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## Disinheritance and the Modern Family

Ralph C. Brashier

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# DISINHERITANCE AND THE MODERN FAMILY

*Ralph C. Brashier†*

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† Assistant Professor of Law, Cecil C. Humphreys School of Law, University of Memphis. B.M., 1979, Florida State University; M.A., 1982, Eastman School of Music; J.D., 1986, University of Mississippi; LL.M., 1990, Yale University.

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## I. INTRODUCTION

The natural objects of a decedent's bounty are traditionally thought to be his spouse and children.<sup>1</sup> While the statutory protection afforded the disinherited<sup>2</sup> surviving spouse has increased significantly in recent decades, the protection afforded the disinherited child has diminished steadily.<sup>3</sup> In the United States, only one jurisdiction currently provides direct, systematic protection to a child intentionally disinherited by a parent.<sup>4</sup> In all other states, the testa-

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1. Legislatures apparently believe this is still true, for the intestacy schemes of most states provide first for the decedent's spouse and children, then for other of the decedent's relatives by consanguinity. *But see infra* note 300 (describing intestacy provision in traditional nuclear family under 1990 Uniform Probate Code (UPC), which provides that the surviving spouse takes the entire estate to the exclusion of the intestate's children).

2. Except when otherwise indicated, the discussion of disinheritance in this article contemplates the scenario in which the testator attempts to minimize estate transfers to spouses (or cohabiting lovers) and children who have not been provided for through the testator's non-probate transfers.

3. The laws regarding disinheritance of children have not changed substantially in recent decades, but family structures have changed dramatically. Regrettably, the plight of disinherited children has worsened in light of the serial polygamy and single parenthood characteristic of the late 20th century. *See infra* notes 257-81 and accompanying text.

4. *See infra* notes 111-23 and accompanying text (discussing legitime under Louisiana law). *See generally* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 138-46 (2d ed. 1953) (discussing lack of protection for children disinherited by a parent). Legislatures have done little under the law of wills to ameliorate this unprotected status in the four decades since the 1953 edition of Atkinson's work.

Scholars have sporadically focused their attention on the disinherited American child. Indeed, one of the leading writers on inheritance law indicated in 1940 that a move was unmistakably under way to limit the unfettered freedom of American testators to disinherit children. Joseph Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337, 338 (1940). Describing then-recent changes in English law, Dainow commented that "[t]he detailed legislative history of the new English reform will serve to orient the unmistakably growing tendency in this country to limit a testator's power of disinheriting the surviving members of his immediate family." *Id.* That move unfortunately bore no fruit in the form of remedial legislation for disinherited children.

Dainow was not the first scholar to express concern over an American testator's

tor is free to disinherit even needy, *minor* children, regardless of the size of the estate.

One rationale asserted for this lack of protection to the disinherited child is the American belief in testamentary freedom.<sup>5</sup> Commitment to testamentary freedom, however, has not prevented most state legislatures from enacting substantial statutory protection for disinherited spouses.<sup>6</sup> Moreover, the American public has his-

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ability to disinherit members of his immediate family. In 1928, Professor Laube of Cornell examined the problem of the disinherited child and reviewed case law pertaining to the subject. See Herbert D. Laube, *The Right of a Testator to Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559, 594 (1928) (concluding that any judicial interpretation of statutory law that enables a father to disinherit his child is contrary to humanity, social interest, and policy, and that the legislature must act to nullify such an interpretation).

5. On the concept of testamentary freedom, see generally MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 4-8 (1970) (discussing the functions, purposes, history, and limits of testamentary freedom in American society). For a study of American philosophy towards inheritance, see generally RONALD CHESTER, *INHERITANCE, WEALTH, AND SOCIETY* 34-90 (1982) (tracing the historical evolution of and influences on American philosophy towards the right of inheritance). See also Edmond N. Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 145 (1936) (listing various historical theories of inheritance).

But see *infra* note 287 (questioning whether "testamentary freedom" is simply an easily asserted platitude masking legislative inertia). See also Dainow, *supra* note 4, at 338 (discussing the "well-nigh universal conviction" that testamentary freedom is ingrained in the English and Americans, but surmising that such freedom might one day be regarded as an "historical accident").

6. Cf. John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 304-05 (1987) (noting that although "America is uniquely the land of testamentary freedom," restrictions on spousal disinheritance are imposed because of the lack of protection spouses receive in marital property ownership in non-community property states). See *infra* notes 17-35, 51-101 and accompanying text (discussing dower and the elective share in common law jurisdictions); *infra* notes 36-50 and accompanying text (discussing community property).

Importantly, in most states there is no *inherent right* of a decedent to dispose of his assets by will, nor is there an inherent right of family members to succeed to his property. In *Estate of Eisenberg*, 280 N.W.2d 359, 362 (Wis. Ct. App.), *appeal dismissed*, 444 U.S. 976 (1979), the male plaintiff failed to convince the court that Wisconsin's then-existing elective share statute was unreasonable based on societal changes in the decade preceding the case. In response to the plaintiff's claims that the statute violated his rights to equal protection and due process under the Constitution, the court noted that "it seems irrefutable that no federal right to dispose of property by will exists under the federal constitution." *Id.* at 363. Indeed, "[r]ights to succession by will are created by the state and may be limited, conditioned, or abolished by it." *Id.* (quoting *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 48 (1944)).

The court noted, however, that unlike most states, which view the right to make a will as statutory, Wisconsin views the right to make a will as an inherent right. *Id.* Nevertheless, the statute withstood an equal protection challenge under the state constitution. The statute served to promote compelling governmental interests, including the following: encouragement of the marital relationship; protection of each spouse from destitution; institution of a uniform and objective method for determining a standard minimum share

torically accepted other forms of testamentary restrictions, direct and indirect, ranging from mortmain to estate tax.<sup>7</sup> Commitment to testamentary freedom alone is not a satisfactory explanation for permitting the disinheritance of children. When the child the testator seeks to exclude is a minor, the state should be reluctant to uphold the disinheritance absent compelling reasons.

A comparison of the substantially different protections afforded to disinherited spouses and minor children reveals a particularly cruel paradox. The testator's minor child is largely incapable of acquiring, earning, managing, and protecting significant property interests during minority, yet almost no state intervenes to prevent his or her disinheritance.<sup>8</sup> The testator's surviving spouse is capable of acquiring, earning, managing, and protecting her property interests during and beyond the marriage, yet most states intervene to prevent spousal disinheritance.<sup>9</sup> In light of our emerging emphasis in family law on societal and parental responsibility to children,<sup>10</sup> the impropriety of America's focus on direct protection solely of the surviving spouse is becoming clear.

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for the surviving spouse; and protection for the surviving husband as well as for the surviving wife. *Id.* at 363-64. The court stated the following: "Whether the state legislature could constitutionally provide similar protection by statute for surviving children is questionable, and a problem we are not called upon to resolve." *Id.* at 364.

7. See Paul G. Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499, 501 (1964) (noting restraints regarding dispositions to charity, for immoral or unworthy purposes, as well as restraints in the form of income, estate, and gift taxes); see also Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 335-36 (discussing the results of 1977 telephone survey in which 89% of respondents initially stated there should be no testamentary restrictions; only 43% of respondents maintained that stance after being asked whether a testator should be allowed to leave his estate to an animal).

8. Indeed, it is these very limitations that have often caused attorneys to advise that a testator not leave property directly to his minor children, but rather to the surviving spouse. See Fellows et al., *supra* note 7, at 325 (noting that "attorneys frequently caution against bequeathing property directly to a minor child, because such a bequest requires appointment of a guardian to the estate of the child"). Increasingly, however, the surviving spouse of the testator is not the parent of the testator's minor children and bequests to the surviving spouse will not benefit the testator's minor children. In light of changing family structures, the burdens associated with direct bequests to minors may be outweighed by the child's need to be provided for after the testator's death.

9. Cf. *infra* notes 198-207 and accompanying text (discussing measures spouse may take to protect herself from disinheritance).

10. See, e.g., Fred Strasser, *Searching for a Middle Ground*, NAT'L L.J., Feb. 3, 1992, at 1, 28 (discussing view of the nascent communitarian movement "that society's responsibility in family law and policy is first to children, not to the rights of parents, business or anyone else").

Laws regarding inheritance must change as the family itself evolves. In the past three decades, many rivals have emerged to challenge the once preeminent nuclear family, the foundation on which most disinheritance provisions continue to be implicitly structured. Serial polygamy,<sup>11</sup> straight and gay cohabitation,<sup>12</sup> and parenting outside of marriage<sup>13</sup> are all common alternatives to the traditional family comprised of undivorced, heterosexual, married parents and their children.<sup>14</sup> A study of existing laws protecting the spouse from disinheritance reveals that many older statutes are unwarranted relics<sup>15</sup> and that even newer ones have failed to ac-

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11. See generally Langbein & Waggoner, *supra* note 6, at 310-12 (discussing the inadequacy of forced share law in dealing with the phenomenon of serial polygamy and noting that it is now "increasingly common for people to have more than one spouse—alas, not simultaneously as in the good old days, but in a series"). Preliminary statistics for 1990 indicated that 2,448,000 marriages occurred in that year while 1,175,000 couples divorced. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 93 (112th ed. 1992) [hereinafter 1992 STATISTICAL ABSTRACT]; see also *id.* at 92 (noting that of 11,577,000 living women whose first marriage ended by death or divorce, over half have remarried). Preliminary statistics for 1991 indicated that 2,371,000 marriages occurred in that year while 1,187,000 couples divorced. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 103 (113th ed. 1993) [hereinafter 1993 STATISTICAL ABSTRACT].

12. As of March 1991, there were 3,039,000 unrelated couples of the opposite sex sharing the same household. 1992 STATISTICAL ABSTRACT, *supra* note 11, at 45. In 962,000 of those households, children under the age of 15 were present. *Id.* Of the more than three million households of unmarried couples, 1,858,000 cohabiting couples were between the ages of 25 and 44. *Id.*; see also *infra* note 254 and accompanying text (providing statistics on gay and lesbian parenting).

13. Twenty-four percent of single American women between the ages of 18 and 44 have given birth. Sam Fulwood III, *Out-of-Wedlock Births Rise Sharply Among Most Groups*, L.A. TIMES, July 14, 1993, at A1 (citing a July 1993 Census Bureau release entitled "Fertility of American Women: June 1992"). A recent study of 60,000 households indicates the largest percentage increases of out-of-wedlock childbirth are now occurring among white, employed, and college-educated women. *Id.* In Los Angeles, two in five live births in 1991 were to unwed mothers. *Id.* In Memphis, Tennessee and the surrounding county, more than one-half of all births in 1992 were to unmarried women. Sam Fulwood III & Mary Powers, *Census Finds Surge in Births Out of Wedlock*, COM. APPEAL (Memphis), July 14, 1993, at A1. In 1960, the out-of-wedlock birth rate in the United States was five percent. Elizabeth Mehren, *American Family Steadily Eroding, Researchers Find*, L.A. TIMES, July 20, 1988, at View, pt. 5, p.1.

14. Although the traditional family may not be relegated to memory yet, its rivals are growing stronger. See, e.g., Fulwood, *supra* note 13, at A1, A16 (noting that "the traditional family in which the husband works while the wife remains at home with children declined from 43% in 1976 to 24% in 1992") (citation omitted).

15. In a society where divorce and remarriage occur rarely and the family exists almost exclusively in its "nuclear" form, the spousal elective share is somewhat justifiable. Under such a scenario, the forced inheritance to the spouse also trickles down to the minor children of the marriage, whom the surviving spouse has a continuing duty to support. See *infra* notes 108-10 and accompanying text (discussing the failure of the spousal

count adequately for recent changes in family structure.<sup>16</sup>

This Article examines methods by which spouses and children are and are not protected from disinheritance in the United States (with a glance or two abroad for comparative purposes). It suggests that the elective share, even in its modern form, is today an unsatisfactory solution to the problem of spousal disinheritance. If a state views marriage as an economic partnership, then community property principles should be adopted to acknowledge the contributions of both spouses *during* the marriage. Alternatively, if the state views marriage solely as a contract between competent adults, then neither the arbitrary elective share nor community property is necessary because the spouses may protect themselves before and during the marriage without state intrusion. Concerning children, the Article suggests that the law permitting their disinheritance historically was not as oppressive as might initially be thought. When minor children are born and reared within the traditional family, they also benefit, albeit indirectly, from the spousal share or community property principles. Today, however, millions of American minors spend some or all of their childhood outside the

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elective share to cope with a changing society). Ironically, some states did not begin to enact elective share statutes until the divorce rate had multiplied exponentially and more and more couples had begun cohabiting and parenting without marriage. Moreover, as women increasingly left the home to become wage earners, the need for the elective share provision lessened for many widows. *See infra* notes 214-16 and accompanying text (discussing belated enactment of forced share statutes).

16. South Dakota, for example, abolished dower in 1893 and did not enact spousal protection until the mid-1970s. It is doubtful that the plight of disinherited widows in the 1970s was as bleak as that of widows in 1893. *Compare In re Estate of Smith*, 401 N.W.2d 736, 737 (S.D. 1987) (noting that elective share provisions were first enacted in South Dakota in 1974, were repealed in 1976, and new elective share provisions were enacted in 1980) *with Kressly v. Kressly*, 87 N.W.2d 601, 604-05 (S.D. 1958) (noting that use of dower by analogy to determine divorce settlement was improper, since dower was abolished in South Dakota in 1893) *and In re Estate of Vetter*, 66 N.W.2d 519, 520 (S.D. 1954) (holding that testator's will leaving entire estate to mother was not fraud because it did not invade the widow's marital rights). For the current elective share scheme, see S.D. CODIFIED LAWS ANN. §§ 30-5A-1 to -8 (1984 & Supp. 1993).

North Dakota similarly has moved in recent years from a system of no spousal protection to the elective share. *Compare* N.D. CENT. CODE §§ 30.1-05-01 to -05-07 (1976 & Supp. 1993) (adopting UPC elective share provisions) *with* N.D. CENT. CODE § 30.1-05 (1976) (noting in the general comment to § 30.1-05 that all common law states except the Dakotas appeared at that time to impose some restriction on the power of a spouse to disinherit the other). *See also* W.S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 2:25, at n.7 (1982) (noting that shortly after being admitted to the Union, North Dakota and South Dakota not only abolished dower and curtesy, but also apparently adopted the separate property concept from California's community property scheme without enacting counterbalancing provisions for the surviving spouse).

traditional family. Legislatures have yet to realize the serious consequence of permitting the total disinheritance of these children. This Article suggests that imposing upon the testator's estate a posthumous duty of support for minor children would be one plausible way in which to address this problem.

## II. CURRENT LAWS CONCERNING DISINHERITANCE OF SPOUSES AND CHILDREN

The following discussion provides an overview of various laws regarding the disinheritance of spouses and children. Much of the discussion focuses on general approaches to disinheritance employed by groups of states. The disinheritance provisions of two states, however, are unique and so important that they merit specific analysis. Also, the modern scheme of testator's family maintenance that has been adopted in several commonwealth countries is examined to see how other countries that have traditionally valued testamentary freedom currently treat disinheritance problems.

### A. *Dower and Curtesy*

The common law recognized the marital life estate of dower to protect a widow from disinheritance by her husband. In most instances, the life estate of curtesy protected the widower from disinheritance by his wife.<sup>17</sup> The lifetime protection afforded a widow typically extended to an interest in only one-third<sup>18</sup> of the estates<sup>19</sup> of which her husband was legally seised during the mar-

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17. See 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 185-97 (5th ed. 1942) (discussing curtesy and dower). For other valuable discussions of the marital life estates, see generally 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 399-436 (2d ed. 1923), and George L. Haskins, *Estates Arising from the Marriage Relationship and Their Characteristics*, in 1 AMERICAN LAW OF PROPERTY §§ 5.1-5.74 (A. James Casner ed., 1952).

18. Holdsworth states that the one-third interest probably became fixed during the early 15th century. 3 HOLDSWORTH, *supra* note 17, at 193. The arbitrary allocation of a fixed fractional interest is one of the characteristics of dower that was carried over in many conventional forced-share provisions and the elective share under the 1969 UPC. See *infra* notes 72-74 and accompanying text (discussing problems that result from imposition of a fixed fractional interest).

19. During the reign of Henry IV, dower of chattels was pronounced a legal impossibility. 3 HOLDSWORTH, *supra* note 17, at 190 (discussing rationale). In fact, the wife's personality, including her chattels real, such as leasehold interests, became the absolute property of the husband at the time of the marriage. George L. Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345, 345 n.1, 349 (1949). If he predeceased her, however, her chattels real that he had not alienated would again become hers. *Id.* at 345 n.1.



riage. The lifetime protection afforded the widower, however, covered all of his wife's inheritable freehold estates of which she was actually seised in possession during coverture.<sup>20</sup> Borrowed from England, these estates represent the earliest form of protection from spousal disinheritance established in the United States.<sup>21</sup>

The extreme subordination of the wife at common law<sup>22</sup> required that some form of protection from disinheritance be given to her<sup>23</sup> upon the death of her husband, for often she was deemed

20. Upon entering into a legally cognizable marriage, the husband acquired a marital tenancy in his wife's inheritable freehold estates known as *iure uxoris* for the joint lives of the couple. He acquired his curtesy interest only upon the birth of issue capable of inheriting, at which time his interest was converted into an estate for *his* life known as curtesy *initiate*. Upon the wife's death, the husband's life estate was known as curtesy *consummate*. 2 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* ¶ 210, at 15-93 (Patrick J. Rohan rev. ed. 1993). Because curtesy was limited to a life estate in the wife's interests of which she was seised in possession at the time of her death, the husband could not enjoy curtesy as to reversionary or remainder interests she owned at the time of her death.

The wife's expectant or contingent interest in the lands of which her husband was seised in fee simple and fee tail at any time during the marriage was known as dower *inchoate*. If the dower right had not been barred and the contingency of survival had been fulfilled, her inchoate right became dower *consummate* upon her husband's death. Until her dower was actually assigned, however, she had no right to enter upon the lands except under her right of quarantine. *See generally* Haskins, *supra* note 17, at §§ 5.31-5.49 (discussing inchoate dower, consummate dower, assignment of dower, and barring of dower).

21. In America, dower rights varied greatly from jurisdiction to jurisdiction. *See generally* MARYLYNN SALMON, *WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA* 141-84 (1986) (discussing the historical divergence among American jurisdictions regarding married women's inheritance rights). For instance, studies of early inheritance law in America indicate that Virginia and Maryland granted a widow dower rights in realty and personalty. *Id.* at 149-56; *cf. infra* note 35 (demonstrating differences in current dower statutes in America). *See also* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1393-95 (1983) (noting that American reception of dower itself varied from colony to colony and state to state).

22. As Professors Cribbet and Johnson have noted, "[t]he common law regarded the husband and wife as one and the husband as the one." JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 89 (3d ed. 1989). *But cf.* 2 POLLOCK & MAITLAND, *supra* note 17, at 405-07 (preferring view that a husband's rights resulted from his guardianship over the wife); Haskins, *supra* note 19, at 346 (discussing husband's *iure uxoris* and noting that "unity of person" is a hackneyed fiction which ignores that "in many situations the law treated the wife as a person"). Haskins readily acknowledges, however, that the "incapacities of a married woman became proverbial in English law." *Id.* at 350; *see also* 2 POWELL, *supra* note 20, ¶ 210 (stating that "[t]hese interests [*iure uxoris*, curtesy *initiate*, and curtesy *consummate*] grew in a soil permeated by male dominance").

23. The unmarried mother was at a disadvantage. To obtain dower to protect herself and her children from disinheritance, a woman had to be married. The cohabitant's palimony suit was unknown at common law. *See infra* note 231 and accompanying text

unable or unqualified to venture from the home into a world run almost exclusively by men.<sup>24</sup> Dower as it developed, however, did not function *solely* for the protection of the surviving wife. At least in part, dower also served to ensure the support and education of the young children of the married couple.<sup>25</sup> Neither the testator's will nor his inter vivos transactions could unilaterally defeat the dower right once the required elements were met.

As long as society was agrarian and wealth was reflected primarily in ownership of real property, men deemed the dower third to be a satisfactory provision for widows and children.<sup>26</sup> Why the widower should be afforded the entire interest in his deceased wife's realty holdings cannot be totally explained apart from gender dominance.<sup>27</sup> To obtain curtesy rights, however, the

(discussing modern actions available to disinherited cohabitant).

24. Marylynn Salmon paints the following picture of dower in early America:

[O]ne characteristic remained constant, the enforced dependency of widows. Provisions governing the transfer of family property . . . assumed that economic dependency for widows was a norm to be enforced. Lawmakers apparently saw nothing inconsistent in their principles governing wives and widows. They made wives economically dependent on husbands during marriage, arguing under the principle of unity of person that this action was fair because the husband had the legal obligation to support them both. Once the husband had died, the courts did make his estate liable for the continued support of his widow, but only at a level far below the standard of living enjoyed by the two of them during marriage.

. . . .

. . . Early American society envisioned a dependent, subservient position for women of all ages, but not for men at any point in their adult lives.

SALMON, *supra* note 21, at 183.

25. 2 WILLIAM BLACKSTONE, COMMENTARIES \*130 ("[T]he reason, which our law gives for adopting [dower], is a very plain and a sensible one; for the sustenance of the wife, and the nurture and education of the younger children."); cf. Linda E. Speth, *More Than Her "Thirds": Wives and Widows in Colonial Virginia*, in LINDA E. SPETH & ALISON D. HIRSCH, WOMEN, FAMILY, AND COMMUNITY IN COLONIAL AMERICA: TWO PERSPECTIVES 5, 10 (1983) (noting that Burgesses in colonial Virginia felt dower provided basic minimum necessary for support of widow and her children). Although dower was an important source of indirect protection from disinheritance for the testator's children, the right originated solely to benefit the widow. See 2 POLLOCK & MATTLAND, *supra* note 17, at 419-22 (noting that dower was not awarded to a widow as to a mother who would keep a home for her husband's heirs).

26. See, e.g., Speth, *supra* note 25, at 10 (discussing the legal status of women in eighteenth-century Virginia).

27. See *supra* note 22 (discussing the common law subordination of the wife to the husband); George L. Haskins, *Curtesy at Common Law: Historical Development*, 29 B.U. L. REV. 228, 230 (1949) (noting difficulty of explaining with assurance the origins of "the liberality or 'courteousness' of English law" and discussing theories put forth by

widower must have fathered a child<sup>28</sup> by his wife.<sup>29</sup> The widow's dower right, although fractionally smaller than that of curtesy, was not dependent upon birth of a child to the couple.<sup>30</sup>

Maitland and Blackstone). Professor Haskins suggests that curtesy had its origins in the concept of guardianship, in promoting stability of the family group, and in the anti-feudal bias of early judges. *Id.* at 230-32; cf. 2 POLLOCK & MAITLAND, *supra* note 17, at 414-21 (noting that widower's guardianship of his children was a prominent early aspect of curtesy, although inclusion of entire estate cannot be easily explained). *But cf.* 3 HOLDSWORTH, *supra* note 17, at 186-87 (modern rule covering entire estate developed in interest of simplicity).

Professor Haskins dates the widespread recognition of the husband's right of curtesy to "at least as early as the end of the twelfth century." Haskins, *supra*, at 228. The right was enlarged over the course of the thirteenth century. *Id.* at 228-29. Concerning the origin of the term, early lawyers referred to the husband's marital life estate as a tenant "by the curtesy of England," to emphasize the liberality of the law as opposed to its Norman counterpart. *Id.* at 230 (emphasis in original). See also Paul G. Haskell, *Restraints Upon the Disinheritance of Family Members*, in DEATH, TAXES AND FAMILY PROPERTY 105, 106 (Edward C. Halbach, Jr. ed., 1977) ("Curtesy was a form of sexist aggrandizement . . .").

28. The child must have been alive at the time of birth and the mother must not have died in childbirth before the living child was delivered. See generally 2 BLACKSTONE, *supra* note 25, at \*126-28 (discussing the requirements under the common law to create a tenancy by the curtesy). The husband's right of curtesy could also depend upon the sex of the child. For instance, if the wife was a tenant in tail male and the only child born to the couple was female, the husband would obtain no curtesy. *Id.* at \*127-28. Moreover, if the property had been conveyed to the wife in special tail during a former marriage, the present husband had no curtesy.

29. Commentators have noted that the prerequisites for obtaining curtesy rights may help to explain "the eagerness with which the first heir was awaited, even by men with few of the normal fatherly characteristics." CRIBBET & JOHNSON, *supra* note 22, at 90.

30. The principal differences between dower and curtesy have been summarized as follows:

- (1) curtesy entitled the husband to an estate in all the wife's inheritable freeholds, whereas dower entitled the widow to an interest in only one-third of the husband's;
- (2) actual seisin on the part of the wife was required for curtesy, whereas seisin in law was sufficient for dower;
- (3) curtesy attached to the wife's equitable as well as to her legal interests, whereas dower was confined to the husband's legal estates;
- (4) a requirement for curtesy was the birth of issue, whereas there was no such requirement for dower;
- (5) before the wife's death curtesy was a present estate, whereas dower was only a protected expectancy before the husband's death;
- (6) since curtesy attached to all the wife's lands, rather than to a fractional share, there was no necessity for assignment, as in the case of dower.

George L. Haskins, *Curtesy in the United States*, 100 U. PA. L. REV. 196, 197 (1951).

Even considering the limitations on curtesy described in paragraphs two and four of the list above, it is undeniable that curtesy was on the whole more generous than dower. Moreover, the curtesy restrictions regarding actual seisin and birth of issue were relaxed

In the United States, the marital life estates were often modified in the last half of the nineteenth century when jurisdictions enacted Married Women's Property Acts.<sup>31</sup> As personalty began to supplement or supplant realty as a source of wealth in the estates of many men, twentieth-century legislators gradually acknowledged that the realty interests afforded by dower were often unsatisfactory to protect the widow and children.<sup>32</sup> Beginning with New York in 1930, common law states<sup>33</sup> gradually turned from a system of dower and curtesy to a system of protection based on the decedent's *entire* estate.<sup>34</sup> Nonetheless, even today a few states recognize dower by statute, although a survivor's rights under such statutes are frequently quite different from those found at common law.<sup>35</sup>

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in some American jurisdictions in the nineteenth century. *Id.*; see *infra* note 35 (indicating that today curtesy has generally been replaced by dower statutes available to surviving spouse of either sex).

31. See Haskins, *supra* note 30, at 197-98 (describing modification of common law curtesy, particularly in light of Married Women's Acts). For a discussion of Married Women's Acts, see generally Chused, *supra* note 21, at 1397-425 (concluding that Married Women's Acts were a result of women's increased role within the family, although not within the political and economic culture at large).

32. Dower inchoate was also considered to be an unnecessary burden upon the alienation of property. See *Pilone v. Blanda*, 544 A.2d 439, 440 (N.J. Super. Ct. Ch. Div. 1988) (noting that UPC commissioners viewed dower and curtesy as anachronistic burdens on alienation of property); *In re Estate of Riefberg*, 446 N.E.2d 424, 427 (N.Y. 1983) (discussing recommendation of Foley Commission in 1928 to abolish dower and curtesy); 3 HOLDSWORTH, *supra* note 17, at 197 (noting the seventeenth-century chancellors' belief that the wife's dower rights "inconveniently restricted" freedom of alienation). See generally 2 POWELL, *supra* note 20, ¶ 209[2] (discussing the common law characteristics of inchoate dower).

33. The term "common law states" is used in this article to distinguish the majority of American jurisdictions from the nine states that apply the community of acquests system of ownership to marital assets. Concepts of dower, curtesy, and forced or elective shares are largely superfluous in community property states. See *infra* notes 44-48 and accompanying text.

34. See *infra* notes 51-56 and accompanying text (discussing the elective share system).

35. Although dower rights created today are at least nominally akin to those found at common law, the differences may be greater than the similarities. The provisions vary greatly among the states that still recognize dower. For instance, 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. See, e.g., ARK. CODE ANN. §§ 28-11-101 to -404 (Michie 1987 & Supp. 1993) (extending dower and curtesy to personalty where decedent is survived by spouse and a child or children; terminating spouse's inchoate right of dower where other spouse has been barred from title to personalty or realty, evidenced by a recorded instrument of conveyance, for at least seven years; allowing survivor a one-half fee interest in certain non-ancestral realty where decedent dies without children); D.C. CODE ANN. §§ 19-102 to -103 (1981) (providing surviving spouse with "dower and its incidents as the rights there-

### B. Community Property

Nine American states apply community property principles to certain assets acquired during the marriage.<sup>36</sup> Community property

to were known at common law with respect to widows"; estate may be forfeited by desertion and adultery); KY. REV. STAT. ANN. §§ 392.010-.140 (Baldwin 1984 & Supp. 1993) (extending dower concept to personalty; abandonment combined with adultery bars spouse's right to dower or curtesy; discussing effect of bigamy on dower and curtesy rights); MICH. COMP. LAWS §§ 558.1-.92 (West 1988) (encompassing general dower provisions); OHIO REV. CODE ANN. §§ 2103.01-.09 (Anderson 1994) (explaining the circumstances under which surviving spouse is entitled to life estate in one-third of the inheritable estates of which the consort was seized during coverture).

Some jurisdictions that formerly allowed the creation of dower rights have abolished dower prospectively, resulting in a phasing out of dower in those states. Such states continue to recognize dower rights which vested prior to a specified date. *See, e.g.*, TENN. CODE ANN. § 31-2-102 (1984) (abolishing dower and curtesy prospectively in 1976, but neither abridging nor affecting such rights which vested prior to April 1, 1977).

The most recent departure from dower occurred in 1992 when West Virginia became the first state to adopt the 1990 revisions to the UPC. *See* W. VA. CODE § 43-1-1 (Supp. 1994) (abolishing dower and curtesy in 1992); *id.* §§ 42-3-1 to -2 (adopting accrual-type elective share). *See generally* Patricia J. Roberts, *The 1990 Uniform Probate Code's Elective-Share Provisions—West Virginia's Enactment Paves the Way*, 95 W. VA. L. REV. 55, 57 (1992) (discussing West Virginia's enactment of the 1990 UPC elective share provisions, concluding that such an enactment was a major step forward).

It appears that no state allows the creation of common law curtesy any longer. Those states that have abolished dower have also abolished curtesy. Of those states retaining dower, several extend dower protection to the surviving husband. *See, e.g.*, D.C. CODE ANN. § 19-102 (1981) (abolishing curtesy; widow or widower entitled to "dower"); OHIO REV. CODE ANN. §§ 2103.02, 2103.09 (Anderson 1994) (same). Other jurisdictions retain the term "curtesy," but treat it as the equivalent of dower. *See, e.g.*, ARK. CODE ANN. §§ 28-11-101 to -404 (Michie 1987 & Supp. 1993) (treating dower and curtesy as equivalents); KY. REV. STAT. ANN. §§ 392.010-.020 (Baldwin 1984 & Supp. 1993) (providing for the equal treatment of husband and wife). *See generally* 2 POWELL, *supra* note 20, ¶ 213 (discussing statutory modifications to dower and curtesy). Michigan affords a surviving spouse of either sex a right to a modern elective share. *See* MICH. COMP. LAWS ANN. §§ 700.281-.282 (West Supp. 1994). It also permits a widow to select dower in its traditional form as an alternative to the modern elective share. *See id.* §§ 700.282, 558.1-.29 (West 1988 & Supp. 1994); *cf.* *Rockwell v. Estate of Rockwell*, 180 N.W.2d 498, 501 (Mich. Ct. App. 1970) (noting that curtesy is a right not recognized by Michigan law).

36. The community property jurisdictions in the United States are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. Wisconsin may also now be considered a community property jurisdiction as a result of its enactment of community property principles effective 1986. *See* WIS. STAT. ANN. §§ 766.001-766.97 (West 1993 & Supp. 1994) ("It is the intent of the legislature that marital property is a form of community property.").

The degree to which community property affects family life in the United States is sometimes overlooked. Significantly, the combined population of the community property states represents more than 27% of the United States population. In light of the itinerant family commonly found in the late twentieth century, community property may play an important role in the lives of millions of other Americans as well. *See* 1993 STATISTICAL

is owned equally by the spouses; all other property is separate property and is owned by the husband or wife in severalty. The community property principles applied in America<sup>37</sup> are borrowed primarily from the civil law of Spain<sup>38</sup> and govern much more

ABSTRACT, *supra* note 11, at 33 (113th ed. 1993) (indicating that more than 70 million of 255 million citizens live in nine community property states).

37. See generally WILLIAM O. DEFUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §§ 1-53.1 (2d ed. 1971) (discussing the origins of community property and its establishment in United States); MCCLANAHAN, *supra* note 16, §§ 2:10-2:39 (1982 & Supp. 1989) (comparing marital property in common law and community property states); Anthony J. Pagano, *The Characterization and Division of Community Property*, in VALUATION AND DISTRIBUTION OF MARITAL PROPERTY §§ 20.01, 20.05[2] (Grace G. Blumberg, rev.) (John P. McCahey, ed. 1988) (discussing the nature, origin, and adoption of community property in the United States and the disposition of community property by will).

38. The Spanish system of community property is based on the community of acquests and must be distinguished from the universal community of Germanic origin used in Roman-Dutch law. Under the universal system, all property owned by either spouse at the time of the marriage becomes community property when the marriage is entered into. Any property acquired after the marriage is also community property, regardless of the source. No American jurisdiction uses the universal community approach. *But see infra* note 92 and accompanying text (discussing the 1990 UPC elective share provision which employs universal community approach at death of spouse).

Under the community of acquests approach, only property acquired during the marriage may be community property. Of this property acquired during the marriage, only that acquired by "onerous title" or by gift to both spouses becomes community property. Onerous title refers roughly to property acquired or earned through the efforts of either spouse during the marriage. Other property acquired during the marriage—for instance by devise, bequest, or inheritance—is acquired by "lucrative" title and does not become community property. See generally MCCLANAHAN, *supra* note 16, §§ 2.28-2.29 (distinguishing onerous and lucrative title in a general discussion of civil law terminology and theory); Pagano, *supra* note 37, at § 20.01[1] (discussing the nature of community property). Property acquired with community property is treated as community property. Property acquired during the marriage with separate property is typically separate property. Thus, in most community property states, property received as rent, issues, or profits from separate property is also treated as separate property. See Harry M. Cross, *Classification of Property as Separate or Community*, in MCCLANAHAN, *supra* note 16, at 329, §§ 6.10-6.13 (discussing how various states treat property received as rent, issues, or profits from separate property). In the remaining community property states, however, such rents, issues, or profits are treated as community property. See *id.* § 6:12 (listing jurisdictions following the "Spanish" rule).

A determination that marital property is community property is based on timing and method of acquisition. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 578 (1979). In community property states, title to property is therefore not controlling as to its status. Property placed in the name of one spouse may nonetheless be community property with an equal ownership interest recognized in the other spouse. See, e.g., *In re Marriage of Hurd*, 848 P.2d 185, 194 (Wash. Ct. App. 1993) (noting that the name under which property is held does not determine whether property is community or separate). In contrast, in common law states ownership of property depends upon title for most purposes. *But cf. Hisquierdo*, 439 U.S. at 578 n.11 (noting that in divorce proceedings title does not necessarily determine distribution in common law states); *infra* note 82 (discussing divorce and the con-

than devolution of property upon a spouse's death.

Upon completion of the nuptial vows, spouses in community property states become equal partners<sup>39</sup> throughout the existence of their marital "community."<sup>40</sup> This approach differs significantly from the historical common law view of marriage as a merger through which a wife's property interests were legally usurped by the husband.<sup>41</sup> In day-to-day affairs, however, wives and husbands traditionally were not equals even in community property jurisdictions. Until the 1960s, the husband was the sole manager of the community property.<sup>42</sup> Since the enactment of statutes providing

cept of equitable distribution, which does not focus entirely on title).

39. The spouses are considered equal partners irrespective of their actual contributions toward property acquisition during the marriage. *See, e.g.,* *McCarty v. McCarty*, 453 U.S. 210, 216 (1981) (stating that under the law of California and other community property jurisdictions, each spouse is deemed to make an equal contribution to the "marital enterprise" and thus shares equally in community property); *Meyer v. Kinzer*, 12 Cal. 248, 252 (1859) (Terry, C.J., & Baldwin, J., concurring) ("[M]arriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other.").

A wife could be expected to fare better in community property states than in common law jurisdictions, where she ceased to exist for many purposes upon marriage. *See* McCLANAHAN, *supra* note 16, § 2:20 (noting statement of historian Charles Beard equating marriage with civil death for the wife at common law). Although in everyday life male dominance was as pervasive in community property states as in common law states, a wife in a community property jurisdiction received explicit legal recognition that her contributions to marital life were as important as those of her husband. She could not be deprived of her right to the community assets. *See id.* §§ 2:30-:31 (discussing the extent and nature of the wife's interest in community property). Moreover, a wife in a community property state frequently retained management and control rights over her separate property. *Cf. supra* note 19 (discussing the treatment of a bride's personality at common law). The more equitable treatment of wives under community property principles is probably the reason that Washington and Idaho rejected the common law approach even though neither state possessed a Spanish heritage. Pagano, *supra* note 37, § 20.01[3][e]. With the enactment of Married Women's Property Acts beginning in the mid-1800s, common law states reduced the disparity in treatment of wives under the two systems. Even so, the widow in a community property state retained a one-half interest in the community property both during the marriage and upon her husband's death; the widow in a common law jurisdiction received only a one-third interest in her husband's realty upon his death.

40. *Cf. infra* notes 82-85 and accompanying text (noting that although the 1990 UPC elective share purports to recognize the economic partnership of marriage, its attempt to do so applies only when the marriage is terminated by death of a spouse).

41. *But see supra* note 22 and accompanying text (noting that some scholars prefer the guardianship theory over the usurpation theory).

42. For a discussion of the husband's historically exclusive "administrative duties" over community property (and, in some instances, even over the wife's separate property), see Pagano, *supra* note 37, § 20.06[1].

the wife with equal management powers over community property, the legal equality espoused by community property jurisdictions is more of a reality today than in the not too distant past.<sup>43</sup>

Because equal ownership of all community property is recognized *prior to* the death of either spouse, the need for a forced or elective share is eliminated.<sup>44</sup> The survivor retains her separate property<sup>45</sup> and her one-half interest in the community property,<sup>46</sup> while the decedent's separate property<sup>47</sup> and his one-half interest

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43. Although courts today agree that the wife in a community property jurisdiction has a true, present, and equal interest in community property, historically the stated equality of the partners' interests was somewhat misleading in view of the husband's management and control rights over the community property. It is only since the late 1960s that most of the community property states have enacted legislation to assure a wife equal rights of management and control in the community property. *See, e.g.*, LA. CIV. CODE ANN. art. 2346 (West 1985) (providing that each spouse alone may manage, control, or dispose of community property unless otherwise provide by law); *id.* art. 2347 (stating that concurrence of both spouses is required for alienation, encumbrance, or lease of immovables); WASH. REV. CODE § 26.16.030 (1994) (providing that either spouse acting alone may manage and control community property, but community realty cannot be bought, sold, conveyed, or encumbered without both spouses joining in execution). As a result of these modern statutes recognizing equal management rights in the spouses, wives in the community property jurisdictions have substantial protections not afforded to their counterparts in common law jurisdictions, where ownership by title often means the husband alone controls the bundle of sticks.

44. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 467-68 (1991) (noting that protection against inheritance is not deemed necessary in community property states).

45. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-214 (1991) (each spouse has sole management, control and disposition rights of his or her separate property); IDAHO CODE § 32-903 (1983) (property owned before marriage or acquired by gift, bequest, devise or descent after marriage, or acquired with proceeds of separate property, remains separate property); *id.* § 32-904 (wife has management, control, and absolute power of disposition of her separate property as does a married man); LA. CIV. CODE ANN. art. 2341 (West 1985) (separate property of a spouse is his or hers exclusively); NEV. REV. STAT. § 123.130 (1990) (separate property, including rents, issues, and profits thereof, belongs to individual spouse); *id.* § 123.170 (1989) (either spouse may convey, charge, encumber or otherwise in any manner dispose of his separate property without consent of other spouse); N.M. STAT. ANN. § 40-3-8(A) (Michie 1994) (separate property defined with reference to either spouse); TEX. FAM. CODE ANN. § 5.01(a) (West 1993) (separate property defined); *id.* § 5.21 (each spouse has sole management, control, and disposition of his or her separate property); WASH. REV. CODE §§ 26.16.010, 26.16.020 (1994) (providing that the husband and wife may each manage, lease, sell, convey, encumber, or devise by will their respective separate property as though each were unmarried); WIS. STAT. ANN. § 766.31 (West 1993) (distinguishing "individual" from "marital" property); *id.* § 766.51 (providing that spouse acting alone may manage and control his or her property that is not marital property).

46. *See, e.g.*, WIS. STAT. ANN. § 861.01 (West 1993) (providing that upon the death of one spouse, survivor retains his or her one-half interest in each item of marital property).

47. *See, e.g.*, CAL. PROB. CODE § 6101 (West 1991) (providing that a will may dis-



in the community property pass pursuant to his will or through intestacy.<sup>48</sup>

Legal scholars generally perceive the community property system of equal ownership during the marriage to be fairer than the common law system of ownership by title.<sup>49</sup> Nevertheless, with one exception, traditional common law jurisdictions in the United States have yet to convert permanently to community property principles.<sup>50</sup>

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pose of the testator's separate property); *cf. supra* note 43 (discussing statutes concerning management and control of separate property).

48. *See, e.g.,* ARIZ. REV. STAT. ANN. § 14-3101 (1975 & 1993 Supp.) (decendent spouse's separate property and share of community property devolve pursuant to will); CAL. PROB. CODE § 6101 (West 1991) (testator may dispose of separate property, one-half of community property, and one-half of quasi-community property); IDAHO CODE § 15-3-101 (1979) (separate property and one-half of community property subject to testamentary disposition); NEV. REV. STAT. § 133.030 (1987) (wife may dispose of entire separate estate by will); N.M. STAT. ANN. § 45-2-805 (Michie 1978) (one-half of community property is subject to testamentary disposition of surviving spouse); TEX. PROB. CODE ANN. § 58 (West Supp. 1994) (person competent to make will may devise all property owned at death and may disinherit an heir); WASH. REV. CODE § 11.02.070 (1987) (confirming one-half share of community property in surviving spouse upon death of decedent and permitting other half to pass by testamentary disposition); *id.* § 11.12.230 (intent of testator controls); WIS. STAT. ANN. § 861.01(1) (West 1993) (surviving spouse's one-half interest in marital property not subject to administration). Only one community property state substantially deviates from this general scheme of testamentary freedom. Alone in fact among all the states (community property or common law), Louisiana imposes testamentary restrictions in favor of forced heirs. *See infra* notes 115-23 and accompanying text (discussing forced heirship in Louisiana). In the absence of forced heirs, however, a Louisiana testator may leave all of his property as he wishes. LA. CIV. CODE ANN. art. 1496 (West Supp. 1994).

Because of the absence of the elective share in community property states, some community property jurisdictions have adopted statutes to protect the surviving spouse when the married couple has moved there from a common law state. These community property states have recognized the survivor's right to a portion of "quasi-community" property—i.e., property acquired by the decedent during the marriage while domiciled in a common law jurisdiction which would have been community property had the couple been domiciled in a community property jurisdiction at the time of acquisition. In Idaho, for example, the survivor is entitled to one-half of the quasi-community property of the decedent. *See* IDAHO CODE § 15-2-201 (1979) (defining quasi-community property and providing for disposition). Moreover, Idaho allows the use of the UPC augmented estate and elective share concepts to protect the survivor where the decedent has made transfers of quasi-community property without adequate consideration and without the survivor's consent. *Id.* §§ 15-2-201 to -202; *see also* WIS. STAT. ANN. §§ 861.02-.03 (West 1991 & Supp. 1993) (election of deferred marital property and augmented marital property estate).

49. Langbein & Waggoner, *supra* note 6, at 305-06. *See also* ATKINSON, *supra* note 4, at 26-27 ("The community property system gave to the surviving spouse the protection which the common law supplied inadequately through dower.").

50. *See supra* note 36 (noting Wisconsin's adoption of community property principles in 1986 and listing the states which are community property jurisdictions). Several com-

### C. The Elective Share

#### 1. The Conventional Elective Share

To remedy the inadequate protection afforded by dower and to prevent disinherited widows and young children from becoming public charges, legislators in common law states enacted elective share statutes as a replacement or substitute for the surviving spouse's legal life estate.<sup>51</sup> If the testator's bequest to the widow

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mon law states experimented briefly with the community property concept during the 1930s and 1940s, but not from a belief in the superiority of community property. Rather, these states sought to lower family income taxes by splitting income between spouses, since the joint marital return was not then allowed. Once the joint return was established, however, these states quickly reverted to the common law system, thereby implicitly recommitting themselves to traditional male dominance and power over the family. See Carolyn C. Jones, *Split-Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 266-74 (1988) (discussing temporary spread of community property laws between 1939 and 1947 so that state citizens would be taxed less).

Attorneys in common law states are often uncomfortable with community property concepts, perhaps largely because they have not been exposed to such concepts during the course of their legal education or practice. Detractors also note, however, that determining the status of property as separate or community can involve an arduous task of tracing back to the source of the property. See Cross, *supra* note 38, at 329-44 (discussing the classification of property acquired during marriage). Moreover, there are differences in the categorization of property among the various community property states themselves. See *supra* note 38 (discussing rents, issues, and profits). Although community property is theoretically the better of the two systems if marriage is viewed as an equal partnership, attorneys and legislators in common law jurisdictions are unlikely to support converting to community property principles. But see *infra* note 96 (citing articles in favor of conversion).

51. See, e.g., *Spencer v. Williams*, 569 A.2d 1194, 1197 (D.C. 1990) (statutory share derives from common law dower and originally was intended to prevent widow from becoming public charge and to protect her from disinheritance); *In re Estate of Anderson*, 394 So. 2d 1146, 1146 (Fla. Dist. Ct. App. 1981) (elective share is a substitute for dower and curtesy); *In re Estate of Shapiro*, 380 N.W.2d 796, 801 (Minn. 1986) (noting state's "strong interest" in protecting surviving spouses and in maintaining elective share scheme); *Arnold v. Anvil Realty Inv., Inc.*, 559 A.2d 444, 446 (N.J. Super. Ct. App. Div. 1989) (right of spouse to a share in deceased spouse's estate and in principal matrimonial residence replaced dower and curtesy and is intended to assure support for the survivor in some circumstances); *McKay v. Estate of McKay*, 501 A.2d 610, 614 (N.J. Super. Ct. Law Div. 1984) (dower and curtesy became unsatisfactory with change in social and economic conditions and where most wealth is now held as personalty); *In re Will of Henken*, 526 N.Y.S.2d 334, 337 (Sur. Ct. 1988) (statutory share designed to provide for support of wife after death of husband and should be liberally construed), *aff'd*, 540 N.Y.S.2d 886 (App. Div. 1989); *Bialczak v. Moniak*, 540 A.2d 962, 965 (Pa. Super. Ct. 1988) (elective share system supplanted dower and was intended to provide "measure of economic security" to surviving spouse). See also *infra* notes 270-72 (discussing effect of elective share on children).

The transition from dower to the elective share was accomplished state by state,

is less than that required by the statute, she can forego the bequest and instead take her statutory share. The elective share, unlike common law dower, extends not only to the testator's realty, but also to his personalty.<sup>52</sup> The elective share is also often called a forced share,<sup>53</sup> because the surviving spouse can force the estate to provide her with the prescribed statutory minimum despite the testator's contrary wishes clearly expressed in his otherwise binding will.<sup>54</sup> Today, most of the common law jurisdictions in the United States afford some form of forced share to the surviving spouse. These provisions are now equally available to widows and widowers,<sup>55</sup> although as a class widows still derive greater benefits from

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beginning with New York, over a period of several decades. For a brief but illuminating view of how the New York legislature made the transition in the late 1920s and early 1930s, see *In re Estate of Riefberg*, 459 N.Y.S.2d 739, 742 (1983) (discussing efforts of Foley Commission and Bennett Commission concerning elective shares). When enacted, the new statute contained loopholes through which a spouse could reduce or defeat the survivor's share by inter vivos gratuitous transfers. New York courts consequently developed the somewhat nebulous concept of the "illusory transfer" to rectify improper transfers until further legislation was enacted to close or at least narrow the gap. See *In re Estate of Agioritis*, 357 N.E.2d 979, 980-81 (N.Y. 1976) (noting transition to elective share in 1930 and discussing approaches to fraudulent transfers); *In re Estate of Crystal*, 352 N.E.2d 885, 886-87 (N.Y. 1976) (discussing illusory transfers and noting that purpose of elective share was to enlarge and protect widow's rights and to ensure freer alienability of land). See also *infra* note 67 and accompanying text (discussing fraudulent transfers in the law of elective shares).

52. Cf. *supra* notes 18-19 (discussing common law dower).

53. Some commentators have stated that the term "elective" is technically preferable, since the surviving spouse may elect whether to receive this amount. See, e.g., WAGGONER ET AL., *supra* note 44, at 473 (discussing how the term "elective" is more descriptive than "forced"). If the survivor does not so elect, the estate will not be "forced" to pay this amount. Nonetheless, the terms are used interchangeably in practice. The UPC uses the term elective share.

54. See, e.g., *In re Estate of Kueber*, 390 N.W.2d 22, 24 (Minn. Ct. App. 1986) (holding that survivor could elect statutory share from deceased husband's estate even though she had not seen him for 20 years prior to his death and had in fact remarried under the mistaken belief that she was divorced from him); *Fogo v. Griffin*, 551 S.W.2d 677, 679 (Tenn. 1977) (noting that widow's abandonment of husband or other misconduct does not affect her right to elective share); see also *infra* note 74 and accompanying text (discussing the arbitrary results of forced share).

55. See, e.g., MD. CODE ANN., EST. & TRUSTS § 3-203 (1991 & Supp. 1993) (surviving spouse may elect one-third of testator's net estate if testator leaves surviving issue; surviving spouse may take one-half if testator leaves no surviving issue); MISS. CODE ANN. § 91-5-25 (1972) (unsatisfactory provision to surviving spouse entitles survivor to intestate share of up to one-half of decedent's estate); PA. CONS. STAT. ANN. § 2203 (Supp. 1994) (surviving spouse electing against will may take one-third of assets to which decedent retained the right or power to enjoy during his lifetime); S.C. CODE ANN. § 62-2-201 (Law. Co-op. 1976 & Supp. 1993) (surviving spouse has right to elective share of one-third of decedent's probate estate); TENN. CODE ANN. § 31-4-101 (1984 & Supp.

their application.<sup>56</sup>

The conventional forced share allows the surviving spouse to receive a fixed fractional portion (often one-third<sup>57</sup>) of the value of the testator's probate estate<sup>58</sup> irrespective of the size of the estate, the survivor's need,<sup>59</sup> her earning capacity or independent

1994) (surviving spouse has right to elect one-third of decedent's net estate); VA. CODE ANN. § 64.1-16 (Michie 1950) (surviving spouse may elect one-third of testator's augmented estate if testator died leaving surviving children or their issue; in other circumstances, surviving spouse receives one-half of testator's augmented estate); cf. MASS. GEN. L., ch. 191, § 15 (1990 & Supp. 1994) (survivor may waive will provision and claim one-third of realty and personalty if decedent left issue; \$25,000 plus one-half of realty and personalty if decedent left kindred but no issue; \$25,000 plus one-half absolutely if no issue or kindred survive decedent; the first two scenarios may involve trust or life estate limitations where realty and personalty exceed \$25,000).

56. Cf. 1992 STATISTICAL ABSTRACT, *supra* note 11, at 77 (table showing longer life expectancies for females); *id.* at 412 (table showing greater numbers of male workers in labor force and higher median weekly earnings than those of females).

57. See *supra* note 55 (listing the forced share provisions of several common law jurisdictions).

58. For purposes of determining the size of the elective share, the decedent's estate is generally calculated to include at least the assets owned upon death. To prevent the testator from depleting his estate shortly before death in an effort to defeat or reduce the surviving spouse's award, many states have enacted statutes to allow such fraudulent conveyances or gifts to be set aside. When such conveyances occur, the assets may often be brought back into the estate for inclusion in determining the spouse's forced share. Fraudulent conveyance problems occur frequently in the reported case law and are the subject of many scholarly works. States have developed varying approaches to deal with the subject. See, e.g., TENN. CODE ANN. § 31-1-105 (1984) ("Any conveyances made fraudulently to children or others, with an intent to defeat the surviving spouse of his distributive or elective share, is voidable at the election of the surviving spouse."); *Young v. Hudgens*, No. 89-19-II, 1989 WL 71041, at \*6 (Tenn. Ct. App. June 30, 1989) (setting aside decedent's conveyance to her daughter made with intent to defeat husband's elective share). See also *infra* note 67 (discussing attempts to prevent fraudulent conveyances under the 1969 UPC).

Even when the assets constituting the estate against which the surviving spouse may elect are determined, their valuation may often remain a difficult question. See, e.g., *In re Estate of Kirkman*, 273 S.E.2d 712, 714 (N.C. 1981) (noting the difficulty of valuing property for purposes of elective share). Cf. *Phillips v. Phillips*, 252 S.E.2d 761 (N.C. 1979). In *Phillips*, the court also noted that North Carolina's statutory scheme for determining the qualified right to dissent might itself turn out to be "complex, time-consuming, and expensive," thus discouraging a deserving spouse from exercising the right to dissent. *Id.* at 770. Comparing the North Carolina qualified right to elect with the unqualified right characteristic of most states, the court noted concerning the latter: "[T]he compensations of certainty, ease of administration, the avoidance of expensive and time-consuming litigation . . . in all probability . . . results in no more inequities than does the present statutory scheme [in North Carolina.]" *Id.* at 771 n.2.

59. But see, e.g., *In re Estate of Merkel*, 618 P.2d 872, 874-75 (Mont. 1980) (holding that the elective share statute did not violate equal protection even though a competent survivor had an unrestricted right to elect but an incompetent survivor could only elect based on need). In *Merkel*, the Montana court found that, although the statute in question

sources of wealth, or her conduct during the marriage.<sup>60</sup> The duration of the marriage is also irrelevant: the widow whose husband dies immediately following the wedding vows and the widow whose husband dies after decades of marriage are each entitled to the same fixed portion of the deceased spouse's estate.<sup>61</sup> Simply put, the conventional forced share is highly arbitrary and may in some instances work more harm than good.<sup>62</sup>

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deprived the incompetent spouse of choice as well as excess funds to pass on to heirs, to invest, or to spend on unnecessarys, the statute was reasonable and not arbitrary. *Id.* The incompetent person is deprived of other choices as well by being placed under protective orders, and the primary purpose of the elective share is to provide for the survivor's needs. *Id.*

60. *See, e.g., In re Estate of Peck*, 497 N.W.2d 889, 889-91 (Iowa 1993) (holding wife's estate not entitled to any of husband's assets she would have received in divorce action pending at her death; moreover, husband could elect against her will which disinherited him). In a few jurisdictions, however, the surviving spouse's right to an elective share may be limited by his or her acts during the lifetime of the testator. *See, e.g., IND. CODE* §§ 29-1-2-14, -15 (1979) (surviving spouse who has abandoned decedent without just cause, or who is living in adultery at time of decedent's death, takes no part of decedent's estate); *N.J. REV. STAT. § 3B:8-1* (1983) (surviving spouse entitled to one-third of augmented estate provided that spouses were not living apart or had not ceased to cohabit based on divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce or annulment). In *Carr v. Carr*, 576 A.2d 872 (N.J. 1990), the widow had ceased to live with testator and divorce proceedings were pending at the time of his death. She was not entitled to equitable distribution because the husband died before the divorce was finalized. Nor was she entitled to an elective share: the New Jersey statute disallowed a forced share to a surviving spouse who was living apart from the testator at the time of his death. *Id.* at 876. Noting recent attempts to amend the New Jersey statute and eliminate this "black hole," the court concluded there was no reason why general equitable remedies available to unmarried cohabitants who separate should not be available to married persons who were in the process of divorcing when one died. *Id.* at 879 n.3, 880. The widow was thus free to pursue claims based on quasi-contract, quantum meruit, and constructive trust theories. *Id.*

One form of misconduct that will often prevent a surviving spouse from inheriting from the decedent is, of course, the willful and felonious killing of the decedent by the surviving spouse. The statutory requirements for forfeiture of an inheritance based on a felonious killing vary from state to state. *See, e.g., IND. CODE § 29-1-2-12.1(a)* (1979) (person is constructive trustee of any property acquired through decedent's death if that person was found guilty of murder, causing suicide, or voluntary manslaughter of the decedent); *TENN. CODE ANN. § 31-1-106* (1984) ("Any person who shall kill, or conspire with another to kill, or procure to be killed" shall forfeit inheritance, but not where killing is done by accident or in self-defense).

61. Not surprisingly, the latter occurs with more frequency than the former. *But cf. Neiderhiser Estate*, 2 Pa. D. & C.3d 302, 305 (1977) (after minister commenced prayer following wedding vows, groom slumped to the floor, gasped, and died; court held bride was widow entitled to letters of administration).

62. *See supra* note 54 (illustrating situations where application of the forced share is of dubious value).

## 2. The Uniform Probate Code—1969

In 1969, the drafters of the Uniform Probate Code ("UPC")<sup>63</sup> promulgated a refined elective share<sup>64</sup> that was later adopted and is currently used in a few common law jurisdictions.<sup>65</sup> The most striking departure from the conventional elective share approach was the UPC's use of the "augmented estate." Under this approach, the value of various properties traditionally not included in computing the decedent's estate are considered a part of the total estate against which the surviving spouse can elect.<sup>66</sup> One of the primary purposes behind the augmented estate concept was to prevent the decedent from reducing the surviving spouse's elective share by fraudulently transferring property to third parties shortly before his death.<sup>67</sup>

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63. See generally Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 893-901 (1992).

64. See 1969 UNIF. PROB. CODE §§ 2-201 to -207, 8 U.L.A. 73, 73-87 (1983).

65. See, e.g., ALASKA STAT. §§ 13.11.070-.100 (1962); COLO. REV. STAT. §§ 15-11-201 to -207 (1987); ME. REV. STAT. ANN. tit. 18-A, §§ 2-201 to -207 (West 1964 & Supp. 1993); MINN. STAT. §§ 524.2-201-.2-207 (Supp. 1994); NEB. REV. STAT. §§ 30-2313 to -2319 (1943); N.D. CENT. CODE §§ 30.1-05-01-.1-05-07 (1976 & Supp. 1993); UTAH CODE ANN. §§ 75-2-201 to -207 (1953).

The UPC's elective share scheme was enacted in South Dakota in 1974, more than eighty years after dower had been abolished in the state. See *supra* note 16 (discussing dower and spousal protection in South Dakota). Interestingly, the provision was not "well received" and the South Dakota legislature repealed it in 1976. See *In re Estate of Smith*, 401 N.W.2d 736, 737 (S.D. 1987) (discussing history of state elective share). In 1980, however, South Dakota enacted a new elective share provision. *Id.*

66. See 1969 UNIF. PROB. CODE § 2-202 cmt., 8 U.L.A. 75, 75-81 (1983). Section 2-202(1) includes within the augmented estate various transfers by decedent during the marriage which are essentially will substitutes. *Id.* Under § 2-202(2), the augmented estate also includes the survivor's property derived from the decedent (and property derived from the decedent which the spouse has in turn given away in a will-like transfer). *Id.*

67. See 1969 UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., 8 U.L.A. 73, 73 (1983) (describing statute and its purpose to protect spouse against improper transfers by decedent); see also *In re Estate of Grasseschi*, 776 P.2d 1136, 1139 (Colo. Ct. App. 1989) (noting that the legislative purpose in enacting augmented estate concept was to provide for surviving spouse and protect her from decedent's transfers to others to defeat her elective right), *cert. denied*, 785 P.2d 1253 (Colo. 1989); *Staples v. King*, 433 A.2d 407, 411 n.4 (Me. 1981) (noting that one of the main purposes of the UPC provision is to prevent spouses from making non-probate transfers to defeat the survivor's share); *In re Estate of Carman*, 327 N.W.2d 611, 613 (Neb. 1982) (elective share combined with augmented estate concept protects survivor from donative inter vivos transfers); *Carr v. Carr*, 576 A.2d 872, 878 (N.J. 1990) (noting that "a clear purpose" of UPC was to eliminate unfair depletion of one spouse's estate to the detriment of the survivor). See generally Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 1011-61 (1977) (describing the augmented estate provisions in detail); Langbein & Waggoner, *supra* note 6, at 303

The 1969 UPC spousal provisions not only successfully diminished the incentive for fraudulent conveyances by married individuals,<sup>68</sup> but also generally reduced the availability of election to surviving spouses.<sup>69</sup> The drafters accomplished this latter result by requiring that certain amounts received by the surviving spouse from the testator during his lifetime be applied against her elective share.<sup>70</sup> In most other respects, however, the 1969 UPC provisions are similar to conventional elective share provisions<sup>71</sup> and are be-

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(noting that forced-share reform found in Uniform Probate Code of 1969 eradicated "fraud on the widow's share").

Non-UPC common law jurisdictions typically have less structured methods for determining which transfers are fraudulent. Predicting in advance which transferred assets may be includable in the testator's estate is problematic in these jurisdictions. *See, e.g.,* *Methodist Episcopal Church v. Hadfield*, 453 A.2d 145, 148-50 (Md. Ct. Spec. App. 1982) (husband conveyed remainder interest in home to church, reserving life estate with power to sell or encumber). The *Hadfield* court noted various factors which may be considered: completeness of the transfer; retention of control by transferor; motive for the transfer; transferee's participation in alleged fraud; extent to which surviving spouse's share has been reduced; relative moral claims of surviving spouse and transferee; other provisions for surviving spouse; extent of surviving spouse's own estate or other means; and passage of time between the transfer and the transferor's death. *Id.* at 148. Although many non-UPC common law states have provisions addressing conveyances made to defeat or reduce a surviving spouse's statutory share, such statutes generally require proof that the transfer was fraudulent before the property transferred can be brought back into the decedent's estate. *See, e.g.,* TENN. CODE ANN. § 31-1-105 (1984) (fraudulent conveyance to defeat spousal forced share is voidable by surviving spouse). Proving fraud on the part of the decedent is not always a simple task. *See* *Warren v. Compton*, 626 S.W.2d 12, 17 (Tenn. Ct. App. 1981) (concluding that there is no fixed rule in Tennessee for determining when transfer is fraudulent under state statute). *See generally* Kurtz, *supra*, at 993-1011 (describing judicial and legislative safeguards against fraudulent transfers in non-UPC states); Scott A. Curnutte, Note, *Preventing Spousal Disinheritance: An Equitable Solution*, 92 W. VA. L. REV. 441, 444-52 (1990) (discussing generally "illusory transfer," "retention of control," "intent to defraud," and "present donative intent" tests as applied by courts in non-UPC common law jurisdictions to address "fraud on the widow's share").

68. Reducing and preventing fraudulent transfers to minimize a surviving spouse's forced share was an important ameliorative step in American forced share law. *See supra* note 67 (discussing protection from fraudulent transfer). A substantial portion of the cases involving the spousal elective share in non-UPC common law jurisdictions is still concerned with precisely this situation.

69. *See* 1969 UNIF. PROB. CODE § 2-202 cmt., 8 U.L.A. 77, 78 (1983) (explaining why the UPC elective share provisions "will operate in the long run to decrease substantially the number of elections").

70. 1969 UNIF. PROB. CODE § 2-207, 8 U.L.A. 86, 86-87 (1983). Under this section, amounts received by the surviving spouse from the decedent and included in the augmented estate are applied to satisfy the elective share. *Id.* In many instances these amounts will exceed the survivor's one-third share of the augmented estate.

71. *See supra* notes 59-61 and accompanying text (discussing conventional elective share provisions).

set by many of the same problems.<sup>72</sup> Upon determining the augmented estate, for example, the survivor receives a fixed elective share of one-third without regard to need, the size of the decedent's estate, or the duration of the marriage.<sup>73</sup> As with conventional forced share statutes, potentially unfair outcomes will occur at least occasionally.<sup>74</sup> Nonetheless, the 1969 UPC provisions were an improvement on their predecessors.<sup>75</sup>

### 3. The Uniform Probate Code—1990

The arbitrariness of the fractional forced share continues to concern legal scholars.<sup>76</sup> Why should the surviving spouse be provided with only one-third of the deceased spouse's estate if, as the current view would have it, marriage is an economic partnership?<sup>77</sup> Why should a fractional share be used at all?<sup>78</sup> Why not

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72. As scholars have noted, the UPC of 1969—like its conventional forced share law counterparts—demonstrated an “astounding insensitivity to differences in the duration of a marriage.” Langbein & Waggoner, *supra* note 6, at 303. See generally Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 715-48 (1992) (explanation of the redesigned spousal elective share by the Reporter of the Drafting Committee to Revise Article II).

73. 1969 UNIF. PROB. CODE § 2-201(a), 8 U.L.A. 74 (1983) (“If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.”). But see Langbein & Waggoner, *supra* note 6, at 308 (noting that argument that arbitrary fixed fraction inadequately addresses the survivor's need may be countered by consideration of cost of individuation).

Pursuant to § 2-207, the value of properties received by the surviving spouse and included in the decedent's augmented estate, as well as amounts which would have passed to the spouse but were renounced, are applied against the survivor's elective share. 1969 UNIF. PROB. CODE § 2-207(a), 8 U.L.A. 86 (1983).

74. See, e.g., *Hall v. McBride*, 416 So. 2d 986 (Ala. 1982). In *Hall*, the then-applicable elective share statute for widows only was held violative of equal protection. *Id.* Had the statute been upheld, the widow could have elected despite having lived apart from the deceased husband for seventeen years, having her own income, and having designated herself as single on her income tax returns during the time the two were separated. *Id.*; see also *supra* note 54 (providing examples of the arbitrary results of forced share).

75. See Averill, *supra* note 63, at 900-01 (noting influence and use of UPC and listing states that have adopted UPC largely in full). As Professor Averill notes, probate law in numerous other states has been affected by the UPC. *Id.*

76. See, e.g., Langbein & Waggoner, *supra* note 6, at 320 (“Forced-share law is intrinsically arbitrary. The fixed fraction . . . is arbitrary.”). The drafters of the 1990 UPC ultimately retained the forced share concept, but softened its harshness somewhat by abandoning the fixed fraction concept.

77. The commonly encountered fractional one-third may have been borrowed from the right of dower; however, today few people would deny that in many marriages, particularly those of long duration, the survivor made at least an equal contribution to the fami-



consider the length of the marriage in determining the portion of the estate to which the surviving spouse is entitled?<sup>79</sup> Why should the survivor's own estate not be considered in determining her ability to take an elective share?<sup>80</sup>

The drafters of the substantially redesigned elective share in the 1990 revisions to the UPC sought to address some of these questions.<sup>81</sup> The general comment to the elective share provisions

ly wealth. Providing the surviving spouse with a fixed one-half interest in the testator's estate might initially appear to place the surviving spouse in common law jurisdictions on the same plane as his counterpart in community property jurisdictions, but it would not do so in many or most instances. Under the community property system, the survivor owns a one-half interest in *marital* property during the marriage and that ownership continues when the spouse dies. The survivor, however, is generally not entitled to any of the testator's separate property at death if the testator's will disposes of it otherwise. Thus, a fixed one-half interest in common law jurisdictions would be even more advantageous for the surviving spouse than the system used in community property jurisdictions.

78. Providing the surviving spouse with any fixed fractional interest—one-third, one-half, or whatever—in the testator's estate will be "arbitrary" unless adjustments for other considerations are made. *See, e.g., supra* note 73 and accompanying text (discussing how the UPC of 1969 and conventional forced share provisions failed to consider the duration of a marriage).

79. A related question would inquire into the status of the marriage at the testator's death—are there circumstances indicating the marriage was not a happy one? A few common law jurisdictions make a limited, indirect inquiry of this sort, but the vast majority do not. *See supra* note 60 (discussing how the conduct of the surviving spouse can effect his or her right to an elective share).

80. *See infra* notes 89-91 and accompanying text (discussing the introduction of need into the elective share equation). *See, e.g., In re Estate of Schriver*, 441 So. 2d 1105, 1107 (Fla. Dist. Ct. App. 1983). In *Schriver*, the testator's will provided as follows:

It is my intent that my present wife . . . should not participate in my estate in that her own estate is entirely adequate to provide for her care. It has been our desire during our relatively short marriage that our estates should remain separate and pass to our respective children.

*Id.* The couple had been married for five years at the time of the testator's death. Despite the will provision, the widow's daughter from a previous marriage exercised a durable power of attorney on behalf of her mother to claim the elective share. *Id.*

81. The policy objectives of the 1990 Article II of the UPC have been described as follows:

- (1) to respond to the changes in the American family, especially the multiple-marriage society;
- (2) to extend the partnership theory of marital property, now recognized in divorce law, into the laws protecting surviving spouses from disinheritance;
- (3) to move toward unification of the law of probate and nonprobate transfers; and
- (4) to diminish the formalistic barriers to the implementation of transferors' intentions.

WAGGONER ET AL., *supra* note 44, at 63-64 (noting authors' belief that "1990 UPC Arti-

states that the principal purpose for the revisions "is to bring elective-share law into line with the contemporary view of marriage as an economic partnership."<sup>82</sup> This view, of course, is the basis of

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cle II is destined to be the model for American family property law deep into the next century"). See also John W. Fisher II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems*, 93 W. VA. L. REV. 61, 64, 98-100, 107-15 (1990) (reviewing the elective share provisions of the 1990 UPC).

82. 1990 UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., 8 U.L.A. 90, 90 (Supp. 1994). The economic partnership or marital sharing theory is based on the idea that husbands and wives presumably intend to combine their resources acquired during the marriage, even though no formal agreement was entered into by the partners and even though title to property may be in the name of only one spouse. The economic partnership does not presume such a bargain regarding property acquired by a spouse through gift or inheritance. See *id.* at 90-91; see also MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 131 (1989) (noting that the marital sharing theory recognizes and implicitly validates the contributions made by the spouse who stays home to rear children and further takes into consideration the opportunities foregone by that spouse); WAGGONER et al., *supra* note 44, at 464-79 (providing cases and materials on partnership theory of marriage); Langbein & Waggoner, *supra* note 6, at 308 ("Especially in the conventional marriage, in which the burdens of home and childcare fall mainly upon the wife, she should be entitled to a share of what she helped her husband earn."). The 1990 UPC provisions do not, however, distinguish between community and separate property, thus leading some to question the extent to which the economic partnership theory of marriage is successfully embodied in the provisions. See *infra* notes 92-93 (discussing the distinction between community and separate property and the problem of tracing).

As the comments to the 1990 revisions note, the economic partnership view has implicitly been accepted by the system of equitable distribution now followed in common law states upon divorce of the spouses. See 1990 UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., 8 U.L.A. 90, 90-96 (Supp. 1994); JOHN D. GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION* ¶ 1.03, at 1-6 to 1-8 (1989). In attempting to define equitable distribution, Gregory states as follows:

The hallmarks of the system are *broad discretion* for trial courts to assign to either spouse property acquired during the marriage, *irrespective of title*, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution 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.* at 1-6 (emphasis added). Although the revisers quoted this definition in the general comment to the 1990 UPC elective share provisions, it is clear that they preferred to avoid bestowing the broad judicial discretion characteristic of equitable distribution upon courts faced with questions of the share of the surviving spouse. See *infra* notes 146, 149 and accompanying text (discussing equitable distribution as applied to forced shares at death).

In *Carr v. Carr*, 576 A.2d 872 (N.J. 1990), the New Jersey Supreme Court discussed both equitable distribution and the forced share in the following terms:

[T]he principle that animates both statutes is that a spouse may acquire an interest in marital property by virtue of the mutuality of efforts during marriage

the community property system.<sup>83</sup> One might therefore expect that in common law states adopting the 1990 UPC elective share revisions, the result obtained will be similar to that achieved in community property jurisdictions.<sup>84</sup> Yet substantial differences remain between the two systems. Most importantly, the survivor's contributions to the marriage under the UPC revisions continue to be recognized only upon the death of her spouse. While both spouses are living, title alone determines ownership.<sup>85</sup>

To develop a more just forced share for the surviving spouse, the revisers of the UPC ultimately chose an accrual system. Under this system, the survivor receives an increase in his or her elective share for each year of the marriage up through the fifteenth year.<sup>86</sup> This accrued elective share is an attempt to rectify the frequently criticized fixed fractional elective share found in conventional forced share statutes and also under the 1969 UPC provisions.<sup>87</sup> Upon completion of the fifteenth year of marriage, the surviving spouse under the 1990 UPC is entitled to the maximum

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that contribute to the creation, acquisition, and preservation of such property.

This principle, primarily equitable in nature, is derived from notions of fairness, common decency, and good faith.

*Id.* at 879.

83. See *supra* note 39 and accompanying text (discussing the concept of spouses as equal partners in the community property system).

84. 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, 134-36 (1992) (criticizing the 1990 UPC as incorporating the universal community concept rather than the community of acquests, thus not truly allowing for implementation of the partnership theory of marriage).

85. The failure of common law jurisdictions to recognize ownership rights of the spouse without "title" to property acquired during the marriage is, of course, not a probate problem. The drafters of the revised UPC provisions, recognizing the disparity of treatment between the common law and community property systems, attempted to provide some uniformity between the two systems upon the death of the spouse in the common law jurisdiction. Left unresolved was the problem of fairness to the spouse without title to property during an existing marriage in a common law jurisdiction. See *infra* note 96 and accompanying text (giving an example of a spouse without title to property and discussing the implications of that problem).

86. 1990 UNIF. PROB. CODE § 2-202(a), 8 U.L.A. 92 (Supp. 1994). In each of the first ten years, the elective share increases by three percent. In the 11th through 15th years, the elective share percentage increases by four percent per year. Because of the augmented estate concept and the manner in which the elective share is satisfied, however, a surviving spouse entitled to a 50% elective share will not necessarily receive 50% of properties owned by the testator at his death. See *infra* notes 88-91 and accompanying text (discussing the calculation of the augmented estate).

87. See *supra* note 72 and accompanying text (examining how the conventional fixed share provisions and the UPC of 1969 are alike).

elective share of fifty percent of the decedent's augmented estate.<sup>88</sup>

To satisfy the elective share, the 1990 UPC takes into consideration part or all of the survivor's own wealth, depending upon the duration of the marriage.<sup>89</sup> Unlike the conventional forced share statutes and the 1969 UPC, the 1990 provisions address the common sense observation that a surviving spouse who is wealthy in her own right typically will have less need for a forced share than will a surviving spouse who has few assets titled in her name at the testator's death. Moreover, for the needy surviving spouse, the revised provisions even allow some additional protection in the form of a "supplemental" elective share amount.<sup>90</sup> Significantly,

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88. Assume Bill married Jill and Dan married Nan in a double wedding. Bill died shortly after he and Jill celebrated their fifth anniversary. Dan died shortly after he and Nan celebrated their 15th anniversary. Under the 1990 UPC provisions, Jill's elective share of Bill's augmented estate is 15%. Nan's elective share of Dan's augmented estate under the new UPC provisions is 50%. The accrual system thus contemplates vastly different treatment of spouses in five-minute, five-year, and 15-year marriages—all of whom are treated identically under previous forced share approaches in common law states.

To determine the elective share amount under the UPC, one must determine the augmented estate of the decedent against which the elective share percentage will be applied. The value of the augmented estate is generally described in § 2-203. It includes the sum of the values of all properties that constitute the decedent's net probate estate; the decedent's nonprobate transfers to others; the decedent's nonprobate transfers to the surviving spouse; and the surviving spouse's property and nonprobate transfers to others. These components of the augmented estate are specifically defined in §§ 2-204 to -207. Section 2-208 excludes the value of certain property from the decedent's nonprobate transfers to others, provides for valuation of components within the augmented estate, and prohibits double inclusions of property. Once the decedent's augmented estate is determined, the elective share percentage is applied to obtain the elective share amount. Finally, § 2-209 charges against the spouse's elective share the following: amounts included in the decedent's augmented estate which the survivor receives by testate or intestate succession; the value of the decedent's nonprobate transfers to the surviving spouse; and an amount representing the doubled elective share percentage multiplied by the survivor's own net assets and reclaims had the survivor predeceased the decedent. *See generally* 1990 UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., 8 U.L.A. 90, 90-96 (providing examples that demonstrate how revised elective share is to work). As can readily be seen, the revised provisions are more complex than the conventional fixed fractional share of most common law states.

89. 1990 UNIF. PROB. CODE § 2-209, 8 U.L.A. 112, 112-133 (Supp. 1994). *See also supra* note 88 (discussing how the duration of the marriage determines the elective share amount).

90. 1990 UNIF. PROB. CODE § 2-202(b) cmt., 8 U.L.A. 97, 97-98 (Supp. 1994). Under the provision, the following amounts are totalled: the value of the surviving spouse's property and nonprobate transfers to others under § 2-207; amounts described in § 2-209(a)(1), which are the amounts included in the augmented estate under § 2-204 that pass or have passed to the surviving spouse by testate or intestate succession and the amounts included in the augmented estate under § 2-206; and that part of the elective

this marks the first time need has been given special consideration in elective share law.<sup>91</sup>

The result obtained under the 1990 UPC provisions is nominally similar to that reached under community property principles. The accrual process employed in the revised UPC, however, is quite unlike anything encountered in community property jurisdictions. Moreover, the augmented estate concept invoked upon the death of the first spouse does not distinguish between "separate" and "community" property. The revised UPC simply applies the appropriate accrued percentage to all of the assets of either spouse that come within the augmented estate definition. This treatment of assets is thus more similar to the universal community than to the community of acquests found in American community property states.<sup>92</sup> The UPC solution does, however, avoid the sometimes difficult tracing problems that arise in community property states.<sup>93</sup>

Although the drafters of the revised UPC note the ease with which the elective share may be calculated and administered, the

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share amount payable from the decedent's probate estate and nonprobate transfers to others under §2-209(b). If the sum of these amounts is less than a legislatively determined amount (the drafters suggest \$50,000), then the surviving spouse is entitled to a supplemental elective share of the legislatively determined amount minus the sum of the amounts totalled above. *Id.* The supplemental elective share amount is payable out of the decedent's probate estate. *Id.*; see also UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., example 6, 8 U.L.A. 90, 95 (Supp. 1994) (demonstrating the mechanics of the supplemental elective share provision).

91. The supplemental share demonstrates the UPC's concern that the marital duty of support not be abruptly terminated to the detriment of a needy spouse. See Waggoner, *supra* note 72, at 742-46 (noting that fixed fractional forced share inadequately addresses need).

92. Langbein & Waggoner, *supra* note 6, at 319; see *supra* note 38 (distinguishing the two systems of community property); cf. Whitebread, *supra* note 84, at 134-36 (criticizing 1990 UPC's broad augmented estate which makes it almost impossible for spouse to maintain separate property absent pre- or post-nuptial agreement opting out of UPC coverage).

93. See, e.g., *In re Estate of Eliassen*, 668 P.2d 110, 113-16 (Idaho 1983) (characterizing the decedent's property as community or separate and discussing the tracing process); *Verheyden v. Verheyden*, 757 P.2d 1328, 1331 (Nev. 1988) (concluding husband's alleged oral statement that 1982 Honda was a gift to wife was not enough to overcome presumption of community property); see also WAGGONER ET AL., *supra* note 44, at 468-69 (providing three examples of tracing problems). See generally MCCLANAHAN, *supra* note 16, at 338 (noting that if there is any doubt, the presumption that the property is that of the community will control). Tracing ownership is required in American community property states because the system employed in these states is based on the community of acquests rather than upon the universal community. See *supra* notes 38, 50 and accompanying text (discussing the community of acquests and tracing problems).

provisions are more complex than those of the conventional elective share or the 1969 UPC.<sup>94</sup> Even with the accrued elective share system, the 1990 provisions may be criticized as arbitrary and somewhat inflexible, incapable of adequately covering the unique scenario.<sup>95</sup> Moreover, the 1990 UPC provisions do nothing to further spousal equality or the economic partnership theory *during* the marriage itself; in some scenarios, the provisions may not accomplish these goals even upon the death of one spouse.<sup>96</sup>

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94. See 1990 UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., 8 U.L.A. 90, 92 (Supp. 1994) (indicating that "ease of administration and predictability of result are prized features of the probate system" and that new provisions were designed with these goals in mind). Attorneys familiar with the fixed one-third elective share used in several states might at least initially question whether these prized features were retained. Familiarity with the mechanics of the process should prove that the new UPC provisions are not unduly complex and indeed are much fairer than the earlier provisions.

Ease of administration and predictability of results are considerations that have long concerned students of testate succession and descent and distribution. See, e.g., Langbein & Waggoner, *supra* note 6, at 314-17 (advocating accrual-type elective share provision for UPC and noting difficulty with discretionary system); see also J. BENTHAM, THE THEORY OF LEGISLATION 177-86 (C.K. Ogden ed. 1931), quoted in WAGGONER ET AL., *supra* note 44, at 38-41. Nonetheless, England and other commonwealth countries have turned to a discretionary system. The perceived problems with the discretionary system used in those countries have, on the whole, not proved insurmountable. See *infra* notes 124-65 and accompanying text (discussing the discretionary system in England and other commonwealth countries).

95. This criticism, of course, can be made of almost any attempt to formulate a well-defined, fixed-rule system for invading the realm of testamentary freedom.

For an enlightening discussion of the drawbacks of the 1990 UPC elective share provisions, see Whitebread, *supra* note 84, at 134-39. One problem of the 1990 provisions is the extremely broad augmented estate, which is more akin to the concept of the universal community than that of the community of acquests. *Id.* at 134-36; see *supra* note 38 (discussing the community of acquests and universal community concepts). Moreover, as Whitebread convincingly demonstrates, the provisions appear to be concerned primarily with protection of the surviving spouse, despite the stated goal of incorporating the economic partnership theory. Whitebread, *supra* note 84, at 137. The provisions also fail to provide for the unique case and will produce unfair results in some cases, as indeed do all forced share systems. *Id.* at 137-39. Whitebread concludes, "If the goal [of the 1990 UPC elective share provisions] is a partnership theory of marriage . . . it must be recognized that while the revised UPC is certainly better than the pre-1990 UPC and a step in the right direction, it is not a very large step." *Id.* at 139.

96. Assume, for instance, that when Dan dies after 15 years of marriage, wife Nan possesses substantial wealth inherited from her own family. Dan's estate is comprised only of assets earned during the marriage. In community property states, Nan's inherited wealth would constitute separate assets which would not affect her one-half interest in community assets. Under the UPC provision, however, Nan's assets, from whatever source derived, will to some extent offset the amount that she will be able to claim from Dan's net probate estate and nonprobate transfers to others, depending on the length of the marriage. How do we justify the UPC approach? Proponents of the UPC may argue that if Nan is wealthy in her own right she hardly needs a full elective share from Dan's estate. If, however, we consider the marriage as a partnership to which Nan has made a contribution

Despite these deficiencies, the revised UPC forced share scheme is an improvement over the conventional elective share provisions and the 1969 UPC statutes.<sup>97</sup> The 1990 provisions are not inordinately complex,<sup>98</sup> and they do contain a special provision for the needy surviving spouse. While the provisions also contain more flexibility than earlier counterparts,<sup>99</sup> precise statutory guidelines ensure that judicial discretion cannot run

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equal to that of Dan, should she not be entitled to a full 50% of Dan's assets earned during the marriage?

The general comment to the 1990 UPC elective share provisions implicitly acknowledges the continuing difference between the common law and community property approaches. It states: "By granting each spouse *upon acquisition* an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple's enterprise is in essence collaborative." 1990 UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., 8 U.L.A. 90, 91 (Supp. 1994). Moreover, Professors Langbein and Waggoner readily admit that "[f]orced-share law is the law of the second best. It undertakes upon death to correct the failure of a separate-property state to create the appropriate lifetime rights for spouses in each other's earnings." Langbein & Waggoner, *supra* note 6, at 306. The drafters of the UPC did consider incorporating community property principles in the common law states on a deferred-until-death basis. Perceived classification problems, including tracing, appear to be the primary reason the drafters rejected this approach. See Waggoner, *supra* note 72, at 730-34 (also noting that couples in common law states would be at risk if good records were not maintained under the deferred-until-death approach).

To implement fully the economic partnership theory of marriage, common law states must be willing to adopt community property principles. To date, they have shown little inclination to make a permanent conversion. See *supra* note 50 and accompanying text (discussing Wisconsin's adoption of community property in mid-1980s). A very few states appear to be considering adoption of the Uniform Marital Property Act (UMPA). See Whitebread, *supra* note 84, at 141 (noting that several states are considering enacting UMPA, but concluding that widespread adoption does not appear promising). Compare June M. Weisberger, *Should Your State Adopt UMPA? Yes*, PROB. & PROP., Sept.-Oct. 1987, at 39-43 (asserting that principal reason for adoption is to ensure that marriage is treated as a partnership; few opponents articulate ideological differences with community property approach) with Jackson M. Bruce, Jr., *Should Your State Adopt UMPA? No*, PROB. & PROP., Sept.-Oct. 1987, at 39-43 (asserting that Wisconsin reform was climax to misguided feminist effort to reform a common law system that was already gender neutral; new system has resulted in classification, estate planning, and creditor problems). See generally 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, 776-81 (1990) (discussing Wisconsin's experience in converting to community property and examining differences between state statute and UMPA).

97. Both the Executive Board and the Assembly of the National Association of Women Lawyers approved the redesigned elective share provision of the 1990 UPC. 1990 UNIF. PROB. CODE, art. II, pt. 2, gen. cmt., 8 U.L.A. 86, 86 (Supp. 1993); WAGGONER ET AL., *supra* note 44, at 478.

98. The provisions are not simple, however. See *supra* notes 88-91 (discussing the 1990 UPC provisions for determining the elective share amount).

99. See *supra* notes 71-73 and accompanying text (discussing fixed fraction characteristic of conventional elective share provisions and 1969 UPC forced share awards).

amok.<sup>100</sup> In sum, the 1990 UPC elective share provisions are the best forced share alternative devised to date. States have already begun to adopt them and they will probably be influential for many years.<sup>101</sup>

#### D. Forced Heirship for Descendants

The three preceding subsections examined the principal means by which a surviving spouse in the United States is directly protected from disinheritance. Disinherited minor children in this country historically have received only indirect protection trickling down from the award to the surviving spouse.<sup>102</sup> In many countries, however, this conduit theory of protection is unnecessary because children receive direct protection as forced heirs of the testator.<sup>103</sup>

##### 1. Common Law Jurisdictions

Although into the fourteenth century English law assured the testator's children a forced portion of his chattels, that right had largely vanished when America was colonized and had completely disappeared by the time of the American Revolution.<sup>104</sup> Pollock

100. See *supra* notes 88-91 and accompanying text (discussing 1990 UPC elective share provisions).

101. See *supra* note 35 (noting that West Virginia was the first state to adopt 1990 UPC elective share provisions). See also MONT. CODE ANN. §§ 72-2-221 to -227 (1993) (adopting 1990 UPC provisions regarding elective share).

102. Pretermitted child statutes ultimately became part of the laws of testation in most states. The protection they afford, however, is typically for the child who is unintentionally omitted from the will. See, e.g., IND. CODE ANN. § 29-1-3-8(a) (1979) (providing that child born after execution of testator's will and unintentionally omitted therefrom receives intestate share); R.I. GEN. LAWS § 33-6-23 (1956) (protecting pretermitted issue born after execution of will unless omission was intentional); UNIF. PROB. CODE § 2-302(b)(1), 8 U.L.A. 105 (Supp. 1994) (providing that a child intentionally omitted from testator's will does not receive a share of the estate). See generally Robert E. Mathews, *Trends in the Power to Disinherit Children*, 16 A.B.A. J. 293, 294-95 (1930) (suggesting that some courts subordinated testamentary power to social obligation by misconstruing presumptions underlying pretermitted child statute); Jan E. Rein, *A More Rational System for the Protection of Family Members Against Disinheritance: A Critique of Washington's Pretermitted Child Statute and Other Matters*, 15 GONZ. L. REV. 11, 25 (1979) (questioning the validity of the presumption underlying pretermitted child statutes). Professor Rein states flatly, "[f]orgetting about the existence of a child one already has is on a par with misplacing a house—not very likely." *Id.* She suggests that such statutes are solutions to the wrong problem; the real problem is permitting intentional disinheritance of children. *Id.* at 26.

103. See *infra* note 111 (noting that most civilized countries give children direct protection from disinheritance by their parent).

104. JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 228 (6th ed.



and Maitland suggest that the demise of the child's portion in England may have been an unfortunate historical accident.<sup>105</sup> Nevertheless, the American colonies and their successor states ultimately borrowed the English model, recognizing curtesy and dower in the spouse<sup>106</sup> while rejecting direct protection for the testator's chil-

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1990); see also ATKINSON, *supra* note 4, § 36, at 138 (noting that the children of an English testator generally lost the right to claim a share of testator's personality by the time of Charles I). Because land was equated with wealth in feudal England, disinheritance involving personality was less important than disinheritance involving realty. In portraying the confused history of the English child's forced portion of chattels, Pollock and Maitland suggest the following:

To the modern Englishman our modern law, which allows the father to leave his children penniless, may seem so obvious that he will be apt to think it deep-rooted in our national character. But national character and national law react upon each other, and law is sometimes the outcome of what we must call accidents. Had our temporal lawyers of the thirteenth century cared more than they did about the law of chattels, wife's part, bairns' part and dead's part might at this day be known south of the Tweed.

2 POLLOCK & MAITLAND, *supra* note 17, at 353. See generally *id.* at 348-56 (discussing the history of English); George W. Keeton & L.C.B. Gower, *Freedom of Testation in English Law*, 20 IOWA L. REV. 326, 337-40 (1935) (discussing the history of the child's forced portion in England). Prior to the disappearance of the right, the testator's surviving children were entitled to one-third of his personality. The protection of the children from disinheritance is mentioned in the Charter of 1215. Keeton & Gower, *supra*, at 337. Although this scheme of forced heirship appears to have died out in large part by the end of the 14th century, in some localities it lasted much longer. *Id.* at 338. The scheme continued in London until 1724. *Id.* The protection may finally have disappeared because it was unpopular with London merchants, who refused to live in a city where they could not completely dispose of their personality by will. Cahn, *supra* note 5, at 140-41.

With regard to realty, the Statute of Wills, 32 Hen. VIII (1540), largely ended compulsory primogeniture. See generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 293 (3d ed. 1990) (statute allowed landowners to devise two-thirds of land held in knight service and all lands held in socage); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 191 (2d ed. 1986) (same). Military tenure was abolished in 1660 by 12 Car. II c. 24; from that time forward, a testator was free to devise all of his land. ATKINSON, *supra* note 4, at 18 n.56.

105. See 2 POLLOCK & MAITLAND, *supra* note 17, at 353 (noting that English law concerning the child's forced share "seems to [have] slip[p]ed unconsciously into the decision of a very important and debatable question"); Keeton & Gower, *supra* note 104, at 339 (noting historical accident theory); see also 3 HOLDSWORTH, *supra* note 17, at 554-56 (noting that the testator's freedom to dispose of his realty and the need for a court to supervise the children's guardian may account for the demise of the child's share).

106. See Haskins, *supra* note 30, at 197 (comparing curtesy and dower and noting that the marital life estate appeared in the colonies as early as 17th century). Although the child's forced share of personality was ultimately rejected in all common law states, it appears to have received very limited recognition in colonial America before disappearing altogether. See, e.g., SALMON, *supra* note 21, at 149 (noting that in colonial Maryland, one-third of male testator's personality descended absolutely to children despite will provisions to the contrary). Concerning realty, following the Revolutionary War the states by constitutional provision or statute rejected the English system of primogeniture with its

dren.

Disinheritance of adult children appears to be quite common in the United States<sup>107</sup> and is less troubling than disinheritance of a minor child. After all, adult children presumably are capable of providing for themselves. A minor child excluded from a parent's will, however, typically is unable to provide for herself and often must depend solely or largely upon the surviving parent for support, if a surviving parent exists.<sup>108</sup> When few marriages ended in

preference for the eldest surviving male heir. See Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 24-25 (1927) (noting attacks on and abolition of primogeniture in the early history of the United States); see also THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 9 (2d ed, 1984) (asserting that primogeniture was "never cordially received in this country"). This is not to say that eldest sons were treated the same as other children early in the history of the United States. For a fascinating and valuable study of women and inheritance in early America, see SALMON, *supra* note 21, at 141-84 (noting that until the late 1700s several colonies or states retained primogeniture or granted the eldest son double portions or other special treatment). Salmon notes that mothers stated their dislike of primogeniture more frequently than did fathers. *Id.* at 142. Cf. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 30 (Kermith Hall et al. eds., 1992) (asserting that Americans favored dispersal of wealth and disliked the aristocratic system of limiting inheritance of land to a single heir).

For a general discussion of primogeniture, see 2 BLACKSTONE, *supra* note 25, at \*212-16 (noting that "as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred"). Explaining the English system of primogeniture, Blackstone carefully notes that, unlike under other legal systems, English females were not totally excluded from the right of inheritance; if there were no son, then the daughters would take equally before any collateral relatives. *Id.* at \*214. England did not abolish primogeniture until the Administration of Estates Act, 1925, 15 & 16 Geo. 5, ch. 23 (Eng). See BERGIN & HASKELL, *supra*, at 8 n.20 (discussing abolition of primogeniture in England and noting that at least during some early period following the Norman invasion, a system of equal distribution to surviving sons challenged the system of primogeniture before succumbing); cf. 2 BLACKSTONE, *supra* note 25, at \*215-16 (noting equal descent of socage estates to all sons as late as the reign of Henry II and further noting inheritance by the youngest son only in some localities).

107. See SUSSMAN ET AL., *supra* note 5, at 97-103 (detailing specific examples of and motives behind disinheritance of adult children).

108. See *supra* note 25 and accompanying text (noting that, at least in part, dower also served to ensure the support of the married couple's young children). Blackstone himself apparently believed that the indirect protection afforded by dower was preferable to a forced inheritance directly to the testator's children. In discussing wills and testaments, he noted that "[i]f a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice." 2 BLACKSTONE, *supra* note 25, at \*13. Blackstone concluded, however, that such a stance is erroneous and that "the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society." *Id.* Discussing the origins of inheritability of property, Blackstone noted that a "strict rule of inheritance made heirs disobedient and head-strong . . . and prevented many provident fathers from dividing or charging their estates as the exigence of their families required." *Id.* at \*12; see also

divorce, the common law marital estates of dower and curtesy served to protect most minor children from complete disinheritance. In his writings, Blackstone explicitly acknowledged the importance of dower to the testator's children.<sup>109</sup>

In the United States, legislators apparently believed that the forced share would indirectly benefit the couple's minor children just as dower had done. Initially, the forced share achieved that goal. When the forced shares were first enacted in the 1930s, multiple marriage and single parenthood were uncommon; thus, the minor children receiving the indirect benefits of the elective share were in most instances the minor children of the testator. Today, however, often the testator's minor children are not children of the surviving spouse. In these instances, the surviving spouse has no legal obligation and may have little emotional incentive to use her elective share for their benefit. Moreover, she quite often will have minor children who are not those of the testator; ironically, the conduit effect will inure to their benefit (because of her legal obligation of support) while the testator's own disinherited children are excluded. It seems unlikely that legislators anticipated this anomalous result in light of social norms which existed when forced shares were first enacted.<sup>110</sup>

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*id.* at \*116 (discussing entailed estates and noting that "[c]hildren grew disobedient when they knew they could not be set aside").

109. See *supra* note 25 and accompanying text (discussing dower and its importance to the testator's young children). This "trickle down" or conduit theory also applies to the forced share in the traditional nuclear family and may be important in intestacy scenarios governed by the 1990 UPC. See Waggoner, *supra* note 72, at 707 (noting that the revised intestacy provision of the 1990 UPC grants everything to the surviving spouse and excludes the children in a strict nuclear family). But cf. *infra* notes 255-57 and accompanying text (noting that conduit theory leaves children of cohabitants unprovided for).

110. Courts today emphasize that the elective share's purpose is to provide for the surviving spouse or perhaps to recognize her contributions to the marriage. Not surprisingly, these courts ignore the indirect benefits afforded to her children, who in modern times frequently are not children of the testator. See, e.g., *In re Estate of Anderson*, 394 So. 2d 1146, 1147 (Fl. Dist. Ct. App. 1981) ("[T]he elective share is for the express purpose of caring for the surviving spouse and not to augment the estate for the benefit of heirs."). In *Anderson*, the surviving but incompetent husband died shortly after his wife, without exercising his right to take an elective share under Florida law. *Id.* at 1446. The court refused to allow the husband's son, who was also the husband's personal representative, to make the election posthumously for the husband. *Id.* at 1447. The court concluded that the elective share was not meant to benefit the survivor's adult children from a prior marriage. *Id.* See also *supra* note 25 (Blackstone on the purpose of dower); *supra* notes 107-10 and accompanying text (discussing surviving spouse as conduit for indirect benefit of her children).

## 2. Civil Law Jurisdictions

Forced heirship is a characteristic of the laws of succession in civil law countries<sup>111</sup> and provides protection from disinheritance to children of a testator.<sup>112</sup> The French system of testate succession, for example, ensures protection for the children of a testator by recognizing the legitime, or portion of the parent's estate of which a child cannot be disinherited without cause.<sup>113</sup> By contrast, the French testator is free to disinherit his surviving spouse, because she is protected through recognition of her ownership of one-half of the community property and through retention of her separate property.<sup>114</sup>

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111. See *In re Estate of Panzeca*, 543 N.E.2d 161, 163-64 (Ill. App. Ct. 1989) (contrasting succession laws in civil law and common law countries). In civil law jurisdictions, the testator's intent is important only with respect to the portion of his estate not subject to forced heirship laws. *Id.* at 164. In common law jurisdictions, however, the testator's intent is the primary focus of inquiry and will be given effect if not against public policy. *Id.*

Most of the civilized countries in the world provide direct protection from disinheritance to children of a testator. A few of the many countries that protect the children of a testator from complete disinheritance include Argentina, MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST ARG-7 (1994); Austria, *id.* at AUT-4; Belgium, *id.* at BLG-3; Brazil, *id.* at BRZ-6; France, *id.* at FRA-11; Germany, *id.* at GER-9; Greece, *id.* at GRC-4; Italy, *id.* at ITL-5; Japan, *id.* at JPN-6; Spain, *id.* at SPN-6; Sweden, *id.* at SWD-4; and Switzerland, *id.* at SWZ-19. See also George A. Pelletier, Jr. & Michael R. Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 VILL. L. REV. 323, 349-53 (1966) (discussing forced heirship in civil law countries); cf. *infra* notes 124-65 and accompanying text (discussing the system of testator's family maintenance used in England, New Zealand, Australia, and some provinces of Canada).

112. Forced heirship can also apply in favor of ascendants of the decedent. No American jurisdiction includes parents among the forced heirs of a testate decedent, although Louisiana did so until 1982. See LA. CIV. CODE ANN. art. 1494 (West 1987) (repeal effective Jan. 1, 1982) (discussing disposable portion of testator's estate when parents survived); see also Michael P. Porter, Comment, *Forced Heirs, The Legitime and Loss of the Legitime in Louisiana*, 37 TUL. L. REV. 710, 728-31 (1963) (discussing the history of the parental forced heirship provision in Louisiana).

113. See GLENDON, *supra* note 82, at 246-49 (discussing French system of intestate and testate succession, citing French Civil Code art. 913). Thus, unlike his counterpart in 49 of the 50 American states, the typical testator in France may not bequeath his entire estate to the surviving spouse if he dies leaving children. *Id.* at 248.

114. *Id.* In discussing testate succession, Professor Glendon notes that the difference in treatment of the surviving spouse under French and American laws is not remarkably disparate. She states, however, that "[p]erhaps it is the American failure to secure a share of parental estates to children that ought to appear remarkable." *Id.* (emphasis added). On this latter point, however, she concludes that the French may have a genuinely different attitude concerning the importance of blood ties:

One must never forget when one speaks of the surviving spouse as a forced heir, that there will always be a fundamental and irreversible difference between

In the United States, only Louisiana employs the civil law concept of forced heirship. Even there, forced heirship has been the source of much controversy. After acrimonious struggles, the Louisiana legislature in 1989 and 1990 severely restricted the traditional legitime that had applied to all children of a testator.<sup>115</sup> Under the

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the spouse and the other forced heirs. The others are the ascendants and the descendants of the decedent. Their right to a forced share is an unquestionable right, because it is founded on a blood tie, which no one, not even the future decedent, can destroy. It is different with a spouse. The inheritance rights of a spouse are derived from marriage, in the absence of divorce or legal separation. The protection that one might wish to assure to a surviving spouse can only boomerang against him because of the fragility of the basis of such a right.

*Id.* (quoting Michel Dagot, *Le Conjoint Survivant, Héritier Réservataire?*, 1974 RECUEIL SIREY DE DOCTRINE 39, 40). Despite French opinion polls indicating that participants favor increasing protection for the surviving spouse, the participants also remain in favor of forced heirship for children. *Id.* at 248-49.

An American Bar Foundation telephone survey conducted in five states in May of 1977 indicated that American parents generally are willing to leave the matter of their children's inheritance to the surviving spouse, except perhaps when there are children from a prior marriage. *See* Fellows et al., *supra* note 7, at 367 (noting that citizens appear to feel "primary but not exclusive responsibility to the spouse even when a child of a prior marriage also survives"). The 1977 survey found no significant differences in attitudes towards property distribution between respondents with wills and those without wills. *Id.* at 385. *But see id.* at 327 (noting that the sample was somewhat biased in underrepresenting the lowest education and income categories, but that generalizations could be made with reasonable confidence); *id.* at 360 (suggesting that regional differences in attitudes may exist; respondents in southern states were more likely than other respondents to favor intestate share for children). The respondents were less willing, as a whole, however, to leave their entire estate to the surviving spouse than were testators studied in previous surveys. *Id.* at 359; *see also infra* note 273 (discussing studies by Dunnam, Browder, and Sussman).

115. Forced heirship was a hotly debated issue in Louisiana throughout the 1980s. *See* Jeri Clausing, *Repeal of Forced Heirship Narrowly Passes Senate*, UPI, May 29, 1984, available in LEXIS, Nexis Library, Wires File (providing views of Louisiana state senators on forced heirship issue). In 1984, opponents of the legitime sought to pass a constitutional amendment that would allow the state legislature to abolish forced heirship. *Id.* Opponents of forced heirship argued that testators should have the same freedom to disinherit children enjoyed by testators in the other 49 states. *Id.* Advocates for the legitime, however, argued that forced heirship was needed now more than ever, since the likelihood of a longer life combined with the increased chance of senility might cause parents to take unjustified actions to disinherit their children. *Id.* They also noted the possibility that blood relations might be passed over in favor of second families. *Id.*

The 1990 statute, which severely restricted forced heirship, also engendered controversy. *See* Frances F. Marcus, *Disinheritance Law Kindles Passion in Louisiana*, N.Y. TIMES, Dec. 1, 1989, at B7 (discussing 1990 statute). Some scholars believed that the amended legitime, which for the first time permitted parents to disinherit an adult child for no reason, would "tear at family ties, add fuel to the fire in family disputes and create the potential of costly intrafamily litigation." *Id.* Cynthia Samuel, a law professor at Tulane, stated that "[g]reed, prejudice, jealousy, meanness and fear will henceforth have a much freer hand in influencing a parent's testamentary plans." *Id.* She also noted that

amended statute, the Louisiana legislature limited the class of forced heirs principally to children who had not reached age twenty-three at the death of the testator.<sup>116</sup> In September of 1993, however, the Supreme Court of Louisiana held that the 1989 and 1990 amendments and the limiting statute violated the state constitution and restored the right of forced heirship to all children of a testator.<sup>117</sup>

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forced heirship "is an old legal institution that serves a new social purpose, guaranteeing that kids don't get divorced from their inheritance when their parents get divorced from each other." *Id.* Professor Glendon stated that "with about 50 percent of all marriages ending in divorce, [the old forced heirship law] has become modern again because of the changed circumstances." *Id.* Comparing the forced heirship law with the testamentary freedom allowed in the other states, Professor Glendon noted that when a parent remarries in other states, children from the first marriage "are apt not to see property that was accumulated during that marriage . . . . [The forced heirship law of] Louisiana enabled an older person to say to the second spouse 'the law requires me to leave a portion of my estate to my children.'" *Id.*

It appears that many of those who supported abolition of forced heirship were "testators . . . involved in some down-and-dirty family fight[s]." *Id.* (quoting a state representative in favor of continuing the forced heirship system). A former staff lawyer in the State Attorney General's office who favored continuation of the old system stated that one legislator had told her, "[t]his is my money, I made it and I can do what I want with it." *Id.* Her reply was "[t]hey're your children and you made them too and they have a claim." *Id.*

116. LA. CIV. CODE ANN. art. 1493 (West Supp. 1994). The class also included (a) descendants of a predeceased child if the child would not have reached the age of 23 at the time of the testator's death and (b) children of any age who were incapable of taking care of themselves because of mental incapacity or physical infirmity. *Id.*

117. Succession of Lauga, 624 So. 2d 1156 (La. 1993). The court relied on the first sentence of Article XII, § 5 of the 1974 Louisiana constitution, which provides that "[n]o law shall abolish forced heirship." *Lauga*, 624 So. 2d at 1157. The court found that the constitutional provision "guarantees the individual right of a child to an equal share of a forced portion of his or her decedent's estate and maintains the correlative public principle of equality of heirship, which furthers the goals of dispersion of wealth, family solidarity, and reduction of litigation." *Id.* at 1158. The court noted that by dividing children into "eligible" and "ineligible" categories, the amended statute would lead to inequality of treatment and likely breed litigation—exactly those things forced heirship was intended to counter. *Id.* The majority did not address the question of whether the statute violated the equal protection clause under the state constitution. *See id.* (stating that it was not necessary to address the equal protection argument).

There were three dissenting opinions, all of which concluded that the majority erroneously interpreted the second sentence of Article II, § 5, which provides: "The determination of forced heirs, the amount of the forced portion, and the grounds for disinheritance shall be provided by law." *Lauga*, 624 So. 2d at 1183 (Marcus, J., dissenting); *id.* (Hall, J., dissenting); *id.* at 1184 (Kimball, J., dissenting). Justice Kimball concluded the amended statute did not violate Article II, § 5 or Article I, § 3, the equal protection clause, of the state constitution. *Id.* at 1197-1200. *See also infra* note 284 (discussing equal protection concerns regarding a lifetime which discriminates based on age).

Note that Justice Kimball's lengthy dissent contains a valuable history of forced heirship beginning with Roman law. *See Lauga*, 624 So. 2d at 1185-93 (discussing Ro-

Under the Louisiana system, the forced heir cannot be deprived of the legitime, or fixed portion of his parent's estate, unless just cause for disinheritance exists.<sup>118</sup> If only one child qualifies as a forced heir, then his legitime is twenty-five percent of his parent's estate.<sup>119</sup> If two or more forced heirs are living at their parent's death, the legitime of the children is fifty percent.<sup>120</sup> Just cause for disinheritance of a child otherwise entitled to a forced share is defined in a fascinating statute.<sup>121</sup> Procedurally, the parent

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man, French, and Spanish law). He presents persuasive historical arguments that the forced heirship system Louisiana borrowed is not static, but rather is subject to change as society changes. *See id.* at 1185-89.

118. LA. CIV. CODE ANN. art. 1494 (West, Supp. 1994).

119. *Id.* art. 1495. The parent's "donations" that are subject to the forced heirship provision include all property belonging to the testator at death and property disposed of by certain gifts inter vivos. *Id.* art. 1505.

120. *Id.* art. 1495. It is possible that in some instances a child's intestate share would be smaller than his forced share under Louisiana law. In those situations, the legitime is to be calculated using the intestate fraction. *Id.*

121. LA. CIV. CODE ANN. art. 1621 (West 1987 & Supp. 1994). The statute lists twelve "just causes" for disinheriting a child. Undoubtedly, some of them are largely relics. For instance, if the child has refused to ransom a parent detained in captivity, just cause for disinheritance of the child exists. *Id.* art. 1621(7). A child may also be disinherited if he has attempted to take the parent's life, *id.* art. 1621(3); has accused the parent of a capital crime, *id.* art. 1621(4); was able but refused to provide sustenance to the parent, neglected to take care of the parent who was insane, *id.* art. 1621(6); used violence or coercion to prevent the parent from making a will; was convicted of a crime punishable by life imprisonment or death, *id.* art. 1621(11); was able but refused to provide security for a parent to take the parent out of prison, *id.* art. 1621(9); or knew how but failed without just cause to contact the parent for two years after attaining the age of majority (except when on active duty in the U.S. military), *id.* art. 1621(12).

The statute potentially could justify disinheritance in a great number of cases. For example, just cause also exists if the child has raised his or her hand to strike the parent (although a mere threat to do so is not sufficient!). *Id.* art. 1621(1). Moreover, the child's cruelty toward the parent is a reason to cut the child out of the parent's estate. *Id.* art. 1621(2). But in *Succession of Landry*, 463 So. 2d 681 (La. Ct. App. 1985), these two grounds were interpreted somewhat strictly. In *Landry*, the testatrix died 33 years after the incident between her and her son Wilbert that gave rise to her attempt to disinherit him in her will. *Id.* at 682-83. During a squabble with his testatrix/mother over the removal of a refrigerator, Wilbert took a hatchet and threatened to chop up the refrigerator in front of her. *Id.* at 683. There was conflicting testimony whether Wilbert had pushed or shoved the testatrix during the fracas. *Id.* at 684. Noting that "[t]here is no right more sacred than that of a forced heir to inherit his legitime," the court held that the conduct did not constitute an attempt to strike his mother. *Id.* Nor were Wilbert's act and his subsequent failure to speak to his mother for the 33 years preceding her death "cruelty" as contemplated in the statute, because "[a]n argument which results in prolonged indifference by both parties cannot be characterized as 'cruelty' by one of the parties." *Id.* Note that subsequently the legislature statutorily overruled *Landry*. *See Succession of Pizzo*, 557 So. 2d 388, 389 (La. Ct. App. 1990) (pointing out that under modern subparagraph 12 of article 1621, if a child today fails without just cause to communicate with the parent for

attempting to exclude a forced heir must express the reason for the disinheritance in the will.<sup>122</sup> Unless the disinherited heir proves the stated just cause did not exist or that a reconciliation with the testator-parent occurred after the act in question, the child is effectively disinherited.<sup>123</sup>

### *E. Judicial Discretion and Family Maintenance*

#### 1. England

Unlike civil law countries, which recognize both community property and the legitime to protect family survivors, common law countries traditionally attach great importance to testamentary freedom.<sup>124</sup> At the very beginning of this century, however, New Zealand became the first common law country to buck tradition by enacting provisions allowing judicial awards to certain family members disinherited or unprovided for by the testator.<sup>125</sup> Almost four

a period of two years after attaining the age of majority, he can be disinherited), *cert. denied*, 561 So. 2d 501 (La. 1990).

One final cause for disinheritance that is the subject of some older case law is the marriage of a minor child without the consent of the parent. *See* LA. CIV. CODE ANN. art. 1621(10) (West 1987 & Supp. 1994). *See, e.g.*, *Stephens v. Duckett*, 36 So. 89, 90 (La. 1904) (quoting testator who partially disinherited his daughter "who so deeply grieved and offended me by her elopement and marriage with Mr. J.D. Stephens against my consent"); *Successions of Burns*, 27 So. 883, 884-85 (La. 1900) (upholding disinheritance of son, although parents' wills were executed 17 years after minor son had married without parental consent).

122. *See* LA. CIV. CODE ANN. art. 1624 (West Supp. 1994). *See also Stephens*, 36 So. at 90 (noting a will clause expressing intent to disinherit a child for marrying without parental consent and testator's failure to mention child's minority did not prevent disinheritance).

123. LA. CIV. CODE ANN. art. 1624 (West Supp. 1994). Proof of reconciliation must be clear and convincing, and evidenced in a writing signed by the testator. *Id.*

124. *See supra* note 5 and accompanying text (discussing testamentary freedom); *see also* Dainow, *supra* note 4, at 344 n.42 (noting that despite five centuries of testamentary freedom in England prior to 1938, complete testamentary freedom in fact was not established until the Wills Act of 1837, which removed limitations on dispositions of certain land tenures excluded from the Statute of Wills of 1540).

125. In 1900, New Zealand abandoned absolute testamentary freedom in favor of a radically innovative system which ultimately served as the basis for current testate succession laws in Australia, several of the Canadian provinces, and England. Testator's Family Maintenance Act of 1900, N.Z. STAT., No. 20 (1900). *See also* Widows and Young Children's Maintenance Act, 1906, VICT. STAT., 6 Edw. 7, No. 2074; Testator's Family Maintenance Act, 1920, BRIT. COL. STAT., 10 Geo. 5, ch. 94. For a discussion of the origins of New Zealand's laws concerning testamentary disposition, *see* Joseph Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107, 1107-17 (1938). The Family Maintenance Act of 1900 avoided the forced heirship provisions of civil law countries and generally allowed the testator freedom to dispose of his property



decades later, England (the country from which our near reverence for testamentary freedom originated) adopted provisions similar to those of New Zealand.<sup>126</sup> One of the factors persuading Parliament to change course was its acknowledgment that very few civilized countries still permitted the disinheritance of children and other members of the immediate family.<sup>127</sup> Moreover, like New Zealand, other countries within the commonwealth had increasingly abandoned the notion that testamentary freedom should prevail over the obligation to one's dependents.<sup>128</sup> The inheritance system that originated in New Zealand and that has significantly diluted testamentary freedom in commonwealth countries is commonly referred to as testator's family maintenance.<sup>129</sup> The following textual dis-

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as he wished. *See id.* at 1110-15 (providing examples and effects of the Act). Where, however, the testator died without leaving adequate provision for the proper maintenance and support of the testator's spouse or children, the court was given discretion to order such provision from the estate of the testator as the court thought fit. *See id.* at 1110-12 (discussing Testator's Family Maintenance Act of 1900 and amendments). The legislative history of the Act indicates its purpose was to ensure that a testator's dependents were treated justly and to avoid unwarranted burdens upon the state where the testator's property is left to others. 113 N.Z. PARLIAMENTARY DEBATES 502, 613-15 (1900), *cited in* Dainow, *supra*, at 1109. Some jurisdictions subsequently adopting a family system similar to that of New Zealand minimized the state's interest in avoiding indigent survivors. *See, e.g., In re Doogan*, 23 S.R. (N.S.W.) 484, 409 W.N. 121 (1923) (noting that the New South Wales statute was intended to benefit testator's dependents, not to relieve public burden), *cited in* Dainow, *supra*, at 1121.

126. Inheritance (Family Provision) Act 1938, 1 & 2 Geo. 6, ch. 45 (Eng.). *See generally* J. Unger, *The Inheritance Act and The Family*, 6 MOD. L. REV. 215, 224-27 (1943) (reviewing early cases under the 1938 Act and concluding that they showed no decline in family obligations but did hint at uncertainty of direction).

Dower, perhaps the most important protection against disinheritance at common law, survived into the 20th century. The Dower Act of 1833, 3 & 4 Will. 4, ch. 105 (Eng.), however, allowed a husband to extinguish his wife's right of dower; from that time until the Inheritance (Family Provision) Act 1938, 1 & 2 Geo. 6, ch. 45 (Eng.), the English testator was essentially free to disinherit all members of his family. *See* 3 HOLDSWORTH, *supra* note 17, at 197 nn.4-5 (discussing Dower Act of 1833). The widow remained entitled to dower after the 1833 Act, but (i) only to those estates to which the husband held a beneficial interest at his death and (ii) only if he had not exercised his power to defeat her right by deed or will. 3 HOLDSWORTH, *supra* note 17, at 197; *see also* Keeton & Gower, *supra* note 104, at 335-37 (history of dower to its abolition in 1925); *see supra* notes 17-30 and accompanying text (discussing dower at common law). For several centuries prior to 1939, the English testator had largely been free to disinherit his children. *See supra* notes 104-05 and accompanying text (discussing testators' rights from the 13th to the 18th century).

127. Dainow, *supra* note 4, at 356.

128. *See generally* Dainow, *supra* note 125, at 1117, 1124-25 (discussing early 20th-century abandonment of absolute testamentary freedom in Australia and Canada); *see also supra* note 125 (noting that in 1900 New Zealand became the first common law country to depart from traditional testamentary freedom).

129. This was the name of the original statutory scheme adopted in New Zealand in

cussion focuses on the current English provisions, which are found in the Inheritance (Provisions for Family and Dependents) Act 1975.<sup>130</sup>

Under Section 1 of the Act, a decedent's spouse<sup>131</sup> or children<sup>132</sup> may file a claim against the decedent's estate if the will (or the law of intestacy) does not provide the survivor with a "reasonable financial provision."<sup>133</sup> This curtailment of testamentary freedom is only the beginning, however. Claims for reasonable financial provision may also be made against the estate by any person who was treated by the decedent as a child during any of the decedent's marriages,<sup>134</sup> as well as by any person who was being maintained in whole or in part by the decedent immediately prior to the decedent's death.<sup>135</sup> Perhaps most unusual is the

1900. See *supra* note 125 (discussing New Zealand's laws on testamentary disposition).

130. Inheritance (Provisions for Family and Dependents) Act, 1975, ch. 63 (Eng.) (effective Apr. 1, 1976). When the English Law Commission sought to reform the original 1938 Inheritance Act, the commissioners considered and rejected both a fixed share system and the community property concept and instead recommended an expansion of the discretionary powers under the Act. See Richard R. Schaul-Yoder, Note, *British Inheritance Legislation: Discretionary Distribution at Death*, 8 B.C. INT'L & COMP. L. REV. 205, 212-13 (1985) (discussing the Law Commission's recommendation to give the court discretionary power to ensure that the surviving spouse would receive at least the protection afforded a divorced spouse).

131. Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 1(1)(a) (Eng.).

132. *Id.* § 1(1)(c).

133. *Id.* § 1. The meaning of the term "reasonable financial provision" depends on the relationship of the claimant to the decedent. In the case of the surviving spouse, the term means the provision that would be reasonable in light of all circumstances, whether or not the provision is required for maintenance of the spouse. *Id.* § 1(2)(a). For all other applicants, the term includes only that amount reasonable under the circumstances for maintenance. *Id.* § 1(2)(b). See also J. Gareth Miller, *Provision for a Surviving Spouse*, 102 LAW Q. REV. 445, 473-74 (1986). The English system of "reasonable financial provision" for the surviving spouse was based upon earlier provisions in English divorce law. Professor Miller concludes that a discretionary system operating under clear guidelines should be able to perform the function of providing a reasonable financial provision for the surviving spouse better than a fixed system of inheritance. Discussing reasonable financial provision to the surviving spouse, he notes, however, that "[w]hat is needed . . . is a clear statement of objectives which draws attention to the need to achieve a division of capital assets if appropriate in the circumstances of a particular case." *Id.* at 474.

Prior to the 1975 Act, all claims were limited to amounts needed for maintenance. In its Working Paper which preceded the Inheritance Act 1975, the Law Commission noted that women were disenchanted with the discretionary system and were demanding definite property rights. THE LAW COMMISSION, WORKING PAPER NO. 42, ¶ 0.22 (1971), cited in Schaul-Yoder, *supra* note 130, at 210-11.

134. Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 1(1)(d) (Eng.).

135. *Id.* § 1(1)(e). The decedent is deemed to have been maintaining a claimant under

statute's provision that specifically permits a claim to be made by the decedent's *former* spouse who has not remarried.<sup>136</sup>

The Act effectively permits a judge not only to alter the testamentary wishes of the decedent,<sup>137</sup> but also to do so in a highly

§ 1(1)(e) if he was providing a "substantial contribution" towards the claimant's reasonable needs other than for full consideration. *Id.* § 1(3). See generally Suman Naresh, *Dependents' Application Under the Inheritance (Provision for Family and Dependents) Act 1975*, 96 LAW Q. REV. 534, 536-54 (1980) (discussing difficulties of determining whether an applicant was being "maintained in whole or in part" under § 1(1)(e)).

Concerning the New Zealand approach to spousal claims, an instructive case is *Re Sutton*, 2 N.Z.L.R. 50 (C.A. 1980), in which the 40-year-old testator died leaving a wife (against whom he had instituted divorce proceedings) and their four minor children. His will left his current dwelling to his 20-year-old lover and cohabitant, with the residue of his estate to go to his children equally upon reaching 21. The lover gave birth to the testator's child after his death. The Court of Appeal noted the difficulty of administering the Family Protection Act where parties with competing moral claims are vying over a small estate. The court concluded:

[T]he fairest course, and the best that can be done towards satisfying the claim of the plaintiff and her children in the light of the competing moral claims on the testator's estate, is to divide the net estate into halves. As to one half the widow should have the income for life, the capital to be divided equally between the children of her marriage with the testator. As to the other half, [the lover] should receive thereout the sum of \$3000 and the balance should be held on trust for [the illegitimate child].

*Id.*

136. Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 1(1)(b) (Eng.). Although the collective sense of obligation in the United States may have successfully limited testamentary freedom for the sake of the surviving spouse (and, indirectly, minor children in traditional families), Americans seem unlikely to embrace a comprehensive inheritance scheme which allows testamentary plans to be revised to benefit former spouses. Cf. *In re Estate of Rayman*, 495 N.W.2d 241, 243-44 (Minn. Ct. App. 1993). In *Rayman*, Richard included his ex-wife Laura in his will. The couple subsequently remarried only to divorce a second time. Although the provision for Laura in Richard's will had not been changed, the court held that the bequest had been revoked upon the divorce. *Id.* (noting split of authority on issue of revocation in these circumstances).

137. *In re Mercer*, 1 N.Z.L.R. 469 (1977), demonstrates the power of a New Zealand court to deviate from the testator's will. In that case, the testator specifically disinherited the wife from whom he had been separated for several years, noting that she had deserted him and alienated the affection of his children. He also disinherited his two daughters from the marriage, leaving everything instead to a cousin's wife because she had been good to him.

The court noted two important questions to be addressed. First and most important, "what provision [would] a just and wise husband and father ' . . . have thought it his moral duty to make . . . had he been fully aware of all the relevant circumstances.'" *Id.* at 472. The court noted that fault of the applicant could be taken into consideration in answering this question. In the instant case, however, the court found that fault lay primarily with the testator. Second, the court must ask "what is the need for maintenance and support in the case of the claimants before the court?" *Id.* at 473. The court stated that the claimants need not be in necessitous circumstances to qualify for an order, although the size of the estate must be considered before an order can be made. *Id.*

discretionary manner.<sup>138</sup> Surprisingly lacking in the statute are well-defined guidelines<sup>139</sup> to lend some element of certainty and predictability to the outcome of a claimant's application against the testator's estate.<sup>140</sup> Also, an application under the English Act must be made to and evaluated by a court. As a result, the costs associated with an English applicant's claim<sup>141</sup> will generally be greater than costs associated with a surviving spouse's claim in the United States, since the latter claim is submitted to the estate executor.<sup>142</sup>

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The court concluded that in this scenario, a "wise and just husband and father" would have regarded the circumstances in which the wife and daughters had lived and further would have considered their expenses. *Id.* In light of the age and health of the wife, the court concluded that the estate should be divided so that the widow received two-fifths, the two daughters one-fifth each, and the beneficiary named in the will the remaining one-fifth. *Id.*

138. *See, e.g., Re Christie*, 1 All E.R. 546, 550-52 (Ch. 1979) (transferring residuary property left equally to son & daughter solely to applicant son). For an excellent discussion of finding the proper balance of fixed rules and discretion, see generally Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1165-68 (1986) (noting that property law is characterized by fixed rules, family law by discretion—where the two meet at death or divorce the optimal balance between rules and discretion is difficult to maintain). Professor Glendon, voicing the view of most American commentators, states that "it is far from clear that a system that permits redistribution of decedents' estates according to a judge's own notion of what is reasonable is preferable to either free testation or forced heirship." *Id.* at 1186. She notes further that family allowance provisions found in most states already permit judges to make discretionary support allowances to meet the needs of the surviving spouse and children during estate administration. *Id.* at 1189.

139. Lack of guidance for courts was one of the unsuccessful objections raised to the Inheritance Act of 1938. *See Dainow, supra* note 4, at 355-56.

140. Even when an application under the Inheritance Act 1975 on its face appears likely to succeed, the amount of the award cannot be predicted with accuracy. Moreover, the order of abatement of legacies under the will against which the award will be made cannot be foretold. Rather, the judge's discretion permeates all phases of the decision. *See, e.g., Malone v. Harrison*, 1 W.L.R. 1353 (Fam. Div'l Ct. 1979) (determining reasonable financial provision to one of testator's mistresses and reducing legacy to testator's brother).

141. Historically, costs in most English probate actions were paid out of the estate. This is in contrast to the general English law, under which the losing party may be ordered to pay costs for both sides. *See Arthur L. Goodhart, Costs*, 38 YALE L.J. 849, 868-70 (1929) (noting that English probate law required estate to pay costs). In *Re Fullard*, 2 All E.R. 796 (C.A. 1981), however, the court noted that judges should look closely at merits of an application before ordering the estate to pay costs when the applicant is unsuccessful. This is especially true concerning a small estate. Thus there may be some disincentive to bringing baseless claims under the Act.

142. *See, e.g., Jelley v. Iliffe*, 2 All E.R. 29 (C.A. 1981) (repeatedly expressing concerns over litigation costs on small estate in doubtful claim by brother-in-law against testator's estate); *Re Coventry*, 3 All E.R. 815 (C.A. 1979) (it was "little short of disastrous that the plaintiff was advised to contest" in light of the small estate involved). *See*

When a surviving spouse files a claim under the Act, the court is to consider the provision she would likely have received if the marriage had ended by divorce at the time of the testator's death.<sup>143</sup> If such a provision were to be adopted in American ju-

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also Langbein & Waggoner, *supra* note 6, at 308 (suggesting that the cost of individual determinations may be too high to justify adoption of discretionary system in the United States).

143. Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 3(2) (Eng.). Under § 3(2) of the Act, the court is also to consider the age of the applicant and the duration of the marriage as well as the applicant's contribution to the welfare of the decedent's family, including looking after the home and caring for the family. *Id.* § 3(2)(a) & (b). See also Miller, *supra* note 133, at 447-48. Although the English Law Commission was attracted to a fixed inheritance concept, it ultimately decided to use a discretionary system in which

[s]o far as is practicable in the differing circumstances, the claim of the surviving spouse upon the family assets should be at least equal to that of a divorced spouse, and the court's powers to order family provision for a surviving spouse should be as wide as its powers to order financial provision on divorce . . . .

[W]e now propose criteria which would enable the court to adopt an approach similar to that adopted in divorce proceedings and to recognize that a surviving spouse may be entitled to a share of the family assets by virtue of contributions to the welfare of the family . . . .

*Id.* at 448, 454 (emphasis omitted) (quoting THE LAW COMMISSION, SECOND REPORT ON FAMILY PROPERTY: FAMILY PROVISION ON DEATH, Law Com. No. 61, ¶¶ 2(b), 33 (1974)).

Difficulties arise "from the need to apply to relatively straightforward family circumstances the sophisticated machinery of the 1975 Act, which combines elements of fact-finding, discretion and hypothesis in a formula of some elaboration." *Moody v. Stevenson*, 2 All E.R. 524 (C.A. 1992) (LEXIS, Enggen library, Cases file). The *Moody* court noted that the English succession act beginning in 1938 had increasingly reduced the testamentary freedom "cherished for many years in England and Wales." *Id.* It further noted that the test of reasonableness as to the testator's provision is to be determined *objectively* under the 1975 Act. With regard to application by surviving spouses, the court stated as follows:

In other words the 1975 Act, when stripped down to its barest terms, amounts to a direction to the judge to ask himself in surviving spouse cases: "What would a family judge have ordered for this couple if divorce instead of death had divided them; what is the effect of any other section 3 factors of which I have not taken account already in answering that question; and what, in the light of those two inquiries, am I to make of the reasonableness, when viewed objectively, of the dispositions made by the will and/or intestacy of the deceased?" If the judge finds those dispositions unreasonable, he will go on to ask himself: "What, in the light of those same inquiries, would be a reasonable provision for me to order for the applicant under section 2?"

*Id.* The court noted that the widower/applicant in question was 81 years old; the decedent was 86. His assets were 6000 pounds and hers included 1000 pounds and the matrimonial home. They had been married for 17 years, although during the last four she had been in

risdictions, courts presumably would apply the principles of equitable distribution to the surviving spouse's claim.<sup>144</sup> The law of equitable distribution, however, is notorious in its unpredictability of application<sup>145</sup> and certainly has not met with universal satisfaction in the United States.<sup>146</sup>

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a nursing home. They had no children, but she had a middle-aged stepdaughter from a prior marriage living on her own. The applicant's contribution to the welfare of the family was only his limited earnings for four years immediately following the wedding. In view of these factors, the court concluded that if the parties had obtained a divorce under the Matrimonial Causes Act 1973, "a family judge would in our view be most unlikely to regard the case as one for refusing financial relief to the husband altogether." *Id.* The court projected that the probable outcome would be to grant the husband a right of occupancy in the matrimonial home so long as he was willing and able to use it, and that a part of the husband's 6000 pounds should be used to provide some comforts for the wife in the nursing home. Moreover, the decedent had no moral obligations or responsibilities to the stepdaughter, even though the stepdaughter admittedly had limited financial resources. *Id.*

The court proposed two possible solutions. First, the applicant might be given a right of occupancy in return for an obligation on his part to keep the property in good repair. Second, and alternatively, the applicant might be required to pay a sum of money to the stepdaughter to discharge his present and future obligations to repair and maintain the property. In either case, the applicant would have to expend some of his 6000 pounds in savings, which the court believed would be in the spirit of the 1975 Act: achieving results similar to those that would have occurred had the marriage ended by divorce. Upon further inquiry, however, it appeared that the applicant in fact did not have 6000 pounds, but was "wholly or virtually" without means. *Id.* The court stated that under such circumstances, the appropriate order was simply to direct settlement of the property enabling the applicant to live there so long as he was willing and able. *Id.*

144. See *supra* note 82 and accompanying text (discussing equitable distribution).

145. See Glendon, *supra* note 138, at 1168-85 (proposing a distinction between divorce affecting minor children and other divorces, and suggesting in the former that a "children first" principle should apply and be determined under a discretionary system supplemented by guidelines to lend predictability to the process).

146. See, e.g., Max Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L. REV. 413, 431-34 (1976) (discussing fixed rules and judicial discretion and questioning whether individual justice is worth the cost); see also Schaul-Yoder, *supra* note 130, at 231 (noting claims that equitable distribution has produced litigant dissatisfaction, is costly economically and judicially, and increases acrimony).

Although arbitrary elective share provisions may be of dubious value, the rise of no-fault divorce and the discretionary system of equitable distribution has hardly been a boon to women. See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985) (noting that men experience 42% rise in standard of living in first year after divorce; women and children experience 73% decline); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L. Q. 351, 391-95 (1987) (providing statistical evidence that in 1980s men emerged from divorce in far better economic shape than did women and questioning whether the gap between them narrows in the years following divorce); see also Michael G. Heymann, *Goodwill and the Ideal of Equality: Marital Property at the Crossroads*, 31 J. FAM. L. 1, 2 (1992-93) (equal treatment of parties to divorce has not occurred despite passage of

Under such a nebulous approach, cases involving spousal claims have little or no precedential value;<sup>147</sup> rather, each new

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Uniform Marriage and Divorce Act); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 119 (1993) (asserting that under the rhetoric of equality today's wife is "catapulted into financial independence, and probably financial ruin" upon divorce).

American commentators on discretionary inheritance systems have frequently criticized the analogous judicial discretion characteristic of equitable distribution. See, e.g., Glendon, *supra* note 138, at 1186-91 (stating that most defects in the American family protection systems can be cured without such judicial discretion); Langbein & Waggoner, *supra* note 6, at 314 (calling the effects of such judicial discretion a "terrible price" to pay for reform).

147. Predictability of result is one of the advantages of a forced share system. Cf. Langbein & Waggoner, *supra* note 6, at 314 (discussing testator's family maintenance and judicial discretion). Where the forced share is determined solely as a fractional part of the testator's estate, without regard to duration of the marriage or the survivor's own wealth—as indeed it is in most common law states in the United States—one may question whether predictability (or ease of administration) is being emphasized at the expense of fairness.

On the other hand, the element of judicial discretion under the Inheritance Act 1975 is very large. Even the period for making an application against the estate is subject to discretion of the court. Section 4 of the Act provides that "[a]n application for an order under Section 2 of this Act shall not, *except with the permission of the court*, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out." Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63, § 4 (Eng.) (emphasis added). See, e.g., *Re Salmon*, 3 All E.R. 532 (Ch. 1980) (noting that statute provides court with no guidelines as to what considerations should apply); *Escrutt v. Escrutt*, 3 Fam. 280 (1981) (refusing to waive time period for application made by widow three years after statutory six-month period had expired where widow had full understanding of availability of claim within the six-month period).

For those who fear this substantial element of discretion, the following passage from *Re Coventry*, 2 All E.R. 408 (Ch. 1979) is both comforting and instructive:

It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court's powers under the 1975 Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession. In order to enable the court to interfere with and reform those dispositions, it must . . . be shown, not that the deceased acted unreasonably, but that, looked at objectively, his disposition or lack of disposition produces an unreasonable result in that it does not make any or any greater provision for the applicant and that means, in the case of an applicant other than a spouse, for that applicant's maintenance.

It clearly cannot be enough to say that the circumstances are such that if the deceased had made a particular provision for the applicant, that would not have been an unreasonable thing for him to do and therefore it now ought to be done. The court has no *carte blanche* to reform the deceased's dispositions or those which statute makes of his estate to accord with what the court itself might have thought would be sensible if it had been in the

case turns on its singular facts.<sup>148</sup> Moreover, divorce and disinheritance are substantially different in numerous important ways.<sup>149</sup> Obviously and quite significantly, the divorce scenario involves two living spouses. Often the deceased spouse will take to his grave relevant information that only he and the survivor knew, and thus no one can counter the evidence presented by the surviving spouse in support of her application.<sup>150</sup> Although the Act presents a list of considerations for determining whether non-spousal applicants should receive maintenance from the estate, this list similarly fails to provide a court with a tangible, structured formula that leads to consistent results.<sup>151</sup> The list takes a common sense but very general approach; the overarching inference one draws is that the court

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deceased's position

*Id.* at 418.

148. However inconvenient this result may be for the attorney, scholar, or potential applicant, an appropriately structured discretionary system *potentially* can best address the needs of the individual family. When dealing with family struggles, the players will always perceive their circumstances as unique. *See* Miller, *supra* note 133, at 458 (noting ability of discretionary system to address differences). *But cf.* Waggoner, *supra* note 72, at 726-29 (explaining conclusion of UPC drafters that modelling the elective share on equitable distribution principles was quite unsatisfactory).

149. *See* Miller, *supra* note 133, at 456-59 (examining propriety of English system in which court powers and standards in disinheritance cases were modeled on powers and standards in divorce scenario). Professor Miller acknowledges that both death and divorce situations may involve support obligations and property division. The differences in the situations, however, may be greater than the similarities. Unlike the divorcee, for instance, a decedent often has no possibility of future earnings which can be accumulated for children or other natural objects of his bounty. *Id.*

150. Under a discretionary system a claimant must be allowed to present evidence extrinsic to the will to establish his claim. The nature of the relationship between the applicant and the testator must be explored even though the will itself is admittedly free from ambiguity, equivocation, or mistake. Thus, in determining the propriety of an applicant's claim under the English system, the decedent's oral and written statements are admissible. Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 21 (Eng.) (providing for admissibility in accordance with § 2 of the Civil Evidence Act 1968). In America, dead man's statutes, which prevent a claimant against the estate from initially testifying about transactions with the decedent, could pose a conflict in some jurisdictions. *See, e.g., In re Estate of Lopata*, 641 P.2d 952, 957 (Colo. 1982) (Quinn, J., dissenting) (criticizing allocation of burden of proof combined with dead man's statute which provided "virtually an insurmountable barrier" for surviving spouse who claimed elective share despite antenuptial agreement); *In re Estate of Stauffer*, 476 A.2d 354, 356-57 (Pa. 1984) (stating that purpose of dead man's act is to prevent injustice that might result from allowing surviving party to testify about transaction with decedent, which decedent's representative could not refute; claimant not permitted to testify concerning conversation with decedent to prove status of common law marriage).

151. *See* Glendon, *supra* note 138, at 1196 ("A list of factors with no indication of relative weight and no over-arching guideline other than the vague admonition to be fair is virtually the same as providing no factors.").



may make such an award when it seems proper to do so.<sup>152</sup> What one judge sees as a proper instance in which to make an award, of course, may not appear to be so to another.<sup>153</sup> Because the outcome of an applicant's claim against an estate cannot be reasonably predicted,<sup>154</sup> there is little to discourage a prospective applicant

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152. Some of the factors the court is to consider include the following:

- (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (b) the financial resources and financial needs which any other applicant for an order under . . . this Act has or is likely to have in the foreseeable future;
- (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
- (d) any obligations and responsibilities which the deceased had towards any applicant for an order . . . or towards any beneficiary of the estate of the deceased;
- (e) the size and nature of the net estate of the deceased;
- (f) any physical or mental disability of any applicant . . . or any beneficiary of the estate of the deceased;
- (g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 3(1)(a)-(g) (Eng.); see also *id.* § 3(2), (3), (4) (listing additional factors that the court must consider).

153. Section 3 of the Act, which lists factors for the court to consider, does not speak in terms of "moral" obligations. *Id.* Yet the implication exists and courts in some cases under the Act have attempted to discern whether a moral obligation to the applicant existed. See, e.g., *Re Coventry*, 1 Ch. 461, 487-89 (1980) (although noting that moral obligation is not mentioned under § 1(1)(c), court nonetheless examined the facts and found no such obligation to applicant existed; application denied); see also Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 294-99 (1955) (courts under testator's family maintenance systems view their task as correcting breaches of morality).

Commentators have suggested that the different judicial traditions in England and America might make a discretionary system infeasible in the United States. See, e.g., Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1307 (1969) (English provisions might prove objectionable in the United States because administration would be vested in many local probate courts rather than in a single court); Verner F. Chaffin, *Protection of the Surviving Spouse*, in 1977 COMP. PROBATE LAW STUDIES 187, 195-96 (1976) (vesting discretion in probate court which is provided over by lay judge would be unwise). See also Langbein & Waggoner, *supra* note 6, at 314 (stating that application of the English system in America is a frightening thought and has no future here so long as American judicial selection prefers politics over merits). Recognizing their need to be omniscient to reach a just result, probate judges themselves might be among the most vocal opponents of a discretionary system in America. Cf. *Re Joslin*, 1 All E.R. 302, 305 (1941) (early case under 1938 Act noting the extreme difficulty judge has in properly exercising discretion); Schaul-Yoder, *supra* note 130, at 209 (judges in early cases under Inheritance Act 1938 protested difficulty of their task).

154. See *Jelley v. Iliffe*, 2 All E.R. 29 (C.A. 1981) (noting difficulty in determining

with a weak claim from bringing suit under the Act.<sup>155</sup> Even when it appears that an applicant has a well-grounded claim for maintenance against the estate, neither the applicant nor the testamentary beneficiaries can accurately foretell what a court's "reasonable financial provision" to the applicant will be.<sup>156</sup> The conduct of the applicant and others is also a factor to be considered in determining whether to grant an applicant's claim. Thus, an enormous amount of a family's dirty laundry may be brought before the court.<sup>157</sup>

The traditional reason given for making a will—to ensure the passing of the testator's estate as he wishes—witheres under the sys-

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whether decedent was "maintaining" her brother-in-law applicant under § 1(1)(e) at her death). The opinion discourages litigation in small estates, noting that where a small estate is involved, litigation costs may make a viable claim irrelevant.

155. Under the Inheritance Act 1975, even antenuptial or post-nuptial agreements entered into by a testator may be varied by the court on behalf of an applicant. *See* Inheritance (Provision for Family and Dependents) Act 1975, ch. 63, § 2(1)(f) (Eng.). It is possible to contract out of the Act, however, through a divorce decree. *See id.* § 15.

Opponents of the Inheritance Act 1938 unsuccessfully claimed that an endless stream of applications could be predicted under the Act and would thereby forestall the winding up of estates. *See* Dainow, *supra* note 4, at 355-56. Indeed, one criticism of New Zealand's original discretionary act was that such an act would provide "food for lawyers." Dainow, *supra* note 125, at 1108. The fear that the discretionary systems—particularly after the broadening of the categories of potential applicants under the Inheritance Act 1975—would breed litigation appears unfounded in light of the numbers of reported cases. As of 1985, fewer than 40 reported cases appeared under the Inheritance Act 1975. A similarly small number of cases appeared in the years immediately following the enactment of the Inheritance Act 1938. Schaul-Yoder, *supra* note 130, at 220 n.182 (noting that less than 40 cases were decided under the Act from 1976 to 1985). One commentator has noted that English courts may be effectively withholding standing where an applicant cannot show that the decedent assumed responsibility for him or owed him a moral obligation. *Id.* at 225-26 (citation omitted).

156. *But cf. id.* at 220-28 (noting that judiciary has discouraged applications by emphasizing continued importance of testamentary freedom, the privacy of family matters, and costs of litigation to small estates).

157. *See, e.g., Re Collins*, 2 All E.R. 47 (1990) (discussing details of decedent's unfortunate marriage and her illegitimate child's life in opinion granting award to child). In considering whether to adopt a system involving discretionary awards against a testator's wishes, the English lawmakers realized that such a system would sometimes lead to embarrassing revelations about the family involved. *See* Dainow, *supra* note 4, at 346 (noting concern that greeted early discretionary proposals in House of Lords); Schaul-Yoder, *supra* note 130, at 225-26 (noting fear that Inheritance Act 1975 would lead to monumental family squabbles). Of course the airing of family linen in public is characteristic of many family lawsuits. Under a system of fixed rules, however, the testator's family survivors (other than the surviving spouse) who are unhappy with their bequest or devise must nonetheless accept or renounce it. Only if the traditional, limited grounds for a will contest exist is the disgruntled survivor likely to be able to use the court to antagonize or embarrass other family members or will beneficiaries.

tem of testator's family maintenance. The testator knows that his will may be effectively rewritten by the courts, despite his testamentary capacity and his clearly expressed intent in the document itself. Although the English courts have stated that theirs is not the prerogative to ignore or refashion the testator's will in general,<sup>158</sup> the testator can seldom if ever be certain that his last will and testament will be honored upon his death.<sup>159</sup>

The judicial discretion afforded by the testator's family maintenance system is the modern commonwealth remedy to the difficult problem of balancing testamentary freedom with moral obligation to protect and provide for one's spouse and children,<sup>160</sup> among others.<sup>161</sup> As scholars have pointed out,<sup>162</sup> however, un-

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158. See *supra* note 147 (quoting *Re Coventry*, 2 All E.R. 408 (Ch. 1979)). See also Schaul-Yoder, *supra* note 130, at 221-25 (discussing the continuing importance of freedom of testation even under the Inheritance Act 1975 and noting that courts are unlikely to disregard testator's will except where the estate is large, the named beneficiaries are not needy, or the will did not conform to testator's true intent).

159. See, e.g., Langbein & Waggoner, *supra* note 6, at 314 (noting statement by Australian justice concerning the lack of certainty that will provisions will be upheld under discretionary system); see *infra* note 161 (testator's will effectively rewritten to include testator's grandchildren in residuary clause, although the testator had intentionally excluded their father as a residuary legatee).

160. For example, in *Re J*, (C.A. 1991) (LEXIS, Enggen library, Cases file), the testator left his estate of 30,000 pounds to his second wife and their child. His teenaged daughter from a prior marriage applied for a provision under the 1975 Act. In a two-step process, the court first concluded that there was not a reasonable financial provision for the teenager under the will. Second, the court determined the amount to be awarded the teenager. The court noted as follows:

[A]lthough in any given case there may be no single figure which it can be said represents a reasonable financial provision for the applicant, there will be a bracket below which it can be said that the disposition of the estate does not make reasonable financial provision for the applicant and above which it can be said that the disposition makes financial provision for the applicant which exceeds that which is reasonable. The court, in exercising its powers to make an order, cannot exceed the upper limit.

*Id.* After discussing factors under § 3 which are to be considered by the court in exercising its powers under § 2, the court concluded that 5000 pounds was the maximum reasonable financial provision for the teenager. *Id.*

161. In *Re Horton*, 1 N.Z.L.R. 251 (C.A. 1976), the testator died leaving as survivors his second wife, two adult unmarried children from his second marriage, and an adult son, Brian, from his first marriage. Brian was not included as a residuary legatee under the will because the testator felt he had assisted Brian sufficiently during his lifetime. Brian, who had not fared well financially, had a wife and two teenage children, and it appeared unlikely that he would be able to help provide for their future. *Id.*

Brian's children themselves made a claim under the Act. The court noted that historically it had not been easy for a grandchild to establish a breach of moral duty on the part of the testator—particularly where the grandchild's parent was still living or when the grandchild was claiming against another child who had a family of his own to support.

guided and unprincipled use of judicial discretion can lead to results as arbitrary and unsatisfactory as those under a system of fixed rules applied unswervingly to everyone.<sup>163</sup> Moreover, the concept of testamentary freedom remains more important in the United States than in other countries.<sup>164</sup> Americans probably would object strenuously to efforts to implement a "redistribution" system, such as family maintenance, in the absence of very well-defined, restrictive guidelines to temper judicial discretion.<sup>165</sup>

## 2. The United States

Although the pervasive discretion characteristic of testator's

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*Id.* The court concluded that here, however, "a wise and just testator would have regarded himself as owing some moral duty to these grandchildren." *Id.* The court noted that the testator's estate was large enough to provide for his two children from the second marriage and also satisfy such other moral claims against his estate. The court thus awarded each of the two grandchildren a one-sixth interest in the residue, contingent on surviving the widow. (The court noted that interests in remainder would not likely help with the education or start in life for the grandchildren, but further noted that proper maintenance and support is not necessarily confined to those purposes.) *Id.*

162. American commentators have repeatedly objected to the discretionary nature of the family maintenance system. *See supra* note 153 (expressing the negative view of several scholars to a discretionary approach). One commentator has noted that it would be particularly unwise to employ such a discretionary system in jurisdictions where probate judges are not required to have legal training. Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447, 462-63 (1976). *But cf.* Rein, *supra* note 102, at 53-56 (noting that Washington probate judges are highly trained and experienced and could properly exercise discretionary powers; that feared increases in litigation have not been experienced in actual experience; and that testamentary freedom of the reasonable man would not be disturbed).

163. Of course Parliament was not unaware of the problems with judicial discretion when it adopted the Inheritance Act 1938. In considering whether to depart from the long-established principle of testamentary freedom, the Law Lords in 1928 opined that judges were not sufficiently capable and wise to be permitted the use of discretion in resolving complicated family matters involving a testator's estate. Dainow, *supra* note 4, at 345 n.48.

164. The evolution of English inheritance law demonstrates, however, that commitment to testamentary freedom can change over time. Until the passage of the 1938 Act, absolute testamentary freedom had long been the rule in England. When the argument for testamentary freedom was made in the House of Commons during the English consideration of the disinheritance problem, the response was that "private limitation [is] the consequence of nearly all legislation, which must look toward the general good rather than the individual inconvenience." Dainow, *supra* note 4, at 355; *see also infra* note 287 (some commentators have questioned whether continued American emphasis on testamentary freedom results from true belief in its value or instead from mere legislative inertia).

165. Although the family maintenance system is characterized by discretion, some commentators have noted that this has not been a problem. *See, e.g.,* Dainow, *supra* note 125, at 1111. Thirty-eight years after the passage of the initial family maintenance bill, Dainow noted that "general principles of construction have been consistent, and despite the extreme latitude of the court's discretion, the decisions have not been conflicting." *Id.*

family maintenance perhaps makes the system infeasible for use in America,<sup>166</sup> probate courts in the United States already possess discretionary power to deviate from a testator's will under current family allowance statutes. The allowance, however, originated as a means of providing the widow and minor children *temporary* shelter and sustenance while dower was being assigned after the death of the husband.<sup>167</sup> Thus, unlike testator's family maintenance, the allowance provides only short-term, limited protection.

Modern allowance provisions in America vary significantly.<sup>168</sup> In some jurisdictions, the allowance is a one-time award for

166. See *supra* note 153 (comparing different judicial traditions in England and America).

167. See ATKINSON, *supra* note 4, at 128-29 (tracing origins of family allowance back to Magna Carta's mention of quarantine of dower, which permitted widow to occupy husband's principal house for 40 days after his death); cf. Haskins, *supra* note 17, § 5.44 (noting that modern quarantine is separate and distinct from family allowance).

168. Most states have a family allowance provision which inures primarily to the benefit of the surviving spouse, although often an award may also be made on behalf of minor children. See, e.g., 1990 UNIF. PROB. CODE § 2-404, 8 U.L.A. 101 (Supp. 1994) ("surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration"); CAL. PROB. CODE §§ 6540-6545 (West 1994) (reasonable family allowance necessary for maintenance; potential recipients include surviving spouse, minor children, adult children physically or mentally incapacitated and dependent upon the decedent for support; other adult children dependent upon decedent; a parent dependent upon decedent); KAN. STAT. ANN. § 59-403(2) (Supp. 1993) (reasonable allowance not less than \$1500 nor more than \$25,000); R.I. GEN. LAWS § 33-10-3 (1956) (reasonable allowance for support of family for six months with a possible extension for another six months; realty may be sold to provide the amount of allowance decreed); TENN. CODE ANN. § 30-2-102 (Supp. 1994) (reasonable allowance for survivor's maintenance for one year after death of spouse). See also *In re Estate of Lawson*, 721 P.2d 760, 762 (Mont. 1986) (purpose of family allowance is to ensure that surviving spouse is not left penniless and abandoned); Chaffin, *supra* note 162, at 476-90 (reviewing family support provisions and noting protection afforded by Georgia's statute). At least in small estates, the entire estate may frequently be awarded to the surviving spouse to meet her needs during the period of estate administration or during such other period as defined in the statute. See, e.g., OR. REV. STAT. § 114.085 (1993) (court may order entire estate set apart for support of spouse and dependent children). See also *Hall v. Jeffers*, 795 S.W.2d 135, 137-38 (Tenn. Ct. App. 1990) (stating that purpose of Tennessee statute is to maintain surviving spouse while he or she adjusts to decrease in standard of living resulting from death of decedent).

Unlike the common law forced share, the family allowance in many states is not automatically granted upon request. See, e.g., *Estate of Welch*, 797 S.W.2d 742, 747-48 (Mo. Ct. App. 1990) (surviving spouse failed to present substantial evidence to support her application for \$12,000 as maintenance). Instead, the amount of the allowance is ordinarily within the discretion of the court. See, e.g., *In re Estate of Bowman*, 609 P.2d 663, 668 (Idaho 1980) (stating factors that court considers in making discretionary allowance award); *Hall*, 795 S.W.2d at 137 (noting that legislature intended widow to receive

a fixed period, usually not exceeding one year.<sup>169</sup> In other jurisdictions, the award may be renewed if the estate has not been closed by the end of the period for which the original award was made.<sup>170</sup> The amount of the award is typically at the probate court's discretion, although some states impose a statutory maximum.<sup>171</sup> Some jurisdictions also provide that the allowance should reflect the spouse's standard of living prior to the decedent's death, taking into consideration the condition of the estate.<sup>172</sup>

The family allowance award may occasionally result in the abatement of some legacies in the testator's will. Nonetheless, the allowance normally does not infringe unduly upon testamentary freedom.<sup>173</sup> Many courts appear to award generous allowances;<sup>174</sup> however, the award is not intended as a substitute for the long-term protection afforded to disinherited spouses by dower or the elective share. The most liberal of family allowances will seldom, if ever, be sufficient to provide protection over a substantial period of time to disinherited spouses or minor children. Even so, in very small estates the family allowance award in conjunction with a homestead allowance<sup>175</sup> and exempt personal

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liberal allowance). At least in some jurisdictions, however, an eligible surviving spouse or minor child is automatically entitled to a fixed allowance. *See* D.C. CODE ANN. § 19-101 (1981) (surviving spouse entitled to \$10,000 allowance from personal estate of decedent); *In re Estate of Burton*, 541 A.2d 599, 604 (D.C. Ct. App. 1988) (discussing allowance provision and noting that proceeds from court-ordered sale of decedent's *realty* are a part of decedent's estate from which allowance may be satisfied).

169. *See supra* note 168 (citing examples).

170. *See infra* note 181 (discussing Georgia allowance statute).

171. *See, e.g.*, KAN. STAT. ANN. § 59-403(2) (Supp. 1993) (maximum allowance of \$25,000).

172. *See, e.g.*, TENN. CODE ANN. § 30-2-102(a) (Supp. 1993) (stating that the court may consider the "totality of the circumstances" including the surviving spouse's previous standard of living and the condition of the estate in setting the allowance award).

173. *See ATKINSON, supra* note 4, at 134 (noting that allowances generally are not set at such a high figure that they will significantly disrupt testamentary plans).

174. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 374 (4th ed. 1990) (noting that reported case law indicates that courts tend to be generous in awarding family allowance); Chaffin, *supra* note 162, at 476-90 (discussing courts' treatment of the Georgia provision).

175. Homestead awards or allowances, like the family allowance, vary significantly from state to state. *Cf.* 1990 UNIF. PROB. CODE § 2-402, 8 U.L.A. 96 (Supp. 1993) (recommending homestead allowance of \$15,000); CAL. PROB. CODE §§ 6520-6528 (West 1991) (providing for the most appropriate property available not beyond the lifetime of the surviving spouse, preference being given to community and quasi-community property rather than separate property); KAN. STAT. ANN. § 59-401 (Supp. 1993) (limiting the allowance "to the extent of 160 acres"). *See generally* 2A RICHARD R. POWELL, THE LAW OF REAL PROPERTY ¶ 263[9][b] (Patrick J. Rohan, rev. ed. 1993) (discussing various homestead

property<sup>176</sup> may leave little or nothing in the estate to be distributed pursuant to the will.

#### F. Permitting Spousal Disinheritance

Of the forty-one common law jurisdictions in the United States, Georgia employs the most unusual approach to spousal disinheritance.<sup>177</sup> Georgia alone affords the surviving spouse no

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provisions upon death of head of household); Carolyn S. Bratt, *Family Protection Under Kentucky's Inheritance Laws: Is the Family Really Protected?*, 76 KY. L.J. 387, 391-92 (1987-88) (discussing the history of homestead in the United States). The homestead award is discretionary with the court in at least some states. WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* 105-06 (1988) (discussing homestead provisions in several states); George L. Haskins, *Homestead Rights of a Surviving Spouse*, 37 IOWA L. REV. 36, 36-56 (1951) (comparing homestead rights among jurisdictions).

176. See, e.g., 1990 UNIF. PROB. CODE § 2-403, 8 U.L.A. 98 (Supp. 1993) (surviving spouse or children are entitled to a value, not exceeding \$10,000 in excess of security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects); CAL. PROB. CODE § 6510 (West 1993) (court has discretion to set apart "all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling," to surviving spouse or minor children); KAN. STAT. ANN. § 59-403(1) (Supp. 1993) (wearing apparel, family library, pictures, musical instruments, furniture and household goods, utensils and implements used in the home, one automobile, and provisions and fuel on hand necessary for the support of the spouse and minor children for one year); R.I. GEN. LAWS § 33-10-1 (1956) (wearing apparel, household effects, supplies, and other personal property exempt from attachment by law as probate court deems necessary); S.C. CODE ANN. § 62-2-401 (Law. Co-op 1976 & Supp. 1993) (not to exceed \$5,000 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects). See also *Estate of Welch*, 797 S.W.2d 742, 746-47 (Mo. Ct. App. 1990) (statute providing surviving spouse with right to certain household effects and food was to provide temporary support). What property falls within such statutes may not always be easy to determine in the absence of explicit statutory direction or case law. In *Welch*, for instance, a picnic table and lawn chairs were considered to be household effects while a lawn mower was not. *Id.* at 747. See generally PAUL G. HASKELL, PREFACE TO *WILLS, TRUSTS AND ADMINISTRATION* 151-54 (1987) (discussing exempt property as well as family allowance and homestead).

177. See GA. CODE ANN. § 53-2-9 (1982) (expressly allowing disposition of testator's entire estate to strangers); *Hood v. First Nat'l Bank*, 133 S.E.2d 19, 21 (Ga. 1963) (construing mortmain provision and noting that moral duty is irrelevant where statute expressly allows disinheritance of spouse and children); see also Chaffin, *supra* note 162, at 469 (stating "[w]hen all the factors are considered . . . it is difficult to make a compelling case in favor of the notion that a person should not be permitted to cut his spouse out of his will"). But see Peter H. Strott, Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427, 427-57 (1985) (arguing that equitable distribution concept should be extended to Georgia probate law). As discussed previously, elective share statutes are generally deemed unnecessary in community property states. See *supra* notes 44-48 and accompanying text.

Georgia is not the only state ever to have allowed disinheritance of the surviving spouse. See *supra* note 16 (noting that for most of this century, North Dakota and South Dakota gave no protection to the disinherited widow or widower); see also Cahn, *supra* note 5, at 141 (1936 article noting that five states in the West and Southwest provided

protection in the form of dower<sup>178</sup> or a forced share.<sup>179</sup> Unlike his counterparts in the other common law states, a Georgia testator who bequeaths his estate to someone other than his spouse may rest in peace concerning the substantial fulfillment of his testamentary wishes. His widow will have no right to assert a claim to any fixed fraction or percentage of his estate.<sup>180</sup> A properly executed disinheritance is effective in Georgia despite the testator's wealth, the duration of the marriage, or the need of the family members the testator leaves behind. Of the various approaches to willmaking taken in common law states, Georgia's thus comes closest to being one of absolute testamentary freedom for the married testator. Even in Georgia, however, complete freedom to disinherit the family does not exist. Like most jurisdictions, Georgia provides short-term protection to the surviving spouse and minor children through an allowance from the estate of the deceased spouse.<sup>181</sup>

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no protection to the surviving widow at that time).

178. See GA. CODE ANN. § 53-1-1 (1982) (abolishing right of dower).

179. See *supra* note 177.

180. When a Georgia testator does leave his estate entirely to someone other than his spouse and children, however, the will is subject to close scrutiny. In such cases, "upon the slightest evidence of aberration of intellect, or collusion, or fraud, or any undue influence or unfair dealing, probate should be refused." GA. CODE ANN. § 53-2-9 (1982). Georgia courts have stressed the use of the adjectival superlative—*slightest* evidence—to prevent probate of a will entirely disinheriting the testator's spouse and children when even "very slight" evidence casting doubt on the will appears. See *Bowman v. Bowman*, 55 S.E.2d 298, 308 (Ga. 1949); *Deans v. Deans*, 156 S.E. 691, 699 (Ga. 1931). But the provision will not protect the disinherited spouse and children in the absence of at least some evidence of one of the problems specified in the statute. See, e.g., *Crawford v. Crawford*, 128 S.E.2d 53, 55-56 (Ga. 1962).

Moreover, the close scrutiny contemplated by the statute is only available when the testator's *entire* estate has been devised or bequeathed to strangers. In *Beman v. Stembridge*, 85 S.E.2d 434, 439 (Ga. 1955), the testator provided his widow with one dollar because of his "unqualified belief that she married me for what she hoped to get out of the marriage in a financial way." The court did not apply the close scrutiny of the statute because the widow was not *altogether* excluded from testator's estate. *Id.*

181. GA. CODE ANN. § 53-5-1 (1982). See *supra* notes 167-76 and accompanying text (discussing the limited usefulness of the family allowance as a long-term protection provision). The allowance is a concept distinct from and typically much more limited than that of dower or the elective share. Although the Georgia allowance statute referred only to widows until 1979, an amendment in that year removed the gender classification so that the statute now applies to widowers as well. See *Adams v. Adams*, 291 S.E.2d 518, 520 (Ga. 1982) (determining that year's support statute as amended is not unconstitutional).

The Georgia year's support allowance is also available to the testator's minor children. GA. CODE ANN. § 53-5-2(b) (Supp. 1993). Moreover, where the decedent dies leaving minor children by a former spouse, the probate court is to specify those properties set apart for the children by that former spouse. See *id.* § 53-5-9. See also *James C.*



Rehberg, *Recent Year's Support Decisions*, 3 GA. B. J. 427 (1967) (discussing usefulness of year's support statute and examining related case law).

The amount awarded under the Georgia statute is discretionary with the court. The Georgia Supreme Court has stated, however, that the award must bear a reasonable relationship to the actual needs of the applicant. *See Young v. Ellis*, 301 S.E.2d 271, 272 (Ga. 1983). Although the statute provides that the family is entitled to a minimum sum of \$1600, there is no cap on the amount that can be awarded to the surviving spouse and minor children of the testator. *See* GA. CODE ANN. § 53-5-2(b) (1982). The applicant for the year's support has the burden of proving the amount necessary. The statute also provides that the amount should be sufficient to maintain the standard of living the applicant had prior to the death of the testator, taking into account the support available to the applicant from other sources, from his or her own estate, and from his or her own earning capacity. *Id.* § 53-5-2(c)(1). In determining the amount of its award, the court is also to consider "other relevant criteria" as it deems equitable and proper. *Id.* § 53-5-2(c)(2). *See also* James C. Rehberg, *Wills, Trusts, and Administration of Estates*, 38 MERCER L. REV. 417, 419 (1986) (discussing Georgia's support statute).

Since the year's support is often the sole protection for the disinherited surviving spouse and minor children under Georgia law, its importance to them is obvious. To claim the year's support, the surviving spouse must present the court with a schedule of property or a statement of the amount of money—or both—she seeks to have set aside for her support. GA. CODE ANN. § 53-5-6 (Supp. 1993). Upon receipt of the application, notice is published. *Id.* § 53-5-8(b) (Supp. 1993). If all goes well for the applicant, the court sets aside a year's award from the decedent's estate sufficient to maintain the applicant's standard of living prior to the testator's death. *Id.* § 53-5-2(c).

If the testator bequeaths or devises property to the spouse in lieu of her year's support, then the survivor must make an election. GA. CODE ANN. § 53-5-5 (1982). The surviving spouse will not be required to elect between the will and the year's support unless it is clear that the will provisions were intended to be in lieu of the year's support. *See Young v. Ellis*, 301 S.E.2d 271, 272 (Ga. 1983) (widow not required to elect between legacy and year's support where court could not discern "manifest implication" of will requiring election). *See also* Strickland v. Miles, 205 S.E.2d 880, 882 (Ga. Ct. App. 1974) (devise of personality and life estate in realty did not preclude year's support to widow); Studstill v. Studstill, 204 S.E.2d 496, 497-98 (Ga. Ct. App. 1974) (testator devised residue equally between current and former spouse; current spouse allowed to seek year's support because will did not expressly require election).

When administration of the estate lasts beyond one year, the surviving spouse may petition for support in each additional year the estate is kept together, if creditors have been given proper notice and there are assets adequate to pay both the additional support and all known unpaid debts and claims against the estate. GA. CODE ANN. § 53-5-4 (1982). *See, e.g.,* Baker v. Baker, 390 S.E.2d 892, 894 (Ga. Ct. App. 1990) (widow not entitled to award for subsequent years; award of \$10,000 was not an abuse of discretion in light of widow's income and social security benefits). *See also* Wolters v. Kennedy, 355 S.E.2d 665, 666 (Ga. Ct. App. 1987) (application for second year's support denied where estate had outstanding obligations for probate court costs, legal advertisements, funeral expenses, and attorney fees); Kittles v. Kittles, 352 S.E.2d 649, 650 (Ga. Ct. App. 1987) (executors cannot avoid paying support in subsequent years by deliberately and intentionally failing to satisfy debts against the estate solely to defeat statute). The disinherited survivors may therefore hope for a protracted period of administration, because there is no elective share or dower to provide them with long-term protection. *But see id.* (noting that widow cannot recover support in subsequent years if the estate is kept together as a result of her conduct or connivance).

For criticism of the Georgia approach, see Strott, *supra* note 177, at 427, 441-48

### III. NEED AND OBLIGATION IN THE MODERN FAMILY

If the American laws regarding disinheritance are to be changed, questions of fundamental policy must be considered anew: Who, if anyone, in the modern family should be protected from disinheritance? Should such protection be based solely on status rather than need, as is the case with most spousal forced share provisions currently in use?<sup>182</sup> If children deserve direct protection from disinheritance, how should the state balance their interests with the decedent's long-established privilege of testamentary freedom? The ensuing discussion focuses first on the relationship of spouses and cohabiting lovers<sup>183</sup> *inter se*, and various reasons why the "modern" forced share may in truth be an anachronism. Then follows an exploration of the plight of disinherited minor children and their increasing need for statutory protection as the family structure continues to evolve.

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(stating that Georgia law is inequitable and proposing adoption of equitable distribution principles to protect surviving spouse). *But cf.* VERNER F. CHAFFIN, *STUDIES IN THE GEORGIA LAW OF DECEDENTS' ESTATES AND FUTURE INTERESTS* 56 (1978), *cited in* Strott, *supra* note 177, at 427 (stating "perhaps the Georgia solution of giving complete freedom to both spouses to disinherit the other will point the way for other states to do likewise").

182. Throughout the past several decades increasing protection has been given to the surviving spouse, while little attention has been paid to the testator's minor dependents who survive him. *See supra* notes 107-10 and accompanying text (discussing disinheritance of children). Status as surviving spouse is the paramount criterion for protection against disinheritance in the United States. *See* GLENDON, *supra* note 82, at 240 (noting that custom and law now prefer surviving spouse over marital children and other blood relatives of decedent). On the increasing protection afforded to the surviving spouse in modern inheritance law, Professor Glendon has stated:

The traditional ideas that family wealth should be preserved for transfer from one generation to another and that a surviving spouse should not take such wealth away from the children are weakening, but they still exist, more so in parts of Europe than in the United States, and more so among certain groups of society than others. The resulting transformation of the surviving spouse's position is substantial when compared with the not-too-distant past.

*Id.*

183. Although the term "lover" may be discomfiting to some readers, it reflects the sexual nature of the relationship of the unmarried couple addressed in this discussion. The frequently used term "cohabitant" can be somewhat misleading, for it may refer merely to one who lives with another, such as two friends or siblings. In this article, the term cohabitant refers to unmarried lovers (or partners) who reside together.

### A. *Spouses (and, Sometimes, Lovers Too)*

#### 1. The Forced Share and Paternalism

It is very difficult to gauge the frequency with which a spouse is disinherited, although empirical observation and instinct tell us that such an act is unusual. The few studies that have been conducted indicate that disinheritance of a spouse is rare.<sup>184</sup> The testator has a variety of incentives to provide adequately for his spouse. The testator, for example, typically feels a natural affection for his spouse and wants to ensure that she is provided for upon his death.<sup>185</sup> Even when the testator's affection for the spouse has waned, fear that his disinherited spouse will vilify his memory may provide a sufficient impetus to include her in his will. The testator also often has a tax incentive for leaving his estate to the surviving

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184. See SUSSMAN ET AL., *supra* note 5, at 86-95. In 85.8% of the 226 estates surveyed in which the testator was survived by spouse and lineal kin, the testator bequeathed everything to the surviving spouse. In 89.2% of 37 estates in which the testator was survived solely by the spouse, the testator bequeathed all to her; in only two of 37 cases was the surviving spouse disinherited. In one of the two cases of disinheritance, the authors were unable to obtain further information. In the other, however, it appeared that the survivor and the testator were separated at the time of his death and that the survivor had already received upon separation one-half of the testator's assets along with his first wife's household furnishings. Nonetheless, the widow elected to take against the will. *Id.* at 87. Other studies also indicate the testator's preference for the spouse over his children. See BROWDER, *supra* note 153, at 1307 (26 of 54 testators bequeathed everything to surviving spouse although there were also surviving issue). See also Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252-53 (1963) (surviving spouse received everything in all of 22 testate estates studied where decedent was survived by wife and children). One must take care in drawing conclusions from these studies conducted before serial polygamy and parenting multiple sets of children became common.

If spousal disinheritance is indeed rare and yet some form of statutory protection is deemed necessary, an argument can be made that the costs of individuation, as exemplified by the English family maintenance system, might not be prohibitive. See Plager, *infra* note 185, at 715 (finding that need for elective share is not great and would be better served by a system keyed to individuation).

185. See Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966). In his examination of the spousal share, Professor Plager stated as follows:

The married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss. For the total society this has real meaning: the need for a surviving spouse's choice between the deceased spouse's testamentary largess and the legislatively-decreed share is not a need of massive proportions.

*Id.* at 715.

spouse.<sup>186</sup>

Elective share and dower statutes thus may be partly based on a distorted perception of the disinheritance problem.<sup>187</sup> Nonetheless, forty of the forty-one common law states afford the surviving spouse dower or the elective share to guard against the *potential* evil of disinheritance.<sup>188</sup> If spousal disinheritance is a problem of *de minimis* proportions, then the typical fractional forced share found in most common law states does more harm than good. The broad swath cut by the fixed fraction elective share is obvious: its arbitrariness may be used by the survivor unjustifiably to reduce legacies to minor dependents and other needy members of the testator's family.<sup>189</sup>

Moreover, when spousal disinheritance does occur, the modern testator may have legitimate reasons for so doing. The disinherited spouse today will often have her own income or be provided for through assets passing outside the estate. In many instances, the surviving spouse is the recipient of a pension<sup>190</sup> or federal or

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186. See, e.g., I.R.C. § 2056 (West Supp. 1993) (marital deduction).

187. A study of mid-18th-century wills from three counties in eastern Virginia indicates that in even colonial days a spouse was unlikely to be completely disinherited. See Speth, *supra* note 25, at 15-21. Male testators with minor children were particularly likely to bequeath the wife more than her minimum dower rights. *Id.* at 17, 20 (slightly more than 80% of testators in Amelia County and Prince Edward County bequeathed substantial legacies to their wives when minor children were still in the home; 62% in Mecklenburg County). Bequests to the widow, however, often were limited to her lifetime or were conditioned upon her remaining unmarried. This served to preserve the estate for the testator's children. In fact, older testators were more likely to leave property directly to their adult children and to grandchildren while charging the eldest son with his mother's "gentle maintenance." *Id.* at 17 (nine of 16 older testators left widow less than dower).

188. See *supra* notes 177-79 and accompanying text (noting Georgia's unique approach to spousal disinheritance).

189. See *supra* notes 54, 72 & 74 and accompanying text.

190. Even an otherwise valid and apparently comprehensive antenuptial agreement may of itself be ineffective to waive the surviving spouse's entitlement to certain benefits. See, e.g., *Callahan v. Hutsell, Callahan & Buchino*, 813 F. Supp. 541 (W.D. Ky. 1992). Two days prior to their marriage, Ed and Nancye entered into an antenuptial agreement under which Ed promised to provide Nancye with \$100,000 to be paid upon his death. At the time of his death, Ed was a participant in two plans governed by ERISA. The court noted that under 29 U.S.C. § 1055 (1988 & Supp. III 1991), for a spouse to waive her right to ERISA pension plan benefits, she must execute a written consent/waiver, the consent must provide the name of the designated beneficiary, and the consent must be witnessed by the plan representative or a notary. *Callahan*, 813 F. Supp. at 542-45. The court also noted that the couple had not complied with the requirements of § 1055 and thus Nancye did not waive her interest in Ed's pension and profit sharing accounts despite the purported waiver in the antenuptial agreement.

The court stated as follows:

[We are] acutely aware of the apparent dissonance between this outcome and

state governmental benefits derived from the testator<sup>191</sup> that cannot be conveyed to others through his will.<sup>192</sup> Particularly now, when young newlyweds are presumed to enter into the marriage as approximate equals, an arbitrary forced share scheme may ultimately serve the interests of greed rather than obligation and need.

Occasionally, the testator may disinherit the survivor in retaliation for her misconduct.<sup>193</sup> The idea that fault or bad behavior on the part of a spouse should diminish her inheritance has in fact largely disappeared from intestacy laws.<sup>194</sup> Understandably, courts are reluctant to engage in murky, highly subjective determinations

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the intent of Ed Callahan. We are also mindful of the logic favoring a policy of informed premarital agreement concerning the distribution of assets. However, the mandate to give effect to an antenuptial waiver of benefits under ERISA must come from Congress or a higher court.

*Id.* at 549. The court found that Nancye also was entitled to the \$100,000 provided for in the antenuptial agreement. *Id.* at 548-49. *See also* *Pedro Enter., Inc. v. Perdue*, 998 F.2d 491 (7th Cir. 1993) (agreeing with Second Circuit that under ERISA's regulation of qualified profit-sharing plans, antenuptial agreements do not waive spouses' rights to survivor benefits; holding that decedent's second wife, not his children, was entitled to pension plan benefits despite antenuptial agreement).

191. *See, e.g.*, *Burnes v. Gordon*, 1980 WL 6368, at \*2 (Del. Ch. Jan. 14, 1980) (widow's receipt of Social Security and Veterans' Administration benefits upon death of husband is irrelevant under state elective share statute, since such benefits flow automatically and not by bequest).

The unmarried cohabitant usually will not receive pensions or governmental benefits from the decedent's former employment. Whether he or she will do so in the future depends in large part upon the extent to which federal, state, or local government and private employers begin to acknowledge "alternative" family relationships. For instance, entry into a "domestic partnership" agreement already serves as the basis for limited survivorship rights in some cities. *See infra* note 239.

192. *See Burnes v. Gordon*, 1980 WL 6368, at \*2 (Del. Ch. Jan. 14, 1980); *see also* *DUKEMINIER & JOHANSON, supra* note 174, at 372-73 (discussing social security and private pension plans under ERISA); *Chaffin, supra* note 162, at 465-67 (discussing survivor's right to social security, medical benefits, governmental pensions among other retirement, disability and death programs); *Langbein & Waggoner, supra* note 6, at 303, 305 n.9 (discussing spousal rights in the employed spouse's federal pension).

193. *See supra* note 184 and accompanying text (describing reasons for disinheritance in survey case). Often the testator may state explicitly the reasons for disinheritance, as in the following example: "On account of the insults, outrages, cruelty, disgrace and humiliation which was constantly, and without reason, during my entire married life heaped upon me, she is wholly undeserving of my generosity." Mark Bernstein, *The Wooing of Hillsboro*, OHIO, Jan. 1990, at 23 (describing Samuel P. Scott's disinheritance of his widow). The testator who wishes to disinherit a spouse for cause should use caution to avoid possible tort actions against the estate when the will is probated. *See also* *Leona M. Hudak, The Sleeping Tort: Testamentary Libel*, 27 MERCER L. REV. 1147, 1149 (1975) (discussing testators "who have vented their spleens upon their widows through the medium of the will—perhaps daring in death what they dared not in life").

194. *See supra* note 60 and accompanying text.

of what behavior is improper within the family.<sup>195</sup> When the testator through his will has explicitly disinherited the spouse for cause, however, a court is not called upon to make such a decision.<sup>196</sup> When the testator's express desire is viewed in combination with the apparent rarity with which spousal disinheritance occurs, there may be little reason to indulge in provisions of such questionable value as the forced share.<sup>197</sup>

Even if spousal disinheritance occurred more often, abolition of the forced share does not seem unduly harsh in view of the variety of means through which a spouse may protect her interest in family assets during the testator's lifetime. Today, almost all Americans are aware of the availability of the antenuptial agreement, by which a prospective spouse can ensure her financial posi-

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195. Courts are not reluctant, however, to inquire into the conduct of an heir or beneficiary who may have wrongfully killed the decedent. *See, e.g.*, 1990 UNIF. PROB. CODE § 2-803(b), 8 U.L.A. 161 (Supp. 1993) (person who "feloniously and intentionally kills the decedent forfeits all benefits with respect to the decedent's estate"); ILL. ANN. STAT. ch. 755, para. 5/2-6 (Smith-Hurd 1993) ("person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death, whether as heir, legatee, beneficiary, joint tenant, survivor, appointee or in any other capacity"); TENN. CODE ANN. § 31-1-106 (1984) ("any person who shall kill, or conspire with another to kill, or procure to be killed, any other person" shall forfeit right to inherit from that person).

196. Courts are not unaware of this, but are currently constrained by elective share statutes even when the testator expressly states the reason for disinheriting his or her spouse. In *In re Estate of McVicker*, 492 N.E.2d 491 (Ohio C.P. 1985), for example, the court noted that "[w]hatever a decedent spouse's motives are, good, bad, or otherwise, there are most likely some personal reasons why a decedent spouse did what he or she did." *Id.* at 493. Nonetheless, the *McVicker* court recognized that the surviving spouse was entitled to her statutory share under Ohio law. The court held that federal estate taxes were to be deducted from the gross estate, however, before her one-third share was determined. The court noted that the legislature had already invaded the area of testamentary freedom with the elective share and apparently did not intend further to invade this domain by imposing the entire federal estate tax solely on the testator's intended beneficiaries. *Id.* at 494.

197. Because the surviving spouse is a natural object of the testator's bounty, however, disinheritance of a spouse should always be cause for close scrutiny of the will. For example, under the Georgia approach, the least evidence of undue influence, fraud, or lack of testamentary capacity is cause for refusing to probate the will when there is complete disinheritance of a spouse. *See supra* note 180. Moreover, the disinherited spouse may, if necessary, bring a will contest as an intestate heir. The testator's beneficiaries unwilling to risk their legacies often can be persuaded to settle with the surviving spouse who is a sympathetic claimant. This is particularly true if the will beneficiaries cannot inherit by intestacy should the entire will be proven invalid.

At least some commentators have also suggested that by allowing the testator to dispose of his estate as he wishes, we would also provide the testator with a greater incentive to become a more productive member of society. *See, e.g.*, Cahn, *supra* note 5, at 145 (citing the concept of individuality in the law of inheritance).

tion for the future.<sup>198</sup> No longer novel or used solely by the wealthy,<sup>199</sup> such an agreement is not properly viewed as a contract in anticipation of marital failure.<sup>200</sup> Rather, it is the expression of two responsible persons who recognize that marriage is in many respects a business and that, in marriage as in business, advance planning can avert later disaster.<sup>201</sup> The post-nuptial

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198. See generally Janice E. Kosel, *Property Disposition in Antenuptial, Postnuptial and Property Settlement Agreements*, in VALUATION AND DISTRIBUTION OF MARITAL PROPERTY 4-1 to 4-29 (John P. McCahey ed., 1988) (discussing requirements for valid antenuptial agreement and history of such agreements). A caveat may be appropriate here, however. The law of marital agreements is in transition; thus, it may be impossible to predict with certainty the ultimate validity of such an agreement. *Id.* at 4-4. Antenuptial agreements regarding disposition of property upon the death of one spouse, however, engender less controversy than do agreements pertaining to property disposition upon divorce, *id.* at 4-14, 4-15, and usually will be upheld if substantively fair or based on full disclosure at the time the contract was entered into. Most states have enacted specific legislation pertaining to the antenuptial agreement. See, e.g., UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369, 369-80 (1983 & Supp. 1993) (adopted in 18 jurisdictions in whole or in part); 1969 UNIF. PROB. CODE, 8 U.L.A. 82 (1983 & Supp. 1993) (permitting contractual waiver of elective share and other rights); 1990 UNIF. PROB. CODE, 8 U.L.A. 99, 99-100 (Supp. 1993) (incorporating standards for validity from Unif. Premarital Agreement Act). See generally LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* (1981) (arguing for explicit contracts within marriage and as alternatives to marriage); Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1249-88 (1974) (earlier, abbreviated version of Weitzman's theories suggesting that contracts in lieu of marriage would allow for various types of interpersonal relationships); Michael K. Davis, *Till Death Do Us Part: Antenuptial Agreements Concerning Wills and Estates*, 8 PROB. L.J. 301, 313-25 (1988) (discussing varying treatment among jurisdictions and emphasizing need for reform and uniformity). For a stimulating discussion of need and fairness in prenuptial agreements, see Paul G. Haskell, *The Premarital Estate Contract and Social Policy*, 57 N.C. L. REV. 415, 419, 425-39 (1979) (suggesting that antenuptial contracts should not be enforceable if substantively unfair to surviving spouse at the time of the decedent's death). Professor Haskell concludes that contractual avoidance of marital responsibility erodes the institution of marriage and should not be countenanced by law. *Id.* at 439.

199. Cf. Richard W. Bartke, *Marital Sharing—Why Not Do It By Contract?*, 67 GEO. L.J. 1131, 1147-51 (1979) (discussing history of antenuptial agreement in United States and noting its use primarily by wealthy, well-advised spouses).

200. Apparently many individuals continue to view the prenuptial agreement as an omen of doom. Some practitioners have suggested that the antenuptial agreement is often unnecessary for young newlyweds; such a contract is more likely to benefit older individuals embarking upon second or later marriages who wish to protect children from their previous marriages. See, e.g., Joseph N. DuCanto, *Taking Your Lawyer to the Altar: A Different Perspective on Premarital Agreements*, PROB. & PROP. 46, 47 (Jan./Feb. 1990) (expressing concern that when the parents of the bride and groom insist that the couple enter into premarital contract, "a slow-growing cancer between the young lovers [can be created] which may ultimately prove fatal to the long-term health of an otherwise joyous union"); cf. Herndon Inge, Jr., *Antenuptial Agreements*, 48 ALA. LAW. 140, 140 (1987) (suggesting that antenuptial agreements may be beneficial for wealthy prospective spouses and prospective spouses who have children from previous marriages).

201. See Bartke, *supra* note 199, at 1151-64 (discussing use of a marital property shar-

agreement between willing spouses may serve to accomplish similar results. Although the will contract is less satisfactory as a means of ensuring protection from disinheritance, it too may be useful in some circumstances.<sup>202</sup> Life insurance is yet another way in which a spouse can protect herself from disinheritance.<sup>203</sup>

Alternatively or in addition to these explicit contractual arrangements, the spouse can assure herself protection somewhat similar to that afforded in community property states by having valuable property placed in the name of both spouses during the marriage.<sup>204</sup> Although only married couples may own property as tenants by the entirety with an indestructible right of survivorship,<sup>205</sup> both married and *unmarried* couples may hold property as

ing agreement to establish a system approximating that of a conventional marital community). Under current law, an antenuptial agreement may provide that the property rights described in the instrument are in lieu of the elective share or dower. *See* WAGGONER ET AL., *supra* note 44, at 477 (noting that couple may enter into antenuptial agreement to avoid 1990 UPC elective share).

Of course, some engaged couples may terminate their relationship prior to marriage if the individuals cannot negotiate a mutually satisfying agreement. *See* Weitzman, *supra* note 198, at 1170 ("one wonders how many men and women would agree to the marriage contract if they were given the opportunity to read it and to consider the rights and obligations to which they were committing themselves").

202. L. Rush Hunt, *Joint Wills May Provide a Solution to Drafting Problems for Clients Concerned with Remarriage*, 12 EST. PLAN. 88, 93 (1985) (noting admonitions against and disadvantages of the joint will, but concluding that it can be used in some instances). *Cf.* Browder, *supra* note 153, at 1342 (discussing disadvantages of contractual joint and mutual wills). *See generally* WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS §§ 10.1-10.50 (1960 & Supp. 1993 by Jeffrey A. Schoenblum) (discussing the will contract); *id.* §§ 11.0-11.10 (joint, mutual, and reciprocal wills).

203. *See* 3 GEORGE J. COUCH, COUCH ON INSURANCE § 24:125 (2d ed. by Ronald A. Anderson, rev. vol. by Mark S. Rhodes, 1984 & Supp. 1993) (noting that husband and wife have insurable interests in one another's lives). If the policy of life insurance is issued without the knowledge or consent of the insured, however, the policy may be void or voidable. *Id.* § 24:124. *See generally* Plager, *supra* note 185, at 688-97 (discussing available will substitutes).

204. *See generally* 4A RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶¶ 599-624 (Patrick J. Rohan, rev. ed. 1993) (discussing the tenancy in common, the joint tenancy, and the tenancy by the entirety).

205. *See* Girard Acceptance Corp. v. Sroop, 425 A.2d 1095, 1097 (N.J. Super. Ct. Ch. Div. 1980) (noting that tenancy by the entirety achieves many of the same goals as dower and curtesy but provides even greater protection for the surviving spouse). *See generally* 4A POWELL & ROHAN, *supra* note 204, ¶¶ 620-624 (discussing tenancy by the entirety). There are many approaches taken to the tenancy by the entirety in the jurisdictions of the United States. Some states have abolished the tenancy by the entirety by statute or judicial decision. *Id.* ¶ 620[4] (noting that 25 states and the District of Columbia affirmatively recognize the tenancy by the entirety; five additional states mention it in their codes; only 13 states appear to have abolished it definitively; four states have conflicting statements on the tenancy; three states have taken no known position). The treatise con-



joint tenants<sup>206</sup> or as tenants in common.<sup>207</sup>

The elective share provisions in most common law states assume that adults will marry and live happily (or at least will remain together) ever after, despite overwhelming statistics to the contrary in late twentieth century America. Today, one of two marriages in the United States ends in divorce<sup>208</sup> and little stigma is attached to one's status as a divorced person. Thus, it seems highly likely that the rare spouse who might have been disinherited seventy-five years ago will instead find herself in divorce court, left to take her chances with equitable distribution. The Georgia experience indicates there is little reason to believe that permitting spousal disinheritance weakens the marital relationship.<sup>209</sup>

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cludes that the tenancy by the entirety "is much more alive and vigorous than its ancient and anachronistic purposes would suggest." *Id.* In a few jurisdictions, the tenancy by the entirety is the only concurrent estate a married couple can hold. *Id.* ¶ 620[2]. A conveyance to a husband and wife which does not specify the form of concurrent ownership intended will result in a tenancy by the entirety in some states. *See, e.g., Dearman v. Bruns*, 181 S.E.2d 809, 811 (N.C. Ct. App. 1971).

In many of the jurisdictions recognizing the tenancy by the entirety, direct conveyances from one spouse as the sole owner of the property to the couple as tenants by the entirety is now allowed. *See, e.g., MASS. GEN. LAWS ANN. Ch. 184, § 8* (West 1991); *OR. REV. STAT. § 108.090(2)* (1990). Moreover, many states recognizing tenancy by the entirety extend the concept to personality. *See* 4A POWELL & ROHAN, *supra* note 204, ¶ 621[6].

206. *See generally* 4A POWELL & ROHAN, *supra* note 204, ¶ 615-19; Sandra J. Chan, *Determining When Spousal Joint Tenancies Should Be Used to Meet Estate Planning Goals*, 14 *EST. PLAN.* 161, 161-66 (May/June 1987). Some states have abolished the joint tenancy with right of survivorship. Frequently, attempts to create a joint tenancy in these jurisdictions will result in a tenancy in common. Alternatively, a court may recognize concurrent life estates in the grantees with a contingent remainder in fee to the survivor. The right of survivorship in such cases is typically indestructible. 4A POWELL & ROHAN, *supra* note 204, ¶ 616[2]. *Cf. infra* note 207 (describing rare tenancy in common with right of survivorship). In jurisdictions recognizing the joint tenancy, the historical requirement of the unities has often been removed. Thus, in those states a direct conveyance from a grantor to himself and others as joint tenants will be recognized as creating a valid joint tenancy. 4A POWELL & ROHAN, *supra* note 204, ¶ 616[3].

207. Because the tenancy in common does not carry with it a right of survivorship, the surviving spouse or significant other holding property as a tenant in common will be protected only to the extent of her fractional interest in the property. In states which have abolished or restricted the joint tenancy, courts have occasionally recognized a hybrid form of concurrent ownership, the tenancy in common with a right of survivorship. *See, e.g., Durant v. Hamrick*, 409 So. 2d 731, 736-38 (Ala. 1981) (recognizing tenancy in common with right of survivorship, citing similar decisions from other jurisdictions, and describing the estate). *See generally* 4A POWELL & ROHAN, *supra* note 204, ¶ 601[2]. The interests of the tenants in common are presumed to be equal in the absence of indications to the contrary.

208. *See supra* note 11 (recent divorce statistics).

209. *See supra* notes 177-81 and accompanying text (discussing lack of spousal protec-

Abolition of the elective share could be expected to cause many individuals contemplating marriage to engage in meaningful planning for future contingencies. Contractual arrangements based on full disclosure and good faith and concurrent ownership in its various forms would not only assure protection for a surviving spouse (or lover, in the case of unmarried couples), but would also emphasize the economic aspects of the partnership. If the couple so wished, nothing would prevent them from agreeing that the survivor should receive one-third (or any other arbitrary fractional interest) of the estate of the first spouse to die. By allowing the couple itself to make the decision, states would respect testamentary freedom and eliminate unnecessarily intrusive legislation. Abolition of the forced share also would encourage women to take an active role in the management of family wealth and to demand deserved recognition of their contributions as wives, mothers, and wage earners. The homemaker whose contributions are evidenced by her current ownership of marital assets may reap psychological rewards from the knowledge that she is not dependent upon her husband's control of the fruits of her labor until his death or their divorce.<sup>210</sup>

In sum, the argument for abolition assumes that spouses are capable, responsible individuals and should be treated as such. Intervention by the state in their relationship is seldom necessary and should be discouraged. The current arbitrary, paternalistic elective share statutes may trammel testamentary freedom by imposing a mandatory inheritance in favor of competent surviving spouses who can protect themselves. Nevertheless, no one should expect to see the demise of the forced share in the near future. As legisla-

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tion in Georgia).

210. Because there may indeed be spouses who have entered into presently existing marriages at least in partial reliance on the elective share (one hopes spouses do not enter marriage solely in reliance on the forced share), a decision to abolish the forced share should apply only to future marriages—for instance, those entered into on or after January 1, 2000. To abolish the elective share for existing marriage would in particular place many “heroines of the Betty Crocker culture . . . who have already devoted their most career-productive years to homemaking” at a complete disadvantage. Starnes, *supra* note 146, at 70 (discussing the results of the equality rhetoric in modern divorce law). As Starnes points out, society must not forget that the homemaking role “was the only ‘proper’ one” at the time many existing marriages were entered into. *Id.* at 75.

State programs to educate prospective spouses about the change in the law could ensure that such individuals realize that each will be held to the same standard of responsibility as any other adult entering into an agreement. An advisory statement or paragraph provided on a marriage license application could serve to give notice to prospective spouses.

tures were loathe to move from dower to the forced share, so will they be reluctant to adopt new measures to protect the new family.<sup>211</sup>

## 2. Husbands and Wives as Equals

Whether or not grounded in modern reality, the solutions that state legislators develop to address disinheritance of family members ultimately depend on *their* vision of what a family is.<sup>212</sup> The early forced share statutes were primarily attempts to protect the then-typical nuclear family from impoverishment should the husband seek to disinherit his widow and children. In light of the historical distribution of marital wealth in common law states, legislatures enacting forced share laws naturally were concerned more with the disinherited widow than the disinherited widower; in fact, the originally enacted forced share of some jurisdictions applied only to widows.<sup>213</sup> To the extent that the spousal disinheritance problem existed, the protective intent behind the statutes was admirable.

Unfortunately, the statutes were often enacted long after the

211. Plausible reasons can be asserted to perpetuate the paternalistic attitude towards spousal disinheritance. Couples embarking upon marriage are often oblivious to the financial aspects of their commitment; it may be unrealistic to expect them to engage in rational estate planning prior to the vows. Further, the surviving wife (particularly the full-time homemaker) who fails to protect herself remains unlikely to have resources approximating those of her husband. See *infra* note 217 and accompanying text. Although the forced share may provide a belated remedy for these problems, it also tacitly encourages irresponsibility and dependence.

212. It would be interesting to discern the familial status of state legislators. As one commentator has stated,

[T]he success of a universal family law depends on the existence of a paradigmatic family upon which the law is based. Families must share enough common features for universal laws to operate in roughly the same way for all those to whom they apply. If there is an insufficient "essence" of family, if there is no governing norm against which all families can fairly be measured, then family laws will only tend to work well for those families the drafters had in mind.

Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 J.L. & SEXUALITY 9, 33 (examining same-sex marriage from an "anti-essentialist" stance).

213. Under the rubric of gender equality, states which originally protected widows only have extended the protection to widowers. See, e.g., *Hall v. McBride*, 416 So. 2d 986, 988-92 (Ala. 1982) (discussing Alabama's widows-only provision which was replaced by gender-neutral statute). In many states, the surviving spousal protection statutes have always been gender-neutral in application (if not in effect). See Cahn, *supra* note 5, at 143 (early article on elective shares noting that many statutes applied in favor of either a widow or widower).

time when they were most needed—that is, the time when wives were largely excluded from the workplace and were thus incapable of providing for themselves and their children.<sup>214</sup> The belated enactment of the forced share is therefore somewhat ironic: as state by state turned to the protective, elective share beginning in 1930, women were entering the job market in record numbers.<sup>215</sup> Although the forced share statutes may have satisfied some continuing need, that need was growing less each year. Even so, as recently as 1992—long after sex equality had become a serious issue in American society and the status of women in the job force had risen significantly—common law states were still in the process of converting from dower to the elective share based on the traditional family model.<sup>216</sup>

Has the status of women in general and wives in particular so improved in American society that the protective forced share for widows is no longer necessary?<sup>217</sup> Men continue to control most forms of wealth in the United States, and in common law jurisdictions husbands control most marital wealth.<sup>218</sup> Despite important

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214. See *supra* note 32 and accompanying text (discussing rationale underlying transition from dower to elective share).

215. Of course, most women entered the job market at lower salaries and in less-esteemed positions than those of men.

216. See *supra* note 35 (discussing West Virginia's adoption of 1990 UPC elective share provisions).

217. Men (and perhaps more importantly, male-dominated legislatures) must be careful not to overestimate the social and economic strides women have made in recent decades. As one commentator stated in 1987:

One by-product of the women's movement has been an image of women triumphant over the barriers of past discrimination, fully equal members of, and fully integrated into, the American labor force. Regrettably, this image has far outstripped social and economic reality. The grim truth is that the average woman still earns roughly 60 percent of what the average man earns. Further, over the course of her working life, her pay will increase much more slowly than his.

McLindon, *supra* note 146, at 396 (citations omitted). Cf. *Hall*, 416 So. 2d at 988-92. In *Hall*, the Alabama forced share provision for widows only was challenged successfully as an impermissible gender-based classification violative of equal protection. The court chose to abolish the statute rather than extend its benefits to all surviving spouses, stating as follows:

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

*Id.* at 990.

218. See 1992 STATISTICAL ABSTRACT, *supra* note 11, at 412 (table showing greater

strides in the sex equality movement, wives are still more likely than husbands to experience discrimination in the workplace. Moreover, many wives who work outside the home may choose (or be compelled by family circumstances) to take less demanding jobs or forego promotions and other vocational opportunities because they also serve as the primary homemaker and caretaker for the marital children.<sup>219</sup> Although statistically a shrinking minority, some wives work exclusively as unpaid homemakers and mothers.<sup>220</sup> With this scenario in mind, it may appear initially that we have not reached a degree of sex equality that of itself would fully justify the elimination of the forced share. Nonetheless, there are persuasive arguments that the forced share has outlasted its usefulness and, in fact, implicitly encourages wives to be dependent upon and subordinate to their husbands during the marriage.<sup>221</sup> This is especially true when the focus shifts from society at large to the two individuals comprising the marriage.<sup>222</sup>

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numbers of male workers in labor force and higher median weekly earnings than those of females). See also Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983, 1001-02, 1001 n.132 (1992) (noting that wives as a group earn less money than do their husbands and women's work is undervalued). For an analysis using game theory to explore why women might be "systematically worse off than men when it comes to acquiring and owning property," see Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 422 (1992).

219. Significantly, the economic disadvantage suffered by the primary caretaker (typically the wife) is inadequately addressed by the 1990 UPC elective share provisions. See Turano, *supra* note 218, at 998-1006 (suggesting that the primary caretaker of marital children be allowed a larger percentage of estate or a lump sum substantially larger than the currently suggested supplemental elective share amount).

220. This kind of marriage, however, in which a wife is truly dependent upon her husband—the "bourgeois" marriage—was in decline even at the beginning of the 20th century. See Rheinstein, *supra* note 146, at 414 (noting that percentage of women in United States' nonagricultural labor force was 23% in 1900).

221. See *supra* notes 198-207 and accompanying text (discussing protections other than the elective share that are available to spouses).

222. The forced share statute may impede the progress of sex equality by deceptively leading one to believe it is in the widow's best interest. Although today's statutes are gender-neutral, they are still permeated with the historical taint of paternalism, which in turn is linked to subordination of women. (If one is servile and docile, one can hope to be protected by the beneficent and powerful.) If legislatures really believe that the marriage is an institution where two spouses participate in an economic partnership, it is ironic that in 41 of 50 states title alone determines ownership of property until divorce or death. Cf. Bartke, *supra* note 199, at 1133 (noting that the "fragmented compilation of marital property laws represents a 'non-system' and an abdication of responsibility by the legislatures of common law states").

For a discussion of the rejection of community property in England, see 2 POLLOCK & MAITLAND, *supra* note 17, at 425-31. Almost a century ago, Pollock and Maitland described the question of property ownership during marriage as "comparatively uninteresting

When, as today, two presumably competent individuals enter into a marriage as equals in the eyes of the law, the elective share—especially the fixed fraction elective share—is unduly patronizing. The marriage contract is an agreement between two individuals, each of whom is fully capable of providing for and protecting himself or herself prior to and after the nuptial vows. Even in its gender-neutral form, the forced share perpetuates to no small degree the lingering impression of the meek and needy wife and discourages equality among the spouses during the marriage. If legislatures want to provide truly gender-neutral treatment for spouses, then they must replace the forced share with community property principles or, alternatively, abolish the forced share and let the spouses protect themselves.<sup>223</sup>

### 3. Partnerships and Protection

The forced share devised in the late 1920s and early 1930s remains the principal family protective provision<sup>224</sup> in common law states. This is true even though the exponential increase in rates of multiple marriage, unmarried cohabitation, and childbirth to single parents demonstrate the profound change in family structure since the early decades of this century. Perhaps because the forced share no longer provides the range of protection originally intended, scholars now attempt to justify the modern share based on the economic partnership view of marriage, thus minimizing the share's origins as a protective provision primarily for widows and young children of the marriage.<sup>225</sup>

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and academic." A husband, after all, had "everywhere a very large power of dealing . . . with the whole mass of property." *Id.* at 397-98. With the enactment of equal management statutes in community property states in the 1960s, however, the situation for wives improved substantially in those parts of the United States. *See supra* note 43 and accompanying text. *See also* Bartke, *supra* note 199, at 1142-47 (noting that negative reaction of common law states to community property may be lessening).

223. *See infra* note 226 and accompanying text.

224. *See supra* note 182. Not all recently promulgated spousal inheritance provisions increase the survivor's protection, however. Under the UPC provisions, for example, the survivor who is wealthy in her own right may receive a smaller elective share amount than she would receive under the conventional forced share. *See supra* note 89 and accompanying text (1990 UPC provisions consider wealth of survivor and duration of marriage). Thus while it is generally true that in this century greater inheritance protection has been afforded to the surviving spouse (to the detriment of other family members), Pollock and Maitland's 1895 protest remains valid: not every change from the law of savagery to the present has been favorable to the wife. *See* 2 POLLOCK & MAITLAND, *supra* note 17, at 400-01.

225. Compare JESSE DUKEMINIER, JR. & STANLEY M. JOHANSON, FAMILY WEALTH

To the extent that the elective share is now being recharacterized as a posthumous means of correcting deficiencies in the common law system of ownership of marital property, legislatures should instead focus their attention on correcting that system during the marriage, not at its end.<sup>226</sup> If states wish to view marriage as an economic partnership in which contributions of each spouse should be recognized, then they must adopt community property principles, not forced share statutes that provide recognition of spousal contributions only to the survivor when the marriage is terminated by death.<sup>227</sup>

Despite 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.<sup>228</sup> Although the elective share once served as a somewhat effective substitute for a comprehensive scheme of family protection from disinheritance, today its benefits reach increasingly few family members. This is because the term family no longer is used to describe only the traditional husband/wife/child relationship. Particularly where minor children are involved, a family is now generally thought to exist whether the parents are single, married, or cohabiting.<sup>229</sup> In light of this

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TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING 461-63 (1972) (noting that forced share was result of concern for wife's possible disinheritance and the limited protection afforded by dower) with *DUKEMINIER & JOHANSON*, *supra* note 174, at 377-78 (policy underlying elective share is same as that underlying community property—to recognize the spouse's contribution to the economic success of the marriage).

Even the most modern forced shares do nothing to promote the economic partnership theory during the marriage itself. *See supra* note 96 and accompanying text. Some scholars have also questioned the degree to which the economic partnership theory is successfully embodied in modern forced share law even upon the death of the first spouse. *See supra* note 84 (criticizing 1990 UPC elective share provisions for incorporating universal community concept rather than that of community of acquests).

226. *See Whitebread, supra* note 84, at 142 (questioning whether the 1990 UPC elective share effectively implements the economic partnership view of marriage and noting that "eventually all states will have to abandon elective or forced share law and adopt some sort of community property system" if there is to be a nationally uniform system of property rights completely incorporating the partnership theory of marriage).

227. Sadly, the contributions of the minor children to the marriage and the family are ignored by most legislatures, courts, and commentators. *But see infra* note 280.

228. *Cf. supra* note 82 (discussing the economic partnership theory of marriage as basis for 1990 UPC elective share provision).

229. Despite the oft-expressed hope of televangelists and politicians for a return to traditional family values, the prospects for turning backward are bleak. "The restoration of

definitional evolution, the following question arises: If the elective share is retained, should it now be extended to the surviving cohabitant<sup>230</sup> who stands in the place of the spouse but lacks the legally valid marital contract?<sup>231</sup>

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Puritan sex ethics is not realistic, and those who preach it are merely evading the difficult questions of policy." RICHARD A. POSNER, *SEX AND REASON* 442 (1992). The percentage of families headed by a married couple with children under 18 in relation to all families with children under 18 continues to decrease. See *Married with Children*, AM. DEMOGRAPHICS DESK REFERENCE, July, 1992, at 6 (discussing the impact of the reconfiguration of the American family).

230. The terms "lover," "partner," and "cohabitant" as used in this article include neither putative spouses nor valid common law spouses. A putative spouse is "[a]ny person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person . . . ." UNIF. MARRIAGE & DIVORCE ACT § 209, 9A U.L.A. 174 (1987). If the jurisdiction recognizes the putative spouse doctrine or common law marriage, the inheritance rights of the surviving "spouse" are frequently the same as those of the validly married spouse. See generally WAGGONER et al., *supra* note 44, at 104-06.

231. Although the surviving partner is not entitled to the forced share in the absence of marriage, in many cases he or she is not totally without recourse. In *Poe v. Estate of Levy*, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982), the court addressed several different theories of recovery for a surviving cohabitant claiming against the estate of the deceased cohabitant. In *Poe*, Michael sought to recover real and personal property interests against the estate of his deceased cohabitant, Gertrude. The court found that his allegations were sufficient to state a claim on an express contract or for a constructive trust, but not for breach of an implied contract or in quantum meruit. *Id.* at 256. The court noted that "as long as it is clear there was valid, lawful consideration separate and apart from any express or implied agreement regarding sexual relations," the cause of action on an express contract or for a constructive trust is enforceable. *Id. Accord*, *Donovan v. Scuderi*, 443 A.2d 121, 125 (Md. Ct. Spec. App. 1982) (upholding survivor's contract claim, finding services and expenditures provided by survivor to decedent "were not dependent upon, in consideration for, or necessarily to promote, an unlawful cohabitation"); *In re Estate of Steffes*, 290 N.W.2d 697, 708 (Wis. 1980) (allowing plaintiff to recover reasonable value of lawful services rendered because illicit relationship with decedent defendant was only an incidental factor to performance).

In *In re Estate of Erickson*, 337 N.W.2d 671 (Minn. 1983), Pamela and Jorgen had agreed orally to make equal contributions towards the purchase of a home. The cohabiting couple placed title solely in Jorgen's name because Pamela was married to another man at the time. Upon Jorgen's death, the court imposed a constructive trust on a one-half interest in the home in favor of Pamela. Because Pamela had made contributions equal to those of Jorgen, an award of the entire home would unjustly enrich his estate. The court emphasized that Pamela was not asserting a claim to the property of her cohabitant, but rather was merely protecting her own property interest which she acquired for cash consideration independent of any oral cohabitation service agreement. The court analogized her claim as similar to one made by a joint venturer or partner. *Id.* at 672-74.

Quantum meruit has long been recognized as a potentially successful claim for a surviving cohabitant. See, e.g., *Lynch v. Rogers*, 10 A.2d 619, 624 (Md. 1940) (awarding domestic servant compensation for 10 years of service to decedent and holding that there was sufficient evidence for jury's determination that her services were not based on a contract of illicit cohabitation, although she bore the decedent's child while residing in his home). See generally Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From*



As recently as the 1950s and early 1960s, male-female cohabitation involving a sexually intimate relationship without the benefit of marriage was unusual and often considered scandalous.<sup>232</sup> Since the so-called sexual revolution of the late 1960s, however, the public attitude towards unmarried cohabitants has softened markedly as their numbers have greatly increased.<sup>233</sup> Although some Americans may still object to unmarried cohabitation, even the Census Bureau has recently recognized the cohabiting couple as a family, at least for statistical purposes.<sup>234</sup> Why not then extend the protection of the elective share to the surviving cohabitant?<sup>235</sup>

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*Status to Contract and Back Again?*, 77 MICH. L. REV. 47 (1978) (discussing remedies available to cohabitants upon dissolution of relationship).

232. Between 1950 and 1989 there was a greater than 660% increase in the number of multiperson nonfamily households in America. See James R. Wetzel, *American Families: 75 Years of Change*, MONTHLY LAB. REV., Mar. 1990, at 4, 5 (noting the proportionally smaller increase in the number of married couples relative to the overall increase in total number of households) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 441, HOUSEHOLDS, FAMILIES, MARITAL STATUS, AND LIVING ARRANGEMENTS: MARCH 1989, (ADVANCE REPORT) 4-9 (1989)). Over half of these households (approximately 2.6 million) were headed by unmarried couples. *Id.* According to Wetzel, who directed the work of the Center for Demographic Studies at the Bureau of the Census, the number of unmarried couples maintaining households increased 400% between 1970 and 1989 alone. *Id.* By 1991, there were over three million households maintained by unmarried couples. See 1992 STATISTICAL ABSTRACT, *supra* note 11, at 45 (listing the number of households maintained in various categories). In almost one million of these households, children under the age of 15 were present. *Id.*

233. A 1988 study by National Center for Health Statistics indicated that 45% of women between the ages of 25 and 29 had cohabited at some point in their lives. A third of women between the ages of 15 and 44 had done so. See Barbara Vobejda, *Americans Spending Less Time Married*, WASH. POST, Aug. 26, 1991, at A1 (identifying factors contributing to America's declining marriage rate). See also Felicity Barringer, *Divorce Data Stir Doubt on "Trial Marriage"*, N.Y. TIMES, June 9, 1989, at A1 (citing National Survey of Families and Households which indicated that 60% of persons who remarried between 1980 and 1987 cohabited with someone before remarrying).

234. See, e.g., Victor F. Zonana, *Census Will Count "Unmarried Partners" for First Time*, L.A. TIMES, Feb. 15, 1990, at A38 (noting that counting "unmarried partners" reflects changing definition of American family and growing acceptance of family diversity).

235. Noting that the legal groundwork for replacing marriage (a status relationship) with cohabitation (a contractual relationship) has been laid in Western countries, Judge Posner states the following:

The principal effect of refusing to give legal recognition to cohabitation—an effect entirely perverse from the standpoint of preserving the nuclear family for the sake of the children—will be to make it more difficult for women to obtain contractual protection for themselves and their children against abandonment by the child's father.

POSNER, *supra* note 229, at 266. Judge Posner further notes that as contractual freedom makes more inroads on formal marriage, it becomes increasingly difficult to prohibit unconventional forms of voluntary sexual relationships, including homosexual relationships.

Marriage remains the preferred status for adults in society, perhaps in part because of the lingering perception that marriage makes adults more responsible citizens. If the forced share is perceived as an inducement for adults to enter into marriage and help preserve the social order, then extending its applicability outside the traditional nuptial framework destroys that inducement.<sup>236</sup> Moreover, the state-imposed spousal forced share may itself be the reason why some couples choose to cohabit rather than marry, particularly if they seek to leave their estates to others (such as children from a former marriage). Denying male-female cohabitants the elective share is not discriminatory,<sup>237</sup> because those who seek its benefits are not denied the right to marry.<sup>238</sup> Extending the elective share to cohabitants also could lead to practical problems: How would an executor decide who is a surviving lover and who is merely a surviving roommate of the decedent?<sup>239</sup> If the cohabiting couple has no children, it could be exceedingly difficult to determine whether the survivor stands in the place of the legal spouse absent intrusive and potentially embarrassing inquiry into their private lives.

The complexion of the cohabitation arrangement is changed significantly, however, when children are born to unmarried cohabitants, as is now frequently the case. The current structure of the law of wills provides the children of cohabitants even less than the indirect protection afforded to marital children. Although the surviving cohabitant and the surviving spouse have the same legal obligation of support to their minor children, the disinherited cohabitant receives no statutory share which can trickle down for the

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*See id.* at 264-66.

236. Of course, if marriage is the threshold to social responsibility, then forced shares themselves would seem to be unnecessary. *Cf.* Weitzman, *supra* note 198, at 1230-36 (questioning whether the Judeo-Christian ideal of monogamous heterosexual marriage is the only appropriate model for personal relationships in modern, diverse society).

237. Moreover, there is empirical and statistical evidence that cohabitation is fundamentally different from marriage. Research indicates that cohabitation may actually function as another "stage of courtship rather than as a replacement for marriage." Barbara Foley Wilson, *The Marry-Go-Round*, AM. DEMOGRAPHICS, Oct. 1991, at 52. Nor does the desire to cohabit rather than marry appear to be an immutable trait.

238. Exceptions may exist where one or both are already married or within prohibited degrees of kinship, for example.

239. Domestic partnership registration is one possible solution to this problem. An increasing number of cities provide the opportunity for cohabitants to register. *See* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COL. L. REV. 1164, 1188-95 (1992) (discussing domestic partnership ordinances in various cities).

children's benefit. Excluding the adult cohabitant from a survivor's share may not be unduly disturbing, but imposing a penalty also upon the cohabiting couple's minor children is unfair to both the child and society. Perhaps rather than extending the surviving share, what is needed is to restructure the family inheritance scheme to protect first the minor children of the testator without regard to the testator's marital status.<sup>240</sup>

Unlike most unmarried heterosexual cohabitants, homosexual cohabitants<sup>241</sup> do not have the legal option to marry one another<sup>242</sup> and thereby ensure statutory inheritance protections for them-

240. See *infra* notes 282-308 and accompanying text (discussing various schemes of protecting children from disinheritance).

241. A 1988 census survey estimated that 1.6 million of the nation's 91 million households are made up of unmarried couples of the same sex. Zonana, *supra* note 234.

242. Marriage, which the Supreme Court once observed creates "the most important relation in life," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), is a relationship forbidden to same-sex couples in all states. Homosexuals' challenges to state marriage laws until recently have been singularly unsuccessful. See generally Rorie Sherman, *Gay Law No Longer Closeted*, NAT'L L.J., Oct. 26, 1992, at 1 (detailing inroads gays and lesbians have made in the controversial area of family law, noting lack of success in attacking marriage statutes, and describing recent challenge to Hawaii statute). For example, in *Baker v. Nelson*, the Supreme Court of Minnesota held that marriage between persons of the same sex is prohibited and denied the plaintiffs' constitutional challenges. 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (finding lack of a substantial federal question). All states continue to define or interpret their marriage statutes to exclude homosexual unions. Unsuccessful challenges by homosexuals to marriage laws include those reported in *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (1974).

In a somewhat surprising decision in this area, however, a plurality of judges of the Hawaii Supreme Court recently held that the state marriage law denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of the state constitution. The plurality took care to note that it had not held that same-sex applicants have a civil right to marry nor that the statute was unconstitutionally discriminatory. Rather, the court vacated the order of the lower court and remanded for further proceedings. On remand, the state was to have the burden under a strict scrutiny standard to overcome the presumption that the statute is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. Ct. App. 1992), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). But see *Hawaii's Marriage Laws Don't Sanction Same-Sex Marriage*, [Current Developments] Fam. L. Rep. (BNA) No. 37, at 1448 (Aug. 2, 1994) (noting that in June 1994 the Hawaii legislature reacted to *Baehr* by amending state marriage statutes to emphasize that a valid marriage contract can be entered into only by a man and a woman).

Perceiving marriage as an instrument of oppression, at least some participants in the gay and lesbian rights movement do not desire the extension of the right to marry to the homosexual community. See Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 J.L. & SEXUALITY 63, 64 (1991) (quoting contrasting views on the same-sex marriage issue which has polarized

selves or their children.<sup>243</sup> Yet in recent years, gay and lesbian couples have fought with increasing success<sup>244</sup> for the legal recog-

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lesbians).

243. For a discussion of various legal strategies employed by gay and lesbians seeking legal recognition of their families, see William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89, 90-99 (1991). The four strategies discussed by the author include direct challenges to existing marriage laws; use of existing gay rights laws; creation of domestic partnership laws; and interpretation of existing statutes.

In light of the AIDS crisis, extension of spousal status to the gay male partner has become a particularly important issue. An extension of medical benefits to the homosexual partner stricken with AIDS may greatly help the couple defray the exorbitant expense associated with the disease. See *Law Firm to Reimburse Health Costs for Same-Sex Domestic Partners*, Pens. Rep. (BNA) No. 14, at 785 (April 5, 1993) [hereinafter *Law Firm to Reimburse*] (describing efforts of first large law firm "to reimburse gay and lesbian employees for the health care insurance costs of their same-sex domestic partners, despite refusal of . . . health care insurers to provide such coverage"). Even the longtime companion of an incompetent gay man or lesbian may have no say in the care and treatment of the sick person if the "legal" family of the incompetent person steps in and decides to exclude the longtime companion. See, e.g., *In re Guardianship of Kowalski*, 382 N.W.2d 861 (Minn. Ct. App.) (naming father guardian of daughter impaired in auto accident, despite petition of daughter's lesbian partner of four years; father immediately terminated lesbian partner's visitation privileges with his daughter), cert. denied, 475 U.S. 1085 (1980). If the decedent leaves no will, the longtime companion will receive nothing through intestacy. If a will does exist and the survivor is not included, the survivor has no right of election. The survivor's best and perhaps only hope in many cases is to claim the value of her services from the estate—basically, the claim of a creditor. See *supra* note 231 (discussing the availability of quantum meruit as a means of recovery for surviving unmarried partners). Finally, even if a will in favor of the survivor exists, provisions to the homosexual partner may be subject to attack by members of the decedent's legal family, whom courts may consider the "natural objects" of the decedent's bounty to the exclusion of the surviving partner. Alternatively, the survivor may be deemed to have exerted undue influence over his or her lover. For a well-known example of the latter, see *In re Kaufmann's Will*, 247 N.Y.S.2d 664 (App. Div. 1964) (finding survivor-legatee to have exerted undue influence upon testator, despite eight-year relationship in which the couple had lived and travelled with one another), *aff'd*, 205 N.E.2d 864 (N.Y. 1965). A dissenting judge in the lower court opinion stated: "The verdict in this case rests upon surmise, suspicion, conjecture and moral indignation and resentment, not upon the legally required proof of undue influence . . ." 247 N.Y.S.2d at 689 (Witmer, J., dissenting). Professors Dukeminier and Johanson question whether the result would have been the same had the relationship been a heterosexual one. See *DUKEMINIER & JOHANSON, supra* note 174, at 161; see also Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 266-67 (1981) (concluding in light of the dearth of case law that the lover-legatee of the homosexual testator may have a more difficult challenge at probate than does his or her heterosexual counterpart and suggesting planning procedures by which the testator may help to circumvent potential challenges somewhat).

244. Decriminalization of homosexual acts is obviously an important initial goal of gay and lesbian activists. For example, in September of 1992 the Supreme Court of Kentucky held that Kentucky's so-called antisodomy statute was violative of privacy rights under the state constitution and was also violative of equal protection as guaranteed by the state constitution. See *Commonwealth v. Wasson*, 842 S.W.2d 487, 491-92 (Ky. 1992) (striking

dition of family property rights<sup>245</sup> traditionally limited to their

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statute punishing "deviate sexual intercourse with another person of the same sex;" the statute was not limited to acts of sodomy). Gays and lesbians cannot realistically hope to gain the full panoply of family property rights in states that retain such statutes. *See also infra* note 245 (discussing homosexuality and family property, marriage, and child custody).

245. In 1989, for example, the New York Court of Appeals ruled that a surviving "life-time partner" of a deceased tenant was a member of the decedent's family under a New York City rent control regulation:

[W]e conclude that the term family, as used in [the regulation], should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.

*Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (survivor could not be dispossessed by the landlord merely because only decedent's name was on the lease). For a discussion of the case by the attorney who served as co-counsel for *Braschi*, see generally Rubenstein, *supra* note 243, at 95-97 ("It was the first time in history that a gay couple had been found to be the legal equivalent of a family by the highest court in any state.").

Also important are the increasing number of state statutes and municipal ordinances which prohibit discrimination on the basis of sexual orientation. *See Sherman, supra* note 242, at 1 (noting that approximately 20 states have anti-gay discrimination legislation in employment or housing). Most of these laws are attempts to prevent discrimination in the workplace. As opponents are quick to note, however, absent very careful wording such laws may later be read expansively to include benefits for the homosexual employee's family. *See Rubenstein, supra* note 243, at 92-93 (noting how general nondiscrimination statute may allow lesbian to argue entitlement to health care benefits for her partner and the couple's child). *But see, e.g., Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 411, 419-20 (Ct. App. 1985) (denying dental benefit coverage to unmarried partners of homosexual state employee did not unlawfully discriminate in violation of equal protection provision of California constitution or executive order prohibiting employment discrimination in state government based on sexual orientation).

On the local level, domestic partnership ordinances have been enacted in a number of cities. *See Sherman, supra* note 242, at 1 (noting cities and municipalities that allow cohabiting couples to register as domestic partners; others provide employees with certain domestic partnership benefits). *See generally Bowman & Cornish, supra* note 239, at 1186-21 (examining domestic partnership ordinances and proposing model language).

Some large private companies have begun to extend certain benefits to the partners of homosexual employees. *See Sherman, supra* note 242, at 1 (noting recent successes by gays and lesbians). And in 1993, a San Francisco law firm became the first large law firm to provide health benefits to partners of homosexual employees. *Law Firm to Reimburse, supra* note 243; *see also Victoria Slind-Flor, Domestic Policy*, NAT'L L.J., Sept. 7, 1992, at 2 (reporting on the new benefits). Many employers, however, may be reluctant to provide employee benefits to nontraditional family units because of lack of

heterosexual, married counterparts.<sup>246</sup> If homosexuality ultimately proves to be based on a genetic predisposition and is *immutable*—as most scientists<sup>247</sup> believe and some noted jurists<sup>248</sup>

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acceptance by the IRS and insurers. See [Jul.-Dec.] 18 Pens. Rep. (BNA) No. 44, at 2010 (Nov. 4, 1991) (citing a 1991 research paper by Hewitt Associates).

At a time when almost half of the states still criminalize homosexual behavior, it is unlikely that gay and lesbian marriage will be legally recognized within the foreseeable future even in the more traditionally liberal states. See, e.g., Ken Hoover, *Same-sex Marriage Bill Stalls*, UPI, Apr. 24, 1991, available in LEXIS, Nexis Library, Wires File (describing opposition to California bill, introduced in 1991, that would legalize same-sex marriage). But see *supra* note 242 (discussing *Baehr v. Lewin* and recent challenge to Hawaii marriage statute). Perhaps a more realistic goal for all cohabiting couples—gay or straight—is the enactment of comprehensive domestic partnership acts on the state level. At least in states that acknowledge the changed structure of family relationships in modern society, such acts would protect the cohabiting family to some degree. Cf. POSNER, *supra* note 229, at 311-14, 440-41 (suggesting further study of the domestic partnership laws of Denmark and Sweden as potential models for use in the United States as an intermediate solution to the question of homosexual marriage).

246. In *Baehr*, 852 P.2d at 59, Judge Levinson listed several marital rights and benefits denied to same-sex couples in Hawaii. These include (1) rights relating to dower, curtesy, and inheritance; (2) rights to notice, protection, benefits, and inheritance under the UPC; (3) control, division, acquisition, and disposition of community property; (4) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates; (5) public assistance from and exemptions relating to the Department of Human Services; (6) award of child custody and support payments in divorce proceedings; (7) the right to spousal support; (8) the right to enter into premarital agreements; (9) the right to change of name; (10) the right to file a nonsupport action; (11) post-divorce rights relating to support and property division; (12) the benefit of the spousal privilege and confidential marital communications; (13) the benefit of the exemption of real property from attachment or execution; (14) the right to bring a wrongful death action. *Id.*

247. At least five studies in recent years have indicated that biology may help to explain homosexuality. In 1991 neuroscientist Simon LeVay published his findings that a cluster of cells in the hypothalamus of the male homosexual resembled that found in females rather than in heterosexual males. See Ann Gibbons, *Is Homosexuality Biological?*, 253 SCIENCE 956, 956 (Aug. 30, 1991) (reporting on contemporary efforts to identify a genetic basis for homosexuality). Also in that year a study of male twins conducted by J. Michael Bailey and Richard C. Pillard indicated an increased likelihood that an identical twin of a gay male will himself be gay. A subsequent study by Bailey and Pillard found that an identical twin of a lesbian is herself much more likely to be lesbian than is the fraternal female twin or other sisters. A 1992 study by Laura Allen and Roger Gorski found a brain structure (the "anterior commissure") to be 34% larger in homosexual males than in heterosexual males and 18% larger than in heterosexual women. Joyce Price, *Mother's Genes Called Determiner of Homosexuality*, WASH. TIMES, July 16, 1993, at A5.

Some of these studies have been criticized as flawed or incomplete or because their authors are gay and may have political reasons for promulgating their hypotheses. See, e.g., Richard A. Knox, *Gene May Help Explain the Origin of Homosexuality*, BOSTON GLOBE, July 16, 1993, national/foreign section at 1 (pointing out that some critics have called studies "merely circumstantial" or "methodologically flawed"); *The MacNeil/Lehrer News Hour: Focus—Sexual Chemistry*, (PBS television broadcast, July 15, 1993) (transcript #4711) [hereinafter *MacNeil/Lehrer News Hour*] (noting that some Freudian psychoanalysts, still asserting their ability "to cure" homosexuality, dispute the biological link to homosex-

strongly suspect—family laws which exclude gays and lesbians from marriage and its benefits will be very difficult to justify

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uality and point out that at least two of the previous studies were authored in part by gay men).

The most recent and persuasive study was released by Dean H. Hamer, a geneticist at the National Cancer Institute, and four colleagues on July 16, 1993 in the journal *Science*. The work suggests that certain genes on the bottom half of the X chromosome inherited from the mother may predispose some men to be homosexuals. See Natalie Angier, *Report Suggests Homosexuality Is Linked to Genes*, N.Y. TIMES, July 16, 1993, at A1 (noting that even those who denounced earlier studies consider this one to be "impressive science"); Boyce Rensberger, *Study Links Genes to Homosexuality*, WASH. POST., July 16, 1993, at A1 (noting scientists' views that this study, unlike earlier ones, is excellent, but needs replication). According to Dr. Hamer, the study indicates there is a 99% probability that specific genes increase the likelihood of a man being homosexual. See Charles Petit, *New Evidence of "Gay Gene" In Some Men*, S.F. CHRON., July 16, 1993, at A1, A15 (noting that such genes are passed from mother to son on X chromosome). In a television appearance, Dr. Hamer stated:

I think all scientists that have studied sexual orientation already agree that there's very little element of choice in whether or not people "choose" to be gay or heterosexual. The important question is whether or not there's a defined genetic component, and if we can ultimately understand how that works.

*ABC News Nightline: The Genetic Link to Male Homosexuality* (ABC television broadcast, July 15, 1993) [hereinafter *Nightline*].

Not everyone is impressed with the Hamer study, however. The president of the Traditional Values Coalition, the Reverend Louis Sheldon, stated: "This is just another scientific study being manipulated for the political gain of the homosexual lobby. It doesn't change the nature of their demands or the fact that they are out of the mainstream." Price, *supra*, at A5. Sheldon noted that the matter is simple: "The body parts don't fit. And I don't believe nature would do that to the human race." *MacNeil/Lehrer News Hour*, *supra*. Sheldon stated that his feelings would not change even if the genetic link were conclusive, because "you still cannot justify the lifestyle." *Id.*

Moreover, some gays and lesbians had mixed reactions to the Hamer report. Some feared that it might lead to efforts to detect homosexuality, resulting in further discrimination against them. Such genetic information could also lead to ethical concerns—for instance, the propriety of aborting of a fetus containing the genetic material in question. See, e.g., *Nightline*, *supra* (relating the concerns of medical ethicist Arthur Caplan that establishing a genetic basis for homosexuality may lead to attempts to eliminate homosexuality biologically or to compare homosexuality to a disease such as alcoholism); *MacNeil/Leher News Hour*, *supra* (expressing concern over genetic alteration of homosexuals and abortion of potentially gay babies).

248. See, e.g., POSNER, *supra* note 229, at 98-108, 119, 163, 438 (1992) ("I have rejected the suggestion that sexual preference is itself chosen; I believe it is for the most part immutable."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1616 (2d ed. 1988) (noting that sexual orientation is probably not a matter of choice and that "homosexuals in particular seem to satisfy all of the Court's implicit criteria of suspectness"). In *Commonwealth v. Wasson*, 842 S.W.2d 487, 500-01 (Ky. 1992), Justice Liebson refused to ignore the medical, scientific, and sociological evidence that sexual orientation is likely not a choice and rejected as "simply outrageous" the Commonwealth's assertions that homosexuals are more promiscuous than heterosexuals and are more prone to engage in sex acts in public.

objectively.<sup>249</sup> In the not too distant future, the claim of a homosexual to an elective share in the deceased partner's estate may not be dismissed as easily as it was in a recent New York case.<sup>250</sup>

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249. See Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 106-11 (1990-91) (discussing constitutional questions concerning same-sex marriage). In *Baehr*, Judge Burns of the Hawaii Supreme Court examined local media coverage of the origins of homosexuality and concluded that if homosexuality is "biologically fated," then the Hawaii constitution probably bars the state from discriminating against persons on the basis of sexual orientation. *Baehr*, 852 P.2d at 69-70. Cf. Thomas H. Maugh II, *Study Strongly Links Genetics, Homosexuality*, L.A. TIMES, July 16, 1993, at A1 (mentioning scientist/attorney Richard Green's opinion that if homosexuality is immutable, constitutional limitations on discrimination may necessarily include gays and lesbians); *All Things Considered: New Study Suggests Biological Basis of Homosexuality* (NPR radio broadcast July 15, 1993) (interviewing Richard Green, who opined that in light of a genetic basis for homosexuality, laws discriminating against gays could be upheld only if they fulfilled a compelling national interest).

As long as many Americans believe AIDS to be a gay male disease, however, some segments of society may assert public health as a compelling state interest for excluding gay men (though not lesbians) from the full panoply of family rights. Cf. UTAH CODE ANN. § 30-1-2(1) (1953 & Supp. 1987) (repealed 1993) (prohibiting and declaring void marriage with person afflicted with AIDS). Concerning religious beliefs and custom as compelling interests, the words of Judge Levinson of the Hawaii Supreme Court seem particularly apt: "With all due respect . . . we do not believe that . . . judges are the ultimate authorities on the subject of Divine Will, and, as *Loving v. Virginia* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order." *Baehr*, 852 P.2d at 63.

250. In *In re Estate of Cooper*, the Surrogate's Court of Kings County, New York held that the survivor of a same-sex couple has no right or standing to elect against the decedent's will. 564 N.Y.S.2d 684, 688 (Sur. Ct. 1990). The plaintiff argued that he and the testator had lived together for over four years and that, except for their homosexuality, their relationship was identical to that of heterosexual spouses. They shared a common home; they shared expenses; their friends recognized them as spouses; and they had a physical relationship. *Id.* at 685. Although the court reviewed the *Braschi* decision and its broadened definition of family the Court of Appeals had recognized under a rent control statute, see *supra* note 245, it concluded that "[t]here is a great distinction between being part of a family entitled to the protection of rent control laws because of public policy and legislative intent, and in being a surviving spouse of a decedent." *Cooper*, 564 N.Y.S.2d at 688. The court stated that recognizing the plaintiff's claim to an elective share would be impermissible judicial legislating and contrary to the public policy expressed by the New York legislature. The court also noted:

[T]he state has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or in nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values.

*Id.* In 1993, the Appellate Division affirmed. *In re Estate of Cooper*, 592 N.Y.S.2d 797 (App. Div. 1993) (quoting language from *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), cert. denied, 409 U.S. 810 (1972)), appeal dismissed, 624 N.E.2d 696 (N.Y. 1993). See *supra* note 242 (discussing *Baker* and cases denying gays and lesbians the right to marry). The court also denied the plaintiff's claim under the state constitution, finding that



Extension of the forced share to gay or lesbian cohabitants would be anathema to some segments of American society, which might prefer to abolish the elective share altogether rather than extend its protection to homosexual couples. Moreover, the individuals comprising an adult gay or lesbian couple currently have many (though clearly not all) of the same opportunities to protect themselves from disinheritance as do married heterosexual individuals.<sup>251</sup> If, of course, the current forced share is now unnecessary even for married couples,<sup>252</sup> then the question of extending the forced share to unmarried lovers need not be long dwelled upon: total abolition of the forced share would eliminate the increasingly difficult question of whether for disinheritance purposes a partner or lover is the equivalent of a spouse in the modern family.

As with heterosexual cohabiting relationships, it is the minor child of gay and lesbian couples who under current law is both unprovided for and incapable of protecting herself from disinheritance. Gay and lesbian parenting is an increasingly common occurrence.<sup>253</sup> Estimates indicate that as many as eight to ten million children have been born into families with a gay or lesbian parent.<sup>254</sup> Like other children in this country, the child whose gay or

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homosexual activity is not a constitutional right and that there is a sufficient rational basis to satisfy the equal protection issue. 592 N.Y.S.2d at 799-800 (quoting *Baker* on the Biblical institution of marriage to procreate and rear children and stating that dismissal of *Baker* for lack of a substantial federal question was a holding that the constitutional challenge was considered and rejected by the Supreme Court).

251. Gays and lesbians, because of their exclusion from the status of marriage with its inherent benefits, have of necessity become more aware than their heterosexual counterparts of the legal alternatives by which they can fashion their relationship. See Rubenstein, *supra* note 243, at 92. Closeted homosexual couples may be wary of revealing their relationship to an attorney who could draft necessary documents for their protection, however. Moreover, many homosexuals consider having to resort to such measures to be a second-rate alternative at best.

252. See *supra* notes 210-11 and accompanying text (discussing abolition of the forced share).

253. Gays and lesbians appear to have the same desire as heterosexuals to parent. See POSNER, *supra* note 229, at 147, 419 (noting desire of homosexuals to parent and concluding that flat rules against homosexuals adopting or having custody of children is undesirable); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461 n.2, 462 n.3 (1990) (presenting statistics on lesbian and gay parenting).

254. *In re Alison D. v. Virginia M.*, 572 N.E.2d 27, 30 (N.Y. 1991) (Kaye, J., dissenting). Cf. Polikoff, *supra* note 253, at 461 n.2 (citing estimates ranging from six to 10 million). As with most statistics dealing with homosexuality, precise figures are almost

lesbian cohabiting parent dies has no direct protection from disinheritance.<sup>255</sup> Like other children of cohabiting parents, the child of gay or lesbian parents receives no indirect protection from the conduit theory, since no elective share is provided to the cohabiting survivor.<sup>256</sup> These children of unmarried parents deserve protection from disinheritance.

## B. Children

### 1. Legislative Inertia

When "family" meant two heterosexual, married parents and their children, unaffected by divorce and remarriage, the elective share system was more effective and thus more justifiable than it is now. After all, the surviving parent who received the elective share was obligated to support the couple's children. Today, however, large numbers of minor children are denied this indirect protection from disinheritance because in our multiple marriage society the surviving spouse often is not the parent of the testator's minor children. Moreover, large numbers of children in America now have only one legal parent because of soaring rates in single motherhood;<sup>257</sup> the child disinherited in these instances

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impossible to obtain.

255. The one exception is the child of a Louisiana testator. *See supra* notes 115-23 and accompanying text (discussing the legitime).

256. Although several reported cases have dealt with the effect of death of one homosexual parent upon the surviving partner and the decedent's biological children, most of these cases involve custody battles between the non-biological, homosexual surviving parent and the biological parent's relatives. *See generally* Polikoff, *supra* note 253, at 527-33 (discussing cases involving custody disputes that arose after the death of lesbian biological parent). If courts permit the non-biological, homosexual parent to adopt the child during the homosexual relationship, such custody battles presumably will cease. With its opinion in *In re B.L.V.B.*, 628 A.2d 1271, 1272 (Vt. 1993), the Vermont Supreme Court became the first state high court to permit adoption by the biological parent's same-sex partner. When such adoptions are permitted, the child has two legal mothers or fathers. *See also In re Evan*, 583 N.Y.S.2d 997, 1002 (Sur. Ct. 1992) (holding that lesbian partner of biological parent was entitled to adopt child and serve as coparent; citing cases holding same); Jeffrey Gold, *N.J. Court Grants Adoption to Lesbian's Partner*, AUSTIN AM.-STATESMAN, Aug. 11, 1993, at A18 (reporting on the decision of a Newark Superior Court judge to allow a lesbian to adopt the child of her artificially inseminated partner). The lover or partner in these cases still has no right to an elective share when the biological parent/partner dies, of course. The non-biological parent will, however, have a continuing duty to support the adopted minor child, thus ameliorating the child's plight somewhat if disinherited by his or her natural mother.

257. *See supra* note 13 (indicating that almost one in four American women of child-bearing age has had a child outside of marriage).

is also denied even the minimal protection provided by the conduit theory. The law of decedents' estates has failed to account for these modern changes in family structures, and consequently the interests of millions of American children have been marginalized.

It seems likely that this unfortunate result stems from an inadvertent omission or unawareness on the part of state legislatures.<sup>258</sup> As previously discussed, the disappearance of the forced share for English children was itself perhaps a historical accident.<sup>259</sup> Although dower benefited the widow, it also indirectly benefited the testator's young children by her.<sup>260</sup> As the twentieth-century successor to dower, the conventional elective share was intended to accomplish dower's purposes more satisfactorily.<sup>261</sup> Some legislatures have explicitly included the testator's minor children among the beneficiaries of the temporary protection afforded by the family allowance.<sup>262</sup> The legislative intent behind dower, the conventional elective share, and other family protection provisions recognizes implicitly the moral obligation of the parent to provide for a minor child beyond the parent's death.<sup>263</sup> Unfortunately, statutes modeled on the once ubiquitous traditional family no longer address the obligation adequately because millions of nontraditional families exist in America today. Thus, while the support obligation remains, it is increasingly likely to go unfulfilled upon the testator's death. To the extent that the estate is sufficient to support the minor child, her protection from disinheritance would serve the interests of the state as well as those of the child, for a disinherited minor frequently will become an additional burden on an already overtaxed welfare system.

Instead of affording indirect protection to minor children in traditional families only, legislatures could provide direct protec-

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258. See *infra* note 287 (suggesting that legislative and judicial inertia explains the state of the law of disinheritance, including that of the unprotected child).

259. *Supra* note 105.

260. *Supra* note 25.

261. See *supra* notes 32-34.

262. Many homestead and personal property exemptions also recognize minor children of the testator as potential recipients upon his death. See *supra* notes 168, 175-76 (discussing family allowance, homestead, and personal property exemption).

263. By enacting numerous support statutes, legislatures have recognized explicitly the moral obligation a parent owes during his lifetime to support his minor children. Cf. *infra* note 294 (citing statutory criminal penalties imposed for breach of support obligation).

tion from disinheritance to all minor children.<sup>264</sup> It is possible to protect both the surviving spouse and the minor child; millions of people around the world accept the civil law concepts of community property and forced heirship without question. Most American jurisdictions appear unready to accept community property principles, however, whether it be from reluctance to accept spousal equality during the marriage<sup>265</sup> or from fear of the system's perceived complexity.<sup>266</sup> Moreover, the one forced heir provision which exists in this country has been the source of much controversy.<sup>267</sup> If civil law concepts are unlikely to be adopted in the United States, the testator's family maintenance provisions of commonwealth countries are even more unlikely to find acceptance here. Most American scholars have rejected testator's family maintenance, fearing its reliance on judicial discretion and the corresponding unpredictability of results obtained.<sup>268</sup> American legislatures also have shown little interest in the approach.

Because the law of disinheritance in America is concerned foremost with protection of the surviving spouse in common law states, much of this Article has examined elective share schemes and questioned whether states should retain them at all. The more disturbing aspect of disinheritance laws in America, however, is the conspicuous lack of protection of America's minor children, who now more than ever appear likely to be disinherited.<sup>269</sup>

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264. Cf. *infra* note 273 (describing surveys indicating that majority of Americans do not believe a testator should be allowed to disinherit minor child).

265. See *supra* note 50; see also Bruce, *supra* note 96 (describing UMPA as a result of feminist maneuvering).

266. See *supra* note 50.

267. See *supra* notes 115-17 and accompanying text.

268. See *supra* note 153.

269. Scholars have paid only slightly more attention than legislators to this problem. The significant works on the topic are sparse indeed. See, e.g., WILLIAM D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 35-36, 307-08 (1960) (proposing model act allowing children under 18 as well as children physically or mentally incapable of maintaining themselves to apply for maintenance from testator's estate); LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 24, 29-30 (1955) (concluding that child should be able to take against parent's will only to extent that child cannot provide his own maintenance and education); Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1253-69 (1990) (proposing a "protected inheritance" whenever testator leaves one or more children); Cahn, *supra* note 5, at 147 (advocating provision for dependent children based on court determination); Haskell, *supra* note 27, at 114-16 (advocating protection for the needy minor at the least); Haskell, *supra* note 7, at 519-20 (advocating limited forced share for children with possibility of supplement tied to minori-

Moreover, this problem exists in both common law and community property jurisdictions.

Even under the least arbitrary and most progressive of the current elective share schemes—that of the 1990 UPC—a testator is free to disinherit his children.<sup>270</sup> If the surviving spouse is not the parent of the testator's children (and thus has no legal duty to support them), or if the testator is not bound by judicial decree or contractual agreement to provide for his child after his death,<sup>271</sup> even the needy minor child may receive nothing from his estate.<sup>272</sup> Public policy should require the protection of the

ty or education; amounts would be placed in trust until child reaches 21 or completes education, whichever occurs later); Laube, *supra* note 4, at 564-69 (discussing "unnatural" wills in 19th- and early 20th-century cases of child disinheritance); Rein, *supra* note 102, at 44-56 (advocating testator's family maintenance).

270. See *supra* notes 76-101 (describing 1990 UPC forced share in favor of surviving spouse only).

271. Because the parental duty of support generally ends at the child's majority or upon the death of the parent, courts traditionally have been reluctant to extend child support obligations beyond the death of the obligor parent. For example, in *Layton v. Layton*, 139 S.E.2d 732 (N.C. 1965), the court noted that the duty to support one's child is not a property right of the child, but rather a personal duty of the parent which is terminated by the parent's death. Thus, because the support order in question contained no express or clearly implied provision that the payments were to continue beyond the obligor's death, his obligation ended at his death. *Id.* at 734-35. See also *Gardine v. Cottey*, 230 S.W.2d 731, 746-50 (Mo. 1950) (en banc) (holding that father's liability for the support of his children terminated upon his death).

Some jurisdictions, however, have recognized that the obligor may by agreement or contract obligate himself to extend the duty of support past his death. See, e.g., *Herring v. Moore*, 561 S.W.2d 95, 96, 98 (Ky. Ct. App. 1978) (holding that support obligation continued past obligor's death because support agreement specified that payments would continue until the child reached 18 and child was still a minor at obligor's death); *In re North Carolina Inheritance Taxes*, 277 S.E.2d 403, 409 (N.C. 1981) (noting that intention to create continuing obligation must be clearly expressed); *Bradshaw v. Smith*, 269 S.E.2d 750, 752 (N.C. Ct. App. 1980) ("[a]bsent some indication of a contrary intent, where a valid separation agreement requires the father to make child support payments, states terminating contingencies, and is silent as to the effect of the father's death, his estate is bound to provide support payments according to the terms of the agreement"); *Wendell v. Sovran Bank/Central South*, 780 S.W.2d 372, 374-75 (Tenn. Ct. App. 1989) (extending obligor's duty to support beyond his death not as a matter of law, but because of language in document creating support obligation).

Even in the absence of a contractual extension of the support obligation, some courts have emphasized the state's concern for the welfare of children as a valid reason for continuing the support obligation. See, e.g., *Hill v. Matthews*, 416 P.2d 144, 145 (N.M. 1966) (noting three lines of opinion—termination upon death, no termination upon death, and intention as indicated in court decree). Nonetheless, as one author has noted, a good child support agreement will require specifically that support payments will continue beyond the death of the obligated parent if there is no "acceptable, alternative protection for the children such as life insurance or a specific bequest" in the parent's will. JOSEPH I. LIEBERMAN, *CHILD SUPPORT IN AMERICA* 61 (1986).

272. There are numerous situations in which a child may not receive the benefit of the

testator's children until they reach majority.<sup>273</sup> This solution seems particularly appropriate when it is recognized that the child's current lack of direct protection may be the result of historical accident and that the indirect protection afforded through the spousal share or community property does not include millions of children in nontraditional families.<sup>274</sup>

Although there is a dearth of statistical studies on point, it seems likely that disinheritance of children occurs with greater

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trickle down from the surviving spouse's elective share. A few of them are as follows:

Harry and Wanda divorce and Wanda receives custody of their minor children. Harry agrees to pay child support, but neither the decree nor the agreement specifies that the support payments are to be claims against his estate. Harry marries Wilma and bequeaths his entire estate to her. In most jurisdictions, Wilma takes everything and the children receive nothing from his estate (except perhaps some temporary benefits during estate administration). See *supra* note 271 (discussing effect of child support agreements or decrees).

Harry and Wanda are married and have no children. During his marriage to Wanda, however, Harry fathers a child born out-of-wedlock to Gloria. Shortly before his death, Harry executes a will leaving everything to his new girlfriend Polly, specifically disinheriting any child who is or may claim to be his son or daughter. Wanda can elect her forced share and Polly is likely to receive the remainder. The minor child born out of wedlock, even if able to prove paternity, will probably not receive anything from Harry's estate. See *supra* note 102 (noting problems faced by pretermitted children).

Almost all of the family assets are held in Harry's name. Harry disinherits his wife Wanda, leaving his entire estate to Jennifer, a new girlfriend. Harry and Wanda die simultaneously (or Wanda dies a few days after Harry but without having made an election against the will in a state where the option of election terminates upon her death). Jennifer will take under Harry's will in most jurisdictions; the minor children will have neither direct nor indirect long-term protection.

By holographic will, Harry bequeaths everything to his second wife Wilma, "knowing that she will remember" their infant children as well as his minor children from his first marriage. Upon his death, what Wilma may be inclined to recall is the difference between *her* children and *those* children. The precatory language is probably not binding upon Wilma, and those children from the first marriage will be left out.

273. See *Clavin v. Clavin*, 233 S.E.2d 151, 152-53 (Ga. 1977) (noting that even though public policy strongly favors support of minor children by father's estate, court cannot as matter of law require estate to provide for child after father's death through support decree). The majority of the American public appears to believe a testator should not be able to disinherit totally his minor children. See, e.g., SUSSMAN et al., *supra* note 5, at 210 (citing survey in which 57% of testate and 62% of intestate respondents agreed with the statement, "When a person makes a will, he or she should be required by law to leave money or property to his or her minor children"); Dunham, *supra* note 184, at 256 n.29 (citing 1958 Nebraska study in which 93.4% of respondents indicated disinheritance should be prohibited if child is under 21; 63.4% indicated disinheritance should be prohibited even if child is over 21). But see Browder, *supra* note 153, at 1307 (reasoning that there has been virtually no sentiment for changing the law concerning disinheritance of children because it is rare and, when it occurs, usually occurs for cause).

274. See *supra* notes 11-13 (citing statistics on divorce, cohabitation, and single motherhood).

frequency than does disinheritance of the surviving spouse.<sup>275</sup>

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275. See, e.g., SUSSMAN ET AL., *supra* note 5, at 91 (noting that in sample of 28 cases in which testator had remarried, over 57% bequeathed entire estate to spouse or legatees from last marriage). See also *supra* note 186 (discussing statistical information indicating children are likely to be disinherited in favor of surviving spouse, particularly in traditional nuclear family).

The reported cases as well as general observation support the hypothesis that the noncustodial divorced parent is particularly likely to disinherit his child. For instance, in *Kujawinski v. Kujawinski*, 376 N.E.2d 1382 (Ill. 1978), the Illinois Supreme Court noted as follows:

[W]hile it is comparatively rare for a nondivorced parent to leave a spouse and their children out of a will, it is not so uncommon for a divorced parent to do so . . . . A divorced parent may establish a new family which may command primary allegiance in a subsequent will. The well-being of children of a former marriage may seem more remote to a noncustodial parent than the well-being of those children over whom that same parent has immediate care and custody. In addition, the divorced parent may harbor animosity toward a former spouse, which disposition might obscure the natural tendency to provide in a will for their mutual children. These are reasonable assumptions for the legislature to have made and assumptions which courts in other jurisdictions have countenanced.

*Id.* at 1390-91.

In *In re Estate of Brown*, 597 P.2d 23 (Idaho 1979), the court cited cases granting an extension of child support beyond death of the divorced parent "[b]ecause of the greater likelihood of a divorced father leaving a child without financial protection or security." *Id.* at 25. The court also noted that "[w]hile it is true that the common law doctrine in effect permits a parent to disinherit a child, there is no great danger that a parent would exercise this arbitrary right so long as the family unit remained intact." *Id.*; see also *id.* at 24 (noting that testator's will acknowledged infant from first marriage, but devised entire estate to second wife with whom he had four children); *Herring v. Moore*, 561 S.W.2d 95, 96-97 (Ky. Ct. App. 1978) (noting that testator bequeathed \$10 of a \$64,000 estate to his infant adopted daughter being reared by his ex-wife); *Hornung v. Estate of Lagerquist*, 473 P.2d 541, 543 (Mont. 1970) (quoting will in which father bequeathed \$1 of \$400,000 estate to infant daughter from prior marriage; support obligation extended beyond father's death); *Hill v. Matthews*, 416 P.2d 144, 144 (N.M. 1966) (extending father's support obligation beyond his death because of agreement and specifically noting that a few weeks after divorce from her mother, father executed will leaving infant daughter one dollar).

In *In re Estate of Fessman*, 126 A.2d 676 (Pa. Super. Ct. 1956), the testator and his wife divorced shortly after the birth of their son. He executed a will which bequeathed one-half of his residuary estate to his parents and the remainder to one Eva Puccinelli. Later he sent a letter to his ex-wife's attorney, agreeing to pay a fixed amount monthly for child support in lieu of the earlier court order. There was no termination date stated in the promise to pay such amount. Finally, the testator asked his ex-wife to remarry him, but he died before the marriage and before he had changed his will. Eva claimed the testator's obligation of support ended at his death and thus that she was entitled to one-half of the residuary estate. The court found that the letter was an ambiguous contract, allowed parol testimony, and held that the testator had in fact contracted to support his son during the child's minority—thus the obligation was binding upon his estate. *Id.* at 677-78. Under the traditional view, if the support contract is silent as to duration, then the obligation terminates at the obligor's death. See, e.g., *Gordon v. Valley Nat'l Bank*,

The intentional disinheritance of a child by a competent testator is both permissible and unchallengeable.<sup>276</sup> Even if disinheritance of minor children were proven to be less frequent than disinheritance of spouses,<sup>277</sup> there remains a crucial distinction between the positions of the disinherited spouse and the disinherited minor child: because of her minority, the minor child with few exceptions has no ability or opportunity to protect herself from disinheritance.<sup>278</sup> The child has no choice concerning her existence

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492 P.2d 444, 446-47 (Ariz. Ct. App. 1972) ("absent a specific or manifestly clear and unmistakable provision for survival of support payments, they will abate upon the death of a divorced obligor"); *see also supra* note 271 (discussing when the obligation to provide support terminates).

276. In *McKamey v. Watkins*, 273 N.E.2d 542 (Ind. 1971), the testator was survived by a child to whom he owed an inter vivos child support obligation pursuant to a divorce decree. The testator's mother was the sole beneficiary under his will. The Supreme Court of Indiana noted that the testator's responsibility for his minor child terminated at death. The court further noted, however, the anomaly created by an Indiana statute that imposed a posthumous support obligation in favor of a father's child born out of wedlock when paternity had been established. Nonetheless, the court ruled for the testator's estate, stating that the child's argument should be addressed to the legislature. *Id.* at 542-43.

277. Compare *Dunham*, *supra* note 184, at 256-57 (concluding in 1963 that the problem of disinheritance of a minor child "does not really exist in modern society given the longevity of the average adult together with the early marriage and the early time of having children") with *MACDONALD*, *supra* note 269, at 35 (noting in 1960 that "[t]here would appear to be as much if not a greater need for protection of the minor children as of the surviving spouse"). *See generally* Rein, *supra* note 102, at 12-15 (discussing cases of disinheritance of minors); Laube, *supra* note 4, at 559-87 (noting numerous 19th- and early 20th-century cases).

Fathers' lifetime refusal to pay child support for noncustodial children is well-documented. *See, e.g.,* LIEBERMAN, *supra* note 271, at ix ("[c]hild support in America is a national disgrace"; more than half of fathers ordered to pay disobey the orders). A reasonable extrapolation from these statistics is that these same fathers will feel very little obligation to provide posthumously for their children. *See also* CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 1992, 71-121 (listing by state the percentage of child support collected in 1990, ranging from low of 5.6% in Arizona to high of 32.6% in Vermont).

278. In 1977, Professor Haskell made the following comment on the "mysterious absence of protection for children":

There is no explanation for the failure to protect minor children from disinheritance where there is no surviving parent or where the surviving parent has inadequate means to support the child, other than that such disinheritance rarely occurs. This is undoubtedly true, but the same can be said for all kinds of aberrational conduct which the law prohibits or punishes.

Every moral obligation need not have its legal counterpart. Moral obligations in the family support area do have legal counterparts in many respects, but the one inexplicable exception is the absence of any legal obligation to assure support for minor children in some manner after death.

Haskell, *supra* note 27, at 114-15. With the continuing increase in serial family formation



and has no choice concerning the parent/child relationship that follows. Unable to provide for herself or terminate the relationship,<sup>279</sup> she is bound to a "family" which she neither created nor can change.<sup>280</sup> Moreover, the ability to disinherit is not mutual: because in most states a child under eighteen cannot make a will, the child cannot disinherit her parent.<sup>281</sup> Ironically, the effect is that the parent receives the benefit of forced heirship which is denied to his child.

## 2. Protecting the Minor Child from Disinheritance

### a. The legitime

There are a variety of ways in which the minor child of a testator could be protected in the United States. The most direct method of protecting the testator's child is to provide her with a legitime.<sup>282</sup> The legitime has several characteristics that make it

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and childbirth out of wedlock, as well as the well-documented difficulty of collecting inter vivos child support obligations, the ineluctable conclusion is that child disinheritance unfortunately is no longer rare. Thus, Professor Haskell's observations concerning moral/legal obligations are even more apropos today.

279. Even in the adoption scenario, the infant child unlike the prospective parent typically has no choice in the adoption arrangement. *See also* *Kingsley v. Kingsley*, 623 So. 2d 780 (Fl. Dist. Ct. App. 1993) (concluding that an unemancipated minor child lacks the capacity to bring a termination of parental rights proceeding in his own right). In *Kingsley*, the much-publicized case in which 13-year-old Gregory K. successfully "divorced" his parents, the appellate court subsequently held that the termination proceeding could only be brought by an attorney or an adult who has knowledge of the facts alleged, or is informed of them and believes them to be true. *Id.* at 784. That Gregory filed his own petition was deemed harmless error, however, because separate petitions for termination were also filed by other adults on his behalf. *Id.* at 785. *But cf. In re Pima County Juvenile Severance Action No. S-113432*, 872 P.2d 1240, 1242 (Ariz. Ct. App. 1993) (allowing child to be petitioner in action to sever parental rights under Arizona law).

280. For an unusually eloquent discussion of the parent-child relationship and what it should mean in the law of disinheritance, see Batts, *supra* note 269, at 1263-69 (concluding that "non-choices" experienced by minor child are contributions the child makes to family assets).

281. *See, e.g.,* AMERICAN BAR ASSOCIATION, ALL-STATES WILLS AND ESTATE PLANNING GUIDE (1993). Only a few states deviate from this general age requirement. In California and Idaho, an emancipated minor can make a will. *Id.* at 4-31, 4-92. In Georgia, the minimum age requirement for executing a valid will is 14. *Id.* at 4-77. In Indiana, a person under 18 may make a will if a member of the Armed Forces. *Id.* at 4-105. In Louisiana, the minimum age requirement is 16. *Id.* at 4-130. *See also* SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 34-36 (1987) (discussing testamentary transfers of property by minors).

282. *Cf. Haskell, supra* note 7, at 518-26. Almost 30 years ago, Professor Haskell pro-

a plausible choice for use in the United States. Because the legitime is a fixed portion of the estate, it is easy to administer. As with the fixed fractional spousal provision, the procedural cost of the legitime to the estate is minimal. Importantly, in a country where the qualifications and training of probate judges vary widely, the legitime involves little or no judicial discretion in application. Moreover, because of the Louisiana experience, states have a model from which to study and learn in adopting and applying the legitime.<sup>283</sup>

Unfortunately, the Louisiana experience also demonstrates the controversy that forced heirship can engender. Some Louisianans would prefer to have their state join the inheritance approach of the other forty-nine, rather than have the other states adopt the legitime. In recent years, reducing the protected class to a testator's children under twenty-three somewhat appeased opponents of the legitime. The age reduction was recently declared unconstitutional, however, and acrimonious debate over the legitime between factions of Louisiana residents is likely to continue.<sup>284</sup>

The legitime also is plagued by the same ill-suited response to need as is the fractional elective share. It is an arbitrary award<sup>285</sup> which cannot take into account the actual need of the

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posed a limited forced share for children of a decedent. Under his proposal, the children of a decedent would be entitled to one-third of the first \$200,000 of the estate after debts and expenses. Children under 21 (or age 26 if engaged in full-time college or graduate education) would receive a supplemental forced share equalling the child's basic forced share. These amounts would be placed in trust to pay income to the child until he or she reaches age 21 or completes his or her education, whichever occurs later (but never beyond the age of 26). *Id.* at 519. *See also infra* note 288 (discussing recent proposal for "protected inheritance").

283. *See supra* notes 115-23 and accompanying text (discussing legitime in Louisiana).

284. Efforts to enact a limited legitime—one that distinguishes among children as did the recently stricken Louisiana provision—may be subject to attack under available state equal protection provisions. In *Succession of Lauga*, 624 So. 2d 1156 (La. 1993) (holding the age reduction unconstitutional), the only justice to address the equal protection claim was Justice Kimball, in his dissenting opinion. *See id.* at 1197-200. He noted that the statute in question had a legitimate purpose—the balancing of freedom of testation and protection of forced heirship to those most likely to need it. Applying the required level of review under Louisiana law (similar to intermediate scrutiny under the federal Constitution), Justice Kimball found that the statute substantially furthered the legitimate state purpose. *Id.* at 1198-99. Moreover, he found that limiting the legitime to those children under 23 or children mentally or physically infirm was not arbitrary or capricious or unreasonable. *Id.* at 1199.

285. *See supra* note 72.

disinherited child.<sup>286</sup> Moreover, the legitime is unquestionably a significant constraint on testamentary freedom. Perhaps more than any other civilized people, Americans cling to and zealously guard this freedom, even while other common law countries have increasingly recognized a posthumous obligation to support needy family members.<sup>287</sup> On the whole, it appears that the civil law legitime has little chance of gaining widespread acceptance in this country.<sup>288</sup>

b. Testator's family maintenance

The modern commonwealth approach to protection from disinheritance invokes judicial discretion. Because non-spousal applicants are limited to awards of maintenance, frustration of the testator's intent can be minimal even when the applicant is suc-

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286. *But cf. infra* note 287 (arguing that consanguinity alone is enough to require legitime or forced share for children).

287. *But see* Laufer, *supra* note 153, at 308 n.165 (stating that legislative inertia appears largely responsible for failure to remedy plight of minor children); Haskell, *supra* note 7, at 500-01 (noting that although the platitude "freedom of alienation" could possibly account for the law of disinheritance, the true explanation is legislative and judicial inertia). Advocating a limited forced share not tied exclusively to need, Professor Haskell made the following profound yet simple statement:

I believe that consanguinity may be justification in and of itself for claim to some portion of the property of the decedent. I would not attempt to offer a reasoned justification for this position, since it involves considerations which I do not believe have their roots in reason. I believe, however, that it is a view widely held, albeit inadequately articulated.

*Id.* at 525. The view is probably still widely held. More importantly, in the 30 years since Professor Haskell's article appeared, the need of the disinherited minor child in America may have become so important that legislators can no longer afford to overlook her plight, regardless of beliefs about consanguinity.

288. In the most recent and thorough proposal for protecting children from disinheritance in America, Professor Batts suggests a substantially modified form of legitime in which one-half of the share of the children would be protected for their benefit. Under the scheme, however, the needs of the minor (and dependent) children of the testator would be satisfied first. A trust would be established to provide income to meet the needs of these minor children. If money remained when the last child became emancipated, then all of the children would share the remainder equally. Batts, *supra* note 269, at 1255-56. Like Haskell, Batts would interpret "needs" expansively to include higher, full-time education. *Id.* at 1255 n.323.

To state legislatures that wish to remedy the plight of the disinherited child, perhaps the most controversial part of Professor Batts' proposal would be the priority given to meeting the needs of minor or dependent children over the spousal forced share. *See id.* at 1255-58 (presenting an example involving minor children, in which case one-half of variable portion of surviving spousal share is also placed in trust for benefit of minor children, whether or not the surviving spouse is biological parent of minor children).

cessful. To reduce further the impact upon testamentary freedom, an adopting legislature in America could limit the class of potential applicants to minor children. Nonetheless, application of the "minor child" maintenance approach also seems unlikely to gain widespread acceptance in the United States.<sup>289</sup> Substantial costs and attorney fees would be incurred in the application process. A vengeful ex-spouse or ex-lover of the testator would be tempted to expose the testator's dirty laundry in the process of ensuring that her disinherited child by the testator received a satisfactory maintenance award. Most importantly, there would be little predictability or comparability of result, with individual probate judges left to follow their own views of moral obligation under the nebulous guidelines characteristic of the family maintenance system.<sup>290</sup>

c. Posthumous obligation of child support

In a society where noncustodial parents frequently shirk their inter vivos child support obligations and are perhaps even more likely to exclude the children from their wills, jurisdictions could protect the disinherited child by recognizing the parent's *posthumous* duty to support the child during minority.<sup>291</sup> Statutory rec-

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289. *But see* Rein, *supra* note 102, at 53-56 (advocating testator's family maintenance and discussing perceived drawbacks of such a system).

290. One is reminded of the statement of Max Rheinstein regarding judicial discretion in distributing marital property upon divorce: "We cannot have both individual justice (or more correctly, the hope of individual justice) and predictable, fast, easy, and inexpensive disposition of matters of divorce." Rheinstein, *supra* note 146, at 433. The statement would also appear to be true of matters of family disinheritance.

291. The continuation of the parental obligation of support beyond death is not a novel idea. When a child support order or agreement provides that the support obligation will extend beyond the parent's death, the provision is recognized. *See supra* note 271 and accompanying text (discussing cases that have extended the obligation beyond death). Essentially, the child is treated as a protected creditor when such an order or agreement exists. *See also* McKamey v. Watkins, 273 N.E.2d 542, 542-43 (Ind. 1971) (noting irony of state legislation that recognized continuing support obligation to child born out of wedlock but not to legitimate child).

Moreover, in a few states, statutes permit the county to claim support from the decedent's estate if the parent was chargeable with the support of the child, died leaving the child chargeable to the county, and had an estate sufficient for the child's support. *See, e.g.,* CAL. FAM. CODE § 3952 (West Supp. 1994) (effective Jan. 1, 1994); MONT. CODE ANN. § 40-6-213 (1993); N.D. CENT. CODE § 14-09-12 (1991); OKLA. STAT. ANN. tit. 10, § 11 (West 1987); S.D. CODIFIED LAWS ANN. § 25-7-14 (1992). The dearth of reported cases implies that these statutes are very rarely used, however, for the benefit of a disinherited minor child. In *Jacobs v. Gerecht*, 86 Cal. Rptr. 217 (Ct. App. 1970), the court disallowed a claim by a minor who had been left substantially less than what would

ognition of the parent's posthumous duty to support the child would make explicit the obligation implicit in the conduit theory under dower and the forced share.<sup>292</sup> Moreover, the loopholes currently permitting children in nontraditional families to be disinherited would be closed. A well-planned scheme of this sort could be easily and efficiently administered and would infringe upon testamentary freedom only to the extent necessary to support the child until she attains the age of majority.<sup>293</sup> The posthumous obligation is a logical extension of the inter vivos duty of support, the violation of which can result in both civil and criminal sanctions.<sup>294</sup> The following discussion provides a brief overview of how such a system might work and the principal problems it would have to address.

Unlike the legitimate and testator's family maintenance, the posthumous award of child support would neither be based on a constant, fixed fraction nor determined by judicial discretion. Rather, the amount of the posthumous award of child support would be determined by support schedules or formulas similar to those found in child support guidelines used in inter vivos awards of child support today.<sup>295</sup> For example, the age of the disinheri-

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be required for her support during minority. The court noted that the statute gave the privilege to sue only to the county supervisors, and not to the disinherited child herself. *Id.* at 218-19.

292. The right of support from the deceased parent's estate would not be limited to children of divorced parents, but rather would extend to all children. Otherwise, single parents and parents in a traditional nuclear family could still effectively leave their minor children unprovided for.

293. *Cf.* Haskell, *supra* note 7, at 515 (questioning cut-off of protection when child reaches 18, since that is the age when advanced study generally begins). Although Professor Haskell's proposal of a limited forced share with the possibility of an educational supplement beyond majority is admirable, probably no legislature outside of Louisiana would seriously consider such an award currently; that step would be too much, too soon, regardless of its merits. Rather, in view of state legislative failure to provide explicitly for disinherited children for over two centuries, it seems that only by convincing legislators that minor children have an urgent, genuine need for protection can one hope to see any remedial action taken. Once minor children are protected, then legislatures could address the question of forced inheritance or support awards for advanced education of the child.

294. *See, e.g.,* CAL. FAM. CODE §§ 3900-3901 (West Supp. 1994) (stating that mother and father have equal responsibility to support their child until child completes 12th grade or reaches age 19, whichever occurs first); N.Y. PENAL LAW § 260.05 (McKinney 1989) (failing or refusing without excuse to provide support for child younger than 16 is a class A misdemeanor); N.C. GEN. STAT. § 14-322 (1993) (stating that parent willfully neglecting or refusing to support child adequately is guilty of misdemeanor; first offense punishable by fine not to exceed \$500 or by imprisonment for not more than six months, or both).

295. *See* ELIZABETH S. BENINGER ET AL., DETERMINING CHILD & SPOUSAL SUPPORT

ed child and the adequacy of other sources of support would be relevant considerations in developing such schedules or formulas. Significantly, however, the size of the testator's own estate should not be a factor in determining the award, since the ultimate goal of the scheme is to ensure that the minimal needs of the testator's minor children are met—even if this requires exhausting the testator's entire estate. In such circumstances, the law would effectively recognize that the testator's obligation to his needy minor children is more important than his privilege of testamentary freedom.<sup>296</sup> Once the estate administration has been closed, the award would not be subject to modification.

Under such a system, if the disinherited minor child does not qualify as "needy" in the applicable support schedules or formulas, then she would take nothing from her deceased parent's estate. To prevent the child from coming within the protective statute, the testator could ensure that the child is not left needy. Life insurance proceeds, joint tenancies, or inter vivos gifts and trusts would all be means by which the child could be satisfactorily provided for outside the will. Alternatively, the will could provide

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§§ 430-433.12 (1990 & Supp. 1992) (discussing child support calculation models used in various states). In 1984, amendments to federal welfare statutes required states to adopt guidelines for determining child support or lose federal welfare funds. *See* 42 U.S.C. § 667 (1988) (mandating that states establish guidelines for child support awards). The guidelines may be established by legislative, judicial, or administrative action and must be reviewed at least once every four years. *Id.*; *see, e.g.*, ALASKA R. CIV. P. 90.3 (1994) (defining judicial child support guidelines); COLO. REV. STAT. § 14-10-115 (1992) (establishing statutory child support guidelines); FRIEND OF THE COURT ADVISORY COMMITTEE, MICHIGAN CHILD SUPPORT GUIDELINE MANUAL (1992) (providing administratively developed child support guidelines). The guidelines vary widely from state to state and are generally viewed as materials to guide, not bind, the court in its determination of the appropriate child support award. Thus, unlike the proposed binding support schedule for posthumous child support awards discussed in the text above, inter vivos child support guidelines do not severely fetter judicial discretion. *See, e.g.*, *Boris v. Blaisdell*, 492 N.E.2d 622, 625-27 (Ill. App. Ct. 1986) (noting that legislative history emphasizes judicial discretion; guidelines merely provide a place to begin analysis); *In re Marriage of Gore*, 781 S.W.2d 828, 832 (Mo. Ct. App. 1989) (stating that guidelines are "simply formulas or schedules to consider which leave significant room for sound judicial discretion"). Commentators have indeed noted that if the goal of the federal statute was to ensure uniformity and eliminate or restrict judicial discretion in support awards, the statute is a failure. *See* 1 ALEXANDER LINDEY & LOUIS I. PARLEY, *LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS* ¶ 15.02 (1994) (discussing lack of uniformity, but nevertheless noting the positive role of guidelines in presenting "objective, mathematically calculable criteria for the determination of child support orders").

296. The posthumous obligation of support could thus be larger than the traditional legitime. As the estate value decreases and the number of minor children increases, it becomes more likely that the testator's entire estate will be exhausted by such a scheme.

the child with at least the minimum required under the posthumous child support provisions.

Although courts normally may use discretion to deviate from child support guidelines in determining inter vivos awards, the child support schedules or formulas for determining the posthumous obligation would be binding. Varying degrees of flexibility could be designed into the schedules or formulas themselves; however, to allow additional judicial discretion would subject the scheme to the same criticisms leveled at the family maintenance system. The awards under the support schedules would instead be based on the perceived needs<sup>297</sup> of the "typical" minor child in the category within which the claimant falls.<sup>298</sup>

Questions of priority between minor children and other claimants<sup>299</sup> against the testator's estate would also require the atten-

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297. Commentators have emphasized the importance of advanced education in preparing a child for entry into the adult world. *See supra* notes 282, 288 (discussing proposals of Haskell and Batts). A state legislature could extend the coverage to include children during minority and continuing through a certain age if the child were a full-time student. Because any measure disallowing complete disinheritance would mark a dramatic change in American law, however, for practical reasons the proposal in this article is more modest: legislatures should start by considering need in its most basic terms. Although few would argue that a minor child is not entitled to food and shelter, at least some Americans might still take issue with the idea of advanced education as a *need*.

Including advanced education as a criterion for extending the support duty presents other problems as well. What advanced education programs satisfy the requirement? A four-year university, a technical school, a conservatory of music? If the award were extended to cover costs of advanced education, would the child be liable to refund some part of the award if she did not attend or finish the program of study? It appears that in these situations, any award to the child would have to be placed in a trust which would terminate upon her failure to comply with the appropriate conditions.

298. To develop an adequate scheme of protection for children, legislatures would have to determine those children who may be properly disinherited. Although the proposal in this article is geared to the protection of needy, minor children, even within this category some children could be subject to disinheritance. *See supra* note 121 (discussing Louisiana disinheritance statute). For example, the needy, minor child who feloniously kills or attempts to kill his parent would be a likely candidate for exclusion from the posthumous support rules. The exclusion of such a child typically would also comport with state statutes concerning felonious killing and their effect on inheritance. *See supra* note 60.

299. A potential and very possibly deserving claimant to the posthumous award of child support is the adult disabled child unable to provide adequately for himself. The needs of the adult disabled child have not been examined in this article, but in some ways are analogous to those of the minor child. If her disability is permanent, the adult child's claim may even seem more compelling than that of minor children. Where the jurisdiction imposes a continuing obligation of support on the living parent of an adult disabled child, an extension of the posthumous obligation would appear logical. Most states now require parents to support their adult disabled children who are unable to support themselves. *See* LYNN D. WARDLE ET AL., 4 CONTEMPORARY FAMILY LAW § 38.05 (1988 & Supp. 1989)

tion of legislatures willing to recognize a posthumous obligation of parental support. For example, an important question of priority would arise if the jurisdiction possessed both an elective share statute and a posthumous duty of support statute and the testator's estate were too small to cover both the spouse's elective share amount and the testator's posthumous obligation of child support.<sup>300</sup> One solution would be to satisfy the spousal share and distribute the remainder to the minor children. In light of the strong preference of twentieth-century legislatures for protecting the surviving spouse even to the detriment of other heirs, this initially appears the most likely approach to the priority problem between a surviving spouse and minor children. Indeed, for most of the history of this country, duty to spouse seems to have been considered greater than duty to children.<sup>301</sup> This alternative also comports with most modern intestacy approaches, which first ensure protection of the spouse and only afterwards provide for the intestate's children.<sup>302</sup>

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(citing statutes and case law from various jurisdictions).

There may, however, be practical reasons for not protecting the adult disabled child with funds from the parent's estate. The needs of the disabled adult child continue over an incalculable period potentially extending for several decades. Moreover, those needs would vary greatly among individual claimants, depending upon the kind and severity of disability in question. Each disability would require its own support schedule or formula. At least where needy, minor dependents of the testator also survive, it may be appropriate not to require the posthumous award on behalf of the adult disabled child. A legislature choosing to protect both minor children and adult disabled children would face an extremely difficult choice in setting the priority of claims between these two categories of children.

300. Note that when a decedent dies intestate leaving no parents, a surviving spouse, and all of the decedent's descendants are also descendants of the surviving spouse (who has no other descendants), then under the 1990 UPC the surviving spouse takes the entire intestate estate. 1990 UNIF. PROB. CODE § 2-102(1), 8 U.L.A. 75, 80 (Supp. 1994). If a state were using the 1990 UPC and a system of posthumous child support obligations for the testate decedent, disinherited children in such a family would be better off than if their parent had died intestate.

301. As previously discussed, however, duty to spouse originally was perceived at least in part as encompassing duty to children. The widow and minor children at that time in numerous ways suffered similar disabilities. With enfranchisement and the Married Women's Property Acts, however, women entered the realm of adult personhood and left childlike disability behind. Today, the adult surviving spouse is in a position vastly superior to that of the minor child, who is still largely unable to protect herself from either the world or, when necessary, her own parents.

302. In most states, the surviving spouse of an intestate decedent receives at the least a child's portion. See, e.g., MISS. CODE ANN. § 91-1-7 (1972) (surviving spouse entitled to only a child's part if decedent is also survived by issue), and, at most, the entire intestate estate, see 1990 UNIF. PROB. CODE § 2-102(1), 8 U.L.A. 75, 80 (Supp. 1994) (surviving



Another approach to priority would be to provide for a pro rata distribution between the surviving spouse and minor children. This approach, however, would quite likely prove to be unsatisfactory to both the surviving spouse and minor children, for persons in either category would be partially disappointed in their awards. The disparity in positions of the surviving spouse and the minor child indicates that the best resolution lies in ensuring that the minor child posthumous support obligation is fulfilled before any distribution is made pursuant to laws of testate (or, for that matter, intestate) succession.<sup>303</sup> As between general creditors and disinherited minor children, the testator's support obligation to the children should also be given priority.<sup>304</sup>

Legislatures also would need to adopt measures to prevent the testator from making fraudulent transfers shortly before death to deplete his estate and defeat the posthumous obligation of child support. The most difficult part of drafting such a preventive statute would be to minimize the inevitable tension between the surviving spouse and the minor children. If, for example, just before

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spouse receives all if decedent is not survived by parents, all of his issue are issue of surviving spouse, and surviving spouse has no other issue). See generally Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 929-33 (1992) (discussing surviving spouse's share under UPC intestacy scheme).

303. Although this article does not specifically address intestacy and the needy minor child, it should be noted that a "minor children first" approach could rectify unfortunate circumstances that some children experience under current intestacy laws. For example, if an intestate decedent left an estate of \$12,000, a wife, and two young children from a former marriage, in many states currently the three would each receive \$4000, regardless of need. See, e.g., TENN. CODE ANN. § 31-2-104 (1984) (specifying that a surviving spouse is entitled to "either one-third (1/3) or a child's share of the entire intestate estate whichever is greater"). A minor children first approach would determine the needs of the two minor children according to applicable guidelines, satisfy those amounts from the estate, and then allow the surviving spouse to take the remainder, if any. The rationales supporting such an approach in intestacy would be the same as those traced in this article, including the inability of the children to protect themselves; the permanence of the parent-child relationship compared to the terminable marriage contract; and the presumed equality of spouses entering into a modern marriage. If the child's intestate share exceeded the support obligation under the applicable guidelines, then the child would take the intestate share rather than the child support amount.

304. This priority determination seems uncontroversial if the importance of the posthumous obligation of support is analogized to the inter vivos obligation of support imposed in the divorce or separation scenario. Cf. 11 U.S.C. § 523(a)(5) (1988) (providing that child support obligation is nondischargeable debt when imposed in connection with separation agreement, divorce decree, or other order of a court of record or property settlement agreement). See generally 3 COLLIER ON BANKRUPTCY ¶ 523.15 (Lawrence P. King ed., 1993) (noting that bankruptcy will not discharge a maintenance or support debt to a child of the debtor).

death the terminally ill testator places his principal assets in joint tenancies or tenancies by the entirety with his second wife, should the minor child from the first marriage be allowed to include some or all of those properties in the estate from which the child's needs are to be satisfied?<sup>305</sup>

Where the child is an infant and the award is substantial, a support trust appears to be a viable solution to the problem of custody and management of the award. At least in some instances, however, an outright award to the guardian of the child might be appropriate. Examples would include where the award is small or where there is no indication of antipathy between either the surviving parent/guardian and child or between the surviving parent/guardian and testator.<sup>306</sup> By making the posthumous award of

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305. If the continuing obligation of support were recognized, the applicability of pretermitted child or heir statutes to minor children would also be called into question. A statutory scheme recognizing a posthumous obligation of support would include not only minor children intentionally disinherited, but also those inadvertently disinherited. An arguable impropriety that would result from enacting a continuing obligation of support scheme while at the same time retaining a pretermitted child statute is that the inadvertently disinherited minor child conceivably could elect between the two approaches, based on which statute provided the greater benefits. If the testator inadvertently disinherited his minor child and the child's needs are less than the child's intestate share (the typical award under pretermitted child statutes), the child would naturally choose to take under the pretermitted child statute. The opportunity to elect between the two systems may not be perceived as improper by everyone: a valid argument can be made that where the child can show he was *inadvertently* (not intentionally) disinherited, he should be able to take the maximum share allowed to him by law. Moreover, in many instances the reason for the disinheritance will be ambiguous and the child will not be assured of taking under the pretermitted statute. In any event, legislatures concerned with the problems of inadvertent disinheritance of adult children or heirs other than minor children might wish to retain the pretermitted statutes for those categories of claimants.

Some commentators have questioned the value of current pretermitted child or heir statutes, because cases of inadvertent disinheritance are a truly rare problem. *See supra* note 102 (discussing views of Rein).

306. Probably in most instances in which the guardian of the minor child is the surviving spouse of the testator there should be little concern that the parent will misappropriate the funds or that her management of them would be contrary to the testator's wishes. A more difficult question arises when the minor child is not the child of the surviving spouse. The simplest solution is to award the money to the surviving parent as the child's natural guardian. In at least some cases, however, it will be apparent that the surviving parent cannot or will not be an adequate fiduciary to the child. In the absence of a mandatory trust in such a case, upon the request of an interested party the court should have the power to place the award in trust for the benefit of the child.

For those who espouse so-called traditional family values, this continuing obligation of support should be appealing. The minor children in the traditional family would receive the amounts representing the testator's obligation to them while the surviving spouse would still be eligible for her forced share should the legislature decide to retain the provision. (Note that, alternatively, the scheme could be structured so that the continuing

the child support in a lump sum,<sup>307</sup> the process of estate administration should take no longer than it does currently. Moreover, the difficulties of collection experienced under inter vivos child support orders would be substantially reduced in collecting from the decedent's estate.

The problems involved in devising a workable scheme upon which to ground the posthumous obligation of support are formidable but not insurmountable. Regrettably, to the extent such a system can be developed, it will probably have to be engrafted onto the existing (and often creaky) framework of protective provisions. Although a nationally uniform system of child protection is desirable in our highly mobile society,<sup>308</sup> it will be difficult to achieve in light of the maze of current inter vivos child support and probate laws. Nonetheless, even support schemes developed and enacted state by state are better than none at all.

#### IV. CONCLUSION

If marriage is viewed as an economic partnership, then the community property system is preferable to the common law system. Because the community property system recognizes the contributions of each spouse during the marriage itself, no special provisions are required to protect a spouse from disinheritance. Nonetheless, most jurisdictions in the United States apply common law principles to ownership of marital assets and are unlike-

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duty of support would apply only to those situations in which the testator left minor children by others than his surviving spouse. Such an approach, while perhaps practical, would fail to recognize explicitly the testator's obligation to *all* of his children and would also appear to marginalize the value of the excluded children.).

307. A posthumous obligation of child support payable in a lump sum has antecedents in the inter vivos obligation of child support. Although child support awards are seldom made payable in lump sums, such awards do occur in some contexts. *See, e.g.*, UNIF. PARENTAGE ACT § 15(d), 9B U.L.A. 287, 324 (1987) ("[i]n the best interest of the child, a lump sum payment . . . may be ordered in lieu of periodic payments of support"); OHIO REV. CODE ANN. § 3111.13(D) (Anderson 1992 Supp.) (same); *Cross v. Goodridge*, No. C-920113, 1993 WL 231714 at \*1-2 (Ohio Ct. App. 1993) (noting availability of lump sum award pursuant to Ohio statute).

308. *Compare* John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 878-79 (1992) (noting that local variation among states enacting uniform laws results in loss of uniformity that is large part of their value) *with* Fellows et al., *supra* note 7, at 361 (questioning propriety of uniform intestate succession statute after 1977 survey indicated that respondents in various regions of the country had differing views on proper distribution at death).

ly to convert to community property principles. The forced share or dower exists in almost all common law states and recognizes to some degree the contributions of the survivor of the marriage. Unfortunately, this recognition is belated: it vests only upon the death of the first spouse. The forced share or dower, however, does prevent complete spousal disinheritance.

Because common law states refuse to fully acknowledge marriage as an economic partnership, the forced share will continue to exist well into the twenty-first century. The forced share, as even its leading proponents acknowledge, is a makeshift provision that cannot completely eliminate the flaws of common law ownership applied to marital assets. Where the share is retained, however, its conventional form should be replaced with the fairer 1990 UPC provisions.

For unmarried cohabitants, there are no statutory protections from disinheritance similar to community property or the forced share. Heterosexual cohabitants may take advantage of the spousal protections by marrying. Homosexual cohabitants, however, do not have this option. As our definition of family evolves, the disparate treatment of homosexual cohabitants becomes increasingly difficult to justify, particularly when minor children are in the home.

Spouses and cohabitants may protect themselves from disinheritance in a variety of ways without state intervention. If marriage or cohabitation is viewed merely as a contractual relationship of equals able to protect their own interests, a plausible argument for the abolition of statutory protection arises. Yet Georgia alone of the common law states affords a surviving spouse no dower or forced share, and there is little indication that this approach will be adopted elsewhere.

Most civilized countries around the world explicitly recognize the testator's obligation to his children beyond his death. In the United States, only Louisiana does so. When children were reared in traditional families by parents who remained married until death, the American laws protecting the surviving spouse from disinheritance implicitly protected the couple's minor children because of the surviving spouse's parental duty of support. Today, however, millions of American children are reared outside the traditional family. If there is a surviving spouse of the testator, she frequently is not the parent of his disinherited minor children. In many nontraditional families, the disinherited minor child there-

fore will not receive the indirect protection afforded by dower, the elective share, or community property principles. Some children in nontraditional families can be protected from disinheritance through child support decrees or express contractual obligations. For others, however, these protective options do not exist.

In this society of fractured families, it appears that disinheritance of minor children is more common than spousal disinheritance. Yet in the absence of statistical evidence that disinheritance of minor children is a substantial problem, legislatures are hesitant to address the issue. That such statistical evidence may be well-nigh impossible to obtain is hardly a satisfactory reason for denying minor children protection from disinheritance: spousal disinheritance has long been the subject of protective statutes even though there is little evidence that spousal disinheritance is a problem. The difference in protection afforded spouses and minor children is particularly ironic when one compares their positions. Spouses have the opportunity and ability to protect themselves from disinheritance; minor children do not.

Neither the civil law legitime nor testator's family maintenance, however, is likely to find widespread acceptance in America. The former is highly arbitrary and the latter is highly discretionary. Both may apply to benefit children of all ages. The proposal suggested in this Article is more modest: states should recognize explicitly that the parental obligation of support is one that extends posthumously until the child attains majority. The child inadequately provided for should have a claim against her parent's estate that receives first priority. The amount of the claim could be determined from binding tables or formulas developed in a manner similar to that used for inter vivos child support guidelines.

In a time of rapidly evolving marital and cohabitating relationships, legislatures are understandably reluctant to change existing provisions for adult survivors. Long before this evolution began, however, American society failed to ensure that its minor children were not the victims of parental disinheritance. We can no longer plausibly assert the benefits flowing from the traditional family model in mitigation of this failure, for such benefits apply to increasingly few children. We can no longer stubbornly cling to the world of our ancestors, for family structures they never envisioned are with us here and now. Minor children did not create the modern family, nor should they be suffer for being

born into it. In fairness to these children and to society at large, we must ensure their protection from parental disinheritance.

