Second Marriage Considerations for the Elderly

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SECOND MARRIAGE CONSIDERATIONS FOR THE ELDERLY

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I. INTRODUCTION

The percentage of the American population that is classified as elderly is increasing. In 1900, 3.1% of the American population was over the age of 65.¹ In 1998, the figure was 34.4%.² The aging of the American population has numerous political, social, economic and legal consequences. Any attorney dealing with an aging clientele must recognize the potential impact a client's action may have upon certain entitlements, estate plans, and marital agreements. A lack of foresight and a failure to recognize and plan around potential problems may befall harsh consequences upon these clients. Of particular importance, and the reason for this article, is the potential impact a decision by an elderly person to remarry may have upon his or her various economic and personal interests.

For many of the elderly, old age is a time of loneliness. The prospect of remarriage can represent an attractive remedy to this problem. Such a second marriage, however, can bring about a number of unanticipated legal ramifications. This article will address and recommend alternatives to those policies that make remarriage financially disadvantageous. Potential problems can include disqualification for Medicaid and, for the near elderly (below 65), a spouse's allowance under social security.³ This article will examine how remarriage may affect the expectations of descendants of prior relationships, the enforceability and consequences of premarital agreements, and how elective share statutes may come into play.

While these various topics can be separately identified, the relevant issues are all intricately interrelated. For example, failure to make an elective share in the face of disinheritance will result in loss of Medicaid

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2. Id.
Additionally, under the Employee Retirement Income Act of 1974 (hereinafter ERISA), rights of the surviving spouse cannot be waived by premarital agreement. These factors must all be considered together to develop a plan that will allow an elderly client to make an informed and effective decision. Failure to recognize and advise an elderly client of these issues may have a devastating impact on the client’s immediate financial well being, as well as his or her future legacy.

This article will conclude by reviewing some of the potential conflicts between a second spouse and the children of a prior relationship. This conflict is particularly important in the context of splitting the estate, either fractionally, or in time (life estate to spouse, remainder to children). In a related matter, this article will discuss how planning for the federal estate tax marital deduction relates to such decisions.

II. MEDICARE AND MEDICAID

Medicare is a federal health insurance program to provide medical insurance to the elderly and to the disabled. Medicaid is a joint federal-state program designed to provide medical service to those in need. Medicare and Medicaid came into existence with the enactment of Sections XVIII and XIX of the Social Security Act of 1965. The provisions of Medicare and Medicaid and the benefits they provide can be affected by any decision to marry. This effect can come about in one of two ways: (1) either terminating previous rights from a former marriage or (2) creating a new resource available to a spouse that thus disqualifies that spouse from coverage. Therefore, another later marriage can cause a previously married spouse to lose social security benefits and thus disqualify them from receiving certain benefits under Medicare. Furthermore, the resources of the new spouse can prevent coverage for benefits under Medicaid based on the increased assets.

A. MEDICARE

Medicare benefits are divided into two distinct parts. The basic Medicare benefit, referred to as “Part A,” is without charge to those who qualify for a minimum social security benefit (forty quarters of eligible

4. See Tannler v. State Dept. of Health & Social Services, 557 N.W.2d 434, 436 (Wis. Ct. App. 1996) (holding that failing to make an election under elective share statute divested the spouse of assets otherwise available to pay her health care costs and therefore she was ineligible to receive Medicaid benefits).
6. See infra note 34 and accompanying text for a discussion of ERISA and premarital agreements.
8. Id. at 335.
10. FROLIK & BARNES, supra note 7, at 350.
service by age sixty-five (as of 1994).\textsuperscript{11} For those who are over age sixty-five and do not qualify for the minimum social benefit, coverage may be obtained for the payment of a premium cost set by the Secretary of the U.S. Department of Health and Human Services.\textsuperscript{12} Part A covers basic hospitalization and nursing home care up to a maximum of 100 days per illness. Part B of Medicare coverage is available with the payment of a premium and provides physician services and some outpatient care. Disabled persons and certain persons needing dialysis are also eligible for Medicare,\textsuperscript{13} but their concerns are beyond the scope of this article.

Remarriage by a widowed or divorced spouse may cause loss of social security benefits that are based on the earnings of a prior spouse.\textsuperscript{14} There may be eligibility for social security based on the earnings of the new spouse, either during marriage or after the new spouse’s death and even after divorce, if the marriage lasts for more than ten years.\textsuperscript{15} The loss of social security benefits will also disqualify an individual from receiving Medicare benefits. However, social security for a widow or divorced wife will not be lost by remarriage if the remarriage occurs after age sixty (or age fifty if the widow or divorced wife is disabled).\textsuperscript{16} Likewise, Medicare benefits will not be lost in such a remarriage occurring after age sixty. The term “elderly” is, of course, a relative term. As I approach my fifty-fifth birthday, anything under age sixty does not count as elderly and need not be considered for this article.

**B. MEDICAID**

Medicaid is a joint federal-state program to administer medical services for the financially needy who are either aged (over sixty-five), blind, disabled or the parent of a minor child.\textsuperscript{17} In comparison to the Medicare system, the financial need requirement makes Medicaid more of a welfare program than a medical program. To qualify as medically needy, the applicant for Medicaid must meet both an income test and a resources test.\textsuperscript{18}

The income test is generally the same as the test for Supplemental

\textsuperscript{11} 42 U.S.C. § 426 (Supp. 1999).
\textsuperscript{13} 42 U.S.C. § 426.
\textsuperscript{14} 42 U.S.C. §§ 426, 1395(c).
\textsuperscript{16} 42 U.S.C. § 402(e), (f). The statute comes to this result in a somewhat backward way. See 42 U.S.C. § 402(e)(1)(A). This section states that a widow is entitled to benefits if not married; however, section 402(e)(3) counters this by stating that if a widow or divorced wife marries after attaining age 60 (or age 50 under conditions of disability), such marriage shall not be deemed to have occurred. 42 U.S.C. § 402(e)(3). Sections 402(f)(1)(A) and 402(f)(3) state the identical terms for divorced husbands and widowers. Compare 42 U.S.C. § 402(f)(1)(A), and 42 U.S.C. § 402(f)(3).
\textsuperscript{17} 42 U.S.C. §§ 1396a(a)(10), 1396a(m) (1992 & Supp. 1999).
\textsuperscript{18} 42 U.S.C. § 1396a.
Security Income (hereinafter SSI). In 1998, this meant the applicant must have an income below $494 per month for a non-institutionalized individual and $741 per month for a non-institutionalized couple.\textsuperscript{19} Income includes "anything you receive in cash or in kind that you can use to meet your needs for food, clothing and shelter."\textsuperscript{20} With non-institutionalized couples, both spouses are ineligible if their combined income exceeds the maximum amount.\textsuperscript{21} All income of each spouse is thereby "deemed" to the other. Therefore, a remarriage will affect the qualifications of both spouses seeking to obtain or maintain Medicaid benefits.

However, the concept of deeming does not apply if the parties are merely living together without the formality of marriage. This policy thereby economically encourages "living in sin." In \textit{Snede v. Kizer},\textsuperscript{22} California was directed to desist from deeming income from unmarried couples cohabiting.\textsuperscript{23} Such a policy was held to be inconsistent with the plain meaning of the Medicaid program.\textsuperscript{24} According to the federal court, the "states may not deem income and resources from any individual (absent actual contribution) except from a spouse to a spouse or a parent to a child for purposes of computing Medicaid eligibility."\textsuperscript{25}

Applicants may "spend down" their excess income to the medically needy level by showing proof of incurred medical expenses.\textsuperscript{26} In other words, the individual may subtract from total income until the balance of the income meets Medicaid eligibility. For example, if an individual has income of $600 per month and the maximum income for Medicaid eligibility is $494 per month, such individual must have $106 in medical expenses before becoming eligible for Medicaid. Medical expenses in excess of $106 would be covered by Medicaid.\textsuperscript{27}

Additionally, Medicaid employs a resources test that applicants are required to satisfy to qualify for medical services entitlements.\textsuperscript{28} The resources test is generally the same as the test for SSI as well.\textsuperscript{29} In 1999, the resources test limited an individual to $4,000 in resources and a couple to $6,000.\textsuperscript{30} If one of the spouses is institutionalized, the rules changed radi-
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cally after adoption of the Medicare Catastrophic Coverage Act of 1988. The noninstitutionalized spouse’s income is no longer considered in determining Medicaid eligibility once the institutionalization has begun. Up to one-half of the combined resources of the couple will be considered unavailable as a resource up to a minimum (in 1999) of $16,382 and a maximum of $81,960. If no premarital agreement will shield the well spouse from having his or her resources considered available to an institutionalized second spouse, only divorce will give the well spouse asset protection. Otherwise, the well spouse will have to pay for the second spouse’s institutional care.

A premarital agreement that separates assets and provides that neither spouse will be responsible for the medical care of the other will not insulate a spouse’s assets from counting towards the resources of the applicant. In *Estate of G.E. v. Division of Medical Assistance*, the pension of an institutionalized spouse was considered fully available to such spouse notwithstanding a “qualified domestic relations order” (hereinafter QDRO) diverting part to the community spouse. It would seem to follow that if a QDRO cannot insulate the noninstitutionalized spouse’s estate from being available as a Medicaid source, a premarital agreement holding that neither spouse will be responsible for the medical care of the other would fail as well to insulate the assets of the noninstitutionalized spouse.

III. THE IMPORTANCE AND LIMITS OF PREMARITAL AGREEMENTS

Premarital agreements are particularly important for the elderly when either or both spouses have children from a prior relationship. The premarital agreement can be used to coordinate support rights for the spouse in the new marriage and the desire to preserve the inheritances of each spouse’s children of former relationships. Absent a premarital agreement, state law will give a surviving spouse many important rights. With reference to South Dakota, a surviving spouse’s rights in the estate

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32. See FROLIK & BARNES, supra note 7 at 594-95; THOMAS P. GALLANIS ET AL., ELDER LAw 366.
33. I.R.C. § 414(p) (West 1999). The code permits a court order allocating qualified pension and profit sharing benefits pursuant to state domestic relations law to be made to a spouse, former spouse, child or other dependent of the participant, making such an order an exception to the rule that such benefits cannot be assigned or alienated. See I.R.C. § 401(a)(13) (West 1999).
of the deceased spouse include the following:

1. The right of a surviving spouse to an elective share of the decedent spouse's estate, which may be elected in lieu of what is provided otherwise in the estate plan of the decedent.\footnote{37} 

2. The right of a surviving spouse to an intestate share if the decedent either dies without a will or provisions of the will do not entirely dispose of the estate.\footnote{38} 

3. The right to an intestate share if the spouse's last will predated the marriage, "(1) unless it is apparent from the will or other evidence that the will was made in contemplation of marriage, (2) that the will expressed the intention that it be effective notwithstanding any subsequent marriage, or that (3) the testator provided for the spouse outside the will and the intent that the transfers outside the will be in lieu of provision under the will can be shown from the testator's statements or reasonably inferred from the amount of the transfer or other evidence."\footnote{39} 

In addition, the surviving spouse may be a default beneficiary under certain contractual arrangements in the absence of a valid beneficiary designation to the contrary.\footnote{40} With regard to a qualified pension or profit sharing plan covered by ERISA,\footnote{41} premarital agreements to waive spousal benefits are unenforceable,\footnote{42} which may have the effect of diverting benefits intended for children. The enforceability of premarital agreements waiving rights under state law will vary from state to state.\footnote{43} The Uniform Premarital Agreement Act\footnote{44} and the Uniform Probate Code, which has a counterpart to the Uniform Premarital Agreement Act at death, have been adopted in South Dakota.\footnote{45} This legislation, as a practical matter, means that all such agreements will be enforceable.\footnote{46} As to the enforceability of premarital agreements in the context of probate, the Uniform Probate Code provides:

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37. S.D.C.L. §§ 29A-2-201 to 2-214 (1997). Under South Dakota law and under the Uniform Probate Code, the wealthier of the spouses will never receive an elective share. \textit{Id.} Under South Dakota Codified Law section 29A-2-209 (and section 2-209 of the Uniform Probate Code), the assets of the surviving spouse are deemed to satisfy the elective share in such an amount as will eliminate the elective share if the surviving spouse is the wealthier of the two spouses. S.D.C.L. § 29A-2-209.  
38. S.D.C.L. § 29A-2-102 (1997). This section, in paragraph (2), gives the surviving spouse's elective share to the first $100,000 plus one-half of the balance if the decedent left issue of a prior relationship. \textit{Id.}  
40. See, e.g., I.R.C. § 417 (West 1999) (requiring a spousal benefit in the absence of a valid waiver).  
42. Treas. Reg. § 1.401(a)-20; Hurwitz v. Sher, 982 F.2d 778, 781 (2d Cir. 1992); see \textit{Langbein & Wolk}, \textit{supra} note 35, at 552.  
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(a) The right of election of and the rights of a surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse’s waiver is not enforceable if the surviving spouse proves that:
   (1) That waiver was not executed voluntarily; or
   (2) The waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:
      (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
      (ii) Did not voluntarily and expressly waive, in writing any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and
      (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver shall be decided by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of “all rights,” or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.47

The validity of any premarital agreement will determine to what degree the spouse has any rights under state law (although not under ERISA).48

The Uniform Premarital Agreement Act is designed to achieve a greater degree of certainty in the enforcement of premarital agreements at

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47. S.D.C.L. §29A-2-213. See also Unif. Premarital Agreement Act, 8 U.L.A. 129. In the context of divorce, the Uniform Premarital Agreements Act is found in South Dakota Codified Laws sections 25-2-16 through 25-2-25. See S.D.C.L. §§ 25-2-16 to 25-2-25 (1999). The language of paragraphs (b) and (c) above is substantially similar to South Dakota Codified Law section §25-2-21 which deals with the enforceability of premarital agreements in the context of divorce. S.D.C.L. § 25-2-21. The South Dakota statutes eliminate a section of the Uniform Premarital Agreement Act dealing with a premarital agreement which leaves a divorced spouse in need of public assistance:

   (b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.


48. See infra notes 36 to 41 and accompanying text for a discussion of the validity of premarital agreements under state law.
the expense of other considerations.\textsuperscript{49} There are several aspects of this act that have been the subject of considerable criticism. One such criticism is that there is no mention of unconscionability at the time of enforcement, only at the time of execution. For example, couples who marry at a young age, and who are not planning on having children, may execute a premarital agreement calling for no alimony, each party to take out of the marriage property brought in and an equal split of marital property. Such an agreement is not likely to be considered unconscionable if they, in fact, never have children. Yet if they do have children, and the wife spends twenty or so years outside of the work force raising the children, there is a strong argument that such an agreement is unconscionable when enforced. Nevertheless, neither the Uniform Premarital Agreement Act nor the Uniform Probate Code will entertain such an argument. Recognizing this, I have refused to draft such an agreement unless the spouses have consented to put in a provision "in the event that we have children, this agreement is null and void" or otherwise provide in some way if their intentions toward having children change.

Unconscionability alone will not invalidate a premarital agreement under the Uniform Premarital Agreement Act or the Uniform Probate Code. If there has been either a "reasonable disclosure of the property or financial obligations" of the decedent or, in the case of divorce, other party, a voluntary waiver in writing, or the surviving spouse or party against whom enforcement is sought had "adequate knowledge of the property or financial obligations" of the decedent or other party, then the agreement is enforceable notwithstanding unconscionability.\textsuperscript{50} The requirement that there must be both procedural and substantive deficiencies to make the agreement unenforceable differentiates premarital agreements from other contracts where unconscionability alone is sufficient to invalidate the contract.\textsuperscript{51} Any competent professional employed to draft the agreement will insert a provision waiving the right to financial disclosure beyond what has been provided.\textsuperscript{52} The effect of such a waiver is to permit a prospective spouse to waive important rights without any understanding of the rights that are being waived.

In the context described above, namely the couple who does not anticipate children at the time of marriage but later has a change of heart, the criticism of the Uniform Premarital Agreement Act is understandable.

\textsuperscript{49} Brod, \textit{supra} note 43, at 276. Unless otherwise specified, observations concerning the Uniform Premarital Agreement Act will apply equally to its equivalent part in the Uniform Probate Code.

\textsuperscript{50} S.D.C.L. \textsection 25-2-21 (1999).

\textsuperscript{51} See Brod, \textit{supra} note 43, at 276 n.259 (quoting \textsc{Restatement (Second) of Contracts} \textsection 208 (1979). According to the Restatement: "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."\textsuperscript{53} \textsc{Restatement (Second) of Contracts} \textsection 208 (1979).

\textsuperscript{52} Brod, \textit{supra} note 43, at 277.
However, what about the elderly couple remarrying, the subject matter of this article? Is not some certainty of enforcement desirable so that step-children will not have to approach a relationship with a stepparent on the fear of disinheritance? This is one of the typical and probably least controversial situations involving the use of premarital agreements.\textsuperscript{53} Even here, though, there has been some criticism of the Uniform Premarital Agreement Act.\textsuperscript{54} Suggested solutions range from providing the right of any court to review a premarital agreement for “economic justice,” allowing a court to overrule the agreement to the degree necessary to protect the parties from injustice,\textsuperscript{55} to making all such agreements unenforceable.\textsuperscript{56} My suggestion is to provide something akin to an elective share minimum designed to protect a surviving or divorced spouse from absolute poverty, with such minimum to be based in part on basic minimum living standards and the wealth of the other spouse. Premarital agreements would then be enforceable, except to the extent they deprive the spouse of these minimums.

A. CONTRACTUAL CONSIDERATIONS FROM PRIOR MARRIAGES

Enforceable premarital agreements take on added importance if there are contractual considerations which arose from a prior marriage, either from a prior premarital agreement, a divorce decree, or a contractual will, such as with a joint and mutual will.\textsuperscript{57} The situation might occur when, in the prior marriage, there is a joint and mutual will in which spouses contract not to revoke the will and to leave the entire estate to each other and, upon the death of the survivor, to the children of that

Typically these agreements are signed by parties to a second marriage where one party has adult children from a prior marriage and wants to prevent the new spouse from exercising her statutory right to override a will that leaves her with nothing but provides for the adult children instead. It is the most conventional premarital agreement, and the least controversial. It anticipates a marriage that ends in the death of one spouse, not divorce, and so some, though not all, of the trust in the marriage is preserved.
\textit{Id.} (citation omitted)

\textsuperscript{54} \textit{Id.} see also Brod, \textit{supra} note 43, at 249-50 (arguing that with regard to remarriages of the elderly, economic disparity between the sexes will be greater).

\textsuperscript{55} Brod, \textit{supra} note 43, at 293-94. Brod also noted that this is to some degree in the law of states adopting the Uniform Premarital Agreement Act if they include that portion of the Act that deems the agreement unenforceable if the spouse will need public assistance as a result of the agreement. \textit{Id.} Brod recommends a far more sweeping review. \textit{Id.} Her emphasis is on eliminating gender discrimination that results from premarital agreements. \textit{Id.}

\textsuperscript{56} Silbaugh, \textit{supra} note 53, at 122-23.

\textsuperscript{57} \textit{See} Dukeminier & Johanson, \textit{supra} note 36, at 322. A joint will is a single document that operates as the will of two or more persons. \textit{Id.} Mutual wills are the separate wills of two or more persons which contain reciprocal provisions. \textit{Id.} Joint wills need not be mutual, and mutual wills need not be joint, but they are often found in the same document. \textit{Id.} They pose no particular legal problems unless there is found to be a contract between the spouses, which is often recited in the document. \textit{Id.} Section 2-514 of the Uniform Probate Code, (8 U.L.A.) provides strict rules for the enforceability of any such proposed contract. \textit{Id.}
One spouse dies and the survivor remarries. If that spouse dies while remarried and there is no enforceable premarital agreement in place in the second marriage, the issue arises as to whether the second spouse of the surviving contracting spouse has rights to an elective share or other spousal rights, or whether, instead, the contractual obligations of the surviving contracting spouse supersede the elective share rights. The problem has arisen in many states (although not to my knowledge in South Dakota), not only in the context of joint and mutual wills from a prior marriage, but also in divorce decrees or settlements and other non-spousal contracts.

Courts are divided as to whether the third party beneficiaries of the prior contractual arrangement take precedence over the rights of a second surviving spouse. In *Via v. Putnam*, the Florida Supreme Court, in holding in favor of the second surviving spouse, categorized the arguments in favor of upholding the third party beneficiaries:

[Courts in other jurisdictions] have advanced four different rationales for giving priority to the contract beneficiaries: (1) The surviving spouse's marital rights attach only to property legally and equitably owned by the deceased spouse, and the will contract entered into before the marriage deprives the deceased spouse of equitable title and places it in the contract beneficiaries. (2) When the surviving testator accepts the benefits under the contractual will, an equitable trust is impressed upon the property in favor of the contract beneficiaries, and the testator is entitled to only a life estate in the property with the remainder going to the beneficiaries upon the testator's death. (3) When the surviving spouse accepts the benefits under the contractual will, the testator becomes estopped from making a different disposition of the property, despite any subsequent marriage.

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58. The joint and mutual will can raise interesting tax issues, such as not qualifying for the marital deduction under the federal estate tax (I.R.C. § 2056 (West 1999)), or there being a taxable gift by the surviving spouse upon the death of the first spouse under the federal gift tax (I.R.C. § 2511 (West 1999)). These issues are beyond the scope of this article. See generally Estate of Grimes v. Commissioner, 851 F.2d 1005 (7th Cir. 1988); Estate of Opal v. Commissioner, 450 F.2d 1085 (2d Cir. 1971); DOUGLAS A. KAHN ET AL., FEDERAL TAXATION OF GIFTS, TRUSTS, AND ESTATES 269-76 (3rd ed. 1997).


60. 656 So. 2d 460 (Fla. 1995).

61. See id. at 465 (citing Lewis v. Lewis, 178 P. 421 (Kan. 1919)).


63. See id. (citing In re Estate of Stewart, 444 P.2d 337 (Cal. 1968)).
nally, as expressed in Johnson, when the surviving testator breaches the will contract, the contract beneficiaries are entitled to judgment creditor status, thus giving them priority over the rights of the surviving spouse under the applicable state probate code.

As mentioned above, the Florida Supreme Court, in *Via v. Putnam*, decided the case in favor of the second spouse and against the third party beneficiaries. In reaching this decision, the Florida Supreme Court relied heavily on *Shimp v. Huff*, which based its rationale primarily on the public policy behind the elective share statute:

Instead, we find the question of priorities between a surviving spouse and beneficiaries under a contract to make a will should be resolved based upon the public policy which surrounds the marriage relationship and which underlies the elective share statute. . . . [T]he right of a person to transfer property upon his death to others . . . is not a natural right but a privilege granted by the State. . . . The Legislature on several occasions has limited this right by enacting restrictions . . . which grants a surviving spouse the right to receive an elective share of a decedent’s estate, regardless of the provisions contained in the decedent’s will. . . . This Court . . . has recognized the strong public policy interest in protecting the surviving spouse’s elective share from the unilateral acts of a deceased spouse.

The factual background of *Shimp v. Huff* was sympathetic to a contrary result. The decedent and his first wife had been married for thirty-three years at the time of her death in 1974, while the decedent and his second wife had been married for a few days over nine months at his death in 1986. Thus, the second wife, but for any limitations on prior contract, became instantaneously entitled to a fifty percent share of her husband’s estate. Yet, the court in *Shimp v. Huff* found for the second wife, despite the valid contractual provisions in the will providing for the

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65. Via, 656 So.2d at 465. As pointed out in *Shimp v. Huff*, giving judgment creditor status to third party beneficiaries in the event of a breach of contract, but leaving such beneficiaries with legatee status if the contract is performed, leads to an anomalous result: since creditors in general take precedence over legatees, third party beneficiaries are better off with a breach of contract than with performance. *Shimp v. Huff*, 556 A.2d 252, 260 (Md. 1989).
66. Via, 656 So. 2d at 466.
67. 556 A.2d at 252. *Shimp v. Huff* was discussed extensively by the Florida Supreme Court in *Via v. Putnam*. See Via, 656 So. 2d at 465.
68. But see Hodel v. Irving, 481 U.S. 704 (1987); Babbitt v. Youpee, 519 U.S. 234 (1997). This conclusion should be called into some doubt by recent decisions of the United States Supreme Court holding unconstitutional federal statutes that eliminated the rights of Native Americans to bequeath trust lands below a certain value, escheating such small parcels to the tribe. Courts nevertheless continue to recite language such as that the Maryland Supreme Court uses here. See, e.g., *In re Estate of Mettel*, 566 N.W. 2d 863, 864-65 (Iowa 1997) (noting that the Iowa Supreme Court recited this language).
69. *Shimp*, 556 A.2d at 263.
70. *Id.* at 254.
71. *Id.* at 255.
72. MD. CODE ANN., EST. & TRUS.TS § 3-203 (1997). If the decedent had been survived by issue, the elective share would have been one third instead of one half. *Id.*
children.\textsuperscript{73}

It should also be recognized that a state with a provision like that of the Uniform Probate Code would mitigate this result. To recapitulate some of what has been discussed in the immediately preceding paragraphs, the Uniform Probate Code provides two remedies for a surviving spouse who feels not adequately protected in an estate plan: an elective share, at issue in \textit{Shimp v. Huff}, and an intestate share if the deceased spouse's will predates the marriage and there is no indication that the omission is intentional or that the spouse is provided for outside the will, at issue in \textit{Via v. Putnam}. What is provided under the elective share statute is a phased in share of the spouse's augmented estate with nothing in the first year,\textsuperscript{74} three percent per year thereafter for the first ten years, four percent per year for the next five years, culminating with a total of fifty percent after 15 years of marriage.\textsuperscript{75} This provides a superior result in a state with an immediate, large elective share, by protecting a spouse of a long term second marriage, while not allowing a second spouse like Lisa Mae Shimp from taking one-half of an estate after a marriage of only nine months.

Under the Uniform Probate Code, the spouse would not be entitled to an intestate share as a pretermitted spouse if either (a) the surviving contracting spouse signed a will after remarriage identical to the first or (b) the joint and mutual will indicated its provisions should be carried out notwithstanding any subsequent remarriage.\textsuperscript{76} In the case of a spouse who simply leaves in place the premarital will which has no mention of remarriage, the second spouse will be entitled to an intestate share.\textsuperscript{77}

In the context of remarriage for the elderly, there are three scenarios that are relevant in this discussion (and to ease terminology, let me assume that the surviving spouse of the first marriage (or, if the situation is following divorce rather than death, the spouse whose estate is being litigated) is a husband):\textsuperscript{78}

1. The interests of the first wife who wants to ensure that, after the death of the survivor of them (or in the context of divorce, after her husband's death), the couple's joint property passes to children or, if there

\textsuperscript{73} \textit{Shimp}, 556 A.2d at 265.

\textsuperscript{74} \textsuperscript{73} UNIF. PROBATE CODE §2-202. Unless the surviving spouse's estate is less than $50,000 in which case such spouse would be entitled to an elective share to bring him or her up to that figure. \textit{Id.}

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} See supra note 54-59 and accompanying text for a discussion recognizing that although it can be argued that the mere fact that there is a prior contract means that any subsequent omission is not inadvertent and therefore the pretermitted heir statute should not apply.

\textsuperscript{77} S.D.C.L. § 29A-2-301 (1997).

\textsuperscript{78} Attempts to make this discussion non-sexist resulted in some very confusing references. Most of the cases that I have reviewed in this area involve the estate of a husband, where contractual or divorce obligations conflict with the claims of a surviving second or later wife, so I adopt that approach here. See, e.g., \textit{Shimp}, 556 A.2d at 252; \textit{Gregory}, 866 S.W.3d at 379; \textit{Via}, 656 So. 2d at 460. There is nothing intended to suggest any changes if sex roles were reversed, or to imply that any particular conduct is peculiar to men or to women.
are no children, in equal shares to both her and her husband's sides of the family.

2. The interests of the husband who wants to ensure that the joint wishes of himself and his first wife are respected.

3. The interests of the husband who wants to defeat any prior contractual obligations and provide for his second wife to the greatest degree possible.

1. Keeping the Pre-existing Contract Intact

What can the husband or first wife do to ensure that the provisions of the joint estate plan are enforced if they reside in a state that holds the rights of the surviving second spouse superior to any contract rights? In a state in which the elective share comes only from a probate estate and does not provide for an augmented estate in determining the amount of the elective share, one possibility is to use an inter-vivos trust arrangement, which has been held to defeat a renunciation of the will or elective share, even though the trust is fully revocable by the grantor. The hus-

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79. See e.g., 755 ILL. COMP. STAT. 5/2-8 (West 1992 & Supp. 1999). This provides: If a will is renounced by the testator's surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant or 1/2 of the entire estate if the testator leaves no descendant.

Id.

Joint tenancy property or property in a revocable trust is not part of the "estate" unless the transfer is a sham. Estate of Mocny, 630 N.E.2d 87, 91 (Ill. App. 1993); Johnson v. LaGrange State Bank, 383 N.E.2d 185, 192 (Ill. 1978).

80. Minneman, supra note 59, at §2. Using an inter-vivos trust that is contractual in nature may raise some issues as to qualification for the marital deduction under the Federal estate tax. I.R.C. §2056 (West 1999).

81. See Johnson, 383 N.E.2d at 192-94. In Johnson, the court stated: "We conclude that an Inter vivos transfer of property is valid as against the marital rights of the surviving spouse unless the transaction is tantamount to a fraud as manifested by the absence of donative intent to make a conveyance of a present interest in the property conveyed." Id. at 194.

The court also noted:

Nevertheless, the facts of a particular case may show that the trust in question, while ostensibly valid, is in actuality a sham transaction, essentially testamentary in character, and therefore invalid. In this case, the facts do not support such a conclusion. Mrs. Johnson was certainly well aware of the fact that her husband had a net worth of over $2,000,000, and was, and would most likely continue to be, well provided for. She was concerned, however, with the welfare of certain of her relatives, particularly her mother, who was dependent on her. She formalized a declaration of trust, with advice of counsel, for the benefit of her relatives. The declaration of trust immediately created an equitable interest in the beneficiaries, although the enjoyment of the interest was postponed until Mrs. Johnson's death and subject to her power of revocation. This, however, did not make the transfer illusory. And the power of control that she had as trustee was not an irresponsible power; she was charged with a fiduciary duty in respect to the beneficiaries' interest, and her management and administration of the assets in trust could only be exercised in accordance with the terms of the trust.

Id. at 195. The concept that Mrs. Johnson parted with something of value during her life and had responsibilities to the remaindermen she could change at will strains one's sensibilities. In Sullivan v. Burkin, the Supreme Judicial Court of Massachusetts prospectively overruled a similar rule (Kerwin v. Donaghy) and held that the assets in a fully revocable, funded trust were subject to the elective share. See Sullivan v. Burkin, 460 N.E.2d 571, 576 (Mass. 1984); Kerwin v. Donaghy, 59 N.E. 2d 299, 306 (Mass. 1945).
band can, of course, enter into a premarital agreement with the second wife to protect his intentions. This is clearly the preferred alternative. However, the first wife cannot compel the husband to do that because nobody can waive the rights of the second wife but the second wife.  

2. Defeating the Pre-existing Contract

If the husband wants to defeat the contractual obligations and lives in a state in which spousal rights defeat contract rights, he need only keep the will in place, in which case the spouse will have rights not only to an elective share but also as a pretermitted spouse. In a state in which contract rights are superior to spousal rights, the husband may attempt to make gifts to the second wife, and if for such things as support and maintenance, may be upheld; however, if such gifts are an obvious attempt to defeat the contractual obligations, the transfers may be set aside. By providing some minimum protection to the surviving spouse, such as the elective share under the Uniform Probate Code, the need for such deceptive practices can be reduced. With these valid, conflicting interests, such minimal protection is a good compromise solution.

B. PROVIDING FOR THE SURVIVING SPOUSE AND CHILDREN OF A PRIOR RELATIONSHIP WHEN THERE ARE NO RESTRICTIONS

Providing for both a surviving spouse and children of a prior relationship can pose its own set of difficulties, particularly if there is any significant degree of hostility between the stepparent and stepchildren. The spouse may wish to divide the estate between the surviving spouse and the children of a prior relationship either in time (life interest in trust for surviving spouse, remainder to children of prior relationship) or in current enjoyment (a percentage of the estate or pecuniary devise to surviving spouse, with or without the surviving spouse having control over the remainder of that portion of the estate and the balance to the children of a prior relationship). Since the enactment of the Economic Reform Tax Act of 1981 (hereinafter ERTA), it has been possible to qualify for the

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83. Shimp, 556 A.2d at 252.
84. Via, 656 So. 2d at 460. Apart from any arguments that prior contract rights should prevail over all spousal rights, a good argument can be made that in any event, a subsequent spouse should have no rights as a pretermitted spouse even if that spouse is entitled to an elective share. Pretermitted spouse statutes are designed to protect against the unintentional omission of a spouse. A will contract is a contract which has the effect of obligating the surviving spouse to omit a subsequent spouse so that no such omission can be intentional. See Dessin, supra note 59, at 458.
marital deduction under the federal estate tax\textsuperscript{87} and still preserve the ability to direct the remainder without interference from the surviving spouse by means of a trust called a qualified terminable interest property (hereinafter QTIP) trust.\textsuperscript{88} A QTIP trust will enable a spouse to provide for his widow without depriving his children of the ultimate enjoyment.\textsuperscript{89} 

However, regardless of how the pie is split between the surviving spouse and the children, each division brings about its own set of problems. With respect to much of the remainder of the ensuing discussion, there appears to be no authority or commentary, and, therefore, will instead be the result of my twenty plus years in the private practice of law. First, it is helpful to state very briefly some principles of the federal estate tax,\textsuperscript{90} the federal gift tax,\textsuperscript{91} and the marital deduction.\textsuperscript{92}

Under the federal estate tax and the federal gift tax, one may transfer up to a certain amount free of either tax to anybody he or she chooses.\textsuperscript{93} In the year 2000, the amount that is free of tax (the "applicable credit amount") is $675,000, increasing in stages to $1,000,000 by the year 2006.\textsuperscript{94} There are no federal restrictions on how this amount may pass. It can be either outright or in trust, and to any beneficiary that local law permits. In addition, one may leave one's U.S. citizen spouse unlimited amounts tax free provided that, with certain very important exceptions, it is not a "terminable interest."\textsuperscript{95} It is this right that is referred to as the "marital deduction."\textsuperscript{96} A corollary of this right is that whatever is left over at the

amended in scattered sections of 26 U.S.C.) [hereinafter ERTA].


88. I.R.C., §2056(b)(7). Prior to ERTA, for any interest in trust to qualify for the marital deduction, either the remainder had to pass to the probate estate of the surviving spouse and not qualify as a terminable interest (an "estate trust") or fit within a statutory exception to the terminable interest rule which required the surviving spouse to have a general power of appointment (a "life estate, general power of appointment trust"). Either will give the surviving spouse absolute control over the remainder interest with the ability to disinherit the deceased spouse's children. See Rev. Rul. 68-554, 1968-2 C.B. 412 (validating the estate trust as qualifying for the marital deduction); Rev. Rul. 77-444, 1977-2 C.B. 341 (holding that, with an estate trust, adding a general power of appointment disqualifies the trust for the marital deduction because it is not a terminable interest); and I.R.C. §2056(b)(5) (establishing the life estate, general power of appointment trust as a statutory exception to the terminable interest rule). See also Estate of Evelyn I. Anderson, 65 Cal Rptr 2d 307 (1997) (providing an example of litigation resulting from the diversion of such a trust from the children of the spouse creating the life estate, general power of appointment trust).

89. Although this may not be strictly true if the surviving spouse is approximately the same age as the children, in which case the children could be deprived of any enjoyment (although presumably grandchildren would not) or have to wait a long time to inherit.


94. I.R.C. § 2010(c). This applicable credit amount is at $675,000 for 2000 and 2001, $700,000 for 2002 and 2003, $850,000 for 2004, $950,000 for 2005, and $1,000,000 for 2006 and thereafter. Id.

95. I.R.C. § 2056. Qualification for the marital deduction is considerably more difficult if the surviving spouse is not a citizen of the United States. See I.R.C. §§ 2056(d), 2056A (West 1999).

96. The term "marital deduction" is found in the title to sections rather than in the substan-
survivor’s death is taxable in the survivor’s gross estate, so that the marital deduction operates as a deferral of tax, not a forgiveness of it.\(^{97}\)

1. Splitting the Pie by Time-Life Estate to Surviving Spouse, Remainder to Children of Prior Relationship

The potential for conflict between life tenant and remaindermen exists regardless of any relationship between them, so that much of what follows is applicable to all such conflicts, not just between a surviving spouse and his or her stepchildren. However, a forced familial relationship may increase any such inherent tensions. The issues that are likely to arise to create conflict in this setting are the propriety of investments, and the propriety of discretionary distributions to the surviving spouse.

The two issues are connected, although there is a good argument that they should not be.\(^{98}\) Traditional trust law theory states that the life tenant is primarily to receive income, but under the applicable principal and income act,\(^{99}\) which defines the return from such things as dividends and interest as income and capital gains as principal, the trustee’s choice of investments will greatly influence how much income is available.\(^{100}\) The argument against coupling the two issues states that the trustee should make investment decisions based on the objective of total growth of the trust estate (favoring the remaindermen) and then decide how much to distribute to the life tenant (independent of traditional concepts of income).\(^{101}\)

Between the life tenant and remaindermen, there is an inherent tension if the trustee has such discretion as to how much should be distributed to the life tenant. A typical marital trust might provide all income to the surviving spouse,\(^{102}\) discretionary distributions to the spouse according to some standard, and remainder to other beneficiaries, often the children of the deceased spouse who may or may not be the children of the surviving spouse. Courts have been called upon to rule upon allegations of abuse of discretion by the trustee based upon such recurring standards as “support,” or with simply no standards at all. The use of language such as

\(^{97}\) An outright bequest will be taxed in the survivor’s estate like any other asset he or she may own. I.R.C. § 2033 (West 1999). A life estate, general power of appointment trust will be taxed under section 2041. I.R.C. § 2041 (West 1999). A QTIP trust will be taxed in the survivor’s estate under section 2044. I.R.C. § 2044 (West 1999). In the case of spouses whose combined wealth exceeds one tax free amount but is less than two, with proper planning, use of the marital deduction can cause the tax to be zero on the deaths of both spouses, in which case the marital deduction will operate as a forgiveness of tax and not merely a deferral.

\(^{98}\) Joel C. Dobris, New Forms of Private Trusts for the Twenty-First Century – Principal and Income, 31 REAL PROP., PROB. & TR. J. 1, 4-5 (1996).


\(^{101}\) Dobris, supra note 98, at 6.

\(^{102}\) See I.R.C. §§ 2056(b)(5), 2056(b)(7) (West 1999). This is required under the statutory exceptions to the terminable interest rule for the trust to qualify for the marital deduction. Id.
“uncontrolled discretion” or “absolute discretion” will not free the trustee from the restraints of judicial review. Another sticking point is the issue of whether there are other resources of the life tenant that can be used instead of trust funds. Courts are divided as to whether, absent instructions in the trust instrument, the trustee must consider available assets of the beneficiary in deciding whether to make discretionary distributions. Remaindermen would, of course, rather see the life tenant utilize funds other than the trust in which they have a valuable interest.

Within the context of the second marriage, these issues point out the necessity for careful drafting in the instrument. If the primary objective is the care of the surviving spouse, the testator may consider language in the instrument waiving the impartiality between life tenant and remaindermen. If the desire is to give the surviving spouse total control, the surviving spouse can be his or her own trustee with discretion to give himself or herself principal without adverse estate tax consequences, if the trust is properly drawn to limit that discretion to an “ascertainable standard” such as “support.” Additionally, having a limited power of appointment can permit the spouse to disinherit a remainder beneficiary who challenges the propriety of principal distributions. These methods can be utilized to create a measure of forced civility among the competing interests, at least facially.

Another possibility to give the spouse total control, though I believe far less desirable, is to have a friendly co-trustee with sole discretion to give distributions to the surviving spouse. This trustee will operate as a figurehead who will do whatever the surviving spouse commands. This has been done when the sole purpose of the trust was to avoid taxes by giving the beneficiary the right to choose a co-trustee who would have sole discretion in making principal distributions to the beneficiary. The shortcoming of this approach in a second marriage situation is amply demonstrated in Jacob v. Davis, where the co-trustee was an attorney, probably the family attorney who drafted the will. The will provided for a standard $600,000 non-marital trust and the balance to a marital trust which turned out to be zero. The remainder beneficiary was the

103. Id. at 551-552.
106. For example: “In determining the propriety of distributions of principal to my spouse, the trustee shall not consider the interests of any remainder beneficiary.”
107. I.R.C. § 2041(b)(1)(A) (West 1999). This type of trust is more typical in a first marriage situation where the only children of either spouse are the children of that marriage and a trust is being used only for the purpose of saving federal estate tax.
109. There is no indication of that in the decision. I surmise this to be the case because I cannot think of another circumstance in which the attorney-trustee would turn over such complete control to the beneficiary, other than, perhaps, there being a blood relation.
110. Jacob, 738 A.2d at 906-07.
son of the decedent’s prior marriage, the stepson of the surviving spouse.\textsuperscript{111} The trust prohibited the surviving spouse from participation in decisions as to principal distributions to her from the non-marital trust,\textsuperscript{112} but the attorney turned over all such decision-making power to her and so wrote to her stepchildren in a letter.\textsuperscript{113} The court held that the letter established a prime facie case for an impermissible delegation of authority, reversed the summary judgment in favor of the trustee, and remanded the case to permit the trustee to establish that “the letter did not accurately reflect how decisions regarding discretionary distributions of principal were reached.”\textsuperscript{114}

If it is desired to preserve the principal for the remaindermen, consider prohibiting all principal distributions, in particular if the surviving spouse has different objects of bounty from the testator, such as his or her own children of a prior relationship. The surviving spouse will be motivated to get every possible amount of principal out of the trust so that it can be left in the survivor’s will. In drafting such an instrument it should be recognized that if there is any possibility of principal distributions in the governing instrument, even such restrictive language as “emergency medical needs,” the surviving spouse will have an opportunity to seek such distributions, in an attempt to come within the permissible language.

Such a scenario was very close to the situation found in \textit{Austin v. U.S. Bank of Washington}.\textsuperscript{115} The life tenant in \textit{Austin} was the sister of the testator and the remainder beneficiaries the grandchildren of the testator. The trust provided: “The trustee shall pay ... $100.00 per month to my sister, MRS. W.D. LAWRENCE, of Trenton, Tennessee for the remainder of her natural life, and such additional sums therefrom as may be required for any emergency or need, in the sole discretion of my trustee.”\textsuperscript{116}

The Trustee received letters from Mrs. Lawrence’s attorney requesting additional funds, as her income was insufficient to meet her expenses, in particular home care and hospitalization. The Trustee approved increases, first to $500 per month and then to $1,000 per month. The Trustee never requested information as to her resources and only considered her income. This was held to be a breach of fiduciary obligation, and the court held the Trustee liable to the remainder beneficiaries for the distributions made to Mrs. Lawrence, plus an interest factor.\textsuperscript{117} This shows not only that the trustee must inquire as to the life tenant’s assets (absent instructions in the governing instrument to the contrary), but must also be wary of the demands of remaindermen, and perhaps seek construction of

\begin{itemize}
  \item \textsuperscript{111} \textit{Id.} at 906.
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.} at 907.
  \item \textsuperscript{114} \textit{Id.} at 919.
  \item \textsuperscript{115} 869 P.2d at 404.
  \item \textsuperscript{116} \textit{Id.} at 406.
  \item \textsuperscript{117} \textit{Id.} at 414.
\end{itemize}
the instrument from the appropriate court.

2. Dividing the Estate Immediately

Dividing the estate currently will eliminate some of the problems in the immediately preceding section, but will raise its own set of problems, in particular with the choosing of assets. If the bequest is in trust, the remainder can pass to the survivor's family or be retained for the family of the testator. One can leave a spouse a dollar bequest or a fraction of the residuary estate. If there is a dollar amount, then whether the spouse will share in any post death appreciation depends on subtle wording in the governing instrument. If the bequest is a "true pecuniary" bequest, assets distributed in kind will be valued on the date or dates of distribution and the survivor will not share in any appreciation in value prior to funding. Alternatively, date of death values can be used, but to qualify for the federal estate tax marital deduction, the bequest must either share ratably in any appreciation or depreciation (a "tax value" pecuniary bequest which behaves very much like a fraction of the residue) or the assets must have a date of distribution value at least equal to the date of death value which, as a practical matter, means such assets must be valued at the lower of date of death or date of funding values (a "minimum worth" pecuniary bequest).

This issue of whether a given bequest was a true pecuniary bequest, a minimum worth pecuniary bequest, or a fraction of the residuary estate has been raised in a few cases where the language of the governing instrument was less than clear. One such case is *Hanna v. Hanna*. In that case, the testator left one-half of his estate outright to his wife and the balance in trust with income "at least quarter-annually [to the wife], according to her needs the remaining net income to be distributed at least annually to the son." The clause in question provided:

In the event I am survived by my wife, I give, devise and bequeath to Mary Sue S. Hanna assets of my estate, to be selected by the Executrix of this Will, in an amount which, when added to any other property which is passed or will pass to my wife independently of this bequest and which will qualify as a part of the marital deduction of my estate, will equal one-half of my adjusted gross estate as defined for federal estate tax purposes in the Federal Internal Revenue Code. Only assets that qualify for the marital deduction shall be available for selection by my Executrix and the fulfillment of this bequest. The values used in fulfilling this bequest shall be those val-

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119. Rev. Proc. 64-19, 1964-1 C.B. 682; see also Covey, supra note 118, at 114.
120. 619 S.W.2d 655 (Ark. 1981).
121. Id. at 657. It is not stated in the opinion whether the son of the testator is the son or stepson of the widow. See id. From the apparent animosity, one might guess the relationship is stepmother-stepson.
ues as finally determined for federal estate tax purposes, but the aggregate fair market value at the date or dates of distribution of the property received by my wife must be no less than the amount of this bequest as finally determined for federal estate tax purposes. 122

The last sentence of the instrument clearly identifies this as a minimum worth formula, but, unbelievably, the Arkansas Supreme Court came to the conclusion that the bequest was a true pecuniary bequest:

This is clearly a true pecuniary bequest. Here, the preresiduary marital bequest in the will provided for the funding of the marital bequest with assets "in an amount which . . . will equal one-half of my adjusted gross estate as defined for federal estate tax purposes . . ." (Italics supplied.) The words "an amount" are construed to indicate a true pecuniary bequest, or a bequest of a certain fixed amount unaffected by appreciation or depreciation of the assets and not a fractional bequest, although the bequest may be satisfied by assets in kind. 123

The court's reasoning is clearly faulty. The use of the "amount" identifies a pecuniary bequest of some sort. One cannot determine what kind of marital formula is used until one sees what the rules of funding are, which the last sentence of the marital bequest identifies. The draftsman drafted correctly, and the court came to the wrong conclusion. The draftsman could have done no more than he did (other than perhaps to say "I intend for this bequest to be a minimum worth pecuniary bequest," and I know of no attorney who has ever done that). The errant legal analysis cost the surviving spouse some part of the post death appreciation of the estate. The opinion does not identify the amount of the increase between the date of death and the date of funding (the adjusted gross estate was $1,774,003.22, entitling the spouse to $887,001.61). 124

In order to see what considerations should go into planning to avoid this type of dispute, it is important to examine what is at stake and see, among other things, why a minimum worth pecuniary bequest should be avoided in a second marriage situation. Assume a date of death value of an estate at $2,000,000, which has appreciated to $3,000,000. Assume a marital bequest of 50% of the estate. With a true pecuniary, when the date of funding arrives, the marital bequest will receive assets worth $1,000,000 and the residuary estate will receive $2,000,000. If a fraction of the residue is used, the marital bequest will receive $1,500,000 and the residuary bequest will receive $1,500,000. It should not matter in either case what assets are used, as long as they are valued fairly. 125 In a harmonious

122. Id. at 657-58.
123. Id. at 658.
124. Id. at 657. The "adjusted gross estate" is a tax concept, the definition of which is no longer part of I.R.C. § 2056. Prior to ERTA, the maximum marital deduction was 50% of the adjusted gross estate. It is now unlimited. There is a definition of "adjusted gross estate" in I.R.C. § 6166 (dealing with payment of Federal estate taxes in instalments), which varies slightly from what used to be in I.R.C. § 2056.
125. Treas. Reg. § 1.1014-4(a)(3) (1957). The choice of assets funding a true pecuniary be-
family situation, one would prefer the true pecuniary formula, because the life tenant and remaindermen will be the same in both a marital trust and a residuary trust and augmenting the residuary estate will minimize taxation on the death of the surviving spouse. In a contentious situation, if the desire is to protect the surviving spouse from a stepchild who, as in Hanna, was a personal representative who wants to minimize what passes to a stepparent, the fractional formula is probably fairer. In a rising market, the stepchild administering a true pecuniary formula will want to delay funding the bequest so that all appreciation will belong to the residuary bequest. Once the marital bequest is funded with assets, appreciation in those assets belongs to their owner, the marital bequest.

With the minimum worth pecuniary marital formula, however, the amount which the marital bequest receives can be at the mercy (or peril) of the personal representative. If the marital bequest consists of two assets, each worth $1,000,000 at death, but one of which stays constant in value while the other appreciates to $2,000,000, either asset will satisfy the obligation to give the spouse his or her $1,000,000 since date of death values are used. If the personal representative has total discretion on what to fund, he or she can determine whether the surviving spouse gets $1,000,000 or $2,000,000 or anything in between. Are there limits on what the personal representative can do? New York, by statute, requires that in such a case where date of death values are used, "the assets selected [by the personal representative] . . . shall have an aggregate value on the dates of their distribution amounting to no less than, and to the extent practicable, no more than, [the amount of the marital bequest]." Yet this has been held not to apply when the minimum worth pecuniary is expressly stated in the governing instrument. With no clear standards, a minimum worth formula in a contentious situation invites litigation.

What if the surviving spouse is the personal representative? With a minimum worth, he or she can overfund the marital bequest, using the $2,000,000 asset in the example in the prior paragraph. There are other potential conflicts of interest. If the surviving spouse is receiving a pecuniary bequest in a QTIP trust, which passes to the surviving spouse's death, this may have an effect on income tax liability, as the use of appreciated assets to fund a pecuniary obligation will be deemed a sale or exchange resulting in the recognition of capital gain for income tax purposes. Id. With a sufficiently large number of assets or with a significant amount of cash, the recognition of capital gain can be minimized. See Regis W. Campfield, Estate Planning and Drafting 504 (2nd ed. 1995).

126. Campfield, supra note 125, at 511.
127. N.Y. Est. Powers & Trusts § 2-1.9 (McKinney 1998). This statute was designed to make pecuniary bequests that used date of death values comply with Rev. Proc. 64-19.
128. See Estate of Guterman, 476 N.Y.S.2d 1006, 1008-09 (N.Y. Surr. 1984) (holding that where the formula provided that assets distributed on kind to a marital bequest, having a value no less on the date of funding than on the date of death (another way of phrasing the minimum worth formula), that there should be no ceiling on the bequest). The opinion gives no guidance as to any standards that might bind the personal representative in making a selection. Id. at 1008. In Guterman, the relationship of widow to children of the testator is clearly stepmother and stepchildren. Id. at 1007.
scendants after death, and the residuary bequest passes to the descend-
ants of the testator, a governing instrument must be carefully drafted to
determine where taxes fall if QTIP treatment is not elected. If the tax
burden is on the residue of the estate (passing to descendants of the testa-
tor who are not related to the surviving spouse), the surviving spouse has
an incentive not to elect QTIP treatment for the marital bequest, at least
to the extent that nonelection will bankrupt the residuary estate. In the
event of such nonelection, the survivor spouse’s trust will pass to his or
her descendants with a lesser or no tax while the testator’s descendants
will have their bequest reduced in a way the testator never envisioned. A
properly drafted tax clause will remove the incentive.¹²⁹

IV. CONCLUSION

Significant considerations can be present for any elderly couple con-
sidering remarriage. Disqualification for Medicare or Medicaid, disrup-
tion of prior premarital agreements of divorce decrees, and disharmony
among second spouses and stepchildren can result. Laws such as Medi-
caid can be amended so as not to require spouses to “live in sin” to pre-
serve benefits, perhaps, by recognition of premarital agreements in a sec-
ond marriage. Disharmony among step relatives cannot be avoided by
statute, but careful drafting can minimize the distrust and potential for
litigation afterward. Some of the areas drafting can be used to minimize
conflict include:

(1) If couples insist on some sort of contract after the death of the
first spouse, consider a trust which keeps the assets outside of the probate
estate of the survivor. This will at least keep the decedent spouse’s assets
out of the probate estate of the survivor and protected from an elective
share. Care must be taken, though, to preserve any needed marital de-
duction.

(2) Premarital agreements are always advisable in a second marriage
situation. A contracting spouse is always free to be more generous than
the agreement requires.

(3) Never use a minimum worth marital formula in a contentious
situation. A fraction of the residue is probably the safest from the point
of view of preventing litigation.

(4) Talk with a client about the relative importance of competing
desires of providing for second spouse and children, and then draft care-
fully to reflect the client’s wishes. This may require limiting the flexibility
of the instrument (such as no principal distributions to the surviving
spouse under any circumstances and dictating investments).

There is no cure all, but much litigation is avoidable by considering

¹²⁹ I first raised this concern sixteen years ago, and confess I have not seen it come up in
these problems in advance.