Law Quadrangle (formerly Law Quad Notes)

Volume 32 | Number 2 Article 6

1988

Redesigning the Spouse's Forced Share: A Proposal

John H. Langbein
University of Chicago Law School

Lawrence W. Waggoner
University of Michigan Law School

Redesigning the Spouse's Forced Share: A PROPOSAL

American forced-share law underwent a major round of reform in the 1960s. The main objective was to prevent the decedent from engaging in "fraud on the widow's share," that is, using nominal inter vivos transfers to evade the surviving spouse's forced-share entitlement. In jurisdictions that follow the Uniform Probate Code of 1969 (UPC), that mischief has been eradicated. The UPC extends the forced-share entitlement to property that has been the subject of inter vivos transfer.

by John H. Langbein and Lawrence W. Waggoner

The following article is adapted from Langbein & Waggoner, Redesigning the Spouse's Forced Share, 22 Real Property, Probate & Trust Journal 303 (1987). The Joint Editorial Board for the Uniform Probate Code recently accepted in principle the idea for redesigning the elective share presented in that article. Legislative language incorporating the authors' proposals has been approved by the Joint Editorial Board and will soon be submitted to the National Conference of Commissioners on Uniform State Laws for official inclusion in the Uniform Probate Code.

In the present Article we develop the view that the time has come for a further round of reform of the forced-share system. With concern about evasion largely resolved, we direct attention to the underlying architecture of the forced share. Taking the UPC provisions as our model, we point to serious discrepancies between purpose and practice in the forced-share system, and we propose legislative correctives. We show that our proposal would remedy the worst shortcoming of modern American forced-share law — its astonishing insensitivity to differences in the duration of a marriage. If a marriage ends in death, the statutes currently in force allow the surviving spouse the same entitlement in the decedent's estate whether the marriage lasted five days or five decades. We recommend a means for adjusting the forced share to the duration of the marriage.

Marital-Property Regimes and the Rationale of the Forced Share

The basic principle in the common law states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns, even when the logic of the marriage is that one spouse earns less, or nothing at all, in order to enable the other to earn more. By contrast, in the eight community-property states, and in the Spanish legal system from whence our community-property states derived their model, each spouse would have an immediate half interest in the property that the other earns during the marriage. This half interest in the fruits of the marriage is known in academic parlance as the community of acquests (in contrast to the so-called universal community, in which spousal rights attach even to property earned before the marriage or acquired through inheritance or gift).

Legal-academic opinion in the United States today generally prefers the community of acquests over common law separate property. By granting each spouse an immediate half interest in the earnings of the other, the community of acquests recognizes that the couple's enterprise is in essence collaborative.

In 1983, the National Conference of Commissioners on Uniform State Laws endorsed a species of the community of acquests when it promulgated the Uniform Marital Property Act (UMPA). Although Wisconsin adopted a version of UMPA and is now reckoned as the ninth community-property state, the prospects for widespread adoption of UMPA in the separate-property states to which it is addressed appear bleak. The act has encountered resistance from the organized bar, in large measure for fear that the scheme of lifetime dual management that the act propounds is too complex.

It is essential to understand that American forced-share law *is entirely a consequence of the common law's separate-property regime for marital property*. Our community-property states do not have forced-share statutes. Having recognized in each spouse a reciprocal half interest in the earnings of the other, no further adjustment is thought necessary when death later terminates the marriage. Forced-share law, in contrast, is the law of the second best. It undertakes upon death to correct the failure of a separate-property state to create the appropriate lifetime rights for spouses in each other's earnings.

The preeminent legal and social policy that underlies the forced-share statutes is to limit the freedom of testation of the primary breadwinner, in recognition of the economic dependency that a conventional marriage characteristically entails for the spouse who specializes in what the economists call household production. Forced-share law is not Yuppie law. If both John and Mary were routinely going to be vice presidents at the Morgan Guaranty Bank, nobody would much care about giving them reciprocal claims in each other's estates. Indeed, under existing law serious Yuppies will contract out of the forced-share system by means of a premarital agreement. For the future and away from elite groups, however, traditional patterns of intrafamilial specialization are continuing.

Interestingly, the protective policy of the forced-share statutes has found expression in a pair of competing theories. One is the support or need theory; the other is the contribution or marital-property theory.

As for the support theory, the label pretty much suggests the argument. The breadwinner has a duty of support during his lifetime, which he ought not to be able to evade in death. If, however, you probe the typical forced-share statute, you will find that it is quite deficient in implementing a support policy. On the one hand, the fixed fraction, usually a third of the decedent's estate, may be woefully inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, all but a few forced-share statutes award the fixed fraction regardless of whether the survivor is in actual need — that is, even when the survivor has independent means that are quite ample. Both these objections to the support theory are of a similar sort — that the forced-share statute addresses need badly because it adopts a categoric rather than an individuated standard.

The other theory, the contribution theory, relates forced-share law back to what we have identified as its origin, in the shortcomings of the separate-property marital-property regime. Spouses are highly likely to have contributed to each other's nominal earnings through various forms of intrafamilial support. Especially in the conventional marriage, in which the burdens of home and childcare fall mainly upon the wife, she should be entitled to a share of what she helped her husband earn. Accordingly, the contribu-

tion theory is sometimes expressed as a "partnership" or "sharing" theory.

The contribution theory is intrinsically more plausible than the support theory, because the contribution theory responds directly to the defective marital-property regime of the separate-property states. Remember that in community-property states there are still plenty of needy widows, but no forced-share statutes. *Once contribution has been rewarded, nothing more is done to adjust the division of marital property to take account of the survivor's need.* Thus, we see in the forced-share system for separate-property states a contingent marital-property regime, under which the law presumes irrebuttably that the survivor contributed materially to the decedent's wealth.

One discrepancy between the contribution theory and current practice is that the forced share extends to all of the decedent's property, including property acquired before the marriage or property that came to the decedent through gift or inheritance — in other words, property that the surviving spouse did not help earn.

Even harder to square with the contribution theory is that aspect of forced-share law that we have advertised as its worst shortcoming, failure to take into account the duration of the marriage. Manifestly, the spouse of five days has not contributed remotely as much as has the spouse of five decades. Here the disparity between theory and implementation is so enormous that the customary apologetics about administrative convenience are not convincing. Either the contribution theory misdescribes the purpose of a forced-share system that tolerates such a disparity or, as we shall presently argue, that shortcoming of our forced-share system needs to be repaired in order to implement the theory properly.

Serial Polygamy

Despite its worthy aspiration to redress the inadequacy of our marital-property law, modern forced-share law does more harm than good.

The time has come to speak of serial polygamy. In modern times it has become increasingly common for people to have more than one spouse — alas, not simultaneously as in the good old days, but in a series. Divorce and remarriage is the most common variety of serial polygamy, a variety that now abounds in modern marriage behavior. From the standpoint of the troubled forced-share law, we are concerned with a remarriage pattern that is not primarily associated with divorce: the tendency among the elderly, whether divorced or widowed, to remarry later in life. The phenomenon is more noticeable among elderly men; since fewer men survive into advanced years, their chances of remarrying are correspondingly higher. Good data on remarriage late in life is hard to find, but the evidence of the troubled forced-share case law reinforces our impression that the phenomenon has become more common across the twentieth century. Growing longevity and better health in advanced years predispose the elderly to live more fully, and taboos against this sort of marriage have probably abated.

The objection to awarding the forced share in these circumstances is manifest. The forced share devolves upon a spouse whose contribution to the decedent's wealth bears no relation to what theory presupposes. It is wrong for a legal system that otherwise places such paramount value on freedom of testation to abridge that freedom when the benefit flows to a person who stands so far outside the protective purposes.

An Accrual-Type Forced Share

We wish to turn a fresh leaf and advance some proposals for legislative reform that have not thus far been considered.

The great attribute of community-property law that fits it for modern patterns of marriage behavior is that community-property rights are automatically adjusted for the duration of the marriage. The community-property right in a spouse's earnings attaches only to the property earned during the persistence of the marriage.

In the redesign of the forced-share system that we propose in this article, we shall be imitating key features of community-property (and UMPA) law; but we avoid both of the characteristic drawbacks of community law — the cumbersome lifetime dual management regime and the tracing-to-source of noncommunity property. We call for a forced-share entitlement that is sensitive to the duration of the marriage; that is mechanically determined; and that resembles the 50/50 split of community and UMPA law. We envision an accrual-type forced-share system in which the forced share grows with the length of the marriage. The particular analogy that we have in mind is the vesting schedule in a pension plan. Under a vesting schedule, there are two elements to consider: the amount of the ultimate benefit, and the rate at which one's entitlement in that benefit becomes indefeasible.

Amount: ***Increase the Forced-Share Fraction to Half.*** In forced-share law the analogue to the retirement benefit under a pension plan would be the statutory fraction of the decedent's estate, which in the UPC and most non-UPC jurisdictions is one-third of the estate. We would increase this fraction from a third to a half, primarily to align the forced-share fraction with the half interest that characterizes the functionally similar community-property and UMPA systems. (We explain shortly that we would apply the fraction to an entity

that is somewhat differently calculated than the probate estate or the "augmented estate" to which the present statutes apply.) We suspect that the one-third figure in present law is a hangover from the one-third life estate in common law dower. We think the return-of-contribution theory better supports a 50/50 split.

Accrual: ***Schedule the Forced Share to Vest Over Time.*** We recommend that the survivor's forced-share entitlement be phased in, according to a predetermined formula. We call this an accrual-type forced share.

Under current law, when John and Mary leave the altar on the day of their marriage, each has a one-third forced-share in the estate of the other. Under our proposal, the forced-share right of each spouse would vest incrementally across time. Suppose, for example, that the revised scheme allowed ten percent of the forced share to vest upon marriage, and the remaining 90-percent of the forced share to vest in five percent annual increments. On those numbers, it would take 18 years for each spouse to acquire the full 100 percent interest in the forced-share fraction.

The Survivor's Property

Our concluding group of proposals would refine the mode of calculating the forced share, by taking into account the survivor's own property. This proposal, for which there is support in a few of the existing state statutes, shares with our other recommendations the object of approximating the outcomes that would be achieved under the community of acquests (or under UMPA), but in a mechanical fashion.

Under the community of acquests, each spouse immediately acquires a half interest in the property earned during the marriage by the other spouse, which means that each spouse incurs an immediate reduction of half of the property arising from his or her earnings. Thus, when death terminates the marriage, the surviving spouse's property has already been reduced by the value of the decedent spouse's half interest.

By contrast, most American forced-share statutes disregard the property that the survivor has earned and titled in his or her name. Consider, for example, the UPC's augmented-estate scheme. The augmented estate is a tripartite computational entity that includes:

(1) The decedent's net probate estate.

(2) The value of property that the decedent transferred during the marriage by means of various will substitutes to persons other than the spouse. For convenience we shall call this class of property the "recapturables."

(3) The value of any of the survivor's property that the decedent had transferred gratuitously to the spouse. We call this the "spousal setoff" property.

The UPC's forced-share fraction (presently one-third) is applied to this computational entity. Property included in the augmented estate that belongs to the survivor (spousal setoff property) or that passes to the survivor as a result of the decedent's death is applied first to satisfy the forced share. As a result, the decedent cannot defeat the forced share by means of the common will substitutes; on the other hand, a surviving spouse for whom the decedent makes ample lifetime provision is precluded from forcing a further share.

We propose to make a pair of further adjustments in the UPC's augmented-estate system, in order to achieve the larger purpose of approximating the community property/UMPA outcome.[1] In this instance, the feature that we believe should be emulated is that under community law there is a 50/50 split in the property acquired by *both* spouses during the marriage.

The Property: ***Combine the Spouses' Augmented Estates but Charge the Survivor with His Own.*** Our proposal would make two alterations in the UPC's augmented estate. First, we would substitute for the present entity, which is constructed only on the decedent's augmented estate, a *combined augmented estate* that merges both the decedent's and the surviving spouse's augmented estates. This entity would, in fact, eliminate an administrative complexity inherent in the current UPC augmented-estate entity, which requires that the spousal setoff property be traced. Our proposal entails no tracing of the sources of funds of either spouse. The combined augmented estates would contain: (1) the decedent's augmented estate, now defined as his net probate estate plus the value of any recapturables; plus (2) the surviving spouse's augmented estate, defined to include that spouse's net worth, together with the value of any recapturables stemming from that spouse.

Including the survivor's augmented estate in the entity to which the forced share attaches requires the second adjustment to the UPC's augmented-estate system: In satisfying the forced share, *the surviving spouse must be charged with receipt of the survivor's own augmented estate.* That is, the survivor's own augmented estate (and property passing to the survivor as a result of the decedent's death) would be subtracted from the survivor's potential forced-share entitlement. Estate planners familiar with modern drafting techniques responsive to the federal transfer tax will recognize that our proposal would allow the elective share in a long-duration marriage to work in the nature of an

equalization clause, hence to duplicate the 50/50 split of the community and UMPA regimes.

It will be manifest that this proposal tends in the direction of the universal community and away from the community of acquests that we prefer in principle. Our proposal does not exclude the property that a spouse acquires by inheritance or gift (so-called separate property), although in a late marriage of short duration the incremental vesting feature does tend by approximation to eliminate the value of property that was acquired before the marriage. Our rationale is straightforward: We opt for the more inclusive system in order to preserve a mechanical forced share — in order, that is, to avoid the tracing for exclusion of separate property that the community of acquests would require. But we think that several factors help to narrow the gap between those two models in the forced-share context. In modern circumstances, it is unusual for either spouse to bring significant separate property to a long-duration first marriage. Further, when substantial separate property does enter such a marriage, it need not necessarily unbalance the spouses's holdings; an affluent person is more likely to marry someone of the same ilk than a pauper. For short-duration marriages, the accrual mechanism that we have emphasized would abate the consequences of an enriched forced share by diminishing the vested portion of the short-term spouse's forced-share entitlement. Finally, in the case in which there is material disparity in the wealth of the parties, the premarital contract would be available to oust the default regime of the forced-share law, as in current practice.

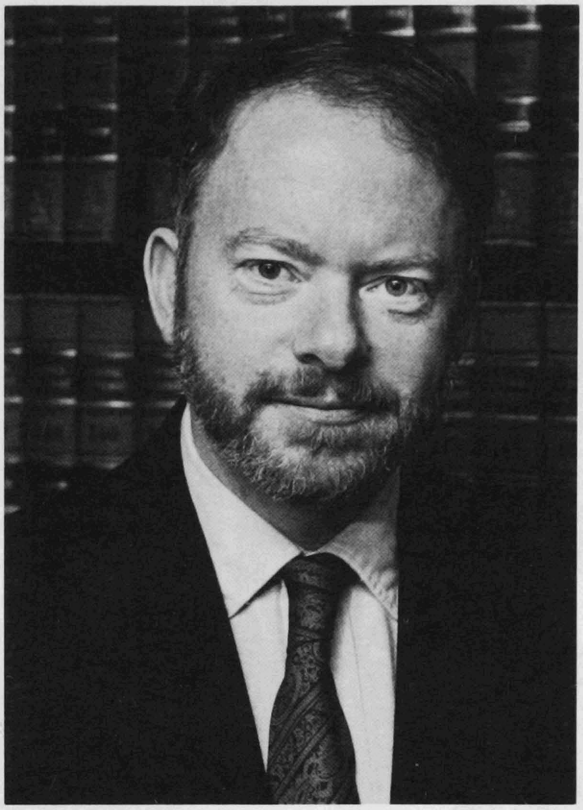
The Needy Survivor: ***Guarantee a Minimum Amount.*** Although we have shown why it is correct to see the contribution theory, rather than the support theory, as the driving force behind the forced-share system, we have also pointed out that the concepts largely overlap. Furthermore, the support theory unmistakably underlies such ancillary measures as the family and homestead allowances. Accordingly, we think it consistent with a system that is in the main based upon the contribution theory to make particular provision for extreme need.

We recommend, therefore, a minimum share for the impoverished survivor. Fifty thousand dollars is the figure we have in mind. Under our proposal the survivor is charged with receipt of his own net assets plus the amounts shifting to the survivor at the decedent's death. If those sums are less than the $50,000 minimum, then the survivor should be entitled — at the least — to whatever additional portion of the decedent's estate is necessary, up to 100 per cent, to bring the survivor's assets up to that $50,000 level. In the case of a late marriage, in which the survivor is aged in the mid-70s, the $50,000 figure would be more or less enough to provide the survivor with a straight-life annuity at a minimum subsistence level of approximately $10,000 per year.[2]

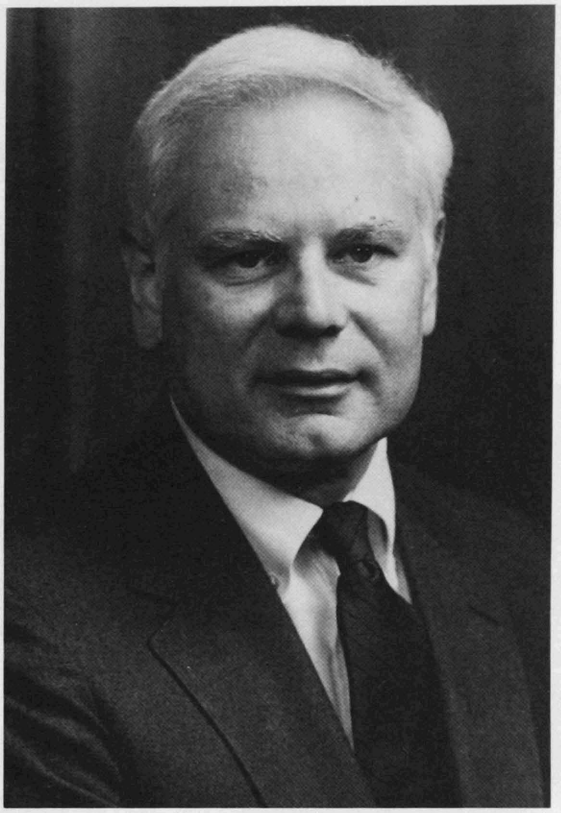
Conclusion

The merits of the accrual system that we have proposed should be fairly obvious in view of our critique of existing forced-share law. The serial-polygamy windfalls would be eliminated (and this by itself is a further ground for increasing the amount of the forced share from a third to a half). But because the accrual-type mechanism would work automatically, the reform would not entail the tracing and other administrative complexity associated with the community property and UMPA regimes.

To be sure, any system that has the advantage of mechanical application will have the corresponding drawback: Mechanistic justice is rough justice, and in most areas of the law we aspire to more than rough justice. But in the realm of forced-share law, there are important reasons for thinking that we cannot do better. Forced-share law is intrinsically arbitrary. The fixed fraction (whether a third or a half or anything else) is arbitrary. So, too, is the very premise on which the forced-share entitlement rests, that is, the irrebuttable presumption that the survivor contributed to the decedent's wealth. The law could, in theory, open such questions to examination of the merits in each case, but it has not, and for good reason. The proofs would be extraordinarily difficult. The issues in such a case would not resemble the issues in ordinary fact-finding — issues such as whether the traffic light was green or red. Examining the true merits of the case under a forced-share system that tried to establish the spouses' actual contributions to the family wealth would necessarily entail an inquiry into virtually every facet of the spouses' conduct throughout the marriage. Further, that litigation would arise just when death has sealed the lips of the most affected party. These are the concerns that have in the past led American policymakers to prefer a mechanical forced-share system. Accordingly, we would claim that the accrual-type system that we have recommended as a corrective for serial-polygamy forced shares has the considerable virtue of consistency with the rest of a mechanistic system. The reforms we propose would not achieve perfect justice. They would, however, achieve much better justice for an area of private law in which the results, at present, are too often repugnant.



John H. Langbein is the Max Pam Professor of American and Foreign Law, University of Chicago Law School, and serves as a member of the Joint Editorial Board for the Uniform Probate Code.



Lawrence W. Waggoner is the Lewis M. Simes Professor of Law, University of Michigan Law School, and serves as the director of research for the Joint Editorial Board for the Uniform Probate Code.

Footnotes

1. Because a forced-share system protects the property interest of the surviving spouse, it does not recognize the contribution-based interest of the decedent spouse. The community-property system does protect the decedent's interest as well, and in this respect our proporsals will fall short of the aspiration to achieve community-like outcomes. Community-like mutuality would require granting to the estate of the deceased spouse a claim against the assets of the surviving spouse. Such a right of election would have to devolve upon the decedent's personal representative, where it would resemble somewhat the situation in current law in which a fiduciary makes the election on behalf of a surviving spouse who is incompetent. In most jurisdictions the standard for making such an election is the survivor's need for support. If a decedent spouse's election were created, that spouse would not require support, but that spouse's personal representative would owe a fiduciary duty to the beneficiaries of that spouse's estate. The election would become virtually automatic when not waived by a well drafted instrument, in contrast to the present situation in which the forced share is actually exercised only rarely, in cases of deliberate disinheritance of the survivor.

2. The guaranteed minimum would also affect the short-duration marriage that ends in death early in life. In the case of a late-in-life short-duration marriage, not much wealth is acquired during the marriage, and the accrual-type forced share produces a better result by not shifting substantial wealth in such circumstances. In an early marriage, however, the partners typically enter the marriage with little in the way of separate property, and all or most of the wealth will have been acquired during the marriage. Under a community-property or UMPA regime, such property would have been community or marital property, and thus divided evenly between the spouses. If the marriage terminates on early death of one of the spouses, the survivor would be entitled to the community or marital half interest in the property despite the short duration of the marriage. By contrast, under the accrual-type forced share that we propose, the short duration of the marriage would cause the vested proportion of the forced share to fall short of the full fifty percent, and thus the surviving spouse would be credited with an inadequate return of contribution. This is not a problem of frequent occurrence; an early marriage gone sour is much more likely to end in divorce than in disinheritance upon premature death of one of the spouses. But a minimum entitlement of $50,000 would ameliorate, in a concededly rough way, the rare case in which such an event came to pass.