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THE 1990 UNIFORM PROBATE CODE'S ELECTIVE-SHARE PROVISIONS—WEST VIRGINIA'S ENACTMENT PAVES THE WAY

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I. INTRODUCTION

In the Spring of 1992 West Virginia became the first state to enact the intestacy and elective-share provisions of the Revised Uniform Probate Code (1990 UPC). The intestacy provisions increase the share of the surviving spouse and provide for a fairer distribution among descendants and collaterals. The elective-share provisions are influenced by the partnership theory of marriage as well as the support rationale. Both statutes represent considerable improvements over the pre-1990 UPC and vast improvements over non-UPC states’ statutes including the West Virginia statutes that were replaced.

This article explains and evaluates the new West Virginia elective-share provisions. In some minor respects, the West Virginia statutes deviate from the UPC language. Even where they do not, some unanswered issues exist that are explored by this article. In some instances, modifications are suggested that future enacting states should consider. The suggested modifications are primarily limited to simplifications and clarifications rather than substantive changes. As with any new statute, there will be unanticipated and inevitable wrinkles that perhaps only can be resolved through litigation. Despite these minor rough edges, the enactment of these statutes represents a significant step forward that hopefully will be followed by other states.

II. GENERAL OVERVIEW OF THE ELECTIVE-SHARE SYSTEM

The drafters of the 1990 UPC adopted an elective-share system devised by Professors Lawrence Waggoner and John Langbein. This system is underpinned by both the “contribution” and “support” rationales. The contribution rationale recognizes that, regardless of the role played during marriage, the surviving spouse contributed to the acquisition of the property of the deceased spouse. The support rationale

recognizes that the surviving spouse needs continuing support after the death of his or her spouse.

The new elective-share system approximates the results reached in a community property jurisdiction while avoiding the complexities of community property. Although it is influenced by the partnership theory of community property, it is not community property. As applied to the facts surrounding a given couple, very different results might be reached under this scheme than would be reached in a community property jurisdiction. Those who accept nothing short of a community property regime will find fault with this system.

The 1990 UPC continues and strengthens the original UPC’s approach of including will substitutes within the reach of the surviving spouse. This is necessary if there is to be any meaningful protection for the surviving spouse considering the “nonprobate revolution” that has occurred during the past three decades. This augmentation concept is expanded by including assets even if they were not transferred by or created by the decedent and even if they were acquired by the decedent prior to marriage.

The new system differs most significantly from the original UPC because of two major factors taken into consideration that had been ignored before: the length of the marriage and the assets of the surviving spouse. The length of the marriage is taken into account in order to more accurately implement the contribution rationale. It is not rational or fair to give the surviving spouse an entitlement to a certain fraction upon walking down the aisle. The goal of approximating community property requires that the assets of the surviving spouse be considered. In other words, the assets of both spouses are shared—not just the assets titled in the decedent.

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2. Alternative methods of disposing of one’s property, i.e., joint tenancy, trusts, and life insurance.

III. BACKGROUND: FOUR SYSTEMS IN A NUTSHELL

Understanding the 1990 UPC elective-share system requires at least a nutshell understanding of (1) community property versus common law, (2) a generic elective-share system, (3) the pre-1990 UPC elective-share system, and (4) equitable distribution.

A. Community Property versus Common Law

In a community property system, each spouse owns fifty percent of whatever is earned by either spouse during marriage. This system recognizes that marriage is an economic partnership, with each spouse making an equal contribution toward the acquisition of the property regardless of the role the spouse plays. Separate property consists of property owned prior to marriage and property acquired by gift or inheritance during marriage.

When one spouse dies, the surviving spouse is protected by owning what he or she owned all along—namely, half of the property that had been earned by either of them during marriage. The characterization of property as community or separate sometimes requires tracing the property to its source. In a community property jurisdiction, the surviving spouse does not have an elective share. The decedent dies controlling his or her half of the community property.

In contrast, in a common-law or title-based jurisdiction, status (marriage) does not affect ownership. Property is owned by the person in whose name it is titled. If one spouse is a wage-earner and the other a homemaker and childraiser, the earned money is titled in the name of the wage-earner. If the wage-earner dies first and, for whatever reason, devises all to someone other than the surviving spouse, then the surviving spouse will get nothing unless he or she has resort to an effective elective-share statute.

B. A Generic Elective-Share System

In order to provide protection for the surviving spouse in those cases where he or she otherwise would be disinherited, all common-
law states except Georgia have elective-share statutes (also called forced share or right to dissent statutes). These represent one of the few limits on testamentary freedom in this country. Before elective-share statutes were enacted, widows were protected by common-law dower\(^4\) and widowers by curtesy.\(^5\) Because dower and curtesy were limited to interests in real property, they were eventually recognized as insufficient. Elective-share statutes were enacted to extend the protection by reaching both real and personal property.

The typical elective-share statute, applicable to both spouses, grants the surviving spouse a certain fraction (usually one third) of the decedent’s probate estate. This often is the amount that the surviving spouse would take by intestacy. When will substitutes, such as joint tenancies, life insurance, revocable trusts, and pay-on-death arrangements became popular, disinheritance of the surviving spouse became an unintended possibility because his or her protection depended on assets being in the probate estate. In short, the will substitutes were nonprobate assets, and although the transferors were merely attempting to avoid probate, it was soon recognized that this could be a disinheri-
tance technique.

Various jurisdictions responded to this underprotection problem by either statute\(^6\) or case law doctrine, such as the “illusory transfer”

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4. Common-law dower entitled a widow to a life estate in one-third of the real property in which the husband was seised at any time during the marriage. See 1 AMERICAN LAW OF PROPERTY §§ 5.1-5.42 (A.J. Casner ed. 1952).

5. Common-law curtesy entitled the widower to a life estate in all freeholds the wife held during the marriage. Unlike dower, curtesy entitled the widower to a life estate in the entire freehold. Curtesy attached to equitable as well as legal freeholds, but attached only if issue of the marriage were born alive. See 1 AMERICAN LAW OF PROPERTY §§ 5.57-5.74 (A.J. Casner ed. 1952). Today, all states have abolished curtesy. See JESSE DUKEMINIER & STANLEY JOHANSON, WILLS, TRUSTS, AND ESTATES 398 (3d ed. 1984). Of the states that have maintained dower, only Michigan does not extend dower rights to widowers. The Supreme Courts of South Carolina and Arkansas have held that limitations of dower rights to widows and not widowers violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See Stokes v. Stokes, 613 S.W.2d 372 (Ark. 1981); Boan v. Watson, 316 S.E.2d 401 (S.C. 1984). The UPC abolishes dower and curtesy. UPC § 2-112 (Supp. 1992).

6. See PA. STAT. ANN. tit. 20, § 6111 (repealed 1978) (treating a conveyance by decedent with retained power of revocation or consumption as testamentary and allowing surviving spouse an elective share of the conveyance); MONT. CODE ANN. § 474.150 (1990)
doctrine\textsuperscript{7}, or the "reality" test.\textsuperscript{8} These doctrines and statutes brought at least some of the will substitutes within the reach of the surviving spouse. The most comprehensive approach was that adopted by the pre-1990 UPC.\textsuperscript{9}

The flip side of the underprotection problem is the over-protection problem. Again, this results from the fact that most elective-share systems do not take the nonprobate assets into account.\textsuperscript{10} Overprotection occurs when the surviving spouse, rather than a third party, is the beneficiary of the nonprobate assets. The surviving spouse may be the beneficiary of life insurance, joint tenancy property, a revocable trust, and a pay-on-death arrangement and still be able to reach a fraction of the probate estate.

C. The Pre-1990 UPC Augmented Estate

The pre-1990 UPC attempted to deal with both underprotection and overprotection with its augmented estate concept. The surviving spouse was granted an automatic right to one-third of the augmented estate, which was the decedent’s probate estate augmented by

\footnotesize{(stating that any gift made by a person “in fraud of the marital rights of his surviving spouse” may be recovered from the donee and used to satisfy the elective share).}

\textsuperscript{7} The leading case describing the illusory transfer test is Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937). \textit{See also} Moore v. Jones, 261 S.E.2d 289 (N.C. Ct. App. 1980); Johnson v. Farmers & Merchants Bank, 379 S.E.2d 752 (W. Va. 1989) (interest retained in revocable inter vivos trust was so great that transfer was illusory and surviving spouse is entitled to an elective share of the assets in the trust).

\textsuperscript{8} Under the “reality” test, an inter vivos transfer is void if it vests no property interest in the donee. Under this test, any transfer which meets the requirements of a gift would not be included in the decedent’s probate estate. The leading case articulating the “reality” test is \textit{In re} Halpern, 100 N.E.2d 120 (N.Y. 1951).


\textsuperscript{10} An exception to this is North Carolina’s statute. N.C. GEN. STAT. § 30-1(a) (1984). This statute involves a two-step process. First it asks if what the spouse gets under the will plus outside the will (i.e., nonprobate assets) is less than his/her intestate share. Second, the statute states that if the answer is yes, the spouse gets the intestate share. Thus, this statute takes nonprobate assets into account in step one but not step two. If there is a right to dissent, the extent to which the surviving spouse benefitted from nonprobate assets is no longer taken into consideration.
nonprobate transfers to third parties\textsuperscript{11} and nonprobate transfers and gifts to the surviving spouse. Instead of disclaiming his or her testate share, anything that the surviving spouse took from the decedent by testate or intestate succession, by gift, or by way of nonprobate transfers was applied first toward the satisfaction of this entitlement. Only if there was a deficit would the surviving spouse be entitled to more.

This system, which has been adopted in about ten states, has several problems.\textsuperscript{12} One of its complications is the requirement of determining what assets owned by the surviving spouse were derived from the decedent, including gifts that were made both during and before marriage. This tracing is necessary because of the crediting process that applies these transfers first toward the satisfaction of his or her elective share.\textsuperscript{13} In addition, there are significant loopholes. For example, life insurance, joint annuities, and pensions payable to third parties are excluded from the pre-1990 augmented estate.\textsuperscript{14} Revocable trusts and joint tenancies with third parties are included only if they were created during marriage.\textsuperscript{15}

Even more basically, the pre-1990 elective-share system does not take the length of the marriage into account. There still can be instances of overprotection, especially in a short, late-in-life second marriage where the decedent’s desire to provide for his or her children of the first marriage is thwarted by the elective share.

\textsuperscript{11} The pre-1990 UPC included in the decedent’s augmented estate transfers which the decedent made during marriage in which he or she retained a life interest, a power of revocation, or a right of survivorship and maintained that interest at death. Also included were gratuitous transfers to donees within two years of death to the extent that the aggregate transfer to any donee in any year exceeded $3,000. UPC § 2-202(1) (1983).

\textsuperscript{12} For a discussion of these problems, see Kurtz, \textit{Augmented Estate Concept}, supra note 9.

\textsuperscript{13} UPC § 2-207(a) (1983).

\textsuperscript{14} The pre-1990 UPC did not include the value of life insurance which the decedent purchased for the benefit of a person other than the surviving spouse. \textit{Id.} § 2-202(1). The drafters felt that life insurance was an estate builder and would not be used to frustrate the surviving spouse’s elective share. \textit{See id.} § 2-202(1) cmt.; G. Michael Bridge, Note, \textit{Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate}, 74 \textit{CORNELL L. REV.} 511 (1989) [hereinafter Bridge, \textit{Life Insurance Assets}].

\textsuperscript{15} UPC § 2-202(1) (1983).
Nor does the pre-1990 UPC take into account the assets of the surviving spouse other than assets derived from the decedent. As explained below, combining both estates is necessary in order to effectuate the partnership rationale that underpins the concept of marital property.

D. Equitable Distribution

During the past two decades the concept of equitable distribution has swept the common-law states.\(^\text{16}\) If a marriage ends in divorce, courts will equitably divide the property, taking all of the circumstances into consideration, rather than simply letting title control. This system is based on community property principles in that it recognizes marriage as an economic partnership with each spouse contributing to the acquisition of the property even though what is earned is titled primarily, or even solely, in one partner.

In community property jurisdictions, the marital property regime protects a spouse whether the marriage ends in divorce or death. In common-law jurisdictions, equitable distribution is intended to protect the less wealthy spouse when the marriage ends in divorce. The 1990 UPC is designed to bring the fourth area into line with the other three by implementing a partnership theory when the marriage ends by death in a common-law jurisdiction.\(^\text{17}\)

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\(^{17}\) The idea of using equitable distribution at death is not new. Fixed elective-share statutes traditionally ignore the age of the surviving spouse, the length of the marriage, and the surviving spouse's actual economic needs. Under the English Inheritance Act, English courts are given great latitude in determining how much of the decedent's estate the surviving spouse should receive. 1 & 2 Geo. 6, ch. 45 (1938); Inheritance (Provisions for Family and Dependents) Act § 1 (1975). The court may direct periodic payments from the decedent's estate to the surviving spouse, or require a lump sum disbursement. The court considers a variety of competing equities including the separate property of the surviving spouse. The Act does not, however, allow the court to reach inter vivos transfers made by the decedent before death which may have been made to diminish the probate estate.

After a review of the American and English systems, Professor William MacDonald concluded that the best way to facilitate an equitable distribution of the decedent's estate
IV. THE 1990 UPC ELECTIVE-SHARE SYSTEM

A. Overview of the Steps

There are four mechanical steps. In some small estates there will be a fifth step.

1. Augmenting and Combining—Section 2-202(b)

Both the decedent’s estate and the assets of the surviving spouse are augmented by adding in their respective reclaimables (their nonprobate assets payable to third parties). The two are combined and added to the nonprobate assets that pass to the surviving spouse.

2. Applying a Fraction—Section 2-201(a)

A fraction, based on the length of their marriage and obtained by referring to a chart, is applied to the sum from step 1. The figure obtained in this step represents the elective-share amount.

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was through a system similar to the English system that could also recapture certain inter vivos transfers used to diminish the decedent’s estate. WILLIAM MACDONALD, FRAUD ON THE WIDOW’S SHARE (1960). For a thorough discussion of MacDonald’s proposal, see Kurtz, Augmented Estate Concept, supra note 9, at 1009-11.

Since the surviving spouse’s separate assets would be considered under the equitable distribution systems but the length of the marriage would not, a surviving spouse with a large amount of property titled in his or her name may never be able to get any portion of the decedent’s estate. This ignores the fact that the surviving spouse in a long marriage probably played a role in the decedent’s acquisition of his or her separate property. The UPC recognizes that the surviving spouse’s contribution to the decedent’s wealth is one justification for elective-share statutes and justifies the incremental vesting schedule of § 2-201. UPC art. II, pt. 2 cmt. (Supp. 1992).

Systems modeled after the English Inheritance Act are subject to the whims of the particular judge hearing the case. Under such systems, the testator loses complete control over the distribution of his or her assets. “Disturbing as that prospect is in English and Commonwealth Jurisdictions, whose judicial selections procedures have produced a trustworthy and meritocratic bench, it is even more frightening to imagine granting such powers to such American venues as Cook County, Illinois, where the very mention of the local bench is cause for alarm.” Langbein & Waggoner, Forced Share, supra note 1, at 314.
3. Crediting—Section 2-207(a)

The amount that the surviving spouse takes by testate or intestate succession or by way of nonprobate transfers is applied first toward satisfaction of the elective-share amount. The surviving spouse is then charged or credited with amounts that would have passed to him or her but were disclaimed. Finally, the spouse is credited with a portion (up to 100%) of his or her own assets.18

4. Contribution—Section 2-207(b)

If there is a deficit after subtracting the credits in step 3 from the elective-share amount in step 2, then the other beneficiaries of the decedent’s probate and nonprobate estate contribute shares to fund the balance of the surviving spouse’s elective share.19 These contributions are proportional to the beneficiaries’ interest in the decedent’s reclaimable estate.20 If there is no deficit, then the surviving spouse is not entitled to more unless he or she is entitled to a supplemental elective-share amount under section 2-201(b), discussed next.21

18. See infra notes 113-22 and accompanying text.
19. Donees who receive gifts from the decedent within two years of the decedent’s death to the extent the gifts exceed the gratuitous transfer allowance of § 2-202(b)(2)(iv)(D) do not have to contribute unless a deficit remains after full depletion of the decedent’s probate estate and the other components of the decedent’s reclaimable estate. UPC § 2-207(b) (Supp. 1992). See infra note 38 and accompanying text.
21. The surviving spouse is not required to transfer property to his or her deceased spouse’s estate even if the elective-share amount is negative. This would be required if the goal was to fully emulate community property. Suppose $H$ and $W$ have been married for 20 years. $W$ has sacrificed by staying at home while $H$ pursued a career. $H$ has accumulated $500,000 worth of property and has sole title. Since $H$ and $W$ have been married more than 15 years, $W$ will be entitled to one-half of $H$’s estate if $H$ dies first. UPC § 2-201(a) (Supp. 1992). All of $H$’s assets are now “community property.” But if $W$ dies first, $H$ will not be required to contribute to $W$’s estate. Under a true community property system, $W$ would immediately take title to one-half of $H$’s wages at the time $H$ acquired the property and would own $250,000 of her own property at $H$’s death. The UPC requirement that a spouse survive the holder of the marital wealth in order to take what is arguably already his or her property weakens the contribution theory. Thus, despite a nod in the direction of the contribution rationale for the forced share, the designers of the 1990 UPC elective-share provision are actually resting their device only on the support or need rationale, tempered...
And, in some estates:

5. Supplemental Elective-Share Amount—Section 2-201(b)

If, after the deficit is added to the assets that are owned by the spouse and that pass to the spouse by testate or intestate succession, the sum is less than $50,000, then the spouse is entitled to whatever additional amount is necessary to bring this sum up to $50,000. The purpose of this supplemental elective-share amount is to implement the support theory. The surviving spouse should not be left with less than a certain minimum regardless of the length of the marriage.

This four, and sometimes five, step process avoids both the tracing problems associated with community property and the pre-1990 UPC and the judicial discretion associated with equitable distribution. Its most difficult aspect is the augmentation-with-reclaimables process, but this is required even under the pre-1990 UPC, at least with respect to the decedent’s estate.

A. Discussion of the Steps

1. Augmenting and Combining

There is little disagreement about the general proposition that nonprobate assets must be taken into consideration. This augmentation idea is not new, and the reason is obvious. Without augmentation the decedent could disinherit the surviving spouse by putting everything into nonprobate form payable to someone other than the surviving spouse. However, in states that did not enact the pre-1990 UPC’s augmented estate provisions, such as West Virginia, the details in-

by a kind of deservedness based on the length of marriage.” Mary M. Wenig, The Marital Property Law of Connecticut: Past, Present, and Future, 1990 Wis. L. Rev. 807, 877. But see Lawrence W. Waggoner, The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code, 76 IOWA L. REV. 223, 250-51 n.78 (1991) (conceding that the redesigned system does not recognize the partnership or marital-sharing interest of the decedent spouse, but maintaining that giving the decedent’s estate an interest in the property of the surviving spouse would be inconsistent with the notion of elective-share statutes and would necessitate the expansion of an already cumbersome election system).
volved in the list of reclaimables will likely be one of the main concerns of the estate planner. These provisions are discussed below.

The new aspect of step one is taking the assets and reclaimables of the surviving spouse into account. This is necessary in order to approximate a community property result. Assume Husband (H) and Wife (W) have been married for thirty years and that neither has assets in nonprobate form. Each owns $100,000 that has been saved from his and her respective earnings during marriage.

If H dies in a community property jurisdiction, H’s estate controls $100,000, representing half of his earnings and half of her earnings. Similarly, W owns $100,000—her half of the community property. H is free to devise his $100,000 to a third party, X, since W has no elective share. Had H died in a common-law jurisdiction devising his $100,000 to X, W would be entitled to a fraction of his estate under the elective-share statute. Thus, W would own her $100,000 plus part (whatever fraction the statute provided) of his, reducing the share that H intended to devise to X. This would be the result under a generic elective-share system as well as under the pre-1990 UPC.

The new scheme remedies the maldistribution that can result under the traditional elective-share system by combining the two spouses’

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22. There are a few common-law states that consider the separate property of the surviving spouse in determining the elective-share amount. See MISS. CODE ANN. § 91-5-29 (1972) (denying the surviving spouse who owns separate property worth as much as the elective share any right to elect); N.J. STAT. ANN. § 3B:8-18 (West 1983) (charging the electing spouse with separate property regardless of the source); ALA. CODE § 43-8-70 (1982) (charging separate property of the surviving spouse against the elective share). Alabama has historically feared the “greedy spouse” and even denied a widow’s dower rights if her separate property exceeded the dower interest. Chambless v. Black, 35 So. 2d 348 (Ala. 1948). The pre-1990 UPC includes in the decedent’s augmented estate the value of the surviving spouse’s property that he or she received gratuitously from the decedent either before or after marriage. Also, property given to the surviving spouse by the decedent that the surviving spouse transferred during the marriage that would have been included in the surviving spouse’s augmented estate had he or she died first is also included in the augmented estate. UPC § 2-202(2) cmt. (1983). Only the spouse’s property obtained from the decedent is considered in the augmenting of the decedent’s estate. Since the surviving spouse only receives one-third of the property in the augmented estate, the entitlement will be reduced because the full value of the property derived from the decedent is used first to satisfy the elective share. Id. § 2-207(a). See Kurtz, Augmented Estate Concept, supra note 9, at 1036-43.
assets and then crediting \( W \) in step 3 with what she already owns. In the hypothetical above, the combined augmented estates equals $200,000. Because they were married longer than fifteen years, her percentage entitlement is 50%. Thus her elective-share amount is $100,000. She is then charged in step three with 100% of her own $100,000, resulting in no deficit. Thus she is entitled to no more, and \( X \) takes the full $100,000 just as \( H \) intended.

Taking the assets of the surviving spouse into account means, of course, that the assets will have to be valued. It is this evaluation process that will be a concern for estate planners and estate administrators, because previously they have been concerned only with valuing the assets of a decedent—an admittedly easier task. However, this problem is not insurmountable; estate planners will be able to borrow from the experience of family lawyers in valuing assets in the context of equitable distribution.\(^2\)

Step one requires that the surviving spouse’s assets be augmented with his or her reclaimables. This is simply the counterpart to augmenting the decedent’s estate. It recognizes the reality of nonprobate assets: namely, that they are in effect owned by the transferor until his or her death. If the assets of the surviving spouse are to be considered in a realistic way, they necessarily must include the will substitutes.\(^3\)

Step one also includes in the augmented estate the nonprobate assets payable to the surviving spouse.\(^4\) This is the way that the system cures the overprotection problem.\(^5\) If nonprobate assets payable to the surviving spouse are not taken into consideration, the elective share can result in a windfall for the surviving spouse by giving him or her a portion of the probate estate in addition to the nonprobate transfers. Hence, these assets are included in the augmented estate in step one, and then the surviving spouse is credited with their receipt in


\(^{24}\) In the case of life insurance, it is not valued as if the surviving spouse were dead. UPC § 2-202(b)(4) (Supp. 1992).

\(^{25}\) Id. § 2-202(b)(3).

\(^{26}\) This aspect is not new to the 1990 UPC. UPC § 2-202(2)(i) (1983).
step 3. This section of the augmented estate is discussed in more detail below.27

2. Applying a Fraction

The surviving spouse is entitled to a percentage of the combined estates that increases with the length of the marriage. This incremental share idea, analogous to the vesting schedule of a pension plan,28 effectuates the contribution rationale by recognizing that the longer the marriage, the more the surviving spouse is likely to have contributed to the acquisition of the property titled in the decedent's name. It approximates a community property system where the protection of the surviving spouse is naturally commensurate with the length of the marriage because the community assets accumulate as the marriage endures.

As already noted, however, the community property analogy is not satisfied to the extreme. In a community property system, the fifty percent ownership rule applies to the ever increasing community assets, while each continues to separately own his or her separate property. Under the 1990 UPC, there is no attempt to separate out their respective separate property. Instead, an ever increasing fraction is applied to all of their property. As the length of the marriage increases, the percentage of all of their property that is deemed to be marital property increases. By the time they have been married fifteen years, 100% of it is deemed to be marital property. The result is roughly equivalent to the result that would be reached in a community property system, although, of course, numerous examples can be given where there would be quite different results.29

27. See infra notes 113-22 and accompanying text.
29. The different treatment of gratuitously received property can result in a great disparity between what the surviving spouse receives under the two systems. H and W decide to marry. Before the marriage, W purchases Blackacre and is the fee simple owner throughout the couple's 10 year marriage. Blackacre is worth $400,000 when H dies. H earned
3. Crediting

The crediting process is designed to preserve the decedent’s estate plan as much as possible and to take into account the assets that the surviving spouse already owns that are deemed to be marital property. Once the surviving spouse’s elective-share amount is computed under step two, the crediting process takes place in order to ascertain if there is a deficit—i.e., if he or she is entitled to more.

First, anything that passes to the surviving spouse by testate or intestate succession is applied toward the satisfaction of the elective share. If W’s elective-share amount is $50,000 and the decedent devisee $10,000 to her, she will get the $10,000 and her entitlement will be reduced to $40,000. This approach, which was also the approach of the pre-1990 UPC, is in contrast to many of the traditional elective-share statutes which require the surviving spouse to dissent from the will, thereby disclaiming any devise.

The difference between the two approaches is best illustrated by the case where the testator devises a life interest to the surviving spouse. Under the traditional elective-share approach, the surviving spouse would disclaim the life estate and take an absolute interest in a fraction of the probate estate. Under the 1990 UPC, the life estate would be valued and would count toward the satisfaction of his or her $500,000 during the couple’s marriage, and brings no separate assets into the marriage. One year before H dies, W’s mother devises her $100,000. In this case, W will get less under the 1990 UPC than she would under a community property system. Under a community property system, W would be entitled to all of her separate property plus one-half of the wages H earned during their marriage. Thus, W would be entitled to $750,000 when H died and H could dispose of the other $250,000. However, W would get much less under the 1990 UPC. H’s augmented estate would total $1,000,000. Since H and W were married for 10 years, W would have an elective share of 30% of the augmented estate ($300,000). The 30% elective share means that 60% of the combined assets of H and W are now “community” property and 60% of W’s separate property will be charged against her to satisfy the elective-share amount. W is charged with having $300,000 (60% of $500,000) of the $600,000 worth of “community” property. Since the elective share is fully satisfied by charging W with her separate property, there is no deficiency and W takes no more. Thus, under the 1990 UPC, W ends up with $500,000 and H’s estate retains the other $500,000.

share. This has the effect of preserving the testator's scheme as much as possible.

Secondly, the surviving spouse is credited with amounts that pass to him or her by way of nonprobate transfers. 31 Continuing the approach of the pre-1990 UPC, this provision cures the overprotection problem that exists under traditional elective-share systems. If the surviving spouse is the beneficiary of a $10,000 revocable trust created by the decedent, then $10,000 will count toward satisfaction of the elective-share amount.

The next provision credits the surviving spouse with amounts that would have passed to him or her but were disclaimed. 32 This in effect forces the surviving spouse to accept whatever is devised to him or her because the value of the property will be charged against him or her whether or not it is accepted. Again, the purpose of this is to preserve the testator's scheme of distribution as much as possible.

Some commentators have argued that it is unfair to the surviving spouse to charge him or her with disclaimed property. 33 They argue that if the wife is devised a life interest (as she typically is), she should be able to disclaim this and not have it charged against her, so that she can take an absolute interest in satisfaction of her elective share. Professor Volkmer argues that it is patronizing and chauvinistic to force her to be a beneficiary of a trust that is controlled by a trustee. If the contribution rationale is to be genuinely effectuated, she has "earned" an interest in property that includes all of the incidents of ownership, not just beneficial title. 34

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31. Id. § 2-207(a)(2).
32. Id. § 2-207(a)(3). The original UPC, as drafted in 1969, did not charge the surviving spouse with disclaimed property. The drafters amended the code in 1975, and now such disclaimed property is charged against the surviving spouse's entitlement. UPC § 2-207 cmt. (1983).
34. Professor Volkmer favors adoption of the Uniform Marital Property Act because
Another commentator, Professor Bloom, focuses on the difficulty of valuing the life interest. He argues that the only source of valuation has been the federal tax tables, which seriously overvalue the life interest.\(^{35}\) This, of course, hurts the surviving spouse because he or she is charged with this value. Bloom argues that if the surviving spouse could disclaim without the value being charged against him or her, the unfairness and the need to valuate would be avoided.

However, if the life interests are overvalued, this hurts the surviving spouse whether or not it is disclaimed. Therefore, if a disclaimer is not charged against the surviving spouse, every surviving spouse will have an incentive to disclaim, because the surviving spouse will be "overcredited" with the devise if it is not disclaimed. Thus, a fairer way to deal with the valuation problem would be to devise a more realistic system of valuation rather than simply reject the disclaimer-is-charged rule. Again, retaining the disclaimer-is-charged rule helps to preserve the testator's scheme of distribution as much as possible.\(^{36}\)

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he believes forced share statutes ignore the partnership theory of marriage. He believes forced share statutes fail to recognize that the property the electing spouse seeks is rightfully his or hers to begin with. Vollmer, Spousal Property Rights, supra note 33, at 103-04.

35. Professors Langbein and Waggoner respond:

We see the prospect of persistent overvaluation as minimal. Professor Bloom builds the case for persistent overvaluation on the assumption that income interests will be automatically valued under the actuarial tables issued by the U.S. Treasury Department for estate and gift tax purposes. As participants in drafting the 1990 UPC, we wish it to be understood that reference to the Treasury tables was deliberately omitted from both the statutory language and the comments. Nothing in the UPC grants the tables mandatory or presumptive status. In a valuation dispute, we would expect the party who would benefit from the tables to argue for their use. We would also expect the party who would be disadvantaged by the table—presumably the surviving spouse—to resist their use, by citing many of the arguments put forward by Professor Bloom. In the end, valuation of income and other partial interests will be resolved by negotiation and agreement or by the trier of fact on the basis of the evidence. There is no reason to expect surviving spouses to be the persistent victim of inaccurate valuation. Valuation issues are endemic to any elective-share system and are not restricted to income and other partial interests. They can arise with regard to partnership interests, closely held corporate stock, land, and jewelry, just to give a few examples. Nearly all of them will be resolved at the pretrial or trial stage and not be the subject of appellate argument.


36. If the surviving spouse is allowed to disclaim property passing to him or her and
Finally, the surviving spouse is charged with the “applicable percentage” of that portion of the augmented estate that represents the surviving spouse’s own assets plus reclaimables. This provision credits not be charged with the value of the disclaimed property, the spouse can manipulate not only what he or she takes, but also the share of others. Suppose $H$ and $W$ have been married for fifteen years and have no children from their marriage. $W$ has child $X$ from a previous marriage and $H$ has two children, $Y$, and $Z$, from a previous marriage. When $H$ dies, he has a probate estate worth $350,000. In his will, $H$ devises $W$ $150,000, and $Y$ and $Z$ $100,000 each. $H$ also bequeaths any residue of his estate to $X$. $H$ also had a joint bank account with right of survivorship with $X$ valued at $50,000. The augmented estate is $400,000, and $W$ is entitled to one-half. If $W$ is not allowed to disclaim, she will have an elective share of $50,000 which she will collect from $X$, $Y$, and $Z$ in proportion to the value of their gifts. $W$ will end up with $200,000, $X$ will have $40,000, and $Y$ and $Z$ will have $80,000 each. If $W$ is allowed to disclaim, the $150,000 devised to her would pass to $X$ under the residuary clause. $X$ would now have $200,000 subject to contribution, and $Y$ and $Z$ would still have $100,000 each. $X$ will contribute $100,000 and $Y$ and $Z$ $50,000 each. $W$ still has her elective share of $200,000, but $Y$ and $Z$'s portion has been reduced to $50,000 while $X$'s portion has increased to $100,000. $W$ has been able to increase the share that her child $X$ receives at the expense of the decedent’s children.

### Table 1—Surviving Spouse Not Allowed to Disclaim

<table>
<thead>
<tr>
<th>Beneficiary</th>
<th>Share of Augmented Estate ($)</th>
<th>% of Elective Share Required of Beneficiary</th>
<th>Contribution ($)</th>
<th>Net Benefit ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$W$</td>
<td>150,000</td>
<td>N/A</td>
<td>N/A</td>
<td>200,000</td>
</tr>
<tr>
<td>$X$</td>
<td>50,000</td>
<td>2</td>
<td>10,000</td>
<td>40,000</td>
</tr>
<tr>
<td>$Y$</td>
<td>100,000</td>
<td>40</td>
<td>20,000</td>
<td>80,000</td>
</tr>
<tr>
<td>$Z$</td>
<td>100,000</td>
<td>40</td>
<td>20,000</td>
<td>80,000</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>400,000</td>
<td>100</td>
<td>50,000</td>
<td>400,000</td>
</tr>
</tbody>
</table>

### Table 2—Surviving Spouse Allowed to Disclaim

<table>
<thead>
<tr>
<th>Beneficiary</th>
<th>Share of Augmented Estate ($)</th>
<th>% of Elective Share Required of Beneficiary</th>
<th>Contribution ($)</th>
<th>Net Benefit ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$W$</td>
<td>150,000</td>
<td>N/A</td>
<td>N/A</td>
<td>$200,000</td>
</tr>
<tr>
<td>$X$</td>
<td>200,000</td>
<td>50</td>
<td>100,000</td>
<td>$100,000</td>
</tr>
<tr>
<td>$Y$</td>
<td>100,000</td>
<td>25</td>
<td>50,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>$Z$</td>
<td>100,000</td>
<td>25</td>
<td>50,000</td>
<td>$50,000</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>400,000</td>
<td>100</td>
<td>200,000</td>
<td>$400,000</td>
</tr>
</tbody>
</table>
the surviving spouse with already owning part or all of what is deemed to be his or her share of “marital property.” The “applicable percentage” is twice the elective-share percentage that is applied in step two.

The impetus behind this provision is the community property paradigm. To illustrate, assume the surviving spouse, W, has assets and reclaimables worth $100,000, that H has assets worth $300,000, and that they had been married long enough that her percentage entitlement is 15%. Since 15% represents her portion (half) of the “marital property,” it follows that 30% of their combined assets is deemed marital property. In other words, 30% of the $400,000 is marital, and 70% is “separate.”

This 30:70 ratio applies not only to their combined assets, but also to his and her assets considered separately. Therefore, 30% of her $100,000, or $30,000, is deemed marital, and she should be credited with already having $30,000 worth of her elective-share amount. If H devised nothing to W, and there are no other credits, W’s $60,000 elective-share amount (15% of $400,000) is reduced by $30,000. The remaining $30,000 is obtained by reducing the shares of the other beneficiaries in the next step, contribution.

4. Contribution

If step three results in a deficit, or if the surviving spouse is entitled to a supplemental share amount, the beneficiaries of the decedent’s probate estate and reclaimables, other than the donees of irrevocable transfers made within two years of death, contribute proportional shares in order to satisfy the elective share.37 In the example above, assume that H devised $10,000 to A and $20,000 to B, and that C was the beneficiary of a $30,000 revocable trust. Their shares in H’s probate and nonprobate-but-reclaimable estate would be one-sixth, one-third, and one-half respectively. Thus, to satisfy the $30,000 deficit, their respective pro rata contributions would be $5,000, $10,000, and $15,000.

37. UPC § 2-207(b)-(c) (Supp. 1992).
With the exception of irrevocable transfers made within two years of death, there is no order of priority as between beneficiaries of probate and nonprobate assets. Consistent with the rationale of similar treatment for wills and will substitutes, this recognizes that, in substance, the decedent is the owner of the nonprobate assets until death. For that reason, the devisees named in the will cannot expect preference over the nonprobate beneficiaries.

However, if there is still a deficit (or a need to satisfy the supplemental snare in step 5) after other beneficiaries' shares have been exhausted, contribution will be required from a donee of an irrevocable transfer within two years of the death of decedent spouse. The purpose of this layer of priority is to reduce the number of times that it will be necessary to require contribution from someone who has held the assets for a period of time.\(^{38}\) With most other probate and nonprobate-but-reclaimable assets, the personal representative will be able to reach them before they have been paid to the beneficiary. Another possible rationale for this layer of priority is that it recognizes that there will be times, such as with a premature and unexpected death, when the irrevocable transfer within two years of death was not intended as a will substitute.

If the beneficiary no longer has the assets at the point contribution is required, it may be more difficult, although not necessarily impossible, to retrieve them. Only original recipients and the donees of the recipients of the reclaimable estate, to the extent that the donees have the property or its proceeds, are required to contribute their pro rata shares.\(^{39}\) A beneficiary who is required to contribute has the choice to

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38. Under the pre-1990 UPC, any remaining balance of the elective share was equally apportioned among all recipients in proportion to the value of their interests. UPC § 2-207(b) (1983). Recipients of gifts within two years of the decedent's death, to the extent that the gifts exceed $3,000 for one year, were required to contribute in the same manner as all other recipients of the augmented estate under § 2-202(1)(iv). The 1990 UPC sets priorities for satisfaction of the elective share. Irrevocable transfers included in the decedent's augmented estate under § 2-202(b)(2)(iv)(D) will be used to satisfy the elective share only after the full amount of other reclaimables have been exhausted. UPC § 2-207 cmt. (Supp. 1992).

39. UPC § 2-207(d) (Supp. 1992). Compare id. with UPC § 2-207(c) (1983). During marriage to W and within two years of H's death, H gives $20,000 to son X. Son X transfers the money to his son Y. $10,000 will be included in H's augmented estate ($20,000 -
give up the proportional part of the assets or pay its equivalent value. 40

5. Supplemental Elective-Share Amount

As explained above, in some estates, the surviving spouse will be entitled to a supplemental share amount so that he or she will not be left with less than $50,000, 41 assuming the estate can satisfy this. 42 When the probate exemptions and allowances ($43,000) are

$10,000 exemption under § 2-202(b)(2)(iv)(D)) and X will be liable for contribution even though he no longer has the money. Y will be liable for contribution only to the extent that he still has the property or proceeds from the sale of the property. It is unclear whether X and Y would be jointly and severally liable for the $10,000 if Y still has the proceeds. It is also unclear whether Y could seek contribution from X if Y pays H's estate the $10,000 contribution.

Another problem with § 2-207(b)-(d) arises when the value of the irrevocable transfer made by the decedent within two years of his or her death decreases and the original transferee no longer has the property. Suppose H owns stock in a company and two years before his death he transfers the stock to son X. At the time of the transfer, the stock is worth $50,000. Under § 2-202(d), the stock will be valued for purposes of the augmented estate at the time the decedent gives the stock to X. After deducting the $10,000 exclusion for gratuitous transfers, $40,000 is recaptured in the decedent's augmented estate. Prior to the decedent's death, the value of the stock decreases and X gives the stock to son Y. According to § 2-207(d), X is liable for the value of the transfer whether or not he still has the property. Section 2-207(d) provides that the recipient of the property can either return the property or pay the value for the amount he or she is liable. Since X no longer has the property, his only option is to contribute based on the value of the stock at the time H transferred it to him. See Kurtz, Augmented Estate Concept, supra note 9, at 1049.

40. See UPC § 2-202(c)(2) (Supp. 1992) (giving protection to payors and third parties); id. § 2-202(f)(1) (protecting bona fide purchasers who purchase property from recipients of the decedent's reclaimable estate).

41. The drafters commented that "the $50,000 figure is bracketed to indicate that individual states may wish to select a higher or lower amount." UPC art. II, pt. 2 cmt. (Supp. 1992).

42. West Virginia has adopted a supplemental share provision that mixes the $50,000 minimum entitlement with a requirement that the amounts described in § 2-201(b) be less than $25,000 before any supplement is due. W. VA. CODE § 42-3-1 (Supp. 1992). The result is that only surviving spouses credited with less than $25,000 will receive a supplement while those credited with $25,000 or more will take no more from the decedent's augmented estate. This method of supplementing the surviving spouse guarantees $50,000 to some but not all surviving spouses. If West Virginia intended to lower the supplemental amount to $25,000, such modifications would have been consistent with the intentions of the drafters of the 1990 UPC. On the other hand, a mixture of more than one value in the
added to this, the minimum becomes $93,000. The comments state: "In the case of a late marriage, in which the survivor is perhaps aged in the mid-seventies, [this] minimum figure ... is pretty much on target—in conjunction with Social Security payments and other govern-

supplemental subsection is cause for concern. Suppose H and W are married and H has separate property worth $100,000. W has separate property worth $20,000. If H dies after two years of marriage to W and provides nothing for W by devise or will substitute, the result will be the same under West Virginia law or the 1990 UPC.

TABLE 3

<table>
<thead>
<tr>
<th>Applicable Sections of West Virginia Code</th>
<th>Amounts ($)</th>
<th>Total Amount W Takes From H's Estate ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 42-3-2(b)(3)</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>§ 42-3-2(b)(4)</td>
<td>20,000</td>
<td>-</td>
</tr>
<tr>
<td>§ 42-3-6(e)(1)</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>§ 42-3-6(e)(3)</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Elective-Share Amount Payable From Decedent's Estate Under §§ 42-3-6(a)-(6)</td>
<td>4,800</td>
<td>$4,800</td>
</tr>
<tr>
<td>Supplemental Amount Under § 42-3-1(b)</td>
<td>25,200</td>
<td>$25,200</td>
</tr>
<tr>
<td>Totals</td>
<td>50,000</td>
<td>$30,000</td>
</tr>
</tbody>
</table>

Consider the same facts as above but in this case, suppose H's separate assets are were $110,000.

TABLE 4

<table>
<thead>
<tr>
<th>Applicable Sections of West Virginia Code</th>
<th>Amounts ($)</th>
<th>Total Amount W Takes From H's Estate ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 42-3-2(b)(3)</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>§ 42-3-2(b)(4)</td>
<td>20,000</td>
<td>-</td>
</tr>
<tr>
<td>§ 42-3-6(e)(1)</td>
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<td>-</td>
</tr>
<tr>
<td>§ 42-3-6(e)(3)</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Elective-Share Amount Payable From Decedent's Estate Under §§ 42-3-6(a)-(6)</td>
<td>5,400</td>
<td>5,400</td>
</tr>
<tr>
<td>Supplemental Amount Under § 42-3-1(b)</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>25,400</td>
<td>5,400</td>
</tr>
</tbody>
</table>
mental benefits—to provide the survivor with a fairly adequate means of support.”

Suppose the decedent’s probate estate plus reclaimables equals $90,000, and the assets of the surviving spouse plus reclaimables equals $10,000. Suppose also that nothing passes to the surviving spouse by testate or intestate succession nor by way of nonprobate transfers. The combined augmented estates are $100,000. If the marriage was more than five but less than six years long, the percentage entitlement would be 15%. Thus, the elective-share amount is $15,000. The spouse is credited with $3,000 under section 2-207(a)(4) (30% of her $10,000), leaving him with a deficit of $12,000. When this deficit is added to the $10,000 that he owns, the sum is $22,000 which is $28,000 short of $50,000. Thus, he is entitled to a supplemental share amount of $28,000 in addition to the $12,000 representing the deficit. In short, he is entitled to a total of $40,000 from the decedent’s probate estate plus reclaimables.

What is the purpose of making these calculations when it appears as though the $40,000 could be derived from simply subtracting the minimum ($50,000) from the spouse’s assets ($10,000)? The calculations are necessary because the elective-share amount might bring the survivor’s assets over the minimum so that the supplemental share amount is not necessary. If the elective-share amount is not calculated (if the spouse is simply brought up to the minimum), then he or she might be deprived of a larger amount to which he or she is entitled.

For example, suppose the surviving spouse (W) has assets of $40,000 and the decedent (H) has a probate estate plus reclaimables consisting of $160,000. The combined augmented estates are $200,000. If the percentage entitlement is 15%, the elective-share amount is $30,000. W is credited with 30% of $40,000, or $12,000, leaving her with a deficit of $18,000. Thus, she is entitled to $18,000 from H’s probate estate and nonprobate estate. If she had simply been given $10,000 to bring her up to the $50,000 minimum, she would have been deprived of her additional $8,000 entitlement under her elective share.

V. THE AUGMENTED ESTATE: A CLOSER LOOK

Section 2-202(b) lists the assets that are in the augmented estate. It is organized as follows:

1. Decedent’s net probate estate

2. Decedent’s reclaimables
   - Powers
   - Joint tenancies
   - Life insurance
   - Transfers by the decedent during marriage
     - Transfers with retained life estate
     - Powers
     - Joint tenancies created within two years of death
     - Transfers within two years of death

3. Nonprobate transfers to the surviving spouse

4. Assets of the surviving spouse plus reclaimables

44. UPC § 2-202(b)(1) (Supp. 1992). Decedent’s net probate estate is decedent’s gross probate estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims. The term “claims” is defined by the UPC as including:
   - liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

45. Id. § 1-201(6). See also id. § 2-202 cmt.

46. Id. § 2-202(b)(2).

47. Id. § 2-202(b)(2)(i).

48. Id. § 2-202(b)(2)(ii).

49. Id. § 2-202(b)(2)(iii).

50. Id. § 2-202(b)(2)(iv)(A).

51. Id. § 2-202(b)(2)(iv)(B).

52. Id. § 2-202(b)(2)(iv)(C).

53. Id. § 2-202(b)(2)(iv)(D).

54. Id. § 2-202(b)(3).

55. Id. § 2-202(b)(4). The reclaimables are those assets that would be included in the...
Section 2-202(b)(2) lists the reclaimables—i.e., the nonprobate assets payable to third parties\(^{56}\)—that are reachable by the surviving spouse to satisfy the elective share. The first three sub-sections, (i)-(iii), deal with assets \textit{whether created before or during marriage} and \textit{whether created by the decedent or another transferor}. The general theory of the first two sections is that the decedent should be considered the owner of the property if, during lifetime, he or she could have made himself or herself the full technical owner.\(^{57}\) The third section, dealing with life insurance, is broader. The last sub-section, (iv), lists four sub-categories of assets transferred by the \textit{decedent during marriage}. These are transfers that traditionally have raised concerns about opportunities for intentional disinheritance.\(^{58}\)

A. \textit{Powers—Section 2-202(b)(2)(i)}

This section includes assets over which the decedent alone held a presently exercisable general power of appointment\(^{59}\) immediately before his or her death. Such assets would also be included if the decedent, while married to the surviving spouse and within two years of death, released the power or exercised it in favor of someone other than the decedent or the decedent’s estate, spouse, or surviving spouse. The latter inclusion prevents the decedent from, for example, shielding the assets by simply releasing the power in anticipation of death.\(^{60}\)

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\(^{56}\) For purposes of this article “third party” means someone other than the surviving spouse.


\(^{58}\) The pre-1990 UPC limited reclaimables to transfers made by the decedent during marriage. UPC § 2-202(1) (1983). \textit{See also id.} § 2-202 cmt. (indicating that a principle reason for the limitation was to allow divorced or widowed spouses the opportunity to provide for the children of the previous marriage without worrying that the proceeds will be subject to the future spouse’s elective share).

\(^{59}\) “Presently exercisable general power of appointment” is defined as “a power of appointment under which, at the time in question, the decedent by an exercise of the power could have created an interest, present or future, in himself [or herself] or his [or her] creditors.” UPC § 2-202(a)(1)(ii) (Supp. 1992).

\(^{60}\) Or, to use another illustration, it prevents the decedent from avoiding the forced share by retaining a power that ends two months before death.
An important loophole that exists under the pre-1990 UPC is closed by this section. Since a power to revoke is simply one kind of power of appointment, this section includes a trust over which the decedent retained a power to revoke, even if the trust was created prior to marriage.\textsuperscript{61} Thus, if prior to his marriage to $W$, $H$ transfers $100,000 into a revocable trust, naming his children from his first marriage to take at his death, the corpus will be included in the augmented estate under this section. Under the pre-1990 UPC, this trust would not be included since it was created prior to marriage. The rationale for the change is that since the decedent could have revoked the trust and given it to himself during marriage, he should be treated as the owner even if the trust was created prior to marriage.

This section includes interests created by the decedent and by others. If $H$'s mother $M$ had devised Blackacre “to $H$ for life, then to whomever $H$ shall appoint,” $H$ would have a life estate and a general power to appoint the remainder. At $H$'s death, survived by $W$, Blackacre would be included in the augmented estate under this section because, immediately before his death, $H$ had a presently exercisable general power of appointment over Blackacre. During $H$'s marriage to $W$, $H$ could have appointed the remainder in Blackacre to himself. It does not matter if $M$ died before or after $H$'s marriage to $W$.

For a power\textsuperscript{62} to be included within this section, it must be “held by the decedent alone.” Therefore, if the transferor requires that the power be exercised with the consent of someone else (even a nonadverse party), the property will not be included. For example, if

\textsuperscript{61} \textit{Restatement (Second) of Property} § 11.1 (1986); see Lawrence W. Waggoner, \textit{Marital Property Rights in Transition}, 18 PROB. L. 1, 46 n.92 (1992); Lawrence W. Waggoner, \textit{Spousal Rights in Our Multiple Marriage Society: The Revised Uniform Probate Code}, 26 REAL PROP. PROB. & TR. J. 683, 748 n.169 (1992). One commentator mistakenly assumed that a revocable trust would not be included under the 1990 UPC if it was created prior to marriage. Rena C. Seplowitz, \textit{Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share—Why the Partnership is Not Yet Complete}, 25 IND. L. REV. 1, 6 (1991) [hereinafter Seplowitz, \textit{Transfers Prior to Marriage}]. Confusion would have been avoided if § 2-202(b)(2)(i) had expressly included a power to revoke.

\textsuperscript{62} For the sake of brevity, the statement that a “power” is included in the augmented estate means the “property over which the decedent had a power of appointment” is included in the augmented estate.
M devised Blackacre "to H for life, then to whomever H, with the consent of J, shall appoint," Blackacre would not be included within this section. However, if the decedent (rather than some other transferor) creates the power during marriage, the property is included under section 2-202 (b)(2)(iv)(B) as discussed later. In short, if a donor wants to provide for his or her children from an earlier marriage by way of a revocable trust, the trust must be created prior to marriage, and the power to revoke must require the consent of another person.

Although treated as owned by the decedent for federal estate tax purposes, the UPC declines to include a purely testamentary power within the reach of the elective share. Thus, if M had devised Blackacre "to H for life, then to whomever H shall appoint by will," Blackacre would not be included in the augmented estate. H's power is testamentary rather than presently exercisable—i.e., H has the power to devise Blackacre to his estate or to the creditors of his estate, but H cannot exercise it during his lifetime.

Does limiting this section to presently exercisable general powers of appointment create an objectionable loophole? It can be argued that if a presently exercisable power is one signature away from outright ownership, then a testamentary power is not far enough behind to justify different treatment. However, a justification for exclusion of a testamentary power is apparent when considering the practical effect of including it. If included, a decedent would be deterred from devising a testamentary power of appointment to his or her surviving spouse because that would bring the asset within the reach of the surviving spouse's potential subsequent surviving spouse.

For example, if H devised Blackacre "to W for life, then to whomever W shall appoint by will," the inclusion of testamentary powers within the augmented estate would mean that if W remarried and then died survived by H#2, Blackacre would be reachable by H#2. To avoid this, H would use a qualified terminal interest property trust (QTIP trust) 63 rather than a life estate coupled with a testamentary

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63. A QTIP trust is a marital deduction bequest in which the surviving spouse receives all the income for life payable at least annually, but is not given a general power of
power of appointment. This, the argument goes, would be to W's detriment because it decreases her interest in Blackacre. Thus, the better view is to exclude purely testamentary powers to avoid deterring their use.

B. Joint Tenancies—Section 2-202(b)(2)(ii)

This section includes property in the augmented estate held by the decedent and a third party as joint tenants with the right of survivorship "to the extent of the decedent's unilaterally severable interest therein." Thus, if H and his friend F own Blackacre (worth $100,000) as joint tenants with the right of survivorship, and H dies survived by W, $50,000 worth of Blackacre will be included in H's augmented estate under this section. It does not matter whether Blackacre was purchased before or after H and W were married, and it does not matter how much, if any, of the purchase price was provided by H. As with the section above, this section also includes such property if the decedent transferred it to a third party within two years of death and while married to the surviving spouse.

The West Virginia provision deviates significantly from the UPC provision by limiting this section to joint tenancy property acquired during the marriage to the surviving spouse. Therefore if, prior to H's marriage to W, H (or F) purchased Blackacre for $500,000, putting title in the name of "H and F as joint tenants with the right of survivorship," and H dies survived by F and W, no portion of the value of Blackacre will be included in H's augmented estate in West Virginia because Blackacre was not acquired during H's marriage to W. Presumably, the West Virginia limitation reflects one or both of two views. First, the creation of joint tenancy property prior to marriage is not likely to be used as a tool for disinheriting a prospect-


tive spouse. Secondly, it is unfair to bring this property within the reach of the surviving spouse, because it is not "marital property" since it was acquired prior to marriage. However, the latter point is equally applicable to powers created prior to marriage. Thus, it is questionable whether joint tenancy property should be treated differently from powers and West Virginia's statute is arguably inconsistent in doing so.

The rationale of the UPC, which would include half the value of Blackacre, is that during H's marriage to W, H had the power to sever his one-half interest in Blackacre and transfer it to anyone, including himself. Therefore, he should be treated as the owner for purposes of the elective share even if Blackacre was acquired before marriage. Thus, the UPC's rationale for including a portion of the joint tenancy property within this section, even if acquired before marriage, is consistent with the rationale for including powers of appointment created prior to marriage.

Even the broader UPC arguably creates at least some potential for using joint tenancy property for intentional disinherittance. If acquired before marriage, only H's unilaterally severable interest is included in the augmented estate, even if H contributed all of the purchase price. Thus, if, prior to his marriage to W, H pays $500,000 for Greenacre and puts it in the name of "H and F as joint tenants with the right of survivorship," only half of it will be included under this section. This, in effect, allows H to keep $250,000 from the reach of the elective share. The rationale for the UPC position is that H could have given $250,000 to F outright. In effect, the creation of the joint tenancy is giving F an outright gift of property worth $250,000. It is so treated for federal gift tax purposes. Furthermore, this is unlikely to become a common technique for decedents intent on disinheriting their prospective spouses since it shelters only half of the joint tenancy property. Nonetheless, the UPC's decision to bring the other half in, even if acquired prior to marriage, seems justified.

With regard to real property, the "unilaterally severable interest" is the decedent's pro rata share based on common-law joint tenancy principles. If A and B own Blackacre as joint tenants with the right of survivorship, A and B each own an undivided one-half interest, and
during their joint lives either one can unilaterally sever the joint tenancy by conveying his or her interest to a third party. Thus if A conveys his interest to C, the joint tenancy is severed, and B and C own Blackacre as tenants in common.

With regard to personal property, the portion that is “unilaterally severable” often is a matter of state statutory law. The elective-share provisions of the UPC were drafted with other provisions of the UPC in mind. For example, in the case of a joint bank account, the UPC provides that during the lifetimes of the joint tenants, each owns the portion that he or she contributed unless there is clear and convincing evidence of a different intent.66 Thus, if A and B have a joint bank account67 in a jurisdiction that has adopted section 6-211 of the UPC along with the elective-share provisions, and if A contributed $50,000 and B contributed $20,000, then $50,000 would be included in A’s augmented estate under this section if A predeceases B.

There is considerable variation among the jurisdictions on the law of joint tenancy ownership of personal property, with much of it governed by statute. Stocks, bonds, certificates of deposit, and bank accounts are often owned in joint tenancy form. Although derived from the law of real property, the law of joint tenancy ownership of personal property has had to adapt to quite different expectations of the co-tenants with regard to their respective rights and duties in, for example, a fluctuating fund. In a jurisdiction that has not adopted section 6-211, it may be that during the lifetimes of the joint tenants of a bank account, local law provides that each owns his pro rata share rather than the amount contributed.68 In short, the law of the jurisdic-

66. UPC § 6-211 (Supp. 1992). See also id. § 6-211 cmt. (stating that the section only applies to the relationship of parties to the account and not to the relationship between the parties and the financial institution).

67. That is, the signature card names the owners as “A and B as joint tenants with the right of survivorship.”

68. It is well established by case law that the statement on the signature card does not necessarily reflect the understanding or the rights of the owners of the joint bank account vis-a-vis each other; rather, it is there to protect the bank. See, e.g., Dorsey v. Short, 205 S.E.2d 687 (W. Va. 1974). For example, if the signature card to a $100,000 joint bank account provides that either A or B may withdraw any portion of it, this provision merely
tion will determine, in the case of joint tenancy ownership of personal property, what portion is the decedent’s “unilaterally severable interest.”

If the joint tenancy property is acquired during marriage and within two years of H’s death, its value is included in the augmented estate, to the extent that H contributed to its purchase price, under section 2-202(b)(2)(iv)(C) (enacted in West Virginia without modification) as discussed below.

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69. The decedent’s unilaterally severable interest in jointly held personal property with a right of survivorship is a matter of state law. The critical factor used by most states, including West Virginia, is the intent of the depositor. In West Virginia, during the life of a depositor who deposits funds into a joint survivorship bank account naming another person as joint tenant, a rebuttable presumption exists that ownership of funds is joint. The presumption allows each co-tenant the right to unilaterally sever his or her pro rata share of the assets. Competent evidence may rebut the presumption thus entitling the depositor to sole ownership during his or her lifetime. See W. Va. CODE § 31A-4-33 (1990); Simons v. Simons, 298 S.E.2d 144 (W. Va. 1982) (holding that rebuttable presumption arises that ownership in joint survivorship bank account is joint regardless of the source of funds, and the depositor’s unilateral withdrawal of the funds does not rebut the presumption that a gift was intended); Kanawha Valley Bank v. Friend, 253 S.E.2d 528 (W. Va. 1979) (establishing that if parties to a joint account with survivorship occupy a confidential or fiduciary relationship, a presumption of constructive fraud may arise which shifts the burden to party who benefitted from the creation of the account to show that it was in fact a bona fide gift); Dorsey v. Short, 205 S.E.2d 687 (W. Va. 1974) (holding that issue as to whether conditions placed on a joint bank entitled depositor to ownership of funds account presented a fact question); John W. Fisher, II, Joint Tenancy in West Virginia: A Progressive Court Looks at Traditional Property Rights, 91 W. Va. L. REV. 267 (1988-89).

70. See infra notes 88-89 and accompanying text. It is possible for property to fall within more than one provision. For example, during marriage and within two years of death, H and friend F purchase Blackacre for $100,000 with H contributing $40,000 and X contributing $60,000. This type of transfer technically falls within the provisions of § 2-202(b)(2)(iv)(C). It also falls within § 2-202(b)(2)(ii) to the extent of H’s unilaterally severable interest in Blackacre. This apparent ambiguity is solved by § 2-202(d) which states that if the reclaimable would fit into more than one part of § 2-202(b)(2), the property will be included under the part that yields the highest value. UPC § 2-202(d) (Supp. 1992). Therefore, under these facts, $50,000 would be included in the augmented estate despite the fact that the decedent only contributed $40,000 of the purchase price.
C. Life Insurance—Section 2-202(b)(2)(iii)

This section closes a loophole that existed in the pre-1990 UPC by including in the augmented estate the proceeds of insurance on the life of the decedent payable to a third party if the decedent had certain incidents of ownership,\(^71\) whether acquired before or during marriage. As with the previous two sections, the proceeds are also included if the decedent transferred the policy to a third party while married and within two years of death. The pre-1990 UPC excluded life insurance payable to a third party from the augmented estate, because, as the comments explained, "it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse."\(^72\)

The drafters of the 1990 UPC thought otherwise\(^73\), and included insurance in a section that is broader in some respects than the two above. The general theory of subsections (i) and (ii) above (powers and joint tenancies) is that the decedent should be treated as the owner for purposes of the elective share if he could make himself the "full technical owner" during his lifetime.\(^74\) Here, the proceeds of life insurance will be included in the augmented estate even if the decedent's only interest is the right to change the beneficiary. Although seeming to go beyond the rationale for inclusion, this is consistent with treatment of life insurance for federal estate tax purposes.\(^75\)

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\(^71\) That is, if the decedent "owned the insurance policy, had the power to change the beneficiary of the insurance policy, or the insurance policy was subject to a presently exercisable general power of appointment held by the decedent alone immediately before his [or her] death." UPC § 2-202(b)(2)(iii) (Supp. 1992). See also I.R.C. § 2042(2) (1988).


\(^73\) The comments to the 1990 UPC state, "[T]his move [to include it] recognizes that such arrangements could, under the pre-1990, have been used to deplete the estate and reduce the spouse's elective-share entitlement." UPC § 2-202 cmt. (Supp. 1992). See also Bridge, Life Insurance Assets, supra note 14 (advocating the inclusion of life insurance proceeds payable to third parties in the decedent's augmented estate); Sidney Kwestel & Rena C. Seplowitz, Testamentary Substitutes: Retained Interests, Custodial Accounts and Contractual Transactions—A New Approach, 38 AM. U. L. REV. 1, 63-65 (1988) (pointing out the loophole created by the exclusion of life insurance and advocating inclusion of the proceeds in the augmented estate).


\(^75\) I.R.C. § 2042(2) (1988). Inclusion of life insurance proceeds on the life of the
Suppose that the only interest the insured has is the right to change the beneficiary to someone other than himself or his estate. Assume also that the named beneficiary is A. Is there a concern that the insured (H) and A might have an agreement that H will not change the beneficiary in exchange for A’s promise to transfer half of the proceeds to the creditors of his estate? Or, perhaps H could promise A not to change the beneficiary in exchange for $100,000. In this way, H benefits during his lifetime. However, there could be the same kind of arrangement if H had a non-general power of appointment over trust assets. If it is non-general, it would not be pulled in under subsection (i), and yet there could be a similar arrangement to benefit the donee. In other words, collusion is always a possibility. This may be the rationale behind the transfer tax laws, but it is not clear that there needs to be such a broad sweep with the elective-share provisions.

D. Transfers by the Decedent During Marriage—Section 2-202(b)(2)(iv)

This section is divided into four sub-sections, all of which address transfers by the decedent during the marriage to the surviving spouse. In the pre-1990 UPC, only these kinds of transfers payable to third parties were included in the augmented estate. The provisions in the four sub-sections are similar to the pre-1990 UPC provisions. Because these are transfers by the decedent during marriage, there is more concern for their use as devices of disinheritance. Hence, they are

decedent payable to a third party is a major modification of the pre-1990 UPC. “The fine-spin tests of the Federal Estate Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.” UPC § 2-202 cmt. (1983). The realization that a decedent may deplete his or her estate by purchasing life insurance is a positive step toward closing loopholes found in earlier versions of the Code. On the other hand, by including the insurance proceeds in the augmented estate, even if the decedent acquired one of the listed interests before marriage, the drafters seem to go beyond their stated goal of preventing the depletion of the estate.

somewhat broader than the above three sections that are not limited to transfers by the decedent during marriage.

The policy behind these sections is similar to the policy behind the federal transfer tax provisions which include similar assets in the gross estate for federal estate tax purposes. Although the tax provisions are somewhat broader, the rationale for both is that the decedent has enjoyed the economic benefit of the property until the time of his death just as he has with the assets that are in his probate estate; therefore, he should be treated as the owner. Although the rationale for inclusion is the same, the ultimate goal is not. The goal of the transfer tax is to spread the wealth among society, while the goal of the elective share is to achieve a fair balance between the surviving spouse and the other beneficiaries of the decedent’s estate. Nonetheless, because the underlying rationale is the same, courts will likely look to tax cases for authority when similar issues arise in the context of the elective-share statute.78

1. Transfer With Retained Life Estate—Section 2-202(b)(2)(iv)(A)

This section includes transfers by the decedent where the decedent retained, at the time of or within two years of death, the possession or enjoyment of, or right to income from, the property. Thus, if during his marriage to W, H transfers Blackacre “to X at my death” or “to myself for life, then to X,” Blackacre will be included in H’s augmented estate under this section. This is a transfer-with-retained-life-estate, a standard will substitute that was included in the augmented estate under the pre-1990 UPC and that is included in the gross estate for federal estate tax purposes.79

Of course, the asset transferred might be personal property rather than real property. For example, assume that during marriage H transferred $100,000 to T in trust to invest the money for the benefit of H

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78. Kurtz, Augmented Estate Concept, supra note 9, at 1024-26.
79. I.R.C. § 2036 (1988 & Supp. 1992). See also Kurtz, Augmented Estate Concept, supra note 9, at 1024-26 (discussing several applications of UPC § 2-202(1)(i) (1983) such as transfers in trust to satisfy support obligation and transfers of Blackacre with understanding that transferor will live on Blackacre for the rest of his life).
for life, then to \( Q \). At \( H \)'s death survived by \( W \), the corpus of the trust would be included in the augmented estate under this section.

This section is not expressly limited to a retained life estate. If it were, it would be easy to avoid by simply conveying Blackacre "to \( A \) at the end of fifty years." \( H \), in effect, has reserved a term of years for fifty years. If \( H \)'s life expectancy is less than fifty years, then \( H \) can expect to enjoy possession of Blackacre until his death just as if he retained a life estate. This would easily shelter Blackacre from the augmented estate if the statute were limited to transfers with a retained life estate. Since the provision is not so limited, transferors will be deterred from retaining a term of years, because there is no reason to take a chance on retaining a term of years that expires before they do. Thus, it will almost always be the transfer with retained life estate that gets nabbed under this section.

One commentator has argued that a retained life estate should trigger inclusion even if created prior to marriage.\(^80\) She points out that a prospective spouse may not realize that Blackacre, which her fiance occupies, is not owned in fee simple absolute. She argues that "[b]y bringing the life estate into the marriage . . . when a couple may enjoy its benefits, a spouse should be deemed to have converted it into partnership property."\(^81\) A counter response is that if a transfer with retained life estate is made prior to marriage, it is only a life estate that is brought into the marriage. This is an interest that will be enjoyed by them during their joint lives and that will end at the death of the life tenant.

More persuasive is her point that during their marriage, the life-tenant spouse may be making mortgage payments with funds that should be considered marital.\(^82\) Carrying her point one step further, economically, at least, the interests of the remaindermen are being created during marriage with each mortgage payment constituting a mini-transfer with retained life estate. A compromise position might be to include the pro rata share of the property based on the percentage

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80. Seplowitz, Transfers Prior to Marriage, supra note 61.
81. Id. at 58.
82. Id. at 65.
of mortgage payments made during marriage; however, this complication may not be worth the effort. Unlike with a power to appoint to himself created prior to (but exercisable during) marriage, the transferor who retains a life estate has made an irrevocable commitment to the remaindersmen prior to marriage, and the mortgage payments can be viewed as relating back to the time the life estate was created.

Finally, with regard to her point about the use of "marital assets," there are other instances where a spouse can transfer property that would be considered community property in a community property jurisdiction and thereby keep it out of the augmented estate. For example, during marriage the propertied spouse can simply give away money that he or she earned while married. As long as the transfer is not within two years of death, it will be excluded from the augmented estate. Presumably, the spouse would be deterred from such generosity, and especially would not use such means simply to defeat the forced share.

In short, with regard to transfers with a retained life estate, it is reasonable to limit the reach of the elective-share provisions to those that are made during the marriage to the surviving spouse. It allows a spouse to protect the children from a prior marriage by naming them the remaindersmen in a pre-marital transfer. It would not, however, preclude the surviving spouse from recovering on the basis of misrepresentation of assets by the decedent in those cases where the evidence supports such a finding.

Other issues exist with regard to retained life interests, some of which are not new to the 1990 UPC. Professor Kurtz, in his pre-1990 UPC article, raises the issue of whether the retained life estate section would include a trust created by the decedent during marriage where the payment of income is purely discretionary. He notes that, if the tax litigation analogy holds, the interest would not be included.83 A

83. Kurtz, Augmented Estate Concept, supra note 9, at 1025. See I.R.C. § 2036(a)(1) (1988 & Supp. 1992) (establishing the rule that for federal estate tax purposes, an interest in property will only be included if the decedent retained the possession of, enjoyment of, or right to income from the property); Jennings v. Smith, 161 F.2d 74, 77-78 (2d Cir. 1947) (holding that the power of a trustee to exercise income of a trust in favor of decedent to maintain decedent at certain standard of living did not render the value of the trust
Maine court has since addressed the issue in the context of the pre-1990 UPC, and Professor Kurtz's prediction proved true.\textsuperscript{84} Although not purely discretionary, in that the beneficiary was to be paid a fixed sum per month, the trustee had sole discretion to pay any additional income. Looking to the law of federal estate taxation for authority, the court concluded that the amount over which the trustee had discretion would not be included for purposes of the elective share because "the potential interest is too remote and tenuous."\textsuperscript{85} Under the 1990 UPC this interest would be covered by the next section (section 2-202(b)(2)(iv)(B)) as a power exercisable by a nonadverse party.

2. Transfer With Retained Power—Section 2-202(b)(2)(iv)(B)

This section includes in the augmented estate property that was transferred by the decedent during marriage if a power to appoint it to himself or his estate was retained by the decedent and held at death or was exercised or released within two years of death. The property is included if the power is exercisable by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party.

This section is broader than the corresponding section that applies to powers created prior to marriage. First, it is not limited to presently exercisable powers and therefore includes testamentary powers. Second, it is not limited to powers held by the decedent alone. Thus, if $H$ transferred $100,000 "to $T$ in trust to pay the income to $A$ for life, then to whomever $H$ shall by will appoint," and $H$ retained this power at his death, the corpus would be included in $H$'s augmented estate under this section. Similarly, if $H$ transferred $200,000 "to $T$ in trust to pay the income to $A$ for life, then to whomever $H$ shall appoint by deed or will with the consent of $X$," and $H$ retained this power at his death, the corpus would be included in $H$'s augmented estate under this section.

\textsuperscript{84} Estate of Fisher, 545 A.2d 1266 (Me. 1988).
\textsuperscript{85} Id. at 1273.
Although the language of this section refers to "income or principal" subject to a power, the section certainly would not be construed to be limited to transfers in trust. Thus, if during marriage the decedent transferred Blackacre "to A for life, then to whomever I shall appoint by will," and H retained this power at his death, Blackacre would be included in the decedent's augmented estate under this section.

Both the pre-1990 UPC and the federal estate tax counterparts to this section are limited to powers that are exercisable by the decedent alone or in conjunction with any other person. Here, the power is included if it is "by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party, for the benefit of the decedent or the decedent's estate." Thus, suppose that during marriage to W, H transfers $100,000 "to T to invest for the benefit of A for life, then to such of H or H's issue as T shall appoint." T, the trustee, has a non-general power of appointment, and H is within the scope of the permissible appointees. At H's death, the corpus will be included in the augmented estate under this section, even though it is excluded from H's gross estate and excluded from the pre-1990 UPC's augmented estate.

3. Joint Tenancies Created Within Two Years of Death—Section 2-202(b)(2)(iv)(C)

This section includes in the augmented estate property, to the extent of the decedent's contribution, acquired during marriage and within two years of the decedent's death, that was owned by the dece-

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86. "[A]ny transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit." UPC § 2-202(1)(ii) (1983). See also I.R.C. § 2038 (1988).

87. UPC § 2-202(b)(2)(iv)(B) (Supp. 1992) (emphasis added). A "nonadverse party" is defined as "a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he [or she] possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property. Id. § 2-202(a)(1)(ii). See also I.R.C. § 672(a)-(b) (1988) (defining "adverse party" and "nonadverse party" for federal income tax purposes).
dent and a third party as joint tenants with the right of survivorship. Thus, if during marriage and within two years of death, \( H \) purchases Blackacre for $100,000 putting title in the name of "\( H \) and \( A \) as joint tenants with the right of survivorship," the full value of Blackacre will be included in \( H \)'s augmented estate under this section. As with the other sections, Blackacre will be included whether decedent retained his interest at his death or gratuitously transferred it prior to death.\(^8\)

The amount that is included under this section is based on the decedent's contribution. If, in the above example, \( H \) had contributed half of the purchase price, then only half of the value of Blackacre would be included in the augmented estate under this section. However, if \( H \) contributed less than his pro rata share (in this case less than 50%), the full pro rata ownership interest share (50%) would be included under section 2-202(b)(2)(ii). This is because section 2-202(d) provides that if more than one section applies (as is the case here), the property will be included in the augmented estate under the section that yields the highest value.

Thus, there are two sections that deal with joint tenancies and they are not mutually exclusive. Subsection (ii) applies to joint tenancies whether created prior to or during marriage and whether created by the decedent or a third party. Section (iv)(C) is limited to joint

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\(^8\) This, of course, is limited to gratuitous transfers within two years of death, since the section itself is limited to joint tenancies acquired within two years of death. The comparable section under the pre-1990 UPC, applied to "any transfer whereby property is held at the time of the decedent's death by decedent and another with right of survivorship." UPC § 2-202(1)(iii) (1983). Since the pre-1990 section applies to joint tenancy property created by decedent at any time during marriage, it is actually broader than § 2-202(b)(2)(iv)(C) of the 1990 UPC which applies only to such interests created during marriage and within two years of the decedent's death. However when read in conjunction with § 2-202(b)(2)(ii) which applies to joint tenancy property created by decedent or a third party at any time, including prior to marriage, the net result is a much broader coverage under the 1990 UPC. Nonetheless there are circumstances under which the surviving spouse would be better off under the old system than the new. Suppose \( H \) and \( W \) marry and one year later, \( H \) contributes the entire $100,000 required to purchase Blackacre. \( H \) names daughter \( Y \) as joint tenant with survivorship. If \( H \) dies ten years later, only $50,000 will be included in \( H \)'s augmented estate under the 1990 UPC. On the other hand, the entire $100,000 would be included under the pre-1990 UPC because the earlier version reclaims such transfers based on contribution if the decedent creates them at any time during the marriage.
tenancies created by the decedent during marriage and within two years of death. Thus, subsection (iv)(C) is actually a sub-class of subsection (ii), but the amount included under subsection (iv)(C) is based on contribution, and the amount included in subsection (ii) is based on the decedent’s unilaterally severable interest. The former may or may not be greater than the latter. In those cases where either measure is applicable, section 2-202(d) breaks the tie by choosing the subsection that yields the greater value to the augmented estate.89

In short, any property that falls within subsection (iv)(C) will also fall within subsection (ii). The subsection that will apply will be determined by which is greater: decedent’s unilaterally severable interest (subsection (ii)), or the decedent’s contribution (subsection (iv)(C)). In the case of real property that falls within both, whenever the decedent’s contribution exceeds his pro rata share, the property will be included under subsection (iv)(C). Whenever his contribution is less than his proportional ownership interest share, the property will be included under subsection (ii).

In the case of personal property, this same generalization cannot be made, because the unilaterally severable interest depends on the law of the particular jurisdiction.90 In those jurisdictions where the unilaterally severable interest is based on contribution, the two sections will yield the same value. Thus, suppose, within two years of death and while married, H contributes three-fourths of the amount to a bank account that he creates in the name of himself and A as joint tenants with the right of survivorship. If the jurisdiction has enacted section 6-211 of the 1990 UPC, which provides that ownership during lifetime is based on contribution, three-fourths of the bank account would be included under either section.

Why is this section limited to joint tenancies created within two years of death? One response is that subsection (ii) will catch joint tenancies that are created more than two years before death, even though the amount included will be limited to the decedent’s proportional ownership share. The real thrust, however, of this section is to

89. UPC § 2-202(d) (Supp. 1992).
90. See supra note 69 and accompanying text.
prevent our would-be disinheritor from escaping the grasp of subsection (iv)(D) by creating a joint tenancy rather than making an outright transfer.

4. Transfers Within Two Years of Death—
Section 2-202(b)(2)(iv)(D)

This section includes "any transfer made to a donee within two years before the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed $10,000."91 The purpose of this section is to prevent the decedent from defeating the spouse's elective share by simply giving property away in contemplation of death. Of course, the statute is objective—there is no need for a determination that the transfer was in fact in contemplation of death. The $10,000 floor is to allow the decedent to take advantage of the annual per donee federal gift tax exclusion.92 In the case of a transfer in trust, presumably the beneficiaries rather than the trustee would be considered the donees for purposes of this section.93

5. Overlap Among the Subsections of 2-202(b)(2)(iv)

In the discussion of subsection (iv)(C) above, it was noted that at times subsection (iv)(C) might overlap with subsection (ii) (joint tenancies created prior to marriage or by someone other than the transferor). There also is potential overlap within the subsections of (iv). Suppose during marriage H transfers securities to his son S reserving the income for life for himself. Suppose also that one year before death, H conveyed his life estate to his son. At H's death the value of the securities would be included in the augmented estate under subsection (iv)(A) because H had possession (enjoyment) within two years of death. Thus, H's conveyance of the life estate to S does not take it out of subsection (iv)(A), but it arguably also puts at least the life

93. This is the case for federal gift tax purposes. See Treas. Reg. § 25.2503-2(a) (as amended in 1984); Kurtz, Augmented Estate Concept, supra note 9, at 1033 (discussing the ambiguity resulting from the drafter's failure to define "donee").
estate into subsection (iv)(D) because he transferred it within two years of death.\textsuperscript{94}

Here we do not have a case that fits completely within the terms of two sections. We have a case that fits completely within subsection (iv)(A) or, alternatively, straddles subsection (iv)(A) and subsection (iv)(D). The greater value rule requires that this transfer be included under subsection (iv)(A) because the value under subsection (iv)(A) would be the full value of the securities at the time of H's death. If part is included under subsection (iv)(A) and part under subsection (iv)(D), the $10,000 exclusion in subsection (iv)(D) would reduce the amount included in the augmented estate.

Suppose that during marriage to \( W \), H transfers Blackacre to his daughter \( X \), retaining a life estate, and that H dies within two years of the transfer. This transfer fits within the terms of subsection (iv)(A) as a transfer with a retained life estate and within the terms of subsection (iv)(D) as a transfer of the remainder within two years of death. Under subsection (iv)(A), the value included would be the value of Blackacre at H's death. Under subsection (iv)(D), the value included would be the value of the remainder at the time of the transfer less the $10,000 exclusion. Thus, under the greater value rule, the transfer would be included under subsection (iv)(A) unless, by some remote chance the value of Blackacre has declined below the value of the remainder, by more than $10,000, at the time of the transfer.

In short, because of the greater value rule, coupled with the $10,000 exclusion in subsection (iv)(D), the property will be included in one of the sections other than subsection (iv)(D), except in very rare instances. Because of the rarity of those instances, perhaps it would be advisable to avoid this issue altogether by drafting the statute to prevent overlap within subsection (iv). For example, subsection (iv)(D) could refer to "any transfer, other than a transfer within (A), (B), or (C), made to a donee within two years of death to the extent

\textsuperscript{94} Of course, the value of the life estate will be relatively small. Because the calculations will be made after H's death, actualities rather than actuarials will be used. Thus, even if H died prematurely, the value of the life estate will be based on a less than two year life.
that the aggregate transfers to any one donee in either of the years exceed $10,000." This would not obviate the need for the greater value rule, because it would still be needed, for example, to resolve a conflict between subsections (ii) and (iv)(C).

E. Nonprobate Transfers to the Surviving Spouse—
Section 2-202(b)(3)

This section continues the approach of the pre-1990 UPC of including nonprobate transfers to the surviving spouse in the augmented estate. This inclusion prevents a major aspect of the overprotection problem that plagued the traditional elective-share system. If the spouse benefits from certain will substitutes, such as life insurance and joint tenancies, this should be taken into consideration in determining the elective-share entitlement. Under the 1990 UPC these assets are included in this section, and then the spouse is credited with their receipt in section 2-207.95

Because this section is limited to nonprobate transfers, it does not include assets received from the decedent by will or by intestate succession. Similarly, it expressly excludes the homestead allowance, exempt property, and the family allowance. With these exceptions, it generally includes "the value of property to which the surviving spouse succeeds by reason of the decedent’s death."96 Examples are given such as insurance and retirement benefits.

Suppose that H deposited $100,000 in a bank account in the name of "H, pay on death to W." Assuming that such a "POD" bank account is valid in the jurisdiction, the assets in this account would be included in the augmented estate under this section because this is

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95. See discussion infra part V.C.
96. UPC § 2-202(b)(3) (Supp. 1992). The UPC defines "value of property to which the surviving spouse succeeds by reason of the decedent’s death" to include:
the commuted value of any present or future interest then held by the surviving spouse and the commuted value of amounts payable to the surviving spouse after the decedent’s death under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system.
Id. § 2-202(a)(1)(vi).
“property to which the surviving spouse succeeds by reason of the decedent’s death.” It does not matter if the account was created before or after H’s marriage to W.

Although the examples listed in section 2-202(b)(3) are not intended to be all-inclusive, it is nonetheless curious that joint tenancies are not mentioned.97 Spouses often own assets, such as real estate, securities, and bank accounts, in joint tenancy form, making this one of the most common ways that spouses avoid probate with regard to each other. The pre-1990 UPC expressly included in the augmented estate property owned by the decedent and the surviving spouse as joint tenants with the right of survivorship.98 In most estates joint tenancy property will likely constitute the largest portion of property falling within this subsection.

Since joint tenancies are not even mentioned, there obviously is no indication of the amount of property that is deemed to pass to the surviving spouse for purposes of inclusion in this section. Assume H and W own Blackacre as joint tenants with the right of survivorship. After a long marriage, H dies survived by W, and at H’s death, Blackacre is worth $200,000. How much of Blackacre is deemed to pass to W? One possible answer is all of it. Another choice is half, on

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97. Early common-law theory of joint tenancy provided that during their joint lives each tenant owned the whole, and nothing passed at death; rather the surviving joint tenant was simply relieved of the participation of the other. It is hard to believe that the drafters assumed that joint tenancies would not be included in this section on the basis of this theory. It has been recognized as a fiction and has been rejected for purposes of most joint tenancy issues that arise. See I.R.C. § 2040(a) (1988) (including in the decedent’s gross estate the value of jointly held property with right of survivorship to the extent that the decedent is unable to show contribution from the other joint tenants); I.R.C. § 2040(b)(1)-(2) (1988) (restricting the applicability of § 2040(a) with respect to husbands and wives and including in the decedent’s estate one-half of the value of the property held by decedent and surviving spouse with right of survivorship acquired after Dec. 31, 1976 regardless of contribution); UPC § 2-202(2)(i) (1983) (expressly including survivorship property as property derived from the decedent); Estate of Lettenagarver, 813 P.2d 468, 472-73 (Mont. 1991) (interpreting § 2-202(2)(i) of the pre-1990 UPC and holding that one-half of the value of contract for deed held by decedent and surviving spouse with right of survivorship passed to surviving spouse at decedent’s death); Kurtz, Augmented Estate Concept, supra note 9, at 1040-41.

the grounds that while $H$ was living each owned an undivided one-half. A third choice is none, on the basis of the common-law theory of joint tenancy.\footnote{99. See supra note 97 and accompanying text.} Finally, the amount deemed to pass can be based on the percentage of the purchase price contributed by $H$.

The pre-1990 UPC provides that the amount deemed to pass to the surviving spouse is based on contribution, but in the absence of evidence of contribution, the presumption is that \textit{all} passed.\footnote{100. UPC § 2-202(2)(iii) (1983).} In other words, the pre-1990 UPC presumed that the decedent provided all of the purchase price unless the surviving spouse can prove otherwise. Not only is this presumption unfair, but it was drafted simply to be consistent with the then existing transfer tax laws which have since been changed. Under current tax law, the amount of spousal joint tenancy property that is deemed to pass for transfer tax purposes is \textit{half}, regardless of contribution.\footnote{101. I.R.C. § 2040(b)(1) (1988). Although the marital deduction allowed under I.R.C. § 2056(a) (1988 & Supp. 1992) is unlimited, calculating the amount deemed to pass to the surviving spouse will have other tax consequences related to subsequent transfers by the surviving spouse. See I.R.C. § 1014 (1988) (describing the special rules governing the basis of property received by virtue of another person’s death); Drake v. United States, 642 F. Supp. 830, 836 (N.D. Ill. 1986) (discussing the relationship between I.R.C. § 1014(b)(9) and federal estate tax).}

Under the 1990 UPC the resolution of this issue will not matter in a marriage of fifteen years or longer because whatever portion of the joint tenancy property is not included in section 2-202(b)(3) will be included in section 2-202(b)(4) (the value of property owned by the surviving spouse at the decedent’s death). If the marriage is fifteen years or longer, the surviving spouse will be charged in section 2-207 with the full amount included under section 2-202(b)(3) and the full amount under section 2-202(b)(4). Therefore, it makes no difference how much of the joint tenancy property is included in subsection (3) and how much is included in subsection (4).

However, the amounts included in subsections (3) and (4) can make a difference in a less-than-fifteen year marriage because of the section 2-207 crediting procedure described above. Suppose, for exam-
ple, that $H$'s estate plus reclaimables equals $400,000 and that $H$ and $W$ owned Blackacre (worth $100,000) as joint tenants with the right of survivorship. Suppose also that $W$ does not own any property other than her interest in Blackacre and that $H$ devises her nothing. Their combined augmented estates equals $500,000. If they have been married long enough for the percentage entitlement to be, say, 20%, then $W$'s elective-share entitlement is $100,000. If all of Blackacre is included under section 2-202(b)(3) (i.e., all is deemed to pass to $W$ from $H$), then $W$ is credited with all of it under section 2-207(a)(2). This gives her no deficit and, thus, no further entitlement under her elective share.

On the other hand, if half is deemed to pass to $W$ (so that $50,000 is included under section 2-202(b)(3)) and $W$ is deemed to already own the other half (so that $50,000 is included under section 2-202(b)(4)), then $W$ will be credited with $50,000 under section 2-207(2) and $20,000 (40% of $50,000) under section 2-207(4). According to these calculations, her entitlement of $100,000 minus her credits of $70,000 leave her a deficit of $30,000. Thus, under her elective share, $W$ is entitled to an additional $30,000 which would be satisfied by reducing the shares of $H$'s other beneficiaries.

In sum, in a less-than-fifteen year marriage it hurts the surviving spouse to assume that all of the joint tenancy property passed to him or her from the decedent. For property (other than a joint bank account) owned by $H$ and $W$ as joint tenants or tenant by the entirety, half should be included under section 2-202(b)(3) and half under section 2-202(b)(4). This is consistent with the fact that each owns half while they are both alive. In the case of a joint bank account, however, ownership is based on contribution. Thus, the amount that is deemed to pass to the surviving spouse should be the amount contributed by the decedent. The remaining portion should be included under section 2-202(b)(4) as an asset of the surviving spouse.$^{102}$

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$^{102}$ Professor Waggoner stated in a telephone conversation on Nov. 18, 1992 that this is consistent with the intent of the drafters and that this will be clarified in the comments.
F. Assets and Reclamables of the Surviving Spouse—
Section 2-202(b)(4)

This section, which represents a significant change from the pre-1990 Code, includes the assets of the surviving spouse in the augmented estate. As explained earlier, this is necessary in order to approximate a community property system. Also included in the augmented estate are any nonprobate transfers that would have been included as reclamables under section 2-202(b)(2) had the surviving spouse been the first to die. Thus, if W transferred $100,000 into a revocable trust, the value of the corpus at H's death would be included as a reclaimable of W's under this section. Life insurance, however, is not valued as if W had died. In other words, if W owns a life insurance policy naming her child C as beneficiary, the face amount of the policy would not be included under this section. The comment to this section suggest that insurance be valued according to federal tax tables.

Executors, administrators, and those who advise them are accustomed to valuing the assets of the decedent, because such valuing has always been part of the estate administration process. They are not, however, accustomed to valuing the assets of the surviving spouse. The fact that the asset owner is still living creates some problems that do not exist when valuing a decedent's estate. For example, if the surviving spouse is the life tenant of a trust, the life estate will have to be valued.

103. UPC § 2-204(b)(4) (Supp. 1992). This section includes in the augmented estate "the value of property owned by the surviving spouse at the decedent's death" which is defined as:
the commuted value of any present or future interest then held by the surviving spouse and the commuted value of amounts payable to the surviving spouse after the decedent's death under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system.

Id. § 2-202(a)(1)(vi).

104. See supra note 24 and accompanying text.

Those who enjoy creating a parade of horrors will quickly imagine a greedy, or simply vindictive, spouse depleting the estate with valuation costs even when a deficit is unlikely. If this is a significant concern, an enacting state could consider adding a provision that would deter such conduct. For example, a provision could be enacted that requires the surviving spouse, rather than the estate, to bear the burden of appraisal costs upon a finding of no probable cause to elect. This would prevent the spouse from being able to intentionally deplete the shares of the others by way of a futile election.

Once the initial premise, that including the assets of the surviving spouse is a necessary part of the scheme, is accepted, it should be recognized that the problems are not insurmountable. The concept is not totally new since equitable distribution requires that the assets of living persons be valued. Furthermore, it will only be required in a small percentage of estates, because only a small percentage of surviving spouses are devised less than, or even close to, the minimum entitlement. A rough approximation of the value of assets will usually reveal that there is no deficit, and appraisals, therefore, will rarely be required. Even among those estates where the spouse is devised less than the entitlement, not every spouse will choose to elect.

There will, of course, be some valuation issues. Suppose, for example, that surviving spouse \( W \) is the income beneficiary of a discretionary trust created by her mother. If the corpus of the trust consists of \$500,000, but payments of income to \( W \) are purely within the discretion of the trustee, it is difficult to value \( W \)'s interest for purposes of inclusion in the augmented estate. However, this issue has been litigated in the context of equitable distribution and in the context of determining if the trust is "medicaid qualifying." In those contexts, the purely discretionary trust has been found to have no value, and the result will likely be the same in an elective-share context. Of course, a presumption of no value could be rebutted by evidence of an understanding between the settlor and the trustee that there would be a certain amount periodically paid to the beneficiary.

It should be kept in mind that the "reclaimables" of the surviving spouse are not assets that would ever need to be recalled. These are simply assets whose values are taken into consideration for purposes of
determining if the spouse is entitled to reach the decedent's reclaimables. In other words, a donee will not have to be concerned about the health and well being of the donor's spouse. If the donor's spouse dies within two years of the transfer, the value of the asset will enter into the computation, but the donee will not be required to contribute, regardless of the outcome of the computation.  

It is fair to take the surviving spouse's nonprobate assets into account just as it is fair to take the nonprobate assets of the decedent into account since the premise that these are in substance owned assets applies just as well to one as it does to the other. Suppose that during marriage, W purchased Blackacre for $100,000 putting title in the name of "W and X as joint tenants with the right of survivorship." If H lives more than two years after the purchase of Blackacre and then dies, survived by W, $50,000 will be included as a reclaimable of W under this section because, had she died first, it would have been included under section 2-202(b)(2)(ii). If H dies within two years of the purchase of Blackacre, then under the "greater value" rule, $100,000 will be included as a reclaimable of W under this section, because the amount included would be based on contribution under section 2-202(b)(2)(iv)(C). The inclusion of this amount, whether it is $50,000 or $100,000, counts against W because she will be credited with all or a portion of it under section 2-207. However, this is not unfair even if $100,000 is included because H died within two years of the purchase of Blackacre. Although this is more than her unilaterally severable interest, she has in effect given half of Blackacre to X within two years of H's death and she owns the other half.

G. Exclusions—Section 2-202(c)

Any transfer or any exercise or release of a power of appointment is excluded from the decedent's reclaimable estate (i) to the

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106. This would not be the case, however, if a "community property at death" system were in force. If it were, and if the calculations revealed that the surviving spouse owned more than her share, then the estate of the decedent would have a claim against the surviving spouse and her reclaimables would have to be reachable. See supra note 21 and accompanying text.

107. The actual wording of UPC § 2-202(c) is "[a]ny transfer or exercise or release of
extent that the decedent received adequate and full consideration or (ii) if irrevocably made with the written consent or joinder of the surviving spouse. Thus, the elective-share provisions are intended to reach only gratuitous transfers rather than property that has been sold to a third party. The second exclusion allows both spouses to make the transfer and thus assure the donee and the testator that the property will not later be recalled to satisfy the elective share. This consent or joinder provision is in addition to section 2-204 provisions that allow the elective-share right to be waived by an express contract executed before or after marriage.

Professor Kurtz, in his discussion of the pre-1990 Code, questions whether the “adequate and full consideration” should be valued at the time of the transfer or at the time of the decedent’s death. He hypothesizes a revocable trust created by the decedent that has a corpus consisting of $200,000 worth of securities created in exchange for $100,000. By the time the decedent dies, both the corpus and the securities received have doubled in value. The provisions require that the trust be valued as of decedent’s death, but Professor Kurtz asks at what point the consideration is valued.

This unrealistic hypothetical confuses the ultimate issue. Revocable trusts are not usually “sold.” If there is any reasonable chance that the power to revoke will be exercised, who would be willing to buy it? Professor Kurtz assumes the transfer was for less than adequate consideration, but if the power retained is legitimate, the $100,000 worth of securities would seem to be more than adequate. During the settlor’s lifetime, the beneficiary’s interest in a revocable trust is worth nothing or something close to nothing. Although the beneficiary’s interest arguably has some value if the settlor has no intention to exercise the power, in that case the settlor might as well make the trust irrevocable which will keep it out of the augmented estate unless a life estate has been retained and the trust was created during marriage.

a power of appointment”; but this, of course, is not intended to be limited exclusively to powers. In other words, the statute obviously means any transfer or any exercise or release of a power. UPC § 2-202(c) (Supp. 1992).

108. Id.
The issue of valuing consideration can be presented in a more realistic setting. Suppose that during marriage to the surviving spouse, the decedent transferred Blackacre to X reserving a life estate and that X paid the decedent $100,000 for this remainder. At the time of the transfer, the value of X’s remainder was $150,000. Blackacre will be included in the augmented estate under section 2-202(b)(2)(iv)(A) as a transfer with retained life estate, and its value will be measured at the time of the decedent’s death which is, say, $200,000. But the amount that is included is the extent to which the value exceeds “full and adequate consideration.” This phrase should be interpreted to mean that the value included be $200,000 minus $100,000 invested for the period between the time of the transfer and the decedent’s death.109 As Professor Kurtz notes: “The spouse then benefits from appreciation on the transferred property but does not benefit from the appreciation on the consideration, which would not have accrued to the estate if no transfer had been made.”110

Property is excluded from the augmented estate by this section if “irrevocably made with the written consent or joinder of the surviving spouse.” This provision assures the spouse-transferor and his or her recipient that the asset will not have to be recalled if there is consent or a waiver by the other spouse. It is likely that this method of exclusion, on an asset by asset basis, will be used more frequently than a pre- or postmarital agreement that waives the entire elective share.

There is concern, however, for what constitutes such consent or waiver. Should the document specifically refer to the signer’s intent to

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109. This would be offset by the amount of predicted inflation taken into account by the valuation table from which the $150,000 is derived.

110. Kurtz, Augmented Estate Concept, supra note 9, at 1020. A similar problem of insufficient consideration arises with respect to federal estate tax. I.R.C. § 2043 applies to any inter vivos less-than-full-consideration transfer which is includible in the decedent’s gross estate. Section 2043 provides that the consideration is valued at the time of the transfer even though the value of the property transferred is to be measured at the time of the decedent’s death. See United States v. Righter, 400 F.2d 344 (8th Cir. 1968) (measuring the value of a life estate in certain stock, used as consideration for a remainder interest in similar stock owned by the decedent, at the time of the transfer, despite the fact that the life interest in the stock in fact yielded more to the decedent than the mortality tables predicted at the moment of transfer); United States v. Past, 347 F.2d 7, 14 (9th Cir. 1965) (stating that consideration is to be measured at the time of the transfer).
exclude the asset from the augmented estate? If the spouse signs a split-gift agreement for federal gift tax purposes, does this constitute consent for purposes of this section? In jurisdictions that still have common-law or statutory dower, joining in a transfer of real property has become so commonplace that it is virtually automatic, often with no questions asked. It is problematic to presume that such a procedurally customary joinder constitutes an informed waiver of rights that otherwise would accrue to the surviving spouse under these provisions. Although releasing dower probably is not an informed act for the same reason, the protection afforded by dower has come to be viewed as so insignificant that the concern for informing those who release it has correspondingly diminished.

This issue could be resolved by a clarification in this section about what qualifies (or does not qualify) as consent or joinder. The concern that will need to be balanced is that the requirements may have the effect of defeating an intended waiver.111

H. Valuation—Section 2-202(d)

This provision has been discussed in conjunction with several of the previous sections. It provides that property is to be valued at the decedent’s death, but property irrevocably transferred within two years of the decedent’s death that is reclaimable under subsections 2-202(b)(2)(i), (ii), and (iv) is valued as of the time of the transfer. This section also anticipates the possibility that a transfer might fall within more than one subsection of 2-202(b)(2), and breaks the tie by requiring inclusion under the section that yields the highest value.112 Finally, it defines an irrevocable transfer for purposes of this section to include an irrevocable exercise or release of a power of appointment.

111. A draft of these provisions currently being considered by the North Carolina Bar Association adds a provision that an election under I.R.C. § 2513 does not in and of itself constitute written consent or joinder for purposes of this section. Minutes from the Elective Share Sub-committee of the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association (Aug. 4, 1992) (on file with author).

112. See supra note 70 and accompanying text.
I. Crediting and Contribution—Section 2-207

Along with sections 2-201 and 2-202(b), this section represents the core of the elective-share provisions. These three are the most important sections because they contain all of the substantive mechanics of the process. Once the elective-share amount is ascertained by applying the fraction in section 2-201 to the augmented estate that is computed under section 2-202(b), the crediting or charging process in section 2-207(a) is undertaken in order to determine if there is a deficit or balance due to the surviving spouse. Sections 2-207(b) and (c) contain the contribution procedure in the event that section 2-207(a) reveals a deficit or in the event that the surviving spouse is entitled to a supplemental elective-share amount under section 2-201(b).

1. Section 2-207(a)

The crediting process in section 2-207(a) is fashioned with the goal of preserving the testator’s scheme as much as possible. Once the elective-share amount is ascertained, four items in section 2-207(a) are applied first toward its satisfaction. If the sum of the amounts included in these four items is equal to or greater than the elective-share amount, then no contribution will be required by the other beneficiaries of the decedent’s probate and nonprobate estate unless the surviving spouse is entitled to a supplemental elective-share amount under section 2-201(b).

If the sum is less than the entitlement, then contribution by the other beneficiaries will be required. With the exception of donees of irrevocable transfers made within two years of death, there is no priority among beneficiaries. Devisees named in the testator’s will (probate estate beneficiaries) are not preferred over nonprobate beneficiaries. They all contribute their shares proportional to their interest in the decedent’s reclaimable estate. This equal treatment is consistent

113. As previously noted, the surviving spouse is not required to reimburse the estate. This would be required if the system carried the principle of community property to its extreme. See supra note 21.

114. UPC § 2-207(b) (Supp. 1992).
with the underlying rationale of augmentation—namely, that the decedent should be treated as the owner of the nonprobate assets because of his lifetime control of them, just as he is treated as the owner of the probate assets.

Item one credits the surviving spouse with assets that pass to him or her by testate or intestate succession. Thus, if \( H \) devises \( \$50,000 \) to \( W \), and \( W \)'s elective-share entitlement is \( \$100,000 \), the devise will be applied first to satisfy her share. This reduces the amount that needs to be satisfied by \( \$50,000 \). If \( H \) devised Blackacre to \( W \) for life, the value of \( W \)'s life estate will have to be ascertained for purposes of this calculation.  

Item two credits the surviving spouse with the nonprobate transfers payable to the surviving spouse. The rationale for this crediting, which is not new to the 1990 UPC, is that the surviving spouse should not be allowed to disrupt the testator's scheme if he or she benefits sufficiently from will substitutes, such as life insurance and joint tenancies. Thus, this section cures the traditional overprotection problem. The assets that are credited here are the assets included under section 2-202(b)(3). If \( W \)'s elective-share entitlement is \( \$200,000 \) and if \( W \) received \( \$100,000 \) in life insurance proceeds payable on the life of \( H \), then \( \$100,000 \) will be applied toward the satisfaction of \( W \)'s elective share under this section.

Item three credits the surviving spouse with amounts in the augmented estate that would have passed to the surviving spouse but were disclaimed. Thus, if \( W \)'s elective-share entitlement is \( \$200,000 \) and \( W \) disclaims a life estate in Blackacre that \( H \) devised to her, she is cred-

115. The pre-1990 UPC provided that the value of a life estate would be one-half the value of the property subject to the life estate unless proved otherwise. UPC § 2-207(a) (1983). See also id. § 2-207 cmt.; Estate of Fisher, 545 A.2d 1266, 1273 (Me. 1988) (allowing surviving spouse to rebut the presumption that life estate was worth one-half of the total value of the property by using standard mortality tables and Internal Revenue Service Regulations); Kurtz, Augmented Estate Concept, supra note 9, at 1038-39. No such presumption exists for life interests transferred to surviving spouse under the 1990 UPC. For a general discussion of valuation problems related to transfers of life interests to a surviving spouse see Bloom, Trust and Other Partial Interests, supra note 33. See Langbein & Waggoner, The New UPC, supra note 35.

116. The pre-1990 UPC did the same. UPC § 2-207(a) (1983).
ited under this section with the value of the life estate. The effect of charging the value of the disclaimed property against the surviving spouse is that no disclaimers will be filed.\footnote{See supra note 32 and accompanying text.} Again, the rationale for this is to preserve testator’s scheme, but it has proved to be a controversial provision both here and under the pre-1990 UPC.\footnote{See supra notes 32-36 and accompanying text.}

Item four credits the surviving spouse with the applicable percentage of property included in the augmented estate under section 2-202(b)(4) (assets owned by the surviving spouse plus reclaimables). The “applicable percentage” is twice the elective-share percentage based on the length of the marriage as provided in the table in section 2-201. This credits the surviving spouse with the amount of “marital property” that he or she already owns.\footnote{See supra text following note 36. See also UPC art. II, pt. 2 cmt. (Supp. 1992) (describing the step by step procedure for satisfying the elective share under various circumstances and offering justifications for the methods employed).} For example, if W’s assets are valued at $100,000, and the elective-share percentage is 20%, W will be credited with 40% of $100,000, or, $40,000.

In sum, section 2-207(a) applies voluntary probate and nonprobate transfers first toward the satisfaction of the elective share. Then disclaimed property is charged. Finally, the amount of “marital property” that the surviving spouse is deemed to already own is charged. If there is no deficit, the process stops unless the surviving spouse is entitled to a supplemental elective-share amount. If there is a deficit or an entitlement to a supplemental share, sections 2-207(b) and (c) provide for contribution to satisfy the deficit or the supplemental share or both.

2. Section 2-207(b)

If contribution is required, the shares of the other beneficiaries of the decedent’s probate estate and reclaimables are reduced. Since this reduction is contrary to the testator’s intent, these are “involuntary transfers” to the surviving spouse. This section provides that the other beneficiaries, with the exception of donees of irrevocable transfers
made within two years of death, contribute shares proportional to their interest in the decedent’s reclaimable estate. In other words, they will receive the same fractional interest of the augmented estate reduced by the deficit as they would have received had there been no deficit. Thus, suppose the decedent’s probate estate plus reclaimables equals $1,200,000 and that there is a deficit of $300,000. Assume also that decedent had devised $400,000 to X and named Y the beneficiary of a revocable trust with a corpus of $800,000. Their respective proportional shares of the augmented estate are one-third and two-thirds. The augmented estate reduced by the deficit is $900,000. Thus, X will receive one-third (or $300,000) and the corpus of Y’s trust will be reduced to $600,000.

3. Section 2-207(c)

If there is still a deficit after all of the shares of the other beneficiaries have been exhausted, then the donees of irrevocable transfers within two years of death are required to contribute. Presumably one reason for this layer of priority is to reduce the number of times that assets will have to be reached that have already been paid to a donee. With the other reclaimables, such as life insurance and revocable trusts, the payor (life insurance company or bank) will likely receive notice of the election before the asset is distributed to the beneficiary. Another justification is that since these are “no strings attached” transfers, they should be treated favorably. If there is more than one donee of an irrevocable transfer within two years of death, they contribute their proportional shares in the same way described above as the other beneficiaries.

The trade off for this layer of priority are the attendant complications. It is possible for the decedent, within two years of death, to intentionally prioritize the beneficiaries of reclaimables by converting some of the nonprobate transfers into irrevocable transfers. For example, suppose that H created a revocable trust, naming X the beneficiary. The corpus of the trust would be includible in H’s augmented estate under section 2-202(b)(2)(i) or under section 2-202(b)(2)(iv)(B) if created during marriage, and X would not be a “priority donee.” However, if H releases the power within two years of death, he has
made an irrevocable transfer within two years of death, the effect of which would be to make X a priority donee. Concededly, H could make anyone a priority donee simply by giving him or her property within two years of death; but he can also do some last minute prioritizing even if he has nothing left to give away.

Suppose H transfers Blackacre to his daughter Y, retaining a life estate. If H dies within two years of transferring the remainder to Y, the transfer falls within the terms of both section 2-202(b)(2)(iv)(A), as a transfer with retained life estate, and section 2-202(b)(2)(iv)(D), as a transfer within two years of death. Under the greater value rule, Blackacre would be includible under section 2-202(b)(2)(iv)(A) because of the $10,000 exclusion in section 2-202(b)(2)(iv)(D). Nonetheless, it is still an irrevocable transfer within two years of death and, thus, fits the description in section 2-207(b) of a priority transfer. This is inconsistent with the notion that a priority transfer is a “no strings attached” transfer.

These complications would be avoided if section 2-207(b) were amended (or interpreted) to limit priority transfers to section 2-202(b)(2)(iv)(D) transfers. A further clarification would be to amend (or interpret) (iv)(D) to be limited to irrevocable transfers.  

4. Section 2-207(d)

This section provides that only original recipients and their donees, to the extent that the donees have the property or its proceeds, are liable for contribution. Another section (section 2-202(f)) protects those who purchase property from a recipient for value and without notice. If X receives $10,000 within two years of the decedent’s death, and if prior to a request for contribution, X has given the $10,000 to Y, then X and Y (if he still has the money) are liable for contribution. Presumably the normal rules of joint and several liability would apply here. If

120. A draft of these provisions currently being considered by the North Carolina Bar Association limits priority transfers to (iv)(D) transfers and limits (iv)(D) transfers to irrevocable transfers. Minutes from the Elective Share Sub-committee of the Legislative Committee of the Estate Planning and Fiduciary Law Section of the North Carolina Bar Association (Aug. 4, 1992) (on file with author).
X pays $10,000 to the decedent's surviving spouse, X should have a cause of action against Y for contribution, and Y would be liable to the extent that he still has the money. If X is judgment proof and Y had used the money to purchase a car, presumably the car constitutes "proceeds." If X is judgment proof and Y lost the money in Las Vegas, the surviving spouse probably cannot recover it, even if Y has $10,000 in a bank account back home.

This section also provides that a person liable for contribution may choose to give up a proportional part of the property or the value of the portion for which he or she is liable. Thus, in those instances where the value of the asset has decreased, the donee can cut his or her losses by returning all or a portion of the asset, rather than paying the value that was included in the augmented estate. This could happen, for example, with shares of stock irrevocably transferred within two years of death. The value included in the augmented estate is the value of the stock at the time of the transfer. If the value has dropped by the time the donee is required to contribute, the donee can choose to return a portion or all of the stock, if he or she still retains it, rather than pay the higher value.

J. Waiver of Rights—Section 2-204

Section 2-204 allows a couple to opt out of the elective-share provisions by a written contract, agreement, or waiver executed before or after marriage. The agreement may wholly or partially waive the right of election, the homestead allowance, exempt property, and the family allowance. This section provides an effective response to the argument that there will be couples whose economics deviate significantly from the presumed economics underlying this system. There is always the choice to be governed otherwise. As Langbein and Waggoner more colorfully state in their seminal article, "Forced share law is not Yuppie Law.... Indeed, under existing law serious

121. Professor Kurtz raises this issue in his discussion of the counterpart section in the pre-1990 UPC. Kurtz, Augmented Estate Concept, supra note 9, at 1048-49.
Yuppies will contract out of the forced-share system by means of a premarital agreement.\textsuperscript{123}

Subsection (b) provides some safeguards for the surviving spouse who has signed a waiver. In general, it is not enforceable if the surviving spouse proves that it was not signed voluntarily or if it was unconscionable when executed and the surviving spouse was not provided fair and reasonable disclosure. The comment states that this section incorporates the standards by which the validity of a premarital agreement is determined under section 6 of the Uniform Premarital Agreement Act.\textsuperscript{124}

K. Procedure—Section 2-205

Section 2-205 contains the time limit and other procedural rules for exercising the elective share. Subsection (a) provides that, unless an extension is granted under subsection (b), the election must be made within nine months of the decedent’s death or within six months after the probate of the decedent’s will, whichever is later. The election is made by filing a petition with the court and mailing or delivering it to the personal representative of the decedent’s estate, if there is one. The surviving spouse is required to give notice of the scheduled hearing to those interested in the estate, including any beneficiaries whose interests would be adversely affected by an election.

Except as provided in subsection (b), the reclaimables that are described in section 2-202(b)(2) are not included in the estate for the purpose of computing the elective share unless the petition is filed within nine months of the decedent’s death. Thus, for purposes of reaching reclaimables, there is a time limit of nine months for peti-

\textsuperscript{123} Langbein and Waggoner, Forced Share, supra note 1, at 307. In states where the Pre-1990 UPC has been enacted, the validity of antenuptial agreements has been litigated. See In re Estate of Lopata v. Mettel, 641 P.2d 952 (Colo. 1982) (upholding the validity of an antenuptial agreement between surviving spouse and decedent which prevented surviving spouse from taking an elective share); In re Estate of Aspenson, 470 N.W.2d 692 (Minn. 1991) (upholding the substantive and procedural fairness of antenuptial agreement made between decedent and surviving spouse who enjoyed equal bargaining power at the time of the agreement).

\textsuperscript{124} UPC § 2-204 cmt. (Supp. 1992).
tioning, unless an extension is granted under subsection (b). If an extension is not granted, the reclaimables cannot be reached after nine months, but the probate assets can be reached if the petition is filed within six months after the probate of the decedent’s will.

Subsection (b) provides that within nine months after the decedent’s death, the surviving spouse may petition the court for an extension of time for making an election. If the surviving spouse gives notice to interested parties within nine months and cause is shown, the court may extend the time. If the extension is granted and the surviving spouse complies with the procedural requirements within the time allowed by the extension, the reclaimables are not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts.

Subsection (c) provides that the surviving spouse may withdraw his or her demand for an elective share at any time before entry of a final determination by the court. 125

Subsection (d) provides that after notice and hearing, the court determines the elective-share and supplemental elective-share amounts and orders its payment from assets in the augmented estate or by contribution under the section 2-207 provisions. If there is an asset that cannot or has not yet been acquired by the personal representative, the court may nonetheless fix the liability of any person interested in the asset or who has possession of the asset.

The last sentence of this subsection (d) states: “The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he [or she] would have been under Section 2-207 had

125. The members of North Carolina Elective Share Sub-committee amended the language of § 2-205(c) by adding a provision to protect the decedent’s estate from bad faith elections. “If after a withdrawal of demand by the surviving spouse or entry of a final determination by the court, the court determines that the surviving spouse had no reasonable basis for filing a petition, the cost of valuing the surviving spouse’s property under Section 2-202(b)(3) shall be assessed against the surviving spouse.” Minutes from the Elective Share Sub-committee of The Legislative Committee of The Estate Planning and Fiduciary Law Section of The North Carolina Bar Association (Aug. 4, 1992) (on file with author).
relief been secured against all persons subject to contribution."¹²⁶
Thus, the surviving spouse can choose whose assets are to be brought
into the augmented estate, but the beneficiaries whose shares are
brought in will not have their liability increased to compensate for
those assets that are voluntarily excluded by the surviving spouse. This
provision allows the surviving spouse to keep intact the part of the
testator’s estate plan with which the surviving spouse is in agreement.
If the surviving spouse were required to maintain the action against all
of the beneficiaries, the surviving spouse could simply transfer the
assets to the approved beneficiaries after receiving the elective share.
This subsection obviates the need for that extra step.

L. Election Personal to Surviving Spouse; Incapacitated Surviving
Spouse—Section 2-203

Section 2-203(a) provides that the election must be made by or on
behalf of a living surviving spouse. The right to elect does not survive
the death of the surviving spouse even if he or she dies before the
time has elapsed to make an election. This provision is consistent with
the notion that the right to elect is to personally benefit the surviving
spouse. However, it is inconsistent with the contribution rationale. If
the surviving spouse has “earned” half of the marital property, he or
she should be able to choose his or her successors in interest. This is
one of several instances that the support rationale competes with the
contribution rationale. The drafters chose the support rationale to over-
ride when the surviving spouse dies within a relatively short period
after the death of the predeceased spouse.

Subsection (a) also provides that if the election is not made by the
surviving spouse personally, it may be exercised on the surviving
spouse’s behalf by his or her conservator, guardian, or agent under the
authority of a power of attorney.¹²⁷ The main application of this pro-

¹²⁶. UPC § 2-205(d) (Supp. 1992).
¹²⁷. Under the 1969 UPC, the right of election could only be exercised on behalf of
an incapacitated surviving spouse by order of the court. “In the case of a protected person,
the right of election may be exercised only by order of the court in which protective pro-
cedings as to his property are pending, after finding that exercise is necessary to provide
adequate support for the protected person during his probable life expectancy.” UPC
vision will be an election that is made on behalf of an incapacitated surviving spouse.

Subsections (b) and (c) and alternative subsection (b) deal with elections that are made on behalf of an incapacitated surviving spouse. Subsections (b) and (c), which are intended to be enacted in states that have enacted the Uniform Custodial Trusts Act, require that a portion of the elective share be paid into a custodial trust. Alternative subsection (b), which is intended to be enacted in states that have not enacted the Uniform Custodial Trusts Act, requires that the court appoint a trustee to administer a support trust. Otherwise, the thrust of subsections (b) and (c) and alternative subsection (b) are the same.

In short, if the surviving spouse is incapacitated, the portion of the elective-share and supplemental elective-share amounts due from the decedent’s probate estate and recipients of the decedent’s reclaimable estate under Section 2-207(b) and (c) are administered by a trustee. If an election is made by the guardian or conservator of the surviving spouse, the surviving spouse is by definition incapacitated. If the election is made by an agent under a durable power of attorney, the election is presumed to be made on behalf of an incapacitated surviving spouse.¹²８

The portion of the elective share that is to be administered by a trustee under this section is limited to the “involuntary transfers,” that is, the assets that the other beneficiaries of the decedent’s probate and nonprobate estate are required to contribute.¹²９ Amounts that the decedent voluntarily transferred to the surviving spouse by way of probate and nonprobate transfers are not subject to being administered by the trust.¹³０ This leaves the testator’s estate plan intact by not dis-

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¹²８UPC § 2-203(c) & alternative subsection (b) (Supp 1992).
¹²９These are the transfers due under § 2-207(b) & (c).
¹³０This includes anything that passes to the surviving spouse by intestacy. This is “voluntary” in the sense that the decedent did not choose to be governed by anything other than the default rules.
mantling, for example, a testamentary trust that qualifies for the federal estate tax marital deduction.\textsuperscript{131}

Expenditures may be made by the trustee without court order.\textsuperscript{132} During incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has the power to terminate the trust, but if the surviving spouse regains capacity he or she has the power to terminate the trust.\textsuperscript{133} Upon the death of the surviving spouse, the trustee is required to pay any unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse, as if the predeceased spouse died immediately after the surviving spouse; or (ii) to the predeceased spouse’s heirs under section 2-711 of the UPC.\textsuperscript{134}

Section 2-711, which is not part of the elective-share provisions, provides that the heirs will be ascertained as if the ancestor died at the time of distribution. Thus, if the property is distributed under this provision, the heirs of the predeceased spouse will be ascertained as if the predeceased spouse died immediately after the death of the surviving spouse. The purpose of section 2-711 is to avoid disinheriting a line of the decedent’s descendants and to avoid passing property through the estates of deceased persons.\textsuperscript{135} States that do not enact section 2-711 along with the elective-share provisions should draft section 2-203 to provide that the property be distributed under (ii)\textsuperscript{136} to the predeceased spouses’s heirs as if the predeceased spouse died immediately after the surviving spouse. For the same reason, the death

\textsuperscript{131} UPC § 2-203 cmt. (Supp. 1992).
\textsuperscript{132} Id. § 2-203(c)(2) & alternative (b)(1).
\textsuperscript{133} Id. § 2-203 (c)(1) & alternative (b)(2).
\textsuperscript{134} Id. § 2-203(c)(3) & alternative (b)(3).
\textsuperscript{135} For example, assume H dies, survived by W who is incapacitated. At the time of H’s death, H had two children, A and B. Assume also that A has two children, X and Y, who are grandchildren of H. A dies devising all to friend F. Then W dies with unexpended funds in the trust created pursuant to § 2-203. Under the traditional rule of ascertaining heirs as of the death of the ancestor, H’s heirs would be W, A, and B. X and Y are “disinherited” by A’s will. And since W and A are dead, their property passes through their estates to their respective heirs or devisees. Under § 2-203, the ascertainment of H’s heirs is deferred. They are ascertained as if H dies immediately after W. Thus, H’s heirs are X, Y, and B.
of the predeceased spouse is also hypothetically deferred for purposes of distributing the unexpended portion of the trust property under the residuary clause in (i).\textsuperscript{137}

The comments explain:

The purpose of subsections (b) and (c), generally speaking, is to assure that that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse's heirs or devisees.\textsuperscript{138}

Thus, if the trust that is created for the incapacitated surviving spouse contains more than is required for the use of the surviving spouse as determined by the trustee, the unexpended portion in effect reverts to the predeceased spouse and is distributed to his or her heirs or devisees. Once again, the support rationale overrides the contribution rationale in the context of an incapacitated surviving spouse. Only if the surviving spouse consciously makes an election on his or her own behalf is the surviving spouse able to choose the successors in interest to the property. Otherwise, the use of the property is limited to the lifetime needs of the surviving spouse.

In short, the predeceased spouse's intent is preserved to a greater extent if the election is made on behalf of an incapacitated spouse. This partial preservation is supported in part by the fact that the surviving spouse may not have chosen to elect had he or she not lacked capacity. Although statistics are not available, it is fair to assume that some surviving spouses approve of their deceased spouses' estate plans and do not elect even if they could take more by electing, especially in second marriages.

Why is the unexpended portion distributed to the residuary devisees or the heirs even when the property may have been derived solely or in part from contributions by nonprobate beneficiaries of the decedent? Another choice would be to distribute it to the beneficiaries of the augmented estate who were required to contribute, with the distributions to be made in proportion to their respective contributions.

\textsuperscript{137} Id. § 2-203(c)(3)(i) & alternative § 2-203(b)(3)(i).
\textsuperscript{138} Id. § 2-203 cmt.
Suppose that H’s residuary devisee, R, was devised ten percent of H’s estate and that Q is the beneficiary of a revocable trust that comprises ninety percent of augmented estate. If R and Q are required to contribute to satisfy W’s elective share, at W’s death any unexpended portion of the trust that is created under section 2-203 will be paid to R or R’s surviving issue if R predeceases W.\(^{139}\)

Although this seems inconsistent with H’s intent, in most cases, the residuary devisee is the testator’s primary beneficiary. Furthermore, ease of administration is the trade off for occasionally defeating the testator’s intent. It could be inconvenient to locate every nonprobate beneficiary (or his or her surviving issue) if several years have elapsed between the deaths of H and W.

VI. 1990 UPC Intestacy Provisions

West Virginia also enacted the majority of the 1990 UPC intestacy provisions. A thorough analysis of these provisions has already been accomplished by the Professor John W. Fisher, II, who served as the Reporter for the Advisory Committee of the West Virginia Law Institute.\(^{140}\) Although most provisions were adopted unchanged from the model code, some alterations were made by the West Virginia Legislature.\(^{141}\)

VII. Conclusion

Many commentators prefer a community property system over a common-law system—even if the common-law jurisdiction theoretically could implement a fair elective-share system. However, converting a common-law jurisdictions to a community property system is viewed

\(^{139}\) Because the property is distributed as if H died immediately after W, the anti-lapse statute would be invoked which would substitute R’s issue in the event that R predeceased W.


\(^{141}\) See infra app. D.
by most as not politically feasible. With this realization in mind, law reformers should support the 1990 UPC elective-share system.

Under the 1990 UPC provisions, the surviving spouse cannot be disinherited through the use of will substitutes. Bringing nonprobate assets within the reachable estate is absolutely essential to a meaningful spousal protection statute. If legislators do not enact a comprehensive statute that does so, courts will have to continue to reach these assets on a case-by-case, asset-by-asset basis. This plodding judicial approach will postpone the implementation of an equitable system and will cause confusion in the interim.

The 1990 UPC avoids overprotection by taking into account nonprobate assets payable to the surviving spouse. These assets, as well as assets devised to the spouse and assets disclaimed by the spouse, are applied first toward the satisfaction of the spouse's entitlement. This process ensures that the testator's scheme of distribution will be preserved as much as possible.

The marital sharing concept is implemented in two ways: (1) by the inclusion of the assets of the surviving spouse into the augmented estate, and (2) by the accrued-share approach. Including the assets of the surviving spouse in the computation is necessary in order to achieve equalization. The accrued-share approach reaches a fairer result than the traditional approach, especially in the most frequent kind of elective-share case where the surviving spouse is pitted against the children of decedent's prior marriage. If the second marriage is shorter than fifteen years, the surviving spouse is not entitled, by way of the elective share, to the full fifty percent entitlement. This helps ensure that the testator's natural desire to benefit his or her children will come to fruition. The second spouse in a late-in-life second marriage may be "disinherited" not because of a failed marriage, but because of a higher felt obligation to the testator's lineal descendants.

Although this system is based on community property principles, it avoids some of the complicated aspects of community property. Separate property is not kept out of the pool of marital property. However, roughly the same result is reached as with community property because of the ever increasing fraction that is applied to all of their assets. This approximates the community property system where a
constant fraction, fifty percent, is applied to the ever increasing amount of community property accumulated by the couple.

The aspect of the elective-share system that is most unlike community property is that equalization will not occur unless the wealthy spouse dies first. If the idea of community property were carried to its logical conclusion, the beneficiaries of the estate would have a claim against the spouse in whose name most of the property was titled. This system stops short of that logical conclusion because the statute is for the benefit of the surviving spouse who chooses to elect it. It is not for the benefit of the successors-in-interest of the decedent. Perhaps legislators will take that next step at a later time. After all, the right to choose one’s successors-in-interest is a valuable incident of ownership. If the decedent in a long marriage had “earned” his or her half of the property that was titled in the survivor’s name, arguably he or she should be able to choose the successors-in-interest.

It is inevitable that the surface complexity of the system will impede its acceptance to a certain extent. However, a degree of complexity is a necessary trade-off for a system that must respond to the complex financial arrangements found in modern marriages. Furthermore, once understood, it is easy to implement because it is mechanical. It is less complex than the pre-1990 UPC. It avoids the tracing to source problems associated with community property, and it avoids the discretionary aspects of equitable distribution. Although the provisions will rarely exactly fit the economic realities of a given couple, it will reach a fair result in most cases. The benefits of the mechanical system outweigh the unpredictability of a system based on judicial discretion.

As Professors Langbein and Waggoner point out, since it is easier to get out of a bad marriage than it used to be, most failed marriages will end in divorce rather than disinheritance at death. However, there are not so few cases of intentional and unfair disinheritance that no protection is needed. Many current statutes are ineffective in preventing disinheritance. In many states a spouse may be better off at divorce than at death, because at divorce the equitable distribution statute applies. At the same time, current statutes also can result in overpro-
tection because they do not take into account the length of the marriage.

No statute can close every imaginable loophole. Under any system, a person intent on disinheri tance will find a way to do it—even if it means, for example, putting all of his or her money in real estate in a non-UPC state. The best any system can do is to close the loopholes that realistically can and will be used for purposes of intentional disinheritance. The 1990 UPC does this in a way that brings elective-share law in line with the economic partnership theory of marriage, yet it allows those couples who choose not to be governed by the provisions to opt out of them by contract. Because this system represents a vast improvement over current statutes, lawyers, judges, and legislators across the country should follow West Virginia’s leadership and actively support enactment of the 1990 UPC.
APPENDIX A — ILLUSTRATION

I. GENERAL PROVISIONS:

H died testate October 26, 1992, a resident of a state that has adopted the elective-share provisions of the 1990 UPC. H was survived by a wife W and four children, A, B, C, and D. A, B, and C are H’s children from a previous marriage and D is the biological child of H and W. H and W were married June 11, 1987. Neither H nor W have given written consent or joinder for any transfer as described by § 2-202(c)(ii).

Under the terms of his will, H devised 100 shares of stock in corporation X worth $10,000 to W. H devised the balance of his probate estate to A, B, C, and D, share and share alike. The value of H’s gross probate estate is $480,000, and is subject to enforceable claims of $120,000. W also receives the $15,000 homestead allowance, exempt property valued at $10,000, and a family allowance of $18,000. All other factors relevant to the computation of the elective share are included in the following:

II. DETERMINATION OF THE DECEDEENT’S AUGMENTED ESTATE:

A. Section 2-202(b)(1) captures the probate estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims.

Gross Probate Estate: $480,000

Less:

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<th>Description</th>
<th>Amount</th>
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<tbody>
<tr>
<td>Enforceable claims</td>
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<tr>
<td>Homestead allowance</td>
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</tr>
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<td></td>
<td>($163,000)</td>
</tr>
</tbody>
</table>

Net Probate Estate: $317,000
B. Section 2-202(b)(2) provides for inclusion of the decedent's reclaimables.

1. In 1982, H purchased a farm naming child A as joint tenant with right of survivorship. At the time of H's death, the farm was worth $100,000. Since H made the transfer prior to H's marriage to W, § 2-202(b)(2)(i) controls and H's unilaterally severable interest will be added to the augmented estate.

2. In 1984, H's mother died and named H the lifetime beneficiary of a trust over which H was given a special power of appointment. The value of the corpus at H's death was $125,000. Since H was not given a general power of appointment over any portion of the trust, the entire value is excluded from H's augmented estate.

3. In 1985, H transferred $100,000 into a trust for the benefit of child B maintaining a general power of appointment. In 1991, the value of the trust had increased to $125,000 and H transferred the entire corpus to child B, thereby exercising his general power. At H's death, the value of the trust had grown to $140,000. Since H made a transfer in which he retained a presently exercisable general power of appointment and exercised the power while married and within two years of death, the value of the trust will be included in the augmented estate. Section 2-202(d) dictates that the irrevocable exercise of the general power within two years of death and while married to the surviving spouse will result in valuing the property at the time of the exercise and not at H's death.

4. In May 1986, H transferred $50,000 into a revocable trust naming child C the beneficiary. In 1991, H revoked the trust and transferred the money into a joint bank account with C, giving C the right of survivorship. The value of the account is $52,000 at H's death. Even though H revoked the trust within two years of death and while married to the surviving spouse, § 2-202(b)(2)(i) does not control because H exercised the power in his favor. On the other hand, the transfer into the joint bank account fits into both § 2-202(b)(2)(ii) and § 2-202(b)(2)(iv)(C). Using the § 2-202(d) greater value rule, § 2-202(b)(2)(iv)(C) controls and the percent of H's contribution multiplied by the at death valuation of the account is included in the augmented estate (100% of $52,000).
5. In 1991, H gave child D a sports car for graduation valued at $25,000. This transfer is governed by § 2-202(b)(2)(iv)(D) which allows a $10,000 yearly exemption for gifts. Therefore, only $15,000 would be included in the augmented estate.

   $15,000

6. In 1980, H purchased a $75,000 life insurance policy on his life payable at death to his nephew N. The 1990 UPC captures the proceeds of such policies into the augmented estate under § 2-202(b)(2)(iii).

   $75,000

7. On June 5, 1987, H transferred the family residence to children A, B, and C retaining a life estate. At the time of H's death, the house was worth $175,000. Since the transfer was prior to the marriage, § 2-202(b)(2)(iv)(A) does not apply and no part of the value is captured into the augmented estate.

   $120,000

8. In 1988, H transferred $100,000 into a trust stating that the trustee shall distribute from time to time such amounts of the income or principal as the trustee determines in his sole discretion necessary to keep H “comfortable” for life. The trustee is also given the power to transfer the entire corpus to H's brother B if the trustee determines B has demonstrated an ability to adequately manage the money. In 1991, the trustee transfers the corpus to B and terminates the trust which has a value of $120,000. At H's death, the proceeds of the trust are valued at $150,000. Section 2-202(b)(2)(iv)(B) captures the value of the trust measured at the time of the transfer to B.

   $120,000

C. Section 2-202(b)(3) includes the value of property to which the surviving spouse succeeds by reason of the decedent's death.

1. H and W had a joint bank account with right of survivorship containing $25,000 when H died. W is able to establish that $15,000 of the account was contributed by her from her personal assets. The better rule here is to include only the amount contributed by the decedent.

   $10,000

2. In 1990, H purchased a $60,000 life insurance policy on his life payable to W. The full amount will be included in the augmented estate under § 2-202(b)(3).

   $60,000
D. Section 2-202(b)(4) includes the value of the surviving spouse's separate property.

1. At the decedent’s death, W had a separate bank account containing $20,000. The full value of this account will go into the augmented estate.

2. The $15,000 of the $25,000 joint bank account mentioned above in C. 1 which represents W’s contribution to the account must be included.

3. On July 5, 1987, W transferred 40 shares of Generic stock to a trust, retaining the income for life. The value of the trust corpus is $9,000 at H’s death. The value of this trust will be included in H’s augmented estate because it would have been in W’s reclaimable estate under § 2-202(b)(2)(iv)(A) had W predeceased H.

III. AUGMENTED ESTATE: $868,000

IV. ELECTIVE SHARE: (15% of the augmented estate) $130,200

V. SATISFACTION OF ELECTIVE SHARE:

A. Amount of elective share: $130,200

B. Charges against surviving spouse in satisfaction of the elective share:

1. § 2-207(a)(1) (see II.C.1 above) $10,000
2. § 2-207(a)(2) (see II.C.2 above) $60,000
3. § 2-207(a)(4) (.3 x $44,000) $13,200
   (total from II.D above times twice the elective share percentage) ($83,200)

C. Balance due: $47,000
VI. CONTRIBUTION DUE FROM RECIPIENTS: If a deficit remains after application of § 2-207(a)(1)-(3), the beneficiaries of the decedent's reclaimable estate will be required to satisfy the deficit based on the amount each recipient received as a percentage of all amounts received. Section 2-207(b)-(c) creates a priority system for recipients, and recipients of irrevocable transfers made within two years of death which are included in the decedent's reclaimable estate do not have to contribute unless a deficit still remains after collecting from all other recipients. As mentioned before, the drafters intended to give priority only to § 2-202(b)(2)(iv)(D) transfers, and this is the better rule. As a result, the only priority transfer in this illustration is H's gift of the car to child D. The following is a list of the reclaimable assets that are not priority transfers and, accordingly, will contribute to satisfy the $47,000 deficit in shares proportional to their interest in the decedent's reclaimable estate.

<table>
<thead>
<tr>
<th>RECIPIENT</th>
<th>H'S WILL ($)</th>
<th>J/T TRUST ($)</th>
<th>LIFE INS. ($)</th>
<th>TOTAL ($)</th>
<th>% OF ALL $47,000 REQUIRED ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>76,750</td>
<td>50,000</td>
<td>-</td>
<td>126,750</td>
<td>17.39</td>
</tr>
<tr>
<td>B</td>
<td>76,750</td>
<td>-</td>
<td>125,000</td>
<td>201,750</td>
<td>27.67</td>
</tr>
<tr>
<td>C</td>
<td>76,750</td>
<td>52,000</td>
<td>-</td>
<td>128,750</td>
<td>17.66</td>
</tr>
<tr>
<td>D</td>
<td>76,750</td>
<td>-</td>
<td>-</td>
<td>76,750</td>
<td>10.53</td>
</tr>
<tr>
<td>N</td>
<td>-</td>
<td>-</td>
<td>75,000</td>
<td>75,000</td>
<td>10.29</td>
</tr>
<tr>
<td>R</td>
<td>-</td>
<td>-</td>
<td>120,000</td>
<td>120,000</td>
<td>16.46</td>
</tr>
<tr>
<td>TOTALS</td>
<td>307,000</td>
<td>102,000</td>
<td>245,000</td>
<td>729,000</td>
<td>100</td>
</tr>
</tbody>
</table>
APPENDIX B — 1990 UPC ART. II, PTS. 1-3†

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PART 1
INTESTATE SUCCESSION

Section 2-101. Intestate Estate.
(a) Any part of a decedent’s estate not effectively disposed of by will passes by intestate succession to the decedent’s heirs as prescribed in this Code, except as modified by the decedent’s will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent’s intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share.

Section 2-102. Share of Spouse.
The intestate share of a decedent’s surviving spouse is:
(1) the entire intestate estate if:
   (i) no descendant or parent of the decedent survives the decedent; or
   (ii) all of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;
(2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;
(3) the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;
(4) the first [$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent’s surviving descendants are not descendants of the surviving spouse.

Section 2-103. Share of Heirs other than Surviving Spouse.
Any part of the intestate estate not passing to the decedent’s surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:
(1) to the decedent’s descendants by representation;
(2) if there is no surviving descendant, to the decedent’s parents equally if both survive, or to the surviving parent;
(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;

(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

Section 2-104. Requirement that Heir Survive Decedent for 120 Hours.

An individual who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If it is not established by clear and convincing evidence that an individual who would otherwise be an heir survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state under Section 2-105.

Section 2-105. No Taker.

If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

Section 2-106. Representation.

(a) [Definitions.] In this section:

(1) "Deceased descendant," "deceased parent," or "deceased grandparent" means a descendant, parent, or grandparent who either predeceased the decedent or is deemed to have predeceased the decedent under Section 2-104.

(2) "Surviving descendant" means a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under Section 2-104.

(b) [Decedent's Descendants.] If, under Section 2-103(1), a decedent's intestate estate or a part thereof passes "by representation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if
the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

(c) [Descendants of Parents or Grandparents.] If, under Section 2-103(3) or (4), a decedent’s intestate estate or a part thereof passes “by representation” to the descendants of the decedent’s deceased parents or either of them or to the descendants of the decedent’s deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest the deceased parents or either of them, or the deceased grandparents or either of them, that contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.


Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

Section 2-108. Afterborn Heirs.

An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.

Section 2-109. Advancements.

(a) If an individual dies intestate as to all or a portion of his [or her] estate, property the decedent gave during the decedent’s lifetime to an individual who, at the decedent’s death, is an heir is treated as an advancement against the heir’s intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or (ii) the decedent’s contemporaneous writing or the heir’s written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent’s intestate estate.

(b) For purposes of subsection (a), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent’s death, whichever first occurs.

(c) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent’s intestate estate, unless the decedent’s contemporaneous writing provides otherwise.
Section 2-110. Debts to Decedent.
A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor’s descendants.

Section 2-111. Alienage.
No individual is disqualified to take as an heir because the individual or an individual through whom he [or she] claims is or has been an alien.

Section 2-112. Dower and Curtesy Abolished.
The estates of dower and curtesy are abolished.

Section 2-113. Individuals Related to Decedent Through Two Lines.
An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

Section 2-114. Parent and Child Relationship.
(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].

(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.
PART 2

ELECTIVE SHARE OF THE SURVIVING SPOUSE

Section 2-201. Elective Share.

(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

If the decedent and the spouse were married to each other:

<table>
<thead>
<tr>
<th>Years</th>
<th>Elective-Share Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>Supplemental Amount Only</td>
</tr>
<tr>
<td>1 year but less than 2 years</td>
<td>3% of the augmented estate</td>
</tr>
<tr>
<td>2 years but less than 3 years</td>
<td>6% of the augmented estate</td>
</tr>
<tr>
<td>3 years but less than 4 years</td>
<td>9% of the augmented estate</td>
</tr>
<tr>
<td>4 years but less than 5 years</td>
<td>12% of the augmented estate</td>
</tr>
<tr>
<td>5 years but less than 6 years</td>
<td>15% of the augmented estate</td>
</tr>
<tr>
<td>6 years but less than 7 years</td>
<td>18% of the augmented estate</td>
</tr>
<tr>
<td>7 years but less than 8 years</td>
<td>21% of the augmented estate</td>
</tr>
<tr>
<td>8 years but less than 9 years</td>
<td>24% of the augmented estate</td>
</tr>
<tr>
<td>9 years but less than 10 years</td>
<td>27% of the augmented estate</td>
</tr>
<tr>
<td>10 years but less than 11 years</td>
<td>30% of the augmented estate</td>
</tr>
<tr>
<td>11 years but less than 12 years</td>
<td>34% of the augmented estate</td>
</tr>
<tr>
<td>12 years but less than 13 years</td>
<td>38% of the augmented estate</td>
</tr>
<tr>
<td>13 years but less than 14 years</td>
<td>42% of the augmented estate</td>
</tr>
<tr>
<td>14 years but less than 15 years</td>
<td>46% of the augmented estate</td>
</tr>
<tr>
<td>15 years or more</td>
<td>50% of the augmented estate</td>
</tr>
</tbody>
</table>

(b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections 2-202(b)(3) and (4), 2-207(a)(1) and (3), and that part of the elective-share amount payable from the decedent’s probate and reclaimable estates under Sections 2-207(b) and (c) is less than [50,000], the surviving spouse is entitled to a supplemental elective-share amount equal to [50,000], minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent’s probate estate and from recipients of the decedent’s reclaimable estate in the order of priority set forth in Sections 2-207(b) and (c).

(c) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent’s domicile at death.
Section 2-202. Augmented Estate.

(a) [Definitions.]

(1) In this section:

(i) "Bona fide purchaser" means a purchaser for value in good faith and without notice of an adverse claim. The notation of a state documentary fee on a recorded instrument pursuant to [insert appropriate reference] is a prima facie evidence that the transfer described therein was made to a bona fide purchaser.

(ii) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power the he [or she] possesses respecting the trust or other property arrangement. A person having general power of appointment over property is deemed to have a beneficial interest in the property.

(iii) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent by an exercise of the power could have created an interest, present or future, in himself [or herself] or his [or her] creditors.

(iv) "Probate estate" means property, whether real or personal, movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.

(v) "Right to income" includes a right to payments under an annuity or similar contractual arrangement.

(vi) "Value of property owned by the surviving spouse at the decedent’s death" and "value of property to which the surviving spouse succeeds by reason of the decedent’s death" include the commuted value of any present or future interest then held by the surviving spouse and the commuted value of amounts payable to the surviving spouse after the decedent’s death under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system.

(2) In subsections (b)(2)(iii) and (iv), "transfer" includes an exercise or release of a power of appointment, but does not include a lapse of a power of appointment.

(b) [Property Included in Augmented Estate.] The augmented estate consists of the sum of:

(1) the value of the decedent’s probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims;

(2) the value of the decedent’s reclaimable estate. The decedent’s reclaimable estate is composed of all property, whether real or personal, movable or immovable, wherever situated, not including in the decedent’s probate estate, of any of the following types:

(i) property to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent’s surviving spouse, was subject to
a presently exercisable general power of appointment held by the decedent alone, if the decedent held that power immediately before his [or her] death or if and to the extent the decedent, while married to his [or her] surviving spouse and during the two-year period next preceding the decedent's death, released that power or exercised that power in favor of any person other than the decedent or the decedent's estate, spouse, or surviving spouse;

(ii) property, to the extent of the decedent's unilaterally severable interest therein, held by the decedent and any other person, except the decedent's surviving spouse, with right of survivorship, if the decedent held that interest immediately before his [or her] death or if and to the extent the decedent, while married to his [or her] surviving spouse and during the two-year period preceding the decedent's death, transferred that interest to any person other than the decedent's surviving spouse;

(iii) proceeds of insurance, including accidental death benefits, on the life of the decedent payable to any person other than the decedent's surviving spouse, if the decedent owned the insurance policy, had the power to change the beneficiary of the insurance policy, or the insurance policy was subject to a presently exercisable general power of appointment held by the decedent alone immediately before his [or her] death or if and to the extent the decedent, while married to his [or her] surviving spouse and during the two-year period next preceding the decedent's death, transferred that policy to any person other than the decedent's surviving spouse; and

(iv) property transferred by the decedent to any person other than a bona fide purchaser at any time during the decedent's marriage to the surviving spouse, to or for the benefit or any person, other than the decedent's surviving spouse, if the transfer is of any of the following types:

(A) any transfer to the extent that the decedent retained at the time of or during the two-year period next preceding his [or her] death the possession or enjoyment of, or right to income from, the property;

(B) any transfer to the extent that, at the time of or during the two-year period next preceding the decedent's death, the income or principal was subject to a power, exercisable by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party, for the benefit of the decedent or the decedent's estate;

(C) any transfer of property, to the extent the decedent's contribution to it, as a percentage of the whole, was made within two years before the decedent's death, by which the property is held, at the time of or during the two-year period next preceding the decedent's death, by the decedent and another, other than the decedent's surviving spouse, with right of survivorship; or

(D) any transfer made to a donee within two years before the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed $10,000.00;

(3) the value of property to which the surviving spouse succeeds by reason of the decedent's death, other than by homestead allowance, exempt property, family allowance, testate succession, or intestate succession, including the proceeds of insur-
ance, including accidental death benefits, on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of the federal Social Security system; and

(4) the value of property owned by the surviving spouse at the decedent’s death, reduced by enforceable claims against that property or that spouse, plus the value of amounts that would have been includible in the surviving spouse’s reclaimable estate had the spouse predeceased the decedent. But amounts that would have been includible in the surviving spouse’s reclaimable estate under subsection (b)(2)(iii) are not valued as if he [or she] were deceased.

(e) [Exclusions.] Any transfer or exercise or release of a power of appointment is excluded from the decedent’s reclaimable estate (i) to the extent the decedent received adequate and full consideration in money or money’s worth for the transfer, exercise, or release or (ii) if irrevocably made with the written consent or joinder of the surviving spouse.

(d) [Valuation.] Property is valued as of the decedent’s death, but property irrevocably transferred during the two-year period next preceding the decedent’s death which is included in the decedent’s reclaimable estate under subsection (b)(2)(i), (ii), and (iv) is valued as of the time of the transfer. If the terms of more than one of the subparagraphs or sub-subparagraphs of subsection (b)(2) apply, the property is included in the augmented estate under the subparagraph or sub-subparagraph that yields the highest value. For the purposes of this subsection, an “irrevocable transfer of property” includes an irrevocable exercise or release of a power of appointment.

(e) [Protection of Payors and Other Third Parties.]

(1) Although under this section a payment, item of property, or other benefit is included in the decedent’s reclaimable estate, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent’s death, before the payor or other third party received written notice from the surviving spouse or spouse’s representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

(2) The written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor’s or other third party’s main office or home by registered or certified mail, return receipt requested, or served upon by the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent’s estate, or if no proceedings have been commenced, to
or with the court having jurisdiction of probate proceedings relating to decedents’ estates located in the county of the decedent’s residence. The court shall hold the funds or item of property and, upon its determination under Section 2-205(d), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under Section 2-205(a) or, if filed, the demand for an elective share is withdrawn under Section 2-205(e), the court shall order disbursement to the designated beneficiary. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

(3) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(f) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property from a recipient for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this Part to return the payment, item of property, or benefit nor is liable under this Part for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit included in the decedent’s reclaimable estate is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, as provided in Section 2-207.

(2) If any section or part of any section of this Part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent’s reclaimable estate, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in Section 2-207, to the person who would have been entitled to it were that section or part of that section not preempted.

Section 2-203. Right of Election Personal to Surviving Spouse.

(a) [Surviving Spouse Must Be Living at Time of Election.] The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under Section 2-205(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse’s behalf by his [or her] conservator, guardian, or agent under the authority of a power of attorney.

(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective-share and supplemental elective-share amounts due from the decedent’s probate estate and recipients of the decedent’s reclaimable estate under Sections 2-207(b) and (c) must be placed in a custodial trust for the benefit of the surviving spouse under the pro-
visions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. For purposes of the custodial trust established by this subsection, (i) the electing guardian, conservator, or agent is the custodial trustee, (ii) the surviving spouse is the beneficiary, (iii) the custodial trust is deemed to have been created by the decedent spouse by written transfer that takes effect at the decedent spouse’s death and that directs the custodial trustee to administer the custodial trust as for an incapacitated beneficiary.

(c) [Custodial Trust.] For the purposes of subsection (b) the [Enacting state] Uniform Custodial Trust Act must be applied as if Section 6(b) thereof were repealed and Sections 2(c), 9(b), and 17(a) were amended to read as follows:

(1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order but with regard to other support, income, and property of the beneficiary [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need.

(3) Upon the beneficiary’s death, the remaining custodial trust property, in the following order: (i) under the residuary clause, if any, of the will of the beneficiary’s predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the beneficiary; or (ii) to that predeceased spouse’s heirs under Section 2-711 of [this State’s] Uniform Probate Code.

[STATES THAT HAVE NOT ADOPTED THE UNIFORM CUSTODIAL TRUST ACT SHOULD ADOPT THE FOLLOWING ALTERNATIVE SUBSECTION (b) AND NOT ADOPT SUBSECTION (b) OR (b) ABOVE]

(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court must set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent’s probate estate and recipients of the decedent’s reclaimable estate under
Section 2-207(b) and (c) and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:

(1) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse’s support, without court order but with regard to other support, income, and property of the surviving spouse [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.

(2) During the surviving spouse’s incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.

(3) Upon the surviving spouse’s death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or (ii) to that predeceased spouse’s heirs under Section 2-711.

Section 2-204. Waiver of Right to Elect and of Other Rights.

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse’s waiver is not enforceable if the surviving spouse proves that:

(1) he [or she] did not execute the waiver voluntarily;
(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he [or she]:
   (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
   (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and
   (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.
(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him [or her] from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

Section 2-205. Proceeding for Elective Share; Time Limit.

(a) Except as provided in subsection (b), the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse must give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's reclaimable estate, described in Section 2-202(b)(2), is not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's reclaimable estate, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's reclaimable estate, described in Section 2-202(b)(2), is not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse may withdraw his [or her] demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution
in any greater amount than he [or she] would have been under Section 2-207 had relief been secured against all persons subject to contribution.

(c) An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this State or other jurisdictions.

Section 2-206. Effect of Election on Statutory Benefits.

If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse’s homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

Section 2-207. Charging Spouse with Owned Assets and Gifts Received; Liability of Others for Balance of Elective Share.

(a) [Elective-Share Amount Only.] In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent’s probate estate and recipients of the decedent’s reclaimable estate:

1. amounts included in the augmented estate which pass or have passed to the surviving spouse by testate or intestate succession;
2. amounts included in the augmented estate under Section 2-202(b)(3);
3. amounts included in the augmented estate which would have passed to the spouse but were disclaimed; and
4. amounts included in the augmented estate under Section 2-202(b)(4) up to the applicable percentage thereof. For the purposes of this subsection, the “applicable percentage” is twice the elective-share percentage set forth in the schedule in Section 2-201(a) appropriate to the length of time the spouse and the decedent were married to each other.

(b) [Unsatisfied Balance of Elective-Share Amount; Supplemental Elective-Share Amount.] If, after the application of subsection (a), the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent’s probate estate and that portion of the decedent’s reclaimable estate other than amounts irrevocably transferred within two years before the decedent’s death are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent’s probate estate and that portion of the decedent’s reclaimable estate are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent’s probate estate and that portion of the decedent’s reclaimable estate in proportion to the value of their interests therein.

(c) [Unsatisfied Balance of Elective-Share and Supplemental Elective-Share Amounts.] If, after the application of subsections (a) and (b), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the
decendent’s reclaimable estate is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of that portion of the decedent’s reclaimable estate in proportion to the value of their interests therein.

(d) [Liability of Recipients of Reclaimable Estate and Their Donees.] Only original recipients of the reclaimable estate described in Section 2-202(b)(2), and the donees of the recipients of the reclaimable estate to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse’s elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the reclaimable estate or to pay the value of the amount for which he [or she] is liable.

PART 3

SPouse AND CHILDREN UNPROVIDED FOR IN WILLS

Section 2-301. Entitlement of Spouse; Premarital Will.

(a) If a testator’s surviving spouse married the testator after the testator executed his [or her] will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he [or she] would have received if the testator had died intestate as to that portion of the testator’s estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised or passes under Sections 2-603 or 2-604 to a descendent of such a child, unless:

1. it appears from the will or other evidence that the will was made in contemplation of the testator’s marriage to the surviving spouse;
2. the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
3. the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator’s statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator’s surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift under Section 2-603 or 2-604 to a descendant of such a child, abate as provided in Section 3-902.
Section 2-302. Omitted Children.

(a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) If the testator had no child living when he [or she] executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(2) If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(i) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will.

(ii) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (i), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(iii) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

(iv) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(b) Neither subsection (a)(1) nor subsection (a)(2) applies if:

(1) it appears from the will that the omission was intentional; or

(2) the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(c) If at the time of execution of the will the testator fails to provide in his [or her] will for a living child solely because he [or she] believes the child to be dead, the child receives a share in the estate equal to the value to that which the child would have received had the testator died intestate.

(d) In satisfying a share provided by subsection (a)(1) or (c), devises made by the will abate under Section 3-902.
APPENDIX C — CONVERSION CHART (UPC ↔ W. VA. CODE)

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### APPENDIX D — WEST VIRGINIA INTESTACY PROVISIONS

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<td>Intestate Estate</td>
<td>§ 42-1-2</td>
<td>§ 2-101</td>
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<td>Share of Spouse</td>
<td>§ 42-1-3</td>
<td>§ 2-102</td>
<td>W. Va. gives the surviving spouse a fractional share only, no set amounts.</td>
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<td>Share of Heirs other than Surviving Spouse</td>
<td>§ 42-1-3a</td>
<td>§ 2-103</td>
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<td>120 Hour Survival Requirement</td>
<td>§ 42-1-3b</td>
<td>§ 2-104</td>
<td>W. Va. does not adopt a clear and convincing standard of proof.</td>
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<td>No Taker</td>
<td>§ 42-1-3c</td>
<td>§ 2-105</td>
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<td>Representation</td>
<td>§ 42-1-3d</td>
<td>§ 2-106</td>
<td>Subsection (b) refers to § 42-1-3a generally where the UPC refers only to § 2-103(1). Subsection (c) refers to § 42-1-3a generally where UPC refers only to § 2-1-3(3) or (4).</td>
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<td>§ 42-1-3e</td>
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<td>Afterborn Heirs</td>
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<td>Advancements</td>
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<td>Alienage</td>
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<td>From Whom Bastards Inherit</td>
<td>§ 41-1-5</td>
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<td>Legitimation by Marriage</td>
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<td>Issue Legitimate Through Marriage Null</td>
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<td>§ 41-1-8</td>
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