

Memorandum 82-15

Subject: Study L-600 - Probate Law (Elective Share of Surviving Spouse)

INTRODUCTION

The Uniform Probate Code contains provisions drawn for common law states which give the surviving spouse a one-third elective share in the decedent's "augmented estate." The estate is augmented by recapturing certain inter vivos transfers. Gratuitous inter vivos transfers to the surviving spouse by the decedent are deducted from the elective share.

Although the UPC does not have elective share provisions for community property states, a number of commentators have pointed out that the community property system does not provide adequate protection for the surviving spouse where most or all of the marital property is separate property, and have argued that therefore the surviving spouse should be given a nonbarrable share of the decedent's separate property in addition to his or her one-half interest in community and quasi-community property. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 190-95, 216-17 (1979); Bodenheimer, The Community Without Community Property: The Need for Legislative Attention to Separate Property Marriages Under Community Property Laws, 8 Cal. W.L. Rev. 381, 415, 417, 423 (1972); Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 34-35 (1956). See also Peterson, Idaho Uniform Probate Code: Time for Some Changes, 13 Idaho L. Rev. 11, 13 (1976).

This memorandum considers (1) whether California should adopt the elective share provisions of the UPC to give the surviving spouse a share of the decedent's separate property, and (2) what changes, if any, should be made in California's quasi-community property system.

Attached to this Memorandum are the following exhibits:

(1) Exhibit 1 sets forth some California statutory provisions that bear on the rights of the surviving spouse in community and quasi-community property on the death of the other spouse (Civil Code §§ 5125, 5127; Prob. Code §§ 201, 201.5, 201.6, 201.7, 201.8).

(2) Exhibit 2 sets forth the elective share provisions of the UPC with Official Comments (UPC §§ 2-201 to 2-207).

(3) Exhibit 3 sets forth the Idaho statutory provisions which apply the UPC's augmented estate provisions to quasi-community property (Idaho Code §§ 15-2-201 to 15-2-209).

(4) Exhibit 4 is a law review article which gives a detailed explanation of the UPC's augmented estate concept and how it works in some sample cases (Kurtz, The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share, 62 Iowa L. Rev. 981 (1977)).

EXISTING CALIFORNIA LAW

Community Property

Each spouse has a present one-half ownership interest in community property. Civil Code § 5105. Each spouse may dispose of his or her half by will, but not the other spouse's half. Prob. Code § 201 (Exhibit 1); 7 B. Witkin, Summary of California Law Wills and Probate § 20, at 5541 (8th ed. 1974). No community real property may be sold or given away without the joinder of both spouses. Civil Code § 5127 (Exhibit 1). A spouse may not make a gift of community personal property, or sell (whether or not full value is received) household furnishings or clothing of the other spouse or of minor children which is community property, without the written consent of the other spouse. Civil Code § 5125 (Exhibit 1).

When a sale or gift is made in violation of these requirements, the nonconsenting spouse may have the transaction set aside to the extent of the entire property during the lifetime of the conveying spouse, and to the extent of one-half after the death of the conveying spouse. 7 B. Witkin, Summary of California Law Community Property §§ 60, 64, 68-70, at 5150-51, 5153-54, 5156-59 (8th ed. 1974). If the property is real property, the action to set aside the conveyance must be brought within one year after the deed is recorded. Civil Code § 5127 (Exhibit 1). However, it has been suggested that this provision is for the protection of third parties and may not prevent the surviving spouse from making a claim against the estate of the deceased conveying spouse. See *Schindler v. Schindler*, 126 Cal. App.2d 597, 604, 272 P.2d 566 (1954); 7 B. Witkin, supra § 66, at 5155. The surviving spouse may also recover half the face value of life insurance bought by the decedent and paid for with community funds, even though someone else is the named beneficiary. 7 B. Witkin, supra § 62, at 5152.

Ordinarily the surviving spouse is not required to elect between asserting his or her community property rights and accepting benefits under the decedent's will. See 7 B. Witkin, Summary of California Law Wills and Probate § 21, at 5542 (8th ed. 1974). However, the decedent may force the surviving spouse to an election by drawing a will which purports to dispose of both halves of the community property and provides that, if the surviving spouse elects to take his or her share of community property, he or she will forfeit the benefits provided by the will. Id. §§ 21-22, at 5542-43; Brawerman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting § 8.7, at 229 (Cal. Cont. Ed. Bar 1965).

The surviving spouse is entitled to his or her one-half of the community property without regard to inter vivos gifts which he or she may have received from the decedent. See 7 B. Witkin, Summary of California Law Community Property § 78, at 5165-66 (8th ed. 1974). Thus there is no offset as there is under the augmented estate concept of the UPC. See Peterson, supra at 14.

The surviving spouse may by antenuptial or postnuptial agreement agree that all the earnings of the other spouse shall be his or her separate property. 7 B. Witkin, supra § 71, at 5159-60; In re Marriage of Dawley, 17 Cal.3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (antenuptial agreement); see Civil Code § 5133. Thus the surviving spouse may be stripped of any protection against a disinheriting will of the other spouse.

Quasi-Community Property

Quasi-community property is defined as all personal property wherever situated and all real property situated in California, acquired by the decedent while domiciled elsewhere, which would have been community property if the decedent had been domiciled in California when the property was acquired, plus certain property resulting from an exchange. Prob. Code § 201.5 (Exhibit 1). During the continuance of the marriage, quasi-community property is for most purposes treated as the separate property of the acquiring spouse. 7 B. Witkin, supra § 125, at 5219. However, on the death of the acquiring spouse while domiciled in California, quasi-community property is treated similarly to community property: Half belongs to the surviving spouse and the other half is subject to

testamentary disposition by the decedent. Prob. Code § 201.5 (Exhibit 1); 7 B. Witkin, supra § 111, at 5204.

The rule concerning when the surviving spouse is required to elect against the will of the deceased spouse in order to claim his or her half interest in quasi-community property is the opposite of the community property rule (no election required unless decedent's intention to require election appears from the will): If the decedent's will has "made provision" for the surviving spouse, he or she can claim quasi-community property rights only by forfeiting the will benefits "unless it appears by the will that the testator intended that the surviving spouse might take both under the will and against it." Prob. Code § 201.7 (Exhibit 1); 7 B. Witkin, supra § 112, at 5205-06.

The surviving spouse's right to recapture inter vivos transfers by the decedent of quasi-community property is considerably more limited than in the case of community property (can recover half of all gifts not consented to and half of certain transfers for value): The surviving spouse can recapture half of the quasi-community property only if the decedent (1) did not receive "consideration of substantial value" and (2) had "a substantial quantum of ownership or control of the property at death." Prob. Code § 201.8 (Exhibit 1); 7 B. Witkin, supra § 113, at 5206. No case has decided whether the surviving spouse may claim an interest in an insurance policy paid for with quasi-community property funds, but, if the decedent had retained the right to change the beneficiary, that would probably constitute sufficient control to permit application of the recapture provisions.

Like the community property rule, no offset against the surviving spouse's elective share of quasi-community property is required for inter vivos gifts made to him or her by the decedent. See Niles, supra at 193; Peterson, supra at 14.

It appears that, like community property, the surviving spouse may surrender expectant rights in quasi-community property by antenuptial or postnuptial agreement. See Civil Code § 5133.

Decedent's Separate Property

Subject to the power of the spouses to alter their rights by contract, each spouse generally has full testamentary power over his or her own separate property, and the other spouse has no elective share in

such property. See Prob. Code § 20. However, even in the case where the decedent's estate is entirely separate property which is willed to a third person, the surviving spouse may nonetheless be able to obtain most or all of the estate by taking advantage of one or more of the following provisions:

(1) Probate homestead: A homestead may be set aside out of the decedent's separate property for the use of the surviving spouse for life. Prob. Code § 661. There is no maximum value for the property that may be set aside. Estate of Levy, 141 Cal. 646, 75 P. 301 (1904).

(2) Small estate set-aside: If the net value of the decedent's estate is \$20,000 or less (excluding the value of any probate homestead which has been set aside), the entire balance of the estate may be set aside to the surviving spouse. Prob. Code § 640.

(3) Family allowance: The surviving spouse may be awarded a reasonable amount for support during the administration of the estate. Prob. Code § 680.

UNIFORM PROBATE CODE

The elective share provisions of the Uniform Probate Code give the surviving spouse of a domiciliary decedent a right to take an elective share of one-third of the augmented estate. UPC § 2-201 (Exhibit 2). The augmented estate under the UPC is more than the probate estate--it is comparable to the gross taxable estate under federal estate tax law and gives the surviving spouse the right to have various inter vivos transfers brought back into the hotchpot. Niles, supra at 190; see UPC § 2-202 (Exhibit 2). The augmented estate is defined generally to include the decedent's net probate estate increased by (1) the value of certain lifetime transfers of property by the decedent during marriage to donees other than the surviving spouse, and (2) the value of all property owned by the surviving spouse at decedent's death and certain lifetime transfers of property by the surviving spouse during marriage to donees other than the decedent, to the extent the owned or transferred property is derived from the decedent. Kurtz, The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share, 62 Iowa L. Rev. 981, 981-82 (1977) (Exhibit 4). Professor Kurtz diagrams the computation of the augmented estate as follows:

GROSS PROBATE ESTATE

LESS:

1. Funeral and administration expenses
2. Homestead allowance
3. Family allowance
4. Exempt property
5. Enforceable claims

EQUALS: NET PROBATE ESTATE

PLUS TRANSFERS TO DONEES OTHER THAN SPOUSE:

1. Transfers with a retained life estate
2. Revocable transfers
3. Joint tenancies with right of survivorship
4. Transfers to a donee in excess of \$3,000 in each of the two years preceding decedent's death

PLUS SPOUSE'S PROPERTY:

1. Spouse's property owned at decedent's death to the extent derived from the decedent other than by testate or intestate succession
2. Property transferred by the spouse during the marriage to donees, other than the decedent, to the extent such property is derived from the decedent and would have been in the spouse's augmented estate if he or she had predeceased the decedent

EQUALS: AUGMENTED ESTATE

Id. at 1016 (Exhibit 4). The Comment to UPC Section 2-202 (Exhibit 2) explains the purpose of the augmented estate concept and how it is intended to work in practice.

The surviving spouse may claim an elective share without losing any benefits under the decedent's will unless the decedent so provides by express provision in the will. Comment to UPC § 2-206 (Exhibit 2); see Kurtz, supra at 1043-44 (Exhibit 4). The surviving spouse may also claim an elective share where the decedent dies intestate (Kurtz, supra at 981 - Exhibit 4); this would be advantageous when one-third of the augmented estate yields a larger share than the applicable fraction of the intestate estate.

After the amount of the surviving spouse's elective share is determined, it is satisfied first by applying property included in the augmented estate which passes to the spouse by the decedent's will or by intestate succession and which has passed to the spouse by inter vivos transfer from the decedent. UPC § 2-207 (Exhibit 2); Kurtz, supra at 1044-46 (Exhibit 4). Then remaining property of the augmented estate (some of which may be in the hands of third persons) is applied, and is charged against estate beneficiaries and inter vivos donees in proportion to the value of their interests. UPC § 2-207 (Exhibit 2). An inter vivos donee who is required to contribute to make up the elective

share may either give up the specific property transferred or may pay its value into the estate. Id. If the third person refuses to pay, the personal representative may sue for contribution. See UPC § 2-205(e) (Exhibit 2).

Life insurance payable to the surviving spouse is included in the augmented estate, but life insurance payable to a third person is not. UPC § 2-202 and Comment thereto (Exhibit 2); Kurtz, supra at 1039-40 (Exhibit 4). Similarly, when payable to a third person, accident insurance, a joint annuity, pension payments are excluded from the augmented estate. Id. See also C. Bruch, *The Definition and Division of Marital Property in California: Toward Parity and Simplicity* 139 n.402 (July 29, 1981) (unpublished study on file with the California Law Revision Commission) (criticising UPC rule and recommending inclusion in the augmented estate of life insurance and pension benefits payable to a third person).

If the surviving spouse claims an elective share, his or her right to a homestead allowance, exempt property, and a family allowance is not affected. UPC § 2-206 (Exhibit 2). However, the surviving spouse may waive the right to an elective share by written contract, either before or after marriage, and after fair disclosure. UPC § 2-204 (Exhibit 2).

THE UPC'S ELECTIVE SHARE COMPARED TO CALIFORNIA COMMUNITY
AND QUASI-COMMUNITY PROPERTY RIGHTS

The following table affords a quick comparison of the surviving spouse's elective share under the UPC with the surviving spouse's rights under California community and quasi-community property law:

Table 1. Rights of surviving spouse

	<u>Community property</u>	<u>Quasi-community property</u>	<u>UPC elective share</u>
1. Amount of share	Half	Half	One-third
2. Is recapture of inter vivos transfers permitted?			
(a) Where D retains control:			
(1) Gift of real property, household furnishings, or clothing	Yes	Yes	Yes
(2) Gift of other personal property	Yes	Yes	Yes
(3) Sale of real property, household furnishings, or clothing	Yes	No	No

	<u>Community property</u> Half	<u>Quasi-community property</u> Half	<u>UPC elective share</u> One-third
(4) Sale of other personal property	No	No	No
(b) Where D does not retain control:			
(1) Gift of real property, household furnishings, or clothing	Yes	No	Yes, if more than \$3K/yr. per donee in either of 2 years before D's death
(2) Gift of other personal property	Yes	No	
(3) Sale of real property, household furnishings, or clothing	Yes	No	No
(4) Sale of other personal property	No	No	No
3. Are life insurance proceeds subject to recapture?	Yes	Probably	No
4. Is there an offset for D's inter vivos gifts to the spouse?	No	No	Yes
5. If spouse elects, is forfeiture of will benefits presumed?	No	Yes	No
6. Can rights be waived by contract?	Yes	Yes	Yes

THE IDAHO EXPERIENCE

In 1971, Idaho (a community property state) enacted the UPC, including the UPC elective share provisions pursuant to which the surviving spouse was given a one-third elective share in the decedent's separate estate. Bodenheimer, supra at 417 n.204; see Peterson, supra at 13. However, a year later, the Idaho Legislature reconsidered the matter. The provisions for an elective share in separate property were repealed and were replaced instead by a quasi-community property system. Peterson, supra. Idaho's basic definition of quasi-community property is closely similar to California's. Compare Idaho Code § 15-2-201 (Exhibit 3) with Prob. Code § 201.5 (Exhibit 1). The surviving spouse's share is one-half of the quasi-community property. Idaho Code § 15-2-201. However, Idaho's recapture provisions are virtually identical to the UPC's augmented estate provisions. Compare Idaho Code §§ 15-2-202 to 15-2-209 (Exhibit 3) with UPC §§ 2-202 to 2-207 (Exhibit 2).

Thus, as compared to California law where recapture is limited to transfers of quasi-community property for less than "substantial value" of property in which the decedent retained some ownership or control, Idaho is more favorable to the surviving spouse by permitting recapture of transfers without "adequate" consideration if the decedent retained (1) possession or enjoyment of, or the right to income from, the property, (2) a power to revoke, consume, invade, or dispose of principal for his own benefit, (3) ownership with another with right of survivorship, or if the decedent (4) transferred the property within two years of death to the extent that aggregate transfers to any one donee in either of the two years exceeded \$3,000. Idaho Code § 15-2-202 (Exhibit 3). Idaho also promotes fairness by providing for offset: Property received by the surviving spouse by inter vivos gift, will, or intestate succession is applied first to satisfy the elective share, the same as under the UPC. See Idaho Code § 15-2-207 (Exhibit 3).

Apparently Idaho retreated from its initial decision to give the surviving spouse an elective share in the decedent's separate property because it was thought that that scheme

may overprotect the surviving spouse. He or she would then have a right to one-half of all community property and a one-third interest in separate property retained by decedent or given away by a device permitting continued enjoyment. If there is a late life marriage, the decedent who accumulated the property may not be able to effectively provide for children of a previous marriage unless the necessary steps are taken before the second marriage [*i.e.*, by antenuptial agreement]. This is the system that operates in common law states but it is a system to which people in community property states are not accustomed.

Peterson, supra at 13.

POLICY QUESTIONS

Should California Adopt the UPC Elective Share Provisions to Give the Surviving Spouse a Share of the Decedent's Separate Property?

In community property states such as California, the disinheritation problem is significant only where the decedent has substantial amounts of separate property. The UPC elective share provisions were drawn for common law states--the representatives of community property states were divided on the question of whether elective share provisions were needed in community property states. General Comment to Part 2 of Article 2 of the UPC. However, a number of commentators, including our consultant,

Professor Russell Niles, have urged that the surviving spouse be given a statutory share of separate property of the deceased spouse. See Niles, supra at 190-95, 216-17; Bodenheimer, supra at 415, 417, 423; Turrentine, supra at 34-35. See also Peterson, supra at 13. The trend toward multiple marriages increases the likelihood that in many marriages the assets will be primarily separate property. Bodenheimer, supra at 415. The potential harsh treatment of the surviving spouse in such a case was emphasized in a concurring opinion in the early case of In re Estate of Cudworth, 133 Cal. 462, 469, 65 P. 1041, 1044 (1901):

In nearly all other civilized countries, marriage immediately vests in the wife some estate in the property owned by the husband at the time of marriage; but such is not the law here, and if he chooses, as in the case at bar, to afterwards do nothing except to collect his rents and profits, he may, after a long period of faithful wifehood, leave her penniless. Her only chance to acquire by marriage any interest in property is to marry a man who has nothing, with the hope that he may afterwards earn something in which she will have a community right.

As a result of the problem created by the separate property marriage, Professor Turrentine has said, "It would seem desirable to place some restriction on the present power of one spouse to will away his entire separate property, leaving the surviving spouse with nothing, in cases where there is no substantial amount of community property." Turrentine, supra at 34. Professor Turrentine also advocated a recapture provision, saying that there should be

a provision invalidating gifts made by the decedent before his death to a third person in order to defeat the forced share of the surviving spouse or the children, and in this connection a presumption of invalidity might be raised as to gifts made within two years of the decedent's death where the surviving spouse or children are inadequately provided for.

Id. at 34-35.

Professor Niles recommends that California give the surviving spouse a forced share of the decedent's separate property and a right of recapture of separate and quasi-community property by adopting the UPC's augmented estate concept for both separate and quasi-community property. Niles, supra at 216-17. He further suggests that the elective share of separate property be one-half rather than the UPC's one-third. This would make the surviving spouse's share of separate property the same as

the existing one-half share of quasi-community property, and thus making it unnecessary to distinguish between the two types of property in the decedent's estate. Id. at 195 n.65, 217 n.201.

The arguments against adopting a forced share in separate property are as follows:

(1) Such a proposal may be highly controversial, as the UPC drafters and Professor Niles have acknowledged.

(2) Rather than giving the surviving spouse a fixed share regardless of need, it may be preferable to enact family maintenance legislation permitting the court to make a long-term support award out of the estate based in part on the needs of the surviving spouse and other family members. See Memo 82-16. However, Professor Niles has informed the staff that it is his view and the view of a number of his colleagues that the fixed share system is preferable to the long-term support scheme with respect to the spouse, since the latter permits too much judicial discretion. Nonetheless, it is apparent that if the Commission recommends family maintenance legislation which includes provision for the surviving spouse, the need for a forced share of separate property would be reduced, if not eliminated.

(3) The surviving spouse already has significant protection by the provisions for a probate homestead, exempt property, small estate set-aside, and short-term support, all of which may be taken out of the decedent's separate property.

(4) A forced share of separate property may interfere with the decedent's ability to provide for children of a prior marriage.

(5) The very complexity of the augmented estate concept is an argument against its adoption.

(6) Empirical studies indicate that married persons disinherit their spouses relatively infrequently, and that the problem is therefore not a major one. See Plager, The Spouse's Nonbarrable Share: A Solution in Search of a Problem, 33 U. Chi. L. Rev. 681 (1966).

With Respect to Quasi-Community Property, Should the Right of the Surviving Spouse to Have Inter Vivos Transfers Set Aside be Made More Like the Community Property Provisions, or Should the UPC's Augmented Estate Concept be Adopted?

Alternative #1: Make quasi-community property more like community property. Professor Carol Bruch has advocated "the full absorption of

quasi-community property into community property." C. Bruch, supra at 132. With respect to rights at death, this could be accomplished by making two changes in the quasi-community property provisions:

(1) Broaden the present limited recapture rule so that after the decedent's death the surviving spouse could recapture half of property transferred outright by the decedent as well as as half of property in which the decedent retained some ownership or control, and half of property transferred for full value where the surviving spouse's written joinder or consent was not obtained as well as property for which no "consideration of substantial value" was received.

(2) Reverse the existing presumption that if the surviving spouse elects to take a statutory one-half interest in quasi-community property, he or she must forfeit benefits under the decedent's will unless the will shows a contrary intent. Instead, make the presumption the same as where community property is involved: The surviving spouse may claim his or her one-half interest in community property without forfeiting will benefits unless the will shows a contrary intent.

Alternative #2: Apply UPC elective share provisions to quasi-community property. Professor Niles, on the other hand, has recommended that the UPC's augmented estate provisions be applied in California both to the decedent's separate property and to quasi-community property. Niles, supra at 190, 193-95, 216-17. He suggests that the principal defect of the quasi-community property system is the absence of any setoff for inter vivos gifts to the surviving spouse or for life insurance benefits provided by the decedent: If the surviving spouse is to be permitted to avoid inter vivos transfers to others by the decedent, "fairness demands the setoffs authorized by the UPC." Id. at 194. If Professor Niles' recommendation is followed, California would end up with quasi-community property provisions which look very much like the Idaho statute. See Idaho Code §§ 15-2-201 to 15-2-209 (Exhibit 3).

Comparison of alternatives. Which of the two foregoing alternatives is the preferable course? Alternative #1 is more favorable to the surviving spouse by applying to quasi-community property the far more extensive recapture provisions of the community property system and by not having any setoffs. However, to apply the community property recapture rules (which permit the surviving spouse to recover property from a

third-party transferee) to quasi-community property will necessarily involve some inter vivos restraints on the ability of the acquiring spouse to transfer quasi-community property. In his study prepared for the Law Revision Commission some 25 years ago, Professor Harold Marsh thought that the "wisdom of such a provision is doubtful." Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere, 1 Cal. L. Rev. Comm'n Reports at E-30 (1957).

Moreover, to interfere with the inter vivos rights of the acquiring spouse in quasi-community property may raise constitutional questions. See *Paley v. Bank of America*, 159 Cal. App.2d 500, 509, 324 P.2d 35 (1958) (unconstitutional to "curtail or diminish" inter vivos rights of acquiring spouse in quasi-community property by giving nonacquiring spouse testamentary power over one-half of it). But see *C. Bruch*, supra at 132 n.382 (constitutional concern is "outdated"); *Addison v. Addison*, 62 Cal.2d 558, 566, 399 P.2d 897, 43 Cal. Rptr. 97 (1965) (not unconstitutional to divide quasi-community property on divorce--vested rights may be impaired if "necessary to the public welfare").

Finally, the argument seems sound that if the surviving spouse is permitted to recapture inter vivos transfers, there should also be setoffs for inter vivos gifts by the decedent to the surviving spouse. All of these arguments tend to favor the second alternative of applying the UPC elective share provisions to quasi-community property as Idaho has done.

Staff recommendation. The more limited recapture provisions of the UPC should better withstand constitutional attack, and providing for setoffs should promote fairness. To follow the UPC rule that a claim of an elective share does not result in forfeiture of will benefits unless the will so provides will also make the quasi-community property rule the same as the community property rule. Accordingly, the staff recommends adopting the UPC elective share provisions for quasi-community property along the lines of the Idaho statute. This should be done whether or not the Commission decides to give the surviving spouse an elective share in the decedent's separate property.

If the Commission approves this recommendation, should we follow Professor Bruch's suggestion and go beyond the UPC by including in the

augmented estate life insurance and pension benefits payable to a third person? Equitable considerations suggest that we should (see discussion in Kurtz, supra at 1034-35--Exhibit 4), but the need for national uniformity in this area suggests that we should not (see General Comment to Part 2, Article 2, UPC--uniformity of law on elective share "is much to be desired").

Respectfully submitted,

Robert J. Murphy III
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EXHIBIT I

CIVIL CODE

§ 5125. Community personal property; management and control; restrictions on disposition

(a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.

(Added by Stats.1969, c. 1608, § 8. Amended by Stats.1969, c. 1609, § 24; Stats.1973, c. 987, § 14; Stats.1974, c. 546, § 14; Stats.1974, c. 1206, § 4; Stats.1977, c. 332, § 4; Stats.1977, c. 692, § 1.)

§ 5127. Community real property; management and control; spouse's joinder in conveyances; limitations of actions

Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between the husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a

lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and that the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect. (Added by Stats.1969, c. 1608, § 8. Amended by Stats.1969, c. 1609, § 25; Stats.1973, c. 987, § 15; Stats.1974, c. 1206, § 5.)

PROBATE CODE

§ 201. Title of surviving spouse; portion subject to testamentary disposition or succession

Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code. (Stats.1931, c. 281, § 201. Amended by Stats.1935, c. 831, § 2.)

§ 201.5. Property acquired while domiciled out of state or in exchange therefor; surviving spouse's share; disposition of other share

Upon the death of any married person domiciled in this state, one-half of the following property in his or her estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and, in the absence thereof, goes to the surviving spouse subject to the provisions of Sections 202 and 203:

(a) All personal property wherever situated, and all real property situated in this state, heretofore or

hereafter acquired by the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.

All such property is subject to the debts of the decedent as provided by law.

As used in this section, personal property does not include and real property does include, leasehold interests in real property.

For purposes of this chapter, and for purposes of Article 3 (commencing with Section 650) of Chapter 10 of Division 3, the property defined in this section shall be known as "quasi-community property."
(Added by Stats.1935, c. 831, § 1. Amended by Stats.1957, c. 490, § 1; Stats.1961, c. 636, § 22; Stats.1970, c. 312, § 4; Stats.1980, c. 955, § 1.)

§ 201.6. Death of non-domiciliary leaving will disposing of non-community realty in state; election of surviving spouse

Upon the death of any married person not domiciled in this State who leaves a valid will disposing of real property in this State which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death. As used in this section real property includes leasehold interests in real property.
(Added by Stats.1957, c. 490, § 2.)

§ 201.7. Election of surviving spouse to take under or against will

Whenever a decedent has made provision by a valid will for the surviving spouse and the spouse also has a right under Section 201.5 of this code to take property of the decedent against the will, the surviving spouse shall be required to elect whether to take under the will or to take against the will unless it appears by the will that the testator intended that the surviving spouse might take both under the will and against it.
(Added by Stats.1957, c. 490, § 3.)

§ 201.8. Restoration to decedent's estate of property in which surviving spouse had expectancy

Whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse has made an irrevocable election to take against the will under Section 201.5 of this code rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made. (Added by Stats.1957, c. 490, § 4.)

EXHIBIT 2

UPC Provisions

Section 2-201. [Right to Elective Share.]

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

COMMENT

See Section 2-802 for the definition of "spouse" which controls in this Part.

Under the common law a widow was entitled to dower, which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which clas-

sifies most wealth as personal property. Hence the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. Few existing forced share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are

Pt. 2 INTESTATE SUCCESSION—WILLS § 2-202

designed to do so. The theory of MacDonald, *Fraud on the Widow's Share* (1960). Legislation comparable to that suggested by Fratcher, "Toward Uniform Succession Legislation," 41 N.Y.U. L.Rev. 1037, 1050-1064 (1966). here became effective in New York on Sept. 1, 1966. See The existing law is discussed in *Decedent Estate Law*, § 18.

Section 2-202. [Augmented Estate.]

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.00.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(2) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by

the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this paragraph:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent

except to the extent that the surviving spouse establishes that it was derived from another source.

(3) For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

COMMENT

The purpose of the concept of trust, without concern that such augmenting the probate estate in provisions will be upset by later computing the elective share is marriage. The limitation to twofold: (1) to prevent the owner transfers during marriage reflects of wealth from making arrangements some of the policy underlying property which transmit his property community property. What kinds to others by means other than probate deliberately to defeat here is a matter of reasonable the right of the surviving spouse to a share, and (2) to prevent difference of opinion. The fine-spun tests of the Federal Estate from electing a share of the Tax Law might be utilized, of probate estate when the spouse course. However, the objectives of a tax law are different from has received a fair share of the those involved here in the Probate total wealth of the decedent either Code, and the present section is during the lifetime of the decedent therefore more limited. It is intended to reach the kinds of transfers decedent or at death by life insurance, joint tenancy assets readily usable to defeat an and other nonprobate arrangements. Thus essentially two separate elective share in only the probate groups of property are added to the net probate estate to arrive at the augmented net estate which is the basis for computing the one-third share of the surviving spouse. In the first category are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category. This makes it possible for a person to provide for children by a prior marriage, as by a revocable living

trust, without concern that such provisions will be upset by later marriage. The limitation to transfers during marriage reflects some of the policy underlying community property. What kinds of transfers should be included here is a matter of reasonable difference of opinion. The fine-spun tests of the Federal Estate Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.

In the second category of assets, property of the surviving spouse derived from the decedent and property derived from the decedent which the spouse has, in turn, given away in a transaction that is will-like in effect or purpose, the scope is much broader. Thus a person can during his lifetime make outright gifts to relatives and they are not included in this first category unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death). But the

time when the surviving spouse derives her wealth from the decedent is immaterial; thus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. Likewise, for policy reasons life insurance is not included in the first category of transfers to other persons, because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse; but life insurance proceeds payable to the surviving spouse are included in the second category, because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance. In this category no distinction is drawn as to whether the transfers are made before or after marriage.

Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate arrangements by which wealth is today transferred. On the other hand the section should provide

realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well-planned or routine cases, however, because the spouse's rights are freely releasable under Section 2-204 and because of the time limits in Section 2-205. Some legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act provision reading:

"A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."

In passing, it is to be noted that a Pennsylvania widow apparently may claim against a revoca-

ble trust or will even though she has been amply provided for by life insurance or other means arranged by the decedent. Penn. Consol.Stats.Annot. title 20, § 2508.

The New York Estates, Powers and Trusts Law § 5-1.1(b) also may be suggested as a model. It treats as testamentary dispositions all gifts causa mortis, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by decedent over which he has a power to revoke or invade. The New York law also expressly excludes life insurance, pension plans, and United States savings bonds payable to a designated person. One of the drawbacks of the New York legislation is its complexity, much of which is attributable to the effort to prevent a spouse from taking an elective share when the deceased spouse has followed certain prescribed procedures. The scheme described by Sections 2-201 et seq., like that of all states except New York, leaves the question of whether a spouse may or may not elect to be controlled by the economics of the situation, rather than by conditions on the statutory right. Further, the New York system gives the spouse election rights in spite of the possibility that the spouse has been well provided for by in-

surance or other gifts from the decedent.

In 1975, the Joint Editorial Board recommended the addition of reference to bona fide purchaser in paragraph (1), "to a donee" in paragraph (1)(iv) and the addition of paragraph (3) to the above section to reflect recommendations evolved in discussions by committees of the Colorado Bar Association to meet title problems that had been identified under the Code as originally enacted. One problem that should be cured by the amendments arose when real property experts in Colorado took the position that, since any transfer might be found to be for less than "adequate and full consideration in money or money's worth," the language of the original text, all deeds from married persons had to be joined in by the spouse, lest the grantor die within two years and the grantee be subjected to the claim that the value involved was a part of the augmented estate.

Also, the Joint Editorial Board in 1975 recommended the addition in Section 2-202(2)(i) of language referring to property moving to the surviving spouse via joint and survivorship holdings with the decedent. The addition would not, in all probability, change the meaning of the subsection, but it would clarify it in relation to jointly held property which will be present in a great number of cases.

Section 2-203. [Right of Election Personal to Surviving Spouse.]

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by

order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

COMMENT

See Section 5-101 for definitions of protected person and protective proceedings.

Section 2-204. [Waiver of Right to Elect and of Other Rights.]

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 party waiving after fair disclosure. 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 to 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 which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

COMMENT

The right to homestead allowance is conferred by Section 2-401, that to exempt property by Section 2-402, and that to family allowance by Section 2-403. The right to renounce interests passing by testate or intestate succession is recognized by Section 2-801. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property seem desirable in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and renunciation takes care of the situation which arises when a spouse dies while a divorce suit is pending.

Section 2-205. [Proceeding for Elective Share; Time Limit.]

(a) The surviving spouse may elect to take his elective share in the augmented estate by filing in the Court and mailing or delivering to the personal representative, if any, a petition for the elective share within 9 months after the date of death, or within 6 months after the probate of the decedent's will, whichever limitation last expires. However, that nonprobate transfers, described in Section 2-202(1), shall not be included within the augmented estate for the purpose of computing the elective share, if the petition is filed later than 9 months after death.

The Court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his 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 amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented net 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 would have been if relief had been secured against all persons subject to contribution.

(e) The 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.

COMMENT

In 1975, the Joint Editorial Board recommended changes in subsection (a) that were designed to meet a question, arising under the original text, of whether the right to an elective share was ever barred in cases of unadministered estates. The new language also has the effect of clearing included, non-probate transfers to persons other than the surviving spouse of the lien of any possible elective share proceeding unless the

spouse's action is commenced within nine months after death. This bar on efforts to recapture non-probate assets for an elective share does not apply to probate assets. Probate assets may be controlled by a will that may not be offered for probate until as late as three years from death. As to these, the limitation on the surviving spouse's proceeding is six months after the probate.

Section 2-206. [Effect of Election on Benefits by Will or Statute.]

A surviving spouse is entitled to homestead allowance, exempt property, and family allowance, whether or not he elects to take an elective share.

COMMENT

The election does not result in a loss of benefits under the will (in the absence of renunciation) because those benefits are charged against the elective share under Sections 2-201, 2-202 and 2-207(a).

In 1975, the Joint Editorial Board recommended changes in this and the following section that reverse the position of the original text which permitted an electing spouse to accept or reject particular benefits as provided him by the decedent without reducing the dollar value of his elective share. The new language in this section, replacing former Section 2-206 (a) and (b), does not mention renunciation of transfers which is now dealt with in Section 2-207. The remaining content of this section is restricted to a

simple statement indicating that the family exemptions described by Article II, Part 4 may be distributed from the probate estate without reference to whether an elective share right is asserted, and without being charged to the electing spouse as a part of the elective share. In the view of the Board, deletion of language in the original form of Section 2-206 (b), dealing with devises that are intended to be in lieu of family exemptions, does not alter the ability of a testator, by express provision in the will, from putting a surviving spouse to an election between accepting the devises provided or accepting the family exemptions provided by law. This matter is dealt with in Sections 2-401, 2-402, 2-403 and 2-404.

Section 2-207. [Charging Spouse With Gifts Received; Liability of Others For Balance of Elective Share.]

(a) In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate. For purposes of this subsection, the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth one half of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.

(b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

COMMENT

Sections 2-401, 2-402 and 2-403 have the effect of giving a spouse certain exempt property and allowances in addition to the amount of the elective share.

In 1975, the Joint Editorial Board recommended changes in Section 2-206 and subsection (a) of this section which have the effect of protecting a decedent's plan as far as it provides values for the surviving spouse. The spouse is not compelled to accept

the benefits devised by the decedent, but if these benefits are rejected, the values involved are charged to the electing spouse as if the devises were accepted. The second sentence of new subsection (a) provides a rebuttable presumption of the value of a life estate or an interest in a trust, when this form of benefit is provided for an electing spouse by the decedent's plan.

EXHIBIT 3

Idaho Provisions

PART 2. SUCCESSION OF QUASI-COMMUNITY PROPERTY—
ELECTIVE SHARE OF SURVIVING SPOUSE

15-2-201. **Quasi-community property.** — (a) Upon death of a married person domiciled in this state, one-half ($\frac{1}{2}$) of the quasi-community property shall belong to the surviving spouse and the other one-half ($\frac{1}{2}$) of such property shall be subject to the testamentary disposition of the decedent and, if not devised by the decedent, goes to the surviving spouse.

(b) Quasi-community property is all personal property, wherever situated, and all real property situated in this state which has heretofore been acquired or is hereafter acquired by the decedent while domiciled elsewhere and which would have been the community property of the decedent and the surviving spouse had the decedent been domiciled in this state at the time of its acquisition plus all personal property, wherever situated, and all real property situated in this state, which has heretofore been acquired or is hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired, provided that real property does not and personal property does include leasehold interests in real property, provided that quasi-community property shall include real property situated in another state and owned by a domiciliary of this state if the laws of such state permit descent and distribution of such property to be governed by the laws of this state.

(c) All quasi-community property is subject to the debts of decedent. [I.C., § 15-2-201, as added by 1972, ch. 201, § 4, p. 510.]

15-2-202. **Augmented estate.** — Whenever a married person domiciled in the state has made a transfer of quasi-community property to a person other than the surviving spouse without adequate consideration and without the consent of the surviving spouse, the surviving spouse may require the transferee to restore to the decedent's estate one-half ($\frac{1}{2}$) of such property, if the transferee retains such property and, if not, one-half ($\frac{1}{2}$) of its proceeds or, if none, one-half ($\frac{1}{2}$) of its value at the time of transfer, if:

(a) The decedent retained, at the time of his death, the possession or enjoyment of or the right to income from the property;

(b) The decedent retained, at the time of his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(c) The decedent held the property at the time of his death with another with the right of survivorship; or

(d) The decedent had transferred such property within two (2) years of his death to the extent that the aggregate transfers to any one (1) donee in either of the years exceeded three thousand dollars (\$3,000). [I.C., § 15-2-202, as added by 1972, ch. 201, § 4, p. 510.]

15-2-203. Elective right to quasi-community property and augmented estate. — (a) The right of the surviving spouse in the augmented quasi-community property estate shall be elective and shall be limited to one-half ($\frac{1}{2}$) of the total augmented quasi-community property estate which will include, as a part of the property described in section 15-2-201 and section 15-2-202, of this code, property received from the decedent and owned by the surviving spouse at the decedent's death, plus the value of such property transferred by the surviving spouse at any time during marriage to any person other than the decedent which would have been in the surviving spouse's quasi-community property augmented estate if that spouse had predeceased the decedent to the extent that the owner's transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or moneys worth. This shall not include any benefits derived from the federal social security system by reason of service performed or disability incurred by the decedent and shall include property transferred from the decedent to the surviving spouse by virtue of joint ownership and through the exercise of a power of appointment also exercisable in favor of others than the surviving spouse and appointed to the surviving spouse.

(b) The elective share to the quasi-community estate thus computed shall be reduced by an allocable portion of general administration expenses, homestead allowance, family allowance, exempt property and enforceable claims.

(c) Property owned by the surviving spouse at the time of the decedent's death and property transferred by the surviving spouse is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source. [I.C., § 15-2-203, as added by 1978, ch. 350, § 2, p. 914.]

15-2-204. Right of election personal. — The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy. [I.C., § 15-2-204, as added by 1972, ch. 201, § 4, p. 510.]

15-2-205. Proceeding for elective share — Time limit. — (a) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the court and mailing or delivering to the personal representative a petition for the elective share within six (6) months after the publication of the first notice to creditors for filing claims which arose before the death of the decedent. The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his 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 amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under section 15-2-207 of this code. If it appears that a fund or property included in the augmented net 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 would have been if relief had been secured against all persons subject to contribution.

(e) The 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. [I.C., § 15-2-205, as added by 1972, ch. 201, § 4, p. 510; am. 1973, ch. 167, § 6, p. 319.]

15-2-206. Effect of election on benefits by will or statute. — (a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 15-2-207(b), as if the surviving spouse had predeceased the testator.

(b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will. [I.C., § 15-2-206, as added by 1972, ch. 201, § 4, p. 510.]

15-2-207. Liability of others. — (a) In a proceeding for an elective share, property which passes or has passed to the surviving spouse by testate or intestate succession and property included in the augmented estate which has not been renounced is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

(b) The remaining amount of the elective share is equitably apportioned among beneficiaries of the will and transferees of the augmented estate in proportion to the value of their interest therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate. [I.C., § 15-2-207, as added by 1972, ch. 201, § 4, p. 510; am. 1978, ch. 350, § 3, p. 914.]

15-2-208. Waiver. — 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 party waiving after fair disclosure. 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 to 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 which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement. [I.C., § 15-2-208, as added by 1972, ch. 201, § 4, p. 510.]

15-2-209. Election of nondomiciliary. — Upon the death of any married person not domiciled in this state who dies leaving a valid will disposing of real property in this state which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property was situated in the decedent's domicile at death. [I.C., § 15-2-209, as added by 1972, ch. 201, § 4, p. 510.]

EXHIBIT 4

**THE AUGMENTED ESTATE CONCEPT UNDER THE
UNIFORM PROBATE CODE: IN SEARCH OF
AN EQUITABLE ELECTIVE SHARE**

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In 1970 the Commissioners on Uniform State Laws published the Uniform Probate Code.¹ The Code was drafted to appeal to reform-minded lawmakers, with the intention and expectation that its virtues would be recognized in enough critical state legislative bodies to ensure its eventual adoption in all the states. The Code contains a comprehensive body of substantive and procedural provisions relating to the disposition and administration of decedents' estates. Some provisions will necessarily be controversial. Of these, the provisions that may create the most vigorous debate are those relating to the spouse's elective share in a deceased spouse's augmented estate.²

Under the Uniform Probate Code, a decedent's spouse is entitled to claim an elective share in an amount equal to one-third of the so-called augmented estate whether the deceased spouse died testate or intestate.³ The augmented estate is defined generally to include decedent's net probate estate increased by (1) the value of certain lifetime transfers of property by the decedent during marriage to donees other than the surviving spouse,⁴ and (2) the value of all property owned by the surviving spouse at decedent's death and certain lifetime transfers of property by the surviving spouse

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1. The Uniform Probate Code has been substantially adopted and is presently in force in seven states. ALASKA STAT. §§ 13.06.005-.36.100 (1976); ARIZ. REV. STAT. §§ 14-1101 to -7307 (1975); COLO. REV. STAT. §§ 15-10-101 to -17-101 (1973); IDAHO CODE §§ 15-1-101 to -7-307 (Supp. 1975); MINN. STAT. ANN. §§ 524.1-101 to .8-103 (West 1975); MONT. REV. CODES ANN. §§ 91A-1-101 to -6-104 (Spec. Pam. 1974); NEB. REV. STAT. §§ 30-2201 to -2902 (1975); N.M. STAT. ANN. §§ 32A-1-101 to 7-401 (Spec. Pam. 1975); N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (1976); UTAH CODE ANN. §§ 75-1-101 to -8-101 (Spec. Pam. 1975). Hawaii has also adopted the Uniform Probate Code. Act of June 4, 1976, No. 200, 1976 Haw. Sess. Laws 372.

Florida has adopted many provisions of the UPC. FLA. STAT. ANN. §§ 731.005-735.302 (West 1976). New Jersey has adopted UPC §§ 2-110, 5-501, 5-502. N.J. STAT. ANN. §§ 3A:4-8, 46:2B-8, 46:2B-9 (West Supp. 1976).

South Dakota had adopted the UPC, S.D. UNIFORM PROB. CODE (Spec. Supp. 1974), but on February 17, 1976, the South Dakota legislature repealed the Code. S.L. 1976 ch. 175, § 2; S.L. 1976 ch. 177, § 3.

For an interesting analysis of the effects of the Code see Crapo, *The Uniform Probate Code—Does It Really Work?*, 1976 B.Y.L. REV. 395.

2. UNIFORM PROBATE CODE §§ 2-201 to -207 [hereinafter cited as UPC]. The states in which the UPC elective share provisions have been adopted in some form include: Alaska, ALASKA STAT. §§ 13.11.070-.11.110 (1976); Colorado, COLO. REV. STAT. §§ 15-11-201 to -11-207 (1973); Idaho, IDAHO CODE §§ 15-2-201 to -2-209 (Supp. 1975); Montana, MONT. REV. CODES ANN. §§ 91A-2-201 to -2-207 (Spec. Pam. 1974); Nebraska, NEB. REV. STAT. §§ 30-2318 to -2319 (1975); North Dakota, N.D. CENT. CODE §§ 30.1-05-01 to -05-07 (1976); Utah, UTAH CODE ANN. §§ 75-2-201 to -2-207 (Spec. Pam. 1975).

3. UPC § 2-201(a).

4. *Id.* § 2-202(1).

during marriage to donees other than the decedent, to the extent the owned or transferred property is derived from the decedent.⁵

The spouse's one-third share of a decedent's probate estate corresponds with the prevailing intestate and elective shares in many American jurisdictions and should not be the focus of significant dispute. The augmented estate concept, however, because of its complexity, may be controversial. Similarly, those provisions of the Code that carve out a surviving spouse's elective share from certain lifetime transfers of the decedent and that reduce the elective share by the value of the decedent's lifetime gifts to the spouse are likely to be vigorously debated. Discussion will probably focus on the right of persons to freely dispose of property by gift without affecting the value of the surviving spouse's elective share. Another concern is the uncertainty created by the augmented estate concept with respect to titles to gifts that are part of the wealth transmission process and potentially included in the augmented estate. It would be unfortunate if controversy over the augmented estate concept, which does not constitute the heart of the Uniform Probate Code, masks a robust and earnest consideration of the Code's significant and reform-minded provisions.

Historically, the protection of a surviving spouse from disinheritance has been controversial. The first four sections of this Article trace the development of the surviving spouse's rights, the policies behind them, the means devised to circumvent them, and the various judicial and legislative efforts to protect the surviving spouse from disinheritance. These sections establish the historical framework within which the augmented estate concept logically (or illogically, depending upon the reader's predilections) developed. The legal history of spousal disinheritance can be expected to affect judicial construction of the augmented estate provisions. Since a primary objective of this Article is to introduce the reader to the augmented estate concept in order to facilitate full consideration of the Code, the bulk of the Article describes the provisions of the Code that embody the augmented estate concept and analyzes these provisions as they interrelate with each other and other laws. The Article suggests numerous construction problems inherent in the Code and their resolution. To assist the reader, the Article incorporates examples that illustrate the reach and operation of the augmented estate concept.

I. HISTORICAL BACKGROUND

An obvious basic policy underlying the augmented estate concept is the protection of a decedent's surviving spouse against disinheritance. The policy did not originate with the Commissioners on Uniform State Laws.⁶ It has had a long and varied history in the development of both the civil and

5. *Id.* § 2-202(2).

6. While the goal of the Uniform Probate Code is to provide protection for a decedent's surviving spouse, it attempts to balance this goal with protection of the competing interests of other donees and of decedent's freedom of testation by taking into account the spouse's property derived from the decedent in the computation of the augmented estate against which the spouse's one-third elective share is computed.

common law, with roots that can be traced to the Code of Hammurabi⁷ and through Roman, Germanic, Scandinavian, and Saxon law.⁸ Under Saxon law in the seventh century A.D., a decedent's widow was entitled to a one-third outright share of all lands and personal property held by her deceased husband at death.⁹ After the Norman Conquest in 1066 and up to the time of Littleton (the fifteenth century) when the full parameters of the widow's common-law dower interest were defined, the widow was variously entitled to (1) an outright one-third share of all lands held at the time of the marriage but not thereafter, (2) a life estate in one third of all lands held at the time of the marriage but not thereafter, and finally, (3) a life estate in one-third of all lands held at any time during marriage.¹⁰

Historically, the gradual diminution of the widow's interest from a one-third outright interest to the more limited life estate corresponded with the general practice of Saxon testators—apparently preoccupied with insuring their wives' chastity after their death—to terminate their spouse's estates in devised land upon re-marriage. In addition, it reflected prejudices against second marriages fostered by the Catholic Church.¹¹ By the beginning of the thirteenth century, the confines of the wife's marital rights in her husband's property was of sufficient importance to the King's lords that the issue was bargained for specifically in the Magna Carta and subsequent charters. Chapter Seven of the Magna Carta provides:

A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.¹²

While the term "dower" was not defined in the Great Charter, two years later, in the Charter of 1217, "dower" was defined in accordance with its then accepted meaning. The Charter provided that "the widow shall have assigned to her for her dower the third part of all of her husband's land which he had in his lifetime . . ."¹³ The phrase "in his lifetime" was

7. R. HARPER, CODE OF HAMMURABI §§ 168-172 (2d ed. 1904); Urch, *The Law Code of Hammurabi*, 15 A.B.A.J. 437, 440 (1929).

8. See C. KENNY, THE HISTORY OF THE LAW OF ENGLAND AS TO THE EFFECTS OF MARRIAGE ON PROPERTY 21-93 (1879) [hereinafter cited as KENNY]. See also 1 AMERICAN LAW OF PROPERTY § 5.2 (A.J. Casner ed. 1952) [hereinafter cited as AMERICAN LAW OF PROPERTY].

9. KENNY, *supra* note 7, at 36.

10. *Id.* at 21-36.

11. *Id.* at 33. Man has long been preoccupied with the chastity of his bride. Under early Saxon law, the bridegroom was free to repudiate the marriage on the "morning after" if he found his bride unsatisfactory. Presumably this meant unchaste. On the other hand, if the bridegroom found his wife satisfactory, he would confer upon her a "morning gift." *Id.* at 22-23.

12. W. MCKECHNIE, MAGNA CARTA 215 (2d ed. 1914) [hereinafter cited as MCKECHNIE]. The right of the widow to reside in her deceased husband's home for the forty days following his death, during which time her dower would be assigned, has its counterpart in the current law of some states. For example, IOWA CODE § 561.11 (1975) allows a decedent's surviving spouse to occupy the decedent's homestead during the administration of the estate and until it is otherwise disposed of in accordance with law.

13. MCKECHNIE, *supra* note 12, at 216.

interpreted to mean "at any time during coverture."¹⁴ Naturally, this bargained for protection was tied to the lords' principal source of wealth, their lands. The lords secured this protection in the Magna Carta and subsequent charters to protect their wives from economic deprivation that might otherwise result from the King's enforcement of all the feudal incidences which were his due.

With the passage of centuries, the law of dower was further developed and refined. During Glanvil's time (the latter half of the twelfth century) the widow's dower attached to one-third of all lands held by her husband at the time of the marriage.¹⁵ With respect to any particular parcel of land held at the time of the marriage, the wife's rights therein could be defeated by a conveyance to a purchaser, although she could claim the value of her lost expectancy from her deceased husband's heirs out of property he owned at death.¹⁶ If, however, the deceased husband owned no property at his death, her rights effectively were defeated.¹⁷ By Bracton's time (the late thirteenth century), the widow's dower attached to all lands held by her husband during coverture as guaranteed by the Great Charter.¹⁸ If the lands to which the wife's dower attached had been specified, she could claim her one-third interest against her husband's grantees.¹⁹ In the case of lands in which her dower interest was not specified, she could take the value thereof from her husband's other lands which passed at his death to his heirs and, if there were no such lands, she could reach the property transferred to her husband's grantee who then would be entitled to a judgment against the heir. At the widow's death, the grantee would be entitled to the whole of the property again.²⁰

Littleton, writing in the latter part of the fifteenth century, identified five forms of dower: dower by the common law;²¹ dower by the custom;²² dower *ad ostium ecclesiae* (church door dower);²³ dower *ex assensu patris*

14. KENNY, *supra* note 8, at 46. See also 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* ch. VII, § 2 (2d ed. 1923) [hereinafter cited as F. POLLOCK & F. MAITLAND].

15. KENNY, *supra* note 8, at 44-45.

16. *Id.*

17. *Id.*

18. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, ch. VII, § 2. The distinction between dower in specified and unspecified lands largely disappeared by the end of the fifteenth century. The early distinction arose out of the prohibitions against interspousal transfers. During the twelfth century, the wife's dower attached to lands held by her husband at the marriage nuptials, to take effect in possession if she survived him. Dower in lands to be acquired could not be granted at the time of the marriage because the husband lacked seisin at the time of the marriage. During the thirteenth century, an exception was recognized for after-acquired property, and by the end of the thirteenth century dower attached by operation of law to all lands of which the husband was seized at any time during the marriage if none of his lands were named. See Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948) [hereinafter cited as Haskins].

19. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, ch. VII, § 2, at 420-21.

20. *Id.* at 421.

21. T. LITTLETON, *TENURES* § 37.

22. *Id.* The size of the widow's share was regulated by custom in certain locales and might extend from one-quarter to one-half or even all of the husband's lands.

23. *Id.* § 39. Dower, which endowed the wife with some quantity of specified lands, was granted by the husband to the wife at the time of the marriage ceremony.

(endowment of some portion of the lands of the husband's father);²⁴ and dower *de la plus beale*.²⁵ Of these, only dower by the common law gained a foothold in the United States and substantially influenced the development of marital rights in this country.²⁶

At Littleton's time, common-law dower amounted to a life estate in one-third of all lands of which the husband was seized during coverture in either fee simple or fee tail general—estates capable of inheritance by issue of the marriage.²⁷ Because the wife's rights extended to lands of which her husband was seized during marriage, her interest could not be barred by a lifetime conveyance to which she did not join.²⁸ In addition, her rights were not subject to her husband's debts.²⁹ On the other hand, while both spouses lived, the wife's rights were inchoate—that is, her rights could only become possessory if she survived her husband. The wife's rights became consummate by her husband's death.

By virtue of the laws of primogeniture, a man's eldest son was his sole heir.³⁰ Thus, in great measure, dower provided economic security for both the widow and her other children and, to the extent decedent's wealth was comprised of real property, it undoubtedly served this purpose well.³¹

24. *Id.* § 40.

25. *Id.* § 48. This form of dower occurred when the husband died survived by his wife and a son under the age of 14. The wife occupied her deceased husband's lands as guardian in socage until the child reached age 14.

26. 1 C. SCRIBNER, A TREATISE ON THE LAW OF DOWER 19 (2d ed. 1883) [hereinafter cited as SCRIBNER].

27. T. LITTLETON, TENURES § 36. If no issue of the marriage were capable of inheriting the husband's lands, his wife could not claim dower therein. For example, if *O* conveyed lands to *H* and the heirs of his body by *W-1* (the so-called fee tail special) and *W-1* predeceased *H* and thereafter *H* married *W-2* who survived *H*, *W-2* could not claim dower in such lands because issue of *H* and *W-2* were incapable of inheriting the property. Prior to the Statute *de Donis* 13 Edw. 1, c. 1, creating the fee tail, a conveyance by *O* to *X* and the heirs of his body gave *X* a fee simple conditional that passed to *X*'s issue at his death if, following the birth of his issue, *X* did not exercise his power to convey a fee simple absolute to another. Dower attached to a fee simple conditional upon birth of issue. 1 AMERICAN LAW OF PROPERTY § 1.3, at 625 n.32. The fee simple conditional, an estate extinct in England since 1285, still lives in some American jurisdictions and dower (or some statutory equivalent) should attach thereto upon birth of issue. *See, e.g., Prichard v. Department of Revenue*, 164 N.W.2d 113, 121 (Iowa 1969).

No common law dower was assignable to a widow under nine years of age. T. LITTLETON, TENURES § 36.

Common law dower did not attach to copyhold lands although by local custom certain lands were set aside for the widow. H. CARY, COMMENTARY ON THE TENURES OF LITTLETON 95 (1829). In Borough English, where the youngest son and not the oldest son was the sole heir, the widow was not entitled to common law dower although she was entitled to a similar estate known as "Freebench." This amounted to a life estate in the whole of the husband's estate. KENNY, *supra* note 8 at 34.

28. F. POLLOCK & F. MAITLAND, *supra* note 14, ch. VII, § 2, at 421-23.

29. MCKECHNIE, *supra* note 12, at 216.

30. *See* 2 W. BLACKSTONE, COMMENTARIES* 208 (1766). *But see* note 27 *supra*. In the absence of a male heir, lands passed to decedent's daughters in equal shares. Primogeniture was abolished in England in 1925. Administration of Estates Act, 1925, 15 & 16 Geor. 5, c. 23, § 45.

31. *See* T. COVENTRY, COKE ON LITTLETON Litt. ch. V, § 36 [hereinafter cited as COKE ON LITTLETON]. *See also* 1 AMERICAN LAW OF PROPERTY § 5.3 While some measure of economic security might flow from the devolution of personal property to the widow, no inchoate interest existed in personal property. Thus, the wife's rights could be defeated by either an *inter vivos* or testamentary transfer to others. Furthermore, in that early agrarian society, one can assume that personalty was relatively valueless.

Dower did, however, conflict with the feudalistic ties of wealth and power to land ownership,³² the preference for inheritance by the male heir, whose rights were subject to the widow's dower, and policies encouraging the free alienability of land. These policy reasons militating against dower found practical expression in the various means developed to circumvent dower largely after the enactment of the Statutes of Uses.³³

Common-law minds (and the minds of many law school property law teachers) were obsessed with the concept of seisin.³⁴ Dower, as noted above, was limited to lands of which the husband was seized during the marriage, and consequently did not ordinarily attach to lands held by the husband for a term of years³⁵ or by way of reversion or remainder following a freehold estate in another;³⁶ nor did it attach to the husband's equitable interests in land.³⁷ Moreover, the husband's estate must have been a beneficial estate; dower did not attach to lands held by the husband as trustee for another.³⁸ The Statute of Uses³⁹ executed equitable estates created by way of a use (trust), notably the springing and shifting executory interests, into recognized common-law estates. By converting estates, which prior to the statute would have been equitable estates in land, into legal estates, dower would attach to lands previously immune therefrom. Section four of the Statute ameliorated this problem to the extent that a husband through "jointures" forced the widow to elect between jointure and dower.⁴⁰ The Statute of Uses, however, did not apply to a "use on a use" (an active as distinguished from a passive trust) and dower did not attach to a husband's use created in such manner. While creation of a use on a use effectively barred dower, the device was infrequently used because it placed the administration of the family

32. See 1 AMERICAN LAW OF PROPERTY § 5.3, at 623.

33. 27 Hen. 8, c. 10.

34. The word "possession" is the closest American equivalent to the meaning of seisin in early English land law. Under early English law, the concept of seisin was related to possession of land by a freeholder who was subject to numerous federal incidences. See W. WALSH, HISTORY OF ANGLO-AMERICAN LAW § 52, 100-01 (2d ed. 1932).

35. See, e.g., *Jones v. Magruder*, 42 F. Supp. 193, 196 (D. Md. 1941) (dictum); *Kilpatrick v. Kilpatrick*, 204 Ark. 452, 455, 162 S.W.2d 897, 898-99 (1942).

36. See *Bradford v. Culbreth*, 10 A.2d 534, 542 (Del. Super. Ct. 1939), *aff'd*, 41 Del. 167, 171-72, 18 A.2d 143, 144 (1941). *But see* *Clarke v. Brown*, 258 Iowa 18, 137 N.W.2d 376 (1965). Because of this prohibition, a daughter-in-law of a decedent would not acquire dower in her father-in-law's lands which descended at his death to his son subject to the mother-in-law's dower. See 2 R. POWELL, REAL PROPERTY ¶ 209[1] n.8 (1949). See also COKE ON LITTLETON Litt. ch. V, § 31a; *Steele v. La Frambois*, 68 Ill. 456, 457-58, (1873). Dower could attach to a husband's reversion or remainder following a term of years since he was considered to have seisin during the termor's possession. 1 AMERICAN LAW OF PROPERTY § 5.3, n.34.

37. See *Radnor v. Vandebendy*, 1 Shower 69, 71-72, 1 Eng. Rep. 48, 49 (H.L. 1697) (Ch.); 1 SCRIBNER *supra* note 26, at 383-98. This rule was changed in England by the Dower Act of 1833, 3 & 4 Will. 4, c. 105, §§ 2-3.

The early English rule that dower did not attach to equitable interests was not generally followed in the United States. See 1 SCRIBNER, *supra* note 26, at 399-407.

38. 1 SCRIBNER, *supra* note 26, at 409-12. See, e.g., *Walker v. Close*, 98 Fla. 1103, 1113-14, 125 So. 521, 525, 126 So. 289 (1930); *Miller v. Miller*, 148 Mo. 113, 119, 49 S.W. 852, 853 (1899).

39. 27 Hen. 8, c. 10.

40. KENNY, *supra* note 8, at 53.

wealth in the hands of strangers. Thus, the exceptions carved out in the Statute of Uses did not prove a significant device to bar dower.

As centuries passed and land became more and more an article of commerce and less a symbol of status and power, the impediments to alienability resulting from dower became more intolerable. Other "evasions" were devised to circumvent the widow's rights. One device was the holding of lands in joint tenancy with right of survivorship, which barred dower for the widow of the first joint tenant to die. Since dower attached only to lands capable of inheritance by issue of the marriage, no dower could attach to lands held by the husband and another as joint tenants with right of survivorship.⁴¹

Perhaps the most frequently employed device to circumvent dower was the trust to preserve contingent remainders.⁴² Under this device, land was conveyed to a purchaser of land for life. Since a life estate was not an inheritable estate, no dower attached to this estate.⁴³ The purchaser was also conveyed a remainder in fee. Since a remainderman is not seized of the remainder, no dower attached to this estate.⁴⁴ Of course, without more the device would fail to bar dower because by merger of the life estate and remainder interests the purchaser would hold the property in fee simple absolute. In order to prevent the merger, an intervening estate in trust, incapable of ever becoming possessory, was created. For example, a remainder following the purchaser's life estate in trust for the purchaser's benefit conditioned upon the purchaser's "civil" death during his natural lifetime was created. By creation of this intervening estate, the purchaser's life estate and remainder did not merge. During the purchaser's lifetime, he was solely entitled to possession of the property, he had a complete power of disposal as owner of the remainder, and his interests were free of dower. Notwithstanding the usefulness of these devices to enhance the marketability of real property by clearing the title of potential dower claims, they clearly worked an injustice to the widow who might otherwise be dependent upon dower after her husband's death to provide her with economic security during her widowhood.⁴⁵

The foregoing brief historical sketch of dower illustrates that the conflict between the protection of a spouse, the rights of heirs or other bounties of a person's magnificence, and the free alienability of land is not new to the twentieth century and that devices used to disinherit a spouse find

41. T. LITTLETON, TENURES § 45. See *Laterza v. Murray*, 2 Ill. 2d 219, 117 N.E.2d 779 (1954); *Johnson v. Muntz*, 364 Ill. 482, 4 N.E.2d 826 (1936); *Jezo v. Jezo*, 129 N.W.2d 195 (Wis. 1964). *Contra*, *Shiell v. Sloan*, 22 S.C. 151 (1884).

Dower attaches to the interest of a deceased tenant in common. See, e.g., *Dudley v. Tyvson*, 167 N.C. 67, 82 S.E. 1025 (1914). If a joint tenancy is severed during the lifetime of the joint tenants creating a tenancy in common, the widow of the first tenant in common to die is entitled to dower. *Napper v. Mutual Life Ins. Co.*, 107 Ky. 134, 53 S.W. 28 (1899).

42. C. FEARNE, CONTINGENT REMAINDERS AND EXECUTORY DEVICES 347 (9th ed. 1831).

43. See, e.g., *Spears v. James*, 319 Mich. 341, 29 N.W.2d 829 (1947).

44. See note 36 *supra*.

45. Under current English law, continuing financial security for a surviving spouse is provided by family maintenance legislation. Inheritance Act, 1938, 1 & 2 Geo. 6, c. 45; see *Laufer, Flexible Restraints on Testamentary Freedom—A Report on Decedent's Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955).

their counterpart in the past. The history evidences the age old conflict between society's interest in protecting certain persons from disinheritance and the property owner's right to the freedom of testation.

Paralleling the development of dower rights in real property in the common-law courts was the development of the wife's marital rights in personal property in the ecclesiastical courts and by local customs.⁴⁶ The principal distinction between the widow's rights in personal property and real property was her protection against lifetime transfers. In the case of personal property there was no protection. Under the Statutes of Distribution of 1670⁴⁷ the widow was entitled to one-third of the personal property that her husband owned at death if issue survived or one-half of his personal property if no issue survived.⁴⁸ Because the widow's rights attached only to personal property held at her husband's death, her expectancy could easily be defeated by lifetime transfers.

Although the preceding discussion has focused on dower, there has been no intent to derogate the rights of husbands at common law, which might be summed up by the common-law quip that "the husband and wife are but one and the husband is that one."⁴⁹ The historical development of curtesy has been omitted because attempts to bar the husband's share were infrequent.⁵⁰ Furthermore, and unlike the common law,⁵¹ in most jurisdictions today the rights of widows and widowers are coextensive and, to the extent historical precedent is relevant, the analogy is more often than not to dower.⁵²

II. PROTECTION UNDER AMERICAN STATUTES

Common-law dower became part of the received common law of the original American colonies and, in time, a part of the received common law of most states.⁵³ Gradually, however, the recognition that common-law dower diminishes the alienability of land and causes nightmares for title

46. See KENNY, *supra* note 8, at 61-69; 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 625 (3d ed. 1922). See also Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1051-52 (1966).

47. 22 & 23 Car. 2, c. 10; 1 Jas. 2, c. 17 (reviving the Statute of Distribution).

48. Under the so-called Custom of London which antedated the Statutes of Distribution, if the husband left surviving both a wife and children, he could only bequeath up to one-third of his personalty to strangers. Of the balance, one-third was set off to the wife and one-third to the children. If the wife alone survived, the husband could bequeath up to one-half to strangers and one-half was set off to the wife. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 348-49. See also MCKECHNIE, *supra* note 12, at 321-26.

49. Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157, 160 (1960).

50. See generally 1 AMERICAN LAW OF PROPERTY § 5.57-.74; 2 POWELL, REAL PROPERTY ¶¶ 210, 211; Haskins, *The Estate by Marital Right*, 97 U. PA. L. REV. 345 (1949).

51. At common law, as finally developed, the husband was entitled to a life estate in the whole of his wife's inheritable lands upon the birth of issue. His estate continued for his life even though his wife predeceased him leaving no surviving issue. 2 F. POLLOCK & F. MAITLAND, *supra* note 14, at 414.

52. Dower and curtesy were abolished in England in 1925. Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 23, 45(1)(b).

53. 1 SCRIBNER, *supra* note 26, at 23-58; Haskins, *A Problem in the Reception of the Common Law in the Colonial Period*, 97 U. PA. L. REV. 842 (1949).

examiners,⁵⁴ and the recognition that the United States is no longer predominantly an agrarian economy with lands necessarily the principal source of wealth,⁵⁵ prompted legislative responses. Some states have completely abolished the estates of dower and curtesy⁵⁶ while others have enhanced the widow's one-third dower interest from a life estate to an outright fee which, like common-law dower, can be released if the widow joins in the conveyance.⁵⁷ Numerous states have granted widowers coextensive rights⁵⁸ and have enacted homestead legislation and exempt property statutes for the benefit of the surviving spouse.⁵⁹ Many states have also granted the surviving spouse a share in the deceased spouse's personal property owned at death in addition to any rights the spouse may have in decedent's real property.⁶⁰

Other states, adopting a concept similar to that of the augmented estate under the Uniform Probate Code, have enacted so-called forced or elective

54. Many states have enacted curative statutes to ameliorate the potential losses resulting to purchasers of property subject to dormant dower claims. See, e.g., IOWA CODE § 614.15 (1975). See also Boyer & Miller, *Furthering Title Marketability by Substantive Reforms with Regard to Marital Rights*, 18 U. MIAMI L. REV. 561 (1964).

55. Much of the literature points to the change from an agricultural to an industrial economy as a justification for the abolition of common-law dower, particularly as a protective device for a surviving spouse. It is further argued in support of abolition that real property is no longer the principal source of wealth. While the everyday events which surround us may support these conclusions, there is some evidence that real property remains the principal source of wealth in many estates. For example, in a study of personal wealth from filed federal estate tax returns, it appears that in 1952 real estate constituted about 23% of personal wealth, while securities (stocks and bonds) constituted about 48% of personal wealth. By 1969, real estate constituted 27% of personal wealth while securities constituted about 40% of personal wealth. This is largely attributable to the fact that real property values had increased markedly over that period. Seven percent of the top wealthholders in the United States hold real property and life insurance and little or no other assets. INTERNAL REVENUE SERVICE, PERSONAL WEALTH ESTIMATED FROM ESTATE TAX RETURNS 59-61 (Pub. 482, October 1973). The statistics in this report further indicate that with respect to persons with a net worth up to \$30,000, real estate averaged between \$25,000 and \$30,000 and that real estate constituted the most significant asset item to a level of net worth of \$150,000. *Id.* at 8. A later study confirms the tendencies indicated by the 1969 report. By 1972, real estate constituted 30% of the total assets. In estates worth less than \$50,000, real estate accounted for 53.8% of the total assets for men, and 61.5% for women. In estates worth more than \$50,000 but less than \$100,000, 44.6% of the total assets were in real estate for men, 40.8% for women. Married top wealthholders held proportionately more real estate and life insurance than did other classes of wealthholders. INTERNAL REVENUE SERVICE, PERSONAL WEALTH ESTIMATED FROM ESTATE TAX RETURNS 4, 6, 55 (Pub. 482, March 1976).

A recent empirical study generally supports the assumption in the text but also concludes: "For the population as a whole, equity in owned homes accounts for a larger share of total wealth than any other asset covered by the Survey." D. PROJECTOR & G. WEISS, SURVEY OF FINANCIAL CHARACTERISTICS OF CONSUMERS 10 (Federal Reserve Technical Paper 1966). The study also found that equity in owned homes was greater for heads of families within the 35-54 age group dropping only by 10% for heads of families over 65. On the other hand, wealth in the form of liquid and investment assets predominated the over 55 group. *Id.* Table 9, at 32.

56. Dower is irrelevant in the eight community property states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See 2 R. POWELL, REAL PROPERTY ¶ 213[1], at 170.14 (1976).

57. See Phipps, *Marital Property Interests*, 27 ROCKY MT. L. REV. 180, 191-208 (1955).

58. *Id.*

59. 1 AMERICAN LAW OF PROPERTY, *supra* note 8, § 5.5, at 632.

60. For a collection of intestate succession statutes, see 2 WILLS, EST. & TR. (P.H.) ¶¶ 2701, 2702 (1975).

share statutes that are intended to assure the surviving spouse a fixed share of the deceased spouse's probate estate notwithstanding the provisions of the deceased spouse's will.⁶¹ Forced share statutes, whose policies are similar to those underlying community property laws,⁶² are intended to provide the surviving spouse some measure of protection against disinheritance. These statutes may or may not combine features of dower or dower-like interests and may grant the spouse rights that are in addition to or in substitution of homestead and exempt property rights.

Depending on the particular state, then, the rights of a surviving spouse in noncommunity property states may include any one or more of (1) a fixed share of the probate estate if decedent dies intestate, (2) a forced share of the probate estate if decedent dies testate, (3) homestead rights, and (4) exempt property.⁶³ In addition, many states by legislation authorize the award of a support allowance to the spouse during the period of estate administration or some portion thereof.⁶⁴

Forced share statutes, which set aside a share of the deceased spouse's probate estate for the surviving spouse without regard to the provisions of the decedent's will, may protect the spouse from disinheritance to a greater extent than dower if the decedent owned substantial personal property at death. Dower or dower-like interests are advantageous to a surviving spouse only if the deceased spouse owned real property during the marriage. To the extent decedent's wealth is substantially measured by personal property, dower or dower-like interests provide little or no protection for the surviving spouse.

However, the typical forced share statute that measures the spouse's share by the size of the decedent's probate estate provides no protection against lifetime transfers, which have the practical effect of disinheriting the surviving spouse. Furthermore, while there has been a definite trend away from dower and dower-like interests in favor of forced share legislation as a means of protecting the surviving spouse from disinheritance, the "[n]ew statutory schemes have very often been built upon common-law foundations without adequate examination of the premises which justified the common-law rules."⁶⁵ For example, under many forced share statutes, the spouse is

61. See Fratcher, *Towards Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1055-57 (1966). For a collection of forced share or elective share statutes see 2 WILLS, EST. & TR. (P.H.) ¶ 2735 (1975).

62. See note 55 *supra*. In community property states, the spouse's protection flows from the nature of the marital property. Thus, at the death of either spouse, the survivor is guaranteed one-half of the community property and also may be entitled to a share of the deceased spouse's separate property as well. See Million, *Community Property: A Guide to Lawyers and Students of Forty States*, 19 MO. L. REV. 201 (1954). See generally COMPARATIVE STUDIES IN COMMUNITY PROPERTY LAWS (Charnatz & Daggett eds. 1955).

63. See 2 R. POWELL, REAL PROPERTY ¶ 213 (1976); M. RHEINSTEIN & M. GLENDON, THE LAW OF DECEDENTS' ESTATES 87-104 (1971).

64. See, e.g., CONN. GEN. STAT. ANN. § 45-250 (West 1960); IOWA CODE § 633.374 (1975); TENN. CODE ANN. § 30-802 (1956).

65. 1 AMERICAN LAW OF PROPERTY § 5.5, at 633. *But see* VT. STAT. ANN. tit. 14, § 401 (1974) (authorizing the spouse to claim from the intestate estate or against the will such portion of decedent's personal property as the probate court assigns "according to his or her circumstances and the estate and degree of the decedent, which shall not be less than a third"). See also ME. REV. STAT. tit. 18, §§ 801, 805-06 (1964).



limited to a fractional share of one-third of the base against which it is measured. The one-third interest has obvious historical antecedents but frequently ignores the surviving spouse's actual needs. Under the typical forced share statutes, the spouse's elective share is unaffected by the value of the spouse's personal estate.⁶⁶

From the point of view of those who are adversely affected by a spouse's forced share claim, forced share statutes are perceived as inadequate to the extent they fail to take account of the spouse's actual financial needs, the size of the probate estate, and the relationship between the spouses. It is not unreasonable to inquire why a surviving spouse already possessed of substantial personal wealth should be permitted to claim an elective share, increase the size of the spouse's personal estate, and upset the decedent's estate plan. The growing body of cases and legislation dealing with forced share statutes more often than not centers around the depletion of the probate estate by decedent's lifetime transfers to the detriment of surviving spouse, without adequate attention to the claims of those adversely affected by the spouse's forced share.

The following three factual patterns illustrate some potential problems involving forced shares that require a solution. In each case, assume the applicable forced share statute gives the spouse one-third of the decedent's probate estate. It is also assumed the legislation evidences a policy that each spouse should take a forced share in each other's estate and that one-third is the appropriate measure.

Case 1: Decedent bequeaths his or her entire probate estate of \$600,000 to children of a first marriage. No provision is made for the surviving spouse.

Case 2: Decedent bequeaths his or her entire probate estate of \$150,000 to the surviving spouse. During the second marriage decedent transferred \$450,000 to decedent's children by a first marriage.

Case 3: Decedent bequeaths his or her entire probate estate of \$400,000 to children by a first marriage. During decedent's lifetime, decedent transferred \$200,000 to decedent's second spouse who survived the decedent.

A forced share statute that limits the spouse's fixed share to one-third of the probate estate would give the spouse \$200,000 in Case 1. The disposition defeats the expectations of decedent and the children but gives the spouse precisely what the forced share statute mandated. In Case 2, the spouse presumably would not elect against the provisions of the will, which are entirely in the spouse's favor. Unless the spouse is able to reach lifetime transfers, however, the spouse's economic interest in what was once a \$600,000 personal estate is limited to \$150,000, a sum less than the amount a one-third forced share statute considers appropriate. In Case 3, the spouse can elect to take \$133,333 from the probate estate. Since the spouse's elective right is unaffected by the \$200,000 lifetime transfer, the spouse's economic

66. Even the Uniform Probate Code rejects need as an absolute weight in the measure of the spouse's share. For example, if the surviving spouse is a millionaire in his or her own right through inheritance from a parent, the spouse's share in the augmented estate is unaffected by this fact. Similarly, the Code ignores the fact that the surviving spouse may be a substantial income earner.

interest in what was once a \$600,000 personal estate is now \$333,333, or more than half the estate. This amount is substantially more than that anticipated to pass to the spouse under the forced share statute if no interspousal gift had been made; moreover, it ignores the spouse's actual needs and defeats the expectations of the decedent and the children. In each case, the amount actually received by the spouse from the \$600,000 personal estate depends upon a number of fortuitous variables, including the value of decedent's lifetime transfers, the value of the probate estate, and the number of donees and beneficiaries. Finally, under the typical forced share statutes, the spouse's elective share in each of these cases is unaffected by the value of the spouse's personal estate.

The implicit assumption in the preceding discussion has been that interspousal disinheritance, whether through lifetime transfers or by will, does occur and that the remedy of forced share statutes is not without disadvantages. Forced share statutes have also been attacked from a different perspective. A growing body of empirical studies suggests there is little deathtime interspousal disinheritance in the wealth transmission process. Consequently, it has been argued that, in effect, forced share statutes are a response to a fictitious problem. Allison Dunham conducted one of the most ambitious recent studies of a limited number of decedents' estates in Cook County, Illinois, for the years 1953 through 1957.⁶⁷ The study, which compared patterns of distributions mandated by the reviewed wills with the statutory pattern of distribution legislated for intestate estates, suggests that because surviving spouses received more under the wills than they would have received had the decedents died intestate, there is little need for forced share legislation.⁶⁸

The evidence adduced from empirical studies on the effect of lifetime transfers is not as convincing. Dunham also reviewed some Illinois inheritance tax returns to ascertain the percentage of wealth "passed" outside of decedent's probate estate, but his review sample was too small to clearly determine whether the surviving spouse's expectations were substantially defeated by lifetime transfers to others.⁶⁹ Dunham's study produced no evidence of the extent to which lifetime transfers under which decedent retained no interest that would have subjected the lifetime transfer to tax

67. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 240 (1963). For a more recent study see Fellows, Simon, Snapp & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717.

68. See Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252-53 (1963).

69. See *id.* at 264. While no additional light was shed on this question in a recent study of estates in Hennepin County, Minnesota, it was determined that in gross estates between \$30,000 and \$60,000 as determined for inheritance tax purposes, 45% of the assets included in the gross estate were also probate assets, 38% of the assets were held by the decedent and another as joint tenants with right of survivorship, 12% constituted insurance and 4% constituted lifetime transfers and annuities and pensions. In gross estates valued in excess of \$200,000, 62% of the included assets were also in the probate estate, 16% constituted joint tenancy property, 11% constituted insurance, and 6% constituted other lifetime transfers and annuities and pensions. Stein, *Probate Administration Study: Some Emerging Conclusions*, 9 REAL PROP. PROB. & TR. J. 596, 599 (1974). In each case, if the bulk of the probate estate and joint tenancy property in fact passes to the surviving spouse, the spouse receives substantial protection.

may have diminished the surviving spouse's expectancy.⁷⁰ Other available empirical evidence does suggest that the surviving spouse is frequently the primary beneficiary of common will substitutes such as joint tenancy property, revocable trusts, and life insurance.⁷¹

Other factors militate against interspousal disinheritance. First, there are substantial societal pressures without the force of law that dissuade a property owner from disinheriting a spouse. Second, the tax laws create incentives for leaving property to a spouse. For federal estate tax purposes, property passing to the spouse is shielded from the estate tax to the extent of the greater of \$250,000 or fifty percent of the adjusted gross estate under section 2056 of the Internal Revenue Code. Similarly, state inheritance tax laws generally provide greater exemptions and more favorable tax rates for property passing to the spouse. However, the paucity of empirical evidence suggesting interspousal disinheritance, coupled with the intuitive response that it just is not frequently done, does not mean the problem does not exist or that society, through its courts and legislatures, does not have an interest in protecting a surviving spouse who has in fact been disinherited. Even the empiricists cannot ignore more than two centuries of case law involving interspousal disinheritances, which itself proves that it does happen. Moreover, the growth of legislation evidences both a public awareness of the problem and a public policy that it should be remedied.⁷²

III. JUDICIAL SAFEGUARDS

While the body of legislation designed to protect a surviving spouse from disinheritance (both inadvertent and intentional) through lifetime transfers continues to grow, these legislative solutions are but relative newcomers when compared to the judicial devices employed for the same purpose. To a greater extent than available under legislation, judicial solutions appear to take account of the competing equities presented by the litigating parties in light of the facts and circumstances of each case. Courts that have been predisposed to erect barriers to practical disinheritance of the surviving spouse by *inter vivos* transfers have carved out three distinct tests designed to determine whether a lifetime transfer is effective to defeat the surviving spouse's expectancy.

Under one test, an *inter vivos* transfer is set aside if the decedent retained either excessive control over, or an interest in, the transferred

70. For a more detailed analysis of the Dunham study, see Plager, *The Spouse's Nonbarrable Share: A Solution in Search of A Problem*, 33 U. CHI. L. REV. 681 (1966) [hereinafter cited as Plager]. See also M. RHEINSTEIN & M. GLENDON, *THE LAW OF DECEDENTS' ESTATES* 87-100 (1971).

71. Plager, *supra* note 70, at 688-97. The Dunham findings generally were confirmed in an Ohio study of patterns of distribution. The study concluded that if testator was survived by spouse and issue, testator generally bequeathed his entire estate to the spouse; and if testator was survived by a spouse but no issue, testator generally bequeathed his entire estate to the spouse. Deviations from this distributive pattern occurred in larger estates or in the case of remarriage. M. SUSMAN, J. CATES & D. SMITH, *THE FAMILY AND INHERITANCE* 103 (1970).

72. Professor Fratcher believes that over one-half of the evasion cases involve transfers to children by a former marriage and the next largest group of cases involve transfers to a bigamous wife or to her children. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1056-57 (1966).

property. This test is known as either the excessive control or illusory transfer test.⁷³ Its antecedent, although of a slightly different shading, was the testamentary transfer test. Under a second test, an *inter vivos* transfer is set aside if the transfer was the result of a fraudulent intent; that is, the transfer was intended by the decedent to defraud the surviving spouse of a statutory forced share.⁷⁴ Since excessive control is not crucial to voiding a transfer resulting from improper intent, from the spouse's viewpoint the intent test has the advantage of reaching *inter vivos* transfers whether outright or in trust. Under a third test, an *inter vivos* transfer is void as against the spouse's claim if it lacks "reality."⁷⁵ This test is least advantageous to the spouse because the spouse cannot reach transfers that are effective under the ordinary principles of the law of gifts.

In arriving at the formal holding in a particular case, and regardless of the test applied, the courts generally appear to consider the following equities even though they may not clearly articulate their relevance to the ultimate result: (1) the size of the lifetime transfer and its proportionate relationship to the size of the transferor's personal estate at the time of the transfer; (2) the proximity of the transfer to the time of the transferor's death; (3) probate and nonprobate transfers that otherwise benefit the surviving spouse and others; (4) the relationship of the transferee to the transferor; (5) the moral claims of rival claimants; and (6) the financial condition of rival claimants.⁷⁶ Assuming in a given case that the equities favor the surviving spouse, the surviving spouse is more likely to prevail under either of the first two theories (illusoriness or fraudulent intent) than under the third (reality) because the reality test simply questions whether the transferee acquired a bona fide property interest in the transferred property notwithstanding the transferor's extent of control or "fraudulent intent."

While due judicial regard to the preceding equities is appropriate, their application to particular fact situations presented in subsequent cases makes the results difficult to predict. Furthermore, to the extent the equities favor one party while the applicable test, in its pristine form, favors the other, courts tend to pollute the test. The effect is the evolution of a test that lacks clear and concise definition.

A lifetime transfer intended to take effect at the transferor's death, because it is in the nature of a testamentary disposition, may be held void if executed in a manner that fails to comply with the applicable statutes of wills. When a lifetime transfer is deemed testamentary and thus void, it is considered part of the probate estate. To the extent the surviving spouse's intestate or forced share is carved out of the deceased spouse's probate estate, lifetime transfers that are void as testamentary increase the size of the probate estate and, ultimately, the spouse's intestate or forced share. While

73. The leading case enunciating the illusory transfer doctrine is *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937).

74. See *Lowe, Transfers in Fraud of Marital Rights*, 26 MO. L. REV. 1, 4-19 (1961).

75. The leading case enunciating the reality doctrine is *In re Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

76. See generally W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 145-74 (1960) [hereinafter cited as MACDONALD].

the effect of applying a testamentary label to the challenged transfer enhances the interest of distributees of the probate estate, it also defeats the rights and expectancies of the donees of the lifetime transfer: the testamentary transfer test does not permit partial invalidity. The test is usually applied to void lifetime transfers in trust,⁷⁷ but it may apply to outright transfers as well.⁷⁸ Application of the testamentary transfer test to void lifetime transfers is more characteristic of older cases, invoked when courts had a tendency to protect rigidly the integrity of wills statutes by voiding lifetime transfers intended to take effect at death. With the growing popularity of will substitutes, particularly the *inter vivos* trust, the test fell out of use. The testamentary transfer test also may have declined because of the unfairness to the donees of the suspected transfer, who forfeited their entire interest therein except to the extent they also shared in the probate estate.

One of the most forceful rejections of the test was set forth in *United Building & Loan Association v. Garrett*.⁷⁹ Settlor executed a revocable declaration of trust of his interest in certain mutual fund shares, reserving the income to himself for life and the additional powers to sell or otherwise dispose of the shares and retain any proceeds of sale for his personal use. The trust instrument further provided that one year after the settlor's death the corpus was distributable to the beneficiaries designated in the trust instrument. After the settlor's death, his widow and certain heirs challenged the trust as testamentary. After the court found the trust instrument duly executed, although not in accordance with the applicable statute of wills, it then considered whether the settlor intended to create any interest in the remainderman at the time of the transfer in trust and not solely after his death. The contestants argued that the accumulated effect of the reserved rights and interest negated this intent. The court rejected their argument; it construed decedent's reserved power of revocation as simply a divesting condition attached to the remainderman's interest that arose at the time of the transfer. Of more significance to the decline of the testamentary transfer test, the court emphasized that while the trust instrument had not been executed in accordance with the statute of wills, the trust had been executed with sufficient formalities under the circumstances, and the mutual fund had acknowledged receipt of the document and the trust ownership was evidenced on its shareholder records and on the shares.⁸⁰

The court's approach effectively signaled the demise of the testamen-

77. *Hill's Estate*, 15 Pa. D. & C. 699, 701-02 (1931) (declaration of trust). See generally *Brown's Estate*, 384 Pa. 99, 119 A.2d 513 (1956); *Bickers v. Shenandoah Valley Nat'l Bank*, 197 Va. 145, 88 S.E.2d 889 (1955), rehearing denied, 197 Va. 732, 90 S.E.2d 865 (1956) (revocable unfunded insurance trust).

78. See, e.g., *Fleming v. Fleming*, 194 Iowa 71, 174 N.W. 946 (1921) (business agreement); *Lonsdale's Estate*, 29 Pa. 407 (1857) (bonds). The joint tenancy has withstood attack on testamentary transfer grounds. See *Malone v. Walsh*, 315 Mass. 484, 53 N.E.2d 126 (1944); *In re Lorch's Estate*, 33 N.Y.S.2d 157 (Sur. Ct. 1941); *Patch v. Squires*, 105 Vt. 405, 165 A. 919 (1933).

79. 64 F. Supp. 460 (W.D. Ark. 1946).

80. Implicitly the court seems to hold that the formalities of the trust's execution satisfied the "ritualistic," "evidentiary," and "protective" functions underlying the Statute of Wills. *Gulliver & Tilson, Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941). See also *Langbein, Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489 (1975).

tary transfer test, at least as applied to any lifetime transfer evidenced by a written instrument.⁸¹ The spurious nature of the testamentary transfer test when applied to trusts evidenced by a written instrument also has been recognized by the Restatement (Second) of Trusts, which provides:

Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust.⁸²

Depending on one's predilection to favor a surviving spouse or the donees of *inter vivos* transfers in cases where lifetime transfers in trust have been made which decrease the spouse's share in the probate estate, one might, or might not, mourn the passing of the doctrine. There are, however, a number of cogent reasons why application of the doctrine to increase the size of the spouse's share is not intellectually satisfying. First, if application of the doctrine requires a finding of *animus testandi* on decedent's part, the evidence at the trial is suspect because it necessarily excludes the testimony of the person whose intent is crucial. The outcome of litigation may be dictated by the testimony of persons who are biased, or by the construction of an inartfully worded instrument often prepared by a lawyer and not the decedent. Second, to the extent that trusts with substantially similar terms may or may not be deemed testamentary depending upon who makes the challenge, the courts' decisions rest more on personal prejudices than on neutral principles.⁸³ Third, to the extent the testamentary transfer cases distinguish revocable trusts under which the settlor has retained no control powers from those under which control has been retained, and hold the

81. See *Adams v. Fleck*, 171 Ohio St. 451, 172 N.E.2d 126 (1961). In a recent nonevasion case considering the application of the testamentary transfer test to a revocable trust of mutual fund shares, the Illinois Supreme Court abandoned any pretense that the remainderman had a vested interest. *Farkas v. Williams*, 5 Ill. 2d 417, 423, 125 N.E.2d 600, 604 (1955). In *Farkas* the settlor retained the right to income, the power to revoke, the power to sell corpus and retain the proceeds of sale for himself, and the power to change beneficiaries. The powers to revoke and change beneficiaries were effective only upon notification to the mutual fund. The court upheld the transfer and found that some interest—which was never labeled by the court but which has been dubbed a "farkas," J. DUKEMINIER & S. JOHANSON, *FAMILY WEALTH TRANSACTIONS* 412 n.23 (1974)—passed to the remainderman on execution of the instrument. One attribute of the interest was the right to hold the settlor to his declared fiduciary responsibilities. The attributes of fiduciary duties may be the critical factor to distinguish the trust arrangement from a mere agency, which is generally held to be testamentary. See, e.g., *In re Ihmsen*, 253 App. Div. 472, 474-75, 3 N.Y.S.2d 125, 127-28 (1938).

82. RESTATEMENT (SECOND) OF TRUSTS § 57 (1957). This section revises the view of RESTATEMENT OF TRUSTS § 57. See A. SCOTT, *LAW OF TRUSTS* §§ 57-57.6 (1960).

83. In each of the following cases the settlor retained an income interest and a power to control the trustee in its administration of a revocable trust. The trust was upheld against a challenge under the testamentary transfer test. In each case, the spouse's distributive share was not in issue. *Denver Nat'l Bank v. Von Brecht*, 137 Colo. 88, 90-102, 322 P.2d 667, 668-74 (1958); *Kelly v. Parker*, 181 Ill. 49, 53-63, 54 N.E. 615, 615-19 (1899); *Farkas v. Williams*, 5 Ill. 2d 417, 418-33, 125 N.E.2d 600, 601-09 (1955); *Keck v. McKinstry*, 206 Iowa 1121, 1122-26, 1127-30, 221 N.W. 851, 852-54, 855-56 (1928); *National Shawmut Bank v. Joy*, 315 Mass. 457, 459-61, 472-78, 53 N.E.2d 113, 115-16, 121-26 (1944); *Ridge v. Bright*, 244 N.C. 345, 345-48, 349-53, 93 S.E.2d 607, 608-10, 611-13 (1956); *In re Estate of Steck*, 275 Wis. 290, 292-300, 81 N.W.2d 729, 731-34 (1957).

former nontestamentary⁸⁴ but the latter testamentary and void,⁸⁵ the courts ignore, or at least seriously minimize, the importance of the retained revocation power. A power of revocation is undoubtedly the single most important power that can be retained by a settlor who seeks continued control over the trust property.⁸⁶ As MacDonald notes, "[c]omplete ownership is at all times attainable by a stroke of [the] pen."⁸⁷

While incidences of void transfers under the testamentary transfer doctrine have declined, lifetime transfers may nonetheless be wholly or partially void for the purpose of enhancing a spouse's share under the illusory transfer test or under the fraudulent intent test. *Newman v. Dore*⁸⁸ is the leading case upholding the right of a surviving spouse to void a lifetime transfer in trust on the ground that the trust is illusory. Ferdinand Straus, the deceased octogenarian, and his thirty-year old wife were married four years before his death. While the reasons for the marriage were unclear, it was clear that the decedent became disenchanted with the arrangement.⁸⁹ Three days before his death the decedent executed an *inter vivos* trust for the benefit of himself and his children by a prior marriage and transferred to the trustees *all* of his real and personal property. Under the terms of the trust, the decedent retained the right to the income for life, the power to revoke the trust, and substantial managerial and control powers.

Approximately two months before establishing the trust, the decedent had executed a new will providing a testamentary trust for his wife of one-third of his probate estate. Under the terms of the statute applicable at the time,⁹⁰ the provisions of the will for the spouse's benefit effectively barred her statutory right of election. Because the decedent's will (and the right of election, if applicable) limited the spouse's rights to a share of the probate estate, no economic rights passed to the spouse under the decedent's will, the probate estate having been emasculated by the transfers in trust.

Subsequent to the decedent's death, an action was brought by the surviving beneficiaries of the trust against the trustees to enforce its terms. Decedent's widow successfully challenged the validity of the trust, which the court held illusory, to the effect that all of the *inter vivos* trust's assets formed

84. See, e.g., *Bergman v. Foreman State Trust & Savings Bank*, 273 Ill. App. 408, 411 (1934); *Kelly v. Snow*, 185 Mass. 288, 297-98, 70 N.E. 89, 94 (1904); *Kerwin v. Donaghy*, 317 Mass. 559, 572, 59 N.E.2d 299, 306-07 (1945); *Windolph v. Girard Trust Co.*, 245 Pa. 349, 367-69, 91 A. 634, 639-40 (1914).

85. See, e.g., *Bickers v. Shenandoah Valley Nat'l Bank*, 197 Va. 732, 732-33, 90 S.E.2d 865, 866 (1956) (denying rehearing and clarifying 197 Va. 145, 88 S.E.2d 889 (1955)).

86. See Scott, *The Effects of a Power to Revoke a Trust*, 57 HARV. L. REV. 362, 366 (1944).

87. MACDONALD, *supra* note 76, at 92.

88. 275 N.Y. 371, 9 N.E.2d 966 (1937).

89. If a purpose of forced share legislation is to protect the deserving widow from disinheritance, the facts of *Newman v. Dore* should give one pause. At decedent's death "there was pending an action brought by the wife for separation with alimony, on the grounds the [decedent's] sexual habits made it impossible for her to live with him, and a counter action by him for an annulment. He instructed his attorney to see to it that that " 'whore' and 'son of bitch' did not get any of his estate." Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 519 n.18 (1969).

90. N.Y. DECEDENT EST. LAW § 18 (McKinney 1939) (current version at N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967)).

part of the decedent's probate estate impressed in part with the testamentary trust for the widow's benefit established under the will. In reaching the result, the court rejected two theories that might have otherwise voided the *inter vivos* trust. The court rejected the argument that the trust was testamentary in nature and therefore void.⁹¹ Rather, in reaching the result, the court assumed "without deciding, that except for the provisions of section 18 of the Decedent Estate Law the trust would be valid."⁹² The court also rejected as irrelevant the trial court finding⁹³ that the decedent intended to defeat his wife's rights by transferring all of his property to the trustees of the *inter vivos* trust; the relevance of intent was held to be limited to fraudulent transfers and, the court said, "there can be no fraud where no right of any person is invaded."⁹⁴ In holding that no right of the spouse had been invaded, the court likened the spouse's statutory share in the assets of the probate estate to a mere expectancy during coverture, quite unlike the common-law estates of dower or curtesy, which created vested rights not subject to defeasance by *inter vivos* transfers in which the spouse did not join.⁹⁵ In lieu of these theories to avoid the transfers, the court held that, as against the claim of decedent's widow, the trust was illusory. The test of illusoriness is whether or not the transferor has in good faith⁹⁶ divested himself of the ownership of his property,⁹⁷ which is to ask, of course, whether the transferor retained too much control over the transferred property.

The *Newman* decision gained wide currency, although it has had a stormy history in its state of origin and elsewhere.⁹⁸ MacDonald considers the test not wholly without merit and generally predictable, although he notes that there is "a disturbing lack of logic" in a control test which in its application underplays the importance of a revocation power when contrasted with retained powers to control the fiduciary.⁹⁹ MacDonald further notes that in too many cases, because other factors aside from control dictate

91. The court noted that under RESTATEMENT OF TRUSTS § 57 (1935), the trust would be considered testamentary since the settlor retained not only the right to income and the power to revoke but all power to control the trustees in the administration of the trust. *Newman v. Dore*, 275 N.Y. at 380, 9 N.E.2d at 969. *Contra*, RESTATEMENT (SECOND) OF TRUSTS § 57, at 151 (1957).

92. *Newman v. Dore*, 275 N.Y. at 380, 9 N.E.2d at 969.

93. *Id.* at 381, 9 N.E.2d at 969.

94. *Id.* at 379, 9 N.E.2d at 968.

95. Other jurisdictions consider intent relevant in determining the spouse's claim. *See, e.g.*, *Payne v. Tatem*, 236 Ky. 306, 311, 33 S.W.2d 2, 4 (1930); *Dyer v. Smith*, 62 Mo. App. 606, 612 (1895); *Evans v. Evans*, 78 N.H. 352, 353, 100 A. 671, 672 (1917); *Patch v. Squires*, 105 Vt. 405, 411, 165 A. 919, 921 (1933); *Dunnett v. Shields*, 97 Vt. 419, 428, 123 A. 626, 631 (1924) (cited in *Newman v. Dore*, 275 N.Y. at 378, 9 N.E.2d at 968).

96. The good faith of the transferor refers to his intent to divest himself of the ownership of his property and not to the purpose of depriving his spouse of her statutory distributive share. *Newman v. Dore*, 275 N.Y. at 379, 9 N.E.2d at 969, citing *Benkart v. Commonwealth Trust Co.*, 269 Pa. 257, 259, 112 A. 62, 63 (1920).

97. Expressed another way and from the lips of Justice Holmes, "from the technical point of view such a conveyance does not quite take back all that it gives, but practically it does." *Newman v. Dore*, 275 N.Y. at 381, 9 N.E.2d at 969, quoting *Leonard v. Leonard*, 181 Mass. 458, 461, 63 N.E. 1068, 1069 (1902).

98. *See generally* Comment, *The Present Status of "Illusory" Trusts—The Doctrine of Newman v. Dore Brought Down to Date*, 44 MICH. L. REV. 151 (1945).

99. MACDONALD, *supra* note 76, at 87-92.

the outcome of the litigation, confusion or even violence to the doctrine results.¹⁰⁰ Finally, MacDonald criticizes the rule as too narrow.¹⁰¹

It may be that the illusory test is merely a nuance of the testamentary transfer test, which would enable a court to uphold the transfers in trust in favor of the beneficiaries except for a partial defeasance to satisfy the spouse's statutory forced share. Thus, the spouse's expectancies and the trust beneficiaries' rights could each be fulfilled in part without causing complete violence to the transferor's estate plan. The issue of partial defeasance was not considered in *Newman v. Dore*, perhaps because the surviving beneficiaries of the trust were also the residuary legatees under the decedent's will.¹⁰² In a subsequent New York case, the New York Court of Appeals in dictum indicated that partial defeasance was impossible under the illusory transfer test.¹⁰³

In Ohio, the illusory transfer test was at first warmly embraced in *Bolles v. Toledo Trust Co.*,¹⁰⁴ only later to be overruled by *Smyth v. Cleveland Trust Co.*¹⁰⁵ In *Bolles*, the court decreed a partial defeasance solely for the spouse's protection. In *Smyth*, the court failed to comprehend how a trust could be valid in part and void in part notwithstanding that partial defeasance has the advantage of protecting all interested parties.¹⁰⁶ Whether the illusory transfer test still lives in Ohio is open to doubt.¹⁰⁷

As noted, the *Newman* court specifically rejected the intent test as unsatisfactory in determining the validity of the lifetime transfer in trust as an effective bar to the spouse's statutory forced share. In other courts, a spouse might challenge an *inter vivos* transfer, whether outright or in trust, on the ground that the transferor intended to defeat the spouse's statutory share by the transfer and that, because of this improper intent, the transfer should be set aside. Courts that have adopted the intent test either void the lifetime transfer in whole or in part.¹⁰⁸ Invocation of the intent test is

100. *Id.* at 93.

101. *Id.* at 96-97. The court in *Newman v. Dore* left open the question of whether a revocable trust without a reservation of the income or the power to control the trustees would also be illusory. The author submits that it is. Unless form is placed over substance, a retained power of revocation subsumes all possible lesser rights and powers. The power of revocation permits the settlor to continuously determine who shall enjoy the income from the trust during his or her lifetime. Cf. I.R.C. §§ 676, 2038 (income from a revocable trust taxed to the settlor and its corpus included in the settlor's gross estate for federal estate tax purposes).

102. See Recent Decisions, 2 SYRACUSE L. REV. 378 n.3 (1951).

103. *In re Halpern*, 303 N.Y. 33, 40, 100 N.E.2d 120, 123 (1951). *But see* Wanstrath v. Kappel, 356 Mo. 210, 218, 201 S.W.2d 327, 331 (1947); *Harris v. Harris*, 147 Ohio St. 437, 142, 72 N.E.2d 378, 380 (1947). As a matter of theory, partial defeasance is questionable whether a transfer is deemed "illusory" or "testamentary." On the other hand, partial defeasance is consistent with those theories that invalidate an *inter vivos* transfer because the transfer was intended to defraud the widow's claim against the probate estate. However, strict adherence to theory may undercut the rights of the beneficiaries of the lifetime transfers if by virtue of decedent's will or the laws of intestate succession they are deprived of the balance of the transfer remaining after satisfaction to the spouse's share.

104. 144 Ohio St. 195, 58 N.E.2d 381 (1944).

105. 172 Ohio St. 489, 179 N.E.2d 60 (1961).

106. Partial defeasance has been accepted in jurisdictions that void *inter vivos* transfers under the intent test. See MACDONALD, *supra* note 76, at 131-132.

107. See *In re Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951); text accompanying note 126 *infra*.

108. See, e.g., *Ackers v. First Nat'l Bank*, 192 Kan. 319, 334, 387 P.2d 840, 851 (1963)

intellectually unsatisfying largely because the courts rarely articulate the substance of an improper intent; frequently they arrive at a result inconsistent with the anticipated result if the plain meaning of the test is applied because other unexpressed considerations weigh in their decision. Moreover, some courts fail to distinguish the motive (incentive) behind a transfer from the intent (specific purpose) of the transferor to defeat the spouse's forced share. These courts should recognize that the transferor may have unequivocally intended to defeat the spouse's share, but for the most justifiable motives—for example, the spouse may be otherwise amply provided for.¹⁰⁹ In some cases, the courts have upheld the suspected transfer notwithstanding proved intent to defeat the spouse's forced share because, during the lifetime of both spouses, neither has any vested property interest in the estate of the other capable of judicial protection.¹¹⁰ The cases discussed below illustrate the nature of the intent test and the confusion generated by its application. In all of the cases the deceased transferor intended to defeat the spouse's statutory forced share. The conflicting results illustrate that other factors often influence the courts' judgments.

In *Patch v. Squires*,¹¹¹ decedent's surviving husband challenged the validity of certain joint bank accounts created shortly before the decedent's death with funds she had inherited from her mother, on the ground that the gift of the accounts was incomplete and was intended to defeat the husband's rights in her estate. The spouses had been married twenty-six years before the decedent's death but had separated and lived apart for twenty years. In rejecting the husband's claim, the court held that it was insufficient merely to show that the practical effect of the *inter vivos* transfer was to undercut the husband's share of decedent's probate estate. Rather, the husband must prove that the "gifts were executed mala fide."¹¹² A review of the evidence disclosed that the deceased spouse had indicated that she was "going to have her money go where she wanted it to."¹¹³ Under the *Patch* test the surviving spouse cannot prevail in the absence of a showing of an actual intent to defeat his or her share as distinguished from a presumed intent that might be circumstantially evidenced by the removal of decedent's property from the probate estate.¹¹⁴ One should not ignore the prolonged separation of the spouses as a possible inducement for the test enunciated by that court.

(partial invalidity); *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 1171, 130 S.W.2d 611, 623 (1939).

109. MACDONALD, *supra* note 76, at 103.

110. *See, e.g.*, *Cherniack v. Home Nat'l Bank & Trust Co.*, 151 Conn. 367, 369-71, 196 A.2d 58, 59-60 (1964).

111. 105 Vt. 405, 165 A. 919 (1933).

112. *Id.* at 410, 165 A. at 921.

113. *Id.*, 165 A. at 920.

114. *Accord*, *Dunnett v. Shields*, 97 Vt. 419, 425, 428-30, 123 A. 626, 629-32 (1924). The actual intent test adopted in *Patch v. Squires* and *Dunnett v. Shields* represents a retreat from the earlier Vermont position. In *Thayer v. Thayer*, 14 Vt. 107 (1842), the court had held that any *inter vivos* gift raises an inference of fraud. In *Nicholus v. Nicholus*, 61 Vt. 426, 18 A. 153 (1889), the court held that an intent to defeat the survivor's marital rights "is necessarily presumed from [the transferor's knowledge] that such rights would be defeated by the conveyance." *Id.* at 431, 18 A. at 154. Jurisdictions that follow or have followed the control test in one form or another have generally upheld joint bank accounts as against the surviving spouse's claim. *See, e.g.*, *Malone v. Walsh*, 315 Mass. 484, 488-92, 53 N.E.2d 126, 128-30

An actual intent test, if remorselessly applied, would be difficult to sustain absent direct statements of intent by the decedent. Thus, many courts, while referring in their opinions to the relative meritorious claims of the litigants and other factors motivating the transfer, permit the spouse to prevail, if at all, on a subjective intent theory.¹¹⁵ Application of a subjective intent theory, which allows the surviving spouse to more easily overcome the burden of proving intent to defeat his or her share,¹¹⁶ increases the likelihood that the spouse will prevail. For example, in *Merz v. Tower Grove Bank & Trust Co.*,¹¹⁷ decedent, while conscious of his impending death, transferred the bulk of his wealth to a revocable *inter vivos* trust naming himself and a bank as co-trustees. Decedent reserved the income of the trust for his life. The trust provided, among other things, that after the decedent's death \$200 per month would be paid to his wife for life. The evidence established that the \$200 limitation on his wife's rights was the primary motive for the transfer in trust. Under the applicable state law, the widow had the right to elect against decedent's will and take one half of decedent's probate estate. The trial court found that the trust was executed for the express purpose of defrauding the widow of her statutory marital rights. In affirming this portion of the trial court decree, the Missouri Supreme Court stated that "in determining whether or not the [decedent] intended to defeat and defraud [his spouse] we cannot presume a fraudulent intent, but it may be inferred when it is a legitimate deduction from all the facts and circumstances in evidence in a given case."¹¹⁸ Among the facts and circumstances evidencing the improper intent were: first, the substantial size of the transfer in the trust; second, the proximity of the transfer to the time of the decedent's death and the fact that decedent was conscious of his impending death; and third, decedent's expressions of his desire to limit his wife to \$200 per month, a level of reserved income that was economically insubstantial when compared with the spouse's one-half interest in the trust corpus if the trust had not been established. While the *Merz* court voided the entire transfer under the testamentary test as well,¹¹⁹ its decision principally rests on the intent test. The court expressly rejected the illusory transfer test, but without explanation.¹²⁰

More recently, the intent test was successfully invoked in *Sherrill v.*

(1944); *Myers v. Laird*, 230 Miss. 675, 678-79, 682-83, 93 So. 2d 828, 829-30 (1957); *Inda v. Inda*, 288 N.Y. 315, 316-18, 43 N.E.2d 59, 60-61 (1942) (relying on provision of N.Y. BANKING Law § 239).

115. See, e.g., *In re Estate of Sides*, 119 Neb. 314, 316-17, 321-24, 228 N.W. 619, 619-20, 622-23 (1930); *Walker v. Walker*, 66 N.H. 390, 392, 395-96, 31 A. 14, 15-17 (1891) (reasonableness of transfer). But see *Ibey v. Ibey*, 93 N.H. 434, 435-37, 43 A.2d 157, 158-59 (1945), exceptions overruled, 94 N.H. 425, 426-28, 55 A.2d 872, 873-74 (1947) (reasonableness of transfer irrelevant upon showing of fraudulent intent).

116. *In re Estate of Sides*, 119 Neb. 314, 316-17, 319-24, 228 N.W. 619, 621-23 (1930); *Dummett v. Shields*, 97 Vt. 419, 421-24, 427-32, 123 A. 626, 628-29, 631-32 (1924).

117. 344 Mo. 1150, 130 S.W.2d 611 (1939).

118. *Id.* at 1160, 130 S.W.2d at 161; cf. *Dubin v. Wise*, 354 N.W.2d 403 (Ill. App. 1976) (transfer of substantial lifetime gifts evidenced lack of good faith intent by husband to abide by ante-nuptial agreement to leave spouse one-fourth of his estate, amounting to fraud on the widow's rights). See also *Potter v. Winter*, 280 S.W.2d 27, 29-33, 35-37 (Mo. 1955).

119. 344 Mo. at 1161, 130 S.W.2d at 617.

120. *Id.* at 1163, 30 S.W.2d at 618.

*Mallicote*¹²¹ to set aside a transfer as fraudulent with respect to the decedent's surviving spouse, who had been previously married and who challenged the validity of an *irrevocable* trust created one year prior to the decedent's death. Under the terms of the trust, which consisted of various securities amounting to a substantial portion of decedent's wealth, decedent retained the income for life. The instrument named decedent's siblings as both trustees and remaindermen. The powers of the trustees were limited by the terms of the agreement. After the securities were registered in the names of the trustees, the decedent kept them in his safe deposit box. The record established a long history of friction between the spouse and decedent's siblings and that decedent and his spouse had undergone some marital strife. Evidence submitted at the trial supported the trial court's finding that the trust was established with the intent to defeat the spouse's statutory distributive share.

The appellate court affirmed the trial court decree setting aside the trust largely on the intent theory, although in rationalizing the result the court cited with approval the control test (colorable transfer) without specifying in any detail whether it was also applicable under the facts of the case. Relevant facts tending to establish a fraudulent intent included the size of the transfer and whether it was made for consideration, the proximity of the transfer to the decedent's death, relations between the spouses at the time of the transfer, and the source of the decedent's wealth.¹²² The court further held that intent alone was not controlling, and that the court should consider the practical effect of the transfer. In the words of the court, "[I]f the properties transferred prior to death are of such a quantity in relation to the total estate as the widow is substantially deprived of that which she otherwise would take under our statutes, then from such transfer fraud may be presumed under certain conditions and circumstances."¹²³ The court placed great importance on the size of the transfer in relation to the transferor's personal estate as evidence of presumed fraudulent intent. Most interestingly, the court applied the intent test to an irrevocable transfer in trust.

Application of the intent test involves more than simply a review of the transfer documents: it is keyed to an analysis of all of the facts and circumstances.¹²⁴ Furthermore, results under the test are highly unpredictable. On the other hand, the test permits a consideration of a number of competing equities in balancing the rights of the spouse and donees of *inter vivos* transfers. One of the most important equitable considerations in light of the historic principle of dower is the manner in which the surviving spouse has otherwise been provided for.

To the extent that the illusory transfer test is undercut by the reality test,

121. 417 S.W.2d 798 (Tenn. App. 1967). Under the applicable Tennessee statute, conveyances fraudulently intended to defeat the widow's distributable share are voidable. TENN. CODE ANN. § 31-612 (1955). Thus, the issue presented to the court was whether the described transfers fell within the statute.

122. 417 S.W.2d at 802.

123. *Id.* at 802-03.

124. MACDONALD, *supra* note 76, at 117.

the intent test ultimately may prove to be the major prevailing judicial theory for protecting a surviving spouse against lifetime transfers that effectively defeat the spouse's distributive share. Under the reality test, an *inter vivos* transfer can be sustained against an attack by the surviving spouse if the transfer "has inter vivos validity aside from any question of the rights of the [spouse] The only transfers subject to the [spouse's] attack, on this reasoning, are sham transfers or testamentary transfers."¹²⁵

In *Matter of Halpern*,¹²⁶ decedent established four Totten trusts¹²⁷ naming his granddaughter as beneficiary. Decedent subsequently died testate leaving his entire estate to his wife who was also appointed executrix under the will. Under applicable state law, decedent's widow had no right to elect against the will. In her capacity as executrix, the widow sought to bring the four Totten trusts into the probate estate on the theory that the trusts were illusory; they would then pass to her under the will. The surrogate ruled in her favor.¹²⁸ On appeal to the intermediate appellate court, the surrogate's order was modified by voiding the challenged transfers only to the extent necessary to give the spouse that which would have been her intestate share in the trust accounts if decedent had died intestate and if the trusts had actually formed part of his probate estate.¹²⁹ The court reasoned that if the accounts were set aside in their entirety, decedent's intent to benefit his granddaughter to the exclusion of the other recipients of his probate estate would be thwarted. No appeal was taken from this limited modification to the New York Court of Appeals by the granddaughter. However, the executrix appealed the portion of the decree that preserved a share of the account for the granddaughter in the hopes of having the entire balance of the trust accounts added to the probate estate.

In an opinion subject to conflicting interpretation, the Court of Appeals held that the Totten trusts were not illusory. In so holding, this court appeared to apply a meaning to the word "illusory" other than substantial control, for if a control test were applied, the Totten trusts would have been set aside. The court colored the meaning of illusory with a further requirement that the transfer lack reality for any purpose—that is, that the transfer be a sham. When the Totten trust is compared to the revocable trust, however, it would appear impossible to uphold the Totten trust and void the revocable trust for lack of reality.¹³⁰ In a Totten trust, the beneficiary's rights

125. *Id.* at 120.

126. *In re Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

127. See *In re Estate of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904). The Totten trust (also known as the tentative trust) has been approved by the Restatement and is described as follows:

Where a person makes a deposit in a savings account in a bank or other savings organization in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust.

RESTATEMENT (SECOND) OF TRUSTS § 58 (1957).

128. *In re Estate of Halpern*, 197 Misc. 502, 505, 96 N.Y.S.2d 596, 599 (Sur. Ct. 1950).

129. *In re Estate of Halpern*, 277 App. Div. 525, 531, 100 N.Y.S.2d 894, 900 (1950).

130. Cf. *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941). In *Krause*, the court held a Totten trust illusory as against the widow's claim. *Krause* was distinguished in *Halpern* on the

accrue solely at the death of the "depositor-trustee." With a revocable *inter vivos* trust, the beneficiary's interest may be defeated by the exercise of a power of revocation, but unless the trust is revoked, the beneficiary would have a cause of action against the trustee to the extent of any breaches of fiduciary duty. The only function of a Totten trust is to pass property at death to the designated beneficiary outside the probate estate. If the Totten trust has reality, surely the revocable trust has reality and the surviving spouse has no protection under the illusory transfer doctrine. Perhaps the Court of Appeals applied a different meaning to illusory, on the facts before it, solely for the purpose of sustaining Totten trusts. The court may have felt that to hold otherwise would jeopardize a great number of such trusts that had been established to benefit young children by individuals who relied on prior decisions of the court upholding such accounts.¹³¹ *Halpern* could be interpreted as implicitly overruling the illusory test as set forth in *Newman v. Dore*,¹³² in which case the surviving spouse's protection against lifetime transfers may be limited to showings that the purported transfer was ineffective to divest the property owner of his property; that is, the transfer created a mere agency.¹³³

In dictum, the *Halpern* court also rejected the idea that an illusory transfer may be partially invalidated. In the court's view, a transfer is either totally valid or totally invalid.¹³⁴ In a recent Illinois case, *Montgomery v. Michaels*,¹³⁵ Totten trusts were recognized for what, under any reasonable test, they are—illusory. The court correctly reasoned that if the purpose of the forced share statute is to provide economic support for a spouse out of probate assets, the nature of the deceased depositor's beneficial and control interest should not remove the account assets from the spouse's reach at the depositor's death. The Illinois court, which failed to cite the *Halpern* case, permitted a partial defeasance of the trust to the extent of the spouse's share. As Scott notes in his criticism of *Halpern*: "[S]urely it is possible to hold that by the creation of such a trust the settlor may avoid the formalities involved in making a will, but may not accomplish a result which he could not accomplish by a will, namely to cut out the surviving spouse."¹³⁶

While the preceding discussion has been limited to *inter vivos* transfers in trust, the trust device is not the only device capable of undermining the spouse's distributive share. If decedent held a joint bank account at the time of his or her death with a person other than the surviving spouse, the survivor will take the account to the exclusion of the spouse. Thus, a joint bank account held by decedent and another can adversely affect the spouse's

ground that the deceased depositor-trustee "had never intended that his Totten trust, made in favor of his daughter who lived in a foreign country and from whom he had not heard in years, should have any real effect, or that the money should ever go to the faraway daughter." *In re Halpern*, 303 N.Y. at 38, 100 N.E.2d at 122 (1951).

131. See Note, *Disinheritance of a Surviving Spouse—Illusory Transfers*, 3 SYRACUSE L. REV. 129, 135 (1951).

132. See note 88 *supra*.

133. See A. SCOTT, LAW OF TRUSTS § 57.2 (1960).

134. *In re Halpern*, 303 N.Y. at 40, 100 N.E.2d at 123.

135. 54 Ill. 2d 532, 301 N.E.2d 465 (1973).

136. A. SCOTT, LAW OF TRUSTS § 58.5 at 149 (1960).

distributive share. The joint bank account generally has been immune from attack by the spouse.¹³⁷ However, a recent Iowa case may suggest a reversal of this position. In *Gunsaulis v. Tingler*,¹³⁸ decedent's surviving spouse attacked the validity of a joint bank account held by the decedent and his niece. While the court upheld the niece's claim to the account, the court nonetheless considered whether under either a sham or fraudulent intent theory the account could be set aside. Without rationalizing its conclusions, the court stated that the account was real and not a sham,¹³⁹ and that no fraudulent intent was involved in its establishment.¹⁴⁰ Interestingly, however, the court did not say that fraudulent intent could never be a ground to avoid the account. Rather, the court stated that under the facts and circumstances of the case, there was no fraud. More particularly, the court noted that both decedent and his spouse had been previously married, that each had their own next of kin, that each had separately acquired his or her wealth, and finally, that each had established arrangements to transfer assets at death to blood relatives of his or her choice. One can only surmise whether under a different set of circumstances the court might have ruled otherwise.¹⁴¹

A joint tenancy in real property may also defeat the spouse's distributive share if utilized for this purpose. There is little authority upholding the right of the surviving spouse to set aside joint tenancy real property held by the decedent and another.¹⁴² In *Mottershead v. Lamson*,¹⁴³ a New York trial court permitted the spouse to challenge a joint tenancy in real property on illusory grounds, "since, by the joint tenancy created, the decedent had an undivided half interest in the premises which could be alienated."¹⁴⁴

A common characteristic of *inter vivos* transfers successfully challenged by the spouse is a retained beneficial interest in the decedent. Ordinarily, if the deceased transferor transferred assets to an irrevocable trust retaining no interest therein, the trust is immune from a spouse's challenge,¹⁴⁵ although there are some cases to the contrary.¹⁴⁶ In theory, there is no reason why an irrevocable trust could not be successfully attacked under the intent theory, or under the illusory transfer test, if the transferor retained substantial control powers other than a power of revocation.¹⁴⁷

137. See MACDONALD, *supra* note 76, at 214-20.

138. 218 N.W.2d 575 (Iowa 1974).

139. *Id.* at 597.

140. *Id.*

141. *Id.*

142. See MACDONALD, *supra* note 76, at 212-14.

143. 101 N.Y.S.2d 174 (Sup. Ct. 1950).

144. *Id.* at 176.

145. See, e.g., *Richard v. James*, 133 Colo. 180, 185, 292 P.2d 977, 979 (1956); *Williams v. Collier*, 120 Fla. 248, 257-58, 158 So. 815, 818 (1935); *Dennis v. Dennis*, 132 Ill. App. 2d 952, 959, 271 N.E.2d 55, 60 (1971); cf. *Norris v. Barbour*, 188 Va. 723, 727, 51 S.E.2d 334, 341 (1949) (wife's share could not be defeated where decedent transferred a mere promise to pay the trustee after death).

146. See, e.g., *Bodner v. Feit*, 247 App. Div. 119, 286 N.Y.S. 814 (1936); *Sherrill v. Mallicote*, 417 S.W.2d 798 (Tenn. App. 1967). See also MACDONALD, *supra* note 76, at 203 n.9.

147. Cf. I.R.C. § 2036(a)(2) (irrevocable trust included in the settlor's gross estate if the settlor retained the right to determine who would enjoy the income from the transferred property).

If decedent makes an outright gift of his or her property, the gift will ordinarily be immune from a spouse's attack, particularly if the jurisdiction follows the illusory (control) rationale. In jurisdictions following an intent or reality test, it would appear that a successful challenge might be possible and the gift avoided on the grounds that the transfer was not intended as a gift or failed for want of delivery.¹⁴⁸ Of course, it is unlikely that a person would utilize substantial outright gifts as an avoidance device if the gift would also have the adverse effect of diminishing his or her future economic stability.

A gift *causa mortis* is by its own nature revocable.¹⁴⁹ The gift is confirmed by the donor's death and is intended to pass property at death. The cases are fairly evenly divided whether the gift *causa mortis* is subject to the spouse's attack,¹⁵⁰ although the better view would subject them to successful attack considering their large potential as an avoidance device and their inherently testamentary character.

Life insurance may also be used as an avoidance device although, viewed as an estate builder and not an estate depletor, it diverts only the premium payments, which might otherwise be found in the probate estate. Insurance usually has been immune from the spouse's attack,¹⁵¹ although MacDonald has criticized this view because insurance is primarily for the protection of a family and forms a substantial part of many decedents' "estates."¹⁵²

In summary, these cases present a picture of various judicial techniques for including in, or excluding from, a spouse's forced share certain *inter vivos* transfers, depending on the competing equities and the type of transfer involved. The decisions rely on essentially an *ad hoc* balancing, based upon the facts and circumstances of each particular case. While no doubt the courts achieve rough equity when the cases are considered in their entirety, the great weakness of the *ad hoc* approach is the total lack of predictability that is essential to the development of a well-designed and cohesive estate plan. As will be seen in Part V, it is the certainty of the augmented estate concept that may be its greatest strength.

IV. LEGISLATIVE SAFEGUARDS

In addition to the judicial devices that have been employed to invalidate disinheriting transfers, a number of legislative measures have been adopted to assure the integrity of forced share legislation. Except for the New York statute and the provisions of the Uniform Probate Code discussed below, none of these statutes has attempted a comprehensive approach that precisely defines tainted transfers and also attempts to take into account the competing equities of the interested parties. This is not to suggest that

148. See MACDONALD, *supra* note 76, at 186-99.

149. R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 7.19 (3d ed. 1975).

150. See MACDONALD, *supra* note 76, at 194-99.

151. See MACDONALD, *supra* note 76, at 237-38, citing *Mitchell v. Mitchell*, 265 App. Div. 27, 32, 37 N.Y.S.2d 612, 617 (1942), *aff'd per curiam*, 290 N.Y. 779, 50 N.E.2d 106 (1943); *Bullen v. Safe Deposit & Trust Co.*, 177 Md. 271, 277, 9 A.2d 581, 584 (1939). *Contra*, *Weisman v. Metropolitan Life Ins. Co.*, 7 N.Y.S.2d 565, 566 (Sup. Ct. 1938), *aff'd mem.*, 256 App. Div. 914, 10 N.Y.S.2d 414 (1939).

152. MACDONALD, *supra* note 76, at 240-41.

statutory solutions which fail on one or both of these counts are failures. In fact, it may be that the problem itself defies a comprehensive statutory remedy that is capable of taking into account the competing interests instead of erecting an inviolate share.

In Pennsylvania, the surviving spouse has a statutory right of election to take either one-third or one-half (depending on whether the transferor is survived by issue) of assets conveyed by the deceased transferor during his or her life if the transferor retained over the principal either a testamentary power of appointment, a power of revocation, or a power of consumption.¹⁵³ The right of election does not apply to life insurance policies purchased by the deceased transferor whether payable outright or in trust.¹⁵⁴ Furthermore, the statute operates solely for the benefit of an electing surviving spouse and preserves the transferred property for the donees except to the extent of the spouse's one-third or one-half share. Under the Pennsylvania statute the electing spouse's rights are subject to the rights of any income beneficiary whose income interest vested in enjoyment prior to the transferor's death.¹⁵⁵ Thus, if *O* transferred property to *T* in trust to pay the income to *A* for life, remainder to *B*, and retained a power of revocation, at *O*'s death *O*'s spouse would have a statutory right to elect a one-third or one-half share from the transferred property. However, if between the date of the transfer and *O*'s death \$25,000 of income had been paid to *A*, that income would be beyond the reach of the spouse's election.

Under a Missouri statute, any gift made by a person who dies testate or intestate "in fraud of the marital rights of his surviving spouse to share in his estate," at the spouse's election will be treated as a testamentary disposition

153. 20 PA. CONS. STAT. ANN. § 6111 (Purdon 1975). The Pennsylvania statute subjects frozen trusts to the spouse's election by virtue of the settlor's retained power of revocation, see *Infollas Estate*, 380 Pa. 391, 396, 110 A.2d 380, 382 (1955) (dictum), and joint tenancy bank accounts to the extent of the settlor's retained power of consumption. See *Hetrick Estate*, 17 Pa. Fiduc. 317, 321 (1967) (one-half of joint bank account held by decedent and daughter subject to spouse's election since decedent had right to consume one-half). See also *Longacre v. Hornblower & Weeks*, 83 Pa. D. & C. 259, 264 (1952); *Hershey Estate* (No. 2) 11 Pa. Fiduc. 122, 125-26 (1960). The statute applies to retained special and general testamentary powers, *Behan Estate*, 399 Pa. 314, 320, 160 A.2d 209, 213 (1960), and should apply to a retained general power exercisable by deed, which is effectively a power of revocation. The statute also applies to annuity contracts that have been held not to fall within the insurance exemption, *Fitzgerald's Estate*, 17 Pa. Fiduc. 324, 336 (1967).

In *Schwartz's Estate*, 449 Pa. 112, 295 A.2d 600 (1972), the court considered whether under the statute the spouse could reach bonds purchased by the decedent as custodian for his minor son under the Uniform Gift to Minors Act. In holding against the spouse, the court noted that the spouse had failed to prove that the account has "relieved, actually or potentially, the donor-decedent of his support obligation." *Id.* at 117, 295 A.2d at 604; *cf.*, *Estate of Jack F. Chrysler*, 44 T.C. 55, 69-70 (1965), *rev'd on other grounds*, 361 F.2d 508 (2d Cir. 1966).

If the transferor merely retains an income interest in the transferred property or authorizes an independent trustee to invade principal for the settlor's benefit, it appears that under the Pennsylvania statute the transferred property is beyond the spouse's reach because the transferor retained no tainted powers.

154. *Id.* See also *Henderson Estate*, 395 Pa. 215, 229, 149 A.2d 892, 899 (1959).

155. The provision favoring income beneficiaries was inserted for two reasons: (1) it might be harsh to withdraw income from persons who have been receiving it; (2) it seemed proper to permit the surviving spouse to share in property of which the decedent had the beneficial enjoyment at his death, but not to permit a sharing in property over which the decedent retained control but which he did not enjoy beneficially. See 20 PA. CONS. STAT. ANN. § 6111 (Purdon 1975).

and the spouse may reserve from the donee or any person taking from the donee without adequate consideration that portion of the transferred property equal to the spouse's statutory elective share.¹⁵⁶ The statute creates a rebuttable presumption of fraud with respect to any conveyance of property made at any time by a married person without the spouse's consent.¹⁵⁷ The Missouri statute is similar to section 33 of the Model Probate Code, which provides:

§ 33. Gifts in fraud of marital rights. (a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.¹⁵⁸

Although the Missouri statute and the Model Probate Code are vague, this is intentional, as is evident from the comments to the Model Probate Code.¹⁵⁹ Both prefer substantial judicial oversight in order to define "fraud of the marital rights" in lieu of the greater certainty provided by the Pennsylvania statute. They would also permit the spouse to negate lifetime transfers beyond the reach of the Pennsylvania statute. For example, outright lifetime transfers are beyond the spouse's reach under the Pennsylvania statute,¹⁶⁰ while presumed to be a fraud on the spouse's marital rights under both the Missouri statute and the Model Probate Code. The Model Probate Code is less protective of the surviving spouse than the Missouri statute because the presumption of fraud arises only for transfers within the two-year period preceding death.¹⁶¹ Unfortunately, to the extent both the Missouri statute and Model Probate Code delegate to the courts the responsibility for defining the contours of fraudulent transfers, the statutory provisions are subject to conflicting interpretations and abundant inconsistencies. In addition, to the extent the spouse can reach property in the hands of donees and their transferees for less than adequate consideration, the statutes impede the marketability of property in ways characteristic of common-law dower.¹⁶²

Both Tennessee¹⁶³ and Vermont¹⁶⁴ have statutes that predate but are

156. MO. REV. STAT. § 474.150(1) (1969).

157. *Id.* § 474.150(2).

158. MODEL PROBATE CODE § 33 (1946); *cf.* MO. REV. STAT. § 474.150 (1969).

159. MODEL PROBATE CODE § 33, Comment (1946).

160. 20 PA. CONS. STAT. ANN. § 6111(a) (Purdon 1975).

161. Compare MO. REV. STAT. § 474.150(2) (1969) with MODEL PROBATE CODE § 33(b) (1946).

162. See Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321, 330 (1947).

163. TENN. CODE ANN. § 31-612 (Supp. 1976). The statute provides: "any conveyance made fraudulently to children or others, with an intent to defeat the surviving spouse of a distributive share, shall be voidable at the election of the surviving spouse."

164. VT. STAT. ANN. tit. 14 § 473 (1974). The statute provides:

A voluntary conveyance by a husband of any of his real estate made during

similar to the Model Probate Code. Tennessee, however, treats certain transfers as voidable whereas the Vermont statute treats them as void.¹⁶⁵ Louisiana,¹⁶⁶ California,¹⁶⁷ and New York¹⁶⁸ also have statutes addressing the problem. The New York statute, which is the most comprehensive outside of the provisions of the augmented estate, will be discussed in footnotes accompanying the discussion of the Uniform Probate Code.

A common failing among all these foregoing statutory proposals is that the premium paid to the spouse's interest is to the detriment of *inter vivos* donees. While the public policy of protecting the surviving spouse may take precedence, to the extent the statutes ignore the spouse's actual economic needs, arguably they provide unnecessary protection. Statutes that provide the spouse with a fixed percentage elective share against probate assets suffer from a failure to consider the age and health of the surviving spouse, the spouse's accustomed manner of living, the spouse's financial needs, and the number of surviving dependents. Cryptically, they lack flexibility.

Under the English Inheritance (Family Protection) Act,¹⁶⁹ the court is authorized to provide the spouse tailor-made relief. If the court determines that the surviving spouse otherwise has not been reasonably provided for, it may direct periodic payments to the spouse from the net estate. In certain cases, the court may award the spouse a lump-sum settlement from the estate. In determining the amount of maintenance payments, the court shall consider a number of competing factors including, without limitation, the spouse's independent financial resources and the interests of other persons in the property subject to maintenance payments. However, the English Act provides no protection to the spouse against *inter vivos* transfers that deplete the probate estate.

coverture and not to take effect until after his decease, and made with intent to defeat his widow in her claim to her share of his real estate, shall be void and inoperative to bar her claim to her share of such real estate.

Compare TENN. CODE ANN. § 31-612 (Supp. 1976) with VT. STAT. ANN. tit. 14 § 473 (1974).

165. The distinction noted in the text has been commented on as follows:

A further problem arises when the fraudulent transferee makes a subsequent transfer of the property involved. Only the Vermont statute states that the fraudulent transfers are *void* for purposes of the widow's share; the Tennessee statute and the Model Probate Code consider them to be merely *voidable*. Where the transfers are only voidable, the question arises as to whether the widow's rights will be cut off upon a further transfer to a bona fide purchaser. If her rights are not cut off, or if the transfer by the decedent is deemed void as to the widow's share, property would then become almost as badly encumbered as it was under the law of dower. Even if an absolute time limit is imposed within which the transfers must have been made to be vulnerable to attack, this objection would remain. To balance the interests involved, the widow's rights in the property itself could be cut off upon a transfer to a bona fide purchaser but, in substitution therefor, she could be given a claim against such purchaser's transferor. This solution, of course, does not completely protect the spouse for the transferor may be insolvent. However, it presents a satisfactory resolution of the conflict between the policies underlying the unencumbered transfer of property and the protection of the surviving spouse.

¹⁶⁷ N.Y.U.L. REV. 306, 312 (1952).

¹⁶⁶ LA. CIV. CODE ANN. art. 1493 (West 1952).

¹⁶⁷ CAL. PROB. CODE § 201.8 (Deering 1974).

¹⁶⁸ N.Y. EST. POWRS & TRUSTS LAW § 5-1.1(b) (McKinney 1967).

¹⁶⁹ 1 & 2 Geo. 6, c. 45 (1938); see Laufer, *Flexible Restraints on Testamentary Freedom, A Report on Decedent's Family Maintenance Legislation*, 69 HARV. L. REV. 277, 287 (1955). See also Inestate's Estates Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64.

MacDonald, after reviewing both the American and English systems, recommended English-type family maintenance legislation coupled with stringent anti-evasion devices.¹⁷⁰ Under MacDonald's proposal, in determining whether the spouse has been otherwise reasonably provided for, the court shall consider the spouse's present and future financial needs, any federal and state benefits payable to the spouse that are not based on the spouse's financial needs, the value of the estate, the spouse's conduct towards the decedent, and other circumstances relevant to the court.¹⁷¹ Only if the probate estate is insufficient to provide court ordered maintenance payments could the court direct maintenance payments from *inter vivos* transferees, and then only if the court first finds that the transfer was "unreasonably large under the circumstances prevailing at the time of the transfer."¹⁷² In making this determination the court, under MacDonald's proposal, shall consider the ratio of decedent's wealth transferred to the wealth retained, the aggregated amount of wealth transferred by the decedent under both prior and simultaneous transfers, decedent's moral or legal obligation to make the transfer, the amount of any consideration received for the transfer by the decedent from the transferee, and other circum-

170. MacDonald states:

The [MacDonald] proposal consists of family maintenance legislation buttressed with anti-evasion provisions. The basic aim is to associate curbs on disinheritance with financial need. Protection against testamentary transfers is given only to immediate members of the decedent's surviving "family" who have not received a reasonable provision from the decedent by way of testamentary or *inter vivos* transfers, or pursuant to the intestacy laws. The emphasis on financial need puts the evasion problem in proper focus. The petitioner who is denied maintenance is thereby precluded from complaining about the testator's *inter vivos* transfers. In other words, maintenance litigation and anti-evasion litigation can occur only when the testator has not made reasonable provision for specified dependents. Hence much of the evasion problem disappears.

For the successful petitioner, however, the anti-evasion protection is comprehensive. The act provides for judicial control over practically all *inter vivos* transfers that are made within a designated period of time before death. In this respect the act is much broader than current judicial doctrine: for example the "illusory transfer" test catches only revocable transfers. In other respects the act is narrower and more selective. It affects only those transfers that, when viewed alone or in the aggregate, are unreasonably large (section 6); it establishes cut-off dates (section 8); and it directs the court to keep in mind any injurious effect on the transferee (section 9).

Large discretionary power is placed in the courts. This discretion must be exercised on three main issues. First, the court must decide whether the petitioner is entitled to maintenance (section 3). Second, whenever the estate is insufficient to provide appropriate maintenance awards, the court may order contribution from an *inter vivos* transferee if the court determines that the transfer was unreasonably large. The "unreasonableness" of the amount of the transfer is tested by reference to circumstances prevailing at the time of the transfer (section 6). Third, if the transfer is held unreasonably large, the court must then determine the amount of contribution, if any, to be made by the transferee. In the last mentioned inquiry the courts are *directed* to balance the equities; they must consider the injurious effect on the particular transferee (section 9).

The reliance interest of transferees is reflected in cut-off provisions (section 8), in waiver provisions (section 17), and in the provision for a hearing in the decedent's lifetime to determine the reasonableness of the transfer (section 18).

MACDONALD, *supra* note 72, at 299-300.

171. *Id.* at 309-10.

172. *Id.* at 310-11.

stances the court deems relevant.¹⁷³

MacDonald presents a one edged sword for the sole purpose of providing the needling spouse with a source of reasonable support under a maintenance payment scheme. Under his proposal it is probable that if the surviving spouse had independent sources of adequate support, no payments would be directed to the spouse from the decedent's estate. MacDonald's recommended proposals fail to account for another cogent policy reason which may lay behind forced share statutes, namely, rewarding the spouse a fixed share of the estate (whether or not increased by *inter vivos* transfers) in recognition of the spouse's contribution, directly or indirectly, to the acquisition of decedent's wealth,¹⁷⁴ or in recognition of husband's and wife's close family relationship.¹⁷⁵ For example, if the deceased husband had been the sole income provider for his wife of twenty-five years and their three children, the forced share statute may reward the wife a share in his estate in recognition of her twenty-five years of housekeeping and child-rearing services, assuming the traditional pattern of noncompensation for her services. Thus, as laudable as family maintenance legislation might be in assuring that the surviving spouse will not be provided with a fixed and immutable share of an estate, it fails to account for other policy reasons behind forced share statutes. Furthermore, like the statutes permitting the spouse to challenge fraudulent *inter vivos* transfers, its vagueness makes for uncertainty in estate planning and client counseling.

V. THE AUGMENTED ESTATE

The end product of the Commissioners on Uniform State Laws is essentially a rejection of the family maintenance formula patterned after the English Act and the MacDonald recommendation, and an acceptance of the traditional fixed percentage share measured against a precisely defined fund. Their approach rejects consideration of most competing equities (with the notable but limited exception of certain spousal property) and minimizes independent court judgments, which are frequently required under statutes protecting the spouse against fraudulent transfers.

The underlying premise behind the augmented estate concept of the Uniform Probate Code (UPC) is that a surviving spouse should be protected in some form from disinheritance. Considering that all states, through either forced share statutes, homestead laws, common-law dower, dower-like statutes, exempt property laws, support allowances, or community property, protect a surviving spouse from disinheritance in some measure, this premise fully accords with current public policy.¹⁷⁶ The Commissioners,

^{173.} *Id.* at 312.

^{174.} See Rheinstein, Book Review, 59 MICH. L. REV. 806, 810-11 (1961). In the preamble to an early North Carolina forced share statute it was provided:

[A]nd whereas the Dower allotted by laws in lands for widows in the present unimproved State of this Country, is a very inadequate provision for the support of such widows, and it is highly just and reasonable that those who by their Prudence, Economy and Industry, have contributed to raise up an estate to their husbands, should be entitled to share in it . . .

N.C. Laws (Fredell 1791), 490, Acts of 1784, c. 10.

^{175.} L. SIMES, PUBLIC POLICY AND THE DEAD HAND 22-23 (1955).

^{176.} As Professor Eifland has stated:

having acknowledged that incidences of disinheritances were few¹⁷⁷ but concluding that some protection should be extended to the spouse, were then confronted with the task of delineating the confines of that protection. The result reflects their decision that the spouse's elective share should extend not only to probate assets but also to a limited number of *inter vivos* transfers—in particular, those commonly used as testamentary substitutes but which are also effective disinheriting devices. In drafting the applicable statutes, the commissioners elected specificity in lieu of broad language permitting judicial discretion—the latter being the hallmark of the Missouri-type statute and the illusory transfer doctrine.

Under section 2-201(a) of the UPC, the surviving spouse of a deceased domiciliary has the right to elect to take one-third¹⁷⁸ of the augmented estate. The augmented estate is defined generally as decedent's net probate estate increased by decedent's gratuitous transfers to donees, other than the surviving spouse, and by the value of the spouse's property owned at the decedent's death and the value of property transferred by the spouse to donees, other than the decedent, to the extent such owned or transferred property was derived from the decedent.¹⁷⁹ While the one-third fixed percentage is obviously arbitrary, it accords with the historic development and traditions of Anglo-American law respecting widow's rights.

A surviving spouse does not include any person who was divorced from the decedent or whose marriage to the decedent was annulled "unless, by virtue of a subsequent marriage, [he or she] is married to the decedent at the

One possibility . . . was to have no provision at all in the Code with regard to protection against disinheritance. Some people have urged that this is the modern solution to the problem: Leave it alone. We were hesitant to accept that solution, primarily because it abolishes the existing system, you are wiping out the existing protection; and while statistically in the few studies that have been made it is clear that there are relatively rare cases where a testator attempts to disinherit his spouse, altogether it is also possible and probable that in a great many other cases the testator has been advised against disinheritance and the presence of a provision against disinheritance—often the wise counselor, the attorney drafting the estate plan—to prevent disinheritance by counseling the testator on the basis of law.

NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE: LEGISLATIVE HISTORY 34-35 (Proceedings of Committee of the Whole in Philadelphia, Pa. July 30, 1968). Professor Effland's acknowledgement of the "in terrorem" effect of the Code's elective share provisions finds further expression in the comment following UPC § 2-202: "Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse. . . ." UPC § 2-202, Comment.

177. See UPC § 2-202, Comment.

178. Of the states which have enacted the UPC, Alaska, Colorado, Montana, Nebraska, North Dakota, and Utah have adopted the augmented estate concept. In Colorado, the spouse is entitled to elect one-half of the augmented estate. COLO. REV. STAT. § 15-11-201 (1973). Idaho has modified the augmented estate concept to reach only quasi-community property. See note 2 *supra*.

179. As initially unveiled, the Code provided that a testator could select the local law to determine the meaning and legal effect of a disposition unless application of the selected local law would be contrary to the policy of the enacting state. UPC § 2-602. It had been suggested that, under this provision, a testator could defeat the spouse's elective share by selecting the law of a non-Code state to govern the legal effect of his will. Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L.F. 413, 422. A 1975 editorial change to § 2-602 provided that a testator may not nullify the elective share provisions of the Code by selection of a contrary local law.

time of death."¹⁸⁰ In anticipation of difficulties that might be encountered by a claim of an invalid divorce, the Code provides that the phrase "surviving spouse" excludes:

- 1) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife;
- 2) a person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person; or
- 3) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.¹⁸¹

Ordinarily, a decree of separation will not adversely affect the right of either spouse to claim an elective share in the estate of the other.¹⁸² If, however, a property settlement agreement accompanying the separation proceeding incorporates a waiver by each spouse of all rights each has or may have in the estate of the other, the waiver bars the right to claim an elective share.¹⁸³

Section 2-201(b) provides that the right of election of a surviving spouse of a deceased nondomiciliary shall be governed "by the law of the decedent's domicile at death." Thus, if decedent dies a domiciliary of State A, a non-Code state, leaving property in State B, a Code state, whether or not the decedent's surviving spouse would have an elective share in property having situs in State B would depend entirely on the law of State A. The precise confines of this provision are unclear. The provision could substantially affect currently accepted notions of the extra-territorial effect of state laws. Under common-law principles, the law of the situs controls the devolution of real property.¹⁸⁴ Section 2-201(b) appears to delegate this role to a foreign state. If section 2-201(b) was merely limited to assertions of a right of election under foreign state law that provides an identical right of election to the right of election provided under the UPC, the delegation would not be too alarming. In such a case, the spouse of a deceased nondomiciliary could claim the same rights in situs real property extended to the spouse of a deceased domiciliary. If so construed, the statute would accomplish the mandatory purpose of forcing a unified election, and would not permit the surviving spouse to file an election at the situs without also filing at the domicile.¹⁸⁵

The section, however, does not expressly so limit its operation; it probably refers to any right of election provided by the law of the domicile

¹⁸⁰ UPC § 2-802(a).

¹⁸¹ *Id.* § 2-802(b).

¹⁸² *Id.* § 2-802(a).

¹⁸³ *Id.* § 2-204.

¹⁸⁴ *In re Estate of Barrie*, 240 Iowa 431, 436, 35 N.W.2d 658, 661 (1949); *Meyer v. Scoles*, 173 Kan. 124, 131, 244 P.2d 1169, 1174 (1952); see Balter, *Conflicts of Law and Property*, 10 MCGILL L.J. 1, 34-35 (1964) (discusses the rule approvingly). But see R. WEINSTEIN, COMMENTARY ON THE CONFLICT OF LAWS 296-338 (1971) (critical review of the situs rule).

¹⁸⁵ If the surviving spouse claims under the will in the domiciliary state, he or she may claim a share against the will in the situs state. *Brooks v. Carson*, 166 Kan. 194, 197, 200, 212-280, 283 (1948). See also *Scoles, Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L.J. 293, 296-97 (1955).

whether or not the domiciliary state has enacted the UPC. If so construed, a number of unresolved questions remain. For example, is it only the right to elect as distinguished from the amount of the election share that the law of the domicile controls? Thus, if State X, the domiciliary state and a non-Code state, grants a right of election in an amount equal to one-half if no issue survives, but the law of State Y, the situs state and a Code state, limits the election of spouses of deceased domiciliaries to one-third whether or not issue survives, does the surviving spouse have a right to elect one-half or one-third of State Y real property? Because the domiciliary state has the most significant interest in determining the amount of protection to be afforded the surviving spouse, its laws should control both the right and the amount of the election, and section 2-201(b) should be construed to mean that both the right and the amount of the elective share in property in a Code state is governed by the law of the domicile.

Permitting the law of the domicile to control both the right and the amount of the election at the situs can have serious adverse effects on both the law of conveyancing at the situs and on the public policies of the situs state. For example, suppose State X, the domiciliary state but a non-Code state, grants a right of election against the will that extends to real property owned at any time during the marriage even though not owned at death.¹⁸⁶ State Y, the situs state and a Code state, has abolished dower and its statutory equivalents. If the law of State X controls the right and amount of election, it affects the marketability of realty in State Y. Arguably purchasers in State Y would be required to know the laws of State X in order to take marketable title. Title searches and the policy of the unrestricted right to alienate property would be adversely affected. This particular criticism would be ameliorated if section 2-201(b) were construed to limit the reach of the domiciliary state's law to real property in the decedent's probate estate. While this construction might limit the adverse effect of the statute on *inter vivos* conveyances, it is a construction not readily gleaned from the words employed in the statute.¹⁸⁷ Similarly, if the laws of the domicile permitted the surviving spouse to reach *inter vivos* transfers not otherwise brought into the augmented estate under section 2-202, the policy of protecting donees in the situs state could be undermined. Finally, how does one determine if the domiciliary state grants an "elective share"? Is that phrase a phrase of art:

186. E.g., IOWA CODE § 633.238(1) (1975).

187. Professor Scoles argues, "While the purchasing public should be protected by their reliance upon the law of the situs, no need exists, in litigation actually occurring during administration of the estate, for looking only to the law of the situs . . ." Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L.J. 293, 297 (1955). He concludes,

In all of the conflict of laws problems concerning elections in decedents' estates . . . there appears to be a need for a single standard against which to measure benefits and elections. It should be recognized that local law provisions for protection of persons interested in estates are drawn with an eye to a single system of law. The policies underlying the protective provisions should not be destroyed or unduly enlarged because the property may be found in different places . . . While regularity of title to real property is important so far as third parties are concerned, there seems little reason why the courts of the situs should not defer to the domicile in litigation within the estate . . .

Id. at 310.

More likely, section 2-201(b) will be construed as if the statute had provided elective share or similar statutory right."

Section 2-202, the heart of the augmented estate concept, defines the augmented estate against which the right of election is to be measured. In drafting the provision, the Commissioners recognized that the probate process is no longer the exclusive domain of wealth transmission and that substantial property interests may pass to others on decedent's death wholly outside of the probate estate. Accordingly, the fund against which the elective share is measured is defined to include not only assets of the probate estate but also certain lifetime transfers determined to be common testamentary substitutes, which if excluded from the augmented estate could be employed to defeat the spouse's legitimate claims. Conversely, the Commissioners sought to minimize the adverse impact of an election on decedent's estate plan and to eliminate perceived inequities resulting from the spouse possibly receiving "too much" property—in particular, property acquired from the decedent. Accordingly, the augmented estate is defined to include three distinct elements, namely, probate property, gratuitous lifetime transfers to persons other than the surviving spouse, and property of the spouse derived from the decedent. Graphically, the augmented estate is computed as follows:

COMPUTING THE AUGMENTED ESTATE

GROSS PROBATE ESTATE

LESS:

1. Funeral and Administration Expenses
2. Homestead Allowance¹⁸⁸
3. Family Allowance¹⁸⁹
4. Exempt Property¹⁹⁰
5. Enforceable Claims¹⁹¹

continued

188. The surviving spouse of a deceased domiciliary is entitled to a \$5000 homestead allowance which is exempt from, and has priority over, claims which are filed against the estate. The allowance payable to the spouse is in addition to any share passing to the spouse by will, intestacy or elective share. UPC § 2-401. The homestead allowance under the Code should not be confused with the homestead currently provided by the laws of many states in decedent's residence and a designated amount of land. For a digest of various homestead statutes see 2 WILLS, EST. & TR. (P.H.) ¶ 2734 (1976).

189. The surviving spouse is entitled to a reasonable maintenance allowance during the period of estate administration. The allowance may not extend beyond one year if the estate is inadequate to pay the allowed claims. The allowance may be paid periodically or in a lump sum. It has priority over all claims other than the homestead allowance. The family allowance is in addition to the homestead allowance and exempt property and is not chargeable to any share passing to the spouse by will, intestacy or election. The spouse's death during the administration of the estate terminates his or her rights to any unpaid allowance. UPC § 2-403.

190. In addition to the \$5000 homestead allowance, the surviving spouse of a deceased domiciliary is entitled "from the estate to value not exceeding \$3500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects." *Id.* § 2-402.

191. The meaning of the phrase "enforceable claims" is unclear and is undefined by the Code. If the phrase is limited to claims as defined in § 1-201(4) of the UPC, it excludes estate and inheritance taxes. If the phrase is intended to be defined as in § 1-201(4), it is redundant to separately subtract funeral and administration expenses from the estate in computing the net estate since these expenses are by definition included in claims under § 1-201(4). It is probable that the phrase refers to claims as defined in § 1-201(4) which are not barred by operation of the non-claims statute, § 3-803 of the UPC, and have otherwise been allowed by the personal representative or the court.

EQUALS: NET PROBATE ESTATE

PLUS TRANSFERS TO DONEES OTHER THAN SPOUSE:

1. Transfers with a retained life estate¹⁹⁴
2. Revocable transfers¹⁹³
3. Joint tenancies with right of survivorship¹⁹²
4. Transfers to a donee in excess of \$3,000 in each of the two years preceding decedent's death¹⁹⁵

PLUS SPOUSE'S PROPERTY:

1. Spouse's property owned at decedent's death to the extent derived from the decedent other than by testate or intestate succession¹⁹⁶
2. Property transferred by the spouse during the marriage to donees, other than the decedent, to the extent such property is derived from the decedent and would have been in the spouse's augmented estate if he or she had predeceased the decedent.¹⁹⁷

EQUALS: AUGMENTED ESTATE

A. *Probate Estate*

The starting point in computing the augmented estate is the "estate." Section 1-201(11) defines the word "estate" to include decedent's property "as originally constituted and as it exists from time to time during administration." Property is defined by section 1-201(33) to include both "real and personal property or any interest therein and means anything that may be the subject of ownership." It is probably intended that all of decedent's property, wherever situated, be taken into account in computing this first element in the augmented estate.¹⁹⁸ Certainly the underlying policy favoring a unified administration of a decedent's estate dictates that the domiciliary state fix the share of the surviving spouse by reference to all of decedent's property wherever located. This construction accords with the underlying policies expressed by section 2-201(b), which looks to the law of the domicile to fix the elective right. On the other hand, given the current state of the law with respect to the extra-territorial effect of probate court decrees, unless all

Section 3-803 operates on claims that arose prior to decedent's death or arose at or after decedent's death. Claims that arose prior to decedent's death if not earlier barred by other statutes of limitation are barred if not presented within four months of the date of the publication of the notice to creditors under § 3-801 or within three years of decedent's death in the absence of such notice. UPC § 3-803(a). Claims arising under a contract with the personal representative that arose at or after decedent's death are barred if not presented within four months after the personal representative's performance. *Id.* § 3-803(b). Other claims arising at or after the decedent's death are barred if not presented within four months after the claim arises. *Id.* § 3-803(b).

192. *Id.* § 2-202(1)(i).

193. *Id.* § 2-202(1)(ii).

194. *Id.* § 2-202(1)(iii).

195. *Id.* § 2-202(1)(iv).

196. *Id.* § 2-202(2).

197. *Id.*

198. If so intended, this also represents a departure from prior norms. Where the local law refers to decedent's "estate," the estate is limited to real and tangible personal property within the domiciliary state and tangible personal property wherever located. Out-of-state real property is excluded from the domiciliary probate estate. In *Bankers Trust Co. v. Greims*, 116 Conn. 36, 147 A. 290 (1929), the Connecticut Supreme Court, construing its local election statute, held that out-of-state real property was excluded from the measurement of the spouse's forced share on the theory that the law of the situs of real property controlled its distribution. *Id.* at 46, 147 A. at 293; accord, *In re Bassford's Will*, 127 N.Y.S.2d 653 (Sur. Ct. 1953). As construed in this Article the Uniform Probate Code rejects this position.

rules enacted provisions similar to section 2-201(b), it may be difficult if not impossible for the domiciliary state to reach situs state assets.¹⁹⁹

If "estate" encompasses all of decedent's property wherever situated and the Code has no extra-territorial reach, the spouse's claim to contribution from situs assets passing to persons outside of the domiciliary's court jurisdiction goes unsatisfied; the spouse cannot shift the contribution liability to others.²⁰⁰ In other words, the spouse has no greater claim to contribution from persons subject to the jurisdiction of the courts of the domiciliary state than the spouse would have had if the situs assets were excluded from the augmented estate. The spouse could reach the elective share in the situs assets only to the extent the courts at the situs have jurisdiction to enforce the elective right. Thus, if the augmented estate consists of property in State A, the domiciliary state and a Code state, passing to Y and valued at \$300,000, and property in State Z, a non-Code state, passing to P and also valued at \$300,000 and P is not subject to the jurisdiction of the courts of State A, the elective share of \$200,000 will only be satisfied to the extent of \$100,000 payable by Y. This contribution equals what the elective share would have been if State Z property had been excluded from the augmented estate.

If situs assets included in the augmented estate pass to persons over whom the courts of the domiciliary state have jurisdiction, and if "estate" as used in section 2-202 is construed by the domiciliary courts to include situs assets, the recipients shall take account of the value of the situs assets in computing the amount of their contribution. Under section 2-207(b) of the UPC, the amount of contribution due to the spouse, if any, from each recipient of property included in the augmented estate is paid from proper-

199. In *Welch v. Trustees of the Robert A. Welch Foundation*, 465 S.W.2d 195 (Tex. Civ. App. 1971), decedent, a South Carolina domiciliary, died testate. Her will was duly admitted to probate in South Carolina. Under her will, decedent bequeathed the residue of her estate, including Texas real property, to the trustees named in her predeceased brother's will to hold as part of the charitable trust thereunder. *Id.* at 197. In a South Carolina will construction proceeding to which the Texas trustees were parties the court held that the will did not adequately incorporate by reference the charitable trust created under the brother's will and the residue passed by intestacy. *South Carolina Nat'l Bank v. Copeland*, 248 S.C. 203, 149 S.E.2d 615 (1966). The trustees, who lost in South Carolina, then initiated an action in Texas to determine whether title to the Texas real property passed to them under decedent's will. The trial court ruled in the trustees' favor finding that under Texas law there had been a valid incorporation by reference. 465 S.W.2d at 197. Appellants attacked this judgment on the grounds of res judicata and full faith and credit arguing that the trustees who were parties to the South Carolina proceeding were bound by the South Carolina decree. *Id.* In affirming the trial court decree, the Texas appellate court reiterated that as respects real property the law of the situs controls its descent. *Id.* at 198-99. Furthermore, the fact that the trustees had commenced the South Carolina proceeding and lost was irrelevant since the Texas courts had exclusive subject matter jurisdiction to adjudicate disputed rights in Texas real property and the South Carolina judgment was not entitled to full faith and credit in Texas. *Id.* The situation is no better than if the parties domiciled at the situs were not parties to the proceedings in the domiciliary jurisdiction adjudicating rights to situs property. The court in *Welch* relied on *Clarke v. Clarke*, 178 U.S. 186 (1900), wherein the Supreme Court noted that if a judgment affecting situs real property was first entered in the domiciliary jurisdiction and such judgment was binding at the situs, the right of the situs state to regulate the transmission of real estate within its borders would be operative "only so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate," *id.* at 191, a proposition which the court expressly rejected. 465 S.W.2d at 198-99; *cf. Durfee v. Duke*, 375 U.S. 106, 116 (1963) (if situs of property is disputed and fully litigated by all of the interested parties the judgment is binding and the situs issue may not be relitigated in another jurisdiction).

200. See UPC § 2-207(b).

ty in the augmented estate but is computed by reference to the value of all property in the augmented estate received by the recipient. Payment need not necessarily be made from the situs property itself. Thus, if the augmented estate consists of property in State *D*, the domiciliary state and a Code state, passing to *H* and valued at \$200,000, and property in State *L*, a non-Code state, valued at \$400,000 and also passing to *H*, the augmented estate equals \$600,000 and the elective share equals \$200,000. The courts of State *D* could direct *H*, who is subject to their in personam jurisdiction, to satisfy the elective share in full by transferring State *D* property to the spouse in satisfaction of the elective share. As an alternative, the court might order *H* to transfer both State *D* and State *L* property to the spouse. However, to the extent a court in State *D* orders *H* to satisfy the elective share with State *L* property, the enforceability of that order in State *L* is open to conjecture because State *D* courts may lack subject matter jurisdiction to render an enforceable order with respect to State *L* real property.

If the State *D* court rendered a money judgment against *H* in the spouse's favor in the amount of \$200,000, then the spouse might enforce the money judgment in State *L* and that state's court might enforce the order without going behind the face of the order to determine its validity. It can be argued, however, that an order of this type is improper under section 2-205(d) of the UPC, which requires the court to order payment of the elective share "from the assets of the augmented net [sic] estate." Furthermore, it is implicit in section 2-207(c) of the UPC, which authorizes a recipient to satisfy any contribution liability with the property in the augmented estate passing to the recipient, that the recipient is not liable for contribution out of assets in his or her personal estate excluded from the augmented estate.

In light of the preceding discussion, it appears that an individual who is intent on disinheriting his or her spouse in some cases may do so by removing his property from a Code jurisdiction to a non-Code jurisdiction with the effect of placing the property out of the spouse's reach. Under current prevailing theories relating to the extra-territorial effect of probate decrees, the only practical safeguard for the spouse would be nationwide enactment of the Code. Even then, the spouse would not be protected against transfers of property to a foreign country.

B. Donee Transfers in General

Section 2-202(1) specifies four nontestamentary transfers to donees (other than the decedent's spouse) that are added to the net probate estate in computing the augmented estate. In the case of transfers with a retained life estate, revocable transfers, and joint tenancies, the provisions reflect a determination that the spouse's rights should not be adversely affected by transfers in which the decedent retains substantial economic enjoyment for life.

Each captured nontestamentary transfer must have been made "during marriage." As the comments to this section note, "[T]his makes it possible for a person to provide for children by a prior marriage . . . without concern

that such provisions will be upset by later marriage."²⁰¹ However, this is only true if the phrase, "during marriage," as used in the statute, is construed to mean "during marriage to the person who is the decedent's surviving spouse."²⁰² Otherwise, the surviving spouse of a second marriage might be able to reach transfers described in section 2-202(1) during decedent's first marriage.

Section 2-202(1) is intended to include only gratuitous transfers to donees (other than the surviving spouse) in the augmented estate. If decedent received adequate and full consideration in money or money's worth for a transfer described in subdivisions (i) through (iv) of section 2-202(1), the transfer is excluded from the augmented estate. If the decedent received consideration in money or money's worth which was less than adequate and full, it is unclear whether the value of the entire transfer or only the excess between its value and the consideration received is brought into the augmented estate. The operative statutory language is "[t]he value of property . . . to the extent that the decedent did not receive adequate and full consideration in money or money's worth."²⁰³ If decedent received some consideration in money or money's worth but less than adequate and full consideration in money or money's worth, the better construction (and the one that is in accord with the policy of the UPC) would limit the inclusion in the augmented estate to the excess since only *to that extent* has the probate estate been depleted to the detriment of the surviving spouse.²⁰⁴ For example, if *O* establishes a \$200,000 revocable trust in consideration for the receipt of the \$200,000, *O*'s personal estate is not depleted and the revocable transfer is not captured into the augmented estate. Since the \$200,000 received finds its way into *O*'s probate estate, it is brought into the augmented estate and subject to the elective share. On the other hand, if *O* received only \$100,000 for the transfer, which finds its way into *O*'s probate estate, the spouse receives full protection only if \$100,000 of the revocable trust is captured into the augmented estate under section 2-202(1) (ii). The problem, however, is somewhat compounded by the valuation rules.

Section 2-202(1) provides that "property is valued as of decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued at the date the donee came into possession or enjoyment if that occurs first." No provision is made for the valuation of the consideration received if it was less than adequate and full consideration in money or money's worth, and the transfer is partially captured into the augmented estate. For example, if decedent, during marriage, establishes a

201. *Id.* § 2-202, Comment.

202. *Id.* § 2-202(1). Both Colorado and Nebraska in enacting the Code amended UPC § 2-202(1) to reach transfers during decedent's marriage to the surviving spouse. COLO. REV. STAT. § 15-11-202 (1973); NEB. REV. STAT. § 30-2314 (1975).

203. UPC § 2-202(1) (emphasis added).

204. The fact that the consideration received in money or money's worth is less than adequate and full should not be conclusive that the excess in value is included in the augmented estate if the transfer is one of those described in § 2-202(1). Since the Code is intended to reach gratuitous transfer, the language employed should not be used to trap transfers which were made in the ordinary course of business free of donative intent at either a bargain price or as a result of a "bad deal." *Cf.* Treas. Reg. § 25.2512-8 (1958). Courts are appropriately equipped to oversee transfers for some consideration intended to mask their gratuitous nature.

\$200,000 revocable trust consisting of securities and receives \$100,000 of securities in consideration for the transfer, and at decedent's death both the trust corpus and consideration received have doubled in value, is the trust included in the augmented estate valued at \$300,000, (the value of the trust at decedent's death, \$400,000, less \$100,000, the consideration received) *or* is the trust included in the augmented estate valued at \$200,000 (the value of the trust at decedent's death, \$400,000, less \$200,000, the value of the consideration received as of decedent's death)?

Under the first alternative, and assuming no other facts, the augmented estate would equal \$500,000 (the sum of the consideration received included in decedent's probate estate and valued at \$200,000 at decedent's death and the \$300,000 attributable to the captured revocable trust), the elective share would equal \$166,667, the donee's contribution fraction would be three-fifths, and the donee would receive \$300,001 from the trust after \$99,999 was distributed therefrom in partial satisfaction of the elective share. Under the second alternative, the augmented estate would equal \$400,000 (the sum of the consideration received included in decedent's probate estate and valued as of decedent's death and \$200,000 attributable to the captured revocable trust), the elective share would equal \$133,333, the donee's contribution fraction would be one-half, and the donee would receive \$333,333 from the trust after \$66,667 was distributed therefrom in partial satisfaction of the elective share. Under this alternative, the spouse loses a one-third interest in the \$100,000 of appreciation that accrued on the consideration received. On the other hand, if the policy behind including certain nontestamentary transfers in the augmented estate is to place the surviving spouse in as closely an identical position as he or she would have been in if no transfer had been made, the second alternative should be preferred. This requires that both the captured property and the consideration received be valued as of decedent's death. The spouse then benefits from appreciation on the transferred property but does not benefit from the appreciation on the consideration, which would not have accrued to the estate if no transfer had been made.²⁰⁵

The adequate and full consideration in money or money's worth language raises the further question of what form the consideration may take other than cash or property. Suppose that within one year of decedent's death, decedent paid \$200,000 to X in satisfaction of a tort claims judgment X held against the decedent. The payment was made in compromise of a pending lawsuit. Economically, there has been no depletion of the estate to the spouse's detriment by payment of X's \$200,000 claim. If decedent had died just before the payment of the claim, the spouse's elective share would have been computed against the value of the probate estate less X's claim. If

205. Section 2043 of the Internal Revenue Code of 1954, which addresses a similar problem with respect to lifetime transfers to be included in the gross estate for federal estate tax purposes and which some courts might view as an appropriate source for construction, provides that the consideration received for a transfer shall be taken into account at its value at the time of receipt. Treas. Reg. § 20.2043-1(a) (1958). Under the line of reasoning followed by the Internal Revenue Code, the donee loses the benefit of the appreciation attributable to the partial consideration which was paid for the transfer. See Treas. Reg. § 20.2043-1(a) (1958). Section 2043, therefore, incorporates a policy of highly questionable fairness.

decendent pays the claim and then dies, the estate is already diminished by the amount of the claim, but the value of the augmented estate is unaffected. Thus, the release of liability is consideration in money or money's worth.

By way of further example, suppose that pursuant to a property settlement agreement decedent transferred \$200,000 to a trust for the support of decedent's first spouse and minor children in complete discharge of decedent's future support obligations. The trust was revocable by the decedent acting in conjunction with the first spouse. Is the transfer included in the augmented estate? If the trust was created prior to decedent's divorce from the first spouse, the trust would be excluded from the augmented estate if "during marriage" as used in section 2-202(1) means "during marriage to the surviving spouse." If "during marriage" as used in section 2-202(1) means "during any marriage," the trust could be included in the augmented estate because it is a transfer to donees who are not the surviving spouse, unless (1) under the terms of the property settlement agreement the consent of the first spouse to the transfer is binding on any future spouse,²⁰⁶ or (2) the transfer is deemed to be for adequate and full consideration in money or money's worth. Is the release of the support right adequate and full consideration in money or money's worth? If the support right equals \$200,000, there has been no additional economic depletion of the estate since, if decedent had lived to fully discharge the obligation, the estate would have been depleted by \$200,000 at the time of the decedent's death. A substantial body of federal tax litigation recognizes that a transfer in consideration for the release of support rights can be a transfer for adequate and full consideration in money or money's worth.²⁰⁷ The more difficult question is whether the amount of the support right released equals or differs from the amount of the transfer. In federal tax litigation, where similar issues arise, at least one court has held that the value of the support rights released and the amount of the transferred property are *not* presumptively equal.²⁰⁸ Factors relevant in measuring the value of support rights include the transferor's annual income, expectations of the parties and the parties' accustomed style of living.²⁰⁹

Transfers in consideration of the release of marital rights in the transferor's estate present additional difficulties under the UPC. Under the Internal Revenue Code, the release of marital rights such as dower or curtesy, or of a statutory estate in lieu thereof, is not considered to any extent consideration in money or money's worth.²¹⁰ The purpose of this provision is to avoid interspousal transfers that could have the effect of defeating the

206. Professor Effland has suggested that "if a husband wishes to establish a revocable living trust and his wife *at the time* consents to the transfer, and if the wife dies and the transferor subsequently remarries, the second spouse could not include the trust assets as part of the augmented estate." Effland, *Rights of the Surviving Spouse and Children*, in *UNIFORM PROBATE CODE PRACTICE MANUAL* 45, 48-49 (1972) (emphasis added). Professor Effland assumes that "during marriage" means "during any marriage." Otherwise the transfer would be excluded from the augmented estate because it occurs prior to decedent's marriage to the surviving spouse.

207. See, e.g., Rev. Rul. 68-379, 1968-2 C.B. 414.

208. *United States v. Past*, 347 F.2d 7, 12 (9th Cir. 1965).

209. See E.T. 19, 1946-2 C.B. 166, *superseded by* Rev. Rul. 68-379, 1968-2 C.B. 414. See also C. LOWNDES, R. KRAMER & J. MCCORD, *FEDERAL ESTATE AND GIFT TAXES* § 14.7 (3d ed. 1974).

210. I.R.C. § 2043(b).

federal estate tax. Since section 2-202(1) of the UPC applies solely to transfers to persons other than the surviving spouse, this policy should not be used to construe the UPC. However, the issue of whether the relinquishment of marital rights in the transferor's estate is consideration in money or money's worth can still be present. Suppose *H* and *W* decide to divorce. *W* will thereafter marry *H-2*. *W* has a personal estate of \$1,000,000 and pursuant to the terms of a property settlement agreement between *H* and *W*, *W* transfers \$300,000 into an *inter vivos* trust primarily for *H*'s benefit, revocable only on the joint consent of *H* and *W*. *H* releases all marital rights in *W*'s estate. If the transfer in trust is made between *W*'s marriages, the transfer is excluded from the augmented estate because section 2-202(1) reaches only transfers "during marriage." If the "during marriage" requirement means "during marriage to the surviving spouse," the transfer is excluded if it occurs before *W* marries *H-2*, whether *W* makes the transfer before the divorce or between marriages. If during marriage means during any marriage,²¹¹ the transfer in trust for *H*'s benefit could be included in the augmented estate under section 2-202(1), which captures transfers to donees, except the surviving spouse, if it precedes the divorce unless the transfer was for adequate and full consideration in money or money's worth, or *H*'s release was binding on *H-2*. Under accepted estate tax analysis, the release of *H*'s marital rights would not be consideration in money or money's worth. However, it is submitted that the release of marital rights in this case should be considered adequate and full consideration in money or money's worth. The general policy behind the statute is to reach only gratuitous lifetime transfers that have the effect of defeating the share of a surviving spouse and might otherwise pass to the spouse as part of the decedent's probate estate. In the divorce context, it strains the imagination to consider interspousal transfers as gratuitous. Furthermore, in our hypothetical the transfer more likely enhances the rights of *H-2*, who might not have been legally able to marry *W* unless the prior marriage was terminated.

Each of the subdivisions (i) through (iv) of section 2-202(1) of the UPC refers to *transfers* by the decedent. Whether a transfer includes property passing to donees other than the surviving spouse as a result of an exercised or unexercised power of appointment granted to the decedent by another, or a retained special power of appointment not exercisable in decedent's favor, is unclear. Section 2-202(2)(i) refers specifically to exercised general and special powers in favor of the surviving spouse when determining the value of transfers to the surviving spouse included in the augmented estate. Under accepted statutory construction techniques, the omissions of any reference to powers in section 2-202(1), coupled with an express reference in section 2-202(2), suggests that the Commissioners intended to exclude powers from the reach of section 2-202(1). This intent may be supported by the paucity of cases suggesting the use of powers as a disinheriting device.²¹²

211. See note 206 *supra*.

212. Most of the statutory schemes that address the surviving spouse's rights in *inter vivos* transfers do not specifically address powers of appointment. 20 PA. CONS. STAT. ANN. § 6111(a) (Purdon 1975), treats as a testamentary disposition subject to the spouse's right of election a conveyance of assets by a person who *retains* a testamentary power of appointment. MacDonald's proposed family maintenance legislation defines both "estate" and "transfer"¹⁰ include certain powers of appointment. MACDONALD, *supra* note 76, at 303-05.

However, to the extent decedent created a presently exercisable general power in himself, the appointive fund would clearly come within the augmented estate under section 2-202(1)(ii) as a revocable transfer. It is unclear whether a retained testamentary general power would capture the appointive assets into the augmented estate. As a matter of policy it should, although there is no clear statutory peg to support the inclusion.

C. Retained Life Estate

Under section 2-202(1)(i), the augmented estate includes any transfer during marriage to persons other than the surviving spouse "under which the decedent retained *at the time of his death* the possession or enjoyment of, or the right to income from, the property," to the extent decedent did not receive adequate and full consideration in money or money's worth for the transfer. Transfers under which decedent retained at death the possession or enjoyment of the transferred property or the right to the income therefrom are appropriate inclusions in the augmented estate. The remainderman must await the deceased transferor's death for his interest to become possessory, a situation no different than if the decedent had retained the transferred property in his probate estate and bequeathed it to the remainderman in his will. The language "possession or enjoyment of, or the right to income from, the property" tracks the language of section 2036(a)(1) of the Internal Revenue Code of 1954, and it is likely to receive a similar interpretation.²¹³

The obvious design of section 2-202(1)(i) is to capture into the augmented estate property transferred by a person who retains a life estate in the transferred property. Thus, if during marriage *H* transfers \$100,000 in trust to pay the income to *H* for his life and upon *H*'s death to pay the corpus to Child *A*, and *H* receives no consideration in money or money's worth for the transfer, the trust, valued at *H*'s death, will be included in the augmented estate.

A closer comparison of the provisions of section 2-202(1)(i) of the UPC and section 2036(a)(1) of the Internal Revenue Code illustrates some potentially significant differences. If, as provided by the UPC, decedent's possession or enjoyment of the transferred property, or the right to the income therefrom, must be retained at the time of the decedent's death, the spouse's rights could easily be circumvented by providing in the instrument of transfer that decedent's rights terminate before death. For example, suppose decedent transfers property in trust and retains the right to quarterly installments of income to terminate in the quarter immediately preceding decedent's death. The trust further provides that income which accrues between the last payment date prior to decedent's death and decedent's death shall be paid to the remainderman. In this case, decedent's rights are not retained at death. Rather, decedent's rights terminate before death. Literally, section 2-202(1)(i) of the UPC is inapplicable. Under section

²¹³ Under § 2209(a) of the Tax Reform Act of 1976 amending I.R.C. § 2036, a retention of voting rights over stock transferred in trust is treated as the retention of the enjoyment of the transferred stock, raising the question whether a similar rule should apply under UPC § 2-202(1)(i). Cf. *United States v. Byrum*, 408 U.S. 125 (1972).

2036(a)(1) of the Internal Revenue Code, this potential tax avoidance conveyance is defeated by statutory language that captures into decedent's gross estate a right retained at the time of the transfer not only for life but also "for any period not ascertainable without reference to his death." Arguably the avoidance potential suggested above may be averted by construing the remainderman's interest as taking effect immediately after the last income payment to the grantor; it is thus captured into the augmented estate under section 2-202(iv), which reaches transfers within two years of death. Since section 2-202(1)(i) of the UPC reaches transfers with a retained right to income at the time of death, it should capture transfers under which the decedent has retained the right to income for a term certain if decedent dies before the end of the term.

Suppose during marriage decedent transfers property in trust and directs that the income shall be paid to his minor children for their support, and the decedent dies during the period of minority. Does the trust fall into the augmented estate under section 2-202(1)(i)? This depends on whether decedent retained at death the right to the income from the transferred property by virtue of the fact that the trust income is used to discharge decedent's support obligation. This question has been litigated in a number of federal tax cases where the issue is relevant to the inclusion of the trust under similar language in section 2036(a)(1) of the Internal Revenue Code. The Internal Revenue Service takes the position that the right to income is retained to the extent the income is to be applied towards the discharge of the decedent's legal obligations, including the obligation to support.²¹⁴ The courts are in full agreement with the Service so long as the transferor can compel the trustee to use the trust income for his or her dependent's support.²¹⁵ On the other hand, if the trustees have discretion whether or not to apply trust income to the support of the transferor's dependents and the transferor cannot compel payment to the dependents for support the trust is excluded from the gross estate.²¹⁶ If the support obligation is discharged by less than all of the income of the trust, only a corresponding proportion will be included in the transferor's gross estate and the burden of proof is upon the estate.²¹⁷

The judicial gloss applied to section 2036(a)(1) of the Internal Revenue Code appears similarly applicable to section 2-202(1)(i) of the UPC. If the trust income discharges the transferor's legal support obligation, economically the position of the transferor's estate has not been changed by the creation of the trust. Assuming the trust had not been created, the income of the transferred property would have been used directly by the transferor to

214. Treas. Reg. § 20.2036-1(b)(2) (1960).

215. See, e.g., *Richards v. Commissioner*, 375 F.2d 997, 999 (10th Cir. 1967); *First Nat'l Bank v. United States*, 211 F. Supp. 403, 405-06 (M.D. Ala. 1962).

216. See, e.g., *Commissioner v. Douglass Estate*, 143 F.2d 961, 963 (3d Cir. 1944); *Jack F. Chrysler v. Commissioner*, 44 T.C. 55, 61-62 (1965), *rev'd on other grounds sub nom. Estate of Chrysler v. Commissioner*, 361 F.2d 508 (2d Cir. 1966). If the transferor is the trustee of a discretionary support trust, the trust will in any event be included in the decedent's gross estate. See *Estate of Marvin L. Pardec v. Commissioner*, 49 T.C. 140, 147-50 (1967).

217. See *Commissioner v. Dwight's Estate*, 205 F.2d 298, 301, 302 (2d Cir. 1953), *cert denied*, 346 U.S. 871 (1953).

discharge the obligation and the remainderman's possession would have been deferred until the transferor's death. If the legal obligation to support the trust beneficiaries ceased before the transferor's death, the transferred property would not be included in the augmented estate since at his death there would be no retained right to income.²¹⁸ When the support obligations cease but payments continue from the trust to provide support to the children-beneficiaries there is an economic change in the transferor's estate because the transferor no longer benefits from the income payments. In such a case, it would appear that the spouse could not include the trust in the augmented estate unless the decedent either retained a tainted power over the trust, within the meaning of section 2-202(1)(ii) of the UPC, or dies within two years of the termination of the support obligation, in which case the trust could be captured under section 2-202(1)(iv).

It is also unclear to what extent, if any, section 2-202(1)(i) reaches wholly discretionary trusts created primarily for the decedent's benefit. For example, suppose *H*, during marriage, transfers property into a trust designating a corporate trustee. Under the terms of the trust, the corporate trustee has the discretionary authority to pay to, or withhold from *H*, income or corpus. *H* has no power to compel payment of income or corpus to himself. In this case, *H* has effectively relinquished all rights in the transferred property. In analogous tax litigation the courts have held that *H* has retained no taxable right under a pure discretionary trust and the transferred property is excluded from the gross estate.²¹⁹ If the analogy holds for augmented estate purposes, the pure discretionary trust may be an effective disinheriting device unless established within two years of death. The discretionary trust as an avoidance technique may be more theoretical than real. It is unlikely that many persons would utilize pure discretionary trusts as a disinheriting device because the cost of severing their interest in the property may present too great a financial risk. If there is an understanding with the fiduciary, express or implied, to minimize that risk, the courts are likely to follow the lead of the federal courts in estate tax litigation to the effect that the understanding amounts to a retained right.²²⁰

The possession or enjoyment language of section 2-202(1)(i) of the UPC is most appropriate to transfers of real property under which the transferor has retained a legal life estate. Thus, if *O*, who owns Blackacre, executes a deed to *X* retaining a life estate, Blackacre would be included in the augmented estate if *O* retained the life estate at death. On the other hand, suppose during marriage *O* deeds Blackacre to child *A* but continues to live on Blackacre. Is this transfer subject to capture even if not made within two years of *O*'s death? In federal tax litigation a similar issue arises under section 2036(a)(1); the Service has generally been successful in bringing the transfer into the gross estate²²¹ when the triers of fact find either an implied

218. *Cf. Townsend v. Thompson*, 42 A.F.T.R. 1309, 1311 (E.D. Ark. 1950).

219. *Commissioner v. Irving Trust Co.*, 147 F.2d 946, 947-48 (2d Cir. 1945); *Clark v. United States*, 209 F. Supp. 895, 901-02 (D. Colo. 1962).

220. *See Estate of McCabe v. United States*, 475 F.2d 1142 (Ct. Cl. 1973); *Edgar Uhl*, 25 F.C. 22 (1955), *rev'd*, 241 F.2d 867 (7th Cir. 1957).

221. *See Guynn v. United States*, 437 F.2d 1148 (4th Cir. 1971); *Emil Linderme, Sr.*, 52 F.C. 305 (1969). *But see Diehl v. United States*, 21 A.F.T.R.2d 1607 (W.D. Tenn. 1967).

or express agreement between the parties permitting the transferor to retain possession of the transferred property.²²²

Section 2-202 is intended "to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate."²²³ Each of the transfers described above are of that caliber. While the reporter's comment to section 2-202 indicates that the provisions of the statute are more limited than the provisions of the Internal Revenue Code that create "fine spun tests," it is likely that the federal courts' judicial gloss to section 2036(a)(1) will substantially affect the construction of section 2-202(1)(i) by the state courts.

Section 2-202(1) does not include transfers that are subject to the transferor's retained right to designate the persons who will enjoy the transferred property or its income, except to the extent the transfer is made within two years of death and is captured by section 2-202(1)(iv). Transfers of this kind would be subject to the federal estate tax under section 2036(a)(2) of the Internal Revenue Code. Thus, if *O* transferred property to *T* and *O* in trust to pay the income to and among *A*, *B*, and *C* for *O*'s life and upon *O*'s death to pay the corpus to *X*, the trust would be included in *O*'s gross estate for federal estate tax purposes but not in *O*'s augmented estate. The exclusion of this type of transfer from the augmented estate is appropriate because it is unlikely that such transfer would ordinarily be made for the purpose of defeating the spouse's right because the transfer also divests the transferor of his future economic enjoyment in the transferred property.

An additional problem arising from the retained-at-death language in section 2-202(1) is illustrated by the following example. During marriage, *W* transfers \$100,000 in trust, reserving the income for life. Three weeks before her death, *W* renounces the income interest. If *W* had not renounced the income interest at her death, the trust would be included in the augmented estate. Does the relinquishment of *W*'s interest remove the trust from the augmented estate? Under a literal reading of section 2-202(1)(i) of the UPC, it would be excluded from the augmented estate because the income interest is not retained at death. This construction increases the possibility that deathbed renunciations of a retained interest may be used as disinheriting devices. However, section 2-202(1)(iv) of the UPC, which reaches transfers within two years of death, may capture the property into the augmented estate. Arguably, section 2-202(1)(iv) could reach the property on the theory that a transfer occurs whenever the transferor relinquishes all economic interest in the transferred property.

D. Revocable Transfers

Section 2-202(1)(ii) of the UPC captures into the augmented estate transfers during marriage to donees (other than the surviving spouse) to the extent decedent did not receive adequate and full consideration in money or

222. Treas. Reg. § 20.2036-1(a) (1960) provides: "An interest or right is treated as having been retained . . . if at the time of the transfer, there was an understanding, expressed or implied, that the interest or right would later be conferred."

223. UPC § 2-202, Comment.

money's worth if at the time of decedent's death decedent retained "a power, whether alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit."²²⁴ This section, like section 2-202(1)(i) of the UPC, reaches transfers that are essentially testamentary in nature: during the donor's lifetime the donee's interest is speculative because of the possibility that the donor can reclaim the property. Only at the donor's death is the donee assured of acquiring the possession or enjoyment of the transferred property. The statute reaches common devices such as revocable trusts and Totten trusts. Section 2-202(1)(ii) of the UPC has less reach than its federal estate tax law counterpart; section 2038 of the Internal Revenue Code captures into the gross estate for federal estate tax purposes interests in property which at the donor's death are subject to a power to revoke, alter, amend or terminate, whether or not the power is exercisable in the donor's favor. Thus, if *O* conveys property to *O* and *T*, as trustees, to pay the income and corpus between *A* and *B* in such shares as the trustees deem advisable and upon the death of the survivor of *A* and *B* to pay any remaining corpus to *C*, the trust is included in *O*'s gross estate²²⁵ but would be excluded from *O*'s augmented estate unless the retained distribution powers were somehow construed to be exercisable in *O*'s favor. In drafting this section, the Commissioner's recognized that the net it spun was not drawn as tight as it could be. Professor Efland has noted, however, that since the tax laws reach transfers subject at the donor's death to a power to alter, amend, or terminate even though not exercisable in the donor's favor, a person who retains one of these tax-tainted powers is likely also to retain the power to revoke,²²⁶ which would cause the transferred property to be included in the augmented estate.

Section 2-202(1)(ii) of the UPC applies whether the tainted power is exercisable by the transferor alone or in conjunction with any other person. Similar language appears in section 2038 of the Internal Revenue Code. This language has been construed for federal estate tax purposes to reach joint powers even though the co-holder of the power has a substantial

224. The language of the UPC closely parallels N.Y. EST., POWERS & TRUSTS LAW § 4-1.1(b)(1)(E) (McKinney 1967), although there are some important differences. Under the New York statute, the power must be expressly retained. Ordinarily, a power of revocation will not be implied and, unless the power is expressly reserved, the trust is irrevocable. *E.g.*, *Gray v. Union Trust Co.*, 171 Cal. 637, 154 P. 306 (1916). Thus, omission of a similar requirement in the UPC does not appear significant.

Under the New York statute, the tainted powers need not be exercisable for the donor's benefit. Thus, the spouse of a New York domiciliary would have greater rights than are extended under the UPC. If a power of invasion cannot be exercised for the donor's benefit there is an economic depletion of the estate and the transfer is less of a testamentary substitute than if all donees' enjoyment were dependent upon the donor's death.

225. *Lober v. United States*, 346 U.S. 335 (1953); *Porter v. Commissioner*, 288 U.S. 436 (1933).

226. NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE: LEGISLATIVE HISTORY 34-35 (Proceedings of Committee of the Whole, in Philadelphia, Pa., July 30, 1968). Professor Efland has noted one exception to his prognosis. A transferor might retain a special power exercisable in favor of children over transferred property and no other interest. In such a case the property would be included in the federal gross estate under § 2038 but excluded from the augmented estate. Efland, *Rights of the Surviving Spouse and Children*, in UNIFORM PROBATE CODE PRACTICE MANUAL 45, 48 (1972). See also text accompanying note 212 *supra*.

adverse interest in the property. Thus, if *O* transfers property to *T* in trust to pay the income to *A* for life and upon *A*'s death to pay the corpus to *B*, and if *O* retains the power to revoke the trust but only with *B*'s consent, the trust is included in *O*'s gross estate.²²⁷ A literal reading of the federal statutory language and the Uniform Probate Code supports no other result.

Suppose *O* gratuitously transfers property to *T* in trust to pay the income to *A* for life and upon *A*'s death to pay the corpus to *B*. The trust instrument states that the trust is irrevocable. Although a trust purports to be irrevocable, as a matter of trust law the settlor and all of the beneficiaries may consent to its termination and a distribution of the corpus among themselves in such proportions as they agree.²²⁸ Suppose in the above described trust, *O* retains a power to revoke exercisable only with the consent of *A* and *B*. This power reserves to *O* no greater power than *O* would have had if the trust were expressly stated to be irrevocable. Is the trust included in *O*'s augmented estate if the transfer occurred during marriage? For federal estate tax purposes, the Service takes the position that if the retained power "adds nothing to the rights of the parties under local law"²²⁹ the property subject to the power is not included in the gross estate under section 2038. A similar result should follow under the UPC.

Section 2-202(1)(ii) provides that the tainted revocation power must be retained at the deceased transferor's death. It does not require that the power be exercisable at that time. Section 2038 of the Internal Revenue Code reaches interests in property, the enjoyment of which is subject to change at the decedent's death by one of the tainted powers described in that statute. If the tainted power at the time of the decedent's death is subject to a contingency beyond the decedent's control which did not occur prior to the decedent's death, the property subject to the contingent power is excluded from the gross estate²³⁰ because at the time of the decedent's death the power was not exercisable. Thus, suppose *O* transferred property to *T* in trust to pay the income to *A* for life and upon *A*'s death to pay the income to *B* for life and upon the death of the survivor of them to pay the corpus to *C*; and should *B* survive *A*, *O* retained the power to revoke the trust. At *O*'s death, *A* and *B* survive. In this case, the trust property is excluded from *O*'s gross estate because the revocation power is subject to a contingency (namely that *B* survive *A*) beyond *O*'s control. Arguably the trust should also be excluded from *O*'s augmented estate since at *O*'s death *O* could not *then* revoke the trust in his or her own favor. Suppose in the above described trust, *O*'s power was subject to *O* paying *A* \$100, a contingency within *O*'s control. For federal estate tax purposes, the trust would be included in *O*'s gross estate.²³¹ It should also be included in the augmented estate since *O* has the power

227. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 90 (1935).

228. See *Botzum v. Havana Nat'l Bank*, 367 Ill. 539, 542-43, 12 N.E.2d 203, 205 (1937); *Fowler v. Lanpher*, 193 Wash. 308, 316, 75 P.2d 132, 136 (1938); cf. *Claffen v. Claffen*, 14th Mass. 19, 22, 20 N.E. 454, 455 (1839).

229. Treas. Reg. § 20.2038-1(a)(2) (1962); see *Helvering v. Helmholtz*, 296 U.S. 93, 95 (1935).

230. Treas. Reg. § 20.2038-1(b) (1962). See also *Jennings v. Smith*, 161 F.2d 74, 77 (2d Cir. 1947); *Cyrus C. Yawkey*, 12 T.C. 1164-1172 (1949).

231. See Treas. Reg. § 20.2038-1(b) (1958).

solely within his or her control to cause the revocation power to be presently exercisable. Any other construction would easily permit circumvention of the policy behind section 2-202(1)(ii).²³²

Suppose *O* transfers property into a revocable *inter vivos* trust but within two years of death relinquishes the power. On the face of section 2-202(1)(ii), the trust property is excluded from the augmented estate because the tainted power was not retained at death. On the other hand, if the release of the power were treated as a transfer on the theory that the release was tantamount to the actual economic depletion of *O*'s estate, the property could be brought into the augmented estate under section 2-202(1)(iv), which reaches certain transfers within two years of death.²³³

Suppose *O* transfers \$100,000 into a revocable *inter vivos* trust ten years before his or her death and retains the revocation power at death. During the ten year period, \$50,000 of trust income is paid to the income beneficiary. At *O*'s death the corpus is valued at \$100,000. How much is included in the augmented estate? Section 2-202(1) provides that "property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first." The statute is silent with respect to the inclusion or noninclusion of income paid to donees other than the surviving spouse. On the other hand, section 2-202(2) relating to property of the surviving spouse derived from the deceased spouse that is included in the augmented estate provides in subdivision (ii) that "income earned by included property prior to the decedent's death is not treated as property derived from the decedent." That the exclusion of income on interspousal transfers was specifically considered as respects the computation of the augmented estate may suggest that the omission of any similar provision as respects other donee transfers was intentional and that a contrary result was intended.²³⁴

This construction would be unfortunate because it would seriously handicap the income beneficiary's right to the use and enjoyment of the income by requiring him or her to set aside a portion of the income for a possible future election; it also runs contrary to the general theory of the augmented estate, which permits the spouse to reach transferred property that decedent economically enjoyed at the time of death. Any income actually paid to the income beneficiary would be beyond the reach of the decedent's revocation power and decedent could not beneficially enjoy the income paid out of the trust. In other words, actual payment is akin to an outright gift. However, on the theory that the actual payment of income releases the amounts paid from the revocation power and constitutes a transfer upon payment, it may be argued that income payments within two years of the decedent's death are included in the augmented estate under

²³² Cf. I.R.C. § 2038(b) (power subject to precedent giving of notice).

²³³ Cf. *Id.* § 2038 (tainted power released within three years of death causes subject property to be included in gross estate).

²³⁴ Compare 20 PA. CONS. STAT. ANN. § 6111(a) (Purdon 1974), which provides that the surviving spouse's right shall not attach to "the rights of any income beneficiary whose interest becomes vested in enjoyment prior to the death of the conveyor."

section 2-202(1)(iv).²³⁵ An analogy may be drawn from the federal gift tax law to the effect that transfers to a revocable trust are incomplete but that subsequent income payments are completed gifts.²³⁶ Section 2-202(1)(ii) should reach any accumulated trust income on the theory that at decedent's death decedent could claim beneficial enjoyment of the accumulated income through the exercise of the revocation power.²³⁷

Both sections 2-201(1)(ii) and 2-201(1)(i) raise the question of who is the transferor—a question also raised by the reciprocal trust doctrine, which is sometimes employed in federal estate tax litigation. For example, suppose *O* transfers property in trust for *A*'s benefit (Trust 1) and *A* transfers property in trust for *O*'s benefit (Trust 2). *A* is authorized to invade the corpus of Trust 1 for his or her own benefit and *O* is authorized to invade the corpus of Trust 2 for his or her own benefit. *O* dies. Is Trust 1 or Trust 2 included in the augmented estate? If the value of each transfer in trust is equal, *O*'s personal estate has suffered no economic depletion by virtue of the transfer in trust. If the value of Trust 2 is less than the value of Trust 1 at the time of the transfer (that is, *O* gave up more than *O* received) the value of *O*'s personal estate is depleted only to the extent of the difference. If the value of Trust 2 exceeds the value of Trust 1 at the time of the transfer (that is, *O* received more than *O* relinquished) *O*'s personal estate is enhanced to the extent of the difference. Since section 2-202 in effect prohibits the spouse from reaching transfers which in fact economically deplete the deceased spouse's estate unless made within two years of death, if the reciprocal trust doctrine applies to section 2-202 the spouse can reach only Trust 2 to the extent *O*'s personal estate has not been depleted.²³⁸

E. Jointly Held Property

Section 2-202(1)(iii) of the UPC includes in the augmented estate transfers to donees (other than the surviving spouse) to the extent decedent did not receive adequate and full consideration in money or money's worth "whereby property is held at the time of decedent's death by decedent and another with right of survivorship." Since "property" by definition includes both real and personal property,²³⁹ this section reaches both joint tenancies in real property, stock, bonds, and bank accounts. However, because the section reaches only the decedent's transfers, to the extent the deceased joint tenant made no contributions to the joint tenancy, no portion thereof would be included in his or her augmented estate if the sole contributing joint tenant survives. Thus, if *O* deposits \$10,000 into a savings account in the name of *O* and *A* as joint tenants with right of survivorship and *O*

235. The Nebraska statute purports to insulate income paid on transferred property included in the augmented estate from also being included in the augmented estate. NEB. REV. STAT. § 30-2314(1)(b) (1975).

236. Treas. Reg. § 25.2511-2(f) (1958).

237. Cf. *United States v. O'Malley*, 383 U.S. 627, 631 (1966).

238. See *United States v. Grace*, 395 U.S. 316 (1969). The Court stated that "application of the reciprocal trust doctrine [for estate tax purposes] requires only that the trust be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been had they created the trust naming themselves as life beneficiaries." *Id.* at 324.

239. UPC § 1-201(33).

predeceases *A*, \$10,000 is included in *O*'s augmented estate. On the other hand, if *A* predeceases *O*, no portion of the account is included in *A*'s augmented estate.²⁴⁰ Similarly, the augmented estate should exclude joint tenancy property received by gift or inheritance and held by decedent and another, whichever joint tenant dies first, since neither joint tenant contributed to the property.

The most obvious difficulty with section 2-202(1)(iii) is the problem of tracing the transfers (direct or indirect) made by both the decedent and the surviving joint tenant to the acquisition or improvement of the joint tenancy property. One can easily imagine state court litigation similar to that which has plagued the federal courts construing the analogous provision of the Internal Revenue Code.²⁴¹

The language of section 2-202(1)(iii) is broad enough to capture into the augmented estate United States Savings Bonds purchased by the decedent in co-ownership form. Professor Effland has written that this provision reaches United States Government Bonds held in co-ownership form.²⁴² Under federal regulations, upon the death of a co-owner of a United States Savings Bond, the survivor is recognized as the sole and absolute owner of the bonds.²⁴³ The regulations further provide that "[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations upon a surviving co-owner or beneficiary."²⁴⁴ In *Free v. Bland*,²⁴⁵ the Supreme Court held that under the supremacy clause of the United States Constitution,²⁴⁶ these regulations preempt any inconsistent provisions of Texas community property law.²⁴⁷ In the Court's view, the right of survivorship is granted by federal law and supersedes any conflicting state law.²⁴⁸ In light of that case, it appears that to the extent section 2-202(1)(iii) would permit the surviving spouse to defeat the survivorship feature that attaches to United States Savings Bonds by claiming an elective share, the statute would violate the supremacy clause and be unconstitutional.²⁴⁹

F. Transfers Within Two Years of Death

Section 2-202(1)(iv) captures into the augmented estate transfers to a donee (other than the surviving spouse) made during marriage and "within

240. Cf. Treas. Reg. § 20.2040-1(c), ex. (3) (1958).

241. I.R.C. § 2040. See generally C. LOWNDES, R. KRAMER & J. McCORD, FEDERAL ESTATE AND GIFT TAXES ch. 11 (3d ed. 1974).

242. Effland, *Rights of the Surviving Spouse and Children*, in UNIFORM PROBATE CODE PRACTICE MANUAL 45, 48 (1972).

243. 31 C.F.R. § 315.62 (1976).

244. *Id.* § 315.20.

245. 369 U.S. 663 (1962).

246. U.S. CONST. art. VI, cl. 2.

247. 369 U.S. at 668.

248. *Id.*

249. See also *United States v. Chandler*, 410 U.S. 257 (1973). A similar problem arises with respect to bonds purchased by *O* payable on death to *A*. During *O*'s life *O* can revoke the designation and have the bonds reissued in his or her name alone or redeem them for cash. 31 C.F.R. §§ 315.65-66 (1976). On *O*'s death if the bonds are then held in the name of *O* payable on death to *A*, *A* may have the bonds reissued in his or her name alone or may redeem the bonds. *Id.* § 315.67. Bonds so registered are revocable by *O* or may be consumed by *O* for his

two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.00" except to the extent decedent received adequate and full consideration in money or money's worth for the transfer.²⁵⁰

Section 2-202(1)(iv) reaches outright transfers in which the decedent retains no beneficial interest as well as transfers in trust which might not otherwise be included in the augmented estate under either section 2-202(1)(i) or 2-202(1)(ii). The \$3000 limitation is obviously related to the federal gift tax annual exclusion²⁵¹ and avoids having to take account of small Christmas, birthday, and wedding gifts. To the extent decedent duly filed all required gift tax returns, the administrative inconveniences that might attach to a search for such transfers is minimized.

The two year limitation may dissuade all but the clairvoyant from making substantial outright transfers for the purpose of defeating the spouse's elective share. The two year rule applies without regard to decedent's motives for the transfer.²⁵² As originally drafted, the two year rule created substantial conveyancing problems because purchasers were subject to the risk that a transfer within two years of death might be attacked on the ground that it was unsupported by sufficient consideration.²⁵³ In order to avoid this problem, a 1975 editorial revision excluded from the augmented estate transfers to a bona fide purchaser defined as a purchaser for value in good faith and without notice of any adverse claim.²⁵⁴

In light of the \$3000 exclusion per donee per year for each of the two years preceding death, it is possible for a person, so inclined, to transfer a substantial amount of property free of the spouse's claim. For example, if *O* had four children by a former marriage, *O* could transfer \$3000 to each child in each of the two years preceding his or her death and remove \$24,000 from the augmented estate. If *O* continued this outright gift-giving pro-

or her own benefit. They appear to be included in the augmented estate under UPC § 2-202(1)(ii). However, like co-owned bonds, if the statute is construed to defeat *A*'s rights it is probably unconstitutional as a violation of the supremacy clause.

250. Compare N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(A) (McKinney 1967), which grants the surviving spouse the right to elect against gifts *causa mortis* and subjects the spouse's claim to all the vagaries that the election connotes.

251. I.R.C. § 2503(b).

252. The comment to UPC § 2-202 suggests that the statute's purpose is "to prevent a person from depleting his estate in contemplation of death." The choice of the phrase "in contemplation of death" in the comment is unfortunate. It appears the Commissioners went out of their way in drafting the provisions to avoid that phrase and the trauma it has created in federal tax litigation under former § 2035 of the Internal Revenue Code, which captured into the gross estate transfers prior to January 1, 1977, within three years of death and in contemplation of death. Congress had admitted the uncertainties of the contemplation of death standard and has substituted an absolute three year rule to the effect that in respect to decedents dying after December 31, 1976, gratuitous transfers after that date and within three years of death are included in all events in the gross estate except to the extent they qualified for the \$3000 annual exclusion. I.R.C. § 2035(a).

253. As noted in the comment to § 2-202, this issue was raised by the Colorado Bar Association. Implicit in the concern is the idea that the UPC does not incorporate an ordinary business transaction exception in the consideration in money or money's worth exception or, at least, that from a title viewpoint the risks were too great to await a court judgment to that effect.

254. UPC §§ 2-202(1), -202(4).

plan for a number of years before his or her death, the depletion could be more substantial. It may be that the Commissioners felt that the fear of crippling one's self of one's wealth was a sufficient impediment to this kind of avoidance device. Also, transfers in excess of the \$3000 exclusion are minimized by the impact of the federal gift tax. Under the unified estate and gift tax rate structure there may be even less incentive to make taxable outright gifts since payment of the estate tax that would be payable if no gifts were made will be accelerated.

Under section 2503(b) of the Internal Revenue Code, the \$3000 annual exclusion is limited to gifts of a present interest in property. No similar limitation is required under the UPC, which appears to allow the exclusion for transfers of either a present or future interest in property. Under section 2-202(1) of the UPC, in all cases where the decedent has transferred a future interest in property that becomes possessory at or after the decedent's death, the interest is valued at decedent's death for the purpose of computing the amount included in the augmented estate. Is the \$3000 exclusion fully allowable if the future interest was valued at less than that amount at the time of the transfer but at more than that amount at the time of the decedent's death? If the future interest is created in a trust, for purposes of section 2-202(1)(iv) is the trustee the donee, and for valuation purposes is the transfer valued at the time of the transfer (less the \$3000 exclusion) and not at the time of the decedent's death? If the trustee is not the donee for purposes of section 2-202(1)(iv), can the trustee be the recipient of property within the meaning of section 2-207(b) and be liable for contribution to satisfaction of the elective share? These are a few of the unanswered questions raised by the \$3000 exclusion per donee per year. It might have been advisable to limit the \$3000 exclusion to present interests in property if the \$3000 exclusion is intended to eliminate small gifts from the augmented estate. The future interest is an unlikely vehicle for the transfer of a small gift, it being more frequently a characteristic of a substantial transfer incorporated into a comprehensive estate plan.

A further ambiguity arises whenever a trust created within two years of death is included in the augmented estate under section 2-202(1)(iv). Under that provision, a \$3000 exclusion is allowed for each donee. Who is the donee, the trustee or each of the income beneficiaries and remaindermen? Under federal gift tax laws, taxable gifts in trust are computed as if the donees were the beneficiaries of the various interests created and not the trustees. By analogy, does section 2-202(1)(iv) permit multiple exclusions for transfers in trust? For example, if *O* transfers \$100,000 of property to *T* in trust to pay the income equally to *A* and *B* and upon the death of the survivor of them to pay over the corpus to *X* and the interests of *A*, *B*, and *X* are valued at \$30,000, \$30,000, and \$40,000 respectively, the aggregate amount included in the augmented estate is \$91,000 if *A*, *B*, and *X* are the donees, whereas if *T* were the donee, \$97,000 would be included in the augmented estate. The hypothetical raises the additional and unanswered question of how the interests of the beneficiaries are to be valued. The UPC unfortunately is silent on this problem.

G. Consent Transfers, Insurance, and Annuities

There are two important caveats to the operation of section 2-202(1). First, any transfer that might otherwise be included in the augmented estate is excluded if made with the *written* consent or joinder of the decedent's spouse.²⁵⁵ Thus, the transferor can assure the effectiveness of a proposed transfer by having his or her spouse consent or join in the transfer. The statute does not detail the form of the consent. Presumably, any consent should refer specifically to the property transferred and to the donee and should include a waiver by the spouse of inclusion of the transfer in the augmented estate under section 2-202 in the event the spouse survives the transferor. However, to the extent the spouse signs the instrument evidencing the transfer, whether a check, deed, or otherwise, a presumption should arise that the signature constitutes consent. Similarly, to the extent the spouse joins in a split gift return for federal gift tax purposes, a presumption should arise that the spouse consents to the gift.

To the extent the consent gains wide and indiscriminate use, it may become the most convenient method of denying the spouse a share of *inter vivos* transfers that might otherwise form part of the elective share. One can only conjecture about the extent to which spouses will consent to otherwise tainted transfers without being fully apprised of their rights. This problem is highlighted by a comparison with section 2-204, which provides that the right to an elective share may be waived "after fair disclosure," a term that may or may not apply to section 2-202. And even if there has been a fair disclosure, in the harmonious family situation the spouse may not wish to encourage strife by refusing to consent to the transfer even though the spouse is fully informed of its potential detriment to his or her rights as a surviving spouse. On the other hand, if the spouse consents to the transfer the donee can be assured that he or she will not later be called upon to contribute to the spouse's elective share. This should have the laudatory effect of securing the donee's title and protecting the transferred property for the stream of commerce. Adoption of the augmented estate provisions will, as a practical matter, substantially affect current gift-giving practices that in the past have generally not required the spouse's consent. Because the donee's title can only be secured if the spouse joins in the transfer and because no one can be assured of living two years after every transfer, in practice, the spouse will have to join in every transfer made if it is to be insulated from the augmented estate.

The second caveat is that in no event does the augmented estate include any life or accident insurance, joint annuities, or pensions payable to a person other than the surviving spouse.²⁵⁶ The comments to section 2-202 suggest that this exclusion is supportable on the ground that insurance is "not particularly purchased as a way of depleting the probate estate and

255. Professor Effland has suggested that the consent need only be signed by the transferor's spouse at the time of the transfer and that the consent of Spouse 1 binds Spouse 2. Effland, *Rights of Surviving Spouse and Children*, in UNIFORM PROBATE CODE PRACTICE MANUAL 45, 48-49 (1972). See also note 206 *supra*.

256. Cf. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b)(2) (McKinney 1967).

voiding the elective share of the spouse." As a general matter, this obvious policy judgment is appropriate because the assets referred to are more like estate builders than estate depleters. However, insurance may be an effective disinheriting device, particularly if decedent in later years depletes his probate estate by the purchase of a substantial single premium life insurance policy in favor of donees other than the spouse. Joint annuities may prove to be the ultimate disinheriting device. The joint annuity would permit the decedent to transfer a substantial portion of his wealth to donees, other than the spouse, without divesting himself of the present economic benefits. This exception is difficult to justify because trusts created by the decedent under which decedent retained the income for life are included in the augmented estate.

H. Valuation of Donee Transfers

Donee transfers to persons (other than the surviving spouse) included in the augmented estate are valued as of the date of the decedent's death unless the property is given irrevocably to the donee during the decedent's lifetime. In the latter case, the property is valued as of the date the donee came into possession or enjoyment of the property.²⁵⁷ Under the possession and enjoyment test, it is irrelevant when the donee's interest vests. Thus, a remainder following a retained life estate is valued as of the decedent's death since the remainderman's interest would not become possessory before that time even though the remainderman's interest may have vested at an earlier time. Similarly, transfers subject to a power of revocation or a power to invade, consume, or dispose of the principal for the decedent's benefit would ordinarily be valued as of the decedent's death. In each case, problems may arise if between the date of the transfer and decedent's death the donee has improved the property. For example, if *O* during marriage gratuitously transfers Blackacre to Child *A*, retaining a life estate for his life and during *O*'s life *A* improves the property, are the improvements included in the valuation of the property at *O*'s death? While the statute fails to address this issue specifically, only *O*'s lifetime transfers are included in the augmented estate; accordingly, *A*'s improvements should be excluded.

The more serious problem is one of tracing the value attributable to the donee's improvements. For example, if Blackacre had been worth \$50,000 at the time of the transfer, \$80,000 at the time of an improvement costing \$20,000, and worth \$200,000 at *O*'s death, is five-sevenths or four-fifths of the value of Blackacre at *O*'s death included in the augmented estate? Arguably, all of the appreciation between the time of the transfer and the time of the improvement should be attributed to *O* and four-fifths of the value included in the augmented estate. Outright transfer within the two-year period preceding decedent's death would ordinarily be valued on the date of the transfer when the donee's interest becomes possessory and the donee's improvements subsequent to the transfer would automatically be excluded under the valuation method.

Since section 2-202(iii) reaches only joint tenancy property held at

257. UPC § 2-202(1).

death, the appropriate valuation date would be decedent's date of death as well. To the extent of any withdrawals from a joint bank account prior to the decedent's death, section 2-202(iii) would be inapplicable. With respect to decedent's withdrawals, the spouse's rights would not be adversely affected to the extent the value of the withdrawals is included in decedent's probate estate at the time of death. To the extent of the surviving joint tenant's withdrawals, the augmented estate would be depleted unless section 2-202(iv) captures into the augmented estate withdrawals within two years of decedent's death. This section could apply either on the theory that if no withdrawal had been made, the entire joint tenancy property would have been included in the augmented estate under section 2-202(iii) and that 2-202(iv) is a backstop to that section or that the withdrawal is a transfer.

I. Spouse's Property

One of the most innovative features of the augmented estate concept is the treatment accorded the spouse's property derived from the decedent in both the computation and satisfaction of the elective share. Under section 2-202 the spouse's elective share is measured not only against decedent's probate estate increased by third party tainted transfers, but also by the spouse's property that is derived from the decedent. If the spouse is or has been adequately provided for by the decedent, the argument goes, there is no compelling policy reason to permit the spouse to upset other dispositive arrangements. An alternate approach would have been to take account of the spouses' separate property from whatever source derived. If *O*'s probate estate amounted to \$50,000 and the surviving spouse has a personal estate of \$1,000,000 inherited from the spouse's parents, why should the spouse be permitted to reach any portion of the \$50,000 passing to persons other than the spouse? The approach of the UPC is more limited—only the spouse's property that is derived from the decedent is taken into account in computing the augmented estate. Thus, in the preceding example, the \$1,000,000 is excluded from the augmented estate and the elective one-third share is computed against the \$50,000 probate estate. The derivation limitation is probably intended to recognize the surviving spouse's contribution, directly or indirectly, to the accumulation of decedent's wealth (an assumption which may or may not be true); the elective share in part should reward the spouse's efforts without regard to the spouse's personal estate not derived from the decedent.²⁵⁸

Inclusion of the spouse's property derived from the decedent in the augmented estate substantially enhances the interest of persons other than the spouse in the augmented estate, and diminishes the share of the spouse in property in the augmented estate passing to others because the spouse's property derived from the decedent is included in the augmented estate for

258. It is difficult to calculate the contribution of a nonworking spouse to the accumulation of "family wealth." Assuming a family of four with the "nonworking" spouse contributing child care, housekeeping, cooking, etc. services for at least ten hours per day at the minimum wage of \$2.30 per hour, the spouse's annual "unpaid salary" with a two-week vacation and only a five-day work week would be \$5750. Over a 20-year period, the spouse's unpaid salary, assuming no raises, would be \$115,000.

purposes of computing the one-third share, and its full value is charged against the elective share for satisfaction purposes. Accordingly, if the spouse has been adequately provided for by property transfers from the decedent, the value of such property reduces the amount of contribution due from others in satisfaction of the elective share, and may completely eliminate the necessity of third-party contribution.²⁵⁹ Contribution will not occur whenever the value of the spouse's property included in the augmented estate or property passing to the spouse by testate or intestate succession equals or exceeds the value of the elective share.

Section 2-202(2) includes in the augmented estate "the value of property owned by the surviving spouse at the decedent's death . . . to the extent (such) . . . property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth."²⁶⁰ Property acquired by the surviving spouse by testate or intestate succession is properly excluded from the augmented estate under section 2-202(2) since it is included in the augmented estate as property in the decedent's probate estate. As noted earlier, property passing from the decedent to the spouse by testate or intestate succession is taken into account for purposes of satisfying the elective share. It is irrelevant whether the property acquired from the decedent was acquired prior to or during the marriage. Thus, interspousal transfers are not treated like decedent's transfers to persons other than the spouse.

The augmented estate also includes property transferred by the surviving spouse at any time during marriage—presumably to the decedent—to any person other than the decedent, "which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent to the extent the . . . transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth."²⁶¹ To the extent the decedent joined or consented to a transfer to others of property derived from the decedent by the spouse, the transfer is excluded from the augmented estate in the same manner as decedent's transfers joined in or consented to by the spouse are excluded from the augmented estate. The laudatory notion behind this inclusion is to take account of spousal transfers of property derived from the decedent in which the spouse still retains economic benefits. Unfortunately, the provision creates difficult tracing problems and the terminology employed presents some constructional difficulties. When is the surviving spouse treated as having predeceased the decedent? It would appear that the most relevant point of time would be immediately before the decedent's death since this would most accurately reflect those *inter vivos* transfers that the spouse will most likely enjoy after the decedent's death. Thus, suppose *H* transferred \$100,000 to *W* who immediately thereafter established a revocable trust of the \$100,000 and *H* died ten years later. If *W*

²⁵⁹ UPC § 2-207(a).

²⁶⁰ Compare N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b) (McKinney 1967) which includes in the computation of the spouse's elective share a limited number of transfers to the surviving spouse and which would not include all property derived from the decedent.

²⁶¹ UPC § 2-202(2).

held the revocation power immediately before *H*'s death it would be appropriate to take account of this transfer in the augmented estate since *W* could reach the trust property for her economic benefit. However, if two years after the transfer in trust, *W* released the revocation power and *H* died eight years later, at *H*'s death the trust would be beyond *W*'s reach and could not be utilized for *W*'s support.

In measuring the spouse's outright transfers of property derived from the decedent it is essential to know when the spouse's fictional death supposedly occurred since only outright transfers within two years of this fictional death would be included in the spouse's augmented estate. Assuming that only outright transfers by the spouse within two years of decedent's death are included in the augmented estate, and that outright transfers more than two years before the decedent's death are excluded, there are potential inequities. For example, decedent's second spouse may have received substantial transfers from the decedent, which in turn were transferred to the spouse's children by a former marriage beyond the two year period. In this case, the spouse would be entitled to a greater share of decedent's augmented estate, perhaps at the expense of decedent's children. However, the uncertainty of the time of the decedent's death should discourage this practice.

The statutory list of property derived from the decedent, in addition to outright gifts, that may be reflected in property owned outright by the spouse at the decedent's death is exhaustive but not exclusive. It includes many types of transfers to the spouse that would be excluded from the augmented estate if transferred by the decedent to others. The distinction is justified on the ground that, if by taking account of all property derived from the decedent the spouse is adequately provided for, there is no reason to defeat decedent's estate plan and the expectation of other donees by permitting the spouse to reach transfers to them. Property derived from the decedent includes the surviving spouse's beneficial interest in any trust created by the decedent during his or her lifetime.²⁶² A beneficial interest in a trust might include a life income interest or a remainder interest and could be subject to any number of restrictions affecting the spouse's possession and enjoyment of the same. As initially drafted, the UPC failed to provide any method for the valuation of any limited interest which the spouse is treated as having derived from the decedent. Arguably, the interest could be valued by reference to market conditions at the appropriate valuation date, although market values of limited interests are highly speculative and difficult to prove. In the alternative, either federal estate tax²⁶³ or state estate or inheritance tax²⁶⁴ valuation tables might have been utilized to fix the value of a limited interest. A 1975 editorial change to section 2-207(a) of the Code, which arguably applies to section 2-202(2) as well, provides that "the electing spouse's beneficial interest in any life estate or in any trust shall be computed

262. *Id.* § 2-202(2)(i).

263. Treas. Reg. § 20.2031-10 (1970).

264. See 4 FED. EST. & GIFT TAX REP. (CCH) ¶ 12,100 (1967).

of worth one-half of the total value of the property subject to the life estate, and of the trust estate, unless higher or lower values for these interests are established by proof."²⁶⁵

It is unclear what effect this valuation provision will have on powers granted to the spouse. For example, suppose *O* transfers \$100,000 into an *inter vivos* trust to pay the income to spouse *S* for life. *O* grants *S* a general power exercisable by deed. The income interest is presumptively worth \$10,000. Since only a piece of paper stands between *S* and \$100,000, the power should be valued at \$50,000 and the entire \$100,000 treated as derived from *O*. On the other hand, suppose *O* grants *S* a general testamentary power. Arguably, this should not affect the suggested result so long as *S* could economically realize some benefit from the power during lifetime. For example, if *S* could borrow money secured by the property interest subject to the power, the power should be treated as an interest passing from *O* to *S*. On the other hand, if under applicable law *S* cannot benefit economically from the power, it is unclear whether the power should be ignored. Under a policy that seeks to assure *S* long-term financial protection, it should be; but a policy that recognizes the elective share as a reward for *S*'s contribution to *O*'s wealth militates in the other direction, since *S* has the power to dispose of the property at death. If *O* grants *S* a limited power that excludes *S* and *S*'s estate as potential appointees, the power should be ignored on the theory that *S* is merely the agent of *O* and receives no economic benefit in the property subject to the power.

A second form of property derived from the decedent is that appointed by the decedent to the spouse in exercise of either a general or special power of appointment that could also have been exercised in favor of objects other than the spouse.²⁶⁶ If the special power was exercisable solely in the spouse's favor, the UPC adopts the relation-back theory of powers and treats the property appointed to the spouse as derived from the donor of the power and not from the donee-decedent. The rationale for this exception is obscure in cases where the spouse is not also the taker in default of the appointment designated by the donor of the power; any exercise in the spouse's favor, whether or not the spouse is the sole potential object of the power, involves discretion on decedent's part which, if not exercised, defeats the spouse's potential interest in the property subject to the power.

Property derived from the decedent can also take the form of proceeds of life and accident insurance on the decedent's life attributable to premiums paid by the decedent.²⁶⁷ While insurance on decedent's life payable to beneficiaries other than the surviving spouse is excluded from the aug-

265. UPC § 2-207(a). Whether the quoted provision applies to § 2-202 is open to doubt. The statutory language is introduced by the phrase "For purpose of this subsection," and obvious reference to § 2-207(a). If the presumptive valuation controls for purposes of satisfying the spouse's elective share, however, it ought to control for purposes of computing the share. Otherwise, the amount included in the augmented estate and the amount deemed to pass to the spouse in satisfaction of the share could differ.

266. *Id.* § 2-202(2)(i).

267. *Id.*

mented estate, proceeds of insurance payable to the spouse are included "because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance."²⁶⁸ It is unfortunate, but probably unavoidable, that the insurance addition is tied to premiums paid by the decedent. It takes little imagination to forecast potential litigation concerning this requirement, centering on a multitude of factual patterns based upon the claim that premiums paid by another are indirectly attributable to the decedent.

A fourth kind of property derived from the decedent includes any lump sum benefit immediately payable to the surviving spouse; also included is the commuted value of any annuity contract proceeds payable to the surviving spouse and attributable to premiums paid by the decedent on annuity contracts under which the deceased spouse was the primary annuitant.²⁶⁹ This inclusion primarily reaches joint and survivor commercial annuity contracts or commercial annuities on decedent's life that provide a guaranteed payment period and designate the spouse as the beneficiary.

With respect to the last two forms of property, section 2-202(2)(i), provides that "premiums paid by the decedent's employer, his partner, a partnership of which he was a member or his creditors, are deemed to have been paid by the decedent." Thus, a group life insurance policy paid by decedent's employer but payable to the spouse would be included in the augmented estate.

Property derived from the decedent also includes the commuted value of any amounts payable to the surviving spouse after decedent's death under any public or private pension plan, disability compensation, death benefits or retirement plans other than social security, to compensate the decedent for services rendered or disabilities incurred.²⁷⁰ This inclusion primarily reaches public or private pension plans, other than social security, that pay benefits to a deceased employee's surviving spouse.

A sixth type of property derived from the decedent is that held by the decedent and the spouse at the time of the decedent's death as joint tenants with right of survivorship.²⁷¹ United States Savings Bonds held by decedent and the spouse as co-owners should be taken into account in computing the elective share. Doubts earlier expressed²⁷² with respect to including co-owned bonds of decedent and a person other than the spouse in the augmented estate focused on the potential problems of the spouse's elective right defeating the bond's survivorship feature. If the spouse is the surviving co-owner, inclusion of the bonds in the augmented estate would not impact

268. UPC § 2-202, Comment. Under N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1967), proceeds of insurance payable to decedent's surviving spouse are excluded in the computation of the spouse's elective share.

269. UPC § 2-202(2)(i). Under N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b)(2) (McKinney 1967), annuity contract proceeds payable to decedent's surviving spouse are excluded from the computation of the spouse's elective share.

270. UPC § 2-202(2)(j). Under N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(b)(2) (McKinney 1967), these benefits would not be taken into account in computing the spouse's elective share.

271. UPC § 2-202(2)(i).

272. See note 249 *supra* and accompanying text.

the survivorship feature but would only limit the right of the spouse to reach other property in the augmented estate.

Finally, the value of the surviving spouse's community property rights²⁷³ is included as property derived from the decedent.

All property owned by the spouse at the decedent's death or transferred by the spouse in a tainted manner "is presumed to be derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source."²⁷⁴ This presumption is rebuttable although difficult tracing problems can make it difficult or impossible for the spouse to overcome the presumption. It is unclear from the language of the UPC whether the spouse must specifically rebut the presumption for each item of the spouse's property included in the augmented estate or whether the spouse can rebut the presumption by evidence that a portion of the total value of all of the spouse's property was derived from a third party source. The latter method should be permissible. Otherwise, the spouse is penalized for not exhausting property derived from the decedent during their joint lifetimes rather than the property derived from a third party source.

Other problems are presented by the derivation concept. Suppose at decedent's death the spouse owns property then worth \$200,000. For the five years preceding decedent's death, the surviving spouse had been employed and earned \$50,000 before taxes but \$37,500 after taxes. Gross earnings could account for the \$200,000 personal estate. Actually, the spouse and the decedent pooled their incomes for the purpose of paying living expenses and the surviving spouse deposited \$500 from each week's salary into a personal savings account for a total accumulation of \$21,500, which is included in the spouse's \$200,000 personal estate. Is the spouse to be penalized for contributions to their joint living expenses? Is the spouse entitled to rebut the presumption by reducing the value of the property owned at death by the gross salary even though \$12,500 clearly went towards the payment of income taxes? These questions illustrate some of the construction and proof problems that await the surviving spouse.

Another problem presented by the derivation concept deals with property received by the spouse in satisfaction of lifetime support obligations. Must the spouse's personal effects purchased by the decedent be taken into account? At what point does a support item become a luxury item? Who owns the painting on the wall, the decedent's estate or the surviving spouse? As Professor Clark has noted, "The dividing line between wealth contributed in satisfaction of the obligation of support and true gifts is relevant in this connection, but will prove an elusive distinction to maintain."²⁷⁵

273. UPC § 2-202(2)(i).

274. *Id.* § 2-202(2)(iii).

275. Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 539 (1970). Professor Clark also states:

The property which she accumulated and still possessed at the husband's death but which she originally acquired from him in the form of reasonable support payments or in the form of household furnishings or necessities are arguably no more includible against her share than are items of food in the larder or clothes in the closet. The statute recognizes no distinction between gifts and support items, but

It is also unfortunate that the UPC fails to adopt a *de minimis* concept to exclude anniversary, Christmas, or birthday gifts to the spouse like section 2-202(1)(iv), which excludes transfers to the extent of the first \$3000 to donees other than the spouse. It might have been advisable in drafting section 2-202(2) to have excluded from the augmented estate all non-income-producing tangible personal property owned by the surviving spouse at decedent's death that is not then used in a trade or business or otherwise for the production of income. An exclusion of this kind can be supported on the ground that the value of these items is not ordinarily substantial and such items are unlikely to assure the spouse long term financial security. The excluded items would ordinarily constitute support items received by the spouse and small gifts.

A further problem with the derivation concept is raised by post-transfer income, appreciation, and improvements. Suppose decedent transferred \$10,000 in cash to the spouse four years before decedent's death and the spouse wisely invested it in real estate. At decedent's death, the real estate is valued at \$50,000. Suppose further that the spouse also owns a savings account with a balance of \$12,000 attributable solely to rental income from the real property and interest on the savings account. Section 2-202(2)(ii) provides that "income earned by included property prior to the decedent's death is not treated as property derived from the decedent."²⁷⁶ This provision should shield the \$12,000 account from the augmented estate. The burden is on the spouse to prove how much of any property owned at death is attributable to income earned on property derived from the decedent. By applying a dictionary meaning to the word "derive" (to trace to, or from a source²⁷⁷), appreciation resulting from the retention of assets received by the spouse from the decedent could be included in the augmented estate. Furthermore, because the appreciation has not been realized, the appreciation arguably would not be shielded by the income exception. Suppose, on the other hand, the spouse had sold the real estate for \$50,000 before decedent's death and reinvested the proceeds in securities that were owned by the spouse at decedent's death and valued at that time at \$60,000. In this case at least \$40,000, the appreciation realized on the sale of the real estate, should be shielded under the income exception if "income" is given a tax law meaning and not a trust accounting meaning. However, this result suggests an unwarranted distinction (which arguably exists by virtue of the income exception) between realized and unrealized appreciation on property derived from the decedent. Unfortunately, federal estate tax analogies are inconclusive.²⁷⁸ The preceding discussion highlights the difficult tracing

it seems probable that a line will have to be drawn at some point if for no other reason than administrative feasibility.

Id. 539 n.82.

276. The word "income" is not defined in the Uniform Probate Code. *But see* REVISION OF THE UNIFORM PRINCIPAL AND INCOME ACT (U.L.A.) § 3.

277. WEBSTER'S NEW INTERNATIONAL DICTIONARY 705 (2d ed. 1959).

278. Section 2035 of the Internal Revenue Code as it applied to transfers prior to January 1, 1977, included in a decedent's gross estate transfers within three years of decedent's death made in contemplation thereof. In valuing included property, post-transfer income and enhancements in value resulting from the donee's improvements or additions to the transferred property were excluded. Treas. Reg. § 20.2035-1(e) (1954). If the donee exchanged the

problems inherent in an income exception. Unfortunately, an alternative valuation that values completed interspousal transfers at the time the spouse becomes entitled to the possession of an outright transfer would be unfair to decedent's donees because it ignores any post-transfer appreciation that could be applied to the spouse's future support needs.

Property owned by the surviving spouse at the decedent's death and included in the augmented estate is valued as of the date of the decedent's death.²⁷⁹ Property transferred by the spouse that is included in the augmented estate is valued at the decedent's date of death or at the time the transfer became irrevocable, whichever first occurs.²⁸⁰ If decedent created an irrevocable trust with a retained life estate, or if the spouse transferred property derived from the decedent into an irrevocable trust with a retained life estate, the value of the property would be included in the augmented estate. However, the remainder interest of the trust created by the decedent would be valued at decedent's death because the remainder interest would not have become possessory prior to the decedent's death even though the interest was irrevocable.²⁸¹ On the other hand, if the spouse makes the transfer, the transfer is valued at the time it is made. If the value of the transferred property has increased between the date of the transfer and the date of the decedent's death, the increase in value will economically benefit the spouse without affecting the spouse's share in the augmented estate. The distinction is difficult to justify. Perhaps it is justified on the theory that like outright transfers in which the spouse cannot reclaim the property, the spouse cannot reclaim the transferred property and control its future investment for his or her own benefit. This theory, however, is equally applicable to decedent's transfers with a retained life estate, which are valued differently. The distinction may be the result of oversight.

J. Satisfying the Spouse's Elective Share

Under typical forced share statutes, a spouse who claims an elective share forfeits the right to take decedent's property by intestate or testate succession. Under the UPC, the surviving spouse may claim an elective share without forfeiting any property passing to the spouse by intestate or testate

transferred property for other property which was held by the donee at decedent's death, whether the transferred property or the exchanged property, valued at decedent's death or under the alternate valuation method, was included in the gross estate was unresolved. Compare *Igthart*, 28 B.T.A. 888 (1933), *aff'd*, 77 F.2d 704 (5th Cir. 1935), with *In re Kroger's Estate*, 145 F.2d 901 (6th Cir. 1944), *cert. denied*, 324 U.S. 866 (1945), and *Estate of James E. Fuzzell*, 9 T.C. 979 (1947), *reconsidered in* 11 T.C. 576 (1948), *aff'd sub nom. Burns v. Commissioner*, 177 F.2d 739 (5th Cir. 1949), *acquiesced in*, 1966-1 C.B. 2. See also Rev. Rul. 72-282, 1972-1 C.B. 306.

Under I.R.C. § 2040, jointly held property is included in the gross estate of the first joint tenant to die except to the extent the survivor proves contribution not attributable to the decedent. If O transfers corporate shares worth \$10,000 to B who later transfers the stock to O included in O's gross estate. Treas. Reg. § 20.2040-1(c)(4) (1954). However, if B sold the stock for \$20,000 and deposited the proceeds into a joint bank account in the names of O and B, and O then died, only \$10,000 would be included in O's gross estate. See Treas. Reg. § 20.2040-1(c) (1954). See also *Harvey v. United States*, 185 F.2d 463, 469 (7th Cir. 1950). *Contra*, *First Nat'l Bank v. United States*, 223 F. Supp. 963, 967 (W.D. Mo. 1963).

279. UPC § 2-202(2)(ii).

280. *Id.*

281. *Id.* § 2-202(1).

succession. Any share passing to the spouse by intestate or testate succession other than the homestead allowance, exempt property, and the family allowance, is first applied in satisfaction of the elective share to reduce contributions that otherwise might be due from other persons.²⁸² As initially proposed, the UPC would have permitted the spouse to renounce an intestate or testate share without reducing the amount of the spouse's elective share, and property so renounced would pass as if the spouse had predeceased the decedent and would be subject to contribution in satisfying the elective share. This right would not only have permitted the spouse to renounce interests which were difficult to value or of spurious value, but also would have permitted the spouse to affect the amount of contribution due from other persons in satisfaction of the elective share.²⁸³ In 1975, the Commissioners approved editorial changes to sections 2-206 and 2-207 of the UPC that prevent any renunciation from affecting the contribution formula. The changes provide that in satisfying the elective share, the value of property that would have passed to the spouse but for the renunciation shall be applied against the elective share and reduce the contributions otherwise due from transferees of property included in the augmented estate in the same manner as if there had been no renunciation and the renounced property had passed to the spouse.²⁸⁴

The following example illustrates the effect of this recent change. Suppose *O* died testate bequeathing \$50,000 to Child *X*, \$100,000 to Spouse *S*, and the residue of the estate (defined to capture all lapsed and renounced legacies) valued at \$150,000 after payment of administration expenses, funeral bill, homestead, family allowances and enforceable claims to Child *Y*. The net probate estate included in the augmented estate is \$300,000. The augmented estate also includes \$300,000 of lifetime transfers to *Z*. *S* owned no property at decedent's death. The augmented estate is \$600,000 and the elective share is \$200,000. As initially proposed, the spouse could renounce the \$100,000 general legacy, which would then pass to *Y*, the residuary legatee, and the shares of *X*, *Y*, and *Z* in the augmented estate and their contributions towards satisfaction of the elective share of \$200,000 would be as shown in Table 1.

TABLE 1

Beneficiary	Share of Augmented Estate Not Deemed Passing to Spouse	Percentage of \$600,000	Amount of Contribution	Net Benefit Passing to Beneficiary
<i>X</i>	\$ 50,000	8%	\$ 16,000	\$ 34,000
<i>Y</i>	250,000	42	84,000	166,000
<i>Z</i>	300,000	50	100,000	200,000
	<u>\$600,000</u>	<u>100%</u>	<u>\$200,000</u>	<u>\$400,000</u>

282. *Id.* § 2-207(a).

283. *Cf.* COLO. REV. STAT. § 15-11-207 (1974) (spouse may renounce beneficial interest in trust created by decedent and affect contribution formula).

284. UPC § 2-207(a).

In light of the recent editorial revision, X, Y, and Z in the aggregate would only contribute \$100,000 towards satisfaction of the spouse's elective share because the \$100,000 renounced legacy is treated as having passed to the spouse in partial satisfaction of the elective share. The shares of X, Y, and Z in the augmented estate and their contribution towards satisfaction of the balance of the \$200,000 elective share would be determined as shown in Table 2.

TABLE 2

Beneficiary	Share of Augmented Estate Not Deemed		Amount of Contribution	Net Benefit Passing to Beneficiary
	Passing to Spouse	Percentage of \$500,000		
X	\$ 50,000	10%	\$ 10,000	\$ 40,000
Y	150,000	30	30,000	120,000
Z	300,000	60	60,000	240,000
	<u>\$500,000</u>	<u>100%</u>	<u>\$100,000</u>	<u>\$400,000</u>

In addition, Y would receive the \$100,000 renounced legacy. Obviously, this recent editorial change as a practical matter will encourage spouses to accept all benefits passing to them by testate or intestate succession.

The satisfaction formula is set forth in section 2-207 of the UPC. Section 2-207(a) provides that "in the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from the recipients of transfers included in the augmented estate." Section 2-207(b) then provides that "remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein." These two sections represent the core of the satisfaction formula. Unfortunately, they are not free of substantial construction problems.

Section 2-207(a) is intended to reduce the amount of the elective share by the value of property that could be made available to the spouse to provide the spouse with future financial security. The verb "pass" obviously refers to property passing to the spouse by testate or intestate succession. The verb "have passed" is less clear. At minimum, it refers to property owned by the spouse at the decedent's death that does not pass to the spouse by testate or intestate succession but is derived from the decedent within the contemplation of section 2-202(2). Thus, it includes trust interests, joint tenancy property, insurance and other forms of property derived from the decedent. The verb "have passed" under any reasonable construction should also include property that at one time passed to the surviving spouse from the decedent and which the spouse thereafter transferred to third

parties.²⁸⁵ While the statute is not crystal clear, any construction that excludes the spouse's transfers from section 2-207(a) perforce must treat the spouse's donees as other recipients of property in the augmented estate within the meaning of section 2-207(b). Thus, by *inter vivos* transfers the spouse not only would be able to adversely affect the contribution liability of decedent's donees but also would be in the position of having to revoke his or her prior gifts to the extent contributions, if any, are due. Accordingly, section 2-207(a) should be construed to require that the value of all property owned or transferred by the surviving spouse that is derived from the decedent and included in the augmented estate first be applied against the elective share together with the value of all property passing or which would have passed but for the spouse's renunciation to the spouse by testate or intestate succession.

Section 2-207(a) further provides that "for purposes of this subsection" the spouse's beneficial interest in a life estate or a trust shall be presumed to equal one half of the property subject to the life estate or the trust estate. Thus, if *O* conveyed Blackacre to Spouse *S* for life, remainder to *X*, and at *O*'s death Blackacre is then worth \$100,000, the value of *S*'s interest is presumed to be \$50,000. This rebuttable presumption should apply to remainders in the spouse following a legal life estate or income interest. Thus, if *O* transferred property to *T* in trust to pay the income to *X* for life and upon *X*'s death to pay the corpus to *S*, the value of *S*'s interest is presumed to be one-half. It is expected that substantial litigation will arise to rebut this valuation presumption particularly if the surviving spouse is very young or very old. If the value of the surviving spouse's interest is presumed to be one-half of the value of the property from which the spouse's interest is carved, the value of the interests of all other persons in the same property is perforce one-half.

Since the interests of the other persons may also be included in the augmented estate and subject to contribution, it would have been advisable for the UPC to address this split interest valuation question with greater specificity. Similarly, the statute fails to establish a presumptive valuation formula when there are multiple beneficiaries, excluding the spouse, of present and future interests in the included property. This problem assumes greater significance because of the uncertainties concerning the identity of the transferees liable for contribution discussed below. For example, if *O* transfers property into a revocable trust to pay the income to Spouse *S* for life, remainder to Child *A* for life, remainder in fee to Grandchild *D*, and the trust is valued at \$100,000 at *O*'s death, the entire transfer is included in the augmented estate. The remainder interests of *A* and *D* are included under section 2-202(1)(ii) of the UPC as a revocable transfer to a donee other than the surviving spouse and *S*'s income interest is included under section 2-202(2) as property of *S* "owned" at *O*'s death. While the entire \$100,000 is

285. Cf. COLO. REV. STAT. § 15-11-207 (1974) (reduces the spouse's elective share by the spouse's third party transfers included in the augmented estate).

included by a combination of these two provisions, the separate values of the interests of *S*, *A*, and *D* are important because the value of *S*'s interest is first applied towards satisfaction of the elective share and, if *A* and *D* are recipients of property liable for contribution, the value of their interests (together with the value of the interests of other recipients of property included in the augmented estate) is taken into account in determining donee contributions towards payment of the remaining portion of the elective share, if any.

In apportioning the unsatisfied portion of the elective share among the recipients of property included in the augmented estate, section 2-207(b) provides that "remaining property of the augmented estate is so applied that liability for the balance of the elective share. . . is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein." The antecedent of "therein" is unclear. If the antecedent is "remaining property of the augmented estate," the contribution formula works: the denominator of the fraction is the augmented estate less the value of all property passing to the spouse included in the augmented estate. Because this construction accomplishes the obvious purpose of the statute it should be preferred. On the other hand, if the antecedent of "therein" is the augmented estate, which is not a strained construction, the contribution formula would not result in complete satisfaction of the elective share in all cases. Under the latter construction, the numerator of the fractional contribution formula for each recipient would be the value of property in the augmented estate received by the recipient and the denominator would be the augmented estate, which includes the spouse's property. The sum total of contributions due from all recipients (other than the spouse) would be less than 100 percent of the total contribution required. The appropriate contribution fraction should be the value of the share of each recipient liable for contribution in the augmented estate over the values of all of the shares of all recipients liable for contribution. Expressed differently, the denominator of the contribution fraction should be the augmented estate reduced by the value of all property that passes or is deemed to pass to the spouse under section 2-207(a). As noted this is the effect of the suggested preferred construction, which treats the antecedent of "therein" as "remaining property in the augmented estate."

Both sections 2-207(a) and 2-207(b) refer to contributions by recipients of transfers in the augmented estate. The word "recipients" is undefined. However, section 2-207(c) provides:

Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

This section is intended to provide a gloss to the meaning of the word "recipient" used in the preceding subsections.

When property has been transferred into a trust the term of which continues beyond the decedent's death, are the transferees the trustees or the beneficiaries of the income and principal interests? If the transferees are the beneficiaries of income and principal, how are they to make the contribution towards satisfaction of the elective share? In such a case, what effect would a spendthrift clause have on their ability to make a contribution? If the transferees are the trustees, as this author believes, is the contribution to be charged to the income or principal account? It would have been advisable for the UPC to provide that when the augmented estate includes a trust that continues beyond the decedent's death, the trustees shall be liable for any contribution towards payment of the elective share based upon the value of the beneficiaries' shares and any contribution shall be charged to principal. A charge to principal may be the most equitable if the spouse is not the income beneficiary. The income beneficiary bears the burden of the contribution by his or her loss of future income on the amount of the contribution. It also has the distinct advantage of avoiding problems which might arise if there are contingent remaindermen of principal since the charge to principal reduces what the persons ultimately entitled to the corpus receive. If the spouse is the income beneficiary some amortization of the spouse's lost income should be provided.

If a transferee, as that word is used in section 2-207(c), includes the spouse (and there is no reason it should not) and donees of a transferee are liable for contribution, does section 2-207(c) require the spouse's donees to contribute ratably with other recipients of property from the augmented estate under section 2-207(b)? In the earlier discussion of section 2-207(a), the argument was made that the spouse's third party transfers included in the augmented estate should be applied in total against the spouse's elective share under the "have passed" language of that section. Any other construction would permit the spouse to increase the amount of contributions due from the decedent's donees by transferring away assets the spouse received from the decedent during the marriage. Accordingly, contribution from the spouse's donees under section 2-207(c) should not be required.

Decedent's transferees are liable for contribution even though they no longer have the transferred property. Their donees are liable for contribution only to the extent they have the transferred property or its proceeds. Purchasers from decedent's transferees or their donees are not liable for contribution. Thus, if *O* transfers \$5000 in cash to Child *A* one year before *O*'s death to be used to pay for *A*'s college education, *A* may be liable for contribution even though the funds are exhausted. On the other hand, if *O* transferred \$5000 to Child *A* one year before *O*'s death and *A* transfers the \$5000 to Grandchild *B* to be used to pay for *B*'s college education, *B* would not be liable for contribution, although *A* would continue to be liable. This much is clear. However, if an original transferee transfers property to a donee who has the property or its proceeds, are the transferee and his or her donee jointly and severally liable for contribution? If the transferee pays the contribution, can the transferee recoup the contribution from the donee or vice versa?

Section 2-207(c) provides that "[a] person liable for contribution may choose to give up the property transferred to him or pay its value as of the time it is considered in computing the augmented estate." In most cases, the value of included property should exceed the amount of any contribution liability. In a rare case, particularly with respect to outright transfers, the value of the property may have sharply declined between the date of the transfer and decedent's date of death and the donee may prefer to surrender the property to the spouse in lieu of paying a greater contribution liability. Section 2-207(c) clearly evidences the policy of subjecting a recipient to contribution liability only with respect to property received from the augmented estate and it negates an intent to subject the recipient's other assets to the contribution liability.

Under section 2-201(a), the spouse is granted a right of election against "one third of the augmented estate." Under section 2-202 the augmented estate is composed of the net probate estate increased by the *value* of certain property transfers. Under section 2-207, the elective share is satisfied by *values*. Since section 2-201(a) does not refer to the *value* of the augmented estate and section 2-202 does not refer to the value of the net probate estate, a question arises whether the spouse receives a fractional share of the augmented estate that increases and decreases with market fluctuations during estate administration and attaches to each asset included in the augmented estate *or* a pecuniary share of the augmented estate that remains constant during administration *or* a little of both. Section 2-205(d) lends support to the argument that the spouse receives a pecuniary amount. The determination of the fractional or pecuniary nature of the elective share can affect the potential liability for contribution. From an administrative point of view, a pecuniary amount is preferrable, although in a rising market the spouse will lose the benefit of post-death appreciation. The issue is also important in light of potentially different income tax consequences attributable to a distribution of assets in satisfaction of fractional and pecuniary interests and the income tax basis of property received by the spouse.²⁸⁶

K. Illustration of the Computation and Satisfaction of the Elective Share

O died on August 10, 1976, a domiciliary of a Code state, survived by Spouse *S* and three children, *A*, *B*, and *C*, of a prior marriage. *O*'s first spouse died in 1955. *O* and *S* were married in 1969. Neither *O* nor *S* ever signed a blanket waiver of their rights in the estates of the other. Unless otherwise stated, neither *O* nor *S* consented to any specified transfer.

²⁸⁶ With respect to estates of decedents dying prior to January 1, 1977, for income tax purposes, to the extent the personal representative distributes appreciated property from the estate to the spouse in satisfaction of a pecuniary share, the estate realizes gain or loss on the distribution and the spouse takes a basis in the distributed property equal to its fair market value on the date of distribution. Treas. Reg. §§ 1.661(a)(2)(f)(1), 1.1014-1(a) (1973). If the executor distributes appreciated property in satisfaction of a fractional interest, no gain or loss is realized on a distribution of appreciated assets and the basis of the distributed property in the hands of the spouse is equal to its basis in the hands of the personal representative. *Id.* Analogous rules apply with respect to estate of persons dying after December 31, 1977. See I.R.C. § 1040.

Under the terms of *O*'s will, *O* bequeathed \$150,000 to *S* and the residue of the probate estate after the payment of debts, expenses, and estate taxes in equal shares to *A*, *B*, and *C*. The value of *O*'s gross probate estate is \$565,000. It is subject to the payment of enforceable expenses and claims, excluding estate taxes, of \$30,000, in addition to a \$5000 homestead allowance, \$3500 exempt property, and a \$15,000 family allowance. Other facts relevant to the computations are set forth in the following calculations:

1. *Computation of the Augmented Estate and Elective Share*

a. *Net Probate Estate*

According to section 2-202 the probate estate is first reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims.

GROSS PROBATE ESTATE		\$565,000	
LESS:			
Enforceable Expenses &			
Claims, other than Estate Taxes	\$30,000		
Homestead Allowance	5,000		
Exempt Property	3,500		
Family Allowance	15,000		53,500
NET PROBATE ESTATE			\$511,500

b. *Donee Transfers*

To the net probate estate is added the value of donee transfers of the types described in section 2-202(1).

1. On January 15, 1957, *O* transferred \$50,000 into a revocable *inter vivos* trust for the benefit of *O*'s mother, *M*. *O* retained the power of revocation at death. The corpus was then valued at \$200,000. *M* survived *O*. This revocable trust is excluded from the augmented estate because the transfer occurred prior to the marriage. —0—
2. On February 9, 1970, *O* transferred securities then worth \$200,000 into an irrevocable *inter vivos* trust. Under the terms of this trust, the income was payable to *O* for life and upon *O*'s death the corpus was distributable to Child *A*. At *O*'s death, the corpus was worth \$250,000. This trust is included in the augmented estate under section 2-202(1)(i) at its value at *O*'s death when the remainder interest became possessory because *O* retained the income interest at death. \$250,000
3. On March 9, 1970, *O* transferred a 40 acre farm then valued at \$95,000 to Child *C* retaining a life estate in the transferred property. In consideration for this transfer, *C* paid *O* \$5000, an amount less than the value of *C*'s remainder interest. At *O*'s death, the farm was worth \$120,000. It is included in the augmented estate under section 2-202(1)(i) because of *O*'s retained possessory interest at death and at its value at *O*'s death when *C*'s interest became possessory. However, this value is reduced by \$5000, the amount of the partial consideration received by *O*. 115,000
4. On September 4, 1970, *O* deposited \$25,000 into a savings account in the name of *O* and Child *B* as joint tenants with right of survivorship.

- This account is valued at \$19,000 at *O*'s death and is included in the augmented estate at that value under section 2-202(1)(iii) because *B*'s interest became possessory at that time. 19,000
5. On March 6, 1971, *O* deposited \$15,000 into a savings account registered in the name of "*O* in trust for Child *A*." This "Totten trust" is included in the augmented estate under section 2-202(1)(ii) as a revocable transfer. At *O*'s death the account was then worth \$8000 and is included at that value because *A*'s interest then became possessory. 8,000
 6. On December 25, 1971, *O* transferred \$25,000 into a revocable *inter vivos* trust for the benefit of *O*'s mother *M*. At *O*'s death, the corpus of the trust was valued at \$55,000. However, because *S* consented to this transfer it is excluded from the augmented estate. —0—
 7. On February 4, 1972, *O* purchased a \$50,000 life insurance policy designating Child *C* as the beneficiary. At *O*'s death, the proceeds of insurance were paid to *C*. The proceeds are excluded from the augmented estate under section 2-202(1), which exempts insurance payable to persons other than the spouse from the operation of the statute. —0—
 8. On May 18, 1973, *O* and Child *A* purchased Blackacre as joint tenants with right of survivorship for \$40,000. Each of them contributed one half of the purchase price. In 1974, when Blackacre had appreciated to \$50,000 in value, *A* financed an improvement on the property at a cost of \$25,000. At *O*'s death, Blackacre was worth \$90,000. While not free from doubt, *O* should be deemed to have contributed one-third to the cost of Blackacre as improved and \$30,000 should be included in the augmented estate. 30,000
 9. On November 5, 1974, *O* gave Child *C* securities then worth \$48,000. The securities were valued at \$59,000 at *O*'s death. The securities should be included in the augmented estate under section 2-202(1)(iv) and valued at the time of the transfer when *O*'s interest became possessory less the \$3000 exclusion. 45,000
 10. On June 11, 1975, *O* transferred \$300,000 into an irrevocable *inter vivos* trust. Under the terms of this trust, income was payable to *S* for life and upon *S*'s death, the income was payable to Child *C* for life and upon the death of the survivor of them, the corpus distributable to *C*'s then surviving issue. The interests of *C* and *C*'s issue but not *S* are included in the augmented estate under the provisions of section 2-202(1)(iv). *S*'s interest is also included in the augmented estate under section 2-202(2). Since neither the interest of *C* nor *C*'s issue became possessory prior to *O*'s death, their interests should be included at values as of *O*'s death. At that time, the corpus was worth \$280,000. Under section 2-207(a), *S*'s interest is presumed to be worth one half of this value; perforce the interest of *C* and *C*'s issue is worth one half. While not free from doubt, presumably if the interest of each of *C* and *C*'s issue is valued at more than \$3000, a \$6000 exclusion is available unless the trustee were the donee. If this trust had been created more than two years prior to the decedent's death, only the spouse's interest would have been included in the augmented estate. 134,000
 11. On December 25, 1975, *O* transferred \$2500 in cash to each of Child *A*, Child *B*, and Friend *D*. All of these transfers are excluded from the augmented estate because of the \$3000 exclusion under section 2-202(1)(iv). —0—

c. Spouse's Property

The value of the spouse's property interests of the type described in section 2-202(2) is also added to the net probate estate.

(i) On October 10, 1968, <i>O</i> gave <i>S</i> \$5000 in securities as an engagement present. <i>S</i> owned these securities at <i>O</i> 's death at which time they were valued at \$21,000. The securities are included in the augmented estate under section 2-202(2), which applies to property acquired from the decedent prior to and during the marriage. While not free from doubt; presumably the post-transfer appreciation on property derived from the decedent is included in the augmented estate.	\$ 21,000
(ii) On February 8, 1970, <i>O</i> purchased a \$15,200 life insurance policy designating <i>S</i> as the beneficiary. Upon <i>O</i> 's death, the proceeds of this policy were paid to <i>S</i> . Insurance payable to a spouse but not third party donees is included in the augmented estate under section 2-202(2).	15,200
(iii) On June 11, 1975, <i>O</i> transferred \$300,000 to the trust described in item 10 above. One half of this trust, the presumptive percentage interest of <i>S</i> 's income interest valued at <i>O</i> 's death, is included in the augmented estate under section 2-202(2).	140,000
(iv) On November 3, 1975, <i>O</i> gave <i>S</i> \$50,000 in cash. Immediately after this transfer, <i>S</i> transferred these funds into a revocable trust reserving the income for life. This trust valued at \$32,000 at <i>O</i> 's death is included in <i>O</i> 's augmented estate under section 2-202(2) because this property derived from <i>O</i> would have been included in <i>S</i> 's augmented estate if <i>S</i> predeceased <i>O</i> .	32,000
(v) On December 25, 1975, <i>O</i> gave <i>S</i> a gift of \$15,000 in securities. <i>S</i> immediately gave these securities to a child of <i>S</i> by a former marriage. At <i>O</i> 's death the securities were worth \$21,000. If <i>S</i> had predeceased <i>O</i> , this transfer would have been included in <i>S</i> 's augmented estate; therefore they are included in <i>O</i> 's augmented estate because the property is derived from <i>O</i> . For valuation purposes, the securities are valued at the time of the transfer less the \$3000 exclusion.	12,000
(vi) On January 8, 1976, <i>O</i> gave <i>S</i> \$50,000 in cash. <i>S</i> immediately gave this gift to Child <i>A</i> . <i>O</i> joined in the transfer. Accordingly, it is excluded from <i>O</i> 's augmented estate. If <i>S</i> had predeceased <i>O</i> , it would have been excluded from <i>S</i> 's augmented estate as well.	—0—
(vii) At <i>O</i> 's death, <i>S</i> owned property having a value at that time of \$890,000. <i>S</i> can establish that <i>S</i> inherited \$820,000 from <i>S</i> 's first spouse and that \$20,000 is attributable to income earned on property received from <i>O</i> . Under section 2-202(2) a presumption arises that the difference was acquired from <i>O</i> and is included in the augmented estate.	50,000
(viii) Subsequent to <i>O</i> 's death, <i>S</i> applied for and received the \$255 social security death benefit. In addition, <i>S</i> will be entitled as <i>O</i> 's surviving spouse to a monthly stipend of \$485 from Social Security. Under section 2-202(2), these items are excluded from the augmented estate.	—0—
AUGMENTED ESTATE (sum of net probate estate, donee transfers, and spouse's property)	<u>\$1,382,700</u>
ELECTIVE SHARE (one third of the augmented estate under section 2-201)	<u>\$ 460,900</u>

2. Satisfaction of Elective Share

In satisfying the elective share, the value of the spouse's property interests included in the augmented estate reduce the value of the elective share to be satisfied by other recipients of property of the augmented estate.

AMOUNT OF ELECTIVE SHARE		\$460,900
LESS SPOUSE'S PROPERTY:		
Securities [item (i) above]	\$ 21,000	
Insurance [item (ii) above]	15,200	
June 11, 1975, trust [item (iii) above]	140,000	
Revocable trust [item (iv) above]	32,000	
Spouse's transfer [item (v) above]	12,000	
Spouse's property at O's death [item (vii) above]	50,000	
Bequest under will	150,000	420,200
BALANCE OF ELECTIVE SHARE AND CONTRIBUTIONS DUE FROM OTHERS		<u>\$ 40,700</u>

3. Allocation of Property Included in the Balance of the Augmented Estate and Contribution Liability

The balance of the elective share due from other recipients is allocated among them in proportion to their interests in the balance of the augmented estate. The balance of the augmented estate passing to persons other than S is calculated as follows:

Value of Augmented Estate	\$1,382,700
Less property in Augmented Estate passing to S	<u>420,200</u>
Equals Augmented Estate passing to others	<u>\$962,500</u>

The allocation of property included in the balance of the augmented estate before contribution to the spouse's elective share from A, B, C, and Trustees is presented in Table 3. The contribution from each recipient to the elective share is then determined according to their proportionate shares in the balance of the augmented estate, as illustrated in Table 4.

TABLE 3

Property Description	To A	To B	To C	To Trustees
Trust dated February 9, 1970 [item 2 above]	\$250,000			
Farm transfer with retained life estate [item 3 above]			\$115,000	
Joint tenancy bank account [item 4 above]		\$ 19,000		
Totten trust [item 5 above]	8,000			
Joint tenancy real estate [item 8 above]	30,000			
Gift of securities [item 9 above]			45,000	
Trust dated June 11, 1975 [item 10 above]				\$134,000
Shares of probate estate	<u>120,500</u>	<u>120,500</u>	<u>120,500</u>	
	<u>\$408,500</u>	<u>\$139,500</u>	<u>\$280,500</u>	<u>\$134,000</u>

TABLE 4

Due from A	$\frac{408,500}{962,500} \times 40,700 =$	\$17,274
Due from B	$\frac{139,500}{962,500} \times 40,700 =$	5,899
Due from C	$\frac{280,500}{962,500} \times 40,700 =$	11,861
Due from Trustees	$\frac{134,000}{962,500} \times 40,700 =$	5,666
		<u>\$40,700</u>

If, in the foregoing illustration, *O* had appointed \$600,000 to *S* by the exercise of a general power granted to *O* by his predeceased father, the augmented estate would have been increased from \$1,382,700 to \$1,982,700 and the elective share would have been increased from \$460,900 to \$660,900. However, because *S* would have been charged with property equal in value to \$920,200, no contributions would be due from other recipients of property included in the augmented estate. While it can be anticipated that in the great majority of estates the value of property passing to the spouse included in the augmented estate will exceed the elective share in each estate, the attorney will necessarily have to undertake the calculations to fully appraise the spouse of his or her rights.

In the foregoing hypothetical, estate taxes are charged to the residue of *O*'s estate passing to the three children.²⁸⁷ The will has absolved *S* from any tax liability *S* might otherwise have had to pay under the provisions of section 3-916 of the UPC, which requires an apportionment of the estate tax liability unless the will otherwise provides. An argument might be made that the amount of the tax liability *S* would have had to pay constitutes an additional benefit passing from *O* to *S* under the will and should not be taken into account in computing the shares of *A*, *B*, and *C* in the augmented estate.

L. Election Procedure

The right of election is personal to the surviving spouse and may only be exercised during the spouse's lifetime.²⁸⁸ If the spouse dies prior to the filing of an election, the right dies with the spouse. If the purpose of the elective share is to provide long term financial security for the surviving spouse,

287. Professor Effland has suggested that if estate taxes are charged to the residue, then in order to achieve an equitable apportionment, the residuary gift must be reduced by the amount of taxes in determining the contribution formula for the residuary legatees. Effland, *Rights of the Surviving Spouse and Children*, in UNIFORM PROBATE CODE PRACTICE MANUAL 55 (1972). This appears contrary to the statute in that the apportionment is based upon the value of property included in the augmented estate and estate taxes are includible in the augmented estate since, by definition, they are not claims. See UPC § 1-201(4). If taxes reduce the residuary devise for contribution purposes but are included in the augmented estate, the contribution formula will fail.

288. UPC § 2-203.

There is no reason to provide protection for the spouse after the spouse has died.²⁸⁹ This view may be somewhat short-sighted. If the personal representative of the estate of the surviving spouse were permitted to petition for an elective share, the election could potentially increase the elective share, the spouse's estate, and the shares of children of both the decedent and the spouse who might also have been disinherited by the decedent. One solution to this problem might have been to authorize the court to permit an election on behalf of the deceased spouse if an election would benefit other members of decedent's family. This authority would recognize that in part the justification for an elective share is the recognition of the contributions of the spouse to the acquisition of decedent's wealth.

If decedent's spouse is a minor or a person for whom a conservator has been appointed,²⁹⁰ the spouse's right of election may be exercised "only by order of the court in which protective proceedings as to his property are pending."²⁹¹ The court may order the exercise of the right of election if the court finds the exercise "necessary to provide adequate support for [the spouse] during his probable life expectancy."²⁹² The scope of review under this standard is unclear. For example, to what extent, if any, must the court consider other resources available to the spouse for support, such as social security or pension rights derived from the spouse's employment? If other resources available to the spouse are sufficient to provide support even though they are not derived from the decedent, there appears to be no right of election even though if the spouse were competent there would be. Section 2-203 appears to authorize the court to fashion a relief in light of all the facts and circumstances. If the spouse's resources would provide only partial support, the court might otherwise limit the right of election to satisfy the spouse's support needs in excess of available resources. Furthermore, the provision is severely limited because it excludes consideration of the effect of any election on the spouse's future income and estate tax liabilities and the interests of other members of the decedent's family.²⁹³

The right of election is exercised by the filing of a petition with the court having jurisdiction over the estate and the mailing or delivering of a copy to any personal representative either within nine months after decedent's date of death or within six months after the probate of the deceased spouse's will, whichever last expires.²⁹⁴ Generally, under the UPC a will may not be admitted to probate more than three years after the decedent's death.²⁹⁵ Thus, the maximum time in which the petition may be filed is three years

289. See NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE: LEGISLATIVE HISTORY 55 (Proceedings of Committee of the Whole, in Philadelphia, Pa., July 30, 1968).

290. The Code defines such person as a "protected person." UPC §§ 2-203, 5-101(3).

291. UPC § 2-203.

292. *Id.*

293. See generally Annot., 3 A.L.R.3d 6 (1965).

294. UPC § 2-205(a). As originally drafted, § 2-205(a) required that the petition be filed within six months after the publication of the notice to creditors. The filing requirement was revised because of the possibility that the right of election would remain open in an unadministered estate and constitute a cloud on title. *Id.* § 2-205, Comment.

295. *Id.* § 3-108.

and six months after decedent's death, and if not filed within that period the right of election expires. In an attempt to give greater security to donees of nonprobate property included in the augmented estate, section 2-205(a) also provides that nonprobate transfers included in the augmented estate under section 2-202(1) shall be excluded from the computation of the augmented estate if the petition to claim an elective share is not filed within nine months after the decedent's death. This provision may create an incentive on the part of the transferees of nonprobate assets to use dilatory tactics to prevent the spouse from making an informed election within the nine month period in order to avoid contributing to the elective share. Presumably the courts have inherent powers to rectify any loss to the spouse occasioned by such actions. Moreover, while the UPC does not contemplate a protective election, the court is authorized for good cause shown to extend the election period if the spouse petitions for an extension before the statutory election period has expired.²⁹⁶ Presumably, an extension would be granted whenever the financial condition of the estate and potentially tainted transfers are uncertain and the spouse cannot make an informed election. The requirement that a petition for an extension be filed before the statutory period has run may create hardship and even loss of the elective share for the spouse and places a premium on the diligence of the spouse's attorney to insure that the spouse's rights are protected.²⁹⁷ In other jurisdictions, the court is empowered to give relief to the spouse who fails to timely file an election even though a prayer for relief is made beyond the election period.²⁹⁸

Notice of time and place of the hearing on the spouse's petition shall be given to persons who are interested in the probate estate and to the other distributees and recipients of property in the augmented estate who may be liable for contribution to the elective share.²⁹⁹ Thus, notice may have to be given to the heirs even if decedent died testate, to beneficiaries under the will if decedent died testate, and to donees of *inter vivos* transfers included in the augmented estate.³⁰⁰ After notice and hearing, the court shall determine both the elective share and its payment from augmented estate assets consistent with the requirements of section 2-207.³⁰¹ At the hearing, the court would consider what assets are properly included in the augmented estate, their values, and other disputed matters. With respect to property that has not come into the possession of the personal representative or has been distributed by him or her, the court "shall fix the liability of any person who has any interest in the fund or property or who has possession thereof.

296. *Id.* § 2-205(a).

297. *See In re Estate of Baker*, 171 Misc. 1022, 1023, 14 N.Y.S.2d 318, 320, *aff'd*, 258 App. Div. 718, 15 N.Y.S.2d 137 (1939).

298. *See, e.g.*, N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(e)(2) (McKinney 1967).

299. *See* UPC § 2-205(b). The manner of the giving of notice is set forth in § 1-401 of the UPC and may include notice by mailing, personal delivery or publication.

300. If decedent's will has been informally probated shortly after the decedent's death, it would be possible for the election period to expire before the will contest period expires. *See id.* § 3-108 (generally one year after probate). In such case, the spouse should join both the heirs and devisees under the informally probated will to bind them to the outcome of the proceeding.

301. *See id.* § 2-205(d).

whether as trustee or otherwise."³⁰² If less than all persons against whom relief could have been sought are made parties to the proceeding, the persons who have been made parties to the proceeding are subject to contribution in an amount no greater than that for which they would have been liable if all parties from whom relief might have been sought were made parties to the proceeding.³⁰³ The burden is on the spouse to join in the proceeding as many potential contributors as possible and the spouse bears the burden of the loss of contribution from persons who are not parties to the proceeding.³⁰⁴ Orders binding against persons who were properly joined in the proceeding may be enforced in other courts in the state or courts of other jurisdictions.³⁰⁵

Section 2-204 of the UPC provides that the right of election may be waived in whole or in part either before or after the marriage. The waiver must be evidenced by either a written "contract, agreement or waiver" that is signed by the waiving party after fair disclosure.³⁰⁶ The right of election may be waived either bilaterally or unilaterally.³⁰⁷ While section 2-204 does not elaborate on the meaning of fair disclosure, at a minimum the waiving spouse should have knowledge of the extent of the right of election and the value of the assets subject to the waiver.

A blanket waiver of "all rights" (or equivalent language) in the property of the estate of either a present or a prospective spouse or a complete property settlement that is entered into "after or in anticipation of separation or divorce" waives all rights to (1) an elective share, (2) the homestead allowance, (3) the family allowance, (4) exempt property and (5) benefits which would pass to the waiving spouse by intestate succession or under the provisions of any will executed prior to the waiver.³⁰⁸ If the waiver is executed during the marriage but is not intended to deprive the waiving spouse of property passing under a previously executed will, this intent should be specified in the waiving instrument.

While section 2-204 also permits a partial waiver, in practice its application to partial waivers will be limited to cases in which the spouse waives the right of election to the extent it exceeds a stated dollar amount. Section 2-204 is of little practical necessity if the waiver is limited to a specific asset since section 2-202(1) provides that any transfer is excluded from the augmented estate if made with either the written consent or joinder of the surviving

302. *Id.* This provision supports the position that trustees of non-probate transfers in trust are the recipients of property for contribution purposes within the meaning of § 2-207(b).

303. *Id.* § 2-205(d).

304. Appropriate forms may be found in UNIFORM PROBATE CODE PRACTICE MANUAL 257-92 (1972).

305. UPC § 2-205(e); see notes 199-200 *supra* and accompanying text.

306. *Id.* § 2-204.

307. *See id.*

308. The comments to the section indicate that the operation of the property settlement as with a waiver and renunciation avoids the problem of whether the surviving spouse can share in decedent's estate if decedent dies during the pendency of the divorce proceedings. If there is a complete property settlement agreement, the surviving spouse cannot share in the estate. If the property settlement agreement follows the divorce, § 2-204 is unnecessary to terminate the right of election since the divorce terminates the status of the survivor as a surviving spouse. *Id.* § 2-602(b)(1).

spouse, and operates exactly like a waiver of the right as to specific property. If the spouse waives the right to the extent it exceeds a stated dollar amount, it is unclear how the right of election that is not waived shall be satisfied. Presumably, the waiver could specify that the right shall first be satisfied out of the decedent's probate estate before subjecting *inter vivos* transfers to contribution. If the waiver is silent, the amount waived presumably should reduce *pro rata* the amount of contribution due from the recipients of property included in the augmented estate. Section 2-204 is designed in large part to accomplish the common estate planning goal of providing for children of a former marriage free and clear of the potential claims of a later spouse.

As originally promulgated, sections 2-206 and 2-207 of the UPC would have permitted an electing spouse to renounce any benefit passing to the spouse by intestate or testate succession without adversely affecting the amount due the spouse in satisfaction of the elective share. A 1975 editorial change to these provisions reversed this position. Section 2-206 no longer addresses the issue of renunciation, which is now governed exclusively by section 2-801,³⁰⁹ and section 2-207 charges against the elective share the value of any interest that would have passed to the electing spouse by intestate or testate succession but for the renunciation. This change creates an incentive, if not a mandate, for the spouse to take benefits passing by intestate or testate succession that in all events are treated as passing to the spouse in satisfaction of the elective share. Section 2-206 now provides only that the surviving spouse is entitled to the homestead allowance, exempt property, and family allowance without regard to the fact that the spouse elects to claim an elective share. Thus, these statutory rights are in addition to the elective share. As originally promulgated, section 2-206(b) provided that if decedent's will provided benefits to the spouse in lieu of these rights the spouse could not claim these rights unless the spouse renounced the substitute provisions in the will. The comments to revised section 2-206 provide that the deletion of section 2-206(b) dealing with "devises that are intended to be in lieu of family exemptions, does not alter the ability of the testator, by express provision in the will, from putting the surviving spouse to an election between accepting the devises provided or accepting the family exemptions provided by law." The UPC does not deal with the inter-relationship of section 2-206 as colored by the comment and sections 2-202 and 2-207. If a devise is intended as a substitution for the family exemptions, then like the exemptions, the devise if not renounced should be in addition to the elective share and should be excluded from the augmented

309. The spouse may renounce any interest passing by way of intestate or testate succession by a signed instrument describing the interest or property renounced and declaring the renunciation which instrument shall be filed not later than six months after the decedent's death or nine months after vesting if a future interest. *Id.* § 2-801(a), (b). No provision is made for an extension of the disclaimer period. Since the statute requires a renunciation of a testamentary benefit to be filed within six months after decedent's death, the renunciation may have to be filed before the will is probated. Under § 3-108, the decedent's will may be probated within three years of decedent's death. But if decedent's will is not probated within six months after death, how can a person renounce an interest thereunder?

estate. If the devise is renounced and the spouse claims the family exemptions, the exemptions are excluded from the augmented estate and the renounced devises should not reduce the spouse's elective share.

The elective share is computed against the augmented estate without reduction for estate and inheritance taxes. Section 3-916 of the UPC provides for the apportionment of estate taxes unless the decedent's will otherwise provides. Estate taxes shall be apportioned among the persons beneficially interested in the gross estate determined for federal estate tax purposes. Thus, unless the decedent's will otherwise provides, the spouse's elective share will be subject to the payment of its share of estate taxes. For the purposes of apportionment, any marital deduction³¹⁰ available on account of the elective share will inure to the benefit of the spouse.³¹¹ The amount of estate taxes apportioned against the elective share reduces the allowable marital deduction, if measured by one-half of the adjusted gross estate, unless the amount of taxes apportioned to the elective share would not reduce the value of property passing to the spouse below fifty percent of the adjusted gross estate.³¹² This apportionment scheme may create a circuitry problem requiring algebraic solution since the amount of estate taxes cannot be determined until the amount of the marital deduction is known and the amount of the marital deduction cannot be determined until the amount of the estate taxes is known.³¹³

The nature of the augmented estate and its constituent assets may also affect the amount of the estate tax marital deduction. Section 2056 of the Internal Revenue Code allows a marital deduction, subject to the greater of the \$250,000 or the fifty percent limitation, for the value of assets *included in the gross estate* that pass to the decedent's surviving spouse.³¹⁴ No deduction is allowed for assets excluded from the gross estate even though passing to the spouse at decedent's death. While assets in decedent's probate estate and *inter vivos* transfers included in the augmented estate under section 2-202(1)(i) (retained life estate), section 2-202(1)(ii) (revocable transfers), 2-202(1)(iii) (joint tenancy property) and section 2-202(1)(iv) (transfers within two years of death) will be included in both the federal gross estate and the augmented estate, the spouse's owned or transferred property will be included in the augmented estate under section 2-202(2) but excluded from the gross estate unless brought within the gross estate under one of the estate tax capture provisions.

No marital deduction is allowable for property included in the augmented estate passing to the spouse that is excluded from the federal gross estate. Moreover, the so-called nondeductible terminable interest rule may

310. I.R.C. § 2056. Under federal law, the estate is entitled to a marital deduction which shall not exceed the greater of one-half of the "adjusted gross estate" defined as the gross estate less debts and expenses, or \$250,000. *Id.* § 2056(c)(1).

311. UPC § 3-916(e)(2).

312. I.R.C. § 2056(b)(4).

313. See 2 FED. EST. & GIFT TAX REP. (CCH) ¶ 9635 (1974).

314. I.R.C. § 2056(e) defines "passing" to include property passing to the spouse in any manner outside of the will, by will, by intestate succession, or by right of election. See Treas. Reg. §§ 20.2056(e)-1(a)(3), -2(c) (1954).

disallow a marital deduction for certain property in the augmented estate passing to the spouse in satisfaction of the elective share. In providing for the marital deduction it was assumed that property not taxed in the estate of the first spouse to die because of the deduction would be taxed in the estate of the survivor. If property passes to the surviving spouse in a manner that is likely to cause its exclusion from the survivor's gross estate, no deduction is allowable in the estate of the first spouse to die. For example, no deduction is allowable for an income interest passing from the decedent to the spouse that terminates at the spouse's death because the spouse's interest would be excluded from the spouse's gross estate.³¹⁵ If the right of election can be satisfied with an interest in property which falls within the nondeductible terminable interest rule,³¹⁶ no marital deduction is allowable for such an interest even though the interest is included in the decedent's gross estate and the augmented estate.

Section 2056(b)(2) of the Internal Revenue Code (the so-called unidentified asset rule) provides that if the spouse's interest, whether characterized as a general legacy or in the nature of a residuary interest, may be satisfied with assets, or their proceeds, with respect to which no marital deduction would be allowable if the assets or proceeds passed directly from the decedent to the spouse, the marital deduction shall be reduced by the value of such assets. For example, assume the elective share is valued at \$80,000 payable out of a probate estate that includes the right to receive rentals for a period of ten years reserved by the decedent under a deed of gift from decedent to X and valued at \$60,000. This interest would be a nondeductible terminable interest if bequeathed to the spouse. If, in satisfying the \$80,000 elective share, the personal representative can distribute to the spouse the right to the reserved rent, the marital deduction must be disallowed to the extent of \$60,000.³¹⁷ If the personal representative can distribute only a proportionate interest in the rentals to the spouse, the marital deduction is disallowed to that extent.³¹⁸

Section 8-101(b)(4) of the UPC provides that no accrued rights shall be impaired by adoption of the UPC. This provision raises a number of interesting questions concerning the meaning of an accrued right as it effects the computation of the elective share. At a minimum, the statute should exclude from the augmented estate outright transfers to the spouse and other donees prior to the effective date of the UPC. If so construed, there may be some difficult tracing problems, particularly with respect to the spouse's owned or transferred property. Unfortunately, the term "accrued right" is ambiguous and one can contemplate a volume of construction litigation. For example, does the beneficiary of a revocable transfer made prior to the effective date of the UPC have an accrued right? Does a noncontributing joint tenant have an accrued right? It might have been

315. I.R.C. § 2056(b)(1). *But see* I.R.C. § 2056(b)(5) (life estate coupled with general power).

316. *Id.* § 2056(b)(1).

317. *See* Treas. Reg. § 20.2056(b)-2(d) (1954).

318. *Id.*

advisable to limit the augmented estate to transfers to the spouse and other donees made after the effective date of the UPC.³¹⁹

Finally, the statute does not make clear whether the remedial provisions favoring the spouse and other donees under sections 2-201 to 2-207 are exclusive. In other words, could a transfer excluded from the augmented estate be attacked by the spouse under one or more of the judicial tests previously discussed or is the augmented estate concept the surviving spouse's exclusive remedy?

VI. CONCLUSION

Anglo-American law has long recognized that a testator's freedom of testation should be circumscribed whenever that freedom collides with society's greater interest in protecting a surviving spouse from disinheritance. This public policy may be supported on many grounds, including, primarily, recognition of the surviving spouse's contribution towards the accumulation of a deceased spouse's wealth; the surviving spouse's continued need for support after the deceased spouse's death, particularly if the spouse stood in a dependency relationship to the decedent; and the possibility that, if the surviving spouse is left financially destitute, the spouse may become a financial burden upon society at the same time that others who have no better claim to decedent's wealth harvest the fruit of decedent's lifetime accumulations.

Over the course of English and American history, measures to provide protection for the surviving spouse against disinheritance have emanated from both the courts and legislatures. The former have been peculiarly adapted to providing carefully tailored protection when the equities of a particular case have not been covered by a legislative enactment; the latter have typically established fixed percentage and invariable shares. The twentieth century has been marked by both a greater willingness on the part of the courts and legislatures to extend a protective hand and by a growing skepticism concerning the need for any protection. Some suggest that in only a relatively miniscule number of estates is the surviving spouse disinherited. There is also a belief that in this contemporary American society a person should be free to disinherit his or her surviving spouse. This author believes, to the contrary, that some protection is desirable for even those small number of cases in which disinheritance occurs and that the historical basis for some protection against disinheritance is as valid today as in the past. If the empiricists are correct that a comprehensive protective scheme is unnecessary because there is factually little evidence of disinheritance, protective legislation like that provided by the Code's augmented estate concept should have little restrictive effect or no impact on most estate plans that presumably take account of the surviving spouse. Viewed in this light, an argument that the Code's provisions are unnecessary begs the question.

³¹⁹ Cf. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b) (McKinney 1967), which applies only to transfers made after August 31, 1966.

Rather, legislation like the augmented estate provisions of the Code would provide protection against unintentional interspousal disinheritance or disinheritance resulting from vindictiveness, but would interfere little with freedom of testation as it is commonly practiced.

Of course, complex problems do not lend themselves readily to simple solutions. The augmented estate provisions of the Uniform Probate Code are proof of the pudding. Unfortunately, their complexity³²⁰ may mask an underlying attitude about the augmented estate provisions that questions the fundamental concept of any legislative protection against disinheritance. After all, attack on the complexity of the Code would be more palatable than public outcries that a husband should be free to completely disinherit his wife, or vice versa. Notwithstanding the complexity of the augmented estate provisions and the construction problems inherent in them, and admitting my own prejudices in favor of providing protection from disinheritance, the Code's provisions represent a giant step forward in protecting *both* decedent's spouse and other objects of decedent's bounty.

Enactment of the Code with its augmented estate provisions should have a number of important benefits. First, if enacted nationwide, the provisions assure uniformity in the treatment of the elective share right. A spouse's elective share would not depend on the happenstance of decedent's domiciliary status at death or the fact that a decedent might have transferred his or her assets to a non-Code state beyond the spouse's reach. Second, to the extent decedent's spouse has been amply provided for by the deceased spouse, the provisions assure that no elective share claim will intercede to undercut a disposition in favor of other objects of decedent's bounty. Thus, the Code attempts to rectify a primary deficiency with the developed case law and other legislation that ignore the spouse's actual needs; it disrupts the decedent's estate plan only when the spouse's needs are less than completely satisfied at the level mandated by the Code. Third, while reasonable minds may differ with respect to the appropriate percentage interest, the provisions assure that substantial provisions will be made for the spouse and that in most cases the spouse's right will not be undercut by lifetime transfers that are effective will substitutes and under which the decedent retains economic benefits for his or her life. Fourth, the augmented estate concept provides the predictability necessary to assist in the development of a client's comprehensive estate plan, and puts donors, donees, and spouses on notice of the extent to which, if any, the plan may be upset by an elective share claim. In this connection, the provisions of the Code permitting either a complete or partial waiver of an elective share claim against transferred assets are commendable. A waiver effectively removes any cloud on the title of transferred assets.

320. Complexity is relative. The Code's provisions are no more complex than the estate and gift tax provisions of the Internal Revenue Code or the myriad of legislation and judicial cases dealing with interspousal disinheritance, both of which capable lawyers have dealt with for many years.

While the Code's provisions cast a wide net of protection for the surviving spouse's benefit, it remains possible to effectively disinherit the spouse by completed lifetime gifts made more than two years before death and by other devices. Some of these devices have already been described. For example, the pure discretionary trust for the benefit of the decedent and donees (other than the spouse) is probably beyond the spouse's reach, although as a disinheriting device the discretionary trust is unattractive because the transferor must surrender all rights in the transferred property and risk future economic insecurity. Similarly, insurance and annuities payable to donees other than the spouse are beyond the spouse's reach. Reasonable minds might differ whether this "loophole" should remain although the historically favored position holding insurance to be beyond the reach of spouses and creditors may, in part, explain this exclusion. Assets transferred beyond the jurisdiction of the appropriate courts may be beyond the spouse's reach unless the Code has been adopted nationwide. It can be anticipated that less conventional devices will be devised for the purpose of disinheriting the spouse by persons so inclined. The historical development of dower and the judicial cases attest to the fact that each generation devises schemes to dispose of property in a manner contrary to existing public policy which favors the surviving spouse. Who would deny that history repeats itself?