NOTES

The Case for Family Maintenance in Quebec

After twenty years of marriage Mr. Smith finds his wife (to whom he is married in separation of property) no longer as attractive as when he married her. Disinheriting her, he leaves his entire estate to the Montreal General Hospital, with the result that Mrs. Smith, who has no estate or income of her own, is left destitute. Mr. Jones, who has two sons, one healthy and prosperous, the other an unemployable invalid, for some perverse reason appoints his healthy son as his sole heir, leaving the invalid son a charge on public assistance. Have Mr. Smith's neglected widow, Mr. Jones's passed-over son, any remedy in law ?

I

The problem of disinherison does not arise in primitive systems of law, where the devolution of a man's estate is immutably fixed by custom. It has occupied the minds of judges and legislators ever since the introduction of testamentary succession. There are two ways in which modern legal systems protect a man's nearest, and, one hopes, dearest, against capricious disinherison: provision for a fixed minimum share in the deceased's estate, of which they cannot be deprived by will, save for cause; or by empowering the courts to award to them maintenance out of the deceased's estate.[1]

The system of the fixed minimum share goes back to the legitimate portion of Roman law, where certain relations of the deceased were entitled to prescribed fractions of their intestate portions, of which, save for good reason, they could not be deprived.[2] The legitimate portion of a child was one-third of his intestate portion if there were four children or less, and one-half if there were more. Parents were entitled to a legitimate portion if, but for the will,

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[1] See H.R. Hahlo, *The Case Against Freedom of Testation,* (1959), 76 S. Afr. L.J. 435.

[2] A formal restriction on the freedom of testation was provided by the law of *exheredatio,* under which certain classes of descendants had to be expressly disinherited, otherwise the will was void.

they would have succeeded *ab intestato.* Subject to the same qualification, brothers and sisters were entitled to a legitimate portion, but only if they had been passed over in favour of *turpis personae,* including *infames* and all those who earned their livings in disreputable ways, such as prostitutes, actors and actresses.

The legitimate portion has become part of the civilian tradition and, in some form or other, forms part of most, if not all, continental legal systems. There are two main forms, exemplified respectively by French and German law. In the French form, a testator cannot effectively, by will or gift, dispose of more than a fraction of his estate, which depends on the protected relations by whom he is survived. In the German form, which reveals its Roman law ancestry, the testator may dispose of his whole estate by will, but a protected relation is entitled to a *Pflichtteil,* calculated as a fixed fraction of the portion which he would have inherited had the testator died intestate.

In all continental systems the testator's children are entitled to a legitimate portion. Children's children may be entitled to their parent's share by representation. The general tendency of recent years has been to include illegitimate issue. In most systems the parents of the testator can claim a *legitim,* provided they would have inherited *ab intestato* had there been no will. Brothers and sisters are generally not entitled to protection, with Swiss law a notable exception. A surviving spouse is generally entitled to a legitimate portion.

Following Roman law, modern continental systems give lists of grounds on which a dependant can be lawfully deprived of his or her legitimate portion. Thus, Swiss law lays down that a dependent may be disinherited if he has committed a grave offence against the testator or a close relative of the testator or if he has failed seriously in his legal duties towards the testator or his family. In German law a descendant can be deprived of the *Pflichtteil* if he has committed one of certain specified crimes against the testator or his spouse, if he has failed to support the testator or his spouse in need, or if he has led, without the consent of the testator, a dishonest or immoral life. The surviving spouse can be deprived of his statutory portion if he has given the testator grounds for a divorce.

A different kind of fixed portion is found in the common law of Scotland, where the surviving widow or widower, taking together with the children of the marriage, is entitled to one-third of the deceased's moveable property as *jus relictae (i),* while the children

take another third as 'bairn's share'. Of the third third the testator can dispose as he pleases. If there are no children of the marriage, the surviving consort is entitled to one-half of the deceased's moveable estate. In addition to the *jus relictae (i)*, the surviving consort is entitled to a life interest in the heritable estate of the first-dying.

In America there is much variation. The law of Louisiana has legitimate portions on the English model. A small number of states retain dower and curtesy, obsolete in modern English law. Other states give the surviving spouse a fixed, indefeasible share in the estate of the first dying spouse, often equivalent to his or her intestate share. Further protection for the survivor is provided by the Homestead Acts which entitle the surviving consort as of right to the enjoyment for life of the homestead.

II

Typical of a modern family maintenance system is English law. In the time of Glanvill and Bracton, English law was similar to the law of Scotland in that one-third of the moveable estate of a man devolved upon his wife, and one-third upon his children, while the testator had free power of disposition over the third third.[3] Later the fixed portion became obsolete, and for centuries now it has been a characteristic feature of the English law of succession that a testator can leave his children penniless. The surviving consort was protected by the institutions of dower and curtesy. 'Dower' was the right of the surviving widow to a life estate in one-third of her husband's freehold estates of inheritance.[4] 'Curtesy', which seems to have been derived from the law of Normandy, was the right of a surviving husband to an estate for life in the entirety of the lands and hereditaments of the wife, subject to issue having been born alive of the marriage.[5] In a time when wealth meant, to all practical purposes, landed wealth, dower and curtesy, of which the surviving consort could not be deprived by will, constituted a satisfactory protection against disinherison. Both dower and curtesy lost in importance from the 1830's onward and were formally abolished by the *Administration of Estates Act, 1925*.[6] The result was a century of completely unrestricted freedom of testation.

[3] Pollock and Maitland, *History of English Law*, 2nd ed., Vol. II, p. 350.
[4] Halsbury, *The Laws of England*, 3rd ed., Vol. 32, para. 455.
[5] *Ibid.*, para. 446.
[6] 15 Geo. 5, c. 23, s. 45.

This was changed in 1938 by the *Inheritance (Family Provision) Act, 1938*.[7] This *Act*, in its present form, confers upon the courts discretionary powers to make reasonable provision out of a deceased's estate for the following classes of dependents: (i) the surviving spouse of the deceased; (ii) a former spouse of the deceased, whose marriage to the deceased was dissolved by divorce or annulled; (iii) a son below the age of twenty-one years; (iv) an unmarried daughter; and (v) a son or daughter who, by reason of mental or physical disability, is incapable of maintaining himself or herself. Adopted children are included, and so, under amendments effected by the *Family Law Reform Act, 1969*,[8] are illegitimate children.

The *Act* applies irrespective of whether succession is by will or *ab intestato*. Provision may be made for the claimant by way of periodical payments or payment of a lump sum. The main factors which the court will take into consideration in exercising its discretion are: (1) the past, present or future capital or income of the claimant; (2) the claimant's conduct towards the deceased and otherwise; and (3) the deceased's reasons for the disposition made by him in his will (if any) or for not making provision or further provision for the claimant.

Where an order is made for periodical payments, it may be varied if there is any substantial change in the circumstances of the dependant or any other person substantially interested in the estate.

Family maintenance on the English model has been adopted in the Canadian common law provinces.[9]

III

The only two legal systems left in the Western World which have neither a legitimate portion nor family maintenance are those of Quebec and South Africa. The reasons for this phenomenon are substantially the same in both countries. Both French law, from which the law of Quebec derived, and Roman-Dutch law (the pre-

[7] 1 & 2 Geo. 6, c. 45, as repeatedly amended. The 1938 *Act* was modelled on New Zealand legislation, which was the first country in the Commonwealth to introduce family maintenance.

[8] 17 & 18 Eliz. 2, c. 46, s. 18.

[9] See e.g., the *Dependants Relief Act* of Ontario, R.S.O. 1960, c. 104; *The Family Relief Act* of Alberta, R.S.A. 1970, c. 134; and the *Testator's Family Maintenance Acts* of British Columbia and Manitoba, respectively, R.S.B.C. 1960, c. 378 and R.S.M. 1970, T. 50.

codification law of Holland), from which South African law derived, had the legitimate portion or its equivalent. In both, it was abolished under the influence of English legal notions during the second half of the nineteenth century.[10] When England departed from the principle of unrestricted freedom of testation in 1938 by introducing family maintenance legislation, neither Quebec nor South Africa followed suit.

Is there a case for the introduction of some manner of protection against capricious disinherison in Quebec and, if so, what form should it take ?

The principle of unrestricted freedom of testation was in conformity with the *laissez-faire* ethos of the English upper middle-class of the late nineteenth century. The fact that today one-half of the Western World has something in the nature of a fixed legitimate portion, while the other half (including England) has family maintenance, goes a long way in showing that such unrestricted freedom is no longer in keeping with the ideas of our time. To mention but one consideration, in the age of the welfare state it is hardly tolerable that a testator, by disposing of his estate in its entirety to outsiders, should be able to shift the burden of maintaining his widow and surviving children to the state.

If it be, then, accepted that some form of protection is called for, the question is what is preferable, the system of legitimate portion or the system of family maintenance. The legitimate portion has obvious virtues. A wife or child who has been passed over need not come, hat-in-hand, to court and, by laying bare her financial circumstances, make out a case for assistance, often as against her own children or brothers or sisters, but can claim a fixed, easily calculable portion of the deceased's estate, as of right. If it is, nevertheless, suggested that a system of family maintenance is preferable, it is because the flexibility of such a system, which undoubtedly has its disadvantages, is in modern conditions its great strength. As long as the family was a fairly stable institution and as long as wealth normally passed from generation to generation, there was much to be said for a fixed legitimate portion. Today, with the rising incidence of divorce, some men and women have no longer only one family, but two or three different families. Owing to inflation and the high rates of income tax and estate and succession duties, inherited wealth has lost much of its former

[10] In South Africa, the legitimate portion was abolished by the *Succession Act*, No. 23 of 1874 (Cape).

importance. In these circumstances, only a system of family maintenance enables justice to be done in each individual case. Under a system of legitimate portion even a wealthy wife can claim her fixed share in her deceased husband's estate, while even a poor wife cannot obtain more than that share. Under a system of family maintenance the court will generally refuse to make an award in favour of a rich widow, but may grant the poor widow the major part of her husband's estate or its income. Again, under a system of legitimate portion, the healthy prosperous son and his destitute brother are entitled to exactly the same minimum shares in their deceased father's or mother's estate. Under a system of family maintenance the court, in making an award to a son, will take both his merits and needs into account.

In its original form, the *English Inheritance (Family Provision) Act* enumerated the surviving spouse of the deceased in the list of dependents, but not an ex-spouse. Subsequently, a former spouse of the deceased, whose marriage to the deceased was dissolved by divorce or annulled, was included.[11] This enables the English courts to do justice in the not uncommon case where a man, after decades of marriage, divorces his wife and marries a younger woman. Under a system of legitimate portion his first wife has no claim to a share in his estate, his second wife has. Yet the equities may all be in favour of the ex-wife, who, having given him 'her best years', is less likely to remarry than his second wife, and will often be no longer able to compete in the labour market. Under a system of family maintenance allowing awards to an ex-wife, the court may decide to make an award in favour of his first wife.

How far the circle of dependents qualifying for family maintenance is to be drawn, is a matter of policy. Minor children and adult children unable to earn a living ought clearly to be included. So ought adopted and illegitimate children. New Zealand law goes further than English law in that it allows claims by the testator's parents and grandchildren. At first blush, this appears to go somewhat far. But is it really unfair that, where a millionaire, who is survived by indigent parents, leaves his whole estate to charity, the courts should have the power to make provision out of his estate for his parents, to provide them with support for the remaining years of their lives ?

On principle there is no reason why a system of legitimate portion should not be combined with a system of family main-

[11] Strangely, none of the common law provinces has taken over this provision of the English Act.

tenance.[12] However, it is suggested that there is no case for a legitimate portion, in addition to family maintenance, in Quebec. Where the spouses are married under the legal regime of partnership of acquests (C.C. Arts. 1266 c *et seq.*), the surviving spouse is entitled as of right to a half-share in the partnership acquests, and, where they are married under the regime of separation of property, there will generally be settlements in favour of the wife. As regards children, a good cause for a legitimate portion could be made out as long as fathers acted as the managers of the family estate in its transmission from generation to generation. It is well arguable that today a parent has discharged his moral obligations to his children if he has supported them as long as they were young and has provided them with an education and training enabling them to stand on their own feet, and that the law should therefore go no further than give them a claim for maintenance out of the estate of a deceased parent as long as they are minors or if, though adults, they are unable, for some reason or other, to earn their own living.

IV

In South Africa which, as previously stated, shares with Quebec the doubtful distinction of having absolute freedom of testation, a family maintenance bill, drafted on English lines by the Law Reform Commission, was referred by the Minister of Justice in 1969 to Parliament. Parliament appointed a Select Committee which in a report, less than a page in length, rejected the bill outright.[13] It based its rejection on the following three grounds: (1) that it would not be in the public interest to enact legislation which will result in a serious inroad being made into the well established principle of freedom of testation merely to provide for exceptional cases; (2) that the liquidation and distribution of estates affected by the

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[12] As previously pointed out (see p. 535 above), early English law had the equivalent of a legitimate portion. On the other hand, though most civil law systems confine themselves to the legitimate portion, some of the early civilistic writers advocate family maintenance. In Justinian's law, a father whose son had died was entitled in case of 'extreme need' to support, on a minimal scale, from his son's heir, and Surdus, a North Italian jurist of the sixteenth century, who wrote a standard work on maintenance *(Tractatus de alimentis)* goes even further and submits that everyone who is under a duty to support another transmits that duty to his heir or heirs. See B. Beinart, *Liability of a Deceased Estate for Maintenance,* [1959] Acta Juridica 92, esp. at pp. 102, 103.

[13] Select Committee 9, (1969).

proposed legislation would be inordinately delayed; and (3) that it would not be equitable for a dependent in all cases to be paid maintenance out of an estate. It is suggested that none of these reasons is valid.

That cases in which a man, without rhyme or reason, disinherits his wife or children are rare exceptions and will, one hopes, always remain so, is, of course, true but this hardly dispenses with the need to make provision for the exceptional cases in which it happens. The purpose of family maintenance legislation, as Professor Joseph Laufer of the New York University once put it, is 'to correct flagrant moral abuses'.[14] That 'flagrant moral abuses' do not often happen has never been considered a reason to refuse to enact remedial legislation for those cases in which they occur. Most fathers and mothers maintain their children without legal compulsion, but all countries have maintenance legislation to deal with the exceptional parents who fail to do so. The blunt statement that it is not in the public interest to enact legislation which will result in an inroad into the principle of freedom of testation really begs the question. Obviously, if one starts off with the premise that freedom of testation must be kept unrestricted in all circumstances, any departure from it, however fair and reasonable, must necessarily be objectionable. But is the premise sound ? Even the most extensive private rights and powers are subject to the doctrine of *abus de droit.* Surely, the same should apply to the freedom to make a will.

There is some substance in the argument that the winding-up of a deceased estate may be somewhat delayed by family maintenance claims, but as cases in which a man disinherits his wife or children will always be exceptions such delays are not likely to be frequent. No public outcry about hardships caused by delays in the liquidation of deceased estates has been heard in New Zealand, Australia, England, or the Canadian common law provinces, where family maintenance has now been in force for a considerable length of time. The fact that in England the tendency in recent years has been to extend, rather than restrict, the discretionary powers of the courts in awarding maintenance out of a deceased estate shows that the disadvantages of a family maintenance system are far outweighed by its advantages.

The third reason mentioned by the South African Select Committee is based on a misapprehension of the principles on which

[14] *Flexible Restraints on Testamentary Freedom — A Report on Decedents' Family Maintenance Legislation,* (1955), 69 Harv. L. Rev. 277, at p. 295.

maintenance is awarded. Family maintenance legislation does not provide for the payment of maintenance to qualified dependents 'in all cases'. On the contrary, the award of maintenance will always be exceptional, made only if the claimant is in need, and if, by failing to make adequate provision for him or her, the deceased has acted unfairly and unreasonably.

H. R. HAHLO *

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* Director, Institute of Comparative and Foreign Law, McGill University.