Spousal Election: Suggested Equitable Reform for the Division of Property at Death

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ARTICLES

SPOUSAL ELECTION: SUGGESTED EQUITABLE REFORM FOR THE DIVISION OF PROPERTY AT DEATH

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INTRODUCTION

Testators have traditionally enjoyed immense discretion in directing the disposition of their wealth upon death; however, when a spouse survives the testator, public policy dictates a limitation on the testator’s ability to dispose of property. American jurisdictions impose this limitation through the elective share in common law states and by the nature of property ownership in community property states. Ideally, this limitation should ensure equitable financial protection for the surviving spouse and protect his or her interest in assets that were accumulated with the decedent, yet the current elective share methods fall short of these goals.

In common law states, a surviving spouse is statutorily protected with an elective share of the deceased spouse’s estate. This protection developed from the common law concepts of dower and curtesy. The elective share percentages and the nature of the property to which the percentage applies differ greatly from jurisdiction to jurisdiction. In jurisdictions following the Traditional Elective Share Method, the elective share is applied to net probate assets. However, current use of

1. The term ‘testator’ is used generically throughout this Article to reference a male or female person who has prepared a last will and testament.
2. Other limitations placed on the testator arise when a testator is survived by forgotten children or when the testator’s will provisions violate public policy. These limitations are beyond the scope of this Article. However, legislation in those areas provides equitable results under the pretermitted heir statutes and the slayer’s rule. See, e.g., MD. CODE ANN., EST. & TRUSTS §§ 3-301 to 3-303 (2001); N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 1999 & Supp. 2003); see also Ford v. Ford, 512 A.2d 389, 390, 392-93 (Md. 1986) (explaining the slayer’s rule); Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889) (holding that a person who murdered his grandfather was “deprived of any interest” in his grandfather’s estate).
5. At common law, curtesy gave a husband a support interest in his wife's land, provided children were born of the marriage. See id. at 479. For the historical background and development of the elective share, see discussion infra Part II.
7. See, e.g., MD. CODE ANN., EST. & TRUSTS § 3-203 (2001); see also infra Part III.A (discussing the traditional elective share statutes).
non-probate arrangements – such as revocable trusts, jointly held accounts, payable on death accounts, retirement benefits, and life insurance – as a means of transferring wealth makes the Traditional Elective Share Method insufficient. The shift in wealth transmission from probate to non-probate transfers⁸ caused a majority of jurisdictions to expand their elective share statutes to include both probate and non-probate assets via the Augmented Estate Elective Share.⁹ Although the addition of non-probate arrangements to the elective share is an improvement over the Traditional Elective Share Method, the Augmented Estate Elective Share also fails to produce equitable results.

First, like the Traditional Elective Share Method, the Augmented Estate Elective Share statutes include separate property¹⁰ and fail to allow equitable factors¹¹ to be considered in determining the surviving spouse’s financial protection. This Article suggests that a better solution is to make marital property¹² and equitable distribution a part of the election calculation in the same manner in which they apply to the division of property at divorce in common law states.

The Equitable Elective Share statute proposed in Part VI of this Article mirrors the fair and equitable division of marital property at divorce in common law states¹³ and the division of property at divorce or death in community property states.¹⁴ The premise is that the division of property at the dissolution of the marital unit should be identical, regardless of whether the termination of the marriage stems from divorce or the death of one spouse.

Although the circumstances necessitating and surrounding the division of property at divorce and death are drastically different,¹⁵ the division at

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⁸ See infra note 103 and accompanying text at (2).
⁹ See infra Part IV (discussing augmented estate elective share jurisdictions).
¹⁰ See ALI Principles of the Law of Family Dissolution: Analysis and Recommendations §4.03 (Tentative Draft No. 2, March 14, 1996) (stating that separate property is property accumulated prior to the commencement of the marriage and property acquired by gift or inheritance).
¹¹ See infra note 21 for a sampling of equitable factors.
¹² Marital property is generally all property, other than gifts and inheritances, accumulated by persons while married to each other. BLACK'S LAW DICTIONARY 873 (7th ed. abridged 2000).
¹⁴ In a community property state, the party retains his or her portion of the community property. See infra Part I.B.
¹⁵ The decedent’s absence is a significant difference. The division of property at divorce arises when both parties are alive and have decided to dissolve the marriage. The
divorce is fair and equitable. The division of property at divorce is fair because each party leaves the marital partnership with one-half of the investment; it is equitable because courts are given equitable powers to modify the property award to ensure fairness. Therefore, when the surviving spouse is making a spousal election, the same principles used for the division of property at divorce should be adopted. Just as a business partnership distributes assets upon dissolution, the marital property accumulated by the spouses during the marital partnership should be divided equitably upon its dissolution.

The proposed Equitable Elective Share statute adopts the principles used for the division of property at divorce and, in doing so, makes three significant improvements. First, the Equitable Elective Share statute factors marital property into the elective share calculation unlike the current elective share methods, which consider separate property. This distinction eliminates many of the inequitable results under the current methods. Second, the Equitable Elective Share statute builds flexibility into the elective share calculation with the discretionary use of equitable factors. Third, the Equitable Elective Share statute minimizes the impact of the decedent's inability to participate in the calculation of the spousal election with rebuttable presumptions that require the surviving spouse to carry a slightly heavier burden of persuasion. These modifications to the Uniform Probate Code's Augmented Elective Share Model will more accurately recognize the marriage as a partnership and produce fair results when the spousal election is at issue.

I. OVERVIEW OF THE MARITAL PROPERTY SYSTEMS

In the United States, there are two marital property systems: the common law property system and the community property system. Each of these systems, in its own way, allows married individuals to acquire and title property accumulated during the marriage.
A. The Common Law Property System

In the common law property system, a husband and wife separately own the property that each individual acquires. Each member of the marital unit acquires, accumulates, and may title property in his or her own name. Therefore, if one spouse is the breadwinner and the other the caretaker, the breadwinner accumulates income and retirement in his or her name, whereas the caretaker accumulates no such assets. If the marriage dissolves by divorce, there is a division of marital property, and the common law property system applies equitable principles to fairly apportion marital property that may be disproportionately titled in one spouse’s name. Factors such as separate property and length of marriage are considered when apportioning the couple’s marital property.

20. See Dukeminier & Johanson, supra note 4, at 471. In some jurisdictions, married persons may title property as tenants by the entirety, a non-probate arrangement where property passes to the surviving spouse upon the death of a spouse. See id. Property titled as tenants by the entirety may also protect the property from the creditor of one spouse. See id. at 350-51. But see United States v. Craft, 535 U.S. 274, 287-89 (2002) (holding that a federal tax lien could attach to a spouse’s interest in property held as a tenancy by the entirety).

21. See, e.g., N.Y. DOM. REL. LAW § 236 (McKinney 1999 & Supp. 2003). The New York statute provides an example of the numerous equitable factors that are taken into consideration in a common law property system when dividing marital property. Under subsection 5, concerning division of marital property, the statute states:

a. Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.
b. Separate property shall remain such.
c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.
d. In determining an equitable disposition of property under paragraph c, the court shall consider:
   (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
   (2) the duration of the marriage and the age and health of both parties;
   (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
   (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
   (5) any award of maintenance under subdivision six of this part;
   (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
   (7) the liquid or non-liquid character of all marital property;
division of marital property upon divorce is founded on community property principles and disregards the titling of assets. Courts using equitable principles consider marital property in making the division of property by reason of divorce, but common law jurisdictions do not follow these principles upon the death of a spouse.

B. The Community Property System

Community property jurisdictions ensure spousal protection at divorce or on the death of one spouse by the nature of their collective property

(8) the probable future financial circumstances of each party;
(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
(10) the tax consequences to each party;
(11) the wasteful dissipation of assets by either spouse;
(12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
(13) any other factor which the court shall expressly find to be just and proper.

E. In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court, in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

F. In addition to the disposition of property as set forth above, the court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty-four of this chapter, without regard to the form of ownership of such property.

G. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

H. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

Id.


ownership. These jurisdictions give each spouse the power to dispose of only one-half of the community property at death, thereby ensuring that the surviving spouse will be entitled to the remaining one-half.\textsuperscript{25} Community property is property accumulated during marriage by spouses of a community property jurisdiction.\textsuperscript{26} The community property system is recognized by nine jurisdictions.\textsuperscript{27} This system recognizes a sharing of assets between husband and wife; thus, there is no need for statutory protection of the surviving spouse at the death of one spouse. The community property system protects the parties at divorce, as each party is awarded his or her share of the community property. Thus, this system is equitable in the division of property at both death and divorce.

\textbf{C. The Uniform Marital Property Act}

One option available to common law jurisdictions is to follow community property principles by adopting the Uniform Marital Property Act.\textsuperscript{28} One state, Wisconsin, has done so, but this is not the best solution.\textsuperscript{29} Adopting the community property system as a solution to the inequities presented by elective share statutes is too comprehensive to fix the isolated problem presented.\textsuperscript{30} A conversion from the separate property system to a community property system would involve a number of transitional hurdles. For example, jurisdictions undergoing transition would need to grandfather existing marital wealth and provide a grace period for those dying shortly after the change. Moreover, the common law citizenry, bar, bench, and legislature are unfamiliar with

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  \item \textsuperscript{25} See DUKEMINIER \& JOHANSON, supra note 4, at 471-73. In a community property state, married persons accumulate property in undivided shares where title is not in either person individually. See id.
  \item \textsuperscript{26} See generally Anthony J. Pagano & Grace Ganz Blumberg, The Characterization and Division of Community Property, in Vol. 1, Release No. 34, VALUATION \& DISTRIBUTION OF MARITAL PROPERTY 20-1 (2003).
  \item \textsuperscript{27} The community property states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. In 1983, the National Conference of Commissioners on Uniform State Law promulgated a Uniform Marital Property Act favoring community property principles, which was adopted by Wisconsin in 1984. See WIS. STAT. ANN §§ 766.001-766.97 (West 2001 & Supp. 2002).
  \item \textsuperscript{28} See Pagano \& Blumberg, supra note 26 (citing examples of the implications of the adoption of the Uniform Marital Property Act); see also WIS. STAT. ANN §§ 766.001-766.97 (West 2001 & Supp. 2002).
  \item \textsuperscript{29} WIS. STAT. ANN. § § 766.001-766.97 (West 2001 & Supp. 2002). See Howard S. Erlanger & June M. Weisberger, From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later, 1990 WIS. L. REV. 769, 778 (noting the complexities that result in the intestate succession provisions by adopting community property principles).
  \item \textsuperscript{30} For example, intestacy laws and other areas of law outside of probate would require revision. Additionally, the transition to community property would result in considerable confusion for those unfamiliar with community property principles.
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community property principles, and the transition would cause considerable confusion.\textsuperscript{31} The better approach is to tailor the solution to the problem more narrowly by incorporating the common law's approach in divorce cases.\textsuperscript{32} The Equitable Elective Share statute follows the common law approach used in divorce cases by taking into consideration the probate and non-probate marital property of both spouses and allowing for the discretionary use of equitable factors to ensure protection for the surviving spouse.\textsuperscript{33}

II. HISTORICAL BACKGROUND AND DEVELOPMENT OF THE ELECTIVE SHARE

The elective share statutes are present only in common law jurisdictions. There is no need for statutory spousal protection in community property states because the very nature of property ownership in these states ensures protection. Historically, the economic protection for the surviving spouse in common law states was dower and curtesy. Subsequently, the Traditional Elective Share statutes developed in an effort to expand spousal protection from a life estate in real property to an outright interest in real and personal property. Finally, due to a revolution from probate to non-probate ownership, Augmented Estate Elective Share statutes were enacted to include probate and non-probate assets in the elective share calculation.

A. Dower and Curtesy

Like much of the common law throughout the United States, the legal protection for a surviving spouse at the death of his or her spouse can be traced to England. Individual states in America adopted the English concepts of dower\textsuperscript{34} and curtesy\textsuperscript{35} to protect the surviving spouse at the

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  \item \textsuperscript{31} See Erlanger & Weisberger, supra note 29 (noting the need for several amendments by Wisconsin to "ensure a smooth transition and implementation of the marital property system").
  \item \textsuperscript{32} See infra Part VI (discussing the proposed equitable elective share statute).
  \item \textsuperscript{33} See discussion infra Part VI.
  \item \textsuperscript{34} See Dukeminier & Johanson, supra note 4; see also G. Michael Bridge, Note, Uniform Probate Code Section 2-202: A Proposal To Include Life Insurance Assets Within the Augmented Estate, 74 CORNELL L. REV. 511, 513 (1989). Bridge observed:

    Originally, dower meant the right of a wife to remain in her husband's house, specifically, a "right to a seat by the hearth." During the Anglo-Saxon period in England, from the fifth to the tenth century, dower became a more specific right of the widow to a share of the deceased husband's property. If the husband had not made a specific dower gift, the law gave his widow an absolute share, generally one-third in an undivided portion of her husband's real property.

    \textit{Id.} (footnotes omitted).
\end{itemize}
death of his or her spouse. Dower protected the wife, while curtesy was the protection extended to the husband.

Until the middle of the nineteenth century, married women in the United States were deprived the right to control property. The husband and wife were treated as one person in the eyes of the law, and that person was the husband. While a single woman could own land, transfer it, and keep any income and rents from her real property, a married woman could not. Upon marriage, all lands, incomes from those lands, and the right to devise land automatically transferred from the wife to her husband. Land that once belonged to the wife could only be transferred by her husband, and upon his death, would transfer to their children, not back to her. In addition, creditors of the husband could attach the wife’s property. In essence, the wife ceased to be an entity in her own right and instead had to “render obedience, domestic service and submission to her husband – duties analogous to the relation of a vassal to his lord.”

As a result, upon the husband’s death, it became necessary for the law to protect the widow and her children from being evicted from their home without any means of support.

Dower rights were established to protect the widow’s rights. Over the centuries, dower developed from the right of a wife to remain in her husband’s house to a law that entitled the widow to an absolute share of one-third of the undivided portion of her spouse’s real property. Without the wife’s consent, the husband could not alienate the wife’s dower interest, nor could it be used to satisfy her husband’s debt.

As America moved forward from an agrarian society to an industrial nation, the principal form of wealth changed from real property to other forms, thus taking away many widows’ security in having a life estate in land. During this time, wealthy single women were discouraged from

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35. See BLACK’S LAW DICTIONARY 389 (7th ed. 1999) (“At common law, [curtesy was] a husband’s right, upon his wife’s death, to a life estate in the land that his wife owned during their marriage, assuming that a child was born alive to the couple.”).


37. See Margaret Valentine Turano, UPC Section 2-201: Equal Treatment of Spouses?, 55 ALB. L. REV. 983, 988 (1992) (quoting Peggy A. Rabkin, The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and Its Contribution to the Passage of the Early Married Woman’s Property Acts, 24 BUFF. L. REV. 683, 752 (1975)). Ms. Turano quotes from 1 WILLIAM BLACKSTONE, COMMENTARIES, in which Mr. Blackstone, in describing the role of the wife in early common law marriages, states: “The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything.” Id. at 988.

38. Bridge, supra note 34, at 513.
marriage, and wealthy fathers were reluctant to designate daughters as beneficiaries of their estates. Wealth changes from real property to other forms of property mandated the establishment of a number of equitable rules designed to protect married women. This development allowed married women to retain some control of real property while diminishing the amount of control extended to the husband. Beginning in 1835, all common law property states eventually adopted the Married Women's Property Acts. As a result of the adoption of the Married Women's Property Acts, dower was completely eliminated by statute in most of the United States. Some version of dower remains in only a few states; these states generally allow the surviving spouses to choose between dower and a statutorily defined elective share of assets.

39. Id. at 515.


41. The reasons for abolishment were numerous. Notably, dower and curtesy were abolished for the following reasons: they diminished the alienability of land; made it difficult for title examiners to clear title; went against public policy in light of the growing recognition of women's property rights; and were antithetical to the evolution away from land's status as the principal source of wealth in the United States. See Cunningham et al., The Law of Property 75 (2d ed. 1993); see also Bridge, supra note 34, at 514-15. Bridge elaborates on the reasons for the trend to abolish dower. See id. On the subject of alienability, he explains that in order to remove the threat of dower, a seller would have to obtain his wife's formal consent to sell her land. See id. at 514. The wife could refuse to consent for any number of reasons, and because a widow could assert dower at any stage in the chain of title, dower caused particular hardships for title examiners. See id. The author also states that as women's rights grew, public policy shifted to acknowledge that the widow was at least entitled to a share of her husband's property, and as land no longer represented the principal source of wealth, the protection due to the wife should extend beyond real property to include personal property. See id.; see also 2 R. Powell, Real Property § 213 (incl. 1982 Supp.).


The surviving husband or wife of a deceased person, except as provided in section thirty-six of chapter two hundred and nine, within six months after the probate of the will of such deceased, may file in the registry of probate a writing signed by him or by her, waiving any provisions that may have been made in it
Common law curtesy rights entitled a surviving husband to a life estate in all of the wife’s land upon her death provided there were children born of the marriage; thus, the husband’s curtesy interest sprang into existence only if the couple had a child capable of inheriting the property. Most states have statutorily abolished curtesy rights.

Id. The surviving spouse, however, may not take under both. See Mass. Gen. Laws, ch. 191, § 17 (West 1990 & Supp. 2003) (“A husband shall not be entitled to his curtesy in addition to the provisions of his wife’s will, nor a widow to her dower in addition to the provisions of her husband’s will, unless such plainly appears by the will to have been the intention of the testator.”); see also Singer, supra note 36, at 378 n.22.


States that abolished dower and curtesy first adopted Traditional Elective Share statutes, allowing a surviving spouse to take a fixed share, anywhere from one-third to one-half, of the decedent’s net probate estate. The Traditional Elective Share statutes do not protect a spouse from an intentional disinheritance with non-probate tools; therefore, most states have adopted Augmented Estate Elective Share statutes, expanding the assets to which the spousal election applies.

B. The Elective Share

Initially, the Traditional Elective Share statutes were designed to reflect a duty of support that arose at the time of marriage. The Augmented Estate Elective Share statutes, however, reflect the partnership theory of marriage. Common law jurisdictions attempt to achieve fairness at divorce with the concept of marital property and equitable factors.


48. See Bridge, supra note 34, at 522. The UPC Augmented Estate Elective Share includes the decedent’s probate estate, as well as all transfers that were made during the decedent’s lifetime, over which the decedent had dominion and control in the form of possession or enjoyment; right to income; or power to revoke, invade, or dispose of for his own benefit. See id.; see also infra Part IV (discussing the augmented estate elective share jurisdictions).
This Article suggests that elective share statutes should be consistent with the division of property at divorce, narrow the marital assets to which the election applies, and allow for the consideration of equitable factors. With these amendments, the elective share statutes will implement the support and partnership theories, provide protection, and more often achieve equitable outcomes.

1. The Support and Partnership Theories

The elective share statutes are based on title of separate property and reflect a support duty or the partnership theory, whereas a division at

49. The basis for the incorporation of the support duty is that the spouse's duty of support should continue in some form after death in favor of the survivor. The duty of support is founded upon status and arises at the time of marriage. In Georgia, the award to the spouse is based on his or her status regardless of whether or not the decedent spouse was providing support. See Gentry v. Black, 342 S.E.2d 731 (Ga. Ct. App. 1986). Moreover, the twelve-month period of support is generally tied to an amount requested by the spouse in his or her petition. See GA. CODE ANN. § 53-5-2 (Michie 1997). The pertinent section states:

(a) Among the necessary expenses of administration, and to be preferred before all other debts, except as otherwise specially provided, is the provision for the support of the family, to be ascertained as provided in this Code section.
(b) Upon the death of any person testate or intestate, leaving an estate solvent or insolvent and leaving a spouse, or a spouse and minor child or children, or minor child or children only, on the application of the spouse, the guardian of the child or children, or any other person in their behalf, proceedings shall be held to set apart and assign to the spouse and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of 12 months from the date of death of the testator or intestate, to be determined using the criteria established in subsection (c) of this Code section and keeping in view also the solvency of the estate. If there is a spouse, there shall also be set apart for the use of the spouse and the children a sufficient amount of the household furniture. Notwithstanding any other provisions of this Code section, the amount set apart for the family shall in no event be less than the sum of $1,600.00 if the estate is of that value; and, if it appears upon a just appraisement of the estate that it does not exceed in value the sum of $1,600.00, excluding household goods and furnishings, the whole estate shall be set apart for the support and maintenance of the spouse and child or children or, if no surviving spouse, to the lawful guardian of the child or children, for their benefit; provided, however, that all taxes and liens for taxes accrued against the property set apart, and any equity of redemption applicable to the property set apart, shall be divested as if the entire title were included in the year's support.
(c) The amount to be set apart under subsection (b) of this Code section shall be an amount sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the testator or intestate, taking into consideration the following:
(1) The support available to the person, for whom the property or money is to be set apart, from sources other than a year's support, including but not limited to the principal of any separate estate and the income and earning capacity of that person; and
divorce ignores title and focuses on what is accumulated during the marriage. Focusing on marital property truly implements the marital partnership theory, which is fair and equitable.

Support-based statutes attempt to provide sufficient assets for support and maintenance of the surviving spouse. The duty of support arose by mere status of the marriage and came about when the elective share was replacing the common law concepts of dower and curtesy. At that time, most families included a male breadwinner and a female caretaker, and wealth was accumulated in the husband's name alone. It was believed that, in the event of the death of the breadwinner, protection was necessary for the caretaker.

Partnership-based statutes recognize that a surviving spouse deserves a portion of the decedent's estate as compensation for his or her non-monetary contributions to the marriage. The partnership theory is consistent with the Equitable Elective Share statute, which entitles the surviving spouse to "one-half of the economic gains of the partnership."6

C. Fair and Equitable Distribution of Property at Divorce

Common law states statutorily govern the fair and equitable distribution of the marital property upon divorce. For example, in

(2) Such other relevant criteria as the court deems equitable and proper. The applicant for a year's support shall have the burden of proof in showing the amount necessary for a year's support.

Id.

50. See Susan N. Gary, Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution, 49 U. MIAMI L. REV. 567, 572 (1995) (explaining that "marriage is an economic partnership to which both spouses contribute productive effort, and each spouse is entitled to one-half of the economic gains of the marriage"); see also MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 131 (1989) ("The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of 'as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike.'"). Under the partnership 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 normally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise as "a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost." Id.

51. ABRAHAM M. MORA, UNIFORM PROBATE CODE REVISED, SPOUSES' RIGHT, ESTATE PLANNING Vol. 19, No. 3 n. 11 (1992); see also DUKEMINIER & JOHANSON, supra note 4, at 480-84.

52. See Gary, supra at note 50, at 572.
Maryland, it is state policy to “adjust the property interests of spouses fairly and equitably upon the dissolution of their marriage and to give careful consideration to both monetary and non-monetary contributions by the spouses to the well-being of the family.” These same interests should be promoted at death.

While statutes governing a fair and equitable distribution of marital property at divorce vary in nature, they generally: (1) determine which property is marital property, (2) determine the value of the marital property, and (3) grant a monetary award “as an adjustment of the parties’ ‘equities and rights’ concerning marital property, whether or not alimony is awarded.” In making this determination, the court will take into consideration a number of factors, such as:

53. See Bender v. Bender, 386 A.2d 772, 778 n.7 (Md. 1978). In Bender, the divorced wife appealed a determination by the Circuit Court that she was not entitled to any alimony or the furniture and antiques that were located in the marital home. See id. at 774.

We today conclude that in the case of household goods and furnishings acquired for the use of the family in contemplation of or after marriage, the mere fact that the funds used for the purchase belonged to one or the other of the spouses does not result in the furnishings in question being owned solely by that spouse. It is to be presumed in such a case that the purchasing spouse made a gift of the property to the marital unit, creating ownership by the entireties in the husband and wife, absent proof demonstrating sole ownership in one of the marital partners. We do not, and could not, decide that a portion of one spouse’s property may be awarded to the other; we simply adopt what we view as a more suitable aid to determining who in fact owns furnishings purchased during the marriage for the use of the family unit at the marital home.

Id. at 778. At the time of this decision, the current governing statute went “no further than to empower a court of equity, in decreeing a divorce, to determine the ownership of the personal property of the parties and to apportion the property accordingly.” Id. at 778 n.7. However, the court stated:

It should be noted that the General Assembly at its 1978 session passed legislation which substantially alters the quoted provisions of section 3-603(c), and in doing so announces it to be this State’s policy to adjust the property interests of spouses fairly and equitably upon the dissolution of their marriage, and to give careful consideration to both monetary and non-monetary contributions by the spouses to the well-being of the family.

Id. at 778 n.7 (citations omitted); see also Hagin v. Hagin, 353 So.2d 949, 951 (Fla. Dist. Ct. App. 1978); Carter v. Carter, 616 S.W.2d 543, 545 (Mo. Ct. App. 1981).

54. See Ward v. Ward, 449 A.2d 443, 445 (Md. Ct. Spec. App. 1982). The divorced spouses were married in 1956, separated in 1976, and divorced in 1980. See id. at 444. They did not have any children during the marriage. See id. The trial court judge disposed of certain marital property and awarded Mrs. Ward $10,000 in substitution for her one-half interest in the marital home. See id. at 444-45. Mrs. Ward appealed, stating that the court had misconstrued and misapplied the statute. See id. at 445. The court agreed, stating that “in effect, the award transferred ownership of the property from one spouse to the other,” an act which is not allowed by statute. Id. The statute states that the court may make a monetary award after considering the contribution of both spouses. Id. This includes both monetary and non-monetary contributions. Id. The court stated:
The contributions, monetary and non-monetary, of each party to the well-being of the family; (2) the value of all property interests of each party; (3) the economic circumstances of each party at the time the award is to be made; (4) the circumstances that contributed to the estrangement of the parties; (5) the duration of the marriage; (6) the age of each party; (7) the physical and mental condition of each party; (8) how and when specific marital property or interest in the pension, retirement, profit sharing, or deferred compensation plan, was acquired, including the effort expended by each party in accumulating the marital property or the interest in the pension, retirement, profit sharing, or deferred compensation plan, or both; (9) the contribution by either party of [the marital property]... to the acquisition of real property held by the parties as tenants by the entirety; (10) any award of alimony and any award or other provision that the court has made with respect to family use [of] personal property or the family home; and (11) any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award or transfer of an interest in the pension, retirement, profit sharing, or deferred compensation plan, or both.  

Like the fair and equitable distribution of property at divorce, the Equitable Elective Share statute is based on marital property. The monetary award is designed to accomplish an equitable division of the marital property in an indirect manner. The statute does not require an equal division of marital property, nor does it contemplate too harsh a decretal award. The clear intent is to counterbalance any unfairness that may result from the actual distribution of property acquired during the marriage, strictly in accordance with its title.

Id. (citations omitted). The court went on to state:

[If an equitable adjustment over and above the distribution of the spouse's property in accordance with its title is an issue, the court shall determine which property is marital property... [T]he court shall then determine the value of all marital property... [F]inally, the court may make a monetary award as an adjustment of the parties' "equities and rights" concerning marital property, whether or not alimony is awarded. If an award is deemed appropriate, the court shall then consider each of the nine factors enumerated in § 3-6A-05(b) in determining a fair and equitable amount and the method of its payment.


55. MD. CODE ANN., FAM. LAW § 4-204 (1999 & Supp. 2002); see also supra note 21 (providing an example of the equitable factors taken into consideration by the New York statute).
spousal election in the amount of one-half of the marital property eliminates the need for a phase-in provision, and because marital assets are those accumulated during the marriage, the statute automatically makes fair distinctions between long-term and short-term marriages. States following the Traditional or Augmented Estate Elective Share Methods should evaluate the shortcomings of their present laws and consider amendments that, like the Equitable Elective Share statute, would bring their elective shares in line with the division of property at divorce.

III. TRADITIONAL ELECTIVE SHARE JURISDICTIONS

Although it attempts to protect surviving spouses, the Traditional Elective Share Method presents many problems. For example, jurisdictions following the Traditional Elective Share Method do not statutorily ensure support or protect a surviving spouse from disinheritzance. Furthermore, common law modifications to the Traditional Elective Share statutes impose hurdles for the surviving spouse to overcome and make estate planning very difficult.

A. Traditional Elective Share Statutes

A minority of jurisdictions follow the Traditional Elective Share Method, which attempts to protect a surviving spouse with an elective share that is based on a fixed percentage of the decedent’s net “[Probate] Estate.” At the decedent’s death, his or her Probate Estate includes property titled in the decedent’s individual name. The surviving spouse is generally entitled to this amount outright; in Connecticut, however, the surviving spouse is only entitled to a life estate in his or her statutory share of probate assets.

56. See discussion infra note 111. The phase-in provision incorporated in the UPC Model provides for a statutory percentage based solely on the length of the marriage. See, e.g., Unif. Probate Code § 2-202 (1990). For example, section 2-202 makes an arbitrary distinction between a marriage of fourteen years, eleven months, and twenty-nine days and a marriage of fifteen years. The one-day difference changes the elective share percentage by four percent. See id.

57. See supra note 46.

58. See Md. Code Ann., Est. And Trusts § 3-203 (2001) (stating that “instead of property left to him 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”); see also Md. Code Ann., Est. And Trusts § 1-101(p) (2001) (defining the net estate as the “property of the decedent exclusive of the family allowance and enforceable claims against the estate” without a reduction for taxes).

The Traditional Elective Share Method of spousal protection is insufficient for many reasons. For example, it fails to protect the spouse from complete disinheritance, which can be accomplished through non-probate arrangements – such as living trusts, life insurance, joint ownership, and retirement – to people other than the surviving spouse. Additionally, this Method gives a windfall to the surviving spouse of a short-term marriage, in a marriage with unequal premarital wealth, or when the surviving spouse inherits through non-probate arrangements. This Method is also inconsistent with the equitable distribution of property at divorce and with the division of property in a community property state. Moreover, the inconsistency between the division of property at divorce and the division of property at the death of one spouse could encourage parties to obtain a divorce from which he or she would benefit financially.

In a Traditional Elective Share jurisdiction, the surviving spouse is exposed to a substantial risk of disinheritance. For example, disinheritance could be accomplished if the deceased spouse created a revocable trust funded with $1,500,000 of assets that were accumulated during the marriage where the trust terms fail to provide for the decedent’s surviving spouse. The Traditional Elective Share statute provides no protection against this disinheritance. Case law in some

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Past, Present and Future, 1990 Wis. L. REV. 807, 850-51 (discussing the historical development of Connecticut’s marital property law). Similarly, Georgia provides no elective share; instead, only on application, it provides for twelve months of support. GA. CODE ANN. § 53-5-2 (Michie 1997); see also supra note 49. Thus, Connecticut and Georgia provide minimal protection for a surviving spouse.

60. See Part I.B (discussing the community property system); see also Principles, supra note 22 (noting that the elective share represents the most significant distinction between common law and community property principles).

61. If the elective share statute provides the surviving spouse with less protection than he or she would have received had the couple divorced, this result could encourage divorce and violate public policy. See Fineman v. Central Nat’l Bank, 175 N.E.2d 837, 841 (Ohio Ct. App. 1961); see also Capps v. Capps, 219 S.E.2d 901, 903 (Va. 1975). The division of property at the death of a spouse is the most significant distinction between community property and common law jurisdictions. See Principles, supra note 22.

62. See, e.g., Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984) (holding that the surviving spouse of the decedent had no right to elect against the decedent’s inter vivos trust).

63. See id. In this case, the decedent’s will stated that he “intentionally neglected to make any provision for [his] wife, Mary A. Sullivan” with a “pour over” provision to his inter vivos trust after the payment of debts and taxes. See id. at 573. The court denied the spouse’s claim against the revocable trust assets. See id. at 578. In dicta, the court declared that for revocable trusts dated after the opinion, the assets of such trusts, for which the decedent alone retained power during life to direct the disposition of assets, would be included as part of the decedent’s estate for purposes of the surviving spouse’s elective share. See id. at 577. Unfortunately, Mary A. Sullivan was left unprotected. See
jurisdictions provides limited protection by permitting the surviving spouse to reach non-probate assets, provided the decedent maintained "dominion and control" over the assets. The case law, however, is sparse and unclear.

id. This case prompted legislative change. See MASS. ANN. LAWS ch. 191, § 15 (West 1990 & Supp. 2003). The case notes explain:
As to inter vivos trust created or amended after January 23, 1984, estate of decedent for purposes of GL c 191 § 15 shall include value of assets held in inter vivos trust created by deceased spouse as to which deceased spouse alone retained powers during his or her life to direct disposition of trust assets for his or her benefit as by, for example, exercising general power of appointment or by revoking trust.


64. See Knell v. Price, 569 A.2d 636, 641 (Md. 1990). In Knell, the decedent, who had been separated from his wife for twenty-seven years, transferred real property through his attorney acting as a strawman and retained for himself a life estate with the "full power unto him to sell, mortgage, lease, convey and dispose (except by Last Will and Testament) of the whole and entire estate." Id. at 637. The remainder interest in the real property was deemed to transfer "unto and to the use of Anabelle Price, her heirs and assigns, in fee simple." Id. The court held that the real property was subject to Mrs. Knell's elective share; in so holding, the court stated:

[[I]t is perfectly clear that Mr. Knell retained control of the property during his lifetime by establishing a life estate in himself with unfettered power in him, while living (except by will), to dispose of all interests in the property in fee simple. He did not part with the absolute dominion of the property during his life. His conveyance, through a strawman, of the remainder of the property was not complete, absolute, and unconditional. The law pronounces this to be a fraud on the marital rights of Mrs. Knell. His reluctance to relinquish control over the disposition of the property during his lifetime defeated his intention.


65. The Maryland General Assembly has not prompted legislative change in light of Knell despite repeated efforts by the Maryland State Bar Association to receive clarification. See H.B. 265, Gen. Assem. Reg. Sess. (Md. 2000); H.B. 665, Gen. Assem. Reg. Sess. (Md. 1997). Knell presented unique facts, such as the involvement of the decedent's attorney as a strawman in the decedent's efforts to disinherit his estranged spouse. See Knell, 569 A.2d at 641. Moreover, Mr. and Mrs. Knell had been separated for twenty-seven years at the time of the conveyance, and the real property was purchased with separate funds and accumulated by Mr. Knell well after the parties went their separate ways. See id. at 636-38. In awarding Mrs. Knell one-third of the decedent's property, the court in Knell seemed to focus exclusively on the fact that Mr. Knell had not parted with "absolute dominion and control" and deemed this factor a per se fraud on marital rights. See id. at 640-42. This case provides no clarification for other non-probate assets such as joint ownership, life insurance, or other multiple party accounts. See id.; see also Md. CODE ANN., FIN. INST. § 1-204 (1998 & Supp. 2002). Moreover, section 3-203 of the Maryland Code fails to include any reference to Knell in its annotations to net probate assets. See MD. CODE ANN., EST. AND TRUSTS § 3-203 (2001). The failure to articulate a clear position further suggests the ambiguity and need for clarification in the Maryland statute and case law.
To reach non-probate assets in some Traditional Elective Share jurisdictions, the surviving spouse may have to prove fraud. Some jurisdictions statutorily provide that a surviving spouse may reach non-probate assets if the inter vivos transfer was fraudulent. In an effort to avoid the abuses permitted by the Traditional Elective Share Method, common law doctrines were developed for a surviving spouse to defeat the intentional disinheritor's use of lifetime transfers and will substitutes. Specifically, courts have looked at whether the transfer was illusory.


67. See, e.g., Allender v. Allender, 87 A.2d 608 (Md. 1952). In 1935, the decedent, a widower with four adult children, married Fay S. Hobby, a widow with one child. See id. at 609. They resided in his home in Westminster, Maryland until his death in 1951. See id. Mr. Allender was the secretary-treasurer and manager of the Key Grain and Feed Company and owned 369 out of 1017 shares of its outstanding stock. See id. In 1949, the decedent transferred his 369 shares to the books of the corporation, surrendering his certificates and ordering four new certificates issued. See id. Three of these certificates were in the amount of ninety-two shares per certificate, and the fourth certificate was issued for ninety-three shares. See id. Each child of the decedent received a certificate, but it was jointly held with the decedent, with a right of survivorship. See id. However, “none of the beneficiaries were [sic] informed of the transfers . . . until after Mr. Allender’s death.” Id. Mr. Allender received all dividends from the stocks and voted in person on the entire 369 shares at the stockholders’ meetings in 1949 and 1950. Mr. Allender’s widow filed suit to have the transfer of shares set aside because there was “no delivery, acceptance, relinquishment of dominion or effective transfer of the shares.” Id. The court held that the transfer was not illusory and that the surrender of the old certificates and the issuance of new ones were sufficient to substantiate a transfer of the donor’s interest. See id. at 612. The court added that even though the decedent voted on the shares, he could not have legally rescinded the transaction or transferred the certificates without the consent of the co-owners. See id. at 611. As a result, the stocks were not considered part of the decedent’s estate for elective share purposes. See id. at 612; see also Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937). In Newman, Ferdinand Straus, an octogenarian, had been married to his thirty-year-old wife for the four years prior to his death. See Newman, 9 N.E.2d at 967. However, immediately prior to his death, Mr. Straus became unhappy with the marriage, and three days before his death, he transferred all of his real and personal property to an inter vivos trust for the benefit of himself as well as his children from another marriage. See id. Under the trust terms, the decedent retained the right to income for life, the power to revoke the trust, and substantial managerial powers. See id. at 968. The decedent’s widow challenged the validity of the trust, and the court held that the trust was illusory because the decedent had retained excessive control over the trust property. See id. Therefore, the trust property was part of the probate estate. See id. at 969. As these cases illustrate, the main question under this doctrine is whether the transferor had in good faith divested himself of the ownership of his property or whether he had retained too much control over the property. See id.
whether the decedent's intent was fraudulent, and whether the transfer was testamentary.

Fraudulent intent statutes, along with the various doctrines that developed in tandem with the Traditional Elective Share statutes, are not sufficient to protect against spousal disinheritance. These judicial doctrines are equally inadequate to protect the surviving spouse because they lack predictability and breadth; they also turn on the specific facts of each individual case. Additionally, in order to reach non-probate arrangements, the surviving spouse must be advised of the possibility of obtaining additional assets. If the surviving spouse is advised of his or

68. See Methodist Episcopal Church of Emory Chapel v. Hadfield, 453 A.2d 145, 149 (Md. 1982). In Hadfield, May Starr Hadfield brought suit against the Methodist Episcopal Church of Emory Chapel (the Church) to set aside a fraudulent conveyance, claiming that she was “unable to include the marital residence in the estate because her husband had conveyed the home to [the Church] to defraud her of her marital rights.” Id. at 146. During the couple’s marriage from 1972 until Mr. Hadfield’s death in 1980, they lived in the house Mr. Hadfield had inherited from his first wife, which was titled in his sole name. As a result of marital problems, Mr. Hadfield, without his wife’s knowledge, “signed a deed conveying a remainder interest in their home to the Church, reserving for himself a life estate with full powers ‘to sell, mortgage, or otherwise dispose’ of the property within his lifetime, without the joiner of the Church.” Id. (footnote omitted). In deciding whether this transfer was a fraudulent conveyance, the court stated:

In Maryland, the completeness of the transfer and the extent of control retained by the transferor, the motive of the transferor, participation by the transferee in the alleged fraud and the degree to which the surviving spouse is stripped of his or her interest in the estate of the decedent spouse have all been considered material, and no one test has been adopted to the exclusion of all other tests. . . . [T]here are several other factors which have been or may be considered as pertinent, such as the relative moral claims of the surviving spouse and of the transferees, other provisions for the surviving spouse, whether or not he or she has independent means and the interval of time between the transfer and the death of the transferor.

69. See Bridge, supra note 34, at 518. The testamentary doctrine is used to challenge the substance of non-probate transfers, arguing that the real transfer occurs at death and is thus testamentary. See infra note 90 (discussing the real owner of joint bank accounts).

70. See Bridge, supra note 34, at 521. Bridge stated that in Sherrill v. Mallicote, 417 S.W.2d 798 (Tenn. Ct. App. 1967), the court held that “proof of an intent to defeat the surviving spouse’s share is not always dispositive because the decedent may have intended to defeat the surviving spouse’s share because he had already provided for her.” See id. at 520-21. The court stressed the importance of considering the actual transfer. See id. at 521. However, other courts ignore the effect of a transfer if they find that the decedent intended to defeat the surviving spouse’s share. See Knell, 569 A.2d at 638.

71. For example, in Maryland, the Traditional Elective Share statute addresses the “net estate,” but case law may not provide sufficient guidance in this area; therefore, the surviving spouse may be ill-advised as to the assets to which the election applies. Maryland case law, for instance, holds that the transfer must be complete, absolute, and unconditional; otherwise, the “law pronounces [the transfer] to be a fraud on . . . marital rights.” Knell, 569 A.2d at 642 (involving the decedent’s transfer of a remainder interest in
her rights to claim against additional assets, he or she must fund the suit and hold a position where he or she can financially withstand the cost of losing. These risks, burdens, and costs may discourage a surviving spouse from pursuing his or her rights.\footnote{72}

In addition to these problems, the Traditional Elective Share statutes may provide a windfall for the surviving spouse of a short-term marriage. The Traditional Elective Share Method fails to distinguish between a marriage of five months and a marriage of fifty years. For example, assume a second marriage where each party had premarital wealth of $500,000, adult children from prior marriages, and no pre-nuptial or post-nuptial agreement in place.\footnote{15} After marrying, each spouse executed a will providing for his or her biological children. When one spouse dies, the surviving spouse will be entitled to elect against the decedent’s will and receive a fixed percentage of the decedent’s estate, thus limiting the deceased spouse’s children to the remaining portion. The percentage received by the surviving spouse, along with his or her other assets, may pass under the surviving spouse’s will to his or her children to the exclusion of the deceased spouse’s children.\footnote{4}

real property through his attorney as a strawman). If a scenario involves a joint bank account or life insurance contract, an attorney’s advice may be that Knell is inapplicable to those facts. At a minimum, the attorney should advise the client as to the risks involved in taking the case, and he or she would not be negligent for rendering such advice.

72. The surviving spouse may not have the financial ability to pursue this action because of the risks, burdens, and costs associated with such cases. It is unclear whether a case would be taken on a contingency basis. However, the rules of ethics do not prohibit an attorney from taking this kind of case on a contingency basis. \textit{See} Model Rules of Prof’l Conduct 1.5(c) (2002).

73. A pre-nuptial agreement is “an agreement entered into between a man and a woman in contemplation of marriage. Such an agreement usually attempts to fix the character of the property acquired by them or either of them during marriage and the rights [in the event of death or divorce] each of them will have in such property.” \textit{John R. Price, Price on Contemporary Estate Planning,} Glossary (2d ed. 2000). Post-nuptial agreements are defined as follows:

A post-nuptial agreement is a contract entered into after marriage by a husband and wife generally involving the property or property rights of the parties. While post-nuptial agreements between a husband and wife concerning property rights and interests were void and of no effect under the common law, they were valid and enforceable in equity, and under the Married Women’s Property Acts, are presumed valid today. Generally, spouses may divide their property presently and prospectively by a post-nuptial agreement, even without its being incident to a contemplated separation or divorce, provided that the agreement is free from fraud, coercion or undue influence, that each party acted with full knowledge of the property involved and his or her rights therein, and that the settlement was fair and equitable.


74. The surviving spouse is free to change his or her will after the death of the spouse, provided he or she has the testamentary capacity to do so. \textit{See Dukeminier & Johanson, supra} note 4, at 276-328.
The Traditional Elective Share statutes also permit a windfall in marriages where the decedent has greater premarital wealth than the surviving spouse. For example, in a marriage where the decedent has premarital wealth in the amount of $1,000,000, the premarital wealth is subject to the spousal election. This outcome encourages parties to contract around the spousal election in order to achieve fair results.

Furthermore, if the deceased spouse uses non-probate arrangements to provide for his or her surviving spouse, the surviving spouse is nonetheless entitled to the fixed percentage of probate assets. Thus, the Traditional Elective Share Method fails to offset the elective share with non-probate assets, which gives the surviving spouse a windfall. For example, if the deceased spouse, in addition to his or her $500,000 of probate assets, has designated the surviving spouse as the beneficiary of a $1,000,000 life insurance policy, the surviving spouse is entitled to a percentage of the probate assets in addition to the insurance proceeds. Thus, there is a windfall because the non-probate assets do not offset the Traditional Elective Share amount.

The proposed Equitable Elective Share statute incorporates non-probate arrangements that are created or funded with marital property in the calculation, thus eliminating the risk of disinheritance with this form of ownership. The Equitable Elective Share statute’s focus on marital property as opposed to separate property also eliminates the potential windfall favoring the surviving spouse of the short-term marriage, the surviving spouse who has been adequately provided for with non-probate assets, or where the decedent has brought greater premarital wealth to the marriage. The Equitable Elective Share statute may also minimize the use of pre-nuptial and post-nuptial agreements because the statute itself achieves fairness.

B. Clarification Needed for Estate Planning

The Traditional Elective Share statutes are challenging for the estate-planning lawyer. In a Traditional Elective Share jurisdiction where the client has accumulated probate and non-probate wealth, if an individual's estate-planning objective is to provide the statutory minimum for a surviving spouse, the attorney cannot precisely advise the client of that amount. The Traditional Elective Share statutes are focused exclusively on probate assets; therefore, the only safe method of estate planning is accomplished with a will, which disposes of probate assets. This safe-harbor approach discourages a client from implementing non-probate

75. See, e.g., UNIF. PROBATE CODE § 2-209(a)(1) (amended 1993) (noting that non-probate transfers to the surviving spouse “reduce or eliminate” his or her elective share amount).
arrangements in estate planning and foregoes the significant advantages associated with non-probate arrangements. 76 Unless released or waived by contract, 77 the elective share is an absolute right given to the surviving spouse that may or may not be exercised at the death of one’s spouse. The elective share, based on a percentage of probate assets, produces unfair outcomes, despite common law authority that the elective share may incorporate revocable trusts 78 and a life estate with powers. 79 It remains unclear as to whether life insurance, joint accounts, payable on death accounts, or retirement arrangements 80 are available for the surviving spouse to elect against, or whether these arrangements should offset the elective share.

The Traditional Elective Share piecemeal approach, involving a statute that provides the elective share against probate assets and case law that expands the applicable pool of assets, also creates problems in the federal estate tax arena. For example, under Internal Revenue Code section 2056, a marital deduction is available against property included in the decedent’s gross estate for property that passes at death to the surviving spouse. The regulations “provide that the ‘passing’ requirement is met where the surviving spouse receives property from an election to take against the will . . . in ‘bona fide recognition of enforceable rights of the surviving spouse in the decedent’s estate.’” 81

Suppose a decedent died in a Traditional Elective Share jurisdiction and had no probate assets because all assets had been transferred to a revocable trust for the benefit of adult children. In addition, suppose the decedent owned a $2,000,000 life insurance policy where he designated his paramour as the beneficiary. If the surviving spouse filed an election against the will, she would receive no protection from the applicable

76. Some of the perceived advantages of using revocable trusts as a probate avoidance technique are reduced administration costs, minimal delays with regard to asset transfers, privacy, choice of law, lack of judicial supervision, and avoiding will contests. See DUKEMINIER & JOHANSON, supra note 4, at 389-94. The advantage of life insurance is that it provides needed liquidity. See PRICE, supra note 73, at § 6.1. The advantage of tenancies by the entireties is that they generally shelter assets from one party’s creditors. See id. § 3.12.4. But see United States v. Craft, 535 U.S. 274, 287-89 (2002) (stating that tenancy by the entirety does not protect against federal tax liens).

77. PRICE, supra note 73 (discussing agreements that govern the elective share).


80. But see Employee Retirement Income Security Act, 29 U.S.C. § 1055(c) (mandating that in order for a non-spouse to be designated beneficiary on a federal retirement account, a waiver must be in place).

statute. Instead, she would be forced to litigate the matter under a fraud on marital rights theory and bear the risks, burdens, and costs of litigation. A settlement in favor of the spouse's elective share would likely be based on the federal estate tax savings of the marital deduction\textsuperscript{82} and the costs of litigation. However, the Internal Revenue Service could deny the marital deduction despite the settlement, based on its position that the statute does not permit an election against the revocable trust or the life insurance policy. Thus, the settlement would not be a "bona fide recognition of the spouse's enforceable rights."\textsuperscript{83} This potential result demonstrates that statutory guidance is necessary for clarification in the Traditional Elective Share jurisdictions.

The Traditional Elective Share statutes permit disinheriance with the use of non-probate arrangements; allow for windfalls in situations of short-term marriages or in marriages with unequal premarital wealth; and create problems from an estate-planning perspective. The Traditional Elective Share statutes give no consideration to the surviving spouse's independent wealth and do not offset the elective share with non-probate transfers to the surviving spouse. In light of the options available to individuals with respect to property ownership,\textsuperscript{84} the Traditional Elective Share statutes are inconsistent with the support duty, partnership theory of marriage,\textsuperscript{85} and property division at divorce.\textsuperscript{86} The distinct differences in how property is divided at death and divorce within the same jurisdiction\textsuperscript{87} warrant the need for change. The Traditional Elective Share states should amend their elective share statutes to mirror the principles used for the division of property at divorce.

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82. The marital deduction is a deduction allowed upon the transfer of property from one spouse to another. See I.R.C. § 2056 (West 2002).
84. Some examples of property ownership include joint ownership, tenancy by the entireties, revocable trusts, life insurance, and annuities.
86. See In re Estate of Kamen, 607 N.W.2d 32, 36 (S.D. 2000); see also Lawrence W. Waggoner, The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code, 76 Iowa L. Rev. 223 (1991); discussion Part II.B.1.
87. See supra Part II.C.
88. See Principles, supra note 10; see also infra Part V (providing a comparison of elective share methods to dissolution at divorce).
IV. Augmented Estate Elective Share Jurisdictions

A majority of jurisdictions extend spousal protection well beyond net probate assets with Augmented Estate Elective Share statutes. The Augmented Estate Elective Share Method was created in an effort to enhance the protection of the surviving spouse by statutorily adding to the decedent’s estate all transfers that the decedent made during his lifetime, over which the decedent had dominion and control. Dominion and control are shown by possession or enjoyment; right to income from; or the power to revoke, invade, or dispose of for his own benefit. This expanded protection incorporates probate and non-probate assets accumulated before and during marriage, as well as property received by either party through gift or inheritance.

The Augmented Estate Elective Share statutes vary as to the specific calculation, yet all models fail to exclude separate property or consider equitable principles. A number of jurisdictions have adopted some form of the Augmented Estate Elective Share Method. Generally, three models have been followed: (1) the UPC Model; (2) the Federal Estate Tax Model; and (3) the Comprehensive Model.

A. The UPC Model

In response to “legislative inaction and judicial uncertainties,” the Uniform Probate Code of 1969 (old UPC) introduced the Augmented

89. See supra note 47.
90. See Bridge, supra note 34, at 522. Bridge notes that “these devices are attractive to disinheritors because although the disinheritor transfers an inter vivos legal interest, the disinheritor is in effect the real owner until death.” Id. at 518. For example, in the case of a joint bank account, while in theory the donee receives an equal interest in the account and the donor loses the power to revoke the transfer, in practice, either the donee or the donor can simply empty the entire account. See id. at 518-19. As a result, a depositor “may name a cotenant on a bank account but treat the account as his own.” Id. (footnote omitted). The cotenant may not even be aware that the account exists. See id. at 519. In addition, “some bank account agreements permit the depositor to revoke and alter co-tenancy designations freely.” Id. Consequently, joint bank accounts “operate like wills yet are not subject to the spouse’s forced share” in a traditional elective share jurisdiction, and if the decedent moves all assets to these accounts, or inter vivos trusts, the surviving spouse may be left with nothing under the statutory share. See id.

91. See UNIF. PROBATE CODE § 2-206(2) (including certain transfers made during the marriage). The Uniform Probate Code § 2-206(3)(iii) addresses gifts in excess of $10,000 made within two years of the decedent’s death. UNIF. PROBATE CODE § 2-206(3)(iii).
92. For an example of equitable principles employed when the dissolution of the marriage is by divorce, see supra note 21.
93. See supra note 47.
94. Bridge, supra note 34, at 522.
Estate Elective Share statute. The goal was to expand and articulate precisely "which assets [were] subject to the surviving spouse’s elective share." The surviving spouse was entitled to a one-third share of the Augmented Estate, whether the decedent died testate or intestate. The old UPC included the most common non-probate assets, such as revocable trusts, retained life estates, and joint tenancies, but excluded the surviving spouse’s assets, insurance, joint annuities, and pension benefits. The old UPC forced a surviving spouse to accept an interest in trust instead of taking his or her share of the property outright.

Over time, the old UPC proved “inadequate to react to the changing structure of the American family.” In 1990, the Uniform Law Commissioners adopted revisions to the Augmented Estate Elective

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96. Bridge, supra note 34, at 522. Prior to the UPC’s augmented estate legislation, the traditional elective share statutes were the only form of protection for the surviving spouse. See id.; see also Alan Newman, Incorporating the Partnership Theory of Marriage Into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative, 49 Emory L.J. 487, 494 (2000).

97. Unif. Probate Code § 2-201 (1969) (amended 1993); Bridge, supra note 34, at 517. The same principles applied to the decedent who died intestate; otherwise, the decedent would be able to avoid the augmented estate by not having a valid will in place as of the date of death. See Unif. Probate Code § 2-201 (1969) (amended 1993) (failing to distinguish between the decedent who died testate or intestate). Currently, the UPC has a separate provision dealing with intestate succession that does not mirror the elective share statute. See Unif. Probate Code § 2-102 (1969) (amended 1993).

98. Unif. Probate Code § 2-202(1) (1969) (amended 1993). The augmented estate, as originally defined by the UPC, included any transfer made during the marriage whereby the transferor retained any of the following incidents of ownership: “possession or enjoyment of, or right to income from the property; . . . power . . . to revoke or to consume, invade or dispose of the principal for his own benefit” as well as any property held with a right of survivorship at the time of death by the decedent and another. See id.; see also Bridge, supra note 34, at 522.

99. See Gary, supra note 50, at 584.

100. See id. at 587 (explaining that the Unif. Probate Code § 2-207(a)(3) (1969) "charged the surviving spouse’s elective share with any amounts the surviving spouse would have received from the decedent, but instead disclaimed" and that this section had "the effect of forcing a spouse to accept an income interest in a trust, instead of taking her or his share in the marital property outright").

Share statute; the primary purpose for the 1990 UPC revision (UPC revision) was "to implement the concept of marriage as a partnership." The drafters of the UPC revision articulated four reasons for the changes:

1. the decline of formalism in favor of intent-serving policies;
2. the recognition that will substitutes and other inter vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission;
3. the advent of the multiple-marriage society, resulting in a significant portion of the population being married more than once and having stepchildren and children by previous marriages; and
4. the acceptance of a partnership or marital-sharing theory of marriage.

The UPC revision incorporated two theories into its elective share provision: the partnership theory of marriage and the support duty. The partnership theory of marriage is premised on the idea that "each spouse is entitled to one-half of the economic gains of the marriage," while the support duty holds that a decedent “should provide for the surviving spouse." The partnership theory of marriage was implemented in the UPC revision by including additional non-probate property controlled by both spouses. The UPC revision expanded the Model to include life insurance, accident insurance, joint annuities, pensions payable to a person other than the surviving spouse, and the surviving spouse's own property. To implement the support duty, the UPC revision established a $50,000 supplemental elective share provision. The UPC revision also established a phase-in system of elective share percentages.

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104. Gary, supra note 50, at 572, 577.


106. Unif. Probate Code, art. II, pt. 2, gen. cmt. (1990) (amended 1993). The basis for the incorporation of the support duty in 1990 was the theory that the "spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor." Unif. Probate Code § 2-202(b). The $50,000 supplemental elective share amount grants the survivor an amount that is generally adequate to meet the survivor's needs. See id. The length of marriage is not considered because "the duty of support is founded upon status[;] it arises at the time of marriage." Id.
based solely on the length of the marriage. This provision was intended to protect against three potential injustices: (1) unintentional disininheritance of children of previous marriages; (2) a windfall to the surviving spouse in the instance of a short-term marriage; and (3) the short-changing of a surviving spouse of a long-term marriage.

Three years later, the UPC's elective share provision was revised yet again and represents the current status of the law (current UPC). The current UPC retains most of the revisions; the most prominent substantive change deleted the requirement that forced "a spouse to accept an income interest in a trust, instead of taking his or her share of the marital property outright." The current UPC recognizes that a spouse is entitled to control his or her share of the decedent's Augmented Estate outright.

Depending on the length of the marriage, the current UPC Model entitles a surviving spouse to an amount between three and fifty percent of the decedent's "Augmented Estate." This Model classifies the

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108. See generally Gary, supra note 50.
109. Id. at 587.
110. See id.
111. UNIF. PROBATE CODE § 2-202(a) (1990) (amended 1993). The UPC defines the elective share perspective based on the number of years that the decedent and the survivor were married.

The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

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

<table>
<thead>
<tr>
<th>Years of Marriage</th>
<th>Elective Share Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>Supplemental Amount Only</td>
</tr>
<tr>
<td>1 year but less than 2 years</td>
<td>3% of the augmented estate</td>
</tr>
<tr>
<td>2 years but less than 3 years</td>
<td>6% of the augmented estate</td>
</tr>
<tr>
<td>3 years but less than 4 years</td>
<td>9% of the augmented estate</td>
</tr>
<tr>
<td>4 years but less than 5 years</td>
<td>12% of the augmented estate</td>
</tr>
<tr>
<td>5 years but less than 6 years</td>
<td>15% of the augmented estate</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>18% of the augmented estate</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>21% of the augmented estate</td>
</tr>
<tr>
<td>8 years but less than 9 years</td>
<td>24% of the augmented estate</td>
</tr>
<tr>
<td>9 years but less than 10 years</td>
<td>27% of the augmented estate</td>
</tr>
<tr>
<td>10 years but less than 11 years</td>
<td>30% of the augmented estate</td>
</tr>
<tr>
<td>11 years but less than 12 years</td>
<td>34% of the augmented estate</td>
</tr>
<tr>
<td>12 years but less than 13 years</td>
<td>38% of the augmented estate</td>
</tr>
<tr>
<td>13 years but less than 14 years</td>
<td>42% of the augmented estate</td>
</tr>
<tr>
<td>14 years but less than 15 years</td>
<td>46% of the augmented estate</td>
</tr>
<tr>
<td>15 years or more</td>
<td>50% of the augmented estate</td>
</tr>
</tbody>
</table>

Id. Thus, the greater the number of years the decedent and the surviving spouse were married, the greater the elective share.
decedent’s Augmented Estate into four categories, including: the
decedent’s net probate estate, decedent’s non-probate transfers to
others; decedent’s non-probate transfers to the surviving spouse; and
the surviving spouse’s probate and non-probate property. The current
UPC also provides a minimum or supplemental elective share of
$50,000. Once the Augmented Estate is calculated, the appropriate
percentage is applied to the value of the Augmented Estate, resulting in
the surviving spouse’s elective share. The elective share is then offset by
amounts that the surviving spouse receives through the will, will
substitute, or the surviving spouse’s own property. The surviving
spouse has a right to elect against the will only to the extent that the
elective share amount exceeds the amount of the offset. If the
surviving spouse is entitled to an elective share, the deficit is funded
from the decedent’s probate estate, and any remaining deficit is then
funded through the decedent’s non-probate transfers to others. Currently, eighteen states follow the UPC Model.

112. See id. § 2-204. The net probate estate is equal to the probate estate less the
various expenses and outstanding claims determined by the code. See id.
113. See id. § 2-205. The augmented estate value encompasses the decedent’s transfers of
property otherwise deemed non-probate transfers. See id.
114. See id. § 2-206. The augmented estate includes inter vivos transfers to the
surviving spouse, which pass outside of probate. See id.
115. See id. § 2-207. The augmented estate includes the spouse’s property. See id.
116. Id. § 2-202(b). A supplemental amount of $50,000 provides minimal support. See id.
117. Id. § 2-209(b). The offset for the surviving spouse’s own property is twice the
applicable percentage. See id. § 209(a)(2). Therefore, the offset for marriages of fifteen
years or more is 100%, or dollar for dollar of the surviving spouse’s property. See id.
118. See id. 2-209(a).
119. See id. § 2-209(b).
120. See id.
121. See id.
(2002), HAW. REV. STAT. ANN. § 560-2-202 (Michie 1999), KAN. STAT. ANN. § 59-6a202
W. VA. CODE ANN. § 42-3-1 (Michie 1997 & Supp. 2002). Some community property
jurisdictions follow the Augmented Estate Elective Share statutes for quasi-community
quasi-community property is beyond the scope of this Article.
To illustrate the UPC Model, assume a decedent and his spouse are married for fifteen years and have $1,500,000 of total assets as of decedent’s date of death. All assets are titled in the decedent’s name, including $500,000 in real property inherited from the decedent’s father and $1,000,000 in personal property, which was accumulated during the marriage. The decedent’s will bequeaths the $500,000 of real property to his children outright, creates by-pass and marital deduction trusts for the spouse, and leaves the remaining trust balances to the children in equal shares. The trusts name the spouse and one other person as trustees and provide the spouse with income for life, mandatory “five and five” powers, and the non-beneficiary trustee with the discretionary power to pay out additional amounts to the spouse.

The first determination is whether the surviving spouse has a right to elect against the will. The applicable percentage of fifty percent is applied to the Augmented Estate of $1,500,000, resulting in an elective share of $750,000. In this example, there are no offsets for the surviving spouse’s interests in trusts. The surviving spouse can disclaim his or her rights.

123. A common estate-planning technique is to utilize the testator’s federal estate tax exemption by placing that amount, currently $1,000,000, see I.R.C. § 2010 (West 2002), in a by-pass trust that is excluded from the surviving spouse’s estate on his or her death. The marital deduction trust allows the decedent’s estate to take a marital deduction despite the property passing to the spouse in trust. Any balances in the marital trust are taxed on the spouse’s death in his or her estate. See I.R.C. § 2056 (West 2002).

124. I.R.C. § 2041(b) (West 2002).

125. See id. § 674.

126. Based solely on fifteen years of marriage, the applicable percentage is fifty percent. UNIF. PROBATE CODE § 2-202(a) (amended 1993).

127. In calculating the Augmented Estate, the separate property of $500,000 is combined with the $1,000,000 of marital property. See id. § 2-203.

128. See I.R.C. § 2518 (West 2002). A key part of the statute reads:

(a) General rule - For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined - For purposes of subsection (a), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if –

(1) such refusal is in writing, (2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of –

(A) the day on which the transfer creating the interest in such person is made, or (B) the day on which such person attains age 21, (3) such person has not accepted the interest or any of its benefits, and (4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either –

(A) to the spouse of the decedent, or (B) to a person other than the person making the disclaimer.
her interest in the trusts and receive $750,000 outright. The surviving spouse’s elective share enjoys preference over the decedent’s testamentary plan. 129

If the marriage had terminated by divorce, after fifteen years of marriage, $1,000,000 of marital property would have been taken into consideration, and the surviving spouse would have been awarded $500,000. 130 This outcome would have been identical in a community property jurisdiction. Thus, this example shows that the UPC Model enables the surviving spouse to take a greater share than the amount he or she would have received by divorce or in a community property jurisdiction. The elective share in the amount of $750,000 enables the surviving spouse to frustrate the testator’s testamentary scheme. The surviving spouse receives not only the fair share of marital property but also a percentage of the decedent’s separate property. 131 Allowing the surviving spouse to take an elective share against separate property leads to outcomes which are inconsistent with the Model’s partnership theory of marriage, 132 and the surviving spouse’s windfall 133 contradicts the Model’s intended results. 134

(c) Other rules - For purposes of subsection (a) —

(1) Disclaimer of undivided portion of interest - A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) Powers - A power with respect to property shall be treated as an interest in such property.

(3) Certain transfers treated as disclaimers - A written transfer of the transferor’s entire interest in the property —

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)), shall be treated as a qualified disclaimer.

Id.; see also UNIF. PROBATE CODE § 2-801 (amended 1993) (discussing the disclaimer of property interests).

129. Generally, statutes and common law strive to preserve the decedent’s testamentary intent unless public policy dictates otherwise. See DUKEMINIER & JOHANSON, supra note 4, at 223-24.

130. Only the $1,000,000 of personal property accumulated during the marriage is part of the calculation. There is an exclusion for the $500,000 inheritance because it is separate property. The court could deviate from awarding each party one-half of the marital property in its consideration of the equitable factors, but that result would depend on facts not expressed in the example and a discussion that is beyond the scope of this Article.

131. Fifteen years of marriage entitled the surviving spouse to take an elective share totaling fifty percent of the augmented estate, which included the decedent’s inheritance. See UNIF. PROBATE CODE § 2-202 (amended 1993).

132. Gary, supra note 50, at 568. Although, one noted reason for the UPC revision was acceptance of the partnership or marital sharing theory of marriage. See UNIF. PROBATE CODE, art. II, prefatory note (1990) (amended 1993). This Model fails to achieve its stated purpose.
The UPC’s attempt to implement the concept of marriage as a partnership is over-inclusive because it fails to recognize the need for exclusions of premarital wealth, gifts, and inheritances. The over-inclusive UPC Model prevents disinheritance, but it enables the surviving spouse to reach assets that were not economic gains of the marital unit and runs afoul to the partnership theory. Such assets would not have been available to the surviving spouse upon divorce because separate property is not a “fruit[] of the marriage.” The UPC Model includes probate and transfers made during life by both parties with little distinction between premarital and postmarital accumulations; thus, the effect of the UPC Model, as illustrated in the previous example, may not be equitable.

The phase-in provision attempts to remedy the potential windfall to the surviving spouse of a short-term marriage. It is difficult, however, to justify the distinction between a marriage of fifteen years and a marriage of fourteen years, eleven months and twenty-nine days. Yet, the one-day difference on an Augmented Estate of $1,500,000 equates to a difference of $60,000 in the elective share amount. Furthermore, the UPC
Model's failure to exclude premarital wealth requires couples who have accumulated wealth individually to contract around the elective share statute in order to achieve equitable results.\textsuperscript{139}

The UPC Model does not require a spouse to accept an income interest in trust. He or she can demand his or her elective share outright. This runs contrary to the support duty as a basis for the elective share.\textsuperscript{140} Moreover, the UPC Model suggests that the elective share is more important than preserving the decedent’s testamentary intent, even when the spouse is not being disinherited.\textsuperscript{141}

The spouse’s election under the UPC Model allows the surviving spouse to destroy the decedent’s sound testamentary estate plan. The spouse receives his or her elective share outright by filing a disclaimer.\textsuperscript{142} This disclaimer enables the children of the marriage to reach the remainder interest prematurely, as they will not be required to wait until the death of the surviving spouse.\textsuperscript{143} The problem inherent with this result is that the testator may have had legitimate reasons for the children taking upon the death of the surviving spouse.\textsuperscript{144} Despite the fact that the elective share frustrates the decedent’s testamentary plan, in order to fulfill the partnership goal, it is necessary that the surviving spouse be entitled to his or her share outright and free of trust.

The UPC Model requires the inclusion of the surviving spouse’s property, which causes an administrative inconvenience in having to trace that property. The surviving spouse may hide or devalue his or her property, which presents a similar problem upon divorce, but at least at

\begin{itemize}
\item The four percent difference on an augmented estate totaling $1,500,000 amounts to $60,000. \textit{See id.} This difference would not exist if property were divided at divorce, in a community property state, or under the Equitable Elective Share statute.
\item 139. \textit{See supra} note 73 for a discussion of contracts used to avoid the elective share.
\item 140. \textit{But see} Estate of Karnen, 607 N.W.2d 32 (S.D. 2000) (holding that the husband’s life interest in the family trust has an ascertainable present value and should be applied to satisfy the elective share amount, regardless of whether the surviving spouse chooses to accept such interest or believes she will never have use of it).
\item 141. \textit{See generally} DUKEMINIER & JOHANSON, \textit{supra} note 4, at 223-329.
\item 142. \textit{See, e.g.}, \textit{UNIF. PROBATE CODE} § 2-801 (amended 1993); \textit{see also} I.R.C. § 2518 (West 2002).
\item 143. Procedurally, the surviving spouse would file a disclaimer with respect to the income interest he or she was to receive under the decedent’s will. \textit{See UNIF. PROBATE CODE} § 2-801 (amended 1993). When the surviving spouse files the disclaimer, he or she is treated as if he or she predeceased the decedent. \textit{See id.} § 2-801(d). Such treatment allows the principal of the trust to be distributed to the remainder beneficiaries. \textit{See id.} § 2-801.
\item 144. Some of the testator’s reasons for wanting the principal to be distributed at the death of the surviving spouse include: the children likely will be older and more mature; it ensures adequate financial protection for the surviving spouse; and it protects the assets from creditors, particularly as the surviving spouse ages and the potential for nursing care increases.
\end{itemize}
divorce both parties are alive and available to challenge the spouse’s attempt to hide or devalue property. Despite the administrative inconveniences in accounting for the surviving spouse’s property and the decedent’s inability to police the surviving spouse’s opportunity to commit fraud, it is crucial to take the surviving spouse’s assets into consideration in order to produce fair results.

The UPC Model is a remarkable improvement over the Traditional Elective Share Method for the eighteen jurisdictions that have adopted it. Nonetheless, like the proposed Equitable Elective Share statute, this Model should exclude premarital and other separate property. Such a change would eliminate the need for the phase-in system, produce fairer results, and make the UPC Model consistent with the distribution of marital property at divorce and community property principles. Additionally, the UPC Model needs to build flexibility into its rigid structure. Like the proposed Equitable Elective Share statute, flexibility could be achieved with judicial discretion.

B. The Federal Estate Tax Model

The Federal Estate Tax Model entitles the surviving spouse to one-third of the decedent’s “Elective Estate,” which is defined as the decedent’s gross estate for federal estate tax purposes less expenses of the estate, such as funeral expenses, administration expenses, claims against the estate, and casualty or theft losses. The Federal Estate Tax Model’s Elective Estate includes the decedent’s probate and non-probate assets accumulated during his or her lifetime. Like the UPC Model, the Federal Estate Tax Model fails to exclude separate property in its elective share calculation and gives no consideration to equitable principles.

Unlike the UPC Model, the Federal Estate Tax Model articulates precisely those assets that offset the surviving spouse’s elective share.

145. See supra note 122.
146. See, e.g., DEL. CODE ANN. tit. 12, §§ 901(a), 903(1) (2001).
147. 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.” See DEL. CODE ANN. tit. 12, § 902(a) (2001). The elective estate is modified by subtracting “those deductions allowable under § 2053 and § 2054 of the Internal Revenue Code of 1986, as amended, or the comparable provisions of any later law.” Id. § 902(a)(1).
148. The Federal Estate Tax Model states that the elective share is offset by: a) assets that pass to the surviving spouse under the will or through intestate succession; b) inter vivos transfers to the surviving spouse that are includable in the decedent’s gross estate; c) jointly titled assets (to the extent that the surviving spouse did not contribute to them); d) beneficial interests in a trust created by the decedent for the surviving spouse; e) property appointed to the surviving spouse through a general or special power of appointment; f)
If a deficit exists, then the contribution from the decedent's other recipients is collected proportionately from the recipients of the decedent's "contributing estate." Delaware's elective share provisions best exemplify the Federal Estate Tax Model. More recently, North Carolina and Ohio adopted the Federal Estate Tax Model for determination of the elective share.

One advantage of the Federal Estate Tax Model over the UPC Model is that practitioners are familiar with the assets included in the Federal Estate Tax Model because the elective share is based on the decedent's gross estate for federal estate tax. The Federal Estate Tax Model ensures that property owned or controlled by the decedent will be recaptured into the elective share calculation.

However, the Federal Estate Tax Model, falls short by failing to include the surviving spouse's property. Therefore, a surviving spouse holding most or all of the property in his or her name could nonetheless elect against the decedent's estate, producing unfair consequences and leaving less protection for the decedent's testamentary beneficiaries.

Moreover, fraud on marital rights is not completely eliminated; prior to death, a spouse is still free to use non-probate transfers to others to disinherit his or her spouse. For example, under the Federal Estate

insurance proceeds on the life of the decedent "attributable to premiums paid by the decedent;" g) lump sum annuity payments to the surviving spouse; h) proceeds from pensions; and i) the value of the share of any community property rights that the surviving spouse may possess. See id. § 903(a)-(i).

149. See id. § 908(a). Section 908(a) states:
(a) The liability for the amount of the elective share shall be apportioned among the recipients of "the decedent's contributing estate." . . . Such apportionment shall be made in the proportion, as near as may be, that the value of the property of each such recipient bears to the total value of the property received by all such recipients interested in the contributing estate. . . . No person or property shall be liable for contribution in any greater amount than the person or such property would have been if relief had been secured against all persons and property subject to contribution.

Id.

150. Id. (stating that "decedent's contributing estate consists of only that portion of the elective estate of which the decedent was the sole owner at death and which was not transferred or deemed transferred to a surviving spouse by the decedent").

151. See id. § 901.


153. OHIO REV. CODE ANN. § 2106.01 (Anderson 2002).

154. The Internal Revenue Code and regulations provide extensive guidance for the determination of the "elective estate." See I.R.C. §§ 2033 through 2044 and regulations thereunder (West 2002).

155. See, e.g., Methodist Episcopal Church of Emory Chapel v. Hadfield, 453 A.2d 145, 149 (Md. 1982); see also discussion supra Part III.A (discussing the unfair burdens
Tax Model, deathbed transfers outside the annual gift tax exclusions are part of the decedent’s Elective Estate.\textsuperscript{156} These transfers could include transfers of present interest greater than $11,000 per donor;\textsuperscript{157} unlimited amounts for education\textsuperscript{158} and medical expenses.\textsuperscript{159} Thus, under this Model, the decedent could disinherit his or her spouse by giving away a good portion of his or her property moments before death.\textsuperscript{160}

The Federal Estate Tax Model does not entitle the surviving spouse to his or her share outright, as the surviving spouse's elective share is offset by “any beneficial interest [he or she has] in a trust created by the decedent.”\textsuperscript{161} Also, Qualified Terminable Interest Property (QTIP),\textsuperscript{162} a special trust for spouses,\textsuperscript{163} is a viable estate-planning tool used to offset the spouse’s elective share regardless of a surviving spouse’s desire to disclaim. Thus, the Federal Estate Tax Model does not give the surviving spouse the right to control his or her elective share; rather, it preserves a preference for the decedent’s testamentary intent.\textsuperscript{164}

\textbf{C. The Comprehensive Model}

The Comprehensive Model articulates various assets included in the Elective Estate.\textsuperscript{165} Under this Model, the surviving spouse is entitled to thirty percent of the decedent’s Elective Estate.\textsuperscript{166}

\begin{itemize}
\item placed on a surviving spouse who must challenge the transaction under a fraud on marital rights theory).
\item I.R.C. § 2503 (West 2002). The gross estate equals property in the decedent’s estate and taxable gifts. Because transfers made within I.R.C. § 2503 (b),(c) & (e) are not taxable gifts, they do not become part of the decedent’s federal gross estate and are not part of the elective estate to which the spousal election applies.
\item Id. § 2503(b) (West 2002). In 2003, this amount is $11,000 per donor to donee.
\item Id. § 2503(c) (West 2002).
\item Id. § 2503(e) (West 2002).
\item See supra Part III.A. There may be an argument concerning fraud on marital rights. However, the elective share statute provides no protection for the surviving spouse. See I.R.C. § 2035(a) (West 2002). Only transfers that would have been included under I.R.C. §§ 2036, 2037, 2038, or 2042 are included in the decedent’s gross estate for federal estate tax. See I.R.C. § 2035(a)(2) (West 2002).
\item See generally Price, supra note 73, at § 5.23 (explaining QTIPs).
\item Assets in a QTIP trust are taxed in the surviving spouse’s estate, but the surviving spouse does not control the ultimate disposition of those assets. See Wendy C. Gerzog, \textit{The Illogical and Sexist QTIP Provisions: I Just Can’t Say It Ain’t So}, 76 N.C. L. Rev. 1597, 1597-1602 (1998).
\item See Dukeminier & Johanson, supra note 4, at 223 (discussing the power of the owner of property to determine her successor).
\item The Elective Estate is defined as the decedent’s probate estate plus: (a) all property passing by right of survivorship; (b) all property held in a revocable trust; (c) all irrevocable transfers by and for the decedent; (d) the net cash surrender value of insurance policies on decedent’s life as valued immediately before decedent’s death; (e)
Like the Federal Estate Tax Model, the Comprehensive Model rejects the phase-in provision,\textsuperscript{167} excludes the surviving spouse's wealth,\textsuperscript{168} and offsets the elective share with property interests that pass outright, in trust, or through certain specified manners that would have satisfied the Elective Estate but were disclaimed.\textsuperscript{169} The Comprehensive Model also prioritizes the elective share offsets.\textsuperscript{170}

Like the Traditional Elective Share and other Augmented Estate Elective Share Models, the Comprehensive Model fails to exclude separate property. The Comprehensive Model's fixed share of the Elective Estate fails to distinguish between a marriage of fifty years and a marriage of five months, allowing for a potential windfall to the surviving spouse of a short-term marriage and penalizing the surviving spouse of a long-term marriage.\textsuperscript{171} This Model does not take the surviving spouse's wealth into consideration, thus allowing a surviving spouse with individual wealth to elect against the estate.\textsuperscript{172}

\textsuperscript{167} See UNIF. PROBATE CODE § 2-202(a) (amended 1993).
\textsuperscript{169} See, e.g., id. § 732.2075(1).
\textsuperscript{170} The Comprehensive Model prioritizes the elective share offsets as follows: (a) Class 1—The decedent's probate estate and revocable trusts; (b) Class 2—Recipients of property interests, other than protected charitable interests, included in the elective estate . . . and, to the extent the decedent had at the time of death the power to designate the recipient of the property, property interests, other than protected charitable interests. . . (c) Class 3—Recipients of all other property interests, other than protected charitable interests, included in the elective estate . . . (d) Class 4—Recipients of protected charitable lead interests, but only to the extent and at such time that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws.
\textsuperscript{171} See Terry S. Kogan & Michael F. Thomson, Piercing the Façade of Utah's "Improved" Elective Share Statute, 1999 UTAH L. REV. 677, 682 (describing the inequity of the windfall spouses could receive from short-term marriages).
\textsuperscript{172} Although an administrative plus, the Comprehensive Model's exclusion of the surviving spouse's independent wealth could result in a windfall to the surviving spouse of a short-term marriage and is inconsistent with the partnership theory of marriage. Moreover, this model could allow a surviving spouse who has title to all marital assets to unfairly receive additional assets by way of the elective share. See id. FLA. STAT. ANN. § 732.2075(2)(b) (West 2000 & Supp. 2003).
Unique to the Comprehensive Model is the inclusion in the elective share of the net cash surrender value of the insurance proceeds on the decedent's life valued immediately before decedent's death.\textsuperscript{173} This is an issue that is hotly debated and, depending on the size of the estate, can be determinative in whether the surviving spouse is entitled to an elective share.\textsuperscript{174}

Finally, the Comprehensive Model is extremely complex. The Comprehensive Model constitutes a significant change from the Traditional Elective Share and was enacted with some reluctance.\textsuperscript{175} Once enacted by the Florida legislature in October 1999, the complexity of the Model and the significant change it implemented mandated a two-year grace period, which provided practitioners with a needed learning period. The statute became applicable to decedents dying on or after October 1, 2001.\textsuperscript{176}

All Augmented Estate Elective Share Models allow potential inequities. The failure to exclude separate property, such as premarital wealth, inheritances, and gifts, distinguish this legislation from marital property statutes, community property systems, and the proposed Equitable Elective Share statute.\textsuperscript{177}

The proposed Equitable Elective Share statute includes the spouse's probate and non-probate assets that were accumulated after the marriage into the elective share, which is consistent with the partnership theory and community property principles and the division of property at divorce. The Equitable Elective Share statute improves upon the Uniform Probate Code's Augmented Estate Model by excluding the spouse's separate property. With the exception of gifts and inheritances,

\begin{itemize}
\item[173.] See, e.g., id. § 732.2075(2). The other Augmented Estate Methods include the face value of insurance policies on the decedent's life, provided the decedent had incidents of ownership in the policy. \textsc{Unif. Probate Code} § 2-205(1)(iv) (amended 1993); see also I.R.C. § 2042 (West 2002) (defining "incidents of ownership").
\item[174.] This is another example of preferential treatment given to the life insurance industry due to its tremendous lobbying efforts. See I.R.C. § 2035(a)(2) (West 2002); Md. Code Ann., Tax-Gen. § 7-203(d) (1997 & Supp. 2001).
\item[175.] The bill was introduced several times before it passed. See \textit{In re Amendments to Florida Probate Rules}, 807 So. 2d 622, 622-23 (Fla. 2001) (discussing the process leading to the passage of the amended elective share statutes). Additionally, Maryland H.B. 265, 2000 Gen. Assem. Reg. Sess. (Md. 2000), was modeled after the Florida statute and was rejected.
\item[176.] The significant change warranted a two-year grace period for estate planners to be informed about the development. For an overview of the changes made to the Florida statute, see Eloisa C. Rodriguez-Dod, \textit{Estates and Trusts: 2001 Survey of Florida Law}, 26 Nova L. Rev. 37 (2001).
\item[177.] The most significant distinction between community property and common law jurisdictions is the distribution of property at the death of one spouse. See Principles, supra note 10.
\end{itemize}
only property accumulated during the marriage should become part of the calculation. Assets included in the elective share statute should be those assets, which were earned, collected, and preserved during marriage. Regardless of the inconveniences caused by tedious and difficult calculations, the results will more often derive a fairer outcome.

The proposed Equitable Elective Share statute includes the surviving spouse’s probate and non-probate assets despite the inconveniences of inclusion. Additionally, the potential for disinheritation by deathbed transfers is substantially reduced. The Equitable Elective Share statute includes transfers made within one year of death unless the transfer falls within the annual exclusion of I.R.C. § 2503(b). This allows the deceased spouse to make nominal gifts to donees but prevents him or her from disinheriting the surviving spouse with unlimited deathbed transfers to educational or medical facilities. 178

The Equitable Elective Share statute also protects the surviving spouse with his or her share outright, thus allowing the elective share to prevail over the decedent’s dispositive plan when the decedent’s plan fails to adequately provide for the surviving spouse. In addition, the Equitable Elective Share statute includes the face value, not net surrender value, of life insurance. 179 This distinction deviates from the division of property at death. However, if exercised, the spousal election is made at the death of one spouse and should be valued at that time. The face value of the proceeds, not the value of the policy immediately before death, is therefore included in the Equitable Elective Share’s Elective Estate. All probate and non-probate assets of both parties are valued as of the date of death, and no preference should be given to valuing the decedent’s life insurance policy.

Additionally, elective share statutes must infuse flexibility into their existing rigid structures and take equitable factors into consideration. 180 In order to bring fairness to the elective share statutes, exclusion for separate property and flexibility are the essential ingredients. Those modifications to the UPC Model would eliminate the need to incorporate a phase-in system, avoid potential windfalls to the spouse of a short-term marriage or a marriage with pre-marital wealth, and fairly protect the decedent’s surviving spouse.

178. See Part IV.B (discussing the Federal Estate Tax Model’s disadvantage of allowing deathbed transfers).
179. See supra Part IV.C (discussing the Comprehensive Model’s inclusion of the net surrender value of life insurance.)
180. See supra note 21 for a sampling of equitable factors.
V. COMPARISON OF ELECTIVE SHARE METHODS TO DISSOLUTION AT DIVORCE

There are drastic discrepancies between the spouse's share of property at divorce and the surviving spouse's elective share at the death of his or her spouse. These discrepancies exist under both elective share methods.

A. Traditional Elective Share Method

A significant problem with the Traditional Elective Share Method is that it potentially encourages divorce. When compared to the Traditional Elective Share statute, spouses may be better protected under the state's provisions dealing with the dissolution of the marriage by reason of divorce. For example, in a marriage of forty years, with two adult children, where assets totaling $1,500,000 were accumulated during the marriage but titled in the breadwinner's name, it is clear that each party should leave the marriage with one-half of that amount ($750,000). If the same couple was instead faced with the death of the breadwinner who had a will that left all property in trust for the children, the surviving spouse would receive an elective share in the amount of $500,000. This example illustrates that because of the elective share's focus on separate and not marital property, the surviving spouse could benefit financially from a divorce. It seems obvious that a jurisdiction would not intentionally extend greater protection to a divorcee, but that is the outcome under this set of facts.

If, rather than $1,500,000 representing marital property, $750,000 represented property that the deceased spouse inherited from his first spouse, the elective share amount would remain at $500,000. This amount constitutes sixty-six percent of the marital property, resulting in a windfall to the surviving spouse. This example illustrates the need to exclude separate property, which would make the elective share consistent with the rationale behind marital property statutes and the

181. The property award to each spouse could deviate from the $750,000 depending on the facts and circumstances of the parties. For example, if the caretaker spouse had made non-monetary contributions to the marriage and needed additional money to establish a career, the court could make an additional award. Furthermore, the court, using its equitable powers, could allow the caretaker spouse use and possession of the marital home. The court could consider a number of factors in making the property award, but for purposes of this illustration, assume that the equitable factors within the court's consideration will not impact the property award.

182. Under MD. CODE ANN., EST. & TRUSTS § 3-203 (2001), the surviving spouse is entitled to one-third of $1,500,000, or $500,000.

183. The point of this illustration is that the Traditional Elective Share Method focuses only on property titled in the decedent's name and leads to unfair results.

184. This inheritance would be classified as separate property. See supra note 10 for a definition of separate property.
division of property within a community property jurisdiction. The likelihood of a windfall is relatively high in light of today’s number of second marriages with pre-marital wealth. These potential consequences cause individuals with separate property to enter into agreements designed to achieve a fair outcome in the event a spouse files an election.

The consequences are far worse in a Traditional Elective Share jurisdiction where the decedent and spouse together accumulate the $1,500,000, but the marital property is not a probate asset as of the decedent’s date of death. Assume that the decedent titled all marital property jointly with adult children from a prior marriage. In this scenario, the Traditional Elective Share statute does not provide the surviving spouse with any protection at all. There are no probate assets against which the surviving spouse can elect. Rather, the surviving spouse would be forced to litigate under the fraud on marital rights theory. If the surviving spouse attempts to reach the $1,500,000 of jointly held assets for purposes of filing his or her elective share, he or she will bear the costs, risks, and burdens of litigation. The spouse will also be forced to deal with the hurdles of collecting the elective share. The use of non-probate assets to avoid the elective share by itself is enough for the minority of jurisdictions to enact provisions that would cover non-probate assets. In doing so, these amendments should exclude separate property and limit the assets subject to election to the fruits of the marriage. Furthermore, the amendments should incorporate discretionary equitable factors in the elective share calculation, which could be used to provide support in certain situations.

B. Augmented Estate Elective Share Method

The Augmented Estate Elective Share Methods include non-probate arrangements that the Traditional Elective Share Method ignores. Like the Traditional Elective Share Method, however, the Federal Estate Tax and Comprehensive Models fail to include the surviving spouse’s independent wealth. The failure to consider the surviving spouse’s

185. The prefatory note to Article II of the UPC revision articulated that the revisions were the advent of the multiple-marriage society, in which a significant portion of the population has been married more than once and has stepchildren and children by previous marriages. See UNIF. PROBATE CODE, art. II, prefatory note (amended 1993).
186. See supra note 73 for a description of marital agreements.
187. See supra Part III.A for a discussion of fraud on marital rights.
188. Such hurdles could include finding the joint tenants, serving them, getting the judgment, and then collecting it. Collection efforts could include additional proceedings, such as garnishment proceedings or filing liens against property owned by the joint tenant.
189. See infra Part VI.B (discussing how equitable factors could be used to provide minimal support).
wealth often leads to a windfall when compared to what the spouse would have received had the dissolution been at divorce. Thus, the surviving spouse may be better protected under the elective share, which could encourage parties to contract around the spousal election.

For example, in a jurisdiction that follows the Comprehensive Model, for a marriage of four years, in which the decedent had inherited wealth in the amount of $500,000, the parties had accumulated together $500,000, and the surviving spouse had independent wealth in the amount of $500,000 that was accumulated during the marriage, where the decedent’s will excludes his or her spouse, the surviving spouse’s elective share would be $300,000. Additionally, the spouse would retain his or her independent assets of $500,000. In total, the surviving spouse would receive $800,000 from a marriage during which only $1,000,000 had been accumulated, thus entitling the spouse to eighty percent of the marital property. Had the dissolution resulted from divorce, the surviving spouse would retain his or her $500,000, but would not be entitled to anything further. This example demonstrates that a surviving spouse of a marriage of four years would receive an unintended windfall in the amount of eighty percent of the marital property, leaving only twenty percent to the decedent’s testamentary beneficiaries.

Under the UPC Model, the elective share percentage in the amount of twelve percent would have been applied to an Augmented Estate of $1,500,000 for an elective share of $180,000. The offset in the amount of $120,000 would entitle the surviving spouse to an additional $60,000. Therefore, the spouse would be entitled to retain his or her independent wealth of $500,000 and receive an additional $60,000. Although the outcome is not drastically different from what the spouse would have received in the event of divorce, the result frustrates the decedent’s estate plan.

Alternatively, the proposed Equitable Elective Share statute would have entitled the surviving spouse to fifty percent of marital assets totaling $500,000, which would be completely offset by the $500,000 in his or her name. Thus, like the outcome in divorce or in a community property state, there would be no deficit, and the surviving spouse would receive no additional amount.

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190. This $300,000 represents thirty percent of the elective estate. The elective estate would include the decedent’s inherited wealth and accumulated assets totaling $1,000,000, but it would exclude the surviving spouse’s independent wealth, even though that amount was accumulated during the marriage. See, e.g., FLA. STAT. ANN. § 732.2035 (West 2000 & Supp. 2003).

191. This quantity represents one-half of the assets accumulated during the marriage. The consideration of equitable factors is beyond the scope of this discussion.
VI. PROPOSED EQUITABLE ELECTIVE SHARE STATUTE

This proposed Equitable Elective Share statute pools the decedent and the surviving spouse’s probate and non-probate properties, which were accumulated during marriage, and entitles the surviving spouse to one-half of that amount.

A. The Equitable Elective Share Statute

§ 1-101. Elective Share.

(a) Except where the parties have provided otherwise by agreement, the surviving spouse of a decedent who dies domiciled in this State may elect to take one-half of the Elective Estate. This Elective-Share Amount is available to the surviving spouse in addition to the surviving spouse’s homestead allowance, exempt property, and family allowance and payments under the Federal Social Security system.

(b) The Elective Estate shall consist of property included under Sections 1-201, 1-202 and 1-203, whether real or personal, movable or immovable, tangible or intangible, wherever situated.

(c) If the Elective-Share Amount awarded pursuant to subsections (a) and (b) of this Code section is insufficient, the court on application by the surviving spouse may award the surviving spouse an additional amount after taking into consideration the following:

(1) The support available to the surviving spouse from other sources and the income and earning capacity of the surviving spouse.

(2) Such other relevant criteria as the court deems equitable and proper.

The surviving spouse shall have the burden of proof by a preponderance of the evidence to show the amount awarded pursuant to subsections (a) and (b) of this Code section is insufficient.

§ 1-201. Decedent’s Net Probate Estate Accumulated During the Marriage.

(a) The value of the Elective Estate includes the value of the decedent’s net probate estate not excluded under Section 1-301(a).

(b) Calculation of the net probate estate – For purposes of this section the net probate estate shall include property of the decedent exclusive of any homestead allowance, exempt property and family allowance, reduced by funeral and administration expenses without a deduction for tax.

192. The court may consider equitable factors such as those statutorily provided in the division of property at divorce. See Part II.C for suggested factors.
§ 1-202. Decedent's Non-Probate Transfers During the Marriage.
(a) The value of the Elective Estate includes the value of the decedent's non-probate transfers not included under Section 1-201, and not excluded under Section 1-301(a) of any of the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

(i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) The value of property held jointly by the decedent and another person or persons with the right of survivorship. The entire value of the property is included except such part of the entire value as is attributable to the amount of the consideration in money or money's worth furnished by the other joint owner or owners. The decedent's estate shall have the burden of proving by a preponderance of the evidence that consideration in money or money's worth was furnished by the other joint owner or owners.

(iii) The value of property held in Payable on Death (POD), Transfer on Death (TOD), or co-ownership registration with the right of survivorship. The entire value of the property is included.

(iv) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned or possessed incidents of ownership in the insurance policy immediately before death, or to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds.

(v) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of assets over which decedent retained the right to the possession or enjoyment of or to the income from.

(vi) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the
power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(2) Property that passed during the one-year period preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the Elective Estate under paragraph (1) if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under said paragraph if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate or surviving spouse. As used in this subparagraph, "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right of interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (a)(1)(v), "termination" occurs when the power terminated by exercise or release, but not otherwise.

(ii) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the Elective Estate under paragraph (a)(1)(iv) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iii) Any transfer of property, to the extent not otherwise included in the Elective Estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee was a transfer not excluded by Section 2503(b) of the Internal Revenue Code.
§ 1-203. Surviving Spouse's Probate and Non-Probate Property Accumulated During the Marriage.

(a) Except to the extent included in the Elective Estate under Section 1-201 or 1-202, the value of the Elective Estate includes the value of the surviving spouse’s probate and non-probate property not excluded under Section 3-101(a) of any the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the surviving spouse. Property included under this category consists of:
   (i) Property over which the decedent’s spouse alone, immediately before the decedent’s death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power.
   (ii) The value of property held jointly by the decedent’s spouse and another person or persons with the right of survivorship. The entire value of the property is included except such part of the entire value as is attributable to the amount of the consideration in money or money’s worth furnished by the other joint owner or owners. The surviving spouse shall have the burden of proving by a preponderance of the evidence that consideration in money or money’s worth was furnished by the other joint owner or owners.
   (iii) The value of property held by the surviving spouse in POD, TOD, or co-ownership registration with the right of survivorship. The entire value of the property is included.
   (iv) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent’s spouse owned or possessed incidents of ownership in the insurance policy immediately before the decedent’s death, or to the extent the decedent’s spouse alone and immediately before the decedent’s death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds.
   (v) Any irrevocable transfer in which the decedent’s spouse retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent’s spouse’s right terminated at or continued beyond the decedent’s death. The amount included is the value of assets over which decedent’s spouse retained the right to the possession or enjoyment or to the income of the asset.
   (vi) Any transfer in which the decedent’s spouse created a power over income or property, exercisable by the decedent’s spouse alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent’s spouse or creditors of the decedent’s spouse. The amount included with respect to
a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(2) Property that passed during the one-year period preceding the decedent’s death as a result of a transfer by the decedent’s spouse if the transfer was of any of the following types:

(i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the Elective Estate under paragraph (1), if the right, interest, or power had not terminated until the decedent’s death. The amount included is the value of the property that would have been included under said paragraph if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent’s estate. As used in this subparagraph, “termination,” with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument, or the decedent’s spouse transferred or relinquished the right of interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (a)(1)(v), “termination” occurs when the power terminated by exercise or release, but not otherwise.

(ii) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the Elective Estate under paragraph (a)(1)(iv) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent’s death to or for the benefit of any person other than the decedent’s estate.

(iii) Any transfer of property, to the extent not otherwise included in the Elective Estate, made to or for the benefit of a person other than the decedent. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee were transfers not excluded by Section 2503(b) of the Internal Revenue Code.

§ 1-301. Exclusions and Presumptions.

(a) Exclusions. The value of any property excluded from the Elective Estate includes:
(1) To the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property, or

(2) Property transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse, or

(3) Separate property which includes assets brought into the marriage (but not accumulations thereon) and any assets received by the decedent or surviving spouse by way of gift, devise, bequest or inheritance before or during the marriage.

(b) Presumptions. The following presumptions shall be applicable for purposes of determining whether property shall be excluded under paragraph (a).

(1) There is a rebuttable presumption that the decedent's net probate property in Section 1-201 and decedent's non-probate transfers in Section 1-202 are included in determining the Elective-Share Amount under Section 1-101. The decedent's estate must prove by a preponderance of the evidence that such assets are excluded under Section 3-101(a).

(2) There is a rebuttable presumption that the surviving spouse's probate and non-probate properties under Section 1-203 are included in determining the Elective-Share Amount under Section 1-101. The surviving spouse must prove by clear and convincing evidence that said assets are excluded under Section 3-101(a).

§1-401. Sources From Which Elective-Share Amount Is Payable.

(a) In a proceeding for an elective share, the following are applied first to satisfy the Elective-Share Amount and to reduce or eliminate any contributions due from the decedent's estate and recipients of the decedent's non-probate transfers to others:

(1) Amounts included in the Elective Estate under Sections 1-201 and 1-202 which pass or have passed to the surviving spouse and amounts included in the Elective Estate under Section 1-203.

(2) If the Elective-Share Amount is not fully satisfied, the remaining portion of the Elective-Share Amount is satisfied first from Section 1-201 and then equitably apportioned among the recipients other than the surviving spouse of the Section 1-202 non-probate transfers in proportion to the value of their interests therein.

B. Strengths and Weaknesses of the Proposed Statute

The statute to be used for evaluating the elective share should be a model based on division of marital property at the dissolution of marriage or community property principles. Although these are the
expressed goals of the UPC Model, they are not accomplished with a statute that includes separate property. In order to achieve fairness and protection for the surviving spouse, only marital property should be pooled, and the surviving spouse should be awarded one-half thereof. Awarding the surviving spouse one-half of the marital assets fairly protects the surviving spouses of long-term and short-term marriages without the need to incorporate a phase-in rate schedule, which makes arbitrary distinctions, or a fixed percentage, which fails to differentiate between the long-term and short-term marriages.

The inclusion of marital property will require the parties to trace the character of all assets. This presents accounting difficulties for which the statute must provide a system for guidance. Guidance is provided through statutory presumptions. Essentially, the presumptions make all probate and non-probate property of both the decedent and the surviving spouse marital property. Thus, all assets of both parties are presumed to be included in the Elective Estate. The decedent’s estate may exclude his or her probate or non-probate assets from the Elective Estate by overcoming the statutory presumptions by the preponderance of the evidence. On the other hand, the surviving spouse must show by clear and convincing evidence that his or her probate or non-probate assets are to be excluded. The different burdens of persuasion

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193. The Equitable Elective Share statute provides for the inclusion of marital property by statutorily providing for the exclusion of separate property.

194. For example, phase-in provisions draw arbitrary distinctions between the marriage of fifteen years and the marriage of fourteen years, eleven months, and twenty-nine days. See supra notes 56, 111, and accompanying text.

195. The Federal Estate Tax and Comprehensive Models, along with the Traditional Elective Share Method, use a fixed percentage that treats the surviving spouse of a marriage of fifty years the same as a surviving spouse of five months. Their failure to make distinctions between the long-term and short-term marriages allows for a windfall or penalty because all property accumulated by death is considered, as opposed to marital property.


197. See LYNN MCLAIN, MARYLAND EVIDENCE § 300:4b (2001). McLain explains: Preponderance of the evidence requires one to (1) establish that a fact is “more likely true than not true” or “more probable than not;” (2) tip the scale ever so slightly in the favor of [the party who bears the burden of persuasion]”; (3) constitute the “greater weight” of the evidence; or (4) amount to at least 51% of the evidence.

Id.

198. See id. § 300:4c (stating that clear and convincing evidence is more than a preponderance of evidence and less than evidence beyond a reasonable doubt). The law is not always clear as to what standard of proof is intended, but the Maryland courts and the General Assembly have used various terms, including “clear and satisfactory proof,” “clear and unequivocal evidence,” and “clear evidence.” Id.
recognize that the decedent’s estate may not have the same access to evidence as that of the surviving spouse.\textsuperscript{199} The different burdens of persuasion necessary to overcome the statutory rebuttable presumptions theoretically attempt to level the playing field.

The heavier burden of persuasion required of the surviving spouse may serve as a deterrent for the greedy spouse who is set on frustrating the decedent’s testamentary scheme. However, if imposing a heavier burden of persuasion on the surviving spouse has a chilling effect on his or her decision to exercise his or her spousal election, the statute should be adjusted. The statute, which is designed to protect the spouse, should not defeat its purpose. Thus, it is more important that the Equitable Elective Share statute protect the surviving spouse than be concerned about leveling the playing field to accommodate for the decedent’s absence. After all, it may not be necessary to level the playing field in cases involving spousal election because the surviving spouse may be financially disadvantaged. However, even with these acknowledged problems, the presumptions minimize the impact caused by the decedent’s absence.

In addition to the suggested modification, the statute must provide flexibility. Flexibility can be achieved by incorporating equitable factors\textsuperscript{200} that may be considered by a court using its equitable powers.\textsuperscript{201} For example, in a short-term marriage in which the decedent had substantial premarital wealth, the court could award the surviving spouse a supplemental elective share amount.\textsuperscript{202} Equitable factors may also be used to relieve society of the possible burdens involved in supporting an impoverished spouse. Although it will be necessary to expand the powers of the probate court, this discretion will enable a court to look

\textsuperscript{199} The surviving spouse will have better access to evidence. He or she is alive, more likely knowledgeable about circumstances involving the acquisition, and better suited than the estate as to proving the character (separate or marital) of the assets. Different burdens of persuasion are typically used when one party has better access to evidence. \textit{See id.} §301:1(ii).

\textsuperscript{200} Such factors are considered in the Equitable Elective Share Statute § 1-101(c)(1),(2), and the court may consider “relevant criteria as the court deems equitable and proper.” The court could consider the spouse’s income and property, age, health, and needs. Additional equitable factors like those considered at divorce may be relevant. \textit{See supra} note 21.

\textsuperscript{201} The incorporation of equitable powers may require expanding the powers of probate courts. The discussion of this potential expansion is beyond the scope of this Article.

\textsuperscript{202} UPC § 2-202(b) provides a supplemental elective-share amount when the augmented estate is less than $50,000. \textit{Unif. Probate Code} § 2-202(b). The discretionary equitable factors could be employed like UPC § 2-202(b) to provide an additional elective share when the elective estate is small.
outside the statute to ensure that the surviving spouse is financially protected.

The incorporation of discretion may require litigation to determine the spousal amount. The statute's requirement that the surviving spouse petition the court and prove his or her Elective-Share Amount will likely discourage unfounded litigation. A similar setting seems to work fairly well in the domestic relations environment and in community property states, and this is not the first time equitable principles have been employed in the elective-share setting.203

CONCLUSION

Upon the death of one's spouse, the survivor should be treated fairly. The current elective share statutes are based on assets owned by one or both parties at death and fail to consider whether those assets are fruits of the marriage. To arrive at fairness, the elective share statutes must take into account marital property and award the survivor one-half of that accumulation. This concept will avoid the many pitfalls that exist within the elective share methods and will achieve a fairer outcome in each case.

The proposed Equitable Elective Share statute truly implements the concept of marriage as a partnership in its elective share calculation by focusing on marital property. This change over the current methods eliminates many of their shortcomings.

The Equitable Elective Share statute will not allow the surviving spouse to be disinherit a with non-probate arrangements because of its inclusion of non-probate transfers of marital property made during the marriage. Moreover, surviving spouses of short-term marriages will not be entitled to a windfall because the elective share under this statute considers assets accumulated during the marriage, thereby excluding all premarital wealth. Distinctions are automatically made between short-term and long-term marriages because, in general, fewer assets will be accumulated in a short-term marriage. The Equitable Elective Share statute will also prevent unintended windfalls due to gifts and inheritances received during marriage. These amounts will be excluded for purposes of the elective share, as these amounts are not economic fruits of the marital partnership and therefore should not be part of the equation.

The Equitable Elective Share statute raises a concern regarding the tracing of property in that it will be more difficult for the decedent’s

203. Historically, equitable rules were designed to protect married women. See Turano, supra note 37, at 990; see also GA. CODE ANN. § 53-5-2 (Michie 1997) (stating that a court may incorporate equitable powers in determining support for the family).
estate to prove that his or her assets should be excluded as separate property. This concern is warranted and is addressed in the Equitable Elective Share statute with statutory presumptions requiring the surviving spouse to overcome the burden of persuasion by clear and convincing evidence and the estate to overcome the burden of persuasion by a preponderance of the evidence. Separate assets not commingled will be easily excluded. If the parties commingle separate property with marital property, then the parties may not be able to meet their burdens. These same issues arise, however, in community property jurisdictions and always present administrative inconveniences. Yet, the fair outcome, which will be achieved more often, justifies the inconveniences caused by the tracing difficulties.

The exclusion of separate property and an adoption of discretionary equitable principles will promote equity. The division of property accumulated during the marriage should not vary based on why the marriage is dissolving. Rather, the division of property accumulated during marriage should be the same regardless of whether the marriage terminates because of divorce or the death of one party.