CHAPTER 21

The British Commonwealth "Decedent's Family Maintenance" Legislation

1. GENERAL CHARACTERISTICS

Back in Chapter 5 we concluded that the solution to the American "evasion" problem lies in adoption of flexible legislative and judicial controls both on the decedent spouse's freedom of testation and on his freedom of inter vivos property transmission. As far as controls on freedom of testation are concerned, the British Commonwealth Decedent's Family Maintenance statutes merit careful study. These statutes authorize the courts to award maintenance payments out of the decedent's estate to deserving members of the surviving family; and the case-law indicates that the scheme is a practicable one. The significance is obvious. If augmented by appropriate anti-evasion provisions these Commonwealth controls would embody the desired maintenance and contribution formula. In other words, they suggest the answer to our "evasion" troubles.

The year 1938 marked the close of a little over a century of unfettered freedom of testation in England. With the enactment in that year of the Inheritance (Family Provision) Act [1] England [2] joined the ranks of Commonwealth jurisdictions that have adopted "maintenance" legislation.[3] The distinc-

[1] 1 & 2 Geo. 6, Chap. 45 (1938). Dainow has contributed a valuable account of the legislative history of the English act, including the arguments pro and con in the parliamentary debates on the successive bills, Dainow, "Limitations on Testamentary Freedom in England," 25 CORNELL L. Q. 337 (1940).

[2] The act does not affect Scotland or Northern Ireland. As the Scots would say, it applies only to the "Sassenachs."

[3] "Family maintenance" legislation originated in New Zealand at the turn of the century. The Family Protection Act, 1900, N.Z. Stat. 64 Vict. No. 20, as amended, N.Z. Stat. 11 Geo. 6, No. 60, §15 (1947).

tive feature of this type of legislation is its flexibility. Relief is tailored to individual need, in contrast with the fixed minimum portions of the légitime and of the typical American forced share. Under the English Act, for example, a court may order that periodic payments be made out of the income of the net estate if the court believes that the decedent did not make "reasonable provision" for the surviving spouse or natural and adopted children.[4] In awarding maintenance payments, the court is to consider the interests of the persons who otherwise would be entitled to the property concerned, the financial position of the applicant, the conduct of the applicant with relation to the testator, the testator's reasons for his dispositions, and any other circumstances that the court deems relevant. The court may order a lump sum award when the estate is under a designated amount. The

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Similar statutes were passed in the Australian states in the following years: Victoria 1906, Tasmania 1912, Queensland 1914, New South Wales 1916, South Australia 1918, and Western Australia 1920. In Canada, British Columbia adopted the New Zealand act in substance in 1920, and the three other Western provinces finally passed restricted maintenance legislation in the following years: Alberta (1947), Saskatchewan (1940), and Manitoba (1946). Ontario entered the fold in 1929.

The most recent account of maintenance legislation is found in the excellent article by Joseph Laufer: "Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation," 69 HARV. L. REV. 277 (1955); also see Albery, THE INHERITANCE (FAMILY PROVISION) ACT 1938 (1950) (English); Macdonell & Sheard, PROBATE PRACTICE, 92–104 (1953) (Ontario); Mason, Tuthill, & Lennard, THE PRINCIPLES AND PRACTICE OF TESTATORS' FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (1929); Smith, INTESTACY AND FAMILY PROVISION (1952) (English); Stephens, THE LAW RELATING TO TESTATORS' FAMILY MAINTENANCE IN NEW ZEALAND (1934); Tillard, FAMILY INHERITANCE (2d ed. 1950) (English); Wright, TESTATORS' FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (1954); Dainow, "Restricted Testation in New Zealand, Australia and Canada," 36 MICH. L. REV. 1107 (1938); Kennedy, "Testators' Dependants Relief Legislation," 20 IOWA L. REV. 317 (1935); Wiren, "Testator's Family Maintenance in New Zealand," 45 L. Q. R. 378 (1929); Comments, 53 HARV. L. REV. 465 (1940); 27 CAN. B. REV. 228 (1949); 18 *id.*, 261, 449 (1940); 17 *id.*, 181, 233 (1939).

[4] Relief may be applied for by a wife or husband, a daughter who has not been married or who is by virtue of mental or physical disability incapable of maintaining herself, an infant son or a son who is by reason of mental or physical disability incapable of maintaining himself. Inheritance (Family Provision) Act, §1(1) (1938).

court may also attach conditions to the award; and in any event the payments end upon the cessation of the dependence, e.g., when the widow remarries. By recent amendment the English act was made applicable to intestate estates.[5] Nevertheless, it remains narrower in scope than many of the other Commonwealth statutes. Under the parent New Zealand act, for example, the class of eligible dependents includes parents and illegitimate children; periodic payments may be made out of capital; and there are no restrictions on lump sum awards.

Despite their heavy responsibility under this type of legislation the courts have done an efficient and conscientious job.[6] If anything, they have been conservative in dealing with applications. Consider, for example, the fundamental inquiry as to whether or not the decedent made a "reasonable" or an "adequate" provision for his dependents. As an English commentator has said, the English statute envisages a reasonable provision as "not a single point but an area." [7] In short, there is a range – the extent of which depends on the circumstances – within which provisions of varying amounts all could be classed as reasonable. Any provision less than the lower limit of that range confers jurisdiction on the court. The result is that judicial interference with the decedent's plan of distribution is kept to a minimum. Ironically, sometimes judicial intervention has the incidental effect of *carrying out* the decedent's intention: thus the testator may have changed his mind after making the will, or the provision made for the applicant may have been frustrated by subsequent events or by the operation of some legal doctrine.

[5] Intestates' Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, Chap. 64, Mitchell, "Intestates' Estates Act 1952," 16 MODERN L. REV. 206, 211 (1953).

[6] Laufer, "Flexible Restraints on Testation, " 69 HARV. L. REV. 277, 293 (1955).

[7] Albery, THE INHERITANCE (FAMILY PROVISION) ACT, 1938, 8 (1950); Macdonell and Sheard, PROBATE PRACTICE, 96 (1953); Unger, "The Inheritance Act and the Family," 6 MODERN L. REV. 215, 224 (1943); Note, 72 L. Q. R. 18 (1956).

In fixing the amount of the award the Commonwealth courts consider "that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. . . ." [8] It is conceived to be a moral duty of the husband to give the widow more than the bare means of subsistence.[9] In general, the maintenance award approximates her standard of living during her husband's lifetime, as circumscribed by the amount in the husband's estate, her own financial position, and the merits otherwise of her claim.

The award is generally made in the form of an annuity. This tends to protect the dependent from the perils stemming from inexperience in business or investments; at the same time, it leaves the rest of the estate free for distribution. A lump sum settlement is sometimes expedient, owing to the small size of the estate or urgent need on the part of the applicant. When future needs cannot be presently ascertained the courts usually have been willing to issue a "suspensory order," which ties up the estate for the time being.[10]

The maintenance scheme has not resulted in a flood of litigation. In fact, relatively few cases have resulted,[11] in contrast with the vast crop of headnotes that have bobbed up under the New York forced share legislation of 1930. Undoubtedly the discretionary nature of maintenance legislation, which discourages unmerited claims, has much to do with this phenomenon.

The maintenance claim must be *meritorious,* in addition to showing need. Maintenance legislation is not a public welfare device, although it may have the incidental effect of alleviating the strain on the tax rate. The scheme taps the

[8] Allardice v. Allardice, 29 N.Z.L.R. 959, 973 (1910), *aff'd,* [1911] A.C. 730 (P.C.).

[9] *Id.* at 969. In re Borthwick, [1949] 395, the widow had been left an annuity of 250 pounds, and the net estate amounted to 130,000 pounds; held, annuity increased to 1000 pounds. See however, Note by V. Evan Gray, 17 CAN. B. REV. 233 (1939).

[10] Laufer, *supra,* note 6, at 292.

[11] *Id.* at 314.

decedent's own funds, in those cases in which the decedent was morally remiss in not providing adequate post-mortem support for his family. In other words, the awards are made only when the decedent could have and *should* have made them. This *ad hoc* enquiry into the merits of the case means that the amount of the award is not necessarily determined by demonstrated need. Thus a New Zealand judge: "I think . . . that the plaintiff's conduct as a husband in those respects in which it fell short must be taken into account in considering the quantum of relief to be granted." [12] It is not surprising that the courts are more disposed to grant relief to widows than to widowers; that they are more solicitous of minor children than of adult children; and that the length of the marriage is a relevant, although not decisive, factor. Moreover, the very flexibility of the maintenance scheme makes it ideal for reconciling the conflicting family claims arising from remarriages. Indeed, the wide latitude given to the courts is reflected in the occasional decision preferring the actual "homemaker" to the one who had been a wife in name only.[13]

2. Inter Vivos "Evasions"

The maintenance claim is just as vulnerable to inter vivos transfers as is the widow's share under the typical American statute, but so far there seems to be no critical "evasion" problem in maintenance jurisdictions. Not all Commonwealth statutes cover the point, but those that do so provide only for maintenance out of the "estate." The handful of decisions involving inter vivos transfers take the position that property

[12] Williams v. Cotton, [1953] N.Z.L.R. 151, 153 (Sup. Ct. 1952).

[13] *E.g.*, Re Joslin, [1941] Ch. 200, 1 All. E. R. 302. Here the husband's will left all of his small estate (about 370 pounds) to the woman with whom he was living and by whom he had had two small children. He had deserted his wife after they had lived together "reasonably happily" for 19 years. The other woman was not destitute, but the widow had a small income. The widow's application was rejected. *Cf.* Andrews v. Andrews, [1940] P. 184 (divorce case), 4 Modern L. Rev. 307 (1941). In general, see Unger, "The Inheritance Act and the Family," 6 Modern L. Rev. 215 (1943).

passing by these transfers cannot be considered part of the "estate." [14] There is, however, authority to the effect that a contract to leave property by will does not supersede maintenance legislation.[15]

Why such a paucity of litigation over inter vivos "evasions?" Does it mean that the maintenance system is intrinsically superior to the system of forced shares in preventing evasions — or is there some other explanation? To answer these questions we must consider the evasion cases from the viewpoint of the equities.

The maintenance system seems superior in all cases in which the equities are clearly against the surviving spouse.

[14] In re Paulin, [1950] Vict. L. R. 462 (payments into bank account with testator as trustee); In re Knight, New Zealand [1939] GLR 673, 675–76 (testator in late seventies buys expensive annuities "in a perverse intention to exclude his family from participation . . . in his estate"); Thompson v. Thompson [1933] N.Z.L.R. Supp. 59 (gift of farm and stock three months before death); Re Dalton and Macdonald [1938] 1 W.W.R. 758, 52 B.C.R. 473, 2 D.L.R. 798 (B.C.) (life insurance payable to children held immune to widow's attack); Re Kerslake [1957] S.C.R. 516 (life insurance); Dumoulin v. Dumoulin [1939] Ont. C.A. (unreported case discussed by V. Evan Gray in 17 CAN. B. REV. 233, 237–8 (1939); gift of money made shortly before death, donee agreeing to maintain donor during his lifetime and pay his funeral expenses, the balance to go to the donee); *cf.* Nosworthy v. Nosworthy [1906] 26 N.Z.L.R. 285 (special power of appointment); Re Dawson [1945] 3. D.L.R. 532 (B. C. Sup. Ct.) (checks issued and cashed within a week of death held to be in payment of earnings); Re Young [1955] O.W.N. 789, 791 (Surr. Ct. Ont.) (federal annuity); Naylor v. Grantley [1940] 1 D.L.R. 716 (Ont.) (assignment of life insurance to nurse; opinion indecisive). Also see Albery, THE INHERITANCE (FAMILY PROVISION) ACT, 1938, 17 (1950); Macdonell & Sheard, PROBATE PRACTICE, 94 (1953).

[15] Dillon v. Public Trustee of New Zealand [1941] A.C. 294 (contract before second marriage to leave farm to children of first marriage, who had supplied valuable consideration); *cf.* Olin v. Perrin, [1946] 2 D.L.R. 461, O.R. 54 (C.A.) (Ont.). The Dillon case is criticized in 19 CAN. B. REV. 603 (1941), 20 *id.* 72 (1942), Theobald, WILLS, 95 (11th ed. 1954), and is praised in 20 CAN. B. REV. 756 (1941). Also see Notes, Kiralfy, "Freedom of Testation under the English Inheritance Act of 1938," 61 JURID. L. REV. 186, 189; S. J. Bailey in 6 CONVEY. (N.S.) 63, 64 (1941). On contracts to make a will as a device for "evasion" of the American statutory share, see Appendix D, *infra*, p. 366. On the effect of an agreement by the dependent not to claim maintenance, see Laufer, *supra*, note 6, 300–02; National Assistance Board v. Parkes [1955] 3 W.L.R. 347, 3 All E.R. 1, 19 MODERN L. REV. 90 (1956).

Here there can be no evasion problem; she cannot legitimately complain about inter vivos transfers if she is not even entitled to maintenance. This in turn enhances the stability of property transactions. Thus when a husband makes generous inter vivos provision for the wife, or when she is independently wealthy, or when she is clearly remiss in her marital obligations, the maintenance legislation prevents her from upsetting the husband's estate-planning arrangements. Under the American scheme, however, she can blunder in like a cow in a china shop.

When the equities favor the applicant, however, the Commonwealth legislation seemingly provides no protection against inter vivos transfers – probably even less protection than under the American legislation, where there are at least some judicial controls on *some* types of transfer. Why, then, so few "evasion" cases under the maintenance statutes? Why no village Hampden to cry the doctrine of illusory transfers? The answer, if there be one, may lie in a combination of factors. For one thing, marital disharmony is probably not as acute in the Commonwealth, if divorce statistics are a reliable guide.[16] Possibly marriage settlements are more popular in the Commonwealth, although we cannot be sure.[17] We assume that the Commonwealth lawyers are well aware that the maintenance statutes are vulnerable to inter vivos transfers; [18] but perhaps counsel for the applicants consider the validity of these transfers to be too well settled to risk litigation. Whatever the answer, the authorities have not been un-

[16] *But cf.* Mace, "Family Life in Britain Since the First World War," 272 ANNALS AMER. ACAD. POL. & SOC. SCI. 179, 182 (1950). Some Commonwealth jurisdictions have narrow divorce laws. On the other hand, this circumstance seemingly would incite inter vivos "evasions." See discussion *supra,* pp. 12–15.

[17] The figures given in Wedgwood, THE ECONOMICS OF INHERITANCE (1929) at p. 237 indicate substantial marriage settlements, at least up to 1926.

[18] The Appendix to Albery, THE INHERITANCE (FAMILY PROVISION) ACT, 1938 (1950) contains a form of trust deed entitled "Settlement upon Mistress and Illegitimate Child for Purpose of Evading the Provisions of the Act."

aware of the problem.[19] Nor can there be any doubt that maintenance legislation would need anti-evasion provisions if it is to be completely effective in the United States.

We may profit in this respect by the Israeli example. The "ingathering of the dispersed" [20] has inspired a survey of the laws of all countries. The object is a fresh start, with the emphasis on practicability. In the field of succession law this has resulted in the preparation of a draft bill [21] which adopts the British Commonwealth family maintenance scheme. One of the most interesting points about this bill is the realistic acknowledgement that protection is needed against inter vivos evasion. Section 74 provides:

> "If the estate is not sufficient to provide maintenance for all entitled to it, the court may consider as included in the estate:
>
> (1) Anything disposed of by the decedent during his lifetime that may be reasonably considered to have been so disposed with the intent of defeating maintenance rights.

[19] I have a letter from Sir Clifton Webb, Minister of Justice for New Zealand, dated 14th April, 1953, stating that the general opinion in New Zealand is that deliberate inter vivos evasions of the maintenance legislation are infrequent. I have permission to quote the letter, which states in part:

> ". . . The majority of testators who exclude relatives from a share in their estate probably consider that they are justified in doing so. The general practice has grown up that where a testator by his will excludes a relative who would be entitled to claim under the Act a special note of the reasons is taken with the instructions for the will. If a claim is made later the trustees are then able to give this information to the Court. Cases rarely come before the courts simply because the law on the subject is quite clear. We have not, however, been indifferent to the problem. The only reason why nothing has been done to amend the legislation is that we have not succeeded in devising a practicable method of avoiding dispositions made to defeat claims without causing as many anomalies and injustices as are cured. The question was last considered a year or so ago by our Law Revision Committee which decided that no practicable remedy was possible."

[20] Yadin, "The Proposed Law of Succession for Israel," 2 AM. J. COMP. L. 143, 147 (1953).

[21] A SUCCESSION BILL FOR ISRAEL 93–107 (Harvard Law School Transl. 1952); *id.* (Sept. 1953 Revision) 27–33 (Harvard Law School Transl. 1954).

(2) Anything given away by the decedent within two years of his death without consideration.

The court may order the donee to return to the estate or to pay maintenance in an amount equal to what is left in his hands at the time of the decedent's death and if he did not receive it in good faith in an amount equal to what he received."

The flexibility and simplicity of the Israeli anti-evasion provisions is of course in keeping with the spirit of maintenance legislation. An equally flexible but somewhat more detailed proposal is made in the Suggested Model Decedent's Family Maintenance Act, which appears in the next chapter.