

## LOOSING THE BONDS OF TRADITION: A CALL FOR A MORE LIBERAL FAMILY MAINTENANCE SYSTEM

When a substantial contributor to the family income dies, the surviving spouse and minor children often face extreme hardship. Income to the family decreases and the decedent's estate may not adequately provide for the family.<sup>1</sup> Family maintenance<sup>2</sup> is one of several devices utilized to protect the decedent's dependents.

Restrictive family maintenance programs in the United States, however, often provide too little protection for dependents.<sup>3</sup> This Note will discuss American maintenance systems, as well as outline a plan for reform. That proposed plan will make family maintenance available to all those who need it; payments will be in amounts better calculated to adequately provide for a family following the death of its primary provider.

Part I of this Note discusses the present family maintenance system in the United States, Part II outlines approaches used by other countries, Part III illustrates the problems with the United States' system, Part IV proposes a new system of family maintenance and Part V answers com-

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1. The law has created several devices to alleviate this hardship, including dower, forced share, and intestacy schemes.

Dower traditionally gave a widow an interest in real property held by her decedent husband. 2 R. POWELL, REAL PROPERTY § 213 (1966). Dower rights have been extended to both husbands and wives in some jurisdictions. See, e.g., OHIO REV. CODE ANN. § 5305.01 (Anderson 1981). The Uniform Probate Code has abolished dower rights. UNIF. PROBATE CODE § 2-113 (1969) [hereinafter U.P.C.].

The forced share concept allows a spouse to relinquish any benefit under the deceased spouse's will in return for a certain percentage of the deceased spouse's entire estate. Note, *Family Maintenance: An Inheritance Scheme for the Living*, 8 RUT.-CAM. L.J. 673, 675 (1977). The UPC allows a spouse to take a forced share of one-third of the deceased spouse's estate, increased in value by certain transfers made by the decedent during his life. U.P.C. § 2-201, 2-202 (1969).

Any part of an estate not transferred by will becomes part of the intestate estate and is distributed by law. U.P.C. §§ 2-101 to -103 (1969). Intestacy statutes assume that a decedent would want her estate to primarily benefit her family. See Note, *supra*, at 676-77.

2. Family maintenance generally provides a limited amount of money from the estate for the benefit of surviving spouses and dependent children until the administration of the estate ends. U.P.C. § 2-403 (1969).

3. Family maintenance may only be paid during estate administration and may in no event be paid for more than one year if the estate cannot satisfy all claims against it. U.P.C. § 2-403 (1969). Maintenance is payable only to surviving spouses and children who were actually dependent on the decedent. *Id.* No more than a six thousand dollar lump sum, or five hundred dollars per month, may be paid in maintenance to the decedent's surviving spouse or children without a court order. *Id.* § 2-404.

mon criticisms that may be lodged against the proposed maintenance system.

## I. FAMILY MAINTENANCE IN THE UNITED STATES

Almost every state protects a surviving spouse from inadequate provision in a decedent's will.<sup>4</sup> Providing the spouse rights to dower or a forced share<sup>5</sup> may protect that spouse from inadequate testamentary provision. Similarly, many states have enacted pretermitted children statutes which protect dependent children from inadequate provision in a decedent's will.<sup>6</sup> In every state, when a decedent dies intestate, the surviving spouse and children receive a prescribed portion of the intestate estate.<sup>7</sup>

Despite these protections,<sup>8</sup> dependents may suffer because they do not receive any financial benefit from the estate during the probate period. In response to this problem, legislatures created family maintenance provisions<sup>9</sup> which allow dependents to utilize funds from the estate during

4. South Dakota does not have any provision. See Note, *supra* note 1, at 675.

5. See *supra* note 1.

6. The UPC provides an intestate share for a child not provided for in her parent's will, unless:

- (a) the omission was intentional; or
- (b) the estate was substantially given to the other parent of the omitted child; or
- (c) the omitted child was provided for outside the will and that provision was intended to be a substitute for provision in the will.

U.P.C. § 2-302 (1969) The UPC also provides an intestate share for children omitted from the will solely because the testator wrongfully believed them to be dead. *Id.*

Fourteen states have adopted the UPC. Martindale Hubbell Law Directory, Vol. VIII, Uniform Acts (1987); see, e.g., Horne, *Family Protection in New York: A Proposal for Legislative Reform*, 47 ALB. L. REV. 1343 (1983). The UPC has also influenced states that have not adopted it. See generally Note, *Effect of the Uniform Probate Code in Non-Adopting States*, 8 U. PUGET SOUND L. REV. 599 (1985).

7. Under the UPC:

- (1) Where there is a surviving spouse and no children, the spouse receives the entire estate;
- (2) Where there is both a surviving spouse and children, the spouse receives the first fifty thousand dollars in value of the estate and one-half of the remainder. The children share equally the other one-half remaining after the spouse's fifty thousand dollar deduction;
- (3) If there are surviving children, but no surviving spouse, the children share the entire estate.

U.P.C. § 2-102, 2-103 (1969). For the intestate share of the spouse in community property states, see *id.* § 2-102A.

8. Pretermitted child statutes do not protect children from intentional disinheritance by the parent. See *supra* note 6.

9. See, e.g., U.P.C. § 2-403 (1969); ME. REV. STAT. ANN., tit. 18-A, § 2-403 (1984); N.M. STAT. ANN. § 45-2-401 (1978).

probate.<sup>10</sup>

### A. *Uniform Probate Code*

Family maintenance provisions vary from state to state.<sup>11</sup> This Note will focus on the Uniform Probate Code's (UPC) family maintenance provision, because those provisions are utilized by a number of states.<sup>12</sup> The UPC provides for maintenance during the administration of the estate through either a lump sum payment or periodic installment plan.<sup>13</sup> Under the UPC, if the estate is insolvent, maintenance may continue for no more than twelve months,<sup>14</sup> and a court must approve any payments in excess of a six thousand dollar lump sum or five hundred dollars per month.<sup>15</sup> One of the greatest drawbacks of the UPC, however, is that none of the provisions measure the actual need of the dependents before awarding maintenance.<sup>16</sup>

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10. *Id.* The Maine statute is the only one among the state statutes that extends the payment of family maintenance beyond the period of estate administration.

11. See *supra* note 9. Note specifically N.M. STAT. ANN. § 45-2-401 (1978)(providing for a fixed ten thousand dollar family maintenance award).

12. U.P.C. § 2-403 (1969) reads:

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

13. U.P.C. § 2-403 (1969).

14. *Id.*

15. U.P.C. § 2-404 (1969)

16. See Note, *supra* note 1 at 676 n. 20. Similarly, the UPC does not attempt to evaluate the actual needs of the spouse or minor children in computing another protective device, the forced share. The traditions in common law and community property point toward a capital sum related to the size of the deceased spouse's holdings rather than to the needs of the surviving spouse. U.P.C., Part 2, *Elective Share of Surviving Spouse*, General Comment, pp. 29-30 (1969).

## B. *Maine*

Maine is the only state to expand family maintenance beyond the provisions of the UPC. While the form of Maine's family maintenance provisions generally are fashioned after those of the UPC, the state provisions also address problems such as lengthy estate administrations and inadequate maintenance awards. Maine allows maintenance payments to continue after administration of the estate ends.<sup>17</sup> This adjustment<sup>18</sup> corrected the problem caused by estate administrations that ended so quickly that the dependents did not have enough time to adjust to the change in their standard of living.<sup>19</sup> Maine, however, retained the one year limitation on the payment of the maintenance if the decedent's estate was insolvent,<sup>20</sup> and thus failed to cure a defect in the UPC provision.

## C. *Defects in the UPC and Maine Provisions*

The UPC and the Maine provisions fail to protect dependents by limiting the payment of family maintenance to one year if the decedent's estate cannot satisfy all claims against it. "Claims" include funeral and estate administration expenses, as well as claims arising in tort, contract or otherwise against the decedent or the estate.<sup>21</sup>

One frequent event that causes a decedent's family to receive only one year of maintenance is the decedent's obligation to pay alimony to a former spouse.<sup>22</sup> In such a situation, a decedent's current dependents would lose family maintenance payments after one year in order to ensure the payment of alimony to the former spouse.

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17. ME. REV. STAT. ANN. tit. 18-A, § 2-403 (1984).

18. Maine adopted UPC § 2-403 but deleted the words, "during the period of administration," which limited the payment of maintenance to the period of estate administration. ME. REV. STAT. ANN., tit. 18-A, § 2-403, Maine Comment—Original 1979 Act, p. 174 (1984).

19. See Horne, *supra* note 6, at 1368.

20. See *supra* notes 12 and 17.

21. U.P.C. § 1-204(4) (1969).

22. *Id.* § 2-403 (1969). If the divorce decree provided that alimony continues after the obligor's death, the alimony still due would be a claim on the decedent obligor's estate. *Id.* § 1-201(4). If the amount of that claim and others exceeded the value of the estate, family maintenance would be limited to one year's duration. *Id.* § 2-403.

The drafters of the Uniform Probate code stated that the only reason for keeping a decedent's assets from her creditors was to benefit the decedent's spouse and children—Article III, Part 12, of the UPC, dealing with small estates, is premised on that notion. *Id.* § 2-401 comment (1969). The preference, however, that the drafters felt spouses and children should have over claims against the estate was not included in the section covering family maintenance.

Thus, both the UPC and Maine approaches often fail to provide adequately for dependents. These schemes also conflict with the state's interest in preserving the family by ensuring the payment of alimony to a decedent's former spouse at the expense of her current dependents. A system more responsive to the dependent's needs must be adopted.

## II. FAMILY MAINTENANCE IN OTHER COUNTRIES

### A. New Zealand

The New Zealand system, one of the first family maintenance plans, responds directly to the needs of dependents and is, therefore, superior to the American system. The Testator's Family Maintenance Act of 1900<sup>23</sup> (the "Act") provides for the court, on a spouse's or child's application, to award maintenance to that person if the decedent did not adequately provide.<sup>24</sup> The court also maintains the power to attach conditions to the maintenance or refuse maintenance to persons exhibiting disintitling character of conduct.<sup>25</sup>

Maintenance awards under the Act lie within the court's discretion.<sup>26</sup> The amount of maintenance awarded depends on a variety of factors including the dependent's ability to provide for his own needs and the level

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23. N.Z. STAT. (1900), No. 20, "An Act to Insure Provision for Testators' Families," noted in Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107, 1109 (1938).

24. N.Z. STAT. (1908), No. 60, Part II § 33 quoted in Dainow, *supra* note 23, at 1110. This consolidating amendment allowed maintenance to be paid in either a lump sum or periodic installments.

The consolidated statute reads:

If any person (hereinafter called "the testator") dies leaving a will, and without making therein adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as the Court thinks fit shall be made out of the estate of the testator for such wife, husband, or children.

The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disintitle him or her to the benefit of an order under this act.

*Id.*

25. *Id.* The interpretation of "disintitling character or conduct" lies solely within the court's discretion. A husband guilty of adultery has been denied maintenance from his wife's estate. See, e.g., *Green v. Green*, Gazette L.R. 905 (1916) noted in Dainow, *supra* note 23, at 1115 n.51.

26. *Id.* But see *Allardice v. Allardice*, 29 N.Z.L.R. 959, 975 (1910) (limiting court's interference with testator's will to providing maintenance for his dependents and disallowing "recasting" of a will based on the court's sense of justice) quoted in Dainow, *supra* note 23, at 1111.

of support to which he was accustomed during the decedent's life.<sup>27</sup>

Testifying to the New Zealand approach's success, is that it has undergone virtually no amendment in its nearly century-long tenure<sup>28</sup> and it has served as a model for family maintenance provisions in at least fourteen other jurisdictions.<sup>29</sup>

### B. *England*

England represents a common law jurisdiction that has borrowed from the New Zealand act.<sup>30</sup> Its family maintenance provision was enacted in 1938.<sup>31</sup> An amendment to this provision, The Inheritance (Provisions for Family and Dependents) Act of 1975,<sup>32</sup> expanded the class of persons eligible for maintenance to include almost anyone who was dependent on a decedent for support prior to the decedent's death.<sup>33</sup> This expanded class of persons who may claim maintenance represents the most significant British departure from the New Zealand Act.<sup>34</sup>

The guiding principles behind the British and New Zealand acts are: (1) the decedent should be fair to his dependents; and, (2) dependents should not become a burden on the state due to the decedent's testamentary wishes.<sup>35</sup> Thus, the family maintenance provisions weigh the needs of the dependents and, unlike the American maintenance schemes, are not restricted by mechanical rules.

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27. Under the Act, the beneficiary cannot waive or contract away her maintenance payments. *Parish v. Parish*, 43 N.Z.L.R. 307 (1924), noted in *Dainow*, *supra* note 23, at n.53.

28. A 1908 amendment allowed maintenance payments to be made either in a lump sum or in periodic installments. N.Z. STAT. (1906), No. 59, cited in *Dainow*, *supra* note 23, at 1110 n.13. Another amendment in 1939 allowed maintenance payments to be made when a decedent died intestate if the intestate share proved inadequate to provide for the intestate's dependent. N.Z. STAT. (1939), No. 39, § 22, cited in *Dainow*, *supra* note 23, at 1117.

29. Those jurisdictions include all Australian jurisdictions, England, Alberta, Saskatchewan, Manitoba, British Columbia and Ontario. Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation*, 69 HARV. L. REV. 277, 284 (1955).

30. *Id.* at 287.

31. *Id.* The act was entitled the English Inheritance (Family Provision) Act of 1938, 1 & 2 Geo. 6, cl. 45 (1938).

32. *Id.* cl. 63, § 1 (1975).

33. *Id.* § 1(1)(a)-(e).

34. See generally *supra* note 29, at 287.

35. See *Dainow*, *supra* note 23, at 1109.

### III. EXAMPLES OF FAMILY MAINTENANCE PROVISIONS DEFICIENCIES

The problems that occur under American family maintenance schemes can be best demonstrated by the following hypotheticals.

#### A. Example 1

Decedent (*D*) dies intestate with an estate worth \$40,000, \$10,000 of which represents equity in the family home. The balance due on the mortgage is \$50,000. *D* is married to Spouse (*S*), and they have two minor children (*C-1* and *C-2*). *D* was the family's sole income producer and earned \$35,000 per year. *D*'s burial cost is \$5,000.

Under this hypothetical, the UPC allows *S* a homestead allowance of \$5,000<sup>36</sup> and exempt property worth \$3,500.<sup>37</sup> Therefore, only \$31,500 remains in the estate for purposes of family maintenance, but because the estate is insolvent, the funds can only be paid for one year.<sup>38</sup> Moreover, barring a court order, only \$6,000 can be awarded *S* and the two children.<sup>39</sup> Upon distribution of the estate, *S* will be entitled to \$26,500, less the amount paid as maintenance. Yet, these funds can only be paid out with the mortgagee's consent.<sup>40</sup>

Under a family maintenance plan similar to New Zealand's, the entire net estate would be made immediately available to maintain *S*, *C-1* and *C-2*'s standard of living upon *D*'s demise.<sup>41</sup> Such a plan minimizes an immediate change in the family's living circumstances and allows depen-

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36. U.P.C. § 2-401 (1969). This \$5,000 exemption has priority over all other claims to the estate and is in addition to any share of the spouse in the estate and is in addition to family maintenance and exempt property. *Id.* § 2-403.

37. *Id.* § 2-402. The exemption may come from value in household furniture, automobiles, furnishings, appliances and personal effects. The estate is insolvent because the estate's liabilities exceed the estate's assets.

38. U.P.C. § 2-403 (1969).

39. *Id.* § 2-404.

40. An intestate's surviving spouse claims the first fifty thousand dollars of value from the intestate estate. *Id.* § 2-101(3). The \$26,500 figure represents the entire estate after deduction for the homestead allowance, exemption of certain property and funeral expenses. The figure also includes the value of the home.

41. The New Zealand "net estate" equals the entire estate less any claims against it including funeral, administrative expenses, and debts of the decedent. *See* Laufer, *supra* note 29, at 282, 283. The British version of a reformed family maintenance system, however, defines the "net estate" in terms approximating the augmented estate concept of the UPC. *See* Note, *supra* note 1, at 684. The augmented estate under the UPC brings certain transfers for inadequate consideration by the decedent back into the estate. U.P.C. § 2-202 (1969). Thus, the British system allows more property to be used for family maintenance than does that of New Zealand.

dents to protect their interests, such as maintaining the payments on the family's home. Where only \$6,000 of family maintenance is available, as under the UPC,<sup>42</sup> protecting these interests may be impossible, at least until the estate is complete and *S* receives an intestate share. This delay can have serious practical consequences, such as a foreclosure on the family home and damage to *S*'s credit rating.

### B. Example 2

Assume the same facts as above, except that *D* has a former spouse (*X*) to whom he is obligated to pay \$400 per month in alimony. Also assume *S* is a joint tenant in the family home and a joint obligor on its mortgage.

In this case, *S*, *C-1* and *C-2* will still receive family maintenance during the period of estate administration under the UPC. Administration could continue, however, for some time because of *X*'s claim to the estate.<sup>43</sup> The UPC only allows family maintenance to continue for one year if claims exceed the value of the estate.<sup>44</sup> Therefore, if *X*'s claim and funeral expenses exceed \$30,000,<sup>45</sup> family maintenance would cease after one year.

The British plan, however, considers the needs of *D*'s dependents in allocating family maintenance.<sup>46</sup> No one year limitation on the payment of maintenance exists, even if claims, including alimony, exceed the value of the estate.<sup>47</sup> A court would evaluate *S*, *C-1* and *C-2*'s needs to maintain their standard of living, and then award that amount of family maintenance to them for as long as needed.

If *X* depends on the monthly alimony to maintain her standard of living, she could also claim maintenance from the estate.<sup>48</sup> There would be no interruption in payment during estate administration, and *X* would

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42. U.P.C. § 2-404 (1969).

43. U.P.C. § 1-201(4) (1969).

44. U.P.C. § 2-403 (1969).

45. In this example, *S* is both a joint obligor on the mortgage and a joint tenant with *D* on the house. Therefore, the home is not part of *D*'s estate and the \$10,000 equity is not added to the estate's value.

46. See Note, *supra* note 1, at 685.

47. This result comes from the British net estate concept, which is similar to the augmented estate concept of the UPC. See *supra* note 40.

48. The Inheritance (Provisions for Family and Dependents) Act of 1975, ch. 63, § 1(1)(b). This amendment to the original 1938 act greatly expands the class of person eligible to apply for maintenance from the estate. See also *supra* note 31.

receive maintenance payments until a court made a final determination of the claim for continued alimony.

### C. Example 3

Same facts as in Example 1, except that *D* bequeaths \$25,000 to a testamentary trust for *C-1* and *C-2*'s education, payable to them upon reaching eighteen years of age. *C-1* and *C-2* are now 13 and 14 respectively. *S* takes the remainder of the estate.

Under the UPC, *S* will receive a \$5,000 homestead exception and \$3,500 for exempt property.<sup>49</sup> *S* will also probably elect to take a forced share against the will,<sup>50</sup> which would amount to approximately \$8,000.<sup>51</sup> Family maintenance, however, will be paid only during estate administration because the claims exceed the estate's value. Maintenance cannot be paid out of the \$20,000 bequeathed to the trust, since the bequeath is considered a valid claim against the estate.<sup>52</sup> Those funds can only be used for *C-1* and *C-2*'s education until they attain age eighteen. The UPC, coupled with *D*'s poor planning, will cause the family to suffer a severe depression in their standard of living. A family maintenance system similar to New Zealand's system would alleviate the family hardship. A New Zealand court would look to the entire estate<sup>53</sup> to fund the family maintenance, and base the award on the family's present and future needs.<sup>54</sup> New Zealand maintenance would continue for as long as needed. This system also considers *C-1* and *C-2*'s future education needs.<sup>55</sup> *D*'s right of testation would not, however, be allowed to endan-

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49. See *supra* notes 36 and 37.

50. U.P.C. § 2-201 (1969).

51. *S* takes one-third of the augmented estate under the forced share provision. *Id.* If the original value of the estate is \$40,000, and the homestead exemption is \$5,000, exempted property of \$3,500 and funeral expenses of \$5,000 are deducted, \$26,500 remains in the estate. Deducting from that amount any family maintenance paid during estate administration, one-third of what remains is approximately \$8,000. See *id.* § 2-202.

52. If the augmented estate equalled only \$20,000, family maintenance could invade the gift to the trust during the period of estate administration only. *Id.* § 2-403.

53. Family maintenance may be paid only out of the net estate in New Zealand, see Laufer, *supra* note 29, at 282. This limitation represents the major drawback in the New Zealand system. The doctrine recognized by the UPC drafters, that the only reason to deny a decedent's creditor's claims is to aid the spouse and children of the decedent, should be incorporated into the New Zealand statute to allow family maintenance to be taken from the gross, rather than net, estate. See *supra* note 22.

54. See Dainow, *supra* note 23, at 1112-13.

55. *Id.* See generally *Anderson v. Anderson*, 437 S.W.2d 704 (Mo. Ct. App. 1969) (recognizing a child's right to be supported through college).

ger the present financial security of the family.

#### IV. A PROPOSAL FOR REFORM

To alleviate the inequities and hardships imposed by the present American family maintenance systems, an approach similar to that of New Zealand's should be adopted uniformly. The New Zealand system looks first to the needs of the decedent's dependents,<sup>56</sup> and then to the state's interest of keeping them off the public rolls,<sup>57</sup> rather than trying to pay homage to the common law tradition of freedom of testation.

Under the revised system, dependents of the decedent would apply to the court for maintenance. The court would then award or deny maintenance based on a set of factors designed to evaluate the dependent's need.<sup>58</sup> Maintenance orders would not be limited to the period of administration, but rather would continue for as long as needed.<sup>59</sup> Because maintenance rights could not be waived or assigned, the proposed system would likely better provide for dependents.

##### A. *Persons eligible for maintenance*

Under the proposed system, any person that the court determines to be dependent on the decedent for support at the time of death would be eligible for an award of maintenance. Enlarging the class of eligible maintenance recipients would prevent the decedent from making a dependent a burden on the state through the exercise of his or her right of testation.<sup>60</sup> Under this proposed system, there is an implied obligation to provide for all dependents, even after one's own demise.<sup>61</sup>

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56. See *supra* note 23.

57. See Dainow, *supra* note 23, at 1115, citing *Curtis v. Adams*, 1933 N.Z.L.R. 385 (maintenance order denied child in insane asylum because order would benefit only the taxpayer and not the child). See also *In re Doogan*, 23 S.R. 484 (1923) (construing New South Wales statute that parallels New Zealand's Act as not designed to be for the general public's relief).

58. The set of factors New Zealand employs provides a good model of what an extended maintenance plan should use as determinative factors. See *supra* note 7 for a list of such factors.

59. The Maine approach represents an extension of maintenance beyond the period of estate administration. See *supra* notes 11 & 12.

60. See *supra* note 35 and accompanying text.

61. This implied duty underlies the British system of family maintenance. See Note, *supra* note 1, at 681. New Zealand phrases the obligation as the testator's moral duty. Laufer, *supra* note 29, at 294, (citing *Allardice v. Allardice*, 29 N.Z.L.R. 959, 973 (1910), *aff'd*, 1911 A.C. 730 (P.C.)).

### *B. Amount and Duration of Maintenance*

The amount of maintenance awarded should be the difference between the sum that the dependent otherwise receives from the estate combined with the dependent's own resources, and the amount necessary to maintain the standard of living to which the dependent was accustomed to prior to the death of the decedent.

Maintenance shall cease when it is not required for the dependant's support. The awarding court should, at its discretion, modify in any way an award of maintenance to conform to a change in a dependant's circumstances. For example, allowances should be made in maintenance awards for education or training<sup>62</sup> that will enable a dependent to become self-sufficient.

### *C. Sources for Maintenance Payments*

Maintenance payments should be paid from the entire estate, regardless of other claims against it. Any asset not required for maintenance could be distributed absolutely by making the deadline for maintenance applications coincide with the end of the period of estate administration.<sup>63</sup> If maintenance payments must be made for an extended period of time, assets should be transferred into an annuity or other investment that will insure the regular payment of maintenance.<sup>64</sup> Such practical considerations ease family maintenance administration, yet have not been incorporated into American maintenance systems to date.

### *D. Assignability of Maintenance*

Maintenance payments should not be waivable or assignable. This protects a dependent from bad judgment and also protects the state from bearing the burden of a dependent's bad judgment.<sup>65</sup>

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62. See *supra* note 55. While borrowing from New Zealand's provision, New South Wales specifically provides for maintenance if the dependent did not receive enough for his "proper maintenance, education, or advancement in life" from the decedent's estate. N.S.W. STAT., No. 41, § 3(1) (1916) noted in Dainow, *supra* note 23, at n.81.

63. See Note, *supra* note 1, at 690.

64. Similarly, courts have required some type of insurance contract when alimony payments were to continue after the obligor's death. See, e.g., Witt v. Witt, 350 N.W.2d 380 (Minn. App. 1984).

65. If maintenance payments are considered a trust for the dependent, prohibitions on their assignability resemble spendthrift trust provisions. See generally BOGERT, LAW OF TRUSTS § 40 (5th ed. 1973) (Many jurisdictions recognize spendthrift trusts are designed to keep creditors and others from taking the trust proceeds from the beneficiary).

In most jurisdictions, a spouse's forced share can be waived prior to the decedent's death,<sup>66</sup> leaving the spouse at the mercy of the decedent's testation. If a spouse made the waiver and the will provided the spouse an inadequate share of the estate, the spouse would be entitled to maintenance which would temper the burden of receiving only a small amount under the will.

### *E. Forfeitability of Maintenance*

If the court determines the dependent no longer needs maintenance, the amount would be forfeited. Any funds set aside for maintenance and not distributed would be distributed according to the decedent's will, or in the absence of a will, pursuant to the intestacy provision governing the estate.

Forfeiture of maintenance for bad character should, however, be excluded from the proposed system. While New Zealand's maintenance provision provides for the forfeiture of maintenance for bad character,<sup>67</sup> forfeiture is inconsistent with the second principle behind the maintenance scheme — to protect the state from the burden of a dependent not adequately provided for by the decedent's estate. Although it may produce desirable conduct during the life of a decedent, it still causes the financial hardship sought to be avoided by the maintenance scheme.<sup>68</sup>

66. See Laufer, *supra* note 29, at 302.

67. See *supra* note 24.

68. The following proposed statute incorporates all the elements of the proposed family maintenance plan discussed in Section IV:

(a) DEFINITIONS. For the purposes of this section —

- (1) "Gross Estate" \* means any interest in property held by the decedent at his death, increased by all transfers made by the decedent within two (2) years of his death for which the decedent received less than an adequate consideration.
- (2) "Interested Person" means any person dependent on the decedent at the time of decedent's death, any beneficiary under the decedent's will and any of the decedent's heirs at law.

(b) WHO MAY FILE. Maintenance shall be awarded by the court charged with administering the decedent's estate to any applicant who, immediately prior to the decedent's death, was financially dependent on the decedent in whole or in part, and who applies for maintenance to the court before the close of estate administration.

(c) AMOUNT OF PAYMENT.

- (1) The awarding court shall exercise its discretion\*\* in awarding an eligible dependent maintenance. Factors determining the amount of that award shall include, but not be limited to, the dependent's current and anticipated future needs including costs of future education and training, the dependent's lifestyle immediately prior to the decedent's death, the relative needs of other dependents, the dependent's ability to meet his or her own needs, the benefit given the dependent from the decedent's estate and the size of the estate.
- (2) So much of the property of the gross estate as is necessary to pay the awarded

The goals of a family maintenance scheme would be frustrated if forfeiture is based on any standard other than that of a recipient's needs.<sup>69</sup>

### VIII. CRITICISMS OF AN EXPANDED FAMILY MAINTENANCE SCHEME

The family maintenance plan proposed in this Note extends the theory

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maintenance shall be converted into cash by the executor or administrator of the estate. These proceeds shall be used by the executor or administrator to purchase an insurance contract, or similar instrument, that pays a regular income from time to time, on a schedule as the court may set. The executor or administrator may refrain from converting property of the estate into cash if such property pays a regular income on a schedule as the court may set. The executor or administrator may refrain from converting property of the estate into cash if such property pays a regular income on a schedule compatible with the court's order and if the ownership of said property can be transferred as required later herein. The executor or administrator, in his or her representative capacity, shall be the owner in trust of said property or contract, and the dependent or dependents shall be the beneficiaries of said property or contract, as the case may be.

- (3) Any and all gifts made by the decedent by testamentary disposition or in contemplation of death, the subject matter of which has been used to satisfy an award of maintenance under this section, shall abate as otherwise provided by law in the case of an estate that is insufficient to satisfy all testamentary gifts.

(d) **ASSIGNMENT AND WAIVER.** A dependent may not voluntarily or involuntarily waive, assign, forfeit, encumber, contract or give away or otherwise anticipate the maintenance provided by this section and any such agreement to do so shall be void *ab initio*.

(e) **CESSATION AND MODIFICATION**

- (1) Maintenance shall cease when no longer required for the dependent's support or when the dependent becomes capable of supporting himself.
- (2) The awarding court may, in its discretion, modify in any way an award of maintenance to conform to a change in the dependent's relevant circumstances, including, but not limited to, a change in any factor set out in section (c)(1).
- (3) Any dependent or interested person may petition the awarding court for modification or cessation of maintenance as provided in subsections (1) and (2).
- (4) Upon the cessation of maintenance, any and all property remaining for that purpose shall be absolutely distributed by the court ordering the cessation. Said property shall be distributed in the manner that same property would have been distributed at the time of decedent's death if said property had been part of the decedent's estate.

\* This version of gross estate incorporates that part of the UPC augmented estate concept that allows the estate to include property transferred by the decedent without adequate consideration. The UPC regards such transfers as fraudulent to the decedent's dependents. U.P.C. § 2-202 & Comment (1969). The gross estate concept, however, prioritizes the maintenance claim absolutely, unlike the UPC that limits maintenance when the estate is otherwise insolvent. *Id.* § 2-403. *See also supra* note 3.

\*\* Allowing courts great latitude in setting maintenance accomplishes the goal of providing the amount of assistance needed in the particular case, rather than utilizing a rigid formula. New Zealand also gives their courts complete discretion in making maintenance orders. *See supra* note 22. Despite this broad discretion, New Zealand courts rarely conflict with each other in awards of maintenance. *See Dainow, supra* note 23, at 1111.

69. *See supra* note 35 and accompanying text.

of maintenance further than any system present in the United States today.<sup>70</sup> An expanded system may be questioned and criticized extensively. This Note will respond to several of the anticipated criticisms, such as the inhibition of testamentary freedom, administrative problems, an increase in litigation and additional costs to creditors.

### A. *Inhibiting the Freedom of Testation*

A family maintenance plan modeled after New Zealand's plan may inhibit a testator's freedom to dispose of his property as he wishes.<sup>71</sup> Freedom of testation, however, did not arise until 1540<sup>72</sup> and thus, in a historical sense, represents a relatively new privilege. Since adopting the freedom of testation, several states have imposed limitation on that right, including the rule against perpetuities,<sup>73</sup> granting the spouse a forced share against a will,<sup>74</sup> homestead allowances,<sup>75</sup> and exempting certain property from the probate estate.<sup>76</sup> In fact, even family maintenance as it exists today limits this freedom, because maintenance limits priority over all claims to the estate and the terms of the decedent's will.<sup>77</sup> While the proposed maintenance plan infringes on some of the rights of testation, when balanced against overall gains to society, the injuries to the testator's rights are minimal.

Family maintenance currently allows the right of the individual to infringe on the rights of society as a whole, by permitting a decedent to place the burden of supporting dependents on the state.<sup>78</sup> The cost to society of allowing a decedent to breach a duty to provide for dependents is the primary impetus for a reformed maintenance plan.<sup>79</sup>

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70. See *supra* notes 12-20 and accompanying text.

71. That country's legislature noted the inhibiting effect of their plan at the time of its adoption. In fact, this limitation on free testation partially caused the first attempt to adopt a family maintenance bill to fail in 1896. See Dainow, *supra* note 23, at 1108.

72. 32 Hen. 8, ch. 1 (1540), cited in, Note, *supra* note 1, at 680.

73. "The 'rule against perpetuities' prohibits the granting of an estate which will not necessarily vest within a time limited by a life or lives then in being and 21 years thereafter . . ." BLACK'S LAW DICTIONARY 692 (5th ed. 1983).

74. See *supra* note 1.

75. The homestead allowance gives a surviving spouse or minor children a nominal interest in the family home. See, e.g., U.P.C. § 2-401 (1969).

76. Exempt property provisions give a surviving spouse or minor children a certain amount of interest in family personalty. See, e.g., *id.* § 2-402 (exempts \$3,500 worth of specified personalty from all claims except the homestead and family allowances).

77. See *supra* note 12.

78. See *supra* note 21 and accompanying text.

79. See *supra* note 35 and accompanying text.

### *B. Administrative Difficulties of Extended Maintenance*

Currently in the United States, family maintenance can only be paid to a dependent while estate administration continues.<sup>80</sup> This maintenance scheme does not burden the courts because the question of maintenance and its administration is handled by systems already in place. Because the New Zealand System utilizes a different administrative approach than that of the United States, a concern exists that implementation of the system might prove to be prohibitive.<sup>81</sup> That concern, however is unfounded. Because the deadline for maintenance applications would be prior to the end of the estate administration,<sup>82</sup> United States courts would have the time to consider maintenance questions in the manner they always do.

Maintenance payments should be made by converting a sufficient value of estate property into an insurance contract paying a regular income and then closing the estate. This system allows the estate to close at the same time it does under the present maintenance system.<sup>83</sup> The purchase of an insurance contract relieves the court of any continuing supervisory role in the payment of the maintenance; any added administrative burden would be slight. Additionally, any interested individual may make application to the courts for discontinuation of maintenance. If discontinuation is granted, the remaining funds will be distributed according to the dissolution prescribed by the decedent's will or the intestacy provision governing the estate.<sup>84</sup> The only additional burden upon the judiciary would come from challenges to the continuation of maintenance. The benefit of extended maintenance to the decedent's dependents and society outweighs the additional time, if any, that courts will need to devote to this new system.

### *C. Cost to Decedent's Creditors*

If a large portion of the estate was required for family maintenance, a decedent's creditors might never recover debts owed them. Creditors, however, stand in a better position to protect themselves than the dependents of the decedent. Creditors can protect themselves by securing the debt with life insurance assigned to them, or by requesting some other

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80. *See supra* note 12.

81. *See Note, supra* note 1, at 689.

82. *See supra* note 68.

83. *Id.*

84. *Id.*

type of collateral. The dependents' only protection lies in the decedent's unenforceable promise to provide for them after death.<sup>85</sup>

## VI. CONCLUSION

Family maintenance in the United States fails to provide adequately for dependents of a decedent. The amount and duration of maintenance under the present American system do too little to alleviate the burden imposed on a family when a substantial income-producer dies.

The family maintenance system proposed herein, however, gives meaningful help to the financially troubled dependents of the decedent.<sup>86</sup> Maintenance would only be awarded when needed, interfering only slightly with freedom of testation. If its usefulness has expired in a particular case, maintenance could be terminated by court order. The administrative costs associated with an extended plan of maintenance would be minimal when contrasted with the cost to society of supporting decedent's dependents. The decedent's estate, rather than the public, should bear the cost of the continued support of the decedent's dependents. Other countries, such as New Zealand and England, have embraced extended family maintenance plans with great success. The proposed system of maintenance gives the decedent's dependents the protection they expect and deserve and forces a decedent to meet her legal obligation to support her dependents.

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85. Consider the case of an elderly man who, not getting along with his wife, put substantially all of his assets into an *inter vivos* trust three days before his death in order to disinherit her. *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937), cited in, *Plager, The Spouse's Nonbarrable Share*, 33 U. CHI. L. REV. 681, 686 (1966).

One study of testamentary behavior found that in nineteenth century New Jersey, 30-37% of wills had no provisions for a spouse, and that in the year 1900, 55% of New Jersey's probated wills did not provide for a spouse. These studies, however, did not consider whether the testator was married. *Id.* at 710.

A similar study in Wisconsin found that 37.4% of all wills failed to provide for one or more heirs, but that in 40% of these cases, substantially all of the estate was devised to the spouse. This was presumably done to provide for all dependents. *Id.* That still leaves more than 22% of these wills that totally failed to provide for one or more heirs either directly or by gift to the spouse for their benefit.

86. See *supra* note 68.