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## Statutory Reform Revisited: Toward a Comprehensive Understanding of the New Law of Intestate Succession and Elective Share

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**STATUTORY REFORM REVISITED:  
TOWARD A COMPREHENSIVE UNDERSTANDING  
OF THE NEW LAW OF INTESTATE SUCCESSION  
AND ELECTIVE SHARE**

JOHN W. FISHER, II\*

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I. INTRODUCTION

In 1992, the West Virginia legislature enacted House Bill 4112 which revised the law of intestate succession and elective share in

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Members of the West Virginia State Bar Probate Committee have been instrumental in identifying the issues and suggesting the solutions incorporated in the 1993 amendments. Thomas G. Freeman, II, chair of the committee and members Marcia F. Allen, William T. Belcher, Richard E. Boyle, Jr., Lynn S. Clarke, Milton T. Herndon, William H. Scharf and Bruce L. Stout deserve special recognition for their work on the intestate succession and elective share revisions and the 1993 amendments.

West Virginia. The new law became effective June 5, 1992.<sup>1</sup> Following its passage, a number of West Virginia Continuing Legal Education programs were offered to introduce the new law and to explain its provisions. While there was an anticipated resistance to such a substantial change to the law of intestacy, the "complaints" were essentially in opposition to "change" and not the substance of the new law. Essentially no one disputes that as far as a statutory scheme, the new law is a significant improvement over the law it replaced.

Perhaps the most common complaint about HB 4112 was that it significantly complicated the law of elective share. If one compares the new statutory provisions for elective share<sup>2</sup> with the *statute* it replaced,<sup>3</sup> such a complaint would seem to be well-founded. However, if one compares the new statute with the *law* of elective share as it existed prior to the passage of HB 4112, the change is not nearly as pronounced. The West Virginia Supreme Court's decisions in *Davis v. KB & T Co.*<sup>4</sup> and *Johnson v. Farmers & Merchants Bank*<sup>5</sup> clearly chartered a course of "equitable" distribution of the decedent's assets in the event the surviving spouse elected against the will.<sup>6</sup> In essence, these decisions authorized the court, on a case by case basis, to recoup "assets" the decedent "controlled" or benefitted from to provide an enhanced or augmented estate to which the statutory percentage for the elective share would be applied. Which "assets" and under what circumstances the "assets" would be recaptured was to be developed by the court on a case by case basis.<sup>7</sup> While the statutory percentage of

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1. In *Kidwell v. Kidwell*, 431 S.E.2d 346 (W. Va. 1993), the court, consistent with its earlier decisions, affirmed that the new elective share statute would not apply where the decedent died before June 5, 1992.

2. W. VA. CODE §§ 42-3-1 to -7 (Supp. 1993).

3. W. VA. CODE §§ 42-3-1 to -3 (1982) (amended 1992).

4. 309 S.E.2d 45 (W. Va. 1983).

5. 379 S.E.2d 752 (W. Va. 1989).

6. For an excellent discussion of these decisions and the practical problems they presented see Scott A. Curnutte, Note, *Preventing Spousal Disinheritance: An Equitable Solution*, 92 W. VA. L. REV. 441 (1989-90).

7. Syllabus 8 of *Davis* states the rule as follows:

No single standard can be applied to test the validity of an inter-vivos trust attacked by the settlor's spouse as a fraud upon his or her marital rights. Rather, the issue is to be decided on a case by case basis, in light of the particular facts and circumstances.

the elective share under the old law remained constant,<sup>8</sup> it would undoubtedly have taken many cases before there would have evolved meaningful guidelines as to which assets, how many assets, and under what circumstances previously “disposed” of assets would be “recaptured” for the purpose of the spouse’s elective share. While the court’s imposition of its “equitable conscience” could produce “fair results” in the case before the court, such a case by case approach had serious disadvantages. “Equitable solutions” in such cases would undoubtedly vary from county to county and probably within the same county in multiple judge circuits. The cost of litigating each such case would constitute a considerable drain on the assets of the estate.

Finally, in the absence of articulated guidelines as to how the “equitable conscience” of the court would be applied, estate planners would be unable to provide meaningful advice to their clients as to more sophisticated estate plans. Furthermore, those consulted by the surviving spouse would face the same quandary in advising the client whether to renounce the will in favor of an elective share. It is therefore submitted that as opposed to complicating the law of elective share, HB 4112 in fact provided a workable framework in which to implement the concept of an “equitable apportionment” of a decedent’s assets that had already been adopted in principle by the court.

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*Davis*, 309 S.E.2d at 46.

Syllabus 8 of the *Davis* case became syllabus 1 of the *Johnson* case, and the concept was then enunciated further in syllabus 3 and 4 of the *Johnson* case as follows:

3. Under the flexible standard adopted by this Court in *Davis v. KB & T*, 172 W. Va. 546, 309 S.E.2d 45 (1983), a court may consider the effect and validity of an inter-vivos transfer by examining both the amount of control the settlor retains over trust assets and whether the transfer of property into a trust constituted a fraud on the rights of the surviving spouse, while also weighing any equitable factors which may be relevant in a given case.

4. An inter-vivos transfer may be found to be illusory or testamentary if it diminishes the probate estate to the extent that nothing is left for the surviving spouse to elect against while allowing the transferor to retain dominion and control over the assets placed in trust.

*Johnson*, 379 S.E.2d at 753.

8. The statutory percentage of the elective share under the old law was one third of personal property and dower in real property. W. VA. CODE §§ 42-3-1, 42-1-1, 43-1-1 (1982) (amended 1992). See *Kidwell v. Kidwell*, 431 S.E. 2d 346, 349-50 (W. Va. 1993).

As the reporter for the Advisory Committee of the West Virginia Law Institute, which worked on this project, I was fortunate to gain an insight into certain aspects of HB 4112 not generally available. It is my hope that this article completes a trilogy of law review articles designed to provide an understanding of our “new” law of intestate succession and elective share. The first article, entitled “Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems,”<sup>9</sup> compared the statute proposed by the Advisory Committee of the West Virginia Law Institute with existing law in West Virginia. (Hereinafter referred to as the *proposed* legislation). The proposed legislation was patterned after the Revised Uniform Probate Code (1990 UPC). The provisions of the proposed legislation that differed from the 1990 UPC were discussed in the first law review article.

The statute enacted in 1992 by the West Virginia Legislature (hereinafter referred to as HB 4112) made several amendments to the proposed legislation. These 1992 amendments and the provision for the abolition of dower will be discussed in this article. An excellent article by Professor Patricia J. Roberts on the elective share provision of HB 4112 was published in the Fall issue of the 1992 West Virginia Law Review.<sup>10</sup> In her article, Professor Roberts discusses the amendments made in 1992 by the legislature to the proposed elective share provisions legislation. Since Professor Roberts discussed those amendments in her article, they will be treated in a summary way in this article. Finally, this article will discuss the “clean up” amendments to HB 4112 requested by the West Virginia State Bar Probate Committee and enacted by the 1993 legislature as HB 2638.

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9. John W. Fisher, II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age Old Problems*, 93 W. VA. L. REV. 61 (1990).

10. Patricia J. Roberts, *The 1990 Uniform Probate Code's Elective Share Provisions—West Virginia Enactment Paves the Way*, 95 W. VA. L. REV. 55 (1992).

## II. HOUSE BILL 4112

### A. *The Abolition of Dower*

One of the more interesting discussions before the advisory group was the proposal to abolish dower. Dower and curtesy had their roots in feudal England. While an extended discussion of these concepts is beyond the scope or needs of this article,<sup>11</sup> a brief summary is necessary to appreciate the discussions before the Advisory Committee.<sup>12</sup>

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11. For an interesting and informative history of Dower and its evolution in the Virginias see Clarence E. Martin, *Dower in Judicial Actions*, 30 W. VA. L.Q. 233 (1923-24).

12. 1 AMERICAN LAW OF PROPERTY § 5.1 (1952) introduces the discussion of dower as follows:

Dower at common law was the estate which a widow enjoyed for her life, in one-third of the lands and tenements of which her husband had been seised solely and beneficially at any time during the marriage, in fee simple and fee tail, to which issue of the marriage, if any, might by a possibility have succeeded. Her interest was ordinarily independent of rights which she might have by testamentary or intestate succession; it arose not by contract but by operation of law. During the subsistence of the marriage the wife had a protected expectancy known as "inchoate" dower, which arose upon marriage and could not be defeated except for certain defined and limited causes and in certain definite ways. Upon the death of the husband her interest became "consummate" but was not regarded as an estate until actually set off and assigned. After assignment the estate arose by operation of law and was, in general, subject to the usual incidents of life estates; it was not subject to the claims of the husband's creditors. The term "dower" has frequently been used indiscriminately to describe the widow's inchoate and consummate interests, as well as the estate of dower after assignment.

1 AMERICAN LAW OF PROPERTY § 5.1 (1952).

In a similar manner, in § 5.57 the discussion of curtesy begins as follows:

[I]n England at common law a husband acquired upon marriage a right to the rents and profits, together with the use and enjoyment, of all the realty of which his wife was then seised and of which she thereafter became seised during coverture. His interest, as tenant by the marital right, was a life interest, measured by their joint lives, which lasted until the dissolution of the marriage or until the birth of issue, but it entitled him to no rights in her lands after her death. Not until the birth of issue did the husband acquire rights which he might assert in his wife's lands if he survived her. If issue of the marriage, capable of inheriting her property, were born alive, he then acquired in her inheritable estates of which she had actual seisin an interest known as "curtesy initiate," a present estate measured by his life alone. If he survived her, that interest became "consummate," and he was then said to be "tenant by the curtesy" during his lifetime.

Minor on Real Property<sup>13</sup> explains dower as follows:

Where a woman marries a man lawfully seised at any time during the coverture of an estate of inheritance, such as that the issue of the marriage (if any) may by possibility inherit it as heirs to the husband, and the husband dies, the wife surviving, as tenant in dower, is entitled to have one-third thereof assigned her for life as a prolongation of the husband's estate annexed by law.<sup>14</sup>

Whereas at common law dower was the surviving widow's right in her deceased husband's real estate, curtesy was the surviving husband's rights to his deceased wife's real estate. The same author defined curtesy as follows:

When a man takes a wife *lawfully seised* at any time during the *coverture* of an estate of *inheritance*, legal or equitable, such as that the issue of the marriage may by *possibility* inherit it as *heirs* to the wife, has issue by her *born alive* during the *coverture*, and the *wife dies*, the husband surviving has an estate in her lands *for his life*, by way of *prolongation* annexed by law to the wife's estate, which is called an estate by the curtesy.<sup>15</sup>

The important differences between common law dower and curtesy are summarized as follows:

It will be observed that the *definition* of dower at common law differs from that of curtesy . . . in that (1) the common law does not permit dower in *equitable* inheritances while it does permit curtesy therein; (2) *no issue* need be born of the marriage in order that the wife may take dower, while for curtesy the *birth of issue alive during the coverture* is essential; (3) the wife as tenant in dower takes *only one-third* of the deceased husband's lands, which being *undivided* necessitates an *assignment* of her particular third, while the tenant by the curtesy takes *the whole*, and therefore needs no assignment to identify the land to which he is entitled, and (4) the tenant in dower is the *widow*, while the tenant by the curtesy is the *husband*.<sup>16</sup>

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*Id.* § 5.57.

13. 1 RALEIGH C. MINOR, THE LAW OF REAL PROPERTY § 248 (Frederick D. G. Ribble ed., 2d ed. 1928).

14. *Id.* at 316.

15. *Id.* § 218, at 279.

16. *Id.* § 248, at 317.

For a little over one-half century, a statutory form of curtesy existed in West Virginia. It was not until the general revision of the Code in 1931 that curtesy was entirely abolished<sup>17</sup> and parity between surviving spouses was achieved by giving the husband “dower” rights equal to those of a widow.<sup>18</sup> Therefore, for the last six decades, the statutory form of dower in West Virginia was essentially common law dower expanded to include dower in equitably owned property<sup>19</sup> and equally applicable to both husband and wife.

As long as real property was the principal asset of an estate, it was at least arguable that dower afforded adequate financial protection and security for a surviving spouse. However, in a society where personal property, including life insurance and annuities, constitutes the principal form of wealth for most people, dower fails to fulfill its common law objectives. All members of the Advisory Committee agreed that dower no longer achieved the purposes that gave rise to it in feudal England. In addition, all members of the Advisory Committee agreed that the elective share provisions in the proposed statute represented a significant improvement over the then current law in West Virginia.

However, when the Advisory Committee discussed the proposal to abolish dower as a part of the proposed statute, some members of the committee objected. It was not the at-death “benefits” of dower the objectors wished to preserve, but rather the marital leverage it provided. These members of the Advisory Committee were concerned that if dower were abolished it would make it easier for a title holder of real

17. W. VA. CODE § 43-1-18 (1982) (repealed 1992) (“Tenancy by the curtesy is abolished.”). For a discussion of curtesy in West Virginia prior to its abolition see John Rush Dyer, Note, *Tenant By Curtesy—Acts 1921—Construction*, 29 W. VA. L.Q. 199 (1923).

18. The former § 43-1-1 provided that:

A surviving spouse shall be endowed of one third of all the real estate whereof the deceased spouse, or any other to his or her use, or in trust for him or her, was, at any time during the coverture, seised of or entitled to an estate of inheritance, either in possession, reversion, remainder, or otherwise, unless the right of such surviving spouse to such dower shall have been lawfully barred or relinquished.

W. VA. CODE § 43-1-1 (1982) (amended 1992).

19. *Commercial Banking & Trust Co. v. Dudley*, 86 S.E. 307 (W. Va. 1915).



property to sell the property in anticipation of divorce and “hide” the replacement asset from his or her spouse. Since a prudent purchaser would not accept a deed from the title holding spouse without the signature of the non-title holding spouse, inchoate dower “forced” the title holding spouse to obtain the non-title holding spouse’s signature to release dower rights. Obviously, acquiring the non-title holding spouse’s signature would make that spouse aware of the conveyance.

The boon of the divorce lawyers was the bane of title examiners. The existence of inchoate dower does not prevent a scoundrel spouse from misleading or deceiving an innocent purchaser as to the title holder’s marital status to the detriment of the innocent purchaser without an immediate corresponding benefit to the non-title holding spouse.<sup>20</sup>

The potential effect of an unreleased dower interest on the title to real estate caused dower to be widely criticized by “property” lawyers. One writer complained that dower not only fails to adequately provide for a surviving spouse in today’s economy, but it also “diminishes the alienability of land and causes nightmares for title examiners . . . .”<sup>21</sup> Another author explained: “Common-law dower is a serious obstacle to free commerce in land and a grave threat to security of titles.”<sup>22</sup>

20. If the non-title holding spouse survived the title holding spouse, the inchoate dower became consummate dower, which entitled the surviving spouse to either an assignment of dower in kind or a lump sum of money in lieu of dower. *See generally* MINOR, *supra* note 13, § 314, at 404, which reads as follows:

The right of dower which, before the husband’s death, is merely inchoate and contingent upon the wife’s surviving the husband, becomes consummate and vested upon the husband’s death. Even then, however, it does not become an *estate*, but is merely *a right of action* until the land which she is to take as dowress has been *actually set apart and assigned her* as her dower. Until her dower has been thus set apart for her by metes and bounds or by some arrangement which will secure to her the beneficial enjoyment of the dower right, she is entitled only to an undivided interest in the lands whereof she is dowable, and *a right to sue for the same* if it be illegally withheld from her, but, independently of statute, not a *right of entry* because the limits and boundaries of her part of the land are not marked out until the assignment.

*Id.*

21. Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of An Equitable Elective Share*, 62 IOWA L. REV. 981, 988-89 (1977).

22. William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV.

Dower's mischief to land titles lies in the fact that it is a nonrecordable right that arises by operation of law upon the happening of certain events. The omission of the non-title holding spouses's signature may be the result of an intentional deception or an "honest" mistake.

As the legislatures of various states attempted to address the deficiencies of dower as an adequate protection for a surviving spouse, it became customary to abolish the common law dower concept because of its adverse effect upon land titles. In fact, dower in a form which resembles its common law ancestor does not exist in a significant majority of states.<sup>23</sup>

In order to get the support of the entire advisory group on this issue, it became important to find a solution that retained the benefit discussed above without a corresponding detriment. The West Virginia Law Institute Council and the Advisory Committee devised a solution which addressed all of the concerns and became a part of HB 4112. The first component of the solution was to abolish dower on June 5, 1992, the effective date of HB 4112.<sup>24</sup> The important role that dower had played in marital situations in which there was a possibility of a divorce, namely, notification to the non-title holding spouse of a conveyance of real estate, was preserved in the provision of section 43-1-2.<sup>25</sup>

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1037, 1054 (1966).

23. The following states still recognize either common law or statutory dower: Arkansas, *see* ARK. CODE ANN. § 28-39-301 (Michie 1987); Hawaii, HAW. REV. STAT. § 533-1 (1985) (dower in all lands owned during marriage and prior to July 1, 1977); Kansas, KAN. STAT. ANN. § 59-505 (1964); Kentucky, KY. REV. STAT. ANN. § 392.020 (1970); Massachusetts, MASS. GEN. L. ANN. ch. 189, § 1 (West 1981) (dower in all lands owned by deceased spouse at death); Michigan, MICH. STAT. ANN. § 26.211 (Callaghan 1936); Ohio, OHIO REV. CODE ANN. § 2103.02 (Baldwin 1953); and Vermont, VT. STAT. ANN. tit. 14, § 461 (1959) (widow entitled to one-third of all real estate of which husband dies seised). The District of Columbia also recognizes dower. D.C. CODE ANN. § 19-102 (1953).

24. W. VA. CODE § 43-1-1 (Supp. 1993) ("The estates of dower and curtesy are abolished."). Curtesy had been abolished in 1931. *See supra* note 17.

25. W. VA. CODE § 43-1-2 states:  
§ 43-1-2. Notice of conveyance.

(a) For purposes of this section, "conveyance" means a dispositive act intended to create a property interest in land and includes the creation of a security interest in real estate.

Section 43-1-2 accomplishes several objectives. First, as it relates to conveyances of real estate in which the non-title holding spouse is not given notice, it shifts the potential financial burden from the innocent purchaser, as it existed with dower, to the title holding spouse who makes a conveyance in violation of the notice provision of the statute.<sup>26</sup> Second, the statute specifically makes the creation of a security interest in real estate a conveyance for the purpose of the statute.<sup>27</sup> Therefore, if a title holding spouse borrows money and uses real estate as security, the non-title holding spouse must be given notice. In other words, a scoundrel title holding spouse cannot avoid the notification requirement by a loan transaction as opposed to a sale.

The emphasis of the statute is on "notice" to the non-title holding spouse and not on the non-title holding spouse's consent to the transfer. Notification to the non-title holding spouse, therefore, must be "prior to or within thirty days of the time of the conveyance."<sup>28</sup> Notice will comply with the statute if it is given before the conveyance,

(b) Any married person who conveys an interest in real estate shall notify his or her spouse prior to or within thirty days of the time of the conveyance if the conveyance involves an interest in real estate to which dower would have attached if the conveyance had been made prior to the date of enactment of this statute.

(c) A person making a conveyance described in the previous sections shall have the burden of proof to show compliance with this section. Such burden shall be met either by:

(1) The signature of the spouse of the conveying party on the conveyance instrument; or

(2) Such other forms of competent evidence as are admissible in a court of general jurisdiction in this state under the rules of evidence.

(d) When a married person fails to comply with the notification requirements of this section, then in the event of a subsequent divorce within five years of said conveyance, the value of the real estate conveyed, as determined at the time of the conveyance, shall be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution or awards of support, notwithstanding that any consideration for said interest in the real estate may already be included in the marital property.

(e) Nothing in this section shall be construed to create a lien or claim against the interest in real estate conveyed in violations of this provision.

W. VA. CODE § 43-1-2 (Supp. 1993).

26. W. VA. CODE § 43-1-2(d), (e) (Supp. 1993).

27. W. VA. CODE § 43-1-2(a) (Supp. 1993).

28. W. VA. CODE § 43-1-2(b) (Supp. 1993).

at the time of the conveyance, or within thirty days after the conveyance.

Special consideration was given to assure that the practice of having the non-title holding spouse join into the conveyance for the purpose of releasing dower would also satisfy the notice requirements imposed by the "new" statute. Therefore, the statute specifically provides that the burden of proof to show compliance can be met by "[t]he signature of the spouse of the conveying party on the conveyance instrument."<sup>29</sup> In addition, notice to the non-title holding spouse can be established in "[s]uch other forms of competent evidence as are admissible in a court of general jurisdiction in this state under the rules of evidence."<sup>30</sup> A logical source of additional ways to comply with the notice requirement would be Rule 4 of the Rules of Civil Procedure.

Prior to the abolition of dower, the recognized manner for the non-title holding spouse to release his/her inchoate dower was to join into the conveyance by executing the deed. Minor on Real Property describes the process as follows:

Should the husband *by his sole act* convey, mortgage or contract to convey his land to another, the wife's contingent right of dower remains to her, and should she survive her husband she may enforce it against the grantee, mortgagee or vendee, to whose claim the dower is superior. But she may during the lifetime of her husband *release* her contingent right of dower to such grantee, mortgagee or vendee, and indeed to *any tenant of the freehold*, except the husband himself . . . .

. . . .

If the wife unites in the husband's conveyance, her joinder does not actually transfer any estate from the wife, for her inchoate dower is a mere contingent possibility, not an estate. Her joinder operates merely as a *release enuring by way of extinguishing* her contingent future rights as against the purchaser and those claiming by, through or under him. Hence, one who receives such a release cannot in general be regarded as an *assignee* of the wife's dower right (in the event she survives her husband) and entitled to assert it as she might have done but for the release.<sup>31</sup>

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29. W. VA. CODE § 43-1-2(c)(1) (Supp. 1993).

30. W. VA. CODE § 43-1-3(c)(2) (Supp. 1993).

31. MINOR, *supra* note 13, § 293, at 375-76.

An early West Virginia decision explained what was necessary to release dower as follows:

If a deed be signed and sealed by a married woman and her husband, and the certificate of her acknowledgement is in due form, yet if she is not on the face of the deed one of the grantors therein, such deed is inoperative to convey any interest she may have in the real estate conveyed thereby, or to relinquish her contingent right of dower in the lands therein named.<sup>32</sup>

Thirty-four years later, the court held that a deed which named the husband and left a blank to be filled in with his wife's name, which was left blank, was sufficient to release the wife's dower rights. The court reasoned that since the deed contained words by which the wife could be identified with absolute certainty as one of the grantors, it was sufficient.<sup>33</sup>

As stated above, W. Va. Code section 43-1-2 was designed so that the practice of having the non-title holding spouse join in the deed to release dower would satisfy the new notice requirement. Some lawyers have opted to include a statement in the deed which states that the reason the non-title holder is joining in the conveyance is to acknowledge notice pursuant to code section 43-1-2.<sup>34</sup> The most apparent reason for the precaution of expressly stating the purpose of the signature on the deed is to avoid any assertions that the non-title holder's signature on the deed makes him or her responsible for the warranties or covenants contained in the deed.

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32. *Laughlin Bros. & Co. v. Fream*, 14 W. Va. 322 (1878).

33. *Hill v. Horse Creek Coal Land Co.*, 73 S.E. 718, 719 (W. Va. 1912). Syllabus 1 of the *Hill* case states as follows:

A deed, signed, sealed, and acknowledged by a husband and wife, which, not naming the wife in the body thereof, makes her a grantor by the designation of wife of the other grantor, is the deed of the wife, as well as the husband, and relinquishes her dower in the land.

*Id.* at 718.

34. An example of such a statement is: John Doe, one of the parties of the first part, states that he joins in the execution of this deed solely for the purpose of acknowledging that he has received notice of this conveyance pursuant to the provision of West Virginia Code § 43-1-2.

The concern that a person who has no interest in the land conveyed but who joins in the deed to release dower rights may incur liabilities on the warranties in the deed is not a new one. Following the general revision of the West Virginia Code in 1931, Professor Leo Carlin wrote an article entitled "Conveyances by Husband and Wife Under the Revised Code."<sup>35</sup> Under a subheading of that article entitled *Covenants and Warranties*, Professor Carlin writes:

Conceding that a husband or a wife is bound by his or her covenant or warranty in a deed conveying his or her own property, is either spouse so bound when he or she joins in the other's deed for the purpose of giving validity to the other's conveyance or for the purpose of releasing a right of dower or curtesy?<sup>36</sup>

While most of this subsection addresses the impact of the Married Woman's Acts<sup>37</sup> on a woman's warranties in deeds conveying her property, Professor Carlin "answers" his question as follows:

The section in which the provision last quoted<sup>38</sup> appears deals exclusively with deeds, writings and contracts concerned with the conveyance by a married woman of "her own real estate." Hence the provision purports to make her liable only on a "covenant contained in any such deed, writing or contract". There is no provision in the Code expressly declaring that she shall, or shall not, be liable on her covenants or warranties in a

35. Leo Carlin, *Conveyances by Husband and Wife Under the Revised Code*, 40 W. VA. L.Q. 1 (1933-34).

36. *Id.* at 18.

37. See generally W. VA. CODE §§ 48-3-1 to -16 (1992).

38. In the quoted portion, Professor Carlin is specifically discussing the last sentence of § 48-3-3 which reads as follows:

When a married woman signs and delivers any deed or other writing, selling or conveying her own real estate, the same shall operate to pass or convey from such married woman and her representatives all right, title and interest in such real estate that is purported to be sold or conveyed by such deed or other writing, as effectually as if she were a single woman, except that such deed or other writing shall not affect her husband's dower, if he does not join therein. When a married woman signs and delivers a contract or writing agreeing to sell or convey her own real estate, the same shall operate to bind her to do that which she agrees to do by such contract or writing, and such contract or writing may be specifically enforced. *A married woman shall be liable on any covenant contained in any such deed, writing or contract, the same as if she were a single woman.*

W. VA. CODE § 48-3-3 (1992) (emphasis added).

deed conveying the husband's realty. The two sections following the above mentioned section in the Revised Code provide for the execution of conveyances for the purpose of releasing a right of dower, applying equally to the husband and the wife. Nothing is said in either of these sections concerning the liability on covenants of either a husband or a wife who executes a conveyance for the purpose of releasing a dower right. Is a husband or a wife liable on such a covenant?

It may very well be argued that, under the principle *expressio unius est exclusio alterius*, the provision in the one section for liability of the wife when she is conveying her own property and the lack of any such provision in the other sections applying when she is releasing a right of dower, indicate an intention that she shall not be bound in the latter instance. By a process of extension, the same reasoning may be applied to the husband. The dower rights of the husband and the wife are identical, and so are their general contractual capacities and their capacities to convey. The same provisions regulate their deeds executed for the purpose of releasing their dower rights. In the present status of their property and contractual rights and capacities, there is no substantial reason for differentiating between the two as to liability on their personal covenants in each other's deeds. Hence it may be concluded that, if it was not the intention that the wife should be bound on such covenants, it was likewise the intention that the husband should not be bound. Opposed to the implication which may be construed into the statutes, whether applied to the husband or the wife, we have the express covenant in the deed and the general contractual capacity to enter into it.

In the present state of the law, should it be considered overcautious, when the intention is that only one spouse shall be bound by covenants or warranties in a deed, expressly to limit the operation of the covenants or warranties to the spouse who is intended to be bound? Or if it is the intention that both spouses shall be bound by the covenants or warranties, to indicate the intention in a form still more emphatic than the usual form of joint covenants?<sup>39</sup>

While the question of whether a spouse who signs a deed to release his/her dower has apparently not been decided by the West Virginia Supreme Court of Appeals, it has been decided in a number of other jurisdictions.

In *Center v. Elgin City Banking Co.*,<sup>40</sup> the court stated that "[a] husband who joins with his wife in a conveyance of her real estate merely for the purpose of releasing his dower, is not liable upon the

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39. Carlin, *supra* note 35, at 21-22.

40. 57 N.E. 439 (Ill. 1900).

covenants contained in the deed . . . .”<sup>41</sup> The general acceptance of this rule is evidenced by the fact that it was summarized in *Corpus Juris* as follows:

Hence, where an obligation is created by two or more, the general presumption is that it is joint, and words of severance are necessary to overcome this primary presumption; but this rule does not apply to covenants joint in form made by husband and wife in conveyances of the husband's property, unless it appears that the sole consideration for the deed was received by her and was by her husband so intended.<sup>42</sup>

A logical extension of the rule that a spouse is not liable on covenants in the deed where he or she joins solely to release dower rights would be that a spouse should not be liable where the only purpose in joining in the deed, whether expressed or implied, is to acknowledge notice pursuant to the provision of W. Va. Code section 43-1-2.

Since the passage of HB 4112, there have been several questions raised relating to the abolition of dower. Essentially, the questions fall into one of two categories. The first is: If the property was acquired before June 5, 1992, does the non-title holding spouse have to join into deeds executed after June 5, 1992, to waive dower? The second question is: If a deed was delivered before June 5, 1992, without the signature of the non-title holding spouse, does the non-title holding spouse have *dower* if the title holding spouse dies after June 5, 1992? The answer to both questions is that the non-title holding spouse does *not* have dower. To understand the answer, one needs to understand the legal characteristics of dower.

In *Carver v. Ward*,<sup>43</sup> our court, in describing a wife's contingent dower right, explained:

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41. *Id.* at 440. *See also* Warner v. Flack, 116 N.E. 197 (Ill. 1917); Smith v. Gaines, 97 So. 739 (Ala. 1923); Pauley v. Knouse, 192 N.W. 195 (Neb. 1923); Fairfax State Sav. Bank v. Coligan, 234 N.W. 537 (Iowa 1931); Edgewater Coal Co. v. Swinney, 65 S.W.2d 674 (Ky. Ct. App. 1933); Crain v. Warner, 87 Pa. Super. 605 (1926); Seeberger v. Tutt, 224 S.W. 72 (Mo. Ct. App. 1920). *See generally* Watts v. Ramsey, 2 S.W.2d 409 (Tenn. 1928). *But see* Tucker v. Walker, 437 S.W.2d 788 (Ark. 1969).

42. 15 C.J. *Covenants* § 22(b) (1918).

43. 95 S.E. 828 (W. Va. 1918).



It is not property, and has no commercial value capable of ascertainment. It is a mere contingency wisely ordained for the protection of the wife in case she is left a widow, an event which may never happen, and until that contingency does arise the law does not regard the inchoate right as property having transferable quality or commercial value. The law makes provision for its release or extinguishment, but none whereby it may be passed to another. By joining her husband in the execution of a deed of conveyance, the wife simply releases her contingent right, and is thereby estopped to assert claim to dower; she does not convey anything.<sup>44</sup>

The United States Supreme Court in *Randall v. Kreiger*<sup>45</sup> explained dower's characteristics as follows:

During the life of the husband the right [of dower] is a mere expectancy or possibility. In that condition of things, the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature.<sup>46</sup>

Keeping in mind that dower was nothing more than a contingency until the spouse dies, the court's analogy to the expectancy of heirs is helpful in understanding that to abolish inchoate dower does not affect a protected property right. Therefore, there is no constitutional prohibition against abolishing it. In *Ruby v. Ruby*,<sup>47</sup> the court stated in Syllabus point 1:

A wife's right of dower, so long as it remains inchoate, is subject absolutely to the control of the Legislature, which may modify or destroy it at will without exceeding its constitutional limits; and this right of dower becomes consummate and vested only by the death of the husband.<sup>48</sup>

The United States Supreme Court used similar language in holding that dower was not a constitutionally guaranteed privilege or immunity.

44. *Id.* at 830.

45. 90 U.S. (23 Wall.) 137 (1874).

46. *Id.* at 148.

47. 163 S.E. 717 (W. Va. 1932).

48. *Id.* See also *MINOR*, *supra* note 13, § 282, at 359-60.

It explained that inchoate dower is “at most . . . a right which, while it exists, is attached to the marital contract or relation; and it always has been deemed subject to regulation by each state as respects property within its limits.”<sup>49</sup> Therefore, as it relates to the abolition of dower, the important question is whether the decedent died before or after June 5, 1992, and not when the property was acquired or conveyed.

### *B. Changes to the Proposed Legislation Elective Share Provision*

When the legislature considered the proposed legislation in 1992, it made several changes. Two of the changes involved the elective share portion of the statute. One of the changes inserted the phrase “acquired during the marriage of the decedent and the surviving spouse” to a provision describing certain assets to be included in the augmented estate.<sup>50</sup> The example provided to the House Judiciary Committee to illustrate the purpose for the change is as follows: Assume A and B are married, that they have adult children, that B dies and that following B’s death, A deposits money in joint certificates of deposit (or joint savings accounts) in A’s name and the name of an adult child; then A marries X. The suggestion was that this fund (the joint certificate of deposit or joint savings account) was an asset from the first marriage now held jointly by the surviving spouse and the children of the first marriage and, therefore, should not be “reachable” by X if A dies within two years. This amendment to section 42-3-2(b)(2)(ii) and its effect are explained and discussed by Professor Roberts in her article and, therefore, will not be repeated herein.<sup>51</sup>

The second 1992 amendment to the elective share section dealt with the amount of the supplemental elective share. The proposed statute read as follows:

If the sum of the amounts described in subdivisions (3) and (4), subsection (b) of section two, and subdivisions (1) and (3), subsection (a), section six of this article, and that part of the elective-share amount payable from the decedent’s probate and reclaimable estates under subsections (b) and (c),

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49. *Ferry v. Spokane, Portland & Seattle Railway Co.*, 258 U.S. 314, 318 (1922).

50. W. VA. CODE § 42-3-2(b)(2)(ii) (Supp. 1993).

51. See Roberts, *supra* note 10, at 83-86, 88-89.

section six of this article, is *less than fifty thousand* dollars, the surviving spouse is entitled to a supplemental elective-share *amount equal to fifty thousand dollars*, minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's probate estate and from recipients of the decedent's reclaimable estate in the order of priority set forth in subsections (b) and (c), section six of this article.<sup>52</sup>

The Uniform Probate Code contemplated that each legislature would establish a dollar amount for this supplemental elective share most appropriate for each state given the social/economic factors of the state. The "fifty thousand dollars" contained in the proposed legislation was, therefore, simply a suggested amount for consideration. The "amendment" to the proposed statute to change fifty thousand to twenty-five thousand was an exercise of the legislature's discretion to establish an appropriate dollar amount for West Virginia. The "amendment" to the proposed statute would be accomplished by striking the word "fifty" and inserting in lieu thereof the word "twenty-five" in this section. However, the way the amendment was prepared, "fifty" was changed to "twenty-five" the first time it appeared in this section, but the corresponding change in the next line from "fifty" to "twenty-five" was not made. The "partial amendment" of this section thereby created a patent internal inconsistency within this section. This drafting "mistake" was corrected in the "clean up" legislation passed in 1993.

### C. *Changes to the Spouse's Intestate Share*

The major changes to the proposed legislation in 1992 related to the spouse's share of the decedent's estate in the event of intestate succession. Prior to the enactment of HB 4112, West Virginia laws of intestate succession were modeled after the statutes adopted in Virginia in 1785.<sup>53</sup> A number of empirical studies, summarized in the earlier article,<sup>54</sup> established that the intestate succession statutes prepared when the "colonies" gained their independence from England no longer

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52. H.B. 4112, 70th Leg., 2d Reg. Sess. § 42-3-1(b) (1992).

53. See generally John W. Fisher, II, *Spousal Property Rights—'Til Death Do They Part*, 90 W. VA. L. REV. 1169, 1170-72 (1988).

54. See *id.* at 1172-81.

reflected either the interest or the needs of the citizens in our post-World War II society. The proposed legislation, therefore, followed the intestate succession patterns proposed in the 1990 RUPC, which relied upon the empirical studies and the experience gained under the original UPC. The empirical studies established that "most people" wanted a significantly greater preference in favor of the surviving spouse than provided for in the statutory schemes that had evolved from the common law canons of descent.<sup>55</sup>

The changes made by the legislature in 1992 to the proposed statute's intestate succession provisions involved the share of the surviving spouse in those situations where (1) either the decedent or the surviving spouse had children not born of the other, and (2) where the decedent was survived by a spouse and parent(s), but without descendants.<sup>56</sup> As proposed, these sections provided for a "lump sum" or

55. The introductory comment of the 1967 Uniform Probate Code to the intestate succession section contains the following explanation for the new pattern proposed therein:

The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personality, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.

UNIFORM PROBATE CODE art. II, pt. 1 cmt. (1967) [hereinafter UPC].

The preference for the surviving spouse is summarized in the comment to UPC § 2-102 as follows:

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share . . . .

*Id.* § 2-102 cmt.

The proposed statute and the reason for it was discussed in the earlier article and will not be repeated herein. *See* Fisher, *supra* note 53, at 1173-88.

56. As *proposed* § 42-1-3 read:

Share of spouse.

“minimum amount” for the surviving spouse and then a percentage of the estate in excess of the minimum amount. The reason for the “floor amounts” and a percentage of the balance of the estates is succinctly stated in the comment to this section of the 1990 RUPC. The drafters explain:

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent’s descendants are unlikely to be the *exclusive* beneficiaries of the surviving spouse’s estate, the surviving spouse receives the first \$150,000 plus one-half of the balance of the intestate estate. The purpose is to as-

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The intestate share of a decedent’s surviving spouse is:

(a) The entire intestate estate if:

- (1) No descendant or parent of the decedent survives the decedent; or
- (2) All of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(b) *The first two hundred thousand dollars, plus three fourths of any balance of the intestate estate*, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(c) *The first one hundred fifty thousand dollars, plus one half of any balance of the intestate estate*, if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(d) *The first one hundred thousand dollars, plus one half of any balance of the intestate estate*, if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.

H.B. 4112, 70th Leg., 2d Reg. Sess. § 42-1-3 (1992) (emphasis added).

As enacted § 42-1-3 provided:

The intestate share of a decedent’s surviving spouse is:

(a) The entire intestate estate if:

- (1) No descendant or parent of the decedent survives the decedent; or
- (2) All of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(b) *Three fourths of the intestate estate*, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(c) *Three fifths of the intestate estate*, if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(d) *One half of the intestate estate*, if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.

Act of March 7, 1992, ch. 75, 1992 W. Va. Acts, 661, 669 (emphasis added).

sure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds \$150,000.

If the decedent has other descendants, the surviving spouse receives \$100,000 plus one half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.<sup>57</sup>

In 1992, the legislature removed the "floor amount" and increased the percentage in section 42-1-3(c) from one half to three fifths of the intestate estate received by the surviving spouse. The reason for these changes in the intestate succession section of the proposed statute was not articulated during the committee sessions in the same manner as the "amendment" which added the phrase "acquired during the marriage of the decedent and the surviving spouse" to section 42-3-2(b)(2)(ii).<sup>58</sup> I believe that it is fair to assume that for some legislators the proposed change in the distribution of the intestate estate simply constituted too great of a shift from the "old" distribution pattern. Those who had read the various studies based on the empirical data, or reflected on the distribution patterns of clients coming to their offices for "simple" wills understood and supported the proposed statute's intestate distribution. However, apparently for others, when compared with the "old" statute, the proposed statute must have intuitively appeared to be too drastic of a change. The legislature, therefore, "zeroed out" the dollar amount designed to assure a minimum estate to a surviving spouse.

Except for the change to section 42-1-3(b),<sup>59</sup> the legislature's amendments stayed within the general principle of favoring the surviving spouse more than the old law had, in a manner generally consistent with the empirical studies.<sup>60</sup> It is recognized that reasonable minds may differ on whether some "floor amount" should have been maintained, or entirely removed, as occurred in West Virginia. It is submitted, however, that the most important thing is that HB 4112

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57. REVISED UNIFORM PROBATE CODE § 2-102 cmt. (1990) [Hereinafter RUPC].

58. See *supra* text accompanying notes 50-51.

59. See *supra* notes 56, 61.

60. See generally Fisher & Curnutte, *supra* note 9, at 72-81.

significantly and substantially improved the intestate succession provision in our state.

The one area in which the 1992 legislative amendments to the proposed legislation made a "step backward" was the change to section 42-1-3(b).<sup>61</sup> The amendments removing the minimum amounts for the surviving spouse in section 42-1-3(b) produced an unintended and undesirable result. This "problem" was corrected by the legislature in 1993.

In section 42-1-3(b) of the proposed legislation, the parent(s) would have shared in the intestate estate in a very limited number of cases, i.e., there would be relatively few cases of intestacy where the "probate" estate exceeded \$200,000 and there were parents of the decedent but no descendants. In most situations in which the parent(s) would have shared under this *proposed* section, there would be a recently married, young couple. Typically, the estate for such a couple would be relatively small, and frequently the assets would be in the husband's and wife's names with the right of survivorship. Therefore, in such situations, if the first \$200,000 of the probate estate went to the surviving spouse, the surviving spouse would usually inherit the

61. Under HB 4112, the intestate share of a decedent's surviving spouse was: "[t]hree fourths of the intestate estate, if no descendants of the decedent survives the decedent, but a parent of the decedent survives the decedent." Act of March 7, 1992, ch. 75, 1992 W. Va. Acts 661, 669 (amended 1993).

The proposed statute would have provided the surviving spouse "[t]he first two hundred thousand dollars, [The dollar amount was to be determined by the legislature], plus three fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent."

H.B. 4112, 70th Leg., 2d Reg. Sess., § 42-1-3(b) (1992).

Before 1992 § 42-1-1(b) provided: "If there be no child, nor descendant of any child, then the whole shall go to the wife or husband, as the case may be." W. VA. CODE § 42-1-1(b) (1982) (amended 1992).

Section 42-2-1 provided for distribution of the personal estate as follows:

(a) If the intestate was a married woman, and leave issue surviving, her husband shall be entitled to one third of such surplus, and if she leave no issue, he shall be entitled to the whole thereof;

(b) If the intestate leave a widow and issue by the same or a former marriage, the widow shall be entitled to one third of such surplus, and if he leave no such issue, she shall be entitled to the whole thereof.

W. VA. CODE § 42-2-1 (1982) (repealed 1992).

entire estate.<sup>62</sup> Perhaps the most common example of when the parent(s) would share in such an estate would involve a young married couple, with the death of one caused by a “tort” injury which results in a substantial wrongful death recovery by the decedent’s estate. In this hypothetical, the empirical studies showed that if there were sufficient assets to adequately provide for the surviving spouse, most of those surveyed wanted their parent(s) to share in the “surplus” assets.<sup>63</sup>

The empirical studies tend to support an aspect of human nature that we may intuitively suspect. First, that the bonding process with a new spouse evolves over a period of time as the parental ties lessen. Second, that young couples suspect that if something happens to one of them, the other is likely to remarry and the “decedent” does not want the “successor” spouse to “enjoy” a windfall as a result of his or her death. Therefore, removing the lump sum dollar amount from this section changed the applicability of the statute from one in which the parent would share in the decedent’s estate in only “unusual” circumstances, to one in which the parent (if there were no descendants of the decedent) would share in every such estate, even the very small or meager estates. As discussed below, the 1993 legislature “corrected”

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62. Professor Lawrence W. Waggoner, who served as reporter for the RUPC, explains the reason for this particular distribution:

Why not, then, *officially* grant the surviving spouse the entire intestate estate when the decedent is childless but leaves a surviving parent? The rationale is that a childless decedent with a surviving spouse and at least one surviving parent and with an estate significantly in excess of \$243,000 *who dies intestate* is likely to have died fairly young and without expecting to have such a large estate. (A decedent who actually accumulated an estate of this size is likely to be older and to have a will. [See Mary Louise Fellows, Rita J. Simon, and William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 336-39 (1978)], reporting that, among those surveyed, 69 percent with estates of \$200,000 and over had wills (the \$200,000 figure is adjusted for inflation between the time of the publication of this article and today); and further reporting that 61 percent of those 46-54 had wills, 63 percent age 55-64 had wills, and 85 percent of those 65 and over had wills, but only 12 percent of those between the ages of 17 and 34 had wills.)

Lawrence W. Waggoner, *Spousal Probate Rights in a Multiple—Marriage Society*, reprinted in 45 Record of the Association of the Bar of the City of New York, 339 n.27 (1989).

63. See Fisher & Cumutte, *supra* note 9, at 77-80.



this situation to produce a much better result in the vast majority of the cases likely to arise with these facts.

### III. 1993 AMENDMENT—HOUSE BILL 2638

#### A. *Amending Section 42-1-3—Share of Spouse*

On April 10, 1993, HB 2638 was passed and became effective ninety days from its passage. House Bill 2638 contained the request for “clean up” amendments to HB 4112, which were prepared and recommended by the West Virginia State Bar Probate Committee. A number of members of this committee had served on the Advisory Committee that had prepared the proposed legislation, and a number had also served as presenters of Continuing Legal Education programs explaining the “new” statute. The initial experiences with the new statute, suggested that some “clean up” legislation would be helpful. Essentially, the amendments contained in HB 2638 clarified certain aspects of HB 4112. The one major substantive change in HB 2638 was to amend section 42-1-3(b) (discussed above) to provide that if the decedent was survived by a spouse and parent(s), but no descendants, the surviving spouse would inherit the entire estate.<sup>64</sup> The 1993 amendment in effect restored the pre-HB 4112 disposition of intestate assets as to this particular factual situation.<sup>65</sup> The 1993 amendment deleted “or parent” from section 42-1-3(a) and omitted what had been section 42-1-3(b). As amended, section 42-1-3 now reads:

#### § 42-1-3. Share of spouse

The intestate share of a decedent’s surviving spouse is:

- (a) The entire intestate estate if:
  - (1) No descendant of the decedent survives the decedent; or
  - (2) All of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
- (b) Three fifths of the intestate estate, if all of the decedent’s

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64. See *supra* text accompanying notes 61-63.

65. See *supra* note 61.

surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(c) One half of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.<sup>66</sup>

### B. Clarifying the Term "Homestead"

Both the 1969 and 1990 versions of the Uniform Probate Code contained provisions for a homestead allowance<sup>67</sup> and for property exemptions.<sup>68</sup> These provisions were a part of a comprehensive plan contained in the Uniform Probate Codes for providing support to the surviving spouse and family. The homestead provisions in the Uniform Probate Code represented an additional grant of funds, and the exempt

66. W. VA. CODE § 42-1-3 (Supp. 1993).

67. Section 2-402. Homestead Allowance.

A decedent's surviving spouse is entitled to a homestead allowance of [\$15,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [\$15,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.

RUPC § 2-402 (1990).

68. Section 2-403. Exempt Property.

In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding \$10,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt property, is less than \$10,000, or if there is not \$10,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$10,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share.

RUPC § 2-403 (1990).

property provision was a companion section protecting certain additional assets for the family.

In contrast, the West Virginia Constitutional Homestead provision<sup>69</sup> and its implementing statutory provisions<sup>70</sup> principally function to exempt the homestead asset from creditors. Therefore, the Advisory Committee that prepared the proposed legislation concluded that since West Virginia's statutory homestead provisions implemented the state constitutional provision, the UPC provision on homestead and exempt property could not be included as part of the proposed statute. While the Uniform Probate Code's provisions for homestead and exempt property were omitted from the proposed legislation, references to those terms were not deleted from other provisions. Since the concept of the West Virginia Homestead provision, to exempt property from creditors, is different from the RUPC's provision to provide additional assets, the references in HB 4112 to "homestead allowance" created unnecessary confusion. Therefore, HB 2638 amended the provisions of HB 4112 by striking the terms "Homestead Allowance" and "exempt property" where necessary.<sup>71</sup>

### C. *An Election Against Intestate Succession*

As discussed above, HB 4112 provides a statutory framework for a spouse to exercise his or her elective share rights, which in effect implements the "equitable" concept the court had recognized in *Johnson v. Farmers & Merchants Bank*.<sup>72</sup> Implied in the new statutory provisions of HB 4112 was the right of a surviving spouse to elect against an *intestate* succession.<sup>73</sup> Because the concept of electing against an intestate succession is a new concept in West Virginia, an *explicit* statement was added to the statute to make it clear that a spouse can elect against an intestate estate.<sup>74</sup> The right to elect

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69. W. VA. CONST. art. VI, § 48.

70. W. VA. CODE §§ 38-9-1 to -3 (1985).

71. The terms were deleted from W. VA. CODE §§ 42-1-3b, 42-3-2(b)(1), (3), and 42-3-3a(a), (d).

72. 379 S.E.2d 752 (W. Va. 1989).

73. W. VA. CODE § 42-3-1 (Supp. 1993).

74. Section 42-3-1 was amended to add "(a) the surviving spouse of a decedent who

against an intestate share could be important where a decedent made substantial inter-vivos transfers, which could be recaptured into an augmented estate, and then died intestate with a relatively small “probate” estate. Even though the surviving spouse’s share would not be less than fifty percent (50%) of the intestate estate,<sup>75</sup> if substantial assets had been transferred during the decedent’s lifetime and within the recapture period for the augmented estate,<sup>76</sup> the share provided by incremented vesting (a maximum of fifty percent (50%) after fifteen (15) years of marriage)<sup>77</sup> may be more beneficial to the surviving spouse.

Another clarifying amendment was made in section 42-3-3 entitled “Right of Election Personal to Surviving Spouse.” Under the provisions of this section, “[t]he right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court . . . .”<sup>78</sup> The section further provides for an election on behalf of a living spouse who is incapacitated. Under this provision, if the election is made on behalf of a surviving spouse who is incapacitated, the elective share payable from the decedent’s probate and reclaimable estates is administered by a trustee for the support of the surviving spouse.<sup>79</sup> As to the assets of this trust, section 42-3-3(b)(3) as enacted in HB 4112 provided that “[u]pon the surviving spouse’s death, the trustee shall transfer the unexpended trust property under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse.”<sup>80</sup> This proposed section is section 2-203 of the RUPC. In the preparation of the proposed legislation, the last phrase of section 2-203 which read “or (ii) to that predeceased spouse’s heirs under Section 2-711” was

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dies domiciled in this state has a right of election, *against either the will or the intestate share . . . .*” W. VA. CODE § 42-3-1(a) (Supp. 1993) (emphasis added).

75. W. VA. CODE § 42-1-3 (Supp. 1993).

76. W. VA. CODE § 42-3-2 (Supp. 1993).

77. W. VA. CODE § 42-3-1(a) (Supp. 1993).

78. W. VA. CODE § 42-3-3(a) (Supp. 1993).

79. W. VA. CODE § 42-3-3(a) (Supp. 1993).

80. Act of March 7, 1992, ch. 75, 1992 W. Va. Acts 661, 681 (amended 1993).

inadvertently omitted.<sup>81</sup> The comment to this section succinctly states the purpose of this section as follows:

At the surviving spouse's death, the remaining custodial trust property does not go to the surviving spouse's estate, but rather under the residuary clause of the will of the predeceased spouse whose probate and reclaimable estates were the source of the property in the custodial trust, as if the predeceased spouse died immediately after the surviving spouse. In the absence of a residuary clause, the property goes to the predeceased spouse's heirs.<sup>82</sup>

The 1993 amendment provides the missing guidance as to what happens in the absence of a residuary clause by adding "or, if there was no residuary clause or no will of that predeceased spouse, to the persons in such shares as would succeed to that predeceased spouse's intestate estate as if that predeceased spouse died immediately after the surviving spouse."<sup>83</sup> This clarification becomes especially helpful in light of the amendment discussed above making it explicit that a surviving spouse can elect against an intestate share.

Finally, in understanding this section, the explanation provided in the comments to this section of the RUPC should be helpful. It states:

The approach of this section is based on a general expectation that most surviving spouses are, at the least, generally aware of an [sic] accept [that] their decedents' overall estate plans are not antagonistic to them. Consequently, to elect the elective share, and not have the disposition of that part of it that is payable from the decedent's probate and reclaimable estates under Sections 2-207(b) and (c) governed by subsections (b) and (c), the surviving spouse must not be an incapacitated person. When the election is made by or on behalf of a surviving spouse who is not an

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81. RUPC § 2-203 (1990).

82. *Id.* cmt.

83. As amended § 42-3-3(b)(3) reads:

Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse, or, if there was no residuary clause or no will of that predeceased spouse, to the persons and in such shares as would succeed to that predeceased spouse's intestate estate as if that predeceased spouse died immediately after the surviving spouse.

W. VA. CODE § 42-3-3(b)(3) (Supp. 1993).

incapacitated person, the surviving spouse has personally signified his or her opposition to the decedent's overall estate plan.

If the election is made on behalf of a surviving spouse who is an incapacitated person, subsections (b) and (c) control the disposition of that part of the elective-share amount or supplemental elective-share amount payable under Sections 2-207(b) and (c) from the decedent's probate and reclaimable estates. The purpose of subsections (b) and (c), generally speaking, is to assure that that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse's heirs or devisees.<sup>84</sup>

#### *D. Clarification of Section 41-1-6—Revocation of Will by Divorce*

The 1990 Uniform Probate Code contains eight articles and includes comprehensive provisions dealing with intestate and testate succession including the formality of wills and rules of construction, probate administration and procedures, non-probate transfers and matters.<sup>85</sup> The West Virginia Law Institute's project initially focused on the law of intestate succession, but given the manner in which our "old" elective share statute incorporates the intestate succession provision,<sup>86</sup> the committee also had to address elective share.

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84. RUPC § 2-203 cmt. (1990). Note that RUPC § 2-207 corresponds to W. VA. CODE § 42-3-6 (Supp. 1993).

85. Article II contains the following parts: Part 1, Intestate Succession; Part 2, Elective Share of Surviving Spouse; Part 3, Spouse and Children Unprovided for in Wills; Part 4, Exempt Property and Allowances; Part 5, Wills, Will Contracts, and Custody and Deposit of Wills; Part 6, Rules of Construction Applicable Only to Wills; Part 7, Rules of Construction Applicable to Donative Dispositions in Wills and Other Governing Instruments; Part 8, General Provisions Concerning Probate and Nonprobate Transfers; Part 9, Statutory Rule Against Perpetuities; Time Limit on Options in Gross, etc.; and Part 10, Uniform International Wills Act. See RUPC at 2-4.

86. W. Va. Code § 42-3-1 reads:

§ 42-3-1 Renunciation of will by husband or wife.

When any provision is made in a will for the surviving wife or husband of the testator, such surviving wife or husband may, within eight months from the time of the admission of the will to probate, renounce such provision. If the will be contested, or the order admitting it to probate be appealed from, such renunciation may be made within two months of the final decision on such contest or appeal. Such renunciation shall be made either in person before the county court by which the will is admitted to probate, or by a writing recorded in the office of the clerk of such court, upon such acknowledgement or proof as would authorize a deed to

While the RUPC is designed to permit states to enact selected parts of it, as a comprehensive statute its separate parts include a significant number of cross-reference to other provisions. Part 3 of Article II of the RUPC deals with "Spouse and Children Unprovided For in Wills." For a variety of reasons, the Advisory Committee decided it would not recommend all parts of Part 3 of Article II.<sup>87</sup> The Committee did, however, believe that (along with the proposed revisions of intestate succession and elective share) revocation of wills as provided in West Virginia Code section 41-1-6 needed to be addressed. In addition to the provision in Article II, Part 3 which included provisions for surviving spouses married after the decedent had executed his or her will, section 2-804 of the RUPC provided for revocation of both probate and non-probate transfers by divorce. In effect, the situations provided for in section 41-1-6 were dealt with in two distinct parts of the RUPC, and the portion covered in Part 8 of Article II dealt with both probate and non-probate transfers.<sup>88</sup>

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be admitted to record. If such renunciation be made, or if no provision be made for such surviving wife or husband, *such surviving wife or husband shall have such share in the real and personal estate of the decedent as such surviving wife or husband would have taken if the decedent had died intestate leaving children*; otherwise the surviving wife or husband shall have no more of the decedent's estate than is given by the will.

W. VA. CODE § 42-3-1 (1982) (amended 1992) (emphasis added). *See generally* Kidwell v. Kidwell, 431 S.E.2d 346, 349 (W. Va. 1993).

87. *See* Elma M. Reed, Note, *Premarital Wills and Pretermitted Children: West Virginia Law v. Revised Uniform Probate Code*, 93 W. VA. L. REV. 197 (1990).

88. The introductory comments to Part 8 reads:

GENERAL PROVISIONS CONCERNING PROBATE  
AND NONPROBATE TRANSFERS  
GENERAL COMMENT

Part 8 contains four general provisions that cut across probate and nonprobate transfers. Section 2-801 is the Uniform Disclaimer of Property Interests Act; this Act replaces the narrower Uniform Disclaimer of Transfers By Will, Intestacy or Appointment Act, which was incorporated into the pre-1990 Code. The broader disclaimer act is now appropriate, given the broadened scope of Article II in covering nonprobate as well as probate transfers.

Section 2-802 deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share.

Section 2-803 spells out the legal consequence of intentional and felonious killing on the right of the killer to take as heir and under wills and revocable inter-vivos transfers, such as revocable trusts and life insurance beneficiary designa-

Since the relevant sections of the RUPC were a part of a comprehensive statutory scheme which dealt with a much larger issue than the intestate succession/elective share project of our advisory committee, it was not feasible to adapt those sections to our needs. Our committee, therefore, turned to the 1969 UPC to find a more compatible provision to include in our proposed statute. Therefore, the new section 41-1-6 is patterned after section 2-508 of the 1969 UPC.

When the new section 41-1-6 was carefully analyzed for the Continuing Legal Education presentation, it was discovered that the new section could be construed to produce a result which could be inconsistent with a testator's expressed wishes. As enacted in HB 4112, section 41-1-6 provided:

**§ 41-1-6. Revocation by divorce; no revocation by other changes of circumstances**

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or an-

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tions.

Section 2-804 deals with the consequences of a divorce on the right of the former spouse (and relatives of the former spouse) to take under wills and revocable inter-vivos transfers, such as revocable trusts and life-insurance beneficiary designations.

RUPC art. II, pt. 8 cmt. (1990).

**Comment**

**Purpose and Scope of Revision.** The revisions of this section, pre-1990 Section 2-508, intend to unify the law of probate and nonprobate transfers. As originally promulgated, pre-1990 Section 2-508 revoked a predivorce devise to the testator's former spouse. The revisions expand the section to cover "will substitutes" such as revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts, and other revocable dispositions to the former spouse that the divorced individual established before the divorce (or annulment). As revised, this section also effects a severance of the interests of the former spouses in property that they held at the time of the divorce (or annulment) as joint tenants with the right of survivorship; their co-ownership interests become tenancies in common.

*Id.* § 2-804 cmt.



nulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. Notwithstanding the provisions of section three, article three, chapter forty-one of this code, the share of such spouse shall be distributed according to the residuary clause of the decedent's will or according to the statute of intestate succession for the decedent's property. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.<sup>89</sup>

Under this provision the share devised to the former spouse (i.e., spouse before the divorce or annulment) would be distributed according to the residuary clause of the decedent's will or according to the statute of intestate succession for the decedent's property, unless the will expressly provided for otherwise. As amended in 1993 the section now provides:

**§ 41-1-6. Revocation by divorce; no revocation by other changes of circumstances.**

(a) If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, except that the provisions of section three [41-3-3], article three, chapter forty-one do not apply, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

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89. Act of March 7, 1992, ch. 75, 1992 W. Va. Acts 661, 662-63 (amended 1993).

(b) This section applies to all divorces, annulments or remarriages which become effective after the fifth day of June, one thousand nine hundred ninety-two.<sup>90</sup>

The 1993 amendment struck from the 1992 version of section 41-1-6 the phrase “the share of such spouse shall be distributed according to the residuary clause of the decedent’s will or according to the statute of intestate succession for the decedent’s property.” As amended, the statute simply provides that the property passes as if the spouse had failed to survive the decedent. Perhaps the best way to understand the reason for this amendment is by an example. Assume the will in question provided that if my spouse does not survive me then I devise Blackacre to my daughter A. Further assume that the residuary clause provided that the rest and residue of my estate shall be divided equally among my grandchildren living at my death. It was recognized that in spite of the express language stating that if Blackacre did not go to the spouse it was to go to A, it could be argued under the 1992 version of section 41-1-6 that Blackacre should go to the grandchildren under the residuary clause.

The 1993 amendment resolves this potential problem. Under the 1993 provision (as was also true of the 1992 version), the statute provides that the anti-lapse statute, section 41-3-3, does not apply and then states the property which the former spouse would have taken passes as if he or she had died before the testator or testatrix. If the will specifically provides for such a contingency, the specific provision of the will controls. If the will does not specifically provide for such a contingency, then the property passes under the will’s residuary clause, if there is an applicable residuary clause, and if not, then by intestate succession.

The second amendment to section 41-1-6 explicitly states that “[t]his section applies to all divorces, annulments, or remarriages which became effective after the fifth day of June, one thousand nine hundred ninety-two.”<sup>91</sup> This amendment makes it clear that if a divorce, annulment or remarriage occurred before June 5, 1992, that the prior

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90. W. VA. CODE § 41-1-6 (Supp. 1993).

91. W. VA. CODE § 41-1-6(b) (Supp. 1993).

statutory provision which revoked existing wills, "except a will which makes provisions therein for such contingency"<sup>92</sup> applied and thereby revokes such a will. The clarifying amendment as to the effective date should help avoid issues found in some of our sister jurisdictions.<sup>93</sup>

### *E. Procedural Clarification of Elective Share*

The 1993 amendments clarified two important aspects of the elective share provisions. Under HB 4112, if a surviving spouse is entitled to an elective share and there are insufficient assets to eliminate any contributions from the decedent's probate estate and the recipients of the decedent's reclaimable estate, the statute establishes the order in which the assets are applied to satisfy the elective share.<sup>94</sup> If a spouse elects to pursue the elective share option,

the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within . . . [the time periods are set forth]. The surviving spouse must give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share.<sup>95</sup>

Under another portion of this section, the recapture of assets for the purpose of the elective share "may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he or she would have been under section two had relief been secured against all persons subject to contribution."<sup>96</sup>

The 1993 amendment added a clause to section 42-3-4(b), which allows the surviving spouse to petition for an extension of time for making an election, to provide that the notice of the filing of the petition need only be given to those "against whom the spouse chooses to

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92. W. VA. CODE § 41-1-6 (1982) (amended 1992).

93. *See generally In re Will of Mitchell*, 203 S.E.2d 48 (N.C. 1974); *Papen v. Papen*, 224 S.E.2d 153 (Va. 1976).

94. W. VA. CODE § 42-3-6 (Supp. 1993).

95. W. VA. CODE § 42-3-4(a) (Supp. 1993).

96. W. VA. CODE § 42-3-4(d) (Supp. 1993).

proceed under subsection (d) of this section” instead of against all persons interested in the decedent’s reclaimable estate.<sup>97</sup> In effect, if the surviving spouse does not plan to assert rights to reclaimable property against a particular party, he or she does not have to notify the party of the petition for extension. Only those who may ultimately be required to contribute to the satisfaction of the elective share must be notified.

The second major procedural amendment relates to the adjudicatory aspects of the elective share provision. Under West Virginia law, the county commission “shall have jurisdiction in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, curators and the settlement of their accounts, and in all matters relating to apprentices.”<sup>98</sup> Consistent with the duties assigned to the county commission, HB 4112 as a part of its general definition section provided: “‘Court’ means the county commission or branch in this state having jurisdiction in matters relating to the affairs of decedents.”<sup>99</sup>

Even a cursory examination of the elective share provisions reveals that there are a number of factual issues which may need to be resolved that are not associated with or similar to other duties assigned to county commissions.<sup>100</sup> Also, discovery procedures provided in the

97. Section 42-3-4(b) reads as follows:

Within nine months after the decedent’s death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent’s death, the spouse gives notice of the petition to all persons interested in the decedent’s reclaimable estate, *against whom the spouse chooses to proceed under subsection (d) of this section*, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse’s petition for an extension, the decedent’s reclaimable estate, described in subdivision (2), subsection (b), section two of this article, in the hands of those persons against whom the spouse chooses to proceed under subsection (d) of this section, is not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

W. VA. CODE § 42-3-4(b) (Supp. 1993) (emphasis added).

98. W. VA. CODE § 7-1-3 (1993).

99. W. VA. CODE § 42-1-1(3) (Supp. 1993). See generally RUPC § 1-102(7) (1990).

100. See generally W. VA. CODE §§ 7-1-1 to -3ff (1993).

Rules of Civil Procedure, which may be important in certain cases, are not available in proceedings before the county commission.<sup>101</sup> In effect, HB 4112 had added to the administrative function of probate matters already assigned to the County Commission an adjudicatory function, as it related to the elective share/augmented estate, that a County Commission is not properly equipped to handle. In order to find a practical solution to this problem, HB 2638 amended section 58-3-1 by adding: “(f) the disposition of disputes arising from the provisions of article three [§ 42-3-1 et seq.], chapter forty-two of this code [Provisions Relating to Husband or Wife of Decedent] which appeal shall be de novo”<sup>102</sup> and added 58-3-1a, Procedures for appeals.<sup>103</sup>

The solution provided by these amendments permits the County Commission to retain its traditional role in probate matters while at the same time it assures a de novo hearing in a court accustomed and equipped to handle the issues that may arise in a contested elective share case.

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101. W. VA. R. CIV. P. 1.

102. W. VA. CODE § 58-3-1(f) (Supp. 1993).

103. Section 58-3-1a reads as follows:

Any interested person may appeal the final order of the county commission described by the provisions of subdivision (f), section one [§ 58-3-1(f)] of this article to the circuit court as a matter of right by requesting the appeal within four months after the final order of the county commission is rendered. The appeal shall be determined by trial de novo. Upon receipt of the request for appeal, the clerk of the county commission shall collect the circuit court filing fee therefor and forward the same, together with the final order and the request, to the clerk of the circuit court. The court may require the clerk of the county commission to file with the circuit clerk all or any portion of the record of the proceedings which resulted in the final order. No bond may be required from any party to the appeal. The final order of the county commission shall be stayed pending the appeal proceedings. If, after the appeal is filed in the circuit court, the matter is not brought on for hearing before the end of the second term thereafter, the appeal shall be considered abandoned and shall be dismissed at the cost of the appellant unless sufficient cause is shown for a further continuance. Upon such dismissal, the final order of the county commission is affirmed. No appeal which has been so dismissed by the circuit court may be reinstated after the expiration of the next regular term following such dismissal.

W. VA. CODE § 58-3-1a (Supp. 1993).

#### IV. CONCLUSION

More than a year has passed since HB 4112 effectuated the first major statutory reform since statehood in our laws of intestacy and elective share. As discussed above, by 1992 the court had already charted a new course for spousal rights at death. The new elective share statute simply “codified” the *spirit* of the court’s pronouncements and provided a framework in which the concepts of *Davis* and *Johnson* could be implemented.

In the time that has elapsed since HB 4112 took effect, the initial hostility to the change resulting from its passage appears to be giving way to acceptance; ambivalence as to the new provision on intestacy is being replaced by approval, and the apprehension about the new elective share statute is being supplanted by the complacency of being able to provide meaningful advice to one’s clients.

Now, as always, the best solution to the disposition of one’s assets at death is a will. However, since the empirical studies establish that more of our citizens will die intestate than testate, the “average citizen” in West Virginia is better served by the statutory provisions existing today than the law they replaced.

