

1990

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J. William Gray Jr.

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Recommended Citation

J. W. Gray Jr., *Annual Survey of Virginia Law: Augmented Estate System: An Overview*, 24 U. Rich. L. Rev. 513 (1990).

Available at: <http://scholarship.richmond.edu/lawreview/vol24/iss4/4>

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VIRGINIA'S AUGMENTED ESTATE SYSTEM: AN OVERVIEW

*J. William Gray, Jr.**

I. INTRODUCTION

The New Year 1991 will bring in an entirely new system of property rights for surviving spouses in Virginia. As of the end of 1990, the centuries-old concepts of dower and curtesy will disappear from the Code of Virginia (the "Code"). The current will renunciation and spouse's election provisions of estate law also will be scrapped. House Bill No. 808¹ replaces those historic concepts with an "augmented estate" system modeled after the Uniform Probate Code² (the "U.P.C."), but having several features unique to the Commonwealth. This article examines the mechanics of the new system, with particular emphasis on features that may require both conveyancers and estate planners to rethink traditional procedures and planning techniques.

Under the augmented estate system, an individual may be free to dispose of assets during lifetime without his spouse's permission or approval. At the individual's death, however, the spouse may choose to reject the provisions that the decedent made and instead may choose to claim a statutory fraction of the decedent's estate. The fraction is not based solely on the net probate estate, as under current law; instead, the probate estate is "augmented" by the value of (i) all non-probate assets remaining at the decedent's death and (ii) certain assets that the decedent transferred during lifetime. If the value of property the spouse has received or is entitled to receive from the decedent through both lifetime and testamentary transfers is less than the required fraction of the augmented estate, all other recipients of the decedent's property may be liable for a portion of the shortfall.

* Partner, Hunton & Williams, Richmond, Virginia; B.S., B.A., 1973, Rutgers University; J.D., 1977, University of Virginia; former chairman of the Board of Governors, Trusts and Estates Section, Virginia State Bar.

1. 1990 Va. Acts 1354. Delegate Howard E. Copeland of Virginia Beach was the primary sponsor of the legislation. Senator Robert L. Calhoun of Alexandria introduced identical provisions in the Senate as Senate Bill No. 233.

2. UNIF. PROB. CODE §§ 2-201 to -207, 8 U.L.A. 73-87 (1983).

II. BACKGROUND

The new system addresses three perceived shortcomings in the current statutory system for protecting a surviving spouse against disinheritance.³ First, the existing dower and curtesy rules are confusing and in some cases inconsistent.⁴ They can present significant real estate title problems, particularly now that dower and curtesy give the surviving spouse a fee simple interest rather than the traditional life estate.⁵ These practical considerations led commentators to advocate changes in Virginia's system as long as three decades ago.⁶

Second, the effect of dower and curtesy on the typical estate is diminishing because those concepts apply only to real estate.⁷ They offered substantial protection to spouses in a rural society, where a farm or other land holdings comprised the bulk of most families' wealth. In today's increasingly urban Virginia, however, that security is greatly reduced because the family's wealth is more likely to lie in money, securities, business interests, life insurance, employee benefits or other intangible personal property. Moreover, one can defeat a spouse's dower or curtesy rights simply by taking title through a Virginia land trust,⁸ through a corporation or partnership,⁹ in a joint tenancy with a third party with right of survivorship,¹⁰ or in "sole and separate equitable estate" form.¹¹

3. For a general discussion of several ways to disinherit a surviving spouse, see Johnson, *Interspousal Property Rights at Death*, 10 VA. B.A.J. No. 3 at 10 (1984).

4. See Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157, 173-76 (1960).

5. When dower and curtesy entitled the surviving spouse to a life estate only, a purchaser from the decedent could derive some comfort from knowing that the dower and curtesy rights of previous owners' spouses terminated at those spouses' deaths. Now that dower and curtesy entitle the surviving spouse to a one-third fee simple interest, however, that interest will pass to the surviving spouse's devisees or heirs.

6. See, e.g., Johnson, *Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation*, 7 U. RICH. L. REV. 99 (1972); Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 U. RICH. L. REV. 299 (1969); Spies, *supra* note 4.

7. See VA. CODE ANN. § 64.1-19 (Repl. Vol. 1987).

8. See generally *id.* § 55-17.1 (Repl. Vol. 1986), which confirms that the beneficial interest in a land trust is personal property and therefore not subject to dower or curtesy.

9. The decedent's ownership interest in the title-holding entity would be personal property and not subject to dower or curtesy.

10. The decedent thus would not have an estate of inheritance to which dower or curtesy rights could attach.

11. See VA. CODE ANN. § 64.1-21 (Repl. Vol. 1987 & Cum. Supp. 1990). See also Jacobs v. Meade, 227 Va. 284, 315 S.E.2d 383 (1984) (previous version of § 64.1-21, providing that a husband was not entitled to curtesy in the equitable separate estate of his deceased wife, must apply equally to extinguish a surviving wife's dower rights in her deceased husband's equitable separate estate in light of § 64.1-19.1, which declares that references to "curtesy"

Third, a surviving spouse's right to share in the decedent's personal property upon renunciation is defined as a fraction of the probate estate.¹² Renunciation rights do not attach to property passing by non-probate means. The current spousal election system therefore allows an individual effectively to disinherit a surviving spouse by owning non-probate property, *e.g.*, an interest in an irrevocable trust, an asset owned jointly with right of survivorship, or life insurance, employee benefits or other contract rights payable to a surviving third party.¹³

The augmented estate system resulted from seven years of Virginia legislative activity aimed at the property rights of surviving spouses. The original legislative proposal, introduced in 1983,¹⁴ would have applied the augmented estate concept to personal property only, leaving the existing dower and curtesy system to govern real property rights. A legislative study subcommittee constituted by the 1983 General Assembly reported in 1984 that the dower and curtesy system did not provide sufficient protection against disinheritance, but its report did not recommend specific changes.¹⁵ Legislation introduced or carried over into each General Assembly session since then, however, has proposed to apply the augmented estate concept to both real and personal property.¹⁶

III. REPEAL OF DOWER AND CURTESY

The augmented estate statute removes from the Code all provisions for inchoate dower and curtesy rights after the end of 1990. The current rules will remain applicable, however, to dower and

shall be construed to include "dower").

12. See VA. CODE ANN. § 64.1-16 (Repl. Vol. 1987), which allows the surviving spouse to renounce the decedent's will and claim one-third of "the surplus of the decedent's personal estate mentioned in § 64.1-11" if the decedent left surviving children or their descendants and one-half of that surplus if no children or their descendants survived. VA. CODE ANN. § 64.1-11 (Repl. Vol. 1987) defines the surplus as the decedent's personal estate "subject to the provisions of . . . [§ 64.1-151.1 et seq.] after payment of funeral expenses, charges of administration and debts."

13. *But cf.* *Bickers v. Shenandoah Valley Nat'l Bank*, 197 Va. 145, 88 S.E.2d 889 (1955) (wife's elective share included nonprobate property that her husband had transferred with a retained lifetime right to reacquire).

14. S.B. 337, Va. Gen. Assembly, 1983 Sess. (1983).

15. See INTERIM REPORT OF THE JOINT SUBCOMMITTEE STUDYING VIRGINIA LAWS AS IT [SIC] AFFECTS TRANSFERS OF PROPERTY UPON DEATH TO THE GOVERNOR AND GENERAL ASSEMBLY OF VIRGINIA, (S. Doc. No. 9 (1984)) [hereinafter 1984 STUDY REPORT].

16. See H.B. 801, Va. Gen. Assembly (1986-87); H.B. 858 (1988-89); H.B. 808, S.B. 233 (1990).

curtesy interests vested before January 1, 1991, and to the rights of creditors and other interested parties in any real estate subject to dower or curtesy. The rights of those parties and the procedures for assigning, valuing, and enforcing those rights will continue to be governed by pre-1991 law.¹⁷

Several related concepts will cease to apply once dower and curtesy are repealed. For example, the sole and separate equitable estate form of title will no longer protect property from a spouse's claims, even if title vested before 1991.¹⁸ The rules of jointure, by which a decedent could force his surviving spouse to elect as to dower, also will be replaced by the new elective share system. A "quarantine" rule, however, will continue to apply to the principal family residence. Until the surviving spouse's rights in the residence have been determined and satisfied by agreement of the parties or by a final court order, the spouse may continue to occupy the house and curtilage without liability for rent, repairs, taxes, or insurance.¹⁹

The repeal of dower and curtesy should simplify land transfers by eliminating the need to secure the transferor's spouse's consent²⁰ and avoiding the creation of vested interests in a surviving spouse. At the same time, it will eliminate two protective features of the current system: (1) an effective veto power for the surviving spouse over the transferor's lifetime conveyances and (2) the surviving spouse's priority over the transferor's creditors. Under current law, after an individual has acquired an estate of inheritance in real property during the marriage, he cannot unilaterally defeat his spouse's inchoate dower or curtesy rights and convey clear title to a third party. It is unlikely that individuals newly freed of this

17. See VA. CODE ANN. § 64.1-19.2 (Cum. Supp. 1990).

18. Through an apparent oversight, the General Assembly failed to repeal VA. CODE ANN. § 57-47 (Repl. Vol. 1986), which provides that equitable separate estates "may be created as heretofore and shall be held in all respects according to the provisions of the instrument by which they are created and with all the powers conferred by such instrument." Even if this provision were construed to retain the concept of equitable separate estates in Virginia law in some form, the augmented estate system should be unaffected. At common law, the equitable separate estate served only to keep a woman's property free from her husband's debts and control and to protect it from curtesy claims. See generally 1 J. MINOR, INSTITUTES OF COMMON AND STATUTORY LAW 345-64 (4th ed. 1891). As curtesy and dower have been repealed and the augmented estate statute does not contain an exception for equitable separate estates, such property should be included in the decedent's augmented estate and thus should be subject to the surviving spouse's claims even if the decedent now holds title in equitable separate estate form.

19. See VA. CODE ANN. § 16.1-16.4 (Cum. Supp. 1990).

20. But see *infra* text accompanying notes 61-64.

constraint by the 1990 amendments will rush to impoverish themselves by conveying away their land without adequate consideration. In a few cases, however, they may sell property and spend the proceeds or incur debts that effectively reduce their estate size.

The surviving spouse's elective share of the augmented estate also will not have the priority over the decedent's creditors that dower and curtesy interests currently enjoy. A spouse's dower or curtesy interest is set off before any payment to general creditors whose claims arose during the marriage; but the spouse's share of the augmented estate will be based upon only the net estate remaining after all debts are paid.²¹ To provide a minimum level of protection for the surviving spouse of a debtor, the General Assembly has increased the amount of the homestead allowance from \$5,000 to \$10,000 as of January 1, 1991.²² When combined with a family allowance that can be \$6,000 or more²³ and an exempt property allowance of up to \$3,500,²⁴ the homestead allowance enables the spouse to shelter \$19,500 or more from the decedent's creditors. The surviving spouse may obtain the exempt property and family allowances in addition to a share of the augmented estate, but the homestead allowance is available only in lieu of an augmented estate election.²⁵

IV. COMPOSITION OF THE AUGMENTED ESTATE

In addition to simplifying land titles, the new system seeks to restore traditional safeguards against disinheritance by "augmenting" the probate estate that is subject to the surviving spouse's election. At the same time, it attempts to protect the decedent's estate plan by charging against the elective share most property that the spouse derived from the decedent through any

21. See VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990).

22. See *id.* § 64.1-151.3.

23. See *id.* § 64.1-151.1. This section allows the spouse or minor children to claim "a reasonable allowance out of the estate for their maintenance during the period of administration." *Id.* This allowance has priority over all claims against the estate, but it may not continue for more than one year if the estate is inadequate to discharge all allowed claims. The family allowance may not exceed \$6,000 or the equivalent in periodic installments without court approval. See *id.* § 64.1-151.4 (Repl. Vol. 1987).

24. See *id.* § 64.1-151.2 (Cum. Supp. 1990) (allowing the spouse to claim up to \$3,500 of personal property, with priority over all claims against the estate, but not over the family allowance).

25. See *id.* § 64.1-151.3. For a more detailed discussion of these statutory allowances, see Johnson, *Wills, Trust and Estates: Annual Survey of Virginia Law* 24 U. RICH. L. REV. 827 (1990).

combination of probate and non-probate means. This prevents a surviving spouse who already has received a fair share of the decedent's total estate from claiming an additional share of the probate assets.

The revised rules for spouses' elections bear at least a superficial resemblance to the current will renunciation system. The fraction that the surviving spouse may claim is one third if the decedent left children or their descendants surviving; and it increases to one half if there are no surviving children or descendants.²⁶ These continued references to the spouse's traditional fractions of the personal estate,²⁷ however, conceal three important changes. First, the augmented estate system extends renunciation rights to every surviving spouse, regardless of whether the decedent left a will.²⁸ The current statutory scheme applies only to testate decedents and provides no protection in intestacy.²⁹ Second, because real estate now will be treated like personal property, a childless decedent's spouse will be able to claim half of the real estate rather than the smaller one-third share available under current dower and curtesy rules.³⁰ Third, the statute calculates the spouse's share by reference to property that was not subject to traditional elective rights. The process of identifying those assets is at the heart of the new system.

The starting point of the augmented estate definition is the traditional probate estate, that is, "the estate, real and personal, after payment of allowances and exemptions elected [the exempt property and family and homestead allowances] . . . , funeral expenses, charges of administration and debts."³¹ To that fund of probate property, the statute adds the value of two distinct groups of non-probate assets: (1) property that the decedent transferred to or for the benefit of a third party and (2) property that the surviving spouse derived from the decedent.³² The former category represents arrangements that are essentially will substitutes or

26. VA. CODE ANN. § 64.1-16 (Cum. Supp. 1990).

27. Compare *id.* § 64.1-16 (Repl. Vol. 1987) (effective through Dec. 31, 1990) with *id.* § 64.1-16 (Cum. Supp. 1990) (effective Jan. 1, 1991).

28. *Id.* § 64.1-13 (Cum. Supp. 1990).

29. *Id.* § 64.1-13 (Repl. Vol. 1987). This section authorizes the surviving spouse to "renounce the will," and has no counterpart in the statutory provisions for intestate succession. See generally *id.* §§ 64.1-1 to -11 (Repl. Vol. 1987 & Cum. Supp. 1990).

30. *Id.* §§ 64.1-16, -16.1 (Cum. Supp. 1990).

31. *Id.* § 64.1-16.1.

32. *Id.* §§ 64.1-16.1(3), -16(1).

that significantly deplete the probate estate, thus reducing the fund over which the spouse otherwise would have election rights under current law. Its inclusion in the augmented estate is consistent with the statutory goal of protecting the spouse against disinheritance.³³ In contrast, the latter category represents property that the decedent already has transferred to the surviving spouse by non-probate means. Its inclusion (and subsequent charging against the spouse's share of the estate) prevents a spouse who already has received ample provision from disrupting the decedent's estate plan by claiming more.

A. *Inclusionary Rules*

Property transferred to a third party may be brought into the decedent's augmented estate only if it was transferred during the marriage and only to the extent it was transferred without adequate and full consideration.³⁴ By excluding transfers made before the marriage, the statute allows an individual to make gifts, for example, to children of a prior marriage without fear that those arrangements will be upset by the claims of a spouse whom the transferor marries later. By ignoring transfers for adequate consideration, the statute seeks to reach only transactions that effectively reduce the decedent's estate value. Subject to those threshold requirements, the augmented estate will include the value of prop-

33. The 1984 legislative study committee considered proposals to exclude transfers to minor children and charitable beneficiaries. See 1984 STUDY REPORT, *supra* note 15, at 18. It appears to have concluded, however, that (1) the proposed exceptions were inconsistent with the primary goal of protecting the surviving spouse and (2) transfers to other beneficiaries enjoyed sufficient protection through the rules exempting outright transfers of up to \$10,000 per year and all transfers before the marriage and the rule limiting a third party's contribution liability to the value of the property (or proceeds) remaining in his possession at the decedent's death. See *infra* text accompanying notes 35, 41-44, 80-92.

34. VA. CODE ANN. § 64.1-16.1(3) (Cum. Supp. 1990). The concept of "an adequate and full consideration in money or money's worth" was borrowed from federal transfer tax law. See I.R.C. §§ 2043, 2512(b) (West 1989). The federal estate tax regulations require the parties to have dealt in good faith. See Treas. Reg. § 20.2043-1(a) (1988). These regulations also declare that a relinquishment of marital rights in the decedent's property or estate is not a consideration in money or money's worth. See *id.* § 20.2043-1(b). The estate tax regulations, literally applied, might appear to impose estate tax on the difference between the full fair market value and the consideration received in any transfer. The federal gift tax regulations, however, make clear that a transfer will be considered made for full and adequate consideration—regardless of the actual value received—if it occurs "in the ordinary course of business . . . [and is] bona fide, at arm's length, and free from any donative intent." *Id.* § 25.2512-8. This protection from an unintended tax result of a bad bargain should carry over into the Virginia augmented estate rules both through the "adequate and full consideration" language and the "bona fide purchaser" exception.

erty transferred to anyone other than the surviving spouse if (1) the decedent retained lifetime rights to possess or enjoy the property or to receive the income from it,³⁵ (2) the decedent retained a lifetime revocation power or a power to consume, invade, or dispose of principal for his own benefit, whether the power is exercisable alone or only in conjunction with another person,³⁶ (3) the decedent and another person owned the property with right of survivorship, (4) the decedent had transferred the property *causa mortis*,³⁷ or (5) the aggregate value of the decedent's transfers to that donee had exceeded \$10,000 in a calendar year, although in this last case only the excess value of the transfers is included.

Although derived from the U.P.C., the first three of these rules may seem especially familiar to tax practitioners who deal regularly with the estate tax provisions of the Internal Revenue Code.³⁸ Like their tax code counterparts, these rules will add the value of transferred property to the decedent's estate if he has retained substantial rights after the transfer. The augmented estate statute, however, does not contain all of the "finespun tests of the Federal Estate Tax Law."³⁹ While Virginia practitioners and courts may

35. The decedent must have retained such rights "for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death." VA. CODE ANN. § 64.1-16.1(3)(a) (Cum. Supp. 1990). Retaining rights for a period of years therefore is permissible if the decedent does not die within the specified period. On the other hand, retaining rights that would end, for example, two hours before his death would cause the transfer to fall within this rule.

36. This power likewise will cause the property to be includable in the augmented estate only if the decedent retained such rights "for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death." *Id.* § 64.1-16.1.

37. A gift *causa mortis* is "a gift of personal property made by a party in the expectation of death then imminent, and upon the essential condition that the property shall belong to the donee in case the donor dies as expected, leaving the donee surviving him, and the gift is not in the meantime revoked." 2 G. SMITH, HARRISON ON WILLS AND ADMINISTRATION 152 (3d ed. 1985).

38. Compare VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990) with I.R.C. § 2036 (West 1989) (transfers with retained life estate) and I.R.C. § 2037 (transfers taking effect at death) and I.R.C. § 2038 (revocable transfers) and I.R.C. § 2040 (joint interests), and I.R.C. § 2041 (powers of appointment).

39. UNIF. PROB. CODE § 2-202 comment, 8 U.L.A. 77, 78 (1983). The drafters explained: "[T]he objectives of the tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate." *Id.*

The Virginia provisions refer to the same retained rights mentioned in the U.P.C. but add Internal Revenue Code language to define the period for which the rights must be retained. The Virginia statute, however, does not contain the intricate Internal Revenue Code provisions governing, for example, retention of voting rights, see I.R.C. § 2036(b) (West 1989); retained interests in business enterprises, see I.R.C. § 2036(c); *de minimis* reversionary in-

draw analogies from the federal principles, therefore, it is entirely possible that a separate body of state law will evolve.

The other inclusionary rules actually owe more to federal tax law than to the U.P.C. If the decedent retained no rights in the property, the U.P.C. augmented estate includes gratuitous transfers to third parties only to the extent that (1) the donee received more than \$3,000 of value in a calendar year and (2) the transfer occurred within two years of the decedent's death.⁴⁰ The drafters' comments indicate that they intended to prevent the decedent from defeating the surviving spouse's election rights through last-minute transfers from his probate estate.⁴¹ The Virginia provision including *causa mortis* transfers fulfills this purpose; but the statute goes still further, including in the augmented estate all annual transfers in excess of \$10,000 per donee regardless of how long before death the transfers occurred.⁴² This is closely analogous to the federal estate tax rule that takes taxable gifts into account in determining the decedent's federal estate tax liability.⁴³

In addition to property the decedent transferred to third parties, the augmented estate will include certain property that the surviving spouse owned or acquired at the decedent's death. Such property will be counted if it (1) is derived from the decedent, (2) is acquired by any means other than testate or intestate succession, (3) is acquired without a full consideration in money or money's worth, and (4) is not tangible personal property.⁴⁴ It is immaterial whether the transfers were made before or during the marriage.

terests, see I.R.C. § 2037(a)(2); tenancies by the entirety and qualified joint interests of husband and wife, see I.R.C. § 2040(a), (b); or ascertainable standards or "five and five" powers, see I.R.C. § 2041(b).

40. UNIF. PROB. CODE § 2-202(1)(iv), 8 U.L.A. 76 (1983).

41. *Id.* comment, 8 U.L.A. at 77.

42. This departure from the U.P.C. format was intentional. The 1984 legislative committee debated the policy merits of a time limit on the outright transfers that could be included in the augmented estate. See 1984 STUDY REPORT, *supra* note 4, at 19. During consideration of House Bill 808, the Senate defeated a floor amendment that would have excluded from the decedent's augmented estate all outright transfers made more than five years before his death.

43. See I.R.C. § 2001(b) (West 1989). One aspect of the Virginia rule is slightly more inclusive in that the augmented estate might include the excess value of certain amounts transferred to pay educational or medical expenses even though those transfers would be ignored for federal gift and estate tax purposes. See *id.* §§ 2503(e), 2001(b). On the other hand, the augmented estate would not include the first \$10,000 of the value of future interests transferred even though those transfers would be subject to federal gift tax and would be included in computing the federal estate tax. See *id.* §§ 2503(b), 2001(b).

44. See VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990).

Thus the decedent's transfers to relatives or friends before the marriage will not count against his augmented estate; but he will receive the benefit of any provisions he may have made then for the person who later would become his spouse.

Direct lifetime gifts from the decedent to the surviving spouse and non-probate transfers at the decedent's death are included in the augmented estate. The statute does not specify what other property is "derived from the decedent." The U.P.C. provision on which it is based, however, applies the term expansively to include such property as a beneficial interest in a living trust created by the decedent, certain life insurance and annuity proceeds attributable to the decedent's premium payments, the commuted value of pension or retirement payments (other than social security) attributable to the decedent's employment or disability, survivorship or pay-on-death property, and community property interests.⁴⁵

Along with property derived from the decedent that the spouse owned or acquired at the decedent's death, the augmented estate will include like property that the spouse transferred to third parties without adequate consideration. Just as the decedent cannot defeat the spouse's claims by depleting the estate during lifetime, so the spouse cannot gain an increased share of the estate by giving away property that the decedent already had provided for the spouse's support. The statute includes in the decedent's augmented estate (and ultimately charges against the spouse's share) all property that would have been included in the surviving spouse's augmented estate if the order of deaths had been reversed.⁴⁶

B. *Exclusionary Rules*

But for several important statutory exceptions, the third-party transfer rules described above would bring into the augmented es-

45. UNIF. PROB. CODE § 2-202, 8 U.L.A. 76-77 (1983).

46. See VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990). This Virginia provision is broader than its U.P.C. counterpart because it does not require the original transfer from the decedent to the spouse to have been for less than full consideration. A literal reading of the Virginia provision therefore would include in the augmented estate (and charge against the surviving spouse's elective share) the value of property that the spouse originally acquired from the decedent by a purchase or an exchange for other property of equal value. This result would be inconsistent with the overall theory of the augmented estate. The U.P.C. consideration language appears to have been omitted inadvertently when the Virginia drafters were converting the U.P.C. provision into the two separate Virginia categories of included spousal property.

tate the excess value of practically all gifts to third parties during the marriage. These major exceptions are essential to understanding the augmented estate system, as they narrow the scope of the statute and can provide significant planning opportunities. They exclude from the augmented estate (1) certain property irrevocably transferred before 1991, (2) certain property transferred with the spouse's written consent or joinder, (3) certain property acquired by the decedent during the marriage and maintained as separate property, and (4) all property transferred to a bona fide purchaser.

Pre-1991 transfers are excluded only to the extent that the transfers are irrevocable on January 1, 1991.⁴⁷ It appears that the decedent may retain any other right, including a right to income or a special power of appointment, so long as he does not retain a revocation power. This exception, however, does not apply to property transferred to the surviving spouse. It is logical that a decedent who had adequately provided for his surviving spouse before 1991 should not be penalized because of the timing of his transfers. While less defensible on spousal protection grounds, the exclusion of other pre-1991 irrevocable transfers may be justified by considerations of fairness and practicality: in the typical situation, an individual simply will not have records of most pre-1991 transfers because they had no continuing tax or estate administration effect under the law in force then.

The consent or joinder exception also is grounded in basic principles of fairness: as to transfers made under the new system, the surviving spouse should not be able to reclaim property after having approved or participated in its transfer. Written consent or joinder is required, but neither the statute nor the U.P.C. provides further guidance on the permissible methods of showing consent or joinder. The spouse's signature on the deed of gift or other transfer instrument would suffice, absent evidence of fraud, duress, undue influence, or other similar circumstances. It is unclear what other methods of consent or joinder would be effective and whether the spouse must show his approval contemporaneously or instead can

47. While the U.P.C. includes no comparable grandfather clause or specific transition rule for its augmented estate provisions, the general U.P.C. effective date provision declares that "an act done before the effective date in any proceeding and any accrued right is not impaired by this Code." UNIF. PROB. CODE § 8-101(b)(4), 8 U.L.A. 565 (1983). As to any court proceeding affected by the U.P.C., the court may determine that "the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code." *Id.* § 8-101(b)(2).

do so after the transfer.⁴⁸

The separate property exception removes from the augmented estate the value of all property, its income or proceeds, that anyone other than the surviving spouse transferred to the decedent by gift, will or intestate succession during the marriage.⁴⁹ In order for it to qualify for the exception the decedent must have maintained it as separate property. The statute does not define the term "separate property," and the U.P.C. contains no comparable exception.

In the absence of direct authority, the augmented estate concept of separate property probably will be based upon the separate property rules of Virginia's equitable distribution statute, which determines the property rights of divorcing spouses.⁵⁰ The differences in the effect of property classification under the two statutory systems, however, ultimately may cause the augmented estate rules to diverge from their equitable distribution counterparts. Under the equitable distribution rules, a two-step process deter-

48. Would the spouse's signature on the decedent's gift tax return, electing for federal gift tax purposes to split a gift to an individual, qualify as consent or joinder for augmented estate purposes? What is the effect of the couple's subsequent filing of a joint income tax return claiming a contribution deduction for the decedent's gift to charity? Those actions may show the spouse's acquiescence or they may show only that, having been unable to prevent the decedent from transferring the assets in question, the spouse did not want to lose any gift tax or income tax benefits that might result.

49. See VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990).

50. See *id.* § 20-107.3(A)(1) to (3) (Repl. Vol. 1990). New equitable distribution rules for distinguishing between separate property and marital property and identifying "hybrid" property went into effect July 1, 1990. See *id.* § 20-107.3. Income from separate property is marital property if attributable to personal efforts that either spouse applied directly to the property. Any increase in the value of separate property during the marriage will be marital property only to the extent that (i) marital property contributed to the increase or (ii) the significant personal efforts of either spouse resulted in substantial appreciation of the property. Personal efforts are "labor, effort, inventiveness, physical or intellectual skills, creativity, or managerial activity and promotional or marketing activity, applied directly to the separate property." *Id.* § 20-107.3(A)(3)(e).

For example, if the decedent had inherited a rental house during the marriage that remained titled in his sole name, the status of the rent received would depend upon several factors. If the decedent had turned management over to a rental agent who was responsible for collecting the rents, making repairs, and otherwise dealing with the property, and if he deposited the rent checks into an account in his sole name, the income would remain separate property. On the other hand, if the decedent took an active role in the property management or if he deposited the rent checks in a joint account with his spouse, the income would be classified as marital property for equitable distribution purposes. If he used marital funds to pay the mortgage or to make improvements to the property, a proportionate part of any increase in the property value would be marital property. Participation by the decedent or the spouse in property management would not cause any portion of the increase to be classified as marital property unless the personal efforts of either party were "significant" and the resulting increase in value was "substantial."

mines the effect of each asset. The court first classifies the asset as separate or marital property; and then it determines whether either spouse is entitled to a monetary award based upon the value of the marital property.⁵¹ The court has no such discretion under the augmented estate statute; instead, assets classified as marital property will be included automatically in the augmented estate and thus will be subject to the spouse's right of election.

Despite any apparent similarities, the separate property exception under the augmented estate rules is considerably narrower than its equitable distribution counterpart. The augmented estate exception applies only to separate property that either party acquired during the marriage, while the equitable distribution definition covers all separate property of each party, regardless of when acquired.⁵² The surviving spouse therefore could claim one third or one half of all separate property that the decedent brought to the marriage (*e.g.*, a prior gift or inheritance from a relative) unless the parties had executed a written agreement to the contrary during the decedent's lifetime.⁵³

Transfers to a bona fide purchaser automatically are excluded from the augmented estate.⁵⁴ The bona fide purchaser exception does not depend upon a showing that the decedent received adequate and full consideration. Thus if a decedent sells an asset to an unrelated third party in an arms' length transaction, he should not have to be concerned that it would be included in his augmented estate for failure to have received a higher price. The rule also does not seem to require him to give up all rights in the property transferred. It appears that the decedent could sell a present partial interest or a deferred interest such as a remainder to a third party under like circumstances and remove a proportionate part of the value (in the case of a partial interest) or the entire value (in the case of a remainder interest) from his augmented estate.⁵⁵

The U.P.C. defines a bona fide purchaser as "a purchaser for

51. *See id.* § 20-107.3(D), (E).

52. *Compare id.* § 64.1-16.1 (Repl. Vol. 1987) with *id.* § 20-107.3(A)(1) (Repl. Vol. 1990).

53. *See infra* text accompanying notes 97-98.

54. *See* VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990).

55. *But see generally* *Gradow v. United States*, 897 F.2d 516 (Fed. Cir. 1990), *aff'g* 11 Ct. Cl. 808 (1989). *Gradow* held that an individual who sold a remainder interest in property did not succeed in removing the property from her estate for federal tax purposes because she received only the actuarial value of the remainder interest. The court found that "adequate consideration" for this purpose would have been the full value of the property.

value in good faith and without notice of any adverse claim,"⁵⁶ and "[a]ny recorded instrument on which a state documentary fee is noted" is prima facie evidence that the transferee was a bona fide purchaser.⁵⁷ Since the Virginia statute does not include that particular U.P.C. provision, it appears that the parties—and ultimately the courts—will have to define bona fide purchaser status by reference to other similar contexts.⁵⁸

As the augmented estate system is designed in part to prevent an individual from defeating his spouse's statutory rights, the Virginia law of fraudulent conveyances may provide a helpful analogy. There the Supreme Court of Virginia has said repeatedly that transferees will be considered bona fide purchasers despite family relationships or prior business dealings with the transferor, so long as they have paid consideration and do not have actual or constructive knowledge or notice of any fraud by the transferor.⁵⁹ This approach is consistent with the dual goals of the new augmented estate system: to protect the surviving spouse from attempts to defeat his statutory rights and at the same time to encourage free transferability of property interests.

Many purchasers of assets from married individuals initially may be reluctant to rely on the bona fide purchaser exception out of fear of incurring additional expense to defend against a spouse's later claims. To avoid being made participants in an equity suit by the spouse after the decedent's death, they may seek to have the spouse join in the conveyance. Those who are willing to risk being made a party to such a suit⁶⁰ may find that their title insurance companies are not so inclined. If it becomes standard practice in Virginia for purchasers to require the spouse's written consent in

56. UNIF. PROB. CODE § 2-202(3), 8 U.L.A. 77 (1983).

57. *Id.*

58. At least one other Uniform Act has included a definition of the term "bona fide purchaser." The UNIF. MARITAL PROPERTY ACT, 9 U.L.A. 97 (1987), declares that a bona fide purchaser is "a purchaser of property for value who: (i) has not knowingly been a party to fraud or illegality affecting the interest of the spouses or other parties to the transaction; (ii) does not have notice of an adverse claim by a spouse; and (iii) has acted in the transaction in good faith." *Id.*, 9 U.L.A. at 120.

59. *See, e.g.*, *Bank of Pocahontas v. Ferimer*, 161 Va. 36, 41, 170 S.E. 591, 592 (1933); *Neff v. Edwards*, 148 Va. 616, 627, 139 S.E. 291, 294 (1927).

60. Actual liability other than the expense of litigation may be minimal. Even if the transferor was not a bona fide purchaser, the spouse must prove that the price fell short of "adequate and full consideration in money or money's worth." The transferor must pay no more than one third or one half of that shortfall, plus interest at the statutory rate. Moreover, he will be liable only to the extent that he still has the property or its proceeds.

order to avoid the bona fide purchaser issue, the surviving spouse will have at least as extensive a veto power over the decedent's lifetime conveyances as the dower and curtesy rules currently allow.⁶¹

Early versions of the U.P.C. did not contain the bona fide purchaser exception; instead, the drafters added it in 1975 in response to similar concerns expressed by the Colorado Bar Association. Its purpose was to provide comfort to Colorado conveyancers, who had been insisting that the transferor's spouse join in every deed so that the spouse could not claim after the transferor's death that the augmented estate should include any part of the value because the consideration had been insufficient. At the same time, the U.P.C. drafters created the presumption of bona fide purchaser status arising from a recorded instrument on which a state documentary fee or transfer tax has been paid.⁶²

Whether or not Virginia adopts a similar presumption, the bona fide purchaser exception must be liberally construed if the goal is to allow individuals to transfer property freely during lifetime. Transferees will not rely on that exception unless they can be assured that their knowledge of the transferor's marital status or marital agreement, their own family relationship with him, or their history of prior business dealings with him will not disqualify them from bona fide purchaser status. Transferees also must be assured that they will qualify as purchasers whenever they have engaged in a voluntary transaction that is not a gift and that they need furnish only such consideration as would support a simple contract, whether through transferring other property or through other means such as extending or promising to extend credit or securing or partially or totally satisfying a pre-existing claim. Such liberal construction seems consistent with the apparent legislative intent; if the goal instead was to give the spouse an effective veto power over the transferor's conveyance plans, then the bona fide purchaser exception would have been superfluous.

The decedent's augmented estate likewise will not include any tangible personal property transferred to the surviving spouse, regardless of its nature or value. The rule acknowledges two every-

61. For example, the spouse's consent might be required not only in transfers of real estate, but also in transfers of business interests and other personal property, particularly if the business includes real estate.

62. See UNIF. PROB. CODE § 2-202 comment, 8 U.L.A. 77, 80 (1975).

day realities: most people do not keep records of the jewelry, clothing and other personal items they give to their spouses; and they do not make such gifts to create an estate that the spouse can use for later support. The exception, however, is not so narrowly drawn. It applies not only to gifts of clothing and jewelry, for which formal records usually are not available, but also to items such as automobiles, where the date of gift, if not the donor's identity, can easily be established through state records. Moreover, it applies to all gifts of tangibles regardless of value, so that a pair of fifty dollar cuff links and a million dollar work of art are equally excludable. To that extent, at least, the tangibles exception appears overbroad.⁶³

If only transfers after 1990 are considered, the product of the inclusionary and exclusionary rules in section 64.1-16.1 of the Code generally will give the surviving spouse a larger elective share than the corresponding U.P.C. provisions would produce. The Virginia exclusion of separate property acquired during the marriage may reduce the size of some augmented estates. The exclusion of all tangibles that the decedent transferred to the surviving spouse, however, will increase the amount of other augmented estate property the spouse may claim from the decedent's transferees because it excludes some of the spouse's own property that otherwise would be charged against his elective share. As noted above, moreover, the U.P.C. estate includes gifts made within two years of death, to the extent that they exceed \$3,000,⁶⁴ the amount of the gift tax annual exclusion available when the U.P.C. model provision was drafted.⁶⁵ The Virginia definition includes all gifts in contemplation of death, regardless of amount; it also includes all gifts in excess of the current federal annual gift tax exclusion amount, regardless of how long before the decedent's death they were made.

The U.P.C. provision also specifically excludes life insurance, ac-

63. The exclusion for tangibles has no U.P.C. counterpart. The Virginia drafters appear to have intended to exclude only tangibles that the decedent gave to the spouse and the proceeds of those gifts, without also excluding tangibles that the spouse subsequently acquired as the proceeds of real estate or intangible personal property received from the decedent. The wording of the exclusion, however, might support a broader interpretation.

64. The U.P.C. drafters' comment observes that "a person can during his lifetime make outright gifts to relatives and they are not included in [the augmented estate] unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death)." *Id.*, 8 U.L.A. at 78.

65. I.R.C. § 2503(b) (1977). The exclusion was increased to \$10,000 per donee for transfers made after December 31, 1981. *See id.* § 2503(b) (West 1989) as amended by Pub. L. No. 97-34, 97th Cong., 95 Stat. 172 (1981).

cident insurance, joint annuities, and pensions payable to anyone other than the surviving spouse.⁶⁶ In contrast, the Virginia definitions of "estate" and "property" expressly include insurance policies, retirement benefits (exclusive of Social Security), annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent the decedent owned, was vested in, or could control them at his death or at the time he irrevocably transferred them.⁶⁷

V. VALUATION PRINCIPLES

Property included in the augmented estate generally is valued as of the decedent's death. Property that the decedent irrevocably transferred during lifetime, however, is valued either at the decedent's death or the time that the transferee first came into possession or enjoyment, whichever is earlier.⁶⁸ Thus, date-of-death values will apply to all property the decedent has transferred to anyone other than the surviving spouse, while retaining a right to revoke the transfer or a right to enjoy the property or receive its income. The valuation date of jointly-owned property will depend upon whether the joint owner has come into possession or enjoyment during the decedent's lifetime. Property that is the subject of a *causa mortis* gift will be valued as of the decedent's death because the transfer potentially will be revocable until that time. Transfers included in the augmented estate solely because they exceed \$10,000 per year, however, will be valued as of the transfer date; any appreciation before the decedent's death will escape the reach of the statute.

Executors and administrators generally use federal estate tax principles to value estate assets,⁶⁹ although state law contains different valuation rules for specific purposes such as calculating state and local probate taxes.⁷⁰ The personal representative, the surviving spouse, and the affected transferees must realize, however, that

66. UNIF. PROB. CODE § 2-202(1), 8 U.L.A. 76 (1983). The drafters' comment reveals that life insurance was not included "because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse." *Id.* comment, 8 U.L.A. at 78.

67. See VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990).

68. VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990).

69. See generally I.R.C. § 2031 (West 1989); Treas. Reg. § 20.2031-1(b) (1988).

70. See VA. CODE ANN. § 8.1-1714 (Cum. Supp. 1990) (allowing the personal representative to calculate state and local probate taxes using the city or county assessed value of real estate).

neither the federal estate tax rules nor the state exceptions will apply in all cases to the augmented estate computation. Augmented estate assets not irrevocably transferred to a third party during the decedent's lifetime must be valued as of the decedent's death, while the personal representative may elect to value the entire estate for transfer tax purposes as of an alternate valuation date, six months after the decedent's death.⁷¹ The augmented estate system also contains no counterpart to the federal rule allowing the personal representative to value the decedent's farm or other real estate at its current use rather than its highest and best use for estate tax purposes.⁷²

The rules for valuing life estates, remainder interests, deferred payments, and estates for years also diverge from the federal system, relying instead on the valuation tables in title 55 of the Code.⁷³ As a result, the parties cannot always rely on federal estate tax values to determine the augmented estate value even if a federal estate tax return is due; instead, they may have to perform a second set of calculations for some or all of the assets, using the valuation principles of the augmented estate system.

Having determined the value of the augmented estate, the surviving spouse then must compare one-third or one-half of that to-

71. See I.R.C. § 2032 (West 1989) (allowing the personal representative to use the six-month alternate valuation if the result will be a smaller gross estate and thus a reduced federal estate liability).

72. See *id.* § 2032A.

73. See VA. CODE ANN. § 64.1-16.1 (Cum. Supp. 1990). This section requires life estates and remainder interests to be valued "in the manner prescribed in Article 2 (§ 55-269.1 et seq.) of Chapter 15 of Title 55" and deferred payments and estates for years to be discounted to present value using "the interest rate [8%] specified in § 55-269.1." *Id.* These tables contain factors for determining the value of life estates, estates for years, and other similar interests and for commuting the value of a surviving spouse's dower or curtesy rights. They are based upon an 8% assumed interest rate and upon factors established in 1973 using mortality data available then. See 1973 Va. Acts 491. In contrast, the personal representative must determine the federal estate tax value of those interests by using special IRS tables based upon current mortality data and assumed interest rates that change from month to month. See I.R.S. Notice 89-60, 1989-1 C.B. 800, for the applicable tables and a detailed description of the valuation method.

The state and federal tables can yield strikingly different results. For example, the federal estate tax value of a ten-year interest in property is 63.49% using the 10.6% federal interest rate in effect for November 1990, while the corresponding augmented estate value is 53.68% using the assumed 8% state interest rate. Likewise, the life estate of a 60-year-old person is valued at 78.68% for federal estate tax purposes and 67.37% for state property law purposes as of November 1990. The disparity increases with the age of the life tenant, so that the federal estate tax and state property law values of a life estate in an 80-year-old are 48.87% and 35.58%, respectively.

tal value (depending on whether the decedent left surviving descendants) with the total value of all augmented estate assets that the surviving spouse received during lifetime or that were designated for the surviving spouse at the decedent's death. If the value of the elective fraction exceeds the aggregate value of the spouse's augmented estate assets, the spouse will have a financial incentive to claim an elective share.

VI. ELECTION PROCEDURE

Though the magnitude of the elective share may have changed for 1991, the method of claiming it closely resembles the current will renunciation procedure.⁷⁴ The spouse must make the election either in person before the court having jurisdiction over administration of the decedent's estate or in a written election signed and acknowledged by the spouse and presented to the court or the clerk for recordation. As under current law, the statute requires no particular form of election; but a written election must be acknowledged or proved in a manner that would make an instrument recordable under title 55 of the Code.

Despite the procedural similarities, the augmented estate system will force the surviving spouse to exercise election rights more quickly. The elective share will be available only if the surviving spouse makes the election within six months from the later of (i) the date of probate, if the decedent was testate, or (ii) the date of qualification, if the decedent was intestate.⁷⁵ Current law, which applies only to testate estates, allows the surviving spouse to renounce the will and claim a statutory share of the estate at any time within one year after probate.⁷⁶ In most estates that are subject to federal estate tax, the shorter deadline will allow the executor to determine what share is passing to the surviving spouse before the estate tax returns are due.⁷⁷ On the other hand, requiring an election up to three months before the estate tax return is

74. Compare VA. CODE ANN. § 64.1-13, -14 (Cum. Supp. 1990) (effective Jan. 1, 1991) with *id.* §§ 64.1-13, -14 (Repl. Vol. 1987) (effective through Dec. 31, 1990).

75. See *id.* § 64.1-14 (Cum. Supp. 1990). The election period does not begin at the decedent death; therefore, the time does not start to run until there is either a probate or a qualification.

76. See *id.* § 64.1-14 (Repl. Vol. 1987).

77. The federal and Virginia estate tax returns are due nine months after the decedent's death. See I.R.C. § 6075(a) (West 1989); VA. CODE ANN. § 58.1-905 (Cum. Supp. 1990). Unless probate or qualification is delayed more than three months after the decedent's death, therefore, the deadline for the spouse's election will occur before either return is due.

due may force the spouse to act before all of the assets have been located or valued.

The spouse may obtain an extension of the six-month election period if a suit is pending in equity to determine the amount or value of property the spouse will receive under the will or the composition or value of the augmented estate. The spouse must seek the extension from the circuit court having jurisdiction during the original six-month period. Upon the spouse's petition, the court is required to extend the election period to provide him "reasonable time, not to exceed ninety days" to claim an elective share after a final order has been entered in the pending suit.⁷⁸

The shortened election period at first may appear likely to force a surviving spouse to file suit to protect election rights even if estate administration is proceeding normally. It is not unusual for the personal representative still to be locating and valuing assets and identifying liabilities six months after probate or qualification. To assume that the process will have been completed even sooner—in time for the surviving spouse to receive the information and evaluate it before the six-month period expires—may be unrealistic. The shorter election period that the augmented estate system allows might seem likely to force into court many estate matters that could have been settled privately under the previous one-year renunciation rule. In that event, even if the parties ultimately can agree on a suitable division, the estate will have incurred expense and publicity that would have been avoidable if the election period were longer.

As a practical matter, however, the shorter period should not have that effect. Unlike the current renunciation system, which prohibits the renouncing spouse from taking any property under the will, the augmented estate system appears to impose no penalty on a spouse who claims an elective share. In effect, any spouse who thinks he might obtain a larger portion of the estate by claiming an elective share can make the election to preserve his rights. Further investigation may reveal, for example, that the augmented estate value is smaller than he believed, that the decedent's other transferees no longer have the property or its proceeds, or that the charging provisions will prevent him from receiving additional property. It appears that he simply can keep the property he otherwise is entitled to receive and refrain from pursuing his claim to

78. See VA. CODE ANN. § 64.1-14 (Cum. Supp. 1990).

an elective share. While the election will become part of the public record, no suit in equity will be necessary unless there is actual uncertainty about the augmented estate value or composition, or the spouse cannot obtain the necessary information through less formal methods.

VII. LIABILITY FOR THE ELECTIVE SHARE

The spouse who claims an elective share will receive a total of one third (or one half) of the augmented estate. To the extent the spouse already has received, or is entitled to receive, augmented estate assets, their value will be applied first to reduce the elective share liability.⁷⁹ This approach avoids unnecessarily disrupting the decedent's estate plan to the extent that he has made provisions for the surviving spouse through lifetime gifts, bequests or devises in his will, or non-probate transfers at death. The surviving spouse cannot avoid this rule by refusing to accept those provisions; assets that pass or have passed to the spouse are charged against his share even if he has disclaimed them.⁸⁰

Liability for the balance of the spouse's elective share does not fall solely on the probate estate, although that fund might be the most convenient source for payment because it is under the personal representative's control. The U.P.C. drafters and the Virginia General Assembly have decided instead that each of the decedent's transferees should bear a proportionate part of the elective share burden.⁸¹ The statute therefore requires the elective share liability to be "equitably apportioned among the recipients of the aug-

79. See VA. CODE ANN. § 64.1-16.2(A) (Cum. Supp. 1990).

80. The drafters' comment on the corresponding U.P.C. provision says it was designed to "have the effect of protecting a decedent's plan as far as it provides values for the surviving spouse. The spouse is not compelled to accept the benefits devised by the decedent, but if these benefits are rejected, the values involved are charged to the electing spouse as if the devises were accepted." UNIF. PROB. CODE § 2-207 comment, 8 U.L.A. 87 (1983).

81. The U.P.C. drafters' comments do not discuss this point. Appendix C of the 1984 STUDY REPORT lists arguments in favor of each approach. Placing the entire liability on the probate estate would be "[e]asier than attempting to trace the property or proceeds of a tainted transfer" and "[f]airer to innocent transferees." 1984 STUDY REPORT, *supra* note 4, at 19. On the other hand, spreading the burden among all recipients would provide a more accurate augmented estate definition by ensuring that the recipient of a non-testamentary transfer would have a direct interest in defending that transfer against inclusion in the augmented estate. It also would more closely approximate the decedent's overall estate plan than would placing the entire burden on the residuary beneficiaries because it would give all beneficiaries the same portions of the total estate that the decedent intended them to have. See *id.*

mented estate in proportion to the value of their interests therein."⁸²

The surviving spouse must receive interest at the legal rate from the decedent's death until the elective share liability is satisfied.⁸³ This interest liability also is apportioned ratably among the recipients of augmented estate property. It is based solely on the statutory rate, without consideration of the amount of income that the estate or recipient has earned from the property.⁸⁴

The surviving spouse, the decedent's personal representative or any party in interest may petition the circuit court having jurisdiction over the estate administration for a determination of (i) the total amount of the elective share and (ii) the ratable portion attributable to each person who is liable for contribution. The petition may seek relief against fewer than all of the interested parties, but no one may be required to contribute any greater amount than he would have had to contribute if the petitioner had secured relief from all possible parties.⁸⁵

The statute contains tracing provisions allowing the surviving spouse to recover a portion of the elective share from the original transferees from or appointees of the decedent and from persons who received the property from them by gift or by testate or intestate succession. Each original and successor transferee from the decedent is liable only to the extent that he still has the property or its proceeds.⁸⁶ Thus an individual who has received augmented estate property from the decedent can avoid liability to the surviving spouse by disposing of the property.⁸⁷ The lengths to which courts will go to trace the property through the proceeds of successive

82. VA. CODE ANN. § 64.1-16.2(B) (Cum. Supp. 1990).

83. *See id.* § 64.1-16. The current legal interest rate is 8%. *See id.* § 6.1-330.53 (Repl. Vol. 1988).

84. A surviving spouse who has renounced the decedent's will is entitled to a proportionate share of income earned on all probate personalty during administration. *See Alexandria Nat'l Bank v. Thomas*, 213 Va. 620, 194 S.E.2d 723 (1973).

85. *See VA. CODE ANN.* § 64.1-16.2(D) (Cum. Supp. 1990).

86. *See id.* § 64.1-16.2(C). This statutory reference to "the property or its proceeds" indicates that the parties should use a strict tracing approach that focuses on the disposition of the particular asset in question rather than a more general accession-to-wealth approach that would focus on whether the transferee has, for example, a higher net worth than he had before the transfer.

87. Although the statute does not specify when the disposition must occur in order to extinguish liability to the surviving spouse, the statutory purpose of protecting the spouse will be dangerously compromised if the courts allow transferees to avoid contribution liability by disposing of the property or its proceeds after the decedent's death.

sales or exchanges remain unclear.

Even if the surviving spouse cannot recover from particular transferees who have disposed of their property, however, he still may have an incentive to identify that property so that it can be included in the augmented estate. Including such unreachable property in the augmented estate will have no effect if the decedent has made no provision for the surviving spouse. But if any property of the surviving spouse is included in the augmented estate, adding unreachable assets can increase the amount of all beneficiaries' liability, even though their proportionate shares remain unchanged.⁸⁸

Any person liable for a portion of the elective share may choose in writing from among four methods of satisfying his contribution and interest liability.⁸⁹ First, he may convey to the surviving spouse a portion of the augmented estate property equal in value to his liability on the date he files his contribution statement. If he chooses that method and his liability exceeds the total property value, he may convey his entire interest in the property to the surviving spouse in full satisfaction. Second, he may pay the value of his liability in cash. Third, he may pay his liability in any other property acceptable to the surviving spouse. Finally, he may elect to use any combination of the proceeding three methods; but the value conveyed and paid must equal his total liability. The contributor must specify his choice in a writing filed with the circuit court within thirty days after the order establishing his liability becomes final and not subject to further appeal. If he does not do so, the court will enter an order specifying the payment method.⁹⁰

88. For example, assume that Wife's augmented estate is \$600,000, including \$50,000 of lifetime gifts to Husband, \$150,000 of excess lifetime gifts to children, other individuals and charities who had spent the entire gift amount, and a \$400,000 probate estate. If the gifts to others were not included in Wife's augmented estate, Husband's elective share would be one-third of \$450,000 or \$150,000. The excess liability after taking into account Wife's lifetime gifts to him would be \$100,000, which would be apportioned equally to the two children. If the ir retrievable lifetime gifts to third parties were included in the augmented estate, however, Husband's elective share would be one-third of \$600,000 or \$200,000. The \$150,000 excess liability would be apportioned among the estate beneficiaries according to their interests, allocating 4/11ths (\$200,000/\$550,000) to each child and 3/11ths (\$150,000/\$550,000) to the other beneficiaries. As a result, the children's total liability would increase to slightly more than \$109,000. The potential gain to Husband will depend on the relative values of the augmented estate assets and the amount of his property that is included. Of course, he also must balance the potential gain (\$9,000 in this example) against any costs he may incur to show that the other gifts were includable in the augmented estate.

89. See VA. CODE ANN. § 64.1-16.2(E) (Cum. Supp. 1990).

90. See *id.*

These liability provisions let the transferee decide whether to return a share of the augmented estate asset to the surviving spouse or instead to satisfy his contribution liability in cash.⁹¹ The transferee also may propose any other payment method he thinks reasonable, but he actually may pay by that method only if the surviving spouse approves. The spouse appears to have absolute discretion whether to approve such a proposal or instead to force a cash payment or a reconveyance of part of the original property. If the transferee does not choose a payment method, the statute places no limits on the court's discretion to order any payment method or combination of methods. The U.P.C. drafters' comments are silent on this issue because these detailed Virginia payment provisions have no direct U.P.C. counterpart.

VIII. BURDENS OF PROOF

The U.P.C. drafters acknowledge the apparent complexity of the augmented estate system and the likelihood that litigation may be required to determine the spouse's interest.⁹² Nevertheless, they maintain that it will not complicate the administration of most estates and, in fact, will reduce the number of instances in which the spouse will claim an elective share.⁹³ The Virginia statute should

91. A valuation question arises if the transferee elects to convey an interest in the asset to the spouse. The value of the augmented estate and thus the spouse's elective share is calculated as of the decedent's date of death or some earlier time. *See supra* text accompanying note 69. Should the same values be used to determine the portion that the transferee must convey or should the property interest be revalued as of the date on which the transferee files his payment election with the court? The latter approach seems more nearly consistent with the traditional rule that an electing spouse is entitled to the dollar value of the elective share rather than to interests in specific assets. *See Morriss v. Garland*, 78 Va. 215, 225 (1883). It also seems consistent with the special statutory rule allowing the transferee to satisfy his contribution liability by conveying his entire property interest if the value of the interest on the filing date is less than the liability.

92. "The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted." UNIF. PROB. CODE § 2-202 comment, 8 U.L.A. 79 (1983).

93. *See generally id.* Part 2 general comment, 8 U.L.A. 74.

Although the system described herein may seem complex, it should not complicate administration of a married person's estate in any but very unusual cases. The surviving spouse rather than the executor or the probate court has the burden of asserting an election, as well as the burden of proving the matters which must be shown in order to make a successful claim to more than he or she has received. Some of the apparent complexity arises from Section 2-202 [VA. CODE ANN. § 64.1-16.1], which has the effect of compelling an electing spouse to allow credit for all funds attributable to the decedent when the spouse, by electing, is claiming that more is due. This feature should serve to reduce the number of instances in which an elective share will be asserted.

have a similar effect. The third-party transfer rules, while by no means all-inclusive, will serve as a deterrent to individuals who might seek to disinherit their spouses. The rules for transfers to the spouse will deter spouses who have received significant shares from seeking to claim an additional share of property that the decedent's estate plan designates for other beneficiaries.

The number of elections made under the new augmented estate system will depend in large part on who bears the burden of proof. Under both the U.P.C. and the Virginia statute, a surviving spouse who claims a share of the augmented estate has the burden of showing what non-probate assets should be included.⁹⁴ As to each challenged asset, the spouse must show not only that the transfer was one of the types includable in the augmented estate but also that (i) it occurred during the marriage, (ii) the decedent did not receive adequate consideration, and (iii) the transferee was not a bona fide purchaser.⁹⁵

The burdens of proof under the Virginia statute and the U.P.C. appear to diverge at this point. The U.P.C. presumes that property owned by the surviving spouse at the decedent's death or previously transferred by the surviving spouse was derived from the decedent, except to the extent that the surviving spouse can show it was derived from another source.⁹⁶ The Virginia statute, however, can be read to impose on the personal representative or beneficiaries the burden of proving what items of the spouse's current or former property should be included in the augmented estate. Without the benefit of the U.P.C. presumption, the personal repre-

Id. (emphasis in original).

94. See *supra* note 93 and accompanying text. The spouse may have personal knowledge of some joint property interests, income rights, reserved powers of appointment or other indicia of property that should be included in the decedent's augmented estate; and he may be able to identify other assets from entries on the decedent's income tax or gift tax returns. If the estate must file a federal estate tax return, the spouse also may be able to identify assets from the personal representative's records. In nontaxable estates and in instances where the personal representative declines to make his records available, however, the surviving spouse may have to bring a suit in equity and seek information through more formal discovery means.

95. The bona fide purchaser exception should be broadly interpreted. Where the decedent received nominal consideration or none at all, proving that the transferee was not a bona fide purchaser may not be difficult. Where any significant consideration passed to the decedent, however, the spouse should be required to show, at a minimum, that a personal (non-business) relationship existed between the decedent and the transferee and that the transferee knew the decedent was attempting to circumvent the spouse's elective rights. See *supra* text accompanying notes 54-62.

96. See UNIF. PROB. CODE § 2-202, 8 U.L.A. 79 (1983).

sentative may face a more difficult task than the spouse faced in proving what third-party transfers should be included. First, most people do not keep detailed records of interspousal transfers. Second, the estate includes all of the decedent's gifts to the spouse, regardless of when made. Any records that once may have existed might not survive.

The U.P.C. presumption is consistent with the general philosophy that a surviving spouse who seeks to claim a larger share than the decedent left to him should have to prove that the amount the decedent provided was inadequate. It also places the burden of proving the source of the spouse's property on the only remaining party with first-hand knowledge: the spouse. Adding such a presumption to the Virginia statute should reduce the risk of litigation and lighten the administrative burden of the personal representative substantially without prejudicing the spouse's rights to any significant extent.

IX. LOSS OR RELINQUISHMENT OF ELECTION RIGHTS

Under well-established principles, the surviving spouse's actions during the decedent's lifetime can prevent election rights from arising at the decedent's death. The spouse can waive election rights along with any other rights in the decedent's property by entering into a binding pre-marital⁹⁷ or marital⁹⁸ agreement. In addition, a surviving spouse who wilfully deserted or abandoned the decedent is denied any interest in the decedent's estate, including a right to an elective share, if the desertion or abandonment continued until the decedent's death.⁹⁹

In all other cases, the surviving spouse's right to claim an elective share becomes absolute at the decedent's death. The right, however, is personal to the surviving spouse; and it will be lost if he dies without having exercised it.¹⁰⁰ If the surviving spouse be-

97. See VA. CODE ANN. §§ 20-147 to -153 (Repl. Vol. 1990) (allowing prospective spouses to enter into agreements to settle their property rights and other personal rights and obligations in contemplation of marriage). Among the permissible subjects of such premarital agreements are "[t]he rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located" and "[t]he disposition of property upon . . . death." *Id.* § 20-150.

98. See *id.* § 20-155 (authorizing married persons to enter into agreements governing their respective rights and obligations to the same extent that prospective spouses could do so).

99. See *id.* § 64.1-16.3 (Cum. Supp. 1990).

100. The statute requires the surviving spouse to claim a share of the augmented estate by appearing before the court in person or by signing an instrument that is presented for

comes incapacitated, the current Virginia renunciation rule should apply: the spouse's guardian or committee will have no power to make the election, but the circuit court with jurisdiction over administration of the decedent's estate will decide whether an election is in the spouse's best interest and, if so, will claim the elective share on the spouse's behalf.¹⁰¹ A competent surviving spouse will lose all rights to an elective share by failing to make a valid election within the prescribed time period, including any extensions. Unlike the current renunciation rule,¹⁰² however, it would seem that the spouse should not lose election rights by accepting the benefits provided in the decedent's will, as the election right represents a claim for additional non-probate assets and is not inconsistent with a decision to accept probate property passing under the will.¹⁰³

X. CONCLUSION

The confusing and often inconsistent system of dower and curtesy rights—as well as such related arcana as jointure and equitable separate estates—will disappear from the Code in 1991, although the transitional rule will retain vestiges of the old system. The will renunciation system likewise will be completely transformed. Though extremely complex after two centuries of development, these systems were familiar to most practitioners, who have grown comfortable with the basic concepts over the years.

The General Assembly has replaced those statutory provisions with another complex system—the augmented estate. Practitioners will need time to become comfortable with the new system. It includes many familiar concepts, some carried over from the dower, curtesy and renunciation rules and some borrowed from federal transfer tax laws. The inter-relation of these concepts in the new system, however, may produce unexpected results on such issues as separate property classification and bona fide purchaser status.

The augmented estate system is intended to simplify real estate transfers and to restore to married individuals certain protections that have been diminished by changes in society over the years.

recording. It contains no mechanism for the spouse's personal representative to make the election after the spouse's death. See generally *id.* § 64.1-13.

101. See *First Nat'l Exchange Bank v. Hughson*, 194 Va. 736, 74 S.E.2d 797 (1953).

102. See generally *Simmons v. Simmons*, 177 Va. 629, 15 S.E.2d 43 (1941).

103. See *supra* text following note 79.

The elimination of dower and curtesy is a substantial step toward the former goal; and, both by including in the augmented estate certain non-probate transfers to third parties and by charging the spouse's share with property received, the statute seems well suited to accomplish the latter. In both areas, however, the statute may require legislative or judicial adjustment. For example, subjects for future consideration may include the extent of the bona fide purchaser and separate property concepts, the scope of the tangible personal property exception, the question of consideration for certain transfers to the spouse, and the burden of proving those transfers.

Other questions may arise as practitioners begin to use these concepts in actual estate planning and administration. For the rest of 1990, each practitioner should seek to become familiar with both the new system that will become effective in 1991 and the planning opportunities that may be available this year. While some may disagree with the underlying policy decisions, the augmented estate rules appear well-suited to implement those policies. The emphasis now must be on understanding and working within the new system.