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# Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative

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# Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative

Alan Newman\*

Pat and Chris were in their sixties when they married. Each had children from a prior marriage. Pat brought \$300,000 of assets to the marriage; Chris came to the marriage with \$150,000 of assets. During the marriage, Pat inherited \$200,000 and Chris inherited \$100,000. They maintained their assets, including their inheritances, separately, and supported themselves with their retirement income. Pat died after they had been married more than 15 years. By that time, inflation and appreciation in the value of their investments had caused their assets to double in value (to \$1,000,000 for Pat and \$500,000 for Chris). Pat's will left Pat's entire estate to Pat's children. Chris elected to take an elective share of Pat's estate.

Pat and Chris lived in a noncommunity-property jurisdiction that had adopted the spousal elective-share system of the Uniform Probate Code (the "UPC")<sup>1</sup> that was redesigned in 1990 to incorporate the partnership theory of

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<sup>1</sup> 1990 UNIF. PROBATE CODE (amended 1993), 8 U.L.A. (1998). The UPC, which was approved by the National Conference of Commissioners on Uniform Laws and the American Bar

marriage into elective-share law.<sup>2</sup> Under the partnership theory of marriage, each spouse has a claim to half of the couple's marital property, but neither spouse should be able to claim a share of the other's separate property.<sup>3</sup> On that basis, Chris' elective share should have been zero, because Pat and Chris had not accumulated any marital property during their marriage. The 1990 UPC elective-share system, however, does not determine the surviving spouse's elective share based on how much, if any, marital property the spouses actually owned.<sup>4</sup> Rather, it employs an "approximation system" to estimate how much of their property is marital (and thus subject to surviving spouse's elective share claim) and how much is separate (and thus not subject to such a claim) based solely on the length of their marriage.<sup>5</sup> Because Pat and Chris had been married more than 15 years when Pat died, the approximation system implicitly treated all of their property as marital property.<sup>6</sup> The result was an elective share for Chris of \$250,000 (the amount necessary to cause their \$1,500,000 of deemed marital assets to be divided equally between them).<sup>7</sup>

The marital partnership theory -- upon which the UPC's elective-share

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Association in 1969 and has been amended numerous times since then, is a comprehensive set of statutes addressing a wide variety of subjects including, among others, wills, intestacy, trusts, estates, non-testamentary transfers of property at death, and persons under disability. See *generally* LAWRENCE H. AVERILL, JR., THE UNIFORM PROBATE CODE (4<sup>th</sup> ed. 1996).

<sup>2</sup> See *infra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>3</sup> See *infra* note \_\_\_\_ . With respect to the classification of spouses' property as marital or separate, see *infra* note \_\_\_\_ and accompanying text.

<sup>4</sup> See *infra* text accompanying note \_\_\_\_ .

<sup>5</sup> See *infra* note \_\_\_\_.

<sup>6</sup> See *infra* note \_\_\_\_ and accompanying text.

<sup>7</sup> For an illustration of how the elective share is calculated under the UPC's new redesigned elective-share system, see *infra* text accompanying notes \_\_\_\_ - \_\_\_\_.

system is based<sup>8</sup> -- also underlies both the community-property system<sup>9</sup> and equitable distribution, which governs the division of property when spouses divorce.<sup>10</sup> Had Pat and Chris lived in a community-property jurisdiction when Pat died, or had they divorced under the equitable distribution law of most states, Chris would not have been entitled to any of Pat's assets.<sup>11</sup> Because the UPC's elective-share approximation system cannot be relied upon to produce results consistent with the marital partnership theory upon which it is based, this article proposes a deferred-community-property alternative as a preferable means of incorporating the partnership theory of marriage into elective-share law. Under such a system, Chris would not have been entitled to receive an elective share of Pat's estate.

### Introduction

In 1990, fundamental changes were made to the UPC provisions under which a surviving spouse may elect to receive a share of the assets of a deceased spouse without regard to the deceased spouse's estate plan.<sup>12</sup> As described in the General Comment to the UPC's new elective-share provisions

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<sup>8</sup> See *infra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>9</sup> See *infra* note \_\_\_\_ and accompanying text.

<sup>10</sup> See *infra* note \_\_\_\_.

<sup>11</sup> See *infra* notes \_\_\_\_ and \_\_\_\_.

<sup>12</sup> Under the UPC, a surviving spouse's elective share reaches not only the deceased spouse's probate estate, but also many forms of nonprobate assets controlled by the decedent immediately prior to death (as well as certain lifetime gifts). See *infra* text accompanying notes \_\_\_\_-\_\_\_\_. As a result, the right of a surviving spouse to elect to receive a share of a deceased spouse's assets can override not only the terms of a decedent's will, but also the provisions of instruments governing the deceased spouse's nonprobate assets.

(the “General Comment”), “[t]he main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership.”<sup>13</sup> The General Comment includes the following summary description of the contemporary partnership theory of marriage:

Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance).<sup>14</sup>

Consistent with the fact that the partnership theory of marriage underlies the community-property system,<sup>15</sup> the objective of the UPC’s redesigned elective-share system generally is to approximate in a noncommunity-property jurisdiction<sup>16</sup> the result that would be reached on the death of a spouse in a

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<sup>13</sup> 1990 UNIF. PROBATE CODE art. II., pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 93 (1998).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 93-94. See also Anthony J. Pagano, *The Characterization and Division of Community Property*, in VALUATION AND DISTRIBUTION OF MARITAL PROPERTY 20-1, § 20.01[1] (Grace Ganz Blumberg rev. 1988 and 1996) (1999), which describes the nature of community property in the following terms:

The general principle underlying the community property system is that all property acquired during the marriage by the industry or labor of either the husband or the wife, or by both spouses working together, belongs equally to each spouse . . . . [T]he community is analogous to a partnership in which the spouses are equal partners. (Footnotes omitted.)

<sup>16</sup> All noncommunity-property states except Georgia have spousal elective-share statutes. Study 10: Surviving Spouse’s Rights to Share in Deceased Spouse’s Estate, published in 1994 by The American College of Trust and Estate Counsel (ACTEC), 3415 South Sepulveda Blvd., Suite 460, Los Angeles, CA 90034 [“ACTEC Study 10”]. With respect to Georgia’s status as the only noncommunity-property jurisdiction in which a surviving spouse is not protected from disinheritance, see Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 136-38 (1994). In community-property states, an elective share is not necessary because the surviving spouse has a vested half interest in the couple’s community property from the time of its acquisition, without regard to how title to such property is held. W. S. McLANAHAN,

community-property jurisdiction: an equal division of the couple's marital

property<sup>17</sup> and no division of their separate property.<sup>18</sup> The new UPC elective-

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COMMUNITY PROPERTY LAW IN THE UNITED STATES § 11.4 (1982); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 520 (2d ed. 1997). Under the recently enacted Alaska Community Property Act, married couples (including non-residents of Alaska) who form Alaska community-property trusts may elect to convert some or all of their property to community property. ALASKA STAT. §§ 34.77.060, 34.77.100 (Lexis 1998). Although the new legislation offers estate planning benefits to couples who elect its application to some or all of their property, see David G. Shaftel & Stephen E. Greer, "Obtaining a Full Stepped-Up Basis Under Alaska's New Community Property System," ESTATE PLANNING, March/April 1999, 109-117, it applies only if both spouses elect for it to do so. § 34.77.030(a). As a result, it did not eliminate the need for Alaska's elective-share system, which remains in effect. §§ 13.21.201-13.12.214.

Special problems are presented by couples who move from noncommunity-property jurisdictions to community-property jurisdictions. If a spouse dies in a community-property jurisdiction holding title to property that would have been community property if he or she had been domiciled in a community-property jurisdiction when it was acquired, the property will not be community property and the surviving spouse will have no right to an elective share. See McLANAHAN, *supra* § 13:9, at 580. To protect the surviving spouse from disinheritance in such a circumstance, California, Idaho, and Washington characterize such property as "quasi-community property," and provide statutory protection to the surviving spouse. CAL. PROBATE CODE §§ 66, 101 (West 1991 & Supp. 1999); IDAHO CODE § 15-2-201 (1999); WASH. REV. CODE ANN. § 26.16.220 (West 1999). At least three community-property states without comprehensive quasi-community property legislation – New Mexico, Idaho, and Nevada – have provided protection to surviving spouses in such cases by not applying their own law to distribute a decedent's property, but by instead applying the elective-share law of the jurisdiction in which the couple was domiciled when the property was acquired. See Pagano, *supra* note \_\_\_, § 20.05[2][b][iii] (citing *Hughes v. Hughes*, 573 P.2d 1194, 1198-202 (N.M. 1978); *Berle v. Berle*, 546 P.2d 407 (Idaho 1976); and *Braddock v. Braddock*, 542 P.2d 1060 (Nev. 1975)). See generally Howard S. Erlanger & Gregory F. Monday, *The Surviving Spouse's Right to Quasi-Community Property: A Proposal Based on the Uniform Probate Code*, 30 IDAHO L. REV. 671, 672-73 (1994).

<sup>17</sup> For purposes of this article, "marital property" generally refers to property that would be characterized as community property if the couple lived in a community-property jurisdiction. Although there are community-property systems that treat all property of spouses as community property, such systems have not been adopted in the United States. Pagano, *supra* note \_\_\_, § 20.01[1]. Rather, in the United States, property acquired during the marriage by the efforts of either spouse, and property given to both spouses during the marriage, is community property. *Id.* By contrast, property owned by either spouse at the time of their marriage, and property acquired by either spouse during the marriage by gift or inheritance, is the separate property of the spouse who owns or acquires it. *Id.* Property acquired by a spouse during the marriage that can be traced to the separate property of that spouse is that spouse's separate property. *Id.* Personal injury awards from causes of action arising during marriage may include both community and separate property; in most community-property jurisdictions, at least the portions of such awards representing compensation for pain and suffering, loss of a body part or disfigurement, and reduced postdivorce earning capacity are classified as separate property. *Id.* § 20.03[3][d]. In classifying property of spouses as community or separate property, a presumption generally is applied in favor of the community. *Id.* § 20.03[1][a]. The presumption may apply only to property shown to have been acquired during the marriage, or to any property possessed during the

share provisions do not attempt to accomplish that result directly -- by requiring a determination of the amount of marital property the spouses own and giving the surviving spouse the right to elect to receive half of it. Rather, the UPC's new elective-share provisions are designed to approximate that result by giving the surviving spouse the right to elect to receive a formula-determined amount of the deceased spouse's assets.<sup>19</sup> The objective is for the election to result in the surviving spouse owning assets with a value of approximately half of the couple's marital property, in addition to the survivor's separate property.<sup>20</sup> The UPC's

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marriage. *Id.*

Whether income received during the marriage from the separate property of a spouse is itself separate or community property varies among the community-property jurisdictions. *Id.* § 20.03[3][b]. Of the eight traditional community-property jurisdictions, three (Texas, Idaho, and Louisiana) generally treat income from separate property as community property, and the other five (Arizona, California, Nevada, New Mexico, and Washington) generally treat income from separate property as separate property. *Id.* In 1983, the National Conference of Commissioners on Uniform State Laws promulgated the *Uniform Marital Property Act* ("UMPA"). UNIF. MARITAL PROP. ACT, 9A U.L.A. 110 (1998). Although the terminology used in UMPA is "marital property" and "individual property," rather than the more commonly used "community property" and "separate property," UMPA is properly characterized as a community-property act. William A. Reppy, Jr., *The Uniform Marital Property Act: Some Suggested Revisions for a Basically Sound Act*, 21 HOUS. L. REV. 679, 682-89 (1984). In 1984, effective in 1986, UMPA was adopted, with modifications, in Wisconsin. See WIS. STAT. §§ 766.001-766.97 (1999); see also Lynn Adelman et al., *Departures from the Uniform Marital Property Act Contained in the Wisconsin Marital Property Act*, 68 MARQ. L. REV. 390 (1985). Under sections 4(d) and 14(b) of UMPA, UNIF. MARITAL PROP. ACT, 9A U.L.A. 116 and 141 (1998), and section 766.31(4) of the Wisconsin Marital Property Act, income from separate property generally is community property.

<sup>18</sup> See General Comment, *supra* note \_\_\_, Example 5, quoted and discussed in the text accompanying notes \_\_\_ - \_\_\_.

<sup>19</sup> See *infra* text accompanying notes \_\_\_ - \_\_\_.

<sup>20</sup> See General Comment, *supra* note \_\_\_, Example 5, quoted and discussed in the text accompanying notes \_\_\_ - \_\_\_. Consistent with the traditional support rationale of elective-share statutes, see *infra* note \_\_\_, the UPC's new elective-share system also provides the surviving spouse with the right to elect to receive a supplemental elective-share amount. 1990 UNIF. PROBATE CODE § 2-202(b) (amended 1993), 8 U.L.A. 102 (1998). Generally, such an entitlement will arise, however, only if the sum of (i) the survivor's own probate and nonprobate assets, plus (ii) the probate and nonprobate property the survivor receives from the decedent, plus (iii) the survivor's basic elective-share amount, is less than \$50,000, in which case the survivor is entitled to a supplemental elective share equal to the amount necessary to result in the surviving spouse

method for accomplishing that objective is an accrual-type elective share, also referred to as an “approximation system.”<sup>21</sup> Under the approximation system, the amount of marital and separate property each spouse is treated as owning for purposes of determining the survivor’s elective share is determined solely by the length of their marriage.<sup>22</sup>

The approximation system avoids the need to classify the spouses’ assets at the first of their deaths as marital or separate property,<sup>23</sup> and was chosen as the means of incorporating the partnership theory of marriage into elective-share law “[b]ecause ease of administration and predictability of result are prized features of the probate system . . . .”<sup>24</sup> Under the approximation system, an increasing percentage of each spouse’s assets is treated as marital property as the length of the marriage increases until, after fifteen years of marriage, all of each spouse’s assets implicitly and conclusively are so treated for elective-share purposes.<sup>25</sup> The purposes of this article are to examine how well the

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having \$50,000 of assets following the decedent’s death (in addition to the surviving spouse’s probate exemptions and allowances and rights under the social security system). *Id.*

<sup>21</sup> 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 96 (1998).

<sup>22</sup> See *infra* text accompanying notes \_\_\_\_ - \_\_\_\_\_. The approximation system has been described as “an administratively simple system that approximates the results that would be achieved by a fifty-fifty split of marital assets . . . . [T]he accrual schedule translates into a system that approximates the amount of marital versus separate property in marriages of various lengths.” Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 52-53 (1994) [hereinafter Waggoner, *Marital Property Rights*].

<sup>23</sup> 1990 UNIF. PROBATE CODE art. II., pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 96 (1998).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* According to the General Comment:

The [approximation] system avoids the tracing-to-source problem by applying an ever-increasing percentage to the couple’s combined assets without regard to



approximation system will accomplish its objective of incorporating the marital partnership theory into elective-share law, and to propose a deferred-community-property alternative for doing so. Generally, under a deferred-community-property elective-share system,<sup>26</sup> the surviving spouse's elective share is half of the couple's marital property without regard to the length of their marriage or the amount of their separate property. The principal anticipated advantages of this approach are twofold. First, a deferred-community-property elective-share system would more fairly and more accurately achieve the partnership theory of marriage objective -- equally dividing the fruits of the spouses' efforts during the marriage without subjecting the separate property of the deceased spouse to the survivor's elective-share claim<sup>27</sup> -- than does the UPC's approximation system.<sup>28</sup>

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when or how those assets were acquired, rather than applying a constant percentage (50%) to an ever-growing accumulation of assets. By approximation, the redesigned system equates the elective-share percentage of the couple's combined assets with 50% of the couple's marital assets-assets subject to equalization under the partnership/marital-sharing theory.

*Id.* at 98. Accordingly, the elective-share percentages set forth in UPC section 2-202(a), reproduced *infra* note \_\_\_, represent half of the amount of the spouses' property the approximation system implicitly treats as marital. Because the elective-share percentage for a marriage of 15 or more years duration is 50%, *see infra* note \_\_\_, the approximation system treats all of the property of spouses who have been married 15 years or more at the first of their deaths as marital.

<sup>26</sup> The phrase "deferred-community-property" also has been used to describe equitable distribution systems in noncommunity-property jurisdictions for the division of property on the dissolution of a marriage, "since community property rights which arise during the marriage are recognized only upon divorce." BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 1.02, at 11 n.44 (2d ed. 1994). There are at least three ways for noncommunity-property jurisdictions to inject community-property principles into elective-share law at the death of a spouse, each of which can be referred to as a deferred-community-property alternative to traditional elective-share systems. *See infra* text accompanying notes \_\_\_-\_\_\_.

<sup>27</sup> *See infra* note \_\_\_.

<sup>28</sup> To illustrate the difference between the UPC's approximation system and a deferred-community-property system by way of an example, assume (i) that D and S had been married 15 years when D died survived by S; (ii) that at D's death D had assets titled in D's name with an

Second, such a system would make the property rights of spouses on the termination of their marriage at one of their deaths more consistent with their rights on the termination of their marriage by divorce.

## Background

The policy underlying traditional elective-share statutes in noncommunity-property jurisdictions is to protect the surviving spouse from disinheritance by the deceased spouse.<sup>29</sup> Prior to the advent of elective-share statutes, the means by

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aggregate value of \$500,000; (iii) that D's assets consisted of \$100,000 of marital property and \$400,000 of separate property; (iv) that at the time of D's death S had assets titled in S's name with an aggregate value of \$150,000; (v) that S's assets consisted of \$50,000 of marital property and \$100,000 of separate property; and (vi) that D's will left D's entire estate to D's child from a prior marriage. Under the deferred-community-property alternative, the spouses' separate property would be ignored in calculating S's elective share. The total of their marital property is \$150,000, of which D owned \$100,000 and S \$50,000. S's elective-share claim therefore would be \$25,000, the payment of which would result in S having half of the value of their marital property. By contrast, under the UPC's approximation system, the 15 year length of the couple's marriage causes all of D's and S's \$650,000 of property implicitly to be treated as marital; because S is entitled to half of their property, but only has \$150,000 of it, S's elective share would be \$175,000. See *infra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>29</sup> Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 982-83 (1977); see also Ronald R. Volkmer, *Spousal Property Rights at Death: Re-evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95, 97-98 (1983). Traditionally, the policies underlying the prohibition of one spouse disinheriting the other were to ensure a means of support for a surviving spouse who might otherwise become a ward of the state. *Id.* In more recent years, elective-share statutes such as the redesigned elective-share provisions of the 1990 UPC have been seen as not only providing surviving spouses with means of support, but also as providing them with a fair share of property they helped to accumulate during the marriage. See *id.* at 104-10; Brashier, *supra* note \_\_\_\_, at 151-52 (noting that "[d]espite the recent tendency of scholars to reclassify the forced share as an acknowledgement of marriage as an economic partnership, case law involving the forced share indicates that most courts still perceive the predominant purpose of the share to be that of protection: the surviving spouse should not be left impecunious if disinherited by the decedent"). For a brief discussion of how the 1990 UPC's redesigned elective-share system reflects the support rationale for the elective share, see *infra* note \_\_\_\_\_. Note that surviving spouses generally are entitled to receive a variety of benefits following a deceased spouse's death in addition to what he or she may take under the decedent's will, by intestacy, or by elective share; among them are rights to social security, rights to retirement benefits, and rights to a homestead allowance, a family allowance, and certain tangible

which that policy was implemented were the rights of dower and curtesy, under which a widow or widower generally was entitled to a life estate in part or all of the deceased spouse's lands.<sup>30</sup> Because those rights encumbered titles and interfered with the alienability of land, and because they provided inadequate protection to a widow or widower whose deceased spouse's wealth consisted in large part of personal property, most noncommunity-property states abolished dower and curtesy and substituted for them elective-share statutes.<sup>31</sup>

Under a traditional, pre-UPC elective-share statute, a disinherited surviving spouse can elect to receive a fraction (typically one-third or half, sometimes depending on whether the decedent was survived by any descendant<sup>32</sup>) of the deceased spouse's probate estate notwithstanding the

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personal property. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 473-78 (6th ed. 2000).

<sup>30</sup> Generally, dower entitled a widow to a one-third interest for life in her husband's land, while curtesy entitled a widower to a life estate in all of his wife's land, but only if the widower fathered a child by his wife. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 90 (3d ed. 1989). For a discussion of dower and curtesy in the context of current laws concerning the disinheritance of spouses and children, see Brashier, *supra* note \_\_\_, at 89-93. See also Kurtz, *supra* note \_\_\_, at 982-88.

<sup>31</sup> Brashier, *supra* note \_\_\_, at 99 n.51. Dower remains in existence in Arkansas, the District of Columbia, Kentucky, Michigan, and Ohio. ARK. CODE ANN. § 28-11-202 (Michie 1999); D.C. CODE ANN. § 19-102 (1999); KY. REV. STAT. ANN. §§ 392.020, 392.080 (Banks-Baldwin 1999); MICH. COMP. LAWS § 558.1 (1998); OHIO REV. CODE ANN. § 2103.02 (Banks-Baldwin 1999). In each of those jurisdictions other than Michigan, dower has been extended to husbands. DUKEMINIER & JOHANSON, *supra* note \_\_\_, at 479. The rights of the surviving spouse under current dower statutes frequently differ materially from those at common law. Brashier, *supra* note \_\_\_, at 93 & n.35 (noting that "in some jurisdictions dower may extend to personalty, the fractional interest may be increased from one-third to one-half, or the realty interest may be a fee rather than a life estate upon the spouse's death."). Generally, a surviving spouse in a jurisdiction that has retained dower must elect to take dower, an elective share, or under the decedent's will; because dower usually is less than the elective share, dower rarely is elected. DUKEMINIER & JOHANSON, *supra*, at 479.

<sup>32</sup> E.g., IOWA CODE ANN. § 633.238 (West 1998) (one-third); OHIO REV. CODE ANN. § 2106.01 (West 1999) (one-third if two or more of decedent's children or their lineal descendants survive; otherwise half). For a summary of the rights of a surviving spouse to share in a deceased spouse's estate under the law of each of the 50 states and the District of Columbia, prepared in

terms of the deceased spouse's will.<sup>33</sup> Two serious shortcomings of such statutes were addressed by the UPC when it was promulgated in 1969.<sup>34</sup> First, most of them limited the surviving spouse's elective-share claim to a share of the decedent's probate estate, and thus did not protect a surviving spouse when the deceased spouse made nonprobate transfers<sup>35</sup> of his or her property to others.<sup>36</sup>

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1994, see ACTEC Study 10, *supra* note \_\_\_\_.

<sup>33</sup> If the decedent's will includes a disposition in trust for the benefit of the surviving spouse, the question whether the surviving spouse can reject that disposition and receive an outright transfer of the elective share is raised. State law varies with respect to this issue. See generally Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 UNIV. MIAMI INST. EST. PLAN., ¶ 904.1 (1998) (discussing the various approaches states take, along with planning considerations to address them, both in jurisdictions that charge such dispositions against the surviving spouse's elective share and in jurisdictions that do not). From 1975 to 1993, the UPC charged the value of a life estate left to a surviving spouse against the elective share, regardless of whether the surviving spouse disclaimed it. 1990 UNIF. PROBATE CODE § 2-207(a) (amended 1993), 8 U.L.A. 315 (1998). This treatment, which was continued even through the 1990 revisions to the UPC's elective-share provisions that were intended to bring elective-share law into line with the partnership theory of marriage, was sharply criticized in Ira M. Bloom, *The Treatment of Trust and Other Partial Interests of the Surviving Spouse under the Redesigned Elective-Share System: Some Concerns and Suggestions*, 55 ALB. L. REV. 941 (1992), and in Volkmer, *supra* note \_\_\_\_, at 144. In 1993, the provision charging the surviving spouse's elective share with the value of a life estate, even if disclaimed, was deleted from the UPC. Compare pre-1993 UPC § 2-207 with current UPC § 2-209. This change has not been universally embraced. South Dakota, for example, adopted most of the UPC after its 1993 amendments were promulgated, but it chose to charge the survivor's elective share with all property left to the spouse by the decedent, including property disclaimed. S.D. CODIFIED LAWS ANN. § 29A-2-209 (Michie 1999).

<sup>34</sup> The UPC's predecessor, the Model Probate Code, addressed the first of these shortcomings – the failure of elective-share statutes to allow the surviving spouse's elective-share claim to reach nonprobate transfers by the decedent – by providing that inter vivos gifts in fraud of marital rights could be deemed testamentary for elective-share purposes. See Kurtz, *supra* note \_\_\_\_, at 1008 (citing MODEL PROBATE CODE § 33 (1946)).

<sup>35</sup> A large part of the problem of traditional elective-share statutes not allowing the surviving spouse's elective-share claim to reach nonprobate transfers to others is the prevalence of such transfers:

Over the course of the twentieth century, persistent tides of change have been lapping at the once-quiet shores of the law of succession. Probate, our court-operated system for transferring wealth at death, is declining in importance. . . . Life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, brokerage houses, stock transfer agents, and a variety of other financial intermediaries are functioning as free-market competitors of the probate system and enabling property to pass on death without probate and without will. The law of wills and the rules of descent no longer govern succession to most of the property of most decedents.

In many jurisdictions, such transfers were effective to defeat the elective-share

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John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

<sup>36</sup> See 1969 UNIF. PROBATE CODE art. II., pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 292 (1998). Courts in some states, however, allow a surviving spouse's elective-share claim to reach some nonprobate assets of a decedent even though the applicable elective-share statute does not expressly so provide. See, e.g., *In re Estate of Prusis*, 434 N.E.2d 443 (Ill. App. Ct. 1982) (subjecting to an elective-share claim a savings deposit trust, commonly referred to as a "Totten trust"). Most of the cases presenting this issue involve decedents who had transferred most or all of their assets to trusts they created for their own benefit during their lifetimes and over which they reserved a power of revocation. See, for example, *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984) and *Seifert v. Southern National Bank*, 409 S.E.2d 337 (S.C. 1991), each of which allow a surviving spouse's elective-share claim to reach assets in such trusts. For a recent concise summary discussing tests courts have used to determine whether surviving spouses' elective-share claims can reach inter vivos transfers to such trusts in the absence of statutes so providing, see Pennell, *supra* note \_\_\_, ¶¶ 900, 904.1 (1998). Professor Pennell observes:

Because of the passion that often permeates cases in this arena and the lack of precision in the tests and even the terms used in the cases that resolve these controversies, and further because the law itself is in a state of flux and therefore constitutes a moving target, it is hard and may be impossible to reach any definitive determinations whether a particular trust will fail in the face of a judicial challenge by a surviving spouse.

*Id.* § 904.1. In what Professor Pennell describes as a "substantial minority" of jurisdictions in which elective-share statutes apply only to a decedent's probate estate, inter vivos revocable trusts can be used successfully to defeat a surviving spouse's elective share. *Id.* ¶ 904.1 at 9-21 & n. 308 (citing *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)).

In an early explanation of the difficulties courts have had in resolving disputes over surviving spouses' claims to nonprobate transfers, Professor MacDonald observed:

Thorough-going protection to the widow necessitates infringement on the decedent's inter vivos transfers; but this infringement, carried to the extreme, entails an impracticable "inchoate dower" in personalty. In the circumstances, it is no wonder that the cases reflect acute judicial indecision. In fact, the entire topic is "intensely undefined." The case-law is cluttered with meaningless doctrine. There is talk of "illusory" transfers, "absolute" transfers, "fraudulent" transfers, "colorable" transfers, of "good faith," of a "factual showing of reality" – a host of baffling criteria. There is uncertainty . . . as to rationale. As has been said of that conglomerate of nutriment, the Scottish haggis, there is here fine confused feeding to be had.

W. D. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 4 (1960) (footnote omitted).

rights of the surviving spouse even if the deceased spouse had retained essentially complete control and use of the property for life.<sup>37</sup> The 1969 UPC addressed this problem by granting to the surviving spouse the right to receive an elective share not just from the decedent's probate estate, but from his or her "augmented estate."<sup>38</sup> Under the 1969 UPC, the decedent's augmented estate included, in addition to his or her probate estate, a variety of nonprobate assets, such as property transferred by the decedent to a revocable trust<sup>39</sup> or into joint

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<sup>37</sup> See, e.g., *Kerwin v. Donaghy*, 59 N.E.2d 299 (Mass. 1945) (overruled by *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984)). According to the court in *Dumas v. Estate of Dumas*, 627 N.E.2d 978 (Ohio 1994), the assets in a decedent's inter vivos revocable trust could not be reached by his surviving spouse's elective-share claim even though during the decedent's life he "is the trustee, derives all income from the trust, reserves the rights to revoke or amend the trust and to withdraw and deposit assets." *Id.* at 983. In *Dumas*, a divorce proceeding was pending when the husband died. *Id.* at 979. Because his death terminated the divorce proceeding before a property settlement award had been made to his wife, and because his inter vivos revocable trust disposing of his assets to others at his death was not subject to his wife's elective share, she received none of the trust assets. See *id.* at 985 (Resnick, J., dissenting). For a discussion of *Dumas* suggesting that its holding may be attributable to the surviving spouse having deserted the decedent and having filed for divorce just nine days before his death, see Pennell, *supra* note \_\_\_, ¶ 904.1, n.49. But see *Carr v. Carr*, 576 A.2d 872 (N.J. 1990) (husband died while divorce proceeding pending; wife not entitled to equitable distribution property settlement because of termination of divorce proceeding by husband's death; wife not entitled to elective share of husband's estate because New Jersey's elective-share statute conditioned eligibility for an elective share on the spouses living together at the first of their deaths; court imposed constructive trust on husband's estate to preserve wife's equitable, beneficial interest in the marital property owned by the husband).

<sup>38</sup> A stated purpose of the UPC provisions augmenting the decedent's probate estate for purposes of determining the surviving spouse's elective share was to "prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share . . ." 1969 UNIF. PROBATE CODE § 2-202 cmt. (amended 1993), 8 U.L.A. 299 (1998).

<sup>39</sup> 1969 UNIF. PROBATE CODE § 2-202(1)(i), (ii) (amended 1993), 8 U.L.A. 297 (1998). Under the pre-1990 versions of subsections (i) and (ii), only transfers to a revocable trust during the marriage, to the extent the decedent did not receive adequate and full consideration, were included in the augmented estate. *Id.* Transfers to such trusts made before the marriage were excluded to make "it possible for a person to provide for children by a prior marriage . . . without concern that such provisions will be upset by later marriage. The limitation to transfers during marriage reflects some of the policy underlying community property." 1969 UNIF. PROBATE CODE § 2-202 cmt. (amended 1993), 8 U.L.A. 299 (1998). The 1990 UPC's redesigned elective-share provisions include in the augmented estate transfers to inter vivos revocable trusts made before

tenancy with rights of survivorship,<sup>40</sup> as well as certain outright gifts made by the decedent during the two years preceding his or her death.<sup>41</sup>

The second major deficiency in traditional elective-share statutes that was addressed by the 1969 UPC was the failure of such statutes to give effect to lifetime gifts the deceased spouse made to the surviving spouse,<sup>42</sup> or to

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as well as during the marriage. 1990 UNIF. PROBATE CODE § 2-205(1)(i) (amended 1993), 8 U.L.A. 105 (1998). The rationale for this change was that a decedent who, at or immediately before death, could have revoked the trust and become the outright owner of its assets should be treated as the owner of the property for elective-share purposes. 1990 UNIF. PROBATE CODE § 2-205 cmt. (amended 1993), 8 U.L.A. 107-08 (1998).

<sup>40</sup> 1969 UNIF. PROBATE CODE § 2-202(1)(iii) (amended 1993), 8 U.L.A. 297 (1998).

<sup>41</sup> Included in the augmented estate were transfers made to a donee within two years of the decedent's death to the extent the aggregate transfers to the donee in either of the two years exceeded \$3,000. 1969 UNIF. PROBATE CODE § 2-202(1)(iv), 8 U.L.A. 297 (1998). Consistent with the increase in the federal gift tax annual exclusion from \$3,000 to \$10,000, I.R.C. § 2503(b) (1999), the redesigned elective-share provisions of the 1990 UPC increased the amount of a decedent's gifts within two years of death that will be excluded from the augmented estate to \$10,000 per donee, per year. 1990 UNIF. PROBATE CODE § 2-205(3)(iii) (amended 1993), 8 U.L.A. 106-07 (1998). See also *infra* note \_\_\_\_\_. Note that under the Taxpayer Relief Act of 1997, the gift tax annual exclusion of Internal Revenue Code section 2503(b) will be adjusted for inflation in \$1,000 increments for taxable gifts made after 1998. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 501(c), 111 Stat. 788, 846 (1997).

Specifically excluded from the list of nonprobate transfers includible in the augmented estate by the 1969 UPC were "any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse." 1969 UNIF. PROBATE CODE § 2-202(1) (amended 1993), 8 U.L.A. 297 (1998). The explanation for this exclusion was that life insurance "is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse . . ." 1969 UNIF. PROBATE CODE § 2-202 cmt. (amended 1993), 8 U.L.A. 299, 299 (1998). For a criticism of the exclusion, see Michael Bridge, Note, *Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate*, 74 CORNELL L. REV. 511 (1989). The redesigned elective-share provisions of the 1990 UPC do not include a similar exclusion and specifically include in the augmented estate proceeds of insurance on the life of the decedent if the decedent, immediately before death, either owned the policy or alone held a presently exercisable general power of appointment over it or its proceeds. 1990 UNIF. PROBATE CODE § 2-205(1)(iv) (amended 1993), 8 U.L.A. 105 (1998). These changes were made in recognition that such assets as life insurance and annuities "were, under the pre-1990 Code, used to deplete the estate and reduce the spouse's elective-share entitlement." 1990 UNIF. PROBATE CODE § 2-205 cmt. (amended 1993), 8 U.L.A. 108 (1998).

<sup>42</sup> See, e.g., *King v. King*, 613 N.E.2d 251 (Ohio Ct. App. 1992) (holding that real property a decedent who was suffering from a terminal illness transferred to his wife eleven days before his death to avoid a probate proceeding was not considered in determining the surviving spouse's elective share of the remaining assets in the decedent's probate estate).

nonprobate transfers the surviving spouse received as a result of the deceased spouse's death, such as through life insurance or the ownership of property by the spouses as joint tenants with rights of survivorship.<sup>43</sup> Elective-share statutes that ignore such transfers allow a surviving spouse who receives them to receive more of the deceased spouse's assets than likely was intended.<sup>44</sup> The 1969 UPC addressed this problem by including in the augmented estate property of the surviving spouse that was derived from the decedent,<sup>45</sup> whether through inter vivos gift or by will substitute,<sup>46</sup> and then reducing the surviving spouse's elective

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<sup>43</sup> See, e.g., *McSpadden v. McSpadden*, 331 P.2d 471 (Okla. 1958).

<sup>44</sup> For example, assume the deceased spouse had a \$600,000 net probate estate. Under a one-half elective-share statute, the surviving spouse would be entitled to receive \$300,000. But if the deceased spouse had a \$300,000 net probate estate and had placed \$300,000 of additional assets in joint tenancy with rights of survivorship with the other spouse, the survivor would receive the \$300,000 of joint tenancy assets by survivorship and also would be entitled to a one-half elective share of the \$300,000 probate estate, for a total of \$450,000.

<sup>45</sup> Note that including in the decedent's augmented estate property of the surviving spouse that was derived from the decedent requires a determination at the decedent's death of what, if any, property of the spouse was derived from the decedent. The 1969 UPC addressed this issue with a rebuttable presumption that all property owned by the spouse at the decedent's death, or previously transferred by the spouse in such a way that it would have been included in the augmented estate of the surviving spouse if the surviving spouse had predeceased the decedent, was derived from the decedent. 1969 UNIF. PROBATE CODE § 2-202(2)(iii) (amended 1993), 8 U.L.A. 298 (1998). For a discussion of the difficulties of rebutting the presumption, and issues raised with respect to its application, see Kurtz, *supra* note \_\_\_, at 1041. For a case in which it was necessary for the court to determine whether nonprobate assets the surviving spouse received following the decedent's death were derived from the decedent, see *Ridgeway v. Archdekin*, 877 S.W.2d 167 (Mo. Ct. App. 1994).

<sup>46</sup> 1969 UNIF. PROBATE CODE § 2-202, 8 U.L.A. 298 (1998). Property of the surviving spouse that had been derived from the decedent is included in the augmented estate under the 1969 UPC not only if it was owned by the surviving spouse at the decedent's death, but also to the extent such property was transferred by the surviving spouse during the marriage to a third party without full consideration, if such property would have been included in the surviving spouse's augmented estate if the surviving spouse had predeceased the decedent. 1969 UNIF. PROBATE CODE § 2-202(2) (amended 1993), 8 U.L.A. 298 (1998). Further, although the proceeds of insurance on the decedent's life that were payable to a third party were not includible in the decedent's augmented estate under the 1969 UPC, see *supra* note \_\_\_, insurance proceeds received by the surviving spouse were includible in the decedent's augmented estate and charged against the surviving spouse's elective share, to the extent that the proceeds were attributable to premiums paid by the decedent. Compare 1969 UNIF. PROBATE CODE § 2-202(1) (amended 1993), 8 U.L.A. 297 (1998)



share by the amount of that property.<sup>47</sup>

Although these modifications to pre-1969 UPC elective-share law work to avoid grossly inequitable results in circumstances in which the deceased spouse, during the marriage, made substantial gifts to others within two years of death, or made nonprobate transfers to others at death, or made lifetime gifts or nonprobate transfers at death to the surviving spouse, they do not avoid grossly inequitable results in other common circumstances.<sup>48</sup> Because of the increase of the elective-share percentage from one-third to half and the adoption of the

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(excluding from the augmented estate “any life insurance . . . payable to a person other than the surviving spouse”) with 1969 UNIF. PROBATE CODE § 2-202(2)(i) (amended 1993), 8 U.L.A. 298 (1998) (including in the decedent’s augmented estate property of the surviving spouse derived from the decedent, including “any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him”). Thus, for example, if the decedent’s probate and nonprobate assets consisted of a \$200,000 net probate estate and a \$100,000 policy of insurance on the decedent’s life payable to a third party, under the 1969 UPC the decedent’s augmented estate would be \$200,000, not \$300,000, and the surviving spouse’s one-third elective share would be \$66,667, not \$100,000. If the \$100,000 of insurance proceeds had been payable to the surviving spouse, however, the augmented estate would have been \$300,000, but the spouse’s one-third elective share (\$100,000) would have been fully satisfied by the insurance proceeds. The rationale for this inconsistent treatment was that life insurance was not thought to be purchased, ordinarily, to defeat the surviving spouse’s elective share, *see supra* note \_\_\_, but it was viewed as being “unfair to allow a surviving spouse to disturb the decedent’s estate plan if the spouse has received ample provision from life insurance.” 1969 UNIF. PROBATE CODE § 2-202 cmt. (amended 1993), 8 U.L.A. 299 (1998).

<sup>47</sup> 1969 UNIF. PROBATE CODE §§ 2-202(2), 2-207(a) (amended 1993), 8 U.L.A. 298, 315 (1998). Note that including the surviving spouse’s property that was derived from the decedent in the decedent’s augmented estate, and then subtracting it from the survivor’s elective share to determine his or her net elective-share claim, will reduce the surviving spouse’s net elective-share claim and may eliminate it entirely. For example, if the decedent’s augmented estate is \$300,000, if the decedent had not made any lifetime gifts to the surviving spouse, and if the surviving spouse’s elective-share fraction under the applicable jurisdiction’s elective-share statute is one-third, the elective-share claim would be \$100,000. But if the decedent had made lifetime gifts to the spouse of \$150,000 that would have been includible in the surviving spouse’s augmented estate if the surviving spouse had predeceased the decedent, the decedent’s augmented estate under the 1969 UPC would be \$450,000, resulting in an elective share under a one-third elective-share statute of \$150,000. From that amount, however, the \$150,000 of the surviving spouse’s property that was derived from the decedent would be subtracted, thus completely satisfying the spouse’s elective share.

<sup>48</sup> For a discussion of circumstances in which the 1969 UPC elective-share provisions produce

approximation system briefly described above,<sup>49</sup> the 1990 UPC's redesigned elective-share provisions should help to avoid such results in many of those circumstances. However, as recognized by one of the chief architects of the approximation system, in other circumstances the approximation system itself can be expected to produce results that are grossly inequitable.<sup>50</sup>

### **Overview of the 1990 Revisions to the Spousal Elective Share of the UPC**

As stated, the primary motivation for redesigning the UPC's elective-share provisions in 1990 was to bring elective-share law in noncommunity-property jurisdictions into line with the partnership theory of marriage.<sup>51</sup> Generally, under

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inequitable results, see *infra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>49</sup> See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>50</sup> Professor Waggoner, who served as Reporter, Drafting Committee to Revise Article II of the Uniform Probate Code, Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 Real Prop. Prob. & Tr. J. 683, 683 (1992) [hereinafter Waggoner, *Multiple-Marriage Society*], recognized that although the approximation system may be reasonably accurate, it can, in a given case, be quite inaccurate. *Id.* at 741-42. In Professor Waggoner's view, however, circumstances which would create grossly inequitable results under the approximation system will arise infrequently and should not be used as a basis for rejecting the approximation system. *Id.* See also *infra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>51</sup> See *supra* text accompanying note \_\_\_\_\_. In addition, the traditional purpose of elective-share law – to provide a surviving spouse with support – also is accommodated by the UPC's new elective-share system. See *infra* note \_\_\_\_\_. Note that the objective of incorporating the partnership theory of marriage into elective-share law is not so fully embraced by the UPC's 1990 revisions that it applies in the event a surviving spouse is incapacitated or dies during the administration of the deceased spouse's estate without having made the election. In the case of an incapacitated surviving spouse, an election may be made on his or her behalf, but the elective share is held in a custodial trust, the remainder beneficiaries of which are the predeceased spouse's residuary devisees or heirs. 1990 UNIF. PROBATE CODE §2-212(b) and (c)(3) (amended 1993), 8 U.L.A. 126-27 (1998). If a surviving spouse dies during the administration of the predeceased spouse's estate without having made the election, the personal representative of the surviving spouse's estate may not make the election on his or her behalf. 1990 UPC § 2-212(a) at 126. At least one state that has adopted most of the Uniform Probate Code since it was revised in 1990 has rejected these limitations on the incorporation of the marital partnership theory into elective-share law, and allows an election by the personal representative of a deceased spouse, and the elective share of an incapacitated spouse to be received outright rather than in a custodial

the marital partnership theory, the spouses are viewed as equal partners with respect to property acquired by either of their efforts,<sup>52</sup> but as having no claim to each other's separate property.<sup>53</sup> The elective-share provisions of the 1969 UPC

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trust. S.D. CODIFIED LAWS § 29A-2-212 (Michie 1999).

<sup>52</sup> See *supra* text accompanying note \_\_\_\_.

<sup>53</sup> Although significant issues can arise with respect to the classification of spouses' property as marital or separate, see *supra* note \_\_\_\_ and *infra* text accompanying notes \_\_\_\_-\_\_\_\_, the marital partnership principle that the spouses' marital property, but not their separate property, should be shared is well established. For example, an early statement of the marital partnership theory was that "[m]arriage should be regarded as a partnership of co-equals with a division of labor that entitles each to a one-half interest in the family assets accumulated out of partnership activity while the marriage is functioning." Henry H. Foster, Jr. & Doris Jonas Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L. Q. 169, 176 (1974). Further, the division of property upon the dissolution of a marriage is made by equitable distribution in all common-law states. 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 94 (1998). Equitable distribution has been described as a system that "views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute – directly and indirectly, financially and nonfinancially – the fruits of which are distributable at divorce." *Id.* (quoting J. GREGORY, THE LAW OF EQUITABLE DISTRIBUTION ¶1.03, at 1-6 (1989)). In the great majority of jurisdictions, only marital property is subject to equitable distribution at divorce, and in most of the jurisdictions in which separate property also may be equitably divided, separate property of one spouse will not be awarded to the other except in limited circumstances. See TURNER, *supra* note \_\_\_\_, § 8.12. Moreover, community-property law, as it exists in the United States, see *supra* note \_\_\_\_, is widely viewed as recognizing the partnership theory of marriage. See, e.g., UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 93-94 (1998). Under the community-property systems in effect in the United States, each spouse has an equal vested half interest in property acquired during the marriage from the efforts of either spouse, but does not have any interest in the separate property of the other spouse. Pagano, *supra* note \_\_\_\_, § 20.02[1][b], at 20-19 – 20-20. Community-property law does not restrict the ability of a spouse to dispose of his or her separate property (and his or her half of the community property) by will. *Id.* § 20.05[2] at 20-120 – 20-121. Although four of the community-property jurisdictions (Nevada, New Mexico, Texas, and Washington) allow the trial court to award one spouse's separate property to the other in a divorce proceeding, that latitude is granted only under limited circumstances, such as a showing of actual need. *Id.* § 20.04[1][b]. In community-property jurisdictions, the surviving spouse is not viewed as needing the protection of an elective share:

The survivor already owns a half interest in the fruits of the marriage. No elective share is provided with respect to the separate or individual property of the other spouse because that property was not attributable to the fruits of the marriage. Contribution having been rewarded [through half ownership of the community property], the decedent can be allowed unfettered power of disposition over her or his separate or individual property and over her or his half of the community or marital property.

Waggoner, *Marital Property Rights*, *supra* note \_\_\_\_, at 47 n.69. But see AMERICAN LAW INSTITUTE,

were not intended to incorporate the partnership theory of marriage into elective-share law;<sup>54</sup> not surprisingly, they can and often do yield results that are not consistent with the marital partnership theory.<sup>55</sup>

For example, if a deceased spouse who owned little or no separate property, and in whose name substantially all of the couple's marital assets were titled, died testate with a will devising the property to someone other than the surviving spouse, the survivor's elective share under the 1969 UPC would be

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PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 2, March 14, 1996) [hereinafter ALI, PRINCIPLES OF FAMILY DISSOLUTION] § 4.18 (proposing the recharacterization of separate property as marital property at the dissolution of long-term marriages, and discussed *infra* note \_\_\_\_); *In re Marriage of Irwin*, 822 P.2d 797 (Wash. Ct. App. 1992) (upholding trial court's decision, under statutory authority granting the court broad discretion to divide marital and separate property of spouses on the dissolution of their marriage, to divide approximately equally the separate as well as the community property of spouses who had been married 27 years).

<sup>54</sup> Rather, the elective-share provisions of the 1969 UPC were viewed as comprising "a system for common law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a 'fair share' of the decedent's estate." 1969 UNIF. PROBATE CODE pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 292, 292 (1998). A central feature of the 1969 UPC's elective-share provisions is the augmented estate, the stated purposes of which were:

(1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements.

1969 UPC § 2-202 cmt. at 299.

As discussed in note \_\_\_\_, *supra*, the principal policies underlying elective-share statutes in noncommunity-property jurisdictions are to provide for the surviving spouse's support and to provide the surviving spouse with the right to receive a share of the assets of the decedent in recognition of the survivor's contribution to their acquisition. Neither policy is implemented well by the 1969 UPC. With respect to the support rationale, the 1969 UPC's one-third elective share is fixed without regard to the needs of the surviving spouse. See *generally* Volkmer, *supra* note \_\_\_\_, at 99 (criticizing elective-share statutes for their inflexibility and potential to over or under compensate a surviving spouse). With respect to implementing the marital partnership rationale, the 1969 UPC "flunks the test because the amount prescribed is one-third, not one-half." *Id.* at 138.

<sup>55</sup> For a discussion of the 1969 UPC's failure to implement the partnership theory of marriage, see

only one-third of the deceased spouse's assets,<sup>56</sup> rather than half, as would be the case under the partnership theory of marriage standard.<sup>57</sup> By contrast, the 1969 UPC elective-share system also can result in a surviving spouse receiving significantly more than he or she would receive under the partnership theory of marriage standard. For example, assume that the marriage was a short-term, later-in-life marriage to which each spouse brought assets, and that during the marriage neither contributed to the accumulation of assets by the other. In such a situation, the surviving spouse's elective share under a system that implements the partnership theory of marriage would be zero, because there would be little or no marital property; the 1969 UPC, however, provides the surviving spouse with a one-third elective share.<sup>58</sup>

Similarly, the surviving spouse's elective share under the 1969 UPC also would be more than it would be under the partnership theory of marriage standard if during the marriage each spouse accumulated approximately the same amount of marital property in his or her name, or if the survivor had more

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Waggoner, *Marital Property Rights*, *supra* note \_\_\_, at 48-51.

<sup>56</sup> 1969 UNIF. PROBATE CODE § 2-201(a), 8 U.C.A. 293 (1998).

<sup>57</sup> In this article, the "partnership theory of marriage standard" refers to a property division at the termination of a marriage under which the couple's marital property, or its value, is divided equally between them, with neither spouse having a claim against the other's separate property. See *supra* notes \_\_\_ and \_\_\_.

<sup>58</sup> For an example based on such facts that is used to illustrate the shortcomings of the 1969 UPC elective-share system, see 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt., ex. 2 (amended 1993), 8 U.L.A. 93, 95 (1998). In cases of such short-term, later-in-life marriages, the General Comment states that the 1990 UPC's new elective-share system is designed "to decrease or even eliminate the entitlement of the surviving spouse because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth." *Id.* at 96. The General Comment, however, does not address the operation of the UPC's new elective-share system in the context of long-term, later-in-life marriages. For such a discussion, see *infra* text accompanying notes \_\_\_-\_\_\_.

marital property (that was not derived from the decedent) than did the decedent.<sup>59</sup> In either case, the surviving spouse's elective share under the partnership theory of marriage standard would be little or nothing, because the surviving spouse already would own half or more of the couple's marital property; under the 1969 UPC, however, he or she could elect to receive one-third of both the marital and separate property of the decedent.<sup>60</sup> This form of inequity is due to the 1969 UPC elective-share system awarding the surviving spouse the same one-third share of the deceased spouse's augmented estate regardless of the amount of property already owned by the surviving spouse (unless part or all of

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<sup>59</sup> The surviving spouse's elective share under the 1969 UPC, as well as under pre-UPC conventional elective-share statutes, is determined without regard to the spouse's own assets or earning capacity (except, under the 1969 UPC, to the extent the surviving spouse's own assets were derived from the decedent, see *supra* notes \_\_\_\_ - \_\_\_\_ and accompanying text), presumably because the elective-share system was designed to protect widows who had not worked outside the home from disinheritance by their husbands. See Volkmer, *supra* note \_\_\_\_, at 98. For a view that the assumption underlying such statutes – that widows have no property or earning capacity – ignores the increasing number of women who have entered the work force, some of whom have a significant earning capacity and earn more than their husbands, see J. Thomas Oldham, *Should the Surviving Spouse's Forced Share be Retained?*, 38 CASE W. RES. L. REV. 223, 234 (1987/88) [hereinafter Oldham, *Surviving Spouse's Forced Share*].

<sup>60</sup> Even if the deceased spouse owned more marital property than did the survivor, the elective-share provisions of the 1969 UPC could result in the survivor having more than half of the couple's marital property, in addition to a one-third share of the decedent's separate property, because the one-third elective share of the decedent's marital property received by the surviving spouse, when added to the surviving spouse's own marital property, could leave the surviving spouse with more than half of the couple's total marital assets. For example, if the decedent owned \$300,000 of marital property (and no separate property) and the surviving spouse owned marital property of \$200,000, the surviving spouse's one-third elective share under the 1969 UPC would be \$100,000, leaving the surviving spouse with \$300,000 of the couple's \$500,000 of marital property. For the surviving spouse's one-third elective share under the 1969 UPC to result in the surviving spouse having 50% of the couple's marital property, a decedent who owned no separate property would have had to own 75% of the total marital property of the couple, with the surviving spouse owning the other 25% ( $[1/3 \times 75\%] + 25\% = 50\%$ ). If the decedent also owned separate property at the time of death, how close the 1969 UPC's elective-share system would come to a result under which the surviving spouse would have assets with a value equal to half of the couple's marital property would depend on the amount of separate property owned by the decedent as well as the relative amounts of marital property owned by the decedent and the surviving spouse.

the surviving spouse's property had been derived from the deceased spouse).<sup>61</sup>

These deficiencies of the elective-share system under the 1969 UPC were addressed by the 1990 revisions. Because the revisions were intended to incorporate into elective-share law the partnership theory of marriage, under which spouses are viewed as equal partners with respect to their marital property,<sup>62</sup> the 1990 revisions increased the surviving spouse's elective-share percentage from one-third to half.<sup>63</sup> The surviving spouse's one-third elective share under the 1969 UPC, however, applied not just to marital property in the deceased spouse's augmented estate, but to separate property as well,<sup>64</sup> and it was determined without regard to the amount of property (marital or separate) the surviving spouse owned in his or her own right at the time of the deceased spouse's death (except to the extent that property of the surviving spouse was derived from the deceased spouse<sup>65</sup>). In redesigning the UPC's elective-share system to recognize the surviving spouse's partnership-theory-of-marriage claim to half of the couple's marital property, but to none of the decedent's separate property,<sup>66</sup> it was necessary for the drafters of the 1990 revisions to adopt a

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<sup>61</sup> See *supra* notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>62</sup> See *supra* text accompanying note \_\_\_\_.

<sup>63</sup> See *supra* note \_\_\_\_.

<sup>64</sup> The 1969 UPC's definition of the augmented estate, against which the surviving spouse could claim a one-third elective share, included the decedent's probate estate, certain nonprobate transfers, and certain property of the surviving spouse that was derived from the decedent, all without regard to whether the property was marital or separate. 1969 UNIF. PROBATE CODE § 2-202 (amended 1993), 8 U.L.A. 297-98 (1998).

<sup>65</sup> See *supra* notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>66</sup> The redesigned elective-share system of the 1990 UPC does not give the surviving spouse an elective share of half of the couple's marital property, less any marital property already owned by the surviving spouse. Rather, it is designed, generally, (i) to approximate the amount of marital

means by which the surviving spouse's elective share would be determined by giving consideration to the marital property owned by both the decedent and the surviving spouse, but not to the separate property of either.

An elective-share system under which the surviving spouse's elective share is half of the couple's marital property was not adopted, because under such a system it would be necessary to classify as marital or separate the property owned by both spouses at the decedent's death.<sup>67</sup> Also considered but rejected was an elective-share system modeled on divorce law,<sup>68</sup> which in the noncommunity-property states and several community-property jurisdictions divides property on the dissolution of a marriage by equitable distribution.<sup>69</sup> The

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and separate property each spouse owns (based on the length of their marriage); and (ii) to give the surviving spouse the right to elect to receive so much of the decedent's property as will result in the surviving spouse having property with a value equal to approximately half of what the system treats as the couple's marital property, in addition to all of what the system treats as the survivor's separate property. See *infra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>67</sup> The General Comment's explanation of why the UPC's redesigned elective-share system does not determine the surviving spouse's elective share directly by reference to the couple's marital property is as follows:

Because ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-partnership theory by means of a mechanically determined approximation system, which can be called an accrual-type elective share. Under the accrual-type elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance.

1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 96 (1998). For a proposal to include in the decedent's augmented estate only marital property of the couple, using as the starting point the deceased spouse's gross estate for federal estate tax purposes, see Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567 (1995).

<sup>68</sup> Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 726-29.

<sup>69</sup> A common meaning of "equitable distribution" is the division of the property of a couple in a divorce proceeding in an equitable manner without regard to legal title. TURNER, *supra* note \_\_\_\_, § 1.01. All of the noncommunity-property states and the District of Columbia are equitable distribution jurisdictions. Ann B. Oldfather, *Basic Property Distribution Rules*, in VALUATION AND



perceived advantage of doing so would be to make marital property rights on the dissolution of a marriage – whether by divorce or death – consistent.<sup>70</sup> Equitable distribution was not used as the model for the UPC’s redesigned elective share because, among other reasons, there are several equitable distribution systems;<sup>71</sup> accordingly, while individual states could adopt into their elective-share law their form of equitable distribution, the result would not be the desired uniformity in elective-share law among the states.<sup>72</sup> In addition, property division by equitable distribution is discretionary, with property of the spouses that is determined to be subject to equitable distribution divided between them according to various subjective factors.<sup>73</sup> Such a system was viewed as being

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DISTRIBUTION OF MARITAL PROPERTY, (Richard D. Belnave rev. 1991 (1999), § 1.01, at 1-3. Community-property jurisdictions that provide for property division at divorce by equitable distribution include Arizona, Nevada, Texas, and Washington. *Id.* at 1-7. For a brief summary of the development and operation of equitable distribution, see Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115 (1997).

<sup>70</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 726.

<sup>71</sup> In some jurisdictions, all of the couple’s property, regardless of how or when it was acquired, is subject to division, while in others only marital property may be divided. *Id.* at 726-27 (citing J. THOMAS OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* § 3.03 (1989)). Under a third system, separate property is presumptively excluded from division, but may be divided if excluding it would be unfair. *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 727-28. In some jurisdictions the factors to be considered in an equitable distribution determination include misconduct or fault, such as adultery, violence, excessive drinking, sexual neglect, mental cruelty, and other subjective criteria. *Id.* In England, at the death of a spouse a family maintenance system is employed under which the surviving spouse, as well as certain other dependents, may apply for and receive maintenance from the estate at the discretion of the court. *Id.* at 729 n. 118 (citing Inheritance Act (Provision for Family and Dependents Act), 1975, ch. § 1 and § 3(1)(a)-(b), 2(a)(Eng.)). Because elective-share claims are rare, *see infra* note \_\_\_\_, it has been suggested that the need to protect surviving spouses from disinheritance in the United States would be better served by an individualized system based on the English family maintenance system. Brashier, *supra* note \_\_\_\_, at 140 n.184. In noting that the drafters of the UPC’s redesigned elective-share system rejected a discretionary system similar to the English system, Professor Shapo has observed that “[g]iven the disdain of American lawyers and commentators for the English model, it is striking that there is very little criticism of that statute in

unsatisfactory for the elective share because the decedent would not be able to rebut claims made by the surviving spouse with respect to the subjective factors,<sup>74</sup> and because the uncertainty such an approach would create would be inconsistent with the elective-share goals of predictability and ease of administration.<sup>75</sup>

The method chosen for limiting the UPC's new 50% spousal elective share to the marital property of the deceased spouse, after giving consideration to marital property owned by the surviving spouse, was a mechanically applied approximation system.<sup>76</sup> Generally, the approximation system is intended to result in an electing surviving spouse owning property after the decedent's death with a value approximately equal to the marital property he or she would own following the decedent's death under a community-property regime,<sup>77</sup> plus his or her separate property.<sup>78</sup>

The UPC's new elective-share approximation system has three essential

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England." Helene S. Shapo, "A Tale of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 707 (1993).

<sup>74</sup> Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_, at 728.

<sup>75</sup> *Id.* at 728-29. (citing Sidney Kwestel & Rena C. Sepowitz, *Testamentary Substitutes – A Time for Statutory Classification* 23 REAL PROP. PROB. & TR. J. 467, 472 n.22 (1988)).

<sup>76</sup> 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt., 8 U.L.A. 93, 96 (1998).

<sup>77</sup> Following the death of a spouse in a community-property jurisdiction, the surviving spouse would own half of the couple's community property and all of his or her separate property (in addition to any property the surviving spouse received from the decedent). *See generally* MCLANAHAN, *supra* note \_\_\_, at Ch.11. The UPC's new approximation system is intended to approximate that result only if at the decedent's death the surviving spouse owns less property than the decedent; if the surviving spouse owns more property than the decedent, the UPC's redesigned elective share does not include a mechanism for the decedent's estate to claim a share of the property of the surviving spouse. *See infra* text accompanying notes \_\_\_ - \_\_\_.

<sup>78</sup> *See infra* text accompanying notes \_\_\_ - \_\_\_.

features.<sup>79</sup> First, because the longer a marriage lasts the more likely it is that more of the couple's property will be marital, the elective-share percentage increases, up to a maximum of 50%, as the length of the marriage increases.<sup>80</sup> Thus, for example, the elective-share percentage of a surviving spouse of a marriage of between five and six years is 15%; if a spouse dies between the tenth and eleventh year of the marriage, the survivor's elective-share percentage is 30%; and if the marriage lasts fifteen years or more, the surviving spouse's elective-share percentage is 50%.<sup>81</sup> Second, the elective-share percentage is applied against an augmented estate that includes not only the probate estate of,

<sup>79</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 734-36.

<sup>80</sup> The General Comment describes the new accrual-type elective share as adjusting "the surviving spouse's ultimate entitlement to the length of the marriage. The longer the marriage, the larger the 'elective-share percentage.' The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of 15 years than in a marriage of 15 days." 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 96 (1998).

<sup>81</sup> The surviving spouse's elective-share percentage under the approximation system is determined in accordance with the following table:

<u>If the decedent and the spouse were married to each other:</u>	<u>The elective share percentage is</u>
Less than 1 year .....	supplemental amount only
1 year but less than 2 years .....	3% of the augmented estate
2 years but less than 3 years .....	6% of the augmented estate
3 years but less than 4 years .....	9% of the augmented estate
4 years but less than 5 years .....	12% of the augmented estate
5 years but less than 6 years .....	15% of the augmented estate
6 years but less than 7 years .....	18% of the augmented estate
7 years but less than 8 years .....	21% of the augmented estate
8 years but less than 9 years .....	24% of the augmented estate
9 years but less than 10 years .....	27% of the augmented estate
10 years but less than 11 years .....	30% of the augmented estate
11 years but less than 12 years .....	34% of the augmented estate
12 years but less than 13 years .....	38% of the augmented estate
13 years but less than 14 years .....	42% of the augmented estate
14 years but less than 15 years .....	46% of the augmented estate
15 years or more .....	50% of the augmented estate

and certain nonprobate transfers by, the deceased spouse,<sup>82</sup> but also property owned by the surviving spouse and the same kinds of nonprobate transfers made by the surviving spouse.<sup>83</sup> Third, the first property charged against the surviving spouse's elective share is part or all of the surviving spouse's own property (including probate and nonprobate property received by the surviving spouse from the decedent) and nonprobate transfers made by the surviving spouse to others that would have been included in the surviving spouse's augmented estate had the surviving spouse been the decedent.<sup>84</sup> The decedent's probate and nonprobate transfers to others are used to satisfy the survivor's elective share only if the sum of the applicable portion of the surviving spouse's own assets and nonprobate transfers to others, plus the probate and nonprobate property received by the surviving spouse from the decedent, is less than the survivor's elective-share amount.<sup>85</sup>

#### Example 5 from the General Comment to the UPC's new elective-share

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1990 UNIF. PROBATE CODE § 2-202(a) (amended 1993), 8 U.L.A. 102 (1998).

<sup>82</sup> Included in the augmented estate are such common nonprobate assets as property in revocable trusts, property held in joint tenancy, life insurance proceeds, and funds in payable-on-death accounts. 1990 UNIF. PROBATE CODE § 2-205(1) (amended 1993), 8 U.L.A. 105 (1998). Note that assets the deceased spouse transferred to an irrevocable trust before the marriage will not be included in the decedent's augmented estate even if the decedent retained the right to receive the trust income for life. 1990 UPC § 2-205(2)(i) at 105-06. The assets in such trusts are included in the augmented estate only if the property was transferred to the trust by the decedent during the marriage. *Id.* For criticism of that limitation, see Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share -- Why the Partnership is Not Yet Complete*, 25 IND. L. REV. 1 (1991).

<sup>83</sup> 1990 UNIF. PROBATE CODE § 2-203 (amended 1993), 8 U.L.A. 103-04 (1998).

<sup>84</sup> 1990 UNIF. PROBATE CODE § 2-209(a), 8 U.L.A. 122 (1998). For a discussion of how it is determined whether all or only part of the surviving spouse's own property and nonprobate transfers to others is charged against the surviving spouse's elective share, see *infra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>85</sup> 1990 UNIF. PROBATE CODE § 2-209(b) and (c) (amended 1993), 8 U.L.A. 122-23 (1998).

provisions illustrates the application of the three features of the approximation system, as well as how it is intended to limit the 50% spousal elective share to marital property of the deceased spouse.<sup>86</sup> In the Example, (i) A and B had been married to each other for between five and six years when A died, survived by B; (ii) A's will left nothing to B; (iii) A made no nonprobate transfers to B or to anyone else; (iv) A's probate estate was \$400,000; and (v) B's assets and nonprobate transfers to others totaled \$200,000.<sup>87</sup> By including in A's augmented estate B's assets and nonprobate transfers to others, the approximation system results in A's augmented estate being \$600,000.<sup>88</sup> Under the sliding scale of UPC section 2-202(a) for determining B's elective-share percentage, the couple's five to six year marriage results in B's elective-share percentage being 15%.<sup>89</sup> As a result, B's elective share is equal to \$90,000, which is the product of the elective-share percentage of 15% multiplied by the \$600,000 augmented estate.<sup>90</sup> The General Comment describes how B's \$90,000 elective share is satisfied, and the underlying theory of the approximation system, as follows:

To say that B's entitlement is \$90,000 presupposes (by approximation) that \$180,000 of their \$600,000 are marital assets - assets subject to equalization. Hence, B's entitlement is half of that amount, or \$90,000. Exempted from equalization is the other \$420,000 of their combined assets, some of which

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<sup>86</sup> 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt., ex. 5 (amended 1993), 8 U.L.A. 93, 98-99 (1998).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

would have been A's individual or exempted property and the rest of which would have been B's individual or exempted property.

The redesigned system applies the same ratio to the asset mix of each spouse as it does to the couple's combined assets. To say that the elective-share percentage is 15% means that the combined assets are treated as being in a 30/70 ratio (30% marital, subject to equalization; 70% individual, exempted from equalization). This same ratio, in turn, governs the approximation of each spouse's mix of marital and individual property. Consequently, the redesigned system attributes 30% of A's \$400,000 (\$120,000) to marital property and the other 70% (\$280,000) to individual property. And, the system does the same for B's \$200,000, i.e., it treats 30% (\$60,000) as marital property and 70% (\$140,000) as individual property.

Accordingly, B is treated as already owning \$60,000 of the \$180,000 of marital property. Under Section 2-209(a)(2), \$60,000 of B's \$90,000 elective-share amount comes from B's own assets. Section 2-209(b) makes A's net probate estate liable for the unsatisfied balance - \$30,000. (Remember that \$120,000 of A's assets are attributed to marital property; thus, removing \$30,000 of those \$120,000 from A and adding that \$30,000 to B's \$60,000 in marital assets equalizes the aggregate \$180,000 marital assets in a 50/50 split - \$90,000 for A and \$90,000 for B.)<sup>91</sup>

Example 5 and the General Comment's explanation of it make it clear that an important objective of the 1990 UPC's redesigned elective-share system is to approximate the result that would be reached if only the couple's marital assets were subject to the elective share of a surviving spouse.<sup>92</sup> In many cases it is

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<sup>91</sup> 1990 UNIF. PROBATE CODE art. II., pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 98-99 (1998). As is apparent from Example 5 and its explanation in the General Comment, the approximation system treats an increasing percentage of each spouse's assets as marital – with that percentage being equal to twice the elective share percentage set forth in the table in 1990 UPC section 2-202(a), *see supra* note \_\_\_\_ -- as the length of the marriage increases.

<sup>92</sup> A second objective of the UPC's redesigned elective-share system is to continue after the death of a spouse his or her duty to support the survivor. 1990 UNIF. PROBATE CODE art. II, pt. 2, gen.

likely that the approximation system will accomplish that objective relatively well; in many others, however, it clearly will not, but instead will produce inequitable results.<sup>93</sup>

### **Operation of the Spousal Elective-Share Approximation System of the UPC**

Generally, the objective of the UPC's new elective-share system is to provide the surviving spouse with a right to elect to receive property of sufficient value to result in the surviving spouse having property with a value equal to approximately half of the couple's marital property, in addition to his or her separate property.<sup>94</sup> This objective is intended to be accomplished by the approximation system, the operation of which is discussed and illustrated in the General Comment in the context of two prototypical sets of circumstances:<sup>95</sup> (i) a long-term marriage of persons who were relatively young when they married and most or all of whose assets were accumulated during the marriage,<sup>96</sup> and (ii) a

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cmt. (amended 1993), 8 U.L.A. 93, 99 (1998). See *supra* note \_\_\_\_.

<sup>93</sup> In this context, inequitable results under the UPC's new approximation system are those in which a surviving spouse's elective share reaches beyond the decedent's marital property to his or her separate property, and thus are inconsistent with the partnership theory of marriage. See *supra* note \_\_\_\_\_. For an argument that in long-term marriages ending in divorce such a result is appropriate, however, see ALI, PRINCIPLES OF FAMILY DISSOLUTION, § 4.18, *supra* note \_\_\_\_, discussed *infra* note \_\_\_\_.

<sup>94</sup> See *supra* text accompanying notes \_\_\_\_-\_\_\_\_. Note the difference between the surviving spouse's elective share being (i) the right to elect to receive property of sufficient value to result in the surviving spouse having property with a value equal to approximately half of the couple's marital property; and (ii) the right to elect to receive half of the couple's marital property, to the extent the surviving spouse does not already own half the marital property. Consistent with the objective of avoiding the need to classify the spouses' property as marital or separate, see *supra* note \_\_\_\_ and accompanying text, the UPC's new approximation system follows the first approach.

<sup>95</sup> 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 93-99 (1998).

<sup>96</sup> In Example 1 of the General Comment, the spouses were in their twenties or early thirties when they married, their marriage lasted more than 15 years, and they accumulated assets worth

short-term marriage of persons who married later in life, when they each already owned substantial assets.<sup>97</sup> In many of these kinds of situations, the approximation system likely will work relatively well to accomplish the intended objective.<sup>98</sup>

The essence of the approximation system is that the length of the marriage conclusively determines for elective-share purposes what portion of each spouse's assets is treated as marital, and thus subject to a surviving spouse's elective-share claim, and what portion is treated as separate, and thus not subject to such a claim.<sup>99</sup> The longer the marriage, the greater the

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\$600,000 during their marriage. *Id.* at 94.

<sup>97</sup> In Example 2 of the General Comment, the spouses were in their seventies when they married, their marriage lasted five years, and they had combined assets of \$600,000 at the time of the first of their deaths, \$300,000 of which was titled in each of their names. *Id.* at 95. Example 2 does not directly state that the spouses brought substantial assets to the marriage, but the discussion of the example in the General Comment makes it clear that was the case. The example is used to illustrate how in such a circumstance the surviving spouse's elective share under conventional elective-share law would be a "windfall" to the surviving spouse, and his or her successors, because the surviving spouse would be unlikely to have made a significant monetary or non-monetary contribution to the decedent's wealth. *Id.* See also Waggoner, *Marital Property Rights*, *supra* note \_\_\_, at 48-49 (illustrating how conventional elective-share law produces results inconsistent with the marital sharing theory in the context of an example very similar to Example 2 of the General Comment, but in which it is expressly stated that each spouse brought \$300,000 of assets to their later-in-life marriage).

<sup>98</sup> To illustrate, in Example 3 in the General Comment, A and B had been married for more than fifteen years when A died, survived by B. 1990 UNIF. PROBATE Code art. II, pt. 2, gen cmt. (amended 1993), 8 U.L.A. 93, 97-98 (1998). At A's death, (i) A had a net probate estate of \$400,000, (ii) B's assets and nonprobate transfers to others, less enforceable claims, totaled \$200,000, and (iii) A's will left nothing to B. *Id.* Because the marriage was more than fifteen years in duration, the 1990 UPC implicitly treats all of the couple's \$600,000 of assets as marital. See *supra* notes \_\_\_ and \_\_\_. Assuming the spouses own little or no separate property, B's 50% partnership-theory-of-marriage share of those assets is \$300,000. Because B already owns \$200,000 of the couple's assets, however, B's claim against A's assets should be only \$100,000, which it is under the approximation system. Similarly, Example 5 of the General Comment, discussed *supra* text accompanying notes \_\_\_-\_\_\_, illustrates application of the approximation system to minimize or avoid inequitable results in the second prototypical case – that of a short-term, later-in-life marriage.

<sup>99</sup> See Example 5 of the General Comment, discussed *supra* text accompanying notes \_\_\_ to \_\_\_.



percentage of each spouse's assets that is treated as marital, until after fifteen years of marriage all of each spouse's assets implicitly are so treated.<sup>100</sup> If either spouse has, or both spouses have, property they brought to the marriage, or received by gift or inheritance during the marriage, over time the UPC's approximation system effectively will convert it, for elective-share purposes, to marital property. This result is not produced by a presumption that can be rebutted by proof of the separate nature of a spouse's property.<sup>101</sup> Rather, unless the spouses have provided otherwise in a valid marital agreement,<sup>102</sup> part or all (depending on the length of the marriage)<sup>103</sup> of the spouses' separate property will be treated as marital property in determining whether the surviving spouse is entitled to an elective share and, if so, the amount of that claim.

Interestingly, the approximation system may not result in an elective share

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<sup>100</sup> See *supra* note \_\_\_\_ and accompanying text.

<sup>101</sup> The rationale for the approximation system's implicit classification of the spouses' property as marital or separate being conclusive has been described as follows:

The 1990 UPC system does not exempt inherited or separate property from the augmented estate, even if the property is segregated and can be easily identified. This might seem unfair, but in actuality it would be unfair to do the opposite. To allow segregated inherited or separate property to be exempted from the system would unfairly disadvantage the spouse whose inherited or separate property was not segregated and could not be easily identified.

Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 741, n.149.

<sup>102</sup> Under the UPC, a surviving spouse may waive the right to an elective share, before or after marriage, by a written waiver or agreement signed by the surviving spouse. 1990 UNIF. PROBATE CODE § 2-213 (amended 1993), 8 U.L.A. 129-30 (1998). See *infra* note \_\_\_\_.

<sup>103</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_\_. The approximation system does not treat any of a couple's property as marital property if they had been married less than a year at the first of their deaths. 1990 UNIF. PROBATE CODE § 2-202(a) (amended 1993), 8 U.L.A. 102 (1998). Rather, in such a case the survivor will not be entitled to an elective share unless he or she is entitled to receive a supplemental elective-share amount to provide for his or her support. 1990 UPC § 2-202(b). See *supra* note \_\_\_\_.

that is inequitable, when measured against the partnership theory of marriage standard,<sup>104</sup> even if the amounts of marital and separate property actually owned by the spouses are materially more or less than the amounts of such property the approximation system implicitly treats them as owning. If the approximation system inaccurately estimates the amount of marital and separate property of one or both of the spouses, and if that inaccurate estimate is offset by inaccurate estimates of the marital and separate property of the other spouse in certain amounts, an elective-share claim that is equal to what would be produced under the partnership theory of marriage standard nevertheless may be reached. For example, assume that A and B were in their sixties when they married; that their marriage had lasted more than fifteen years when A died, survived by B; that A's will leaves A's entire estate to A's children from a prior marriage; that A and B each owned \$300,000 of assets at the time of A's death; and that all of their assets had been brought to the marriage (or acquired during the marriage by gift or inheritance). Because their marriage lasted more than fifteen years, the approximation system treats all of their assets as marital;<sup>105</sup> in fact, all of their assets are separate. Nevertheless, the correct result under the partnership theory of marriage standard -- an elective share of zero for B -- is produced by the approximation system;<sup>106</sup> because all of their property is treated as marital

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<sup>104</sup> See *supra* notes \_\_\_\_ and \_\_\_\_.

<sup>105</sup> See *supra* note \_\_\_\_.

<sup>106</sup> This kind of result -- an equitable elective-share claim under the partnership theory of marriage standard when spouses own comparable amounts of separate property, some or all of which

and B already owns half of it, B has no net elective-share claim under the UPC's redesigned elective-share system.<sup>107</sup>

Whether in a given case the approximation system will produce an elective share that is consistent with the partnership theory of marriage standard, particularly if the marriage was a long-term, later-in-life one, however, is purely fortuitous. If the spouses in such a marriage own little or no marital assets and disproportionate amounts of separate property, an inequitable result will be produced if the wealthier spouse dies first. To illustrate, assume (i) that A and B had been married more than fifteen years when A died with a will that devised none of A's estate to B, (ii) that A had made no nonprobate transfers to others and had a \$400,000 net probate estate, all of which was separate property, and (iii) that B owned \$200,000 of probate and nonprobate assets, also separate

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implicitly is treated inaccurately as marital property by the approximation system – was anticipated by the new system's designers. See John H. Langbein and Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 319 (1987), which notes that the approximation system would not necessarily produce inequitable results when substantial separate property is brought to a marriage that is of long duration because "an affluent person is more likely to marry someone of the same ilk than a pauper." Compare J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L. Q. 219, 250-51 (1989) [hereinafter Oldham, *Tracing, Commingling, and Transmutation*] in which the author argues that, in the divorce context, distinguishing marital property from separate property, along with creating standards for the award of alimony, "to some degree facilitates marriages between people from different classes." The argument is that "a person with a high earning capacity or significant savings would be disinclined (without a premarital contract) to marry a person with a significantly lower earning capacity or smaller nest egg" if a divorce court could divide separate property and award alimony based solely on need. *Id.* at 250. Similarly, a deferred-community-property elective-share system arguably also would facilitate marriages between spouses from different economic classes, because a person bringing a substantial amount of property to a marriage, or expecting to receive a substantial gift or inheritance during the marriage, would not risk having up to half of that property claimed by a surviving spouse as an elective share.

<sup>107</sup> The calculation is as follows. A's augmented estate is \$600,000. 1990 UNIF. PROBATE CODE §§ 2-203, 2-204, 2-207 (amended 1993), 8 U.L.A. 103, 104, 118 (1998). Because of the length of their marriage, B's elective-share percentage is 50%. 1990 UPC § 2-202(a) at 102. B's resulting elective-share amount is \$300,000. *Id.* B's \$300,000 elective-share amount is satisfied in full by

property. In such a case, the implicit and inaccurate assumption of the approximation system -- that all of A's and B's property is marital and none separate, when in fact all of their property is separate and none marital -- will yield an inequitable elective-share result when measured by the partnership theory of marriage standard. At A's death, the approximation system implicitly will treat all of A's and B's combined \$600,000 of assets as marital property, B will be entitled to \$300,000 of those assets, and because B already has \$200,000 of property, B's net elective-share claim against A's estate will be \$100,000.<sup>108</sup> By contrast, because the spouses owned no marital property, under the partnership theory of marriage standard B would not be entitled to an elective share.<sup>109</sup>

Whether the UPC's approximation system will yield an elective share for a surviving spouse that is close to the goal of incorporating the partnership theory of marriage into elective-share law -- an amount that will cause the survivor to have assets with a value of approximately half of the couple's marital property,

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B's \$300,000 of assets. 1990 UPC § 2-209(a)(2) at 122.

<sup>108</sup> See *supra* note \_\_\_\_.

<sup>109</sup> Notice, though, that even with such wholly inaccurate implicit assumptions of the marital or separate character of the spouses' property, and even though the spouses own significantly disproportionate amounts of assets (\$400,000 by A and \$200,000 by B), the right elective-share result, under the partnership theory of marriage standard, nevertheless will be reached if B dies before A. In that case, as in the illustration in the text, the approximation system will treat -- inaccurately -- all of their \$600,000 of assets as marital. But because A's 50% elective-share amount of those assets (\$300,000) is less than the \$400,000 of assets A already owns, UPC section 2-209(a) will cause A's net elective-share claim against B's estate to be zero, which is the correct result under the partnership theory of marriage standard because the spouses owned no marital property. Note also that in cases like this, despite the approximation system treating all of the couple's \$600,000 of assets as marital property, B's estate would not have a claim against A to equalize the ownership of their property. See *infra* text accompanying notes \_\_\_\_ - \_\_\_\_.

plus his or her separate property<sup>110</sup> -- will depend on at least four variables: (i) the amount of marital property each spouse owns (including assets titled in each spouse's name and each spouse's nonprobate transfers to others that are included in the decedent's augmented estate); (ii) the amount of separate property each spouse owns (again including assets titled in each spouse's name and each spouse's nonprobate transfers to others that are included in the decedent's augmented estate); (iii) the length of the marriage; and (iv) which spouse dies first. Depending on the relationships among those four variables, the application of the approximation system in a given case may produce the right elective-share result under the partnership theory of marriage standard even if the assumptions implicit in the approximation system are grossly inaccurate.<sup>111</sup> As illustrated by the following discussion, however, that often will not be the case.

In evaluating the effectiveness of the UPC's redesigned elective-share system to produce a result consistent with the partnership theory of marriage standard, the questions raised include whether the approximation system's implicit assumptions of the marital and separate character of the spouses' property will prove to be relatively accurate most of the time, and how often application of the approximation system will produce a reasonably accurate result even if its implicit property classification assumptions are inaccurate. As to the former, the adoption of the approximation system apparently was not based

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<sup>110</sup> See *supra* note \_\_\_\_.

on empirical studies of how much marital and how much separate property spouses own at different stages of their marriages.<sup>112</sup> Rather, the implicit assumption upon which the approximation system is built is that the portion of each spouse's property that is marital begins at zero when they marry, and increases by 6% for each of the first ten full years of their marriage, and by 8% for each of the next five full years they are married, until all of their property is treated as marital after fifteen years of marriage.<sup>113</sup> Although it may be accurate that short-term marriages usually do not produce significant amounts of marital property,<sup>114</sup> the converse -- that spouses in long-term marriages will have little or no separate property -- often, perhaps even usually, will not be accurate for spouses in second or subsequent marriages, and also frequently will not be accurate for spouses in first marriages.

With respect to second and subsequent marriages, one of the expected general effects of the UPC's redesigned elective-share system "is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life

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<sup>111</sup> For a detailed illustrative example, see the Appendix.

<sup>112</sup> Because in most noncommunity-property jurisdictions marital and separate property are treated differently when a marriage ends in divorce, but not when a marriage ends with a spouse's death, *see infra* notes \_\_\_\_ - \_\_\_\_, such a study that would include couples whose marriages terminated with one of their deaths would be difficult to design and conduct in a noncommunity-property jurisdiction. Because of the different treatment marital and separate property receive in community-property jurisdictions both when marriages end in divorce and death, *see infra* note \_\_\_\_ and accompanying text, perhaps such a study that would yield reliable results could be conducted in a community-property jurisdiction.

<sup>113</sup> *See supra* notes \_\_\_\_ and \_\_\_\_.

<sup>114</sup> If a short-term first marriage ends in the death of a spouse, the amount of property they own may not be substantial, but particularly if the spouses are relatively young when they marry, substantially all of it may be marital. In such a case, the UPC's approximation system will shortchange a disinherited surviving spouse. That possibility was anticipated by the designers of the approximation system, but not viewed as a serious problem. *See infra* notes \_\_\_\_-\_\_\_\_ and

marriage in which neither spouse contributed much, if anything, to the acquisition of the other's wealth . . . ."<sup>115</sup> Example 2 in the General Comment illustrates the problem of conventional elective-share law<sup>116</sup> overcompensating a surviving spouse of such a marriage in the context of a marriage of two persons in their seventies that ends with one of their deaths after five years of marriage;<sup>117</sup> Example 5 illustrates how the UPC's redesigned elective-share system minimizes or eliminates the surviving spouse's elective share in such a circumstance.<sup>118</sup> Many, if not most, second and subsequent marriages, however, presumably last more than five or six years, and a significant number of them presumably last more than the fifteen year period after which the approximation system implicitly treats all of the couple's property as marital for elective-share purposes.<sup>119</sup> Spouses of such marriages frequently will bring to

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accompanying text.

<sup>115</sup> 1990 UNIF. PROBATE CODE art. II., pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 93 (1998).

<sup>116</sup> In this context, the term "conventional elective-share law" refers to an elective-share system under which the surviving spouse's elective share is one-third of the decedent's probate or augmented estate. See *id.* at 94-96.

<sup>117</sup> In Example 2, B and C marry when both are in their seventies. *Id.* at 95. After five years, B dies survived by C. *Id.* Both B and C have adult children from prior marriages and "each naturally would prefer to leave most or all of his or her property to those children." *Id.* The couple's combined assets are \$600,000, \$300,000 of which is titled in each of their names. *Id.* Under traditional elective-share law, C would have a claim to one-third of B's \$300,000, the exercise of which would reduce B's estate to \$200,000 and thus disadvantage B's descendants while providing a windfall to C's. *Id.*

<sup>118</sup> See *supra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>119</sup> By definition, spouses in second or subsequent marriages were previously divorced or widowed. According to data published by the federal government, using period rates for 1980, approximately 78% of divorced women, but only 8% of widowed women, were expected to ever remarry; the percentages of divorced and widowed men expected to ever remarry were 83% and 21%. Waggoner, *Multiple-Marriage Society*, *supra* note\_\_\_\_, at 723 n.108 (citing BARBARA F. WILSON, U.S. DEP'T OF HEALTH & HUMAN SERVICES, PUB. NO. 89-1923, REMARRIAGES AND SUBSEQUENT DIVORCES – UNITED STATES 12 (1989)). Further, in 1983 the mean age of women who had been divorced who remarried was 33.7 years; women who had been widowed had a mean age at remarriage of 52.6 years. *Id.* Men who remarried in 1983 had a mean age of 37.3

the marriage property accumulated by them during, or received by them in connection with the termination of, a prior marriage. In the absence of a valid waiver providing otherwise,<sup>120</sup> the passage of time will result in such separate property effectively being converted by the approximation system to marital property for elective-share purposes.<sup>121</sup>

This feature of the UPC's approximation system can work to the benefit or the detriment of the surviving spouse, compared with the result that would be reached under the partnership theory of marriage standard, depending on the length of the marriage and the value of the separate and marital assets owned by the spouses at the first of their deaths. For instance, in Example 3 of the General Comment, discussed above,<sup>122</sup> (i) A and B had been married more than fifteen years when A died, (ii) A had a \$400,000 net probate estate, (iii) A had made no nonprobate transfers to others that were included in A's augmented estate, (iv) B's assets and nonprobate transfers to others that were included in A's augmented estate totaled \$200,000, (v) A's will left nothing to B, and (vi) A made no nonprobate transfers to B.<sup>123</sup> Under the approximation system, the couple's \$600,000 of assets are treated as marital because they had been

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years if they had been divorced and 60.2 years if they had been widowed. *Id.* The data do not include information on the average duration of second and subsequent marriages that end in the death of a spouse, but based on the average ages of men and women who remarry relative to their life expectancies, it likely is substantially greater than five or six years.

<sup>120</sup> See *infra* note \_\_\_\_.

<sup>121</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>122</sup> See *supra* note \_\_\_\_.

<sup>123</sup> 1990 UNIF. PROBATE CODE art.II., pt. 2, gen. cmt., ex. 3 (amended 1993), 8 U.L.A. 93, 97-98 (1998).



married more than fifteen years when A died.<sup>124</sup> Because A owned \$400,000 of those assets and B just \$200,000, and because under the partnership theory of marriage B is entitled to 50% of the marital estate,<sup>125</sup> the approximation system yields an elective-share claim for B against A's estate of \$100,000.<sup>126</sup> That result is deemed an appropriate one because the approximation system's treatment of all of their property as marital due to their marriage having lasted more than fifteen years is expected to be reasonably accurate most of the time.<sup>127</sup> If in fact all of their property was marital (or if each of them owned the same amount of separate property), the approximation system would yield the correct result under the partnership theory of marriage standard, i.e., the survivor and the decedent's estate each would own half of the couple's marital assets.<sup>128</sup>

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<sup>124</sup> See *supra* note \_\_\_\_.

<sup>125</sup> See *supra* text accompanying note \_\_\_\_.

<sup>126</sup> See 1990 UNIF. PROBATE CODE §§ 202 - 209 (amended 1993), 8 U.L.A. 102-24 (1998). The calculation is as follows:

A's net probate estate (1990 UPC § 2-204).....	\$400,000
B's assets and nonprobate transfers to others (1990 UPC § 2-207)..<	<u>200,000</u>
A's augmented estate (1990 UPC § 2-203).....	\$600,000
B's elective-share percentage (1990 UPC § 2-202) .....	<u>50%</u>
B's elective-share amount (1990 UPC § 2-202) .....	\$300,000
B's assets and nonprobate transfers to others credited against B's elective-share amount (1990 UPC § 2-209) .....	< <u>200,000</u> >
B's net elective-share claim .....	\$100,000

<sup>127</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 741-42.

<sup>128</sup> If all of A's and B's property was marital, the \$100,000 elective-share claim produced by the UPC's approximation system is the correct result under the partnership theory of marriage standard because \$100,000 is the amount of property B would need to receive from A's estate to equalize their marital assets. If part of A's \$400,000 and part of B's \$200,000 of assets was separate property, the approximation system's \$100,000 elective-share amount would be the correct result under the partnership theory of marriage standard only if A and B owned equal amounts of separate property. For example, if A's \$400,000 and B's \$200,000 of assets each included \$50,000 of separate property, A would have \$350,000 of marital property and B would have \$150,000 of marital property, in which case B's \$100,000 elective-share claim under the approximation system would result in their \$500,000 marital estate being divided equally between A's estate and B.

If, however, B had owned the \$200,000 of assets when A and B married (or if B had received them by gift or inheritance during the marriage), and if the \$400,000 of assets owned by A at A's death were marital assets, the approximation system would shortchange B. In such a case, the correct amount of B's elective-share claim against A's estate, under the partnership theory of marriage standard, would be \$200,000 (half of the couple's \$400,000 of marital property, all of which was titled in A's name), not the \$100,000 net elective-share claim B would have under the UPC's approximation system. By contrast, if A's \$400,000 consisted of \$200,000 of separate property and \$200,000 of marital property, and if B's \$200,000 was marital property, the approximation system would overcompensate B. In such a case, B's elective-share claim against A's estate under the partnership theory of marriage standard would be zero (because their marital property already was divided between them equally), not the \$100,000 amount produced by the approximation system.<sup>129</sup>

With respect to both first and subsequent marriages, the approximation system's treatment of all of the property of spouses who have been married at least fifteen years as marital property implicitly assumes that neither spouse owns property that was received by gift or inheritance either before or during the marriage.<sup>130</sup> Although many persons will not inherit significant amounts of

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<sup>129</sup> Similarly, if all of A's and B's property was separate, as might be the case in a second or subsequent, later-in-life marriage, B would have no elective-share claim against A's estate under the partnership theory of marriage standard, not the \$100,000 elective-share claim that would result under the UPC's approximation system.

<sup>130</sup> The approximation system also implicitly assumes that spouses who are in marriages that last

property,<sup>131</sup> many others will. According to a relatively recent study, the generation commonly referred to as the “Baby Boomers” can expect to inherit some \$10.4 trillion over the fifty year period from 1990 to 2040, with the average size of each of the projected 115 million bequests being slightly more than \$90,000 (both amounts stated in 1989 dollars).<sup>132</sup> Family owned businesses,

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15 years or more had no property when they married, or that any separate property a spouse owned at the time of the marriage or received by gift or inheritance during the marriage was consumed or lost its character as separate property during the marriage, so that when their long-term marriage ends at the first of their deaths, neither of them owned any separate property.

<sup>131</sup> For an argument that for the broad middle classes, wealth transmission no longer centers on transfers at death, but on lifetime transfers to children in the form of an investment in skills, see John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988). As “human capital” has become an increasingly important form of modern wealth, *id.*, “[e]ducation is displacing inheritance, lifetime transfers are displacing succession on death.” *Id.* at 735. Professor Langbein also attributes a perceived decline in importance to the middle classes of the transmission of wealth at death to the “pension revolution.” *Id.* at 739-46. Generally, the term “pension revolution” describes the accumulation of enormous amounts of wealth in financial assets in tax-qualified retirement plans, which for many participants are exhausted to meet their retirement needs over their ever-increasing life expectancies. *Id.* But see Robert B. Avery & Michael S. Rendall, *Inheritance and Wealth* (1993) (unpublished presentation for the Philanthropy Roundtable, Nov. 11, 1993) (on file with author) (stating that approximately 52.1% of survey respondents reported that leaving an estate for their surviving heirs was “important” or “very important,” 27.3% reported that doing so was “somewhat important,” and only 20.6% answered that leaving an estate was “not important”).

<sup>132</sup> *Id.* The \$10.4 trillion estimate is described as “a large number, totaling 62% of the total 1989 U.S. household wealth of \$16.7 trillion. It is almost twice total 1989 U.S. GNP, and over 13 times total 1989 private savings.” *Id.* See also Robert B. Avery & Michael S. Rendall, *Estimating the Size and Distribution of Baby Boomers’ Prospective Inheritances* (unpublished; on file with author). The Avery and Rendall study assumes that married decedents will leave their entire estates to their surviving spouses and thus that their children will not receive inheritances until the second of the parents’ deaths, at which time the entire estate of the second parent to die will be divided equally among the children. *Id.* Further, the study notes “that some Baby Boomers will receive more than one inheritance, in the case that their parents are both alive, but living in separate households. Moreover, married Baby Boomers will often have inheritances coming to both self and spouse.” *Id.* The study ignores bequests of childless couples or individuals, *id.*, noting that “[w]hile some childless individuals will leave bequests for nieces or nephews, some individuals with children may disinherit them or leave some of their estate to charity. There are therefore offsetting effects in our all-bequest assumption for persons with children and no-bequest assumption for persons without children.” *Id.* at n.6. For a critical look at the conclusions of the Avery and Rendall study, characterizing the \$10.4 trillion estimate as “a wild quesstimate,” see Andy Zipser, *And Now, the Bad News*, BARRON’S, Dec. 5, 1994, at 33. See also LAURENCE J. KOTLIKOFF, *GENERATIONAL ACCOUNTING: KNOWING WHO PAYS, AND WHEN, FOR WHAT WE SPEND* 57 (1992) (disputing the contention that Baby Boomers will receive sizable inheritances from their

interests in which presumably are routinely bequeathed from senior to junior family members,<sup>133</sup> were estimated to constitute more than 90% of all United States businesses in 1991,<sup>134</sup> to contribute at least 40% of the total United States Gross Domestic Product (in 1993 dollars),<sup>135</sup> to employ 59% of the United States workforce,<sup>136</sup> and to have generated 78% of all new net jobs between 1976 and 1990.<sup>137</sup> Further, members of the Baby Boomer generation may be saving less than they otherwise would in anticipation of receiving substantial inheritances, indicating at least their expectation that property they will inherit will constitute a significant percentage of their total assets.<sup>138</sup> There does not appear to be any reason to believe that inheritances will be received more frequently, or in larger amounts, by persons who will die single or in short-term

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parents, and arguing that Baby Boomers' inheritances will not offset inadequate savings, because (i) their inheritances relative to their incomes will be small; (ii) they have more siblings with whom they will share inheritances from parents and grandparents; (iii) their parents are retiring earlier, living longer, and thus consuming more of their wealth; and (iv) more of their parents' wealth is in the form of pension and social security annuities that cannot be bequeathed).

<sup>133</sup> Succession planning for family businesses receives considerable attention from estate planning professionals and others. See, e.g., Jon J. Gallo & David A. Hjorth, *Handling the Nontax Issues in Business Succession Planning*, ESTATE PLANNING, January 1998, at 22; Michael D. Allen, *Succession Strategies for the Family Business* (ALI-ABA Course of Study, Mar. 12, 1998), available in WESTLAW, SC81 ALI-ABA 1. In response to concerns that federal estate taxes will force the sale of family businesses upon the owners' deaths, Congress has enacted estate tax relief for the estates of decedents who owned interests in qualifying family businesses that pass to members of the decedents' families. E.g., I.R.C. § 2057 (West 1999) (providing an estate tax deduction for qualified family-owned businesses); I.R.C. § 2032A (West 1999) (providing for the valuation of qualified real property used in farming or another qualifying closely-held business at its current use value, rather than at its highest and best use fair market value).

<sup>134</sup> Melissa Carey Shanker & Joseph H. Astrachan, *Myths & Realities: Family Businesses' Contribution to the U.S. Economy – A Framework for Assessing Family Business Statistics*, 9 FAM. BUS. REV. 107 (1996). Cf. Allen, *supra* note \_\_\_, at \*3 stating that "[m]ore than 80% of the business enterprises in the United States are family dominated."

<sup>135</sup> Shanker, *supra* note \_\_\_, at 114-15.

<sup>136</sup> *Id.* at 115.

<sup>137</sup> *Id.* at 116.

<sup>138</sup> KOTLIFF, *supra* note \_\_\_, at 56-57.

marriages than by persons who will die in long-term marriages. Thus, an important, implicit assumption of the UPC's new approximation system – that substantially all of the assets of spouses who have been married more than fifteen years at the first of their deaths are marital – likely will be inaccurate in many cases.

Further, in some short-term marriages ending with the death of a spouse the approximation system's implicit assumptions of the spouses' marital and separate property also will prove to be inaccurate. Perhaps the clearest example of the inequities that can result from such a case is a relatively short first marriage of persons who were relatively young when they married, who had little or no separate property at that time, and who did not receive property by gift or inheritance during their marriage. If one of them dies after less than nine years of marriage, less than 50% of their property will be treated by the approximation system as marital<sup>139</sup> when in fact substantially all of it will be marital.<sup>140</sup> As a practical matter, however, for several reasons the possible operation of the UPC's redesigned elective-share system in the context of short-term first marriages is not expected to produce inequitable results often.<sup>141</sup>

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<sup>139</sup> See *supra* notes \_\_\_\_ and \_\_\_\_\_. Because less than 50% of the property of a couple who had been married less than nine years at the first of their deaths is treated as marital by the approximation system, the surviving spouse's elective-share percentage of the decedent's augmented estate will be less than 25%. 1990 UNIF. PROBATE CODE § 2-202(a) (amended 1993), 8 U.L.A. 102 (1998) (reproduced at note \_\_\_\_).

<sup>140</sup> For examples of the inequities that could result under the UPC's approximation system in such a circumstance and others, see Charles H. Whitebread, *The Uniform Probate Code's Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 PROB. L. J. 125, 130 (1992).

<sup>141</sup> For example, not many short-term marriages of young spouses will end in one of their deaths.

The operation of the UPC's redesigned elective-share system in the context of short-term, second and subsequent marriages also can produce results that are inconsistent with the partnership theory of marriage standard. For example, in second and subsequent marriages between retired persons, there often will be little or no marital property accumulated during the marriage.<sup>142</sup> Under the approximation system, however, 18% of the property of

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See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_, at 745-46. Of those that do, the elective-share issue will not arise unless the decedent had title to most of the couple's assets and died with a will that left the surviving spouse less than the elective share. *Id.* at 746. The decedent in such a circumstance may have died intestate or with a premarital will, in which case by pretermission the surviving spouse may inherit the entire estate. *Id.* Finally, even in the case of a spouse of a short-term marriage who dies owning most of the couple's assets with a will executed during the marriage that attempts to disinherit the surviving spouse, the supplemental elective share provisions of UPC section 2-202(b) will provide the surviving spouse with a minimum of \$50,000, *see infra* note \_\_\_, and he or she also will receive as much as an additional \$43,000 of assets through the homestead allowance, family allowance, and exempt property provided to the surviving spouse by UPC sections 2-402 through 2-404. *Id.*

<sup>142</sup> As discussed in note \_\_\_, *supra*, marital property generally does not include property owned by a spouse prior to the marriage, property acquired by a spouse during the marriage by gift or inheritance, or property that can be traced to property owned prior to the marriage or acquired during the marriage by gift or inheritance. Whether spouses who own separate property and who do not have earned income during the marriage will have any marital property at the first of their deaths may depend on whether income (such as interest, dividends, and rent) received and accumulated during the marriage from separate property is itself marital or separate property. *See id.* In most noncommunity-property states, marital and separate property are treated differently on the dissolution of a marriage. *See infra* note \_\_\_. In such states it is necessary to classify income from separate property received and accumulated during the marriage as marital or separate property. According to one commentator, in 1993, eighteen of the twenty-seven noncommunity-property states that distinguish between marital and separate property on the dissolution of a marriage had addressed the issue of classifying income received during the marriage from separate property. Thomas R. Andrews, *Income from Separate Property: Towards a Theoretical Foundation*, 56-SPG LAW & CONTEMP. PROBS. 171, 191 (1993). Of those eighteen states, eleven were found to treat such income as separate property, while the other seven treat it as marital property. *Id.*

If separate property appreciates during the marriage, other than as a result of the labor of one or both of the spouses, that appreciation generally will be treated as separate property both in community-property jurisdictions, *see* Pagano, *supra* note \_\_\_, § 20.04[2][b], and in noncommunity-property jurisdictions that treat marital and separate property differently on the dissolution of a marriage. ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_, § 4.04 cmt. a. Because the separate property owner controls whether separate property is invested in such a way as to generate income (for example, in dividend paying stocks or interest paying bonds), or capital appreciation (for example, in non-dividend or low dividend paying growth stocks or raw

such spouses will be treated as marital property after three years of marriage, 30% after five years, 42% after seven years, and 54% after nine years.<sup>143</sup> This does not necessarily mean, however, that the surviving spouse of such a marriage will have an elective-share claim against the deceased spouse's estate and nonprobate transfers to others. Rather, if there is little or no marital property and both spouses have separate property, the approximation system will treat only a portion of the excess of the separate property of the first spouse to die over the separate property of the survivor as marital property that will be subject to the survivor's elective-share claim.<sup>144</sup> As a result, in many such short-term, later-in-life, second or subsequent marriages, the effective elective-share percentage of the surviving spouse against separate assets of the deceased spouse will be less than the already relatively low length-of-the-marriage determined percentage set forth in UPC section 2-202(a).<sup>145</sup>

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land), in states that treat income from separate property as marital property, the classification rules allow the separate property owner to control whether on the termination of the marriage his or her spouse will have any interest arising out of the investment of the separate property. See Andrews, *supra*, at 179-80. For a proposal that income therefore should be imputed to separate property that appreciates in value but produces little or no income, see *id.* at 215-16.

Note that even if income from separate property is treated as marital property, or if part or all of the appreciation in separate property is allocated to income and treated as marital property, there still will be no marital property for division at the termination of the marriage if the income from, and reclassified appreciation of, separate property is spent during the marriage on living expenses.

<sup>143</sup> See *supra* notes \_\_\_\_ and \_\_\_\_.

<sup>144</sup> See *infra* note \_\_\_\_.

<sup>145</sup> For example, assume that D and S were in their seventies when they married; that D died in the sixth year of their marriage, survived by S; that D had \$400,000 of separate property both at the time of their marriage and at D's death; and that they had no marital property when D died. Although the approximation system treats 30% (\$120,000) of D's assets as marital, see *supra* notes \_\_\_\_ and \_\_\_\_, S's elective-share claim probably will not be \$60,000 (half of D's property that is treated as marital). Rather, if S has separate property, the approximation system also will treat 30% of it as marital property. See the explanation of Example 5 of the General Comment, quoted at *supra* text accompanying note \_\_\_\_\_. Thus, because S already is treated as owning some of the

The most serious potential for the UPC's redesigned elective share to produce inequitable results, then, is in long-term marriages.<sup>146</sup> And because it is less common for a spouse in a long-term first marriage to attempt to disinherit a surviving spouse, the context in which the redesigned elective share presents the greatest risk of seriously inequitable results is long-term second or subsequent marriages, particularly when the deceased spouse is survived by one or more descendants from a prior marriage.<sup>147</sup> Although the architects of the approximation system did not directly address its potential to produce inequitable results in long-term, later-in-life second or subsequent marriages, they recognized that it would produce inequitable results in circumstances such as a

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couple's marital property, S's elective-share claim against D's probate estate and nonprobate transfers to others will be reduced or eliminated, depending on whether S owns more or less property than did D. See *supra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>146</sup> In second and subsequent marriages that are long-term, as in such short-term marriages, the potential for the approximation system to produce inequitable results by misclassifying separate property of the decedent as marital property will be reduced or eliminated if and to the extent that the surviving spouse also owns separate property the approximation system misclassifies as marital property. See *supra* notes \_\_\_\_ - \_\_\_\_ and accompanying text. But because for marriages of more than 15 years the approximation system treats all of the spouses' property as marital, see *supra* note \_\_\_\_, the potential for inequitable results when the decedent owned significantly more separate property than did the surviving spouse is substantially greater for long-term than short-term marriages.

<sup>147</sup> See Whitebread, *supra* note \_\_\_\_, at 138-39. In his comprehensive early work on spousal disinheritance and elective-share statutes, Professor MacDonald concluded that "[t]he evasion cases afford striking corroboration of the understandably human desire to make provision for one's own children. A choice between the children and the second wife usually favors the children . . . ." MACDONALD, *supra* note \_\_\_\_, at 13-14 (1960) (footnote omitted). Professor MacDonald's study found that of the 185 cases in which the relationship of the donee to the decedent could be determined, more than half (94) involved transfers to children who clearly or presumably were children of a prior marriage. *Id.* at 157. Several early studies indicated that disinheritance of a spouse is relatively rare, even when the testator was survived by children. Brashier, *supra* note \_\_\_\_, at 140 n. 184 (citing MARVIN B. SUSSMAN ET.AL., *THE FAMILY AND INHERITANCE* 86-95 (1970); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1307 (1969); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252-53 (1963)). After identifying these studies, however, Professor Brashier notes, "[o]ne must take care in drawing conclusions from these



decedent or a surviving spouse receiving a large inheritance the day before the decedent's death.<sup>148</sup> That kind of situation was viewed, appropriately, as one that rarely would occur and thus should not be used to criticize the approximation system.<sup>149</sup> The fact that "wealth in any individual case will not often accumulate in the linear fashion set forth in the accrual schedule"<sup>150</sup> of UPC section 2-202(a) was not viewed as problematic, because the "schedule is likely to be reasonably close to the mark in most cases."<sup>151</sup> The approximation system, however, does not deal only with the accumulation of wealth during the marriage. Perhaps more importantly, it implicitly governs the classification of accumulated wealth as marital or separate, without regard to whether it was accumulated before the marriage, or acquired during the marriage by gift or inheritance.<sup>152</sup> As the length of the marriage increases, the approximation system treats more of the assets of each spouse as marital until all of their assets are so treated when they have been married fifteen years.<sup>153</sup> In light of the prevalence of second and

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studies conducted before serial polygamy and parenting multiple sets of children became common." *Id.*

<sup>148</sup> Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 741. The surviving spouse receiving a large inheritance the day after the decedent's death might also be viewed as a circumstance in which an inaccurate result could be reached by the approximation system, *see id.*, presumably because the survivor's elective share would be substantially less if the inheritance had been received during the marriage rather than the day after the decedent's death. But if the objective of the UPC's redesigned elective-share system is to approximate the result that would be reached under the partnership theory of marriage standard, such an inheritance would not cause an inequitable result because it would constitute separate property that ought not be considered in the elective-share calculus in any event.

<sup>149</sup> *Id.* at 741-42.

<sup>150</sup> *Id.* at 742.

<sup>151</sup> *Id.*

<sup>152</sup> *See supra* note \_\_\_\_.

<sup>153</sup> *Id.*

subsequent marriages,<sup>154</sup> to many of which one or both spouses will have brought separate property, and in light of inheritances that will be received by many spouses during their marriages,<sup>155</sup> it is questionable whether the approximation system will in fact yield results that are close to the mark in most elective-share cases, given that the objective is an elective-share result under which marital property is divided between the spouses equally and neither has a claim to the other's separate property.<sup>156</sup>

If the UPC's approximation system can be expected to produce inequitable results with some frequency, when measured against the partnership theory of marriage standard, is it nevertheless preferable to the other alternatives available to replace conventional elective-share systems? The designers of the UPC's new elective-share system considered two other alternatives for incorporating the partnership theory of marriage into elective-share law -- equitable distribution and a deferred-community-property system -- and concluded that the approximation system was preferable not only to existing conventional elective-share systems, but also to each of those alternatives.<sup>157</sup>

Equitable distribution, and the reasons it was rejected as a model for an elective-

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<sup>154</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 685-86.

<sup>155</sup> See *supra* note \_\_\_\_ and accompanying text.

<sup>156</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_\_. As discussed *supra* text accompanying notes \_\_\_\_ - \_\_\_\_, and in the Appendix, depending on the amount of marital and separate property each spouse owns and the length of their marriage, the approximation system may produce an elective share that is close to what would be produced under a partnership theory of marriage standard even if its implicit classification of their property as marital or separate in a given case is materially inaccurate. In some cases, however, such a result would not be reached unless the spouses own about the same amount of separate property, which may not be the case. See *supra* note \_\_\_\_ and text accompanying notes \_\_\_\_ - \_\_\_\_.

share system incorporating the partnership theory of marriage into elective-share law, have been discussed.<sup>158</sup> Following is a description of deferred-community-property approaches to the elective share and a consideration of them as an alternative to the UPC's new approximation system.

### **Deferred-Community-Property Elective-Share Alternatives**

Professor Waggoner reports that the designers of the UPC's new elective-share system considered two methods of incorporating the partnership theory of marriage into elective-share law using a deferred-community-property approach: the "strict deferred-community approach" and the "elective-share deferred-community approach."<sup>159</sup> The former

automatically retitles the couple's property upon the decedent's death, giving both the surviving spouse and the decedent spouse's estate an automatic half interest in that portion of the couple's property (however titled during the course of the marriage) that would have been community property had the couple spent their married life in a community-property jurisdiction.<sup>160</sup>

The latter "gives the surviving spouse (but not the decedent spouse's estate) a right to elect that same portion of the couple's property."<sup>161</sup> The strict deferred-

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<sup>157</sup> Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 742.

<sup>158</sup> See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text.

<sup>159</sup> Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 730.

<sup>160</sup> *Id.* Because the retitling of the couple's marital property is automatic under this approach, the strict deferred-community approach sometimes is referred to in this article as a strict deferred-community-property *forced-share* system, rather than as a strict deferred-community property *elective-share* system.

<sup>161</sup> *Id.* Consistent with the spouses being viewed as equal partners with respect to their marital property by the partnership theory of marriage, presumably such an election also would result in the decedent's estate receiving half of each marital asset owned by the surviving spouse at the decedent's death.

community approach was viewed as being more consistent with the marital-partnership theory, while the elective-share deferred-community approach was viewed as being more consistent with the traditional role of the elective share in noncommunity-property jurisdictions.<sup>162</sup>

There is a third means by which community-property principles could be used at the death of a spouse to incorporate the partnership theory of marriage into elective-share law in a noncommunity-property jurisdiction. Rather than providing the surviving spouse with a right to elect to receive half of each marital asset, an elective-share system based on community-property principles could give the surviving spouse the right to elect to receive a pecuniary amount of property from the deceased spouse's augmented estate such that the value of the couple's marital property would be divided equally between the surviving spouse and the deceased spouse's estate, without necessarily dividing each marital asset equally between them.<sup>163</sup> To differentiate such a system from the elective-share deferred-community-property system identified by Professor Waggoner, it is referred to in this article as a "value deferred-community-property elective-share system," or a "value system," while the system described by Professor Waggoner is referred to as an "asset-by-asset deferred-community-property elective-share system," or an "asset-by-asset system."

The most striking difference between the strict deferred-community

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<sup>162</sup> See *id.* at 731 n.123.

<sup>163</sup> In other contexts in which the character of spouses' property as marital or separate affects their rights in it, each marital asset need not be divided equally between the spouses. See *infra*

approach on the one hand, and the asset-by-asset system on the other, is that if most of the marital property is titled in the survivor's name, the strict deferred-community approach gives to the decedent's estate a share of the property of the survivor.<sup>164</sup> By contrast, the asset-by-asset system does not, but instead leaves the deceased spouse's estate with less than half of the couple's marital assets.<sup>165</sup> Similarly, the UPC's new elective-share system does not give the deceased spouse's estate a claim against the surviving spouse when the surviving spouse owns most of what the approximation system treats as marital property of the couple.<sup>166</sup> The explanation of the UPC's failure to do so is that elective-share systems traditionally are intended to benefit the surviving spouse,

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note \_\_\_\_.

<sup>164</sup> For example, assume that D and S were married, that D died survived by S, and that at D's death all of the couple's marital property was titled in S's name. Under a strict deferred-community-property forced-share system, half of the marital property automatically would be retitled in D's estate. Note that if D held title to more than half of any of the couple's marital assets, the strict deferred-community approach also would give to S a share of D's assets, but if S owned more than half, in the aggregate, of all of the couple's marital assets, there would be a net transfer to D's estate. Thus, if D held title to investment securities that were marital property and that had an aggregate value of \$100,000 at D's death, and if S held title to real estate that was marital property and that had a value of \$300,000 at D's death, the strict deferred-community approach would result in half of each security being retitled in S's name and half of each tract of real estate being retitled in D's estate.

<sup>165</sup> To continue with the example in note \_\_\_\_, *supra*, under an elective-share deferred-community system, S could choose not to make an election. A consequence of that choice is that S would forego receipt of half of D's investment securities, but declining to make the election would enable S to retain all of the marital property real estate to which S held title.

A form of an elective-share deferred-community-property system exists in Wisconsin. In 1984, Wisconsin adopted the Wisconsin Marital Property Act (WMPA), which is based on the Uniform Marital Property Act (UMPA). See *supra* note \_\_\_\_\_. Property of Wisconsin spouses that would have been marital property had it been acquired after the effective date of WMPA is referred to as "deferred marital property" and is treated differently than either marital property or separate property. See WIS. STAT. ANN. § 861.02 (West 1999); see generally Howard S. Erlanger, *Proposed Changes to the Wisconsin Probate Code*, 68-SEP WIS. LAW 25, 26 (1995). The surviving spouse is given elective rights to the decedent's deferred marital property, but no similar rights are granted to the decedent's estate in the surviving spouse's deferred marital property. *Id.* at n.46.

<sup>166</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 738 n.146.

rather than the beneficiaries of a deceased spouse's estate; providing the deceased spouse's estate with a claim in such a circumstance therefore would contravene the traditional purpose of an elective-share system.<sup>167</sup>

The difficulty with that reasoning is that the traditional purpose of elective-share statutes was to provide support for surviving spouses.<sup>168</sup> Under the UPC's redesigned elective-share system, the support rationale is secondary to the primary objective of incorporating the marital partnership theory into elective-share law.<sup>169</sup> Given that objective – and that under the marital partnership theory each spouse is entitled to half of the fruits of the marriage<sup>170</sup> -- it is difficult to justify denying a deceased spouse's estate a claim against the surviving spouse when the surviving spouse owns more than half of the couple's marital property.<sup>171</sup> Perhaps the reason such a claim was not included in the UPC's redesigned elective-share system was a pragmatic one – that such a claim is of such a qualitatively different nature than the traditional elective share of a surviving spouse that it would have jeopardized adoption of the UPC's new

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<sup>167</sup> *Id.*

<sup>168</sup> See *supra* note \_\_\_\_.

<sup>169</sup> See *supra* text accompanying notes \_\_\_\_ and \_\_\_\_.

<sup>170</sup> See *supra* text accompanying note \_\_\_\_.

<sup>171</sup> Not allowing a decedent's estate to assert such a claim in some cases will cause the order of the spouses' deaths to control how their property is divided between them, and thus how much of their property each of them will be able to leave to other beneficiaries, such as children from prior marriages. Note that the potential for the fortuitous order of spouses' deaths to affect their property rights under the UPC's pre-1990 traditional elective-share system was a basis for replacing it with the redesigned elective share: "Conventional elective-share law . . . basically rewards the children of the remarried spouse who manages to outlive the other . . ." 1990 Unif. Probate Code art. II, pt. 2, gen. cmt. (amended 1993), 8 U.L.A. 93, 95 (1998).

elective-share system.<sup>172</sup>

The decision that a deceased spouse's estate should not have a claim against a surviving spouse who owned more than half of the couple's marital property – despite the equitable and policy considerations favoring such a claim<sup>173</sup> – obviously precludes using the strict deferred-community approach as the means of incorporating the partnership theory of marriage into elective-share law.<sup>174</sup> As between the other two alternatives for a deferred-community-property

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<sup>172</sup> Note that broadly conforming marital property rights to the partnership theory of marriage clearly was not the objective of the drafters of the UPC's redesigned elective-share system. If it had been, their approach arguably would not have been to redesign the elective share at all, but instead to replace it with the community-property system under which marital property of spouses not only is owned equally by them at the first of their deaths, but also is owned by them equally during their lifetimes. See *infra* notes \_\_\_\_ - \_\_\_\_\_. Although there are many who advocate the adoption of the community-property system, see *infra* note \_\_\_\_, the prospects of that occurring appear to be bleak. *Id.* Presumably granting a deceased spouse's estate a claim against a surviving spouse who owned more than half of a couple's marital property would not create vested rights in one spouse in marital property owned by the other during their joint lifetimes, and thus would not constitute the adoption of community property. See *infra* note \_\_\_\_\_. Such a claim, however, is not unlike that held by the estate of a deceased spouse against a surviving spouse who held title to most of a couple's community property in a community-property jurisdiction.

<sup>173</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>174</sup> The automatic retitling of marital property that would occur under the strict deferred-community property approach also can be criticized for impinging unnecessarily on both the deceased spouse's freedom of testation and the surviving spouse's rights with respect to marital property to which he or she holds title. See *supra* note \_\_\_\_\_. Further, although a strict deferred-community-property elective-share system would divide the couple's marital property at the first of their deaths in a manner similar to the way the decedent's estate and the surviving spouse would own their property in a community-property jurisdiction, it would fall far short of a true community-property system in defining the marital property rights of spouses. See *infra* note \_\_\_\_.

A strict deferred-community-property elective-share system also would raise other problems and issues. For example, how would a provision in a decedent's will or inter vivos trust instrument devising half of his or her estate to a spouse and the other half to a child from a prior marriage be interpreted if the decedent held title to all of the couple's marital property? Because of the automatic retitling under the strict deferred-community-property system, the decedent would have no power to devise the surviving spouse's half of the marital assets, but if the will were construed as applying only to the decedent's half of the marital property, the surviving spouse would receive three-fourths of the couple's marital estate and the child only one-fourth. By contrast, if the will were construed as intending to dispose of all of the couple's marital estate, including the surviving spouse's share over which the decedent had no power of disposition, the surviving spouse arguably should be put to an election between (i) allowing his or her half of the

elective-share system – the asset-by-asset approach and the value approach – the former is more consistent with the result that would be reached in a community-property jurisdiction than is the latter.<sup>175</sup> The objective of an elective-share system in a noncommunity-property jurisdiction, however, is not to

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marital property to pass under the decedent's will in order to accept the devises to him or her under the will, or (ii) keeping his or her half of the couple's marital property and foregoing the benefits provided for him or her under the will. See generally MCLANAHAN, *supra* note \_\_\_, § 11:6 (discussing the widow's election doctrine, which is described as "a broad principle of equity . . . [that] is not confined to community-property states, but is part of the law of the common-law states").

A strict deferred-community-property elective-share system also could raise questions with respect to the rights of creditors of the spouses both during their joint lifetimes and at the first of their deaths. Generally, in noncommunity-property jurisdictions the rights of creditors with respect to spouses and their property are relatively straightforward: only the property of the debtor/spouse can be reached by his or her creditors; if the debt was incurred by both spouses and their liability is several, the property of both of them may be reached. *Id.* § 10:1. By contrast, in community-property jurisdictions, the ability of the creditors of one or both of the spouses to reach the separate and community property of the spouses is not only considerably more complicated, but also varies in material respects from jurisdiction to jurisdiction. *Id.* §§ 10:3 – 10:4. If a debtor/spouse's potential forced-share interest in marital property titled in the other spouse's name during their joint lifetimes were treated like an inchoate dower interest, which is characterized as a mere expectancy, the debtor/spouse's creditors likely could not reach it. See *Flynn v. Flynn*, 50 N.E. 650 (Mass. 1898) (rejecting wife's claim to a share of the proceeds of a taking by eminent domain of real property of her husband in which she had an inchoate dower interest); *Opinion of the Justices*, 151 N.E.2d 475 (Mass. 1958) (holding constitutional the application of a statute abolishing dower to inchoate dower rights existing prior to the effective date of the statute); CRIBBET & JOHNSON, *supra* note \_\_\_, at 90; JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 394 (4<sup>th</sup> ed. 1998). Under a strict deferred-community-property forced-share system, however, the non-title holding spouse's interest in marital property held by the other spouse would have, in at least one significant respect, more substance than dower: it would not be contingent on the non-title holding spouse surviving the spouse who held title to the marital property. Thus, in some respects a spouse's potential forced-share interest in marital property titled in the other spouse's name under a strict deferred-community-property forced-share system would be more similar to a community-property interest than a dower interest, which could raise creditors' rights issues.

<sup>175</sup> In community-property jurisdictions, each spouse owns a vested half interest in each community asset, from the date of its acquisition, without regard to how title to the asset is held. See *infra* note \_\_\_. At the death of one of the spouses, the surviving spouse continues to own his or her half interest in each asset comprising the couple's community property. MCLANAHAN, *supra* note \_\_\_, § 11:5. Under an asset-by-asset deferred-community-property elective-share system, that result would be reached – although not until the death of the first spouse to die - if the surviving spouse chose to make the election. By contrast, an equal division of each marital asset would not be required under the value system. See *supra* text accompanying note \_\_\_\_.



replicate the community-property system of spousal ownership.<sup>176</sup> Rather, the dual objectives of an elective-share system in a noncommunity-property jurisdiction, as identified in the General Comment to the UPC's new elective-share provisions, are to bring elective-share law into line with the partnership theory of marriage<sup>177</sup> and to provide support to needy surviving spouses.<sup>178</sup> Those objectives can be accomplished under a value deferred-community-property elective-share system<sup>179</sup> more equitably,<sup>180</sup> and without as much

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<sup>176</sup> Indeed, such an objective would not be accomplished even by adoption of a strict deferred-community-property elective-share system. In noting that Wisconsin's adoption of UMPA makes it a community-property state (even though under UMPA management and control of marital property is not joint, as it is in all community-property jurisdictions except Texas, but instead generally is in the title-holding spouse), Professors Erlanger and Weisberger describe the "essential feature of a community property system" as the "equal vested ownership of marital property." Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 769 n.2. See also Rev. Rul. 87-13, 1987-1 C.B. 20 (finding that under the Wisconsin Marital Property Reform Act, the rights of spouses to marital property received by them during the marriage are community-property rights for federal income tax purposes because the Wisconsin Marital Property Reform Act automatically vests a fifty percent interest in such property in each spouse). Similarly, the spouses' ownership of community property has been described as being based on the principle that property acquired during the marriage by the efforts of either or both spouses "becomes at the moment of acquisition community property, that is, the property of both spouses." MCLANAHAN, *supra* note \_\_\_, § 7:14. As such, "each spouse has a present, existing and equal interest in it." *Id.* None of the three deferred-community-property elective-share systems discussed in this article would create vested ownership interests in each spouse in the couple's marital property upon its acquisition. For a discussion of the alternative of a noncommunity-property jurisdiction adopting community property to implement the partnership theory of marriage, rather than reforming its elective-share law, see *infra* note \_\_\_.

<sup>177</sup> See *supra* text accompanying notes \_\_\_-\_\_\_.

<sup>178</sup> See *supra* note \_\_\_.

<sup>179</sup> A value deferred-community-property elective-share system would accomplish the objective of bringing elective-share law into line with the partnership theory of marriage by dividing the value of the couple's marital estate between them equally (when the spouse holding title to most of the couple's marital property dies first), even though it would not divide each marital asset equally between the spouses. When a marriage terminates by divorce, all noncommunity-property jurisdictions divide the spouses' property under the partnership-theory-of-marriage based equitable distribution doctrine. See *supra* notes \_\_\_ and \_\_\_. In most such jurisdictions, the separate property of one spouse generally may not be awarded to the other, TURNER, *supra* note \_\_\_, § 2.08, and their marital property is to be divided between them equitably, which need not be equally. *Id.* § 8.01, at 550. Further, the community-property system generally is regarded as

interference with the testator's freedom of testation,<sup>181</sup> than under an asset-by-asset system. Furthermore, a value deferred-community-property elective-share system could be established using much of the existing structure of the UPC's

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recognizing the marital partnership theory. See *supra* note \_\_\_\_ and accompanying text. In community-property jurisdictions, it is necessary to divide the couple's community property when their marriage ends in divorce or by one of their deaths. If the marriage ends in divorce, three of the community-property states (California, New Mexico, and Louisiana) require the couple's community property to be divided between them equally, but the division may be accomplished by awarding each spouse community assets with an aggregate value of half the community property; it is not required that each community asset be divided equally. Pagano, *supra* note \_\_\_\_, § 20.04[1][a][i]; McLANAHAN, *supra* note \_\_\_\_, § 12:5. In the other traditional community-property states (Arizona, Idaho, Nevada, Texas, and Washington), at divorce community property is divided between the spouses equitably, rather than equally. Pagano, *supra* § 20.04[1][a][ii]. Similarly, when spouses divorce in Wisconsin (which became a community-property state upon its adoption of a modified version of UMPA in 1984, see *supra* note \_\_\_\_), their marital property presumptively is to be divided between them equally, but such a division may be altered upon consideration of eleven specified factors and "[s]uch other factors as the court may in each individual case determine to be relevant." TURNER, *supra* note \_\_\_\_, at 799-800. Moreover, the UPC's new partnership-theory-of-marriage inspired elective-share system does not divide each marital asset equally between the spouses, but uses the approximation system to approximate an equal division of the couple's marital estate. See *supra* notes \_\_\_\_-\_\_\_\_ and accompanying text. Accordingly, an equal division of each marital asset between the surviving spouse and the decedent's estate, as would be accomplished under an asset-by-asset deferred-community-property elective-share system if the spouse owning most of the marital property died first and the survivor made the election, is not necessary to accomplish the objective of bringing elective-share law into line with the partnership theory of marriage. With regard to the elective-share objective of providing support to a needy surviving spouse, a value deferred-community-property elective-share system could be designed to do so in the same way as does the UPC's new elective-share system. See *supra* note \_\_\_\_.

<sup>180</sup> Under an asset-by-asset deferred-community-property elective-share system, the surviving spouse would have the option of forcing an equal division of each marital asset; the decedent's estate would have no similar right of election. See *supra* text accompanying notes \_\_\_\_-\_\_\_\_. Under a value deferred-community-property elective-share system, the surviving spouse would have the right to elect to receive enough of the deceased spouse's property to cause the surviving spouse to own property with a value equal to half of the couple's marital assets, along with the separate property the surviving spouse owned before the decedent's death. See *supra* text accompanying note \_\_\_\_\_. The deceased spouse's estate would have no similar election, but the surviving spouse would not be able to control which assets of the deceased spouse would be used to satisfy his or her elective share. See *infra* note \_\_\_\_.

<sup>181</sup> Apparently referring to a view expressed in Professor Lewis M. Simes' work, L. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955), Professor Volkmer has noted: "As the Simes thesis goes, freedom of testation ought not be restricted unless we can clearly identify a public policy consideration outweighing the right to dispose of one's property as one pleases." Volkmer, *supra* note \_\_\_\_, at 147-48. Elective-share statutes, of course, reflect public policy considerations that outweigh freedom of testation. But if there are two methods by which such statutes can be structured to accomplish their underlying policies, one of which is more disruptive of the

new elective-share system<sup>182</sup> in a simpler fashion than could an asset-by-asset system.<sup>183</sup> Thus, as between the asset-by-asset and value deferred-community-property alternatives for an elective-share system in a noncommunity-property jurisdiction desiring to bring its elective-share law into line with the partnership theory of marriage, the value deferred-community-property elective-share system would appear to be the preferable means of doing so.

A value deferred-community-property elective-share system could be structured similarly to the redesigned elective share of the 1990 UPC.<sup>184</sup> The

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decedent's testamentary plan than the other, the less disruptive approach should be adopted.

<sup>182</sup> See *infra* notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>183</sup> For example, the surviving spouse's elective share under the UPC's new approximation system is a pecuniary amount, 1990 UNIF. PROBATE CODE § 2-202(a) (amended 1993), 8 U.L.A. 102 (1998), which first is satisfied by probate and nonprobate transfers by the decedent to the surviving spouse. 1990 UPC § 2-209(a)(1) at 122. The same approach could be taken under a value deferred-community-property elective-share system, but it could not be used under an asset-by-asset system without modification. To illustrate, if the decedent devised separate property to the surviving spouse, who made an election under an asset-by-asset system, how would the separate property be charged against the surviving spouse's elective share of a half interest in each marital asset? One approach would be to reduce the survivor's interest in each marital asset on a pro rata basis. Another would be to reduce or eliminate the survivor's interest in selected marital assets, but that would require establishing a procedure for making the selections. Alternatively, an asset-by-asset deferred-community-property elective-share system could treat an election by the surviving spouse as in lieu of all other probate and nonprobate transfers to the surviving spouse by the decedent (unless the decedent had clearly indicated that some or all of such other transfers were to be made to the surviving spouse regardless of whether the surviving spouse elected to receive half of the couple's marital property).

<sup>184</sup> For a description of how the UPC's redesigned elective share operates to accomplish its objective of incorporating marital partnership theory into elective-share law, see *supra* notes \_\_\_\_ - \_\_\_\_ and accompanying text. For a description of how the UPC's redesigned elective-share system accommodates the traditional support policy of the elective share by providing the surviving spouse with the right to elect to receive a supplemental elective share, see *supra* note \_\_\_\_\_. The supplemental elective-share provisions of the UPC, or other provisions designed to accomplish their objective, presumably would be retained by a jurisdiction adopting a deferred-community-property elective-share system. Note, however, that the concept of a support-based supplemental elective share is not rooted in the partnership theory of marriage – because a supplemental elective share provides the surviving spouse with the right to elect to receive a share of a deceased spouse's assets that the surviving spouse did not help to acquire – and that it has no counterpart in community-property jurisdictions.

Presumably, under a value deferred-community-property elective-share system the

most significant differences would be that under a value deferred-community-property elective-share system: (i) the surviving spouse's elective-share percentage would be 50% of the decedent's augmented estate, without regard to the length of the marriage;<sup>185</sup> (ii) the decedent's augmented estate would consist only of the couple's marital property;<sup>186</sup> (iii) the surviving spouse's elective-share amount would be charged only with marital property (probate and nonprobate) of

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surviving spouse also would be entitled to receive a homestead allowance, a family allowance, and some tangible personal property under provisions similar to those set forth in the 1990 UPC, regardless of whether the decedent owned any marital property. 1990 UNIF. PROBATE CODE §§ 2-402 - 2-404 (amended 1993), 8 U.L.A. 139-42 (1998). Such means of providing support to surviving spouses are available not only in noncommunity-property jurisdictions, e.g., *id.*, but also from a deceased spouse's interest in community property or from his or her separate property in community-property states. See Pagano, *supra* note \_\_\_, § 20.05[2][b].

<sup>185</sup> By contrast, under the UPC's new elective-share system, the survivor's elective-share percentage ranges from zero, for marriages of less than one year, to 50%, for marriages of 15 years or more, in an effort to approximate 50% of the couple's marital property. See *supra* notes \_\_\_ and \_\_\_. Effective January 1, 1996, in response to recent changes made to the UPC, North Dakota revised its spousal elective-share provisions. See generally Alexander J. Bott, *North Dakota Probate Code: Prior and Revised Article II*, 72 N. D. L. REV. 1 (1996) (discussing differences between North Dakota's new probate law, its prior law, and the UPC). Consistent with the revisions made to the UPC in 1990, and the policy of bringing elective-share law into line with the partnership theory of marriage that underlies those changes, North Dakota's revisions increase the surviving spouse's elective-share percentage from one-third to half; unlike the revised UPC, however, they do so immediately upon the spouses' marriage, rather than gradually increasing the surviving spouse's elective-share percentage until it reaches 50% for marriages of 15 years or more. *Id.* at 11-12. The augmented estate to which a North Dakota surviving spouse's elective-share percentage applies, however, excludes certain pre-marriage nonprobate transfers by the deceased spouse to others (which necessarily would be separate property) that would be includible in the deceased spouse's augmented estate under the UPC. *Id.* at 16-17.

<sup>186</sup> Under the UPC, the decedent's augmented estate is determined without regard to the marital or separate nature of the decedent's (or the surviving spouse's) property, and generally consists of (i) the decedent's net probate estate; (ii) the decedent's nonprobate transfers to others; (iii) the decedent's nonprobate transfers to the surviving spouse; and (iv) the surviving spouse's property and nonprobate transfers to others. 1990 UNIF. PROBATE CODE §§ 2-203 - 2-207 (amended 1993), 8 U.L.A. 103-21 (1998). Under a value deferred-community-property elective-share system, the only property in each of those categories that would be included in the decedent's augmented estate is marital property of the couple. Note that two noncommunity-property jurisdictions, Utah and Oklahoma, already limit the surviving spouse's elective share to marital property. UTAH CODE ANN. §§ 75-2-202(1) and 208(1) (1999); OKLA. STAT. tit. 84, § 44 B 2 (1999). See *infra* note \_\_\_. In addition, by excluding from a deceased spouse's augmented estate certain nonprobate transfers by the deceased spouse to others prior to the marriage, North Dakota excludes from the reach of a surviving spouse's elective-share claim some separate property of a deceased spouse.

the surviving spouse at the time of the decedent's death<sup>187</sup> (and with significant transfers of marital property by the surviving spouse within a specified period of time before the decedent's death<sup>188</sup>), as well as with marital or separate property received by the surviving spouse as a result of the decedent's death;<sup>189</sup> and (iv) a means of classifying the couple's property at the time of the first of their deaths as marital or separate would be required.<sup>190</sup>

Perhaps the most significant potential drawback to a deferred-community-property elective-share system is the necessity under such a system to determine at the death of a spouse which property and debts<sup>191</sup> of each spouse

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*See supra* note \_\_\_\_.

<sup>187</sup> By contrast, under the UPC's new elective-share system, the survivor's elective-share amount is reduced by part or all (depending on the length of the marriage) of the survivor's property and nonprobate transfers to others, regardless of whether such property is marital or separate. UNIF. PROBATE CODE § 2-209(a)(2) (amended 1993), 8 U.L.A. 122 (1998). *See supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>188</sup> In order to preclude a spouse from defeating a prospective surviving spouse's elective share by transferring substantial assets to third parties shortly before death, the UPC's elective-share provisions include a two-year rule under which property in excess of \$10,000 per year, per donee that is transferred by a spouse to a third party during the marriage and within two years of the transferor's death is included in the decedent's augmented estate, 1990 UNIF. PROBATE CODE § 2-205(3) (amended 1993), 8 U.L.A. 105-7 (1998), unless made for adequate and full consideration in money or money's worth, *see* 1990 UPC § 2-208(a) at 121. Similarly, such gratuitous transfers made by the surviving spouse within two years of the deceased spouse's death also are included in the decedent's augmented estate, 1990 UPC § 2-207(a)(2) at 118, and are then charged against the surviving spouse's elective-share amount. 1990 UPC § 2-209(a)(2) at 122. Under a value deferred-community-property elective-share system, the inclusion of such transfers in the augmented estate would be limited to transfers of marital property.

<sup>189</sup> As is provided by the UPC's elective-share system, a value deferred-community-property elective-share system would charge the survivor's elective-share amount with all probate and nonprobate transfers by the decedent to the surviving spouse, whether of marital or separate property. *See* 1990 UNIF. PROBATE CODE § 2-209(a)(1) (amended 1993), 8 U.L.A. 122 (1998).

<sup>190</sup> For two other proposals that the augmented estate against which the surviving spouse's elective share is determined consist solely of marital property, and that the surviving spouse's elective-share percentage be 50% of the augmented estate without regard to the length of the marriage, *see* Gary, *supra* note \_\_\_\_, at 597-98 and Oldham, *Surviving Spouse's Forced Share*, *supra* note \_\_\_\_, at 245-47.

<sup>191</sup> For a brief discussion of the treatment of debts of spouses under a deferred-community-property elective-share system, *see infra* notes \_\_\_\_ - \_\_\_\_ and accompanying text.

are marital and which are separate.<sup>192</sup> A jurisdiction desiring to redesign its elective-share law to determine the survivor's elective share by reference only to the couple's marital property, with the objective of dividing it or its value equally between the spouses, would have a variety of alternatives for classifying the couple's property as marital or separate at the first of their deaths. In most noncommunity-property jurisdictions, generally only marital property is divisible at divorce,<sup>193</sup> and in many of the noncommunity-property jurisdictions in which separate property is subject to such division, the preference is not to divide it.<sup>194</sup> Therefore, in most, if not all, noncommunity-property jurisdictions, presumably there already is a body of law for classifying spouses' property as marital or separate that could be used in the elective-share context under a deferred-community-property system.<sup>195</sup>

A jurisdiction that does not have a satisfactory body of law for classifying

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<sup>192</sup> The architects of the UPC's redesigned elective-share system, Professors Langbein and Waggoner, preferred in principle an elective-share system that would consider only the spouses' marital property in determining the survivor's elective share. Langbein and Waggoner, *supra* note \_\_\_, at 319. They opted instead for the mechanical accrual-type approximation system that considers the separate as well as the marital property of the spouses in determining the surviving spouse's elective share to avoid the tracing issues, *see infra* note \_\_\_, that would be required to exclude separate property from the determination of the elective share. Langbein & Waggoner, *supra*, at 319. *See also supra* notes \_\_\_ - \_\_\_ and accompanying text (discussing the UPC's use of the approximation system to incorporate the partnership theory of marriage into elective-share law to avoid property classification and tracing problems).

<sup>193</sup> TURNER, *supra* note \_\_\_, § 2.08.

<sup>194</sup> *Id.* § 2.09.

<sup>195</sup> *Cf.* UNIF. MARITAL PROP. ACT § 14 cmt., 9A U.L.A. 142 (1999) (noting that a jurisdiction that adopted UMPA already would have dealt with marital and separate property tracing issues in dissolution and probate matters, and that UMPA therefore would build on existing procedures for tracing). Noncommunity-property jurisdictions also may be called upon to determine whether property of spouses is community or separate when persons move to such a jurisdiction from a community-property state, because, for example, the community nature of property brought from a community-property state to a noncommunity-property state generally is preserved for purposes

the spouses' property as marital or separate and that desires to employ a deferred-community-property system to determine the spousal elective share would have several models from which to choose to accomplish the classification. A current project of the American Law Institute is to publish principles of law with respect to family dissolution;<sup>196</sup> a tentative draft of a part of that project includes extensive provisions for the classification of spouses' property as marital or separate.<sup>197</sup> Another alternative for classifying spouses' property as marital or separate would be to adopt the classification provisions of UMPA.<sup>198</sup> Also, there are nine community-property states,<sup>199</sup> each with a

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of its disposition at death. See, e.g., THE UNIF. DISPOSITION OF COMMUNITY PROP. AT DEATH ACT, 8A U.L.A. 191 (1998).

<sup>196</sup> ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_\_\_. The Forward provides:

The text as a whole constitutes "principles of law." This term signifies proposals of a legislative character as distinct from a Restatement. Thus, the appropriate standard in consideration of the draft is the soundness of the proposals in terms of public policy, rather than the extent to which they reflect current decisional law.

*Id.*

<sup>197</sup> *Id.* § 4.03 ("Definition of Marital and Separate Property"), § 4.04 ("Income From and Appreciation of Separate Property"), § 4.05 ("Enhancement of Separate Property by Spousal Labor"), § 4.06 ("Property Acquired in Exchange for Marital and Separate Property"), § 4.07 ("Earning Capacity and Goodwill"), and § 4.08 ("Deferred or Contingent Earnings and Wage Substitutes").

<sup>198</sup> See *supra* note \_\_\_\_\_. Had the designers of the UPC's new elective-share system decided to adopt a deferred-community-property elective-share system, apparently they would have followed the approach taken in UMPA to classify the spouses' property as marital or separate, at least with respect to such issues as whether income generated by, and appreciation in the value of, separate property during the marriage are marital or separate property. Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_, at 732-33 & n.127. Presumably they would not, however, have followed the UMPA rule treating substantial appreciation in the separate property of one spouse as marital only if it results from the labor of the other spouse for which the other spouse did not receive reasonable compensation. UNIF. MARITAL PROP. ACT § 14, 9A U.L.A. 141 (1999). This treatment is a significant departure from traditional community-property principles and the partnership theory of marriage, under which the fruits of both spouses' efforts during the marriage generally are marital, ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_\_, § 4.04 cmt. c., and has been characterized as "astonishing." Reppy, *supra* note \_\_\_\_, at 706.

<sup>199</sup> Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington are

comprehensive body of law for characterizing spouses' property as marital or separate, that could be used as a source of classification rules.<sup>200</sup>

A deferred-community-property elective-share system would require classifying as marital or separate the spouses' debts, as well as their assets, at the first of their deaths.<sup>201</sup> An alternative for doing so would be to follow the approach used by community-property states in determining whether creditors of one or both spouses can reach the spouses' separate and community property.

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traditional community-property states. Pagano, *supra* note \_\_\_, § 20.01[3], at 20-9. Because of Wisconsin's adoption of UMPA, it properly is considered the ninth community-property state. See *supra* notes \_\_\_ and \_\_\_. See *supra* note \_\_\_ for a description of Alaska's recent adoption of opt-in community property legislation.

<sup>200</sup> In at least one significant respect, however, community-property law is not an ideal model for noncommunity-property jurisdictions to use in classifying property of spouses. In community-property jurisdictions, it is necessary to classify the spouses' property as marital or separate from the time of its acquisition, not just at the termination of the marriage by divorce or death, because each spouse has a vested interest in community property from its acquisition. See *supra* note \_\_\_. As a result, most community-property states classify the spouses' property according to the inception of title rule, under which classification occurs immediately upon acquisition of the asset and cannot thereafter change. TURNER, *supra* note \_\_\_, § 5.09, at 147. Often a substantial portion of the value of an asset accrues after its acquisition, however; in such cases in which marital capital or labor contributes to the increase in value, the inception of title rule would lead to inequitable results that favored the spouse whose contributions were made at the time of inception of title. *Id.* at 148. To avoid such results, community-property jurisdictions developed a right of equitable reimbursement in the non-title owning spouse, but that doctrine also presented difficulties and did not adequately address the inequities of the inception of title rule. *Id.* Not needing to classify property of spouses at the time of its acquisition, the great majority of noncommunity-property jurisdictions have rejected the inception of title rule and use a source of funds classification rule in applying equitable distribution at the dissolution of a marriage. *Id.* at 150-53. Under the source of funds rule, property is classified by reference to the proportion of its value that was created by marital and separate contributions. *Id.* § 5.10, at 164.

<sup>201</sup> To illustrate, if a deceased spouse had \$50,000 of debts, \$100,000 of separate property, and held title to all of the couple's marital assets, totaling \$400,000 in value, the question is whether the half of the marital property the surviving spouse would be entitled to receive under a deferred-community-property elective-share system would be charged with, and thus reduced by, up to half of the decedent's \$50,000 of debts. If the debts were marital obligations, the decedent's net marital estate would be \$350,000, not \$400,000, and the surviving spouse's half share would be \$175,000; by contrast, if the debts were separate, the surviving spouse's half share of the marital property would be \$200,000. If the surviving spouse also had debts, they too would need to be classified as marital or separate, because the marital property subject to equal division between the spouses at the first of their deaths under a deferred-community-property elective-share system would be the net marital property of the couple, considering the marital assets held by,



Those rules have been summarized by one commentator as follows:

Obligations incurred prior to the marriage or after a separation or divorce are universally denominated as the separate obligation of the spouse incurring the debt. Debts incurred during the marriage are generally community obligations if they result from a contract made on behalf of the community, or if the activity giving rise to a tort obligation was designed to benefit the community. The presumption is that a debt incurred during marriage by either spouse is a community obligation.<sup>202</sup>

The following is an illustration of how a value deferred-community-property elective-share system would operate. Assume the following:

1. D and S were married to each other at the time of D's death. D is survived by S and by one descendant, a child, C, from a prior marriage.
2. D's probate and nonprobate assets at death include: (a) a brokerage account of securities with a value of \$100,000; (b) real estate, and an investment account consisting of accumulated income from the real estate, with an aggregate value of \$360,000; and (c) a policy of insurance on D's life with a death benefit of \$250,000. The real estate and associated investment account are two-thirds (\$240,000) D's separate property and one-third (\$120,000) marital property;<sup>203</sup> the securities and insurance policy

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and the marital debt incurred by, each spouse.

<sup>202</sup> MCLANAHAN, *supra* note \_\_\_, § 10:4. The treatment of obligations of spouses under UMPA follows the "family purpose" doctrine developed in Arizona, Louisiana, and Washington, under which obligations incurred during the marriage that are related to the marriage, family, or community are treated differently than are obligations incurred during the marriage for the debtor's personal purposes. UNIF. MARITAL PROP. ACT cmt. §8 9A U.L.A. 127 (1999). Thus, under UMPA, "an obligation incurred by a spouse in the interest of the marriage or the family" may be satisfied from the couple's marital property or from the nonmarital property of the debtor/spouse. *Id.* § 8(b)(ii). Obligations incurred during marriage are presumed, under UMPA, to have been incurred in the interest of the marriage or the family. *Id.* § 8(a).

<sup>203</sup> Such a divided classification of the real estate and associated investment account could result from the real estate originally having been separate property – i.e., owned by D before the marriage to S or received by D by gift or inheritance during the marriage – with part or all of the income from and appreciation in the real estate during the marriage being attributable to the efforts of one or both of D and S. See, e.g., ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_, § 4.04(2) (stating that "[b]oth income during marriage from separate property, and the appreciation in value during marriage of separate property, are marital property to the extent the income or appreciation is attributable to either spouse's labor during marriage . . .").

are marital property.<sup>204</sup>

3. In addition, at D's death D and S owned, as joint tenants with rights of survivorship, (a) a bank account with a balance of \$20,000, and (b) a residence with a value of \$200,000 and an outstanding mortgage indebtedness of \$80,000. These assets are marital property, and the outstanding mortgage is a marital obligation.
4. At the time of D's death, S owned assets with a value of \$200,000, of which \$160,000 are marital and \$40,000 separate.
5. Neither D nor S had made nonprobate transfers to others of marital property that are included in D's augmented estate.
6. D's will devised D's estate to C and D had designated C the beneficiary of the policy of insurance on D's life.

Under a value deferred-community-property elective-share system, D's

augmented estate is \$770,000,<sup>205</sup> resulting in S's 50% elective-share amount

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<sup>204</sup> For a discussion of the classification of an insurance policy on a decedent's life as marital or separate, see Pagano, *supra* note \_\_\_\_ § 20.04[2][f].

<sup>205</sup> D's augmented estate, which would include only marital assets and obligations, would be calculated as follows:

D's securities	\$100,000
Marital property portion of D's real estate and associated investment account	120,000
Policy of insurance on D's life	250,000
Joint tenancy bank account	20,000
Residence, less mortgage indebtedness	120,000
S's marital assets	<u>160,000</u>
D's augmented estate	<u>\$770,000</u>

Note that this example does not consider funeral and administration expenses, the homestead and family allowances, and exempt property. Under the UPC, those items reduce the amount of the probate estate that is included in the decedent's augmented estate, 1990 UNIF. PROBATE CODE § 2-204 (amended 1993), 8 U.L.A. 104 (1998), and thus effectively reduce the surviving spouse's elective-share claim, but the surviving spouse is entitled to receive the allowances and exempt property in addition to the elective-share amount, 1990 UPC § 2-202(c) at 102. The result is that the surviving spouse receives more than the elective-share percentage of the sum of the allowances and exempt property and the augmented estate remaining after the payment of funeral and administration expenses.

By contrast, in Utah the allowances and exempt property also are subtracted from the augmented estate in determining the surviving spouse's elective share, UTAH CODE ANN. § 75-2-

being \$385,000. Because S already owns \$160,000 of the couple's marital property and received by survivorship the \$20,000 bank account and the \$120,000 of equity in the residence, each of which had been held in joint tenancy, S's net elective-share claim would be \$85,000 (the difference between S's \$385,000 elective-share amount and the \$300,000 sum of the marital property S owned and received by survivorship). By contrast, under the UPC's redesigned elective-share system, if D and S had been married 15 years or more when D died, all of their property would be treated as marital, resulting in S

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204 (1999), but in addition they are charged against the elective-share amount. §§ 75-2-202(3) and 75-2-209(1)(d). The result, presumably unintended, is that in Utah, where the elective-share fraction is one-third, § 75-2-202(1), an electing surviving spouse receives less than one-third of the augmented estate remaining after the payment of claims, funeral and administration expenses. To illustrate, assume that (i) the decedent's augmented estate remaining after the payment of claims, funeral, and administration expenses, but without reduction for the surviving spouse's homestead and family allowances and exempt property, is \$350,000, (ii) the sum of the surviving spouse's homestead and family allowances and exempt property is \$50,000, and (iii) the surviving spouse's elective-share percentage is one-third. Under the UPC approach, the surviving spouse would receive \$50,000 of allowances and exempt property, plus one-third of the remaining \$300,000 augmented estate, for a total of \$150,000 (some \$33,000 more than one-third of the \$350,000 of assets remaining after the payment of claims, funeral and administration expenses). Under the Utah approach, the surviving spouse would receive the \$50,000 of allowances and exempt property, but that amount not only would reduce the estate against which the elective share is calculated, but also apparently would be charged against the elective share itself. The result is an elective share of \$100,000 ( $\frac{1}{3} \times [\$350,000 - \$50,000]$ ) which would be satisfied, in part, by the \$50,000 of allowances and exempt property. The surviving spouse would be left with a total of \$100,000, which is \$17,000 less than one-third of the \$350,000 of assets remaining after the payment of debts and expenses.

The treatment of funeral and administration expenses, the homestead and family allowances, and exempt property under a value deferred-community-property elective-share system is complicated by the need to allocate those items between marital property, of which the surviving spouse would be entitled to half, and separate property, of which the surviving spouse generally would have no entitlement. Rather than treating those items as having been paid entirely from marital or separate property, they could be allocated between them based on the relative amounts of marital and separate property, which was the way those items were treated in Utah prior to its revisions of its elective-share statutes in 1998. See Alfred C. Emery, *The Utah Uniform Probate Code – Protection of the Surviving Spouse – The Elective Share*, 1976 UTAH L. R. 771, 807-09.

having a net elective-share claim of \$185,000.<sup>206</sup>

## **Evaluation of the Value Deferred-Community-Property Elective-Share System as an Alternative to the Approximation System of the UPC**

Three questions can serve as the basis for considering a value deferred-community-property elective-share system as an alternative to the UPC's approximation system.<sup>207</sup> First, would a value deferred-community-property

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<sup>206</sup> Under the UPC's new approximation system, D's augmented estate would include all of their assets, with an aggregate value at D's death of \$1,050,000. 1990 UNIF. PROBATE CODE §§ 2-203 – 2-207 (amended 1993), 8 U.L.A. 103-18 (1998). S's 50% elective-share amount would be \$525,000. 1990 UPC § 2-202(a) at 102. Charged against that would be S's \$200,000 of assets, the \$20,000 joint tenancy bank account, and the \$120,000 of equity in the residence. 1990 UPC § 2-209 at 122-23. S's net elective-share claim under the UPC, therefore, would be \$185,000.

<sup>207</sup> Another alternative to the UPC's elective-share approximation system for a jurisdiction to make its marital property rights consistent with the partnership theory of marriage would be for it to adopt the community-property system of marital property rights. Such a change has many proponents. See, e.g., Brashier, *supra* note \_\_\_, at 152 (opining that "[i]f states wish to view marriage as an economic partnership in which contributions of each spouse should be recognized, then they must adopt community property principles, not forced share statutes that provide recognition of spousal contributions only to the survivor when the marriage is terminated by death."); Oldham, *Surviving Spouse's Forced Share*, *supra* note \_\_\_, at 233 (arguing that to advance the marital partnership concept, forced share systems should be abandoned in favor of UMPA, which adopts community-property principles under which each spouse acquires an immediate vested interest in the other spouse's earnings during the marriage); Whitebread, *supra* note \_\_\_, at 142 (arguing that "[i]f America is really looking for a uniform system of marital property rights that completely incorporates the partnership theory of marriage, eventually all states will have to abandon elective or forced share law and adopt some sort of community property system.") But in an early response to the call for noncommunity-property jurisdictions to adopt the community-property system of marital property rights, Professor Powell wrote:

When adopted at the beginning of a society's existence, community property may be as good as its proponents claim. Any attempt to shift from the customs, practices and rules of a state having the common law traditions to the community property system involves changes in so many aspects of society that it is a shift not lightly to be undertaken. There is at present no apparent likelihood that the system will spread in continental United States to more than the eight states which have grown up in its practices.

CRIBBET & JOHNSON, *supra* note \_\_\_, at 96 (quoting 4 RICHARD R. POWELL, REAL PROPERTY 675, 676 (1954)). With the exception of Wisconsin's adoption of UMPA, see *supra* note \_\_\_, Professor Powell's prediction more than 40 years ago that the perceived benefits of community

elective-share system make the administration of a decedent's assets<sup>208</sup> more difficult and less certain more often than the mechanical approximation system of the redesigned UPC?<sup>209</sup> Second, would a value deferred-community-property elective-share system yield more equitable results more often than the UPC's approximation system? Third, if the answers to the first two questions are "yes,"

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property would not result in its spreading to noncommunity-property states has proven accurate. The prospects of other noncommunity-property states following Wisconsin's lead and adopting UMPA do not appear to be good. See Whitebread, *supra* note \_\_\_, at 141; Langbein & Waggoner, *supra* note \_\_\_, at 306; but see Volkmer, *supra* note \_\_\_, at 155.

For arguments at the other end of the spectrum - that forced or elective-share statutes are not needed in noncommunity-property jurisdictions, see Brashier, *supra* note \_\_\_, at 140-48; Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966). See also Pennell, *supra* note \_\_\_, ¶ 903 (reporting an empirical study on spousal disinheritance conducted in Georgia, the only noncommunity-property jurisdiction that does not protect a surviving spouse from disinheritance, that led Professor Pennell to conclude that decedents who partially or wholly disinherited their spouses almost always did so for appropriate estate or family planning reasons and that given the relatively few number of disputed elective-share cases, a discretionary equitable distribution approach may be preferable to statutes that fix the size of a surviving spouse's elective share). For a contrary view on the need for elective-share statutes, published well before Professor Pennell's study, see Kurtz, *supra* note \_\_\_, at 993:

However, the paucity of empirical evidence suggesting interspousal disinheritance, coupled with the intuitive response that it just is not frequently done, does not mean the problem does not exist or that society, through its courts and legislatures, does not have an interest in protecting a surviving spouse who has in fact been disinherited. Even the empiricists cannot ignore more than two centuries of case law involving interspousal disinheritances, which itself proves that it does happen. Moreover, the growth of legislation evidences both a public awareness of the problem and a public policy that it should be remedied. (Footnote omitted.)

<sup>208</sup> Such an administration could take the form of a probate administration of a decedent's probate estate, a postmortem administration of a decedent's inter vivos, revocable trust or other nonprobate assets, or both.

<sup>209</sup> Note that the approximation system itself has increased significantly the level of complexity of administering the assets of a decedent when a surviving spouse asserts an elective-share claim. For example, under the approximation system the decedent's augmented estate, upon which the survivor's elective share is based, includes not only the decedent's probate and nonprobate property - and gifts made by the decedent within two years of death in excess of \$10,000 per year, per donee - but also such property of, and such gifts made by, the surviving spouse. See *supra* notes \_\_\_ - \_\_\_ and accompanying text. For the perspective of two practitioners in a jurisdiction (Ohio) that has considered adopting the approximation system, who characterize it as "creating extreme complexity," see James R. Bright and Jeffry L. Weiler, *Revised Spousal Rights*

are the benefits of the more equitable results offered by a value deferred-community-property elective-share system significant enough to outweigh the costs of its added complexity and uncertainty?

Certainly in many cases in which the surviving spouse would exercise his or her right to take an elective share, and in which classification, tracing,<sup>210</sup> and commingling<sup>211</sup> questions are raised, a value deferred-community-property elective-share system would add complexity, and inject uncertainty, by requiring that all property of both spouses at the first of their deaths (and substantial gifts made by each of them within a specified period of time before the first of their deaths<sup>212</sup>) be classified as marital or separate. But for several reasons, that does not mean that a value deferred-community-property elective-share system would add complexity and produce uncertainty in probate or trust administration cases generally, or even in a substantial majority of elective-share cases. First, it is relatively rare for a spouse to disinherit a surviving spouse, partially or wholly,<sup>213</sup> and, of course, many decedents are not survived by spouses. Thus, in the great majority of probate and trust administrations, the form the surviving spouse's elective share takes in the governing jurisdiction will have no effect at

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*Under Ohio S.B. 95 and Where is My Grandfather?*, PROBATE L. J. OF OHIO, Sept.-Oct. 1997, at 5.

<sup>210</sup> Although property acquired by the spouses during their marriage generally is marital property, that is not the case if the funds used to make the acquisition were the separate property of one of the spouses. See Oldham, *Tracing, Commingling, and Transmutation*, *supra* note \_\_\_, at 221-22. "Tracing" refers to the process of determining the source of funds used to acquire an asset during the marriage. *Id.*

<sup>211</sup> "Commingling" occurs when marital property and separate property are mixed, such as often occurs in spouses' bank accounts. *Id.* at 220-21.

<sup>212</sup> See *supra* note \_\_\_\_.

<sup>213</sup> See *supra* notes \_\_\_\_ and \_\_\_\_\_. But see *infra* note \_\_\_\_ (discussing factors that may cause an

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Second, in cases in which an election might be made by a surviving spouse against the decedent's estate plan, a value deferred-community-property elective-share system will add complexity and uncertainty only when there are material marital and separate property classification issues with respect to the spouses' property. In cases in which the spouses have taken care not to commingle marital and separate assets,<sup>215</sup> and in cases in which there clearly is little or no marital property, a value deferred-community-property elective-share system presumably would simplify estate and trust administrations by precluding a surviving spouse from taking an elective share that he or she might have elected to receive under the UPC's approximation system.<sup>216</sup> For example, spouses who remarry during retirement typically bring separate property to the marriage. In such cases in which the spouses maintain the property they owned before the marriage separately, they may own little or no marital property at the first of their deaths.<sup>217</sup> In such a case, under a deferred-community-property

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increase in the number of elective-share claims in the future).

<sup>214</sup> Elective-share disputes also can be avoided by the use of a valid marital agreement. See *infra* note \_\_\_\_.

<sup>215</sup> See, e.g., *Briggs v. Wyoming Nat'l Bank*, 836 P.2d 263 (Wyo. 1992).

<sup>216</sup> In such cases, a value deferred-community-property elective-share system also would add certainty to the elective-share subject because each spouse would know that his or her separate property could not be reached by an elective-share claim by the other spouse regardless of actions the other spouse takes with his or her separate property or with marital property he or she owns. By contrast, under the UPC's new elective-share system, the surviving spouse's elective share is determined by the approximation system, which in turn is affected by the amount of the surviving spouse's marital and separate property and by certain lifetime transfers made by the surviving spouse. See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>217</sup> For example, retired spouses may have no earned income, any appreciation in their separate property may not be attributable to either of their efforts, they may consume their income from separate property, or the jurisdiction may classify income from separate property as separate

elective-share system, the surviving spouse would have little or no likelihood of success in asserting an elective-share claim and presumably would not do so. But the fact that most or all of a deceased spouse's property is separate does not preclude elective-share claims under elective-share systems, such as the UPC's approximation system, that do not differentiate between separate and marital property of the decedent.<sup>218</sup> Particularly when the jurisdiction's elective-share system is the UPC's approximation system, allowing an elective-share claim when the decedent owned little or no marital property will burden substantially the estate or trust administration proceedings because of the necessity under the approximation system to identify and value<sup>219</sup> both spouses' assets, as well as gifts made by each of them within two years of the deceased spouse's death in excess of \$10,000 per year, per donee.<sup>220</sup>

Another circumstance in which a value deferred-community-property

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property. See *supra* note \_\_\_\_.

<sup>218</sup> See, e.g., *In re Estate of Schriver*, 441 So. 2d 1105 (Fla. Dist. Ct. App. 1983) (holding that even though the decedent's will noted his relatively short (five year) marriage to his surviving spouse and the couple's desire that their estates should remain separate and pass to their respective children, the widow's daughter from a prior marriage, acting under a durable power of attorney, was permitted to exercise her incapacitated mother's right to take an elective share); *Estate of Edington v. Edington*, 489 N.E.2d 612 (Ind. Ct. App. 1986) (allowing the surviving spouse's election against the decedent's will even though both parties came to the marriage with substantial property and children from prior marriages, and despite the fact that both had previously executed wills leaving nothing to the other; the surviving spouse had not waived her right to elect against the will because there was no written waiver and no disclosure of the nature and extent of her right to elect against the will). Cf. *Flagship Nat'l Bank of Miami v. King*, 418 So.2d 275 (Fla. Dist. Ct. App. 1982) (denying the surviving spouse an elective share because the decedent and the surviving spouse had orally agreed prior to marriage that each would retain complete control over his or her separate property because it was a second marriage for both parties and each had children from a prior marriage to whom each desired to leave his or her estate).

<sup>219</sup> Valuing property subject to an elective-share claim can be difficult and complex. See Brashier, *supra* note \_\_\_\_, at n.58 (citing *In re Estate of Kirkman*, 273 S.E.2d 712 (N.C. 1981)).

<sup>220</sup> See *supra* note \_\_\_\_.



elective-share system could reduce complexity is one in which the decedent's assets, or those of the surviving spouse, included separate property that was easily classified as such, but difficult to value,<sup>221</sup> and other property that was difficult to classify, but easy to value.<sup>222</sup> If the surviving spouse claimed an elective share in such a case under the UPC's approximation system, the valuation issues associated with the separate property would have to be resolved; under a value deferred-community-property elective-share system, the classification issues with respect to the commingled assets would have to be addressed, but the separate property valuation issues would not. Depending on the circumstances, there could be more complexity and uncertainty in such a case under the UPC's approximation system than under a value deferred-community-property elective-share alternative.

This discussion is not intended to suggest that a value deferred-community-property elective-share system would be less complex and more certain than the UPC's approximation system in most elective-share cases. But in the great majority of probate or postmortem trust administrations, there will not be an elective-share claim made regardless of the jurisdiction's elective-share system; in some cases such a claim would be made under the UPC approximation system when one would not be made under a value deferred-

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<sup>221</sup> An example of such an asset is an interest in a closely held business the deceased spouse owned at the time of the marriage, or received by gift or inheritance during the marriage, which either did not appreciate in value during the marriage, or did appreciate but not due to the efforts of either spouse.

<sup>222</sup> An example of this kind of asset is a bank or brokerage account in which there had been

community-property system; and in some cases in which an election would be made under either system, the administrative difficulties will be as great or greater under the UPC's approximation system than they would be under a deferred-community-property system.<sup>223</sup> In short, although the adoption of a value deferred-community-property approach would add complexity and unpredictability in some elective-share cases, it would not do so in others and would have no effect on the great majority of estate and trust administrations in which the elective share is not an issue at all.

Another response to the concern that a value deferred-community-property elective-share system would introduce unacceptable levels of complexity and unpredictability into elective-share law in noncommunity-property jurisdictions is that most, if not all, of them already are addressing the classification, tracing, and commingling issues in the more common cases of spouses divorcing.<sup>224</sup> Further, the nine community-property states<sup>225</sup> -- in which

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commingling of separate and marital property. See *infra* notes \_\_\_\_ - \_\_\_\_ and accompanying text.

<sup>223</sup> Note also that the marital versus separate property classification, commingling, and tracing issues that would have to be addressed under a deferred-community-property elective-share system when the spouses own marital and separate property presumably would be more difficult for first marriages, particularly long-term first marriages, than for second or subsequent marriages, particularly later-in-life second or subsequent marriages. It is less likely, however, that a deceased spouse would attempt to disinherit, partially or wholly, a surviving spouse of a first marriage, see *supra* note \_\_\_\_, particularly a long-term first marriage.

<sup>224</sup> See *infra* note \_\_\_\_\_. With respect to the infrequency of elective-share cases, see *supra* notes \_\_\_\_ and \_\_\_\_\_. The system for the division of property on the dissolution of a marriage included in the American Law Institute's tentative draft of *Principles of the Law of Family Dissolution: Analysis and Recommendations*, treats marital and separate property differently because of the "widespread consensus" that marriage should not affect the spouses' ownership of their separate property. ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_\_, § 4.03 cmt. a. That system was not viewed as adding complexity and uncertainty to the division of property at the dissolution of a marriage, but as allocating the spouses' property between them in accordance with principles "that are consistent and predictable in application," *id.* § 4.02(3), "so that individuals can in most

more than a quarter of the United States population resides<sup>226</sup> -- routinely address those issues in determining whether the spouses' property is community or separate both at the death of a spouse, and when a marriage terminates by divorce.<sup>227</sup> Arguably, however, the classification, commingling, and tracing

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cases discern their legal obligations without resort to litigation." *Id.* § 4.02 cmt. c. Similarly, the issue of whether the division of property at the dissolution of a marriage should be affected by whether it is marital or separate has been described as requiring:

. . . a balancing of the competing goals of flexible and consistent justice. (Footnote omitted.) The majority consensus to date seems to be that the consistency of dual classification is worth the cost, as a large majority of all recent statutes reject the all property system. Moreover, there is a clear trend in states with all property systems to adopt some of the benefits of dual classification by court decision. A number of courts, for instance, have held that while separate property can be divided, it should not be divided unless unusual circumstances are present. (Footnote omitted.) . . . At both the legislative and judicial level, therefore, there is a clear present trend toward adoption of the dual classification model of equitable distribution.

TURNER, *supra* note \_\_\_, § 2.09. The classification of the couple's property as marital or separate, and generally subjecting only marital property to division, furthers the objectives of consistency and predictability in the division of property at divorce because without such a classification, all of the spouses' property is subject to division pursuant to a variety of subjective factors. *Id.* § 2.07. By contrast, a deferred-community-property elective-share system is an alternative not to a system for the division of the couple's property at the first of their deaths that is based on numerous subjective factors, but to the UPC's mechanical, formula driven system under which the surviving spouse's elective share is a length-of-the-marriage determined percentage of the decedent's augmented estate. See *supra* notes \_\_\_-\_\_\_ and accompanying text. Because of the need to classify the spouses' property as marital or separate, a deferred-community-property elective-share system in many cases would not be more predictable and consistent in application than the UPC's approximation system, although it would in others. See *supra* text accompanying notes \_\_\_-\_\_\_. Nevertheless, how the classification issue is viewed in the divorce context is useful in evaluating the degree of complexity and uncertainty that would be added to estate and trust administration proceedings if the surviving spouse's elective share is determined by reference only to the spouses' marital property.

<sup>225</sup> See *supra* note \_\_\_\_.

<sup>226</sup> See Brashier, *supra* note \_\_\_, at n.36.

<sup>227</sup> In a community-property jurisdiction, a spouse generally may devise to anyone half of the couple's community property, as well as his or her separate property, but the surviving spouse's half of the community property is not subject to disposition by the decedent. MCLANAHAN, *supra* note \_\_\_ §11:5. For a discussion of the division of community property and separate property at divorce in a community-property jurisdiction, see Pagano, *supra* note \_\_\_, § 20.04. Although the fact that such determinations routinely are required in community-property jurisdictions does not mean that they do not present significant issues and administrative difficulties, see *id.* §§ 20.03 and 20.04[2], it demonstrates that those issues and difficulties have not proven to be of such magnitude as to warrant abandonment of the requirement that the spouses' assets be classified

issues would be more prevalent and difficult in a noncommunity-property jurisdiction that adopted a value deferred-community-property elective-share system than they are in community-property jurisdictions, because couples in noncommunity-property jurisdictions are not aware of the need to keep their separate property segregated from their marital property, or to maintain the records necessary to identify their separate property if it has been commingled with marital property.<sup>228</sup> But the lack of awareness of persons in noncommunity-property jurisdictions of the need to segregate their separate property from their marital property, or to maintain sufficient records to uncommingle mixed property, arose prior to the widespread adoption of equitable distribution as the basis for the division of property at divorce.<sup>229</sup> Given the universal adoption of

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as community or separate in favor of a system like that under the UPC's new elective-share provisions that would approximate the amount of separate and community-property each spouse owned in a more easily administered manner, such as by basing the approximation on the length of the marriage.

<sup>228</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_, at 733. Note that the degree of difficulty in protecting the separate nature of separate property may depend to some extent on the classification law of the governing jurisdiction. If, for example, the jurisdiction classifies income from separate property as marital property, *see supra* note \_\_\_, the risk of commingling may be greater than if such income is classified as separate property, because income such as interest and dividends may be accumulated and reinvested with the separate property principal that produced it. See Oldham, *Tracing, Commingling, and Transmutation*, *supra* note \_\_\_, at 228. Similarly, if in a jurisdiction the use of separate property by both spouses results in it being transmuted into marital property, the separate property owner will not be able to protect its separate character without disallowing the other spouse's use of the property, or addressing the subject in a marital agreement. *Id.* at 246-47 (citing *Quinn v. Quinn*, 512 A.2d 848 (R.I. 1986)).

<sup>229</sup> Prior to the adoption of equitable distribution, when spouses in a noncommunity-property jurisdiction divorced, the division of their property was unaffected by whether it was marital or separate; rather, each spouse was awarded the property to which he or she held title. TURNER, *supra* note \_\_\_, § 1.02, at 4. Because the rights of a surviving spouse to dower or curtesy, or under an elective-share statute, also were unaffected by whether a deceased spouse's assets were marital or separate, generally the distinction between marital and separate property had little or no significance in noncommunity-property jurisdictions. See *Brown v. Little*, 489 S.E. 2d 596, 598 (Ga. Ct. App. 1997). With respect to the adoption of equitable distribution for the division of property at divorce, *see infra* note \_\_\_\_.

equitable distribution,<sup>230</sup> its different treatment of marital and separate property,<sup>231</sup> the prevalence of divorce in our society,<sup>232</sup> and the mobility of our population between community and noncommunity-property jurisdictions, it is likely that increasing numbers of residents of noncommunity-property jurisdictions are, and will become, aware of the need to take appropriate steps to protect separate property,<sup>233</sup> if that is their goal, without regard to whether there also is an elective-share system that distinguishes between separate and marital property. If such an elective-share system also is adopted in a noncommunity-

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<sup>230</sup> In 1970, the Uniform Marriage and Divorce Act (UMDA) was promulgated. UNIF. MARRIAGE & DIVORCE ACT (amended 1973), 9A U.L.A. 169 (1987). UMDA, which has been characterized as the first equitable distribution statute, TURNER, *supra* note \_\_\_, § 1.02, at 12, based the division of property between the spouses on its classification as marital or separate. 1970 UMDA § 307 at 288-89. In 1973, the Commissioners on Uniform State Laws revised UMDA to replace its provisions under which only marital property was divisible at divorce with a requirement that all of a divorcing couple's property, "however and whenever acquired," be "equitably apportion[ed]" between the spouses. 1973 UMDA § 307 at 288. But as noted by Professor Andrews, "[t]he community property distinctions of the original UMDA seem to have found a much more sympathetic audience in the states than among the commissioners, however." Andrews, *supra* note \_\_\_ at 173. Over the next three decades, equitable distribution was widely adopted as the basis for the division of property at divorce, and in a significant majority of adopting states, it follows the dual classification model that distinguishes between marital and separate property. TURNER, *supra* note \_\_\_, § 1.02, at 14. Furthermore, although some equitable distribution systems allow the separate property of one spouse to be awarded to the other in a divorce proceeding, many courts in such "all property" jurisdictions nevertheless have adopted means by which the separate property of one spouse generally is not awarded to the other. *Id.* at § 2.09.

<sup>231</sup> See *supra* note \_\_\_.

<sup>232</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_, at 685 n.2 (noting that "[i]f current divorce rates continue, about two out of the three marriages that began this year will not survive as long as both spouses live." (quoting Norval D. Glenn, *What Does Family Mean?*, AM. DEMOGRAPHICS, June 1992, at 30, 30)). But see, *Lies, Damn Lies and Statistics*, Investors Bus. Daily, Nov. 10, 1995, at \_\_\_, (disputing the "supposed fact" that 50% of all marriages end in divorce and concluding that "a closer look at the numbers reveals that marriages have a much better chance of surviving than media clichés indicate").

<sup>233</sup> In a 1989 article discussing the unforgiving manner in which some courts find that separate property that is commingled with marital property itself becomes marital property, Professor Oldham noted, apparently with reference to the relatively recent widespread adoption of equitable distribution: "But it is not clear that the average resident of a common-law state yet understands the difference between 'separate' and 'marital' property and the potentially disastrous ramifications upon divorce of mixing the two." Oldham, *Tracing, Commingling, and Transmutation*, *supra* note

property jurisdiction, knowledge of the importance of segregating separate property or maintaining adequate records to identify it presumably will increase further.<sup>234</sup>

The case for the deferred-community-property alternative being a more equitable means of bringing elective-share law into line with the partnership theory of marriage than is the UPC's approximation system is a straightforward one. Generally, the partnership theory of marriage treats the spouses as equal partners with respect to their marital property.<sup>235</sup> Consistent with the marital partnership theory, when the marriage terminates – whether by divorce or death – the couple's marital property should be divided between them,<sup>236</sup> but because

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\_\_\_\_\_, at 229 (emphasis added).

<sup>234</sup> Professor Oldham suggests that because noncommunity-property states do not determine spousal property rights at the death of a spouse based on whether the couple's property was separate or marital, residents of such states may not be as concerned about commingling as residents of community-property states, despite equitable distribution. *Id.* The inference is that if a distinction also is made between separate and marital property in the elective-share context, the difference between the level of awareness of classification, tracing, and commingling issues of residents of community and noncommunity-property states would narrow further. Although that seems likely, it nevertheless is not likely that residents in noncommunity-property states – even those states that distinguish between marital and separate property both at divorce and at the death of a spouse – would develop the same level of awareness of classification and commingling issues as residents of community-property states, because in the latter, the distinction between marital and separate property also has significant lifetime consequences with respect to such matters as creditors' rights and the management of property. See generally, Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235 (1995); J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROBS. 99 (1993) [hereinafter Oldham, *Management of the Community Estate*]. Note also that decedents who attempt to provide for their separate property to pass at their deaths to beneficiaries other than a surviving spouse often will do so with a will or revocable trust instrument prepared by an attorney. In such cases, if the jurisdiction's elective-share system treats marital and separate property differently, presumably the attorney would advise the separate property owner of the need to take appropriate steps to preserve the separate nature of the separate property.

<sup>235</sup> See *supra* text accompanying note \_\_\_\_; Waggoner, *Marital Property Rights*, *supra* note \_\_\_\_, at 43-44.

<sup>236</sup> There is no consensus on precisely how a couple's marital property should be divided between them when their marriage terminates. As noted, all noncommunity-property jurisdictions have

neither spouse contributed to the acquisition of the separate property of the other, their separate property should be excluded from the division.<sup>237</sup> A deferred-community-property elective-share system recognizes and respects this equitable basis for treating marital and separate property differently in

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adopted equitable distribution, *see supra* note \_\_\_, which is rooted in the partnership theory of marriage, *see supra* note \_\_\_, for the division of a couple's property when their marriage is dissolved. In some jurisdictions, their separate as well as their marital property is subject to such division, while in others only their marital property may be divided. TURNER, *supra* note \_\_\_, §§ 2.07-2.09. With respect to the division of their marital property under an equitable distribution system, generally the division is to be made "equitably," which does not necessarily mean equally. *Id.* § 8.01. In community-property jurisdictions, when a marriage ends in death, the community property is owned by the spouses equally (as it was while they both were living). *See* McLANAHAN, *supra* note \_\_\_, §11:5. But when spouses who live in a community-property jurisdiction divorce, in some states the couple's community property will be divided between them equally – which does not mean each community asset is divided between the spouses equally – while in other states, the division of community property is to be made between them equitably. *See supra* note \_\_\_. Factors affecting the division of marital property between spouses at divorce include relative need and marital misconduct. TURNER, *supra* note \_\_\_, § 8.01, at 551-52.

<sup>237</sup> *See supra* note \_\_\_. Note, however, that an elective-share claim is not the only context in which a spouse's separate property is not protected from a claim by the other spouse. For example, while the separate property of a deceased spouse in a community-property jurisdiction generally is not subject to claims by the surviving spouse, an exception is made for claims for a homestead allowance and exempt property. Pagano, *supra* note \_\_\_, § 20.05[2][b][i]. Further, if a marriage in a community-property jurisdiction ends in divorce, the separate property of a spouse may be awarded to the other spouse in Nevada, New Mexico, Texas, and Washington, although the court's power to do so is subject to limitations. McLANAHAN, *supra* note \_\_\_, § 12:17. Similarly, in Wisconsin, the ninth community-property state, *see supra* note \_\_\_, the separate property of one spouse may not be awarded to the other on the dissolution of the marriage, unless such an award is necessary to avoid creating a hardship on the other party (or on the children of the marriage). WIS. STAT. § 767.255 (1999). In the other community-property states (Arizona, California, Idaho, and Louisiana), generally the separate property of one spouse may not be awarded to the other, McLANAHAN, *supra* note \_\_\_, § 12:17, although exceptions exist which allow awards of alimony, support, or community funds to be made a lien on separate property in some circumstances. *Id.* at n.17. Although in most noncommunity-property jurisdictions the equitable distribution of the couple's property at divorce does not include the power to award one spouse's separate property to the other, in other such jurisdictions separate property is subject to division. TURNER, *supra* note \_\_\_, § 2.07. Furthermore, in states that do not allow separate property to be divided at divorce, such a result effectively may be reached by an alimony award. Oldfather, *supra* note \_\_\_, § 1.02[2] (noting that "courts have expanded their own authority to dispose of property by judicially implementing alimony concepts to make one time lump sum awards, which are not subject to modification, and which have all the earmarks of property distributions . . ."). Similarly, equitable considerations sometimes result in the doctrine of transmutation being applied in divorce proceedings to convert what otherwise would be non-divisible separate property to marital property. TURNER, *supra* note \_\_\_, § 5.24, at 275; *see infra* note \_\_\_.

determining the elective-share rights of a surviving spouse in a noncommunity-property jurisdiction. In short, while the partnership theory of marriage recognizes each spouse's equal claim to the couple's marital property without regard to how title to such property is held, it does not contemplate a claim by either spouse against the other's separate property.<sup>238</sup> Accordingly, as is the case under the marital partnership theory based community-property system,<sup>239</sup> an elective-share system that is intended to incorporate the partnership theory of marriage into elective-share law should not subject a deceased spouse's separate property to an elective-share claim of the surviving spouse by, in effect, converting separate property into marital property as the length of the marriage increases.<sup>240</sup>

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<sup>238</sup> In discussing the division of property between spouses at divorce, Professor Oldham has noted that: "One of the goals of the marital property system is to allow spouses to share the fruits of the marital partnership; other property, such as premarriage acquisitions, gifts, and inheritances, is excluded, because it is not the fruit of the partnership." Oldham, *Tracing, Commingling, and Transmutation*, *supra* note \_\_\_, at 248.

<sup>239</sup> See *supra* note \_\_\_.

<sup>240</sup> See *supra* text accompanying notes \_\_\_ - \_\_\_. The pending draft of the American Law Institute's *Principles of the Law of Family Dissolution* includes a provision for the recharacterization of separate property as marital property at the dissolution of a long-term marriage. ALI, *PRINCIPLES OF FAMILY DISSOLUTION*, *supra* note \_\_\_, § 4.18. The comment to that provision notes that states that distinguish between marital and separate property at the dissolution of a marriage generally do not have provisions under which separate property is changed into marital property with the passage of time. *Id.* § 4.18 cmt. a. The rationale for section 4.18 is not consistency with the partnership theory of marriage, which is the purpose of the UPC's redesigned elective-share system, see *supra* text accompanying note \_\_\_; rather, the rationale for section 4.18 is that such a recharacterization is said to be equitable given the presumed expectations of spouses in long-term marriages with respect to their separate property. ALI, *PRINCIPLES OF FAMILY DISSOLUTION*, *supra*, § 4.18 cmt. a. But see Robert J. Levy, *An Introduction to Divorce – Property Issues*, 23 FAM. L. Q. 147, 152 (1989) (stating that the exclusion of separate property from property available for division in divorce proceedings results from "essentially common-sense extrapolations of fairness notions and beliefs about spouses' expectations"). The comment to section 4.18 further notes that in some states, divorce courts are permitted to redistribute separate property to the nonowning spouse at divorce, and that this power presumably is exercised most often in long-term marriages. ALI, *PRINCIPLES OF FAMILY*



But even if a deferred-community-property elective-share system is more equitable in principle than the UPC's approximation system, would it in practice actually yield results that are more accurate – measured against the partnership theory of marriage standard of dividing the marital property of the spouses between them equally without subjecting the deceased spouse's separate property to the survivor's election<sup>241</sup> – than the approximation system? If the spouses' separate and marital property can be accurately identified, certainly. Arguably, however, the classification, tracing, and commingling questions are of such difficulty that the administrative burden would be addressed by a presumption that all spousal property is marital.<sup>242</sup> If so, under a deferred-community-property elective-share system, property of the spouses might be treated as marital rather than separate for elective-share purposes not because it was in fact marital, but because there is insufficient evidence to overcome the presumption.<sup>243</sup> Furthermore, the classification problem, and thus the need to rely on a presumption, arguably is more difficult in noncommunity-property states than in community-property states because in the former, spouses are not on notice of the risk of not maintaining appropriate records to prove that separate property is in fact separate.<sup>244</sup>

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DISSOLUTION, *supra*, § 4.18 cmt. a. In most states, however, divorce courts are not empowered to divide separate property at all, and the trend in states that do allow separate property to be divided at divorce is to do so only when unusual circumstances are present. See *supra* notes \_\_\_\_ and \_\_\_\_.

<sup>241</sup> See *supra* note \_\_\_\_ and accompanying text.

<sup>242</sup> See Waggoner, *Multiple-Marriage Society*, *supra* note \_\_\_\_ at 733.

<sup>243</sup> *Id.* at 733-34.

<sup>244</sup> *Id.* at 733; see *supra* notes \_\_\_\_ - \_\_\_\_ and accompanying text.

Presumptions in favor of community or marital property commonly are used to aid in the classification process in both community-property<sup>245</sup> and noncommunity-property<sup>246</sup> jurisdictions,<sup>247</sup> and also would be appropriate under a deferred-community-property elective-share system.<sup>248</sup> To accomplish the objective of not subjecting the decedent's separate property to the surviving spouse's elective share, however, reasonable limitations on the application of such a presumption would be necessary. In the context of the division of property at the dissolution of a marriage, Professor Oldham has expressed a concern that an overly broad application of a marital property presumption would result in a mischaracterization of separate property as marital: "A state that adopts strict tracing rules for commingled funds, rejects the marital-property-out-first uncommingling presumption and adds to that liberal doses of transmutation (such as transmutation by use) . . . will undermine the distinction between divisible marital property and nondivisible separate property."<sup>249</sup> This risk of

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<sup>245</sup> See Pagano, *supra* note \_\_\_, § 20.03[1][a]. A presumption that property is community property universally is applied to property acquired during the marriage; there is not a similar consensus that it should be presumed that property owned at the termination of a marriage was acquired during the marriage. *Id.* If it is not presumed that property of the spouses was acquired during the marriage, the initial burden of proof on the classification issue is on the nonowning spouse to prove that the property in question was acquired during the marriage. TURNER, *supra* note \_\_\_, § 5.03. Only after that showing is made does the burden of proof shift to the owning spouse to prove that the property is his or her separate property. *Id.*

<sup>246</sup> "There is . . . a strong presumption of marital property, and usually, the party contending that property is separate has the burden of overcoming the presumption." William H. DaSilva, *Property Subject to Equitable Distribution*, in VALUATION AND DISTRIBUTION OF MARITAL PROPERTY 18-1, § 18.01, at 18-7 (Maris Warfman rev.) (1999). See also TURNER, *supra* note \_\_\_, § 5.03.

<sup>247</sup> For a discussion and criticism of several cases that not only apply a factual presumption that assets owned by married persons are marital property, but also employ a preference for marital property, see TURNER, *supra* note \_\_\_, § 5.03 (2d ed. Supp. 1998).

<sup>248</sup> See Gary, *supra* note \_\_\_, at 600.

<sup>249</sup> Oldham, *Tracing, Commingling, and Transmutation*, *supra* note \_\_\_, at 249. Similarly, another

mischaracterizing separate property as marital property<sup>250</sup> resulting from application of a presumption that favors marital property, as well as the classification, tracing, and commingling issues that would have to be addressed

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commentator has concluded that the risk of a marital property presumption becoming an overbroad preference for marital property in dividing the spouses' property at divorce is a significant one:

Courts which express a strong general preference for marital property over separate property are limiting the concept of separate property in such a significant manner as to threaten the fundamental *dual classification* concept. Recognition of separate property imposes a significant administrative cost. By enacting a *dual classification* statute, the state legislature demonstrates its belief that the additional cost is justified by the potential for greater certainty and consistency. Once the preference for marital property becomes sufficiently strong, however, the courts do not find separate property to exist often and reliably enough to create certainty and consistency. The state is therefore left with all of the costs and none of the benefits of *dual classification*, and the system would operate more efficiently if separate property were abandoned altogether. Since the enactment of a dual classification statute shows clear legislative intent that separate property not be abandoned, there must logically be limits on how far the courts can go in adopting a preference for marital property.

TURNER, *supra* note \_\_\_, § 5.03 (2d ed. Supp. 1998).

<sup>250</sup> The mischaracterization risk also affects whether each asset of the spouses should be classified as entirely marital or entirely separate (the "unitary theory of property") or whether a given asset can be part marital and part separate (the "mixed theory of property"). TURNER, *supra* note \_\_\_, § 5.08. Generally, under the unitary theory of property, if an asset is acquired with both marital and separate property, the doctrine of strict transmutation is applied to cause the acquired asset to be classified as marital property. *Id.* Although this inequity can be corrected in a divorce proceeding by the trial court making an unequal property division, whether it does so is in its discretion. *Id.* As a result, separate property receives significantly less protection under the unitary theory of property than under the mixed theory of property; largely for that reason, "[m]ixed property is the overwhelming nationwide majority rule." *Id.*

The resolution of a classification dispute also may be affected by the degree of proof required to rebut the presumption that property acquired by the spouses during the marriage is marital. Some jurisdictions require clear and convincing evidence to rebut the presumption, while others require only a preponderance of the evidence. TURNER, *supra* note \_\_\_, § 5.03; Lewis Becker, *Overview of Statutes Governing Property Distribution*, in VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 3.03[4] (1999). The allocation of the burden of proof also can affect the outcome in a classification dispute. For example, the equitable distribution cases on classifying the appreciation of separate property during the marriage are said to "have reached a remarkable degree of consensus in recent years. Appreciation in separate property is marital property if it was caused by marital funds or marital efforts; otherwise, it remains separate property." TURNER, *supra* note \_\_\_, § 5.22, at 230. In determining whether such appreciation was caused by marital funds or efforts, the initial burden of proving marital contributions and appreciation in the property generally is on the nonowning spouse; most, but not all, states then shift the burden of proof to the owning spouse to prove that the appreciation was not caused by the marital contributions. *Id.* at

under a deferred-community-property elective-share system, can be illustrated by an examination of problems that arise when marital and separate funds are commingled. Such cases raise issues with respect to the classification both of the commingled funds and of assets purchased with commingled funds.<sup>251</sup>

Although one of the general commingling rules is that if separate property is mixed in a fund with marital property, the separate property becomes marital,<sup>252</sup> that will not be the result if the fund can be “uncommingled,”<sup>253</sup> such as by tracing the deposits and withdrawals from the fund to marital and separate property.<sup>254</sup> Courts have used a variety of techniques for uncommingling mixed funds,<sup>255</sup> or otherwise determining that part or all of such funds are separate property.<sup>256</sup> Similarly, when the issue is whether an asset purchased from a

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<sup>251</sup> See Oldham, *Tracing, Commingling, and Transmutation*, *supra* note \_\_\_, at 220-21.

<sup>252</sup> *Id.* at 222.

<sup>253</sup> *Id.*

<sup>254</sup> For example, assume that a spouse entered the marriage with \$1,000 in an account, to which he or she added \$1,000 of wages earned during the marriage and made no withdrawals; of the \$2,000 in the account, \$1,000 is marital property and \$1,000 is separate. *Id.* at 223.

<sup>255</sup> Examples include: (i) tracing withdrawals from a commingled account to separate or marital property expenditures and classifying the withdrawals accordingly, *id.* at 224; (ii) applying the “family expense doctrine,” under which withdrawals used to pay family living expenses are treated as withdrawals of marital property, *id.*; (iii) treating withdrawals as the separate property of the withdrawing spouse unless he or she can trace the withdrawal to marital property or show that it was used to pay a family living expense, *id.* at 225; (iv) applying the “marital-property-out-first” rule, under which withdrawals are treated as marital property to the extent that marital funds were in the account at the time of the withdrawal, *id.*; (v) considering the intention of the spouse who makes withdrawals from the account to determine whether the withdrawals were of marital or separate property, *id.* at 226; (vi) comparing the amount of separate property deposited in a commingled account to the total amount of withdrawals from the account, *id.*; (vii) comparing the total amount of marital property deposits in the account to the balance in the account at the time of the divorce, *id.*; and (viii) applying the “total recapitulation” doctrine, under which a commingled fund at divorce will be treated as separate if the aggregate family living expenses paid from the account exceed the aggregate marital property deposits to the account. *Id.* at 226-27.

<sup>256</sup> Examples include: (i) considering whether there was an agreement between the spouses with respect to whether the separate property contributed to the commingled account would be

commingled account is marital or separate property, courts usually find that the newly acquired asset is marital property,<sup>257</sup> but in appropriate circumstances various techniques have been used to reach the opposite result.<sup>258</sup> Because of the various means courts have employed in appropriate circumstances to treat part or all of the property remaining after separate and marital property have been commingled as separate property, Professor Oldham has concluded that in most states “[r]easonable standards are being established for uncommingling mixed accounts,”<sup>259</sup> and that the presumption in favor of marital property is not being so broadly applied as to undermine the distinction between marital and separate property.<sup>260</sup> If courts are finding reasonable means to protect the

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returned to the contributing spouse, *id.* at 227; (ii) declining to follow the usual commingling rule in circumstances when the amount of marital property in the commingled account is relatively small compared to the amount of separate property in the account, *id.* at 228; and (iii) reimbursing a spouse who contributes separate property to a commingled fund, particularly when the contributing spouse had a significant amount of separate property that was commingled with marital property and the net worth of the parties increased significantly during the marriage. *Id.* at 228. At least one approach taken by divorce courts to avoid the harsh consequences of the general commingling rule, however, would not be available to a court in an elective-share proceeding under a deferred-community-property system. In divorce cases in which a spouse contributed significant separate property to a commingled account that cannot be uncommingled, some courts have treated the fund as entirely marital property, but then have awarded most of it to the spouse who had contributed substantial amounts of separate property to it. *Id.* at 228 (citing *Schwartz v. Linders*, 426 N.W.2d 97 (Wis. 1988) and *Lambert v. Lambert*, 367 S.E.2d 114 (Va. Ct. App. 1988)).

<sup>257</sup> This result is said to be “consistent with the general view that a spouse should be punished for being reckless and mixing separate and marital property, as well as with the presumption that acquisitions during marriage are marital property.” *Id.* at 231.

<sup>258</sup> *Id.* at 230-33 and cases cited therein.

<sup>259</sup> *Id.* at 249.

<sup>260</sup> *Id.* Issues of classification also arise when actions taken by one or both of the spouses are alleged to have caused a transmutation of separate property to marital property, or of marital property to separate property. *Id.* at 233-47. Such actions include (i) the spouses entering into an agreement with respect to the ownership of their property, *id.* at 233-36; (ii) the spouse who owns separate property transferring its title to the spouses jointly, *id.* at 236-42; (iii) the spouse who owns separate property using it as consideration for the acquisition of property titled in both spouses’ names, *id.*; (iv) a spouse using marital or separate property to purchase property that is

separate property of spouses when their marriage ends in divorce,<sup>261</sup> presumably such means also could and would be found and used to accomplish that objective under a deferred-community-property elective-share system when a marriage ends with a spouse's death.<sup>262</sup> Assuming that to be the case, and given that under a deferred-community-property elective-share system presumably there also would be cases in which there were no commingling or transmutation issues,<sup>263</sup> it appears likely that if a jurisdiction adopted a deferred-

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titled in the other spouse's name, *id.* at 242-46; and (v) both spouses using property that was the separate property of one of them. *Id.* at 246-47. Generally, in such cases the question of whether a transmutation has occurred depends on the spouses' intentions, *id.* at 221, and "relatively clear evidence" of such intentions is required for these actions to transmute property of either or both spouses. *Id.* at 249.

<sup>261</sup> Although Professor Oldham so concludes, he also notes that protecting separate property by uncommingling it, and allowing evidence to rebut the presumption of transmutation by gift, "requires additional court time and undermines certainty in property characterization." *Id.* at 251. In response to such concerns, Professor Oldham has proposed a means by which the separate nature of separate property can be preserved without the complexities of tracing, uncommingling, and rebutting the joint-title-gift presumption: at the termination of the marriage each spouse is refunded, perhaps with an inflation adjustment, the net equity value at the time of the marriage of all property he or she owned at that time, plus the value of gifts or inheritances received during the marriage; the remaining assets of the spouses would be marital property subject to equitable distribution. *Id.* at 251.

<sup>262</sup> Note, however, that in a divorce proceeding both spouses are able to participate in the process of classifying their property. By contrast, in the elective-share context, the argument that property of the deceased spouse was separate, or that property of the surviving spouse is marital, necessarily would be made by successors of the decedent. Because in many cases the decedent's successors would not have as much information on the character of the couple's assets as would the surviving spouse, it may be more difficult for the decedent's successors to address the property characterization issues with the surviving spouse than it would have been for the decedent to do so in a divorce proceeding. That does not mean, however, that they should be foreclosed from attempting to do so and relegated to having the surviving spouse's elective share determined based solely on the length of the marriage. Further, steps could be taken, if deemed appropriate, to make the task of the decedent's successors less difficult. For example, the decedent's successors could be required to rebut the presumption that property acquired by the decedent during marriage was marital property with a preponderance of the evidence instead of with clear and convincing evidence. See *supra* note \_\_\_\_\_. Similarly, the surviving spouse could be required to prove that property the deceased spouse owned at death was acquired during the marriage before the marital property presumption is raised. See *supra* note \_\_\_\_.

<sup>263</sup> The transmutation doctrine, however, sometimes is applied in relatively unpredictable ways:

[A]ny legal analysis of the doctrine of transmutation must recognize that the results of the

community-property elective-share system, the survivor's elective share would be more consistent with the partnership theory of marriage standard than it would be under the UPC's approximation system.<sup>264</sup>

If the classification issues of a deferred-community-property elective-share system would increase the level of complexity and uncertainty in the administration of some decedents' property, but yield results that are more equitable, more often, when measured against the partnership theory of marriage standard than would be produced under the UPC's approximation system, the next question is whether the benefits of the more equitable results would outweigh the costs of added complexity and uncertainty. As previously noted, because elective-share claims arise infrequently, the system employed in a particular jurisdiction for determining the surviving spouse's elective share should not have a widespread effect on the administration of decedents'

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cases are not always consistent with the law on the books. Transmutation is the court's last chance to make an asset marital property, and it accordingly functions as something of a steam valve for the entire classification system. Where the strict rules of classification require an unjust result which the court cannot otherwise avoid, the court is likely to use transmutation to avoid that result and classify the asset as marital. In an ideal world this use of transmutation would not be necessary, but classification systems are imperfect, and judges are human beings. Inevitably, therefore, courts will sometimes stretch the law of transmutation to reach an equitable result on the facts.

TURNER, *supra* note \_\_\_, § 5.24, at 275.

<sup>264</sup> To the extent that the couple's marital and separate property are so commingled that they cannot be uncommingled reasonably, the equities in favor of insulating property of the decedent from the survivor's elective-share claim are reduced significantly. In such a circumstance, the presumption applied in many states -- that the separate property owner intended that the separate property become marital, see DaSilva, *supra* note \_\_\_, § 18.07[3][d] -- may be accurate. See Gary, *supra* note \_\_\_, at 601 (noting that "[i]f . . . establishing separate property is difficult or impossible, then it may be because the spouses considered all of the property marital property, and as such it should be subject to the elective share").

property.<sup>265</sup> Rather, the elective-share system employed in the jurisdiction will affect a relatively small number of estate and trust administrations,<sup>266</sup> most of which, presumably, will involve competing and compelling equities asserted by surviving spouses and children from prior marriages.<sup>267</sup> In the relatively small number of cases in which elective-share claims are made, the issue is whether the goal of defining the surviving spouse's elective share in a manner consistent with the partnership theory of marriage<sup>268</sup> should be implemented by a system

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<sup>265</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>266</sup> Most elective-share claims presumably are made when persons die survived by spouses of second or subsequent marriages, particularly when the decedent has children from a prior marriage. See *supra* note \_\_\_\_\_. Given the prevalence of divorce in recent years, see *supra* note \_\_\_\_, and the likelihood that many divorced, as well as widowed, spouses will remarry, see *supra* note \_\_\_\_, there likely will be an increase in the number of decedents who die survived both by a spouse from a second or subsequent marriage and by descendants from one or more prior marriages. If that proves to be the case, the frequency of elective-share claims may increase. See also Pennell, *supra* note \_\_\_\_, ¶ 900 (discussing other factors that also may result in an increase in surviving spouses' elections against decedents' estate plans). If so, the governing elective-share system, although still affecting a relatively small percentage of postmortem administrations, may affect a higher percentage of them than in the past. If a jurisdiction adopted the deferred-community-property elective-share system, if that system resulted in greater complexity and uncertainty in more postmortem administrations than would the UPC's approximation system, and if more elective-share claims are made in future years than have been made in the past, the choice of a deferred-community-property elective-share system would affect more postmortem administrations, but arguably would lead to more equitable results in those more frequent elective-share cases.

<sup>267</sup> See MACDONALD, *supra* note \_\_\_\_, 157, 175-80.

<sup>268</sup> For the view of two practitioners who question the advisability of bringing elective-share law into line with the partnership theory of marriage by adoption of the UPC's approximation system, see Bright & Weiler, *supra* note \_\_\_\_, at 5-6 (asking "[d]o we really want to limit the freedom of disposition for our clients and increase the uncertainty relating to the completion of gifts made within two years of the date of death? Is the perceived need to make spousal rights more in line with 'economic partnership' really a major priority for our clients and the citizens of Ohio?"). But for at least two reasons, the appropriate question is not whether elective-share systems should reflect the partnership theory of marriage, but how they should do so. First, the marital partnership theory not only is the foundation upon which the community property system of marital property rights rests, see *supra* note \_\_\_\_, but also underlies equitable distribution, see *supra* note \_\_\_\_, which governs the division of property at divorce in all of the noncommunity-property states, see *supra* note \_\_\_\_\_. Second, the desire to avoid complexity and to preserve the property rights of the spouse holding title to marital property do not appear to be any more persuasive reasons for rejecting the marital partnership theory in the elective-share context than in the divorce context,



that determines the elective share by reference only to the couple's marital property, or by a system designed to approximate that result by, in effect, classifying the spouses' property as marital or separate based solely on the length of their marriage.

With respect to the complexity and uncertainty that would result, in some cases, from an elective-share system that requires the classification of the spouses' property at the first of their deaths, it is worth noting again that those obstacles have not been deemed serious enough to warrant abandoning the classification of spouses' property as separate or marital in divorce proceedings.<sup>269</sup> Marital and separate property are treated differently in a divorce

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*see infra* note \_\_\_\_\_. Arguments also can be made, however, that neither the UPC's redesigned elective-share system nor a deferred-community-property elective-share system go far enough towards implementing the partnership theory of marriage into marital property rights law. For example, during the marriage a deferred-community-property elective-share system, unlike a true community-property system, would not confer on the non-title holding spouse any rights in marital property owned by the other spouse. *See supra* note \_\_\_\_\_. Further, under a deferred-community-property elective-share system, if the spouse who dies first did not own any of the couple's marital property, his or her estate would have no claim against the surviving spouse, *see supra* text accompanying notes \_\_\_\_ - \_\_\_\_, and he or she thus would have no ability to devise any of such property to beneficiaries of his or her choosing. By contrast, in a community-property jurisdiction, the first spouse to die could devise half of the couple's community property. *See Pagano, supra* note \_\_\_\_, § 20.05[2][a]. *See also supra* note \_\_\_\_ (briefly discussing the alternative of noncommunity-property jurisdictions becoming community-property jurisdictions).

<sup>269</sup> In the nine community-property jurisdictions, property classification issues routinely are addressed when marriages end in divorce (or death). *See Pagano, supra* note \_\_\_\_, § 20.04. In most noncommunity-property jurisdictions, divorce courts are not authorized to divide separate property, and in those noncommunity-property jurisdictions that do empower their divorce courts to award separate property of one spouse to the other, the exercise of that power often is limited by statute or judicial decision to cases involving unusual circumstances. *See supra* note \_\_\_\_\_. Although classification issues routinely are addressed in divorce proceedings, arguably they would be more difficult when a marriage ends in death than at divorce, because marriages that end with the death of a spouse generally are of longer duration than marriages that end in divorce. *See Waggoner, Marital Property Rights, supra* note \_\_\_\_, at 51-52. But the marriages that are of the most significance in comparing the difficulty of classification issues in divorce cases with the difficulty such issues would present in elective-share cases under a deferred-community-property elective-share system are those marriages that end in death and as to which elective-share claims are likely to be made. Most elective-share claims are made by surviving spouses of

because there is “a widespread consensus that marriage alone should not affect the ownership interest that each spouse has over property possessed prior to the marriage or received after the marriage by gift or inheritance.”<sup>270</sup> Why that consensus should not also apply to the spouses’ separate property when their marriage terminates by one of their deaths is not clear.<sup>271</sup> Although there are

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second or subsequent marriages when there are descendants of the deceased spouse from a prior marriage, see *supra* note \_\_\_, and those marriages presumably are, on average, of shorter duration than first marriages that end in death, and may not be longer, or much longer, than marriages that end in divorce.

Further, some of the more difficult property division issues in divorce proceedings in the majority of jurisdictions that distinguish between marital and separate property would not arise at all in an elective-share dispute. For example, a divorce may involve difficult issues with respect to whether spousal skills and earning capacity can be treated as divisible property. See ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_, § 4.07 and comments thereto. At the death of a spouse who had such skills and earning capacity, none would remain to be classified, and any such skills and earning capacity of the surviving spouse arguably would not be includible in the decedent’s augmented estate as property of the surviving spouse, regardless of how it might be classified. See TURNER, *supra* note \_\_\_, § 6.20, at 402 (noting that “[c]ourts across the nation have agreed almost uniformly that because degrees and licenses are not property, they cannot be divided on divorce.”) Similarly, the difficult issue in a divorce of whether goodwill exists and has value apart from spousal earning capacity and skills, ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_, § 4.07(3), cannot arise when the spouse who had such earning capacity or skills dies. Further, classifying an employee spouse’s rights to future income from a deferred compensation plan as marital or separate property, and valuing those rights, is particularly difficult in a divorce when the employee spouse’s rights to future income will be affected by postmarital labor performed by the employee spouse. *Id.* § 4.08 and cmts. No such uncertainties are possible when the marriage terminates because of the employee spouse’s death.

<sup>270</sup> ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_, § 4.03, cmt. a. See also Oldham, *Tracing, Commingling, and Transmutation*, *supra* note \_\_\_, at 250 (stating that distinguishing between marital and separate property in divorce proceedings “is perceived by most people as fair. There seems to be general acceptance today that spouses should share the fruits of the marital partnership, but not other property”).

<sup>271</sup> The elective-share statutes in two noncommunity-property jurisdictions, Oklahoma and Utah, are exceptions to the general rule that the marital or separate character of the decedent’s property has no effect on the surviving spouse’s elective share. In Oklahoma, the elective share of a surviving spouse is half of the property of the deceased spouse that was acquired by the joint industry of the spouses during their marriage. OKLA. STAT. tit. 84, § 44B (19\_\_). For this purpose, “joint industry” generally means the efforts of either spouse, in recognition of the fact that both spouses contribute to the acquisition of property during the marriage regardless of whether one spouse does not work for compensation. See R. ROBERT HUFF, OKLAHOMA PROBATE LAW AND PRACTICE § 3.22 (3d ed. 1995).

In Utah, the surviving spouse’s elective share is one-third of the deceased spouse’s “augmented estate,” UTAH CODE ANN. §§ 75-2-202(1) (1999), which is defined to exclude separate

## persuasive reasons not to design an elective-share system to parallel equitable

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property. § 75-2-208(1). The Utah system, which, like the UPC's, excludes from the augmented estate gifts made more than two years before death, see § 75-2-205(3), has been criticized for creating a framework within which a spouse who is determined to disinherit a surviving spouse can do so:

By imposing the community property concept of separate property on the elective share, Utah has given the surviving spouse the poorest of all alternatives: her elective share is restricted to the assets acquired during marriage, but it leaves the deceased spouse free to destroy her claim by making absolute gifts of this property more than two years before his death. This combination of statutes creates a significant opportunity for a determined spouse to destroy the elective share of the surviving spouse in situations that were not foreseen by the legislature.

Emery, *supra* note at 810. A similar criticism could be leveled against the deferred-community-property elective-share system under consideration in this article. The simple response – that completed gifts made more than two years before death should not be considered in the elective-share calculus under such a system for the same reasons they are not included in the augmented estate under the UPC's new approximation system – is not satisfactory because under the UPC's system part or all of any separate property the donor retains implicitly would be treated as marital property and would be subject to a surviving spouse's elective-share claim. By contrast, the deferred-community-property system would allow a determined-to-disinherit spouse to make gifts to non-spouse beneficiaries of marital property titled in his or her name more than two years before death, while retaining separate property that could not be reached by the surviving spouse's elective-share claim. Although a property owner's concern for his or her future economic security might, as a practical matter, provide some limits on such transfers, those limits could be only marginally effective for a spouse who owned substantial separate property, or for a spouse who had confidence that his or her donees of marital property (such as children from a prior marriage) would provide for him or her. The solution of restricting the ability of a spouse to give marital property away – as is done in community-property jurisdictions, see MCLANAHAN, *supra* note \_\_\_, § 9:10 – 9:11; Oldham, *Management of the Community Estate*, *supra* note \_\_\_, at 138-54; UNIF. MARITAL PROP. ACT § 6, 9A U.L.A.125-26 (1999) - would interfere with the marketability of property in noncommunity-property states and constitute a significant departure from the traditionally unfettered control a spouse has over marital property titled in his or her name in a noncommunity-property jurisdiction. Perhaps a better solution, if one is deemed necessary, would be to lengthen the period before death during which significant gifts of marital property – see *supra* note \_\_\_ for a discussion of gifts deemed significant for this purpose by the UPC – are included in the donor spouse's augmented estate for elective-share purposes to, for example, five years. For a proposal that the augmented estate under a system similar to the deferred-community-property approach considered in this article include gifts of marital property made within three years of a deceased spouse's death, see Gary, *supra* note \_\_\_, at 602. If the prospect of a donee of such gifts having to restore them so long after they were made were deemed unacceptable, the effect of including such gifts in the decedent's augmented estate could be limited to calculating the surviving spouse's elective-share claim that could be satisfied only from the decedent's half of other marital assets included in the augmented estate, or perhaps from separate property of the decedent.

distribution law for the division of property at divorce,<sup>272</sup> deciding not to base an elective-share system on equitable distribution law does not foreclose an elective-share system that would be consistent with a fundamental principle of the division of property at divorce (and the partnership theory of marriage): that the separate property of one spouse ordinarily should not be awarded to the other on the termination of their marriage.<sup>273</sup>

Under the UPC's approximation system, the principle of the partnership

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<sup>272</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>273</sup> See *supra* note \_\_\_\_\_. For several reasons, however, the adoption of a deferred-community-property elective-share system would not necessarily cause the spouses' property rights on the termination of their marriage to be the same regardless of whether their marriage ended in divorce or on the first of their deaths, even if the jurisdiction does not allow a spouse's separate property to be awarded to the other spouse in a divorce. First, under the proposed deferred-community-property elective-share system, if the spouse who owned most of the couple's marital property died first, the value of their marital property would be divided between them equally. See *supra* text accompanying note \_\_\_\_\_. By contrast, if their marriage ended in divorce, their marital property would be divided between them equitably, TURNER, *supra* note \_\_\_\_, § 8.01, at 550, based on a balancing of various equitable distribution factors. *Id.* § 8.04. Second, under a deferred-community-property elective-share system structured similarly to the UPC approximation system, if the deceased spouse owned less of the couple's marital property than the surviving spouse, the surviving spouse would not be entitled to receive an elective share, and there would be no claim by the deceased spouse's estate against the surviving spouse. See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_\_. The inequitable result in such a circumstance is that the couple's marital property would be divided between the surviving spouse and the deceased spouse's estate based solely on how much of their marital property was titled in each spouse's name, rather than equally or equitably. Such would not be the case if the marriage ended in divorce. Third, when a marriage ends in divorce, the disposition of the spouses' property may be affected by a determination that one spouse should contribute to the other's support for some period of time. See, e.g., ALI, PRINCIPLES OF FAMILY DISSOLUTION, *supra* note \_\_\_\_, Ch. 5. Under the deferred-community-property elective-share system, such a need is addressed by giving to the surviving spouse the right to receive a supplemental elective-share amount to aid in his or her support, see *supra* notes \_\_\_\_ and \_\_\_\_, and a homestead allowance, a family allowance, and exempt personal property, see *supra* note \_\_\_\_.

Note, though, that even in the community-property jurisdictions there is not perfect symmetry between the division of property when a marriage ends in divorce and the division of property when a marriage ends with the death of a spouse. If a marriage in a community-property jurisdiction ends in death, generally the surviving spouse owns his or her separate property and half of each of the couple's community assets, and has no claim to the separate property of the deceased spouse. MCLANAHAN, *supra* note \_\_\_\_, §§ 11.5 and 11.9. By contrast, if the marriage ends in divorce, the separate property of one spouse may, in some jurisdictions and in certain

theory of marriage that, generally, neither spouse should be entitled to a share of the other's separate property,<sup>274</sup> has given way to the probate system's goals of ease of administration and predictability of result.<sup>275</sup> Certainly there is a legitimate interest in providing for the efficient and expeditious administration of estates.<sup>276</sup> But it is not clear why the efficient and predictable resolution of competing spousal property claims should be sufficient to override the partnership-theory-of-marriage principle that a spouse's separate property should be protected from claims by the other spouse when their marriage terminates by one of their deaths, but not when it terminates by their divorce. Traditionally, elective-share systems have not differentiated between a deceased spouse's separate and marital property because their objective was to provide the surviving spouse with support after the deceased spouse's death.<sup>277</sup> Although the support rationale continues under the UPC's redesigned elective-share system, its role has been significantly reduced.<sup>278</sup> Given that the driving force for the UPC's redesigned elective share is the implementation of the partnership theory of marriage<sup>279</sup> that underlies the community property

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circumstances, be awarded to the other spouse, *see supra* note \_\_\_\_, and each community asset may not be divided between the spouses equally, *see supra* note \_\_\_\_.

<sup>274</sup> *See supra* note \_\_\_\_.

<sup>275</sup> *See supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>276</sup> *See, e.g.,* Lalli v. Lalli, 439 U.S. 259 (1978) (holding constitutional a state statute that precluded a nonmarital child from inheriting from his or her intestate deceased father unless paternity was established in a judicial proceeding during the father's lifetime because of the state's interest in the just and orderly disposition of a decedent's property).

<sup>277</sup> *See supra* note \_\_\_\_.

<sup>278</sup> *See supra* note \_\_\_\_.

<sup>279</sup> *See supra* text accompanying note \_\_\_\_.

system<sup>280</sup> and equitable distribution law in divorce,<sup>281</sup> the distinction between marital and separate property that is fundamental to marital partnership theory<sup>282</sup> and an important basis for the division of property at divorce in a substantial majority of jurisdictions<sup>283</sup> should be sufficient to warrant resolving the classification and tracing issues in the elective-share context just as it is in the divorce context.<sup>284</sup>

Finally, an advantage of a deferred-community-property elective-share

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<sup>280</sup> See *supra* note \_\_\_\_.

<sup>281</sup> See *supra* note \_\_\_\_.

<sup>282</sup> *Id.*

<sup>283</sup> See *supra* note \_\_\_\_.

<sup>284</sup> In addition to the argument that classification issues would be more difficult in the elective-share context than in a divorce, see *supra* note \_\_\_\_, there are at least two possible reasons to accept the difficulties that accompany classifying and tracing the spouses' property in a divorce but not at death. First, in a divorce the party seeking to protect separate property is the owner of the property, while in the elective-share context the persons who stand to lose by separate property being subject to a survivor's elective-share claim are the separate property owner's beneficiaries (who often will be children from a prior marriage). That distinction, however, does not support treating a spouse's separate property differently when he or she dies than when the spouses divorce. The principle underlying the partnership theory of marriage is that the spouses should share ownership of property acquired by their efforts during the marriage. See *supra* note \_\_\_\_\_. Property brought by them to the marriage or acquired by them during the marriage by gift or inheritance is not a product of their marital relationship and should not be subject to a claim by the non-owning spouse. *Id.* This basis for distinguishing between marital and separate property on the termination of the spouses' marriage is as applicable to marriages terminating by the death of a spouse as it is to marriages terminating by the spouses' divorce. If the separate property owner's death terminates the marriage, policy may dictate that the decedent's separate property be subject to a surviving spouse's claim for support in the form of a supplemental elective share, or for a homestead allowance, family allowance, or exempt personal property. See *supra* note \_\_\_\_\_. But to the extent the decedent's separate property is not so needed, the fact that it will pass to persons other than the surviving spouse, rather than continue to belong to the spouse who owned it – as would be the case if the marriage had ended in divorce – should not change its nature as the freely devisable separate property of its owner.

A second basis for distinguishing between separate and marital property in divorce proceedings but not in determining a surviving spouse's elective share is that in a divorce, both spouses are able to participate in the fact finding process to determine whether property is marital or separate; by contrast, at death the separate property argument necessarily will be made by the decedent's successors. But because it often will be more difficult for the decedent's successors to address the classification, tracing, and commingling issues with the surviving spouse than it would have been for the decedent to do if the marriage had ended in divorce does not mean that

system that divides equally the value of the spouses' marital property (when the spouse owning the majority of the marital property dies first), without subjecting a decedent's separate property to a surviving spouse's elective-share claim, is that it avoids creating circumstances in which a spouse who owns separate property could have an economic incentive to terminate the marriage by divorce.<sup>285</sup>

Under the UPC approximation system, in the absence of a valid marital agreement or waiver,<sup>286</sup> a spouse who owns separate property that he or she

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they should not be given the opportunity to do so. See *supra* note \_\_\_\_.

<sup>285</sup> Note that a restriction on a donative transfer, such as a gift under a will, that conditions the gift on the transferee divorcing or separating from his or her spouse violates public policy and is invalid, unless the transferor's dominant motive is to provide support if the transferee divorces or separates. RESTATEMENT (SECOND) OF PROPERTY § 7.1 (1983). Similarly, "contracts in restraint of marriage are void as against public policy, while anything which tends to prevent marriage, or to disturb the marriage state, is viewed by the law with suspicion and disfavor." *Shimp v. Huff*, 556 A.2d 252, 261 (Md. 1989) (quoting *Owens v. McNally*, 45 P. 710 (Cal. 1896)).

<sup>286</sup> Under the UPC, a surviving spouse's right of election may be waived, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse. 1990 UNIF. PROBATE CODE § 2-213(a) (amended 1993), 8 U.L.A. 129-30 (1998). The ability to opt-out of the UPC approximation system by use of a marital agreement or waiver is not, however, a sufficient response to the potential inequities of the UPC's treatment of a couple's property as marital or separate for elective-share purposes based solely on the length of their marriage. Pre or post-marital agreements or waivers require affirmative action by spouses or prospective spouses. Although premarital agreements are being used with increased frequency, see Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891-92 (1997), relying on their use to protect separate property from surviving spouses' elective-share claims means requiring prospective spouses who have or may acquire separate property they want the ability to leave to children or other non-spouse beneficiaries to negotiate and execute such agreements in anticipation of marriage. As noted by Professor Gary, "[i]t is true that spouses can protect their property by contract, but the purpose of the elective share statute is to apply a fair result for spouses who have not used contract law to create their own solution." Gary, *supra* note \_\_\_\_, n.166.

Further, because of the parties' relationship and impending marriage, some prospective spouses may choose not to have a premarital agreement despite one or both of them owning (or anticipating receiving by gift or inheritance during the marriage) separate property that they want the ability to leave to persons other than their spouse. Other prospective spouses who own or anticipate receiving such separate property may not know of the need for a premarital agreement to protect it from a surviving spouse's elective-share claim. And if there is not a premarital agreement, it may be difficult or impossible to obtain a marital agreement during the marriage if one of the spouses later decides that one is needed. Finally, another obstacle to marital agreements or waivers being adequate to protect separate property from surviving spouses' elective-share claims is that such documents – which clearly affect substantial rights of the

wants to leave to persons – such as children from a prior marriage – other than a surviving spouse may not be able to do so if he or she predeceases his or her spouse. Rather, if the spouses had been married at least a year when the decedent died, the UPC approximation system would treat part or all of the decedent's separate property as marital, and thus potentially subject to the surviving spouse's elective share.<sup>287</sup> If the couple lives in one of the majority of jurisdictions in which the separate property of one spouse may not be awarded to the other in a divorce,<sup>288</sup> however, concerns as to the possibility of the surviving spouse being entitled to receive an elective share of as much as half of

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spouses – generally should not be executed without each spouse having the assistance of competent counsel, see Marston, *supra*, at 909-16, access to which may be problematic. See Roger C. Crampton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994).

Arguably, the UPC's new elective-share system reduces the need for premarital agreements in second marriages. Waggoner, *Marital Property Rights*, *supra* note \_\_\_, at 54. That will be the case for elderly prospective spouses whose second or subsequent marriages likely will be short in duration – in which case the surviving spouse's elective-share percentage will be small. See *supra* note \_\_\_. It also may be the case for second and subsequent marriages in which the spouses expect to own roughly equal amounts of property at the first of their deaths – in which case the surviving spouse's elective-share claim will be little or nothing regardless of the length of the marriage because the surviving spouse already will be deemed to own approximately half of the couple's property the UPC approximation system implicitly treats as marital. See *supra* text accompanying notes \_\_\_-\_\_\_. But for second and subsequent marriages that are not expected to be short in duration, and in which one of the spouses may own substantially more separate property than the other at the first of their deaths, premarital agreements will be necessary to protect the separate property of the spouse who owns more such property from an elective-share claim by the other spouse.

For a discussion of premarital agreements in the context of the elective share, see generally Brashier, *supra* note \_\_\_, at 143–45 (arguing that the availability of premarital agreements, among other reasons, supports abolishing the elective share altogether).

<sup>287</sup> The portion of the decedent's separate property that would be treated as marital and potentially subject to the survivor's elective-share claim would depend on the length of the couple's marriage, see *supra* notes \_\_\_-\_\_\_ and accompanying text, and the survivor's elective share would be reduced or eliminated if the surviving spouse owned property of his or her own. See *supra* text accompanying notes \_\_\_-\_\_\_.

<sup>288</sup> See *supra* note \_\_\_.



the decedent's separate property could be eliminated by a divorce.<sup>289</sup> By contrast, under a deferred-community-property elective-share system, there would be no incentive for a spouse who owns separate property he or she wishes to leave to non-spouse beneficiaries to terminate his or her marriage by divorce because the separate property would not be subject to the surviving spouse's elective-share claim.<sup>290</sup>

## Conclusion

The most compelling arguments in favor of a deferred-community-property elective-share system are that protecting the separate property of a deceased spouse from an elective-share claim of a surviving spouse is more fair than making such property subject to an elective-share claim, and that determining the surviving spouse's elective share by reference only to the

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<sup>289</sup> For a similar argument that prior New York law – under which the elective share often was less than what the prospective surviving spouse would receive in a divorce – could have created an economic incentive for the less propertied spouse to obtain a divorce in contravention of public policy, see Robert A. Apfel, *Divorce and Death: Disparity in Economic Rights of Spouse*, N. Y. Law J., Jan. 28, 1988, at 1. In 1992, New York's elective-share statute, N.Y. EST. POWERS & TRUSTS LAW §5-1.1-A (McKinney 1999), was amended to increase significantly the elective-share rights of a surviving spouse. Generally, an effect of that change is to reduce the economic incentive a less propertied spouse might otherwise have to terminate the marriage by divorce. However, because in New York the separate property of a spouse may not be awarded to the other spouse in a divorce (N.Y. DOM. REL. LAW §236, part B (McKinney 1999)), while a spouse's separate property may be reached by a surviving spouse's elective-share claim, New York's divorce and elective-share laws, like those of many states, are subject to the same criticism discussed in the text -- that they can operate to encourage a spouse who owns separate property to terminate the marriage by divorce in order to protect the separate property.

<sup>290</sup> In the minority of jurisdictions in which separate property is subject to division at divorce, see *supra* note \_\_\_\_, the adoption of a deferred-community-property elective-share system arguably would create an incentive for the spouse who owns less separate property to initiate a divorce because the wealthier spouse's separate property that would not be subject to an elective-share claim might be reachable in a divorce proceeding. Most jurisdictions that allow separate property

couple's marital property is more consistent with the partnership theory of marriage and how property is divided at divorce. Although the UPC's new elective-share system is designed to approximate a division of a deceased spouse's estate between the surviving spouse and the decedent's other beneficiaries in accordance with the partnership theory of marriage, it does so by implicitly classifying the spouses' property as marital or separate based solely on the length of their marriage. In many cases the UPC approximation system may reach a result that is relatively close to the result that would be reached under a system that subjected only the marital property of a decedent to a surviving spouse's elective-share claim, but in many others it will not.

The primary reason the UPC drafters chose to incorporate the marital partnership theory into elective-share law with the approximation system, rather than with a deferred-community-property system, was to avoid the classification and tracing issues that would have to be resolved under a deferred-community-property elective-share system. Those issues, however, would arise only in the relatively infrequent case of a decedent leaving his or her spouse less than the elective-share amount and the surviving spouse electing against the decedent's estate plan, and thus would not affect the administration of the vast majority of decedents' estates. Further, elective-share claims frequently are made in the context of second or subsequent marriages that end with the death of a spouse whose intended beneficiaries are children from a prior marriage. In such cases

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to be divided in a divorce, however, do so only in limited circumstances. See *supra* note \_\_\_\_.

the competing equities are strong and – absent a need of the surviving spouse for support, which could be addressed under a deferred-community-property elective-share system by rights to a supplemental elective share, a homestead allowance, a family allowance, and exempt personal property like those provided by the UPC – justify requiring the surviving spouse’s elective share to be limited to marital property. Finally, the classification and tracing issues – along with the need to plan for dealing with them through such measures as segregating separate property – are becoming increasingly familiar to the public as those issues no longer are confined to community-property jurisdictions, in which they must be addressed when marriages terminate by divorce or by the death of a spouse, but also routinely arise in a substantial majority of noncommunity-property jurisdictions when spouses divorce.

## Appendix

The objective of the UPC's approximation system is to produce a result that is consistent with the partnership theory of marriage – an elective share that will result in the surviving spouse having assets with a value of approximately half of the couple's marital property, plus his or her separate property.<sup>291</sup> As illustrated by the following example, that objective may be realized even if the assumptions of how much marital and separate property the spouses own that are implicit in the approximation system<sup>292</sup> are grossly inaccurate.<sup>293</sup>

Assume (i) that A died survived by A's spouse, B, (ii) that at A's death, A owned \$150,000 of marital property and B owned \$90,000 of marital property, and (iii) that A died testate with a will leaving A's entire estate to A's child, C. For the couple's marital estate to be divided between them equally, B's elective-share claim against A's estate would need to be \$30,000. That is the case regardless of the length of their marriage and the amount of separate property they each own. Application of the UPC's approximation system will result in the desired \$30,000 elective-share claim for B under an infinite variety of circumstances, including the following:

	<u>A's Separate Assets</u>	<u>B's Separate Assets</u>
<b>5-6 year marriage</b>		
Case 1 (A) <sup>294</sup>	\$350,000	\$210,000

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<sup>291</sup> See *supra* note \_\_\_\_.

<sup>292</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>293</sup> See *supra* text accompanying notes \_\_\_\_ - \_\_\_\_.

<sup>294</sup> Case 1 for each length of marriage is the amount of separate property each spouse would own if the implicit assumptions upon which the UPC's approximation system is based are accurate.

Case 2 (A) <sup>295</sup>	\$140,000	\$ - 0 -
Case 3 (A) <sup>296</sup>	\$700,000	\$560,000

### 10-11 year marriage

Case 1 (B)	\$100,000	\$ 60,000
Case 2 (B)	\$ 40,000	\$ - 0 -
Case 3 (B)	\$200,000	\$160,000

### 15 or more year marriage

Case 1 (C)	\$ - 0 -	\$ - 0 -
Case 2 (C)	\$ - 0 -	\$ - 0 -
Case 3 (C)	\$300,000	\$300,000

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For example, for a marriage of between five and six years, the approximation system implicitly assumes that 30% of the couple's property, and 30% of each of A's and B's property, is marital, and that the other 70% is separate. See *supra* text accompanying notes \_\_\_\_-\_\_\_\_. Because in this example A and B have \$150,000 and \$90,000, respectively, of marital property, the amount of separate property each of them would have to own for their marital property to constitute 30% of their total property is \$350,000 for A and \$210,000 for B. The UPC's new approximation system would produce a \$30,000 elective-share claim for B in each of the Case 1 scenarios. For an explanation of how the approximation system calculates the surviving spouse's elective share when the spouses had been married between five and six years at the first of their deaths, see *supra* text accompanying notes \_\_\_\_- \_\_\_\_.

<sup>295</sup> For each length of marriage set forth in the table, Case 2 illustrates the least amount of separate property A and B could own for the approximation system to produce the desired elective share for B of \$30,000, based again on A having \$150,000 of marital property and B having \$90,000 of marital property. For example, if A died after they had been married between five and six years, the approximation system implicitly assumes that they owned \$560,000 of separate property, \$350,000 by A and \$210,000 by B. See *supra* note \_\_\_\_\_. As set forth in Case 2 (A) of the table, however, B would have the same \$30,000 elective-share claim if they owned only \$140,000 of separate property -- just 25% of the \$560,000 of separate property the approximation system assumes they own -- if all of it was owned by A.

<sup>296</sup> Case 3 for each length of marriage illustrates that the spouses in the example can own substantially more separate property than the approximation system assumes they do without producing an elective-share claim for B of more (or less) than the \$30,000 amount needed to equalize their marital property. For example, if A and B had been married between five and six years when A died owning \$150,000 of marital property, and if B owned \$90,000 of marital property at that time, the approximation system implicitly assumes that they owned \$560,000 of separate property, \$350,000 by A and \$210,000 by B. See *supra* note \_\_\_\_\_. A \$30,000 elective-share claim for B will result, however, even if they own \$1,260,000 of separate property, as long

As indicated by the table and its explanation in notes \_\_\_\_ - \_\_\_\_, if spouses own unequal amounts of marital property and the one who dies first owns more marital property than the survivor,<sup>297</sup> there is no limit to the amount of separate property they can own without causing the elective-share claim of the survivor to be more (or less) than the amount needed to divide equally the value of their marital property,<sup>298</sup> as long as the amount of separate property owned by the survivor bears the requisite relationship to the amount of separate property owned by the decedent.

If the first spouse to die owned more marital property than the survivor, the relationship between the amounts of separate property the deceased and surviving spouses must own to produce the right elective-share result under the partnership theory of marriage standard will depend on how long they had been

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as it was owned \$700,000 by A and \$560,000 by B.

<sup>297</sup> If the decedent and the surviving spouse owned equal amounts of marital property at the decedent's death, then without regard to the length of their marriage the correct amount of the surviving spouse's elective-share claim under the partnership theory of marriage standard is zero. Regardless of the length of the marriage, this result would be reached under the UPC approximation system if the surviving spouse owned at least as much separate property as did the decedent. Similarly, if the surviving spouse owned more marital property at the decedent's death than did the decedent, the surviving spouse's elective-share claim under the partnership theory of marriage standard should be zero. That would be the case under the UPC approximation system as long as the sum of the surviving spouse's separate and marital property equals or exceeds the sum of the decedent's separate and marital property.

<sup>298</sup> Note that for elective-share purposes, the value of the decedent's augmented estate is not reduced by estate or inheritance taxes. 1990 UNIF. PROBATE CODE § 2-204 cmt. (amended 1993), 8 U.L.A. 104 (1998). Note also that under the UPC, in determining how estate taxes are borne by the recipients of property from the decedent, the benefit of the marital deduction inures to the benefit of the surviving spouse. 1990 UPC § 3-916(e)(2) at 285. As a result, if the decedent's estate is subject to such taxes they should be borne by other beneficiaries of the estate, leaving the surviving spouse with more of the decedent's augmented estate that is treated by the approximation system as marital property than will be received by the decedent's other beneficiaries. It is not likely that the deceased spouse effectively could reduce the surviving spouse's elective share by directing in his or her will that it be computed after the payment of the estate's wealth transfer taxes. See Pennell, *supra* note \_\_\_\_, ¶ 904.3 L.

married. For instance, in the example above, if A and B had been married between five and six years when A died, and if A and B owned \$150,000 and \$90,000, respectively, of marital property at that time, A could own \$2,000,000 (or \$20,000,000, or any other amount) of separate property without causing B's elective-share claim to exceed (or be less than) the desired \$30,000 amount, as long as B owned separate property with a value of \$140,000 less than the amount of separate property owned by A.<sup>299</sup> If A and B had been married between ten and eleven years at A's death, A would have to own \$40,000 more separate property than B;<sup>300</sup> and if they had been married more than fifteen years at A's death, A and B would have to own the same amount of separate property for B's elective-share claim to be the desired \$30,000 amount.<sup>301</sup>

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<sup>299</sup> This conclusion is illustrated by Cases 1 (A), 2 (A), and 3 (A), *supra* text accompanying notes \_\_\_\_ - \_\_\_\_, in each of which the value of A's separate assets is \$140,000 more than the value of B's separate assets. The mathematical explanation is that because A and B were married for between five and six years when A died, the UPC approximation system provides B with a 15% elective-share percentage of the marital property A owns (\$150,000) in excess of the marital property B owns (\$90,000); thus, in the Case 1 (A), Case 2 (A), and Case 3 (A) examples, B's elective-share claim of A's marital assets is only \$9,000, which is 15% of the \$60,000 difference between A's \$150,000 of marital property and B's \$90,000. The remaining \$21,000 needed for B's elective-share claim to be \$30,000 must come from separate property of A in excess of the separate property of B. Because B's elective-share percentage under the approximation system is 15% due to A's death having occurred during the sixth year of their marriage, for B's elective-share claim against A's separate property to be \$21,000, A's separate property must exceed B's by an amount that, when multiplied by 15%, will yield a product of \$21,000. That amount is \$140,000 (\$21,000 divided by 15% = \$140,000).

<sup>300</sup> This conclusion is illustrated by Cases 1 (B), 2 (B), and 3 (B), *see supra* text accompanying notes \_\_\_\_ - \_\_\_\_, in each of which the value of A's separate assets is \$40,000 more than the value of B's separate assets. The mathematical explanation is the same as set forth in note \_\_\_\_, except that because the marriage lasted between 10 and 11 years, the calculations would be based on an elective-share percentage of 30%.

<sup>301</sup> This conclusion is illustrated in Cases 1 (C), 2 (C), and 3 (C), *supra* text accompanying notes \_\_\_\_ - \_\_\_\_\_. Because B's elective-share percentage is 50% due to the marriage having lasted more than 15 years, if A owned more separate property than B, B's elective-share claim would be 50% of such excess (in addition to 50% of the \$60,000 of marital property A owned in excess of the marital property B owned). And if B owned more separate property than did A, the approximation

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system effectively would reduce B's 50% elective-share claim against the \$60,000 of marital property A owned in excess of the marital property B owned.