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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)

Terry L. Turnipseed*

The act of constitution will be precisely that regularly required to create or transfer the right in question. Thus, until late in the Empire, if the object handed over as dowry is *res mancipi*, a *mancipatio* or in *jure cessio* will be necessary, whereas for *res nec mancipi* a simple *traditio* will suffice. The distinction has disappeared, as every one knows, by the time of Justinian, and *traditio* serves for anything corporeal.¹

I. INTRODUCTION

*This abstract question has intrigued philosophers of all ages; and has likewise furnished a peg on which to hang many a pedantic decoration of legal erudition.*²

Should you be able to leave your property to whomever you choose at death?³ That seemingly rhetorical question has been answered, off and on,

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¹ PERCY E. CORBETT, *THE ROMAN LAW OF MARRIAGE* 155 (Oxford Univ. Press 1969) (1930).

² LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 4 (1955).

³ One survey found that 73 percent of Americans answered “yes” to the following question: “When a person makes a will, he should be allowed to leave his money or property to whomsoever he pleases.” MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 207-09 (1970). Note that this Article does not deal with the issue of disinheriting your children, which one can do in all states, except Louisiana and in the District of Columbia. *See id.* (discussing the right to disinherit a child).

with a consistent resounding no, for literally thousands of years. Has society finally evolved to the point when we say no to the paternalistic interference that has been the norm; when we say yes – a person does have the simple but powerful right to devise his or her property as he or she sees fit? After all, is this America or is this France?⁴

This Article analyzes whether the ancient common law concepts of dower and curtesy, and their modern day statutory equivalents – the elective share laws – should be substantially modified or eliminated.⁵

The concept of dower dates to ancient times.⁶ Originally, a widowed woman was given a life estate in one-third of certain of her husband's real property – property in which the husband held an inheritable or devisable interest during the marriage.⁷ Once dower attached to a parcel of land at the inception of the marriage, the husband could not unilaterally terminate it by transferring the land.⁸ The right would spring to life upon the husband's death unless the wife had also consented to the transfer by signing the deed, even if title were held in only the husband's name.⁹

Curtesy provided a surviving husband with a life estate in all the wife's qualifying real property, but only if children were born to the couple.¹⁰ Qualifying real property was the same as with dower, as were the rules that related to when the right attached and when it could be terminated.¹¹

⁴ Forced heirship, in general, is inherent in civil law countries such as France. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 84, 117 (1994). Louisiana is the only American state with a form of forced heirship. *Id.* at 118. Ironically, surviving spouses in France do not need the protection of the forced heirship system (nor are they afforded it) because of their community property laws. *Id.* at 117 (citing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 248 (1989)).

⁵ “Although a lengthy paper discussing the reformation of an elective share statute may show promise at first only as a cure for insomnia, it actually is an intriguing account of human struggles over the status of marriage and women, the control of property, the machinations of legislatures, and the struggles to achieve justice and fairness.” Kathleen M. O'Connor, *Marital Property Reform in Massachusetts: A Choice for the New Millennium*, 34 NEW ENG. L. REV. 261, 261 (1999). Stay with me people.

⁶ JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 423 (7th ed. 2005).

⁷ *Id.* at 422-23.

⁸ *Id.* at 423.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Virtually all United States jurisdictions have abolished dower and curtesy in favor of the elective share.¹² In the few jurisdictions that retain the doctrines, curtesy is identical to dower. Moreover, in the few states that retain the concept of dower, the elective share is also available and usually results in a greater financial award for the surviving spouse. Georgia is the only state that does not have dower/curtesy, a statutory elective share, or community property concepts.¹³

In modern America, forty-nine of the fifty states and the District of Columbia severely limit freedom of testation *vis-à-vis* surviving spouses.¹⁴ More than in any other area of wills and trusts, state laws differ over the exact details of their elective share doctrines. For example, states vary widely in the amount to which the surviving spouse is entitled, the variables that determine the amount (length of marriage, family situation, surviving spouse's net worth, etc.), and the property that is subject to the elective share. Typically, the surviving spouse is allowed to elect one-third of the decedent-spouse's property if the decedent had surviving issue or one-half if there are no surviving issue. Most elective share laws apply the same regardless of the length of the marriage.¹⁵

In some states, a testator can easily avoid subjecting her assets to the elective share at death simply by placing assets into one or more types of trusts.¹⁶ Other more sophisticated elective share statutes bring back into the pool of assets from which the elective share is taken most *inter vivos transfers*, including those made to trusts.

All elective share statutes, however, can be defeated by transferring assets to an offshore asset protection trust.¹⁷ Once the transferor-decedent has died, it

¹² Though the "forms of action we have buried . . . still rule us from their graves." Emerson G. Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157, 158 n.8 (1960) (quoting F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 2 (A.H. Chaytor & W.J. Whittaker eds., 1936) (1909)).

¹³ Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 U. MIAMI L. CENTER EST. PLAN. § 904 (1998).

¹⁴ See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 245 (1989).

¹⁵ See generally discussion *infra* Part III.

¹⁶ See discussion *infra* Part VI.B.1.a.

¹⁷ See discussion *infra* Part VI.B.2.

is in reality impossible for a United States court to force the transfer of such assets back into the hands of the surviving spouse.¹⁸

While there may or may not have been valid grounds for dower and elective share concepts when they were originally adopted by most U.S. states, we are long overdue for a total review of the entire system of forced dispositions to spouses. In particular, we must reexamine whether they are necessary at all. The primary purpose of this paper is to stimulate such discussions, with the hopeful result that state legislatures will at least address the issue of elective share repeal to give freedom of testamentary disposition to all citizens, not just to those very wealthy who can afford expensive counsel fees to configure assets in needless, wasteful and complex arrangements specifically designed to defeat the elective share. As one noted commentator said with elegance:

One easy answer to this academic inquiry is that repeal of existing elective share statutes isn't likely to happen, so why dance with the angels (perhaps the angels of darkness at that) on the head of a pin? One easy response is because that is what academics like to do. Another more useful response is there are states currently debating whether and, if so, in what respect to change their elective share statutes. Rather than being settled law or policy, this topic continues to beguile legislatures. And that would appear to indicate that there are conflicting policies at work about which reasonable minds differ.¹⁹

It is high time for policymakers to learn the facts – not just the politically correct rhetoric – about the costs to society of the current spousal forced heirship regimes in this country and the benefits that could flow from their elimination. At a minimum, legislators need to decide in a clearer way the goals for the statutes and design better, more targeted solutions than currently exist today.²⁰ However, it “may well be that there are too many solutions to a problem that does not really exist.”²¹

¹⁸ Thomas M. Brinker, Jr. & Thomas P. Langdon, *The Offshore Trust: An Asset Protection Tool*, OHIO CPA J., Apr. June 2000, available at <http://www.ohioscpa.com/publications/journal/default.asp?article=639-7>.

¹⁹ Pennell, *supra* note 13, § 905.

²⁰ One commentator defines the problem as “the inability of legislators to decide definitively what is the purpose of the elective share and to carry this purpose through to its logical ends.” DUKEMINIER ET AL., *supra* note 6, at 426.

²¹ Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Years Support and Intestate Succession*, 10 GA. L. REV. 447, 470 (1975-1976).

II. HISTORY OF DOWER, CURTESY, AND THE ELECTIVE SHARE

A. Dower and Curtesy Generally

*In approaching the history of compulsory shares accorded by the common law to a decedent's widow . . . one finds that the tale is discontinuous, the moral correspondingly recondite.*²²

For a long time in this country, and still in many separate property states²³ today, a widow had a dower interest in the lands of her deceased husband that were inheritable by the husband and wife's issue.²⁴ Widows received a life estate – not outright ownership – in one-third of her deceased husband's qualifying land.²⁵

Unlike modern elective share rights, common law dower attached at the later of the moment of marriage or acquisition of the qualifying land.²⁶ This aspect of dower is much more similar to the modern system of community property, where rights attach before death. Because of this *inter vivos* attachment of rights (albeit a right to a future interest), land subject to dower was not alienable at the sole discretion of the husband-owner.²⁷ Indeed, in jurisdictions where common law dower and a statutory elective share exist together, one of dower's only real practical applications is to force the owner-spouse of real property to obtain, in certain situations, the signature of the nonowner-spouse to sell or encumber the land.²⁸ Widows of insolvent decedents, in addition, received dower before debts were paid (unlike

²² Edmond N. Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 139 (1936-1937).

²³ A separate property jurisdiction does not follow the rules of a community property state that "recognizes the mutuality of marital relationships." ROGER W. ANDERSEN & IRA M. BLOOM, *FUNDAMENTALS OF TRUSTS AND ESTATES* 246 (2d. ed. 2002). Community property is property held jointly between husband and wife, including: "property acquired through the efforts of either spouse during the marriage and while domiciled in a community property jurisdiction, and income or proceeds from the sale of community property." *Id.* "Separate property in a community property state [is] property that a spouse owned before marriage or acquired during marriage by inheritance or by gift from a third party . . ." BLACK'S LAW DICTIONARY 1369 (7th ed. 2001). Husband and wife each hold one-half ownership in the community property and one hundred percent ownership in their separate property. ANDERSEN & BLOOM, *supra*, at 246. "At death, both spouses usually have the power to dispose of their own separate property and half of the community property." *Id.*

²⁴ DUKEMINIER ET AL., *supra* note 6, at 422-23.

²⁵ *Id.*

²⁶ *Id.* at 423.

²⁷ *See id.*

²⁸ *See id.*

bequests, which could be claimed by creditors).²⁹ Dower made women “necessary players in men’s economic transactions.”³⁰

Curtesy was the widower equivalent of dower, with a couple key differences: (1) the widower was given a life estate in the entire land holdings of the decedent wife (instead of one-third as in the case of dower); and (2) nothing flowed to the widower unless the marriage bore children.³¹ In all states that retain the concepts of dower and curtesy, the rights embraced by both are identical, and in some jurisdictions, curtesy has been abolished and dower rights are afforded to widows and widowers equally.³²

B. Ancient History of Dower and Curtesy

*Limitations upon free testation are at least as old as the Code of Hammurabi*³³ [circa 2084 B.C].³⁴

²⁹ MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 143 (1986).

³⁰ Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 12 *YALE L.J.* 1641, 1666 (2003).

³¹ DUKEMINIER ET AL., *supra* note 6, at 423.

³² *Id.* In Michigan, dower-type rights are given to the wife but not the husband. *Id.* Commentators note that this difference is likely unconstitutional. *Id.*

³³ Cahn, *supra* note 22, at 139 (quoting R. HARPER, *THE CODE OF HAMMURABI* §§ 168-172 (1904)); see also Rick Geddes & Paul J. Zak, *The Rule of One-Third*, 31 *J. LEGAL STUD.* 119, 123 Table 1 (2002) (describing women’s property rights at marital dissolution from the Code of Hammurabi to 1977). Geddes and Zak detail the very first known dower-type code language from the original Code of Hammurabi:

In the case of either a private soldier of a commissary, who was carried off while in the armed service of the king, if his son is able to look after the feudal obligations, the field and orchard shall be given to him and he shall look after the feudal obligations of his father.

If his son is so young that he is not able to look after the feudal obligations of his father, field and orchard shall be given to his mother in order that his mother may rear him.

If a man should decide to divorce a *sugitu* who bore him children, or a *naditu* who provided him with children, they shall return to that woman her dowry and they shall give her one half of (her husband’s) field, orchard, and property, and she shall raise her children; after she has raised her children, they shall give her a share comparable in value to that of one heir from whatever properties are given to her sons, and a husband of her choice may marry her.

Id. at 134-35. *Sugitu* is defined as a “member of a group or class of temple dedicatees, with special privileges, but always inferior to a *naditu*.” *Id.* at 137 n.48 (quoting MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* 18, 273 (1995)). *Naditu* is defined as a “member of a group or class of Old Babylonian temple dedicatees, with special inheritance privileges and economic freedoms; some groups lived in cloisters or compounds, others married

During the early times in England when land holdings virtually equaled wealth, the land passed to blood relatives and not to surviving spouses – “[n]either husband nor wife was an heir of the other”³⁵ Widows and widowers of decedent landholders were not left penniless, however, as dower and curtesy provided some support for their lifetime.³⁶ These income rights in land “developed in medieval times to compensate women for loss of control over their real property during marriage and, especially, to make provision for widows after their husbands’ property had passed to the legal heirs.”³⁷

Dower was originally a private contractual matter between the families of the groom and bride.³⁸ Thirteenth-century common law recognized and enforced an early version of dower.³⁹ The dower one-third fixed interest in the decedent husband’s lands⁴⁰ likely came about during the early fifteenth century.⁴¹ (This rather arbitrary one-third interest was, oddly, carried all the

way to the dower and curtesy laws of early America, and is inherent in many elective share laws today.⁴²) The widow lost her dower interest, however, if the husband-decedent had been guilty of treason or if the widow herself had been guilty of any felony, adultery, or treason.⁴³

Much like community property today, the wife was granted a property interest in any real property received by the husband during marriage, even though her husband had legal title to the land.⁴⁴ The husband could not defeat

but were not permitted to bear children; Sumerian *lukur*.” *Id.* at 137 n.49 (quoting ROTH, *supra*, at 273). *Lukur* is a Sumerian term meaning priestess or nun. WEBSTER’S ONLINE DICTIONARY, at <http://www.websters-online-dictionary.org/Nu/Nun.html> (last visited Mar. 15, 2006).

³⁴ CORBETT, *supra* note 1, at 147 n.1.

³⁵ Sheldon J. Plager, *The Spouse’s Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 698 (1966) (citing 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 176 (1950)).

³⁶ *See id.*

³⁷ LEE HOLCOMBE, WIVES & PROPERTY: REFORM OF THE MARRIED WOMEN’S PROPERTY LAW IN NINETEENTH-CENTURY ENGLAND 21 (1983).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Speculation exists that early dower may have been the origin of the husband’s promise during a traditional marriage service: “With all my worldly goods I thee endow.” *Id.*

⁴¹ Brashier, *supra* note 4, at 89 n.18 (citing 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 190 (5th ed. 1942)).

⁴² *Id.*

⁴³ HOLCOMBE, *supra* note 37, at 22.

⁴⁴ Brashier, *supra* note 4, at 90 n.20. Brashier states:

The wife’s expectant or contingent interest in the lands of which her husband was seised in fee simple and fee tail at any time during the marriage was known as dower inchoate. If the dower right had not been barred and the contingency of survival had

her dower right without her consent,⁴⁵ though if his wife agreed, he could bar dower by levying a fine when he conveyed his land to a third party without restrictions.⁴⁶ The Statute of Uses of 1535 gave a married couple the right to enter into an antenuptial agreement whereby the wife would give up her right to dower in exchange for a jointure – a “settlement of land upon her at least for her own lifetime.”⁴⁷

Because of the two distinct types of court systems that existed during this era – law courts and ecclesiastical courts⁴⁸ – the manner used to determine the recipient of the tangible personal property varied widely. The widow’s intestate share of tangible personal property was set by the 1670 Statute of Distribution⁴⁹ as one-third if the decedent husband left descendants and one-half if there were no descendants.⁵⁰

However, chattels were never subject to dower.⁵¹ Once married, in fact, a wife’s tangible personal property became the property of her husband.⁵² If the husband predeceased his wife, however, the widow’s tangible personal property that was hers before her marriage was “kindly” returned to her, but only if the decedent husband had not alienated the items before death.⁵³

Dower was necessary during this time because the wife’s property was essentially taken away at the time of marriage, and any property acquired by the marital unit after marriage was always placed in the name of the husband. “The extreme subordination of the wife at common law required that some form of protection from disinheritance be given to her upon the death of her

been fulfilled, her inchoate right became dower consummate upon her husband’s death. Until her dower was actually assigned, however, she had no right to enter upon the lands except under her right of quarantine.

Id. (citing GEORGE L. HASKINS, *ESTATES ARISING FROM THE MARRIAGE RELATIONSHIP AND THEIR CHARACTERISTICS* §§ 5.31-5.49 (A. James Casner ed., 1952)). *See also* Statute of Uses of 1535, 27 Hen. 8, ch. 10 (Eng.) (repealed).

⁴⁵ Brashier, *supra* note 4, at 91. “Neither the testator’s will nor his *inter vivos* transactions could unilaterally defeat the dower right once the required elements were met.” *Id.*

⁴⁶ HOLCOMBE, *supra* note 37, at 22.

⁴⁷ *Id.*

⁴⁸ Plager, *supra* note 35, at 698 (citing 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 625 (1922); Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943)).

⁴⁹ *Id.* (citing Statute of Distribution of 1670, 22 & 23 Car. 2, ch. 10 (Eng.)).

⁵⁰ *Id.* (citing THEODORE F. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 726 (5th ed. 1956)).

⁵¹ Geddes & Zak, *supra* note 33, at 124.

⁵² Brashier, *supra* note 4, at 89 n.19 (citing George L. Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345, 345 n.1, 349 (1949)).

⁵³ *Id.* (citing Haskins, *supra* note 52, at 345 n.1).

husband, for often she was deemed unable or unqualified to venture from the home into a world run almost exclusively by men.”⁵⁴ As Blackstone summarized: “The husband and wife are one, and the husband is that one.”⁵⁵

Early English lawyers referred to the husband’s life estate as “a tenant ‘by the curtesy of England,’ to emphasize the liberality of the law as opposed to its Norman counterpart.”⁵⁶ Curtesy operated a little differently than dower under English common law:

Upon entering into a legally cognizable marriage, the husband acquired a marital tenancy in his wife’s inheritable freehold estates known as [*j]ure uxoris* [“by right of the wife”] for the joint lives of the couple. He acquired his curtesy interest only upon the birth of issue capable of inheriting, at which time his interest was converted into an estate for his life known as curtesy initiate. Upon the wife’s death, the husband’s life estate was known as curtesy consummate. Because curtesy was limited to a life estate in the wife’s interests of which she was seised in possession at the time of her death, the husband could not enjoy curtesy as to reversionary or remainder interests she owned at the time of her death.⁵⁷

While men received a one hundred percent interest in the wife’s lands, as opposed to the wife’s one-third interest in the husband’s lands, the husband was required to have issue that could inherit to obtain the curtesy interest.⁵⁸ No such requirement was present for a surviving wife to receive dower.⁵⁹ As noted by commentators, this prerequisite of a male heir may help to explain “the eagerness with which the first heir was awaited, even by men with few of the normal fatherly characteristics.”⁶⁰

⁵⁴ *Id.* at 90-91.

⁵⁵ Marsha Garrison, *Toward a Contractarian Account of Family Governance*, 1998 UTAH L. REV. 241, 245 (1998).

⁵⁶ Brashier, *supra* note 4, at 91 n.27 (quoting Haskins, *supra* note 52, at 230).

⁵⁷ *Id.* at 90 n.20 (citing 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 210, at 15-93 (Patrick J. Rohan rev. ed., 1993)).

⁵⁸ *Id.* at 91-92. There were several elements of the issue requirement of old common law curtesy. *Id.* First, the mother and child must have survived childbirth. *Id.* Second, the husband might not receive curtesy if the marriage only bore daughters. *Id.* Finally, if the real property had been conveyed to the wife “in special tail” during a former marriage, the current husband would have no curtesy interest. *Id.* at 92 n.28 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126-28 (1765-1769)).

⁵⁹ Brashier, *supra* note 4, at 92.

⁶⁰ *Id.* at 92 n.29 (citing JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 90 (3d ed. 1989)).

The wide grant of the right of curtesy dates at least to the end of the twelfth century.⁶¹ This early right “was enlarged over the course of the thirteenth century.”⁶² After 1833, dower and curtesy were abolished in England.⁶³ For 105 years thereafter, there was complete testamentary freedom in England.⁶⁴ Between 1938 and 1975, an English statute provided that a court could in its discretion award maintenance to a surviving spouse and other specified descendants where the testator deprived them of a “reasonable share” of the property.⁶⁵ From 1975 and on, the surviving spouse’s claim was not limited to maintenance, but instead a court had the same discretion afforded in a divorce situation to award “reasonable financial provision” taking into account all circumstances including conduct of the parties.⁶⁶

C. History of Dower and Curtesy in America

*Borrowed from England, these estates represent the earliest form of protection from spousal disinheritance established in the United States.*⁶⁷

Like much of early American property law, dower and curtesy were imported from England,⁶⁸ though today the difference between the laws in England and America are dramatic.⁶⁹ Early on, dower and curtesy rights varied quite a bit between the colonies and later between the states.⁷⁰ Early dower and curtesy statutes also varied from their English roots.⁷¹

In jolly old England when land was the major source of wealth for most well-off families, the dower system actually worked well in terms of adequacy

⁶¹ *Id.* at 92 n.27 (citing Haskins, *supra* note 52, at 228).

⁶² *Id.* (citing Haskins, *supra* note 52, at 228-29).

⁶³ GLENDON, *supra* note 14, at 241.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 241-42.

⁶⁷ Brashier, *supra* note 4, at 90.

⁶⁸ See Geddes & Zak, *supra* note 33, at 122 (“This right was considered so important that it was included in the Magna Carta by King Henry III . . .”).

⁶⁹ GLENDON, *supra* note 14, at 244.

⁷⁰ Brashier, *supra* note 4, at 90 n.21 (citing MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 141-84 (1986); Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1393-95 (1983)).

⁷¹ *Id.* at 92 n.30 (citing Haskins, *supra* note 52, at 197). For example, the old English curtesy requirements of actual seisin and birth of issue were not present in most American versions. See generally *id.*

of support.⁷² Nevertheless, in the modern era of intangible wealth, dower makes very little sense and often results in little or no support at all.⁷³ Because of this, dower (and curtesy) has been abolished in a large majority of separate property jurisdictions.⁷⁴ Dower survives in four states alongside elective share statutes: Arkansas, Kentucky, Michigan, and Ohio;⁷⁵ though there are substantial differences between modern-day dower and traditional English dower.⁷⁶ In Michigan and Ohio, a surviving spouse must choose either dower or an elective share.⁷⁷ As discussed, elective share laws usually yield more assets, with the result that dower in this country is effectively moot.⁷⁸

III. DESCRIPTION OF ELECTIVE SHARE STATUTES

*Caution. There is no subject in this book on which there is more statutory variation than the surviving spouse's elective share.*⁷⁹

Unfortunately for the goal of simplicity, the elective share statutes vary widely,⁸⁰ and have been described as:

[A] jungle, with hardly two states to be found that are exactly alike, and there exists in reality fifty different schemes most of which, when analyzed, are not built upon a single, adequate interest given the surviving spouse; but instead

⁷² DUKEMINIER ET AL., *supra* note 6, at 423. Of course, the widows did not own any of the land in fee simple.

⁷³ *Id.*

⁷⁴ *Id.* Dower inchoate, i.e., the vested expectation of a dower interest during the life of both husband and wife, acted as a restraint on alienability of real property. Brashier, *supra* note 4, at 93 n.32. This was another reason for its decline in America. *Id.*

⁷⁵ DUKEMINIER ET AL., *supra* note 6, at 423.

⁷⁶ See Brashier, *supra* note 4, at 93 n.35 (providing a full discussion of the differences).

⁷⁷ DUKEMINIER ET AL., *supra* note 6, at 423.

⁷⁸ *Id.* One could imagine that in unusual situations, dower could yield the surviving spouse better financial results. The two most prevalent benefits of dower over an elective share law are: (1) the inchoate rights inherent in dower that may lessen the ability of the spouse to transfer real property *inter vivos*, and (2) dower is given priority over creditors, which may protect the surviving spouse if the estate is insolvent.

⁷⁹ *Id.* at 425. For an overview of the variations, Dukeminier references JEFFREY A. SCHOENBLUM, 2004 MULTISTATE GUIDE TO ESTATE PLANNING Tables 6.1-6.125 (2004). *Id.* at 425-26.

⁸⁰ The history of the development of the myriad elective share laws in America is beyond the scope of this Article. As one scholar noted, "It would require a volume of some size, and more research than the subject is worth, to recount all the developments of the rules permitting a surviving spouse to elect against the will of the deceased spouse." SIMES, *supra* note 2, at 16.

give her a bit of homestead, a bit of widow's allowance, and in addition a bit of dower or some statutory substitute therefore.⁸¹

Every separate property jurisdiction except Georgia gives a surviving spouse an elective share or forced share of the decedent-spouse's property.⁸² The elective share is just that – an election: the surviving spouse has the right to take the property, if any, left to him or her under the will or elect against the will and take the amount specified by the elective share law instead.⁸³

A. Traditional Probate-Only Statutes

*Simply put, the conventional forced share is highly arbitrary and may in some instances work more harm than good.*⁸⁴

Starting in the 1930s, state-by-state transitions from dower to elective share laws took place over several decades.⁸⁵ New York state enacted the first elective share statute in this country.⁸⁶ Legislators did so, it appears, based solely on anecdotal evidence of two instances of disinheritance; no disinheritance studies had been conducted at that time.⁸⁷

Some states retain what was originally the norm in this country – an elective share statute that gives the surviving spouse a share (usually one-third to one-half) of the property in the decedent-spouse's *probate estate only*.⁸⁸ Planning around a probate-only type of law became so easy, and non-probate transfers such as life insurance, joint tenancies, qualified retirement plans, joint accounts and the like became so common, that most states now have toughened their laws to include, to some extent or another, nonprobate assets. However, probate-only elective share laws are still with us even today.

⁸¹ WILLIAM J. BOWE ET AL., PAGE ON THE LAW OF WILLS § 3.13 (2003).

⁸² DUKEMINIER ET AL., *supra* note 6, at 425.

⁸³ *Id.* Note that, as discussed below, in some states the election is to take the elective share or the property left to the surviving spouse by all sources, whether via the will or outside the will (e.g., life insurance proceeds, qualified retirement plans, joint property, etc.). See, e.g., UNIF. PROBATE CODE §§ 2-204 to 2-207 (amended 1993).

⁸⁴ Brashier, *supra* note 4, at 102.

⁸⁵ *Id.* at 99 n.51.

⁸⁶ *Id.* Brashier also points to *In re Estate of Riefberg*, for a chronology of how the New York state legislature went about enacting the first elective share law. *Id.* (citing *In re Estate of Riefberg*, 446 N.E.2d 424, 427 (N.Y. 1983)).

⁸⁷ See Plager, *supra* note 35, at 685-86 (explaining that no empirical data supported the findings “as to the frequency, and thus the social significance, of disinheritance”).

⁸⁸ DUKEMINIER ET AL., *supra* note 6, at 438 (emphasis added).

The probate-estate-only elective share laws have the advantage of simplicity. As one commentator noted:

The probate court need only know the total value of the estate to which the forced share applies and the applicable proportion of the estate (as set out in the statute) to which the surviving spouse is entitled. There is usually no occasion for the taking of testimony about family relationships and history, and no need for the application of judicial discretion.⁸⁹

Simplicity, however, has its disadvantages: “its total insensitivity to the surviving spouse’s actual need, the contribution the survivor may have made to the estate, and the reason why the testator, who presumably knew his family situation as well as anyone, preferred his particular dispositive plan.”⁹⁰ The probate-only type of elective share laws have been subject to stiff criticism.⁹¹

B. Modern Trend: Augmented Share

*The forced share system, as it currently exists in most states, is difficult to justify. Recent societal changes have undermined whatever usefulness the system might have had.*⁹²

As previously noted, New York State was the first state to make a statutory attempt to deal with the issue of nonprobate transfers subject to the elective share.⁹³ This larger pie is, in most state statutes, called the augmented share or augmented estate. This augmented share provides the asset pool that the surviving spouse’s percentage is taken from.

Other states soon followed New York’s lead, and today most separate property jurisdictions have some version of an augmented share concept. Because of the extreme variation from state to state, a survey of exactly what types of property are included in the augmented share is beyond the scope of this Article. However, suffice it to say, most of these augmented estate laws still have loopholes that good (read “expensive”) planners can take advantage of if a client has a need to plan around the elective share.

⁸⁹ Plager, *supra* note 35, at 682.

⁹⁰ *Id.*

⁹¹ See, e.g., Brashier, *supra* note 4, at 102; see also Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984) (reaching beyond probate estate to include assets held in *inter vivos* trust).

⁹² J. Thomas Oldham, *Should the Surviving Spouse’s Forced Share be Retained?*, 38 CASE W. RES. L. REV. 223, 224-25 (1987-1988).

⁹³ DUKEMINIER ET AL., *supra* note 6, at 446; see also N.Y. EST. POWERS & TRUSTS LAW ch. 952 (Consol. 1966), amended by N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2005).

C. Uniform Probate Code Provisions

*If the goal is a partnership theory of marriage . . . it must be recognized that while the revised UPC is certainly better than the pre-1990 UPC and a step in the right direction, it is not a very large step.*⁹⁴

The Uniform Probate Code incorporates the most inclusive and detailed augmented share concept, leaving very few (but still important) loopholes.⁹⁵ The goal of the UPC drafters was to approximate as best as possible the division of property at death in a community property jurisdiction.⁹⁶ Important differences remain, however. One key difference is that the UPC augmented share includes all the property (including property acquired by gift and inheritance and pre-marriage property) owned by both spouses.⁹⁷ In contrast, community property does not include property owned by the spouses before marriage or property acquired by gift or inheritance.⁹⁸ This can act to increase quite dramatically (and quite unfairly) the share of the surviving spouse if the decedent spouse, for example, had a great deal of inherited wealth. If, in addition, the surviving spouse is wealthy in her own right, then she may not receive any share of the marital property.

For various reasons, the most recent version of the UPC elective share provisions has been adopted in only eight states.⁹⁹

⁹⁴ Charles H. Whitebread, *The Uniform Probate Code's Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 PROB. L.J. 125, 139 (1992).

⁹⁵ UNIF. PROBATE CODE §§ 2-202 to 2-207 (amended 1993); *see also* discussion *supra* notes 84-87 and accompanying text (discussing the loopholes in both UPC and non-UPC elective share laws).

⁹⁶ DUKEMINIER ET AL., *supra* note 6, at 449.

⁹⁷ *Id.*

⁹⁸ *Id.* Note, however, that a couple may agree to characterize premarital property, gifts and inheritances as community property. *Id.* at 456.

⁹⁹ *Id.* at 449. These states, as Dukeminier points out, are mainly in the Great Plains. *Id.* at 450. *See* JEFFREY A. SCHOENBLUM, 2004 MULTISTATE GUIDE TO ESTATE PLANNING Table 6.03 (2004).

IV. TESTAMENTARY FREEDOM

*America is uniquely the land of testamentary freedom.*¹⁰⁰ (But, only in Georgia!)

Elective share laws interfere with an individual's right to pass her property to whomever she wishes. Freedom of asset disposition should be one of the most fundamental rights guaranteed by U.S. law. Elective share statute decisions should be based on a balancing between the need to protect surviving spouses, which has decreased dramatically in modern times, and a testator's fundamental right to freedom of testation.

Despite not being constitutionally protected,¹⁰¹ the right of testamentary freedom has "gained general acceptance in Anglo-American law during the past two centuries."¹⁰² For all its virtues, however, "[f]reedom of testation, once a hallmark of the common law, shares the contemporary fate of other more important liberties – it is in a state of decline."¹⁰³

In ancient Rome, testamentary freedom was the law.¹⁰⁴ In the fifth century B.C., the law of the Twelve Tables was clear: "As he bequeathed shall be the law."¹⁰⁵ Philosophers in Roman times were very much in favor of freedom of

¹⁰⁰ Brashier, *supra* note 4, at 85 n.6 (quoting John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 304 (1987)); see also Kymberleigh N. Korpus, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 554 (2001) ("Testamentary freedom . . . comports with American ideals." (citing Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12-13 (1992), in JOEL C. DOBRIS & STEWART E. STERK, ESTATES AND TRUSTS 12-13 (1998))).

¹⁰¹ Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 333 n.46 (1978) ("The federal Constitution does not forbid a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (citing *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942))).

¹⁰² *Id.* at 333 (citing THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 5 (2d ed. 1953); 1 RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 415-20 (1914); W.H. PAGE, PAGE ON THE LAW OF WILLS § 1.7, at 27-28 (Bowe Parker rev. ed., 1960); E. ADAMSON HOEBEL, *The Anthropology and Inheritance*, in SOCIAL MEANING OF LEGAL CONCEPTS NO. 1, INHERITANCE OF PROPERTY AND THE POWER OF TESTAMENTARY DISPOSITION 5-26 (Edmond N. Cahn ed., 1948)).

¹⁰³ Joseph Laufer, *Flexible Restraints on Testamentary Freedom – A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 277 (1955).

¹⁰⁴ Arthur Nussbaum, *Liberty of Testation*, 23 A.B.A. J. 183, 183 (1937).

¹⁰⁵ *Id.*

testation.¹⁰⁶ Grotius, for instance, “found in freedom of testation an expression of natural law, only to be restricted by provisions for necessary support of relatives,” while Leibnitz “based the testamentary power on the immortality of the soul.”¹⁰⁷

Wills as a concept date back to the “earliest period of reliably recorded Roman history.”¹⁰⁸ In Rome, “no honorable citizen die[d] without having made his will.”¹⁰⁹ Given the proper form, testamentary freedom at this time was virtually absolute.¹¹⁰

Testamentary freedom was an important part of the societal development of ancient Greece, Rome, and pre-1066 Anglo-Saxon England, especially when no issue were born to the testator.¹¹¹ Indeed “[e]vidence of complete or almost complete substantive freedom of testation can be found only twice in history, viz., in Republican Rome and in England” (during the one hundred or so year period anyway).¹¹²

Common law countries have traditionally incorporated the concept of testamentary freedom to a much greater extent than civil law countries.¹¹³ Beginning with the Statute of Wills of 1540, England expanded testamentary freedom, though the Wills Act of 1837 finally eliminated the last remnants of the pre-1540 regime, namely limitations on dispositions of certain land tenures.¹¹⁴

At the start of the twentieth century, New Zealand became the first common-law jurisdiction to pass legislation providing for certain family

¹⁰⁶ SIMES, *supra* note 2, at 4.

¹⁰⁷ *Id.*

¹⁰⁸ Katherine S. Spaht et al., *The New Forced Heirship Legislation: A Regrettable “Revolution”*, 50 LA. L. REV. 409, 485 (1990) (citing M. RADIN, HANDBOOK OF ROMAN LAW 399 (1927)).

¹⁰⁹ *Id.* (quoting J. BRISSAUD, 3 HISTORY OF FRENCH PRIVATE LAW § 455, at 621 (1912)).

¹¹⁰ *Id.* (citing L. OPPENHEIM, SUCCESSIONS AND DONATIONS § 141, in 10 LOUISIANA CIVIL LAW TREATISE (1973)).

¹¹¹ SUSSMAN ET AL., *supra* note 3, at 7-8.

¹¹² SIMES, *supra* note 2, at 6 (quoting MAX WEBER, LAW IN ECONOMY AND SOCIETY 137 (Max Rheinstein ed., 1954)).

¹¹³ Brashier, *supra* note 4, at 121.

¹¹⁴ *Id.* at 121 n.124 (citing Joseph Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337, 344 n.42 (1940)). Simes gives a slightly different summary of the law, stating, “until 1938, there was no restraint on testation in favor of the family in English law subsequent to 1724 as to personalty, and subsequent to 1822 as to realty.” SIMES, *supra* note 2, at 10 (citing Dainow, *supra*). No matter, the important point is that there was a substantial period in English law when there were no restrictions on testation.

members in the case of disinheritance.¹¹⁵ While this system did not incorporate the notions of forced heirship and allowed the testator to dispose of his or her property as desired, if the decedent spouse died without leaving proper support for the surviving spouse or children, a court could order such support at its discretion.¹¹⁶ Years later, England followed suit, enacting similar legislation and swinging back to the position of restricted testation.¹¹⁷ American commentators have criticized the commonwealth system:

[U]nguided and unprincipled use of judicial discretion can lead to results as arbitrary and unsatisfactory as those under a system of fixed rules applied unswervingly to everyone. Moreover, the concept of testamentary freedom remains more important in the United States than in other countries. Americans probably would object strenuously to efforts to implement a 'redistribution' system, such as family maintenance, in the absence of very well defined, restrictive guidelines to temper judicial discretion.¹¹⁸

Limitations upon free testation "are, of course, familiar to the civil law, with its ancient *pars legitima*, or modern *légitime*."¹¹⁹ In France, testamentary freedom became taboo after the revolution.¹²⁰ The revolutionaries, including Honoré Gabriel Riqueti, better known as Comte de Mirabeau,¹²¹ were opposed to testamentary freedom because "they regarded it as a basis for the concentration of wealth."¹²² From the revolution forward, French law

¹¹⁵ Brashier, *supra* note 4, at 121.

¹¹⁶ *Id.* at 121 n.125.

¹¹⁷ *Id.* at 121-22; SIMES, *supra* note 2, at 22.

¹¹⁸ Brashier, *supra* note 4, at 132-33 (citing Dainow, *supra* note 114, at 345 n.48, 355; Joseph Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107, 1111 (1938)).

¹¹⁹ Cahn, *supra* note 22, at 139 (citations omitted).

¹²⁰ SIMES, *supra* note 2, at 4.

¹²¹ Comte de Mirabeau, a French politician who was often referred to as Mirabeau, was born on March 9, 1749 and died April 2, 1791. WIKIPEDIA, *Honoré Mirabeau*, at http://en.wikipedia.org/wiki/Honor%C3%A9_Mirabeau (last visited Mar. 15, 2006). During the French Revolution, Mirabeau believed that "for a government to be strong it must be in harmony with the wishes of the majority of the people." *Id.* In order to create a stronger government, he studied the English Constitution with the aspirations of creating a French system similar to the English system. *Id.* Mirabeau consolidated the National Assembly in 1789. *Id.* After the storming of the Bastille, Mirabeau decided he needed to establish a ministry similar to that of the English Ministry, to be responsible and represent the people of France. *Id.* He devoted the rest of his life to working towards building the new French system. *Id.*

¹²² SIMES, *supra* note 2, at 4. Note that Mirabeau may have had some personal issues relating to the subject as well, as he had been a disinherited younger son. *Id.* at 5. Mirabeau may, however, have had clarity on this issue on his deathbed. Orrin K. McMurray, *Liberty of*

incorporated forced heirship in favor of both descendants and ascendants, but not the surviving spouse as he or she was protected by community property principles.¹²³ At death, the assets of the community are equally divided, operating the same as in the divorce context.¹²⁴

In 1815, when discussing forced disposition, Robert Stewart, known as Lord Castlereagh,¹²⁵ said, “It is unnecessary to destroy France, the Civil Code will take care of that.”¹²⁶ These forced disposition laws in France,¹²⁷ and many other developed and non-developed countries, have caused very large percentages of middle- and upper-class citizens to transfer their property *inter vivos* to asset protection jurisdictions – a situation that is not healthy for the economy or the family unity of these countries.

Among other ills,¹²⁸ these harsh restrictions on testamentary freedom in France have been blamed for very low rates of testamentary charitable

Testation and Some Modern Limitations Thereon, 14 ILL. L. REV. 96, 97 (1919-1920) (“And there can scarcely be found a better example of the folly of a purely rationalistic treatment of a great and ancient legal institution than is afforded by the fact that Mirabeau made a death-bed will on the very morning of the day that Talleyrand read his ‘testament politique.’ The same inconsistency has been charged to Plato, who like Mirabeau criticized the will, and like him died testate.” (citation omitted)).

¹²³ See SIMES, *supra* note 2, at 6.

¹²⁴ GLENDON, *supra* note 14, at 246.

¹²⁵ Robert Stewart, later titled Lord Castlereagh, was born on June 18, 1769 in Ireland. Spartacus Educational, *Lord Castlereagh*, at http://www.spartacus.schoolnet.co.uk/PRcastle_reagh.htm (last visited Mar. 15, 2006). In 1794, Castlereagh claimed a seat in the English House of Commons. *Id.* In 1797, he was appointed as Irish Chief Secretary to William Pitt. *Id.* Together, they decided the best way to stop the religious conflict in Ireland was to unite with the rest of Britain. *Id.* The plan, however, was very unpopular and Castlereagh refused to serve under the new Prime Minister. *Id.* After being reappointed several years later, Castlereagh defeated Napoleon, and focused his concentrations on improving Britain. *Id.* His hoped improvements failed, leading to the downfall of his popularity, as well as his suicide on August 12, 1822. *Id.*

¹²⁶ McMurray, *supra* note 122, at 112.

¹²⁷ See SUSSMAN ET AL., *supra* note 3, at 8 (France “has severely prescribed distribution of an estate at death. With few exceptions, beneficiaries are immediate family members.”).

¹²⁸ See McMurray, *supra* note 122, at 112-13. For example, “M. Le Play . . . finds in the system of enforced partition the destruction of the family, of morality, religion, and industry, the cause of the declining birth rate, of the increase in crime, of stock gambling and fraudulent promotions of financial enterprises, indeed, all the evils of modern society.”

Id. at 112.

bequests¹²⁹ and very little privately funded research.¹³⁰ Contrast that with the “relatively healthy state” of American charities, at least partially due to testamentary charitable bequests facilitated by a larger degree of testamentary freedom.¹³¹

In America, freedom of testation evolved quite differently than it evolved in England.¹³² Early on, we as a country made the decision to reject the French concept of forced dispositions of one’s property to family members other than the surviving spouse.¹³³ Oddly, America incorporated civil law concepts of forced disposition, but only with respect to surviving spouses and not other family members (except in Louisiana, where the Code Napoléon forms the basis of their civil law¹³⁴) – a disconnect that is not easily explained.¹³⁵

There are numerous rationales put forth by philosophers and scholars from ancient times on to support testamentary freedom.¹³⁶

A. Testamentary Freedom is a Natural Right Worthy of Protection

It would be robbery to deprive a man of the right to dispose by will all that which he owns. The soul is immortal¹³⁷ and must not be deprived of the exercise of its rights.¹³⁸

¹²⁹ See SUSSMAN ET AL., *supra* note 3, at 8 (“The severe restrictions on testamentary freedom in France have not been conducive to the development of charitable foundations and agencies having the functions of public service and research.”).

¹³⁰ *Id.* at 312.

¹³¹ *Id.*

¹³² SIMES, *supra* note 2, at 12-13.

¹³³ *Id.* at 15. This Article does not explicitly deal with the issues surrounding disinheritance of children and family members other than spouses. For a recent article on forced heirship *vis-à-vis* children, see Brashier, *supra* note 4.

¹³⁴ SUSSMAN ET AL., *supra* note 3, at 26.

¹³⁵ See GLENDON, *supra* note 14, at 245 (“In American law, the forced share operates in favor of the spouse rather than descendants and ascendants, as, for example, in the French system.”).

¹³⁶ See Adam J. Hirsch & William K. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 (1992) (noting that “traditional rationales for testamentary freedom are as varied as they are controversial”).

¹³⁷ Cahn, *supra* note 22, at 145. The author concurs with Cahn on this point: “We shall dodge the question of the immortality of the soul (concerning which the statutes are ambiguous and the reported cases nil).” *Id.* at 146.

¹³⁸ *Id.* at 145 (citing LUIGI MIRAGLIA, *COMPARATIVE LEGAL PHILOSOPHY* 748-50 (1912)); see also BOWE ET AL., *supra* note 81, § 1.7.

Locke and Grotius believed that testators have a natural right to leave property at death freely, having created that wealth.¹³⁹ It is a widely-held tenet of natural law that a person has a property interest in the fruits of her labor. Depriving a person of the ability to dispose freely of these fruits violates this basic concept of the bundle of rights: “[p]roperty clearly is not viewed as a unitary right. Instead, it is viewed as a ‘multilithic’ concept that includes a ‘bundle’ of disparate rights, including the right to use something, the right to prevent others from using it, and the right to transfer your rights to someone else.”¹⁴⁰ In traditional common law, citizens believed that property was something tangible that they had the right to own.¹⁴¹ Their rights, however, did not stop with ownership, but rather were coupled with the “right to use, sell, give away, leave idle, or destroy” their own property.¹⁴²

B. Testamentary Freedom Provides an Incentive to Work

*There would be no incentive to ingenuity, productiveness and thrift unless a man could direct the enjoyment of his property after his death.*¹⁴³

One, of many, reasons people work hard throughout their lives includes the opportunity to pass the fruits of their labor to whomever they choose at their deaths.¹⁴⁴

Curtailment of testamentary freedom has been unpopular largely because of a belief that beneficial economic and social effects result from a policy of allowing nearly unrestricted transfers of wealth at death. The accumulation of property and control of its transfer at death is thought to breed ingenuity, initiative, creativity, and self-reliance.¹⁴⁵

¹³⁹ Hirsch & Wang, *supra* note 136, at 6 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 27, 305-06, 329 (2d ed. 1970) (1690); 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 265 (Francis W. Kelsey trans., 1925) (1625)).

¹⁴⁰ A. Mechele Dickerson, *From Jeans to Genes: The Evolving Nature of Property of the Estate*, 15 BANKR. DEV. J. 285, 287-88 (1999) (citations omitted).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Cahn, *supra* note 22, at 145.

¹⁴⁴ See FRIEDRICH, THE ECONOMICS OF INHERITANCE, in 1 SOCIAL MEANING OF LEGAL CONCEPTS 27, 33 (E. Cahn ed., 1948).

¹⁴⁵ Fellows et al., *supra* note 101, at 333 (citing ATKINSON, *supra* note 102, at 34-35; 2 F.W. TAUSSIG, PRINCIPLES OF ECONOMICS 288-309, 564-66 (4th ed. 1939); 6 AMERICAN LAW OF PROPERTY § 26.1, at 409, § 26.3 (James A. Casner ed., 1952); Calvin Coolidge, *The Harmful Economic Effects of Existing Estate Taxation in the United States*, 29 ECON. WORLD 305 (1925); A.W. Mellon, *Economic Aspects of Estate and Inheritance Taxation*, 39 TR. CO. 708-10 (1924);

“[B]inding a property owner to fixed, unalterable laws of distribution psychologically thwarts the property instinct in man, and is therefore in opposition to his nature.”¹⁴⁶ The only thing one has to do is to watch the documentary *Born Rich* to see the effect that guaranteed wealth has on individuals.¹⁴⁷ Anecdotally, any estate planner that works with high net worth individuals and their families would say the same thing. “[G]uaranteed inheritances cause heirs to cease to work and so reduces the total wealth of the country.”¹⁴⁸

C. Testamentary Freedom Leads to an Optimal Level of Wealth Creation and Savings

*[T]estamentary freedom is an accommodation mechanism in American society. It functions to meet multiple demands: those of continuity; a multilinear descent system; values that espouse freedom, democracy, and rationality; and a complex and highly differentiated modern industrial society.*¹⁴⁹

Freedom of testation usually facilitates the development of a complex society, as there “appears to be a high correlation between its exercise and the rise in societal complexity.”¹⁵⁰ With the erosion of testamentary freedom comes the erosion of savings and a lack of production.¹⁵¹ In the thirteenth century, Henry de Bracton believed that testamentary freedom was an incentive to industry and savings, a view that is widely held among scholars.¹⁵²

JEROME NATHANSON, THE ETHICS OF INHERITANCE, *in* SOCIAL MEANING OF LEGAL CONCEPTS 74 (Edmond N. Cahn ed., 1948)).

¹⁴⁶ BOWE ET AL., *supra* note 81, § 1.7, at 35.

¹⁴⁷ BORN RICH (HBO Cinemax 2003). Most of the “cast,” including the writer/director Jamie Johnson, have guaranteed assets either already in their names or irrevocably in trusts for their benefit. *Id.*

¹⁴⁸ Deborah A. Batts, *I Didn't Ask to Be Born Rich: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1221 (1990) (quoting R.D. OUGHTON & EDWARD L. TYLER, TYLER'S FAMILY PROVISION 32-33 (2d. ed. 1984)); *see also* Gerald Le Van, *Alternatives to Forced Heirship*, 52 TUL. L. REV. 29, 34 (1977) (arguing that “the French compromise not only ‘atomizes successions,’ but also takes away from the privileged heir that economic incentive that would otherwise keep him active and diligent”).

¹⁴⁹ SUSSMAN ET AL., *supra* note 3, at 4.

¹⁵⁰ *Id.* at 7.

¹⁵¹ Joseph E. Stiglitz, *Notes on Estate Taxes, Redistribution, and the Concept of Balanced Growth Path Incidence*, 86 J. POL. ECON. S. 138 (1978).

¹⁵² Hirsch & Wang, *supra* note 136, at 7-8 (citing 1 JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE, *in* THE WORKS OF JEREMY BENTHAM 338 (John Bowring ed., 1962); 2

For the most part, individuals enjoy bequeathing their assets to the donees of their choice. Testamentary freedom, then, creates a real incentive to be productive and accumulate wealth.¹⁵³ Property values decline with loss of testamentary freedom, which in turn removes incentives for wealth creation.¹⁵⁴

“[T]o dictate the persons who shall be a man’s successors and to deny freedom of testation might discourage frugality, thrift and individual initiative.”¹⁵⁵

D. Testamentary Freedom Promotes the Creation of Greater Stocks of Noncommodity Wealth

*The testator’s power to bequeath encourages her beneficiaries to provide her with care and comfort – services that add to the total economic “pie”.*¹⁵⁶

BLACKSTONE, *supra* note 58, at 11; 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 182 (George E. Woodbine ed., 1968); 1 FRANCIS HUTCHENSON, A SYSTEM OF MORAL PHILOSOPHY 352 (1755); 1 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 221 (Colonial Press 1899) (1848); ATKINSON, *supra* note 102, at 34; ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 165 (1988); Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465 (1971)).

Bracton’s assumption – shared by modern social scientists – was that persons derive satisfaction out of bequeathing property to others. To the extent that lawmakers deny persons the opportunity to bequeath freely, the subjective value of property will drop, for one of its potential uses will have disappeared. As a result, thwarted testators will choose to accumulate less property, and the total stock of wealth existing at any given time will shrink. Testamentary freedom accordingly fulfills the normative goal of wealth maximization, which is advanced by its proponents as the best available barometer of utility maximization.

Id. (citations omitted).

¹⁵³ Korpus, *supra* note 100, at 554 (citing Hirsch & Wang, *supra* note 136, at 12). Renowned legal scholar Richard Posner’s terminology for this concept is “wealth maximization.” Michael Rosenblum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTEL. PROP. L. 163, 177 (1997) (citing RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 13-115 (1981)). “Posner believes that as the value of property decreases, people will accumulate less property. Hence, the total amount of wealth will decrease.” *Id.* at n.83 (citing POSNER, *supra*, at 13-115).

¹⁵⁴ Korpus, *supra* note 100, at 554 (citing Hirsch and Wang, *supra* note 136, at 12).

¹⁵⁵ BOWE ET AL., *supra* note 81, § 1.7, at 35.

¹⁵⁶ Hirsch & Wang, *supra* note 136, at 10.

Another argument for freedom of testation, also premised upon the goal of wealth enhancement is that such freedom supports, as it were, a market for the provision of social services. Social life, like commercial life, is not a one-way street. Though classified by the law as “gratuitous” transfers, bequests within the family may in fact repay the beneficiary for “value” received (though of a sort not recognized as consideration under the common law). What Lord Hobhouse termed “the delicate interdependence of Parent and Child” could wither were testamentary freedom

Some people are loyal and responsible to those they should be without the prospect of being compensated at some point, but sadly, many might not be so attentive without economic incentives to do so.¹⁵⁷ In 1923, one social commentator observed that testamentary freedom “encourages family virtue, represses vice, assures the testator against ingratitude, and generally keeps the family house in order.”¹⁵⁸ In 1870, one English court said:

It is one of the most painful consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities.¹⁵⁹

As King Lear found out after his daughters’ shares of his estate were secure, sometimes individuals need a little (or a lot) of monetary incentive to treat others decently.¹⁶⁰

denied, a point made by many legal scholars (and dramatists) beginning with Bracton and hinted at still earlier in scripture and classical philosophy.

Id. (citations omitted).

¹⁵⁷ Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 434 (2001).

¹⁵⁸ SUSSMAN ET AL., *supra* note 3, at 212 (quoting JEREMY BENTHAM, UTILITARIAN BASIS OF SUCCESSION, in *THE RATIONAL BASIS OF LEGAL INSTITUTIONS* 420-21 (John H. Wigmore ed., 1923)). Sussman points out that this view was shared by some in a telephone survey he had performed, eliciting in particular the following two responses to a question relating to when a testator should be free to disinherit family members: “If you were a Catholic and couldn’t divorce your wife, but you wanted to, then you shouldn’t have to leave her your money” and “If you had a second wife and she was no damn good.” *Id.* See also Batts, *supra* note 148, at 1220 (quoting OUGHTON & TYLER, *supra* note 148, at 32).

¹⁵⁹ BOWE ET AL., *supra* note 81, § 1.7, at 35 (quoting *Banks v. Goodfellow*, 5 L.R.Q.B. 549 (1870)). Bowe summarizes, “To bind a person to an intestate scheme might destroy parental control, and deprive a person of the ability to reward kindness and punish cruelty.” *Id.*

¹⁶⁰ W. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES* 88 (1988). “How sharper than a serpent’s tooth it is [t]o have a thankless child!” WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 4. In the play, the eldest daughters – Goneril and Regan – professed their total and undying love for King Lear, their father. *Id.* at act 1, sc. 1. To show how pleased he was, he split his land between the two. *Id.* His youngest daughter, Cordelia, refused to shower her father with confessions of love for him, but instead told him that she loved him as any child should love their father. *Id.* This displeased King Lear so much that he left Cordelia with no land. *Id.* The irony behind the play, however, was that after the eldest daughters received their land, they showed their true feelings of ungratefulness and disrespect for their father. *Id.* at act 2, sc. 4. They mistreated King Lear to such an extent that he went to stay with Cordelia. *Id.* Unlike her sisters, Cordelia welcomed King Lear into her home, and treated him with the utmost respect, love, and kindness, just as she had earlier promised. *Id.* at act 4, sc. 4, 7.

E. Testamentary Freedom Increases Efficiency by Allowing Testators to Direct Assets to Those with the Greatest Need

*[D]istribution of the decedent's resources in response to the particular needs of family members is . . . a social virtue, one that freedom of testation promotes.*¹⁶¹

Freedom of testation is inapposite to the wasteful practice of the elective share that blindly distributes assets, not based on need, but based on the uninformed morality of state legislatures.¹⁶² Testamentary freedom helps to reduce the necessity of governmental support systems for the poor because a testator can direct property to those family members, close or distant in relation, that have the greatest need once immediate family members have enough property.¹⁶³ As one commentator noted, "Indeed, it is probable that through the centuries freedom of testation has been used more as an instrument of family protection than as a weapon of disinheritance."¹⁶⁴

F. Testamentary Freedom is Inherent in the Ability to Control Property Inter Vivos

*[T]estamentary freedom is . . . "a logical extension of an owner's freedom to deal with his property during his lifetime."*¹⁶⁵

If one is free to transfer property titled in a person's sole name during their lifetime,¹⁶⁶ then why should that right change just because one dies? The fact that individuals have comparatively less freedom of disposition at death than they do during life creates real inefficiencies and inconveniences. As a practical matter, decedents cannot retain assets until they die and are forced to

¹⁶¹ Hirsch & Wang, *supra* note 136, at 12.

¹⁶² *See id.*

¹⁶³ SUSSMAN ET AL., *supra* note 3, at 311.

¹⁶⁴ W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 40 (1960) (citing *cf.* JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 621-22 (R. Howell trans., 1912)).

¹⁶⁵ Batts, *supra* note 148, at 1219 (quoting OUGHTON & TYLER, *supra* note 148, at 31); *see also* Hirsch & Wang, *supra* note 136, at 3 (noting the assertion of other commentators that "the right to consume property while alive carries with it by necessary implication an absolute right to control it forever" (citing RICHARD A. EPSTEIN, TAKINGS 304 (1985); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 704-05, 710-13 (1986))).

¹⁶⁶ *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 243 (2001) ("During life, a person has virtually complete control over her property. She can give it to whomever she pleases. She can assist the needy, reward the meritorious, or simply indulge a whim. So long as the property owner remains competent, that control continues until death.").

dispose of them prematurely by making lifetime gifts to beneficiaries.¹⁶⁷ Because virtually all *inter vivos* gifts are irrevocable,¹⁶⁸ this can lead to all sorts of problematic issues, including: post-gift relationship deterioration between donor and donee;¹⁶⁹ post-gift financial deterioration of donor forcing the donor to rely on friends, family or the government for support;¹⁷⁰ loss of control over the assets;¹⁷¹ loss of control over the donee's behavior;¹⁷² and "family disharmony caused by unequal gifts to family members or gifts to nonrelatives."¹⁷³

G. Fairness Issue

*[F]reedom of testation remains available to those decedents with enough wealth to be well-advised.*¹⁷⁴

As discussed in more detail below, there is increasingly a distinction between those that can afford testamentary freedom (through the high fees of competent advisors) and those that cannot. This distinction is shameful and should be eliminated.

Absent converting to community property concepts, there is no way to produce an effective elective share law.¹⁷⁵ If a jurisdiction wishes to retain separate property concepts, then elective share laws should be eliminated to give everyone a fair playing field and eliminate these wasteful efforts of the privileged. "For the vulnerable testator . . . who does not have the best legal advice, the family paradigm [embodied in the elective share and similar laws] can be virtually a confiscator of property."¹⁷⁶ Note that the burdens of testamentary freedom restrictions tend to fall on "unnatural" beneficiaries such

¹⁶⁷ *Id.* at 244.

¹⁶⁸ *Id.* at 273 n.229 ("Outright *inter vivos* gifts are irrevocable." (citing GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS 262 (1999))).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (citing BEYER, *supra* note 168, at 262).

¹⁷² *Id.* (citing BEYER, *supra* note 168, at 262); *see also* discussion *supra* Part IV.D.

¹⁷³ *Id.* (citing BEYER, *supra* note 168, at 262).

¹⁷⁴ Pennell, *supra* note 13, § 905.

¹⁷⁵ *See* discussion *infra* Part V.

¹⁷⁶ Foster, *supra* note 166, at 244.

as non-immediate family members, caregivers, same-sex partners, and others.¹⁷⁷

V. MODIFICATION OF ELECTIVE SHARE IN SEPARATE PROPERTY JURISDICTIONS

*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.*¹⁷⁸

Legislatures need to address head-on the goals of their marital property systems generally, and elective share statutes specifically. They should decide first which theory their elective share law should be based on: the support theory,¹⁷⁹ the marital partnership theory,¹⁸⁰ or the contract theory.¹⁸¹ It is currently a confused jumble:

As it is, both the policy justifications and the effect of these rules are flawed, confused, or conflicted. To illustrate simply, most statutes cannot even choose whether they are based on a support theory (that is, the surviving spouse should not be left destitute and therefore a ward of the state) or an economic partnership theory (that is, everything acquired by investment or industry by either spouse during the marriage should belong to them equally, as in community property). This easily is shown by the vast divergence in size of the share from state to state. For example, the surviving spouse's share can range from a low of 0 percent to a high of 50 percent under the new Uniform Probate Code accrual share regime (indicating a marital partnership approach, based on the length of the marriage) but with a support allowance

¹⁷⁷ *Id.* at 273 n.227 (noting that “only the wealthy may have the luxury to provide for a beneficiary society regards as ‘unnatural’” (quoting Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 988 (1999))).

¹⁷⁸ Langbein & Waggoner, *supra* note 100, at 306; *see also* Brashier, *supra* note 4, at 151 n.225.

¹⁷⁹ The support theory of marital property states that all property is considered marital property except for “property acquired by means of gift or inheritance.” HARRY D. KRAUSE & DAVID D. MEYER, *FAMILY LAW, IN A NUTSHELL* § 22.2 (4th ed. 2003). The surviving spouse has an interest in the property “according to title,” and the marital property is divided. *Id.*

¹⁸⁰ Under the marital partnership theory, “all property owned by the parties, even if acquired before the marriage and held separately ever since, may be reallocated . . .” *Id.*

¹⁸¹ The contract theory of marital property allows “one or both parties to waive their spousal rights” altogether. ANDERSEN & BLOOM, *supra* note 23, § 6.01[E]. Note that if one espouses the contract theory of marriage, i.e., marriage is a contract between competent adults, “then neither the arbitrary elective share nor community property is necessary because the spouses may protect themselves before and during the marriage without state intrusion.” Brashier, *supra* note 4, at 88.

in all cases (the Uniform Probate Code § 2-202(b) Supplemental Elective Share Amount, based on the spouse's other property and property received outside of probate). In some states the share can be as high as 100% in certain cases. And, those states that still reflect a one-third share presumably are attributable to the dower/curtesy origins of elective share statutes, which arguably are not informed by either the support or the marital partnership theories.

. . . .
The conflicted underpinnings of these statutes is especially well illustrated by the fact that, in virtually all states, the election is denied if the spouse has died before an election is made. Quere how to justify a marital partnership theory underlying these statutes if the surviving spouse's property right substitute is defeated merely by the accident of dying before making the claim. This bespeaks a support theory, but it should not inform an accrual entitlement that increases with the length of the marriage. The conflict also is illustrated almost everywhere by the fact that an election made on behalf of an incapacitated surviving spouse must be justified based on need. Again, if the statutes reflect a marital partnership surrogate for community property, why should need or death of the spouse before completion of the election process be critical at all?¹⁸²

Another example of this confused identity is that some jurisdictions allow the elective share to be satisfied by life interests in property held in trust or otherwise, while other jurisdictions do not.¹⁸³ In the former, the support theory can be seen, whereas the latter suggests the partnership theory.¹⁸⁴

Finally, in most states, a surviving spouse that has abandoned a decedent spouse is still entitled to his or her elective share.¹⁸⁵ Again, does this really comport with the notions of partnership theory?¹⁸⁶ All of this can get confusing for even the most respected scholars.¹⁸⁷

¹⁸² Pennell, *supra* note 13, § 905 (citing Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223 (1987)); *see also* DUKEMINIER ET AL., *supra* note 6, at 425, 432; *see generally* American College of Trust and Estate Counsel ("ACTEC"), *Study 10: Surviving Spouse's Rights to Share in Deceased Spouse's Estate* (1994); UNIF. PROBATE CODE § 2-212(a) (amended 2003); *In re Estate of Crane*, 649 N.Y.S.2d 1006 (N.Y. Sur. Ct., Erie Co. 1996).

¹⁸³ DUKEMINIER ET AL., *supra* note 6, at 425.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 433.

¹⁸⁶ *Id.* (suggesting that perhaps the elective share should only apply to the property owned by the decedent-spouse at the time the surviving spouse abandoned the decedent-spouse, an

The Uniform Probate Code's elective share provisions go the farthest in attempting to implement the partnership theory.¹⁸⁸ With a sliding percentage ranging from zero percent to fifty percent, the UPC awards the surviving spouse a higher percentage of the decedent-spouse's assets the longer the marriage lasts on the theory that the longer the marriage, the greater the amount of property acquired through marriage partnership efforts.¹⁸⁹

But even this seems like the poor man's community property system. As the epigram under the heading of this section indicates, the 1990 UPC drafters concur.

A. Community Property

*Resolved, [t]hat the laws of property, as affecting married parties, demand a thorough revisal, so that all rights may be equal between them; – that the wife may have, during life, an equal control over the property gained by their mutual toil and sacrifices, be heir to her husband precisely to the extent that he is heir to her, and entitled, at her death, to dispose by will of the same share of the joint property as he is.*¹⁹⁰

This resolution could have been passed yesterday. Sadly, though, it was proclaimed in 1850.¹⁹¹ We have not made much headway in implementing community property laws, but we absolutely should. Limiting a decedent's control over his property is really a right with no force if there is no parallel limit on property transfers during lifetime.

arrangement that can be compared to the California community property laws that deem earnings acquired after separation not to be community property).

¹⁸⁷ For example, in one edition of his classic book, Jesse Dukeminier seemingly states the elective share purpose to be based on the support theory. JESSE DUKEMINIER, JR. & STANLEY M. JOHANSON, *FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING* 461-63 (1st ed. 1972) ("noting that forced share was [a] result of concern for wife's possible disinheritance and the limited protection afforded by dower"). However, in a later version, he states the elective share purpose to be based on the marital partnership theory. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES*, 377-78 (4th ed. 1990) (policy underlying elective share is the same as that underlying community property – to recognize the spouse's contribution to the economic success of the marriage). *See also* Brashier, *supra* note 4, at 151 n.225.

¹⁸⁸ *See generally* UNIF. PROBATE CODE art. II, pt. 2, general cmt. (amended 1993).

¹⁸⁹ DUKEMINIER ET AL., *supra* note 6, at 427.

¹⁹⁰ O'Conner, *supra* note 5, at 261 (quoting THE PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23RD & 24TH, 1850 (Boston, Prentiss & Sawyer 1851), *cited in* Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1113 (1994)).

¹⁹¹ *Id.*

“How can a restraint on testamentary power be made effective without a corresponding restraint on the *inter vivos* power of disposition?”¹⁹² If a separate property jurisdiction is really interested in implementing a system that tracks most closely the marital partnership theory of marriage, then there is no question that it should simply (though perhaps not so simply) switch to a community property theory of marriage and property disposition.¹⁹³

The community property theory of asset distribution¹⁹⁴ is much more effective at protecting the non-wage earning spouse, especially during life, as

¹⁹² SIMES, *supra* note 2, at 25; *see also* GLENDON, *supra* note 14, at 245 (arguing that the principal weakness of the American forced share “is that it can be defeated by lifetime transfers that deplete the estate”).

¹⁹³ Brashier, *supra* note 4, at 88. Note that only nine states currently have a system of community property: Arizona (ARIZ. REV. STAT. ANN. § 25-211 (West 1998)), California (CAL. FAM. CODE § 760 (West 2004)), Idaho (IDAHO CODE § 32-906 (Michie 2003)), Louisiana (LA. CIV. CODE ANN. art. 2338 (West 1985)), Nevada (NEV. REV. STAT. ANN. § 123.220 (Michie 1989)), New Mexico (N.M. STAT. ANN. § 40-3-2 (Michie 1978)), Texas (TEX. FAM. CODE ANN. § 3.002 (Vernon 1998)), Washington (WASH. REV. CODE ANN. § 26.16.030 (West 2000)), and Wisconsin (WIS. STAT. ANN. § 766.001 (West 2001)). Alaska allows spouses to choose whether to be subject to community or separate property (ALASKA STAT. § 34.77.030 (Michie 1998)). DUKEMINIER ET AL., *supra* note 6, at 455. These states, however, represent over one-fourth of the U.S. population. *Id.* As summarized by Dukeminier:

Community property in the United States is a community of acquests: Husband and wife own the earnings and acquisitions from earnings of both spouses during marriage in undivided equal shares. Whatever is bought with earnings is community property. All property that is not community property is the separate property of one spouse or the other or, in the case of a tenancy in common or joint tenancy, of both. Separate property includes property acquired before marriage and property acquired during marriage by gift or inheritance. In Idaho, Louisiana, and Texas, income from separate property is community property. In the other community property states, income from separate property retains its separate character.

....

Almost all community property states follow the theory that husband and wife own equal shares in each item of community property at death.

Id. at 455, 457.

¹⁹⁴ To be clear, there are two types of community property utilized in the world: the Spanish system in use in America today and the universal community system, of Germanic origin, used in Roman-Dutch law. In the Germanic system, “all property owned by either spouse at the time of the marriage becomes community property when the marriage is entered into,” and any property, regardless of source, obtained during marriage becomes community property. Brashier, *supra* note 4, at 95 n.38. The current UPC elective share provisions purport to employ this universal community approach at the death of a spouse, despite the fact that no American jurisdiction utilizes the universal community property system during life. *Id.* As John Lennon might say, “Strange days indeed; strange days indeed.” JOHN LENNON, *NOBODY TOLD ME* (Polydor Records 1984).

he or she has an immediate property interest in any property deemed earnings during the marriage. There are significant limitations on the rights of one spouse to transfer community property without spousal consent.¹⁹⁵ If implemented properly, this would close most of the loopholes inherent in even the best separate property elective share law.¹⁹⁶ Prohibiting a person from disposing of his or her property in the manner of his or her choice at death will only lead to a bizarre race against the clock to give away property as death approaches, and who knows when that will be? This approach requires individuals to be both psychic and quick in order to fulfill their wishes. Most likely, they will not be both, thus frustrating a primary tenet of both property law (the right to do with your property what you choose) and decedents' estates law (that the testator's intent is paramount). As one scholar notes, "If we prevented them from bestowing it in the open and explicit mode of bequest, we could not prevent them from transferring it before the close of their lives, and we should open a door to vexatious and perpetual litigation."¹⁹⁷

Commentators have agreed with this view, noting, for example, that "eventually all states will have to abandon elective or forced share law and adopt some sort of community property system" if the partnership theory of marriage is to be implemented nationwide,¹⁹⁸ and that:

To the extent that the elective share is now being recharacterized as a posthumous means of correcting deficiencies in the common law system of ownership of marital property, legislatures should instead focus their attention on correcting that system during the marriage, not at its end. If states wish to view marriage as an economic partnership in which contributions of each spouse should be recognized, then they must adopt community property principles, not forced share statutes that provide

¹⁹⁵ See Oldham, *supra* note 92, at 229; Kathy T. Graham, *The Uniform Marital Property Act: A Solution for Common Law Property Systems?*, 48 S.D. L. REV. 455, 464 (2002-2003) (For example, § 6 of the Uniform Marital Property Act, which seeks to implement community property concepts on a uniform basis, "restricts the ability of a spouse to gift marital property valued in excess of five hundred dollars.").

¹⁹⁶ DUKEMINIER ET AL., *supra* note 6, at 456-57.

¹⁹⁷ Hirsch & Wang, *supra* note 136, at 11 (quoting WILLIAM GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON MODERN MORALS AND HAPPINESS 718-19 (Penguin Books 1985) (1793)); see also 1 FRANCIS HUTCHESON, A SYSTEM OF MORAL PHILOSOPHY 352 (1755) ("Take away this right and . . . men must be forced into a pretty hazardous conduct by actually giving away during life whatever they acquire beyond their own probable consumption.").

¹⁹⁸ Brashier, *supra* note 4, at 152 n.226 (quoting Whitebread, *supra* note 94, at 142).

recognition of spousal contributions only to the survivor when the marriage is terminated by death.¹⁹⁹

Feminist scholars, in addition, have heaped quite harsh criticism – rightly so – on the continued separate property regimes in most jurisdictions.²⁰⁰

The greatest injustice associated with separate property systems (even with the newest elective share statute) is the situation where the non-earning spouse dies first.²⁰¹ In that case, he or she would have no ability to devise any property that the earning spouse accumulated during the marriage to his or her children.²⁰² With multiple marriages (perhaps each with children) becoming more commonplace, society can no longer assume that both spouses have identical testamentary intentions.²⁰³ So much for the UPC's promise of implementing the marital partnership theory.²⁰⁴

B. Distribution at Death Should Be More Consistent With Distribution Upon Divorce

*In general, the state says to the widow, "We give you this compulsory or elective share because you need it, but we will not ask how much you do need or whether you need anything at all."*²⁰⁵

A consensus has developed in the past few decades regarding the method of property distribution at divorce, with both separate and community property

¹⁹⁹ *Id.* at 152 (citations omitted).

²⁰⁰ See, e.g., Mary Louise Fellows, *Wills and Trusts: The Kingdom of the Fathers*, 10 LAW & INEQ. 137, 150-51 (1991) (arguing that modern estate planning, from the female viewpoint, has not progressed much past the fourteenth century). Fellows notes: "How else can we explain the continuing reliance in the majority of states on inheritance and forced share rights, rather than the community-property system, to acknowledge the contribution and support needs of spouses?" *Id.*

²⁰¹ *Id.* at 151 ("Recognizing a wife's claim to the marital estate only if she survives is wholly consistent with the maintenance (or vessel) ideology of the fourteenth century. It denies the wife the right to testamentary control over capital except, and only reluctantly, when practicality demands this solution.").

²⁰² Oldham, *supra* note 92, at 229.

²⁰³ *Id.* at 235.

²⁰⁴ DUKEMINIER ET AL., *supra* note 6, at 427; see also Whitebread, *supra* note 94, at 140-44 (discussing the benefits of converting to community property, and noting that the conversion to the Uniform Marital Property Act would be easier than most believe and that it has gone well in the one state that has adopted it (i.e., Wisconsin)).

²⁰⁵ Cahn, *supra* note 22, at 146; see also Foster, *supra* note 166, at 219-20 (elective share laws "award property mechanically on the basis of fixed rules, with virtually no consideration for the actual circumstances or needs of the surviving spouse" (citation omitted)).

jurisdictions moving in the direction of equitable distribution, i.e., family law courts can divide property accumulated by either spouse if acquired through the spouse's efforts.²⁰⁶ This type of division best reflects the marital partnership view of marriage – that the spouses should share the fruits of the marital effort, no more and no less.²⁰⁷

Neither the partnership nor the support theory of marriage would allow a surviving spouse to have any interest, either at divorce or at death, in property received by the decedent spouse through inheritance and gifts or from property owned before marriage.²⁰⁸ These assets are clearly not derived from a marital partnership and support should come, if at all, from assets earned during the marriage. Many separate property jurisdictions today, as well as the Uniform Probate Code, give the surviving spouse a share of total assets (including inheritance and premarital assets); therefore, there is decidedly less consensus between community and separate property states regarding division of property at death.²⁰⁹ This is a non-trivial issue given the very large sums that are expected to be passed from one generation to the next via inheritance over the next few decades.²¹⁰

Property distribution at divorce is governed to a significantly lesser degree by bright line rules, and many more of the concepts of equity come into play. The elective share laws in separate property states give the surviving spouse a fixed percentage, whether on the sliding scale of the Uniform Probate Code or the one-third or one-half that the other elective share laws yield.²¹¹ “By necessity it operates upon a mechanical theory of justice, since obviously no statute can allocate family wealth according to the needs of the individual spouse.”²¹²

²⁰⁶ Oldham, *supra* note 92, at 223.

²⁰⁷ *Id.* at 223-24.

²⁰⁸ *Id.* at 223.

²⁰⁹ *Id.* at 224.

²¹⁰ Alan Newman, *Incorporating the Partnership Theory of Marriage Into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 517 (2000) (“According to a relatively recent study, the generation commonly referred to as the ‘Baby Boomers’ can expect to inherit some \$10.4 trillion over the fifty-year period from 1990 to 2040, with the average size of each of the projected 115 million bequests being slightly more than \$90,000 (both amounts stated in 1989 dollars).”).

²¹¹ Pennell, *supra* note 13, § 905.

²¹² Chaffin, *supra* note 21, at 459.

Divorce laws consider “numerous factors such as relative contributions to the marriage, length of the union, and the moral and financial standing of the spouses.”²¹³ The two schemes are fundamentally different, but should they be?

In cases where the spouse objects to being denied a sufficient outright bequest (however that is defined), one proposal for reform is for the English approach to be utilized: allow the judge to consider the equities of the situation based on factors similar to the divorce setting and set out a more tailored solution than currently exists.²¹⁴ As the Pennell study shows, in a state where disinheritance is both legal and easy, there would not be a large number of instances where this discretion would come into play.²¹⁵ As one commentator noted almost forty years ago:

If the need is great for the individual, but small in a number of cases involved and in total individuals affected, rough justice may be poorer justice than the situation requires. We may be able to afford the luxury of individuation; to protect the surviving spouse who has genuine need, protect the testator's dispositive plan when there is no such need, and do it all without an undue burden on the courts.²¹⁶

²¹³ Pennell, *supra* note 13, § 905 (citing J. GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION* (1989)).

²¹⁴ *Id.* This approach is summarized well as follows:

An alternative is to provide a system of maintenance payments to the surviving spouse . . . payable out of the decedent's estate. The amount of the payments would be keyed to the individual need of the survivor, the interests of persons who otherwise would be entitled to the deceased's property, the conduct of the survivor with relation to the deceased, the deceased's reasons for his dispositions, and the many other factors that might be relevant in a particular case. This is essentially the system established by the British Commonwealth decedent's family maintenance legislation.

Plager, *supra* note 35, at 682 (citing Inheritance (Family Provision) Act of 1938, 1 & 2 Geo. 6, ch. 45 (Eng.); Family Protection Act of 1900, 64 Vict., No. 20 (N.Z.), amended by 11 Geo. 6, No. 60, § 15 (1947)); see generally Joseph Laufer, *Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955).

²¹⁵ Pennell, *supra* note 13, § 905.

²¹⁶ Plager, *supra* note 35, at 683.

Placing more discretion in courts has, however, drawn broad criticism from commentators.²¹⁷

VI. COMPLETE ELIMINATION OF ELECTIVE SHARE STATUTES

*The responsible family member should not be coerced by legal restrictions to take care of his family: he ought to have the privilege of doing it of his own volition.*²¹⁸

The concept of no dower or elective share law in separate property states has been around for a long time, but has never caught on – why? In this age of political correctness, are we as a society just afraid to debate the subject in a meaningful way?

Right now, Georgia is the only separate property jurisdiction that does not have an elective share law.²¹⁹ In addition, for most of the twentieth century, North Dakota and South Dakota did not have dower or an elective share statute.²²⁰

In the past, multiple commentators – many at the top of their field – have supported the notion of eliminating the elective share laws. But these arguments have been met with the silence of perceived political correctness and not the debate of informed policymakers. It is time for that to change.

A. Elective Share Statutes Are Less Necessary

The underlying reason for statutory protection legislation is the basic notion that a man should not disinherit his wife. However compelling this postulate may have been in earlier times, it does not loom as important in

²¹⁷ See, e.g., GLENDON, *supra* note 14, at 246 (“Occasionally, the English approach is proposed as a replacement or supplement to present American systems, but it has found no acceptance.”). Another scholar viewed this system as follows:

The English system could create problems, however. Although this system seems to work well in England, some have been concerned that American surviving spouses would frequently litigate to determine whether they had adequate resources to provide for their support, and what would constitute a “reasonable” support award from the estate. Also, this system probably would complicate the administration of many decedents’ estates. If the estate had an obligation to support a surviving spouse for life, a significant reserve would have to be maintained; it would not be clear what property could be transferred from the estate to a devisee.

Oldham, *supra* note 92, at 230-31.

²¹⁸ SUSSMAN ET AL., *supra* note 3, at 293.

²¹⁹ GA. CODE ANN. § 53-2-9 (1982).

²²⁰ Brashier, *supra* note 4, at 88 n.16.

*modern society as it once did. Within the past several years serious questions have been raised as to the need for such protective legislation.*²²¹

In today's society, the elective share is not as necessary as it was in prior generations. The balancing test – between protection of surviving female spouses and testamentary freedom – that policymakers have instinctively used throughout the ages should now squarely tip the scales in favor of eliminating forced heirship laws favoring surviving spouses.

It seems that the rhetoric associated with forced spousal heirship is premised on a number of myths that simply are not true in today's society.

1. Disinheritance Very Seldom Occurs Without the Acquiescence of the Surviving Spouse (Georgia on My Mind)

*Elective share and dower statutes thus may be partly based on a distorted perception of the disinheritance problem. . . . If spousal disinheritance is a problem of de minimis proportions, then the typical fractional forced share found in most common law states does more harm than good. The broad swath cut by the fixed fraction elective share is obvious: its arbitrariness may be used by the survivor unjustifiably to reduce legacies to minor dependents and other needy members of the testator's family.*²²²

There have not been an overwhelming number of studies on the rate of, and reasons for, spousal disinheritance. The studies that have been performed, though, have been clear: “The plight of the impoverished widow wronged by her husband's unfair estate plan appears to be overdrawn and perhaps even fanciful, in light of actual experience.”²²³ Perhaps the best and most modern study on the subject comes from the most relevant jurisdiction: Georgia. As the only state that allows the unfettered ability to disinherit a spouse, Georgia is the ideal starting point for a disinheritance study. In 2000, Professor Jeffrey Pennell published a study that looked at 2,529 wills filed with probate courts in multiple Georgia jurisdictions designed to be a cross-section of Georgia society.²²⁴ On a number of fronts, the results are so stark as to be almost shocking.

²²¹ Chaffin, *supra* note 21, at 463.

²²² Brashier, *supra* note 4, at 141 (citations omitted).

²²³ Chaffin, *supra* note 21, at 469. “There are comparatively few instances pointing to misuse of the power of disposition, and there is no evidence of any determined or widespread trend of disinheritance or other unfairness in the planning of estates.” *Id.* at 464.

²²⁴ Pennell, *supra* note 13, §§ 900-906. The 2,529 wills included 432 cases of substantial spousal disinheritance. *Id.* § 903.

Of the over 2,500 relevant wills examined,²²⁵ there were only nine situations “in which it appeared that the provisions were objected to by the surviving spouse.”²²⁶ These nine situations represented an amazing 0.36 percent of the total.²²⁷

There were, in fact, no will contests filed in any of the disinheritance situations.²²⁸ Put more plainly, this means that *not one* of the 2,529 surviving spouses studied thought that they were being unfairly treated such that they would file suit to try and have the will deemed invalid on other grounds so they could take their relatively substantial intestate share. As one commentator summarized: “Maybe Georgia has accidentally hit upon the acceptable modern answer to this centuries-old problem.”²²⁹ As another said, “The Georgia experience indicates there is little reason to believe that permitting spousal disinheritance weakens the marital relationship.”²³⁰

There have been other, less recent, disinheritance studies that show disinheritance has been more an illusion than a reality from the beginning of early America to now.²³¹ It is remarkable how close these old studies track the lone modern study from Pennell.²³² The biggest study, published in 1960, found only 0.06 percent to 0.10 percent, i.e., between six and ten

²²⁵ The study looked only at wills “in which it was possible to identify whether there was a surviving spouse (and in most cases that fact was easy to establish).” *Id.*

²²⁶ *Id.* Pennell rightfully reasoned that only those surviving spouses that requested a “widow’s election,” which provided a surviving spouse with roughly a year’s worth of support, were objecting to the dispositive provisions of the decedent’s will. *See id.*

²²⁷ *Id.* For those math-challenged readers, this is not 36 percent, but roughly one-third of 1 percent. In the cases involving spousal disinheritance, the surviving spouse objected two percent of the time. *Id.*

²²⁸ *Id.*

²²⁹ Chaffin, *supra* note 21, at 469.

²³⁰ Brashier, *supra* note 4, at 146.

²³¹ *See generally* Plager, *supra* note 35, at 683-85 (reviewing a handful of older disinheritance studies and other older data); Brashier, *supra* note 4, at 140 (“The few studies that have been conducted indicate that disinheritance of a spouse is rare.”); R.R. Powell & C. Looker, *Decedents’ Estates: Illumination From Probate and Tax Records*, 30 COLUM. L. REV. 919 (1930); E. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393; Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1962-1963); Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34 (1964).

²³² Plager, *supra* note 35, at 686-87 (citing MACDONALD, FRAUD ON THE WIDOW’S SHARE 8 n.9 (1960)).

disinheritance cases per 10,000 wills probated, were subject to dispute.²³³ The author of the study concluded that “there [was] no need in practice for a non-barrable share for the surviving spouse; the surviving spouse [was] given much more than the statutory one-third in a very high percentage of the wills.”²³⁴ Another commentator, looking at all the pre-1970 studies, concurred.²³⁵ The older leading article that pulled together all relevant studies released prior to its publication concluded:

This leads to the final and perhaps the most significant finding, and here the evidence is strikingly consistent. The married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss. If the balance is struck it is not done so publicly. For the total society this has real meaning: the need for a surviving spouse's choice between the deceased spouse's testamentary largess and the legislatively-decreed share is not a need of massive proportions. The machinery designed to satisfy this need need not be massive and insensitive; on the contrary, the dimensions of need are such as to compel the conclusion that the machinery should be keyed to individuation and able to adjust its impact to the circumstances calling it into play.²³⁶

One very early study from the mid-eighteenth century shows that, even in colonial times, spouses were incredibly unlikely to be disinherited.²³⁷ Husbands with minor children were “particularly likely to bequeath the wife more than her minimum dower rights.”²³⁸

A related statistic is the percent of assets, on average, that testators leave to surviving spouses. In one study of federal estate tax returns from 1998-2000, married male decedents bequeathed a larger percentage of their estate to their

²³³ *Id.* at 687 (citing Dunham, *supra* note 231, at 255 n.28 (1963) (acknowledging that the rate of will contests “would not appear alarming.”)).

²³⁴ *Id.* at 712 (citing Dunham, *supra* note 231, at 255).

²³⁵ SUSSMAN ET AL., *supra* note 3, at 312 (“Although testamentary freedom permits the disinheritance of immediate or distant kin in favor of nonrelated persons, this rarely occurs.”).

²³⁶ Plager, *supra* note 35, at 715 (citing Joseph Laufer, *Flexible Restraints on Testamentary Freedom: A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955)).

²³⁷ Brashier, *supra* note 4, at 141 n.187 (citing Linda E. Speth, *More Than Her “Thirds”*: *Wives and Widows in Colonial Virginia*, in LINDA E. SPETH & ALISON D. HIRSCH, *WOMEN, FAMILY, AND COMMUNITY IN COLONIAL AMERICA: TWO PERSPECTIVES* 5, 15-21 (1983)).

²³⁸ *Id.* (citation omitted).

spouses (62.7 percent) than married female decedents did (54.8 percent).²³⁹ This same study found that widows were, on average, by far the wealthiest female decedent group.²⁴⁰

Moreover, with the rise in divorce rates, it is likely that the very rare spouse who might have been disinherited decades ago might be divorced today.²⁴¹ With divorce so easy and common today, there are few reasons why someone would stay with a spouse they despise until death, when they have the ability to disinherit them. One scholar agrees that “[t]he problem, in fact, arises quite rarely in practice. Studies show little inclination to disinherit spouses; and easy divorce makes the problem less real by providing a better way to end financial entanglements when the emotional tie has been destroyed.”²⁴²

2. *There Are Many Very Legitimate Reasons for Disinheriting a Spouse*

*[T]he existing laws lost their teeth because they were attempting to devour everything in sight, including a mass of entirely defensible conveyances.*²⁴³

With the introduction of the unlimited marital estate tax deduction and the so-called Qualified Terminable Interest Trust (“QTIP”) in 1982,²⁴⁴ the reasons for disinheriting a spouse are dwindling.²⁴⁵ The reasoning that most give for elective share laws is “to protect the dutiful spouse who was loyal to the end, only to be left destitute and denied a rightful share of the marital property.”²⁴⁶

Nevertheless, there are numerous valid reasons for not leaving all of your property to your spouse, and as the study cited above confirms, almost all of the time the spouse agrees with these reasons. The most prevalent reason is probably estate planning. There are numerous marital and nonmarital trusts that are available to estate planners to assist in planning for someone with even modest means. These include, but are not limited to, setting up marital trusts where the surviving spouse has at least a mandatory income interest for his or her lifetime, and quite often has an interest in trust corpus as well. Also very

²³⁹ Barry W. Johnson & Jacob M. Mikow, *Federal Estate Tax Returns, 1998-2000*, STAT. INCOME BULL. 133, 141 (Spring 2002), available at <http://www.irs.gov/pub/irs-soi/00esart.pdf>.

²⁴⁰ *Id.* at 144.

²⁴¹ Brashier, *supra* note 4, at 146.

²⁴² LAWRENCE M. FRIEDMAN, *The Law of Succession in Social Perspective*, in EDWARD C. HALBACH, JR., DEATH, TAXES AND FAMILY PROPERTY 15 (1977).

²⁴³ Cahn, *supra* note 22, at 153.

²⁴⁴ DUKEMINIER ET AL., *supra* note 6, at 429 (citing I.R.C. § 2056 (1986)).

²⁴⁵ Pennell, *supra* note 13, § 903.1.

²⁴⁶ *Id.*

common is the use of so-called “bypass trusts” that utilize the statutory federal estate tax exemption amount (currently \$1.5 million). Practitioners often draft these trusts to allow the surviving spouse access to trust income and/or principle. These simple and prevalent tax-planning techniques usually provide for the surviving spouse, often quite amply, despite not being outright marital transfers. Indeed, in the Pennell study, in seventy-five percent of the instances of “disinheritance,” the surviving spouse was left with one or more life interests in trusts or property.²⁴⁷

There are, of course, many non-tax reasons for setting up trusts, and marital trusts are no different. Trusts were used extensively in this country long before the advent of the estate tax in 1913. As Pennell detailed in his study, traditional reasons for using a trust “might include the desire to protect the spouse from predators, the need for expert property management, the desire to shelter wealth and use the decedent’s unified credit, and denial of control over the decedent’s wealth because it was a short term marriage, there were children from a prior marriage, a business agreement or prenuptial agreement.”²⁴⁸ Pennell found, as shown in more detail below, that “in some cases the spouse’s disinheritance is in favor of a trust or other arrangement that is designed as a safety net for the surviving spouse and is not designed to disinherit at all; there are no mala fides in any of this planning.”²⁴⁹

The Pennell disinheritance study listed several non-tax, legitimate reasons for disinheritance found among the 2,500-plus wills: spouses were divorcing or had been separated for some time at the time of one spouse’s death;²⁵⁰ the primary residence was left outside the will to the surviving spouse or was already in the surviving spouse’s name and there was little other property;²⁵¹ the surviving spouse was provided for as the beneficiary of non-trust assets outside probate-like life insurance, annuities, qualified plans and the like;²⁵² the surviving spouse was already well provided for²⁵³ by having ample assets

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* One male decedent stated that he was leaving his wife nothing because she was living with another man, and one female decedent stated that she had not seen her husband in 20 years.

Id.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Even if everyone agrees that the support theory is the correct one, the definition of support may well differ between the decedent spouse and the state legislature. See Plager, *supra* note 35, at 715 (“But when wealth-holders use a will, the stage is set for a potential conflict between

in his or her own name and thus the decedent's assets provided for other worthy beneficiaries such as children or other family members;²⁵⁴ the decedent and surviving spouse came to an agreement, either formally or informally, about how assets would be divided at their respective deaths;²⁵⁵ where the surviving spouse was incapable of caring for himself or herself, assets were sometimes left to a relative or caregiver with precatory instructions to use the assets for the benefit of the surviving spouse;²⁵⁶ often children or grandchildren of the decedent and surviving spouse's marriage were the primary beneficiaries;²⁵⁷ and in a "good number" of cases, the surviving spouse was named the fiduciary – executor or trustee – of the probate estate or trust assets and the fiduciary-spouse did not object to the property distribution scheme of the will.²⁵⁸

Finally, in some circumstances, it may make sense to disinherit one's spouse as part of a plan to qualify for government benefits, including Medicare.²⁵⁹ This may be very important in instances when the surviving spouse would have too much wealth to qualify for Medicare, but not enough wealth to cover the very expensive costs of long-term medical care.

Commentators have argued, for example, that "the intuitive response that [disinheritance] just is not frequently done, does not mean the problem does

society's and the testator's concern for the surviving spouse. This is true whether the issue arises out of a testator's desire to punish the spouse, or simply because he *applies a different standard of need.*") (emphasis added).

²⁵⁴ Pennell, *supra* note 13, § 903.1. One decedent stated: "I have not made any bequest to my husband . . . [because he has] been blessed and [is] financially sufficient." *Id.* (alteration in original). Another stated:

My beloved wife has been my constant companion and source of comfort and inspiration. All my earthly possessions would never repay her love and devotion. It is therefore through no lack of affection that I bequeath the residue of my estate in the manner herein provided. Rather, it is because both she and I believe that her needs and comforts have been amply provided for by me outside of this Will and through a substantial estate of her own.

Id. See also Brashier, *supra* note 4, at 141-42 ("The disinherited spouse today will often have her own income or be provided for through assets passing outside the estate. In many instances, the surviving spouse is the recipient of a pension or federal or state governmental benefits derived from the testator that cannot be conveyed to others through his will.").

²⁵⁵ Pennell, *supra* note 13, § 903.1.

²⁵⁶ *Id.*

²⁵⁷ *Id.* Pennell states that, in these cases, there was "no indication that [the children] were from a prior marriage." *Id.*

²⁵⁸ *Id.* As Pennell states, this gives "the unmistakable indication that the disinheritance was agreed upon and not a product of animosity or mala fides at all." *Id.*

²⁵⁹ *Id.* § 903.3.

not exist. . . . [M]ore than two centuries of case law involving interspousal disinheritances . . . proves that it does happen."²⁶⁰ However, the real point is as follows: yes, disinheritance does happen, but virtually all disinheritance happens for good, legitimate reasons with which the surviving spouse agrees.²⁶¹ Testamentary freedom is valuable.²⁶² As one commentator noted:

[W]hen spousal disinheritance does occur, the modern testator may have legitimate reasons for so doing. . . . Particularly now, when young newlyweds are presumed to enter into the marriage as approximate equals, an arbitrary forced share scheme may ultimately serve the interests of greed rather than obligation and need.²⁶³

3. Not a Gender Issue – Men Are Twice as Likely to be Disinherited as Women

The Pennell study referenced above shows that women are much less likely to be disinherited than men in the modern era. Overall, men were disinherited at a rate of 25.6 percent versus 14.3 percent.²⁶⁴ This point highlights the logical shallowness that proponents of spousal forced heirship argue, namely that if men were allowed to by law, they would disinherit their wives in favor of undeserving beneficiaries in much greater proportions than women would.

4. Women Very Well May Now Have Roughly Equivalent Net Worths

[A]lthough women may be disadvantaged in the occupational marketplace, they are not disadvantaged in matters of inheritance. . . .²⁶⁵

The dower concept originally protected women, and most would think of women as the gender most affected by the elimination of modern-day dower and the elective share. There seem to be few reliable, current statistics on net

²⁶⁰ *Id.* § 905 (citing Sheldon F. Kirtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 993 (1977)).

²⁶¹ *Id.*

²⁶² As all competent estate planners know, use of the elective share can dismantle an otherwise effective estate plan. Indeed, the failure of an attorney to inform the client of this potential has been held to be grounds for a malpractice action. *DUKEMINIER ET AL.*, *supra* note 6, at 433 (citing *Johnson v. Sandler*, 958 S.W.2d 42 (Mo. Ct. App. 1997)).

²⁶³ Brashier, *supra* note 4, at 141-42.

²⁶⁴ Pennell, *supra* note 13, § 903 n.26.

²⁶⁵ SUSSMAN ET AL., *supra* note 3, at 313.

worth broken down by gender,²⁶⁶ though studies cited by commentators in the middle of the last century maintained that, even then, “women own[ed] the great bulk of the country’s wealth.”²⁶⁷ One fifteen-year-old study concurred, finding women’s net worth to be higher than men’s net worth on estate tax returns.²⁶⁸

As the following qualitative chart indicates, in theory women’s net worth (not income, but net worth) today should be roughly equivalent to men’s net worth.

²⁶⁶ Note that, of course, there are plenty of statistics of income broken down by gender, but that is not what is at issue here.

²⁶⁷ MACDONALD, *supra* note 164, at 25 n.23 (citing SATURDAY REV. LITERATURE, Mar. 12, 1949, at 18 (“between sixty and seventy percent”); *Women in the Dough*, AM. MAG., Mar. 1948, at 112 (“nearly 70 percent of the investment funds”); FL. TIMES-UNION, Mar. 4, 1954, at 4 (“80 percent of the wealth”); *A Woman Banker Looks at Women and Their Money*, 30 INDEP. WOMAN, Apr. 1951, at 99).

²⁶⁸ Barry W. Johnson, *Personal Wealth, 1992-1995: The Distribution and Composition of Personal Wealth in the United States*, STAT. INCOME BULL. 70, 71-72 (Winter 1997/1998), available at <http://www.irs.gov/pub/irs-soi/92-95pw.pdf> (finding that the average net worth of male decedents over age 21 was \$1,330,000, compared to \$1,370,000 for women decedents over age 21). Note that to file an estate tax return, a decedent must have had a net worth of at least \$600,000 at the time of this study.

Source of Wealth	Men v. Women
Inheritance and gifts from ancestors	Equal ²⁶⁹
Inheritance from spouse	Big edge to women because (1) women live longer than men, and (2) women tend to marry at a younger age than men ²⁷⁰
<i>Inter vivos</i> gifts from spouse and others	Slight edge to women ²⁷¹
Built from own work efforts during lifetime	Men probably still have an edge
Divorce proceeds	Women probably have an edge

Anecdotally, the estate planners that I know indicate they are visited equally by wealthy women and wealthy men.

It is not clear, then, that women are in need of the protection that they once may have required.²⁷² Indeed, women likely desire testamentary freedom in equal numbers to men as seen from the Pennell study, which found that women disinherited their surviving spouses twice as often as men did.²⁷³

²⁶⁹ SUSSMAN ET AL., *supra* note 3, at 313 (“Female children are as likely to inherit as male children . . .”).

²⁷⁰ *See id.* (“[G]iven the greater longevity of women and the likelihood that they are younger than their husbands, female spouses are more likely to inherit than male spouses.”).

²⁷¹ A 1997 study of gift tax returns showed that females received a higher percentage of reportable gifts (47.7 percent) than males (47.0 percent). Martha B. Eller, *Inter Vivos Wealth Transfers, 1997 Gifts*, STAT. INCOME BULL. 52, 56 (Winter 2003), available at <http://66.77.33.7/pub/irs-soi/97transf.pdf>. In addition, males transferred a higher total amount of reportable gifts than did females (\$17.6 billion versus \$14.7 billion). *Id.* at 57.

²⁷² *See, e.g.*, Hall v. McBride, 416 So. 2d 986, 990 (Ala. 1982). The court stated:

It is clear that the widow’s right to dissent had its origin in a time when women had no property rights. Women needed some protection of the law to prevent their husbands from transferring all assets that would provide women with a means of support. This is no longer the case. Women may, and do, freely build separate estates and freely transfer assets. In many cases, women may accumulate more wealth than their husbands.

Id. Note that this was stated twenty-three years ago. Women, in the meantime, have almost surely made even more strides in net worth compared to men.

²⁷³ *See supra* text accompanying note 264.

5. If Unintentional Disinheritance is a Real Issue, Then Existing Pretermitted Spouse Statutes Are the Answer

Commentators have also listed unintentional disinheritance as a rationale for elective share statutes.²⁷⁴ Pretermitted spouse statutes, currently available in almost all jurisdictions, form a much better basis for providing for unintentionally disinherited spouses.²⁷⁵ Pretermitted statutes do not restrict testamentary freedom and therefore should be encouraged.²⁷⁶ These laws provide for a surviving spouse in an instance where a testator does not change her will after a marriage.²⁷⁷ The state presumes in this situation that the testator simply forgot to update her will after the marriage.²⁷⁸

6. Surviving Spouses Are Adequately Protected by Existing Protections and Incentives

*Even where the testator's affection for the spouse has waned, fear that his disinherited spouse will vilify his memory may provide a sufficient impetus to include her in his will.*²⁷⁹

There are numerous protections and incentives built into the current system that would provide more than enough protection for surviving spouses should the elective share laws be repealed. These include: a one hundred

²⁷⁴ See, e.g., Pennell, *supra* note 13, § 905.

If the empiricists are correct that a comprehensive protective scheme is unnecessary because there is factually little evidence of disinheritance, protective legislation . . . should have little restrictive effect or no impact on most plans Rather, legislation like the augmented estate provisions . . . would provide protection against unintentional spousal disinheritance or disinheritance resulting from vindictiveness

Id. (alteration in original) (citing Sheldon F. Kurtz, *The Augmented Estate Concept under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 1061-62 (1977)). A pretermitted heir includes a "spouse who has been [unintentionally] omitted from a will. . . . Most states have . . . pretermitted-heir statutes under which an omitted . . . spouse receives the same share of the estate as if the testator had died intestate" BLACK'S LAW DICTIONARY 728 (7th ed. 2001).

²⁷⁵ See Pennell, *supra* note 13, § 905. As the Pennell study indicated, unintentional disinheritance is a very small part of an already small percentage of disinheritances, with 98 percent of disinheritances lacking an "evil motive." *Id.*

²⁷⁶ SIMES, *supra* note 2, at 18 ("They merely require the testator expressly to exclude a particular class of heirs.").

²⁷⁷ ANDERSEN & BLOOM, *supra* note 23, at 288-90.

²⁷⁸ *Id.*

²⁷⁹ Brashier, *supra* note 4, at 140; see also Chaffin, *supra* note 21, at 464 (discussing "the influence of public opinion").

percent estate tax deduction for transfers to U.S.-citizen spouses;²⁸⁰ ERISA protection for qualified retirement plans (surviving spouses must have survivorship rights if the employee-spouse predeceases, and spouses can only waive this right in writing and not via a premarital agreement);²⁸¹ the family allowance amount (generally a fixed amount or the amount necessary to support the surviving family members for a year);²⁸² Social Security spousal survivor benefits;²⁸³ placing valuable property in a tenancy by the entirety or, at a minimum, a joint tenancy with right of survivorship;²⁸⁴ the homestead allowance (to ensure the family home flows to the surviving spouse free of encumbrances);²⁸⁵ the exempt personal property set-aside (to ensure certain tangible personal property flows to the surviving spouse);²⁸⁶ the availability of life insurance;²⁸⁷ the avoidance of will contests;²⁸⁸ the availability of antenuptial and post-nuptial agreements;²⁸⁹ and the “normal affection of spouses who choose to remain married.”²⁹⁰

²⁸⁰ See Brashier, *supra* note 4, at 140-41; Pennell, *supra* note 13, § 905; GLENDON, *supra* note 14, at 239 (“tax law (which can be decisive for the estate planning of the well-to-do) increasingly encourages dispositions in favor of the surviving spouse by giving such dispositions preferred treatment”); Chaffin, *supra* note 21, at 465.

²⁸¹ See DUKEMINIER ET AL., *supra* note 6, at 420-21; Pennell, *supra* note 13, § 905. See generally Chaffin, *supra* note 21, at 465-67. Is it odd that Congress has chosen to step into this debate only with respect to qualified plans?

²⁸² See DUKEMINIER ET AL., *supra* note 6, at 422; Chaffin, *supra* note 21, at 468; see, e.g., UNIF. PROBATE CODE § 2-404(a) (amended 1993) (allowing a reasonable allowance that cannot continue beyond a year if the estate is inadequate to pay creditors).

²⁸³ See DUKEMINIER ET AL., *supra* note 6, at 419-20; Chaffin, *supra* note 21, at 465-67.

²⁸⁴ See Brashier, *supra* note 4, at 145-46.

²⁸⁵ See DUKEMINIER ET AL., *supra* note 6, at 421-22.

²⁸⁶ *Id.* at 422.

²⁸⁷ See Brashier, *supra* note 4, at 145 (“Life insurance is yet another way in which a spouse can protect herself from disinheritance.”); see also *id.* (explaining that husband and wife have insurable interests in each other’s lives (citing 3 GEORGE J. COUCH ET AL., COUCH ON INSURANCE § 24:125 (2d ed. 1984 & Supp. 1993))).

²⁸⁸ See Pennell, *supra* note 13, § 905; Chaffin, *supra* note 21, at 464-65.

²⁸⁹ See Chaffin, *supra* note 21, at 467-68; Brashier, *supra* note 4, at 143-45, 147. Brashier notes, in particular, that:

Even if spousal disinheritance occurred more often, abolition of the forced share does not seem unduly harsh in view of the variety of means through which a spouse may protect her interest in family assets during the testator’s lifetime. Today, almost all Americans are aware of the availability of the antenuptial agreement, by which a prospective spouse can ensure her financial position for the future. No longer novel or used solely by the wealthy, such an agreement is not properly viewed as a contract in anticipation of marital failure. Rather, it is the expression of two responsible persons who recognize that marriage is in many respects a business

These arguments have been playing out in the test grounds of Georgia, where disinheritance has been permitted for some time. As stated above, precious little disinheritance occurs without the surviving spouse's consent in this state where it is perfectly legal.²⁹¹

If the elective share statutes are eliminated in separate property jurisdictions, then perhaps the family allowance should be raised to decrease the chances that the surviving spouse will be forced onto public assistance.²⁹²

B. There Is Fundamental Inequity with Current Elective Share Schemes: Those Who Can Afford Sophisticated Legal Advisors Can Usually Plan Around the Laws

*Only the poor and the stupid need conform [to the elective share laws].*²⁹³

Forty-nine of fifty states have laws in place to protect, to one extent or another, against spousal disinheritance via either community property or elective share laws.²⁹⁴ Neither community property nor separate property jurisdictions, however, protect against disinheritance absolutely. Indeed, many

and that, in marriage as in business, advance planning can avert later disaster. The post-nuptial agreement between willing spouses may serve to accomplish similar results.

.....

Abolition of the elective share could be expected to cause many individuals contemplating marriage to engage in meaningful planning for future contingencies. Contractual arrangements based on full disclosure and good faith and concurrent ownership in its various forms would not only assure protection for a surviving spouse (or lover, in the case of unmarried couples), but would also emphasize the economic aspects of the partnership. If the couple so wished, nothing would prevent them from agreeing that the survivor should receive one-third (or any other arbitrary fractional interest) of the estate.

Id. (citations omitted).

²⁹⁰ Pennell, *supra* note 13, § 905; *see also* Chaffin, *supra* note 21, at 464; Brashier, *supra* note 4, at 140 (“The testator has a variety of incentives to provide adequately for his spouse. The testator, for example, typically feels a natural affection for his spouse and wants to ensure that she is provided for upon his death.”).

²⁹¹ Pennell, *supra* note 13, § 903.

²⁹² A family allowance consists of “[a] portion of a decedent’s estate, set aside by statute for a surviving spouse, children, or parents, regardless of any testamentary disposition or competing claims.” BLACK’S LAW DICTIONARY 76 (7th ed. 2001). The UPC, for example, provides that the surviving spouse and surviving children “are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year” UNIF. PROBATE CODE § 2-404 (amended 1993).

²⁹³ Cahn, *supra* note 22, at 150.

²⁹⁴ Pennell, *supra* note 13, § 904. Every jurisdiction, that is, except Georgia.

jurisdictions do so little in practice to stop disinheritance, they should simply recognize the regime for what it is and eliminate their elective share law.

If the statutes creating such valuable rights for widows . . . are subject to easy evasion by transfers inter vivos, their utility is slight indeed. . . . In view of the jurisprudence in some states, the question may well be put whether these statutes have been placed on our books for any sincere enforcement. Or do they simply represent a sort of sentimental desire of the community which must be formally registered but need not inconvenience those with means to consult competent counsel? Are these laws a mere pious wish, a sort of sanctimonious recital of what we should prefer but will not insist upon?²⁹⁵

As seen below, in any jurisdiction, if one pays a high enough billable-hour rate to a good-enough estate planning attorney, and is willing to accept at least some amount of hassle, then the elective share laws can be planned around, and a spouse disinherited (likely for very legitimate reasons). For those individuals, however, who are unable to engage in this type of planning for financial reasons, it is most certainly not a level playing field.²⁹⁶ These individuals have no choice but to accept the spousal forced heirship regimes, even if the individual has a very good reason for wanting to disinherit his or her spouse.²⁹⁷

²⁹⁵ Cahn, *supra* note 22, at 150.

²⁹⁶ See, e.g., Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 987 (1999) (arguing that “only the wealthy have expansive testamentary freedom because their resources are extensive enough to fulfill societal expectations of support to biological family members and simultaneously include bequests to others” (citing SUSSMAN ET AL., *supra* note 3, at 6)). See also Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 377:

Freedom of testation, then, is most truly a working reality for the upper classes, but even for them it is hedged about with restrictions. The lower down the economic scale one goes, the higher the likelihood that assets will largely be bound assets outside the system of testation or subject to levy by the nuclear family.

Id.

²⁹⁷ Testators with large estates have the testamentary freedom to choose how and to whom the estate shall be distributed. SUSSMAN ET AL., *supra* note 3, at 5. Note, however, that the testator of a small estate, i.e., under the statutory mandatory allowance amount, has essentially no testamentary freedom – his or her will is basically of no use *vis-à-vis* its dispositive provisions. See *id.* (“Limited assets induce forced succession even though the testator might have had other things in mind.”). The assets in a small estate will most likely “be consumed entirely in payment of debts or by the exemption, year’s allowance, and other provisions . . .” *Id.*

Since there is no way to tighten the laws enough to keep high net worth individuals from exploiting the system, the current system should be eliminated because of its fundamental unfairness. As one commentator noted:

A more reasonable surmise about the porous nature of these statutes is that legislatures are not totally committed to the concept of an elective share: to the extent they retain escape hatches the legislature may be indicating that those who want to engage in this planning badly enough to hire competent counsel ought to have the opportunity. Thus, freedom of testation remains available to those decedents with enough wealth to be well-advised. This last response may suggest that these laws ought to be repealed and, if appropriate in the first instance, replaced with rules that are effective to protect the policies underlying these statutes. As it is, any approach that is circumventable – and every elective share statute is more easily avoided than community property – merely creates unjustified expectations and reliance by the nonpropertied spouse.²⁹⁸

1. Planning Around Separate Property Elective Share Laws

*[T]he beauty of the forced share is only skin deep; protection is announced, but it is not given.*²⁹⁹

a. Simple Probate Avoidance Techniques that Retain Grantor Control

A substantial minority of states still allow a grantor to establish a simple revocable *inter vivos* trust that will avoid being subject to the elective share at

²⁹⁸ Pennell, *supra* note 13, § 905. Pennell goes on to say:

So, for example, if it is correct to say that “[t]he presumed intent of husbands and wives [is] to pool their fortunes . . . an unspoken or imputed marital bargain . . . that each is to enjoy a half interest in the economic production of the marriage . . . nominally acquired by and titled in the sole name of either partner,” then the ability to circumvent these statutes indicates that reliance on this implied understanding is unjustified, a chimera if one spouse chooses to breach the bargain. Also quere whether the presumption is correct: if the spouses remain married but one spouse “reneges” on the “bargain,” isn’t this proof positive that the presumption itself is flawed and that these statutes should not be premised on it? Either way you look at the issue, it seems fair to argue that these laws are inappropriate from their inception because they are based on flawed assumptions, or they defeat expectations because they are so easy to avoid.

Id. (citing Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 43 (1994)).

²⁹⁹ MACDONALD, *supra* note 164, at 3.

death.³⁰⁰ Revocable trusts are very common, and are as easy to prepare as a will. Once executed, a grantor must only retitle his or her property into the name of the revocable trust, and that property so retitled is no longer subject to probate at the grantor's death. There are many legitimate reasons for wanting to avoid probate (such as eliminating potentially costly and lengthy court proceedings at death, privacy, and immediate access to assets by beneficiaries at death, among others) such that this cannot be labeled a "disinheritance technique."

As trustee of the revocable trust, a grantor can retain virtually the same control that he or she would have if the property were held outright. This leads to a form-over-substance argument that, in theory, elective share laws should treat assets held in revocable trusts the same as assets held outright by a decedent.

Anyone who for legitimate (or illegitimate) reasons wants to disinherit their spouse can do so very easily in one of the jurisdictions that follows the traditional elective share-type laws. This leads to a dichotomy between those that engage in some modest amount of estate planning and those that simply have wills prepared. In these jurisdictions, it is so easy to avoid being subject to the elective share laws that legislatures should either repeal the elective share law (a preferable alternative) or at the very least toughen it to the level of the Uniform Probate Code's elective share provision. Anywhere in between should be avoided as bad (and failed) public policy.

b. Other Elective Share Avoidance Techniques

There are a wide variety of elective share laws, between the substantial minority of jurisdictions that allow assets placed in revocable trusts to avoid being subject to claim by a surviving spouse,³⁰¹ to those jurisdictions that have incorporated the Uniform Probate Code's very tough elective share provisions.³⁰² While difficult to summarize, there are several techniques that someone who engages in some level of planning could utilize to avoid being subject to elective share laws.

One is outright gifts. The simplest measure that can be taken, and one that works in any jurisdiction, is to simply give away – with no strings attached –

³⁰⁰ See Pennell, *supra* note 13, § 904.1; BOWE ET AL., *supra* note 81, § 3.20, at 148-55.

³⁰¹ See discussion *supra* Part VI.B.1.a.

³⁰² See discussion *infra* Part VI.B.1.b; Pennell, *supra* note 13, § 904.3; BOWE ET AL., *supra* note 81, § 3.20; see also DUKEMINIER ET AL., *supra* note 6, at 445 (Connecticut and Ohio are two states in which nonprobate transfers are not subject to the elective share).

property to someone other than your spouse. In most jurisdictions, this works immediately (even on your death bed), and in Uniform Probate Code states, this works as long as the grantor lives two years after the gift.³⁰³ A second technique includes most non-probate transfers. Many states allow some or all non-probate transfers to be outside the elective share system. This would include life insurance,³⁰⁴ qualified retirement plans, joint tenancies, joint accounts, most irrevocable trusts, etc.³⁰⁵ A third technique is pre- or postnuptial agreements. If the spouses agree to opt out of the elective share system in a separate property state, they can do so by contractual agreement.³⁰⁶ A fourth option is to change domicile. One could move away from a strict jurisdiction to one that has more loopholes; or to Georgia, which has eliminated the elective share altogether. The situs of the property itself could also be moved to a more favorable jurisdiction. There are, of course, choice of law considerations in play with these tactics, and careful planning should occur before any such move.³⁰⁷ Fifth, many states have favorable laws that allow individuals with incompetent spouses to structure, at a minimum, any marital devises such that the decedent retains control over the ultimate disposition of that property after the death of the incompetent spouse.³⁰⁸ Older versions of the Uniform Probate Code, in fact, allow an elective share only if “necessary to provide adequate support” for the actuarial life expectancy of the incompetent surviving spouse.³⁰⁹ Sixth, spouses may purchase treasury obligations. New York law exempts U.S. savings bonds and Treasury bills from its elective share regime based on perceived Constitutional conflicts.³¹⁰ Even if one is not a New York resident, it may be possible to take advantage of this aspect of New York law by locating these assets in New York.³¹¹ Last, for

³⁰³ See Pennell, *supra* note 13, § 904.3B; UNIF. PROBATE CODE § 2-205(3)(iii) (amended 1993).

³⁰⁴ Neither the states nor the federal government interfere with one’s right to designate whomever they wish to receive life insurance proceeds. Why have we chosen this path with insurance, but not, for example, with ERISA retirement plans? In theory, one could easily invest quite a large portion of their assets into life insurance policies designated to go to one or more non-spousal beneficiaries.

³⁰⁵ See Pennell, *supra* note 13, § 904.3F n.91 (citing ACTEC, *supra* note 182).

³⁰⁶ Pennell, *supra* note 13, § 904.3A.

³⁰⁷ *Id.* §§ 904.3C-3D.

³⁰⁸ *Id.* § 904.3N (citation omitted).

³⁰⁹ *Id.* (citing UNIF. PROBATE CODE § 2-203 (amended 1993)). See also DUKEMINIER ET AL., *supra* note 6, at 423.

³¹⁰ Pennell, *supra* note 13, § 904.3E (citing N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(2)(C) (McKinney 1997)).

³¹¹ *Id.* § 904.3E.

short-term marriages, spouses may utilize the Uniform Probate Code. As discussed above (*see* discussion *supra* Part VI.B.1.b.), the Uniform Probate Code provisions set up a sliding scale, starting at 0 percent for shorter-term marriages.³¹² Thus, establishing domicile in a Uniform Probate Code state would effectively disinherit a spouse in a short-term marriage.

c. Planning Around the Uniform Probate Code Elective Share Provision

The relatively new elective share provisions of the Uniform Probate Code are the toughest in the country to get around. There are a few ways to plan around even these laws, though. First, one could set up an irrevocable life insurance trust and have the trustee purchase a life insurance policy, or one could even transfer an existing policy to a new trust with a two-year waiting period.³¹³ Second, gifts more than two years before death also escape the Uniform Probate Code provisions.³¹⁴ Third, one could provide all the consideration for a joint purchase of property with a non-spouse, with the result that only fifty percent of the value will be subject to the elective share.³¹⁵ Finally, annual exclusion gifts (currently \$11,000/person/year) are exempted.³¹⁶

2. Establishing an Offshore Trust

*Foreign jurisdictions don't recognize a spouse's right to an elective share against the estate. Therefore, assets that are transferred to an offshore jurisdiction will not be subject to the claims of a surviving spouse.*³¹⁷

Commentators seem not to be discussing what may be the surest way around the elective share laws, and the only way around the stricter elective share laws, while still allowing the grantor to remain a discretionary beneficiary – offshore asset protection trusts.³¹⁸ If prepared and implemented properly, these trusts – set up in the modern era in the Cook Islands and similar jurisdictions – allow a great deal of flexibility while keeping the trust assets

³¹² *See id.* § 904.3M (citing UNIF. PROBATE CODE § 2-202 (amended 1993)).

³¹³ *Id.* § 904.3G (citing UNIF. PROBATE CODE § 2-205(2)(i)).

³¹⁴ *Id.* (citing UNIF. PROBATE CODE § 2-205(3)).

³¹⁵ *Id.* (citing UNIF. PROBATE CODE § 2-205(1)(ii)).

³¹⁶ *Id.* (citing UNIF. PROBATE CODE § 2-205(3)).

³¹⁷ Brinker & Langdon, *supra* note 18.

³¹⁸ *See* DUKEMINIER ET AL., *supra* note 6, at 557-60 (discussing self-settled asset protection trusts). Note that I am not discussing fraudulent conveyances, but rather legal offshore transfers. “Fraud is so old a villain that courts should find little difficulty in recognizing his face.” Cahn, *supra* note 22, at 153.

beyond the reach of American courts. Therefore, no matter what the state elective share legislation states, if the money is offshore, then it is not coming back.

This type of planning is becoming much more commonplace and easier in practice to implement than a couple of decades ago. Anecdotal evidence suggests that recently people are much more worried about asset protection generally, and are increasingly setting up offshore trusts for asset protection reasons, not necessarily to get around the elective share laws. No matter the motivation, however, make no mistake that these trusts are very much acting to dodge the elective share laws. Offshore asset protection planning is the ultimate in the debate between “haves and have-nots,” with this “nuclear option” not available to ordinary citizens who cannot afford the relatively large fees associated with this type of planning.

C. Elective Share Laws Are Paternalistic, Perpetuating the Mythical Image of Women as the “Weaker Sex” in Need of Protection, and Furthering Harmful Gender Stereotypes by Relegating Women to an Inferior Position

*[D]ependence [is] the gravamen of inheritance.*³¹⁹

Like Father, apparently most state legislatures know “what is best” – women are weak and need governmental protection from disinheritance. This way of thinking is as wrong today as it was one hundred, or even one thousand years ago. “Spouses are capable, responsible individuals and should be treated as such. Intervention by the state into their relationship is seldom necessary and should be discouraged.”³²⁰

Early common law property systems were characterized by two major principles – the wife’s legal identity merged into that of the husband’s, and the total domination of the wife.³²¹ Some of the justifications put forth included: (1) in exchange for the protection and support of her husband, the wife bargained away her property and personal rights; and (2) “there could only be one head of household and . . . the husband, because of his superior physical strength and business aptitude, was the natural choice.”³²²

³¹⁹ *Id.* at 145.

³²⁰ Brashier, *supra* note 4, at 147.

³²¹ See Scott Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 73-74 (1979-1980).

³²² *Id.* at 77 n.24.

Early on, the feminist movement³²³ sought to fix the family model of support, not replace it.³²⁴ The nineteenth-century women's rights movement "fought for dower reform, recognizing . . . the ideological role of dower in shaping the female-dependent/male-provider model of the family, as well as women's second-class citizenship rights."³²⁵ As one scholar noted recently:

By perpetuating the wifely synthesis of protection and dependency, dower preserved a woman's socioeconomic and cultural status as a wife even beyond her husband's death. Much as a coverture³²⁶ required a husband to support his wife and demanded a wife's reciprocal dependence, dower granted to a widow a seemingly powerful protective right to financial resources from her deceased husband, and simultaneously virtually ensured that those resources would not render her financially independent. Dower thus "aimed at the sustenance, rather than the economic freedom, of widows."

As such, it reproduced the basic gendered tenets of the law of marriage and extended them beyond marriage.³²⁷

Initially, feminists sought formal equality, where men and women were entitled to the same legal status and rights.³²⁸ Dower was denounced on

³²³ Feminist legal theory is a reaction to the gender inequality perpetuated by a patriarchal culture. Anne-Marie L. Storey, *An Analysis of the Doctrines and Goals of Feminist Legal Theory and Their Constitutional Implications*, 19 VT. L. REV. 137, 140 (1994). "Patriarchy is a 'system of social relations in which men as a group have power over women as a group; it is a system that is characterized by relationships of domination and submission, superiority and inferiority, power and powerlessness, based on sex.'" *Id.* (quoting Diane Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 294, 302 n.1 (David Kairys ed., 1982)).

³²⁴ Dubler, *supra* note 30, at 1700-01. Dubler theorizes:

The very parameters of their respective projects point to the generally bounded imagination with which both feminist and legal actors approached the questions posed by dower's clear failure. Perhaps this is not surprising. Most women's rights activists, after all, sought not utopian solutions, but rather practical ways to better women's lived experiences within an existing set of social relations.

Id. at 1701 (citations omitted).

³²⁵ *Id.* at 1651.

³²⁶ Coverture is defined as follows: "The inclusion of a woman in the legal person of her husband upon marriage under common law. Because of coverture, married women formerly did not have the legal capacity to hold their own property or contract on their own behalf. These disabilities have been removed for the most part by statute." MERRIAM-WEBSTER'S DICTIONARY OF LAW 103 (1996).

³²⁷ Dubler, *supra* note 30, at 1667-68 (quoting Alexander Keyssar, *Widowhood in Eighteenth-Century Massachusetts*, 8 PERSP. AM. HIST. 83, 103 (1974)).

³²⁸ *Id.* at 1677-78.

equality grounds because it sought to create separate legal worlds for men and women with sex-specific privileges and responsibilities.³²⁹ The movement later split between “equality” and “difference” feminists, the latter arguing that women needed different forms of protection in order to achieve equal status.³³⁰

Regarding gender stereotypes, noted philosopher John Stuart Mill said:

The general opinion of men is supposed to be, that the natural vocation of a woman is that of a wife and mother. I say . . . one might infer that their opinion was of the direct contrary. . . . [I]f they are free to do anything else . . . there will not be enough of them who will be willing to accept the condition said to be natural to them. . . . I should like to hear someone openly enunciating the doctrine It is necessary to society that women should marry and produce children. They will not do so unless they are compelled. Therefore it is necessary to compel them.³³¹

Like the attack on dower in the nineteenth and early twentieth centuries, there are strong arguments that dower’s replacement – the elective share – is similarly “unduly patronizing.”³³² “Even in gender-neutral form, [it] perpetuates . . . the . . . impression of the meek and needy wife and discourages equality among spouses during the marriage.”³³³

After all, politicians still look to marriage, broadly defined, as a solution to female dependency, pointing to the family as the proper providing institution

³²⁹ *Id.* at 1679.

³³⁰ *Id.* at 1690. The “equality principle,” in essence, maintains that “sex stereotypes must be supplanted by sex equality as the guiding principle for social regulation.” John D. Johnston, Jr., *Sex and Property, the Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1035 (1972). “Fairness in result, rather than the appearance of equality on the face of legal rules, must be the goal.” *Id.* at 1035-36. The issue can be characterized as follows: is equality achieved by refusing to recognize any difference between men and women as being legally relevant (equal rights approach) or by recognizing the differences that exist and reflecting them in the law (difference approach)? See Storey, *supra* note 323, at 147. The “neutrality principle” states that individuals should be “left completely free to make their own arrangements.” Johnston, *supra*, at 1036. “It questions the validity of any form of socially compelled conformity regarding individual relationships. . . .” *Id.* at 1036. This line of reasoning criticizes the “effort of society to compel individual conformity to sex-based behavioral norms” through laws or regulations, which ties into the testamentary freedom arguments made herein. *Id.*

³³¹ Johnston, *supra* note 330, at 1034 n.4 (citing John S. Mill, *The Subjection of Women*, in ON LIBERTY AND OTHER ESSAYS 221-23 (E. Neff ed., 1926)).

³³² Brashier, *supra* note 4, at 151.

³³³ *Id.*

for women's material needs, and, thus, designating husbands as the proper providers for female citizens. . . . [A]s long as marriage plays this mediating role in the collective imagination of lawmakers, it remains incompatible with a robust notion of sex equality and female citizenship.³³⁴

What is a modern family? When enacting elective share laws, legislatures clearly had in mind the nuclear family where the wife did not work outside the home and was not educated enough to handle her own affairs.³³⁵ This view of women meant that a woman needed to be protected because she was weak – a view that is just plain demeaning and wrong in today's society (if it was ever right to begin with). Legislators need a serious attitude adjustment regarding their view of women in the modern family.

State legislatures have been reacting to last century's problem at each step.³³⁶ When women were kept from the workplace before the 1930s, states only had the quite inadequate dower to protect women, many of whom really did need the better elective share form of protection. When women started to work beginning in the 1930s, ironically, is when states began to enact elective share laws.³³⁷ Incredibly, as late as 1992, states were still changing from dower to elective share laws when they should have been eliminating dower and elective share laws completely, because women no longer needed "the man" to shelter her.

When, as today, two presumably competent individuals enter into a marriage as equals in the eyes of the law, the elective share – especially the fixed fraction elective share – is unduly patronizing. The marriage contract is an agreement between two individuals, each of whom is fully capable of providing for and protecting himself or herself prior to and after the nuptial vows. Even in its gender-neutral form, the forced share perpetuates to no small degree the lingering impression of the meek and needy wife and discourages equality among the spouses during the marriage. If legislatures want to provide truly gender-neutral treatment for spouses, then they must replace the forced share with community property principles or, alternatively, abolish the forced share and let the spouses protect themselves.³³⁸

³³⁴ Dubler, *supra* note 30, at 1715.

³³⁵ Brashier, *supra* note 4, at 148-49.

³³⁶ *Id.*

³³⁷ *Id.* at 149.

³³⁸ *Id.* at 151.

Ridding society of the elective share laws would have the beneficial side effect of encouraging wives to become engaged in the family's financial affairs and planning, and "to demand deserved recognition of their contributions as wives, mothers, and wage earners."³³⁹ The female spouse that does not work outside of the home will rest more comfortably knowing she is not dependent upon her husband who might be controlling every aspect of the family unit's financial and non-financial spoils.³⁴⁰ An elective share law "tacitly encourages irresponsibility and dependence."³⁴¹

As one commentator summarized:

[T]he argument for abolition assumes that spouses are capable, responsible individuals and should be treated as such. Intervention by the state in their relationship is seldom necessary and should be discouraged. The current arbitrary, paternalistic elective share statutes may trammel testamentary freedom by imposing a mandatory inheritance in favor of competent surviving spouses who can protect themselves.³⁴²

There is a definite tension between notions of subordination and protection. "[W]hen confronted repeatedly with the specter of widows in dire financial straits, lawmakers have refashioned marriage's shadow, hoping to return widows to their proper places as dependents within families with responsible (albeit dead) male providers."³⁴³

"Many of the legal restrictions defining the status of married women were couched in the language, not of restriction, but rather of marital protection."³⁴⁴

Rather than encouraging widows to be strong, move on with their lives, and be happy and productive, elective share laws reinforce the notion that widows are no more than the wives of their dead husbands.³⁴⁵

As one commentator noted:

The forced share statute may impede the progress of sex equality by deceptively leading one to believe it is in the widow's best interest. Although today's statutes are gender-neutral, they are still permeated with the historical

³³⁹ *Id.* at 147.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 148 n.211.

³⁴² *Id.* at 147.

³⁴³ Dubler, *supra* note 30, at 1649.

³⁴⁴ *Id.* at 1655.

³⁴⁵ *Id.* at 1658.

taint of paternalism, which in turn is linked to subordination of women. (If one is servile and docile, one can hope to be protected by the beneficent and powerful.) If legislatures really believe that the marriage is an institution where two spouses participate in an economic partnership, it is ironic that in 41 of the 50 states title alone determines ownership of property until divorce or death.³⁴⁶

Another asked: “how much weight should be given to the fact that laws emphasizing and responding to the factual economic dependence of married women may tend to perpetuate dependence and to discourage the acquisition of skills and seniority needed to make married women economically independent and equal in the labor market?”³⁴⁷ Indeed, “opting for devices which shore up the economic role of housewife will, in the long run, work to the economic detriment of women.”³⁴⁸

[W]hen the widespread expectation that marriage will last only so long as it performs its function of providing personal fulfillment is put together with the reality of unilateral divorce, a diminished sense of economic responsibility after divorce, the increasing economic independence of married women, and the expansion of social welfare, the resulting state of affairs does not lead inevitably to the sharing of worldly goods. Compulsory sharing . . . may come to be seen by increasing numbers of spouses as undesirable . . .³⁴⁹

VII. CONCLUSION

*Thus while it is generally true that in this century greater inheritance protection has been afforded to the surviving spouse (to the detriment of other family members), Pollock and Maitland's 1895 protest remains valid: not every change from the law of savagery to the present has been favorable to the wife.*³⁵⁰

³⁴⁶ Brashier, *supra* note 4, at 150 n.222 (arguing that the “‘fragmented compilation of marital property laws represents a ‘non-system’ and an abdication of responsibility by the legislatures of common law states’” (quoting Richard W. Bartke, *Marital Sharing – Why Not Do It By Contract?*, 67 GEO. L.J. 1131, 1133 (1979))).

³⁴⁷ GLENDON, *supra* note 14, at 326.

³⁴⁸ *Id.* (citing Stöcker, *Zur Kritik des Familienvermögensrechts*, 13 Neue Juristische Wochenschrift 553 (1972)).

³⁴⁹ *Id.* at 327.

³⁵⁰ Brashier, *supra* note 4, at 151 n.224 (citing 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 400-01 (2d ed. 1923)).

If, as a policymaker, one believes the marital partnership theory of marriage to be gospel, then by goodness change to community property and be done with it. Do not, as many states have done, choose separate property (an inherently non-partnership, eat-what-you-kill philosophy) and then try to graft some back-end sorry excuse for community property at death. As LBJ³⁵¹ would say, “That dog won’t hunt.”

But if you truly believe, as I think many well-intentioned people do, that this America and its citizens have a long tradition of property and testator freedom, then keep your separate property system and completely eliminate your elective share law. Those are really the only two options that have internally consistent logic.

If you eliminate the elective share laws, the sky will not fall. They have been doing it for decades in Georgia and all the empirical evidence shows that things are working just fine, thank you. Georgians are free to exercise a fundamental freedom – to give their property to whomever they wish with no governmental interference. We should all be so lucky.

The fact that the privileged can pay their way out of any elective share law – by some estate planning technique or by moving money offshore – and the less financially fortunate cannot, is a real injustice that must be rectified. Elective share laws have been around since the 1930s in this country, and even with seventy-plus years of tinkering, these laws are still too easy for a good enough attorney to bypass. Let us eliminate the elective share laws for all, not just the well-to-do.

Today, women are in a financial position to desire testamentary freedom just as much as men do. (Recall that the Pennell study showed that men were twice as likely to be disinherited as women were.³⁵²) The elective share laws are terribly demeaning and paternalistic to women. Male-dominated legislatures, though, continue to perpetuate belittling female stereotypes by saying through elective share laws that women are so incompetent and unable to stand up for themselves that the “little missies” still must be protected by some ancient magical sword.

With literally every single disinheritance study showing *de minimis* rates of disinheritances that are not agreed to by the spouse, elective share laws

³⁵¹ Lyndon B. Johnson, Master of the Senate, Texan extraordinaire, and U.S. President.

³⁵² See *supra* text accompanying note 264.

seem like some ridiculous school child's Rube Goldberg machine³⁵³ trying to solve in as complex a manner as humanly possible a problem that really does not exist. Every few years, mostly male law professors huddle to build a better mousetrap to keep their evil male counterparts from doing something they have no desire or motivation to do,³⁵⁴ and in the process precious freedom – for both men and women – loses out.

Let us stop this costly arms race and simplify by either implementing community property or eliminating elective share laws: the only two logical outcomes. Anything else is no-man's land.

³⁵³ Rube Goldberg machines are “devices that are exceedingly complex and perform very simple tasks in a very indirect and convoluted way.” WIKIPEDIA, *Rube Goldberg*, at http://en.wikipedia.org/wiki/Rube_Goldberg (last visited Mar. 15, 2006).

³⁵⁴ See, e.g., UNIF. PROBATE CODE §§ 2-201 to 2-207 (amended 1993).