

PART IV
POSSIBLE LEGISLATIVE
SOLUTIONS

Solutions Based On Retention Of The Typical Statutory Share

Now that we have concluded our survey of the “evasion” case-law we should be able to decide on the advisability of remedial legislation. How do we make the decision? Why, by going back to first principles. Do the existing legislative and judicial controls in this field achieve the desired community goals? Is the statutory protection against disinheritance of the family geared to need? In testing “evasions” do the courts have discretion to weigh and balance the applicant’s need against the legitimate expectations of the donee? In brief, does the statutory share, as interpreted by the courts, enunciate the principles of the maintenance and contribution formula?

1. SHOULD WE PRESERVE THE STATUS QUO?

The objective evidence indicates that we need new legislation, to meet modern conditions. The typical statutory share is a product of the nineteenth century when — relatively — there was less inter vivos property transmission. Nowadays the emphasis is on inter vivos dispositive devices. Consequently, effective protection against disinheritance requires some degree of interference with these devices. This interference is justifiable only when its purpose is to alleviate the need of deserving members of the surviving family. Under the statutory share, however, there is no criterion of need; and the courts are given no directive on how to test inter vivos evasions. It is not surprising that the courts have responded with unsuitable rationales, some stressing the decedent’s “motive,” some stressing retention of “control,” and

some rejecting *any* possibility of relief to the surviving spouse. Under these rationales one claimant may be rebuffed in spite of demonstrated need, another claimant may prevail although not in need. The first decision results in unwarranted family hardship; the second decision results in unwarranted appropriation of the donee's property. Both decisions are inconsistent with the maintenance and contribution formula. Both decisions harm the community.

And the statutory share is too inflexible in another respect. It fails to make allowance for the complicated family relationship resulting from a remarriage. In this situation the statutory share flouts the wishes of the average decedent. Usually he would prefer to give the great bulk of his capital to the children of his first marriage, with appropriate provision for the support of his widow, if such is needed.¹ Instead, the statutory share awards the widow a specified outright fraction of the decedent's capital. Presumably the theory is that this fractional share is needed in order to help the widow to support the children. In the remarriage cases, however, the widow's desires may not coincide with the welfare of the decedent's children. She may be at odds with them. In any event, she may have children of her own. These children have a prior claim on her for support during her lifetime, and for her property at her death.² Thus the existing legislation ensures a perpetual evasion problem. The husband will wish to "evade," when he has no affection for his second wife. Even when he *has* affection for her his natural inclination may well be to give the bulk of his property to his children. Indeed, the typical "evasion" case involves a stepmother, seeking to set aside the decedent's inter vivos transfers to children of a prior marriage.³

Nor have these shortcomings of the statutory share been

¹ See text, *supra*, Chap. 10, at note 38.

² The possibility that a husband may give *all* his property to his second wife indicates the necessity of protecting dependent children against disinheritance.

³ See Chap. 10, note 35, *supra*; Chap. 18, text at note 24, *supra*.

remedied by the courts. To be sure, our analysis of the "equities" in the "evasion" cases revealed a close correlation between the actual decisions and the decisions that probably would have been reached under the maintenance and contribution formula.⁴ But this analysis, although suggestive, is far from conclusive. Many of the cases examined had to be placed in the "not clear" category; in other words, the state of the equities could not be deduced owing to inadequate judicial recital of the facts. Moreover, even if we assume that the courts are consciously or subconsciously following the desired formula we cannot ignore the fact that the announced rationales suggest otherwise. In short, the courts may be following the equities, but they certainly do not say so. This state of affairs should be remedied, if only to give greater predictability to property owners and estate planners. The maintenance and contribution formula should be given legislative sanction. In other words, protection against disinheritance should be related to need, and the courts should be given a positive legislative directive to decide "evasion" cases by balancing the equities between the applicant for maintenance and the donee.

We shall now examine proposals that have been made by others for legislative reform based on retention of the statutory share. Later, in Chapter Twenty, we shall draw on the experience of the civil law. Chapter Twenty-one will be devoted to the Decedent's Family Maintenance legislation of the British Commonwealth. Finally, in Chapter Twenty-two, a model statute will be suggested.

2. TESTS BASED ON "FRAUD"

Section 33(a) of the Model Probate Code provides that a gift "in fraud of the marital rights" of a surviving spouse may be treated as a testamentary disposition, and applied to the payment of the spouse's share.⁵ Section 33(b) states that "any

⁴ See Chap. 12, *supra*, *passim*.

⁵ For complete text see Appendix B, *infra*, p. 333; also see Mo. Ann.

gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary." A more detailed proposal is found in the 1939 Report of the Commission on Revision of the Laws of North Carolina Relating to Estates.⁶ Under the North Carolina scheme the widow, but not the widower, is permitted to invade such of the decedent husband's gratuitous transfers as were either revocable or made within a year of death and in contemplation thereof. There is a rebuttable presumption that transfers made within one year prior to death were made in contemplation of death. The proposed North Carolina statute also contains valuable procedural suggestions. Moreover, it aids estate planning by charging the widow with property received in designated inter vivos transfers, as well as property received from the decedent's estate.⁷ The complete text of the "evasion" provisions of the Model Probate Code and of the North Carolina proposal is set out in Appendix B,⁸ with explanatory comments supplied by the respective authors of each plan.

Note that both proposals place great stress on the proximity of the transfer to the date of death. In the Model Probate Code the burden is on the donee to show absence of fraud when the transfer was made within two years of death. Under the North Carolina plan there is a rebuttable presumption of fraud if "the transfer be in contemplation of the hus-

Stat. §474.150 (Supp. 1955), discussed p. 114, *supra*; Tenn. Code Ann. §8365 (Williams 1934), discussed p. 110, *supra*; Vt. Stat. §3039 (1947): "A voluntary conveyance by a husband of any of his real estate made during coverture and not to take effect until after his decease, and made with intent to defeat his widow in her claim to her share of his real estate, shall be void and inoperative to bar her claim to her share of such real estate. The husband shall be deemed at the time of his death to be the owner and seised of such real estate for the purpose of assigning and setting out such share to his widow." For the Vermont law see p. 108, *supra*.

⁶ REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES, 44-48 (1939).

⁷ *Id.*, Art. 6, §2; also see §5(c), referring to property that may have been received "upon the husband's death." In the Model Probate Code (§32) the surviving spouse is charged only with estate assets.

⁸ *Infra*, p. 333.

band's death and take place within one year prior thereto." ⁹ In an earlier chapter ¹⁰ it was suggested that the "proximity to death" factor should not receive any particular stress in testing evasions of the widow's share. Analysis of the cases shows that the litigated transfers are by no means confined to "deathbed" transfers, or even to transfers made within two years of death. And the "contemplation of death" notion is not helpful: it is too ambiguous.¹¹ Possibly it may be traced to the present Section 2035 of the Internal Revenue Code of 1954, concerning transfers "in contemplation of death." If so, the confusion in the tax cases is a poor advertisement for this test. "The present subjective test of transfers in contemplation of death works abominably, or to be precise, it does not work at all." ¹²

The Model Probate Code proposal is also vague as to the type of transfers that are affected. Indeed, the "comment" to the section in question suggests that the courts would have to decide whether or not inter vivos revocable trusts and Totten trusts would be affected by the proposed statute.¹³ The North Carolina plan, on the other hand, affects transfers made more than one year before death only when they are revocable. This restriction, which also appears in the Pennsylvania legislation,¹⁴ deprives the widow of effective protection against disinheritance.

Finally, neither proposal concerns itself with the claimant's "need." ¹⁵ For this reason alone, if not for the reasons men-

⁹ §5(a)(1).

¹⁰ Chap. 10, pp. 148-154, *supra*.

¹¹ *Id.* at 151.

¹² Lowndes and Rutledge, "An Objective Test of Transfers in Contemplation of Death," 24 TEXAS L. REV. 134, 158 (1945).

¹³ Also see Niles, "Model Probate Code and Monographs on Probate Law: A Review," 45 MICH. L. REV. 321, 330 (1947); Mechem, "Why Not a Modern Wills Act?" 33 IOWA L. REV. 501, 514 (1948).

¹⁴ Discussed *supra*, Chap. 9:4.

¹⁵ Art. 7 of the North Carolina proposal contains useful provisions for barring the rights of unworthy spouses, but the criteria are, in the main, manslaughter and desertion. The grasping spouse who does not need the money is not excluded. Note also that under §5(c) of the North Carolina proposal the donee of the inter vivos transfer is liable regardless of the value of the estate assets.

tioned above, neither proposal seems to offer a permanent solution to the evasion problem.

3. THE FEDERAL ESTATE TAX ANALOGY

Another possibility is to utilize the "gross estate" concept of the federal estate tax regulations.¹⁶ To gear the widow's elective rights to the gross taxable estate would certainly give her more extensive protection than she would receive under the Model Probate Code or the North Carolina plan. Her claim would "affect" any property in which the husband had a beneficial interest at death, or which he had transferred in contemplation of death. She could "invade" her husband's life insurance, joint ownership interests, revocable trusts, powers of appointment, and other border-line devices — at least to the extent that these devices would leave the property concerned includible in the husband's gross taxable estate. And (say some writers), predictability would be enhanced: the tax regulations are definitive, and the legal profession is familiar with them.¹⁷

I have not used the gross estate analogy in the suggested model statutory provisions appearing in Chapter Twenty-two.¹⁸ Probably the estate tax regulatory scheme achieves its community purpose, but this scheme does not necessarily suggest the proper legislative cure for inter vivos evasions of the spouse's share.

What *are* the community goals implicit in death taxes? Well, these taxes are a fairly recent phenomenon in the

¹⁶ Suggesting the "gross estate" analogy: Simes, PUBLIC POLICY AND THE DEAD HAND, 28-31 (1955) (in modified form); Note, 27 N. Y. U. L. REV. 306, 312 (1952); also see Atkinson, "Succession," ANNUAL SURVEY OF AMERICAN LAW, 749, 755 (1948); Cahn, "Restraints on Disinheritance," 85 U. PA. L. REV. 139, 152 (1936); Niles, "Model Probate Code and Monographs on Probate Law: A Review," 45 MICH. L. REV. 321, 331 (1947). The appropriate provisions of the Internal Revenue Code of 1954 are set out in Appendix B, part 3, *infra*.

¹⁷ *E.g.*, Note, 27 N. Y. U. L. REV. 306, 313 (1952).

¹⁸ Some of the estate tax concepts, however, proved of great value in framing the model statute, *e.g.*, see the provisions of §1 dealing with powers of appointment.

United States.¹⁹ It seems clear that they are here to stay, but there is some doubt as to what they are all about.²⁰ As far as the estate tax is concerned, the most popular theory is that it tends to equalize wealth.²¹ The importance of preventing undue concentration of wealth cannot be minimized. Democracy means equality of opportunity. Without death taxes there could be an oligarchy of the purse. Money breeds money; ²² it is only wishful thinking to postulate "shirtsleeves to shirtsleeves" in any foreseeable number of generations. In short, the curbing of unreasonably large fortunes is probably a vital urge of the American community.²³ But this means that the estate tax must be enforced without partiality or discrimination, against *all* estates in the designated brackets; and it must affect *each* of the designated inter vivos transfers made by the decedent. If this scheme were to be used to test evasions of the statutory share it would be as mechanical in operation as the statutory share itself. Having regard neither to the claimant's need nor the equities of the donee, it is the antithesis of the maintenance and contribution formula.

It would, of course, be possible to combine the tax regulations with the maintenance and contribution formula. The tax regulations could be used to delineate the types of inter vivos "transfers" that would be affected by the spouse's claim; and assertion of that claim against any particular transfer

¹⁹ By the beginning of the present century only twenty-six states had inheritance taxes of varying types. Wisconsin in 1903 led the way in taxing direct heirs. The federal estate tax began in 1916.

²⁰ See, in general, Paul, *TAXATION FOR PROSPERITY* (1947); Seligman, *ESSAYS IN TAXATION*, Chap. 5 (10th ed. 1925); Schulz, "Inheritance Taxation," 8 *ENCY. SOC. SCI.* 43 (1932); Cahn, "Time, Space and Estate Tax," 29 *GEO. L. J.* 677, 682-88 (1941).

²¹ The estate tax has also been justified as a prop of the national fisc. But death taxes amount to only a little more than one per cent of the total tax yield of the federal government. See table 7, *ANNUAL REPORT OF THE SECRETARY OF THE TREASURY FOR THE FISCAL YEAR ENDED JUNE 30, 1952*, pp. 550-54.

²² The statistics that are available indicate that "ownership of wealth is much more concentrated than that of income." Blodgett, *PRINCIPLES OF ECONOMICS*, 426 (1946).

²³ Morris R. Cohen, *LAW AND THE SOCIAL ORDER*, 30 (1933); Wedgwood, *THE ECONOMICS OF INHERITANCE* 1, (1929).

could then be handled in accordance with the formula. This compromise scheme could even be used in conjunction with the existing elective share legislation: thus the elective share would determine the claimant's share in the decedent's estate; the tax regulations would designate the types of inter vivos devices that would be vulnerable to the claimant; and the maintenance and contribution formula would determine the degree of recovery from particular donees, with an "elective share" fraction of all the relevant inter vivos devices constituting the *upper* limit of recovery. But this would be a forced union — a misalliance. Once the principles of the maintenance and contribution formula are accepted they should — for consistency's sake — be used to determine both the share in the estate and the claim against the inter vivos transferee. Nor do the estate tax provisions necessarily suggest the best delineation of the types of inter vivos devices that should be subject to the spouse's share. For example, the surviving spouse should have a stronger claim against the husband's life insurance than she would have under the present estate tax provisions. Moreover, the present regulations concerning powers of appointment are not entirely appropriate for determination of spouses' rights. The same comment may be made with respect to the tax provisions dealing with transfers in contemplation of death. Nor would a *modified* use of the tax provisions be wholly satisfactory. The fundamental objection would still remain that problems of spouses' rights could not be solved without reference to, and familiarity with, a rather complicated and relatively impermanent set of regulations that express a different community policy. The cure must fit the disease.