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Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution

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Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution

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I. INTRODUCTION

In an effort to protect the rights and needs of surviving spouses, common law states have adopted elective share statutes that restrict the testamentary freedom of married persons. These statutes prevent spousal disinheritance by giving a surviving wife or husband the power to elect to take a share of the decedent spouse's estate. Theoretically, the elective share protects the marital property rights of a spouse—typically the wife—who contributes to the marriage through homemaking and caring for children.

Elective share statutes have for years been labeled inadequate, inap-

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propriate, or both.¹ Critics have identified problems ranging from inadequate support for destitute spouses to inadequate protection of spousal rights in marital property. In addressing these problems, proposals for reform rely increasingly on marital partnership theory—the theory founded on the belief that spouses should share equally in the economic gains of a marriage.

Two recent reform efforts—the 1990 Uniform Probate Code (“UPC”), as amended in 1991 and 1993,² and a proposal developed by a subcommittee of the Chicago Bar Association³ (“Illinois Proposal”)—specifically point to marital partnership theory as the guiding principle behind the changes they propose. Although both proposals represent significant improvements over existing law, neither embraces marital partnership theory wholeheartedly. As a result, the proposed statutes do not adequately protect the rights of either spouse in a marriage that terminates by death.

One of the most serious flaws in elective share statutes is that some statutes permit an income interest of sufficient value, without more, to satisfy a decedent’s obligation to the surviving spouse. The 1990 UPC did this by charging the elective share with any amounts disclaimed by the surviving spouse.⁴ Section 2-207(a)(3) prevented the surviving spouse from electing to take property outright if the decedent had provided the spouse with an income interest in a trust. The 1993 revisions to the UPC corrected this problem by deleting section 2-207(a)(3). Unfortunately, other proposals⁵ and statutes⁶ continue to permit the use of a life estate to defeat a surviving spouse’s right to control a share of the marital property.

Another problem with existing statutes and proposals is that they fail to apply the elective share to all marital property while excluding any separate property.⁷ Neither the 1990 UPC nor the Illinois Proposal exclude separate property from the reach of the elective share. Older

1. See, e.g., W.D. MACDONALD, *FRAUD ON THE WIDOW’S SHARE* (1960); Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977); John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse’s Forced Share*, 22 REAL PROP. & TR. J. 303 (1987); J. Thomas Oldham, *Should the Surviving Spouse’s Forced Share Be Retained?*, 38 CASE W.L. REV. 223 (1987); Lewis M. Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand*, 26 U. CIN. L. REV. 1 (1957).

2. Unif. Prob. Code §§ 2-201 to 2-214 (1990) (amended 1993).

3. SPOUSAL RIGHTS SUBCOMM., CHICAGO BAR ASS’N, PROPOSED NEW ELECTIVE SHARE STATUTE (1992) [hereinafter ILLINOIS PROPOSAL].

4. UNIF. PROB. CODE § 2-207(a)(3) (1991) (deleted 1993).

5. See, e.g., ILLINOIS PROPOSAL, *supra* note 3.

6. See, e.g., DEL. CODE ANN. tit. 12, § 907 (1987 & Cumul. Supp. 1994).

7. Pursuant to marital partnership theory each spouse is entitled to one-half of the marital property. See *infra* text accompanying notes 21-25.

statutes, such as the Illinois elective share statute,⁸ may fail to reach all the marital property.

The deficiencies in current elective share statutes and proposals point to the need for a new approach. The proposed statute set forth in this Article uses federal estate tax law to define the estate to which the elective share is applied. The proposed statute attempts to make all property earned or acquired during the marriage subject to the elective share. At the same time, the proposal seeks to apply the elective share to separate property only if a surviving spouse would otherwise be left without minimal support.

This Article examines the definitions and treatment of marital property in the United States, with particular reference to marital partnership theory. The Article then describes the development of elective share law and focuses on the lack of fit between the rationales for elective share statutes and the actual impact of those statutes. The Article analyzes three attempts to deal with the problems of traditional elective share statutes: the 1990 UPC, the Delaware elective share statute, and the Illinois Proposal. The Article concludes with a specific proposal that applies the marital partnership theory in a manner that is both fair and manageable.

II. THE TREATMENT OF MARITAL PROPERTY IN THE UNITED STATES

Marital property law affects the ownership, control, and disposition of property during a marriage, upon divorce, and upon the death of one spouse. Two systems of marital property law exist in the United States: community property and common law property.⁹ Eight states have community property systems,¹⁰ and Wisconsin is essentially a community property state by virtue of its adoption of the Uniform Marital Property Act.¹¹ The other forty-one states, plus the District of Columbia, have common law marital property systems. Community property and common law property systems differ in their definitions of marital property

8. ILL. REV. STAT. ch. 755 (1993). The Illinois statute applies the elective share to the decedent's probate estate. That estate may not include all of the couple's marital property.

9. See generally WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971); W.S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES, Judith R. Seligman et al., *A Guide to Community Property*, in 3 FAMILY LAW AND PRACTICE § 38A (Arnold H. Rutkin ed. 1995).

10. Those states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Puerto Rico is also a community property jurisdiction. EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 92 (5th ed. 1993).

11. *Id.* In adopting the marital property system, the Wisconsin Legislature modified several UMPA rules. See Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769 (1990).

and in the rights they accord spouses in that property. In addition, differences exist within each system that affect property during marriage, upon divorce, in intestacy, and upon disinheritance.

The community property system developed out of the civil law of continental Europe.¹² The basic premise of community property in the United States is that all property earned by either spouse during a marriage is marital property and is owned in equal shares by each spouse. Property brought into the marriage and property received by gift or inheritance remain separate property. Income earned on separate property, without additional effort by a spouse, is treated by some states as community property,¹³ and by others as separate property.¹⁴

During the marriage, title to a particular asset may determine who controls it. Title, however, does not necessarily determine beneficial ownership during the lifetime of the spouses or at their death. The beneficial ownership right of each spouse attaches at the moment the property is acquired. The first spouse to die has testamentary power over one-half of the community property, and the surviving spouse controls the remaining half.

Although property law in community property states varies,¹⁵ two underlying principles apply to marriages terminated by death. First, both spouses share equally in the property earned during the marriage, regardless of who actually earned it and regardless of the actual division of labor within the marriage. Second, property received by gift or inheritance is separate property and, upon the death of the property-owning spouse, the surviving spouse has no rights in that property.¹⁶

Property law in common law states is derived from English com-

12. Other than Louisiana, all the community property states have adopted the common law as the basis for their jurisprudence. Community property was the only aspect retained from civil law. The result has been that the civil law concepts of community property have been interpreted using common law principles. For a historical explanation of the development of marital property law in the United States, see McCLANAHAN, *supra* note 9, §§ 3:1-3:34.

13. Idaho, Louisiana, Texas, and Puerto Rico use this method, which is known as the Spanish Rule. *Id.* § 6:12.

14. Arizona, California, Nevada, New Mexico, and Washington use this method, which is known as the California Rule. *Id.* § 6:13.

15. The division between separate and community property is not always clear, as for example when a spouse's efforts have combined with separate capital to yield income. Commingled separate and community property also creates problems. The community property states deal with these issues in different ways. See generally *A Guide to Community Property*, *supra* note 9, § 38A.04.

16. Community property states use a presumption that all property is community property. The presumption can be overcome by a showing that the property is in fact separate. While in theory the surviving spouse has no rights in a decedent's separate property, in practice the property may have been commingled with community property and will be treated as community property. McCLANAHAN, *supra* note 9, § 4:15.

mon law.¹⁷ A basic principle underlying common law property is that title determines beneficial ownership. For a married couple, the spouse who earns the money can choose to title it in his or her name and then control its use and disposition during life and upon death. Thus, without some restriction on testation, a wage-earning spouse can completely disinherit a nonwage-earning spouse.

A. *The Marital Partnership*

Prior to this century, inheritance between spouses in Western Europe and the United States was rare. As Mary Ann Glendon explains, "[m]arriage was not seen as a reason for shifting family wealth, especially land, from one blood line to another."¹⁸ Marital property law developed at a time when land was the primary source of inheritable wealth. Spousal protections in both civil and common law jurisdictions allowed landowning families to maintain control of their real property.

In common law countries, dower and curtesy gave the surviving spouse a measure of support by providing for a life estate in a portion of the deceased spouse's real property.¹⁹ Upon the surviving spouse's subsequent death, the decedent spouse's family regained fee simple ownership of the property.

In civil law countries the approach was different, but the result was the same. Marital property rights attached only to property earned during the marriage. Real property was the primary source of wealth and was transferred primarily through bequest. This system created no marital property rights in inherited property and served to maintain inheritance of real property by blood line.²⁰ For the most part, land remained outside the marital property system. Thus community property, now often cited as the embodiment of marital partnership theory in the

17. See generally Charles Donahue, Jr., *What Causes Fundamental Legal Ideas?: Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59 (1979).

18. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 239 (1989).

19. Dower gave a widow a life estate in one-third of all the inheritable real property of which her husband had been seised at any time during their marriage. The right was inchoate while the husband was alive and became consummate upon his death. The right applied to property sold by the husband unless the wife consented to release her dower rights. Curtesy provided protection for a surviving husband. Curtesy differed from dower in that the surviving husband received a life estate in all the wife's real property, rather than in only one-third of the real property. However, the husband acquired curtesy only if a child or children were born to the marriage.

For descriptions and explanations of dower and curtesy, see 1 AMERICAN LAW OF PROPERTY §§ 5.1-5.49 (dower), §§ 5.57-5.74 (curtesy) (1952); 2 RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* ¶ 209 (dower), ¶ 210 (curtesy) (1994). Land was subject to dower only if the husband was seised of an estate that could be inherited by his children. For an explanation of seisin, see *id.* at ¶ 209[1]; see also George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948), for an account of the early history of dower.

20. GLENDON, *supra* note 18, at 239.

United States, has its roots in a system designed to protect family assets rather than to promote a partnership between spouses.

The idea that each spouse has a right to an equal share of property acquired during the marriage has been termed the sharing principle or the marital partnership theory.²¹ Under this theory, marriage is an economic partnership to which both spouses contribute productive effort, and each spouse is entitled to one-half of the economic gains of the marriage. These gains include income earned by both spouses during the marriage but exclude property held by either spouse before the marriage or received at any time by gift or inheritance.²² Thus, as the term has come to be used, marital partnership theory describes a partnership of acquests (i.e., of property acquired other than by gift or inheritance).

Marital partnership theory recognizes that one spouse, typically the wife, may make career sacrifices to raise children and may make other unpaid contributions to the marriage. By providing that assets acquired during the marriage should be shared equally, the partnership theory recognizes the nonwage-earning spouse's contributions to the marriage. In this way marital partnership theory accords with society's changing view of the role of women and the institution of marriage.²³

Community property states apply marital partnership theory to the economic relationship between spouses during marriage and upon the death of the first spouse.²⁴ Common law states, however, have been slow to embrace marital partnership theory. Although the Uniform Marital Property Act ("UMPA") has adopted the theory, only Wisconsin has adopted the UMPA.²⁵

In contrast with marital partnership theory, research indicates that a couple in an ongoing first marriage are likely to view their marriage as a

21. See generally Oldham, *supra* note 1; Ronald R. Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95 (1983); UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1993).

22. Commentators discussing marital partnership theory in the context of disinheritance at death have ignored the question of the characterization of income earned on separate property. Some community property states treat the income as marital, while others treat it as separate if earning the income required no further effort on the part of either spouse. Still other states use complex theories to apportion income between separate and marital property. See *supra* text accompanying notes 13-14. For purposes of this article, marital partnership theory is assumed to include income earned on separate property. This is the approach taken by the Uniform Marital Property Act.

23. For a discussion of the feminist movement of the 1960s and 1970s and its relationship to the marital partnership theory, see Volkmer, *supra* note 21.

24. Under community property laws, each spouse has a vested ownership interest in 50% of all property earned (and in some states acquired) during the marriage by either spouse. Upon the death of the first spouse, the decedent spouse can dispose of one-half of the marital property, while the surviving spouse owns and controls the remaining one-half. See McCLANAHAN, *supra* note 9, §§ 4:24-4:27.

25. WIS. STAT. § 766 (1993).

sharing not just of property earned during the marriage but of all their property.²⁶ This approach can be termed a universal partnership.²⁷ In a 1978 survey, a majority of respondents stated they would give all their property to their spouse, even if they were survived by children of the marriage, parents, or siblings.²⁸ Intestacy statutes, which purport to dispose of a decedent's property in the manner desired by most people, increasingly give the surviving spouse either a substantial share or all of the decedent's estate.²⁹ Thus, inheritance by a surviving spouse of all of the decedent spouse's property, either by will or by intestacy, is common.

One area of marital property law that has undergone dramatic changes is the law of divorce. Prior divorce law followed the marital property principles of the jurisdiction. In common law states, reliance on title meant that the divorce court's task was, in part, to divide property according to the way in which title was held, with jointly held property divided between the spouses. Provisions were then made for spousal support (alimony) and child support. In community property states, the court divided equally property acquired during the marriage, and separate property remained separate.³⁰

These traditional divorce law concepts have been replaced in the common law jurisdictions by variations of equitable distribution.³¹ Generally, in an equitable distribution system, the court has discretion to divide property between the spouses. The property subject to division varies among the states. Increasingly, statutes are moving closer to a partnership of acquests approach.

A majority of states limit the property subject to division to marital property.³² The court must determine which property is marital and

26. GLENDON, *supra* note 18, at 243.

27. *Id.* at 131-34.

28. The survey, conducted by the American Bar Foundation, confirmed prior testamentary studies by finding that a majority of respondents would choose to leave their entire estate to a surviving spouse. Respondents were also more likely to favor their children than their family of origin, particularly if the children were from a prior marriage. Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319 (1978), cited in GLENDON, *supra* note 18, at 243-44.

29. See, e.g., OR. REV. STAT. §§ 112.025, 112.035 (1993). Under the Oregon statute, the surviving spouse receives the decedent's entire estate unless the decedent died leaving issue who were not issue of the surviving spouse.

30. MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 62 (1981).

31. BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* §§ 2.06-2.08 (2d ed. 1994).

32. *Id.* § 2.08. States that distinguish between marital and separate property are termed dual property states. Dual property jurisdictions are Alaska, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. *Id.* § 2.08 n.46.

which property is separate. Some statutes limit marital property to property earned during marriage, while other statutes use a rebuttable presumption that treats all property acquired during marriage as marital.³³

In seventeen other states, all property owned by either spouse is subject to division.³⁴ Courts in these states can still consider the origin of the property in order to determine distribution.³⁵

In all common law states, courts attempt to reach equitable results by basing their decisions on statutory factors. The factors vary from state to state, but generally include nonmonetary contributions to the marriage such as homemaking and child-rearing. Factors such as length of marriage, future financial needs of the spouses, and conduct during the marriage may also be considered.³⁶

Despite the changes in divorce law, and notwithstanding commentators' calls for a marital partnership approach, elective share reform has been limited. Neither type of marital partnership (partnership of acquests or universal partnership) has penetrated elective share statutes. As a result, a spouse who remains married only to be disinherited often ends up worse off financially than he or she would have been had the marriage ended in dissolution.

The universal partnership approach taken by some divorce statutes is problematic in the elective share context. Even in the divorce context, the trend has been toward a partnership of acquests approach. For elective share statutes, the partnership of acquests approach has distinct advantages over universal partnership. In particular, it provides a means of addressing the special needs of individuals who have been married more than once.

Lawrence W. Waggoner has argued that we live in a multiple-marriage society in which serial matrimony has become common.³⁷ Divorces and remarriages have increased dramatically. Although long-term marital partners may view their marriage as a partnership of all their assets, spouses entering into a second or third marriage may be more likely to consider each spouse's property as separate. A spouse with children from a prior marriage may not want to leave all of his or her separate property to a spouse who is not a parent of the children.

33. *Id.* §§ 5.02-5.03. Statutes generally exclude gifts and inheritances from property subject to division. *Id.* § 5.02..

34. The states are Alabama, Connecticut, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, Washington, and Wyoming. *Id.* § 2.07 n.43.

35. *Id.*

36. *Id.* §§ 8.05-8.09.

37. Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991).

An elective share statute should create an equitable result under as many scenarios as possible. While a universal partnership may be the approach many spouses take, a partnership of acquests is more likely to yield fair results in a wide variety of circumstances. This is particularly true in marriages that end in death with disinheritance. That circumstance indicates that at least one of the spouses did not view the marriage as a complete sharing of assets. The elective share should protect a spouse who has contributed nonmonetarily to a marriage as well as prevent a spouse from obtaining an economic windfall based on marital status.

B. *Development of the Concept of the Elective Share*

Elective share statutes have their roots in dower and curtesy, the common law protections for surviving spouses.³⁸ These English imports developed at a time when real property was the primary form of wealth. They provided the surviving spouse with a degree of support by giving her or him a life estate in a portion of the decedent's real property.

As dower and curtesy became outmoded,³⁹ they were replaced in a majority of states⁴⁰ by elective share statutes.⁴¹ An elective share statute gives the surviving spouse the right to claim a share of the decedent spouse's estate if the surviving spouse is dissatisfied with the amount he or she would otherwise receive. States define the elective share as a fraction, ranging from one-quarter to one-half,⁴² of the decedent's estate. The estate to which the statute applies varies. It may be the probate estate,⁴³ the federal gross estate for tax purposes,⁴⁴ or an augmented estate defined in the statute to include all or most of the assets owned by

38. See note 19.

39. Two reasons are frequently given for the demise of statutes providing for dower and curtesy. First, intangible property constitutes much of modern wealth, with the result that dower and curtesy provide inadequate protection for most surviving spouses. Second, dower and curtesy place a substantial restraint on the free alienability of land. See MACDONALD, *supra* note 1, at 61; Kurtz, *supra* note 1, at 989.

40. 2 POWELL & ROHAN, *supra* note 19, at ¶ 213, at 15-121-22.

41. Many states also provide additional protections for surviving spouses. These include homestead statutes that give the surviving spouse rights in the family home, set-asides for tangible personal property, and family allowances for maintenance during the year after the decedent's death. AMERICAN LAW OF PROPERTY, *supra* note 19, §§ 5.75-5.120. These provisions often can be important sources of assets, particularly in small estates. This article, however, will focus on elective share statutes.

42. 7 POWELL & ROHAN, *supra* note 19, ¶ 971.5[4]. Earlier statutes derived from the dower tradition tended to provide for a one-third share. More recently adopted statutes tend to increase the share to one-half. See *id.* Only Oregon provides for a one-fourth share. See OR. REV. STAT. § 114.105 (1993).

43. See, e.g., ILL. REV. STAT. ch. 755 para. 5/1-1 (1993).

44. See, e.g., DEL. CODE ANN. tit. 12, § 902 (1976 & Cumul. Supp. 1994).

both spouses.⁴⁵

Early elective share statutes, drafted when will substitutes were less common, applied the fraction to the decedent's *probate* estate. As will substitutes became more popular, the amount of the elective share began to depend on the manner in which title to the property was held. As long as the elective share could be taken only from the probate estate, a spouse could effectively prevent his or her surviving spouse from taking an elective share by transferring property outside of the probate estate. Revocable inter vivos trusts and joint and survivor accounts provided easy vehicles for defeating a spouse's elective share rights.⁴⁶

In order to prevent testators from using trusts and other will substitutes to disinherit their surviving spouses, courts developed several tests to determine whether nonprobate property was subject to the elective share.⁴⁷ These subjective tests gave courts considerable discretion in reaching a determination and, as a result, the tests were applied inconsistently. The courts seemed to rely more on the perceived equities of the cases than on the stated tests. This made prediction and planning difficult.⁴⁸

After withstanding years of confusing case law, the New York and Pennsylvania Legislatures responded by adopting elective share statutes⁴⁹ that attempted to establish objective rules. Under these rules, some nonprobate property over which a decedent retained specified powers could be subject to the elective share. The New York statute influenced the elective share provisions of the Uniform Probate Code⁵⁰ and marked the beginning of a trend to use statutes to apply the elective share to nonprobate assets.

45. See, e.g., UNIF. PROB. CODE § 2-203 (1993); W. VA. CODE § 42-3-2(b) (1982 & Cumul. Supp. 1994).

46. In states that still apply the elective share to the probate estate, assets held in trust continue to avoid the reach of the elective share. See, e.g., *Soltis v. First of America Bank-Muskegon*, 513 N.W.2d 148 (Mich. Ct. App. 1994). *Johnson v. La Grange State Bank*, 383 N.E. 2d 185 (Ill. 1978).

47. For an extensive explanation of the tests devised to prevent testators from evading the full impact of elective share statutes, see MacDONALD, *supra* note 1, at 67-144; see also Sidney Kwestel & Rena C. Seplowitz, *Testamentary Substitutes—A Time for Statutory Clarification*, 23 REAL PROP. PROB. & TR. J. 467, 468-70 (1988); Kurtz, *supra* note 1, at 993-1011.

48. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1190-91 (1986); Kwestel & Seplowitz, *supra* note 47, at 469-70.

49. The current version of the Pennsylvania statute, 20 PA. CONS. STAT. ANN. § 2203 (a)(2)-(6) (1975 & Supp. 1995) grew out of the 1947 version. See § 2203 cmt. (Official Comment—1978). New York enacted its elective share provision in 1966. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1.

50. See UNIF. PROB. CODE § 2-201 cmt. (1983) (current version at § 2-202 (1993)).

C. Purposes of Elective Share Statutes

Two main theories serve as rationales for protecting spouses against disinheritance. The first theory is based on the need of the surviving spouse for support, and the other, discussed above,⁵¹ is based on the surviving spouse's right to a share of the marital property under a view of marriage as an economic partnership.⁵² The need and marital partnership theories are not mutually exclusive, and recent attempts to address the problem of spousal disinheritance find support in a combination of the two.⁵³ Still, it is important to understand the purposes behind elective share statutes, both to assess the adequacy of present statutes and to consider possible alternatives.⁵⁴

Early critics of elective share statutes argued that the basis of such statutes should be the surviving spouse's need for support.⁵⁵ The need-based theory holds that a testator spouse should provide for the needs of the surviving spouse for any of several reasons: a moral duty that each spouse owes to the other; expectations of the surviving spouse that he or she will be supported; or a public desire that the surviving spouse not rely on the state for support when support is available from the testator's estate.⁵⁶

51. See *supra* notes 20-22 and accompanying text.

52. For a more thorough discussion of both theories, see Langbein & Waggoner, *supra* note 1, and Oldham, *supra* note 1. The partnership theory has also been referred to as the "common endeavor" theory. The spouses are engaged in a common endeavor and should share in its benefits, both economic and noneconomic. Paul G. Haskell, *Restraints Upon the Disinheritance of Family Members*, in DEATH, TAXES AND FAMILY PROPERTY, 105, 111-12 (Edward C. Halbach, Jr., ed. 1977).

53. The Commentary to the 1990 UPC indicates that both theories were considered in designing the elective share provisions. It states that under the partnership theory, "the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage." UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1993). The commentary goes on to state that "[a]nother theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate." *Id.*

54. As Ronald Volkmer has written: "[T]he choice of premises underlying spousal property rights is the most important determination in evaluating the present day effectiveness of forced share legislation and in assessing where the law ought to be going." Volkmer, *supra* note 21, at 96.

55. See, e.g., Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955); Emerson G. Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157 (1960).

56. See Kurtz, *supra* note 1, at 1061, stating that

[T]his 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

More recently, commentators have rejected the idea that dependence is "the gravamen of inheritance."⁵⁷ Instead, they stress the principles of equality and sharing.⁵⁸ Yet this new emphasis has had little impact on elective share statutes,⁵⁹ and, in many states, concerns for financial need and support are still paramount.⁶⁰

D. *Effects of Traditional Elective Share Statutes*

If the purposes of elective share statutes are to provide for the needs of surviving spouses, protect their rights in property acquired during the marriage, or both, do the statutes actually accomplish these purposes? To address this question, this Article looks first at "traditional" elective share statutes. The term "traditional" elective share statute is used herein to refer to a statute that gives the spouse the right to one-third⁶¹ of the probate estate. Although some elective share statutes have changed, many still follow this formula.⁶² Even those states that have expanded the reach of the elective share to include nonprobate property have done

same time that others who have no better claim to decedent's wealth harvest the fruit of the decedent's lifetime accumulations.

See also Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

57. This phrase was used by Edmund N. Cahn in *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 145 (1936).

58. See, e.g., Volkmer, *supra* note 21, at 155; cf. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 88 (1994) (advocating the abolition of elective share statutes because spouses can protect themselves by contract before or during the marriage).

59. Volkmer noted that, "[t]he oft-repeated generalization that the common law states have been moving closer to the sharing concept in the area of probate is questionable to say the least." Volkmer, *supra* note 21, at 151.

60. The Delaware elective share statute charges the surviving spouse with the commuted value of an income interest in a trust, even if the spouse disclaims the interest. DEL. CODE ANN. tit. 12, § 903(a)(1) (1987 & Cumul. Supp. 1994). Thus the spouse can be given support without being given control. In New York, the legislature recently changed an even more restrictive statute. N.Y. EST. POWERS & TRUST LAW § 5-1.1(a)(1)(B) (McKinney 1993). Spouses of decedents dying after Aug. 31, 1994 will no longer be forced to accept an interest in a trust and may elect to take property outright. *Id.* § 5-1.1-A(a)(4) to (5).

61. Many statutes now use one-half rather than one-third. Although one-half better represents a partnership share, the fraction is irrelevant as to partnership concerns unless the estate to which it is applied includes all of the marital property and excludes any separate property.

62. See, e.g., S.C. CODE ANN. § 62-2-202 (Law. Co-op. 1976 & Cumul. Supp. 1994), which provides that "[e]state means the estate reduced by funeral and administration expenses and enforceable claims." The Reporter's Comments state in part:

This section rejects the "augmented estate" concept promulgated by the drafters of the Uniform Probate Code as unnecessarily complex. The spouse's protection relates to all real and personal assets owned by the decedent at death but does not take into account the use of various will substitutes which permit an owner to transfer ownership at his death without use of a will.

Despite this comment, the South Carolina Supreme Court applied the elective share to a revocable inter vivos trust that the court had found illusory. *Seifert v. Southern Nat'l Bank of South Carolina*, 409 S.E.2d 337 (S.C. 1991).

so by including more of the decedent's property, and not by redefining marital property.⁶³

1. NEED THEORY

It is easy to imagine circumstances in which a traditional elective share statute overprotects or underprotects the surviving spouse.⁶⁴ State statutes fix the elective share amount pursuant to arbitrary formulas that provide no mechanism for considering the actual needs of the surviving spouse. The elective share amount may be insufficient to support the spouse when the estate is small⁶⁵ or when the decedent holds assets that are not subject to the statute.⁶⁶ On the other hand, when a spouse has assets in his or her own name,⁶⁷ has reasonable earning capacity, or has received adequate support from the decedent through transfers not considered in determining the elective share,⁶⁸ he or she may receive more than is necessary for support.

Commentators who regard meeting the needs of the surviving spouse as the primary purpose of elective share statutes have advocated changes in existing statutes.⁶⁹ In a 1960 critique of elective share statutes,⁷⁰ W.D. MacDonald argued for replacing elective share statutes with a system of judicial discretion, or "testator's family mainte-

63. See, e.g., DEL. CODE ANN. tit. 12, § 902 (1974 & Cumul. Supp. 1994).

64. For a good discussion of the dangers of over- and underprotection, see Debra A. Falender, *Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to Leazenby*, 11 IND. L. REV. 755 (1978) (responding to *Leazenby v. Clinton County Bank & Trust Co.*, 355 N.E. 2d 861 (Ind. Ct. App. 1976), in which the Indiana Court of Appeals refused to set aside a transfer the decedent had made of all her property).

65. It is unlikely that a one-third share of \$20,000, \$50,000, or even \$100,000 could support a person with no other resources and negligible earning potential.

66. If all of the decedent's assets are held in a trust not subject to the statute, the elective share amount would be zero regardless of the decedent spouse's accumulated wealth.

67. When a couple marry late in life, both spouses may bring substantial assets to the union. If each spouse has \$100,000 in his or her own name, the surviving spouse will still be entitled to an elective share under most statutes. Likewise, a spouse who holds most of the couple's property in her name will still be entitled to the elective share. For example, if a wife has \$200,000 and her husband has \$20,000, the wife can take an elective share of her husband's assets if he dies first.

68. Under the Illinois Probate Act of 1975, ILL. REV. STAT. ch. 755 (1993), lifetime gifts by the decedent spouse to the surviving spouse do not affect the elective share calculation. Also, if the decedent provides for the surviving spouse by giving her or him an interest in an inter vivos trust, or by leaving property in joint tenancy or tenancy by the entirety, the elective share will supplement that property.

69. Elias Clark argued that society now provides benefits to surviving spouses in ways that render elective share statutes unnecessary. Under ERISA, for example, pension plan benefits must be paid to the surviving spouse unless that spouse agrees otherwise in writing. I.R.C. § 417(a)(2)(A). In addition, social security benefits cannot be assigned away from the surviving spouse. Elias Clark, *The Recapture of Testamentary Substitutes to Preserve Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. R. 513, 544 (1970).

70. MACDONALD, *supra* note 1.

nance.”⁷¹ His proposal was modeled on the family maintenance system that was developed in New Zealand and is now used there, as well as in England, Australia, and several Canadian provinces.⁷² MacDonald argued that replacing elective share statutes with a statutory system of testator’s family maintenance would accomplish two related purposes: It would provide reasonable support for the decedent’s family, and it would prevent a decedent from using inter vivos transfers to evade elective share provisions of the statute.⁷³

Under MacDonald’s proposed Model Act⁷⁴ the court can review the facts and circumstances of an estate, particularly where the surviving spouse or dependent children of a decedent argue that they need more assets to meet their reasonable support needs.⁷⁵ The judge may consider all relevant circumstances but should consider in particular the petitioner’s financial need; any non-need-based government benefits available to the petitioner; the value of the decedent’s estate; the amount of inter vivos transfers made to persons other than the petitioner; and the petitioner’s conduct toward the decedent.⁷⁶ The court would then determine whether the decedent made reasonable provision for the petitioner. MacDonald comments that financial need is the main criterion, but he indicates that the court can consider the surviving spouse’s conduct to determine whether disinheritance is in fact reasonable under the circumstances.⁷⁷

For those who believe financial need is the only valid reason for interfering with testamentary freedom and preventing spousal disinheritance, testator’s family maintenance seems potentially able to accomplish this objective. Commentators have advocated this approach,⁷⁸ and at least one state has included a degree of judicial discretion in its elec-

71. MacDonald used the term “decedent’s family maintenance.” *Id.* at 299. “Testator’s family maintenance” has become more commonly used and will be used herein.

72. *Id.* at 290-91.

73. *Id.* at 299. MacDonald was particularly concerned with attempts to evade elective share statutes and with the confusing case law that resulted from the potpourri of equitable, fact-specific holdings declaring that inter vivos transfers were not effective to defeat the elective share. *Id.* at 54-58.

74. *Id.* at 301-27.

75. *Id.* at 308-09. The “family” to which family maintenance legislation applies may vary. MacDonald’s proposal covers the surviving spouse, children under the age of 18, and older children who are physically or mentally incapable of maintaining themselves. *Id.* at 307.

76. *Id.* at 308-09.

77. John T. Gaubatz believes conduct should be a criterion for judicial consideration. John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 521-22 (1977). He refers to “spouses whose sole existence seems to be directed towards making a failure of marriage,” *id.* at 522, and other spouses who “have provided adequate cause to be disinherited by any but the most saintly and forgiving decedent.” *Id.* at 521.

78. *See id.*; Laufer, *supra* note 55, at 313.

tive share statutes.⁷⁹ In recent years, however, the idea has been criticized.⁸⁰

One concern with the testator's family maintenance approach is that its adoption would likely lead to increased litigation, since family members could challenge a will on the grounds that they need additional support. This could drain judicial resources and increase the likelihood of family discord. The system would also introduce a high degree of uncertainty into estate planning, an area in which consistency and predictability are important.⁸¹ Furthermore, testator's family maintenance makes the dubious assumption that an impartial outsider—the judge—can act fairly and reach a result preferable to the one reached by the testator. Finally, giving a judge discretion may disrupt both spouses' partnership interests in their marital property.

2. PARTNERSHIP THEORY

Just as traditional elective share statutes often do not provide for the needs of the surviving spouse, they also fail to protect spousal interests in property acquired during the marriage. A statute that gives a surviving spouse a one-third, or even one-half, share of the decedent's probate estate is not likely to result in the equal division of property acquired during the marriage. If it does so, that result is purely fortuitous. The difficulty is that the decedent's probate estate may not include all the marital property, and the estate may include property that is the separate property of that spouse.

A decedent's probate estate may not include marital property that was transferred to an inter vivos trust or was held in joint tenancy with the right of survivorship. Unless the elective share is applied to all property acquired by the spouses during marriage, estate owners wishing to defeat their spouses' elective share can simply transfer property out of the probate estate.⁸² In those situations, the partnership interest is not

79. OR. REV. STAT. § 114.135 (1993). If the couple are living apart at the time of death, this statute gives the court discretion to deny or reduce the election. In deciding the share to be granted, the court considers the length of the marriage, the length of the separation, whether the marriage was a first or subsequent marriage, and any other relevant circumstances.

80. See Glendon, *supra* note 48, at 1190; Falender, *supra* note 64, at 791-93; *cf.* the increase of judicial discretion in divorce law. See *supra* text accompanying notes 31-33.

81. UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1993) ("[E]ase of administration and predictability of result are prized features of the probate system . . .").

82. See, e.g., *Briggs v. Wyoming Nat'l Bank of Casper*, 836 P.2d 263 (Wyo. 1992) (holding that a valid and enforceable no-contest clause in a wife's trust agreement precluded her husband from electing a share of the trust); *Krause v. Krause*, 32 N.E.2d 779 (1941) (upholding a gratuitous transfer of real property from the decedent to his son against claims by the widow that she had been cheated out of her marital share); *Szombathy v. Merz*, 148 S.W.2d 1028 (1941) (holding that a note endorsed by decedent to his brother within a week of his death was a fraudulent transfer intended to deprive the decedent's wife of her property rights in his estate).

protected.

In other cases, the probate estate may not include marital property because the surviving spouse holds title to it individually. If the surviving spouse already owns at least one-half of the marital property, the surviving spouse should not be entitled to an additional share. Similarly, the surviving spouse may receive a full one-half share of the marital property through testamentary nonprobate transfers arranged by the decedent. For example, if the surviving spouse is to take one-half of the decedent's nonprobate estate through joint bank accounts, insurance policies, pension plans, or nontestamentary trusts, an elective share should not be available.⁸³ If the decedent comes to the marriage with assets earned before the marriage or with inherited wealth, or if he or she receives gifts or inheritances during the marriage, marital partnership theory treats those assets as separate property. The surviving spouse is not entitled to a share of those assets. Under a traditional elective share statute, the elective share would include those nonmarital assets if they were part of the probate estate.

III. 1969 UNIFORM PROBATE CODE

The original 1969 Uniform Probate Code attempted to address the problems of disinherited spouses who were deprived of their elective share rights by nonprobate transfers. In a key change from traditional elective share statutes, the UPC created an augmented estate to which the one-third elective share was to be applied. The comment to the elective share provision of the UPC explained the purposes for augmenting the probate estate. First, the drafters sought to prevent a spouse from defeating the surviving spouse's claim by titling assets in ways that avoided probate. Second, the drafters wanted to ensure that a surviving spouse would not be permitted to claim an additional share of the decedent spouse's estate if the decedent had provided for his or her spouse through nonprobate means.

The idea behind the augmented estate was that the elective share should be based on the assets of the decedent spouse, however held. In defining the augmented estate,⁸⁴ the UPC started with the decedent's probate estate and added to it assets transferred by the decedent, provided the decedent retained rights to control or benefit from those assets.

83. See, e.g., *In re Estate of Holling*, 622 A.2d 273 (N.J. Super. Ct. App. Div. 1993). The court held that decedent's husband could not take an elective share in addition to their marital home, which passed to him under tenancy by the entirety. The value of decedent's interest in the house, which her husband received by virtue of her death, substantially exceeded the value of the elective share determined under New Jersey law.

84. UNIF. PROB. CODE § 2-202(1) (1977).

This augmented estate included most will substitutes, such as revocable trusts, and joint and survivor accounts, but specifically excluded life insurance, annuities, and pension benefits. Also included in the augmented estate were assets the decedent gave to the surviving spouse, regardless of how they were held at the time of the decedent's death. Such assets were deemed part of the augmented estate, even if the donee spouse had given them away.

Assets owned by the surviving spouse were not included in the augmented estate unless the decedent had given them to the surviving spouse. Proceeds of insurance and annuity contracts were included only if paid to the surviving spouse upon the decedent's death.

Under the original UPC, certain assets of the surviving spouse were offset against the elective share to reduce the amount she or he would receive.⁸⁵ The surviving spouse's share was charged with all amounts included in the augmented estate that the spouse had received from the decedent during the decedent's life or upon the decedent's death.

The spouse's share was also charged with any property disclaimed by the surviving spouse. This provision, added in 1975 as a technical correction⁸⁶ to section 2-207, effectively prevented the surviving spouse from taking against the will. In other words, because the elective share amount was automatically reduced by the amount of any devise regardless of disclaimers, the surviving spouse had to first take the property under the will, and then take any additional amounts due under the elective share statute. This enabled the decedent to retain control of the eventual disposition of the property while providing for the surviving spouse by giving him or her a life estate in an inter vivos or testamentary trust.

When measured against the need theory, the 1969 UPC came up short. On the positive side, as compared with a traditional statute, more assets were subject to the elective share, so there was a greater likelihood that a needy spouse would obtain some support. Yet there was no minimum amount available to the surviving spouse, and insurance and pension benefits, which are a substantial part of many estates, were excluded from the elective share.

When analyzed against marital partnership theory, the changes the 1969 UPC proposed were inadequate. The first problem lay with the one-third fraction used to compute the elective share. If each partner's share is defined as one-half of the property acquired during the marriage, then a one-half share, not a one-third share, is appropriate.

The second problem was the scope of the estate to which the elec-

85. *Id.* § 2-202(2).

86. *Id.* § 2-207 cmt.

tive share applied. The augmented estate proposed by the 1969 UPC failed to correspond to marital property in several respects. Insurance proceeds, annuity contracts, and pension plans, all of which are often marital property, were excluded. Also excluded from the augmented estate was the surviving spouse's own property, unless it was received from the decedent.

Most other assets in which the decedent had an interest were subject to the elective share. No provision was made for excluding property acquired before the marriage or received by gift or inheritance. Thus nonmarital property could have been subject to the elective share. A surviving spouse who was the sole wage-earner and who retained title to all property earned during the marriage would still be entitled to a share of any property the decedent had inherited.

Finally, requiring a surviving spouse to accept an income interest as her share of the marital property undercut her right to property as a marital partner. An income interest is not equivalent to outright ownership.⁸⁷

A. *The 1990 Uniform Probate Code's Revised Elective Share*

In 1990 a new version of the UPC was completed.⁸⁸ The new code substantially revised the elective share provisions and openly embraced the marital partnership theory. The comments to the UPC state, "The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership."⁸⁹

Lawrence W. Waggoner⁹⁰ explained that in incorporating partnership theory into the elective share provisions, the drafters of the 1990 UPC considered and rejected two models provided by existing law: equitable distribution and community property.⁹¹ The strongest argument in favor of an equitable distribution approach was the goal of achieving parity between marital property laws affecting the division of property upon divorce and at death. The drafters concluded, however, that a uniform version of an equitable distribution elective share would be difficult to draft, given that the systems in use in divorce law vary so

87. See discussion *infra*.

88. In 1993, amendments to the 1990 UPC reorganized and clarified the elective share provisions. Former § 2-202 was divided into five sections, while other sections were moved or renumbered. Citations herein are to the 1993 Code. The reader should be aware that the amendments changed most section numbers.

89. UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1993).

90. Professor Waggoner, of the University of Michigan Law School, is Director of Research and Chief Reporter, Joint Editorial Board for the Uniform Probate Code; Reporter, Drafting Committee to Revise Article II of the Uniform Probate Code. Waggoner, *supra* note 37, at 233 n.*.

91. *Id.* at 242; see also Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. REV. 21, 51 (1994).

greatly.⁹²

Beyond the practical difficulty of drafting a uniform equitable distribution statute, the drafters found the discretionary aspect of equitable distribution inappropriate for an elective share statute.⁹³ Under systems of equitable distribution, the court may look at subjective factors in deciding how to divide the spouses' property.⁹⁴ In a divorce proceeding, both spouses can testify and present their versions of marital misconduct or fault. In an elective share setting, however, the decedent spouse is dead and cannot protect her or his estate plan or the interests of the named beneficiaries. In addition, giving a judge discretionary power makes estate planning more difficult. In light of these problems, the drafters decided against creating a discretionary elective share system.⁹⁵

The drafters also considered creating an elective share based on the community property concept of marital property. In community property states, each spouse is entitled to one-half of the couple's marital property.⁹⁶ The drafters found this predetermined formula and the accompanying absence of court discretion "considerably more promising as a model for implementing the partnership or marital-sharing theory than equitable-distribution law."⁹⁷ Nonetheless, they rejected an elective share based on the community property approach because of concerns that tracing the marital or separate character of property would be too difficult.

In order to determine an elective share based on marital property,⁹⁸ a court would first have to classify each spouse's assets as either marital

92. Waggoner, *supra* note 37, at 242.

93. Professor Waggoner agreed with Professor Glendon's characterization of equitable distribution as discretionary distribution. *Id.* at 244 (quoting Glendon, *Family Law Reform in the 1980's*, 44 L.A. L. R. 1553, 1556 (1984)).

94. See *supra* text accompanying note 31.

95. Equitable distribution may be contrasted with the system of testator's family maintenance discussed *supra* at text accompanying notes 71-77. In addressing issues of disinheritance at death, the court's discretion under testator's family maintenance is strongly based on questions of support and need. If the intent of the UPC revisions was to emphasize the partnership theory, the drafters may have concluded that a discretionary system was less appropriate than other approaches.

96. The one-half share can comprise either property earned during the marriage (California Rule) or property acquired during the marriage (Spanish Rule). See *supra* text accompanying notes 12-16.

97. Waggoner, *supra* note 37, at 245.

98. Professor Waggoner describes two possible approaches in using community property concepts in determining property rights on the death of the first spouse. One approach, which he calls the "strict deferred-community approach," would automatically retitle the marital property on the death of the first spouse, giving each spouse a one-half share. The other approach, termed the "elective-share deferred-community approach," would give the surviving spouse a right to elect a one-half share of the marital property. *Id.*

The elective share deferred-community approach seems more appropriate in discussing the drafting of an elective share statute and will be referred to hereinafter.

or separate property. This classification is necessary in community property states where the distinction is relevant during marriage and at death. As a result, married persons are on notice of the distinction from the outset of their marriages. In common law states, some tracing is required at divorce. However, each spouse is alive and able to protect his or her assets and rights. In a system that applies only at death, the beneficiaries of a spouse who did not keep property separate are at a disadvantage. Property that has been commingled for years during a marriage may indeed be difficult to trace. Waggoner states that such tracing concerns were perceived to be too great to warrant adoption of an elective share based on community property.⁹⁹

Having rejected equitable distribution and community property as models for a new elective share, the drafters of the 1990 UPC created what they called an accrual-type elective share.¹⁰⁰ They hoped this approach would yield fair results under most circumstances without the difficulty of tracing.¹⁰¹

The new elective share provision changes the spouse's share from a flat one-third to a maximum of one-half, phased in over fifteen years of marriage, to reflect the idea of an economic marital partnership. If a spouse dies in the first year of marriage, the elective share percentage is zero. The percentage increases each year thereafter until, at fifteen years of marriage, the percentage reaches fifty percent of the augmented estate. The fifteen-year phase-in period is designed to prevent the inequities that result when a spouse survives a short marriage and can elect to take half the decedent's estate.¹⁰² With this accrual approach, the UPC attempts to create an elective share amount that will correspond roughly to the surviving spouse's contribution, nonmonetary as well as monetary, to the acquisition of the marital property.¹⁰³

The 1990 UPC adopted the augmented estate concept of the 1969 UPC but expanded it significantly. The new augmented estate attempts to include all property owned by both spouses at the death of the first spouse, plus any property given away within two years of the death of that spouse. Types of property that were excluded by the 1969 UPC—insurance, pension benefits, and annuity contracts—are now included. Property owned by the surviving spouse is included, regardless of whether the decedent gave the property to the surviving spouse. Thus the new augmented estate represents the combined assets of both

99. *Id.* at 247.

100. *Id.*

101. For an example of the difficulties of tracing, see *Popp v. Popp*, 432 N.W.2d 600 (Wis. Ct. App. 1988).

102. UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1993).

103. *Id.*

spouses, regardless of how title to the property was held.¹⁰⁴

Under the new UPC, the elective share is determined by applying the "elective share percentage" to the augmented estate.¹⁰⁵ Offsets are then taken against that amount, and the surviving spouse is entitled to the remainder. The surviving spouse's own assets, together with any assets received by reason of the decedent's death, are charged against the elective share.¹⁰⁶ Life estates and trust benefits are valued at the commuted value of the surviving spouse's interest.¹⁰⁷

The 1990 UPC also incorporates the support theory into its elective share statute by providing for a supplemental elective share amount that applies regardless of the length of the marriage.¹⁰⁸ The recommended amount of \$50,000 is offset by any assets the surviving spouse owns or receives from the decedent.¹⁰⁹ Thus a spouse with no assets of her or his own cannot be left destitute. Although the supplemental elective share is not tailored to actual need, it attempts to provide some protection for the surviving spouse without requiring judicial discretion.¹¹⁰

In 1993, revisions to the UPC "reorganized and clarified"¹¹¹ the elective share sections. The revisions renumbered the sections, divided former section 2-202—the section creating the augmented estate—into sections 2-203 through 2-207, and added to the comments numerous examples explaining the augmented estate sections.

Although most of the 1993 revisions did not make substantive changes, one change does have a significant substantive impact. Since 1975, the UPC, through section 2-207(a)(3), charged the surviving spouse's elective share with any amounts the surviving spouse would have received from the decedent, but instead disclaimed. This provision had the effect of forcing a spouse to accept an income interest in a trust, instead of taking her or his share of the marital property outright. The spouse's partnership right to control a share of the marital property was

104. *Id.* §§ 2-203 to 2-207. If marital partnership is defined as a partnership of acquests, then the augmented estate of the 1990 UPC actually takes a universal community approach, at least after 15 years.

105. *Id.* § 2-202(a).

106. *Id.* § 2-209.

107. *Id.* § 2-208(b)(2).

108. *Id.* § 2-202(b).

109. Homestead and family allowances, and exempt property, are not charged against the elective share. *Id.* § 2-202(c).

110. The inclusion of this provision means that in small estates all of the decedent's property will go to the surviving spouse. This follows the modern trend in intestacy statutes. See *supra* text accompanying notes 26-29. Professor Waggoner has stated that the \$50,000 figure provides only minimal support and that a higher number may be appropriate. Waggoner, *supra* note 91, at 56.

111. UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1993).

reduced to a support right.¹¹² Criticism of this section continued even after the 1990 UPC revisions appeared.¹¹³

The 1993 UPC revisions deleted former section 2-207(a)(3). The comment to new section 2-209 does not discuss the partnership rationale for the change, but rather focuses on the difficulty of actuarial valuations.¹¹⁴ Although there is no reference to the section's negative effect on partnership rights, the removal of this section was a victory for partnership rights. Now a spouse who prefers to control her or his share of the marital assets may do so.

With the 1990 revisions and the 1991 and 1993 changes, the UPC drafters substantially improved the prior version of the Code. The expanded definition of the augmented estate closes gaps left by the pre-1990 version. The use of the phased-in percentages for the elective share helps with late-in-life second marriages and short-term marriages. The one-half rather than one-third share for long-term marriages reflects societal acceptance of the marital partnership theory. A reasonable argument can be made that making \$50,000 available for a needy spouse protects society's interest in assuring some degree of support for the surviving spouse. And, the recent deletion of section 2-207(a)(3) means that a spouse cannot be forced to accept an income interest in a trust as part or all of the elective share.

Despite the improvements, problems remain. Although the 1990 UPC attempts to adopt the marital partnership theory, it fails to do so, even with the 1993 revisions. The comments to the UPC define marital partnership as a partnership of acquests, yet the UPC creates a universal partnership, with a fifteen-year phase-in period. The structured, nondiscretionary approach taken by the 1990 UPC facilitates planning and

112. This is an example of what Mary L. Fellows has called the subversion of women's property rights by "patriarchal power." Mary L. Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQUALITY 137, 142 (1991). The UPC gave the surviving spouse the right to an equal share of marital property based on marital partnership theory. The right was then reduced to an income interest so that the property owner could retain control. The partnership was not an equal one. See generally *id.*

113. See Ira M. Bloom, *The Treatment of Trust and Other Partial Interests of the Surviving Spouse Under the Redesignated Elective-Share System*, 55 ALBANY L. REV. 941 (1992). Commentators have argued that allowing a decedent to leave a spouse an income interest rather than a fee undercuts the marital partnership theory and that consequently the surviving spouse should have an option to elect against the income interest. See Rena C. Seplowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesignated Elective Share—Why the Partnership is Not Yet Complete*, 25 IND. L. REV. 1, 9-10 (1991).

114. UNIF. PROB. CODE § 2-209, cmt. (1993). The comment points out that the provision was added to the UPC before adoption of the QTIP provisions of the federal estate tax. Creating a Qualified Terminable Interest Property (QTIP) trust allows a title-holding spouse to control the ultimate disposition of property in the trust. The surviving spouse need be given only an income interest in the trust.

avoids wasting judicial resources on tracing problems and support suits. Yet these strengths are also the weaknesses of the revised Code.

The drafters of the 1990 UPC sought to use the fifteen-year phase-in provision to confront the problem of including nonmarital property in the augmented estate. Although the phase-in may help in some cases, the arbitrary nature of the formula fails to solve the problem. Under many scenarios, the resulting elective share amount will not equal one-half of the marital property. For example, property owned by spouses married five years could be entirely marital property. On the other hand, property could be substantially separate if it was owned by spouses who began a fifteen-year marriage after or near retirement.

Another way in which the 1990 UPC fails to apply the marital partnership theory is in its treatment of an independently wealthy surviving spouse. The universal community approach of the UPC means that separate assets of both spouses are included in the estate to which the elective share percentage is applied. Separate assets of the surviving spouse are then charged against that spouse's elective share amount. The result is that a spouse who has contributed a lifetime of energy and work in amassing a couple's marital estate may be denied any part of that property if the value of that spouse's independent wealth is greater than that of the marital estate.

B. *Using Federal Estate Tax Law in Elective Share Statutes*

One alternative to the UPC definition of the augmented estate is to define the augmented estate with reference to the decedent's gross estate as determined for federal estate tax purposes. Two early critics of elective share statutes, Lewis M. Simes and Paul G. Haskell, separately recommended that any inter vivos transfers that are subject to the federal estate tax should be added to the probate¹¹⁵ estate for purposes of computing the value of the elective share.¹¹⁶ Neither of their proposals considered alternative methods of augmenting the probate estate, but instead used the federal estate tax approach as a readily understood method of inclusion. Haskell stated:

It has been recognized [by federal estate tax laws] that the distinction between decedent estate property in the strict sense and joint bank accounts, Totten trusts, life insurance, transfers with retained powers, and general powers of appointment, is an artificial one . . . ; the same principle is applicable to family protection. The ease and frequency

115. The proposals of Simes and Haskell are based on traditional elective share statutes that apply the elective share to the probate estate.

116. Simes, *supra* note 1, at 15-16; Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L. J. 499, 522-23 (1964).

of the use of "will substitutes" make it essential that the gross estate concept be adopted.¹¹⁷

Simes and Haskell both published their proposals before the completion of the 1969 UPC, but the drafters of that UPC rejected the idea of using federal gross estate as the basis for the augmented estate. The 1969 Comment to UPC section 2-202 explains:

What kinds of transfers should be included here is a matter of reasonable difference of opinion. The finespun 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.¹¹⁸

While it is true that the purposes of tax law and probate law are different, it does not necessarily follow that using the gross estate concept as a starting point in creating an augmented estate for an elective share statute is undesirable. Indeed, a comparison of the 1990 UPC with the relevant federal estate tax provisions reveals many similarities.¹¹⁹ The current differences between the UPC's augmented estate and the I.R.C. gross estate generally reflect policy differences between the two statutory schemes.¹²⁰

One difficulty with using the Internal Revenue Code's gross estate in creating an augmented estate is that the gross estate makes no distinction between marital and nonmarital property. For estate tax purposes, the distinction is irrelevant. If, for elective share purposes, nonmarital property is to be excluded from the augmented estate under marital partnership theory, then some mechanism must be used to subtract the spouse's separate property from the gross estate.

Conversely, some property that is not part of the decedent's gross estate for tax purposes should be included in the augmented estate. Transfers made by a decedent, even if made immediately before death, will not be included in the gross estate because they will have been subject to a gift tax.¹²¹ Since the property is taxed at the same rate for

117. Haskell, *supra* note 116, at 522.

118. UNIF. PROB. CODE § 2-202 cmt. (1969).

119. Insurance is now included in the augmented estate. General powers of appointment are also included, regardless of who created them. It is interesting to note that when the § 2-202 augmented estate was expanded in 1990, the drafters dropped the portion of the comment that declared that federal tax goals are different from probate code goals.

120. QTIP property from a previous spouse is part of the gross estate but not part of the UPC's augmented estate. The same is true for pre-marriage transfers with retained interests. In both cases the property involved is not marital property.

121. Sidney Kwestel and Rena C. Seplowitz write: "The fact that certain lifetime transfers are not taxable for estate tax purposes because they are taxable as gifts militates against wholesale

gift and for estate tax purposes, taxing it at the time of the gift is the functional equivalent of including it in the gross estate.¹²²

In constructing an augmented estate, the inclusion of gifts made during a specified period before death is necessary to prevent fraudulent reduction of the spouse's share through gifts causa mortis. Under the 1990 UPC, gifts made within two years of death are added to the augmented estate.¹²³ The two-year period reflects a compromise between preventing the use of gifts to defeat the spousal share and easing the burden of tracing gifts made more than two years before death.

The use of the gross estate as a starting point for the augmented estate has significant benefits. One advantage is that a substantial body of regulations, rulings, and case law defines the gross estate and its component parts.¹²⁴ There is less risk of ambiguity or confusion in using terms with established definitions than with creating new ones. Estate planning lawyers are familiar with the gross estate concept and may be more comfortable with it than with a new creation.¹²⁵ Consequently, reference to the gross estate in defining the augmented estate may facilitate estate planning and minimize litigation.

IV. TWO CURRENT EXAMPLES OF THE USE OF FEDERAL ESTATE TAX LAW

Although the drafters of the Uniform Probate Code dismissed the recommendations of Simes and Haskell, the idea of using federal estate tax law in reforming elective share statutes should be reexamined. An elective share statute in Delaware¹²⁶ and a bar association proposal in Illinois¹²⁷ provide examples of the current use of the federal gross estate tax as the starting point for an elective share statute.

acceptance of tax decisions in the elective share area." Kwestel & Seplowitz, *supra* note 47, at 487 (footnote omitted). The authors limit their proposal to using federal tax case law to answer questions arising under New York's elective share law.

122. The gift tax paid on a gift made within three years of death is included in the gross estate under I.R.C. § 2035(c). This rule eliminates problems of transfer tax avoidance through gifts causa mortis.

123. UNIF. PROB. CODE § 2-205(3) (1993).

124. Kwestel and Seplowitz posit that the case law interpreting federal estate tax provisions is relevant in interpreting elective share statutes with similar wording. Kwestel & Seplowitz, *supra* note 47, at 486.

125. ILLINOIS PROPOSAL, *supra* note 3, at 5. The subcommittee did express concern that probate judges might be less familiar with the details of estate tax law than the estate planning bar. *Id.*

126. DEL. CODE ANN. tit. 12, §§ 901-08 (1987 & Cumul. Supp. 1994).

127. ILLINOIS PROPOSAL, *supra* note 3.

A. *The Delaware Statute*

The Delaware elective share statute gives the surviving spouse the right to one-third of a decedent's "elective estate," less the amount equal to all the property the surviving spouse receives from the decedent by reason of the decedent's death. The elective estate is defined as the decedent's gross estate for federal estate tax purposes, less any amounts deductible under I.R.C. sections 2053 and 2054 for expenses of the estate such as funeral expenses, expenses of administration, claims against the estate, and losses from casualty or theft.

By expanding the elective estate from the probate estate of traditional statutes to the gross estate for federal estate tax purposes, the Delaware statute does ensure that most, and usually all, of the property owned or controlled by a decedent will be subject to the elective share. Compared to traditional statutes, the Delaware approach makes it more difficult to avoid the elective share, although a dying decedent could prevent his or her spouse from taking an elective share by transferring property outright to someone other than the surviving spouse. Thus, the Delaware statute addresses the problem of applying the elective share when assets are increasingly transferred outside the probate estate.

The Delaware statute does not address another problem with the traditional elective share statute: applying the elective share to all marital property while excluding separate property. Like the traditional elective share statute, the Delaware statute is based solely on the decedent's estate. There is no attempt to base the elective share on marital property, no attempt to include marital property held in the surviving spouse's name, and no attempt to exclude the decedent's separate property. A surviving spouse is entitled to take an elective share even if all the marital assets are titled in that spouse's name.

The Delaware statute does provide one avenue for protecting separate assets—the use of a Qualified Terminable Interest Property (QTIP) trust. Like the previous version of UPC section 2-207,¹²⁸ the Delaware statute reduces the elective share amount by the commuted value of any income interest given to the surviving spouse, even if the surviving spouse disclaims the interest.¹²⁹ Forcing the surviving spouse to accept an income interest restricts the surviving spouse's ability to control her or his share of the marital property.¹³⁰

128. See *supra* text accompanying note 86.

129. Before 1990, no disclaimed property was charged against the surviving spouse's share. A 1990 amendment altered the statute only as to income interests. Thus, the surviving spouse can still disclaim non-income interests. For example, she or he can choose to take the elective share amount in lieu of a house or other specifically bequeathed property. DEL. CODE ANN. tit. 12, § 903(1)(a) (1987 & Cumul. Supp. 1994).

130. See *supra* notes 112-113 and accompanying text.

Although the Delaware statute is an improvement over the traditional elective share statute, it fails to meet the goals of either the need or the partnership theory. Still, it provides an example of the use of federal estate tax concepts in elective share law. In at least one state, "the finespun tests of Federal Estate Tax Law" have found their way into probate law.¹³¹

B. *The Illinois Proposal*

In 1990, a subcommittee of the Chicago Bar Association's Probate Practice Committee reviewed Illinois elective share law and recommended a statutory alternative. Under the current Illinois statute, a surviving spouse who elects to take against the decedent spouse's will is entitled to the decedent's entire probate estate if the decedent leaves no descendants, or a one-half share if the decedent leaves descendants.¹³² Nonprobate assets are subject to the election only if the surviving spouse can establish that the decedent transferred the property in fraud of the survivor's rights. In order to establish fraud in Illinois, the surviving spouse must show that the decedent intended to frustrate the surviving spouse's rights under the elective share statute. Transfers that defeat the spouse's rights are not fraudulent per se.¹³³

After reviewing several alternatives,¹³⁴ the Subcommittee set forth a proposal adopting an augmented estate approach tied to federal estate and gift tax principles and modeled in part on the 1990 UPC. The Subcommittee determined that the property classifications of the UPC were "arbitrary," "complex," and "flawed."¹³⁵ The Subcommittee further indicated that "the relatively settled estate and gift tax provisions of the

131. Three bills to amend the Massachusetts elective share statute were introduced in February, 1995. Each defined the elective estate as "the decedent's federal gross estate, as finally determined under section 2031 and sections 2033 to 2046 inclusive of the Internal Revenue Code." S. 883, 179th Gen. Court, 1st Sess. (1995); H.R. 3163, 179th Gen. Court, 1st Sess. (1995); H.R. 2980, 179th Gen. Court, 1st Sess. (1995).

132. ILL. ANN. STAT. ch. 755 para. 5/1-1 (1976).

133. See, e.g., *Johnson v. La Grange State Bank*, 383 N.E.2d 185 (Ill. 1978), including two cases in which the petitioners alleged fraud on their marital share by inter vivos transfer. In both cases the court found that the transfer did defeat marital rights but nevertheless refused to set either aside; *Payne v. River Forest State Bank & Trust Co.*, 401 N.E.2d 1229 (Ill. App. 1980), where the court refused to set aside a land transfer, which transfer defeated the petitioner's marital rights, absent allegations that the transferor lacked donative intent at time of transfer.

134. Among the alternatives that the subcommittee considered and rejected were:

(1) Repeal an amendment of the Illinois Validity of Lifetime Transfer Act and the mandate of *Johnson v. La Grange State Bank*; (2) Adoption of a marital property regime, similar to that contained in the IMDMA or the Uniform Marital Property Act ("UMPA"), to take effect at death; and (3) Adoption of the augmented estate approach of the Uniform Probate Code.

ILLINOIS PROPOSAL, *supra* note 3, at 3.

135. *Id.* at 4, 5.

Internal Revenue Code, with which most Illinois probate practitioners are intimately familiar, if not its courts, would best provide much needed guidance and simplicity in planning for and enforcing a new forced share statute."¹³⁶

The Illinois Proposal mandates an elective share of fifty percent of the augmented estate. Unlike the UPC, however, the share locks in automatically upon marriage rather than being phased in over fifteen years. The report indicates a concern that a phase-in will "unduly penalize surviving spouses of first marriages and of young marriages of brief duration."¹³⁷ The Subcommittee expressed its belief that spouses of multiple marriages and late-in-life marriages can protect their nonmarital assets through the use of prenuptial agreements or waivers, premarital transfers, irrevocable marital transfers, and QTIP trusts.¹³⁸

Under the Proposal, the augmented estate consists of all property included in the adjusted gross estate for federal estate tax purposes, with three exceptions: (1) QTIP property received from a previous spouse; (2) property subject to a general power of appointment and includable under I.R.C. section 2041 to the extent that the power was not a lifetime power of withdrawal and was unexercised immediately before death; and (3) property includable under the retained interest sections, I.R.C. sections 2035, 2036, 2037, and 2038, if the surviving spouse consented to the initial transfer of the property.¹³⁹

The first two exceptions represent property that the decedent spouse inherited and that is therefore nonmarital property. The third exception permits transfers by the decedent spouse to escape the elective share *if* the surviving spouse either consents at the time of the transfer or subsequently ratifies the transfer. Property in which the decedent retained an interest is subject to the elective share even if the transfer was made before the marriage, before the passage of the act, or before the spouses established domicile in Illinois. The Subcommittee felt this provision was necessary to protect the surviving spouse from fraudulent transfers.¹⁴⁰

The augmented estate also includes property transferred by gift within five years of the decedent's death, unless the surviving spouse consented to the transfer. The purpose of this requirement is to prevent *causa mortis* gifts in fraud of the surviving spouse's share. This provision is modeled on the UPC provision, except that the look-back period

136. *Id.* at 5.

137. *Id.* at 6. In this respect the subcommittee ignored the marital partnership theory.

138. *Id.* at 7.

139. *Id.* at 8.

140. *Id.* at 9. This reflects a universal partnership approach.

is five years rather than two.¹⁴¹

Finally, the augmented estate includes the value of the surviving spouse's augmented estate, determined as if she or he had died first.¹⁴² If all marital property is to be included in the augmented estate, it must include property titled in the surviving spouse's name.

The elective share offset under the Illinois proposal charges the surviving spouse's elective share with (1) the surviving spouse's augmented estate, (2) all property in the decedent's augmented estate that passes to the surviving spouse by reason of the decedent's death, and (3) any property disclaimed by the surviving spouse. The surviving spouse's interests in QTIP trusts, general power of appointment trusts, and life insurance or annuity contracts subject to a general power of appointment are valued at the full value of the underlying assets, not the value of the life estate plus whatever powers of appointment exist.

While the Illinois proposal attempts to bring Illinois elective share law into line with the partnership theory of marriage,¹⁴³ the proposal does not protect a spouse's partnership interest in marital property or separate property. The proposal is underinclusive in that an elective share may be reduced by property never received by the surviving spouse,¹⁴⁴ and overinclusive in that the augmented estate may include nonmarital property.

The proposed statute exempts two types of inherited property from inclusion in the augmented estate—general power of appointment property other than property subject to a lifetime power of withdrawal, and property held for the decedent's benefit in a QTIP trust.¹⁴⁵ Aside from these two exceptions, all nonmarital property is included under the Illinois Proposal. The comments even state that property transferred before the marriage will be part of the augmented estate if the decedent retains interests in the property.¹⁴⁶ In contrast, the 1990 UPC does not recapture property transferred before the marriage with retained interests unless the interest retained is a presently exercisable general power of appointment.¹⁴⁷

Offsetting the spouse's elective share with the full amount of prop-

141. *Id.* at 9-10.

142. *Id.* at 10.

143. *Id.* at 2.

144. The spouse's share is charged with any disclaimed property and with the value of a remainder interest she or he will not receive or control.

145. QTIP property is also excluded under the 1990 UPC, but property subject to a general power of appointment exercisable before death is included, regardless of whether the power was created by a third party. UNIF. PROB. CODE § 2-205(1)(i) (1993).

146. ILLINOIS PROPOSAL, *supra* note 3, at 9.

147. UNIF. PROB. CODE §§ 2-205(1)(i) & 2-205(2) (1993).

erty held in a QTIP or power of appointment trust, whether or not the spouse accepts the property, substantially reduces the application of the partnership theory.¹⁴⁸ The Subcommittee states that the purpose of including these types of marital trusts at full value is to allow a spouse in a multiple-marriage family to provide for the surviving spouse and yet ensure that the principal of the trust will eventually go to the spouse's first family. This is a valid concern given that the proposed statute includes nonmarital property in the augmented estate. A more appropriate resolution, however, would be to limit the elective share to marital property.

Despite its flaws, the Illinois Proposal is instructive in two respects. First, the federal taxable gross estate is chosen as the starting point for defining the augmented estate. The Subcommittee believed that using already established concepts of federal estate tax law would aid in the acceptance and understanding of a new elective share statute. Second, the Illinois Proposal suggests several ideas for fine-tuning the augmented estate to create a statute that will fairly and effectively apply the marital partnership theory.

V. PROPOSAL

The 1990 UPC and the Illinois Proposal both significantly improve the pre-1990 UPC and traditional elective share law. The influence of marital partnership theory pervades both these statutory prototypes. Yet both proposals fail to adopt a consistent application of the marital partnership theory. A state seeking to adopt the marital partnership theory as fully as possible can do so by adopting the Uniform Marital Property Act ("UMPA").¹⁴⁹ However, states have been reluctant to adopt the UMPA because of concerns about changes in property management during the lifetimes of the spouses.¹⁵⁰ But even if adoption of the UMPA is

148. Indeed, this provision undercuts the surviving spouse's marital property rights more significantly than did former UPC § 2-207(a)(3). That section charged the spouse with the commuted value of the income interest, not with the value of the entire trust.

149. One commentator concluded that the Uniform Marital Property Act "embodies the concepts of 'dual equality' and sharing principles that reflect both our ideals and our behavior." Volkmer, *supra* note 21, at 155.

150. The Illinois Proposal states that the Illinois and Chicago Bar Associations "have vigorously opposed passage of UMPA in Illinois, principally because of its potentially far reaching impact on the laws of this State, as they relate to the rights and duties of spouses *during* their marriage" ILLINOIS PROPOSAL, *supra* note 3, at 4. The Subcommittee also expressed concern that spouses of short marriages would be inadequately protected (presumably on a need or support basis), that tracing and characterization of marital property would be difficult, and that the vested property rights created in the nonwage-earning spouse could lead to unintended income or gift tax consequences. *Id.*

politically infeasible, states can and should seek to improve outdated and unfair elective share statutes.

Proposals that apply the marital partnership theory at the death of a spouse can provide guidance to states as they revise elective share statutes. If marital partnership theory is accepted as being the most fair approach, then states can improve existing proposals while retaining the general framework of an elective share statute.

The following proposal for an elective share statute combines elements of the 1990 UPC and the Illinois alternative, but makes changes to bring the proposed statute more closely in line with marital partnership theory. The proposal attempts to give a surviving spouse the right to elect a one-half share of the marital property, defined as the acquests of the marriage. The primary difference between this proposal and the UPC and Illinois versions is that it attempts to apply the elective share only to marital property. Although the process of doing so is not exact, limiting the augmented estate to marital property will more likely lead to fair results than will the approaches taken by the other proposed statutes.

In addition to applying the partnership theory, the proposal also applies the need theory by adopting the 1990 UPC's supplemental elective share provision.¹⁵¹ Like the UPC, this proposal creates a supplemental elective share amount to provide a minimal level of support to the surviving spouse. If the surviving spouse's own assets, plus any property received by reason of the decedent's death, plus any elective share amount, do not exceed \$50,000,¹⁵² the spouse is entitled to the difference, which is the "supplemental elective share." This supplemental amount provides some support for a spouse of a short marriage or a marriage in which marital assets are minimal. The provision creating the supplemental share is separate from the other elective share provisions and acts as a back-up to the elective share amount.

Like the UPC and Illinois Proposal, this proposed statute uses three elements to compute the elective share: the elective share percentage, the augmented estate, and offsets against the elective share amount. The elective share percentage is applied to the augmented estate to obtain the elective share amount. Specified assets owned or received by the surviving spouse are then offset against the elective share amount to determine the final amount that the surviving spouse may elect.

Under this proposed statute, the elective share percentage is fifty

151. UNIF. PROB. CODE § 2-202(b) (1993).

152. The \$50,000 amount suggested by the UPC seems reasonable. The general comment explains that \$50,000 plus probate exemptions, allowances, and Social Security payments should provide a spouse about 75 years old "with a fairly adequate means of support." UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (1993).

percent. Because the augmented estate is limited to marital property, the fifty percent figure reflects the partnership theory. The accrual-type elective share used by the 1990 UPC is unnecessary because the augmented estate will be limited to marital property.

In constructing the augmented estate, this proposal starts with the federal gross estate. Subtractions and additions are made in keeping with the policy differences between the estate tax and an elective share. These modifications represent an attempt to limit the augmented estate to marital property. Of course, in order for the augmented estate to include all marital property, property held in the name of either spouse or in the names of both spouses must be included.

The first component of the augmented estate is the decedent's gross estate as it would be determined for federal tax purposes. The federal estate and gift tax code, as well as regulations and cases, provide the valuation rules to be used to determine the value of the augmented estate. Although the court probating the estate will make its own value assessment and need not rely on return values or IRS determinations, the federal rules are to be used as guidelines for valuation. While nothing precludes the state court from using return values or tax court determinations, the state court need not wait for the final return values before reaching its conclusions on valuation. The state court determination of value will control for elective share purposes.¹⁵³

The gross estate is reduced by the amount of enforceable claims and by funeral and administration expenses. Enforceable claims are debts of the marital community and should be part of the equation when assets are divided. The claims referred to here do not include death taxes, and such taxes are not subtracted from the gross estate.¹⁵⁴

Family allowances and exemptions, homestead rights, and spouses' awards also reduce the augmented estate. These awards and allowances are made by the court based on the needs of the spouse or family. To the extent such awards are made, they fall outside the partnership theory. They are not included in creating the augmented estate, and the elective share is not reduced by any allowances received by the surviving spouse. This provision allows the court to exercise a degree of discretion without

153. This is the approach taken in the Illinois proposal. ILLINOIS PROPOSAL, *supra* note 3, at 10-11. Ira M. Bloom has raised concerns that use of the tax valuation method may result in the overvaluation of income interests charged against the surviving spouse. Bloom, *supra* note 113, at 959-70. Bloom adds that "[e]xisting alternatives may be no better." *Id.* at 769 n.115.

154. This proposal follows the 1990 UPC. UNIF. PROB. CODE § 2-204 (1993). The Illinois Proposal reduces the augmented estate by "any excise, generation-skipping, succession or other death taxes . . . payable by reason, or as a result, of the deceased spouse's death." ILLINOIS PROPOSAL, *supra* note 3, attachment Art. IIA, § 2-2a(c).

giving the court discretion over the entire estate.¹⁵⁵

This proposal then reduces the gross estate, to the extent feasible, by the value of the decedent's separate property.¹⁵⁶ The first category of subtractions identifies separate property by reference to the federal estate tax code. Excluded from the gross estate is property included solely under I.R.C. section 2041 (a general power of appointment received from a third party); I.R.C. section 2044 (a QTIP from a former spouse);¹⁵⁷ or I.R.C. sections 2035, 2036, 2037 or 2038 (transfers with retained interests), to the extent that the transfer was made either before the marriage or with the prior written consent or subsequent written ratification of the surviving spouse.¹⁵⁸

For tax purposes, the gross estate includes property identified by these sections either because the property has not yet been subject to a transfer tax or because the decedent had a sufficient degree of control over the property to warrant subjecting it to the estate tax. Although these sections require inclusion of certain property for estate tax purposes, they also provide a useful way to identify some nonmarital property. Property included under section 2041 or section 2044 is by definition property received from a third party and is therefore the separate property of the decedent spouse. Property included under the retained interest sections is also separate property if the decedent transferred it before the marriage. If the property is transferred during the marriage, it is not necessarily separate property, but it is appropriate to exclude property that was given away if the spouse consented to the transfer. The law should permit marital partners to rearrange their assets by agreement.¹⁵⁹

Under this proposal, the second category of property exempt as separate property is property that either the decedent's estate or the sur-

155. The 1990 UPC excludes any "homestead allowance, family allowances, [and] exempt property" from the augmented estate. UNIF. PROB. CODE § 2-204 (1993). If the surviving spouse receives any of these amounts, they will be in addition to the elective share. *Id.* § 2-202(c). In contrast, the Illinois Proposal does not exclude family allowances. It also treats a spouse's award as an offset. ILLINOIS PROPOSAL, *supra* note 3, attachment Art. IIA, § 2-3(a)(i).

156. In a critique of the 1990 UPC, Bloom recommended "exceptions to the rule that bars exclusion of separate property . . ." Bloom, *supra* note 113, at 980. Bloom would except QTIP property from a prior marriage, interests in trusts created by third parties, and partial interests outside of trust. *Id.* at 980-81.

157. These first two modifications are used in the Illinois Proposal. ILLINOIS PROPOSAL, *supra* note 3, attachment Art. IIA, § 2-2a(a)(i).

158. The Illinois Proposal includes these transfers, even if made before marriage, unless the spouse consents. *Id.* The 1990 UPC includes transfers with retained interests only if made during the marriage. UNIF. PROB. CODE § 2-205(2) (1993).

159. There is a risk that a domineering spouse will coerce consent to a transfer. As with antenuptial agreements, a surviving spouse could demonstrate that consent was not given willingly or with full disclosure.

viving spouse can establish as the separate property of one of the spouses. The proposed statute contains a presumption that all the property included in the augmented estate is marital property. The party seeking to overcome the presumption has the burden of establishing that certain property constitutes nonmarital property either because one of the spouses held the property before the marriage or because one of the spouses received the property by gift or inheritance.

Determining whether property is marital or separate can be difficult. In the case of divorce property settlements, many states attempt to distinguish separate from marital property.¹⁶⁰ Because spouses often commingle property, questions of tracing and transmutation occur.¹⁶¹

Concerns about tracing and the characterization of property led the drafters of both the 1990 UPC and the Illinois proposed statute to reject an elective share that attempted to distinguish between marital and separate property.¹⁶² Although there will always be problems in separating marital from separate property,¹⁶³ these problems can be minimized through use of the exclusions identified above and by use of a presumption that property is marital property.

The presumption that property is marital property should be strong and the corresponding burden of proof substantial to reduce the likelihood of litigation.¹⁶⁴ The presumption should be drafted to create a substantial hurdle to overcome. The purpose of the presumption is not to encourage litigation in situations in which spouses have commingled property for years. Rather, the rebuttable presumption allows a surviving spouse or an executor to keep property separate if the property has

160. See J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219 (1989).

161. *Id.* Oldham describes the problems of sorting out marital and nonmarital property.

162. See Waggoner, *supra* note 37, at 247; ILLINOIS PROPOSAL, *supra* note 3, at 4.

163. Despite these problems, California, Idaho, and Wisconsin apply quasi-community property rules to property acquired while a decedent domiciliary of one of those states was domiciled in a common law property state. SCOLES & HALBACH, *supra* note 10, at 93. If spouses acquire property in a common law state, that property will remain the separate property of the spouse who holds title to the property, but it will be subject to the elective share. If the couple moves to a community property state, the property retains its separate property status during the marriage, but the elective share protection is lost. Quasi-community property protects the marital property rights of the surviving spouse. Like the proposal in this article, quasi-community property creates spousal partnership rights at death in property that was not subject to community property rules during the marriage.

164. See Robert J. Levy, *An Introduction to Divorce-Property Issues*, 23 FAM. L.Q. 147, 152-53 (1989). Levy argues that tracing can "do little harm" if the courts take seriously the presumption that property is marital property. *Id.* at 152. In the context of marital dissolution, Levy believes that a weak presumption has facilitated litigation. He states that the Uniform Marriage and Divorce Act did not phrase the presumption firmly enough and that appellate courts have further weakened it. The stronger the presumption, the less likely that tracing issues will be litigated. *Id.* at 152-53.

been kept separate during the marriage, or if the separate property can be easily traced. If property has been commingled, spousal disinheritance is less likely than if separate property has been segregated. The Uniform Marital Property Act can provide guidance on issues such as whether income earned on separate property during the marriage is separate or marital property. A partnership of acquiescence approach favors treating all income earned during the marriage as marital property.

A rebuttable presumption that property is marital property would avoid the need to trace to the source in every case, and would provide a means to redress inequities in late-in-life marriages or situations in which one spouse had substantial inherited property. Establishing the existence of nonmarital property should not be difficult if, for example, inherited property is held in trust for one of the spouses, or if the inherited property consists of one asset, such as land, a family business, or even a separate investment or pieces of personal property. If the marriage occurred after retirement, then each spouse should have the right to dispose of his or her separate property. For those spouses, it may be possible to establish which assets each brought to the marriage. If, in any of these cases, establishing separate property is difficult or impossible, then it may be because the spouses considered all of the property marital property, and as such it should be subject to the elective share.

In some cases it may be impossible to establish separate property, even if the equities of the situation justify doing so.¹⁶⁵ In those cases the elective share statute would be unjust. Nonetheless, it is preferable to treat property as separate for elective share purposes if the spouses themselves have kept it separate. The presumption will not be overcome in all cases; but this should not preclude its use in the many cases in which it can be overcome. The presumption, coupled with the modified approach to calculating the augmented estate, would be more likely to achieve just results than either the 1990 UPC or the Illinois Proposal.¹⁶⁶

After the exclusions from the gross estate are made, certain prop-

165. Waggoner warns that such a presumption should not be implemented because in some cases it may yield incorrect results. "Thus, what appears to be an exact method may not in fact give exact results." Waggoner, *supra* note 37, at 247.

166. The UPC elective share percentage increases with the length of the marriage. Although this approach may yield an appropriate elective share, such a result would be merely fortuitous. Spouses with family trust funds, inherited businesses, or savings accumulated before a late-in-life marriage may stay married for 15 years. The passage of time alone is not sufficient to convert the property to marital property.

The Illinois Proposal indirectly addresses the problem of separate property by permitting the use of a QTIP trust to hold the elective share. The result is that separate property that the decedent wants to transfer to other family members stays tied up in a trust. Further, a QTIP may be used for marital property, thus depriving a spouse of control. The comments to the Illinois proposal state that couples with significant separate property can protect it through prenuptial agreements. It is true that spouses can protect their property by contract, but the purpose of the elective share

erty must be added to the augmented estate. For elective share purposes, some recapture of gifts made immediately before death is necessary to protect the surviving spouse. Otherwise, a spouse with a terminal illness could successfully disinherit the surviving spouse simply by giving away the marital property.¹⁶⁷ To avoid this problem, the augmented estate includes, in addition to the gross estate as modified, any property transferred by the decedent within three years of death to any person other than the surviving spouse without the surviving spouse's written consent or subsequent ratification. Property is included only to the extent it was not exempt from gift tax under the annual exclusion.¹⁶⁸ Thus, birthday gifts and tax planning gifts are not included.

It is true that all gifts made from marital property without the consent of the surviving spouse serve to limit the surviving spouse's share of the marital property. Nonetheless, problems of tracing and recovering property for the elective share make it impractical to apply the elective share to gifts made throughout the marriage. A three-year look-back provision, which is consistent with the I.R.C. section 2035 rule for estate tax purposes, seems reasonable.¹⁶⁹

In creating the augmented estate, a second category of property to be added is the amount of any insurance proceeds paid to any person¹⁷⁰ by reason of decedent's death, to the extent the insurance is not included in the gross estate. Under this provision, insurance is included unless it is established that nonmarital funds were used to purchase the insurance.

A provision adding insurance proceeds to the augmented estate is necessary to prevent circumvention of the elective share and to prevent inadvertent depletion of the augmented estate. Insurance trusts are popular estate planning tools. If policies are transferred to an insurance trust more than three years before death, and if the decedent does not control the trust or the policies, the insurance proceeds will not be included in the gross estate. Thus there are estate tax reasons for transferring insurance policies that do not affect marital interests in the property. For this

statute is to apply a fair result for spouses who have not used contract law to create their own solution.

167. See *supra* text accompanying notes 121-123.

168. I.R.C. § 2503(b) provides that in any year, amounts aggregating up to \$10,000 may be given to each donee (and to any number of donees) free of gift tax.

169. The 1990 UPC uses a two-year period. UNIF. PROB. CODE § 2-205(3)(iii) (1993). The Illinois Proposal uses a five-year period. ILLINOIS PROPOSAL, *supra* note 3, at 10. Either two or three years seems workable, but five years seems longer than necessary.

170. The 1990 UPC includes insurance proceeds in its augmented estate either if the decedent controlled the policy or if the proceeds were paid to the surviving spouse. UNIF. PROB. CODE §§ 2-205(1)(iv), 2-206(3) (1993). If the purpose in constructing the augmented estate is to include all marital assets, then insurance should be included regardless of who receives the proceeds. If a third party purchased the policy or if separate assets were used to buy the insurance, that fact may be used to overcome the presumption that all property is marital property.

reason, it is appropriate to include insurance proceeds in the augmented estate regardless of whether the decedent owned the policy.¹⁷¹

Tort claims related to a decedent's death and payable to the surviving spouse are also included in the augmented estate, to the extent that such claims are not part of the decedent's gross estate and therefore already part of the augmented estate. Claims paid to someone other than the surviving spouse, such as to a child, remain outside the augmented estate.

Finally, this proposal's augmented estate includes all marital property held or controlled by the surviving spouse. This is done by computing a deemed augmented estate for the surviving spouse, as if the surviving spouse had died immediately before the decedent.¹⁷²

Both the 1990 UPC and the Illinois Proposal include the surviving spouse's property as part of the decedent's augmented estate.¹⁷³ This is a key change from the pre-1990 UPC, and it is essential in order to implement the partnership theory. If, under the marital partnership theory, the surviving spouse is to receive one-half of the property acquired by the couple during marriage, then the augmented estate must include all the marital property, regardless of how it is titled.

After the value of the augmented estate is determined, a preliminary elective share amount can be computed by applying the elective share percentage, fifty percent, to the augmented estate. A number of offsets then reduce the preliminary elective share amount. The final elective share amount, combined with the surviving spouse's own property, should leave the surviving spouse with approximately one-half of the marital property. If the surviving spouse already has more than one-half of the marital property, the elective share will be zero.

Amounts in the surviving spouse's deemed augmented estate are offset against the elective share amounts. These are the assets held in the surviving spouse's name before decedent's death. If the surviving spouse overcomes the presumption that all of her or his property is marital property, then any separate property will not be offset against the elective share.

Also offset are amounts received by the surviving spouse by reason of the decedent's death. The surviving spouse may receive property

171. Insurance transferred out of the decedent's estate would otherwise be included in the augmented estate only if it had been transferred within three years of death. The tracing concerns present with other outright gifts are less of a problem with insurance.

172. The surviving spouse's augmented estate would be valued as if the surviving spouse were alive, not predeceased. For example, insurance would be valued at its gift tax value, not its face value.

173. UNIF. PROB. CODE § 2-207 (1993); ILLINOIS PROPOSAL, *supra* note 3, attachment Art. IIA, § 2-2a(a)(iii).

under the decedent's will, by intestate succession, or through a variety of nonprobate means. The decedent can choose to transfer separate rather than marital assets to the surviving spouse.

Amounts disclaimed by the surviving spouse are not included as offsetting amounts, except as provided below. This differs from the Illinois Proposal and is necessary to obtain a fair result under marital partnership theory.¹⁷⁴ The effect of offsetting disclaimed amounts is to force the surviving spouse to accept a trust arrangement set up by the decedent spouse. The asset-holding spouse can maintain control over the marital property by giving the surviving spouse an income interest under a QTIP trust. If the property in the trust is marital property, the surviving spouse should have a right to control the property during her or his life and at death.

The drafters of the Illinois Proposal expressed concern that allowing the surviving spouse to disclaim property could jeopardize the interests of other beneficiaries, particularly if the decedent had children from a prior marriage. This proposal addresses that concern by limiting the augmented estate to marital property. The remaining problem with allowing the surviving spouse to disclaim without penalty occurs if the disclaimer causes property to go to children or other relatives of the surviving spouse who are not related to the decedent. Therefore, an offset is made for property disclaimed if the property goes to relatives of the surviving spouse who are not related to the decedent.

If the surviving spouse chooses to accept benefits under a trust, the valuation of the interest is based on the value of the interest itself, not on the value of the underlying property. This is the approach taken by the 1990 UPC.¹⁷⁵ The Illinois Proposal, which charges the surviving spouse with the entire value of the trust, is at odds with marital partnership theory. The effect of the Illinois approach is to reduce the value of the surviving spouse's share to below fifty percent.¹⁷⁶

VI. CONCLUSION

Elective share statutes are in need of review and reform. Increasing attention to the outdated state of these statutes, exemplified by the 1990 UPC and the Illinois Proposal, is an indication of interest in this area. Both of these proposals reflect a general acceptance of marital partner-

174. See *supra* notes 112-113 and accompanying text.

175. UNIF. PROB. CODE § 2-208(b) (1993).

176. There is some greater justification for the Illinois approach when it is viewed in the context of the entire Illinois Proposal. The Illinois augmented estate includes nonmarital property and lacks the accrual-type percentage structure of the 1990 UPC. Even in the context of the Illinois Proposal, however, charging the spouse with QTIP property should be limited to second-marriage situations.

ship theory, but neither embraces it wholeheartedly. Yet treating the marriage as a partnership for economic purposes is the key to protecting the rights of spouses.

Although disinheritance of a spouse is an infrequent occurrence, it may become common as multiple marriages increase. A revised elective share statute can ensure that a surviving spouse of a long-term marriage receives her or his share of the economic fruits of the marriage, free from control. A revised statute can also protect children from a prior marriage by limiting application of the elective share to marital property.

If the goal in revising the elective share is to create a marital-property-on-death statute, then an approach must be found to create an augmented estate that approximates marital property. The proposal set forth herein uses two means to do this. Federal estate and gift tax law provides a framework for constructing the augmented estate. The proposal uses the federal gross estate as a starting point and then further limits and defines the augmented estate by reference to other estate tax sections. Although a federal estate tax return will not be required for all estates, the tax rules provide an established methodology that has regulations and case law to illuminate problematic areas.

The second means used to limit the augmented estate to marital property is a provision that allows either spouse to remove nonmarital property from the augmented estate by proving that it is separate property. Concerns about tracing assets have been raised as an argument against trying to distinguish between marital and nonmarital property at death. But removing separate property is essential to creating a fair elective share statute and is consistent with the marital partnership theory. The use of a presumption that all property is marital property minimizes litigation. The result is a compromise that is more likely to lead to fair results than the phased-in augmented estate created by the 1990 UPC.

It is hoped that this proposal will generate further discussion and, in the end, reform of existing statutes. An elective share statute should protect a spouse who forgoes career opportunities to care for children; should protect the nonmonetary contributions of a spouse who happens to have separate assets; and should protect the families of first marriages from spouses of subsequent marriages who seek to use marital status to obtain nonmarital assets. The 1990 UPC, despite its changes, does not yet meet these goals.