

# Inheritance in America

From Colonial  
Times to the  
Present

Carole Shammas,  
Marylynn Salmon, and  
Michel Dahlin

Carole Shammas  
Marylynn Salmon  
Michel Dahlin

---

# Inheritance in America From Colonial Times to the Present

---

---



**Rutgers University Press**  
New Brunswick and London

---

**Library of Congress Cataloging-in-Publication Data**  
**Shammas, Carole.**

**Inheritance in America from colonial times to the present.**

**Bibliography: p.**

**Includes index.**

**1. Inheritance and succession—United States—**

**History. I. Salmon, Marylynn, 1951– . II. Dahlin, Michel. III. Title.**

**KF753.S53 1987 346.7305'2 86-20409**

**ISBN 0-8135-1214-X 347.30652**

**0-8135-1266-2 (pbk.)**

**The preparation of this volume was made possible in part by a grant from the Division of Research Programs of the National Endowment for the Humanities, an independent federal agency.**

**Copyright © 1987 by Rutgers, The State University**

**All Rights Reserved**

**Manufactured in the United States of America**

---

## Preface

---

This study originated in a 1982 grant proposal entitled "Inheritance, Family, and the Evolution of Capitalism in America." Before writing the proposal, all the authors, in the course of working on other topics, had come into contact with some aspect of the current research on inheritance: Carole Shammas had worked extensively with probate records while studying colonial consumer behavior; Marylynn Salmon was finishing a book on women and property law in early America; and Michel Dahlin had just completed a dissertation on the elderly in the Progressive era. Our limited exposure to the subject indicated that, although the inheritance process played a crucial role in linking the institution of the family to that of capitalism, the available research raised more questions than it answered about the nature of the relationship and how it had developed over time.

For example, the economics literature on bequests and the problem of capital formation demonstrated the importance of inheritance in the economy and showed ingenuity in devising ways to measure the effects of government policies on the intergenerational transmission of wealth. From our perspective, however, much of the work seemed to be rather ahistorical and monocausal. Most writers assumed parents had, from time immemorial, a "natural desire" to transmit property to the next generation and that little change had occurred until the state began interfering in the twentieth century. Some studied interference in the form of progressive taxation, while others looked at social security. Structural changes in the private sector and in the family, however, did not often enter the picture. Although we were far from sure how all the pieces fit together, we sensed something was missing.

We were also uncomfortable with an extremely functionalist portrayal of seventeenth- and eighteenth-century family relations that was enjoying some popularity among scholars in our own discipline, his-

tory. The interpretation went something like this: Yes, it was true that under intestacy laws all daughters and younger sons received smaller shares than the eldest son, that testators could disinherit any or all children in a will, and that married women had only limited inheritance rights, in the form of a one-third share of family realty, and had no will-making powers. But all this was for the good of the family and did not produce much inequality.<sup>1</sup> Disinheritance was rare, and husbands took extraordinary measures to see that their widows were maintained. In addition, the plentifulness of land insured that almost all families owned realty and that most family members got some property. Daughters were established in marriages, and younger sons went off to the frontier. In this interpretation, the family was such a harmonious institution that a reader had difficulty understanding why the system was ever altered.<sup>2</sup> And that was in fact the problem. Nowhere was there evidence of any impetus for change, yet we knew that significant transformations in inheritance had occurred at the end of the eighteenth and during the nineteenth century, when laws giving preferential treatment to eldest sons disappeared and legislators enacted the married women's property acts. ③

It was puzzles such as these that prompted us to embark upon this study. Given the scope of the project, it would have been impossible to complete our work within a reasonable amount of time had we not received grants from the Law and Social Sciences Program of the National Science Foundation (SES-8208620) and the Basic Research Program of the National Endowment for the Humanities (RO-20466-83). Once the funding had been obtained, we set out to collect the data. We are grateful to Charles Raudenbush Jr. and Kathy Miller in the office of the Register of Wills and Clerk of Orphan's Court, Bucks County; David J. Collins, Civil Processing Division, Los Angeles County Courthouse; "Charles" at the archives of the Los Angeles Hall of Records; and Kai-Yun Chiu, librarian of the Library Company of the Baltimore Bar for their assistance.

The two biggest tasks we faced in this project were the coding of ten sets of probate records and the compilation of inheritance statutes for all the colonies/states at four points in time. Our research assistant, Simon P. Newman, did an excellent job of supervising the coding; and the following students, in addition to Simon, spent long hours in front of the microfilm machines: Mark Angelos, Peter Angelos, Helen Danecki-Hermann, Wendy Henning, Deborah Kitchen, Robert Olwell,

and Christine Zienkienicz. Carole Shammas then went through the wills and administrations, checking for inconsistencies and errors. Marylynn Salmon and Michel Dahlin collected most of the statute material appearing in Tables 1.1, 3.1, and Appendixes B and C. Mary Ann Stevanus gathered case and statute materials on nineteenth-century Pennsylvania inheritance law and otherwise served as an able research assistant. Institutional support from the Social Science Research Facility, where the data sets from this study are deposited, the Office of Women's Studies, and the History Department of the University of Wisconsin-Milwaukee speeded the project along.

A number of scholars very generously shared data, provided references, supplied information, and raised questions. We thank Norma Basch, James Brundage, Lois Green Carr, Margo Conk, James Cronin, Jack Crowley, Toby Ditz, Mary Maples Dunn, Cissie Fairchilds, Mark Friedberger, Darryl Holter, Barbara Laslett, Jean Lee, William Newell, Mary Beth Norton, Joseph O'Rourke, Gregory Roeber, Anne Firor Scott, Eileen Spring, Gail Terry, and Lorena Walsh.

Drafts of chapters were presented at the Legal History Summer Seminar, University of Wisconsin-Madison Law School and at the 1985 meetings of the Organization of American Historians and the Social Science History Association. Comments made on those occasions aided us in making revisions. We benefited from a very knowledgeable critique of the entire manuscript by Michael Grossberg. Our biggest debt is to Daniel Scott Smith, both for the numerous letters of support we know he has had to write on behalf of this project and for the insights he has continually provided concerning the dynamics of historical change. Finally, we want to thank Rutgers University Press, and particularly Marlie Wasserman, for offering us a contract when this study was no more than a grant proposal.

---

# Contents

---

|  |     |
|--|-----|
| <i>List of Figures and Tables</i>  | vii |
| <i>Preface</i>   | xi  |
| <b>Introduction</b>  |     |
| The History of Inheritance in America  | 3   |
| <b>Part One: Inheritance under Family Capitalism</b>   | 21  |
| CHAPTER ONE: English Inheritance Law and Its Transfer to the Colonies                                    | 23  |
| CHAPTER TWO: Colonial Testamentary Practice and Family Capitalism  | 41  |
| CHAPTER THREE: Tension in the System: Changes and Attempted Changes in Postrevolutionary Inheritance Law | 63  |
| <b>Part Two: Family, Property, and the Rise of Corporate Capitalism</b>                                  | 81  |
| CHAPTER FOUR: Inheritance Law and the Rights of Women and Children in the Nineteenth Century             | 83  |
| CHAPTER FIVE: Testamentary Behavior in the 1790s and 1890s   | 103 |
| <b>Part Three: State Capitalism and Inheritance Today</b>  | 123 |
| CHAPTER SIX: The Federal Estate Tax and Inheritance  | 125 |
| CHAPTER SEVEN: Demographic Change, Old-Age Policy, and the Family  | 147 |

|   |     |
|---|-----|
| CHAPTER EIGHT: Inheritance Law and the Unfinished Revolution                                      | 163 |
| CHAPTER NINE: Testamentary Behavior in the Late Twentieth Century                                 | 179 |
| <b>Conclusion</b>   |     |
| Inheritance, the Family, and Capitalism   | 207 |
| <b>Appendixes</b>   |     |
| A: Samples of Probate Records from Bucks County, Pennsylvania, and Los Angeles County, California | 215 |
| B: Inheritance Laws 1890  | 223 |
| C: Inheritance Laws 1982  | 259 |
| <i>Notes</i>  | 271 |
| <i>Index</i>  | 313 |



---

# Inheritance in America

---



---

## Introduction

---

# The History of Inheritance in America

**T**he bulk of household wealth in America, perhaps as much as 80 percent of it, is derived from inheritance, not labor force participation.<sup>1</sup> The irony that accident of birth is the prime determinant of one's material situation in a society that considers free market competition to be the most rational and efficient method of making economic decisions has, of course, not gone unnoticed over the years. It was just such a realization that led reformers at the beginning of the twentieth century to push for progressive taxation, and the persistence of poverty has kept a small but dedicated band of researchers busy analyzing the role of inherited wealth in perpetuating inequality.<sup>2</sup>

What invariably has rescued the inheritance system from abolition or more stringent taxation policies has been the fear that these actions would jeopardize capital formation and family organization. Using arguments that date back at least to Ricardo, proponents of the unrestricted transmission of wealth from one generation to the next contend that this accumulation of capital is essential to investment. They point to studies showing that the affluent devote a higher proportion of their lifetime resources to investment and a smaller percentage of it to consumption than do the rest of the population. Progressive taxation, taxing the rich at higher rates than the poor, interferes with this process and, in their opinion, depresses economic growth and employment opportunities. Thus, they maintain, the policy ultimately hurts the very people it was designed to help. Alternative methods of capital accumulation are either not discussed or dismissed as inefficient and inappropriate because they would aggrandize the state. Defenders of the inheritance system also usually bring up, at some point, the danger of meddling with the "natural" desire of parents to leave property to their

children, implying that doing so diminishes the industriousness and the cohesiveness of families.<sup>3</sup>

Seldom in the debates about inheritance in America is mention made of the long-term changes in capitalism and the family. In Ricardo's time, after all, family heads not only owned most of the capital in society but also managed the enterprises; death not divorce ended marriages; and married women lacked property rights, to mention but a few of the differences. Many of the codes governing inheritance in the states contain provisions, for example, the spousal thirds, life estates, trusts, and inheritance taxes, originally enacted a century ago or earlier under different conditions. Clearly, to formulate a sound rationale for changing or retaining policies and laws relating to the transmission of wealth requires some knowledge of the social and economic forms prevailing when those policies and laws were instituted. What we need to know, then, is the extent to which the inheritance system we now have reflects the "world we have lost." To figure out that, however, requires knowledge of how American capitalism and the family have evolved over time.

### **INHERITANCE AND STRUCTURAL TRANSFORMATIONS IN CAPITALISM AND THE FAMILY**

---

When we refer to structural transformations in capitalism, we mean changes in the composition of capital or in who had the right to own, use, and manage it.<sup>4</sup> Was capital mainly in the form of realty (land, buildings, and improvements) or personalty, and was the personalty in tangibles (livestock, equipment, inventory stock, and so forth) or in intangibles (financial assets and cash)? Who had property rights in the wealth—individuals, families, corporations, the state? Obviously any alterations in either composition or rights could affect inheritance.

In the colonial period, one-half or more of wealth tended to be in land and buildings, and almost all property was held by white male heads of families. The absence of financial institutions and private corporations limited financial assets to book debts, mortgages, personal bonds, notes, and bills. In America there were no lords and virtually

none of the claims on familial property characteristic of manorial societies. The public sector was also weak, and both monarchy and church had comparatively small accumulations of wealth.

This situation began to change after the Revolution. A rather disparate group of business and institutional studies written in the last few years has improved our understanding of how corporate organization evolved. Despite all the attention lavished upon firms such as the Lowell textile mills, it was not manufacturing concerns that first employed corporate forms most frequently. It was financial institutions, insurance companies, transportation firms, and enterprises concerned with producing energy. These corporations built up the infrastructure in America, beginning after the break with Great Britain. Evolving along with these corporate businesses were family trusts and charitable endowments that, as Peter Dobkin Hall has noted, allowed the wealthy to control, privately, segments of the public sphere. Over the course of the nineteenth century, profit and nonprofit corporations gradually assumed the role of the family in the management of capital. It was not so much that family farms or businesses all became corporations as it was that the existence of financial institutions and stocks made it possible for firms to liquidate and for the patrimony to take the form of financial rather than physical assets.<sup>5</sup>

Another major transformation in capitalism involves the government. Historical research on the growth of the state is only just beginning, so the full contours of its changing influence on not only the economy but family life as well are yet to be explored. It appears, however, that in the nineteenth century the state, primarily through the courts, functioned as an enabler. It permitted corporations, foundations, and trusts to be set up and allowed women and children, in certain circumstances, the right to challenge patriarchal authority. This role has continued into the twentieth century, but it has been joined by the more aggressive forms of government action to which social scientists have drawn attention. Fiscal policy has had a very strong impact on the functioning of the economy and, through estate taxation, has touched inheritance. The expansion of the government's role in assuring the welfare of its citizens—through programs such as social security and Medicare—has purportedly played a part in transforming family relations.<sup>6</sup>

Aside from the possible effects of the state on the family, there are two other structural changes the historical literature indicates are im-

portant and perhaps relevant to inheritance. One is the sharp decline in the fertility rate in the nineteenth century. In 1800, women living through their childbearing years gave birth to an average of seven children. By 1900 that number had been halved, and of course the downward trend has continued throughout the twentieth century, interrupted only briefly by the baby boom. Among historical demographers a lively debate rages over the reasons for the drop.<sup>7</sup> It has been tied to a reduction in the availability of land, to literacy, and, most interesting, to what Daniel Scott Smith has referred to as “domestic feminism,” an increase in the wife’s ability to control household affairs including the size of the family.<sup>8</sup> Whatever the cause, we do know something about the result of the fertility decline. Households had many fewer children, and they were being educated longer and working less.

The notion of a “domestic feminism” operating in the Victorian period has been taken up by other scholars in addition to demographers. Some family and women’s historians trace the improvement in the status of wives and mothers back to the late eighteenth century.<sup>9</sup> While, according to this interpretation, domestic ideology may have sharply restricted the behavior and the opportunities of women, it at the same time reduced patriarchal control on the home and altered the structure of authority within the family. If domestic feminism was important to women in any group, it was certainly to those in capitalist households. Part of the improvement in the status of these women was the passage of the marital property acts in the third quarter of the nineteenth century.<sup>10</sup> This legislation altered the common law (the traditional English law adopted with some variations by the original thirteen colonies and most of the states east of the Rockies) to allow women to retain control over their own property after marriage. For wives with capital, the acts greatly increased their economic power within the family. Among other rights, they acquired the power to write a will. Adoption of the community property system (which owes more to Roman law), in place of the common law, by a group of states entering the union in the last half of the nineteenth and early twentieth century conferred even greater rights on wives.<sup>11</sup>

The relationship of the marital property legislation to inheritance law is relatively straightforward, but we do not know how it actually affected the transmission of wealth. The impact of the other transformations is even less understood.<sup>12</sup> Although the history of inheritance has attracted a number of able scholars over the years, most of the re-

search has been clustered in the colonial period and has not dealt directly with changes in economic structure. Instead, the effect of land availability on the disposition of realty has been the primary issue.

The abundance of land in the colonies, so often used as the main determinant of behavior in the New World, was quickly appropriated by legal scholars seeking to explain American departures from the English common law,<sup>12</sup> especially the adoption of the partible inheritance of land and the demise of primogeniture (the practice of devising all land to the eldest son).<sup>13</sup> Local studies of testamentary patterns in early America also have concentrated on the transfer of realty. Their findings support those made by researchers studying inheritance laws. Colonists commonly gave land to more than one son and, in the beginning years of settlement at least, frequently made gifts of realty to daughters and wives.<sup>14</sup>

There is no comparable literature on the growth of financial assets and its possible impact on inheritance. Only a few disparate testamentary studies exist covering the period 1800 to the mid twentieth century, and they do not deal extensively with the effects of changes in the composition and management of capital, although they do record its increased importance.<sup>15</sup> Farm communities and land transfers actually continue to hold their own in the research on testamentary behavior in the modern era, despite the sharp decline in the population living in rural areas and the drop in the proportion of wealth held in realty.<sup>16</sup>

Research on the status of women in the eighteenth- and nineteenth-century family has come to include the study of inheritance. Legal scholars have reevaluated earlier work on colonial intestacy laws and dower rights, the one-third of a man's real estate his widow could claim for her lifetime use. They have investigated, for the first time, the interpretations given those laws by the courts.<sup>17</sup> The idea that America's divergence from English law had provided a golden age for women has been challenged.<sup>18</sup> Improvement in women's ability to bequeath wealth presumably occurred when, in the later nineteenth century, states began passing marital property acts. But some new research concludes that the process began almost a century earlier with the gradual increase in popularity of marriage settlements among the affluent. Equity courts, using the civil law rather than the common law, recognized these agreements, through which married women often received the right to make a will.<sup>19</sup> Complicating the issue further are testamentary studies of early American communities showing that at just the point when mar-

riage settlements gave more autonomy to at least some affluent married women, late eighteenth-century husbands placed more and more restrictions on their wives' ability to control property in their wills.<sup>20</sup> Why this occurred has not been determined, and owing to the limited number of studies for the nineteenth century, we do not know when or to what extent this trend began reversing itself.

Another major structural change in the family, the drop in the number of sons and daughters born to American women, has been linked to inheritance but with the causal arrow pointing in the opposite direction from the one we are considering. One of the most popular theories explaining the nineteenth-century decline in fertility has been put forward by Richard Easterlin. He has contended that land available for bequests to children had a big impact on the number of offspring produced by farm parents. In other words, fertility declined in areas where land had become scarce and expensive and rose where it was plentiful and cheap. The theory has been criticized and alternative explanations offered. No one, however, has explored the reverse problem, how the drop in the number of children affected bequests.<sup>21</sup>

In sum, the existing literature has established certain significant points about the evolution of inheritance in America. Scholars, understanding the importance of land in the New World, have furnished a fairly detailed picture of how its availability altered the laws of distribution. Also the connection between domestic feminism and wives' acquisition of the right to own and will property has been brought out, as has a conflicting trend in the testamentary record of husbands' spousal bequests. Clearly, though, historians have much further to go in explaining the major shifts that have occurred in inheritance practices.

Before much more can be done, moreover, we must fill some of the gaps in our factual knowledge about the history of inheritance law. When the legal history work on primogeniture is put together with the research on women's property rights, the information we have on intestacy laws and dower for the period up to 1820 is extensive and surpasses the scholarship available for any other past era. Inheritance statutes as they intersected with the married women's property acts in the later nineteenth century have also been researched. Aside from that, virtually no substantial historical work has been done on the inheritance law of modern America. There is no place to go, except the contemporary sources, to find out, for example, when states made in-



testacy laws apply equally to husbands and wives or when lifetime-only restrictions on a widows' dower were eliminated or what widow's rights actually were in the first states adopting community property law. Nor do we know if there has been any change in the rights of collateral heirs to estates or the privileges of charities to inherit.

Most of the research on past testamentary patterns also relates to the colonial period. While not all studies ask the same questions, and some suffer from inadequate sample size, much could be learned by simply putting the pieces of research into a coherent framework. After 1780, however, the work on bequest patterns by historians and legal experts grows too thin to permit any synthetic treatment, and that situation holds true for the periods right up to the mid twentieth century. Consequently, we know next to nothing about the changing behavior of testators toward sons, daughters, spouses, kin and nonkin, and charities during most of the industrial era.

## OBJECTIVES AND LIMITS OF THIS STUDY

---

By necessity a certain portion of this book is descriptive, a historical account of (1) American inheritance laws—those governing intestacy, dower, right to will, and estate taxes—and (2) testamentary behavior—the division of realty and personalty among heirs, restrictions on bequests, the creation of trusts and life estates, and the naming of executors and guardians. We were most interested in what caused these laws and behavior to change. Specifically, we considered how the declining importance of realty and the growth of financial assets, the switch from family to corporate management of capital, the increased role of the state in management decisions and in family welfare, the fall in fertility, and alterations in the power relations within families affected patterns of wealth transmission.

Several issues are involved here. Traditionally, the English and American inheritance system assumed realty was the prime source of wealth. We already discussed briefly the findings of those studying how the plentifulness of land altered intestacy laws and bequest patterns. What has not been much examined is the response to the long-term growth in personalty. In plantation areas, this increase began in the late seventeenth century with the rise in slave importations. A more perma-