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Macdonald: Fraud on the Widow's Share

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RECENT BOOKS

FRAUD ON THE WIDOW'S SHARE. By *William D. Macdonald*. Ann Arbor: Michigan Legal Publications. 1960. Pp. xviii, 477. \$10.00.

In practically every state of the Union the law contains devices designed to safeguard to a married woman a minimum of property rights in the case of her husband's death. In the nine community property jurisdictions the widow retains that one-half share in the community property to which she has become entitled during coverture. In those jurisdictions in which common law dower has survived, the widow has a life estate in each parcel of land of which the husband had been seized of an estate of freehold during coverture. In North and South Dakota the surviving spouse of a land owner is protected through a generous homestead interest. In the majority of the jurisdictions the widow is sought to be protected by statutory provisions guaranteeing to her a minimum share in the estate of her husband of which he cannot deprive her through his last will and testament. In those non-community property states in which common law dower has been abolished, this "forced share" or "indefeasible share" constitutes the sole protective device against disinheritance. Because, dower is, of necessity, limited to immovables, and because movables have come to be the more important form of wealth, the indefeasible share constitutes the principal protective device even in those jurisdictions in which common law dower has been preserved. However, while the widow's indefeasible share cannot be defeated by the testamentary disposition of the husband, it can be defeated by depletion of his estate either through squandering it or through his giving it away before his death. The indefeasible share of the widow constitutes a part, in most states a fraction, of the estate left by the husband upon his death. The share is zero if the estate is zero. In civil law countries, which give forced shares to various close relatives, although not always to the widow, the statutes expressly provide that inter vivos transfers are, as a general rule, ineffective as against the beneficiaries of the forced share laws. Evasion of the forced share laws is thus effectively prevented except, of course, as to transfers made in such secrecy that they remain undiscovered. In the United States, practically all the statutes simply say that the surviving spouse is to have a forced share, usually determined on a generous scale, and then stop. In contrast to their civil law counterparts the American statutes are silent concerning the effect of inter vivos gifts made by the decedent. Does this silence mean that the forced share laws can be evaded by the simple expedient of an inter vivos transfer? That conclusion seems to have been the starting point for the practice of the courts. But there has developed a trend to come to the aid of the surviving spouse where a transfer has been made "in fraud" of his or her right to a forced share. The trouble has been that this term is devoid of clear meaning and that few courts, if any, have consistently had sufficient courage to use it in cases of gifts made outright and without strings attached.

Also, there has grown up in the United States a set of transactions by which one can simultaneously give away and keep; such include, for example, revocable inter vivos trusts, transfers with a life estate reserved to the transferor, joint tenancies and bank accounts with the incident of survivorship, and Totten trusts. As a matter of fact, American courts have placed at the disposal of property owners a whole arsenal of transactions by which one can eat his cake and have it too. Originally developed, it seems, for the avoidance of state inheritance taxes, or to save the expenses of probate and administration, these "give-and-retain" transactions also invite their use for the painless defeasance of a surviving spouse's forced share. Shall such use be countenanced by the courts? Two approaches have developed, one formalistic, the other realistic. Under the former the court analyzes the effect of the transaction upon title to the asset in question. Has it had the effect that at the moment of the transferor's death title was no longer in him? If so, the asset cannot be a part of the estate and, consequently, cannot be considered in the determination of the surviving spouse's share although, from a more realistic point of view, the transferor enjoyed practically all incidents of ownership down to the moment of his death. Under the more realistic approach, such enjoyment or control would result in the inclusion of the asset in the estate, at least for purposes of determining the surviving spouse's share. How large a measure of control is necessary has never been clearly determined. Besides, neither the formalistic nor the realistic approach is followed consistently even within a single state. There has been constant wavering, with a marked trend, however, to favor the formalistic approach and thus to allow "give-and-retain" transactions to defeat the surviving spouse's right to an indefeasible share.

What, if anything, can or shall be done to render effective the policy of protecting the rights of surviving spouses? This is the theme of the book by Professor W. D. Macdonald, entitled *Fraud on The Widow's Share* and recently published by the University of Michigan Law School. The problem is explored by the author extensively and incisively.

As any investigator concerned with remedial legislation ought to do, Macdonald begins by asking if there exists any need for doing anything in the matter. Are evasions frequent? If so, do they counteract policies which the community regards as sufficiently important to justify interference with freedom of disposition? The frequency of evasion is indicated by the large number of cases which have reached those courts whose opinions are published. The contradictory results of the decisions constitute in themselves an evil, *viz.*, that of uncertainty of property transfer with consequent jeopardy to the reliance interest of transferees and to estate planning. In the author's opinion the frequency of evasive transactions is likely to increase. Inter vivos gifts are becoming ever more popular. They are favored by the fact that the rate of the gift tax is lower than that of the estate tax. Thanks to draftsmen's ingenuity sympathetically received by the courts, giving can be

achieved in painless ways allowing the giver to keep for his life what he has given away. We must agree with the author that these facts tend to endow inter vivos gifts with a certain attractiveness, but is this effect not counteracted by the unavailability of the lower gift tax rates for those transfers which are not outright? And does not the tax benefit of the marital deduction constitute a powerful incentive to a man to leave at least one half of his estate to his widow? But even if resort to evasive devices should be at a lesser increase than that believed to exist by the author, or if it should even be at no increase at all, the policy pursued or, as the author says, the community value sought to be protected by the forced share laws, is of such importance that its easy avoidance cannot be permanently tolerated. The basic policy pursued by the forced share laws is said to be that of safeguarding continued family support after the death of the family provider. By preventing the husband from willing all his property to outsiders, the widow and, through her, the children are to be protected against destitution. Toward the achievement of this aim the forced share laws are supplemented by "charity-begins-at-home" statutes and by "hell-fire" statutes, but they are the center piece and, in many jurisdictions, the only device. Balanced against the countervailing policy of promoting the free unfolding of personality through testamentary freedom the policy of family protection is shown to be regarded by the community as the higher one. Does it also overbalance the policy or policies which induce the community to safeguard freedom of property dispositions during lifetime? The author concludes that it does, but not without qualification. The policy of safeguarding family support is to be maintained as against the policy of freedom of disposition insofar, and only insofar, as a need of family support exists in an individual case. The forced share laws fail to regard individual need. They apply mechanically and often give protection where none is needed and, because of ease of evasion, fail to give it in cases of need. In many cases they thus unnecessarily interfere with freedom of property disposition, with the stability of estate plans, and with justified reliance interests of transferees, and transferees from transferees. The view that the forced share laws extend to cases to which the underlying policy of those laws does not apply is largely based upon the observation of the facts of the evasion cases. In 105 cases out of 185 investigated, the donees against whom suit was later brought by the widow were children of the decedent, in 45 other cases they were close relatives such as parents, brothers or sisters, and in 5 cases they were more distant relatives such as uncles, cousins or in-laws. Only in 6 cases were the donees charitable organizations and in only 17 or perhaps 24 (the facts could not be fully ascertained in 7 cases) were they other outsiders. It also appears that a very high proportion of the claimants were spouses of a second or subsequent marriage. Macdonald thus concludes that a typical evasion situation is that in which a man in the distribution of his wealth seeks to favor the issue of his earlier marriage over his new wife. Such a wish is regarded as justified where the property has come from the first wife or was accumulated with her help during the

time of the first marriage. In any event, this situation is different from that which seems to have motivated the enactment of the forced share laws, *i.e.*, that of a man giving his wealth to an outsider at the expense of his wife and his infant children. The step-mother situation is indeed regarded as so typical that Macdonald uses it as another basis for his conclusion that the number of evasion cases is likely to increase, for the likelihood of remarriage and thus of conflicts between children and step-parents is growing in consequence of both the lengthening of the life expectancy and of the increasing frequency of divorce.

Since forced share laws are found to be wanting in suitability for the achievement of the policy for which they were intended, Macdonald makes short shrift of efforts to establish legislative hurdles against their evasion. What he recommends is a new start. The aims of limiting family protection to those cases in which it is actually needed and of simultaneously rendering this protection proof against evasion as well as mitigating the unsettling of transferees' reliances can, in his opinion, all be achieved by adopting a new statutory pattern whose outlines are indicated by the Family Maintenance statutes of England and other Commonwealth countries. The pattern of these acts was established by a New Zealand statute of 1900. Its salient feature consists in the discretionary power of the courts to order that suitable maintenance payments be made out of the assets of a decedent's estate to needy dependents insufficiently provided for under the will or the intestate rules. In the Commonwealth countries such legislation has come to be common. In England the enactment of the Inheritance (Family Provision) Act, 1938, has ended more than two centuries of unfettered testamentary freedom, but this was done not by re-establishing the forced share as it once existed under the Custom of London, but by the flexible scheme of the New Zealand type. The United States (with the exception of Louisiana and Puerto Rico) has thus remained the only major nation in which a parent has the power of completely disinheriting his children. Adoption of Macdonald's proposal would end that anomaly. In a draft model statute of his own, Macdonald improves upon the Commonwealth statutes in two respects: Evasion of the statutory scheme is to be counteracted by including, within certain limits, transferees of inter vivos gifts within the circle of the persons subject to the duty to pay maintenance; and by extending judicial discretion to the determination of those persons who are actually to pay and the extent of their contribution. Elimination of evasion is thus combined with flexibility as to the beneficiary of the new right of family support and as to those by whom the corresponding burden is to be born. For this "maintenance and contribution formula" Macdonald draws support not only from intrinsic justice, but also from his analysis of 263 cases of attempted evasion of the present forced share laws. Macdonald believes that the formulae officially announced in the opinions rarely explain the actual decisions. What has determined the outcome have been considerations of equity which are rarely announced in the cases. They can, if at all, be gathered indirectly by reading between the lines, or by trying to reconstruct

the facts which are not frequently revealed fully in the opinions. Equities whose influence has every now and then been avowed by the courts are the proportions of decedents' property included in the transfer, the proximity of the transfer to the date of death, the provision by the decedent for the surviving spouse, the relationship of the donee, and the participation in the transfer by the donee. In addition, there are equities not avowed by the courts. Macdonald calls them "minor equities," although he is inclined to ascribe to them at least as great a weight in the decisions as those whose influence has been admitted by courts. Working in favor of the claimant are the moral claim of widows in general, claimant's having helped to accumulate decedent's estate, abandonment of claimant by decedent, and reprehensible conduct by decedent. For the donee the following equities are found to weigh in the balance: moral claim of donees, source of decedent's property, remarriage of claimant. In addition the following factors are found to influence the decision in one way or another: claimant's financial position, claimant's treatment of decedent, unpleasantness between the spouses, disparity in age between the spouses, duration of the marriage, sex of claimant, and whether decedent died testate or intestate.

Under Macdonald's maintenance-and-contribution formula discretion is to be exercised by the courts in deciding three main issues: first, whether the petitioner is entitled to maintenance; second, whether a transfer made by decedent was "unreasonable" so that the transferee might have to participate in the burden of the maintenance payments; and, third, in what amount, if any, contribution is to be made. In all these issues considerations of equity are expected not only to determine the answer, but also to be articulated so clearly that the judicial process can be observed and that a body of coherent case law can grow up in the course of time.

If the forced share laws have indeed no aim other than that of safeguarding family support beyond the death of the survivor, Professor Macdonald's maintenance and contribution formula certainly achieves it more efficiently than the present laws, even if they were improved by anti-evasion devices. But are the forced share laws not meant also to pursue another policy, *viz.*, that of allowing a surviving spouse, especially a widow, to participate in the gains which the husband achieved during marriage? Community property laws are openly and consistently based upon the idea that by running the household, tending the children, and providing in the home an atmosphere of love and quiet, the wife assists her husband to engage in gainful work, and that it is just to let the wife participate in these gains. Under the system of separation of assets, as it prevails in the majority of the American jurisdictions, the acquiescence made by the husband belong solely to him. But when the marriage comes to an end the wife receives a part of his estate. Under the intestacy laws this share is generous: usually one-third when the wife competes with issue of the husband; at least one-half where she competes with other relatives. The forced share laws are meant to make sure that this participation by the widow in that estate, which was accumulated with her help, cannot be thwarted by the

husband's testamentary disposition. This policy of giving the widow a share in that property, the accumulation of which she has made possible, is certainly not the only one which motivated the enactment of the forced share laws. It would be interesting to inquire to what extent, if any, this policy was consciously pursued and stated by the initiators of the forced share laws.

In his inquiry into the equities underlying the decisions in evasion cases, Macdonald ascribes but a minor role to the factor "whether or not claimant helped accumulate decedent's estate." In all of the comparatively few cases in which he finds this factor to have swayed the decision in the widow's favor, the wife's contribution had been more direct than simply running the household. This latter element appears, however, in such other equities as moral claims of widows in general, source of decedent's property, claimant's treatment of decedent, or duration of marriage. The accumulated weight of these factors appears to be considerable. Besides, an inquiry consciously directed to the discovery of the influence of the factor "increase of husband's property during marriage and wife's direct or indirect role in its accumulation" might have revealed a considerable measure of influence. Such influence should be expected in view of the fact that in recent decades devices to allow a surviving spouse to participate in the marital acquests of the predeceasing spouse have tended to be common in many parts of the world. The most effective of these devices, the system of community property, has the serious drawback of complexity, especially when equal rights of management and disposition are to be given to both spouses. In a steadily-increasing number of countries there has been adopted a new type of marital property law, the "Scandinavian" system, which combines separation of assets during coverture with participation in the marital acquests upon the termination of the marriage by death or divorce. For example, in Colombia or Uruguay, this system has replaced systems of community property, and in Germany, it has replaced a system of separation of assets.¹ So far, this "wave of the future" has not fully touched the common law countries, but in both England and the United States, a tendency can be observed in the handling of the divorce laws to bring about a participation of one spouse, usually, of course, the wife, in the marital gains of the other. The same idea has been openly expressed in those cases in which, in the case of an invalid marriage, the property settlement between the parties has been based upon the idea of a quasi partnership. Laws expressly providing for a distribution between spouses of a valid marriage of the marital acquests upon death have so far been unnecessary because that effect is, in a rough and ready way, achieved by the intestacy and forced share laws. If the latter were to be abolished and replaced by new laws aiming exclusively at family support, supplementation by provisions for participation in the marital acquests would be called for.

¹ For a world wide survey, see PARIS UNIVERSITÉ INSTITUT DE DROIT COMPARÉ, TRAVAUX ET RECHERCHES, No. 13, LE RÉGIME MATRIMONIAL LÉGAL DANS LES LÉGISLATIONS CONTEMPORAINES (Rouast ed. 1957).

The radical step of abolishing a legislative device which simultaneously pursues two important social policies, and substituting for it a new one by which only one of these can be pursued, is justified if the existing technique is so faulty that it neither achieves this latter policy nor can be reformed to remedy this defect. Macdonald is certainly right in his negative judgment of the reforms of the forced share laws proposed in recent years in the United States.

Section 33 of the Model Probate Code (1946) would render ineffective as against the surviving spouse "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." The author's incisive analysis of those cases in which courts have sought to apply the test of fraud renders it clear that this test is not only too vague to serve as a useful guide, but that it also fails to provide redress in a good many deserving cases. Macdonald also finds the proposal of the North Carolina plan of 1939 to be too vague, too rigid, and of insufficient scope.

The technique of the civil law, as found in Louisiana, Germany, and Switzerland, are also said to be of little help. Macdonald finds them to be insufficiently flexible and too harsh on donees. When viewed in their proper surroundings, these techniques should appear to be less censurable, however. They proceed upon the basis that as a general rule inter vivos gifts are ineffective as against those survivors of a property owner who are entitled to a forced share of his estate. Under the French system, which is discussed by Macdonald only in its Louisiana form, the surviving spouse is generally not among those persons. Indefeasible shares are provided only for descendants and, in certain cases, for parents. The surviving spouse is taken care of through the community property system. He or she is thus entitled to a share in the marital acquests, but not in that property which has come to the decedent from his own family or which he has accumulated before his marriage to the survivor. Only where there is no community fund for the widow to share, and where she lacks funds of her own to take care of her needs, is she entitled to maintenance out of the estate of the husband. The policies underlying this approach deserve attention.

In Germany and Switzerland, where community property exists only in those exceptional cases in which it is expressly "contracted in" by the parties, and where, consequently, the widow does not generally have a share in the acquests made by the husband during coverture, she is entitled to a generous intestate share and protected against disinheritance by a forced share, which is smaller, however, than the intestate share.

This converse relation between community property and the widow's forced share should not be without interest in the discussion of fraud on the widow's share. But of primary interest is the technique by which forced shares are sought to be protected against defeasance, irrespective of whether or not the surviving spouse is a beneficiary. As already stated, the various civil law legislations achieve this end by rendering inter vivos gifts ineffec-

tive as against the beneficiaries of forced shares. Is this rule really as harsh on donees as Macdonald is inclined to believe?

In France a gift cannot generally be made with any legal effect, unless a public record is made of it by a *notaire*. I do not translate this French term "notary." A French *notaire* is not only a lawyer but a lawyer of especially high standing and experience. He is likely to be the financial adviser of the family, to be well acquainted with them, and to enjoy their confidence. It would be a rare case in which the *notaire* would not warn the parties of the possibility that the donative transfer might later on be attacked by a *réservataire* so that the parties might be dissuaded from the intended transaction, or at least be put on guard. In recent times, the French courts have developed, it is true, possibilities of circumventing the necessity of a notarial record for each donation, and it would be interesting to investigate to what extent, if any, the reliance interest of donees and their transferees may have been jeopardized. Serious complaints do not seem to have been voiced.

In German and Swiss law the donee is protected through cut-off dates and through the availability of the defense of change of position. The Swiss code, in a section immediately following those dealing with forced shares, says that a donee who has acted in good faith is liable to restore only that amount by which he is still enriched by the gift at the date of the opening of the succession. In Germany, the corresponding rule is stated in a less obvious way so that its existence has been overlooked by Macdonald. As a matter of fact, the German rule is even more favorable to the donee than the Swiss: the date beyond which a change in position no longer reduces the amount to be restored is not necessarily that of the death of the decedent, but that of the moment at which the donee learns that he is bound to make restoration or the date at which the action for restoration is brought against him. A considerable measure of flexibility is also introduced by the rule, mentioned by Macdonald, which exempts from restoration gifts which were made in compliance with a moral duty or the rules of social propriety.

For the transformation of his maintenance and contribution formula into legislative reality, Macdonald offers a model statute that has been elaborated with great care. Following the Commonwealth model, the forced share is replaced by a claim for maintenance which is to arise only in the case of need, but the claim is not limited to the surviving spouse; it can also arise for a child or even a step-child that has actually been dependent upon the decedent. The sacred right of American fathers completely to pauperize their children would thus be abolished and American law would be brought into the fold of other civilized nations. This feature should by itself recommend Macdonald's model statute to the attention of state legislatures. The second essential feature is that the statute puts teeth into its scheme of maintenance and thus transforms the present statutes from pious wishes into effective reality. The curbs upon disinheritance

are coupled with a requirement of financial need, so that the avoidance problem is prevented from arising in those cases in which the petitioner fails to show his need. But for the successful petitioner the anti-evasion protection is comprehensive. The act provides for judicial control over practically all inter vivos transfers which are made within a designated period of time before death. The painstaking care with which the various kinds of these transfers are defined is particularly meritorious. Helpful also is the inclusion, within the scope of assets potentially subject to charge, of those assets which do not belong to the decedent's estate and never belonged to it, but over which he had a power of appointment of such broad range that, in conjunction with a life estate, it virtually gave him all the benefits of ownership.

If the estate, including such assets, is insufficient to provide for appropriate maintenance awards, the court may require contributions to be made by persons who have received inter vivos transfers from the decedent. Since equitable distribution of the burden is one of the author's avowed aims, it should be possible to resort to such transferees even in priority over the distributees of the estate, especially if, as it is done by the author in sections 1 (c) and 1 (d), the estate is so defined as not to include assets "transferred" by an inter vivos "give-and-retain" transaction.

As stated by Macdonald himself, before its adoption as a statute the act should receive that extensive scrutiny by specialists in the field and by the persons who would have the task of practical administration. That feature which ought to receive the most incisive scrutiny is that which subjects the entire scheme of maintenance and contribution to the widest measure of judicial discretion. It is one of the advantages of the present forced share laws that they operate automatically. Once the widow has filed with the probate court her declaration that she elects to renounce the will and take her forced share, the size of that share is determined by the statute itself and no judicial determination is necessary unless the widow seeks to reach assets of inter vivos transfers. Under the new scheme no benefit can be obtained without judicial determination of need and of burden-allocation. The cost of dying, which is already high in the United States, will be not inconsiderably increased, especially if the necessary determinations are to be made by the court of equity rather than the probate court. Of the latter's suitability for the task, Macdonald is suspicious, since in many parts of the United States probate judges need not be lawyers. Further investigation of Commonwealth practice in this respect, particularly as to the cost involved, would be desirable.

In 1938 a law similar to the Family Support acts of the Commonwealth and, consequently, to Professor Macdonald's model act, was enacted in Germany by the National-Socialist regime. Serious discussions were had in the Allied Control Council for Germany whether this law constituted a typical expression of National-Socialist ideology, not only because it allowed judicial correction where a testamentary or intestate scheme of distribution would, in an individual case, appear to be "contrary to the sound feelings

of the people," but also simply because it generally opened the door to wide judicial discretion in the distribution of a decedent's estate. As such an expression it was, indeed, repealed by the new German legislature.

Reception of the scheme into the body of American law would thus not lack irony. However, in the Macdonald draft, judicial discretion is not only not to be determined by the sound feeling of the people, but a good measure of guidance is given to it by the statement of criteria which the court should consider in deciding whether a petitioner has already received a reasonable provision from the decedent, and whether a transferee has received a transfer so "unreasonably large" as to subject him to the burden of contribution. These criteria are exactly those which Macdonald has found to underlie the judicial opinions in the evasion cases decided under the present forced share laws. The author's analysis of the cases is thus put to creative use.

The analysis of the cases will also be valuable by itself. Professor Macdonald's book is not only a contribution to legislative reform of a defective branch of the law, but also a detailed presentation of the existing law. The book contains a full survey of the statute law and an analysis of the entire body of the case law. The cases are approached and elucidated from several angles. In chapters 7, 8, and 9 they are grouped according to the three tests "officially" used in the opinions: retention of control, motive for the transfer, and "reality" of the transfer. In chapters 10 and 11, together with Tables A, B, and C, the cases are grouped according to the "equities" underlying the judicial process. Chapters 12 to 16 contain a particularly detailed analysis of the ways in which the courts have treated the "give-and-retain" transactions, such as deeds not to be recorded until the grantor's death, gifts causa mortis, joint tenancies, bank accounts and other survivorship devices, life insurance, and powers of appointment. Finally, in Table E, the cases are indexed by states. The book is thus a full compendium in which the practitioner will not only find all the cases but also a wealth of ideas for argument.

The usefulness of the book in deliberations of legislative reforms is enhanced by the inclusion of the full texts of the relevant passages of the Model Probate Code, of the North Carolina Report of 1939, and of those provisions of the Internal Revenue Code of 1954 which determine what property "transferred" by a decedent inter vivos is, nevertheless, to be included in his gross estate for estate tax purposes. The reader will furthermore find in English translation the chapters on forced shares contained in the civil codes of Germany and Switzerland. These texts should be supplemented, however, by relevant passages contained in other chapters. There is not reproduced in the book the text of any of the Commonwealth statutes, probably because they are more easily accessible to American readers than those of foreign language.

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