12] alimony or maintenance cases,[13] or cases under the custom of Lon-

[8] An early fraudulent conveyance decision in England had this to say: ". . . I must decree for the plaintiff, the creditors against the wife and children; for though I have always a great compassion for wife and children; yet, on the other side, it is possible, if creditors should not have their debts, their wives and children would be reduced to want." Taylor v. Jones, 2 Atk. 600, 603, 26 Eng. Rep. 758, 760 (Ch. 1743).

[9] Hamilton v. First State Bank, 254 Ill. App. 55 (1929) (misconstruing earlier Illinois cases); *cf.* Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894); also see the arguments of counsel in Feighley v. Feighley, 7 Md. 537, 547–60 (1855).

[10] McCammon v. Summons, 2 Disn. 596, 598 (Ohio 1859); Crain v. Crain, 17 Tex. 80, 98 (1856) (forced heirs).

[11] *E.g.,* Bolles v. Toledo Trust Co., 144 Ohio St. 195, 215, 58 N.E.2d 381, 391 (1944) (discussed, *supra,* Chap. 7, note 69); Thayer v. Thayer, 14 Vt. 107, 117–8 (1842) (citing custom of London cases); *cf.* Grover v. Clover, 69 Colo. 72, 169 Pac. 578 (1917); Ghormley v. Smith, 139 Pa. 584, 21 Atl. 135 (1891) (nonevasive); also see cases cited in argument of counsel in Hastings v. Hudson, 359 Mo. 912, 913, 224 S.W.2d 945 (1949). Some cases, without explicitly stating that the widow is a creditor, argue that she should be entitled to like protection, *e.g.,* Smith v. Smith, 22 Colo. 480, 489, 46 Pac. 128, 131 (1896) (disapproved in Moedy v. Moedy, *infra,* note 17).

[12] Dorrough v. Grove, 257 Ala. 609, 60 So.2d 342 (Ala. 1952).

[13] *Alimony:* Blankenship v. Hall, 233 Ill. 116, 125, 84 N.E. 192, 195 (1908); Oles Envelope Corp. v. Oles, 193 Md. 79, 65 A.2d 899 (1949); Fischer v. Fischer, 24 N.J. Super. 180, 93 A.2d 788 (1952) (wife cannot invade policemen's pension fund for alimony since she is a general creditor); Caldwell v. Caldwell, 259 App. Div. 845, 19 N.Y.S.2d 392 (2d Dep't 1940), *motion to dismiss appeal denied,* 285 N.Y. 517, 32 N.E.2d 819 (1941), *aff'd,* 285 N.Y. 655, 33 N.E.2d 866 (1941); *cf.* Deke v. Huenkemeier, 260 Ill. 131, 102 N.E. 1059, 48 L.R.A. (N.S.) 512

don.[14] And, of the purely evasion cases,[15] the authority cited is almost invariably from the above-mentioned group of cases.[16] Indeed, there seems to be no recent evasion case holding squarely that the widow is a creditor.[17] Nor is the widow's

(1913), *related hearing*, 289 Ill. 148, 124 N.E. 381 (1919); Small v. Small, 56 Kan. 1, 14, 42 Pac. 323, 327 (1895); Wright v. Holmes, 100 Me. 508, 514, 62 Atl. 507, 507–08 (1905); Armstrong v. Connelly, 299 Pa. 51, 149 Atl. 87 (1930) (maintenance).

[14] The fact that the forced share takes priority over creditor's claims is of course relevant: see *e.g.*, Smith v. Hines, 10 Fla. 258, 293 (1863–4). This case sustained the widow's claim, not on the ground that she was a creditor, or superior to a creditor, but because the husband had retained too much "dominion" over the res. The present Florida statutory share also takes precedence over creditors' claims: see note 5, *supra*.

[15] The language is often ambiguous; thus Ibey v. Ibey, 93 N.H. 434, 436, 43 A.2d 157, 158 (1945), *exceptions overruled*, 94 N.H. 425, 55 A.2d 872 (1947): "Just as future creditors are protected by statute from conveyances made with actual intent to defraud, similarly it is held by judicial reasoning that wives should be protected with respect to their distributive shares in the estates of their deceased husbands." Also see Rose v. Union Guardian Trust Co., 300 Mich. 73, 79, 1 N.W.2d 458, 460 (1942).

[16] *E.g.*, in Walker v. Walker, 66 N.H. 390, 394, 31 Atl. 14, 16 (1891) the court stated that "she stands in the equity, if not in the attitude, of a creditor . . . [M]arriage is equivalent to a pecuniary consideration." But none of the cases cited in the Walker case is squarely in point: Tyler v. Tyler, 126 Ill. 525, 21 N.E. 616 (1888) (maintenance and support); Johnson v. Johnson, 75 Ky. 485 (1877) (cited as 12 Ky. 485) (divorce suit jurisdictional problems); Jiggitts v. Jiggitts, 40 Miss. 718 (1866) (post marital transfer, but not authority for the point it is cited for); Bouslough v. Bouslough, 68 Pa. 495, 499 (1871) (stands for the opposite of what it is cited for); Killinger v. Reidenhauer, 6 S. & R. 531, 535 (Pa. 1821) (fraudulent mortgage by husband will not prevail against the widow *and* creditors); Reynolds v. Vance, 48 Tenn. 294 (1870) (decided under statute concerning transfers in fraud of dower); Boils v. Boils, 41 Tenn. 192 (1860) (alimony); Brewer v. Connell, 30 Tenn. 343 (1851) (decided under statute concerning transfers in fraud of dower); Green v. Adams, 59 Vt. 602 (1887) (alimony).

[17] Many cases state explicitly or by inference that the widow is not a creditor, as far as the evasion cases are concerned; in other words, she cannot have her husband's inter vivos transfers set aside under the statutes dealing with transfers in fraud of creditors. Maruska v. Equitable Life of U.S., 21 F. Supp. 841 (D. Minn. 1938); Moedy v. Moedy, 130 Colo. 464, 469–70, 276 P.2d 563, 566 (1954) (expressly disapproving Smith v. Smith, *supra*, note 11); Stewart v. Stewart, 5 Conn. 317 (1824); Cook v. Lee, 72 N.H. 569, 58 Atl. 511 (1904); Krause v. Krause, 285 N.Y. 27, 32, 32 N.E.2d 779, 780 (1941); In re Schurer's Estate, 157 Misc. 573, 576–77, 284 N.Y. Supp. 28, 32 (Surr. Ct. 1935), *aff'd*, 248 App. Div. 697, 289 N.Y. Supp. 818 (1st Dep't 1936) ("Objectant's contention that a widow should stand in as good a position as the creditor is chivalrous,

position improved if her husband had agreed by antenuptial contract to leave his "estate" to her, unless a definite sum was agreed upon.[18]

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though legally untenable"); Garrison v. Spencer, 58 Okla. 442, 160 Pac. 493 (1916); Farrell v. Puthoff, 13 Okla. 159, 74 Pac. 96 (1903); Richards v. Richards, 30 Tenn. 294 (1850); Gentry v. Bailey, 47 Va. (6 Gratt.) 594 (1850); Lightfoot's Ex'ors v. Colgin, 19 Va. (5 Munf.) 42, 72 (1813) (custom of London cases distinguished); *cf.* Haskell v. Art Institute, 304 Ill. App. 393, 26 N.E.2d 736 (1940); Boyle v. Smyth, 248 Ill. App. 57 (1928); McLaughlin v. McLaughlin's Adm'r, 16 Mo. 242 (1852); Sanborn v. Goodhue, 28 N.H. 48 (1853); In re Lorch's Estate, 33 N.Y.S.2d 157 (Surr. Ct. 1941); In re Wrone's Estate, 177 Misc. 541, 31 N.Y.S.2d 191 (1941); Bodner v. Feit, 247 App. Div. 119, 125, 286 N.Y. Supp. 814, 820 (1st Dep't 1936) (dissent); Robb v. Washington and Jefferson College, 103 App. Div. 327, 93 N.Y. Supp. 92 (1st Dep't 1905), *modified and aff'd*, 185 N.Y. 485, 78 N.E. 359 (1906) (charities); Del Conte v. Luca, 2 D.&C.2d 130 (Pa. 1954); Dunnett v. Shields, 97 Vt. 419, 123 Atl. 626 (1924); In re Peterson's Estate, 12 Wash. 2d 686, 123 P.2d 733 (1942); Mann v. Grinwald, 203 Wis. 27, 31–32, 233 N.W. 582, 584 (1930).

[18] In Mornes v. Lawrence Savings & Trust Co., 8 Lawrence L. J. 163 (Pa. 1949) a prospective husband agreed by antenuptial contract to leave his wife all of his estate in excess of $6000. The court held that the wife thereby became a creditor of the estate, but since no fixed sum had been agreed upon she was not a creditor for purposes of setting aside inter vivos transfers. Also see Eaton v. Eaton, 233 Mass. 351, 124 N.E. 37, 5 A.L.R. 1426 (1919); Mornes Estate, 79 D.&C. 356 (Pa. 1951); and citations in Jacobs and Goebel, CASES ON DOMESTIC RELATIONS, 661 (1952); *cf.* Pickell case, Appendix C, note 19, *infra*.

CHAPTER 18

Procedure: Who May Sue?

Normally, the evasion litigation is initiated by the surviving spouse. Having renunciation privileges not possessed by the other distributees,[1] it is up to her – not the personal representative – to complain about transfers in derogation of those privileges. In fact, she may prejudice her position if she permits the personal representative to bring suit on her behalf.[2] The *Halpern* case is illustrative. The majority opinion informed the widow (suing as executrix) that the transfers were valid; and Lewis, J. (concurring), sprinkled salt on her wounds, as follows: "Whatever personal rights the petitioner, as widow, may have in the estate of her husband, may

[1] Children or collaterals have no standing *per se* to attack inter vivos transfers of the decedent as being in "evasion" of their rights as distributees. Hirschfield v. Ralston, 66 N.Y.S.2d 59, 61 (Sup. Ct. 1946); *cf.* Schenectady Trust Co. v. Seward, 21 N.Y.S.2d 815, 817 (Sup. Ct. 1940). In some cases children or other distributees have joined the surviving spouse in bringing suit: *e.g.*, Wooton v. Keaton, 168 Ark. 981, 272 S.W. 869 (1925) (children); Rudd. v. Rudd, 184 Ky. 400, 214 S.W. 791 (1919) (child; undue influence alleged); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945) (child); Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894) (collateral heirs).

Two early Texas cases state that a child may set aside conveyances in fraud of his distributive share, if the parent retained either a life estate or the power to revoke: Crain v. Crain, 17 Tex. 80 (1856), *aff'd on second appeal,* 21 Tex. 790 (1858); Epperson v. Mills, 19 Tex. 66 (1857). In Harrell v. Hickman, 147 Tex. 396, 403, 15 S.W.2d 876, 880 (1949), the court questioned the statement in the Crain case that reservation of a life estate makes a deed testamentary. *Cf.* Huie, "Community Property Laws as Applied to Life Insurance," 18 TEXAS L. REV. 121, 134 (1940).

[2] *Cf.* Cochran's Adm'x v. Cochran, 273 Ky. 1, 115 S.W.2d 376 (1938); Farrell v. Puthoff, 13 Okla. 159, 74 Pac. 96 (1903). *Contra:* Mann v. Grinwald, 203 Wis. 27, 32, 233 N.W. 582, 584 (1930) (under Wisconsin statute; dictum only); *cf.* Grover v. Clover, 69 Colo. 72, 169 Pac. 578 (1917) (suit by personal representative to set aside transfer in evasion of the widow's allowance, the latter being a *claim* against the estate); Barroll v. Brice, 115 Md. 498, 80 Atl. 1035 (1911) (surviving spouse dies; no inter vivos transfer in dispute).

not be enforced in a proceeding, such as the one before us, brought by her as executrix." [3] Certainly, the surviving spouse should bring suit in her own behalf in a jurisdiction committed to the "partial defeasance" notion.[4] The amount recoverable in such a suit is earmarked for the spouse.

Nevertheless, although it may not be safe to relegate the action entirely to the personal representative, it may be prudent to join him as co-plaintiff. The court conceivably may declare that it has always followed or is now adhering to the "reality" test – in which event the personal representative should be the plaintiff.[5] Furthermore, if there is any chance of the transfer being declared a sham – or colorable, or obtained by fraud, undue influence and the like – it may be to the advantage of the surviving spouse to have the transfer invalidated on that ground by the personal representative.[6] In some circumstances she might take all, as the sole distributee. When she attacks the instrument as a fraud on her elective share, however, the court may restrict her to her elective share in the recaptured assets, even when it permits defeasance in toto.[7]

[3] 303 N.Y. 33, 45, 100 N.E.2d 120, 126 (1951); *cf.* a well-written note in 25 N. Y. U. L. REV. 920, 923 (1950). As to the widow's right to bring a stockholder's derivative action with respect to her deceased husband's stock, pending probate, see Steuer v. Hector's Tavern, 1 M.2d 614, 148 N.Y.S.2d 402 (1955).

[4] Sykes, "Inter Vivos Transfers in Violation of the Rights of Surviving Spouses," 10 MD. L. REV. 1, 9 (1949).

[5] *E.g.,* In re Leiman's Estate, 116 N.Y.S.2d 658, (Surr. Ct. 1952), *aff'd without opinion,* 281 App. Div. 764, 118 N.Y.S.2d 750, (2d Dep't 1952), *leave to appeal denied,* 119 N.Y.S.2d 230, 112 N.E.2d 288 (2d Dep't 1953); *cf.* Bodner v. Feit, 247 App. Div. 119, 123, 286 N.Y. Supp. 814, 818 (1st Dep't 1936) (dissenting opinion). Frequently the surviving spouse sues individually and as personal representative, *e.g.,* Poole v. Poole, 96 Kan. 84, 150 Pac. 592 (1915). If it is not entirely clear which rationale is followed—as in New York at the present time with reference to transfers other than Totten trusts—presumably the widow should join the personal representative as co-plaintiff.

[6] The personal representative is the proper party to bring suits to set aside transfers of this sort, but a distributee may sue in the event that the personal representative unreasonably refuses to sue, or when none has yet been appointed. In Merz v. Tower Grove Bank and Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939) the personal representative, joined as co-defendant, was permitted defeasance in toto, by crossbill.

[7] See discussion, *supra,* Chap. 9:2.

But it should not be assumed that the evasion question arises only on the initiative of the widow. In some cases the personal representative started the ball rolling, e.g., in seeking instructions,[8] or in requesting settlement of his account.[9] And suit may be brought by the donee; [10] or by a trustee, whether in seeking instructions,[11] in settlement of accounts,[12] or in attempting to remove a cloud on title.[13] Usually the issue will arise in a court having equitable jurisdiction,[14] but it has also arisen in a court of law.[15] Interpleader cases may be found; [16] and in several instances the surviving spouse sued for damages incurred from a "conspiracy" to defraud her of her marital rights.[17] In several cases the widow brought a declaratory judgment action.[18] The issue may arise in the

[8] *E.g.,* Kelley v. Snow, 185 Mass. 288, 70 N.E. 89 (1904); *cf.* Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944).

[9] *E.g.,* In re Kalina's Will, 184 Misc. 367, 53 N.Y.S.2d 775 (Surr. Ct. 1945), *appeal dismissed by default,* 270 App. Div. 761, 59 N.Y.S.2d 525 (2d Dep't 1946).

[10] *E.g.,* In re Rynier's Estate, 48 Lanc. Rev. 475, *aff'd,* 347 Pa. 471, 32 A.2d 736 (1943) (presentment of claim).

[11] *E.g.,* Norris v. Barbour, 188 Va. 723, 51 S.E.2d 334 (1949).

[12] *E.g.,* Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S.2d 648, (3rd Dep't 1939), *appeal denied,* 256 App. Div. 1026, 11 N.Y.S.2d 547, *aff'd without opinion,* 281 N.Y. 760, 24 N.E.2d 20 (1939).

[13] *E.g.,* National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950). In this case the cloud was occasioned by the widow's claim that the trust was invalid.

[14] *E.g.,* Lines v. Lines, 142 Pa. 149, 21 Atl. 809 (1891).

[15] *E.g.,* Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905) (administrator brings trover; widower at that time in Maine had no "forced share").

[16] United Building & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); Weisman v. Metropolitan Life Ins. Co., 7 N.Y.S.2d 565 (Sup. Ct. 1938), *aff'd without opinion,* 256 App. Div. 914, 10 N.Y.S.2d 414 (1st Dep't 1939).

[17] *E.g.,* Maruska v. Equitable Life Assur. Soc. of United States, 21 F. Supp. 841 (D. Minn. 1938); *cf.* Samson, Adm'x v. Samson, 67 Iowa 253, 25 N.W. 233 (1885).

[18] Morrison v. Morrison, 99 Ohio App. 203, 132 N.E.2d 233 (1955); Estate of Brown, 384 Pa. 99, 119 A.2d 513 (1956).

lifetime of the offending spouse,[19] or after the death,[20] or remarriage [21] of the surviving spouse, or while she is a minor [22] or mentally incompetent.[23]

Parenthetically, a spot check of one hundred and fifty evasion cases reveals that in the great majority of the cases the widow is surviving spouse.[24] One hundred and twenty-six of these cases (eighty-four per cent) involve widows; twenty-four cases (sixteen per cent) involve widowers. These figures prove little, other than that most "evasions" are perpetrated by husbands. And this in turn is to be expected in view of the economic superiority of husbands,[25] the fact that women live longer than men, and the fact that in some states, e.g., Florida, the widower does not have a forced share.

[19] Bee Branch Cattle Co. v. Koon, 44 So.2d 684 (Fla. 1949) (suit by wife, individually and as curator for her mentally incompetent husband, to set aside husband's transfers); De Noble v. De Noble, 331 Pa. 273, 200 Atl. 77 (1938); *cf.* Beck v. Beck, 64 Iowa 155, 19 N.W. 876 (1884) (dower); Buzick v. Buzick, 44 Iowa 259 (1876) (dower); Delaney v. Delaney, 133 N.E.2d 915 (Ohio C.A. 1956); Mann v. Grinwald, 203 Wis. 27, 31, 233 N.W. 582, 584 (1930). *But cf.* Galewitz v. Walter Peek Paper Corp., 145 N.Y.S.2d 402, 405 (Sup. Ct. 1955).

[20] Hastings v. Hudson, 359 Mo. 912, 224 S.W.2d 945 (1949) (widower dies after the trial, action revived in name of his administrator and heirs).

[21] *E.g.,* Smith v. Hines, 10 Fla. 258 (1863–4); see discussion of this factor, *supra,* p. 167.

[22] *E.g.,* Potter Title & Trust Co. v. Braum, 294 Pa. 482, 144 Atl. 401 (1928) (widow aged eighteen).

[23] *E.g.,* Hastings v. Hudson, 359 Mo. 912, 224 S.W.2d 945 (1949); York v. Trigg, 87 Okla. 214, 209 Pac. 417 (1922).

[24] As to equities, if any, based on the sex of the claimant, see p. 173, *supra.*

[25] See discussion, *supra,* Chap. 2:3.

PART IV

POSSIBLE LEGISLATIVE SOLUTIONS

CHAPTER 19

Solutions Based On Retention Of The Typical Statutory Share

Now that we have concluded our survey of the "evasion" case-law we should be able to decide on the advisability of remedial legislation. How do we make the decision? Why, by going back to first principles. Do the existing legislative and judicial controls in this field achieve the desired community goals? Is the statutory protection against disinheritance of the family geared to need? In testing "evasions" do the courts have discretion to weigh and balance the applicant's need against the legitimate expectations of the donee? In brief, does the statutory share, as interpreted by the courts, enunciate the principles of the maintenance and contribution formula?

1. SHOULD WE PRESERVE THE STATUS QUO?

The objective evidence indicates that we need new legislation, to meet modern conditions. The typical statutory share is a product of the nineteenth century when — relatively — there was less inter vivos property transmission. Nowadays the emphasis is on inter vivos dispositive devices. Consequently, effective protection against disinheritance requires some degree of interference with these devices. This interference is justifiable only when its purpose is to alleviate the need of deserving members of the surviving family. Under the statutory share, however, there is no criterion of need; and the courts are given no directive on how to test inter vivos evasions. It is not surprising that the courts have responded with unsuitable rationales, some stressing the decedent's "motive," some stressing retention of "control," and

some rejecting *any* possibility of relief to the surviving spouse. Under these rationales one claimant may be rebuffed in spite of demonstrated need, another claimant may prevail although not in need. The first decision results in unwarranted family hardship; the second decision results in unwarranted appropriation of the donee's property. Both decisions are inconsistent with the maintenance and contribution formula. Both decisions harm the community.

And the statutory share is too inflexible in another respect. It fails to make allowance for the complicated family relationship resulting from a remarriage. In this situation the statutory share flouts the wishes of the average decedent. Usually he would prefer to give the great bulk of his capital to the children of his first marriage, with appropriate provision for the support of his widow, if such is needed.[1] Instead, the statutory share awards the widow a specified outright fraction of the decedent's capital. Presumably the theory is that this fractional share is needed in order to help the widow to support the children. In the remarriage cases, however, the widow's desires may not coincide with the welfare of the decedent's children. She may be at odds with them. In any event, she may have children of her own. These children have a prior claim on her for support during her lifetime, and for her property at her death.[2] Thus the existing legislation ensures a perpetual evasion problem. The husband will wish to "evade," when he has no affection for his second wife. Even when he *has* affection for her his natural inclination may well be to give the bulk of his property to his children. Indeed, the typical "evasion" case involves a stepmother, seeking to set aside the decedent's inter vivos transfers to children of a prior marriage.[3]

Nor have these shortcomings of the statutory share been

[1] See text, *supra,* Chap. 10, at note 38.

[2] The possibility that a husband may give *all* his property to his second wife indicates the necessity of protecting dependent children against disinheritance.

[3] See Chap. 10, note 35, *supra;* Chap. 18, text at note 24, *supra.*

remedied by the courts. To be sure, our analysis of the "equities" in the "evasion" cases revealed a close correlation between the actual decisions and the decisions that probably would have been reached under the maintenance and contribution formula.[4] But this analysis, although suggestive, is far from conclusive. Many of the cases examined had to be placed in the "not clear" category; in other words, the state of the equities could not be deduced owing to inadequate judicial recital of the facts. Moreover, even if we assume that the courts are consciously or subconsciously following the desired formula we cannot ignore the fact that the announced rationales suggest otherwise. In short, the courts may be following the equities, but they certainly do not say so. This state of affairs should be remedied, if only to give greater predictability to property owners and estate planners. The maintenance and contribution formula should be given legislative sanction. In other words, protection against disinheritance should be related to need, and the courts should be given a positive legislative directive to decide "evasion" cases by balancing the equities between the applicant for maintenance and the donee.

We shall now examine proposals that have been made by others for legislative reform based on retention of the statutory share. Later, in Chapter Twenty, we shall draw on the experience of the civil law. Chapter Twenty-one will be devoted to the Decedent's Family Maintenance legislation of the British Commonwealth. Finally, in Chapter Twenty-two, a model statute will be suggested.

2. Tests Based on "Fraud"

Section 33(a) of the Model Probate Code provides that a gift "in fraud of the marital rights" of a surviving spouse may be treated as a testamentary disposition, and applied to the payment of the spouse's share.[5] Section 33(b) states that "any

[4] See Chap. 12, *supra, passim.*

[5] For complete text see Appendix B, *infra,* p. 333; also see Mo. Ann.

gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary." A more detailed proposal is found in the 1939 Report of the Commission on Revision of the Laws of North Carolina Relating to Estates.[6] Under the North Carolina scheme the widow, but not the widower, is permitted to invade such of the decedent husband's gratuitous transfers as were either revocable or made within a year of death and in contemplation thereof. There is a rebuttable presumption that transfers made within one year prior to death were made in contemplation of death. The proposed North Carolina statute also contains valuable procedural suggestions. Moreover, it aids estate planning by charging the widow with property received in designated inter vivos transfers, as well as property received from the decedent's estate.[7] The complete text of the "evasion" provisions of the Model Probate Code and of the North Carolina proposal is set out in Appendix B,[8] with explanatory comments supplied by the respective authors of each plan.

Note that both proposals place great stress on the proximity of the transfer to the date of death. In the Model Probate Code the burden is on the donee to show absence of fraud when the transfer was made within two years of death. Under the North Carolina plan there is a rebuttable presumption of fraud if "the transfer be in contemplation of the hus-

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Stat. §474.150 (Supp. 1955), discussed p. 114, *supra;* Tenn. Code Ann. §8365 (Williams 1934), discussed p. 110, *supra;* Vt. Stat. §3039 (1947): "A voluntary conveyance by a husband of any of his real estate made during coverture and not to take effect until after his decease, and made with intent to defeat his widow in her claim to her share of his real estate, shall be void and inoperative to bar her claim to her share of such real estate. The husband shall be deemed at the time of his death to be the owner and seised of such real estate for the purpose of assigning and setting out such share to his widow." For the Vermont law see p. 108, *supra.*

[6] REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES, 44–48 (1939).

[7] *Id.,* Art. 6, §2; also see §5(c), referring to property that may have been received "upon the husband's death." In the Model Probate Code (§32) the surviving spouse is charged only with estate assets.

[8] *Infra,* p. 333.

band's death and take place within one year prior thereto." [9] In an earlier chapter [10] it was suggested that the "proximity to death" factor should not receive any particular stress in testing evasions of the widow's share. Analysis of the cases shows that the litigated transfers are by no means confined to "deathbed" transfers, or even to transfers made within two years of death. And the "contemplation of death" notion is not helpful: it is too ambiguous.[11] Possibly it may be traced to the present Section 2035 of the Internal Revenue Code of 1954, concerning transfers "in contemplation of death." If so, the confusion in the tax cases is a poor advertisement for this test. "The present subjective test of transfers in contemplation of death works abominably, or to be precise, it does not work at all." [12]

The Model Probate Code proposal is also vague as to the type of transfers that are affected. Indeed, the "comment" to the section in question suggests that the courts would have to decide whether or not inter vivos revocable trusts and Totten trusts would be affected by the proposed statute.[13] The North Carolina plan, on the other hand, affects transfers made more than one year before death only when they are revocable. This restriction, which also appears in the Pennsylvania legislation,[14] deprives the widow of effective protection against disinheritance.

Finally, neither proposal concerns itself with the claimant's "need." [15] For this reason alone, if not for the reasons men-

[9] §5(a)(1).

[10] Chap. 10, pp. 148–154, *supra.*

[11] *Id.* at 151.

[12] Lowndes and Rutledge, "An Objective Test of Transfers in Contemplation of Death," 24 TEXAS L. REV. 134, 158 (1945).

[13] Also see Niles, "Model Probate Code and Monographs on Probate Law: A Review," 45 MICH. L. REV. 321, 330 (1947); Mechem, "Why Not a Modern Wills Act?" 33 IOWA L. REV. 501, 514 (1948).

[14] Discussed *supra,* Chap. 9:4.

[15] Art. 7 of the North Carolina proposal contains useful provisions for barring the rights of unworthy spouses, but the criteria are, in the main, manslaughter and desertion. The grasping spouse who does not need the money is not excluded. Note also that under §5(c) of the North Carolina proposal the donee of the inter vivos transfer is liable regardless of the value of the estate assets.

tioned above, neither proposal seems to offer a permanent solution to the evasion problem.

3. The Federal Estate Tax Analogy

Another possibility is to utilize the "gross estate" concept of the federal estate tax regulations.[16] To gear the widow's elective rights to the gross taxable estate would certainly give her more extensive protection than she would receive under the Model Probate Code or the North Carolina plan. Her claim would "affect" any property in which the husband had a beneficial interest at death, or which he had transferred in contemplation of death. She could "invade" her husband's life insurance, joint ownership interests, revocable trusts, powers of appointment, and other border-line devices — at least to the extent that these devices would leave the property concerned includible in the husband's gross taxable estate. And (say some writers), predictability would be enhanced: the tax regulations are definitive, and the legal profession is familiar with them.[17]

I have not used the gross estate analogy in the suggested model statutory provisions appearing in Chapter Twenty-two.[18] Probably the estate tax regulatory scheme achieves its community purpose, but this scheme does not necessarily suggest the proper legislative cure for inter vivos evasions of the spouse's share.

What *are* the community goals implicit in death taxes? Well, these taxes are a fairly recent phenomenon in the

[16] Suggesting the "gross estate" analogy: Simes, Public Policy and The Dead Hand, 28–31 (1955) (in modified form); Note, 27 N. Y. U. L. Rev. 306, 312 (1952); also see Atkinson, "Succession," Annual Survey of American Law, 749, 755 (1948); Cahn, "Restraints on Disinheritance," 85 U. Pa. L. Rev. 139, 152 (1936); Niles, "Model Probate Code and Monographs on Probate Law: A Review," 45 Mich. L. Rev. 321, 331 (1947). The appropriate provisions of the Internal Revenue Code of 1954 are set out in Appendix B, part 3, *infra*.

[17] *E.g.*, Note, 27 N. Y. U. L. Rev. 306, 313 (1952).

[18] Some of the estate tax concepts, however, proved of great value in framing the model statute, *e.g.*, see the provisions of §1 dealing with powers of appointment.

United States.[19] It seems clear that they are here to stay, but there is some doubt as to what they are all about.[20] As far as the estate tax is concerned, the most popular theory is that it tends to equalize wealth.[21] The importance of preventing undue concentration of wealth cannot be minimized. Democracy means equality of opportunity. Without death taxes there could be an oligarchy of the purse. Money breeds money; [22] it is only wishful thinking to postulate "shirtsleeves to shirtsleeves" in any foreseeable number of generations. In short, the curbing of unreasonably large fortunes is probably a vital urge of the American community.[23] But this means that the estate tax must be enforced without partiality or discrimination, against *all* estates in the designated brackets; and it must affect *each* of the designated inter vivos transfers made by the decedent. If this scheme were to be used to test evasions of the statutory share it would be as mechanical in operation as the statutory share itself. Having regard neither to the claimant's need nor the equities of the donee, it is the antithesis of the maintenance and contribution formula.

It would, of course, be possible to combine the tax regulations with the maintenance and contribution formula. The tax regulations could be used to delineate the types of inter vivos "transfers" that would be affected by the spouse's claim; and assertion of that claim against any particular transfer

[19] By the beginning of the present century only twenty-six states had inheritance taxes of varying types. Wisconsin in 1903 led the way in taxing direct heirs. The federal estate tax began in 1916.

[20] See, in general, Paul, TAXATION FOR PROSPERITY (1947); Seligman, ESSAYS IN TAXATION, Chap. 5 (10th ed. 1925); Schulz, "Inheritance Taxation," 8 ENCY. SOC. SCI. 43 (1932); Cahn, "Time, Space and Estate Tax," 29 GEO. L. J. 677, 682–88 (1941).

[21] The estate tax has also been justified as a prop of the national fisc. But death taxes amount to only a little more than one per cent of the total tax yield of the federal government. See table 7, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY FOR THE FISCAL YEAR ENDED JUNE 30, 1952, pp. 550–54.

[22] The statistics that are available indicate that "ownership of wealth is much more concentrated than that of income." Blodgett, PRINCIPLES OF ECONOMICS, 426 (1946).

[23] Morris R. Cohen, LAW AND THE SOCIAL ORDER, 30 (1933); Wedgwood, THE ECONOMICS OF INHERITANCE 1, (1929).

could then be handled in accordance with the formula. This compromise scheme could even be used in conjunction with the existing elective share legislation: thus the elective share would determine the claimant's share in the decedent's estate; the tax regulations would designate the types of inter vivos devices that would be vulnerable to the claimant; and the maintenance and contribution formula would determine the degree of recovery from particular donees, with an "elective share" fraction of all the relevant inter vivos devices constituting the *upper* limit of recovery. But this would be a forced union — a misalliance. Once the principles of the maintenance and contribution formula are accepted they should — for consistency's sake — be used to determine both the share in the estate and the claim against the inter vivos transferee. Nor do the estate tax provisions necessarily suggest the best delineation of the types of inter vivos devices that should be subject to the spouse's share. For example, the surviving spouse should have a stronger claim against the husband's life insurance than she would have under the present estate tax provisions. Moreover, the present regulations concerning powers of appointment are not entirely appropriate for determination of spouses' rights. The same comment may be made with respect to the tax provisions dealing with transfers in contemplation of death. Nor would a *modified* use of the tax provisions be wholly satisfactory. The fundamental objection would still remain that problems of spouses' rights could not be solved without reference to, and familiarity with, a rather complicated and relatively impermanent set of regulations that express a different community policy. The cure must fit the disease.

CHAPTER 20

Civil Law Solutions

The civil law approach is too mechanical for our purposes. Nevertheless, the comprehensive rules of the civil law form a treasure house of useful ideas.

It is possible that the main regulatory pattern was set by the Romans.[1] At any rate, their rules are similar to the modern civil-law provisions. This is not surprising. Covering a period longer than the life of the Anglo-American legal system, Roman law dealt with many of the problems that now concern us. These problems were occasioned by familiar circumstances: failure to provide for the surviving family; democratic notions on freedom of alienation; marital disharmony; and changes in the status of women.[2] The solutions start with the early rule that the next of kin had to be mentioned in the will in order to be disinherited; and they conclude with the "legitim" of Justinian, by which the favored members of the family were assured a designated portion of the decedent's property.

1. QUERELA INOFFICIOSI TESTAMENTI

If a testator failed to make a specified provision for his children and nearest heirs [3] the disappointed heirs could have

[1] *But cf.* LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW, 185 (1955).

[2] For an analysis of the "family" in Roman history, see ZIMMERMAN, OUTLINE OF THE FUTURE OF THE FAMILY, 18–38 (1947).

[3] The *querela* could be brought by three groups of relatives: descendants, ascendants, and brothers and sisters. The two latter groups could attack the will only in the event of no attack by the prior group or groups. The last group (brothers and sisters) could bring the *querela* only if *turpes personae*—persons of infamy, bad character, etc.—had been preferred to them. LEE, ELEMENTS OF ROMAN LAW, 208 (1946 ed.). Critical of the view that parents were eligible is SCHULZ, HISTORY OF ROMAN LEGAL SCIENCE, 235 (1946); also see Schulz' stric-

the *querela inofficiosi testamenti,* or "plaint of an unduteous will." This remedy, which became available in the early Empire, was based upon the supposed insanity of the testator in not providing for his heirs. The fiction of insanity is said to have been derived from Greek law.[4] The fiction was later dropped for a rationale emphasizing the rights of the disappointed heir.[5] We are told that the *querela* was from the beginning "based upon the ancient idea of family ownership than upon the more modern conception, that a testator is under a duty to provide after his death for those related to him by near kinship." [6] The amount [7] that could be obtained was at first discretionary, but eventually was fixed by statute at one fourth of what the claimant would have received as his intestate share. Justinian later increased this amount in the case of children to one third, if there were not more than four children, and one half if there were more than four children.

Acceptance of benefits under the will would bar the *querela.* In certain instances the claimant had to make allowance for anything that he had received by inter vivos gift from the testator.[8] Moreover, the claimant had to show

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tures on the terminology of the *querela* in his CLASSICAL ROMAN LAW, 275–79 (1951).

[4] Sohm, INSTITUTES OF ROMAN LAW, 556, note 6 (3rd ed. 1907). *Cf.* Maine, ANCIENT LAW, 209, (1912 ed.). For an account of the influence of Greek and Roman institutions on the ancient Egyptian law of inheritance, in particular with respect to the rights of forced heirs, see Taubenschlag, THE LAW OF GRECO-ROMAN EGYPT IN THE LIGHT OF THE PAPYRI, 158–59, (1st ed. 1944).

[5] Lee, ELEMENTS OF ROMAN LAW, 454, note 92 (1946 ed.).

[6] Leage, ROMAN PRIVATE LAW, 187 (3rd ed. 1924). Muirhead ascribes the advent of the *querela* to a general slackening in religious and moral scruples. Muirhead, HISTORICAL INTRODUCTION TO THE LAW OF ROME, 244 (3rd ed. 1916); also see Buckland, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW, 195–96 (1931); Cooper, THE INSTITUTES OF JUSTINIAN, 518 (3rd ed. 1852) (comparing the custom of London with the *querela.*)

[7] "In connection with the *querela* it was known as the *portio legibus debita* or the *legitima portio* (the statutory portion) and in modern usage is termed 'the legitim'." Lee, *op. cit. supra,* note 5, at 208. *But cf.* Schulz, CLASSICAL ROMAN LAW, 276 (1951).

[8] Moyle, IMPERATORIS IUSTINIANI INSTITUTIONES, 283 note 6, (2nd ed.

that he had no other means of attacking the will; for example, the *querela* was not available to an emancipated son, since he could get another remedy from the praetor.[9] It was also denied to a claimant who had been disinherited for just cause, e.g., because of an attempt on the testator's life. Justinian specified fourteen grounds for disinheriting children, with fewer grounds for disinheriting parents, brothers, and sisters.[10] These grounds related to breach of family duty.

Originally a successful attack would void the will in toto.[11] Under Justinian, however, the will would be set aside only to the extent necessary to provide for the claimant. If anything at all had been left him in the will, he was given an action to supplement it up to the statutory share.[12] Significantly, protection was afforded against excessive inter vivos gifts.[13] The *querela inofficiosae donationis* and the *querela inofficiosae dotis* were developed to protect the claimant whose share was diminished by an immoderate inter vivos gift, or *dos,* as the case may be. The gift or *dos* would be rescinded and used, so far as necessary, to make up the claimant's full statutory share.[14]

2. The Légitime

The thoroughgoing protection afforded by the Roman legitim is reechoed in the modern légitime. This powerful institution has endured despite changing times, changing ideas. In Louisiana, for example, it has if anything grown in strength, as indicated by its "sanctification" in the Louisiana

1890), and references therein cited; Radin, Handbook of Roman Law, 442, (1927).

[9] Lee, *op. cit. supra,* note 5, 204–07.

[10] Buckland, A Text-book of Roman Law, 331 (1950).

[11] However, if there had been two "instituted heirs" it was possible in a given case that only partial intestacy would result. Lee, *op. cit. supra,* note 5, 209. Also see Buckland, A Text-book of Roman Law, 330 (1950).

[12] Sandars, The Institutes of Justinian, 543 (1941 ed.).

[13] *But cf.* Buckland & McNair, Roman Law and Common Law, 168 (Lawson ed., 1952).

[14] Sohm, Institutes of Roman Law, 558 (3rd ed. 1907).

Constitution of 1921.[15] In the Louisiana community the values implicit in freedom of property transmission have long been mortgaged to the communal concern for the welfare of the surviving family. In the case of land, not even the purchaser for value without notice can shake off the family claim. In a sense, we have in the légitime a modern manifestation of the original group-ownership of wealth, in which no individual transmission was permitted.[16] Under the légitime, however, the group is the family. The family property is charged with family support. "It is the family's means of life from which no member can be shut out except for positive misconduct." [17]

The légitime applies only to the gratuitous dispositions of the deceased. As to these transactions,

> "the law divides the estate of every person into two parts, of which one is called the *disposable* portion, of which he may dispose gratuitously according to his pleasure; the other is called the *reserve* or *forced portion,* of which he is not permitted to dispose gratuitously to the prejudice of his legitimate descendants or ascendants, to whom the law *reserves* it and *forces* the person to leave it, and who are, therefore, called *forced* heirs." [18]

The Louisiana Civil Code states that "Donations *inter vivos* or *mortis causa* cannot exceed two thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one half, if he leaves two children; and one third, if he leaves three or a greater number." [19] Similarly these dona-

[15] La. Const. of 1921, Art. IV, Section 16. "No law shall be passed abolishing forced heirship. . . ."

[16] *Cf.* G. D. H. Cole, "Inheritance," 8 ENCY. SOCIAL SCIENCES, 35 (1932); also see Cairns, "The Explanatory Process in the Field of Inheritance," 20 IOWA L. REV. 266 (1934).

[17] Cole, *supra,* note 16, 36. On protection of the children of the first marriage in early French law, see Brissaud, A HISTORY OF FRENCH PRIVATE LAW, 156–7 (1912) (3 Continental Legal History Series).

[18] Tessier v. Rousell, 41 La. Ann. Rep. 474, 477, 6 So. 542, 543 (1889). A forced heir may waive his right to claim the légitime, Succession of Fertel, 208 La. 614, 635, 23 So.2d 234, (1945).

[19] La. Civ. Code Ann. art. 1493 (West 1952). Art. 1493 also states that

tions "cannot exceed two thirds of the property, if the disposer, having no children, leaves a father, mother, or both." [20] These forced heirs [21] cannot be deprived of their reserved portion by the decedent, "except in cases where he has a just cause to disinherit them." [22] A decedent cannot make a donation inter vivos which divests himself of all his property. If he does not reserve to himself enough for subsistence, the transaction is "null for the whole." [23] Aside from this exceptional case, however, the rule is that "any disposal of property, whether *inter vivos* or *mortis causa,* exceeding the *quantum* of which a person may legally dispose to the preju-

"Under the name of *children* are included descendants of whatever degree they be, it being understood that they are only counted for the child they represent."

[20] La. Civ. Code Ann. art. 1194 (West 1952).

[21] As in the typical civil law jurisdiction, the widow in Louisiana is not a forced heir, *i.e.,* she is not protected by the légitime. Nevertheless, other devices exist for her benefit; and the over-all trend is to better her position. She has community property; she has the homestead if she is "in necessitous circumstances"; and she has the "marital fourth": if the decedent spouse "died rich," the survivor may be awarded a fourth of the succession, with provision for temporary allowances.

Ordinarily in community property states the community property stands in the husband's name, and he has power to manage, sell, transfer, and encumber. Has the wife any remedy if the husband gives away the community property? It all depends. The cases on this point look very much like the cases in the common law states on "evasions" of the statutory share. There is considerable stress on "intent to defraud," particularly in California, Nevada and Texas. In the main, however, the decisive criterion appears to be the comparative size of the transfer. The cases are analysed in a carefully-written article: Huie, "Community Property Laws as Applied to Life Insurance," 18 TEXAS L. REV. 121 (1940); also see de Funiak, 1 PRINCIPLES OF COMMUNITY PROPERTY, s. 122, (1943); Succession of Geagan, 33 So.2d 118 (La. 1947), discussed in Chap. 15, note 30, *supra.* As to transfers of life insurance in "fraud" of the community, see Chap. 15, note 77, *supra.*

[22] La. Civ. Code Ann. art. 1495 (West. 1952). On disinherison see *id.* arts. 1617–24; Cahn, "Disinherison as It Developed Historically," 10 LOYOLA L. J. 41 (1929); Oppenheim, "The Revocation of a Testamentary Disinherison," 16 TUL. L. REV. 97 (1941).

[23] La. Civ. Code Ann. art. 1497 (West. 1952). This rule has some curious inconsistencies, Comment, 6 LA. L. REV. 98 (1944). The article apparently can be invoked only by the donor; the forced heirs may not act until the donor's death. La. Civ. Code Ann. art. 1503 states that "A donation inter vivos, exceeding the disposable *quantum,* retains all its effect during the life of the donor."

dice of the forced heirs, is not null, but only reducible to that quantum." [24] The latter doctrine also contrasts favorably with the disposition on the part of some courts in common-law states to effect a total defeasance of the inter vivos disposition in order to give the surviving spouse a fractional share.[25]

The strength of the légitime lies in the power of the forced heirs to reach inter vivos transfers.[26] Articles 1505 states:

> "To determine the reduction to which the donations, either *inter vivos* or *mortis causa* are liable, an aggregate is formed of all the property belonging to the donor or testator at the time of his decease; to that is fictitiously added the property disposed of by donation inter vivos, according to its value at the time of the donor's decease, in the state in which it was at the period of the donation.
>
> The sums due by the estate are deducted from this aggregate amount, and the disposable quantum is calculated on the balance, taking into consideration the number of heirs and their qualities of ascendant or descendant, so as to regulate their legitimate portion by the rules above established." [27]

Donations mortis causa are, naturally, exhausted first, and then donations inter vivos in reverse chronological order, the last being appropriated first.[28] Immovable property may

[24] *Id.* art. 1502; also see *id.* art. 1503, *supra,* at note 23.

[25] See discussion, Chap. 9:2.

[26] La. Civ. Code Ann. art. 1504 (West. 1952).

[27] La. Rev. Stat. §22:647 (1950) (Acts 1948, No. 195, Section 14.37) provides that the proceeds of life insurance, endowment and annuity contracts are not subject to the rules of forced heirship; see discussion p. 240, *supra.* The language of art. 1505 is broad enough to include donations made while the donor was a bachelor with no living parents. Dicta to the contrary are examined in Fenner, "An Example of Homeric Nodding in Relation to the Reduction of Donations Inter Vivos," 1 SOUTHERN L. Q. 129, 137–38 (1916). He concludes that the prudent practitioner would decline to prove a title based on such a donation "unless it can be shown that the donor has died leaving no forced heirs, or in the event that he left forced heirs, that the said donation did not exceed the disposable portion of the estate, whether at the time the donation was made the donor was married or unmarried."

[28] La. Civ. Code Ann. arts. 1507–08 (West. 1952). Legacies are reduced pro rata (*id.* art. 1511) unless the testator expressly states that a legacy is to be preferred (*id.* art. 1512).

be brought into the succession "without any charge of debts or mortgages created by the donee." [29] As far as immovable property is concerned, the action may be brought against transferees from the donee "in the same manner and order that it may be brought against the donee himself, but after discussion [30] of the property of the donee." [31] Notice that the forced heir's rights with reference to third parties apply only to immovables. The légitime in this respect is no harsher than common-law dower; in fact, it is not as severe: it does not catch genuine sales.

The Louisiana courts have evolved the action *en declaration de simulation* by which forced heirs are given the power to recover property transferred by a simulated sale of the decedent.[32] This action probably cannot be brought against a good-faith purchaser, even to enforce the légitime.[33]

3. The "Reserved Portion": Continental Examples

Variations of the "reserved portion" may be found in the individual civil-law jurisdictions. By way of example we shall glance at the German and Swiss provisions.

(a) *Germany.* The German Civil Code has complicated rules for augmentation of the compulsory portion (*Ergänzung des Pflichtteils*). These rules (as well as the Swiss provisions) are set out in Appendix B.[34] The mechanics of the German scheme are similar in rigidity and complexity to that of the légitime. Some points, however, are of special interest. Con-

[29] *Id.* art. 1516. "If the donee has successively sold several objects of real estate, liable to the action of revindication, that action must be brought against third persons holding the property, according to the order of their purchases, beginning with the last, and ascending from the last to the first," *id.* art. 1518; also see *id.* arts. 1281–82. The vendee from a donee can repel the demand by offering to pay the heirs their money, Stockwell v. Perrin, 112 La. 643, 36 So. 635, (1904).

[30] *I.e.*, using up, appropriating.

[31] La. Civ. Code Ann. arts. 1517–18 (West 1952); Comment, 2 La. L. Rev. 387, 389, note 20 (1940).

[32] See cases mentioned in Comment, 2 La. L. Rev. 387, 389, note 18 (1940).

[33] *Id.* at 389–90.

[34] *Infra,* p. 333, at pp. 347, 351.

sumables are valued as of the date of the gift. "Other matters" are valued as of the time of the accrual of the inheritance, but not to exceed the value as of the date of the gift.[35] There is a ten year cut-off point on the liability of donees; [36] and no liability exists if the gift was made "in compliance with a moral duty or the rules of social propriety," [37] e.g., a gift made to an indigent blood relative, or a "reward for voluntary service." [38] The donee may refuse to return the gift upon payment of its value.[39] Among several donees a prior donee is liable only in so far as a subsequent donee is not liable.[40] And, finally, the claim of the "compulsory beneficiary" against the donee is barred in three years.[41]

(b) *Switzerland.* The Swiss Civil Code has a more moderate approach.[42] Reduction of gifts to persons other than heirs is restricted to the following: ". . .

> 3. Gifts which the donor had full liberty to revoke and those which he made within the five years preceding his death, with the exception of presents made on occasions when they are customary;
> 4. Alienations made by the deceased with the evident intention of evading the rules restricting his freedom of disposition. [43]

And a measure of flexibility is provided: a child who is an invalid or who has not received his education is entitled to preferential benefits, payable either in a lump sum or as an annuity.[44] Moreover, the surviving spouse may not take her compulsory share if she has been bequeathed a usufruct in the whole of the share of the common descendants. We have

[35] German Civil Code (*Bürgerliches Gesetzbuch,* cited hereafter as G.C.C.) §2325. For a definition of consumables see §92.
[36] G.C.C. §2325.
[37] G.C.C. §2330.
[38] *Id.,* note (f).
[39] G.C.C. §2329.
[40] *Ibid.*
[41] G.C.C. §2332.
[42] For detailed provisions see Appendix B, *infra.*
[43] Swiss Civil Code, (cited hereafter as S.C.C.) §527 (1907).
[44] See *id.* art. 631 par. 2; arts. 14, 273–74.

already encountered this notion in New York.[45] The Swiss also have a practicable approach to the problem of the decedent's life insurance. When the policy is payable to a person other than a compulsory heir the redemption value as of the date of death is "added to the value of the estate" [46] and is subject to reduction.[47] The permissible period for bringing the reduction action seems overly long (10 years after death), but this is to cover the contingency that the "evasion" may not be immediately discernible at the time of death. Once discovered, action must be brought within one year.[48]

4. Some Ideas from the Civil Law

The basic civil-law approach seems too inflexible. Stress on blood relationship — regardless of dependence — is foreign to the maintenance and contribution formula. Nevertheless, the civil-law experience may help us to solve some of the problems involved in legislative implementation of the formula.

Take the question of valuation, for instance. The experience under the légitime indicates that no rule on this question will be completely satisfactory, but that *some* rule must be adopted. Article 1505 of the Louisiana Civil Code states that in computing the value of the mass any inter vivos donation is fictitiously added "according to its value at the time of the donor's decease, in the state in which it was at the period of the donation." "Value" apparently means the market value of articles of like nature, not the inventory value nor the value stated on the assessment rolls. Article 1506 says that "In the fictitious collation of effects given by act *inter vivos* by the deceased, those which have perished by accident

[45] N.Y. Deced. Est. Law, §18(d), discussed p. 74, *supra*.
[46] S.C.C. §476.
[47] *Id.*, §529.
[48] *Id.*, §533. For references to the Swedish system (reserved portion, subject to the child's right of maintenance) and to maintenance for children in Russia, see Yadin, "The Proposed Law of Succession for Israel," 2 Amer. J. Comp. Law, 152 (1953).

in the hands of the donee, are not included; those which have perished through his fault only are to be included." Presumably this means that the loss is borne by the succession if the property deteriorates through natural causes. The donee is credited with any increase in value attributable to his improvements; but increase due to natural causes or a rise in the market enures to the succession.[49] As has already been mentioned,[50] the Germans distinguish between consumables and non-consumables. Consumables are valued as of the date of the gift (which seems harsh on the donee); and non-consumables are valued as of the time of the accrual of the inheritance, but not to exceed the value as of the date of the gift. In the model statute suggested in the next chapter [51] I borrowed in part from the following Swiss provision: "A donee who has acted bona fide is liable to restore only the amount by which he is still enriched by the gift at the date of the opening of the succession." [52]

Consider also the civil-law rules relating to the order of reduction or "abatement," of inter vivos gifts, and to the "cut-off" point. As to reduction, under the civil law the inter vivos gifts usually are affected in reverse chronological order, the last in point of time being exhausted first.[53] This method has the great advantage of certainty, thus enhancing predictability. Moreover, the donee who takes last in point of time — particularly when the gift was made close to the donor's

[49] See a well-written comment by J. E. Pierson, in 12 TUL. L. REV. 262, 270 (1938). "Suppose, for example," states Pierson, "that in 1920, *A* donated to *B* an automobile worth $900. In 1935, *B* sold the car to a second-hand dealer for $100. *A* died in 1937. Applying Article 1505, the amount which should be computed in the mass of the succession is the value of the 1920 car in 1937 in the "state" in which it was in 1920. In such a case, the natural deteriorations would probably be borne by the succession."

It may be seen that too literal a reading of Article 1505 involves complications. The Suggested Model Decedent's Family Maintenance Statute §9(b), *infra,* Chap. 22, attempts to simplify the problem.

[50] See text at note 34, *supra.*

[51] *Infra,* p. 301.

[52] S.C.C. §528; see Appendix B, *infra.*

[53] *E.g.,* S.C.C. §532.

death – is less likely to have a strong "reliance interest." In the suggested model statute, however, I thought it best to give the court a discretion in this matter,[54] in keeping with its discretion in other matters under the statute. The reliance interest of the individual donees would, of course, influence the court's decision. The civil law "cut-off" provision furthers the reliance interest of *all* donees. The German Civil Code states: "The gift is not taken into consideration if, at the time of the accrual of the inheritance, ten years have elapsed since delivery of the object given. . . ." [55] The Swiss scheme affects gifts only when they were made within five years of death, unless they were revocable or made "with the evident intention of evading the rules restricting . . . freedom of disposition." [56] The "cut-off" idea appears in the model statute.[57]

[54] Suggested Model Decedent's Family Maintenance Statute, § 9, *infra,* Chap. 22.

[55] G.C.C. §2325.

[56] S.C.C. §527(3) and (4).

[57] Suggested Model Decedent's Family Maintenance Statute, § 8, *infra,* Chap. 22.

CHAPTER 21

The British Commonwealth "Decedent's Family Maintenance" Legislation

1. GENERAL CHARACTERISTICS

Back in Chapter 5 we concluded that the solution to the American "evasion" problem lies in adoption of flexible legislative and judicial controls both on the decedent spouse's freedom of testation and on his freedom of inter vivos property transmission. As far as controls on freedom of testation are concerned, the British Commonwealth Decedent's Family Maintenance statutes merit careful study. These statutes authorize the courts to award maintenance payments out of the decedent's estate to deserving members of the surviving family; and the case-law indicates that the scheme is a practicable one. The significance is obvious. If augmented by appropriate anti-evasion provisions these Commonwealth controls would embody the desired maintenance and contribution formula. In other words, they suggest the answer to our "evasion" troubles.

The year 1938 marked the close of a little over a century of unfettered freedom of testation in England. With the enactment in that year of the Inheritance (Family Provision) Act [1] England [2] joined the ranks of Commonwealth jurisdictions that have adopted "maintenance" legislation.[3] The distinc-

[1] 1 & 2 Geo. 6, Chap. 45 (1938). Dainow has contributed a valuable account of the legislative history of the English act, including the arguments pro and con in the parliamentary debates on the successive bills, Dainow, "Limitations on Testamentary Freedom in England," 25 CORNELL L. Q. 337 (1940).

[2] The act does not affect Scotland or Northern Ireland. As the Scots would say, it applies only to the "Sassenachs."

[3] "Family maintenance" legislation originated in New Zealand at the turn of the century. The Family Protection Act, 1900, N.Z. Stat. 64 Vict. No. 20, as amended, N.Z. Stat. 11 Geo. 6, No. 60, §15 (1947).

tive feature of this type of legislation is its flexibility. Relief is tailored to individual need, in contrast with the fixed minimum portions of the légitime and of the typical American forced share. Under the English Act, for example, a court may order that periodic payments be made out of the income of the net estate if the court believes that the decedent did not make "reasonable provision" for the surviving spouse or natural and adopted children.[4] In awarding maintenance payments, the court is to consider the interests of the persons who otherwise would be entitled to the property concerned, the financial position of the applicant, the conduct of the applicant with relation to the testator, the testator's reasons for his dispositions, and any other circumstances that the court deems relevant. The court may order a lump sum award when the estate is under a designated amount. The

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Similar statutes were passed in the Australian states in the following years: Victoria 1906, Tasmania 1912, Queensland 1914, New South Wales 1916, South Australia 1918, and Western Australia 1920. In Canada, British Columbia adopted the New Zealand act in substance in 1920, and the three other Western provinces finally passed restricted maintenance legislation in the following years: Alberta (1947), Saskatchewan (1940), and Manitoba (1946). Ontario entered the fold in 1929.

The most recent account of maintenance legislation is found in the excellent article by Joseph Laufer: "Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation," 69 HARV. L. REV. 277 (1955); also see Albery, THE INHERITANCE (FAMILY PROVISION) ACT 1938 (1950) (English); Macdonell & Sheard, PROBATE PRACTICE, 92–104 (1953) (Ontario); Mason, Tuthill, & Lennard, THE PRINCIPLES AND PRACTICE OF TESTATORS' FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (1929); Smith, INTESTACY AND FAMILY PROVISION (1952) (English); Stephens, THE LAW RELATING TO TESTATORS' FAMILY MAINTENANCE IN NEW ZEALAND (1934); Tillard, FAMILY INHERITANCE (2d ed. 1950) (English); Wright, TESTATORS' FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (1954); Dainow, "Restricted Testation in New Zealand, Australia and Canada," 36 MICH. L. REV. 1107 (1938); Kennedy, "Testators' Dependants Relief Legislation," 20 IOWA L. REV. 317 (1935); Wiren, "Testator's Family Maintenance in New Zealand," 45 L. Q. R. 378 (1929); Comments, 53 HARV. L. REV. 465 (1940); 27 CAN. B. REV. 228 (1949); 18 *id.*, 261, 449 (1940); 17 *id.*, 181, 233 (1939).

[4] Relief may be applied for by a wife or husband, a daughter who has not been married or who is by virtue of mental or physical disability incapable of maintaining herself, an infant son or a son who is by reason of mental or physical disability incapable of maintaining himself. Inheritance (Family Provision) Act, §1(1) (1938).

court may also attach conditions to the award; and in any event the payments end upon the cessation of the dependence, e.g., when the widow remarries. By recent amendment the English act was made applicable to intestate estates.[5] Nevertheless, it remains narrower in scope than many of the other Commonwealth statutes. Under the parent New Zealand act, for example, the class of eligible dependents includes parents and illegitimate children; periodic payments may be made out of capital; and there are no restrictions on lump sum awards.

Despite their heavy responsibility under this type of legislation the courts have done an efficient and conscientious job.[6] If anything, they have been conservative in dealing with applications. Consider, for example, the fundamental inquiry as to whether or not the decedent made a "reasonable" or an "adequate" provision for his dependents. As an English commentator has said, the English statute envisages a reasonable provision as "not a single point but an area." [7] In short, there is a range – the extent of which depends on the circumstances – within which provisions of varying amounts all could be classed as reasonable. Any provision less than the lower limit of that range confers jurisdiction on the court. The result is that judicial interference with the decedent's plan of distribution is kept to a minimum. Ironically, sometimes judicial intervention has the incidental effect of *carrying out* the decedent's intention: thus the testator may have changed his mind after making the will, or the provision made for the applicant may have been frustrated by subsequent events or by the operation of some legal doctrine.

[5] Intestates' Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, Chap. 64, Mitchell, "Intestates' Estates Act 1952," 16 MODERN L. REV. 206, 211 (1953).

[6] Laufer, "Flexible Restraints on Testation, " 69 HARV. L. REV. 277, 293 (1955).

[7] Albery, THE INHERITANCE (FAMILY PROVISION) ACT, 1938, 8 (1950); Macdonell and Sheard, PROBATE PRACTICE, 96 (1953); Unger, "The Inheritance Act and the Family," 6 MODERN L. REV. 215, 224 (1943); Note, 72 L. Q. R. 18 (1956).

In fixing the amount of the award the Commonwealth courts consider "that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. . . ." [8] It is conceived to be a moral duty of the husband to give the widow more than the bare means of subsistence.[9] In general, the maintenance award approximates her standard of living during her husband's lifetime, as circumscribed by the amount in the husband's estate, her own financial position, and the merits otherwise of her claim.

The award is generally made in the form of an annuity. This tends to protect the dependent from the perils stemming from inexperience in business or investments; at the same time, it leaves the rest of the estate free for distribution. A lump sum settlement is sometimes expedient, owing to the small size of the estate or urgent need on the part of the applicant. When future needs cannot be presently ascertained the courts usually have been willing to issue a "suspensory order," which ties up the estate for the time being.[10]

The maintenance scheme has not resulted in a flood of litigation. In fact, relatively few cases have resulted,[11] in contrast with the vast crop of headnotes that have bobbed up under the New York forced share legislation of 1930. Undoubtedly the discretionary nature of maintenance legislation, which discourages unmerited claims, has much to do with this phenomenon.

The maintenance claim must be *meritorious,* in addition to showing need. Maintenance legislation is not a public welfare device, although it may have the incidental effect of alleviating the strain on the tax rate. The scheme taps the

[8] Allardice v. Allardice, 29 N.Z.L.R. 959, 973 (1910), *aff'd,* [1911] A.C. 730 (P.C.).

[9] *Id.* at 969. In re Borthwick, [1949] 395, the widow had been left an annuity of 250 pounds, and the net estate amounted to 130,000 pounds; held, annuity increased to 1000 pounds. See however, Note by V. Evan Gray, 17 CAN. B. REV. 233 (1939).

[10] Laufer, *supra,* note 6, at 292.

[11] *Id.* at 314.

decedent's own funds, in those cases in which the decedent was morally remiss in not providing adequate post-mortem support for his family. In other words, the awards are made only when the decedent could have and *should* have made them. This *ad hoc* enquiry into the merits of the case means that the amount of the award is not necessarily determined by demonstrated need. Thus a New Zealand judge: "I think . . . that the plaintiff's conduct as a husband in those respects in which it fell short must be taken into account in considering the quantum of relief to be granted." [12] It is not surprising that the courts are more disposed to grant relief to widows than to widowers; that they are more solicitous of minor children than of adult children; and that the length of the marriage is a relevant, although not decisive, factor. Moreover, the very flexibility of the maintenance scheme makes it ideal for reconciling the conflicting family claims arising from remarriages. Indeed, the wide latitude given to the courts is reflected in the occasional decision preferring the actual "homemaker" to the one who had been a wife in name only.[13]

2. Inter Vivos "Evasions"

The maintenance claim is just as vulnerable to inter vivos transfers as is the widow's share under the typical American statute, but so far there seems to be no critical "evasion" problem in maintenance jurisdictions. Not all Commonwealth statutes cover the point, but those that do so provide only for maintenance out of the "estate." The handful of decisions involving inter vivos transfers take the position that property

[12] Williams v. Cotton, [1953] N.Z.L.R. 151, 153 (Sup. Ct. 1952).

[13] *E.g.*, Re Joslin, [1941] Ch. 200, 1 All. E. R. 302. Here the husband's will left all of his small estate (about 370 pounds) to the woman with whom he was living and by whom he had had two small children. He had deserted his wife after they had lived together "reasonably happily" for 19 years. The other woman was not destitute, but the widow had a small income. The widow's application was rejected. *Cf.* Andrews v. Andrews, [1940] P. 184 (divorce case), 4 Modern L. Rev. 307 (1941). In general, see Unger, "The Inheritance Act and the Family," 6 Modern L. Rev. 215 (1943).

passing by these transfers cannot be considered part of the "estate." [14] There is, however, authority to the effect that a contract to leave property by will does not supersede maintenance legislation.[15]

Why such a paucity of litigation over inter vivos "evasions?" Does it mean that the maintenance system is intrinsically superior to the system of forced shares in preventing evasions — or is there some other explanation? To answer these questions we must consider the evasion cases from the viewpoint of the equities.

The maintenance system seems superior in all cases in which the equities are clearly against the surviving spouse.

[14] In re Paulin, [1950] Vict. L. R. 462 (payments into bank account with testator as trustee); In re Knight, New Zealand [1939] GLR 673, 675–76 (testator in late seventies buys expensive annuities "in a perverse intention to exclude his family from participation . . . in his estate"); Thompson v. Thompson [1933] N.Z.L.R. Supp. 59 (gift of farm and stock three months before death); Re Dalton and Macdonald [1938] 1 W.W.R. 758, 52 B.C.R. 473, 2 D.L.R. 798 (B.C.) (life insurance payable to children held immune to widow's attack); Re Kerslake [1957] S.C.R. 516 (life insurance); Dumoulin v. Dumoulin [1939] Ont. C.A. (unreported case discussed by V. Evan Gray in 17 CAN. B. REV. 233, 237–8 (1939); gift of money made shortly before death, donee agreeing to maintain donor during his lifetime and pay his funeral expenses, the balance to go to the donee); *cf.* Nosworthy v. Nosworthy [1906] 26 N.Z.L.R. 285 (special power of appointment); Re Dawson [1945] 3. D.L.R. 532 (B. C. Sup. Ct.) (checks issued and cashed within a week of death held to be in payment of earnings); Re Young [1955] O.W.N. 789, 791 (Surr. Ct. Ont.) (federal annuity); Naylor v. Grantley [1940] 1 D.L.R. 716 (Ont.) (assignment of life insurance to nurse; opinion indecisive). Also see Albery, THE INHERITANCE (FAMILY PROVISION) ACT, 1938, 17 (1950); Macdonell & Sheard, PROBATE PRACTICE, 94 (1953).

[15] Dillon v. Public Trustee of New Zealand [1941] A.C. 294 (contract before second marriage to leave farm to children of first marriage, who had supplied valuable consideration); *cf.* Olin v. Perrin, [1946] 2 D.L.R. 461, O.R. 54 (C.A.) (Ont.). The Dillon case is criticized in 19 CAN. B. REV. 603 (1941), 20 *id.* 72 (1942), Theobald, WILLS, 95 (11th ed. 1954), and is praised in 20 CAN. B. REV. 756 (1941). Also see Notes, Kiralfy, "Freedom of Testation under the English Inheritance Act of 1938," 61 JURID. L. REV. 186, 189; S. J. Bailey in 6 CONVEY. (N.S.) 63, 64 (1941). On contracts to make a will as a device for "evasion" of the American statutory share, see Appendix D, *infra*, p. 366. On the effect of an agreement by the dependent not to claim maintenance, see Laufer, *supra*, note 6, 300–02; National Assistance Board v. Parkes [1955] 3 W.L.R. 347, 3 All E.R. 1, 19 MODERN L. REV. 90 (1956).

Here there can be no evasion problem; she cannot legitimately complain about inter vivos transfers if she is not even entitled to maintenance. This in turn enhances the stability of property transactions. Thus when a husband makes generous inter vivos provision for the wife, or when she is independently wealthy, or when she is clearly remiss in her marital obligations, the maintenance legislation prevents her from upsetting the husband's estate-planning arrangements. Under the American scheme, however, she can blunder in like a cow in a china shop.

When the equities favor the applicant, however, the Commonwealth legislation seemingly provides no protection against inter vivos transfers – probably even less protection than under the American legislation, where there are at least some judicial controls on *some* types of transfer. Why, then, so few "evasion" cases under the maintenance statutes? Why no village Hampden to cry the doctrine of illusory transfers? The answer, if there be one, may lie in a combination of factors. For one thing, marital disharmony is probably not as acute in the Commonwealth, if divorce statistics are a reliable guide.[16] Possibly marriage settlements are more popular in the Commonwealth, although we cannot be sure.[17] We assume that the Commonwealth lawyers are well aware that the maintenance statutes are vulnerable to inter vivos transfers; [18] but perhaps counsel for the applicants consider the validity of these transfers to be too well settled to risk litigation. Whatever the answer, the authorities have not been un-

[16] *But cf.* Mace, "Family Life in Britain Since the First World War," 272 ANNALS AMER. ACAD. POL. & SOC. SCI. 179, 182 (1950). Some Commonwealth jurisdictions have narrow divorce laws. On the other hand, this circumstance seemingly would incite inter vivos "evasions." See discussion *supra,* pp. 12–15.

[17] The figures given in Wedgwood, THE ECONOMICS OF INHERITANCE (1929) at p. 237 indicate substantial marriage settlements, at least up to 1926.

[18] The Appendix to Albery, THE INHERITANCE (FAMILY PROVISION) ACT, 1938 (1950) contains a form of trust deed entitled "Settlement upon Mistress and Illegitimate Child for Purpose of Evading the Provisions of the Act."

aware of the problem.[19] Nor can there be any doubt that maintenance legislation would need anti-evasion provisions if it is to be completely effective in the United States.

We may profit in this respect by the Israeli example. The "ingathering of the dispersed" [20] has inspired a survey of the laws of all countries. The object is a fresh start, with the emphasis on practicability. In the field of succession law this has resulted in the preparation of a draft bill [21] which adopts the British Commonwealth family maintenance scheme. One of the most interesting points about this bill is the realistic acknowledgement that protection is needed against inter vivos evasion. Section 74 provides:

> "If the estate is not sufficient to provide maintenance for all entitled to it, the court may consider as included in the estate:
>
> (1) Anything disposed of by the decedent during his lifetime that may be reasonably considered to have been so disposed with the intent of defeating maintenance rights.

[19] I have a letter from Sir Clifton Webb, Minister of Justice for New Zealand, dated 14th April, 1953, stating that the general opinion in New Zealand is that deliberate inter vivos evasions of the maintenance legislation are infrequent. I have permission to quote the letter, which states in part:

> ". . . The majority of testators who exclude relatives from a share in their estate probably consider that they are justified in doing so. The general practice has grown up that where a testator by his will excludes a relative who would be entitled to claim under the Act a special note of the reasons is taken with the instructions for the will. If a claim is made later the trustees are then able to give this information to the Court. Cases rarely come before the courts simply because the law on the subject is quite clear. We have not, however, been indifferent to the problem. The only reason why nothing has been done to amend the legislation is that we have not succeeded in devising a practicable method of avoiding dispositions made to defeat claims without causing as many anomalies and injustices as are cured. The question was last considered a year or so ago by our Law Revision Committee which decided that no practicable remedy was possible."

[20] Yadin, "The Proposed Law of Succession for Israel," 2 AM. J. COMP. L. 143, 147 (1953).

[21] A SUCCESSION BILL FOR ISRAEL 93–107 (Harvard Law School Transl. 1952); *id.* (Sept. 1953 Revision) 27–33 (Harvard Law School Transl. 1954).

(2) Anything given away by the decedent within two years of his death without consideration.

The court may order the donee to return to the estate or to pay maintenance in an amount equal to what is left in his hands at the time of the decedent's death and if he did not receive it in good faith in an amount equal to what he received."

The flexibility and simplicity of the Israeli anti-evasion provisions is of course in keeping with the spirit of maintenance legislation. An equally flexible but somewhat more detailed proposal is made in the Suggested Model Decedent's Family Maintenance Act, which appears in the next chapter.

CHAPTER 22

Suggested Model Decedent's Family Maintenance Act

The provisions of this tentative draft follow the growing trend toward shifting the burden of support from the state to the individual who is, or should be, responsible for maintaining his immediate dependents. Indicative of this trend is the widely adopted Uniform Reciprocal Enforcement of Support Act, which is aimed at that individual when he is living. The suggested family maintenance act extends the responsibility of support in favor of his immediate surviving family. The over-all purpose is twofold: to provide reasonable support for the surviving family and to recognize and delineate the decedent's power of inter vivos alienation.

The draft does not purport to be free from imperfections. It has not had the advantage of extensive scrutiny by specialists in the field or by persons who would have the task of practical administration. It is offered in the hope that it will be useful to those who are concerned with the reform of succession law.

The proposal consists of family maintenance legislation buttressed with anti-evasion provisions. The basic aim is to associate curbs on disinheritance with financial need. Protection against testamentary transfers is given only to immediate members of the decedent's surviving "family" who have not received a reasonable provision from the decedent by way of testamentary or inter vivos transfer, or pursuant to the intestacy laws. The emphasis on financial need puts the evasion problem in proper focus. The petitioner who is denied maintenance is thereby precluded from complaining about the testator's inter vivos transfers. In other words, maintenance litigation and anti-evasion litigation can occur

only when the testator has not made reasonable provision for specified dependents. Hence much of the evasion problem disappears.

For the successful petitioner, however, the anti-evasion protection is comprehensive. The act provides for judicial control over practically all inter vivos transfers that are made within a designated period of time before death. In this respect the act is much broader than current judicial doctrine; for example, the "illusory transfer" test catches only revocable transfers. In other respects the act is narrower and more selective. It affects only those transfers that, when viewed alone or in the aggregate, are unreasonably large (section 6); it establishes cut-off dates (section 8); and it directs the court to keep in mind any injurious effect on the transferee (section 9).

Large discretionary power is placed in the courts. This discretion must be exercised on three main issues. First, the court must decide whether the petitioner is entitled to maintenance (section 3). Second, whenever the estate is insufficient to provide appropriate maintenance awards, the court may order contribution from an inter vivos transferee if the court determines that the transfer was unreasonably large. The "unreasonableness" of the amount of the transfer is tested by reference to circumstances prevailing at the time of the transfer (section 6). Third, if the transfer is held unreasonably large, the court must then determine the amount of contribution, if any, to be made by the transferee. In the last mentioned inquiry the courts are *directed* to balance the equities; they must consider the injurious effect on the particular transferee (section 9).

The reliance interest of transferees is reflected in cut-off provisions (section 8), in waiver provisions (section 17), and in the provision for a hearing in the decedent's lifetime to determine the reasonableness of the transfer (section 18).

Administration of the act is allocated to the courts that have jurisdiction in matters of an equitable nature. These courts will be aided by permanent fact-finding officials. Un-

deniably, the heavy responsibility placed on the courts may pose a problem in judicial administration. The act is based on the assumption that American judicial personnel can and will assume that responsibility. In view of the British Commonwealth experience there is no insuperable reason why maintenance legislation could not be used successfully in this country. Moreover, our analysis of the case-law on "evasions" of the statutory share suggests that the American courts tend to balance the equities in these cases. The proposed act would give legislative sanction to this tendency.

The act is intended to be a complete replacement for the statutory share and for judicial doctrines relating to "evasion" of the statutory share. The act should also supplant inchoate dower. A legislature that so wished could use the act in conjunction with inchoate dower, but the inflexible nature of dower makes the combination an undesirable one. The act would supplement and further the purpose of homestead legislation. Before enactment it would need to be co-ordinated with statutes permitting summary distribution of the assets of small estates. It should supplant existing family allowance statutes.

SUGGESTED MODEL DECEDENT'S FAMILY MAINTENANCE ACT

SECTION 1. *Definitions.* As used in this act, unless the context requires otherwise:

(a) "Child" includes:

(1) a legitimate son or daughter of the decedent;
(2) an adopted son or daughter of the decedent;
(3) an illegitimate son or daughter of the decedent, who immediately prior to the decedent's death was wholly or partially supported by the decedent or entitled by law to receive such support;

(4) a stepchild who immediately prior to the decedent's death was wholly or partially supported by the decedent or entitled by law to receive such support;
(5) a posthumous son or daughter of the decedent, whether legitimate or illegitimate.

COMMENT

The act does not apply to grandchildren. This restriction represents a compromise between the conflicting policies of family support and finality of property transactions. In most instances the decedent has no legal or moral responsibility to support his grandchildren. If he assumes the responsibility of support, the chances of deliberate disinheritance seem slight. The exclusion of grandchildren may bring about occasional hardship cases, but to include them would undoubtedly entail administrative inconvenience as well as uncertainty for transferees. This reasoning also applies a fortiori to other relatives or non-relatives who may have been supported by the decedent in his lifetime. However, some states impose support duties in favor of needy grandchildren, parents, or grandparents. See the table of basic support duties in the introduction to the Uniform Reciprocal Enforcement of Support Act, Uniform Laws Annotated, Vol. 9A, 1956 Supp. p. 103. Further, some states protect the divorcee who, not having remarried, was at the time of her husband's death receiving or entitled to receive support from him. In such states the present act could be expanded to give corresponding protection. Section 2 limits the present act to a child under 18, unless he is incapable of maintaining himself.

Illegitimate children are included if supported by the decedent in his lifetime, or if entitled to such support. "Entitled by law to receive such support" envisages the legal formalities that may be required in the decedent's lifetime, *e.g.*, acknowledgement. It also protects the illegitimate child whose parent failed to meet an existing support obligation.

A stepchild is eligible only if the decedent assumed the responsibility. Once the responsibility is assumed the stepchild will be "entitled by law to receive such support"; whether or not the support is given.

(b) "Court" means the court with original jurisdiction over matters of an equitable nature.

COMMENT

The act rests on broad and novel judicial controls. This makes it desirable to use the "equity" court instead of the probate court. In some states probate judges need not be lawyers. In many states the probate court lacks the equitable powers that are needed to enforce an order under section 6 requiring contribution from a transferee. *Cf.* Note, "Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees," 48 YALE L. J. 1273 (1939).

(c) "Estate" means the property of the decedent that is transmitted at his death by testamentary disposition or under the laws dealing with intestacy, less amounts required for payment of taxes, funeral expenses, administration expenses, and secured and unsecured claims. For the purposes of this act "estate" includes:

(1) any property that is transmitted at the decedent's death by the exercise, non-exercise, release, or lapse of a power of appointment created or reserved by the decedent, within ten years of his death, exercisable by any person or persons including the decedent;

(2) any property of the decedent that is subject at the decedent's death to an unexercised power of appointment created or reserved by the decedent within ten years of his death, exercisable by any person or persons including the decedent;

(3) any property that is transmitted by the decedent at the time of his death by the exercise, non-exercise, release, or lapse of a power of appointment created by a person other than the decedent, and exercisable by the decedent in favor of the decedent, his estate, his creditors, or the creditors of his estate. "Estate" does not include

any property as described in this clause if the power of appointment was exercisable by the decedent only in conjunction with a person or persons having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent.

COMMENT

Elective rights under the American statutory share usually are subordinated to the claims of creditors (Chapter 2, *supra,* text at note 5). Apparently there is a corresponding limitation on maintenance privileges under the British Commonwealth family maintenance statutes. *Cf.* WRIGHT, TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND, 4 1954).

For the purposes of this act "estate" is deemed to include property transmitted at the decedent's death by virtue of a power of appointment created or reserved by the decedent. It includes any property which at the decedent's death is subject to an unexercised power of this type. It also includes property which the decedent transmits at his death by virtue of a general power of appointment created by another person. Inclusion of these general powers in the definition of "estate" prevents the "relation back" doctrine (Chapter 16, *supra,* text at note 27) from excluding the maintenance claim of the surviving family. The language pertaining to general powers is taken from the Internal Revenue Code of 1954, §2041.

Section 1 (c) (1) and (2). These two clauses affect powers of appointment reserved by the decedent in connection with a transfer. They also affect powers of appointment created by the decedent with no accompanying transfer. The ten-year restriction is inserted in order to co-ordinate subsection (c) with section 8. Section 8 establishes a ten-year cut-off date with respect to the liability of transferees to contribute to maintenance awards.

The act does not cover special powers of appointment created by a person other than the decedent. The disposition of such property is within the owner's discretion. But if the owner places his property at the disposal of the decedent, under a general power, the decedent will not be permitted to evade his family responsibilities.

(d) "Transfer" means any postnuptial inter vivos transmission of property by the decedent for substantially less than an adequate and full consideration in money or money's worth. "Transfer" includes any such transmission of property at any time after the birth of an illegitimate child whether or not the decedent later marries the child's other parent. For the purposes of this act a transmission of property in a genuine business transaction will be considered as made for an adequate and full consideration in money or money's worth.

"Transfer" includes, but is not restricted to, a transmission of the decedent's property effected by such methods as gift, gift causa mortis, revocable or irrevocable trust, creation of any joint interest, contract to make a will, and any contract, such as life insurance, under which the decedent purchased benefits payable at his death. Concerning powers of appointment, "transfer" means a transmission of the decedent's property effected by the exercise, non-exercise, release, or lapse of the powers of appointment described in the definition of "estate" in clauses (1) and (3) of section 1 (c).

COMMENT

The first sentence restricts the act to postnuptial transfers. For a discussion of antenuptial transfers see Appendix C. Since the act is limited to postnuptial transfers, the second sentence is needed in order to protect the illegitimate child whose parents never intermarried. Such a child would be excluded from the contribution provisions if he could complain only about "postnuptial" transfers. Concerning other petitioners, "postnuptial" must be related to the marriage with which the petitioner is associated. For the widow it refers to her marriage with the decedent. For a child it refers to the marriage of his parents, even though the decedent may later have remarried.

The first sentence also confines the act to those transfers which are either totally or partially gratuitous. Payment of substantially less than an adequate and full consideration will not suffice to take a transfer out of the act. It is, however, a factor that the court must consider under section 7 (4) in deciding the amount of contribution, if any, that is payable by the transferee. The word "substantially" is intended to ob-

viate any question of the act applying to ordinary business transfers. This notion is also expressed in the second sentence, which excludes a "genuine business transaction." The act is not intended to infringe upon commercial transactions. In other words, the act is designed to catch avowed or disguised gifts but not bad business bargains.

The first sentence of the second paragraph is designed to catch all gratuitous postnuptial dispositive devices except those that are specifically excluded. For example, the act applies to deeds of realty, gifts of personalty (see *supra,* p. 193), gifts causa mortis (pp. 197–198), revocable trusts (p. 201), irrevocable trusts (p. 205), bank account trusts, joint bank accounts, joint tenancies (p. 213), United States savings bonds (p. 230), partnership interests (p. 235), contracts to make a will (p. 372), life insurance (p. 241), annuities providing death benefits, employee death benefits, pecuniary obligations of the decedent payable at his death, and purchases by the decedent with title taken in the name of another. Some of these devices, of course, represent the result of a transfer as well as a method of transfer; for example, trusts. The existing case law pertaining to each of the above mentioned devices is discussed in Chapters 12-16 *supra.* The page references in parentheses indicate a discussion of the application of the act to the device in question.

Contracts to make a will are anomalous. These contracts normally are antenuptial and they often involve adequate consideration in money or money's worth. The proposed act would affect only postnuptial contracts. Under the existing case law, however, the courts tend to give adequate protection to the surviving spouse against the contract to make a will; see Appendix D, p. 373 *infra.* If the proposed legislative scheme is adopted it is probable that this tendency will be more pronounced, as far as antenuptial contracts are concerned. It may also be hoped that this judicial protection will be extended to children.

The last sentence concerns powers of appointment. "Transfer" is deemed to encompass the transmission of property in the decedent's lifetime by virtue of the powers of appointment previously described in the definition of "estate." Such "transfers" are affected by the act only if they occur subsequent to the applicable cut-off dates. These cut-off dates, which apply to all transfers otherwise subject to the act, are set out in section 8.

(e) "Transferee" means the recipient of the beneficial interest in the property concerned. "Transferee" includes a person who succeeds to such an interest upon the transferee's death, and any immediate or remote taker from the original transferee who provides substantially less than an adequate and full consideration in money or money's worth. "Transferee" does not include a person who acquires property or its proceeds by judicial sale or by condemnation proceedings from the decedent, from the original transferee, or from any subsequent taker.

COMMENT

The first sentence states in part that a "transferee" is the person beneficially entitled to the property in question. This is intended to preclude the possibility of a mere title-holder, *e.g.,* a fiduciary, being liable for contribution.

The second sentence includes in the definition of "transferee" any immediate or remote taker from the original transferee who does not provide sufficient consideration. The purpose is to prevent evasion of the act by avowed or disguised gifts on the part of a transferee. For restrictions on the amount contributable by any transferee, see section 9.

SECTION 2. *Eligible petitioners.* A petition for maintenance may be filed by or on behalf of the following persons and no others:

(1) the surviving spouse;
(2) a child who at the time of the decedent's death was under eighteeen; or
(3) a child who at the time of the decedent's death was eighteen or over but physically or mentally incapable of maintaining himself.

COMMENT

This section limits the class of persons eligible to petition for maintenance to the decedent's spouse and children. The reasons for this limitation are set out in the comment to Section 1 (a), which defines "child." Under section 11 (a) (3) periodic payments to an unmarried daughter under eighteen will cease upon her marriage. The procedure in filing petitions is set out in section 10.

SECTION 3. *Power of court to award maintenance.* The court may award maintenance from the estate in any amount it deems just if it determines that under the circumstances prevailing at the date of decedent's death the petitioner has not received a reasonable provision from the decedent by way of testamentary or inter vivos disposition or under the laws dealing with intestacy.

This section empowers the court to award maintenance to any petitioner who has "not received a reasonable provision" from the decedent. This phrase is vague by design; however, it gains some content from the provisions of section 4 which set out the factors to be considered by the court. The reasonableness of the provision made by the decedent is determined as of the time of death. This will prejudice the petitioner who experiences sudden and unanticipated need between the time of decedent's death and the time of the hearing. But these rare instances should not be within the decedent's responsibility. Moreover, the court is empowered under section 13(b) to award temporary maintenance.

Unlike the English family maintenance legislation, there is no limitation on the proportion of the estate that may be appropriated for maintenance awards. The provision made by the decedent may be inadequate even though it amounts to a sizeable fraction or all of the estate, since the estate may have been depleted by inter vivos transfers to persons other than the petitioner. The provision made by the decedent for the petitioner may have been made at any time, even antenuptially, since it includes, but is not restricted to, postnuptial "transfers." The act also applies when the decedent dies intestate. Sometimes the intestacy statutes may work an injustice. Florida, for example, gives the widow merely a child's share; Fla. Stat. §731.23 (1957). Ordinarily the widow would need more than a child's share.

SECTION 4. *Criteria of a reasonable provision.* In determining whether the petitioner has received a reasonable provision from the decedent the court shall consider:

(1) the petitioner's present and future financial need;

(2) any federal or state benefits receivable by the petitioner that are not predicated on his financial need;
(3) the value of the estate;
(4) the amount transferred by the decedent to persons other than the petitioner;
(5) the petitioner's conduct toward the decedent; and
(6) any other circumstance that the court deems relevant.

COMMENT

This section provides criteria to guide the court in determining whether the decedent made reasonable provision for the petitioner. The main criterion is the petitioner's financial need, set out in *clause (1)*. Clause (1) must be read in conjunction with section 11, which states that maintenance payments are to be terminated in certain instances, *e.g.*, upon a child attaining the age of eighteen.

Under *clause (2)* the court must take into account any public benefits receivable by the petitioner that are not predicated on his financial need. Since the decedent, as a taxpayer, has already contributed to these benefits he is not acting unreasonably if he denies equivalent aid to the petitioner. The British Commonwealth courts apparently assume that "if the individual may have support from the state for the asking he may not claim it from the estate." Laufer, "Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation," 69 HARV. L. REV. 277, 303-04 (1955). This approach seems particularly appropriate under the present act in view of the potential liability of transferees.

Under *clause (4)* the court must consider transfers made to other persons, since the size of these transfers bears on the reasonableness of the provision made for the petitioner.

Consideration of the petitioner's conduct is essential if the court, in the classic formula of the Privy Council, is to "place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband and father." *Bosch* v. *Per-*

petual Trustee Co., [1938] A.C. 463, 478-79. Thus, under *clause (5)* the court must consider the moral claim of the petitioner. Normally this will be the moral claim of the surviving spouse, since the decedent should, within reason, be expected to make adequate provision for his children regardless of their conduct. The claim may be a strong one, *e.g.*, material contribution to the decedent's financial resources. On the other hand, it may be such as to justify rejection of the petition, *e.g.*, desertion on the part of a spouse.

SECTION 5. *Apportionment of burden of maintenance award.*

(a) The burden of any maintenance award shall be borne by the persons beneficially entitled to the estate in proportion to the value of their respective interests in the estate. The court may order otherwise if it determines that pro rata apportionment would work exceptional hardship on any such person.

(b) For the purposes of this section the interests of persons successively entitled to any property in the estate shall not be separately valued. The portion of the burden of the maintenance award allocated to the property under this section shall be charged against the corpus.

COMMENT

Subsection (a). Provision is made for pro rata abatement of all estate assets in apportioning the burden of maintenance payments. The court is empowered to deviate, since pro rata abatement may in some cases be inequitable. There is no requirement that the court must follow the decedent's directions on apportionment. His directions might unduly prejudice a person eligible to apply for maintenance.

The entire section may be found, with slightly different phraseology, in several British Commonwealth family maintenance statutes, *e.g.*, New South Wales Stat., 3 Geo. 6 No. 30, §6 (2) (1938).

SECTION 6. *Power of court to order contribution.*

(a) If the estate is insufficient to provide for appropriate maintenance awards the court may order a transferee subject

to its jurisdiction to contribute to the awards. No transferee shall be liable for contribution unless the court determines that the transfer was unreasonably large under the circumstances prevailing at the time of the transfer.

(b) This act does not apply to antenuptial transfers or judicial remedies with respect thereto.

COMMENT

Subsection (a). The court is empowered to order transferees subject to its jurisdiction to contribute to the support of the surviving family.

The conflict of laws poses problems. The act has not been limited to resident petitioners. Neither has it been restricted to local decedents. Hence, a petitioner residing in state X can reach the decedent's immovables located in state X even though the decedent died domiciled in state Y. But the petitioner will be at a disadvantage with respect to the decedent's property located in state Y, particularly immovables; *cf.* Scoles, "Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates," 8 U. FLA. L. REV. 151 172-80 (1955) (family allowance); Ehrenzweig, "Interstate Recognition of Support Duties." 42 CALIF. L. REV. 382 (1954). Also, it may not be possible to obtain contribution from non-resident transferees. Whenever the court has effective jurisdiction for its contribution order, however, subsequent interstate enforcement may be feasible under the Uniform Reciprocal Enforcement of Support Act.

The second sentence of subsection (a) limits the liability of transferees to transfers that are adjudged "unreasonably large." The court must place itself in the position of the decedent, keeping in mind the decedent's moral obligation to make a reasonable provision for his surviving family. Since a compromise must be made between family support and finality of property transactions, the inquiry relates to circumstances at the time of the transfer. This enhances predictability for both the transferee and the decedent. The transferee is not liable for contribution if the transfer was reasonable *at the time it was made,* even though the decedent's wealth should subsequently have diminished. The estate planner can eliminate much of the transferee's uncertainty by giving the potential petitioners enough to preclude

a successful petition, and in addition, by obtaining a waiver from the spouse.

Lapse of time since the date of the transfer is irrelevant; in determining whether the transfer was unreasonably large the court is only concerned with the circumstances at the time of the transfer. Lapse of time may be decisive under section 8, however, which bars the court from exacting contribution when the transfer was made prior to specified cut-off dates. Moreover, it is an important factor under section 9, where the court must look into the reliance interest of the transferee before determining the *amount* of contribution payable.

Subsection (b). This subsection states that the act does not affect antenuptial transfers. These transfers are discussed in Appendix C.

SECTION 7. *Criteria of an unreasonably large transfer.* In determining whether a transfer was unreasonably large the court shall consider:

(1) The ratio of the wealth transferred to the wealth retained.

(2) The aggregate of the wealth transferred under prior and simultaneous transfers to any transferee. For this purpose the court shall consider all transfers drawn to its attention, whether made prior or subsequent to the appropriate cut-off dates referred to in section 8.

(3) Any moral or legal obligation of the decedent to make the transfer.

(4) The amount, in money or money's worth, of any consideration paid by the transferee to the decedent.

(5) Any other circumstance that the court deems relevant.

COMMENT

This section provides criteria to guide the court in determining whether the transfer was unreasonably large.

Under *clause (1)* the relative size of the transfer is persuasive, although not decisive.

Under *clause (2)* the court must consider the amount of wealth already transferred, even under transfers made prior to the cut-off dates prescribed in section 8. These cut-off dates are related to the date of the decedent's death which would, of course, be unknown to the decedent. For example, suppose in 1955 the decedent made a large transfer of property in which he retained no beneficial interest. If he dies in 1960 section 8 (a) of the act will exempt the transferee from any liability to make contribution. Nevertheless, in deciding on the reasonableness of another transfer made in 1959 the court will consider the amount of wealth previously transferred in 1955.

Clause (2) is also designed to prevent evasion of the act by a large number of moderate gifts, not one of which is by itself unreasonably large, but which in the aggregate may be decidedly unreasonable. In such case the court might determine that each transfer subsequent to the appropriate cut-off date was unreasonably large, and consequently that each transferee might be called upon for contribution. Clause (2) thus puts the transferee on notice that his liability to contribute may be affected, within reason, by prior or simultaneous gifts to other transferees. This hinders predictability, but not seriously. Most group transfers or series of transfers are to children of a prior marriage, at the expense of the second or third wife. Normally, each child should be able to obtain sufficient information from the decedent to gauge the validity of the transfer. A flexible test is particularly desirable in these situations, since the transactions will be in the nature of a family settlement on children who may themselves be eligible for maintenance. The inconvenience to other recipients, including charities, is not critical enough to override the maintenance claim of the surviving family.

Clause (3) recognizes the decedent's moral obligation to the transferee as a factor affecting the reasonableness of the transfer. For example, the gift may have been in return for unsolicited but valuable services performed for the decedent by the transferee.

SECTION 8. *Termination of transferee's liability for contribution; cut-off dates.*

(a) A transferee of property in which the decedent retained no substantial beneficial interest is

under no liability to contribute if the decedent made the transfer more than three years before his death.

(b) A transferee of property in which the decedent retained a substantial beneficial interest is under no liability to contribute if the decedent made the transfer more than ten years before his death. Such a transferee is under no liability to contribute if the interest of the decedent was terminated more than three years before his death.

(c) For the purposes of this section the decedent's interest is substantial if he retained, for example, a life estate, a power to alter or amend dispositive provisions, a power to revoke, or a power of appointment. The decedent's interest is not substantial if, for example, he had merely a remote reversionary interest arising by operation of law.

COMMENT

These cut-off provisions recognize the reliance interest that stems from the mere passage of time. See *supra,* p. 153 for a discussion of the practicability of the three and ten year periods.

Subsection (c). This subsection gives the court some guidance on the meaning of "substantial beneficial interest."

SECTION 9. *Extent of transferee's liability for contribution.*

(a) No transferee shall be liable to contribute more than an amount equal to the extent to which the transfer was unreasonably large. If the decedent made several transfers that were unreasonably large, no transferee shall be liable to contribute more than his pro rata share, based on the extent to which the tranfer was unreasonably

large. In determining the amount of contribution payable by any transferee the court shall consider the injurious effect on the transferee, in view of any circumstances occurring between the date of the transfer and the date on which the transferee receives notice of the petition.

(b) If the transferee has retained the property he shall not be liable to contribute more than the value of his beneficial interest therein. If the transferee has disposed of or exchanged the property, in whole or in part, he shall not be liable to contribute more than the combined value of any remaining original property and any remaining proceeds or substituted property. For the purposes of this section, "value" is the fair market value as of the date the transferee becomes beneficially entitled to the property, or the date of the petition, whichever amount is lower.

COMMENT

This section provides rules to help the court determine the source and amount of contribution that transferees are liable to make to, or on behalf of, successful petitioners.

Subsection (a). The first sentence provides a general formula for determining the extent of contribution. Suppose that the decedent transferred $6000 to A. Under section 6 the court may determine, in view of the circumstances prevailing at the time of the transfer, that the transfer was unreasonably large to the extent of $4000. Likewise, it may determine that a gift of $2000 to B was unreasonably large to the extent of the entire $2000. Assuming no decrease in the value of the property concerned, the most that A is liable to contribute is $4000, and B's top limit is $2000. The problem of change in value is dealt with in subsection (b).

The second sentence concerns apportionment of the burden of contribution. Suppose that $3000 is needed for contribution to petitioners. Under the second sentence the top limit for each transferee is his pro rata share, *i.e.*, A's limit is $2000, and B's limit is $1000.

Under *the third sentence* the court may determine that the transferee should contribute a lesser amount than the top limit indicated in the first two sentences. The third sentence is a broad directive to the court to consider the reliance interest of the transferee. This reliance interest will concern events subsequent to the date of the transfer. For example, a transferee should be credited with the payment of taxes or maintenance charges, at least to the extent that he has not been reimbursed by income from the property. The reliance interest may also stem from the mere passage of time. For example, a transferee who has been receiving income from, or otherwise relying on, a gift of principal made several years before the decedent's death will normally be more injuriously affected by a contribution order than would the recipient of life insurance or a gift causa mortis. The third sentence is also flexible enough to permit the court to take care of hardship cases.

Subsection (b). This subsection deals with specific problems that arise when the court must determine the amount of contribution payable by a transferee.

Under *the second sentence* the transferee who makes a gift of his entire beneficial interest in the subject-matter of the transfer is no longer under any liability for contribution. The donee of such a gift would be liable, however, since he comes within the definition of "transferee" in section 1 (e). When the transfer is for value the original transferee remains liable, to the extent of value received. The other party to the transaction would not be liable; having paid value, he is not a "transferee."

The last sentence states that value is determined as of the date of the transfer or the date of the petition, whichever amount is lower. This compromise formula favors the transferee. He is protected when the asset concerned has declined in value after the date of the transfer. Under this rule a large gift of perishables may entail no liability for contribution. This differs from the civil law rule, which pegs the value as of the time of the gift (see *supra,* p. 287–288). But gifts of perishables are not likely to be employed as an evasive device. The transferee is also protected in the event of an increase in value. This may work occasional hardship on the petitioners. On the other hand, it avoids the troublesome question of the extent to which the increase in value is attributable to the efforts of the transferee.

SECTION 10. *Procedure.*

(a) The petition shall be verified and shall state:
  (1) the financial circumstances of the petitioner as of the date of the petition;
  (2) the provision that the petitioner received from the decedent, whether by way of testamentary or inter vivos disposition or under the laws dealing with intestacy; and
  (3) the names and addresses of all other eligible petitioners and of any transferees who may be liable to contribute, so far as known to the petitioner.

(b) Copies of the petition shall be filed in the court and in the probate court. A copy shall be served on the personal representative and on all eligible petitioners and transferees named in the petition. Within a period of —— days from such service the personal representative shall file in the court a verified statement disclosing, so far as known to him:
  (1) relevant details on all transfers, whether made before or after the appropriate cut-off dates referred to in section 8;
  (2) any other information that may help the court to adjudicate the petition.

(c) If the court determines that the petitioner has stated a prima facie case it shall set a date for a preliminary hearing. The court shall give directions for appropriate service to be made on all persons concerned. The preliminary hearing shall be before a permanent master, who shall be a member of the bar of at least five years standing. The permanent master shall submit a written report to the court stating the findings of fact and any conclusions of law. The report shall recommend the amount of maintenance

and contribution payments, if any, and the source, manner, and terms of payment. The court shall set a date for a hearing on the report and on objections thereto. Copies of the report shall be served on all interested parties. The court after the hearing may incorporate the report in either a maintenance award or a contribution order, or both, or it may modify the report or reject it in whole or in part, or it may receive further evidence, or it may recommit the report with instructions.

COMMENT

This section provides skeletal rules of procedure. Each jurisdiction can augment the section with its own rules.

The court should use permanent officials. For example, an experienced lawyer should be appointed permanent master; an Official Guardian, or some equivalent official, should represent all minor children (Cahn, "Restraints on Disinheritance," 85 U. PA. L. REV. 139, 147 (1936); *cf.* Ontario Dependent's Relief Act, R.S.O. 1950 c. 101, §1 (a)). This latter official could also act as a "petitioner's representative" when the adult petitioner lacks the means to hire a lawyer. These officials should be compensated by salary rather than by fees.

SECTION 11. *Periodic payments.*

(a) The maintenance award and the contribution order shall provide for periodic payments, unless the court determines that payment should be made in a lump sum. The award and the order shall specify that the payments be terminated not later than:

(1) in the case of a widow, her remarriage;

(2) in the case of a widower, his remarriage or upon his becoming capable of maintaining himself, whichever occurs earlier;

(3) in the case of a female child, her attainment of the age of eighteen or her marriage, whichever occurs earlier;

(4) in the case of a male child, his attainment of the age of eighteen;

(5) in the case of a child of either sex who is incapable of maintaining himself, his attainment of the age of eighteen or upon his becoming capable of maintaining himself, whichever occurs later; and

(6) in any case, the death of the petitioner.

(b) Periodic payments under a maintenance award and under a contribution order shall not, prior to actual payment:

(1) be assigned or incumbered by the petitioner;

(2) be subject to attachment or garnishment.

COMMENT

Subsection (a). The first sentence provides for periodic payments unless the court decides that the circumstances warrant a lump-sum payment, *e.g.,* when the estate assets are modest.

The second sentence provides for termination of periodic payments in designated circumstances. Under *clause (2)* the payments to the widower are to cease when he becomes capable of maintaining himself. This restriction does not apply to widows. Since the restriction may in some cases be unnecessarily harsh it seems best to leave the point to the court's discretion. Problems of this sort normally will arise under section 16 when an interested person requests a reduction or termination of payments.

SECTION 12. *Conditions of award or order.* The maintenance award or contribution order may be made subject to any conditions that the court considers appropriate. Satisfaction of the award or order may be secured by deposit or

investment of funds, transfer or incumbrance of property, purchase of an annuity, or in any other manner the court considers appropriate.

COMMENT

This section outlines methods of enforcing maintenance awards and contribution orders. Normally an application for maintenance will cause no undue delay in the administration of the estate. In England the usual practice is to secure the payments by purchase of an annuity. Likewise, a trust can be used, to be administered by the Official Guardian or some other public official. Surplus estate assets may then be distributed to the persons otherwise entitled.

SECTION 13. *Preservation of assets; temporary maintenance.*

(a) The court may appoint a receiver for any property affected by the act. The court may enjoin any person from transferring or incumbering any property affected by the act.

(b) Whenever a petition has been filed, there shall be no distribution of the estate until the petition has been adjudicated. However, in hardship cases the court may award temporary maintenance to any petitioner in any amount it deems just.

COMMENT

Subsection (a). The purpose is to preserve available assets. *The first two sentences* are adapted from section 5(e) of the 1939 Report of the Commission on Revision of the Laws of North Carolina Relating to Estates; see Appendix C, *infra.* In the *second sentence* "any person" would include an heir as well as a transferee.

Subsection (b). This subsection assumes that maintenance legislation would supplant existing family allowance legislation.

SECTION 14. *Suspensory orders.*

(a) At the hearing on the report the court may make an order, suspending the distribution of the estate in whole or

in part, to permit a rehearing on the petition at any subsequent date. Whenever the court makes such a suspensory order it shall determine which transferees, if any, shall remain potentially liable for contribution.

(b) For the purposes of this section

(1) no transferee shall remain potentially liable for contribution unless the court so orders at the time it makes the suspensory order;

(2) no contribution order shall be made later than three years after the decedent's death.

COMMENT

Subsection (a). The first sentence empowers the court to make a suspensory order. For a similar provision see section 3(2) of the Canadian Uniform Act, 1945 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, 112. Such an order may be made when the decedent did not make a reasonable provision for the petitioner and the petitioner's financial needs are uncertain; for example, she may be a widow who for the time being is able and willing to live in the home of her daughter. See *Parish* v. *Valentine,* [1916] *N. Z. L. R.* 455 (Sup. Ct.). In such case the court may freeze all or any part of the estate assets pending a petition for maintenance at some future date. For the Commonwealth practice on this controversial matter see Laufer, "Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation," 69 HARV. L. REV. 277, 292 (1955). Since a suspensory order may be incompatible with the reliance interest of a transferee the second sentence requires the court to decide, in the case of each transferee, whether the transfer he received was unreasonably large and whether he is to remain liable for contribution. If he remains so liable the extent of his contribution will, of course, be governed, *inter alia,* by such equities as he may have at the time of the rehearing.

Subsection (b). This subsection is intended to protect the transferee against unreasonable delay in deciding the extent of his contribution, if any.

SECTION 15. *Limitations on filing petition.*

(a) The petition must be filed within one year after the decedent's death or prior to the expiration of a period of thirty days after the running of the non-claim statute, whichever occurs later. Whenever a petition is filed all eligible petitioners desiring relief under the act must file a petition within twenty days after receiving notice of the original petition.

(b) The court may entertain a petition filed subsequent to the appropriate date specified in subsection (a); but such a petition shall not affect any portion of the estate that has been distributed, and the petitioner shall not be entitled to contribution from any transferee.

COMMENT

Subsection (a). The first sentence sets a limitation on the filing of petitions. Until the non-claim statute has run the court will not know what assets are available, since maintenance petitioners are subordinate to creditors. But petitions for temporary maintenance could be made before that time, especially if the maintenance statute is coordinated with legislation permitting summary distribution of small estates to the surviving family, free of creditor's claims. *Cf.* Basye, "Dispensing with Administration," 44 MICH. L. REV. 329, 337-46 (1945).

Subsection (b). This subsection applies to any petition filed subsequent to the appropriate period prescribed in subsection (a). Late petitions of this sort must be distinguished from petitions in good standing, the adjudication of which may be delayed by a suspensory order under section 14.

SECTION 16. *Variation or termination of payments.*

(a) Subject to the provisions of subsections (b) and (c) of this section the court shall not order an increase in any lump-sum payment or periodic payments. The court on its own initiative or upon the written request of a petitioner, a transferee, or the personal representative, may at any time reduce or terminate any periodic payments or change the manner of making or of securing periodic payments.

(b) The court may increase, reduce, terminate or order the complete or partial return of any lump-sum payment or periodic payments on the ground of misrepresentation or non-disclosure of material facts by any person.

(c) As far as is practicable any surplus funds made available by the reduction or termination of periodic payments or by the complete or partial rescission of a lump-sum payment shall be returned pro rata to the sources from which they were taken. However, the court may use such surplus funds to meet any need of other petitioners that was established in the original hearing.

COMMENT

Subsection (a). The first sentence prohibits increases except under subsection (b) (misrepresentation of facts) or under subsection (c) (surplus funds). The purpose is to expedite distribution of estate assets and to further the reliance interest of transferees. In this respect the first sentence differs from comparable provisions of the British Commonwealth family maintenance statutes, which are broad enough to authorize increases.

The second sentence authorizes the reduction or termination of periodic payments. This provision does not apply to lump-sum payments, which may neither be increased nor decreased, except under subsections (b) and (c). This sentence also authorizes a change in the manner of payments, *e.g.*, from periodic payments to a single lump-sum payment.

These requests for variation of payments are distinct from appeals. Any award or order will be appealable under the existing appellate machinery in each jurisdiction.

Subsection (b). This subsection authorizes variation of any award or order on the ground of misrepresentation or nondisclosure. For example, the payments might be increased because of misrepresentations by a transferee, or reduced because of misrepresentations by the petitioner.

Subsection (c). This subsection provides for the disposition of funds that become available because of a reduction in payments. Unless used to meet the needs of other petitioners, these funds are to be returned as far as practicable to the estate or transferee in the ratio in which the funds were originally appropriated.

SECTION 17. *Waivers.*

(a) No petitioner shall be denied maintenance on the ground that he signed a waiver thereof, whether signed before or after the date of the decedent's last marriage or after the decedent's death. However, a surviving spouse is not entitled to maintenance if before the effective date of this act such spouse signed an instrument that:

(1) was a valid waiver of all rights in the estate of the decedent spouse, including the right of election against any last will; and

(2) was made for a reasonable consideration, under the circumstances prevailing at the time of signing.

(b) No transferee is liable for contribution to the maintenance of a surviving spouse by reason of any transfer with respect to which the surviving spouse at any time signs a written waiver of contribution. No transferee is liable for contribution to the maintenance of a child by reason of any transfer with respect to which the child's judicial guardian at any time signs a written waiver of contribution. No consideration is required for a waiver of contribution.

(c) No waiver of contribution is valid unless the signature is either acknowledged or proved in the manner required for the recording of a conveyance of real property.

COMMENT

Subsection (a). The first sentence prevents a petitioner from "contracting out" of his maintenance privileges. This carries out the basic policy of maintenance legislation. The decedent must not be permitted to foist on the state the burden of supporting his dependents. To effectuate this policy the petitioners must be shielded from their own improvidence.

The second sentence is designed to validate a waiver, signed by a surviving spouse before the effective date of the act, of all rights in the estate of the decedent spouse. Such a waiver must be supported by reasonable consideration.

This latter requirement is consistent with existing law on antenuptial and postnuptial settlements; see Atkinson, WILLS, 110-12 (2d. ed. 1953).

Subsection (b). This subsection provides for waivers of contribution by a surviving spouse and by a child. No provision is made for such waivers signed prior to the effective date of the act since the act applies only to transfers made after that date. The waiver will protect a transferee who anticipates that his transfer may be determined to be "unreasonably large," under section 6. No consideration is needed. To be sure, the surviving spouse or the guardian of a child may in some cases be improvident in signing such a waiver. On the other hand, the transferee is also entitled to protection. Security of title requires that the transferee be permitted to rely on the validity of the waiver of contribution regardless of the amount, if any, of consideration. The dependent's protection lies in his privilege of demanding consideration before he signs. Most "evasion" disputes concern large transfers to children of a prior marriage. If a waiver is sought in these circumstances, the self-interest of both sides will probably dictate a waiver of contribution in return for reasonable consideration. The petitioner also has the privilege of attacking the waiver as having been obtained by reason of the fraud or undue influence of the transferee, the decedent, or any other person.

Subsection (c). This subsection prescribes the formalities for the execution of waivers. The language is taken in part from the N.Y. Deced. Es. Law §18(9).

SECTION 18. *Hearing during decedent's lifetime.*

(a) The decedent or any transferee may apply to the court during the decedent's lifetime for a determination that the transfer is not unreasonably large, under the circumstances prevailing at the time of the transfer. Notice of a preliminary hearing before the permanent master shall be served on all potential petitioners. A guardian ad litem shall be appointed for living and unborn children. With necessary changes the procedure shall be as specified in section 10.

(b) The determination of the court shall be conclusive in the event of a subsequent petition for maintenance.

COMMENT

This section permits a transferee to ascertain during the decedent's lifetime whether or not the transfer is so "unreasonably large" as to make him vulnerable to a contribution order. This section should tend to minimize any infringement on the transferee's freedom of alienation.

SECTION 19. *Exoneration, death taxes.* Petitioners who receive maintenance awards shall be exonerated from payment of:

(1) estate taxes, to the extent that other persons are liable to pay any part of the federal estate tax attributable to the taxable gross estate;
(2) inheritance taxes, to the extent that other assets are available in the estate.

COMMENT

The purpose of this section is to protect the successful petitioner from liability for death taxes, as far as is practicable. In *clause (1)* "other persons" covers persons beneficially entitled to those estate assets that were not appropriated for maintenance awards. It also covers transferees whose property is includible in the "gross estate" for estate tax purposes, at least to the extent that the Internal Revenue Code does not restrict such liability. The burden of death taxes on these persons is not specified by this act. It will be determined by testamentary directive, existing apportionment statute, or judicial doctrine, as the case may be.

If exoneration is not practicable the maintenance award is, of course, subject to death taxes; see section 1(c).

In deciding the amount of contribution to be required of a transferee the court may consider taxes paid or payable by the transferee by reason of the transfer; see comment to section 9(a).

SECTION 20. *Costs and attorney fees.* The court may make any order it deems just with respect to costs and attorney fees for any proceeding under this act.

COMMENT

This gives the court discretion to award costs and attorney fees. For the practice in New Zealand and Australia see WRIGHT, TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND, 128-35 (1954).

SECTION 21. *Application.* The provisions of this act apply only to:

(1) the estates of decedents who die after the date that it takes effect; and
(2) transfers made after the date that it takes effect.

COMMENT

The purpose of this section is to preclude questions as to constitutionality.

SECTION 22. *Severability.* If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 23. *Time of Taking Effect.* This act shall take effect on .....

APPENDIXES AND TABLES

APPENDIX A

Remarriage Statistics

MARRIAGES BY AGE AND NUMBER OF PRESENT MARRIAGE OF BRIDE AND OF GROOM: TOTAL OF 10 REPORTING STATES, 1952.

TABLE 9, PAGE 75, VITAL STATISTICS OF THE UNITED STATES, 1952, VOL. 1 (NATIONAL OFFICE OF VITAL STATISTICS, 1955)

Age	Marriage of Bride						Marriage of Groom					
	Total	First	Second	Third	Fourth or more	Not Stated	Total	First	Second	Third	Fourth or more	Not Stated
Total	207,206	157,915	40,227	7,007	1,000	1,057	207,206	160,046	38,879	6,361	932	988
Under 15 years	369	363	—	—	—	6	1	1	—	—	—	—
15 years	1,457	1,448	8	—	—	1	12	12	—	—	—	—
16 years	7,484	7,400	42	—	—	42	220	218	—	—	—	2
17 years	12,400	12,221	113	—	—	66	1,517	1,503	5	—	—	9
18 years	25,930	25,332	433	5	—	160	8,074	8,017	17	—	—	40
19 years	21,599	20,877	586	20	—	116	13,400	13,271	66	—	1	62
20 years	17,974	17,101	765	26	1	81	15,164	14,949	138	1	1	75
21 years	19,970	18,459	1,370	43	2	96	22,502	22,015	376	6	4	101
22 years	14,142	12,623	1,391	64	5	59	17,339	16,696	543	16	1	83
23 years	10,126	8,510	1,478	84	6	48	14,648	13,768	787	22	—	71
24 years	8,152	6,479	1,521	110	8	34	14,041	12,897	1,042	38	2	62
25 years	6,425	4,780	1,477	117	12	39	11,594	10,233	1,236	59	4	62
26 years	5,327	3,673	1,470	162	7	15	9,452	8,008	1,331	63	5	45
27 years	4,626	2,799	1,599	193	14	21	8,103	6,616	1,369	80	7	31
28 years	4,263	2,438	1,597	194	18	16	6,998	5,340	1,501	117	9	31
29 years	3,498	1,852	1,380	224	16	26	5,797	4,227	1,405	127	11	27

APPENDIX A—(Continued)

Age	Marriage of Bride						Marriage of Groom					
	Total	First	Second	Third	Fourth or more	Not Stated	Total	First	Second	Third	Fourth or more	Not Stated
30 years	3,337	1,660	1,439	204	22	12	4,798	3,349	1,266	150	14	19
31 years	2,873	1,321	1,311	200	26	15	4,042	2,671	1,220	116	16	19
32 years	2,679	1,140	1,289	223	15	12	3,653	2,194	1,265	161	18	15
33 years	2,310	885	1,182	206	29	8	3,067	1,817	1,080	141	20	9
34 years	2,209	810	1,154	209	30	6	2,898	1,536	1,196	138	12	16
35 years	2,128	694	1,194	198	34	8	2,531	1,307	1,037	156	16	15
36 years	1,919	566	1,081	229	31	12	2,385	1,110	1,096	152	14	13
37 years	1,843	536	1,072	205	21	9	2,204	974	1,024	179	18	9
38 years	1,836	497	1,084	212	30	13	2,124	869	1,051	174	24	6
39 years	1,682	446	976	226	24	10	2,028	799	1,003	198	24	4
40 years	1,561	363	939	216	35	8	1,750	641	927	154	18	10
41 years	1,315	289	801	188	31	6	1,612	571	863	152	17	9
42 years	1,438	318	852	231	27	10	1,660	545	912	174	21	8
43 years	1,303	254	798	216	27	8	1,446	425	836	165	19	1
44 years	1,138	220	705	187	19	7	1,379	401	786	164	20	8
45–49 years	4,977	754	3,238	809	144	32	5,887	1,389	3,538	822	104	34
50–54 years	3,302	351	2,178	637	119	17	4,551	732	2,973	705	107	34
55–59 years	2,318	187	1,552	468	93	18	3,720	462	2,498	646	104	10
60–64 years	1,559	93	1,060	332	71	3	2,691	233	1,865	473	100	20
65–69 years	982	59	641	228	45	9	2,073	119	1,420	424	95	15
70–74 years	370	15	244	83	26	2	1,047	42	717	219	64	5
75 years and over	161	5	102	41	12	1	628	15	409	155	42	7
Not stated	224	97	105	17	—	5	170	74	81	14	—	1

NOTE.—States included: Alabama, Delaware, Iowa, Maine, Michigan, New Hampshire, Ohio, Oregon, Tennessee, and Vermont.

APPENDIX B

Miscellaneous Statutes

PART 1. THE MODEL PROBATE CODE (1946).

"§33. Gifts in fraud of marital rights.

"(a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

"(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

> *"Comment.* This section makes no attempt to define the expression "in fraud of marital rights." It is believed that only by judicial decision can that be done. Among the situations which courts would have to classify in this connection is that where a married person sets up an inter vivos trust reserving to himself a life estate and a power to revoke the trust. It has sometimes been held that such a transfer could be set aside at the instance of the surviving spouse, particularly where it deprived the settlor of most of his estate. It is sometimes said that the transfer is set aside because it is illusory. See 44 Mich. L. Rev. 151 (1945). But it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. A similar problem arises where a married person sets up a so-called savings bank trust. It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse.
>
> "Subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made

within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud."

PART 2. REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES (1939).

"SECTION 5. Wife's Power to Set Aside Transfers in Fraud of Her Rights. –

"(a) From the effective date of this act, any gratuitous transfer of property, whether real or personal, by a husband shall be deemed in fraud of his wife, unless she join therein or assent thereto in writing, if:

"(1) the husband retain a power to revoke the transfer, whether exercisable by him alone or in conjunction with any other person, or (2) the transfer be in contemplation of the husband's death and take place within one year prior thereto.

"(b) A gratuitous transfer by the husband in which the wife did not join or to which she did not assent in writing shall, if made within one year prior to his death, be presumed to be in contemplation of death, but such presumption may be rebutted.

"*Comment.* Paragraph (a): The value to the widow of the power to dissent is jeopardized if her husband retains power to strip himself of his property for the purpose of defeating her claim. Under existing law, a husband may place all or the greater part of his property in a revocable trust, and it will not be included in determining the widow's share on dissent despite the fact that at all times the husband will have retained substantial control over the property and though his estate is obliged to pay estate taxes upon it. Moreover, a husband is now free to give away all his personal property on his deathbed, and his widow will have no claim to any share in it. The above section is designed to protect the widow against such abuses of her husband's power by enabling her to reach a gratuitous transfer, made without her joinder or written assent, if the transfer were revocable or were in contemplation of the husband's death and within one year thereof, the two types of situations in which the normal instinct to retain title to one's property does not operate to protect the widow. This does not give the widow as much protection against

gratuitous transfer as is accorded her husband's creditors, but it is submitted that she is certainly entitled to no less.

"Paragraph (b): In view of the difficulties of proving that a transfer is in contemplation of death, the widow is assisted by the creation of a rebuttable presumption to that effect if the transfer is made within a year of the husband's death. Under the preceding paragraph, a widow cannot reach transfers made more than a year prior to the husband's death, even though they were made in contemplation of death, unless the husband has retained a power of revocation.

"(c) A widow may institute an action against any transferee of property transferred by the husband in fraud of his wife to have the property so transferred adjudged assets of the husband's estate, for the purpose, if she has dissented from the husband's will, of increasing her share upon dissent or, if the husband died intestate, of increasing her intestate share. If, in such action, it be adjudged that the property was transferred in fraud of the wife, the court shall order that so much of the property as may be necessary adequately to secure the widow's claim, be, in the case of real property, impressed with a lien in her favor to be satisfied out of such property when her claim shall have been ascertained upon the settlement of the estate, or, in the case of personal property, be delivered to the personal representative to hold for a like purpose, or, in the case of either real or personal property, that the defendant give bond in an amount sufficient to secure payment of the widow's claim. The value of the property at the time of the husband's death shall be ascertained upon a proceeding for the settlement of the husband's estate to which the transferee shall be a party, and the amount so ascertained shall be added to the husband's estate for the purpose of computing the widow's claim, which, if the husband died intestate, shall be computed in the same manner provided in Sections 1 and 2 of this Article for the determination of the widow's claim upon dissent. The transferred property shall be applied to the satisfaction of the widow's claim in the proportion that it bears to the total net value of the husband's estate, including therein the value of all property adjudged to have been transferred in fraud of the wife, but excluding therefrom the value of such property as may have been received by the widow upon the husband's

death. If, for any reason, the widow cannot obtain satisfaction for that portion of her claim attributable to such transfer, no recourse therefor may be had by her against other property in the husband's estate or which had been the subject of another transfer by him.

"*Comment.* This paragraph provides an action, in the nature of an action for a declaratory judgment, to be brought by the widow against the husband's transferee to determine whether the property transferred falls within the terms of paragraph (a) of this section and, if so, to declare the transferred property assets of the husband's estate for the purpose of increasing her share either on dissent or in case of the husband's intestacy (a point which will be discussed below). It will not be possible in this action to determine the extent of the transferee's liability. A transferee should not be held liable to the widow if she has received upon the death of her husband sufficient property so that, even though the transferred property is added to his estate, she will still have received her intestate share therein. Again, if the widow has received some property upon her husband's death, even though it may not be sufficient to satisfy her intestate share, it is still fair that the transferee should be credited with a proportionate share of that which the widow has received. These are matters which involve the beneficiaries of an estate passing by will or intestacy as well as the widow and the transferee, and the appropriate time for their determination is the settlement of the estate. Accordingly, it is provided above that, upon rendition of a judgment for the widow in the action brought by her, the court shall give supplemental relief in the form of orders assuring the preservation of the transferred property, or the giving of security in lieu thereof, to protect the widow's interest until the extent of her claim can be determined upon the settlement.

"The determination of the widow's claim involves the same computations provided for the case of a dissent where no transfer is involved, except that the husband's estate is increased by the value of the property transferred, thus automatically increasing the widow's share. In order to apportion the credit for the property for which the widow must account fairly as between the beneficiaries of the estate and the transferee, it is provided that the property received by the latter shall be

liable only in the proportion it bears to the net estate, including the transferred property and excluding the property received by the widow. Thus, suppose a husband dies testate, leaving an estate of $100,000 but making no provision in his will for his wife. Before his death he had made a transfer in fraud of her of $60,000. She obtains $40,000 proceeds of life insurance payable to her. For the purpose of determining her claim on dissent, the estate is valued at the sum of these items, or $200,000. Her share, assuming there be no children, would be one-half that sum, or $100,000, of which she has received $40,000, leaving her claim on dissent for $60,000. For this claim $160,000 is available, $100,000 in the estate and $60,000 in transferred property. The estate is liable, therefore, for 10/16 of that claim or $37,500, and the transferred property for 6/16, or $22,500.

"Since there is a risk that transferred property may have been dissipated or sharply diminished in value between the time of the transfer and the wife's action, and since the transferee, who is subjected to personal liability by the succeeding paragraph under certain circumstances, may not be able to respond in damages, it would subject the estate to a considerable risk of loss if it were liable to satisfy any share of the transferee's liability. Provision has, accordingly, been made against this contingency.

"As above noted, this action is available to the widow even though the husband dies intestate. There is just as great a risk in that case that a widow may be left penniless by a hostile husband who strips himself of his property by antemortem transfers. Her right to share in his intestate estate is valueless if that estate contains little or no property. The provisions governing the widow's share on dissent are equally adaptable to meet this situation, so the grant of power to the widow to reach transferred property in this situation presents no procedural difficulty.

"(d) If it be adjudged in any action brought under this section that the transfer was made in fraud of the wife but the transferee shall himself have transferred the property or, the property being personalty, it shall have been received and retained by the transferee in, or removed by him to, another jurisdiction and he shall refuse or fail to deliver over such property to the personal representative or give adequate bond therefor, as the court may have ordered, the court shall forthwith adjudge him personally liable

for such portion of the widow's claim as may be found in the proceeding for the settlement of the estate to be attributable to the property transferred to him. The widow may join in any such action, or institute a separate action against any subsequent transferee unless he or a previous transferee shall have been a bona fide purchaser for value of the property. To the extent of the property received by him, any such subsequent transferee shall be subject to the same liability as the original transferee. If the husband, the original transferee, or any subsequent transferee had transfered the property to two or more transferees in such manner as to render the transfers substantially one transaction, the widow, or a defendant transferee, may join the transferees participating in such transaction as parties defendant in the action, but the liability of each shall be limited to the extent of the property received by him.

"*Comment.* Although it is anticipated that the widow's claim, established as provided in the preceding paragraph, would normally be satisfied out of the property transferred to the defendant, precaution must be taken to protect her against subsequent transfers by the husband's transferee and the risk, in the case of personal property, that the property will be outside the state. Accordingly provision is made herein for the imposition of a personal liability against the defendant in such event by a judgment in the nature of a declaratory judgment fixing the fact of his liability but leaving the amount thereof to be determined subsequently in the settlement of the estate. Provision is also made to reach property in the hands of a subsequent transferee and to impose personal liability upon him where such might be done against the original transferee. However, a transfer for consideration cuts off the right of the widow to proceed against the transferee paying consideration or any subsequent transferee from him. If the transfer is a genuine sale or incumbrance for consideration, the transferee is protected even though he may have had notice of the character of the original transaction, since no requirement that a subsequent transferee must take without notice is imposed.

"The power to reach subsequent transferees will not materially affect the stability of titles. In the first place, the number of transactions which could possibly be affected is closely restricted by the terms of paragraph (a)

of this section. Secondly, any genuine purchaser is protected by the fact that he has given consideration. Finally, the succeeding paragraph provides a limitation on the time in which the widow may bring an action which will remove any remaining uncertainty within a period not longer than that usually absorbed in the administration of an estate. Certainly the power granted under this section introduces an element of uncertainty in titles which is insignificant in comparison to that arising from the power of the husband's creditors to reach property conveyed in fraud of their claims.

"Provision is also made in this section to enable the widow to join a subsequent transferee in an action against the original transferee and, where transfers had been made to two or more transferees in a single transaction to join all such transferees. Such joinder does not, however, operate to increase the liability of any party so joined.

"(e) No action shall be instituted by the widow under this section after the final settlement of the estate or after two years from the date of the husband's death, and any such action shall abate upon her death. A defendant may be restrained by injunction from transferring the property during the course of the action, and, where justice shall require, the personal representative or some other person may be appointed receiver of the property.

"*Comment.* This paragraph establishes special limitations on the bringing of the action and authorizes the court to protect the widow's interest in the property by injunction or, when necessary, by the appointment of a receiver.

"Section 6. Waiver by Wife in Lifetime of Husband. – During the lifetime of the husband and whether before or after marriage, a woman may waive the right to dissent from her husband's will or to bring an action under Section 5 of this Article to reach property which has been transferred by him. Any such waiver, whether made before or after marriage, shall be by an instrument in writing, duly approved as is required for conveyances of land, and upon her separate examination in the manner provided by law for contracts between husband and wife affecting any part of the real estate of the wife.

"*Comment.* This section authorizes a means whereby a husband may safeguard his testamentary and ante-

mortem transfers from the exercise of the widow's power to dissent from his will or to reach property transferred by him which would otherwise be subject to Section 5 hereof. Such waivers would normally, although not necessarily, be made by wives in connection with settlements of property upon them. Certain formalities are prescribed in this section for the protection of the widow. Elsewhere provision is made to debar the widow from exercising the power to dissent or to reach transferred property where she has feloniously and intentionally killed her husband or where she has been guilty of marital misconduct."

PART 3. INTERNAL REVENUE CODE OF 1954 – (ESTATE TAX PROVISIONS).

"Sec. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) General Rule. – The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) Application of General Rule. – If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of apointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

"Sec. 2036. TRANSFERS WITH RETAINED LIFE ESTATE.

(a) General Rule. – The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in

money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —

(1) the possession or enjoyment of, or the right to the income from the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

. . . . . .

"Sec. 2037. TRANSFERS TAKING EFFECT AT DEATH.

(a) General Rule. — The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has . . . made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if —

(1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(2) the decedent has retained a reversionary interest in the property . . . , and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per cent of the value of such property.

(b) Special Rules. — For purposes of this section, the term "reversionary interest" includes a possibility that property transferred by the decedent —

(1) may return to him or his estate, or

(2) may be subject to a power of disposition by him,

but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary or his delegate. In determining the value of a

possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. Notwithstanding the foregoing, an interest so transferred shall not be included in the decedent's gross estate under this section if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a general power of appointment (as defined in section 2041) which in fact was exercisable immediately before the decedent's death.

"Sec. 2038. REVOCABLE TRANSFERS.

(a) In General. — The value of the gross estate shall include the value of all property. . . . To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

. . . . . .

(b) Date of Existence of Power. — For purposes of this section, the power to alter, amend, revoke, or terminate shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, revocation, or termination takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose, if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered

to have been given, or the power exercised, on the date of his death.

"Sec. 2039. ANNUITIES.

(a) *General.* — The gross estate shall include the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under any form of contract or agreement entered into after March 3, 1931 (other than as insurance under policies on the life of the decedent), if, under such contract or agreement, an annuity or other payment was payable to the decedent, or the decedent possessed the right to receive such annuity or payment, either alone or in conjunction with another for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death.

(b) *Amount Includible.* — Subsection (a) shall apply to only such part of the value of the annuity or other payment receivable under such contract or agreement as is proportionate to that part of the purchase price therefor contributed by the decedent. . . ."

. . . . . .

"Sec. 2040. JOINT INTERESTS.

The value of the gross estate shall include the value of all property . . . to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person:

Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

"Sec. 2041. POWERS OF APPOINTMENT.

(a) In General. — The value of the gross estate shall include the value of all property (except real property situated outside of the United States) —

. . . . . .

(2) Powers created after October 21, 1942. — To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

(3) Creation of another power in certain cases. — To the extent of any property with respect to which the decedent —

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under section 2035, 2036, or 2037,

exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

(b) Definitions. – For purposes of subsection (a) –

(1) General power of appointment. – The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that –

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

. . . . . .

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person –

(i) If the power is not exercisable by the decedent except in conjunction with the creator of the power – such power shall not be deemed a general power of appointment.

(ii) If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent – such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

(iii) If (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person – such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power,

such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

(2) Lapse of power. – The lapse of a power of appointment . . . during the life of the individual possessing the power shall be considered a release of such power. The preceding sentence shall apply with respect to the lapse of powers during any calendar year only to the extent that the property, which could have been appointed by exercise of such lapsed powers, exceeded in value, at the time of such lapse, the greater of the following amounts:

(A) $5,000, or

(B) 5 per cent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could have been satisfied.

. . . . . .

"Sec. 2042. PROCEEDS OF LIFE INSURANCE.

The value of the gross estate shall include the value of all property –

(1) Receivable by the executor. – To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) Receivable by other beneficiaries. – To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term 'incident of ownership' includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 per cent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "re-

versionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Secretary or his delegate. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

"Sec. 2043. TRANSFERS FOR INSUFFICIENT CONSIDERATION.

(a) In General. — If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent."

PART 4. THE COMPULSORY PORTION: GERMANY.

(taken from Wang, THE GERMAN CIVIL CODE, (1907))

"2303. If a descendant of a testator is excluded from succession by disposition *mortis causa,* he may demand his compulsory portion from the heir. The compulsory portion is equal to one-half of the statutory portion.

"The same right belongs to the parents and spouse of the testator, if they have been excluded from succession by a disposition *mortis causa.*

"Note to S. 2306. A compulsory beneficiary has a right to his compulsory portion free from all charges. Where his share in the inheritance which is subject to a limitation or charge is greater than his compulsory portion, he may either claim his compulsory

portion free from all charges, or accept his share in the inheritance subject to the limitation or charge.

. . . . . .

"2315. A compulsory beneficiary shall deduct from his compulsory portion any benefit which has been conferred on him by the testator by a juristic act *inter vivos,* with the direction that such benefit shall be deducted from his compulsory portion. The value of such benefit is added to the estate in calculating the value of the compulsory portion. The value of such benefit is determined as at the time at which the benefit was conferred. . . .

"Note to s. 2315. Such direction may be either express or implied. As the testator was under obligation to furnish an 'advancement' to his child, he could not have directed the advancement to be deducted from the child's compulsory portion. 1624.

. . . . . .

"2325. When a testator has made a gift to a third party (a), a compulsory beneficiary may claim, by way of augmentation of his compulsory portion, (b), the amount whereby the compulsory portion would be increased if the object given were added to the estate.

"A consumable thing is estimated at the value which it had at the date of the gift. An object other than a consumable thing is established at the value which it had at the time of the accrual of the inheritance; if its value at that time is greater than its value at the date of the gift, only the latter is taken into consideration.

"The gift is not taken into consideration if, at the time of the accrual of the inheritance, ten years have elapsed since delivery of the object given; if the gift was made by the testator to his surviving spouse, the period does not begin to run until the dissolution of the marriage.

"Notes: (a) That is, to a person who is not a compulsory beneficiary. For a gift made to a 'compulsory beneficiary," see 2327.

(b) Ergänzung des Pflichteils.

"2326. The compulsory beneficiary may claim an augmentation of his compulsory portion even if one-half of his statutory portion has been given to him. If more than one-half of his statutory portion has been given to him, such claim is barred to the extent of the excess in value which he has received.

"2327. Where the compulsory beneficiary has himself received

a gift from the testator, the value of the gift shall be added to the estate in the same manner as if it were made to a third party (c), and shall at the same time be deducted from the compulsory beneficiary's augmentation of his compulsory portion. The value of a gift to be deducted in the manner provided for by 2315, shall be deducted from the total value of the compulsory portion and of any augmentation of such portion.

"Where the compulsory beneficiary is a descendant of the testator, the provision of 2051, par. 1, applies *mutatis mutandis* (d).

"Notes to 2327: (c) 'Third Party' here means 'a person who is not a compulsory beneficiary.'

(d) The period of ten years specified in 2325, par. 3, does not apply to this case.

"2328. If an heir is himself a compulsory beneficiary, he may refuse augmentation of another compulsory beneficiary's portion to the extent that he is not deprived of his own compulsory portion, including what would accrue to him by way of augmentation of his own compulsory portion.

"2329. In so far as an heir is not liable for augmentation of a compulsory portion, the compulsory beneficiary may, under the provisions relating to the return of unjustified benefits (e), require any donee of the testator to return the gift for the purpose of making up the deficiency. If the compulsory beneficiary is sole heir, he has the same right.

The donee may refuse to return the gift by payment of its value.

Among several donees a prior donee is liable only in so far as a subsequent donee is not liable.

(e) See 818-822.

"2330. The provisions of 2325 to 2329 do not apply to gifts which are made in compliance with a moral duty or the rules of social propriety (f)

(f) See notes (m) and (n) to 534

(m) *E.g.*, a gift made to a poor relative by blood

(n) *E.g.*, a reward for voluntary service

"2331. A gift made out of any common property under the regime of general community of goods, community of income and profits, or community of moveables, is deemed to have been made by both spouses in equal shares. If, however, the gift was made to a person who is a descendant of one only of the spouses, or of

whom one only of the spouses is a descendant, or if one of the spouses has to make compensation to the common property for the value of the gift, it is deemed to have been made by such spouse alone.

These provisions apply *mutatis mutandis* to a gift made out of any common property under the regime of continued community of goods (g)

(g) *Cf.* 1483.

"2332. The claim to compulsory portion is barred by prescription in three years from the time at which the compulsory beneficiary has knowledge of the accrual of the inheritance and of any disposition whereby his compulsory portion is injured; in the absence of such knowledge, in thirty years from the accrual of the inheritance.

Any claim which a compulsory beneficiary has against a donee under 2329 is barred by prescription in three years from the accrual of the inheritance.

The prescription is not suspended by the fact that such claims may not be enforced until after a disclaimer of the inheritance or legacy (h).

(h) See 2306 *et seq.*

"2333. A testator may deprive a descendant of his compulsory portion.

(1) If the descendant makes an attempt against the life of the testator or his spouse, or of any of his descendants;

(2) If the descendant has been guilty of wilful corporal ill-treatment of the testator or his spouse; in the case of ill-treatment of his spouse, however, only where the descendant is also descended from such spouse.

(3) If the descendant has been guilty of any crime, or any serious wilful offence against the testator or his spouse;

(4) If the descendant maliciously commits a breach of his statutory duty to furnish maintenance to the testator;

(5) If the descendant leads a dishonourable or immoral life contrary to the testator's wishes."

And see Schuster, "The Principles of German Civil Law" 626 *et seq.*, (1907).

PART 5. THE COMPULSORY PORTION: SWITZERLAND

(taken from Switzerland, THE SWISS CIVIL CODE, English version with vocabulary and notes by Ivy Williams (1925))

"471. The compulsory portion is as follows:

1. for a descendant three-quarters of his statutory share of inheritance;
2. for the father or mother one-half
3. for a brother or sister one-quarter
4. for the surviving spouse the whole of his statutory share where there are statutory co-heirs with him, and one-half of it where he is sole heir.

"473. A testator can by testamentary disposition leave to his surviving spouse the usufruct in the whole of the share of the inheritance devolving on their common descendants.

Such usufruct is taken to be in satisfaction of the right of inheritance conferred by law on the surviving spouse where descendants take as co-heirs with them.

The surviving spouse loses half his usufruct if he re-marries.

"474. The devisable portion of the estate is determined by its value at the death of the testator.

In this computation the debts of the deceased, his funeral expenses, the cost of sealing the inheritance and of making an inventory, and that of maintaining for one month the members of the deceased's household must first be deducted from the gross value of the estate.

"475. Gifts made by the deceased *inter vivos* are included in the value of the estate in so far as they are subject to reduction.[1]

"476. Where the life of the deceased is insured and he has undertaken by an agreement *inter vivos* or by will or pact to assign the policy to a third person, or has gratuitously transferred it in his lifetime, the redemption value of the policy at the date of the death of the insured is added to the value of the estate.

"527. The following gifts are subject to the same reduction as testamentary dispositions:

1. Gifts *inter vivos* made by the deceased as satisfaction of the donee's right of inheritance or by way of dower or for the donee's outfit or as a division of the

[1] See ss. 527 *et seq.*

donor's estate, where they are not liable to be brought into hotchpot; [2]

2. Alienations in consideration of a renunciation or sale of rights of inheritance; [3]

3. Gifts which the donor had full liberty to revoke and those which he made within the five years preceding his death, with the exception of presents made on occasions where they are customary;

4. Alienations made by the deceased with the evident intention of evading the rules restricting his freedom of disposition.

"528. A donee who has acted bona fide is liable to restore only the amount by which he is still enriched by the gift at the date of the opening of the succession.

Where the benefit received by virtue of a testamentary pact has to be reduced, the beneficiary is entitled to claim the return of a proportionate part of what he gave in consideration of the benefit.

"529. Where the life of the deceased is insured and he has undertaken by an agreement *inter vivos* or by will or pact to assign the policy to a third person or has gratuitously transferred it in his lifetime, the redemption value of the policy is subject to reduction.

"530. Where a testator has burdened the inheritance with usufructs and rent-charges to such an extent, that according to the presumed duration of these rights, their capitalized value would exceed the devisable portion of the estate, the heirs can either demand that they shall be reduced to their proper limit, or redeem them by surrendering the devisable portion of the estate to those entitled.

"531. The appointment of a reversionary heir is not binding on an heir who is entitled to a compulsory portion, in so far as it constitutes a burden on that portion.

"532. Reductions are made in the first place in testamentary dispositions and then in gifts *inter vivos,* beginning with the latest in point of time and continuing in that order until the compulsory portions are fully restored.

[2] They must be brought into hotchpot, unless the testator directs otherwise (see s. 626).

[3] *I.e.,* as under s. 495.

"533. The action for reduction must be brought within one year from the time when the heirs had cognizance of the infringement of their rights, and in any case not later than ten years from the opening of the will in respect of testamentary dispositions, and from the death of the donor in respect of other gifts.

Where a disposition has been declared void and an earlier one has in consequence revived, the period runs from the date of the declaration of nullity.

The claim for a reduction can always be pleaded as a defence to an action."

APPENDIX C

Antenuptial Transfers

The basic policy underlying the "maintenance and contribution" formula is also suggestive of the proper approach to the problem of antenuptial transfers.

We concluded earlier[1] that antenuptial transfers should be given separate treatment. Nevertheless, the antenuptial transfer cases have striking points of similarity with the cases dealing with postnuptial transfers. Some of the antenuptial transfer cases even utilize the illusory transfer doctrine.[2] Moreover, we find in the antenuptial transfer cases a familiar irresolution on matters of basic policy. There is indecision on matters of proof and on the scope of the action. Two problems will be examined. First, on matters of proof: should the courts follow the rule of (a) "actual fraud," (b) "presumed fraud," or (c) some other rule? Second, as to the scope of the action, does the wife's remedy affect transfers of personalty, or of realty where inchoate dower has been abolished?

We may obtain a better appreciation of these problems if we examine the origin and social utility of the wife's remedy.

Historically, the wife's action to set aside antenuptial transfers in "fraud" of her marital rights stems from an English doctrine that developed solely for the protection of the husband. As far back as the seventeenth century, Chancery would set aside secret conveyances by the fiancee whenever she had induced the proposal of marriage by her pecuniary, if not physical, assets.[3] The justification was entirely mercenary: in those days the husband was legally responsible for the wife's debts, had practical ownership

[1] See text, pp. 181–182, *supra.*

[2] See note 24, *infra.*

[3] Strathmore v. Bowes, 1 Ves. Jr. 22, 30 Eng. Rep. 211 (1789). The Strathmore case has a Gilbertian setting, described in Shannan, "The Countess of Shannon v. Bowes," 1 CAN. B. REV. 425 (1923), and also in the excellent article by Brégy and Wilkinson, "Antenuptial Transfers as Frauds on Marital Rights in Pennsylvania," 90 U. PA. L. REV. 62, 64–66 (1941).

of her personalty, and had an estate during coverture in her freeholds, which entitled him to the rents and profits.[4] Eventually the reliance factor was dropped; he could have the transfer set aside even though he had married without knowing that the woman owned the property concerned.[5] The wife, however, was refused any remedy with respect to secret antenuptial conveyances made by her potential husband to evade her dower from attaching. It was felt that she did not need this protection, apparently in view of the then prevailing custom of making antenuptial jointures and settlements in lieu of dower. That custom not obtaining in this country, the American courts utilized the English rule (which protected the husband) to permit the American wife [6] to set aside her husband's secret antenuptial conveyances of realty.[7]

(a) Matters of Proof

The American cases,[8] following the English lead, eventually discarded the requirement of reliance. One early American case

[4] Day, "Rights Accruing to a Husband upon Marriage with Respect to the Property of his Wife," 51 Mich. L. Rev. 863, 864 (1953).

[5] Taylor v. Pugh, 1 Hare 608, 66 Eng. Rep. 1173 (1842).

[6] The action is also available to the husband: see, *e.g.*, Gedart v. Ejdrygiewicz, 305 Mass. 224, 25 N.E.2d 371 (1940), 14 U. Cin. L. Rev. 451 (1940) (woman assures man her realty "all pay up," then mortgages it to her daughter three days before the marriage).

[7] The cases are reviewed in Chandler v. Hollingsworth, 3 Del. Ch. 99, 115 (1867); also see Brégy and Wilkinson, *supra* note 3; 26 Am. Jur., *Husband and Wife* §185–95 (1940); Note, 40 Mich. L. Rev. 300 (1941).

[8] The basic inquiry is whether the transfer was in contemplation of marriage: Bozarth v. Bozarth, 399 Ill. 259, 77 N.E.2d 658 (1948): Chase v. Phillips, 208 Mass. 245, 95 N.E. 266 (1911), *writ of error dismissed,* 223 U.S. 715 (1912) (transfer made while woman still married to her first husband; valid); Griffin v. Griffin, 225 Mich. 253, 196 N.W. 384 (1923); Noe v. Noe, 359 Mo. 867, 224 S.W.2d 77 (1949) (three years before marriage). But the transfer may be invalidated even though the potential husband had no particular woman in mind: Higgins v. Higgins, 219 Ill. 146, 76 N.E. 86 (1905). In the Higgins case a widower deeded his farm to his six children, reserving a life estate. He then went East to visit relatives and married the plaintiff there two days after being introduced; also see Jarvis v. Jarvis, 286 Ill. 478, 122 N.E. 121 (1919) (conveyance of realty twenty-two months before marriage). The statutes of limitation applicable to the widow's request for dower or statutory share begin to run at the husband's death: Breshears v. Breshears, 360 Mo. 1057, 232 S.W.2d 460 (1950). If the transfer was for consideration the attacking spouse will be required to show that

even stated that the wife need not have known that the potential husband owned the property concerned.[9] Most of the cases adopt the doctrine of "presumed fraud": a secret transfer in contemplation of marriage will be presumed to be fraudulent, regardless of whether the wife relied on the husband's apparent ownership.[10] The presumption may be overcome,[11] however, by evidence of a worthy purpose, *e.g.*, to make reasonable provision for children of a prior marriage.[12]

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the grantee was in collusion: Dorrough v. Grove, 60 So. 2d 342 (Ala. 1952).

The transfer is set aside only to the extent of the wife's claim: Breshears v. Breshears, 360 Mo. 1057, 232 S.W.2d 460 (Mo. 1950) (transfer 5 days before marriage, with the marriage license in his hands); Hanson v. McCarthy, 152 Wis. 131, 139 N.W. 720 (1913); *but cf.* Collins v. Collins, 98 Md. 473, 57 Atl. 597 (1904); Clavin v. Clavin, 41 N.Y.S.2d 377 (Sup. Ct. 1943), *aff'd without opinion,* 267 App. Div. 760, 45 N.Y.S. 2d 937 (1st Dep't 1943); Rubin v. Myrub Realty Co., 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep't 1935); Lestrange v. Lestrange, 242 App. Div. 74, 273 N.Y. Supp. 21 (2d Dep't 1934).

The suit being in equity, relief is not automatic. The wife may be estopped if she discovered the transfer before the glide to the altar; Clark v. Clark 183 Ill. 448, 56 N.E. 82, 75 Am. St. Rep. 115 (1900). But not, says a California case of fifty years ago, if she has been seduced and "got with child"; Murray v. Murray, 115 Cal. 266, 273, 47 Pac. 37, 39 (1896) ("to her the alternative was marriage, or the continued state of concubinage, and the bastardy of her offspring"). In Cook v. Lee, 72 N.H. 569, 58 Atl. 511 (1904) the plaintiff who was with child by her fiancé, married him knowing of the transfer; held, plaintiff widow could be reinstated as judgment creditor, a status she had attained in connection with her breach of promise suit before marriage; also see Taylor v. Taylor, 197 N.C. 197, 148 S.E. 171 (1929) (seduction, but relief not predicated thereon).

[9] Chandler v. Hollingsworth, *supra* note 7. Most of the later cases appear to require knowledge.

[10] *E.g.*, Ward v. Ward, 63 Ohio St. 125, 57 N.E. 1095, 51 L.R.A. 858 (1900).

[11] Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441 (1879); Goff v. Goff's Exrs, 175 Ky. 75, 193 S.W. 1009 (1917); Hamilton v. Smith, 57 Iowa 15, 10 N.W. 276 (1881); *cf.* Beechley v. Beechley, 134 Iowa 75, 108 N.W. 762 (1906).

[12] *E.g.*, Beechley v. Beechley, 134 Iowa 75, 108 N.W. 762, 120 Am. St. Rep. 412, 13 Ann. Cas. 101, 9 L.R.A. (n.s.) 955 (1906); Sederlund v. Sederlund, 176 Wis. 627, 187 N.W. 750 (1922); *cf.* Hampton v. Hampton Holding Co., 17 N.J. 431, 111 A.2d 761 (1955). *Contra:* Ward v. Ward, 63 Ohio St. 125, 57 N.E. 1095, 51 L.R.A. 858 (1900); also see cases cited in 2 Tiffany, REAL PROPERTY, §506 notes 91, 92 (1939).

In Wilson v. Findley, 223 Iowa 1281, 275 N.W. 47 (1937), the marriage took place ten days before the husband's death; held, valid.

In recent years there has been some disposition to restrict the action by doing away with the presumption of fraud. Under the new approach the plaintiff spouse is required to prove actual reliance on the other spouse's apparent ownership of the property in question. For example, in *Kirk* v. *Kirk* [13] it was stated: "Either spouse may challenge, as fraudulent, a conveyance of real estate or a gift of personal property made during a treaty of marriage, but mere proof of the conveyance or gift, without the knowledge of the other party, does not constitute a prima facie case of fraudulent transfer. In addition, it is necessary for the party alleging it to prove the fraud, or 'actual fraud,' to use an expression common in the decisions. Mere conjecture or suspicion does not take the place of evidence." What the court meant by "evidence" may be gleaned from the next paragraph of the decision: "Or did he make the conveyance, not to satisfy a bona fide obligation, but with the intention of depriving her of rights which, expressly or by implication, he induced her to believe she would receive by marrying him?" [14] In other words, the "actual fraud" requirement appears to impose a stiff burden of proof on the claimant. Certainly she must prove active or implied representations of property ownership on his part; presumably she must prove that she was induced to marry him in reliance on those representations.

The "actual fraud" doctrine has received support in other cases,[15] and has been endorsed in a carefully written article.[16] It is not yet clear that it is the prevailing trend. Probably all Ameri-

[13] 340 Pa. 203, 207–08, 16 A.2d 47, 50 (1940). *Accord:* Overbeck v. McHale, 354 Pa. 177 (1946) (transfer for consideration).

[14] *Id.* at 208, 16 A.2d at 50.

[15] "The old doctrine was utterly unreasonable. Suppose the intended husband was worth millions in city property and owned hundreds of lots, and should convey on the eve of his marriage one or a few of such lots and not disclose it. Would the deed be ipso facto void? Yes, by the doctrine of some cases. We conclude, therefore, that the facts and circumstances of this case may be considered in determining whether the giving of that deed was fraudulent." Dudley v. Dudley, 76 Wis. 567, 579, 45 N.W. 602, 606 (1890). *Accord:* Connelly v. Ford, 202 Mich. 558, 561, 168 N.W. 411, 412 (1918); Noah v. Noah, 246 Mich. 324, 224 N.W. 611 (1929); Tracy v. Thatcher, 135 Kan. 615, 11 P.2d 691 (1932); *cf.* Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441 (1879).

[16] Brégy and Wilkinson, "Antenuptial Transfers as Frauds on Marital Rights in Pennsylvania," 90 U. PA. L. REV. 62 (1941).

can courts would permit recovery upon proof of "actual fraud"; but there is still substantial authority for the "presumed fraud" rule, in which the burden is on the transferee to show that the transfer was for a reasonable purpose or in pursuance of a moral obligation. The "actual fraud" rule favors the transferee; the "presumed fraud" rule favors the wife.

Neither rule is entirely satisfactory. The "actual fraud" rule may not interfere "with the power of a chancellor to draw reasonable inferences from all the evidence in the case," [17] but it presupposes too high a degree of financial shrewdness in the average bride, whether it be a first or a second marriage. She should be able to feel assured that support will be forthcoming; she should not be forced to bargain for it. In marriage the woman takes on the responsibilities of homemaking. In return she looks to her husband for support and for security in her old age. It is true that many women out of necessity continue to work during the early years of marriage; [18] but it is also true that her homemaking responsibilities would be more easily discharged if she did not have to work. Consequently the husband is obliged to provide for his wife during coverture and to give her at least a designated fraction of whatever "estate" he leaves at death. Thus in these antenuptial transfer cases the emphasis should be on the husband's duty of support, not on the presence or absence of the husband's *scienter*. Whatever the husband's motive for the transfer and whatever the wife's motive for the marriage, the wife has a justifiable complaint about unreasonably large antenuptial transfers.

But note that the wife's quarrel should lie only with *unreasonably large* antenuptial transfers. This is important. We must bear in mind that antenuptial transfers are more apt to precede a second marriage, when the parties frequently marry for companionship and convenience. The husband, being older, has had a chance to acquire an estate; and it is only natural that he should wish to make some provision for the children of his first marriage. Probably the normal estate planning here would involve some inter vivos provision for the children of the first marriage, plus a

[17] *Id.* at 76.
[18] See Chap. 2, note 27, *supra.*

life estate for the widow, with remainder on her death to his children. The second wife should expect no more.

Tested by these considerations, neither the "actual fraud" rule nor the "presumed fraud" rule appears to carry out the desired community policy. The wife should not have to prove actual reliance: marriage settlements [19] and antenuptial contracts are not so common that either the first or the second wife should feel impelled to call for an audit before she says "I do." On the other hand, the "presumed fraud" rule is too generous to the wife. We should not encourage "nuisance" litigation over settlements on children of a prior marriage. These settlements are quite normal; thus the burden should be on the wife to prove that the secret transfer was unreasonably large, not on the children to overcome a presumption that it was fraudulent. In brief, our basic policy on postnuptial transfers is the key to proper judicial controls on the potential husband's antenuptial transfers. "In discharging his duty to his children, he must not be recreant to his equally binding duty to his future bride." [20] For example, let us assume that children of a former marriage received $10,000 by a secret antenuptial transfer. Let us also assume that the claimant is by now the transferor's widow,[21] and that the jurisdiction concerned has adopted the Suggested Model Decedent's Family Maintenance Act. This statute affects postnuptial transfers only, but the underlying policy applies also to antenuptial transfers. In such a jurisdiction the widow logically should not prevail against her deceased husband's antenuptial transfers unless she first can show that she is entitled to maintenance and that the estate is inadequate to provide for her needs. Her next step in "family maintenance" jurisdictions (and her first step in "statutory share" jurisdictions) should be to prove that the transfer was in an unreasonably large amount under the circumstances prevailing at the time of the transfer. If she can do this the court should then be permitted to require the donees to contribute any amount that it deems fair, up to the full amount that was transferred. Norm-

[19] The wife is in a stronger position if the transfer was in evasion of an antenuptial contract; see, *e.g.*, Newton v. Pickell, 201 Ore. 225, 269 P.2d 508 (1954); *but cf.* Chap. 17, note 18, *supra*.

[20] Arnegaard v. Arnegaard, 7 N.D. 475, 491, 75 N.W. 797, 802, 41 L.R.A. 258 (1898).

[21] See note 28, *infra*.

ally this will approximate the excess over what the court considers would have been a reasonable transfer. If any amount up to $6,000 would have been reasonable, then the donees could be ordered to return $4,000. But the court should have discretion to name any amount it thinks fair, in order to balance the equities between the parties.[22]

(b) Scope of the Action

But what if personalty was transferred — or realty, in a jurisdiction in which inchoate dower is abolished — and the suit is brought in the husband's lifetime? In these circumstances the cases suggest that the wife could set the transfer aside if "actual fraud" is proved.[23] When there is no "actual fraud," *i.e.*, representations inducing reliance, the converse appears to be true: the courts will not presume fraud with reference to transfers of this sort, apparently on the theory that the decree would be unenforceable. In *Petty* v. *Petty* [24] the wife sued in the husband's lifetime to set aside a transfer of land and slaves made after the engagement. She prevailed as to the land. With respect to the slaves, however, the court said that she "has no such right or interest in them during the coverture, as to authorize her to ask an annulment of the deed to them. And should such decree be rendered,. . . the title would re-vest in the husband, and he would have the right to sell or give the estate to whom he pleased the next moment." [25] And a leading article has stated: "Certainly

[22] The fact that the fiancé was financially independent would suggest that the transfer was a reasonable one. The wife's need at the time of the litigation would be a factor to be considered in deciding on the amount of contribution, whether the jurisdiction concerned operates under the statutory share or under family maintenance legislation.

[23] *E.g.*, Kirk v. Kirk, 340 Pa. 203, 16 A.2d 47 (1940).

[24] 4 B. Mon. 215 (Ky. 1843).

[25] The court did concede that she might have an action on the death of her husband. And perhaps she may win, with or without reference to the fact that personalty is involved, on the ground that the antenuptial transfer is "illusory," *i.e.*, that excessive control was retained (see cases, *infra*). If the transfer was a reasonable one, however, what difference does it make that it is "illusory?" In fact, retention of a life estate inures to the wife's favor, since it provides more funds from which she could be supported during coverture. Colorable or sham or testamentary transactions are, of course, void in any event: Alexander v. Zion's Sav. Bank & Trust Co., 2 Utah 2d 317, 273 P.2d 173 (1954)

fraud should not be presumed from a gift the day before the wedding when it could not have been attacked if made the day after." [26]

(testamentary trust). Cases using the "postnuptial" terminology include: In re Freistadt's Will, 104 N.Y.S.2d 510 (Surr. Ct. 1951), *aff'd without opinion,* 278 App. Div. 962, *rev'd,* 107 N.Y.S.2d 466 (2d Dep't 1951) (antenuptial Totten trusts tested as to whether "illusory"); Clavin v. Clavin 41 N.Y.S.2d 377 (Sup. Ct. 1943), *aff'd without opinion,* 267 App. Div. 760, 45 N.Y.S.2d 937 (1st Dep't 1943); Courts v. Aldridge, 190 Okla. 29, 120 P.2d 362 (1941) (transfer 22 days before second marriage held ineffective, using "control" rationale). The United States savings bonds in the famous Deyo v. Adams litigation were purchased four years before marriage. The litigation was argued throughout on the basis of the rules applicable to postnuptial transfers. In re Deyo's Estate, 180 Misc. 32, 42 N.Y.S.2d 379 (Surr. Ct. 1943), *refusing to follow* Deyo v. Adams, 178 Misc. 859, 36 N.Y.S.2d 734 (Sup. Ct. 1942), discussed p. 224, *supra. Cf.* Collins v. Collins, 98 Md. 473, (1904) (leasehold estate and furniture; postnuptial cases cited); Marano v. LoCarro, 62 N.Y.S.2d 121 (Sup. Ct. 1946), *aff'd without opinion,* 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946) (transfer either 4 days before or 10 days after marriage). *Contra;* Hoeffner v. Hoeffner, 389 Ill. 253, 262, 59 N.E.2d 684, 688 (1945).

[26] Brégy and Wilkinson, "Antenuptial Transfers as Frauds on Marital Rights in Pennsylvania," 90 U. PA. L. REV. 62, 73 (1941), citing Fritz Estate, 135 Pa. Super. 463, 5 A.2d 601 (1939). In the Fritz case a sealed note executed three days before marriage was upheld against the widow on the reasoning of the Pennsylvania postnuptial cases. Brégy and Wilkinson, at p. 70, cite 13 R.C.L. §104 for the point under discussion, as also does a well-written note in 20 CORNELL L. Q. 381, 383, note 9 (1935); but the text in 13 R.C.L. cites chiefly dicta: Butler v. Butler 21 Kan. 521, 382, 30 Am. Rep. 441, 445 (1879) (suit in lifetime involving realty, dictum as to personalty); Kelly v. McGrath, 70 Ala. 75, 45 Am. Rep. 75 (1881) (mortgage executed the day before marriage; wife, suing in lifetime of husband prevails as to her dower and homestead rights); Arnegaard v. Arnegaard, 7 N.D. 475, 485–86, 75 N.W. 797, 800 (deed of realty held fraud on wife's homestead rights; dictum that were it not for the homestead rights plaintiff widow would have no ground for complaint). Also see Bynum v. Prudential Ins. Co. of America, 77 F. Supp. 56 (E.D.S.C. 1948) (group insurance benefits to common law wife, later formal marriage; valid under South Carolina "mistress" statute); Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937) (bakery business and land transferred by man before his second marriage; wife, suing in huband's lifetime, wins as to realty but loses as to personalty); Note, 14 U. CIN. L. REV., 451, 452 (1940).

On the other hand, authority does exist for permitting the wife or the widow to set aside antenuptial transfers of personalty. See, *e.g.,* Beere v. Beere, 79 Iowa 555, 44 N.W. 809 (1890) (bill of sale of personalty three days before "shotgun" marriage, husband abandoning wife the next day); Collins v. Collins, 98 Md. 473, 57 Atl. 597 (1904) (husband transfers all his property twenty days before marriage; wife sues

The nature of the wife's "interest" in the husband's personalty should not be a decisive factor in these antenuptial transfer cases. Even if we assume for the sake of argument that a woman may not complain of transfers made the day after marriage, it does not follow that she has no ground for complaint if one of her reasons for marriage is a belief that her husband has a reasonable amount of property. To be sure, the golddigger cannot complain if the mine has been salted: but in these antenuptial transfer cases there is actual value, deliberately spirited away. Moreover, here we have the additional element of active or implied misrepresentation, in circumstances calling for full disclosure. And is the wife any less injured because the property transferred happened to be bonds instead of Blackacre? Possibly most cases involving unreasonably large transfers also entail "actual fraud," but the wife may find this latter factor difficult to prove. If she can show that it was an unreasonably large transfer, made secretly, why should she be prejudiced because she did not demand that her fiancé pass his accounts? True, she married him "for better or for worse"; but that refers to *future* shocks and reverses. To say that she must lose because the decree would be unenforceable carries more conviction than to say that she loses because she has no "interest" in his personalty during coverture. But courts and commentators agree, cryptically, that the wife would win if there was "actual fraud." How would the decree be any more enforceable [27] in that situation? The problem seems to have been ignored, probably because in most cases the husband is dead at the

at his death, prevails; semble, actual fraud); Duncan's Appeal, 43 Pa. 67 (1862) (husband prevails in wife's lifetime); Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1930) (antenuptial gift of personalty set aside on husband's death, to extent of statutory share); LeStrange v. LeStrange, 242 App. Div. 74, 273 N.Y. Supp. 21 (2d Dep't 1934) (trust of realty and transfer of bank deposit to sons of former marriage the day after marriage license issued; wife sues in husband's lifetime; held, void, stressing element of misrepresentation); *cf.* Rubin v. Myrub Realty, 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep't 1935), stating that the wife's position in these cases is strengthened by the "increased rights" given her under §18 of the New York Dec. Es. Law; Matter of Schurer, 157 Misc. 573, 284 N.Y. Supp. 28 (Surr. Ct. 1935), *aff'd without opinion,* 248 App. Div. 679, 289 N.Y. Supp. 818 (1st Dep't 1936) (distinguishes the Rubin and LeStrange cases because of "definite misrepresentation therein").

[27] Enforceability was not discussed in the LeStrange case, note 26, *supra.*

time of the suit.[28] Even if he is alive,[29] however, the matter of enforceability should not overtax the ingenuity of equity. If realty was transferred, and inchoate dower is not available, the decree could establish an equitable lien [30] on the property that was returned to the husband, enforceable for her support during his lifetime or upon his death.[31] With reference to personalty,

[28] Of fifty cases involving antenuptial transfers, selected at random, the recalcitrant spouse was alive at the time of the suit in only eleven cases: Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937); Kelly v. McGrath, 70 Ala. 75, 45 Am. Rep. 75 (1881); Deke v. Huenkemeier, 260 Ill. 131, 102 N.E. 1059, 48 L.R.A. (N.S.) 512 (1913), *later appeal,* 289 Ill. 148, 124 N.E. 381 (1919); Beere v. Beere, 79 Iowa 555, 44 N.W. 809 (1890); Hamilton v. Smith, 57 Iowa 15, 10 N.W. 276 (1881); Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441 (1879); Petty v. Petty, 4 B. Mon. 215 (Ky. 1843); Griffin v. Griffin, 225 Mich. 253, 196 N.W. 384 (1923) (divorce suit); LeStrange v. LeStrange, 242 App. Div. 74, 273 N.Y. Supp. 21 (2d Dep't 1934); Taylor v. Taylor, 197 N.C. 197, 148 S.E. 171 (1929) (action to obtain alimony without divorce); Duncan's Appeal, 43 Pa. 67 (1862). Most of the cases examined involved second marriages, with the transfer being made to children of the first marriage. In many of the cases the wife was considerably younger than the husband, and (naturally, under the prevailing tests) willing to admit that it was a marriage of convenience. In LeStrange v. LeStrange, 242 App. Div. 74, 75, 273 N.Y. Supp. 21, 22 (2d Dep't 1934), at the time of the marriage the husband was sixty-eight, the wife's age not stated. Each had been married before. Said the court: "Evidently the agreement to marry was a practical one, and the parties wished to have a separate home and live their lives free from the conflicts arising through living in the home of younger people." In Re Ramsey's Estate, 98 N.Y.S.2d 918 (Surr. Ct. 1950), the husband, aged sixty-seven, conveyed away his farm three days before his marriage to plaintiff, aged twenty-six, and reserved a life estate; held, valid.

[29] The wife's position on discovery of the transfer is awkward. She has an action for fraud and deceit against her husband, but in the circumstances it is not an appropriate remedy: her concern is more with the property transferred. She cannot get a divorce or an annulment because of the husband's misrepresentation of his financial position; but see Shoufeld v. Shoufeld, 260 N.Y. 477, 184 N.E. 60 (1933) (false statement by the woman that she had $6000; annulment granted, three judges dissenting). The Shoufeld case was called "border-line" in Berardino v. Berardino, 156 Misc. 203, 206, 280 N.Y.S. 15, 16 (1935). And if she waits until her husband dies the donee may have squandered the property or transferred it to a purchaser for value without notice.

[30] *But cf.* Deke v. Huenkemeier, 260 Ill. 131, 137, 102 N.E. 1059, 48 L.R.A. (N.S.) 512 (1913); *later appeal* 289 Ill. 148, 124 N.E. 381 (1919).

[31] The decree could be recorded, to prevent sales to bona fide purchasers. It could be enforceable to the same extent and amount as is afforded her by the local forced share statute. Presumably the land could be sold during the husband's lifetime, subject to the wife's interest.

the decree could direct that a specified amount [32] be used to purchase property to be held in tenancy by the entireties; or that the same amount be put into an irrevocable trust, with the income to the husband for life,[33] remainder to the wife, and, in the event that the wife predeceases the husband, with power of appointment in the husband. As further alternatives, the husband could be directed to make suitable improvements in or on the homestead; in aggravated circumstances the husband could be forced to purchase life insurance payable to the wife, with proviso for cashing in or changing beneficiaries if the wife predeceases him; or, if the wife needs the money immediately for support, an order could be made requiring that it be paid directly to her.

Use of the "reasonableness" test would no doubt tend to restrict the frequency and extent of the widow's recovery, since she is usually a second or third wife. Nevertheless, the suggested test would ensure that she would win or lose on the equities of the case.[34] Recovery would not hinge on the state of mind of either

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An alternative to the lien would be an injunction against further unreasonably large transfers.

[32] Also equivalent to the widow's forced share in the husband's personalty.

[33] The reasoning here is that the wife may request return of the property to her husband, but normally she should not be entitled to secure it for herself.

[34] That the comparative amount of the property transferred is relevant: Anderson v. Anderson, 194 Ky. 763, 240 S.W. 1061 (1922); Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441 (1879).

A singular case is Gellatly v. United States, 71 F. Supp. 357 (1947). When a plaintiff widow became acquainted with the 77 year old Gellatly he was worth several millions, an eccentric who "wore white velvet trousers and a red velvet coat." He had already decided to devote his fortune to augmenting his valuable art collection, and to present the collection to an institution that could preserve and display it in his name. The plaintiff believed Gellatly to be wealthy. The court stated that "she frankly admits that she thought the marriage would give some assurance of being able to care for the needs of her [invalid] daughter"; that "he permitted her to believe that he was a man of means"; and that he led her to believe he intended to make provision for her maintenance "at his death." The formal transfer to the Smithsonian authorities took place June 13, 1929, with a supplementary transfer in August 1930. On 2 September 1930 he wrote plaintiff an offer of marriage, having been acquainted with her for five years. At the time of his death in 1931 the art collection was worth some four millions, his estate "practically nothing except some small articles, including an umbrella and a suit case." Mrs. Gellatly had to

the man or the woman at the time of the transfer, on whether the husband is alive or dead at the time of the litigation, on the fortuitous nature of the wife's "interest" [35] during coverture, or on the type of property that is involved.

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borrow money to pay for the funeral. The Smithsonian Institute refused any relief, whereupon various bills were introduced in Congress over a period of years to give her relief. One such bill was referred to the Court of Claims in 1944. The court held that the widow, as administratrix, had no grounds in law or equity to set aside the transfer. No reason was given, other than the fact that the Smithsonian Institute had "lived up to their agreement" with the decedent; nor was there any discussion of the antenuptial transfer case-law.

[35] The "interest" of course represents the judgment of the state legislature. Nevertheless, the forced share purports to be the equivalent of common law inchoate dower, as far as protection against disinheritance is concerned. Imposition of a restraint on the property after it is returned to the husband is justifiable because of the husband's reprehensible antenuptial transfer.

APPENDIX D

Contracts To Make A Will[1]

(a) INTRODUCTORY REMARKS

The contract to make a will is another device that merits separate treatment. Litigation over spouses' rights in these contracts almost invariably concerns antenuptial contracts, usually made long before the marriage to the surviving spouse; and, of course, no contract may be enforced unless consideration is present. Here also, however, the case-law is confused; here also we deal almost invariably with second and third marriages; and here also the solution to the problem of spouses' rights is suggested by the policy underlying the maintenance and contribution formula.

A contract to make a will concerns a promise by A to B that A will leave a legacy or devise either to B or to a designated third party. The most obvious but the most important thing that can be said about this arrangement is that it is a contract, not a will. The substantive and formal validity of the arrangement depends on the law of contracts; B's remedies are contract remedies. If A dies without having made the promised devise, B may obtain contract damages or quasi-contractual recovery from A's estate or he may obtain the property concerned by a suit in the nature of specific performance. If A makes the promised will it is usually and properly held that A still has the power to revoke the will.

The contract to make a will may be a reciprocal arrangement.

[1] I am indebted to six excellent articles by Professor Bertel M. Sparks. The articles appear in the following order: "Historical Development of the Law of Contracts to Devise or Bequeath," 42 KY. L. J. 573 (1954); "Problems in the Formation of Contracts to Devise or Bequeath," 40 CORNELL L.Q. 60 (1954); "Legal Effect of Contracts to Devise or Bequeath Prior to the Death of the Promisor: I & II," 53 MICH. L. REV. 1, 215 (1954); "Enforcement of Contracts to Devise or Bequeath After the Death of the Promisor," 39 MINN. L. REV. 1 (1954); "Contract to Devise or Bequeath as an Estate Planning Service," 20 MO. L. REV. 1 (1955). The articles are commented on by Rheinstein in "Critique: Contracts to Make a Will," 30 N.Y.U. L. REV. 1224 (1955); and they have recently appeared in book form: Sparks, CONTRACTS TO MAKE WILLS (1956).

Two testators, normally spouses, may make a common ("mutual") disposition of their respective property. The usual plan, whether the spouses sign separate wills or one "joint" will, is to give the surviving spouse a life estate, with remainder to the children. These arrangements do not imply *per se* that the survivor has made a contract not to revoke. When the contract can be proved, however, the more enlightened, more practicable view is that the arrangement is just another species of contract to make a will. Under this view the survivor can revoke, but the beneficiaries of the contract still have their contract remedies against his estate.

The contract to make a will is quite popular with laymen. The promisor retains full use of the property concerned during his lifetime. In return for his promise he may obtain material support, companionship, personal services. The device is useful in marriage settlements, particularly between older people; it also is used in adoption proceedings, separation agreements, and divorce settlements. Partners employ it to dispose of partnership assets; and corporations find it valuable in schemes for deferred compensation of high-salaried personnel.

(b) Rights of the Surviving Spouse

The great majority of the cases involving spouses' rights concern contracts entered into before the marriage with the surviving spouse – generally before the promisor even met the surviving spouse.[2] The cases involving these "antenuptial" [3] contracts usually concern a promisor who was fairly well along in years at the time the contract was made; and almost without exception the marriage concerned was a second or third marriage. Cases involv-

[2] Presumably a contract made in *contemplation* of the marriage could be set aside under the rules relating to antenuptial transfers. See Appendix C, *supra*.

[3] We must distinguish between (a) contracts between a spouse and a third party, and (b) antenuptial and postnuptial contracts between the spouses themselves. Contracts in class (b) which regulate or waive succession rights between the spouses are usually upheld, as between the parties thereto, if the terms are fair and made after full disclosure; Atkinson, Wills, §31 (2d ed. 1953). Local statutes entail exceptions to this rule; *e.g.*, Tucker v. Zachary, Okla., 269 P.2d 773 (1954) (postnuptial agreement). We are concerned with contracts in class (b) only when they restrict the succession rights of a later-acquired spouse of one of the parties.

ing first marriages appear to be restricted to "postnuptial" contracts.[4]

The promisee has prevailed in almost two-thirds of the cases. The more recent cases, however, reveal a trend in favor of the surviving spouse.[5] The decisions contain a variety of rationales — some of a flexible nature, others quite arbitrary. Since the issue usually arises in a suit for specific performance by the contract beneficiary,[6] a common rationale when the widow prevails [7] is that an equity court in its discretion may refuse specific performance when that remedy would be unfair to innocent [8] third persons.[9] A similar flexible approach is to consider the "equities" [10] of the parties to the litigation: in some instances the courts refer to the duration [11] of the marriage between the decedent and the surviving spouse, and the merits otherwise of the contract

[4] Ward v. Ward, 94 Colo. 275, 30 P.2d 853 (1934); Crofut v. Layton, 68 Conn. 91, 35 Atl. 783 (1896); Buehrle v. Buehrle, 291 Ill. 589, 126 N.E. 539 (1920); Fleming v. Fleming, 194 Iowa 71, 184 N.W. 296 (1921), *writ of error dismissed,* 264 U.S. 29 (1924).

[5] *E.g.,* Tod v. Fuller, 78 So. 2d 713 (Fla. 1955); Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944); In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954). *Contra:* Komarek Estate v. Komarek, 177 Kan. 659, 282 P.2d 446 (1955); In re Davis' Estate, 171 Kan. 605, 237 P.2d 396 (1951).

[6] But it also may arise in accounting proceedings, In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954); in partition suits, Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910); in suit to quiet title, Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941); and in proceedings to construe the will in the lifetime of the testator, Underwood v. Myer, 107 W.Va. 57, 146 S.E. 896 (1929).

[7] The successful spouse prevails only to the extent of her dower or elective share; Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939).

[8] On the significance of the plaintiff spouse's knowledge of the contract, at the time of the marriage, see p. 375, *infra.*

[9] Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); In re Arland's Estate, 131 Wash. 297, 230 Pac. 157 (1924); *cf.* Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944).

[10] Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944); Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909); Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939); Ralyea v. Venners, 155 Misc. 539, 280 N.Y. Supp. 8 (Sup.Ct. 1935); In re Arland's Estate, 131 Wash. 297, 230 P. 157 (1924); *cf.* Poor v. Logan, 252 S.W.2d 1 (Ky. 1952).

[11] Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909); In re Arland's Estate, 131 Wash. 297, 230 Pac. 157 (1924); *cf.* Fleming v. Fleming, 194 Iowa 71, 184 N.W. 296 (1921), *writ of error dismissed,* 264 U.S. 29 (1924).

beneficiary's case. But references to the financial condition of the surviving spouse are relatively infrequent.[12] And not all courts use the term "equity" as descriptive of some appealing feature of the particular litigant's case. Sometimes it appears from the context that the court is thinking of the moral claim of widows in general, or of contract beneficiaries in general.

Other rationales are less pliant, less sensitive to the individual circumstances of the case. For example, some courts have concluded that when the contract was made the parties thereto must necessarily have contemplated that enforcement would be subject to the elective rights of the later-acquired spouse.[13] And the promisee will lose, of course, if he is characterized as a legatee: *qua* legatee he is subordinate to the widow.[14] Other courts, less concerned with the doctrinal niceties, merely take it for granted that the contract is subject to the widow's claim,[15] or that the estate that was to be willed away was the net estate after deducting the widow's claim.[16]

The favorite rationale when the decision is for the promisee is that at the time of the marriage the property concerned *belonged* to the promisee.[17] The "stream can not rise higher than its source";[18] neither, say these decisions, can the widow have any rights in property that before the marriage the husband-to-be had contracted to give to a third party. This notion seems particularly

[12] Fleming v. Fleming, 194 Iowa 71, 184 N.W. 296 (1921), *writ of error dismissed,* 264 U.S. 29 (1924); Smith v. Smith, 340 Ill. 34, 172 N.E. 32 (1930); Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909).

[13] *E.g.,* Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); *cf.* Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944).

[14] *E.g.,* In re Hoyt's Estate, 174 Misc. 512, 21 N.Y.S.2d 107 (Surr. Ct. 1940).

[15] Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918); Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939); In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954); *cf.* Ward v. Ward, 94 Colo. 275, 30 P.2d 853 (1934); Near v. Shaw, 76 Misc. 303, 137 N.Y. Supp. 77 (Co. Ct. 1912) (contract not proven).

[16] Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944).

A statute declaring that marriage revokes a man's will does not aid the widow since the promisee's rights stem from the contract, not the will; Rundell v. McDonald, 41 Cal. App. 175, 182 Pac. 450 (1919), *later appeal,* 62 Cal. App. 721, 217 P. 1082 (1923); Mosloski v. Gamble, 191 Minn. 170, 253 N.W. 378 (1934).

[17] *E.g.,* Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919); Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912).

[18] Baker v. Syfritt, 147 Iowa 49, 62, 125 N.W. 998, 1003 (1910).

appealing when the contract related to real estate, in a jurisdiction in which inchoate dower is available.[19] Dower has also been refused on the reasoning that the decedent held the land as a "trustee" [20] for the promisee, or that the contract to devise is analogous to a contract to sell.[21]

It is not unnatural that the cases on our present problem reflect a variety of inflexible clichés, *e.g.*, that the contract removes the affected property from the decedent's estate, or that the beneficiary is in the nature of a legatee. Nor is it unnatural that even those courts that are disposed to consider the "equities" are vague as to the criteria that determine the significance of any given "equity." These phenomena are to be expected when the community decision on widow's support, as announced in the statutory share, bears no relation to need and ignores the problem of inter vivos transactions. The statutes being arbitrary, a like attitude on the part of the courts is not entirely reprehensible.

(c) Policy Considerations

The apparent diversity in judicial thinking has its parallel in the views of commentators. Professor Sparks tends to be critical of the cases enforcing spouses' rights, particularly when the contract concerns less than the entire estate [22] or when it was made

[19] Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910); Harris v. Harris, 130 W. Va. 100, 43 S.E.2d 225 (1947).

[20] Harris v. Harris, 130 W.Va. 100, 43 S.E.2d 225 (1947); also see Sonnicksen v. Sonnicksen, 45 Cal. App.2d 46, 113 P.2d 495 (1941).

[21] Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S.E. 992 (1900); Harris v. Harris, 130 W.Va. 100, 43 S.E.2d 225 (1947).

The analogy is debatable since the widow would seem to have a stronger case when the contract was to make a devise. In the contract to sell, the consideration is money. Whether it is paid before or after the promisor's death it may, and probably will, augment the estate available for the widow's share. In the contract to devise, however, the consideration frequently is not monetary, and usually is given during the promisor's lifetime.

Also used is the theory that the contract is in the nature of an inter vivos transfer which if made in "good faith" removes the property from the estate available to the widow: *e.g.*, Brindisi v. Stallone, 259 App. Div. 1080, 21 N.Y.S.2d 29 (2d Dep't 1940); *cf.* Crofut v. Layton, 68 Conn. 91, 35 Atl. 783 (1896). *But see* In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954).

[22] Sparks, Contracts to Make Wills, 173 (1956). Most of the cases involving spouses' rights concern all of the estate. But an amount

after the marriage to the surviving spouse.[23] Professor Rheinstein takes the opposite view. "But it would be strange," he says, "if the public interest in protecting a surviving spouse against disinheritance would have to yield to the private interest of a third party with whom the spouse who later happens to be the predeceasing one has, before or after marriage, concluded a contract to make a will . . . it must also be irrelevant whether or not the existence of the contract to make a will was known to the surviving spouse at the time of the marriage." [24]

Both views have merit, since the beneficiary and the surviving spouse are each entitled to protection. The difficulty with each view is that it leads to stress on the rights of one party at the expense of the other, without regard to the individual equities. *Complete* protection for one party may in many cases entail unnecessary hardship to the other party. The beneficiary, on the one hand, undoubtedly relies on the contract being fulfilled. The consideration that has been "paid" may in some instances be purely conceptual, but in other instances it may be quite substantial. The deserving widow, on the other hand, must be protected since she relies, or is entitled to rely, on the financial support that society has provided by way of dower and the statutory share. Both parties being worthy of protection, it follows that the one suffers if there is overemphasis on the privileges or expectations of the other. Consequently I believe that the preferred position lies somewhere between the two views. Probably both writers would agree that implicit (although perhaps not explicit) in either view is the proviso that neither party should prevail in *all* circumstances. There being a conflict of interests, of policy considerations, the courts should have an approach that reconciles the two points of view. I believe that our conclusions as to the community values that are implemented in dower and the statutory share have application to antenuptial and postnuptial con-

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comprising less than the entire estate may be unreasonably large, as far as the spouse's claim is concerned. And when the contract affects designated property, that property may in actuality be the entire estate, as in Rundell v. McDonald, 41 Cal. App. 175, 182 Pac. 450 (1919), *later appeal*, 62 Cal. App. 721, 217 Pac. 1082 (1923).

[23] Sparks, *op. cit. supra* note 22 at 177.

[24] Rheinstein, "Critique: Contracts to Make a Will," 30 N.Y.U.L. REV. 1224, 1236 (1955).

tracts to make a will, as well as to voluntary antenuptial and postnuptial transfers. The Suggested Model Decedent's Family Maintenance Statute affects only voluntary postnuptial transfers,[25] but the basic approach relates also to contracts to make a will. As far as spouses' rights are concerned, the fact that the contract to make a will normally is made before marriage should be no more decisive than in the case of voluntary antenuptial transfers. To be sure, the contract beneficiary is not a mere voluntary transferee: he has paid consideration. But the nature and amount of the consideration should be a circumstance to be considered, not a factor that *per se* should foreclose the widow. "[I]t would be a rare case where some consideration could not be worked into the arrangement." [26]

I suggest the following approach. Jurisdictions that adopt the family maintenance type of legislation should not permit the claimant to attack the contract to make a will unless she can show that she is entitled to maintenance and is not otherwise adequately provided for. The next step in these jurisdicions – and the first and only step in jurisdictions operating under the statutory share – should be to balance the equities between the surviving spouse and the contract beneficiary. By "equities" I mean circumstances or factors that militate in favor of one party or the other under the maintenance and contribution formula.[27] The two most important equities, of course, would be the spouse's need [28] and the nature and amount of consideration "paid" by the promisee.[29] Also relevant would be such factors as the widow's treatment of the decedent, her knowledge or otherwise of the contract at the time of the marriage, and hardship to the beneficiary.

[25] The reasons for excluding the contract to make a will are set out at p. 366, *supra;* see also Suggested Model Decedent's Family Maintenance Act, §1(d) (comment), text, p. 306, *supra.*

[26] In re Erstein's Estate, 205 Misc. 924, 932, 129 N.Y.S.2d 316, 324 (Surr. Ct. 1954).

[27] See text, pp. 44–46, *supra.*

[28] In jurisdictions using the statutory share the upper limit of recovery would be governed by the fractional amount of the estate permitted under the statutory share.

[29] Inquiry into the adequacy of consideration is not unheard of in other areas of the law; *cf.* Llewellyn, "The Modern Approach to Counselling and Advocacy," 46 COLUM. L. REV. 167 (1946).

It should be immaterial, of course, that the promisor made the promised will or died intestate.[30]

The courts should find no insuperable difficulties in balancing the equities. Some cases, of course, will be easier to decide than others. Thus a needy and deserving widow should prevail when the beneficiary's claim depends more on "inheritance" than on substantial consideration.[31] Not so, however, if the beneficiary had given all of the property concerned to the decedent in return for the promise to make a will. In other cases, with the equities more in balance, a partial award to the widow may be indicated. In brief, the path of the courts should be cleared of preconceived dogmas. Relief for the surviving spouse should be discretionary, and avowedly so.[32]

Analysis of the existing case-law indicates that the suggested approach is a practicable one. Indeed, it would seem that the courts consciously or subconsciously pay much more attention to the equities of the case than would be suspected from the announced rationale. To test this theory I tried to discover the break of the equities in the individual cases dealing with spouses' rights in contracts to make a will. In other words, from the given facts I tried to decide what result would have been reached in each case under the approach suggested above. Cases in which the actual decision is clearly consistent or inconsistent with the equities under this approach are classified as "consistent" or "inconsistent," respectively. When an element of doubt appears the case is classified either as "probably consistent" or "probably inconsistent." "Not clear" means that I could not decide one way or the other. In most instances cases falling under this last classification had insufficient facts; in a few cases the known equities appeared to be in equilibrium. The breakdown of cases, grouped with reference to the party that actually prevailed, is as follows: [33]

[30] In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954), disapproving Brindisi v. Stallone, 259 App. Div. 1080, 21 N.Y.S. 2d 29 (2d Dep't 1940); also see Dillon v. Public Trustee of New Zealand, L. R. [1941] A.C. 294.

[31] See In re Arland's Estate, 131 Wash. 297, 230 Pac. 157 (1924).

[32] See Dillon v. Public Trustee of New Zealand, L.R. [1941] A.C. 294 (family maintenance legislation).

[33] CASES FAVORING THE SURVIVING SPOUSE. *Consistent.* In re Arland's Estate, 131 Wash. 297, 230 Pac. 157 (1924). *Probably consistent,* Tod v. Fuller, 78 So.2d 713 (Fla. 1955); Fleming v. Fleming, 194 Iowa 71,

A. CASES FAVORING SPOUSE

Consistent	1
Probably consistent	4
Not Clear	7
Total cases	12

184 N.W. 206 (1921), *writ of error dismissed,* 264 U.S. 29 (1924); Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944) (widow willed home for life and about one-sixth of $60,000 estate; her financial position not clear); In re Hoyt's Estate, 174 Misc. 512, 21 N.Y.S.2d 107 (Surr. Ct. 1940). *Not clear.* Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); Buehrle v. Buehrle, 291 Ill. 589, 126 N.E. 539 (1920); In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954); *cf.* Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918); Ward v. Ward, 94 Colo. 275, 30 P.2d 853 (1934); Poor v. Logan, 252 S.W.2d 1 (Ky. 1952) (suit in decedent spouse's lifetime); Gall v. Gall, 19 N.Y. Supp. 332 (1892) (contract not proved).

CASES FAVORING THE CONTRACT BENEFICIARY. *Consistent.* Rundell v. McDonald, 41 Cal. App. 175, 182 Pac. 450 (1919), *later appeal,* 62 Cal. App. 721, 217 Pac. 1082 (1923); Komarek Estate v. Komarek, 177 Kan. 659, 282 P.2d 446 (1955) (both spouses elderly at time of marriage, widow received substantial property); In re Davis' Estate, 171 Kan. 605, 237 P.2d 396 (1951) (promisee had given decedent considerable financial help); Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912); Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909); Price v. Craig, 164 Miss. 42, 143 So. 694 (1932) (promisee paid valuable consideration, marriage of only 3 weeks duration); Ralyea v. Venners, 155 Misc. 539, 280 N.Y. Supp. 8 (Sup. Ct. 1935) (claim by widow's estate); Larrabee v. Porter, 166 S.W. 395 (Tex. 1914). *Probably consistent.* Crofut v. Layton, 68 Conn. 91, 35 Atl. 783 (1896); Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939); Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S.E. 992 (1900) (equities for promisee, widow's need not clear). *Probably inconsistent.* Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910) (seven years marriage). *Not clear.* Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941); Smith v. Smith, 340 Ill. 34, 172 N.E. 32 (1930); Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919) (promisees merely heirs, but marriage of short duration); Price v. Aylor, 258 Ky. 1, 79 S.W.2d 350 (1935); Mosloski v. Gamble, 191 Minn. 170, 253 N.W. 378 (1934) (no discussion of spouse's claim); In re Lewis' Will, 123 N.Y.S.2d 859 (1953) (annuity payable under separation agreement held superior to spouse's claim on ground that husband's estate had been charged with liability therefor); Brindisi v. Stallone, 259 App. Div. 1080, 21 N.Y.S.2d 29 (2d Dep't 1940); Harris v. Harris, 130 W. Va. 100, 43 S.E.2d 225 (1947) (short duration). *Cf.* Underwood v. Myer, 107 W. Va. 57, 146 S.E. 896 (1929) (suit in decedent spouse's lifetime).

Dicta bearing on our problem are found in the following cases: *Favoring the surviving spouse:* Alban v. Schnieders, Adm'r, 67 Ohio App. 397, 403, 34 N.E.2d 302, 304 (1940) (contract not proven); Fields v. Fields, 137 Wash. 592, 243 Pac. 369 (1926) (contract not proven);

B. CASES FAVORING BENEFICIARY

Consistent	8
Probably consistent	3
Probably inconsistent	1
Not clear	9
Total cases	21

Summary

Total cases	33
Consistent, or Probably consistent	16
Probably inconsistent	1
Not clear	16

Admittedly this classification of cases is far from conclusive. The dearth of reported facts is reflected in the number of cases grouped under "not clear." And when sufficient facts are given, the classification represents at best one person's reaction to those facts. Nevertheless, the findings do suggest that courts are already groping toward the desired approach, and that it is a workable one. It reconciles the conflicting policy interests; it also provides a working reconciliation of the reported cases. Far from being in hopeless confusion, the cases tend to fall in line when tested in this manner. Of the thirty-three cases, only one decision appears to be clearly inconsistent with the equities.

(d) EFFECT OF THE WIFE'S KNOWLEDGE OF THE CONTRACT AT THE TIME OF MARRIAGE

Should it matter that at the time of the marriage the wife was aware of her husband's contract to will his property to a third person? The cases leave the impression that this is a serious question indeed. Some courts and some commentators [34] say that the wife's actual knowledge of the contract is a decisive bar to her recovery.[35] It has even been suggested that constructive notice

cf. Thomas v. Byrd, 112 Miss. 692, 73 So. 725 (1916) (contract deemed testamentary).

Favoring the beneficiary: McGowan v. Barber, 127 F.2d 458, 463 (2d Cir. 1942) (contract not proven).

[34] *E.g.*, Sparks, CONTRACTS TO MAKE WILLS, 174 (1956).

[35] Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941); Price v. Craig, 164 Miss. 42, 143 So. 694 (1932); Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S.E. 992 (1900).

would suffice, at least when the contract affects realty.[36] We cannot always tell from these cases whether the knowledge factor is conclusive or whether it is tossed in for makeweight effect.[37] When the spouse prevails, her lack of knowledge is sometimes considered decisive,[38] and is often mentioned as a point in her favor.[39]

A commendable attitude toward the knowledge factor is exhibited in the recent Kentucky case of *Wides* v. *Wides, Ex'r.*[40] Here a husband, in anticipation of being divorced, contracted to make a will leaving his property to his wife and four children. The contract was incorporated in the divorce judgment. Three years later he remarried, the second wife being in ignorance of the contract. Before he died he made a will leaving his second wife their home for life and approximately one sixth of his $60,000 estate. The widow elected to take her statutory share. The court took the view that enforcement of the promisee's rights was a matter for equitable discretion. Stressing the wife's lack of knowledge of the contract, the court stated:

> The husband had sought to be fair to all. He devised only a reasonable part of his estate to his second wife and the balance to his divorced wife and children equally as provided in his separation agreement or contract. Our conclusion is that to adjudge recovery of the entire estate or its equivalent in money to them to the exclusion of the second wife's statutory rights would be inequitable and contrary to the spirit and intent of the statutes reflecting the public policy of the State.[41]

[36] Smith v. Smith, 340 Ill. 34, 172 N.E. 32 (1930) (but court suggests that any fair contract would defeat the spouse); Larrabee v. Porter, 166 S.W. 395 (Tex. 1914) (but court states that equities not particularly in widow's favor); *cf.* Harris v. Harris, 130 W.Va. 100, 43 S.E.2d 225 (1947) (possession of a building).

[37] *E.g.,* Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909) (stress on equities).

[38] Tod v. Fuller, 78 So.2d 713 (Fla. 1955). *Contra:* Rundell v. McDonald, 41 Cal. App. 175, 182 Pac. 450 (1919), *later appeal,* 62 Cal. App. 721, 726–7, 217 Pac. 1082, 1085 (1923).

[39] Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939); In re Arland's Estate, 131 Wash. 297, 230 Pac. 157 (1924); *cf.* Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918); Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912).

[40] 299 Ky. 103, 184 S.W.2d 579 (1945).

[41] *Id.* at 114, 184 S.W.2d at 584.

When the case was later reinstated on the trial docket evidence as to the wife's knowledge of the contract was rejected. This ruling was affirmed on appeal, on the ground that "the widow's innocence was a matter of considerable equity, yet it was and is not controlling in and of itself. The paramount factor is the policy of the law to protect a widow. . . ." [42] Although the ruling on the evidence seems inconsistent with the *ratio decidendi,* the court's philosophy is good. These cases usually involve second marriages,[43] but even in second marriages may we not assume that the prospective wife regards her husband as much an object of affection as a walking annuity? If this be so, should she be penalized, in a case in which she was aware of her fiance's contract to make a will, merely because her emotions supplanted her business acumen? Under the approach suggested above, her knowledge of the contract becomes merely a circumstance to be considered, relevant but not decisive.[44]

(e) Inter Vivos Transfers in "Evasion" of the Beneficiary's Rights

We tread familiar ground when we examine the decisions dealing with the decedent's inter vivos transfers in evasion of the beneficiary's contract rights. These cases provide a striking analogy to the postnuptial transfer cases, even when no spouse's claim is involved. The case-law on this point has been ably covered by Professor Sparks.[45] The problem arises chiefly in connection with contracts to devise or bequeath all or a fractional part of the promisor's property. One would assume that such a promisor impliedly undertakes not to make inter vivos transfers in an amount that would defeat the legitimate expectations of the beneficiary.[46]

[42] Wides v. Wides' Ex'r, 300 Ky. 344, 346, 188 S.W.2d 471, 472 (1945).

[43] See p. 367, *supra.* The marriage being a second marriage, it would seem that the widow could not characterize the usual "knowledge" bar as being a restraint on marriage; *cf.* 6 American Law of Property §27.13 (1952).

[44] Knowledge may be quite important when, as in Larrabee v. Porter, 166 S.W. 395, 404 (Tex. 1914), the marriage is "void of sentiment."

[45] Sparks, Contracts to Make Wills, 52–69 (1956).

[46] The *power* of the promisor to make inter vivos transfers is of course undisputed. Recent cases on the problem include Bell v. Pierschbacher, 245 Iowa 436, 62 N.W.2d 784 (1954) (bona fide purchaser

In this situation, as well as in connection with postnuptial transfers in "evasion" of the widow's share, we encounter a judicial disposition to talk in terms of the promisor's "intent," [47] or his "good faith." [48] Here also we find the old familiar misuse of the "testamentary" label, applied in one case even to an irrevocable trust.[49] And the case-law parallels the postnuptial "evasion" case-law in another important respect: the courts appear to ask if the gift was unreasonably large under the circumstances.[50] Factors that are considered include the size and purpose of the gift, the relationship of the beneficiary to the decedent, the moral claim of the beneficiary,[51] and the amount of consideration involved.[52]

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will be protected); Kaplan v. Kaplan, 134 N.Y.S.2d 753, 284 App. Div. 972 (2d Dep't 1954); Richardson v. Lingo, 274 S.W.2d 883 (Tex. 1955).

As to United States savings bonds purchased in "fraud" of contract expressed in joint and mutual will, see Chase v. Leiter, 96 Cal. App. 439, 215 P.2d 756 (1950); also see Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953), *appeal dismissed on stipulation,* 215 F.2d 752 (8th Cir. 1954) (resulting trust in widow's favor); In re Nelson's Will, 200 Misc. 3, 106 N.Y.S.2d 427 (1951) (Totten trust).

[47] *E.g.,* Whiton v. Whiton, 179 Ill. 32, 53 N.E. 722 (1899); *cf.* Anderson v. Benson, 117 F. Supp. 765 (D. Neb., 1953), *appeal dismissed on stipulation,* 215 F.2d 752 (8th Cir. 1954).

[48] *E.g.,* Rastetler v. Hoenninger, 214 N.Y. 66, 108 N.E. 210 (1915).

[49] Farmer's Nat. Bank of Danville v. Young, 297 Ky. 95, 179 S.W.2d 229 (1944) ("had the effect of a will").

[50] *E.g.,* Bergmann v. Foreman State Trust & Savings Bank, 273 Ill. App. 408, 414 (1934); Dickinson v. Seaman, 193 N.Y. 18, 85 N.E. 818 (1908).

[51] Sparks, CONTRACTS TO MAKE WILLS, 61 (1956).

[52] *Id.* at 65.

TABLE A

CASES THAT SHOW THE PROXIMITY OF THE DATE OF TRANSFER TO THE DATE OF DEATH

NOTE: The cases in each group are divided into two subgroups: those cases that favor the surviving spouse and those that favor the donee.

Probably within few days, although not clear. SPOUSE: Rudd v. Rudd, Ky. (1919); Manikee v. Beard, Ky. (1887); Baker v. Smith, N.H. (1891). DONEE: Cameron v. Cameron, Miss. (1848); Brodt v. Rannells, Ohio (1890); Hall v. Hall, Va. (1909).

Within one week. SPOUSE: Smith v. Lamb, Ark. (1908); Hatcher v. Buford, Ark. (1895); Mushaw v. Mushaw, Md. (1944); Newman v. Dore, N.Y. (1937); Mc Cammon v. Summons, Ohio (1859); Hill's Estate, Pa. (1931); Brewer v. Connell, Tenn. (1851); Thayer v. Thayer, Vt. (1842); DONEE: Ellis v. Jones, Colo. (1923); Patterson v. Mc Clenathan, Ill. (1921); Vosburg v. Mallory, Iowa (1912);

One week to one month. SPOUSE: Merz v. Tower Grove Bank & Trust Co., Mo. (1939); Newton v. Newton, Mo. (1901); Stone v. Stone, Mo. (1853); DONEE: Richard v. James, Colo. (1956); Small v. Small, Kan. (1895); Sanborn v. Goodhue, N.H. (1853); In re Kilgallen's Estate, N.Y. (1953); Schmidt v. Rebhann, N.Y. (1952), Moyer v. Dunseith, N.Y. (1943); Garrison v. Spencer, Okla. (1916); Patch v. Squires, Vt. (1933).

One to three months. SPOUSE: Davis v. Davis, Mo. (1838); Burns v. Turnbull, N.Y. (1944); Bodner v. Feit, N.Y. (1936); Nichols v. Nichols, Vt. (1889); DONEE: Harmon v. Harmon, Ark. (1917); Harris v. Spencer, Conn. (1898); Holmes v. Mims, Ill. (1953); Samson v. Samson, Iowa (1885); Wright v. Holmes, Me. (1905); Roche v. Brickley, Mass. (1926); Jones v. Somerville, Miss. (1900); Matter of Ward, N.Y. (1951); In re Lorch's Estate, N.Y. (1941); In re Schurer's Estate, N.Y. (1936); Lightfoot v. Colgin, Va. (1813).

Three to six months. SPOUSE: Wanstrath v. Kappell, Mo. (1949); Rice v. Waddill, Mo. (1902); Gillette v. Madden, N.Y. (1952); DONEE: Williams v. Collier, Fla. (1935); Haskell v. Art In-

stitute of Chicago, Ill. (1940); Blankenship v. Hall, Ill. (1908); Bestry v. Dorn, Md. (1941); Ascher v. Cohen, Mass. (1956); Van Devere v. Moore; Minn. (1954); Potter v. Winter, Mo. (1955); Mitchell v. Mitchell, N.Y. (1943); Guitner v. McEowen, Ohio (1954); Dunnett v. Shields, Vt. (1924); Sederlund v. Sederlund, Wisc. (1922).

Six to twelve months. SPOUSE: Hamilton v. First State Bank of Willow Hill, Ill. (1929); Straat v. O'Neil, Mo. (1884); Marano v. LoCarro, N.Y. (1946); Feeser Estate (No. 2), Pa. (1954); London v. London, Tenn. (1839). DONEE: Phillips v. Phillips, Colo. (1903); Harber v. Harber, Ga. (1921); Pruett v. Cowsart, Ga. (1911); Poole v. Poole, Kan. (1915); Malone v. Walsh, Mass. (1944); Redman v. Churchill, Mass. (1918); Rose v. Union Guardian Trust Co., Mich. (1942); Re Wrone's Estate, N.Y. (1941); Farrell v. Puthoff, Okla. (1903); Estate of Kerr, Pa. (1951); Young's Estate, Pa. (1902); Gentry v. Bailey, Va. (1850).

One to two years. SPOUSE: Grover v. Clover, Colo. (1917); Smith v. Hines, Fla. (1863); Smith v. Northern Trust Co., Ill. (1944); Stroup v. Stroup, Ind. (1894); Brown v. Crafts, Me. (1903); Jaworski v. Wisniewski, Md. (1925); Sanborn v. Lang, Md. (1874); Dyer v. Smith, Mo. (1895); Tucker v. Tucker, Mo. (1862); Ibey v. Ibey, N.H. (1947); MacGregor v. Fox, N.Y. (1953); Longacre v. Hornblower & Weeks, Pa. (1952); Potter Title & Trust Co. v. Braum, Pa. (1928); (also valid in part) DONEE: Williams v. Williams, Kan. (1889); Cook v. Cook, Ark. (1851); Stewart v. Stewart, Conn. (1824); Whittington v. Whittington, Md. (1954); In re Halpern's Estate, N.Y. (1951); In re Kalina's Will, N.Y. (1946); MacLean v. J. S. MacLean Co., Ohio (1955); Sellers v. Gibney, Pa. (1949); Beirne v. Continental-Equitable Trust Co., Pa. (1932); Orth v. Doench, Pa. (1932); Potter Title and Trust Co., v. Braum, Pa. (1928) (also invalid in part); McIntosh v. Ladd, Tenn. (1840).

Two to three years. SPOUSE: Payne v. Tatem, Ky. (1930); Jiggitts v. Jiggitts, Miss. (1866); Hastings v. Hudson, Mo. (1949); Bickers v. Shenandoah Valley Nat. Bank, Va. (1956); DONEE: Speaker v. Keating, N.Y. (1941); Ford v. Ford, Ala. (1842); Moedy v. Moedy, Colo. (1954); Williams v. Evans, Ill. (1895); Brown v. Fidelity Trust Co., Md. (1915); Leonard v. Leonard, Mass. (1902); In re Zern's Estate, N. Y. (1954); In re Phipp's Will, N.Y. (1953); Marine Midland Trust Co. of Binghampton v. Stan-

ford, N.Y. (1939); Murray v. Brooklyn Savings Bank, N.Y. (1939); Matter of Glen, N.Y. (1936); York v. Trigg, Okla. (1922); McKean Estate, Pa. (1951); Ballantyne Estate, Pa. (1951); Windolph v. Girard Trust Co., Pa. (1914).

Three to four years. SPOUSE: Cochran's Adm'x. v. Cochran, Ky. (1938); Hays v. Henry, Md. (1848); Brownell v. Briggs, Mass. (1899); Steixner v. Bowery Savings Bank, N.Y. (1949); Krause v. Krause, N.Y. (1941) (also valid in part); Harris v. Harris, Ohio, (1947); In re Pengelly's Estate, Pa. (1953); DONEE: United Building & Loan Ass'n v. Garrett, Ark. (1946); West v. Miller, Ill. (1935); National Shawmut Bank v. Cumming, Mass. (1950); Wahl v. Wahl, Mo. (1947); Crecelius v. Horst, Mo. (1886); Estate of Sides, Neb. (1930); In re Galewitz' Estate, N.Y. (1954); In re Iafolla's Estate, Pa. (1955); Mornes Estate, Pa. (1951); Lines v. Lines, Pa. (1891); Richards v. Richards, Tenn. (1850).

Four to five years. SPOUSE: Smith v. Smith, Colo. (1896); Rabbitt v. Gaither, Md. (1887); Getz v. Getz, N.Y. (1950); Vederman Estate, Pa. (1851); Rowland v. Rowland, Tenn. (1885); DONEE: Cheatham v. Sheppard, Ga. (1944); Bullen v. Safe Deposit & Trust Co., Md. (1939); Sturgis v. Citizens National Bank, Md. (1927); Kerwin v. Donaghy, Mass. (1945); Inda v. Inda, N.Y. (1942); Benkart v. Commonwealth Trust Co., Pa. (1920); Hummel's Estate, Pa. (1894).

Five to ten years. SPOUSE: Wilson v. Wilson, Ky. (1901); Leonard v. Leonard, Mass. (1902); Resch v. Rowland, Mo. (1953); Walker v. Walker, N.H. (1891) (also valid in part); Goewey v. Hogan, N.Y. (1951); Schnakenberg v. Schnakenberg, N.Y. (1941); Bolles v. Toledo Trust Co., Ohio, (1944); Reynolds v. Vance, Tenn. (1870); DONEE: Thuet v. Thuet, Colo. (1953); Flowers v. Flowers, Ga. (1892); Osborn v. Osborn, Kan. (1918); Kelley v. Snow, Mass. (1904); In re Leiman's Estate, N.Y. (1952); Morrison v. Morrison, Ohio (1955); In re Huntzinger's Estate, Pa. (1952); In re Rynier's Estate, Pa. (1943); Dickerson's Appeal, Pa. (1887).

Over ten years. SPOUSE: Thomas v. Louis, N.Y. (1954) (twelve); Darrow v. Fifth Third Union Trust Co., Ohio (1954) (fifteen); Brown's Estate, Pa. (1956) (thirteen); Estate of Black, Pa. (1950) (various times up to seventeen years); DONEE: Wooton v. Keaton, Ark. (1925) (between eleven and twelve); Burnet v. First Nat'l Bank, Ill. (1957) (twenty-eight; twelve); Poole v.

Poole, Md. (1916) (fourteen); Charest v. St. Onge, Mass. (1955) (sixteen); In re Naydan's Estate, N.Y. (1951) (fifteen years before the marriage); In re Krasney's Estate, Pa. (1957) (twelve); Norris v. Barbour, Va. (1949) (eleven). *Cf.* Walker v. Walker, N.H. (1891) (eleven, as to realty; invalid as to personalty).

TABLE B

CASES THAT SHOW RELATIONSHIP OF THE DONEE TO THE DECEDENT

NOTE: The cases in each group are divided into two sub-groups: those cases that favor the surviving spouse and those that favor the donee.

DECEDENT'S CHILDREN BY A PRIOR MARRIAGE

(a) SPOUSE: Smith v. Lamb, Ark. (1908); Grover v. Clover, Colo. (1917); Smith v. Smith, Colo. (1898); Cochran's Adm'x v. Cochran, Ky. (1938); Payne v. Tatem, Ky. (1930); Rudd v. Rudd, Ky. (1919); Wilson v. Wilson, Ky. (1901); Gibson v. Gibson, Ky. (1890); Murray v. Murray, Ky. (1890); Manikee v. Beard, Ky. (1887); Smith v. Northern Trust Co., Ill. (1944); Hamilton v. First State Bank, Ill. (1929); Buzick v. Buzick, Iowa (1876); Brown v. Crafts, Me. (1903); Jiggitts v. Jiggitts, Miss. (1866); Resch v. Rowland, Mo. (1953); Rice v. Waddill, Mo. (1902); Dyer v. Smith, Mo. (1895); Stone v. Stone, Mo. (1853); Walker v. Walker, N.H. (1891); (also valid in part); Getz v. Getz, N.Y. (1950); Matter of Mooney, N.Y. (1950); Burns v. Turnbull, N.Y. (1945); Krause v. Krause, N.Y. (1941) (also valid in part); Krasney's Estate, Pa. (1957); Feeser Estate (No. 2) Pa. (1954); Reynolds v. Vance, Tenn. (1870); McIntosh v. Ladd, Tenn. (1840); Nichols v. Nichols, Vt. (1889); Thayer v. Thayer, Vt. (1842); Bickers v. Shenandoah Valley Nat. Bank, Va. (1956).

(b) DONEE: United Bldg. & Loan Ass'n v. Garrett, Ark. (1946); Cook v. Cook, Ark. (1851); Moedy v. Moedy, Colo. (1954); Ellis v. Jones, Colo. (1923); Williams v. Collier, Fla. (1935); Harber v. Harber, Ga. (1921); Pruett v. Cowsart, Ga. (1911); Osborn v. Osborn, Kan. (1918); Poole v. Poole, Kan. (1915); Small v. Small, Kan. (1895); Beck v. Beck, Iowa (1884); Whittington v. Whittington, Md. (1954); Bestry v. Dorn, Md. (1941); Ascher v. Cohen, Mass. (1956); Kerwin v. Donaghy, Mass. (1945); Rose v. Union Guardian Trust Co., Mich. (1942); Jones v. Somerville, Miss. (1900); Potter v. Winter, Mo. (1955); Crecelius v. Horst, Mo. (1886); Estate of Sides, Neb. (1930); In re Zern's Estate, N.Y.

(1954); In re Freistadt's Will, N.Y. (1951); Morrison v. Morrison, Ohio (1955); MacLean v. J. S. MacLean Co., Ohio (1955); Brodt v. Rannells, Ohio (1890); In re Huntzinger's Estate, Pa. (1952); In re Iafolla's Estate, Pa. (1955); Potter Title & Trust Co. v. Braum, Pa. (1928) (also invalid in part); Dickerson's Appeal, Pa. (1887); McIntosh v. Ladd, Tenn. (1840); Gentry v. Bailey, Va. (1850); Lightfoot's Ex'ors v. Colgin, Va. (1813); Sederlund v. Sederlund, Wisc. (1922).

DECEDENT'S CHILDREN, NOT CLEAR WHETHER HIS LAST MARRIAGE OR A PRIOR MARRIAGE

(a) SPOUSE: Stroup v. Stroup, Ind. (1894); Wanstrath v. Kappel, Mo. (1949); Tucker v. Tucker, Mo. (1862); Ibey v. Ibey, N.H. (1947); Baker v. Smith, N.H. (1891); Steixner v. Bowery Savings Bank, N.Y. (1949); In re Graham's Estate, Pa. (1954) (also valid in part); Estate of Black, Pa. (1950); Hill's Estate, Pa. (1931); London v. London, Tenn. (1839); Hughes v. Shaw, Tenn. (1827).

(b) DONEE: Speaker v. Keating, N.Y. (1941); Harmon v. Harmon, Ark. (1917); Stewart v. Stewart, Conn. (1824); Flowers v. Flowers, Ga. (1892); Redman v. Churchill, Mass (1918); Stewart v. Barksdale, Miss. (1953); Cameron v. Cameron, Miss. (1848); Sanborn v. Goodhue, N.H. (1853); In re Halpern's Estate, N.Y. (1951); Matter of Ward, N.Y. (1951); Matter of Schacter, N.Y. (1944); Inda v. Inda, N.Y. (1942); In re Lorch's Estate, N.Y. (1941); Marine Midland Trust Co. v. Stanford, N.Y. (1939); Ballantyne Estate, Pa. (1951); DeNoble v. DeNoble, Pa. (1938); Benkart v. Commonwealth Trust Co., Pa. (1920); Young's Estate, Pa. (1902); Lines v. Lines, Pa. (1891); Richards v. Richards, Tenn. (1850).

DECEDENT'S CHILDREN, OF THE LAST MARRIAGE

(a) SPOUSE: Davis v. Davis, Mo. (1838); Bolles v. Toledo Trust Co., Ohio (1944).

(b) DONEE: Thuet v. Thuet, Colo. (1953); Wilson v. Lowrie, Colo. (1925); Phillips v. Phillips, Colo. (1903); Samson v. Samson, Iowa (1885); Allender v. Allender, Md. (1952); In re Galewitz' Estate, N.Y. (1954); York v. Trigg, Okla. (1922); Garrison v. Spencer, Okla. (1916); Stefano v. First Nat'l Bank, Pa. (1947).

CLOSE RELATIVES (PARENT, BROTHER, NEPHEW, ETC.)

(a) SPOUSE: Hatcher v. Buford, Ark. (1895); Smith v. Hines, Fla. (1863); Fleming v. Fleming, Iowa (1921); Brownell v. Briggs, Mass. (1899); MacGregor v. Fox, N.Y. (1953); Hastings v. Hudson, Mo. (1949); Merz v. Tower Grove Bank & Trust Co., Mo. (1939); Newton v. Newton, Mo. (1901); Thomas v. Louis, N.Y. (1954); Goewey v. Hogan, N.Y. (1951); Schnakenberg v. Schnakenberg, N.Y. (1941); Del Conte v. Luca, Pa. (1954); In re Lonsdale's Estate, Pa. (1857); Rowland v. Rowland, Tenn. (1855); Norris v. Barbour, Va. (1949).

(b) DONEE: West v. Miller, Ill. (1935); Robertson v. Robertson, Ala. (1905); Bee Branch Cattle Co. v. Koon, Fla. (1949); Cheatham v. Sheppard, Ga. (1944); Burnet v. First Nat'l Bank, Ill. (1957); Vosburg v. Mallory, Iowa (1912); National Shawmut Bank v. Cumming, Mass. (1950); Malone v. Walsh, Mass. (1944); Kelley v. Snow, Mass. (1904); Leonard v. Leonard, Mass. (1902); Van Devere v. Moore, Minn. (1954); In re Kilgallen's Estate, N.Y. (1953); In re Leiman's Estate, N.Y. (1953); In re Aybar's Estate, N.Y. (1952); In re Naydan's Estate, N.Y. (1951); Deyo v. Adams, N.Y. (1944); Matter of Karlinski, N.Y. (1943); Mitchell v. Mitchell, N.Y. (1943); Moyer v. Dunseith, N.Y. (1943); Murray v. Brooklyn Savings Bank, N.Y. (1939); Matter of Glen, N.Y. (1936); Guitner v. McEowen, Ohio (1954); Estate of Kerr, Pa. (1951); In re Rynier's Estate, Pa. (1943); Windolph v. Girard Trust Co., Pa. (1914); Hummel's Estate, Pa. (1894); Orth v. Doench, Pa. (1932); Patch v. Squires, Vt. (1933) (semble); Dunnett v. Shields, Vt. (1924); In re Steck's Estate, Wis. (1957).

DISTANT RELATIVES (UNCLES, COUSINS, IN-LAWS ETC.)

(a) SPOUSE: Marano v. LoCarro, N.Y. (1946); Newman v. Dore, N.Y. (1937).

(b) DONEE: Mornes Estate, Pa. (1951); Sellers v. Gibney, Pa. (1949); Hall v. Hall, Va. (1909) (semble);

NON-RELATIVES (INCLUDING FORMER WIFE)

(a) SPOUSE: In re Pengelly's Estate, Pa. (1953); Vederman Estate, Pa. (1951); Brewer v. Connell, Tenn. (1851).

(b) DONEE: Williams v. Williams, Kan. (1889); Ford v. Ford, Ala. (1842); Wooton v. Keaton, Ark. (1925); Holmes v. Mims, Ill.

(1953); Haskell v. Art Institute, Ill. (1940); Blankenship v. Hall, Ill. (1908); In re Leiman's Estate, N.Y. (1952) (to woman with whom living as husband and wife; also to sister); In re Phipps Will, N.Y. (1953); In re Aybar's Estate, N.Y. (1952); (stranger; also to brother); Schmidt v. Rebhann, N.Y. (1952); Re Wrone's Estate, N.Y. (1941); Farrell v. Puthoff, Okla. (1903); In re Auch's Estate, Pa. (1955); McKean Estate, Pa. (1951) (former wife).

NON-RELATIVES (SEMBLE)

(a) SPOUSE: Harris v. Harris, Ohio (1947).

(b) DONEE: Patterson v. McClenathan, Ill. (1921); Wright v. Holmes, Me. (1905); Charest v. St. Onge, Mass. (1955); Roche v. Brickley, Mass. (1926); Thomas v. Brevoort Sav. Bank of Brooklyn, N.Y. (1949); Hirschfield v. Ralston, N.Y. (1946);

CHARITY

(a) SPOUSE: Straat v. O'Neil, Mo. (1884); Darrow v. Fifth Third Union Trust Co., Ohio (1954); Vederman Estate, Pa. (1951).

(b) DONEE: Richard v. James, Colo. (1956); Williams v. Evans, Ill. (1895); Beirne v. Continental-Equitable Trust Co., Pa. (1932).

TABLE C

THE EQUITIES

NOTE: There are two groups of cases: one in which the actual result favors the surviving spouse, and one in which the actual result favors the donee. The cases in each group are classified according to the apparent state of the equities. "Unreasonable" means that the transfer was unreasonably large, and thus the equities favored the spouse. "Reasonable" means that the equities favored the donee. See Chapter 11, *passim*.

A. CASES FAVORING SURVIVING SPOUSE

1. *Unreasonable*

Grover v. Clover, Colo. (1917) (widow not even left enough money to pay funeral expenses); Smith v. Smith, Colo. (1896) (court emphasizes heartless attitude in leaving widow penniless); Blodgett v. Blodgett, Ill. (1932) (fraudulent judicial sale); Cochran's Adm'x v. Cochran, Ky. (1938) (in three years of marriage husband strips himself of practically all his estate of $100,000); Payne v. Tatem, Ky. (1930) ($4,000 transferred, net estate at death about $900); Wilson v. Wilson, Ky. (1901) (substantial antenuptial transfer, secret postnuptial transfer); Murray v. Murray, Ky. (1890) (husband gave away either before or after marriage all of his $70,000 estate except for $12,500); Mushaw v. Mushaw, Md. (1944) (husband transfers "substantially all" of estate); Jaworski v. Wisniewski, Md. (1925) (wife transfers most of property); Sanborn v. Lang, Md. (1874) (husband conveyed "nearly the whole of his property" to nephew); Hart v. Parrish, Mo. (1951) (fraudulent sheriff's sale; $37.50 for land worth $3,500); Headington v. Woodward, Mo. (1919) (two secret deeds of land by wife four years before death, at expense of an aged "useful" husband); Burns v. Turnbull, N.Y. (1945) (wife transfers practically all assets eleven weeks before her death by suicide); Schnakenberg v. Schnakenberg, N.Y. (1941) (entire estate transferred); Newman v. Dore, N.Y. (1937) (total estate transferred three days before death); Reiss v. Reiss, N.Y. (1937) (husband changes name of beneficiary

of his life insurance from wife to another, in violation of an agreement not to do so in consequence of settlement of litigation between husband and wife); McGee v. McGee, N.C. (1843) (stresses necessity of "an effectual provision" for the wife); Hayes v. Lindquist, Ohio (1926) ("colorable"; no intent to pass title); Brewer v. Connell, Tenn. (1851) (transfer in evasion of alimony to fraudulent magistrate); Crain v. Crain, Tex. (1856); (children as forced heirs).

2. *Probably unreasonable*

Hatcher v. Buford, Ark. (1895) (gift causa mortis; proportion not clear); Smith v. Hines, Fla. (1863–4) (transfer of approximately six-tenths of gross estate; "intent"); Smith v. Northern Trust Co., Ill. (1944) (substantially all, about fourteen months before death, with no provision for widow; but vague implications that the equities were not all with the widow); Crawfordsville Trust Co. v. Ramsey, Ind. (1913), (gift causa mortis; some provision for claimant widow); Buzick v. Buzick, Iowa (1876) (suit in lifetime: "grossest fraud"); Fleming v. Fleming, Iowa (1922) ("yet we are asked to say that this wife, who has done faithful service and practiced self-denial for 36 years . . . must be left penniless"); Benge v. Barnett, Ky. (1949) (forty-five per cent of personalty within two years of death); Rudd v. Rudd, Ky. (1919) (husband transfers substantially all his property just before death; widow owned a small farm); Rabbitt v. Gaither, Md. (1887) (purchase of farm by husband, in name of grand niece of first wife, coupled with antenuptial transfers; practically all of husband's property came from his first wife; proportion transferred not clear); Hays v. Henry, Md. (1848) (conveyance to mistress, having "utterly discarded his wife"; proportion not clear); Jiggitts v. Jiggitts, Miss. (1866) (nearly all of property); Merz v. Tower Grove Bank & Trust Co., Mo. (1939) (transfer, 13 days before death, of about $300,000; widow gets $200 a month for life and one-half of residue of will, amounting to about $18,000); Kerwin v. Kerwin, Mo. (1918) (entire personalty); Rice v. Waddill, Mo. (1902) (antenuptial transfer of land; gifts of practically the whole of husband's considerable personalty within six months before death; ailing decedent aged 70 had married wife, aged about 36, about nine months before death, husband had never shown gener-

osity to his donee relatives before); Newton v. Newton, Mo. (1901) (proportion not clear, but probably most of property); Dyer v. Smith, Mo. (1895) (all of estate given over a year before death to children of former marriage, at expense of widow who had children of her own); Tucker v. Tucker, Mo. (1862) (transfer of nine slaves fourteen to eighteen months before death, one slave given to wife; total estate not stated); Davis v. Davis, Mo. (1838) (wife given support in will, but renounces; transfer of slaves did not escape "argus eyes of the Chancellor"); Laton v. Balcom, N.H. (1886) (clandestine purchase by mortgagee at tax sale: stern discussion of mutual obligations of husband and wife); Frank v. Frank's Inc., N.J. (1951) (dower in corporate property; marital disharmony); Thomas v. Louis, N.Y. (1954), (insufficient facts); Gillette v. Madden, N.Y. (1952) (reference to New York rule on "depletion" of an estate); MacGregor v. Fox, N.Y. (1952) (practically all); Goewey v. Hogan, N.Y. (1951) (proportion not clear; secrecy of the marriage considered irrelevant); Mottershead v. Lamson, N.Y. (1950) ("principal part"); Debold v. Kinscher, N.Y. (1945) ($3,500 out of $4,200); In re Sanchez' Estate, N.Y. (1945) (substantially all; separation agreement not a defence); Krause v. Krause, N.Y. (1941) (no provision for wife); Bodner v. Feit, N.Y. (1936) (sixty per cent, three months before death); Harris v. Harris, Ohio (1947) (testamentary trust with income not to exceed $5,000 annually to the widow, but the trust obviously could produce only a mere fraction of this; widow permitted to invade inter vivos trust worth almost one-half amount of decedent estate); Feeser Estate (No. 2), Pa. (1954) (practically all of personalty, judgment note payable out of realty); Vederman Estate, Pa. (1951) (transfer of practically all, to non-relatives; widow "does not own nearly enough to support herself and her daughter in comfort"); In re Lonsdale's Estate, Pa. (1857) (transfer out of "unnatural antipathy" to wife, and "suffering from *mania a potu*"; but wife given small annuity); Reynolds v. Vance, Tenn. (1870) (consideration of $300 for all of decedent's realty worth $3,000, not recorded until after death; he had considerable personalty); Hughes Lessee v. Shaw, Tenn. (1827) ("The effect of the proof increases in proportion to the amount of the estate conveyed, compared with the amount retained"); Nichols v. Nichols, Vt. (1889) (roughly $10,200 out of $11,700, month and a half

before death, to children of former marriage); Norris v. Barbour, Va. (1949) (bond for $20,000 which would exhaust his personalty; house apparently went to wife by joint tenancy; no mention of other real property);

3. Reasonable

Brown v. Crafts, Me. (1903) (about one-third of husband's personalty to daughter by former marriage; wife a golddigger); City Bank Farmers Trust Co. v. Miller, N.Y. (1938) (decedent retained other substantial property, and gave considerable sums to claimant husband before her death).

4. Probably reasonable

Manikee's Adm'x v. Beard, Ky. (1887) (entire personalty in contemplation of death; claimant widow had sufficient dower out of decedent's considerable real estate to support herself); Wanstrath v. Kappel, Mo. (1949) (amount transferred approximately $402,000, estate under administration about $10,000; widow had been given one-half the income after husband's death, until remarriage; widow 30 years younger than husband); Stone v. Stone, Mo. (1853) (widow had previously expressed herself satisfied with provision for her; court deemed the principle of protecting wife's rights too important to suffer it to be overthrown "even in case which has no merit to commend it"); President and Directors of Manhattan Co. v. Janowitz, N.Y. (1940) (held illusory on theoretical possibility that widow might be prejudiced; modified by upper court on other grounds); Darrow v. Fifth Third Union Trust Co., Ohio (1954) (second wife invades trust which gave her life estate); McCammon v. Summons, Ohio (1859) ("we may well commiserate his [decedent spouse's] condition, and understand why it was he desired his property to be thus distributed. But we have a legal duty to perform, and must discharge it impartially"); In re Pengelly's Estate, Pa. (1953) (inter vivos trust of $25,000 to housekeeper, decedent's estate $12,000 plus real estate of indeterminate value; parties had separated 35 years before trust established, and housekeeper had been living with decedent since the separation); Bickers v. Shenandoah Valley Nat'l Bank, Va. (1956) (second wife gets one-fifth of $200,000 estate).

5. *Not clear*

Smith v. Lamb, Ark. (1908) (husband transfers all of personalty to son by former marriage four days before death; donee paid debts for decedent and gave widow materials to build a home); Blevins v. Pittman, Ga. (1940) (parties separated at time of transfer); Hamilton v. First State Bank, Ill. (1929) (within year of death husband procures two certificates of deposit totalling $1500 payable to himself or his child of prior marriage or the survivor; net estate: a homestead, worth $600); Stroup v. Stroup, Ind. (1894) (insufficient facts); Gibson v. Gibson, Ky. (1890) (insufficient facts); Brownell v. Briggs, Mass. (1899) (comprehensive scheme to defraud wife, but personalty reacquired before death); Resch v. Rowland, Mo. (1953) (proportion not stated); Hastings v. Hudson, Mo. (1949) (decedent wife transfers practically all her property, but court mentions "chimney-corner equities": decedent had owned most of her property at time of marriage or acquired it thereafter by inheritance; marriage late in life; bad blood between decedent and husband's daughter; donee had provided money for wife when she was ill; claimant husband incapacitated, with small pension); Straat v. O'Neil, Mo. (1884) (satisfaction of $52,000 in specific legacies to charities a year before death; total estate at death $200,000; wife and four children survive); Ibey v. Ibey, N.H. (1947) ($2,250; gross estate $9000); Baker v. Smith, N.H. (1891) (insufficient facts); Pichurko v. Richardson, N.Y. (1951) (proportion not clear); Galewitz v. Walter Peek Paper Corp., N.Y. (1955) (insufficient facts); Getz v. Getz, N.Y. (1950) (proportion not clear); In re Mooney's Will, N.Y. (1950) (insufficient facts); Steixner v. Bowery Savings Bank, N.Y. (1949) (proportion not clear); Marano v. LoCarro, N.Y. (1946) (substantial transfer, marriage seven months before death); Application of Barasch, N.Y. (1944) (insufficient facts); Hellstern v. Gillett, N.Y. (1937) (insufficient facts); Bolles v. Toledo Trust Co., Ohio (1944) (decedent husband attempted to make apparently reasonable inter vivos provision for wife, subsequently ruled invalid; claimant widow had some property of her own and given $500 month for life); Krasney Estate, Pa. (1957) (insufficient facts); Estate of Brown, Pa. (1956) (proportion not clear); Del Conte v. Luca, Pa. (1954) (insufficient facts); In re Graham's Estate, Pa. (1954) (wid-

ower wins as to Totten trusts, loses as to U.S. Savings Bonds); Elias v. Elias, Pa. (1953) (insufficient facts); Longacre v. Hornblower and Weeks, Pa. (1952); Black Estate, Pa. (1950) (proportion not clear); Hill's Estate, Pa. (1931) (insufficient facts); Rowland v. Rowland, Tenn. (1855) (proportion not clear; suit by children as "heirs"); London v. London, Tenn. (1839) (transfer of sole realty, for some consideration; claimant widow had been accused of adultery); Thayer v. Thayer, Vt. (1842) (husband transfers most of property; but discord between spouses, and widow had a "small amount of property").

B. Cases Favoring Donee

1. *Reasonable*

Cook v. Cook, Ark. (1851) ("The amount given . . . was quite reasonable"); Richard v. James, Colo. (1956) (marriage four months before husband dies of cancer); Williams v. Collier, Fla. (1935) (stress on reasonableness of provisions for widow, moral claim of donees); Pruett v. Cowsart, Ga. (1911) (conveyance to children of former marriage in recognition of fact that the land was purchased with first wife's money and that title was taken in decedent's name perhaps by oversight); Burnet v. First Nat'l Bank, Ill. (1957) (no intent to defraud; estoppel); Holmes v. Mims, Ill. (1953) (joint bank account of joint earnings of husband and bigamous second wife sustained against attack by first wife who had divorce set aside three years after husband's death); Hoeffner v. Hoeffner, Ill. (1945) (reasonable provisions for widow); Patterson v. McClenathan, Ill. (1921) wife's transfer sustained against widower who was an invalid, but who ". . . was not dependent on his wife's property for support."); Delta & Pine Land Co. v. Benton, Ill. (1912) ("ample property" left for widow); Williams v. Evans, Ill. (1895) (claimant widower, who had neither lived with nor supported aged decedent for twenty years held entitled to dower in land, but loses as to personalty); DeLeuil's Ex'rs v. DeLeuil, Ky. (1934) (donee incapacitated, other provisions made for claimant); Weber v. Salisbury, Ky. (1912) (stress on reasonableness of provisions for claimant); Bestry v. Dorn, Md. (1941) (equities favor donee); Bullen v. Safe Deposit & Trust Co., Md. (1939) reasonable provisions for widow); Whitehill v. Thiess, Md. (1932)

(husband deserts wife and six children; wife buys property chiefly out of earnings of children, taking life estate only, with power of absolute disposition in wife; stress on reasonableness, possibility that the husband might have ample means of his own); Sturgis v. Citizens National Bank, Md. (1927) (reasonable provisions for widow); Poole v. Poole, Md. (1916) (deed fourteen years before death, recorded immediately); Brown v. Fidelity Trust Co., Md. (1915) (reasonable provisions for widower); Rose v. Union Guardian Trust Co., Mich. (1942) (reasonable provisions for widow); Smith v. Corey, Minn. (1914) (reasonable provisions for widow, who was decedent's third wife); Potter v. Winter, Mo. (1955) (widow amply provided for); Wahl v. Wahl, Mo. (1947) (transfer held not fraudulent as it was "reasonable"); Melinik v. Meier, Mo. (1939) (some evidence that joint bank account composed of transferee's money); Pollman v. Schaper, Mo. (1914) (claimant widow died before litigation; probably she had acquiesced in the transfers); Lusse v. Lusse, Mo. (1909) (apparently a "genuine transaction", for consideration); Walker v. Walker, N.H. (1891) (reasonable as to one transfer, valid; unreasonable as to another, invalid); In re Freistadt's Will, N.Y. (1951) (promise to first wife, provision for surviving widow; originally held illusory, reversed because of Halpern case, to take further evidence); In re Naydan's Estate, N.Y. (1951) (widow amply provided for); Marine Midland Trust Co. v. Stanford, N.Y. (1939) (reasonable settlement to wife); York v. Trigg, Okla. (1922) (reasonable provisions for widow); Ballantyne Estate, Pa. (1951) (reasonable provisions for widow); Dunnett v. Shields, Vt. (1924) (reasonable provisions for widow); Lightfoot's Ex'rs v. Colgin, Va. (1813) (reasonable provisions for widow, moral claim of donees).

2. *Probably Reasonable*

Speaker v. Keating, N.Y. (1941) (wife, separated from husband for thirty years, on advice of counsel transfers apparently most if not all of her wealth by assigning mortgages into joint ownership with daughter, wife retaining interest by arrangement with daughter); West v. Miller, Ill. (1935) (reasonable provisions for widow made by decedent, and, later, by donee); Williams v. Williams, Kan. (1889) (prolific Welsh husband deserts wife, emi-

grates to Kansas where lives illegally for twelve years with second "wife," begetting two children and with her help amassing estate of $8000; held for second woman, ignoring antenuptial contract with Welsh wife, stressing moral obligation to Kansas brood, source of his estate); Ford v. Ford, Ala. (1842) (irrevocable deed of trust of all husband's property two years before death to second wife and children by second wife sustained against claim of first wife abandoned many years before, who subsequently has had two illegitimate children; first marriage apparently valid but balanced by high moral claim of second "wife.") Wootton v. Keaton, Ark. (1925) (husband, separated from wife for 36 years, but supporting the children, transfers $29,000 to mistress eleven or twelve years before death; total wealth not stated; other woman no fool); Harmon v. Harmon, Ark. (1917) (husband makes gift of interest in his business, one and a half months before death, to his sons. The property had come to the husband on the death of another son a few days previously); Moedy v. Moedy, Colo. (1954) (transfer of land to joint tenancy with son of former marriage, two and one-half years before death); Thuet v. Thuet, Colo. (1953) (wife conveys family home to daughter by secret deed not to be recorded or delivered till death; the land had been given to wife by her family, she and the daughter had helped maintain the home, and at wife's death husband still being cared for in the family home); Burton v. Burton, Colo. (1937) (gifts to children of former marriage by aged husband at expense of ". . . a wife in name only, of some twenty months, whom he did not greatly trust . . ."); Bee Branch Cattle Co. v. Koon, Fla. (1949) (husband mentally incompetent, wife his curator; husband still possessed of sufficient property to give wife reasonable amount at his death); Cheatham v. Sheppard, Ga. (1944) (husband cleans out his estate by inter vivos gifts but gave wife respectable amount also); Boyle v. John M. Smyth Co., Ill (1928) (family arrangement); Wheelock v. Wheelock, Ind. (1933) (trust created by husband after post-nuptial agreement with wife, there being no promise in the agreement to retain all his personalty); Vosburg v. Mallory, Iowa (1912) (wife, with elephantiasis, delivers note worth $432 to her brother five days before death. Her total property (including note) was about $1,500, plus one-half interest in property worth $1,800); Beck v. Beck, Iowa (1884) (suit in lifetime); Cooke v. Fidelity

Trust and Safety Vault Co., Ky. (1898) (advancements, labelled "not an excessive provision"); Wright v. Holmes, 100 Me. (1905) (husband married decedent wife a year before her death from tuberculosis she being worth $10,000; she gave practically all of it away before death); Whittington v. Whittington, Md. (1954) (widow received roughly $12,000 out of $40,000); Allender v. Allender, Md. (1952) ("reasonableness" of the transfer impliedly considered relevant); Ascher v. Cohen, Mass. (1956) (wife transfers interest in close corporation built up by herself and first husband); National Shawmut Bank of Boston v. Cumming, Mass. (1950) (substantial transfer by husband who became married for first time, late in life, to a widow with three children; some provision for the widow); Roche v. Brickley, Mass. (1926) (wife transfers about one-third her estate in trust; some provision for husband); Leonard v. Leonard, Mass. (1902) (deed for support held valid; spouses living together but ". . . after 1886 her husband furnished her with no supply of food"; presumably she had some personal income as he did not die until 1894; gift of savings account held "illusory" on grounds of motive and insufficient evidence); Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, Mich. (1935) (widow dead before litigation); Trabbic v. Trabbic, Mich. (1905) (discharge of mortgage, proceeds of new mortgage divided among sons; some provision for wife); Brandon v. Dawson, Mo. (1892) (gift causa mortis; new trial ordered on ground widow's testimony improperly excluded); Crecelius v. Horst, Mo. (1886) (husband purchases farm in name of child by former marriage, with retention of life estate; spouses had then not been living together for nine years); Estate of Sides, Neb. (1930) (size of decedent's estate $40,215.12, inter vivos transfers $41,444; court considered all the circumstances); Sanborn v. Goodhue, N.H. (1853) (husband three weeks before death of tuberculosis transfers notes approximating one-quarter of his estate in trust for his two minor children; other provisions made for widow); In re Aybar's Estate, N.Y. (1952) (claimant widower, a disabled war veteran who had been declared incompetent, possessed of adequate means); Schmidt v. Rebhann, N.Y. (1951), (transfer of apartment building by wife few weeks before death; stress on equities of the donee, who had taken care of and lived with the wife, the husband having separated from the wife nine years be-

fore death); In re Prokaskey's Will, N.Y. (1951) (Totten trusts by the wife, post Halpern; "In determining the effect of such purported transfers consideration must be given to the surrounding circumstances"; parties had separated before the transfer; husband's financial position, or proportion of total estate transferred not stated); Hart v. Hart, N.Y. (1949) (other provisions for claimant); Spafford v. Pfeffer, N.Y. (1947) (husband transfers firm to daughter shortly before death; good review of available evidence; donee expended own money on the property); Matter of Schacter, N.Y. (1944) ("The decedent retained in his control other assets of substantially similar value"; no "intent"); Mitchell v. Mitchell, N.Y. (1943) (reasonable provision for widow); Moyer v. Dunseith, N.Y. (1943) (schoolteacher, contributing to pension fund since 1917, marries in 1935, and in 1940, 16 days before death, changes beneficiary rights ($13,000) from her mother to her sister); Re Wrone's Estate, N.Y. (1941) (donee had given financial assistance to decedent; spouses separated at time of transfer and until death); Morrison v. Morrison, Ohio (1955) (transfer of interest in close corporation before marriage); MacLean v. J. S. MacLean Co., Ohio (1955) (stress on fact evidence discloses no "failure . . . to provide present support"; decedent left estate of $44,000); Farrell v. Puthoff, Okla. (1903) (man transfers his separate property to his bigamous second "wife," with whom he had lived for five years); Mornes Estate, Pa. (1951) (other provisions for claimant); In re Rynier's Estate, Pa. (1943) (other provisions for claimant); Potter Title and Trust Co. v. Braum, Pa. (1928) (aged man married for 3 months to 16 year old girl executes mortgages worth $19,400, without receiving consideration, and assigns mortgages worth $65,000, to son by former marriage, his total wealth not stated; widow wins as to mortgages, loses on assignments); Young's Estate, Pa. (1902) (proportion not clear; settlement of wife's belated attempt to elect against will); Hummel's Estate, Pa. (1894) (transfer with "intent" sustained as donees had not participated in the fraud; but court awards widow compensation out of the decedent's estate on ground that she had a "higher equity" than the heirs); Dickerson's Appeal, Pa. (1887) (proportion not clear; estate planning, observing meticulous formalities); McIntosh v. Ladd, Tenn. (1840) (stress on reasonableness of transfer); Patch v. Squires, Vt. (1933) (wife

transfers about thirteen-sixteenths of her property twenty-six days before death, but evidence that (a) husband had not lived with or supported wife for over twenty-six years, (b) the property came to the wife by gift from her mother, and (c) donees were her kin who had cared for her in her illness); Hall v. Hall, Va. (1909) (widow receives generous devise and some personalty); Gentry v. Bailey, Va. (1850) (slaves; small proportion transferred); Estate of Steck, Wis. (1957) (life estate for widow); Sederlund v. Sederlund, Wis. (1922) (widow received only one tenth of husband's estate; but parties had been married but a short time, and the property transferred represented the earnings of the husband and his former wife and nine children).

3. *Unreasonable*

Small v. Small, Kan. (1895) (man with five children marries second wife twenty nine years before death; "most amicable" relations between the spouses, and in effect she brought up the children; secret transfers culminating nineteen days before death strip his estate so that all widow got out of valuable realty and $100,000 in personalty was $1,400 a year for life or until remarriage); Kerwin v. Donaghy, Mass. (1945) (husband, worth about half a million, transfers "substantially all" his property); Redman v. Churchill, Mass. (1918) (widow in practical effect was disinherited when husband transferred $50,000 to himself as executor of his mother's will); In re Leiman's Estate, N.Y. (1953) (Totten trusts to sisters and mistress upheld, per Halpern case, even though estate depleted); Murray v. Brooklyn Savings Bank, N.Y. (1939) (wife gets only about one-fifth gross estate); *Cf.* Dick v. Bauman, Ohio (1943) (transfer of realty and personalty leaves aged widow penniless; not clear that she sought to set aside transfer of personalty; she lost her inchoate dower right since she died before suit).

4. *Probably Unreasonable*

Stewart v. Stewart, Conn. (1824) (all husband's realty; amount of his remaining personalty not mentioned); Haskell v. Art Institute, Ill. (1940) (gift of forty valuable paintings; bequests of almost half a million in will, with half of remaining net estate to

wife, in lieu of all other claims against estate); Blankenship v. Hall, Ill. (1908) (practically all of husband's real estate: but widow, insane, could not be deprived of inchoate dower and homestead); Osborn v. Osborn, Kan. (1918) (wife joins in sale of land with understanding she would have benefit of proceeds; court brushes aside any question of donee's financial position, or possibility that wife may have contributed to payment of mortgage on the realty); Malone v. Walsh, Mass. (1944) (decedent wife grasping, vindictive, pretended she had no money; but husband somewhat shiftless and had not supported her; wife transferred her $15,000 into joint savings account with her brother living in Ireland whom she had not seen for 30 years but with whom she had corresponded); Jones v. Somerville, Miss. (1900) (secret transfer few months before death; widow gets only about one-ninth of husband's total property); Cameron v. Cameron, Miss. (1848) (most of husband's personalty; amount of remaining realty not stated); In re Halpern's Estate, N.Y. (1951) ($14,000 out of some $17,300; parties separated at or about time of transfers); In re Kalina's Will, N.Y. (1946) (widow given bare minimum in a small estate); Inda v. Inda, N.Y. (1942) (proportion not clear; widow and ten children survive); In re Schurer's Estate, N.Y. (1936) (substantial amount transferred); Holmes v. Holmes, N.Y. (1832) (husband buys son's land at a price "far beyond its value," thereby exhausting his "considerable" personal estate: widow loses, but of course can have dower in the realty); Brodt v. Rannells, Ohio (1890) (all personalty shortly before death); Garrison v. Spencer, Okla. (1916) (widow, who had been "supported" by husband during coverture, stripped of everything but homestead); Estate of Kerr, Pa. (1951) (substantial transfers; court refers to "a natural sympathy for the widow under the circumstances of the case"); Stefano v. First Nat'l Bank, Pa. (1947) ("apparently did treat his wife unfairly from a financial standpoint"); Beirne v. Continental-Equitable Trust Co., Pa. (1932) (proportion not stated; widow left $40 monthly in will, which was same amount he had been paying her during separation before death); In re Davies Estate, Pa. (1931) ("intent"; total estate not stated); Windolph v. Girard, Pa. (1914) (wife transfers $108,550 plus interest in an estate; "intent"); Lines v. Lines, Pa. (1891) (substantially all of estate transferred, widow receiving annuity amounting

to about one-fifteenth of the income); Richards v. Richards, Tenn. (1850) (note for $300; no money in estate to pay widow her year's support).

5. *Not Clear*

United Building & Loan Ass'n v. Garrett, Ark. (1946) (proportion not stated); Robertson v. Robertson, Ala. (1905) (proportion not clear); Norris v. Bradshaw, Colo. (1935) (marriage late in life; husband gives all his small estate to husband of child by former wife); Wilson v. Lowrie, Colo. (1925) (insufficient facts); Ellis v. Jones, Colo. (1923) (proportion not stated, but probably reasonable: deed given to reward child of former marriage for care of the decedent spouse); Phillips v. Phillips, Colo. (1903) (stresses natural duty of father to care for children); Harris v. Spencer, Conn. (1898) ("large part or all" of wife's property month and a half before death; parties had been married only about six months); Harber v. Harber, Ga. (1921) (transfer of all real estate, wife gets annuity, proportion not stated); Flowers v. Flowers, Ga. (1892) (erroneous charge to jury; new trial ordered); Stice v. Nevin, Ill. (1951) (headnotes only; wife's right of attack dies with her); Padfield v. Padfield, Ill. (1875) (advancement, with provision for support of decedent); Pond v. Sweetser, Ind. (1882) (proportion not stated); Samson, Adm'x v. Samson, Iowa (1885) (transfer by husband to children of "greater part" of his estate shortly before death); Poole v. Poole, Kan. (1915) (widow considerably younger than husband and had previously received a settlement: transfer of remaining estate with intent to defraud); Lindsey's Ex'r v. Lindsey, Ky. (1950) (widow fails to sustain burden of proof that certificates of deposit purchased with husband's money); Charest v. St. Onge, Mass. (1955) (insufficient facts); Seaman v. Harmon, Mass. (1906) (purchase of realty in name of donee, during separation; insufficient facts); Kelley v. Snow, Mass. (1904) (proportion not stated); Stone v. Hackett, Mass. (1858) (insufficient facts); Van Devere v. Moore, Minn. (1954) (insufficient facts); Stewart v. Barksdale, Miss. (1953) (insufficient facts); In re Zern's Estate, N.Y. (1954) (insufficient facts); Matter of Galewitz, N.Y. (1954) (some provision for widow; proportion not stated); In re Kilgallen's Estate, N.Y. (1953) (wife in last illness transfers her earnings from over 35 years employment;

"intent"); In re Phipps' Will, N.Y. (1953) (some provision for widow; chief beneficiary was decedent's secretary); Estate of Morstatt, N.Y. (1952) (insufficient facts); Radecki v. Radecki, N.Y. (1952) (insufficient facts); Matter of Ward, N.Y. (1951) (wife transfers $18,000 in Totten trusts; no facts on proportion, or on widower's financial condition); In re Sturmer's Estate, N.Y. (1950) (insufficient facts; separation agreement held not a waiver of election rights); Superat v. Dylawski, N.Y. (1950) (insufficient facts); Thomas v. Brevoort Sav. Bank of Brooklyn, N.Y. (1949) (insufficient facts); Hirschfield v. Ralston, N.Y. (1946) (proportion not clear); Deyo v. Adams, N.Y. (1944) (marriage of short duration; proportion not stated); Matter of Karlinski, N.Y. (1943) (insufficient facts); In re Lorch's Estate, N.Y. (1941) ($3700 out of approximately $12,000; parties separated apparently without widow's fault); Burtt v. Riley, N.Y. (1940) (insufficient facts); Matter of Smith, N.Y. (1939) (insufficient facts); Matter of Glen, N.Y. (1936) (insufficient facts); In re Yarme's Estate, N.Y. (1934) (insufficient facts); Guitner v. McEowen, Ohio (1954) (insufficient facts); Neville v. Sawicki, Ohio (1946) (decedent considered donee daughter had legal claim to property transferred); In re Iafolla's Estate, Pa. (1955) (widow had waived her rights, and died before suit; substantial transfer); In re Huntzinger's Estate, Pa. (1952) (insufficient facts); McKean Estate, Pa. (1951) (proportion not clear); Sellers v. Gibney, Pa. (1949) (insufficient facts); Cancilla v. Bondy, Pa. (1945) (a "patently crude attempt" to destroy her dower: but he had made other provision for her); DeNoble v. DeNoble, Pa. (1938) (equities with donee; widow's financial position not clear); Orth v. Doench, Pa. (1932) (insufficient facts); Benkart v. Commonwealth Trust Co., Pa. (1920) (proportion not clear); In re Sutch's Estate, Pa. (1902) (notes comprising more than one-half father's estate given to children by former marriage who had helped him build up truck farm); Pringle v. Pringle, Pa. (1868) (insufficient facts); Mann v. Grinwald, Wis. (1930) (suit by bigamous wife suing as administratrix).

TABLE D

EVASION CASES DEALING WITH INTER VIVOS GIFTS

AUTOMOBILE: *Favoring donee:* In re Kilgallen's Estate, 123 N.Y.S.2d 827 (Surr. Ct. 1953); Mitchell v. Mitchell, 177 Misc. 1050, 32 N.Y.S.2d 839 (Sup. Ct. 1943), *rev'd* 265 App. Div. 27, 37 N.Y.S.2d 612 (1st Dept. 1942) *aff'd without opin.* 290 N.Y. 779, 50 N.E.2d 106 (1943).

BANK ACCOUNT. *Favoring spouse:* Estate of Rosenfeld, N.Y. Sur., N. Y. L. J. (9 Feb. 1939), 1 P.H. Unreported Trust Cases, para. 25, 275. *And cf.* Whalen v. Milholland, 89 Md. 199, 43 A. 45, 44 L.R.A. 208 (1899) (retention of pass-book and right of withdrawal; no surviving spouse). *Favoring donee:* Wright v. Holmes, 100 Me. 508, 62 Atl. 507 (1905).

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JUDGMENT OR JUDGMENT NOTE. *Favoring spouse:* Murray v. Murray, 90 Ky. 1, 13 S.W. 244, 8 L.R.A. 95 (1890). *Favoring donee:* In re Rynier's Estate, 48 Lanc. Rev. 475, *aff'd,* 347 Pa. 471, 32 A.2d 736 (1943); In re Davies' Estate, 102 Pa. Super. 326, 156 Atl. 555 (1931). *And cf.* In re Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902) (consideration).

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NOTES OF DECEDENT PAYABLE AT DEATH: *Favoring spouse:* Wilson v. Wilson, 23 Ky. L.Rep. 1229, 64 S.W. 981 (1901). *And cf.* Hummel's Estate, 161 Pa. 215, 28 Atl. 1113 (1894); *Favoring donee:* In re Rynier's Estate, 48 Lanc. Rev. 475, *aff'd*, Pa. 471, 32 A.2d 736 (1943).

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PAINTINGS. *Favoring donee:* Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E.2d 736 (1940). *And cf.* Gellatly v. United States, 71 F. Supp. 357 (1947) (*supra*, p. 364).

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(a) ADVANCEMENTS: *Favoring spouse:* Murray v. Murray, 90 Ky. 1, 13 S.W. 244, 8 L.R.A. 95 (1890). *And cf.* Dyer v. Smith, 62 Mo. App. 606 (1895); *Favoring donee:* McIntosh v. Ladd, 20 Tenn. 445, 1 Humph. 459 (1840) (realty). *And cf.* Cooke v. Fidelity Trust and Safety-Vault Co., 104 Ky. 473, 20 Ky. L.Rep. 667, 47 S.W. 325 (1898) (realty); Schaper's Ex'r v. Schaper, 158 Mo. App. 605, 138 S.W. 896 (1911).

(b) BILLS OF SALE. *Favoring spouse:* Smith v. Hines, 10 Fla. 258 (1863–4). *And cf.* Mottershead v. Lamson, 101 N.Y.S.2d 174 (Sup. Ct. 1950).

(c) CONFESSION OF JUDGMENT. *Favoring spouse:* Blodgett v. Blodgett, 266 Ill. App. 517 (1932), transferred 343 Ill. 569, 175 N.E. 777 (1931). *And cf.* Waterhouse v. Waterhouse, 206 Pa. 433, 55 Atl. 1067 (1903).

(d) "SATISFACTION" OF SPECIFIC LEGACIES. *Favoring spouse: Cf.* Straat v. O'Neil, 84 Mo. 68 (1884).

TABLE E

TABLE OF CASES

The cases are arranged by states in order to give the practising lawyer a quick entry into the "evasion" case-law of the individual American jurisdictions. The cases in each jurisdiction are grouped as follows:

First, *"evasion" cases.* These involve postnuptial transfers in alleged "evasion" of the elective share. In these cases the court either reaches a decision on the merits or takes a stand on the "evasion" question (see page 147 *supra*). These cases were analysed from the viewpoint of the equities in chapters Ten and Eleven. Subject to human error, this group contains all "evasion" cases reported up to the end of May 1958. Cases which favor the surviving spouse are italicized. A few cases involve a transfer that the court has ruled invalid as well as a transfer that the court has ruled valid. Such a case is arbitrarily classified as favoring the spouse if the opinion is concerned chiefly with the transfer which was ruled invalid; otherwise it is classified as favoring the donee.

Second, *supplemental "evasion" cases.* These cases involve gratuitous postnuptial transfers, but they lack the requirements for inclusion in the first-mentioned group: no decision is reached on the merits, and the court has nothing significant to say on the "evasion" problem.

Third, *related cases.* These are divided into three subgroups: cases dealing with antenuptial transfers, cases dealing with contracts to make a will, and miscellaneous cases. The first two subgroups include all cases cited in Appendix C and Appendix D respectively. The miscellaneous cases deal with collateral matters, *e.g.,* transfers in fraud of alimony privileges. Some of these miscellaneous cases are apropos only by way of analogy, but most of them contain dicta bearing directly on the "evasion" problem.

The "related cases" include a number of decisions not referred to elsewhere in the book. They are marked with an asterisk. Some of these decisions were reported after the manuscript was

completed. The rest of them deal with peripheral points not considered important enough for exhaustive citation in the text. Since the table presents all relevant cases on a state by state basis, these decisions are included for purposes of completeness.

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