CHAPTER 11

# Role Of The Equities In The Judicial Process

My purpose in this chapter is to estimate the influence of the equities in the evasion cases. In this inquiry I am not concerned with theories put forward in the cases themselves. My interest lies in the actual judicial process, not in the formally announced *ratio decidendi.* The courts purport to be guided by the decedent's "intent," or by the "illusoriness" or "reality" of the transfer. My working hypothesis is that these terms have a broader, more flexible connotation than might be suspected at first glance. I am interested in the possibility that these terms or criteria are not decisive *per se;* that they relate to or are governed by the equities of the case; and that the decision in each case, ostensibly based on motive, retention of control, or "reality," actually is based on the equities. To test this hypothesis I examine the facts of each case to ascertain the result that in my opinion would have been reached on a balancing of the equities. The suggested result on this approach is compared with the reported result. I find a significantly high correlation between the decisions actually reached and the decisions that would be dictated by the equities.

The term "equity" is of course more significant in the plural than in the singular. The strength of a given factor or "equity" may be found only in the interplay of all the circumstances. We must examine, for example, the claimant's need, the size of the transfer, and the moral claim of the donee. If this examination indicates that the inter vivos transfer was a reasonable one, it may be said that the "equities" favor the donee — in other words, that the *fair* decision, on the particular facts, would be for the donee.

Admittedly, the "reasonableness" of a given inter vivos transfer is a matter of opinion. The human variable cannot be eliminated from the selective process. What seems reasonable to A may appear unreasonable to B; what A would choose as an "equity," B might dismiss as a mere irrelevancy. It depends on the point of view. My point of view was the maintenance and contribution formula.[1] Under the formula the widow cannot be heard to complain about the inter vivos transfer unless first she persuades the court that the decedent did not make reasonable provision for her. If she clears this hurdle she may then ask the court to require contribution from the donee of any transfer that was unreasonably large under the circumstances prevailing at the time of the transfer. The more important circumstances are the relative size of the transfer and the moral claim, if any, of the donee.

Considerable difficulty was encountered in attempting this factual analysis. The courts are not in the habit of making a careful delineation of the facts. Rarely is there a statement of the financial position of the surviving spouse, the relative size of the transfer, or other material circumstances. Usually the reference to these factors is by way of window-dressing, for make-weight effect.

Two hundred and sixty-three cases were found to be relevant.[2] These cases were divided into two groups, according to whether the actual result in the particular case favored the surviving spouse or the donee. Each group was split into five subgroups, found below, based on my judgment as to the result that would be dictated by the equities. "Unreasonable"[3] means that in my opinion the transfer should not have

[1] See pp. 44–46, *supra*. See also suggested model statute, *infra*, p. 299.

[2] The criteria for determining the relevance of a case are outlined, *supra*, p. 147.

[3] A transfer may be "unreasonable" even though made from laudable motives. Thus a transfer that seemed reasonable when made may turn out to be unreasonably large if some provision for the surviving spouse fails to have legal effect, *e.g.*, when an inter vivos gift to the surviving spouse is invalid for lack of delivery, as in Bolles v. Toledo Trust Co.,

been sustained, i.e., that the equities favored the surviving spouse. "Reasonable" means just the opposite. "Probably unreasonable" or "probably reasonable" indicates some indecision on my part as to the state of the equities, with the balance of probability pointing one way or the other. "Not clear" means that I could not make up my mind, in most cases because of insufficient facts. The cases as classified are set out in Table C.[4]

| | | |
|---|---|---|
| A. *Cases Favoring Spouse* | | |
| 1. Unreasonable | 20 | |
| 2. Probably unreasonable | 37 | |
| 3. Reasonable | 2 | |
| 4. Probably reasonable | 8 | |
| 5. Not clear | 31 | |
| Total | 98 | |
| Consistent with the "equities," or not clearly inconsistent | 88 | (90%) |
| Inconsistent | 10 | (10%) |
| Sharply inconsistent | 2 | ( 2%) |
| B. *Cases Favoring Donee* | | |
| 1. Reasonable | 33 | |
| 2. Probably reasonable | 53 | |
| 3. Unreasonable | 6 | |
| 4. Probably unreasonable | 21 | |
| 5. Not clear | 52 | |
| Total | 165 | |
| Consistent with the "equities," or not clearly inconsistent | 138 | (84%) |
| Inconsistent | 27 | (16%) |
| Sharply inconsistent | 6 | ( 4%) |

SUMMARY

| | | |
|---|---|---|
| Total cases | 263 | |
| Consistent with the "equities," or not clearly inconsistent | 226 | (86%) |
| Inconsistent | 45 | (14%) |
| Sharply inconsistent | 8 | ( 3%) |

Admitting again that these figures are derived from my own classification of the cases, and that another person using

Ohio (1944). A decision for the spouse in these circumstances may frustrate the expectations of the decedent; but the decedent should be entitled to rely on his transfers being immune from the widow's claim only when she has been effectively provided with adequate support. Aside from this unusual situation, however, the "reasonableness" of a transfer is determined from the circumstances prevailing at the time of the transfer.

[4] *Infra*, p. 387.

the same criteria might reclassify any given case, the figures suggest several interesting conclusions.

First, notice that the correlation between the actual decisions and the equities is more sensitive when the surviving spouse wins (90%) than when she loses (84%). In other words, there are more cases in which the surviving spouse loses when she should win than in which she wins when she should lose. This means that most decisions that do not follow the equities are inimical to the surviving spouse. This phenomenon is not unexpected. The legislatures have not yet clearly indicated that the policy of ensuring financial support for the surviving spouse is strong enough to encroach on freedom of inter vivos alienation. Assuming the validity of our policy conclusions, as expressed in the maintenance and contribution formula, this points to the advisability of a policy directive to the courts by the legislatures.

Second, jurisdictions that use or have used the "reality" doctrine show a relatively high proportion of decisions at variance with the equities. These decisions are found under the following classifications: "unreasonable" and "probably unreasonable" (when the actual decision favors the donee), and "reasonable" and "probably reasonable" (when the actual decision favors the spouse). Here is the breakdown: New York, nine; Pennsylvania, seven; Ohio, four; Massachusetts, three; Illinois, Kansas, and Mississippi, two each; and Connecticut, Kentucky, Maine, Maryland, Missouri, Oklahoma, Tennessee, and Virginia, one each. Notice that nineteen of these thirty-four atypical decisions were decided in but three states, namely New York, Pennsylvania, and Massachusetts. The 1951 *Halpern* case decision in New York means that there will probably be more of these inequitable decisions in that jurisdiction, particularly if the "reality" doctrine is extended to transfers other than Totten trusts. The outlook is a little better in Pennsylvania, however, where the 1947 legislation openly recognizes the evasion problem and attempts to cope with it.

Third, one receives the over-all impression that the courts are muddling through to sensible results. The high correlation between actual decisions and sensible decisions suggests — if we exclude the possibility of a phenomenal coincidence — that the courts *do* place great emphasis on the equities of the case. With some courts, e.g., Kentucky and Missouri, the emphasis is openly acknowledged; with others it is inarticulate, perhaps subconscious. To the reader, it is deducible from the facts — not observable in the *ratio decidendi.*

Let us concede [5] that the courts do a fair job, under the circumstances. But can we be sure that the community values implicit in the statutory share are being achieved? Sometimes yes; sometimes no. It depends on the court concerned. Courts using the "intent" rationale seem in general to follow the equities; but there is confusion as to the significance of the decedent's motive and of the proximity of the date of the transfer to the date of death. Courts using the "control" rationale occupy a medium position: they have some room for exercise of discretion, but it is not enough and is unrelated to the equities. Courts using the "reality" rationale have no room for maneuver; as far as the surviving spouse is concerned, an inter vivos transfer is sacrosanct. Notice from our figures on the atypical decisions that few are rendered by courts using the "intent" rationale, but many occur in courts that have been or are using the "reality" rationale. Accordingly, the need for legislative reform seems more acute in "reality" jurisdictions, less pressing in "intent" jurisdictions.

Nor should the need for legislation be deprecated because the atypical decisions are few in number. The litigated transfers are probably but a fraction of the unlitigated transfers. No doubt many actual evasions remain unchallenged. Litigation is expensive, regardless of jurisdiction or of prevailing doctrine. And the possibility of undesirable publicity on

[5] The fairly large proportion of cases in the "not clear" category detracts somewhat from the value of the figures.

family matters may militate against litigation in a few cases, probably stimulates settlement in many more cases. Moreover, cases not appealed are in most instances not reported.

Individuals in the community conduct their affairs in reliance on, and in deference to, the apparent state of the case-law. In a jurisdiction that uses the "reality" rationale an indigent widow faced with an otherwise valid but unreasonably large inter vivos transfer will be deterred from litigation and probably barred from a settlement.[6] To that extent, the statutory share, as interpreted by the courts, is not doing its community job. As a corollary, we also may criticize decisions that permit a widow, who has no financial need, to set aside a transfer merely because too much "control" was retained. Decisions of this sort unduly minimize the values implicit in freedom of alienation (looking at the transfer from the viewpoint of the transferor), and in security of title (looking at it from the viewpoint of the transferee).

In summation, the equities appear to play a leading role in the judicial process. That role is more decisive when it is openly acknowledged, as in most "intent" jurisdictions. Jurisdictions employing the "control" and "reality" rationales are in more urgent need of remedial legislation. The inarticulate judicial tendency in these jurisdictions to follow the equities is too haphazard a phenomenon to ensure that community values in this field are realized. There should be a legislative endorsement of the principles of the maintenance and contribution formula.

[6] The relatively high rate of litigation in such "intent" jurisdictions as Kentucky and Missouri may be explained in part by the fact that the equities are relevant, and thus meritorious claims have a better chance of success.