

## Basic Policy Considerations: Conclusion

The discussion in the preceding chapters has indicated that societal concern for the surviving family justifies complete restraint, if necessary, on freedom of testation, and some restraint on freedom of inter vivos alienation. We have seen also that restraints on inter vivos transfers involve substantial inconvenience to the community. This means that restraints on inter vivos transfers should be tolerated only when the surviving family is in need and its claim is meritorious<sup>1</sup> and only after due regard has been paid to the reliance interest of the donee and his transferee. In other words, there must be a compromise of these conflicting interests, engineered by flexible judicial controls. I believe that the compromise can best be made by legislation that embodies three related principles, set out here in broad outline.<sup>2</sup>

First, the restraint on freedom of testation should be restricted to alleviation of demonstrated need during widowhood and during the minority or period of dependence of children. The equity courts should have discretion to determine the amount necessary for reasonable support<sup>3</sup> of each applicant, and to fix the mode of payment. As soon as this principle is given legislative sanction part of the evasion problem will disappear. No longer will a husband be forced to make inter vivos transfers in order to prevent an unworthy widow from taking an automatic statutory share. Moreover, reasonable advancements to children will be im-

<sup>1</sup> A widow, for example, may be in need but nevertheless be "unworthy"; see *infra*, Chap. 21, text at note 12.

<sup>2</sup> Certain points, marked by footnotes, are explained in detail in succeeding chapters in conjunction with the case study. The principles under discussion are given formal expression in the suggested model statute, *infra*, Chap. 22.

<sup>3</sup> Chap. 21, *passim*.

mune from attack, regardless of the type of inter vivos transfer that was involved. Evasion litigation will be restricted to cases where the equities are in doubt, or clearly in the petitioner's favor.

Second, the courts should be given discretion to require contribution from any inter vivos transferee, and to apportion the amounts payable by the several transferees. If protection against evasion is to be effective, all types of inter vivos "transfer" must be affected.<sup>4</sup> No given type of transfer should be made immune by statute merely because it is a type of transfer that normally induces a strong reliance interest. Inter vivos gifts and irrevocable inter vivos trusts, for example, must be affected by the statute; otherwise a husband could transmit an unreasonably large portion of his assets by arrangements of this sort.

Third, care must be taken to safeguard the community interest in security of title, as well as the reliance interest of the individual donee. Complete protection is of course impossible, but the following provisions would remove much of the uncertainty:

(a) No donee should be liable for contribution unless his "gift" was unreasonably large,<sup>5</sup> under the circumstances prevailing at the time of the transfer. The most important circumstances would, of course, be the relative size of the gift and the purpose of the gift. Under this test, for example, an advancement to support a child of a prior marriage would in most instances be immune from attack. The petitioner should have the burden of proving that the transfer was unreasonably large.

(b) The petitioner should be barred from a claim for contribution from a particular donee if she signed a waiver<sup>6</sup> in his favor, with or without compensation.

<sup>4</sup> *But cf.* Simes, PUBLIC POLICY AND THE DEAD HAND 30 (1955). See Chaps. 12-16, *infra*, for the application of this principle to the individual dispositive devices.

<sup>5</sup> See Chaps. 10-11, *infra*, *passim*; also see Chap. 22, *infra*, *passim*.

<sup>6</sup> See the suggested model statute, Chap. 22, §17(b), *infra*.

(c) Claims for contribution from a donee should be subject to cut-off provisions <sup>7</sup> that bear some relation to the "reliance interest." For example, a revocable trust made more than three years before the decedent's death should entail liability for contribution, whereas suits with respect to an inter vivos gift made before that time probably should not be permitted.

For convenience in expression I shall refer to these general principles as the "maintenance and contribution" formula. I believe that this formula expresses the ideal reconciliation of adequate family protection with the "reliance interest" of the donee. Accordingly, it will be used in Part Three as the criterion for judging the work of the American courts in the evasion cases. The need for corrective legislation is less urgent if the courts, despite the lack of legislative directive, are in substance espousing the principles implicit in our formula.

<sup>7</sup> *Id.* §8.