The Tension between Testamentary Freedom and Parental Support Obligations: A Comparison between the United States and Great Britain

Elizabeth Travis High

Follow this and additional works at: http://scholarship.law.cornell.edu/cilj

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.cornell.edu/cilj/vol17/iss2/3

This Note is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
THE TENSION BETWEEN TESTAMENTARY FREEDOM AND PARENTAL SUPPORT OBLIGATIONS: A COMPARISON BETWEEN THE UNITED STATES AND GREAT BRITAIN

INTRODUCTION

The tension between freedom of testation and the support obligations associated with parenthood and marriage creates many policy and drafting problems for legislatures. The imposition of support obligations on a testator’s estate necessarily restricts testamentary freedom. Conversely, complete freedom of testation may frustrate the enforcement of familial support obligations. Although the policies of freedom of testation and enforcement of support obligations are not mutually exclusive, it is difficult to satisfy both policies within a single statutory scheme.

The English family maintenance system resolves this tension with a balancing test. Under the English system, if a dependent is left without adequate support, a court may order an estate to make appropriate payment to continue to satisfy the support obligations that the decedent assumed during his life. The English balancing test has not been adopted in any jurisdiction in the United States. In fact, in the United States there are no direct remedial procedures to impose support obligations on the estate of the provider. Instead, current state laws favor freedom of testation at the expense of a dependent’s support expectations. This complete testamentary freedom forces dependents and courts to rely upon indirect methods of imposing support obligations on an estate. Because these procedures do not have support as their primary objective, they do not consistently fulfill a dependent’s justified expectations of

1. Family maintenance statutes are also found in other Commonwealth legal systems. These statutes use judicial balancing to resolve the tension between the policies of freedom of testation and enforcement of support obligations. “[U]nder this system complete testamentary freedom exists, but the courts are given power to reform the will of a testator to the extent of making reasonable provision for his dependants.” E.L.G. Tyler, Family Provision 3 (1977).

2. See infra notes 48-53 and accompanying text. For the sake of brevity and clarity in this Note, gender-specific pronouns are used to include both genders.

3. See infra notes 68-84 and accompanying text.
support. The disinheritance of dependent children is a problem in the United States. Compiling statistics that reflect the magnitude of the problem accurately, however, is difficult precisely because there is no remedy in most jurisdictions. Because lawyers cannot bring the cases to court, most problem cases pass without comment or remedy.

Family maintenance legislation for jurisdictions in the United States is the most appropriate solution to the problems caused by complete deference to testamentary freedom. The primary goal of family maintenance is the enforcement of support obligations. Family maintenance statutes permit courts to examine support obligations and provide guidelines that force courts to balance support obligations and freedom of testation equitably. A comparison of (1) the principles of the English family maintenance system and its practical success with (2) the principles supporting current state laws in the United States and their ad hoc procedures establishes that family maintenance legislation is the superior system and should be adopted by state legislatures.

I  HISTORICAL BACKGROUND

A.  ENGLISH BACKGROUND

1.  Before Family Maintenance Legislation

England has experienced a broad spectrum of succession schemes since the time of the Norman conquests in 1066. Restraints on freedom of testation have existed at various times in English history. In medieval England, for example, a testator could not dispose of his land or personal property at his discretion, but instead had to comply with certain transfer restrictions. By the sixteenth century, the force of

4.  See infra notes 135-53 and accompanying text.

5.  Dependents rarely take action against wills that make inadequate provision for them, because they lack remedies. The situation in England before statutory reform was similar: "Unfortunately, because of the circumstances, very frequently these matters are never brought before the public. There is no remedy and people hesitate to bring personal domestic matters, cases of hardship and of bad treatment, before the public." 71 PARL. DEB. H.L. (5th ser.) 39 (1928). Some experts contend that the dearth of recorded cases itself indicates the need for reform. New York Surrogate Midonick is a particularly active reformist. See, e.g., Midonick & Bush, The Surrogate's Court as a Family Protector, N.Y.L.J., Nov. 4, 1971, at 1, col. 4; Foster, Freed & Midonick, Child Support: The Quick and the Dead, 26 SYRACUSE L. REV. 1157 (1975). See infra notes 154-71 and accompanying text.

6.  The extent of freedom of testation immediately following the Norman conquests is difficult to discern. Glanvil, writing during the late twelfth century, see 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 188 (4th ed. 1936), refers to the legitimacy of any reasonable alienation of property, but then observes that a man must not disinherit his son
these restraints diminished significantly; a testator could effectively disinheret his children.\(^7\) The progression away from restraints\(^8\) culminated in total freedom of testation from 1891 through 1938.

2. **The 1938 Family Maintenance Legislation**

Debate concerning the need to restore restraints on freedom of testation emerged in Parliament in 1908.\(^9\) The debate remained

and heir. T. Plunknett, A Concise History of the Common Law 526 (1956). By the twelfth century, land passed by primogeniture, the succession of the eldest son to the military fief. The heir inherited only the land that was in the patriarch's possession at death, so the fief was bound to honor all of the patriarch's inter vivos gifts that encumbered the land. *Id.* at 527-28; 3 W. Holdsworth, A History of English Law 73 (5th ed. 1942). Primogeniture was extended to all land held in free tenure during the fourteenth century. *Id.* at 173. Dower rights entitled the widow "to the use for her life of one-third of all land of which her husband was seised at any time during the marriage of an estate in fee simple or fee tail, descen-dible to children of the marriage. . . . [T]he surviving husband was entitled by the curtesy to an estate for life in all of his wife's land." Fratcher, Protection of the Family Against Disinheritance in American Law, 14 Int'l & Comp. L.Q. 293, 294-95 (1965). For more detail, see 3 Holdsworth, *supra*, at 185-94.

The decedent's personal property passed in shares set by consanguinity ("set shares"), according to the custom of the locality. Generally, if the deceased was survived by a wife and children, the chattels were divided into three portions: one for the wife, one for the children, and one to be distributed according to the deceased's wishes. If only a wife or child survived, the estate was divided into two portions, one for the survivors, and one for distribution. *Id.* at 550. An heir of the fief through primogeniture could share in the surviving children's portion of the personal property only if he permitted the patriarch's other children to benefit from the land. Dainow, Limitations on Testamentary Freedom in England, 25 Cornell L.Q. 337, 341 (1940).

7. Freedom of testation existed in scattered localities throughout England by the fourteenth century, largely due to the disparate influences of the ecclesiastic and secular laws. 3 Holdsworth, *supra* note 6, at 553-54. The Wills Act of 1540 permitted any landowner to devise a large portion of land at his discretion. 7 W. Holdsworth, A History of English Law 364-65 (1st ed. 1926). At that time, shares for personal property distribution were falling into disuse. 3 Holdsworth, *supra* note 6, at 556. The obsolescence of set shares combined with the unrestrained freedom to pass land by will left children with no legal claim to any inheritance. Dower and curtesy still protected a surviving spouse's interest in the land.

8. The few remaining restraints on freedom of testation were eliminated during the eighteenth and nineteenth centuries. The last vestiges of the set share system disappeared from England in 1724, when Parliament abolished the "Custom of London"; London was the last region to retain such restraints. Abolition was necessary, because the city was losing revenue as the result of an exodus of citizens who maintained businesses there but lived elsewhere to avoid the restraints. Some other statutory shares remained on the books until 1850, but had not been enforced since 1724. See Cahn, Restraints on Disinheritance, 85 U. Pa. L. Rev. 139, 139-40 (1936); Dainow, *supra* note 6, at 342.

The Dower Act of 1833 sanctioned the frustration of dower and curtesy rights through inter vivos transfers. Such conveyances had been ineffective against the spousal rights. 3 Holdsworth, *supra* note 6, at 197. The Mortmain and Charitable Uses Act, 1891, 54 & 55 Vict. ch. 73, § 5, removed the limitations on devises for charitable purposes and on gifts in mortmain. See E.L.G. Tyler, *supra* note 1, at 5; J. Ross Martyn, The Modern Law of Family Provision 2 (1978). Mortmain (literally, "dead hand") is the practice of conveying land to a legal entity, such as a church or charitable corporation. Mortmain terminates any benefit that the lord or government may expect from the land or its bequeathal. See 1 W. Blackstone, Commentaries *268-69 & n. 2.

largely dormant, however, until Viscount Astor revived it in the House of Lords in 1928. Astor described in vivid detail the gruesome situations that arose under a system that permitted decedents to leave their dependents penniless. Astor considered such cases "entirely inconsistent with and contrary to the broad sense of fairness and fair play associated with this country." He outlined the historical justifications for testamentary restrictions and discussed the various testamentary schemes used in other Commonwealth countries, particularly New Zealand. Astor advocated the formation of a committee to examine the family maintenance provisions of the Commonwealth dominions with a view toward reformation of the English system. Astor withdrew his request after much criticism, but his comments on the family maintenance issue triggered yearly debates on the topic.

Parliamentary debates on family maintenance revolved around several critical issues. Proponents of reform stressed the injustices of the system by describing cases of severe hardship created by absolute freedom of testation. They noted that the restraints on the alienation of property that marital and parental obligations imposed on the living inexplicably did not apply to a decedent's estate. This distinction between the support obligations of the living and those of the dead frequently yielded harsh and inconsistent results, which, it was argued, indicated that absolute freedom of testation was "bad law."

The members who opposed reform maintained that a law passed
in response to a few "hard cases" would indeed make "bad law." Commentators indicated that certain members of the bench would not be capable of rearranging dispositions in a proper fashion. The proposed reform was complex insofar as it required judges to work through lengthy statutory guidelines to reach an acceptable decision. This complexity, opponents claimed, made it too difficult for judges to interpret the statute properly, and the injustices that would result from misinterpretations of the law were too great a burden for society to bear. Those favoring complete freedom of testation also alleged that the rearrangement of dispositions might discourage thrift and productivity, because people would no longer be free to dispose of their property as they saw fit. Finally, they argued that the proposed legislation would cause excessive and frivolous litigation; any disinherited person could bring suit alleging some benefit due from the deceased's estate, even though the claim had little or no merit.

A critical review of the debates reveals the continuing change in the focus of the discussion. Proponents of absolute testamentary freedom eventually realized that they simply could not effectively criticize the position of those favoring family maintenance. Once it was accepted that some form of remedial legislation was necessary, the precise contours of the statute became the topic of debate. The major problem with many of the proposals was that they were too complex to ensure that judges would apply the standards correctly. Consequently, each successive proposal was simplified in an effort to provide for the maintenance of dependents while also establishing clearly discernible guidelines for judges. Finally, in its 1937-38 session, Parliament saw many emotional speeches on marital and parental obligations. One speech, by Eleanor Rathbone, a long-time proponent of family maintenance legislation in the House of Commons, was particularly moving:

18. See id. at 54; see also 328 PARL. DEB. H.C. (5th ser.) 1311 (statement of Mr. Spens).

19. A proposed alternative to family maintenance reform that avoided judicial discretion was the fixed statutory share system, following the Scottish pattern. Parliament rejected this proposal, because it was too rigid to satisfy the support policy. See Dainow, supra note 6, at 346-48.

20. One member criticized leaving the decision to judges:

[B]ut when the State intervenes in the matters of wills I have seen too much of what goes on in the Courts to think that the Judges are able to do it wisely.

21. Id. at 55.

22. See 328 PARL. DEB. H.C. (5th ser.) 1300 (statement of Lt. Col. Heneage). This criticism is known as the floodgates argument. For the reformists' response, see infra note 197 and accompanying text.

23. See infra note 25.


25. The 1937-38 session of Parliament saw many emotional speeches on marital and parental obligations. One speech, by Eleanor Rathbone, a long-time proponent of family maintenance legislation in the House of Commons, was particularly moving:
ment enacted the Inheritance (Family Provision) Act, 1938 ("the 1938 Act").

The 1938 Act resembles the New Zealand family maintenance system in that both systems use judicial discretion to limit testamentary freedom and to ensure support for dependents. Under the 1938 Act, a court could only accept applications from disabled children, minor sons, unmarried daughters, and spouses. Parliament extended the protective scope of the Act in 1952 to include intestate distribution and again in 1958 to include former spouses. A 1966 amendment granted courts additional flexibility when distributing an estate by giving them greater power over property. In 1969, Parliament amended the Act to include illegitimate children.

3. The 1975 Family Maintenance Legislation

In 1971, the Law Commission evaluated the amended 1938 Act as part of its general review of Britain’s family property law. The Commission concluded that the "relief available to the spouse and children of a deceased person compares unfavorably with the relief available to a spouse and children after a decree of divorce, nullity or annulment.

Is it or is it not right that in this country, alone of all the countries of the civilised world, it should be possible for a man or woman to enter into a life-long partnership, take the responsibility of bringing children into the world and be compelled . . . to provide for husband or wife, . . . unless there is some valid reason for open separation—and then by the accident of death to shuffle it all off—when a woman has passed the period when she can possibly return to the labour market, when she has abandoned the use of a profitable profession or business in order to undertake the duties of wife or mother, to throw her absolutely on the world, upon the rates very likely, or, far worse, to compel her to bear the cruellest kind of poverty which faces those who are too proud to seek charity, to compel her to hide in solitude and suffering, and to endure the harsh verdict of the world which she cannot in any way repudiate—is that just or right?

Id. at 1310.

26. The Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6, ch. 45 [hereinafter cited as the 1938 Act].

27. Id. at § 1. "[I]f the court on application . . . is of opinion that the will does not make reasonable provision . . . , the court may order that such reasonable provision as the court thinks fit shall . . . be made."

28. Id. The Act was a product of English society in the 1930s, as reflected by the criteria that made a dependent eligible to apply for support. The statute made a strong distinction between the support capabilities of the sexes and recognized no obligations beyond the family circle, for example, to dependent third persons. See infra notes 120-23 and accompanying text.

29. Intestate’s Estate Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 64, § 7, sched. 3.


judicial separation."^34 It advocated increasing the discretionary power of courts in family maintenance cases to a level equal to the level of courts' power in divorce cases. Such discretion would permit courts to assess more accurately the support obligations and needs of the parties.^35 To this end, the Commission suggested that the courts be given greater discretion to transfer and settle an estate in a manner more favorable to the decedent's dependents.^36

The Commission recognized, however, the different objectives of these two types of property division cases. Divorce cases must divide property equitably between the provider and his dependents, but in family maintenance cases no support by the decedent is required. Therefore, the Commission distinguished the aims of support arrangements in divorce cases from the support goals in family maintenance cases. It defined the purpose of family maintenance legislation as providing support for the dependent, in contrast to the objective in divorce cases to share property equitably between spouses.^37 Accordingly, it proposed making the support function clearer in new family maintenance legislation,"^38 emphasizing that the purpose of the legislation is not to judge a decedent's disposition on its reasonableness.^39

The Commission also suggested that a new statute incorporate a balancing test devised by courts under earlier statutes.^40 The Commission enumerated the factors that a court should balance, including (1) the size of the estate; (2) the nature of the relationship between the applicant and the decedent, including any contribution the applicant may have made to the estate; and (3) the age and abilities of the parties.^41

---

35. For comparison, the Commission referred to the Matrimonial Causes Act, 1955, and the Matrimonial Proceedings and Property Act, 1970. These divorce statutes enforce maintenance obligations arising from marriage and parenthood and give courts significant powers to divide marital property. Id.
36. Id. at 175-77, reprinted in 5 Law Commission Working Papers at 373-75.
37. Id. at 161, reprinted in 5 Law Commission Working Papers at 359.
38. The Commission considered the possibility of extending the family provision legislation to ensure the dependents equitable rights in the property in the estate separate from support rights. Id. at 159-61, reprinted in 5 Law Commission Working Papers at 357-59. It concluded, however, that the legislation should not be extended in this manner. Id. at 161, reprinted in 5 Law Commission Working Papers at 359.
39. Id. at 163-64, reprinted in 5 Law Commission Working Papers at 361-62. This point ensures that the distinction between "provision" and "share" is incorporated into the statute. The aim of such legislation is to provide support for a dependent, not to guarantee the dependent a "fair" share of the property. If a "fair" share is not needed for support, a disposition that does not include such a share will stand even if the disposition is unreasonable.
40. Id. at 168, reprinted in 5 Law Commission Working Papers at 366.
41. The new guidelines include:
   (1) The size and nature of the estate[.]
   (2) The age of the surviving or former spouse and the duration of the marriage[.]
The changes proposed in the family maintenance area paralleled contemporaneous changes in the divorce laws. The divorce law, for example, made no distinction between provision for sons and provision for daughters, unlike the 1938 Act. The divorce statute also provided support for people who had been treated like a “child of the family,” again, unlike the 1938 Act. The Commission suggested omitting an age limit for child applicants, or, alternatively, changing the age limit to eighteen, the limit under the divorce laws. Additionally, the divorce statute provided for payment of educational or vocational training expenses. The Commission advocated amending the child maintenance provisions of the 1938 Act by adopting a version of these additions to the English divorce law.

In 1974, the Commission incorporated its findings into an official recommendation and attached to it a draft statute. The Commission recommended that provisions for spouses should include any equitable rights that the spouse may have in the estate, but it stated that other dependents should receive payments only to the extent necessary for maintenance. The Inheritance (Provision for Family Maintenance and Dependents) Act, 1975 (“the 1975 Act”) was based on these findings. The 1975 Act included both the family maintenance theory and the specific statutory changes the Law Commission recommended.

The 1975 Act permits judicial alteration of testamentary plans in cases that involve the disinheritance of or inadequate provision for a decedent’s dependents. Under the 1975 Act, a surviving dependent must apply to a court for an order to rearrange the original testamentary disposition to provide him with “reasonable financial provi-
The 1975 Act allows applications from spouses, former spouses, children of any age, and others who depended upon the deceased when he was alive. A court order may provide dependents with periodic payments, a lump sum payment, or a transfer of property to remedy the deficient testamentary plan. In making its order, the court must consider the statutory guidelines. These guidelines direct the court to balance the financial need and resource potential of the applicants and the current beneficiaries, and to consider the size of the estate and the deceased's obligations to the applicant. In cases

48. Id. at § 1(2)(a), (b). Section 1 of the 1975 Act has a dual definition of "provision":

(2) In this Act "reasonable financial provision"—
(a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;
(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

49. Id. at § 1(1). Section 1 provides:

1. Application for financial provision from deceased's estate

(1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons—
(a) the wife or husband of the deceased;
(b) a former wife or former husband of the deceased who has not remarried;
(c) a child of the deceased;
(d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased; that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

50. Id. at § 2.
51. Id. at § (3)(1). This section gives courts the following guidelines:

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;
(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;
(e) the size and nature of the net estate of the deceased;
involving an application from a spouse, the court must examine the nature of the marriage and the extent of the applicant’s contribution to the family welfare and assets. Support provisions for children, on the other hand, may include the cost of the education or training that the deceased might have provided had he lived. These statutory guidelines are similar to the standards that courts had devised and used successfully under previous, less explicit family maintenance legislation.

B. AMERICAN BACKGROUND

There are few formal legal limitations on freedom of testation in the United States. Moreover, pride in the preservation of testamentary freedom permeates judicial commentary on this area of the law. The absence of concrete limitations is somewhat anomalous in the Anglo-American legal system. In the late eighteenth century,

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

52. Id. at § 3(3). This section sets out guidelines pertaining to children:

(a) to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;

(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;

(c) to the liability of any other person to maintain the applicant.

53. See J. Ross Martyn, supra note 8, at 15. See also supra notes 40-41 and accompanying text.

54. Some of these limitations are taxes, the requisite executory formalities for a valid will, statutory shares, family allowances, pretermiem statutes, limitations on charitable dispositions, and the rule against perpetuities. Community property states generally divide the ownership of marital property so that each spouse owns a portion; even the most liberal freedom of testation will not permit a decedent to dispose of property that is not his.

55. See Laube, The Right of a Testator to Pauperize His Helpless Dependents, 13 CORNELL L.Q. 559, 559-64 (1928), for a compilation of opinions that illustrate this pride, e.g., Ball v. Boston, 153 Wis. 27, 31, 141 N.W. 8, 10 (1913) (“As often, and not too often, said, the testamentary right is one of the most important of the inherent incidents of human existence.”); In re Moore's Estate, 114 Or. 444, 447, 236 P. 265, 266 (1925) (“It is an attribute of property that the owner thereof has the right to dispose of it as he pleases.”).

56. Most of the countries with a British legal heritage have adopted the family maintenance solution. New Zealand was the first to adopt it. The Testator's Family Maintenance Act, 1900, N.Z. Stat., 64 Vict. No. 20. For a description of the New Zealand Act, see Laufer, Flexible Restraint on Testamentary Freedom, 69 HARV. L. REV. 277, 282-84 (1955). Australia and certain Canadian provinces follow the New Zealand model. Id. at
lish law favored testamentary freedom, and this emphasis was reflected in the law of the American colonies and ultimately in the law of the new nation.\(^5\) Although complete testamentary freedom has yielded to a more equitable and progressive posture in England, the primacy of the freedom of testation lingers stubbornly in the United States. Few legal alternatives are available to provide disinherited dependents with extended maintenance. Nearly all states have homestead or family allowances as alternatives for spouses and children.\(^6\) Although in some states these shares are generous,\(^7\) in most they are quite small\(^8\) or are contingent on conditions that may restrict the amount the dependent may receive.\(^9\) Moreover, these allowances are designed to support the family only for a limited time.

American laws provide more adequate support for spouses than for children. Dower and curtesy were the original methods of spousal protection in the United States, but these measures originally applied only to land. Many states have either substituted or augmented dower with the spousal elective share as a means of giving a spouse access to the marital personal property.\(^10\) The spousal share\(^11\) ensures the sur-


\(^{58}\) See * supra* note 8 and accompanying text. The Custom of London was repealed in 1724; by 1776, almost no practical limitations on freedom of testation existed in England. Even earlier, the land grants for the original colonies were construed to preclude set shares. See Fratcher, * supra* note 6, at 295.

\(^{59}\) See WILLS EST. & TR. (P-H) \(\S\) 2734 (1984) (homestead and family allowance statutes by state). A homestead allowance pays a lump sum or gives property to assist in long term plans, but it generally is not sufficient for subsistence. A family allowance is a payment designed to support the family for the duration of probate proceedings. For a comprehensive description of these allowances, see W. MacDONALD, \*FRAUD ON THE WIDOW'S SHARE* 30-31 (1960).

\(^{60}\) See, e.g., CAL. PROB. CODE \(\S\) 640 (West Supp. 1984). The California Code permits small estates to set aside an allowance of up to $20,000. This provision supplements the homestead allowance in CAL. PROB. CODE \(\S\) 660 and the family allowance in CAL. PROB. CODE \(\S\) 680.

\(^{61}\) See, e.g., N.Y. EST. POWERS & TRUSTS LAW \(\S\) 5-3.1 (McKinney Supp. 1983) gives up to $1000; W. VA. CODE \(\S\) 38-8-10 (Michie Supp. 1984) gives up to $1000 as a family allowance, and \(\S\) 38-9-5 permits a $5000 homestead allowance; and S.C. CODE ANN. \(\S\) 15-41-100 (110) (Law. Co-op. 1976) allows no money at all but permits a meager homestead allowance.

\(^{62}\) See, e.g., MASS. ANN. LAWS, ch. 196, \(\S\) 2 (Michie/Law. Co-op. 1981). The provision is quite small, providing a $100 limit per child for an allowance and permission to stay in the family house for no more than six months, both at the discretion of the court. Only if a family establishes a homestead under ch. 188, \(\S\) 1 may it stay in the home for more than six months.

\(^{63}\) Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 503 (1964); W. MacDONALD, * supra* note 58, at 3. Dower, in its original inchoate form, represented a troublesome cloud on the title of land. It removed the land from the grasp of the husband's creditors, Younger, *Marital Regimes*, 67 CORNELL L. REV. 1, 65 (1981), and the land holder always bore the risk that a previous owner's wife might assert her dower rights after her husband had sold the land. W. MacDONALD, * supra* note 58, at 62-63. Some states have modified dower by limiting the dower rights to the land in the husband's posses-
viving spouse a portion of the deceased's property. Although the spousal share originally may have been designed to provide the surviving spouse with a source of support, recent developments indicate that the share is viewed increasingly as a means of satisfying the equitable rights of the surviving spouse in the marital property. In view of this salutary development, it is unfortunate that inter vivos transfers can subvert spousal share provisions in most jurisdictions.

Although spouses have a limited array of legal protections from disinheritance, children have no formal recourse available to them to procure support from the estate of their parents. For example, although statutory shares exist for children to establish a right to a portion of the decedent's estate, the homestead or family allowance typically accrues to the benefit of the surviving spouse instead of to the children. Pretermission statutes, the only remedy expressly available to children in most states, are hopelessly inadequate protective shields, because they are designed only to redress unintentional omissions. Apart from the enforcement of ante mortem court support decrees at the time of death. See Haskell, supra, at 502. This modification made it easy to evade dower by inter vivos transfer.

63. The spousal share guarantees the surviving spouse a portion of the deceased's estate. It would be inaccurate to generalize that spousal shares are constructed in one particular way; they vary from state to state. The options include dispositions that may be similar to the intestate share, a portion of the intestate share, or realty only. See W. MacDonal, supra note 58, at 21.

64. Furthermore, the spousal share generally provides the spouse with title to the property instead of a life estate, which is all that dower provided. See Haskell, supra note 62, at 503.

65. W. MacDonal, supra note 58, at 24.

66. The Committee on Civil and Political Rights condoned this view: "[D]uring marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property . . . . Such right should survive the marriage and be legally recognized in the event of its termination by . . . death." Report to the President's Commission on the Status of Women, quoted in Younger, supra note 62, at 71. Several states employ the augmented estate concept, which includes certain inter vivos transfers in the estate for purposes of determining the elective share. It reflects the partnership concept, that each spouse has rights in property acquired during marriage. Id. For a list of states that use an augmented estate, see id. at 71 n.202.

67. There are three major views regarding transfers that evade the statutory share requirement by reducing the basic estate from which the share is calculated. Either statutes or court decisions dictate which view a jurisdiction adopts. The three views are: (1) the reality view, which holds that any inter vivos transfer that is not a sham will decrease the estate; (2) the intent view, which holds that any transfer made for the purpose of reducing the share will be included in the estate; and (3) the control view, which holds that any transfer over which the transferor had significant control is included in the estate. For a brief description of these views, see Haskell, supra note 62, at 504-05; for a detailed discussion, see W. MacDonal, supra note 58, passim.

68. But see infra notes 71-84 and accompanying text (Louisiana, Oregon, and Wisconsin have some provisions).

69. It is assumed that the parent will support the child; this assumption is often unrealistic in light of the current prevalence of divorce. See infra notes 87-91 and accompanying text.

70. For example, the Uniform Probate Code provides:
against an estate, there is currently no legal procedure through which a child may request continuation of obligatory parental support.

Three states have procedures that make support available to children. Louisiana adheres to a forced share system under its Civil Code. Under the forced share or legitime system, children can only be disinherited in specific situations. Although the child's share is calculated from an augmented estate, certain assets are not included in this calculation. Thus, a testator who is intent upon disinheriting his children can easily evade the Code's support provisions.

Wisconsin also restricts a testator's freedom to disinherit a child. Wisconsin law is a combination of the statutory share and family maintenance systems. A court may order an estate to provide an allowance for a dependent child. Courts calculate the award by considering support and potential education expenses, but only until the child is eighteen years old. The allowance will not apply if the testator provided adequately for the child in his will.

Wisconsin's statute provides:

(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 of 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 on other evidence.


71. See generally Nathan, An Assault on the Citadel: A Rejection of Forced Heirship, 52 TUL. L. REV. 5 (1977); LeVan, Alternatives to Forced Heirship, 52 TUL. L. REV. 29 (1977). Forced heirship is frequently called "the legitime system." Louisiana is the only state that has this system, which derived from the Roman and French Civil Codes. See Lemann, supra, at 20-21.


73. LA. CIV. CODE ANN. § 1505 (West Supp. 1982).

74. Nathan, supra note 71 at 12. Additionally, the share given to the child is set according to the number of surviving children, LA. CIV. CODE ANN. § 1493, but the statute does not address the needs of the child and adequacy of the share to meet those needs. Nathan, supra note 71.

75. See Summary, WIS. STAT. ANN. § 861 (West 1971).

76. WIS. STAT. ANN. § 861.35 (West Supp. 1983). The statute provides:

1. If decedent is survived by minor children, the court may order an allowance for the support and education of such minor child until he reaches a specified age, not to exceed 18. This allowance may be made whether the estate is testate or intestate: but no allowance may be made if the decedent has amply provided for each child by the terms of his will and if the estate is sufficient to carry out the
bears a closer resemblance to family maintenance legislation than does any other state's statutes.77

Oregon's probate code permits "necessary and reasonable provision from the estate of a decedent for the support of the spouse and dependent children of the decedent."778 The statute provides courts with vague guidelines for determining the amount of support needed. Moreover, the statute defines "support" broadly to include transfers of real or personal property or periodic payments.79 Commentators hoped that the statute would be a means of providing permanent support for dependents,80 but a study has determined that courts usually grant only temporary support under the statute.81 This conservative approach may be the result of statutory vagueness or of imprecise drafting;82 both of these factors would make judges reluctant to apply

terms after payment of all debts and expenses; or if support and education have been provided for by any other means, or if the surviving spouse is legally responsible for support and education and has ample means to provide them in addition to his own support. In any case where the decedent is not survived by a spouse, the court also may allot directly to the minor children household furniture, furnishings and appliances.

77. Attempts in New York to pass family maintenance legislation have not succeeded. See infra notes 181-86 and accompanying text.
79. OR. REV. STAT. § 114.055 (1983) provides:
Nature of Support
(1) Provision for support under ORS 114.015 ordered by the court may consist of any one or more of the following:
(a) Transfer of title to personal property.
(b) Transfer of title to real property.
(c) Periodic payment of moneys during administration of the estate, but the payments may not continue for more than two years after the date of death of the decedent.
(d) The court, in determining provision for support shall take into consideration the solvency of the estate, property available for support other than property of the estate, and property of the estate inherited by or devised to the spouse and children.
81. The study was conducted in Multnomah County, Oregon during the summer of 1976. Note, Protection of the Surviving Spouse Under the Oregon Probate Law, 57 OR. L. REV. 135 (1977). In 1728 estates administered, there were 23 applications for temporary support, id. at 140, and three applications for transfers of property or payment under § 114.055, id. at 145. The statute itself specifically favors temporary support. OR. REV. STAT. § 114.035 (1983).
82. If the statute was meant to provide permanent support, this provision should have been explicit. The law gives no guidance for how long necessary and reasonable provision should continue. Moreover, even if the bulk of the statute is read as a means of providing permanent support, the periodic payments in § 114.055 are limited to two years. This inconsistency may have made courts reluctant to read the statute broadly. See Note, supra note 81, at 143. One commentator explained the two-year limitation as an effort to distribute the assets of the estate in a timely fashion. See Note, supra note 80, at 462 n.85.
Perhaps another reason why courts have construed the statute narrowly is its inadequate guidelines. The estate of a decedent who had two families from divorce illustrates this inadequacy. Note, supra note 81, at 146-47. Both families were needy, and both included
the statutory provisions aggressively.

The statutory schemes of both Louisiana and Oregon provide support for spouses as well as for children. Louisiana is a community property state; therefore, the spouse keeps her share of the community property. The spouse, however, is not a forced heir; dispositions to the spouse may be restricted if the decedent has surviving children. Oregon’s provision for surviving spouses is the same as that for dependent children and has been similarly unsuccessful.

Recent societal changes increase the magnitude of the problems created by the disinheritance of a dependent child. At one time, the disinheritance of children was an occasional problem encountered in the dispositions of eccentric testators. Yet the increase in divorces, single-parent families, and reconstituted families is likely to alter disinheritance and support patterns significantly. In divorce negotiations, children are frequently the focus of legal battles that may leave one parent with hostile feelings for the child. If an alienated parent remarries and has children in a second marriage, he may intentionally disinherit the children of the first marriage.

Several other problems are likely to emerge in the wake of divorce. A decedent who dies with more than one family may not have an estate that is large enough to support both. The family maintenance solution for this difficult problem may be to require a judge to balance the needs of the families in view of the limited estate. Additionally, the decedent’s surviving spouse may not be his child’s natural parent. Consequently, the stepparent has no legal obligation to support the child unless the stepparent has adopted the child. Even

---

the decedent’s minor children, but the assets were not sufficient to support both families. The statute did not help the court determine the extent of need; thus, the court did not grant temporary support. The disposition was abandoned, and the estate was distributed according to the intestacy statute. The court made no analysis of the parties’ needs. Id.

83. LA. CIV. CODE ANN. § 916 (West 1952).
84. Note, supra note 81, at 145.
85. For an elaboration of troublesome fact patterns arising from the increase of divorce and single parenting, see Note, Family Maintenance: An Inheritance Scheme for the Living, 8 Rut.-Cam. L. Rev. 672 (1977).
87. In 1979, 18.5% of minor children in the United States were being raised by single parents. This is a significant increase, and it is predicted to continue. It is estimated that by 1990, 15% of minor children will be living in reconstituted families. Younger, supra note 62, at 86-87.
88. Id. at 88.
89. Foster, Freed & Midonick, supra note 5, at 1182.
90. A related issue is whether the decedent owes support to both families. If the second marriage is a brief twilight marriage, perhaps the assets accumulated during the first marriage should revert back to the first spouse or the children of the original marriage. See Haskell, Disinheritance Restraints, in Death, Taxes and Family Property 105 (E. Halback ed. 1977).
if the surviving parent is the child's parent, the surviving parent may not be sufficiently responsible to provide support for the child. If there is no testamentary disposition that makes specific provision for the child, the surviving spouse's mismanagement may leave the child destitute.\textsuperscript{91} Separate provision from the estate in the form of periodic payments for the child's benefit would reserve a portion of the estate, making it available for better management, and would prevent the estate from being squandered quickly.\textsuperscript{92}

The remedies that the current legal framework affords disinherited dependents are inadequate. A testator may totally disinherit his children in all but three states,\textsuperscript{93} and the only guaranteed support for spouses, statutory shares, is not designed to provide support for children. This situation is anomalous in the Anglo-American legal tradition, and the inequities that it creates warrant reform.

\section*{II

POLICY OBJECTIVES}

\subsection*{A. ENGLISH POLICY OBJECTIVES}

Laws affecting testation must accommodate two competing policies. One policy is freedom of testation; the other is enforcement of the support obligations the testator assumed in marriage and parenthood. If there are no limitations on testamentary freedom, a testator may disinherit his dependents and ignore his support obligations. On the other hand, requiring an estate to provide support for a decedent's dependents restricts testamentary freedom. Neither policy must totally eclipse the other. This tension can be resolved through a sufficiently flexible statutory scheme that accommodates both policies and emphasizes one or the other according to the circumstances of each case.

The parliamentary debates that preceded the 1938 Act indicate a sensitivity to the tension between the policies.\textsuperscript{94} The family mainte-

\textsuperscript{91} Cahn, \textit{supra} note 8, at 143-44; Laufer, \textit{supra} note 56, at 193. Cahn writes of the spouse who is totally inexperienced in financial matters. For example, he estimates that lump sum life insurance payments are spent within seven years. Despite women's increasing sophistication as financial managers, the danger of mismanagement by the surviving spouse still exists.

\textsuperscript{92} Laufer, \textit{supra} note 56, at 293, contends that periodic payments are ideal for maintenance, because the timing of payment safeguards the estate from being squandered quickly and permits some court control. Social service agencies could assume an active role if the child were awarded periodic payments. A new agency could be formed or an existing one extended to assist the child and his guardian to allocate funds in a productive and safe manner. A court could consider a parent's irresponsibility during the hearings for maintenance, and it could appoint responsible agencies or guardians in appropriate cases.

\textsuperscript{93} Louisiana, Oregon, and Wisconsin. \textit{See supra} notes 71-84.

\textsuperscript{94} \textit{See supra} notes 14-26 and accompanying text.
nance legislation in England is a flexible statutory scheme that accommodates both policies. English judges must now consider both objectives and balance them in each case in order to reach an equitable compromise.

The objective of the 1975 English family maintenance legislation is "securing reasonable provision for the maintenance of dependents." The deceased's maintenance obligation does not include anything beyond maintenance for dependents other than surviving spouses. Consequently, family maintenance legislation gives a family no guarantee that its application for support will be successful. An applicant will succeed only if he proves that he was dependent upon the decedent and that the provision in the will is inadequate for maintenance. Courts examine other sources of the applicant's income; if these sources provide sufficient support, the court should not award payment. An application under the family maintenance system, then, does not automatically infringe upon the testator's freedom of disposition.

The Law Commission's examination of divorce statutes to discern the support obligations of an estate indicates an intent to enforce a uniform support standard. The level of support should be consistent, whether a child seeks support under divorce law or under the family maintenance statute. Guidelines in the 1975 Act are designed to secure continuity in a dependent's support through objective determinations of financial need, potential earning capacity, anticipated educational or training expenses, and the degree of support that the decedent provided in life.

Family maintenance legislation preserves freedom of testation yet provides for the needs of surviving dependents. It meets both policy objectives by requiring an analysis of each case through specified guidelines. If the testamentary disposition is either adequate or justified in view of the circumstances the court deems relevant, the court will respect the testator's freedom of disposition. In sum, family maintenance accommodates both policies in an equitable fashion.

95. LAW COMM'N WORKING PAPER No. 42, supra note 33, at 161, reprinted in 5 LAW COMMISSION WORKING PAPERS at 359.
96. See supra note 51.
97. See supra note 35, text accompanying note 37.
98. LAW COMM'N No. 61, supra note 45, at 5-6.
99. LAW COMM'N WORKING PAPER No. 42, supra note 33, at 185, reprinted in 5 LAW COMMISSION WORKING PAPERS at 383.
100. The guidelines' objectivity may act as a safeguard against judicial overstepping or arbitrary use of the statute.
101. See supra note 52.
102. See supra note 51.
B. AMERICAN POLICY OBJECTIVES

State legislatures must consider the same policies that confront the English law makers, freedom of testation and enforcement of parental and marital obligations to support dependents. In the United States, however, legislatures and courts consider freedom of testation to be more important than a dependent’s support expectations.\(^\text{103}\) As a New York legislative advisory commission stated, “our tradition of limited restraint upon the disposition of property by will has become part of our public policy.”\(^\text{104}\) The preference for testamentary freedom has totally eclipsed support obligations.

It is difficult to discern why the right of testamentary disposition has not been modified more in the United States.\(^\text{105}\) Several theories attempt to explain the rationales underlying the vigorous protection of this right. Some maintain that the freedom to possess and to dispose of property at will is characteristic of advanced civilizations.\(^\text{106}\) Others argue that freedom to dispose of property provides an incentive for productivity and advancement; restrictions on freedom of testation threaten to destroy such incentives.\(^\text{107}\) Elevation of the privilege of disposition to the status of a fundamental right, however, is legally inaccurate and is essentially only a product of judicial preference.\(^\text{108}\)

Marital and parental support obligations are enforceable when the spouse or parent is alive and when dependents have common law or statutory remedies to enforce these obligations.\(^\text{109}\) Moreover, after-divorce, alimony and support decrees provide a mechanism for enforc-

\(^{103}\) See generally, Laube, supra note 55, at 560-64.

\(^{104}\) NEW YORK STATE, THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE 211 (Legis. Doc. No. 19, Mar. 31, 1964) [hereinafter cited as THIRD REPORT].

\(^{105}\) “Freedom of alienation has been a favorite of our common law, and this platitude alone could possibly account for the present state of the law.” Haskell, supra note 62, at 500.

\(^{106}\) 1 I. REDFIELD, WILLS 1-3 (1876):

But it [testamentary freedom] is, nevertheless, an instinctive sentiment, intimately associated with that love of acquisition, and of dominion, which forms the basis . . . of social progress; and which in its normal development, is the sure measure of advancing civilization, and, in its morbid excesses, equally marks the process of decline, and the increase of crime.

\(^{107}\) See Cahn, supra note 8, at 145.

\(^{108}\) The Constitution does not protect “the right to will” as a fundamental right on the same level, for example, as freedom of speech, freedom of religion, or other constitutionally enumerated fundamental rights. To the contrary,

\[^{109}\] the right to take property by devise or descent is a statutory privilege, and not a natural right. Such matters are strictly within legislative control. . . . It could in the exercise of sovereignty take any or all property upon the death of the owner for the payment of the decedent’s debts, and apply the residue to public uses.

Laube, supra note 55, at 564 (quoting In re Emerson’s Estate, 191 Iowa 900, 905, 183 N.W. 327, 329 (1921)).

\(^{109}\) Foster, Freed & Midonick, supra note 5, at 1158.
ing support obligations. That is, in the context of divorce proceedings, obligations to support dependent children take precedence over the parent’s obligations to support a spouse or himself. These obligations of living parents frequently include educational costs, if the child reasonably may expect them.

No adequate attempts have been made to ensure that the obligation to support will continue after the provider dies. The spousal share, purportedly devised to provide support, may yield insufficient funds, or inter vivos transfers may defeat it in many jurisdictions. Moreover, no efforts have been made to incorporate child support policies into black letter law. The rationale behind the failure to provide for children is reliance upon the surviving spouse to support the child. The presumption that a surviving spouse who has received property from the estate will care for the child may be misplaced in situations involving divorce, and mismanagement of funds may cause additional problems. Finally, leaving the support of the child to a surviving parent assumes that the parent will do what is best to support the child, including electing against the will if the statutory share is larger than the disposition provided in the will. The patchwork of devices developed in American jurisdictions to provide support for a dependent makes support the result of good fortune rather than a right secured by reliable legal procedures. The need for reform is evident.

110. The “obligation to support dependent children transcends all other obligations including that of the beneficiary himself to his own food, clothing and shelter.” In re Estate of Chusid, 60 Misc. 2d 462, 465, 301 N.Y.S.2d 766, 771 (Sur. Ct. 1969).

111. See Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978) (parents may be statutorily obliged to provide funding for a child’s college education); Anderson v. Anderson, 437 S.W.2d 704 (Mo. Ct. App. 1969) (common law right to educational expenses). See also Foster, Freed & Midonick, supra note 5, at 1162, 1180. But see Sunderland v. Williams, 553 S.W.2d 889, 893 (Mo. Ct. App. 1977) (common law right to educational expenses is subject to the financial capabilities of parent and child); Morris v. Henry, 193 Va. 631, 70 S.E.2d 417 (1952) (support decree can be enforced against deceased parent’s estate).

112. THIRD REPORT, supra note 104, at 213.

113. See supra notes 63-67 and accompanying text.


115. See supra notes 87-90 and accompanying text.

116. See supra notes 91-92 and accompanying text.

117. Cahn, supra note 8, at 143-44.
III

THE CASE LAW

A. ENGLISH CASES

1. 1975 Act Cases

The 1975 Act is progressive in two respects. First, the Act’s guidelines118 provide an objective framework within which a court must assess and protect the child’s interests.119 Second, the Act permits courts to take applications not only from dependent minor children and spouses but also from dependents who are not family members and from children who are not minors.

In Malone v. Harrison,120 for example, a non-family member applied for support under the 1975 Act. Using the statutory guidelines, the court first considered the applicant’s financial need and the adequacy of the will’s provisions for the testator’s beneficiaries.121 In order to determine the support that the applicant reasonably should expect, the court examined her relationship with the testator. It considered both her independent earning capacity and the extent to which the testator encouraged her dependence upon him. Satisfied that the applicant’s dependence was created by the testator, the court ruled

118. See supra notes 51-52.
119. The extension of the class of dependents and the resort to additional criteria make the concept of “provision” under the 1975 Act socially progressive. Parliament has responded to changes in society and has incorporated these changes into the Act’s provisions. Three illustrations of the changes are elimination of sexual discrimination, inclusion of educational expenses in necessary maintenance, and expansion of the class of applicants outside family bounds. See supra notes 48-49, 51-52.
120. [1979] 1 W.L.R. 1353. The applicant in Malone was a mistress of twelve years who had been omitted from her lover’s will. Two years before he died, he informed her that he would not include her in his will, but he also showed her an article that explained the 1975 Act. She was entitled to apply under section 1(1)(e). See supra note 49. Because the 1975 Act permits such applications, it has earned the nickname of the “Mistresses’ Charter”. But bringing a mistress into the applicant pool and weighing her support needs against those of a spouse will not always benefit the mistress, because the 1975 Act imposes high obligations to spouses. Whether a state statute would permit applications from mistresses is a matter for legislative discussion. Although it does seem sensible to permit some applications from non-family members, family maintenance legislation need not recognize meretricious relationships per se.

Workers’ compensation is an interesting parallel and may provide a starting point for legislative consideration of support for non-family members. “Usually, actual contributions to claimant’s support is enough to establish dependency without evidence of legal obligation to support.” 2 A. Larson, Workman’s Compensation § 63.00 (1981). See id. at § 63.21. States differ in their application of workers’ compensation to “illicit relationship claimants.” Generally, a claimant who is involved in a relationship that he or she does not know is illicit may receive death benefits. See id. at § 63.43. But courts are divided on the topic of “intentional illicit relationship” claimants. Some courts contend that dependency has no moral implications and grant benefits to such claimants, but others refuse benefits to paramours. The modern view of granting benefits irrespective of moral considerations seems to be gaining strength. Id. at § 63.43.
121. [1979] 1 W.L.R. at 1362.
that she was entitled to receive some provision.\textsuperscript{122} A meticulous evaluation of specific factors led the court to a precise award for the applicant.\textsuperscript{123} The applicant in \textit{Malone} would not have been entitled to apply for support under earlier family maintenance legislation. Moreover, the statutory guidelines provided the basis for the court's determination of an equitable support payment in view of the facts relevant to the applicant and testator; judicial intuition yielded to a more systematic analysis of need and entitlement.

\textit{In re Coventry}\textsuperscript{124} also involved an applicant who would not have been eligible to apply under the 1938 Act. The applicant, a forty-six-year-old son of the decedent, was omitted from the intestate distribution of his father's estate. Father and son had lived together for the nineteen years preceding the father's death, and during that time the applicant was not dependent upon his father. The son had performed numerous administrative duties of the household, had paid some of the bills, and generally had cared for his elderly father. Low earnings and support obligations under a divorce decree had placed the son in financial difficulty. The intestate statute gave the entire estate to the widow, despite the fact that she and the decedent had been separated and had lived apart for many years.

The \textit{Coventry} court applied a two-tier analysis. The court initially examined whether the distribution of the estate made "reasonable financial provision for the applicant," then assessed whether the judge should exercise his discretion to issue financial provision from the estate.\textsuperscript{125} The court, noting that "the word 'maintenance' . . . is a word of somewhat limited meaning in its application to any person qualified to apply, other than a husband or wife,"\textsuperscript{126} held that the failure to provide a maintenance allowance for the son was reasonable in view of the relevant factors in the 1975 Act. The court maintained that the decedent had a stronger obligation to support his wife because of her contribution to rights in the marital property. Hence, the court found that it was reasonable for an independent adult son to receive no provision from the estate and thus would not disturb the intestate

\begin{footnotes}
\item[122] \textit{Id.} at 1364-65.
\item[123] The court considered her lifestyle and her annual living expenses. It made an accounting of her free capital, the value of her residences, and her yearly earning potential. Turning to actuarial tables, the court determined the amount that the estate should contribute to her support in order to maintain her standard of living for her estimated life span. The amount taken from the estate reduced the bequest to one of the will's beneficiaries who was wealthy and did not require inheritance for support. The case seems unusual, for the amount of the estate was sufficient to support all concerned, leaving no one with inadequate funds. \textit{Id.} at 1365-66.
\item[124] [1979] 3 W.L.R. 802.
\item[125] \textit{Id.} at 809.
\item[126] \textit{Id.} at 807.
\end{footnotes}
distribution.\(^{127}\)

Applications from dependents who would have been ineligible to apply for support before the 1975 Act, such as those in \textit{Malone} and \textit{Coventry}, require courts to consider the facts of the particular case carefully. The Act emphasizes that the deceased's support obligations must arise from the applicant's dependency rather than from traditional societal expectations concerning support. The amount of support required, if any, varies with each case and is determined on the basis of the Act's objective guidelines. As \textit{Malone} and \textit{Coventry} demonstrate, the guidelines' flexible standards enable courts to respond to the particular case's support or maintenance issues and to ensure that the award will be equitable.

2. \textit{Divorce Cases}

In revising family maintenance legislation in England, the Law Commission used divorce laws as a model for estate support obligations.\(^{128}\) A brief examination of two divorce cases will illustrate the rationale for creating parallel judicial powers in divorce and disinheritance cases.

In \textit{Preston v. Preston},\(^{129}\) a wealthy divorced couple litigated the division of cash and property; both husband and wife had contributed substantially to the marital assets. The court measured the husband's support obligations by establishing the reasonable support standards that the wife and child should expect.\(^{130}\) A detailed accounting of the assets and a history of typical spending led the court to affirm a large lump-sum payment to the wife. In calculating the wife's payment, the court included reasonable educational expenses for their minor son.\(^{131}\) The court analogized the award to one given in a case under the 1975 Act.\(^{132}\)

Similarly, in \textit{Lilford v. Glynn},\(^{133}\) another divorce case involving a wealthy couple, the court upheld financial arrangements that provided

\(^{127}\) \textit{Id.} at 810-12. The distribution may be "reasonable" by family maintenance standards, but it seems to be an unfair share of the estate in light of the time and care that the applicant gave to the intestate.

\(^{128}\) \textit{See supra} note 35 and accompanying text.


\(^{130}\) Among the standards used to discern these obligations were the amount of the wife's contribution to the marital assets, her needs, and the couple's standard of living. \textit{Id.} at 624-26.

\(^{131}\) The court rejected separate periodic payments to the boy in order to facilitate a "clean break" between the husband and wife. Perhaps this was unwise, because the wife had total discretion over allocation of the boy's support funds. Separate payments independent from the wife's management would have met the husband's support obligation to the boy better.

\(^{132}\) \textit{Id.} at 638.

\(^{133}\) [1979] 1 W.L.R. 78.
funds for the reasonable maintenance and education of their minor daughters. The court, however, rejected a request for overly generous payments that would have provided the children with cash after they attained majority, because these payments transcended the father's legal obligations. The court noted that parental support obligations cease when the child becomes eighteen; consequently, a parent, regardless of wealth, cannot be compelled to provide support for adult children.\textsuperscript{134}

There are clear parallels among the 1975 Act cases and \textit{Preston} and \textit{Glynn}. Support for dependents is and should be required, but only within reasonable limits. Furthermore, the support provision must be adequate and should be ascertained on the basis of objective legal guidelines. The wealth of the obligor or the financial straits of a non-dependent applicant alone should not define legal obligations. The same balancing of legal support obligations and freedom to dispose of property exists in many divorce cases and in cases arising under the 1975 Act. The Law Commission's reliance on divorce law was well placed, and the cases illustrate that the revisions provide a workable and uniform standard for the support of dependents.

\section*{B. American Cases}

\subsection*{1. Courts Favor Disinherited Dependents}

Common law and statutory constraints direct courts to prefer freedom of testation over family support obligations when these two policies conflict. Yet courts frequently comment on the rights of dependents, especially children, and try to prevent the inequities that the current law condones. Unfortunately, the common law and statutory preference for freedom of testation prevents judges from basing decisions on the satisfaction of a decedent's support obligations. Instead, courts must resort to indirect methods to remedy what they deem to be an inequitable "testamentary" disposition and to provide support for a disinherited dependent. Judicial activity in the area produces ad hoc limitations that restrict testamentary freedom, contrary to the primacy of this doctrine.

Dispositions that are unnatural, that is, wills that break the traditional rules of consanguinity or affection, are frequently subject to careful judicial scrutiny and reformation.\textsuperscript{135} In many cases, for example, unnatural dispositions have been particularly susceptible to attack on the basis of inadequate testamentary capacity or undue influence.\textsuperscript{136}

\begin{flushright}
\textsuperscript{134} Id. at 85.  \\
\textsuperscript{135} See generally Laube, supra note 55, at 564-69, 572.  \\
\textsuperscript{136} See, e.g., Hall v. Mikovich, 158 Mont. 430, 492 P.2d 1388 (1972) (charge of undue influence against the testator's wife reached jury).
\end{flushright}
Such an allegation places the burden of proving the validity of the will on the beneficiaries. When these cases go to a jury, the jury frequently is sympathetic to a disinherited dependent.\(^{137}\)

Some states have well-developed case law in this area. For example, Kentucky has an interesting line of cases concerning "unnatural wills." In *McDonald's Executors v. McDonald*,\(^ {138}\) decided in 1905, the court set aside an unnatural disposition by defining testamentary capacity in terms of an ability to recognize the objects of one's bounty and the duty owed them. The testator's disposition only provided his family with a life estate in his property, but the court observed that a fee simple would have made living easier for the dependents and thus was a preferred disposition. To ensure that the family obtained the "appropriate" possessory interest, the court ruled that the evidence presented, including the device of the life estate, indicated that the testator lacked the requisite perception of his duty to the objects of his bounty. The court's manipulation of the definition of testamentary capacity allowed it to reach a result congruent with its view of an appropriate testamentary disposition.

In later decisions,\(^ {139}\) Kentucky courts expanded the applicability of the "objects of the testator's bounty" rule and thereby permitted will contests to reach juries in order to resolve questions of mental incapacity and undue influence. "[W]here a will is unnatural in its provisions such a fact, when unexplained and when corroborated by even slight evidence, is sufficient to take to the jury the question of undue influence."\(^ {140}\) The unnatural will alone is not enough to prove undue influence or lack of capacity,\(^ {141}\) but the burden of production is slight. Kentucky does not require those challenging unnatural wills to produce direct proof of mental incapacity or undue influence.\(^ {142}\) Moreover, the presentation of contrary evidence by the proponents of a testamentary scheme will not prevent these issues from going to the jury.\(^ {143}\)

Although pretermission statutes are designed to provide a remedy

---

\(^{137}\) See, e.g., Laube, *supra* note 55, at 572-75.

\(^{138}\) *120 Ky. 211, 85 S.W. 1084* (1905).

\(^{139}\) E.g., *McKinney v. Montgomery*, 248 S.W.2d 719 (Ky. 1952) (when a testator is on affectionate terms with his children and disinherits them, there is sufficient evidence to submit the question of lack of testamentary capacity to a jury).

\(^{140}\) *Id.* at 721.

\(^{141}\) *Sutton v. Combs*, 419 S.W.2d 775, 777 (Ky. 1967) (jury's verdict of undue influence reasonable in light of evidence despite proponent's assertion that evidence did not prove undue influence). The court also noted the pertinence of the testator's capacity to recognize the natural objects of his bounty. *Id.* at 776.

\(^{142}\) *Zeiss v. Evans*, 436 S.W.2d 525 (Ky. 1969) (when a will is unnatural in provisions, it is easy to prove undue influence; case went to jury when the will disinherited testator's children in favor of a nephew). *See also* Belcher v. Somerville, 413 S.W.2d 620 (Ky. 1967).

\(^{143}\) *Sutton v. Combs*, 419 S.W.2d at 779.
for children whom the testator omitted from a will unintentionally, courts also have used the statutes to provide an inheritance share for children whom the testator may have omitted intentionally. The statutes frequently establish a rebuttable presumption that the testator forgot the child, which places a high burden of proof on the proponents of the will. Arkansas courts, for example, construe the state statute in favor of the omitted child. "It will be presumed that the omission was unintentional, no contrary intent appearing in the will itself." Moreover, extrinsic evidence is generally not admissible, because the statute is construed to operate in favor of the child. "The intention of the testator is to be gathered from the four corners of the instrument itself." Finally, if extrinsic evidence is admissible in some jurisdictions, it will be admitted only to show lack of intent to disinherit.

Courts also use life insurance contracts as a means of ensuring support for children, especially in cases that involve a divorced parent. Courts recognize that there is no equivalent to the spousal share for the child, and they frequently prefer children's claims over those of a spouse in litigation involving an insurance policy. Litigation often occurs between a spouse and a child from a previous marriage. In order to prevent disinheritance following a divorce, courts sometimes require a divorced parent to keep life insurance policies that name his children as beneficiaries. If the parent breaches the agreement to keep his children as beneficiaries, however, the child's remedy depends

144. See supra note 70.
147. Armstrong v. Butler, 262 Ark. 31, 39, 553 S.W.2d 453, 457 (1977) (despite an earlier holographic will, children were pretermitted heirs).
149. Connecticut Gen. Life Ins. Co. v. Markel, 90 Wis. 2d 126, 279 N.W.2d 715 (Wis. Ct. App. 1979), involved an insured decedent who deliberately had named his daughter as beneficiary. The court rejected the widow's claim against the policy and commented that insurance policies are an important source of protection for children. Spouses may take statutory shares, but children have no such recourse and rely more heavily on the policies.
150. Riley v. Riley, 131 So. 2d 491 (Fla. Dist. Ct. App. 1961), required a husband in a divorce settlement to keep all insurance policies that he owned for the benefit of his children. The court commented on the law of the state:

Although the law will permit a general creditor to enforce payment of a continuing obligation against the estate of a deceased father, it does not afford the same protection to a helpless child. In the event of the father's death, the rule of law presently in effect in this state places the burden of supporting and maintaining the minor children of a deceased father on someone not obligated to bear it, or on the public, in the event the father leaves no estate or disinherit the children by will. Although this rule may well comport with the law of the jungle, its proper place in a modern civilized society is subject to question.

Id. at 492.
upon the court's sympathy and ingenuity.\textsuperscript{151}

As another means of protecting children, a majority of state courts enforce existing support decrees, if no statute bars such action.\textsuperscript{152} Enforcement of support obligations against an estate is appropriate, because "[t]he decree of a court requiring the father to provide for the wants of his children would be a futile thing if it could be defeated by a will leaving all of his property to somebody else."\textsuperscript{153}

2. \textit{Development of New York Case Law}

A review of the New York case law reveals a recurrent effort to lessen the tension between family support obligations and testamentary freedom. A plan for a reform of the law concerning the disinher- tance of children emerged in a line of Surrogate Court opinions.\textsuperscript{154} The relevant line of cases involves a recently repealed state statute that permitted a decedent's spouse or issue to challenge charitable dispositions that total more than one-half of the estate.\textsuperscript{155} The decedent's spouse or issue could bring such an action only if he or she would

\textsuperscript{151} Two recent Oregon cases addressed the problem of a deceased parent who breached an agreement to maintain insurance policies for the benefit of the children from a former marriage. In Sinsel v. Sinsel, 7 Or. App. 153, 614 P.2d 115 (1980), the decedent substituted his second wife for his minor daughter as beneficiary. The court imposed a constructive trust on the proceeds of the policy to help support the child. In McDonald v. McDonald, 57 Or. App. 6, 643 P.2d 1280 (1982), the court did not impose a constructive trust under similar circumstances. The court distinguished \textit{Sinsel}, which involved one easily traceable policy, from \textit{McDonald}, which involved five policies, none of which was designated to support the children. The distinction may be spurious; the court in \textit{McDonald} may tacitly be considering the children's failure to visit their father. \textit{Id.} at 1282 n.6.

\textsuperscript{152} \textit{See} Morris v. Henry, 193 Va. 631, 70 S.E.2d 417 (1952), in which the court describes the majority and minority views concerning enforcement of court-ordered support decrees against an estate. \textit{Id.} at 641, 70 S.E.2d at 423 (emphasis added).

\textsuperscript{153} Reform proposals to assist disinherited children have also come before the New York legislature. \textit{See infra} notes 181-86 and accompanying text. Outside the specific line of cases discussed, but indicative of the priority New York gives child support, is In re Estate of Chusid, 60 Misc. 462, 301 N.Y.S.2d 766 (Sur. Ct. 1969). The dependent children were income beneficiaries of a trust that their grandfather established for his son and grandchildren. The father did not provide sufficient support for the children. The court, in a decision of first impression, ordered the trustees to exercise their discretion and to invade the principal of the trust for the children. A surrogate is a probate judge in New York State. \textit{See} N.Y. \textit{Surr. Ct. Proc. Act} § 2603(1) (McKinney 1967).


(a) A person may make a testamentary disposition of his entire estate to any person for a benevolent, charitable, educational, literary, scientific, religious or missionary purpose, provided that if any such disposition is contested by the testator's surviving issue or parents, it shall be valid only to the extent of one-half of such testator's estate, wherever situated, after the payment of debts, subject to the following:

(1) An issue or parent may not contest a disposition as invalid unless he will receive a pecuniary benefit from a successful contest as a beneficiary under the will or as a distributee.

For the reasons for the repeal, see \textit{infra} note 172.
receive some pecuniary benefit from a successful challenge of the testamentary disposition. In an effort to manipulate the statute to achieve "fair" results, the New York surrogates construed the law for the benefit of disinherited children even when the "pecuniary benefit" requirement was not satisfied.

In In re Estate of Norcross,156 for example, the surrogate permitted the decedent's daughter, who was excluded from decedent's will, to challenge a charitable disposition. The court relied primarily on the absence of an express intent to disinherit the daughter157 and found potential pecuniary benefit, and therefore a basis for the challenge, in the intestate distribution that she would receive if the court were to set aside the charitable disposition. The fact that the testator excluded his daughter from receiving any benefit from his will did not bar her from bringing the action.158

The surrogate in In re Estate of Rothko,159 following Norcross, permitted the children of the testator to challenge the testamentary disposition despite the fact that they probably would not receive pecuniary benefit.160 Surrogate Midonick, a supporter of family maintenance reform in New York, observed that under New York law "issue can be disinherited unquestionably, even though they be the testator's defenseless babies in the cradle in favor of any human being whether related to the testator or totally unrelated."161 Noting the discrepancy between the enforceability of parental support obligations while a parent is alive and the lapse of those obligations upon the parent's death,162 Surrogate Midonick advocates remedial family maintenance.

---

157. The will stated that the testator did not lack affection for his daughter but left her no portion of the estate because inter vivos gifts had provided for her support. 67 Misc. 2d at 937, 325 N.Y.S.2d at 482.
158. The court distinguished an earlier case of this type, In re Estate of Cairo, 35 A.D.2d 76, 312 N.Y.S.2d 925 (1970), aff'd 29 N.Y.2d 527, 272 N.E.2d 574, 324 N.Y.S.2d 81 (1971), in which the testator expressly disinherited the petitioner. 67 Misc. 2d at 937-38, 325 N.Y.S.2d at 482. The disinheritance was found to express the intent of the testator, and barred a challenge under N.Y. EST. POWERS & TRUSTS LAW § 5-3.3. Moreover, § 1-2.18 has been interpreted to make a disinheritance in a will effective to preclude that person from taking under intestate distribution. See N.Y. EST. POWERS & TRUSTS LAW § 1-2.18, Practice Commentary, at 42 (McKinney 1981). The Norcross court used this express disinheritance to distinguish the cases. See 67 Misc. 2d at 937-38, 325 N.Y.S.2d at 482.
160. The children of Mark Rothko were to be beneficiaries under his will only in the event that the primary beneficiary, their mother, died. The lack of express intent to disinherit was the pivotal issue in this case as well as in Norcross. See Rothko, 71 Misc. 2d at 76, 335 N.Y.S.2d at 668; Norcross, 67 Misc. 2d at 937-38, 325 N.Y.S.2d at 482.
161. Rothko, 71 Misc. 2d at 77, 335 N.Y.S.2d at 670.
162. However, under present New York laws a parent can utterly disinherit his minor children (and leave the burden of their support to equally defenseless taxpayers) from the moment of death. If such an unconscionable financial abandonment of young children is forbidden by the family laws and by the criminal laws.
legislation to impose parental support obligations upon a deceased parent's estate. A child should not be forced to rely upon the ingenuity of a court to receive parental support.

In re Estate of Willey expanded Rothko and Norcross by eliminating the distinction between express and implied disinheriance. The surrogate noted that every will bequeathing an estate to charity necessarily disinherits issue. In a subtle shift of focus, however, this court emphasized the right of a relative to elect against a disposition rather than the intent of the testator: "[T]he right of issue to elect . . . is a limitation on the right of the testator to dispose of his property and is a personal right conferred by the legislature which cannot be diminished or abrogated by judicial construction." Thus, Willey abandoned the distinction between express and implied disinheriance that earlier courts had used in order to find possible pecuniary benefit, thereby making the statute applicable to any disinherited dependent.

Subsequently, the New York Court of Appeals halted the increasingly liberal interpretations of the statute. In In re Estate of Eckart, the court ruled that children who are disinherited or receive a nominal bequest tantamount to disinheritance may not challenge a charitable distribution. Judge Wachtler observed that the structure of the statute defeats the statute's intended purpose of preventing "improvident and unjust wills, which deprive the relatives and dependents of the testator of proper consideration in the distribution of his estate." A testator can circumvent the requirements of the statute by providing an alternate disposition to a third party in the event that the charitable disposition fails. Such an alternate disposition would prevent the challenging person from receiving any pecuniary benefit; thus, it would preclude that person from recovering under the statute for lack of the requisite pecuniary interest. After Eckart, courts condoned alternative dispositions that would prevent the issue or spouse from deriving

while a parent is alive, why should death of a wealthy parent free him or her to make a young minor child destitute?

Id. at 78, 335 N.Y.S.2d at 670.

163. See supra note 5.

164. 85 Misc. 2d 380, 380 N.Y.S.2d 940 (Sur. Ct. 1976). The facts of Willey are similar to those in Norcross: the testatrix expressly disinherited her children because she had provided for them adequately with inter vivos gifts.

165. 85 Misc. 2d at 384, 380 N.Y.S.2d at 944.

166. 39 N.Y.2d 493, 348 N.E.2d 905, 384 N.Y.S.2d 429 (1976). The facts of Eckart are similar to the others in this line of cases. The testatrix gave her two children nominal bequests, which were tantamount to disinheriance, and gave the remainder of her estate to a charity.

167. The court revived the Cairo holding, which Norcross, Rothko, and Willey had eroded. See 39 N.Y.2d at 502, 348 N.E.2d at 910, 384 N.Y.S.2d at 434. See supra notes 158-64.

168. Eckart, 39 N.Y.2d at 500, 348 N.E.2d at 909, 384 N.Y.S.2d at 433 (quoting Hollis v. Drew Theol. Seminary, 95 N.Y. 166, 174-75 (1884)).
a pecuniary benefit from a successful challenge. Consequently, a spouse or issue could not challenge wills that contained an alternate disposition if the charitable grant failed. Judicial interpretation could not remedy a problem that the language of the statute created so explicitly. Thus, Judge Wachtler shifted the onus back to the legislature to conform the law to its objective.

Although Eckart made the surrogates' task clearer, the decision constricted the powers of a court to provide equitable assistance to disinherited dependents. Moreover, if the purpose of the statute was to help disinherited dependents confronted with excessive charitable dispositions, the case provided drafters with a way of circumventing that purpose by drafting in the alternative. Observing this problem, which Eckart accentuated, subsequent courts called for legislation to provide disinherited dependents with a remedy. The legislature responded by repealing the troublesome statute, but it did not replace it with a more carefully drafted or more comprehensive cure.

These cases illustrate that many state courts have devised ad hoc doctrines to provide for dependent children. This judicial initiative has created restrictions on freedom of testation and permitted courts to enforce family support obligations. Unfortunately, these practices are subject to abatement at any time by higher court decisions, as the New York cases illustrate. Decisive legislation that acknowledges parental support obligations and authorizes limitations on testamen-

169. Writing of the stare decisis effect of the Cairo opinion, that disinherited relatives could not challenge a charitable disposition, Judge Wachtler observed:

True, Cairo permits a testator to easily avoid the statute by expressly disinheriting those who might otherwise challenge the will. But the statute itself permits the same result if the testator simply creates a gift over to one not qualified to contest. In other words it is the statute itself and not the Cairo opinion which disrupts the stated legislative purpose.

Eckart, 39 N.Y.2d at 502, 348 N.E.2d at 910, 384 N.Y.S.2d at 434.

170. Id.

171. Id. Surrogate Midonick commented on the unsatisfactory situation in In re Estate of Alexander, 90 Misc. 2d 482, 395 N.Y.S.2d 598 (Sur. Ct. 1977), which concerned a charitable disposition, but was dismissed in accordance with an unreported Court of Appeals decision. The dismissal in Alexander is not disturbing, because the election was made by an adult son, not a dependent minor. Surrogate Midonick observed that the decision might have been disturbing if the suit had been brought by a minor. Compare Alexander, 90 Misc. 2d 482, 395 N.Y.S.2d 598 (no award to adult son), with Coventry, [1979] 3 W.L.R. 802 (award to independent adult son). See supra text accompanying notes 124-27. But an English court would probably not have granted provision to the applicant in Alexander.

172. The statute was repealed by 1981 N.Y. Laws, ch. 461 (July 7, 1981). The reasons given for its repeal were that the statute created too much litigation and confusion and that it could be circumvented easily. See [1981] N.Y. LEGIS. ANN. 254-55 (Memorandum of Assem. Hannon).

173. For example, an appellate court may change the burden of proof in pretermission statutes so that they no longer favor children or require more explicit jury instructions in order to reduce the significance of jury sympathy.
tary freedom could remedy the uncertainty that the judiciary's ad hoc approach created.

IV

PROPOSALS FOR LEGISLATIVE REFORM

Parental support obligations and freedom of testation are important yet often conflicting policies. State statutes currently subordinate parental support obligations to freedom of testation and do not provide the flexibility characteristic of a balancing approach. Complete deference to testamentary freedom produces unsatisfying results.

There is no absolute freedom of testation. It is restricted in many ways, for example, by statutory shares, limits on charitable dispositions, the rule against perpetuities, taxes, and testamentary formalities. In addition, creditors may restrict dispositions by satisfying obligations from the debtor's estate. Finally, court-created doctrines establish many common law limitations on testamentary freedom.

The privileged position of testamentary freedom vis-à-vis parental support obligations is difficult to explain, because the policies behind current restrictions are not significantly more important than the obligation of a parent to a dependent child.

Courts are sympathetic to the problems of disinherited dependents. They recognize the need for balancing the two policies equitably, perhaps because they are confronted most frequently with hardship situations. Courts, however, are not bound to consider both policies as an integral part of every decision. Moreover, there are no clearly established criteria to which courts can refer consistently in order to balance between the two policies. The language of current statutes strictly limits the factors that a court may consider in a particular case. The result of this amorphous state of the law is a fundamental uncertainty concerning the rights of a disinherited child and the role of courts in remedying hardship situations.

Legislative reform can alleviate both the rigidity of statutory prohibitions and the inconsistent judicial revision of testamentary plans. There are two basic categories of legislative reform: (1) fixed legitime shares and (2) family maintenance. Some theorists blend the two solutions by proposing that dependents receive a compulsory share that would vary according to their needs. Many proposals would include certain inter vivos transfers in the basic estate from

174. Haskell, supra note 62, at 508-09.
175. See supra notes 135-53 and accompanying text.
176. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-3.3. See supra note 155.
177. See, e.g., W. MACDONALD, supra note 58, at 299-301; Laufer, supra note 56, at 312-14.
178. See Haskell, supra note 62, at 518-21; Cahn, supra note 8, at 146-48.
which the support payment will be taken. The proposals also differ on the requisite duration of the support. Some commentators would terminate support at the age of eighteen or twenty-one, while others would extend support until the child has completed his education or is self-supporting.

New York first recognized the inconsistencies and inadequacies of its laws in a series of official reports composed during the 1930s. In the mid-1960s, the New York Temporary State Commission on the Law of Estates analyzed the inequities of the system and proposed family maintenance reform. The Commission observed that the system "reflects an indifference to moral and social responsibility." The Commission proposed that support be extended to dependent children and that this support terminate when the dependent reaches the age of twenty-one. The Commission's recommendations were not enacted, but reformists have been active in New York since that time.

A more recent New York proposal would permit children to enforce a preexisting parental support decree against the deceased's estate. Payments would come from a trust fund formed from the decedent's estate for the benefit of his children and administered by the court. The trust would terminate when the child reaches twenty-one years of age, and the dependent child would then receive the residue of the corpus. Critics originally said that the bill was too vague and was overly generous to dependent children. The legislature has not yet adopted the bill, but in 1979 it won the approval of two major bar associations.

---

179. See supra notes 62-67 and accompanying text.
180. See Fourth Report, supra note 114, at 1493 (support terminated no later than upon reaching age 21).
182. Fourth Report, supra note 114, at 1343.
183. Id. at 1492-93. The Commission proposed that a court examining an application for support consider the following guidelines: earning potential of the child, the decedent's reasons for making the original disposition, and the conduct of the child towards the decedent. Id. at 1493.
185. See Foster, Freed & Midonick, supra note 5, at 1191-94 app.
The New York proposal does not go far enough in assisting disinherited dependents. The latest bill would merely convert New York from the minority view concerning enforcement of support decrees against an estate to the majority view.\textsuperscript{188} A more comprehensive solution is necessary to provide support for children who do not have a support decree to enforce.\textsuperscript{189} A child's right to support does not depend upon a support decree when the parent is alive. Consequently, a child's right to enforce a support obligation against an estate should not hinge upon a preexisting decree after the parent dies.

The adoption of a system providing legitime shares, like Louisiana's system,\textsuperscript{190} would not satisfy a dependent's support needs as well as a family maintenance system. Forced shares provide a guaranteed level of support, but the legitime system does not consider the size of the estate or whether the share is adequate for the needs of the individual. What constitutes an adequate level of support varies according to the facts of the case; therefore, the statute should not set the amount arbitrarily. Finally, the legitime system is unnecessarily restrictive of testamentary freedom, because forced heirship requirements cannot be waived, even if the disinherited party is not dependent.

Family maintenance legislation mitigates the tension between freedom of testation and support obligations by balancing the two policies properly. Freedom of testation is subordinated only when it is necessary to enforce parental obligations. Family maintenance is less offensive to testamentary freedom than is forced heirship, which always infringes on testamentary freedom. Under the family maintenance system, even a testamentary disposition that is prima facie unfair in light of criteria other than support obligations will be upheld if it satisfies the basic support obligation set by the court.

Developments in contemporary family structure accentuate the need for reform. The rise in the number of divorces and the concomitant rise in the number of testators leaving multiple families\textsuperscript{191} create support problems that a family maintenance scheme would alleviate. A testator who leaves more than one family may have more obligations than his estate can satisfy. A statutory share system distributes support arbitrarily, according to the legal relationship between the decedent and each dependent, regardless of need. Such a system operates fairly when the estate is ample, but when a decedent's testamentary plan disinherits a needy party yet provides for a self-sufficient party merely because of legal dependency, the need for equitable

\textsuperscript{188} See \textit{supra} notes 152-53 and accompanying text.
\textsuperscript{189} See Foster, Freed & Midonick, \textit{supra} note 5, at 1189.
\textsuperscript{190} See \textit{supra} notes 71-74 and accompanying text.
\textsuperscript{191} See \textit{supra} notes 87-91 and accompanying text.
reform becomes clear. Additionally, the children of divorced parents are at a disadvantage in relation to the children of a second marriage and are likely to depend upon a stepparent's benevolence. The best solution to these problems is a flexible court procedure that considers both need and dependency in each case.\textsuperscript{192}

The American critics of family maintenance legislation repeat many of the same arguments and doubts that members of the British Parliament articulated in the 1930s.\textsuperscript{193} Critics claim that the flexibility of the proposed reform would become a basis for unwarranted litigation.\textsuperscript{194} They also refer to the imprudence of providing courts with a mechanism for rearranging testamentary dispositions.\textsuperscript{195}

Proponents of reform refer to the proven success of the English law.\textsuperscript{196} Litigation need not increase, because testators would be on notice that the statute permits challenges. Thus, they may be less inclined to make inadequate provisions that would provoke judicial interference with their testamentary scheme. Consequently, litigation may actually decrease.\textsuperscript{197} Moreover, a well-drafted statute with precise guidelines should restrain judicial discretion to an appropriate level.\textsuperscript{198}

Estate planners warn that the flexibility provided by family maintenance legislation will remove the certainty of disposition, which is essential to the effective treatment of tax issues.\textsuperscript{199} Again, the advocates of reform maintain that family maintenance will not rupture the

\textsuperscript{192} The inadequacies of the Oregon statute may be attributed to a failure to treat the multiple family situation explicitly. The statute is ineffective, because it provides no guidance for courts in this situation, when guidance is needed most. \textit{See supra} notes 78-82 and accompanying text.

\textsuperscript{193} \textit{See supra} notes 18-22 and accompanying text.

\textsuperscript{194} \textit{See} \textit{THIRD REPORT, supra} note 104, at 211.

\textsuperscript{195} \textit{See id.} at 211.

\textsuperscript{196} The English family maintenance system is successful in that it recognizes the problem created by the tension between the two policies. Moreover, it provides a means by which judges can work through the problem on a case-by-case basis and develop solutions in accordance with the legislative policy.

\textsuperscript{197} However, the United States is a more litigious country than England. Two factors may affect probate proceedings directly: (1) estates in the United States are typically larger, making the incentive to litigate greater; and (2) in England, an unsuccessful plaintiff must bear the entire cost of the litigation. \textit{See} Jolis v. Jolis, 111 Misc. 2d 965, 446 N.Y.S.2d 138 (Sup. Ct. 1981).

\textsuperscript{198} A prime example of such a statute is the Marital Equitable Distribution Law, N.Y. DOM. REL. LAW § 236(5), pt. B, (McKinney 1983 Supp.) The statute provides specific guidelines for division of property upon dissolution of a marriage. In Jolis v. Jolis, 111 Misc. 2d at 988-89, 446 N.Y.S.2d at 151-52, for example, the court's application of the statute resulted in an opinion that rivals Malone v. Harrison, [1979] 1 W.L.R. 1353, in its precision. \textit{See supra} notes 120-23 and accompanying text. The opinion illustrates that courts can achieve good results with carefully drafted statutes. State legislatures considering reform should examine precisely drafted divorce statutes as a model for family maintenance proposals.

\textsuperscript{199} \textit{See} \textit{THIRD REPORT, supra} note 104, at 211.
predictability that is central to estate planning, because the estate planner will know of the statute and will be able to draft instruments that accommodate the testator's support obligations. Furthermore, American family maintenance legislation can copy the English method of taxing the original disposition scheme rather than the one the court has revised.

The effectiveness of the system in England has proven the criticism of family maintenance reform inaccurate. Current legislative inaction must be the result of simple inertia. American jurisdictions should learn from the English experience and should stop sacrificing support obligations for freedom of testation. The English system successfully accommodates both policies and has proven responsive and adaptable to society's changing views of support obligations.

This use of comparative legal method will delineate the boundaries of prudent legislative action. The precise contours of the law, of course, will vary to some degree from state to state with the particular societal norms concerning a dependent's entitlement to support. A review of the English legislative history and the current law should be the first step in the movement for legislative reform in the United States. State legislatures should also compare the needs of English society with those of American society in order to ensure that any remedial action is appropriate and is sufficiently flexible to respond to future changes.

Reform legislation should be based on a study of family structure and resulting parental support obligations in the United States. It may become evident, for example, that reliance on the surviving spouse to support the child is no longer prudent in light of divorce statistics. Study may also reveal that educational expenses and life insurance policies, which in some instances are obligations of living parents, should be imposed on a deceased parent's estate. A legislature considering reform must know what support obligations it intends to accommodate both policies and has proven responsive and adaptable to society's changing views of support obligations.
enforce. 205

Complete subordination of support obligations to freedom of testation is no longer justifiable. Current law forces judges who recognize support obligations to improvise the means to obtain equitable results. A dependent's right to support should not depend upon a particular court's imagination. The goal of reform should be legislation that establishes the importance of support obligations and limits judicial discretion by specific guidelines. Moreover, the law, like current family law, should be reviewed periodically to respond to changing social and moral values. American legislatures should enact statutes patterned after the 1975 Act, which balances support obligations and testamentary freedom.

CONCLUSION

In the United States, the tension between freedom of testation and parental support obligations is currently resolved by dismissing support obligations in favor of testamentary freedom. This resolution of the conflict is hardly justifiable in light of the harsh results and the uncertainty that the current law engenders. Neither courts nor dependents should be forced to rely upon indirect methods to balance support obligations and freedom of testation. Family maintenance legislation patterned after the English family maintenance system would establish a mechanism for balancing the two policies and for achieving equitable results in a rational fashion. Jurisdictions in the United States should adopt family maintenance legislation immediately.

Elizabeth Travis High  

205. Societal changes give rise to obligations that family maintenance might consider. One example of these changes is the obligation owed to partners in unmarried relationships. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976).

* The author expresses her gratitude to Michael E. High (Cornell '83) for his help and patience throughout the preparation of this Note.