

## Tests That Stress The Motive For The Transfer

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

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

### 1. ORIGIN AND SIGNIFICANCE OF THE "KERR" PASSAGES

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

<sup>1</sup> At p. 220. This edition has notes on American cases, by Orlando F. Bump.

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

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

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

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

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

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

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

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

<sup>5</sup> 1 Md. Ch. \*337 (1848); see also *Crain v. Crain*, 17 Tex. 80 (1856) (extensive discussion of custom of London cases).

<sup>6</sup> Citing *Smith v. Fellows*, 2 Atk. 62, 26 Eng. Rep. 435 (1740); *Hall v. Hall*, 2 Vern. 276, 23 Eng. Rep. 779 (1692).

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

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

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

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

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

## 2. MEANINGS OF THE WORD "FRAUD"

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

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

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

<sup>10</sup> E.g., Rabbitt v. Gaither, 67 Md. 94, 8 Atl. 744 (1887).

<sup>11</sup> E.g., Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912).

<sup>12</sup> See Appendix C, *infra*.

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

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

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

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

5. *Fraud on the marital right*.<sup>17</sup> This term is used with

<sup>13</sup> The purported transfer in this situation is also said to be colorable; *infra*, p. 133.

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

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

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

<sup>17</sup> Cf. MODEL PROBATE CODE §33, *infra*, Chap. 19:2; Maryland cases, Table E, *infra*.

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

### 3. THE "INTENT" TEST

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

<sup>18</sup> See, e.g., the Kentucky cases, *infra*, section 3(4).

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

<sup>20</sup> 275 N.Y. 371, 379, 9 N.E.2d 966, 968 (1937).

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

<sup>22</sup> Webster's New International Dictionary (20th ed. 1949).

<sup>23</sup> See *supra*, Chap. 7, text at note 39.

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

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

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

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

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

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

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

<sup>27</sup> *Haskell v. Art Institute*, 304 Ill. App. 393, 26 N.E.2d 736 (1940).

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

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

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

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

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

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

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

<sup>34</sup> 119 Neb. 314, 321, 228 N.W. 619, 622 (1930).

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

<sup>36</sup> See discussion p. 99, *supra*.

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

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

<sup>37</sup> Italics supplied.

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

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

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

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

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

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

<sup>40</sup> 14 Vt. 107 (1842).

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

<sup>42</sup> 61 Vt. 426, 18 Atl. 153 (1889).

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

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

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

<sup>43</sup> 97 Vt. 419, 123 Atl. 626 (1924).

<sup>44</sup> 105 Vt. 405, 165 Atl. 919 (1933).

<sup>45</sup> Cf. *Tillison v. Tillison*, 95 Vt. 535, 116 Atl. 117 (1922).

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

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

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

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

<sup>47</sup> 66 N.H. 390, 395, 31 Atl. 14 (1891).

<sup>48</sup> 78 N.H. 352, 100 Atl. 671 (1917).

<sup>49</sup> Italics supplied.

<sup>50</sup> 93 N.H. 434, 43 A.2d 157 (1945), *exceptions overruled*, 94 N.H. 425, 55 A.2d 872 (1947).

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

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

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

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

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

<sup>53</sup> 20 Tenn. 445 (1840).

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

<sup>55</sup> 48 Tenn. 294 (1870).

<sup>56</sup> Presumably in Tennessee nowadays retention of possession or life income would not prevent a deed from being operative, either as to realty or personality.

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

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

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

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

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

<sup>57</sup> 30 Tenn. 294 (1850).

<sup>58</sup> 85 Ky. 20, 2 S.W. 545 (1887).

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

<sup>60</sup> 90 Ky. 1, 13 S.W. 244 (1890).

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

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

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

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

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

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

<sup>64</sup> *Cf.* *Goff v. Goff's Ex'rs*, 175 Ky. 75, 193 S.W. 1009 (1917) (antenuptial transfer).

<sup>65</sup> 309 Ky. 354, 217 S.W.2d 782 (1949).

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

(5) The Missouri Cases. The Missouri legislature has recently enacted the following statute:<sup>67</sup>

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

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

This statute is almost as vague as the corresponding section of the Model Probate Code.<sup>68</sup> Undoubtedly the existing case-

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

<sup>67</sup> Mo. Ann. Stat. §474.150 (1955), 21 Mo. L. Rev. 151, 165-68 (1956).

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

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

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

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

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

<sup>69</sup> 344 Mo. 1150, 130 S.W.2d 611 (1939).

<sup>70</sup> See discussion, *infra*, pp. 148-154.

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

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

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

<sup>72</sup> *Rice v. Waddill*, 168 Mo. 99, 67 S.W. 605 (1902).

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

<sup>74</sup> 280 S.W.2d 27 (Mo. 1955).

<sup>75</sup> *Id.* at 36

## 4. CONCLUSION

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

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

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

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

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

<sup>77</sup> Discussed *supra*, Chap. 4.

<sup>78</sup> *Cf.* *Norwood v. Norwood*, 207 Ga. 148, 60 S.E.2d 449 (1950) (undue influence).

<sup>79</sup> *But cf.* *In re Sides' Estate*, 119 Neb. 314, 228 N.W. 619 (1930), discussed *supra*, pp. 106-108.

<sup>80</sup> *E.g.*, *Benge v. Barnett*, 309 Ky. 354, 217 S.W.2d 782 (1949).

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

expressed his intent to “evade” the statutory share. The maintenance and contribution formula would assent to the finality of no one factor, but to the relevance of all factors.<sup>82</sup> The “intent” test comes close to this ideal, but not close enough.

<sup>82</sup> Moreover, it is geared to decedent’s family maintenance legislation instead of the statutory share.