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Lawrence W. Waggoner

University of Michigan Law School, waggoner@umich.edu

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MARITAL PROPERTY RIGHTS IN TRANSITION

by **LAWRENCE W. WAGGONER***

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* Lewis M. Simes Professor of Law, University of Michigan; Director of Research and Chief Reporter, Joint Editorial Board for the Uniform Probate Code; Reporter, Restatement (Third) of Property (Donative Transfers). Portions of this lecture have been drawn from L. Waggoner, R. Wellman, G. Alexander & M. Fellows, *Family Property Law: Wills, Trusts, and Future Interests* (1991); Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 Iowa L. Rev. 223 (1991); Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop., Prob. & Tr. J. 683 (1992). The helpful comments of David Chambers on Part IV are gratefully acknowledged.

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INTRODUCTION

The subject of “marital property rights” is very timely because those rights are in a state of transition. The term “marital property rights” covers a vast multitude of rights or interests conferred by law on persons who occupy the status of spouse.

This lecture is divided into four discrete, yet related segments. The first segment addresses how the law allocates original ownership between spouses in a marriage. The second segment turns to the intestate share of the surviving spouse. This is not a topic that high-powered estate planners get involved in very much because intestate estates are usually fairly small. But to the surviv-

ing spouse, the intestate share can mark the difference between economic security and poverty. The third segment addresses the rights of spouses upon divorce and disinheritance at death. The fourth and final segment surveys some recent developments regarding the rights of persons who are not spouses at all, but “near-spouses.”

The Uniform Probate Code was revised in 1990, and central parts of those revisions affect spousal rights. The American College of Trust and Estate Counsel (the “College”) was heavily represented in the discussion and final outcome of those revisions, through its three representatives to the Joint Editorial Board for the Uniform Probate Code, Chuck Collier, Joe Foster, past president of the College (who actually joined the Board after the revisions were completed), and Ray Young, and its three emeritus members, past presidents all, Harrison Durand, Harley Spitler, and of course Joe Straus, former Trachtman lecturer, and the father of the Code. As a matter of fact, all but one of the members of the Board are also prominent members of the College though they officially represent either the American Bar Association or the Uniform Law Conference. Included in this latter group are a former president of the College and Trachtman lecturer, Mal Moore; the current Secretary of the Board of Regents, Jack Bruce; and two former Trachtman lecturers, Ed Halbach and John Langbein. The Board’s State Courts Liaison, Jim Wade, is a member of the Board of Regents, and the Board’s Executive Director and Chief Reporter of the original UPC, Dick Wellman, is a well-known Academic Fellow.

In this lecture, I shall be reporting on the UPC revisions regarding spousal rights. If nothing else, those revisions have already stirred a renewed interest in and debate about spousal rights, and are likely to continue to do so for years to come.

I. ALLOCATION OF ORIGINAL OWNERSHIP

Family property is like any resource, and spousal rights are just one characteristic of the allocation of those resources, albeit probably the most important one. So, I start with the question of how ownership of family property is allocated and distributed. For the most part, the law defers the distributive decision to the member of the family who is the so-called owner of the property. The law, in other words, appears merely to be a facilitator rather than a direct regulator in this field. When a dispute arises regarding the distribution of property, the law arbitrates the dispute by reference to the donor's intention. The lawyers among us have all read hundreds of court opinions containing the stock phrase "the donor's intention is the polestar of construction."

But the law's deference to the donor's intention somewhat disguises the truly important question of who is or can be the donor, or stated another way, who is the *owner* of the family property and hence the person with economic power within the family. Regarding original ownership (hence economic power) between spouses, it is the law, not the donor, that makes the crucial allocative decision. Although the law makes this allocative decision, the law throughout the world and, indeed, within the United States, is not uniform. In this country, two fundamentally divergent legal systems for allocating original ownership between spouses co-exist. I refer, of course, to the profound difference between the community-property and separate-property systems.

During an ongoing marriage, the basic principle in the separate-property states (also called common-law or title-based states) is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage, regardless of how the property is nominally titled. By granting each spouse *upon*

acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that spouses are partners rather than sole proprietors.

A. Historical Origins of Community and Separate Property Systems

The divergence between separate and community marital property ideas dates to the thirteenth century. The separate-property (title-based) system derives from English common law, while community property developed in continental Europe and was transplanted to the new world by French and Spanish settlers. The reasons for the divergence between the systems in England and the continental nations remain somewhat obscure.¹ One plausible explanation is that, while England had all of the other ingredients that led to community property in France, it lacked any strong tradition of community within the family, at least one that extended beyond the nuclear family. Professor Donahue has argued: "Without any strong tradition of community, the English lawyers could not group these same [French] elements together and call it community. They lacked at an early stage the social practice around which the legal concept could crystallize and at a slightly later stage the legal concept around which the social practice could crystallize."²

There seems to be no doubt that the English system was male-dominated. Jeremy Bentham, the founder of Utilitarianism, wrote that "the stronger [referring to males] have had all the preferences. Why? Because the stronger have made the laws."³ Until the latter part of the nineteenth century, the husband became the owner of his wife's personalty upon marriage⁴ and had what

1. See Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 Wis. L. Rev. 807, 811-16.

2. Donahue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 Mich. L. Rev. 59, 86-87 (1979).

3. J. Bentham, *The Theory of Legislation* 177-78 (C.K. Ogden ed. 1931).

4. See T. Atkinson, *Handbook of the Law of Wills* 42 (2d ed. 1953).

was called a “tenancy by the marital right” in his wife’s land.⁵ This gave the husband the right to the rents and profits from the land his wife owned at the time of their marriage or acquired during their marriage (until the birth of issue). Upon birth of issue, the husband’s tenancy turned into the estate in curtesy. This system persisted in England and the United States until the latter part of the nineteenth century. The estate was abolished by legislation that came to be called the Married Women’s Property Acts. These acts actually differed in detail, but their basic effect was to return the wife’s property to her control, free from her husband’s claims or control.⁶

B. Community versus Separate Property in this Country

In this country, eight states originally adopted the community-property system and the other states and the District of Columbia adopted the separate-property (common-law) system. What we have, then, is communal ownership in nearly twenty percent of the states, individual ownership in over eighty percent.

Reflect on how profoundly these systems differ. Community property reinforces a married spouse’s sense of participation in the marriage and ownership of the marital estate. Separate property tends to place the nonpropertied spouse in a subordinate position. How did this split on so fundamental a question come about? It came about partly by historical accident. Community property was mostly adopted in the territories first settled by Spanish settlers. It “continues today chiefly in the states carved out of the former Spanish possessions.”⁷ This explains why the eight original community-property states are located in the west and south west.⁸ The separate-property system, on the other

5. Haskins, *Estates Arising from the Marriage Relationship and Their Characteristics*, in 1 American Law of Property §§ 5.50-55 (A. Casner ed. 1952).

6. *Id.* at § 5.56.

7. Moynihan, *Community Property*, in 2 American Law of Property § 7.2 (A. Casner ed. 1952).

8. The original community-property states were Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. This is not to say that

hand, was adopted in the territories first settled by English settlers, the eastern states, and it spread westward from there.

Historical accident may also explain why the original community-property states adopted the community of acquests concept of the Spanish legal system. Under that concept, each spouse owns a half interest in the earnings of the other acquired during the marriage, in effect as a tenant in common; property acquired prior to the marriage and property acquired during the marriage by gift, bequest, or inheritance are not counted in the community, and so remain separate property. The other community-property model, called universal community, has not appeared in this country. In universal-community systems, each spouse owns a half interest in all the property of the other, regardless of the property's source or time of acquisition.⁹

Interest in the community-of-acquests system over the years has not been limited to the original states, however. During the 1930s and 40s, before Congress allowed the joint income-tax return for married persons, several separate-property states converted to community property in order to grant their residents the tax benefits of community property's income-splitting effect. When the income-splitting joint return was adopted in 1948, these states converted back to the separate-property regime,

all these states adopted community law without debate, nor that all were once Spanish possessions. Six of the original states adopted the English common law, but at the same time or after several years, replaced the English system of dower and curtesy with community property. See W. McClanahan, *Community Property Law in the United States* ch. 3 (1982); Wenig, *supra* note 1, at 818-21.

9. Because both spouses own community property, problems arise concerning management of community assets. Community-property states have statutes prescribing who has power to manage and deal with the assets. These statutes vary considerably in their details, but some generalizations are possible. In Texas, the wife has sole management power over her earnings that are kept separate, and the husband has sole management power over his. In California and several other community-property states, either spouse has power, acting alone, to manage community assets. Both spouses, however, ordinarily are required to join in transfers or mortgages of community real property. If one spouse makes a gift of community property to a third party, the non-donor spouse may set it aside entirely or in excess of a stated amount.

which had the effect of conserving traditional gender roles and power relationships within the marriage.¹⁰

C. The Uniform Marital Property Act

More recently, interest in community property has been rekindled by a growing conviction in favor economic equalization between husbands and wives. The idea that each marital partner should share equally acquests from the economic activity of the other led to the promulgation in 1983 of the Uniform Marital Property Act (UMPA). UMPA, drafted by our former president, Bill Cantwell, adopts a version of the community of acquests, although the terminology used in UMPA is different — community property is called “marital property,” separate property is called “individual property.”¹¹ Under UMPA, as under community property, each spouse acquires a present, vested ownership right in all the assets acquired by the economic activities of either during the marriage; the right does not depend on survival of the other spouse. Wisconsin adopted UMPA in 1986,¹² and is now properly counted as the ninth community-property state.¹³

D. Allocation Rules are Default Rules

Even these rules of original ownership are default rules. They yield to a contrary intention. But the two systems are far from parallel in how a contrary intention must be formed. For spouses in community-property states to decide to operate as sole proprie-

10. See Jones, *Split-Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 Law & Hist. Rev. 259 (1988); Wenig, *supra* note 1, at 821-24.

11. With respect to income earned on individual property, UMPA follows the minority view and provides in § 4(d) that “income earned or accrued by a spouse or attributable to property of a spouse during marriage . . . is marital property.”

12. Wis. Stat. Ann. §§ 766.001-766.979.

13. See Rev. Rul. 87-13, 1987-1 C.B. 20. For tax purposes, the implication of this ruling is that the basis in both halves of marital property is stepped up to the value at the date of the decedent’s death under IRC § 1014(b)(6). If marital property had been treated for tax purposes as tenancy-in-common property, only the decedent’s half would have received a stepped-up basis.

tors, not financial partners, there must be *mutual* consent, in a premarital or postmarital agreement. For spouses in separate-property states to operate as partners, the propertied spouse must decide to give ownership rights to the other spouse, by outright gift, or by putting his or her earnings into joint checking or money market accounts, joint tenancies or tenancies by the entirety (which to varying degrees create property rights in the non-contributing spouse).

These rules, then, serve to reinforce the profoundly different symbolical and psychological feelings within the ongoing marriage. Spouses are partners by right in community-property states. Spouses are partners, if at all, by the generosity or continued commitment to the marriage of the propertied spouse in separate-property states.

I shall return to the partnership theory of marriage in Part III of the lecture, when I focus on spousal rights upon dissolution of a marriage by divorce or disinheritance at death. Before that, however, I'd like to turn to a discussion of spousal rights in intestacy.

II. SPOUSAL RIGHTS IN INTESTACY

Intestacy laws build upon the rules that allocate original ownership. Intestacy laws govern the distribution of property that the decedent "owns" at death. In the separate-property states, that means the property titled in the decedent's name. In the community-property states, that means the decedent's half of the community property and the decedent's separate property. Like the original-ownership rules, intestacy laws serve as default rules. The state's intestacy pattern of distribution prevails unless the decedent has made a valid will.

A. The Shift from Mandatory Rules to Default Rules

Intestacy laws have not always served as default rules. To be sure, the power to dispose of personal property by will was recognized early. The ecclesiastical courts asserted jurisdiction over succession to personal property on death, and encouraged bequests for religious and charitable purposes, as well as for the decedent's family. During the Anglo-Saxon period, testamentary disposition of land was possible, but recognition ceased within about a century after the Norman Conquest. The devise of land by will "stood condemned," Maitland wrote, "because it is a death-bed gift, wrung from a man in his agony. In the interest of honesty, in the interest of the law state, a boundary must be maintained against ecclesiastical greed and the other-worldliness of dying men."¹⁴ The church courts never gained jurisdiction over succession to land and the Crown courts were not concerned with seeing that a man atoned for his wrongs by devoting a portion of his property to pious objects.

This all came to a head in the Sixteenth Century. By the English Statute of Wills of 1540,¹⁵ men (but not women) were granted the power to dispose of their land by will, in effect transforming intestacy from rules of mandatory law into default rules. It was not until the Nineteenth Century that power of testation was granted to women by the Married Women's Property Acts.¹⁶

B. Formulating Modern Intestacy Rules

How are or should modern intestacy rules be formulated, especially regarding the intestate share of the surviving spouse? In

14. 2 F. Pollock & F. Maitland, *History of English Law* 328 (2d ed. 1911).

15. 34 & 35 Hen. 8, c. 5, § 14.

16. For further discussion of the development of women's property rights in the United States, see N. Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (1982); M. Salmon, *Women and the Law of Property in Early America* (1986); E. Warbase, *The Changing Legal Rights of Married Women 1800-1861* (1987); Chused, *Married Women's Property Law, 1800-1850* (1983). See also S. Staves, *Married Women's Separate Property in England, 1660-1833* (1990).

the last several years, the Joint Editorial Board for the Uniform Probate Code has had occasion to consider and debate that question. The result of that deliberation, in which representatives of the College played a significant role, appears in the revisions of the Uniform Probate Code, promulgated by the Uniform Law Commissioners in 1990.

That or any other consideration of spousal rights in intestacy must begin with the assumption that intestacy laws should reflect "common" intention. This is another way of underscoring the point that intestacy serves in default. No intestacy regime can hope to be "suitable" for every person who dies intestate. People whose individuated intention differs from common intention must assume the responsibility of making a will; otherwise, their property will be distributed, by default, according to common intention or, more accurately, according to intention as attributed to them by the state legislature.

C. Common Demographic Characteristics of Intestates and their Surviving Spouses

In considering what intention legislatures should attribute to decedents regarding their surviving spouses, we should first know something about the demographics of those who predominantly die intestate. As one might expect, decedents dying intestate tend to be older and their estates tend to be rather modest. Although younger people overwhelmingly do not have wills,¹⁷ and so the great majority of those dying young die intestate, they die in even lower numbers than you might guess. Only about 0.5% of the population (married and unmarried) die between ages 20 and 25, another 0.6% die between ages 25 and 30, and another 0.5% die between ages 30 and 35. That adds up to 1.6% dying between 20

17. In telephone surveys conducted in five states in 1977, the following percentages of persons in each age category said they did not have a will: 87.7% age 17 to 30, 65.4% age 31 to 45, 39.3% age 46-54, 36.6% age 55 to 64, and 15.4% age 65 and over. See Fellows, Simon & 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.

and 35. Indeed, only another 0.7% die between ages 35 and 40,¹⁸ so that only 3.3% die in the two decades between ages 20 and 40. It is between ages 60 and 90 that we get serious about dying, for that is the period in which nearly three-fourths of the population die.¹⁹ Although most people age 65 and older have wills, the minority who die without wills make up a much larger number of people than the cohort of young people who die prematurely.

In terms of wealth, 72.3% of persons with estates valued between \$0 and \$99,999 do not have wills, 49.8% with estates between \$100,000 and \$199,999 do not have wills, but only 15.4% with estates between \$200,000 and \$1 million do not have wills.²⁰

We can expect, therefore, that decedents dying intestate will typically be older than 60 and have an estate valued below \$200,000. What about the demographic characteristics of their surviving spouses? We know that they will likely be wives, not husbands, for wives tend to outlive their husbands. This is not only because women live longer than men,²¹ but also because wives tend to be, on average, nearly three years younger than their husbands.²² It should not be surprising, therefore, that married women of middle age, on average, will become widowed before turning 70 and will live fifteen more years.²³

What are the needs of these surviving spouses? They are, by and large, beyond working years. This forces them to rely to a great extent on capital-generated income and makes them vulner-

18. See Table 80CNSMT, in Fed. Est. & Gift Tax Rep. (CCH) ¶ 6415.301 (1989).

19. See *id.*

20. See Fellows, Simon & Rau, *supra* note 17. The estate figures have been adjusted for inflation. Between 1977, when the surveys were conducted, and 1992, when this lecture was prepared, the consumer price index has about doubled. To reflect this increase in inflation, I have doubled the figures reported in the original article.

21. Average life expectancy is projected to be 78 years for women, 72 years for men. See U.S. Bureau of the Census, Statistical Abstract of the United States: 1991, tbl. 105, at 73 (111th ed. 1991).

22. See *id.* tbl. 132, at 88.

23. Nordheimer, *A New Abuse of Elderly: Theft by Kin and Friends*, New York Times, Dec. 16, 1991, p. A1 at p. A12 col. 3.

able to the ebbs and flows of interest rates.²⁴ Apart from their social security payments and perhaps a small pension, the principal source of income for nonworking surviving spouses is the income they earn on their investments.²⁵ For elderly surviving spouses of less wealthy decedents, those who are most likely to die intestate, that means the interest they earn on their certificates of deposit.²⁶ As of 1991, average social security payments barely exceeded the poverty level. The excess was only \$34 a month for nondisabled widows and widowers and only \$76 a month for retired workers.²⁷ Contrary to the image of the elderly as “fat cats

24. See Barringer, *As Interest Rates Are Cut, Retirees Are Stung*, N.Y. Times at 9 (July 5, 1992) (Retirees “see themselves as the economy’s other losers. . . . They invested in savings accounts and certificates of deposits, only to watch their income be drastically reduced as the Federal Reserve sliced its discount rate from 6.5 percent in January of 1991 to 3 percent last week.”); Lewis, *More Folks Feel Pinch*, 33 American Association of Retired Persons Bulletin 1, 12 (March 1992) (“[R]esearchers at Economic Analysis Associates in Stowe, Vt., estimate that for every percentage point drop in interest rates, investors 65 years and older lose \$15 billion of income. The loss for persons between 55 and 64 is calculated at \$4 billion.”); Liscio, *Exploding Some Popular Myths*, U.S. News & World Report 60 (March 16, 1992) (“Economist Susan Stearne calculates that each 1 percentage point drop in [short-term interest] rates costs the over-55 set about \$19 billion in interest income . . .”).

25. As of 1990, according to the U.S. Census Bureau, the principal sources of income for persons over 65 were social security (37.8%), earnings (15.5%), pensions (16.9%), and investments (24.7%). See Lewis, *Ups and Downs of the 1980’s: New Income Data Refutes [sic] “Fat Cat” Age Stereotype*, American Association of Retired Persons Bulletin 1, 15 (Feb. 1992). Another study, conducted in Florida, found that, in 1990, social security was the main source of income for 44% of those 60 and over. See Wilson, *Interest-Rate Plunge Chills Savers*, Ann Arbor News, Feb. 9, 1992, at C5, col. 1 (Associated Press).

26. The Public Policy Institute of the American Association of Retired Persons reports that people 65 and over derive 17.5% of their income from interest-bearing accounts, compared to just 5.5% for those 45 through 64 and 3% for those under 45. See Lewis, *supra* note 24.

27. Average social security payments were \$6,672 per year or \$556 per month for nondisabled widows and widowers and \$7,236 per year or \$603 per month (\$679/month for men, \$518/month for women) for retired workers. See U.S. Dep’t of Health & Human Services, Social Security Administration, Social Security Bulletin, Annual Statistical Supplement at 2, 178, 196 (1991).

As of 1990, the poverty level for single persons age 65 and over was \$6,268 per year or \$522 per month. See U.S. Dep’t of Commerce, *Poverty in the United States: 1990 at 195* (1991). The government’s “poverty index” is a very crude measure, however. It is based largely on outdated assumptions concerning consumption behavior. By one study, “if the consumption standards used to calcu-

living the good life at the expense of everybody else,”²⁸ government reports indicate that “twenty percent of all elderly widows were poor.”²⁹ About 40% of the elderly, in fact, are either poor or near-poor, “near-poor” being defined as having an income no more than two times the poverty level.³⁰ A Florida study recently found that 31% of those 60 and over reported incomes of less than \$10,000 annually.³¹

Given these demographic characteristics of intestates and their surviving spouses, I think we must next make certain basic assumptions about the marriage itself and the decedent’s motives. Sound public policy, I believe, requires that we assume that the marriage is solid (that the partners remain committed to one another) and that the decedent has what may be described as “just” motives. After all, the marriages we are talking about have ended in death, not divorce, and there has been no effort by the decedent to disinherit his or her surviving spouse. To assume that those marriages are other than solid would be to make a distinctly unfortunate cultural statement about the institution of marriage in American society. Included within the assumption that decedents have “just” motives are that decedents mean to be generous to their surviving spouses, mean to strike a fair balance between their surviving spouses and children (that is, to be fair to all), but, above all, in striking that fair balance, mean at the very least to provide economic security for their surviving spouses.³² The link, of course, between need and intention is that need shapes inten-

late the index were updated, it would raise aged poverty by at least 50 percent.” Schulz, *“Poverty Level” — Worn-Out Words to Hide the Truth*, 33 American Association of Retired Persons Bulletin 18 (March 1992).

28. Lewis, *supra* note 25.

29. See U.S. Dep’t of Commerce, Population Profile of the United States, 1989, at 41 (1989).

30. Lewis, *supra* note 25.

31. See Wilson, *supra* note 25.

32. Obviously, not all marriages are ideal and not all decedents have “just” motives. But these assumptions are not unfair to people whose marriages or motives fall outside the mold. Decedents whose marriages are less than ideal must be expected to understand that their situation calls for individuated action. They must make their own wills (or get divorced).

tion — surviving spouses's need for economic security shapes decedents's intentions or, more accurately, shapes the intentions that the state should properly attribute to decedents.

D. Current Non-UPC Intestacy Laws are Typically Based on the English Approach of Granting a Fractional Share

How responsive are our current intestacy laws to these demographics and assumptions? They do not respond well in those states that still retain the pattern of intestacy transplanted from England. This is because the English antecedent determined the surviving spouse's share by *fraction*. Only in the larger intestate estates can a fractional share provide the surviving spouse with enough capital to generate an adequate stream of income. In the smaller intestate estates, such as in a \$30,000 intestate estate, a fractional share of one-half gives the surviving spouse only \$15,000. The full \$30,000 would be insufficient, but the intestacy laws cannot manufacture larger estates for people. The most they can do is give the full \$30,000 to the surviving spouse.

The English Statute of Distribution of 1670, which governed the intestate distribution of personal property, did not even give a one-half share. The share provided the decedent's widow in that statute was one-third; the remaining two-thirds was divided among the decedent's children or their issue by representation. Only if there were no children or issue was the widow's share increased to one-half; the other half went to the decedent's ancestors and collateral relatives. Under no circumstances did the widow have a right to her husband's entire estate. The statute did not bother to provide for a surviving husband's share because, as noted earlier, the wife's personalty became her husband's upon marriage.

The descent of land followed a similar pattern of fractional shares for widows. Although surviving spouses received no share at all under the canons of descent, they were provided for by the

estates of dower and curtesy. Dower gave each widow a life estate in one-third of her deceased husband's land. Curtesy gave each widower a life estate in all of his deceased wife's land.

For the most part, the non-UPC intestacy laws of this country follow a similar pattern. If the decedent is survived by children (or descendants of deceased children), the spouse's share will likely be one-third, with the remaining two-thirds going to the decedent's descendants.³³ This is so even when some or all of them are minors, in which case any portion the minors inherit must be placed in a normally cumbersome and expensive guardianship form of ownership. More importantly, it is also so even when some or all of them are able-bodied adults with adequate means of support, in which case the surviving spouse is the more typical surviving spouse who is elderly and dependent on capital for income. If the decedent is not survived by children (or descendants of deceased children), but is survived by one or both parents, the spouse's share will likely be one-half, with the other half going to the decedent's parent or parents, even though the parents may be financially self-sufficient ("WOOPS," in new-speak, standing for well-off older people).³⁴ Only if the decedent leaves no surviving descendants or parents does the surviving spouse commonly inherit the entire intestate estate.

33. Other variations exist. Some non-UPC statutes provide for a 50/50 split between the surviving spouse and the descendants. Others provide the spouse a one-half share if there is one descendant but a one-third share if there is more than one descendant, the remaining half or two-thirds going to the descendants. Still others provide a variety of unique patterns of division between the spouse and descendants. Normally, no distinction is drawn between decedent's descendants who are also descendants of the spouse and those descendants who are not also the spouse's descendants. For a compilation of the various statutory patterns as of 1978, see Fellows, Simon & Rau, *supra* note 17, at 357 n.128.

34. Other variations exist. In a few states, the spouse must share the estate with the decedent's siblings if both parents have predeceased. Others have unique systems for allocating the estate between the spouse and parents. Some non-UPC law gives the entire estate to the surviving spouse and nothing to the decedent's parents. See *id.* at 348-50.

E. The Uniform Probate Code

As originally promulgated in 1969, the Uniform Probate Code (pre-1990 UPC) continued the common practice of granting the decedent's surviving spouse the entire intestate estate when the decedent left neither surviving issue nor surviving parents. But the pre-1990 UPC made a significant and ingenious departure from the fractional-share approach commonly applied to cases in which there were surviving issue or a surviving parent. Here, the pre-1990 UPC used a lump-sum-plus-a-fraction approach.³⁵ The genius of the lump-sum-plus-a-fraction approach is that it gives the surviving spouse first claim to a certain amount of capital. If the lump sum specified is adequate and if the estate is large enough to discharge that responsibility and have assets to spare, then dividing the remaining part of the estate between the spouse and the issue or parents does not jeopardize the spouse's economic security. In the pre-1990 Code, when the cost of living was less than a third of what it is today, the lump sum granted off the top was \$50,000.³⁶ Only to the extent the estate exceeded that minimum figure of \$50,000 (over \$150,000 in today's dollars) would the balance be split between the spouse and children or parents. In a \$100,000 estate, for example, the spouse's share was \$75,000, with \$25,000 going to the decedent's descendants or parents. In a \$150,000 estate, the spouse took \$100,000, with \$50,000 going to the descendants or parents.

Studies before and after 1969 suggest that the pre-1990 Code may not have gone far enough. These empirical studies have identified a strong social preference to give the entire estate to the surviving spouse, even when the decedent has surviving children or parents. Some of these studies were based on an examination of the probated wills of similarly situated decedents who died

35. The lump-sum-plus-a-fraction approach was derived from § 22 of the Model Probate Code.

36. Some states adopting a lump-sum-plus-a-fraction approach have used a different figure, ranging from a low of \$20,000 in Florida and Missouri to a high of \$100,000 in Alabama.

during a particular time frame in a particular locality.³⁷ Other studies were based on interviews with living persons.³⁸

The message of these studies seems clear: The typical decedent with children sees the surviving spouse in a dual role — first and foremost as the decedent's primary beneficiary, but also as a conduit through which to benefit their children. If the decedent dies prematurely, at a time when the couple's children are still minors, the surviving spouse is seen as occupying a better position to use the decedent's property for the benefit of their children, as well as for himself or herself. For a decedent who lives well beyond the minority of their children, as most do, the surviving spouse will likely be older and have greater economic needs than their children. By then the children are probably middle-aged, working adults whose support comes from labor-generated income, as opposed to the surviving spouse, who is likely to be dependent on

37. See, e.g., M. Sussman, J. Cates & D. Smith, *The Family and Inheritance* 86-87, 89-90, 143-45 (1970) (for those testators survived by spouse and lineal kin, 85.8 percent of the decedent testators (N=226) and 85.3 percent of the testators (N=367) in the survivor population provided that the spouse receive the entire estate; in 33 of 37 cases where the testator was not survived by lineal descendants or ascendants but was survived by a spouse, the spouse received the entire estate); Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 Mich. L. Rev. 1303, 1307-09 (1969) (26 of the 54 testators left their entire estates to their spouse and not to their issue; of those 18 testators who distributed the estate to both spouse and issue, six designed their wills to give the spouse only that amount equal to the maximum marital deduction available for federal estate tax purposes at that time; in 9 of the 13 instances in which the testator was survived by a spouse and no children, the testator gave the spouse the entire estate); Dunham, *The Method, Process and Frequency of Wealth Transmissions at Death*, 30 U. Chi. L. Rev. 241, 252-53 (1963) (in the 22 testate estates where the deceased was survived by spouse and children, 100 percent left all of the property to the spouse; in all but one of the six cases in which the testator was survived by a spouse but no children, the testator gave the spouse all of the property).

38. See Fellows, Simon & Rau, *supra* note 17, at 351-54, 358-64, 366-68 (found the majority favored granting entire estate to the spouse regardless of the level of wealth involved); Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and [Pre-1990] Uniform Probate Codes*, 63 Iowa L. Rev. 1041, 1089 (1978) (found the percentage who favored granting the entire estate to the spouse decreased as the level of wealth increased); U.K. Law Comm'n, *Report on Family Law: Distribution on Intestacy*, 1989, No. 187, app. C, at 36-37, 40-45 (well over 70% of the respondents favored the spouse receiving the entire estate regardless of whether the decedent was also survived by minor children, adult children, or siblings).

capital-generated income to lift him or her above the poverty level. That does not mean, however, that the conduit theory does not operate for adult children. The adult children stand to inherit any unconsumed portion of the decedent's property at the surviving spouse's death.

These studies, along with other evidence,³⁹ led the Joint Editorial Board to make substantial changes in the spouse's share in the 1990 Code. The 1990 Code continues the pattern of giving the surviving spouse the entire estate when the decedent is not survived by descendants or parents. It goes further, however, and provides that the surviving spouse also receives the entire estate when the decedent is survived by descendants, as long as those descendants are also the descendants of the surviving spouse and the surviving spouse has no descendants who are not the decedent's.

Marriages with step-children — sometimes called “blended families” — are another matter. With divorce and remarriage a common circumstance in society today, many married couples will end up having children by prior marriages on one or both sides.⁴⁰ By introducing divided loyalties, the existence of step-children weakens the conduit theory. A statute that gives the entire estate to the surviving spouse of a decedent who leaves chil-

39. The move to have the spouse inherit the entire estate is aligned with trends in intestacy laws throughout the U.S. and Europe. A recent report of the U.K. Law Commission recommended granting the surviving spouse the entire intestate estate in all circumstances. See U.K. Law Comm'n, *supra* note 38, at 8-12. In her recent book, Mary Ann Glendon has identified this trend, which she calls the “shrinking circle of heirs” phenomenon. See M. Glendon, *The Transformation of Family Law* 238 (1989). By this she means that, over time, throughout the U.S. and Europe, “the position of the surviving spouse has steadily improved everywhere at the expense of the decedent's blood relatives.” *Id.* She goes on to point out that this trend “strikingly illustrate[s] the movement of modern marriage into the foreground of family relationships.” *Id.* at 239. It recognizes “the gradual attenuation of legal bonds among family members outside the conjugal unit of husband, wife, and children,” and “[t]he tendency to view a marriage that lasts until death as a union of the economic interests of the spouses” *Id.* at 238, 240.

40. “One out of every three Americans is now a stepparent, a stepchild, a stepsibling, or some other member of a stepfamily.” Larson, *Understanding Stepfamilies*, Am. Demographics, July 1992, at 36.

dren by a prior marriage puts those children at the risk of permanent “loss” of inheritance. Similarly, a statute that gives the entire estate to the surviving spouse who has children by a prior marriage puts the decedent’s children at risk of partial loss of inheritance.⁴¹ Thus, the dilemma in the stepparent situations becomes one of striking a reasonable balance between the needs of the surviving spouse and the inheritance expectations of the decedent’s children.

The pre-1990 Code sought to address the question of step-relationships. Under the pre-1990 Code, the surviving spouse of a decedent who had children by a prior marriage did not receive a lump-sum-plus-a-fraction. The pre-1990 Code reverted to the straight fractional-share approach in that situation. The pre-1990 Code provided for a 50/50 split of the decedent’s property between the decedent’s spouse and descendants. The problem with this approach is that it sacrifices the surviving spouse’s economic security in the smaller to modest estates in order to preserve inheritance expectations of adult children who, unlike the surviving spouse, are in the labor market and not forced to rely for subsistence on capital-generated income. Remember also that the fact that the decedent has children by a prior marriage does not necessarily mean that the decedent did not have any joint children with the second and surviving spouse. Nor does it necessarily mean that the decedent’s second marriage was a short-term, late-in-life marriage.⁴² The decedent’s second marriage could, in fact, be his or her main marriage in life.

41. The possibility that the same moral conflict will arise after the decedent’s death, should the surviving spouse remarry and have children by his or her new spouse, exists but must be disregarded. As currently constituted, intestacy law requires the decision as to how much to award the surviving spouse to be made on the basis of the facts existing at the decedent’s death.

42. Even if it was, the decedent’s surviving spouse may deserve this amount as rough compensation for having taken care of the decedent in his or her dying years. For every person receiving long-term care in a nursing home, another 2 people living in the community have long-term care needs. Seventy to 80% of these people are cared for by their families at home. See Teachers Insurance and Annuity Ass’n, *Long-Term Care* 2, 11 (1992).

The 1990 revisions address the step-children dilemma differently. The 1990 revisions invoke the lump-sum-plus-a-fraction device for these situations also. The intent is to grant a share that is commensurate with the size of the estate and the circumstances of the family make-up. In the typical intestate estate of small to modest size, this approach would give the surviving spouse the entire estate.⁴³ In allocating scarce resources such as these, granting economic security to the surviving spouse appears more important than playing to the inheritance expectations of the decedent's adult children.

In the larger intestate estates, the UPC approach is predicated on the notion that the decedent would feel that some provision for his or her children would not deprive the surviving spouse of economic security.⁴⁴ For larger estates, the lump-sum-plus-a-fraction device assures that the decedent's children receive an inheritance.

The 1990 Code draws a distinction between cases in which only the surviving spouse has children by a prior marriage and cases in which the decedent has children by a prior marriage. In the for-

43. A factor that makes this even more likely is that, under the UPC scheme, the intestate share is in addition to the probate exemptions and allowances, which run mostly in favor of the surviving spouse. Specifically, § 2-402 gives the surviving spouse a homestead allowance of \$15,000; § 2-403 gives the surviving spouse an exempt property allowance up to \$10,000 in household furniture, automobiles, furnishings, appliances, and personal effects (non-liquid assets and therefore not available to generate income); and §§ 2-404 and -405 authorize the personal representative to determine a family allowance up to \$1,500/month for one year (\$18,000) without court authority. The family allowance does not necessarily go exclusively to the surviving spouse, however. If the decedent left minor or dependent children who are not living with the surviving spouse, the allowance may go partly to or for the benefit of those children and partly to the surviving spouse. If the decedent left children by a prior marriage who are adults, and if the surviving spouse has ample resources (including life-insurance proceeds etc. from the decedent by way of will substitute), the personal representative can take those resources into account and determine a family allowance of a lesser amount and if the personal representative does not determine a lesser amount, the children can challenge the personal representative's decision.

44. Economic security for the surviving spouse would be further safeguarded in estates in which the decedent created will substitutes providing for the spouse, such as joint tenancies, joint checking, savings, or money-market accounts, life-insurance contracts, and pension plan arrangements.

mer case, the surviving spouse is granted the first \$150,000 plus 50% of any remaining balance. In the latter case, the surviving spouse is granted the first \$100,000 plus 50% of any remaining balance.

Lest granting the surviving spouse a minimum claim on the first \$100,000 appears over-generous, and hence unfair to the decedent's children by the prior marriage, consider that at today's "CD" interest rates of around 4%,⁴⁵ \$100,000 generates only \$333 a month (\$4,000 a year) in income. With average social security payments added in, the surviving spouse's income only rises to \$889 a month (\$10,668 a year), which is a mere \$367 a month (\$4400 a year) above the poverty level. This still puts the surviving spouse into the category of the near-poor (defined as persons with incomes less than twice the poverty level). Even if short-term interest rates return to the 8% level of a year and a half ago, the income yield rises only \$333 a month (\$4,000 a year). A surviving spouse who only has social security and \$100,000 in assets will still be in jeopardy of outliving those assets, especially if he or she lives into deep old age, as so many now do. To the extent that the interest plus social security prove insufficient, capital will need to be drawn down, perhaps to the point of exhaustion or near exhaustion, or standard of living will need to be further lowered.⁴⁶ With high real estate taxes and high costs of prescription drugs and other medical procedures not covered by Medicare, not to mention nursing home expenses should that become necessary,⁴⁷ the cost of living for the elderly often rises faster than the general inflation rate.

45. Current interest rates on 6-month CD's average 3.68%; on 1-year CD's, 4.03%; and on 2 1/2-year CD's, 4.91%. See N.Y. Times, July 5, 1992, § 3, at 16.

46. We are currently experiencing a general inflation rate of about 3.1%. See N.Y. Times, July 15, 1992, C1 at C13. If \$100,000 is invested in "CDs" yielding 4% interest, and if \$10,000 is withdrawn each year (adjusted upward for a 3% inflation rate), \$100,000 will only last 10 years. Reducing annual withdrawals to, say, \$7,000 extends the period to 15 years. See tables published in J. Quinn, *Making the Most of Your Money* 893-94 (1991).

47. Two out of 5 people over 65 will spend some time in a nursing home during their lifetimes. Nearly 75% of all nursing home residents are women.

These computations assume that the surviving spouse receives as much as \$100,000 in cash that can be invested in "CDs." In fact, some of the decedent's estate will probably be distributed in kind, that is, in the form of specific assets that are illiquid, thus decreasing the income-generating potential of the spouse's share.

Of course, some surviving spouses need not depend on a share of the decedent's intestate estate for economic security. Some already have independent means or will benefit from will substitutes such as life insurance, pension death benefits or annuities, joint tenancies, or joint banking or money market accounts. Because intestacy laws, by tradition, are kept simple, however, they do not reduce the spouse's share by the amount of the spouse's assets. Unless this constraint on the intestacy laws is to be broken, it necessitates designing those laws on the assumption that the surviving spouse does not have independent means and will not benefit appreciably from will substitutes. This approach is the only way to guarantee all surviving spouses a minimum degree of economic security. It does require, not unfairly, it seems to me, the decedent whose spouse has economic security to make a will in favor of his or her children by the prior marriage, if that is what the decedent thinks is appropriate.

Costs range from \$20,000 to \$80,000 per year; 36% of these costs are currently borne by Medicaid. See Teachers Insurance and Annuity Ass'n, *Long-Term Care* 2, 11 (1992). Note that the more the intestacy laws reduce the surviving spouse's share in order to favor adult children by a prior marriage, the more likely it becomes that state funds will have to be expended under Medicaid for nursing home care of the surviving spouse. This point alone should make state legislators more sympathetic to the UPC's lump-sum-plus-a-fraction approach than to the inheritance expectations of the decedent's adult children by a prior marriage.

III. SPOUSAL RIGHTS UPON DIVORCE AND AGAINST DISINHERITANCE

Suppose the decedent does make a will that gives little or nothing to the surviving spouse. In the United States,⁴⁸ the decedent's spouse is the only relative who is protected against intentional disinheritance.⁴⁹ Like the question of allocation of original ownership, disinheritance of a surviving spouse brings into question the fundamental nature of the economic rights of each spouse in a marital relationship, of how the institution of marriage is viewed in society. As noted earlier, the contemporary view of marriage is that it is a partnership, and that the financial component of marriage is that it is an economic partnership.⁵⁰

48. In contrast, in the western European nations, a decedent cannot totally disinherit his or her children and sometimes cannot totally disinherit other blood relatives. In England and the principal commonwealth jurisdictions (the Australian states, most of the Canadian provinces, and New Zealand), the statutory scheme known as Testator's Family Maintenance (TFM) is in place, by which the chancery judge is empowered to revise the dispositive provisions of a testator's will (including intestate shares, in an intestate estate) for the benefit of the decedent's relatives and other dependents.

49. The decedent's children and possibly more remote descendants are granted protection only against unintentional disinheritance.

50. One of the earliest American expressions of the partnership theory of marriage appears in the 1963 Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women. As quoted in the Prefatory Note to the Uniform Marital Property Act, the Report states:

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While the laws of other countries have reflected this trend, family laws in the United States have lagged behind.

The strength of the attribution to marriage of an economic partnership is evidenced by the recent New Jersey case of *Carr v. Carr*, 576 A.2d 872 (N.J. 1990). In that case, a husband, after having left his wife of seventeen years, died during the pendency of a divorce proceeding initiated by the wife. The husband's will devised his entire estate to his children by a former marriage. The court held that the husband's death terminated the divorce proceeding under which the wife would have been entitled to a share determined under New Jersey's equitable-distribution statute. The wife also had no recourse under New Jersey's elective-share statute because that statute withheld an elective share from a surviving

A. The Partnership Theory of Marriage⁵¹

The partnership theory of marriage, sometimes called the marital-sharing theory, is variously stated and supported. Sometimes it is portrayed “as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike.”⁵² Under this approach, the economic rights of each spouse are seen as deriving from an unspoken or imputed

spouse if the decedent and spouse were not living together at the time of the decedent’s death. Despite the wife’s inability to recover under either the divorce or elective-share statute, the court held:

We conclude . . . that the principle that animates both [the equitable-distribution and elective-share] statutes is that a spouse may acquire an interest in marital property by virtue of the mutuality of efforts during marriage that contribute to the creation, acquisition, and preservation of such property. This principle, primarily equitable in nature, is derived from notions of fairness, common decency, and good faith. Further, we are convinced that these laws do not reflect a legislative intent to extinguish the property entitlement of a spouse who finds himself or herself beyond the reach of either statute because the marriage has realistically but not legally ended at the time of the other’s death.

In the exercise of their common-law jurisdiction, courts should seek to effectuate sound public policy and mold the law to embody the societal values that are exemplified by such public policy. . . .

The constructive trust, we believe, is an appropriate equitable remedy in this type of case . . . [that] should be invoked and imposed on the marital property under the control of the executor of [the husband’s] estate . . . to avoid the unjust enrichment that would occur if the marital property devolving to [the husband’s] estate included the share beneficially belonging to [the wife].

In a footnote, the court noted that efforts were currently pending in the New Jersey legislature to correct the problem of a surviving spouse who falls outside the protection of both statutes.

51. In the late Eighteenth Century, Jeremy Bentham sought, unsuccessfully, to reform the English common-law system by writing a model law of succession. Some of his ideas seem to reflect a conception of marriage as a partnership. He wrote:

Article I. No distinction between the sexes; what is said of one extends to the other. The portion of the one shall be always *equal* to that of the other. Reason.— Good of *equality*. . . .

Article II. After the husband’s death, the widow shall retain half the *common* property; unless some different arrangement was made by the marriage contract.

J. Bentham, *supra* note 3, at 178-79 (Emphasis added).

52. M. Glendon, *The Transformation of Family Law* 131 (1989).

marital bargain under which the partners agree that each is to enjoy a half interest in the economic production of the marriage, that is, in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is visualized in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as “a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost.”⁵³ Sometimes the theory is stated in aspirational and behavior-shaping terms:

[T]he ideal to which marriage aspires [is] that of equal partnerships between spouses who share resources, responsibilities, and risks. . . .

From a policy standpoint, this partnership framework is desirable both because it encourages cooperative commitments between spouses and because it serves broader egalitarian and caretaking objectives. In effect, sharing principles hold promise for bridging traditional public/private divisions between family and market. A partnership model can cushion the impact of persistent gender biases in couples' private allocation of homemaking tasks and in the public allocation of salaries and benefits. By sharing their total resources, families can spread the risks and benefits of sex-linked roles, the remnants of a socioeconomic system that makes it difficult for any one individual to accommodate a full work and family life. . . .

Not only do partnership principles promote gender equality; they also support caretaking commitments toward children and elderly dependents.⁵⁴

Part I of this lecture was devoted to a description of the rules that allocate original ownership in a marriage. The fundamental divergence between the community-property and separate-prop-

53. *Id.*

54. Rhode & Minow, *Reforming the Questions, Questioning the Reforms*, in *Divorce Reform at the Crossroads 191, 198-99* (S. Sugarman & H. Kay eds. 1990).

erty systems reveals that the community-property system implements the partnership theory while the separate-property system does not.

B. Equitable Distribution Upon Divorce⁵⁵

The community-property system directly treats a couple's enterprise as collaborative, by granting each spouse a one-half interest in the earnings of the other immediately upon acquisition. Today all or nearly all⁵⁶ of the separate-property states also give effect, or purport to give effect, to the partnership theory at dissolution of a marriage upon divorce.⁵⁷ Under so-called equitable distribution statutes, courts are given broad discretion "to assign

55. For a collection of excellent essays on divorce-reform laws, see *Divorce Reform at the Crossroads* (S. Sugarman & H. Kay eds. 1990).

56. In 1989, Professor Oldham reported that "Mississippi is the only state that has not clearly accepted [the equitable-distribution] system. See *Jones v. Jones*, 532 So.2d 574 (Miss. 1988)." Oldham, *Tracing, Commingling, and Transmutation*, 23 Fam. L.Q. 219, 219 n.1 (1989).

For a fascinating account of how this system swept the country, see Glendon, *Property Rights Upon Dissolution of Marriages and Informal Unions*, in *The Cambridge Lectures* 245 (N. Eastham & B. Krivy eds. 1981).

57. In *Rothman v. Rothman*, 320 A.2d 496 (N.J. 1974), a landmark case interpreting New Jersey's equitable-distribution statute, the New Jersey Supreme Court stated:

The statute we are considering authorizes the courts, upon divorce, to divide marital assets equitably between the spouses. . . . [T]he enactment seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute. . . . The widely pervasive effect this remedial legislation will almost certainly have throughout our society betokens its great significance.

Id. at 501-02. Although in this early equitable-distribution case, the court refused to establish a presumptive division of marital assets on a 50/50 basis, see *id.* at 503 n.6, many courts today do indulge in such a presumption of equal division, and many of the more recently enacted statutes explicitly do so also. See J. Gregory, *The Law of Equitable Distribution* ¶ 8.03 (1989).

to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute — directly and indirectly, financially and nonfinancially — the fruits of which are distributable at divorce.”⁵⁸

The equitable-distribution scheme was first introduced by the Uniform Marriage and Divorce Act (UMDA). As originally promulgated in 1970, the UMDA required that “marital” property be distinguished from “nonmarital,” or “separate” property. Only the former was subject to distribution at divorce. This distinction, which was drawn from community-property law and generally corresponds to community and separate property, created various characterization problems. For example, are increases in value of admittedly nonmarital property during marriage marital or nonmarital? The statute’s approach to characterization was similar to that in a community of acquests regime: a presumption that all assets acquired by either spouse during marriage are marital. Several exceptions to this presumption existed: (1) assets that either spouse brought to the marriage, including assets that could be traced back to such assets; (2) assets that either spouse acquired during marriage other than from earnings; and (3) assets that both spouses agreed to exclude from distribution upon dissolution of their marriage.

In response to characterization problems that the marital/nonmarital assets dichotomy created, the UMDA was subsequently amended to abolish that distinction. The UMDA now describes the property subject to distribution as “property and assets belonging to either [spouse] or both however and whenever acquired. . . .”⁵⁹ This provision creates what is called a “hotch-

58. J. Gregory, *supra* note 57, ¶ 1.03 at 1-6.

59. UMDA § 307.

pot" property scheme. This change eliminates the characterization problem, but it makes the question how the property should be distributed more difficult.⁶⁰

Among the states that have not adopted UMDA, there are considerable differences in the statutes concerning what property is subject to division.⁶¹ Once the court has determined what property is divisible, however, it has power to order the title-holding spouse to transfer all or a part of divisible assets to the other spouse. The statutes differ regarding the criteria by which courts are to make distributive decisions, but, in general, equitable distribution is characterized by a considerable degree of judicial discretion. This feature is an important difference between the equitable-distribution and community-property regimes. Despite this difference, however, equitable distribution approximates community property at divorce by implementing the partnership theory.⁶² The widespread adoption of equitable-distribution statutes is a source of pressure on separate-property states to implement the partnership theory in the other circumstances in which spousal property rights loom large — disinheritance at death.

C. Protection Against Disinheritance

1. CONVENTIONAL ELECTIVE-SHARE LAW

All but one of the separate-property states⁶³ have decided that disinheritance of the surviving spouse at death is one of the few

60. See Levy, *An Introduction to Divorce-Property Issues*, 23 Fam. L.Q. 147, 151-56, 159-61 (1989).

61. The various schemes are canvassed, state-by-state, in J. Gregory, *supra* note 56; J. Oldham, *Divorce, Separation and the Distribution of Property* (1989); and L. Golden, *Equitable Distribution of Property* (1983).

62. See Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. Rev. 1269 (1981).

63. Georgia is the only separate-property state lacking an elective-share statute. For a discussion of the reasons for Georgia's position, including its unusual "year's support" practice, and an argument that elective-share statutes are generally unnecessary, see Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 Ga. L. Rev. 447 (1976). For an opposing view, see Note, *Preventing Spousal Disinheritance in Georgia*, 19 Ga. L. Rev. 427 (1985).

instances in which the decedent's testamentary freedom with respect to title-based ownership interests must be curtailed.⁶⁴ No matter what the decedent's intent, the separate-property states recognize that the surviving spouse has a claim to some portion of the decedent's estate. These statutes, which in all but a few states have replaced the common-law estates of dower and curtesy,⁶⁵ provide the spouse a so-called "forced" share. Because the forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent's estate, and not as a retitling of the decedent's property that automatically occurs at death, the more descriptive term "elective" share is often used.

Elective-share law in the separate-property states has not caught up to the partnership theory of marriage. Under typical American elective-share law, including the elective share provided by the pre-1990 UPC, a surviving spouse is granted a right to claim a one-third share of the decedent's estate, not a right to claim the one-half share of the couple's combined assets that the partnership theory would imply.

To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The elective-share fraction of one-third of the decedent's estate plainly does

64. A unique feature of community-property regimes is that a decedent's surviving spouse is not seen as needing "protection" against disinheritance by means of a so-called "elective" share in the estate of the deceased spouse. The survivor already owns a half interest in the fruits of the marriage. No elective share is provided with respect to the separate or individual property of the other spouse because that property was not attributable to the fruits of the marriage. Contribution having been rewarded, the decedent can be allowed unfettered power of disposition over his or her separate or individual property and over his or her half of the community or marital property.

65. The Restatement of Property lists five jurisdictions as providing the surviving spouse a dower or dower-like interest in the decedent's real property — Arkansas, District of Columbia, Kentucky, Ohio, and West Virginia. See Restatement (Second) of Property (Donative Transfers) § 34.1 stat. note (1992). Dower, however, was abolished in West Virginia in 1992 incident to enactment of the UPC's accrual-type elective share, as described *infra* text accompanying notes 68-80.

not implement a partnership principle. The actual result is governed by which spouse happens to die first and by how the property accumulated during the marriage was nominally titled.

Consider Harry and Wilma. Assume that Harry and Wilma were married in their twenties or early thirties. They never divorced, and Harry died somewhat prematurely at age, say, 62, survived by Wilma. For whatever reason, Harry left a will entirely disinheriting Wilma. Throughout their long marriage, the couple managed to accumulate assets worth \$600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, Wilma's ultimate entitlement is governed by the manner in which these \$600,000 in assets were nominally titled as between them. Wilma could end up significantly better off or significantly less well off than a 50/50 principle would suggest. The reason is that under conventional elective-share law, Wilma has a claim to one-third of Harry's "estate."

In a marriage in which the marital assets were disproportionately titled in the decedent's name, as is typical in a traditional support marriage in which the husband dies first, conventional elective-share law often entitles the survivor to less than an equal share. Thus, if Harry "owned" all \$600,000 of the marital assets, Wilma's claim against Harry's estate would only be for \$200,000 — well below Wilma's \$300,000 entitlement produced by the partnership principle. If Harry "owned" \$500,000 of the marital assets, Wilma's claim would only be for \$166,500 (1/3 of \$500,000), which when combined with Wilma's "own" \$100,000 yields a less-than-equal share of \$266,500 for Wilma — still below the \$300,000 figure produced by the partnership principle.

In a marriage in which the marital assets were more or less equally titled, conventional elective-share law grants the survivor a right to take a disproportionately large share. If Harry and Wilma each owned \$300,000, Wilma is still granted a claim for an additional \$100,000.

Finally, in a marriage in which the marital assets were disproportionately titled in the survivor's name, conventional elective-share law entitles the survivor to compound the disproportion. If only \$200,000 were titled in Harry's name, Wilma would still have a claim against Harry's estate for \$66,667 (1/3 of \$200,000), even though Wilma was already overcompensated as measured by the partnership theory.

I should now like to draw attention to a very different sort of marriage — a short-term marriage, particularly the short-term marriage later in life, in which each spouse typically comes into the marriage with assets derived from a former marriage. In these marriages, the one-third fraction of the decedent's estate far exceeds a 50/50 division of assets acquired during the marriage.

To illustrate this sort of marriage, let us turn to the case of Wilma and Sam. Suppose that a few years after Harry's death, Wilma married Sam. Suppose that both Wilma and Sam were in their mid-to-later sixties when they were married. Then suppose that after a few years of marriage — five, let us say — Wilma died survived by Sam. Assume further that both Wilma and Sam have adult children and a few grandchildren by their prior marriages, and that each would prefer to leave most or all of his or her property to those children.

Assuming that Wilma and Sam entered their marriage equally well off, each with \$300,000 in assets, conventional elective-share law, for reasons that are not immediately apparent, gives the survivor, Sam, a right to shrink Wilma's estate (and hence the share of Wilma's children by her prior marriage to Harry) by \$100,000 (reducing it to \$200,000) while supplementing Sam's assets (which will likely go to Sam's children by his prior marriage) by \$100,000 (increasing their value to \$400,000).

In this type of marriage, in other words, conventional elective-share law basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the "loser's" estate. The "winning" spouse — the one who chanced to survive — gains a windfall, for

this “winner” is unlikely to have made a contribution, monetary or otherwise, to the “loser’s” wealth remotely worth one-third.

How prevalent are marriages like that between Wilma and Sam — the remarriage later in life ending in the death of one of the partners a few years later? Plainly, such marriages do not affect a high proportion of the widowed and divorced population. Nevertheless, government data suggest that the incidence of such marriages may not be insignificant.⁶⁶ Equally to the point, when such marriages occur, conventional elective-share law renders results that are dramatically inconsistent with the partnership theory of marriage. That these results are seen as unjust by the children of the decedent’s former marriage is both unsurprising and well doc-

66. Government data reveal that, within the widowed and divorced population at large, not disaggregated by age, about 21% of widowed men and about 8% of widowed women remarry; and about 83% of divorced men and 78% of divorced women remarry. See U.S. Dep’t of Health & Human Services, Pub. No. 89-1923, *Remarriages and Subsequent Divorces — United States 12* (1989). The average (mean) ages at the time of remarriage of widowed men and women have steadily increased from 57.7 in 1970 to 60.2 in 1983 for men and from 50.3 in 1970 to 52.6 in 1983 for women. The average (mean) ages at remarriage of divorced men and women have also steadily increased, but the ages are, of course, much lower. The average (mean) ages increased from 36.7 in 1970 to 37.3 in 1983 for men and from 32.8 in 1970 to 33.7 in 1983 for women. *Id.*, tbl. 4, at 24.

In 1983, the average intervals between becoming widowed and remarriage for the 65-and-older age group were 3.6 years for men and 7.9 years for women. The average intervals between divorce and remarriage for the same age group were 6.3 years for men and 10.4 years for women. *Id.* at 13.

Within the 65-and-older population, 2.62% of divorced men and .05% of divorced women remarried during 1983. During that same year, 1.68% of widowed men age 65 and older and .02% of women age 65 and older remarried. Within the divorced population ages 60 to 64 for that same year, 4.93% of divorced men and 1.29% of divorced women remarried; figures were not given for the widowed population ages 60 to 64 for that or any other year. The remarriage rates within the 65-and-older divorced and widowed segments of the population have been treading downward, but not in a straight line. The data show peaks and valleys over the course of the 1970-83 period. The peak occurred during the year 1975, when 3.14% of divorced men, .091% of divorced women, 1.95% of widowed men, and .021% of widowed women remarried. Data for 1975 for the 60 to 64 years age group were not reported. *Id.*, Table 3, at 23.

These marriage rates, of course, do not reveal the remarriage rates of divorced or widowed men and women age 65 and older or 60 to 64; they merely reveal the remarriage rates for a given year. Because such remarriages accumulate within the population, the incidence of remarriage later in life appears to be significant.

umented in the elective-share case law.⁶⁷ In a case like that of Wilma and Sam — the short-term, late-in-life marriage, which produces no children —, a decedent who for all intents and purposes disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a felt higher obligation to the children of his or her former, long-term marriage.

2. IMPLEMENTING THE PARTNERSHIP THEORY

The stage is now set for rethinking elective-share law. Without a theory to support it, conventional elective-share law is untenable. This alone does not necessarily make it vulnerable to change. Unsatisfactory though it may be, it will likely remain in place unless a viable system is brought forth to replace it.

The system that, in time, seems sure to replace it is one that implements the partnership theory of marriage. The pressure to bring elective-share law into line with the partnership theory can only increase. Spurred by the Uniform Marital Property Act and the Uniform Marriage and Divorce Act, the 1990 revisions of the Uniform Probate Code are now in place to offer a means of repairing elective-share law.

It is one thing to speak of implementing the partnership theory and another thing to work out a model for doing it. In seeking to implement the partnership theory, the Joint Editorial Board considered three possible approaches. The first was to use the UMDA's equitable-distribution system for divorce law, *i.e.* to extend that system into the area of the elective share. The second

67. See W. Macdonald, *Fraud on the Widow's Share* 156-57 (1960). Of the elective-share cases in the law reports up to the time of writing and in which the author could identify the relationships, more than half pitted children of a former marriage against a later spouse.

Statistically, "on average, women ending first marriages had 1.06 children under 18 years, those ending second marriages had 0.64 children, and those ending third marriages had 0.36 children. These differences are due at least in part to the fact that most children are born into first marriages and may not be mentioned on divorce records of subsequent marriages unless custody becomes an issue." U.S. Dep't of Health & Human Services, *supra* note 66, at 3.

was to adopt a community-property system similar to the UMPA, except that it would attach only at death. The third, the one adopted, was to establish an accrual system that would approximate a fifty/fifty split of marital assets.

Because I have already written about the pros and cons of each approach in the *Iowa Law Review*,⁶⁸ and because a somewhat more extensive treatment appears in the *Real Property, Probate, and Trust Journal*,⁶⁹ I will not go into a lengthy discussion of the JEB's analysis here. Briefly, the idea of extending the equitable-distribution system into the area of elective-share law was rejected because of the discretionary and unpredictable nature of the results under that system. Also, unlike the divorce context, where both parties are still alive and can testify, only the survivor's side of the story can be told in the elective-share context.

The idea of imposing a deferred community-property elective share seemed a far better approach. Under this approach, the surviving spouse would have a right to claim a 50% share of that portion of the couple's combined assets that were acquired during the marriage other than by gift or inheritance. The disadvantage of this system is that it requires post-death classification of the couple's property to determine which is community and which is separate. Over a marriage of any length, much property that was separate property is likely to be commingled to such an extent that tracing to its source would prove administratively difficult.⁷⁰ Unlike their community-property counterparts, marital partners

68. Waggoner, *The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code*, 76 *Iowa L. Rev.* 223 (1991).

69. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 *Real Prop., Prob. & Tr. J.* 683 (1992).

70. See, e.g., J. Quinn, *supra* note 46, at 81-82. Speaking of married partners in which both have paychecks, the author writes:

Poolers put all the money into a common pot. *Splitters* keep their own separate accounts. Which you choose is a matter of soul, not of finance. Poolers think that sharing is what a marriage is all about. Splitters hold to their own independence within the marriage. The previously married often split but sometimes pool. The first-time married often pool but sometimes split. It's so unpredictable that even your best friend might surprise you. Over time, and if the marriage goes well, splitters usually turn into *spoolers*, splitting

in title-based states are not put on notice regarding the risk involved in not maintaining adequate records. The administrative difficulty is also arguably greater in the elective-share context than in the divorce context, where by definition the duration of the marriage is shorter than it would have been had the marriage ended in disinheritance at death. Finally, it is important to understand that, to the extent that presumptions would have to be imposed to resolve close questions, a deferred community-property elective-share system would not yield an accurate result anyway.⁷¹

In the end, the UPC adopted a more mechanical system that implements the partnership theory by approximation.⁷² The UPC's system, which can be called an accrual-type elective share, seeks to establish an administratively simple system that approximates the results that would be achieved by a 50/50 split of marital assets. Under community law, each spouse from the first moment of the marriage has a right to 50% of the couple's assets that are acquired during the marriage other than by gift or inheritance. The hitch of course is that in the first moments of the marriage, little or no such property exists. Growth of each spouse's community-property entitlement occurs over time as the marriage continues and property is acquired and accumulated;

some, pooling some, and growing less antsy about who pays for what. (Emphasis in original.)

Of married partners in which only one has a paycheck, the author writes: "Splitting is out. Pooling is in."

71. See Levy, *An Introduction to Divorce-Property Issues*, 23 Fam. L.Q. 147, 152-53 (1989) (noting, in the context of equitable-distribution law, that "the stronger the presumption [in favor of characterizing all property as marital property], the less likely it will be that the spouse who owned nonmarital property at marriage or received some during the marriage will try to trace the property or funds;" and that the weaker the presumption, the more likely it will be that tracing issues will be litigated.).

72. The UPC's redesigned elective-share system has been endorsed by the Executive Board and by the Assembly of the National Association of Women Lawyers.

For a proposal that divorce law utilize an accrual-type system for division of assets, see Sugarman *Dividing Financial Interests on Divorce*, in *Divorce Reform at the Crossroads* 130, 159-60 (S. Sugarman & H. Kay eds. 1990).

each spouse's 50% share is applied to an upwardly-trending accumulation of assets.

The UPC's approximation system operates the other way around. Formally, it does not distinguish between property acquired during the marriage and other property, but compensates for this informally by applying an upwardly-trending percentage to the couple's assets whenever and however acquired. Thus the accrual schedule translates into a system that approximates the amount of marital versus separate property in marriages of various lengths. After five years of marriage, for example, each spouse's elective-share percentage is 15%, which is meant to represent 50% of the marital-assets portion of the couple's property. By approximation, this means that 30% of the couple's combined assets are treated as having been acquired during the marriage and 70% not. After ten years of marriage, the elective-share percentage is 30%, which in effect treats 60% of the assets as having been acquired during the marriage. After fifteen years of marriage and beyond, the elective-share percentage peaks out at 50%, which in effect treats all of the assets as marital assets from that point forward.

The advantage of the UPC system is that it avoids the administrative difficulties of post-death classification and tracing-to-source that would be endemic to a deferred-community elective share. The trade off is that it does what its name implies — it approximates. No approximation system will give precisely accurate results in each given case. We have reason to believe, however, that the UPC system gives reasonably accurate results in nearly all cases and caution again that the other system, the deferred-community system, does not give results that are as accurate as you might think.⁷³

Whether implemented by approximation, as in the UPC, or by a deferred-community elective share, a partnership-based elective share has two main consequences: (1) it equalizes assets in a

73. See Waggoner, *supra* note 69, at 741-42.

longer-term marriage; and (2) it reduces or eliminates the spouse's claim in short-term, late-in-life marriages. The conventional elective share of one-third of the decedent's estate does not reward the surviving spouse sufficiently in most instances of long-term marriages and over-rewards the surviving spouse in short-term, late-in-life marriages that usually involve a widow and widower with children by their prior marriages.

To illustrate this last point, let's return to Wilma and Sam and apply the UPC system to their late-in-life marriage. Recall that each came out of their main marriages with about \$300,000 in assets. This having been a marriage that lasted five years, the elective-share percentage prescribed in the statute is 15%.⁷⁴ Sam's elective-share entitlement is \$90,000 (15% of their combined assets of \$600,000). But this does not mean that Sam has a \$90,000 claim against Wilma's estate. Thirty percent of Sam's own \$300,000 in assets (double the elective-share percentage) count in fulfilling Sam's elective-share amount. Since 30% of Sam's assets is \$90,000, there is no deficiency and hence no claim to any of Wilma's assets.

Although this approach does not eliminate the desirability of a premarital agreement in second marriages, it does make such an agreement less essential by removing the disincentive to remarriage on the part of older widows and widowers that conventional elective-share systems now impose. When an older widow and widower — each financially independent and each with adult children by the prior, main marriage — want to get married, a concern that often arises is that the survivor of the two will take a large portion of the other's property and deprive the decedent's children of their inheritance. As the financial journalist, Jane Bryant Quinn, said in a recent book:

[When older people remarry,] your friends will be enchanted. But don't be surprised if your children aren't. It's usually not the "pater" they worry about, but the patrimony. If your new spouse gets your property after your death, he or she is free to cut your

74. See UPC § 2-201(a) (1990).

children out. Even if you own assets separately, state inheritance laws [referring to elective-share laws, not intestacy laws] usually require that the spouse get one-third to one-half.⁷⁵

A partnership-based elective share serves to remove that concern.

3. NEED TO SUPPLEMENT PARTNERSHIP ELECTIVE SHARE WITH A SUPPORT THEORY ELEMENT

As sensible as the partnership theory is, it is not sufficient by itself to “do right” by all surviving spouses. One persistent criticism of the partnership theory as applied to divorce law is that it often leaves divorced women without an adequate means of support.⁷⁶ This is because the traditional division of labor within a marriage allows the husband to devote his energy to his career while the wife devotes her energy to what the economists call “household production.” An equal division of assets saved during the marriage still leaves the divorced wife far behind in earning power after a divorce than she would have been had she devoted her energy during the marriage to a career.⁷⁷ This criticism of divorce law does not apply, of course, to all divorced spouses, but mainly to those who come out of the failed marriage with diminished work skills.

The problem is, if anything, more endemic to elective-share law, where the surviving spouse is typically beyond working years. One of the theories traditionally thought to underlie elec-

75. J. Quinn, *supra* note 46, at 83.

76. See, e.g., L. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* Ch. 7 (1985); Krauskopf, *Theories of Property Division/Spousal Support: Searching Solutions to the Mystery*, 23 Fam. L.Q. 253, 271 n. 65 (1989); McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L.Q. 351, 352, 391-92 (1987); Rhode & Minow, *Reforming the Questions, Questioning the Reforms*, in *Divorce Reform at the Crossroads* 191, 201-04 (S. Sugarman & H. Kay eds. 1990); Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 Texas L. Rev. 689 (1990); Sugarman, *Dividing Financial Interests on Divorce*, in *Divorce Reform at the Crossroads* 130 (S. Sugarman & H. Kay eds. 1990). But see S. Faludi, *Backlash* 1-35 (1991).

77. See Stake, *Fostering Private Ordering by Forcing Parties to Bargain: A Matrimonial Mandate to Deal with Divorce*, 2 L. Rev. J. 1, 5-12 (1991).

tive-share law involves a post-death duty of support, that is, that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate.

Conventional elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law, as it is in intestacy law. The problem is not addressed in intestacy law because intestacy affects so many estates of small size. Elective-share law can accommodate a more individuated system, however, because elections are the exception in estate practice.

The 1990 UPC's elective-share system, therefore, seeks to implement the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

The revised UPC implements the support theory by providing a supplemental elective-share amount of \$50,000.⁷⁸ This feature is not like the lump-sum device used in intestacy law. Here, the surviving spouse's own title-based ownership interests, amounts shifting to the survivor at the decedent's death, and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above are counted first toward making up this \$50,000 amount. (Amounts going to the survivor under the Code's probate exemptions and allowances⁷⁹ and the survivor's Social Security and other governmental bene-

78. 1990 UPC § 2-201(b).

79. See note 43 *supra*.

fits are not counted, however.) Only if the survivor's assets and entitlements are less than the \$50,000 minimum is the survivor entitled to whatever additional portion of the decedent's estate is necessary, up to 100% of it, to bring the survivor's assets and entitlements up to that minimum level.⁸⁰

If there could be any complaint about this feature of the UPC system, it would be that the \$50,000 figure is too low. With average social security payments added in, \$50,000 at current interest rates will generate an income stream of only \$723 a month (\$8,676 a year), which is only \$200 a month above the poverty level. The figure of \$50,000 is given in brackets in the Code, which means that any state is invited to supply a different figure if it so chooses. A somewhat higher figure might be quite appropriate.

4. PROTECTION AGAINST WILL SUBSTITUTES

I would now like to turn to another feature of elective-share law. Conventional statutes grant the surviving spouse a right to elect a fractional share of the decedent's "estate." In our parlance, the term "estate" normally means the *probate* estate, *i.e.*, the property owned at death and included in the gross estate for estate tax purposes under IRC section 2033.

One of the most troublesome issues under these "estate" statutes is the extent to which spousal elective-share rights extend to will substitutes. An elective share is just as ineffective if it applies only to the decedent's probate estate as the federal transfer taxes would be if there were no gift tax and the estate tax only contained section 2033. The elective-share system would serve only as a blueprint for evasion.

A. COMMON-LAW THEORIES

"Estate" statutes shift to the judicial system the task of breathing integrity into the elective share. In the earlier part of this

80. 1990 UPC § 2-207(b), (c).

century, the courts only halfheartedly rose to the occasion, by adopting one or the other of two approaches: the fraudulent-intent test or the illusory-transfer test. The illusory-transfer test is the predominant view. The leading case adopting the illusory-transfer test is *Newman v. Dore*,⁸¹ a New York case that arose in the late 1930s. In that case, Ferdinand Straus, an eighty-year-old testator, executed trust agreements by which he transferred all his real and personal property to his trustees. The trust agreements were executed three days before his death and when cross actions for dissolution of his marriage were pending. The terms of the trusts reserved to Straus the right to the income for life, the power to revoke the trusts, and the power to control the trustees in all aspects of the trusts' administration; needless to say, Straus's wife of four years, a woman in her thirties, received no beneficial interest in these trusts. In holding that the trusts were part of Straus's estate for purposes of his widow's rights, the New York Court of Appeals "judged [the trust] by the substance, not by the form." Under this test, "the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed."

Although it was by no means the first case to have formulated this general approach,⁸² the decision in *Newman v. Dore* had substantial influence on the law in other states.⁸³ Although promising in theory, the illusory-transfer doctrine of *Newman v. Dore* has, for the most part, given the surviving spouse very limited

81. 9 N.E.2d 966 (N.Y. 1937).

82. In *Gentry v. Bailey*, 47 Va. (6 Gratt.) 594 (1850), the court observed that it was "not at all material by what motive the husband was actuated in making the disposition of his property." However, the right given the surviving spouse by the election statute was one that "the husband cannot defeat by any contrivance for that purpose: . . . Whatever may be the form of the transaction, if the substance of it be a testamentary disposition, it cannot be effectual in relation to the wife. If this were otherwise, the statute might be rendered a dead letter at the volition of the husband."

83. In New York, the ruling of the case has been superseded by comprehensive legislation that protects the surviving spouse against specified will substitutes. See N.Y. Est. Powers & Trusts Law § 5-1.1.

protection against will substitutes.⁸⁴ Among the courts accepting the doctrine, one of the most common will substitutes of all, the revocable trust with a retained life estate, has been held not to be illusory.⁸⁵ There was even some doubt that a Totten trust is illusory under the illusory-transfer test.⁸⁶

A breakthrough finally occurred in the important 1984 Massachusetts decision of *Sullivan v. Burkin*.⁸⁷ In an opinion written by Justice Herbert Wilkins, the court held that assets held in a revocable inter-vivos trust created during the marriage⁸⁸ is part of the estate in determining the surviving spouse's elective share.

84. The comprehensive work in the field is W. Macdonald, *Fraud on the Widow's Share* (1960). See also Schuyler, *Revocable Trusts — Spouses, Creditors and Other Predators*, 1974 Inst. on Est. Plan. ch. 13; Annots., 63 A.L.R.4th 1173 (1988); 49 A.L.R.2d 521 (1956); Reporter's Note, Restatement (Second) of Property (Donative Transfers) § 13.7, at 101-11 (1986).

85. See, e.g., *Johnson v. LaGrange State Bank*, 383 N.E.2d 185 (Ill. 1978) (see also Ill. Rev. Stat. ch. 110 1/2 § 601); *Kerwin v. Donaghy*, 59 N.E.2d 185 (Mass. 1945) (prospectively overruled in *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984); *Beirne v. Continental-Equitable Trust Co.*, 161 A. 721 (Pa. 1932); see *Johnson v. Farmers & Merchants Bank*, 379 S.E.2d 761 (W.Va. 1989); Restatement (Second) of Trusts § 57 cmt. c (1959). In a 1944 Ohio decision, such a trust was held ineffective against the claim of a surviving spouse, *Bolles v. Toledo Trust Co.*, 58 N.E.2d 381 (Ohio 1944), but the decision was later overruled in *Smyth v. Cleveland Trust Co.*, 179 N.E.2d 60 (Ohio 1961).

On the other hand, the Supreme Court of Maine seemed to indicate that a revocable trust with a retained life estate might be "illusory" under the illusory-transfer doctrine. See *Staples v. King*, 433 A.2d 407 (Me. 1981). Maine subsequently enacted the augmented-estate concept of the pre-1990 UPC.

86. Compare *Matter of Halpern*, 100 N.E.2d 120 (N.Y. 1951) and *Jeruzal's Estate v. Jeruzal*, 130 N.W.2d 473 (Minn. 1964), with *Montgomery v. Michaels*, 301 N.E.2d 465 (Ill. 1973).

87. 460 N.E.2d 572 (Mass. 1984).

88. The facts in the case were that, in September, 1973, Ernest G. Sullivan executed a deed of trust under which he transferred real estate to himself as sole trustee. The net income of the trust was payable to him during his life and the trustee was instructed to pay to him all or such part of the principal of the trust estate as he might request in writing from time to time. He retained the right to revoke the trust at any time. On his death, the successor trustee was directed to pay the principal and any undistributed income equally to George F. Cronin, Sr., and Harold J. Cronin, if they should survive him, which they did.

The husband died on April 27, 1981, while still trustee of the inter-vivos trust. He left a will in which he stated that he "intentionally neglected to make any provision for my wife, Mary A. Sullivan and my grandson, Mark Sullivan." He directed that, after the payment of debts, expenses, and all estate taxes levied by reason of his death, the residue of his estate should be paid over to the trustee of

The court engaged in the frequently applied Massachusetts practice of *prospective* overruling, so that the new rule was not applied to the *Sullivan* case itself. For the future, however, the court held that “as to any inter vivos trust created or amended after the date of this opinion, we announce that the estate of a decedent . . . shall include the value of assets held in an inter vivos trust created by the deceased spouse as to which the deceased spouse alone retained the power during his or her life to direct the disposition of those trust assets for his or her benefit, as, for example, by the exercise of a power of appointment or by revocation of the trust. Such a power would be a general power of appointment for Federal estate tax purposes . . . and a “general power” as defined in the Restatement (Second) of Property” More significantly, the court also noted: “What we have announced as a rule for the future hardly resolves all the problems that may arise.” The court then ticked off a laundry list of undecided questions, questions whose resolution await future case-by-case adjudication.⁸⁹ Citing the Uniform Probate Code, the court added that “The question . . . is one that can best be handled by legislation.”

the inter-vivos trust. George F. Cronin, Sr., and Harold J. Cronin were named coexecutors of the will.

Ernest and Mary had been separated for many years. At his death, Ernest owned personal property worth approximately \$15,000. The only asset in the trust was a house in Boston, which was sold after his death for approximately \$85,000.

89. In full, the court’s statement was:

There may be a different rule if some or all of the trust assets were conveyed to such a trust by a third person. . . . We have not, of course, dealt with a case in which the power of appointment is held jointly with another person. If the surviving spouse assented to the creation of the inter vivos trust, perhaps the rule we announce would not apply. We have not discussed which assets should be used to satisfy a surviving spouse’s claim. We have not discussed the question whether a surviving spouse’s interest in the intestate estate of a deceased spouse should reflect the value of assets held in an inter vivos trust created by the intestate spouse over which he or she had a general power of appointment. That situation and the one before us, however, do not seem readily distinguishable. A general power of appointment over assets in a trust created by a third person is said to present a different situation. Restatement (Second) of Property, Supplement to Tent. Draft No. 5, reporter’s note to § 13.7 at 29 (1982). Nor have we dealt with other assets

B. AUGMENTED-ESTATE LEGISLATION

It seems clear that courts will now be more and more inclined to protect surviving spouses against disinheritance by will substitute. This movement, begun by *Sullivan*, can only be boosted by the adoption of a similar approach published in 1986 and 1992 in the Restatement (Second) of Property (Donative Transfers).⁹⁰

If this is the case, then it would seem to be far preferable to enact legislation along the lines of the augmented-estate concept of the Uniform Probate Code or some similar model and be done with it, so that estate planners know what the rules are. Otherwise, the rules will be developed on a case-by-case basis and it may take years or decades before the full scope of the spouse's protection becomes clarified in a particular jurisdiction.

Under the UPC, the surviving spouse's elective-share percentage is applied to the augmented estate. The augmented estate serves two basic functions. By combining the couple's assets, it plays a crucial part under the 1990 Code in implementing the partnership theory. The other function is to provide a means of protecting the spouse against evasion by will substitute. To these ends, the augmented estate consists of the sum of the values of four components: (1) the decedent's net probate estate; (2) the decedent's reclaimable estate; (3) property to which the surviving spouse succeeds by reason of the decedent's death other than from the decedent's probate estate; and (4) property owned by the surviving spouse and amounts that would have been included in

not passing by will, such as a trust created before the marriage or insurance policies over which a deceased spouse had control.

Sullivan, 460 N.E.2d at 577-78.

90. Section 34.1 of the Restatement provides:

(3) An inter vivos donative transfer to others than the donor's spouse that is a substitute for a will, or that is revocable by the donor at the time of the donor's death, is subject to spousal rights of the donor's spouse in the transferred property that would accrue to the donor's spouse on the donor's death if the transfer had been made by the donor's will.

See also *id.* § 13.7, the comment to which states that this provision is not restricted to transfers that took place during the marriage.

the surviving spouse's reclaimable estate had the spouse predeceased the decedent.

The function of protecting the spouse against evasion by will substitute is performed by the reclaimable-estate component of the augmented estate. The concept of providing in the statute itself a list of will substitutes to be subjected to the surviving spouse's elective share⁹¹ was pioneered by legislation in New York and Pennsylvania and adopted by the pre-1990 UPC.

The 1990 UPC revisions sought to strengthen the reclaimable-estate component. The pre-1990 version contained several loopholes. The most important of these was life insurance that the decedent purchased, naming someone other than his or her spouse as the beneficiary. Under the 1990 revision, proceeds of these policies are included in the reclaimable estate.

The other important feature of the 1990 revision is that the reclaimable estate now includes property that is subject to a presently exercisable general power of appointment held solely by the decedent.⁹² Such powers are viewed as substantively indistinguishable from outright ownership. The power need not have been created by the decedent and need not have been conferred on or retained by the decedent during the marriage. The decedent need only have held the power immediately prior to his or her death or have exercised or released the power in favor of someone other than the decedent, the decedent's estate, or the decedent's spouse while married to the spouse and during the two-year period next preceding the decedent's death.

91. The UPC's list is contained in § 2-202(b)(2).

92. The term "presently exercisable general power of appointment" is a defined term and includes a reserved power of revocation in a revocable trust. See Restatement (Second) of Property (Donative Transfers) § 11.1 cmt. c & illus. 5 (1986); *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984).

IV. WHO IS A SPOUSE?

For the fourth and final segment of this lecture, I should like to discuss a question you might not immediately think is a question — who qualifies as a “spouse”?

The rights we have been discussing are granted to the person who holds the *status* of spouse. Spousal status is what grants the person a right to an intestate share and the right to elect a forced share if dissatisfied with the decedent’s estate plan. Spousal status is also what grants original ownership of half the property acquired during the marriage in the community-property states. Pinning these rights on status is not only beneficial to the spouse, but also efficient for society. It means that spouses can claim these rights without having to prove anything about the underlying details or commitment of their relationships.⁹³ The marriage certificate itself qualifies the person for what the law allows.

93. A few states, by statute, bar the surviving spouse from taking for desertion or adultery. See Ky. Rev. Stat. § 392.090 (spouse barred if spouse “leaves the other and lives in adultery,” unless the spouses “afterward become reconciled and live together as husband and wife”); N.H. Rev. Stat. Ann. § 560:19 (spouse barred “if at the time of the death of either husband or wife, the decedent was justifiably living apart from the surviving husband or wife because such survivor was or had been guilty of conduct which constitutes cause for divorce”); N.Y. Est. Powers & Trusts Law § 5-1.2 (spouse barred if spouse “abandoned the deceased spouse, and such abandonment continued until the time of death” or if the spouse “who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support”); 20 Pa. Cons. Stat. § 2106 (spouse barred “who, for one year or upwards previous to the death of the other spouse, has wilfully neglected or refused to perform the duty to support the other spouse, or who for one year or upwards has wilfully and maliciously deserted the other spouse”); Va. Code § 64.1-23 (spouse barred if spouse “wilfully desert[s] or abandon[s] his or her consort and such desertion or abandonment continues until the death of the consort”). See also Haw. Rev. Stat. § 533-9.

A few courts, without statutory authority to vary the rights provided to surviving spouses, have denied claims against decedents’ estates by persons who were lawfully married to the decedents when they died. See, e.g., Estate of Abila, 197 P.2d 10 (Cal. 1948) (wife barred because interlocutory decree of divorce, granted to decedent before his death, terminated decedent’s obligation of support, though it did not dissolve the marriage).

As my final topic, I want to turn to the situation of the unmarried cohabitor or domestic partner. Unmarried cohabitators or domestic partners lack marital status and hence the automatic rights granted to spouses.

When a domestic partner dies, the status law grants the surviving partner none of the rights surveyed in the first three parts of this lecture. If the decedent died intestate, the decedent's surviving partner receives no intestate share and receives no right to elect against the decedent's will. Intestate-succession law gives a surviving spouse a large intestate share on the theory of imputed or attributed intent — the law deduces that most decedents (assuming a sound marriage) would have wanted to leave everything to the survivor or at least a substantial enough portion to give the survivor economic security. Regarding unmarried couples, the law grants the survivor no share at all; the omission treats the surviving partner as no more a natural object of the decedent's bounty than a complete stranger. Elective-share law gives a disinherited surviving spouse a right to a certain fraction of the decedent's property, whether the decedent wanted the survivor to have anything or not. The claim is based on either a right to support or a financial partnership theory or, more conventionally, a carryover from common-law dower. Regarding unmarried couples, the law grants the survivor no right against being disinherited, thus treating the surviving partner as having contributed nothing to the decedent's wealth.

Who are these domestic partners and what do we know about them? Actually, we are beginning to know a fair amount.⁹⁴ As of 1990, according to Census Bureau estimates, there were nearly

94. Much of the demographic information in the following pages is drawn from Sweet & Bumpass, *Disruption of Marital and Cohabitation Relationships: A Social-Demographic Perspective*, Working Paper No. 32 (Nat'l Survey of Families and Households, 1990); Bumpass, *What's Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 *Demography* 483 (1990); Bumpass, Sweet & Cherlin, *The Role of Cohabitation in Declining Rates of Marriage*, Working Paper No. 5 (Nat'l Survey of Families and Households, 1989).

3 million cohabiting couples in the United States,⁹⁵ as compared with only about 450,000 such couples in 1960. The number of these arrangements increased significantly in the 1970s and 80s and continues to increase in the 90s. Of course, the term “cohabiting couple” is itself indeterminate. Is it restricted to couples whose only household is their shared one? Or, does it also include other, less clear examples such as the yuppie who has an apartment but lives for days, weeks, or months on end at the other’s apartment? The statistics we have count only those who share a single household.

Although at the current time, only 4% of all Americans age 19 and older are cohabiting, the percentage is far higher at the younger ages. In the age 19 to 34 category, about one in seven never-married and about one in four formerly married persons are currently cohabiting. As might be expected, the rates are lower for middle-aged and older people. Fewer than 5% of unmarried persons in their 50’s and about 1% of those 60 and older are cohabiting.

In recent years, about 42% of those marrying for the first time cohabited at some time prior to their marriage, mostly with their first spouse only, and about three-fifths of those entering second marriages cohabited between their first and second marriages.

The most important statistic for spousal-rights law is that for most people cohabitation is a temporary or short-term state. The parties either break up or get married fairly quickly. By about one and one-half years, half the cohabiting couples have either married or broken up. Only about 10% remain cohabiting after five years. This does not mean, however, that at any point in time there exist only a few longer-term or marriage-like cohabitations. The longer-term cohabitations tend to accumulate in the population. Twenty percent of cohabiting couples, in fact, have lived together for five or more years. Many are gay or lesbian couples for whom marriage is not an option. But most are heterosexual

95. See *Newsweek*, March 23, 1992, at 62.

couples who, for one reason or another, remain together without marrying. The duration of cohabiting unions is longer among persons previously married. Also, children are more frequently present in such unions than you might think. Demographers have reported that children are present in 40% of cohabiting households. This breaks down to one-third of the never-married householders and almost half of the previously married householders. More significantly,

one-sixth of never-married cohabiting couples have a child that was born since they began living together. . . . [T]his represents a significant component of unmarried births (about a quarter) that are not born into single-parent households.

Further, the children in cohabiting households are not all young children. . . . [A] quarter of the households with children have children age 10 or older; mostly living with previously-married parents. In thinking about the meaning of cohabitation and the dynamics of cohabiting households, it is critical to keep in mind that issues of parenting and step-parenting are very much a part of the picture.⁹⁶

The longer-term cohabitations are the ones that tend to find their way into the legal system. Like married couples, this happens upon disinheritance at death or, more commonly, the deliberate decision of one of the parties to terminate the relationship. The unmarried-cohabitators cases that come to *public* attention nearly always involve a defendant who is a wealthy celebrity, entertainer, or professional athlete. But the less celebrated come to court also. As a Houston divorce attorney remarked: "You don't need millions of dollars for people to fight. Give two people a house worth \$200,000 and they'll consider an action."⁹⁷

These suits are sometimes grounded on a common-law marriage claim, but, when that claim is unavailable, because the state does not recognize common-law marriages or because the arrangement does not fit within the criteria, they can still go for-

96. Bumpass, Sweet & Cherlin, *supra* note 94, at 10.

97. Taylor, *Increased Mobility Adds to Common Law Claims*, Nat'l L.J., Aug. 14, 1989, at 24.

ward as a “palimony suit.”⁹⁸ Not surprisingly, as I said, most of the cases arise in the context of a dissolution during life. Claims arising at death are less common because, if the partners remain devoted to one another, the surviving partner is probably provided for in the decedent’s will or other parts of the estate plan.⁹⁹ Therefore, it is less usual for cases to arise in which a surviving partner is making a claim to a share of a decedent’s estate, but such cases do arise.¹⁰⁰

98. The term “palimony” is misleading because the plaintiff is usually seeking a division of the couple’s property, not an award of periodic payments similar to alimony.

99. In speaking of the power of testation, Jeremy Bentham noted that “a man . . . should have the means of cultivating the hopes and rewarding the care of . . . a woman who, but for the omission of a ceremony, would be called his widow” J. Bentham, *supra* note 3, at 185-86.

See generally, however, deFuria, *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 Notre Dame L. Rev. 200 (1989) (“[Although only] a few courts [raise] a rebuttable presumption of undue influence . . . whenever the testator willed his estate to a meretricious partner . . . , [m]any more courts emphasized that such a relationship raised a significant suspicion of undue influence, which would be closely scrutinized.”); Sherman, *Undue Influence and the Homosexual Testator*, 42 U. Pitt. L. Rev. 225 (1981) (“[T]here is at least some evidence to suggest that a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned than does a heterosexual testator who bequeaths the bulk of his estate to a spouse or lover.”); Annot., 76 A.L.R.3d 743 (1977).

100. Although most of the cases have involved property disputes between living cohabitators who have separated, some cases have involved contractual or equitable claims by the survivor to a share of the other’s estate upon the latter’s death. Complaints founded upon breach of oral promises supported by social, domestic, nursing, and business services have been held to state a cause of action. *See, e.g.*, *Poe v. Estate of Levy*, 411 S.2d 253 (Fla. Ct. App. 1982) (reversing trial court’s dismissal of count seeking enforcement of an express support contract and count seeking imposition of a constructive trust in certain property due to a confidential relationship between surviving cohabitor and decedent, but affirming trial court’s dismissal of count seeking one-half ownership interest in decedent’s property grounded on argument that their relationship had the same force and effect as a legal marriage); *Donovan v. Scuderi*, 443 A.2d 121 (Md. Ct. Spec. App. 1982) (plaintiff entitled to recover damages for breach of express oral promise to pay to plaintiff 1,000 shares of stock of the bank of which the decedent was chairman of the board, in return for which plaintiff made various expenditures and provided loans and services, including “catering services, personal shopping services (clothing, furniture and furnishings)”); decedent, a married man, and plaintiff, an unmarried woman, did not have a full-time cohabitation relationship, but frequently used an apartment plaintiff had obtained at decedent’s request);

Plaintiffs seem to have no problem in stating a cause of action when they allege that they made a *financial* contribution toward the purchase of specific property on the understanding that they would be the owner or part owner. The fact that the property was not titled in the plaintiff's name is not a defense. A cause of action for the imposition of a purchase-money resulting trust or a constructive trust on the specific property is well established.¹⁰¹

But what if the plaintiff's contribution came in the form of *domestic services*? The case that has received the most notoriety is *Marvin v. Marvin*.¹⁰² The *Marvin* case was one of the first cases to confront the problem of remedy in a domestic-services case.

Tyranski v. Piggins, 205 N.W.2d 595 (Mich. Ct. App. 1973) (surviving cohabitor entitled to specific performance of decedent's oral promise to convey house to her; plaintiff, a married woman who was separated from her husband, performed various domestic, social, and nursing services for decedent).

Complaints have also been held to state a cause of action when they sought the imposition of a constructive trust on specific property based on a confidential relationship between the cohabitators. *See, e.g., Poe v. Estate of Levy, supra*. Complaints seeking damages in the amount of the value of such services on the theory of quantum meruit (as much as the plaintiff deserved) have also been upheld. *See, e.g., Green v. Richmond*, 337 N.E.2d 691 (Mass. 1975) (surviving cohabitor entitled to quantum meruit recovery of damages for value of social, domestic, and business services performed in reliance on decedent's oral promise to leave a will devising his entire estate to her); *Humiston v. Bushnell*, 394 A.2d 844 (N.H. 1978) (lack of proof of alleged oral promise to devise a certain parcel of realty prevented surviving cohabitor from recovering damages for breach; surviving cohabitor was entitled to recover in quantum meruit for value of "intimate, confidential, and dedicated personal and business service" she performed for the decedent with the expectation of being ultimately compensated therefor); *Estate of Steffes*, 290 N.W.2d 697 (Wis. 1980) (surviving cohabitor entitled to recover damages for value of housekeeping, farming, and nursing services rendered at decedent's request and with the expectation of being compensated therefor).

Also, complaints seeking the imposition of an implied partnership with respect to a business arrangement have been upheld. *See, e.g., Estate of Thornton*, 499 P.2d 864 (Wash. 1972) (surviving cohabitor entitled to recover on basis of an implied partnership in cattle-raising business). But the dismissal of a complaint seeking a half interest in the decedent's property based on the theory that the parties' relationship had the same force and effect as a legal marriage was affirmed. *See, e.g., Poe v. Estate of Levy, supra*.

101. *See, e.g., Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983) (surviving cohabitor entitled to constructive trust in her favor of a one-half interest in home purchased with joint funds but titled in decedent's name alone).

102. 557 P.2d 106 (Cal. 1976)

These are the cases in which the domestic partnership follows the division-of-labor pattern of the traditional marriage. The plaintiff specializes in "household production," an asset perhaps worth something in the "remarriage market" after dissolution, but worth little in the labor market. The defendant specializes in career advancement, a "divorce-proof" asset.

These plaintiffs, consequently, are entering a much riskier venture than those entering a marriage with a similar division of labor. Those entering a marriage with a similar division of labor at least have the divorce laws and the intestacy and elective-share or community-property laws as back-up protection. Those entering a nonmarital relationship have virtually no legal rights to fall back on.

What can they do to protect themselves? One thing they can do is to insist on protection by contract, just as married persons use a premarital agreement. Academic lawyers tend to call this "private ordering." The reality is, however, that in many of the litigated cases, there is an enormous disparity of bargaining power. By being older and already wealthy, the defendant is often in a dominant position. For this reason, and because bargaining is done in the shadow of one's legal rights and the unmarried have virtually no back-up legal rights, the plaintiff is in a "subordinate" position. If there is to be a contract, a *written* contract, the partner insisting on it is likely to be the dominant defendant, not the subordinate plaintiff.¹⁰³ The contract is more likely to take the form of what Bill Cantwell calls a "Non-Marvenizing" agreement, under which the subordinate plaintiff in

103. Premarital agreements are enforceable only if in writing. See Unif. Premarital Agreement Act § 2 (1983) ("A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.").

Legislation in Minnesota provides that an express written contract "between a man and a woman who are living together . . . out of wedlock" is valid, even if "sexual relations between the parties are contemplated," but also provides that, in absence of an express written contract, any claim to another's earnings or property must be dismissed as contrary to public policy if it is "based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state." Minn. Stat. §§ 513.075, .076.

effect waives all rights.¹⁰⁴ The plaintiff is likely just as frightened to raise or press the subject of a contract as marriage. Plaintiffs who do press the issue, at least to some extent, are more likely to get vague oral statements than a written contract for their efforts.

Consequently, the plaintiff in many of the litigated cases alleges an *oral* contract, which in the end may not be provable. The *Marvin* case fell into this category. The plaintiff, Michelle Triola, brought a breach of contract action against the defendant, Lee Marvin. Because the trial court granted judgment on the pleadings for the defendant, the question on appeal was whether the plaintiff's complaint stated a cause of action. The California Supreme Court held that it did, but on remand Michelle could not prove her allegation.

The facts alleged in Michelle's complaint were that in October of 1964, she and Lee "entered into an oral agreement." As is typical of these complaints, Michelle not only listed the domestic services she agreed to perform but also the opportunities for employment or training she agreed to forego. The services she listed were "companion, homemaker, housekeeper and cook." Michelle's foregone opportunities were "her lucrative career as an entertainer [and] singer." Lee, in turn, she alleged, not only agreed "to share equally any and all property accumulated" during the cohabitation¹⁰⁵ but also "to provide for all of [her] financial support and needs for the rest of her life."

104. As reported in J. Quinn, *supra* note 46, at 84, Bill Cantwell's "Non-Marvenizing" Agreement, which would be suitable for parties of equal bargaining power, states:

We have decided to live together beginning on _____. We do not intend that any common law marriage should arise from this. We have not made any promises to each other about economic matters. We do not intend any economic rights to arise from our relationship. If in the future we decide that any promises of an economic nature should exist between us, we will put them in writing, and only such written promises made by us in a written memorandum signed by us in the future shall have any force between us. Signed at _____ on _____.

105. Michelle's actual allegation was that the parties agreed that "they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." But,

Michelle and Lee lived together for about five and a half years (from October 1964 through May 1970). During this period, she alleged, the parties as a result of their efforts and earnings acquired in Lee's name substantial real and personal property, including motion picture rights worth over \$1 million. In May 1970, however, Lee (in the language of the complaint) "compelled" her to leave his household. He continued to support her for another year and a half (until November 1971), but thereafter refused to provide further support.

In a landmark decision, the California Supreme Court held that her complaint stated a cause of action. There are two aspects of the *Marvin* decision that I'd like to address. First is the question of whether an express contract is enforceable, assuming that it can be proved if oral; second is whether the disappointed domestic partner has any rights at all if no express contract can be proved.

A. Enforceability of an Express Contract—the "Meretricious" Consideration Problem

The principle obstacle to recovering for breach of an express oral contract, other than the difficulty of proving the contract, was what the courts call the "meretricious" nature of such a relationship — that the relationship involved sexual intimacy. Because prostitution is illegal, a contract for prostitution is unenforceable. A few post-*Marvin* decisions in other states have held that contracts between unmarried cohabitators are flat unenforceable for that reason alone, citing public policy grounds.¹⁰⁶ Those decisions are still presumptively good law in those states.

since the complaint alleged that Michelle promised to remove herself from the work force, it appears that it was Lee's earnings that were to be shared.

106. See, e.g., *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977) ("It is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration. Code Ann. § 20-501. . . . The parties being unmarried and the appellant having admitted the fact of cohabitation in both verified pleadings, this would constitute immoral consideration under Code Ann. § 20-501 . . ."); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) ("Illinois' public policy regarding agreements such as the one alleged

The *Marvin* court sought to remove this obstacle to enforcement. The court held that the sexual component of the arrangement could prevent enforcement only if the contract were “expressly and inseparably based upon an illicit consideration of sexual services.”¹⁰⁷ This was not the case in *Marvin*, for Michelle did not allege that one of the services for which Lee agreed to pay was for her to be Lee’s lover.

The time has surely come to put the meretricious-consideration argument behind us. It is surely time to remove it as *any* potential obstacle at all to enforcement of these agreements, for there is no way these cases involve agreements for prostitution. Perhaps the *Marvin* court thought it had done that by making contracts enforceable unless the contract was “expressly and inseparably” based upon “sexual services.” Nevertheless, in a subsequent California case, *Jones v. Daly*,¹⁰⁸ the plaintiff made the mistake of alleging in his complaint that one of the services he agreed to perform, in addition to domestic services, was to be the defendant’s “lover.” This proved to be fatal, for the court held that the complaint did not state a cause of action, citing the ground that the plaintiff’s “allegations clearly show that plaintiff’s rendition of sexual services to Daly was an inseparable part of the consideration for the ‘cohabitators agreement,’ and indeed was the predominant consideration.” “There is,” the court said, “no severable portion of the ‘cohabitators agreement’ supported by independent consideration.”¹⁰⁹

The solution came in a still later case, *Whorton v. Dillingham*.¹¹⁰ The complaint in that case listed *mutual* sexual promises

here was implemented long ago . . . , where this court said: ‘An agreement in consideration of future illicit cohabitation between the plaintiffs is void.’ . . . The issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State. The question whether change is needed in the law . . . [is best left to] the legislative branch . . .’).

107. *Marvin*, 557 P.2d at 114.

108. 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981).

109. *Id.* at 509, 176 Cal. Rptr. at 134.

110. 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (1988).

— that the plaintiff promised to be the defendant’s “lover” and that the defendant promised to be the plaintiff’s “lover.” The court held the complaint stated a cause of action. In a key passage, the court stated that “by itemizing the mutual promises to engage in sexual activity, [the plaintiff] has not precluded the trier of fact from finding those promises are the consideration for each other and independent of the bargained for consideration for [the plaintiff’s] employment.”¹¹¹

It seems to me that the *Whorton* analysis suggests a responsible way around this problem. Even if sexual intimacy is listed in the complaint on only one side, surely the way to handle these cases is to presume that the sexual component of a cohabitation is always separable from the other parts of the contract, on the ground — to be blunt — that the consideration for sex is sex.

B. Rights of Domestic Partners Who are Not Protected by a Provable Contract

What if the plaintiff entered upon a cohabitation arrangement without contractual protection? In *Marvin*, Michelle did allege an oral contract, but she was unable to prove it. Should plaintiffs who never allege or cannot prove a contract ever receive relief? Or, should the law say that they knew what they were getting into, took the risk that it would not work out, and cannot now cry foul when they lost the gamble and the arrangement later fell apart? After all, they already got room and board, probably some gifts, and, in general, probably lived a higher life style than they could have afforded on their own. Is that not all they deserve?

This is the most important question in this developing area. The courts in a few jurisdictions have closed the door to plaintiffs without an express contract¹¹² and at least one legislature has

111. *Id.* at 454, 248 Cal. Rptr. at 409-10.

112. *See, e.g.,* *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Estate of Alexander*, 445 So.2d 836 (Miss. 1984); *Dominguez v. Cruz*, 617 P.2d 1322 (N.M. Ct. App. 1980); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980). The *Alexander* court held that if a remedy is to be given to a surviving cohabitant in the absence of an express contract, “the Legislature should provide the remedy.” *See also*

closed the door to plaintiffs without an express written contract.¹¹³ The advantage of such a bright-line test, especially the one that insists on an express *written* contract, is that it introduces an element of efficiency into the law similar to the efficiency accruing from grounding spousal rights on status.¹¹⁴ The domestic partner with a contract can claim the contractual rights without having to prove anything about the underlying details or commitment of the relationship. Just as the marriage certificate qualifies the spouse for what the law allows, the written contract qualifies the domestic partner-plaintiff for what the contract allows.

The disadvantage is that plaintiffs with just claims are shut out. This category includes plaintiffs who are in a “subordinate” position to the defendant in terms of bargaining power, and hence are unable to obtain contractual protection. This category also includes plaintiffs who are unsophisticated in the ways of the law, the underclass, for want of a better term.

To its credit, the court in the *Marvin* case thought that there would be cases that warranted relief even without a contract, and however you feel about the morality of these arrangements, there are cases in which the plaintiff’s claim seems undeniably just. In seeking to find a way of analyzing this problem, the court in *Marvin* used an interesting phrase. The court spoke, and spoke repeatedly, of enforcing the “reasonable expectations of the

Carnes v. Sheldon, 311 N.W.2d 747 (Mich. Ct. App. 1981) (although prior Michigan cases have held that express contracts are enforceable to the extent they are based on independent consideration, and have enforced contracts implied in fact for wages or for the value of commercial services, the court in the instant case was “unwilling to extend equitable principles to the extent plaintiff would have us do, since recovery based on principles of contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legislature. . . . [J]udicial restraint requires that the Legislature, rather than the judiciary, is the appropriate forum for addressing the question raised by plaintiff. We believe a contrary ruling would contravene the public policy of this state ‘disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.’ ”).

113. See *supra* note 103.

114. See text accompanying note 93, *supra*.

parties.” “The courts may inquire into the conduct of the parties¹¹⁵ to determine whether that *conduct* demonstrates an *implied* contract or implied agreement of partnership or joint venture, or some other *tacit* understanding between the parties,” the court said.

In speaking of the “reasonable expectations of the *parties*” — plural — the court was probably knowingly engaging in a fiction. Few could doubt that the parties in the *Marvin* case did not enter or continue the arrangement with the same expectations. Some interesting empirical research has shown that different expectations are standard. The study found:

In 39 percent of the cases for which we have couple data, one party believes they will marry and the other does not! This difference of perception is surely a factor in the higher instability of these unions. Another 11 percent agree that they will not get married, making just about half of all cohabiting couples where there is disagreement about marriage or no plans to marry. Twenty-nine percent agree that they have definite plans to marry, and in another 20 percent of the cases one partner has definite plans to marry, while the other thinks they will marry but does not have definite plans to do so.¹¹⁶

To be sure, this study reports on *marriage* expectations in *shorter-term* cohabitations, and the *Marvin* court’s emphasis was on a different type of expectation — the expectation that there will be “profit-sharing.” To be sure, also, our emphasis is on the longer-term, marriage-like cohabitations, those that are the exception overall but tend to accumulate in the population. In any event, Lee Marvin and Michelle Triola, it would probably be safe to speculate, did not share the same expectations, not even when

115. According to Professor Glendon, the reference to an inquiry into the conduct of the parties raised “the prospect of litigation in which the private lives of the parties can be explored in detail [and] has led already to the settlement out of court of a number of suits by alleged same-sex lovers or clandestine playmates of well-known people.” M. Glendon, *supra* note 39, at 279.

116. Bumpass, Sweet & Cherlin, *supra* note 94, at 14. See also Rindfuss & VandenHeuvel, *Cohabitation: Precursor to Marriage or an Alternative to Being Single*, 16 *Population & Dev. Rev.* 703, 721 (1990) (empirical study finding that “cohabitators are substantially more similar [in their attitudes toward matters such as marriage and childbearing plans] to the singles than to the married.”).

entering into or during the happy periods of their arrangement. Michelle probably hoped and maybe even expected that Lee would eventually marry her or, failing that, that he would “do right” by her financially. Whether Lee ever intended to do either is unclear. He certainly determined never to give her a dime shortly after they broke up.

So, what do we make of the court’s emphasis on “the reasonable expectations of the parties”? The court could be saying one of two things. One is that there should be inquiry into whether the defendant’s behavior reasonably led the plaintiff to think that he had the same expectations she did, *i.e.*, whether the defendant led her on. The other, more significant possibility is that the court is saying that it will attribute or impute “reasonable” expectations even when they are fictional regarding one of the parties.

Although this latter idea came to nothing in the *Marvin* case itself,¹¹⁷ some courts, in later cases, have begun to apply this idea. Case authority is beginning to appear in which marriage-like cohabitation relationships are held to have the same force and effect as a legal marriage.¹¹⁸ Many if not all of these cases involve relationships that would be common-law marriages¹¹⁹ but for the ab-

117. On remand, Michelle failed to prove the existence of an express or implied contract, but the trial court awarded her \$104,000 for rehabilitation on the ground of an unspecified equitable theory. On appeal, the judgment granting this award was reversed for want of a “recognized underlying obligation in law or in equity.” *Marvin v. Marvin*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981). See also *Taylor v. Polackwich*, 145 Cal. App. 3d 1014, 194 Cal. Rptr. 8 (1983) (“rehabilitative award” reversed on appeal).

118. For examples of cases providing for equitable division of property acquired while the couple cohabited before marrying or acquired while the couple cohabited after having divorced each other, see *Eaton v. Johnson*, 10 Fam. L. Rep. (BNA) 1094 (Kan. Ct. App. 1983); *Pickens v. Pickens*, 490 So.2d 872 (Miss. 1986); *Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984).

119. The requirements necessary to establish a common-law marriage vary somewhat from state to state, but have been summarized as follows:

The jurisdictions which recognize common law marriages all require that the parties presently agree to enter into the relationship of husband and wife. Most jurisdictions also require cohabitation, or actually and openly living together as husband and wife. . . . Some jurisdictions further require that the parties hold themselves out to the world as husband and wife, and acquire a reputation as a married couple. However, other jurisdictions hold

olition of that doctrine.¹²⁰ I'll give you two examples.¹²¹ The first is *Goode v. Goode*,¹²² a recent West Virginia case. Carl and Martha Goode separated after having lived together for 28 years. Although the couple had never formally married, they had constantly held themselves out to the public as husband and wife.

that cohabitation and reputation are not requirements of a valid common law marriage, but solely matters of evidence.

Under all of these definitions, evidence that the parties have stated "We're not married, we're just living together" will destroy the claim of a common law marriage.

Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Nontraditional Family*, 24 Idaho L. Rev. 353, 361 (1987).

120. Most states have abolished common-law marriage by statute. See, e.g., Mich. Comp. Laws § 551.2. As of 1987, only thirteen states (Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas) and the District of Columbia still recognized the concept. H. Clark, *Law of Domestic Relations* § 2.4 (2d ed. 1987).

Negative judicial and legislative reaction to the concept of common-law marriage grew during the late nineteenth century. One criticism of the concept was that the informality of common-law marriages makes them highly vulnerable to fraud and perjury. More prominent was the argument that common-law marriage undermined the sanctity of marriage. See, e.g., *Sorenson v. Sorenson*, 100 N.W. 930, 932 (Neb. 1904). See generally M. Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985).

In some states where common-law marriage has been abolished, courts have applied a de facto common-law marriage doctrine to couples who lived together in a common-law marriage state. In *Kellard v. Kellard*, 13 Fam. L. Rep. (BNA) 1490 (N.Y. Sup. Ct. 1987), a New York man and woman, unmarried but cohabiting with one another, took an automobile trip to Disney World in 1978. During the trip, they stayed overnight in a motel in South Carolina where they registered as husband and wife, and engaged in sexual intercourse. They also stayed for two nights in a motel in Georgia. Some years later, in defense to a divorce suit filed in New York by the woman, the man claimed that no divorce was necessary because he was not married to the plaintiff. A New York court rejected his defense, holding that the couple's behavior enroute to Disney World satisfied the common-law marriage requirements of South Carolina and Georgia. This, along with the lengthy history of the couple's relationship, led the court to recognize them as married. See also Taylor, *Increased Mobility Adds to Common Law Claims*, Nat'l L.J., Aug. 14, 1989, at 24.

121. Other post-*Marvin* cases have asserted claims based on nonfamily doctrines, such as express contract, contract implied in fact, contract implied in law, quantum meruit, and constructive trust. See, e.g., *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). Decisions in many of these cases are ambiguous as to whether the court based recovery on a contract implied in fact or on unjust enrichment grounds.

122. 396 S.E.2d 430 (W. Va. 1990).

They had four children. Martha, age 47, filed a divorce action against Carl, age 61, seeking an equitable division of the property they had acquired during their 28-year period of cohabitation. Although West Virginia is not a common-law marriage state, the court held that Martha could recover, saying:

[W]e hold that a court may order a division of property acquired by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife. Such order may be based upon principles of contract, either express or implied, or upon a constructive trust. Factors to be considered in ordering such a division of property may include: the purpose, duration, and stability of the relationship and the expectations of the parties. Provided, however, that if either the man or woman is validly married to another person during the period of cohabitation, the property rights of the spouse and support rights of the children of such man or woman shall not in any way be adversely affected by such division of property.¹²³ The expectations of the parties under these circumstances would be equitable treatment by the other party in exchange for engaging in such a cohabiting relationship.

My second example is a case that goes even farther and allows an unmarried plaintiff to utilize the divorce laws directly. That case is a Washington case, *Warden v. Warden*.¹²⁴ Charles Warden and Denise Boursier began living together in 1963, holding themselves out as husband and wife. They had two children. In 1972, Charles moved to California and formally married another woman. After learning of this, Denise brought suit under the divorce laws for child support and an equitable division of property, which the trial court awarded. Charles appealed that part of the

123. Under the facts of this case, the parties lived together for an extended period of time, considered themselves as husband and wife, and, in fact, pooled their resources to include taking property under three joint deeds. Therefore, in this case, the equities are more easily determined than in a relationship between two parties which was for a shorter duration, or where the parties did not consider themselves to be husband and wife, or where the parties did not pool their resources. Cases in other jurisdictions have noted that “[e]ach case should be assessed on its own merits with consideration given to the purpose, duration and stability of the relationship and the expectations of the parties.” *Hay v. Hay*, 100 Nev. 196, 199, 678 P.2d 672, 674 (1984). [Footnote by the court.]

124. 676 P.2d 1037 (Wash. Ct. App. 1984).

judgment decreeing a division of the property. Although Washington is not a common-law marriage state, the Washington Court of Appeals affirmed, saying:

We believe the time has come for the provision of [the Washington statute providing for equitable division of property upon dissolution of a marriage] to govern the disposition of the property acquired by a man and a woman who have lived together and established a relationship which is tantamount to a marital family except for a legal marriage.

The trial judge here properly treated Denise and Charles as a marital family and correctly considered the length and purpose of their relationship, the two children, the contributions of the parties, and the future prospects of each. He correctly assumed that both Denise and Charles contributed to the acquisition of the property and divided it in a manner which was “just and equitable after considering all relevant factors.”¹²⁵

If the plaintiff in this case could utilize the divorce laws to gain a share of the “marital” property, surely a similarly situated plaintiff could gain an intestate share of the defendant’s estate and, since Washington is a community-property states, claim her half of the “community property.”

If the law begins to grant extra-contractual rights to disappointed domestic partners, does this mean that the law is edging toward granting rights based on “status”? The answer appears to be both Yes and No. To the extent that rights are granted without having been explicitly bargained for, yes it seems that rights are being granted on the basis of status. Unlike marital status or contractual status, however, each litigated cohabitation must be probed in order to classify it as marriage-like or non-marriage-like to determine whether relief is warranted. Each plaintiff must prove that the underlying nature of his or her relationship with the defendant warrants recovery, that the relationship fits within the criteria of a marriage-like cohabitation. The extract quoted from the *Warden* opinion gives some idea of what must be proved. Another definition comes from the recent New York

125. *Id.* at 1039-40.

case of *Braschi v. Stahl Associates Co.*,¹²⁶ a case that involved an analogous question under the New York rent control laws: There must be, the court said:

an objective examination of the relationship of the parties[, including] the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. . . . These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.¹²⁷

The question these cases leave us with is: Are we obliged to continue resolving these issues inefficiently, on a case-by-case basis? We may be for a time, perhaps quite a long time, but eventually there will be pressure to minimize case-by-case adjudication by opening up more efficient, bright-line tests into which most plaintiffs with just claims could fit automatically. I would like to offer a couple of tentative ideas.

One possibility is to consider enacting legislation along the lines of a New Hampshire statute. In codifying a statutory version of common-law marriage, New Hampshire introduced a three-year bright-line rule. That legislation provides:

Cohabitation, etc. Persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.¹²⁸

There is no magic in three years, of course, though that seems a decent compromise.¹²⁹

126. 543 N.E.2d 49 (N.Y. 1989).

127. *Id.* at 55. See also Truethart, *Adopting a More Realistic Definition of "Family,"* 26 Gonzaga L. Rev. 91 (1990/91).

128. N.H. Rev. Stat. Ann. § 457:39.

129. Remember, though, that only about 10% of cohabiting couples remain together beyond five years, and so a five-year requirement might be given consideration.

Another opportunity, not mutually exclusive with a fixed-time rule, would arise if domestic-partnership registration legislation should become state law. Ordinances in a number of municipalities have set up domestic partnership registries. In some municipalities, registration has no legal effect whatever, whereas in others it has the effect of extending the same employee benefits, such as health insurance, to the domestic partners of registering city employees that are extended to spouses of city employees.¹³⁰ Extending this type of legislation to the state level is likely to be very controversial.¹³¹ Should it come about, however, the legislation need not and hopefully will not attribute marital status to those who register, although that would be a possibility. Another approach would be to provide registrants with an *optional* check-off system that would serve as a written contract. The registering partners could be given the opportunity to check off whether or not they want to be treated as if they were married for purposes of divorce, intestacy, and elective-share or community law, or to opt for some other system for regulating their financial affairs. The more the law can do to encourage and facilitate written contracts, the more efficient the system will become.

Other creative measures may also come to light to handle this thorny question in the near term and beyond. The area certainly cries out for more efficient solutions than we now have.

130. See Truethart, *supra* note 127, at 101-05.

131. See, e.g., *Unmarried-Partners' Rights Test Those of Washington*, N.Y. Times, March 10, 1992, at A13, describing a brewing controversy about a domestic-partnership ordinance recently passed by the City Council of the District of Columbia. The ordinance, called the Health Care Benefits Expansion Act, entitles registering District employees to add their domestic partners to their health insurance coverage and provides a tax benefit to private companies that expand health benefits to domestic partners of registering employees.

Congress reviews and can repeal District of Columbia ordinances. Some members of the House District of Columbia Committee have expressed opposition to the ordinance on the ground that it undermines the traditional family.

CONCLUSION

Spousal rights are in a state of transition, but the directional trends seem clear and you, as ACTEC members, can help speed the process along by working in your state for legislative reform.

I would urge you to take a close look at the spouse's intestate share and, in title-based states, the spouse's elective share.

In intestacy, the lump-sum-plus-a-fraction rather than the straight fractional-share approach for marriages in which there are step children is the only way of granting economic security to a surviving spouse who is beyond working years, as most are, before the estate gets divided between the spouse and children.

In the title-based states, adoption of the community-property system would be ideal. In the meantime, attention should be given to the elective share, for the partnership approach is an idea whose time has surely come. It needs to be implemented and joined with a minimum support element. It also needs to be backed up with an augmented-estate concept, so that evasion by will substitute is curtailed.

Both these intestacy and elective-share features have already been worked out in fine detail and converted to statutory language in the 1990 revisions of the Uniform Probate Code. If study of those revisions is not yet underway in your state, I urge you to take steps to get that study process going. Finally, as that process does get underway, I recognize that it is inevitable that questions will arise. When and if they do, please contact me or a member of the Joint Editorial Board for assistance. We are happy to help in any way we can, in explaining the theory of any provision, what it means, or how it fits together with other provisions to form a coherent whole. Opening up lines of communication between us and your state study committee can only be beneficial to the ultimate improvement of the law.