#L-604 2/17/82

Memorandum 82-16

Subject: Study L-604 - Probate Law (Family Maintenance Legislation and Pretermission)

Introduction

It has been said that there is an inconsistency in the law which requires a parent during lifetime to support his or her children but permits the parent to leave the children penniless at death. See Haskell, The Power of Disinheritance: Proposal For Reform, 52 Geo. L.J. 499, 500 (1964). The failure of American law to prevent a testator from disinheriting his or her children has been called its "most serious shortcoming" in the field of testamentary succession. Laufer, Flexible Restraints on Testamentary Freedom--A Report on Decedents' Family Maintenance Legislation, 69 Harv. L. Rev. 277, 308 (1955) (Exhibit 1). As a result, there is a considerable and growing body of opinion urging adoption of family maintenance legislation to permit a long-term support award out of the decedent's estate for the decedent's dependent children. See, e.g., Niles, Probate Reform in California, 31 Hastings L.J. 185, 198-99 (1979); Laufer, supra. This memorandum recommends the adoption of such legislation in California in place of the existing pretermission statutes. Family maintenance legislation is discussed first, followed by a discussion of pretermission. Attached to this memorandum are the following exhibits:

(1) An article describing family maintenance legislation and presenting policy arguments in favor of it: Laufer, supra (Exhibit 1).

(2) The New Zealand Family Protection Act 1955 (Exhibit 2).

(3) The limited family maintenance act proposed (but not enacted) in New York (Exhibit 3).

(4) The California pretermission statutes: Probate Code Sections 90-91 (Exhibit 4).

(5) The UPC pretermission section: UPC § 2-302 (Exhibit 5).

Family Maintenance Legislation

In California, as in all other states except Louisiana, a testator may disinherit his or her children by willing the property to others. See 7 B. Witkin, Summary of California Law Wills and Probate § 5, at 5524 (8th ed. 1974); T. Atkinson, Handbook of the Law of Wills § 36, at

138 (2d ed. 1953). This power is qualified by statutory provisions for probate homestead, family allowance, small estate set-aside, and exempt property (see Memo 82-17), and for pretermission, although these provisions furnish an incomplete solution to the problem of disinheritance.

The probate homestead provisions protect only minor children, not disabled or incompetent adult children, and provide a dwelling but not support. See Prob. Code § 661. The family allowance is of limited duration--it must terminate when the estate is distributed. See Prob. Code § 680. (A child support order made during the decedent's lifetime, however, is enforceable against the decedent's estate, and may be collected in a lump sum sufficient to cover the aggregate of future monthly payments to the child's majority. See, e.g., Taylor v. George, 34 Cal.2d 552, 212 P.2d 505 (1949); Stein v. Hubbard, 25 Cal. App.3d 603, 102 Cal. Rptr. 303 (1972).) The pretermission statute awards an intestate share to a child not provided for or mentioned in the parent's will, but the parent may negate this by express words of disinheritance. See Prob. Code § 90; 7 B. Witkin, supra. Family maintenance legislation would afford more adequate protection for the disinherited dependent child.

The pioneer family maintenance act was adopted in New Zealand in 1900. Since then, such legislation has been enacted in 14 other common-law jurisdictions, including all Australian jurisdictions, five Canadian provinces, and England. Laufer, supra at 284. The New Zealand legislation is now embodied in the Family Protection Act 1955 (Exhibit 2).

The principal features of the New Zealand Act are the following:

(1) The court has broad discretion: The court may "order that such provision as the Court thinks fit shall be made out of the estate" for eligible family members of the decedent, including periodic payments, a lump-sum payment directly to the family member or into a trust fund, or some other payment scheme, whether the decedent dies testate or intestate.

(2) The court's order is conditioned on there not being "adequate provision" for the "proper maintenance and support" of eligible family members under the decedent's will or under the intestate succession statutes.

(3) Eligible family members are the decedent's spouse, children (including illegitimate children), grandchildren (if the parent through whom the grandchild is related to the decedent is dead, has deserted or

failed to maintain the grandchild, is missing, is an undischarged bankrupt, or is mentally defective), stepchildren who were being maintained or were entitled to be maintained by the decedent, and parents (but only where either the parent was being maintained or was entitled to be maintained by the decedent, or the decedent left neither a surviving spouse nor a legitimate child).

(4) The court may decline to make an order "in favour of any person whose character or conduct is or has been such as in the opinion of the Court to disentitle him to the benefit of such an order."

(5) In making its order, the court may consider the decedent's reasons for making or not making provision for any person.

(6) The court may attach conditions to and may modify its order.

For additional details of the New Zealand legislative scheme, see the act itself (Exhibit 2) and the excellent discussion in the Laufer article (Exhibit 1).

Experience under family maintenance legislation in the many British Commonwealth jurisdictions that have enacted it has been generally favorable. See Laufer, supra at 284-94, 312. Although no American jurisdiction has yet enacted such legislation, the courts of Maine have apparently construed Maine's temporary family allowance statute to authorize permanent maintenance for the widow out of a decedent's personal estate. See Laufer, supra at 281.

In 1966, the Bennett Commission in New York recommended a scaled-down version of the New Zealand statute to provide only for a minor child or a disabled adult child of the decedent, and further provided that the act did not apply in the ordinary case where the decedent has left substantially all of the estate to the surviving spouse who is also the child's parent. (See Exhibit 3.) Under the New York proposal, the family maintenance act would have replaced the pretermission statute for wills executed after the operative date of the act. This modest proposal failed to pass the New York Legislature.

Professor Niles has recommended that California adopt a limited family maintenance act similar to that proposed in New York, limited to natural or adopted children of the decedent and not including the decedent's spouse, stepchildren, parents, or grandchildren. See Niles, supra at 200, 217. See also C. Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity 137-38

(July 29, 1981) (unpublished study on file with California Law Revision Commission). Professor Niles prefers to give the decedent's surviving spouse a nonbarrable share of the decedent's separate property (see Memorandum 82-15) rather than to include the spouse within a family maintenance act. See Niles, supra at 216-17. It is Professor Niles' view and the view of a number of his colleagues that, with respect to the surviving spouse, a family maintenance act gives the court too much discretion to upset the testator's estate plan.

The Niles view is supported by Professor Haskell, who argues that need should not necessarily be the exclusive criterion for judging the spouse's claim, that most states have a fixed share for the spouse, and that the fixed share system has the virtue of certainty and predictability. Professor Haskell argues that although the fixed share system may on occasion produce awkward results, it should not be assumed that a flexible system will produce just results in every case. Haskell, supra at 525-26.

Professor Laufer defends the contrary view that the flexible system is superior to the fixed share system for the spouse, because of the ease with which fixed share systems are avoided by inter vivos transfers, and because the fixed share system treats alike the "deserving and undeserving, rich and poor, old and young, strong and weak, burdened with small children or childless." Laufer, supra at 280 (Exhibit 1). Accord, C. Bruch, supra. California, of course, has a fixed share system by virtue of its community property system, which is relatively immune to defeat by inter vivos transfers, the only question being whether the surviving spouse should also be given a fixed share of the decedent's separate property. (See Memorandum 82-15.) For present purposes, however, the staff is proposing to limit its family maintenance recommendation to children, and not to include the spouse. If a limited family maintenance act is adopted in California, it may be that favorable experience under the act would commend the inclusion of the spouse at some future time.

Therefore, the staff recommends enactment in California of a limited family maintenance act, similar to the New York proposal set forth in Exhibit 3, to permit a long-term support award out of the decedent's estate for a dependent child. The act should replace the pretermission statute which is so easily defeated by the well-advised testator who

uses express words of disinheritance. Moreover, the family maintenance scheme permits a support order tailored to the needs of the children, while the pretermission statute is inelastic: It gives the omitted child an intestate share, which may be more or less than the child needs and may be larger or smaller than the share given by the testator's will to other children (probably larger in the usual case). See Mathews, Pretermitted Heirs: An Analysis of Statutes, 29 Colum. L. Rev. 748, 768 (1929); Sweet, Rights of a Pretermitted Heir in California Community Property--A Need for Clarification, 13 Stan L. Rev. 80, 88 (1960).

The family maintenance act should replace the pretermission statute for wills executed before the operative date as well as after, since the purpose of the act is to override the testator's intent to disinherit in order to effectuate important public policy.

Pretermission

Introduction. The following discussion is relevant only if a family maintenance act is not to be adopted in place of the pretermission statute. In such a case, California's pretermission statute should be improved by substituting a modified UPC provision.

Pretermission statutes generally provide an intestate share for a child of the testator omitted from the testator's will where it does not appear that the omission was intentional. See T. Atkinson, Handbook of the Law of Wills § 36, at 141-45 (2d ed. 1953). California has a broad pretermission statute which is much more favorable to the testator's omitted issue than is the UPC and the law in most other states. Niles, supra at 197. California law and the UPC differ in three important respects:

(1) Unlike California law, the UPC pretermission provision does not apply if the testator had at least one child when the will was made and willed substantially the whole estate to the other parent of an omitted child.

(2) California provides an intestate share for an omitted child living when the will was made, as well as for afterborn children. The UPC protects afterborn children as does California law, but protects a child living when the will was made only if the omission was solely because the testator mistakenly believed the child to be dead.

(3) California protects omitted issue of a deceased child of the testator; the UPC is limited to children of the testator.

Purpose of pretermission statute. The cases reveal some confusion over whether the purpose of the pretermission statute is to carry out the parent's presumed intent not to disinherit a child by protecting against the parent's forgetfulness, or is to thwart the parent's apparent intent to disinherit by requiring the parent to fulfill the social obligation to children. Compare In re Estate of Callaghan, 119 Cal. 571, 574, 51 P. 860 (1898), with Estate of Torregano, 54 Cal.2d 234, 248-49, 352 P.2d 505, 5 Cal. Rptr. 137 (1960). Presumably both policies underly the statute, and the statute must be judged from both perspectives.

Changes to succession laws will limit pretermission statute. The changes to intestate succession laws being recommended by the Commission will make the pretermission statute meaningless where the testator is married and all of the testator's children are of that marriage. This is because the pretermission statute gives the omitted child the share the child would have received had the testator died intestate. The Commission has tentatively decided to recommend that if a married person dies intestate and has no issue of some other union, all separate property as well as all community property goes to the surviving spouse. Thus in such a case the intestate share of a pretermitted child will be zero.

If the recommended changes to the intestate succession statutes become law, the pretermission statute will be meaningful only in the following cases:

(1) Where the testator was not married at death.

(2) Where the testator was married at death, left one or more children of another union, and had substantial separate property.

Whole estate devised to omitted child's other parent. The UPC provides nothing to an omitted afterborn child if the testator had one or more children when the will was made and devised substantially the whole estate to the other parent of the child. This provision is sound because it both carries out the testator's probable intent, and is not inconsistent with public policy. According to empirical evidence, the surviving parent who receives the decedent's property will provide for the child in the usual case. Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Foundation Research J. 319, 355. If the

child is a minor, to give the child an intestate share may require the cumbersome and expensive appointment of a guardian; in such a case, the child will be better protected and have more funds available if the child's parent receives the property. Id. at 356.

For these reasons, the staff recommends this aspect of the UPC pretermission provision over the California rule. The same reasoning supports a modification of the UPC provision to eliminate the requirement that, before the omitted child will be denied an intestate share where the whole estate goes to the child's parent, it must be shown that the testator had one or more children when the will was executed. Presumably the purpose of this requirement is to ensure that the testator thought about his or her children before deciding to leave the estate to the other parent. However, the fact that the property is going to the child's surviving parent would seem to be sufficient protection for the child, suggesting that the child should be denied an intestate share in such a case whether or not the testator had children at the time the will was made.

No protection for omitted child living when will was made. The California provision, which gives an intestate share to an omitted child who was living when the will was made, is intention-defeating in the usual case, since it is much more likely that the omission was deliberate than that it resulted from an oversight. See Evans, Should Pretermitted Issue Be Entitled to Inherit?, 31 Calif. L. Rev. 263, 265, 269 (1943); Niles, supra at 197. The UPC, by protecting an omitted child living when the will was executed only if the omission was solely because the testator believed the child to be dead, is more likely to carry out the testator's probable intent. Arguably, the California provision is justifiable from the standpoint of the public policy against disinheritance of children. However, the difficulty with this view is that it is so easily circumvented by the well-advised testator who includes express language of disinheritance in the will.

In its 1973 critique of the Uniform Probate Code, the State Bar found "considerable merit to the [UPC] proposal to eliminate the present California protection for the child that is alive at the time the will was executed." State Bar of California, The Uniform Probate Code: Analysis and Critique 34 (1973).

The staff recommends this aspect of the UPC pretermission section over the California rule. The staff would modify the UPC to incorporate a suggestion made by Professor Niles that the UPC could be improved by including protection for a child living when the will was made if the testator was unaware of the birth of the child. Niles, supra at 197. This is closely analogous to protecting a child the testator believed was dead.

No protection for omitted grandchildren. The California pretermission statute protects omitted "issue of any deceased child" of the testator. The UPC limits its protection to children of the testator. The staff finds the UPC rule preferable.

If the parent of the testator's grandchild (i.e., the testator's child) is living when the will is made, is a named beneficiary under the will, and dies before the testator, the anti-lapse statute will substitute the testator's grandchildren for their parent. In such a case, the anti-lapse statute takes precedence over the pretermission statute. In re Estate of Todd, 17 Cal. 2d 270, 276-77, 109 P.2d 913 (1941). The anti-lapse statute produces fairer results than the pretermission statute, since the anti-lapse statute gives the testator's grandchildren the share that was intended for their parent rather than taking property which the testator has expressly left to others as the pretermission statute does. See Evans, supra at 268.

If at the time the will is executed the testator's child has died leaving surviving children (i.e., the testator's grandchildren) and the latter are not mentioned in the will, the situation is the same as when the testator omits to mention a living child: It is reasonable to assume that the omission was intentional in the usual case. It would also seem that the public policy against disinheritance of issue is weaker in the case of grandchildren than in the case of children, since a grandparent ordinarily owes no duty of support to grandchildren. See 6 B. Witkin, Summary of California Law Parent and Child §§ 115-116, at 4636-37 (8th ed. 1974).

Both Professors Niles and Evans have suggested that grandchildren and more remote issue of the testator be eliminated from the protection of the pretermission statute. See Niles, supra at 197; Evans, supra at 269. The staff recommends the UPC provision which does not protect grandchildren in place of the California provision which does.

Conclusion

It is the staff's view that the California pretermission statute should be replaced by a limited family maintenance act. If, however, a family maintenance act is not to be adopted, the staff recommends that the California pretermission statute be replaced by the UPC pretermission provision, modified in the two respects described above.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

# FLEXIBLE RESTRAINTS ON TESTAMENTARY FREEDOM – A REPORT ON DECEDENTS' FAMILY MAINTENANCE LEGISLATION

*Joseph Laufer* *

FREEDOM of testation, once a hallmark of the common law, shares the contemporary fate of other more important liberties — it is in a state of decline. Over the past several decades, new, direct restraints on the testator's freedom have come into existence. One of the most interesting aspects of this development is that, unless present trends are reversed, American law on the one hand and the law of England and of many Commonwealth jurisdictions on the other will move forward along quite different lines. Broadly speaking, American jurisdictions have adopted rigid limitations, not unlike the legitim of the civil law,[1] while England and certain Commonwealth jurisdictions have preferred flexible restraints. While there appears to be general agreement that the state of the American law on the subject is unsatisfactory,[2] there are, in contrast, many indications that the scheme of flexible restraints is functioning well.[3] If the American law is to be improved, the latter approach may prove suggestive. Hence it is

* Director, Harvard Law School-Israel Cooperative Research for Israel's Legal Development. Research Associate in Law, Harvard Law School. LL.B., Duke, 1940; LL.M., Harvard, 1941.

[1] Most civil law countries assure the decedent's immediate family, above all his children, an indefeasible share in his estate. The nature of this share varies. Thus, for example, under the French Civil Code a testator may freely dispose of only a fraction of his property, the fraction varying with the number of surviving children. The share thus protected is a right in the property itself. CODE CIVIL art. 913–19 (54th ed., Dalloz 1955). In contrast, under German law the members of the decedent's immediate family have merely a claim against the beneficiaries of his will for payment of the portion reserved for them. BÜRGERLICHES GESETZBUCH §§ 2313–30 (12th ed., Palandt 1954). Louisiana, under French and Spanish influence, limits a testator's freedom to dispose of his assets by will or gift to two-thirds of his property or less, depending on the number of his children. See LA. CIV. CODE ANN. art. 1493 (Dart 1945).

[2] See, *e.g.*, Atkinson, *The Law of Succession*, in 1950 ANNUAL SURVEY OF AMERICAN LAW 674, 678–79 (1951); Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 144 (1936); LEACH, LAW OF WILLS 17–19 (2d ed. 1949).

[3] See, *e.g.*, WRIGHT, TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (1954); Campbell, *Family Law*, in 4 THE BRITISH COMMONWEALTH (NEW ZEALAND) 317, 335 (Robson ed. 1954).

the purpose of this article to examine, against the background of the American scene, some pertinent aspects of the legislative and judicial experience with flexible limitations on testamentary freedom.

## I. The American Statutes

The American trend toward a pattern of fixed limitations on testamentary freedom is of long standing. Many years after dower and curtesy had virtually disappeared from England and most of her dominions,[4] freedom of testation in the United States continued to be circumscribed by these institutions. Dower assured the widow a life estate in one-third of all lands of which her husband had been seised at any time during the marriage. Curtesy assured the widower (but only if issue of the marriage had been born alive) a life estate in all freehold property which his wife had owned at any time during the marriage.[5] For children, however, no protection against disinheritance existed. In the nineteenth century, dower and curtesy were supplemented by legislation, notably the homestead laws, which protected the surviving family in the enjoyment of the homestead; these laws, like dower and curtesy, were effective not only against the testator's will, but against his creditors as well.[6]

Ever since the end of the last century the importance of these institutions has been declining. With the transition from an agricultural to an industrial society, they proved useless to the ever-growing ranks of city dwellers who owned neither home nor land. Dower, moreover, became more and more irksome as the number of land transactions increased; a purchaser could not always be assured of the nonexistence of dower rights. As the use of the corporate device became more popular, the wife's dower rights were frequently frustrated by the holding of land in a corporate name. Finally, the priority of dower rights over claims against the estate — a most important aspect of the institution — came to be considered as unduly prejudicial to creditors.

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[4] The Dower Act of 1933, 3 & 4 Will. 4, c. 105, § 4, permitted the destruction of dower by deed and will; the Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 45, abolished dower and curtesy even in cases of intestacy. For the development in some of the Commonwealth jurisdictions, see notes 35, 40 *infra*.

[5] See 2 Powell, Real Property ¶¶ 212–19 (1950); 1 American Law of Property §§ 5.1, 5.57 (Casner ed. 1952).

[6] 1 *id.* §§ 5.75–.120.

Despite this declining effectiveness, a number of states, particularly those with strong agricultural interests, have refused to this day to abandon common-law dower or its statutory equivalent.[7] Most states, however, have made changes; their number and complexity defy concise statement.[8] Many jurisdictions sought to modernize the ancient rules by permitting the widow or widower to repudiate the decedent's will and to choose between a traditional or modified dower interest and a fixed portion of the entire estate. The inadequacies of the legislation which effected these half-hearted reforms have been described by competent observers in harsh terms.[9] A minority of jurisdictions broke with the past and replaced dower and curtesy with a system of forced heirship which assured the widow and often the widower the choice of an indefeasible share in the decedent's estate. This share is usually the equivalent of the intestate portion, sometimes limited to one-half of the estate. The systems of forced heirship in the several states vary greatly in detail. Unfortunately, they have not fulfilled the expectations of their advocates.[10]

The most obvious defect of these systems is one inherited from the past: their failure to protect the decedent's children. This discrimination is inconsistent with the letter and spirit of the homestead legislation and the almost universal scheme of temporary family allowances which equally protect the surviving spouse and children.[11] It is also in conflict with the practical effect, if not the

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[7] Professor Rheinstein explains this survival by the protection it affords against creditors. See RHEINSTEIN, THE LAW OF DECEDENTS' ESTATES 28–29, 67–68 (1955).

[8] For a recent summary and classification, see 2 POWELL, REAL PROPERTY ¶¶ 217–19 (1950).

[9] The most pronounced reaction . . . after having examined the statutes . . . is a feeling of disgust for the slipshod methods of lawmakers. Many statutes are practically incomprehensible without a knowledge of local practice and of the legislative and case history in the particular jurisdictions. The statutes are filled with ancient matter which, coupled with piecemeal innovations, forms an inconsistent, ambiguous hodge-podge. In no field is there more evidence of haphazard, fragmentary legislation; and in most jurisdictions, no field is more deserving of a complete renovation . . . .

3 VERNIER, AMERICAN FAMILY LAWS 346–47 (1935). See also 1 AMERICAN LAW OF PROPERTY § 5.5, at 633–34 (Casner ed. 1952).

[10] For recent summaries, see 2 POWELL, REAL PROPERTY ¶ 217 (1950); ATKINSON, WILLS 108–09 (2d ed. 1953); ABA MODEL PROBATE CODE, printed in SIMES & BASYE, PROBLEMS IN PROBATE LAW 5, 258–63 (1946). For a thoughtful critique, particularly of the New York statute, see Cahn, *supra* note 2, at 141–49. See also Note, 40 GEO. L.J. 109 (1951).

[11] Louisana law, however, grants children an indefeasible share in a deceased parent's estate. See LA. CIV. CODE ANN. art. 1493 (Dart 1945). On family allowances, see ATKINSON, WILLS 128–34 (2d ed. 1953).

spirit, of many of the "pretermitted children" statutes in force almost everywhere. These were intended to protect children against their parents' inadvertent failure to provide for them by will, usually by permitting them to take the equivalent of their intestate share. In practice, they often thwart a testator's deliberate attempt to disinherit his children.[12] Such discrimination is finally rejected by public opinion, which is manifested by the well-known readiness of trial courts and juries to view a testator's disregard of his children, who are considered as having "natural" claims on his bounty, as symptomatic of an unsound mind.[13]

Another major shortcoming of the provisions for forced shares is the ease with which they may be avoided. In contrast to dower and curtesy, which attach to all land which belonged to the decedent during the marriage, the size of forced shares is determined by the property which the decedent owned at the time of his death. This method leaves the decedent free to destroy or decrease the survivor's share by inter vivos gifts which reduce the assets of the estate. Moreover, the courts have gone far in sustaining against claims of survivors inter vivos trust arrangements under which a decedent transfers assets to a trustee but retains substantially all incidents of ownership; assets thus transferred are held to be effectively withdrawn from the estate. That statutes were enacted which admit of such easy avoidance has led one observer to doubt even the good faith of the legislatures, let alone their wisdom.[14]

Finally, it has been pointed out that the system of fixed shares applies a mathematical rule to what has been described as the "fictitious 'average' surviving spouse." [15] The statutes treat alike the "deserving and undeserving, rich and poor, old and young, strong and weak, burdened with small children or childless." [16]

A perceptive critic of the contemporary American statutes has sought to explain what he describes as their contradictions as resulting from a failure "to accept dependence as the gravamen of

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[12] See Matthews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748, 763, 767 (1929).

[13] See ATKINSON, WILLS 35, 139–40 (2d ed. 1953); Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 301–03 (1944). Conversely, the fact that a will provides adequately for the natural objects of the testator's bounty is often considered as strong evidence of testamentary capacity. See *id.* at 302.

[14] See LEACH, *op. cit. supra* note 2, at 19; *cf.* Cahn, *supra* note 2, at 150.

[15] ATKINSON, WILLS 679 (2d ed. 1953); see Cahn, *supra* note 2, at 147.

[16] ATKINSON, WILLS 679 (2d ed. 1953). For a similar criticism of the rigidity of the pretermitted children statutes, see Matthews, *supra* note 12, at 768–69.

inheritance. . . . dependence, which regards a man's estate as the continuation of his personality and the successor to his social obligations." [17] As we shall now see, it is principally this notion of dependence which underlies the system of flexible limitations.

## II. Flexible Restraints on Testamentary Freedom

The notion that a decedent's estate should above all be available to provide maintenance for those who were dependent on him during his life has been recognized by various legal systems. Thus the Talmud developed early an elaborate system of maintenance for the widow of a decedent and for his daughters, who, under Jewish law, do not take by intestate succession if sons survive.[18] In South Africa, where the British in 1874 abolished the system of the legitim which was part of the Roman-Dutch law,[19] the courts, drawing on Roman-Dutch sources, have come to recognize a claim of both legitimate and illegitimate minor children to maintenance out of their parents' estate.[20] American lawyers are, of course, familiar with the system of discretionary and temporary allowances for the widow and children of a decedent.[21] Since the early part of the last century, Maine courts have construed a statute providing for such allowances [22] to authorize permanent maintenance for the widow out of a decedent's personal estate.[23]

Although most civil-law countries protect a decedent's family

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[17] Cahn, *supra* note 2, at 145.

[18] See Horowitz, The Spirit of Jewish Law 389–92 (1953). Strongly influenced by this tradition, the draftsmen of the pending Israeli Succession Bill have adopted the maintenance principle as "the center of gravity" of their bill. A Succession Bill for Israel 93–107 (Harvard Law School transl. 1952); *id.* (Sept. 1953 Revision) 27–33 (Harvard Law School transl. 1954).

[19] The Succession Act, 1874, No. 23, 5 Sessions 1874–1878, at 57 (Cape of Good Hope).

[20] See, *e.g.*, *In re* Estate of Visser, [1948] 3 So. Afr. L.R. 1129. See also Meyerowitz, The Law and Practice of Administration of Estates 231–32 (2d ed. 1954). Surviving spouses are protected by the community property system. See Price, *Matrimonial Property Law in South Africa*, in Matrimonial Property Law 188, 207 (Friedmann ed. 1955).

[21] See generally Atkinson, Wills 128–34 (2d ed. 1953).

[22] Me. Laws 1821, c. 51, § 39 (now Me. Rev. Stat. Ann. c. 156, § 14 (1954)). The probate court may allow the widow "so much of the personal estate . . . [as it] deems necessary" where her husband died intestate, when his will failed to provide for her, if she waived its provisions, or finally, if the estate is insolvent.

[23] The decisions strongly resemble those under the New Zealand type of statute discussed pp. 282–84 *infra*. See especially Kersey v. Bailey, 52 Me. 198 (1863); Gilman v. Gilman, 53 Me. 184 (1865); Perkins, 141 Me. 137, 39 A.2d 855 (1944).

by the system of forced shares,[24] Mexico as early as 1884 adopted the maintenance principle. Under its present civil code, maintenance claims can be asserted in the case of testate succession, but the award may not exceed the dependent's intestate share nor be less than one half of it.[25] Under the Austrian Code of 1812, spouses are entitled not to a forced share but to adequate maintenance from the decedent's estate if their testate or intestate share and their own means are insufficient to provide it.[26] An heir who has been disinherited for cause may nevertheless claim necessary subsistence out of the estate. Swedish law provides for maintenance out of the estate for children under 21 who have not yet completed their education or are incapable of supporting themselves.[27] These claims may be asserted in the event of testate or intestate succession.

Notwithstanding these parallels in other laws, particularly in the law of Maine, flexible restraints on testamentary freedom in their modern form seem an independent creation of New Zealand's legislative genius. Its statute,[28] first enacted in 1900, remains the most comprehensive and uncompromising version of this approach.

In substance, it assures to a decedent's surviving family, above all his spouse and children, adequate maintenance whenever his will does not provide it. Maintenance may only be granted out of the net estate, *i.e.*, after all claims have been discharged. A dependent who claims that the will failed to make proper provision for him may apply to the court within twelve months of probate. Eligible dependents are not only the testator's spouse, child, or grandchild, but also his parents and his adopted and illegitimate children. Upon application the court will determine whether the testator has adequately provided for the dependent.

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[24] See Hallstein, *Pflichtteilsrecht*, in 5 RECHTSVERGLEICHENDES HANDWOERTERBUCH 622 (1936); McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 96, 110–13 (1919).

[25] NUEVO CODIGO CIVIL arts. 1368–77 (10th ed., Andrade 1952). Eligible are the decedent's descendants (including adopted and illegitimate children) and parents, his concubine, brothers and sisters, and other collaterals. *Id.* art. 1368. *Cf.* CODE CIVIL art. 205 (54th ed., Dalloz 1955) (France), which gives the surviving spouse in case of need a claim for maintenance from the estate.

[26] DAS ALLEGMEINE BÜRGERLICHE GESETZBUCH § 796 (5th ed., Kapfer 1951).

[27] Law concerning Intestate Succession of June 8, 1928, c. 8, §§ 1–9, printed in 10 DIE ZIVILGESETZE DER GEGENWART 122–123 (1939).

[28] The Family Protection Act, 1900, N.Z. STAT. 64 VICT. No. 20, as amended, N.Z. STAT. 11 GEO. 6, No. 60, § 15 (1947).

If it finds that he has not, it may in its discretion order that suitable provisions be made out of the estate, or it may refuse an order if it finds that the dependent's character or conduct "disentitles" him. It may order that provision shall be made in the form of periodic payments or in a lump sum. It may attach any conditions it deems fit to its order. It may provide that the incidence of the order shall fall ratably on the entire estate or it may exonerate certain portions, either completely or partially. Save where the dependent has been granted a lump sum, the court may later set aside, vary, or suspend its order where it finds that the dependent's situation has improved. The court's power extends over the entire estate even if the will disposes of only a part of the estate.[29]

Until 1939, maintenance could not be granted unless the decedent died testate. In dealing with applications under the act, however, the courts had long been aware of the fact that at times the rules of intestate succession produced as much injustice as an "unnatural" will. If, for example, a mother survived only by a wealthy son and a destitute daughter had provided in her will that her two children should equally share her small estate, the daughter could apply for an order granting her additional maintenance, which, of course, could only be carved out of her brother's share. But where the mother under the same circumstances died intestate and each of the children took half of the estate, the daughter could not apply for such relief. In 1939 the New Zealand legislature took the final step which the logic of its original approach suggested: it provided in effect that even where a decedent dies wholly intestate, his dependents may apply to the court on the ground that the rules of intestate succession fail to provide adequately for their needs.[30]

[29] The statute was amended in 1939 to give the court also power over the intestate portion of an estate only partially disposed of by will. N.Z. STAT. 3 GEO. 6, No. 39, § 22 (1939). For similar provisions in the Australian statutes, see WRIGHT, *op. cit. supra* note 3, at 1–2.

[30] N.Z. STAT. 3 GEO. 6, No. 39, § 22 (1939). On the New Zealand, Australian, and Canadian statutes until 1938, see Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107 (1938). The New Zealand and Australian statutes and decisions are collected in WRIGHT, *op. cit. supra* note 3, at 161–216. For previous collections, see MASON, TUTHILL, & LENNARD, THE PRINCIPLES AND PRACTICE OF TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (1929); STEPHENS, THE LAW RELATING TO TESTATOR'S FAMILY MAINTENANCE IN NEW ZEALAND (1934). On the English statute, see TILLARD, FAMILY INHERITANCE (2d ed. 1950); ALBERY, THE INHERITANCE (FAMILY PROVISION) ACT, 1938 (1950). See also Note, *Provision for Dependents: The English Inheritance Act of 1938*, 53 HARV. L. REV. 465 (1940).

These, in briefest outline, are the substantive provisions of the New Zealand statute. Its present scope is the result of a gradual evolution over the last half century, stimulated by the experience of judicial administration. As a result of this development, family maintenance has in substance been transformed in New Zealand from a mere limitation on testamentary power into a general principle of the law of succession: the rules of intestate succession or the provisions of a will (or both combined) become operative only after maintenance of the decedent's dependents out of his estate has been adequately safeguarded.

Since 1906, no fewer than fourteen other common-law jurisdictions, with a total population of over 58 million, including all Australian jurisdictions, five Canadian provinces,[31] and, most recently, England, have followed New Zealand's example.[32] The legislative histories of all the statutes show significant parallels to the development in New Zealand. As was true there, none of the numerous amendments which have been added to the various statutes over the last fifty years was designed to curb the basic principle. On the contrary, all tended to broaden the scope of the statutes to discard limitations, both substantive and procedural, by which anxious legislatures had originally sought to contain both the scope of the statutes and, especially, the sweep of judicial discretion. This process seems certain to continue.

Generally speaking, the Australian statutes[33] follow the New Zealand model. Their adoption marked a new departure for Australia where, as in New Zealand,[34] dower had long disappeared.[35] Compared with the New Zealand statute, however, the Australian acts, despite numerous amendments broadening their scope, still

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[31] See note 38 *infra*.

[32] The pending Israeli Succession Bill has also adopted the maintenance principle for both testate and intestate succession. See note 18 *supra*.

[33] VICT. STAT. 6 EDW. 7, No. 2074 (1906); TASM. STAT. 3 GEO. 5, No. 7 (1912); QUEENS. STAT. 5 GEO. 5, No. 26 (1914); N.S.W. STAT. 7 GEO. 5, No. 41 (1916); SO. AUS. STAT. 9 GEO. 5, No. 1327 (1918); W. AUS. STAT. 11 GEO. 5, No. 15 (1920); Administration & Probate Ordinance of the Capital Territory, 1929; Ordinance of the Territory of No. Aus. No. 21, 1929.

[34] See GARROW, REAL PROPERTY IN NEW ZEALAND 125 (4th ed., Adams 1945).

[35] The Dower Abolition Act, 1880, VICT. STAT. 44 VICT. No. 673; The Deceased Persons' Estates Act, 1874, TASM. STAT. 38 VICT. No. 1, § 4; Intestacy Act, 1877, QUEENS. STAT. 41 VICT. No. 24; Dower Abolition Act, 1906, N.S.W. STAT. 6 EDW. 7, No. 4; see also HASTINGS & WEIR, PROBATE LAW AND PRACTICE 195 (2d ed. 1948). For South Australia, see Administration and Probate Act, 1891, SO. AUS. STAT. 54 & 55 VICT. No. 537, § 64(2); SO. AUS. STAT. 10 GEO. 5, No. 1367 (1919); SO. AUS. STAT. 1 GEO. 6, No. 2368 (1937).

have a much narrower definition of eligible dependents; [36] more important, they do not generally apply in the case of intestate succession.[37]

The Canadian experience is particularly instructive to the American observer, because of the continuing struggle in Canada between the flexible and rigid approaches to the problem of family protection. At the present time, the reign of the flexible maintenance principle is limited to the five western provinces: Alberta, British Columbia, Manitoba, Ontario, and Saskatchewan.[38] Significantly, only one of these, Ontario, has never abandoned dower.[39] The other four, like New Zealand and the Australian states, have followed England in abolishing it.[40] On the other hand, of the remaining jurisdictions which now have no direct limitations on testamentary freedom, Nova Scotia, New Brunswick, and Prince Edward Island have preserved dower; [41] while in Quebec, where freedom of testation was introduced under British

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[36] Thus a testator's illegitimate child can apply only in Tasmania, South Australia, and Queensland. 6 TASM. PUB. GEN. ACTS (1826–1936) 1320 (1938); SO. AUS. STAT. 7 GEO. 6, No. 28, § 3 (1943); QUEENS. STAT. 7 GEO. 6, No. 28, § 2 (1943). None of the Australian statutes permit a testator's grandchildren or parents to apply.

[37] But a beginning has been made. An intestate's widow may apply in New South Wales and an intestate's illegitimate child may apply in Queensland. N.S.W. STAT. 3 GEO. 6, No. 30, § 9(a) (1938); QUEENS. STAT. 7 GEO. 6, No. 28, § 6 (1943). In some respects, however, Australian statutes now go further than that of New Zealand; a divorcee may apply in South Australia, Western Australia, and Queensland, if she is entitled to receive or is receiving permanent maintenance from her former husband at the time of his death. SO. AUS. STAT. 7 GEO. 6, No. 29, § 3 (1943); W. AUS. STAT. 4 GEO. 6, No. 44, § 2 (1940); QUEENS. STAT. 1 ELIZ. 2, No. 28, § 2 (1952). Queensland is today the only jurisdiction which permits stepchildren to apply for maintenance. QUEENS. STAT. 7 GEO. 6, No. 4, § 2 (1942).

[38] ALTA. STAT. 11 GEO. 6, c. 12 (1947), as amended, ALTA. STAT. 15 GEO. 6, c. 91, § 3 (1951); B.C. REV. STAT. c. 336 (1948); 4 MAN. REV. STAT. c. 264 (1954); ONT. REV. STAT. c. 101 (1950); 1 SASK. REV. STAT. c. 121 (1953). The Conference of Commissioners on Uniformity of Legislation in Canada, on Manitoba's initiative, adopted in 1945 a Uniform Testator's Family Maintenance Act. 28 PROC. CAN. B. ASS'N 215–16, 301–12 (1945). So far, the act has been adopted in Manitoba and Alberta. *Proceedings of Conference on Uniform Legislation* 74, printed in 36 PROC. CAN. B. ASS'N (1953).

[39] See ONT. REV. STAT. c. 109 (1950).

[40] ALTA. STAT. 6 EDW. 7, c. 19, § 5 (1906); B.C. STAT. 24 GEO. 5, c. 2, § 3 (1934); MAN. STAT. 48 VICT. c. 28, § 24 (1885); SASK. STAT. 7 EDW. 7, c. 16, § 23 (1907).

[41] NOV. SC. REV. STAT. c. 143 (1923); NEW BRUNS. REV. STAT. c. 64 (1952); 1 P.E.I. REV. STAT. c. 46 (1951). In Newfoundland, however, dower rights appear not to exist in lands transferred by the husband inter vivos or by will. See Auld, *Matrimonial Property Law in the Common Law Provinces of Canada*, in MATRIMONIAL PROPERTY LAW 239, 263 (Friedmann ed. 1955).

pressure, a measure of relief is provided by other devices: spouses are either protected by the statutory community property system or, where they define their marital property relations by marriage contracts, by the frequent practice of inserting clauses entitling the survivor to succeed to all marital property.[42]

The only Canadian province in which the transition from the "no protection" stage to the flexible system was as direct as in New Zealand and Australia is British Columbia, which in 1920 adopted the New Zealand act with little change.[43] Alberta,[44] Saskatchewan,[45] and Manitoba[46] originally adopted systems which, in substance, resembled present American forced share statutes. Within a generation, however, all three shifted to the system of flexible limitations in the New Zealand pattern, and extended protection to children. However, Saskatchewan and Manitoba retained the rigid limitations of the existing statutes as "floors" under the discretionary awards which the new legislation authorized.[47] Ontario, as already noted, has never abolished dower. Since 1929, the protection thus afforded the widow there has been

[42] See Turgeon, *Matrimonial Property Law in the Province of Quebec*, in MATRIMONIAL PROPERTY LAW 139, 141, 166–68 (Friedmann ed. 1955). Since under this system wives and children may not be protected against disinheritance, the same author has suggested the adoption of the flexible maintenance principle in Quebec. Turgeon, *Rétablissement de la Légitime Sous une Forme Moderne*, 15 REVUE DU BARREAU 204 (1955) (Canada).

[43] Testator's Family Maintenance Act, 1920, B.C. STAT. 10 GEO. 5, c. 94.

[44] Married Women's Relief Act, 1910, ALTA. STAT. 1 GEO. 5, c. 18 (2d Sess.). This statute authorized the court to grant a widow to whom the testator had left less than her intestate share "such allowance . . . as may be just and equitable in the circumstances." The courts, not without some doubts, finally construed it as merely authorizing a grant to the widow of not more than her intestate share. McBratney v. McBratney, 59 Can. Sup. Ct. 550, 50 D.L.R. 132 (1919).

[45] Devolution of Estates Act, 1910, SASK. STAT. 1 GEO. 5, c. 13.

[46] MAN. STAT. 9 GEO. 5, c. 26, §§ 13, 14 (1918). No such right existed where the survivor's resources, including gifts from the decedent, totaled $100,000 or yielded $6,000 annually. The same statute also provided for homestead rights, in §§ 1–12.

[47] SASK. STAT. 4 GEO. 6, c. 36, § 8(2) (1940) (widow only); MAN. STAT. 10 GEO. 6, c. 64, § 22 (1946). In Alberta, the Married Women's Relief Act, *supra* note 44, was repealed when the maintenance act was adopted. ALTA. STAT. 11 GEO. 6, c. 12, § 22 (1947). No fewer than six decisions were rendered in the case which established that the Saskatchewan statute still entitled a widow to claim in effect her intestate share if the court found her inadequately provided for. *In re* Shaw, [1942] 1 West. Weekly R. 613 (Sask. K.B.); Toronto Gen. Trust Corp. v. Shaw, [1942] 1 West. Weekly R. 818, 2 D.L.R. 439 (Sask. C.A.); Shaw v. Toronto Gen. Trust Corp., [1942] Can. Sup. Ct. 513, 4 D.L.R. 657; Shaw v. Toronto Gen. Trust Corp., [1943] 2 West. Weekly R. 567, 4 D.L.R. 712 (Sask. K.B.); Shaw v. Regina, [1944] 1 West. Weekly R. 433, 2 D.L.R. 223 (Sask. C.A.); Saskatoon v. Shaw, [1945] Can. Sup. Ct. 42, 1 D.L.R. 353.

supplemented by the system of flexible family allowances.[48] But there the intestate share forms a "ceiling" over the judicial award; the award, together with the amount left by the will, may not exceed the dependent's intestate share.[49]

Considering the Canadian statutes as a group, it is apparent that, like their Australian counterparts, they are less comprehensive than the New Zealand model.[50] It is also arguable that the retention of a compulsory share, whether as "floor" or "ceiling" for the judicial award, is not consistent with the maintenance principle; if dependence is to be the criterion, the intestate share is irrelevant.

The English Inheritance (Family Provision) Act of 1938 [51] was enacted after a long struggle with an indifferent government and a hostile English probate bar. As a result, the 1938 act, while accepting the principle of the New Zealand statute, was quite restrictive. There were, for example, limitations on the age of eligible children, on the total maintenance allowable, and on the court's power to make lump-sum awards. Following the recommendations of the Committee on the Law of Intestate Succession,[52] the Intestates' Estates Act of 1952 [53] liberalized the act somewhat and extended it to total intestacy. Important restrictions, however, still remain.[54] There are also, in marked contrast to the other jurisdictions, indications of a cool attitude on the part of the judiciary toward the policy of this legislation.[55]

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[48] Dependents Relief Act, 1929, ONT. STAT. 19 GEO. 5, c. 47, ONT. REV. STAT. c. 101 (1950).

[49] ONT. REV. STAT. c. 101, § 10 (1950).

[50] Thus, for example, only the Saskatchewan statute permits applications in the case of intestacy. The age limit for children who are not disabled in Ontario is 16, in Alberta 19, in Saskatchewan 21; finally, all Canadian statutes are limited to spouses and children.

[51] 1 & 2 GEO. 6, c. 45 (1938). On the legislative history, see Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337, 344 (1940); on the statute's effect, see Unger, *The Inheritance Act and the Family*, 6 MODERN L. REV. 215 (1943).

[52] CMD. NO. 8310, at 15–18, 19 (1951).

[53] 15 & 16 GEO. 6 and 1 ELIZ. 2, c. 64 (1952).

[54] Included are only spouses, sons under 21, and daughters who have not been married. 15 & 16 GEO. 6 and 1 Eliz. 2, c. 64, pt. III, schedule 4, § 1(1)(1952). If a surviving spouse receives at least two-thirds of the income no child may apply. *Ibid.* Periodic payments may only be ordered out of income, lump-sum payments only if the estate is less than £5,000. *Id.* §§ 1(3), (4).

[55] "The legislature, presumably in its wisdom gave no guidance to the court as to how the jurisdiction should be exercised . . . . The previous decisions clearly established that the jurisdiction is one which should be cautiously, if not sparingly,

## III. Judicial Interpretation

In the survey of the judicial interpretation of the maintenance statutes to which we now turn, no effort has been made to deal separately with each of the major jurisdictions. Little violence is done to the reports by treating, for present purposes, all of them together. In broad outline, despite differences in wording and coverage, the statutes, as already noted, are substantially similar, as are the problems. This is also the view of most courts; [56] with the exception of those in England, they have freely drawn on one another's decisions, predominantly on those of New Zealand.

The case law that has developed over the past fifty years is impressive both in its bulk and its general consistency. Among its many facets only a few have been selected which illustrate most vividly the judicial reaction to this unusual legislation. Accordingly, the following sections deal briefly with the exercise of judicial discretion in fixing the awards, the predominance of ethical considerations, the parties' freedom to affect their statutory rights and duties by private transactions, and the peculiar problems raised by the emergence of the modern social security state as a vicarious paterfamilias. The concluding section deals with what is perhaps the most characteristic aspect of the case law, the emergence of distinct categories of dependents.

### *A. The Exercise of Judicial Discretion*

The heart of the statutes lies in the broad grant of power to the courts to award a dependent found to be inadequately provided for "such provision as the Court thinks fit" and to distribute at their discretion the burden of the award among the beneficial in-

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used." Innes v. Wallace, [1947] 1 Ch. 576, 581–82. In *In re* Lawes, 62 T.L.R. 231 (Ch. 1946), Justice Vaisey is reported as having said that "the Act was vague and difficult to understand, and that he had the greatest difficulty in deciding what order he ought to make in the case." In Vrint v. Swain, [1940] 1 Ch. 920, 926, a petition for maintenance out of a £138 estate was dismissed on the ground that the act was not passed to provide legacies. While the dismissal may have been justified because the costs would have consumed the estate, the act does contemplate lump-sum awards. Other jurisdictions do not discriminate against small estates. See note 130 *infra*.

[56] See, *e.g.*, *In re* Willan Estate, [1951] 4 West. Weekly R. (n.s.) 114 (Alta.); *In re* Lawther Estate, 55 Man. 142, [1947] 2 D.L.R. 510 (K.B. 1948); *Re* Greene's Estate, 25 Tasm. L.R. 15 (1930); *In re* Sinnott, [1948] Vict. L.R. 279, 2 Argus L.R. 309.

terests in the estate.[57] Thus, in a real sense, until the claims of the dependents have been disposed of, all interests in the estate are only provisionally created by the will or determined by the law of intestate succession.[58] The courts have responded to this broad delegation of control over private property rights with characteristic self-restraint. They have emphasized the limitations on their functions rather than stressed their powers.[59] They have asserted time and again that it is not within their "power to recast the testator's will or to redress inequalities or fancied injustice . . . . "[60] Instead, the broad power to award maintenance is read only as authorizing the court to make adequate provision for proper maintenance and support whenever the testator or the rules of intestate succession fail to do so.[61]

That these are not merely empty declamations may be seen by examining the awards made in particular cases. To arrive at a specific amount, the courts are called upon to evaluate a variety of data, a task for which the statutes offer little guidance.[62] Occasionally the courts refer to such factors as the standard of living, age, health, means, and other circumstances of the applicant[63] in language strongly reminiscent of the formulae used in American alimony decisions.[64] But, as in the case of alimony awards, the relative weight of these considerations remains undefinable. What has been said of the maintenance award itself is equally true of the finding of inadequacy: it "essentially depends

[57] *E.g.*, The Family Protection Act, 1908, 2 N.Z. STAT. 8 EDW. 7, No. 60, § 33(1).

[58] "No doubt the effect of the statute is to decree that a man's will may be no more than a tentative disposition of his property and that the function of ultimately settling how his estate shall devolve must be exercised by the Court." Welsh v. Mulcock, [1924] N.Z.L.R. 673, 682 (1923).

[59] "[T]he testator [who] . . . does not make adequate provision in his will for wife, husband, or children . . . *does not . . . offend against any legal duty imposed by the statute. His will-making power remains unrestricted*, but the statute in such a case authorizes the court to . . . carve out of his estate what amounts to adequate provision . . . ." Dillon v. Public Trustee, [1941] A.C. 294, 301 (P.C.). (Emphasis added.)

[60] Allardice v. Allardice, 29 N.Z.L.R. 959, 975 (1910), *aff'd*, [1911] A.C. 730 (P.C.).

[61] Bosch v. Perpetual Trustee Co., [1938] A.C. 463, 478–79 (P.C.).

[62] For a comparatively specific statutory provision, see ONT. REV. STAT. c. 101, § 7 (1950).

[63] For a list of fifteen items, see *In re* Lawther Estate, 55 Man. 142, 152–53, [1947] 2 D.L.R. 510, 519 (K.B. 1948).

[64] See Cooey, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROB. 213, 216 (1939). See also Gilman v. Gilman, 53 Me. 184, 192 (1865), arising under the widow's allowance statute of Maine, *supra* note 22.

upon the exercise of a discretionary judgment. It cannot be done by calculation or computation . . . ." [65] As the courts are aware, it is largely a matter of "guess-work." [66] Despite the wide discretion thus vested in the courts, this guesswork, generally speaking, leads to rather conservative results.

To be sure, the courts today everywhere reject the notion that all the statutes require is "just enough to put a little jam on his [the dependent's] bread and butter"; [67] in other words, they recognize that maintenance means more than mere subsistence.[68] Interestingly, according to one observer the argument that these provisions merely contemplated subsistence helped to persuade the New Zealand legislators in 1900 to adopt the original statute.[69] If that is true, the New Zealand courts took little time to free themselves from any such limitation.[70]

As early as 1903, a New Zealand court also rejected the scheme of intestate distribution as a standard for either minimum or maximum provision under the statute.[71] Other courts followed suit.[72] As a matter of fact, where the estate is substantial the dependent usually receives less than his intestate share would have been. On the other hand the smaller the estate, the greater the likelihood that the award will exceed the intestate share. As a result, it is one of the characteristics of maintenance statutes that the measure of testamentary freedom rises with the size of the estate. The larger the estate the smaller the percentage needed to provide for dependents.

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[65] Sampson v. Sampson, 70 Commw. L.R. 576, 585 (Austr. 1945).

[66] Bosch v. Perpetual Trustee Co., [1938] A.C. 463, 483 (P.C.).

[67] Borthwick v. Beauvais, [1949] 1 Ch. 395, 401.

[68] See, *e.g.*, Allardice v. Allardice, [1911] A.C. 730 (P.C.); Borthwick v. Beauvais, *supra* note 67; Allen v. Manchester, [1922] N.Z.L.R. 218 (Sup. Ct. 1921).

[69] See Campbell, *Family Law*, in 4 THE BRITISH COMMONWEALTH (NEW ZEALAND) 317, 336 (Robson ed. 1954).

[70] The limitation seems to have been observed in the first reported case under the New Zealand statute, Rush v. Rush, 20 N.Z.L.R. 249 (Sup. Ct. 1901), but was expressly rejected in Allardice v. Allardice, 29 N.Z.L.R. 959, 969 (1910), *aff'd*, [1911] A.C. 730 (P.C.).

[71] Laird v. Laird, 5 N.Z. Gaz. L.R. 466 (Sup. Ct. 1903). The court noted the injustices which the rules of intestate succession may produce and ascribed the failure of the legislature to extend the act to intestate succession to inadvertence. *Id.* at 467–68 (dictum).

[72] *E.g.*, *In re* Willan Estate, [1951] 4 West. Weekly R. (n.s.) 114 (Alta.); *In re* McPhee Estate, [1947] 1 West. Weekly R. 741 (B.C. Sup. Ct.). *But see* Barker v. Westminster Trust Co., 57 B.C. 21, [1941] 4 D.L.R. 514; *In re* Dupaul, 56 B.C. 532, [1941] 4 D.L.R. 246.

The general tendency toward restraint is particularly impressive in two situations: (1) where the court acts not to override, but to realize the testator's actual intention, *i.e.*, when total or partial disinheritance was unintended, and (2) where a substantial estate has been willed to charity or strangers in disregard of the strong moral claims of the dependent. Inevitably, the courts are impressed by these aspects of the case and hence tend to be more liberal in their awards. Nevertheless, they have usually been able to resist the pressure to proceed outright to an "equitable distribution" of the estate.[73]

This pressure also arises, however, in other circumstances. Since the amount of the award is largely determined by the applicant's dependence, a peculiar problem arises which is absent in the case of rigid limitations. As of what date is this dependence to be ascertained? Logically, the crucial point in time should be the testator's death, since we are concerned with the determination of rights to the estate of the decedent.[74] Some courts, however, consider the time of application or of the hearing as crucial.[75] Where, as is usual, no change has occurred in the dependent's situation between the date of the decedent's death and the time of application or hearing, it is immaterial which date is selected. But where the dependent's needs are as yet indefinite or arise after the decedent's death but before the hearing, which at times may be much later, the courts will be urged to abandon the date of death as controlling. The answers have not been consistent.[76]

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[73] See, *e.g.*, Bosch v. Perpetual Trustee Co., [1938] A.C. 463 (P.C.) (legacies to two young sons increased from £15,000 to £25,000 out of £257,000 estate left to a university where death prevented an intended change in will); Hawke v. Public Trustee, [1935] N.Z.L.R. s.157 (Sup. Ct.) (widow and two of nine children granted increased income where testator had filed in public trust office memorandum of intended change, but intended change not given full effect). *But see In re* Saywell, an unreported 1952 New Zealand Supreme Court decision noted in WRIGHT, *op. cit. supra* note 3, at 50, 69 (widow's income increased in accordance with drafted but unsigned new will). Some awards in British Columbia also seem unusually liberal. See *In re* Estate of Foxe, 60 B.C. 77, [1944] 2 D.L.R. 392 (Sup. Ct.) (widow separated from testator since 1928 granted $20,000 out of $69,000 estate left to sisters).

[74] "[T]he moral duty of the testator . . . can only be ascertained by reference to the facts as existing at the date of his death, including . . . the reasonable probabilities as to future changes of circumstances." Welsh v. Mulcock, [1924] N.Z.L.R. 673, 687 (1923). See also *Re* Brown, [1952] Queens. S.R. 47 (1951).

[75] *Re* Forsaith, 26 N.S.W.S.R. 613 (1926); *In re* Wheare, [1950] So. Aus. S.R. 61.

[76] *Compare Re* Hull Estate, [1943] Ont. L.R. 778, [1944] 1 D.L.R. 14 (C.A. 1944), *and In re* Testator's Family Maintenance Acts, 12 Tasm. L.R. 11 (1916),

In some cases it may be obvious to all concerned that the testate or intestate provision is inadequate; although present needs are negligible, future needs are bound to arise which cannot presently be estimated with accuracy.[77] An overly liberal estimate may prejudice the other interests in the estate; an unduly conservative award may leave the dependent unprotected. The time limits set by the statutes do not permit the dependent to postpone his application. Faced with this dilemma, the New Zealand courts have from time to time entered so-called "suspensory orders," [78] which first establish the inadequacy of an existing provision; then, instead of making an award, they "freeze" part of the estate by charging it with the burden of such orders as the court may make in the future. These orders have been severely criticized, not only because they suspend *pro tanto* the administration of the estate, but also because the application later made is based on the circumstances existing at the time not of the testator's death, but of the final order. Thus the practice of suspensory orders has been questioned as transforming the estate into an "artificial father which is responsible for the future welfare of the children." [79] Nevertheless, the reluctance to award speculative amounts appears to have weighed more heavily than the objections, both practical and theoretical, to the use of "suspensory orders," and the practice seems to continue in New Zealand and elsewhere.[80]

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*with Re* Forsaith, *supra* note 75, *and* Walker v. McDermott, [1931] Can. Sup. Ct. 94, 1 D.L.R. 662 (1930), *reversing* 42 B.C. 184, [1930] 1 D.L.R. 945.

A similar problem arises when the applicant dies pending appeal. In Barker v. Westminster Trust Co., 57 B.C. 21, [1941] 4 D.L.R. 514, claimant's estate was held entitled to receive the award. This holding squarely conflicts with the purpose of the maintenance statutes.

[77] Where future needs can be presently ascertained, orders may be made to run as of a future date. See, *e.g.*, *In re* Sinnott, [1948] Vict. L.R. 279, 2 Argus L.R. 309. *Contra*, *In re* Schwerdt, [1939] So. Aus. S.R. 333, 339.

[78] See, *e.g.*, Parish v. Valentine, [1916] N.Z.L.R. 455 (Sup. Ct.); Toner v. Lister, [1919] N.Z. Gaz. L.R. 498 (Sup. Ct.); see generally WRIGHT, *op. cit. supra* note 3, at 98–100. The practice may have been borrowed from the English workmen's compensation acts, under which "suspensory awards" are made which establish liability but postpone the award until the extent of the liability can be determined. See WILLIS, WORKMEN'S COMPENSATION ACTS 335–37 (37th ed. 1945).

[79] Welsh v. Mulcock, [1924] N.Z. Gaz. L.R. 169, 174 (1923) (statement made during oral argument).

[80] The suspensory award has been expressly authorized in Manitoba, Alberta, and in the Canadian Uniform Act. MAN. STAT. 10 GEO. 6, c. 64, § 3(2) (1946); ALTA. STAT. 11 GEO. 6, c. 12, § 4(4) (1947); 28 PROC. CAN. B. ASS'N 308–09 (1945). Other jurisdictions follow the practice in substance, if not in name. Thus in South Australia it has been sanctioned by court rule. WRIGHT, *op. cit. supra* note

A related problem arises in connection with lump-sum awards. Periodic payments are obviously the ideal form for providing maintenance, because the court retains control over the award. This has at least two advantages. First of all, if the dependent dies (or in the case of a spouse, remarries) or his situation improves, the balance will revert to the original beneficiaries. Thus the interests of those upon whom the incidence of the order has fallen will be safeguarded. On the other hand, the dependent himself is protected against careless spending or unwise business ventures, a consideration particularly important in the case of widows without experience in business affairs.[81] But occasionally lump-sum awards appear more practical, where the funds available are small or special needs exist (as for the discharge of pressing debts, for housing, or for medical treatment). Unless the court takes special precautions, the award is no longer under the court's control and hence may be diverted by inter vivos or testamentary gifts or otherwise. To avoid this eventuality alien to the purpose of the statutes, most courts restrict lump-sum payments to cases of demonstrated need.[82]

In general the cases are characterized by conscientious and determined efforts to limit discretionary intervention to a reasonable minimum. Similarly, the appellate courts in passing on maintenance awards have generally been willing to re-examine painstakingly the trial courts' determinations, and the reports, although relatively few in number, show frequent modifications and re-

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3, at 189. See also Borthwick v. Beauvais, [1949] 1 Ch. 395; Franks v. Franks, [1948] 1 Ch. 62 (1947); Laventure v. Killey, 61 Man. 198 (Q.B. 1953); *In re* Estate of Ramsey, 50 B.C. 83 (Sup. Ct. 1935). A similar result may be obtained by granting the dependent, with the consent of all parties, the right to reapply for an increase. See, *e.g.*, Shelley v. Public Trustee, [1937] N.Z. Gaz. L.R. 200 (Sup. Ct.). Most Australian courts do not interpret their broad statutory powers to rescind or change orders as including the power to increase an allowance; at least one decision in Victoria, however, has asserted it. See WRIGHT, *op. cit. supra* note 3, at 101–10. In Saskatchewan, dependents may apply for reconsideration. SASK. REV. STAT. c. 121, § 17 (1953).

[81] On the failure of American statutes to deal with this problem, see Cahn, *supra* note 2, at 142–43. He reports that experts in the life insurance field generally estimate that lump-sum payments are consumed by the beneficiaries within seven years.

[82] For surveys of this cautious practice, see McInnes v. Woolerton, [1942] N.Z.L.R. 547 (Sup. Ct.); Glentworth v. Williamson, [1954] N.Z.L.R. 293 (1953). British Columbia courts again seem to follow a fairly liberal practice in this respect. See *In re* Estate of Foxe, 60 B.C. 77, [1944] 2 D.L.R. 392 (Sup. Ct.); *In re* Tero Estate, [1949] 2 West. Weekly R. (n.s.) 203, 4 D.L.R. 34 (B.C.).

versals, often accompanied by detailed dissenting opinions.[83] This may be contrasted with, for example, the perfunctory disposition of alimony appeals in the United States.

### *B. Ethical Considerations*

One of the characteristic aspects of judicial interpretation of the statutes is the heavy emphasis which the courts place on the ethical aspects of the problem before them. This emphasis is all the more noteworthy because the statutes are not couched in moral or ethical terms. To be sure, most of them provide that a dependent may be denied maintenance if his character or conduct are such as to "disentitle" him; the courts are not told, however, what character trait or course of conduct will warrant disqualification. More important, it is not the dependent alone whose ethics are relevant. It is the testator with whose action the courts are usually concerned. Nor can they ignore the just deserts of those whom the testator or the law of intestate succession has designated as beneficiaries; what the court grants the dependent it must take from them, and the incidence of the order is not fixed by law, but is entrusted to judicial discretion.

The courts conceive their task essentially to be one of correcting a breach of morality on the testator's part. They insist that they will not intervene unless the testator "has been guilty of a *manifest breach of that moral duty* which a just, but not a loving, husband or father owes towards his wife or towards his children . . . ." [84] As is usual in debates over freedom of testation,[85] the image of the villainous testator intent on consigning his hapless family to the poorhouse is invoked because it serves best to justify interference with a man's last will. The courts define their own task in these terms: "the Court must place itself in the position of the testator and consider what he ought to have done in all the circum-

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[83] See, *e.g.*, Allardice v. Allardice, 29 N.Z.L.R. 959 (1910), *aff'd*, [1911] A.C. 730 (P.C.); Worms v. Campbell, [1953] N.Z.L.R. 931; *In re* Maitland Estate, [1954] 10 West. Weekly R. (n.s.) 673, 1 D.L.R. 657 (Alta. App. Div.). The New Zealand courts substitute their own discretion for that of the court below. Zukerman v. Public Trustee, [1951] N.Z.L.R. 135, 141. The Supreme Court of Maine follows the same practice. Gilman v. Gilman, 53 Me. 184 (1865). ALTA. STAT. 11 GEO. 6, c. 12, § 21 (1947) provides that the appellate court may reverse or modify "as in its discretion it may deem proper."

[84] Allardice v. Allardice, 29 N.Z.L.R. 959, 973 (1910), *aff'd*, [1911] A.C. 730 (P.C.). (Emphasis added.)

[85] See, *e.g.*, Laube, *The Right of a Testator To Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559 (1928).

stances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband and father." [86] We have before us, then, the reasonable man of the law of domestic relations.

These formulae would seem to indicate that it is the purpose of maintenance legislation to correct only flagrant moral abuses. While this is often its function, there are two significant departures. First, the statutes are frequently invoked where a testator's intention has been frustrated by his mistakes or by the limitations inherent in the nature of wills. To illustrate: the testator misunderstood the will,[87] his draftsman blundered,[88] he changed his mind about the provision for the dependent after he had made his will or the will had become "obsolete" because of the birth of children,[89] ademption of legacies,[90] or other changing circumstances.[91] In some cases specific evidence of the testator's actual intention is available. In others, the courts strain to read his mind from the general circumstances of the case in order to arrive at the conclusion that he would have done the proper thing had he appreciated the situation. What the courts are doing in these situations is to protect rather than limit the testator's freedom.

Here a significant distinction between rigid and flexible restraints appears. Since rigid restraints operate automatically, as it were, the reason for the omission of the dependent is irrelevant. In the case of flexible restraints, however, the fact that the testator's true intention was frustrated is important, for in that event judicial intervention derives its ultimate sanction from the testator's own will and is not an act of moral censure. Bearing in mind the traditional respect of common-law judges for a man's right to dispose of his estate as he pleases, it is not surprising to find them

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[86] Bosch v. Perpetual Trustee Co., [1938] A.C. 463, 478–79 (P.C.).

[87] *Re* Connor, 11 N.Z. Gaz. L.R. 349 (Sup. Ct. 1908).

[88] Mackin v. Public Trustee, [1931] N.Z. Gaz. L.R. 180 (Sup. Ct. 1930) (codicil for widow invalid).

[89] Franks v. Franks, [1948] 1 Ch. 62 (1947); Oakey v. Thompson, [1951] N.Z.L.R. 580 (Sup. Ct.). *But see Re* Little Estate, [1953] Ont. W.N. 865, 4 D.L.R. 846 (Surr. Ct.) (application denied, since many testators provide for children by leaving all to spouse).

[90] *In re* Sinnott, [1948] Vict. L.R. 279, 2 Argus L.R. 309.

[91] *In re* Morton, 49 B.C. 172 (Sup. Ct. 1934) (depression made income provisions insufficient); *In re* Hunter, [1932] N.Z. Gaz. L.R. 507 (Sup. Ct.) (same).

more ready to grant allowances if, in doing so, they carry out what they believe to be the testator's real intentions.[92]

The "breach of moral duty" formula for justifying judicial intervention is usually inapplicable to another situation, *i.e.*, where the testator died intestate. As is true with inadvertent disinheritances, judicial intervention in the case of intestacy is prompted not by the decedent's breach of moral duty, but by the dependent's moral claim.

Although these formulae are thus not pertinent in all situations, they are significant because they evidence a desire to anchor judicial action as firmly as possible to commonly accepted concepts of family morality and thus to establish safeguards against judicial arbitrariness. In numerous cases the moral issue is not clear-cut, particularly where it arises in the context of family conflicts in which the testator is faced with a moral or emotional dilemma. It is particularly here that the courts have developed attitudes or policies which effectuate their views of modern family ethics and, to some extent, their philosophy of inheritance.

The decisions emphasize the minimum loyalties and decencies owed one another by the members of the family; they reward marital and filial devotion [93] and extol the virtues of self-reliance,[94] while they frown on the miserliness of testators [95] and on vices of dependents which lead them to lean on others.[96] On occasion the

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[92] "[T]he Court is in this case encouraged and not deterred by a knowledge of the views of the testator himself." Hawke v. Public Trustee, [1935] N.Z.L.R. 5.157, s.160 (Sup. Ct.).

[93] Calder v. Public Trustee, [1950] N.Z. Gaz. L.R. 465 (Sup. Ct.) (second wife who had nursed testator 14 years and had been bequeathed £5 weekly held entitled to £8/10 over middle-aged children to whom testator had left bulk of estate and who failed to disclose their financial situation); *In re* Brown, [1946] Queens. W.N. 46 (Sup. Ct.) (life estate in £1,000 farm devised to son, 44, who had worked for testator most of his life changed into absolute gift).

[94] In Allardice v. Allardice, 29 N.Z.L.R. 959 (1910), *aff'd*, [1911] A.C. 730 (P.C.), two able-bodied sons were denied maintenance out of their father's £20,000 estate because it might weaken their desire to exert themselves. On judicial reluctance to grant maintenance to able-bodied widowers and adult sons, see pp. 308, 311 *infra*.

[95] The courts will not be bound by a miserly testator's living standards, imposed on his family during his lifetime. Welsh v. Mulcock, [1924] N.Z.L.R. 673 (1923); Dalton v. Spence, [1952] N.Z. Gaz. L.R. 230 (Sup. Ct.).

[96] Ray v. Moncrieff, [1917] N.Z.L.R. 234 (Sup. Ct.) (drinking son denied maintenance); Sinclair v. Sinclair, [1917] N.Z.L.R. 144 (Sup. Ct. 1916) (small additional allowance subject to spendthrift provision of will granted to spendthrift son, 60); *cf. Re* Raymond, 14 N.Z. Gaz. L.R. 560 (Sup. Ct. 1912) (married

courts have even used their statutory power to impose conditions on an award to the dependent for the purpose of improving his moral standards or even his physical condition. Thus a drunkard may be enjoined to abstain from drink [97] or an invalid required to submit to a newly discovered cure for a disabling ailment.[98]

These illustrations of a fairly stern approach, noticeable particularly in earlier decisions, have given way to greater willingness to make allowances for human frailty.[99] On the other hand, the range of moral review was broadened when the courts of New Zealand and Australia determined that they had power to reduce an award otherwise due to a dependent whose conduct was blameworthy although not so egregious as to "disentitle" him altogether.[100]

The courts are particularly sensitive to the moral claim based on work. In many instances, estates have been built or increased by contributions made by the dependent or beneficiary in the form of services. It may be argued, and a few early cases have intimated,[101] that these contributions are irrelevant to a determination of the adequacy or inadequacy of a provision for a dependent, but most courts appear to be profoundly affected by the presence or absence of this factor.[102]

The emphasis on ethics has also led the courts to an implicit rejection of a purely formal concept of the family. While family status is in general a *sine qua non* of a claim, existence of the

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daughter denied allowance from mother's small estate on ground that drunkard husband would waste award).

[97] *E.g.*, Fletcher v. Usher, [1921] N.Z.L.R. 649 (Sup. Ct.).

[98] *Re* Green, 13 N.Z. Gaz. L.R. 477 (Sup. Ct. 1911).

[99] *In re* Dunn, [1944] 3 West. Weekly R. 289, 4 D.L.R. 266 (B.C. Sup. Ct.) (son granted increased income because of disability although a "black sheep"); *In re* Bell, [1929] N.Z. Gaz. L.R. 320 (Sup. Ct.) (annuity to son increased subject to conditions against excessive drinking).

[100] Williams v. Cotton, [1953] N.Z.L.R. 151 (Sup. Ct. 1952) (marital unhappiness due mainly to applicant's conduct); Jackson v. Public Trustee, [1954] N.Z.L.R. 175 (Sup. Ct. 1953) (widow's conduct in deserting testator ground for reducing allowance); *In re* Paulin, [1950] Vict. L.R. 462 (widow partially to blame for separation). *But see Re* Greene's Estate, 25 Tasm. L.R. 15 (1930); Meyer v. Capital Trust Corp., [1948] Can. Sup. Ct. 329, 3 D.L.R. 225.

[101] Welsh v. Mulcock, [1924] N.Z.L.R. 673, 682 (1923); Carroll v. Carroll, [1917] N.Z. Gaz. L.R. 600 (Sup. Ct.).

[102] See, *e.g.*, Moon v. Card, [1951] N.Z. Gaz. L.R. 287 (Sup. Ct.) (two married daughters who had worked on family farm granted additional amounts); *cf.* Cairns v. Reynolds, [1950] N.Z. Gaz. L.R. 409 (Sup. Ct.) (widow who did not help build estate granted small amount). This attitude may also be found in American alimony cases. See Cooey, *supra* note 64, at 218.

bare legal ties is not sufficient to qualify a dependent for maintenance. He must have a moral claim on the decedent's bounty. This claim may disappear where the dependent by his actions repudiates the relationship.[103] It may also disappear where as a result of the claimant's indifference the personal ties with the decedent had become so tenuous that mutual loyalties no longer existed.[104]

On the other hand, the courts have recognized that testators may incur moral obligations through personal relationships which the law does not recognize or indeed disapproves.[105] If the testator honors these obligations by provisions in his will, the court may in a particular case concede that they rank as high as or higher than those owed his "legal" family.[106] Here again, the flexible limitations on testamentary freedom differ sharply from the systems of forced shares adopted in the United States. Many of these make succession simply dependent on the existence of a formal relationship; [107] others have a few isolated provisions barring the spouses from taking their shares in particular situations.[108] As a result,

[103] See, *e.g.*, Packer v. Dorrington, [1941] N.Z. Gaz. L.R. 337 (Sup. Ct.); *In re* Kennedy, [1920] Vict. L.R. 513 (Sup. Ct.).

[104] *In re* Saunders, 62 B.C. 204 (Sup. Ct. 1946) (son who had no contact with father for twenty years denied allowance from estate left to devoted niece); Jennings v. Kerr, [1940] N.Z. Gaz. L.R. 546 (Sup. Ct.) (daughter of first marriage, estranged for eleven years, denied maintenance from father's estate); *Re* Richardson's Estate, 29 Tasm. L.R. 149 (1935) (daughter who ignored father for thirty years denied allowance from estate left to housekeeper).

[105] Here, of course, the moral obligation can be considered only indirectly, *i.e.*, by judicial refusal to interfere with the testator's provision honoring it. *But cf.*, *e.g.*, the British Columbia statute which permits a mistress and her illegitimate child actually maintained by the decedent or under his protection to secure maintenance from his estate not exceeding 10% or $500, whichever is larger. B.C. REV. STAT. c. 6, §§ 101–04 (1948). This statute antedates the family maintenance legislation.

[106] Joslin v. Murch, [1941] 1 Ch. 200 (widow's application denied where small estate left by testator to penniless mistress and their two illegitimate children); *In re* La Fleur Estate, 56 Man. 44 (K.B. 1948) (application of son denied where testator's small estate left to mistress who had rehabilitated him, and to their three children); Worthington v. Ongley, 13 N.Z. Gaz. L.R. 127 (Sup. Ct. 1910) (widow and child left £300 from £500 estate not entitled to increased grant from remainder left to two illegitimates).

[107] Thus, *e.g.*, under the Colorado statutes a surviving spouse appears to be disqualified from taking half of the decedent's estate only by a conviction for murder of the decedent. COLO. REV. STAT. ANN. §§ 152–2–13, 152–5–5 (1953).

[108] See, *e.g.*, N.Y. DECED. EST. LAW §§ 18(4), (5), which denies a statutory share to a spouse who has abandoned the decedent and to a husband who has neglected or refused to provide for his wife. For a summary of the American statutes denying, under certain circumstances, the right to a statutory share, see

courts have no opportunity to exercise any judgment over complex relationships, and a hard and fast approach often leads to harsh results.

### C. *The Maintenance Claim and Freedom of Contract*

What effect is to be given to private transactions which affect the claims to maintenance? Here again the statutes are silent. The judicial answers are not wholly consistent. The courts have substantially curtailed, on the one hand, the testator's freedom with respect to contracts to bequeath property. Moreover, they have flatly denied the dependent any freedom to bargain away either before or after the decedent's death his right to claim maintenance; there is no "contracting out." On the other hand, like the American courts, they have been unwilling to limit the testator's freedom to transfer his property inter vivos whether the transfer is outright or in trust. The criticism leveled in the United States against the ease with which forced-share statutes may be avoided applies with equal force to the maintenance statutes. As in the United States, legislative efforts to remedy the situation have yet to be made.

The judicial reasoning with respect to inter vivos transfers is simple: although only a few statutes are explicit on the point, it is generally held that it is the "net estate" left after payment of "funeral, testamentary and administration expenses, debts and liabilities and estate duty" [109] out of which maintenance can be awarded. Hence, assets transferred inter vivos are not part of the estate if the transfer was completed before the decedent died.[110] This includes transfers in trust, although the decedent had retained some measure of control over the assets as the trustee.[111]

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ABA MODEL PROBATE CODE, printed in SIMES & BASYE, PROBLEMS IN PROBATE LAW 5, 263-67 (1946).

[109] The English Inheritance (Family Provision) Act, 1938, 1 & 2 GEO. 6, c. 45, § 5(1), expressly so provides.

[110] See, *e.g.*, *Re* Dawson, [1945] 3 D.L.R. 532 (B.C. Sup. Ct.) (check cashed shortly before death); Naylor v. Grantley, [1940] 1 D.L.R. 716 (Ont. Sup. Ct.) (insurance policies assigned to nurse).

[111] See, *e.g.*, *In re* Paulin, [1950] Vict. L.R. 462. Property held under a general power of appointment is part of the estate if the will treats it as such. *In re* Carter, 44 N.S.W.S.R. 285 (1944); Kensington v. Kensington, [1949] N.Z. Gaz. L.R. 185. Under the English and Saskatchewan statutes only property over which the decedent had a special power of appointment is excluded from his estate. See Inheritance (Family Provision) Act, 1938, 1 & 2 GEO. 6, c. 45, § 5(1); 1 SASK. REV. STAT. c. 121, § 2(1)(3) (1953). A treatise on the English statute contains a

Even a transfer made with intent to defeat application of the act apparently cannot be attacked by the dependent because "the statute in no way attempts to regulate dispositions in life." [112]

In the light of this generally formal approach, it is all the more noteworthy that the courts, without statutory guidance, have established some limitations on the testator's freedom of contract. The most important of these has been created by a decision of the Privy Council which in this instance overruled the interpretation given by New Zealand's highest court to the New Zealand statute.[113] The Privy Council said that an agreement by the decedent to bequeath all or part of his assets to a third party can be enforced only against what is left after the satisfaction of the dependents' claims under the statute, whether or not the will conforms to the agreement. This holding has been sharply attacked;[114] it has in effect been superseded in Saskatchewan by a special provision in the statute.[115] The policy underlying it is a realistic departure from the formal approach followed by all jurisdictions with respect to other inter vivos transactions. Agreements to bequeath are usually made between members of the family and thus offer many opportunities for evasion of the statute. Since they directly affect the disposition of the estate, they could thus be readily used to defeat the purposes of the statute.

The courts have taken an equally firm stand in connection with agreements of a dependent not to claim maintenance. Such agreements cannot be pleaded in bar of any such claim. This rule has been applied to agreements made before the testator's death,

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form for a "Settlement upon Mistress and Illegitimate Child for Purpose of Evading the provisions of the Act." ALBERY, THE INHERITANCE (FAMILY PROVISION) ACT, 1938, at 67-68 (1950). The author explains that the "purpose of this deed is to evade the provisions of the Act while retaining the greatest possible control by the settlor over his property." *Id.* at 67 n.(a). The suggested form of trust is similar to those used by testators in this country to defeat the forced share of a spouse.

[112] Thomson v. Thomson, [1933] N.Z.L.R. s.59, s.62 (Sup. Ct.) (dictum). It is to be noted that in this case no intent to defeat the dependent's claim was found.

[113] Dillon v. Public Trustee, [1941] A.C. 294 (P.C.), *reversing* [1939] N.Z.L.R. 550.

[114] See Note, 19 CAN. B. REV. 603 (1941). *But see* Note, 19 CAN. B. REV. 756 (1941).

[115] SASK. REV. STAT. c. 121, § 9 (1953). See also MAN. STAT. 10 GEO. 6, c. 64, § 18 (1946).

whether contained in an antenuptial contract,[116] a settlement of family litigation,[117] or a deed of separation.[118]

These partial curtailments of the freedom of contract are usually justified on the ground that one of the purposes of the maintenance statutes is to prevent the testator from shifting to the community the burden of supporting his dependents after his death.[119] This view of the statutes, now generally accepted, has not gone unopposed.[120] Thus it was pointed out that the statutes contemplate maintenance, not mere subsistence, which is the usual measure of public assistance, and that, in any event, the statutes could not have been designed to protect the interest of the general taxpayer because they authorized the court to deny maintenance to unworthy dependents, however substantial the estate may have been; moreover, it was precisely this type of dependent, it was argued, who was likely to become a public charge.[121] Another argument was that the statutes left to the dependent the choice whether to apply, and that this would not have been done if the legislators had been concerned with the protection of the general taxpayer.[122] Recent New Zealand developments appear to answer that contention. The Social Security Commission is now entitled to appear on behalf of a dependent who has failed to apply but later seeks public assistance. Moreover, a dependent may be denied public assistance where he has failed without good reason to file or pursue an application under the maintenance statute.[123]

The limitations on freedom of contract may be explained by a judicial feeling that the typical dependent must be protected against his own improvidence or inexperience. The courts appear to fear that in many instances waivers may be inserted as a matter of routine in agreements signed when the need for maintenance may seem remote.[124] The desire to protect the dependent against

[116] Parish v. Parish, [1924] N.Z.L.R. 307 (Sup. Ct. 1923); *Re* Duranceau, [1952] Ont. 584, 3 D.L.R. 714 (C.A.).

[117] *Re* Close, [1952] 3 D.L.R. 814 (Ont. C.A.); Hooker v. Guardian Trust Co., [1927] N.Z. Gaz. L.R. 536 (Sup. Ct.).

[118] *In re* Pearson, [1936] Vict. L.R. 355, Argus L.R. 480.

[119] *E.g.*, Lieberman v. Morris, 69 Commw. L.R. 69 (Austr. High Ct. 1944), *approving In re* Morris, 43 N.S.W.S.R. 352 (full ct. 1943).

[120] See *In re* Doogan, 23 N.S.W.S.R. 484 (1923).

[121] See dissent *In re* Morris, 43 N.S.W.S.R. 352, 359, 361 (full ct. 1943).

[122] This was one of the reasons for the earlier view that a waiver contained in a marriage settlement was enforcable. *In re* Doogan, 23 N.S.W.S.R. 484 (1923).

[123] N.Z. STAT. 14 GEO. 6, No. 49, §§ 18(1), (2) (1950).

[124] On the policy problems involved, see especially Gardiner v. Boag, [1923] N.Z.L.R. 739, 745–46 (Sup. Ct. 1922).

other parties interested in the estate has led the courts similarly to deny effect to agreements affecting his claims which are entered into with the beneficaries of the will following the decedent's death.[125]

Here again, a contrast between the systems of forced and flexible limitations appears. While some American statutes declare waivers of forced shares invalid,[126] the courts in most states, with or without statutory support, uphold them. However, they reserve to themselves a measure of control by insisting that the underlying agreements be fair and that there have been full disclosure and absence of duress.[127] Thus, as under the system of flexible shares, the paramount social interest appears to take precedence over the right of the parties to affect their interests by private bargaining. Nevertheless, under the system of flexible maintenance a dependent who in an attempt to bargain away his claim has entered into an agreement with the decedent, however fair, will not necessarily be prevented from claiming maintenance if following the decedent's death he can prove dependence; [128] under the system of forced shares, he would be effectively barred.

### *D. Social Security and Freedom of Testation*

The growing concern with the needs and responsibilities of the individual has led to the present restrictions on testamentary freedom. Paradoxically, the same concern has caused a development which tends to restore some measure of that freedom. Lately, the state has assumed substantial financial responsibility for the welfare of its handicapped or aged citizens. To what extent may the testator anticipate that his dependents will be supported from public funds? To put it differently, may the courts in determining the adequacy or inadequacy of the provision made by the will or the rules of intestate succession take into account the social security benefits to which the dependent is entitled? Although the problem in the last analysis is again an ethical one, involving the relationship of the individual to the state, the answer in practice would seem to have been that if the individual may have

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[125] *E.g.*, *Re* Close, [1952] 3 D.L.R. 814 (Ont. C.A.).

[126] *E.g.*, IOWA CODE § 597.2 (1954); ORE. REV. STAT. § 108.060 (1953).

[127] *E.g.*, Rash v. Bogart, 226 Ala. 284, 146 So. 814 (1933); *In re* Prudenzano's Will, 116 Vt. 55, 68 A.2d 704 (1949).

[128] *Cf. In re* Holmes, [1936] N.Z. Gaz. L.R. 264 (daughter who through husband's incompetence lost farm given by her father allowed maintenance from father's estate).

support from the state for the asking he may not claim it from the estate. The state, to this extent, stands in loco parentis.

The problem first came before the courts in a special situation. Applications were made on behalf of dependents who were patients in public mental hospitals. These applications naturally assumed that the estate's responsibility for the cost of hospitalization — if it existed at all — would be limited to the fairly nominal amounts, usually fixed by statute, which the patient or his family were required to contribute.[129] To that extent, therefore, the responsibilities of the poor and wealthy decedent alike were considered to have been assumed by the government. The courts were divided, however, on the decedent's "moral duty" to provide for these costs. Some assumed the existence of this duty without apparent regard to the size of the estate involved.[130] Others differentiated between small and large estates. Where the estate was small and several dependents competed, the courts were reluctant to grant allowances, sometimes emphasizing that to do so would merely relieve *pro tanto* the general taxpayer rather than benefit the hospitalized dependent.[131] Although this is true whatever the size of the estate, some courts thought that a testator with a substantial estate was under a continuing moral duty to the patient and hence granted the application.[132] More logically, a New South Wales court thought that a testator had no moral duty to reimburse the state for maintaining the patient whether the estate be large or small. He was, however, bound to make provisions which would personally benefit the patient.[133] Similarly, an English court, barely veiling its distaste for current English social welfare legislation, refused to interfere with a will in which a testator be-

[129] See *Re* Miller, [1949] Ont. W.N. 577 (Surr. Ct.). *But see In re* Brousseau Estate, [1952–53] 7 West. Weekly R. (n.s.) 262, [1952] 4 D.L.R. 664 (B.C. Sup. Ct.), in which the court, pointing to much higher actual cost, to the better conditions of a private hospital costing $350 monthly, and to failure to provide for possible recovery, increased a $45 monthly allowance to $350.

[130] See *In re* Taylor Estate, [1950] 1 West. Weekly R. 1055 (B.C. Sup. Ct.) ($2,500 estate); *In re* Cousins, 59 Man. 372 (K.B. 1951) ($20,000 estate); *In re* Barclay, [1952] 5 West. Weekly R. (n.s.) 308 (Alta. Sup. Ct.) ($38,000 estate).

[131] Curtis v. Adams, [1933] N.Z.L.R. 385 (£2,900 estate); *In re* Koehler, [1920] N.Z.L.R. 257 (Sup. Ct. 1919) (£550 estate); *In re* Whiting, [1938] So. Aus. S.R. 188 (Sup. Ct.) (£1,300 estate).

[132] *In re* Brousseau Estate, [1952–53] 7 West. Weekly R. (n.s.) 262, [1952] 4 D.L.R. 664 (B.C. Sup. Ct.); *In re* Cousins, 59 Man. 372 (K.B. 1951); *In re* Williams, [1933] So. Aus. S.R. 107 (Sup. Ct.).

[133] *Re* Duff, 48 N.S.W.S.R. 510 (1948). The court also said that provision for eventual discharge must be made unless recovery was impossible.

queathed the bulk of a £23,000 estate to his mistress, thus shifting the responsibility for maintaining his insane daughter to the government, which had undertaken to furnish medical services to anyone upon request.[134]

With respect to social security payments, the New Zealand courts seem to have arrived at a solution which is likely to be generally accepted. In a case in 1944, the court differentiated between social security benefits granted without any means test and those which required such a test, holding that only the former may be weighed in fixing the amount of maintenance.[135] The distinction has since been embodied in New Zealand's Social Security Act.[136] This solution has managed to accommodate two basically inconsistent developments, both aimed at bettering the lot of the individual: greater private responsibility on the one hand, more public services on the other. Even those who can well afford to do without the public services may rely on these services to lighten their responsibility; this seems not unfair since, as taxpayers, they are called upon to contribute to the cost.

### *E. Categories of Dependents*

Consistent with the general philosophy of the maintenance legislation, which considers dependence as the rationale for limiting the decedent's freedom and for qualifying the rules of intestate succession, the statutes do not generally distinguish among claimants either according to age or sex. The decisions, however, demonstrate that the seemingly simple concept of dependence is strongly tinged by prevalent notions of the status of and obligations to the particular dependent as a member not only of the family, but also of the social and economic community. It is hardly surprising that in hundreds of adjudications the courts have developed contrasting attitudes toward the various categories of dependents.

*Widows.* — Widows alone file over half of all applications in the reported cases. This statistical preponderance is matched by the rank accorded them by the courts. A widow's claim is sometimes

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[134] *Re* Watkins, [1949] 1 All E.R. 695 (Ch.).

[135] Wood v. Leighton, [1944] N.Z.L.R. 567, 570 (Sup. Ct.); see Calder v. Public Trustee, [1950] N.Z. Gaz. L.R. 465, 467 (Sup. Ct.).

[136] N.Z. STAT. 14 GEO. 6, No. 49, § 18(3) (1950). For continuing doubts in this regard under the English statute, see *Re* Howell, [1953] 2 All E.R. 604, 606 (C.A.).

said to be "paramount." [137] She "has a higher moral claim on his estate than anyone else." [138] This preference equally reflects the husband's common-law duty to support his wife and the common experience that the widow has shared her life with the testator, has brought up his children, and has "generally acted as his partner in the business of life." [139] But not all widows fit into this pattern. A typical departure occurs where marital discord has led to a break-up of the marriage ending in divorce or separation; another, where either spouse has been married before.

About half the reports concerning widows deal with unhappy couples that were separated at the time of the husband's death. Following a separation the testator often attempts to benefit his own family or another woman at the expense of his wife's share in the estate. Unless the wife has clearly repudiated the marital relationship, the courts usually show little sympathy with these efforts.[140] Moreover, they are usually reluctant to stir the cold ashes of the marital strife and to assess the blame for separation. Of course, where the husband deserted [141] or ejected [142] his wife, by his conduct forced her to leave,[143] or insisted on separation,[144] she will be entitled to maintenance out of his estate. And a widow may not necessarily be barred from obtaining maintenance even though she is responsible for the separation.[145] The courts deal similarly with desertion by the wife. Where her desertion involves a real breach of marital loyalty, she will ordinarily be denied maintenance from the estate.[146] But this is not an absolute

[137] De Renzi v. De Renzi, 17 N.Z. Gaz. L.R. 620, 624, 625 (1915).

[138] Russell v. Dunn, 9 N.Z. Gaz. L.R. 509, 510 (Sup. Ct. 1907).

[139] Cunningham v. Cunningham, [1936] N.Z.L.R. s.69, s.71 (Sup. Ct.).

[140] See, *e.g.*, Eves v. Public Trustee, [1917] N.Z. Gaz. L.R. 344 (Sup. Ct.) (despite long separation, widow allowed 10 shillings weekly out of £299 estate left to adult sons); Toner v. Lister, [1919] N.Z. Gaz. L.R. 498 (Sup. Ct.) (suspensory order for widow separated thirty-one years after three months with husband). *But see* cases cited note 100 *supra*.

[141] See, *e.g.*, Shepherd v. Preen, [1918] N.Z. Gaz. L.R. 60 (Sup. Ct.).

[142] Dalton v. Spence, [1952] N.Z. Gaz. L.R. 230 (Sup. Ct.).

[143] *In re* Mays Estate, [1943] 3 West. Weekly R. 479 (Alta. Sup. Ct.).

[144] *In re* Willan Estate, [1951] 4 West. Weekly R. (n.s.) 114 Alta. Sup. Ct.).

[145] In Coates v. Thomas, [1947] N.Z. Gaz. L.R. 329 (Sup. Ct.), an adultery committed long before was considered expiated where the wife thereafter lived chastely and brought up their son without the testator's help. Adultery will usually "disentitle" a wife. See, *e.g.*, In the Will of T.M., [1929] Queens. W.N. 3 (Central Ct. 1916) (adultery after separation).

[146] *Re* Parr, 30 N.S.W.S.R. 10 (1929). The Ontario statute denies a widow the right to maintenance if she was living apart from her husband and could not claim alimony. ONT. REV. STAT. c. 101, § 9 (1950).

rule.[147] If spouses had agreed to separate or it is shown only that they had lived apart, courts have held that the widow in need of maintenance should get it regardless of how short the married life may have been.[148] The willingness of the courts to award maintenance even where the marriage had become an empty shell seems to be based on the thought that usually the decedent could have terminated his obligations by obtaining a divorce or judicial separation but, for reasons of his own, failed to do so.

The effect of marital misconduct on the widow's right to a forced share is not uniform in the United States. In some states statutes declare widows barred if they have engaged in certain types of misconduct.[149] If no statutory provisions exist, the courts seem inclined to follow the common-law rule which, in the absence of express statutory authority, permits the widow to recover even if she committed a serious breach of her marital duties.[150] Even where statutes exist, the courts are, of course, not vested with the range of discretion available under most of the maintenance statutes.

*Second or Third Marriages.* — Another typical departure from the normal family pattern occurs where the testator had been married before.[151] Often the testator was middle-aged or older. What he owned he may have acquired with the aid of his first wife or her children who are now all adults. Often, the age discrepancy between the spouses was so marked that the second marriage was bound to be short. Not infrequently the spouse chosen in advanced age had been employed in the testator's household.[152] In these circumstances, conflicts between the second wife

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[147] Delacour v. Waddington, 89 Commw. L.R. 117 (Austr. 1954), *affirming* [1953] Argus L.R. 913 (Vict. full ct.) (widow not barred though she would have been denied separate maintenance during testator's life because of desertion); Jackson v. Public Trustee, [1954] N.Z.L.R. 175 (Sup. Ct. 1953). In the latter case the widow's desertion was held to justify a reduction in the allowance granted.

[148] *In re* Godwin, [1948] Queens. W.N. 1 (1947) (remarriage at advanced age, separation after one year); *In re* Howard, 25 N.S.W.S.R. 189 (1925) (married two years, separated 42 years).

[149] For a summary of the statutes, see ABA MODEL PROBATE CODE, printed in SIMES & BASYE, PROBLEMS IN PROBATE LAW 5, 263–67 (1946).

[150] See 1 AMERICAN LAW OF PROPERTY § 5.35 (Casner ed. 1952); ATKINSON, WILLS 148–50 (2d ed. 1953).

[151] For a survey of pertinent decisions, see Worms v. Campbell, [1953] N.Z.L.R. 931.

[152] See Pugh v. Pugh, [1943] 1 Ch. 387 (housekeeper, 47, married farmer, 75, two years before his death). See also *In re* Richardson, [1920] So. Afr. L.R. 24 (Sup. Ct.) (nurse, 38, married testator, 72, three years before his death); Parish

and the children of the first marriage are frequent, particularly where the second wife's financial contributions to the estate were minimal.

Where the second marriage was short-lived and the age discrepancy great, the courts tend to minimize or deny maintenance. They may suggest that the young widow seek employment to supplement her resources.[153] On the other hand, where the second marriage lasted a number of years, the testator is not permitted to favor his adult children, let alone his more remote relatives or strangers, at his widow's expense, and this attitude holds true even if the second marriage was not a success.[154] Other circumstances may also strengthen the widow's position. The designated beneficiaries may be well off or fail to disclose their financial position to the court. The widow may have nursed the testator through a long illness,[155] or relinquished a well-paying position in order to marry.[156]

Thus the courts are unwilling to deal with the problem by such stereotyped formulae as the paramount rights of the surviving widow; they are aware of the moral, economic, and social problems involved in remarriages and make a realistic effort to strike a balance between the conflicting interests of the "newcomer" to the family group, the children from former marriages, and the other beneficiaries of the will.

The rising divorce rate and increasing longevity make it likely that remarriages in the United States will be more frequent than ever. The problems of such marriages are usually ignored by the forced-share statutes, which apply equally to the widow whether she was the decedent's first or fourth mate, whether she lived with him for fifty years or five days.

*Widowers.* — American forced share legislation tends to grant the same rights to surviving husbands and wives. The justice of this equal treatment seems so self-evident that it is rarely questioned. It is all the more interesting, therefore, to note the experience under the maintenance legislation, which also grants

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v. Parish, [1924] N.Z.L.R. 307 (Sup. Ct. 1923) (housekeeper, 50, married four years to testator, 76).

[153] See, *e.g.*, *Re* Edwards, [1950] Tasm. S.R. 20, 23.

[154] *In re* Bradbury, [1947] Queens. L.R. 171; Wilton v. Wilton, [1942] N.Z. Gaz. L.R. 246 (Sup. Ct.); Gardiner v. Boag, [1923] N.Z.L.R. 739 (Sup. Ct. 1922).

[155] Calder v. Public Trustee, [1950] N.Z. Gaz. L.R. 465 (Sup. Ct.); Laird v. Laird, 5 N.Z. Gaz. L.R. 466 (Sup. Ct. 1903).

[156] Jennings v. Kerr, [1940] N.Z. Gaz. L.R. 546 (Sup. Ct.).

both spouses equal rights. Widowers apply very rarely. Among some 600 reported decisions which were examined, only twenty-odd widowers had applied and at least five were unsuccessful. As is true of widows' applications, separations or second marriages underlie most of the claims. Generally even successful applicants do not fare too well. Judges frown on widowers who claim that their wives should have provided for them. Although the statutes plainly contemplate applications by widowers, such applications are described as "unusual," [157] are being considered with a "more critical eye," [158] and will not "readily be entertained." [159] A New Zealand court openly doubted that "marriage by a poor man to a rich woman . . . gives him any moral claims on her purse." [160] Accordingly the courts are inclined to deny maintenance to a widower in the absence of special circumstances.[161] But a widower who upon marriage gave up his occupation to take care of the testatrix may be entitled to judicial consideration.[162] The same is true where the widower has substantially contributed to the estate left by the testatrix [163] or where a small estate has for no apparent reason been left to remote relatives.[164]

*Children.* — The most serious shortcoming of the American law in the field of testamentary succession is its failure to prevent a testator from disinheriting his children. Legislative inertia seems largely responsible for the failure of modern forced-share legislation to remedy this glaring defect at least in the case of minor or invalid children.[165] It is significant that in the judicial administration of the maintenance statutes, despite the frequent reference to the "paramount" claims of a widow upon a testator's bounty, the claims of *minor* children are most willingly recognized. The

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[157] *Re* Blackwell, [1948] Ont. 522, 525, 3 D.L.R. 621, 623 (C.A.).

[158] *In re* McElroy, [1940] Vict. L.R. 445, 447, Argus L.R. 356, 357.

[159] Sylvester v. Public Trustee, [1941] 1 Ch. 87, 89.

[160] Jones v. Cummings, [1929] N.Z. Gaz. L.R. 236, 238 (Sup. Ct.).

[161] Styler v. Griffith, [1942] 1 Ch. 387; Pointer v. Edwards, [1941] 1 Ch. 60 (1940) (widower granted five shillings weekly from £15,800 estate left to testatrix's granddaughter).

[162] Sylvester v. Public Trustee, [1941] 1 Ch. 87.

[163] See, *e.g.*, *Re* Blackwell, [1948] Ont. 522, 3 D.L.R. 621 (C.A.).

[164] See, *e.g.*, Barker v. Westminster Trust Co., 57 B.C. 21, [1941] 4 D.L.R. 514; *In re* McElroy, [1940] Vict. L.R. 445, Argus L.R. 356.

[165] The Anglo-American adherence to the principle of freedom of testation has often been attributed to the predominance of the spirit of individualism in those countries. But even the most ardent advocates of this spirit do not contend that a testator should be permitted to leave his infant or invalid children destitute.

cases of inadvertent or apparently inadvertent neglect by the testator — usually involving after-born children — have already been mentioned.[166] It may seem surprising that parents should deliberately fail to provide for their minor children. It might be done out of concern for their welfare where a trusting testator is content to leave everything to the surviving spouse, who is thus enabled to provide for their children as circumstances may require. Here, unexpectedly, a few recent cases have held that the testator may not simply assume that the surviving spouse will maintain the children, and have granted applications on the children's behalf.[167] This view, obviously in conflict with the practice of many testators, has been sharply challenged by other courts.[168] A different reason for disinheriting minors arises upon divorce or separation. The decedent, particularly in instances where the other spouse had custody, is apt to carry over his resentment to the children of the unsuccessful marriage; in these instances the courts rarely fail to intervene.[169] Finally, it seems that those who have adopted children do not always feel under an obligation to provide for them. Whatever the reason for this attitude, the courts show no sympathy for it.[170]

As already noted, in a number of jurisdictions illegitimate children are eligible to claim maintenance.[171] Significantly, the courts insist that this inclusion of the illegitimates does not end the distinction between them and legitimate children. Hence, in a South Australian case, an illegitimate child was held entitled to maintenance of no more than ten shillings a week although the

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[166] See p. 295 *supra*.

[167] *In re* Denton, [1950] 2 West. Weekly R. 848, 1 D.L.R. 113 (Alta. 1950); Matthews v. New Zealand Ins. Co., [1951] N.Z. Gaz. L.R. 120 (Sup. Ct. 1950).

[168] See, *e.g.*, *Re* Little Estate, [1953] Ont. W.N. 865, 4 D.L.R. 846 (Surr. Ct.).

[169] See, *e.g.*, *In re* Hoffman, 43 B.C. 463 (Sup. Ct. 1931) (testator who deserted wife and infant daughters left $12,800 to boardinghouse keeper, court granted $10,000 to daughters); *In re* Westby, 62 T.L.R. 458 (Ch. 1946); Coull v. Gardner, [1952] N.Z. Gaz. L.R. 368 (Sup. Ct.).

[170] *In re* Finlan, [1951] 3 West. Weekly R. (n.s.) 671 (Alta.); Official Guardian v. LeMasurier, [1949] 2 West. Weekly R. 748, 4 D.L.R. 654 (Alta.); *In re* Tian, [1952] 6 West. Weekly R. (n.s.) 371 (Sask. Q.B.).

[171] See p. 298 *supra*. Assertion of the claim is made subject to various qualifications, mainly designed to protect the estate against fraud. Under the Queensland statute, an illegitimate child if under 21 must have been acknowledged or recognized by the testator, and if over 21 must have "helped to build up and/or conserve" the estate. The Testator's Family Maintenance Act, Amendment Act of 1943, QUEENS. STAT. 7 GEO. 6, No. 4, § 2.

testator, a bachelor, had left about £4,000 to his mother.[172] And in a recent New Zealand case, the intestate had deserted his wife after five years of marriage, and died leaving five minor illegitimate children. Under the intestacy rules, his wife was entitled to his entire estate of £9,000. The court ordered only one-third of the estate set aside for the illegitimates, deeming the widow's claim on the deceased's bounty higher than theirs.[173]

Difficult problems arise in connection with adult children. They relate especially to the limits on parental control through testamentary dispositions, and to the distinction between adult sons and adult daughters, who are equals before the law but not in economic and social life. Adult children are disinherited for a great variety of reasons, or for no apparent reason. Whatever the reasons, the courts exercise their customary restraint; they generally defer to the testator's decision to prefer one child over another or even outsiders over his own children. There is little attempt to redress, beyond granting modest allowances for maintenance, the seeming unfairness even where the discrimination appears to be plainly arbitrary and the applicant's character or conduct seems above reproach.[174] On the other hand, the courts have recognized that it is their duty to provide maintenance when the applicant is in need of support unless he is shown to be "disentitled." Thus they will intervene where the dependent is handicapped by advanced age or impaired health.[175] This handicap may also arise from unsuitable training or from the testator's failure to educate the applicant properly.[176] The applicant's case will be strengthened by a showing that the decedent exploited him, that there are no competing claims to the estate, which has been left to strangers, and particularly that he has substantially contributed to the building of the estate or, conversely, that the beneficiaries chosen by the testator have contributed little.[177]

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[172] *In re* Wade, [1946] So. Aus. S.R. 131 (full ct.).

[173] Wehipeihana v. Guardian Trust and Ex'rs Co., [1954] N.Z.L.R. 1108 (Sup. Ct.).

[174] Cleaver v. Guardian Trust and Ex'rs Co., [1950] N.Z. Gaz. L.R. 68 (Sup. Ct. 1949); *In re* Willert, [1937] Queens. W.N. 45; *In re* Chapman, [1918] Queens. S.R. 226. *But cf. In re* McCreedy, [1938] Queens. S.R. 293.

[175] *In re* Fergie Estate, [1939] West. Weekly R. 513 (B.C. Sup. Ct.); Hart v. Hart, 17 N.Z. Gaz. L.R. 393 (Sup. Ct. 1915).

[176] See Cook v. Webb, [1918] N.Z.L.R. 664 (shares of poorly educated daughters increased); Smith v. Public Trustee, [1927] N.Z.L.R. 342 (Sup. Ct.) (son engaged in moribund trade granted increase).

[177] See, *e.g.*, *In re* Bell, [1929] N.Z. Gaz. L.R. 320 (Sup. Ct.) (annuity of son

Although the statutes refer to children rather than to sons and daughters, able-bodied men in the prime of life are generally denied assistance even where the will is plainly unfair to them. This attitude is explained on the ground that an adult able to earn his living by work is not in real need and that allowing maintenance under those circumstances would encourage idleness.[178] However, the courts would be less than human if they were not willing to relent where the arbitrariness of the testator is marked and the applicant has a strong moral claim[179] or the estate is very substantial.[180] Adult daughters fare better.[181] Unmarried, widowed, or divorced daughters are usually allowed maintenance even if the estate involved is rather small.[182] Some early decisions tended to deny maintenance to married daughters because their husbands were supposed to maintain them, even if the husbands failed to do so.[183] But a more liberal practice has generally been followed, particularly where the estate is substantial and no competing claims exist.[184]

Nowhere is the elasticity of the statutory scheme more evident than in the judicial categorization of dependents. Unhampered by formal concepts or fixed rules, the courts survey the entire relationship between the decedent, dependent, and beneficiaries before reaching their decision. At the same time, they are more and more able to fall back on previous cases, not as rigid precedents but as particular applications of broad and flexible policies or rather attitudes toward family relations which, despite their diversity, are bound to present recurrent problems.

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who had been exploited increased). See also McMaster v. Cunningham, [1936] N.Z. Gaz. L.R. 264; *In re* Turner, [1943] Queens. S.R. 27 (1942); *Re* Hatte, [1943] Queens. S.R. 1 (1942).

[178] Allardice v. Allardice, 29 N.Z.L.R. 959 (1910), *aff'd*, [1911] A.C. 730 (P.C.).

[179] *In re* Brown, [1946] Queens. W.N. 46 (son who had long worked for testator granted fee in place of life estate); In the Will of Hughes, [1930] Queens. S.R. 329 (son who worked on testator's farm granted part of estate).

[180] *In re* Jones, 49 B.C. 216 (Sup. Ct. 1934); *Re* Sherrard, 55 N.S.W.W.N. 38 (1938).

[181] For a summary of decisions distinguishing between sons and daughters, see *In re* Sinnott, [1948] Vict. L.R. 279, 280–81, 2 Argus L.R. 309, 310–11.

[182] See, *e.g.*, *In re* Hall, [1941] Queens. W.N. 4 (1940); Harris v. Public Trustee, [1942] So. Aus. S.R. 183.

[183] See, *e.g.*, *Re* Raymond, 14 N.Z. Gaz. L.R. 560 (Sup. Ct. 1912).

[184] *E.g.*, Severn v. Public Trustee, [1916] N.Z.L.R. 710 (Sup. Ct.).

## IV. Conclusion

The history of estate maintenance legislation over the last 54 years is marked by a continuing advance into new territory and a steady growth of both judicial control and coverage. These developments indicate that the legislation has become widely accepted as both just and workable. Many statements of informed observers point in the same direction.[185] What are the reasons for this remarkable success?

Undoubtedly, the climate of opinion in most common-law jurisdictions has changed: a testator's callous neglect of his immediate family is no longer viewed as an idiosyncrasy which is deplorable but immune to correction. Conceivably, the legislators could have selected some system of forced shares in the American pattern. It is doubtful, however, if that solution would have proved as popular as the present bold formula which in its most advanced form entrusts the protection of the decedent's family to judicial discretion, unhampered by rules and details. Its advantages are important.

The statute minimizes interference with the testator's discretion. Unlike the scheme of forced shares, it does not come automatically into operation whenever dependents are discriminated against in the will, for the court must apply a means test which, however flexible, rules out all dependents who possess adequate resources. Moreover, the award is usually not made in the form of an outright lump sum but will take the form of a trust or other arrangement suitable to protect not only the applicant but all others interested in the estate, according to the exigencies of the particular situation. Even if judicial intervention is indicated, the remedy is defined by the dependent's needs, which may be merely temporary; the claim to maintenance is neither inheritable nor

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[185] See Campbell, *Family Law*, in 4 The British Commonwealth (New Zealand) 317, 335–38 (Robson ed. 1954); Stephens, Testator's Family Maintenance 5–10 (1934); Note, *Testator's Family Maintenance in England*, 15 Austr. L.J. 197 (1941). In Gardner v. Boag, [1923] N.Z.L.R. 739, 746 (Sup. Ct. 1922), the court said:

> As the law stands and as it has been administered it is a law which has in a very small percentage of the total number of testamentary dispositions made a very moderate deduction from the otherwise plenary testamentary authority of the subject, but within that small percentage of instances it has afforded the appropriate remedy in a very large number of cases of injustice or inadvertence.

See also Justice McLelland's foreword to Wright, Testator's Family Maintenance in Australia and New Zealand, at v (1954).

transferable; as a rule maintenance consists of periodic payments which are terminated upon the dependent's death, change in status, or cessation of need.

The wide range of discretion enables the court — at least for this limited purpose — openly to explore and adjust a total family situation instead of being compelled to operate under hard and fast rules which often permit only a choice between undesirable alternatives. To illustrate, the statutes require the court to consider the other means available to the dependent. Thus, the maintenance principle can coexist with dower and homestead legislation and serve to supplement them whenever necessary. Nor will the court be compelled, for example, to turn over all or part of the estate of a wealthy testator to his widow after a few days of marriage and thus treat her as the equal of a widow who has shared her life with her husband.

The maintenance principle is essentially modern in contrast to the system of the legitim, or forced share. The latter is based on the ancient notion that the decedent's estate is the product of a joint family effort and hence family property which is equally distributable among those who contributed to its production. This notion is no longer relevant to our present urbanized and industrial society. Most dependents do not contribute to the building of the parental or marital estate, and the family home has ceased to be the center of the family's economic efforts. This is recognized by the maintenance system; at the same time the flexibility of that system permits the court to recognize whenever appropriate the survival of the producing family as an institution, notably on the family farm, by giving due weight to the economic contributions made by the dependent.

The legislation has a strong ethical appeal. The very fact that it is available only to those who are in need focuses attention on the moral aspects of the husband-wife and parent-child relationships. The broad judicial review of the conduct of all concerned before maintenance is awarded enables the court to deal realistically with the strain and stress of modern family life, its greater mobility and instability, and the changing status of women.

It is also evident that the statute fulfills adequately its preventive functions. After the adjudication of several hundred cases, a climate of decision has developed which enables the practitioner to predict, within reasonable limits, the likely reac-

tion of a court to a particular set of circumstances. He is thus enabled on the one hand to restrain testators from making unreasonable provisions and on the other to advise dependents and beneficiaries against engaging in fruitless litigation. It may be significant in this connection that earlier fears that these statutes would provide "food for lawyers" and would "drain the estates in unpleasant lawsuits" [186] have not materialized.

However, it cannot be overstressed that in one important aspect maintenance legislation is subject to the same serious objections as the American forced share statutes: a failure to prevent the testator from reducing the distributable estate by suitable inter vivos transactions.

Despite this grave shortcoming the statutes deserve the close attention of American legislatures. They offer an intelligent, forthright, and relatively simple solution for many problems that beset our law. The American statutes affording protection to spouses are often inadequate, overly complex, and rigid, and provide little direct protection for children. The maintenance principle, as has been demonstrated by the experience in Ontario, can function effectively even if more traditional and rigid methods of protection such as dower are continued. Even if its application were confined to children, it would do away with many of the intricacies and inconsistencies of pretermitted children statutes and above all with the distortions of the judicial process now caused by the subterranean desire to protect children against disinheritance. Translating this popular desire into statutory policy would make our law more just and, in any event, less devious.

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[186] See Gold, *Freedom of Testation, The Inheritance (Family Provision) Bill*, 1 MODERN L. REV. 296, 299 (1938). He rightly considered those fears exaggerated in the light of the experience of New Zealand where, as he reports, between 1932 and 1937 an average of 77 wills, 1.75% of the total, were contested. A comparison of the reports published in New Zealand during that period and since indicates no increase in litigation. Significantly, although the New Zealand statute has authorized applications in the case of total intestacy since 1939, only a few such applications have been reported. The amount of litigation in Maine under the widow's allowance statute, see note 22 *supra*, also seems negligible.

EXHIBIT 2

New Zealand Family Protection Act

# THE FAMILY PROTECTION ACT 1955

## 1955, No. 88

**An Act to consolidate and amend certain enactments of the General Assembly relating to claims for maintenance and support out of the estates of deceased persons**

[*26 October 1955*

**1. Short Title**—This Act may be cited as the Family Protection Act 1955.

**2. Interpretation**—(1) In this Act, unless the context otherwise requires,—

"Administration" and "administrator" have the same meanings as they have in the Administration Act 1952:

"Application" means an application made under this Act:

"Court" means the Supreme Court:

"Stepchild", in relation to any deceased person, means any child by a former marriage of the deceased's husband or wife; and includes any illegitimate child of the deceased's husband or wife who was living at the date of the marriage of the husband or wife to the deceased.

(2) This Act shall apply in all cases, whether the deceased person died before or after the commencement of this Act:

Provided that no distribution of any part of the estate of a deceased person that has been made before the commencement of this Act shall be disturbed in favour of any person by reason of any application or order made under this Act if it could not have been disturbed in favour of that person by reason of any application or order made under the enactments repealed by this Act.

(3) For the purposes of this Act an illegitimate relationship between a parent and child shall not be recognised unless the Court is satisfied that the paternity or maternity of the parent has been admitted by or established against the parent while both the parent and child were living.

(4) For the purposes of this Act no real or personal property that is held upon trust for any of the beneficiaries in the estate of any deceased person who died after the seventh day of October, nineteen hundred and thirty-nine (being the date of the passing of section twenty-three of the Statutes Amendment Act 1939), shall be deemed to have been distributed or to have ceased to be part of the estate of the deceased by reason of the fact that it is held by the administrator after

he has ceased to be administrator in respect of that property and has become trustee thereof, or by reason of the fact that it is held by any other trustee.

(5) For the purposes of this Act the estate of any deceased person shall be deemed to include all property which is the subject of any *donatio mortis causa* made by the deceased:

Provided that—

(a) No claim in respect of any property to which this subsection relates shall lie against the administrator by any person who (under any order of the Court under this Act) becomes entitled to the property or to any benefit therefrom; and

(b) In all other respects the provisions of this Act shall apply in respect of that property in the same manner as those provisions would apply to the property if it were part of the estate of the deceased which was properly distributed by the administrator immediately after the expiration of six months from the date of the grant in New Zealand of administration in the estate of the deceased without notice of any application or intended application under this Act in respect of the estate, whether the order of the Court is made before or after the expiration of the said six months.

Cf. 1908, No. 60, s. 32; 1939, No. 39, s. 23

**3. Persons entitled to claim under Act**—An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons:

(a) The wife or husband of the deceased:

(b) The children of the deceased, whether legitimate or illegitimate:

(c) The grandchildren of the deceased, being children (whether legitimate or illegitimate) of any child (whether legitimate or illegitimate) of the deceased:

Provided that no claim under this Act may be made by any such grandchild of the deceased, unless—

(i) The parent through whom he is related to the deceased has died (whether in the lifetime of the deceased or subsequently); or

(ii) That parent has deserted or failed to maintain the grandchild; or

(iii) The grandchild and the persons (if any) who have custody of the grandchild do not know the whereabouts of that parent; or

(iv) That parent is an undischarged bankrupt; or

(v) That parent is a mentally defective person within the meaning of the Mental Health Act 1911:

(d) The stepchildren of the deceased who were being maintained wholly or partly or were legally entitled to be maintained wholly or partly by the deceased immediately before his death:

(e) The parents of the deceased, whether their relationship is legitimate or illegitimate:

Provided that no claim under this Act may be made by any such parent, unless—

(i) The parent was being maintained wholly or partly or was legally entitled to be maintained wholly or partly by the deceased immediately before his or her death, or

(ii) At the date of the claim, no wife or husband or legitimate child of the deceased is living.

Cf. 1908, No. 60, s. 33 (1); 1936, No. 58, s. 26; 1939, No. 39, s. 22; 1943, No. 20, s. 14; 1947, No. 60, s. 15

**4. Claims against estate of deceased person for maintenance**—(1) Notwithstanding anything to the contrary in the Administration Act 1952, if any person (in this Act referred to as the deceased) dies, whether testate or intestate, and in terms of his will or as a result of his intestacy adequate provision is not available from his estate for the proper maintenance and support thereafter of the persons by whom or on whose behalf application may be made under this Act as aforesaid, the Court may, at its discretion on application so made, order that such provision as the Court thinks fit shall be made out of the estate of the deceased for all or any of those persons.

(2) Where an application has been filed on behalf of any person, it may be treated by the Court as an application on behalf of all persons who might apply, and as regards the question of limitation it shall be deemed to be an application on behalf of all persons on whom the application is served and all persons whom the Court has directed shall be represented by persons on whom the application is served.

(3) It shall not be necessary to serve any application on any person, or to make provision for the representation of any person on any application, by reason only of the person being entitled to apply, unless—

(a) The person is the wife or husband or a legitimate child of the deceased, or is a legitimate child of a deceased legitimate child of the deceased; or

(b) The Court in its discretion considers that there are special circumstances which render it desirable that the person be served or represented.

(4) An administrator of the estate of the deceased may apply on behalf of any person who is not of full age or mental capacity in any case where the person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat the application as an application on behalf of the person for the purpose of avoiding the effect of limitation.

Cf. 1908, No. 60, s. 33 (1), (7), (10)

**5. Terms of order**—(1) The Court may attach such conditions to any order under this Act as it thinks fit or may refuse to make such an order in favour of any person whose character or conduct is or has been such as in the opinion of the Court to disentitle him to the benefit of such an order.

(2) In making any such order the Court may, if it thinks fit, order that the provision may consist of a lump sum or a periodical or other payment.

Cf. 1908, No. 60, s. 33 (2), (3)

**6. Provision for class fund**—(1) Without in any way restricting the powers of the Court under this Act, it is hereby declared that the Court may order that any amount specified in the order shall be set aside out of the estate and held on trust as a class fund for the benefit of two or more persons specified in the order (being persons for whom provision may be made under this Act).

(2) Where any amount is ordered to be held on trust as a class fund for any persons under subsection one of this section, that amount shall be invested and the trustee may at his discretion, but subject to such directions and conditions as the Court may give or impose, apply the income and capital of that amount or so much thereof as the trustee from time to time thinks fit for or towards the maintenance or education (including past maintenance or education provided after the death of the deceased) or the advancement or benefit of those persons or of any one or more of them to the exclusion of the other or others of them in such shares and proportions and generally in such manner as the trustee from time to time thinks fit; and may so apply the income and capital of that amount notwithstanding that only one of those persons remains alive.

(3) For the purposes of this section the term "trustee" means the administrator, unless the Court appoints any other trustee (whether by the order creating the class fund or subsequently), in which case it means the trustee so appointed.

(4) If the trustee is not the administrator, then the Court may give such directions as it thinks fit relating to the payment to the trustee of the amount which is to be held on trust as a class fund and may exercise any power under [section sixty-four of the Trustee Act 1956] (which relates to dealings with trust property) either on the creation of the class fund or from time to time during the continuance of the trusts thereof.

In subs. (4), s. 64 of the Trustee Act 1956, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed s. 81 of the Statutes Amendment Act 1936.

**7. Incidence of payments ordered**—(1) The incidence of the payment or payments ordered shall, unless the Court otherwise determines, fall rateably upon the whole estate of the deceased, or, in cases where the authority of the Court does not extend or cannot directly or indirectly be made to extend to the whole estate, then to so much thereof as is subject to the authority of the Court.

(2) The Court shall have power to exonerate any part of the deceased's estate from the incidence of any such order, after hearing such of the parties who may be affected by the exoneration as it thinks necessary, and may for that purpose direct any administrator to represent, or appoint any person to represent, any such party.

(3) The Court shall have power at any time to fix a periodical payment or lump sum to be paid by any beneficiary in the estate of the deceased to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested, and to exonerate that portion from further liability, and to direct in what manner the periodical payment shall be secured, and to whom the lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

(4) Upon an order being made under this Act the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

Cf. 1908, No. 60, s. 33 (4)–(6), (8)

**8. Mortgages and assignments of provisions under orders**—No mortgage, charge, or assignment of any kind whatsoever which is given of or over any provision out of the estate of any deceased person granted by any order of the Court under this Act and which is made before the order of the Court is made shall be of any force, validity, or effect; and no such mortgage, charge, or assignment made after the order of the Court is made shall be of any force, validity, or effect unless it is made with the permission of the Court.

Cf. 1908, No. 60, s. 33 (12)

**9. Limitation of proceedings**—(1) No application in respect of any estate shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made before the expiration of the prescribed period specified in subsection two of this section:

Provided that the time for making an application may be extended for a further period by the Court, after hearing such of the parties affected as the Court thinks necessary; and this power shall extend to cases where the time for applying has already expired, including cases where it expired before the commencement of this Act:

Provided also that no such extension shall be granted unless the application for extension is made before the final distribution of the estate, and no distribution of any part of the estate made before the administrator receives notice that the application for extension has been made to the Court shall be disturbed by reason of that application or of any order made thereon, and no action shall lie against the administrator by reason of his having made any such distribution.

(2) The prescribed period mentioned in this section shall be,—

(a) In the case of an application by an administrator made on behalf of a person who is not of full age or mental capacity, a period of two years from the date of the grant in New Zealand of administration in the estate; and

(b) In the case of any other application, a period of twelve months from the date of the grant in New Zealand of administration in the estate.

Cf. 1908, No. 60, s. 33 (9), (11); 1921–22, No. 33, s. 2

**10. Power of administrator to distribute before limitation period has expired**—(1) No action shall lie against the administrator by reason of his having distributed any part of the estate, and no application or order under this Act shall disturb the distribution, if it was properly made by the administrator for the purpose of providing for the maintenance, support, or education of any person who was totally or partially dependent on the deceased immediately before the death of the deceased, whether or not the administrator had notice at the time of the distribution of any application or intended application under this Act in respect of the estate.

(2) No action shall lie against the administrator by reason of his having distributed any part of the estate, if the distribution was properly made by the administrator after the expiration of six months from the date of the grant in New Zealand of administration in the estate of the deceased and without notice of any application or intended application under this Act in respect of the estate.

(3) Without limiting the foregoing provisions of this section, it is hereby declared that no action by any person whose relationship to the deceased is in any way illegitimate shall lie against the administrator by reason of his having distributed any part of the estate, if the distribution was properly made by the administrator without notice of any application or intended application under this Act in respect of the estate.

(4) Notice to an administrator of an intended application shall lapse and shall be incapable of being renewed, and the administrator may act as if he had not received the notice, if, before the expiration of three months after the date on which he first receives notice of the intention to make the application or before the sooner expiration of twelve months from the date of the grant in New Zealand of administration in the estate of the deceased, the administrator does not receive notice that the application has been made to the Court:

Provided that nothing in this subsection shall prevent the subsequent making of the application.

(5) For the purposes of this section a distribution by an administrator of any part of the estate shall be deemed to be properly made if it is made in accordance with any trust, power, or authority which is subsisting when the distribution

is made and would justify the distribution if no subsequent order were made by the Court under this Act in respect of the estate.

(6) It is hereby declared that in any case where the administrator has made a distribution of any assets forming part of the estate and there is nothing in this Act to prevent the distribution from being disturbed,—

(a) The Court may make an order under this Act in respect of the assets, or may order that any person to whom the assets were distributed or his administrator shall pay to any applicant under this Act or to the administrator of the deceased a sum not exceeding the value of the assets; and for the purpose of giving effect to any such order the Court may make such further order as it thinks fit:

Provided that no such order shall deprive any other person of any estate or interest in the assets if the estate or interest was acquired in good faith, for valuable consideration, and without notice that any application was being made or was intended to be made under this Act and might affect the assets:

(b) If an order is made under paragraph (a) of this subsection in favour of any applicant,—

(i) That applicant may exercise all remedies available to him in respect of the assets and against the person who received them or his administrator without first exercising his remedies (if any) against the administrator of the deceased, notwithstanding any rule of law to the contrary:

(ii) No remedies which may be available to the applicant against the administrator of the deceased for distributing the assets shall be enforceable by execution or otherwise except so far as that applicant, having exhausted all remedies available to him against the assets and the persons to whom they were distributed or their administrators, has failed to recover all assets and benefits to which he has become entitled under that order or their value:

Provided that nothing in this subparagraph shall prevent the administrator of the deceased from being joined as a defendant in any action against any person to whom the assets were distributed or his administrator or prevent judgment from being entered against the administrator of the deceased in any such action, but judgment so entered shall not be enforceable by execution or otherwise except in accordance with this subparagraph:

Provided also that nothing in this subparagraph shall affect any other defence which may be available to the administrator of the deceased.

Cf. 1936, No. 58, s. 26 (1)

**11. Evidence as to deceased's reasons for dispositions**—Without restricting the evidence which is admissible or the matters which may be taken into account on any application under this Act, it is hereby declared that on any such application the Court may have regard to the deceased's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for any person; and the Court may accept such evidence of those reasons as it considers sufficient, whether or not the same would be otherwise admissible in a Court of law.

**12. Variation of orders**—(1) Where (whether before or after the commencement of this Act) the Court has ordered periodical payments, or has ordered any part of the estate or a lump sum to be held as a class fund or invested for the benefit of any person or persons, it shall have power to inquire whether at any subsequent date any party deriving benefit under its order is still living or has become possessed of or entitled to provisions for his proper maintenance or support and into the adequacy of the provisions, or whether the provisions made by its order for any such party remain adequate, and may increase or reduce the provisions so made or discharge, vary, or suspend its order, or make such other order as is just in the circumstances.

(2) Where an order has been made under this Act in respect of the estate of any deceased person and application is subsequently made in respect of that estate on behalf of any person who is not bound by the order, the Court may vary the previous order in such manner as it thinks fit:

Provided that the previous order shall not be varied so as to disturb any distribution made pursuant thereto if anything in this Act prevents the distribution from being disturbed:

Provided also that, without limiting the provisions of section ten of this Act, no action shall lie against the administrator by reason of his having distributed any part of the estate pursuant to a previous order without notice of any subsequent application under this Act in respect of the estate, whether the distribution is made before or after the expiration of six months from the date of the grant in New Zealand of administration in the estate of the deceased.

Cf. 1908, No. 60, s. 33 (13)

**13. Certain benefits under the Social Security Act to be disregarded**—In making any order under this Act for provision out of the estate of a deceased person, the Court shall disregard any benefit under Part II of the Social Security Act 1938 (other than a superannuation benefit, a miner's benefit, or a family benefit) which is or may become payable to any person.

Cf. 1950, No. 49, s. 18 (3)

**14. Duty on estate**—(1) Where an order is made by the Court under this Act, all duties payable on the transmission of the estate under the will or on the intestacy of the deceased shall be computed as if the provisions of the order had been part of the will of the deceased.

(2) Any duty paid in excess of the amount required to be paid under this section shall, on application and without further appropriation than this Act, be refunded by the Commissioner of Inland Revenue or a District Commissioner of Stamp Duties to the person entitled to receive it.

Cf. 1908, No. 60, s. 34; 1952, No. 33, s. 20 (2); 1953, No. 55, s. 17

**15. Right of appeal**—From any order made under this Act, a party prejudicially affected may appeal to the Court of Appeal, and may apply to the Supreme Court for directions as to who is to be served with notice of any such appeal.

Cf. 1908, No. 60, s. 35

**16. Repeals and savings**—(1) The enactments specified in the Schedule to this Act are hereby repealed.

(2) Without limiting the provisions of the Acts Interpretation Act 1924, it is hereby declared that the repeal of any provision by this Act shall not affect any document made or any thing whatsoever done under the provision so repealed or under any corresponding former provision, and every such document or thing, so far as it is subsisting or in force at the time of the repeal and could have been made or done under this Act, shall continue and have effect as if it had been made or done under the corresponding provision of this Act and as if that provision had been in force when the document was made or the thing was done.

(3) All the provisions of sections one to thirty-one of the Family Protection Act 1908 shall remain in full force so far as they relate to family homes which are registered under Part I of that Act at the date of the commencement of this Act; and, notwithstanding anything in paragraph (c) of section seventeen of that Act, any alienation (including a mortgage) by a settlor or his family of any such family home shall be valid if it is made with the prior approval of the Court; and the Court may by order confer upon the settlor or his family, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money derived from any such alienation shall be applied.

EXHIBIT 3

New York Family Maintenance Act

# FAMILY MAINTENANCE ACT

Senate Intro. No. 1601, Print No. 1646 (Greenberg)

Assembly Intro. No. 3878, Print No. 3972 (Turshen)

## AN ACT

To amend the decedent estate law, in relation to dependent children of a decedent

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section twenty-six of the decedent estate law, as last amended by chapter six hundred eighty-one of the laws of nineteen hundred sixty-four, is hereby amended to read as follows:

§ 26. Child born after making a will. Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.

*This section shall apply only in the case of wills executed prior to September first, nineteen hundred sixty-seven.*

§ 2. Such law is hereby amended by inserting therein a new section, to be section twenty-six-a, to read as follows:

*§ 26-a. Dependent children. 1. Where a person domiciled in this state dies after August thirty-first, nineteen hundred sixty-seven survived by a dependent child, and the surrogate's court having jurisdiction of the decedent's estate finds that no reasonable provision for the maintenance of such dependent child has been made under a will executed by the decedent after August thirty-first, nineteen hundred sixty-seven or, if there is no will, is available to such dependent child under the law governing intestate succession, on application by or in behalf of such dependent child, such court may, in its discretion, order that reasonable provision be made out of the decedent's net estate for the maintenance of such child.*

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

*2. No application shall be entertained by the court by or in behalf of any dependent child if the surviving spouse is the parent of such child and is entitled under the decedent's will to substantially all of the net estate or to substantially all of the net income therefrom.*

*3. For the purpose of this section, a dependent child is an infant or an adult incapable, by reason of mental or physical disability, of maintaining himself, who is either: (a) a legitimate child of the decedent; (b) a child adopted by the decedent; or (c) an illegitimate child if the decedent is the mother of such child or, where the decedent is the father of such child, if such child is entitled to inherit under the provisions of article three of this chapter.*

*4. The dependent child shall be maintained by periodic payments of income from the net estate, unless the court finds it in the interest of the estate beneficiaries to order periodic payments of income and principal from such part of the estate as in its discretion is sufficient to effectuate the purposes of this section. In any case, maintenance of a dependent child shall be terminated (a) in the case of an infant child, when such child becomes twenty-one years of age; (b) in the case of an adult child under disability, the cessation of the disability; (c) or in any case, the earlier death of such child.*

*5. In acting upon any application made under this section, the court shall consider (a) any present or future income from any source or any capital resource of the dependent child; (b) the decedent's reasons, so far as ascertainable, for making the dispositions in his will, and the court may accept any relevant evidence of such reasons as it considers sufficient, including a statement in writing signed by the decedent and dated; and (c) any conduct of the dependent child in relation to the decedent or other person, and in relation to any other matter which the court may consider relevant.*

*6. An application under this section may be made by (a) a guardian or committee of the property of such child; (b) if there is no guardian or committee, a person having lawful custody of such child; (c) such child if he is more than fourteen years of age; (d) the executor or administrator of the estate, and in any case shall be made upon a petition which, in addition to the requirements of section fifty-one of the surrogate's court act, shall set forth: (a) the reason for the dependency of such child; (b) the capital resources of such child if ascertainable; and (c) his present or future income from other sources. Such application may be made at any time after the issuance of letters testamentary or letters of administration, provided no decree settling the final account of the executor or administrator of the estate has been made.*

*If such application is entertained, a citation shall issue to all persons who may be affected by an order of maintenance.*

*Upon a proceeding to settle the final account of the executor or administrator of an estate, the petition shall set forth the name of*

*any dependent child of the decedent, whether or not an application under this section has been made on behalf of such child and, if made, whether any order has been entered thereon. If it appears that no application has been made, the surrogate, on the return of citation in such proceeding, may appoint a special guardian to represent such dependent child.*

*7. Upon the making of an application under this section or where a dependent child is a party to a proceeding to settle the accounts of an executor or an administrator, it shall be the duty of the executor or administrator, and of the special guardian, if any, to furnish the court with such facts as are necessary to effectuate the purposes of this section.*

*8. Where a maintenance order has been made, the estate of the decedent subject to such order shall be treated as affected thereby, as of the date of the decedent's death, for all purposes including estate taxes.*

*9. The court may at any time or from time to time modify, suspend or set aside any order made pursuant to this section.*

*10. The burden of any order of maintenance shall be ratably apportioned among the persons beneficially interested in the estate. Where a trust is created or other provisions are made in a will whereby a person is given an interest in income, an estate for years or for life or any other temporary interest in any property or fund, the amount apportionable against such temporary interest and a remainder limited thereon shall be charged against and paid out of the principal of such property or fund without apportionment between such temporary interest and remainder; provided, however, that no portion of the estate which passes to the surviving spouse of the decedent in a manner which qualifies for an estate tax marital deduction under any tax law of the United States or of the state of New York shall be subject to the burden of a maintenance order, and provided further that the court in its discretion may exonerate any other portion of the estate from such burden where an increase in the liability of the estate for taxes or hardship upon a beneficiary of the estate would otherwise result.*

*11. Nothing herein contained shall give a surviving spouse an absolute right of election under sections eighteen or eighteen-b of this chapter, nor affect the amount of such elective share as provided in such sections.*

*12. Nothing in this section shall prevent a fiduciary from exercising any of the powers authorized by section one hundred twenty-seven of this chapter.*

*13. Anything in this section to the contrary notwithstanding, the surrogate in his discretion may refuse to entertain any application made under this section.*

§ 3. The opening paragraph of section eighty-three of such law, said section having been last amended by chapter seven hundred

twelve of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

The real property of a deceased person, male or female, not devised, shall descend, and the surplus of his or her personal property, after payment of debts and legacies, and if not bequeathed, shall, *subject to the provisions of section twenty-six-a of this chapter,* be distributed, in manner following:

§ 4. This act shall take effect September first, nineteen hundred sixty-seven.

NOTE.—This act is recommended by the Temporary State Commission on the Law of Estates. It is intended to terminate the glaring inconsistency of the law which compels a parent to support his dependent children during his lifetime, and permits him to leave them penniless at his death.

The act provides that where the decedent's will or the intestacy law fails to make reasonable provision for an infant child of the decedent or for an adult child who because of a physical or mental disability cannot support himself, the Surrogate in his discretion may make an order providing for the maintenance of the child out of the income of the estate. The act does not apply in the ordinary case of a will leaving substantially all of the estate or substantially all of the income therefrom to the spouse of the decedent where the spouse is the surviving parent of such child.

In order not to frustrate the testamentary scheme, payments by reason of maintenance orders are to be made from the income of the estate and not from the principal unless the court in its discretion determines that there would be less hardship on the estate beneficiaries if principal payments were authorized. The latter provision will facilitate the distribution of the estate. Thus, the dependent child is protected and the will or the laws of intestacy are carried out as to the balance of the estate.

This act will only affect wills executed after its effective date and estates of persons dying after its effective date so as not to disturb property settlements made in good faith prior thereto. See Report 1.7B and 1964 Supplement to same [Leg. Doc. 1965) No. 19, pp. 188–205].

EXHIBIT 4

California Pretermission Statute

**§ 90. Omitted children and grandchildren**

When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.

(Stats.1931, c. 281, § 90.)

**§ 91. Omitted children and grandchildren; sources of share; apportionment**

The share of the estate which is assigned to a child or issue omitted in a will, as hereinbefore mentioned, must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

(Stats.1931, c. 281, § 91.)

EXHIBIT 5

UPC Pretermission Section

**Section 2-302. [Pretermitted Children.]**

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

**COMMENT**

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his existing children because of mistaken belief that the child is dead.

Although the sections dealing with advancement and ademption by satisfaction (2-110 and 2-612) provide that a gift during lifetime is not an advancement or satisfaction unless the testator's intent is evidenced in writing, this section permits oral evidence to establish a testator's intent that lifetime gifts or nonprobate transfers such as life insurance or joint accounts are in lieu of a testamentary provision for a child born or adopted after the will. Here there is no real contradiction of testamentary intent, since there is no provision in the will itself for the omitted child.

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of (a) (1).

Under subsection (c) and Section 3-902, any intestate estate would first be applied to satisfy the share of a pretermitted child.

This section is not intended to alter the rules of evidence applicable to statements of a decedent.