

REDESIGNING THE SPOUSE'S FORCED SHARE*

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EDITOR'S SYNOPSIS: *This article discusses the history of the forced share, the justifications for it, and the uneven fit between the rule and the objectives, then proposes a new approach that would meet the objectives.*

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,"¹ 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, which is discussed in some detail below,² extends the forced-share entitlement to property that has been the subject of inter vivos transfer.

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.

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¹W. Macdonald, *Fraud on the Widow's Share* (Michigan Legal Studies 1960).

²UNIFORM PROBATE CODE (UPC), 8 U.L.A. (1983 ed.). The UPC elective-share provisions are discussed *infra*, text at notes 38–43, and reproduced in Appendix B, *infra* at p. 326. See generally Kurtz, *The Augmented Estate Concept under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977).

I. MARITAL PROPERTY REGIMES AND THE FORCED SHARE

Forced-share law abridges the testamentary freedom of a married person to disinherit his surviving spouse. The spouse's forced share overrides any contrary disposition in the decedent's will. The typical American forced-share statute provides that the surviving spouse may claim a one-third share of the decedent's estate. This forced share is expressed as an option that the survivor may elect or decline during the administration of the decedent's estate, hence the synonym "elective share."³

A spouse also has the power to waive the forced-share right by contract, either during the marriage or by means of a premarital agreement.⁴ Apart from the carriage trade, such agreements have not been common in the United States, although as the population ages there is good reason for thinking that such agreements will be more frequently employed, especially in remarriage situations.

The national anthem celebrates America as the land of the free, and in the law of wills that boast deserves to be taken very seriously. America is uniquely the land of testamentary freedom. In none other of the world's great legal systems would you be so free to choose whom you want to receive your property when you die. If you were to die domiciled in any of the European states, your children (and in some circumstances other blood relatives as well) would have a forced share.⁵ In England and in the principal Commonwealth jurisdictions (the Australian states, the Canadian provinces, New Zealand), your testamentary freedom would be differently restricted, under a statutory scheme known as Testator's Family Maintenance (TFM).⁶ Your descendants and other relatives are not entitled to statutorily calculated forced shares as on the Continent; rather, the chancery judge exercises a vast discretion to revise the disposition in your will for the benefit of your relatives and other dependents.

When, however, we turn away from the question of the power to disinherit children, and we examine instead the power to disinherit a spouse, the picture alters dramatically. The English and Commonwealth solution remains the same; TFM empowers the judge to modify your will as he thinks appropriate for the benefit of your spouse.⁷ But as between American and European law, the

³E.g., UPC § 2-201. For an up-to-date compilation of the various state statutes, see Joslyn, *Surviving Spouse's Right To Share in Deceased Spouse's Estate: ACPC Study No. 10*, in ACPC STUDIES (American College of Probate Counsel, 1985).

⁴UPC § 2-204.

⁵See, e.g., for Germany, T. Kipp & H. Coing, ERBRECHT 52-105 (13th ed. 1978).

⁶See generally R. Davern Wright, TESTATOR'S FAMILY MAINTENANCE IN AUSTRALIA AND NEW ZEALAND (3d ed. 1974). These statutes now empower the courts to alter intestate as well as testate shares, hence the tendency to change the title of the legislation so that it no longer speaks of testation alone. The current English version is the Inheritance (Provision for Family and Dependents) Act 1975, c. 63, on which, see generally J. Ross Martyn, FAMILY PROVISION: LAW AND PRACTICE (2d ed. 1985); R. Oughton & E. Tyler, TYLER'S FAMILY PROVISION (2d ed. 1984); and J. Miller, FAMILY PROPERTY AND FINANCIAL PROVISION (2d ed. 1983).

⁷*Infra*, text at notes 32-34.

contrast is exactly reversed. American law exemplifies a forced-share system for spouses, European law has none.

The reason that American law abandons its predilection for testamentary freedom in the case of spouses has to do with marital-property law—the rules that characterize the property relations between spouses. Exclude for the moment the strongly divergent tradition in the eight American community-property states⁸ and consider the remaining, so-called common law states. 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 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. Although John and Mary have arranged that Mary will free John for the workplace by caring for their home and children, the property John earns is his alone (unless, of course, he does something further by way of contract or gratuity to divide his property with her).⁹ By contrast, in the eight community-property states, and in the Spanish legal system from whence our community-property states derived their model, Mary would have an immediate half interest in the property that John earns during the marriage. This half interest in the fruits of the marriage is called 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).¹⁰

Legal-academic opinion in the United States today generally prefers the community of acquests over common law separate property. Mary's service in the home enables John to be the wage earner while Mary specializes in what

⁸They are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In addition, Wisconsin is now to be reckoned a community property state by virtue of adopting a version of the Uniform Marital Property Act; see *infra* text at note 12.

⁹Glendon has pointed out that forces of convergence have narrowed the seeming gap between separate- and community-property regimes. The tendency of spouses to hold bank accounts and realty in joint tenancy "has become so widespread in the United States that it amounts to a form of quasi-community property . . ." M. Glendon, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 154 (1977). Glendon also remarks on the tendency of American courts to infer interspousal transfers. *Id.* at 155–56. She cites, for example, *In re Estate of Smith*, 90 Ill. App. 2d 305, 232 N.E.2d 310 (1967), in which the court held that the spouses' joint use of furniture and household artifacts led to the conclusion that they had intended to hold the property as tenants in common, without regard to which spouse was the source of the property. (Regarding similar presumptions within community-property systems for dealing with asserted separate property, see *infra* text at note 22.)

The Retirement Equity Act of 1984, which amends the federal pension law (Employee Retirement Income Security Act of 1974, [ERISA]), is a further example of creeping community property. It creates spousal rights in the employed spouse's pension. See generally Terry & Smith, *Guide to the Retirement Equity Act of 1984*, 24 TAX NOTES 1195 (1984).

¹⁰See the typology developed in Rheinstejn & Glendon, *INTERSPOUSAL RELATIONS*, §§ 4–53 to 4–55, at 48–49, in 4 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY* (Hamburg 1975). For American authority, see generally W. McClanahan, *COMMUNITY PROPERTY LAW IN THE UNITED STATES* (1982 and Cum. Supp.).

the economists call household production. Their enterprise is in truth collaborative, and Mary should have an immediate interest in the property that results from the collaboration. If John and Mary are both in the workforce, as is increasingly the case, Mary is likely to take less remunerative employment, of the sort that is easier to leave and then resume after a longish interval of childcare. Even if both spouses remain continually in the workforce, their family life is likely to entangle their financial affairs so significantly that it is troublesome and artificial to isolate separate streams of income and expenditure.

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).¹¹ Although Wisconsin adopted a version of UMPA and is now reckoned as the ninth community-property state,¹² 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.¹³

It is essential to understand that American forced-share law *is entirely a consequence of the separate-property regime for marital property*. Our community-property states do not have forced-share statutes.¹⁴ Forced-share law 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.

II. THE RATIONALE OF THE FORCED SHARE

Early forced-share statutes protected only wives (hence the former term, the "widow's share"). In the present age of ever greater attention to equality between the sexes, the forced-share statutes have been unisexed. Husband and wife have precisely reciprocal rights in the estates of each other. From the standpoint of antidiscrimination law, this development is undoubtedly correct and quite inevitable. As a descriptive matter, however, unisexing tends to

¹¹Uniform Marital Property Act (UMPA), 9A U.L.A. 21 (1987 Supp).

¹²Rev. Rul. 87-13, 1987-1 C. B. _____. See generally on the Wisconsin legislation the symposium issue, *Marital Property Reform*, 57 WIS. BAR BULL. (July 1984).

¹³See Interview, *The Wisconsin Experience with Marital Property Reform*, 125 TR. & EST. 31 (April 1986) (interview of Michael Wilcox of Wisconsin Bar).

¹⁴Save that in California and Idaho, the problem of migratory spouses has been addressed through the recognition of so-called quasi-community property (property acquired elsewhere that would have been characterized as community property had the spouses been under the community regime when the property was acquired). Idaho, a UPC state, applies the UPC's augmented-estate forced-share system to quasi-community property. IDAHO C. §§ 15-2-101 et seq. This amounts to a special-purpose forced-share statute for migratory property. California's new statute, PROBATE CODE § 101, enacted in 1983, creates a nonelective half share for the surviving spouse in the quasi-community property.

conceal what forced-share law is really about, which is the economic dependency that marriage often entails for one of the spouses, traditionally the wife.

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. Mary could take care of herself. Indeed, under existing law serious Yuppies will contract out of the forced-share system by means of a premarital agreement. For the future there will doubtless be more wives of independent means, and some more house-husbands, but—especially across the breadth of the population and away from elite groups—traditional patterns of intrafamilial specialization are continuing.¹⁵ 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.

Interestingly, this protective policy has found expression in a pair of competing theories that purport to supply the rationale for the forced-share system. One is the support or need theory; the other is the contribution or marital-property theory.

A. Support

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.¹⁶ On the other hand, all but a few¹⁷ forced-share statutes award

¹⁵"Relatively few women work continuously over the total period during which they are employed Young women's intermittent participation in the labor force is closely tied to childbearing." Voydanoff, *Women's Work, Family, and Health*, in *WORKING WOMEN: PAST, PRESENT, FUTURE* 69, 73–74 (BNA: Industrial Relations Research Ass'n Ser.) (1987).

¹⁶*Infra*, text at notes 35–36, we recommend that the forced-share fraction be increased from a third to a half. Note that in the intestacy scheme of UPC section 2–102(2)–(3) the surviving spouse takes the first \$50,000 plus half of the remaining probate estate. In the mid-1960s when the UPC was drafted, \$50,000 was the equivalent of about \$150,000 current dollars. Thus, the object was to award the surviving spouse 100 percent of a small estate. But the purpose of that reform was intent-serving—to tailor an intestacy regime that would most closely resemble the wishes of the typical intestate decedent. See UPC Article 2, Part I, Comment. Because forced-share law is intent-defeating, the rationale for the UPC's generous intestate provision is absent.

¹⁷For discussion of Alabama, Mississippi, and New Jersey statutes that take account of the survivor's need, see Volkmer, *Spousal Property Rights at Death*, 17 *CREIGHTON L. REV.* 95, 140–41 (1983).

The UPC also resorts to an alternative need-based forced-share standard in the special situation governed by section 2–203, treating the surviving spouse of impaired capacity who has been placed under protective regime. The right of election in that case "may be exercised only by order

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 categorical rather than an individuated standard. There is, of course, an answer to that objection—the usual answer whenever the law uses arbitrary categories. Individuation is costly, and the cost may not be worth the gain.

B. Contribution

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

The contribution theory has surprisingly ancient roots. Lewis Simes traced the earliest American forced-share legislation to the colonial and early national period.¹⁸ He noticed that the North Carolina legislature gave strong expression to the contribution rationale as early as 1784, in a statute that created a forced share for the widow in her husband's personal property. The preamble explains that, because dower in unimproved frontier real estate "is a very inadequate Provision for the support of such Widows, . . . it is highly just and reasonable that those who by their Prudence, Economy and Industry, have contributed to raise up an estate to their Husbands, should be entitled to share in it."¹⁹

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,

of the court in which protective proceedings as to [the survivor's] property are pending, after finding that exercise is necessary to provide adequate support for the [survivor] during his probable life expectancy." *Id.* (emphasis supplied). The UPC rule is generally, but not universally, followed in American law; see Annot., *Factors Considered in Making Election for Incompetent to Take Under or Against Will*, 3 A.L.R.3d 6 (1965 and Supp.). For a prominent instance of adherence to the contrary rule, see *In re Estate of Clarkson*, 193 Neb. 201, 226 N.W.2d 334 (1975). The UPC rule does not, we think, proceed from a general support theory of the forced share. Rather, it reflects the judgment that, because only a handful of surviving spouses exercise the forced share entitlement when competent, there should not be a rule of automatic election by the fiduciary for an incompetent spouse.

¹⁸L. Simes, *PUBLIC POLICY AND THE DEAD HAND* 13–16 (1955).

¹⁹N.C. Laws (Iredell, 1791), 490, Acts of 1784, c. 10, cited by L. Simes, *supra* note 18, at 13–14 and n.27.

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.

There is, of course, a considerable overlap between the contribution theory and the competing support theory—the North Carolina statute of 1784 speaks both of support and of contribution. Property assuages need. Rewarding the survivor's contribution assures a crude measure of support. We shall return to the subject of this overlap in connection with one of our recommendations for redesigning the forced-share system.

When tested against the reality of modern forced-share law, the contribution theory is not free from difficulty. Because the idea is essentially restitutionary—Mary is recovering from John's estate a part of his property that was really hers—it is odd that we seem not to acknowledge or protect her interest during his lifetime. She cannot, for example, get injunctive relief against his dissipating the property.²⁰ However, it may be reasonable to see the potent remedies available on divorce as framing a species of shadow lifetime regime.²¹ That is to say, Mary's ability to obtain a property settlement in the event of divorce gives her bargaining power with John about his use of the property during the persistence of the marriage.

Another 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. Again, the justification seems to be that individuation is not worth the cost—the cost in this instance being the clumsiness and unfairness of trying to reconstruct a species of post-mortem community of acquests when the decedent is no longer alive to participate in the proofs. Better a crude fraction of everything the decedent owned and be done with it. Even in community-property systems, a similar notion is at work in a fundamental although rebuttable presumption, that property found in the possession of a spouse during the marriage is community property unless the spouse who alleges that the item is separate property can prove it.²²

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

²⁰The New York Court of Appeals spelled this point out in *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937), the leading case discussed *infra*, text at notes 25–28. The forced share “is only an expectant interest dependent upon the contingency that the property . . . becomes a part of a decedent's estate. The contingency does not occur, and the expectant property right does not ripen into a property right in possession, if the owner sells or gives away the property.” 275 N.Y. at 376, 9 N.E.2d at 967 (citations omitted).

²¹We invoke the image from Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

²²E.g., LA. CIV. CODE ANN. Art. 2340; TEXAS FAM. CODE ANN. § 5.02.

account the duration of the marriage. Manifestly, the spouse of five days²³ 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.

III. 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 problem is—if we may lapse into the jargon of modern constitutional law—that the forced share is wildly overinclusive. For every rescued survivor who fits the stereotype of a victim being cheated of his or her contribution to the decedent's wealth, the forced-share law sweeps in many spouses—mostly remarried spouses, typically the decedent's second spouse from a late-in-life marriage of short duration—for whom the forced share is a windfall.

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.

These late-in-life marriages produce repugnant results under forced-share law. The short duration of the marriage undercuts the return-of-contribution rationale. The late-in-life spouse makes at best a modest contribution to the decedent's earnings. Worse, the decedent is likely to have had children by a former marriage. A well-known study published in 1960 examined all the

²³The notion that serious property consequences attach to marriages of the shortest duration is no figment of the academic imagination. See, e.g., *Neiderhiser Estate*, 2 Pa. D. & C.3d 302 (1977), for a case in which the widow received the full intestate share (larger than the forced share) after her husband collapsed and died during the wedding ceremony. (We owe this reference to Jesse Dukeminier.)

forced-share litigation that could be found in the law reports up to that time. The author, W.D. Macdonald, found that, of those cases in which he could identify the relationships, more than half pitted children of a former marriage against a later spouse.²⁴

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 purpose.

Consider, for example, the marriage that was involved in the most famous of all forced-share cases, *Newman v. Dore*,²⁵ decided in 1937. The lawsuit concerned the question of whether the husband could defeat his wife's forced share by transferring all his property to a revocable inter vivos trust that excluded her. The New York Court of Appeals prevented what it called this illusory transfer. In the fifty years since that decision, a great legislative reform movement has largely solved the problem that preoccupied the court in *Newman v. Dore*. Statutes promulgated in the 1960s in New York and in Uniform Probate Code jurisdictions²⁶ now effectively block off the nonprobate system as an avenue for evading the forced-share entitlement. The newer statutes extend the spouse's forced-share right to reach property of the decedent that is passing in nonprobate channels, such as the revocable inter vivos trust in *Newman v. Dore*.

But *Newman v. Dore* exemplifies a second great theme of American forced-share law, a theme that the reform legislation of recent decades has left untouched—namely, the failure to adjust the forced share to take account of the radically different equities that are present in situations of serial polygamy. The court in *Newman v. Dore* said nary a word about the marriage upon which the widow based her forced-share claim. The actual facts are these: The decedent, Mr. Straus, died in his eightieth year. His first wife had predeceased him, and when he was 76 years old he married a woman in her thirties. This second wife was the widow whose forced share the court protected. At Straus' death a divorce action was pending in which the second wife had complained that Straus'²⁷

perverted sexual habits made it impossible for her to live with him. The record never makes clear the nature of his alleged perversions although it does include a newspaper account in which he is described as having received a transplant of monkey glands by surgical operation. In the manner of a perfectly normal, red-

²⁴W. Macdonald, *supra* note 1, at 156–57 (1960).

²⁵275 N.Y. 371, 9 N.E.2d 966 (1937).

²⁶N.Y. EST. POWERS & TRUSTS LAW § 5–1.1 (McKinney 1981 and Supp.); UPC §§ 2–201, 2–202, and 2–207.

²⁷E. Clark, L. Lusky & A. Murphy, *CASES AND MATERIALS ON GRATUITOUS TRANSFERS* 147 (3d ed. 1985).

blooded octogenarian, he was highly indignant over these charges. He brought an action for annulment of the marriage, which was also pending at his death, and [he] instructed his lawyer to see to it that that "whore" and, here, at least, displaying some confusion as to genders, "son of a bitch" was not to receive any of his estate at death.

The authors who gathered this information about *Newman v. Dore* for a note in their casebook are posing a question that is more sarcastic than socratic. They ask readers to reflect whether "[t]hese seamy details of a tragic second marriage between a young woman and a pathetic old man two and a half times her age" comport well with "the usual policy statements on the subject" of the forced share.²⁸

Why does modern forced-share law continue to inflict these windfalls? Surely not for legislative neglect of the field—remember the great initiatives of the 1960s that redesigned the forced-share statutes to foreclose inter vivos evasion. Nor are we aware of any body of opinion that finds merit in awarding these windfalls. The failure to remedy the injustice of serial-polygamy forced shares arises from essentially technical grounds. Legal policymakers understand that the present law is working injustice, but they seem to have been unable to find statutory concepts to correct it. Specifying the reform is difficult. Marriages do not easily sort themselves into types, some within and the others outside the purposes of forced-share law. It would be wrong, for example, simply to exclude the spouses of remarriages from forced-share protection; after all, for many people a remarriage is the enduring marriage, achieved after one or both spouses recover from a false start and early divorce.

IV. PREVIOUS REFORM PROPOSALS

In the legal-academic literature, there have been two prominent proposals for reforming the forced share. These proposals, which we pause to examine, tend in opposite directions. What they have in common is overkill. They are enormously broad, hence they underscore the difficulty of refining the categories of existing forced-share law.

A. Abolition

Twenty years ago Sheldon Plager proposed a reform of breathtaking simplicity. He suggested that the forced-share system be abolished. Coining a memorable phrase, Plager called the forced share "a solution in search of a problem."²⁹ He pointed to a simple truth: Spouses ordinarily need no protection against disinheritance. If you live out a long-duration marriage, you are ordinarily quite devoted to your spouse. Careful empirical investigation has been

²⁸*Id.* at 148.

²⁹Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966). In a similar vein, see Clark, *The Recapture of Testamentary Substitutes To Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970); see also Chaffin, *A Reappraisal of the Wealth Transmission Process*, 10 GA. L. REV. 447, 469 (1976).

done on this question, and it shows that, far from trying to disinherit the survivor, the typical spouse strains in the opposite direction: He leaves everything to the surviving spouse, even at the price of disinheriting their children.³⁰ Plager argued that forced-share law therefore did more harm than good; for every deserving spouse whom forced-share law protected from an unjustified disinheritance, countless unjustified forced-share windfalls were created, primarily in remarriage cases.

The liberalization of divorce law that has mostly occurred since Plager wrote supplies a further ground in support of his argument. Death and divorce are cognate phenomena, they are the two ways to dissolve a marriage. It is odd to think of death and divorce as alternatives, since the spouses in those two modes of dissolution ordinarily have wholly different aspirations for each other. But there is an important connection between the liberalization of divorce and our question of forced-share policy. The relative ease with which an unhappy spouse may now escape a sour marriage means that such a person need no longer feel locked into a bad marriage until death. Accordingly, there is less reason to fear that marital discord will result in the unjustified disinheritance of a spouse. The deserving spouse whose contribution forced-share law is trying to protect now has a realistic lifetime remedy in the property settlement incident to divorce.

Thus, both the increase in divorce and the increase in remarriage that typify late-twentieth-century serial polygamy supply cause for thinking about abolishing the forced-share system. But abolition would work fresh injustice. It would expose the long-duration spouse to the risk of disinheritance. Although cases in which the long-duration spouse is disinherited are exceptionally rare, part of the explanation is that the forced-share system has protected that spouse well. The forced-share entitlement works mainly by deterrent; it encourages the reluctant testator to make provision for his spouse in order to spare his estate the nuisance and notoriety of forced-share proceedings. Furthermore, divorce is not a wholly satisfactory alternative to the forced share. For people of certain religious persuasions, divorce is not an option; and even within the rest of the populace, divorce offers no remedy in the case of surprise disinheritance.

Thus, it is safe to say that the consensus in favor of having a forced-share system will endure. Indeed, the most recurrent proposal for reforming the forced share would cut in quite the opposite direction—it would expand the reach of forced-share law. The idea would be to refashion our law in imitation of the system that prevails in England and the Commonwealth, Testator's Family Maintenance (TFM).³¹

³⁰M. Sussman, J. Cates & D. Smith, *THE FAMILY AND INHERITANCE* 86, 89–90 (1970); Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1307–08 (1969); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252 (1962); Plager, *supra* note 29, at 708–12; Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 283, 311–17 (1975).

³¹*Supra*, text at notes 6–7.

B. TFM

TFM empowers a judge to vary the testator's will in order "to make reasonable financial provision" for the surviving spouse.³² The late-in-life second or third spouse would not fare very well under TFM, because the court can weigh the competing equities of the children of the first marriage; and because the statute directs the court to pay attention to the adequacy of the later spouse's own resources; the spouse's age; and "the duration of the marriage."³³

TFM would, therefore, supply a remedy of sorts for the shortcoming of American forced-share law that we have been discussing, but at a terrible price. TFM remits to judicial discretion every important issue of policy in forced-share law. TFM exposes the estate of every married testator to potential litigation, on an issue of the greatest difficulty. The statutes do not define the "reasonable provision" standard because that standard cannot be defined; it means, subject to hazy guidelines, whatever the judge who happens to hear the case happens to think is fair. The late Justice Frank Hutley of the New South Wales Supreme Court once remarked to one of us—only partly in jest—that in New South Wales, as a result of TFM, "the only thing that a testator can be sure of achieving by will is his choice of an executor." Disturbing as that prospect is in English and Commonwealth jurisdictions, whose judicial selection procedures have produced a trustworthy and meritocratic bench, it is even more frightening to imagine granting such power to judges in such American venues as Cook County, Illinois, where the very mention of the local bench is cause for alarm. Broad judicial discretion cannot be devolved upon the Grey-lord judiciary. So long as American judicial selection practices prefer politics over merit, TFM can have no future in the United States, although revivals of interest among academic writers³⁴ will occur periodically.

We conclude this discussion of past approaches to the forced share on a note of stalemate. The shortcoming in our law has been identified, but because the cures seem worse than the disease, the shortcoming abides.

V. 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. As our starting point, we return to the basic principles of forced-share law that we identified at the outset of this article. We explained why the forced-share system is best understood as a species of *ersatz* marital-property law, whose purpose is to effect a return of the spouse's presumed contribution to the decedent's wealth. We pointed out

³²Inheritance (Provisions for Family and Dependents) Act § 1 (1975).

³³*Id.* §§ 3(1)(a), 3(2)(a), discussed in J. Miller, *supra* note 6, at 443, 446.

³⁴*E.g.*, Note, *Family Maintenance: An Inheritance Scheme for the Living*, 8 RUT-CAM. L.J. 673 (1977); contrast the lucid critique of TFM in Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986). For citations to earlier literature, see E. Clark, et al., *supra* note 27, at 197.

that in a community property state, because each spouse enjoys a reciprocal half interest in the earnings of the other spouse, there is no forced-share statute.

Serial polygamy is at least as typical of a place like California as it is of the rest of the country, yet in California and Texas and in the other community-property states serial polygamy does not give rise to the windfalls that disgrace forced-share law in the common law states. Why? What is it about community-property law that enables it to function so smoothly in the world of serial polygamy?

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. Let us supply a couple of simple hypothetical cases; in each we assume that the parties have not altered the community-property regime by contract.

In the prototypical case, John and Mary live a forty-year marriage, during which John is the wage earner and Mary the homemaker. The property is all in John's name. Mary has a half interest in all that John earned during the forty years. If John dies first and should wish to disinherit Mary—in favor, let us say, of Fifi—John's will can pass his own half interest in the property to Fifi, but not Mary's half interest.

Now contrast a serial-polygamy case. Suppose that the forty-year marriage of John and Mary terminates upon Mary's death. Afterwards, John gets re-married, to his erstwhile companion, Flora. Two years thereafter, John dies. The community property regime provides for Flora a half interest in whatever John earned during their two-year marriage, but all John's earnings from the years prior to that marriage, together with anything that John may have inherited from Mary (such as the property to which Mary was entitled as a result of her half interest in John's earnings during their forty-year marriage), will be John's separate property and not subject to Flora's community-property claim. Note well that if these facts had transpired in a separate-property state with a conventional forced-share scheme, Flora would have taken the full one-third forced share in John's estate.

These illustrations are meant to show why serial polygamy is a nonissue in community-property systems. The community-property regime adjusts the spouse's interest to the duration of the marriage. Notice further that this adjustment occurs automatically. Unlike, for example, the TFM scheme, under which the judge would exercise discretion to apportion John's estate between such claimants as Flora and John's heirs, in a community-property regime the apportionment is wholly mechanical. These are the two distinctive attributes of the community-property approach to serial polygamy: the spouse's share is mechanically determined, and it is crudely measured by the duration 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 non-community 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 fifty/fifty 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 infeasible.

A. 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,³⁵ primarily to align the forced-share fraction with the half interest that characterizes the functionally similar community-property and UMPA systems.³⁶ (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 that the return-of-contribution theory better supports a fifty/fifty split.

B. 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 10 percent of the forced share to vest upon marriage, and the remaining 90 percent of the forced share to vest in 5-percent annual increments. On those numbers, it would take eighteen years for each spouse to acquire the full 100 percent interest in the forced-share fraction, whatever its amount. (We have no strong

³⁵This step has already been taken in Nebraska. NEB. REV. STAT. § 30-2313, noted in Volkmer, *supra* note 17, at 149 (1983).

³⁶The increase from a third to a half would also bring the forced-share fraction into greater parity with the half interest that is now commonly the share of the surviving spouse under both the intestacy and the pretermitted spouse statutes. Under UPC § 2-102(2)-(4), the surviving spouse takes a half share in intestacy when the decedent also leaves children; when no issue or parent survives the decedent, the spouse takes the entire estate under UPC § 2-102(1). UPC § 2-301 awards a spouse who is omitted from the decedent's premarital will the intestate share just described.

feeling about the precise period of time that is appropriate for such a forced-share vesting schedule. The idea is to increase the entitlement as the length of the marriage increases; and to do it by a mechanical formula that, while necessarily arbitrary, is simple to calculate and admits no judicial discretion.)

VI. 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,³⁷ shares with our other recommendations the object of approximating the outcomes that would be achieved under a community of acquests (or under UMPA), but in a mechanical fashion.

Under the community of acquests, each spouse has an immediate half interest in the property that the other spouse earns during the marriage, 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, whose statutory text is reproduced in full as Appendix B of this article. The augmented estate is a tripartite computational entity that includes:

- (1) The decedent's net³⁸ 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.³⁹ (This is the UPC's recapture mechanism for defeating the "fraud on the widow's share" that had so troubled the case law of the middle third of this century.⁴⁰) 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.⁴¹ We call this the "spousal setoff" property.

The UPC's forced-share fraction (presently one-third⁴²) is applied to this computational entity. Property included in the augmented estate that belongs

³⁷*Supra*, note 17.

³⁸By "net" we refer to the definition in the opening sentence of UPC § 2-202 that reduces the (probate) estate by the amount of funeral and administrative expenses, homestead allowances, family allowances and exemptions, and enforceable claims (excluding estate and inheritance taxes).

³⁹UPC § 2-202(1).

⁴⁰See Macdonald, *supra* note 1; and discussion, *supra*, text at notes 24-26.

⁴¹UPC § 2-202(2).

⁴²UPC § 2-201.

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.⁴³ 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.⁴⁴ In this instance, the feature that we believe should be emulated is that under community law there is a fifty/fifty split in the property acquired by *both* spouses during the marriage.

A. *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 de-

⁴³UPC § 2-207.

⁴⁴Because 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 proposals 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. See *supra* note 17, where it is explained that 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 spouses'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.

cedent's death) would be subtracted from the survivor's potential forced-share entitlement. Thus, whereas the UPC scheme currently charges the survivor only with property stemming from the decedent, our notion is to charge the survivor with the whole of the survivor's property. (We present a series of illustrations in Appendix A of this article that demonstrate how the system would operate in a variety of settings.) 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 fifty/fifty 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' 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.

B. *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.⁴⁵ 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

⁴⁵*E.g.*, UPC Art. 2, Part 4.

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 percent, 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.⁴⁶

VII. 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 require that vast dose of judicial discretion that makes TFM so frightening, nor would it 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 on the merits in each case, but it has not, and for good reason. The proofs would be extraordinarily

⁴⁶See Table A, Treas. Reg. § 20.2031-7(f). 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 50 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.

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 over the discretionary TFM 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.

APPENDIX A

The six examples below present a variety of situations in which to assess the redesigned elective share. The examples demonstrate how closely the redesign tracks the result that would be reached under a community property or UMPA regime. For comparison, we give the result under the current UPC's forced share.

I. "WEALTHIER" SPOUSE DIES FIRST

Example 1—Long-Term Marriage

Married in their twenties, John and Mary lived a long life together. John died at age 75 (his life expectancy), survived by Mary. Posit the value of John's augmented estate to be \$500,000 and Mary's to be \$100,000.

Solution under Redesigned Elective Share

Because this was a 50-year marriage, Mary's elective share reached full vesting, at the maximum 50 percent level, long before John's death. Combined, their augmented estates have a value of \$600,000. The redesigned system grants Mary an elective share of \$300,000 (50 percent of \$600,000). Mary is charged with receipt of her own \$100,000 augmented estate, however, so her entitlement from John's augmented estate is \$200,000. Each spouse ends up in control of \$300,000.

Community Property/UMPA Result Compared

The result in Example 1 resembles the result that would be reached in a community-property or UMPA state. Ordinarily, the whole of the spouses's property would be community property or marital property; if so, each spouse would own half of \$600,000 or \$300,000 each. (The example posits none of the \$600,000 to be the separate property of either spouse, by gift, inheritance, or premarital earnings.)

Current UPC Elective Share Compared

If none of Mary's \$100,000 was derived from John, Mary's elective share would be \$166,667 (1/3 of John's \$500,000 augmented estate). The decedent, John, controls \$333,333 (\$33,333 more than the appropriate figure under the contribution theory) and the survivor, Mary, controls \$266,667 (\$33,333 less than appropriate under the contribution theory).

Example 2—Short-Term Late Marriage

After John's death in Example 1, Mary married Charles. Four years later, Mary died, survived by Charles. The value of Mary's augmented estate is \$300,000. The value of Charles' augmented estate is \$100,000.

Solution under Redesigned Elective Share

If 10 percent of the forced share vests upon marriage, and if the remainder vests at an annual rate of 5 percent thereafter, 30 percent (10% + [4 × 5%]) of Charles' 50 percent elective share had vested when Mary died; thus Charles' elective share is 15 percent (30% of 50%). Charles' elective share is \$60,000 (15 percent of the combined augmented estates of \$400,000). Inasmuch as Charles is charged with receipt of his own \$100,000 augmented estate, the redesigned elective share does not entitle Charles to any forced-share amount from Mary's estate. The decedent, Mary, maintains control of her \$300,000 and the survivor, Charles, controls his \$100,000.

Community Property/UMPA Result Compared

The result in Example 2 approximates the community-property or UMPA result. Because this marriage was a second marriage late in life, in which both spouses were probably retired, they would be unlikely to have much community property or marital property. Their earnings would have been low, and most or all would have been consumed. The result would be that the decedent, Mary, would control her separate property of \$300,000 and the survivor, Charles, would control his separate property of \$100,000.

Current UPC Elective Share Compared

Assuming that none of Charles' \$100,000 was derived from Mary, Charles' elective share would be \$100,000 (1/3 of Mary's \$300,000 augmented estate). The decedent, Mary, thus controls \$200,000, which is \$100,000 less than the contribution theory would deem appropriate; and the survivor, Charles, controls \$200,000, \$100,000 more than the contribution theory would dictate.

* * *

Example 3—Needy Surviving Spouse

In Example 2, suppose Mary's augmented estate to be \$90,000 and Charles' to be \$10,000.

Solution under Redesigned Elective Share

Charles' forced share, under the redesigned system, would be \$15,000 (15 percent of \$100,000). Under the guaranteed \$50,000 minimum recommended in text, Charles' forced share would be raised to \$50,000. Charles would first be charged with his own \$10,000 augmented estate, however, so that he would receive \$40,000 from Mary's estate.

II. "POORER" SPOUSE DIES FIRST**Example 4—Long-Term Marriage**

Married in their twenties, John and Mary lived a long life together. John died at age 75 (his life expectancy), survived by Mary. The value of John's augmented estate is \$100,000. The value of Mary's augmented estate is \$500,000.

Solution under Redesigned Elective Share

Mary's elective share, having fully vested years before John's death, is \$300,000 (50 percent of the combined augmented estates of \$600,000). However, because Mary is charged with receipt of her own augmented estate of \$500,000, she is entitled to no amount from John's estate.

Community Property/UMPA Result Compared

Assuming the full \$600,000 to be community property or marital property, John's estate controls \$300,000 and the survivor, Mary, controls \$300,000. The result in Example 4, although departing materially from the fifty/fifty community split, comes closer to the community property/UMPA result than any other forced-share system.

Current UPC Elective Share Compared

Mary is entitled to a forced share of \$33,333 (1/3 of John's \$100,000 augmented estate). Mary controls \$533,333, which is \$233,333 more than the contribution theory would dictate; John, the decedent, controls \$66,667, \$233,333 less than the appropriate figure under the contribution theory.

* * *

Example 5—Short-Term Late Marriage

After John's death in Example 4, Mary married Charles. Four years later, Charles died, survived by Mary. Charles' augmented estate is \$100,000, Mary's is \$500,000.

Solution under Redesigned Elective Share

Mary takes nothing by way of elective share from Charles' estate. Mary's elective share is \$15,000 (15 percent of Charles' \$100,000 augmented estate), but she is charged with already having received her own \$500,000 augmented estate. Charles maintains control of his \$100,000 estate.

Community Property/UMPA Result Compared

The result in Example 5 resembles the result that would be reached in a community-property or UMPA state. Because this was a second marriage late in life, in which both Mary and Charles were probably retired, there would be little or no community or marital property, and Charles would keep control of his \$100,000 separate estate.

Current UPC Elective Share Compared

Mary's elective share would be \$33,333 (1/3 of Charles' \$100,000 augmented estate). The survivor, Mary, ends up in control of \$533,333, which is \$33,333 more than dictated by the contribution theory; the decedent, Charles, controls \$66,667, \$33,333 less than appropriate under the contribution theory.

Example 6—Needy Surviving Spouse

In Example 5, suppose that the values were different. Posit the value of Mary's augmented estate to be \$40,000 and Charles' to be \$10,000.

Solution under Redesigned Elective Share

Because the marriage was a four-year marriage, the starting point is to identify Mary's forced share as being \$7,500 (15 percent of the combined augmented estates of \$50,000). Because Mary is charged with receipt of her own \$40,000 augmented estate, Mary would ordinarily get nothing from Charles' estate. However, the guaranteed \$50,000-minimum feature would change this result by entitling her to all of Charles' \$10,000, the amount necessary to raise her net to \$50,000.

APPENDIX B

Uniform Probate Code, Official 1982 Text

Section 2-201 [Right to Elective Share.]

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

Section 2-202 [Augmented Estate.]

The augmented estate means the estate reduced by funeral and administrative expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

- (i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from the property;
- (ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;
- (iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;
- (iv) any transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(2) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had prede-

ceased the decedent to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this paragraph:

- (i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.
- (ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.
- (iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

(3) For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

Section 2-207 [Charging Spouse with Gifts Received; Liability of Others for Balance of Elective Share.]

(a) In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving spouse, or which

would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate. For purposes of this subsection, the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth one half of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.

(b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.