Should the Surviving Spouse's Forced Share be Retained

J. Thomas Oldham
SHOULD THE SURVIVING SPOUSE'S FORCED SHARE BE RETAINED?

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Upon dissolution of a marriage, the inheritance law of most states dictates division of the property based on a theory that only the assets of the marriage will be divided. Upon death of a spouse, while community property states espouse such a theory, common law forced share states do not. This Article explores the propriety of the forced share system in light of society's present attitudes toward marriage. The author concludes that the common law system should be amended to reflect aspects of the community property system.

I. INTRODUCTION

During the past two decades a consensus has evolved in community law and common property states regarding the economic consequences of divorce. In most states, a divorce court can divide property accumulated by either spouse during marriage, if the property was acquired due to the spouse's effort. Premarital acquisitions, and acquisitions by one spouse during marriage due to gifts or inheritances, cannot be so divided. This reflects the “marital part-

* Professor of Law, University of Houston Law Center. This Article incorporates helpful comments made by my colleagues Gil Finnell and Joe Sanders. The author is indebted to Juanita Alt for her tireless secretarial help. Rosa Silbert's research assistance also has been quite valuable. Barbara Foley Wilson, of the National Center for Health Statistics, kindly helped the author locate relevant statistical information.


2. Eight states accepted the marital property system developed by France and Spain. These states are referred to as “community property” states. See W. DEFUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 1 (2d ed. 1971); Comment, supra note 1, at 1269, 1276-78.

3. See generally Comment, supra note 1 (discussing the distinctions between the common law and community property systems and highlighting the emerging incorporation of the sharing principle of the community property system into the common law system).

4. See generally Foster & Freed, Marital Property Reform in New York: Partnership of Co-Equals?, 8 Fam. L.Q. 169 (1974) (asserting the inequities of the common law system, where only jointly held property is distributed or made subject to partition in the case of
nership" theory of marriage—that spouses should only share the fruits of the efforts expended by the spouses during the marriage.\textsuperscript{5}

However, no such consensus exists regarding the rights of a surviving spouse when a marriage is dissolved by the death of a spouse. In community property states, the survivor receives one-half of the marital partnership property; the decedent can devise the remaining one-half, plus all other property owned by the decedent.\textsuperscript{6}

In common law states, the survivor has the right to receive a specified portion of the decedent's total estate, rather than a portion of marital partnership property. This right of the survivor is referred to as the "forced share" or the "elective share."\textsuperscript{7}

The forced share system, as it currently exists in most states, is

\textsuperscript{5} Foster & Freed, \textit{supra note 4}, at 188-94; Krauskopf & Thomas, \textit{supra note 4}, at 586-91; Krauskopf, \textit{supra note 4}, at 165-67.

\textsuperscript{6} See generally W. REPPY & C. SAMUEL, \textit{COMMUNITY PROPERTY IN THE UNITED STATES} 309-32 (2d ed. 1982) (all community property states allow the decedent spouse to dispose, by will, of half of the community property, in addition to his separate property).

\textsuperscript{7} See generally Cahn, \textit{Restraints on Disinheritance}, 85 U. PA. L. REV. 139, 144-49 (1936) (limitations upon free testation, widow may elect to take a compulsory share under applicable statute, in lieu of will provision; the widow's share includes real property held by decedent and has been extended to decedent's personal property in some jurisdictions); Chafflin, \textit{A Reappraisal of the Wealth Transmission Process: The Surviving Spouse's Year's Support and Intestate Succession}, 10 GA. L. REV. 447, 458-59 (1976) (statutory provisions protect wife from disinheritance; at common law, an inchoate interest exists in the property of the husband and cannot be defeated by will; currently, an elective share has evolved in most states allowing the spouse to take a statutory amount rather than that provided for in the will); Fratcher, \textit{Toward Uniform Succession Legislation}, 41 N.Y.U. L. REV. 1037, 1058-64 (1966) (the first tentative draft of Revised Part II, Model Probate Code, allows a widow to elect a statutory share rather than the amount provided in the will, the elective share is taken from the augmented net estate); Kulzer, \textit{Property and the Family: Spousal Protection}, 4 RUT.-CAM. L. J. 195 (1973) (the forced share theory contemplates that the survivor will have the right to a stated fraction, often the intestate share of the net probate estate (both realty and personalty) at the death of the property-owning spouse); Kulzer, \textit{Law and the Housewife: Property, Divorce and Death}, 28 U. FLA. L. REV. 1, 28-41 (1975) (the widow's elective share is generally the same or less than the intestate share; such share is measured by the "augmented estate," which includes various inter vivos transfers that are not permitted to affect the spouse's share).

difficult to justify. Recent societal changes have undermined whatever usefulness the system might have had. The purpose of this Article is to consider possible justifications for the forced share system and to suggest changes that would better satisfy the relevant policies involved.

II. HISTORICAL PREDECESSORS OF THE FORCED SHARE SYSTEM

At common law, a surviving spouse had the right of dower (if a female) or curtesy (if a male). This gave the surviving spouse a life estate in a specified amount of the lands of the decedent. For example, a surviving wife received a life estate in one-third of the husband's lands. These rights attached not only to land owned by the decedent at death, but also to land that was conveyed by the decedent during the marriage.

While dower and curtesy provided some protection for surviving spouses, they also had negative effects. For example, dower constituted a cloud on title to realty and, therefore, a restraint upon alienation, since it attached to all realty owned by the husband at any time during the marriage.

In addition, dower and curtesy did not adequately ensure that the surviving spouse would share in all property accumulated by the spouses during marriage. Although dower attached to all realty owned by the husband during marriage, it did not attach to realty owned by a corporation controlled by the husband. The controlled corporation therefore became a popular avoidance technique. Also, interests in personalty became increasingly important components of family wealth. Since dower and curtesy did not attach to personalty, they were increasingly irrelevant to any attempt to divide equitably the estate of the parties accumulated during the marriage.

Even when there was some realty upon which the dower right could attach, the result was not always satisfactory. After the hus-

8. Chafflin, supra note 7, at 465.
9. Id. at n.39.
10. If the wife joined in the conveyance, however, the dower right was extinguished. Id. Curtesy attached if an issue of the marriage was born alive. If this occurred, the surviving husband would have a life estate in all of the wife's realty. See J. DUKEMINIER & J. KRIER, PROPERTY 541 (1981). See also M. SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 141 (1986).
12. Id. See also Clark, The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms, 2 CONN. L. REV. 513, 516 (1970) (discussing inadequacies of wife's right to dower in husband's land).
band's death, the widow would have to continue to pay taxes and any purchase-money debt secured by the property. The widow frequently did not have the assets to make such payments. Moreover, the life estate was not particularly marketable.

III. THE CURRENT SYSTEMS REGARDING THE RIGHTS OF A SURVIVING SPOUSE

A. Common Law States

Almost all states have abolished dower and curtesy interests. These systems were replaced by an overlay of protective measures. Many states give the surviving spouse some kind of family allowance. This is either a small lump sum payment, a right to live in the family home or a right to receive maintenance from the decedent's estate while the estate is being administered. Also, the surviving spouse is given certain types of personal property, such as the furnishings of the home.

In addition, many common law states give the surviving spouse the right to obtain a forced share of the decedent's estate. Under this system, the surviving spouse has the right to elect to take one-
third or one-half of the decedent's estate, depending upon the state's law. The election fraction applicable in a state sometimes varies, depending upon whether the decedent is also survived by children.\textsuperscript{18}

In many states these forced share rights initially were limited to property in the decedent's estate. This did not accomplish the desired result, however, since it was quite easy for decedents who desired to disinherit the surviving spouse to circumvent the system by various means, such as by conveying their property before death, by establishing an \textit{inter vivos} trust, or by establishing joint tenancies with a third party. So, it was quite possible that there would be little property in the decedent's estate, even if the decedent accumulated a significant amount of property during the marriage. Thus, the forced share initially did little to assure that the surviving spouse would be protected.\textsuperscript{19}

Attempts were made to broaden the forced share to include more of the actual family wealth. The Uniform Probate Code gives the surviving spouse the right to obtain a forced share of the decedent's "augmented estate."\textsuperscript{20} The augmented estate includes more than the property in the decedent's estate. It includes gifts to any donee totaling more than $3000 that are made by the decedent within two years of the date of death,\textsuperscript{21} as well as other \textit{inter vivos} transfers made during marriage over which the decedent retained substantial control.\textsuperscript{22} By these measures, the drafters attempted to


For a comparative law discussion regarding the provisions of other systems for a surviving spouse, see M. RHEINSTEIN & M. GLENDON, Interspousal Relations, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 4, at 122 (France), 195 (Islamic law).

18. See Clark, supra note 12, at 533-34. For an example of the Model Probate Code's treatment of this, see Fratcher, supra note 7, at 1058-59.

19. See Kulzer, Property and the Family, supra note 7.


21. Id. This restriction does not apply if the transfers were made with the consent of the surviving spouse. Id.

22. See Clark, supra note 12, at 537 ("augmented estate . . . includes various transfers with testamentary characteristics"); Falender, Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to Leazenby, 11 IND. L. REV. 755, 778 (1978) (Augmented estate consists of decedents net estate "increased by the value of two categories of gratuitous transfers—transfers to third parties and transfers to the spouse."); Spouse's Elective Share, 12 REAL PROP. PROB. & TR. J. 323, 328 (1977) (Report of the Committee on Administration and Distribution of Decedent's Estates) (Augmented estate is "the net probate estate plus the value of certain property transferred at any time to any person other than the surviving spouse, to the extent that full and adequate consideration has not been received.").

For cases involving this issue, see, e.g., Estate of Fleischmann, 723 S.W.2d 605 (Mo. App. 1987); Estate of Gray, 729 S.W.2d 668 (Tenn. App. 1987).
give the surviving spouse the right to have a forced share regarding an estate that more closely approximated the actual estate accumulated by the decedent.

The drafters of the Uniform Probate Code concluded that the surviving spouse's forced share rights should be offset against any property transferred to the surviving spouse by the decedent by will or during the marriage, as well as any life insurance, joint tenancy holdings, or pension rights that the spouse will receive after the decedent's death. So, the UPC forced share amount is offset against all such transfers from the decedent to the widow.23

The various state forced share systems are not uniform. Therefore, it is difficult to generalize about their provisions. Many states have amended their forced share statutes to make it more difficult to disinherit the surviving spouse. Some have adopted the UPC augmented estate concept.24 Almost all common law states give the survivor a forced share of the decedent's estate, and some effort is made to return to the decedent's estate transfers made before death in fraud of the surviving spouse's rights.25

B. Community Property States

In community property states, a surviving spouse normally receives the furnishings of the home and certain other "exempt property,"26 as well as transitional support from the decedent's estate.27 In addition, the survivor is entitled to one-half of the "community estate,"28 which is all property accumulated by either spouse during the marriage, except for that property acquired by gratuitous transfer.29

23. See supra note 22. The UPC forced share applies regardless of whether the husband or wife dies first. From a policy standpoint, however, the former situation is more important and will be the focus of this paper.


25. For example, for purposes of the forced share computation a number of states will include in the decedent's estate any property transferred by the decedent that is considered an illusory transfer. See, e.g., Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

26. See, e.g., CAL. PROB. CODE § 6510 (West 1956); TEX. PROB. CODE ANN. § 271 (Vernon 1980).

27. See, e.g., CAL. PROB. CODE § 6540 (West 1956); TEX. PROB. CODE ANN. § 287 (Vernon 1980).


29. The term "gratuitous transfer" is used to refer to an acquisition by a spouse from a third party, if the property is received by gift, inheritance, devise or bequest.
In contrast to common law systems, in community property states each spouse has a vested, fifty percent ownership interest in all community property from the moment that the property is acquired by a spouse.\textsuperscript{30} Significant limitations, therefore, normally are imposed upon the ability of one spouse to give community property to a third party without the other spouse's consent.\textsuperscript{31}

If a homemaker spouse predeceases a wage earner spouse in a community property state, the homemaker can devise one-half of the community estate.\textsuperscript{32}

\section*{IV. Is the Current Forced Share System Adequate?}

In order to analyze the adequacy of the forced share system, the goals of the system must be determined. The forced share system attempts to ensure the support of dependent surviving spouses. In addition, it may, to a limited extent, also recognize the partnership aspect of marriage. In other words, even though property accumulated during marriage by one spouse in a common law state is considered "owned" by that spouse during marriage, society considers it fair to give the other spouse a share of the fruits of the partnership when the marriage ends. For the below stated reasons the forced share system accomplishes neither of these goals well.

\subsection*{A. The Support Function}

Under current forced share systems, the surviving spouse is given the right to obtain one-third to one-half of the decedent's estate.\textsuperscript{33} To the extent that this system provides the surviving spouse with reasonable support, this result is fortuitous. For example, if the decedent's estate is small, one-third of the small estate will not provide adequate support for the surviving spouse if the surviving spouse has little other property and no earning capacity. However, if the estate is large, or if the surviving spouse has significant property or a decent earning capacity, one-third could be too much.

A random sampling of decedent's estates in the 1960's found that most estates at that time amounted to between $2,000 and $60,000.\textsuperscript{34} Even if these numbers are adjusted for inflation, it seems

\begin{itemize}
\item \textsuperscript{30} W. DeFUNIAK & M. VAUGHN, supra note 2, at § 105.
\item \textsuperscript{31} Id. at 233-41.
\item \textsuperscript{32} Id. at 309-19. See, e.g., CAL. PROB. CODE § 100 (West Supp. 1987).
\item \textsuperscript{33} See supra notes 17-24 and accompanying text.
\item \textsuperscript{34} See M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 173-75 (1970).
\end{itemize}
clear that one-third of this amount alone will not guarantee ade-
quate support for life for the survivor.

Even though the specified fractional share is not well-tailored to
provide support for a surviving spouse, it could be argued that it
works a fair compromise between testamentary freedom and the
needs of the surviving spouse. The testator is permitted to devise
some property, while another portion of the estate is subject to the
support obligation toward the surviving spouse. Still, this dodges a
basic issue presented by the forced share question. Should the dece-
dent have a continuing obligation to support the surviving spouse?
The forced share system attempts to answer this question, yet re-
sults in a compromise that both disrupts testamentary freedom and
fails to ensure adequate support for the spouse.

Another flaw of the forced share system is the absence of any
consideration of the assets and earning capacity of the surviving
spouse. It would seem reasonable to interfere with the decedent's
testamentary freedom only when a compelling policy concern is
present. However, under current forced share systems, a surviving
spouse is always entitled to a portion of the decedent's estate, re-
gardless of whether the surviving spouse would otherwise suffer.

As a result, the forced share system is an ineffective way to en-
sure that a surviving spouse receives adequate support after the
death of the decedent. Under this system, many surviving spouses
receive insufficient support, while others are given a right to a
forced share even though they are already self-sufficient. The sup-
port function could be better satisfied by other systems. For exam-
ple, the English system allows a dependent spouse to obtain a
reasonable allowance (not limited to one-third or one-half) from the
decedent's estate, if the spouse would not otherwise be able to sup-
port herself.35

The English system could create problems, however. Although

35. Crane, Family Provision on Death in English Law, 35 N.Y.U. L. REV. 985, 992
(1960). See also Wis. STAT. ANN. § 861.35 (West Supp. 1987) (permitting reasonable allow-
ance); W. MacDONALD, FRAUD ON THE WIDOW'S SHARE (1960) (a critical analysis of the
American system and advocating adoption of the British system); Laufer, Flexible Restraints
on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation, 69
HARV. L. REV. 277 (1955) (comparing various common law systems); Naresh, Dependants'
Applications Under the Inheritance (Provision for Family and Dependants) Act 1975, 96 L.Q.
REV. 534 (1980); Note, Family Maintenance: An Inheritance Scheme for the Living, 8 RUT.-
current English law, the probate court can also make a reasonable award of property to the
surviving spouse, in addition to the support award. See Glendon, Fixed Rules and Discretion
in Contemporary Family Law and Succession Law, 60 TUL. L. REV. 1164, 1187 (1986).
this system seems to work well in England, some have been concerned that American surviving spouses would frequently litigate to determine whether they had adequate resources to provide for their support, and what would constitute a “reasonable” support award from the estate. Also, this system probably would complicate the administration of many decedents’ estates. If the estate had an obligation to support a surviving spouse for life, a significant reserve would have to be maintained; it would not be clear what property could be transferred from the estate to a devisee.

The English family maintenance system clearly gives the surviving spouse claim to all the assets of the estate, if necessary. This system has accepted the idea that the primary obligation of the decedent is the satisfaction of family support obligations. If this priority is not accepted, the English system would have to be modified.

B. The Marital Partnership Function

The forced share gives a surviving spouse the right to claim a portion of the decedent’s estate. It could therefore be considered a delayed mechanism for allowing the surviving spouse to share in the accumulation of property during the marriage. However, this purpose is imperfectly attained.

Many commentators have remarked upon the partnership nature of contemporary marriage. One spouse may help the other achieve success in his or her career. Also, if the spouses have children one spouse frequently assumes responsibility for childcare, while the other works for wages outside the home. Because of this, many have concluded that, at least at divorce, spouses should share property accumulated during marriage. In most states, if a marriage is dissolved by divorce spouses do not share all property accumulated during marriage; property acquired during marriage by one spouse by gratuitous transfer is not considered a marital asset.

37. See R. OUGHTON, supra note 36, at 109, 230 (noting court has discretion to ensure the applicant will be adequately maintained).
41. Id. at 263-64 nn. 1-2.
Because no effort is necessary to acquire a gift or an inheritance, such acquisitions are not considered true partnership acquisitions.\textsuperscript{42} For similar reasons, acquisitions before marriage are not shared.

The forced share system achieves a result quite different from the division of marital property at divorce. For example, \textit{all} property of the decedent is included in the augmented estate; it is irrelevant under forced share systems whether property was acquired before or after marriage, or whether the property was derived from the decedent's wages or from a gratuitous transfer. Also, the amount of property accumulated by the surviving spouse during marriage, other than via gifts from the decedent, is irrelevant. A wealthy spouse surviving a marriage that endured for two months has the same forced share rights as a poor spouse surviving a marriage that endured for fifty years.\textsuperscript{43}

Viewed from the perspective of a woman surviving a "traditional marriage\textsuperscript{44}" of long duration, the forced share system seems to punish the woman for not divorcing. In most marriages of long duration, all of the spouses' property is marital partnership property. At divorce, she could receive one-half (or more) of the marital property, plus alimony. In contrast, if the marriage continues until the wage earner dies, if the wage earner devises his estate to a third party, in most states the woman receives one-third of the marital property and no alimony (other than transitional support).\textsuperscript{45}

Another aspect of the forced share system undermines any partnership goal. In a "traditional family," where one spouse works outside the home and the other is responsible for household functions, if the financially dependent spouse dies first, that spouse cannot devise marital partnership property unless some property has been put in the name of the dependent spouse during marriage.

\textsuperscript{42} See Cantwell, Drafting the Uniform Marital Property Act: The Issues and Debate, 21 Hous. L. Rev. 669 (1984).


A few states do not grant a surviving spouse a forced share of a spouse's estate if the surviving spouse has significant assets. For example, some states bar a forced share claim if the surviving spouse has net assets of a value at least equal to the amount of the enumerated forced share. See Miss. Code Ann. § 91-5-29 (1972); N.J. Stat. Ann. tit. 3B, § 8-18 (1983). Alabama does not permit a forced share if the value of the survivor's estate exceeds the value of the decedent's. See 22 Ala. Code § 43-8-70 (1982).

\textsuperscript{44} The term "traditional marriage" is used to refer to those relationships in which one spouse did not work outside the home during the marriage.

\textsuperscript{45} The English Law Commission has concluded that the claim of a surviving spouse to marital assets should be at least equal to that of a divorcing spouse. See C. OUGHTON, supra note 36, at 26 nn. 61-62 and accompanying text.
This characteristic of the forced share system suggests that its primary concern is providing support for a potentially dependent surviving spouse, not fulfilling a marital partnership concept.

The marital partnership concept is not well served by current forced share systems. The marital partnership concept would best be advanced by the adoption of the Uniform Marital Property Act. This act basically adopts the community property concept of marital property rights. Each spouse acquires a vested interest during marriage in the earnings of the other spouse received during marriage. So, if the dependent spouse survives the wage-earning spouse, the surviving spouse would receive one-half of the fruits of the partnership. Conversely, if the dependent spouse dies first, she could devise one-half of the marital estate. However, it is unclear whether many common law states will be willing to accept this new marital property rights system.

V. QUESTIONABLE ASSUMPTIONS OF THE CURRENT FORCED SHARE SYSTEM

A. Infrequency of Remarriage

The forced share system appears to be a relic of another age. First, the share applies to all property owned by the decedent. This system must assume that all decedents have been married for a long period, that most marriages are dissolved by death, not divorce, and that people marry only once. These assumptions are now quite inaccurate.

During the last few decades, the divorce rate has significantly increased. Many marriages, particularly those of senior citizens, are remarriages for one or both parties. In such a marriage, the

46. UNIF. MARITAL PROP. ACT, 9A U.L.A. 19 (Supp. 1984). For a general discussion concerning the issues and debates on this act, see Cantwell, supra note 42.
47. Wisconsin is the only common law state to date that has adopted a system similar to the U.M.P.A. WIS. STAT. ANN. §§ 766.001-766.97 (West 1987).
spouse could die quite soon after the wedding.\textsuperscript{50}

B. Dependency of the Surviving Spouse

The forced share system is primarily tailored to protect the widow.\textsuperscript{51} Most systems ignore the amount of property owned by the widow when the decedent dies, as well as the widow's earning capacity.\textsuperscript{52} The system therefore must assume that all widows have no property or earning capacity.

Married women are entering the work force in increasing numbers.\textsuperscript{53} Some have a significant earning capacity. For example, a recent study found that six million women earned more than their husbands.\textsuperscript{54} Also, particularly because women live longer\textsuperscript{55} the widow might have received property in connection with the dissolution of a prior marriage. A significant number of widows own a substantial amount of property or have an earning capacity when the decedent dies. This is ignored by the forced share system.\textsuperscript{56}
C. Both Spouses Have Identical Testamentary Intentions

Under the forced share system, if a financially dependent spouse dies first the financially dependent spouse has no right to devise property accumulated by the other spouse during marriage. This assumes either that the acquiring spouse will devise the property in a manner consistent with the other spouse's wishes, or it may assume that the financially dependent spouse has no legitimate claim to accumulations during marriage. These assumptions certainly could be challenged.

D. A Post-Death Spousal Support Obligation Should Always Exist

One recent case involved a situation where two people met in August 1973 and married in November 1973.\(^\text{57}\) Both had been married before, and had raised children. The man died about two months after the wedding. The widow sued to obtain her forced share right. Under current law, she clearly possessed such a right (regardless of the length of the marriage), unless she waived it.\(^\text{58}\) The case involved the validity of the purported waiver.

*Estate of Neiderhiser*\(^\text{59}\) presented an even more extreme case. Mr. Neiderhiser collapsed and died during the marriage ceremony. Before Mr. Neiderhiser died, he and the bride had agreed to be man and wife, and he had placed a ring on her finger. The man died while the minister was saying a prayer. When the man collapsed, the minister stopped the ceremony and pronounced the bride and groom man and wife. This was considered a valid marriage, entitling the widow to a forced share.

To the extent that the forced share system is intended to provide support for the surviving spouse after death of the decedent, it as-

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\(^{57}\) See Merrill v. Estate of Merrill, 275 Or. 653, 552 P.2d 249 (1976).

\(^{58}\) For a similar case, see Hoffman v. Kohns, 385 So. 2d 1064 (Fla. Dist. Ct. App. 1980).

sumes that a post-death support obligation should stem from all marriages. This assumption deserves serious reconsideration.

Marriage traditionally was considered a lifetime bond dissolved only by the death of a spouse. Divorce was quite difficult to obtain, the childless marriage was almost unknown, and most couples raised children. The traditional marriage generally was a lifetime partnership and was "childful," and middle class married women rarely worked.

Recent social changes have dramatically affected the institution of marriage. Divorce at will has been accepted by most states. Indeed, it has been estimated that more marriages now being celebrated will be dissolved by divorce than by death. Childless marriages are increasingly common. Marriage is increasingly viewed as a partnership terminable at will, rather than a lifetime partnership. Also, many more married women work outside the home.

How should these societal changes affect the rights of a surviving spouse? It is useful to compare the manner in which the rights of divorcing spouses have been affected by these winds of change. In the past, if spouses divorced and the husband had a sufficient income, an obligation was imposed upon him to provide support for his former wife until she died or remarried, or until he died. This was a reasonable remedy in an age when marriages were perceived as lifetime partnerships, most marriages were "childful," and middle class married women rarely worked outside the home.

However, a consensus has now been reached that a lifetime post-divorce support obligation is not always warranted. Marriage is no longer always viewed as a lifetime commitment. Serial monogamy is increasingly common. Women now are assumed to be able

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62. Id. at 391, 416.
63. See W. Kephart, supra note 60, at 463.
64. See J. Weed, NATIONAL ESTIMATES OF MARRIAGE DISSOLUTION AND SURVIVORSHIP, DEPT. OF HEALTH AND HUMAN SERVICES PUB. NO. 81-1403, at 3 (Nov. 1980); Marriage and Divorce, supra note 51, at 104-05, 108.
67. See supra notes 53-54 and accompanying text.
68. See generally H. Clark, supra note 1, at 420 (outlining a general history of the concept of alimony).
70. See Marriage and Divorce, supra note 51, at 111.
to work outside the home. When determining whether to award post-divorce support, courts increasingly focus upon whether the wife’s earning capacity has been undermined by the marriage. The marriage might have been quite short, or the marriage might have been childless. In either instance, the earning capacity of the wife would not have been significantly undermined due to the marriage. Such marriages are increasingly viewed as partnerships of an indefinite term rather than as a lifetime partnership. When dissolved by divorce, the parties merely divide the fruits of the marriage, and no post-divorce support obligation normally is imposed.

A post-divorce support obligation more frequently is imposed in connection with the dissolution of a marriage of long duration in which the parties raised children. This type of marriage resembles the “traditional marriage” of prior eras: it appears to be a lifetime partnership. Also, the female’s earning capacity normally has been significantly reduced due to childcare responsibilities. The post-divorce support obligation imposed after the dissolution of a lifetime partnership traditionally continues until the recipient dies or remarries, or until the payor dies.

71. See generally Oldham, supra note 39, at 268 (arguing that the equitable distribution of property should not automatically apply to all marriages). Some would argue that, if the spouses had one or more children, the earning capacity of the primary caretaker will thereby be significantly affected, even if the marriage did not last a significant period. See J. Eekelaar & M. Maclean, Maintenance After Divorce (1986); Glendon, Family Law Reform in the 1980’s, 44 LA. L. REV. 1553 (1984). Cf. Deech, Financial Relief: The Retreat from Precedent and Principle, 98 L.Q. REV. 621 (1982).

72. See Glendon, Modern Marriage Law and Its Underlying Assumptions: The New Marriage and the New Property, 13 FAM. L.Q. 441, 449-451 (1980) (perishability of modern marriages has led to breakdown of support laws); Deech, supra note 71, at 655 (short-term rehabilitative alimony may be granted if claimant can justify it).

73. See generally J. Eekelaar & M. Maclean, supra note 71.

74. At common law, the only common type of “divorce” was a divorce a mensa et thoro. This was a divorce from bed and board, not an absolute divorce. A continuing support obligation was conceptually appropriate, since the marriage was not dissolved. This support obligation ended when the marriage was dissolved by the death of either spouse. For a fuller discussion of common law divorce, see Comment, Continuance of Alimony and Payments for Support of Minor Children After a Husband’s Death, 35 VA. L. REV. 482 (1949); Vernier & Hurlbut, The Historical Background of Alimony Law and Its Present Statutory Structure, 6 LAW & CONTEMP. PROBS. 197 (1939).

A husband no longer automatically has an obligation after divorce to support the wife until she dies or remarries. A lifetime support obligation is imposed only if the marriage was of long duration and the parties raised a child. Also, the obligation normally ends when the payor dies, even if the recipient still needs support.

Given this system for support after divorce, what would make sense for post-death support? Most state probate systems currently provide for short-term transitional support for the surviving spouse while the estate is being administered. This is analogous to the short-term rehabilitative alimony sometimes awarded in divorces involving marriages of relatively short duration. When, if ever, should support for a longer period be possible?

In order to make this decision, it is useful to clarify the situations where the decedent excludes the surviving spouse from most or all of his estate. Almost all such occurrences involve marriages later in life of adults who have been previously married to others, and who have raised a family with others. These later marriages frequently are childless. When a spouse dies after such a marriage late in life, the spouse frequently devises most or all of his property to his children. Seen from this perspective, the policy concerns presented by the post-death support obligation issue become clear. When should property (other than 50 percent of the marital part-

Wash. 2d 686, 374 P.2d 973 (1962); Prather v. Prather, 305 S.E.2d 304 (W.Va. 1983); Comment, supra. Even in these states, however, an alimony obligation rarely extends beyond the payor's death. See generally Annotation, 39 A.L.R.2d 1406; 24 Am. Jur. 2d, Divorce and Separation, § 676 (1983); H. Clark, supra note 1, at 461-63. If the alimony obligation continues beyond the payor's death, this would complicate the probate of the payor's estate and possibly make it impossible to carry out the terms of the decedent's will. One commentator has suggested that this explains why alimony rarely binds the payor's estate. Id.

If the payor consents, however, the alimony obligation can bind the payor's estate. In re Estate of Sweeney, 210 Kan. 216, 500 P.2d 56 (1972) (support payments for a child do not bind an estate unless there is express language which gives evidence of the intentions of the parties); White v. White, 48 Ohio App. 2d 72, 355 N.E.2d 816 (Ohio App. 1975) (if a husband, by written separation agreement, contracts to support the wife as long as she lives, this obligation continues after the husband dies). Also, courts sometimes effect a property division via "lump-sum alimony." This type of "alimony" is treated as if it were a property division, and does bind the payor's estate. See Diment v. Diment, 531 P.2d 1071 (Okla. Ct. App. 1974) (if the court does not designate part of periodic alimony payments as support, then the award of permanent alimony is not terminable upon death of the husband).

75. See generally Comment, Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma, 12 U.S.F. L. Rev. 493, 499 (1978) (If the length of marriage measures the time period during which the spouse has been absent from the work force and therefore the difficulty she will have in re-entering it, then the support is a type of insurance for the employment benefits the wife has missed while being a homemaker).

76. See, e.g., In re Estate of Gray, 729 S.W.2d 668 (Tenn. Ct. App. 1987); Finley v. Finley, 726 S.W.2d 923 (Tenn. Ct. App. 1986).
nership property) that the decedent wishes to leave to his children be diverted to the surviving spouse? A long-term post-death support obligation should be imposed, at most, only in those instances when the marriage was a lifetime partnership.\footnote{The concept of "lifetime partnership" will be explored below. The author believes it is useful to distinguish between marriages of short duration in which neither spouse's earning capacity was affected by the assumption of family responsibilities, and other marriages. If the couple has children, a spouse frequently removes herself from the work force to fulfill child care responsibilities. In such situations, it would be fair to require the decedent to provide support to such a spouse while she develops an earning capacity.} In all other instances, the transitional support provided by current law while the decedent's estate is being administered, plus the amended forced share system suggested below, should be more than fair to the survivor.

Arguably the state has an interest in reducing the number of surviving spouses who will become wards of the state. Still, there should be a better justification for an obligation than that one person has financial need and another has resources sufficient to satisfy the need. Support obligations should continue beyond the dissolution of a marriage only when the spouse's financial needs result from sacrifices made for the marriage. The most common financial sacrifice would be devoting one's time to childcare responsibilities, thereby incurring career damage. In contrast, if the surviving spouse's needs are unrelated to the marriage, it seems quite unfair to impose a continuing support obligation upon the decedent's estate.\footnote{The rights of a surviving spouse in some states reflect this sentiment to some degree. For example, in some states a spouse surviving a second marriage of the decedent has fewer rights than one surviving a first marriage. \textit{See} N.C. GEN. STAT. § 30-3 (1984) (The second wife is entitled to one-half of the amount provided by the Intestate Succession Act of the surviving spouse). Other states give a surviving spouse greater rights if the spouse and decedent had a child. \textit{See} VT. STAT. ANN. tit. 14, § 461 (1974) (Widow is entitled to one-third of all the real estate, but if there is a child, she is entitled to half in value of such real estate in fee.); IND. CODE ANN. § 29-1-3-1 (1979) (The surviving spouse is entitled to one-third of the net personal and real estate of the husband; provided that, if the surviving spouse is a second or subsequent wife who did \textit{not} have a child with decedent \textit{and} there is a child from the husband's previous marriage, then the second childless spouse will take one-third of the net personal estate plus a life estate in one-third of the land).}

If a couple remains married for a significant period, and the marriage is "childful," such a marriage should be considered a "lifetime partnership" marriage. Some contend that a childless marriage of long duration should also be deemed a lifetime partnership. In such marriages, the wife could remove herself from the work

\textit{77.} The concept of "lifetime partnership" will be explored below. The author believes it is useful to distinguish between marriages of short duration in which neither spouse's earning capacity was affected by the assumption of family responsibilities, and other marriages. If the couple has children, a spouse frequently removes herself from the work force to fulfill child care responsibilities. In such situations, it would be fair to require the decedent to provide support to such a spouse while she develops an earning capacity.

\textit{78.} The rights of a surviving spouse in some states reflect this sentiment to some degree. For example, in some states a spouse surviving a second marriage of the decedent has fewer rights than one surviving a first marriage. \textit{See} N.C. GEN. STAT. § 30-3 (1984) (The second wife is entitled to one-half of the amount provided by the Intestate Succession Act of the surviving spouse). Other states give a surviving spouse greater rights if the spouse and decedent had a child. \textit{See} VT. STAT. ANN. tit. 14, § 461 (1974) (Widow is entitled to one-third of all the real estate, but if there is a child, she is entitled to half in value of such real estate in fee.); IND. CODE ANN. § 29-1-3-1 (1979) (The surviving spouse is entitled to one-third of the net personal and real estate of the husband; provided that, if the surviving spouse is a second or subsequent wife who did \textit{not} have a child with decedent \textit{and} there is a child from the husband's previous marriage, then the second childless spouse will take one-third of the net personal estate plus a life estate in one-third of the land).
force at the husband's request, thereby incurring career damage. Although there is little information regarding this issue, it appears that a wife could just as easily remove herself from the work force because she preferred to do so, rather than surrender her livelihood solely for her husband's benefit. Even if she did stop working at her husband's request, in childless marriages the domestic responsibilities assumed would be much less burdensome than those present in a household with children. In such instances, it seems doubtful that the spouse was forced to incur career damage due to family responsibilities. Therefore, "lifetime partnership" marriages should be limited to "childful" marriages that endured for a significant period, such as seven to ten years. A long-term post-death support obligation should arise, at most, only if the marriage was a lifetime partnership.

However, if the notion is accepted that a long-term support obligation should always survive a spouse's death, additional problems are presented. For example, if a decedent had been married two or more times, should all spouses, including former spouses, have a support claim? If the support claim is limited to the last lifetime partner, this problem could easily be avoided. Similarly, if all marriages imposed a post-death support obligation, this could create undesirable incentives for senior citizens. The loss of significant governmental benefits or the fear of incurring other burdens if or when they marry, has encouraged senior citizens to establish unmarried cohabitation relationships instead of getting married. A mandatory post-death support obligation could have the same effect upon the remarriage behavior of senior citizens who have significant assets.

One factor justifying post-divorce alimony is not present if a marriage is dissolved by death. If one spouse has a significant earning capacity at divorce, the divorce court does not consider this earning capacity to be divisible property. However, in lifetime partnership marriages courts frequently allow the other spouse to share some of the spouse's post-divorce earnings via alimony. This is considered fair, because the dependent spouse probably helped the wage earner develop the earning capacity.79 Alimony normally

80. These senior citizens may be reluctant to assume a post-death responsibility to support the other spouse.
81. See Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 U.C.L.A. L. REV. 1181, 1249 n.219 (1981) ("Our interviews indicate that 100% of the respondents in long marriages, both men and
ends when the wage earner dies, and is a way of allowing the dependent spouse to share the other spouse's post-divorce earnings. If a marriage is dissolved by death of the wage-earning spouse, there will be no post-dissolution earnings. The justification for a post-death support obligation would have to be based on something other than allowing the spouse to share post-dissolution earnings.

Alimony has been justified as compensation for the lost earning capacity during marriage suffered by a spouse who assumes primary responsibility for childcare. If this spouse does not work outside the home, it has been estimated that her earning capacity decreases 0.582 to 1.5 percent per year. Even if this spouse does work outside the home, she may not be able to maximize her earning capacity due to her childcare responsibilities. If this justification for post-dissolution support is accepted, it could be applicable regardless of whether a marriage is dissolved by divorce or death.

Post-divorce support obligations normally cease upon the death of the payor, regardless of whether the recipient has been adequately compensated for any career damage incurred during marriage. This suggests that the rationale for post-divorce support is not compensation for career damage. Still, this does not foreclose compensation as a rationale for post-dissolution support if a marriage is dissolved by death. In equitable distribution states, divorce courts can compensate a spouse who has suffered career damage during marriage with a disproportionate division of the marital estate. In contrast, no state has accepted an equitable distribution concept regarding marriages dissolved by death. Therefore, there may be more of a need in this instance to create a remedy for career damage.

Another factor may distinguish marriages terminated by divorce and those terminated by death. The remarriage rate of females involved in a divorce is much higher than that of widows. This seems to suggest that widows are more in need of protection than divorcees. However, the remarriage rate of divorcees older than 64

women, said they believed that their marriage would be a lifelong partnership in which they would share all the property and income they acquired, and that the wife's efforts to build their husband's careers (and earning power) were investments both would share." (footnote omitted)).

84. See H. CLARK, supra note 1, at 461-62. Cf. supra note 74 (possible exceptions).
85. Marriage and Divorce, supra note 51, at 111.
approximates the remarriage rate of widows. The higher remarriage rate of divorcees therefore probably is merely a function of the youth of most divorcees. Therefore, widows do not need more protection than divorcees of the same age.

One could argue that a post-death support obligation never should be imposed, because an alimony obligation after divorce ceases upon the death of the payor even if the recipient continues to have a need for support. This policy decision regarding alimony could be said to reflect the notion that marital support obligations should terminate at death. Still, there are differences between the effects of applying this rule to marriages dissolved by death and those dissolved by divorce, regardless of any continuing need. If a lifetime partnership marriage is dissolved by divorce, the recipient normally will receive alimony for a significant period even if the support obligation stops upon the payor’s death. In contrast, if a lifetime partnership marriage is dissolved by death, the application of the “no support after the death of the payor” rule would provide no support to a dependent spouse after dissolution. In addition, if a marriage is dissolved by divorce, a disproportionate division of property is possible to provide for the spouse in need. Under current systems, if a spouse dies, such a disproportionate division is not possible.

Federal law provides that surviving spouses normally “inherit” certain important benefits from the decedent, regardless of the provisions of the decedent’s will. For example, a surviving non-employee spouse normally inherits the right to receive the monthly Social Security benefits that were paid to the decedent. In addition, the survivor normally will receive a survivor’s annuity from the employee’s pension plan. In contrast, a divorcing non-employee spouse normally will receive none of the other spouse’s Social Security benefits, and only a fraction of his/her pension.

86. Id. at 104, 111-12.
87. See 1984 ADVANCE REPORT, supra note 48.
89. See infra text accompanying notes 118-25.
90. The employee-spouse’s Social Security benefits normally are not divided at divorce. J.T. Oldham, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 12.02 [3] (1987) [hereinafter DIVORCE AND DISTRIBUTION]. However, the non-employee divorced spouse might qualify for her own benefits, if the marriage lasted for 10 years. See E. Kingson, supra note 88.
91. See generally DIVORCE AND DISTRIBUTION, supra note 90, § 7.10 at 7-41.
This suggests that, as compared to divorcing spouses, there is less of a need to provide additional support for a surviving spouse.

Some might argue that the right to post-death support should depend upon the survivor's behavior during marriage. For example, in some states a spouse's post-divorce alimony right can be totally lost if the court concludes that the spouse's behavior during marriage was offensive.92 Also, even if neither spouse is at "fault," if marriage discord had reached the point where the spouses chose to divorce, a support obligation to a dependent spouse normally would not survive the death of the payor. If there is marital discord, but the parties do not divorce, should this affect a right to post-death support?

In those instances where a wealthy decedent does not leave the surviving spouse an amount of property sufficient to provide support, this does suggest that there was significant marital discord.93 Still, if the right to support is tied to the survivor's behavior during marriage and the amount of marital discord, the probate process could become as emotionally destructive as a divorce custody fight, especially where children from a prior marriage contest the issue. Also, this could complicate the probate process. Furthermore, in connection with a divorce, many states will not award alimony to a dependent spouse who committed acts that significantly contributed to the "breakdown" of a marriage. However, when death dissolves a marriage, at least in theory, the marriage remains intact.94 Because the marriage remained intact, no acts could have contributed to its "breakdown." For all of these reasons, the survivor's behavior during marriage therefore should not be a consideration when determining a right to post-death support.

VI. FREEDOM OF CONTRACT AND THE RIGHTS OF A SURVIVING SPOUSE

Under current law, all rights of a surviving spouse in a common

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92. Id. § 13.04 at 13-39.
93. Available information suggests that this does not happen frequently, if the decedent had sufficient property to provide for the survivor. See M. SUSSMAN, J. CATES & D. SMITH, supra note 34, at 103; Clark, supra note 12, at 514; Dunham, The Method, Process and Frequency of Wealth Transmission at Death, 30 U. CHI. L. REV. 241, 251-52 (1963) (only 8% of wills studied in Cook County failed to leave the surviving spouse the entire estate); Browder, Recent Patterns of Testate Succession in the U.S. and England, 67 MICH. L. REV. 1303, 1311 (1969) ("Some evidence remains for the proposition that a small proportion of testators would, if possible, leave their widows less than the [forced share].").
94. If the spouses had separated and were contemplating divorce, however, this issue could be presented.
law state, such as the right to probate homestead, family maintenance and a forced share, can be waived in a marital contract. In most states, the spouses must make a fair disclosure regarding their assets, and duress in connection with the execution of the contract must be absent. Still, under the majority rule there is no requirement that the contract be substantively fair, either at the time of execution or at the time of death, so long as the surviving spouse was aware of what he or she was getting into.

It is curious that courts have been more willing to uphold waivers in contracts dealing with the rights of spouses at death than they have been to uphold waivers dealing with their respective rights and


California will enforce an unfair contract if the surviving spouse was represented by counsel when the contract was signed, and a disclosure of the property of the other spouse was provided to the surviving spouse before signing (unless the surviving spouse waived the disclosure). See Cal. Prob. Code § 143 (West Supp. 1987).

A few courts will enforce a waiver of rights only if the terms were fair at time of execution. See Rosenberg v. Lipnick, 377 Mass. 666, 389 N.E.2d 385 (1979) (The court held that fraud was needed to invalidate the antenuptial agreement, but said that in future cases it would look at other factors, including whether the agreement was fair at the time of execution.); In re Estate of Benker, 416 Mich. 681, 331 N.W.2d 193 (1982) (The court held an antenuptial agreement to be invalid because the presumption of non-disclosure of assets was not rebutted.); Hosmer v. Hosmer, 611 S.W.2d 32 (Mo. App. 1980) (The court looked at the fairness of an antenuptial agreement as of the date of the agreement in holding it invalid). Others would not enforce a waiver if it was unconscionable at the time of signing. See Estate of Lebsock, 44 Colo. App. 220, 618 P.2d 683 (1980) (The court upheld an antenuptial agreement where the widow had waived all claims against her husband's estate, stating that an agreement is unenforceable if it is unconscionable at the time it was entered into.); Martin v. Farber, 68 Md. App. 137, 510 A.2d 608 (1986), cert. denied, 308 Md. 237, 517 A.2d 1126 (1986) (The court stated that the validity of an antenuptial agreement is determined as of the time entered into, while holding this particular agreement to be not unconscionable). See also Unif. Marital Prop. Act § 10(f)(1), 9A U.L.A. 120 (1983). These authorities look to the fairness at the time of signing, not at the time of death. Cf. Cal. Prob. Code §§ 143-44 (West Supp. 1987) (provision focuses on the waiver's fairness at the time of signing in determining enforceability).
 obligations at divorce. For example, in connection with agreements contemplating divorce, most states now grant spouses great freedom to change their respective rights in property accumulated during marriage.\textsuperscript{98} Still, significant disagreement remains regarding whether a spouse can effectively waive a right to post-divorce alimony.\textsuperscript{99} So, it has not been accepted that a spouse can enforce a waiver of a \textit{post-divorce} support obligation, particularly if the waiving spouse would be left in great financial need.

This willingness to allow a waiver of a post-death support obligation, but not a post-divorce obligation, is strange. When a marriage is dissolved by death, it is probably more likely that the marriage was a lifetime partnership. Also, if the marriage is dissolved by death it is more likely that the surviving spouse is a senior citizen with significant financial needs. There presumably is a public policy interest in facilitating adequate support for dependent widows. Therefore, it would seem that the post-death support obligation should be harder to waive than a post-divorce obligation. In those states that do not allow waiver of the right to receive alimony, it would seem logical not to allow the waiver of the right to receive family maintenance after the death of a decedent.\textsuperscript{100}

\section*{VII. Suggestions for Reform}

The forced share system attempts to accomplish two different goals: the support function and the marital sharing function. It accomplishes neither goal very well. The one system should be replaced by two different systems so that both goals of the forced share system could be better served.

\subsection*{A. Marital Partnership Function}

The forced share system should be modified to reflect the co-


\textsuperscript{99} Id. at 761 n.17.

\textsuperscript{100} Few states are in accord with this proposition. For example, a waiver of post-divorce support contained in a premarital contract is unenforceable in California. \textit{See In re Marriage of Dawley}, 17 Cal.3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (The court held that an antenuptial agreement was enforceable where the husband and wife agreed to hold their earnings during marriage as separate property, because its terms did not promote dissolution). However, a probate homestead and the family allowance can be waived. \textit{See CAL. PROB. CODE § 145} (West Supp. 1987). These waivers will not be enforced if the surviving spouse was not represented by counsel when the contract was signed and the terms of the contract are unconscionable, in light of the circumstances of the surviving spouse when the first spouse dies. \textit{See id.} at §§ 143-44.
cept of marital partnership. Alternatively, the forced share system could be replaced by the Uniform Marital Property Act concept of shared ownership during marriage. Some commentators seem concerned that this latter alternative would complicate management of property by the spouses during marriage. In contrast, if the marital partnership concept is incorporated into the forced share system, management during marriage would not be affected, but the surviving spouse would receive a share of the property accumulated during marriage, at least if the dependent spouse survived the wage-earner.

The marital partnership concept could be incorporated into the forced share system by redefining the estate upon which the survivor could elect a forced share. The forced share should be limited to the acquisitions of the decedent during marriage, other than gratuitous transfers from third parties. Provisions similar to the Uniform Probate Code’s augmented estate could be incorporated so the decedent could not circumvent the survivor’s forced share with inter vivos transfers or will substitutes. Based upon the partnership model, the survivor always should be able to elect to receive one-half of this marital property estate, instead of the one-third share that is now common. Offset against this forced share should be one-half of all property held by the survivor at the time of the decedent’s death, to the extent that the property was acquired during marriage, but not due to a gratuitous transfer. In addition, it probably would be fair to offset gifts made by the decedent to the surviving spouse during marriage, as well as any bequests by the decedent to the survivor.

The determination of what constitutes property subject to a forced share certainly should not be difficult in those states that per-

101. Some commentators have advocated this. See Kulzer, Law and the Housewife: Property, Divorce and Death, supra note 7; Power, Well Begun Is Half Done: Community Property For Missouri, 21 St. Louis U. L.J. 308 (1977) (recognizing that marriage is a partnership means it should be treated as such upon its termination); Volkmer, supra note 13, at 123.


105. This would make the system much like a community property system. In such a system, the first spouse to die can devise 50% of the fruits of the marriage and the survivor retains the other 50%. See generally W. Reppy & C. Samuel, supra note 6, at 309 (cases and materials involving dissolution of the community property marriage by death). The community assets generally include all accumulations by either spouse during marriage, except for property acquired by gift or inheritance. Id. at 9. In community property states, each spouse has a 50% interest in each item of community property. Id. at 314.
mit a divorce court to divide only property accumulated during marriage, other than gifts or inheritances. In those states, the property included in the decedent's estate for purposes of the forced share could be made equivalent to such "marital property" divisible at divorce. This proposed system would be similar to the system applied in California to determine the surviving spouse's share of property accumulated by the decedent while domiciled in a common law state, if the decedent then moved to California.

B. The Support Function

In some instances, 50 percent of the assets of the marital partnership will not be sufficient to provide for the surviving spouse. This squarely presents the issue of the circumstances, if any, in which the decedent should have an obligation to support the survivor. Many states now provide a family allowance for a surviving spouse while the estate is being administered. However, these systems seem quite inadequate to satisfy this function if the spouse is dependent, because under current systems support for the survivor normally ceases one year after the death of the decedent. The average duration of widowhood is about eight years for men, and about fifteen years for women.

It is not clear whether all decedents should have a continuing obligation to support a surviving spouse. American divorce law certainly does not make this assumption. Alimony awards generally cease upon the payor's death, regardless of the recipient's need. Many Commonwealth countries do impose such a support obligation upon a decedent's estate, but the divorce rate in those countries is significantly lower than the U.S. rate. In such countries it may be fair to impose a post-death support obligation.

When imposing a post-death duty of support, it would make sense to distinguish between the different types of American marriages. For example, some marriages last for a long period, and involve the raising of children, while others are short and do not involve the assumption of childcare responsibilities. I have argued

106. For a survey of these states, see Divorce and Distribution, supra note 90, § 13.03[7], n.46.
109. Id. at § 287. See supra note 15.
110. See Marriage and Divorce, supra note 51, at 112.
111. H. Clark, supra note 1, at 461. Cf. supra note 74.
112. See Spanier & Glick, supra note 48, at 329.
above\textsuperscript{113} and elsewhere\textsuperscript{114} that there are substantial differences bet-
tween these two types of marriages that significantly affect the equi-
ties of imposing a support obligation that survives dissolution. If a 
long-term post-death support obligation is to be imposed, I would 
suggest limiting such support responsibilities to marriages of long 
duration in which the spouses raised children.

The support obligation could be satisfied in a number of ways. For 
example, the Commonwealth family maintenance system could 
be accepted.\textsuperscript{115} This would permit a probate court to render a rea-
sonable support award for a dependent survivor. If such a family 
maintenance system would be adopted, it would be fair to limit the 
support claim to the marital property portion of the decedent's es-
tate. Property acquired before marriage or after marriage by gift or 
inheritance should be excluded. This system would essentially es-
tablish an equitable distribution procedure for division of the mari-
tal property owned by the decedent, if the marriage was a lifetime 
partnership marriage.

This family maintenance system would have certain disadvan-
tages, however. Significant litigation could evolve regarding what 
constitutes a "dependent" spouse, and what constitutes "reason-
able" support. Probate administration of many estates could be-
come more complicated. The estate reserve needed to provide 
lifetime support for the surviving spouse could make it unclear 
whether any devises to third parties could be completed. Also, the 
support obligation could significantly disrupt the decedent's testa-
mentary intentions, and creditors' rights could be jeopardized.

When deciding whether to enact a system that would provide 
support to a surviving spouse, it would be useful to attempt to de-
termine how many surviving spouses need such support, as well as 
whether creating a survivor's support right would help many such 
surviving spouses. Unfortunately, there is little information avail-
able.\textsuperscript{116} However, an attempt can be made to estimate the magni-

\begin{itemize}
\item \textsuperscript{113} See \textit{supra} notes 62-69 and accompanying text.
\item \textsuperscript{114} See Oldham, \textit{supra} note 40, at 281-86. Similar arguments have been made by others. 
\textit{See, e.g., supra} note 71.
\item \textsuperscript{116} One recent study found that if a spouse died when the surviving widow was younger 
than 50, there was no significant decline in the standard of living for the widow. \textit{See Morgan, Economic Changes at Midlife Widowhood: A Longitudinal Analysis}, 43 \textit{J. Marriage & Fam.} 899 (1981). Another study found that older widows are more likely to experience a decline in 
standard of living, particularly if the widow had little work experience outside the home. \textit{See Smith & Zick, supra} note 56, at 619. \textit{See also, Income Transitions, supra} note 56, at 292.
\item The Bureau of the Census has found that, for women of the same age, a divorced woman
\end{itemize}
tude of the problem.

Many spouses leave all of their property to the surviving spouse. Also, some spouses accumulate little or no property. In these cases, the imposition of a post-death support responsibility would not help the survivor. The support responsibility would only be significant if the decedent accumulated a significant amount of property and wanted to devise the property to someone else.

If the decedent leaves nothing to the surviving spouse, the surviving spouse will receive Social Security benefits, if the spouses qualified for such benefits. Under federal law, the surviving spouse "inherits" the employee spouse's Social Security rights when he or she dies, if the survivor is at least 65 years of age.

Today most senior citizens are entitled to Social Security benefits. For example, in 1979 approximately 92.5% of all persons aged 65 or older were receiving Social Security benefits.

These Social Security rights can be quite valuable. The amount of the benefits depends upon the age at which the employee retired, the salary of the employee, and the amount of time the employee contributed to Social Security. For example, for a 65 year-old worker who retires in 1987, the maximum monthly retirement benefit is $769. This amount will be adjusted annually to compensate

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is more likely to have an income below the poverty level, as compared to widows. For example, using 1979 information it was found that, for women aged 65-74, 22.1% of widows had income below the poverty level, compared to 24.8% of divorced women. This information was provided to the author by Arnold A. Goldstein of the Bureau of the Census.

One report has estimated that, of the 5.9 million widows, 19%, or 1.1 million, live in poverty. See Old, Alone and Poor, supra note 56, at 3.

117. See C. SHAMMAS, M. SALMON & M. BAHLIN, INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 184-85, 196, 199 (1987); Browder, supra note 93, at 1307 (most decedents leave all their property to their spouses); Clark, supra note 12, at 514; Dunham, supra note 93, at 251-52 (same as above); Price, The Transmission of Wealth at Death, 50 WASH. L. REV. 277 (1975).

118. If the survivor is at least age 65, the survivor receives the employee's benefit amount. If the survivor is younger than 65, but at least 60, the survivor receives a somewhat lower benefit. See generally 20 C.F.R. §§ 404.335, 404.338 (1987) (specifying who is entitled to widow's or widower's benefits, as well as the amounts thereof).

In 1988, the average benefits to a surviving widow will be $468 per month. See Spears, U.S. Gives Recipients of Social Security 4.2 Percent Increase, Houston Chronicle, Oct. 24, 1987, at 8, col. 1.


120. See T. WATERBURY, MATERIALS ON TRUSTS AND ESTATES 2 (1986). In 1988, the maximum monthly retirement benefit will be $822 per month. See Spears, supra note 118, at 8, col. 1. The average monthly social security benefit for a worker will be $513 per month in 1988. Id. The method of computation is found at 20 C.F.R. §§ 404.201-404.290 (1987), and is explained in T. WATERBURY, supra, at 2-7. Of course, all senior citizens do not receive the maximum benefit. In 1983, the average monthly benefit for widows, widowers, and the
for inflation. If, however, the employee continues working past age 65, than the amount received will be greater than if he or she had retired at age 65. Furthermore, Social Security benefits are not subject to federal income tax, unless the recipient has other income. The value of this survivor's Social Security benefit frequently exceeds the value of all other property in the decedent's estate. For example, it would have cost approximately $60,000 in 1981 to buy a $500 monthly annuity for a seventy year-old woman.

In the past, widows did not frequently receive pension benefits. A number of factors caused this result. Married women rarely worked outside the home for a continuous period long enough to qualify for pension benefits in their own right. If the husband qualified for a pension, the benefits were frequently paid as a single-life annuity. Because men normally marry younger women, and because women normally live longer than men, this meant that many widows did not receive pension benefits after their husband died.

The Retirement Equity Act of 1984 establishes more rights for a surviving non-employee spouse. This law specifies that all covered pensions must be paid as "joint and survivor" benefits, unless the non-employee spouse approves a single life annuity payment method. So, if the decedent earned pension rights, the surviving spouse normally will receive both Social Security and the survivor's pension benefits until she dies, regardless of the terms of the decedent's will. This will significantly increase the income of widows nondisabled was $396. See Statistical Abstract of the United States 364 (105th ed. 1985) [hereinafter Statistical Abstract].

121. See T. Waterbury, supra note 120, at 4.
122. Id. at 3.
123. See supra notes 17-24 and accompanying text, about the average value of estates.
124. See T. Waterbury, supra note 120, at 1 n.4.
126. Id at § 103, 98 Stat. 1429 (amending 29 U.S.C. § 1055). Various joint and survivor options are available. Most plans allow the employee to choose whether the survivor should receive 50, 67 or 100% of the monthly pension payment received while both spouses are living. See Bureau of Labor Statistics, U.S. Dep't. of Labor, Employee Benefits in Medium and Large Firms, at 15 (1984) [hereinafter BLS Employee Benefits Study]. The amount of monthly pension payment received while both spouses are alive is affected by the survivor option selected.
whose husbands earned pension rights.\textsuperscript{128} An increasing number of workers do earn pension rights.\textsuperscript{129}

Another factor should gradually increase the financial well-being of widows. Married women are working outside the home in increasing numbers. Also, the 1986 tax reform legislation mandates that pension rights must fully vest after seven years of employment.\textsuperscript{130} Permitted break in service rules have been liberalized. Because of these changes, more women should independently qualify for a pension from their own career.

The preceding discussion suggests that there may be a simpler way to provide for surviving spouses who need support. If a family maintenance system were adopted, the probate of all estates where there is a surviving spouse would be made more complex. Also, the testator would have no certainty that his devises to others would be effective. A family maintenance system therefore would impose a significant burden on many estates.

It would be desirable to create a maintenance system that would impose less of a burden upon the testamentary freedom of the decedent and the administration of estates. One such system is the life estate probate homestead scheme adopted by Texas.\textsuperscript{131} The surviving spouse receives a life estate in the spouses' house at the time the decedent died, regardless of the value of (or equity in) the house, up to one acre of land in an urban area, or a larger area in a rural area.\textsuperscript{132} Such a system attempts to provide at least a home for the

\textsuperscript{128} See Myers, Burkhauser & Holden, The Transition from Wife to Widow: The Importance of Survivor Benefits to Widows, 54 J. of Risk & Ins. 752 (1987).

\textsuperscript{129} Eighty-two percent of all full-time employees in medium and large firms are covered by pension plans. (A firm must employ at least one hundred people to be considered such a firm.) \textit{See BLS Employee Benefits Study, supra note 126, at 10.} Eighty-three percent of professional and administrative employees have such rights, as compared to 84% of technical and clerical employees, and 80% of all production employees. \textit{Id. at 18.}

\textsuperscript{130} If employer profit-sharing, thrift, and other similar defined contribution plans are included, it has been estimated that more than 90% of workers in medium and large firms are covered by some kind of pension plan (Statement made to the author by John Thompson of the Bureau of Labor Statistics).

\textsuperscript{131} If all workers are included, not just employees of medium and large firms, the percentage of covered workers is lower. \textit{See Statistical Abstract, supra note 120, at 368.}


\textsuperscript{134} See \textit{Tex. Const.} art. XVI, § 52.
spouse. The surviving spouse takes the homestead free of all debts of the decedent, except for purchase money liens on the house.

In the past, a life estate has not been an effective support system for a dependent surviving spouse, since the surviving spouse might not be able to pay the house payment. Now, with improved Social Security and survivor's pension benefits, more spouses will be able to afford such expenses.\(^{133}\)

Given the recent increases in Social Security benefits for a surviving spouse and the Retirement Equity Act of 1984, it appears that the most valuable family assets usually will be payable to a surviving dependent spouse, regardless of the terms of the decedent's will. The Social Security and pension rights often will be worth more than the decedent's estate. If these benefits cannot satisfy the survivor's support needs, it seems doubtful that funds from the decedent's estate would often make a significant difference. So, in the United States a family maintenance system would provide few benefits and impose substantial costs. The probate homestead system described above would help to ensure support for a surviving spouse, but would infringe much less on testamentary freedom and impose much less of a burden on probate administration.

This probate homestead system may not provide adequate support for some spouses with unusual financial needs. Still, it would not impose an additional burden upon the administration of estates. Also, the decedent could be certain that most devises to third parties would be effective. The cost of an individualized long-term support system from the decedent's estate (the family maintenance system) would not be worth its minor benefits.

Some spouses may not own a house.\(^{134}\) These spouses probably would not have significant assets in any event, however, so no family maintenance system would be effective in such instances. In any event an allowance in lieu of probate homestead could be created for such situations.\(^{135}\)

The life estate probate homestead should be modified in one way, however. In most states, all surviving spouses are given some

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133. In 1980, one study found that, of those older couples who owned a home, 80% owned the house "free and clear"; no mortgage debt remained. See UNITED STATES SENATE SPECIAL COMMITTEE ON AGING, Developments in Aging: 1985, vol. 3, at 50.

134. One recent study found that nearly 75% of older people owned a home. Id. A significant number of these elderly people own their home "free and clear." UNITED STATES SENATE SPECIAL COMMITTEE ON AGING, supra note 133, vol. 3, at 50. See also Chevan, Homeownership in the Older Population 1940-1980, 9 RESEARCH ON AGING 226 (1987).

135. See TEX. PROB. CODE ANN. §§ 273, 277 (Vernon 1980).
kind of a probate homestead. Probate homesteads should be limited to those surviving spouses who need it, and probably should only arise after a marriage of long duration.

C. Contractual Waiver

Another issue worthy of continuing review is the spouses' ability to contract out of the forced share and/or support right. Under the Commonwealth system, the spouses cannot waive the surviving spouse's support right. In contrast, American states now permit spouses to waive forced share rights if the agreement is signed after full disclosure and without duress. Also, most states permit spouses to waive homestead rights and the family allowance. American spouses have significant power to alter the financial ramifications of divorce, if the premarital agreement was signed after full disclosure and without duress. Still, not all states enforce an alimony waiver.

If it is determined that, after a long marriage, a spouse should have a support obligation (or a homestead right) that continues beyond death, it would be possible to establish a compromise position regarding the validity of a waiver of rights by the surviving spouse. The forced share could be considered waivable in a premarital contract by a spouse, but the support obligation after a long marriage could be considered not waivable. This scheme would give most spouses great contractual freedom, but some provision would be made for a dependent spouse after a long marriage.

VIII. Conclusion

The rights given surviving spouses in community property states generally reflect a sensible system. The surviving spouse receives

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137. See R. OUGHTON, supra note 36, passim.
139. See, e.g., Hunter v. Clark, 687 S.W.2d 811, 815-17 (Tex. Ct. App. 1985) (discussing waiver of homestead right in Texas); Williams v. Williams, 569 S.W.2d 867 (Tex. 1978) (discussing the enforceability of the waiver of homestead rights in states other than Texas).
140. See Premarital Contracts, supra note 98, at 763-64.
141. Id. at 761 n.17.
142. A similar approach was advocated in the Model Probate Code of 1946. See MODEL PROB. CODE § 39 (Simes ed. 1946); Fratcher, supra note 7, at 1064 n.109 and accompanying text. The First Tentative Draft of Revised Part II of the Model Probate Code accepted much broader waiver rules. Id. at 1064 n.110.

It may also be appropriate not to enforce a waiver if the circumstances of the parties have materially changed since the waiver. See Premarital Contracts, supra note 98, at 774-82.
fifty per cent of all property accumulated by the spouses during the marriage, except for property acquired by gratuitous transfer. Also, the spouse receives the furnishings of the spouses' home and transitional support from the decedent's estate. In Texas, the spouse also receives a life estate in the home.

The only questionable aspect of some state community property systems is the grant of a probate homestead to all surviving spouses. This assumes that all surviving spouses should have a long-term right of support from the decedent. I would only give a probate homestead to a needy spouse who survives a lifetime partnership marriage.

Plucknett has described the law of inheritance as "an attempt to describe the family in terms of property."\footnote{143} The common law forced share system no longer reflects a sense of the family that is consistent with contemporary notions of marriage. Radical revision is needed. The survivor should have no forced share right regarding acquisitions by the decedent before marriage or gratuitous transfers to the decedent during marriage. The forced share should be fifty per cent, not one-third. With these changes, the common law system would more closely resemble the community property scheme, and would be more congruent with the current view of the nature of marriage.

\footnote{143. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 711 (5th ed. 1956).}

Editor's Note: Subsequent to the printing of this Article, the author learned that the Editorial Board of the Uniform Probate Code was considering whether to revise the Uniform Probate Code provisions regarding the surviving spouse's forced share. In addition, two members of the Editorial Board have recently published suggested amendments to the UPC forced share system which are different from the author's proposal set out above. See Langbein & Wagganer, Redesigning the Spouse's Forced Share, 22 REAL PROP. PROB. & TR. J. 303 (1987).