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SPOUSAL DISINHERITANCE: THE NEW YORK SOLUTION--A CRITIQUE OF FORCED SHARE LEGISLATION

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COMMENTS

SPOUSAL DISINHERITANCE: THE NEW YORK SOLUTION — A CRITIQUE OF FORCED SHARE LEGISLATION

I. INTRODUCTION

For centuries, courts and legislatures have attempted to devise the perfect solution to the problem of spousal disinheritance with little success. Today, the typical forced share statute, which "guarantees" a surviving spouse a fraction of the deceased spouse's estate, contains loopholes facilitating evasion. In most jurisdictions providing for an elective share, testators may circumvent the legislative policy against spousal disinheritance by distributing their property during their lifetimes thereby depleting the probate estate. To compound the problem, current statutes remain unresponsive both to the actual needs and the equitable claims of the surviving spouse in calculatingg the amount due. This comment will review the history of forced share protection, focusing upon New York's judicial and legislative responses as well as the Uniform Probate Code augmented estate model. Although the New York statutory scheme and the Code approach represent highly innovative attempts to provide a more equitable solution than presently exists under most state laws, neither scheme goes far enough in balancing the equities to insure a fair result in each instance of disinheritance. The fixed and fractional nature of the elective share precludes such results. A more flexible standard better designed to balance the equities in each case should be adopted.

II. HISTORICAL BACKGROUND

Legal protection of a surviving spouse against disinheritance is neither new to our society nor to this century.[1] The history of the

1. *See* Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 982-83 (1977).

protection dates as far back as seventh century Saxon law,[2] which entitled a widow to an outright one-third share of all property, personalty as well as realty, which her husband owned at the time of his death.[3] "Dower," the term assigned to the widow's protection, however, did not initially act as a protection against disinheritance (the purpose served by the protection today); rather it sought to protect the widow against the enforcement of feudal incidents by the King.[4] Under the laws of primogeniture, the eldest son was a man's only heir.[5] Thus a man's widow and younger children faced becoming destitute upon his death.[6] During the period of feudalism, dower represented "the community concern for the economic protection and social standing of the surviving family."[7] Although its protection clearly conflicted with the then important policy of transferability of land as well as the "feudalistic ties of wealth and power to land ownership,"[8] the King's lords, husbands and fathers alike, successfully bargained for it in the Magna Carta and subsequent charters.[9] Interestingly, in the early feudal pe-

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2. *Id.* at 983 (citing C. KENNY, THE HISTORY OF THE LAW OF ENGLAND AS TO THE EFFECTS OF MARRIAGE ON PROPERTY 21-93 (1879)).

3. Kenny, *supra* note 2, at 36. The period between the seventh and thirteenth centuries, however, saw "the gradual diminution of the widow's interest from a one-third outright interest to the more limited life estate [which] corresponded with the general practice of Saxon testators—apparently preoccupied with insuring their wives' chastity after their death—to terminate their spouse's estates in devised land upon remarriage." Kurtz, *supra* note 1, at 983. The life estate, with termination upon remarriage of the wife, moreover, "reflected prejudices against second marriages fostered by the Catholic Church." *Id.* Under early English common law, any property belonging to a woman became her husband's upon marriage. A married woman had no right to hold property in her own name. *See* 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 527 (5th ed. reissue 1968). Although the widow became destitute without dower, a widower was the absolute owner of all his wife's property during coverture and after her death. *See* Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1051 (1966). Consequently, a wife was powerless to defeat her husband's right to her property once the marriage took place. *Id.*

4. Kurtz, *supra* note 1, at 984. By the fifteenth century, five identifiable forms of dower had evolved: (1) dower by the common law; (2) dower by the custom; (3) dower *ad ostium ecclesiae* (church door dower); (4) dower *ex assensu patris* (apportioning lands of the husband's father); and (5) dower *de la pluis beale* (when a man died leaving a son under the age of fourteen). *Id.* at 984-85 & n.25.

5. *See* 2 W. BLACKSTONE, COMMENTARIES 208 (1766). Parliament abolished the law of primogeniture centuries later with the administration of Estates Act, 1925, 15 & 16 Geor. 5, ch. 23, § 45.

6. W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 60 (1960).

7. *Id.*

8. Kurtz, *supra* note 1, at 986.

9. *Id.* at 983. *See also* W. MACKECHNIE, MAGNA CARTA 215-16 (2d ed. 1914). Other countervailing factors important during the feudal period included: "the primary function of land in supplying troops for armies; . . . the interest of the lord in wardship of land where the heir was an infant; and . . . the ancient principle that succession to land depended on blood relationship." MACDONALD, *supra* note 6, at 60.

riod, some of the principal proponents of dower were the King's lords, who sought to protect their wives from a likely eviction by the King when the lord died. The Charter of 1217 provided that "the widow shall have assigned to her for her dower the third part of all of her husband's land which he had in his lifetime."[10] Over the years, the common law dower protection evolved into a life estate in a third of all lands of which the husband had been seised during coverture whether in fee simple or in fee tail.[11] Neither inter vivos transfer, whether by gift or by sale, nor devise could defeat the wife's rights, which were "inchoate" or the equivalent of an expectancy until the actual death of her husband.[12] Further, a wife's dower remained free of the claims of the deceased husband's creditors.[13]

Over the centuries, however, land became "more an article of commerce and less a symbol of status and power"[14] and the interference of dower with the free alienability of land became intolerable.[15] Consequently, husbands frequently employed devices to circumvent dower. Of these, the holding of lands in joint tenancy with survivorship rights and the trust to preserve contingent remainders became the most common.[16] Finally, England abolished dower altogether in 1833 by enacting legislation that enabled a husband to defeat his wife's dower by inter vivos conveyances or by will, leaving dower only in the event of intestacy.[17] Another hundred years passed before Parliament enacted widow's protection in the form of family maintenance legislation, the Inheritance Act of 1938, also termed the Family Provision

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10. Kurtz, *supra* note 1, at 983 (quoting W. MACKECHNIE, MAGNA CARTA 216 (2d ed. 1914)). The grant of a one-third interest in the husband's realty represented a not insignificant share as land constituted the lord's principal source of wealth. MACDONALD, *supra* note 6, at 60.

11. Kurtz, *supra* note 1, at 984 (citing T. LITTLETON, TENURES § 36). *See also* MACDONALD, *supra* note 6, at 60 n.8.

12. *See* MACDONALD, *supra* note 6, at 60 n.8. Upon the death of the husband, the wife's right became known as "consummate" dower. *Id.*

13. *See id.* at 61. *See also* Kurtz, *supra* note 1, at 985. Lifetime conveyances of realty could be effected so long as the wife joined in the grant. F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW ch. VII, § 2, at 421-23 (2d ed. reissue 1968).

14. Kurtz, *supra* note 1, at 987.

15. *Id.*

16. *Id.* at 987. The land trust conveyed to the purchaser both a life estate in the real property and a remainder in fee. An intervening estate in trust, not capable of ever becoming possessory, was created to prevent merger. *Id.* The purchaser, therefore, received a life estate to which no dower could attach because it did not constitute an inheritable interest. *Id.*

17. Dower Act, 3 & 4 Will. 5, c. 105, § 4 (1833). *See also* MACDONALD, *supra* note 6, at 61 n.9; Fratcher, *supra* note 3, at 1052.

Act.[18] Thus, for a period of over one hundred years, English law left the widow dependent entirely upon the testamentary plan of the deceased.[19]

Of the five forms of dower,[20] the original American colonies only recognized dower by the common law and it alone became part of the common law throughout most of the United States.[21] As the nation grew, however, the same problems that led to the demise of dower in England[22] plagued the American states and evoked legislative responses.[23] The responses came primarily in two forms: community property[24] and forced or elective share[25] legislation. By the 1930's, all but ten states, excluding community property jurisdictions, supplanted the dower right by forced or elective share legislation.[26] Recognizing that in twentieth century America a husband's wealth more likely found its way into *personal* property such as stock and bank accounts, the typical forced share statute gave the widow the right to elect against her husband's will in favor of a fractional share in all personal property that her husband owned at the time of his death.[27] After

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18. Inheritance (Family Provision) Act, 1938, 1 & 2 Geo. 6 c. 45, as amended by the Intestates' Estates Act, 1951, 15 & 16 Geo. 6, 1 Eliz. 2, c. 64. Instead of a fixed fraction of decedent's estate, the British statute provides that the surviving spouse's share is determined solely upon the basis of need. *Id.*

19. *See* MACDONALD, *supra* note 6, at 61 & n.10.

20. *See supra* note 4.

21. 1 C. SCRIBNER, A TREATISE ON THE LAW OF DOWER 19, 23-58 (2d ed. 1883); *see also* Kurtz, *supra* note 1, at 988.

22. *See supra* text accompanying notes 14-15. *See also* Fratcher, *supra* note 3, at 1054, stating that "[c]ommon-law dower is a serious obstacle to free commerce in land and a grave threat to security of titles. A man whose wife is hostile, missing, or mentally incompetent cannot convey an acceptable title to his land or mortgage it to finance improvements."

23. Kurtz, *supra* note 1, at 989.

24. In community property jurisdictions, a surviving spouse is entitled to one-half of the community or "marital" property which includes all property acquired during coverture except that which was acquired by gift, devise, or descent which remains "separate." Property owned prior to the marriage also remains the separate property of the spouse. Community property jurisdictions are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

25. Besides dower and the elective share, other forms of family protection include homestead allowances which enable the widow, during the remainder of her life, and the children, until they reach the age of majority, to occupy the deceased husband's homestead to the exclusion of any rights of the decedent's creditors. Further protections include family support allowances to extend throughout probate administration and exemption of certain personal property of the deceased up to a fixed monetary amount. Thus a widow and the children of the deceased must not entirely depend upon dower or forced share for protection from destitution.

26. Fratcher, *supra* note 3, at 1055.

27. *Id. See also* Kurtz, *supra* note 1, at 990 which states,

Forced share statutes, which set aside a share of the deceased spouse's probate

passage of the Married Women's Property Acts, most states passed legislation making the statutory right of election available to both spouses.[28] The advent of the Married Women's Property Acts, which authorized married women to own and acquire property in their own right, freed widows form their dependency on the dower right as their sole means of protection once their husbands died.

From this brief history several important factors emerge. First, dower-like protection has not only survived for thirteen centuries but in most of the United States it has survived in much the same form in which it originated under Saxon law; i.e., a fractional share of the deceased's property outright. That this protection has lasted throughout centuries evinces surprise, particularly considering the impediments to free alienability of real property which dower imposed and, more recently, a married woman's new found property rights under the Married Women's Property Acts. Obviously throughout the centuries, lawmakers have deemed the widow's dower protection of great importance. Yet particular note may be taken that lawmakers in our society continue to consider the protection necessary in view of the evolving status of married women in terms of their right to hold property in their own name and their capacity to earn and acquire property. No longer must women depend totally on their husbands for financial security. Indeed, the economic realities of our present culture necessitate in most instances a double income per family. Thus perhaps the most important reason why our lawmakers continue to require protection for the widow against disinheritance relates to the different functions served by common law dower and the statutory forced share. As previously noted, dower originated as a safeguard for the widow against eviction from the estate once the lord died.[29] As it evolved in both England and the United States, dower became recognized first as a support protection. Thus, today, legislatures design forced or elective share statutes to protect the widow or, in states that afford the protection to both husband and wife, the "surviving spouse" from dis-

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estate for the surviving spouse without regard to the provisions of the decedent's will, may protect the spouse disinheritance to a greater extent than dower if the decedent owned substantial personal property at death. Dower or dower-like interests are advantageous to a surviving spouse only if the deceased spouse owned real property during the marriage. To the extent decedent's wealth is substantially measured by personal property, dower or dower-like interests provide little or no protection for the surviving spouse.

Id.

28. Fratcher, *supra* note 3, at 1055.

29. *See supra* text accompanying notes 4-7.

inheritance.[30] Few reported cases exist, however, of a wife's disinheritance of her husband. Despite the present egalitarian treatment under the law, in practice common law dower and forced share statutes primarily serve the interests of the wife.[31]

Differences between dower and the statutory forced share exist. The critical distinction lies in the ways in which a testator may defeat the rights of the surviving spouse. Under common law dower a husband cannot defeat his wife's rights by inter vivos transfers of property acquired during the marriage if the wife did not join in the transaction. Most forced share statutes, however, measure the surviving spouse's share by the size of the deceased spouse's probate estate; i.e., by the decedent's property *at the time of death*.[32] Under the forced share statutes, a wife possesses only an expectancy interest in her husband's property. Her statutory right is therefore subject to her husband's inter vivos conveyances. Although enacted with the purpose of providing protection against disinheritance,[33] the typical forced share statute fails to protect the surviving spouse against lifetime transfers, thereby enabling the testator to defeat the legislative purpose of preventing disinheritance. The result has been that "interspousal disinheritance, whether through lifetime transfers or by will, does occur and . . . the remedy of forced share statutes is not without disadvantage."[34] The following discussion will relate the typical means employed to defeat the forced share and judicial responses to such attempts.

III. DISINHERITANCE THROUGH LIFETIME TRANSFERS

Most states presently protect a surviving spouse against testamentary disinheritance by statutorily providing a guaranteed right to elect a fractional share of the decedent's probate estate in lieu of any testamentary bequests.[35] Unfortunately, however, most of these statutes have proven ineffective as a spouse can typically defeat the purpose of forced share statutes through the use of inter vivos conveyances or will substitutes. Use of testamentary substitutes results in a depleted probate estate base from which the surviving spouse may elect her share.[36]

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30. Kurtz, *supra* note 1, at 990.

31. *See supra* notes 11-12 and accompanying text.

32. Kurtz, *supra* note 1, at 990.

33. Another purpose behind statutory share legislation was to promote free alienability of land. *See infra* notes text accompanying notes 41-44.

34. Kurtz, *supra* note 1, at 992.

35. Comment, *Protection of the Base for the Surviving Spouse's Election: The Search For An Alternative*, 7 CAP. U. L. REV. 423, 423 (1978) [hereinafter cited as *Protection*].

36. *Id.*

The will substitutes most frequently employed include Totten trusts, revocable inter vivos trusts, inter vivos gifts, joint tenancy, joint bank accounts, life insurance policies, employee benefit plans, joint and survivor annuities, and P.O.D. accounts. Testators use these devices regularly as most will substitutes enable testators to retain a life interest in a transferred asset while assuring its exclusion from their probate estates.[37] Because of the ineffectiveness of forced share legislation, the responsibility has fallen on the courts to balance testators' rights to dispose of their property as they wish with the need to protect the surviving spouse.[38] Forced share legislation has produced contradictory and inadequate judicial responses.[39]

A. *New York: A Legislative and Judicial Illustration*

New York's judicial and statutory responses to the problems of disinheritance are particularly appropriate as a referent because New York has produced the most authoritative case law and innovative statutory responses to the issue of interspousal disinheritance.[40] The enactment of the New York Decedent Estate Law in 1930 abolished the common law protections of dower and curtesy, the husband's counterpart to dower,[41] in favor of the statutory right of election provided by section 18.[42] The legislature intended the statute to provide the surviving spouse with greater protection than was previously available under common law[43] while at the same time removing the dower "restraints on the conveyance of real estate with a view of giving re-

37. *Id.*

38. *Id.* The historical concern for the free alienability of land has been supplanted by the concern for the right of testators to dispose of their porperty upon death as they wish. Courts legislatures balance the latter interest against the need or desire for spousal protection against disinheritance.

39. *Id.*

40. *See, e.g.*, Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937) (illusory transfer test); *In re* Halpern's Estate, 303 N.Y. 33, 100 N.E.2d 779 (1941) (reality of transfer test).

41. N.Y. REAL PROP. LAW §§ 189, 190 (McKinney 1981).

42. N.Y. DECEDENT ESTATE LAW § 18. *See also* § 83 (making the spouses reciprocal heirs thereby providing for equal treatment under the election statute). A unique feature of the early New York forced share statute was the restriction on the right of election in the event that the testator had established a testamentary trust for the life benefit of his/her spouse in an amount equal to or greater than the intestate share. *Id.* § (1)(b). The Decedent Estate Law viewed the decedent's creation of such a trust as adequately providing for the spouse and, therefore, barred the right of election under such circumstances. *Id.* The provision was later carried over to the revised statute and still exists under the present law. *See* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (c)(1)(D) (McKinney 1981). *See infra* note 138 and accompanying text.

43. *See* Powers, *Illusory Transfers and Section 18*, 32 ST. JOHN'S L. REV. 193, 194-95 (1958). The New York legislature declared the intent of the statute to be "to increase the share of a surviving spouse in the estate of a deceased spouse . . . by an election against the

alty, as nearly as possible, the liquidity and ease of disposition now characteristic of personal property."[44] The "glaring inconsistencies"[45] in the new legislation, which enabled a spouse to defeat the surviving spouse's share by inter vivos conveyances, soon became apparent, however, and necessitated the formulation of judicial doctrines by which disinheriting inter vivos conveyances were to be judged.

As litigation arose evidencing the weaknesses of section 18, the burden of salvaging the intent and integrity of the statutory forced share fell on the New York courts. Disinherited widows, whose clever husbands had used will substitutes to circumvent the intent of section 18, turned to the courts to give meaning to the statutory forced share by resolving whether the value of inter vivos transfers should be included in the elective base. Over the years the courts developed three purportedly distinct tests: (1) the "intent" or "motive" test[46] under which proof of the deceased's intent to defeat his spouse of her statutory share is dispositive of invalidity; (2) the "illusory transfer" test[47] under which proof of the decedent's retention of excessive control over the transferred property renders the transfer invalid as against the widow's claim; and (3) the "reality of the transfer" test[48] under which the transfer will be upheld as effective against the widow's claim "if it has inter vivos validity aside from any questions of the rights of the

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terms of the will of the deceased spouse thus enlarging property rights of such surviving spouse." 1919 N.Y. Laws c. 229, § 20.

44. 1928 LEG. DOC. NO. 70, COMBINED REPORTS 12, 149 (quoted in Powers, *supra* note 43, at 195).

45. Commentators have noted that New York's decedent Estate Commissioners, who held the duty in 1928 to investigate defects in the then current estate law, knew of the flaw in the proposed Section 18 elective share legislation. *See* Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 518 (1970); Powers, *supra* note 43, at 194-95. Powers suggests that the Commissioners knew of the threat posed by gratuitous inter vivos transfers which could be effectuated to evade the policy underlying the statute. *Id.* at 194. The purpose of the new legislation was to remedy the "glaring inconsistency in our law which compels a man to support his wife during his lifetime [yet] permits him to leave her practically penniless at his death," 1928 LEG. DOC. NO. 70, Combined Reports, Commission to Investigate Defects in the Laws of Estates 18 (reprinted 1935) (*quoted in* Powers, *supra* note 43, at 194). By failing to provide for restraints on lifetime transfers of property, Section 18 became from its inception "a statute that lacks effective provision for preserving the 'increased benefits' which it explicitly promises to the surviving spouse." Powers, *supra* note 43, at 195. Professor Clark states that although "the proponents of the legislation . . . were most certainly aware of the flaw in their new prescription . . . [u]ndoubtedly, the draftsmen proceeded on the basis of a calculated risk that no man would be so vengeful toward his wife as to strip away all his substance in order to disinherit her." Clark, *supra* note 45, at 518.

46. *See* Bodner v. Feit, 247 A.D. 119, 286 N.Y.S. 814 (1936).

47. *See* Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

48. *See In re* Halpern's Estate, 303 N.Y. 33, 100 N.E.2d 120 (1951).

widow."[49] While the intent test found its origins elsewhere,[50] the illusory transfer and the reality tests both originated in the New York Court of Appeals in the leading cases of *Newman v. Dore*[51] and *In re Halpern's Estate*,[52] respectively. New York's judicial remedies to the widow's statutory right of election gained wide acceptance by courts of other jurisdictions faced with the failings of similar legislation.[53] The following discussion will trace the development of the judicial elective share remedies in New York courts.

1. The Judicial Responses

In the case of *Bodner v. Feit*,[54] the court confronted the issue of whether a husband could circumvent the legislative policy of Section 18 by conveying all of his property during his lifetime in such a manner as to allow him to retain control over such "transferred" property for life. In *Bodner*, the second wife of the decedent claimed that her husband's conveyance three months before his death of a substantial portion of both his real and personal property to his four children from a prior marriage were made in fraud of her rights under the Decedent Estate Law.[55] The court held in favor of the wife and interpreted Section 18 as conferring rights that are "substantial and . . . intended to enlarge rather than restrict the rights of a wife in her hus-

49. MACDONALD, *supra* note 6, at 120.

50. *See id.* at 98-119.

51. 275 N.Y. 371, 9 N.E.2d 966 (1937).

52. 303 N.Y. 33, 100 N.E.2d 120 (1951).

53. For cases following the illusory transfer test, see Lane v. Palmer First Nat'l Bank & Trust Co., 213 So.2d 301 (Fla. App. 1968); Watson v. St. Petersburg Bank & Trust Co., 146 So.2d 383 (Fla. App. 1962); Burnet v. First Nat'l Bank, 12 Ill. App.2d 514, 140 N.E.2d 362 (1957); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945), *overruled*, Sullivan v. Bulkin, 390 Mass. 864, 460 N.E.2d 672 (1984); Ascher v. Ross, 27 Misc.2d 889, 213 N.Y.S.2d 927, *aff'd*, 13 A.D.2d 943, 218 N.Y.S.2d 592, *appeal denied*, 14 A.D.2d 671, 219 N.Y.S.2d 943 (1961); President & Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S.2d 375 (1939), *mod. on other grounds*, 260 A.D. 174, 21 N.Y.S.2d 232 (1940); MacGregor v. Fox, 280 A.D. 435, 114 N.Y.S.2d 286 (1952), *aff'd*, 305 N.Y. 576, 111 N.E.2d 445 (1953); Burns v. Turnbull, 266 A.D. 779, 41 N.Y.S.2d 449 (1943), *reargued*, 267 A.D. 986, 48 N.Y.S.2d 453, *order resettled on rehearing*, 268 A.D. 882, 49 N.Y.S.2d 538 (1944), *appeal denied*, 294 N.Y. 809, 62 N.Y.S.2d 240, *aff'd*, 294 N.Y. 889, 64 N.E.2d 785 (1945); Schnakenberg v. Schnakenberg, 262 A.D. 234, 28 N.Y.S.2d 841 (1941); Marine Midland Trust Co. v. Stanford, 256 A.D. 26, 9 N.Y.S.2d 648, *aff'd*, 281 N.Y. 760, 24 N.E.2d 20 (1939); Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944), *overruled*, Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961); Land v. Marshall, 426 S.W.2d 841 (Tex. 1968); *In re* Steck's Estate, 275 Wis. 290, 81 N.W.2d 729 (1957).

54. 247 A.D. 119, 286 N.Y.S. 814 (1936).

55. *Id.* at 120, 286 N.Y.S. at 815.

band's property."[56] The court further stated that the widow's rights "may not be destroyed by transfers under which the grantor retains the control and benefit of his property during life."[57] Thus the First Department found the degree of control retained by the husband a critical factor in evaluating the validity of the transfer. Yet the First Department did not employ solely the control test. The court further stressed that "husbands and wives . . . may not . . . strip themselves of their property for the *sole purpose* of depriving those that the statute intended to protect of their right to inherit."[58] Thus the court announced a dual test:[59] the control test and the motive or intent test. Although the *Bodner* court was not the first to invalidate an inter vivos conveyance in New York on the grounds that it violated the legislative policy behind Section 18,[60] the decision did draw attention to the inadequacies of the statute and pronounced a remedial judicial standard. The intent to defraud test, however, proved to be an insufficient guideline. While *Bodner* invalidated an inter vivos trust made for the *sole purpose* of disinheriting the spouse, the court failed to prescribe what additional intent would render an inter vivos conveyance valid despite the side effect of disinheriting the spouse. Courts later regarded the intent test as unfair inasmuch as it required second-guessing testators after their deaths.

The following year the New York Court of Appeals in *Newman v. Dore*[61] rejected "[m]otive or intent [as] an unsatisfactory test of the validity of a transfer."[62] *Newman* is an interesting case as the facts of the case all but justify the court's result. In *Newman*, eighty-year-old Ferdinand Straus and his thirty-year-old second wife Clara had been married just four years before Ferdinand's death. During its short history, the Straus' marital relationship had so deteriorated that at the time of Ferdinand's death Clara's action for separation with alimony was pending before the divorce court.[63] In turn, Ferdinand had brought a counterclaim for annulment[64] and had instructed his attor-

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56. *Id.* at 121, 286 N.Y.S. at 817.

57. *Id.*

58. *Id.* at 122, 286 N.Y.S. at 817 (emphasis added).

59. Crystal v. Crystal, 39 N.Y.2d 934, 937, 352 N.E.2d 885, 886, 386 N.Y.S.2d 581, 582(1976).

60. *See* Rubin v. Myrub Realty Co., 244 A.D. 541, 544, 279 N.Y.S. 867, 870 (1st Dep't 1935).

61. 275 N.Y. 371, 9 N.E.2d 966 (1937).

62. *Id.* at 379, 9 N.E.2d at 968.

63. *See* Clark, *supra* note 45, at 519 n.20. Clara claimed that her husband's sexual habits made life with him unbearable. *Id.*

64. *Id.*

ney to plan his estate so that Clara would not get a cent.[65]

Approximately two months prior to his death Ferdinand had executed a will wherein he established a trust for Clara for life of an amount equal to one-third of all his property both real and personal.[66] By so providing for her by will, Ferdinand precluded Clara from exercising her right of election.[67] Three days prior to his death, however, Ferdinand had executed revocable trust agreements through which he transferred all of his personal and real property to trustees, naming his children of a prior marriage as beneficiaries.[68] Under the terms of the trust Ferdinand retained a life interest in the income, a power to revoke, and substantial managerial control over the fiduciaries.[69] In an action brought by the beneficiaries to enforce the terms of the trust, Clara challenged the validity of the transfers on the grounds that it was her husband's obvious intent in establishing them to deprive her of her statutory share.[70] Despite its rejection of the motive or intent test,[71] the *Newman* court found in favor of Clara that under the trust agreements the testator had retained such significant control over the property[72] that "[j]udged by the substance, not by the form, the testator's conveyance is illusory."[73] Specifically, the *Newman* court applied a standard of "whether the husband has in good faith divested himself

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65. *Id.* When instructing his attorney to arrange for Clara's disinheritance, Ferdinand preferred to call his wife that "whore" and "son of a bitch." *Id.*

66. *Newman*, 275 N.Y. at 375, 9 N.E.2d at 967.

67. In the event of a testamentary trust of an amount equal to an intestate share, the statute barred a surviving spouse from exercising a right of election. *Id.* at 375, 9 N.E.2d at 967. *See* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(c)(1)(D) (McKinney, 1981). *See also supra* note 42 & *infra* note 138 and accompanying text.

68. *Newman*, 275 N.Y. at 375, 9 N.E.2d at 967.

69. *Id.* at 377-78, 380, 9 N.E.2d at 968, 969.

70. *Id.* at 375, 9 N.E.2d at 967.

71. In rejecting as irrelevant Ferdinand's obvious intent to deprive Clara of her elective rights, the court stated that "it cannot be said that a 'purpose of evading and circumventing' the law can carry any legal consequences." 275 N.Y. at 376, 9 N.E.2d at 967. The decedent's act cannot be deemed an evasion if it falls within the letter of the law. *Id.* (citing Bullen v. Wisconsin, 240 U.S. 625, 630 (1916)). The court then noted that under Section 18 the widow had only an expectancy interest in her husband's probate property which he could defeat by lawful means. Use of lawful conveyances to defeat a contingent expectant interest does not amount to an improper "evasion." *Id.* at 376-77, 9 N.E.2d at 967. Note the distinction between the indefeasible dower right and right of the forced share which is subject to lifetime transfers.

72. Under the trust agreement the settlor retained a life interest in the income from the trust, the power to revoke the trust, and the power to control the acts of the trustee. 275 N.Y. at 377, 9 N.E.2d at 968. Had the court adopted the motive test, surely it would have found the trust agreements invalid as "[t]hey had no other purpose and substantially . . . no other effect" than to deprive the widow of her rights under section 18. 275 N.Y. at 378, 9 N.E.2d at 968.

73. *Id.* at 381, 9 N.E.2d at 969.

of ownership of his property or has made an illusory transfer."[74] Here, the court did not use the term "good faith" in reference to the husband's intent to disinherit his wife, but rather to his intent to relinquish control over his property.[75] Under *Newman*, therefore, the test of whether an inter vivos transfer may defeat the statutory share depended upon whether the testator had divested himself of ownership or control over the asset or whether he had retained enough control as to render the transfer a sham.[76] Interestingly, the *Newman* court assumed, without deciding, that but for the widow's statutory share the trust would have been a valid inter vivos trust.[77] By invalidating the trust, the *Newman* court "legislat[ed] a preferred status for the spouse,"[78] regardless of whether the spouse either needed or deserved preferential treatment.[79] In terms of protecting the spouse, however, the illusory transfer test gives less protection than the intent test since under the latter test excessive control need not exist in order to nullify a conveyance made with improper motive. Despite its landmark status, commentators have criticized the *Newman* decision for "provid[ing] no clear guide to follow as to the amount of 'control' that could have been retained that would have permitted the inter vivos transfer to have been upheld as 'real.' "[80]

The failure of Newman to set forth a clear standard by which to find a transfer illusory became apparent five years later in *Krause v. Krause*.[81] In *Krause*, the husband had created a Totten trust for the

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74. *Id.* at 379, 9 N.E.2d at 969. The court found the illusory transfer test the only sound means of adjudging validity of inter vivos transfers when the wife has only an expectancy interest in her husband's estate since the forced share, unlike dower, does not preclude the husband from making inter vivos transfers. *Id.*

75. *Id.* (citing Benkart v. Commonwealth Trust Co., 269 Pa. 257, 259, 112 A.62, 63 (1920)).

76. The *Newman* court never described just how much control the testator had to relinquish in order for the conveyance not to be found illusory. Indeed, the court explicitly stated that it would "not attempt now to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than 'illusory.' " 275 N.Y. at 381, 9 N.E.2d at 969. The amount of control and enjoyment retained by the decedent satisfied the court that "[in] this case it is clear that the settlor never intended to divest himself of his property." *Id.* at 381, 9 N.E.2d at 970.

77. *Id.* at 380, 9 N.E.2d at 969. The court did, however, question the testamentary nature of the trust, pointing to the amount of control the settlor retained over the trustees. *Id.*

78. Clark, *supra* note 45, at 519.

79. As one commentator has noted, "The facts of this famous case put to test the usual statements of policy which assume a worthy widow who has been wronged by the husband's cruel act of disinheritance." Clark, *supra* note 45, at 519 n.18. Indeed, the result in *Newman* may be viewed as inequitable.

80. *Protection, supra* note 35, at 424-25. *See also* Clark, *supra* note 45, at 519 n.18.

81. 285 N.Y. 27, 32 N.E.2d 779 (1941).

benefit of his daughter by a previous marriage.[82] He had also executed two warranty deeds to property in favor of each of his two sons from the same earlier marriage.[83] Under the warranty deeds, however, the decedent reserved for himself a life interest in the use, rents, and profits of the realty conveyed.[84] The decedent's second wife challenged the validity of the Totten trust and the transfer of the realty on the grounds that they were testamentary in character and therefore constituted invalid will substitutes.[85] The *Krause* court followed the *Newman* good faith test[86] and found the conveyance not illusory notwithstanding the significant degree of control the decedent had retained.[87] Despite the decedent's obvious intent to disinherit his spouse and deprive her of her statutory share, the court found that the settlor did in fact divest himself of the real property in accordance with the law.[88] Regarding the Totten trust, however, the court found the transfer illusory because not only was the daughter no longer living in this country at the time the testator established the trust, but also he had not kept in contact with her and actually never intended for her to make withdrawals from the account.[89] The court, therefore, found that the settlor had established the Totten trust for no benefit other than his own, reserving the power to deal with the account as he liked.[90]

In *Krause* two inconsistent results emerge. Regarding the real property, it appears that the court found the decedent's intent to transfer the realty in a manner allowing retention of the benefits of ownership irrelevant. Yet in relation to the Totten trust, the decedent's motive did emerge as an important factor in invalidating the trust. Moreover, despite the view in *Newman* that "[r]eality, not appearance should determine legal rights,"[91] the *Krause* court found it sufficient that the settlor had divested himself of ownership by transferring legal title to the realty in accordance with law, despite the retention of rights of ownership. Thus, although the court stated that it followed *Newman*,[92] the decision is not in complete accord with the *Newman*

82. *Id.* at 30, 32 N.E.2d at 780.
83. *Id.* at 29-30, 32 N.E.2d at 779-80.
84. *Id.* at 30, 32 N.E.2d at 779.
85. *Id.*
86. *Id.* at 31, 32 N.E.2d at 780 (quoting *Newman*, 275 N.Y. at 379, 9 N.E.2d at 969).
87. *Id.* at 31-32, 32 N.E.2d at 780.
88. *Id.*
89. *Id.* at 32-33, 32 N.E.2d at 781.
90. *Id.* at 33, 32 N.E.2d at 781.
91. Newman, 275 N.Y. at 380, 9 N.E.2d at 969.
92. 285 N.Y. at 31, 32 N.E.2d at 780.

guidelines.

Inda v. Inda [93] by contrast resulted in a complete rejection of the *Newman* retention of the control/illusory transfer test and produced an outcome inconsistent with *Krause*. In *Inda*, the husband had opened two joint bank accounts, one in the name of a fictitious person and the other in the name of a daughter-in-law.[94] Soon after, the husband died intestate leaving his wife and ten children.[95] The widow, choosing her elective share over her intestate share, challenged the joint accounts in an effort to increase her share.[96] She claimed that as her husband never intended to divest himself of ownership, he had made an illusory transfer.[97] The court upheld the transfer, ignoring the illusory transfer test.[98] The court determined that section 239 of the Banking Law[99] rather than the Decedent Estate Law governed the validity of the transfer.[100] Under banking law, the court found that the form of the deposit constituted "a lawful and convenient method for the transmission of property"[101] and that the original deposit plus any additions to it, therefore, belonged to both joint tenants with survivorship rights vesting after the death of one joint tenant.[102]

The result in *Inda* may be explained by the court's unwillingness to endorse the legislative policy of section 18 over that of section 239 of the Banking Law which specifically authorized survivorship rights of a joint tenancy. Faced with the two disharmonious statutes, the court in *Inda* yielded to the strict mandate of section 239 and rejected application of the legislative policy behind section 18. The result in *Inda* upholding the joint bank account is inconsistent with that in *Krause* invalidating the Totten trust as illusory. Although slight differences exist between a Totten trust and a joint bank account, the two forms possess significant similarity in the amount of control and rights of enjoyment that the settlor retains.[103] *Inda* and *Krause* exemplify the incongruous results emerging from the post-*Newman* cases, demonstrating the problems caused by the *Newman* court's failure to provide a clear guideline by which to judge disinheriting lifetime transfers.

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93. 288 N.Y. 315, 43 N.E.2d 59 (1942).
94. *Id.* at 316, 43 N.E.2d at 60.
95. *Id.*
96. *Id.*
97. *Id.* at 316-17, 43 N.E.2d at 60.
98. *Id.* at 317-18, 43 N.E.2d at 60-61.
99. N.Y. Banking Law, § 239, subd. 3 (repealed 1964) (savings bank deposits).
100. 288 N.Y. at 318, 43 N.E.2d at 61.
101. *Id.* at 317, 42 N.E.2d at 60.
102. *Id.*
103. Clark, *supra* note 45, at 520.

The clearest refection of the *Newman* retention of control test came in *In re Halpern's Estate*,[104] in which the widow challenged her husband's establishment of four Totten trusts for the benefit of an infant granddaughter.[105] The value of the Totten trusts was four times that of the decedent's gross estate.[106] The court held that regardless of the decedent's motive in creating them, the Totten trusts were "valid, effective and not illusory."[107] The court based its decision on the widespread recognition of Totten trusts as valid transfer devices.[108] By their very nature, however, Totten trusts permit the settlor to retain complete control over the trust property. Thus, by validating Totten trusts against challenges based on a widow's elective share, the *Halpern* court clearly rejected the retention of control test as set forth in *Newman*. The court distinguished *Krause* on the grounds that in *Krause* the Totten trust was found illusory "on a factual showing of unreality, and not solely because the transfers operated to, and were intended to, defeat the widow's expectancy."[109] By contrast, the *Halpern* court held that "unworthiness of motive could not make illusory an otherwise complete transfer."[110] The *Halpern* court therefore "lost sight of the control aspect of illusoriness and became more concerned with form than with substance."[111] The *Halpern* test considered whether the transfer of property inter vivos had significance apart form the widow's disinheritance.[112] Of the three judicial doctrines formulated to supplement section 18, the *Halpern* and *Inda* reality test gives the widow the least protection. Under the test, the court ignores the ill intent of the testator and the amount of control retained. All that matters is whether the testator has completed a legally recognized conveyance.

The case law which emerged in New York after the enactment of Section 18 illustrated the inadequacies of the existing forced share provisions. First, the statute clearly failed its essential purpose because it

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104. 303 N.Y. 33, 100 N.E.2d 120 (1951).

105. *Id.* at 36, 100 N.E.2d at 121.

106. *Id.*

107. *Id.* at 37, 100 N.E.2d at 122. The court further stated that "[i]t is, perhaps, regrettable that any husband resorts to such transfers to keep his money from his wife. But Totten trusts, if real and not merely colorable or pretended, are valid transfers with legally fixed effects." *Id.*

108. *Id.* at 38, 100 N.E.2d at 122, stating "[t]here is nothing illusory about a Totten trust as such." *Id. See also* Matter of Totten, 179 N.Y. 112 (1904).

109. *In re* Halpern's Estate, 303 N.Y. at 38, 100 N.E.2d at 122.

110. *Id.*

111. *Protection, supra* note 35, at 427.

112. *Halpern*, in accord with *Inda*, cited *Inda* as authority. 303 N.Y. at 39, 100 N.E.2d at 123.

enabled evasion through its implicit exemption of inter vivos transfers from the statutory share restrictions upon testation. The legislators' lack of foresight as to the statute's loopholes resulted in the burden shifting to the courts to determine the extent of validity for such purposively disinheriting lifetime transfers. Without a clear legislative directive, the courts' response proved as inadequate as the legislation that precipitated the judicial response. As one commentator has noted, "The melancholy experience in New York, where the volume of cases is the greatest, is the most instructive in demonstrating that a court-made rule could not be devised to retrieve a situation lost through faulty legislation."[113] The courts unwillingness to look beyond the particular facts of the case at hand, preferring instead to resolve the issue on a case-by-case basis, may explain the courts' inability to formulate a clear standard by which to judge disinheriting will subsitutes.[114] The courts either disregarded or watered down the applicable test to the extent that it would not produce the most equitable result.[115] Judges have not always desired this responsibility. In fact, the court in *Halpern* implicitly pleaded for legislative response:

> Perhaps it may seem that we are putting the legislative policy of section 18 to rout by use of the court made . . . rule. . . . But the Legislature has made no effort to interfere with the impact of Totten trusts in this connection, nor has the Legislature . . . done anything to save a wife from disinheritance by means of an effective trust erected in a husband's lifetime, for that purpose. It is the simple fact that section 18 does not affect the disposition of property *inter vivos*.[116]

In an effort to provide greater protection to the surviving spouse and to put an end to the courts' inconsistent and discretionary interpreta-

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113. Clark, *supra* note 45, at 518.

114. Professor Kurtz has noted that courts, without expressly stating so, consider the following equities in arriving at a final decision: (1) the amount of the lifetime transfer in relation to the size of the estate; (2) the timing of the transfer in relation to the time of death; (3) inter vivos and testamentary transfers benefitting the surviving spouse and others; (4) the relationship between the transferor and transferees; (5) the moral claims of competing claimants; and (6) the economic status of competing claimants. Kurtz, *supra* note 1, at 994 (citing MACDONALD, *supra* note 6, at 145-74).

115. Kurtz, *supra* note 1, at 994, stating that:

> While due judicial regard to [equities] is appropriate, their application to particular fact situations presented . . . makes the results difficult to predict. Furthermore, to the extent the equities favor one party while the applicable test, in its pristine form, favors the other, courts tend to pollute the test. The effect is the evolution of a test that lacks clear and concise definition.

Id.

116. *In re* Halpern's Estate, 303 N.Y. at 39, 100 N.E.2d at 122-23.

tions of section 18, the New York legislature finally intervened with substantial revisions to its Decedent Estate Law.

2. New York's Estates, Powers and Trusts Laws—Section 5-1.1

The New York legislature eventually recognized that testators could thwart the policy underlying section 18 by using judicially sanctioned inter vivos conveyances which effectively depleted the probate estate base thereby "reducing the surviving spouse's right of election to absurdity."[117] The New York legislature, therefore, sought to salvage section 18 by a 1965 amendment which enumerated inter vivos transactions which are in fact, although not in law, "testamentary substitutes."[118] These lifetime transfers were treated as the equivalent of testamentary dispositions and were, therefore, included in the decedent's probate estate base for the purpose of calculating the spouse's statutory share. Specifically, Section 18-a of the Decedent Estate Law included: (a) gifts causa mortis;[119] (b) joint tenancies and tenancies by the entirety;[120] and (c) "any disposition of property, in trust or otherwise, as to which the deceased spouse retained, by express provision of the disposing instrument either alone or in conjunction with another person, a power to revoke the disposition of the assets thereof."[121] As the elective base also included Totten trusts[122] and joint bank accounts,[123] the amendment effectively overruled *Inda v. Inda*[124] and *In re Halpern's Estate*,[125] the most corrosive judicial precedents to the policies underlying Section 18.

A year after the 1965 amendment, however, the New York legislature repealed Section 18[126] and in its place enacted section 5-1.1 of the Estates, Powers and Trusts Law.[127] Section 5-1.1 re-enacted Section 18-a with minor changes to clarify the statute's purpose and coverage.[128] Thus, as under section 18-a, section 5-1.1 defines

117. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981) (Practice commentary).

118. 1965 N.Y. Laws ch. 665, § 1, amending N.Y. DECEDENT ESTATE LAW § 18 (1965).

119. N.Y. DECEDENT ESTATE LAW § 18-a(1)(a) (1965).

120. *Id.* § 18-a(1)(d).

121. *Id.* § 18-a(1)(e).

122. *Id.* § 18-a(1)(b).

123. *Id.* § 18-a(1)(c).

124. 288 N.Y. 33, 100 N.E.2d 59 (1942).

125. 303 N.Y. 33, 100 N.E.2d 120 (1951).

126. N.Y. EST. POWERS & TRUSTS LAW § 14-1.1 (McKinney 1967).

127. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981).

128. *See id.* (Practice commentary).

"testamentary substitutes" against which the surviving spouse may elect her statutory share. The list is comprised of (a) gifts causa mortis;[129] (b) Totten trusts;[130] (c) joint bank accounts;[131] (d) transfers in joint tenancy or tenancy by the entirety;[132] and (e) transfers made in trust or otherwise "to the extent that the decedent at the date of his death retained, either alone or in conjunction with another purpose, . . . a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof."[133]

The new statute, however, declared certain inter vivos transactions exempt from the elective base. Thus the statute provides that the probate estate base does not include

> (A) payment in money, securities or other property under a thrift, savings, pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust, (B) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract, a policy of life, group life, industrial life or accident and health insurance or a contract by such insurer relating to the payment of proceeds or avails thereof or (C) payment of any United States savings bond payable to a designated person.[134]

Although generally regarded as will substitutes, the listed properties are exempted as they are most often acquired as extra spousal support rather than as a means of disinheriting the spouse. Moreover, the legislature intended the enumeration of transfers qualifying for testamentary treatment to be exhaustive and not to be expanded by judicial analogies.[135]

Under the new statute, for purposes of measuring the elective share, the decedent's estate expands to include not only the value of property owned at death, as originally provided by Section 18, but also the capital value of the specified testamentary substitutes as provided by Section 18-a and Section 5-1.1.[136] The fraction to which the surviving spouse is entitled depends on whether the decedent died leaving

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129. *Id.* § 5-1.1(b)(1)(A).
130. *Id.* § 5-1.1(b)(1)(C).
131. *Id.* § 5-1.1 (b)(1)(C).
132. *Id.* § 5-1.1 (b)(1)(D).
133. *Id.* § 5-1.1 (b)(1)(E).
134. *Id.* § 5-1.1 (b)(2). Gifts of United States savings bonds are exempt on Constitutional grounds. *See* Free v. Bland, 369 U.S. 663 (1962).
135. *In re* Estate of Zeigher, 95 Misc.2d 230, 406 N.Y.S.2d 977 (1978).
136. By adding testatmentary substitutes to the probate base, New York's statutory scheme parallels the "augmented estate" concept under the Uniform Probate Code. *See supra* notes 149-160 and accompanying text.

issue. If issue survive the decedent, the statutory share equals one-third of the net estate; in all other cases the share equals one-half of the net estate.[137] The New York statute, however, restricts the right of election when the elective share exceeds $10,000 and the testator has established a life estate for the spouse in a testamentary trust in an amount equal to or greater than the spouse's elective share. In such event, the spouse, if dissatisfied with the trust, may elect to take $10,000 from the principal outright.[138] The legislature intended to diminish the surviving spouse's redress against the decedent's other beneficiaries and transferees when the decedent has made adequate provision for his/her spouse in the testamentary plan.

The legislature placed several limitations on the inclusion of assets in the probate estate base. First, as regards joint tenancies, tenancies by the entirety, and joint bank accounts, the statute provides that disposition will be deemed testamentary substitutes only so far as the decedent deposited or contributed the consideration therefor.[139] The surviving spouse bears the burden of establishing the portion of the decedent's contribution.[140] The statute also places a restriction on the timing of the transaction. In order to include one of the enumerated testamentary substitutes in the net estate base, it must have been effected after August 31, 1966, *and* after the marriage.[141]

Cases decided under the new laws illustrate the judicial deference accorded the innovative statutory scheme. In *In re Agioritis*,[142] the First Department of the Appellate Division held that Totten trust accounts, which were established prior to the enactment of the new elective share provisions but to which a change in beneficiary occured *after* August 31, 1966, were not exempt from the widow's right of election.[143] The court based its decision on the underlying policy of the new legislation which was designed to "strengthen and enlarge the rights of a surviving spouse in all instances where moneys were depos-

137. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981).

138. *Id.* § 5-1.1(c)(1)(D). *See, e.g., In re* Estate of Bartley, 83 Misc.2d 672, 370 N.Y.S.2d 990 (1975) (testamentary bequest to husband in trust of sum "equal to and not in excess of the minimum allowed to a surviving spouse pursuant to the . . . right of election," 83 Misc.2d at 672, 370 N.Y.S.2d at 990, construed as validly creating a testamentary trust for the benefit of the deceased's husband such as to give husband a limited right to elect).

139. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(3) (McKinney 1981); *see also* N.Y. DECEDENT ESTATE LAW § 18-a (1965).

140. *Id.*

141. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981).

142. 52 A.D.2d 128, 383 N.Y.S.2d 304, *aff'd*, 40 N.Y.2d 646, 389 N.Y.S.2d 323, 357 N.E.2d 979 (1976).

143. *Id.* at 135-37, 383 N.Y.S.2d at 309-10.

ited in Totten trusts after August 31, 1966."[144] Thus, a previously exempt Totten trust lost its exempt status when the settlor changed the designated beneficiary. *Agioritis* is a landmark case:

> [T]he significance of this case is that the highest court in New York State, the State that originated Totten trusts, decided *Halpern*, and struggled for years with what non-probate devices could and could not be attacked by the surviving spouse, strictly interpreted the New York statute without hesitation and flatly declared the Totten trust invalid against the surviving spouse's right.[145]

New York has thus come full circle since *Bodner v. Feit*[146] in its effort to protect the surviving spouse from attempts to defeat the statutory elective share. The present statutory scheme, however, is not immune from criticism. The New York approach results in both overprotection and underprotection of the spouse.[147] Section 5-1.1, as do most other forced share statutes, fails to take into account: (a) transfers made by the decedent during his lifetime to the spouse; (b) the individual wealth of the surviving spouse and the question of actual need for the elective share; (c) the relationship between the spouses and the reasons why the testator devised his estate plan as he did, cutting off the surviving spouse from his assets; and (d) the burden placed on the testator's beneficiaries who bear the expense of the elective share. The statute may in one instance give a surviving spouse greater protection than needed. Under a different set of facts the same statute may result in underprotection of the surviving spouse. Recall that for the testamentary substitutes to be recalled into the net estate, they must have been effected *after* the marriage.[148] Although the time restriction may not appear a significant restraint, it may prove itself so

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144. *Id.* at 134, 383 N.Y.S.2d at 309. *Compare In re* Estate of Agioritis, 40 N.Y.2d 646, 389 N.Y.S.2d 323, 357 N.E.2d 979 (1st Dep't, 1976)(transfers not exempt when made to a Totten trust account in one bank from money deposited before the effective date to the same type of account in another bank when the beneficiaries remain the same) *with* Estate of Kleinerman, 66 Misc.2d 563, 319 N.Y.S. 898 (1971) (transfers from "exempt" Totten trust to a joint account with the same beneficiary after effective date does not alter exempt status of the account).

145. *Protection*, *supra* note 35, at 430.

146. 247 A.D. 119, 286 N.Y.S. 814 (1936). *See supra* notes 54-59 and accompanying text.

147. *See* Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95, 129 (1983). Professor Volkmer proposes adoption of the "sharing principle" as put forth in the UMPA as a remedy to the problems of disinheritance. Under the UMPA approach, each spouse retains a one-half interest in the "marital" property which precludes disinheritance upon the death of a spouse. *Id.* at 112.

148. *See supra* text accompanying note 135.

in its application. The case law indicates that disinheritance of a spouse often occurs in second marriages when the decedent effectuates lifetime transfers in trust or otherwise for the benefit of the former spouse or children of the earlier marriage. Thus, under the current New York law, a spouse could establish an inter vivos trust for the benefit of a third person *before* the second marriage took place, retaining as much control as he/she chooses, yet still be able to defeat the second spouse's elective right. Such arrangements are likely not uncommon. Further, since the statute includes, with the exception of gifts causa mortis, only dispositions in which the decedent retained control over the property, any absolute gifts and sales of real and personal property would defeat the surviving spouse's elective rights. Nothing in the statute prevents testators, with the purpose of leaving the spouse penniless, from conveying assets during life to those persons who would otherwise be designated beneficiaries under their wills, so long as they do not retain control over the property and a court does not later adjudge the property to have been a gift causa mortis.[149]

The revised New York statute served as a model for the drafters of the parallel provision under the Uniform Probate Code.[150] Like the New York statute, the Uniform Probate Code includes testamentary substitutes recaptured in the net or augmented estate: (a) transfers in which the decedent retained a life estate;[151] (b) revocable transfers such as the Totten trust and other inter vivos trusts in which the decedent retained the power to revoke, consume, or invade the principal;[152] (c) transfers invoking a right of survivorship[153] such as joint tenancies in realty and joint bank accounts; and (d) any transfer made to a donee within two years of decedent's death to the extent that the aggregate amount transfered to a single recipient exceeds $3,000.[154] Under both statutes, the testamentary transfers must have been effected *during the marriage* in order to be included in the net or augmented estate.[155] The Uniform Probate Code also reflects the New

149. *See, e.g., In re* Perlmutter's Will, 199 Misc. 330, 98 N.Y.S.2d 968 (1950).

150. *See* UNIFORM PROBATE CODE § 2-202, Comment (1978).

151. *Id.* § 2-202(1)(i).

152. *Id.* § 2-202(1)(ii). *Cf.* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(C), (D) (McKinney 1981).

153. UNIFORM PROBATE CODE § 2-202(1)(iii) (1978). *Cf.* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(C), (D) (McKinney 1981).

154. UNIFORM PROBATE CODE § 2-202(1)(iv) (1978). *Cf.* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(A) (McKinney 1981).

155. UNIFORM PROBATE CODE § 2-202(1) (1978); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981).

York scheme in its exemption of life insurance, accident insurance, joint annuities, and pensions from the elective base, at least to the extent that the exemptions benefit persons other than the surviving spouse.[156]

The approach taken by the drafters of the Uniform Probate Code differed from New York's elective share provisions in one important regard. In calculating the net or augmented estate, both models start with the inclusion of the value of the assets in the probate estate. Next, both statutes recapture any of the enumerated testamentary substitutes if applicable. The New York system next determines the amount of the spouse's elective share. The beneficiaries under decedent's will bear the burden of making up the elective share. The Uniform Probate Code, on the other hand, goes one step further. Subsection (3) of 2-202 provides that the augmented estate also includes the value of property that the surviving spouse owned at the time of the deceased's death *and* the value of property that the surviving spouse transferred to persons other than the decedent to the extent that such property was derived from the decedent.[157] In measuring the final amount due the surviving spouse, the value of subsection (3) property is first added to the probate base, the estate base which has now been augmented by the value of testamentary substitutes under 2-202(1). Then, once the elective share is determined, property that the decedent passed inter vivos to the spouse is charged against the elective share in at least partial satisfaction of the amount due. Under the Code, the spouse's claim is first applied against both lifetime and testamentary transfers.[158] In charging the spouse with lifetime transfers the legislature sought "to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements."[159] The New York statute does not charge the surviving spouse with the benefit of the transfers. The Uniform Probate Code approach thus alleviates the problem of spousal overprotec-

156. UNIFORM PROBATE CODE § 2-202(2) (1978); *Cf.* N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(2). When the surviving spouse is the beneficiary of proceeds from sources such as life insurance, or is the joint tenant in real or personal property, the augmented estate includes the value of the property for purposes of charging the spouse's elective share with their value. *See* UNIFORM PROBATE CODE § 2-202(3)(i); 2-207 (1978).

157. UNIFORM PROBATE CODE § 2-202(3) (1978).

158. *Id.* § 2-207.

159. *Id.* § 2-202, Comment.

tion inherent in the New York scheme. Indeed, the Code provisions minimize disturbance of the decedent's testamentary plan.

While the Uniform Probate Code and the New York approaches both merit praise for attempting to achieve an equitable formula for determining the surviving spouse's elective share, neither approach provides a workable solution to the problem of disinheritance. The augmented estate concept fails in two critical regards. First, it is far too complex. Determining what transfers are to be included in the augmented estate for what purpose is not always an easy task. Subsection (3) of Uniform Probate Code section 2-202 and section 2-207 charging surviving spouses with lifetime transfers made both *to* them by their decedents and *by* them to all others besides their decedents exemplifies such complexity.[160] Also, under the New York scheme, the burden has fallen on the courts to determine under what circumstances a previously exempt lifetime transfer loses its exempt status when the donor either makes subsequent contributions to it or changes the designated beneficiary.[161] Third, both statutory approaches unrealistically and impractically assume that lifetime conveyances qualifying as enumerated testamentary substitutes can be traced and valued appropriately. Certainly, under the Uniform Probate Code approach it is difficult to trace all lifetime transfers from the decedent to the spouse and all transfers by the spouse to others besides the decedent when the marriage is of substantial duration. By requiring the inclusion of such transfers in the augmented estate, the Code breeds litigation between the surviving spouse and transferees without adequately guaranteeing an equitable result. The conclusion that the augmented estate concept as defined by the Code contains inherent problems is reflected in the fact that since its proposal in 1969, only six common law states have adopted its elective share approach.[162]

IV. A PROPOSAL FOR CHANGE

Looking to the common law origins of forced share legislation, we see that the original purpose stemmed from the duty of support

160. UNIFORM PROBATE CODE §§ 2-202(3), 2-207 (1978). *See* Kurtz, *supra* note 1, at 1036-43.

161. *See In re* Agioritis, 52 A.D.2d 128, 383 N.Y.S.2d 304 (1976); *In re* Filfiley's Will, 69 Misc.2d 372, 329 N.Y.S.2d 632, *aff'd*, 43 A.D.2d 981, 353 N.Y.S.2d 400 (1972); Estate of Kleinerman, 66 Misc.2d 563, 319 N.Y.S.2d 898 (1971).

162. *See* ALASKA STAT. §§ 13.11.070-.100 (1972 & Supp. 1982); COLO. REV. STAT. §§ 15-11-201-.207 (1973); ME. REV. STAT. tit. 18-A, §§ 2-202 to -207 (1981); MONT. CODE ANN. §§ 72-2-701 to -2-707 (1979); NEB. REV. STAT. §§ 30-2313 to -2319 (Reissue 1979); N.D. CENT. CODE §§ 30.1-05-01 to -05-07 (1976).

which a husband traditionally owed his wife throughout the marriage.[163] Common law dower and forced share legislation represented society's concern that support continue after the husband had died.[164] Although the support rationale persists to justify remedies against disinheritance, it no longer constitutes the sole reason to award the surviving spouse a portion of the deceased's estate. Presently, the elective share should represent a right to repayment for contributions that the surviving spouse made to the marriage. Such a premise recognizes that a marriage comprises two parties who each contribute to the marital partnership though not always in like kind. Within the typical forced share structure, however, a surviving spouse's fraction is not calculated to reflect the proportion of his/her contributions to the marriage.

In most jurisdictions providing an elective share upon the death of a spouse,[165] the form has remained essentially the same since its inception centuries ago. New York's section 5-1.1 and the Uniform Probate Code estate concept stand as exceptions to the general rule. Typically, the amount allowed equals a life estate in one-third of the property owned by the decedent at the time of death. Thus, most states hold fast to the support rationale of forced share, protecting the surviving spouse against destitution upon disinheritance. The rationale, however, no longer justifies awarding the spouse a fractional share in every instance. Recall that the Married Women's Property Acts freed women from financial dependency upon their husbands by enabling them to take title to property in their own right. Thus today, disinheritance does not by itself present a significant problem if the surviving spouse owns sufficient wealth in her own name such that she will not be destitute upon her husband's death.

While to a large degree support should no longer be the sole rationale for retaining the forced share, the elective right should not be totally abrogated. First, although few instances of actual spousal disinheritance exist,[166] the right of election acts as a disincentive for disinheritance.[167] The right to share in a deceased spouse's estate, however, should presently reflect the widely recognized view of mar-

163. L. SIMES, PUBLIC POLICY AND THE DEAD HAND 22 (1955).

164. *Id.*

165. *See, e.g.*, CONN. GEN. STAT. § 45-273a (1981).

166. *See* Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303 (1969); Dunham, *The Method, Process, and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); Prager, *The Spouse's Nonbarrable Share: A Solution In Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

167. *See* UNIFORM PROBATE CODE § 2-202 (1978), Comment.

riage as a partnership.[168] The treatment of property under the laws of inheritance, at least to the extent of disinheritance, should conform to the principles of equitable distribution under divorce law. No valid justification supports treating property distribution upon the dissolution of marriage by death differently from property distribution upon the dissolution of marriage by divorce in the case of an alleged spousal disinheritance. To draw the analogy further, both events encompass a marriage which has (1) terminated and, (2) presumably, from which the spouses have not parted amiably. Assuming that the amount a spouse contributes economically to a continuing marriage bears no relation to the manner in which the relationship terminates, the same principles of property distribution should apply. The underlying premise of equitable distribution, which "permits the spouse who has made a material economic contribution toward the acquisition of property, which may be titled in the other spouse, to claim an equitable interest in such property,"[169] carries equal force in disinheritance as in dissolution. Equitable distribution under the laws of inheritance should apply, however, only to cases of disinheritance. It should not extend to testate or intestate succession as a general principal for the same reason that courts do not interfere with property apportionment during a continuing marriage: The law should not interfere when the spouses are satisfied with the results of their own planning. Thus the law would only apportion marital property when the parties are unable to do so equitably themselves.

Adopting the equitable distribution approach to disinheritance would entail empowering the courts with the responsibility of deciding the equities on a case-by-case basis. The suggestion does not mean, however, that by adopting a judicial remedy we would be returning to the days of unbridled judicial discretion as seen in *Newman v. Dore* and its progeny.[170] As in divorce cases, statutes may provide equitable distribution in the event of disinheritance by enumerating a detailed set of factors for consideration in distributing an equitable amount to the surviving spouse.[171] Thus, a court could consider (a) the length of

168. *See* UNIFORM MARRIAGE AND DIVORCE ACT. In apportioning property upon divorce, the UMPA "recognize(s) that the spouses have been partners in the marriage, and require(s) courts to look beyond title in deciding how much each spouse should share in the assets to be distributed." Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1287 (1981).

169. Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L. Q. 369, 392 (1985).

170. 275 N.Y. 371, 9 N.E.2d 966 (1937). *See supra* notes 54-112 and accompanying text.

171. Several states' divorce statutes list criteria to be considered in apportioning

the marriage; (b) the age, health, and station in life of the surviving spouse; (c) the occupation or employability of the surviving spouse; (d) the amount and sources of income, including separate property; (e) the relative contribution made by each spouse in the acquisition, preservation, appreciation, or dissipation of marital property, including homemaker services; (f) the exchange of assets, separate and marital, between the spouses during the marriage; (g) the testamentary provisions made by the decedent for the surviving spouse and their fractional relation to the remainder of decedent's estate; (h) the relationship between decedent and the other beneficiaries under the will or lifetime transferees; and (i) the burden placed on the beneficiaries and transferees in making up the spouse's share.[172] Concededly, despite the tracing problems inherent in an augmented estate approach, effectiveness of equitable distribution in the disinheritance arena presumes a net estate as provided by New York's Estates, Powers, and Trusts Law.

Although equitable distribution has met with widespread recogni-

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property. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1981); DEL. CODE ANN. tit. 13, § 1513 (Supp. 1980); Act of Oct. 1, 1977, ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980); KY. REV. STAT. ANN. § 403.190 (Baldwin Supp. 1980); MASS. ANN. LAWS ch. 208, § 34 (Michie/Law Co. Op. 1981); MICH. STAT. ANN. §§ 25.105, 25.133 (1974); NEB. REV. STAT. § 42-365 (1978); R.I. GEN. LAWS § 15-5-16.1 (Supp. 1980); VT. STAT. ANN. tit. 15, §§ 751, 754 (1974 & Supp. 1981).

172. *Cf.* UNIFORM MARRIAGE AND DIVORCE ACT § 307 (Alternative A). This alternative provides:

> (a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit. (b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

Id.

tion in the domestic relations arena,[173] state lawmakers have yet to displace forced share statutes with the equitable distribution doctrine. One possible reason lies in the difficulty which equitable distribution may present to estate planners who seek to devise plans leaving minimal portions to surviving spouses. From a planner's perspective, forced share statutes, by their fixed nature, enable testators to calculate the amount statutorily allowed their spouses and to plan their estates accordingly. On the other hand, the equitable distribution approach forfeits the certainty characteristic of forced share in favor of a flexible standard. Under the equitable distribution doctrine, therefore, testators cannot be certain that their testamentary provisions for their spouses will suffice to avoid judicial disturbance of their eatate plans. As noted earlier, however, actual incidents of disinheritance are few, and the statutory protection actually serves to discourage disinheritance.[174] By its uncertain nature, then, equitable distribution could act as a greater disincentive to spousal disinheritance than the forced share. Moreover, since equitable distribution provides a flexible standard that focuses upon such factors as the actual needs of the surviving spouse and the amount of contributions to the family assets, a court could conclude that, considering all relevant factors, the testamentary provisions adequately served the surviving spouse. The testamentary plan of the decedent, therefore, need not necessarily be upset. Forced share statutes do not afford the same benefit. A second possible objection to equitable distribution lies in the view that it is somehow unfair to adjudicate the relevant factors when deceased spouses cannot be present to protect their interests. Here the analogy to divorce ends. Although the absence of testators presents a valid concern, however, the beneficiaries under the wills as well as lifetime transferees share decedents' interests and will represent those interests when surviving spouses challenge decedents' testamentary provisions.

V. CONCLUSION

The statutory forced share no longer provides an acceptable means of awarding a surviving spouse a share of the deceased spouse's estate. Allowing a surviving spouse to elect a fractional and fixed share of the deceased spouse's estate conflicts with the equitable distribution approach most courts take in allocating marital assets between divorcing spouses. No valid reason exists for the disparate treatment

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

174. *See supra* notes 166-67.

of property. The equitable distribution doctrine reflects the widely recognized view that a marriage constitutes a partnership where *both* spouses contribute substantially. Upon dissolution of the marital partnership, each spouse should be apportioned a share of the marital assets that equitably reflects the contributions each made. Forced share statutes fail to guarantee equity in every instance of disinheritance. Application of equitable distribution principles in determining the elective share of a disinherited spouses should be adopted.

Marie Falsey