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SPOUSAL RIGHTS IN OUR MULTIPLE-MARRIAGE SOCIETY: THE REVISED UNIFORM PROBATE CODE

Lawrence W. Waggoner

Editors' Synopsis: The Joint Editorial Board for the Uniform Probate Code has adopted omnibus revisions to Article II of the Uniform Probate Code, including significant amendments affecting spousal rights. The author examines the policies underlying the spousal rights amendments and explains the impact of the four most significant revisions.

I. INTRODUCTION

II. THE UNIFORM PROBATE CODE REVISION PROJECT

A. Section 2-804: The Revocation-Upon-Divorce Provision

1. Conventional Statutes
2. **1990 UPC Provision**
   a. **General Description**
   b. **ERISA Preemption of State Law?**
   c. **Constitutionality of Section 2-804 Under the Contracts Clause**

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

C. **Sections 2-201 to 2-207: The Redesigned Elective Share**
   1. **The Partnership Theory of Marriage**
      a. **Specific Features of the Redesigned Elective Share**
      b. **Implementing the Partnership Theory of Marriage**
         (1) **An Equitable-Distribution Elective Share?**
         (2) **A Deferred Community-Property Elective Share?**
      c. **The Method Adopted—An Accrual-Type Elective-Share System**
   2. **Support Theory**
   3. **Reclaimable-Estate Component of the Augmented Estate**

D. **Section 2-301: Spouse’s Protection Against Premarital Wills**

**III. CONCLUSION**

**IV. APPENDIX**
I. INTRODUCTION

The transformation of the American family constitutes one of the great phenomena of the past two decades.1 The traditional Leave It to Beaver family no longer prevails in American society. To be sure, families consisting of the wage-earning husband, the homemaking and child-rearing wife, and their two joint children still exist. But divorce rates are astonishingly high2 and remarriage abounds.3 In fact, there is an increasing prevalence in the popula-


2 A demographic study recently found:

' Although annual rates of divorce have fluctuated around the trend line, the underlying rate of increase in the level of lifetime divorce has been virtually constant for more than 100 years, generating the accelerating curve from 7% for marriages in 1860 to the current expectation of well over one-half. It is too soon to conclude that the plateau in the divorce rate of the last decade represents the end of this trend—we must remember that there was a similar 15-year plateau before the takeoff of the late 1960s.

In any event, the current level of marital disruption is very high. [A 1989 study] recently estimated that almost two-thirds of recent first marriages would be likely to disrupt if current levels persist. Further work leads us to suspect that 60% may be closer to the mark. The exact level of marital disruption is much less important, however, than the social fact that the majority of recent first marriages will not last a lifetime.

Larry Bumpass, What's Happening to the Family? Interactions Between Demographic and Institutional Change, 27 DEMOGRAPHY 483, 485 (1990) (footnote omitted); see also Norval D. Glenn, What Does Family Mean?, AM. DEMOGRAPHICS, June 1992, at 30, 30 ("If current divorce rates continue, about two out of the three marriages that begin this year will not survive as long as both spouses live.").

3 Government data indicate:

Most Americans marry, and if the marriage ends in divorce, more than three-fourths marry again...

During the 1970-83 period the annual totals of remarriages of previously divorced men and women increased by 82 percent. The estimated national number of previously divorced brides increased from
tion of marriages that are more likely to end in divorce than others—marriages in which one or both partners were divorced before\textsuperscript{4} and marriages of couples who cohabited prior to marriage.\textsuperscript{5}

\begin{quote}
404,000 in 1970 to 736,000 in 1983. The estimated number of previously divorced grooms increased from 423,000 in 1970 to 773,000 in 1983. In the 14-year period, 8.2 million previously divorced women and 8.7 million previously divorced men remarried. . . . Currently about 1 out of 3 American brides and grooms have been married before, up from 1 out of 4 in 1970.

\textsc{Barbara F. Wilson}, \textsc{U.S. Dept of Health & Human Services}, \textsc{Pub. No. 89-1923, Remarriages and Subsequent Divorces—United States 1-2 (1989)} [hereinafter REMARRIAGES AND SUBSEQUENT DIVORCES].

\end{quote}

\begin{quote}
\textsuperscript{4} See id. at 16 ("Generally, the more times a divorcing person has been married, the briefer the duration of the marriage. . . . It may be that some selection factor is at work and that people who divorce repeatedly are likely to regard divorce as an acceptable solution to an unpleasant marriage and resort to it with increasing promptness."); \textsc{James McCarthy}, \textit{A Comparison of the Probability of the Dissolution of First and Second Marriages}, \textsc{15 Demography 345 (1978)}.

\end{quote}

\begin{quote}
\textsuperscript{5} See \textsc{James A. Sweet & Larry Bumpass}, \textit{Disruption of Marital and Cohabitation Relationships: A Social-Demographic Perspective}, 23-25 (Nat'l Survey of Families and Households Working Paper No. 32, 1990). The authors state:

There are two separate ways to think about the relationship of increased cohabitation to marital disruption—on the aggregate level and on the individual level.

At the aggregate level, rising levels of cohabitation may have the effect of reducing the rate of marital disruption. If cohabitation is seen by the participants as a "trial marriage" or if it is something done by people who would like to marry but whose lives are not settled enough to feel that they should get married, then it may be that cohabitation will tend to select out "unsuitable" unions prior to marriage—in effect, resulting in many couples "divorcing" before they get married. If this is true, the current rate of marital disruption may be lower than it would have been in the absence of the increase in cohabitation. Thus, the slowing of the increase in the divorce rate that has been observed in the early 1980s may be due to this, rather than to an increase in "familism" or an increased commitment to marriage.

On the individual level, what is the effect of having cohabited on subsequent marital stability? Again, one might think that couples who are unsuitable for each other may find that out while cohabiting and never get married. This might suggest that, other things equal, couples who cohabit before they get married would have a lower rate of marital
In addition, single parent families and families with two working adults are commonplace. Lesbian, gay, and unmarried heterosexual couples, sometimes with children, constitute unmistakable parts of the American family scene. Inevitably, this transformation of the family will increasingly exert new tensions on traditional wealth-succession laws and on overlapping fields such as family, social security, and pension law.\(^6\)

\[\text{disruption than those who did not. The data suggest that this is not the case. Persons who cohabited prior to first marriage have a much higher rate of marital disruption than those who did not. If they lived only with their spouse, the rate is 49 percent higher than for those who did not cohabit; if they lived with someone other than their first spouse, their rate is 84 percent higher.\}]

\[\ldots\] There are two alternative explanations for this result. First, there may be something about living together prior to marriage that affects the survival chances of the marriage. Perhaps expectations about the relationship or behavior patterns develop during the period the couple is cohabiting that are not conducive to the long-term survival of the relationship.\ldots\]

The second possibility is that couples who choose to cohabit before getting married are selected on (unmeasured) characteristics that are not conducive to the long-term survival of marriage. That is to say, these couples would have a higher risk of marital instability, even in the absence of cohabitation. They may have a value system that places a relatively lower priority on relationship stability, or personality characteristics that are not conducive to cultivating and maintaining strong, enduring relationships.

\[\text{Id. (footnote omitted); see also Kenneth Woodward, Young Beyond Their Years, NEWSWEEK, Winter/Spring 1990, at 54, 57 (''[Cohabitation is] a relationship that attracts, those, mainly men, who are looking for an easy out \ldots and it is uncertain what, if anything, it contributes to marriage.'' (quoting sociologist Glen Elder of the University of North Carolina)).}\]

\[\text{6 The trend toward multiple marriages and reconstituted families seems to be unremitting. Like any trend, however, it might moderate or even reverse itself as future generations adopt different attitudes toward family. Regardless of whether the trend moderates or reverses itself, multiple marriages will continue to exist—only the incidence might decrease. Furthermore, the high-incidence multiple-marriage and reconstituted-family segment of the current population spans the young adult generation and reaches at least into the younger portions of the mid-life generation. As this large segment moves through the life cycle to old age and eventually death, many married couples will end life having children from prior marriages or partnerships on one or both sides.}\]
II. THE UNIFORM PROBATE CODE REVISION PROJECT

The Uniform Probate Code (UPC) is over twenty years old and was developed prior to the multiple-marriage society. Article II of the UPC, which covers the substantive law of intestacy, wills, and certain aspects of nonprobate transfers, has now undergone a systematic round of review. A main objective of the project was to develop sensible rules adaptable to the ever-changing climate of marital behavior. The Article II revisions have now been completed, approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL), and promulgated as an official revision of the UPC. These revisions have also been promulgated as a freestanding Uniform Act on Intestacy, Wills, and Donative Transfers that can

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7 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 consists 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 School of Law); the American Bar Association (Jackson M. Bruce, Jr., of Wisconsin; Professor and former Dean 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; 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 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, who represented the American Bar Association, and Professor Gail McNight Beckman of Georgia State University, who represented the National Association of Women Lawyers.

be adopted without the procedural and other provisions of the full UPC.

The Article II revisions are far-reaching. To one degree or another, nearly every section has been revised. An in-depth analysis of all these revisions is beyond the scope of this article. This article will examine the following four parts in detail: (1) the spouse's intestate share (section 2-102), (2) the spouse's elective (forced) share (sections 2-201 to 2-207), (3) the spouse's rights against a premarital will (section 2-301), and (4) revocation of benefits to the former spouse in the case of divorce (section 2-804).9 Of the new provisions, these four have the greatest impact on the multiple-marriage society. Throughout this article, I will illustrate the effect of these provisions upon the multiple-marriage society from the vantagepoint of Ben and Elaine, a fictional couple whose marriage plays out in various ways.

A. Section 2-804: The Revocation-Upon-Divorce Provision

For many years, Ben and Elaine had a happy and prosperous marriage. They purchased a house in joint tenancy and consulted an estate planning attorney who drafted reciprocal wills and a revocable inter-vivos trust for them. Ben's employer provided a retirement plan, and Ben personally acquired a substantial amount of life insurance. All of these documents—the will, the revocable trust, the retirement plan, and the life-insurance policy—designated Elaine as the primary beneficiary at Ben's death. Ben, an only child whose parents had died, attempted to foster good relations with Elaine's parents by naming them as the alternate beneficiaries.

As time elapsed, Ben and Elaine grew apart. Ben devoted his time to his work and neglected Elaine. Elaine devoted her time to Carl, a former sweetheart whom she nearly married before she met Ben. Eventually Ben and Elaine's difficulties led to divorce. Shortly after the divorce, Elaine married Carl. And, shortly after Elaine's

9 These statutory provisions are appended at the end of this article. See infra Appendix.
marriage to Carl, Ben died. Because Ben never amended any of the documents constituting his estate plan, the applicability of the revocation-upon-divorce provision commonly found in probate codes critically impacts the distribution of Ben’s assets.

1. **Conventional Statutes**

Conventional non-UPC provisions\(^{10}\) and the pre-1990 UPC provision\(^{11}\) revoke the disposition in Ben’s will to Elaine, but do not extend that treatment to the house held in joint tenancy or to Ben’s revocable trust, retirement plan, or life-insurance policy. For purposes of Ben’s will, these provisions effectively treat Elaine as if she predeceased Ben, which triggers the will’s alternative disposition in favor of Elaine’s parents.

Due no doubt to the increased usage of will substitutes, such as revocable trusts, the courts have increasingly been asked to utilize statutory construction techniques to extend the non-UPC and pre-1990 UPC provisions to various types of revocable dispositions—dispositions that are wills in function and substance, but not in form.\(^{12}\) As one might expect, the case results have varied. Particu-

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\(^{12}\) Apart from statute, divorce decrees and separation agreements are usually held not to revoke life-insurance or similar beneficiary designations of a former spouse unless they say so specifically. *See* Rountree v. Frazee, 209 So. 2d 424, 426 (Ala. 1968) ("One may take out a life insurance policy on his own life and . . . name anyone as a beneficiary regardless of whether [the beneficiary] has an insurable interest. . . . [D]ivorce per se [does] not affect or defeat any of [the former spouse's] rights as the designated beneficiary."); *American Health & Life Ins. Co. v. Binford*, 511 So. 2d 1250, 1254 (La. Ct. App. 1987) ("[T]he description in the policy of Ms. Watson as wife is merely the showing of a relationship in existence at the time of the execution of the contract. The termination of the relationship has no automatic effect on the provisions of the insurance policy."); *Gerhard v. Travelers Ins. Co.*, 258 A.2d 724, 729 (N.J. Super. Ct. Ch. Div. 1969) ("[A] separation agreement . . . which contain[s] a general release of all claims to each other's estate [does] not divest the
larly noteworthy is the 1985 decision of the Supreme Judicial Court of Massachusetts in *Clymer v. Mayo*. The Clymer court, in applying a Massachusetts statute virtually identical to the pre-1990 version of UPC section 2-508, held the statute applicable to a revocable inter-vivos trust. But the court was also careful to restrict its "holding to the particular facts of [that] case—specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death." The testator's will devised the residue of her estate

[former] wife of her interest, as named beneficiary, since her claim under the policy was neither against him nor his estate, but was against the insurance company.); *Romero v. Melendez*, 498 P.2d 305, 308 (N.M. 1972) ("The weight of competent authority seems to support the proposition that where the divorce decree makes a definite disposition of the insurance policies, the [former] wife's interest as a beneficiary can be defeated by such disposition. ... [C]ases holding conversely to [sic] do so on the basis of the absence of a clear divorce decree."); *Cannon v. Hamilton*, 189 N.E.2d 152, 154-55 (Ohio 1963) ("[W]here the terms of a separation agreement carried into a divorce decree plainly disclose an intent to remove the [former spouse] from all rights to the proceeds [of a life insurance policy], such agreement may ... prevent the [former spouse] from claiming the proceeds ... , but the separation agreement herein did not contain language sufficiently strong or definite to accomplish that result, especially when considered in relation to [the insured's failure] to change the beneficiary in accordance with the terms of the policy."); see also *Bersch v. VanKleeck*, 334 N.W.2d 114 (Wis. 1983). *But cf. Stiles v. Stiles*, 487 N.E.2d 874 (Mass. App. Ct. 1986) (holding that former spouse was not an eligible beneficiary although designated as beneficiary prior to divorce); *Harris v. Harris*, 804 P.2d 1277 (Wash. Ct. App.) (holding that postdivorce community property agreement between decedent and new spouse revoked predivorce designation of former spouse as beneficiary of decedent's retirement plan), *review denied*, 116 P.2d 103 (Wash. 1991).


15 *Clymer*, 473 N.E.2d at 1093. The court's statement that the receptacle trust, into which the decedent's residuary estate poured, was to be "funded entirely at the time of the decedent's death" was a misdescription. The text of the court's opinion indicates that the receptacle trust 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, this contract right constituted the trust res. *See Gurnett v. Mutual Life Ins. Co.*, 191 N.E. 250 (Ill. 1934); *Bose v.
to the trustee of an unfunded life-insurance trust executed on the same day as her will. 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 other courts have reached similar conclusions, but the majority have been unwilling to extend similar statutory provisions to will substitutes unconnected to a pour-over devise, even though the particular will substitute served as the functional equivalent of a "will."

The problem with these state statutes is not that the courts have construed them too narrowly, but that the statutes themselves have not expressly covered all of the arrangements that are functionally equivalent to wills.

Meury, 163 A. 276 (N.J. Ch. 1932); Gordon v. Portland Trust Bank, 271 P.2d 653 (Or. 1954); RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. f, § 82 cmt. b, § 84 cmt. 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 Testamentary Additions to Trusts Act, MASS. GEN. LAWS ANN. ch. 203, § 3B (West 1990), validate a pour-over devise to an unfunded trust? Although the Uniform Act, UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT § 1, 8A U.L.A. 603 (1983), which is incorporated into the pre-1990 UPC as § 2-511, is somewhat unclear on this point, the court in Clymer held that the Massachusetts statute authorizes pour-over devises to unfunded trusts. As revised in 1990, § 2-511 makes it clear that a pour-over devise to an unfunded trust is authorized. UNIF. PROBATE CODE § 2-511(a), 8 U.L.A. 119 (Supp. 1992). 1990 UPC § 2-511 has now been promulgated as part of a revised Uniform Testamentary Additions to Trusts Act.

16 Clymer, 473 N.E.2d at 1092-93.

17 See, e.g., Miller v. First Nat'l Bank & Trust Co., 637 P.2d 75 (Okla. 1981). In Miller the court held a similar statute to be applicable to an unfunded life-insurance trust. The testator's will devised the residue of his estate to the trustee of the life-insurance trust. The court held that the pour-over devise incorporated the life-insurance trust into the will by reference, causing the revocation statute to apply.

2. **1990 UPC Provision**

   a. **General Description**

   The 1990 UPC expands the divorce provision to cover all the will substitutes, including revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, payable-on-death accounts, and other revocable predivorce dispositions made by a divorced individual to the former spouse. A few states have enacted piecemeal legislation that revokes certain will substitutes upon divorce, but no state has enacted a provision as comprehensive as the 1990 UPC provision. Unless a governing instrument or other relevant document provides otherwise, 1990 UPC section 2-804(b)(1) revokes not only the provision to Elaine in Ben's will, but also the provisions to Elaine in Ben's retirement plan, life-insurance policy, and revocable inter-vivos trust.


21 Section 2-804 is inapplicable if "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" provides otherwise. Unif. Probate Code § 2-804(b), 8 U.L.A. 163 (Supp. 1992).
The 1990 UPC will also not allow Elaine to take the joint tenancy property by survivorship. Section 2-804(b)(2) severs the former spouses' ownership interests in property held by them at the time of the divorce (or annulment) as joint tenants with the right of survivorship and transforms their interests into a tenancy in common. In effect, section 2-804(b)(2) aligns joint tenancies with tenancies by the entirety, which are automatically severed upon the tenants' divorce. The severance of spousal joint tenancies upon divorce merely applies the general principle of the 1990 revisions that all revocable dispositions are presumptively revoked upon divorce. A joint tenancy is unilaterally severable, meaning that each spouse can revoke the other's survivorship interest in half of the property.

If Elaine does not benefit under Ben's documents, who does? Conventional statutes resolve that question by invoking the fiction that Elaine predeceased Ben. In consequence, Ben's property would apparently pass to Elaine's parents as alternative beneficiaries. Because such an outcome appears inconsistent with Ben's likely intent, the 1990 UPC also revokes any disposition to the former

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22 Id. § 2-804(b)(2).

23 In several cases, treating the former spouse as having predeceased the testator triggered a gift in the governing instrument to the former spouse's relatives who, after the divorce, were no longer relatives of the testator. See Porter v. Porter, 286 N.W.2d 649 (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); Clymer v. Mayo, 473 N.E.2d 1084 (Mass. 1985) (treating the former spouse as having predeceased meant that former spouse's nieces and nephews succeeded to interest in trust); Estate of Coffed, 387 N.E.2d 1209 (N.Y. 1979) (stating that a former spouse's child by a prior marriage could succeed to an estate interest); Bloom v. Selfon, 555 A.2d 75 (Pa. 1989) (reflecting that the testator's divorce does not nullify alternative distribution provisions in favor of the former spouse's uncle because the law presumed that the former spouse predeceased the testator); Estate of Graef, 368 N.W.2d 633 (Wis. 1985) (treating former spouse as having predeceased the testator meant the testator's estate passed to the former spouse's mother).
spouse's relatives. The rationale is that the divorce process severely weakens any ties between the transferor and the former spouse's relatives. Accordingly, the 1990 UPC would revoke the disposition to Elaine's parents.

b. ERISA Preemption of State Law?

As noted above, 1990 UPC section 2-804 revokes the provision to Elaine in Ben's retirement plan. If the Employee Retirement Income Security Act of 1974 (ERISA) covers Ben's retirement plan, however, a risk exists that ERISA will preempt the statutory provision. In federalizing pension and employee benefit law, ERISA 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.

ERISA's preemption clause is extraordinarily broad. It does not merely preempt state laws that conflict with specific provisions in

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24 UNIF. PROBATE CODE § 2-804(b)(1), 8 U.L.A. 163 (Supp. 1992). In the somewhat comparable "slayer-rule" provision, § 2-803 nullifies all revocable transfers to a murderer but not to the murderer's relatives. Id. § 2-803, 8 U.L.A. 159-61. 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, seem just as likely to sympathize with the murderer's victim as with the murderer.

25 Under § 2-804(d), the effect of revocation is that the governing instrument takes effect as if the divorced individual's former spouse and relatives of the former spouse had disclaimed the revoked provisions. Id. § 2-804(d), 8 U.L.A. 163.

26 See supra note 21 and accompanying text.


ERISA. It preempts "any and all State laws" insofar as they "relate to" any ERISA-governed employee benefit plan.

A complex body of case law has arisen concerning the question of whether to apply ERISA to preempt state law in circumstances in which ERISA supplies no substantive rule. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees.29 The Retirement Equity Act of 1984 (REACT)30 amended ERISA by adding provisions confirming the judicially created exception for state domestic relations decrees.31

The federal courts have been less certain about whether to defer to state probate law. In Metropolitan Life Insurance Co. v. Hanslip,32 the court held that ERISA preempted an Oklahoma statute33 resembling 1990 UPC section 2-804.34 Both statutes purport to extend the revocation-upon-divorce provision common in will statutes to ERISA-covered death benefits. On the other hand, in

29 See, e.g., American Tel. & Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979).


32 939 F.2d 904 (10th Cir. 1991).


34 See also Board of Trustees of W. Conference of Teamsters Pension Trust Fund. v. H.F. Johnson, Inc., 830 F.2d 1009 (9th Cir. 1987) (ERISA preempted Montana nonclaim statute, which is similar to § 3-803 of the 1990 UPC); cf. Albamis v. Roper, 937 F.2d 1450 (9th Cir. 1991) (ERISA preempted any community-property law right of a deceased wife to devise half of her surviving husband's pension benefits).
Mendez-Bellido v. Board of Trustees of Division 1181, A.T.U., the court applied the New York "slayer-rule" despite an ERISA preemption claim, reasoning that "state laws prohibiting murderers from receiving death benefits are relatively uniform [and therefore] there is little threat of creating a 'patchwork scheme of regulation'" that ERISA seeks to avoid.

It is hoped that the federal courts will show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. Otherwise, ERISA preemption will stifle long-overdue advancements in state probate and nonprobate law without providing any compensating federal rule. To the extent that the federal judges think themselves unable to craft exceptions to ERISA's preemption language, however, another avenue is open to them. They can apply state law concepts as federal common law. Because the UPC contemplates multistate applicability, it is well suited to be the model for federal common-law absorption.

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in 1990 UPC section 2-804(h)(2). That subsection imposes a personal liability for pension payments (or their value) that pass to a person who, not for value, receives a payment to which the recipient is not entitled. Section 2-804(h)(2) of the 1990 UPC operates in a manner similar to a constructive trust by obligating the recipient to return the payment (or to pay the amount of the payment) to the person who would have been entitled to the payment were section 2-804 not preempted. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing the unjust enrichment that would result if an unintended recipient were to be paid the pension benefits. In the absence of conflicting substantive policies or provisions, federal law properly has no interest in working a broader


36 Id. at 332 (footnote omitted) (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987)).

disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans. 38

38 There is no direct authority on the question of whether ERISA preempts a state statute such as 1990 UPC § 2-804(h)(2) that imposes a personal liability on a recipient to turn over a payment or pay its value to the person properly entitled to it under that statute. There is authority that the Federal Employees' Group Life Insurance Act (FEGLIA), Pub. L. No. 89-554, 80 Stat. 592 (1966) (codified as amended at 5 U.S.C. §§ 8701-8716 (1988)), does not preempt imposing a constructive trust on FEGLIA-governed life-insurance proceeds after they have been paid to a recipient. See Rollins v. Metropolitan Life Ins. Co., 863 F.2d 1346, 1353 (7th Cir. 1988) (reasoning that imposing a constructive trust "would not do 'major damage' to any 'clear and substantial federal interests.'"); Kidd v. Pritzel, 821 S.W.2d 566, 571 (Mo. Ct. App. 1991) (reasoning that "[i]f Congress had desired to totally pre-empt all state law claims it would have included an anti-attachment provision to FEGLIA."). 38

Both the Rollins and Kidd courts distinguished Ridgway v. Ridgway, 454 U.S. 46 (1981), which held that the Servicemen's Group Life Insurance Act (SGLIA), Pub. L. No. 89-214, 79 Stat. 880 (1965) (codified as amended at 38 U.S.C. §§ 765-776 (1988)), preempted the post-payment imposition of a constructive trust on SGLIA-governed life-insurance proceeds, on the ground that SGLIA contains an anti-attachment provision, but FEGLIA does not. SGLIA § 770(g) provides that "[p]ayments of benefits due ... under [SGLIA] ... shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 770(g) (1988) (emphasis added). The court in Kidd noted that "[i]f Congress had desired to totally pre-empt all state law claims it would have included an anti-attachment provision to FEGLIA." Kidd, 821 S.W.2d at 571.

ERISA, like FEGLIA, contains no anti-attachment provision. ERISA does contain an anti-alienation provision, ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988), but that provision only requires each ERISA-governed pension plan to prohibit the assignment or alienation of benefits before payment. See Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 836 (1988) (5-4 decision) ("Section 206(d)(1) bars the assignment or alienation of pension plan benefits, and thus prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being paid to plan participants."). (second emphasis added)).

Although, as noted supra note 28 and accompanying text, ERISA's preemption provision, ERISA § 514(a), 29 U.S.C. § 1144(a) (1988), is one of unusual breadth, the Supreme Court in Mackey held that it does not preempt state-law pre-payment garnishment of individual participants' benefits under ERISA-governed employee welfare benefit plans to satisfy money judgments awarded against those participants.
c. Constitutionality of Section 2-804 Under the Contracts Clause

The implementation of 1990 UPC section 2-804 could create a problem regarding Ben's life-insurance policy if Ben designated Elaine as beneficiary before the effective date of section 2-804. Although, under UPC section 8-101(b)(5), the provisions of section 2-804 apply to "instruments executed . . . before the effective date [of the enactment] unless there is a clear indication of a contrary intent," a recent decision of the Eighth Circuit, *Whirlpool Corp. v. Ritter*, raises a concern regarding the constitutionality of applying rules of construction such as UPC section 2-804 to third-party beneficiary contract designations that were executed before the effective date of the statute. The court in *Ritter* held that the Contracts Clause of the United States Constitution prohibited the application of the same Oklahoma statute that was embroiled in the *Hanslip* litigation to pre-existing life-insurance beneficiary designations. As noted above, this is the Oklahoma statute that resembles 1990 UPC section 2-804 and extends the revocation-upon-divorce rule to will substitutes such as life insurance. In *Ritter* the decedent's revocable designation of his former spouse as his life-insurance beneficiary was executed before the enactment of the statute but the divorce that revoked it (and, of course, the decedent's death)

in independent causes of action, despite the fact that forcing the plan to honor the garnishment orders caused the plan to incur significant administrative burdens and costs. ERISA's anti-alienation provision would block pre-payment garnishment proceedings under state law, but that provision only applies to pension plans, not to employee welfare benefit plans. See *Mackey*, 486 U.S. at 837-38.


40 929 F.2d 1318 (8th Cir. 1991).

41 U.S. Const. art. I, § 10, cl. 1.

42 *Ritter*, 929 F.2d at 1322.

43 See supra notes 33-34 and accompanying text.
occurred after enactment.\textsuperscript{44}

The Joint Editorial Board (JEB) for the Uniform Probate Code has issued a statement expressing its disapproval of the \textit{Ritter} decision.\textsuperscript{45} The JEB statement makes four points in arguing that \textit{Ritter} is wrong and should not be followed elsewhere. In summary, those four points are, first, that the beneficiary-designation in a life-insurance policy is a donative transfer. The statute does not impair the contractual component of the policy, the insurance company's obligation to pay the proceeds to any person the insured names as beneficiary. The statute only affects the identity of the donee. Thus, the statute does not properly raise any Contracts Clause issue.

Second, the statute merely establishes a rule of construction designed to implement intention. It reflects a legislative judgment that when the insured leaves unaltered a will, trust, or insurance-beneficiary designation in favor of an ex-spouse, the insured's failure to designate substitute takers more likely than not represents inattention rather than intention. The legislative judgment yields to a contrary intention.

Third, the Contracts Clause has never been read to pose any obstacle to the application of legislatively altered constructional rules to pre-existing donative documents such as revocable trusts that have no contractual component. There is therefore no justification for extending Contracts Clause concerns to a statute that only affects the revocable, donative-transfer component of a life-insurance policy.

Fourth, the JEB found no Supreme Court authority for the Eighth Circuit's intrusion of the Contracts Clause into the area of

\textsuperscript{44} \textit{Ritter}, 929 F.2d at 1319-20.

\textsuperscript{45} The full statement is published in \textit{Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents}, 17 AM. C. TR. & EST. COUNS. NOTES 184 (1991), and is available from the headquarters office of the NCCUSL. \textit{See also} S. Alan Medlin, \textit{Joint Editorial Board Rebukes Eighth Circuit Decision}, PROB. PRAC. REP., Jan. 1992, at 1.
legislative default rules. In fact, the Eighth Circuit's approach is at variance with the Supreme Court's recent tolerance of retroactive federal legislation imposing liabilities under the Multiemployer Pension Plan Amendments Act of 1980 (MEPPA). When an employer withdraws from an underfunded pension plan, MEPPA allows the imposition of significant unforeseen liabilities. Yet, the Supreme Court has rejected both due process and uncompensated takings objections to these retroactively imposed MEPPA obligations.

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

To examine this section, let us turn the clock back and give Ben and Elaine another chance. Not only did the couple marry, but they beat the odds and stayed married. In fact, they had a wonderful marriage. But eventually the law of mortality, which even the uniform law commissioners cannot repeal, caught up to Ben, and he died intestate. Elaine survived, along with their two adult children and a number of grandchildren. In this version of the marriage, Ben was a procrastinator and never got around to seeing an estate planning attorney.

Under these circumstances, what is, or should be, Elaine's share in intestate succession? Section 2-102(1) of the 1990 UPC grants

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46 The principal Supreme Court precedent upon which the Eighth Circuit relied in Ritter was Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Spannaus held unconstitutional a Minnesota statute that retroactively increased the pension obligations that a company would owe to its workers when the company ceased operations in Minnesota or terminated the plan. By contrast, in Ritter, there was no increase, decrease, or other interference with the obligation of the insurer to pay the contractual proceeds.


Elaine the entire intestate estate,\textsuperscript{49} even though the couple's two children also survived Ben.\textsuperscript{50} In fact, the 1990 UPC would grant Elaine the entire intestate estate even if she and Ben had not had children, because 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.\textsuperscript{51} If the decedent leaves a parent but no children, the surviving spouse's share is the first $200,000 plus three-fourths of the remaining balance.\textsuperscript{52} If all of the decedent's surviving children are also children of the surviving spouse, but the surviving spouse has one or more surviving children who are not biological or adopted children of the decedent, the surviving spouse's share is the first $150,000 plus one-half of the remaining balance.\textsuperscript{53} Finally, if the decedent leaves one or more surviving children who are not biological or adopted children of the surviving spouse, the surviving spouse's share is the first $100,000

\begin{itemize}
  \item \textsuperscript{49} \textit{UNIF. PROBATE CODE} § 2-102(1), 8 U.L.A. 72 (Supp. 1992). Under the pre-1990 UPC, the sole instance in which the surviving spouse was granted the entire intestate estate was when the decedent left no surviving issue and no surviving parent. \textit{Id.}, 8 U.L.A. 59 (1983) (amended 1990). Elaine would receive the first $50,000 plus one-half of the remaining balance under the pre-1990 UPC. \textit{Id.} § 2-102(3).
  \item \textsuperscript{50} For shorthand purposes, I use the term "children" to refer not only to children but also to descendants of deceased children.
  \item \textsuperscript{51} \textit{UNIF. PROBATE CODE} § 2-102(2)-(4), 8 U.L.A. 72 (Supp. 1992).
  \item \textsuperscript{52} \textit{Id.} § 2-102(2). For the rationale of this approach, see \textit{infra} note 65. Under the pre-1990 UPC, the surviving spouse was granted the first $50,000 plus one-half of the remaining balance. \textit{UNIF. PROBATE CODE} § 2-102(2), 8 U.L.A. 59 (1983) (amended 1990).
\end{itemize}
plus one-half of the remaining balance.\textsuperscript{54}

In sum, the two instances in which the surviving spouse’s share is potentially less than the full amount of the intestate estate are (1) when the decedent leaves no surviving children but is survived by a parent and (2) when the decedent has children and either the decedent or the surviving spouse has children who are not children of the other. In the hypothetical, no reduction would occur because Ben’s parents predeceased him and his marriage to Elaine was the first marriage for each.

Suppose that after Ben died intestate, Elaine married Carl, who was either a widower or a divorcé. Some years later, Elaine died intestate survived by Carl. Because Elaine left children by her marriage to Ben, Carl would not necessarily take Elaine’s entire intestate estate. Carl’s share would be the first $100,000 plus half of the remaining balance, with Elaine’s children by her marriage to Ben receiving the other half.\textsuperscript{55} 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 Elaine’s children receiving the other half of the remaining balance.\textsuperscript{56} If Carl had no children by a prior marriage and Elaine’s parents predeceased her, his intestate share would be the entire intestate estate.\textsuperscript{57}

To understand the rationale of the 1990 revisions, first consider Elaine’s share in Ben’s intestate estate, and then Carl’s share in Elaine’s intestate estate. A mixture of considerations drive, or should


\textsuperscript{55} Id. § 2-102(4), 8 U.L.A. 72 (Supp. 1992).

\textsuperscript{56} Id. § 2-102(3).

\textsuperscript{57} Id. § 2-102(1).
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. The 1990 UPC imputes to Ben the intention to give all his property to Elaine. Several items of evidence support this imputation. One is that empirical studies reveal that testators tend to grant their entire estates to the surviving spouse, even when the decedent has surviving children. Another is the trend in intestate-succession law throughout the United States and Europe toward granting ever-increasing shares to surviving spouses. In *The Transformation of Family Law*,

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Other studies were based on interviews with living persons. See Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Res. J. 319, 351-55, 358-64, 366-68 (finding that the majority favored granting entire estate to the spouse regardless of the level of wealth involved); see also UNITED KINGDOM LAW COMMISSION, NO. 187, REPORT ON FAMILY LAW: DISTRIBUTION ON INTESTACY 28 (1989) (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 adults, 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 had young children); Note, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 Iowa L. Rev. 1041, 1089-90 (1978) (finding that the percentage who favored granting the entire estate to the spouse decreased as the level of wealth increased).

59 A recent report of the United Kingdom Law Commission recommended granting the surviving spouse the entire intestate estate in all circumstances. UNITED KINGDOM LAW COMMISSION, NO. 187, REPORT ON FAMILY LAW: DISTRIBUTION ON INTESTACY 8-12 (1989).
Mary Ann Glendon calls this trend the "shrinking circle of heirs" phenomenon. Glendon writes that throughout the United States 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." This trend signifies "the gradual attenuation of legal bonds among family members outside the conjugal unit of husband, wife, and children" and "[t]he 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 when neither spouse has surviving children by a prior marriage or when the decedent has no surviving children or parent therefore conforms

\[\text{60 Mary A. Glendon, The Transformation of Family Law} 238 (1989).\]

\[\text{61 Id.}\]

\[\text{62 Id. at 239.}\]

\[\text{63 Id. at 238.}\]

\[\text{64 Id. at 240.}\]

\[\text{65 If the decedent is childless, the 1990 UPC grants the surviving spouse the entire intestate estate if the decedent leaves no surviving parent. Unif. Probate Code} \text{ § 2-102(1), 8 U.L.A. 72 (Supp. 1992). If the decedent leaves a surviving parent, the 1990 UPC grants the surviving spouse the first $200,000 (actually, the first $243,000 including the applicable probate exemptions and allowances) plus three-fourths of the remaining balance. Id. § 2-102(2). Very few intestate estates exceed $243,000, and even fewer exceed this sum by any substantial margin. Thus, the surviving spouse will usually receive the entire intestate estate even when the decedent is childless but leaves a surviving parent.}\]

The rationale for not granting the entire intestate estate to the surviving spouse is that a childless decedent, who is survived by a spouse and a parent and who died intestate with an estate in excess of $243,000, probably died relatively young and without expecting to have such a large estate. Decedents who accumulate estates of this size are typically older and have wills. See Fellows, supra note 58, at 336-39 (reporting that, among those surveyed, 69% with estates of $200,000 and over
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."66

Of course, in the competition for the decedent's property, not all blood relatives are created equal. Intestate-succession laws must rank blood relatives by category or degree of relationship. Under the 1990 UPC, the categories of relatives that lose to the surviving spouse are (1) the decedent's children (or descendants of deceased children) and (2) the decedent's collateral relatives and ancestors more remote than parents.67

Between these two categories, decedents typically assume that their children have higher claims to their property than do their collateral relatives or ancestors more remote than parents. On the surface, the 1990 UPC does not treat the two categories differently—it grants the surviving spouse the entire estate to the exclusion of

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had wills (the $200,000 figure is doubled to adjust for inflation between the publication of the article and today), 61% of those age 46-54 had wills, 63% of those age 55-64 had wills, and 85% of those 65 and over had wills, but only 12% of those between the ages of 17 and 34 had wills).

Intestate estates of over $243,000 often include a large tort recovery. Reconsider Ben and Elaine. 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. Under many survival-type statutes, the tort recovery becomes part of the decedent's estate, to be distributed as other estate assets. See, e.g., UNIF. LAW COMMISSIONERS' MODEL SURVIVAL AND DEATH ACT § 2(b), 8A U.L.A. 591 (1983) (last amended 1979); 4 FOWLER V. HARPER ET AL., LAW OF TORTS § 25.16, at 614 nn. 8-9 (2d ed. 1986). Suppose that Ben's estate, swelled by a tort recovery, stemming from the accident, amounted to $1 million. Disregarding the probate exemptions and allowances, the advantage of the 1990 UPC formula is that it grants a thoroughly adequate sum of $800,000 ($200,000 plus $600,000) to Elaine (who might remarry) and $200,000 to Ben's parents (who bore the cost of raising and educating Ben). See UNIF. PROBATE CODE § 2-102(2), 8 U.L.A. 72 (Supp. 1992).

66 GLENDON, supra note 60, at 238.

both categories. In fact, however, the decision to exclude these categories was based on entirely different assumptions.

The 1990 UPC presumes that decedents see their children as winners, not losers. The decedents view their surviving spouses as performing dual functions as primary beneficiaries and as conduits through which to benefit their children. If Ben died prematurely, when his children were minors, Elaine would be better equipped to use Ben's property for herself and for the children's benefit. If Ben died at an older age, when the children were middle-aged working adults, Elaine would also be older with greater economic needs than the children. In the latter case, the conduit theory assumes that Ben's children will eventually inherit any unconsumed portion of his property from Elaine.

The conduit theory does not apply to decedents' collateral relatives or ancestors more remote than parents. They will likely suffer a permanent "loss." When a decedent leaves only a surviving spouse and collateral relatives or ancestors more remote than parents, the typical decedent sees the surviving spouse as the sole beneficiary. The decedent does not ordinarily expect the surviving spouse to share any significant portion of the decedent's property with those other relatives.

In Elaine and Carl's hypothetical marriage, if Elaine and Ben had children (whether or not Elaine also had children with Carl), Carl would receive an intestate share of the first $100,000 plus half of the remaining balance, and Elaine's children would receive the other half. If Elaine had children with Carl but none with Ben, Carl's intestate share is the first $150,000 plus half of the remaining balance if Carl had children by a prior marriage. Elaine's children would receive the other half.

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68 See id. § 2-102(4).

69 See id. § 2-102(3).

70 See id.
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 surviving spouse has divided loyalties and is a less reliable conduit. If the surviving spouse in either of these instances were to be granted the entire intestate estate, the likelihood of the decedent's children recouping their "loss" by inheriting from the surviving spouse the unconsumed portion of the decedent's property would be less secure. The existence of children from a prior marriage—on either side—creates a moral conflict regarding how the surviving spouse should divide the property inherited from the decedent.\textsuperscript{71} When the surviving spouse later dies, his or her natural instinct is to leave a will treating all of his or her own children equally. And, if the surviving spouse dies intestate, the intestate-succession law automatically grants those children equal shares.

Thus, the problem in the stepparent situations becomes one of striking a reasonable balance between the claims of the surviving spouse and the decedent's children. The dominant objective is to grant the surviving spouse an adequate share. To achieve this objective, the 1990 UPC grants a share to the surviving spouse commensurate with the estate size and the family circumstances.\textsuperscript{72} The UPC implements this idea by means of the lump-sum-plus-a-fraction-of-the-remaining-balance device.\textsuperscript{73} In the typical small or modest intestate estate, this device grants the surviving spouse the entire estate, especially because the 1990 UPC gives the probate exemptions and allowances ($43,000 is the typical amount) to the

\textsuperscript{71} By necessity, the UPC disregards the possibility that the same moral conflict will arise after the decedent's death, should the surviving spouse remarry and have children by a new spouse. Intestate succession law is forced to base the amount awarded to the surviving spouse on facts existing at the decedent's death. See Lawrence W. Waggoner, The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code, 76 IOWA L. REV. 223, 234-35 (1991).

\textsuperscript{72} UNIF. PROBATE CODE § 2-102, 8 U.L.A. 72 (Supp. 1992).

\textsuperscript{73} Id.
surviving spouse.\textsuperscript{74}

In the larger intestate estates, infrequent though they may be, the 1990 UPC assumes that the wealthier intestate decedent would not consider that a provision for children would deprive the surviving spouse of an adequate share. Thus, to provide the decedent's children with some protection against the claims of the surviving spouse's other children, the 1990 UPC reserves a share in the larger intestate estates for the decedent's own children.\textsuperscript{75}

Because the moral conflict is more acute when the decedent leaves children from a prior marriage than when only the surviving spouse has children from a prior marriage, different formulas are employed to determine the surviving spouse's share in each scenario. In the former case, the surviving spouse is granted the first $100,000 (typically $143,000 after including the minimum probate exemptions and allowances) plus fifty percent of the remaining balance.\textsuperscript{76} In the latter case, the surviving spouse is granted the first $150,000 (typically $193,000 after including the minimum probate exemptions and allowances) plus fifty percent of the remaining balance.\textsuperscript{77}

Lest granting the surviving spouse a minimum claim on the first $100,000 appears over-generous, and hence unfair to the decedent's children by the prior marriage, consider that decedents dying intestate are typically older than 60\textsuperscript{78} and have estates below

\textsuperscript{74} See id. §§ 2-404 to -405, 8 U.L.A. 107-08.

\textsuperscript{75} Id. § 2-102(3)-(4), 8 U.L.A. 72.

\textsuperscript{76} Id. § 2-102(4).

\textsuperscript{77} Id. § 2-102(3).

\textsuperscript{78} Although younger people overwhelmingly do not have wills, see Mary L. Fellows et al., Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 AM. B. FOUND. RES. J. 319, 336-39, and so the great majority of those dying young die intestate, they die in even lower numbers than might be guessed. Only about 0.5% of the population, married and unmarried, die between ages 20 and 25, another 0.6% die between ages 25 and 30,
$200,000. Their surviving spouses will likely be wives, not husbands, for wives tend to outlive their husbands. This is not only because women live longer than men, but also because wives tend to be, on average, nearly three years younger than their husbands. It should not be surprising, therefore, that married women of middle age, on average, will become widowed before turning seventy and will live fifteen more years.

What are the needs of these surviving spouses? They are, by and large, beyond working years. This forces them to rely to a great extent on capital-generated income and makes them vulnerable to the ebbs and flows of interest rates. Apart from their social

and another 0.5% die between ages 30 and 35. That adds up to 1.6% dying between 20 and 35. Indeed, only another 0.7% die between ages 35 and 40, so that only 3.3% die in the two decades between ages 20 and 40. It is between ages 60 and 90 that we get serious about dying, for that is the period in which nearly three-fourths of the population die. See 1 Fed. Est. & Gift Tax Rep. (CCH) ¶ 6415.301, tbl. 80 CNSMT, at 6961 (1989). Although most people age 65 and older have wills, the minority who die without wills make up a much larger number of people than the cohort of young people who die prematurely.

In terms of wealth, 72.3% of persons with estates valued between $0 and $99,999 do not have wills, 49.8% with estates between $100,000 and $199,999 do not have wills, but only 15.4% with estates between $200,000 and $1 million do not have wills. See Fellows, supra note 78, at 338 tbl. 4. The estate figures have been adjusted for inflation. Between 1977, when the surveys were conducted, and 1992, the consumer price index has about doubled. To reflect this increase in inflation, the figures reported in the original article have been doubled.


See id. at 88 tbl. 132.


security payments and perhaps a small pension, the principal source of income for nonworking surviving spouses is the income they earn on their investments.\(^8\) For elderly surviving spouses of less wealthy decedents, those who are most likely to die intestate, that means the interest they earn on their certificates of deposit.\(^8\) As of 1991, average social security payments barely exceeded the poverty level. The excess was only $34 a month for nondisabled widows and widowers and only $76 a month for retired workers.\(^8\) Contrary to the image of the elderly as "fat cats living the good life at the

\(8^4\) As of 1990, according to the United States Census Bureau, the principal sources of income for persons over 65 were social security (37.8%), earnings (15.5%), pensions (16.9%), and investments (24.7%). See Robert Lewis, *Ups and Downs of the 1980s: New Income Data Refutes [sic] 'Fat Cat' Age Stereotype*, AM. ASS'N RETIRED PERSONS BULL., Feb. 1992, at 1, 15 [hereinafter Lewis, *Ups and Downs of the 1980s*]. Another study, conducted in Florida, found that, in 1990, social security was the main source of income for 44% of those 60 and over. See Catherine Wilson, *Interest-Rate Plunge Chills Savers*, ANN ARBOR NEWS, Feb. 9, 1992, at C5.

\(8^5\) The Public Policy Institute of the American Association of Retired Persons reports that people 65 and over derive 17.5% of their income from interest-bearing accounts, compared to just 5.5% for those 45 through 64 and 3% for those under 45. See Lewis, *More Folks Feel Pinch*, supra note 83, at 12.

\(8^6\) Average social security payments were $6,672 per year or $556 per month for nondisabled widows and widowers and $7,236 per year or $603 per month ([$679 per month for men, $518 per month for women] for retired workers. See SOCIAL SEC. ADMIN., U.S. DEPT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY BULLETIN: ANNUAL STATISTICAL SUPPLEMENT—1991, at 2, 178, 196 (1991).

As of 1990, the poverty level for single persons age 65 and over was $6,268 per year or $522 per month. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, POVERTY IN THE UNITED STATES—1990, at 195 tbl. A-2 (1991). The government's "poverty index" is a very crude measure, however. It is based largely on outdated assumptions concerning consumption behavior. By one study, "if the consumption standards used to calculate the index were updated, it would raise aged poverty by at least 50 percent." James H. Schulz, *Poverty Level—Worn-Out Words to Hide the Truth*, AM. ASS'N RETIRED PERSONS BULL., Mar. 1992, at 18, 18.
expense of everybody else," government reports indicate that "[t]wenty percent of all elderly widows were poor." About forty percent of the elderly, in fact, are either poor or near-poor, "near-poor" being defined as having income no more than two times the poverty level. A Florida study recently found that thirty-one percent of those sixty and over reported incomes of less than $10,000 annually.

Given these demographic characteristics of intestates and their surviving spouses, I think we must next make certain basic assumptions about the marriage itself and the decedent's motives. Sound public policy, I believe, requires that we assume that the marriage is solid (that the partners remain committed to one another) and that the decedent has what may be described as "just" motives. After all, the marriages we are talking about have ended in death, not divorce, and there has been no effort by the decedent to disinherit his or her surviving spouse. To assume that those marriages are other than solid would be to make a distinctly unfortunate cultural statement about the institution of marriage in American society. Included within the assumption that decedents have "just" motives are that decedents mean to be generous to their surviving spouses, mean to strike a fair balance between their surviving spouses and children (that is, to be fair to all), but, above all, in striking that fair balance, mean at the very least to provide economic security for their surviving spouses. The link, of course, between need and intention

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87 Lewis, Ups and Downs of the 1980s, supra note 84, at 14.


89 Lewis, Ups and Downs of the 1980s, supra note 84, at 15.

90 See Wilson, supra note 84, at C5.

91 Obviously, not all marriages are ideal and not all decedents have "just" motives. But these assumptions are not unfair to people whose marriages or motives fall outside the mold. Decedents whose marriages are less than ideal must be expected to understand that their situation calls for individuated action. They must make their own wills (or get divorced).
is that need shapes intention—the surviving spouse’s need for economic security shapes decedents’ intentions or, more accurately, shapes the intentions that the state should properly attribute to decedents.

At today’s CD interest rates of around four percent, $100,000 generates only $333 a month ($4,000 a year) in income. With average social security payments added in, the surviving spouse’s income only rises to $889 a month ($10,668 a year), which is a mere $367 a month ($4,404 a year) above the poverty level. This still puts the surviving spouse into the category of the near-poor (defined as persons with incomes less than twice the poverty level). Even if short-term interest rates return to the eight percent level, which is where they were a year and a half ago, the income yield rises only $333 a month ($4,000 a year). A surviving spouse who only has social security and $100,000 in assets will still be in jeopardy of outliving those assets, especially if he or she lives into deep old age, as so many now do. To the extent that the interest plus social security proves insufficient, capital will need to be drawn down, perhaps to the point of exhaustion or near exhaustion. With high real estate taxes and high costs of prescription drugs and other medical procedures not covered by Medicare, not to mention nursing

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92 Current interest rates on 6-month CDs ranged from 3.14% to 4% in the New York City area and from 3.65% to 4.69% in major banks outside the New York City area. See Elizabeth M. Fowler, Bank Yields Show Mixed Trend for Week, N.Y. TIMES, Mar. 18, 1992, at D15.

93 We are currently experiencing a general inflation rate of 2 to 3%. The most recent report puts the annual increase in the consumer price index at 2.2%. Consumer Price Index Rises 0.3%, N.Y. TIMES, Mar. 18, 1992, at D21. If $100,000 is invested in CDs yielding 4% interest, and if $10,000 is withdrawn each year (adjusted upward for a 2% inflation rate in Year 2 and beyond), $100,000 will last only 11 years. If the same annual withdrawal is adjusted upward for a 3% inflation rate, $100,000 will last only 10 years. Reducing annual withdrawals to, say, $7,000 extends the period to 17 years at a 2% inflation rate and to 15 years at a 3% inflation rate. See Jane B. Quinn, Making the Most of Your Money 893-94 tbls. (1991).
home expenses should that become necessary, the cost of living for the elderly often rises faster than the general inflation rate.

These computations assume that the surviving spouse receives as much as $100,000 in cash that can be invested in CDs. In fact, some of the decedent’s estate will probably be distributed in kind, that is, in the form of specific assets that are illiquid, thus decreasing the income-generating potential of the spouse’s share.

Of course, some surviving spouses do not need a big portion of the decedent’s intestate estate for economic security. Some already have independent means or will benefit from will substitutes such as life insurance, pension death benefits or annuities, joint tenancies, or joint banking or money market accounts. Because intestacy laws, by tradition, are kept simple, however, they do not reduce the spouse’s share by the amount of the spouse’s assets. Unless this constraint on the intestacy laws is to be broken, it necessitates designing those laws on the assumption that the surviving spouse does not have independent means and will not benefit appreciably from will substitutes. This approach is the only way to guarantee all surviving spouses a minimum degree of economic security. It does require, not unfairly, it seems to me, the decedent whose spouse has economic security to make a will in favor of his or her children by the prior marriage, if that is what the decedent thinks is appropriate.

94 Two out of five people over 65 will spend some time in a nursing home during their lifetimes. Nearly 75% of all nursing home residents are women. Costs range from $20,000 to $80,000 per year; 36% of these costs are currently borne by Medicaid. See TEACHERS INS. & ANNUITY ASS’N, LONG-TERM CARE: A GUIDE FOR THE EDUCATIONAL COMMUNITY 2, 11 (1992). Note that the more the intestacy laws reduce the surviving spouse’s share in order to favor adult children by a prior marriage, the more likely it becomes that state funds will have to be expended under Medicaid for nursing home care of the surviving spouse. This point alone should make state legislators more sympathetic to the 1990 UPC’s lump-sum-plus-a-fraction approach than to the inheritance expectations of the decedent’s adult children by a prior marriage.
C. Sections 2-201 to 2-207: The Redesigned Elective Share

The preceding sections demonstrate that the 1990 UPC intestate-succession law presumes a marriage in which the decedent wants to give the surviving spouse the entire estate. In addition, the 1990 UPC presumes that the decedent would want all of a smaller estate and a substantial portion of a larger estate to pass to the surviving spouse if there are no children from their marriage, even if a parent or children from a previous marriage survive. The 1990 UPC imputes to Ben a desire to give his entire estate to Elaine and imputes to Elaine a desire to give her estate to Carl, but it also imputes to Elaine a desire to give some of her estate to her children by her marriage to Ben if she has more than enough property to provide for Carl's economic security. The law disregards all extrinsic evidence to the contrary except documentary evidence in the form of a valid will expressing an intent to give the spouse less or nothing at all. Intestate-succession cases, by definition, do not involve such documentary evidence.

The next section involves situations in which such documentary evidence does exist. Specifically, the section addresses the situation in which the decedent has left a will that totally or substantially disinherits the surviving spouse.95

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—of how society views the institution of marriage.

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95 Intestate decedents may indirectly disinherit the surviving spouse by depleting the intestate estate through gifts or will substitutes. By restricting the discussion to decedents directly disinheriting the surviving spouse by will, I do not suggest that the elective share is unavailable or never taken in intestacy cases.
The contemporary view of marriage is that it is an economic partnership. The partnership theory of marriage, also called the

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96 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." UNIF. MARITAL PROPERTY ACT prefatory note, 9A U.L.A. 97 (1987) (quoting COMM. ON CIVIL AND POLITICAL RIGHTS, REPORT TO THE PRESIDENT’S COMMISSION ON THE STATUS OF WOMEN 18 (1963)).

The strength of the idea that marriage is an economic partnership is evidenced by the recent New Jersey case of Carr v. Carr, 576 A.2d 872 (N.J. 1990). In that case, a husband, after having left his wife of seventeen years, died during the pendency of a divorce proceeding initiated by his wife. Id. at 874. The husband's will devised his entire estate to his children by a former marriage. Id. 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. Id. at 877. The wife also had no recourse under the New Jersey elective-share statute because that statute withheld an elective share from a surviving spouse who was not living with the decedent at death. Id. Despite the wife's inability to recover under either the divorce or elective-share statutes, 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 entitlement 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. . . .

The constructive trust, we believe, is an appropriate equitable remedy in this type of case.

The equitable remedy of constructive trust should be invoked and imposed on the marital property under the control of the executor of [the husband's] estate. . . . [The constructive trust remedy] should be
marital-sharing theory, is expressed 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 agreement in which each spouse possesses a half interest in all property nominally acquired by and titled in the sole name of either partner during the marriage (excluding property acquired by gift or inheritance). A decedent who disinherits a surviving spouse is seen as having reneged on the bargain. Sometimes the theory is visualized 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." 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 homemak-

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applied to avoid the unjust enrichment that would occur if the marital property devolving to Mr. Carr's estate included the share beneficially belonging to [the wife].

Id. at 879-81 (footnote omitted). In a footnote, the court noted that efforts were pending in the New Jersey legislature to eliminate the gap created by the two statutes. Id. at 879 n.3.

97 GLENDON, supra note 60, at 131.

98 Id.
ing 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.99

No matter how the rationale is expressed, the community-property system100 recognizes the partnership theory,101 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 property ownership. 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 a half interest in the property the other earns during the marriage. By granting each spouse upon acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative.

The common-law states, however, also give effect or purport to give effect to the partnership theory when it perhaps counts


101 As one author noted: "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." William A. Reppy, Jr., Community Property in California 1 (1980).
most—when the marriage ends in divorce. If the marriage ends in divorce, a spouse who sacrificed his or her financial earning opportunities to contribute so-called domestic services to the marital enterprise (such as child rearing and homemaking), or a spouse who pursued a lower paying career or engaged in volunteer work, stands to be recompensed. Almost all, if not all, states now follow the so-called equitable-distribution system upon divorce, under which broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contribu-

102 In Rothman v. Rothman, 320 A.2d 496 (N.J. 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 501-02 (footnote and citation omitted). Although in this early equitable-distribution case, the court refused to establish a presumptive division of marital assets on a 50-50 basis, see id. at 503 n.6, many courts today do presume an equal division, and many recently enacted statutes expressly so provide, see J. GREGORY, THE LAW OF EQUITABLE DISTRIBUTION ¶ 8.03 (1989).

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

For a fascinating account of how this system swept the country, see Mary A. Glendon, Property Rights Upon Dissolution of Marriages and Informal Unions, in THE CAMBRIDGE LECTURES 245 (N. Eastham & B. Krivy eds., 1981).
tions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce.\textsuperscript{104}

The common-law states also protect spousal property rights when the decedent disinherits the surviving spouse. The overwhelming majority of common-law states have responded to this situation by curtailing the decedent's testamentary power over title-based ownership interests. Regardless of the decedent's intent, the surviving spouse receives a partial claim to the decedent's estate—a forced share. Because title to the decedent's property does not automatically transfer to the surviving spouse upon the decedent's death, the forced share must be elected. Thus, 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 conventional elective-share law, including the pre-1990 UPC elective-share provision, the surviving spouse is granted a right to claim a one-third share of the decedent's estate.\textsuperscript{105} In comparison, the marital-partnership theory would allow a claim for one-half of the couple's combined assets. The 1990 UPC elective-share provision is designed to bring elective-share law into line with the partnership theory of marriage.\textsuperscript{106}

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 mostly accumulated during the course of the marriage. The conventional elective share of one-third of the decedent's estate plainly does not

\textsuperscript{104} GREGORY, supra note 102, ¶ 1.03, at 1-6.


implement a partnership principle.\textsuperscript{107} The actual result is governed by which spouse happens to die first and by how the marital property was nominally titled.

Consider Ben and Elaine again. Assume that they married in their twenties, never divorced, and Ben died at age sixty-two, survived by Elaine. For whatever reason, Ben left a will entirely disinheriting Elaine. The couple accumulated assets worth $600,000 during their marriage.

Because conventional elective-share law grants Elaine a claim to one-third of Ben's estate, her ultimate entitlement is governed by the manner in which the marital assets were nominally titled. She could receive much more or much less than the fifty percent share that the partnership principle would imply.

In a marriage in which the marital assets were disproportionately titled in the decedent'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 would only be for $200,000—well below the $300,000 amount the marital-partnership theory produces. If Ben "owned" $500,000 of the marital assets, Elaine's claim against Ben's estate would only be for $166,500 (one-third of $500,000), which when combined with Elaine's "own" $100,000 yields a less than equal share of $266,500—still below the $300,000 figure produced by the marital-partnership theory.

\textsuperscript{107} Nor does a less conventional elective-share fraction of one-half of the decedent's estate, which a few states have adopted, see, e.g., COLO. REV. STAT. § 15-11-201 (1987), implement true partnership principles. A one-half share of the decedent's assets whenever or however acquired does not equal a one-half share of the couple's assets acquired during the marriage other than by gift or inheritance. For example, if the marital assets were equally titled, a one-half share of the decedent's estate allows the survivor to take 75\% of the couple's assets. Worse yet, if the marital assets were disproportionately titled in the survivor's name, the survivor takes an even greater percentage of the marital assets. For example, if 80\% of the marital assets were titled in the survivor's name and 20\% in the decedent's name, the survivor takes 90\% of the marital assets.
In a marriage in which the marital assets were more or less equally divided, conventional elective-share law grants the survivor a right to take a disproportionately large share. If Ben and Elaine each owned $300,000, Elaine is still granted a claim against Ben's estate for an additional $100,000.

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

I should now like to draw attention to a very different sort of marriage—a short-term marriage, particularly the short-term marriage later in life, in which each spouse typically enters the marriage with assets derived from a former marriage. In these marriages, the conventional one-third share of the decedent's estate greatly exceeds a fifty-fifty division of assets acquired during the marriage.

The point is illustrated by the hypothetical case of Elaine and Carl. Recall that, a few years after Ben's death, Elaine married Carl. Suppose that both Elaine and Carl were in their mid-to-later sixties when they married. Then suppose that after a few years of marriage—five, let us say—Elaine died survived by Carl. Suppose further that both Elaine and Carl have adult children and a few grandchildren by their prior marriages, and that each naturally would prefer to leave most or all of his or her property to those children.

As before, 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 Carl, the survivor, a right to shrink Elaine's estate (and hence the share of Elaine's children from her prior marriage to Ben) by $100,000, reducing it to $200,000, while supplementing Carl's assets (which will likely go to Carl's children by his prior marriage) by
S$100,000, increasing their value to $400,000. 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 chanced to survive—gains a windfall, for the "winner" is unlikely to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

How prevalent are marriages like that between Elaine and Carl—the remarriage later in life ending in the death of one of the partners a few years later? Plainly, such marriages do not affect a high proportion of the widowed and divorced population. Nevertheless, government data suggest that the incidence of such marriages may not be insignificant.108

108 Data published by the federal government reveal that, within the widowed and divorced population at large, not disaggregated by age, about 21% of widowed men and about 8% of widowed women remarry, and about 83% of divorced men and 78% of divorced women remarry. REMARRIAGES AND SUBSEQUENT DIVORCES, supra note 3, at 12. The average (mean) ages at the time of remarriage of widowed men and women have steadily increased from 57.7 in 1970 to 60.2 in 1983 for men and from 50.3 in 1970 to 52.6 in 1983 for women. Id. at 24 tbl. 4. The average (mean) ages at remarriage of divorced men and women have also steadily increased, but the ages are, of course, much lower. The average (mean) ages increased from 36.7 in 1970 to 37.3 in 1983 for men and increased from 32.8 in 1970 to 33.7 in 1983 for women. Id.

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

Within the 65-and-older population, 2.62% of divorced men and .05% of divorced women remarried during 1983. Id. at 23 tbl. 3. In the same year, 1.68% of widowed men age 65 and older and .02% of widowed women age 65 and older remarried. Id. Within the divorced population ages 60 to 64, 4.93% of divorced men and 1.29% of divorced women remarried in 1983. Id. Figures were not given for the widowed population ages 60 to 64. The remarriage rates within the 65-and-older divorced and widowed segments of the population have been trending downward, but not in a straight line. The data show peaks and valleys during the 1970-83 period. One of the peaks occurred in 1975 when 3.14% of divorced men, .09% of divorced women, 1.95% of widowed men, and .02% of widowed women remarried. Id. 1975 data for the 60 to 64 years age group were not reported. Id.
Equally relevant to the point is that, when such marriages occur, conventional elective-share law produces 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. Recognize, then, that in a short-term, late-in-life marriage, which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting out of malice or spite toward the surviving spouse, but from a perceived higher obligation to the children from his or her former, long-term marriage.

a. Specific Features of the Redesigned Elective Share

The 1990 UPC elective-share system responds to these concerns by bringing 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 eliminate the surviving spouse’s entitlement when the

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

See W.D. MacDonalD, Fraud on the Widow’s Share 156-57 (1960) (Of the reported elective share cases in which the author could identify the relationships, more than half pitted children of a former marriage against a later spouse).

Statistics show:
On average, women ending first marriages had 1.06 children under 18 years, those ending second marriages had .064 children, and those ending third marriages had .036 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.

Remarriages and Subsequent Divorces, supra note 3, at 3.
marital assets were disproportionately or equally titled in the surviving spouse’s name. Put differently, the effect is both to reward the surviving spouse who sacrificed money-making opportunities in order to contribute domestic services to the marital enterprise and to deny an additional windfall to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

In the short-term, later-in-life marriage, illustrated by the marriage of Elaine and Carl, the effect of implementing a partnership theory is to decrease or 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 surviving spouse 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 1990 UPC grants the surviving spouse a special supplemental elective-share amount when the surviving spouse would otherwise lack sufficient funds for support.\(^{10}\)

\textit{b. Implementing the Partnership Theory of Marriage}

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

\(^{10}\) The supplemental elective-share provision, established by \textsc{Unif. Probate Code} § 2-201(b), 8 U.L.A. 89 (Supp. 1992), is discussed \textit{infra} text accompanying notes 153-61.
Modeling the elective share on divorce law appeared to the UPC drafters to be quite unsatisfactory. The strongest argument for extending divorce law to disinherition at death is that of parallelism. Disinheritance of a spouse at death resembles divorce, the argument goes, because the marriage has failed and terminated. There are several objections to this analogy. One is that disinherition at death, especially in the late-in-life marriage, does not always signify a failed marriage. When the disinherited spouse has ample independent means of support, a decedent might disinherit the spouse to provide for children by a prior marriage. Conventional law 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 at divorce and upon 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 equitable-distribution system; there are several. 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. One author has identified three major types of equitable-distribution


systems: 113 (1) the "kitchen sink" system, in which all property of the two spouses, regardless of how or when acquired, is subject to division; 114 (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 between the regimes of marital property at divorce and upon death is the goal, a uniform laws project that aspires to a single regime for dissolution at death cannot track the multitude of regimes on divorce. The logic of the argument for parity is that each state should incorporate its equitable-distribution system into its elective-share system. The logic of a uniform laws project dealing with probate law is that all states should 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.

Quite apart from these concerns, 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

113 Oldham, supra note 112, § 3.03; see also Joseph W. McKnight, Defining Property Subject to Division at Divorce, 23 Fam. L.Q. 193 (1989) (suggesting that effecting an equitable dissolution depends on how courts classify property).

114 But see Oldham, supra note 112, § 13.02[1][i] (noting judicial reluctance to divide property acquired before the marriage or during the marriage by gift or inheritance "unless the circumstances warrant").
adultery, violence, excessive drinking, sexual neglect, mental cruelty\footnote{See GREGORY, supra note 112, ¶ 9.03. In Brown v. Brown, 704 S.W.2d 528 (Tex. Ct. App. 1986), for example, a husband demonstrated the wife's fault by proffering evidence that his wife "talked to him like he was dirt, hurt his feelings, made him nervous, refused at times to let him touch her, did little or no housekeeping or cooking, didn't like visits from the neighbors, and was very extravagant with his money." Id. at 529.}—and other subjective criteria.\footnote{For a discussion of other factors, see GREGORY, supra note 112, ch. 8; OLDHAM, supra note 112, §§ 13.02-.03. Professor McKnight reports that "as many as thirty-eight factors have been identified that may be considered in equitable distribution." McKnight, supra note 113, at 197 n.14 (citing Mary J. Connell, Note, Property Division and Alimony Awards: A Survey of Statutory Limitation on Judicial Discretion, 50 FORDHAM L. REV. 415, 439 n.170 (1981)).} When death terminates the marriage, only the surviving spouse can testify regarding 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 factor is not prescribed. Because each case is handled on an ad hoc basis,\footnote{One commentator has described the equitable-distribution process as follows:}
equitable distribution is in truth "discretionary distribution." The following analysis of Professors Kwestel and Seplowitz sums up many of the reasons for not carrying equitable-distribution law into the elective share:

[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 . . . .


This discretionary distribution system closely resembles the Testator’s Family Maintenance (TFM) system, which is prevalent in England and the Commonwealth. TFM empowers a judge to vary the testator’s will "to make reasonable financial provision" for the surviving spouse. Inheritance Act (Provision for Family and Dependents Act), 1975, ch. 63, § 1 (Eng.). In determining what is reasonable, the court can consider the competing equities of the children of a prior marriage, the adequacy of the spouse’s own resources, the spouse’s age, and "the duration of the marriage." Id. § 3(1)(a)-(b), (2)(a). TFM remits to judicial discretion every important policy issue in forced-share law. For a lucid critique of TFM, see Mary A. Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 TUL. L. REV. 1165, 1186-89 (1986).


The other model from existing law that might have been used to implement a marital-partnership theory is the community-property system. As noted before, under community-property law, each spouse automatically acquires a half interest in property as it is acquired during the marriage (other than by gift or inheritance). There are two possible approaches for injecting community law into the legislative schemes of the noncommunity property states on a deferred-until-death basis. Unfortunately, it is not always clear which of the two approaches is advocated by those proposing it. One approach, which I call the \textit{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 the couple spent their married life in a community-property jurisdiction. The other approach, which I call the \textit{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 proper-

\begin{footnotesize}
\begin{enumerate}
\item See J. Thomas Oldham, \textit{Should the Surviving Spouse's Forced Share Be Retained?}, 38 CASE W. RES. L. REV. 223, 245-47 (1987). In his article, the author apparently advocates the elective-share deferred-community approach, but he does not mention the strict deferred-community approach.
\item In an analogous situation, the community-property states of California and Washington apply a strict deferred-community approach to "quasi-community" property. The quasi-community property concept addresses the problem of "migratory" married couples by treating as quasi-community property all property acquired by the couple while living in a noncommunity property jurisdiction that would have been community property had the couple been living in a community-property jurisdiction when the property was acquired. In California and Washington, quasi-community property is automatically retitled at death, hence invoking a strict deferred-community approach. See \textit{Cal. Prob. Code} §§ 66, 101 (West Supp. 1991); \textit{Wash. Rev. Code Ann.} §§ 26.16.220-250 (West Supp. 1991).
\end{enumerate}
\end{footnotesize}
The elective-share deferred-community approach is considerably more appealing as a model for implementing the marital-partnership theory than equitable-distribution law. Interestingly, most of the community-property states distinguish 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, but the mechanical community-property fifty-fifty split is used at death. In the probate area, the attractive feature of community law is its predetermined formula. That portion of the couple's property acquired during the marriage (other than by gift or inheritance) is divided according to a strict fifty-fifty ratio; other factors are excluded. In terms of the contribution theory, the premise upon which community law can be said to rest is that of an irrebuttable presumption that each spouse contributed equally to the acquisition of the couple's wealth. The argument for a mechani-

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122 The community-property states of Idaho and Wisconsin apply an elective-share deferred-community approach to quasi-community property. These states permit the surviving spouse to elect to take a half share of the couple's quasi-community property, hence invoking an elective-share deferred-community approach. See IDAHO CODE §§ 15-2-201 to -209 (1979); WIS. STAT. ANN. §§ 851.055, 861.02 (West 1991). For an explanation of quasi-community property, see supra note 121.

123 In comparing the strict and elective-share deferred-community approaches, the strict approach is more consistent with the marital-partnership theory, but the elective-share approach is more consistent with the notion of an elective share in the common-law states. See infra note 147.

124 See OLDHAM, supra note 112, § 3.03[5] ("In a few community property states, community property must be divided equally. [citing CAL. CIV. CODE § 4800 (West 1983)]. Most of these states, however, permit an equitable division of the community estate. [citing ARIZ. REV. STAT. ANN. § 25-318 (1976); NEV. REV. STAT. § 125.180 (1987); TEX. FAM. CODE § 3.63 (1975)].") see also William A. Reppy, Jr., Major Events in the Evolution of American Community Property Law and Their Import to Equitable Distribution States, 23 FAM. L.Q. 163, 164 (1989).

125 Stated in marital-partnership terms, the law presumes that the couple impliedly bargained to split in half the marital proceeds, unless the couple provided otherwise in a premarital or postmarital agreement.
cal, 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 on 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' actual contributions to the family wealth would necessarily entail an inquiry into virtually every facet of the spouses' 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.126

Like equitable-distribution systems, community-property systems also vary from state to state regarding some of the details. Some states, for example, treat income earned during the marriage on separate property as community property; other states treat it as separate. But these variations do not pose a parity problem because no one would propose an elective share based on a deferred-until-death community-property model for adoption in community-property states. 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 among the community-property states could easily be resolved by embracing one method regarding each of the subsidiary issues upon which there is variation.127


127 Had we decided to adopt a deferred-community elective 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 have
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.\textsuperscript{128} A deferred-community elective share would require identifying which of the couple's assets were acquired during the marriage (other than by gift or inheritance) and which were brought into the marriage (or acquired during the marriage by gift or inheritance). The classification problem is arguably more difficult in noncommunity-property states than in community-property states because couples in the former states are not put on notice regarding the risk of not maintaining good records. The problem is commingling.\textsuperscript{129}

To be sure, the administrative burden could be eased by adopting a rebuttable presumption that all spousal property is community property. That presumption would ease the administrative burden, but at the cost of reaching incorrect results in cases in which the presumption would prevail, not because it is correct, but


\textsuperscript{129} See \textit{GLENDON}, \textit{supra} note 60, at 124 (stating that 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."); \textit{see also} Popp, 432 N.W.2d at 600; Kessler, \textit{supra} note 128; Oldham, \textit{supra} note 103.

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. Jane B. Quinn, \textit{Marriage and Money—Keeping the Peace}, WOMAN'S DAY, June 16, 1987, at 18.
because sufficient contrary evidence cannot be obtained. Thus, what appears to be an exact method may not in fact give exact results.

c. *The Method Adopted—An Accrual-Type Elective-Share System*

Given the inescapable problems associated with classification, 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 this system, property earned during the marriage need not be segregated from property acquired prior to the marriage or acquired during the marriage by gift or inheritance.

The 1990 UPC's accrual-type elective share has three essential features. First, section 2-201(a) establishes a schedule under which the elective-share percentage adjusts to the length of the marriage. The longer the marriage, the larger the elective-share

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130 See Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 152-53 (1989) (noting that, in the equitable-distribution context "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).

131 For a proposal that divorce law should utilize an accrual-type system for asset division, see Stephen D. Sugarman, *Dividing the Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130, 159-60 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

132 The 1990 UPC's accrual-type elective share has been endorsed by the Assembly of the National Association of Women Lawyers, on the unanimous recommendation of its Executive Board. Letter from Gail M. Beckman, President, National Association of Women Lawyers, to the author (August 14, 1990) (on file with author).

percentage. This sliding scale is intended to approximate the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of fifteen years than in a marriage of fifteen days. Specifically, the elective-share percentage is initially small and increases annually according to a graduated schedule until it reaches a maximum rate of 50%. During the first year of marriage, the schedule provides the surviving spouse a right to elect the supplemental elective-share amount only. After five years of marriage, the elective-share percentage is 15% of the augmented estate; after ten years of marriage, the share is 30%; and after fifteen years of marriage, the share reaches the maximum 50% level.

The second feature of the 1990 UPC elective-share system is that the elective-share percentage is applied to the "augmented estate," which includes the value of the couple's combined assets and not merely the value of the assets nominally titled in the decedent's name. Specifically, the augmented estate consists of the sum of the values of four components. On the decedent's side are (1) the decedent's net probate estate and (2) the decedent's reclaim-

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134 Id.

135 Id. § 2-201(a)-(b). The supplemental elective-share amount is explained infra text accompanying notes 153-61.

136 UNIF. PROBATE CODE § 2-201(a), 8 U.L.A. 88-89 (Supp. 1992). Unlike Elaine and Carl's short-term marriage, some later-in-life marriages will endure for 15 or more years, which will entitle the surviving spouse to a 50% elective share. Some will endure for almost 15 years, which will entitle the surviving spouse to a near-50% elective share.

As previously noted, the average (mean) age at remarriage is 60.2 for widowed men and 52.6 for widowed women. See supra note 108. The 1988 government data report that average life expectancy at birth for men is 71.5 and that average life expectancy at birth for women is 78.3. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES—1991, at 73 tbl. 105 (111th ed. 1991). These figures indicate that many spouses in later-in-life marriages will endure 15 years and reach the maximum 50% elective-share percentage.


able estate. On the surviving spouse's side are (3) the property to which the surviving spouse succeeds by reason of the decedent's death other than from the decedent's probate estate and (4) the property owned by the surviving spouse plus amounts that would have been included in the surviving spouse's reclaimable estate had the spouse predeceased the decedent. 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. Including the couple's combined assets in the augmented estate is absolutely essential to implement a marital-partnership theory. If the elective-share percentage were to be applied only to the decedent's assets, the elective-share system would grant a windfall to a surviving spouse who held nominal title to half or more of the couple's marital assets. 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 1990 UPC elective-share system disregards the possibly fortuitous factor of how the couple took title to particular assets.

The third feature relates to the means of satisfying the elective-share amount: The surviving spouse's own assets (or a portion of them in under fifteen-year marriages, as explained below) are applied first. The decedent's assets are liable only to the extent of any deficiency.

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139 For a discussion of the reclaimable-estate provision's role in preventing "fraud on the spouse's share," see infra text accompanying notes 167-68.

140 This component includes life insurance on the decedent's life payable to the surviving spouse and property held by the decedent and surviving spouse in joint tenancy. UNIF. PROBATE CODE § 2-202(b)(3), 8 U.L.A. 91 (Supp. 1992).

141 Id. § 2-201(a), 8 U.L.A. 88-89.

142 The windfall occurs even if the elective share is one-half instead of the traditional one-third. See supra note 107.

To illustrate these three features, we can reexamine the cases of Ben and Elaine and Elaine and Carl. Remember that Ben and Elaine were married a long time, well beyond fifteen years, and that Ben died at age sixty-two, survived by Elaine. Remember also that, for whatever reason, Ben left a will entirely disinheriting Elaine and that the couple's combined assets totalled $600,000.

Under the 1990 UPC, Elaine's elective-share percentage would have reached the maximum 50% rate long before Ben's death. Unlike previous elective-share statutes, the 1990 UPC disregards how these combined assets were nominally titled. The 1990 UPC does not view the marital assets as partly belonging to Ben and partly to Elaine. Under the 1990 UPC's marital-partnership theory, half the value of those assets "belongs" to 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. If the marital assets were disproportionately titled in the decedent's name, the 1990 UPC gives the surviving spouse a right to equalize them. If Ben "owned" all $600,000 of the marital assets, 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, Elaine's claim against Ben's estate would be for $200,000, which is the amount necessary to bring Elaine's $100,000 in assets up to $300,000.

In marriages in which the marital assets were nearly equally titled, the 1990 UPC elective-share system prevents the survivor from

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144 This example assumes that Ben entirely disinherited Elaine, that is, that nothing passed to Elaine by testate or intestate succession, by nonprobate transfers such as life insurance, or by right of survivorship under a joint tenancy or a joint bank account. If property passed to Elaine by any of these methods, § 2-207(a)(1) provides that these assets count first toward satisfying Elaine's elective-share amount. Id. § 2-207(a)(1).

145 Note that under the 1990 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. Id. § 2-202(b), 8 U.L.A. 90-91.
taking a disproportionately large share. Thus, if $300,000 of the marital assets were titled in Ben's name and $300,000 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 theory.

In marriages in which the marital assets were disproportionately titled in the survivor's name, the 1990 UPC elective-share system prevents the survivor from increasing the disparity. If Ben "owned" $200,000 and Elaine "owned" $400,000, Elaine would have no additional claim against Ben's estate.\(^\text{146}\)

\(^{146}\) Elaine would have no claim against Ben's estate because she has already been disproportionately compensated according to marital-partnership principles. Under conventional elective-share law, Elaine could magnify the disproportion by claiming an additional $66,667.

The 1990 UPC system does not equalize the distribution of marital assets by giving Ben's estate a claim to a portion of Elaine's property, because such a claim would contravene the purpose of an elective-share system. Noncommunity-property states traditionally view the elective share as personally benefitting the surviving spouse rather than the beneficiaries of a spouse's estate. For this reason, the 1990 UPC elective-share system does not recognize the decedent spouse's marital-partnership interest. For similar reasons, the Uniform Simultaneous Death Act, UNIF. SIMULTANEOUS DEATH ACT, 8A U.L.A. 315 (Supp. 1992), and the corresponding UPC version, UNIF. PROBATE CODE §§ 2-104, -702, 8 U.L.A. 75, 138-40 (Supp. 1992), which imposes a 120-hour survivorship requirement in simultaneous or near-simultaneous death cases, do not invoke a marital-partnership theory; instead they distribute each spouse's property to that spouse's beneficiaries.

The community property system differs from the 1990 UPC elective-share system. The community-property system protects the decedent's interest as well as the survivor's interest. Achieving parity in noncommunity elective-share law would require granting the deceased spouse's estate a claim against the surviving spouse's assets. This claim would devolve upon the decedent's personal representative in the same manner that a fiduciary makes the election on behalf of an incapacitated surviving spouse.

Administratively, there are at least two ways for handling this 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 decedent's estate, the election would be virtually automatic unless waived by a well-drafted instrument. This contrasts with the present situation in which the elective share is 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 the election only if the decedent spouse's
Now, let us return 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. After five years of marriage, Elaine died, survived by Carl. Elaine and Carl each had adult children and grandchildren from their prior marriages.

The previous discussion of this example showed how the conventional-type elective-share law allows the surviving spouse to siphon off (for the survivor's children, eventually) 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 elective-share system. Recall that the value of the couple's combined assets was $600,000, of which $300,000 was titled in Elaine's name (the decedent) and $300,000 was titled in Carl's name (the survivor). Because the marriage lasted about five years, the applicable elective-share percentage is 15%.

Although Carl's elective-share amount is $90,000 (15% of $600,000), Carl does not necessarily have a $90,000 claim against Elaine's estate. In a short-term marriage such as this, a portion of Carl's own assets is applied first in satisfying his elective-share amount. The portion of Carl's assets that counts first is 30%, a figure determined by doubling the elective-share percentage.\footnote{147}

\footnote{147} Under § 2-207(a)(4) of the 1990 UPC, the portion of the surviving spouse's assets that counts toward satisfying the elective-share amount is derived by applying a percentage to the survivor's assets equal to twice the elective-share percentage. UNIF. PROBATE CODE § 2-207(a)(4), 8 U.L.A. 99 (Supp. 1992). As applied to Carl, 30% of his assets (twice the 15% elective-share percentage) would count toward satisfying the elective-share amount.

Why is it appropriate to double the elective-share percentage in determining...
Because 30% of Carl’s assets is $90,000, no deficiency exists and Carl has no claim against Elaine’s estate.

The 1990 UPC’s accrual-type elective share is designed to approximate results that would be reached under the partnership theory of marriage. The theory of the system can be explained by again comparing it to community-property law. Under community law, each spouse gains an immediate right to 50% of the couple’s assets acquired from the first moment of the marriage, other than by gift or inheritance. The hitch, of course, is that in the first moments of the marriage, little or no such property exists. Growth of each spouse’s entitlement occurs over time as the marriage continues and property is acquired and accumulated; each spouse’s 50% share is applied to an ever-growing aggregation of assets.

The 1990 UPC elective-share system operates the other way

how much of the survivor’s assets count toward satisfying the elective-share amount? In order to avoid the tracing-to-source problem, the 1990 UPC applies a graduated elective-share percentage to the couple’s combined assets without regard to when or how the couple acquired those assets. The 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-partnership theory. Thus, in a marriage that endures long enough for the elective-share percentage to reach 15%, the 1990 UPC system equates 15% of the couple’s combined assets with 50% of all assets acquired during the marriage, other than by gift or inheritance. In the aggregate, the system considers 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 system applies the same ratio to each spouse’s mix of assets as it does to the couple’s combined assets. For example, if the elective-share percentage is 15%, then the combined assets are deemed to be held in a 30-70 ratio (30% marital, subject to equalization; 70% individual, exempted from equalization). This ratio is also applied to each spouse’s mix of marital and individual property. Accordingly, the system attributes 30% of Elaine’s $300,000 ($90,000) to marital property and 70% ($210,000) to individual property. Correspondingly, 30% of Carl’s $300,000 ($90,000) is attributed to marital property and 70% ($210,000) to individual property.

Therefore, under the system’s theory, Carl already owns $90,000 of the $180,000 of marital property. In elective-share terminology, $90,000 of Carl’s $90,000 elective-share entitlement comes from his own assets, giving him no right to any of Elaine’s net probate estate. Remember that $90,000 of Elaine’s assets is attributed to marital property; therefore, each spouse already owns his or her 50% marital-property share of the combined assets.
around. It does not distinguish between property acquired during the marriage and other property, but compensates for this by applying an ever-growing elective-share percentage to the couple's combined assets regardless of when or how those assets were acquired. Thus, the accrual schedule translates into a system that approximates the ratio of marital to separate property in marriages of various lengths. After five years of marriage, for example, each spouse's elective-share percentage of 15% is meant to represent 50% of the couple's marital-assets portion of the couple's property. In other words, the law treats 30% of their combined assets as assets acquired during the marriage. After ten years of marriage, the 30% elective-share percentage treats 60% of the couple's combined assets as assets acquired during the marriage. After fifteen years of marriage, the 50% elective-share percentage treats all of the assets as acquired during the marriage.

How accurate is this approximation system? Overall, we believe it to be reasonably accurate. In a given case, of course, the system can be quite inaccurate. It is rather easy, in fact, to pose cases of gross inaccuracy—the decedent or the surviving spouse who receives a large inheritance from a wealthy uncle the day before the decedent's death or the surviving spouse who receives a large inheritance from a wealthy aunt the day after the decedent's death. These situations, however, rarely occur and should not be used

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148 For a discussion of how the system applies to marriages of young people that end in the premature death of one of the spouses, see infra text accompanying notes 158-61.

149 The 1990 UPC system does not exempt inherited or separate property from the augmented estate, even if the property is segregated and can be easily identified. This might seem unfair, but in actuality it would be unfair to do the opposite. To allow segregated inherited or separate property to be exempted from the system would unfairly disadvantage the spouse whose inherited or separate property was not segregated and could not be easily identified.

150 A bizarre turn of events can also distort community-property and equitable-distribution law. In Lynch v. Lynch, 791 P.2d 653 (Ariz. Ct. App. 1990), a paperwork error delayed a couple's final divorce decree beyond the date on which the husband and wife won $2.2 million in the state lottery. Each spouse owned one-half
to criticize a system that produces reasonably accurate results under normal circumstances. Although wealth in any individual case will not often accumulate in the linear fashion set forth in the accrual schedule, that schedule is likely to be reasonably close to the mark in most cases. The fact that it will probably never be exactly on the mark in any given case should not be a reason to reject the system. It should certainly not be a reason for perpetuating the conventional elective-share systems now in place. Measured against the partnership theory of marriage, conventional elective-share systems produce grossly inaccurate results in nearly every case. Moreover, the other partnership models—the equitable-distribution and deferred-community property models—would suffer from far greater defects and could produce an elective share that would be just as inaccurate or more so in given cases. An equitable-distribution elective share would be highly discretionary and unpredictable in result. A deferred-community elective share would not only suffer from the problem of tracing to source, but would still produce inaccurate results when insufficient evidence exists to rebut the presumption that all the couple's property is community property.\footnote{See supra notes 128-31 and accompanying text.}

2. **Support Theory**

The marital-partnership theory is not the only force driving elective-share law. Another rationale 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 the typical one-third or some other fraction, disregards the survivor's actual needs. A one-third share may be inadequate to the surviving spouse's needs,

\[\text{of the winning ticket. The wife filed an amended petition in the unconcluded divorce proceeding seeking half of the husband's winnings. Id. at 655. The trial court concluded that the husband's share of the winnings was community property and that the wife was therefore entitled to half of his $1.1 million share. Id. The Arizona Court of Appeals affirmed. Id. at 659.}\]
especially in a modest estate. In a large estate, it may exceed the survivor’s needs. Moreover, conventional elective-share law disregards the surviving spouse’s independent sources of support.

The 1990 UPC 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.\textsuperscript{152} 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.

The 1990 UPC elective-share system implements the support theory by providing a supplemental elective-share amount of $50,000.\textsuperscript{153} Counted first in making up the $50,000 amount are the surviving spouse’s own title-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 previously discussed.\textsuperscript{154} The system, however, excludes amounts going to the surviving spouse under the UPC probate exemptions and allowances and the survivor’s social security and other governmental benefits. Under 1990 UPC section 2-207, if the value of the surviving spouse’s assets is below $50,000,

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\textsuperscript{152} This support feature responds to the objection that the marital-partnership theory, as applied to divorce law, provides insufficient funds to certain categories of divorced women. See Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America ch. 7 (1985); Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms, in Divorce Reform at the Crossroads 191, 201-04 (Stephen D. Sugarman & Herma H. Kay eds., 1990); Bea A. 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 131, at 130.
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\textsuperscript{154} See discussion supra part II.C.1.c.
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the system holds the decedent's estate liable for the deficiency.\(^{155}\) In a later-in-life marriage, in which the surviving spouse could easily be in the mid-seventies, the supplemental elective-share amount plus the probate exemptions and allowances, social security payments,\(^{156}\) and other governmental benefits may provide the survivor with a fairly adequate means of support.\(^{157}\) In short, the


\(^{156}\) See supra notes 84-90 and accompanying text.

\(^{157}\) If there could be any complaint about this feature of the UPC system, it would be that the $50,000 figure is too low. With average social security payments added in, $50,000 at current interest rates will generate an income stream of only $723 a month ($8,676 a year), which is only $200 a month above the poverty level. Although the spouse also receives the probate exemptions and allowances, which typically would amount to an additional $43,000, a substantial portion of these exemptions and allowances is made up of assets distributed in kind that are illiquid and, unless sold, are not income-producing. By putting the $50,000 figure in brackets, the 1990 UPC invites states to supply a different figure if they so choose. A somewhat higher figure might be quite appropriate.

If the surviving spouse is incapacitated, § 2-203(b) of the 1990 UPC establishes a special provision for the management and ultimate disposition of the elective-share amount and the supplemental elective-share amount. Unif. Probate Code § 2-203(b), 8 U.L.A. 94 (Supp. 1992). These amounts, to the extent payable from the decedent's probate or reclaimable estates, must be placed into a custodial or support trust for the surviving spouse. Id. Enacting states are given a choice 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. Id. § 2-203(c)(2).

For a discussion of whether conventional elective-share law permits an insolvent or Medicaid-assisted surviving spouse, incapacitated or not, to forgo an elective share to defeat creditors or to qualify for Medicaid assistance, see Adam J. Hirsch, The Problem of the Insolvent Heir, 74 Cornell L. Rev. 587, 640-45 (1989); see also State v. Jakubowski, Conn. L. Trib., July 30, 1990, at 31 (Conn. Super. Ct., June 13, 1990) (holding that the state assistance agency had the right to appeal probate decree of distribution when the surviving spouse's conservator failed to elect to take her statutory share); Estate of Schoolnik, Conn. L. Trib., Dec. 4, 1989, at 28 (Conn. Prob. Ct., Oct. 27, 1989) (requiring a Medicaid-assisted surviving spouse to elect to take her statutory share); Flynn v. Bates, 413 N.Y.S.2d 446, 448 (N.Y. App. Div. 1979) (holding that an application for medical assistance under state social services law was properly denied because the test for eligibility "is the availability of assets
supplemental elective-share amount prevents a wealthy decedent from impoverishing the surviving spouse regardless of how brief or extended, happy or unhappy the marriage.

Although the primary rationale for the supplemental elective-share provision was to implement a support theory, the provision was also designed to apply to short-term marriages of couples that end when a young spouse dies. In early marriages, the partners typically enter the marriage with little separate property. All or most of the couple's wealth is accumulated during the marriage. Under a community-property system, all or nearly all of their property would be community property, and thus divided evenly between them. If the marriage terminates upon a young spouse's death, the survivor would be entitled to the community half despite the short duration of the marriage. By contrast, under the 1990 UPC accrual-type elective share, the short duration of the marriage would cause the elective-share percentage to fall well short of the maximum 50%. Thus the surviving spouse would receive an inadequate return of contribution. This problem with accrual-type systems looms far greater for divorce law than elective-share law, however, because early marriages that are faltering tend to end by divorce rather than the premature death of a spouse. To implicate elective-share law, the following must occur: (1) One spouse in an unhappy marriage must die very prematurely, (2) the marital assets must be disproportionately titled in the decedent's name, and (3) the decedent must have disinherited the surviving spouse in a will executed during the marriage. Although empirical evidence regarding the frequency of this combination of events does not exist, data does establish that an insignificant portion of the population dies in the early years of a

rather than those assets actually possessed* and the applicant’s right to elect a sum in excess of $26,000 against her deceased husband’s will, which she had waived, was an asset that was available to her). My thanks to David L. Hemond, Chief Attorney of the Connecticut Law Revision Commission, for bringing the Jakubowski case to my attention and Professor Mary Moers Wenig for bringing the Schoolnik case to my attention.
typical first marriage. Moreover, the majority of young persons who die prematurely die intestate, in which case the 1990 UPC gives the surviving spouse the entire intestate estate. If the decedent left a will, it probably is a premarital will or a will that devises most of the decedent's property to the surviving spouse. If it is a premarital will, the 1990 UPC omitted-spouse provision guarantees the surviving spouse an amount equal to an intestate share of the decedent's estate, which in this type of marriage would probably be the entire intestate estate.

The bottom line is that instances of remarkably premature death of a young married person who during marriage executed a will that disinherit the surviving spouse are rare indeed. But, even in these rare situations, the supplemental elective-share provision guarantees the surviving spouse no less than $50,000 plus the probate exemptions and allowances, which could amount to $93,000 in total. Because most young decedents' estates are small, the supplemental elective-share provision amply rewards the overwhelming majority of surviving spouses who are both young and disinherited in a marriage in which the marital assets were disproportionately titled in the decedent's name.

158 Only about 0.5% of the population (married and unmarried) die between ages 20 and 25, another 0.6% die between ages 25 and 30, and another 0.5% die between ages 30 and 35. Indeed, only another 0.7% die between ages 35 and 40. See 1 Fed. Est. & Gift Tax Rep. (CCH) ¶ 6415.301, tbl. 80CNSMT, at 6961 (1989). The probability of a surviving spouse's disinheritance in these age categories is even lower than these low percentages suggest. Many of the persons dying in each age category were probably unmarried.

159 According to the most comprehensive empirical study undertaken to date, 88% of Americans (married and unmarried) between ages 17 and 30 have no will, and were they to die would die intestate; over 65% of those between ages 31 and 45 have no will, and would die intestate. See Fellows, supra note 58, at 336-39.

160 See supra text accompanying notes 49-95.

3. Reclaimable-Estate Component of the Augmented Estate

The augmented estate serves two basic functions. First, by combining the couple's assets, it plays a crucial role in implementing the marital-partnership theory. Second, it helps prevent fraud on the spouse's share. The problem of fraud arises when the decedent attempts to evade the spouse's elective share by making nominally inter-vivos transfers such as revocable inter-vivos trusts. To render that type of behavior ineffective, the 1990 UPC includes the value of the decedent's "reclaimable estate" as a component of the augmented estate.\(^{162}\) The reclaimable-estate component extends the elective-share computation to the value of property that was the subject of specified types of inter-vivos transfers. In general, the decedent's reclaimable estate includes arrangements that are quite similar to the will substitutes included in a decedent's gross estate for federal estate tax purposes.

The reclaimable-estate component has historical origins in legislation in New York\(^ {163}\) and Pennsylvania.\(^ {164}\) These statutes served as the model for the augmented-estate concept adopted in the pre-1990 UPC.\(^ {165}\) Without legislative guidance, the problem of preventing evasion of the elective share is thrown to the court system to decide on a case-by-case basis.\(^ {166}\)

\(^{162}\) *Id.* § 2-202(b)(2), 8 U.L.A. 90.

\(^{163}\) *N.Y. EST. POWERS & TRUSTS LAW* § 5-1.1(b) (McKinney 1981).

\(^{164}\) *20 PA. CONS. STAT. ANN.* § 301.11(a) (1947) (repealed 1978).


\(^{166}\) An analogous 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 that includes in the gross estate only property owned at death. In the early estate tax statutes, Congress remedied this problem by including in the gross estate various inter-vivos transfers such as transfers with a retained power to revoke, transfers with a retained life estate, joint tenancies, and life insurance. State elective-share systems must do the same by implementing the 1990 UPC's augmented-estate concept or something akin to it. Otherwise, the judiciary is forced to erect stop gap measures.
The 1990 UPC strengthens the reclaimable-estate component by closing loopholes in the pre-1990 UPC. One of these is life insurance that the decedent purchased, naming someone other than the decedent's surviving spouse as beneficiary. With appropriate protection for insurance companies that pay out before receiving notice of an elective-share claim, the 1990 UPC provision includes the face value of these insurance policies in the decedent's reclaimable estate.

The 1990 UPC reclaimable estate also includes the value of property that is subject to a presently exercisable general power of appointment held solely by the decedent. Such powers are viewed as substantively indistinguishable from outright ownership. The power need not have been created by the decedent and need not have been conferred on the decedent during the marriage. The decedent need only have held the power immediately preceding death or have exercised or released the power in favor of someone other than the decedent, the decedent's estate, or the decedent's spouse while married to the spouse and during the two-year period immediately preceding the decedent's death.

D. Section 2-301: Spouse's Protection Against Premarital Wills

The 1990 UPC also protects a disinherited surviving spouse by means other than the elective-share system. Section 2-301 of the 1990 UPC, the omitted-spouse provision, protects a surviving spouse on an ad hoc basis. See, e.g., Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984); Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937).


168 Id.

169 "Presently exercisable general power of appointment" is a defined term. Id. § 2-202(a)(1)(iii). The definition includes a reserved power of revocation in a revocable trust. See Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984); RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 11.1 cmt. c & illus. 5 (1986).
against unintentional disinherittance.

Nearly every state has a similar statute for children called a "pretermitted-heir" statute. These statutes typically protect children born after the execution of the will against unintentional disinherittance. Although pretermitted-heir statutes are commonplace, and one is included in the 1990 UPC, statutes protecting the decedent's surviving spouse against a premarital will are rare in non-UPC states.

The 1990 UPC omitted-spouse provision stands in addition to the apparatus of the elective-share system. One purpose of the provision is to reduce the frequency of elections under the elective share, and thus to reduce the number of times the augmented-estate procedure is invoked. Another purpose is to provide a share for the surviving spouse more related to the amount the decedent would probably have given the surviving spouse had the decedent gotten around to revising the premarital will.

Under the omitted-spouse provision of the pre-1990 UPC, a surviving spouse who was disinherited by a premarital will was given a right to an intestate share. The provision was meant to be intent-effecting, 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 were made in contemplation of the marriage.

When this provision was first drafted and brought into the pre-1990 UPC, the setting in which it probably was principally thought to


171 Early common-law doctrines, sometimes codified, addressed the problem by revoking a person's will if he or she later married. As elective-share statutes came to replace dower and curtesy, the elective share was thought to provide sufficient protection against a premarital will.

operate was with respect to a first marriage. With the remarriage phenomenon on the increase, whether the remarriage follows divorce or death of the first spouse, and with the revisions having dramatically increased the intestate share of the surviving spouse, the UPC drafters paid additional attention to the omitted-spouse provision.

A particular concern was the impact of this provision on the last example we discussed in the elective share. That example began with Ben and Elaine having enjoyed a long marriage that produced children. Then, after Ben’s death, Elaine married Carl. It would not be exceptional if, during their marriage, Ben and Elaine had executed mutual wills, in which each devised the entire estate to the other if the other survives, but if not, to their children. Were this to have been the situation when Ben died, Elaine would have succeeded to Ben’s entire estate without having to exercise an elective share. It would also not be exceptional if, after Ben’s death, Elaine never undertook to execute another will, not even after marrying Carl. This is the type of late-in-life marriage in which Elaine’s instincts would likely be to want to continue to provide for her children from her first marriage. On her own, without the advice of competent legal counsel, Elaine could hardly be expected to appreciate the need for a new will that would merely repeat the provisions in her old will for her children. For this type of late-in-life marriage, the 1990 UPC elective-share system grants Carl no claim or a very modest claim against Elaine’s estate. If, however, Carl could use the omitted-spouse provision to take a much larger portion, he could circumvent the whole purpose of the elective-share system. Unless Elaine and Carl entered into a premarital or postmarital agreement or waiver, the pre-1990 UPC omitted-spouse provision would allow Carl to accomplish this result.

The 1990 UPC corrects this problem by granting the omitted spouse an intestate share in only that portion of the decedent’s estate that is neither devised to the decedent’s children by a prior marriage nor to the children’s descendants. In our hypothetical, the

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173 Section 2-301 uses the terms "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 "a descendant of such a child." Id. § 2-301(a), 8 U.L.A. 100 (Supp. 1992).
omitted-spouse provision would grant Carl nothing and would relegate him to the elective-share system.

The omitted-spouse provision still plays a useful role, however. In the case of a first marriage, where occasionally the decedent spouse may have executed a premarital will in favor of his or her parents or siblings, the omitted-spouse provision confers the full intestate share upon the omitted spouse. And, the provision is certainly not restricted to first marriages, but applies to any marriage. To the extent that the premarital will favors persons other than children (or descendants) of a prior marriage, the surviving spouse is entitled to a full intestate share. This share might very well be the entire estate and could—in consequence—quite properly give the spouse more than the elective-share system would otherwise provide.

III. CONCLUSION

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

To be sure, as with any uniform laws project, the final package reflects a multitude of policy choices upon which reasonable minds can differ. Arguments for making a different choice here or 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 agree in all particulars.

The 1990 UPC is therefore not presented as the "right" answer. No one claims that all other possible answers are "wrong." Rather, the 1990 UPC 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 that the 1990 UPC provides suitable responses to the multiple-marriage society and is destined to be the model for American law deep into the next century.
IV. APPENDIX

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

Spouse's Share in Intestate Succession

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:

If the decedent and the spouse were married to each other:

<table>
<thead>
<tr>
<th>Time Period</th>
<th>Elective-Share Percentage</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>5 years but less than 6 years</td>
<td>15% of the augmented estate.</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>18% of the augmented estate.</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>21% of the augmented estate.</td>
</tr>
<tr>
<td>8 years but less than 9 years</td>
<td>24% of the augmented estate.</td>
</tr>
<tr>
<td>9 years but less than 10 years</td>
<td>27% of the augmented estate.</td>
</tr>
<tr>
<td>10 years but less than 11 years</td>
<td>30% of the augmented estate.</td>
</tr>
<tr>
<td>11 years but less than 12 years</td>
<td>34% of the augmented estate.</td>
</tr>
<tr>
<td>12 years but less than 13 years</td>
<td>38% of the augmented estate.</td>
</tr>
<tr>
<td>13 years but less than 14 years</td>
<td>42% of the augmented estate.</td>
</tr>
<tr>
<td>14 years but less than 15 years</td>
<td>46% of the augmented estate.</td>
</tr>
<tr>
<td>15 years or more</td>
<td>50% of the augmented estate.</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.]

(1) In this section:

(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;\(^{174}\)

(2) the value of the decedent's reclaimable estate. The decedent's reclaimable estate is composed of all property, whether

\(^{174}\) 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." UNIF. PROBATE CODE § 1-201(6), 8 U.L.A. 8 (Supp. 1992).
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 married to his [or her] surviving spouse and during the two-year period 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 includible in the surviving spouse's reclaimable estate had the spouse predeceased the decedent. But amounts that would have been includible 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 payor175 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,176 or for having

175 The term "payor" is defined to mean "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." UNIF. PROBATE CODE § 1-201(34), 8 U.L.A. 10 (Supp. 1992).

176 The term "beneficiary designated in a governing instrument" is defined to include 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." Id. § 1-201(3), 8 U.L.A. 8. A "governing instrument" means a "deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD),
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 notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

(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.

pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type." Id. § 1-201(19), 8 U.L.A. 9.
(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,177 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 terminated, the custodial trust terminates on the death of the beneficiary.

177 The term "incapacitated person" is defined to mean "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, 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." UNIF. PROBATE CODE § 5-103(7), 8 U.L.A. 271 (Supp. 1992).
(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 beneficiary 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 governmental 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 FOLLOWING ALTERNATIVE SUBSECTION (B) AND NOT ADOPT SUBSECTION (B) OR (C) ABOVE]

[(b) [Incapacitated Surviving Spouse.] If the election is exercised 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 decedent'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;
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 the 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 distributee 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 Benefits by Will or Statute.

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 decedent's reclaimable estate:

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

(2) amounts included in the augmented estate under Section 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 Section 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; Supplemental 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 supplemental 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 amount 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 described 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.
Spousal Rights in Multiple-Marriage Society

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\(^\text{178}\) 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 surviving 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.

\(^{178}\) Sections 2-603 and 2-604 are the UPC's antilapse statutes. UNIF. PROBATE CODE §§ 2-603 to -604, 8 U.L.A. 125-32 (Supp. 1992).
Revocation-Upon-Divorce Provision

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.179

(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" means a governing instrument180 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

179 For the definitions of the terms "beneficiary designated in a governing instrument" and "governing instrument," see supra note 176.

180 For the definition of the term "governing instrument," see supra note 176.
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 appointment 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 as community property with the right of survivorship], transforming the interests of the former spouses into tenancies in common.

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181 The terms "joint tenants with the right of survivorship" and "community property with the right of survivorship" are defined to 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." UNIF. PROBATE CODE § 1-201(26), 8 U.L.A. 9 (Supp. 1992).
(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.

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

(1) A payor 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

182 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. Id. § 2-801, 8 U.L.A. 156-57.

183 For the definition of the term "payor," see supra note 175.
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.

(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.