Integrating Marital Property into a Spouse’s Elective Share

Raymond C. O’Brien
The Catholic University of America, Columbus School of Law

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ARTICLES

INTEGRATING MARITAL PROPERTY INTO A SPOUSE'S ELECTIVE SHARE

Raymond C. O'Brien*

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* Professor of Law, The Catholic University of America, Columbus School of Law; Visiting Professor of Law, The Georgetown University Law Center.
In 2008, the National Conference of Commissioners on Uniform State Laws (Commissioners) adopted substantial revisions to the Uniform Probate Code (UPC). Among the revisions was a redesigned spousal elective-share provision—codified in sections 2-201 through 2-214—that better implemented the economic-partnership theory of marriage.\(^1\) This most recent revision builds on previously adopted elective-share provisions enacted in 1969 and in 1990, each one reflecting the understanding at the times of their respective enactments as to what would have occurred if a marriage had ended by a divorce, rather than the death of a spouse. In designing elective-share provisions, the Commissioners have consistently sought to provide a spouse with an equal share of marital property, regardless of whether the marriage ended with divorce or death. The evolution towards the most recent UPC enactment has been progressive.

Each state provides benefits at divorce, and these benefits vary depending on whether the state is a community-property state or a separate-property state. The former treats property acquired during marriage as a product of the community without regard to the manner in which title is held—all property acquired during marriage is shared equally regardless of which spouse technically owns the property. Separate-property states recognize title but apportion marital property at divorce through equitable guidelines. Both jurisdictions provide spousal support in exceptional cases; most support provided is transitional, rehabilitative, or in the form of reimbursement. Both community-property and separate-property jurisdictions also struggle to determine whether to classify property as community (or marital) property, as distinct from separate property. Moreover, both jurisdictions employ presumptions and various tests in an effort to simplify the process of classifying property as either marital or separate.

The newly revised elective-share component of the UPC responds to the need of separate-property states to give a surviving spouse a fair share of the marital property at death, similar to what the spouse would have obtained at divorce.\(^2\) As has become the norm in divorce, the UPC rejects a support model for the surviving spouse, and instead provides the surviving spouse with a share of the marital property. Specifically, the UPC allocates a right of election to the surviving spouse under which the spouse may take fifty percent of the value of the marital property portion of the augmented estate.\(^3\) To calculate this portion, the UPC includes the “values of all property, whether real or personal, movable or immovable, tangible or intangible, [and] wherever wherever

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1. See UNIF. PROBATE CODE § 2-202 cmt. (amended 2008) ("The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up.").
2. See id.
3. Id. § 2-202(a) (articulating the amount a surviving spouse may take as his or her elective share).
situated . . . ."4 In dividing marital assets at divorce, state courts often employ a formula to apportion the broad scope of marital property.5 On the other hand, the UPC ignores classification issues that are often integral to dividing property at divorce. The UPC does not distinguish between the property that the couple owned before the marriage, acquired during the marriage, or received by gift or inheritance during the marriage. In other words, the UPC purposely refrains from the classification of property as separate or marital—a task that creates lengthy (and expensive) litigation at divorce. Classification similarly causes considerable delay and costly litigation during the administration of many decedents' estates. Seeking to avoid this delay—and as a means of avoiding classification issues—the UPC has adopted an approximation system that multiplies the sum of the augmented estate by a fixed percentage that is based on the length of the marriage; the percentages range from three percent for a marriage that is less than one year, to one hundred percent for a marriage lasting fifteen years or longer.6 The result of this computation becomes the "value of the marital-property portion of the augmented estate," and the surviving spouse is entitled to fifty percent of this amount.7

This approximation system permits the UPC to avoid classifying property as separate property or marital property; the system has been adopted to promote efficiency and minimize delay in the administration of decedents' estates. Critics of the system argue that approximation will jeopardize estate plans, penalize some married couples, and treat some heirs of predeceasing spouses unfairly.8 The same critics suggest alternative models that would better mirror the classification that occurs at divorce and better safeguard the intent of the decedent spouse.9 The extensive discussion of the approximation system adopted by the UPC is included in Part II.E.4 of this Article and, as it suggests, the classification of property as separate or marital is not the only challenge that the newly revised UPC seeks to address. Instead, the issue on which the UPC must be evaluated is whether the 2008 revision brings elective-share law into line with the contemporary view of marriage as an economic partnership; thus, it must be determined whether the UPC's revision integrates marital

4. Id. § 2-203(a).
5. See discussion infra Part III.B.1 (noting the wide breadth of property that divorce courts are asked to divide).
6. UNIF. PROBATE CODE § 2-203(b) (setting forth the composition procedure for calculating augmented estate).
7. Id. § 2-202(a).
9. Id. at 488 (proposing a deferred-community-property system as an alternative to the UPC's approximation system).
property into a spouse’s elective share. This Article addresses each of these issues in turn.

First, this Article begins with history, as this forms the basis of elective-share law. It is necessary to begin with the historical basis of a spouse’s right to support, and then proceed to examine how and why a spouse obtained a share of the property acquired during marriage. Second, because a spouse’s rights at death were often very different from those that a spouse would obtain at divorce, it is necessary to explain the various judicial and statutory models adopted by the states to provide a modicum of protection to a surviving spouse at death. There are many models and it will soon become apparent why the UPC seeks to provide some uniformity to a babel of approaches. Third, this Article examines the changes that have occurred in the law of divorce, because these changes have had an impact on deciding whether the UPC has captured the trend of spousal protection now present in state divorce courts. Finally, this Article analyzes the newly revised elective-share provision in the context of what has been discussed throughout this Article. The evolution of the UPC’s revisions, the multiple state approaches mentioned, and the abundance of opinions on this important topic together prompt the conclusion that any assessment of the UPC must begin with a determination of whether the 2008 revision is reasonable in light of present circumstances. With this admonition, we begin.

I. BASIS IN HISTORY

Prior to the last three decades of the twentieth century, when a woman married, she often surrendered her financial autonomy to her husband. Thus, under a common law that originated in England, a woman’s personal property that she brought into a marriage, her services and earnings during the marriage, and all dominion over the transfer of her husband’s wealth were considered to be the property of her husband throughout the marriage.\(^{10}\) A wife lost her legal identity when she married; her interests were subsumed within those of her husband, and as a result she lost her ability to contract with third parties.\(^{11}\) Her husband, however, was obligated to provide for her necessities as long as they were reasonable. During the middle of the nineteenth century, a trend toward greater economic independence for married women emerged in some states. A few states enacted statutes that provided some rights to a married woman, particularly the right to her own earnings, to contract with third parties, and to buy and sell property without her husband’s consent. Many states codified these and other advances by adopting various versions of the Married

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11. See id.
Women’s Property Act. Such newly adopted state legislation allowed a wife to assert a financial identity, but still required a husband to support his wife; in return, he remained head of the household.

By the twentieth century, each state had enacted some form of statutory recognition of a wife’s economic independence. Following the significant influx of women into the workforce during the Second World War and the resulting surge of two-income families after the soldiers returned from war and women continued working while caring for their families, property ownership became problematic with respect to rents earned, the obligation to pay for necessities, and the obligation to pay support for a child. These issues continue to arise, but they have not hampered the continuing evolution of financial independence for married women and even married men. The early patchwork of state statutes that granted married women a minor degree of financial independence remained the law until a series of gender-based discrimination inquiries revolutionized the financial status of both married women and men. In the 1970s, the United States Supreme Court conclusively resolved these issues in a series of decisions that had a widespread impact by crafting a new pattern of uniformity among states. For example, in Orr v. Orr, the Supreme Court struck down an Alabama statute mandating that


15. See, e.g., Orr v. Orr, 440 U.S. 268, 283 (1979) (ruling that states cannot “classify on the basis of sex” when the legislative purpose can be achieved by gender-neutral legislation); Craig v. Boren, 429 U.S. 190, 208–09 (1976) (striking down an Oklahoma law allowing women to buy alcohol at age eighteen while prohibiting men from doing the same until the age of twenty-one, because the gender classification was not substantially related to an important government interest); Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (ruling unconstitutional a federal law allowing men automatically to claim a spouse as a dependent in order to receive greater benefits while requiring women to prove the dependent status of a spouse to qualify for the same benefits, because differential treatment on the basis of gender solely for administrative convenience violates the Equal Protection Clause); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (reversing an Idaho law that gave preference to men over women in the administration of estates, because the gender classification did not withstand rational-basis scrutiny and thus violated the Equal Protection Clause).
former husbands pay alimony to former wives (but not vice versa), holding that any statute making such gender classifications was unconstitutional.\textsuperscript{16} Beginning in the 1970s, a new standard of scrutiny was employed by the Court: any statute that discriminated solely on the basis of gender must survive a heightened level of scrutiny to be constitutional.\textsuperscript{17} Partly because of this heightened level of scrutiny, both spouses had equal rights to property held in the entirety, and the common-law doctrine of necessities—which required a husband to pay for his wife's necessities, but not vice versa—was abolished.\textsuperscript{18} Not only were spousal necessities to be furnished without regard to gender, but each parent shared an equal obligation to support the children, regardless of the gender of the parent.\textsuperscript{19}

Each spouse's right to financial independence has continually progressed to the current status of the law—where spouses, or prospective spouses, may contract with each other over various matters including, for example, choice of domicile or religious practices, as long as the matter does not violate public policy, such as provisions regarding payment for a spouse's domestic service.\textsuperscript{20} Today, as the Commissioners correctly observe in the 2008 revisions to the UPC, community-property states and common-law states treat the union of the marital couple as reflecting an economic partnership.\textsuperscript{21} As a result, even though one spouse may remain home and raise the children or maintain the household, both spouses share equal ownership with respect to marital property, debt, services, and prerogatives. Stated succinctly, "marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner, or homemaker."\textsuperscript{22} According to Professor

\textsuperscript{16} Orr, 440 U.S. at 270, 283.
\textsuperscript{17} See, e.g., United States v. Virginia, 518 U.S. 515, 519, 532-33 (1996) (applying an intermediate level of scrutiny to hold unconstitutional a Virginia law excluding women from the Virginia Military Institute); Craig, 429 U.S. at 197 ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").
\textsuperscript{18} See, e.g., Connor v. Sw. Fla. Reg'l Med. Ctr., 668 So. 2d 175, 175-77 (Fla. 1995) (holding that any gender orientation of necessities violates constitutional protections, and as such, the doctrine of necessities must be abolished).
\textsuperscript{19} See, e.g., CAL. FAM. CODE § 3900 (West 2004) ("Subject to this division, the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances.").
\textsuperscript{21} UNIF. PROBATE CODE art II, pt. 2, general cmt. (amended 2008). Although the UPC has been repeatedly revised, for purposes of clarity and convenience, this Article will refer to the three principal revisions: those occurring in 1969, 1990, and 2008.
\textsuperscript{22} O'Brien v. O'Brien, 489 N.E.2d 712, 716 (N.Y. 1985) (citation omitted); see also PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND
Charles H. Whitebread, the marital partnership is a pooling of fortunes on an equal basis:

According to this unspoken marital understanding, each spouse acquires a half interest in the property earned by either spouse during marriage. A gift or inheritance received by either spouse during marriage is not considered part of these “fruits of the marriage” because the spouse puts forth no effort to acquire the gift or inheritance and, therefore, it is not a true partnership acquisition.

One can also think of the partnership theory of marriage as restitutionary. A spouse receives compensation for his or her non-monetary contributions to the marital enterprise, such as home or child care, and for opportunities lost because of these contributions.\(^{23}\)

Once each state established the normative concept of the existence of an economic partnership during marriage, it was logical to create a similar paradigm upon dissolution of marriage—that is, at divorce, often termed dissolution, the principles of economic partnership that govern a marriage would also be applied to the division of marital property. As was true under the common law during marriage, however, title of marital property was often in the name of one of the married partners (usually the husband), and this excluded the other spouse (the wife) from ownership. The same proportionate evolution that occurred in state marriage laws also began to transform divorce proceedings. First, a husband’s exclusive holding of title meant that only the husband was responsible for paying alimony. This has now changed to reflect the elimination of a gender presumption.\(^{24}\) Second, even though title was held in the husband’s name, divorce courts applied equitable factors to divide the

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\(^{23}\) Charles H. Whitebread, *The Uniform Probate Code’s Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 Prob. L.J. 125, 132 (1992); see also Price v. Price, 503 N.E.2d 684, 687 (N.Y. 1986) (“Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner, or homemaker.” (citations omitted)).

\(^{24}\) See Judith Arten & Milton C. Regan, Jr., *Family Law: Cases and Materials* 696–97 (5th ed. 2006) (noting that the modern approach taken by courts is to divide assets equitably at dissolution of the marriage, granting alimony only in cases where division of assets would be impractical); Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* 110–18 (1989) (explaining the historical basis for the move away from the alimony model and toward a system based on equity); Walter Wadlington & Raymond C. O’Brien, *Family Law in Perspective* 79–83 (2d ed. 2007) (tracing the various changes affecting the move away from the alimony model).
property between both of the divorcing spouses regardless of which spouse legally held title.\textsuperscript{25} Third, obligations to provide support to an ex-spouse became minimal as courts moved toward a paradigm of terminating an economic partnership, and away from one of ending a marriage.\textsuperscript{26}

In order to comport with the shift in perspective regarding marriage and divorce, the Commissioners drafted the Uniform Marriage and Divorce Act (UMDA), which was the first of its kind.\textsuperscript{27} Originating in 1970, and subsequently modified in 1971 and 1973, the UMDA established a system of “equitable” factors used to divide property upon dissolution of the marriage.\textsuperscript{28} The distributive scheme erases title ownership by one spouse, and treats both spouses as “equitable” owners of all property acquired during marriage for purposes of division.\textsuperscript{29} Such a scheme mirrors the undivided ownership of community-property states and the modern development of economic partnership in separate-property states. This scheme has been adopted by the American Law Institute, which presumes that all property acquired during marriage is marital property unless the contrary is expressly established by the parties.\textsuperscript{30} The effect is to allow for all property, no matter who earned the property or in whose name it is titled, to be divided by the parties in a valid prenuptial or postnuptial agreement, or, if not specified in such an agreement, by the court upon dissolution.

Today, through legislative initiatives and constitutional prodding by the United States Supreme Court, married persons share an economic partnership during marriage and, in the event of divorce, they divide marital property according to a scheme premised on economic partnership. This scheme disregards the exclusivity of title and apportions ownership in accordance with community-property principles (or equitable principles, as they are labeled in separate-property states). This framework of equitable property division occurs at divorce. The task of the revised 2008 UPC’s elective-share provision is to rework the division of marital property at death. Is it possible to divide marital property at death in a manner that is similar to the way property is held by spouses during life and divided by spouses in the event of divorce? Has the 2008 elective-share provision succeeded in creating a parallel between divorce and death in the division of marital property? The challenge is formidable, especially considering that death may occur after many years or after only a

\textsuperscript{25} AREEN \& REGAN, supra note 24, at 696–97.
\textsuperscript{26} See sources cited supra note 24.
\textsuperscript{27} UNIF. MARRIAGE \& DIVORCE ACT (amended 1973).
\textsuperscript{28} See id. § 307.
\textsuperscript{29} Id.
few days of marriage,\textsuperscript{31} and as is often the case in subsequent marriages, death may occur when one spouse leaves property to children from a prior marriage.

In confronting the issue of incorporating marital property into distributive schemes at death, the UPC continues advances that were initiated in its 1969 and 1990 revisions. Many states have statutes that offer protection to a surviving spouse; inevitably, some statutes are better than others.\textsuperscript{32} Similarly, many courts have forged doctrines based on illusory transfer, fraud, or something similar in an attempt to protect surviving spouses from the vagaries of nonprobate transfers, inter vivos gifts, and inadequate statutory protection. But the goal is an elusive one: determining how to integrate marital property into a spouse’s elective share in a way that mirrors the economic-partnership theory of modern marriage. Simply put, if, in accordance with modern standards, marital property is owned under an economic-partnership scheme and divided equitably under an economic-partnership theory at divorce, does economic partnership also govern the distribution of marital property at death? New revisions to the UPC hope to answer this question in the affirmative. The 2008 revisions to the elective-share provisions of the UPC are the latest and most comprehensive attempt to integrate marital property into a spouse’s elective share.\textsuperscript{33}

Rooted in history, this Article is an assessment of the efficacy of the UPC revisions made by the Commissioners to “bring elective-share law into line with the contemporary view of marriage as an economic partnership.”\textsuperscript{34} This is the standard by which this Article assesses the success of the UPC’s 2008 revisions. The Article asks whether the newly revised elective-share provisions incorporating marital property provide a framework similar to that dividing marital property at divorce. But the task of creating a new elective-share framework is compounded, because the evolution of the economic-partnership theory at divorce continues at a rapid pace. For example, the definition of property continues to expand, laws mandating support for the spouse who has contributed in a non-monetary fashion are changing, and the

\textsuperscript{31} For a revealing statistical summary of “first marriages, remarriages occurring after divorce, and remarriages occurring after widowhood,” see Lawrence W. Waggoner, The Uniform Probate Code’s Elective Share: Time for a Reassessment, 37 U. Mich. J.L. Reform 1, 11-18 (2003). The empirical research was due, perhaps, to the suggestion that provisions regarding a spouse’s elective share should conform to empirical studies of how much marital and separate property spouses own at different stages of their marriages. See id. at 20-22 (observing that the current elective-share system yields just results for spouses in first marriages and post-divorce remarriage, but not in the case of spouses in a “remarriage following widowhood” because in that situation, the property held by the spouses is not likely to have been accumulated during the marriage); see also Newman, supra note 8, at 513–14 (noting that the current elective-share system was not based on empirical data).

\textsuperscript{32} See infra Part II.C.

\textsuperscript{33} See UNIF. PROBATE CODE §§ 2-201 to 2-214 (amended 2008).

\textsuperscript{34} Id. art II, pt. 2, general cmt (providing comments from the Commission regarding the elective share of a surviving spouse).
distinction between marital and non-marital property has also shifted. Litigation surrounding transmutation and the classification of property as marital or separate is particularly relevant to this Article's inquiry because of the UPC's new approximation method, which mixes separate and marital property. This Article will discuss these issues and attempt to arrive at a reasonable conclusion regarding the efficacy of the newly revised elective-share provisions.

This Article is divided into three sections. First, it addresses protection of a spouse's interests at death and the present protection offered to a surviving spouse. Second, the Article explores the protection of a spouse's interests at divorce. The law has changed drastically here: from alimony to reimbursement, and from equitable division of the marital home to equitable division of goodwill. Third, the Article examines the 2008 elective-share provisions available to a surviving spouse. Specifically, the Article discusses the support mechanism and whether it is comparable to that provided at divorce. Next, the Article analyzes the fifty-percent division of what is approximated as marital property to determine if it is reasonable in light of what is done at divorce. As a corollary to divorce procedure, the Article investigates litigation surrounding transmutation of property and inquires whether it is reasonable to approximate the value of what is considered marital property in accordance with the process articulated by the newly revised 2008 UPC. Finally, the Article adds to its investigation the economic-partnership paradigm of marriage as it is reflected in the approximation schedule provided by the UPC. Ultimately, the focus of the Article is whether the 2008 elective-share provisions reasonably integrate what has come to be classified as marital property.

II. PROTECTION OF A SPOUSE AT DEATH

Once a couple validly marries, the resulting status precipitates benefits and protections exclusive to that status.\(^\text{35}\) These marital protections and benefits...
include the ownership by both spouses of any property acquired during marriage and as a result of the labor of either spouse. Furthermore, the definition of property is continually expanding, and marital courts are consistently crafting definitions for newly discovered property. In addition, upon marriage, one spouse may make medical decisions for the other, interspousal support obligations arise, and evidentiary privileges are often attached to the status of marriage. Likewise, at divorce, because the state governs the status of marriage and its policy goals, courts retain power to distribute marital property, characterize property as either marital or separate, apportion debts, order support of a spouse, mandate non-dischargeable bankruptcy debts, and craft decrees ordering one spouse to reimburse or rehabilitate the other. These status entitlements are described in greater detail in family law journals or casebooks.

Marriage is premised on the reality that a spouse is entitled to equal protection and treatment: first, during the course of the marriage, and second, in the event of divorce. But this equality of treatment is not present at death. As Professor Lawrence W. Waggoner has noted: “Family law implements both the partnership and support theories—the partnership theory upon divorce through the equitable distribution regimes and the support theory through the duty of support during the marriage and the right to alimony upon divorce. Traditional elective share law [at death] is the odd one out.”

There is a legal disparity between the way spouses are treated in marriage and divorce and how they are treated at death: If a spouse dies, but prior to death transfers all property acquired during marriage to a third-party—through either an inter vivos gift, a valid inter vivos trust, or another form of nonprobate transfer—the asset will be unavailable to the surviving spouse unless the spouse is the beneficiary of the transfer. If a spouse dies with a...
valid last will and testament that leaves all property acquired during the marriage to a third party, what remedy is available to a surviving spouse that will allow him or her to recover a portion of the transferred marital property? If the transfer had occurred during marriage, spousal protection would be provided at any subsequent divorce in the form of an equitable remedy that would satisfy concerns over economic waste or fraud on the part of the spouse transferring property. Such a recapture exists at divorce in community-property and common-law jurisdictions.

Is similar protection available to a disappointed spouse at death? To answer this question, legislatures and courts have grappled with how best to protect a spouse at death in a manner consistent with protections available during marriage or at divorce. The objective of providing protection has been elusive, however, partly because of the historical evolution of probate law and the shift in wealth from real to personal property—a change that is evidenced by the advent of pension funds and investment portfolios. Perhaps the best protection is an incentive program that would provide economic benefits to support a spouse after death. There are some incentives in place to treat a spouse as an equal partner in death—as was true in life—in the ownership of all wealth accumulated during marriage: for example, the marital deduction available in the Internal Revenue Code.

A. The Marital Deduction

Taxation of assets at death demonstrates how federal and state taxing authorities provide protection to a surviving spouse by offering an incentive to transfer wealth through a gift or through support. This protection is termed the marital deduction. The federal marital deduction—available to married couples at death—has morphed into either an outright bequest to the surviving spouse at death or a support trust device. The support trust device is called a qualified terminable interest property (QTIP) trust and will be discussed in greater detail within this Article.40 The marital deduction is based on the premise that upon marriage, a couple forms an economic partnership and thus, there should be no taxation when the first spouse dies; taxation occurs only upon the end of the marital economic partnership—the death of the second spouse.41 Taxation is postponed, creating an incentive to take advantage of the deduction and then hope for better taxation rules in the future. Marital deduction for estate taxes is coupled with the exclusion of gift taxes for gifts from one spouse to the other.42 By omitting gift taxes and allowing a marital

41. See infra notes 44–48 and accompanying text.
42. See I.R.C. § 2056(a).
43. See id. § 2523; id. § 2012.
deduction on estate taxes, federal and state taxing authorities endorse the establishment of an economic partnership between spouses.

There is only one anomaly to what would otherwise be complete recognition at death of the economic partnership of marriage—the ability of a decedent spouse to restrict the surviving spouse's ownership of the marital property through the creation of a QTIP trust. Prior to 1981, a surviving spouse took the decedent spouse’s property free from any restrictions, and that one-half of the property qualified for the marital deduction. By 1981, Congress had noticed that when decedent spouses died, they often left behind biological children from earlier marriages who were not the biological children of the decedent’s surviving spouse. Congress thought it conceivable that the surviving spouse, not being the biological parent of the decedent’s prior-born children, would not transfer the decedent’s property to the children even though that may have been the decedent’s intention. Anticipating this scenario, a decedent spouse may be forced to choose between making gifts to his or her biological children or providing for the surviving spouse. At that time, federal tax law offered an incentive for the decedent to provide for the spouse only, and as a result, the children would often suffer a disparity. To address this disparity, Congress developed a device that would offer a compromise by allowing the decedent spouse to benefit his or her biological children and surviving spouse at the same time. This device is called the marital deduction trust, or QTIP trust.

A QTIP trust permits a decedent title-owning spouse to place a significant restriction on the surviving spouse’s economic-partnership rights. The trust device allows for the decedent spouse to give the surviving spouse a life estate followed by a remainder interest vested in someone else. This trust device guarantees that the property bequeathed or devised will transfer to the decedent’s named beneficiaries at the death of the surviving spouse. A QTIP trust is formed only if three conditions are met: (1) the surviving spouse is able to receive all income for life, payable at least annually; (2) the trust property is income-producing or capable of being income-producing; and (3) no person, including the surviving spouse, can have the power to transfer the property to any third party during the spouse’s lifetime.


45. See id. at 319.

46. See id. (noting that a decedent may wish “unilaterally to control to whom ‘his’ property is transferred when it leaves the marital unit”).

47. See id. at 309-10.

48. I.R.C. § 2056(b)(7)(B). The determination of whether a valid QTIP has been formed is often complicated, and a federal tax court is not bound by a state court’s ruling on the validity of a decedent’s QTIP. See, e.g., Estate of Rapp v. Comm'r, 140 F.3d 1211, 1215-16 (9th Cir. 1998).
The possibility that a predeceasing spouse could limit the surviving spouse to a life estate is inconsistent with the notion that all property acquired during marriage is jointly owned because of the spouses’ economic partnership. Historically, the majority of wealth is earned and titled by male spouses, and thus the control of the transfer of spousal property often raises gender issues. In separate-property states—where the manner in which title is held matters—the husband may restrict the wife’s interest in the marital property to a life estate, followed by a vested remainder in a third party chosen by the husband. In other words, a husband retains control of the property even after he dies by giving property to his wife for use only during her life, and then gifting the rest of the property to someone else upon her death. This is similar to the process of dower, in which the surviving widow was allowed a life estate in her husband’s lands, and then it reverted to his estate. Notwithstanding its historical origin, the life-estate feature of dower is similar to the more modern theory of an economic partnership between the married spouses in that, through dower, a surviving spouse was entitled to a share of the assets.

QTIP devices are often criticized as being discriminatory toward women because of their structure that allows a husband (often the first spouse to die and also usually the primary income-earner) to give property to his wife only for use during her life and then to control the gifting of property after her death, excluding his wife from any estate-planning decisions concerning the marital property. Any gender discriminatory impact that arose through the QTIP trust method of allocating property may be offset with planning in the following ways: (1) prenuptial agreements; (2) an election made by the surviving spouse against the last will and testament; or (3) contesting the last will and testament based on any deficiency in formalities or intentionalities. Commentators have discussed the gender disparity present in the QTIP trust’s provisions. The presence of the QTIP trust, however, should not obscure Congress’s recognition of an economic partnership between spouses through the creation of the marital deduction as an incentive for one spouse to transfer property to the other at death.

50. See Karsenty v. Schoukroun, 959 A.2d 1147, 1167–68 (Md. 2008) (describing the manner in which both dower and the right of election provide the surviving spouse with a share of the decedent spouse’s property).
52. See sources cited supra note 51.
B. Spousal Allowances

Traditionally, common-law dower and curtesy protected the surviving spouse from disinheritance. Eventually, states enacted statutory allowances, complementing any applicable federal benefits attached to survivorship of a spouse, such as Social Security and pension rights.53 Although these spousal allowances have progressed, they still provide little benefit to the surviving spouse; they do not compensate for an equitable division of the economic-partnership theory of marriage. Instead, these allowances reflect a duty of support—that is, the surviving spouse is only entitled to support from a decedent spouse while the decedent, the person in whom title resides, is still the owner of the property and, as such, has the right to distribute the property itself.54 There is a consistent clash between support rights from the marital property and ownership rights in the marital property. To understand the underpinnings of this distinction, it is necessary to discuss the statutory spousal allowances and how they came to align themselves with the support theory.

The UPC provides spousal allowances that take priority over the claims of any unsecured creditors and devisees or legatees under the decedent’s last will and testament, such as the homestead and family allowances.55 These allowances are in addition to anything that the surviving spouse would take under testate or intestate succession.56 The 2008 amendments to the UPC provide the surviving spouse with the following: (1) a homestead allowance of $22,500;57 (2) an exempt property allowance of $15,000, which includes “household furniture, automobiles, furnishings, appliances, and personal effects”;58 and (3) a reasonable family allowance to support the spouse during the period of estate administration—but no longer than one year—to be paid out of any existing money in the estate.59 These statutory allowances—

54. See infra Part IV.A (discussing the support theory of marriage).
55. UNIF. PROBATE CODE §§ 2-402, 2-404 (amended 2008).
56. Id.
57. Id. § 2-402. Homestead, family allowance, and any other protective amount are not charged against any elective-share amount to which the surviving spouse may be entitled. See, e.g., KAN. STAT. ANN. § 59-6a202(c) (2005). But see UTAH CODE ANN. §75-2-202(3) (2009) (“If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse’s homestead allowance, exempt property, and family allowance, if any, are charged against, and are not in addition to, the elective-share and supplemental elective-share amounts.”).
58. UNIF. PROBATE CODE § 2-403.
59. Id. § 2-404. Individual states have provisions comparable to these allowances granted under the UPC. See, e.g., VA. CODE ANN. § 64.1-151.1 (2007) (providing a reasonable family
homestead, exempt property, and family support—are purely supportive in the context of marriage; they reflect only a recognition of a support obligation, not a division of marital property.

In the context of estate administration, these modest allowances are supplementary to any legal action that the surviving spouse may take against the decedent’s estate. Thus, these allowances are in addition to whatever the surviving spouse may take through election against the decedent’s last will and testament, as a pretermitted (omitted) spouse, or, as a last resort, by contesting the will and inheriting through intestacy. The right to contest a last will and testament is available to any person with standing, but only a spouse may take as an omitted spouse. Plus, only a spouse has the right to elect against the assets owned by the decedent at death. This right to elect is integral to this Article’s inquiry—whether the new UPC successfully integrates marital property into the elective share according to an economic-partnership theory. The right of election complements the UPC’s new statutory allowances and is thus a part of the protection afforded to a spouse.

C. The Right to Elect

“The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated . . . to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.” As this Article will discuss, the elective-share options may be limited to a year of support, or it may be restricted to the probate estate of the decedent, or it may, as is true of the newly revised UPC, seek to encompass the marital property. It is initially necessary to posit that the surviving spouse’s right of election is distinct from spousal allowances and different from the rights of an omitted spouse, who has the right to contest the validity of a last will and testament.

Sometimes a surviving spouse may take less than he or she anticipated under a predeceasing spouse’s last will and testament. Disappointment may result in a procedure called “election against the predeceasing spouse’s estate plan.” Through this process, the election may disrupt both a plan that the

60. See infra Part II.C.
61. See UNIF. PROBATE CODE § 2-301(a) (permitting a surviving spouse to take an intestate share if the decedent spouse dies with an operative last will and testament that was executed before the marriage to the surviving spouse). The UPC contains restrictive conditions that prevent the surviving spouse from receiving his or her share of the decedent’s estate. Id. § 2-301(a)(1)–(3).
63. See UNIF. PROBATE CODE § 2-301.
64. ATKINSON, supra note 62, at 120.
65. UNIF. PROBATE CODE § 2-202(a).
Integrating Marital Property into a Spouse's Elective Share

The decedent designed to avoid taxes and provisions that benefit relatives—often children from a prior marriage—with no connection to the surviving spouse. In the context of a spouse’s right to elect, states are divided on whether the election should be (1) under a support theory, designed to compensate a surviving spouse for the spouse’s disappointment by providing an amount sufficient to support the surviving spouse’s living expenses, or (2) under an economic-partnership theory, structured to compensate the surviving spouse with a portion of the marital property accumulated during the marriage. Professor Waggoner characterizes the difference between the two approaches as follows:

Applied to the elective share, the partnership theory suggests that if the surviving spouse so elects, the survivor is entitled to force a transfer of the decedent’s assets sufficient to equalize the marital assets. The support theory suggests that the surviving spouse is entitled to force a sufficient transfer of the decedent’s assets to bring the survivor’s assets up to a predetermined amount deemed to be at least minimally sufficient for support, should the value of the survivor’s assets be below that amount at the decedent’s death.

States that allow for election based on the necessity of providing support for a surviving spouse, by implication, are concerned about preserving the estate plan of the decedent spouse. As a result, if the elective-share amount is considered a support device, rather than a share of the accumulated marital property, a smaller portion of the estate will be available to the surviving spouse. Vermont provides an illustrative example of the support mechanism:

The surviving spouse of a decedent shall receive out of the decedent’s personal estate, not lawfully disposed of by the decedent’s last will, all the articles of wearing apparel and ornament, the wearing apparel of the decedent, and such other part of the personal estate of the decedent as the probate court assigns to such surviving spouse, according to his or her circumstances and the estate and degree of the decedent, which shall not be less than a

66. See Litman, supra note 51, at 543–44 (discussing the federal tax ramifications of spousal-election rights and the marital deduction).


68. Cf. Foman v. Moss, 681 N.E.2d 1113 (Ind. Ct. App. 1997) (ruling that when a conflict between the decedent’s estate plan and the surviving spouse’s best interest arises, the lower court must consider the incompetent spouse’s best interests in addition to pecuniary considerations); Clarkson v. First Nat’l Bank of Omaha (In re Estate of Clarkson), 226 N.W.2d 334, 337 (Neb. 1975) (holding that a court must consider the best interests of an incompetent surviving spouse instead of considering the “preservation of the decedent’s estate plan” as is the approach in other jurisdictions).
third, after the payment of the debts, funeral charges and expenses of administration.\textsuperscript{69}

Connecticut and Rhode Island, two other support states, allow a surviving spouse either to take under the decedent spouse’s estate plan or to take an elective share that is limited to a life estate in whatever is allowed by statute.\textsuperscript{70} Conversely, other states view the surviving spouse as an economic partner who is entitled to a share of the marital property, rather than a portion of property limited to what is necessary to provide support. These states address the right of election by the surviving spouse as a claim for restoration of what the couple earned during the marriage. Partnership states include the community-property states, which view each spouse as equal in the acquisition of all marital wealth, regardless of which spouse holds title to it.\textsuperscript{71} Partnership states also include separate-property states that adopted the Model Marital Property Act and created a system similar to a community-property system. Also included in partnership theory states are separate-property states that adopted any form of the UPC.\textsuperscript{72} Underlying any elective-share system is the need to enlarge the grasp of the election device to encompass wealth that passes under nonprobate transfers, such as joint accounts, inter vivos trusts, inter vivos gifts, and whole life-insurance policies. In general, too few states have incorporated such nonprobate transfers into the elective share.\textsuperscript{73}

Election by a surviving spouse may precipitate a contest between states when election in one state affects real property located in another state. For example, by statute, Nebraska provides that when a married person dies having already conveyed “real estate during his or her lifetime without joinder” of a surviving spouse, the conveyance will be valid regardless of the decedent’s

\textsuperscript{69} VT. STAT. ANN. tit. 14, § 401 (2002).

\textsuperscript{70} See CONN. GEN. STAT. ANN. § 45a-436 (West 2004) (providing a one-third life estate in the probate estate); R.I. GEN. LAWS § 33-25-2 (2008) (providing for a life estate in all of the decedent’s real property).

\textsuperscript{71} See JEFFREY A. SCHOENBLUM, 2009 MULTISTATE GUIDE TO ESTATE PLANNING tbl. 6.01 (2008).

\textsuperscript{72} See infra Part II.D–E (discussing in greater detail different approaches used by states).

\textsuperscript{73} See, e.g., OKLA. STAT. ANN. tit. 84, § 44(B) (West 1990) (limiting the elective share to the estate of the decedent, thus excluding nonprobate transfers); see Weishear v. Mellor (\textit{In re Estate of Weishear}), 142 P.3d 994, 997 (Okla. Civ. App. 2006) (holding that Oklahoma’s spousal-election statute did not apply to a decedent’s IRA account because the designation of beneficiaries for the decedent’s account was not testamentary); see also OR. REV. STAT. ANN. § 114.105(1) (West 2003) (limiting the elective share to “one-fourth of the value of the net estate of the decedent” and excluding nonprobate transfers); S.C. CODE ANN. § 62-2-201 (2007) (limiting a spouse’s “elective share [to] one-third of the decedent’s probate estate” and excluding nonprobate transfers); TENN. CODE ANN. § 31-4-101(b) (2007) (limiting “[t]he value of the net estate [to] all of the decedent’s real property . . . and personal property subject to disposition under the provisions of the decedent’s will or the laws of intestate succession” and excluding nonprobate transfers); WYO. STAT. ANN. § 2-5-101(a) (2009) (limiting election to property passing under the will of the decedent and excluding nonprobate transfers).
domicile at death.\textsuperscript{74} Thus, even though the decedent may die domiciled in a state with an augmented-estate statute allowing for the inclusion of the real estate, any subsequent election by the surviving spouse will not affect the validity of the transfer of the decedent's real estate located in Nebraska. In Rhode Island, if any of the real estate is located in a city different than the city in which probate occurs, the election claim must be "filed in the records of deeds in each city and town where the real estate is located."\textsuperscript{75}

A spouse's right to elect may be preempted by contract. Unless a spouse waives his or her right to an election through a valid prenuptial or postnuptial agreement, a spouse may elect against the decedent's probate estate,\textsuperscript{76} the election must occur within a specified period of time,\textsuperscript{77} in the state in which the decedent was domiciled,\textsuperscript{78} and while the surviving spouse is still living.\textsuperscript{79} The right to elect is personal to the surviving spouse (and cannot be taken by an heir), but if the surviving spouse is incapacitated, then the spouse's

\textsuperscript{74} NEB. REV. STAT. ANN. § 30-2313(c) (LexisNexis 2001). \textit{But see} N.D. CENT. CODE § 30.1-05-01(4) (2009) ("The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death.").

\textsuperscript{75} R.I. GEN. LAWS § 33-25-4 (1995).

\textsuperscript{76} See \textit{Unif. Probate Code} § 2-213(a) (amended 2008) ("The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse."). Waiver through a valid agreement will be valid if, under the terms of the Uniform Premarital Agreement Act (UPAA), the agreement was (1) in writing, (2) voluntary, (3) conscionable when entered into, and if the opposing party had "fair and reasonable disclosure" of the other party's finances and property interests. \textit{Unif. Premarital Agreement Act} §§ 2, 6(a)(1)-(2) (2001); see also \textit{In re Estate of Martin}, 938 A.2d 812 (Me. 2008) (concluding that the UPAA standards superseded the common law and are controlling in a determination of the validity of a waiver of spousal rights by a premarital agreement); \textit{Unif. Probate Code} § 2-213 cmt. (adopting the standards in section 6 of the UPAA); \textit{Restatement (Third) of Property: Wills and Other Donative Transfers} § 9.4 cmts. c-e (2003) (reflecting the requirements in the UPAA).

\textsuperscript{77} See, e.g., \textit{Unif. Probate Code} § 2-211(a). Under the UPC, the surviving spouse must file a petition to elect "within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires." \textit{Id.} The Code allows for an extension of time provided that proper notice is given within nine months of the decedent's death. \textit{Id.} § 2-211(b).

\textsuperscript{78} See \textit{id.} § 2-202(d); see also JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING §§ 10.02-05 (2008 ed. 2007) (discussing various approaches to elective-share rules in a number of state jurisdictions). \textit{But see} NEB. REV. STAT. ANN. § 30-2313(c) (LexisNexis 2001) (specifying that a land transfer made by a decedent during his or her lifetime is a valid transfer regardless of the law of the state in which the decedent was domiciled at the time of his death); Clark v. Pericles (\textit{In re Estate of Pericles}), 641 N.E.2d 10, 13-14 (III. App. Ct. 1994) (holding that in Illinois, the law of the situs of the real property controls the right to election).

\textsuperscript{79} \textit{Unif. Probate Code} § 2-212(a); see, e.g., Wilson v. Wilson, 197 P.3d 1141, 1146 (Or. Ct. App. 2008) (holding that the death of the spouse extinguished any need for support and, consequently, election).
conservator, guardian, or agent, under the authority of a power of attorney, may make an election on the spouse’s behalf. Although anyone responsible for the electing spouse may make the election, the assets that are ascertained and transferred are held in a trust to be used solely for the spouse’s benefit, and, upon that spouse’s death, the funds—if they have not been expended—revert to the estate of the person against whom the election was made. Such a device prohibits a windfall for the electing spouse’s heirs who may attempt to make an election in order to receive the elected amount from the surviving spouse who dies soon after the election is made.

The trust device also supports the criticism of commentators such as the late Professor Jesse Dukeminier. Professor Dukeminier criticized those who suggested that the elective-share device mirrored the achievements of a community-property state:

Although the Uniform Probate Code revisers attempted to achieve community-property-like results with the redesigned elective share, there remains a profound difference between community property, which gives a present right to each spouse of a share of the earnings of the couple, and an elective share system, which gives a spouse only a possibility of a share in the other spouse’s property.

Requiring the surviving spouse to make the election personally illustrates the lack of a present ownership right. Furthermore, if one spouse dies before the other, the elective-share system extinguishes ownership in one-half of the property and prohibits a bequest of property to others. Finally, the entire process of “election against the husband’s [(as is most often the case when a surviving spouse makes an election)] will may be psychologically or socially difficult.”

These factors, plus the trust device used for election by an

80. Unif. Probate Code § 2-212(a). In order to certify that the incapacitated surviving spouse—and not the heirs of that spouse—receives use of the elective amounts, the Code provides for a custodial trust to come into being when election is made on behalf of the spouse. See id. § 2-212(b). Throughout the term of the trust, any money generated through the election may only be used for the “benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary.” Id. § 2-212(c)(2). The trust remains in existence as long as the spouse is incapacitated; if the spouse recovers, then the spouse may terminate the trust. Id. § 2-212(c)(1). At the beneficiary’s death, the custodial trustee shall transfer any unused funds to the residuary clause of the last will and testament of the spouse against whom the election was made or to that spouse’s heirs. Id. § 2-212(c)(3).

81. Id. § 2-212(c).

82. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 483 (6th ed. 2000); see Ira Mark Bloom, The Treatment of Trust and Other Partial Interests of the Surviving Spouse under the Redesigned Elective-Share System: Some Concerns and Suggestions, 55 Alb. L. Rev. 941, 944-45 (1992); Fellows, supra note 51, at 151 (suggesting the benefits of community-property regimes); Waggoner, supra note 31, at 3-4; see also Litman, supra note 51, at 559-60 (observing that the differences in state laws will affect the marital deduction).

83. Dukeminier & Johanson, supra note 82, at 484.

84. Id.
incapacitated spouse, illustrate stark differences between election in separate-property states and community-property states.

The elective-rights procedure for surviving spouses in community-property states functions more simply. Primarily, this is because property title is not an obstacle as it is in separate-property states. Community-property courts are more experienced in apportioning property and reimbursing parties from this collective pot in order to satisfy the rights of both parties, each of whom is entitled to a one-half ownership in the community property. The process seems simpler, and some commentators suggest that the UPC adopt a community-property approach, such as the Model Marital Property Act, formerly the Uniform Marital Property Act. The Act posits that, during marriage,

> each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and be legally recognized in the event of its termination by annulment, divorce, or death.

Professor Charles Whitebread suggests that common-law states have not adopted the community-property approach advocated by the Act because they fear asset-tracing problems. Professor Whitebread discusses tracing, which is the problem of transmutation—the classification of assets as separate or marital and how to differentiate between them. Only community property (marital property) may be divided upon death or divorce, and considerable litigation occurs over transmutation issues. Nonetheless, Professor Whitebread argues that the benefits of adopting the community-property system outweigh the disadvantages; and "if the goal is a view of the marriage as a partnership, the elective share system should be abandoned."

To this end, the 2008 version of the UPC’s elective-share provision provides an alternate subsection for those states preferring a community-property approach,

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85. See, e.g., Waggoner, supra note 31, at 30 n.53 ("[The Uniform Marital Property Act (UMPA)] has been downgraded to a Model Act by the Uniform Law Commission [and so] the MMPA definition [of community property] would not be obligatory in the UPC, though it could still serve as a possible definitional source." (citation omitted)).

86. UNIF. MARITAL PROP. ACT Prefatory Note (amended 1998).


89. See infra Parts III.B.3, IV.C.

90. Whitebread, supra note 87, at 142-44.

91. Id. at 143.
such as that offered by the Model Marital Property Act. But, as this Article will discuss, the problem of transmutation is significant and prevents making an easy choice between community-property and separate-property solutions.

In separate-property states, where title is relevant, courts are tasked with amassing marital property that remains marital, even when that property is titled in the decedent’s name and transferred by the decedent. Courts must employ a process by which the court may make available to the surviving spouse more than the assets that pass under a will or by intestate succession (the probate estate), assets such as marital assets over which the decedent surrendered total control during life (inter vivos gifts), or over which the decedent had control of at death but that nonetheless pass outside of probate (nonprobate assets). This task has become more formidable in modern times because the vast majority of wealth passes outside of probate at death following a nonprobate revolution that occurred during the last decades of the twentieth century. State probate administrations have not kept abreast of these rapid developments; divorce courts have been much more effective in integrating new wealth into division of marital wealth and transitional support. There is, however, a major difference between the two divisional systems. At divorce, both parties are alive to discuss, negotiate, and litigate over assets. At death, on the other hand, one of the parties is the decedent, and unless that decedent has provided a very effective estate plan, the survivors (including the state probate system) are left to speculate as to the decedent’s intentions. Because wealth is held in varying forms, often beginning as

92. See UNIF. PROBATE CODE § 2-203 alternative subsection (b) (amended 2008).
93. See infra Parts III.B.3, IV.C.
96. See infra Part III (outlining a move toward economics in divorce proceedings).
separate property but subsequently commingled with marital assets (and probably titled in the name of only one of the spouses), legal issues arise questioning how to proceed with this property. Is it a marital asset? Is the asset only partially marital and partially separate? What if the spouse with title passes it at death to a child from a previous marriage, but the surviving spouse claims a share of the asset? Is the surviving spouse entitled to a share of this liquid asset? Because the asset will pass outside of the traditional probate estate, the state statutes usually do not include this asset within their parameters. This is the dilemma of modern probate; there is no indication that these new challenges will abate soon.

Not all nonprobate transfers are the same. Without analyzing all of the devices available to transferees today, this Article will classify them as revocable and irrevocable. That is, there are some devices over which the transferee surrenders all control during life—such as an irrevocable inter vivos trust—even though the transferee may retain a right to income from that property. Conversely, there are devices whereby the transferee retains the right to exercise significant control over the property interest—such as revocable trusts or general testamentary powers of appointment. Characterizing the device as irrevocable or revocable will make a difference in whether the device may be available to the surviving spouse’s elective share at death. This Article previously mentioned (and will discuss in greater detail) that the distinction would be irrelevant in assessing the spouse’s share during marriage or at divorce. Why does this distinction matter when it comes to the right of a spouse to elect? The reason is that, at death, when probate and election occur, the law has not matched the precision of incorporating assets that are available to courts during a marriage or at divorce. The issue at death is whether the spouse’s elective share includes marital property that has been irrevocably transferred or over which dominion has been retained by the decedent spouse through some form of joint ownership or revocable feature. To address this issue, it is necessary to analyze the judicial and statutory methods used by judiciaries and legislatures to augment the amount of marital property against which the election may be made. This is called the augmented estate. There are multiple approaches to calculating the augmented estate, and they continue to evolve, creating a slippery landscape that makes it difficult to plan an estate, implement tax-avoidance plans, and arrive at fair solutions. Against this background we will eventually discuss the 2008 elective-share revisions made

to the UPC, particularly in reference to whether these revisions successfully integrate marital property into a spouse’s elective-share amount. To fully appreciate the UPC, it is necessary first to survey what is currently done by way of augmentation of the estate through judicial or statutory elective procedures.

D. Judicial Augmentation

With the exception of Georgia, all states allow a disappointed surviving spouse to make an election against a portion of the estate of a decedent spouse. As previously discussed, both community-property states and separate-property states allow for election, but problems arise in separate-property states because in those states, title matters; thus, a decedent spouse is able to irrevocably or revocably transfer property during life, either to the surviving spouse or to a third party. Various forms of nonprobate devices allow for this, such as joint accounts, payable-on-death accounts, the exercise of a general testamentary power of appointment, and another device that has gained popularity as a device to avoid probate—the revocable inter vivos trust. If the inter vivos transfer through the nonprobate device is effective and if the proliferation of newly adopted statutes prompts quick assurance of this, the asset will not be available to the surviving spouse for purposes of election. An early case summarized the non-availability of inter vivos property at death by noting that “[p]roperty which did not belong to a decedent at his death and which does not become part of his estate does not come within [the] scope [of decedent estate law].” Put simply, because of nonprobate transfers, it is possible that in separate-property states, the surviving spouse will be denied an elective share of all of the marital property because such nonprobate transfers render the property unattainable. To address this shortcoming, courts have struggled to find a remedy—a method to augment the estate to achieve a just result for a surviving spouse.

One of the earliest judicial augmentation cases is the 1937 New York decision in Newman v. Dore. In Newman, the decedent husband died with a last will and testament that gave his wife a life estate of one-third of his real and personal property, but excluded all property that was not part of the decedent’s estate at the date of his death. Three days before he died, the

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98. See Mary F. Radford & F. Skip Sugarman, Georgia’s New Probate Code, 13 GA. ST. U. L. REV. 605, 663–69 (1997) (outlining Georgia’s revised support framework). The reasoning here is that Georgia supports the rights of a decedent “to dispose of his or her property at death” as he or she wishes without restraint. Id. at 652–53. Georgia mandates that the surviving spouse is entitled to either one year of support or to take under the decedent’s will. See id. at 666.

99. Newman v. Dore, 9 N.E.2d 966, 966 (N.Y. 1937). Note, however, that the Court of Appeals of New York allowed for inter vivos transferred property to be included in decedent’s estate for election purposes through a newly established illusory-trust doctrine. Id. at 969–70.

100. Id. at 966.

101. Id. at 967.
decendents executed inter vivos trusts that transferred all of his real and personal property to trustees for the benefit of a third party, not his surviving wife. A New York statute permitted the surviving spouse to take an elective share against the decedent's estate equivalent to what the spouse would have taken under intestate succession if the decedent had died without a will. At that time, however, the spouse's right of election was confined to the decedent's estate at the time of his death. In this case, that meant the decedent's estate did not encompass the funds transferred to the inter vivos trusts, which included all of the decedent's real and personal property. At the time the husband created the inter vivos trusts, there was sufficient evidence to conclude that the decedent husband intended to benefit a third party and, in so doing, to defeat the claims of his surviving spouse at his death. He had retained the right to income and the power to revoke the trusts whenever he wished. The Newman decedent's intent to defeat the claims of his spouse did not create an illegal purpose; there was no claim of fraud. The decedent spouse possessed title to the real and personal property, and the surviving spouse had no claim until she inherited the property at the decedent's death; thus, the surviving spouse only had an expectancy, not an actual legal claim to the property. Faced with the inadequacy of the state's elective-share statute to incorporate the nonprobate inter vivos trusts (in order to reach a just result for the surviving spouse), the court opined "that [it] does not mean ... that the law may not place its ban upon an intended result even though the means to effect that result may be lawful. ... A wrong does not cease to be a wrong because it is cloaked in form of law." The court carefully avoided any consideration of intent on the part of the decedent spouse to deprive the surviving spouse of property by use of fraud, explaining that no attempt was made to prove that the decedent acted fraudulently. Instead, the test devised by the court was "whether the husband has in good faith divested himself of ownership of his property or

102. Id.
103. Id. at 966.
104. Id. at 967.
105. Id. at 968.
106. Id. at 969–70.
107. Id. at 967, 969.
108. Id. at 968–69.
109. Id. at 968.
110. Id. at 969. As stated by another court, fraud by the decedent is not the issue in judicial augmentation cases: "[T]he body of precedents forming the doctrine that, until now, has been referred to as 'fraud on marital rights' has really little to do with common-law fraud as typically understood." Karsenty v. Schoukroun, 959 A.2d 1147, 1151 (Md. 2008). Nonetheless, state statutes often use the word "fraud" in framing statutes. See, e.g., MO. ANN. STAT. § 474.150 (West 2009) (titling the section, "Gifts in fraud of marital rights—presumptions on conveyances"); TENN. CODE ANN. § 31-1-105 (2007) (titling the section, "Fraudulent conveyance to defeat share voidable").
alternatively] has made an illusory transfer.\textsuperscript{111} The Newman court's decision draws an important distinction: the decedent's inter vivos nonprobate transfer is completely valid—this is not what is illusory. The trust is illusory only in reference to the rights of the surviving spouse in her expectant interest in a share of her husband's estate. The emerging rule thus provides that nonprobate arrangements that are valid will be given effect, but when a surviving spouse seeks to make a claim on the property through a right of election, the court may inquire as to whether the decedent's arrangements are illusory as to the surviving spouse's claim. The Newman court explained "that except for the provisions of [the statute granting the spouse an elective share] the trust would be valid . . . [and] [t]hat is enough to render it an unlawful invasion of the expectant interest of the wife."\textsuperscript{112}

The Newman decision does not provide any objective factors as to what constitutes an illusory transfer: "We do not attempt now to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than illusory."\textsuperscript{113} This issue is left for later courts.

Nearly fifty years later, in the 1984 decision, Sullivan v. Burkin, a Massachusetts court revisited the issue and developed more objective criteria.\textsuperscript{114} With facts similar to those in the 1937 Newman decision, the Massachusetts court ruled that for purposes of election, the estate of the decedent will include assets held in an inter vivos trust that: (1) "is created by the deceased spouse" and (2) "as to which the deceased spouse alone retained the power during his or her life to direct the disposition of those trust assets," such as by exercising a general power of appointment or retaining the ability to revoke the trust.\textsuperscript{115} Subsequent decisions and statutes in other states

\textsuperscript{111.} Newman, 9 N.E.2d at 969.

\textsuperscript{112.} Id.

\textsuperscript{113.} Id. The language in Newman is similar to the recent decision in Karsenty, which remarked that it is difficult to determine whether a decedent spouse intended an inter vivos transfer to be a "sham" because such an arrangement creates an "ethereal touchstone." Karsenty, 959 A.2d at 1173.

\textsuperscript{114.} 460 N.E.2d 572, 574–75 (Mass. 1984); see also Kathleen M. O'Connor, Note, Marital Property Reform in Massachusetts: A Choice for the New Millennium, 34 NEW ENG. L. REV. 261, 268–70 (1999) (providing an extensive discussion of the Sullivan decision and advocating for the adoption of the Uniform Marital Property Act to rectify gender inequality manifested in existing election procedures).

\textsuperscript{115.} Sullivan, 460 N.E.2d at 574–75. Today, the Massachusetts elective share of the augmented estate available to a surviving spouse is cumbersome to calculate. Within six months after probate of a last will and testament, a surviving spouse may elect to take under the following framework: (1) one-third of the real and personal property if the decedent left issue; (2) $25,000 and one-half of the real and personal property if the decedent left kindred but no issue; (3) if the real or personal property value is greater than $25,000, the surviving spouse only takes a life estate in the real or personal property shares; (4) $25,000 and one-half of the real and personal property absolutely if the decedent left no issue and no kindred. MASS. GEN. LAWS ANN. ch. 191, § 15 (West 2004).
demonstrate that some states treat nonprobate assets held under these identified criteria as being available to the spouse’s elective share. Some courts arrived at this inclusive rationale because of Newman, while others did so in spite of Newman.116

Although the Newman decision was rendered in 1937, it framed the factors that currently confront modern courts and legislatures seeking to accommodate the elective-share rights of a surviving spouse to marital property. These factors must be the focus of any analysis of whether courts, legislatures, or the Committee developing the UPC have adequately integrated marital property into the surviving spouse’s elective share. Factors for analysis include the following: (1) whether the spouses had a valid marriage; (2) whether they lacked a prenuptial or postnuptial agreement that adequately addressed nonprobate transfers; (3) whether title established ownership of property in a separate-property jurisdiction; (4) whether the decedent spouse used his or her right to title to transfer property through a valid nonprobate device to someone other than the surviving spouse without consent or full consideration; (5) whether the decedent spouse retained dominion over the property until death or surrendered it within a specified period of time before death; (6) whether the remaining assets passing to the surviving spouse are inadequate to satisfy the claims of the surviving spouse; and (7) whether the surviving spouse commenced the statutory election process through which the surviving spouse is seeking to recapture his or her marital portion.117 Subsequent decisions do not depart from these issues; rather, they offer clarifying factual contexts.

Issues involving a valid marriage, prenuptial and postnuptial agreements, and the comparison of both community- and separate-property states may be more fully addressed in the context of family law.118 For purposes of this Article and the necessity of clarifying the issues first raised in Newman, this Article addresses the fourth and fifth factors listed above, asking whether a valid nonprobate transfer was created by the decedent spouse even though

116. See, e.g., Hanke v. Hanke, 459 A.2d 246, 248–49 (N.H. 1983) (refusing to apply Newman’s illusory-transfer doctrine, noting that it is illogical and difficult to apply). In Hanke, the New Hampshire court focused instead on what it termed “objective manifestations of the transferor’s intent.” Id. at 248. This means the court will consider the circumstances of the transfer, including the assets of the parties, the relationship of the parties, and any consideration received for the transfer. Id. If circumstances dictate that the transfer should be set aside, the property transferred will be included within the decedent’s probate estate for purposes of the elective share. Id.

117. The marital portion of property does not include premarital transfers to a revocable trust, because such transfers are considered separate property. See, e.g., Chrisp v. Chrisp (In re Estate of Chrisp), 759 N.W.2d 87, 94–97 (Neb. 2009) (holding that premarital transfers to a revocable trust are not included in augmented estate for purposes of calculating the elective share). But see UNIF. PROBATE CODE § 2-202(b)(2) (1990) (amended 2008) (including the value of the decedent’s nonprobate transfers to others through a revocable trust, whether created before or after marriage to the surviving spouse).

substantial dominion was retained until the date of settlor’s death, or closely thereto. If creation of the trust is defective, then the property will not pass through a nonprobate transfer, but instead will become part of the probate estate.

One of the earliest cases that addresses this issue is *Smyth v. Cleveland Trust Co.* 119 In *Smyth*, a husband created an inter vivos trust in which he retained rights to income and revocation during life. 120 At his death, the income was to go to his wife if she survived his death. 121 At her death, or sooner if she predeceased him, the corpus of the trust (the trust’s contents) would go to his son. If the son predeceased him, then the trust’s income would go to the son’s widow, but if he did not have a widow, then the corpus of the trust would go to the son’s surviving issue per stirpes. If the son did not have issue, then the corpus would pass to the settlor’s intestate heirs living at the time. 122 Although the trust’s purposes may seem convoluted, this is not atypical, and the *Smyth* court ruled that a valid inter vivos trust was created even though the settlor retained dominion over the income and possessed a power of revocation until the date of his death. 123 In modern times, the validity of similar inter vivos revocable trusts has been taken for granted, and courts have sustained alternative nonprobate transfers even though the settlor of the trust has reserved even greater control. 124 Courts sustain inter vivos trusts and other nonprobate devices as valid even when little control is transferred during the settlor’s life, making the device appear testamentary.

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119. 179 N.E.2d 60, 68 (Ohio 1961).
120. Id. at 61–62.
121. Id. at 62.
122. Id. at 62–63. In addition to the life interest created in the trust, the decedent’s wife received $37,748.47 at the death of her husband. Id. at 69.
123. Id. at 68–69 (“Where . . . a settlor transfers, assigns and sets over to a trustee title to property owned by him in proceeding to create a trust inter vivos, the interest therein passes immediately to the trustee, and the trust is consummated even though the trust instrument reserves to the settlor the income for life, an absolute power to revoke the trust in whole or in part and the right to control investments and further to modify the trust in any respect.”); see also Defilippis v. Defilippis (In re Estate of Defilippis), 683 N.E.2d 453, 458 (Ill. App. Ct. 1997) (stating that reservation of a life estate, power to revoke, or ability to control the conduct of the trustee “does not render the trust testamentary”); Groesbeck v. Groesbeck (In re Estate of Groesbeck), 935 P.2d 1255, 1258–59 (Utah 1997) (holding that a revocable inter vivos trust that allowed for income and power over a trustee did not jeopardize the validity of the trust). But see Dreher v. Dreher, 634 S.E.2d 646, 650 (S.C. 2006) (finding that extensive control of an inter vivos trust created by the settlor does not render the trust illusory for purposes of determining a spouse’s elective share).
124. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 25 (2003) (providing that an inter vivos trust “is not rendered testamentary merely because the settlor retains extensive rights); Langbein, Twentieth-Century Revolution, supra note 94, at 748–50 (naming the “explosive growth” of nonprobate transfers as a major reason for the decreased formalities in transferring property at death); Grayson M.P. McCouch, Probate Law Reform and Nonprobate Transfers, 62 U. MIAMI L. REV. 757, 759–61 (2008) (discussing the UPC’s attempt to bring the probate and nonprobate systems together to form a middle ground after the original UPC designated nonprobate transfers as nontestamentary).
In *Smyth*, once the validity of the trust had been established, the court addressed the issue of whether the surviving spouse's elective share could include the corpus of the trust. 125 The court did not challenge the validity of the trust itself. 126 This is the same issue raised in *Newman*. 127 The *Smyth* court used the *Newman* term—illusory—but subsequently rejected two previous state court decisions that would have supported the result in *Newman*. 128 These decisions held that a valid trust is illusory when it deprives the surviving spouse of an elective share because of the nonprobate transfers. 129 The *Smyth* court took a different position, holding that "[i]f the trust was, in reality 'illusory,' . . . then it was not a valid trust, and all of the property in it should have passed to the settlor's administrator or executor." 130 Nonetheless, the *Smyth* court held that the trust created by the settlor was not illusory, fraudulent, nor a mere agency, and as such, the trust was valid as a nonprobate transfer, and the assets it listed must pass accordingly. 131 Furthermore, once the property passes under the nonprobate transfer, no recourse is available to the surviving spouse unless a statute provides for it. 132

The court in *Smyth* was not willing to make a distinction between the trust being illusory on its own and the denial of the surviving spouse's elective share rendering it illusory. 133 This was the distinction made in *Newman*. 134 In this respect, the decision in *Smyth* differs in outcome from that rendered in *Newman*, as the *Smyth* court held that the illusory-trust doctrines are invalid and any recourse available to the surviving spouse must be specified by statute, not crafted by a court. 135

A few states have enacted statutes that define conditions that would incorporate nonprobate transfers into a spouse's elective share. In other words, some state statutes define "illusory" in terms of an election made by the

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126. *Id.*
129. *Id.* at 69.
130. *Id.* at 67. The Ohio court's interpretation of "illusory" in *Smyth* differs from what was decided by the New York court in *Newman*. In the Ohio decision, "illusory" meant that the trust failed and the assets were part of the decedent's probate estate. *Id.* Whereas in the earlier New York decision, "illusory" meant that the trust was valid and will only be considered illusory when it seeks to deprive the surviving spouse of an elective share in the nonprobate assets transferred by the decedent. *See Newman*, 9 N.E.2d at 969.
131. *Smyth*, 179 N.E.2d at 69. The court inferred that only a state statute may incorporate the trust assets into an elective-share framework available to the surviving spouse. *See id.* at 69–70. Neither of the existing statutes justified exclusion. *Id.; see also Ohio Rev. Code Ann. § 1335.01 (LexisNexis 2006); Restatement (Second) of the Law of Trusts § 57 (1959).*
133. *See id.* at 67.
134. *Newman*, 9 N.E.2d at 969.
surviving spouse, as it was done in *Newman*. Furthermore, these statutes do not invalidate the nonprobate transfer itself. For example, South Carolina provides the following:

A revocable inter vivos trust may be created either by declaration of trust or by a transfer of property and is not rendered invalid because the settler [*sic*] retains substantial control over the trust including, but not limited to, (1) a right of revocation, (2) substantial beneficial interests in the trust, or (3) the power to control investments or reinvestments. Nothing herein, however, shall prevent a finding that a revocable inter vivos trust, enforceable for other purposes, is illusory for purposes of determining a spouse's elective share rights under [the statute]. A finding that a revocable inter vivos trust is illusory and thus invalid for purposes of determining a spouse’s elective share rights under [the statute] shall not render that revocable inter vivos trust invalid, but would allow inclusion of the trust assets as part of the probate estate of the settlor only for the purpose of calculating the elective share and would make available the trust assets for satisfaction of the elective share only to the extent necessary under [the statute].136

In *Dreher v. Dreher*, the Supreme Court of South Carolina applied this statute to an inter vivos trust that a husband had created nine years before he died and almost twenty years after he married.137 The trust powers allowed the husband/settlor to revoke the trust, to withdraw all or any part of the principal, to name a substitute or successor co-trustee, and to revoke the co-trustee requirement; he was a co-trustee and could sell, manage, invest, and reinvest trust property; and as a trust beneficiary, he received income during his lifetime.138

Based on the substantial control the husband retained over the trust, the court ruled that the trust was illusory and the corpus must be made available to satisfy the spouse's elective-share requirement.139 The husband provided for the surviving spouse through other nonprobate assets, but that was "irrelevant to the determination of whether the [husband’s trust] [wa]s illusory because, as the surviving spouse, [the wife] had a statutory right to take an elective share of one-third of the decedent's probate estate."140 Because the decedent's

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137. Dreher v. Dreher, 634 S.E.2d 646, 647 (S.C. 2006). The statute the *Dreher* court applied is now codified at section 62-7-401(c); it is substantially similar to the version the court cites (62-7-112), but it replaced the term "trust creator" with "settlor." *See id.* at 648 n.2.
138. Id. at 649 (footnote omitted).
139. Id. at 650.
140. Id. at 649–50. By refusing to include transfers made to the surviving wife through nonprobate transfers, the court may provide the surviving spouse with a windfall. The newly revised UPC, however, seeks to avoid this. *See UNIF. PROBATE CODE § 2-203(a)(3) (amended
probate estate did not automatically include the inter vivos trust, the court employed the state statute provisions to include the corpus of the trust within the state’s elective-share ambit.\footnote{Dreher, 634 S.E.2d at 649.}

Other states have rejected the judicial formulation of the illusory-trust doctrine and based any relief available to the surviving spouse on the state’s statute. For example, in Barrett v. Barrett, the Supreme Court of Rhode Island acknowledged the historical origin of the illusory test when it established a spouse’s elective right.\footnote{894 A.2d 891, 896 (R.I. 2006).} The court recognized that the elective right had been established by judicial interpretation, noting that “[t]he illusory transfer test was adopted in the absence of any legislative determination respecting inter vivos trusts of real property or whether a transfer to a trust is sufficient to defeat a surviving spouse’s right to a life estate.”\footnote{Id. at 898.} Under that test, any transfer made by a spouse was illusory unless the spouse \textit{completely conveyed} the property during his or her lifetime.\footnote{See id. at 896.} If the inter vivos nonprobate transfer is deemed illusory, then the surviving spouse would be entitled to an elective share of a life estate in the property.\footnote{Id.} Nonetheless, the court noted that the legislature had enacted a statute that preempted the judicial test: “the only predicate to defeating a surviving spouse’s right to a life estate is a conveyance of the real estate that is recorded prior to death.”\footnote{Id. at 898.} The statute greatly limited the opportunity for election by a surviving spouse because “[t]he General Assembly did not delimit the type of conveyance necessary to avoid a spousal life estate or even require a complete divestiture of all beneficial interest in the real estate; instead, the broadest language was utilized.”\footnote{Id. at 898.} Thus, simply because the decedent spouse “conveyed the property to the trustees” and this conveyance was ultimately recorded, the requirements of the statute were met

\footnote{R.I. GEN. LAWS § 35-25-2(b) (Supp. 2008).}
to defeat the elective share of the surviving spouse.\footnote{148} Under the previous judicial test, the decedent’s retention of control over the property would have rendered the transfer illusory, thus placing the real estate within the elective-share portion. Under the new state statute, however, as long as the transferor spouse records the land transfer prior to death, the surviving spouse has no elective share in the land even if the transferor retained control or disposition of the land.\footnote{149} The \textit{Barrett} court lamented the effect of the legislature’s new statute, suggesting that the state may have been better served by adoption of the UPC.\footnote{150} The court nevertheless deferred to the legislature, stating that “it is not the Supreme Court’s function to rewrite or amend statutes that the General Assembly enacted.”\footnote{151}

Similar to Rhode Island, Maryland’s elective-share statute restricts the rights of a surviving spouse to include nonprobate assets within the elective share. The initial approach of the Court of Appeals of Maryland mirrored that of Rhode Island: “the underlying right of a spouse to take a share of an Estate in contravention of a Will . . . [is] entirely statutory.”\footnote{152} In \textit{Karsenty v. Schoukroun}, however, Maryland departed from the narrow approach of Rhode Island and established a parallel mechanism by which a surviving spouse may incorporate nonprobate assets into the elective share.\footnote{153} The facts in this case are similar to many spousal election cases decided in other jurisdictions. In \textit{Karsenty}, at the time of the husband’s death, both the decedent and his wife had been married previously and each had a child from the earlier marriage.\footnote{154} The husband, seeking to provide for his biological child, established an inter vivos trust to benefit the child.\footnote{155} He also executed a last will and testament, through which the residuary estate was poured over into the inter vivos trust.\footnote{156} At the death of her husband, the surviving spouse received a bequest of personal property, plus the proceeds from the decedent’s life insurance policy.\footnote{157}

The couple had only been married for four years, and after the husband’s death—but within the statutory period prescribed for an election—the surviving spouse renounced any claim that she had under her husband’s last

\begin{itemize}
\item \footnote{148} \textit{Id.} at 899.
\item \footnote{149} \textit{Id.}
\item \footnote{150} \textit{Id.} at 898–99.
\item \footnote{151} \textit{ld.} at 898 (quoting \textit{Furia v. Furia}, 638 A.2d 548, 552 (R.I. 1994)). Similarly, in another elective-share decision, the Supreme Court of Nebraska refused to look beyond a state statute in providing a remedy for a surviving spouse. \textit{See Chisp v. Chisp (In re Estate of Chisp), 759 N.W.2d 87, 94–96 (Neb. 2009)} (declining to apply the revised version of the UPC’s augmented-estate definition when the state legislature had not adopted it).
\item \footnote{152} \textit{Downes v. Downes}, 880 A.2d 343, 350 n.5 (Md. 2005).
\item \footnote{153} 959 A.2d 1147, 1158–59 (Md. 2008).
\item \footnote{154} \textit{Id.} at 1151–52.
\item \footnote{155} \textit{Id.} at 1152.
\item \footnote{156} \textit{Id.}
\item \footnote{157} \textit{Id.} at 1153.
\end{itemize}
will and testament and commenced an action against his estate, claiming "fraud on her marital rights and constructive fraud." 158 As part of her claim, the surviving spouse asserted that her husband had retained the right to revoke the inter vivos trust and to take income from it, named himself as trustee, and retained the right to amend the trust during his lifetime. 159 At the time of decedent’s death, the inter vivos nonprobate trust was worth approximately $422,000. 160

The applicable Maryland statute is concise: “Instead of property left to the surviving spouse by will, the surviving spouse may elect to take a one-third share of the net estate if there is also a surviving issue, or a one-half share of the net estate if there is no surviving issue.” 161 The deficiency presented by the statute as it relates to a surviving spouse’s elective share is that the statute’s definition of “net estate” includes only property classified as passing under “testate succession”; thus, it excludes the inter vivos trust that contains significant assets. 162 The Karsenty court considered that “by its plain language, [the state election statute] does not permit [the surviving spouse] to take a share of the Trust assets . . . .” 163 As is true with other state statutes, the probate estate does not incorporate nonprobate transfers. Both the Maryland court and the Rhode Island court discussed other state statutes that provide some form of augmentation—that is, statutes that allow for the inclusion of nonprobate assets, which create an augmented estate that may more fairly satisfy the surviving spouse’s elective-share rights against nonprobate assets transferred. As the Karsenty court recognized, “a surviving spouse’s elective share is calculated by including non-probate assets over which the decedent had dominion and control during her or his lifetime.” 164 But the Maryland court, like Rhode Island, refused to interpret the state statute so as to judicially incorporate an augmented-estate approach: “In effect, if we were to hold that dominion and control (even absolute control) is per se fraud on marital rights . . . we would be imposing, by judicial fiat, a kind of augmented estate model eschewed by the Legislature.” 165

Unlike Rhode Island, however, Maryland crafted an equitable alternative to the “net estate” statute that is rooted in the concept that equity will provide a solution when there is no adequate remedy at law: “Maryland precedent long has recognized that a court may invalidate a deceased spouse’s inter vivos transfer where equity requires that the transferred property be considered part of her or his estate for the purpose of calculating the surviving spouse’s

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158. Id.
159. Id.
160. Id. at 1154.
161. MD. CODE ANN., EST. & TRUSTS § 3-203(b) (LexisNexis Supp. 2009).
163. Id. The trust was the beneficiary of the transfer-on-death (TOD) accounts. Id. at 1153.
164. Id. at 1158.
165. Id. at 1159.
The equitable alternative demands that "all of the relevant facts and circumstances should be considered and a determination made on a case-by-case basis." Such an approach is reminiscent of the multi-factor (but never defined) 1937 Newman decision that inaugurated the concept of the illusory-trust doctrine. Like Newman and subsequent decisions, the Maryland court does not consider retention of control by the decedent nor intent to defraud as determinative factors. Instead, "the question to be determined in any case in which a surviving spouse seeks to invalidate an inter vivos transfer is whether the transfer was set up as a mere device or contrivance." Furthermore, "the intent that matters is the decedent's intent to structure a transaction by which she or he parts with ownership of the property in form, but not in substance."

Maryland's equitable approach, although grounded in historical distinctions between law and equity, is cumbersome and reactionary. By establishing an alternative to the state's elective-share statute, the court minimizes the utility of the state's legislative enactment and creates a nebulous alternative that will be difficult for practitioners and planners to implement. The Karsenty court concluded that "by its plain language," the statute prohibits a surviving spouse from electing against inter vivos transfers. But when the Rhode Island court confronted the same problem in accordance with its statute, the court suggested that the legislature remedy the problem without resort to a competing equitable approach. The Rhode Island approach seems preferable to Maryland's alternative equitable remedy, because the equitable remedy is retrogressive and based on the highly subjective format of illusory transfer.

As modern wealth has become progressively more complex, fluid, and global, the need to establish uniformity and predictability in the management and transfer of wealth has intensified. Illusory doctrines, even though grounded in equity, provide neither uniformity nor predictability. The decisions and statutes that follow New York's 1937 Newman decision moved progressively toward identifiable factors—specific indicia that included the nonprobate inter vivos transfers within the elective share of the surviving spouse, often through an augmented-estate device. The beneficiaries of this

166. Id.
167. Id. at 1160.
168. Id. at 1165–66.
169. Id. at 1170.
170. Id. The court listed three factors to consider when establishing intent: (1) whether the "decedent retained an interest in or otherwise continued to enjoy the transferred property"; (2) whether "reasonable and legitimate estate planning arrangements" should be respected; and (3) whether a sham may be evidenced by control, motives, assets to which the spouse would be entitled, and the relationship between the decedent and the beneficiaries of the trust. See id. at 1173–79.
171. Id. at 1158.
173. See discussion infra Part II.E.
trend toward objectivity are estate planners and the many persons who create or benefit from carefully worded estate plans. The evolution of wealth demands objectivity.

Upon remand, the Maryland Court of Appeals in *Karsenty* ordered the trial court to determine whether the inter vivos trust established by the decedent was a mere contrivance. But the equitable approach the court offered as an alternative to the state statute is difficult to apply: "We admit that determining whether someone intended that an *inter vivos* transfer be a sham that changes nothing may be difficult, as it is an ethereal touchstone." Estate planners and their clients deserve more—the probate system values "ease of administration and predictability of result."

To meet the needs of modern estate planners, states have enacted different versions of elective-share statutes, each intended to provide protection to a surviving spouse. As the cases have illustrated, however, the statutes are varied, cumbersome, and often outdated. It is necessary to analyze existing statutes to better place in perspective the newly revised marital property model of the UPC's augmented estate (1990) or marital estate (2008).

**E. Statutory Augmentation**

Recall that election is problematic in separate-property (common-law) states because title is important in determining property ownership; title allows one of the spouses to transfer assets through nonprobate inter vivos arrangements. As discussed in the previous section, courts have attempted to include nonprobate inter vivos transfers by a title-owning decedent spouse within the property against which the surviving spouse may elect. Most often, states allow election against the probate estate of the decedent, but as previously described, state courts have struggled to expand election statutes to include inter vivos transfers. However, in some cases, state legislatures have provided statutory augmentation mechanisms.

Every separate-property state except Georgia has enacted an elective-share statute. Georgia does, however, provide a surviving spouse with one year of support from the estate of the decedent spouse. The goal of any state

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175. *Id.* at 1173.


177. See Radford & Sugarman, *supra* note 98, at 624. Some states mandate that the elective share is a life estate, but the portion of the estate from which the life estate is calculated can range from one-third to one-half. See, e.g., CONN. GEN. STAT. ANN. § 45a-436 (West 2004) (permitting a surviving spouse to elect a life estate of one-third of the decedent's property); R.I. GEN. LAWS §
legislation is for elective-share provisions to provide some objectivity in determining which inter vivos transfers will be included in the elective share; subsequently, the legislation should aim to provide a surviving spouse with a portion of those transfers. Objectivity assists courts, but most of all, it assists estate-planning professionals. New York was the first state to introduce a statute augmenting the probate estate to include nonprobate transfers.\footnote{178} Other states have used the New York statute as a model for their own revisions, but uniformity is scant among the various state statutes. Commentators caution persons who study elective-share statutes that the statutes vary based on factors such as the length of a marriage, whether surviving issue exist, the wealth of the surviving spouse, and what property should be included in the surviving spouse's elective share.\footnote{179}

There is an additional problem with elective-share statutes: legislatures cannot decide what purpose the elective-share statutes should serve.\footnote{180} On one hand, some statutes may be a means by which to recognize the economic partnership of a marriage and, upon the death of one of the partners, to divide the marital property in a fashion somewhat similar to what would have occurred at divorce.\footnote{181} In this model, the elective-share statute would disregard title held by only one of the parties and divide the marital property, regardless of whether it passes as a nonprobate inter vivos transfer or as part of the probate estate. This model would be similar to what occurs in a

\footnote{178. \textit{See} N.Y. \textit{EST. POWERS \& TRUSTS LAW} § 5-1.1-A (McKinney Supp. 2009); \textit{see also} Terry L. Tumipseed, \textit{Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)}, 44 \textit{BRANDEIS L.J.} 737, 748 (2006) ("New York state enacted the first elective share statute in this country.").

179. JESSE DUKEMINIER ET AL., \textit{WILLS, TRUSTS, AND ESTATES} 478–79 (8th ed. 2009); \textit{SCHOENBLUM, supra} note 71, at tbl. 6; \textit{see also} Ronald R. Volkmer, \textit{The Complicated World of the Electing Spouse: In Re Estate of Myers and Recent Statutory Developments}, 33 \textit{CREIGHTON L. REV.} 121, 131–32 (1999) (discussing the lack of consistency in state elective-share statutes even when a state has adopted the UPC version of the elective-share statute).

180. DUKEMINIER ET AL., \textit{supra} note 179, at 479 (citing Laura A. Rosenbury, \textit{Two Ways to End a Marriage: Divorce or Death}, 2005 \textit{UTAH L. REV.} 1227, 1245–61 (observing the disparity in partnership and support theories and noting the difficulty of elective-share statutes to uniformly reflect either theory)).

community-property state, where all property acquired by a married couple is treated as though both spouses own the property, regardless of title. Approximating this marital property for the purpose of elective-share proceedings is one of the goals of the newly revised UPC. Further, the UPC seeks to develop an elective-share statute that would be uniform throughout the common-law states: "The logic of a uniform laws project dealing with probate law is that all states should adopt the same elective-share system, particularly in order to prevent a spouse bent on disinheriting from domicile shopping by relocating property to a state with fewer safeguards." Finally, the UPC and state statutes seek fairness in providing an elective-share amount to the surviving spouse. Thus, the ideal statute would consider the length of the marriage, address any prenuptial or postnuptial agreements executed by the parties, and provide a mechanism to distinguish between marital and separate property. Such criteria are useful in examining the statutes.

On the other hand, the purpose of some elective-share statutes is merely to provide support. Likely based on the common-law concept of dower, such support statutes provide the surviving spouse a fixed percentage of the augmented estate, rather than dividing the marital property. Such an approach maintains the estate plan of the decedent as much as possible. If the purpose of an elective-share statute is to provide support for the surviving spouse, other considerations come into play, such as the duration of the support, the assets of the surviving spouse, and the property to be included within the ambit of the statute. If support is the objective of the statute, there is no attempt to divide marital property in a fashion similar to that in community-property states. A support rationale justifies the use of restrictive devices on an incompetent spouse to elect against the decedent spouse’s estate. The support rationale also justifies the desire to prohibit a windfall for the heirs of the electing spouse.

Many state statutes divide marital property and, perhaps only incidentally, provide a modicum of support to the surviving spouse. The 1990 UPC and its 2008 revision are examples of this type of statute, but there are others. Professor Newman suggests that there are three types of marital property division statutes. First, the "strict deferred-community approach," provides that upon the death of the decedent spouse, title automatically changes, giving each spouse—the decedent’s estate and the surviving spouse—an automatic one-half interest in the marital property acquired by the couple during marriage. Interestingly, this type of statute would provide the

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182. See Waggoner, supra note 67, at 727.
183. See Whitebread, supra note 23, at 133–34 (asserting that the UPC is not premised on a partnership theory of marriage, but rather is aimed at providing support for the surviving spouse and preserving the decedent’s estate plan).
184. See UNIF. PROBATE CODE § 2-212(c) (amended 2008).
186. ld. at 523 (emphasis added) (quoting Waggoner, supra note 67, at 730–31).
decedent’s estate with an interest in the marital property. Thus, if the surviving spouse has title to marital property in his or her name, the present elective-share statutes prevent the decedent’s estate from making an election and incorporating into the decedent’s estate a share of the marital property that presently goes to the surviving spouse. A strict deferred-community approach would allow for this election to occur and would operate in reverse of traditional election statutes, whereby the surviving spouse claims a portion of the decedent’s assets that are titled separately. But also, under this approach, the decedent’s estate seeks to claim a portion of the survivor’s separate property that is titled in the survivor’s name. This radical approach is not present in any of the UPC’s elective-share provisions. Perhaps, as Professor Newman suggests, the omission was practical because the approach could have jeopardized adoption of the UPC’s provisions had it appeared in the recommended draft.187

The second type of statute Professor Newman addresses is the “‘elective-share deferred-community approach,’” which gives only the surviving spouse an elective-share right against the decedent’s estate to claim a portion of the marital property.188 In this second approach, the reverse election right is not available: the decedent’s estate has no election rights to the marital estate, as it had in the strict deferred-community model. The elective-share deferred-community model is consistent with present elective-share statutes that are aimed toward the distribution of marital property, rather than providing support to the surviving spouse. Finally, the third system named by Professor Newman is the “‘value deferred-community-property elective-share system.’”189 Such a system allows for the surviving spouse to elect as in the previous two approaches. Instead of taking title to the property, however, the surviving spouse receives a “pecuniary amount of property from the deceased spouse’s augmented estate such that the value of the couple’s marital property would be divided equally between the surviving spouse and the deceased spouse’s estate, without necessarily dividing each marital asset equally between them.”190 Such an approach would do minimal damage to a decedent’s estate plan even though it does not mirror division under community-property or marital-property systems.191

187. Id. at 525–26.
188. Id. at 523 (emphasis added) (quoting Waggoner, supra note 67, at 730–31).
189. Id. at 524 (emphasis added). This third approach diverges from that identified by Professor Waggoner. See Waggoner, supra note 67, at 730 (identifying only two approaches for incorporating a community-property framework into elective-share schemes).
190. Newman, supra note 8, at 524.
191. Id. at 528–29. Professor Newman suggests that evaluating the value system depends on the following: (1) the difficulty of administration, (2) whether the value-deferred system would be more equitable than the elective-share system, and (3) whether the complexity of the elective-share system makes it less desirable than the value-deferred system. Id. at 536–38.
These general observations on different elective-share statutes introduce us to statutes that have already been adopted and thus have a pedigree— statutes such as the 1965 New York elective-share statute and the UPC's elective-share statute, amended in 1969, 1990, and 2008. Remember that once adopted, the statute provides a presumptive base that allows for married persons, estate planners, and taxation consultants to plan accordingly for the distribution of wealth upon death. But legislatures could continue to modify the statutes to correspond to changes in the inter vivos transfer of wealth and the manner in which property is divided upon the dissolution of a marriage through divorce. Admittedly, married persons can trump the application of any statute through effective prenuptial, or sometimes postnuptial, agreements, but personal initiatives of the spouses are unreliable and legislatures must be vigilant in surveying both wealth transfers and property division at divorce.

The National Conference of Commissioners on Uniform State Laws sought to provide some uniformity to the states' elective-share statutes by adopting an augmented-estate device in 1969 based in part on the 1966 New York statute. This initial statute, the UPC, was amended in 1990 and revised again in 1993. Finally, in 2008, the Commissioners modified the UPC a third time, and this third modification is the focus of this Article. The evolution of the UPC from 1969 to 2008 offers a framework by which to analyze the UPC's provisions and the various state statutes. A more complete analysis of the 2008 version's augmented-estate statute is provided in Part III of this Article. Undoubtedly, the statutes utilized by many states likely derive from one of the models offered by the UPC.

1. The 1965 New York Elective-Share Statute

A decade before states began to codify greater economic rights for women, the New York legislature enacted an elective-share statute that replaced the judicially constructed illusory-trust doctrine established by the Newman decision. The statute included in the elective share certain inter vivos transfers, presaging what would become the augmented estate subsequently implemented in the 1969 UPC. At the time of enactment, the nascent New York legislation provided a statute that served as a model for the development of the UPC. The current version of New York's statute provides for the following: First, a surviving spouse receives a personal right of election over the predeceasing spouse's net estate, which consists of the probate estate, property passing by last will and testament or by intestate succession, and the following inter vivos transfers:

(1) "gifts causa mortis",

192. See supra Part I.


194. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b)(1)(A).
(2) inter vivos gifts which, in the aggregate, exceed the federal gift tax exclusion ($13,000 in 2009) made within one year of the death of the decedent. The transfers are not subject to election if full consideration was received for them or if the surviving spouse consented to the transfers.  

(3) any money deposited in a “Totten Trust”—an account established by the decedent in trust for another person;  

(4) any money deposited jointly with another person and payable upon death to that other person;  

(5) property payable to a person other than the surviving spouse upon the death of the decedent spouse;  

(6) inter vivos transfers, including trusts, whereby the decedent retained possession, income, or any power to invade the principal, including by revocation or disposition;  

(7) pension plans associated with employment or retirement;  

(8) any interest passing as a release or an exercise under a general inter vivos or testamentary power of appointment, either at the death of the decedent or within one year of the decedent’s death.

In computing the net estate, debts, administration expenses and reasonable funeral expenses shall be deducted, but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him or her under [the statute].

Second, “The elective share . . . is the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate.”

195. *Id.* § 5-1.1-A(b)(1)(B).  
196. *Id.* § 5-1.1-A(b)(1)(C).  
197. *Id.* § 5-1.1-A(b)(1)(D). In the UPC’s elective-share provision, only those amounts that can be traced to the decedent’s contribution will be included in the elective share. *See, e.g.*, UNIF. PROBATE CODE § 6-211(b) (amended 2008) (“[A]n account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.”).  
199. *Id.* § 5-1.1-A(b)(1)(F). The arrangement must cease at the death of the decedent, and to be included within the elective share, the transfer cannot have been made for full consideration or with the consent of the surviving spouse. *See id.*  
200. *Id.* § 5-1.1-A(b)(1)(G).  
201. *Id.* § 5-1.1-A(b)(1)(H).  
202. *Id.* § 5-1.1-A(a)(2).  
203. *Id.* The one-third fixed share remains a common denominator among state statutes, perhaps because it mirrors dower rights. *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, § 2-201(a) (1998) (“If a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of ⅓ of the augmented estate under the limitations and conditions hereinafter stated.”); MINN. STAT. ANN. § 524.2-201 (West 2002) (“If a married
Third, the following procedures apply:

(1) if a spouse elects under the terms of the statute, “such election shall have the same effect with respect to any interest which passes or would have passed to the spouse, other than absolutely, as though the spouse died on the same date but immediately before the death of the decedent”,

(2) if an election is made by the surviving spouse, the “will or other instrument making a testamentary provision, as the case may be, is valid as to the residue after the share to which the surviving spouse is entitled has been deducted”,

(3) contribution to the elective share amount will be done ratably unless otherwise expressly stated in the will or other instrument,

(4) “[t]he right of election is personal to the surviving spouse” unless a court authorizes election on behalf of a minor, conservatee, or incompetent spouse;

(5) “election . . . must be made within six months from the date of issuance of letters testamentary or of administration, . . . but in no event later than two years after the date of decedent’s death”,

(6) the right to elect may be waived either before or after a marriage by one or both of the parties, as long as the waiver is in writing and executed in the manner required by New York law to record a conveyance of real property.

The New York elective-share statute has been revised often since its enactment almost fifty years ago, but the framework remains unchanged. The statute was a radical departure from the amorphous common-law rules, and because it provided objectivity, estate planners were able to craft testamentary and inter vivos plans that best suited the needs of their clients. In addition, the

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

204. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(a)(4)(A). Such a provision deprives the electing spouse from taking under the probate estate (and from any inter vivos transfers identified), and from taking an elective portion. There are similar provisions in other state elective-share statutes, even if such a statute is not as generous as New York’s. See, e.g., OR. REV. STAT. ANN. § 114.105(1) (West 2003) (reducing the elective-share amount obtained from the decedent’s net estate by the amount of any “property given [to the surviving spouse] outright, . . . the present value of legal life estates; and . . . the present value of the right of the surviving spouse to income or an annuity”).

205. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(c)(1).

206. Id. § 5-1.1-A(c)(2).

207. Id. § 5-1.1-A(c)(3).

208. Id. § 5-1.1-A(d)(1). Although there are exceptions to the time limitations, the statute specifies that an election must be made no later than “entry of the decree of the first judicial account of the representative of the estate, made more than seven months after the issuance of the letters.” See id. § 5-1.1-A(d)(2)-(3).

209. Id. § 5-1.1-A(e)(2)-(3).
state legislation provided a model for the Commissioners; this approach eventually became the augmented-estate provision of the UPC.

2. The 1969 Uniform Probate Code Elective Share

In its earliest inauguration, the Commissioners sought to address the problem of nonprobate transfers and how to include them within the elective share available to a surviving spouse. To meet this challenge, the Commissioners adopted an inclusive device—termed the augmented estate—that contained an amalgamation of the probate estate and certain inter vivos transfers made during the marriage by the decedent spouse without full and adequate consideration. The Prefatory Note for the Model Property Act described the augmented estate of the UPC, and indeed, the New York “net estate” provision upon which the UPC is modeled as follows:

It is an advance on traditional forced-share procedures, operating by the creation of a larger universe of property against which a spousal right of election is exercisable. It accomplishes this by penetrating the veil of title and other techniques which have developed to insulate assets from the reach of forced-share statutes. In the official comment to the Uniform Probate Code the augmented estate provisions are described as preventing arrangements by the owner of wealth which would transmit property to others than a surviving spouse by means other than probate for the deliberate purpose of defeating the rights of a surviving spouse.

The 1969 version of the augmented estate did not include everything that would eventually be contained in later revisions of the UPC. For instance, in 1969, only transfers made during the marriage were included, and life insurance proceeds payable to someone other than the surviving spouse were excluded. The following items were included in the 1969 augmented-estate provision:

1. any transfers in which the decedent spouse retained the right to possession or income from the property at his or her death;
2. any transfer restricted by the right of the decedent spouse to revoke or invade the corpus for his or her own benefit;

210. UNIF. PROBATE CODE § 2-202 (1969). The UPC’s augmented estate is roughly similar to the “net estate” of the New York provision—it included any property passing under the probate estate and certain inter vivos transfers that would have otherwise been beyond the scope of probate election. *Id.*

211. UNIF. MARITAL PROP. ACT Prefatory Note (amended 1998). Note that the 1969 UPC did not truly treat property acquired by the married couple as the couple’s own. In the case of an incompetent spouse, a court could order election only if the election would provide support for the surviving spouse during that spouse’s anticipated life expectancy. UNIF. PROBATE CODE § 2-203 (1969). If ownership were intended, election would be available regardless of support needs.

212. UNIF. PROBATE CODE § 2-202 (1969). Some states retain the early UPC language and provide for a one-third share—excluding life insurance—and restrict transfers to those that occurred during the marriage. *See, e.g.*, 20 PA. CONS. STAT. ANN. § 2203 (West 2005).
(3) any transfer in joint tenancy with someone other than the surviving spouse;

(4) any complete transfer made within two years of the death of the decedent spouse if the amount was in excess of $3,000 per donee per year; and

(5) any property given to the surviving spouse during life, including a life estate in a trust or property received outright, such as proceeds from life insurance or a pension.\textsuperscript{213}

The 1969 elective-share provision was a significant development when it was proposed by the Commissioners. First, it occurred during a time when no-fault divorce was being introduced in California; today, no-fault divorce is available in every state.\textsuperscript{214} During the 1970s, states gradually abandoned common-law restraints on married women owning property during coverture and enacted laws that would eventually presage economic partnership for married couples.\textsuperscript{215} Second, the elective-share provision not only incorporated inter vivos transfers into the spouse's elective share, but did so in an objective fashion, eschewing the subjective pitfalls of the old common-law doctrine of illusory conjecture. The elective-share provision listed specific nonprobate items and defined the conditions for incorporating these items into the spouse's elective share. The changing economic times of the 1970s and 1980s precipitated an increasing diversification of wealth, and estate planners benefitted from their ability to create evermore complex inter vivos planning schemes.\textsuperscript{216} Third, the provision sought to prevent a spouse who received assets from a decedent spouse during life or at death from electing and taking additional assets, and thus taking a windfall. This goal of fairness is illustrated by the inclusion of inter vivos or testamentary gifts to the spouse within the parameters of the augmented estate, providing credits for gifts to the spouse.
against the elective portion when computing the share.\footnote{217} This process—revolutionary for that time—approximated the total value of the marital property. The process was further refined in the 2008 version of the UPC.

Critics of the 1969 UPC elective-share provisions focused on the calculation of the augmented estate. Commenting on the 1969 augmented-estate provision of the UPC, Professor Whitebread wrote that “the one-third share of the entire estate does not reflect the partnership theory,” and even if provision were made for a surviving spouse to take one-half of the decedent’s assets, this would not be a true reflection of a partnership because one-half of a decedent’s assets is not equivalent to one-half of assets acquired during the marriage.\footnote{218} In addition, Professor Whitebread observed that the 1969 UPC provisions were inadequate because they failed to consider the needs of the surviving spouse and, thus, often over-compensated or under-compensated the surviving spouse for his or her contribution. Additionally, the pre-1990 UPC elective share provisions failed to consider the length of the marriage or adequately incorporate a partnership theory of marriage.\footnote{219}

Overall, the 1969 UPC elective-share provision was deficient for the same reason that successive versions were deficient: it “fail[ed] to consider the unique circumstances that a mechanical, statistical model cannot take into account.”\footnote{220} A better test of the success of subsequent versions of the UPC would ask whether the UPC provides a reasonable statutory model in light of the competing interests involved and the difficulty of legislating for every situation. This inquiry is addressed in Part IV of this Article.

The 1969 elective-share provision that created the concept of augmented estate formed a model that was based more on support than on the idea of an economic partnership. Giving a one-third share of the augmented estate mirrors the amount available under common-law dower, and the provision made only a modest effort to include all of the marital property into the augmented estate. For example, the 1969 UPC provision provided that if a surviving spouse were incompetent and unable to elect personally, the probate court could elect on the spouse’s behalf only after finding that the election is necessary to provide adequate support during his or her remaining life expectancy.\footnote{221} The 1990 elective-share provision contained similar language, but in order to lessen any windfall to heirs of the surviving spouse, this version

\footnote{217} Unif. Probate Code § 2-207(a)—(b) (1969). But see Bravo v. Sauter, 727 So. 2d 1103, 1107 (Fla. Dist. Ct. App. 1999) (permitting a surviving spouse to take an income interest that she received from an inter vivos trust created by her deceased husband, as well as an elective share from her deceased husband’s probate estate).

\footnote{218} Whitebread, supra note 23, at 133 (commenting on pre-1990 versions of the UPC).

\footnote{219} Id. at 128.

\footnote{220} Id. at 138.

of the UPC created a custodial trust. Under the 1969 UPC, the surviving spouse was entitled to take one-third of the augmented estate as long as the proper person made a timely election. The one-third share of the augmented estate "was largely a carry over from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband's land." The duration of the marriage was accounted for in the elective-share amount itself, and the provision only included inter vivos transfers made during the marriage. This disregard for the property acquired over the duration of the marriage indicates that the 1969 elective-share provision was more of a support model rather than a model based on economic partnership. The 1990 UPC revisions addressed this deficiency and moved toward a model based on the division of marital property according to an economic-partnership theory.

3. The 1990 Uniform Probate Code Elective Share

The 1990 revised version of the elective-share statute retained the augmented-estate concept, but implemented significant revisions. The idea of an economic partnership, rather than the support model relied on in the 1969 UPC, became more of the basis for determining the augmented estate. The 1990 revision focused on a division of marital property that was more analogous to that adopted in a community-property state or under the Model Marital Property Act.

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222. Id. § 2-203(b)-(c) (1990). If a guardian for an incompetent spouse elects on the spouse's behalf, the portion of the elective share that exceeds the amount that the decedent spouse left to the surviving spouse must be placed in a custodial trust and managed by a person appointed by the probate court. Id. § 2-203(c). The trustee may expend income and principal in caring for the spouse, but upon the spouse's death, any remaining assets must revert to the residuary legatees under the last will and testament of the decedent against whom the election was made. Id. The 2008 UPC revision also contains the custodial trust provision. See Unif. Probate Code § 2-212(b)-(c) (2008). "The purpose of [these provisions], generally speaking, is to assure that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse's heirs or devisees." Id. § 2-212 cmt.


224. See Unif. Marital Prop. Act Prefatory Note (amended 1998) ("Property acquired during marriage by the effort of spouses is shared and is something the couple can truly style as 'ours.' Rather than an evanescent hope, the idea of sharing implicit in viewing property as 'ours' becomes reality as a result of a present, vested ownership right which each spouse has in all
The 1990 elective-share provision made several key changes. First, although it included a minimal support amount of $50,000, the support obligation could be satisfied from any elective-share amount received; thus, the statutory framework is similar to a division-of-marital-property—or economic-partnership—model, rather than a support model. The provision included the $50,000 minimal support amount to accommodate very short-term marriages in which a surviving spouse would not receive much under the augmented-estate calculation table. Second, the 1990 revised UPC provision incorporated all property without regard to source or inheritance: “[P]roperty earned during the marriage need not be segregated from property acquired prior to the marriage or acquired during the marriage by gift or inheritance.” The 1990 version of augmented estate included all accumulated property of both of the spouses and then apportioned it according to an accrual time scale based on the length of the marriage. Because the UPC revision did not classify property as separate or marital, it permitted parties to the probate process to dodge the extensive litigation and delay in the administration of the estate that would occur if the court were required to distinguish ownership of assets. Nonetheless, Professor Whitebread criticized the failure to properly classify property as marital or separate as contrary to what would be done in a community-property state: “By continuing to consider the universal community and not the community of acquests, the UPC elective share provisions do not allow for implementation of the partnership theory of marriage.” Fourth, the decedent spouse’s estate has no right to “elect” against the property titled in the name of the surviving spouse. In other words, the surviving spouse may elect a share of the decedent’s property, but

property acquired by the personal efforts of either during the marriage. That property is ‘marital property.’”).

225. Waggoner, supra note 67, at 734; see also UNIF. PROBATE CODE § 2-202(b)(1)–(4) (1990) (identifying what is included in the augmented estate).
226. See UNIF. PROBATE CODE § 2-201(a) (1990) (setting forth the elective-share schedule). A significant revision in the 1990 version of augmented estate is the inclusion of the value of property owned by the surviving spouse in the augmented estate—a value that is then combined with property titled in the decedent spouse’s name. Id. § 2-202(a)(4).
227. See Waggoner, supra note 31, at 7 (“Formally, the system does not distinguish between property acquired during the marriage and other property, but compensates for this informally by applying an upwardly-trending percentage to the couple’s assets whenever and however acquired.”). The value of the 1990 augmented estate was determined by adding the value of the four components described in sections 2-202(b)(1) through 2-202(b)(4) of the 1990 UPC. See UNIF. PROBATE CODE § 2-202(b) (1990).
228. Whitebread, supra note 23, at 136. The community-property states exclude from marital property all property acquired by gift or inheritance because this property is not acquired as “fruits of the marriage.” Id. at 132. In addition, property brought separately into the marriage and maintained as such may remain separate property. See id. at 133 (explaining that the system of community property “grants each spouse upon marriage a half interest in the earnings of the other during the marriage”).
the decedent's estate may not elect a share of the surviving spouse's property. In the case of property held disproportionately in the name of the surviving spouse, the decedent spouse's estate is not afforded the opportunity to claim a share. Some relief would be available for the decedent's estate under Professor Newman's strict deferred-community approach model. This lack of an election right for the decedent's estate demonstrates the continuing dissimilarity between a community-property approach and a separate-property approach.

Fifth, the 1990 revision first considered the surviving spouse's own assets when determining what property the surviving spouse was entitled to receive. Professor Waggoner has noted that "by applying the elective-share percentage to the couple's combined assets, the 1990 UPC elective-share system disregards the possibly fortuitous factor of how the couple took title to particular assets." The 1990 UPC specified that the decedent's estate was responsible for the needs of the surviving spouse's elective share only insofar as the elective-share amount is not fully satisfied by the sum of the surviving spouse's assets. By starting with the surviving spouse's assets, the 1990 UPC revision eliminated any windfall for the surviving spouse and better incorporated the joint-ownership theory of marital partnership.

Sixth, the 1990 revision of the augmented estate included many transfers made before marriage when the decedent retained substantial control over the property during marriage. One example would be a revocable inter vivos trust created by the decedent. The 1990 UPC also included transfers made during the marriage that affected the augmented estate. Professor Waggoner has provided an illustration: Ben and Elaine were married when they were in their twenties, and they never divorced. Ben dies at the age of sixty-two and is survived by Elaine; they enjoyed a forty-year marriage. Ben left a valid last will and testament in which he disinherited Elaine from the $600,000 worth of assets that the couple had accumulated during their marriage. Because the couple had been married for more than the fifteen-year statutory limit, they have achieved the maximum fifty-percent rate under the revised approach of the 1990 UPC. Note too, however, that the 1990 UPC considers the property of both parties—without regard to title—in both augmenting the

\[\text{230. See id. at 524 (stating that under a strict deferred-community approach, the decedent's estate may elect a share from the surviving spouse's property if the marital property is held disproportionately by the surviving spouse).}\]

\[\text{231. UNIF. PROBATE CODE § 2-207(a) (1990).}\]

\[\text{232. Waggoner, supra note 67, at 736.}\]

\[\text{233. UNIF. PROBATE CODE § 2-207(b)-(c) (1990).}\]

\[\text{234. Waggoner, supra note 67, at 721.}\]

\[\text{235. Id. Under earlier versions of the elective-share provision, giving Elaine a one-third share of Ben's estate could result in her receiving an unfair advantage (or disadvantage) depending on in whose name title to the property was held. Id.}\]

\[\text{236. See UNIF. PROBATE CODE § 2-201(a) (1990).}\]
estate and satisfying Elaine's elective-share amount. Thus, under the 1990 UPC,

[i]f Ben "owned" all $600,000 of the marital assets, Elaine's claim against Ben's estate would be $300,000 [fifty percent of the marital assets]. If Ben "owned" $500,000 of the marital assets and Elaine 'owned' $100,000, Elaine's claim against Ben's estate would be for $200,000, which is the amount necessary to bring Elaine's $100,000 in assets up to $300,000 [fifty percent of the marital assets].

The assets titled in Elaine's name in the second example provide a means by which the 1990 UPC may recognize the fifty-percent share to which Elaine is entitled, but it will be necessary to include in that amount those assets she has derived from the marriage. This will prevent her from receiving a windfall from Ben's estate, as Professor Waggoner has explained: "[I]f $300,000 of the marital assets were titled in Ben's name and $300,000 in Elaine's name, Elaine would have no claim against Ben's estate. Elaine's title-based ownership rights would already have sufficiently rewarded her, as measured by the partnership theory."  

The following summarizes the elements included within the 1990 augmented-estate provisions against which the surviving spouse will be entitled to elect:

(1) the decedent's net estate;

(2) inter vivos transfers to persons other than the surviving spouse when the decedent (a) had a power of revocation, (b) was given a general power of appointment by himself or herself (or by another person), (c) had a joint interest in the property, or (d) had the power to make a payable-on-death designation, and proceeds of insurance on the decedent's life owned by the decedent and payable to any person other than the surviving spouse;

(3) property transferred by the decedent during marriage and over which he or she had control similar to that identified in (2) above, or property irrevocably transferred to someone other than the surviving spouse within the two years preceding the decedent's death if its value exceeds $10,000; and

(4) the value of the decedent's inter vivos transfers to the surviving spouse and the value of the surviving spouse's property and inter vivos transfers to others that would have been included in his or her augmented estate had he or she been the decedent.

Both the 1969 version of the UPC and the New York statute provided an elective-share portion consisting of one-third of the augmented estate, regardless of the length of the marriage. The 1990 UPC gave the surviving spouse a percentage of the elective-share amount based on a sliding scale

237. See id. § 2-202(b).
238. Waggoner, supra note 67, at 737.
239. Id. at 738.
reflecting the length of the marriage; this is referred to as the accrual feature of the 1990 UPC. Under the 1990 sliding scale, the elective-share amount was three percent of the augmented estate after one year of marriage; the share amount increased by three percent each of the next ten years of marriage, followed by a four-percent annual accrual until fifteen years of marriage, at which point the elective-share amount became set at the maximum share percentage of fifty percent.242 In addition, the 1990 UPC provided a surviving spouse with a $50,000 supplemental elective-share amount to provide an element of support in addition to the spousal allowances provided by statute.243 Even though the supplemental amount is intended merely as support, the amount provided is substantial enough to reflect something more than a support model, which was the basis of the 1969 UPC provisions.

Commenting on whether the 1990 elective-share provisions of the UPC better implemented the partnership theory of marriage, Professor Whitebread noted that "while the revised UPC is certainly better than the pre-1990 UPC and a step in the right direction, it is not a very large step."244 Additional commentators have been critical of the 1990 UPC's elective-share approach: "Because the UPC's elective-share approximation system cannot be relied upon to produce results consistent with the marital partnership theory upon which it is based, [Professor Newman] proposes a deferred-community-property alternative as a preferable means of incorporating the partnership theory of marriage into elective-share law."245 At first glance, Professor Newman's proposed value deferred-community-property elective system would be structured similarly to the 1990 UPC. Under Newman's proposed arrangement, the following would occur:

\[(1)\] the surviving spouse's elective-share percentage would be 50% of the decedent's augmented estate, without regard to the length of

241. See id. § 2-201(a). A number of states have adopted various versions of the 1990 revised UPC's elective-share provisions. See, e.g., COLO. REV. STAT. § 15-11-201 (2008) (implementing an accrual method of elective-share percentage and retaining the $50,000 supplemental elective share); KAN. STAT. ANN. § 59-6a202 (2005) (adopting the 1990 UPC elective-share percentages); MINN. STAT. ANN. § 524.2-202 (West 2002) (maintaining the 1990 elective-share percentages); N.D. CENT. CODE § 30.1-05-01 (Supp. 2009) (increasing the 1990 UPC's $50,000 supplemental elective-share amount to $75,000); S.D. CODIFIED LAWS § 29A-2-202 (2004) (adopting the 1990 UPC provisions—both the $50,000 supplemental amount and the 1990 elective-share percentages); W. VA. CODE ANN. § 42-3-1 (LexisNexis 2004) (providing a supplemental amount of $25,000 and a sliding-scale accrual method like that in the 1990 UPC). But see ARK. CODE ANN. § 28-39-401(a)–(b)(2) (2004) (permitting a surviving spouse to take against the will of a decedent, but only in an amount equal to the share of his or her dower or curtesy); OHIO REV. CODE ANN. § 2106.01 (LexisNexis 2007) (allowing a surviving spouse to take "one-half of the net estate, unless two or more of the decedent's children . . . survive, in which case the surviving spouse [may] take . . . one-third of the net estate").

243. Id. § 2-201(b) cmt.
244. Whitebread, supra note 23, at 139.
245. See, e.g., Newman, supra note 8, at 488.
the marriage; [(2)] the decedent’s augmented estate would consist only of the couple’s marital property; [(3)] the surviving spouse’s elective-share amount would be charged only with marital property (probate and nonprobate) of the surviving spouse at the time of the decedent’s death (and with significant transfers of marital property by the surviving spouse within a specified period of time before the decedent’s death), as well as with marital or separate property received by the surviving spouse as a result of the decedent’s death; and [(4)] a means of classifying the couple’s property at the time of the first of their deaths as marital or separate would be required. 246

Professor Newman’s proposal discusses marital property that is to be divided under item (2); then, under item (4), Newman suggests that a method must be devised by which the courts can classify property as marital or separate. This is a significant departure from the UPC approach, which allows for a system of accrual approximation in order to escape the litigation and delay that results when courts are required to classify the property. This is an important distinction in any comparison between Professor Newman’s approach and the 1990 or 2008 UPC. Consistently, criticism of the UPC focuses on the accrual system adopted in the 1990 UPC and adopted in a modified version in the 2008 revision. Criticism of the approximation system stems from debate over whether to include all property—even though some of the property may be separate property—into the augmented estate. 247

This Article has discussed the various approaches of some separate-property states—such as Rhode Island, Maryland, and New York—toward elective-share parity. There are many other approaches among the states, some that have been the subject of recent comment. 248 The only common element among all of the varied approaches is an attempt to make some property available to a surviving spouse, whether that is support or a portion of marital property. Differences among the state statutes occur in a number of contexts.

246. *Id.* at 530–31 (footnotes omitted). Professor Newman provides examples illustrating how to distinguish marital from separate property. *Id.* at 532–33 (suggesting the Uniform Marital Property Act and the American Law Institute’s principles of law with respect to family dissolution).

247. *Id.* at 492 (suggesting that a deferred-community-property elective-share system would not subject the deceased spouse’s separate property to the surviving spouse’s elective-share claim).

a. The Augmented Estate

The transition from the elusive definition of property available to the surviving spouse that was first identified in the illusory-trust doctrine was cumbersome at best. Eventually, courts and legislatures began to quantify property subject to election; in this respect, the New York and UPC statutes are illuminating and clarifying. Nonetheless, discussion continues over what should be included in the elective estate, often referred to as the augmented estate. For example, Delaware’s elective estate piggybacks on property owned by the decedent that would be included for federal estate-tax purposes: “The elective estate means the amount of the decedent’s gross estate for federal estate tax purposes, regardless of whether or not a federal estate tax return is filed for the decedent.”249 Some commentators note that the 1990 UPC “resembles the Internal Revenue Code, which subjects to estate taxation property transferred by the decedent during life over which the decedent retained substantial control as well as property subject to a general power of appointment given the decedent by others.”250 In Utah, the elective-share statute references augmented estate;251 in the earlier version of the statute, it was unclear what property was included within the augmented estate.252 Other states employ a traditional approach, perhaps modeling themselves after the early New York legislation by listing specific property to be included in the augmented estate. For example, the Idaho statute provides:

The right of the surviving spouse in the augmented quasi-community property estate shall be elective and shall be limited to one-half (1/2) of the total augmented quasi-community property estate which will include, as a part of the property described in . . . this code, property received from the decedent and owned by the surviving spouse at the

249. DEL. CODE ANN. tit. 12, § 902(a) (2007). Delaware’s statute further provides that “[i]n every case where an elective share petition has been filed, the personal representative of the estate shall prepare a [federal estate tax return] for the estate, regardless of whether such form is required to be filed.” Id. § 902(c). The 1990 UPC (with the 1993 amendments) utilized federal estate-tax valuation. See, e.g., UNIF. PROBATE CODE § 2-207 cmt. (1993) (“[The] amounts that would have been includible in the surviving spouse’s nonprobate transfers to others under Section 2-205(1)(iv) are not valued as if he or she were deceased. Thus, if, at the decedent’s death, the surviving spouse owns a $1 million life-insurance policy on his or her life, payable to his or her sister, that policy would not be valued at its face value of $1 million, but rather could be valued under the method used in the federal estate tax under [IRS regulations].”).

250. DUKEMINIER ET AL., supra note 179, at 498.

251. See UTAH CODE ANN. § 75-2-202 (Supp. 2009) (allowing an elective-share amount of one-third of the augmented estate, plus a supplemental share amount equal to $25,000).

252. In the 1993 version of the augmented-estate provision, the legislators noted that [t]he augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well-planned or routine cases, however, because the spouse’s rights are freely releasable under [the waiver provision] and because of the time limits [for making an election]. UTAH CODE ANN. § 75-2-202 cmt. (1993).
decedent’s death, plus the value of such property transferred by the surviving spouse at any time during marriage to any person other than the decedent which would have been in the surviving spouse’s quasi-community property augmented estate if that spouse had predeceased the decedent to the extent that the owner’s transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or moneys worth. This shall not include any benefits derived from the federal social security system by reason of service performed or disability incurred by the decedent and shall include property transferred from the decedent to the surviving spouse by virtue of joint ownership and through the exercise of a power of appointment also exercisable in favor of others than the surviving spouse and appointed to the surviving spouse.253

In an effort to define the augmented estate, Indiana allows a surviving spouse to make an election against the decedent spouse’s last will and testament: the surviving spouse may elect “one-half (½) of the net personal and real estate of the testator.”254 If the electing spouse is a subsequent spouse who never had children by the decedent and the decedent is survived by children from a previous spouse, the subsequent spouse only takes

one-third (⅓) of the net personal estate of the testator plus an amount equal to twenty-five percent (25%) of the remainder of:

(1) the fair market value as of the date of death of the real property of the testator; minus

(2) the value of the liens and encumbrances on the real property of the testator.255

254. IND. CODE ANN. § 29-1-3-1(a) (LexisNexis Supp. 2009). Whenever the surviving spouse elects, the election amount may be satisfied from “all specific bequests or devises given to the surviving spouse in the will at their fair market value as of the time of the decedent’s death and receive the balance due in cash or property.” Id. § 29-1-3-1(b). When the spouse elects, however, he or she is treated as having renounced “all rights and interest of every kind and character in the personal and real property of the deceased spouse, and to [have] accept[ed] the elected award in lieu thereof.” Id. § 29-1-3-1(c).

The one-third amount often appears in statutory election, perhaps as a result of its association with common-law dower: “The one-third fraction was largely a carry over from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband’s land.” UNIF. PROBATE CODE § 2-202 cmt. (amended 2008).
255. IND. CODE ANN. § 29-1-3-1(a) (LexisNexis Supp. 2009). Kentucky has a similar provision, allowing an elective share of one-third of the decedent’s real estate and a personal-property share of whatever would be the surviving spouse’s intestate portion. See KY. REV. STAT. ANN. § 392.080 (LexisNexis 1999); see also MISS. CODE ANN. § 91-5-25 (West 1999) (allowing an election by a surviving spouse if, within ninety days after the will is probated, the surviving spouse renounces provisions made for that spouse in the will, opting instead to take one-half of the real and personal property of the decedent as if the decedent had died intestate).
What is included in the net estate? Comments to the statute's provisions specify that, in determining the net estate, the court may consider only property passing "under the laws of descent and distribution," thus excluding real estate "held jointly by entireties, joint bank accounts, income from inter vivos trusts, etc." Thus, in Indiana, the elective share of the surviving spouse is far less than that offered by states using the illusory-trust doctrine or the augmented estate of the UPC.

In addition, the Indiana statute provides for a smaller elective-share amount if the surviving spouse is a subsequent spouse of the decedent or if the decedent has issue from a prior spouse who survives the decedent. North Carolina has a similar provision, providing an elective-share amount of one-half of the total net assets if the decedent has no surviving issue, or if there is one issue surviving. But if the decedent is survived by "two or more children, or by one or more children and the lineal descendants of one or more deceased children, or by the lineal descendants of two or more deceased children, [the applicable share is] one-third of the Total Net Assets."

Likewise,

[i]n those cases in which the surviving spouse is a second or successive spouse, and the decedent has one or more lineal descendants surviving by a prior marriage but there are no lineal descendants surviving by the surviving spouse, the applicable share... shall be reduced by one-half.

Analyzing the various state statutes is a daunting task. One conclusion is inescapable: the effort on the part of the Commissioners to provide uniformity through the UPC is a worthy goal. Furthermore, any confusion in digesting the intricacies of the UPC is insignificant in comparison to the task of navigating the state statute landscape for clients who move to and from multiple jurisdictions.

b. Should All Property—Separate and Marital—Be Included?

Community-property states and separate-property states classify property as community (marital) or as separate. As discussed, Professors Whitebread and Newman suggest that any elective-share system should exclude separate property from the augmented estate, because such property is not a product of the marriage and is thus not divisible at divorce. Commentators arguing for its inclusion are those who suggest that the decedent spouse, at the moment of his...
or her death, controlled the devolution of the asset through an inter vivos transfer or by a last will and testament and that even though separate property is involved, it is fair to include it within the augmented estate. In addition—and as frequently argued by Professor Waggoner—the classification procedure at death would be so litigious and time-consuming that the distinction between separate property and marital property should not be made. The importance of uniform estate administration justifies an approach that more easily, yet fairly, accommodates separate- and marital-property distinctions: "This is what justifies including these components in the augmented estate without regard to the person who created the decedent’s substantive ownership interest, whether the decedent or someone else, and without regard to when it was created, whether before or after the decedent’s marriage."

Some state statutes may be interpreted to be inclusive, thus incorporating separate and marital property into the augmented estate for elective-share purposes. The Iowa Code, for example, allows a spouse an elective share against the following: (1) one-third of real estate possessed by a decedent at any time during the marriage; (2) all personal property that was in the hands of the decedent, as head of the family, at his or her death; (3) "[o]ne-third of all personal property of the decedent that is not necessary for the payment of debts and charges"; and (4) one-third of all personal property held in trust over which the decedent retained the right, at the time of his or death, "to alter, amend, or revoke the trust, or over which the decedent waived" this right within one year of death. Such inclusiveness does not reduce the intensity of the debate over whether there should be a distinction between marital and separate property.

As mentioned, some commentators think that because "neither spouse contributed to the acquisition of the separate property of the other, their separate property should be excluded from the division." The spouse’s control over separate property at death is irrelevant; the only fact of consequence is the origin of the property. If it originated as separate property and has not been transmuted into marital property, the augmented estate should not include it. Perhaps the resolution of the debate depends on whether the classification of marital versus separate property is feasible. Arguably, the

261. Unif. Probate Code § 2-205 cmt. (amended 2008). The components of the augmented estate are as follows: "(1) property owned or owned in substance by the decedent immediately before death that passed outside probate" to persons other than the surviving spouse; (2) property transferred by the decedent during marriage and that passed outside probate to persons other than the surviving spouse; and (3) property transferred by the decedent "during marriage and during the two-year period next preceding the decedent’s death . . . ." Id. § 2-205.

262. Iowa Code Ann. § 633.238(1) (West Supp. 2009); see also Sieh v. Sieh, 713 N.W.2d 194, 195 (Iowa 2006) (ruling that assets of an inter vivos trust, over which the settlor had complete control at the time of his death, were assets to be included in the elective share).

263. Newman, supra note 8, at 544.
classification and tracing issues, along with the need to plan for dealing with them through such measures as segregating separate property, are becoming increasingly familiar to the public, as those issues no longer are confined to community-property jurisdictions, in which they must be addressed when marriages terminate by divorce or by the death of a spouse, but also routinely arise in a substantial majority of noncommunity-property jurisdictions when spouses divorce. Litigation nevertheless continues over the classification of property, and litigation at death becomes particularly onerous because one of the parties to the marriage is no longer alive to address the classification issues. Transmutation—the movement of one type of property into another without proper documentation—is another issue that this Article will discuss in more detail in connection with divorce and the revised 2008 elective-share provisions of the UPC. In a perfect world, separate property, on par with marital property, would not assimilate into the augmented estate for elective-share purposes. The difficulty of classifying these assets makes this less than a perfect world. Unable to achieve perfection, is it reasonable to use the approximation system to escape the costs and administrative burdens of tracing and classifying property as separate or marital? Professor Newman, the 1990 UPC, and the 2008 revisions conclude that an approximation system is a reasonable accommodation and approach. This will be discussed further below.

c. Accommodating Length of Marriage in the Division of Marital Property

The 1969 UPC provision for the elective share gave the spouse a one-third share of the augmented estate, regardless of the length of the marriage. In contrast, the 1990 UPC created an accrual system that entitled the spouse to a percentage of the augmented estate; that percentage ranged from zero to fifty percent and increased correspondingly with the length of the marriage, which could be less than one or more than fifteen years. This length-of-marriage scale is more appropriate than the earlier one-third-share approach, because the longer a couple is married, the greater the elective share of the surviving spouse should be. The accrual system also approximates the transmutation of

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264. Id. at 559.
265. See infra Parts III.B.3, IV.C.
266. See, e.g., Newman, supra note 8, at 555 (“Under the UPC’s approximation system, the principle of the partnership theory of marriage that, generally, neither spouse should be entitled to a share of the other’s separate property has given way to the probate system’s goals of ease of administration and predictability of result.” (footnotes omitted)).
267. See infra Part IV.
268. See Waggoner, supra note 67, at 720.
separate property into marital property. Any separate property brought into the marriage will gradually be transmuted into marital property. Such assumptions affect the ingredients in the augmented estate, as previously discussed. The length-of-marriage approximation system does more than fairly divide marital property—it encompasses a reasonable guess as to what constitutes marital property.

As Professor Waggoner writes, the 1990 UPC was "the first effort to bring elective share law broadly into line with the partnership and support theories."270 The basis for this assessment is the length-of-marriage addition to the 1990 UPC.271 The accrual approach intended "to establish a system that approximates the results that would be achieved by a fifty-fifty split of marital assets—without burdening the system with the costs and uncertainties associated with post-death classification of the couple's property to determine which is marital (community) and which is individual (separate)."272 The premise is that couples often marry with each person owning separate property, and in some marriages, the spouses continue to acquire separate property during the marriage. Rather than seek to distinguish the separate property from the marital property at the death of one of the spouses so as to provide a "true" division of marital (but not separate) property, the UPC adopts an accrual system that says, in effect, that it is reasonable to assume that the "separate" character of each spouse's separate property diminishes the longer the couple stays married, and likewise, their jointly owned marital property increases.273 Therefore, after fifteen years of marriage, it is appropriate to split all property as if it is marital property.274

While the approximation system established in the 1990 UPC is described as reasonable, the real issue is whether the system is reasonable in the context of a marital economic partnership.275 Professor Newman has written that Professor Waggoner characterizes "the approximation system itself [as something that] can be expected to produce results that are grossly inequitable."276 Professor Newman's argument that the approximation system is unreasonable is as follows:

270. Id. at 4.
271. Id. at 6–7.
272. Id. at 6.
273. Id.
274. Id. at 7.
275. See Waggoner, supra note 67, at 741. Professor Waggoner illustrates how the present system could be unreasonable in certain scenarios, such as when a surviving spouse receives a large inheritance from a wealthy relative a few days before the decedent's death. Id. Such an inheritance is easily classified as separate property, but the UPC includes it in the augmented estate subject to the other spouse's elective share. Id. at 741 n.149.
276. Newman, supra note 8, at 499. For examples of results inconsistent with the partnership theory of marriage, see id. at 501.
In light of the prevalence of second and subsequent marriages, to many of which one or both spouses will have brought separate property, and in light of inheritances that will be received by many spouses during their marriages, it is questionable whether the approximation system will in fact yield results that are close to the mark in most elective-share cases (given that the objective is an elective-share result by which marital property is divided between the spouses equally and neither has a claim to the other's separate property).

Professor Waggoner similarly has admitted that instances will occur in which inequities will result. Professor Waggoner suggested changes to the 1990 UPC, and in doing so, he contributed statistical data to support his conclusion that the approximation system is reasonable, especially in light of changes scheduled to be made to the UPC in 2008. The approximation system is reasonable in light of the community-property assumption that all property acquired during the marriage is community property; thus, the approximation system requires a rebuttal of this assumption. It is only unreasonable in circumstances in which a great discrepancy exists between the decedent's assets and the survivor's assets. Furthermore, reasonableness must be measured in light of the burden of administrative costs associated with tracing separate property so as to exclude it from the augmented estate. In addition, a couple contemplating marriage always has the option of executing premarital agreements, which could remove this issue from public 277

277. Id. at 522 (footnotes omitted).

278. Waggoner, supra note 31, at 9–22. If the test is reasonable, it seems unwarranted to dismiss too quickly a proposal that adopts an equitable-distribution model for elective share similar to what is done at divorce. See Vallario, supra note 181, at 521–22. Professor Waggoner states that the drafting committee rejected the equitable-distribution model (as used in divorce) because of its unpredictable nature and unpopularity among members of the probate bar. Waggoner, supra note 31, at 30 & n.52. Professor Waggoner also discussed this option in his earlier work. See Waggoner, supra note 67, at 726–29 (arguing that there are significant differences between termination of a marriage at divorce and at death); see also Sidney Kwestel & Rena C. Seplowitz, Testamentary Substitutes—A Time for Statutory Clarification, 23 REAL PROP. PROP. & TR. J. 467, 472 & n.22 (1988) (noting that an equitable-distribution model in the elective-share context is not ideal given the need for “predictability and ease of administration”); Newman, supra note 8, at 504–05 (summarizing why divorce and death are dissimilar).

279. Professor Waggoner also has argued, however, that the community-property presumption may be unreasonable. See Waggoner, supra note 67, at 733–34 (“That presumption would ease the administrative burden, but at the cost of reaching incorrect results in cases in which the presumption would prevail, not because it is correct, but because sufficient contrary evidence cannot be obtained. Thus, what appears to be an exact method may not in fact give exact results.”).

280. Waggoner, supra note 31, at 29. Professor Newman suggests that the approximation system is reasonable if it considers (1) “the amount of marital property each spouse owns”; (2) “the amount of separate property each spouse owns”; (3) “the length of the marriage”; and (4) “which spouse dies first.” Newman, supra note 8, at 513.
determination and make it a matter of personal choice between two adults entering into marriage with years, assets, and beneficiaries already amassed.

**d. Items Charged Against the Surviving Spouse’s Elective Amount**

In order to prevent a surviving spouse from receiving a windfall upon the death of his or her spouse, the elective share is first determined in accordance with the statute, and then the amount due to the surviving spouse is taken from property already passing to the surviving spouse via the probate estate (the will or intestacy) or through inter vivos transfers. Some states have similar arrangements, although they are far less extensive than that of the UPC. The effect of these arrangements is that the estate plan of a decedent is preserved as much as possible. Because the surviving spouse would already receive property through probate, little disruption to the decedent’s estate plan would occur when we satisfy the elective share of the surviving spouse with property already designated for that spouse.

Recall that the 1990 UPC revisions included, for purposes of determining the augmented estate, all of the property of both spouses, regardless of whether the property is considered separate or marital. This augmented estate thus included property owned by the surviving spouse or to which the spouse is entitled via probate or nonprobate transfer. The only property excluded from the augmented estate would be enhancements to income-earning capacity resulting from professional degrees or licenses, and after 1993, any life estate renounced by the surviving spouse. Exclusion of the renounced life estate resulted from the utilization of the modern estate plan whereby the decedent uses a QTIP trust containing a life estate followed by a vested remainder in someone other than a spouse. If this life estate were valued as part of the augmented estate, it would require extensive actuarial computations that should be avoided if possible. Nonetheless, commentators do not all agree that the 1993 change regarding life-estate valuation is beneficial to all concerned:

The Code does not indicate that the surviving spouse may disclaim only income interests in trust. But if a surviving spouse can disclaim an absolute interest, and thereby assure that the interest does not count against her elective share, the surviving spouse may upset the testator’s testamentary scheme for no good reason.

Additional commentary on this issue will surely follow.

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282. See, e.g., Ala. Code §43-8-70(a) (1991) (noting that the elective share consists of “[a]ll of the estate of the [decedent] reduced by the value of the surviving spouse’s separate estate” or one-third of the decedent’s estate, whichever is less).
283. See supra Part II.A.
284. See Bloom, supra note 82, at 968.
The 1969 UPC definition of augmented estate did not include a decedent’s life-insurance policy that he or she owned at death. In contrast, the 1990 UPC and the 2008 revision include life insurance within the augmented estate.\textsuperscript{286} The purpose of combining the estates and nonprobate transfers of both spouses is to implement a partnership or marital-sharing theory. Under that theory, there is a fifty/fifty split of the property acquired by both spouses.\textsuperscript{287} The rationale is that life insurance is part of the spouses’ property, regardless of whether they acquired it before or during the marriage. The fact that the policy is payable to someone at death is irrelevant.\textsuperscript{288}

\section*{4. The 2008 Uniform Probate Code Elective Share}

The 1990 UPC was a substantial revision to what had previously been normative statutes: the 1966 New York augmented-estate statute and the 1969 UPC. Undoubtedly, the Commissioners contemplated revisions to the 1990 UPC’s elective-share provisions immediately after its adoption and far in advance of what would eventually become the UPC’s provisions in 2008. Professor Waggoner is the principal drafter of the elective-share portion of the UPC in the 1990s; he also serves as Director of Research for the Joint Editorial Board for the \textit{Uniform Trust and Estate Acts}.\textsuperscript{289} Professor Waggoner suggested that the 1990 UPC should be revised. First, the revisions should replace the percentages in the earlier version with “a provision stating simply that the elective share percentage is always fifty percent.”\textsuperscript{290} Second, he suggested that references to the augmented estate should be replaced with the term “marital estate.”\textsuperscript{291} Finally, Professor Waggoner suggested that the

\textsuperscript{286} See \textit{Unif. Probate Code} § 2-202(b)(iii) (1990); \textit{id.} § 2-205(1)(D) (amended 2008). Amounts included in the 2008 augmented-estate provision include the “[p]roceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds.” \textit{Id.} § 2-205(1)(D) (amended 2008); see also Jeffrey S. Kinsler, \textit{The Unmerry Widow: Spousal Disinheritance and Life Insurance in North Carolina}, 87 N.C. L. REV. 1869, 1892–94 (2009) (discussing the inclusion of life insurance into the elective-share provisions in North Carolina); Waggoner, \textit{supra} note 67, at 748 (“With appropriate protection for insurance companies that pay out before receiving notice of an elective-share claim, the 1990 UPC provision includes the face value of these insurance policies in the decedent’s reclaimable estate.”).


\textsuperscript{288} \textit{Id.} By statute, Alabama includes all property of the surviving spouse in the computation of that spouse’s elective share. \textit{Ala. Code} § 43-8-70(b) (1991) (“The ‘separate estate’ of the surviving spouse shall include . . . [a]ll property which immediately after the death of the decedent is owned by the spouse outright or in fee simple absolute . . . .”).

\textsuperscript{289} Lawrence W. Waggoner—Biography, http://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/LawrenceWWaggoner.aspx.

\textsuperscript{290} Waggoner, \textit{supra} note 31, at 9.

\textsuperscript{291} \textit{Id.}
accrual percentages in the 1990 UPC—ranging from zero percent to fifty percent—should be moved to a new section and doubled.\textsuperscript{292} Thus,

the marital estate in a marriage that has lasted fifteen years or more is one hundred percent of the sum of the four components described . . .

(1) decedent’s net probate estate, (2) the decedent’s nonprobate transfers to others, (3) the decedent’s nonprobate transfers to the surviving spouse, and (4) the surviving spouse’s net worth.\textsuperscript{293}

Professor Waggoner thought the changes would better incorporate the economic partnership of marriage, better approximate the assimilation of all property (separate and marital), and better mirror what occurs at divorce.\textsuperscript{294}

Changes proposed and adopted by the 2008 UPC are significant. As an illustration of the revision, consider a couple married for more than five years but less than six. Each spouse is over the age of seventy, and when the husband dies, his net probate estate is worth $300,000. He has created a revocable inter vivos trust worth $100,000, from which he derived income during his life. At his death, the remainder (corpus) was to go to his children from a prior marriage. The husband had made no transfers to his wife, and at the date of his death, she had net assets worth $200,000; neither spouse made transfers to the other. Professor Waggoner’s proposed 2008 revision to the spouse’s elective share would proceed as follows: First, the \textit{elective-share percentage} is fifty percent of the marital estate (regardless of the length of the marriage).\textsuperscript{295} Second, calculate the \textit{marital estate} by first combining the husband’s net probate estate ($300,000), the husband’s nonprobate revocable trust to benefit his children ($100,000), and the wife’s net assets ($200,000) to arrive at a total of $600,000.\textsuperscript{296} Next, multiply this figure by thirty percent, which is based on the length of the marriage. Thirty percent of $600,000 leaves $180,000. This amount is the marital estate. Third, calculate the \textit{elective-share amount} by multiplying the marital estate by fifty percent to arrive at $90,000. This is the amount to which the surviving spouse is entitled; it is an appropriate amount because the surviving spouse should take fifty percent of the marital property. The computation, however, is not yet complete.\textsuperscript{297} Fourth, when \textit{satisfying the elective-share amount}, apply voluntary transfers to the spouse and utilize the spouse’s marital assets first. The husband made no voluntary transfers to the wife by probate or nonprobate

\begin{itemize}
  \item \textsuperscript{292} Id.
  \item \textsuperscript{293} Id. at 9–10.
  \item \textsuperscript{294} Id. at 9–11 (offering a comparison of the 1990 UPC provision and the proposed change). Comments to the 2008 UPC reference Professor Waggoner’s 2003 article, \textit{The Uniform Probate Code’s Elective Share: Time for a Reassessment}, \textit{supra} note 31, as a proper description of the changes incorporated into the revisions. \textit{See} UNIF. PROBATE CODE art. II, pt. 2, general cmt. (amended 2008).
  \item \textsuperscript{295} Waggoner, \textit{supra} note 31, at 9–11.
  \item \textsuperscript{296} Id.
  \item \textsuperscript{297} Id.
\end{itemize}
transfers, and as such, the marital portion of the wife's net assets is $60,000 (thirty percent of the wife's $200,000). In other words, she already has $60,000 of marital property, so this amount should be excluded from whatever she takes under her elective share.\textsuperscript{298} Fifth, meeting the balance owed to the surviving spouse can be achieved by starting with the $90,000—the wife's elective-share amount. Once this amount is calculated, we can then deduct $60,000 because the wife already has this amount. There is, however, an unsatisfied balance of $30,000 owed to the wife to provide her with her share of the marital estate. To satisfy this, the wife is entitled to take from the husband's net probate estate ($300,000) in a ratable fashion. If this were insufficient, then the payment would be drawn from the nonprobate transfers to others ($100,000).

Professor Waggoner suggests a number of reasons why the revised 2008 elective-share provision will better meet the goal of providing for a fair division of marital property upon death. First, Professor Waggoner concludes that a couple's assets during marriage (marital assets) increase with the length of the marriage, starting at zero percent and gradually increasing until it reaches one hundred percent after fifteen years of marriage.\textsuperscript{299} Admittedly, arriving at a fixed accrual rate does not take into consideration all possible variations of asset ownership, but Professor Waggoner suggests that this is a reasonable approach.

Second, as we have previously discussed, some commentators have suggested that by incorporating separate property into marital property, the UPC does not reflect the joint efforts of both spouses in the marital partnership. The 1990 UPC provision received this criticism as well. Professor Waggoner responds by suggesting that because separate property cannot easily be identified, it is reasonable to include it within marital property, but without the administrative expenses of searching for and disassembling the marital and separate property.\textsuperscript{300} He reiterates that there would be significant administrative costs in identifying such property, and that even community-property systems retreat into a presumption that all property

\begin{itemize}
\item \textsuperscript{298} Id.
\item \textsuperscript{299} Id. at 18. There is no magic moment at the fifteen-year point at which all of the property should be considered as marital property.
\item The current approximation system is likely to give a reasonably accurate result for the median first marriage and for the median post-divorce remarriage. Both types, if not ending in divorce, are likely to be long-term marriages and most if not all of the couples' accumulated property is likely to be marital.
\item The problem with the fifteen year schedule is posed by the median remarriage following widowhood . . . [because] there is not likely to be a significant accumulation of marital property.
\end{itemize}

\textit{Id.} at 20–21. In spite of disparity, a couple always retains the right to enter into a premarital agreement. \textit{Id.} at 29.

\textsuperscript{300} Id. at 19–20.
is community property.  

These same administrative costs prompt Professor Waggoner to reject any move toward adopting the Model Marital Property Act—an act that would simplify the elective procedure by allowing a surviving spouse to take one-half of the community property, as a spouse would do in community-property states and separate-property states that have adopted the Act. “The advantage of the approximation system [the percentage system previously described] is that it avoids incurring the administrative costs of post-death classification that would burden a deferred-community elective share.”  

Considering what has been suggested to protect the marital-property interests of a spouse at death prompts an evaluation based on several factors. First, there should be an evaluation of fairness in light of the changing nature of property and the vagaries of title in separate-property jurisdictions. Second, adult couples have the ability to control their financial marital affairs through prenuptial agreements, thereby nullifying any judicial or statutory approach. Third, simplicity is important because estate administration should provide efficiency and availability of assets. Fourth, uniformity of practice provides a significant advantage to estate planners, wealth managers, and the heirs of a decedent. Fifth, although there is a significant difference between property-distribution schemes at divorce and at death because only one party is available for testimony in the latter scenario, there should be some comparability between the two schemes in reference to fairness and achieving expectations. Examining all of these factors, this Article now turns to an evaluation of the protection available to a spouse at divorce.

III. PROTECTION OF A SPOUSE AT DIVORCE

A. Shift Toward Economics

Protection of a spouse at death evolved from dower and curtesy to more defined spousal allowances, such as homestead and maintenance, and then, as a complement to the general schemes, to illusory-trust doctrines and finally, increasingly generous elective-share statutes. There has been a concomitant expansion of the protection of a spouse at divorce. In reference to marital property, state protection has shifted from reimbursement for the other spouse’s fault toward an approach that is more focused on the economics of...
making each spouse whole without regard to marital fault. Thus, states have gradually replaced alimony—a type of damages for one party’s destruction of the marriage—with a purely economic approach. This is similar to the replacement of dower with elective share in division of property at death.

The shift in marital-property law at divorce must be discussed in order to understand the similarities with the distribution of marital property at death. Thus, as this Article discusses the shift toward economics and away from fault, it establishes a basis from which to evaluate the 2008 elective-share revision and to determine if it reflects what a spouse could expect at divorce. This must be a criterion of the effectiveness of the 2008 UPC revisions, because the goal of the revisions is to reflect a theory of economic partnership. The discussion begins with an analysis of the changes in family law, particularly the introduction of no-fault divorce and its effect on marriage, divorce, marital support, and property.

Originally, fault was always a factor in effecting a divorce; fault was usually defined as adultery, desertion, or cruelty. Historically, when divorce occurred as a result of the fault of one of the spouses—most often the husband—the innocent spouse was granted a divorce and entitled to support until her death or remarriage ended the obligation. Because the at-fault spouse was considered to have destroyed the marriage, alimony was given as a type of damages to account for what would have happened if the fault-causing behavior did not occur. In calculating alimony, the length of marriage and the amount of marital property amassed were irrelevant. The method by which the rights of an innocent spouse were satisfied was support, and support was dependent on both the innocent spouse’s need and the at-fault spouse’s ability to pay. Thus, marital property was simply a means to an end—it was a method of paying support for an indefinite period of time, usually ending at the death or remarriage of the innocent spouse. This is a structure that existed until the introduction of no-fault divorce at the end of the 1960s.

304. The distinction between community-property and separate-property states will be discussed below. See infra Part III.B.2.

305. There are additional egregious faults that factor into a court’s calculation; the utility of each depends on state law. See, e.g., Howard S. v. Lillian S., 876 N.Y.S.2d 351, 352, 354 (App. Div. 2009) (explaining that a wife’s misrepresentation that her husband was the biological father of a child conceived during an adulterous affair was not an egregious fault and explaining that for behavior to constitute egregious fault, it must “involve[ ] extreme violence”).

306. See, e.g., Crosby v. Lebert, 676 S.E.2d 192, 194 (Ga. 2009) (finding that a former wife’s remarriage ended her former husband’s duty to make her car payments as was ordered as part of the support obligation); In re Cortese, 176 P.3d 1064, 1065 (Mont. 2008) (ruling that a former husband’s obligation to pay support to his former wife ended upon her remarriage).

307. See WADLINGTON & O’BRIEN, supra note 24, at 60–62.

By 1969, during a period of considerable social change in the United States, the California legislature enacted a new ground for “marital dissolution,” a new term to replace divorce, and called it “irreconcilable differences.” This new ground allowed either party to petition for dissolution, regardless of fault. Furthermore, because fault was no longer a consideration in obtaining a divorce, the common-law defenses did not
No-fault divorce allowed either spouse to petition to dissolve the marriage in any state in which that spouse could establish residency. With proper notice to the other spouse, a marriage could be dissolved in one state upon the petition of only one spouse; the dissolution would then be entitled to full faith and credit in other states. However, the introduction of no-fault divorce was not the sole factor that contributed to changing spousal-support obligations. Adults increasingly demanded greater self-autonomy, freedom of choice, and expansive liberty to self-order their own lives without the approbation of the state. State and federal courts interpreted various state constitutions to guarantee to individuals the liberty to marry, procure abortions, obtain birth-control devices, engage in sodomy, and, for a parent, to raise a child in the manner that the parent deems appropriate. These personal liberties eventually caused an increase in pre-marital, marital, and non-marital contracting. Indeed, present-day controversy surrounds the contractual obligations arising in connection with human sperm, eggs, and embryos.

apply. Presumptively, the no-fault ground would eliminate lengthy and ribald litigation, forum shopping by domiciliaries, and moribund marriages. Eventually, it would spark debate as to whether divorce was too easy to obtain.

Id. at 61–62.

308. Id. at 65.


310. See, e.g., Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding that the liberty interest under the Due Process Clause permits adults to engage in consensual sodomy); Troxel v. Granville, 530 U.S. 57, 66 (2000) (holding that a parent has a fundamental right to raise his or her own child); Zablocki v. Redhail, 434 U.S. 374, 375, 382–86 (1978) (concluding that the Equal Protection Clause confers a fundamental right to marry); Roe v. Wade, 410 U.S. 113, 153–54, 164–65 (1973) (ruling that a woman’s right to privacy guarantees the right to an abortion before viability of the fetus); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding that the constitutional right to privacy inherent in a marital relationship extends to individuals); Loving v. Virginia, 388 U.S. 1, 2, 10–11 (1967) (striking down a state law prohibiting interracial couples from obtaining a marriage license); Griswold v. Connecticut, 381 U.S. 479, 483–86 (1965) (finding that constitutional guarantees provide a marital right to privacy that prohibits states from outlawing the use of contraceptives); Marvin v. Marvin, 557 P.2d 106, 110, 122 (Cal. 1976) (holding that unmarried adults may validly contract to support each other even though they were incidentally cohabitating and not in a marital relationship); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (ruling that same-sex adult couples are afforded the right under the Massachusetts Constitution to obtain a marriage license). But see Gonzalez v. Carhart, 550 U.S. 124, 167–68 (2007) (upholding the constitutionality of the federal Partial Birth Abortion Ban Act).

311. See WADLINGTON & O’BRIEN, supra note 24, at 55–57.

312. See, e.g., Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (holding that human sperm is property and may be governed by statutes); Speranza v. Repro Lab Inc., 875
Such concerns were unimaginable a few decades ago; today they emphasize the shift to private ordering between couples.

Increasingly, courts rely on spouses to negotiate an individualized end to their marriage and property interests; likewise, courts allow the couple to sever all economic ties as quickly as possible.\textsuperscript{313} As a result of this shift, in all but a few isolated cases, there is no longer an ongoing duty of support to a former spouse, and the number of instances when that support must be modified or terminated has decreased correspondingly.\textsuperscript{314} In adjusting divorce, states seek to divide the marital property, provide a modicum of support in rare cases, and allow the couple to sever ties. Alimony has been replaced with rehabilitation of a former spouse, with the hope that he or she can be restored to his or her position as if no sacrifice had been made by that spouse for the marriage. If rehabilitation is not warranted, then the former spouse may be compensated with reimbursement payments until such time as the former spouse may be brought to a level equal to what was sacrificed for the marriage. This departure from the previous system is dramatic. Rehabilitation and reimbursement are not restitution for expectations lost through fault; rather, they are restitution for what was lost through sacrifice.

Courts seek to avoid continuing support obligations and will make rehabilitation or reimbursement awards from existing marital property if it is a feasible option. The concept of a duty to support based solely on the fact of marriage is gone; today’s duty is to apportion the marital property in as short a period of time as possible so that the former spouses may move on with their lives.\textsuperscript{315} Thus, in an optimal situation, a couple may sever all economic ties immediately if each spouse has sufficient marital property to apportion between them. The modern practice at dissolution of the marriage is to focus

\textsuperscript{313} For a discussion of the challenge of severance, see Tess Wilkinson-Ryan & Deborah Small, \textit{Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining}, 26 \textit{LAW & INEQ.} 109, 109–12 (2008) (explaining that private contracts play an increasingly important role in family law and that there is a trend toward swift economic severance upon divorce).

\textsuperscript{314} \textit{See, e.g.}, Mandelbaum v. Mandelbaum, 905 N.E.2d 172, 176–79 (Ohio 2009) (holding that a court may modify spousal support only if the court retained jurisdiction to do so and a substantial change in circumstances has occurred that was not contemplated at the time of the original divorce decree).

\textsuperscript{315} \textit{See} Jennifer Levitz, \textit{The New Art of Alimony}, \textit{WALL ST. J.}, Oct. 31, 2009, at W1 (discussing measures introduced in various states that limit alimony payments, both in amount and in duration).
on property—and not support—in all but a few circumstances. Interestingly, the property that is distributed increasingly includes property the couple acquired during premarital cohabitation, not simply property acquired during the marriage. Such a practice not only relies on the equities of the situation, but also recognizes the newly acquired self-ordering of the parties themselves. Nonetheless, such inclusion offers no solution to the dilemma of distinguishing marital from separate property—a task that arises in the context of the division of property at death and at divorce. This Article will revisit the issue of transmutation in Part III.B.3.

Some states nevertheless retain marital-fault grounds for divorce; others incorporate marital fault into the manner by which marital property is divided at divorce. Even so, attendant to the trend toward self-ordering by adults, the focus of the courts is on the economics of dissolution, rather than the fault of a party in dissolving the marriage. There is a continuing debate concerning whether marital fault should be used in dividing marital property. If fault is not a factor, then the focus of the court is on what was amassed during the marriage and sacrificed for the sake of the marriage; the court then apportions the assets accordingly. Even if a state court considers the marital fault of a spouse in the distribution process, fault is not the predominant factor as it was prior to the introduction of no-fault divorce.

316. For an example of support that may be needed in addition to a division of marital property, see In re Becker, 756 N.W.2d 822, 827 (Iowa 2008). In Becker, the court held that after a twenty-two-year marriage, a wife was entitled to $3.3 million of marital property, $8,000 per month for three years so that she could obtain an education that would allow her to resume the career that she abandoned for the marriage, and $5,000 per month for seven years to allow her time to develop her earning capacity past an entry-level position. Id.

317. See, e.g., Sprouse v. Sprouse, 678 S.E.2d 328, 330 (Ga. 2009) (holding that a statute allowing the court to consider factors it deems equitable and proper permits inclusion of premarital and marital property in property distribution at divorce); see also Wiest v. Wiest, 273 S.W.3d 545, 551 (Mo. Ct. App. 2008) (finding that property earned during a marital separation could be included as marital property); Northrop v. Northrop, 622 N.W.2d 219, 221–22 (N.D. 2001) (finding that courts may consider a couple’s premarital time together when dividing property); Meyer v. Meyer, 620 N.W.2d 382, 391 (Wis. 2000) (ruling that premarital support for a spouse’s education was rightly considered in a maintenance decision).

318. The argument is that marital fault should be addressed through tort or criminal law, not in the distribution of marital property. Ira Mark Ellman, The Place of Fault in a Modern Divorce Law, 28 ARIZ. ST. L.J. 773, 786–87 (1996). Nonetheless, states continue to consider marital fault in the distribution of marital assets. The argument is that by allowing fault to be considered in the distribution of marital property or support, courts are recognizing that tort law and criminal law do not resolve all economic issues repeatedly found in fractious marriages. See Barbara Bennett Woodhouse with comments by Katharine T. Bartlett, Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era, 82 GEO. L.J. 2525, 2531–32, 2566–67 (1994).

319. See, e.g., Sparks v. Sparks, 485 N.W.2d 893, 901 (Mich. 1992) (considering marital fault as one—but not the only—factor, but cautioning that the overall distribution of property must be equitable); Brown v. Brown, 665 S.E.2d 174, 179–80 (S.C. Ct. App. 2008) (per curiam) (ruling that a husband was not required to pay alimony because he proved with circumstantial evidence that his ex-wife commited adultery when she met a companion in a parked car during lunch approximately twenty-four times over a four- or five-year period).
There is another type of fault that courts consider in the distribution of marital property—economic fault. Economic fault is defined as the wasteful dissipation of marital assets. Examples of this type of fault include the purposeful destruction of marital property or the conveyance of property without the consent of the other spouse and without receiving fair market value. When the court concludes that marital property was lost due to the intentional acts of one spouse, then the innocent spouse is entitled to one-half of the value of that lost property as a reimbursement for the economic dissipation. Further, if one of the spouses purposefully conceals assets in an attempt to sequester them (thus making the assets unavailable for distribution) the innocent spouse is entitled to the value of the entire asset upon its discovery. Finally, irrespective of a state’s policy to recognize marital fault, economic fault, or even misappropriation, a spouse’s intent as expressed in a valid agreement will always be the predominant factor in a court’s consideration.

B. Death and Divorce: Some Marital Property Similarities

There are significant similarities between the evolution of spousal rights at death and spousal rights at divorce. The progressive changes have occurred sporadically and in a piecemeal manner, state by state. For example, the multifaceted approach that states take toward a spouse’s elective-share rights at death is observed by comparing the 2008 revisions to the UPC’s augmented-
estate provision with Maryland’s 2008 *Karsenty* decision.\(^{324}\) The UPC provision is precise and objective. The Maryland decision suggests that courts employ an “ethereal touchstone” by which to gauge inter vivos transfers by spouses for the purposes of making an election.\(^{325}\) There is a crucial difference in these approaches. Similarly, some family-law courts consider marital fault in the division of marital property, and some do not. Still other courts consider property acquired during premarital cohabitation as marital property for purposes of division at divorce, and some do not. Some family law courts consider professional degrees and Social Security benefits as marital property, and some do not. Finally, some courts have abandoned the notion of spousal support and replaced it with rehabilitation and reimbursement, and some have not.

Despite the differences between marital rights at divorce and marital rights at death, there are still certain indicia on which the 2008 elective-share revision to the UPC may be examined to determine whether it integrates marital property into its version of augmented estate. This Article discusses these indicia in order to better evaluate the 2008 UPC revisions.

1. *The Scope of Property*

Marital property continues to be more diverse as wealth becomes characterized in more varied forms, both tangible and intangible. Formerly, marital property, subject to division at divorce, most often consisted of a marital home, real estate, a pension, and perhaps a savings and checking account.\(^{326}\) Today, divorce courts are asked to divide widely divergent and sometimes unique property interests, such as income-enhancing degrees and professional licenses,\(^{327}\) personal disability payments and awards,\(^ {328}\) Social

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\(^{324}\) *Karsenty v. Schoukroun*, 959 A.2d 1147 (Md. 2008).

\(^{325}\) See *id.* at 1173.

\(^{326}\) The marital home is a unique asset, with many states having statutes that affect the use or possession of the home if there are minor children. These statutes allow the court to award possession of the home to the custodial parent in order to limit child trauma following the divorce. See, e.g., *IOWA CODE ANN.* § 598.21(5)(g) (West Supp. 2009). The court may apportion the home in this fashion as part of the property settlement. See, e.g., *Maness v. Sawyer*, 950 A.2d 830, 839 (Md. Ct. Spec. App. 2008) (interpreting Maryland’s use and possession statute to allow for a home to be a marital home even though the family never lived there).

\(^{327}\) See, e.g., *Mahoney v. Mahoney*, 453 A.2d 527, 534 (N.J. 1982) (explaining that a professional degree is not marital property but expenses to obtain one are reimbursable); see also *O’Brien v. O’Brien*, 489 N.E.2d 712, 718 (N.Y. 1985) (holding that a degree is marital property and its value is subject to division upon divorce); *Jayaram v. Jayaram*, 880 N.Y.S.2d 305, 307–08 (App. Div. 2009) (suggesting that the value of the degree must be established through the testimony of more than one expert); *Judge v. Judge*, 851 N.Y.S.2d 639, 640–41 (App. Div. 2008) (determining that a degree is marital property as long as it enhances earning capacity in any way).

\(^{328}\) Compensation for personal injuries may be treated as separate or marital property depending on the facts of each case. See, e.g., *Rossin v. Rossin* (*In re Marriage of Rossin*), 91 Cal. Rptr. 3d 427, 437 (Cl. App. 2009) (ruling that disability payments paid to a spouse from a disability-insurance policy purchased prior to marriage are separate property because of a pivotal
Security entitlements,\textsuperscript{329} and miscellaneous payments received through employment or individual contracting.\textsuperscript{330} This expansive list of property factor—the time of acquisition of the right to the benefits); Bandy v. Bandy, 756 N.W.2d 751, 757–78 (Neb. Ct. App. 2008) (holding that a husband’s disability payments were not the same as pension benefits and should therefore not be considered as marital property); Fitzgerald v. Fitzgerald, 639 S.E.2d 866, 878 (W. Va. 2006) (explaining that a lump-sum disability payment was marital property because it represented lost wages that would have been earned if not for the injury).

\textsuperscript{329} Even though state divorce courts may not apportion federal Social Security benefits per se, some courts have considered the projected value of these benefits in apportioning marital property. See, e.g., Depot v. Depot, 893 A.2d 995, 1001–02 (Me. 2006) (“Failing to consider Social Security benefit payments a spouse can reasonably be expected to receive in the near future may result in a distorted picture of that spouse’s financial needs, and, in turn, an inequitable division of the marital property.”); Rimel v. Rimel, 913 A.2d 289, 292 (Pa. Super. Ct. 2006) (holding that Social Security benefits may be offset against the husband’s Civil Service Retirement System pension). \textit{But see} Bradbury v. Bradbury, 893 A.2d 607, 609–10 (Me. 2006) (holding that under certain circumstances, Social Security benefits may be considered in equitable division of property, but not as property to offset existing assets); Litz v. Litz, 288 S.W.3d 753, 758 (Mo. Ct. App. 2009) (explaining that Social Security benefits are not marital property and not available to offset existing marital property); Webster v. Webster, 716 N.W.2d 47, 56 (Neb. 2006) (ruling that the court may not offset against existing assets any respective Social Security benefits).

\textsuperscript{330} See, e.g., Webb v. Schleutker, 891 N.E.2d 1144, 1149 (Ind. Ct. App. 2008) (crops growing on a couple’s farm at the time the couple separated were marital property); Myhra v. Myhra, 756 N.W.2d 528, 539–40 (Neb. Ct. App. 2008) (merger bonus received by the husband prior to entry of a divorce decree was marital property, which entitled the wife to reopen the case); Houseman v. Dare, 966 A.2d 24, 29 (N.J. Super. Ct. App. Div. 2009) (a pet dog may be property with a strong sentimental value); Elder v. Elder, No. 2008-CAL-74, 2009 WL 2963691, at *2–3 (Ohio Ct. App. Sept. 11, 2009) (overtime pay may be included in an award of support to a former spouse); Brickner v. Brickner, No. CA2008-03-081, 2009 WL 683706, at *6–7 (Ohio Ct. App. Mar. 16, 2009) (season football tickets and an accompanying parking pass may be awarded as marital property); \textit{In re} Marriage of Brown, 183 P.3d 207, 211–12 (Or. Ct. App. 2008) (husband’s interests in two family trusts were marital property in a long-term marriage because he had integrated the income into the couple’s financial planning); \textit{In re} Marriage of Miller, 145 P.3d 285, 288 (Or. Ct. App. 2006) (non-vested survivor annuity was marital property); Kulp v. Kulp, 920 A.2d 867, 873 (Pa. Super. Ct. 2007) (cremated remains of a divorcing couple’s son may not be divided upon divorce when one party disagrees); Novak v. Novak, 713 N.W.2d 551, 554–55 (S.D. 2006) (farmland inherited by husband during the marriage was marital property when one party had made contributions to the maintenance of the farm); Larsen-Ball v. Ball, No. E2007-02220-COA-R3-CV, 2008 WL 4922414, at *4–5 (Tenn. Ct. App. Nov. 13, 2008) (contingency fee paid after spouse filed for divorce was still marital property because it was earned during the marriage); Roman v. Roman, 193 S.W.3d 40, 54–55 (Tex. Ct. App. 2006) (frozen embryos were marital property but courts defer to the mutual intention of the parties upon divorce); Mcllwain v. Mcllwain, 666 S.E.2d 538, 544 (Va. Ct. App. 2008) (wife was entitled to one-half of the rental value of her home when her husband remained in the home during their separation). \textit{But see} Thomas v. Thomas, No. 2071171, 2009 WL 2096241, at *5 (Ala. Civ. App. 2009) (life-insurance policy purchased during marriage and paid for with marital funds was not marital property because it had a mere expectancy as opposed to present value); Shinitzky v. Shinitzky, 16 So. 3d 168, 170–71 (Fla. Dist. Ct. App. 2009) (damages derived from a lawsuit over non-marital property were non-marital property even though marital assets were used to pursue the legal suit); Joachim v. Joachim, 942 So. 2d 3, 4 (Fla. Dist. Ct. App. 2006) (contractor’s license was not marital property); \textit{In re} Marriage of Abrell, 898 N.E.2d 1163, 1173–74 (Ill. App.
interests responds to the varied financial interests present in the national and international economy; some property is difficult to appraise, but it is nonetheless available for distribution at divorce.

Court decisions often conflict about whether an asset should be included as marital property. For example, goodwill is an intangible and elusive asset that is difficult to value, and debates have ensued over whether to include it as marital property. Goodwill has been defined as "the advantage or benefit, which is acquired by an establishment, beyond the mere value of capital, stock, funds, or property employed therein . . . ." Some courts hold that goodwill is marital property and determine its value based on the capitalization of excess earnings or value reflected in the sale or transfer of a business. Similarly, speculation and post-marriage earnings forbid the inclusion of income-enhancing degrees and licenses as part of marital property in all but one state; goodwill must be based in the present with a degree of definiteness.

Likewise, the inclusive language of the 2008 UPC's augmented estate incorporates the modern manifestations of wealth, providing that "the value of the augmented estate . . . consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated . . . ." Such broad language will incorporate some of the elusive property items typical of modern wealth and prevalent in the litigation of divorce.

Ct. 2008) (employer-provided sick leave and vacation time were not marital property). See also J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 5.02[1], [3] (2009) (commenting on the expanding definition of property).

331. See RAYMOND C. O'BRIEN & MICHAEL T. FLANNERY, THE PRUDENT INVESTING OF TRUSTS 657-86 (2009) (describing non-traditional investments, such as hedge funds and derivatives, and traditional investments, such as equities, mutual funds, index funds, real-estate investment trusts, bonds, and cash).

332. JOSEPH STORY & JOHN C. GRAY, COMMENTARIES ON THE LAW OF PARTNERSHIP AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE 170 (6th ed. 1868); see also AM. LAW INST., supra note 30, § 4.07(3) (defining goodwill as marital property to the extent it has value separate from future earnings, "spousal skills, or post-dissolution spousal labor"). But see Arneault v. Arneault, 639 S.E.2d 720, 728 (W. Va. 2006) (ruling that the personal goodwill of one spouse is not an equitable factor to be used in dividing marital assets); Holbrook v. Holbrook, 309 N.W.2d 343, 354 (Wis. Ct. App. 1981) (holding that goodwill should not be considered marital property because it represents future earning capacity).

333. See, e.g., Hanson v. Hanson, 738 S.W.2d 429, 435-36 (Mo. 1987) (en banc) (suggesting the use of a fair-market-value method of valuation for goodwill); Dugan v. Dugan, 457 A.2d 1, 9-10 (N.J. 1983) (providing an example of capitalizing an attorney's law practice in order to place a value on goodwill); see also Helga White, Professional Goodwill: Is It a Settled Question or is There "Value" in Discussing It?, 15 J. AM. ACAD. MATRIMONIAL LAW. 495, 497 (1998) (observing the distinction between a legal meaning of goodwill and an economic meaning of goodwill and explaining that courts often use both definitions when splitting marital property during divorce proceedings).

334. UNIF. PROBATE CODE § 2-203(a) (amended 2008).
2. Community-Property States Versus Separate-Property States

The distinction between community-property states, in which married couples take property without consideration of title, and separate-property states, in which married couples hold title to property individually, was discussed in Part I of this Article. The comparison between the two systems is instructive, because commentators consistently seek to find a separate state elective-share model that matches the distribution scheme in community-property states.

Title is the problem with crafting an elective-share system. Separate-property states equate ownership of the property with title to the property. Because of this relationship, separate-property states were forced to develop procedures by which a surviving spouse may "elect" against the ownership of the decedent spouse at death to claim a fair share of the decedent's estate. This Article addressed this procedure in connection with the various judicial and legislative enactments associated with elective-share rights, but note that none of the judicial or statutory approaches existent in any separate-property state would safeguard the rights of a decedent spouse through an elective procedure. Some commentators have argued that this lack of a safeguard is also a failure of the elective-share provision of the UPC. For example, if a surviving spouse possesses title to marital property, the survivor would take the property to the disappointment of the predeceasing spouse's heirs, and the decedent's estate would have no recourse.

At divorce, there are similarities between community-property and separate-property states. First, both community- and separate-property states seek to meet the economic expectations of the parties at dissolution through existing community (marital) assets, thus curtailing ongoing support obligations. Second, a court may order support to enable rehabilitation of one of the parties or, if rehabilitation is impossible, to compensate that party for what a division of existing marital assets cannot provide. The latter procedure is referred to as reimbursement. Third, private contracting to fix the rights of adult parties through prenuptial or postnuptial agreements is preferred, but the contracts must be executed in accordance with statutory guidelines. Fourth, both property regimes have difficulty in determining what should be included as marital property. Finally, both jurisdictions struggle with the expanding types of wealth that married couples acquire during the marriage.

335. See supra Part I.
336. See supra Part II.D.
338. For a discussion of postnuptial agreements, see Sean Hannon Williams, Postnuptial Agreements, 2007 WIS. L. REV. 827, 832–45.
Community-property standards are increasingly predominant in divorces occurring in separate-property states. It is illustrative to explore the parameters of what occurs in a community-property jurisdiction. In Ruggles v. Ruggles, the New Mexico Supreme Court resolved an issue between a couple that had been married from 1959 to 1988 before they petitioned for divorce.339 The husband had been employed long enough to have a vested pension at his place of employment, but he was not receiving a pension check and did not plan on retiring anytime soon.340 At the time of the divorce, the couple stipulated by agreement that the wife owned forty-eight percent of the vested pension.341 The couple had entered into a detailed marital-settlement agreement, but the agreement was silent on the question of when the wife would receive a share of her former husband's pension (or even how much of the pension she would own).342 Similarly, the husband owned a share of his wife's pension, but again, the settlement agreement was silent as to when he would receive his share or how much of the pension he owned.343 Each spouse's ownership right in the other's pension depended on when the other chose to retire.344

The couple resided in a community-property state and, as is also typical of separate-property states, pension benefits were often distributed through use of a Qualified Domestic Relations Order (QDRO)—a device created through the enactment of the federal Retirement Equity Act of 1984.345 The Act permits state courts to assign pension-plan benefits during divorce if the state-court order is a QDRO.346 The Act governs a vast majority of pension plans in the United States and permits future payments to a spouse when the employee spouse retires.347 The issue before the Ruggles court was whether a QDRO operating under a “pay as it comes in” rule corresponds with the nature of community property.348 In other words, the Ruggles court considered whether the “pay as it comes in” rule met the community-property goal, which

339. 860 P.2d 182, 185 (N.M. 1993). In its decision, the court consolidated another case with Ruggles, but this Article only references those facts concerning Joseph and Nancy Ruggles. Id. at 184.
340. Id. at 185.
341. Id.
342. Id. If the couple had agreed on a method of distributing the pension, it would have taken precedence over the court's decision. Id. at 196 (explaining that the judicially created method of distribution “should be applied only in the absence of an agreement between the spouses on the subject”).
343. Id. at 186.
344. See id. at 185–86. Alternatively, the couple could negotiate a Qualified Domestic Relations Order with the respective employers, but that would only establish the right to receive the pension proceeds; it would not establish when that right would arise. See id. at 185–86 & n.3.
348. Ruggles, 860 P.2d at 184, 186.
establishes that "the fundamental principle that property attributable to community earnings must be divided equally when the community is dissolved." Resolution of this issue involves several basic tenets of the community-property structure that are similar to what the UPC seeks to provide at death for married couples.

The Ruggles decision recites the fundamental principles of community-property law. First, "each spouse . . . has a present, vested, one-half interest in the spouses' community property." Second, upon dissolution of a marriage, the court has a duty to divide the community property equally. Third, to promote equality of ownership at divorce, each spouse should receive "complete and immediate control over his or her share of the community property in order to ease the transition of the parties after dissolution." The court emphasized that immediate distribution is of signal importance, not only because it eases the parties' transition following dissolution, but also because it furthers the important goal of minimizing future contact and conflict between divorcing spouses . . . [because] financially linking the parties to one another following a judgment of dissolution, invites future strife when one of the parties seeks to enforce the order.

The Ruggles court concluded that rather than rely on the pay-as-it-comes-in system, a court should strive to distribute a lump sum at divorce. The lump-sum payment, if feasible, better matches the fundamental principles of community property.

Separate-property states increasingly pursue the goals elucidated by the Ruggles court. The introduction of the Uniform Marital Property Act—now termed the Model Marital Property Act (Model Act)—prompted the assimilation of community-property standards in some separate-property states. Introduced in 1983, the Model Act offers

349. Id. at 186, 188 (quoting Copeland v. Copeland, 575 P.2d 99, 101 (N.M. 1978)).
350. Id. at 192.
351. Id.
352. Id.
353. Id. Further, with a method of immediate distribution, a "court has the prospect of relitigating the parties' precise shares of the pension payments when the employee decides to retire." Id. at 194 (explaining that the prospect of future litigation is "not an equal sharing of the risk").
354. Id. at 184, 193. The court admits that there are many assumptions that must be determined in effecting a lump-sum distribution to the non-employee spouse. Id. at 195. The court decided to "leave the choice of method, as well as its implementation, to the sound discretion of the trial court—subject, however, to the preference [the court had] expressed in favor of the lump sum, present value, cash-out method of distribution." Id. at 197–98.
355. Id. at 195.
356. UNIF. MARITAL PROP. ACT Prefatory Note (amended 1998) ("Common law states have been moving closer and closer to the sharing concept in both divorce and probate legislation, and the Uniform Marital Property Act builds on the direction of that movement."). For commentary
a means of establishing present shared property rights of spouses during the marriage. This approach is bottomed on two propositions. The first is creation of an immediate sharing mode of ownership. The second proposition is that the sharing mode during marriage is an ownership right already in existence at the end of a marriage.357

The Model Act establishes its basis in the community-property model: "The fundamental principle that ownership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in vested, present, and equal interests is the heart of the community property system."358 Nonetheless, because most states did not adopt the Model Act, it is more reasonable to conclude that, at least in reference to divorce, the adoption of no-fault-divorce statutes precipitated the adoption of community-property standards at divorce. That is, separate-property states abandoned long-term support obligations, such as alimony, and began to distribute marital property by employing equitable principles without regard to gender or fault.

Emboldened by the gradual assimilation of community-property fundamentals, some commentators have suggested that separate-property states should abandon equitable-distribution statutes at divorce and replace those standards with the simple goal of equal distribution of marital property.359 Nonetheless, efforts to repeal the equity statutes have failed. Presently, separate-property states continue to use equitable factors to divide property at divorce, or if the property is insufficient to meet the equities, to order general support. But regardless of whether the property is distributed in a community-property system or a separate-property system, a significant issue arises in both types of states when determining the type of property courts should divide. It

357. UNIF. MARITAL PROP. ACT Prefatory Note (amended 1998).
358. Id.
359. See, e.g., Penelope E. Bryan, Reasking the Woman Question at Divorce, 75 CHI.-KENT L. REV. 713, 714–20 (2000) (arguing that the outcomes fail to address a wife’s financial needs at divorce); Mary Ann Glendon, Family Law Reform in the 1980’s, 44 LA. L. REV. 1553, 1556–57 (1984) (suggesting that equitable distribution is often unfair and unpredictable); Allen M. Parkman, Bringing Consistency to the Financial Arrangements at Divorce, 87 KY. L.J. 51, 75–76 (1998) (stating that choices made during marriage should be conceptualized as debts that should be compensated for at divorce); Laura A. Rosenbury, Two Ways to End a Marriage: Divorce or Death, 2005 UTAH L. REV. 1227, 1233 (commenting that wifely sacrifice is not taken into consideration at divorce or death).
is necessary to establish parameters as to what constitutes property and to distinguish separate property from community property. Additionally, this issue provides a significant hurdle for the UPC. To establish parameters, we turn to the transmutation of assets. Here, we seek to analyze the chameleonic nature of property as it evolves during marriage.

3. Transmutation of Assets

As the *Ruggles* decision established, the nature of community property gives to each spouse a present and vested one-half interest in all property acquired during the marriage. Although inclusive, "all property" is a nebulous concept; some property may be separate because it was acquired before the marriage or by gift, devise, or bequest during the marriage, and some property may be community property because it was acquired during the marriage. Income generated by separate property is also usually classified as separate property. If property is classified as community property, it is subject to division at divorce in the manner discussed in *Ruggles*. However, whether the asset is community property—as opposed to separate property—is the subject of extensive, and often extremely fractious, litigation. This litigation is expensive and is mitigated only by carefully drafted agreements entered into by the spouses before or during the marriage.

The same classification dilemma occurs in separate-property states. Here, the operative terms to classify property are marital and separate, but the issue of classifying property remains the same: how to distinguish marital property from separate property. For example, if a single woman established a retirement account and subsequently married and transferred the account's assets into a marital home, does she still have separate-property rights in the retirement account? Is the money in this account now a part of the couple's

361. *AM. LAW INST., supra* note 30, § 4.03.
363. *See, e.g.*, Barnett v. Jedynak, 200 P.3d 1047, 1050–52 (Ariz. Ct. App. 2009) (finding that the former husband’s home was separate property and the payments made on the house during the marriage were community assets); Forrester v. Forrester, 953 A.2d 1217, 1219 (Me. Ct. App. 2008) (explaining that the increase in the value of husband’s premarital assets was not transmuted into marital property because the husband did not take an active role in the management of the assets); Cole v. Cole, No. M2006-00425-COA-R3-CV, 2008 WL 1891436, at *3 (Tenn. Ct. App. Apr. 29, 2008) (determining that a life-insurance policy that lacked cash value was not marital property).
364. *See, e.g.*, Holtemann v. Holtemann, 83 Cal. Rptr. 3d (Ct. App. 2008) (upholding an agreement between the spouses transmuting the husband’s separate property into community property because the terms of the agreement were unequivocal).
marital property? What if she titled the home with her husband as a tenancy by the entirety? This factual setting establishes what is most often the underlying issue: whether one type of property, separate or marital, has been transmuted into the other. Property may be transmuted whenever one type of property becomes mixed with the other through transfer, sale, or deposit.\textsuperscript{365} The intentions of the parties, however, are often ensnared in time, lack of paperwork, and eventually, a factious divorce or death.

Characterization of property when a party makes an allegation of transmutation is complicated and divisive. Community-property states have the most experience in addressing the issues raised in such a scenario; separate-property states are less experienced.\textsuperscript{366} Both types of jurisdictions often employ some type of presumption regarding the classification of the property as separate or community (marital). Some separate-property states

\textsuperscript{365} See, e.g., Gersten v. Gersten, 219 P.3d 309, 316 (Ariz. Ct. App. 2009) (holding that federal income paid for lost wages, earning capacity, or medical expenses is community property and thus purchases made with the wages are also community property); Ettefagh v. Ettefagh (\textit{In re} Marriage of Ettefagh), 59 Cal. Rptr. 3d 419, 424 (Ct. App. 2007) (finding that a preponderance of the evidence is the appropriate level of proof required to rebut the presumption that property is marital property); \textit{In re} Marriage of Wojcik, 838 N.E.2d 282, 292–93 (Ill. App. Ct. 2005) (reasoning that the length of time that an asset is jointly held in the marriage will impact the classification of that property as marital); Keyt v. Keyt, 244 S.W.3d 321, 327 n.7 (Tenn. 2007) (explaining that property will be considered “separate” unless it was given to the marriage as a gift or commingled with the marital assets and thus transmuted into marital property); Langschmidt v. Langschmidt, 81 S.W.3d 741, 747 (Tenn. 2002) (noting that the commingling of separate property with marital property or the demonstration of intent for separate property to be marital property will result in the property being classified as marital); Robinson v. Robinson, 613 S.E.2d 484, 489 (Va. Ct. App. 2005) (holding that a party seeking to prove that an asset is separate property must prove such by a preponderance of the evidence); Borghi v. Gilroy (\textit{In re} Estate of Borghi), 219 P.3d 932, 937 (Wash. 2009) (concluding that legal title in which the property is held is not conclusive as to whether the property is separate or community). For further commentary on commingling and transmutation, see \textit{Am. Law Inst.}, supra note 30, § 4.03; GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 113, 118 (4th ed. 2003); Joan M. Krauskopf, \textit{Classifying Marital and Separate Property—Combinations and Increase in Value of Separate Property}, 89 W. Va. L. Rev. 997, 1000 (1987); Oldham, supra note 88, at 222.

\textsuperscript{366} Courts in separate-property states use various tests to distinguish between marital and separate property. See Abood v. Abood, 119 P.3d 980, 985 (Alaska 2005) (holding that a wife’s personal-injury settlement was not transmuted into marital funds because her intent at the time was to receive compensation, not to donate to the marriage); Zoob v. Jordan, 841 A.2d 761, 766 (D.C. 2004) (finding that a husband’s intent indicated that apartments he purchased with separate funds were later transmuted into marital assets when he named his wife as a joint owner); \textit{In re} Marriage of Wojcik, 838 N.E.2d at 292–93 (suggesting that an asset’s duration as marital property will help determine whether that asset is marital or separate); Wiese v. Wiese, 617 S.E.2d 427, 430 (Va. Ct. App. 2005) (holding that refinancing a marital home that had been purchased with a down payment of separate property does not transmute the down payment into marital property because the payment may be traced to the separate property); Robinson, 613 S.E.2d at 491 (explaining that separate property must be traceable to a separate source); Steinmann v. Steinmann, 749 N.W.2d 145 (Wis. 2008) (discussing the presumption of transmutation when there is a gift from one spouse to another through joint title).
may assume that all property brought into a marriage, earned during the marriage, or received during the marriage is marital property subject to division at divorce. This eliminates any need for litigation and forces the couple to enter into a written agreement, stating that the property is separate property. The American Law Institute provides another approach in which all property would be marital property as long as the marriage is long-term.\(^{366}\) Such an approach is an approximation and meant to spare the courts and parties the expense and time of litigation. This Article will discuss further the approximation system employed by the UPC when it addresses the divisive issue of transmutation in Part IV.C.\(^{368}\) Finally, any separate-property state adopting the Model Act, such as Wisconsin, has a framework similar to that used in community-property states as a guide for evaluating the issue of transmutation. It is instructive to discuss this model act framework, as it will establish the parameters for community-property states as well.

When the Model Act was introduced in 1983, it incorporated community-property principles into the shared-property rights of couples during marriage; shortly thereafter, Wisconsin adopted the act and its principles.\(^{369}\) A married couple shared ownership of the property during marriage, and this precipitated consequences at both death and divorce.\(^{370}\) Among the specifics offered by the Model Act are the following: (1) each spouse has a vested right to property acquired during the marriage; (2) property brought into the marriage retains its status as individual (separate) property; (3) income derived from individual property becomes marital property if earned during the marriage; (4) appreciation in value of individual property remains individual property; (5) at death or divorce, the Model Act takes effect to transmute the property in accordance with the principles of the Model Act; (6) gifts by one spouse to a third party are voidable at the election of the other spouse if the gifts are unreasonable; (7) marital agreements are encouraged if they are in writing and signed by both parties; and (8) marital debts are presumed to have been incurred in the interest of the marriage and thus may be paid from marital property.\(^{371}\)

The Model Act adopts the community-property perspective that “[o]wnership of all of the economic rewards from the personal effort of each spouse during marriage is shared by the spouses in vested, present, and equal interests.”\(^{372}\) Unlike traditional common-law states in which title matters to establish ownership, under the Model Act, title only establishes management

\(^{366}\) See AM. LAW INST., supra note 30, § 4.18.

\(^{368}\) See infra Part IV.C.

\(^{369}\) See WIS. STAT. ANN. § 766.31 (West 2009). Alaska allows spouses to hold property acquired during marriage as community property provided that this is indicated in a community-property trust or agreement. ALASKA STAT. § 34.77.030 (2008).

\(^{370}\) UNIF. MARITAL PROP. ACT § 4 (amended 1998).

\(^{371}\) See id.

\(^{372}\) Id. at Prefatory Note.
functions. The Model Act replaces title and ownership with a presumption: 
“[a]ll property of spouses is presumed to be marital property.” 373 Furthermore, 
each “spouse has a present undivided one-half interest” 374 in all assets as the 
assets are acquired, not just when the marriage dissolves through death or 
divorce. This shared-ownership concept, which is similar to community-
property perspectives, provides the fulcrum on which transmutations may be 
evaluated and on which the Model Act establishes a basis for declaring 
property to be community property. In the context of the Model Act, however, 
classification of property may not be certain. Professor Waggoner has noted 
that “a community property regime [and thus a Model Act regime] does not 
always yield an accurate result because in some cases the presumption [of all 
property being community property] is untrue but cannot be rebutted due to 
lack of proof.” 375 Unfairness through miscalculation of the property may 
abound even in states with a fixed procedure for classifying the property.

Professor Waggoner’s caution about the fairness of the outcome is pertinent 
to any discussion about the merits of the 2008 elective-share revisions to the 
UPC. Professor Waggoner suggests that the approximation system in the 2008 
revisions to the UPC’s elective-share statute is as fair as the community-
property approach. 376 Commissioners drafting the UPC, however, “were not 
opposed to providing a deferred-until-death community-property alternative 
for enacting states.” 377 Whether the property is divided under the 
approximation system of the UPC or the community-property-presumptive 
system established by the community-property model, there is a possibility of 
unfairness that may result in the classification of property as separate or 
community. At a minimum, Professor Waggoner remains convinced that the 
approximation system “avoids incurring the administrative costs of post-death 
classification” that would result from seeking to rebut the presumption of 
community property. 378 Waggoner admits that inequities can occur, 379 but he 
concludes that, overall, the approximation system provides “suitable responses 
to the multiple-marriage society and is destined to be the model for American 
law . . . .” 380

Because that the utility of the approximation system is integral to any 
evaluation of whether the newly revised elective-share provisions of the UPC 
incorporate marital property, this discussion is crucial. Recall that the

373. Id. § 4(b).
374. Id. § 4(c).
376. Id. at 30.
377. Id. Professor Newman argues that a deferred-community-property approach is better 
suited to meet the goals of a partnership theory of marriage at divorce. Newman, supra note 8, at 
488.
379. Waggoner, supra note 67, at 741–42.
380. Id. at 752.
presumptions used by community-property jurisdictions are not foolproof; the same is true for the approximation system's presumption that a long marriage results in more marital property. The question then becomes one of reasonableness—a determination that must then be balanced against the additional features contained in the approach. One additional feature in protecting a spouse is the financial support of a spouse, especially in a marriage of short duration. The UPC departed from the support model with the 1990 revision; the 2008 revision has also rejected the theory of providing support to the surviving spouse.

C. Consideration of Spousal Support

The adoption of no-fault divorce significantly altered spousal support and had a similar impact on the division of marital property. Before the radical shift occasioned by no-fault divorce during the 1970s, spousal support was generally meant to compensate the innocent spouse for the at-fault spouse's breach of the marriage contract. Furthermore, until 1979, the responsibility for payment of spousal support was generally viewed as gender-based, because the husband was responsible for making support payments. Because alimony was thought to compensate the wife for what she would have received if the marriage had remained intact, the support was to last until she died or remarried.

The abolishment of fault and the adoption of no-fault grounds for divorce prompted courts and legislatures to adopt a different premise on which to divide marital property and order support. This framework was understood as an equitable division of property, and it applied in separate-property states where title mattered in dividing property. The UMDA offered the first comprehensive, post-fault support guidelines based on equitable principles. The UMDA's support guidelines emphasized the following: (1) enabling a spouse to be self-supporting; (2) minimizing economic dependency; and (3)


384. No-fault grounds exist in every state, most permitting a divorce if the parties live separate and apart for a specified period of time. WADLINGTON & O'BRIEN, supra note 24, at 77–78. Some states allow for no-fault divorces based on such grounds as irreconcilable differences or irretrievable breakdown. Id. at 77 (discussing California as a state that permits irreconcilable differences as a basis for divorce).

permitting maintenance only for rehabilitation and transitional support.\textsuperscript{386} Overall, the UMDA developed equitable guidelines for awarding spousal support that, barring any prenuptial agreement to the contrary, were meant to allow the parties to divide the marital property as quickly as possible. Also, the new equitable guidelines provided for a minimal level of transitional support, followed by, in a few cases, rehabilitative support to allow each former spouse to have a "clean break" from the other. Such a paradigm excludes any consideration of marital fault, but permits consideration of economic fault. As with the division of marital property, neither the American Law Institute nor the UMDA permit any consideration of marital fault when awarding spousal support.\textsuperscript{387}

Each state addresses the issue of spousal support individually, but some general observations may be taken from the UMDA. First, the UMDA permits a maintenance award

only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property to provide for his [or her] reasonable needs; and

(2) is unable to support himself [or herself] through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.\textsuperscript{388}

Thus, support is ordered only when the court concludes that equitable circumstances exist, such as when there is insufficient marital property to accommodate the needs of one of the spouses and employment is not presently available to that spouse. Once a needful spouse has met the burden of proving insufficient marital property and unemployment, the court may order support based on the following factors: (1) the financial resources of the needy spouse; (2) the child-custody needs of the needy spouse; (3) the time and resources necessary to gain an education sufficient to secure appropriate employment; (4) the standard of living during the marriage; (5) the length of the marriage; (6) the physical condition of the needy spouse, including his or her age; and (7) the ability of the spouse from whom maintenance is sought to meet his or her

\textsuperscript{386} See Mary Kay Kisthardt, Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance, 21 J. AM. ACAD. MATRIMONIAL LAW 61 (2008) (observing that the present system of spousal support is inconsistent, unpredictable, and generates a lack of confidence in the judicial system).

\textsuperscript{387} See AM. LAW INST., supra note 30, § 5.03 (favoring compensatory payments to rectify differences in each spouse's financial standing, but not permitting consideration of marital fault); UNIF. MARRIAGE & DIVORCE ACT § 308(b) (amended 1998) (allowing for maintenance in an amount and for such periods of time that the court deems just without regard to marital fault). See generally Karen Turnage Boyd, The Tale of Two Systems: How Integrated Divorce Laws Can Remedy the Unintended Effects of Pure No-Fault Divorce, 12 CARDOZO J.L. & GENDER 609, 620 (2006) ("As a result of no-fault divorce, many jurisdictions have discarded traditional considerations of fault in favor of economic fault in the consideration of property distribution.").

\textsuperscript{388} UNIF. MARRIAGE AND DIVORCE ACT § 308(a) (amended 1998).
Noticeably absent from these factors is any consideration of marital fault in the dissolution of the marriage. Rather, the UMDA contemplates a clear financial break as soon as possible with support ordered only in certain equitable circumstances, such as when marital-property distribution is insufficient to meet the parties' needs or when one of the parties would suffer a severe financial detriment without support. Similar to most state statutes and judicial decisions, the UMDA prefers to create a clean break between the spouses with a lump-sum distribution similar to that suggested in Ruggles.

Commentators discussing the new clean-break philosophy have sharp differences of opinion. Many think that quick termination of support penalizes the spouse who has not been employed outside of the home, often for a long period of time. Most often this is the spouse who has been raising the children and maintaining the household. Courts and legislators cannot equitably assign value to the contribution of this stay-at-home spouse. Thus, one spouse is left with an income-producing career, while the other is left with the necessity of rehabilitation in order to survive financially. Before the abolishment of fault grounds, the stay-at-home spouse, if innocent of any marital fault, would have been compensated for the other spouse's destruction of the marriage and would thus obtain a larger share of the marital assets or

389. Id. § 308(b).
390. Id. § 308 cmt.
391. See supra notes 380–83 and accompanying text (discussing the Ruggles decision). For an example of the use of lump-sum distribution with minimal support as a means of minimizing continued contact between the parties, see Russell v. Russell, 809 So. 2d 1148, 1150 (Fla. Dist. Ct. App. 2004).
392. See Ira Mark Ellman, The Theory of Alimony, 77 CAL. L. REV. 1, 35–36 (1989) (asserting that each spouse should take a share of the partnership that was their marriage); Martha M. Ertman, Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements, 77 TEX. L. REV. 17, 18 (1998) (describing the difficulty of assigning a dollar value to homemaker services); Pamela Laufer-Ukeles, Selective Recognition of Gender Differences in the Law: Revaluing the Caretaker Role, 31 HARV. J.L. & GENDER 1, 46 (2008) (describing the factors that should be considered in computing contributions made to the family); Twila L. Perry, Alimony: Race, Privilege, and Dependency in the Search for Theory, 82 GEO. L.J. 2481, 2519 (1994) (arguing that long-term alimony creates a dependency on men by women); Jana B. Singer, Husbands, Wives and Human Capital: Why the Shoe Won't Fit, 31 FAM. L.Q. 119, 124 (1997) (opining that owned assets should be considered owned by both spouses); Cynthia Lee Starnes, Mothers as Suckers: Pity, Partnership, and Divorce Discourse, 90 IOWA L. REV. 1513, 1543 (2005) (proposing that marriage is a partnership and one spouse should buy out the interest of the other at divorce); Cynthia Lee Starnes, One More Time: Alimony, Intuition, and the Remarriage-Termination Rule, 81 IND. L.J. 971, 973 (2006) (suggesting that temporary awards of alimony are the norm today); Katharine K. Baker, Comment, Contracting for Security: Paying Married Women What They've Earned, 55 U. CHI. L. REV. 1193 (1988) (observing that marriage is not an economic enterprise and the partnership analogy is not effective); Jennifer L. McCoy, Comment, Spousal Support Disorder: An Overview of Problems in Current Alimony Law, 33 FLA. ST. U. L. REV. 501, 516 n.126 (2005) (arguing that upon divorce, a woman's standard of living decreases by one-third).
increased levels of support. Such treatment, under a marital-fault regime, afforded a stay-at-home spouse compensation in order to value that innocent spouse’s stay-at-home contributions. Today, however, because states either do not consider marital fault, or if they do, the courts of that state often discount its significance, the innocent spouse may be unable to recover for the breach of the marriage contract. Balancing the equities of the situation is perplexing and always in flux.

Modern courts often attempt to respond to the perplexing dilemma of equitable distribution through temporary support. Temporary support may take the form of that which is often termed transitional support. Transitional support always lasts for a limited period of time and with a certain objective, such as medical care or some form of therapy. Sometimes, transitional support is defined as rehabilitative support, thus implying that the support is intended for additional education or job training. The rehabilitation is meant to enable one spouse to reenter the work force and become financially self-sufficient. A New Jersey statute provides an example:

Rehabilitative alimony shall be awarded based upon a plan in which the payee shows the scope of rehabilitation, the steps to be taken, and the time frame, including a period of employment during which rehabilitation will occur. An award of rehabilitative alimony may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the rehabilitative award.

In 2004, the Supreme Court of Appeals of West Virginia decided Campbell v. Smith, which provided an illustrative rehabilitation scenario arising from a marriage lasting for twenty-four years. Although the wife remained at home, working as a homemaker, throughout most of the marriage, at the time of divorce she was working for the local board of education as a paraprofessional. After the divorce, she wanted to continue her education by obtaining both a bachelor’s and a master’s degree, and she sought rehabilitative support from her former husband to accomplish these goals.

393. See, e.g., Murphy v. Murphy, 816 A.2d 814, 816, 818–19 (Me. 2003) (awarding the former spouse transitional support to cover dental and medical expenses because the state’s statute providing for transitional support for physical or emotional rehabilitation covers the expenses).

394. See, e.g., Solem v. Solem, 757 N.W.2d 748, 752 (N.D. 2008) (explaining that rehabilitative support may last longer than the marriage itself); Van Klootwyk v. Van Klootwyk, 563 N.W.2d 377, 380 (N.D. 1997) (holding that rehabilitative support is appropriate even though the party receiving it is currently employed); see also S.C. CODE ANN. § 20-3-130B(3) (Supp. 2008) (mandating that the court provide modifiable ending dates to coincide with significant events such as completion of education for employment).


397. Id.

398. Id.
She estimated that she would need $14,170 to earn her degrees and another $19,266 for education-related expenses over the eleven years that she estimated would be needed to complete her education. The trial court rejected the eleven-year period as unreasonable and reduced the estimate to five years, subject to the wife's petitioning for a future modification if she required additional time. The court ordered the former husband to pay her a fixed amount each month for the next five years in order to provide her with the opportunity for rehabilitation.

Commentators often criticize rehabilitative support for many reasons, including the following: (1) rehabilitation does not work when the rehabilitating spouse has physical custody of the children; (2) the spouse who spent many years raising the children must now enter or reenter the workforce underprepared and likely at an age-disadvantage in comparison to others entering the workforce; and (3) courts overlook the contributions made by the primary caregiver in developing the wage-earner's career. These arguments illustrate the perplexing nature of seeking to do equity through transitional, temporary support orders designed to provide for the rehabilitation of the stay-at-home spouse. Nonetheless, rehabilitative support is an example of courts and legislatures moving toward short-term support orders under narrow, need-based circumstances.

Modern courts use reimbursement as another short-term support remedy. For example, if one of the spouses commits economic fault against marital assets, the innocent spouse is entitled to reimbursement for one-half of the value of that lost asset. Some interesting cases involving economic fault have occurred within the context of the division of marital property; nevertheless, the courts in those cases still ordered spousal support. Most cases of economic fault involve intentional destruction or misconduct that invites a remedy. In addition to rectifying economic fault, however, courts may also order reimbursement when one spouse uses community or marital property to enhance separate property that is not divisible upon the dissolution of the marriage. For example, when an apartment building has been designated as separate property, but community assets have been spent on the restoration or

399. Id.
400. Id. at 845, 847.
401. Id.
403. For examples of economic fault, see supra note 321 and accompanying text.
maintenance of the building, the spouse who does not own the separate property would be entitled to reimbursement for the value of one-half of the community or marital property that the other spouse used to finance the restoration or maintenance of the separate property. Reimbursement occurs most often because, as stated in a New Jersey Code provision, there are “circumstances in which one party supported the other through an advanced education, anticipating participation in the fruits of the earning capacity generated by that education.”

For example, one spouse is employed to support the other spouse while he or she is in law school. The supporting spouse hopes that the law degree will ultimately benefit the marriage and both of their lives. Sadly, on the day the student-spouse obtains his or her law degree, the supporting spouse is served with divorce papers. Because of unmet financial expectations in these situations, courts may award reimbursement to the supporting spouse.

With the exception of New York, every state permits reimbursement for any direct financial contributions that a supporting spouse made to the other spouse for tuition, living expenses, and other educational costs. Thus, if one spouse supports the other through law school with the expectation that, upon graduation and admission to the bar, the supported spouse’s enhanced earning capacity will benefit their lives, the supporting spouse is entitled to reimbursement if the supported spouse terminates the marriage before meeting the supporting spouse’s income expectations. If dissolution of the marriage occurs long after the degree, then reimbursement is not justified, because marital assets presumptively would be sufficient to meet the needs of the parties. Additionally, if the supporting spouse subsequently obtained a degree, then the ex-spouses’ degrees balance each other in worth. A court may also consider rehabilitative support to be a better remedy under the particular circumstances and thus may order the supported spouse to pay for the other spouse’s education subsequent to the dissolution of the marriage.

The acknowledged consensus among the states is that any degree or license that a spouse earned during the course of the marriage is not classified as marital property. Instead, to balance equitable considerations, courts have

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406. For an example of a state reimbursement statute, see CAL. FAM. CODE § 2641(c) (West 2004).

407. See, e.g., In re Marriage of Francis, 442 N.W.2d 59, 67 (Iowa 1989) (awarding temporary rehabilitative support and reimbursement alimony to help the spouse continue her education to further her employment options).

408. See, e.g., Helm v. Helm, 345 S.E.2d 720, 721 (S.C. 1986) (“The majority of states considering the question have held a professional degree to be a personal intellectual attainment, not marital property subject to equitable distribution.”); AM. LAW INST., supra note 30, § 4.07(2).
ordered reimbursement for the amount expended to meet the expectations of the supporting spouse. The reasons for excluding the degree as an item of marital property are (1) that the benefits from the degree are too speculative to fairly estimate its worth, (2) the degree is personal to the one who obtained it, and (3) any increased earning capacity due to the degree would be realized after the marital period, which is beyond the reach of the court.\textsuperscript{409} With the exception of New York, every state comports with this approach.

New York courts rely on the state's equitable-distribution statute, which broadly incorporates all property, including an educational degree or license; this approach is evident in the 1985 decision in \textit{O'Brien v. O'Brien}.\textsuperscript{410} Under this statute, the \textit{O'Brien} court held as follows: (1) the enhanced earning capacity from the degree or license is not too speculative to value; (2) the degree is not personal to the degree-holder because both parties worked to obtain it; and (3) the degree is subject to division because it was earned during the marriage, even though its enhanced earnings may not result until after the marital period.\textsuperscript{411} Although subsequent New York decisions have upheld this approach, commentators have criticized the \textit{O'Brien} holding, perhaps explaining why other states have not adopted its rationale.\textsuperscript{412}

Many issues in spousal support could be discussed further, but such a discussion is beyond the scope of this Article. The point to be made is that ordered support between spouses is characterized as exceptional, temporary, equity-based, and an approximation of the expectations of both spouses. The approximation runs the gamut from transitional support, to rehabilitative support, to reimbursement. Likewise, even if a court makes a lump-sum distribution of marital assets in order to sever contact between the parties, its decision to do so is an approximation of what appears equitable. Indeed, it is possible to conclude that in reference to the equitable distribution of marital assets or the ordering of support to accomplish an equitable division, courts seek to approximate first the intentions of the spouses and then the parameters of need and ability to pay.


\textsuperscript{410} See, e.g., O'Brien v. O'Brien, 489 N.E.2d 712, 715–16 (N.Y. 1985) (ruling that "an interest in a profession or professional career potential is marital property").

\textsuperscript{411} Id. at 716–17; see also Holterman v. Holterman, 814 N.E.2d 765, 768–69 (N.Y. 2004) (reaffirming the \textit{O'Brien} holding). The dissent in \textit{Holterman} commented that the \textit{O'Brien} holding should "be applied only in those situations where there is a problem for \textit{O'Brien} to remedy—not where \textit{O'Brien} puts the parties and the court through a complex and largely empty exercise." Holterman, 814 N.E.2d at 781 (Smith, J., dissenting).

Support within the context of the 2008 revision to the UPC is similar to the modern community-property regimes. As this Article will discuss, the 2008 UPC provides a modicum of financial support in addition to the allowances granted. This support award is easily met with a share of the marital estate and increases as the marriage progresses in length. If the support mechanism at divorce is characterized as exceptional, then the support mechanism available under the newly revised UPC incorporates this feature. Unlike the elective-share provision of the 1969 UPC, the 1990 and 2008 revisions are not support mechanisms. This Article turns to the 2008 UPC to incorporate what has been discussed into a critique of the newly adopted elective-share provision.

IV. THE 2008 ELECTIVE SHARE OF A SURVIVING SPOUSE

Kentucky was the first state to introduce no-fault divorce and to permit couples, as early as 1850, to divorce if they had been living separate and apart for five years. California was the first state to permit no-fault as an exclusive ground for divorce, enacting its no-fault statute in 1969. Interestingly, four years earlier, New York had become the first state to adopt an elective-share statute that permitted a surviving spouse to augment the decedent-spouse’s estate with transfers of property that passed outside of the probate estate. This augmented-estate statute was a radical departure from the earlier illusory-trust approach employed by the few states that had considered the issue. New York enacted the first statutory mechanism by which a surviving spouse could elect against nonprobate transfers, such as joint accounts and irrevocable gifts made within a specified time before death. The New York statute gradually expanded its scope through subsequent revisions, but it also precipitated another legislative model—the augmented-estate provision of the 1969 UPC.

Similar to the New York statutory scheme, the 1969 UPC’s augmented-estate concept was introduced to protect a widow’s share of the decedent’s estate by providing the widow with a minimum percentage of the decedent’s estate for support. Revisions to the UPC in 1990 and 2008 retained the same framework as the New York statute, but instead of seeking to prevent transfer of the widow’s share, the revisions sought to align elective-share law with the economic-partnership theory of marriage. It is propitious that no-fault divorce and augmented estate at death originated in the same year.

414. Kay, supra note 356, at 1. California permits divorce only for incurable insanity and irreconcilable differences. CAL. FAM. CODE §§ 2310, 2312 (West 2004); see AREEN & REGAN, supra note 24, at 374.
Integrating Marital Property into a Spouse's Elective Share

Contemplating the previous discussion of the protection of a spouse at both death and divorce, this Article will now explore whether the newly revised elective-share provision of the UPC effectively integrates marital property into a spouse's elective share. Some general observations must precede any conclusions regarding the 2008 revisions. First, it is essential to acknowledge that no perfect mechanical solution can address human assessments of marital fairness. The General Comment to the 1990 revisions discusses application of the approximation system as intended to incorporate both marital and separate property proportionally; it provides examples that illustrate the human complexities of arriving at a precise solution.

Second, since the introduction of the New York statute and the first UPC in 1969, the prenuptial agreement has become acceptable and available as a resource to married couples. These written agreements, entered into prior to marriage, allow marrying couples to take charge of their own affairs. In addition, prenuptial agreements are complemented by the possibility of postnuptial agreements, which are entered into after the marriage, but without anticipation of divorce. Separation agreements, negotiated through attorneys representing the spouses in a divorce action, have also become available to help spouses control their property. The 1983 Uniform Premarital Agreement Act (UPAA) facilitated the rapid acceptance of premarital agreements by reducing the likelihood that the agreement would be void. Even though there is modest litigation regarding the enforceability of all three of these agreements, it is undeniable that private ordering is a frequent element of modern family law in America. It is therefore reasonable to assume that parties to a marriage have an alternative to any statutory means of dividing property at divorce or death. This recognition may be implied from Professor Waggoner’s comments:

[When there is a sizeable discrepancy in assets coming into [a marriage in which there is a significant discrepancy in wealth between the spouses], the likelihood increases that there will be a premartial agreement that waives or reduces the surviving spouse's

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416. See supra Parts II, III.
417. See Whitebread, supra note 23, at 138 (discussing the introduction of the partnership theory of marriage into the 1990 elective share).
418. See UNIF. PROBATE CODE art. II, pt. 2, general cmt. (amended 2008); see also Newman, supra note 8, app. at 560–63 (providing data to illustrate the effects of the approximation system).
421. See generally SANFORD N. KATZ, FAMILY LAW IN AMERICA 37 (2003) (observing that contracts have replaced love); WADINGTON & O'BRIEN, supra note 24, at 8–9; Howard Fink & June Carbone, Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making, 5 J.L. & FAM. STUD. 1, 6–7 (2003).
right to an elective share, perhaps strongly encouraged by the adult children of the wealthier one.\textsuperscript{422}

The existence of private-ordering alternatives mitigates any harshness that may accompany presumptions contained within the elective share’s augmented estate.

Third, although the manners in which separate-property states and community-property states divide property at divorce are becoming increasingly similar, differences between them remain in the distribution of property at death. From these differences arises the separate-property state requirement that a spouse elect to capture property titled in the name of the predeceasing spouse. This may be done statutorily through the augmented estate. In providing the augmented-estate device, however, the goal is not to replicate the community-property model within separate-property states. There are two distinctions between what is done with the augmented estate and what is done in community-property states. First, separate-property states do not provide a vested property interest to the estate of the decedent spouse in property titled in the name of the surviving spouse. Second, in classifying property as separate or community, the community-property states are aided by legal presumptions, while few separate-property states employ such presumptions. These differences and others indicate that the goal of the newly revised UPC is not to mimic the community-property states’ treatment of property acquired during marriage.

A fourth observation is that uniformity of application was one of the goals of the Commissioners in introducing the UPC. Globalization of estate planning mirrors the globalization of both wealth management and family law.\textsuperscript{423} It is unavoidably true that married persons deserve a regulatory process that promotes fairness at the national level, and not merely at the state level. Such a process best meets the goals of spouses and their heirs if it is objective, easily decipherable, and consistent. These criteria urge the implementation of a statutory model instead of a judicial model.

With these general observations in mind, this Article now addresses the specifics of the 2008 revisions of the elective-share provisions of the UPC.

\textit{A. Support Theory}

As previously discussed, a surviving spouse is entitled to various allowances upon the death of the other spouse; some of these are payable from the decedent’s estate, and some are automatic, resulting from the fact of the parties’ marriage. These latter allowances include such items as Social Security benefits or an ERISA-protected pension. Those benefits payable from

\textsuperscript{422} Waggoner, supra note 31, at 29 (footnotes omitted).

the decedent’s estate include a homestead allowance ($22,500), an exempt-
personal-property allowance ($15,000), and a one-year family allowance (what
is determined to be a reasonable amount). Historically, dower provided a
widow with a common-law entitlement to a life estate in one-third of her
husband’s real property. This right existed simply because of her marriage and
prevented the sale of the property to a third party without her consent. At her
husband’s death, the wife’s dower became possessory; she could not transfer
her dower rights in the event she predeceased her husband. A husband’s
curtesy interest was similar to dower, but it only existed if children were born
to the marriage; further, the husband was given a life estate in all of the wife’s
lands, as opposed to the one-third interest granted by the wife’s dower
rights.

Even though dower itself waned, the model and the percentage share of
dower were integrated into the earliest versions of elective-share rights.
Perhaps because wives more often survived their husbands and received a one-
third interest under dower, many state elective-share statutes retained the one-
third allotment. The 1969 UPC, for example, granted the surviving spouse a
one-third share of the augmented estate. New York still retains a percentage
or amount share in its elective-share statute. Thus, it appears that election
was initially premised on support, modeled first after dower and then after the
more inclusive one-third elective-share amount of the UPC’s augmented estate.

Support is helpful, but it does not equate to equal division of marital
property. The 1990 revisions to the UPC abandoned the general premise of
support, and instead initiated a process that divided marital property based on
an incremental percentage of the property that increased in proportion to the
length of the marriage. Despite the economic division of property, the
percentage was nonetheless supplemented with a $50,000 elective-share sum,
presumptively for support: “[T]he 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.” The $50,000 is in addition
to the probate exemptions and allowances, forming a reasonable assumption
that—even in marriages of short duration—there will be a modicum of support
provided by the statute. In longer marriages, the excluded surviving spouse—
who is still restricted to the same $50,000—may nonetheless benefit from
entitlements such as Social Security or pensions, in addition to an
incrementally larger percentage of the augmented estate.

424. See supra Part II.B.
425. See id.
426. UNIF. PROBATE CODE § 2-203 (1969); see supra Part II.E.2.
427. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(2) (McKinney 2009).
428. See supra Part II.E.3.
429. Waggoner, supra note 67, at 742.
430. Id. at 743–44. Professor Waggoner has stated (in reference to the 1990 Code provision,
but applicable to the 2008 revision) that the
The 2008 revision increased support for the surviving spouse—the supplemental-share elective amount—from $50,000 to $75,000, but the overall rationale of the revisions did not change: "[T]he duty of support is founded upon status, it arises at the time of the marriage." The UPC espouses the rationale for modern divorce law by applying a partnership theory to "decrease or even eliminate the entitlement of the surviving spouse [in a long-term marriage in cases] when the marital assets were . . . disproportionately titled in the surviving spouse's name. Any supplemental amount provided to a surviving spouse for support may be satisfied from any title-based ownership interests that the spouse now receives outright. This includes all of the nonprobate assets held jointly with the decedent or paid to the surviving spouse, and if the marriage exceeds one year, the surviving spouse is entitled to an accrual elective share that also counts against the $75,000. Taken in context, the spousal support is triggered upon marriage, but it is very limited. There is no long-term support, and the $75,000—satisfied from existing transfers—hardly would have constituted support in previous marital-property divorce schemes. Furthermore, the longer the marriage, the greater the elective-share percentage, and because this is counted against the $75,000, the sum of support actually paid declines or is eliminated.

The support theory—enacted as part of the elective-share revisions—mirrors at death what occurs at divorce. As discussed, modern courts—in community-property and separate-property states—seek to provide the couple with a clean break. Although there are commentators who disagree with this clean-break policy, the trend is to eradicate support based simply on the fact of marriage itself and to replace the support with a division of existing marital assets, with exceptions for rehabilitation or transitional support, or when one of the spouses can clearly and convincingly assert a claim for equitable relief. The policy similarities between division of marital property at divorce and at death are illustrated in the comment to the supplemental elective-share provision:

support theory suggests that the surviving spouse is entitled to force a sufficient transfer of the decedent's assets to bring the survivor's assets up to a predetermined amount deemed to be at least minimally sufficient for support, should the value of the survivor's assets be below that amount at the decedent's death.

Waggoner, supra note 31, at 4.


432. Id. Excluded from contribution toward the supplemental amount are the following: (1) any probate exemptions and allowances and (2) any Social Security or other governmental benefits. Id. In adopting the UPC, states may also raise the amount of support if thought appropriate by the state's legislature.

433. Id.

434. Id.

435. Id.

436. UNIF. PROBATE CODE § 2-202(b) (amended 2008).

437. See supra Part III.C.

438. See id.
"[Section 2-202(b)] implements the support theory of the elective share by providing a [$75,000] supplemental elective-share amount, in case the surviving spouse’s assets and other entitlements are below this figure."  

Comments provided by the drafters of the revisions suggest that the supplemental support award is justified when, in the case of a short term marriage, “neither spouse . . . contributed much, if anything, to the acquisition of the other’s wealth . . . . [The] special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support."  

As at divorce, support is exceptional and transitional.

B. Fifty-Percent Share

In addition to support, the new elective share controls the division of marital property. The trend in marital-property division at divorce is to divide the marital property as equally as possible: fifty-fifty in community-property states and equitably in separate-property states. The goal is to allow the couple to bid each other a fond fiscal farewell.

The newly designed elective-share provision subscribes to the economic-partnership theory:

Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance).

This is the assumption at death too, but as discussed, the rights of spouses at death have not kept pace with the rights of spouses at divorce.

In community-property states, and in those states adopting the Model Marital Property Act, the fifty-fifty split is more easily accomplished at death. The goal of equal division of property, however, is more elusive in separate-property states. As noted above, many states provide a surviving spouse with a mandated share of one-third of the property, often taken from the probate estate of the decedent without the benefit of augmentation. Some states retain an illusory-trust doctrine that provides inconsistent results. The goal of the 2008 revision of the elective-share statute is to provide an elective share that is always fifty percent of the “‘marital-property portion’ of the augmented estate.”  

This is a departure from the 1990 UPC elective share that provided fifty percent of the augmented estate. The 2008 revision is significant because it more effectively responds to the elusive nature of marital-property

439. UNIF. PROBATE CODE § 2-202(b) cmt. (amended 2008) (second alteration in original).
440. Id. art. II, pt. 2, general cmt.
441. Id.
442. Id.
443. Id.
ownership than did the 1990 provision.\textsuperscript{444} Another difficulty with the 1990 UPC provision is the elusive nature of the transmutation dilemma—the problem of classifying property as separate or marital. The newly revised UPC incorporates an approximation system, which is a reasonable approach when balanced against issues of litigation and delay.

The 2008 revision begins by amassing the marital property accumulated by the spouses during marriage. Computing marital property under the 2008 revision entails calculating

the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute:

1. the decedent’s net probate estate;
2. the decedent’s nonprobate transfers to others;
3. the decedent’s nonprobate transfers to the surviving spouse; and
4. the surviving spouse’s property and nonprobate transfers to others.\textsuperscript{445}

These four components comprise a couple’s augmented estate and are not dissimilar to what appeared in the 1990 UPC provision. What is dissimilar, however, is a new provision in the 2008 revision, providing that “[t]he value of the marital-property portion of the augmented estate consists of the sum of the values of the four components of the augmented estate . . . multiplied by [percentages based on the duration of the marriage].”\textsuperscript{446} The percentages indicate that if a couple has been married for less than one year, the marital property accumulated within the augmented estate is three percent; the percentage increases gradually until it reaches one-hundred percent—the percentage for a marriage of fifteen years or more.\textsuperscript{447} To arrive at the spouse’s elective share, divide the marital property by half: this is the fifty-percent share.

The percentages established in the augmented-estate provision are approximations meant to include property acquired during the marriage. The provision does not attempt to distinguish marital property from separate property. This is a significant distinction between the UPC’s recommended provision and its alternate provision for states preferring a deferred-marital-property approach.\textsuperscript{448} The UPC’s alternate approach is discussed later in this Article in reference to both Professor Newman’s article and transmutation difficulties. But the 2008 approach assumes that one-hundred percent of the

\textsuperscript{444} See supra Part II.E.4.
\textsuperscript{445} UNIF. PROBATE CODE § 2-203(a) (amended 2008). For a comparison of what would constitute property upon dissolution of a marriage, see supra Part III.A.
\textsuperscript{446} UNIF. PROBATE CODE § 2-203(b) (amended 2008).
\textsuperscript{447} Id.
\textsuperscript{448} Id.
components of the augmented estate becomes marital property after fifteen years of marriage.\textsuperscript{449} Once we amass the augmented estate to ascertain all of the property and use the provision's schedules to approximate what percentage of the augmented estate is marital, we arrive at the "elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate."\textsuperscript{450}

The 2008 revision is significant. In evaluating the revision's usefulness, this Article inquires into whether taking fifty percent of the marital property is an effective incorporation of marital property into the spouse's elective share. Seen in the context of the 1969 UPC provision, which granted the surviving spouse a simple one-third share of the augmented estate, the 2008 revision is a dramatic change and improvement. States retaining the one-third share may become motivated to adopt the new UPC if those states seek to incorporate the economic-partnership theory of marriage into a system similar to that in effect at divorce. However, the 2008 revision is also an improvement over the 1990 UPC provision. In the 1990 provision, the surviving spouse took an elective share based on a percentage of the augmented estate.\textsuperscript{451} Once the augmented estate was computed, the surviving spouse's elective share was equal to a percentage of the augmented estate, which was based on the length of the marriage.\textsuperscript{452} Now, with the 2008 revision, the UPC first incorporates all property into the augmented estate, then creates a marital estate based on an approximation system, and finally, confers on the surviving spouse the right to take fifty percent of the marital estate.\textsuperscript{453} If a goal of the 2008 revision is to offer support only in exceptional circumstances and to divide the marital property without regard to fault, then the 2008 revision is an improvement over previous models.

The 2008 revision may not be a perfect solution for the surviving spouse at death, but it does replicate what occurs at divorce in separate-property states. First, the UPC replaces frequent litigation with the approximation system, which provides for the speedy administration of the estate. As described above, the new UPC provision amasses the marital property acquired during the marriage and determines its value by approximating a portion of that

\textsuperscript{449} Id. § 2-203 cmt.

Government data indicate that the median length of a first marriage that does not end in divorce is 46.3 years, the median length of a post-divorce remarriage that does not end in divorce is 35.1 years, and the median length of a post-widowhood remarriage that does not end in divorce is 14.4 years.

\textit{Id.}

\textsuperscript{450} Id. § 2-202(a). This elective-share amount is in addition to "homestead allowance, exempt property, and family allowance," and if the elective-share amount is less than $75,000, then the surviving spouse receives a supplemental amount sufficient to total $75,000. \textit{Id.} § 2-202(b)-(c).

\textsuperscript{451} UNIF. PROBATE CODE § 2-202 (1990).

\textsuperscript{452} \textit{Id.}

\textsuperscript{453} \textit{Id.} §§ 2-202(a), 2-203(b) (amended 2008).
property as constituting marital property without regard to whether it may be traced to, or maintained as, separate assets. This may cause discontent among purists, but it is a reasonable approach and certainly preferable to extensive litigation and delay if disputes should occur after death regarding the classification of property as marital or separate. Based on approximation, the surviving spouse may elect to take fifty percent of the marital-property portion of the augmented estate. This percentage seems reasonable in light of the circumstances of death, the inability of both parties to establish proof, and the vicissitudes of transmutation.

In some cases, the surviving spouse may have titled a significant portion of the marital property in his or her name. In such a situation, the estate of the decedent spouse will have no ability to execute a “reverse election” to allow the estate to elect against the surviving spouse in order to claim a share for the decedent’s heirs; such a right would be available in community-property states, but is absent in separate-property states. Nonetheless, the absence of a reverse election does not detract from the reasonableness of the UPC’s approach. Because such occasions are rare, spouses may accommodate a husband or wife through proper estate-planning devices. In addition, it is the heirs who would suffer a loss in such a situation, not a spouse. The UPC’s elective-share provision is intended as a spousal benefit, and providing the surviving spouse with a fifty-percent share of the marital property is a reasonable means by which to fulfill this intention.

C. Transmutation

The classification of property as separate or marital is a significant component of any successful integration of marital property into an elective-share system. As previously discussed, in the division of marital property at divorce and at death, the objective is to divide only property that results from the efforts of the married economic partners; as such, there should be a distinction between marital property and separate property. The former is subject to division, and the latter is not. But how are we to tell them apart? This task is elusive, both at divorce and at death. Classification is especially elusive in long-term marriages in which the couple has purchased, mixed, divided, and replaced numerous assets. The transmuting of assets confounds courts, whether property is distributed at divorce or death. To ease this burden, some states have simply declared that all property brought into or acquired during the marriage is marital property, while other states employ a system of presumptions. It is questionable, however, whether anything other

454. See also supra text accompanying notes 448–50.
455. UNIF. PROBATE CODE § 2-202(a) (amended 2008).
456. See Newman, supra note 8, at 546–50 (describing the various methods used by courts and legislatures to establish presumptions distinguishing marital from separate property); supra Part III.B.3.
than an agreement between the spouses themselves truly reaches the equities of the issue.

Both the 1990 and the 2008 versions of the elective-share provision of the UPC seek to accommodate the dilemma of transmutation through an approximation system of accrual. After the 1990 adoption, and in the years leading to the 2008 revision, Professor Waggoner wrote: “Formally, the [UPC’s approximation] system does not distinguish between property acquired during the marriage and other property, but compensates for this informally by applying an upwardly-trending percentage to the couple’s assets whenever and however acquired.”\textsuperscript{457} Some commentators think that the approximation system’s upwardly trending percentage is justified when a value-deferred-community-property approach is available.\textsuperscript{458} Professor Newman has suggested that the approximation system “can be expected to produce results that are grossly inequitable.”\textsuperscript{459} Based on statistics, there are situations when this is true. Previously, this Article discussed the deferred-community-property approach,\textsuperscript{460} which suggests that the most significant criticism of the approximation approach concerns long-term second or subsequent marriages.\textsuperscript{461} In such a marriage, when a decedent spouse is survived by one or more descendants from a previous marriage, the descendants may suffer disparagement from a surviving stepparent’s election,\textsuperscript{462} and the approximation system would not fairly distinguish separate property from marital property.\textsuperscript{463}

Professor Newman criticized the approximation system when it was introduced in the 1990 UPC, and he continues to criticize the system as it currently exists in the 2008 version. He is also an advocate of the deferred-community-property approach and offers examples of when unfairness would result from the approximation system’s approach of not distinguishing between separate and marital property.\textsuperscript{464} First, Professor Newman has noted that spouses who remarry during retirement typically bring separate property to the marriage . . . [b]ut the fact that most or all of a deceased spouse’s property is separate does not preclude elective-share claims . . . such as the UPC’s approximation system, that do

\begin{footnotes}
\textsuperscript{457}. Waggoner, supra note 31, at 7.
\textsuperscript{458}. See, e.g., Newman, supra note 8, at 492 (stating that the objective of his article is to “examine how well the approximation system will accomplish its objective of incorporating the marital partnership theory into elective-share law”).
\textsuperscript{459}. Id. at 499. Additionally, “[i]n many cases it is likely that the approximation system will accomplish [its] objective relatively well; in many others, however, it clearly will not, but instead will produce inequitable results.” Id. at 509. But approximation for short-term first marriages may not always produce equitable results. Id. at 519.
\textsuperscript{460}. See supra Part II.E.3.
\textsuperscript{461}. Newman, supra note 8, at 521.
\textsuperscript{462}. See id. at 521 & n.150.
\textsuperscript{463}. Id. at 522.
\textsuperscript{464}. Id. at 492–93.
\end{footnotes}
not differentiate between separate and marital property of the decedent.\textsuperscript{465}

Second, he has determined that allowing an elective-share claim when the decedent owned little or no marital property will substantially burden the estate or trust administration proceedings because of the necessity of identifying and valuing both spouses' assets, as well as gifts made by each of them within two years of the deceased spouse's death in excess of $10,000 per year, per donee.\textsuperscript{466}

Third, Professor Newman recognized that separate-property states distinguish separate property from marital property at divorce.\textsuperscript{467} This has generated a familiarity with the system and prompted residents in these states to be more concerned, according to Professor Newman, about "the need to take appropriate steps to protect separate property."\textsuperscript{468} Using the approximation system penalizes those persons who have protected their separate-property interests through reasonable means that courts would have respected in a divorce proceeding and that should be protected at death.

The deferred-community-property alternative system that Professor Newman advocates stems from the ability to classify fairly both marital and separate property. The system is premised on the partnership theory of marriage and the division of marital property: "[W]hen the marriage terminates—whether by divorce or by death—the couple's marital property should be divided between them."\textsuperscript{469} But the system remains dependent on defining marital property, which remains an especially troublesome task in the long-term, second, or subsequent marriages that Professor Newman notes as more likely to be treated unfairly.\textsuperscript{470} The difficulty of transmutation remains in such a system. Professor Newman acknowledges by implication the difficulty of classifying property in the deferred-community-property alternative system because, in such a system, a presumption that all spousal property is marital is permitted.\textsuperscript{471} Furthermore, he suggests that "[i]f courts are finding reasonable

\footnotesize{465. Id. at 539.}
\footnotesize{466. Id. at 539–40 (footnotes omitted). The $10,000 limit was recently changed to $13,000. See I.R.C. § 2503(b) (2006).}
\footnotesize{467. Newman, supra note 8, at 542–44.}
\footnotesize{468. Id. at 543. Professor Newman has also noted that [w]ith respect to the complexity and uncertainty that would result from an elective-share system requiring the classification of spousal property upon [death], it is worth noting . . . that those obstacles have not been deemed serious enough to warrant abandoning the classification of spousal property as separate or marital in divorce proceedings.

\textit{Id.} at 552.
\footnotesize{469. Id. at 544.}
\footnotesize{470. Id. at 519–20 (noting the inequities caused by the UPC elective-share provision in long-term, second, or subsequent marriages).

\textit{471. See id.} at 546–49 (suggesting multiple means of classifying property).}
means to protect the separate property of spouses when their marriage ends in
divorce, presumably such means also could and would be found and used to
accomplish that objective under a deferred-community-property elective-share
system when a marriage ends with a spouse’s death.\footnote{472}

Unfortunately, divorce courts have not achieved certainty in classifying
property as marital or separate. It is thus understandable that, at death, the
classification problem should fester in the approximation system and the
defered-community-property alternative. Both systems could rely on tracing,
 presumptions, or time rules.\footnote{473} Yet, the elective-share procedure operates at a
distinct disadvantage in comparison to what is available at divorce, because
both parties would be alive at divorce to provide testimony and rebuttal
evidence. The inevitable absence of both living spouses at one spouse’s death
justifies an approximation system like the one found in the UPC. It is helpful
to revisit approximation and inquire whether it is reasonable when compared to
alternatives.

\textbf{D. Economic Partnership by Approximation}

Recall that the goal of the 1990 and 2008 revisions to the elective-share
provision of the UPC was to conjoin distribution of marital property at divorce
with distribution of marital property at death. Both distribution schemes
should be viewed within the same construct: an economic partnership. Since
the early 1970s, marriage has been evolving toward a framework of economic
partnership; this Article has previously discussed this history and its impact on
the distribution of property at divorce and at death.\footnote{474} As marital law has
evolved, comments to the 2008 revisions to the elective-share provisions of the
UPC state that community-property states—and any state adopting the Model
Marital Property Act—have been more successful in implementing an
economic-partnership model because the relevancy of title is less important in
community-property states than in separate-property states.\footnote{475} Title matters in
a separate-property state, and as such, the ability of one spouse to transfer
property irrevocably or revocably during his or her lifetime, without the
consent of the other spouse, is the problem that the UPC addresses.

Addressing the issue of title over marital property necessarily involves
transmutation issues. Whether considering property at divorce or at death, one
or both of the spouses could have affected the economics of the marriage by
transmuting property in such a fashion that it would be impossible to
characterize the property as marital or separate. This issue lies at the heart of
the debate between the UPC’s approximation system and the deferred-
community-property system. At divorce, the issue of identifying marital

\footnote{472} \textit{Id.} at 549–50 (footnotes omitted).
\footnote{473} See supra Part III.B.3.
\footnote{474} See supra Part I.
\footnote{475} UNIF. PROBATE CODE art. II, pt. 2, general cmt. (amended 2008).
property may be addressed through statutes that allow courts in separate-property states to divide property equitably. In addition, both parties would be alive and able to negotiate as partners to arrive at an equitable approximation. A review of the state statutes and cases interpreting them would reveal that divorce courts approximate the division of wealth at divorce rather effectively. At death, however, many state statutes restrict election to a division of probate assets, failing thereby to make nonprobate assets available to the surviving spouse for division at death. The reach of the surviving spouse’s share of the marital property is not as inclusive as it is at divorce. There is thus an economic disparity at death that necessitates a response seeking economic parity. That response has been judicial and statutory.

Judicial solutions provide neither certainty nor uniformity. Courts’ repeated efforts to respond to the growing number of nonprobate devices that thwart most state elective-share statutes, which address only probate property, have been inconsistent and unpredictable.\textsuperscript{476} Modern estate planning requires predictability, at a minimum, and judicial formulations of what is illusory do not meet this expectation. Furthermore, because the judicial standards are binding on the individual states, forum shopping is encouraged and uniformity of application is diminished. Marital property division at divorce is increasingly uniform at inception and at enforcement;\textsuperscript{477} it seems reasonable that marital-property division at death should strive for a similar status.

Previous versions of the UPC have not sufficiently addressed the inequity that results when the surviving spouse holds title to the vast majority of marital assets and, by contrast, the decedent has few assets, if any. The newly revised UPC does not address this disparity either, and to properly do so, it must include a reverse-elective-share provision. Such a provision would aid spouses who toil together for many years, but who opt for one of them to hold title to most of the assets while the other holds title to few assets. At death, the spouse with few assets still has a smaller share of property under the new UPC because the UPC does not provide the decedent’s estate with a claim against the surviving spouse in whose name the vast majority of the marital wealth remains. In such a situation, the heirs of the decedent—often children from a previous marriage—would suffer the economic inequity of their parent’s death but would have no right to take from the surviving spouse their rightful economic share of the marital property. There is always the possibility of a premarital agreement—a device that continues to gain in popularity and, through implementation in the aforementioned facts, would result in a share of the economic rewards of the marital property passing to the heirs of the decedent. The UPC, however, emphasizes the economic protection of the spouses, not the spouses’ heirs.

\textsuperscript{476} See supra Part II.D.

\textsuperscript{477} For a discussion of uniformity of equitable-distribution schemes at divorce, see supra Part III.A.
V. CONCLUSION

The effort to provide a substantive portion of the marital assets to a surviving spouse through a fair elective-share mechanism is a historical effort. Initially, common law provided a dower-or-curtesy right—modest support mechanisms to protect against penury. This, however, was gender-based and short-lived. States built on this support model, and some began to provide a fixed amount of one-third of the probate estate. Other states maintained life estates and one even retained the dower formulations. As modern wealth evolved from probate to nonprobate transfers, the fixed share of the probate estate did not keep pace; courts and legislatures were confronted with transfers by decedent spouses during lifetime or through nonprobate transfers that defeated the claims of surviving spouses. Judicial responses to the inequities precipitated by minimum-elective-share statutes involved, among other things, illusory-trust doctrines. These doctrines, however, were piecemeal, unpredictable, and did not apply in every state. Uniformity, speed, and certainty were consistently absent.

Eventually, concomitant with the introduction of greater gender equality and no-fault divorce, New York enacted the first elective-share statute that incorporated nonprobate transfers into an augmented estate that was then made available to the surviving spouse’s elective share. This statute became the prototype for the 1969 UPC. Both the New York statute and the 1969 UPC elective-share provision were support measures, providing a surviving spouse with a fixed percentage of the decedent’s estate as compensation. As the economy continued to diversify, an increasing number of women entered the workforce, and as no-fault divorce led to the occurrence of multiple marriages, a distinctive means by which to divide marital property at divorce developed. This means was described as equitable division of marital property in separate-property states and division of community property in the remaining states. Through this division, marital property was divided equally (if possible), obligations of support were transitional (if at all), and there was an effort to divide marital property as quickly as possible to provide the couple with a clean economic break from one another. The model at divorce would become the standard at death.

The division of all marital property at divorce soon permeated the deliberations of the National Conference of Commissioners on Uniform State Laws, as the Commissioners sought to arrive at a fair division of marital property at death. In 1990, they promulgated a revision to the UPC’s elective-share provision that would equate—as much as possible—the division of marital property at death with what occurred at divorce. The means by which the Commissioners sought to implement this change was the computation of an augmented estate, which consisted of probate and nonprobate assets owned by both of the married spouses. The concept of an augmented estate was first initiated by the New York Code and was subsequently included in the 1969 UPC’s elective-share statute. Once the augmented estate was amassed, the
surviving couple would take a percentage of the augmented estate based on an accrual system in which the percentage increased in relation to the number of years the couple was married. This percentage system is an approximation system based on the assumption that the longer the marriage, the more likely the property is marital and subject to division. In addition to family maintenance, homestead, and a small personal-property exemption, the surviving spouse was entitled to this elective-share amount. Further, the 1990 UPC provided the surviving spouse a supplemental support amount of $50,000. If the elective amount was greater than $50,000, the surviving spouse would not receive the supplemental support amount. If the elective share was less, then the surviving spouse would take a supplemental amount equal to the amount needed to reach the $50,000. In 1990, this system seemed fair and reasonable because it incorporated the augmented estate and provided a proportionate elective share in accordance with the length of the marriage. Because this was consistent with what would have occurred at divorce, there was some parity in this early system.

In 2008, the Commissioners revised the UPC again. This time the revisions sought to capture more effectively the essence of marital property and its true division according to the economic-partnership theory. That is, the Commissioners attempted to incorporate a better approximation of marital property. In so doing, they sought to better approximate what occurs at divorce with what occurs at death. The augmented-estate model was already in place, which was necessary to include the various permeations of property that have developed through the globalization of wealth. Also already in existence was the approximation schedule based on the length of marriage. Nonetheless, the Commissioners included the following new developments: First, the 2008 UPC augments the estate in the same way as the earlier UPC provisions and arrives at an augmented estate that includes probate and nonprobate assets. The list is as extensive as what would be included in the marital property at divorce. The new provision provides no means by which to classify and distinguish marital and separate property. Then—and this is what is distinctive about the elective-share provision of the 2008 version—the UPC approximates the portion of the augmented estate that is considered marital property by multiplying the augmented estate by the percentage based on the number of years the couple has been married. If the couple has been married for fifteen years or more, the provision considers all of the property acquired during the marriage to be marital property. If the spouses are married for less than fifteen years, the provision considers less of the property acquired to be marital property. Once the percentage amount is ascertained, the surviving spouse is able to elect by taking fifty percent of that amount, or one-half of the marital property.

The newly revised elective-share provision is not perfect, but it is reasonable for two reasons: First, it provides certainty, uniformity, and the promotion of planning objectives between married couples seeking to transfer wealth at
death. Uniformity among the states is a necessary estate-planning tool as couples travel among various jurisdictions. Second, the 2008 revision is reasonable and comparable to what occurs at divorce. In any petition for divorce and subsequent distribution of marital assets, each of the spouses must produce an inventory of assets for the court to divide equitably. This equitable distribution of assets at divorce is not completely objective, as evidenced by frequent litigation. The approximation system by which the UPC estimates how much property would become marital property is not unreasonable when compared to a system that classifies property at divorce. Promoting ease of estate administration and avoidance-of-proof scenarios weighs in favor of the approximation system as opposed to the deferred-community-property system that requires classification at death. Taken as a whole, the 2008 revision to the UPC’s elective-share provision incorporates the best and most reasonable approaches of marital-property law.