Foreword

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

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

GEORGE E. PALMER

Preface

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

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

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

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

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

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

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

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

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

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

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

W. D. MACDONALD