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# Spousal Probate Rights in a Multiple-Marriage Society

Lawrence W. Waggoner
*University of Michigan Law School*, waggoner@umich.edu

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*By* LAWRENCE W. WAGGONER*

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Nearly everyone knows about the transformation of the American family that has taken place over the last couple of decades. The changes comprise one of the great events of our age—from the latter half of the 1970's into the present. Articles on one aspect or another of the phenomenon frequent the popular press, and a special edition of Newsweek was recently devoted to the topic.[1]

The traditional "Leave It To Beaver" family no longer prevails in American marriage behavior. To be sure, the wage-earning husband, the homemaking and child-rearing wife, and their two joint children—this type of family still exists. But because divorce rates are high[2] and remarriage abounds,[3] many married couples have or will end life having children from prior marriages on one or both sides. Families are routinely headed by two adults working outside the home, or by a single parent. Unmarried heterosexual and homosexual couples, sometimes with children, are also unmistakable parts of the American family scene.

And, if you think we live in a multiple-marriage society now, just wait! Marriage behavior may get even more "multiple" with the increasing prevalence in the population of those marriages

*Lawrence W. Waggoner is Director of Research, Joint Editorial Board for the Uniform Probate Code; Reporter, Drafting Committee to Revise Article II of the Uniform Probate Code; Lewis M. Simes Professor of Law, University of Michigan Law School. The author wishes to thank Eleanor B. Alter, Mary Ann Glendon, John H. Langbein, Malcolm A. Moore, and Patricia J. Roberts for helpful comments on an earlier draft of this article. The ideas and conclusions expressed herein, including drafts of proposed legislation, are those of the author and have not been passed upon by the Commissioners on Uniform State Laws. 

that are more likely to end in divorce than others—marriages in which one or both partners were divorced before[4] and marriages of couples who cohabited prior to marriage.[5]

Inevitably, this transformation has exerted new tensions on traditional wealth-succession laws, as well as on overlapping fields such as family law and social security and pension law.

## THE UNIFORM LAWS PROJECT

The Uniform Probate Code is about 20 years old and was developed prior to the multiple-marriage society. Article II of the Code is undergoing a systematic round of review.[6] A main objective of the project is to develop sensible probate rules for this changed and still changing climate of marital behavior. Article II is the part of the Code that deals with the substantive law of intestacy, wills, and donative transfers.

*Free Standing Uniform Act.* Once approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the Article II revisions will also be separated out and promulgated not only as part of a revised Uniform Probate Code, but also as a free standing Uniform Act on Intestacy, Wills, and Donative Transfers, which can be adopted without the procedural and other provisions of the full Code.

*Status of Project.* The Uniform Laws project is currently only in draft form. The Uniform Laws Commissioners have not given final approval to the results. Some of the provisions were given a first reading at the 1988 annual NCCUSL meeting. The project will come up for what is projected to be its final reading and adoption at the 1990 summer NCCUSL meeting.

I wish to single out four parts of the Uniform Laws project for discussion in the present paper: the spouse's intestate share; the spouse's elective (forced) share; the spouse's rights as against a premarital will; and revocation of benefits to the now-former spouse in the case of divorce. Of the new provisions, these four have the greatest impact on the multiple-marriage society.

I shall discuss these parts of the project in terms of a story

about a fictional couple—Ben and Elaine. Actually, there are several different versions of their story that I will be using to relate the Uniform Laws project to the multiple-marriage society.

Ben and Elaine got married, their marriage went well, and they prospered. They bought a house in joint tenancy. They saw an estate-planning attorney, who set them up with reciprocal wills and also a revocable *inter vivos* trust. Ben's employer provided a retirement plan and Ben, along the way, also bought a substantial amount of life insurance. All of these documents—the will, the revocable trust, the retirement plan, and the life-insurance policy—named Elaine as the sole beneficiary at Ben's death. Ben's parents having died, and Ben being an only child, Ben tried to get on the good side of Elaine's parents by putting them in as the alternate beneficiary.

## THE REVOCATION-UPON-DIVORCE PROVISION

As time went on, regrettably, Ben and Elaine started to grow apart. Ben devoted his time to business and neglected Elaine. Elaine devoted her time to Carl, an old flame to whom she almost got married before she met Ben. Well . . . eventually Ben's and Elaine's difficulties led to divorce. Shortly after the divorce, Elaine married Carl. And, shortly after Elaine's marriage to Carl—Ben died.

The key to the distribution of Ben's assets focuses on a section that is quite commonly found in probate codes—the revocation-upon-divorce section.

*Conventional Statutes.* If you look at the New York statute[7] or the Uniform Probate Code provision[8] on the point, you will find that these statutes treat the disposition in Ben's will in favor of Elaine as revoked. You will also find that the statutes do not extend this treatment to the house held in joint tenancy, nor to Ben's revocable trust, retirement plan, or life-insurance policy. You will also find that the effect of revoking the provision for Elaine in Ben's will is to treat Elaine as having predeceased Ben, giving effect to the alternative provision in Ben's will in favor of Elaine's parents.

*Judicial Construction of Conventional Statutes.* Due no doubt to the increased usage of will substitutes, such as revocable trusts, the courts have come under increasing pressure to use statutory construction techniques to extend statutes like the New York and Uniform Probate Code measures to various types of revocable dispositions—dispositions that are wills in function and substance, though not in form.[9] As one might expect, the results of the cases have not been uniform. One of the more notable of the recent cases is *Clymer v. Mayo*,[10] a 1985 decision of the Supreme Judicial Court of Massachusetts. The Massachusetts court was willing to extend the scope of the statute beyond its terms; the court held the statute applicable to a revocable *inter vivos* trust. But the court was also careful to restrict its "holding to the particular facts of this case—specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death."[11] The testator's will devised the residue of her estate to the trustee of an unfunded life-insurance trust she executed on the same day; the life insurance was employer-paid life insurance. When connected to a pour-over devise, this type of trust is the easiest to label the same as a "will," *i.e.*, to say that the statute applies. Some other cases have reached a similar result,[12] but most cases have not been willing to extend similar statutory provisions to will substitutes unconnected to a pour-over devise even though the will substitute in the case was also the functional equivalent of a "will," such as a retirement-plan beneficiary designation[13] or life-insurance beneficiary designation.[14]

*Proposed New Statute Extends Scope to All Revocable Dispositions.* As drafted, the proposed revocation-upon-divorce section for the Uniform Laws project is the most comprehensive measure of its kind. A few states have enacted piecemeal legislation tending in the same direction.[15] The problem in the revocation-upon-divorce statutes is not that the courts have adopted a too-narrow construction of them, but that the terms of the statutes themselves have not expressly covered all the types of arrangements that are functionally equivalents of wills. In the proposed Uniform Laws project, we have expanded the *terms* of

the statute *expressly* to cover "will substitutes" (whether or not connected to a pour-over devise), such as revocable *inter vivos* trusts, life-insurance and retirement-plan beneficiary designations, payable-on-death accounts, and other revocable dispositions made before the divorce (or annulment) by the divorced individual to his or her former spouse. Unless provided otherwise,[16] the proposed revocation-upon-divorce statute not only revokes the provision in Ben's *will* in favor of Elaine but also in Ben's retirement plan,[17] life-insurance policy, and revocable *inter vivos* trust.

*Joint Tenancies Severed Upon Divorce.* Elaine will also not be able to take the joint tenancy property by survivorship. The proposed new section effects a severance of the interests of the former spouses in property held by them at the time of the divorce (or annulment) as joint tenants with the right of survivorship, specifically transforming the form of ownership into a tenancy in common. In effect, this part of the proposed new statute aligns joint tenancies with tenancies by the entirety, which are automatically severed upon divorce of the tenants. Note that the severance of spousal joint tenancies upon divorce is merely an application of the general principle embraced by the new statute—that *all* revocable dispositions are to be presumptively revoked upon divorce. A joint ten ancy is unilaterally severable by either joint tenant, meaning that each spouse in effect has a power to revoke the other's survivorship interest with respect to half the property.

*Revoking Benefits to the Former Spouse's Relatives.* If *Elaine* doesn't benefit under any of Ben's documents, who does? Remember that the conventional statutes only revoke bequests or devises to Elaine; they do so by invoking the fiction that Elaine predeceased Ben. This would give Ben's property to *Elaine's* parents.[18] Such an outcome does not seem calculated to have pleased Ben. And so, the new statute also revokes benefits to the former spouse's relatives as well as to the former spouse. Under the proposed new statute, Elaine's parents would not be allowed to take, either.[19]

## SPOUSE'S SHARE IN INTESTATE SUCCESSION

Let's turn back the clock, now, and give Ben and Elaine another chance. Not only did they get married, but they beat the odds and stayed married. In fact, they had a wonderful marriage.

But, at some point in the future, the law of mortality—which even the New York legislature can't repeal—caught up to Ben, and he died. Elaine survived, along with their two adult children and a number of grandchildren. We now want to know the distribution of Ben's estate in intestacy. Ben, it seems, was a procrastinator, and just never got around to seeing an estate-planning attorney.

What is, or should be, Elaine's share in intestate succession? The proposed Uniform Laws project rewards the surviving spouse in marriages such as Ben's and Elaine's by granting Ben's *entire* intestate estate to Elaine. Elaine's share is Ben's entire intestate estate even though Ben was also survived by their two joint children. (For shorthand purposes, I will refer to children; these references should be understood as referring not only to children, but also to descendants of deceased children.) Elaine would also be granted the entire intestate estate had they been childless, since neither of Ben's parents survived.

In all other cases, the surviving spouse's intestate share is a lump sum plus a fraction of the remaining balance. If the decedent leaves no surviving children, but a parent, the surviving spouse's share is the first $200,000 plus three-fourths of the remaining balance. If all of the decedent's surviving children are also children of the surviving spouse, but the surviving spouse has a surviving child who is not a child of the decedent, the surviving spouse's share is the first $150,000 plus one-half of the remaining balance. And, if the decedent leaves one or more surviving children who are not children of the surviving spouse, the surviving spouse's share is the first $100,000 plus one-half of the remaining balance.

What this amounts to is that the only times the surviving spouse's share potentially is less than the full amount of the intestate estate is if the decedent dies without children but

survived by a parent; or if the decedent has children *and* the decedent *or* the surviving spouse—either one—has children who are not children of the other. In the case of Ben and Elaine, no cut back would occur, since Ben's parents had predeceased him and his marriage to Elaine was the first marriage for each.

But, we can take the story a little farther into the future. Suppose that after Ben died intestate survived by Elaine, Elaine married Carl, who by then was either a widower or a divorcé. Suppose further that some years later, Elaine died intestate survived by Carl. Because Elaine had children by her marriage to *Ben*, Carl would not necessarily take Elaine's entire intestate estate: Carl's share would be the first $100,000 plus half of the remaining balance, with the other half of the remaining balance going to Elaine's children by her marriage to Ben. Had Elaine and Ben been childless, and had Elaine and Carl had children by their marriage to each other, Carl's share would depend on whether *he* had children by a prior marriage: If he did, Carl's share would be the first $150,000 plus half of the remaining balance, with the other half going to *Elaine's* children; if Carl had no children by a prior marriage, his intestate share would be the entire intestate estate (assuming that both of Elaine's parents predeceased her).

*Rationale of Proposed Provision.* What is the rationale for this approach? Let's first consider *Elaine's* share in Ben's intestate estate; then we can move to *Carl's* share in Elaine's intestate estate.

A mixture of considerations drive, or should drive, the formulation of intestate-succession laws. The most obvious and perhaps predominant one is the decedent's intention. Of course, we give effect to intention by imputation. We impute to Ben the intention to give all his property to Elaine. We make this judgment—that the imputation to Ben of such an intention is justified—on the basis of several items of evidence. One is that empirical studies show that a strong preference exists within the populace for granting the entire estate to the surviving spouse, even when the decedent *has* surviving children.[20]

Another is that the move to give the spouse the entire

intestate estate is aligned with trends in intestate-succession law throughout the U.S. and Europe.[21] In her recent book *The Transformation of Family Law* (1989), Mary Ann Glendon has identified this trend, which she calls the "shrinking circle of heirs"[22] phenomenon. By this she means that, over time, throughout the U.S. and Europe, "the position of the surviving spouse has steadily improved everywhere at the expense of the decedent's blood relatives."[23] She goes on to point out that this trend "strikingly illustrate[s] the movement of modern marriage into the foreground of family relationships."[24] It recognizes "the gradual attenuation of legal bonds among family members outside the conjugal unit of husband, wife, and children"[25] and "the tendency to view a marriage that lasts until death as a union of the economic interests of the spouses. . . ."[26]

So, in our proposed intestate-succession law, we visualize a marriage in which neither spouse has children by a prior marriage as one in which the decedent would have wanted to *give* the spouse all of the estate.[27] We also view this attributed or imputed intention to be quite rational on the decedent's part. If Ben died prematurely, at a time when their children were still minors, Elaine would be better equipped to use Ben's property for the benefit of their children as well as herself. If Ben was elderly at death, Elaine would also be elderly, and her needs would be greater than those of their children, who by then would probably be middle-aged working adults.

Let's switch, now, to the case of Elaine and *Carl.* In this marriage, recall that if Elaine had children *by Ben* (whether or not she also had children by Carl), Carl's intestate share is the first $100,000 plus half of the remaining balance; the other half goes to Elaine's children. Also recall that if Elaine had children *by Carl* (but none by Ben), Carl's intestate share is the first $150,000 plus half of the remaining balance *if* Carl had children by a prior marriage; the other half of the remaining balance goes to Elaine's children.

The rationale for this is that the existence of children by a prior marriage—on either side—places the surviving spouse in a moral conflict as to how later to divide the property he or she

inherited from the decedent: When the surviving spouse later dies, his or her natural instinct is to treat *all* of his or her *own* children equally; and if the surviving spouse dies intestate, the intestate-succession law will automatically grant *those* children equal shares. To provide the *decedent's* own children with at least some protection against the claim of the surviving spouse's *other* children, the Uniform Laws project carves off a share, in the larger intestate estates, for the decedent's own children. The size of these estates leads one to think that the decedent would feel that a modest provision for his or her children would not deprive the surviving spouse of an adequate share. Remember also that the spouse's intestate share is in addition to any nonprobate property to which he or she might succeed by reason of the decedent's death—in the form of joint tenancies (the home), joint checking, savings, or money-market accounts, life insurance, pension benefits, and so on.

The proposed Uniform Laws project recognizes that the surviving spouse's moral conflict is greater when the decedent has children by a prior marriage than when only the surviving spouse has children by a prior marriage. The lump sum granted the surviving spouse in the former case is $100,000; in the latter case, $150,000.

The approach taken is admittedly a crude solution to the survivor's moral conflict. If the purpose is to strike a reasonable balance between the objective of granting the surviving spouse an adequate share and the objective of assuring that the surviving spouse does not later deprive the decedent's blood heirs (the decedent's children) of the unconsumed portion of the decedent's property, a more responsive solution might be to reinvoke the idea of common-law dower. When stepchildren are involved, the idea is attractive of giving the surviving spouse the *use* of the property for life, but forcing a return of the unconsumed portion of that property on the surviving spouse's death to the decedent's own children. Strictly speaking, no one would suggest reinvoking *true* common-law dower, under which the surviving spouse was entitled to a life estate in one-third of the decedent's land. Instead, the device would be to create a

statutory trust of *all* the decedent's property (land and personalty), under which the surviving spouse would receive the right to all the income generated by the trust for life, coupled with a power in the statutory trustee to invade the *corpus* of the trust to the extent the surviving spouse's other sources of income prove inadequate for his or her support and maintenance; upon the survivor's death, any remaining income and corpus would go to the decedent's own children and not stepchildren (unless, of course, the decedent had adopted the stepchildren, in which case they would be treated as his or her own children).

The statutory-trust approach responds to another troublesome feature of conventional intestate-succession law. As the statutes are currently constituted, the decision as to how much to award the surviving spouse must be made on the basis of the facts existing at the decedent's death. This does not permit account to be taken of the possibility that a surviving spouse who had no children by a prior marriage at the decedent's death might subsequently remarry and have children by the new spouse. Conventional intestate-succession schemes provide no mechanism for adjustment in cases where a surviving spouse's moral conflict arises after the decedent's death. The statutory-trust approach, on the other hand, if applied in *all* intestacy cases with a surviving spouse, and not just in cases in which the moral conflict is known to exist at the decedent's death, provides a solution to this problem.

The statutory-trust approach, therefore, has a lot to commend it, except for one thing: It makes little practical sense! It's simply not practical to compel a statutory trust in every intestate case with a surviving spouse, with respect to mainly small estates of, say, $15,000 to $25,000.[28] In the end, the statutory-trust approach was not adopted.

## REDESIGNED ELECTIVE SHARE

As we've just seen, intestate-succession law visualizes a marriage in which the decedent would have wanted to *give* the spouse all of the estate; or, if there are no children but a parent or children by a prior marriage, a substantial portion of the

estate. We impute to Ben the desire to give all his property to Elaine; we impute to Elaine a desire to give her property to Carl, except that we also impute to her a desire to give some of her property to her children by her marriage to Ben if she has enough property to afford to do that. If there is *extrinsic* evidence to the contrary, we don't want to hear it; in fact, if there is corroborating evidence, we don't want to bother with that, either.

Ordinarily, the only type of *contrary* evidence we recognize is documentary evidence—a valid will expressing an intent to give the spouse less or nothing at all. In intestate-succession cases, by definition we have no such evidence.

I now turn to the situation where we *do* have such evidence. I now address the situation where the decedent has left a will totally (or largely) *dis*inheriting the surviving spouse.[29]

### *The Partnership Theory of Marriage*

Disinheritance of a surviving spouse brings into question the fundamental nature of the economic rights of each spouse in a marital relationship, of how the institution of marriage is viewed in society. The contemporary view of marriage is that it is an economic partnership. The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike."[30] Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, *i.e.*, in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise,

as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost."[31]

No matter how the rationale is expressed, the community-property system[32] recognizes the partnership theory, but it is sometimes thought that the common-law system denies it. In the ongoing marriage, it is true that the basic principle in the common-law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse *upon acquisition* an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative.

The common-law states, however, also give effect or purport to give effect to the partnership theory when it counts most—at dissolution of a marriage upon divorce. If the marriage ends in divorce, a spouse who sacrificed his or her financial-earning opportunities to contribute so-called domestic services to the marital enterprise (such as child-rearing and homemaking) or a spouse who pursued a lower-paying career or who engaged in volunteer work stands to be recompensed. Almost all, if not all, states now follow the so-called equitable-distribution system upon divorce,[33] under which "broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce."[34]

The other situation in which spousal property rights figure

prominently is the topic at hand—disinheritance at death. Almost all common-law states have decided that this is one of the few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed. No matter what the decedent's intent, the common-law states recognize that the surviving spouse does have some claim to a portion of the decedent's estate. These statutes provide the spouse a so-called forced share. The forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent's estate, hence the forced share is sometimes termed the "elective" share. Forced-share law in the common-law states, however, has not caught up to the partnership theory of marriage. Under typical American forced-share law, including the forced share provided by the original Uniform Probate Code and, if the decedent is survived by one or more issue, the one provided by the New York statute,[35] a surviving spouse may claim a one-third share of the decedent's estate—not the fifty percent share of the couple's combined assets that the partnership theory would imply. The redesigned elective share is intended to bring forced-share law into line with the partnership theory of marriage.

To illustrate the discrepancy between the partnership theory and conventional forced-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The current forced-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result is at the mercy of which spouse happens to die first and of how the property accumulated during the marriage was nominally titled.

> Consider Ben and Elaine again: Assume that Ben and Elaine were married in their twenties or early thirties; they never divorced, and Ben died somewhat prematurely at age, say, 62, survived by Elaine. For whatever reason, Ben left a will entirely disinheriting Elaine.
>
> Throughout their long life together, the couple man-

aged to accumulate assets worth $600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional forced-share law, Elaine's ultimate entitlement is *entirely at the mercy of* the manner in which these $600,000 in assets were nominally titled as between them. Elaine could end up much poorer or much richer than a fifty/fifty principle would suggest. The reason is that under conventional forced-share law, Elaine has a claim to one-third of *Ben's "estate".*

When the marital assets have been disproportionately titled in the decedent's name, conventional forced-share law often entitles the survivor to less than an equal share. Thus, if Ben "owned" all $600,000 of the marital assets, Elaine's claim against Ben's estate would only be for $200,000—well below Elaine's $300,000 entitlement produced by the partnership/marital-sharing principle. And, if Ben "owned" $500,000 of the marital assets, Elaine's claim against Ben's estate would only be for $166,500 (one third of $500,000), which when combined with Elaine's "own" $100,000 yields a less than equal share of $266,500 for Elaine—still below the $300,000 figure produced by the partnership/marital-sharing principle.

When, on the other hand, the marital assets have already been more or less equally divided, conventional forced-share law grants the survivor a right to take a disproportionately large share. If Ben and Elaine each owned $300,000, Elaine is still granted a claim against Ben's estate for an additional $100,000.

Finally, when the marital assets have been disproportionately titled in the survivor's name, conventional forced-share law entitles the survivor to magnify the disproportion. If only $200,000 were titled in Ben's name, Elaine would still have a claim against Ben's estate for $66,667 (one third of $200,000), even though Elaine was *already* overcompensated as judged by the partnership/marital-sharing theory.

I should now like to draw attention to a very different sort of marriage—a short-term marriage, particularly the short-term

marriage later in life, where each spouse typically comes into the marriage with assets derived from a former marriage. In these marriages, the one-third fraction of the decedent's estate far exceeds a fifty/fifty division of assets acquired during the marriage.

To illustrate this sort of marriage, let's return to the case of Elaine and Carl. Remember that a few years after Ben's death, Elaine married Carl. Suppose that both Elaine and Carl were in their mid-to-later sixties when they were married. Then suppose that after a few years of marriage—five, let's say—, Elaine died survived by Carl. Assume further that both Elaine and Carl have adult children and a few grandchildren by their prior marriages, and that each naturally would prefer to leave most or all of his or her property to those children. So, let's work through the numbers:

> The value of the couple's combined assets is, again, $600,000, $300,000 of which is titled in Elaine's name (the decedent) and $300,000 of which is titled in Carl's name (the survivor).
>
> Under conventional forced-share law, Carl would have a claim to one-third of Elaine's estate, or $100,000. Keep in mind that when this short-term, late-in-life marriage terminated by Elaine's death, Elaine's assets were $300,000 and Carl's assets were $300,000. For reasons that are not immediately apparent, conventional forced-share law gives the survivor, Carl, a right to shrink Elaine's estate (and hence the share of Elaine's children by her prior marriage to Ben) by $100,000 (reducing it to $200,000) while supplementing Carl's assets (which will likely go to Carl's children by his prior marriage) by $100,000 (increasing their value to $400,000).

Conventional forced-share law, in other words, basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one third of the "loser's" estate. The "winning" spouse who chanced to survive gains a windfall, for this "winner" is unlikely

to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

How prevalent are marriages like that between Elaine and Carl—the remarriage later in life ending in the death of one of the partners a few years later? Plainly, such marriages do not affect a high proportion of the widowed and divorced population. Nevertheless, government data suggest that the incidence of such marriages may not be insignificant.[36] Equally to the point, when such marriages occur, conventional forced-share law renders results that are dramatically inconsistent with the partnership theory of marriage. That these results are seen as unjust by the children of the decedent's former marriage is both unsurprising and well documented in the forced-share case law.[37]

Recognize, then, that in a case like that of Elaine and Carl—the short-term, late-in-life marriage, which produces no children—, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a felt higher obligation to the children of his or her former, long-term marriage.

### *Specific Features of the Redesigned Elective Share*

The redesigned elective-share system incorporated in the proposed Uniform Laws project responds to these concerns by bringing forced-share law into line with the partnership theory of marriage.

In the long-term marriage, illustrated by the marriage of Ben and Elaine, the effect of implementing a partnership theory is to increase the entitlement of the surviving spouse when the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of the surviving spouse when the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. The effect is both to reward the surviving spouse who sacrificed his or her financial-earning opportunities in

order to contribute so-called domestic services to the marital enterprise and to deny an additional windfall to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

In the short-term, later-in-life marriage illustrated by the marriage of Elaine and Carl, the effect of implementing a partnership theory is to decrease or even eliminate the windfall entitlement of the spouse who chanced to survive, for in such a marriage, neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth. The effect is to deny a windfall to the survivor who contributed little to the decedent's wealth, and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. Bear in mind that in such a marriage, which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a natural instinct to want to leave most or all of his or her property to the children of his or her former, long-term marriage. In hardship cases, however, as explained later, a special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support.

*Implementation of The Partnership/Marital-Sharing Theory.* Because ease of administration and predictability of result are prized features of the probate system, implementing the partnership or marital-sharing theory proved to be a challenging undertaking. In the judgment of the drafters, neither model provided by existing law—the equitable-distribution system provided by divorce law or the community-property system allocating ownership of marital property equally between the spouses—seemed appropriate as a basis for adapting forced-share law to noncommunity property states.

*An Equitable-Distribution Forced Share?* Modeling the elective share on divorce law appeared to us to be quite unsatisfactory. The strongest argument for extending divorce law to disinheritance at death is that of parallelism. Disinheritance of a spouse

at death resembles divorce, the argument goes, because the marriage has failed and terminated.[38] There are several objections to this analogy. One is that disinheritance at death—especially in the late-in-life marriage—need not be the mark of a failed marriage. Disinheritance of such a spouse might be motivated by the decedent's sense that he or she had a higher obligation to his or her children by a prior marriage, especially if the disinherited spouse has ample independent means of support. Conventional law, of course, allows such a surviving spouse to take a forced share of the decedent's estate anyway, or to be prevailed upon by his or her children by a prior marriage to do so.

Nor is the goal of parity between regimes of marital property division on divorce and death compatible with a Uniform Laws project devoted to achieving uniformity within the probate system. Although all or almost all states now follow the so-called equitable-distribution system upon divorce, there is considerable variation among the states in the details, large and small, of implementing that system. There is not one, uniformly accepted equitable-distribution system; there are several.[39] The systems vary with respect to the type of property that is subject to equitable distribution and they take into account different factors in deciding how to divide that property. Professor Oldham has identified three major types of equitable-distribution systems:[40] (1) the "kitchen sink" system, in which all property of the two spouses, regardless of how or when acquired, is subject to division;[41] (2) the "marital property" system, which excludes "separate" or "individual" property—excludes, that is, property acquired by either spouse before the marriage and property acquired by either spouse during the marriage by gift or inheritance; and (3) the "hybrid" system, in which separate or individual property is presumptively excluded from division, but could be reached when exclusion would be "unfair." Further variations within each broad category are recognized.

If parity with the regime of marital property both in divorce and in dissolution on death is the goal, a Uniform Laws project

that aspires to a single regime for dissolution on death cannot track the multiplicity of regimes on divorce. The logic of the argument for parity is that within each state the method of property division upon divorce and upon disinheritance at death should be the same. The logic of a Uniform Laws project dealing with probate law is that each state should honor the same elective-share system, particularly in order to prevent a spouse bent on disinheritance from domicile shopping by moving property to a state with fewer safeguards against this sort of behavior.

Quite apart from concerns about the difficulty of implementing parity between forced-share law and equitable-distribution law, the discretionary aspect of equitable-distribution law makes it inappropriate for a forced-share system. Under equitable distribution, once the property subject to division is identified, the practice is not to divide that property by applying a flat fraction, fifty/fifty or whatever, but to weigh various factors in determining how that property is to be divided, often (but not always) including "misconduct" or "fault" of each party—such as adultery, violence, excessive drinking, sexual neglect, mental cruelty[42]—and other subjective criteria.[43] When death terminates the marriage, only the surviving spouse can testify as to certain types or instances of misconduct or fault, making factors such as these seem unfair to the decedent's side. In addition, whether or not the state's laundry list of factors includes fault or misconduct, the exact weight to be given each included factor is not prescribed. Because each case is handled on an ad hoc basis,[44] equitable distribution is in truth "discretionary distribution."[45]

Consequently, we endorse the analysis of Professors Kwestel and Seplowitz, who recently wrote:

> [A]n equitable distribution model, which entails a case-by-case determination based upon [ ] subjective criteria, is not appropriate in the elective share area, which has traditionally involved different concerns and in which predictability and ease of administration are important goals. Furthermore, use of an equitable distribution

> model would significantly impede the development of a comprehensive estate plan and, more importantly, would probably provide no greater protection for the surviving spouse. . . .[46]

*A Deferred Community-Property Forced Share?* The other model from existing law that might implement a partnership or marital-sharing theory is the community-property system. As noted before, under community-property law, each spouse automatically acquires a half interest in property as it is acquired during the marriage (other than by gift or inheritance). There are two possible approaches for injecting community law into the legislative scheme of the noncommunity property states on a deferred-until-death basis, and it is not always clear which of the two approaches is advocated by those proposing it.[47] One approach, called the *strict* deferred-community approach, automatically retitles the couple's property upon the decedent's death, giving both the surviving spouse and the decedent spouse's estate an automatic half interest in that portion of the couple's property (however titled during the course of the marriage) that would have been community property had they lived their married life in a community-property jurisdiction.[48] The other approach, called the *forced-share* deferred-community approach, gives the surviving spouse (but not the decedent spouse's estate) a right to elect that same portion of the couple's property.[49]

The forced-share deferred-community approach.[50] is considerably more promising as a model for implementing the partnership/marital-sharing theory than equitable-distribution law. Interestingly, most of the community-property states themselves recognize a difference between termination of a marriage by divorce and termination by death of one of the spouses: The discretionary equitable-distribution system is used for divorce,[51] but the mechanical community-property fifty/fifty split is used at death. In the probate area, the attractive feature of community law is its predetermined formula. That portion of the couple's property acquired during the marriage (other than by gift or inheritance) is divided according to a strict fifty/fifty

ratio; other factors are excluded. In terms of the contribution theory, the premise upon which community law can be said to rest is that of an irrebuttable presumption that each spouse contributed *equally* to the acquisition of the couple's wealth.[52] The argument for a mechanical as opposed to a discretionary formula for determining contribution was recently stated in these terms:

> [Forced-share] law could, in theory, open [the question of contribution] to examination of the merits in each case, but it has not, and for good reason. The proofs would be extraordinarily difficult. The issues in such a case would not resemble the issues in ordinary fact-finding—issues such as whether the traffic light was green or red. Examining the true merits of the case under a forced-share system that tried to establish the spouses's actual contributions to the family wealth would necessarily entail an inquiry into virtually every facet of the spouses's conduct throughout the marriage. Further, that litigation would arise just when death has sealed the lips of the most affected party. These are the concerns that have in the past led American policymakers to prefer a mechanical forced-share system over [a discretionary] system.[53]

Unlike the equitable-distribution model, the fact that the community-property systems vary from state to state with respect to details such as whether income earned during the marriage on separate property becomes community property or remains separate does not pose a problem. A forced share based on a deferred-until-death community-property model is not proposed for the community-property states; lack of parity is therefore not a disadvantage. A deferred community-property forced share is for noncommunity property states. Consequently, the variations in the details of community law that exist within the community-property states could easily be resolved by embracing one method on each of the subsidiary issues upon which there is variation.[54]

If lack of parity is not a problem, why then did we not adopt a deferred-community forced share? The perceived difficulty is

the tracing-to-source and associated problems.[55] A deferred-community forced share would require identifying which of the couple's assets were acquired during the marriage (other than by gift or inheritance) and which were brought into the marriage (or acquired during the marriage by gift or inheritance). This problem is arguably more difficult in noncommunity-property states than in community-property states because couples in the former are not put on notice of the risk of not keeping good records. The problem is commingling.[56] To be sure, the administrative burden could be eased by adopting a presumption that all spousal property is community property. That presumption would ease the administrative burden, but at the cost of reaching incorrect results in cases in which the presumption would prevail not because it is correct but because sufficient contrary evidence cannot be obtained.[57] Thus, what appears to be an exact method may not in fact give exact results.

*The Method Adopted—An Accrual-Type Forced Share System.* To avoid the tracing-to-source problem, we decided to implement the marital-partnership theory by means of a mechanically determined approximation system, which we call an accrual-type forced share. Under the accrual-type forced share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance.

The accrual-type forced share has three essential features. The first establishes a schedule under which the elective share adjusts to the length of the marriage. The longer the marriage, the bigger the "elective-share percentage." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of fifteen years than in a marriage of fifteen days. Specifically, the "elective-share percentage" starts low and increases annually according to a graduated schedule until it levels off at fifty percent. The exact schedule starts by providing the surviving spouse, during the first year of marriage, a right to elect the "supplemental elective-share amount"[58] only. After one year of

marriage, the surviving spouse's "elective-share percentage" is three percent of the augmented estate and it increases with each additional year of marriage until it reaches the maximum fifty percent level after fifteen years of marriage.[59]

The second feature of the redesigned system is that the "elective-share percentage" is applied to the value of the couple's *combined* assets,[60] not merely to the value of the assets nominally titled in the decedent's name. This calculation yields the "elective-share amount"—the amount to which the surviving spouse is entitled. Application of the "elective-share percentage" to the couple's combined assets is an absolutely essential feature, if the system is to implement a marital-sharing theory. If the elective-share percentage were to be applied only to the *decedent's* assets, a surviving spouse who has already been overcompensated in terms of the way the couple's marital assets have been nominally titled would receive a further windfall under the elective-share system. The couple's marital assets, in other words, would not be equalized. By applying the elective-share percentage to the couple's combined assets, the redesigned elective-share system denies any significance to the wholly fortuitous factor of how the spouses happened to have taken title to particular assets.

The third feature is that the surviving spouse's *own* assets are counted first (or a portion of them in under-fifteen-year marriages, as explained below) in making up the spouse's ultimate entitlement, so that the decedent's assets are liable only to make up the deficiency, if any.

Let's illustrate these three features, first in the case of Ben and Elaine and then in the case of Elaine and Carl. Here's how it works with Ben and Elaine:

> Remember that Ben and Elaine were married a long time (well beyond the fifteen-year mark) and that Ben died at age 70, survived by Elaine. Also remember that, for whatever reason, Ben left a will entirely disinheriting Elaine.[61] And, remember that the value of the couple's combined assets was $600,000.[62]
>
> Under the redesigned elective share, the survivor's

entitlement in a marriage of this length would have reached the 50 percent mark long before Ben's death.

Unlike previous forced-share statutes, the redesigned elective share disregards how these combined assets were nominally titled as between Ben and Elaine. For purposes of the redesigned elective share, the assets are not regarded as partly belonging to Ben and partly to Elaine. Under the marital-sharing theory of the redesigned system, half the value of those assets—$300,000—"belongs" to the surviving spouse, Elaine (if Elaine wishes to claim that amount by making an election).

Of course, in working out the amount of Elaine's claim on *Ben's estate*, it *does* matter how the $600,000 in assets was nominally titled as between them.

When the marital assets were disproportionately titled in the decedent's name, the redesigned elective-share system gives the survivor a right to equalize them. If Ben "owned" all $600,000, and Elaine "owned" nothing, Elaine's claim against Ben's estate would be for $300,000. If Ben "owned" $500,000 of the marital assets, and Elaine "owned" $100,000 of them, Elaine's claim against Ben's estate would be for $200,000, which is the amount necessary to bring Elaine's $100,000 in assets up to the $300,000 level.

When the marital assets were already more or less equally divided, the redesigned elective-share system prevents the survivor from taking a disproportionately large share. Thus, if $300,000 of the marital assets were titled in Ben's name, and $300,000 were titled in Elaine's name, Elaine would have no claim against Ben's estate, for Elaine's title-based ownership rights would already have sufficiently rewarded her, as judged by the partnership/marital-sharing theory.

When the marital assets were disproportionately titled in the survivor's name, the redesigned elective-share system prevents the survivor from magnifying the disproportion. If Ben "owned" $200,000, and Elaine "owned" $400,000, Elaine would have no claim against Ben's estate for an additional amount.[63]

Now, let's turn to Elaine and Carl. Remember that, a few years after Ben's death, Elaine married Carl. Both Elaine and Carl were in their mid-to-late sixties, and after a few years of marriage—about five, we said—Elaine died survived by Carl. Both Elaine and Carl had adult children and a few grandchildren) *by their prior marriages.*

The previous discussion of this example showed how the conventional-type forced-share law gives the one who survives the other the power to siphon off (for the survivor's children, eventually) a share of the loser's estate without justification under the marital-sharing principle.

Let's, now, see how Carl (and ultimately his children by his prior marriage) fares under the redesigned system:

> Recall that the value of the couple's combined assets was $600,000, of which $300,000 was titled in Elaine's name (the decedent) and $300,000 was titled in Carl's name (the survivor). This having been a marriage that lasted about five years, the elective-share percentage is 15 percent.
>
> Although Carl's elective-share entitlement is $90,000 (15 percent of $600,000), this does *not* mean that Carl has a $90,000 claim against Elaine's estate. Thirty percent of Carl's own $300,000 in assets (double the elective-share percentage of fifteen percent) count in fulfillment of Carl's elective-share amount.[64] Since thirty percent of Carl's assets is $90,000, there is no deficiency, and hence no claim to any of Elaine's assets. And, there should properly be none.[65]

### *The Support Theory*

The partnership/marital-sharing theory is not the only driving force behind forced-share law. Another theoretical basis for forced-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate. Current forced-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-

third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional forced-share law.

The redesigned elective-share system in the proposed Uniform Laws project seeks to implement the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

We implement the support theory by providing a supplemental elective-share amount of $50,000.[66] Counted first in making up this $50,000 amount are the surviving spouse's own titled-based ownership interests, including amounts shifting to the survivor at the decedent's death and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above, but excluding amounts going to the survivor under the Code's probate exemptions and allowances and the survivor's Social Security and other governmental benefits. If the survivor's assets are less than the $50,000 minimum, then the survivor is entitled to whatever additional portion of the decedent's estate is necessary, up to 100 percent of it, to bring the survivor's assets up to that minimum level. In the case of a late marriage, in which the survivor is perhaps aged in the mid-seventies, the minimum figure plus the probate exemptions and allowances (which under the Code amount to a minimum of another $43,000) is pretty much on target—in conjunction with Social Security payments, which in 1990 could range somewhere between $600 and $975 a month, and other governmental benefits—to provide the survivor with a fairly adequate means of support.[67]

In short, no matter how brief or extended, happy or unhappy the marriage was, a decedent with ample means should not be able to leave the survivor impoverished, and the minimum

elective-share feature of the redesigned system seeks to prevent him or her from doing so.

### *Augmented-Estate Concept*

I don't want to leave the elective share without mentioning another aspect of the overall problem. This is the problem of "fraud on the spouse's share." It arises when the decedent seeks to evade the spouse's elective share by engaging in various kinds of nominal *inter vivos* transfers. To render that type of behavior ineffective, the original Uniform Probate Code of 1969 picked up New York's and Pennsylvania's augmented-estate concept, which extended the forced-share entitlement (via the augmented-estate concept) to property that was the subject of specified types of *inter vivos* transfer, such as revocable *inter vivos* trusts.[68]

In the redesign of the elective share, we have strengthened the augmented-estate concept. Students of the 1969 Code (and of the New York provision) will know that several loopholes were left ajar in the augmented estate—a notable one being life insurance the decedent buys, naming someone other than his or her surviving spouse as the beneficiary. With appropriate protection for the insurance company that pays off before receiving notice of an elective-share claim, the redesigned elective-share closes that loophole, as well as the others.

## SPOUSE'S PROTECTION IN THE CASE OF A PREMARITAL WILL

The elective-share apparatus is not the only protection the Uniform Probate Code provides a disinherited surviving spouse. There is another provision that might come into play, a provision unique to the Uniform Probate Code. This is the omitted-spouse provision; its purpose is to protect the surviving spouse against *unintentional* disinheritance.

Nearly all states have a similar type of statute for *children*, called a "pretermitted-heir" statute. These statutes typically grant *children* born *after* the execution of the will a measure of

protection from being unintentionally disinherited, and the UPC has such a provision also.

Although pretermitted-heir statutes are common, protection for the decedent's surviving spouse against the provisions of a *premarital* will is rare—outside the UPC states.[69] The Code's omitted-spouse provision stands in addition to the apparatus of the elective share. The purpose is partly to reduce the frequency of elections under the elective share, and thus to reduce the number of times the augmented-estate procedure is invoked. Another purpose is to provide a share for the surviving spouse more related to the amount the decedent would probably have wanted to give, had he or she gotten around to revising the premarital will.

Under the omitted-spouse provision of the 1969 Code, a surviving spouse who was disinherited by a premarital will was given a right to his or her intestate share. The provision is meant to be intent-effectuating, not intent-defeating. Thus, unlike the elective-share provisions, the omitted-spouse provision yields to a contrary intention stated by the decedent in the premarital will or inferred from circumstances, such as if the will was made in contemplation of the marriage.

When this provision was first drafted and brought into the Code, the setting in which it probably was principally thought to operate was with respect to a first marriage. With the remarriage phenomenon on the increase, whether the remarriage follows divorce or death of the first spouse, and with the revisions having dramatically increased the intestate share of the surviving spouse, we thought that added attention should be paid to the omitted-spouse provision.

A particular concern was the impact of this provision on the last example we discussed in the elective share. Remember that in that example, we began with Ben and Elaine having lived a long married life to one another, a marriage that produced children. Then, after Ben died, Elaine married Carl.

It would not be exceptional if, during their marriage, Ben and Elaine had executed mutual wills, in which each devised the entire estate to the other if the other survives, but if not, to their

children. Were this to have been the situation when Ben died, Elaine would have succeeded to Ben's entire estate; Elaine would have had no reason to have claimed an elective share. It would also not be exceptional if, after Ben's death, Elaine never undertook to execute another will, not even after marrying Carl. She could hardly be expected to appreciate the need to do so, considering the fact that her new will would merely repeat the provisions in her old will for her children.

So, this is the type of late-in-life marriage where Elaine's instincts would likely be to want to continue to provide for her children by her first marriage, to Ben. This is also the type of late-in-life marriage that the redesigned elective share ends up granting Carl no claim or a very modest claim against Elaine's estate. If, however, Carl could use the omitted-spouse provision instead of the elective-share apparatus and take a much bigger portion, the whole purpose of having redesigned the elective share could be defeated. And, unless Elaine and Carl had entered into a premarital agreement, Carl *would* be able to do this under the omitted-spouse provision of the 1969 Code.

The revisions solve this problem. The solution we adopted is to amend the omitted-spouse provision so that the spouse (Carl in our example) who is omitted from a premarital will is entitled to an intestate share only in that portion of the decedent's estate neither devised to the decedent's children by a prior marriage nor to their descendants.[70] In our example, then, Carl would have nothing coming under the omitted-spouse provision, and would be remitted to the marital-sharing principle implemented by the redesigned elective-share apparatus.

The omitted-spouse provision can still play a useful role, however. In the case of a first marriage, where occasionally the decedent spouse may have executed a premarital will in favor of his or her parents or siblings, the omitted spouse is entitled under the omitted-spouse provision to the full intestate share. And, the provision is certainly not restricted to first marriages, but applies to any marriage. To the extent that any premarital will favors persons other than children (or descendants) of a prior marriage, the surviving spouse is entitled to a full intestate

share. That share might very well be the entire estate and—in consequence—quite properly give the spouse much more than he or she would take under the elective-share apparatus.

## CONCLUSION

The multiple-marriage society seems to be here to stay, and the probate laws must respond intelligently to it. The conventional probate laws now in place, including those in the original Uniform Probate Code, do not fit that society as well as they might. We believe that the package of statutory provisions discussed in this article move in the right direction. To be sure, as in any uniform laws project, the final package reflects a multitude of policy choices on which reasonable minds can differ, on which a reasonable case could be made for making a different choice. Thus we do not assert that our package contains the "right" answers and that any other set of answers is "wrong." We do believe that ours is a reasonable package, that it is well thought out, and that its individual parts add up to a coherent whole. As such, we believe it is suitable response to the multiple-marriage society and hope that it will be given serious consideration in all states.

## ENDNOTES

[1] Special Edition, *The 21st Century Family, Newsweek (Winter/Spring 1990).*

[2]"[T]he likelihood of divorce has increased in a steadily accelerating curve, from 7 percent for first marriages in 1880 to recent levels of more than 50 percent. . . . Increases in divorce since 1965, as well as the declines in marriage and fertility rates, are best seen as a continuation of the long-term reduction of family functions that has occurred in conjunction with the transformation of our economy and an increasing cultural emphasis on individualism. . . . [Recent Census Bureau data] yielded estimates that 56 percent of recent first marriages would be likely to disrupt within 40 years of marriage. After adjusting, however, for the well-known underreporting of marital disruption in [such] surveys . . . , we conclude that the best estimate based on these data is that about two-thirds of all first marriages are likely to disrupt." Martin & Bumpass, *Recent Trends in Marital Disruption,* 26 Demography 37 (1989).

[3]"Most Americans marry, and if the marriage ends in divorce, more than three-fourths marry again. . . . During the 1970-83 period the annual totals of remarriages of previously divorced men and women increased by 82 percent. . . . In contrast, marriages of single and widowed persons declined. Currently about 1 out of 3 American brides and grooms have [sic] been married before, up from about 1 out of 4 in 1970. . . . Remarriage rates for both divorced men and women declined during the 1970-83 period. Remarriage rates dropped even though the number of remarriages was increasing because the pool of divorced persons

available for remarriage was increasing faster than the number of remarriages. . . . The estimated annual national total of remarriages for previously divorced men and women increased almost every year from 1970 to 1983 [ ]. The number of previously divorced brides was 404,000 in 1970 and rose to 736,000 in 1983. During that period more men than women remarried single persons, but the percent increase in the number of remarriages was the same for both sexes. The number of previously divorced grooms increased 83 percent from 423,000 to 773,000. In the 14-year period, 8.2 million previously divorced women and 8.7 million previously divorced men remarried. . . . In 1970 the proportion of marriages that were remarriages was considerably lower than in 1983." U.S. Dep't of Health & Human Services, Pub. No. 89-1923, Remarriages and Subsequent Divorces—United States 1-2, 5 (1989).

4 On the higher propensity of remarried divorced persons to divorce again, *see, e.g.,* U.S. Dep't of Health & Human Services, supra note 3, at 16 ("Generally, the more times a divorcing person has been married, the briefer the duration of the marriage. . . . It may be that some selection factor is at work and that people who divorce repeatedly are likely to regard divorce as an acceptable solution to an unpleasant marriage and resort to it with increasing promptness."); McCarthy, *A Comparison of the Probability of the Dissolution of First and Second Marriages,* 15 Demography 345 (1978).

5 On the higher propensity of couples who cohabited prior to marriage to divorce, *see* Bumpass, Sweet & Cherlin, *The Role of Cohabitation in Declining Rates of Marriage,* Working Paper No. 5 (Nat'l Survey of Families and Households, 1989) ("[C]ohabiting unions are much less stable than those that begin as marriages. . . . [M]arriages that are preceded by living together have 50 percent higher disruption rates than marriages without premarital cohabitation.") *See also* Newsweek, *supra* note 1, at 57, quoting a sociologist to the effect that "cohabitation is a relationship that attracts those, mainly men, who are looking for an easy out . . . and it is uncertain what, if anything, it contributes to marriage."

6 The review is being conducted by the Joint Editorial Board for the Uniform Probate Code and the Drafting Committee to Revise Article II of the Uniform Probate Code.

7 N.Y. Est. Powers & Trusts Law § 5-1.4.

8 Uniform Probate Code § 2-302 (1969).

9 Apart from statute, divorce decrees and separation agreements usually do not effect a revocation of life-insurance or similar beneficiary designations of a former spouse unless they say so specifically. *Rountree v. Frazee,* 282 Ala. 142, 209 So.2d 424 (1968) ("One may take out a life insurance policy on his own life and . . . name anyone as a beneficiary regardless of whether [the beneficiary] has an insurable interest. . . . [D]ivorce per se [does] not affect or defeat any of [the former spouse's] rights as the designated beneficiary."); *American Health & Life Ins. v. Binford,* 511 So.2d 1250 (La. Ct. App. 1987) ("[T]he description in the policy of Ms. Watson as wife is merely the showing of a relationship in existence at the time of the execution of the contract. The termination of the relationship has no automatic effect on the provisions of the insurance policy."); *Gerhard v. Travelers Ins. Co.,* 107 N.J. Super. 414, 258 A.2d 724 (1969) ("[A] separation agreement . . . which contain[s] a general release of all claims to each other's estate [does] not divest the [former] wife of her interest, as named beneficiary, since her claim under the policy was neither against him nor his estate, but was against the insurance company."); *Romero v. Melendez,* 83 N.M. 776, 498 P.2d 305 (1972) ("The weight of competent authority seems to support the proposition that where the divorce decree makes a definite disposition of the insurance policies, the [former] wife's interest as a beneficiary can be defeated by such disposition. . . . [C]ases holding conversely do so on the basis of the absence of a clear divorce decree."); *Cannon v. Hamilton,* 174 Ohio St. 268, 189 N.E.2d 152 (1963) ("[W]here the terms of a separation agreement carried into a divorce decree plainly disclose an intent to remove the [former spouse] from all rights to the

proceeds thereof, such agreement may . . . prevent the [former spouse] from claiming the proceeds ..., but the separation agreement herein did not contain language sufficiently strong or definite to accomplish that result, especially when considered in relation to [the insured's failure] to change the beneficiary in accordance with the terms of the policy [during the 11-year period between the divorce and his death]."); *Lewis v. Lewis,* 693 S.W. 2d 672 (Tex. Civ. App. 1985); *Bersch v. Van Kleeck,* 112 Wis. 2d 594, 334 N.W. 2d 114 (1983); but cf. *Stiles v. Stiles,* 21 Mass. App. Ct. 514, 487 N.E. 2d 874 (1986).

10 393 Mass. 754, 473 N.E.2d 1084 (1985).

11 473 N.E.2d at 1093.

12 *E.g., Miller v. First Nat'l Bank & Tr. Co.,* 637 P.2d 75 (Okla. 1981). In this case, the court held a similar statute applicable to an unfunded life-insurance trust. The testator's will devised the residue of his estate to the trustee of the life-insurance trust. The court held that the pour-over devise incorporated the life-insurance trust into the will by reference, and for this reason the revocation statute was held applicable.

13 *E.g., Pepper v. Peacher,* 742 P.2d 21 (Okla. 1987); *Estate of Adams,* 447 Pa. 177, 288 A.2d 514 (1972).

14 *E.g., Equitable Life Assurance Society v. Stitzel,* 1 Pa. Fiduc.2d 316 (C.P. 1981).

15 As yet, no state has enacted a provision as comprehensive as the one drafted in the Uniform Laws project. Michigan and Ohio have statutes transforming spousal joint tenancies in land into tenancies in common upon the spouses' divorce. Mich. Comp. Laws Ann. § 552.102; Ohio Rev. Code Ann. § 5302.20(c)(5). Ohio, Oklahoma, and Tennessee have recently enacted legislation effecting a revocation of provisions for the settlor's former spouse in revocable *inter vivos* trusts. Ohio Rev. Code Ann. § 1339.62; Okla. Stat. Ann. tit. 60, § 175; Tenn. Code Ann. § 35-50-115 (applies to revocable and irrevocable *inter vivos* trusts unless, among other things, "the trust agreement . . . expressly provides otherwise."). Statutes in Michigan, Oklahoma, and Texas relate to the consequence of divorce on life-insurance and retirement-plan beneficiary designations. Okla. Stat. Ann. tit. 15, § 178; Mich. Comp. Laws Ann. § 552.101; Texas Family Code §§ 3.632, -.633.

16 The statute is inapplicable if provided otherwise in the governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment.

17 If Ben's retirement plan was covered by the Employee Retirement Income Security Act (ERISA), there is a danger that the proposed statutory provision will be preempted. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. There are a variety of arguments as to why ERISA should not preempt the proposed statutory provision in the Uniform Laws project; these are too complicated to state here, but they are stated in the Official Commentary to that provision. In case these arguments do not prevail, however, and the proposed statutory provision is found preempted, the proposed statutory provision imposes an offsetting personal liability on the recipient in the amount of any payment received as a result of preemption.

18 In several cases, including *Clymer v. Mayo, supra* note 10, and *Estate of Coffed,* 46 N.Y.2d 514, 414 N.Y.S.2d 893, 387 N.E.2d 1209 (1979), the result of treating the former spouse as if he or she predeceased the testator was that a gift in the governing instrument was triggered in favor of relatives of the former spouse who, after the divorce, were no longer relatives of the testator. In the Massachusetts case, the former spouse's nieces and nephews ended up with an interest in the property. In the New York case, the winners included the former spouse's child by a prior marriage. For other cases to the same effect, *see Porter v. Porter,* 286 N.W. 2d 649

(Iowa 1979); *Bloom v. Selfon,* 520 Pa. 519, 555 A. 2d 75 (1989); *Estate of Graef,* 124 Wis. 2d 25, 368 N.W. 2d 633 (1985).

19 The effect of revocation by this section is, of course, that the governing instrument is given effect as if the revoked provisions were removed or stricken therefrom at the time of the divorce or annulment. The remaining or unrevoked provisions of the governing instrument take effect as if the divorced individual's former spouse and relatives of the former spouse had disclaimed the revoked provisions.

20 Some of these studies were based on an examination of the probated wills of similarly situated decedents who died during a particular time frame in a particular locality. *E.g.,* M. Sussman, J. Cates, and D. Smith, The Family and Inheritance 86, 89-90, 143-45 (1970); Browder, *Recent Patterns of Testate Succession in the United States and England,* 67 Mich. L. Rev. 1303, 1307-08 (1969); Dunham, *The Method, Process and Frequency of Wealth Transmissions at Death,* 30 U. Chi. L. Rev. 241, 252 (1963); Gibson, *Inheritance of Community Property in Texas—A Need for Reform,* 47 Tex. L. Rev. 359, 364-66 (1969); Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction,* 50 Wash. L. Rev. 277, 283, 311-17 (1975).

Other studies were based on interviews with living persons. Fellows, Simon, and Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession in the United States,* 1978 Am. B. Found. Res. J. 319, 351-54, 358-64, 366-68 (found the majority favored granting entire estate to the spouse regardless of the level of wealth involved); Note, 63 Iowa L. Rev. 1041, 1089 (1978) (found the percentage who favored granting the entire estate to the spouse decreased as the level of wealth increased). See also U.K. Law Commission, Report on Family Law: Distribution on Intestacy, 1989, No. 187, at 28 (reporting that 72 percent of respondents favored granting the entire estate to the surviving spouse if the decedent owned a house and the decedent's children were grown up, 79 percent favored granting the entire estate to the surviving spouse if the decedent had a house and young children, and 79 percent favored granting the entire estate to the surviving spouse if the decedent had no house but young children).

21 A recent report of the U.K. Law Commission recommended raising the surviving spouse's intestate share to the entire estate in all circumstances. U.K. Law Commission, *supra* note 20, at 8-12.

22 M. Glendon, The Transformation of Family Law 238 (1989).

23 *Ibid.*

24 *Id.* at 239.

25 *Id.* at 238.

26 *Id.* at 240.

27 If the decedent is childless, the surviving spouse is officially granted the entire intestate estate only if the decedent leaves no surviving parent. If the decedent does leave a surviving parent, the surviving spouse is granted the first $200,000 (actually, the first $243,000 when the probate exemptions and allowances are added in) plus three-fourths of the remaining balance. Very few intestate estates exceed $243,000, and fewer still exceed this value by any substantial margin. Thus, in almost all cases, the surviving spouse *in practice* will receive the entire intestate estate even if the decedent is childless but leaves a surviving parent.

Why not, then, *officially* grant the surviving spouse the entire intestate estate when the decedent is childless but leaves a surviving parent? The rationale is that a childless decedent with a surviving spouse and at least one surviving parent and with an estate significantly in excess of $243,000 *who dies intestate* is likely to have died fairly young and without expecting to have such a large estate. (A decedent who actually accumulated an estate of this size is likely to be older and to have a will. See Fellows, Simon & Rau, *supra* note 20, at 336-39, reporting that, among those surveyed, 69 percent with estates of $200,000 and over had wills (the $200,000 figure is adjusted for inflation between the time of the publication of this article and today); and further reporting that 61 percent of those age 46-54 had wills, 63

percent age 55-64 had wills, and 85 percent of those 65 and over had wills, but only 12 percent of those between the ages of 17 and 34 had wills.)

An intestate estate of this size is, in fact, likely to consist of a large tort recovery. Consider Ben and Elaine again. Suppose that shortly after their marriage, Ben was injured on his way to work by a negligent truck driver employed by a large, publicly held corporation, and that Ben eventually died from those injuries. Suppose further that his estate, swelled by a tort recovery stemming from the accident, amounted to a million dollars. Disregarding the probate exemptions and allowances for the sake of simplicity, the formula adopted has the advantage of granting Elaine (who might well remarry) a thoroughly adequate share of $800,000 ($200,000 plus $600,000), with a $200,000 return to Ben's parents (who bore the cost of raising and educating Ben).

28 To be sure, the statute could invoke the statutory-trust approach only in estates above a certain value, or only as to that portion of the estate in excess of a certain value. But a moment's reflection suggests that this is not completely satisfactory, either. If the statutory-trust approach were invoked in estates above a certain value, say $150,000, too many estates would fall just above or just below the line, with dramatically different outcomes. An estate of $149,000 would not go into a statutory trust, but one of $151,000 would. Similarly, if the statutory-trust approach were invoked only as to that portion of the estate in excess of a certain value, again, say $150,000, an estate of $151,000 would produce a statutory trust of a mere $1,000.

Since the terms of the statutory trust would likely provide that the statutory trustee should invade the corpus for the benefit of the surviving spouse only in case of need, taking into account the survivor's other sources of income, a small statutory trust might not be quickly dissipated.

The problem would not be solved by the further step of directing a statutory trust only if the estate were large enough to produce a statutory trust of at least a certain size, say $50,000. Under this scheme, the trust would arise only if the estate exceeded the minimum $150,000 figure by $50,000. This approach suffers from the same arbitrariness seen before—an estate of $199,000 would not have a statutory trust, but one of $201,000 would have one of $51,000.

29 Note, however, the possibility of a decedent who dies intestate having taken *indirect* measures to disinherit the surviving spouse by means of depleting the intestate estate by gifts or will substitutes. By couching the discussion in terms of a decedent who disinherits the surviving spouse *directly* by will, I do not intend to indicate that the elective share is unavailable or never taken in the case of an intestate estate.

30 M. Glendon, *supra* note 22, at 131.

31 *Id.*

32 I use the term "community-property system" to include that version of community law adopted in the Uniform Marital Property Act (UMPA), enacted in modified form in Wisconsin.

33 In 1989, Professor Oldham reported that "Mississippi is the only state that has not clearly accepted [the equitable-distribution] system. *See Jones v. Jones,* 532 So.2d 574 (Miss. 1988)." Oldham, *Tracing, Commingling, and Transmutation,* 23 Family L.Q. 219, 219 n.1 (1989).

For a fascinating account of how this system swept the country, *see* Glendon, *Property Rights Upon Dissolution of Marriages and Informal Unions,* in The Cambridge Lectures 245 (N. Eastham & B. Krivy eds. 1981).

34 J. Gregory, The Law of Equitable Distribution ¶ 1.03, at p. 1-6 (1989).

35 N.Y. Est. Powers & Tr. Law § 5-1.1(c)(1)(B) (elective share of one-third if the decedent is survived by one or more issue; one-half in all other cases).

36 Data published by the federal government reveal that, within the widowed and divorced population at large, not disaggregated by age, about 21 percent of widowed men and about 8 percent of widowed women remarry; and about 83

percent of divorced men and 78 percent of divorced women remarry. U.S. Dep't of Health & Human Services, supra note 3, at 12. The average (mean) ages at the time of remarriage of widowed men and women have been steadily increasing, to 60.2 for men and 52.6 for women in 1983, the latest year for which statistics have been published, up from 57.7 for men and 50.3 for women in 1970. The average (mean) ages at remarriage of divorced men and women have also been steadily increasing, but the ages are, of course, much lower. The average (mean) ages for 1983 are 37.3 for men and 33.7 for women, up from 36.7 for men and 32.8 for women in 1970. *Id.*, Table 4, at 24.

In 1983, the average intervals between becoming widowed and remarriage for the 65-and-older age group were 3.6 years for men and 7.9 years for women. The average intervals between divorce and remarriage for the same age group were 6.3 years for men and 10.4 years for women. *Id.* at 13.

Within the 65-years-and-older population, 2.62 percent of divorced men and .049 percent of divorced women remarried during 1983. During that same year, the remarriage rate of widowed men and women age 65 and older was 1.68 percent for men and .019 percent for women. Within the divorced population ages 60 to 64 for that same year, 4.93 percent of divorced men and 1.29 percent of divorced women remarried; figures were not given for the widowed population ages 60 to 64 for that or any other year. The remarriage rates within the 65-and-older divorced and widowed segments of the population have been trending downward, but not in a straight line. The data show peaks and valleys over the course of the 1970-83 period. The peak occurred during the year 1975, when 3.14 percent of divorced men, .091 percent of divorced women, 1.95 percent of widowed men, and .021 percent of widowed women remarried. Data for 1975 for the 60 to 64 years age group were not reported. *Id.*, Table 3, at 23.

These remarriage rates, of course, do not reveal the remarriage rates of divorced or widowed men and women age 65 and older or 60 to 64; they merely reveal the remarriage rates for a given year. Because such remarriages accumulate within the population, the incidence of remarriage later in life appears to be significant.

[37] *See* W. Macdonald, Fraud on the Widow's Share 156-57 (Michigan Legal Studies 1960). Of the forced-share cases in the law reports up to the time of writing and in which the author could identify the relationships, more than half pitted children of a former marriage against a later spouse.

Statistically, "on average, women ending first marriages had 1.06 children under 18 years, those ending second marriages had 0.64 children, and those ending third marriages had 0.36 children. These differences are due at least in part to the fact that most children are born into first marriages and may not be mentioned on divorce records of subsequent marriages unless custody becomes an issue." U.S. Dep't of Health & Human Services, *supra* note 3, at 3.

[38] *E.g.*, Comment, *Spousal Disinheritance: The New York Solution—A Critique of Forced Share Legislation*, 7 W. New Eng. L. Rev. 881, 903-08 (1985).

[39] The various schemes are canvassed, state-by-state, in L. Golden, Equitable Distribution of Property (1983); J. Gregory, The Law of Equitable Distribution (1989); G. McLellan, Equitable Distribution Law and Practice (1985); J. Oldham, Divorce, Separation and the Distribution of Property (1989).

[40] J. Oldham, *supra* note 39, at § 3.03; see also McKnight, *Defining Property Subject to Division at Divorce*, 23 Family L.Q. 193 (1989).

[41] But *see* J. Oldham, *supra* note 39, at § 13.02[1][i] (noting judicial reluctance to divide property acquired before the marriage or during the marriage by gift or inheritance "unless the circumstances warrant.").

[42] *See* J. Gregory, *supra* note 39, at ¶ 9.03. In *Brown v. Brown*, 704 S.W.2d 528 (Tex. Ct. App. 1986), for example, fault was shown, among other things, by evidence that the wife "talked to [the husband] like he was dirt, hurt his feelings, made him nervous. . . ."

[43] The factors are discussed in J. Gregory, *supra* note 39, at ch. 8; J. Oldham,

*supra* note 39, at § 13.02-.03. Professor McNight reports that "as many as thirty-eight factors have been identified that may be considered in equitable distribution [citing Note, 50 Fordham L. Rev. 415, 439 n.170 (1981)]." McNight, *supra* note 40, at 197 n.14.

44 One commentator has described the equitable distribution process as follows:

> Most equitable distribution statutes set out a list of factors that a court must consider when distributing property. In a few jurisdictions where the statutes do not contain factors, appellate courts have developed and articulated them for the guidance of the trial courts. At the same time, it is abundantly clear that no particular factors are intended to be more important than any others. In the final analysis, judicial discretion is the hallmark of equitable distribution.
>
> A much debated point among lawyers, legislators, and others engaged in drafting equitable distribution legislation is whether equal division is most equitable. The question is far from resolved and perhaps never will be. In a small minority of jurisdictions, the statutes contain a presumption of equal division of marital property. In a few others, the courts have created a fifty-fifty starting point for division, even while rejecting a presumption of equal division. Some states reject altogether both presumptions and starting points.

J. Gregory, *supra* note 39, at ¶ 8.01. *See also* J. Oldham, *supra* note 39, at § 13.02[2] (noting and lamenting the arbitrary results produced by giving trial courts such great discretion).

45 Glendon, *Family Law Reform in the 1980's*, 44 La. L. Rev. 1553, 1556 (1984).

The discretionary characteristic of equitable-division law resembles the probate-law system that prevails in England and the Commonwealth, called Testator's Family Maintenance (TFM). TFM empowers a judge to vary the testator's will in order "to make reasonable financial provision" for the surviving spouse. Inheritance (Provision for Family and Dependents) Act 1975, c. 63, § 1. In making this determination, the court can weigh the competing equities of the children of a prior marriage; the adequacy of the spouse's own resources; the spouse's age; and "the duration of the marriage." *Id.* §§ 3(1)(a), 3(2)(a). TFM remits to judicial discretion every important issue of policy in forced-share law. For a lucid critique of TFM, *see* Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 Tul. L. Rev. 1165 (1986).

46 Kwestel & Seplowitz, *Testamentary Substitutes—A Time for Statutory Clarification*, 23 Real Prop. Prob. & Tr. J. 467, 472 n.22 (1988).

47 *See* Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 Case W. Res. L. Rev. 223, 245-47 (1987) (favoring the forced-share community approach).

48 An analogue to this approach exists in the community-property states of California and Washington. These states apply a strict deferred-community approach to the case of "quasi-community" property. The quasi-community property concept addresses the problem migratory spouses; it treats as quasi-community property property that was acquired elsewhere that would have been characterized as community property had the spouses been under the community regime when the property was acquired. In California and Washington, such property is automatically retitled at death, hence invoking a strict deferred-community approach. Cal. Prob. Code § 101 (Supp. 1989); Wash. Rev. Code §§ 26.16.220-.250 (Supp. 1989).

49 An analogue to this approach exists in the community-property states of Idaho and Wisconsin, with respect to quasi-community property. For an explanation of quasi-community property, see *supra* note 48. These states give a surviving spouse a right to elect to take a half share of the couple's quasi-community property, hence invoking a forced-share deferred-community approach. Idaho Code §§ 15-2-101 to -209 (1979); Wis. Stat. Ann. §§ 851.055, 861.02 (Supp. 1989).

50 For the reasons set forth *infra* note 63, the strict deferred-community approach is not as promising as the forced-share community approach.

51 *See* J. Oldham, *supra* note 39, at § 3.03[5] ("In a few community property states, community property must be divided equally. [Citing Cal. Civ. Code § 4800]. Most of these states, however, permit an equitable division of the community estate. [Citing Ariz. Rev. Stat. Ann. § 25-318; Nev. Rev. Stat. § 125.180; Tex. Fam. Code § 3.63]."); *see also* Reppy, *Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States,* 23 Family L.Q. 163, 164 (1989).

52 Alternatively, in terms of the marital-sharing or partnership theory, the couple's implied bargain upon entering the marriage was one of equal splitting of the proceeds of the marriage, unless the couple opted out of that implied bargain by entering into a premarital or postmarital agreement.

53 Langbein & Waggoner, *Redesigning the Spouse's Forced Share,* 22 Real Prop. Prob. & Tr. J. 303, 320-21 (1987).

54 Had we decided to adopt a deferred-community forced share, subsidiary questions such as whether income generated by and appreciation in value of separate property during the marriage are marital or separate property would undoubtedly have been resolved in accordance with the rules provided in the Uniform Marital Property Act. For a discussion of these issues under the various community and equitable-distribution regimes, *see* Wenig, *The Increase of Value of Separate Property During Marriage: Examination and Proposals,* 23 Family L.Q. 301 (1989).

55 For a discussion of tracing-to-source and associated problems in equitable-distribution law, *see* Oldham, *supra* note 33.

56 *See* M. Glendon, *supra* note 22, at 124 (Even title-based systems are "not always simple in practical application. . . . Complexity creeps in because in most households the assets of the spouses tend to be mingled rather than kept separate or neatly earmarked."); *see* also Oldham, *supra* note 33.

Jane Bryant Quinn, the columnist, has written that married couples divide into two camps—"poolers" and "splitters." Poolers put all their earnings into a single marital account; savings, investments, and the house are held jointly; even inheritances tend to straggle toward the common pot. Splitters keep their money separate. The longer splitters are married, the more they edge towards forms of pooling. Quinn, *Marriage and Money—Keeping the Peace,* Woman's Day, June 16, 1987, p. 18.

57 *See* Levy, *An Introduction to Divorce-Property Issues,* 23 Family L.Q. 147, 152-53 (1989) (noting, in the context of equitable-distribution law, that "the stronger the presumption [in favor of characterizing all property as marital property], the less likely it will be that the spouse who owned nonmarital property at marriage or received some during the marriage will try to trace the property or funds;" and that the weaker the presumption, the more likely it will be that tracing issues will be litigated.).

58 The supplemental elective-share amount is explained *infra,* text accompanying notes 65-67.

59 Unlike the short-term marriage between Elaine and Carl, a certain fraction of later-in-life marriages will endure for 15 or more years, giving the surviving spouse the right to an elective-share percentage of 50 percent, or will endure for a period not substantially less than 15 years, giving the surviving spouse the right to a near-50 percent elective-share percentage. As reported *supra* note 36, the average (mean) age at the time of remarriage of widowed men who remarry is 60.2 and of widowed women who remarry is 52.6. Given that average life expectancy is 75 years, remarriages that take place at ages 60.2 and 52.6, respectively, can easly endure for the required 15-year period in order to reach the maximum 50 percent elective-share percentage.

60 In statutory terms, the couple's combined assets come under the term "augmented estate." As defined in proposed section 2-202, the "augmented estate"

is (in general terms) composed of the decedent's and the surviving spouse's property.

61 This example assumes that Ben entirely disinherited Elaine, *i.e.*, that nothing passed to Elaine by testate or intestate succession, nor by nonprobate transfers, such as life insurance or by right of survivorship under a joint tenancy or a joint bank account. If any property does pass to Elaine by any of these methods, these assets count first toward making up Elaine's elective-share entitlement.

62 Remember that under the Uniform Probate Code's augmented-estate system, the couple's combined assets extend well beyond the so-called probate assets and include such items as the couple's home (even if held in joint tenancy), life insurance, and pension benefits.

63 Notice that the redesigned system does not seek to equalize the marital assets in this case by giving Ben's estate a claim to a portion of Elaine's property. As noted in the text, under the redesigned system, Elaine would have no claim against Ben's estate, because Elaine has already been disproportionately compensated as judged by the marital-sharing principle; this is in contrast to conventional forced-share law, where Elaine would be entitled to magnify the disproportion by claiming an additional $66,667.

Under the redesigned system, one might think that Ben's estate ought to have a claim against Elaine's property. But to provide such a claim would be inconsistent with the notion of a forced-share system. In the noncommunity-property states, the forced share has traditionally been viewed as an entitlement for the personal benefit of the surviving spouse, not for the benefit of the beneficiaries of a spouse's estate. Because of this, the redesigned elective-share system does not recognize the partnership/marital-sharing interest of the decedent spouse; if it did, the forced share would benefit the beneficiaries of the decedent spouse's estate, not the decedent spouse.

To be sure, the community-property system does protect the decedent's interest as well, and in this respect the redesigned elective share differs from the community-property system. Community-like mutuality in noncommunity forced-share law would require granting to the estate of the deceased spouse a claim against the assets of the surviving spouse. Such a right of election would have to devolve upon the decedent's personal representative, where it would resemble somewhat the situation in current law in which a fiduciary makes the election on behalf of a surviving spouse who is incompetent. Administratively, there would be at least two ways of handling the situation. One is to authorize the decedent spouse's personal representative to make the election. Because the decedent spouse's personal representative would owe a fiduciary duty to the beneficiaries of that spouse's estate, the election would become virtually automatic when not waived by a well-drafted instrument, in contrast to the present situation in which the forced share is actually exercised only rarely, in cases of deliberate disinheritance of the survivor. The other way of handling the situation would be to authorize the decedent spouse's personal representative to make an election only if the decedent spouse's will authorized or directed that the election be made. This approach is less objectionable than the other one because it would reduce the number of elections. But even this approach does not square with the traditional notion that the forced share is for the personal benefit of the surviving spouse. Thus the redesigned system leaves the parties where they are in this situation, and provides neither with a claim against the other's assets.

64 Under the redesigned system, the portion of the surviving spouse's assets that counts toward making up the elective-share amount is derived by applying a percentage to the survivor's assets equal to double the elective-share percentage. In the case of Elaine and Carl, the elective-share percentage is 15 percent, which means that 30 percent of Carl's assets are counted first toward making up the elective-share amount.

To explain why this is appropriate requires further elaboration of the underlying

theory of the redesigned system. The system avoids the tracing-to-source problem by applying an ever-increasing percentage to the couple's combined assets without regard to when or how those assets were acquired, rather than applying a constant percentage (50 percent) to an ever-growing level of assets. By approximation, the redesigned system equates the elective-share percentage of the couple's combined assets with 50 percent of the couple's marital assets—assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage like that of Elaine and Carl, which endured long enough for the elective-share percentage to be 15 percent, the redesigned system equates 15 percent of the couple's combined assets with 50 percent of those assets that were acquired during the marriage (other than by gift or inheritance). In the aggregate, the system counts 30 percent ($180,000) of the couple's $600,000 in combined assets as assets acquired during the marriage (other than by gift or inheritance).

The redesigned system applies the same ratio to the asset mix of each spouse as it does to the couple's combined assets. To say that the elective-share percentage is 15 percent means that the combined assets are treated as being in a 30/70 ratio (30 percent marital, subject to equalization; 70 percent individual, exempted from equalization). This same ratio, in turn, governs the approximation of each spouse's mix of marital and individual property. Consequently, the redesigned system attributes 30 percent of Elaine's $300,000 ($90,000) to marital property and the other 70 percent ($210,000) to individual property. And, the system does the same for Carl's $300,000, i.e., it treats 30 percent ($90,000) as marital property and 70 percent ($210,000) as individual property.

Accordingly, Carl is treated as already owning $90,000 of the $180,000 of marital property. Or, to say this in elective-share terminology, $90,000 of Carl's $90,000 elective-share amount comes from Carl's own assets, giving Carl the right to claim nothing from Elaine's net probate estate. (Remember that $90,000 of Elaine's assets are attributed to marital property; thus, each partner already owned his or her respective 50 percent share of the marital-property component of their combined assets.)

65 Note, however, that although in this last example, the redesigned system gave Carl no claim against Elaine's assets, there is a further safeguard built into the system. As explained next, the redesigned system has another prong—the support-theory prong. Do bear in mind that in the example we just discussed, if the dollar values were much lower, Carl *would* have a claim against Elaine's estate to be brought up to the $50,000 level, and that this claim is in addition to the claim for $43,000 in probate exemptions and allowances. These rights apply regardless of the length of the marriage.

66 The $50,000 figure is bracketed to indicate that individual states may wish to select a higher or lower amount. For a similar proposal, including the proposal to grant the surviving spouse a minimum elective right of $50,000, *see* Note, 1980 U. Ill. L.F. 277, 311 (by Richard Lee Dees).

67 If the surviving spouse is incapacitated, the Uniform Laws project contains a special provision for the management and ultimate disposition of the elective-share amount or the supplemental elective-share amount. These amounts, to the extent payable from the decedent's probate or reclaimable estates, are to be placed into a custodial or support trust for the surviving spouse; enacting states are given a choice as to whether to authorize the trustee of this trust to take governmental benefits such as Medicaid into account in expending the assets of this trust for the spouse's support.

For a discussion of whether under conventional forced-share law an insolvent or Medicaid-assisted surviving spouse, incapacitated or not, can forgo an elective share in order to defeat his or her creditors or in order to continue to qualify for Medicaid assistance, *see* Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell L. Rev. 587, 640-45 (1989). *See also* Estate of Schoolnik, 15 Conn. L. Trib. (No. 48, Dec. 4, 1989) p. 28 (Conn. Prob. Ct., Oct. 27, 1989) (requiring a Medicaid-assisted surviving

spouse to elect to take her statutory share). The author wishes to thank Professor Mary Moers Wenig for bringing the *Schoolnik* case to his attention.

68 If a forced-share law is to have any integrity, these nominal *inter vivos* transfers must be subjected to the forced-share entitlement. The same problem arises under the federal estate tax. Having an elective share that applied only to the decedent's *probate* assets would be like having a federal estate tax whose only provision is IRC § 2033 (which includes in the gross estate property owned at death). In the early estate tax statutes, Congress recognized this problem and included provisions bringing into the gross estate various types of inter-vivos transfers, such as transfers with a retained power to revoke, transfers with a retained life estate, joint tenancies, and life insurance. The state elective-share system must do the same, and the UPC's augmented-estate concept or something akin to it is the method to follow, rather than to throw it to the judiciary to try to erect stop-gap measures on a case-by-case basis, as in cases such as *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572 (1974) or *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937).

69 The earlier approach to the problem took the form of the common-law doctrines, sometimes codified, revoking a person's will if he or she later married. As forced-share statutes came to replace dower and curtesy, the forced share was thought to provide sufficient protection in the situation of a premarital will.

70 The actual terms of the proposed statute do not speak of children by a prior marriage, but of "a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse" and of "a descendant of such a child."