CHAPTER 3

Basic Policy Considerations: The Cost of Restraints on Disinheritance

1. INTRODUCTORY REMARKS

We have seen that *effective* restraints on disinheritance necessitate interference with both the power of testation and the power to make inter vivos transfers. How important to the community is the decedent's liberty of property transfer and the donee's security of title?

From generation to generation there is a continual transmission of wealth. Wealth commands most material things: power, position, security. And it is in the nature of man to transmit the tokens of wealth to the next generation. Nowadays these tokens are manifold; and the choice of token is dictated by personal convenience, or by expectation of maximum yield. But human nature is unchanged. Wealth is still coveted, used for the same personal ends, and then handed to the next generation. Under our modern capitalistic economy it has long been considered that there should be unfettered transmission of all types of property, whether land, tangible personalty, or choses in action. This freedom applies to transfers for consideration and to gifts. Transfers for consideration, the life blood of trade, concern us here only indirectly. As a general rule a transfer for consideration implies a fair exchange, so that in theory the widow is not injured, property-wise. Widows, of course, can reach this type of transfer if they are entitled to inchoate dower; and there probably will always be litigation over the adequacy of the consideration that has been paid to take a transfer out of the gift category. But our chief concern is with the gratuitous transaction, whether by way of will, intestacy, gift *causa mortis,* or by one of the many forms of inter vivos transfer.

The community derives a variety of benefits from liberty of property transfer.[1] It expresses a basic democratic notion of freedom of individual action; otherwise there would be an unhappy citizenry. It stimulates exertion by donors; this provides an accumulation of investment capital which is necessary for productive enterprise. Basically the motives of the donors coincide with the welfare of the community. The average husband desires the economic well-being of his wife and children. Likewise with charitable contributions: these gifts help the community as they reduce the amount of public funds that otherwise would be needed for a healthy body politic.

In brief, freedom to transmit wealth is a desirable community policy. It contributes to the happiness of the citizen and helps to increase the total economic product of the state. But it is obvious that community welfare requires some restriction on liberty of property transmission. The claim of the surviving family is but one example.[2]

2. Freedom of Testation [3]

It is sometimes stated that man has a natural right to freedom of testation, and that it is an inevitable concomitant

[1] The literature on theories of inheritance may be found in Cahn, "Restraints on Disinheritance," 85 U. Pa. L. Rev. 139, 145, note 19 (1936), and in McDougal and Haber, Property, Wealth, Land 324 (1948).

[2] Other claims include:

(a) Taxation of testamentary and inter vivos transfers, ostensibly for revenue, but also as a means of promoting social harmony by prevention of undue concentration of wealth. See pp. 276–278 *infra*.

(b) Protection of creditors' rights.

(c) Control of property by the living, as a curb on the "dead hand" and to ensure that wealth remains in reasonable circulation: rule against perpetuities, rules against suspension or prohibition of the power of alienation, rule against prolonged indestructibility of trusts.

[3] At the outset we must distinguish between testation and inheritance. Absolute freedom of testation (or, as it is sometimes called, of bequest) implies the unhampered discretion in a property owner to dispose of his property at death. Inheritance, though technically limited to in-

of democracy, of capitalism, of western civilization. There is a subtle attractiveness to a generality of this sort. Seeming a plausible one, it may beguile the gullible.

The fact is that over the centuries freedom of testation has been the exception rather than the rule. To begin with, in primitive times there was little transmission of wealth, either at death or inter vivos.[4] Inheritance can be of no significance when all the wealth is owned by the group or clan or tribe. The group never dies. To be sure, the personal trinkets, utensils, or weapons belong in a sense to the individual, and in many cases go with him to the grave, but the herd and the land are owned by the group. The need and urge for transmission of wealth comes only with the emergence of private property and degrees of kinship. Regulation of transfers at death becomes a social necessity. Rules must be prescribed, if only to prevent family squabbles and internecine warfare; and assurance must be given to creditors that debts will be paid. But it is significant that the rules of intestacy precede the creation of the modern will.[5] The will is not a universal institution in the early legal systems; it emerges late in the history of the law of succession.

Eventually we have stirrings of discontent with the rules of intestacy. Forerunners of the modern will appear: the

testate succession, may be described generally as the receipt of a decedent's property, either under intestate distribution or in accordance with the will. The continental legitim is an example of an absolute "right" of inheritance. Restrictions on inheritance are uncommon. Favored by Bentham, they were also used temporarily in the early communist regime in Russia. Holman, "The Law of Succession in Soviet Jurisprudence, A Survey," 21 IOWA L. REV. 487 (1936). For the literature on proposals to limit the right of collateral succession, see Cavers, "Change in the American Family and the 'Laughing Heir,'" 20 IOWA L. REV. 203, 204, note 2 (1935). For restrictions on aliens in the United States, see Atkinson, WILLS 93–95 (2d ed. 1953).

[4] Noyes, THE INSTITUTION OF PROPERTY 550, 551 (1936); Beaglehole, "Ownership and Inheritance in an American Indian Tribe," 20 IOWA L. REV. 304 (1935); Cairns, "The Explanatory Process in the Field of Inheritance," 20 IOWA L. REV. 266 (1935).

[5] For the literature on the history of the English law of intestacy, see GROSS, "The Medieval Law of Intestacy," in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 723, 724, note 1 (1909).

post-obit gift, the early form of irrevocable *donationis mortis causa,* adoption, and the plebian mancipatory will. These devices are not sharply differentiated; in many cases they blend, the one into the other. And it is of interest that when the will does come, it is frequently the result of factors unrelated to succession to property. For example, superstition may play a part, among the lettered and the unlettered. The wishes of the dead may be respected as the command of a spirit that, if provoked, may do evil. It is generally assumed that the Roman will had a religious origin.[6] And in sixteenth-century England, when the will of realty was finally permitted, the motivation, in part at least, was social: [7] feudal insistence on dominance of the male heir was no longer in keeping with contemporary family notions.

Indeed, it is probable that through the centuries freedom of testation has been used more as an instrument of family protection than as a weapon of disinheritance.[8] Maine pointed out long ago that in Roman law "it would rather seem as if the Testamentary Power were chiefly valued for the assistance it gave in *making provision* for a Family, and in dividing the inheritance more evenly and fairly than the Law of Intestate Succession would have divided it." [9] We encounter the same phenomenon in modern continental law.

[6] McMurray, "Liberty of Testation and Some Modern Limitations Thereon," 14 ILL. L. REV. 96, 102 (1919).

[7] The preamble to the Statute of Wills, 32 Hen. VIII, Chap. 1, states that for lack of a will of realty Englishmen "cannot . . . conveniently keep and maintain their hospitalities and families, nor the good education and bringing up of their lawful generations, which in this realm (laud be to God) is in all parts very great and abundant, . . ." and that personalty is insufficient "to discharge their debts, and after their degree set forth, to advance their children and posterity. . . ."

Statute of Wills, 32 Hen. VIII, Chap. 1. For the text of the statute, see Reppy and Tompkins, HISTORY AND STATUTORY BACKGROUND OF THE LAW OF WILLS 188–190 (1928).

[8] *Cf.* Brissaud, A HISTORY OF FRENCH PRIVATE LAW 621–22 (1912), 3 Cont. Legal History Series.

[9] Maine, ANCIENT LAW 233 (1912 ed.). On the significance of an increase in the proportion of wills in any locality, see Powell and Looker, "Decedents' Estates, Illumination from Probate and Tax Records," 30 COLUM. L. REV. 919, 927 note 15 (a) (1930).

We are told that there are comparatively few wills in France, even in connection with the disposable portion. "The small proportion of Frenchmen who make wills," say Amos and Walton, "is perhaps an indication that the legal rules of succession are considered satisfactory." [10] And Unger [11] has recently suggested three examples of this thesis in the history of English succession law: (a) the custom of London [12] and (b) the Statute of Wills in 1540 (both of which aimed at providing more family protection than was afforded under existing rules of intestacy); and (c) the new system of intestate succession established in the Administration of Estates Act, 1925, which is stated to have been based on an investigation of a large number of English wills.[13]

To conclude, there can be no quarrel with the partial restraint on testation that is found in the statutory share. But it should be more flexible, more sensitive to individual need. In some instances the designated fraction may be too small, as, *e.g.,* when the particular widow needs *all* of the estate. In other instances the fraction may be far too liberal.

3. Freedom to Make (and to Retain) Inter Vivos Gifts

Restraints on a husband's power to make gratuitous inter vivos transfers necessarily inconvenience the husband himself, the donee, and any transferee [14] from the donee. As far as the community is concerned, the inconvenience to the husband is of no moment if the widow's claim is meritorious. But regardless of the merits of the widow's claim the inconvenience to the donee may be a serious matter, both to the donee and to society. True, the donee is a volunteer; but a volunteer may in some circumstances suffer a real hardship

[10] Amos and Walton, Introduction to French Law 338 (1935).

[11] Unger, "The Inheritance Act and the Family," 6 Mod. L. Rev. 215 (1943).

[12] See *infra,* Chap. 5.

[13] Unger, *supra* note 11, at 222.

[14] In §1(e) of the suggested model statute, Chap. 22 *infra,* "transferee" includes the original transferee (donee) and "any immediate or remote" taker therefrom who does not pay value.

if the donated property is taken away from him. And the mere existence of the widow's potential claim entails certain consequences that are harmful to the community. It casts an unsettling cloud on the subject-matter of the gift — hampering its productive use, discouraging improvements, and restricting its marketability.[15] When the donee finds a buyer, the buyer may have *his* worries. Did he pay "value," for instance; otherwise he is not a purchaser for value without notice.

The uncertainty affects each of the three parties. The husband wants to plan his estate with assurance that his wishes will be carried out; and the donee and his transferee are entitled to a reasonable security of title. The uncertainty may not cause a "flight of capital" [16] into another jurisdiction that has a more predictable if not a more equitable rule; neither can we say that the legal profession will suffer; but one thing seems clear — tension between the widow and the transferees is all but inevitable. Nor can the uncertainty be eliminated merely by clarification of the law. No one can predict with complete assurance that any particular wife will survive her husband, undivorced.

Being human, any donee eventually tends to depend upon the economic or other advantages occasioned by the gift. The greater the dependence, the greater the injury if he is suddenly bereft of his benefits. And, as a general rule, we may also state that the larger the time-lapse between the date of the transfer and the date of the husband's death, the greater the infringement on the donee's legitimate "reliance interest" when he is called upon to return the subject matter to the widow. The "reliance interest" is also stronger where the donee had some moral or other claim on the husband's bounty.

The strength or degree of the donee's "reliance interest" will also depend on the type of transfer employed by the

[15] *Cf.* 6 AMERICAN LAW OF PROPERTY §26.3 (1952).
[16] See p. 87, *infra*.

decedent. Generally speaking, a "reliance interest" based on mere lapse of time would be negligible when the property was received only at the husband's death, as, for example, in a gift *causa mortis,* or by way of life insurance. Inter vivos gifts made sometime before death are in a different category. Similarly, the donee who has been receiving the income from the property during the decedent's lifetime is more likely to be hurt than a donee whose interest commenced only at the decedent's death. And the "reliance interest" will normally be higher with respect to an irrevocable trust than with respect to a revocable trust.

To recapitulate, restraints on a husband's inter vivos transfers adversely affect the community's interest in the donee's security of title. The harm to the particular donee depends on the extent of his "reliance interest." This interest varies with the donee. It is affected by a number of factors, including lapse of time and the type of transfer.