A Child's "Station in Life": *Inheritance Rights and Expectations*

BARBARA R. HAUSER

BARBARA R. HAUSER
is special counsel at Cadwalader, Wickersham and Taft (New York and London).
brhauser@aol.com

The line between a parent's duty to provide for a child and additional "gifts" that may "spoil" or, in today's terms, "disincentivize" a child is a tough line to draw. It has always been so.

Today we have statements like those by Warren Buffett who said he will leave only a modest fraction of his wealth to his children, because to do otherwise would be to give them "too much." Many pick up the debate at this point and worry: "How much is too much?" But the issues are far deeper and have quite a history.

This article will describe some of the parental themes throughout the ages and will close with a focus on the child. What is the obligation of parents to their children? How is law involved in setting those obligations? Why do parents assume that too much wealth can ruin a child? What is viewed as a "successful life"? What are a child's expectations? What are a child's rights? What role do parents play in encouraging or discouraging those expectations? When should children be entitled to rely on their expectations? When might the law enforce those expectations?

The author hopes that the discussion below will shift the focus of today's debate ("How much is 'too much' to leave to children?") to basic issues of justice and fairness.

PRIMOGENITURE

In the good old days a lot was simpler. Within a family, everyone knew that the first-born son would inherit all of the land (which constituted the bulk of the wealth) along with any related titles, the second son would join the army, and the third would become a priest. The daughters would be married off, into other families. Prior to the Norman Conquest, in 1066, many parts of England followed a system of "gavelkind" in which all of the sons (and only the sons) divided the property equally. In early Roman times a man needed to have a son, and was allowed to adopt one before death if he would otherwise die without one.

In all these ancient systems, the engrained preference for the sons lingers on today, causing more trusts with later distribution ages for daughters than for sons. Sadly, the "gender-sensitive infanticide" in countries like China and India is another effect of fewer inheritance rights, and related property ownership and economic dependence for daughters.

But primogeniture did have many advantages. The family land holdings were kept intact, and not diminished by subdivisions. The certainty of the system meant that all the children knew what the rules were and the parents did not have to fret about how to divide the wealth (or titles).

On the other hand it did lead to a fair amount of sibling conflict and family murders.

An even older law appears in the Code of Hammurabi, promulgated by a king of Babylonia who ruled during the 18th century B.C. A surprising number of those Code provisions deal with inheritance, often in complicated situations (e.g., when a man has children by

both a wife and a maidservant). The assumption is that property will go to the sons equally, although the father could alter the shares by making lifetime gifts: "If a man give to one of his sons whom he prefers a field, garden and house, and a deed therefor: if later the father die, and the brothers divide the estate, then they shall first give him [the favored son] the present of his father, and he shall accept it; and the rest of the paternal property shall they divide."

Wives are provided for also upon the death of the husband:

> If her husband made her no gift, she shall be compensated for her gift, and she shall receive a portion from the estate of her husband, equal to that of one child. If her sons oppress her, to force her out of the house, the judge shall examine into the matter, and if the sons are at fault the woman shall not leave her husband's house. If the woman desires to leave the house, she must leave to her sons the gift which her husband gave her, but she may take the dowry of her father's house. Then she may marry the man of her heart.

And finally, we find many rules about inheritances in the Old Testament of the Bible. In Deuteronomy it is stated that the sons are to inherit the father's estate, with a double portion to the first born, and no inheritance allowed to an illegitimate child. Daughters may inherit only when there are no sons.

MONEY AS PARENTAL SECURITY

Another issue behind the scenes is often a parental fear that if they give a child a substantial amount during the parents' lifetime, as many tax advisors will recommend (and as English and French tax laws specifically encourage), the financial "balance of power" could shift. This too is a very old issue.

The conflict between generosity during lifetime and the retention of security (and power) is addressed in Ecclesiasticus:

> Neither to son nor wife, brother nor friend, give power over yourself during your own lifetime. And do not give your property to anyone else, in case you regret it and have to ask for it back. As long as you live and there is breath in your body, do not yield power over yourself to anyone; since it is better for your children to be your supplicants than for you to have to look to the generosity of your sons. In all you do, be the master, and do not spoil the honor that is rightly yours. The day your life draws to a close, when death is approaching, is the time to distribute your inheritance.

Advice not heeded by King Lear!

"KEEP WEALTH WITHIN THE TRIBE" AND "REMEMBER YOUR PLACE"

On a societal basis there have also long been prohibitions against marrying an "outsider" or someone in another "class."

The oldest written Roman laws are often said to be those found written on 12 stone tablets (the Laws of the Twelve Tablets, c. 450 B.C.), which include a clear class prohibition: "Marriages should not take place between plebeians and patricians." In other words, everyone knew his or her "station in life" and was directed to marry (and stay) within it.

In the Bible, daughters are directed to marry only within their own tribe in Israel. A childless widow is to marry her husband's brother, to stay within the right group.

Religions and states have often prohibited marriage outside a defined class. Those who disobeyed could even lose their rights to inherit titles.

TO THE MANOR BORN AND WHO MAY WEAR PURPLE?

As European, English, and Chinese dynasties and monarchies progressed, a child's station in life became well defined by class. Succession to thrones was strictly decreed, nearly always to the oldest son. (Some laws allowed the oldest child, of whichever sex, to ascend, which they are currently considering in Japan with their pregnant princess.) In England the oldest son would inherit any number of titles, including the right to be a Lord in the House of Lords. This law was changed only in 1999. The French Constitution of 1804 is quite detailed about Napoleon's title being "hereditary in the direct, natural and legitimate descent of Napoleon Bonaparte, in male line, by primogeniture, forever excluding females and their issue." In the event that he had no sons, "[He] can adopt the children or grandchildren of his brothers."

We use the phrase "to the manor born" to refer to those born in an upper-class "mansion," but the correct expression is "to the *manner* born," which refers much more broadly to every child's position at birth. One explanation of the phrase is: "fitted by birth or endowment for

a certain position in life" as in "He's an executive to the manner born," or even "He's a ball player to the manner born."

As for being allowed to wear purple, that one goes way back. King Solomon tried to obtain some of this special dye, which was rare and costly, produced from a fluid secreted by a type of shellfish on the coast of Syria and Palestine. It became associated with royalty and wealth. Mark and John write of Jesus robing himself in purple to mock the claim that he was a king.

In the Manchu dynasty, in the 17th century, the highest six rankings of royalty had the following special rights, among others:

- To wear the purple button
- To wear a three-eyed peacock's feather, and
- To use purple bridle reins

The privileges accorded to one's station in life rankled many who were not so privileged. The *Communist Manifesto* had a vision of an equal world, in which all property ownership and inheritance rights would be prohibited. Oscar Wilde, writing in 1891, thought this would be wonderful: "With the abolition of private property, then, we shall have true beautiful, healthy Individualism. Nobody will waste his life in accumulating things and the symbols for things. One will live."

On a more bitter note, we find that Andrew Carnegie did not lightly forget the positions of privilege to which others were born when he was a poor child in Scotland. In his autobiography it remains vivid to him:

> As a child I could have slain king, duke, or lord, and considered their deaths a service to the state. . . . There was still the sneer behind for mere pedigree—"he is nothing, has done nothing, only an accident, a fraud strutting in borrowed plumes; all he has to his account is the accident of birth; the most fruitful part of his family, as with the potato, lies underground."

EQUALITY AND THE UNITED STATES

When the Puritans began to settle the new land, they brought with them strong opinions against primogeniture. In 1624, John Winthrop wrote: "It is against all equity that one [son] should be a gentleman to have all, and the rest as beggars to have nothing . . . it breedeth often times such strife and contention betwixt the elder brother and the rest of the children."

In addition to the importance of "equality" within a family, the concept of "equality" across society in general was a founding principle. As stated in the Declaration of Independence, as a self-evident truth: "All men are created equal."

Daniel Webster, in 1843, praised America's new opportunities: "She holds out an example, a thousand times more enchanting than ever was presented before, to those nine-tenths of the human race who are born without hereditary fortune or hereditary rank."

Andrew Carnegie, who came with his poor family from Scotland and amassed a great personal fortune in the United States, agreed wholeheartedly:

> The denunciations of monarchical and aristocratic government, of privilege in all its forms, the grandeur of the republican system, the superiority of America, a land peopled by our own race, a home for freemen in which every citizen's privilege was every man's right—these were the exciting themes upon which I was nurtured.

Colonies, and later states, quickly abolished primogeniture. Some have thought this may have been tied to the abundance of available land in the new country and a wish to have it settled by as many as possible. In any event, in all states except Louisiana, there are no state restrictions on how a parent leaves inheritances to children, and if there is no will all the children are treated equally.

FORCED HEIRSHIP

Meanwhile, back in Europe there were general uprisings against the privileged few (including the landowning church), resulting most notably in the French Revolution. Central to the new regime was a drastic change in inheritance laws, one which has been adopted with occasional differences by every country in Europe.

Primogeniture was abolished (with the notable exception mentioned above of the inheritance of the throne itself). Trusts could not be used to tie up family fortunes and perpetuate family dynasties. Continuing a tradition from Roman law, children were assured a right to a large portion of the family's wealth. Interestingly, in Roman law the children's inheritance rights seemed to represent the ongoing "immortality" of the family itself. The family would "continue" through the inheritance by the next generation. The concept was similar to the abhorrence of a gap in the monarchy, expressed by "The King is dead. Long live the King."

The French refer to the children's rights as the "*part légitimaire*" (or the "*part réservataire")*, which is translated as

the "portion in parents' estate secured by law to each child." Here in the United States, the land of opportunity, individualism, and complete freedom to disinherit one's children (with limited exceptions in Louisiana, which followed French law when it was settled), we call the French system one of "forced heirship." This puts the focus on having the state force an individual to leave his or her property a certain way, which generally carries a very negative connotation (although our states all enforce rights of spouses to inherit property).

Lawyers in the United States often offer to help those living in countries that obligate them to leave a substantial part of their wealth to their children, to create trusts and other devices in jurisdictions that may not enforce the inheritance rights of those children. Whether those strategies are effective is often determined by the location of the court to which a child complains.

DISINHERITANCE

In the United States, children of every "station in life" are probably aware of the risk that they will be disinherited, in whole or in part. Bumper stickers announce "We are spending our children's inheritances." Several of today's billionaires announce to the world that they will leave relatively little to their children.

This relatively unusual freedom on the part of parents in the United States forces parents to think about how much should they leave their children, and in what manner.

A LIFE WELL LIVED

The idea that some amount is "too much" for the child's "own good" needs much more examination, in the author's opinion.

It seems to be an accepted assumption that "too much" will spoil the child. What this refers to is a fear that the child will not work to earn money, unless he or she needs to. Going a bit farther, we find the assumption that in the United States the "purpose" of a good life seems to be to work for money. The more money one earns, the bigger a success his or her life is. This sad view of the joys and possibilities of life keeps wealthy parents focused on how much, or how little, they should leave to their children.

A CHILD'S ENTITLEMENTS

In U.S. law, the area in which a child's entitlements is still addressed is in setting the amount of child "support" in a divorce. The amount that is appropriate is directly tied to the child's "station in life," a phrase that is still used today.

One recent example involved an executive at Qualcomm, and involved an award of a percentage interest in his stock options as well as his compensation. The court stated that: "[C]hild support awards must reflect a minor child's right to be maintained in a lifestyle and condition consonant with his or her parents' position in society after dissolution of the marriage . . . A child's 'need' is measured by the parents' current station in life."

The question may be when this obligation will end, as a practical matter, and how it relates to ongoing expectations of inheritance. Does a child have enforceable expectations in the United States?

Children in the United States may not have any inheritance "rights" (except in Louisiana), but they do all have "expectations." Are they entitled to have those expectations honored?

UNCERTAINTY AND PROMISSORY ESTOPPEL

Much cruelty is done by disinheritance. Children do seem to feel an entitlement to be left wealth that is somehow consistent with their "station in life." Money is tied to love in our society. The power over its disposition makes statements of love and rejection all the time.

The cruelty can take place during life or at death. A son grieves that his father (who had remarried) left nothing in his will for him or the grandchildren, "who had thought he loved them." A woman is shocked that the aunt for whom she was named has specifically excluded her from the will. A mad parent says: "I do not approve of your choice to [whatever]." A dowager can avoid mentioning disinheritance yet feel secure in the knowledge that the whole family will visit her regularly.

Wealthy parents say they will not leave large fortunes to their children "for their own good," without consulting the children (who are often by then in their forties and fifties). They say they want the children to be motivated to work hard and enjoy the reward of earning their own money. Yet while growing up these children have become accustomed to a certain way of life. Will that be taken away from them? Will the answer depend on their behavior, year after year?

If there are unspoken messages from parent to child, upon which the child relies and in accordance with which the child proceeds to plan his or her adult life, one could argue that the parent is obligated to fulfill those expectations. In the Midwest there were unspoken promises about the succession of the family farm. Those who would receive it would also care for the parents, and so

on. Today an entire consulting industry gives advice on the succession of a family business.

The legal doctrine of promissory estoppel was created by the English courts of equity to cover situations that seemed unfair under strict contract law. These were instances of promises (without consideration) upon which someone reasonably relied. The chancery courts would hear those claims, and if they felt that the person had been reasonable to rely on those promises, and had relied in such a way that would result in negative consequences to that person if the promise were not enforced, then they would hold that the one who made the promise was "estopped" from not honoring it. That legal tradition has continued in the United States.

FAMILY PROTECTION ACTS

Outside of the United States, there has been a recent and growing trend in common law jurisdictions to allow a court to change the inheritance plan in someone's will, if it seems necessary in order to be "fair" to certain family members or to others. In particular, in portions of Canada, England, and New Zealand (none of which have "forced heirship" regimes but which share the freedom to disinherit children that we inherited from England), there are increasing numbers of such legislative acts. Usually called something like a Family Protection Act, they allow certain relatives (or others) to present claims to a judge that they have been treated "unfairly." If convinced, the judge may rearrange the deceased person's inheritance dispositions in a way that would result in more fair or just treatment.

In the United States, in the aftermath of the 1981 estate tax change that increased the marital deduction from 50% of the estate to the entire amount of the estate, we have begun to see increasing numbers of "children" who will expect to receive their inheritances, if at all, when they themselves are in their sixties or seventies.

Prior to the 1981 estate tax change it was common for wealthy clients to leave the nondeductible other 50% directly to their children (or in a trust for the surviving spouse together with the children). After that tax change nearly all clients changed their plans to minimize or postpone the estate tax, and thus left much less to their children if they had a surviving spouse. Needless to add, the increase in second marriages in the United States, often to a much younger spouse, may result in the children's postponement becoming an unintended exclusion.

If the estate tax is repealed, as it is currently scheduled to be, at least for the one year of 2010, clients will have an opportunity to consider their preferred inheritance plans, free of tax motivations, and to consider the position of their children.

JUSTICE AND FAIRNESS

What is fair in all this? Across society as a whole, is it fair that some are "to the manner born" and some are not?

In his book *A Theory of Justice*, John Rawls proposes that those who would construct a society should do so while they themselves are behind a "veil of ignorance" in the sense that they do not know which of those positions they themselves will occupy. In our terms, they will not know which will be their "station in life." The goal in constructing the society then is for those who create it to feel that whichever station they come to occupy is "fair."

Within a family, it is the author's view that the key to successful succession plans is communication with the children. The parents can explain their motives; the children can add insights from their own positions in life. When the children's expectations are clear, they should be honored. The sense of betrayal (which results so often in litigation and festering sibling feuds long after the parents' death) is rooted in surprise: an expectation was not honored.

To keep one's promises is the essence of justice and fairness. To mislead is to lose trust and to cause harm, even tragedy. Macbeth had relied on the witches' promise that "none of woman born" would stop him, and then found to his dismay that Macduff had been "from his mother's womb untimely ripped." As he died, Macbeth lamented his trust and warned: "And be these juggling fiends no more believ'd, that palter with us in a double sense; that keep the word of promise to our ear, and break it to our hope." How far worse it is to mislead one's own child.

Children learn early that genuine surprise they express in "But, you promised!" In a larger societal sense, the members make a "social compact" about what the rules will be and agree that they will be followed. This is just as important within the family unit. In early Roman times the children were the continuation of the family. That has not changed. So is it not important to ensure the family memories continue, with a sense of justice and fairness by each generation?