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ESTATES, GIFTS, AND TRUSTS

Spouse's Elective Share

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DETAILED ANALYSIS

I. Introduction

Unlike certain civil law countries, the common law respects a testator's simple, but powerful, right to devise property with very few restraints.[1] The question of restraints on testamentary freedom has been addressed by nearly every state legislature, yet the legal principles and actual rules are in substantial disarray and the law in America is not uniform.

With regards to a surviving spouse, 50 of the 51 American jurisdictions[2] limit, to some degree, a testator's freedom of testation.[3] But these state laws differ significantly over the broad principles and exact details of the elective share doctrine. For example, state laws vary widely in the amount to which a surviving spouse is entitled, the variables that determine that amount (such as length of marriage, family situation, and the surviving spouse's net worth), and the property that is subject to the elective share. There are some common themes, however. Typically, a surviving spouse is allowed to elect one-third of the deceased spouse's property if the decedent had surviving descendants. The surviving spouse is generally allowed to elect half of the deceased spouse's property if the decedent had no surviving descendents. Furthermore, most elective share laws grant the same entitlement regardless of the length of the marriage.[4]

Some states permit a decedent to easily avoid subjecting assets to the elective share at death simply by placing assets into one or more types of trusts.[5] On the other hand, some elective share statutes "augment" the pool of assets against which the elective share is computed by including most inter vivos transfers, including those made in trust. There are surprisingly broad variations in the law in this regard.

Given this variety, the elective share concept produces a checkered remedy to surviving spouses who are dissatisfied with a decedent's estate plan. Various trends suggest that election of the statutory share alternative to a decedent's estate plan will increase. The popularity of § 2056(b)(7)[6] QTIP marital deduction trusts,[7] which may limit the spouse's enjoyment and control of trust assets[8] and their devolution after the spouse's death, and the substantial increase in the basic exclusion amount that may be sheltered in a non-marital trust[9] both exacerbate the situation. Further, the potential for conflict is greater in blended families (subsequent marriages with children of a prior marriage) or nontraditional circumstances.[10] Indeed, various demographic changes are occurring,[11] along with an increase in general levels of education, workplace experience, investing acumen, and other factors that inform a surviving spouse's desire to control wealth. With these changes, the number of surviving spouses who will passively accept a trust that denies the spouse control over the corpus will likely decline.[12]

Conflict may be minimized through planning that grants a surviving spouse more control over trust assets. For example, the surviving spouse can be the trustee[13] and also may be given an unlimited inter vivos power of withdrawal[14] or a testamentary nongeneral power of appointment over a QTIP marital

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[1] For example, forced heirship is inherent in civil law countries. *See* Brashier, "Disinheritance and the Modern Family," 45 *Case W. Res. L. Rev.* 84, (1994). Ironically, surviving spouses in civilian legal systems do not need the protection of the forced heirship system (nor are they afforded it) because of their community property entitlement. *See* Glendon, *The Transformation of Family Law* 248 (1989). See I, B, below, regarding community property rights in America. Other forms of restricted freedom of testation include public policy that invalidates certain conditional bequests (such as a restriction on first marriage or encouragement of divorce) and the Rule Against Perpetuities restraint on the duration of dead hand control of any variety.

[2] Georgia is the only state that does not have dower or curtesy, a statutory elective share, or a community property structure. *See* Pennell, "Minimizing the Surviving Spouse's Elective Share," 32 *U. Miami Inst. Est. Plan.* ¶ 904 (1998). In other states, the elective share may not exist under certain circumstances.

[3] *See generally* Glendon, *The Transformation of Family Law* 245 (1989).

[4] See generally III, below.

[5] See VI, A, 1, below.

[6] All section references herein are to the Internal Revenue Code, as amended, and the regulations promulgated thereunder, unless otherwise specified.

[7] Qualified Terminable Interest Property (QTIP) trusts are authorized by § 2056(b)(7) as a form of exception to the § 2056(b)(1) nondeductible terminable interest rule. For a detailed discussion of QTIP trusts, see 843 T.M., *Estate Tax Marital Deduction*.

[8] A QTIP trust will qualify for the federal estate tax marital deduction if it grants the spouse only a right to receive all income annually and guarantees that the trust will be reasonably productive of income. The spouse need not have any powers over, or right to receive distributions of, corpus.

[9] For taxable years beginning in 2011, a nonmarital trust may shelter up to $5 million (plus the inflation index amount) of a decedent's estate from federal estate tax without granting the surviving spouse any access to, or power over, the trust's corpus or income. However, a traditional nonmarital trust would make the surviving spouse one of a group of beneficiaries entitled to distributions of income or corpus at the discretion of an independent trustee.

[10] Such as claims that are certain to arise by same-sex partners who may assert common law marriage rights, or direct claims by surviving same-sex spouses whose marriage was legal but too recent for a decedent to have amended a prior estate plan.

[11] *See* Pennell, "It's Not Your Father's Buick, Anymore: Estate Planning for the Next Generation(s) of Clients," 43 *U. Miami Inst. Est. Plan.* ¶ 1300 (2009).

[12] In this respect, consider Gerzog, "The Marital Deduction QTIP Provisions: Illogical and Degrading to Women," 5 *UCLA Women's L.J.* 301 (1995). *See also* Ordower, "Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World," 31 *Real Prop., Prob. & Trust J.* 313 (1996). A good guess is that it is not just women who will find QTIPs unpalatable; some surviving widowers will not like being hobbled either.

[13] *Note*: If the reason for using the QTIP is to provide the postmortem benefits of partial QTIP elections and reverse QTIP generation-skipping exemption allocations for tax purposes, then the spouse's powers as trustee should not rise to the level of a general power of appointment that would make the trust an automatically qualified § 2056(b)(5) all-income, general-power-of-appointment variety, because it might thereby fail to qualify for these QTIP trust benefits.

[14] Exercisable after some delay so that it flunks as an "all-events general power of appointment" and cannot convert the trust into an unwanted § 2056(b)(5) automatically qualifying marital deduction trust. Note, however,

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deduction trust. If the income interest in such a trust is too uncertain in value, a unitrust payment may provide more certain benefits that will ease concerns about enjoyment. Unfortunately, such flexible planning does not alter the effects of more wealth being settled in nonmarital trusts. The elective share statute may permit a surviving spouse to claim a share of the estate outright, if the decedent's plan is not sufficiently palatable. Portability of the decedent's unused unified credit[15] will permit more plans to eschew non-marital trust planning entirely.

The elective share also may be claimed by a surviving spouse merely to qualify for the estate tax marital deduction in circumstances in which the decedent's plan did not satisfy the requirements and reformation of the decedent's dispositive documents is not available, or the entitlement granted to the surviving spouse did not achieve the most effective tax result possible. In this regard, it is not always appropriate to consider an elective share claim as a defeat of the decedent's estate plan because it may complement or improve the planning that was done while the decedent was alive.

A. *History of Dower, Curtesy, and the Elective Share*

Elective share laws arise out of the historical concepts of dower and curtesy. Historically, a widow had a dower interest in the lands of her deceased husband that were inheritable by their descendants. Widows received a life estate — not outright ownership — in one-third of the deceased husband's qualifying land. That concept survives to this date only in Arkansas, Kentucky, Michigan, and Ohio.[16] Elsewhere, all that remains of it is the one-third fractional entitlement that is the most common elective share in noncommunity property jurisdictions. Curtesy provided a surviving husband with a life estate in *all* of the wife's qualifying real property, but only if children were born to the couple. Curtesy is nearly identical to dower in states that retain both doctrines and, because the elective share is also available in those states and usually results in a greater amount for the surviving spouse, the result is that dower and curtesy effectively are moot.[17]

B. *Community Property*

The two fundamentally different marital property systems that coexist in America are community property and noncommunity property.[18] Community property is acquired by either spouse during marriage in a community property jurisdiction, excluding property received by gift, devise, bequest, or inheritance.[19] Community property systems reflect the concept that marriage is an equal economic partnership, to which each spouse contributes resources, talent, and time. The partnership concept acknowledges equal contributions to the marital estate by each spouse, regardless of who earns wages.

Community property has existed since inception in eight original community property states:[20] Louisiana, Texas, New Mexico, Arizona, California, Washington, Idaho, and Nevada. Community property was adopted in those states that originally were settled by the Spanish and, therefore, have a civil law history.[21] In 1986, Wisconsin adopted a statutory community property system based on the Uniform Marital Property Act (UMPA).[22] In 1998, Alaska adopted an elective (i.e., voluntary) community property system.[23]

All other states and the District of Columbia are noncommunity property systems. Thus, approximately 20% of the states have community property systems, but almost 30% of the

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that adding such a power may defeat some discount planning that takes advantage of fractional interest discounts, as in *Bonner Est.v. U.S.*, 84 F.3d 196 (5th Cir. 1996). *See also Mellinger Est. v. Comr.*, 112 T.C. 26 (1999), *acq.*, AOD 1999-006, *Bailey Est. v. Comr.*, T.C. Memo 2002-152; *Lopes Est. v. Comr.*, T.C. Memo 1999-225; *Nowell Est. v. Comr.*, T.C. Memo 1999-15. *See Fontana Est. v. Comr.*, 118 T.C. 318 (2002).

[15] *See* § 2010(c)(2)(B) (originally effective only for situations in which both decedents die before 2013).

[16] Cf. R.I. Gen. Laws §§ 33-25-1 and -2(a), which repealed dower and curtesy, but granted an elective share of a life estate in *all* of a decedent's realty. R.I. Gen. Laws §§ 33-25-1, -2(a). Quirky additional rules exist in a handful of other states (e.g., Massachusetts, Missouri, New Jersey, New York, and Virginia). For example, in Michigan, dower-type rights are given to the wife, but not the husband. *See* Mich. Comp. L. Ann. § 558.1. *In re Estate of Miltenberger*, 753 N.W.2d 219 (Mich. 2008), concluded that this gender-based difference was not unconstitutional.

[17] Dower could yield a surviving spouse better financial results in two unusual situations. First, because the inchoate rights inherent in dower may lessen the ability of the deceased spouse to transfer real property *inter vivos* (because, unlike modern elective share rights, common law dower attached at the later of the moment of marriage or acquisition of the qualifying land, which meant that land subject to dower was not alienable at the sole discretion of the husband-owner). Thus, dower made women "necessary players in men's economic transactions." *See* Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State," 12 *Yale L.J.* 1641 (2003). Second, dower may protect the surviving spouse if the decedent's estate is insolvent because widows of insolvent decedents receive dower before debts are paid (unlike the elective share, which is a fraction of a decedent's net estate after debts and expenses). For a discussion of representative elective share statutes, see III, below.

[18] *See* Casner & Pennell, *Estate Planning* § 3.4 (6th ed. 2010), regarding both community property and the elective share entitlement of a surviving spouse to renounce a will and take an elective share of the decedent's property. For a summary of the history of the community and noncommunity property systems, see Waggoner, "Marital Property Rights in Transition," 59 *Mo. L. Rev.* 21 (1994). *See also* Moore, "Migration and Property in the 1990's: The Increasing Importance of Community Property — Separate Property Recognition and Resolution," 25 *U Miami Inst. Est. Plan.* ¶ 1100 (1991), as updated and expanded in Moore, "Coming Soon to Your State: Community Property," 34 *U. Miami Inst. Est. Plan.* ¶ 1700 (2000).

[19] *See, e.g., In re Marriage of Dekker*, 17 Cal. App. 4th 842 (1993) (rebuttable presumption that property acquired during marriage is community property).

[20] Ariz. Rev. Stat. Ann. § 25-211; Cal. Fam. Code § 760; Idaho Code § 32-906; La. Civ. Code Ann. art. 2338; Nev. Rev. Stat. Ann. § 123.220; N.M. Stat. Ann. § 40-3-8; Tex. Fam. Code Ann. § 3.002; Wash. Rev. Code Ann. § 26.16.030.

[21] *See* Waggoner, "Marital Property Rights in Transition," 59 *Mo. L. Rev.* 21 (1994), discussing the origins of community property in the United States.

[22] Wis. Stat. ch. 766. Wisconsin is the only state that adopted the UMPA community property system, under which community property is called "marital property" and separate property is called "individual property." *See* Erlanger & Weisberger, "From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later," 1990 *Wis. L. Rev.* 769 (1990), and the brief summary in IV, A, below.

[23] Alaska Stat. ch. 34.77 permits spouses to mutually agree to treat their property as community property. In the absence of a mutual agreement the couple's property is governed by noncommunity property laws. This "voluntary" community property system allows individuals outside of Alaska to hold assets in Alaska community property trusts, typically as a tax gambit with the expectation that they will benefit from the double basis adjustment under § 1014(b)(6). For property to be considered community property for tax purposes each spouse must have a present, vested interest in the property. Although this double basis adjustment would seem to result from these Alaska trusts, a case on point has yet to be decided, and thus its success is uncertain.

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U.S. population lives in those ten community property states.[24] Additionally, many foreign jurisdictions embrace community property systems, and such systems remain the civil law norm.

Community property can exist only between spouses during marriage.[25] The community is dissolved upon death or divorce. Under an inception of title doctrine, each spouse owns half of the couple's community property from the time it is acquired.[26] Each spouse's community property interest vests upon acquisition and is present, equal, and undivided.[27] Further, community property retains its status as community property regardless of the spouses' relocation to a noncommunity property jurisdiction.[28] Thus, the general bromide is that "once property is community property, it always is community property," unless the spouses agree otherwise.[29]

In a community property jurisdiction, property that is not community property is separate property; it may be jointly owned by both spouses or it may be titled in any other way, including being owned exclusively by one spouse. Separate property effectively exists in both noncommunity and community property jurisdictions, in the sense that noncommunity property systems do not regard marital status as affecting either spouse's ownership of property. Thus, each spouse may own all of that spouse's acquisitions as separate property. In community property jurisdictions, separate property generally is defined as property acquired by a spouse before marriage, or any property acquired during the marriage by gift, bequest, devise, or inheritance.[30]

Community property jurisdictions generally do not provide added rights to a surviving spouse. The surviving spouse is guaranteed no additional inheritance, even if a couple has limited community property, because community property only recognizes rights to property acquired during marriage.[31] Thus, although they enjoy normal intestate succession rights,[32] surviving spouses have no enforced entitlement to the deceased spouse's separate property under a community property system.

Typically, a rebuttable presumption treats all property acquired in a community property jurisdiction during marriage as community property, regardless of how title to the property is held.[33] All income earned by either spouse during the marriage is community property, regardless of who earns more or supports the community,[34] income generated by community property also is community property.[35] However, the converse is not necessarily true. In most states, income generated by separate property is separate property,[36] but income generated by separate property is community property in Louisiana, Idaho, Texas, and under the UMPA in Wisconsin.[37]

1. Commutation (a/k/a Transmutation)

Separate property can be commuted into community property, and vice versa, by agreement, gift, or commingling.[38] In a community property jurisdiction, the presumption that property acquired during marriage is community property can be overcome by an agreement between the spouses.

Commutation, also called transmutation, is one type of interspousal agreement that changes the character of property.[39] It occurs if an express statement is made, communicating that the ownership or characterization of property is altered. Each community property jurisdiction has slightly different statutory requirements to accomplish commutation. For example, under California law, the express statement of commutation must be evidenced in writing (unless the property transfer occurred prior to 1984).[40] Additionally, California law requires that commutation be made by an express declaration that contains language directly stating that the characterization

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[24] According to the United States Census Bureau, the 2010 population estimates show that the 10 community property states account for over 30% of the U.S. population. This information may be accessed electronically at http://quickfacts.census.gov/qfd/.

[25] *See In re Chavez's Estate*, 280 P. 241 (N.M. 1929).

[26] *See Peck v. Peck*, 172 S.W.3d 26 (Tex. Ct. App. 2005).

[27] *See* Cal. Fam. Code § 751; *In re Marriage of Moore & Ferrie*, 14 Cal. App. 4th 1472 (1993); *In re Kessler's Estate*, 203 N.E.2d 221 (Ohio 1964); *Peck v. Peck*, 172 S.W.3d 26 (Tex. Ct. App. 2005).

[28] *See In re Kessler's Estate*, 203 N.E.2d 221 (Ohio 1964). As a form of confirmation of this principle, see Uniform Dispositions of Community Property Rights at Death Act, 8A U.L.A. 213 (2003), which codifies the notion that community property (and the proceeds of community property) does not lose that status if the spouses move to a noncommunity property state.

[29] See the discussion of commutation, also known as transmutation in I, B, 1, below. Commutation is one way that spouses can change the status of their property. The status of property also can be changed by gift or commingling. *See Nationwide Res. Corp. v. Massabni*, 694 P.2d 290 (Ariz. Ct. App. 1984).

[30] *See, e.g.*, Cal. Fam. Code § 770(a).

[31] In a sense, some community property states protect a surviving spouse in a second way. For example, Cal. Prob. Code § 21610 grants a share equal to an intestate entitlement to a surviving spouse who is pretermitted, i.e,, omitted from a will that predated the marriage and that does not indicate that the omission was intentional. For further discussion of spousal disinheritance, see II, A, below. *Estate of Allen*, 16 Cal. Rptr. 2d 352 (Cal. Ct. App. 1993), rejected a surviving spouse's claim (under a predecessor to Cal. Prob. Code § 21610) to a share of Totten trusts created by the decedent before their marriage. The couple was married for less than one year and the decedent's will, which also predated the marriage, simply failed to provide for the surviving spouse. Because Totten trusts are nonprobate property, the court determined that they could not be considered as part of the estate for computing the surviving spouse's intestate entitlement.

Of concern in any community property state is whether one spouse with rights as manager of the community may make a conveyance that deprives the other spouse of beneficial enjoyment of that property, particularly if the manager could not, by will, bind the other spouse in such a manner. *See, e.g., Comr. v. Chase Manhattan Bank*, 259 F.2d 231 (5th Cir. 1958) (managing spouse's transfer to revocable living trust was binding on surviving spouse, who was deemed to make taxable gift of the value of the remainder interest following a life estate in the surviving spouse when the trust became irrevocable on manager's death); *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968) (manager's transfer to revocable living trust without consent of other spouse was invalid because trust was illusory due to excessive retention of control by manager).

[32] *See, e.g.*, N.M. Stat. § 45-2-102.

[33] *See, e.g., In re Marriage of Haines*, 39 Cal. Rptr. 2d 673 (Cal. Ct. App. 1995); *Peck v. Peck*, 172 S.W.3d 26 (Tex. Ct. App. 2005).

[34] *See, e.g., Norwest Fin. v. Lawver*, 849 P.2d 324 (Nev. 1993).

[35] *In re Marriage of Dekker*, 17 Cal. App. 4th 842 (1993) (income produced by property takes on same character as property that produced it); *In re Miles' Estate*, 164 P.2d 546 (Cal. Dist. Ct. App. 1945); *Anderson v. Gilliland*, 684 S.W.2d 673 (Tex. 1985).

[36] Ariz. Rev. Stat. § 25-213; Cal. Fam. Code § 770(a); Nev. Rev. Stat. § 123.130; N.M. Stat. Ann. § 40-3-8; Wash. Rev. Code § 26.16.010.

[37] Idaho Code Ann. § 32-906; La. Civ. Code Ann. art. 2339; Tex. Fam. Code Ann. §§ 3.001, 3.002; *Norris v. Vaughan*, 260 S.W.2d 676 (Tex. 1953) (in Texas, income from separate property mineral interests remains separate property so long as oil or gas can be definitely traced and identified).

[38] *See, e.g., Nationwide Res. Corp. v. Massabni*, 694 P.2d 290 (Ariz. Ct. App. 1984).

[39] *See, e.g., In re Marriage of Campbell*, 74 Cal. App. 4th 1058 (1999).

[40] Cal. Fam. Code §§ 850–852; *Estate of Bibb*, 104 Cal. Rep. 2d 415 (2001) (requirements for valid transmutation are: (1) a writing that satisfies statute of frauds; and (2) an expression of intent to transfer property interest).

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or ownership of property is being changed.[41] Contrariwise, in Arizona, commutation may occur even in the absence of explicit written or oral agreement if circumstances clearly demonstrate that one spouse intended to effect a change in the status of their separate property.[42]

2. Commingling

Commingling occurs if community property becomes so mixed with separate property that re-segregation or classification of property or its income is not possible.[43] Property is presumed to be community property under commingling, unless proven otherwise.[44] Spouses who move from a noncommunity property state to a community property state must avoid commingling if they wish to maintain their separate property rights. The burden of proof (on the person seeking to rebut the community property presumption) is met by identifying the property as separate at inception, then tracing that separate property through its contact and mingling with community property to identify it as separate property.[45] Successful tracing of separate property requires that the property or its proceeds be sufficiently intact to prove separate identity. Even if the form of the property has been altered, definitive tracing of separate property into particular accounts is required to meet this burden, such that the property can be identified as separate property.[46]

3. Title, Management Rights, and Disposition

Title in one spouse's name does not defeat the other spouse's community interest in that property. Instead, title only confers "management rights." For example, one spouse alone may not borrow against the security of community property. A lender will require that both spouses sign a lending agreement and assignment of collateral, regardless of who holds title to the asset. Thus, spouses essentially are tenants in common with regard to their community property, regardless of title.

This differs from the rules in noncommunity property jurisdictions, in which a surviving spouse may have no interest in a decedent's property until the marriage has been terminated by death. In a community property jurisdiction, half of the community property already belongs to each spouse. Indeed, only the decedent's half is subject to testamentary disposition or intestacy.[47]

Historically, husbands held title and, therefore, management rights over most community property.[48] Today, spouses share equal management rights over community property,[49] with each spouse's right to manage and dispose of community property being subject to a fiduciary duty to the other spouse.[50] This fiduciary responsibility exists for the duration of their marriage and applies to any disposition of community property.[51] The fiduciary duty is breached if one spouse removes community assets without approval from the other spouse.[52] Known as a fraud on the community, this judicially created concept is based on constructive fraud and exists regardless of intent.[53]

4. Quasi-Community Property

In a noncommunity property state, each spouse owns the property that he or she acquires during marriage as separate property. Neither spouse has any interest in the separate property of the other spouse during their joint lifetime. At best, at death, the elective share statute may give the surviving spouse a statutorily determined entitlement to claim a share of the decedent's marital property.

Community property jurisdictions do not normally protect surviving spouses with an elective share because community property is regarded as a sufficient protection of a surviving spouse's right to property obtained during marriage. As a result, the migration of spouses from a noncommunity property state to a community property state creates the possibility of disinheritance, without the protection of an elective share. For example, assume that spouses H and W lived their entire working lives in Illinois, a noncommunity property state, and then retired in Arizona, a community property state that does not recognize quasi-community property. Also, assume that all of their property acquired in Illinois during their marriage is separate property titled in H's name, who dies shortly after moving to Arizona, leaving a will that does not provide for W. Under Arizona law, W will not receive any of H's separate property and will only receive half of any community property that they had acquired while domiciled in Arizona.

To prevent this result, California, Idaho, Louisiana, and Washington recognize the concept of "quasi-community" property in assets that "would have been" community property had the spouses been domiciled in that state at the time of

[41] *Estate of Bibb*, 104 Cal. Rep. 2d 415 (2001).

[42] *Moser v. Moser*, 572 P.2d 446 (Ariz. Ct. App. 1977).

[43] *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965).

[44] *Mueller v. Mueller*, 301 P.2d 90 (Cal. Dist. Ct. App. 1956) (holding that, if a business is husband's noncommunity property, but value increased, wife worked in business, and profits were used jointly, then, upon divorce, all business assets are regarded as community property); *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987) (holding that separate and community property were so commingled that segregation and identification were not possible and yielded conclusive presumption that it is all community property); *Dillingham v. Dillingham*, 434 S.W.2d 459 (Tex. Civ. App. 1968) (holding that increase in value of corporation used as husband's alter ego for conducting business involving his separate property capital is community property).

[45] *See, e.g., Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965).

[46] *See, e.g., Pritchard v. Tuttle's Estate*, 534 S.W.2d 946 (Tex. Civ. App. 1976).

[47] Cal. Prob. Code § 6401 specifies that the surviving spouse is entitled to an intestate share in only the decedent's separate property, not the decedent's half of the community or quasi-community property.

[48] *See, e.g., Spreckels v. Spreckels*, 48 P. 228 (Cal. 1897).

[49] Ariz. Rev. Stat. Ann. § 25-214; Cal. Fam. Code §§ 1100, 1102; Idaho Code Ann. § 32-912; La. Civ. Code Ann. art. 2346; Nev. Rev. Stat. § 123.230; N.M. Stat. Ann. § 40-3-14; Tex. Fam. Code Ann. § 3.102(a); Wash. Rev. Code § 26.16.030; Wis. Stat. § 766.51; *Roselli v. Rio Communities Serv. Station, Inc.*, 787 P.2d 428 (N.M. 1990); *In re Marriage of Mattson*, 730 P.2d 668 (Wash. 1986).

[50] Cal. Fam. Code § 1101 is representative.

[51] *See, e.g., Roselli v. Rio Communities Serv. Station, Inc.*, 787 P.2d 428 (N.M. 1990)

[52] *See, e.g., Gerow v. Covill*, 960 P. 2d 55 (Ariz. Ct. App. 1998).

[53] *See, e.g., Osuna v. Quintana*, 993 S.W.2d 201 (Tex. Ct. App. 1999); *In re Estate of Herring*, 970 S.W.2d 583 (Tex. Ct. App. 1998); *Zieba v. Martin*, 928 S.W.2d 782 (Tex. Ct. App. 1996) (stating that constructive fraud is presumed if one spouse disposes of other spouse's interest in community property without their knowledge or consent).

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acquisition.[54] Treated just like community property, the quasi-community property regime prevents disinheritance of spouses who move to a community property jurisdiction from a non-community property jurisdiction. At the death of the first spouse, the surviving spouse is entitled to half of their quasi-community property, regardless of title or the decedent's will.[55] Thus, if H and W had retired to California, a community property state that recognizes quasi-community property, then H's separate property acquired during their marriage would be considered as quasi-community property and W would have a vested interest in half of that property, as if it was property that they obtained while married and living in California.

In Arizona, New Mexico, and Texas, the protection of quasi-community property applies only for divorce and not at death.[56] Nevada does not recognize quasi-community property for either purpose.

5. Conflict of Laws and Other Problems Caused by Migration

Separate and community property retain their status regardless of a change of domicile, so individuals who migrate among jurisdictions often run into classification and choice of law problems. The general rule is that the classification of movable property is determined at the time of acquisition according to the laws of the couple's domicile.[57] Thus, if a couple is domiciled in a community property state, the classification of their movable property is governed by the laws of that state. Generally, the law of the situs determines the classification of real property.[58] However, the situs state will recognize property as community property if real property located in a noncommunity property state is purchased with community funds.[59]

C. Statutory Elective Share Entitlements

Elective share statutes have been described as "a jungle, with hardly two states to be found that are exactly alike."[60] Every noncommunity property jurisdiction, except Georgia, gives a surviving spouse the choice to take the property bequeathed to the spouse by the decedent or to elect against the estate and take the amount specified by the elective share law.[61]

New York State enacted the first elective share statute in America,[62] apparently based solely on anecdotal evidence of two instances of disinheritance. No disinheritance studies had been conducted at that time.[63]

Some states continue to limit the elective share to a fraction of the decedent's *probate estate*. However, most states have expanded their statutory entitlement laws to include non-probate property, to some extent, because planning to avoid a probate-only entitlement is relatively easy, especially because nonprobate property, such as life insurance, retirement benefit accounts, joint tenancy, transfer on death (TOD) or payable on death (POD) registration, and funded revocable trusts, is so prevalent.

The probate-only elective share of a predetermined fraction has the advantage of simplicity.

> 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.[64]

Simplicity can be defective, however. It is insensitive to the surviving spouse's needs or contributions to the marital estate, and it makes no provision for a testator who knew the family situation and favored a different disposition. The probate-only elective share has been criticized because it is too easy to avoid[65] and it can reward undeserving spouses or defeat a plan that benefits more needy or worthy beneficiaries.

The probate-only elective share system also fails to reflect societal changes that have undermined its utility.[66] As a result, New York was the first state to make nonprobate property subject to the elective share.[67] A larger amount — the "augmented estate" — provides the asset pool from which the surviving spouse's entitlement is derived. Other states have followed suit and, today, most noncommunity property jurisdictions have some version of an augmented estate. However, most of these augmented estate laws have loopholes that clients may exploit to minimize the spouse's elective share.

The Uniform Probate Code (UPC) incorporates the most inclusive and detailed augmented estate concept, leaving few (but still important) loopholes.[68] As a trend toward a better form of reflecting a "partnership theory of marriage," however, the revised UPC "is not a very large step."[69] Indeed, one additional goal of the UPC drafters was to better approximate

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[54] *See, e.g.*, Cal. Fam. Code § 125; Cal. Prob. Code §§ 66, 101.

[55] *See, e.g.*, Cal. Prob. Code § 6401(b).

[56] Ariz. Rev. Stat. Ann. § 25-318(A); N.M. Stat. § 40-3-8(D); Tex. Fam. Code Ann. § 7.002.

[57] *See, e.g.*, Cal. Fam. Code § 760.

[58] *See, e.g.*, *Barber v. Barber*, 331 P. 2d 628 (Cal. 1958).

[59] *See, e.g.*, *Quintana v. Ordano*, 195 So. 2d 577 (Fla. Dist. Ct. App. 1967).

[60] 1 *Page on the Law of Wills* § 3.13 (2003).

[61] In some states, the election to take the statutory share operates as a total rejection of the decedent's entire estate plan because calculation of the elective share reflects all property benefitting the surviving spouse from all sources, whether under the will or by nonprobate transfer (e.g., life insurance proceeds, qualified retirement plans, joint property, etc.). *See, e.g.*, UPC § 2-209, as discussed in III, C, below. In other states, it only constitutes a rejection of the decedent's will and does not alter nonprobate dispositions. See III, below.

[62] See Brashier, "Disinheritance and the Modern Family," 45 *Case W. Res. L.Rev.* 84 (1994), for a chronology of how the New York State legislature went about enacting the first elective share law (citing *In re Estate of Riefberg*, 446 N.E.2d 424 (N.Y. 1983)).

[63] *See* Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem," 33 *U. Chicago L. Rev.* 681 (1966) (explaining that no empirical data supported findings "as to the frequency, and thus the social significance, of disinheritance").

[64] Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem," 33 *U. Chicago L. Rev.* 681 (1966).

[65] *See, e.g.*, Brashier, "Disinheritance and the Modern Family," 45 *Case W. Res. L. Rev.* 84 (1994). *See also Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984) (reaching beyond probate estate to include assets held in inter vivos trust).

[66] Oldham, "Should the Surviving Spouse's Forced Share Be Retained?" 38 *Case W. Res. L. Rev.* 223 (1987-1988).

[67] *See* N.Y. Est. Powers & Trusts Law ch. 952 (Consol. 1966), amended by N.Y. Est. Powers & Trusts Law § 5-1.1-A.

[68] See III, C, 2, below, regarding the UPC augmented estate.

[69] Whitebread, "The Uniform Probate Code's Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions," 11 *Prob. L.J.* 125 (1992).

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the division of property at death in a community property jurisdiction.[70] In that regard, important differences remain. One difference is that the UPC augmented estate includes property acquired by gift and inheritance and premarital property owned by either spouse, neither of which is regarded as community property unless the couple provides otherwise.[71] This can dramatically increase the share of a surviving spouse if the deceased spouse inherited substantial wealth or came to the marriage having already accumulated a substantial estate. As a counterbalance, under the UPC, a wealthy surviving spouse who is independently wealthy may receive no share of the spouses' aggregate marital property.

The most recent version of the UPC elective share has been adopted in only seven states: Colorado, Hawaii, Kansas, Minnesota, Montana, South Dakota, and West Virginia.[72]

[70] See the Comment to UPC § 2-202.

[71] This failure to mimic community property may be a function of how difficult it is to trace the origin of such property postmortem, although the same issue exists in community property states with little difficulty.

[72] Schoenblum, *2010 Multistate Guide to Estate Planning* Table 6.03 (2009).

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III. Representative Elective Share Statutes

Over 40% of American jurisdictions grant a surviving spouse a share of a decedent's probate estate with no consideration of nonprobate transfers or wealth.[103] This means that a decedent may reduce the amount of property subject to a surviving spouse's elective share simply by settling wealth in nonprobate forms. However, many jurisdictions (and the Uniform Probate Code) have amended their statutory shares to provide a more robust entitlement.

A. *New York Elective Share Statute*

The New York elective share statute[104] was changed significantly in 1992. Prior to then, the elective share was a fraction of the decedent's net estate, which included only probate property and certain lifetime transfers (largely testamentary substitutes), reduced by debts, administration expenses, and reasonable funeral expenses. Estate taxes were not subtracted before the share was determined because the elective share was deductible for federal estate tax purposes and was protected from wealth transfer taxation by the concept of equitable apportionment.[105]

Among its shortcomings, the pre-1992 statute did not list a number of testamentary substitutes that properly might be regarded as nonprobate property against which the elective share should be computed. For example, a decedent could minimize the elective share by investing in pension funds, life insurance, United States government obligations, and inter vivos trusts. Further, the decedent could satisfy the elective share by placing the appropriate amount in a trust from which the surviving spouse could receive only a lifetime income benefit. These defects were altered by the 1992 changes. Today the surviving spouse of a New York decedent has the right to the greater of $50,000 or one-third of the decedent's "augmented" net estate, which consists of the decedent's probate assets and testamentary substitutes, reduced by debts, administration expenses, and funeral expenses, but not by estate taxes.[106]

The benefit of the current law lies in an expanded definition of the property against which the elective share is computed and from which it can be satisfied. Among the testamentary substitutes that are included in the net estate are:[107]

- gifts causa mortis;
- outright gifts made in the last year of the decedent's life (other than § 2503(b) annual exclusion gifts and § 2503(e) education and medical expense payments);
- Totten trusts;
- most property owned concurrently with a third party;
- most pension and retirement benefit accounts;
- lifetime trusts, contracts, or other transfers made by the decedent as to which the decedent retained enjoyment or control of the sort that would trigger federal estate tax inclusion under §§ 2036 and 2038; and
- property over which the decedent had a presently exercisable general power of appointment, or over which the decedent exercised or released such a power gratuitously within a year of death, in favor of a third party, to the extent the amount subject to the power exceeded the "five or five" threshold under § 2041(b)(2).

Notably, however, life insurance is excluded from the augmented estate definition.[108] Further, the "elective-share trust" was eliminated as a means of satisfying the spouse's entitlement — property passing "other than absolutely" to the spouse is considered as not having passed to the spouse at all.

A decedent's will remains effective after the elective share is paid (except for transfers to the spouse).[109] Any absolute gift to the spouse is applied as a set off against the elective share, as are amounts that the spouse receives from testamentary substitutes or as part of any intestate share of the decedent's estate.[110] The elective share is satisfied by *pro rata* abatement of other bequests under the decedent's will, of testamentary substitutes, and any intestate property passing to third parties.[111]

As is true for many state statutes, special judicial and legislative rules exist to determine whether an individual quali-

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[103] A tally such as this is uncertain, for several reasons. Because state law is a moving target — no reader should rely on this summary without checking the law specifically — and because reliance on the interpretation of reporters is only as good as their evaluation. Sources used include Schoenblum, 2010 *Multistate Guide to Estate Planning* Table 6.03, Part 1 (2009), and Question 2(a) of *Study 10: Surviving Spouse's Rights to Share in Deceased Spouse's Estate*, published by the American College of Trust and Estate Counsel (ACTEC), available electronically at http://www.actec.org/resources/publications/studies/Study10.pdf. Together they list 22 states that do not use any form of augmented probate estate calculation, although authority in several would augment an estate with assets transferred away from the decedent's estate in "fraud" of the elective share — which is an amorphous concept that varies under standards that differ from state to state. In addition, by way of example, Mich. Comp. Laws § 700.2202(7) (2000) and Ore. Rev. Stat. § 114.630 et seq. (effective Jan. 1, 2011), altered prior law reported for those states and are not reflected in those compilations, which reveals that summary lists may not be reliable. Subject to these caveats, the list includes Ala. Code § 43-8-70(a); Ark. Code §§ 28-11-301, -305, -307; Conn. Gen. Stat. § 45a-436; D.C. Code §§ 19-113, -301; 755 Ill. Comp. Stat. 5/2-8(a); Ind. Code § 29-1-3-1; Iowa Code § 633.238 (augmentation applies under (1)(d) for certain trusts); Ky. Rev. Stat. § 392.020; Md. Code, Est. & Trusts § 3-203(a); Mass. Gen. Laws ch. 191, § 15; Miss. Code § 91-5-25; Mo. Rev. Stat. §§ 474.160, 474.163; N.H. Rev. Stat. § 560:10; Ohio Rev. Code Ann. § 2106.01; 84 Okla. Stat. § 44.B; R.I. Gen. Laws § 33-25-2(a); S.C. Code §§ 62-2-201, -202; Tenn. Code § 31-4-101(b); 14 Vt. Stat. Ann. § 319; and Wyo. Stat. § 2-5-101.

Again, pay attention to the date of these resources and be careful to verify this information, which is only as good as the individual reporter for a given state and is subject to the possibility that the law has been changed. Also note that some states invalidate certain transfers (such as trusts over which the decedent retained too much control in Massachusetts, and both Carolinas) but otherwise have no comprehensive augmentation regime.

[104] N.Y. Est. Powers & Trusts L. § 5-1.1-A.

[105] *See* N.Y. Est. Powers & Trust L. § 2-1.8(c)(2). See also 834 T.M., *Transfer Tax Payment and Apportionment*.

[106] N.Y. Est. Powers & Trusts L. § 5-1.1-A(a)(2).

[107] *See* N.Y. Est. Powers & Trusts L. § 5-1.1-A(b).

[108] See *In re Boyd*, 613 N.Y.S.2d 330 (Surr. Ct 1994), for a detailed discussion of the legislative history behind this exclusion.

[109] See N.Y. Est. Powers & Trusts L. § 5-1.1-A(c)(1).

[110] *See Matter of Gerard*, 377 N.Y.S.2d 394 (Surr. Ct. 1975).

[111] N.Y. Est. Powers & Trusts L. § 5-1.1-A(c)(2).

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fies as a spouse. These rules address common-law marriage,[112] bigamous, incestuous, or prohibited marriages,[113] divorce actions,[114] and abandonment and other circumstances that disqualify a surviving spouse from making the election.[115]

As in most American jurisdictions, the right of election belongs to the surviving spouse personally. Thus, the surviving spouse's administrator or executor cannot make the election if the surviving spouse died before a notice of election was served on the decedent's executor.[116] Unlike many jurisdictions, however, the election can be exercised by an incompetent surviving spouse's personal representative, but only with court approval.[117]

B. *Florida Elective Share Statute*

Florida's current elective share statute became effective in 1999, for decedents dying after September 2001.[118] The surviving spouse of a Florida decedent is entitled to an amount equal to 30% of the fair market value of all assets deemed to be subject to the right of election, as under prior law.[119] The new law did, however, change the amount of property subject to the elective share and the manner in which the elective share is satisfied, along with and several procedural alterations.

The new elective share statute gives the surviving spouse a portion of the "elective estate" (a concept that is similar to the UPC augmented estate), which is best understood as the decedent's probate estate (all property wherever located that is subject to estate administration in the United States), plus (1) nonprobate property that would be includible in the decedent's federal estate tax gross estate under §§ 2036 through 2040 and 2042, and (2) the value of any transfers made by the decedent within one year of death that were not excludible as gifts under the § 2503(b) annual exclusion or the exclusion under § 2503(e) for education and medical expenses.

The Florida elective share statute specifically *excludes* nine categories of property from the elective estate, including:[120]

- irrevocable transfers made by the decedent to the extent the transfer was irrevocable before October 2001 and any other irrevocable transfers made before the decedent's marriage to the surviving spouse;
- transfers for full and adequate consideration and those with the spouse's written consent[121] (spousal consent to split-gift treatment is not such consent);
- life insurance policy proceeds on the decedent's life exceeding the net cash surrender value of the policy or maintained pursuant to a court order;
- the decedent's half of any community property;
- property held in a qualifying special needs trust or included in the decedent's federal estate tax gross estate solely because the decedent possessed a general power of appointment; and
- the decedent's protected homestead property.

Notable is how both Florida and New York law sought to expand the estate against which a surviving spouse's elective share is calculated, but they did so in different ways,[122] making it possible to diminish the spouse's entitlement in different ways. These variations are not uncommon when comparing one state law to another — the statutes are more or less avoidable in ways that clients may prefer, making forum shopping a viable planning tool.

Florida also provides that certain transfers that *benefit* the surviving spouse are deemed to reduce the elective share. Thus, unlike the law in many jurisdictions (but similar to the Uniform Probate Code), the decedent's nonprobate property may satisfy the spouse's elective share.[123] Amounts that count as a satisfaction of the surviving spouse's entitlement include:

- life insurance policy proceeds on the decedent's life payable to the surviving spouse (unless the policy was owned by the surviving spouse);
- amounts payable to the surviving spouse under public or private pension, retirement, or deferred compensations plans;
- the decedent's half of any community property;
- assets held for the benefit of the surviving spouse in a qualifying special needs trust;

[112] *See, e.g., In re Dugro*, 25 N.Y.S.2d 88 (1st Dept. 1941), *aff'd*, 38 N.E.2d 706 (1941).

[113] N.Y. Est. Powers & Trusts L. § 5-1.2(a)(2). Note that N.Y. Dom. Rel. L. § 10-A now authorizes same-sex marriages.

[114] N.Y. Est. Powers & Trusts L. § 5-1.2(a)(3). *See, e.g., In re Bingham*, 36 N.Y.S.2d 584 (Surr. Ct. 1942), *aff'd*, 39 N.Y.S.2d 756 (2d Dept. 1943).

[115] *See* N.Y. Est. Powers & Trusts L. § 5-1.2(a)(5). See, e.g., *In re Morris*, 893 N.Y.S.2d 161 (Sup. Ct. 2010), in which a surviving husband, who abandoned his wife 32 years prior to her death, was granted letters of administration because her daughters did not prove that the separation was without the decedent's consent.

[116] N.Y. Est. Powers & Trusts L. § 5-1.1-A(c)(3). *See, e.g., In re Thronstrom*, 95 N.Y.S.2d 42 (Surr. Ct. 1950). However, the right is preserved and the elective share is payable to the surviving spouse's estate if the election notice is served but the spouse dies before the share is paid.

[117] N.Y. Est. Powers & Trusts L. § 5-1.1-A(c)(3).

[118] Fla. Stat. § 732.2155. *In re Estate of Magee*, 988 So. 2d 1 (Fla. Dist. Ct. App. 2007), upheld the statute against a due process constitutional challenge because the state's strong public policy to protect surviving spouses is a legitimate legislative purpose and the statute is rationally related to that purpose, notwithstanding that need of the surviving spouse is not considered in determining the elective share.

[119] Fla. Stat. § 732.2035.

[120] Fla. Stat. § 732.2045.

[121] Quaere whether a nonparticipant spouse's ERISA-required written consent to the participant's alteration of the § 401(a)(11) spousal annuity constitutes such a waiver. The written consent provision in Fla. Stat. § 732.2045(1)(C) is similar to UPC § 2-208, and the Comment to § 2-208 states that a spousal waiver that complies with § 417 (requiring that an election to waive the spousal annuity must designate a beneficiary that may not be changed without the nonparticipant spouse's consent) *does* constitute the requisite consent under § 2-208. Thus, the nonparticipant's waiver and consent for ERISA purposes "would serve to exclude the value of the death benefits from the decedent's nonprobate transfers to others" for purposes of calculating the augmented elective estate.

[122] Both incorporated a federal estate tax gross estate inclusion concept, which Nebraska also has embraced in principle. For example, in *Fries v. Hurst*, 782 N.W.2d 596 (Neb. 2010), the court utilized federal inclusion concepts such as the notion that § 2036(a)(1) inclusion does not require that enjoyment be expressly retained, nor must it be legally enforceable. In that case, the retention was a question of fact based on the decedent having continued to "perform management functions for, receive income from, and pay taxes on" transferred property.

[123] Fla. Stat. § 732.2075(1).

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VI. Planning to Minimize an Elective Share

A. *Premortem Alignment*

Some property owners in elective share jurisdictions seek techniques that can reduce or eliminate the entitlement that will pass to their spouse at death. In some states, this can be accomplished by nonprobate transfers without elaborate planning. In most states, however, more complex techniques may be required.[169]

Underlying this discussion is an assumption that there are legitimate reasons for planning that restricts the elective share of the client's surviving spouse. In many cases, the propriety of this planning is so normal that the notion of a spousal election is not considered, and no special planning in anticipation of an election is employed. For example, even if portability of an unused unified credit is available,[170] a typical married couple takes advantage of credit shelter bypass trust planning for the basic exclusion amount in their respective estates, and each qualifies only any balance of their estate for the marital deduction. The only difference between the plans is that one spouse may have a smaller estate and may leave any marital portion outright to the other, while the wealthier spouse may use a QTIP marital trust for the survivor's benefit for life.

Contrary to common expectations, the less wealthy spouse's objection to this commonplace plan may not be the QTIP trust used by the wealthier spouse. Instead, the objection may be about the *lack* of a QTIP in both plans, based on a concern that the survivor will do something irrational with "their" property after the first spouse dies.

It is not uncommon for one spouse to worry about the surviving spouse's dissipation of wealth. For example, actual cases encountered (without subsequent controversy) include a client who worried that the surviving spouse was a soft touch for "the yoga instructor" or a particular pastor's evangelical outreach. Another was concerned that the surviving spouse would take the decedent's wealth and purchase an airplane or a yacht. A third knew the surviving spouse's proclivity to shop (and spend on frivolous items) when depressed or stressed.

So, imagine that a woman explains her various concerns about her husband's inclinations with money and gifts to charity, children, or other predators, and articulates her desire that all of her wealth be preserved for their children (whether they all are common to this one long-term marriage or some are from another relation). Further, inquiries about the husband's likely reaction to any proposed restriction on his freedom to dispose of the marital bequest as he deems appropriate, and the psychological and emotional aspects of the wife's death before him, cause her to agree that perhaps there is a need to protect against an angry or irrational reaction. This could lead to his election against her plan in favor of his elective share entitlement, which easily could exceed the optimum marital deduction amount provided for him under her estate plan. If protective planning against such an election is prudent and appropriate in such a case,[171] then what alternatives can, should, or would a typical planner recommend to her in this situation? That is the gist of this discussion.[172]

1. *Create a Trust That Will Survive Challenge*

The most affirmative and, in a majority of states, predictably successful planning recommendation is that the client create a trust and retain less control or enjoyment than would trigger application of the state law tests that determine validity, which is not very difficult. Although it makes little sense, the majority of cases applying the most common (illusory trust or retention of control) test affirm that a revocable inter vivos trust as to which the settlor retained no more than a life estate and power of revocation is not subject to challenge. Required to defeat this planning is more retained enjoyment or control, typically found in the form of the settlor being the trustee or retaining some form of withdrawal right, direction, or veto power.[173] Because planning designed to disfranchise a surviving spouse often is undertaken late in a client's life (as revealed by numerous cases in which the decedent died shortly after the trust was created), it makes sense to question whether the

[169] For example, *In re Reifberg*, 446 N.E.2d 424 (N.Y. 1983) (spousal rights case), involved a buy-sell agreement calling for purchase of the decedent's closely held business stock, with payment to be made directly to the decedent's children by a prior marriage.

[170] *See* § 2010(c)(2)(B), which is slated for sunset expiration after 2012.

[171] Failure to advise the client on the potential for an election and on alternatives to anticipate that action may constitute malpractice. *See, e.g., Machulski v. Boudart*, 2008 BL 72398 (Del. Super. 2008) (denying attorney motion for summary judgment in case alleging malpractice flowing from failure to protect decedent's dwelling, which could have been placed in joint tenancy or transferred to revocable inter vivos trust to preclude surviving spouse's claim, all because Delaware does not augment probate estate, even for death bed transfers); *Johnson v. Sandler, Balkin, Hellman & Weinstein*, 958 S.W.2d 42 (Mo. Ct. App. 1998) (reversing summary judgment dismissing case against attorneys). Also, as shown by the example in text, although it is not always the case, planning by one spouse to disfranchise the other may indicate that a conflict of interest exists and that the same attorney may not represent both spouses for estate planning purposes without complying with the informed and voluntary consent provisions of Rule 1.7 of the Model Rules of Professional Conduct (or its counterpart under a particular state's rules governing the ethical conduct of attorneys). Moreover, unless the one spouse is willing to have the attorney make sufficient disclosure to obtain such a consent, the practical consequence normally would be the need to withdraw from representing the disfranchised spouse and, if the attorney previously represented that spouse, perhaps from representing either spouse due to the former client representation conflict parameters of Model Rule 1.9 (or its counterpart). See Casner & Pennell, *Estate Planning* § 13.10 (6th ed. 2010), regarding the ethics of representing both spouses for estate planning purposes.

[172] This endeavor differs from that in *Tensfeldt v. Haberman*, 768 N.W.2d 641 (Wis. 2009), in which the attorney was held "liable as a matter of law for intentionally aiding and abetting his client's unlawful act" (which was the client's failure to comply with a divorce court order that incorporated a property settlement agreement requiring a bequest to children). It was improper for the attorney to advise or assist the client in violating that court order. Advice regarding transfers in fraud of creditors or a marital share might be regarded similarly, but advising a client on *lawful* ways to minimize a surviving spouse's elective share is akin to the *Tensfeldt* court saying that advising a client about a breach of contract or fiduciary duty would not be subject to the same prohibitions. And, in any event, Model Rule 1.2(d) states that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

[173] *See, e.g., Pezza v. Pezza*, 690 A.2d 345 (R.I. 1997) (surviving spouse was unable to defeat decedent's trust because decedent resigned as trustee and made trust irrevocable).

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settlor really needs to retain as much enjoyment or control as required to trigger this most common test.

Several questions that arise in jurisdictions that allow a spouse to avoid application of the elective share simply by transferring assets to a revocable inter vivos trust include:[174] (1) whether the state's law applies at the death of that spouse; (2) how will an appropriate court determine whether the trust may prevail as against the claim of a surviving spouse domiciled in another jurisdiction; and (3) what degree (if any) of control or enjoyment may the settlor retain and still succeed?

Nationwide, these questions are not well settled. For example, *Seifert v. Southern Nat'l Bank*[175] was decided in a Uniform Probate Code (UPC) jurisdiction, but without reliance on the augmented probate estate concept of the UPC because augmentation was omitted when the state legislature adopted its version of the UPC. Nevertheless, the court produced essentially the same result as it would have if it had applied the augmented probate estate concept because the decedent retained "substantial control" over a revocable inter vivos trust. The court determined that the settlor had such extensive powers over the trust that the settlor essentially was in the same position as if the trust had not been created.[176]

Some courts have changed their approach over time. For example, in *Kerwin v. Donaghy*,[177] a Massachusetts court rejected the surviving spouse's attempt to invalidate the trust notwithstanding the decedent's power to amend or revoke the trust. But 40 years later, in *Sullivan v. Burkin*,[178] the same court ruled that the assets of a self-settled trust over which the decedent retained an inter vivos or testamentary general power of appointment would be considered part of the settlor's estate in computing the survivor's elective share, regardless of the settlor's motive or intent and without consideration of whether the trust was colorable, fraudulent, or illusory.[179] Illinois, on the other hand, went the other way. *Johnson v. La Grange State Bank*[180] created a standard under which challenges by a surviving spouse would be nearly impossible to sustain.[181] With the dearth of guidance provided by case law like this, in a very real sense settlors take their chances, hoping the equities favor their position[182] and the courts see those equities in a favorable light.

a. Three Tests for Trust Transfers

At least three tests now are in use in various jurisdictions to determine whether a lifetime transfer in trust can defeat an elective share claim. These tests use terms such as "fraudulent" or "colorable," which, in this context, are vague or inappropriate.[183] Therefore, when applying these tests, typically it is more helpful to judge a court's conclusions rather than its rhetoric.[184]

The least predictable of the three tests is the one that looks at intent or motive, sometimes referred to as a "fraudulent

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[174] *See, e.g., Estate of Overmire v. American Nat'l Red Cross*, 794 P.2d 518 (Wash. Ct. App. 1990) (decedent transferred all of decedent's noncommunity property to revocable inter vivos trust in which decedent retained life estate; decedent's surviving spouse was entitled to income from portion of trust, but petitioned for award in lieu of homestead to be charged against trust because there was no probate or other property; court rejected petition because trust was not part of decedent's probate estate and was not subject to spousal claim); *Richards v. Worthen Bank & Trust Co.*, 552 S.W.2d 228 (Ark. 1977); *Cherniack v. Home Nat'l Bank & Trust Co.*, 198 A.2d 58 (Conn. 1964); *Leazenby v. Clinton County Bank & Trust Co.*, 355 N.E.2d 861 (Ind. Ct. App. 1976); *DeLeuil's Executors v. DeLeuil*, 74 S.W.2d 474 (Ky. 1934); *Brown v. Fidelity Trust Co.*, 94 A. 523 (Md. 1915); *Rose v. Union Guardian Trust Co.*, 1 N.W.2d 458 (Mich. 1942); *Smyth v. Cleveland Trust Co.*, 179 N.E.2d 60 (Ohio 1961).

[175] 409 S.E.2d 337 (S.C. 1991).

[176] This is a classic illusory trust approach. The illusory trust concept is illustrated in VI, A, 1, a, below.

[177] 59 N.E.2d 299 (Mass. 1945) (involving second spouse and children by former marriage who were equal one-fifth beneficiaries of trust established to minimize spouse's elective share).

[178] 460 N.E.2d 572 (Mass. 1984) (involving estranged surviving spouse).

[179] The same result is advocated in Restatement (Second) of Property, *Donative Transfers* § 13.7 (1986), although only two years earlier the Tentative Draft of that proposal would have provided the exact opposite rule. Restatement (Third) of Property, *Wills and Other Donative Transfers* § 23.1(2) is the current iteration of the same rule.

[180] 383 N.E.2d 185 (Ill. 1978).

[181] Meanwhile, the Kansas court produced an anomalous result in *Newman v. George*, 755 P.2d 18 (Kan. 1988) (son of an incompetent surviving spouse's prior marriage had a guardian appointed to claim the spouse's intestate share of the decedent's intestate estate, notwithstanding that decedent had created inter vivos trust to benefit decedent and spouse until survivor's death, with remainder in equal shares to sister of decedent and sister of spouse, both of whom had cared for decedent and spouse; although trust was not created to disfranchise spouse's share and was not abusive in any manner, court allowed spouse to invalidate trust and, because decedent died intestate, to take 100% of decedent's estate; if decedent had created trust for spouse and election had been made against that estate plan, spouse's elective share would have been limited to 50%). *McCarty v. State Bank*, 795 P.2d 940 (Kan. 1990), was to the same effect with respect to the decedent's individual retirement account. This resulted in a legislative change and decisions, such as *Taliaferro v. Taliaferro*, 843 P.2d 240 (Kan. 1992), and *Rice v. Garrison*, 898 P.2d 631 (Kan. 1995), that disapproved the *Newman* result, showing again the lack of continuity in this area of the law. With respect to the power of a guardian to make an election against the decedent's estate plan, see Casner & Pennell, *Estate Planning* § 3.4.7 (6th ed. 2010), and III, C, 7, above.

[182] With respect to the equities of a given situation, it is notable that far fewer trusts are regarded as invalid if the plaintiff is a surviving husband rather than a surviving wife. *See, e.g., Estate of Allen v. First Presbyterian Church*, 16 Cal. Rptr. 2d 352 (Ct. App. 1993); *Briggs v. Wyoming Nat'l Bank*, 836 P.2d 263 (Wyo. 1992); *Hanke v. Hanke*, 459 A.2d 246 (N.H. 1983); *Johnson v. La Grange State Bank*, 383 N.E.2d 185 (Ill. 1978) (two consolidated cases, each rejecting claims by surviving husbands); *In re Kohut*, 519 N.Y.S.2d 858 (App. Div. 1987); *In re Estate of Soltis*, 513 N.W.2d 148 (Mich. Ct. App. 1994) (portion of trust property surviving husband sought had been contributed by him to decedent's trust).

[183] See, e.g., *Pezza v. Pezza*, 690 A.2d 345 (R.I. 1997), citing the most famous cases establishing two very different tests as standing for the test the court purported to apply (note that the court mistakenly referred to the illusory trust approach as the "illusory transfer test").

For an illustration of the imprecision and, therefore, uncertainty generated by decisions in which it simply is not clear what approach a court was following, see, e.g., *Johnson v. Farmers & Merchants Bank*, 379 S.E.2d 752 (W. Va. 1989) (trust was found to involve impermissible retained control, indicative of lack of good faith by decedent, opinion referring to trust as being illusory, testamentary, and fraudulent, but claimed to focus on illusory trust doctrine).

See also Jarvis v. Jarvis, 824 P.2d 213 (Kan. Ct. App. 1991) (terms "fallacious, illusive, and deceiving" used in decision that would have been same under retention of control test). *In re Estate of Mocny*, 630 N.E.2d 87 (Ill. App. Ct. 1993), referred to "what has been misleadingly termed 'a fraud on a marital right' (fraud is not an element of this cause of action). *In re Revocable Trust of McDonald*, 814 S.W.2d 939 (Mo. Ct. App. 1991), made reference to the fact that the type of conveyance involved in these cases is, "unfortunately, commonly referred to as a conveyance 'in fraud of marital rights.' As so used, the term 'fraud' bears a meaning distinct from the meaning of that term when used in the conventional sense [and] has resulted in confusion."

[184] On this topic in general, little has changed since an excellent summary and explication was prepared by Pherigo, "Estate Planning: Validity of Inter Vivos Transfers Which Reduce or Defeat the Surviving Spouse's Statutory Share in Decedent's Estate," 32 *Okla. L. Rev.* 837 (1979). Another useful resource is Kwestal & Seplowitz, "Testamentary Substitutes — A Time for

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transfer" or "balancing the equities" test. Under this approach, courts consider factors such as: (1) proximity of creation of the trust to the settlor's death; (2) length and "quality" of the marriage;[185] (3) extent of interests retained by the settlor; (4) size of the conveyance compared to property that remains subject to the spousal share; (5) relative wealth of the spouses;[186] and (6) the standing of the surviving spouse relative to the beneficiaries favored by the settlor.[187]

A second test looks to whether the transfer was illusory. Under this test, a transfer to a revocable inter vivos trust will not defeat a surviving spouse's elective share if the deceased settlor retained so much control that no substantial or meaningful transfer occurred during the settlor's life.[188] Most cases hold that retention of no more than a life estate and a power to revoke is permissible.[189] More control, often in the form of powers as trustee, typically must be retained before the spouse will be successful.

A leading case for this test (even though it is no longer followed in its own jurisdiction) is *Kerwin v. Donaghy*,[190] which rebuffed a surviving spouse's attack of a trust, even though the court determined that the trust was "false and illusory" with respect to a third party (the federal government). The court found that the decedent could not have defrauded the surviving spouse because each spouse had the right during their joint lifetimes to dispose of property without the other's consent, creating a presumption as between the spouses of an effective transfer.

The third and most recent test (to date applicable only in Illinois)[191] allows a transfer in trust to defeat an elective share claim if the transferring spouse had a "present donative intent" by which any interest (present or future) was created in beneficiaries other than the settlor. Under this test, it is extremely unlikely that a surviving spouse would succeed in overturning a trust for elective share purposes.[192] The Illinois court stated:

> [A]n otherwise valid transfer of property, in trust or otherwise, by a decedent during his or her lifetime,

Statutory Clarification," 23 *Real Prop., Prob. & Trust J.* 467 (1988).

[185] Notwithstanding that the case was decided under a retained control test (the decedent was the trustee and retained a general power of appointment) and not the intent test, *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984), is revealing in this respect because the spouses had been separated for many years and a significant justification for the court's holding in favor of the surviving spouse was that a surviving spouse should not fare better in divorce than on termination of a marriage at death. Nevertheless, it seems reasonable to conclude that the spouses must have reached some accommodation regarding their marriage and found greater value in remaining married than in being divorced, all without imposing contractual or other restrictions on each other. Indeed, there had been an action many years before the decedent's death for a temporary support order, with no record of a permanent order and without attempting to guarantee or preserve property rights. That being the case, the court's focus on divorce rights seems anomalous.

In all but its conclusion, *Dumas v. Estate of Dumas*, 627 N.E.2d 978 (Ohio 1994), is almost indistinguishable from *Sullivan*, including the poor quality of the marriage and the fact that the decedent was both settlor and trustee of the trust and retained a general power to appoint the trust assets. The decision probably turned on the fact that the surviving spouse had deserted the decedent and filed for divorce a scant nine days before the decedent's fatal heart attack. Had the spouse known the decedent was in extremis, the divorce action might have been strategic, recognizing the difference in property division on divorce compared to what the spouse stood to receive if the trust was upheld following the decedent's death. As it was, however, the proximity of filing to the decedent's death may have sealed the spouse's fate in terms of the poor equities it presented. Contrariwise, however, is *Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1936), involving a different test and recovery by the surviving spouse, notwithstanding that at death the decedent and the survivor had cross-petitions pending for divorce.

The opinion in *Friedberg v. Sunbank*, 648 So. 2d 204 (Fla. Dist. Ct. App. 1994), does not reveal who was trustee of the decedent's trust but flatly noted the court's dismay that the Florida legislature made it clear "that a divorced spouse is entitled . . . to reach assets held in a revocable, inter vivos trust but a loving, devoted [surviving] spouse is not." Also, consider the recognition by *In re Estate of Chandler*, 413 N.E.2d 486 (Ill. App. Ct. 1980), that, although

> dissipation of marital assets by one spouse in contemplation of divorce . . . is not . . . an acceptable practice, . . . [j]udicial authority to distribute property . . . is expressly confined to those proceedings which culminate in a declaration of invalidity or a judgment of dissolution[, and] . . . death of either party to a divorce action prior to final judgment deprives the . . . court of jurisdiction over all aspects of the marriage relationship.

This is evidence that, in many states, there is a well conceived and intentional disparity between rights in divorce and at death. The *Chandler* court made special note of the fact that the parties addressed their respective entitlements in jointly held properties, reflecting their respective contributions to the economics of the marriage, and based its decision on that factor, which arguably is the manner in which these cases ought to be decided.

[186] See, e.g., *Karsenty v. Schoukroun*, 959 A.2d 1147, 1161–1162 (Md. 2008), which held that

> the completeness of the transfer and the extent of control retained by the transferor, the motive of the transferor, participation by the transferee in the alleged fraud and the degree to which the surviving spouse is stripped of his or her interest in the estate of the decedent have all been considered material, and no one test has been adopted to the exclusion of all other tests.

Nevertheless, the court essentially applied a balancing of the equities test that analyzed the relative merits of the spouse's claim, considered assets received by the spouse in other ways, and judged factors such as other legitimate claims to the decedent's wealth and the needs and moral standing of the surviving spouse, saying that "the question to be determined in any case in which a surviving spouse seeks to invalidate an inter vivos transfer is whether the transfer was set up as a mere device or contrivance." *Davis v. KB & T Co.*, 309 S.E.2d 45 (W. Va. 1983) (applying "flexible standard" to consider all "equities on each side," court concluded that decedent's trust was bona fide and motivated by concern for health problems of both decedent and surviving spouse, who had suffered "mental collapse" and also possessed relatively significant independent wealth, including family residence).

[187] *See generally Hanke v. Hanke*, 459 A.2d 246 (N.H. 1983) (rejecting the surviving spouse's challenge, apparently driven by tax factors because the spouse was provided for in a trust that did not qualify for the marital deduction). *See also Rice v. Garrison*, 898 P.2d 631 (Kan. 1995), in which the court recounted irrelevant facts about the marriage of the decedent and a former spouse — who was the designated beneficiary of the decedent's employer-funded life insurance, notwithstanding the decedent's remarriage — and precluded the surviving spouse from reaching the insurance proceeds by refusing to invalidate the beneficiary designation as a court would invalidate a trust. Perhaps the court's object in revealing those facts was to bolster its conclusion that it could not have been inadvertent that the decedent designated the former spouse and, therefore, it would not be appropriate for the court to override that designation in favor of the surviving spouse.

[188] *See, e.g., Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984); *Seifert v. Southern Nat'l Bank*, 409 S.E.2d 337 (S.C. 1991). In fact, it is not clear from either case exactly what test the courts were applying, or how the courts would judge other trusts in the future. *Cf. Sieh v. Sieh*, 713 N.W.2d 194 (Iowa 2006) (court stated that decedent "had full control of the assets of the inter vivos trust at the time of his death, including the power to revoke the trust," but without articulating which test court thought this mimicked).

[189] *See* Scott & Fratcher, *The Law of Trusts* §§ 57.5, 146A (4th ed.), which cited cases from 18 states that concur and from 9 contra. Notable is that there was some overlap among the states cited on opposite sides of the issue. *See, e.g., Davis v. KB & T Co.*, 309 S.E.2d 752 (W. Va. 1983); *Johnson v. Farmers & Merchants Bank*, 379 S.E.2d 752 (W. Va. 1989). The most recent edition no longer attempts such a tally. See Scott, Fratcher, & Ascher Scott and Ascher on Trusts § 8.2.5 (5th ed. 2006).

[190] 59 N.E.2d 299 (Mass. 1945).

[191] 755 Ill. Comp. Stat. 25/1, originally adopted in 1977 as declaratory of existing law.

[192] *See Johnson v. La Grange State Bank*, 383 N.E.2d 185 (Ill. 1978), in which this test was formulated; *In re Estate of DeFilippis*, 683 N.E.2d 453 (Ill. App. Ct. 1997); *In re Estate of Puetz*, 521 N.E.2d 1277 (Ill. App. Ct. 1988).

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shall not, in the absence of an intent to defraud, be invalid, in whole or in part, on the ground that it is illusory because the decedent retained any power or right with respect to the property.

For purposes of this test, an intent to defeat the surviving spouse's elective share rights does not constitute an intent to defraud:

> In the present context, intent to defraud . . . refers to a transfer that is illusory or colorable . . . one which takes back all that it gives . . . one which appears absolute on its face but due to some tacit or secret understanding . . . is in fact not a transfer because the parties intended that ownership be retained by the transferor. In either case, the question is really whether there was present donative intent, or instead the intent to retain complete ownership.[193]

At least in Illinois, "[t]he paramount rule . . . grants an owner of property the absolute right to dispose of [it] during his lifetime in any manner he sees fit . . . even with the expressed intent of minimizing or defeating the statutory marital interest of his or her spouse."[194]

If the trust may be revocable and avoid invalidation under the most common (retention of control or illusory trust) test, and assuming the trustee is chosen wisely, it hardly seems necessary for the settlor to retain more control.[195] Although this planning might not succeed in a state that applies the intent or motive test (although it should, if the assessment of the decedent's motives by the estate planner revealed legitimate objectives and an adequate paper trail is preserved), it certainly will succeed under the present donative intent test. All things considered, then, the use of trusts will maximize the possibility of success for clients who are unwilling to engage in more aggressive planning, such as a change of domicile or a realignment of asset ownership through gifting.

Nevertheless, if the various tests appear confusing (and the authorities cited *are* in conflict), the fault lies in the fact that courts often mouth a particular rule but do something different, and there are no firm rules in the context of cases that present varying equities. Therefore, because the final result cannot be predicted with much success, the planning process is fraught with uncertainty. In that respect, because the goal is to minimize the likelihood of a surviving spouse successfully defeating the client's objectives, several other tactics offer some promise. They all require action that may be inconsistent with the client's normal desire, which, in many cases, is just to preserve a QTIP plan from defeat by a disaffected surviving spouse. These alternatives raise the issue of how high a price a client is willing to pay, particularly in terms of how much control or enjoyment the client is willing to relinquish, to construct a plan that accomplishes more certain results.

2. *Pre- or Postnuptial Agreement*

A testator may minimize a surviving spouse's entitlement by an agreement with the spouse, executed before or after marriage. Although prenuptial agreements are more common, postnuptial agreements also can be valid under state law if supported by proper consideration, and no distinction is made here between the two.[196] For convenience, both are referred to merely as spousal agreements.[197] Under the Uniform Premarital Agreement Act and the 2008 version of UPC § 2-213, a surviving spouse's waiver of the elective share is enforceable[198] unless the spouse proves that execution of the agreement was not voluntary or that it was unconscionable when it was executed and (1) before execution the spouse was not provided with a "fair and reasonable disclosure of the property or financial obligations of the decedent," (2) did not "voluntarily and expressly waive, in writing, any right to disclosure" of that information, and (3) did not and reasonably could not have "an adequate knowledge" of that information.[199]

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[193] *In re Estate of Mocny*, 630 N.E.2d 87 (Ill. App. Ct. 1993).

[194] 630 N.E.2d at 91. *See also Payne v. River Forest State Bank & Trust Co.*, 401 N.E.2d 1229 (Ill. App. Ct. 1980).

[195] See VI, A, 5, below, regarding the use of offshore asset protection trusts, which also constitutes an unnecessary degree of planning given that domestic trusts that do not entail excessive retained control generally are immune to spousal challenge in the vast majority of American jurisdictions.

[196] See the 2008 version of UPC § 2-213 (enumerated as UPC § 2-204 prior to technical amendments that reorganized the Code in 1993 and as UPC § 2-207 between 1993 and 2008), which also makes no distinction. Although it embraces the Uniform Premarital Agreement Act standards of enforceability, it is not limited only to prenuptial agreements. The spousal annuity requirements of ERISA § 401(a)(11) cannot be waived by a prenuptial agreement and, in that respect, a distinction between prenuptial and postnuptial agreements is relevant. *See* Regs. § 1.401(a)-20, Q&A 28; *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992); *Zinn v. Donaldson Co. Salaried Employees Retirement Savings Plan*, 799 F. Supp. 69 (D. Minn. 1992). *Contra*, *In re Estate of Hopkins*, 574 N.E.2d 230 (Ill. App. Ct. 1991). Indeed, ERISA § 417(a)(4)(A) may operate to require renewal of a waiver within 90 days of the participant reaching the annuity starting date.

[197] Terminology can be a problem in this arena, as illustrated by just the following title: Smith, "The Unique Agreements: Premarital and Marital Agreements, Their Impact Upon Estate Planning, and Proposed Solutions to Problems Arising at Death," 28 *Idaho L. Rev.* 833 (1992), in which postnuptial is replaced by "Marital," which is the author's antithesis to premarital, and "Unique" is said to be appropriate because the parties are not bargaining at arm's length (which is not universally true).

[198] *See* Springs & Bruce, "Marital Agreements: Uses, Techniques, and Tax Ramifications in the Estate Planning Context," 21 *U Miami Inst. Est. Plan.* ¶700 (1987); Davis, "Till Death Do Us Part: Antenuptial Agreements Concerning Wills and Estates," 8 *Prob. L.J.* 301 (1988); Younger, "Perspectives on Antenuptial Agreements," 40 *Rutgers L. Rev.* 1059 (1988); Melbinger & Melbinger, "How to Allocate Pension Benefits in Prenuptial Agreements," 125 *Trusts & Estates* 26 (July 1988); Zaritsky, "Attack of the Surviving Spouse: The Evolving Problems of the Elective Share," 23 *U Miami Inst. Est. Plan.* ¶501.2E (1989) (suggesting that postnuptial agreement might be desirable and preferable to marital deduction planning under § 2056A in context of Qualified Domestic Trust involving surviving spouse who is not U.S. citizen, in generating § 2053 deduction for payments made under agreement that satisfies requirements of § 2516).

In re Estate of Johnson, 452 P.2d 286 (Kan. 1969), held that the testator's failure to comply with the spousal agreement did not give the surviving spouse the option to reject the agreement to instead elect against the testator's will to claim an entitlement larger than the share specified under the spousal agreement. *In re Estate of Anderson*, 552 N.E.2d 429 (Ill. App. Ct. 1990), involved a spousal agreement that failed to address the spouse's rights to insurance provided by the federal government. The default beneficiary under the insurance contract and federal law alike was the surviving spouse, but the decedent's executors successfully argued that the spousal agreement established the spouse's entire entitlement; therefore, assets, such as insurance, proceeds not allocated to the spouse were the estate's entitlement.

[199] Uniform Premarital Agreement Act § 6, 9C U.L.A. 48 (2001), is the operative provision, making an agreement unenforceable if a party (a) did not execute it voluntarily, or (b) all three conditions are met, in which case it is unenforceable if it also is unconscionable (which § 6(c) specifies is a question of law). *See Ruzic v. Ruzic*, 549 So. 2d 72 (Ala. 1989), holding that fair disclosure exists if the waiving party received adequate consideration or competent independent representation. The consideration in *Ruzic* was marriage, which was deemed adequate, and the waiving party instigated the agreement and sought the assistance of professional advisors in the process. Under § 2 of the Uniform Premarital Agreement Act, a premarital agreement "is enforceable

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Absent a divorce and property settlement agreement meeting the requirements of § 2516, for tax purposes a surviving spouse's voluntary relinquishment of marital rights (such as the elective share) in exchange for a predetermined testamentary transfer fails to meet the requirements of § 2043(b). Therefore, it does not constitute § 2053(c)(1)(A) full and adequate consideration in money or money's worth. As a result, payment does not permit a § 2053(a)(3) deduction for the value of the surviving spouse's claim under the agreement against the testator's estate.[200] Nevertheless, because even a prenuptial agreement is not enforceable until the parties marry,[201] property transferred in satisfaction of the obligations created by spousal agreements ought to qualify for the §§ 2056 and 2523 estate and gift tax marital deductions,[202] provided that the parties remain married — which is the presumption in the context of this treatment of the elective share.

3. Completed No-Strings-Attached Gifts

A second viable alternative (of limited utility in many cases) is for the client to make completed no-strings-attached gifts and live for whatever period of time is required under state law to avoid counting those gifts in any augmented probate estate computation.[203] Excepting for notions of fraud on the marital property (a vague notion because the terminology is used imprecisely),[204] gifting is effective to work a disinheritance of the surviving spouse. But, gifting frequently is not viable for the client and it usually would preclude Medicaid qualification for a period of time,[205] which may be inappropriate if qualifying the surviving spouse for Medicaid is a rationale for disinheritance planning.

4. Change Domicile

A third alternative for a client who wants to minimize the entitlement of a surviving spouse is to change domicile to a jurisdiction that does not support the elective share. Because domiciliary law typically governs a surviving spouse's entitlement, regardless of the location of the decedent's property, this technique is most likely to generate the protection sought by a client. For example, the 2008 version of UPC § 2-202(d) provides that "[t]he right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death."

Essentially like the Uniform Probate Code, some states provide that the local law right of election is unavailable to the surviving spouse of a nondomiciliary decedent,[206] meaning that a decedent can leave property behind in an old state of residence, establish a new domicile in a state that is not favorable to the surviving spouse, and effectively disfranchise the surviving spouse.[207] Furthermore, and strange as it may seem, it is the law in some states that a decedent who is or becomes domiciled elsewhere may own property that is not subject to the law of the situs, notwithstanding that it also is not subject to the law of the decedent's new domicile (for example, because it is realty, although local law may vary about the reach of the elective share statute).[208]

Among the most viable jurisdictions for this purpose are Georgia and any of the community property jurisdictions that do not embrace the notion of "quasi-community property," because none of them provide an elective share for a surviving spouse. To illustrate, assume a married decedent retired and moved from Illinois (which has an elective share of one-third), to Arizona, which is a community property state that does not apply quasi-community property at death. At the time, the decedent owned $1,400,000 in separate property. While living in Arizona, the decedent earned another $100,000 of community property prior to death. With an estate of $1.5 million, the decedent's surviving spouse would receive only a community property half share of the $100,000 and none of the accumulation from the years of their marriage in Illinois. Indeed, if the

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without consideration," but the Comment to § 2 clarifies that "marriage is a prerequisite for the effectiveness of a premarital agreement under this Act," meaning that the Act has no application to a couple that cohabits without benefit of marriage.

[200] *See* §§ 2043(b)(1), 2053(e); *Ellman Est. v. Comr.*, 59 T.C. 367 (1972); *Rubin Est. v. Comr.*, 57 T.C. 817 (1972), *aff'd*, 478 F.2d 1399 (3d Cir. 1973); *Myers Est. v. Comr.*, 27 T.C.M. 975 (1968); *Sutton v. Comr.*, 32 T.C.M. 982 (1973), *aff'd*, 535 F.2d 254 (4th Cir. 1974) (all denying § 2053(a)(3) deduction for claim by surviving spouse against estate to postmortem annuity payable pursuant to prenuptial agreement and, because predating QTIP marital deduction, also denying § 2056 marital deduction). See also Regs. § 25.2512-8, holding that the waiver of marital rights also does not constitute consideration for gift tax purposes, unless the requirements of § 2516 are met.

In *Carli Est. v. Comr.*, 84 T.C. 649 (1985), a § 2053(a)(3) deduction was allowed and § 2043 consideration was deemed to support the agreement because the surviving spouse relinquished rights (although not all to the testator) other than marital property rights under state law.

[201] *See* Rev. Rul. 69-347, 1969-1 C.B. 227.

[202] *See Cline Est. v. Comr.*, 43 T.C.M. 607 (1982); Rev. Rul. 68-271, 1968-1 C.B. 409 (spousal agreement required decedent's estate to distribute specified amount to surviving spouse; even absent bequest, § 2056(e) (now § 2056(c)) passing requirement was deemed met with respect to transfers made pursuant to that obligation); Rev. Rul. 54-446, 1954-2 C.B. 303. An exception to this marital deduction entitlement could apply if the agreement calls for each spouse to execute a mutual will, which imposes an obligation on the surviving spouse that is deemed to disqualify the marital deduction. *See* Casner & Pennell, *Estate Planning* § 3.7.1 (6th ed. 2010).

[203] E.g., two years under UPC § 2-205(3)(C).

[204] See VI, A, 7, below. An example of a fraudulent inter vivos transfer is *Kettler v. Security Nat'l Bank*, 805 N.W.2d 817 (Iowa Ct. App. 2011), in which the husband withdrew the entire balance of a joint tenancy bank account and placed the funds in his sole name so as to preclude his incompetent wife from acquiring the entire fund by survivorship, which would pass through her estate to heirs who unsuccessfully sought to have him declared incompetent. Although he had his wife's durable power of attorney, his action was regarded as a conversion of the wife's presumed proportional interest in the joint account, which allowed her to recover a share of the withdrawn fund, as if the husband had partitioned the tenancy and then transferred only his separate share.

[205] See the Medicaid spenddown and spousal community resource rules in 42 USC § 1396p(c).

[206] *See, e.g.*, N.Y. Est. Powers & Trusts L. § 5-1.1-A(c)(6) (elective share "is not available to the spouse of a decedent who was not domiciled in this state at the time of death" unless decedent affirmatively elected to have state elective share provision apply).

[207] See *In re Estate of Schwarzenberger*, 626 N.Y.S.2d 229 (1995), in which the decedent successfully changed domicile from New York to Florida by purchasing a Florida residence, acquiring a Florida drivers license, registering to vote in Florida, and signing a Declaration of Domicile declaring Florida as the decedent's domicile "to the exclusion of all others." In so doing, the decedent effectively prevented the surviving spouse from asserting an elective share with respect to assets that remained subject to New York law.

[208] *See In re Estate of Rhoades*, 607 N.Y.S.2d 893 (Sup. Ct. 1994) (decedent moved to Florida, leaving real property in New York that Florida law did not consider with respect to rights of surviving spouse and that New York court regarded as immune to claim of elective share), which expressly confirmed that decedents who want to disinherit surviving spouses may simply become domiciliaries of other states and execute wills disinheriting their spouses.

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decedent earned the $100,000 as separate property in Arizona, the surviving spouse would receive nothing.

The surviving spouse would have received $500,000 if there had been no move and the decedent had died in Illinois with $1.5 million. Arizona, New Mexico, and Texas embrace quasi-community property for divorce only, but not at death.[209] Nevada appears not to embrace quasi-community property notions at all. But, California, Idaho, Louisiana, Washington, and Wisconsin all appear to have quasi-community property at death.[210] Because this is a moving target and state laws can change, it makes sense to consider carefully all aspects of a potential move to any of the nine community property states. Further, this is not planning that is viable for the masses: a change of domicile is a major decision that many clients simply cannot or will not consider.

5. *Settle Wealth in a Favorable Jurisdiction*

A similar, but less dramatic, alternative is to settle the client's wealth in a jurisdiction that denies legislative protections under its own law to the surviving spouse. That is, in most states the law of the decedent's domicile governs, not the law of the situs of property.[211] So, if domiciliary law does not reach nondomiciliary sited property, it may be effective to invest in property situated in such a foreign state, essentially letting this wealth fall in a crack between the statutory coverage of the domiciliary and the situs states. This approach only applies, however, if domiciliary law does *not* reach nondomiciliary property.

Unrelated to the conflict of laws coordination of various state law elective share entitlements, an individual also could move wealth to an offshore asset protection haven, which entails the same form of planning considered in anticipation of other creditor claims. It remains to be seen whether this planning successfully precludes creditor claims in general, and there appears to be no cases that involve the claim of surviving spouse against such an arrangement.[212]

6. *Invest in Treasury Obligations*

In this last regard, New York law raises an interesting opportunity that should exist everywhere with respect to United States savings bonds and Treasury bills, which are exempted from a surviving spouse's challenge because of a perceived constitutional mandate. The exclusion of United States savings bonds under New York law[213] is based on the notion that to do otherwise would violate the United States Constitution[214] because the Treasury Direct Book-Entry Securities System[215] (which treats Treasury bills and savings bonds alike) specifies that "[i]f a security is registered in beneficiary form or a form which provides for a right of survivorship, upon the death of an owner, the beneficiary or survivor shall be the sole and absolute owner, notwithstanding any purported testamentary disposition by the decedent and notwithstanding any State or other law to the contrary."[216] In essence, the supremacy of federal law pre-empts state elective share rights with respect to these assets.

If it is valid, the theory underlying New York's statute ought to apply everywhere. But, if the state of the decedent's domicile does not have similar legislation, it might be appropriate (and less risky) to purchase Treasuries and settle them in a trust or other account subject to New York jurisdiction and New York law, effectively disfranchising a surviving spouse.[217]

7. *No Augmentation*

Various states exempt other specified forms of property, with variations among them that are impractical to summarize. Over 40% of the states have no form of augmenting the probate estate against which the elective share is computed, meaning

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[209] See I, B, 4, above.

[210] Cal. Prob. Code § 101; Idaho Code § 15-2-201; La. Civ. Code Ann. art. 3526; Wash. Rev. Code Ann. § 26.16.250; Wis. Stat. §§ 851.055 (using the term "deferred marital property").

[211] As itemized in Schoenblum, *2010 Multistate Guide to Estate Planning* Table 6.03, Part 2 (last question) (2009), and by question 2(b) of *Study 10: Surviving Spouse's Rights to Share in Deceased Spouse's Estate*, published by the American College of Trust and Estate Counsel (ACTEC), available electronically at http://www.actec.org/resources/publications/studies/Study10.pdf, as many as 30 states appear to provide for the law of a nonresident decedent's domicile to govern the surviving spouse's rights in property located in those 30 states, and then seven other jurisdictions appear to provide that their law does *not* apply to out-of-state property. The overlap of those states is where the gap in coverage occurs. Thus, ownership of property situated in one of the 30 states by a decedent domiciled in one of the seven would allow the property to avoid the reach of a surviving spouse. *See, e.g.*, UPC § 2-202(d).

In this situation, it is critical to very carefully verify information because the sources indicate some doubt about the rules in various jurisdictions; the coverage is only as good as the individual reporter for a given state and all of the results are subject to the possibility that the law has changed. Also note that the designation of the 30 states almost always is statutory (which is why those authorities are listed), but the seven states are classified nearly without exception on the basis of case law.

Among the 30 states listed are Ala. Code § 43-8-70(a), (c); Alaska Stat. § 13.12.202(d); Cal. Prob. Code § 120; Colo. Rev. Stat. § 15-11-201(4); Conn. Gen. Stat. § 45a-287(c); Del. Code Ann. tit. 12, § 901(b); Fla. Stat. § 732.201; Haw. Rev. Stat. § 560:2-202(d); Idaho Code § 15-2-209; 755 Ill. Comp. Stat. 5/2-8; Kan. Stat. §§ 59-6a202(d), 59-806(2); Me. Rev. Stat. tit. 18A, § 2-201; Mass. (case law only); Mich. Comp. Laws § 700.2202(6); Minn. Stat. § 524.2-202(d); Mo. Rev. Stat. § 473.675; Mont. Code Ann. § 72-2-221(4); Neb. Rev. Stat. § 30-2313(b); N.J. Stat. § 3B:8-2; N.Y. Est. Powers & Trusts L. § 5-1.1-A(c)(6); N.D. Cent. Code § 30.1-05-01(4); Okla. (case law only); Ore. Rev. Stat. § 114.600(2); 20 Pa. Cons. Stat. Ann. § 2202; S.C. Code Ann. § 62-2-201(b); S.D. Codified Laws § 29A-2-202(d); Utah Code Ann. § 75-2-202(4); Va. Code Ann. § 64.1-13.B; W. Va. Code § 42-3-1(c); and Wyo. Stat. § 2-5-101(b). Connecticut and New York are unusual in providing that their law *will* apply instead of the law of the decedent's domicile, but only if the decedent's will calls for that result, meaning that if Connecticut or New York law otherwise is attractive, the decedent may become subject to that law.

The seven jurisdictions in which it appears that situs law governs are Arkansas, District of Columbia, Florida, Illinois, Louisiana, New Hampshire, and Virginia. In another 23 states there appears to be no law on the question of whether situs law governs.

[212] For a discussion of offshore asset protection planning, see 810 T.M., *Asset Protection Planning*.

[213] N.Y. Est. Powers & Trusts L § 5-1.1(b)(2)(C).

[214] See *Free v. Bland*, 369 U.S. 663 (1962), and *In re Estate of Scheiner*, 535 N.Y.S.2d 920 (1988), which deemed this exclusion to apply to Treasury bills as well.

[215] 31 CFR Part 357 (Treasury Direct).

[216] 31 CFR § 357.22(b)(1).

[217] Curiously, N.Y. Est. Powers & Trusts L. § 5-1.1-A(b)(3) purports to include United States obligations in its augmented estate computation and a savings clause in § 5-1.1-A(b)(7) places an obligation on any "person who, not for value, received that . . . item of property . . . to return to the surviving spouse . . . the value of that item of property." See Practice Commentaries to N.Y. Est. Powers & Trusts L. § 5-1.1-A, explaining that the legislation is an effort to do by indirection what *Free* indicated the state could not do directly, by forcing the recipient of exempt Treasuries to restore similar value to the estate. This statute may not be valid, but even if it is effective in New York it should not apply to a nondomiciliary. See VI, A, 4, above.

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that virtually any form of nonprobate settlement potentially avoids the surviving spouse's claim.[218] In addition, some states (such as Alabama and South Carolina) are Uniform Probate Code jurisdictions that intentionally did not embrace the augmented estate concept when they enacted the balance of the Code, which gives a pretty strong indication that augmentation should not be imposed by a court.[219] Again, it is critical to verify these results because summaries of the law can be inaccurate when written, certain exceptions may apply,[220] or the law may change as it develops over time.

8. *Exploit 1990 Uniform Probate Code Augmented Probate Estate Gaps*

In addition to those states that do not augment the probate estate — or do so incompletely — even the most comprehensive statutory augmentation under the new Uniform Probate Code (UPC) has certain gaps that can be exploited. For example, UPC § 2-205(1)(D) still does not reach the proceeds of insurance received by an irrevocable life insurance trust if UPC § 2-205(2)(A) (transfer with a retained income interest) is not applicable and the two-year gift rule in UPC § 2-205(3) does not apply.

Thus, consider creation of an irrevocable life insurance trust and transfer of existing policies to it more than two years before death, or creation at any time and acquisition of insurance by the trustee in the first instance, in either case followed by payment of premiums by the decedent. Only the premium payments made within two years of death will be subject to augmentation, not the full, or even a percentage of, the proceeds of the policy. In addition, transfers more than two years before death as to which the decedent retained no strings also are excluded, which creates another viable avenue if gifting that long before death is not too high a price to pay to restrict the entitlement of a surviving spouse. Similarly, annual exclusion gifts are not subject to the augmented estate, even if made on the decedent's death bed.[221]

Another exception that may be administratively wise (because it avoids the need to trace consideration), provides that only a fractional share of jointly held property is brought back into the decedent's augmented probate estate by UPC § 2-205(1)(B), regardless of the source of consideration for its acquisition. Thus, if the two year rule does not apply, a decedent may provide 100% of the consideration to acquire joint tenancy property with a third party and only 50% of the value would be subject to the surviving spouse's claim. Creation with even more concurrent owners would leave even less for a surviving spouse. An exception to this may apply, however, with respect to joint tenancy bank accounts or other financial assets[222] as to which contribution is pertinent because ownership does not shift prior to a withdrawal by a noncontributing joint tenant.

There also may be an opportunity under UPC § 2-208(a)(i) to the extent a nonprobate transfer is deemed to be made for full and adequate consideration in money or money's worth but works a valuation reduction. For example, a wealth transfer opportunity may exist if the decedent is willing to incur a gift tax under § 2701 or § 2702 in an estate freezing transaction that might be deemed to entail full and adequate consideration for state law purposes (such as a private annuity), notwithstanding that it would not be deemed to entail full and adequate consideration for federal wealth transfer tax purposes.

9. *Exploit Pre-1990 Uniform Probate Code Gaps*

The pre-1990 version of the Uniform Probate Code (UPC) augmented probate estate concept did not reach certain assets. Most specifically, UPC § 2-202(1) did not reach life insurance proceeds,[223] retirement benefits, and certain annuities. Nor did the 1969 version of the Uniform Probate Code preclude dispositions within close proximity of death of interests that otherwise would be subject to the augmented estate if still held at death. This is useful for planning purposes because many of the

[218] See III, above, for a list of state statutes.

[219] *See Russell v. Russell*, 758 So. 2d 533 (Ala. 1999), stating that "in enacting its Probate Code in 1982, Alabama rejected the UPC's augmented-estate concept," and S.C. Laws § 62-2-201, which includes the word "probate" before "estate" in defining the property as to which the surviving spouse's elective share will apply, thereby confirming that augmentation does not apply. The Reporter's Comment to S.C. Laws § 62-2-202 states that the augmented probate estate concept was rejected as "too complex" and confirms that the surviving spouse's protection "does not take into account" will substitutes; instead, it notes that "judicial doctrines identifying certain transfers to be 'illusory' or to be a 'fraud' of the spouse's share have evolved in some jurisdictions to offset the problems of will substitutes," all without indicating whether the intent in South Carolina is to adopt the same principles. As discussed by the court in *Seifert v. Southern Nat'l Bank*, 409 S.E.2d 337 (S.C. 1991), this provision literally compelled the court to find the trust in issue to be invalid, subjecting trust assets to probate and, thus, to the spouse's elective share entitlement.

See also Dreher v. Dreher, 634 S.E.2d 646 (S.C. 2006) (detailing history of South Carolina's treatment of revocable inter vivos trusts as illusory with respect to elective share, but state's failure otherwise to augment probate estate); *Traub v. Zlatkiss*, 559 So.2d 443 (Fla. Dist. Ct. App. 1996), *citing In re Solnik*, 401 So.2d 896 (Fla. Dist. Ct. App. 1981) (recognizing Florida's then applicable (but since changed) rejection of augmented estate concept in Fla. Stat. § 732.205, thus allowing disinheritance of surviving spouse); *In re Estate of George*, 265 P.3d 222 (Wyo. 2011), and *In re Estate of Soltis*, 513 N.W.2d 148 (Mich. Ct. App. 1994) (which regarded it as significant that, at that time, legislature had adopted Uniform Probate Code without augmented estate concept, and rejected surviving spouse's effort to reach trust assets).

[220] For example, American College of Trust and Estate Counsel (ACTEC), *Study 10: Surviving Spouse's Rights to Share in Deceased Spouse's Estate*, available electronically at http://www.actec.org/resources/publications/studies/Study10.pdf, lists 13 jurisdictions that allegedly have an exception for any transfer that constitutes a fraud on the spousal right. Included in that list (and representative authority given) are the District of Columbia (*Windsor v. Leonard*, 475 F.2d 932 (D.C. Cir. 1973)), Illinois (755 Ill. Comp. Stat. 25/1), Maryland (*Knell v. Price*, 569 A.2d 636 (Md. 1999)), Massachusetts (*Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984)), Michigan (Mich. Comp. Laws §§ 700.2202(2)(b) and 700.3710), Missouri (Mo. Rev. Stat. § 473.160, which does not appear to support the fraud exception), New Hampshire (*Hanke v. Hanke*, 459 A.2d 246 (N.H. 1983)), North Carolina (*Moore v. Jones*, 261 S.E.2d 289 (N.C. 1980)), Oklahoma (*Thomas v. Bank of Oklahoma*, 684 P.2d 553 (Okla. 1984)), Rhode Island (*Pezza v. Pezza*, 690 A.2d 345 (R.I. 1997) (note that *Barrett v. Barrett*, 894 A.2d 891 (R.I. 2006), held that *Pezza* was overruled by statute), South Carolina (*Seifert v. Southern Nat'l Bank*, 409 S.E.2d 337 (S.C. 1991)), Tennessee (Tenn. Code § 31-1-105), and Vermont (14 Vt. Stat. Ann. § 321). Because Illinois generally is a haven for inter vivos trusts that disinherit the surviving spouse, this "fraud on the spouse" — whatever that means under local jurisprudence — exception must be evaluated carefully as well.

[221] Gifts that qualify for the § 2503(e) education and medical expense payments exclusion, however, are not similarly exempted.

[222] As provided in UPC § 6-211 and illustrated in Example 6 of the Comment to UPC § 2-205.

[223] *See also In re Will of Boyd*, 613 N.Y.S.2d 330 (Surr. Ct. 1994), and Supplementary Practice Commentary to N.Y. Est. Powers & Trusts L. § 5-1.1-A, which make clear that New York's elective share augmented estate concept also does not reach life insurance because it is "not a testamentary substitute."

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existing UPC states (in addition to those states noted in VI, A, 7, above, that have embraced the UPC without adopting the augmented probate estate rules at all) have not yet changed their law to adopt the upgraded augmented probate estate concept.

10. Totten Trusts

With respect to the challenge of a surviving spouse, tentative or "Totten" trusts arguably present special equities not necessarily subject to rules governing garden-variety trusts in general. "In the case of a tentative trust the depositor reserves such complete control that it would seem that, even if the trust is valid as against the depositor's personal representative, it should not be valid as against a surviving spouse."[224] Because these savings account deposit arrangements are such thin trusts, courts that would validate other trusts as against a surviving spouse's elective share challenge have regarded the tentative trust as invalid (meanwhile, courts that would permit a surviving spouse's challenge as against a revocable inter vivos trust also will permit it as against tentative trusts).[225]

According to *In re Estate of Jeruzal,*[226] however, there are three differing positions that various courts have taken on this issue, only one of which being an "invalidation" of the Totten trust.[227] Some courts regard these tentative trusts as beyond the reach of the surviving spouse because they are no less valid than garden variety trusts and the decedent was not the trustee.[228] Most courts, however, regard these trusts as includible for purposes of computing the share of the surviving spouse, subject to invalidation only to the extent probate assets of the decedent are inadequate to satisfy the entire elective share (as inflated by this inclusion). Finally, the *Jeruzal* court opined that some courts might subject these trusts to the claim of a surviving spouse who otherwise would be impoverished.[229] Although the authorities are far from consistent, it seems prudent to suggest that more substantive nonprobate transfers than a Totten trust should be employed, if the object is to restrict a client's surviving spouse, because Totten trusts are less likely to withstand a spouse's challenge.

11. Satisfy Elective Share Entitlement in Ways the Testator Prefers

Even if state law will count nonprobate property in determining the surviving spouse's share, affirmative planning still may be advisable if state law counts the dispositions provided by the decedent first against the elective share entitlement of the surviving spouse. If some assets are more desirable than others, the decedent can require the spouse to accept the less desirable assets in partial satisfaction of the elective share just by making a bequest of them to the spouse.[230] For example, the client may choose to create a family limited partnership in which the limited partner interests are of little utility because of restrictions on transferability, participation, and liquidation. Assuming that those interests qualify for the federal estate tax marital deduction, they might be a perfect disposition to the surviving spouse in satisfaction of the elective share entitlement.[231]

In pre-1990 Uniform Probate Code states and in some other jurisdictions as well, this satisfaction approach also will count the discounted present value of a QTIP trust or other income interest against the elective share, and this entitlement could be quite substantial depending on the life expectancy of the surviving spouse, the applicable interest rate assumptions, and the method for computing the value of that income interest.[232] In a few states, a surviving spouse's entitlement in a trust is valued artificially at an even greater amount in satisfaction of

[224] Scott, Fratcher & Ascher, *Scott and Ascher on Trusts* § 8.3.5 (5th ed. 2006).

[225] *Compare*, *Johnson v. La Grange State Bank*, 383 N.E.2d 185 (Ill. 1978) (involving, in one of two consolidated cases, fully revocable inter vivos trust as to which decedent was trustee and, in other case, joint tenancy bank account, both of which were regarded as immune to challenge by surviving spouse), *with Montgomery v. Michaels*, 301 N.E.2d 465 (Ill. 1973), *In re Estate of Prusis*, 434 N.E.2d 443 (Ill. App. Ct. 1982), and *In re Estate of Mertes*, 340 N.E.2d 25 (Ill. App. Ct. 1975) (all involving and invalidating Totten trusts as against surviving spouse's challenge).

[226] 130 N.W.2d 473 (Minn. 1964).

[227] Cases are collected in Scott, Fratcher & Ascher, *Scott and Ascher on Trusts* § 8.3.5 (5th ed. 2006). *See, e.g.*, *Riggio v. Southwest Bank*, 815 S.W.2d 51 (Mo. Ct. App. 1991) (Illinois residents with Missouri bank account trusts), which also specified that the governing law is that which would be applied by the state where the deposit was made.

[228] *See, e.g.*, *Dalia v. Lawrence*, 627 A.2d 392 (Conn. 1993) (notwithstanding that decedent retained effective control until death, surviving spouse's challenge was rejected on ground that assets were not probate assets and identity of claimant should not matter if they are valid under state law in general).

[229] *Citing Whittington v. Whittington*, 106 A.2d 72 (Md. 1954) (dicta).

[230] *See, e.g.*, UPC §§ 2-206, 2-209(a) (bequests under will and nonprobate transfers to spouse are counted first against spouse in determining size of elective share). Under the pre-1990 version of § 2-209, a life estate in a trust benefiting the surviving spouse was valued arbitrarily at 50% of the fair market value of the trust corpus for purposes of computing its offset of the elective share. In addition, between 1975 and 1993, UPC § 2-207(a)(3) provided that property passing to the surviving spouse counted against the elective share even if the spouse disclaimed it. *See* Comment to UPC § 2-209. Today, there is no corresponding valuation presumption in UPC § 2-209, meaning that the parties must determine the appropriate reduction of the spouse's entitlement for an interest in trust that the spouse does not disclaim. Presumably, valuation is based on commonly accepted valuation principles. The UPC does not address the effect of a disclaimer, although, presumably, disclaimed property is not treated as passing to the spouse and, thus, does not count against the spouse's elective share.

Some states adopted the UPC early and have not amended these provisions. In those states, it appears that the decedent may satisfy the elective share with property that the decedent would prefer the spouse to receive.

By statute in some other states the value of a life estate, such as in a QTIP marital deduction trust, also is counted against the statutory share. *See* Ala. Code § 43-8-75(a); Fla. Stat. § 732.2095(2); Me. Rev. Stat. Ann. Tit. 18-A § 2-207(a); N.J. Rev. Stat. 3B:8-17; N.Y. Est. Powers & Trust L. § 5-1.1-A(a)(4)(B); N.C. Gen. Stat. §§ 30-3.3A, 8-46, 8-47; S.C. Code Ann. § 62-2-207(a); Tenn. Code § 31-4-101(c); Va. Code Ann. §§ 64.1-16.1.C.1, 64.1-16.2. *See also In re Estate of Myers*, 594 N.W.2d 563 (Neb. 1999) (adopting Treasury tables to value spouse's life estate in trust for purposes of satisfying UPC elective share); *Estate of Karnen*, 607 N.W.2d 32 (S.D. 2000) (adopting state unisex inheritance tax annuity tables to value spouse's life estate in trust for purposes of satisfying UPC elective share); *In re Estate of Finch*, 389 S.E.2d 126 (N.C. Ct. App. 1990) (testamentary QTIP trust, established by formula as that amount needed to preclude surviving spouse from being able to elect against testator's estate plan, was adequate to preclude spouse's election).

[231] Caution may be required in this endeavor in two respects. One is qualification for the marital deduction, although traditional concerns about income producing assets held in trust can be avoided if an outright gift of these interests would be acceptable. The other is the potential for conversion of realty into personalty and, with it, a change in the applicable spousal election entitlement and other rules surrounding this planning.

[232] *See, e.g.*, Ala. Code § 43-8-70(b)(3)a; Mo. Rev. Stat. § 474.163.2(l); N.C. Gen. Stat. § 30-3.3A (all providing that elective share is reduced by value of life estate granted to surviving spouse). Other states have more generic statutes providing that transfers to the spouse in general are counted against the elective share. *See, e.g.*, Del. Code Ann. tit. 12, § 901(a); N.J. Rev. Stat. § 3B:8-18; S.D. Codified Laws § 29A-2-209(a)(1) as interpreted by *Estate of Karnen*, 607 N.W.2d 32 (S.D. 2000) (commuted value of discretionary income interest in bypass trust); Va. Code Ann. §§ 64.1-16.1.C.1, 64.1-16.2.A; W. Va.

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the elective share. For example, under some state laws, all the spouse is entitled to receive is a life estate in a fraction of the decedent's wealth.[233] Under South Carolina law,[234] the elective share is deemed to be satisfied by the full value of the corpus of a trust that is QTIPable — even if the QTIP election is not made — and not just by the value of the spouse's income interest in that trust. Other states may have specific opportunities of a similar nature that the client may consider.

In most cases, it would be favorable to be in a state whose law provides that the spousal share first is satisfied with bequests under the decedent's will and to either use a trust or bequeath less desirable property to the spouse. Other states permit the spouse to take a portion of the estate free and clear. But, if the decedent chooses to be subject to the law of a state that gives the spouse the right to elect to take a fraction of the estate,[235] uninformed by the decedent's dispositions to the spouse (that is, if the spouse can reject all provisions in favor of an outright entitlement), the decedent may still succeed to some extent by putting the spouse to an equitable election.

Based on the principle that a testator has no right to bequeath property that the testator does not own (or does not have the power to appoint by will), equitable election puts the rightful owner of an asset to an election. The owner can dispute a will that attempts to dispose of the owner's property by denying the testator's ability to transfer that property. Alternatively, the owner can accept the will and, in the process, concede its validity for all purposes — including to dispose of the owner's property. In the context of planning in anticipation of the statutory share and an election by a disappointed surviving spouse, the technique can be used to provide a sufficient testamentary entitlement to the surviving spouse that the spouse will be loathe to relinquish in exchange for an elective share. Equitable election specifies that the spouse cannot have both.

To be effective, care is required to guarantee that an affirmative or intentional application of the doctrine cannot be questioned.[236] In addition, the will must dispose of all of the testator's property that otherwise might pass to the surviving spouse by intestacy or outside probate, as to which the doctrine does not apply.[237] Finally, the will should specify the alternative disposition of all property bequeathed to the spouse under the will if the doctrine is triggered by the spouse's decision to relinquish all benefits under the will and assert the right to an elective share.

As with the community property forced election estate planning technique, the trick is to make the provisions in the

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Code § 42-3-6(a)(2); Wis. Stat. § 861.06(2).

[233] *See, e.g.*, Conn. Gen. Stat. § 45a-436(a) (elective share limited to "a life estate of one-third in value of all the property passing under the will"); Mass. Gen. Laws ch. 191, § 15; R.I. Gen. Laws § 33-25-2(a) (life estate only in real property owned by decedent at death).

[234] S.C. Code Ann. § 62-2-207(a).

[235] In some jurisdictions, a surviving spouse who renounces the testator's will to claim a statutory elective share is entitled to a fractional share of each item in the estate against which the fractional share is computed, in which case planning to engineer satisfaction of the elective share is more difficult. *See, e.g.*, *Winters Nat'l Bank & Trust Co. v. Riffe*, 206 N.E.2d 212 (Ohio 1965) (testator created trust of specific stock for friend and business associate and bequeathed residue of estate to trust for surviving spouse, who renounced will and became entitled under state law to half of every asset in estate, leaving trust of specific stock reduced by half; court directing that specific stock be used only to extent other property was not adequate to satisfy spouse's entitlement).

Nassif v. Green, 18 A.3d 1018 (Md. Ct. Spec. App. 2011), involved two similar questions, one being whether distribution should be in cash or in kind, and the other being the proper date for valuation of the elective share. The court determined that the spouse's interest would fluctuate in value during the period of administration and rejected the estate's argument that distribution could be solely in cash. In essence, the surviving spouse was arguing for a share of appreciation that was generated during the period of administration, with which the court agreed, as if the spouse was entitled to a fraction of the estate rather than a pecuniary bequest. Cf. VII, D, below.

Sometimes, engineering is for tax minimization purposes. *See, e.g.*, *Florida Nat'l Bank v. U.S.*, 313 F. Supp. 1072 (M.D. Fla. 1970), *aff'd in part and rev'd in part*, 443 F.2d 467 (5th Cir. 1971) (government properly reduced estate's marital deduction to statutory percentage of total estate as valued for federal estate tax purposes and not value of specific items awarded in satisfaction of elective share, which had appreciated on applicable tax valuation date more than balance of estate and, therefore, exceeded that proportionate share of total estate value).

In re Estate of Hjersted, 135 P.3d 202 (Kan. Ct. App. 2006), *rev'd*, 175 P.3d 810 (Kan. 2008), involved creation of an FLP to hold corporate stock that was discounted for lack of marketability and that the court refused to further discount for valuation purposes in the context of the elective share, citing many estate tax valuation cases involving discount entity planning, stating that "[r]ecognition of discounting under these circumstances could encourage the creation of layers of illusory ownership for nonprobate transfers . . . in furtherance of a scheme to disinherit a spouse . . . counter to the legislative purpose of the Kansas spousal elective share statutes." Quaere whether the effect of discounts would be to cause a *larger* share of the entity to pass to the surviving spouse to make up the full elective share entitlement, thus giving the spouse a larger share of any distribution on termination of the entity. Reducing taxes through discounts presumably is not a relevant factor, unless the elective share is computed after tax, because equitable apportionment and the marital deduction mean that any tax reduction only benefits the nonmarital portion of the estate, which bears the burden of those taxes. See VII, C, below. In any event, on appeal, the court's denial of discounts to reflect entity restrictions was reversed and the case was remanded to the district court, which, as the fact finder, should weigh all elements in determining value for elective share purposes. *Id.*

[236] For example, *In re Estate of Hermann*, 864 N.E.2d 334 (Ind. 2007), involved a decedent's will that provided that the surviving spouse "shall receive the home in which we are living at the time of my death as a part of [the spouse's] one-half (1/2) of the residue of my estate." According to the court, this reflected the decedent's intent that the residuary estate be divided equally between the surviving spouse and the plaintiff-trustee and that the decedent's residence be included in the calculation, notwithstanding that it was owned as tenants by the entireties and passed automatically to the surviving spouse at the decedent's death. Rather than create an equitable election (as a purported disposition of the dwelling), the intent was deemed to merely consider the value of the dwelling in calculating the spouse's distributive share, without regard to whether it passed to the spouse under the will or otherwise.

[237] *See, e.g.*, *Waring v. Loring*, 504 N.E.2d 644 (Mass. 1987), involving the intestate distribution of a trust remainder that the testator failed to convey effectively. The will provided that its provisions were "in lieu of dower and all . . . statutory rights" of the testator's surviving spouse, and the issue was whether the surviving spouse was entitled to a share of the intestate remainder interest. The court rejected the contention that the will required the surviving spouse to elect to take under the will and relinquish all other rights in the testator's estate and instead held that it merely referred to the statutory elective rights available to a spouse and not to any other intestate entitlement that may come to the spouse. As a result, the surviving spouse was entitled to a share of the intestate property. The court conceded, however, that its decision was against the majority rule laid down by the few American courts that have considered the issue.

Bravo v. Sauter, 727 So. 2d 1103 (Fla. Ct. App. 1999), and *Carnahan v. Stallman*, 504 N.E.2d 1218 (Ohio Ct. App. 1986), both involved a surviving spouse who was the income beneficiary of an inter vivos trust created by the testator and whose election against the testator's will did not affect any rights under the trust, including the right to enjoy trust benefits in estate assets that poured over to the trust, because the doctrine of equitable election is limited to testamentary dispositions. To make equitable election applicable the testator should have created the trust by will, in which case the election would have precluded the spouse from benefiting under the trust in addition to taking the elective share, or should have provided, by explicit provision in the trust, that the spouse would be treated as predeceased if the spouse elected against the testator's will. Regarding the marital deduction aspects of such a condition, see VI, A, 15, below.

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will sufficiently attractive that the spouse will not renounce them in favor of a less desirable (although potentially more valuable) statutory share.[238]

To illustrate, imagine that a client's spouse lives with the client in a dwelling that they both favor. If the client owns the title, then an equitable election might include a bequest of their home to the spouse, with a requirement that the spouse not claim the elective share. The fair market values need to be close or the spouse will reject the election, although intangible values may make the bargain more compelling.

In states in which property bequeathed to the surviving spouse does not first satisfy the elective share, any benefits that the surviving spouse would have received under the will but instead elected to reject must be disposed of. In such a case, state law usually regards the spouse as predeceased and the normal lapse rules as being applicable. Because those results may be inappropriate, the testator's will should anticipate this issue by defining the alternate disposition that should apply if the spouse predeceases the testator or elects against the will. This issue may be particularly relevant if, for example, descendants of the spouse who are not descendants of the testator would receive benefits if the spouse predeceased the testator, but the testator would prefer them removed from the will entirely if the spouse instead makes the statutory election.[239]

In addition, equity may direct that benefits the spouse would have received under the will should be allocated to specific beneficiaries to compensate for their contribution to satisfaction of the elective share (especially if the abatement rules do not work properly). For example, if the spouse was income beneficiary of a trust that passes to designated remainder beneficiaries other than the residuary takers of the testator's will, the normal abatement rules might satisfy the spouse's elective share from the residue of the probate estate and the normal lapse rules might accelerate the remainder in that trust. This would give the trust remainder beneficiaries an unexpected windfall from the election, and the estate residuary beneficiaries would suffer for the election. In that case, the residuary beneficiaries appropriately might receive the value of the life estate the spouse renounced as compensation for their loss in satisfaction of the elective share. All of these issues are part of drafting a will in anticipation of abatement, with satisfaction of the statutory share of the surviving spouse being just one source of that problem.

12. *Direct that Elective Share Be Computed After Tax Payment*

If state law is not clear on the issue, an attempt can be made to minimize the surviving spouse's entitlement by directing that the elective share be computed after payment of wealth transfer taxes on the decedent's estate, effectively overriding any equitable apportionment regime under state law.[240] Even though the spouse's election against the will may be regarded as an election against all aspects of the decedent's estate plan, including any provision attempting to allocate taxes in a manner detrimental to the spouse,[241] this may be one of those "can't hurt to try" alternatives.

It also bears noting that not all jurisdictions embrace the concept of equitable apportionment. In a handful of states, the benefit of the marital deduction inures to the estate as a whole, not just to the surviving spouse. In these jurisdictions, it might be easier to allocate the tax burden to the spouse without raising issues of conflicting state policies.[242] A similar concept would be to allocate debts or expenses of administration to the elective share, again to the extent permissible under state law and depending on how the estate is defined for purposes of determining the size of the elective share.

13. *Become Subject to the 2008 Uniform Probate Code*

In a short-term marriage, it also may be desirable to minimize the surviving spouse's entitlement by becoming subject to the accrual share approach of the Uniform Probate Code. Because the marital property portion under UPC § 2-203 is based on the length of the marriage, it might be that changing domicile to be subject to the UPC — even with its augmented probate estate system — will be preferable to remaining in the decedent's home jurisdiction with a higher fixed share because the UPC accrued share is sufficiently small. This could be especially true if the decedent's home state elective share entitlement does not consider property the spouse already received from the decedent or that otherwise would constitute marital property as counting against the elective share, both of which are issues resolved favorably to the decedent by the UPC.

14. *If the Surviving Spouse Is Incompetent*

Becoming subject to the law of a Uniform Probate Code jurisdiction also might be desirable if the surviving spouse is incompetent because UPC § 2-212(c)(3) provides that the share of such a spouse shall be held in a custodial trust for the benefit of the spouse for life, with remainder back to the *decedent's* designated beneficiaries. Even better, the old UPC provided an elective share in such a case only if "necessary to provide adequate support" for the expected overlife of an incompetent surviving spouse. So, if the decedent provided adequate support for the survivor with a trust over which the survivor had no control, third parties acting on behalf of the survivor could not

[238] The forced election estate plan also may be desirable in a community property jurisdiction in which the decedent wants more control over both shares of the community. For example, the decedent could condition entitlement to a life estate in the decedent's share of the community on the surviving spouse subjecting the survivor's half of the community to the decedent's estate plan, including the disposition after the survivor's death. A drawback of this form of planning is that it may constitute a sale by the surviving spouse of the remainder interest, subject to § 2702. Similar planning could be attractive in a noncommunity property jurisdiction if trading a life estate in the decedent's wealth is a good bargain for the surviving spouse relinquishing control over the survivor's wealth after the survivor's death.

[239] Some state laws may accomplish this objective, but be cautious. UPC § 2-804(b) contains a revocation-upon-divorce rule and it treats provisions for the former spouse's relatives as revoked as well. But there is no counterpart in the event the spouse asserts the elective share. It might appear that there is no need for such a provision in a UPC state because those dispositions in favor of the spouse are applied in satisfaction of the spouse's entitlement. However, a decedent might not want the spouse's family to benefit after the spouse's interest terminates in such a case. Note that these sorts of issues could be compounded in states that have adopted part but not all of the UPC.

[240] *See* Kahn, "The Federal Estate Tax Burden Borne by a Dissenting Widow," 64 *Mich. L. Rev.* 1499 (1966).

[241] See VII, C, below.

[242] See *id.*

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make the election in hopes of increasing the survivor's estate (which they might take as heirs or beneficiaries).[243]

15. Draft in Anticipation of Trust Invalidity

Finally, in drafting inter vivos trusts that provide for a surviving spouse (but perhaps not in a manner that the spouse will regard as an acceptable alternative to the elective share) it pays to draft in anticipation of the trust being regarded as ineffective to disfranchise the surviving spouse. Under the law of many states, a surviving spouse is not required to relinquish nonprobate benefits when an election is made against the decedent's will.[244] Also, nonprobate benefits typically are not counted in determining the share of the decedent's property that the surviving spouse receives pursuant to such an election. As a result, if the client does not intend for the surviving spouse to receive an elective share plus enjoys benefits provided under an inter vivos trust or other nonprobate disposition, affirmative planning should condition the nonprobate transfers on the spouse not asserting the elective share. Thus, unless the state statute regards an electing spouse as having predeceased the decedent with respect to nonprobate transfers, the client may want to specify that the surviving spouse shall be treated as having predeceased if an elective share entitlement is asserted.

If an inter vivos trust does specify that the surviving spouse shall be treated as predeceased if an election against the decedent's will is made, the question then arises whether this provision (or a state law) terminating all rights of the surviving spouse constitutes the trust as a nondeductible terminable interest, even if the surviving spouse does not select the statutory elective share. If it did, then such a provision would be inappropriate and state law would need to be negated to preserve the federal estate tax marital deduction. Fortunately, this should not be necessary, because similar provisions have been held to be harmless for purposes of the marital deduction nondeductible terminable interest rule.[245]

Further, if the spouse *is* treated as predeceased, and this accelerates a remainder interest in the trust, then the drafter must consider whether acceleration will create problems because of the class closing rules. For example, if added members of a class of remainder beneficiaries are possible, acceleration will disfranchise those born or adopted after the spouse's election (i.e., the acceleration event). Delayed closing of such a class may be wise, but that would require an added provision to address distribution of income in the interim.

B. Postmortem Calculations

Any illustration of the operation of the inclusion and satisfaction rules in an elective share context requires a careful study of state law to determine the extent to which nonprobate transfers are subject to the right of election. This could occur due to calculation under a system of augmentation of the probate estate that includes the value of those transfers in determining the size of the elective share (but does not necessarily tap those transfers for satisfaction of the entitlement itself). Another possibility is that it could occur because nonprobate transfers can be defeated by the surviving spouse and actually treated as part of the probate estate.

A major difference between traditional state laws and the newest version of the UPC is that the economic partnership provisions of the UPC look at both nonprobate transfers by the decedent to third parties and transfers to the spouse. It also considers property already owned by the surviving spouse. The concept underlying the UPC is that a marital partnership should provide a share of the aggregate property of *both* spouses to the survivor, and it should count whatever the survivor already owns or receives by virtue of the decedent's death against that partnership share.

The following example begins as a UPC illustration, and then discusses how the results would differ under more traditional state laws (which are not necessarily detrimental to the surviving spouse).

Here is a simplified balance sheet for D (the first spouse to die) and S (the survivor):

[243] *See, e.g., In re Estate of Clarkson*, 226 N.W.2d 334 (Neb. 1975) (decedent provided for surviving spouse with marital deduction trust that granted general power of appointment that spouse would not be able to exercise, so effect was tantamount to QTIP marital trust, with remainder to decedent's children by former marriage; survivor's children by prior marriage successfully asserted elective share entitlement on behalf of survivor, notwithstanding that share held in trust and share they would receive were same amount (benefit was that they would receive corpus when spouse died)).

[244] *See, e.g., Bravo v. Sauter*, 727 So. 2d 1103 (Fla. Ct. App. 1999) (spouse who made election against estate plan to retain life estate in inter vivos trust); *Estate of Evers v. Comr.*, 57 T.C.M. 718 (1989) (Minnesota statute provided that spouse electing to take against will "also must elect to take against all conveyances within the scope of section Minn. Stat. § 525.213 of which the spouse is a beneficiary," which encompassed conveyances to third parties and away from spouse; surviving spouse's interest under right of survivorship in joint tenancy was not conveyance away from surviving spouse and, thus, was not one deemed described in Minn. Stat. § 525.213, although revocable trust that included third parties as beneficiaries would seem to be included, presumably making election against will also election against beneficial rights in revocable trust). *Editor's Note*: Minn. Stat. § 525.213 has since been repealed.

[245] *See* Regs. § 20.2056(c)-2(c). *See, e.g., Mackie v. Comr.*, 64 T.C. 308 (1975) (spousal election, required to perfect bequest under will); TAM 8727002 (spouse required to release all rights to contest decedent's will to perfect bequest under will).

In TAM 8735003 and PLRs 9233033, 9244020, 9036040, and 8936009, the interests passing to surviving spouses were not nondeductible terminable interests, notwithstanding that they were subject to the condition that the spouse not contest the decedent's will. Relying on *Mackie*, Regs. § 20.2056(c)-2(c), and Rev. Rul. 82-124, 1982-2 C.B. 215, the government determined that there is no substantive difference between a bequest that relates back to the testator's date of death and a spouse's election against a will, or between a surviving spouse who has a choice between accepting a testamentary bequest or challenging the provisions of the decedent's will to obtain an elective share because, in each case, the beneficiary has a choice between two groups of assets.

Changes and Analysis of New Developments appear in the front of this portfolio
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D

D's Net Probate Estate	1,000,000
Joint Tenancy with Third Party	400,000
Trust with General Power to Appoint	1,000,000

S

S's Net Probate Estate	200,000
ILIT with S as life beneficiary	2,000,000
Dwelling in S's sole name	600,00
S's Retirement Fund	1,000,000

- D's net probate estate is property owned in D's sole name at death, reduced by debts, claims, and expenses of administration. S's net probate estate is shorthand for wealth that would be included in S's probate estate at death, which is calculated here without guessing at expenses that might be incurred in administering S's estate.

- Regardless of whether the joint tenancy was created with D's funds or those of the surviving third party, UPC § 2-205(1)(B) considers the joint tenancy as D's property only to the extent of D's pro rata portion of its value. Thus, only $200,000 would enter into the calculation.

- The trust over which D has a general power of appointment may be includible in D's gross estate under § 2041(a)(2) for federal estate tax purposes, but that is not the key to its inclusion in the UPC augmented estate calculation. Instead, UPC § 2-205(1)(A) reflects the fact that D could have exercised the power to exert personal ownership or control over the trust assets. So, the general power makes it subject to augmentation, regardless of whether D exercised the power or whether that power caused estate tax inclusion to D. Note, however, that this applies only if the power was exercisable by D inter vivos. If this is a testamentary general power of appointment, the UPC § 2-205(1)(A) would *not* apply. Several states follow a federal estate tax inclusion approach to determine the size of D's estate for elective share purposes and would mimic this result to the extent federal law was applicable. In either case, the destination of the trust corpus after D's death is irrelevant, unless it passes to S and, thus, is deemed to satisfy a portion of S's entitlement (as discussed, below, with respect to the ILIT).

- Assume that the Irrevocable Life Insurance Trust (ILIT) was created by D, but not within two years before D's death, meaning that the two-year rule in UPC § 2-205(3)(B) is not applicable. Therefore, it is not subject to UPC § 2-205(1)(D), regardless of whether the insurance is subject to inclusion in D's gross estate for federal estate tax purposes under § 2042(2) (or perhaps by virtue of § 2035(a) because the transfer was within three years of D's death). This result would differ if state law followed a federal estate tax inclusion regime. UPC § 2-205(3)(C) might apply if D paid premiums for the insurance within the two-year period before D's death. In that case, the issue would be whether the premiums paid exceeded the § 2503(b) gift tax annual exclusion amount. In this case, the $2,000,000 of proceeds will be included in the calculation under UPC § 2-206(3) to the same extent that they are subject to UPC § 2-205 because the trust benefits S, meaning that the value of S's trust interest will be regarded as satisfying a portion of S's entitlement. The UPC does not establish how to determine the value assigned to S's beneficial interest in the trust. Thus, a determination of value must be made because S is not entitled to outright distribution of the full $2,000,000 of the insurance proceeds. It simply is not possible to state what that value might be. Some other state laws assign a value based on arbitrary criteria or formulas, typically depending on the degree of enjoyment granted to S in that trust.[246]

- The dwelling that S owns is included in the calculation under UPC § 2-207(1). S's retirement fund also is included by virtue of UPC § 2-207(a)(2), which essentially incorporates by reference UPC§ 2-205(2)(A).

Ignoring, for the sake of illustration only, the valuation uncertainty regarding the ILIT, assume in this case that the aggregate wealth of both D and S for UPC calculation purposes is $2,200,000 and $3,800,000, respectively. Also, for the sake of simplified illustration, assume that D and S were married for over 15 years, meaning that S's elective share under the UPC is half of the $6 million total of their respective properties. Again, depending on the value assigned to S's interest in the ILIT, S may already be treated as having more than a 50% share of that aggregate. If so, the UPC would deem S's share to be satisfied.

In a non-UPC jurisdiction, S's entitlement might be a portion (one-third would be the most common fraction, regardless of the length of their marriage) of D's net probate estate, and the rest of the assets shown might be ignored in the overall calculation. Assets owned by S almost certainly would not be included in any such calculation under the typical state law. Thus, the UPC result would disadvantage S in this case.

In this example, if S had died first, D would have been entitled to the same 50% interest ($3 million). Because D already owns $2,200,000 of their aggregate $6 million combined wealth, D would be entitled to only an additional $800,000. To satisfy that entitlement, UPC § 2-209(c) would require pro rata contribution from the probate and nonprobate beneficiaries of property includible in the augmented estate calculation, which may lead to an issue regarding enforcement of contribution from nonprobate takers. Under the traditional rules applicable in most states, the probate estate would be used first to satisfy any entitlement — which might result in full exhaustion of S's probate estate — and resort to nonprobate transfers would be considered, if at all, only to the extent the entire probate estate was inadequate.

State law must be consulted to evaluate the impact on these calculations if state or federal estate taxes were incurred on the estate of the first to die. In most jurisdictions, equitable apportionment would apply, meaning that the elective share would bear none of those taxes to the extent it generated a marital deduction in calculating those taxes. That is *not* the universal result, however, as noted in VII, C, below.

[246] *See, e.g.*, Fla. Stat. § 732.2095.

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