

## Introduction

Sherman Gordon died in 1974 at the age of twenty-eight, a victim of homicide. He had no will to cover his meager estate, which consisted only of a Plymouth worth about \$2,500. Sherman was survived by his infant daughter, Deta Mona, who lived with him, and by his parents and siblings. Under probate law then existing in Illinois, Sherman's parents and siblings received the vehicle and Deta Mona received nothing. Why? Because Deta Mona was *illegitimate* at a time when law and society preferred to ignore the existence of nonmarital children. Spurred on by the law's refusal to recognize her daughter, Deta Mona's mother challenged the Illinois law in a series of battles that eventually wound their way to the United States Supreme Court. Three years after Sherman's death, the Court ruled that the Illinois law was unconstitutional.<sup>1</sup>

The fight had just begun, but the Court sent a clear warning: probate laws could no longer turn a blind eye to a man's nonmarital children; as family structures evolved, states would have to adapt their inheritance laws to reflect at least some of those changes.

Census statistics show the rapid change in family structure that has occurred in recent decades. The March 2000 Census Population Survey indicates that the number of family households (households having at least two members related by marriage, blood, or adoption, one of whom is the

householder) declined from 81 percent in 1970 to 69 percent in 2000. That same report classifies 3.8 *million* households as *unmarried-partner* households—a number that is probably underrepresentative because some unmarried cohabitants are reluctant to identify themselves as such and because the number excludes unmarried couples who reside in a household headed by someone else. More than two-fifths of the reported unmarried-partner households include minor children. Like households headed by unmarried cohabitants, *single-parent* households also continue to increase. By 2000 the number of single-mother families had grown to 10 million, an increase of more than 300 percent since 1970; the number of single-father families had grown to 2 million, an increase of more than 500 percent since 1970. Many children in these families are children of divorce; others are nonmarital children like Deta Mona.<sup>2</sup>

Although Deta Mona's battle over a Plymouth profoundly affected modern inheritance law, it did not create detailed rules that a state must follow in developing probate laws for the evolving family. In fact, more than a quarter of a century after Deta Mona's case, states often still struggle with the inheritance claims of nonmarital children. Unfortunately, the inheritance rights of many other members of nontraditional families are even more uncertain.

The difficulty of establishing simple, efficient, and objective inheritance laws that accurately reflect the wide variety of modern family structures is formidable. Not surprisingly, many default inheritance rules in the United States still address only the traditional family. For example, despite the large number of unmarried cohabiting couples in long-term committed relationships, states rarely include the surviving partner in the default provisions of their inheritance laws.

What is surprising is that inheritance laws often fail to protect surviving members in the *traditional* family. Consider these statistics: in more than 20 percent of married households, the wife continues in the traditional homemaking role while her husband is the sole breadwinner for the family. Even when both spouses work, the husband on average continues to receive substantially more yearly pay than his wife—30 percent of the time he earns at least \$30,000 more. Mortality tables tell us that women generally outlive men; consequently, most of these

“poorer” wives are likely to survive their wealthier husbands. Compounding the gender disparity in spousal wealth and mortality rates, state property and inheritance laws often do not recognize the surviving spouse as an equal partner in the marriage. Rather, probate’s default rules may provide the widow with only a relatively small portion of her husband’s estate—even if she is poor and even if her homemaking efforts helped to make his earnings possible. Sad to say, probate laws can be so stingy that in some instances a widow would be better off financially if she had divorced her husband shortly before his death.<sup>3</sup>

The way inheritance laws develop to meet the needs of modern families concerns us all. Because legislators are often reluctant to change inheritance laws in the absence of judicial directive or public pressure, it is particularly important for the general population to become aware of the inadequacies of current probate statutes and to demand laws that better reflect the structure and needs of our families.<sup>4</sup>

## Traditional and Nontraditional Families

The term “traditional family” has no universally accepted definition.<sup>5</sup> Even the widely used term “nuclear family” means different things to different people. To examine inheritance laws for the nontraditional family, however, we must separate that family from its more traditional counterpart. In this book, the term *traditional* or *nuclear* family will refer to a family headed by a husband and wife (a) whose only children are their combined genetic offspring and (b) who have not used any form of reproductive technology to procreate. Well into the twentieth century, state legislatures designed inheritance laws using this family form as the almost exclusive paradigm.

I treat other forms of family, as relative newcomers to the world of probate law, as nontraditional. This nontraditional label reflects probate history, which often conflicts with modern societal attitudes about the family structure. While few people today consider a married couple and their adopted infant to be a particularly modern form of family, I treat them as nontraditional in this book. Why? Because the adoptive family is new to the world of default inheritance laws. True, some states began to permit formal adoption as early as the mid-nineteenth century.

Only in recent decades, however, have legislatures liberally included adopted children as potential heirs in the adoptive family. In contrast, many other families I discuss under the nontraditional label still seek both legal and *social* acceptance. Some of these families are welcomed in parts of the country but are, at best, only tolerated elsewhere. Gay and lesbian couples with or without children are an obvious example.

## Heirship

Like Deta Mona's father, many Americans die without a will, or *intestate*.<sup>6</sup> Each state has its own set of intestate succession statutes. Such statutes are default laws that govern the distribution of an intestate estate. Persons who receive the estate under intestate succession statutes are *heirs* of the dead person, who in legal lingo is called the *decedent*. The two principal questions intestacy statutes answer are "Who takes his stuff?" and "How much does she get?"<sup>7</sup>

Among the similarities that one finds in state intestacy laws, none is more important than the universal inclusion of the surviving spouse as a recipient of at least part of the intestate decedent's estate. Until very recently state legislatures also believed that an intestate decedent would inevitably want his descendants, or issue, to receive part of the estate along with his surviving spouse. Lately, however, legislatures in some states have begun to consider family structure in allocating the estate between the decedent's surviving spouse and children. Under this newer approach, if the decedent dies intestate survived by a spouse and children, and neither the decedent nor the surviving spouse has children by a third party, then the surviving spouse takes the entire estate of the decedent. In other words, the surviving spouse is the sole heir. The 1990 Uniform Probate Code (UPC)—an important set of model probate laws developed by top legal scholars that some states use in whole or part—employs this approach.

In developing intestate succession laws, the first goal of the state legislature is to determine how the *typical* person domiciled in the state would want his estate to be divided. Until the last decades of the twentieth century, "legitimate" family life for the typical person was divided into two parts, both tied to relationships of blood and marriage. The

pattern was something like this: during infancy and adolescence, our typical person lived within the family created by his *married* parents. As an adult, however, he created his own family by marrying and having children. Although legislatures recognized both families of the typical decedent, they always concluded that the typical decedent would want, first and foremost, to protect the family that he *created* or *chose*. This explains why the spouse and children (or their descendants) are the initial distributees under virtually all intestacy laws. Only once the laws have provided for the decedent's chosen family do they provide for the decedent's birth family—a family whose members include parents and siblings, nieces and nephews, grandparents and their offspring.<sup>8</sup>

By the mid-twentieth century, the adoptive family was an increasingly acknowledged variant of the created family. In response, state probate laws expanded to recognize the adoptive parent and adopted child as potential heirs from each other. Modern probate laws concerning adoption go much further and often provide that, for most (if not all) inheritance purposes, a legal adoption is the equivalent of the blood relationship typically connecting parent and child. Like the parent's biological child, the adopted child can inherit not only from the adoptive parent but also from the adoptive parent's relatives. By the last decades of the twentieth century, however, the number of American children available for adoption had declined. Nonmarital birth had become commonplace, and many unmarried parents who in former times might have placed their children for adoption chose instead to rear their children outside marriage. Deta Mona was one of these children. With its ruling in Deta Mona's case, the Supreme Court recognized a nonmarital child as part of a deceased parent's created family. States again began revising their probate laws, this time to account for nonmarital children like Deta Mona.

As the twenty-first century begins, state probate laws still frequently fail to recognize members of the nontraditional family outside the adoption or nonmarital child setting. The old, circumscribed view of family—based almost exclusively on marriage and blood relationships—still carries the day in probate law, although it is increasingly at odds with many forms of nontraditional families we now create. To further the intent of today's decedent, and to protect the family he creates, state

legislatures must eventually develop new indicators that—along with or apart from marriage and blood—will help identify membership in modern families and serve as the basis for more inclusive default inheritance rules.

## Some Practical Concerns

Probate rules should further the intent of the typical decedent to provide for his family. But probate rules should also be simple, objective, and efficient, and should provide consistent and predictable patterns of distribution. In light of these concerns, the reluctance of state legislatures to move far beyond ties of marriage and blood is understandable: spousal and blood relationships are usually easy to verify. Marriage decrees and birth certificates are still clear indicators of family ties in most instances. Moreover, to date the expansion of inheritance law to encompass adopted or nonmarital children has not seriously compromised the probate process, because adopted children can readily prove the parent-child relationship with adoption papers and nonmarital children often can prove the parent-child relationship with a paternity decree obtained during the decedent's lifetime.

In contrast, some survivors have no legal link to the decedent at his death. If the intestate decedent cohabited without marrying his significant other, did he create a new family? If so, at what point? When they moved in together? After six months of cohabitation? If a decedent is survived by a stepchild, should probate laws include the stepchild even though—unlike the adopted or nonmarital child—there was no legal parent-child relationship involved? Would most stepparents want their stepchildren to inherit the same as their “lawful” children? Does anyone know what most stepparents would want? After all, both Cinderella and the Brady Bunch boys had stepmoms, but the parent-child relationships in those two families were as different as night and day.

Instead of authorizing probate courts to make detailed, individualized—not to mention potentially messy and embarrassing—inquiries about the relationships of the decedent with survivors claiming to be part of his family, state legislatures rely on *objective rules* for determining membership within the decedent's created family. Under these

objective rules, probate courts can usually determine family membership immediately. Recent developments in two or three states indicate that state legislatures will continue to rely on such objective rules for determining family membership, even as the laws expand to include more nontraditional families. Admittedly, objective rules cannot fulfill the desires of every decedent; moreover, judges have some limited discretion even under current American probate law. So far, however, legislatures believe it is neither wise nor feasible to grant American probate judges the pervasive discretion to decide who is and who is not in the family for each estate that comes before them. Untempered judicial discretion could lead to wildly inconsistent and unpredictable outcomes, reducing public confidence in the probate process. Also, a discretionary system permitting individually tailored solutions would demand far more resources than does an objective system.

Like all laws, probate laws ultimately should promote and protect the state. Fortuitously, recognizing members of the decedent's created family as heirs has a stabilizing effect on family life and society as a whole, as those family members are also the people most likely to be dependent upon him. In the following chapters I posit that states can develop default probate laws that better reflect modern American families, without sacrificing the objectivity and efficiency we have come to rely on. Chapters 1 and 2 of the book discuss the inheritance rights of spouses and spouse-like partners. Probate laws have long included the surviving spouse, but even today states disagree substantially about the manner of her inclusion. Very few states include spouse-like partners in their basic inheritance schemes, but changing public attitudes will force legislatures to reconsider that exclusion in coming years. In Chapters 3 through 6, I examine inheritance laws relating to children. All states make the decedent's children his *potential* heirs, but in some respects our inheritance laws for children are much stingier than those in other parts of the world. Chapter 3 provides a discussion of children's inheritance rights generally. Chapters 4 and 5 focus more narrowly on the inheritance rights of nonmarital children and adopted children, the two principal areas in which probate laws have expanded beyond the blood-and-marriage connection. Chapter 6 examines inheritance problems that now or soon will arise for children conceived through reproductive

technology. In the conclusion to the book I discuss the overarching hurdles we face in adapting probate laws to meet the needs of evolving families. I also present some guiding principles that can help us meet these challenges.

Because the family has changed so rapidly in recent decades and is continuing to evolve, reasonable people can reach different conclusions on how to structure modern inheritance laws. Acknowledging this, I candidly admit that my recommendations often reflect a compromise among competing views. Yet for readers who stubbornly and unrealistically see the nuclear family as the only family worthy of probate inclusion, even these compromise positions will seem heretical. For readers who believe probate should define the family on a case-by-case basis—without regard to the constraints under which an efficient probate system must operate—the recommendations will be disappointingly conventional. However the reader views my suggestions, if the discussion here helps in some small way to stimulate thoughtful debate concerning inheritance laws for evolving families, then perhaps the book will have served a useful purpose.



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## Spouses

Country singer Conway Twitty—whose estate was probated under his real name, Harold Jenkins—died in 1993, leaving everything by will to his mother and his four adult children from a prior marriage. Twitty’s will left nothing to Dolores, his wife. Dolores, however, claimed part of Twitty’s estate. When estate litigation came before the Tennessee Court of Appeals, the court did not inquire why Twitty had excluded Dolores from his bounty. The court showed no interest in Dolores’s own wealth or her need for a part of the Twitty estate. Such inquiries were irrelevant: Dolores was Twitty’s surviving spouse, and Tennessee law gives a surviving spouse an automatic right to part of the deceased spouse’s estate. Dolores walked away with one-third of the estate.<sup>1</sup>

All states have default inheritance provisions that include the surviving spouse in some fashion. Moreover, the marriage does not have to last long for the surviving spouse’s inheritance rights to kick in. In 1976 Robert and Naomi had just said “I do” and exchanged vows in a Presbyterian church when Robert slumped to the floor and died. Four days later Naomi sought to administer Robert’s estate, but someone questioned her status as a surviving spouse. A Pennsylvania court concluded that, because the couple had exchanged vows, the marital contract was complete even if the minister had not pronounced them husband and wife before Robert’s death. Naomi was entitled to the preferential treatment

probate law gives a surviving spouse, including the right to administer Robert's estate.<sup>2</sup>

In most states a surviving spouse receives "top billing" in probate even if she is estranged from the decedent at his death, regardless of the reason for the estrangement. For example, Kenzie married Mary in 1981 and died in 1992. Kenzie's will, executed in 1984, left the bulk of his estate to his son from a prior marriage. When Mary sought her spousal portion of the estate, Kenzie's son informed the court that Mary had abandoned Kenzie after only eighteen months of marriage and had lived apart from Kenzie until his death. (By now you've begun to detect a pattern: the surviving spouse and the decedent's children from prior marriages often go at each other's throats when the estate is probated.) The court concluded that the son's evidence was irrelevant. Under West Virginia law, Mary was entitled to a spouse's part of the estate, even if she had abandoned Kenzie.<sup>3</sup>

What if the spouses are in the midst of divorce proceedings when one of them dies? Does probate law favor the spouse even then? In 1993 Beverly died before obtaining a divorce decree from Ronald. Her will left her estate to her children from a prior marriage. When Beverly died, however, Ronald wanted his spousal part of Beverly's estate. Beverly's children argued that Ronald should not receive assets that would have belonged to Beverly had the parties completed the divorce. Ronald thumbed his nose at the children's argument, paraphrasing John Greenleaf Whittier: "For all sad words of tongue or pen, The saddest of these are: 'It might have been!'" An Iowa court ruled that Ronald was Beverly's surviving spouse who could take his spousal portion.<sup>4</sup>

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In the United States, the surviving spouse receives greater protection in inheritance schemes than any other family member. In fact, in all but one state the surviving spouse is the *only* family member who consistently receives significant protection from *intentional* disinheritance by the decedent. Why should the surviving spouse receive such preferred treatment?

In part the spouse's favored position is historical. Americans long viewed the spousal relationship as the most important in life—a view the United States Supreme Court emphasized during the nineteenth century.<sup>5</sup> Of course, the importance of marriage sometimes had little to do with romantic or spiritual union. Rather, marriage was often a practical imperative for women given the socially and legally enforced dependence of women on men and restrictive views of both gender roles and family life. Yet the spouse's preferred position in probate law is not merely a relic. Despite the sexual revolution of the 1960s and the decreasing sex discrimination in modern society, most committed heterosexual couples desire to marry even today.

Thus marriage remains extremely important in modern society. But the rules have changed in recent decades. For good or ill, marriage is now less central to American family life, and it is unlikely to regain the exalted position it once enjoyed. Today, many Americans find life's most important relationship outside marriage. For many single or divorced parents rearing children alone, the parent-child relationship will be the most important (and permanent) relationship in life—particularly for mothers. An increasing number of heterosexual adult couples choose unmarried cohabitation despite their commitment to each other. And as long as states prohibit two men or two women from marrying one another, gay men and lesbians are unlikely to find life's most important relationship in marriage.<sup>6</sup>

Nonetheless, inheritance laws still give the surviving spouse star treatment. This chapter examines the general structure of spousal inheritance laws and the need for spousal provisions in our changing society. To understand spousal provisions in probate, however, we first have to understand a bit about how spouses own property.

## **Separate-Property and Community-Property States**

In most states husbands and wives own their assets separately or individually, unless they choose to share ownership with each other. For example, assume that Ralph and Alice are a married couple who live in

one of these so-called separate-property or “common-law” jurisdictions. Ralph uses wages he has earned to purchase an expensive boat in his name only. Under separate-property laws, Ralph alone is the owner of the boat. During the marriage, Alice has no interest in that boat.

An important minority of states, however, treat the married couple as a single entity, not as two individuals, in determining ownership of at least *some* assets acquired during the marriage. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are *community-property* states. In the 1980s Wisconsin adopted marital-ownership principles based on community-property rules. In the late 1990s Alaska enacted a provision that allows spouses to choose community-property ownership if they wish. Under the community-property system, the spouses generally share the earnings that either received during the marriage. For example, if Ralph purchases a boat with wages he earned during the marriage, the boat is community property owned by Ralph *and* his wife. This is so even if title to the boat is in Ralph’s name only. In contrast, assets acquired by one spouse before marriage are the individual (or “separate”) property of that person. Assets acquired after the marriage by one spouse through gift, devise, or inheritance also remain the separate property of that spouse. Assets purchased with a spouse’s separate property remain separate property. Thus, if Ralph purchased the boat during the marriage with assets he owned prior to the marriage, it would be his separate property, not a part of the marital community.

## **The Spouse of a Testate Decedent**

The inheritance laws of *all* states provide the surviving spouse with a share of the decedent’s intestate estate. Most married decedents dying intestate would probably wish to include their spouse, and the provisions favoring the surviving spouse also reduce the likelihood that the survivor will be dependent on the state for support.

But suppose Ralph gets fed up with his wife Alice. He executes a will specifically disinheriting her and leaving his estate to others. If the couple has lived in a community-property state, property laws give Alice substantial protection from disinheritance by awarding her a one-half

interest in the couple's community property *during the marriage*. Ralph can disinherit Alice, but he cannot deprive her of that one-half interest in the community property.

In contrast, if Ralph and Alice spent their married life in a separate-property jurisdiction and most of the family wealth was held in his name, the disinheritance provision in his will could easily leave Alice in financial trouble. In a separate-property state Alice acquires no automatic one-half interest in assets Ralph earns during the marriage. To prevent the potentially devastating effects on the surviving spouse who is disinherited, almost all separate-property states have laws that guarantee the surviving spouse a minimum part of the decedent's estate, *regardless of the provisions in the decedent's will*. It was such a provision that allowed Conway Twitty's widow to receive part of his Tennessee estate even though his will left the entire estate to his mother and children. Such spousal provisions are the best example of the pre-eminent position that probate law gives to the surviving spouse in separate-property states.

The most common form of protection against spousal disinheritance in separate-property states is the *elective share*. The elective share is a twentieth-century American creation. Its precursors are dower and curtesy, which are property and inheritance rules that colonists brought with them from England. Although the elective share has now replaced dower and curtesy in most separate-property states, a few states continue to rely on dower exclusively. The following paragraphs discuss various forms of spousal protection against disinheritance found in separate-property states.

## Dower

Under old English law, when a husband died, his widow received her dower. Though his will could purport to leave everything he owned to a third party, the husband could not generally deprive his widow of her dower. Dower entitled the widow to a one-third interest in inheritable realty owned by her husband at any time during the marriage. Her interest in the realty expired at her death. So if Ralph owned sixty acres of land outright during his marriage to Alice, upon his death Alice would enjoy the use of twenty of those acres until she died.<sup>7</sup>

Today, dower as a source of protection from disinheritance seems quaint and unsatisfactory, but the concept proved remarkably hardy until the middle third of the twentieth century. One reason for its longevity was that it did not remain static but evolved differently in different states. Dower still exists in some fashion in a few places, including Arkansas, Kentucky, Michigan, and Ohio. Yet considerable variation exists among the “modern” dower provisions: some laws extend the concept to personalty (that is, property other than real estate), some increase the fractional interest from one-third to one-half, and some convert the interest in the survivor from a life estate to outright ownership. Curtesy, the old English disinheritance protection awarded to the widower, seems to have disappeared from modern American inheritance law; however, to avoid nasty questions of sex discrimination, states employing dower usually extend its benefits to widowers.<sup>8</sup>

Over time, practical concerns caused most separate-property states to become disenchanted with dower. First, dower interfered with the state’s interest in promoting free transferability of land. A potential purchaser of Ralph’s land would be reluctant to buy that land from Ralph if Alice could claim a life interest in one-third of it when Ralph died. Second, because dower originally applied only to real estate, the protection it afforded against spousal disinheritance steadily diminished as intangible personalty (such as bank accounts and investments) increasingly replaced real estate as the principal form of modern family wealth. If Ralph had owned three acres during the marriage but held a fortune in stock at his death, under strict dower principles Alice would only receive a life estate in one acre if he chose to disinherit her. She would have no interest in the stock. Dower in its strict form was a relic; no wonder states abandoned it.

### The Conventional Elective Share

During the second quarter of the twentieth century, lawmakers in separate-property states increasingly concluded that the surviving spouse should receive a part of the value of *all* assets owned by the decedent, not merely a life interest in land the decedent owned during the marriage. This conclusion led states to develop the *elective share*, under which a surviving spouse could elect to receive a certain part of the

decedent's total estate—realty and personalty—when she was unhappy with his will or with her intestate share. Initially, observers referred to the elective share as the “widow's share,” implying that widows were more likely than widowers to need forced protection from spousal disinheritance. The realities of the time warranted the implication, for women had yet to enter the marketplace in significant numbers and they seldom controlled family wealth during the marriage. Women who did work outside the home usually held low-paying jobs and had little real opportunity for career advancement.

In its conventional form, the elective-share statute permits the surviving spouse to claim a fixed portion of the decedent's total estate. Often the statute—like the one governing Conway Twitty's estate—provides the surviving spouse with one-third of the decedent's estate. Suppose that Ralph dies leaving no debts and owning thirty acres and \$150,000. Under such an elective-share statute, Ralph's widow Alice receives one-third of the combined value of this land and money owned by Ralph at death. If Ralph's will bequeaths a greater amount to Alice, she will probably choose her bequest and ignore the elective share. If Ralph's will bequeaths a lesser amount to Alice or completely disinherits her, however, she will probably “elect against” or “dissent from” the will to obtain the elective-share amount. Not surprisingly, the elective share is also sometimes called a “forced” share, since Alice can force the estate to provide her with the guaranteed minimum despite Ralph's wishes to the contrary.

Although the conventional elective share is an improvement over dower, it is the least satisfying form of the elective share used in the United States today. The conventional forced share can soften the blow of spousal disinheritance; yet because it is an arbitrary award, the protection it affords is only incidental. Alice's award is the same in all instances; the duration of the marriage and her own wealth or need are irrelevant. Some simple illustrations under separate-property laws demonstrate how ill equipped the conventional forced share is to protect the surviving spouse and our changing families.

Assume that Alice is a young widow whose husband, Ralph, has disinherited her by will. She has no children. She has a job that pays well. In fact, at Ralph's unexpected and untimely death Alice is the wealthier

spouse by far. Assume also that Ralph is survived by dependent young children from a prior marriage or relationship. Under the conventional elective share, Alice can receive a fixed part of Ralph's estate even if she does not need it and perhaps even if Ralph's estate is insufficient to provide for his needy, dependent children.

Now assume a scenario in which Alice and Ralph have three young children of their own. The couple agree that she will stay home and care for the children at least while the children are young. Alice puts her external career on hold to serve as the primary—indeed, almost exclusive—caretaker of the children, giving Ralph more time and opportunity to advance his career. At his unexpected and untimely death, Ralph is, unsurprisingly, the wealthier spouse. Assume further that the couple's children are quite young and that Ralph leaves no dependent survivors outside the marriage. Unbeknownst to Alice, however, Ralph disinherited her and the children in favor of his mother and a girlfriend. Here Alice may very well need Ralph's entire estate at his death; if and when she can obtain outside employment, she is likely to suffer from the career opportunities she missed while at home with the children. The elective-share amount that Alice will receive, however, is no larger than in the previous example, in which she has no children, has remained continuously in the work force in a job that pays well, and has substantial assets of her own. In short, the award in the first example seems to overcompensate Alice at the expense of Ralph's dependent young children outside the marriage. In contrast, the award in the second example deprives Alice and the couple's marital children of funds they need.

These examples show the arbitrariness of the conventional elective share when one spouse meets an untimely death and leaves dependent children. But the unyielding approach of the fixed-fractional conventional elective share is not a problem for young couples only; many of the same inadequacies exist when the conventional elective share applies to long-term marriages. The disinherited middle-aged widow who has spent her entire adult life as a homemaker may have no children left to rear, but her long absence from the labor market could severely hamper her job prospects and therefore her ability to support herself. The disinherited elderly widow who has remained financially



dependent on her late spouse throughout the marriage may be in the worst position of all surviving spouses. The conventional elective-share approach simply does not recognize or value the survivor's contribution to the marriage. Alice receives the same fixed portion of Ralph's estate, regardless of whether the marriage has lasted fifty minutes or fifty years.

In a state using a conventional elective share, often the surviving spouse of a long-term marriage would be better off financially if she had divorced the decedent shortly before his death. In the typical divorce proceeding, a court can consider her needs, her contributions to the wealth accumulated over the course of the marriage, and her diminished future economic opportunities. By using the arbitrary fixed-fractional approach in probate, states have unwittingly made divorce more economically attractive than remaining married until death—at least for the less wealthy spouse in a long-term marriage who fears being disinherited by her marital partner.

The decedent himself may attempt to reduce the effectiveness of the conventional elective share. On its face, the share applies only to assets owned by the decedent *at death*. If Ralph does not want Alice to receive even one-third of the value of his current estate through the elective share, then shortly before death he may transfer assets to friends or relatives to reduce the value of his estate against which Alice can elect. States using the conventional elective share often attempt to remedy this problem—a problem once frequently referred to as “fraud on the widow's share”—by nullifying at least some such transfers. Two approaches to the problem are common. Under one approach, a state may disregard a decedent's pre-death transfer if he made the transfer with the *intent* to deprive the surviving spouse of her share. Intent, however, is sometimes extremely difficult to ascertain. If Ralph silently transferred a vacation home to his sister shortly before his death, what was his motive? To reward his sister, to punish his wife Alice, or both? Some states focus not on the decedent's intent but rather on the decedent's *control* over the asset following the purported transfer. If the transfer appears illusory, then the asset or its value is included in the estate against which the surviving spouse may elect. Under this second approach, however, a transfer is not necessarily illusory just because a decedent has retained some rights to (or power over) the transferred

asset. Thus determining whether a purported transfer is illusory is not a cut-and-dried process, either. In fact, neither the intent nor the control approach provides a perfect remedy to the problem of fraudulent transfers against spousal interests.<sup>9</sup>

### The Uniform Probate Code—1969

Many scholars believe that a nationally uniform system of probate laws is preferable to a mishmash of state inheritance laws. In 1969 the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Probate Code (UPC) as a model for states to consider. Among its provisions is an elective share that addresses some of the deficiencies of the conventional elective share. Under the 1969 provisions the electing spouse receives her award from the decedent's "augmented estate." The augmented estate includes the value of certain assets—most notably those transferred by the decedent through will substitutes—not included in the conventional elective-share approach. The augmented estate is the most important contribution of the 1969 provisions. It substantially reduces the incentive for the decedent to make transfers shortly before death to deprive the surviving spouse of her elective share. But the 1969 provisions also introduced other important measures. The provisions count certain pre-death or nonprobate transfers by the decedent to the surviving spouse *against* her elective-share amount, thus reducing the survivor's part of the probate estate when the decedent has provided her with assets passing outside the probate process.

For example, assume that Ralph owns \$100,000 in cash and a \$200,000 home. Shortly before death, Ralph places the home in a joint tenancy (a classic form of will substitute) with his son Seth from a prior marriage. Property held by joint tenants normally passes outright to the surviving joint tenant; it does not pass through the probate estate of the joint owner who dies first. Seth therefore receives the home at Ralph's death by right of survivorship, not through probate. Because the house is nonprobate property, Ralph's only probate property is the \$100,000 in cash. Under a *conventional* forced share giving the surviving spouse one-third of the decedent's probate estate, Alice receives an elective share of only \$33,333.33. Alice could have the home or

its value included in the probate estate only if she can prove that the joint tenancy created by Ralph came within the state's fraudulent-conveyance provisions.

Under the 1969 UPC, however, Alice does not need to prove Ralph's bad intent or continuing control over the joint tenancy property. Rather, the UPC provisions automatically include the value of the home in his augmented estate. Ralph's augmented estate here is \$300,000 and Alice's one-third interest is \$100,000. The provisions eliminate Ralph's incentive to make such a transfer if the purpose of the transfer is to defeat or reduce Alice's share.

The drafters of the 1969 UPC also believed, however, that guaranteeing the surviving spouse an absolute right to one-third of the decedent's augmented estate could be too generous—particularly if the decedent made *nonprobate* transfers to the surviving spouse. Assume in the preceding example that Ralph places the home in joint tenancy with his wife, not his son. At death, Ralph's augmented estate again is \$300,000, and Alice's one-third is \$100,000. But wait! Alice has already received the home (valued at \$200,000) through survivorship principles that avoided probate. Because the value of the nonprobate transfer to Alice equals or exceeds her one-third share of Ralph's augmented estate, Alice receives no further award when Ralph dies. The nonprobate property (the home) she receives from Ralph counts against her elective share to prevent her from double-dipping.

The 1969 UPC improved on the conventional elective share. Yet, like the conventional elective share, the 1969 UPC elective share employs an arbitrary, fixed-fraction approach (one-third of the augmented estate) without regard to the overall picture of marital wealth, the survivor's need, or the duration of the marriage.<sup>10</sup>

### The Uniform Probate Code—1990

The conventional elective share and the 1969 UPC elective share implicitly view the decedent primarily as a source of support for the surviving spouse. In the last years of the twentieth century, however, scholarly observers began to view marriage as a gender-neutral economic *partnership*. If marriage is a partnership, then the conventional and 1969 UPC elective shares are difficult to justify, since neither guarantees that

the surviving spouse will end up with at least 50 percent of the couple's combined marital wealth, even if the couple was married for many years.

In 1990 NCCUSL promulgated a revised UPC elective share that incorporates the partnership view. The new provisions, amended in 1993, begin by assessing the wealth of the couple, not just that of the decedent. Moreover, the presumed economic contribution of the surviving marital partner increases over time. In a long-term marriage—fifteen years or longer—the provisions treat the surviving spouse as an *equal* contributor to the marital partnership. Accordingly, the survivor in a long-term marriage winds up with at least 50 percent of the couple's wealth.<sup>11</sup>

If the drafters had designed the 1990 provisions solely to reflect the marriage as an economic partnership, then a testator could have disinherited the surviving spouse any time the survivor owned more than one-half of the couple's wealth. Such strict adherence to the economic partnership view of marriage, however, would have permitted this disinheritance even if the “wealthier” surviving spouse were left with insufficient means to support herself. Suppose Ralph dies with an estate of \$5,000 and is survived by Alice, his wife of fifty years, whose own estate is \$10,000. If the UPC economic partnership formula applied unwaveringly, Alice would not take any part of Ralph's estate because she owned more than 50 percent of the couple's combined wealth at his death.

The drafters of the 1990 provisions believed that a blind commitment to an economic partnership view of marriage was inappropriate. Recognizing that marriage continues to include a support component, the drafters designed a supplemental provision for the surviving spouse who would be impoverished under the partnership-based award. The drafters currently recommend that, when possible, no surviving spouse should end up with less than \$50,000 of the total marital wealth. Thus, applying the 1990 UPC to the preceding example, Alice will receive all of Ralph's \$5,000 estate—regardless of any provisions to the contrary in his will—because that amount combined with her own \$10,000 does not exceed the recommended minimum of \$50,000. The supplemental share protecting Alice is an important improvement in elective-share