

## CHAPTER 2

# Basic Policy Considerations: The Need for Restraints on Disinheritance

### I. METHODOLOGY <sup>1</sup>

Our findings in Chapter One indicate that the "evasion" problem is, on the surface at least, a serious one. It would appear that "something must be done." Should something be done? If so, what? No decision can be made unless we ask further questions in the present chapter. What are the community values <sup>2</sup> involved in restraints on disinheritance of the widow, and how important are they? How does financial aid to the widow relate to the over-all welfare of the surviving family? Is there any justification for the commonly held belief that women, particularly widows, own the bulk of the country's wealth? Can the security of the surviving family be ensured by utilizing other legal or extra-legal controls that achieve the desired community goals without infringing on freedom of property transmission?

In Chapter Three we shall try to reckon the cost of adequate family protection; for example, how important is it to the community that the decedent be given complete freedom to make testamentary and inter vivos gifts? Chapter Four suggests a formula for reconciling the family protection value with the "reliance interest" of the transferee. Finally, in Part 3, we shall examine the case-law to determine whether or not the desired community goals are being achieved by existing judicial doctrine.

<sup>1</sup> I am indebted to the ideas found in Shartel, *OUR LEGAL SYSTEM AND HOW IT OPERATES* 434-594 (1951); Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *YALE L. J.* 203 (1943); Lasswell, "The World Revolution of Our Time, a Framework for Basic Policy Research," Hoover Institute Studies, Series A: General Studies, No. 1 (1951).

<sup>2</sup> Or "goal," or "purpose," or "interest."

2. THE STATUTORY SHARE<sup>3</sup>

(a) *Typical Provisions.* As mentioned earlier, the statutory (or "forced") share normally guarantees the surviving spouse a specified fraction of the "estate" of the deceased spouse. This share may be elected ("forced") regardless of the terms of the will. In most states<sup>4</sup> the share is specifically or by implication based upon the net estate.<sup>5</sup> The phrase "estate" is significant. For one thing, it ensures the widow a share in the husband's personal property as well as in his realty. In another aspect, however, it breeds confusion: in literal terms it restricts the forced share to property that forms part of the husband's estate for purposes of administration. *Inter vivos* transfers, in theory, are unaffected.

There is some variety in the statutory provisions. The amount recoverable may include: (a) the intestate share;<sup>6</sup> (b) the intestate share limited to a defined amount or fraction of the estate;<sup>7</sup> (c) a share in the realty only;<sup>8</sup> (d) a combina-

<sup>3</sup> On the historical development and significance of the statutory share, see Simes, *PUBLIC POLICY AND THE DEAD HAND* 12-31 (1955). See, in general, Simes, *MODEL PROBATE CODE* §§31 and 32 and pp. 258-63 (1946); 3 Vernier, *AMERICAN FAMILY LAWS* §§189, 216 (1935); 4 P-H *WILLS, EST., & TRUSTS SERV.* §2371 (Dower), §2732 (Curtesy), §2734 (Widow's and Children's Allowances), §2735 (Election of Widow or Surviving Spouse).

<sup>4</sup> The community property states, which are in a special category, are as follows: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The provisions differ from state to state, and generalizations are hazardous. To oversimplify, we may say that community property is the property that has been earned by either spouse during the marriage. The other spouse acquires immediately an undivided half-interest in the community. The decedent spouse cannot deal with the other spouse's interest by will, and it is not part of his estate. Since community property is of limited application, we shall, for the most part, restrict our discussion to the remaining American states. On transfers in "fraud" of the surviving member of the community, see Chap. 20, note 21, *infra*.

<sup>5</sup> But see Fla. Stat. §731.34 (1957).

<sup>6</sup> *E.g.*, N.C. Gen. Stat. §30-2 (1950).

<sup>7</sup> *E.g.*, in Massachusetts the surviving spouse may elect to take the estate assets up to a value of \$10,000, and the income for life in any surplus over that amount. Mass. Ann. Laws c. 191, §15 (1955).

<sup>8</sup> *E.g.*, Georgia restricts the widow to dower in the realty, or to a "child's part" in the realty. Ga. Code Ann. §§31-101, 31-110(3) (1952).

tion of a share in personalty and inchoate dower; <sup>9</sup> (e) a limited right to elect; <sup>10</sup> (f) nothing.<sup>11</sup>

The extent of the share usually varies with the number of children involved. Thus, if no children survive, the widow may receive one half or even all of the estate; but in the event of children surviving she may be relegated to a "child's share," which may be a third, or even less, depending on the number of surviving children.<sup>12</sup> Aside from this mechanical variation, the over-all picture is one of fixed, unalterable, arbitrary portions. Relief is standardized; no attention is paid to individual equities or unusual circumstances.

There are, of course, some isolated instances of flexibility. A Vermont statute provides that the surviving spouse may take, out of the intestate property or upon waiving the will, such part of the personalty "as the probate court assigns . . . according to his or her circumstances and the estate and degree of the decedent, which shall not be less than a third, after the payment of the debts, funeral charges, and expenses of administration."<sup>13</sup> In Mississippi there is a proviso that the wife may not elect against the will if her separate estate is equal to the share of the realty and personalty that she would take under the will.<sup>14</sup> A comparable provision exists

<sup>9</sup> *E.g.*, Fla. Stat. §731.34 (1957).

<sup>10</sup> *E.g.*, in New York the surviving spouse may not elect if the will gives him or her \$2500 and the income for life from a trust fund the corpus of which equals the difference between the share in the will and the intestate share. N.Y. Dec. Est. Law §18.

<sup>11</sup> *E.g.*, North Dakota, South Dakota.

<sup>12</sup> Thus in Nebraska the intestate share of the surviving spouse is limited to one-fourth, "if the survivor is not the parent of all the children of the deceased and there be one or more children, or the issue of one or more deceased children surviving." Neb. Rev. Stat. §30-101 (1943).

<sup>13</sup> Vt. Rev. Stat. §§3018-19 (1947).

<sup>14</sup> Miss. Code Ann. §670 (1942). If the wife's separate estate is less than her share in the will the deficiency may be claimed from the estate in amounts set out in the statute. If the wife is the beneficiary of her husband's life insurance she must consider it as part of her separate estate. *Osburn v. Sims*, 62 Miss. 429 (1884). This is not so if she took the proceeds as sole heir. *O'Reily v. Laughlin*, 92 Miss. 1, 45 So. 19 (1907).

Legislation of this sort would not appear to be suitable for modest

in Alabama.<sup>15</sup> South Carolina sloughs off the excess over one fourth of the net estate when testamentary gifts are made to mistresses or illegitimate children.<sup>16</sup> In the main, however, the pattern is one of unyielding rigidity.

The wife is the favored spouse. A number of states have no forced share for the husband,<sup>17</sup> but the wife seems to be provided for in all states but North Dakota and South Dakota.

In slightly less than one half of the states where community property does not prevail, the share is barred by the misconduct of the spouse. But statutes of this sort are of limited and, in some respects, uncertain application.<sup>18</sup> Desertion without cause is their common denominator; but some of the statutes require adultery — or even a bigamous marriage. In many of the evasion cases the conduct of the surviving spouse has been reprehensible, but does not amount to "desertion." Naturally, this conduct will stimulate inter vivos transfers by the husband, and the widow will attack the transfers as being in "evasion" of her rights.

The statutory share almost inevitably entails a lump sum payment. No thought is given to the possibility — indeed, the probability — that the widow will be inexperienced in money matters and that the lump sum will soon be dissipated.<sup>19</sup> The comparatively recent New York statute<sup>20</sup> is an exception. It encourages the testator to leave the widow an amount equivalent to her intestate share in trust for her life,

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estates. It would be unfair to a widow with minor children, when the separate estate is limited. Similar hardship would ensue to a widow with no children, when her husband leaves a small estate which, combined with her own separate property, is not enough to sustain her.

<sup>15</sup> Ala. Code Ann. tit. 34, §§42, 43 (1940). United States bonds payable to husband or to husband or wife have been considered a part of the wife's separate estate, even though purchased by the husband. *Chambless v. Black*, 250 Ala. 604, 35 So.2d 348 (1948).

<sup>16</sup> S.C. Code §19-238 (1952).

<sup>17</sup> *E.g.*, Florida. See 3 *Vernier*, *AMERICAN FAMILY LAWS* §216 (1935).

<sup>18</sup> *Simes*, *MODEL PROBATE CODE* 263-67 (1946).

<sup>19</sup> Cahn, "Restraints on Disinheritance," 85 *U. PA. L. REV.* 139, 144 (1936).

<sup>20</sup> *N.Y. Dec. Est. Law* §18.

or as a legal life estate or annuity for life. But even in New York the husband has the power to denude his "estate" by inter vivos transfers; and even if he leaves a substantial trust for the widow, there is no effective protection for the children: the widow may die during the minority of the children, thus cutting off the income.

(b) *Apparent Aims.* It seems reasonably clear that the immediate goal of the statutory share is to provide economic assistance to the surviving spouse — for our purposes, the widow. In the oft-quoted words of a comparatively recent legislative report: "There is a glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death."<sup>21</sup>

The need for protection is obvious. By the marital vows the wife assumes her natural role of homemaking and the husband undertakes to "provide" for the home. If many years later the husband disinherits his family, the widow must then undertake both roles — homemaker and provider. By that time, however, she is one of the disadvantaged: she is much older; she lacks the practical or professional skills that would have been hers had she preferred a career to marriage; and by now she may have the distracting responsibility of rearing minor children. And disinheritance of the family may entail more serious consequences than the loss of material comforts. For the widow, it means a loss of "face," of prestige. She can no longer keep up with the Joneses; in fact, she cannot even approximate her former standard of living. For the children, who depend on the widow, the consequences are perhaps more drastic, in terms of potential harm to the community. Society is concerned that they, as future citizens, receive proper food, adequate dental and medical care, and educational opportunities commensurate with individual talent and inclinations. Disinheritance makes it more

<sup>21</sup> The Reports of the Commission to Investigate Defects in the Laws of Estates, New York Legislative Document No. 69, p. 86 (1930).

difficult for the widow to carry out these family responsibilities. And for both the widow and children this may result in a lowering of morale, with consequent harm to the family's role in character-building.<sup>22</sup> This in turn injures the community, for the community is essentially a collection of families. The virtues inculcated by a happy family life are the virtues that support democracy: tolerance, integrity, a sense of responsibility. The welfare of the family is the welfare of the state.

### 3. WOMEN'S WEALTH

It is frequently asserted nowadays that women own the great bulk of the country's wealth.<sup>23</sup> This assertion cannot be ignored. It would appear that effective protection for widows requires intrusion on the husband's freedom of inter vivos alienation. This means that appropriate legislation will be expensive, in terms of community convenience; it can be justified only if the need is great. We may well ask, then, if the emancipation of modern woman<sup>24</sup> has in turn led to her

<sup>22</sup> In some cases the family ties may be strengthened by adversity; but these are probably rare instances—occurring in spite of, and not because of, disinheritance.

<sup>23</sup> *E.g.*, "between sixty and seventy per cent": THE SATURDAY REVIEW OF LITERATURE, Mar. 12, 1949, p. 18; "nearly 70 per cent of the investment funds": "Women in the Dough," AMERICAN MAGAZINE, Mar. 1948, p. 112; "80 per cent of the wealth": FLORIDA TIMES-UNION, (Jacksonville) Mar. 4, 1954, p. 4, col. 7; see "A Woman Banker Looks at Women and their Money," 30 INDEPENDENT WOMAN 99 (Apr. 1951).

<sup>24</sup> On the proposed constitutional amendment guaranteeing complete equality of the rights of men and women, see Murrell, "Full Citizenship for Women: An Equal Rights Amendment," 38 A. B. A. J. 47 (1952) (pro), and Brophy, "An Equal Rights Amendment: Would It Benefit Women?" 38 A. B. A. J. 393 (1952) (con). For early legislative protection against disinheritance of the widow, see Morris, STUDIES IN THE HISTORY OF AMERICAN LAW 155-64 (1930). On modern legislation affecting the American family, see "Sex, Discrimination, and the Constitution," 2 STAN. L. REV. 691, 697-712 (1950). On inheritance as a factor of decreasing importance in promoting family obedience, see Herkheimer, "Authoritarianism and the Family Today," in Anshen, THE FAMILY: ITS FUNCTION AND DESTINY 359, 361 (1949). In general, see Groves, THE CONTEMPORARY AMERICAN FAMILY 564 (2nd ed. 1947); Murdock, SOCIAL STRUCTURE (1949); Cohen, "Social Security and Family Stability," 272 ANNALS AMER. ACAD. POL. & SOC. SCI. 117 (1950); Tauber

economic independence. If this should be the case there would be no necessity for new legislation. It would be preferable to retain the statutory share as it now exists, and to let the widow of the future take her chances with the court.

The status of women has been bettered in many respects since the present forced share statutes were introduced. As far as the power to own property is concerned, the liberation is all but complete. But a statement that women are entitled to separate property can have no significance without considering the extent of the average woman's separate property.<sup>25</sup> Here we encounter myth, conjecture, half-truth. The park-bench philosophy that "women own the country" probably stems from, or is fed by, two facts of modern life: (a) the institution of inheritance favors women, for the simple reason that women live longer; and (b) more women are working than ever before.

Not much is known about women's wealth.<sup>26</sup> What little is known<sup>27</sup> indicates that a few women own great wealth but

and Eldridge, "Some Demographic Aspects of the Changing Role of Women," 251 *id.* 24 (1947); Zimmerman, "The Family and Social Change," 272 *id.* 22 (1950).

<sup>25</sup> In fact, we cannot even rely on averages. Even if the average were high, it would mean only that *many* needed no protection, not that *all* were without need of a forced share.

<sup>26</sup> We know very little about the total distribution of wealth or the manner in which it is transferred. Doane, *THE ANATOMY OF AMERICAN WEALTH* (1940); see references collected in McDougal and Haber, *PROPERTY, WEALTH, LAND* 107, 108 (1948).

<sup>27</sup> At midsummer 1956 prices, women had "an approximate equity of \$100 billion in common and preferred stock. They have about half of the \$110 billion in savings accounts, about half the \$66 billion in government bonds. . . ."

According to a recent survey made for the New York Stock Exchange, the largest single group in the occupational breakdown of all stockholders . . . is *Housewives and Non-employed Females*. There are almost three million in that category, and they make up 34.2 per cent of the 8,630,000 stockholders of record. . . ." Hamill, "Women and Business," *FORTUNE*, Oct. 1956, p. 149. It must be borne in mind, however, that some men register their securities in their wives' name for tax or business protection purposes.

Figures compiled by the insurance companies indicate that women own 20 per cent of the life insurance issued in any year, but their policies are seldom for more than \$1,000; and, although modern woman inherits more than 75 per cent of the death benefit payments, "there

that the average woman has modest means.<sup>28</sup> She owns a limited amount of capital, if any, and her income is barely at the subsistence level. If the woman is married, most of her earnings probably go into the family budget. It follows that the average widow<sup>29</sup> will require financial assistance from her

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are reasons to believe that, on the average, these net her relatively small amounts." Adams, "Women's Wealth, BARRON'S Dec. 18, 1950, p. 7, col. 4.

More women are working than ever before. The 21 million women in the U.S. labor force in 1956 comprised a third of all women over 14, and 30 per cent of all married women. Hamill, "Women and Business," FORTUNE, Aug. 1956, p. 173. The most significant increase is from the ranks of the older married women. In 1920 fewer than 20 per cent of married women in the 45 to 54 years age group were working; in 1956 45 per cent were at work. "Working, rather than being at home (except during the years when the children are young) has become the 'natural' thing to do." *Id.*, July, 1956, p. 92. But women do not earn as much as men. "There are fewer than 40,000 U.S. women . . . who earn as much as \$10,000 a year (less than 0.2 per cent of all the women who work for a living) and this figure includes actresses, movie stars, buyers, and some of the professional women, as well as women executives." *Id.*, June, 1956, p. 106.

See also "Women as Workers (A Statistical Guide)," Women's Bureau Report, (U.S. Dep't of Labor) July 1952. On decedents' estates, see "Where Trusts Business is going, as recorded in the Probate Records of Los Angeles County," TRUST BULL. 1940, p. 5. But *cf.* Doane, THE ANATOMY OF AMERICAN WEALTH 13, 14 (1940).

<sup>28</sup> Some humorous statistics on the reaction of the sexes to the emancipation of women may be found in a survey—"Women in America," FORTUNE, Aug. 1946.

<sup>29</sup> Statistical bulletins of the Metropolitan Life Insurance Company reveal these current trends in widowhood:

1. *Increase in numbers*: "As a result of the marked decline in mortality, the *proportion* widowed in the population has been decreasing at every period of life. Nevertheless, the *number* of widows in our country has been mounting rapidly, because the population at the older ages has been growing and because mortality has improved more rapidly among women than among men. In 1935 there were 7.4 million widows in the United States, compared with 5.7 million in 1940 and less than 4 million in 1920. Thus, between 1920 and 1953 the number of widows rose by almost 90 per cent, while the adult female population showed a gain of 63 per cent" (Stat. Bull., Jan. 1955). "Currently, about 660,000 marriages are broken by death each year. In two-thirds of these families the wife is the surviving spouse. Fifty years ago the corresponding proportion was close to one-half. . . . Only if the wife is at least

husband's estate.<sup>30</sup> The great wealth of a few women should not preclude community protection to the average married woman. The very fact of marriage puts her at an economic disadvantage. After all the raptures over the fine new woman's world,<sup>31</sup> the facts of life remain: Nature has given to woman a vital task to perform for society. She has the responsibility, during the productive period of her life, of child-bearing, child-rearing, and homemaking.<sup>32</sup> We deal here not with those who evade that responsibility, the single or the divorced, but with the wife who remains with her husband to the end. By that time it is, for most, too late to secure a job providing adequate support. If these premises are sound, our succession laws should be so drafted as to ensure adequate

five years older than her husband are the odds against her being widowed" (Stat. Bull., Sept. 1953).

2. *Emphasis on the older ages*: "Whereas in 1920 little more than one third of the widows . . . were at ages 65 and over, in 1953 the proportion was more than one half" (Stat. Bull., Jan. 1955).

The median age at which wives enter widowhood is about 56 years. However, a significant number are much younger when their family life is disrupted by the death of the husband; almost one quarter of the new widows each year are under age 45" (Stat. Bull., Sept. 1953).

3. *Emphasis on urban areas*: Between 1940 and 1953 the number of widows in urban areas rose by 44 per cent. In 1953 ". . . widows constituted 13.7 per cent of all women living in urban areas, 11.2 per cent of those in rural nonfarm areas, and only 8.5 per cent of the women residing on farms. This situation suggests that many widows in rural areas who do not remarry, especially the younger and middle-aged, soon move to urban centers" (Stat. Bull., Jan. 1955).

4. *Emphasis on the nonwhite population*: "In the country as a whole in 1950, the proportion widowed at ages 45-54 was 22.8 per cent among the nonwhite women and 9.9 per cent among the white; at ages 65-74 the proportions were 60.6 and 44.9 per cent, respectively. Moreover, young widows are much more common among the nonwhite women. Of all the nonwhite widows in 1950, no less than 19.2 per cent were at ages 14-44, compared with 7.3 per cent for the white woman" (*Ibid.*)

<sup>30</sup> *But cf.* Cavers, "Change in the American Family and the 'Laughing Heir,'" 20 IOWA L. REV. 203, 204 (1935).

<sup>31</sup> *Cf.* Evans, THE SPOOR OF SPOOKS, 146-56 (1954).

<sup>32</sup> *But cf.* Warne, "The Reconversion of Women," 8 CURRENT HISTORY 200 (Mar. 1945).

support to deserving widows, even if this necessitates some degree of interference with her husband's gratuitous inter vivos transfers.

#### 4. SUPPORT OF THE SURVIVING FAMILY: OTHER DEVICES

The fact that the chief goal of the statutory share is uninterrupted family support points to the gravity of the evasion problem. But we cannot fully assess the gravity of the problem until we have given some thought to the other expedients used by society to ensure family support. No sleep need be lost over evasions of the statutory share if its basic goal may legitimately be attained by other controls that do not infringe on inter vivos transfers.

Our American community uses many devices to ensure financial assistance to the surviving family. Some of these expedients involve public welfare, such as widows' pensions, and relief payments. Others, including the statutory share, attempt to minimize the necessity for public welfare by tapping the most logical source of revenue—the decedent's property. Most devices of this sort operate as restraints on the decedent's testamentary transfers—for example, homestead legislation (in some instances); family allowances; legislation restricting testamentary gifts to charity; and statutory and judicial doctrines concerning mental incompetency, undue influence, and fraud. Allied to these protective devices is preferential treatment in death duties, as, for example, the marital deduction and gradation of inheritance taxes according to the degree of relationship to the decedent. A relatively small group of controls affects the decedent's privilege of making inter vivos transfers, as, *e.g.*, inchoate dower, homestead legislation (in some instances), and judicial doctrines aimed at preventing evasions of inchoate dower and the statutory share.

We need not consider public-welfare devices; the husband who has the means to do so should bear primary responsibility for his family's support. Preferential treatment in death

duties has some merit,<sup>33</sup> but it affects only the larger estates. Inchoate dower will be discussed later, in Chapter Six.

(a) *Homestead*. Most American states, by constitution or by statute, make the family dwelling place immune to the claims of the husband's creditors. Indigenous to the United States, the homestead legislation shows community solicitude for the family; continuance of the home is viewed as a more basic need than enforcement of creditors' claims.<sup>34</sup> This community judgment is based on one or more, or perhaps all, of the following factors: (a) tangible community benefit: less public funds needed for welfare and allied purposes; (b) intangible community benefit: family solidarity, particularly in periods of economic stress, enhances the general morale; (c) sentimental regard for the home; and (d) solicitude for debtors, owing to their large number and voting power.

The protection is restricted to the premises used as a home. Moreover, it is effective only against debts that have been incurred by a person who factually is the head of a family. In keeping with its basic philosophy, it is not affected by the death of the head of the family; it continues for the benefit of the widow and minor children. In point of fact, in some states the wife and minor children may have indefeasible property interests in the homestead. The husband may not be able to make an *inter vivos* conveyance of the home without the wife's consent; and on his death the homestead may be claimed as an "estate" by the widow and perhaps by the children. And this homestead legislation has still another facet: it may effect an exemption from property taxation.<sup>35</sup>

To the extent that the homesteader cannot devise the home away from the family the homestead protection is a valuable adjunct to the statutory share. But homestead does not play a large part in the total scheme of protection against disin-

<sup>33</sup> The relevance of the federal estate tax to our problem is discussed, *infra*, pp. 276-278.

<sup>34</sup> Chattel exemption laws antedate homestead legislation. Comment, 46 *YALE L. J.* 1023, 1024 (1937).

<sup>35</sup> Crosby and Miller, "Our Legal Chameleon, the Florida Homestead Exemption: 1-111," 2 *U. FLA. L. REV.* 12 (1949).

heritance of the surviving family. Many testators do not own a home: most urban families live in rental property. And some of the homestead provisions afford immunity only up to a designated monetary value, which may be quite low — as *e.g.*, \$1,000.<sup>36</sup> Further, the husband may defeat the homestead protection by abandoning the homestead in his lifetime.

(b) *Family Allowances.* Family allowance legislation,<sup>37</sup> sometimes referred to as the widow's allowance or the year's support, constitutes another important supplement to the statutory share. The family allowance provides temporary maintenance for the surviving family, pending distribution of the decedent's assets. But for this protection the delay entailed in probate and administration may operate as a real hardship to the needy family. By express wording or by implication, the protection usually is restricted to the surviving spouse<sup>38</sup> and children. Generally it is restricted to personalty, up to a prescribed limit. Specified articles, *e.g.*, clothing and furniture, may also be awarded. A few states exclude from the estate assets a certain amount of money or other property and award it outright to the widow. The amount of the family allowance usually is free of claims of the creditors of the deceased spouse. In the absence of a controlling provision in the statute, the allowance, being considered an administrative expense, is generally held not to be deductible from the widow's distributive share, and may be taken regardless of the terms of the will. But, ironically, the courts have been inclined to uphold a provision in the will that would prevent the widow from taking both the allowance and a share in the will. The rationale here appears to be that the share in the will is in the nature of a windfall, hence the testator is at liberty to attach a restrictive condition to the legacy.<sup>39</sup>

<sup>36</sup> 3 Vernier, AMERICAN FAMILY LAWS 628-34, 638-63 (1935).

<sup>37</sup> 4 P-H WILLS, EST., & TRUST SERV. ¶2734.

<sup>38</sup> In some states only the widow.

<sup>39</sup> *Contra*, Andros v. Flournoy, 22 N.M. 582, 166 Pac. 1173 (1917); see Annots. 4 A.L.R. 387 (1917); 140 A.L.R. 1220 (1942).

Normally the amount awarded will vary with the size of the estate, the size of the family, and its former standard of living. Frequently a top limit is prescribed.<sup>40</sup> But even where no monetary limit is fixed the amount awarded will be limited judicially to reasonable support for a brief period. To summarize, the family-allowance protection is limited in amount and temporary in nature.

An exception to the usual restrictions is found in Maine. The Maine legislation<sup>41</sup> seems innocuous enough, except that no top limit is prescribed and the widow may be granted, on "final probate" of the will, a "final reasonable allowance from the personal estate, according to the degree and estate of her husband and the state of the family under her care."<sup>42</sup> On occasion, this legislation has been administered quite liberally. In one case an award of \$75,000, on complaint by one of the heirs as being excessive, was increased to \$85,000. The husband's estate was in the neighborhood of "five to six hundred thousand dollars."<sup>43</sup> The widow, significantly, had been the second wife. Her dower was "normal," and the share given her in the will "was disproportionately inade-

<sup>40</sup> *E.g.*, in Florida the limit is \$4200. Fla. Stat. §733.20(1)(d)(i)(1957).

<sup>41</sup> Me. Rev. Stat. Ann. Chap. 156, §§14-19 (1954).

<sup>42</sup> *Id.* at §16.

<sup>43</sup> *Gilman v. Gilman*, 53 Me. 184 (1865). The court stated:

"All the attendant and accompanying circumstances are to be considered,—the ages of the husband and wife,—the length of their cohabitation,—whether a first or second marriage,—the number of children of each and of both,—that is, by former marriages or by their joint union,—the wealth of the husband,—the estate of the wife in her own right,—any antinuptial [*sic*] agreements,—their performance or non-performance,—the treatment of each to the other,—the health, place of residence and necessary expenditures of the wife,—the family under her charge and whatever other circumstances may address themselves to a sound judicial discretion, and may enable the Court to approximate as nearly as possible to exact justice to all whose interests may be involved in its judgment. . . . No rule can be established in advance as to the relative weight of any particular fact, for it cannot be foreknown how far it may be modified by the other facts with which it is indissolubly connected."

For later proceedings, see 54 Me. 537 (1867).

quate." The court stated, however, that the allowance could be made "without infringing on the rights of others."<sup>44</sup> This phrase hints at solicitude for beneficiaries of the will as a potential restriction on the allowance. A recent case has emphasized that the allowance need not be restricted to "provision for needs that are temporary and immediate as such as are presently foreseeable" and that "an allowance is available to provide means for a widow additional to what she would receive as her distributive share."<sup>45</sup> In general, however, the Maine legislation has been administered in a conservative fashion.<sup>46</sup> It is more akin to the standard American family-allowance statute than to the "family maintenance" legislation of the British Commonwealth.<sup>47</sup>

(c) *Legislation Restricting Testamentary Gifts to Charity.*

Found in about one quarter of the American states, legislation of this type operates as a form of family protection. The statutes either limit the amount of the estate that can be transferred, or invalidate the bequest if the will was made in too close a proximity to death.<sup>48</sup> The purpose is to protect the surviving family, not to discriminate against charities. A common provision is that the statute does not apply unless designated close relatives survive. In fact, in the absence of a statutory directive, it is probable that the gift would stand even if the close relatives do survive, provided they do not

<sup>44</sup> 53 Me. 184, 194 (1865).

<sup>45</sup> Perkins et al., Appellants, 141 Me. 137, 141, 39 A.2d 855, 857 (1944). In this case the widow in addition to her intestate share received an allowance of \$2000 out of an estate of approximately \$8000. No children survived. The award was sustained over the protests of the husband's parents, who had urged that the award should be reduced because the widow was self-supporting. *But cf.* Helt v. Ward, 128 Me. 191, 146 Atl. 439 (1929). In general, see Hussey v. Titcomb, 127 Me. 423, 144 Atl. 218 (1929); Walker v. Walker, 83 Me. 17, 21 Atl. 176 (1890); Dunn v. Kelley, 69 Me. 145 (1879); Kersey v. Bailey, 52 Me. 198 (1863); Cooper, Petitioner, 194 Me. 260 (1841).

<sup>46</sup> Note, 53 HARV. L. REV. 465 (1940).

<sup>47</sup> "Decedent's family maintenance" legislation differs from the American family allowance legislation both in scope and in function. See Chap. 21, *infra*.

<sup>48</sup> Atkinson, WILLS §35 (2nd ed. 1953); Bordwell, "The Statute Law of Wills," 14 IOWA L. REV. 1, 196 (1929).

object to the gift.<sup>49</sup> But the protection is of a doubtful efficacy. These statutes may be evaded even more easily than the statutory share legislation. Evasive devices that have been sanctioned include inter vivos trusts<sup>50</sup> and testamentary gifts to an individual who has a moral obligation to give to the charity.<sup>51</sup> On the other hand, these evasions are perhaps not so reprehensible as are evasions of the statutory share. The donee in the statutory share cases may or may not be a deserving person; but gifts to charities accomplish a worthwhile purpose: they help to alleviate want and ignorance, and they ease the tax burden.

(d) *Lapse*. A mild degree of family protection is afforded by anti-lapse statutes, which may be found in most American jurisdictions. These statutes prevent a lapse when the legatee or devisee, being a child or other issue of the testator, predeceases him and leaves issue. But the surviving spouse has been held to be excluded even under a statute which refers to "relatives"; and, in any event, the statutes do not come into play if a "contrary intent" is expressed in the will.<sup>52</sup>

(e) *Revocation by Operation of Law*. At common law a man's will was revoked "by operation of law" if followed by marriage and birth of a child. This rule is still in effect in many American jurisdictions; and there is a legislative tendency to declare that marriage alone is sufficient to effect a revocation.<sup>53</sup> The protection is more apparent than real. If the husband's goal is disinheritance, we have seen that the widow is vulnerable to her husband's inter vivos transfers; and, as for the children, they are not even adequately protected against testamentary transfers.

<sup>49</sup> See, e.g., *Taylor v. Payne*, 154 Fla. 359, 17 So.2d 615 (1944); also see Annot., 154 A.L.R. 677 (1945).

<sup>50</sup> *Cleveland Trust Co. v. White*, 134 Ohio St. 1, 15 N.E.2d 627 (1938); see Annot., 118 A.L.R. 475 (1939); also see *President of Bowdoin College v. Merritt*, 75 Fed. 480 (C.C.N.D. Cal. 1896).

<sup>51</sup> *Bickley's Estate*, 270 Pa. 101, 113 Atl. 68 (1921); see Leaphart, "The Use, as Distinct from the Trust, a Factor in the Law Today," 79 U. PA. L. REV. 253 (1931); note, 16 KY. L. REV. 333.

<sup>52</sup> Mechem, "Some Problems Arising under Anti-Lapse Statutes," 19 IOWA L. REV. 1 (1933).

<sup>53</sup> Atkinson, WILLS §85 and references cited therein.

(f) *Statutory Protection to Children.*<sup>54</sup> In most American jurisdictions a child may be completely disinherited if the will shows sufficient evidence of that intent. It is only when the disinheritance is unintentional that many states have legislation giving the child the share that he or she would take on intestacy.<sup>55</sup> This callous indifference of the American legislatures to the welfare of children contrasts sharply with the solicitude shown in the civil law "reserved portion," in the United Kingdom and Commonwealth decedent's family maintenance legislation, and in the ancient custom of London. There would appear to be as much if not a greater need for protection of the minor children as of the surviving spouse. Possibly the omission is based on the supposition that the surviving spouse will provide for the children. Normally this assumption will be correct; but what if no parent survives?<sup>56</sup> To be sure, some few states permit the county, in civil suit, to recover for the child's support from the estate and distributees; and most jurisdictions provide some relief in small estates either by way of the infrequent legislation that awards the widow and minor children the entire estate under a certain sum, or by the common provision for exempt housing or chattels, and by allowances pending distribution.<sup>57</sup> Indirect restraints on disinheritance may also be found in the legislation invalidating testamentary gifts to charities; in the threat of an unnatural will being invalidated for lack of testamentary capacity or for undue influence; in the advice of the testator's attorney; and in the censure of the community. The absence of concerted pressure for remedial legislation possibly suggests that most parents are solicitous of their children's welfare. But the fact remains: the American

<sup>54</sup> "Our law does not prevent a father from disinheriting his child: a circumstance which has been invaluable to our dramatists. . . ." A'Beckett, *COMIC BLACKSTONE* 98 (2d ed. 1887).

<sup>55</sup> Atkinson, *WILLS* §36 and the literature therein cited.

<sup>56</sup> This situation was anticipated by the Florida legislature in 1949. See Fla. Stat. §733.20(1)(j) (1957) (court may award support up to age 18, limited by the amount of intestate share); note, 3 *U. FLA. L. REV.* 232 (1950).

<sup>57</sup> Note, 53 *HARV. L. REV.* 465, 470-71 (1940).

legislation, for one reason or another, permits disinheritance of minor children.

### 5. SUMMARY

It seems clear that the various controls that we have discussed cannot and do not purport to perform the same function as the statutory share. It seems clear also that the statutory share itself is not doing a good job. In fact, the entire legislation in this field needs revision. The public policy is admirable: homesteads, family allowances, the statutory share, all evince the traditional American sentiment in favor of preservation of the home. But its benevolence is uncoordinated. It is doubtful if the American community is using the best legislative formulas. The older devices (dower, homestead) are of limited efficiency, being geared to real estate. The flexible protection (family allowance) is, in general, temporary, inadequate; and the main protection (the statutory share) is so inflexible that it incites evasion.