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The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code

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I. INTRODUCTION

Nearly everyone knows about the transformation of the American family that has taken place over the last couple of decades. The changes, from the latter half of the 1970s into the present, comprise one of the great events of our age. 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. The traditional "Leave It To Beaver" family no longer prevails in American society. To be sure, families consisting of a wage-earning husband, a homemaking and child-rearing wife, and their two joint children still exist. But because divorce rates are high and remarriage abounds, 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 may get even more "multiple" with the increasing prevalence in the population of those marriages that are more likely to end in divorce than others—marriages in which one or both partners were divorced before and marriages of couples who cohabited prior to marriage. Inevitably, this transformation has exerted new tensions on traditional wealth-succession laws, as well as on overlapping fields such as family, social security, and pension law.

II. The Uniform Probate Code Revision Project

The Uniform Probate Code (UPC or Code) is over twenty years old and was developed prior to the multiple-marriage society. Article II of the Code has now undergone a systematic round of review. One of the main

4. A Department of Health and Human Services publication comments on the higher propensity of remarried divorced persons to divorce again:

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.

see 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 & Households, 1989 ("[p]robably 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"); Bumpass, supra note 2, at 487:

If many couples are using cohabitation to test their relationship, and if 40% split up without marrying, then we expect those who do marry to have more stable marriages than would have been the case in the absence of cohabitation. Despite all the attention given the results on the higher divorce rate of marriages preceded by cohabitation, this finding is not contrary evidence on this point. Cohabitation is selective and includes a lower proportion of couples who hold traditional family attitudes and a higher proportion of those who are uncertain about their relationship.

(citations omitted).

6. The review was conducted by the Joint Editorial Board for the Uniform Probate Code and the Drafting Committee to Revise Article II of the Uniform Probate Code. The Joint Editorial Board for the Uniform Probate Code is composed of three representatives each from the Uniform Laws Conference (Clark A. Gravel of Vermont, Professor John H. Langbein of Yale Law School, and Dean Robert A. Stein of the University of Minnesota Law School); the American Bar Association (Jackson M. Bruce, Jr., of Wisconsin, Professor and former Dean
objectives of the project was to develop sensible probate rules for the altered and ever-changing climate of marital behavior. Article II of the UPC deals with the substantive law of intestacy, wills, and donative transfers. The Article II revisions have now been completed and approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL). These revisions will also be submitted to NCCUSL for promulgation 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.

The revisions of Article II are far reaching. To some degree, nearly every section in Article II has been revised. The full scope of the project is too sweeping to be captured in a single paper. In the present paper, I wish to single out for discussion four parts of the revision project: the spouse's intestate share (section 2-102); the spouse's elective (forced) share (sections 2-201 to 2-207); the spouse's rights as against a premarital will (section 2-301); and revocation of benefits to the now-former spouse in the case of divorce (section 2-804). These statutory provisions are appended at the end of this paper. Of the new provisions, these four will have the greatest impact on the multiple-marriage society.

I shall discuss these provisions of the project in terms of a story about a fictional couple, Ben and Elaine. Several versions of their story will demonstrate the impact of the UPC revisions upon our multiple-marriage society.

Ben and Elaine got married, their marriage went well, and they prospered. They bought a house in joint tenancy. They conferred with an estate planning attorney who set them up with reciprocal wills and a revocable inter vivos trust. Ben acquired an employer-provided retirement plan, and 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, an only child whose parents had died, tried to get on the good side of Elaine's parents by naming them as the alternate beneficiary.

Edward C. Halbach, Jr., of the University of California at Berkeley School of Law, and Malcolm A. Moore of Washington); and the American College of Trust and Estate Counsel (J. Pennington Straus of Pennsylvania, who serves as Chairman of the Board, Charles A. Collier, Jr., of California, and Raymond H. Young of Massachusetts, with Harrison F. Durand of New Jersey and Harley J. Spitler of California as Emeritus Representatives). The Law School Liaison to the Board is Professor and former Dean Eugene F. Scoles of the University of Oregon School of Law and the Probate Judges Liaison is James R. Wade of Colorado. Professor Richard V. Wellman of University of Georgia School of Law serves as the Board's Executive Director.

The Drafting Committee to Revise Article II of the Uniform Probate Code was chaired by Richard V. Wellman. The members were the three Uniform Laws Conference members of the Joint Editorial Board (Gravel, Langbein, and Stein) and Commissioners Florence Nelson Crisp of North Carolina, Richard E. Ford of West Virginia, and Oglesby H. Young of Oregon. The Advisers to the Drafting Committee were Professor Martin D. Begleiter of Drake University School of Law, representing the American Bar Association, and Professor Gail McKnight Beckman of Georgia State University, representing the National Association of Women Lawyers.
A. Section 2-804: The Revocation-Upon-Divorce Provision

As time went on, regrettably, Ben and Elaine grew apart. Ben devoted his time to his work and neglected Elaine. Elaine devoted her time to Carl, an old flame she almost married before she met Ben. Eventually Ben and Elaine's difficulties led to divorce. Shortly after the divorce, Elaine married Carl. 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.

1. Conventional Statutes

The conventional non-UPC provision7 and the pre-1990 UPC provision8 treat the disposition in Ben's will in favor of Elaine as revoked, but do not extend that treatment to the house held in joint tenancy, nor to Ben's revocable trust, retirement plan, or life insurance policy. 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.

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 non-UPC and the pre-1990 UPC 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 these cases have not been uniform. One of the more notable recent cases is Clymer v. Mayo,10 a 1985 decision of the Supreme Judicial Court of Massachusetts. The Massachusetts court extended the scope of the statute beyond its terms by holding the statute applicable to a revocable inter vivos trust. However, 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

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9. Apart from statutes, 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 name anyone as beneficiary on a life insurance policy, divorce per se does not affect or defeat any of the former spouse's rights as designated beneficiary.); American Health & Life Ins. v. Binford, 511 So.2d 1250 (La. Ct. App. 1987) (description of wife in policy "is merely the showing of a relationship in existence at the time of the execution of the contract" and divorce "has no automatic effect on the provisions of the insurance policy"); Gerhard v. Travelers Ins., 107 N.J. Supr. 414, 258 A.2d 724 (1969) (separation agreement containing "general release of all claims to each other's estate" does not divest former wife of interest as named beneficiary; her claim under the policy was not against her former husband, but against the insurance company); Romero v. Melendez, 85 N.M. 776, 498 P.2d 305 (1972) ("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 . . . cases holding conversely do so on the basis of the absence of a clear divorce decree"); see also Cannon v. Hamilton, 174 Ohio St. 268, 189 N.E.2d 152 (1963); Lewis v. Lewis, 693 S.W.2d 672 (Tex. Civ. App. 1985); Bersh v. VanKleeck, 112 Wis. 2d 594, 334 N.W.2d 14 (1983). But cf. Siles v. Siles, 21 Mass. Ct. App. 514, 487 N.E.2d 874 (1986).
the decedent's death. . .".\textsuperscript{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. When connected to a pour-over devise, this type of trust is the easiest to label the same as a "will" and thus to say the statute applies. Some courts have reached a similar result,\textsuperscript{12} but most courts are not willing to extend similar statutory provisions to will substitutes unconnected to a pour-over devise. This is true even though the will substitute is also the functional equivalent of a "will," such as a retirement plan beneficiary designation\textsuperscript{13} or life insurance beneficiary designation.\textsuperscript{14}

2. 1990 UPC Extends to All Revocable Dispositions

As revised, the 1990 UPC revocation-upon-divorce section, section 2-804, is the most comprehensive measure of its kind. A few states have enacted piecemeal legislation tending in the same direction.\textsuperscript{15}

\textsuperscript{11} 473 N.E.2d at 1093. The court's statement that the receptacle trust, into which the decedent's residuary estate poured, was one to be "funded entirely at the time of the decedent's death" was a misdescription. As indicated in the text, the receptacle trust in the Clymer case was a life insurance trust. By designating the trustee as the beneficiary of the life insurance policy, the testator-insured conferred on the trustee a contract right to collect the life insurance proceeds on the testator-insured's death. Under well-established trust law, that contract right constituted the trust res. Gurnett v. Mutual Life Ins., 356 Ill. 612, 191 N.E. 250 (1934); Bose v. Meury, 112 N.J. Eq. 62, 163 A. 276 (1932); Gordon v. Portland Trust Bank, 201 Or. 648, 271 P.2d 653 (1954); Restatement (Second) of Trusts § 57 comment f, § 82 comment b, § 84 comment b (1959). Thus, the trust was not without a trust res prior to the decedent's death.

The court's misunderstanding of this point forced it to consider a question not actually raised by the case: Does the Massachusetts Uniform Testamentary Additions to Trusts Act validate a pour-over devise to an unfunded trust? Although the Uniform Testamentary Additions to Trusts Act, 8A U.L.A. 599 (1983), incorporated into the pre-1990 UPC as § 2-511, is somewhat unclear on this point, the Massachusetts court in the Clymer case held that it does. As revised in 1990, § 2-511 makes it clear that a pour-over devise to an unfunded trust is authorized, and the amended § 2-511 will be submitted to NCCUSL in 1991 for promulgation as a revised Uniform Testamentary Additions to Trusts Act.

\textsuperscript{12} E.g., Miller v. First Nat'l Bank & Trust, 637 P.2d 75 (Okla. 1981) (where the testator's will devised the residue of his estate to the trustee of an unfunded life insurance trust, court held the revocation statute applicable because the pour-over devise incorporated the life insurance trust into the will by reference).

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


with revocation-upon-divorce statutes is not that courts adopt an overly narrow construction of them, but that the terms of the statutes themselves do not expressly cover all of the arrangements that are functionally equivalent to wills. Section 2-804 rectifies the problem by expressly expanding the terms of the statute to cover "will substitutes," whether or not connected to a pour-over devise. Thus, the statute covers 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 divorced individuals to their former spouses. Unless provided otherwise, subsection (b)(1) of revised section 2-804 not only revokes the provision in Ben's will in favor of Elaine but also in Ben's retirement plan, life insurance policy, and revocable inter vivos trusts.

Elaine also will not be able to take the joint tenancy property by survivorship. Subsection (b)(2) of revised section 2-804 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, by transforming their ownership interests into a tenancy in common. In effect, subsection (b)(2) 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 presumptively revoked upon divorce. A joint tenancy 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 of the property.

If Elaine is prevented from benefiting under any of Ben's documents, who does benefit? Remember that the conventional statutes only revoke dispositions to Elaine; they do so by invoking the fiction that Elaine predeceased Ben. This would give Ben's property to Elaine's parents.

16. Section 2-804 is inapplicable if provided otherwise in "a 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 statutory provision will be preempted. Section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1988), 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 § 2-804(b)(1) is found preempted, § 2-804(h)(2) imposes an offsetting personal liability on the recipient in the amount of any payment received as a result of preemption.

18. In several cases, treating the former spouse as predeceasing the testator triggered a gift in the governing instrument in favor of relatives of the former spouse who, after the divorce, were no longer relatives of the testator. See Clymer v. Mayo, 393 Mass. 754, 473 N.E.2d 1084 (1985) (concluding that treating former spouse as predeceasing the testator meant that former spouse's nieces and nephews succeed to interest in trust); Porter v. Porter, 286 N.W.2d 649, 652-53 (Iowa 1979) (concluding that the distribution of the testator's estate to the stepson would occur because of the spouse's inability to take under the will for any reason, including divorce); Estate of Coffed, 46 N.Y.2d 514, 518-20, 414 N.Y.S.2d 893, 894-95, 387 N.E.2d 1209, 1210-11 (1979) (stating that those obtaining an interest in the estate included the former spouse's child by a prior marriage); Bloom v. Selton, 520 Pa. 519, 522-26, 522-26.
Because such an outcome seems inconsistent with Ben's likely intent, revised section 2-804 also revokes benefits to the former spouse's relatives as well as to the former spouse.19 The general predicate of this provision is that, during the divorce process or in the aftermath of the divorce, the former spouse's relatives are more likely than not to side with the former spouse. This will result in breaking down or weakening any former ties that may have previously developed between the transferor and the former spouse's relatives.

B. Section 2-102: The Spouse's Share in Intestate Succession

Let us 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. At some point in the future, however, the law of mortality—which even the Uniform Law Commissioners can not repeal—caught up to Ben and he died. Elaine survived, along with their two adult children and a number of grandchildren. 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? Section 2-102 of the revised 1990 UPC rewards the surviving spouse in marriages such as Ben and Elaine's by granting Ben's entire intestate estate to Elaine.20 Elaine's share is Ben's entire intestate estate even though Ben was also survived by their two joint children.21 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.22 If all of the decedent's surviving

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555 A.2d 75, 77-78 (1980) (reflecting that the testator's divorce does not nullify alternative distribution provisions in favor of the former spouse's uncle; such property is distributed as if the former spouse predeceased the testator); Estate of Graef, 124 Wis. 2d 24, 29-33, 39-42, 368 N.W.2d 633, 634-36, 639-41 (1985) (concluding that the effect of treating former spouse as predeceasing the testator was that the testator's estate passes to the former spouse's parents since there was no issue and the testator's parents predeceased the testator).

19. In the somewhat comparable "slayer-rule" provision, § 2-803 denies revocable benefits to the murderer, but not to the murderer's relatives. The rationale for the distinction between divorce and murder is that, in the case of divorce, the relatives of each former spouse are likely to side with that former spouse. A murderer's relatives, however, are as likely to sympathize with the murderer's victim as with the murderer. UPC § 2-803 (1990).

The impact of revocation under § 2-804(d) is that the unrevoked provisions of the governing instrument take effect as if the divorced individual's former spouse and the former spouse's relatives had disclaimed the revoked provisions. UPC § 2-804(d) (1990).

20. Under § 2-102 of the pre-1990 UPC, the only time the surviving spouse was granted the entire intestate estate was when the decedent left neither a surviving descendant nor a surviving parent. UPC § 2-102 (1989). As for Elaine, § 2-102(3) of the pre-1990 UPC would have granted her the first $50,000 plus one-half of the remaining balance. UPC § 2-102(3) (1989).

21. For shorthand purposes, the reference to children refers not only to surviving children, but also to descendants of the children.

22. For the rationale of this approach, see infra note 33. Under § 2-102(2) of the
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.\(^2\) If the decedent leaves one or more surviving children who are not the biological children of the surviving spouse, the surviving spouse’s share is the first $100,000 plus one-half of the remaining balance.\(^2\)

The only time the surviving spouse’s share potentially is less than the full amount of the intestate estate is when the decedent dies without children but is survived by a parent or when the decedent has children and either the decedent or the surviving spouse has children who are not the biological children of the other. In the case of Ben and Elaine, no reduction would occur, since Ben’s parents had predeceased him and his marriage to Elaine was the first marriage for each.

We can take the story a little farther into the future. After Ben died intestate, survived by Elaine, suppose that Elaine married Carl, who by then was either a widower or a divorcée. 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 would take 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 upon 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 and Elaine’s parents predeceased her, Carl’s intestate share would be the entire intestate estate.

What is the rationale for this approach? First, we will consider Elaine’s share in Ben’s intestate estate. Then we will examine Carl’s share in Elaine’s intestate estate.

Various considerations drive the formulation of intestate-succession laws. The most obvious and perhaps predominant consideration is the decedent’s intention. Of course, the law gives effect to intention by imputation. Several items of evidence support the judgment to impute to Ben the intention to give all his property to Elaine. One is that empirical studies reveal the existence of a strong preference within the populace for granting the entire estate to the surviving spouse, even when the decedent has surviving children.\(^2\) Another is that the grant to the spouse of the

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\(^2\) Under § 2-102(3) of the pre-1990 UPC, the surviving spouse’s share in this situation would have been the first $50,000 plus one-half of the remaining balance. UPC § 2-102(2) (1989).

\(^3\) Under § 2-102(4) of the pre-1990 UPC, the surviving spouse’s share in this situation would have been one-half of the intestate estate. UPC § 2-102(4) (1989).

\(^4\) 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, & 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.
entire intestate estate is aligned with trends in intestate-succession law throughout the United States and Europe. Professor Mary Ann Glendon refers to this trend as the "shrinking circle of heirs" phenomenon. This trend indicates that 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." Glendon points out that this trend "strikingly illustrate[s] the movement of modern marriage into the foreground of family relationships." It recognizes "the gradual attenuation of legal bonds among family members outside the conjugal unit of husband, wife, and children" and "the tendency to view a marriage that lasts until death as a union of the economic interests of the spouses."

Granting the surviving spouse the entire intestate estate in cases in which neither spouse has surviving children by a prior marriage or in cases in which the decedent has no surviving children or parent therefore


Other studies were based on interviews with living persons. Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws 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); Contemporary Studies Project, A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes, 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% 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% favored granting the entire estate to the surviving spouse if the decedent had a house and young children, and 79% favored granting the entire estate to the surviving spouse if the decedent had no house but young children).


27. Id.

28. Id. at 293.

29. Id. at 258.

30. Id. at 240.

31. Id. at 240.

32. If the decedent is childless, revised § 2-102 grants the surviving spouse the entire intestate estate only if the decedent leaves no surviving parent. If the decedent leaves a surviving parent, revised § 2-102(2) grants the surviving spouse 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 still fewer exceed this value by any substantial margin. Thus, in almost all cases, the surviving spouse will receive the entire intestate estate even if the decedent is childless but leaves a surviving parent.

Why not 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 survived by a spouse and a parent, and who dies intestate with an estate significantly in excess of $243,000, most likely died at a fairly young age without expecting such a large estate. See Fellows, Simon & Rau, supra note 25, at 336-39 (reporting that, among those surveyed, 69% with estates of $100,000 and over had wills and further reporting that 61% of those age 46-54 had wills, 63% age 55-64 had wills, and 85% of those 65 and over had wills, but only 8% of those between the ages of 17 and 24 had wills).
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conforms with modern trends. Observe, however, the other side of the equation. As Professor Glendon noted, granting the surviving spouse the entire intestate estate comes “at the expense of the decedent’s blood relatives." Of course, in the competition for the decedent’s property, not all blood relatives are created equal. One must rank the decedent’s blood relatives by category or degree of relationship in an intestate-succession law; there is no room for subordinating the claim of a disliked uncle in order to benefit a favored aunt disproportionately. Notice the categories that lose out to the surviving spouse under revised section 2-102: one losing category is composed of the decedent’s collateral relatives or ancestors more remote than parents; the other losing category is composed of the decedent’s children or descendants of deceased children.

Between these two categories, typical decedents presumably view their children as having higher claims to at least some portion of their property than the claims of their collateral relatives and/or ancestors more remote than parents. On the surface, the revised UPC appears not to recognize any such distinction because it grants the surviving spouse the entire estate to the exclusion of both categories. In fact, the revised intestacy scheme distinguishes between these categories in the sense that the two categories “lose” to the surviving spouse for quite different reasons.

The 1990 UPC is predicated on the notion that decedents do not perceive their own children as losing. Rather, they see the surviving spouses as occupying somewhat of a dual role, not only as their primary beneficiaries, but also as conduits through which to benefit their children. If Ben died prematurely, at a time when their children were still minors, Elaine would be better equipped than their children to use Ben’s property for the benefit of their children as well as for herself. If Ben was older at death, when their children were middle-aged working adults, Elaine would probably be older and have greater economic needs than their children. In this latter case, the conduit theory assumes that Ben’s children will eventually inherit any unconsumed portion of his property from Elaine upon her death.

The conduit theory does not apply to decedents’ collateral relatives or ancestors who are more remote than parents. Their “loss” is likely to be permanent. When a decedent leaves only a surviving spouse and collateral relatives or ancestors more remote than parents, a typical decedent presumably sees the surviving spouse as sole beneficiary. The decedent

An intestate estate of this size likely consists of a large tort recovery. Consider Ben and Elaine. Under many survival-type statutes, a tort recovery becomes part of the decedent’s estate, to be distributed like other estate assets. E.g., Unif. Law Commissioners’ Model Survival & Death Act § 2(b) (1979), 8A U.L.A. 593 (1983); 4 F. Harper, F. James & O. Gray, Law of Torts § 25.16 at 614 nn. 8 & 9 (2d ed. 1986). 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. Ben’s 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.

33. M. Glendon, supra note 27, at 238.
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does not ordinarily expect the surviving spouse, while alive or at death, to share any significant portion of the decedent's property with those other relatives.

We will return 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 who are not joint children renders the conduit theory problematic. When a decedent is survived by children not descended from the surviving spouse, or by children of the surviving spouse not descended from the decedent, the decedent has a surviving spouse with divided loyalties and, hence, a spouse who is a less reliable conduit. If the surviving spouse in either of these two cases were to be granted the entire intestate estate, the prospect of the decedent's children recouping their "loss" later, by inheriting the unconsumed portion of the decedent's property from the surviving spouse, is less secure. The existence of children by a prior marriage 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.

Thus, the problem in the stepparent situations becomes one of striking a reasonable balance between the claim of the surviving spouse and that of the decedent's children. The dominant objective is to grant the surviving spouse an adequate share. By this, the revised UPC does not mean to restrict the spouse's share to no more than necessary to provide him or her with the bare necessities of life, but rather to grant a share that is commensurate with the size of the estate and the circumstances of the family make-up. In implementing this idea, the revised UPC invokes the lump-sum-plus-a-fraction-of-the-remaining-balance device. In the typical intestate estate of small to modest size, this means that the surviving spouse still will take the entire estate, especially since the probate exemptions and allowances, which under the 1990 UPC amount to a minimum of $43,000, go to the surviving spouse in addition to the lump sum portion of the formula.

In the more sizeable intestate estates, infrequent though they may be, the revised UPC approach is predicated on the notion that wealthier

34. The possibility that the same moral conflict will arise after the decedent's death, should the surviving spouse remarry and have children by his or her new spouse, exists but must be disregarded. As currently constituted, intestate-succession law requires the decision as to how much to award the surviving spouse to be made on the basis of the facts existing at the decedent's death.

35. See UPC § 2-404, 405 (1990) (too subsidiary to include in appendix).
intestate decedents would feel that some provision for their children would not deprive the surviving spouse of an adequate share. Thus, to provide the decedent's own biological children with at least some protection against the claim of the surviving spouse's other children, the revised UPC carves off a share in the larger intestate estates for the decedent's own children. Remember also that the spouse's intestate share is in addition to any nonprobate property to which she might succeed by reason of the decedent's death such as joint tenancies, joint checking, savings or money-market accounts, life insurance, and pension benefits.

The revised UPC recognizes that the surviving spouse's loyalties are more divided when the decedent has children by a prior marriage than when only the surviving spouse has children by a prior marriage. In recognition of this difference, the surviving spouse in the former case is granted the first $100,000 ($143,000, with the minimum probate exemptions and allowances added in) plus fifty percent of any remaining balance; the surviving spouse in the latter case is granted the first $150,000 ($193,000, with the minimum probate exemptions and allowances added in) plus fifty percent of any remaining balance.

This approach is admittedly a crude solution to the survivor's divided-loyalties problem. 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 children of the unconsumed portion of the decedent's property, a more responsive solution might be to reinvite the idea of common-law dower. When stepchildren are involved, the law might give the surviving spouse the use of the property for life, but upon the death of the surviving spouse force a return of the unconsumed portion of that property to the decedent's own biological children. Strictly speaking, no one would suggest reinvoking true common-law dower, under which the surviving spouse would be entitled to a life estate in one-third of the decedent's land. Instead, the device would create a statutory trust for the benefit of the surviving spouse in all the decedent's property, land, and personalty. The trust could take a variety of forms. One approach would give the surviving spouse the right to all of the income generated by the trust for life, coupled with a power in the spouse or the statutory trustee to invade the corpus of the trust to the extent other sources of income prove inadequate for the spouse's support and maintenance in accordance with the spouse's accustomed standard of living. However such a trust might be structured during the surviving spouse's lifetime, the trust would provide that upon the survivor's death, any remaining income and corpus would go to the decedent's own biological children and not stepchildren unless adopted by the decedent.

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 take account 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. Conventional intestate-succession schemes provide no mechanism for adjustment 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 in which the decedent leaves a surviving spouse and one or more children, 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, is commendable, except for the fact that its compulsion by a state would likely be considered offensive by many surviving spouses and it makes little practical sense. Putting aside the potential offensiveness, the strength of which would be difficult to predict, it is simply not practical to compel a statutory trust in every intestacy case with a surviving spouse and one or more children, with respect to mainly small estates of, say, $15,000 to $25,000. In the end, the statutory-trust approach was not adopted, leaving it to decedents with enough property at stake to warrant a trust to seek professional advice and decide for themselves whether or not to establish one, by will or inter vivos deed.

C. Sections 2-201 to 2-207: The Redesigned Elective Share

As we have just seen, the revised UPC intestate-succession law visualizes a marriage in which the decedent wants to give the spouse all of the estate; or, if there are no children but a parent or children by a prior marriage, all of a smaller estate and a substantial portion of a larger estate. The revised UPC imputes to Ben the desire to give all of his property to Elaine and imputes to Elaine a desire to give her property to Carl, except that it also imputes to her a desire to give some of her property to her children by her marriage to Ben if she has enough property to do so. If there is extrinsic evidence to the contrary, we do not want to hear it. Ordinarily, the only type of contrary evidence the law recognizes is documentary evidence of a valid will expressing an intent to give the spouse less or nothing at all. In intestate-succession cases, by definition, there is no such evidence. We now turn to a situation in which there is such evidence, a situation in which the decedent leaves a will totally or largely disinheriting the surviving spouse.

36. Although 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, this is not completely satisfactory. 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 likely would provide that the surviving spouse or the statutory trustee invade the corpus for the benefit of the surviving spouse only in case of need in accordance with the spouse's accustomed standard of living, 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—an estate of $199,000 would not have a statutory trust, but one of $201,000 would have one of $51,000.

37. 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 framing the discussion in terms of a decedent who disinherit the
1. 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 and the manner in which society views the institution of marriage. The contemporary view of marriage is that it is an economic partnership. The partnership theory of marriage, sometimes called the marital-sharing theory, is stated in various ways. Sometimes it is portrayed "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike." 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, that is, in the property nominally acquired by 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.

38. One of the earliest American expressions of the partnership theory of marriage appears in the 1963 Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women. As quoted in the Prefatory Note to the Uniform Marital Property Act, the Report states: "Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind." Id. at 97.

The strength of the idea that marriage is an economic partnership is evidenced by a recent New Jersey case, Carr v. Carr, 120 N.J. 336, 576 A.2d 872 (1990). In that case, the husband, after having left his wife of seventeen years, died during the pendency of a divorce proceeding initiated by the wife. The husband's will left his entire estate to his children by a former marriage. The court held that the husband's death terminated the divorce proceeding under which the wife would have been entitled to a share determined under New Jersey's equitable-distribution statute. The wife also had no recourse under New Jersey's elective-share statute because that statute withheld an elective share from a surviving spouse if the decedent and spouse were not living together at the time of the decedent's death. Despite the wife's inability to recover under either the divorce or elective-share statute, the court held:

We conclude . . . that the principle that animates both [the equitable-distribution and elective-share] statutes is that a spouse may acquire an interest in marital property by virtue of the mutuality of efforts during marriage that contribute to the creation, acquisition, and preservation of such property. This principle, primarily equitable in nature, is derived from notions of fairness, common decency, and good faith. Further, we are convinced that these laws do not reflect a legislative intent to extinguish the property entitlements of a spouse who finds himself or herself beyond the reach of either statute because the marriage has realistically but not legally ended at the time of the other's death.

In the exercise of their common-law jurisdiction, courts should seek to effectuate sound public policy and mold the law to embody the societal values that are exemplified by such public policy . . . .

Id. at 349-50, 576 A.2d at 879.

The constructive trust, we believe, is an appropriate equitable remedy in this type of case . . . [that] should be invoked and imposed on the marital property under the control of the executor of [the husband's] estate . . . to avoid the unjust enrichment that would occur if the marital property devolving to [the husband's] estate included the share beneficially belonging to [the wife].

Id. at 351-55, 576 A.2d at 880-81.

In a footnote, the court noted that efforts were currently pending in the New Jersey legislature to correct the problem of a surviving spouse who falls outside the protection of both statutes. Id. at 350 n.3, 576 A.2d at 879 n.3.

and titled in the sole name of either partner during the marriage other than property acquired by gift or inheritance. A decedent who disinherits her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is couched in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for nonmonetary 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."40 Sometimes the theory is stated in aspirational and behavior-shaping terms:

[T]he ideal to which marriage aspires [is] that of equal partnerships between spouses who share resources, responsibilities, and risks . . .

From a policy standpoint, this partnership framework is desirable both because it encourages cooperative commitments between spouses and because it serves broader egalitarian and caretaking objectives. In effect, sharing principles hold promise for bridging traditional public/private divisions between family and market. A partnership model can cushion the impact of persistent gender biases in couples' private allocation of homemaking tasks and in the public allocation of salaries and benefits. By sharing their total resources, families can spread the risks and benefits of sex-linked roles, the remnants of a socioeconomic system that makes it difficult for any one individual to accommodate a full work and family life . . .

Not only do partnership principles promote gender equality; they also support caretaking commitments toward children and elderly dependents.41

No matter how the rationale is expressed, the community-property system42 recognizes the partnership theory,43 but the common-law system is sometimes thought to deny 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.

40. Id.
42. 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.
43. As noted in W. Reppy, Community Property in California 1 (1980): "The crux of the community property system . . . is shared ownership by husband and wife of acquisitions earned by either or both during marriage . . . . Community property thus extends the notion of marriage as a partnership to property rights of the spouses."
The common-law states, however, also give effect or purport to give effect to the partnership theory when it perhaps counts most—at dissolution of a marriage upon divorce. If the marriage ends in divorce, a spouse who sacrificed her financial-earning opportunities to contribute so-called domestic services to the marital enterprise, such as childrearing and homemaking, or a spouse who pursued a lower-paying career or who engaged in volunteer work, stands to be recompensed. Almost all states now follow the so-called equitable-distribution system upon divorce, under which:

Trial courts enjoy broad discretion to examine the circumstances of each case, acknowledging a nonworking spouse's contributions to the acquisition of property, and assign the property to either spouse, irrespective of title. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise 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.

The other situation in which spousal property rights figure prominently is disinheritance at death. Almost all common-law states hold that this is one of the few instances in American law in which a decedent's testamentary freedom with respect to his title-based ownership interests must be curtailed. No matter what the decedent's intent, the common-law states recognize that the surviving spouse does possess some claim to a portion of the decedent's estate. These statutes provide the spouse a so-called forced share. Because the forced share is expressed as an option

44. In Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974), a landmark case interpreting New Jersey's equitable-distribution statute, the New Jersey Supreme Court stated:

The statute we are considering authorizes the courts, upon divorce, to divide marital assets equitably between the spouses. . . . [T]he enactment seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute. . . . The widely pervasive effect this remedial legislation will almost certainly have throughout our society betokens its great significance.

Id. at 228-29, 320 A.2d at 501-02. Although in this early equitable-distribution case, the court refused to establish a presumptive division of marital assets on a fifty/fifty basis, see id. at 232 n.6, 320 A.2d at 503 n.6, many courts today do indulge in such a presumption of equal division, and many of the more recently enacted statutes explicitly do so. See J. Gregory, The Law of Equitable Distribution 8.03 (1989).

45. In 1989, Professor Oldham reported that "Mississippi is the only state that has not clearly accepted [the equitable-distribution] system. See Jones v. Jones, 552 So. 2d 574 (Miss. 1988)." Oldham, Tracing, Commingling, and Transmutation, 23 Fam. 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).

46. J. Gregory, supra note 42, § 1.03, at 1-6 (1989).
SPOUSAL RIGHTS UNDER THE REVISED UPC

that the survivor can elect or let lapse during the administration of the
decedent's estate, and not as a retitling of the decedent's property that
automatically occurs at death, the UPC uses the more descriptive term
"elective" share.

Elective-share law in the common-law states has not caught up to the
partnership theory of marriage. Under typical American elective-share law,
including the elective share provided by the pre-1990 UPC, a surviving
spouse is granted a right to claim a one-third share of the decedent's estate,
not a right to claim the fifty percent share of the couple's combined assets
that the partnership theory would imply. The redesigned elective share
promulgated in the 1990 UPC is intended to bring elective-share law into
line with the partnership theory of marriage.

To illustrate the discrepancy between the partnership theory and
conventional elective-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 conventional elective-share fraction of one-
third of the decedent's estate plainly does not implement a partnership
principle. The actual result is governed by which spouse happens to die
first and by 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 sixty-two. For whatever reason, Ben left
a will entirely disinheriting Elaine. Throughout their long life together, the
couple managed to accumulate assets worth $600,000, making them a
somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, Elaine's ultimate entitlement is
governed by 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 suggests. The reason is that under conventional
elective-share law, Elaine has a claim to one-third of Ben's "estate."

When the marital assets were disproportionately titled in the dece-
dent's name, conventional elective-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 is only for $200,000, well below
Elaine's $300,000 entitlement produced by the partnership principle. If
Ben "owned" $500,000 of the marital assets, Elaine's claim against Ben's
estate is only 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, a figure still below the $300,000 produced by the partnership or
marital-sharing principle.

When, on the other hand, the marital assets were more or less equally
divided, conventional elective-share law grants the survivor a right to take

47. Nor does a less conventional elective-share fraction of one-half, as is in effect in a small
decedent's assets whenever and however acquired is not the equivalent of a true or
hypothesized one-half share of the couple's assets acquired during the marriage other than by
gift or inheritance.
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 were disproportionately titled in the survivor’s name, conventional elective-share law entitles the survivor to magnify the disproportion. If only $200,000 were titled in Ben’s name, Elaine still has a claim against Ben’s estate for $66,667 (one-third of $200,000), even though Elaine is already overcompensated as measured by the partnership or marital-sharing theory.

Let us now look at a very different sort of marriage—a short-term marriage, particularly the short-term marriage later in life, in which 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 us 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-late sixties when they married. Then suppose that after a few years of marriage, Elaine died survived by Carl. Assume further that both Elaine and Carl have adult children and a few grandchildren by their respective prior marriages, and that each naturally would prefer to leave most or all of his or her property to those respective biological children. So, let us work through the numbers. The value of the couple’s combined assets is $600,000, $300,000 of which is titled in Elaine’s name and $300,000 of which is titled in Carl’s name.

Under conventional elective-share law, Carl has a claim to one-third of Elaine’s estate, or $100,000. For reasons that are not immediately apparent, conventional elective-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, while supplementing Carl’s assets, which will likely go to Carl’s children by his prior marriage, by $100,000. Conventional elective-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—the one who managed to survive—gains a windfall, for this person is unlikely to have made a contribution, monetary or otherwise, to the “loser’s” wealth remotely worth one-third.

How prevalent is 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.48

48. 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. Dept of Health & Human Services, supra note 3, at 12. The average (mean) ages at time of remarriage of widowed men and women has increased steadily, to 60.2 for men and 52.6 for women in 1988, the latest year for which
Equally relevant to the point, when such marriages occur, conventional elective-share law renders results that are dramatically inconsistent with the partnership theory of marriage. That the children of the decedent's former marriage see these results as unjust is both unsurprising and well documented in the elective-share case law.\textsuperscript{49} Recognize, then, that in a short-term, late-in-life marriage which produces no children, a decédent 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 perceived higher obligation to the children of his or her former, long-term marriage.

The redesigned elective-share system incorporated in the 1990 UPC responds to these concerns by moving elective-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. Put differently, the effect is both to reward the surviving spouse who sacrificed his or her financial-earning opportunities in order to

\textsuperscript{49} See W. MacDonald, Fraud on the Widow's Share 156-57 (Michigan Legal Studies 1960). Of the elective-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, and 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. Dept of Health & Human Serv., supra note 3, at 3.
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, 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 partnership theory denies a windfall to the survivor who contributed little to the decedent's wealth and, ultimately, denies a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. In hardship cases, however, the surviving spouse receives a special supplemental elective-share amount when he or she would otherwise be left without sufficient funds for support. 50

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 UPC 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.

2. An Equitable-Distribution Elective Share?

Modeling the elective share on divorce law appeared to the UPC drafters to be quite unsatisfactory. The strongest argument for extending divorce law to disinherance at death is that of parallelism. Disinheritance of a spouse at death resembles divorce, the argument goes, because the marriage has failed and terminated. 51 There are several objections to this analogy. One is that disinherance 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 has a higher obligation to his or her biological 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 an elective 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 striving to achieve 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

50. The supplemental elective-share feature, established by section 2-201(b), is discussed infra text accompanying notes 81-83.

equitable-distribution system; there are several.52 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:53 (1) the “kitchen sink” system, in which all property of the two spouses, regardless of how or when acquired, is subject to division;54 (2) the “marital property” system, which excludes “separate” or “individual” property—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 must be identical. The logic of a uniform laws project dealing with probate law is that each state will adopt the same elective-share system, particularly in order to prevent a spouse bent on disinheritance from domicile shopping by relocating property to a state with fewer safeguards against this sort of behavior.

Quite apart from concerns about the difficulty of implementing parity between elective-share law and equitable-distribution law, the discretionary aspect of equitable-distribution law makes it inappropriate for an elective-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,—and other subjective criteria.56 When death terminates the marriage, only the surviving spouse

52. The various schemes are canvassed, state-by-state, in L. Golden, Equitable Distribution of Property §§ 2.01-2.03 (1983) (discussing the dual property system, the all property system, and the special equity system); J. Gregory, The Law of Equitable Distribution A1-A81 (1989) (excerpting relevant statutes from all 50 states); G. McLellan, Equitable Distribution Law and Practice §§ 6.1-.12 (1988) (discussing no statute jurisdiction, community property jurisdiction, all property jurisdiction, and excluded property jurisdictions); J. Oldham, Divorce, Separation and the Distribution of Property (1989).

53. J. Oldham, supra note 52, at § 3.03; see also McKnight, Defining Property Subject to Division at Divorce, 23 Fam. L.Q. 193 (1989) (discussing the process each state uses in equitable division of property).

54. But see J. Oldham, supra note 52, at § 13.02(1)(j) (noting judicial reluctance to divide property acquired before the marriage or during the marriage by gift or inheritance “unless the circumstances warrant”).

55. See J. Gregory, supra note 52, at para. 9.03. In Brown v. Brown, 704 S.W.2d 528, 529 (Tex. Ct. App. 1986), for example, fault was shown by, among other things, evidence that the wife “talked to [the husband] like he was dirt, hurt his feelings, made him nervous.”

56. The factors are discussed in J. Gregory, supra note 52, at ch. 8; J. Oldham, supra note 52, at § 13.02-.03. Professor McKnight reports that “[a]s many as thirty-eight factors have
can testify as to certain types or instances of misconduct or fault, making consideration of 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,\textsuperscript{57} equitable distribution is in truth "discretionary distribution."\textsuperscript{58} The following analysis of Professors Kwestel and Seplowitz sums up many of the reasons for not carrying equitable-distribution law into the elective share:

\[\text{[A]n equitable distribution model, which entails a case-by-case determination based upon . . . subjective criteria, is not appropriate in the elective share area, which has traditionally involved different concerns and in which predictability and ease of administration are important goals. Furthermore, use of an equitable distribution model would significantly impede the development of a comprehensive estate plan and, more importantly, would probably provide no greater protection for the surviving spouse . . . .} \]

\[\text{\textsuperscript{59}}\]

been identified that may be considered in equitable distribution [citing Note, 50 Fordham L. Rev. 415, 439 n.170 (1981)]." McKnight, supra note 53, at 197 n.14.

\textsuperscript{57}. One commentator describes 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.


The discretionary characteristic of equitable-distribution 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, Halsbury's Stat. ch. 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. at §§ 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).


3. A Deferred Community-Property Elective Share?

The other model from existing law that might have been used to 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, other than a gift or inheritance, as it is acquired during the marriage. There are two possible approaches for injecting community-property 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.60 One approach, which I call 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.61 The other approach, which I call the elective-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.62

The elective-share deferred-community approach is considerably more promising as a model for implementing the partnership or marital-sharing theory than equitable-distribution law.63 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,64 but the mechanical community-property fifty-fifty split is used at

60. See Oldham, Should the Surviving Spouse’s Forced Share Be Retained?, 38 Case W. Res. 223, 245-47 (1987) (without discussing the strict deferred-community approach, author seems to accept the elective-share deferred-community approach).
61. 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 problems of "migratory" married couples; it treats property acquired elsewhere that would have been characterized as community property under the community regime as quasi-community property. 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).
63. As between the strict and elective-share deferred-community approaches, the strict approach is more consistent with the marital-sharing theory, but the elective-share approach is more consistent with the notion of an elective share in the common-law states. See infra note 76.
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. The argument for a mechanical as opposed to a discretionary formula for determining contribution was recently stated in these terms:

[Elective-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 [an elective]-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 elective-share system over [a discretionary] system.

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. No one would propose an elective share based on a deferred-until-death community-property model for adoption in the community-property states; lack of parity would therefore not be a difficulty. If a deferred community-property elective-share were to be proposed, it would be for adoption in the 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.


65. Stated in terms of the marital-sharing or partnership theory, the analysis is that the couple's implied bargain upon entering marriage is one of equal splitting of the proceeds of the marriage, unless the couple opts out of the implied bargain by entering into a premarital or postmarital agreement.


67. 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 Fam. L.Q. 301 (1989).
If lack of parity is not a problem, why then did the UPC drafters not adopt a deferred-community elective share? The perceived drawback was the tracing-to-source and other problems associated with classification. A deferred-community elective share would require identifying which of the couple’s assets were acquired during the marriage and which assets were brought in at the time of the marriage or acquired during the marriage by gift or inheritance. The classification problem is arguably more difficult in noncommunity-property states than in community-property states because couples in the former are not put on notice as to the risk involved in not maintaining good records. The problem is commingling.

To be sure, the administrative burden could be eased by adopting a presumption that all spousal property is community property. Such a 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. Thus, what appears to be an exact method may not in fact give exact results.

4. The Method Adopted: An Accrual-Type Elective-Share System

To avoid the classification conundrum, which can plunge the parties and trier of the facts into a tracing-to-source pursuit, the UPC drafters decided to implement the marital-partnership theory by means of a mechanically determined approximation system, which the drafters call an accrual-type elective share. Under the accrual-type elective 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 UPC’s accrual-type elective share, which, on the unanimous recommendation of its Executive Board, has been endorsed by the Assem-

68. For a discussion of tracing-to-source and associated classification problems in equitable-distribution law, see Oldham, supra note 45; Kessler, Transmutation, Wisconsin Lawyer 13 (Aug. 1990); Popp v. Popp, 146 Wis. 2d 778, 432 N.W.2d 600 (Wis. Ct. App. 1988).

69. See M. Glendon, supra note 27, 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 Popp 146 Wis. 2d at 778, 432 N.W.2d at 600; Oldham, supra note 45; Kessler, supra note 68.

Jane Bryant Quinn, the columnist, has written that married couples divide into two categories—“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, at 18.

70. See Levy, An Introduction to Divorce-Property Issues, 23 Fam. 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).

71. For a proposal that divorce law utilize an accrual-type system for division of assets, see Sugarman, Dividing the Financial Interests on Divorce, in Divorce Reform at the Crossroads 130, 159-60 (S. Sugarman & H. Kay eds. 1990).
bly of the National Association of Women Lawyers (NAWL),\(^7\) has three essential features. The first, implemented by section 2-201(a), establishes a schedule under which the elective share adjusts to the length of the marriage. The longer the marriage, the larger the "elective-share percentage." The "elective-share percentage" is initially small and increases annually according to a graduated schedule until reaching a maximum rate of fifty percent. Specifically, the schedule starts by providing the surviving spouse, during the first year of marriage, a right to elect the "supplemental elective-share amount" only. After five years of marriage, the surviving spouse's "elective-share percentage" is fifteen percent of the augmented estate; after ten years of marriage, the share is thirty percent; and after fifteen years of marriage, the share reaches the maximum level of fifty percent.\(^7\)

The second feature of the UPC's redesigned system is that the "elective-share percentage" is applied to the value of the "augmented estate," as defined in section 2-202(a). The augmented estate includes the couple's combined assets, not merely the value of the assets nominally titled in the decedent's name. The application of the "elective-share percentage" to the "augmented estate" yields the "elective-share amount"—the amount to which the surviving spouse is entitled. Inclusion in the "augmented estate" of the couple's combined assets is absolutely essential for the system 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 because of the manner that 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 UPC's redesigned elective-share system denies any significance to the possibly fortuitous factor of how the spouses have taken title to particular assets.

The third feature implemented by section 2-207 is that the surviving spouse's own assets are counted first\(^7\) when determining the spouse's ultimate entitlement, so that the decedent's assets are liable only to make up

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\(^7\) Letter from the President of NAWL, Gail McKnight Beckman, to the author (August 14, 1990). It has also been endorsed by the West Virginia Law Institute for enactment in West Virginia. See Fisher & Curnette, Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems, 93 W.Va. L. Rev. 61, 65 (1990).

\(^7\) For an explanation of the supplemental elective-share amount established by §2-201(b), see infra text accompanying notes 81-83.

\(^7\) 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%, or will endure for a period not substantially less than 15 years, giving the surviving spouse the right to a near-50% elective-share percentage. As reported supra at note 48, 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 at birth is 72 years for men and 78.8 years for women, U.S. Dept of Commerce, Statistical Abstract of the United States—1990, at Table No. 106 at 74 (110th ed. 1990), remarriages that take place at ages 60.2 and 52.6, respectively, easily can endure for the required 15-year period in order to reach the maximum 50% elective-share percentage.

\(^7\) Or a portion of them in under-fifteen-year marriages, as explained infra note 79.
the deficiency, if any. To illustrate these three features, we will examine the cases of Ben and Elaine and Elaine and Carl.

Remember that Ben and Elaine were married a long time, well beyond the fifteen-year mark, and that Ben died at age seventy, survived by Elaine. Remember also that, for whatever reason, Ben left a will entirely disinheriting Elaine. And, remember that the value of the couple's combined assets was $600,000.

Under the redesigned elective share, the survivor's entitlement in a marriage of this length would have reached the fifty percent mark well before Ben's death. Unlike previous elective-share statutes, the UPC's 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 "belongs" to the surviving spouse, Elaine, if she chooses to claim that amount by making an election.

Of course, in calculating the amount of Elaine's claim on Ben's estate, it does matter how the $600,000 in assets was nominally titled between them. When the marital assets were disproportionately titled in the decedent's name, the UPC's redesigned elective-share system gives the survivor a right to equalize them. If Ben "owned" all $600,000 of the marital assets, 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 of assets up to the $300,000 level.

When title to marital assets was already nearly equally divided, the UPC's 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. Elaine's title-based ownership rights would already have sufficiently rewarded her, as measured by the partnership or 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 disparity. If Ben "owned" $200,000 and Elaine "owned" $400,000, Elaine would have no additional claim against Ben's estate.

76. 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, § 2-207(a)(1) provides that these assets count first toward making up Elaine's elective-share entitlement.

77. Note that under the UPC'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. See UPC § 2-202(b)(2) (1990).

78. 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. Under the redesigned system, as noted in the text, Elaine has no claim against Ben's estate because she already has
Now, let us 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 about five years of marriage 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 elective-share law gives the surviving spouse the power to siphon off a share of the decedent's estate without justification under the marital-sharing principle. Let us now see how Carl and ultimately his children by his prior marriage fare under the UPC's 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 and $300,000 was titled in Carl's name. Because the marriage lasted about five years, the elective-share percentage is fifteen percent.

Although Carl's elective-share entitlement is $90,000 (fifteen 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 been disproportionately compensated as judged by the marital-sharing principle. This is in contrast to conventional elective-share law, under which Elaine could magnify the disproportion

One might argue that the redesigned system ought to have given Ben's estate a claim against Elaine's property. But giving his estate such a claim is inconsistent with the notion of an elective-share system. Noncommunity-property states have traditionally viewed the elective share as an entitlement for the personal benefit of the surviving spouse, not for the benefit of the beneficiaries of a decedent spouse's estate. For this reason, the UPC's redesigned elective-share system does not recognize the partnership or marital-sharing interest of the decedent spouse. Also for this reason, in cases of simultaneous or near-simultaneous deaths, the Uniform Simultaneous Death Act and the UPC's version of that Act, which requires survivorship of the decedent by 120 hours, do not invoke a partnership theory, but rather provide for the disposition of each spouse's property to that spouse's beneficiaries. See UPC § 2-104 (1993) (too subsidiary to include in appendix).

The community-property system does protect the decedent's interest as well as the survivor's interest, and in this respect the redesigned elective share differs from the community-property system. A similar mutuality in noncommunity elective-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 to 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 are 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 owes a fiduciary duty to the beneficiaries of the spouse's estate, the election would become virtually automatic when not waived by a well-drafted instrument. This contrasts with the present situation in which the elective share is actually exercised only rarely, in cases of deliberate disinheritance of the survivor. The other way of handling the situation is to authorize the decedent spouse's personal representative to make an election only if the spouse's will or some other legal document authorizes the election. The second approach is less objectionable than the first because it would reduce the number of elections. But even this approach would necessitate extension of the cumbersome elective-share apparatus, not only to cases in which the less wealthy spouse predeceases the other by a clear or substantial margin, but also to cases of simultaneous and near-simultaneous deaths. More importantly, this approach does not square with the traditional notion that the elective share is for the personal benefit of the surviving spouse. Thus, the redesigned system leaves the parties where they are in this situation, providing neither with a claim against the other's assets.

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elective-share percentage of fifteen percent) counts in fulfillment of Carl's elective-share amount. 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.

5. Other Elective Share Features

a. The Support Theory

The partnership or marital-sharing theory is not the only force driving elective-share law. Another theoretical basis for elective-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. Conventional elective-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

79. Under § 2-207(a)(4) of 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%, which means that 30% 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 UPC's 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%) 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% of the couple's marital assets—assets subject to equalization under the 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%, the redesigned system equates 15% of the couple's combined assets with 50% of those assets that were acquired during the marriage other than by gift or inheritance. In the aggregate, the system counts 30% ($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% means that the combined assets are treated as being in a 30/70 ratio (30% marital, subject to equalization; 70% 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% of Elaine's $300,000 ($90,000) to marital property and the other 70% ($210,000) to individual property. And, the system does the same for Carl's $300,000, i.e., it treats 30% ($90,000) as marital property and 70% ($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% share of the marital-property component of their combined assets.

80. Note, however, that although in this last example the redesigned system gave Carl no claim against Elaine's assets, there is an additional safeguard built into the system. As explained next, the redesigned system has another prong—the support-theory prong. 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 in addition to the claim for $43,000 in probate exemptions and allowances. These rights apply regardless of the length of the marriage.
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 elective-share law.

The UPC's redesigned elective-share system 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.

Section 2-201(b) of the revised UPC implements the support theory by providing a supplemental elective-share amount of $50,000.82 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. Under section 2-207(b) and (c), 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 one-hundred percent of it, to bring the survivor's assets up to the minimum level. In the case of a late marriage, the minimum figure plus the probate exemptions and allowances, which under the Code amount to a minimum of another $43,000, in conjunction with Social Security payments, which in 1990 could reach $975 a month for a retired worker or for a nondisabled widow or widower of a retired worker, and other governmental benefits, provide the survivor with a fairly adequate means of support.

This support feature responds to an objection to the marital-partnership theory as applied to divorce law, which is that it sometimes leaves certain categories of divorced woman without sufficient funds for support. See L. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America ch. 7 (1985); Rhode & Minow, Reforming the Questions, Questioning the Reforms, in Divorce Reform at the Crossroads 191, 201-04 (S. Sugarman & H. Kay eds. 1990); Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 Tex. L. Rev. 689 (1990). For criticism of the Weitzman study, see Sugarman, supra note 71, at 130.

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.

If the surviving spouse is incapacitated, § 2-203(b) of the revised UPC sets forth 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 elective-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 State v. Jakubowski, 16 Conn. L. Trib. (No. 30, July 30, 1990) p. 31 (Conn. Super. Ct., June 13, 1990) (holding that state assistance agency had right to appeal probate decree of distribution when surviving spouse's conservator failed to elect to take statutory share on her behalf); Estate of
In short, no matter how brief or extended, happy or unhappy a 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.

b. Augmented-Estate Concept

I do not 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, such as revocable inter vivos trusts. To render that type of behavior ineffective, the pre-1990 UPC picked up New York 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.\(^\text{84}\)

In the redesign of the elective share, the revised UPC strengthens the augmented-estate concept. Students of the pre-1990 UPC (and of the New York and Pennsylvania 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 the beneficiary before receiving notice of an elective-share claim,\(^\text{85}\) the redesigned elective-share closes that loophole, as well as the others.\(^\text{86}\)

D. Section 2-301: Spouse's Protection in the Case of a Premarital Will

The elective-share apparatus is not the only protection the UPC provides a disinherited surviving spouse. There is another provision that might come into play, a provision unique to the UPC. This is section 2-301, the omitted-spouse provision. Its purpose is to protect the surviving spouse against unintentional disinherance.

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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 David L. Hemond, Chief Attorney of the Connecticut Law Revision Commission, for bringing the Jakubowski case to his attention and Professor Mary Moers Wenig for bringing the Schoolnik case to his attention.

84. If an elective-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. An elective share that applies only to the decedent's probate assets is like 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 (1984) or Newman v. Dore, 275 N.Y. 371, 9 N.E.3d 966 (1997).


Nearly all states and the UPC 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. 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. The UPC'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 probably would have wanted to give, had the decedent gotten around to revising the premarital will.

Under the omitted-spouse provision of the pre-1990 UPC, a surviving spouse disinherited by a premarital will was given a right to an intestate share. The provision was 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, it probably was thought to operate principally with respect to a first marriage. With the remarriage phenomenon on the increase, and with the revisions dramatically increasing the intestate share of the surviving spouse, the UPC drafters paid additional attention to the omitted-spouse provision.

A particular concern was the impact of this provision on the elective share discussed in the last example. In that example, we began with Ben and Elaine having lived a long married life to each other, a marriage that produced children. Then, after Ben died, Elaine married Carl. It would not be exceptional if, during their marriage, Ben and Elaine 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 the situation, Elaine would succeed to Ben's entire estate upon his death; Elaine would have had no reason to claim an elective share. It also would not be exceptional if, after Ben's death, Elaine never executed another will, even after marrying Carl. Acting without the advice of competent legal counsel, 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.

This is the type of late-in-life marriage in which Elaine's instincts would be to continue providing for her children from her first marriage. For this type of late-in-life marriage, the UPC's redesigned elective share grants Carl either no claim or a very modest claim against Elaine's estate. However, if Carl could use the omitted-spouse provision instead of the

37. The earlier approach to the problem took the form of the common-law doctrines, sometimes codified, revoking a person's will if the person later married. As elective-share statutes came to replace dower and curtesy, the elective share was thought to provide sufficient protection in the situation of a premarital will.
elective-share apparatus to take a much bigger portion, he could defeat the
purpose of redesigning the elective share. Unless Elaine and Carl entered
into a premarital agreement, Carl would be able to use the pre-1990 UPC
omitted-spouse provision to accomplish this.

The 1990 revisions solve this problem. The amended omitted-spouse
provision provides the spouse who is omitted from a premarital will to an
intestate share only in that portion of the decedent's estate which is neither
devised to the decedent's children by a prior marriage nor devised to their
descendants. In our example, Carl would receive nothing under the
omitted-spouse provision, and would be remitted to the marital-sharing
principle implemented by the redesigned elective-share apparatus.

But the omitted-spouse provision still can play a useful role. In the
case of a first marriage, in which the decedent spouse executes a premarital
will to benefit his or her parents or siblings, the omitted spouse provision
confers the full intestate share upon the omitted spouse. This provision is
not restricted to first marriages, but applies to all marriages. To the extent
that any premarital will favors persons other than the children of a prior
marriage, the surviving spouse is entitled to a full intestate share. That
share very well might be the entire estate and, consequently, might
properly give the spouse much more than he or she would be entitled to
under the elective-share apparatus.

III. CONCLUSION

The current trend toward multiple marriages is apparently unremit-
ting. Probate laws must respond intelligently to these changes and others
that are sure to follow. The current probate laws, including those in the
pre-1990 UPC, are ill-suited to the present times. The drafters of the UPC
believe that the statutory provisions discussed in this Article are a step in the
right direction.

As with any uniform laws project, the final package reflects a multi-
tude of policy choices upon which reasonable minds can differ. Arguments
for making a different choice here and a different choice there can be
made. The most that any uniform laws project can hope to achieve is
well-crafted legislation that reasonably balances competing interests. No
process, not even one as open and broadly participatory as that of
NCCUSL, can produce legislation upon which all persons completely
agree.

The revised UPC is therefore not presented as the "right" answer,
accompanied by a claim that all other possible answers are "wrong." Rather,
it is presented as a reasonable package, one that is well thought-out and
whose individual parts add up to a coherent whole. As such, the UPC
drafters and their sponsoring organization, NCCUSL, believe their revi-

88. The actual terms of § 2-301 do not speak of children by a prior marriage, but speak
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."
sions are a suitable response to the multiple-marriage society and are destined to be the model for American law deep into the next century.
APPENDIX

STATUTORY PROVISIONS OF THE 1990 UNIFORM PROBATE CODE PERTAINING TO THE MULTIPLE-MARRIAGE SOCIETY

SPOUSE’S SHARE IN INTESTATE SUCESSION

SECTION 2-102. SHARE OF SPOUSE. The intestate share of a decedent’s surviving spouse is:

1. the entire intestate estate if:
   (i) no descendant or parent of the decedent survives the decedent; or
   (ii) all of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
2. the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;
3. the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;
4. the first [$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.

REDESIGNED ELECTIVE SHARE

SECTION 2-201. ELECTIVE SHARE.
(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

<table>
<thead>
<tr>
<th>If the decedent and the spouse were married to each other:</th>
<th>The elective-share percentage is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year ........................................</td>
<td>Supplemental Amount Only.</td>
</tr>
<tr>
<td>1 year but less than 2 years ................................</td>
<td>3% of the augmented estate.</td>
</tr>
<tr>
<td>2 years but less than 3 years ............................</td>
<td>6% of the augmented estate.</td>
</tr>
<tr>
<td>3 years but less than 4 years ............................</td>
<td>9% of the augmented estate.</td>
</tr>
<tr>
<td>4 years but less than 5 years ............................</td>
<td>12% of the augmented estate.</td>
</tr>
<tr>
<td>Time Period</td>
<td>Percentage of Augmented Estate</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>5 years but less than 6 years</td>
<td>15%</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>18%</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>21%</td>
</tr>
<tr>
<td>8 years but less than 9 years</td>
<td>24%</td>
</tr>
<tr>
<td>9 years but less than 10 years</td>
<td>27%</td>
</tr>
<tr>
<td>10 years but less than 11 years</td>
<td>30%</td>
</tr>
<tr>
<td>11 years but less than 12 years</td>
<td>34%</td>
</tr>
<tr>
<td>12 years but less than 13 years</td>
<td>38%</td>
</tr>
<tr>
<td>13 years but less than 14 years</td>
<td>42%</td>
</tr>
<tr>
<td>14 years but less than 15 years</td>
<td>46%</td>
</tr>
<tr>
<td>15 years or more</td>
<td>50%</td>
</tr>
</tbody>
</table>

(b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections 2-202(b)(3) and (4), 2-207(a)(1) and (3), and that part of the elective-share amount payable from the decedent's probate and reclaimable estates under Sections 2-207(b) and (c) is less than [$50,000], the surviving spouse is entitled to a supplemental elective-share amount equal to [$50,000], minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's reclaimable estate in the order of priority set forth in Sections 2-207(b) and (c).

(c) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

SECTION 2-202. AUGMENTED ESTATE.

(a) [Definitions.]

(i) “Bona fide purchaser” means a purchaser for value in good faith and without notice of an adverse claim. The notation of a state documentary fee on a recorded instrument pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

(ii) “Nonadverse party” means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he [or she] possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

(iii) “Presently exercisable general power of appointment” means a power of appointment under which, at the time in question, the decedent by an exercise of the power could have created an interest, present or future, in himself [or herself] or his [or her] creditors.
(iv) "Probate estate" means property, whether real or personal, movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.

(v) "Right to income" includes a right to payments under an annuity or similar contractual arrangement.

(vi) "Value of property owned by the surviving spouse at the decedent's death" and "value of property to which the surviving spouse succeeds by reason of the decedent's death" include the commuted value of any present or future interest then held by the surviving spouse and the commuted value of amounts payable to the surviving spouse after the decedent's death under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system.

(2) In subsections (b)(2)(iii) and (iv), "transfer" includes an exercise or release of a power of appointment, but does not include a lapse of a power of appointment.

(b) [Property Included in Augmented Estate.] The augmented estate consists of the sum of:

(1) the value of the decedent’s probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims;89

(2) the value of the decedent’s reclaimable estate, which is composed of all property, whether real or personal, movable or immovable, wherever situated, not included in the decedent's probate estate, of any of the following types:

(i) property to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent's surviving spouse, was subject to a presently exercisable general power of appointment held by the decedent alone, if the decedent held that power immediately before his [or her] death or if and to the extent the decedent, while married to his [or her] surviving spouse and during the two-year period next preceding the decedent's death, released that power or exercised that power in favor of any person other than the decedent or the decedent's estate, spouse, or surviving spouse;

(ii) property, to the extent of the decedent's unilaterally severable interest therein, held by the decedent and any other person, except the decedent's surviving spouse, with right of survivorship, if the decedent held that interest immediately before his [or her] death or if and to the extent the decedent, while

89. As defined in § 1-201, the term "claims" includes "liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate."
married to his [or her] surviving spouse and during the two-year period next preceding the decedent's death, transferred that interest to any person other than the decedent's surviving spouse;

(iii) proceeds of insurance, including accidental death benefits, on the life of the decedent payable to any person other than the decedent's surviving spouse, if the decedent owned the insurance policy, had the power to change the beneficiary of the insurance policy, or the insurance policy was subject to a presently exercisable general power of appointment held by the decedent alone immediately before his [or her] death or if and to the extent the decedent, while married to his [or her] surviving spouse and during the two-year period next preceding the decedent's death, transferred that policy to any person other than the decedent's surviving spouse; and

(iv) property transferred by the decedent to any person other than a bona fide purchaser at any time during the decedent's marriage to the surviving spouse, to or for the benefit of any person, other than the decedent's surviving spouse, if the transfer is of any of the following types:

(A) any transfer to the extent that the decedent retained at the time of or during the two-year period next preceding his [or her] death the possession or enjoyment of, or right to income from, the property;

(B) any transfer to the extent that, at the time of or during the two-year period next preceding the decedent's death, the income or principal was subject to a power, exercisable by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party, for the benefit of the decedent or the decedent's estate;

(C) any transfer of property, to the extent the decedent's contribution to it, as a percentage of the whole, was made within two years before the decedent's death, by which the property is held, at the time of or during the two-year period next preceding the decedent's death, by the decedent and another, other than the decedent's surviving spouse, with right of survivorship; or

(D) any transfer made to a donee within two years before the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed $10,000.00;

(3) the value of property to which the surviving spouse succeeds by reason of the decedent's death, other than by homestead allowance, exempt property, family allowance, testate succession, or intestate succession, including the proceeds of insurance, including accidental death benefits, on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of the federal Social Security system; and

(4) the value of property owned by the surviving spouse at
the decedent's death, reduced by enforceable claims against that property or that spouse, plus the value of amounts that would have been includable in the surviving spouse's reclaimable estate had the spouse predeceased the decedent. But amounts that would have been includable in the surviving spouse's reclaimable estate under subsection (b)(2)(iii) are not valued as if he [or she] were deceased.

(c) [Exclusions.] Any transfer or exercise or release of a power of appointment is excluded from the decedent's reclaimable estate (i) to the extent the decedent received adequate and full consideration in money or money's worth for the transfer, exercise, or release or (ii) if irrevocably made with the written consent or joinder of the surviving spouse.

(d) [Valuation.] Property is valued as of the decedent's death, but property irrevocably transferred during the two-year period next preceding the decedent's death which is included in the decedent's reclaimable estate under subsection (b)(2)(i), (ii), and (iv) is valued as of the time of the transfer. If the terms of more than one of the subparagraphs or sub-subparagraphs of subsection (b)(2) apply, the property is included in the augmented estate under the subparagraph or sub-subparagraph that yields the highest value. For the purposes of this subsection, an "irrevocable transfer of property" includes an irrevocable exercise or release of a power of appointment.

(e) [Protection of Payors and Other Third Parties.]

(1) Although under this section a payment, item of property, or other benefit is included in the decedent's reclaimable estate, a payor\(^\text{90}\) or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument,\(^\text{91}\) or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written

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90. As defined in § 1-201, the term "payor" means "a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments."

91. As defined in § 1-201, the term "beneficiary designated in a governing instrument" includes a "grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, or a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised" and the term "governing instrument" means a "deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a donative, appointive, or nominative instrument of any other type."
(2) The written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under Section 2-205(d), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under Section 2-205(a) or, if filed, the demand for an elective share is withdrawn under Section 2-205(c), the court shall order disbursement to the designated beneficiary. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

(3) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(f) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property from a recipient for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this Part to return the payment, item of property, or benefit nor is liable under this Part for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit included in the decedent's reclaimable estate is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, as provided in Section 2-207.

(2) If any section or part of any section of this Part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's reclaimable estate, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return that
payment, item of property, or benefit, or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in Section 2-207, to the person who would have been entitled to it were that section or part of that section not preempted.

SECTION 2-203. RIGHT OF ELECTION PERSONAL TO SURVIVING SPOUSE.

(a) [Surviving Spouse Must Be Living at Time of Election.] The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under Section 2-205(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his [or her] conservator, guardian, or agent under the authority of a power of attorney.

(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's reclaimable estate under Sections 2-207(b) and (c) must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. For purposes of the custodial trust established by this subsection, (i) the electing guardian, conservator, or agent is the custodial trustee, (ii) the surviving spouse is the beneficiary, (iii) the custodial trust is deemed to have been created by the decedent spouse by written transfer that takes effect at the decedent spouse's death and that directs the custodial trustee to administer the custodial trust as for an incapacitated beneficiary.

(c) [Custodial Trust.] For the purposes of subsection (b), the [Enacting state] Uniform Custodial Trust Act must be applied as if Section 6(b) thereof were repealed and Sections 2(e), 9(b), and 17(a) were amended to read as follows:

(1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously termi-

92. As defined in § 5-103, the term "incapacitated person" means "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions." A recommendation is pending to delete "advanced age" from this definition.
nated, the custodial trust terminates on the death of the benefici-

(2) If the beneficiary is incapacitated, the custodial trustee
shall expend so much or all of the custodial trust property as the
custodial trustee considers advisable for the use and benefit of the
beneficiary and individuals who were supported by the benefici-
ary when the beneficiary became incapacitated, or who are
legally entitled to support by the beneficiary. Expenditures may
be made in the manner, when, and to the extent that the custodial
trustee determines suitable and proper, without court order but
with regard to other support, income, and property of the
beneficiary [exclusive of] [and] benefits of medical or other forms
of assistance from any state or federal government or governmen-
tal agency for which the beneficiary must qualify on the basis of
need.

(3) Upon the beneficiary’s death, the remaining custodial
trust property, in the following order: (i) under the residuary
clause, if any, of the will of the beneficiary’s predeceased spouse
against whom the elective share was taken, as if that predeceased
spouse died immediately after the beneficiary; or (ii) to that
predeceased spouse’s heirs under Section 2-711 of [this State’s]
Uniform Probate Code.

[STATES THAT HAVE NOT ADOPTED THE UNIFORM
CUSTODIAL TRUST ACT SHOULD ADOPT THE FOLLOW-
ING ALTERNATIVE SUBSECTION (B) AND NOT ADOPT
SUBSECTION (B) OR (C) ABOVE].

[(b) [Incapacitated Surviving Spouse.] If the election is exer-
cised on behalf of a surviving spouse who is an incapacitated
person, the court must set aside that portion of the elective-share
and supplemental elective-share amounts due from the dece-
dent’s probate estate and recipients of the decedent’s reclaimable
estate under Section 2-207(b) and (c) and must appoint a trustee
to administer that property for the support of the surviving
spouse. For the purposes of this subsection, an election on behalf
of a surviving spouse by an agent under a durable power of
attorney is presumed to be on behalf of a surviving spouse who is
an incapacitated person. The trustee must administer the trust in
accordance with the following terms and such additional terms as
the court determines appropriate:

(1) Expenditures of income and principal may be made in
the manner, when, and to the extent that the trustee determines
suitable and proper for the surviving spouse’s support, without
court order but with regard to other support, income, and
property of the surviving spouse [exclusive of] [and] benefits of
medical or other forms of assistance from any state or federal
government or governmental agency for which the surviving
spouse must qualify on the basis of need.
(2) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.

(3) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or (ii) to that predeceased spouse's heirs under Section 2-711.

SECTION 2-204. WAIVER OF RIGHT TO ELECT AND OF OTHER RIGHTS.

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) he [or she] did not execute the waiver voluntarily; or
(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he [or she]:
   (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
   (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and
   (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him [or her] from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.
SECTION 2-205. PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT.

(a) Except as provided in subsection (b), the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse must give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's reclaimable estate, described in Section 2-202(b)(2), is not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's reclaimable estate, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's reclaimable estate, described in Section 2-202(b)(2), is not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse may withdraw his [or her] demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he [or she] would have been under Section 2-207 had relief been secured against all persons subject to contribution.

(e) An order or judgment of the court may be enforced as
necessary in suit for contribution or payment in other courts of
this State or other jurisdictions.

SECTION 2-206. EFFECT OF ELECTION ON STATUTORY BEN-
EFITS. If the right of election is exercised by or on behalf of the surviving
spouse, the surviving spouse's homestead allowance, exempt property, and
family allowance, if any, are not charged against but are in addition to the
elective-share and supplemental elective-share amounts.

SECTION 2-207. CHARGING SPOUSE WITH OWNED ASSETS
AND GIFTS RECEIVED; LIABILITY OF OTHERS FOR BALANCE OF
ELECTIVE SHARE.

(a) [Elective-Share Amount Only.] In a proceeding for an
elective share, the following are applied first to satisfy the elective-
share amount and to reduce or eliminate any contributions due
from the decedent's probate estate and recipients of the dece-
dent's reclaimable estate:

(1) amounts included in the augmented estate which pass or
have passed to the surviving spouse by testate or intestate succe-
sion;

(2) amounts included in the augmented estate under Sec-
tion 2-202(b)(3);

(3) amounts included in the augmented estate which would
have passed to the spouse but were disclaimed; and

(4) amounts included in the augmented estate under Sec-
tion 2-202(b)(4) up to the applicable percentage thereof. For the
purposes of this subsection, the "applicable percentage" is twice
the elective-share percentage set forth in the schedule in Section
2-201(a) appropriate to the length of time the spouse and the
decedent were married to each other.

(b) [Unsatisfied Balance of Elective-Share Amount; Supple-
mental Elective-Share Amount.] If, after the application of
subsection (a), the elective-share amount is not fully satisfied or
the surviving spouse is entitled to a supplemental elective-share
amount, amounts included in the decedent's probate estate and
that portion of the decedent's reclaimable estate other than
amounts irrevocably transferred within two years before the
decedent's death are applied first to satisfy the unsatisfied balance
of the elective-share amount or the supplemental elective-share
amount. The decedent's probate estate and that portion of the
decedent's reclaimable estate are so applied that liability for the
unsatisfied balance of the elective-share amount or for the sup-
plemental elective-share amount is equitably apportioned among
the recipients of the decedent's probate estate and that portion of
the decedent's reclaimable estate in proportion to the value of
their interests therein.

(c) [Unsatisfied Balance of Elective-Share and Supplemental
Elective-Share Amounts.] If, after the application of subsections
(a) and (b), the elective-share or supplemental elective-share
amount is not fully satisfied, the remaining portion of the
decedent's reclaimable estate is so applied that liability for the
unsatisfied balance of the elective-share or supplemental elective-
share amount is equitably apportioned among the recipients of
that portion of the decedent's reclaimable estate in proportion to
the value of their interests therein.

(d) [Liability of Recipients of Reclaimable Estate and Their
Donees.] Only original recipients of the reclaimable estate de-
scribed in Section 2-202(b)(2), and the donees of the recipients of
the reclaimable estate to the extent the donees have the property
or its proceeds, are liable to make a proportional contribution
toward satisfaction of the surviving spouse's elective-share or
supplemental elective-share amount. A person liable to make
contribution may choose to give up the proportional part of the
reclaimable estate or to pay the value of the amount for which he
[or she] is liable.

SPOUSE'S PROTECTION IN THE CASE OF A PREMARITAL WILL

SECTION 2-301. ENTITLEMENT OF SPOUSE; PREMARITAL
WILL.

(a) If a testator's surviving spouse married the testator after
the testator executed his [or her] will, the surviving spouse is
entitled to receive, as an intestate share, no less than the value of
the share of the estate he [or she] would have received if the
testator had died intestate as to that portion of the testator's estate,
if any, that neither is devised to 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 nor is devised or passes under
Sections 2-603 or 2-604 to a descendant of such a child, unless:

(1) it appears from the will or other evidence that the will
was made in contemplation of the testator's marriage to the
surviving spouse;

(2) the will expresses the intention that it is to be effective
notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse by transfer outside
the will and the intent that the transfer be in lieu of a testamentary
provision is shown by the testator's statements or is reasonably
inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises
made by the will to the testator's surviving spouse, if any, are
applied first, and other devises, other than a devise to a child of
the testator who was born before the testator married the surviv-
ing spouse and who is not a child of the surviving spouse or a
devise or substitute gift under Sections 2-603 or 2-604 to a
descendant of such a child, abate as provided in Section 3-902.

93. Sections 2-603 and 2-604 are the UPC's antilapse statutes.
SECTION 2-804. REVOCATION OF PROBATE AND NONPROBATE TRANSFERS BY DIVORCE; NO REVOCATION BY OTHER CHANGES OF CIRCUMSTANCES.

(a) [Definitions.] In this section:

(1) “Disposition or appointment of property” includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument. 94

(2) “Divorce or annulment” means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of Section 2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

(3) “Divorced individual” includes an individual whose marriage has been annulled.

(4) “Governing instrument” refers to a governing instrument 95 executed by the divorced individual before the divorce or annulment of his [or her] marriage to his [or her] former spouse.

(5) “Relative of the divorced individual's former spouse” means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(6) “Revocable,” with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his [or her] former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself [or herself] in place of his [or her] former spouse or in place of his [or her] former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

(b) [Revocation Upon Divorce.] Except as provided by the express terms of a 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, the divorce or annulment of a marriage:

(1) revokes any revocable (i) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appoint-
ment created by law or in a governing instrument to a relative of the divorced individual's former spouse, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse, and (iii) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) severs 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 [or community property with the right of survivorship], transforming the interests of the former spouses into tenancies in common.

c) [Effect of Severance.] A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

d) [Effect of Revocation.] Provisions of a governing instrument that are not revoked by this section are given effect as if the former spouse and relatives of the former spouse disclaimed the revoked provisions or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

e) [Revival if Divorce Nullified.] Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

f) [No Revocation for Other Change of Circumstances.] No change of circumstances other than as described in this section and in Section 2-803 effects a revocation.

96. As defined in § 1-201, the terms "joint tenants with the right of survivorship" and "community property with the right of survivorship" include co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but exclude forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

97. Under the UPC's disclaimer provision, § 2-801, a disclaimant, generally speaking, is treated as if he or she predeceased the decedent in the case of a transfer under a testamentary instrument and predeceased the effective date of the instrument or contract in the case of a transfer under a nontestamentary instrument or contract.
(g) [Protection of Payors and Other Third Parties.]

(1) A payor98 or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

(2) Written notice of the divorce, annulment, or remarriage under subsection (g)(2) must be mailed to the payor’s or other third party’s main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent’s estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents’ estates located in the county of the decedent’s residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(h) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property from a former spouse, relative of a former spouse, or any other person for value and without notice, or who receives from a former spouse, relative of a former spouse, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

98. See supra note 90 for the definition of the term “payor.”
(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, relative of the former spouse, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.