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# Spousal Disinheritance in Rhode Island: Barrett v. Barrett and the (De)evolution of the Elective Share Law

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# Spousal Disinheritance in Rhode Island: *Barrett v. Barrett* and the (De)evolution of the Elective Share Law

*Whatever we inherit from the fortunate*

*We have taken from the defeated.*

— T.S. Eliot<sup>1</sup>

## I. INTRODUCTION

Just months after the Anna Nicole Smith case<sup>2</sup> was heard by the U.S. Supreme Court last year, a less scandalous version was litigated in Rhode Island. The case of *Barrett v. Barrett*<sup>3</sup> did not involve a voluptuous celebrity, a billionaire oil mogul, or a crooked son,<sup>4</sup> but it presented the familiar story of a younger woman marrying an older man and then, after his death, fighting with his children over the estate. At the heart of both cases is the question of what rights a surviving spouse should have to continued support in a society in which multiple marriages are increasingly common.

The *Barrett* decision drew little attention, yet it changed the law of this state in one dramatic way: it is now remarkably easy to disinherit a spouse. In fact, Rhode Island's law has become one of

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1. T.S. ELLIOT, *FOUR QUARTETS: LITTLE GIDDING* (1943).

2. *Marshall v. Marshall*, 126 S. Ct. 1735 (2006) (former *Playboy* model marries billionaire octogenarian with adult children from a previous marriage. After he dies, his estate is the subject of a pitch-battle between the would-be heiress and his son).

3. *Barrett v. Barrett*, 894 A.2d 891 (R.I. 2006).

4. *Anna Nicole Smith Case Reaches Supreme Court*, Nina Totenberg (National Public Radio, Morning Edition, broadcast Feb. 28, 2006) *available at* [www.npr.org](http://www.npr.org)).

the least protective of surviving spouses in the entire country.<sup>5</sup> Should we be concerned that our state has dismantled the traditional protections afforded to surviving spouses while many states are doing the opposite? The significance of the change is best understood when looked at in the context of Rhode Island's evolving elective share law.

Under Rhode Island General Laws § 33-25-2 et seq., the elective share system that replaced the common law doctrines of dower and curtesy in 1978, when a married person dies, the surviving spouse is given a choice between (A) whatever has been provided to him or her under the decedent's will or (B) a life estate in all the real property owned in fee simple by the decedent at the time of his or her death.<sup>6</sup> While the purpose of the elective share is to give the surviving spouse an expectancy in the marital partner's real estate that cannot be deprived by will, it has never been a barrier to absolute and bona fide gifts or transfers of real property during life.<sup>7</sup> Complications arise, however, when a married person transfers his real property into an inter vivos trust for his own benefit for life and for the benefit of someone other than his spouse after death.<sup>8</sup> The specific issue is generally whether the settlor has retained such extensive control and ownership over the trust as to render it testamentary in character – essentially, a “will in disguise.”<sup>9</sup>

In 1997, the Rhode Island Supreme Court addressed this issue for the first time in *Pezza v. Pezza*.<sup>10</sup> Looking to other jurisdictions for guidance, the court adopted the “illusory transfer test” as a means by which to analyze, on a case by case basis, whether an inter vivos transfer of real property may defeat a

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5. See Appendix.

6. See R.I. GEN. LAWS § 33-25-2 to 33-25-4 (2006).

7. See *Pezza v. Pezza*, 690 A.2d 345, 349 (R.I. 1997) (“Because § 33-25-2 creates only an expectancy interest, a property-owning spouse is free, while he or she is alive, to transfer his or her real property without interfering with any vested right of a surviving spouse.”).

8. See J.R. Kemper, Annotation, *Validity of Inter Vivos Trust Established by One Spouse Which Impairs the Other Spouse's Distributive Share or Other Statutory Rights in Property*, 39 A.L.R.3D 14, 22 (2006).

9. See *id.* at 18, 19.

10. *Pezza*, 690 A.2d at 348 (“This Court has not yet considered the question of whether an inter vivos trust can be used to defeat a surviving spouse's statutory right to a life estate in his or her deceased spouse's real estate.”).

surviving spouse's statutory expectancy.<sup>11</sup> The test required two elements: (1) a complete inter vivos transfer by conveyance that divests the spouse of all ownership in the property conveyed to the trust; and (2) proper donative intent.<sup>12</sup> The adoption of the illusory transfer test injected uncertainty into the practice of real estate conveyancing.<sup>13</sup> After *Pezza*, every deed transferring property from a trust was potentially illusory. This raised a number of practical questions about the extent to which conveyancing attorneys and title insurers would be required to look beyond the recorded deed to the circumstances surrounding the trust's creation.<sup>14</sup>

Two years after the *Pezza* decision, the Rhode Island General Assembly amended §33-25-2 by adding a subsection (b) which provides that a spousal life estate can be defeated in two steps: (1) a conveyance of real estate (2) recorded in the land evidence records prior to the transferor's death.<sup>15</sup> The term "conveyance" is not defined in the statute. The effect of the amendment on the

11. *Id.* at 350 ("We adopt now the illusory transfer test as the proper test to be used when determining whether a now-deceased spouse's inter vivos transfer of real property is sufficient to defeat a surviving spouse's statutory share pursuant to § 33-25-2.")

12. *See id.* at 349; *Barrett*, 894 A.2d at 896.

13. *See* Anthony Mignanelli, *Trust Can Extinguish a Spouse's Expectancy*, R.I. B.J., Jan. 1999, at 13; *see also infra* note 124.

14. *See id.*

15. R.I. GEN LAWS § 33-25-2 (2006). Life estate to spouse:

(a) Whenever any person shall die leaving a husband or wife surviving, the real estate owned by the decedent in fee simple at his or her death shall descend and pass to the husband or wife for his or her natural life subject, however, to any encumbrances existing at death; provided that the liability, if any, of the decedent to discharge the encumbrance or encumbrances shall not be impaired. The provisions of §§ 33-1-1 and 33-1-2 shall be subject to the provisions of this chapter and of § 33-1-6.

(b) *For purposes of this section, any real estate conveyed by the decedent prior to his or her death, with or without monetary consideration, shall not be subject to the life estate granted in subsection (a) if the instrument or instruments evidencing such conveyance were recorded in the records of land evidence in the city or town where the real estate is located prior to the death of the decedent. Nothing in this section shall be construed to require that the instrument or instruments evidencing the conveyance must be recorded prior to the death of the decedent to be valid and thus not subject to the life estate contained herein.* (emphasis added).

illusory transfer test remained untested until early 2006 when the Rhode Island Supreme Court, in *Barrett v. Barrett*, was faced with the question of whether the test adopted a decade earlier in *Pezza* had been legislatively repealed by the recent amendment.<sup>16</sup> Answering in the affirmative, the *Barrett* decision represents a radical departure from past Rhode Island law and renders Rhode Island's spousal election statute a mere paper tiger, easily evaded by changing the form, not substance, of one's property ownership.

This Note argues that the Rhode Island General Assembly should re-evaluate the state's spousal election statute in light of concerns by advocates of both sides of the issue: those favoring continued limitations on spousal disinheritance and those advocating for testamentary freedom and the free alienability of property inter vivos. If it determines protection is still a relevant concern in Rhode Island, the General Assembly should give the statute teeth by defining "conveyance" in §33-25-2(b) as "a complete inter vivos transfer that divests the spouse of all ownership and control in the property." To address concerns of the title bar that one should not have to look beyond a recorded deed, the General Assembly should consider adopting an "objective" approach used by Massachusetts courts, which removes from judicial consideration inquiry into motive or intention of the spouse in transferring the property.<sup>17</sup> In short, if a testator wants to defeat his spouse's expectancy rights, he should be required to put his real property out of his own reach. Otherwise, he should deal with the issue through a pre or post nuptial agreement.

Alternatively, if the General Assembly determines that surviving spouses no longer need protection from the state, which appears to be the message of the *Barrett* decision, then it should do away entirely with the spousal election statute and join Georgia as the only other state that places no limits on testamentary freedom.<sup>18</sup> In its current form, however, Rhode Island's elective share law is senseless. No matter how Rhode Islanders might feel about the issue of whether a spouse should be

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16. *Barrett*, 894 A.2d at 892.

17. See *infra* II(C)(1)(c).

18. See GA. CODE ANN. §53-4-1 (2006); see also Peter H. Strott, Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427 (1985) (discussing the unique aspects of Georgia's probate law).

protected from intentional disinheritance, they would not likely be content with an elective share system which in practice applies only to those not wealthy or knowledgeable enough to hire an attorney to mold their property into an allowable form.

Part II of this Note places Rhode Island's elective share law into national perspective by outlining the most common limitations on spousal disinheritance in the United States, ranging from the most protective of the surviving spouse to the least. Part III considers the *Pezza* and *Barrett* decisions in detail, while Part IV critiques the current state of Rhode Island's elective share law and makes practical recommendations for improvement.

## II. PROTECTIONS AGAINST SPOUSAL DISINHERITANCE IN THE UNITED STATES

### A. Introduction

The nation has undergone a movement to reform spousal inheritance rights in response to the changing needs of modern families.<sup>19</sup> High divorce rates, second marriages later in life, and greater opportunity for women in the workplace are among the factors making families less homogeneous than they once were.<sup>20</sup> Despite these changes, however, women are still more likely than men to forego opportunities to earn income in order to raise children.<sup>21</sup>

Most would agree that a bread winning husband should not be permitted to disinherit his wife in favor of, say, a mistress, after his wife has spent years working at home raising their children. Fortunately, this type of disinheritance seems very rare.<sup>22</sup> The more difficult question is the extent to which states

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19. See ROGER W. ANDERSON & IRA MARK BLOOM, *FUNDAMENTALS OF TRUSTS AND ESTATES* 245 (2005).

20. See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 *CASE W. RES. L. REV.* 83, 87, 87 n.11 (1994).

21. See Joan C. Williams, *Married Women and Property*, 1 *VA. J. SOC. POL'Y & L.* 383, 391 (1994).

22. Given the large number of articles published on the topic of spousal disinheritance, there are surprisingly few modern studies looking at how often it actually occurs. One recent study conducted in Georgia, where spousal disinheritance is permitted, looked at 2,500 wills filed in probate courts around the state and found that there were only 9 cases in which a surviving spouse objected to a provision. See Jeffrey N. Pennell, *Minimizing*

should protect surviving spouses in less traditional families, such as in second marriages when the decedent also has children of a prior marriage. States vary greatly in where they view the limits of an individual's autonomy to decide what to do with his or her property at death.<sup>23</sup> This section provides a brief outline of the various approaches used to balance the competing concerns of testamentary freedom and spousal protection.

### B. *Community Property*

While there is no requirement in most states that husbands and wives share their assets, a significant minority of states treat the married couple as a single entity with regard to certain assets acquired during marriage.<sup>24</sup> In these states, husband and wife are viewed as equal partners and all property acquired by either spouse during their marriage, other than by gift or inheritance, is deemed "community property."<sup>25</sup> Gifts, inheritances and property brought into the marriage by either spouse are considered "separate property."<sup>26</sup> Upon the death of one spouse, half of the community property and all of the deceased spouse's separate property pass by will or intestacy, while the surviving spouse is entitled to the other half of the community property and all of his or her own separate property.<sup>27</sup> Because this system recognizes husband and wife as equal partners during life, there is no need for the state to intervene at death and impose limitations on the decedent's testamentary freedom.<sup>28</sup> Spouses can disinherit each other, but they cannot deprive each other of the one-half interest in their community property.<sup>29</sup>

Only nine states, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin, are community property states, but they encompass more than one

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*the Surviving Spouse's Elective Share*, 32 U. MIAMI INST. ON EST. PLAN. 9-1, 9-11 (1998).

23. See Appendix I.

24. RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 12 (2004).

25. ANDERSON & BLOOM, *supra* note 19, at 246.

26. *Id.*

27. *Id.*

28. See Brashier, *supra* note 20, at 97.

29. See *id.*

quarter of the country's population.<sup>30</sup> While community property principles are arguably the most equitable way in which to conceive of marital property, Wisconsin is the only separate property state that has converted in whole to community property principles.<sup>31</sup> Interestingly, Alaska, a separate property state, offers its married couples a choice of holding their property as separate or community.<sup>32</sup>

### C. *Separate Property*

In contrast to the nine community property states, the overwhelming majority of states take a title based approach to marital property.<sup>33</sup> Under this model, whatever each spouse earns in the marketplace is his or her own unless he or she chooses otherwise.<sup>34</sup> Therefore, the critical issue in the separate property states is what protection should be provided to a spouse who works at home raising children, caring for an elderly family member, or is employed in a lower paying job that provides health care benefits to both spouses.<sup>35</sup> In the case of divorce, separate property states adopt equitable principles very similar to what one finds in community property states.<sup>36</sup> Property acquired by either spouse during marriage, except by gift or inheritance, is put into the pot for division. The real difference in the two marital property systems is only evident when one spouse dies.

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30. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 521 (6th ed. 2000).

31. See generally Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769 (1990) (reviewing Wisconsin's experience transitioning from a separate to community property system).

32. See generally David G. Shaftel et al., *Alaska Enacts an Optional Community Property System Which Can Be Elected by Both Residents and Nonresidents*, SD36 A.L.I.-A.B.A. 1 (1999) (explaining effect of the Alaska Community Property Act).

33. See Appendix I.

34. See DUKEMINIER, *supra* note 30, at 472.

35. See *id.*

36. See Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 532-535 (2003) (proposing a model "Equitable Elective Share" statute that mirrors the division of property at divorce).



### 1. *The Conventional Elective Share*

In every separate property state except Georgia, there are laws that guarantee the surviving spouse a portion of the deceased spouse's estate regardless of what has been provided to him or her by will.<sup>37</sup> These "elective share" laws present the surviving spouse with the option of taking either under the decedent's will or under the state's default inheritance provision.<sup>38</sup> The fraction of the estate subject to election and the scope of assets that can be reached vary widely from state to state, but they are all, to a certain extent, operating in the shadow of their common law ancestors, dower and curtesy.<sup>39</sup>

The common-law right of dower entitled a wife to a life estate in one-third of all real estate her husband owned during marriage, whether or not they had children.<sup>40</sup> Curtesy, on the other hand, entitled a widower to a life estate in all land owned by his wife during marriage, but only if they had children.<sup>41</sup> Dower and curtesy are inchoate rights that attach upon marriage and cannot be cut off without consent, and therefore create marketability of title problems.<sup>42</sup> While elective share statutes have largely replaced dower and curtesy, the common law versions persist in some form in several states.<sup>43</sup>

The conventional elective share statute is the closest in form to dower and curtesy.<sup>44</sup> The statutes vary from state to state, but most permit the surviving spouse to claim a fraction of the deceased spouse's probate estate, usually one-third, which includes personal as well as real property.<sup>45</sup> As more and more individual wealth is held in personal property, this change is sensible.

The principle disadvantage of the conventional elective share

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37. DUKEMINIER, *supra* note 30, at 480.

38. *Id.*

39. *Id.* at 472 (While community property principles originated in France and Spain and took root in the western part of this country during colonization, dower and curtesy arrived with the English settlers to the eastern seaboard and spread westward.).

40. ANDERSON & BLOOM, *supra* note 19, at 255.

41. *Id.*

42. BRASHIER, *supra* note 24, at 14.

43. See DUKEMINIER, *supra* note 30, at 479.

44. See *id.* at 478; see also Appendix I.

45. See Appendix I.

statute is its inflexibility. It can both under and over protect the surviving spouse.<sup>46</sup> It overprotects in two principal ways. First, under the conventional statute, the surviving spouse gets the same share regardless of the length of the marriage.<sup>47</sup> The case of *In re Neiderhiser Estate* best illustrates this point.<sup>48</sup> Just as a bride and groom exchanged vows, but before the minister pronounced them man and wife, the groom collapsed and died.<sup>49</sup> The court held that a state of marriage had been created and that the bride had the status of a surviving spouse.<sup>50</sup> Under the conventional system, she would therefore be entitled to the same fraction of the groom's estate as if he had died after they had been married for 50 years.<sup>51</sup> The other way in which the conventional elective share statute overprotects the surviving spouse is when he or she has already been given substantial assets through will substitutes but still elects against the will, in effect double-dipping into the estate to the detriment of other beneficiaries.<sup>52</sup> In short, the conventional elective share statute disregards the duration of the marriage and the surviving spouse's actual financial need.

Of greater concern, however, is how the conventional elective share can under-protect a surviving spouse. The conventional system is of limited usefulness in protecting against disinheritance because it applies only to the decedent's probate estate and is therefore easily circumvented by will substitutes.<sup>53</sup> To protect against this type of evasion courts have developed several approaches to bring certain will substitutes back into the probate estate.

a. *Fraudulent Intent Test*

As its name implies, courts that use this approach look to the decedent's intent in making the transfer of property to determine if it was done for the purpose of depriving the surviving spouse of

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46. See DUKEMINIER, *supra* note 30, at 483; see also Vallario, *supra* note 36, at 537.

47. See DUKEMINIER, *supra* note 30, at 483.

48. *In re Estate of Neiderhiser*, 2 Pa D. & C.3d 302 (Pa. Com. Pl 1977).

49. *Id.* at 305.

50. *Id.* at 309-10.

51. See DUKEMINIER, *supra* note 30, at 483.

52. See Vallario, *supra* note 36, at 536.

53. See DUKEMINIER, *supra* note 30, at 500.

his or her elective share rights.<sup>54</sup> A relatively recent application of this approach is found in the case *Hanke v. Hanke*.<sup>55</sup> There, a wife established a revocable inter vivos trust for the stated purpose of providing for both herself and her husband during life and for avoiding the cost and delay of probate at her death.<sup>56</sup> The wife retained the right to change beneficiaries, to amend and revoke the trust, and to withdraw all of the trust estate.<sup>57</sup> At death, ninety-eight percent of her total assets were held in the trust.<sup>58</sup> Even though her husband was the primary beneficiary, he sought to have the transfers to the trust set aside as illusory so that the property would become part of the wife's estate and the trust would be entitled to a substantial estate tax refund.<sup>59</sup>

The court held that even though the wife had "retained and exercised virtually absolute control over the transferred property during her lifetime," the trust would not be set aside because it was not the wife's purpose to deprive her husband of his rights.<sup>60</sup> In determining fraudulent intent, courts generally consider the facts and circumstances surrounding the transfer, including the financial and personal relationship of the parties at the time of the transfer, the consideration, if any, for the transfer, and any other factor that may be relevant.<sup>61</sup>

Courts and commentators have been critical of the intent to defraud approach.<sup>62</sup> One common criticism is that a narrow emphasis on fraudulent intent, aside from being difficult to prove, does not focus on the effect of the transfer on spousal survivorship rights: a "transfer of all his property by a married man during his

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54. See, e.g., *Hanke v. Hanke*, 459 A.2d 246 (N.H. 1983).

55. *Id.*

56. *Id.* at 247.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 249.

61. *Id.* at 248; see also *In re Estate of Froman*, 803 S.W.2d 176, 179 (Mo. App. 1991) ([Among the factors included are] (a) a lack of consideration for the transfer, (b) retention of control by transferor-spouse over the asset in question, (c) a transfer of disproportionately high value when compared to transferor's total estate, (d) a lack of open and frank disclosure by the transferor spouse to the surviving spouse about the transfer, and (e) contemplation by the transferor-spouse of his imminent death.).

62. *Newman v. Dore*, 275 N.Y. 371, 379 (1937); W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 98-120 (1960).

life, if made with other purpose and intent than to cut off an unloved wife, is valid even though its effect is to deprive the wife of any share in the property of her husband at his death.”<sup>63</sup> The approach has also been criticized for clouding titles and restricting the free alienation of land by “cast[ing] doubt upon the validity of all transfers made by a married man [or woman], outside of the regular course of business.”<sup>64</sup> While criticism of the approach has been applied from both sides of the spousal protection - free alienation policy debate, the fraudulent intent test is still defended in some quarters.<sup>65</sup>

b. *Illusory Transfer Test*

Rather than focusing on the transferor’s intent to defeat a spouse’s survivorship rights, the second approach focuses on control. *Newman v. Dore* is the most often cited case illustrating this approach.<sup>66</sup> There, a husband transferred all of his property into an inter vivos trust three days prior to his death, but retained the power to revoke the trust, receive all the income and had complete control over the powers granted to the trustees.<sup>67</sup> The court defined the test in terms of whether the spouse “has in good faith divested himself of ownership of his property or has made an illusory transfer.”<sup>68</sup> An illusory transfer is one in which the transferor “intended only to cover up the fact that [he or she] is retaining full control of the property though in form he has parted with it.”<sup>69</sup> The gist of the doctrine is that “[r]eality, not appearance should determine legal rights.”<sup>70</sup> The *Newman* court concluded that the husband’s trust was illusory, but it left open the question of where to draw the line between a valid and illusory

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63. *Newman*, 275 N.Y. at 378.

64. *Id.* at 379.

65. See *Hanke*, 459 A.2d at 248 (The fraudulent intent test “attempts to reconcile the policy of permitting a spouse to freely dispose of his or her property with the policy of protecting a surviving spouse by guaranteeing him or her a portion of the deceased spouse’s estate. We believe that our test which focuses on objective manifestation of the transferor’s intent properly balances the two policies.”).

66. See generally *Newman*, 275 N.Y. 371 (1937).

67. *Id.* at 375.

68. *Id.* at 379.

69. *Id.* at 380.

70. *Id.*

trust.<sup>71</sup> Scholars have called the test illogical because some courts have held that the power to revoke, arguably the ultimate power, is not excessive enough to make a transfer illusory.<sup>72</sup> A second criticism of the illusory transfer test is that while created out of dissatisfaction with inquiries into intent, by requiring a “good faith” divestiture of ownership and control, without a clear definition of how much control is too much, courts may still focus heavily on the transferor’s intent and simply announce a decision on the equities of the case in terms of the control factor.<sup>73</sup>

c. *The Objective Test*

A somewhat more recent approach preserves the illusory transfer test’s emphasis on control, but completely disregards the motive or intention of the spouse in creating the trust. This so-called objective approach was articulated in *Sullivan v. Burkin*.<sup>74</sup> There, a husband executed a deed of trust transferring his real estate to himself as sole trustee.<sup>75</sup> He retained the right to all income and principal and the power to revoke the trust at any time.<sup>76</sup> In his will he stated that he “intentionally neglected to make any provision for [his wife and grandson].”<sup>77</sup> While the court felt obligated to follow an earlier Massachusetts case denying a surviving spouse’s claim against an inter vivos trust over which the deceased spouse retained considerable control, it articulated a new rule for the future:

The rule we now favor would treat as part of the “estate of the deceased” for the purpose of [the state’s elective share statute] assets of an inter vivos trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment, exercisable by deed or by will. This objective test would

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71. *Id.* at 381 (“We do 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 a conveyance more than illusory.”).

72. See MacDonal, *supra* note 62, at 92 (“Complete ownership is at all times attainable by a stroke of his own pen.”).

73. *Id.* at 93-97.

74. 390 Mass. 864 (1984).

75. *Id.* at 865.

76. *Id.*

77. *Id.*

involve no consideration of the motive or intention of the spouse in creating the trust.<sup>78</sup>

The court partially based its decision on a recognition that the interests of spouses in each other's property has increased substantially in the case of divorce and therefore "it is neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an inter vivos trust created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her spouse."<sup>79</sup> The court concluded by admitting that judicially crafted tests are imperfect mechanisms for enforcing the expectancy interests of surviving spouses and that the problem is best handled by legislation.<sup>80</sup>

## 2. *The Legislative Response*

### A. *The 1969 Uniform Probate Code*

To address both the deficiencies of the conventional elective share statute and the judicially crafted tests used to limit disinheritance by will substitutes, the drafters of the Uniform Probate Code ("UPC") in 1969 developed a model elective share system for state legislatures to consider.<sup>81</sup> The 1969 UPC introduced the concept of the "augmented estate," which encompasses not only assets in the net probate estate but also a number of nonprobate transfers made during marriage to people other than the surviving spouse.<sup>82</sup> These include common will substitutes such as revocable inter vivos trusts, property held in joint tenancy, and even complete gifts made within two years of death exceeding a certain monetary value.<sup>83</sup> The augmented estate concept derived from earlier legislative efforts by New York and Pennsylvania to subject certain enumerated nonprobate

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78. *Id.* at 872.

79. *Id.*

80. *Id.* at 873.

81. UNIF. PROBATE CODE §§ 2-201 to 207 (1969) (Westlaw); *see also* DUKEMINIER, *supra* note 30, at 507.

82. UNIF. PROBATE CODE § 2-202 (1969) (Westlaw) (The comment following §2-202 states that a principal purpose of the augmented estate is to prevent "the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share.").

83. *Id.*

transfers to the elective share, an approach those states continue to this day.<sup>84</sup> Florida, Michigan, and North Carolina have also followed the approach of making certain nonprobate transfers reachable by the surviving spouse, without going so far as adopting the UPC.<sup>85</sup>

In addition to addressing how conventional elective share statutes under protect the surviving spouse, the 1969 UPC also sought to correct the unfair practice of “double dipping” into the decedent’s estate when the surviving spouse has already been adequately provided for by will substitutes.<sup>86</sup> To prevent this result, the augmented estate also includes property the decedent gave the surviving spouse before death.<sup>87</sup> Some commentators see the 1969 UPC, still in use by a number of states, as an improvement over the conventional elective share system, but it also still has many of its disadvantages.<sup>88</sup> Most significantly, the 1969 UPC, like the conventional system, does not take into consideration the length of marriage or actual financial need of the surviving spouse.<sup>89</sup>

#### B. *The 1990 Uniform Probate Code*

While the goal of the 1969 UPC was to remedy deficiencies in the conventional elective share system, the 1990 UPC had a broader and more fundamental ambition: “to bring elective-share law into line with the contemporary view of marriage as an economic partnership.”<sup>90</sup> The basic principle is to gross up the wealth of both spouses, not just the decedent, and then divide it according to how long the couple has been married, with a

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84. John W. Fisher, II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Share: New Solutions to Age-Old Problems*, 93 W. VA. L. REV. 61, 107 (1990); ANDERSON & BLOOM, *supra* note 19, at 265.

85. See Appendix I.

86. UNIF. PROBATE CODE § 2-202 (1969) (A second purpose of the augmented estate is “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.”).

87. *Id.* (“[P]roperty given to the surviving spouse during life, including a life estate in a trust, and property received by the spouse at death derived from the decedent, such as life insurance and pensions.”).

88. See BRASHIER, *supra* note 24, at 19.

89. *Id.*; See generally UNIF. PROBATE CODE (1969).

90. UNIF. PROBATE CODE. art. II, pt. 2, gen. cmt. (1990).

minimum amount of \$50,000.<sup>91</sup> For example, a spouse in a long term marriage, defined as fifteen years or more, will be entitled to 50% of the gross estate should the other spouse die. On its face, the approach appears to mirror the result that would be achieved in a community property state, but significant differences remain.<sup>92</sup>

A major difference is that the 1990 UPC augmented estate encompasses a much broader range of property than would be available to a surviving spouse in a community property state. Not only does the augmented estate include gifts and inheritances made during marriage, property deemed "separate" in community property states, but it also, unlike community property states, includes all property acquired prior to the marriage over which the decedent retained substantial control.<sup>93</sup> By making no distinction between "separate" and "community" property, the UPC prevents tracing problems that occur in community property states and some commentators applaud it as the best elective share system devised to date,<sup>94</sup> but it can also be criticized. First, as the augmented estate includes gifts, inheritances, and property acquired before marriage, it is arguably overreaching. While a marriage is an economic partnership, it is not necessarily one that relates back to birth. Another criticism of the 1990 UPC is that it is overly complex.<sup>95</sup> If a state really wants to embrace the concept of community property, perhaps it should do as Wisconsin did and adopt community property principles wholesale, rather than artificially strain separate property principles. After all, the UPC attempts to treat spouses as economic partners, but it does so only at death, not during the marriage itself. So far, nine states have adopted the revised version of the UPC.<sup>96</sup>

### 3. *Georgia*

At the other end of the spectrum is Georgia, where spouses

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91. See *DUKEMINIER*, *supra* note 30, at 509.

92. See *id.* at 511.

93. UNIF. PROBATE CODE. §2-205 (1990); *DUKEMINIER*, *supra* note 30, at 509.

94. See *BRASHIER*, *supra* note 20, at 113 ("In sum, the 1990 UPC elective share provisions are the best forced share alternative devised to date.").

95. See *DUKEMINIER*, *supra* note 30, at 509.

96. See Appendix I.



have a statutory right to disinherit each other.<sup>97</sup> Georgia's statute states that as long as there is no evidence of fraud, undue influence or lack of capacity, a testator "may give all [his or her] property to strangers, to the exclusion of the testator's spouse and descendants."<sup>98</sup> The land where testamentary freedom reigns has drawn the attention of commentators who assert that Georgia has stumbled upon something that the rest of the country can learn from.<sup>99</sup> A recent study conducted there suggests that spousal disinheritance is extraordinarily rare.<sup>100</sup> If complete testamentary freedom does not make a person any more likely to disinherit a spouse, is there really a problem? Are the chapters devoted in law school textbooks, the countless articles written on the subject, the judicial and legislative efforts to address the issue, much ado about nothing? Is it just the principle that is being defended? The Georgia approach raises some intriguing questions and, at the very least, highlights the dearth of empirical studies out there looking at whether intentional spousal disinheritance is significant enough of a problem to justify limiting a person's freedom to give away property at death.

Even if spousal disinheritance is a *de minimus* problem, it is still difficult to reconcile Georgia's approach of complete testamentary freedom when marriage ends at death with its scheme of equitable division of property when marriage ends in divorce.<sup>101</sup> The principal rationale for protecting a spouse is equally compelling in both cases: under the "presumed contribution theory," both spouses are viewed as making significant contributions to the "economic success" of the marriage regardless of who is earning income.<sup>102</sup> Therefore, when one

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97. See GA. CODE ANN. §53-4-1 (2006).

98. *Id.*

99. See Terry L. Turnipseed, *Why Shouldn't I be Allowed to Leave my Property to Whomever I Choose at my Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737 (2006).

100. *Id.* at 776 (citing a 2000 study that looked at 2,529 wills filed in probate courts around Georgia and found that there was not one will contest and only 9 instances where it appeared that a surviving spouse objected to a will provision); see also Pennell, *supra* note 22, at 9-19.

101. See Strott, *supra* note 18, at 444; see also Stokes v. Stokes, 273 S.E.2d 169 (Ga. 1980) (holding that property acquired by either spouse during the marriage, not including gifts and inheritances, should be equitably divided between divorcing spouses regardless of who held title).

102. See Strott, *supra* note 18, at 434-35.

spouse dies, or the marriage ends in divorce, each spouse is entitled to a portion of the wealth accumulated during the marriage.<sup>103</sup> It is difficult to understand why the property rights of a spouse in a “successful marriage” should be any less than those in an “unsuccessful marriage.”<sup>104</sup>

### III. THE EVOLUTION OF RHODE ISLAND’S ELECTIVE SHARE LAW

#### *A. Legislative Repeal of Dower and Curtesy*

Dower and curtesy have been largely abolished throughout the country and replaced by elective share statutes that trigger various property rights, not upon marriage, but upon the death of a spouse.<sup>105</sup> There are at least two reasons why dower and curtesy fell out of favor. The first is obsolescence: as the country shifted from an agrarian to an industrial society, less wealth was being held in land and more in personality, making an inchoate interest in real estate no longer sufficient protection.<sup>106</sup> As a result, most states now extend the expectancy interest to both real and personal property. The second reason why dower and curtesy were abolished is that they severely interfered with the alienability of land: the inchoate rights that attached upon marriage clouded titles and created apprehension in purchasers that the prior owner’s widow would some day come knocking on the door to claim ownership.<sup>107</sup>

The Rhode Island General Assembly abolished dower and curtesy in 1978,<sup>108</sup> replacing them with a gender neutral statute entitling a surviving spouse to a life estate in all the real property owned by the decedent in fee simple at the time of his or her death.<sup>109</sup> While the typical elective share statute corrects the alienation problem by making the property interest a mere expectancy during life, Rhode Island’s version is unlike most

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103. *See id.*

104. *See id.* at 447.

105. RESTATEMENT (THIRD) OF PROP. §9.1, cmt. c.

106. *See BRASHIER, supra* note 20, at 91-93.

107. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641, 1669 (2003).

108. R.I. GEN. LAWS §33-25-1 (dower and curtesy abolished).

109. R.I. GEN. LAWS §33-25-2 (life estate to spouse).

others in that it does not extend the expectancy interest to personal property.<sup>110</sup> In essence, Rhode Island's elective share statute is a neutered version of curtesy. Under ideal conditions, it assures a place for a surviving spouse to live for the rest of his or her life.

#### B. Pezza v. Pezza

In 1997, nearly twenty years after dower and curtesy were abolished, the first case challenging the effectiveness of the state's elective share statute made its way to the Rhode Island Supreme Court.<sup>111</sup>

##### 1. *Facts and Analysis*

Anthony and Olga Pezza were married in 1973.<sup>112</sup> Anthony was a widower, with two children from his first marriage, and Olga was a divorcee.<sup>113</sup> Ten years into their marriage, Anthony did some estate planning. First, he created an inter vivos trust, naming himself as trustee, his son as successor trustee, and conveyed into this trust certain parcels of real estate he acquired prior to his marriage to Olga, as well as shares of stock in his garage door business.<sup>114</sup> Anthony retained the power to revoke the trust, demand payments of the principal, and he occupied one of the parcels as his martial estate and collected rents from the others.<sup>115</sup> His will, executed with the trust, contained a "pour over" provision, directing that any remaining assets be placed into the trust upon his death.<sup>116</sup> The attorney who drafted the documents testified that Anthony's intent at the time was to honor his first wife's "deathbed promise" that his children receive the majority of his property, while allowing Olga to retain possession of their jointly held property, including a Florida residence, inherited from Anthony's mother, and several bank accounts.<sup>117</sup>

After a dispute with Olga in 1986, Anthony resigned as

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110. See Appendix.

111. See *Pezza*, 690 A.2d 345.

112. *Id.* at 346.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 347.

117. *Id.* at 346 n.2.

trustee of the trust, appointed his son as successor trustee and waived his power of revocation.<sup>118</sup> Shortly thereafter, Olga filed for divorce.<sup>119</sup> In response, Anthony took the additional step of disclaiming his power to demand payment of the trust principal.<sup>120</sup> The divorce action was presumably discontinued and in 1990 Anthony died testate, still married to Olga.<sup>121</sup>

Olga filed suit in Superior Court contending that Anthony's inter vivos trust was an intentional effort to defraud her of the spousal life estate created by § 33-25-2 and should be declared "invalid" by the court.<sup>122</sup> As the issue was one of first impression in Rhode Island, the trial judge looked to other jurisdictions for guidance. Finding the "illusory transfer test" the preferable approach, the Superior Court judge applied it to the facts and concluded that whatever his intention may have been in establishing the trust, the actions Anthony took in 1986 to divest himself of ownership and control "eliminated any question that the trust was a sham or illusory."<sup>123</sup>

The Rhode Island Supreme Court unanimously affirmed the decision and adopted the illusory transfer test as the proper test to be used when determining whether a deceased spouse's inter vivos transfer of real property is sufficient to defeat a surviving spouse's statutory share.<sup>124</sup> The court clarified, however, one important point left open by the Superior Court decision. A good faith divestment of *some* ownership interest in the property was clearly not enough:

In order for a transfer of real property to a trust to be real, valid, and nonillusory, the spouse transferring the property must effectuate a completed inter vivos transfer by conveyance that both divests him or her of *all* ownership in the property and that, also, at the time of conveyance, is made with the proper donative intent.<sup>125</sup>

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118. *Id.* at 347.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Pezza v. Pezza*, 1994 WL 930902 at \*2 (R.I. Super. 1994).

123. *Id.* at 5.

124. *Pezza*, 690 A.2d at 350.

125. *Id.* at 349 (emphasis added).

### C. 1999 Amendment

Shortly after the *Pezza* decision came down, two pieces appeared in the Rhode Island Bar Journal suggesting that the court's adoption of the illusory transfer test had caused concern among some segments of the bar.<sup>126</sup> The first piece raised a number of questions about the potential impact of the decision on land conveyancing.<sup>127</sup> The second piece indicated that the Committee on Probate and Trust, together with the Title Standards Committee, had drafted legislation that "would clarify the current law creating life estates of surviving spouses" in the wake of the *Pezza* decision, but that the status of the bill was unclear.<sup>128</sup>

Rhode Island does not record legislative history so it is unclear what kind of debate took place in the General Assembly over the issue. Later that year, however, §33-25-2(b)<sup>129</sup> was enacted, which provides that the surviving spouse's life estate expectancy can be defeated so long as the real estate is "conveyed" and recorded in the land evidence records prior to the decedent's

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126. See Mignanelli, *supra* note 13, at 11; David T. Riedel, *Feature: Bar Association Committee Reports*, Probate and Trust Committee, 47 R.I. B.J. 15 (1999).

127. See Mignanelli, *supra* note 13, at 13 ("For example, how does a conveyancing attorney verify if the settlor is single or widowed and whether or not the real estate in that trust was subject to a surviving spouse's life estate? ... Also, does a bona fide purchaser for value from a trustee automatically take title free and clear without the threat of a surviving spouse's life estate attaching to the real estate? ... Finally, are conveyancing attorneys required to: verify if the settlor of the trust is still living; verify whether the settlor was single or married; verify whether the settlor's spouse, if he/she was married, is still living or has died; and if the spouse of the settlor has died; and, verify that he/she had not instituted any proceeding to claim a life estate in trust real estate pursuant to § 33-23-2?").

128. Riedel, *supra* note 126.

129. R.I. GEN. LAWS § 33-25-2(b).

For purposes of this section, any real estate conveyed by the decedent prior to his or her death, with or without monetary consideration, shall not be subject to the life estate granted in subsection (a) if the instrument or instruments evidencing such conveyance were recorded in the records of land evidence in the city or town where the real estate is located prior to death of the decedent. Nothing in this section shall be construed to require that the instrument or instruments evidencing the conveyance must be recorded prior to the death of the decedent to be valid and thus not subject to the life estate contained herein.

death. The statute then reads, in an apparent contradiction, that recording the deed is not a necessary element. Not only is one of the two required elements apparently not required, but the General Assembly did not define the meaning of conveyance, which has a narrow legal definition (“[t]he voluntary transfer of a *right* or of property”) <sup>130</sup> and a broader definition (“[t]he transfer of title to property from one person to another”) <sup>131</sup> that most lay people associate with the word. In short, the words Justice Jackson used to describe the problem of executive power seem equally as applicable to Rhode Island’s amended elective share statute: “almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.” <sup>132</sup>

#### D. *Barrett v. Barrett*

Rhode Island’s new elective share statute was bound to be litigated. It took seven years for the Court to be faced with the now familiar factual scenario: a widower, with grown children from a prior marriage, remarries a younger woman. Shortly after remarrying, he restructures his estate plan. He would like his children to inherit the real property he acquired while still married to his first wife, preferring to provide for his second wife under his will. The elective share law of the state would frustrate that goal, so he transfers the property into an inter vivos trust over which he retains rights roughly equivalent to ownership in fee simple. When he dies, his second wife, unsatisfied with what has been left to her under his will, challenges the trust on the grounds that it nothing more than a will in disguise. In light of the 1999 amendment, may the court still probe the validity of the trust using the “illusory transfer test?”

##### 1. *Facts and Travel*

The *Barrett* Court notes initially that the deceased, Horace, was married to his first wife, Nancy, for fifty-two years before she died in 1997, and during this long marriage they had five

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130. BLACK’S LAW DICTIONARY 357 (2d ed. 2001) (emphasis added).

131. THE AMERICAN HERITAGE DICTIONARY 128 (4th ed. 2000).

132. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

children.<sup>133</sup> In 1976, twenty years before Nancy's death, the couple bought a single family home on Prudence Island in Portsmouth, Rhode Island.<sup>134</sup> The year after Nancy's death, Horace married the plaintiff, Jane. At the time of their marriage Horace was seventy-four years old and Jane was forty-one.<sup>135</sup>

Horace then did some estate planning. He executed a will in which he bequeathed to Jane certain personal property, an amount of money measured by the length of marriage at the time of Horace's death, and a proportional share in the residue of the estate so long as they were married for five years at the time of his death.<sup>136</sup> He noted in his will that the "relatively small size of the bequest does not reflect my lack of regard or affection for [Jane] but rather my prior obligation to the children and grandchildren of my first wife, [Nancy], as I still feel that fifty percent of my estate is hers."<sup>137</sup> Horace also created a revocable inter vivos trust between himself as donor and two of his children as co-trustees.<sup>138</sup> By quitclaim deed, he conveyed a life estate in the Prudence Island property to himself with a remainder to the co-trustees.<sup>139</sup> Significantly, he retained the "full power to sell, mortgage, convey or otherwise encumber the life estate and the remainder."<sup>140</sup> One month after creating the trust he amended its terms to totally exclude Jane from a share in the residuary trust estate.<sup>141</sup> The co-trustees, however, were still required to satisfy the specific monetary bequest to Jane under his will.<sup>142</sup>

Horace died in 2003 after he and Jane had been married for a little over four years.<sup>143</sup> Rather than take the monetary bequest made to her under Horace's will, Jane elected to exercise her statutory right to a life estate in the real estate owned by Horace at his death.<sup>144</sup> Finding the real estate insulated by the trust,

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133. *Barrett*, 894 A.2d at 893.

134. *Id.*

135. *Id.* at n.3.

136. *Id.* at 893.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Barrett*, 894 A.2d at 893.

143. *Id.*

144. *Id.* at 894.

Jane brought suit against the trustees in Superior Court seeking a declaration of her rights in the Prudence Island property.<sup>145</sup> Her principal argument was that Horace's conveyance to the trust was illusory since during his life he retained the functional equivalent of fee simple ownership.<sup>146</sup> Horace's children countered that Horace did not own the property in fee simple at the time of his death, but more importantly, that the §33-25-2(b) amendment overruled the illusory transfer test adopted in *Pezza*.<sup>147</sup>

## 2. *The Court's Analysis*

Given the "conflicting criteria" of what is required to defeat a surviving spouse's statutory expectancy under the illusory transfer test and under §33-25-2(b), the court sought to determine whether the General Assembly intended for the two standards to co-exist or for §33-25-2(b) to replace the judicially crafted test.<sup>148</sup> Noting that it would not be the first time the General Assembly has enacted legislation to supplant a judicial pronouncement, the court concluded that the timing of the amendment and the fact that it does not include the elements of complete divestiture and proper donative intent could mean only one thing: §33-25-2(b) was meant to repeal the illusory transfer test.<sup>149</sup> The court stated "the General Assembly has spoken in the clearest of terms, and has declared that the only predicate to defeating a surviving spouse's right to a life estate is a conveyance of the real estate that is recorded prior to death."<sup>150</sup>

As to the fact that the legislature did not define the term "conveyance," the court reasoned that it could not qualify the plain meaning of the term, which Black's Law Dictionary defines as "[t]he voluntary transfer of a right or of property."<sup>151</sup> If the General Assembly intended to limit the type of conveyance, the court reasoned, it could have adopted, for example, the Uniform Probate Code's augmented estate approach.<sup>152</sup>

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145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 895.

150. *Id.* at 898.

151. *Id.* (quoting BLACK'S LAW DICTIONARY 357 (8th ed. 2004)).

152. *Id.* at 898-99.



The court proceeded to apply the broad language of the amendment to the facts. Even though Horace retained the power to “sell, mortgage, convey or otherwise encumber the life estate and the remainder,” he did not do so and therefore for the purposes §33-25-2(a) and (b), the conveyance to the trust was complete.<sup>153</sup> The court concluded by noting that although not “crucial to the outcome,” the result was consistent with Horace’s intent that the Prudence Island property pass to the children of his first marriage.<sup>154</sup>

Justice Robinson dissented, but he did not take issue with the majority’s conclusion that the General Assembly enacted §33-25-2(b) in response to *Pezza*, nor its right to do so.<sup>155</sup> His dissent took aim at the language of the amendment, specifically the phrase, “any real estate conveyed by the decedent,” which he argued was not broad enough to encompass a transfer in which the transferor retains the right to convey both the life estate and the remainder interest.<sup>156</sup> In his words, “[a]t the risk of sounding simplistic, my view is that one has not actually ‘conveyed’ if the grantor specifically retains the right to convey to some other person or entity – even though it turns out that the grantor opts not to exercise that retained right to convey in his or her lifetime.”<sup>157</sup>

#### IV. ANALYSIS AND RECOMMENDATIONS

The *Barrett* decision is a dramatic, unexplained departure from past law. However one views the change, it is now extremely easy to disinherit a spouse in Rhode Island. *Barrett* provides the roadmap: simply transfer your real estate into an inter vivos trust, structure it as to retain essentially the same control over the property as if it were held outright, record the deed and rest easy that it will be out of reach. Note that a married person with the same intention of maintaining control over real property during life and devising it to someone other than a spouse at death will be frustrated by the elective share statute if the devise is attempted through a simple will. Therefore, Rhode Island’s elective share

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153. *Id.* at 899.

154. *Id.*

155. *Id.* at 900 (Robinson, J., dissenting).

156. *Id.*

157. *Id.* at 901.

statute, as interpreted in *Barrett*, values *form over substance* and rewards only those who have the means or knowledge to comply with its technical requirements without demanding any substantive divestiture. In other words, a married person can have his cake and eat it too, so long as he jumps through the loophole once closed by *Pezza*, but reopened by the 1999 amendment.

Would Rhode Islanders really favor the kind of elective share statute that the General Assembly has enacted? If it genuinely believes that spousal disinheritance is not a legitimate concern, as the *Barrett* decision suggests, then the General Assembly should abolish the elective share statute altogether and join Georgia as the only other state that allows spouses to freely disinherit each other. There are some cogent arguments for following Georgia's lead. Chief among them is that nonconsensual disinheritance appears to be extremely rare.<sup>158</sup> Almost all disinheritance, then, according to at least one study in Georgia happens with the disinherited spouse's consent for reasons such as tax and public benefits planning.<sup>159</sup> Even if this is true, a decision to abolish the elective share statute should not be made until there has been some meaningful debate that includes advocates from both sides of the issue.

One only needs to look as far as Massachusetts to see an example of the kind of debate that should be occurring over the issue of spousal disinheritance. As discussed *supra*, Massachusetts adopted an objective version of the illusory transfer test in the 1984 decision *Sullivan v. Burkin*,<sup>160</sup> the equivalent of Rhode Island's *Pezza* decision. It did so in order to close the loophole created by *Kerwin v. Donaghy*,<sup>161</sup> a 1945 case that held that assets in a revocable trust created by a deceased spouse could not be reached by the surviving spouse under the state's elective share statute. Interestingly enough, Rhode Island's law on the issue of spousal disinheritance has devolved to where Massachusetts law was in 1945. In any case, several years ago, in *Bongaards v. Millen*,<sup>162</sup> members of the Massachusetts

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158. See Pennell, *supra* note 22, at 9-19.

159. Turnipseed, *supra* note 99, at 776.

160. *Sullivan v. Burkin*, 390 Mass. 864 (1984).

161. 317 Mass. 559 (1945).

162. 440 Mass. 10 (2003).

Supreme Court, faced with another disinheritance case, took the opportunity to consider the proper role of the legislature and the judiciary in shaping public policy and gave thoughtful consideration to several proposed solutions to enhance the effectiveness of the state's "outdated and inadequate" elective share statute.<sup>163</sup>

The majority opinion in *Bongaards* acknowledged that the judiciary should have some role in interpreting statutory language, but concluded that the legislative branch should have the primary role in forming public policy.<sup>164</sup> If the legislature does act, however, as it has in Rhode Island, then there is a responsibility to formulate a comprehensive solution to the problem, one that considers the concerns of all those who will be affected. Otherwise, the legislature should leave it to the courts to do what they do best: resolve complex factual problems on a case by case basis through the common law process. It is one thing to limit judicial discretion as the General Assembly has done through enacting §33-25-2(b), but fashioning a bright line solution to only one half of a social problem will one day require the court to enforce inequitable results. As it turns out, the facts of *Barrett* weigh against the plaintiff. The age discrepancy between the plaintiff and the decedent, the relative brevity of their marriage compared with the length of the decedent's first marriage, and the large number of children from that first marriage, make the outcome somewhat palatable. But a slight change in the facts might lead to a much more inequitable result. One can only hope that a Rhode Island court is not presented with a summary judgment motion in a case in which a decedent uses a revocable trust to disinherit his wife of fifty-two years and five children in favor of much younger woman he knew for only four years. Such a fact pattern will decidedly lay bare how meaningless the protections provided by Rhode Island's elective share statute really are.

If the General Assembly decides that Rhode Islanders still want some form of elective share statute to protect a spouse from disinheritance, then it must find one that provides meaningful protection while, at the same time, not unduly interfering with

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163. *Id.* at 34.

164. *Id.*

real estate transactions. Theoretically, the best solution would be to adopt a Uniform Marital Property Act as Wisconsin has and become a community property state. It is the only way to treat marriage as an economic partnership *during the marriage* because it recognizes the contribution of both spouses to household welfare regardless of how property is titled. Moreover, it does not overreach or automatically co-mingle property independently acquired before the marriage or by gift and inheritance. If Rhode Island were a community property state, the result in *Barrett* might have been the same, but at least the plaintiff's four year commitment to the decedent would have been acknowledged. To be practical, though, Rhode Island is not likely to become a community property state. There are probably very good reasons why only one separate property state has adopted community property principles outright. Tracing is a problem in community property states, but the reluctance probably has more to do with perceived or actual difficulty in transitioning between the two systems. Further research as to why more separate property states have not adopted community property principles might be valuable. After all, it seems strange that the fortuitousness of whether an area was colonized by Spain or England should continue to dictate how states conceive of marital property in the twenty first century.

Rhode Island could also adopt either the original or revised version of the UPC, as many states have. There does not appear to be the same reluctance to adopting the UPC as there is to the outright adoption of community property principles. As it is, more separate property states than not have some form of augmented estate approach. In New England, despite relatively progressive laws regarding who may marry, the area is still very traditional with regard to marriage's effect on property ownership. Maine is the only New England state so far to have adopted some form of augmented estate approach.<sup>165</sup> A full evaluation of the UPC augmented estate approach is beyond the scope of this Note and there are a number of very informative articles available on the issue.<sup>166</sup> In general, though, while the UPC augmented estate

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165. See Appendix; ME. REV. STAT. ANN. tit. 18-A, §§2-201 to 207.

166. See generally Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891 (1992). Lawrence W. Waggoner, *Spousal Rights in our Multiple Marriage Society*:

concept is heralded as better than anything else devised to date, it makes it impossible for people to maintain any separate property because all property acquired before and after the marriage is included in the pot for division.<sup>167</sup> This may be desirable for first time marriages, but not necessarily for later marriages in cases where the couple have already lived the majority of their lives. In any event, it may be howling at the moon to suggest that the Rhode Island General Assembly would adopt UPC principles given its current position on the issue, which is as far removed from the UPC philosophy as possible. The *Barrett* decision, itself, uses the General Assembly's non-adoption of the UPC as evidence that it did not intend to limit the type of conveyance necessary to defeat a surviving spouse's life estate.<sup>168</sup> This makes it is an unlikely solution for the near future.

The most pragmatic solution at this juncture would be to define "conveyance" in §33-25-2(b) in such a way as to make the elective share statute meaningful while at the same time preventing land title problems. This would be consistent with the spirit of Justice Robinson's dissent.<sup>169</sup> One way to go about it is to make §33-25-2(b) compatible with the illusory transfer test adopted in *Pezza* by defining conveyance as "a completed inter vivos transfer that divests the transferor of *all* ownership and control in the property."<sup>170</sup> Whether or not a person has divested himself of all ownership and control in the property should be sufficiently apparent from the deed. The General Assembly could then do as Massachusetts did and make the test objective by eliminating the proper donative intent requirement, which is difficult to apply and may cloud titles transferred out of trusts.<sup>171</sup> This is not to say that a trust could not be invalidated under traditional competency doctrines such as undue influence, just that a court will not consider the settlor's intent in conveying the property. In sum, as long as the property is put entirely out of the transferor's reach, then the surviving spouse will have no claim.

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*The Revised Uniform Probate Code*, 26 REAL PROP. PRON. & TR. J. 683 (1992); Fisher and Curnutte, *supra* note 84.

167. See *DUKEMINIER*, *supra* note 30, at 509.

168. *Barrett*, 894 A.2d at 899.

169. See *generally id.* at 900 (Robinson, J., dissenting).

170. *Pezza*, 690 A.2d at 349.

171. See *supra* section IV.

The proposed definition of conveyance addresses the form over substance issue, provides more protection for a surviving spouse than is currently available, and makes it relatively clear from the deed whether the property may be subject to the elective share statute. That said, it is not without problems inherent to a compromise between the two conflicting policy considerations of spousal protection and free alienability of property. For example, a complete conveyance definition would not prevent deathbed gifts of real estate with the intent of disinheriting a spouse. Courts, therefore, would still be powerless to prevent the most inequitable type of disinheritance.

The General Assembly could also prospectively close whatever loopholes in §33-25-2(a) a clever lawyer might find by defining “real estate owned by the decedent” as including certain nonprobate transfers, preferably those visible on the face of a deed. This might include, for example, real estate held in joint tenancy with someone other than the spouse. Other nonprobate transfers that are commonly included but which might create title problems are gifts causa mortis, or transfers of property made within two years of death that would be subject to estate or gift taxation. As mentioned previously, a significant number of states have developed their own individually tailored augmented estate models, without going so far as adopting the UPC. Rhode Island is in a position to do the same.

## V. CONCLUSION

Rhode Island’s elective share statute needs to be revisited. Only the General Assembly has the ability to hold hearings and gather information to draft a bill that will balance the interests of both the title industry and surviving spouses. It is evident from *Barrett* that the General Assembly only considered the former interest in 1999 when it enacted §33-25-2(b). It is one thing for the General Assembly to permit spousal disinheritance, but it is another to do so without considering the majority of Rhode Islanders who are probably both unaware of the loophole and unable to afford an attorney to transmute their property into the allowable form. Given the range of models currently in use throughout the nation to protect surviving spouses, Rhode Island’s legislature can do a better job of developing a solution that is in the best interest its citizens. The solution may be as easy as

providing a definition of “conveyance” that provides enhanced protection to surviving spouses without unduly interfering with land conveyancing. Or it may require something more. In the absence of a comprehensive solution to the problem, the General Assembly should free the courts to decide each case on its merits, as was required under *Pezza*. We will get more equitable, consistent results through the common law process than through application of our new, regressive elective share statute.

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## APPENDIX

State	Inheritance Model	Elective Share Statute	Statutory Share
Alabama	Conventional Elective Share	ALA. CODE § 43-8-70 (LexisNexis 1975).	Lesser of (1) decedent's estate reduced by value of surviving spouse's separate estate or (2) 1/3 of decedent's estate.
Alaska	Choice between original UPC or community property	ALASKA STAT. §§ 13.12.202; 34.77.030 (2006).	One-third of augmented estate or as provided by community property agreement.
Arizona	Community Property		
Arkansas	Modified Dower/ Curtesy	ARK. CODE ANN. § 28-39-401 (1987).	Requirement that spouses be married for more than one year. If the surviving spouse is a woman, dower in husband's real and personal property as if he died intestate. If the surviving spouse is a man, curtesy interest in real and personal property as if she died intestate.
California	Community Property		
Colorado	1990 UPC	COLO. REV. STAT. §§ 15-	Ten year maximum accrual



		11-201 -15-11-207 (2006).	to achieve 50% of augmented estate.
Connecticut	Conventional Elective Share	CONN. GEN. STAT. ANN. § 45a-436(a) (West 1958).	Life estate of 1/3 value of all property passing under will, after payment of debts and expenses.
Delaware	Non-uniform Augmented (Estate defined by estate tax law)	DEL. CODE ANN. tit. 12, §§ 901; 902 (1974).	One-third of "elective estate" less transfers to surviving spouse by decedent. Elective estate means gross estate for federal estate tax purposes.
District of Columbia	Conventional Elective Share	D.C. CODE § 19-113 (2001).	Intestate share, not to exceed ½ of net estate.
Florida	Non-uniform Augmented	FLA. STAT. ANN. §§ 732.2035; 732.2065 (West 2005).	Thirty percent of "elective estate." Property entering elective estate includes (1) decedent's probate estate, (2) "pay on death" accounts, (3) fractional interest in joint tenancy, (4) property transferred by decedent to extent transfer was revocable by decedent alone or in conjunction with another person, (5) property

			transferred over which decedent had right to possession, use, income, principal or like (6) any beneficial interest in insurance on decedent's life, (7) the value of any public or private pension or similar arrangement, and (8) most property transferred during the one year preceding the decedent's death.
Georgia	None	GA. CODE ANN. § 53-4-1 (1997).	A testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants.
Hawaii	1990 UPC	HAW. REV. STAT. ANN. §§ 560:2-201-560:2-209 (LexisNexis 2005).	
Idaho	Community Property	IDAHO CODE ANN. § 15-2-201 (1949).	Applies augmented estate to quasi-community

			property.
Illinois	Conventional Elective Share	755 ILL. COMP. STAT. ANN. 5/2-8 (LexisNexis 1993).	One-third of estate if testator leaves a descendant; one-half if testator leaves no descendant.
Indiana	Conventional Elective Share	IND. CODE ANN. § 29-1-3-1 (West 1999).	One-half net personal and real estate. However, if surviving spouse is a second or subsequent spouse who did not have children with decedent and decedent has surviving issue, 1/3 of net personal estate plus 25% of fair market value of real property less value of liens and encumbrances.
Iowa	Conventional Elective Share	IOWA CODE ANN. § 633.238 (West 1991).	a. One-third value of all legal real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of right. b. All personal property that, at the time of death,

			was in the hands of the decedent as the head of a family, exempt from execution. c. One-third of all other personal property of the decedent that is not necessary for the payment of debts and charges.
Kansas	1990 UPC	KAN. STAT. ANN. §§ 59-6a202 -59-6a207 (2005).	
Kentucky	Conventional Elective Share	KY. REV. STAT. ANN. § 392.080 (LexisNexis 1999).	One-third of real estate.
Louisiana	Community Property		
Maine	Original UPC	ME. REV. STAT. ANN. tit. 18-A, §§ 2-201 -207 (1964).	One-third of augmented estate
Maryland	Conventional Elective Share	MD. CODE ANN., EST. & TRUSTS § 3-203 (LexisNexis 1974).	One-third of net estate if there is also surviving issue, or ½ of net estate if there is no surviving issue.
Massachusetts	Conventional Elective Share	MASS. GEN. LAWS ANN. ch. 191, § 15 (West 2004).	One-third of personal and real property if decedent left issue. If no issue, surviving spouse entitled to \$25,000 and ½ remaining

			real and personal property.
Michigan	Non-uniform Augmented	MICH. COMP. LAWS ANN. § 700.282 (West 2002).	One-half of estate or share that would have passed if testator died intestate, reduced by ½ of value of all property derived by the spouse from the decedent through inter vivos transfers. "Property derived by the spouse from the decedent" includes the following: (a) transfers made within 2 years of decedent's death to the extent transfer is subject to federal gift or estate tax, (b) transfers made before death subject to a power retained by decedent which would make the property subject to federal estate tax, and (c) transfers effectuated by death of decedent through joint ownership, tenancy by entireties, insurance beneficiary, or similar means.

Minnesota	1990 UPC	MINN. STAT. ANN. §§ 524.2-201 - 524.2-209 (West 2000).	
Mississippi	Conventional Elective Share	MISS. CODE ANN. § 91-5-25 (West 1972).	Real and personal property surviving spouse would have received through intestacy, capped at 50%.
Missouri	Conventional Elective Share	MO. ANN. STAT. §§ 474.160; 474.163 (West 1992).	One-half of estate if no lineal descendants; otherwise, 1/3 of estate. Share reduced by decedent's inter vivos transfers to surviving spouse.
Montana	1990 UPC	MONT. CODE ANN. §§ 72-2-221 -226 (2005).	
Nebraska	Original UPC	NEB. REV. STAT. §§ 30-2313 - 30-2319 (2004).	One-half of augmented estate.
Nevada	Community Property		
New Hampshire	Conventional Elective Share	N.H. REV. STAT. ANN. § 560:10 (2006).	One-third of personal and real estate if there are children of the deceased surviving or issue of any deceased children. If no children or issue, but surviving parents or siblings, \$10,000

			value in personal and real estate plus $\frac{1}{2}$ of remainder. If no children, issue, parents, or siblings, \$10,000, plus \$2,000 for each year of marriage and $\frac{1}{2}$ of remainder.
New Jersey	Original UPC	N.J. STAT. ANN. §§ 3B:8-1 - 3B:8-19 (West 1983).	One-third of augmented estate, also available to domestic partner.
New Mexico	Community Property		
New York	Non-uniform Augmented	N.Y. EST. POWERS & TRUSTS LAW §§ 5-1.1-A (McKinney 1999).	Greater of \$50,000 or 1/3 of net estate, including enumerated non-probate transfers, including (a) gifts causa mortis, (b) gifts of property within one year of death not excludible from taxable gifts, (c) savings account trusts, (d) decedent's share of joint bank accounts, (e) joint tenancies and tenancies by the entirety, (f) transfers of property over which decedent enjoyed

			possession, income, retained power to revoke, consume, invade or dispose of the principal, (g) pension plans, (h) any property over which decedent had a general power of appointment.
North Carolina	Non-uniform Augmented	N.C. GEN. STAT. §§ 30-3.1 - 30-3.6 (2005).	One-third or one-half of "total net assets," depending upon whether decedent has surviving children. Total net assets include (a) decedent's real and personal property, (b) share of joint tenancies and tenants by entirety, (c) value of property includible in taxable estate, (d) gifts to donees other than surviving spouse, excluding those within the annual gift tax exclusion, gifts to which the surviving spouse consented, and gifts made prior to marriage, (e) proceeds from retirement or pension plans.



North Dakota	1990 UPC	N.D. CENT. CODE §§ 30.1-05-01 - 30.1-05-07 (1996).	
Ohio	Conventional Elective Share	OHIO REV. CODE ANN. § 2106.01 (West 2005).	One-half of net probate estate, unless two or more of decedent's lineal descendants survive, in which case surviving spouse takes 1/3 of probate estate.
Oklahoma	Conventional Elective Share	OKLA. STAT. ANN. tit. 84, § 44 (West 1990).	Intestate share or ½ of probate estate.
Oregon	Conventional Elective Share	OR. REV. STAT. §§ 114.105, 114.125 (1990).	One-quarter of net estate reduced by value of property given to the surviving spouse under decedent's will. Elective share amount plus non-probate transfers to surviving spouse may not exceed ½ of decedent's total property.
Pennsylvania	Non-uniform Augmented	20 PA. CONS. STAT. § 2203 (West 2005).	One-third of the following property: (1) property passing from decedent by will or intestacy, (2) life estate in property conveyed by decedent during life to extent decedent had use

			of the property, an interest in it, or power to withdraw the income, (3) property conveyed by decedent during life to extent decedent had power to revoke, consume, invade, or dispose of principal for own benefit, (4) property held in joint tenancy, (5) annuity contracts purchased during marriage from which decedent received payments at time of death, (6) property conveyed by decedent during marriage and within one year of death with aggregate value exceeding \$3,000 at time of conveyance.
Rhode Island	Conventional Elective Share	R.I. GEN. LAWS § 33-25-2 (2006).	Life estate in all real estate owned in fee simple at decedent's death, not including any real estate conveyed and recorded during decedent's life.
South Carolina	Conventional Elective Share	S.C. CODE ANN. §§ 62-2-201, 62-2-	One-third of probate estate, meaning property

		202 (1976).	passing under the decedent's will plus decedent's property passing by intestacy.
South Dakota	1990 UPC	S.D. CODIFIED LAWS §§ 29A-2-201 - 29A-2-213 (1997).	
Tennessee	Conventional Elective Share	TENN. CODE ANN. § 31-4-101 (West 2001).	Between 10% and 40% of net estate depending upon length of marriage reduced by inter vivos transfers to the surviving spouse.
Texas	Community Property		
Utah	1990 UPC	UTAH CODE ANN. §§ 75-2-201 - 75-2-214 (2002).	
Vermont	Conventional Elective Share	VT. STAT. ANN. tit. 14, §401 (2002).	One-third of deceased spouse's personality.
Virginia	Original UPC	VA. CODE ANN. §§ 64.1-16 - 64.1-16.2 (2002).	One-third of augmented estate if decedent left surviving children or their descendants; otherwise, ½ of augmented estate.
Washington	Community Property		
West Virginia	1990 UPC	W.VA. CODE §§ 42-3-1 - 42-3-6	

		(LexisNexis 2004).	
Wisconsin	Community Property (adopted)	WIS. STAT. ANN. §§ 861.02; 861.03 (West 2002).	Fifty percent of augmented deferred marital property estate.
Wyoming	Conventional Elective Share	WYO. STAT. ANN. § 2-5-101 (2005).	One-half if there are no surviving issue of the decedent, or if the surviving spouse is also a parent of any of the surviving issue of the decedent; or one-fourth, if the surviving spouse is not the parent of any surviving issue of the decedent.