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NOTES

Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate

In 1970 the Commissioners on Uniform State Laws published the Uniform Probate Code (the "U.P.C."). The U.P.C. entitles a surviving spouse to take a one-third share of the decedent's augmented estate whether the deceased spouse dies testate or intestate.¹

The Commissioners developed the augmented estate concept to calculate the assets subject to the surviving spouse's forced share. The Commissioners include in the augmented estate the value of certain lifetime transfers of property by the decedent during marriage to donees other than the surviving spouse.² The comment to

¹ UNIF. PROB. CODE § 2-202 (1982). Section 2-201 states in part: "If a married person . . . dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated."

² *Id.* § 2-202(1). Section 2-202(1) states in full:

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

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

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

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

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

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

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

U.P.C. section 2-202 explicitly states that the addition of these lifetime transfers to the augmented estate supports the policy of preventing the decedent from deliberately disinheriting the surviving spouse.³ Although this policy restricts freedom of testation, it reflects a long history of protecting the surviving spouse from complete disinheritance.⁴

U.P.C. section 2-202 places a limit on the augmented estate by excluding life insurance.⁵ Given the current popularity of life insurance as an estate planning device,⁶ this exclusion allows a decedent effectively to disinherit the surviving spouse.⁷ Because the augmented estate forecloses other lifetime transfers used in the past to disinherit the surviving spouse,⁸ this loophole may prove increasingly significant in the future.⁹

Part I of this Note traces the various methods courts and legislatures have used to protect the surviving spouse from disinheritance. Part II analyzes the importance of life insurance as a transmitter of wealth by comparing the functions of life insurance and other will substitutes with the functions of wills, and discusses the implications for disinheritance of the surviving spouse. Part III proposes a formula to eliminate the life insurance limitation in the augmented estate which would not expose insurance companies to liability for wrongly paying out life insurance proceeds to named beneficiaries, or threaten them with unduly high costs. Finally, this Note concludes that legislatures and courts should acknowledge the similar functions played by life insurance and wills in estate planning, and treat life insurance assets as probate assets by including them in the augmented estate.

³ *Id.* section 2-202 commentary at 39 (1982). The comment states that one reason for adding the lifetime transfers specified in section 2-202(1) is "to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share"

⁴ See Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948).

⁵ UNIF. PROB. CODE § 2-202(1) (1982).

⁶ See *infra* notes 114-21 and accompanying text. See also Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984). (Pointing out the prominence of will substitutes, such as life insurance, in estate planning, and criticizing courts for treating them differently from wills.)

⁷ See W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 236-42 (1960) (Noting that although life insurance is generally regarded as an estate enhancer, it can function to evade the surviving spouse's forced share.)

⁸ Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 1027 (1977). Professor Kurtz points out that the U.P.C. reaches common disinheritance devices such as revocable trusts and Totten trusts.

⁹ See *id.* at 1035.

I

PROTECTION OF THE SURVIVING SPOUSE FROM
DISINHERITANCE

A. Dower

The premise behind the U.P.C. augmented estate concept—that the laws should not allow decedents to disinherit surviving spouses—traces its history to the common law concept of “dower.” “Dower” is a French word, but the idea’s origins date to German law which prevailed in England before the Norman Conquest.¹⁰ Originally, dower meant the right of a wife to remain in her husband’s house, specifically, a “right to a seat by the hearth.”¹¹ 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.¹² 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.¹³

Under the prevailing form of twelfth century dower, at marriage a husband gave his wife a life estate in particular land should she survive him.¹⁴ During the period following the Conquest, land was the principal source of wealth for most families.¹⁵ Because dower was land-based, it provided a widow with some economic security, and it afforded support for younger children who had no inheritance rights by the laws of primogeniture.¹⁶ Although the bridegroom could specify which lands would form the dower, he could not marry without having named a dower.¹⁷

By the thirteenth century, a wife’s right to dower had become important enough to be included in the Magna Carta.¹⁸ By the end of the thirteenth century, if a man did not name a specific dower, the

¹⁰ 1 AMERICAN LAW OF PROPERTY § 5.2, at 618 (A.J. CASNER ed. 1952) [hereinafter AMERICAN LAW OF PROPERTY]. Casner observes that dower seems to have been derived from early German law where a bridegroom paid his bride’s family a fee. The fee served two purposes. First, it was a payment by the bridegroom to acquire rights over the bride. Second, the payment was a mourning gift for the wife to use if her husband predeceased her.

¹¹ *Id.*

¹² *See id.* at 619.

¹³ *Id.*

¹⁴ *Id.* The widow lost the life estate in her husband’s land when she remarried.

¹⁵ *Id.* § 5.3, at 622.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ W. McKECHNIE, MAGNA CARTA 215 (2d ed. 1914). Chapter 7 of the Magna Carta provides:

A widow after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance

law entitled his surviving widow to one-third of the lands of which he had been seised at any time during his marriage.¹⁹ Named dower fell into disuse by the fifteenth century, and unnamed dower by operation of law became the prevalent form of dower.²⁰ Under unnamed dower, a husband could not bar his wife's interest in land²¹ which he owned during their marriage by a lifetime conveyance, unless his wife consented. The husband's inability to convey land unencumbered by the dower interest made it difficult to alienate land at its fair value because potential buyers feared the land would later be subject to a widow's dower interest.²² Although conceptually dower conflicts with primogeniture,²³ the free alienability of land, and land-based feudal power,²⁴ by the fifteenth century it had become a durable part of the common law in England.²⁵

While states in the United States initially adopted the essential features of the English concept of dower,²⁶ most states subsequently have abolished or limited dower.²⁷ Several reasons explain

which her husband and she held on the day of the death of that husband

¹⁹ Haskins, *supra* note 4, at 52.

²⁰ *Id.* at 54.

²¹ While both spouses were alive the wife's right remained inchoate—that is, her right did not become possessory until she survived her husband. Kurtz, *supra* note 8, at 985.

²² Dower also cut off creditor's rights against a husband because a wife's rights were not subject to her husband's debts. Kurtz, *supra* note 8, at 985.

²³ Primogeniture made a man's eldest son his sole heir. This reflected a traditional bias for passing the estate to one's blood heirs. See W. MACDONALD, *supra* note 7, at 60.

²⁴ The King viewed land as a fund for the support of his armies, and, therefore regarded dower as a burden upon the land. Because the King coveted land for his armies, men feared that without dower, the King might take the their land after their death. 1 AMERICAN LAW OF PROPERTY, *supra* note 10, at 623.

²⁵ *Id.* at § 5.3, 630. Because of the strong policies which conflicted with dower, courts and Parliament devised several ways to circumvent dower. Those methods were: (1) jointures created under the Statute of Uses; (2) trusts; and (3) powers of appointment, which deprived a wife of dower and yet gave the husband all the advantages of an estate of inheritance. *Id.* at 631-32.

²⁶ The similar common law concept of curtesy also was adopted in the United States. At common law, curtesy gave a husband an interest in his wife's land upon her death. Curtesy was similar to dower except that (1) courts only awarded curtesy to the husband if children were born from the marriage, and (2) courts gave the husband a life estate in *all* the wife's real property, rather than just one-third. J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 398 (3d ed. 1984). Today, all states have abolished curtesy. *Id.* Of the states retaining dower, only Michigan and South Carolina have not extended dower rights to widowers. The Michigan and South Carolina dower statutes may be unconstitutional, however, because the Arkansas Supreme Court held a similar Arkansas statute violative of the equal protection clause. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981). However, the Court approved a later statute that was cast in gender-neutral language. *Beck v. Merritt*, 280 Ark. 331, 657 S.W.2d 549 (1985).

²⁷ See AMERICAN LAW OF PROPERTY, *supra* note 10, at 631-32. See also *infra* note 35 for a list of states that have retained dower in some form, and *infra* note 46 for a list of state statutes that abolished dower in favor of elective share statutes.

this trend. First, common-law dower diminishes the alienability of land.²⁸ Buyers hesitate to buy lands that might be subject to a surviving spouse's future dower claim. To remove the threat of dower, a seller must obtain his wife's formal consent to any sale of land.²⁹ His wife might not consent for any number of reasons.³⁰ Because a widow can assert dower at any stage in the chain of title, dower causes a special hardship for title examiners.³¹ Second, as part of a more general movement to recognize women's rights, most states have acknowledged that the widow is at least as entitled to a share in her husband's property as the children, and certainly more so than the next of kin.³² Finally, because land no longer represents the principal source of wealth in this country, most states have realized that protection of the spouse must extend beyond real property to include personal property.³³

B. Statutory Protection of the Surviving Spouse

In place of common-law dower, states have developed various devices to protect the surviving spouse from disinheritance by the decedent.³⁴ Many states have completely abolished dower, while a few have refined it.³⁵ Many states that have refined dower have enhanced the widow's share from a one-third share in a life estate to a one-third share in an outright fee.³⁶ Most of the states retaining dower have granted coextensive rights to widowers as well.³⁷ More-

²⁸ See W. MACDONALD, *supra* note 7, at 61.

²⁹ *Id.* See also *United States v. Certain Parcels of Land in Annapolis*, 46 F. Supp. 441, 446 (D. Md. 1942) (Dower may not be defeated by a voluntary conveyance without wife's consent); *Rowe v. Ratcliff*, 268 Ky. 217, 219, 104 S.W.2d 437 (1937) (Husband cannot, by gift, take away wife's inchoate dower rights without her consent).

³⁰ W. MACDONALD, *supra* note 7, at 60-61.

³¹ See *id.* at 62-63.

³² See AMERICAN LAW OF PROPERTY, *supra* note 10, at 632-33.

³³ Kurtz, *supra* note 8, at 989.

³⁴ Dower is irrelevant in the eight community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington). The community property system views marriage as an equal partnership which each spouse contributes to, whether by working inside or outside the home. Therefore, each spouse owns an undivided one-half interest in the community property. Community property includes earnings by both spouses during marriage. Under this system, a deceased spouse has testamentary power only over one-half the community property. Conversely, under the common-law system, all earnings belong to the wage earner if only one spouse works outside the home.

³⁵ The following states retain dower in some form: ARK. STAT. ANN. § 28-11-102 (1987); IOWA CODE ANN. § 633.211 (West 1964 & Supp. 1988); KY. REV. STAT. ANN. § 392.020 (Baldwin 1984); MICH. STAT. ANN. § 26.221 (Callaghan 1984 & Supp. 1988); OHIO REV. CODE ANN. § 2103.02 (Baldwin 1983); S.C. CODE ANN. § 21-5-110 (Law Co-op. 1976); W. VA. CODE § 43-1-1 (1982 & Supp. 1988).

³⁶ See *supra* note 35.

³⁷ The rights widowers receive coextensively with widows replace any curtesy rights widowers had. See *supra* note 26.

over, all common-law states have developed various devices to protect the surviving spouse beyond any dower or forced share rights he or she may have.³⁸ The most common devices used to enhance protection of the surviving spouse include homestead laws, personal property set-aside laws, and family allowance laws.

Homestead laws generally give a surviving spouse a right to occupy the family home for his or her lifetime free of creditor claims.³⁹ This right supplements any other rights the surviving spouse has in the decedent's estate. However, the amount of the exemption from debt varies dramatically among the states. Some states exempt the entire home regardless of value,⁴⁰ while others provide little protection for the surviving spouse.⁴¹

Related to homestead laws are personal property set-aside laws and family allowance laws. Under personal property set-aside laws, the surviving spouse has the right to have certain statutorily enumerated tangible personal property of the decedent set aside for her.⁴² Like homestead, personal property items are exempt from creditors. Every state has a statute authorizing the probate court to award an allowance for maintenance and support of the surviving spouse.⁴³ The allowance may be for a fixed period, or for the dura-

³⁸ See *infra* notes 39-44 and accompanying text.

³⁹ This type of homestead is often called a "probate homestead." In addition to exemption from general creditor claims, some states exempt the homestead from property tax.

⁴⁰ See, e.g., COLO. REV. STAT. § 38-41-205 (1973); S.C. CODE ANN. § 15-41-100 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 43-31-15 (1987).

⁴¹ Uniform Probate Code section 2-401 recommends a mere \$5,000. UNIF. PROB. CODE § 2-401 (1982). See also ALA. CODE § 43-8-100 (1975) (\$6,000); ARK. STAT. ANN. § 28-39-203 (1987) (\$2,500); HAW. REV. STAT. § 560:2-401 (1976) (\$5,000); IOWA CODE § 561.2 (1946 & Supp. 1987) (\$500); KY. REV. STAT. ANN. § 427.060 (Baldwin 1978) (\$5,000); NEB. REV. STAT. § 30-2322 (1979) (\$7,500); UTAH CODE ANN. § 75-2-401 (1978) (\$6,000); VT. STAT. ANN. tit. 27, § 105 (1975) (\$5,000); VA. CODE ANN. § 64.1-151.3 (1950) (\$5,000); W. VA. CODE § 38-9-1 (1985) (\$5,000).

⁴² These items typically include household furniture and clothing, but may also include other family items, such as the family car. See, e.g., ALA. CODE § 43-8-111 (1982) (awarding the surviving spouse \$3,500 worth of furniture, automobiles, furnishings, appliances and personal effects beyond the homestead allowance); MINN. STAT. § 525.15(2) (1984 & Supp. 1988) (surviving spouse entitled to receive one automobile as part of the allowance).

⁴³ See, e.g., ALA. CODE § 43-8-112 (1982); ALASKA STAT. § 13.11.135 (1962 & Supp. 1985); COLO. REV. STAT. § 15-11-403 (1987); CONN. GEN. STAT. § 45-273a (1958 & Supp. 1988); DEL. CODE ANN. tit. 12, § 907(h) (1974); FLA. STAT. § 732.403 (1976); HAW. REV. STAT. § 560:2-403 (1985); ILL. ANN. STAT. ch. 110 1/2, para. 15-1 (Smith-Hurd 1978 & Supp. 1988); IND. CODE ANN. § 29-1-4-3 (Burns Supp. 1988); KAN. STAT. ANN. § 59-403 (1983); ME. REV. STAT. ANN. tit. 18-A, § 2-403 (1964); MD. EST. & TRUSTS CODE ANN. § 3-201 (1974 & Supp. 1987); MASS. GEN. L. ch. 200, § 10 (1981); MINN. STAT. § 525.15 (1984 & Supp. 1988); MISS. CODE ANN. § 91-7-135 (1973); MO. REV. STAT. § 474.260 (1986); MONT. CODE ANN. § 72-2-803 (1988); NEB. REV. STAT. § 30-2324 (1985); N.H. REV. STAT. ANN. § 560:1 (1974); N.J. REV. STAT. § 3B:3-30 (1983); N.Y. EST. POWERS & TRUSTS LAW § 5-3.1 (Consol. 1979); N.C. GEN. STAT. § 30-15

tion of the administration period.⁴⁴ The allowance, like homestead and personal property set-aside, exists independently of whatever other rights the surviving spouse may have.

Because of the inadequacies of common-law dower,⁴⁵ the vast majority of states have replaced it with forced share statutes.⁴⁶ Typically, forced share statutes allow a surviving spouse to take a fixed share, usually one-third or one-half⁴⁷ of the decedent's probate estate,⁴⁸ whether the decedent dies testate or intestate. In most cases,⁴⁹ the forced share statutes provide the surviving spouse with greater protection against disinheritance than that provided by common-law dower because under a forced share regime the surviving spouse takes a share of the decedent's entire probate estate, which

(1984); N.D. CENT. CODE § 30.1-07-02 (1983); OR. REV. STAT. § 114.015 (1983); 20 PA. CONS. STAT. ANN. § 2110 (Purdon 1975); R.I. GEN. LAWS § 33-10-3 (1984); S.C. CODE ANN. § 62-2-401 (Law. Co-op 1976); S.D. CODIFIED LAWS ANN. § 30-20-20 (1984); TENN. CODE ANN. § 30-2-102 (1984 & Supp. 1988); UTAH CODE ANN. § 75-2-403 (1978); VT. STAT. ANN. tit. 14, § 404 (1974 & Supp. 1988); VA. CODE ANN. § 64.1-151.1 (1987); WIS. STAT. ANN. § 861.31 (West 1971 & Supp. 1987); WYO. STAT. § 2-5-103 (1977).

⁴⁴ Kurtz, *supra* note 8, at 990.

⁴⁵ See *supra* notes 27-33 and accompanying text.

⁴⁶ The following states have abolished dower in favor of elective share statutes: ALA. CODE § 43-8-70 (1982); ALASKA STAT. § 13.11.070 (1962 & Supp. 1985); COLO. REV. STAT. § 15-11-201 (1987); CONN. GEN. STAT. § 45-273a (1958); DEL. CODE ANN. tit. 12, § 901 (1974); FLA. STAT. § 732.201 (1976); HAW. REV. STAT. § 560:2-201 (1985); ILL. ANN. STAT. ch. 110 1/2, para. 15-1 (Smith-Hurd 1978); IND. CODE ANN. § 29-1-3-1 (Burns 1972); KAN. PROB. CODE ANN. § 59-2233 (Vernon 1983); ME. REV. STAT. ANN. tit. 18-A, § 2-201 (1964); MD. EST. & TRUSTS CODE ANN. § 3-203 (1974); MASS. GEN. L. ch. 191, § 15 (1981); MINN. STAT. § 525.2-212 (1984); MISS. CODE ANN. § 91-5-25 (1973); MO. REV. STAT. § 474.160 (1986); MONT. CODE ANN. § 72-2-702 (1988); NEB. REV. STAT. § 30-2313 (1985); N.H. REV. STAT. ANN. § 560:10 (1974); N.J. STAT. ANN. § 3B:8-1 (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (Consol. 1979); N.C. GEN. STAT. § 30.1 (1984); N.D. CENT. CODE § 30.1-05-01 (1983); OR. REV. STAT. § 114.105 (1983); 20 PA. CONS. STAT. ANN. § 2203 (Purdon 1975 & Supp. 1987); R.I. GEN. LAWS § 33-6-22 (1984); S.C. CODE ANN. § 62-2-201 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 30-5A-1 (1984); TENN. CODE ANN. § 31-4-101 (1984); UTAH CODE ANN. § 75-2-201 (1978); VT. STAT. ANN. tit. 14, § 402 (1974); VA. CODE ANN. § 64.1-13 (1987); WIS. STAT. ANN. § 861.02 (West 1971 & Supp. 1987); WYO. STAT. § 2-5-101 (1977).

⁴⁷ The exact amount of the surviving spouse's fixed share often is calculated by what the share would be under the state's intestacy statute. Thus, her share will vary depending upon whether the decedent left issue and/or kin. See J. DUKEMINIER & S. JOHANSON, *supra* note 26, at 400. See, e.g., HAW. REV. STAT. § 560:2-201 (1976).

⁴⁸ The probate estate is composed of all assets the decedent owned at death that pass by will or inheritance and which the decedent's personal representative can administer. Because the statute of wills does not cover property passing at death by contract: (1) property held in a joint tenancy; (2) property held in trust; and (3) property in which the decedent holds a power of appointment, these forms of property are not probate assets. See T. ATKINSON, *ATKINSON ON WILLS* § 44, at 193 (2d ed. 1953).

⁴⁹ In cases where the husband had held large amounts of real property during his lifetime, but had sold most of it and consumed most of the proceeds by his death, a widow would be better off under common-law dower than under a forced share statute because under the latter she is unable to reach land which her husband owned during marriage once it is sold.

includes both real and personal property. The policy underlying forced share statutes is similar to that underlying community property laws: the spouse's protection flows from the nature of the marital property.⁵⁰ This reflects the notion that both spouses contribute to the financial assets after marriage. It naturally follows that the surviving spouse receives a forced share of the decedent's probate estate in fee simple regardless of the surviving spouse's actual need.⁵¹

Forced share statutes, however, do not prevent a decedent from disinheriting a surviving spouse because the probate estate does not include assets which the decedent transfers *inter vivos*. A person who wishes to disinherit his spouse need only transfer his property before death. Two of the most common lifetime transfers used to disinherit spouses are revocable *inter vivos* trusts and joint bank accounts.⁵² 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. For example, in one common type of revocable *inter vivos* trust, a Totten trust,⁵³ the owner names himself trustee for the beneficiary, but retains lifetime dominion and the power to revoke.⁵⁴ The owner receives all the proceeds of the trust during his lifetime, and can revoke the beneficiary's interest at anytime up to his own death. A revocable trust therefore resembles a will in two respects: it is revocable until death, and "the interests of the devisees are ambulatory—that is, nonexistent until the testator's death".⁵⁵

Similarly, a disinheritor can use a joint bank account to disinherit his surviving spouse. In theory, the donee in a joint bank ac-

⁵⁰ See Kurtz, *supra* note 8, at 990.

⁵¹ Under all forced share statutory schemes the surviving spouse is entitled to a share in the decedent's probate estate even though the surviving spouse may be a substantial wage earner, or may have significant wealth of her own through inheritance from a parent. Kurtz, *supra* note 8, at 991; see also W. MACDONALD, *supra* note 7, at 290-91 (Advocating adoption of a maintenance system patterned after England's in which a court may award maintenance payments to a surviving spouse and children if it determines that the decedent did not make adequate provisions for them.).

⁵² W. MACDONALD, *supra* note 7, at 4.

⁵³ See *In re Estate of Totten*, 179 N.Y. 112, 71 N.E. 748 (1904). The Totten trust has been approved by the Restatement and is described as follows:

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

RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).

⁵⁴ Langbein, *supra* note 6, at 1113.

⁵⁵ *Id.* at 1110.

count receives an interest equal to the donor's, and the donor loses the power to revoke the transfer.⁵⁶ In practice, however, because of the privilege of mutual withdrawal, either cotenant can empty the entire account. Therefore, a depositor may name a cotenant on a bank account but treat the account as his own.⁵⁷ The cotenant may not even know that the account exists. Moreover, some bank account agreements permit the depositor to revoke and alter cotenancy designations freely.⁵⁸ The depositor also may close the account, withdraw the funds, and open a new account in his name only.⁵⁹ In this manner, joint bank accounts, like revocable inter vivos trusts, operate as wills yet are not subject to the spouse's forced share. Thus, if the decedent removes all assets from the probate estate through lifetime transfers, the surviving spouse may be left with a statutory share of nothing.

C. Judicial Protection of the Surviving Spouse

Because persons wishing to disinherit their spouses could easily evade forced share statutes by using lifetime transfers, courts have created three primary tests by which the surviving spouse might defeat a lifetime transfer by the decedent and return the assets to the probate estate. First is the illusory transfer test.⁶⁰ Under this test a court will set aside an inter vivos transfer if the decedent retained excessive control over, or an interest in, the transferred property.

The leading case defining the illusory transfer doctrine is *Newman v. Dore*.⁶¹ In *Newman*, Ferdinand Straus, a deceased octogenarian, and his thirty-year old wife were married four years before his death. The decedent became unhappy with the marriage. Three days before his death, the decedent executed an inter vivos trust consisting of all his real and personal property for the benefit of himself and his children from a prior marriage. The terms of the trust gave the decedent the right to income for life, the power to revoke the trust, and substantial managerial powers.⁶² The decedent's widow challenged the validity of the trust. The court held that the trust was illusory because the decedent had retained exces-

⁵⁶ *Id.* at 1112.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ This test grew out of the more rigid testamentary transfer test. Courts used the test to void lifetime transfers that were to take effect at death. Courts at this time were concerned with protecting the statute of wills, and did so rigidly. *See, e.g.*, *Fleming v. Fleming*, 194 Iowa 122, 184 N.W. 296 (1921) (outright transfer under a business agreement); *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611 (1939) (revocable trust); *Hill's Estate*, 15 Pa. D. & C. 699 (1931) (declaration of trust).

⁶¹ 275 N.Y. 371, 9 N.E.2d 966 (1937).

⁶² *Id.* at 380, 9 N.E. 2d at 969.

sive control over the trust property. Therefore, the court concluded that the trust property was part of the probate estate.⁶³ The question under the illusory transfer test is whether or not the transferor had in good faith⁶⁴ divested himself of the ownership of his property, or whether the transferor retained too much control over the transferred property.

Although relatively predictable,⁶⁵ courts and commentators have criticized the illusory trust test for: (1) undervaluing the importance of retained revocation power; (2) causing courts to ignore the test when equities cut the other way; and (3) being too narrow.⁶⁶ These criticisms all rest on the fact that the test focuses on the degree of retained control by the transferor to the exclusion of all other considerations.

The second test courts use to void inter vivos transfers is the intent test.⁶⁷ Under this test, a court will set aside an inter vivos transfer if it finds that the decedent intended to defraud the surviving spouse of a statutory forced share. The court in *Sherrill v. Mallicote*⁶⁸ employed the intent test to set aside an irrevocable trust of securities. The trust gave the decedent income for life, and named his siblings as trustees and remaindermen. The record indicated a long history of severe marital problems between the surviving spouse and the decedent and his family.⁶⁹

In holding that the decedent had established the trust intending to defeat the spouse's statutory share, the appellate court found the following facts relevant: the size of the transfer and whether it was made for consideration, the proximity of the transfer to the decedent's death, relations between the spouses at the time of the transfer, and the source of the decedent's wealth.⁷⁰ The court further held that proof of an intent to defeat the surviving spouse's share is not always dispositive because the decedent may have intended to

⁶³ *Id.* at 381, 9 N.E. 2d at 969-70.

⁶⁴ The court defined good faith as the transferor's intent to divest himself of the ownership of his property, not his intent concerning his wife's statutory share. *Id.* at 379, 9 N.E.2d at 969, *citing* Benkart v. Commonwealth Trust Co., 269 Pa. 257, 259, 112 A. 62, 63 (1920).

⁶⁵ See W. MACDONALD, *supra* note 7, at 89.

⁶⁶ *Id.* at 87-92.

⁶⁷ *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611 (1939) (court inferred a fraudulent intent from all the facts and circumstances surrounding the case); *Patch v. Squires*, 105 Vt. 405, 165 A. 919 (1933) (court held that a surviving spouse cannot defeat an inter vivos transfer absent a showing of actual intent to defraud his or her elective share as distinguished from a presumed intent that could be inferred by circumstantial evidence that the decedent intended to defraud the surviving spouse).

⁶⁸ 57 Tenn. App. 241, 417 S.W.2d 798 (1967), *superseded by statute*, as noted in *Haren v. Compton*, 626 S.W.2d 12 (Tenn. App. 1981).

⁶⁹ *Id.* at 244-45, 417 S.W.2d at 800.

⁷⁰ *Id.* at 248, 417 S.W.2d at 802.

defeat the surviving spouse's share because he had already provided for her.⁷¹ Under the *Sherril* court's interpretation of the intent test, courts should consider the actual effect of the transfer. Some courts, however, ignore the practical effect of a transfer once they find that the decedent intended to defeat the surviving spouse's share.⁷² In addition to the uncertainty over the distinction between motive (incentive) and intent (specific purpose), the intent test is highly unpredictable because it depends upon a close examination of the particular facts of each case.⁷³

The third major test courts use to determine the validity of inter vivos transfers is the reality test. Under the reality test, courts uphold an inter vivos transfer if it is valid, regardless of the rights of the surviving spouse. The surviving spouse can, therefore, only challenge a transfer on the grounds that it is purely fictional or testamentary.⁷⁴

The leading case employing the reality test is *In re Halpern*.⁷⁵ The decedent in *Halpern* established four Totten trusts naming his granddaughter as beneficiary. The surviving spouse sued to have the trust assets placed in the probate estate. The New York State Court of Appeals upheld the trusts, declaring that "[t]here is nothing illusory about a Totten trust as such."⁷⁶ The court did not define "illusory" in terms of control, because under a pure control test a Totten trust would be set aside.⁷⁷ Instead, the court defined an "illusory" transfer as one lacking reality for any purpose.⁷⁸ The reality test provides the surviving spouse with little protection against disinheritance because the spouse cannot reach transfers that are effective under the law of gifts.

The tests courts use to determine the validity of inter vivos transfers alternatively lack predictability and breadth, and fail to protect the surviving spouse from disinheritance. The decisions under these tests often rely on an "ad-hoc balancing of equities,

⁷¹ *Id.*, 417 S.W.2d at 802-03.

⁷² *See, e.g.*, *Cherniak v. Home Nat'l Bank & Trust Co.*, 151 Conn. 367, 369-71, 198 A.2d 58, 59-60 (1964) (holding that although the decedent's trust, which gave most of his assets to his brothers and their children, was tantamount to an expression of the decedent's intent to limit his wife's statutory share, she had no claim of fraud).

⁷³ Kurtz, *supra* note 8, at 1000.

⁷⁴ W. MACDONALD, *supra* note 7, at 120.

⁷⁵ 303 N.Y. 33, 100 N.E.2d 120 (1951), *superseded by statute* as stated in *Estate of Agioritis*, 52 A.D.2d 128, 383 N.Y.S.2d 304 (1976), *aff'd*, 40 N.Y.2d 646, 357 N.E.2d 979, 389 N.Y.S.2d 323.

⁷⁶ *Id.* at 38, 100 N.E.2d at 122 (1951). *But see* *Montgomery v. Michaels*, 54 Ill. 2d 532, 537, 301 N.E.2d 465, 468 (1973), *superseded by statute* as stated in *Clay v. Woods*, 39 Ill. App. 3d 711, 487 N.E.2d 1106 (1985) (held that Totten trusts clearly are illusory).

⁷⁷ Kurtz, *supra* note 8, at 1003.

⁷⁸ *Halpern*, 303 N.Y. at 38, 100 N.E. 2d at 122.

based upon the facts and circumstances of each particular case."⁷⁹ By ruling according to the equities in particular cases, courts tend to distort the tests from their original form because the equitable result may differ from the result the court would reach if it applied the test strictly.⁸⁰

D. The Augmented Estate Under the Uniform Probate Code

In response to legislative inaction and judicial uncertainties concerning inter vivos transfers under forced share statutes, the U.P.C. developed the augmented estate concept to define precisely which assets are subject to the surviving spouse's elective share.⁸¹ The augmented estate enhances the protection of the surviving spouse by specifically including any transfer 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."⁸² Because both revocable trusts and retained life estates meet these criteria, such inter vivos transfers are subject to the surviving spouse's elective share.

Also included in the decedent's augmented estate is any property "held at the time of death by the decedent and another with a right of survivorship."⁸³ This provision brings any joint tenancy within the augmented estate. This provision and the provision covering transfers where the transferor retains incidents of ownership eliminate two of the most prevalent means used by spouses to circumvent forced share statutes. The Code contains the two provisions because the Commissioners recognized that will substitutes allow a person to enjoy continued benefit or control over his property while making arrangements to disinherit his spouse should she survive him.⁸⁴ In order to understand better why the Commissioners created the two provisions, it is necessary to compare the functions of will substitutes with the functions of wills.

⁷⁹ Kurtz, *supra* note 8, at 1006.

⁸⁰ *Id.* at 994.

⁸¹ See *supra* notes 1-9 and accompanying text. Eleven states have adopted elective share provisions similar to U.P.C. § 2-202; ALASKA STAT. §§ 13.11.070 - 13.11.100 (1985); COLO. REV. STAT. §§ 15-11-201 - 15-17-207 (1987); HAW. REV. STAT. §§ 560:2-201 - 560:2-207 (1976 & Supp. 1984); ME. REV. STAT. ANN. tit. 18-A, §§ 2-201 - 2-207 (1964 & Supp. 1988); MINN. STAT. §§ 524.2-201 - 524.2-207 (1988); MONT. CODE ANN. §§ 72-2-702 - 72-2-707 (1987); NEB. REV. STAT. §§ 30-2313 - 30-2319 (1985); N.J. REV. STAT. §§ 3B:8-1 - 3B:8-19 (1983); N.D. CENT. CODE §§ 30.1-05-01 - 30.1-05-07 (1976 & Supp. 1987); S.D. CODIFIED LAWS ANN. §§ 30-5A-1 - 30-5A-8 (1984); UTAH CODE ANN. §§ 75-2-201 - 75-2-207 (1953 & Supp. 1988).

⁸² UNIF. PROB. CODE § 2-202(1) (1982). See *supra* note 2 for full text.

⁸³ *Id.*

⁸⁴ UNIF. PROB. CODE § 2-202 commentary at 39 (1982).

II WILL SUBSTITUTES

A. Will Substitutes as Wealth Transmitting Devices

Estate planners increasingly have resorted to nonprobate methods of transferring wealth upon death in order to avoid the costs of probate, such as court costs, delays, and publicity.⁸⁵ One can divide the nonprobate system into four primary will substitutes: life insurance, pension accounts, joint accounts, and revocable trusts.⁸⁶ These will substitutes are inexpensive and readily available to the public. Financial intermediaries market them using standard form instruments with fill-in-the-blank beneficiary designations.⁸⁷ These substitutes can perform the same functions as a will. Like wills, they are revocable until death, and the interest of the devisee therefore is nonexistent until death.⁸⁸

Notwithstanding the functional similarities between wills and will substitutes, our legal system often has ignored the will-like character of will substitutes, resulting in distorted legal doctrine.⁸⁹ To the extent that the U.P.C. elective share provision captures certain lifetime transfers within the augmented estate, it serves to eliminate these distortions. The Commissioners explicitly adopted a policy against transfers “deliberately [designed] to defeat the right of the surviving spouse to a share [of the decedent’s estate]”⁹⁰ The capture provisions of U.P.C. § 2-202 are consistent with this policy against disinheritance because they include in the augmented estate two of the most common methods by which persons have disinherited their spouses. By failing to include life insurance in the augmented estate, however, the Commissioners did not carry this policy to its logical conclusion.

B. The Will-like Nature of Life Insurance

Like other will substitutes, life insurance possesses the two elements of a will—it is revocable until death,⁹¹ and the interests of the devisees are ambulatory.⁹² In fact, life insurance is “functionally in-

85 See N. DACEY, *HOW TO AVOID PROBATE* (1965).

86 Langbein, *supra* note 6, at 1109.

87 *Id.*

88 *Id.* at 1110.

89 See *supra* notes 55-80 and accompanying text.

90 UNIF. PROB. CODE § 2-202 commentary at 39 (1982).

91 Life insurance contracts rarely create an irrevocable beneficiary designation. See J. GREIDER & W. BEADLES, *LAW AND THE LIFE INSURANCE CONTRACT* 145 (3d ed. 1974). See also *infra* note 122.

92 Langbein, *supra* note 6, at 1110.

distinguishable from a will."⁹³ The different treatment accorded wills and life insurance policies results from the fact that life insurance derives its validity from contract law, while wills derive their validity from the law of wills. Because of its contractual nature, courts consistently have held life insurance to be unrelated to husband-wife relationships.⁹⁴ Courts variously have defined the beneficiary's right under a life insurance policy to be vested, subject to divestment,⁹⁵ an inchoate right,⁹⁶ and, in the majority of cases, a mere expectancy interest.⁹⁷ This is precisely the same type of characterization courts use to define a beneficiary's right under a will.⁹⁸ In reality, then, the assets of a life insurance policy belong to the policy holder during his lifetime, just as assets under a will belong to the testator until his death.

The U.P.C. advances another rationale for treating life insurance assets differently from probate assets. The Code states that life insurance assets are more like estate builders than estate depleters.⁹⁹ While undoubtedly true in most cases, life insurance serves as an effective disinheriting device in some cases.¹⁰⁰ Life insurance serves this purpose if the insurance proceeds comprise a large portion of the decedent's assets. In such a case, the decedent can disinherit his spouse merely by changing the beneficiary designation under the policy to someone other than the spouse. Moreover, even if the decedent does not have life insurance assets, he can disinherit his spouse by purchasing a substantial single pre-

⁹³ *Id.*

⁹⁴ *Jenkins v. Lovelady*, 290 Ala. 25, 273 So. 2d 189 (1973); *Hollaway v. Selvidge*, 219 Kan. 345, 548 P.2d 835 (1976); *Redd v. Brooke*, 96 Nev. 9, 604 P.2d 360 (1980); *Hergenrather v. State Mut. Life Assur. Co.*, 79 Ohio App. 116, 68 N.E.2d 833 (1946); *Washington v. Hicks*, 109 Wis. 2d 10, 325 N.W.2d 68 (1982). *See also* 4 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 27:112, at 777 (2d ed. 1984).

⁹⁵ *See, e.g.*, *Johnson v. New York Life Ins. Co.*, 56 Colo. 178, 138 P. 414 (1913); *Indiana Nat'l Life Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N.E. 289 (1913); *Metropolitan Life Ins. Co. v. Woolf*, 138 N.J. Eq. 450, 47 A.2d 340 (1946); *John Hancock Mut. Life Ins. Co. v. Heidrick*, 135 N.J. Eq. 326, 38 A.2d 442 (1944).

⁹⁶ *See, e.g.*, *Gurnett v. Mutual Life Ins. Co.*, 356 Ill. 612, 191 N.E. 250 (1934).

⁹⁷ *See, e.g.*, *Thorp v. Randazzo*, 41 Cal. 2d 770, 264 P.2d 38 (1953) (en banc); *Shaw v. Board of Admin.*, 109 Cal. App. 2d 770, 241 P.2d 635 (1952); *McEwin v. New York Life Ins. Co.*, 42 Cal. App. 133, 183 P. 373 (1919); *Hicks v. Northwestern Mut. Life Ins. Co.*, 166 Iowa 532, 147 N.W. 883 (1914); *Life Ins. Co. of North America v. Jackson*, 475 A.2d 1150 (Me. 1984).

⁹⁸ *See Langbein, supra* note 6, at 1128. *See also, Moore v. Lindsey*, 662 F.2d 354, 359 (5th Cir. 1981) (characterizing a devisee's legally protected interest in devised property, depending on the context, as an "inchoate title"); *Nelson v. Nelson*, 31 Colo. App. 63, 66, 497 P.2d 1284, 1286 (1972) (characterizing a named beneficiary's interest under a will as a "mere expectancy[ly]").

⁹⁹ *See UNIF. PROB. CODE* § 2-202 commentary at 40 (1982) (life insurance is "not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse").

¹⁰⁰ *See infra* notes 105-11 and accompanying text.

mium life insurance policy in favor of donees other than his spouse.¹⁰¹ In order to protect fully the surviving spouse from disinheritance, life insurance assets must be included in the augmented estate.¹⁰²

In other contexts, courts and legislatures have recognized the functional similarities of wills and life insurance policies and have accorded them the same treatment. Courts now categorize life insurance as a substantial asset in property divisions resulting from divorce. For example, recent decisions have awarded insurance benefits to the non-purchasing spouse as part of a property settlement, child support, or alimony decree.¹⁰³ In addition, the Internal Revenue Code acknowledges the will-like quality of life insurance by including the life insurance assets payable to third parties in the decedent's gross estate.¹⁰⁴ These examples demonstrate that insurance assets, like probate assets, are in fact assets of the insured's. They are not the beneficiary's assets because the insured retains the power to eliminate completely the beneficiary's interest.

C. Life Insurance as a Disinheriting Device

Caselaw supports the contention that a decedent can use life insurance effectively to disinherit his surviving spouse. The decedent in *Mitchell v. Mitchell*¹⁰⁵ changed the beneficiary rights on his insurance policies from his estate to his mother shortly after separating from his wife. Thereafter, the decedent and his wife reconciled, with the decedent assuring his wife that he had not changed the beneficiary designation. The trial court invalidated the transfers as illusory and a fraud on the wife. The court compared the life insurance to a Totten trust, stating that when the insured can change beneficiaries, the rights of those beneficiaries "are contingent and revocable; they do not vest until the death of the assured or settlor."¹⁰⁶

¹⁰¹ Kurtz, *supra* note 8, at 1035.

¹⁰² Including life insurance in the augmented estate also would prevent the surviving spouse from being unjustly enriched at the expense of other beneficiaries under the decedent's will. This occurs where the decedent already adequately has provided for the surviving spouse in a life insurance policy, but the spouse elects to take a statutory share. The spouse therefore receives the life insurance assets plus one-third of the probate assets.

¹⁰³ See, e.g., Teaff v. Ritchey, 622 S.W.2d 589, 592 (Tex. Civ. App. 1981) (residue or community property including the life insurance policies on husband's life passed to wife); see also Note, *Whose Life (Insurance) is it Anyway? Life Insurance and Divorce in America*, 22 J. FAM. L. 95, 95-96 (1983) (authored by Mark Richardson Brown) (discussing use of insurance policy as a means of child support, and as part of a property settlement).

¹⁰⁴ I.R.C. § 2042(2) (1982).

¹⁰⁵ 177 Misc. 1050, 32 N.Y.S.2d 839 (Sup. Ct. 1942), *rev'd*, 265 A.D. 27, 37 N.Y.S.2d 612 (1942), *aff'd without opinion*, 290 N.Y. 779, 50 N.E.2d 106 (1943).

¹⁰⁶ *Id.* at 1050, 1052, 32 N.Y.S.2d at 842.

The appellate court reversed, finding nothing illusory about the change in beneficiaries. The court further stated that the insured had an "absolute right"¹⁰⁷ to change beneficiaries under his insurance contract. The court also stressed the reasonableness of the transaction given the fact that the decedent left the surviving spouse a sizeable net estate.¹⁰⁸

In *Estate of Brown*,¹⁰⁹ however, the surviving spouse successfully argued that the decedent's life insurance policy was testamentary in character and subject to her elective share. The decedent had set up an unfunded insurance trust which allowed the decedent to revoke the beneficiaries, to receive income and benefits from the policies, and to withdraw the policies from the trust agreement. The decedent named his minor son as beneficiary under the trust agreement, and the widow chose to take against the decedent's will. The Pennsylvania Supreme Court held that because the decedent had retained lifetime control over the insurance trust, the trust was testamentary in nature.¹¹⁰ Accordingly, the court, awarded the widow one-half of the cash surrender value of the insurance policy as part of her elective share.¹¹¹

Most of the cases questioning the immunity of life insurance from the surviving spouse's elective share¹¹² arose when life insurance played a relatively small role in the wealth transmission process.¹¹³ Today, however, life insurance has emerged as one of the most significant modes of wealth transmission.¹¹⁴ In fact, some commentators view life insurance today as a testament more important than the will,¹¹⁵ and the "life insurance beneficiary designation

¹⁰⁷ *Id.* at 30, 37 N.Y.S.2d at 615.

¹⁰⁸ *Id.* at 33, 37, N.Y.S.2d at 617. *See also* Bullen v. Safe Deposit & Trust Co., 177 Md. 271, 9 A.2d 581 (1939) (holding that a revocable trust involving a substantial amount of life insurance was not subject to the surviving spouse's interest merely because the decedent retained complete control over it).

¹⁰⁹ 384 Pa. 99, 119 A.2d 513 (1956).

¹¹⁰ *Id.* at 99, 119 A.2d at 515.

¹¹¹ *Id.*, 119 A.2d at 517.

¹¹² *See supra* notes 105-11 and accompanying text; *see also* Weisman v. Metropolitan Life Ins. Co., 7 N.Y.S.2d 565 (Sup. Ct. 1938), *aff'd without opinion*, 256 A.D. 914, 10 N.Y.S.2d 414 (1939) (surviving spouse prevailing where the decedent assigned his life insurance policies to another after promising to make the surviving spouse the beneficiary); Reiss v. Reiss, 166 Misc. 274, 2 N.Y.S.2d 358 (Sup. Ct. 1937) (ruling in widow's favor when the husband had changed beneficiaries in violation of a settlement agreement).

¹¹³ In 1950, purchases of life insurance were just below 30 billion dollars. In 1985 purchases of life insurance exceeded 1.6 trillion dollars. AMERICAN COUNCIL OF LIFE INSURANCE, 1986 LIFE INSURANCE FACT BOOK 14 (1986).

¹¹⁴ Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, in LIFE INSURANCE LAW IN INTERNATIONAL PERSPECTIVE 74, 76 (J. Hellner & G. Nord eds. 1969).

¹¹⁵ *Id.*

[as] the principal 'last will and testament' of our legal system."¹¹⁶ In 1985, purchases of life insurance exceeded \$1.6 trillion dollars.¹¹⁷ This represents a nine-fold increase over purchases of life insurance in 1965.¹¹⁸ In 1985, 85% of American families owned life insurance, in an average amount of \$74,600.¹¹⁹ Life insurance is appealing because it avoids probate costs,¹²⁰ shelters the insured from income taxes during his life, provides an immediate source of funds to meet taxes and expenses of the estate upon death, keeps the insurance proceeds out of the insured's estate, and avoids estate taxes.¹²¹ The rapid growth in the use of life insurance greatly increases the possibility that persons will use life insurance effectively to disinherit their surviving spouse's.

III

PROPOSALS

By excluding life insurance assets from the surviving spouse's forced share, states leave open a significant loophole for anyone wishing to disinherit his or her spouse. Because life insurance allows the insured to revoke the policy at any time prior to his death, it is an attractive disinheriting device. Life insurance is even more attractive under the U.P.C. augmented estate concept because the augmented estate excludes life insurance while including all other lifetime transfers where the transferor retains power to revoke the transfer or to control the assets during his lifetime. To provide uniformity of law and to protect the well-settled public policy of preventing decedents from disinheriting surviving spouses, states should permit surviving spouses to reach life insurance assets with their forced share.

A. Include Life Insurance Assets in the Augmented Estate

Accordingly, states should pass elective share statutes that include revocable life insurance assets in the augmented estate because, like probate assets, they belong to the insured. The insurance assets belong to the insured rather than the beneficiary

116 *Id.*

117 *See supra* note 113.

118 AMERICAN COUNCIL OF LIFE INSURANCE, 1986 LIFE INSURANCE FACT BOOK 6 (1986).

119 *Id.*

120 *See supra* note 85 and accompanying text.

121 D. WESTFALL, ESTATE PLANNING LAW AND TAXATION 5-1 (1984). Life insurance shelters the insured from income taxes during his lifetime because he does not pay income taxes on the amount of the policy. Moreover, life insurance proceeds are contractual, and therefore not considered part of the decedent's estate. Thus, life insurance funds do not go through probate and immediately are available to the named beneficiary.

because the insured usually retains an absolute power to revoke the beneficiary's interest in the assets.¹²² Only by including insurance assets in the augmented estate can courts protect surviving spouses from this method of disinheritance. Such a statute would completely protect the surviving spouse because the spouse's statutory share would encompass all assets owned and controlled by the decedent. This statute would produce rational consistency in statutory share provisions, and would foster the well-settled public policy of protecting the surviving spouse.¹²³

Even without action by state legislatures, courts should abandon the functional distinction between wills and life insurance. It is unrealistic to characterize life insurance as anything other than an asset of the insured.¹²⁴ The insured retains the same rights over insurance assets as a testator retains over will assets—namely, the power to revoke the transfer at any time up to death. Because the insured retains an absolute right to revoke the beneficiary's interest in the life insurance policy, that interest, like the beneficiary's interest under a will, is ambulatory. Because of the functional similarities between life insurance assets and probate assets, a legal rule that distinguishes between the two is unrealistic with current reality. Courts therefore should exercise their function of common law formulation and create a more consistent rule.

¹²² Irrevocable life insurance beneficiary designations are used infrequently today. J. GREIDER & W. BEADLES, *supra* note 91, at 145. The only time a person wishing to disinherit his spouse would use an irrevocable life insurance policy would be just prior to his death because the beneficiary's right under the policy is vested. Once vested, the insured cannot reduce or destroy the beneficiary's right. *Id.* However, the augmented estate thwarts such disinheriting plans by capturing any irrevocable transfer made by the decedent within two years of the decedent's death. UNIF. PROB. CODE § 2-202 (1)(iv) (1982). After capturing this transfer, it remains unclear how courts should calculate the worth of the irrevocable policy. Courts either could value the life insurance at the time of the transfer, or at the time the insured dies and the beneficiary is to receive the policy proceeds. The U.P.C. states that courts should value irrevocable inter vivos transfers of property "as of the date the donee came into possession or enjoyment if that occurs first," rather than valuing the policy upon the decedent's death. *Id.* § 2-202 (1). Valuing an irrevocable life insurance policy when the donee's interest vests is sensible because the policy becomes valuable to the donee at that time. The donee can take out a loan against the policy or assign the policy for consideration. Because the beneficiary's interest in an irrevocable life insurance policy is valuable when the insured creates the policy, states should follow the general rule of valuation of irrevocable transfers enunciated in the U.P.C. and explicitly state in the statute that if the decedent creates an irrevocable life insurance policy within two years of his death, it is to be valued as of the date the insured designates the beneficiary.

¹²³ See Comment, *Probate Reform: The New Minnesota Elective Share Statutes*, 70 MINN. L. REV. 241, 258 (1985) (arguing for reform of Minnesota's elective share statute to include all insurance benefits payable upon the decedent's death within the augmented estate).

¹²⁴ See Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 CORNELL L. REV. 653, 694 (1988) (authored by Alan S. Wilmit) (arguing that revocation-by-divorce statutes should treat life insurance policy assets like assets transferred under a will because life insurance is a will substitute).

B. Protecting Insurance Companies from Wrongful Disbursement Liability

In implementing a rule which treats insurance policies and wills as functional equivalents, courts must guard against the insurance company's potential liability for wrongful disbursement. Wrongful disbursement may occur because of the insurance company's contractual obligation to pay a certain amount of money upon the insured's death to whomever the insured designates.¹²⁵ If an insurance company fulfills its obligations by paying a named beneficiary who is not the decedent's spouse, and a court later holds that the insurance proceeds should have gone to the augmented estate, the surviving spouse may sue for wrongful disbursement. Courts can protect insurance companies from such liability in several ways.

1. *Interpleader*

Interpleader permits any party possessing property to which it does not claim title to submit to a court the question of who rightfully owns the property if at least two other parties claim title to the property.¹²⁶ This is precisely the position of the insurance company if an insured names a third party as beneficiary under this policy and the insured's spouse claims the insurance as part of his or her elective share. Upon the death of the insured, the insurance proceeds belong to someone other than the insurance company, but the company may be unsure as to whom it should pay. In such a situation, the insurance company could file a bill of interpleader, deposit the money with the court, and let the court decide among the claimants.¹²⁷

The costs of interpleader to the insurance company are relatively low considering that interpleader settles the entire question in one court proceeding rather than the several that might be required if each claimant brought a separate suit.¹²⁸ Moreover, the expenses an insurance company incurs in an interpleader action generally are deductible by the company in whole or in part from the proceeds of the policy.¹²⁹ Thus, interpleader would protect insurance compa-

¹²⁵ See, e.g., Case Comment, *Life Insurance—Divorce Property Settlements—Relative Rights of Beneficiaries—New Jersey's Inflexible Approach*, 25 *RUTGERS L. REV.* 189, 198 (1970).

¹²⁶ J. Greider & W. Beadles, *supra* note 91, at 495.

¹²⁷ *Id.* See also, *Cassiday v. Cassiday*, 256 Md. 5, 259 A.2d 299 (1969) (Use of interpleader by life insurance company where the policy named the decedent's divorced wife as beneficiary, and the decedent's second wife claimed he intended to assign the insurance to her); *Nixon v. Life Ins. Co. of Va.*, 124 A.2d 305 (D.C. Mup. App. 1956) (Use of interpleader by life insurance company where decedent's life insurance policies failed to designate a beneficiary).

¹²⁸ J. GREIDER & W. BEADLES, *supra* note 91, at 495.

¹²⁹ *Id.* at 496. Life insurance companies also may fear the delay caused by inter-

nies from double liability and would avoid multiple litigation at a relatively low cost.

2. *Notice to File for an Elective Share*

Another way courts can protect insurance companies from wrongful disbursement liability is to relieve them from liability for benefits wrongly paid to the named beneficiary unless the surviving spouse gives notice of an intention to file for an elective share. Requiring such notice is sensible because where the surviving spouse has given notice, a controversy over the life insurance assets is likely if the other assets do not satisfy the spouse's forced share.

In order to avoid burdening the named beneficiary with undue delay in collecting the proceeds of the policy, courts should require the spouse to give notice within a reasonable time of the decedent's death. Absent such notice, the insurer would not be liable merely for fulfilling its contractual obligation of paying the named beneficiary.¹³⁰ If the insurer were to wrongfully pay the named beneficiary, restitution law would make the recipient disgorge the payment to the intended beneficiary.¹³¹

CONCLUSION

For centuries, both in the United States and in England, courts have protected surviving spouses from complete disinheritance by their deceased spouses. The basis for this protection is both a concern that surviving spouses be supported adequately, and an idea that surviving spouses contribute to the marriage and therefore deserve a share of the marital property upon the marriage's dissolution. The public policy of protecting the surviving spouse is so important that it supercedes the strong competing public policy favoring freedom of alienation. In fact, every state protects a surviving spouse from disinheritance in some manner.

Because of the strong public policy concerns favoring the surviving spouse, the U.P.C. explicitly adopts a position against disinheritance. The Commissioners sought to prevent disinheritance altogether by developing the augmented estate concept. While the augmented estate captures transfers in which the decedent retained

pleader. However, this is a small price to pay for uniformity. Moreover, where interpleader prevents multiple litigation, it reduces delay.

¹³⁰ S. 291, 74th Leg., 1985 Sess., Minn. (proposed statute that would have included life insurance in the augmented estate and protected the insurer from liability by requiring the surviving spouse to give notice of an intention to file for an elective share).

¹³¹ See Restatement of Restitution § 204 (1937); see also Langbein, *supra* note 6, at 1139.

a lifetime interest or a right to revoke the transfer, it neglects to capture life insurance proceeds.

The failure to include life insurance in the augmented estate reflects the traditional notion that insurance is within the ambit of contract law rather than the law of wills. Courts use this distinction to justify treating life insurance assets differently from probate assets. This view ignores the true nature of life insurance. Like probate assets, life insurance assets remain under the control of the decedent until his death. Courts and state legislatures should now realize that wills and life insurance perform the same functions. Because wills and life insurance policies function alike, the law should treat these assets the same by allowing the surviving spouse to reach life insurance assets to satisfy the forced share.

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