

PART I  
MATTERS OF POLICY

## CHAPTER I

# The Existing Confusion

This chapter will present the broad outlines of the problem of the widow's elective share. It will attempt to identify the social and other pressures that are at the root of the problem; and, finally, it will attempt to determine whether or not those pressures are of a permanent nature. My conclusion is that the problem is serious: the number of actual evasions, if not the volume of litigation, is likely to increase.

### 1. JUDICIAL CONFUSION

Inchoate dower is no longer the main protection against disinheritation of the widow. Contrived in a feudal economy, dower succeeds only when wealth means land. In our modern era the average decedent's estate is comprised chiefly of personalty. Cash, credits, securities — these are the main assets. Hence most American jurisdictions now give the widow a statutory share in the husband's personalty as well as in his realty. A similar protection is generally afforded the widower. The usual provision is that the surviving spouse, if dissatisfied with the terms of the will, may elect to take his or her intestate share in the estate of the deceased spouse. A surprising number of states still retain inchoate dower; but even these states supplement it with a "forced" share of personalty.

Protective legislation of this sort is a popular mandate. It caters to the needs of the widow. The policy is wholesome. But the beauty of the forced share is only skin-deep; protection is announced, but it is not given. The widow's share applies only to the property in the "estate" of her deceased husband. Inter vivos transfers are not affected. In some extreme cases, where the husband transferred *all* his property

inter vivos, the widow has received a segment of zero. And the statutory ineptitude is aggravated: by accepted procedures the husband can "give" all his property and yet in substance retain it. Revocable inter vivos trusts, bank-account trusts, joint bank accounts, United States savings bonds — these and similar devices all achieve the same effect. A legal "interest" is transferred inter vivos: in actuality the husband is the real owner until death.

The silence of the legislatures on the problem of inter vivos "evasions" has imposed a heavy responsibility on the courts. Theirs has been the difficult task of identifying and formulating the policy of the community with respect to the decedent's inter vivos transfers. Thorough-going protection to the widow<sup>1</sup> necessitates infringement on the decedent's inter vivos transfers; but this infringement, carried to the extreme, entails an impracticable "inchoate dower" in personalty. In the circumstances, it is no wonder that the cases reflect acute judicial indecision. In fact, the entire topic is "intensely undefined." The case-law is cluttered with meaningless doctrine. There is talk of "illusory" transfers, "absolute" transfers, "fraudulent" transfers, "colorable" transfers, of "good faith," of a "factual showing of reality" — a host of baffling criteria. There is uncertainty as to whether the widow may set aside inter vivos transfers, and there is uncertainty as to rationale. As has been said of that conglomerate of nutriment, the Scottish haggis, there is here fine confused feeding to be had.

Assume that a particular inter vivos transfer is otherwise valid; in other words, that it is a valid transfer aside from

<sup>1</sup> Since the forced share usually is available to both spouses it is obvious that a similar problem occurs in connection with transfers by the wife in evasion of the rights of the surviving husband. The American evasion cases appear to treat transfers by a decedent wife on the same basis as transfers by a decedent husband. It seems clear, however, that a more convincing case can be made for protection of the widow (see pp. 24-29, *infra*); hence the discussion will proceed on that basis. On the other hand, there would appear to be no reason why a legislature should not extend like protection to the widower.

any question of the widow's rights. The cases involving transfers of this sort <sup>2</sup> fall into two groups: those that concede the widow a chance to invalidate the transfer and those that refuse to concede her any possible cause of action that is based on her "rights" under the statutory share. Turning to the first group of cases, we may for convenience make an arbitrary subgrouping. One subgroup tests the validity of the transfer by the degree of "control" retained by the decedent over the *res* of the transfer. The other subgroup inquires into the "intent" (motive) with which the transfer was made. But this generalization, once made, must immediately be qualified. The validity of a given transfer depends on a variety of uncertainties. The courts themselves are not clear as to the precise significance of the "control" and "intent" tests. The fuzziness of these tests is no doubt due in part to the judicial tendency to follow the equities but to announce the decision in terms of "control" or "intent." These equities, in addition to retention of control and intent to disinherit, include the amount of property transferred, proximity of the transfer to the date of death, relationship of the donee, treatment of the decedent by the claimant, independent wealth of the claimant, and the like. To summarize, the cases leave an impression of *ad hoc* compromise, couched in elusive doctrine.

There can be no serious criticism of a test that weighs all the circumstances, considers all the equities. Where fraud is concerned, a flexible rationale is desirable. Indeed, risk is involved in attempting a specific definition of fraud: delineation facilitates evasion. But many courts are quite uninterested in all the circumstances of the case; and others, although seemingly giving decisive weight to the equities, persist in speaking as if the only factor they are concerned with is retention of control or the decedent's motive. These aspects of the case-law imply that some confusion exists as to the basic policy underlying the widow's claim, with serious conse-

<sup>2</sup> Hereafter referred to simply as "evasion" cases.

quences: when the rationale stresses a single factor, the widow's share may be defeated by apt draftsmanship. A revocable trust will probably be sustained against the widow, an irrevocable trust will be completely invulnerable. Moreover, predictability is adversely affected by cases that disguise the *ratio decidendi*. The legitimate expectations of the husband may be defeated — in some instances perhaps where the widow has no real need for economic protection.

And there is equal cause for concern in the decisions that bar the widow from *any* claim against an otherwise valid inter vivos transfer. Until 1951 it had apparently been the view of the New York courts and of the New York bar that a Totten trust, *i.e.*, a bank account trust, could not be utilized to defeat the widow's statutory share. In that year, however, the New York Court of Appeals stated, in *Matter of Halpern*,<sup>3</sup> that a Totten trust was not "illusory" as such and that it could not be reached by the widow. Although the court may have been thinking solely of Totten trusts,<sup>4</sup> the implications of this rationale are clear, and they cut deep: the election statutes are to be construed strictly. In plain language, they apply solely to testamentary transfers. If anything is to be done about inter vivos transfers, it is to be done by the legislatures, not the courts. Let us assume for the moment that the basic goal of the statutory share is to provide economic assistance to the widow. Is that goal likely to be furthered by the rationale of the *Halpern* case?

## 2. ACCELERATING INCREASE IN LITIGATION

Is the evasion problem likely to become more critical? The facts are disturbing. Looking first at surface phenomena, we find that cases involving attempts to evade the statutory share have seriously increased in number in recent decades. Set out below is an analysis of two hundred and sixty-three evasion

<sup>3</sup> In re Halpern's Estate, 197 Misc. 502, 96 N.Y.S.2d 596 (Surr. Ct. 1950), *modified and aff'd*, 277 App. Div. 525, 100 N.Y.S.2d 894 (1st Dep't 1950), *aff'd*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

<sup>4</sup> *Infra*, Chap. 9.

cases in terms of the date of the case. The cases affected comprise practically all of the cases dealing with postnuptial transfers.<sup>5</sup> The analysis indicates that the sharpest increase in litigation has occurred in the last quarter of a century, during the period when inter vivos transmission of wealth has become decidedly popular. Nor can it be said that the increase in litigation<sup>6</sup> is entirely attributable to the natural increase in population. The country's population has a little more than doubled since 1900;<sup>7</sup> but in the same period the evasion cases have increased more than fourfold.

	Favoring Spouse	Favoring Donee	Total
Before 1850 .....	6	6	12
1850-1874 .....	11	6	17
1875-1899 .....	14	17	31
1900-1909 .....	5	14	19
1910-1919 .....	5	14	19
1920-1929 .....	4	13	17
1930-1939 .....	9	23	32
1940-1949 .....	19	29	48
1950-May 1958 .....	25	43	68
Total .....	98	165	263

It may be seen that of a total of two hundred and sixty-three cases, two hundred and three, or 77 per cent, have been

<sup>5</sup> The list of cases used in this chronological analysis is the same list that is used in Chapter Eleven, *infra*, for an analysis from the viewpoint of the equities. From this list, which appears as Table C, *infra*, p. 387, some dozen cases were excluded, although technically dealing with postnuptial "evasions." In each instance, for one reason or another, I did not think it feasible to earmark the decision as inherently favoring or disfavoring the surviving spouse. Also excluded were cases dealing with antenuptial transfers and cases dealing with spouses' rights in contracts to make a will. The criteria for exclusion of cases are set out at p. 147, *infra*. Table E, *infra*, p. 379, contains a complete list of all cases dealing with postnuptial transfers, including the few cases excluded from Table C.

<sup>6</sup> It is still too early to gauge the over-all influence of the Halpern case (see *infra*, p. 126), but the fact that its rationale forecloses the widow may induce a decrease in litigation. Forty-four cases were noticed in the period from 1952 to May 1958, of which twenty-eight favored the donee.

<sup>7</sup> Census figures show a population, in 1900, of 75,994,575; in 1950 the population was 150,697,361. See 22 ENCYCLOPEDIA BRITANNICA 732. As of September 1, 1958, the provisional estimate, including Armed Forces overseas, was 174,595,000. Bureau of the Census, Series P 25, No. 184 (October 10, 1958).

decided since the turn of the century; and one hundred and forty-eight cases, or 56 per cent, have been decided since 1930.<sup>8</sup> To repeat, more than half of the cases have been litigated in the last quarter of a century. Moreover, sixty-eight cases, or more than one-quarter of the total number, have occurred in the present decade up to May 1958.<sup>9</sup>

The figures also reveal that the courts are not as liberal to the surviving spouse as they were formerly. In the nineteenth century the spouse was the favored litigant in thirty-one cases, as opposed to twenty-nine cases favoring the donee. By the turn of the century, however, this trend was reversed. From 1900 there is a pronounced tendency to sustain the validity of the transfer. Until 1940 the ratio is a little more than two to one in favor of the donee; from 1940 on the ratio favoring the donee is slightly less than two to one.

Nor can we assume that the modern trend against the surviving spouse is indicative merely of the fact that in two out of every three evasion cases the spouse does not *deserve* to win, i.e., that the equities are against her. Relevant in this respect is Chapter Eleven, where the cases are examined to determine whether or not each particular decision is consistent with the individual equities of the case. The equities are considered to be with the spouse only when she could establish (a) that she was in financial need at the time of the application, and (b) that the inter vivos transfer was unreasonably large under the circumstances prevailing at the time of the transfer. The results of this study show that the surviving spouse is not faring as well in twentieth century cases as in the

<sup>8</sup> By coincidence, the year that the statutory share legislation was enacted in New York.

<sup>9</sup> The total number of evasion cases is not large. But there may be more there than meets the eye. The great bulk of an iceberg lies under the surface; so may these cases betoken widespread evasion of marital obligations. It is probable that many cases are never reported. An appeal may not be taken; or the case may be settled before appeal or even before suit. The chances of success would be slim in many instances—as, e.g., where the transfer was by way of outright gift or irrevocable trust in a “control” jurisdiction, or, for that matter, any sort of an inter vivos transfer in a “reality” jurisdiction.

nineteenth century. Consider, for example, the cases that involve an unreasonably large transfer, or one that probably was unreasonably large. Of the eighty-five cases concerned, fifty-nine, or 69 per cent, were decided since 1900. This tends to show that the decedent spouse is no more malevolent nowadays than in the nineteenth century: it will be recalled that 77 per cent of *all* evasion cases have occurred since 1900. Nevertheless, the box score for judicial reaction to unreasonably large transfers<sup>10</sup> indicates that present-day courts are probably more apt to sustain such transfers.<sup>11</sup> Of the twenty-six unreasonably large transfers occurring in the nineteenth century, only six, or 23 per cent, were sustained. Since 1900, however, twenty-four out of fifty-nine, or 41 per cent, of these transfers have been sustained.<sup>12</sup>

The increasing volume of cases is significant. Litigation is at best an inadequate gauge of unlitigated evasions, but at least it is suggestive of many such evasions. We are put on notice of the possibility that the community values implicit in the statutory share are not being achieved.

<sup>10</sup> As to cases in which the surviving spouse won, although the equities dictated otherwise, see Table C, *infra*.

<sup>11</sup> CASES INVOLVING "UNREASONABLE" OR "PROBABLY UNREASONABLE" TRANSFERS

	Invalid	Valid	Total
Before 1850	4	3	7
1850-1874	8	1	9
1875-1899	8	2	10
1900-1909	4	2	6
1910-1919	5	4	9
1920-1929	0	3	3
1930-1939	7	4	11
1940-1949	10	6	16
1950-May 1958	9	5	14
Total	55	30	85

<sup>12</sup> Is there any relation between this trend and the emancipation of modern woman? Do present-day courts believe that women, as a class, have achieved economic parity with men? Such a generalization is easy to make, probably unwarranted.



## 3. AGGRAVATING FACTORS

It is possible, if not probable, that in the future the number of "evasions," both reprehensible and otherwise, will seriously increase. Too many forces in our modern way of life tend to undermine the frail structure of the statutory share. These forces are diverse — moral, social, economic, legal; and a quantitative analysis is impracticable. We can speculate, however, on the relative importance of the major factors, which would include the following: (a) increase in family disharmony, (b) growing popularity of inter vivos property transmission, and (c) the arbitrary nature of the statutory share itself.

(a) *Increase in Family Disharmony.* How secure is the institution of the family<sup>13</sup> in the United States? Do marriage, the home, and children occupy the same firm place in the hearts of Americans as in the early days? The answer to this question should throw some light on the probable percentage of evasions. If the home is happy, it is unlikely that the husband will evade his family responsibilities. If the home is unhappy, the husband may be tempted to disinherit his wife. Family disharmony, of course, is difficult to assess.<sup>14</sup> The

<sup>13</sup> "The time has passed, it is believed, when the lawyer must preface his reference to a doctrine of social science by apologetic demonstration of the general relevance of the social sciences to legal problems." Julius Stone, Book Review, 5 J. LEGAL EDUC. 373, 376 (1953). A forerunner in this approach in the field of succession law is Cavers, "Change in the American Family and the Laughing Heir," 20 IOWA L. REV. 203 (1935).

<sup>14</sup> "Divorce is an effect, not a cause. It is a symptom, not the disease. It is safe to assert, except in the most attenuated institutional sense, that divorce never broke up a single marriage. It is adultery, cruelty, desertion, drunkenness, incompatibility, the decay or transfer of affection, and the like that destroy marriages. Divorce never occurs until after the marriage has been completely wrecked—sometimes not until many years after." Lichtenberger, DIVORCE, A SOCIAL INTERPRETATION 16 (1931).

The popular excuse for the high divorce rate is the stress and tension of modern living. Jensen, THE REVOLT OF AMERICAN WOMEN 182-3 (1952). Cf. Jacobs and Goebel, CASES ON DOMESTIC RELATIONS 384 (1952). Indicative of the "tensions" in modern living is the high U. S. suicide rate of 16,000 to 22,000 a year, with 100,000 failures. 75 per cent of the failures are women. Jensen, *supra*, at 202.

In general, on family disharmony, see Zimmerman, THE FAMILY OF

interpretation of the available statistics may vary with the length of each sociologist's foot. In consequence, and out of prudence, the following discussion will deal in generalities.

In attempting to estimate the extent of American family disharmony, we are immediately struck by the rising American divorce rate. Twentieth-century statistics indicate an uptrend in dissolutions caused by divorce, and a downtrend in dissolutions caused by death.<sup>15</sup> Until the last few years it was possible to state that the divorce rate has averaged a three per cent increase each year since the War Between the States.<sup>16</sup> It has leveled off substantially since 1946;<sup>17</sup> and there have been predictions that it will continue to decrease. On balance, however, the over-all picture presents a more or less steadily rising rate. The figures do not flatter us. As Zimmerman pointed out in 1949: "By the turn of the Twentieth Century, although the divorce rate was relatively low (one for each eleven marriages) as compared to the present it was higher than the total of all the divorce rates in the European countries, from which most of the American people

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TOMORROW (1949); Burgess, "The Family in a Changing Society," 53 AM. J. SOCIOLOGY 417 (1948); Gruenberg, "Changing Conceptions of the Family," 251 ANNALS AMER. ACAD. POL. & SOC. SCI. 128 (1947); Haber, "The Effects of Insecurity on Family Life," 196 *id.* 35 (1938); Mowrer, "War and Family Solidarity and Stability," 229 *id.* 100 (1943); Murdock, "Family Stability in Non-European Cultures," 272 *id.* 195 (1950).

<sup>15</sup> Stat. Bull., Metropolitan Life Ins. Co., Nov. 1949; see also SUMMARY OF MARRIAGE AND DIVORCE STATISTICS: UNITED STATES 1950 (Nat'l Office Vital Stat., Special Report, Oct. 29, 1952).

Is there a link between the increase in divorce rates and the gradual increase in longevity? The longer persons live the more chance there is to "get on each other's nerves." For figures on longevity, see note 23, *infra*.

<sup>16</sup> Burgess, "The Family in a Changing Society," 53 AM. J. SOCIOLOGY 417 (1948).

<sup>17</sup> Stat. Bull., Metropolitan Life Ins. Co., Aug. 1949. See also World-wide Increase in Divorce, *id.*, Apr. 1949. The general upward trend has been acute in England and Wales since the end of World War II. The divorce ratio in England and Wales is now about one half of ours, whereas 35 years ago it was only one-fiftieth of what we were then experiencing. The world-wide disruptive effect of war on family life is evident. See also note 23, *infra*.

came. Since then, particularly during the past decade, it has advanced to something like one divorce for every three marriages. . . . Divorce is almost now as frequent as it was in the fateful third century preceding the spread of the Christian religion among western people.”<sup>18</sup>

At first glance, the divorce rate appears to have no direct bearing on the possible percentage of evasions of the forced share. In divorce there is a clean break, property-wise: the divorced wife loses rights of succession. For our purposes, however, the significance of the divorce rate lies not in the figures *per se* (appalling though they are), but in the high rate of remarriage that follows divorce. There has been a marked increase in the frequency of remarriage since the turn of the century.<sup>19</sup> This is particularly true in the case of divorced persons.<sup>20</sup> They tend to remarry with some promptness; indeed, the chances of remarriage for the divorced person are greater

<sup>18</sup> Zimmerman, *THE FAMILY OF TOMORROW* 2 (1949).

<sup>19</sup> “Altogether, in somewhat more than one out of every six families, either the husband or wife had been previously married.” Stat. Bull., Metropolitan Life Ins. Co., April 1951. “There are also definite indications that a considerable portion of the divorced lost little time in remarrying. This may be inferred from the fact that although about 5,500,000 persons were divorced from 1940 through 1946, the number of divorced persons who had not remarried increased by only a little more than 500,000 during this period,” *Id.*, Mar. 1948.

<sup>20</sup> “Persons married more than once now constitute a larger proportion of the total number of married couples, despite a decline in widowhood at the younger ages. The explanation . . . lies in the remarriage of divorced persons . . . among whom the remarriage rate is very high. . . . [In] the age range 25 to 34 years, for example, somewhat more than three-fifths of them were remarried according to the figures for 1940, as compared with about one-half in 1910. . . . As a consequence . . . wives who have been married more than once are relatively more frequent at present than at any time in the past half century or longer; they now represent about one out of every eight married women in our country.” Stat. Bull., Metropolitan Life Ins. Co., Jan. 1949.

“Individual states differ markedly in the proportions of the single, divorced, and widowed among those getting married. . . . These geographic variations reflect a number of factors, including the age and marital composition of the population, differences in attitudes towards divorce among various religious groups, and—even more important—the diversity in our marriage and divorce laws.” Stat. Bull., Metropolitan Life Ins. Co., June 1953.

than the chances of marriage for the unmarried person.<sup>21</sup> The propensity to remarry strengthens with advancing age, for both the widowed and the divorced. This desire of older people to "have another go at it" is clearly shown by the remarriage statistics set out in Appendix A.<sup>22</sup> Possibly the increase in remarriages may be ascribed in part to the fact that nowadays people are living longer<sup>23</sup> and that they move about the country more than formerly.<sup>24</sup> In any event, we are probably justified in assuming that many remarriages are marriages of convenience, motivated by the desire for companionship or security. To be sure, the chances of success in the second and succeeding marriages appear to be about the same as in the average first marriage.<sup>25</sup> A substantial number are unsuccessful, however, probably due to the same intrinsic personality difficulties that led to the first divorce. And the presence of children by a former marriage is a complicating factor even when the remarriage is a successful one. Children under eighteen are involved in probably one half of all divorces and annulments.<sup>26</sup> The evasion cases afford striking

<sup>21</sup> "Among women, the chances are about one in two for the spinster of 30, the widow of 33, and the divorcee of 45. In other words, the chances of marriage in each sex are as good among the divorced of 45 as among the single of 30." Stat. Bull., Metropolitan Life Ins. Co., May 1945.

<sup>22</sup> *Infra*, p. 331. And see Glick, "First Marriages and Remarriages," 14 AM. SOCIOLOGICAL REV. 726 (1949).

<sup>23</sup> "The average length of life in the United States increased to a new high of 68.5 years in 1951. This is a gain of 3.7 years in a decade and of 19.3 years since 1900-1902, when the average length of life was 49.2 years. Thus, the expected lifetime of the average American has been lengthened by almost 40 per cent since the beginning of the century. For white females, the expectation of life at birth in 1951 was as high as 72.6 years, compared with 66.6 years for white males; the corresponding figures for the nonwhite population were 63.7 years and 59.4 years, respectively." Stat. Bull., Metropolitan Life Ins. Co., June, 1954; see also Stat. Bull., Apr., Sept., Nov., 1953.

<sup>24</sup> In 1948 and 1949, about one out of every five adults in the country changed residence. See Stat. Bull., Metropolitan Life Ins. Co., May 1950.

<sup>25</sup> *E.g.*, more than one fifth of the remarried husbands stay married at least 20 years. Stat. Bull., Metropolitan Life Ins. Co., April 1949.

<sup>26</sup> See Table 15, VITAL STATISTICS OF THE UNITED STATES 83 (1952). Divorces involving children are on the increase. They are concentrated

corroboration of the understandably human desire to make provision for one's own children.<sup>27</sup> A choice between the children and the second wife usually favors the children; and, as was mentioned earlier, frequently the children will receive inter vivos transfers of most of the husband's assets.<sup>28</sup>

It is possible to rationalize the divorce figures in disparagement of the evasion problem. The argument runs this way: if divorce is so easily and so frequently obtained,<sup>29</sup> it follows that those who remain married are probably content with their current spouses and that evasions of the statutory share will hence be relatively few in number. There is some merit to this contention. The great majority of husbands will not attempt to evade their marital responsibility. If this were not so, marriage as an institution could not survive. No law can endure that flouts human nature. The husband's common-law duty of support, for example, has had a long and ef-

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in the early years of marriage. Fully two-thirds of the children affected by divorce are under age 10. The relative frequency of divorce for couples with minor children was little more than one-half that for couples without minor children at the time of divorce. Stat. Bull., Metropolitan Life Ins. Co., Feb. 1950.

Widows with children seem to be at a disadvantage in remarrying. Stat. Bull., Metropolitan Life Ins. Co., Aug. 1952.

<sup>27</sup> See Chap. 10, text at note 34, *infra*.

<sup>28</sup> It is of course probable that many children of a former marriage will be of adult age at the time of the parent's remarriage. This would not appear to be a deterrent to the making of gifts to children of a former marriage. The sentimental attachment to one's own children will survive most remarriages, particularly when the second marriage is one of convenience.

A more important deterrent to inter vivos evasions, when there has been a remarriage, is the existence of an antenuptial contract. Such a contract is not unusual when the parties marry for convenience; and if the second wife thereby waives her forced share privileges there will of course be no problem of evasion. But it is not clear that the contract will always bar the statutory share. See Appendix D, note 3.

<sup>29</sup> As Westermarck, § THE HISTORY OF HUMAN MARRIAGE 377 (1922), has indicated, loose divorce laws do not necessarily connote a breakdown in the institution of marriage. The low Swedish divorce rate, for example, considered in conjunction with the very liberal Swedish grounds for divorce, indicates that there may be no connection whatsoever between the divorce rate and the legal grounds for divorce. On the other hand, it cannot be denied that in the United States there is a frighteningly high turnover in marriage partnerships. If this indicates anything, it indicates marital disharmony.

fective validity because responsible monogamy is in general esteem. But the fact that most husbands do support their wives (at least, in those marriages that do not end in divorce) has never been urged as a reason for scrapping the common-law duty of support. There are always some recalcitrant members in any community. And we may assume that there will probably continue to be many first marriages in which one spouse or the other will be tempted to evade the statutory share legislation. Disharmony may exist between husband and wife without serious thought of a divorce. Marriages may survive under conditions that run from (a) a monotonous coexistence under the same roof to (b) an irreconcilable separation; and yet divorce may be unsought for many reasons: consideration of the children's happiness; fear of community censure; religious convictions; pride in the preservation of appearances; sheer inertia; or even a perverse sense of loyalty. For diverse reasons a marriage may be merely a shared legal status, without happiness, without respect. Ironically, our present succession laws tend to discriminate against the wife who for some reason or another does not press her grounds for divorce. If she does so, she perhaps may obtain a property settlement. But if she practices conciliation, cooperation, restraint, she is at the mercy of her husband's inter vivos transfers. At his death she may find no property in his "estate."

To recapitulate, the high divorce rate is accompanied by a high rate of remarriage. These remarriages are often motivated more by convenience than by romantic affection. The natural object of the husband's inter vivos bounty will be children of a former marriage. And marital disharmony may lead to inter vivos "evasions" even when the spouses do not seek a divorce.

(b) *Popularity of Inter Vivos Property Transmission.* It is probably safe to say that inter vivos devices now comprise a large and ever-growing portion of all gratuitous transfers. The statistics about them are meagre, but this assumption

seems justified in the light of modern conditions. To begin with, inter vivos transfers are easier to effect now that the greater part of our total wealth is composed of personalty. The corporation, the trust, freely assignable choses — these and other devices ensure a wide diversity and flexibility in the media in which wealth may be held and transferred. In the early days wealth meant land — stable, enduring, seldom transferred other than at death. Inter vivos transmission was abnormal. But in our time wealth is found in liquid intangibles. Transferability is the *sine qua non*; and ease in alienation<sup>30</sup> tends to promote a greater percentage of inter vivos transfers.

Secondly, survivorship devices have emerged as an effective substitute for the will. In a recent article<sup>31</sup> Gilbert Stephenson notes a significant increase in joint ownership, particularly in joint ownership of homes and joint bank accounts. The increase in joint ownership of homes he ascribes to a desire to minimize taxes, to save probate expenses, and to keep the home intact. Convenience in family banking explains the increase in joint bank accounts. Joint registration of War Bonds has stimulated increase in joint ownership of all property; and the special requirements of persons in military service has led in many cases to joint ownership of the entire property of families concerned. A further contributing factor is the natural advantage of expediting payment of the decedent's property to his beneficiaries at his death. Joint ownership eliminates the time-lag (and expense) that occurs between death and eventual distribution under the auspices of the probate court.

Thirdly, the heavy impact of modern death duties dis-

<sup>30</sup> The demands of convenience have led to ease in transfer of land. For example, deeds and mortgages merely require written evidence of intent; "title" in sales of land need only be "marketable," not fool-proof; and curative acts help to minimize the effect of antiquated recordation systems. Cf. Basye, "Streamlining Conveyancing Procedure," 47 MICH. L. REV. 935, 1097 (1949).

<sup>31</sup> Stephenson, "Joint Ownership of Property," 25 TRUST BULL. 25, 31-32 (1945).

courages testamentary transmission. Conversely, the lower rate on the gift tax stimulates inter vivos gifts to relatives and to charities.

Fourthly, the comparatively recent growth of "estate planning" is causing greater awareness of the benefits to be derived from inter vivos transmission. The man of modest means, for example, will find that he — as well as the man of wealth — can use the revocable inter vivos trust to advantage. Indeed, the main components of the average man's holdings are usually transmitted by an inter vivos device: the family home and the family bank account by survivorship; life insurance and United States savings bonds by contract. And undoubtedly in recent years the high cost of living and of education has induced many fathers to make an early advancement of a portion of their worldly goods. This assumption finds corroboration in the fact that a large proportion of the evasion cases concern transfers to children, particularly to children of a prior marriage.<sup>32</sup>

To summarize, the pattern of American property donation has changed since the original forced share statutes were enacted. No longer can it be said that transmission of wealth will in all cases coincide with death. Inter vivos transfers are now the rule, not the exception. This suggests that there should be an increasing community concern for the security of the transferee's title. Effective protection for the widow will involve ever-increasing interference with the legitimate expectations of both the decedent and the transferee. Thus we may expect the "evasion" problem to give greater trouble in the future to the courts and to the community.

(c) *Arbitrary Nature of the Statutory Share.* It is possible that much of the evasion litigation is occasioned by the arbitrary, mechanical operation of the forced share statutes. As we shall see later,<sup>33</sup> the existing legislation pays no attention to the widow's need, and but casual attention to the merits

<sup>32</sup> *Infra*, Chap. 10, text at note 35.

<sup>33</sup> *Infra*, Chap. 2, text at note 3.



otherwise of her claim. It is immaterial in the statutes that the widow has independent means, or that she has already been adequately provided for by the decedent's inter vivos transfers; and it is only in limited instances that her share will be barred by "misconduct."<sup>34</sup> Naturally, most husbands will try to prevent a widow from taking an elective share that she neither needs nor deserves.

Consider a typical "evasion" situation. The husband has children by a prior marriage. The wife may also have children by a prior marriage and perhaps a little money of her own. If the husband's children are adults, there will possibly be unpleasantness with the stepmother. In all probability the husband will wish (a) to provide his widow with sufficient income to continue her present standard of living and (b) to leave the principal to his own children. Naturally, he will not wish to leave the principal to the widow, since at her death it would in all likelihood go to *her* children or relatives. And, naturally, he will carry out his plan by inter vivos disposition; otherwise the widow may elect a statutory share. In these circumstances the dictates of sentiment and of common sense foster inter vivos transfers. "Evasion" here is laudable, not reprehensible.

#### 4. CONCLUSION

Predictions as to the present or future gravity of the evasion problem are at best speculation: too many extra-legal factors are involved. It seems safe to say, however, that the statutory share legislation shows serious signs of wear. A brittle edifice, it is assailed by two powerful forces, (a) the increasing instability in the American family and (b) the popularity of devices for controlled lifetime giving. There is a greater incentive for making inter vivos transfers; there is a wider selection of practicable devices. Greater temptations: deft new expedients. The cumulative effect of these forces is to make the statutory share less effective unless protection is

<sup>34</sup> *Id.*, text at note 18.

given against inter vivos transfers, and, at the same time, to render interference with inter vivos transfers intolerable if permitted to a widow in automatic fashion. It is this state of affairs that has led some courts to place subconscious stress on the "equities"; that has led other courts to deny *any* claim of *any* widow; and that probably will continue to aggravate the evasion problem so long as the statutory share legislation remains in its present form.