CHAPTER 10

The Individual Equities

1. PRELIMINARY REMARKS

This chapter is concerned with the factual circumstances that the courts appear to find persuasive. 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. Dare, 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. 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, 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."  

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. 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, with antenuptial transfers, or with transfers in evasion of the privileges entailed in alimony, maintenance, or community property. 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, 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, 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 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.
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 II, 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:

<table>
<thead>
<tr>
<th>Proximity of Transfer</th>
<th>Cases</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Probably within few days, although not clear</td>
<td>Invalid</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>5</td>
</tr>
<tr>
<td>Within one week</td>
<td>Invalid</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>3</td>
</tr>
<tr>
<td>One week to one month</td>
<td>Invalid</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>8</td>
</tr>
<tr>
<td>One to three months</td>
<td>Invalid</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>11</td>
</tr>
<tr>
<td>Three to six months</td>
<td>Invalid</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>11</td>
</tr>
<tr>
<td>Six to twelve months</td>
<td>Invalid</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>12</td>
</tr>
<tr>
<td>One to two years</td>
<td>Invalid</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>12</td>
</tr>
<tr>
<td>Two to three years</td>
<td>Invalid</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>16</td>
</tr>
<tr>
<td>Three to four years</td>
<td>Invalid</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>11</td>
</tr>
<tr>
<td>Four to five years</td>
<td>Invalid</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>7</td>
</tr>
<tr>
<td>Five to ten years</td>
<td>Invalid</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>9</td>
</tr>
<tr>
<td>Over ten years</td>
<td>Invalid</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Valid</td>
<td>7</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Description</th>
<th>Count (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases Examined</td>
<td>263</td>
</tr>
<tr>
<td>Cases in which factor mentioned</td>
<td>176 (67%)</td>
</tr>
<tr>
<td>Total invalid</td>
<td>66 (37.5%)</td>
</tr>
<tr>
<td>Total valid</td>
<td>110 (62.5%)</td>
</tr>
<tr>
<td>Total transfers within three years</td>
<td>118 (67%)</td>
</tr>
<tr>
<td>Total invalid</td>
<td>42 (36%)</td>
</tr>
<tr>
<td>Total valid</td>
<td>76 (64%)</td>
</tr>
<tr>
<td>Total invalid transfers</td>
<td>66</td>
</tr>
<tr>
<td>Within three years</td>
<td>42 (64%)</td>
</tr>
<tr>
<td>Over three years</td>
<td>24 (36%)</td>
</tr>
<tr>
<td>Total valid transfers</td>
<td>110</td>
</tr>
<tr>
<td>Within three years</td>
<td>76 (69%)</td>
</tr>
<tr>
<td>Over three years</td>
<td>34 (31%)</td>
</tr>
<tr>
<td>Total transfers within ten years</td>
<td>165 (94%)</td>
</tr>
<tr>
<td>The &quot;proximity to death&quot; factor is doctrinally irrelevant in jurisdictions that do not use the &quot;intent&quot; rationale; possibly this may explain why the factor is not even mentioned 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 &quot;invalid&quot; 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 &quot;invalid&quot; transfers outnumber the &quot;valid&quot; 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</td>
<td></td>
</tr>
</tbody>
</table>

---

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; 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." 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.\textsuperscript{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,\textsuperscript{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\textsuperscript{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 \textit{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

\textsuperscript{18} To extend the presumptive period to three years would help the widow, harm the donee.
\textsuperscript{19} See \textit{supra}, Chap. 8:3(b)(5).
\textsuperscript{20} \textit{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, or, for that matter, testamentary intent. Probably the phrases “contemplation of death” and “apprehension of death” have primary reference to either or both of the latter two factors. 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. 1955) 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.\textsuperscript{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 \textit{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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, \textit{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.
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


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. And it may have been testamentary 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, 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).
32 Infra, p. 383.
<table>
<thead>
<tr>
<th>Favoring Spouse</th>
<th>Favoring Donee</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Decedent's children by a prior marriage... 30</td>
<td>33</td>
<td>63</td>
</tr>
<tr>
<td>(b) Decedent's children, not clear whether of his last marriage or a prior marriage... 11</td>
<td>20</td>
<td>31</td>
</tr>
<tr>
<td>(c) Decedent's children, of the last marriage... 2</td>
<td>9</td>
<td>11</td>
</tr>
<tr>
<td>(d) Close relatives (parent, brother, nephew)... 15</td>
<td>30</td>
<td>45</td>
</tr>
<tr>
<td>(e) Distant relatives (uncle, cousin, in-law, etc.) 2</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>(f) Non-relatives 4</td>
<td>13</td>
<td>17</td>
</tr>
<tr>
<td>(g) Non-relatives (semble) 1</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>(h) Charity 3</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>68 (37%)</strong></td>
<td><strong>117 (63%)</strong></td>
</tr>
</tbody>
</table>

These figures indicate that the motivation for an inter vivos "evasion" is likely to be concern for children. 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. 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. 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. 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? Surely he would. And surely he would attempt an inter vivos “evasion.”

These figures also support our working hypothesis that the relative increase in American family disharmony presages an increase in “evasions” of the statutory share. 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.


\(^{44}\) 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. It seems to be immaterial whether or not the participation benefited the donee. In the normal case the donee will of course derive some benefit.

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. 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. 589, 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,\textsuperscript{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 \textit{Thayer} case and the \textit{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.\textsuperscript{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

\begin{itemize}
  \item 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 distributary 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. . . .”

\textsuperscript{51} See infra, text at note 53.

\textsuperscript{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.
THE INDIVIDUAL EQUITIES

cannot be made to defeat a wife's claim under the statute.”

Similar views have been expressed in other cases. The factor also receives indirect emphasis in those cases that characterize the widow as a volunteer, as contrasted with the contribution of the donee. 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.

(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.

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.


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.”


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).
FRAUD ON THE WIDOW’S SHARE

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).


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).


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, but also with particular classes of donee, e.g., children, and with the individual donee concerned in the litigation. Allusions to the equities of a particular donee are quite common. These equities include the circumstance that decedent had always “preferred” the donee, or that the donee had cared for, or given financial support, or its equivalent, to the decedent. In some of the cases the donee is a bigamous second wife, usually with the equities in her


63 The superior claim of any donee is of course implicit in the “reality” doctrine.


65 Poole v. Poole, Md. (1916) (“The child will be more benefitted by this arrangement than if . . . the deed set aside”).


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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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).


74 See infra, Chap. 21.

75 Fla. (1863-4).

76 See discussion on remarriages, supra, Chap. I, text at note 19.

77 Sanborn v. Goodhue, N.H. (1853); McIntosh v. Ladd, Tenn. (1840); Lightfoot v. Colgin, Va. (1813).
savings. The courts have noted in some cases that the deceased transferred the property to children of his first marriage in furtherance of a promise made to his first wife.

(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. The evasion decisions, however, make frequent references to the claimant's poverty or need, in sustaining the claim; and, less frequently, to her independent means, 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

79 E.g., Estate of Sides, Neb. (1930); but cf. Rice v. Waddill, Mo. (1902).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{85} Certainly the claimant with independent wealth \textsuperscript{86} does not present as appealing a case as the indigent widow and particularly so when the family allowance statute is limited in scope.\textsuperscript{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.\textsuperscript{88} Surprisingly enough, the relationship between the claimant's conduct and her chances of success appears to be closer than might be expected.\textsuperscript{89} Seemingly the factor has some sort of haphazard in-

\textsuperscript{83} But cf. Manikee v. Beard, Ky. (1887).
\textsuperscript{84} See supra, Chap. 2:3.
\textsuperscript{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), \textit{passim}.
\textsuperscript{86} This factor would preclude relief under a "family maintenance" type of statute, see infra, Chap. 21.
\textsuperscript{87} See supra, Chap 2:4(b).
\textsuperscript{88} See supra, Chap 2, text at note 18.
\textsuperscript{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. Nonetheless, it seems to be an unavoidable concomitant of evasion litigation

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. Winstead, Md. (1925); Rabbitt v. Gaither, Md. (1887); London v. London, Tenn. (1839); cf. Thayer v. Thayer, Vt. (1842); and see Guitner v. McEwen, Ohio (1954) (widow had "fulfilled all her obligations as a dutiful consort"); loses.

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.*, for instance, the opinion makes no mention of this factor; but the record contains numerous — and conflicting — references.

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* 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.

The fact that the spouses became reconciled after the transfer was made seems to have no particular weight.

(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

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—without either 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. 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.

(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. Some of these cases may be explained on doctrinal grounds, e.g., that retention of control is all-important. And it is possible in any given case that on balance the equities may favor such a claimant. 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. When the parties have not long been married the claimant has had no time to help accumulate the decedent's estate, and an inter

97 Widow younger, prevails: Brown v. Crafts, Me. (1903) (forty year disparity); Wansstrath 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 personality. 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.\textsuperscript{104}

(6) Sex of Claimant. We have seen that the election statutes appear to favor the widow.\textsuperscript{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.\textsuperscript{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,\textsuperscript{107} the First Department decided in Murray v. Brooklyn Savings Bank\textsuperscript{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 . . . ."

The restriction developed in the Murray case is rare, and it has since been repudiated in New York.\textsuperscript{110} This is fortunate,

\textsuperscript{104} In re Sutch's Estate, Pa. (1902).
\textsuperscript{105} See p. 23, supra.
\textsuperscript{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.
\textsuperscript{107} 275 N.Y. 371, 9 N.E.2d 966 (1937).
\textsuperscript{109} 258 App. Div. at 134, 15 N.Y.S.2d at 918.
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.\textsuperscript{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: \textsuperscript{112}

<table>
<thead>
<tr>
<th>Description</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decedent testate, or probably so</td>
<td>73</td>
<td>48.66%</td>
</tr>
<tr>
<td>Decedent intestate, or probably so</td>
<td>70</td>
<td>46.66%</td>
</tr>
<tr>
<td>Not clear</td>
<td>7</td>
<td>4.66%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>150</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{111} Some states permit the widow to renounce her intestate share: \textit{e.g.}, Fla. Stat. §731.34 (1957). This is also the legislative tendency under the British Commonwealth "family maintenance" jurisdictions; see p. 292, \textit{infra}. Cf. Note, 58 Dick. L. Rev. 70, 74 (1953).

\textsuperscript{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

---

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.