

Suggested Model Decedent's Family Maintenance Act

The provisions of this tentative draft follow the growing trend toward shifting the burden of support from the state to the individual who is, or should be, responsible for maintaining his immediate dependents. Indicative of this trend is the widely adopted Uniform Reciprocal Enforcement of Support Act, which is aimed at that individual when he is living. The suggested family maintenance act extends the responsibility of support in favor of his immediate surviving family. The over-all purpose is twofold: to provide reasonable support for the surviving family and to recognize and delineate the decedent's power of inter vivos alienation.

The draft does not purport to be free from imperfections. It has not had the advantage of extensive scrutiny by specialists in the field or by persons who would have the task of practical administration. It is offered in the hope that it will be useful to those who are concerned with the reform of succession law.

The proposal consists of family maintenance legislation buttressed with anti-evasion provisions. The basic aim is to associate curbs on disinheritance with financial need. Protection against testamentary transfers is given only to immediate members of the decedent's surviving "family" who have not received a reasonable provision from the decedent by way of testamentary or inter vivos transfer, or pursuant to the intestacy laws. The emphasis on financial need puts the evasion problem in proper focus. The petitioner who is denied maintenance is thereby precluded from complaining about the testator's inter vivos transfers. In other words, maintenance litigation and anti-evasion litigation can occur

only when the testator has not made reasonable provision for specified dependents. Hence much of the evasion problem disappears.

For the successful petitioner, however, the anti-evasion protection is comprehensive. The act provides for judicial control over practically all inter vivos transfers that are made within a designated period of time before death. In this respect the act is much broader than current judicial doctrine; for example, the "illusory transfer" test catches only revocable transfers. In other respects the act is narrower and more selective. It affects only those transfers that, when viewed alone or in the aggregate, are unreasonably large (section 6); it establishes cut-off dates (section 8); and it directs the court to keep in mind any injurious effect on the transferee (section 9).

Large discretionary power is placed in the courts. This discretion must be exercised on three main issues. First, the court must decide whether the petitioner is entitled to maintenance (section 3). Second, whenever the estate is insufficient to provide appropriate maintenance awards, the court may order contribution from an inter vivos transferee if the court determines that the transfer was unreasonably large. The "unreasonableness" of the amount of the transfer is tested by reference to circumstances prevailing at the time of the transfer (section 6). Third, if the transfer is held unreasonably large, the court must then determine the amount of contribution, if any, to be made by the transferee. In the last mentioned inquiry the courts are *directed* to balance the equities; they must consider the injurious effect on the particular transferee (section 9).

The reliance interest of transferees is reflected in cut-off provisions (section 8), in waiver provisions (section 17), and in the provision for a hearing in the decedent's lifetime to determine the reasonableness of the transfer (section 18).

Administration of the act is allocated to the courts that have jurisdiction in matters of an equitable nature. These courts will be aided by permanent fact-finding officials. Un-

deniably, the heavy responsibility placed on the courts may pose a problem in judicial administration. The act is based on the assumption that American judicial personnel can and will assume that responsibility. In view of the British Commonwealth experience there is no insuperable reason why maintenance legislation could not be used successfully in this country. Moreover, our analysis of the case-law on "evasions" of the statutory share suggests that the American courts tend to balance the equities in these cases. The proposed act would give legislative sanction to this tendency.

The act is intended to be a complete replacement for the statutory share and for judicial doctrines relating to "evasion" of the statutory share. The act should also supplant inchoate dower. A legislature that so wished could use the act in conjunction with inchoate dower, but the inflexible nature of dower makes the combination an undesirable one. The act would supplement and further the purpose of homestead legislation. Before enactment it would need to be co-ordinated with statutes permitting summary distribution of the assets of small estates. It should supplant existing family allowance statutes.

SUGGESTED MODEL DECEDENT'S FAMILY MAINTENANCE ACT

SECTION 1. *Definitions.* As used in this act, unless the context requires otherwise:

(a) "Child" includes:

- (1) a legitimate son or daughter of the decedent;
- (2) an adopted son or daughter of the decedent;
- (3) an illegitimate son or daughter of the decedent, who immediately prior to the decedent's death was wholly or partially supported by the decedent or entitled by law to receive such support;

- (4) a stepchild who immediately prior to the decedent's death was wholly or partially supported by the decedent or entitled by law to receive such support;
- (5) a posthumous son or daughter of the decedent, whether legitimate or illegitimate.

COMMENT

The act does not apply to grandchildren. This restriction represents a compromise between the conflicting policies of family support and finality of property transactions. In most instances the decedent has no legal or moral responsibility to support his grandchildren. If he assumes the responsibility of support, the chances of deliberate disinheritance seem slight. The exclusion of grandchildren may bring about occasional hardship cases, but to include them would undoubtedly entail administrative inconvenience as well as uncertainty for transferees. This reasoning also applies a fortiori to other relatives or non-relatives who may have been supported by the decedent in his lifetime. However, some states impose support duties in favor of needy grandchildren, parents, or grandparents. See the table of basic support duties in the introduction to the Uniform Reciprocal Enforcement of Support Act, Uniform Laws Annotated, Vol. 9A, 1956 Supp. p. 103. Further, some states protect the divorcee who, not having remarried, was at the time of her husband's death receiving or entitled to receive support from him. In such states the present act could be expanded to give corresponding protection. Section 2 limits the present act to a child under 18, unless he is incapable of maintaining himself.

Illegitimate children are included if supported by the decedent in his lifetime, or if entitled to such support. "Entitled by law to receive such support" envisages the legal formalities that may be required in the decedent's lifetime, *e.g.*, acknowledgement. It also protects the illegitimate child whose parent failed to meet an existing support obligation.

A stepchild is eligible only if the decedent assumed the responsibility. Once the responsibility is assumed the stepchild will be "entitled by law to receive such support"; whether or not the support is given.

(b) "Court" means the court with original jurisdiction over matters of an equitable nature.

COMMENT

The act rests on broad and novel judicial controls. This makes it desirable to use the "equity" court instead of the probate court. In some states probate judges need not be lawyers. In many states the probate court lacks the equitable powers that are needed to enforce an order under section 6 requiring contribution from a transferee. *Cf.* Note, "Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees," 48 *YALE L. J.* 1273 (1939).

(c) "Estate" means the property of the decedent that is transmitted at his death by testamentary disposition or under the laws dealing with intestacy, less amounts required for payment of taxes, funeral expenses, administration expenses, and secured and unsecured claims. For the purposes of this act "estate" includes:

- (1) any property that is transmitted at the decedent's death by the exercise, non-exercise, release, or lapse of a power of appointment created or reserved by the decedent, within ten years of his death, exercisable by any person or persons including the decedent;
- (2) any property of the decedent that is subject at the decedent's death to an unexercised power of appointment created or reserved by the decedent within ten years of his death, exercisable by any person or persons including the decedent;
- (3) any property that is transmitted by the decedent at the time of his death by the exercise, non-exercise, release, or lapse of a power of appointment created by a person other than the decedent, and exercisable by the decedent in favor of the decedent, his estate, his creditors, or the creditors of his estate. "Estate" does not include

any property as described in this clause if the power of appointment was exercisable by the decedent only in conjunction with a person or persons having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent.

COMMENT

Elective rights under the American statutory share usually are subordinated to the claims of creditors (Chapter 2, *supra*, text at note 5). Apparently there is a corresponding limitation on maintenance privileges under the British Commonwealth family maintenance statutes. Cf. WRIGHT, TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND, 4 (1954).

For the purposes of this act "estate" is deemed to include property transmitted at the decedent's death by virtue of a power of appointment created or reserved by the decedent. It includes any property which at the decedent's death is subject to an unexercised power of this type. It also includes property which the decedent transmits at his death by virtue of a general power of appointment created by another person. Inclusion of these general powers in the definition of "estate" prevents the "relation back" doctrine (Chapter 16, *supra*, text at note 27) from excluding the maintenance claim of the surviving family. The language pertaining to general powers is taken from the Internal Revenue Code of 1954, §2041.

Section 1 (c) (1) and (2). These two clauses affect powers of appointment reserved by the decedent in connection with a transfer. They also affect powers of appointment created by the decedent with no accompanying transfer. The ten-year restriction is inserted in order to co-ordinate subsection (c) with section 8. Section 8 establishes a ten-year cut-off date with respect to the liability of transferees to contribute to maintenance awards.

The act does not cover special powers of appointment created by a person other than the decedent. The disposition of such property is within the owner's discretion. But if the owner places his property at the disposal of the decedent, under a general power, the decedent will not be permitted to evade his family responsibilities.

(d) "Transfer" means any postnuptial inter vivos transmission of property by the decedent for substantially less than an adequate and full consideration in money or money's worth. "Transfer" includes any such transmission of property at any time after the birth of an illegitimate child whether or not the decedent later marries the child's other parent. For the purposes of this act a transmission of property in a genuine business transaction will be considered as made for an adequate and full consideration in money or money's worth.

"Transfer" includes, but is not restricted to, a transmission of the decedent's property effected by such methods as gift, gift causa mortis, revocable or irrevocable trust, creation of any joint interest, contract to make a will, and any contract, such as life insurance, under which the decedent purchased benefits payable at his death. Concerning powers of appointment, "transfer" means a transmission of the decedent's property effected by the exercise, non-exercise, release, or lapse of the powers of appointment described in the definition of "estate" in clauses (1) and (3) of section 1 (c).

COMMENT

The first sentence restricts the act to postnuptial transfers. For a discussion of antenuptial transfers see Appendix C. Since the act is limited to postnuptial transfers, the second sentence is needed in order to protect the illegitimate child whose parents never intermarried. Such a child would be excluded from the contribution provisions if he could complain only about "postnuptial" transfers. Concerning other petitioners, "postnuptial" must be related to the marriage with which the petitioner is associated. For the widow it refers to her marriage with the decedent. For a child it refers to the marriage of his parents, even though the decedent may later have remarried.

The first sentence also confines the act to those transfers which are either totally or partially gratuitous. Payment of substantially less than an adequate and full consideration will not suffice to take a transfer out of the act. It is, however, a factor that the court must consider under section 7 (4) in deciding the amount of contribution, if any, that is payable by the transferee. The word "substantially" is intended to ob-

viate any question of the act applying to ordinary business transfers. This notion is also expressed in the second sentence, which excludes a "genuine business transaction." The act is not intended to infringe upon commercial transactions. In other words, the act is designed to catch avowed or disguised gifts but not bad business bargains.

The first sentence of the second paragraph is designed to catch all gratuitous postnuptial dispositive devices except those that are specifically excluded. For example, the act applies to deeds of realty, gifts of personalty (see *supra*, p. 193), gifts causa mortis (pp. 197-198), revocable trusts (p. 201), irrevocable trusts (p. 205), bank account trusts, joint bank accounts, joint tenancies (p. 213), United States savings bonds (p. 230), partnership interests (p. 235), contracts to make a will (p. 372), life insurance (p. 241), annuities providing death benefits, employee death benefits, pecuniary obligations of the decedent payable at his death, and purchases by the decedent with title taken in the name of another. Some of these devices, of course, represent the result of a transfer as well as a method of transfer; for example, trusts. The existing case law pertaining to each of the above mentioned devices is discussed in Chapters 12-16 *supra*. The page references in parentheses indicate a discussion of the application of the act to the device in question.

Contracts to make a will are anomalous. These contracts normally are antenuptial and they often involve adequate consideration in money or money's worth. The proposed act would affect only postnuptial contracts. Under the existing case law, however, the courts tend to give adequate protection to the surviving spouse against the contract to make a will; see Appendix D, p. 373 *infra*. If the proposed legislative scheme is adopted it is probable that this tendency will be more pronounced, as far as antenuptial contracts are concerned. It may also be hoped that this judicial protection will be extended to children.

The last sentence concerns powers of appointment. "Transfer" is deemed to encompass the transmission of property in the decedent's lifetime by virtue of the powers of appointment previously described in the definition of "estate." Such "transfers" are affected by the act only if they occur subsequent to the applicable cut-off dates. These cut-off dates, which apply to all transfers otherwise subject to the act, are set out in section 8.

(e) "Transferee" means the recipient of the beneficial interest in the property concerned. "Transferee" includes a person who succeeds to such an interest upon the transferee's death, and any immediate or remote taker from the original transferee who provides substantially less than an adequate and full consideration in money or money's worth. "Transferee" does not include a person who acquires property or its proceeds by judicial sale or by condemnation proceedings from the decedent, from the original transferee, or from any subsequent taker.

COMMENT

The first sentence states in part that a "transferee" is the person beneficially entitled to the property in question. This is intended to preclude the possibility of a mere title-holder, e.g., a fiduciary, being liable for contribution.

The second sentence includes in the definition of "transferee" any immediate or remote taker from the original transferee who does not provide sufficient consideration. The purpose is to prevent evasion of the act by avowed or disguised gifts on the part of a transferee. For restrictions on the amount contributable by any transferee, see section 9.

SECTION 2. Eligible petitioners. A petition for maintenance may be filed by or on behalf of the following persons and no others:

- (1) the surviving spouse;
- (2) a child who at the time of the decedent's death was under eighteen; or
- (3) a child who at the time of the decedent's death was eighteen or over but physically or mentally incapable of maintaining himself.

COMMENT

This section limits the class of persons eligible to petition for maintenance to the decedent's spouse and children. The reasons for this limitation are set out in the comment to Section 1 (a), which defines "child." Under section 11 (a) (3) periodic payments to an unmarried daughter under eighteen will cease upon her marriage. The procedure in filing petitions is set out in section 10.

SECTION 3. *Power of court to award maintenance.* The court may award maintenance from the estate in any amount it deems just if it determines that under the circumstances prevailing at the date of decedent's death the petitioner has not received a reasonable provision from the decedent by way of testamentary or inter vivos disposition or under the laws dealing with intestacy.

This section empowers the court to award maintenance to any petitioner who has "not received a reasonable provision" from the decedent. This phrase is vague by design; however, it gains some content from the provisions of section 4 which set out the factors to be considered by the court. The reasonableness of the provision made by the decedent is determined as of the time of death. This will prejudice the petitioner who experiences sudden and unanticipated need between the time of decedent's death and the time of the hearing. But these rare instances should not be within the decedent's responsibility. Moreover, the court is empowered under section 13(b) to award temporary maintenance.

Unlike the English family maintenance legislation, there is no limitation on the proportion of the estate that may be appropriated for maintenance awards. The provision made by the decedent may be inadequate even though it amounts to a sizeable fraction or all of the estate, since the estate may have been depleted by inter vivos transfers to persons other than the petitioner. The provision made by the decedent for the petitioner may have been made at any time, even antenuptially, since it includes, but is not restricted to, postnuptial "transfers." The act also applies when the decedent dies intestate. Sometimes the intestacy statutes may work an injustice. Florida, for example, gives the widow merely a child's share; Fla. Stat. §731.23 (1957). Ordinarily the widow would need more than a child's share.

SECTION 4. *Criteria of a reasonable provision.* In determining whether the petitioner has received a reasonable provision from the decedent the court shall consider:

- (1) the petitioner's present and future financial need;

- (2) any federal or state benefits receivable by the petitioner that are not predicated on his financial need;
- (3) the value of the estate;
- (4) the amount transferred by the decedent to persons other than the petitioner;
- (5) the petitioner's conduct toward the decedent; and
- (6) any other circumstance that the court deems relevant.

COMMENT

This section provides criteria to guide the court in determining whether the decedent made reasonable provision for the petitioner. The main criterion is the petitioner's financial need, set out in *clause (1)*. Clause (1) must be read in conjunction with section 11, which states that maintenance payments are to be terminated in certain instances, *e.g.*, upon a child attaining the age of eighteen.

Under *clause (2)* the court must take into account any public benefits receivable by the petitioner that are not predicated on his financial need. Since the decedent, as a taxpayer, has already contributed to these benefits he is not acting unreasonably if he denies equivalent aid to the petitioner. The British Commonwealth courts apparently assume that "if the individual may have support from the state for the asking he may not claim it from the estate." Laufer, "Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation," 69 HARV. L. REV. 277, 303-04 (1955). This approach seems particularly appropriate under the present act in view of the potential liability of transferees.

Under *clause (4)* the court must consider transfers made to other persons, since the size of these transfers bears on the reasonableness of the provision made for the petitioner.

Consideration of the petitioner's conduct is essential if the court, in the classic formula of the Privy Council, is to "place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband and father." *Bosch v. Per-*

petual Trustee Co., [1938] A.C. 463, 478-79. Thus, under *clause (5)* the court must consider the moral claim of the petitioner. Normally this will be the moral claim of the surviving spouse, since the decedent should, within reason, be expected to make adequate provision for his children regardless of their conduct. The claim may be a strong one, *e.g.*, material contribution to the decedent's financial resources. On the other hand, it may be such as to justify rejection of the petition, *e.g.*, desertion on the part of a spouse.

SECTION 5. *Apportionment of burden of maintenance award.*

(a) The burden of any maintenance award shall be borne by the persons beneficially entitled to the estate in proportion to the value of their respective interests in the estate. The court may order otherwise if it determines that pro rata apportionment would work exceptional hardship on any such person.

(b) For the purposes of this section the interests of persons successively entitled to any property in the estate shall not be separately valued. The portion of the burden of the maintenance award allocated to the property under this section shall be charged against the corpus.

COMMENT

Subsection (a). Provision is made for pro rata abatement of all estate assets in apportioning the burden of maintenance payments. The court is empowered to deviate, since pro rata abatement may in some cases be inequitable. There is no requirement that the court must follow the decedent's directions on apportionment. His directions might unduly prejudice a person eligible to apply for maintenance.

The entire section may be found, with slightly different phraseology, in several British Commonwealth family maintenance statutes, *e.g.*, New South Wales Stat., 3 Geo. 6 No. 30, §6 (2) (1938).

SECTION 6. *Power of court to order contribution.*

(a) If the estate is insufficient to provide for appropriate maintenance awards the court may order a transferee subject

to its jurisdiction to contribute to the awards. No transferee shall be liable for contribution unless the court determines that the transfer was unreasonably large under the circumstances prevailing at the time of the transfer.

(b) This act does not apply to antenuptial transfers or judicial remedies with respect thereto.

COMMENT

Subsection (a). The court is empowered to order transferees subject to its jurisdiction to contribute to the support of the surviving family.

The conflict of laws poses problems. The act has not been limited to resident petitioners. Neither has it been restricted to local decedents. Hence, a petitioner residing in state X can reach the decedent's immovables located in state X even though the decedent died domiciled in state Y. But the petitioner will be at a disadvantage with respect to the decedent's property located in state Y, particularly immovables; *cf.* Scoles, "Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates," 8 U. FLA. L. REV. 151 172-80 (1955) (family allowance); Ehrenzweig, "Interstate Recognition of Support Duties." 42 CALIF. L. REV. 382 (1954). Also, it may not be possible to obtain contribution from non-resident transferees. Whenever the court has effective jurisdiction for its contribution order, however, subsequent interstate enforcement may be feasible under the Uniform Reciprocal Enforcement of Support Act.

The second sentence of subsection (a) limits the liability of transferees to transfers that are adjudged "unreasonably large." The court must place itself in the position of the decedent, keeping in mind the decedent's moral obligation to make a reasonable provision for his surviving family. Since a compromise must be made between family support and finality of property transactions, the inquiry relates to circumstances at the time of the transfer. This enhances predictability for both the transferee and the decedent. The transferee is not liable for contribution if the transfer was reasonable *at the time it was made*, even though the decedent's wealth should subsequently have diminished. The estate planner can eliminate much of the transferee's uncertainty by giving the potential petitioners enough to preclude

a successful petition, and in addition, by obtaining a waiver from the spouse.

Lapse of time since the date of the transfer is irrelevant; in determining whether the transfer was unreasonably large the court is only concerned with the circumstances at the time of the transfer. Lapse of time may be decisive under section 8, however, which bars the court from exacting contribution when the transfer was made prior to specified cut-off dates. Moreover, it is an important factor under section 9, where the court must look into the reliance interest of the transferee before determining the *amount* of contribution payable.

Subsection (b). This subsection states that the act does not affect antenuptial transfers. These transfers are discussed in Appendix C.

SECTION 7. *Criteria of an unreasonably large transfer*. In determining whether a transfer was unreasonably large the court shall consider:

- (1) The ratio of the wealth transferred to the wealth retained.
- (2) The aggregate of the wealth transferred under prior and simultaneous transfers to any transferee. For this purpose the court shall consider all transfers drawn to its attention, whether made prior or subsequent to the appropriate cut-off dates referred to in section 8.
- (3) Any moral or legal obligation of the decedent to make the transfer.
- (4) The amount, in money or money's worth, of any consideration paid by the transferee to the decedent.
- (5) Any other circumstance that the court deems relevant.

COMMENT

This section provides criteria to guide the court in determining whether the transfer was unreasonably large.

Under *clause (1)* the relative size of the transfer is persuasive, although not decisive.

Under *clause (2)* the court must consider the amount of wealth already transferred, even under transfers made prior to the cut-off dates prescribed in section 8. These cut-off dates are related to the date of the decedent's death which would, of course, be unknown to the decedent. For example, suppose in 1955 the decedent made a large transfer of property in which he retained no beneficial interest. If he dies in 1960 section 8 (a) of the act will exempt the transferee from any liability to make contribution. Nevertheless, in deciding on the reasonableness of another transfer made in 1959 the court will consider the amount of wealth previously transferred in 1955.

Clause (2) is also designed to prevent evasion of the act by a large number of moderate gifts, not one of which is by itself unreasonably large, but which in the aggregate may be decidedly unreasonable. In such case the court might determine that each transfer subsequent to the appropriate cut-off date was unreasonably large, and consequently that each transferee might be called upon for contribution. Clause (2) thus puts the transferee on notice that his liability to contribute may be affected, within reason, by prior or simultaneous gifts to other transferees. This hinders predictability, but not seriously. Most group transfers or series of transfers are to children of a prior marriage, at the expense of the second or third wife. Normally, each child should be able to obtain sufficient information from the decedent to gauge the validity of the transfer. A flexible test is particularly desirable in these situations, since the transactions will be in the nature of a family settlement on children who may themselves be eligible for maintenance. The inconvenience to other recipients, including charities, is not critical enough to override the maintenance claim of the surviving family.

Clause (3) recognizes the decedent's moral obligation to the transferee as a factor affecting the reasonableness of the transfer. For example, the gift may have been in return for unsolicited but valuable services performed for the decedent by the transferee.

SECTION 8. *Termination of transferee's liability for contribution; cut-off dates.*

- (a) A transferee of property in which the decedent retained no substantial beneficial interest is

under no liability to contribute if the decedent made the transfer more than three years before his death.

- (b) A transferee of property in which the decedent retained a substantial beneficial interest is under no liability to contribute if the decedent made the transfer more than ten years before his death. Such a transferee is under no liability to contribute if the interest of the decedent was terminated more than three years before his death.
- (c) For the purposes of this section the decedent's interest is substantial if he retained, for example, a life estate, a power to alter or amend dispositive provisions, a power to revoke, or a power of appointment. The decedent's interest is not substantial if, for example, he had merely a remote reversionary interest arising by operation of law.

COMMENT

These cut-off provisions recognize the reliance interest that stems from the mere passage of time. See *supra*, p. 153 for a discussion of the practicability of the three and ten year periods.

Subsection (c). This subsection gives the court some guidance on the meaning of "substantial beneficial interest."

SECTION 9. *Extent of transferee's liability for contribution.*

- (a) No transferee shall be liable to contribute more than an amount equal to the extent to which the transfer was unreasonably large. If the decedent made several transfers that were unreasonably large, no transferee shall be liable to contribute more than his pro rata share, based on the extent to which the transfer was unreasonably

large. In determining the amount of contribution payable by any transferee the court shall consider the injurious effect on the transferee, in view of any circumstances occurring between the date of the transfer and the date on which the transferee receives notice of the petition.

- (b) If the transferee has retained the property he shall not be liable to contribute more than the value of his beneficial interest therein. If the transferee has disposed of or exchanged the property, in whole or in part, he shall not be liable to contribute more than the combined value of any remaining original property and any remaining proceeds or substituted property. For the purposes of this section, "value" is the fair market value as of the date the transferee becomes beneficially entitled to the property, or the date of the petition, whichever amount is lower.

COMMENT

This section provides rules to help the court determine the source and amount of contribution that transferees are liable to make to, or on behalf of, successful petitioners.

Subsection (a). The first sentence provides a general formula for determining the extent of contribution. Suppose that the decedent transferred \$6000 to A. Under section 6 the court may determine, in view of the circumstances prevailing at the time of the transfer, that the transfer was unreasonably large to the extent of \$4000. Likewise, it may determine that a gift of \$2000 to B was unreasonably large to the extent of the entire \$2000. Assuming no decrease in the value of the property concerned, the most that A is liable to contribute is \$4000, and B's top limit is \$2000. The problem of change in value is dealt with in subsection (b).

The second sentence concerns apportionment of the burden of contribution. Suppose that \$3000 is needed for contribution to petitioners. Under the second sentence the top limit for each transferee is his pro rata share, *i.e.*, A's limit is \$2000, and B's limit is \$1000.

Under *the third sentence* the court may determine that the transferee should contribute a lesser amount than the top limit indicated in the first two sentences. The third sentence is a broad directive to the court to consider the reliance interest of the transferee. This reliance interest will concern events subsequent to the date of the transfer. For example, a transferee should be credited with the payment of taxes or maintenance charges, at least to the extent that he has not been reimbursed by income from the property. The reliance interest may also stem from the mere passage of time. For example, a transferee who has been receiving income from, or otherwise relying on, a gift of principal made several years before the decedent's death will normally be more injuriously affected by a contribution order than would the recipient of life insurance or a gift *causa mortis*. The third sentence is also flexible enough to permit the court to take care of hardship cases.

Subsection (b). This subsection deals with specific problems that arise when the court must determine the amount of contribution payable by a transferee.

Under *the second sentence* the transferee who makes a gift of his entire beneficial interest in the subject-matter of the transfer is no longer under any liability for contribution. The donee of such a gift would be liable, however, since he comes within the definition of "transferee" in section 1 (e). When the transfer is for value the original transferee remains liable, to the extent of value received. The other party to the transaction would not be liable; having paid value, he is not a "transferee."

The last sentence states that value is determined as of the date of the transfer or the date of the petition, whichever amount is lower. This compromise formula favors the transferee. He is protected when the asset concerned has declined in value after the date of the transfer. Under this rule a large gift of perishables may entail no liability for contribution. This differs from the civil law rule, which pegs the value as of the time of the gift (see *supra*, p. 287-288). But gifts of perishables are not likely to be employed as an evasive device. The transferee is also protected in the event of an increase in value. This may work occasional hardship on the petitioners. On the other hand, it avoids the troublesome question of the extent to which the increase in value is attributable to the efforts of the transferee.

SECTION 10. *Procedure.*

- (a) The petition shall be verified and shall state:
 - (1) the financial circumstances of the petitioner as of the date of the petition;
 - (2) the provision that the petitioner received from the decedent, whether by way of testamentary or inter vivos disposition or under the laws dealing with intestacy; and
 - (3) the names and addresses of all other eligible petitioners and of any transferees who may be liable to contribute, so far as known to the petitioner.
- (b) Copies of the petition shall be filed in the court and in the probate court. A copy shall be served on the personal representative and on all eligible petitioners and transferees named in the petition. Within a period of — days from such service the personal representative shall file in the court a verified statement disclosing, so far as known to him:
 - (1) relevant details on all transfers, whether made before or after the appropriate cut-off dates referred to in section 8;
 - (2) any other information that may help the court to adjudicate the petition.
- (c) If the court determines that the petitioner has stated a prima facie case it shall set a date for a preliminary hearing. The court shall give directions for appropriate service to be made on all persons concerned. The preliminary hearing shall be before a permanent master, who shall be a member of the bar of at least five years standing. The permanent master shall submit a written report to the court stating the findings of fact and any conclusions of law. The report shall recommend the amount of maintenance

and contribution payments, if any, and the source, manner, and terms of payment. The court shall set a date for a hearing on the report and on objections thereto. Copies of the report shall be served on all interested parties. The court after the hearing may incorporate the report in either a maintenance award or a contribution order, or both, or it may modify the report or reject it in whole or in part, or it may receive further evidence, or it may recommit the report with instructions.

COMMENT

This section provides skeletal rules of procedure. Each jurisdiction can augment the section with its own rules.

The court should use permanent officials. For example, an experienced lawyer should be appointed permanent master; an Official Guardian, or some equivalent official, should represent all minor children (Cahn, "Restraints on Disinheritance," 85 U. PA. L. REV. 139, 147 (1936); *cf.* Ontario Dependent's Relief Act, R.S.O. 1950 c. 101, §1 (a)). This latter official could also act as a "petitioner's representative" when the adult petitioner lacks the means to hire a lawyer. These officials should be compensated by salary rather than by fees.

SECTION 11. *Periodic payments.*

- (a) The maintenance award and the contribution order shall provide for periodic payments, unless the court determines that payment should be made in a lump sum. The award and the order shall specify that the payments be terminated not later than:
 - (1) in the case of a widow, her remarriage;
 - (2) in the case of a widower, his remarriage or upon his becoming capable of maintaining himself, whichever occurs earlier;

- (3) in the case of a female child, her attainment of the age of eighteen or her marriage, whichever occurs earlier;
 - (4) in the case of a male child, his attainment of the age of eighteen;
 - (5) in the case of a child of either sex who is incapable of maintaining himself, his attainment of the age of eighteen or upon his becoming capable of maintaining himself, whichever occurs later; and
 - (6) in any case, the death of the petitioner.
- (b) Periodic payments under a maintenance award and under a contribution order shall not, prior to actual payment:
- (1) be assigned or incumbered by the petitioner;
 - (2) be subject to attachment or garnishment.

COMMENT

Subsection (a). The first sentence provides for periodic payments unless the court decides that the circumstances warrant a lump-sum payment, *e.g.*, when the estate assets are modest.

The second sentence provides for termination of periodic payments in designated circumstances. Under *clause (2)* the payments to the widower are to cease when he becomes capable of maintaining himself. This restriction does not apply to widows. Since the restriction may in some cases be unnecessarily harsh it seems best to leave the point to the court's discretion. Problems of this sort normally will arise under section 16 when an interested person requests a reduction or termination of payments.

SECTION 12. *Conditions of award or order.* The maintenance award or contribution order may be made subject to any conditions that the court considers appropriate. Satisfaction of the award or order may be secured by deposit or

investment of funds, transfer or incumbrance of property, purchase of an annuity, or in any other manner the court considers appropriate.

COMMENT

This section outlines methods of enforcing maintenance awards and contribution orders. Normally an application for maintenance will cause no undue delay in the administration of the estate. In England the usual practice is to secure the payments by purchase of an annuity. Likewise, a trust can be used, to be administered by the Official Guardian or some other public official. Surplus estate assets may then be distributed to the persons otherwise entitled.

SECTION 13. *Preservation of assets; temporary maintenance.*

(a) The court may appoint a receiver for any property affected by the act. The court may enjoin any person from transferring or incumbering any property affected by the act.

(b) Whenever a petition has been filed, there shall be no distribution of the estate until the petition has been adjudicated. However, in hardship cases the court may award temporary maintenance to any petitioner in any amount it deems just.

COMMENT

Subsection (a). The purpose is to preserve available assets. *The first two sentences* are adapted from section 5(e) of the 1939 Report of the Commission on Revision of the Laws of North Carolina Relating to Estates; see Appendix C, *infra*. In the *second sentence* "any person" would include an heir as well as a transferee.

Subsection (b). This subsection assumes that maintenance legislation would supplant existing family allowance legislation.

SECTION 14. *Suspensory orders.*

(a) At the hearing on the report the court may make an order, suspending the distribution of the estate in whole or

in part, to permit a rehearing on the petition at any subsequent date. Whenever the court makes such a suspensory order it shall determine which transferees, if any, shall remain potentially liable for contribution.

(b) For the purposes of this section

- (1) no transferee shall remain potentially liable for contribution unless the court so orders at the time it makes the suspensory order;
- (2) no contribution order shall be made later than three years after the decedent's death.

COMMENT

Subsection (a). The first sentence empowers the court to make a suspensory order. For a similar provision see section 3(2) of the Canadian Uniform Act, 1945 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, 112. Such an order may be made when the decedent did not make a reasonable provision for the petitioner and the petitioner's financial needs are uncertain; for example, she may be a widow who for the time being is able and willing to live in the home of her daughter. See *Parish v. Valentine*, [1916] N. Z. L. R. 455 (Sup. Ct.). In such case the court may freeze all or any part of the estate assets pending a petition for maintenance at some future date. For the Commonwealth practice on this controversial matter see Laufer, "Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation," 69 HARV. L. REV. 277, 292 (1955). Since a suspensory order may be incompatible with the reliance interest of a transferee the second sentence requires the court to decide, in the case of each transferee, whether the transfer he received was unreasonably large and whether he is to remain liable for contribution. If he remains so liable the extent of his contribution will, of course, be governed, *inter alia*, by such equities as he may have at the time of the rehearing.

Subsection (b). This subsection is intended to protect the transferee against unreasonable delay in deciding the extent of his contribution, if any.

SECTION 15. *Limitations on filing petition.*

(a) The petition must be filed within one year after the decedent's death or prior to the expiration of a period of thirty days after the running of the non-claim statute, whichever occurs later. Whenever a petition is filed all eligible petitioners desiring relief under the act must file a petition within twenty days after receiving notice of the original petition.

(b) The court may entertain a petition filed subsequent to the appropriate date specified in subsection (a); but such a petition shall not affect any portion of the estate that has been distributed, and the petitioner shall not be entitled to contribution from any transferee.

COMMENT

Subsection (a). The first sentence sets a limitation on the filing of petitions. Until the non-claim statute has run the court will not know what assets are available, since maintenance petitioners are subordinate to creditors. But petitions for temporary maintenance could be made before that time, especially if the maintenance statute is coordinated with legislation permitting summary distribution of small estates to the surviving family, free of creditor's claims. Cf. Basye, "Dispensing with Administration," 44 MICH. L. REV. 329, 337-46 (1945).

Subsection (b). This subsection applies to any petition filed subsequent to the appropriate period prescribed in subsection (a). Late petitions of this sort must be distinguished from petitions in good standing, the adjudication of which may be delayed by a suspensory order under section 14.

SECTION 16. *Variation or termination of payments.*

(a) Subject to the provisions of subsections (b) and (c) of this section the court shall not order an increase in any lump-sum payment or periodic payments. The court on its own initiative or upon the written request of a petitioner, a transferee, or the personal representative, may at any time reduce or terminate any periodic payments or change the manner of making or of securing periodic payments.

(b) The court may increase, reduce, terminate or order the complete or partial return of any lump-sum payment or periodic payments on the ground of misrepresentation or non-disclosure of material facts by any person.

(c) As far as is practicable any surplus funds made available by the reduction or termination of periodic payments or by the complete or partial rescission of a lump-sum payment shall be returned pro rata to the sources from which they were taken. However, the court may use such surplus funds to meet any need of other petitioners that was established in the original hearing.

COMMENT

Subsection (a). The first sentence prohibits increases except under subsection (b) (misrepresentation of facts) or under subsection (c) (surplus funds). The purpose is to expedite distribution of estate assets and to further the reliance interest of transferees. In this respect the first sentence differs from comparable provisions of the British Commonwealth family maintenance statutes, which are broad enough to authorize increases.

The second sentence authorizes the reduction or termination of periodic payments. This provision does not apply to lump-sum payments, which may neither be increased nor decreased, except under subsections (b) and (c). This sentence also authorizes a change in the manner of payments, e.g., from periodic payments to a single lump-sum payment.

These requests for variation of payments are distinct from appeals. Any award or order will be appealable under the existing appellate machinery in each jurisdiction.

Subsection (b). This subsection authorizes variation of any award or order on the ground of misrepresentation or non-disclosure. For example, the payments might be increased because of misrepresentations by a transferee, or reduced because of misrepresentations by the petitioner.

Subsection (c). This subsection provides for the disposition of funds that become available because of a reduction in payments. Unless used to meet the needs of other petitioners, these funds are to be returned as far as practicable to the estate or transferee in the ratio in which the funds were originally appropriated.

SECTION 17. *Waivers.*

(a) No petitioner shall be denied maintenance on the ground that he signed a waiver thereof, whether signed before or after the date of the decedent's last marriage or after the decedent's death. However, a surviving spouse is not entitled to maintenance if before the effective date of this act such spouse signed an instrument that:

- (1) was a valid waiver of all rights in the estate of the decedent spouse, including the right of election against any last will; and
- (2) was made for a reasonable consideration, under the circumstances prevailing at the time of signing.

(b) No transferee is liable for contribution to the maintenance of a surviving spouse by reason of any transfer with respect to which the surviving spouse at any time signs a written waiver of contribution. No transferee is liable for contribution to the maintenance of a child by reason of any transfer with respect to which the child's judicial guardian at any time signs a written waiver of contribution. No consideration is required for a waiver of contribution.

(c) No waiver of contribution is valid unless the signature is either acknowledged or proved in the manner required for the recording of a conveyance of real property.

COMMENT

Subsection (a). The first sentence prevents a petitioner from "contracting out" of his maintenance privileges. This carries out the basic policy of maintenance legislation. The decedent must not be permitted to foist on the state the burden of supporting his dependents. To effectuate this policy the petitioners must be shielded from their own improvidence.

The second sentence is designed to validate a waiver, signed by a surviving spouse before the effective date of the act, of all rights in the estate of the decedent spouse. Such a waiver must be supported by reasonable consideration.

This latter requirement is consistent with existing law on antenuptial and postnuptial settlements; see Atkinson, WILLS, 110-12 (2d. ed. 1953).

Subsection (b). This subsection provides for waivers of contribution by a surviving spouse and by a child. No provision is made for such waivers signed prior to the effective date of the act since the act applies only to transfers made after that date. The waiver will protect a transferee who anticipates that his transfer may be determined to be "unreasonably large," under section 6. No consideration is needed. To be sure, the surviving spouse or the guardian of a child may in some cases be improvident in signing such a waiver. On the other hand, the transferee is also entitled to protection. Security of title requires that the transferee be permitted to rely on the validity of the waiver of contribution regardless of the amount, if any, of consideration. The dependent's protection lies in his privilege of demanding consideration before he signs. Most "evasion" disputes concern large transfers to children of a prior marriage. If a waiver is sought in these circumstances, the self-interest of both sides will probably dictate a waiver of contribution in return for reasonable consideration. The petitioner also has the privilege of attacking the waiver as having been obtained by reason of the fraud or undue influence of the transferee, the decedent, or any other person.

Subsection (c). This subsection prescribes the formalities for the execution of waivers. The language is taken in part from the N.Y. Deced. Es. Law §18(9).

SECTION 18. *Hearing during decedent's lifetime.*

(a) The decedent or any transferee may apply to the court during the decedent's lifetime for a determination that the transfer is not unreasonably large, under the circumstances prevailing at the time of the transfer. Notice of a preliminary hearing before the permanent master shall be served on all potential petitioners. A guardian ad litem shall be appointed for living and unborn children. With necessary changes the procedure shall be as specified in section 10.

(b) The determination of the court shall be conclusive in the event of a subsequent petition for maintenance.

COMMENT

This section permits a transferee to ascertain during the decedent's lifetime whether or not the transfer is so "unreasonably large" as to make him vulnerable to a contribution order. This section should tend to minimize any infringement on the transferee's freedom of alienation.

SECTION 19. Exoneration, death taxes. Petitioners who receive maintenance awards shall be exonerated from payment of:

- (1) estate taxes, to the extent that other persons are liable to pay any part of the federal estate tax attributable to the taxable gross estate;
- (2) inheritance taxes, to the extent that other assets are available in the estate.

COMMENT

The purpose of this section is to protect the successful petitioner from liability for death taxes, as far as is practicable. In *clause (1)* "other persons" covers persons beneficially entitled to those estate assets that were not appropriated for maintenance awards. It also covers transferees whose property is includible in the "gross estate" for estate tax purposes, at least to the extent that the Internal Revenue Code does not restrict such liability. The burden of death taxes on these persons is not specified by this act. It will be determined by testamentary directive, existing apportionment statute, or judicial doctrine, as the case may be.

If exoneration is not practicable the maintenance award is, of course, subject to death taxes; see section 1(c).

In deciding the amount of contribution to be required of a transferee the court may consider taxes paid or payable by the transferee by reason of the transfer; see comment to section 9(a).

SECTION 20. Costs and attorney fees. The court may make any order it deems just with respect to costs and attorney fees for any proceeding under this act.

COMMENT

This gives the court discretion to award costs and attorney fees. For the practice in New Zealand and Australia see WRIGHT, TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND, 128-35 (1954).

SECTION 21. *Application.* The provisions of this act apply only to:

- (1) the estates of decedents who die after the date that it takes effect; and
- (2) transfers made after the date that it takes effect.

COMMENT

The purpose of this section is to preclude questions as to constitutionality.

SECTION 22. *Severability.* If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 23. *Time of Taking Effect.* This act shall take effect on