Reforming the Law of Interstate Succession and Elective Shares: New Solutions to Age-Old Problems

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REFORMING THE LAW OF INTESTATE SUCCESSION AND ELECTIVE SHARES: NEW SOLUTIONS TO AGE-OLD PROBLEMS

JOHN W. FISHER, II*
SCOTT A. CURNUTTE**

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The authors would like to acknowledge with sincere appreciation the assistance of Ms. Elma Reed, a C. Howard Hardesty Research Fellow, in the preparation of this article.
As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.¹

I. INTRODUCTION

The West Virginia Law Review published an article in its Summer 1988 issue which advocated that the West Virginia laws of intestate succession and "forced or elective" share be revised.² Given the various empirical studies published over the last three decades regarding

distribution of assets at death, opining that our current laws of intestate succession needed reform was not a difficult challenge. These studies, which will be discussed herein, establish that current statutory provisions, which reflect the societal needs of Thomas Jefferson's agrarian society, simply do not reflect the economic reality nor the social needs of today.³

The effort to reform intestate succession statutes gained nationwide attention in 1969 with the promulgation of the Uniform Probate Code (UPC) by the National Conference of Commissioners on Uniform State Laws and its approval by the House of Delegates of the American Bar Association. The Uniform Probate Code has been adopted in whole or in part by fifteen states.⁴ A second generation Uniform Probate Code has now been drafted by the Commissioners on Uniform State Laws. This Revised Uniform Probate Code (RUPC) reflects an effort by its drafters to provide a reasonable compromise for the distribution of the assets of one who dies intestate. The drafters based their decisions on the empirical data and the experience gained under the Uniform Probate Code.

Similarly, the redefinition of property rights when a marriage ends in a divorce, now characterized by the equitable distribution of marital assets,⁵ is not reflected in West Virginia's current elective

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3. See generally id. at 1170-72 (discussing the origins of the relevant West Virginia statutes).
4. The fifteen states which have adopted the UPC in whole or in part are:
   - Alaska ................................. 1972
   - Arizona .................................. 1973
   - Colorado ............................. 1973
   - Florida ............................... 1974
   - Hawaii ................................. 1976
   - Idaho .................................... 1971
   - Kentucky .............................. 1976
   - Maine ................................... 1979
   - Michigan ................................ 1978
   - Minnesota ............................ 1974
   - Montana ............................... 1974
   - Nebraska .............................. 1974
   - Mexico .................................. 1975
   - Dakota ................................ 1973
   - Utah .................................... 1975

share statute. While on the one hand, the case of *Johnson v. Farmers & Merchants Bank* addressed fundamental issues and charted a new direction for spousal elective share rights, the augmentation of the probate estate on a case-by-case basis adopted therein creates very real problems for estate planners. In addition, the *Johnson* approach will encounter the same tracing problems which plagued the original Uniform Probate Code’s augmented estate concept. As discussed *infra*, the RUPC avoids tracing problems by combining the spouses’ assets to compute the augmented estate, as well as providing the predictability which is lacking in the *Johnson* approach. The “simplified” augmented estate of the RUPC is combined with an incremental vesting concept to reduce the incidents of “windfall” which had become a problem of short duration, late in life second marriages under the Uniform Probate Code. The RUPC also seeks to achieve sufficient computational certainty and predictability of application so that estate planners can provide reasonable guidance to their clients. Equally significant is the problem facing an attorney who is asked to advise the surviving spouse concerning his or her rights. The result of computational certainty and predictability should significantly reduce the incidents of litigation and the accompanying cost.

Two unrelated developments coalesced to make significant reform of the current laws of intestate succession and elective shares in West Virginia a realistic possibility. In 1988, the West Virginia Legislature created the West Virginia Law Institute “as an official advisory law revision and law reform agency of the State of West Virginia.” At its meeting on January 11, 1989, the West Virginia Law Institute’s Council, its governing body, selected the revision of West Virginia’s law of intestate succession and elective share as its first project. The West Virginia Law Institute Council appointed an advisory committee for this project. This committee included members of The West Virginia State Bar’s Probate Committee and representatives of

a variety of other interested groups. Lay representatives helped to assure a diversity of background and experience.

The second development was that the Joint Editorial Board for the Uniform Probate Code began a revision of the 1969 edition of the Uniform Probate Code. The drafters of this revision have paid particular attention to those sections of Article II involving intestate succession and elective share. Professor Lawrence W. Waggoner, the Director of Research for the Joint Editorial Board, provided the West Virginia Law Institute’s Advisory Committee with the draft provision of these sections so as to make it possible for the West Virginia Advisory Committee to keep abreast of the discussions and developments on the national scene.

After an intensive review and discussion, the West Virginia Law Institute Advisory Committee reported to the West Virginia Law Institute Council at its annual meeting on April 26, 1990. With only a few minor exceptions, the Advisory Committee endorsed in concept the provisions set forth in the relevant portions of the RUPC. These exceptions will be discussed herein. The Law Institute Council accepted the Advisory Committee’s report and recommendation and authorized the drafting of legislation based upon the Revised Uniform Probate Code.

As indicated above, given the previous studies, it is not difficult to demonstrate that the existing West Virginia intestate succession statutes do not comport with the “average” persons’ wishes for the distribution of his or her property at death. Since empirical studies show that a majority of people die intestate,9 the importance of the best possible solution for intestate succession cannot be overstated.

In comparison to the number of intestate successions, the number of elective share cases are relatively few. However, when such a dispute does arise, it exacts a heavy toll on the participants. While the decision in the Johnson case has redefined the surviving spouses’ elective share rights in a manner consistent with the augmented estate concept, it also underscores the importance of reasonable predict-

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ability for estate planners as well as those who advise the surviving spouse.

While it may be easy to gain a consensus that these subject areas need reform, it does not necessarily follow that there will be a consensus as to the best solutions. Given the fact that both intestate succession and elective share situations present an infinite number of variables and have the potential for evoking strong emotional reactions, obtaining a compromise solution is not easy.

Essentially everyone is able to relate to a problem of a friend or relative and then judge the solution by how well or how poorly it solved that particular problem. If such an anecdotal standard is applied, the drafting of an acceptable statute is doomed to failure. Therefore, in order to obtain a consensus, reasonable compromise is essential. To the extent a reasonable statute of intestate succession does not adequately meet one’s unique or specific need, a will or appropriate will substitute must be viewed as the solution. On the other hand, unless we, as a society, are willing to let the courts resolve every elective share case following equitable principles on a case by case basis, then a “fair” rule with a reasonable amount of predictability and capable of nonjudicial application is a necessity. It is submitted that the RUPC comes closer to satisfying the competing and conflicting interests and needs than any other statutory solution.

It is important to note that the RUPC contains eight articles and includes comprehensive provisions dealing with intestate and testate succession including the formality of wills and rules of construction, probate administration and procedures, non-probate transfers and ancillary matters. Article II of the RUPC, which addresses intestate succession, was revised by the National Conference of Commissioners on Uniform State Laws in cooperation with the Joint Editorial Board of the Uniform Probate Code. Elective shares and wills is the focal point of the current revision. The West Virginia Law Institute project and this discussion will focus on the first two parts of Article II.10 A companion article which discusses part 3 of Article II, “Spouses

10. Part 1, Intestate Succession & Part 2, Elective Share of Surviving Spouse. The other parts
And Children Unprovided For In Wills,” appears in this issue. Part 3 was also discussed by the Advisory Committee. The decision to restrict the Law Institute’s project to intestate succession and elective share, with ancillary provisions, reflects a policy decision to address the subject area most in need of legislative attention. Therefore, the decision to limit the Law Institute project is not intended to suggest or infer that the other parts of Article II are not deserving of careful consideration for adoption.

This article will discuss and compare the provisions of the RUPC as approved by the National Conference of Commissioners on Uniform State Laws and the case and statutory law of West Virginia. At the conclusion of each comparative discussion, the position of the Advisory Committee to the West Virginia Law Institute will be stated. While the West Virginia Law Institute Council has authorized drafting of legislation patterned after the RUPC, it has not formally taken a position on those relatively minor issues where the advisory committee recommends a departure from the provisions contained in the RUPC.

II. Revised Uniform Probate Code, Part 1

The prefatory note to Article II of the Revised Uniform Probate Code notes that in the years since the Uniform Probate Code was promulgated in 1969 the few amendments to the code have been relatively minor. Over the last several years, the Joint Editorial Board for the UPC has been engaged in a general and extensive review which was warranted in light of the following four developments which have occurred since the adoption of the UPC:

(1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) the

of Article II are: Part 3, Spouse and Children Unprovided For in Wills; Part 4, Exempt Property and Allowances; Part 5, Wills, Will Contracts, and Custody and Deposit of Wills; Part 6, Rules of Construction Applicable Only to Wills; Part 7, Rules of Construction Applicable to Donative Dispositions in Wills and Other Governing Instruments; Part 8, General Provisions Concerning Probate and Nonprobate Transfers; Part 9, Statutory Rule Against Perpetuities; Time Limit on Options in Gross, etc.; and Part 10, Uniform International Wills Act. See Revised Uniform Probate Code, at 5-8 (Draft 1990) (Revised Table of Sections).
advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages[1] and [(4)] in the acceptance of a partnership or marital-sharing theory of marriage. 11

As will be seen below, the RUPC has responded to these developments and all of their ramifications with reasonable and responsible solutions. In effect, the second generation UPC is not only refining the original version, but where necessary, taking an entirely new approach in order to provide better solutions to age old problems.

A. Section 2-101 Intestate Estate

Section 2-101 provides for the distribution of that portion of the testator’s estate not disposed of by his will. It allows the testator, by will, to exclude an heir from sharing in the intestate estate. This represents one of the few new subject areas covered in the RUPC. 12 This new provision permits “negative wills.” The connotation of “negative wills” is unfortunate; in fact, this provision is designed to give effect to a testator’s expressed intentions. An enlightening summary of the subject area is found in “The Intestate Claims of Heirs Excluded by Will: Should ‘Negative Wills’ Be Enforced?” 13 In essence, the author of this note argues in favor of the “English Rule” which enforces a “negative will” where (1) the testator clearly intended to exclude an heir or to limit an heir’s share in the estate to the devise in the will, and (2) at least one other heir remained eligible to take the property that passes by intestacy. 14 The doctrinal basis of the English rule is that there is an implied gift of the excluded heirs share under the laws of intestacy to the testator’s other heirs. In contrast, the “American Rule” essentially ignores the testator’s

11. Id. at 9 (Prefatory Note to Article II Revisions). See infra note 135 and accompanying text.
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.
The RUPC is reprinted in the appendix to this article.
14. Id. at 177.
expressed intention by holding that a testator may prevent an heir from receiving his or her share of any property that passes by intestacy only by affirmatively disposing of the entire estate through a will.15

The author of this law review note summarizes the court’s justification of the American Rule as follows:

Courts that refuse to enforce negative wills offer three principal justifications for this limitation on testamentary freedom: (1) negative wills would create an undesirable “mixing” of the probate and intestacy systems by requiring courts to alter the distribution scheme provided in the intestacy statute; (2) because negative wills do not expressly indicate who should receive the excluded heir’s share of the property that passes by intestacy, their enforcement would in effect require courts to draft new wills for testators; and (3) negative wills are inconsistent with the law of succession, which generally provides that property not disposed of by the will shall descend as provided in the intestacy statute.16

The author discusses each of these contentions and concludes there are no important policy reasons underlying the American Rule which justify frustrating the testator’s expressed intent.

It should be emphasized that this concept becomes applicable only in those instances in which the testator’s intent to exclude an heir is established. As the comment to section 2-101 of the RUPC states: “Whether or not in an individual case the decedent’s will has excluded or limited the right of an individual or class to take a share of the decedent’s intestate estate is a question of construction.”17

The probability of encountering a purely negative will is remote. Most likely, such an occurrence would involve a holographic will by a person not versed in the law. An example of a purely negative will would be testamentary language such as “none of my property is to go to my brothers or sisters.” If such a testator dies unmarried, but survived by brothers and sisters and nieces and nephews, but without any surviving descendants or parents, the question is who inherits. Under the “American Rule,” the only way the testator’s intent would be honored is if the testator had positively disposed of

15. Id. at 180.
16. Id. at 186.
17. RUPC § 2-101, comment.
his estate. Otherwise, it would pass to his brothers and sisters, even though he had expressly stated his desire that his brothers and sisters should not take any portion of his estate. The "English Rule" would give effect to the testator's intent by recognizing an implied gift of the brothers' or sisters' share to the brothers' and sisters' children, i.e. the testator's nieces and nephews.

The far more likely application of this section would be in cases of partial intestacy. Again, assume an unmarried testator without surviving descendants or parent(s), but with surviving brothers and sisters and nieces and nephews. Further assume the testamentary language provided that the brothers and sisters were not to take any portion of the estate, or the brothers and sisters were given a specific devise "and no more." If the will does not dispose of all the property by specific devise and does not contain a residuary clause which successfully disposes of the balance of decedents estate, then a portion of the estate will pass pursuant to the laws of intestacy. Again, the question is whether the brothers and sisters should take that portion of the estate passing by intestacy. According to the author of the law review note, "at present, only two American jurisdictions permit a negative will to foreclose the award of an intestate share of an excluded heir."19

West Virginia apparently follows the "American Rule" which does not recognize negative wills, but there are no recent cases directly on point. The case which most resembles the issue of negative wills is Boisseau v. Aldridges.20 The will in that case was almost entirely a "negative will" because its function was to disinherit two sisters. The only disposition was $500 to each sister if they survived their respective husbands. The court held that the testator could not disinherit his heirs in any way other than by positively transferring his property to someone else and, since the will did not dispose of his estate, the estate passed according to the intestacy statutes.21 In this case, the sisters he wished to exclude were allowed to take.

20. 32 Va. (S Leigh) 222 (1834).
21. Id. at 222-25, 244-49.
Two more recent cases contain language which supports this rule. The court in *Ball v. Ball*,22 noted:

A man can disinherit his heirs only by unmistakably giving his estate to someone else. This principle results from the nature of property; for property is the creature of law, and the law will dispose of it, unless, under the permission which the law gives the owner to make a will, he disposes of it.23

Also in support of the "American Rule," the court in *Harmer v. Boggess*24 stated, "No matter how strong the intention of the testator may be to disinherit an heir, the intention cannot be given any effect as to intestate property, and the only method of disinheriting him is to give the property to someone else."25

It should be noted, however, that these more recent cases involve attempts to determine the intent of the testator rather than consideration of clear expressions designed to exclude heirs, i.e. "negative wills."26

In light of the above cases, the adoption of the provision of RUPC 2-101(b) would alter existing West Virginia case law. The use of the word "disclaimed" in section 2-101(b) is important. If in fact the excluded individual(s) predeceased the decedent (testator), then this provision would not apply.27

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23. Id. at 860, 69 S.E.2d at 60.
25. Id. at 596, 73 S.E.2d at 267 (quoting Tea v. Millen, 101 N.E. 209, 211 (Ill. 1913)).
27. The following example is provided in the comment to illustrate the application of this provision. In the example, Hector is G's brother and is the "excluded heir." G is the decedent.

Subsection (b) establishes the consequence of a disinheritance — the share of the decedent's intestate estate to which the disinherited individual or class would have succeeded passes as if that individual or class had disclaimed the intestate share. Thus, if the decedent's will provides that brother Hector is to receive $50.00 and no more, Hector is entitled to the $50.00 devise (because Hector is not treated as having predeceased the decedent for purposes of *testate* succession), but the portion of the decedent's *intestate* estate to which Hector would have succeeded passes as if Hector had disclaimed his intestate share. The consequence of a disclaimer by Hector of his intestate share is governed by Section 2-801(d)(1), which provides that Hector's intestate share passes to Hector's descendants by representation.

*Example:* G died partially intestate. G is survived by brother Hector, Hector's 3 children (X, Y, and Z), and the child (V) of a deceased sister. G's will excluded Hector from sharing in G's intestate estate.
The advisory committee supports the adoption of this section.

B. Section 2-102 Share of Spouse

1. Empirical Studies

If judged by the number of people affected, there are no more important provisions in the RUPC than those providing for intestate succession. All three of the major empirical studies which have investigated this aspect of probate matters have determined that more people die intestate than testate.

It is not surprising that the frequency of intestacy decreases as an individual’s wealth increases.

Solution: V takes half of G’s intestate estate. X, Y, and Z split the other half, i.e., they take 1/6 each. Sections 2-103(3); 2-106; 2-801(d)(1). Had Hector not been excluded by G’s will, the share to which Hector would have succeeded would have been 1/2. Under section 2-801(d)(1), that half, not the whole of G’s intestate estate, is what passes to Hector’s descendants by representation as if Hector had disclaimed his intestate share.

Note that if brother Hector had actually predeceased G, or was treated as if he predeceased G by reason of not surviving G by 120 hours (see section 2-104), then no consequence flows from Hector’s disinheritance: V, X, Y, and Z would each take 1/4 of G’s intestate estate under sections 2-103(3) and 2-106.

RUPC § 2-101 comment.


29. In reviewing the probated estates in Cook County, Illinois from 1931 to 1957, Dunham showed that 51.5% of these estates were intestate. Dunham Study, supra note 28, at 244 (Table 2). Of the 600 Iowans interviewed for the 1978 Iowa Study, 51% did not have a will at the time of the interview. Iowa Study, supra note 28, at 1070 (Table 6). The 1978 Fellows Study involved interviews with 750 people from five states; 54.6% of those interviewed did not have wills. Fellows Study, supra note 28, at 338 (Table 4).

30. Dunham, based on 1950 data, showed that 75% of estates of less than $5,000 were intestate whereas only 4% of estates of $100,000 were intestate. Dunham Study, supra note 28, at 250 (Table 8):

<table>
<thead>
<tr>
<th>Value of Estate</th>
<th>Percentage of Intestacy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Below $ 5,000</td>
<td>75.0%</td>
</tr>
<tr>
<td>5,000 - 9,999</td>
<td>44.0%</td>
</tr>
<tr>
<td>10,000 - 24,999</td>
<td>37.0%</td>
</tr>
</tbody>
</table>
Given the frequency of intestate succession, it should be accepted that a statutory provision which meets the needs of the greatest numbers of those affected should be a primary legislative objective. While the majority of those who die intestate possess small to moderate estates, the fact that some substantial estates pass by intestatancy, either in whole or part, further complicates the drafting of a statutory solution.

This article will not retrace the origins of West Virginia statutes on intestate succession.31 It is sufficient to say that the existing West Virginia statute which favors children over the surviving spouse32 is inconsistent with the empirical studies.

<table>
<thead>
<tr>
<th>Value of Estate</th>
<th>Percentage of Intestacy</th>
</tr>
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<tbody>
<tr>
<td>Below $5,000</td>
<td>64.0%</td>
</tr>
<tr>
<td>5,000 - 9,999</td>
<td>64.0%</td>
</tr>
<tr>
<td>10,000 - 24,999</td>
<td>61.5%</td>
</tr>
<tr>
<td>25,000 - 49,999</td>
<td>48.5%</td>
</tr>
<tr>
<td>50,000 - 99,999</td>
<td>39.0%</td>
</tr>
<tr>
<td>100,000 - 249,999</td>
<td>24.0%</td>
</tr>
<tr>
<td>250,000 - 500,000</td>
<td>31.0%</td>
</tr>
<tr>
<td>500,000 - 1 million</td>
<td>18.5%</td>
</tr>
<tr>
<td>over 1 million</td>
<td>0.0%</td>
</tr>
</tbody>
</table>

Component I of the Iowa Study reviewed approximately equal numbers of testate and intestate estates from probate files in Iowa (150 testate, 145 intestate). Component III comprises the responses of 600 randomly selected Iowa citizens. A study of these estates and responses with reference to the value of each estate and the percentage of intestacy shows a decrease in intestacy as the value of the estate increases. Iowa Study, supra note 28, at 1072 (Table 8):

The Fellows Study reaches the same result as to intestacy and the value of the estate as did Dunham and the Iowa Study. See Fellows Study, supra note 28, at 338 (Table 4). In the Fellows Study, the percentage of people who do not have wills decreased from 85.3% for estates of less than $13,000 to 31% for estates of $100,000 to $500,000. Id.

<table>
<thead>
<tr>
<th>Value of Estate</th>
<th>Percentage of Intestacy</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0 - $12,000</td>
<td>85.3%</td>
</tr>
<tr>
<td>13,000 - 24,999</td>
<td>76.4%</td>
</tr>
<tr>
<td>25,000 - 49,999</td>
<td>61.2%</td>
</tr>
<tr>
<td>50,000 - 99,999</td>
<td>49.8%</td>
</tr>
<tr>
<td>100,000 - 500,000</td>
<td>31.0%</td>
</tr>
</tbody>
</table>

Id.


32. See W. VA. Code § 42-1-1. Section 42-1-1 provides in essence that if a decedent dies survived by a spouse and children or descendants of children, the child, children or descendant take all the real estate, subject to a dower interest in the surviving spouse, pursuant to § 43-1-1 (1982). As to personal property, the issue take 2/3 and the surviving spouse takes 1/3. Id. § 42-2-1.
The Dunham Study reviewed twenty-two estates in which the decedent was survived by a spouse and children and six estates in which the decedent was survived by only a spouse. Of these twenty-eight estates, twenty-seven decedents gave 100% of the estate to the surviving spouse. Of the twenty-two estates in which the decedent was survived by both a spouse and children, 100% left the entire estate to the spouse. In order to further test the finding based on the probate records, the Dunham Study utilized a limited purpose questionnaire. An analysis of the responses to the questionnaire revealed that 85% of the respondents indicated they would give 100% of the estate to the spouse if the estate were small ($36,000), but only 25% would give 100% to the spouse if the estate were large ($180,000). The age of the children had some effect on the responses, although the effect was not as significant as the size of the estate. If survived by a spouse and minor children, 47.5% of the respondents would give the spouse 100% of the estate, but 60% would leave everything to the surviving spouse if the children had established their own families. The Illinois Study, however, showed a different result when adult children were involved. If the decedent had minor children, 53.3% of the respondents would give the spouse 100% of the estate, but only 41.2% (compared to 60% in the Dunham Study) would give the entire estate to the spouse if the children were adults.

In both the Iowa Study and the Dunham Study, the percentage of respondents who would give the spouse with children 100% of the estate decreased as the value of that estate increased. Sixty-eight percent of the Iowa Study respondents would give the spouse 100% of a $10,000 estate; the percentage of respondents decreased to 44% if the estate was $50,000. However, in the Fellows Study, (published in 1978) the percentage of respondents who would give the spouse 100% of the estate increased with the size of the estate. This percentage varied from 50% for estates of less than $13,000, to 61.4%
for estates between $50,000 and $99,999 and 60.4% if the estate was valued over $100,000.\textsuperscript{38}

In a study conducted by Browder, 57.5% of the testators gave the entire estate to the spouse; 89% of the wills left the estate either exclusively to the spouse, the children, or both.\textsuperscript{39}

The tendency to give the surviving spouse 100% of the estate decreases when the decedent is survived by a spouse and the decedent’s child who is not the child of the surviving spouse. When given the choice of giving the spouse 100% of the estate, 51% to 99% of the estate, 50% of the estate, or 0% to 49% of the estate with the decedent’s child receiving the remainder of the estate, the most frequent response in the \textit{Fellows Study} (37.2%) was to give 50% to the spouse.\textsuperscript{40} However, 23% of the respondents would give the surviving spouse 100% of the estate, and 28.9% of the respondents would give the spouse between 51% and 99% of the estate. Therefore, the \textit{Fellows Study} reveals that a majority (51.9%) of the respondents would give the spouse over 50% of the estate rather than divide the estate equally between the spouse and the decedent’s child from a previous marriage.\textsuperscript{41}

The respondents in the \textit{Iowa Study} were asked how they would divide the estate if the decedent were survived by a spouse, an adult child of the present marriage and an adult child from a prior marriage. Twenty-nine percent of the respondents would give the spouse 100% of the estate with the average allocation given to the spouse being 58% of the estate with each child receiving 21%.\textsuperscript{42} When asked the same question, except that both surviving children were from the present marriage, 59% of the respondents would give the spouse 100% of the estate with the average allocation being 78% to the spouse with each child receiving 11%.\textsuperscript{43} This study seems to indicate that the respondents believe that the child of a previous marriage

\textsuperscript{38} \textit{Fellows Study}, supra note 28, at 364.
\textsuperscript{40} \textit{Fellows Study}, supra note 28, at 366.
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} \textit{Iowa Study}, supra note 28, at 1095.
\textsuperscript{43} \textit{Id}.
may need protection from disinheritance by the surviving stepparent, as well as the belief that the common child and the child of a prior marriage should be treated equally. Forty-three percent of the respondents in the Illinois Study would distribute the estate equally between the spouse and the child from a previous marriage and 33.4% would, under the same conditions, give the spouse more than 50%.

2. Distribution Under Section 2-102.

a. Distribution when Decedent is Survived by a Spouse or by a Spouse and Children

The RUPC responds to the empirical data and the collective wisdom and experience of the drafters, by providing a significantly increased share for a surviving spouse and a corresponding reduction for the decedent’s children as compared with the statutory scheme of states such as West Virginia. In addition, as the comment to RUPC § 2-102 observes: “This section is revised to give the surviving spouse a larger share than the original UPC.” Section 2-102 of the RUPC provides:

Share of Spouse. The intestate share of a decedent’s surviving spouse is:

(1) [T]he 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 . . . .

The RUPC and current West Virginia law both provide that if there is a surviving spouse but no surviving descendants, or surviving parents, the surviving spouse takes the entire estate. Unlike West Virginia, under this section, if there are no surviving parents and the only descendants of either spouse are descendants of the decedent and the surviving spouse, the surviving spouse takes the entire estate. If either the decedent or the surviving spouse have descendants as

44. Illinois Study, supra note 28, at 728.
45. RUPC § 2-102(1). See also id. § 2-102 comment: “If the decedent leaves no surviving descendants and no surviving parent or if the decedent does leave surviving descendants but neither the decedent nor the surviving spouse has other descendants, the surviving spouse is entitled to all of the decedent’s intestate estate.”
a result of a previous relationship then subparagraphs (3) and (4) become applicable. Under these subsections, the surviving spouse's portion of the intestate estate is:

(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.\(^{46}\)

The reason for this graduation of both "floor amounts" and percentage of the balance of the estates is succinctly stated in the comment to this section. The drafters explain:

If the decedent leaves surviving descendants and if the surviving spouse (but not the decedent) has other descendants, and thus the decedent's descendants are unlikely to be the exclusive beneficiaries of the surviving spouse's estate, the surviving spouse receives the first \$150,000 plus one-half of the balance of the intestate estate. The purpose is to assure the decedent's own descendants of a share in the decedent's intestate estate when the estate exceeds \$150,000.

If the decedent has other descendants, the surviving spouse receives \$100,000 plus one half of the balance. In this type of case, the decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse.\(^{47}\)

Absent a valid will, the above provision is an attempt to provide a reasonable solution, based upon the empirical data, of allocating the estate's assets between a surviving spouse and descendants.

b. Distribution When Decedent Is Survived by a Spouse and Parents

The second basic disposition pattern provided in Section 2-102 is when there is a surviving spouse and surviving parent(s), but no descendants. Again, the empirical studies provide an insight into the "average person's" preferences in such occurrences. (This occurrence

\(^{46}\) RUPC § 2-102(3)-(4). The bracketed dollar figures are "suggested" figures for the legislature of each state to consider. The actual dollar figure selected is viewed as a policy consideration for each legislature.

\(^{47}\) RUPC § 2-102 comment.
often involves a relatively young couple with a short duration marriage.)

When survived by both a spouse and parents but no children, 73% of the respondents in the Iowa Study would give 100% of the estate to the spouse with the average allocation to the spouse being 89% of the estate.\(^{48}\) When the financial need of the parents is taken into consideration, the percentage of respondents who would give the spouse 100% of the estate is significantly affected. Ninety-two percent of the respondents would give 100% of the estate to the spouse when the decedent’s parents are financially secure. However, only 54% indicated the spouse should be given 100% of the estate when the parents are not financially secure. The average amount of the estate allocated to the spouse when the parents are financially secure is 97% compared to 81% when the parents need financial help.\(^{49}\)

If the decedent is survived by a spouse and mother, 70.8% of the respondents in the Fellows Study would give 100% of the estate to the spouse.\(^{50}\) The number of years of marriage did not have a significant overall effect on the responses, although individuals married only one to three years represented the group with the lowest percentage of respondents allocating 100% to the spouse (63.5%).\(^{51}\) The percentage of respondents in the Fellows Study allocating 100% of the estate to the spouse when the decedent is also survived by a mother (70.8%) is higher than that of the Illinois Study where only 54.4% of the respondents gave 100% of the estate to the spouse.\(^{52}\) If the decedent is survived by a spouse and both parents, 58.6% of the Illinois Study respondents would give 100% to the spouse.\(^{53}\)

After considering several options for distributing the estate between a surviving spouse and parent(s), the drafters of the RUPC elected to modify the basic pattern of the original UPC to provide

\(^{48}\) *Iowa Study*, supra note 28, at 1138.
\(^{49}\) *Id.* at 1124.
\(^{50}\) *Fellows Study*, supra note 28, at 351.
\(^{51}\) *Id.* app. at 388 (tables A2 & A3).
\(^{52}\) *Illinois Study*, supra note 28, at 726.
\(^{53}\) *Id.*
an increased share to the surviving spouse. Section 2-102(2) provides that the decedents’ surviving spouse takes “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.”

In comparison with the original UPC, the minimum share to the spouse was increased from $50,000 to $200,000 and the percentage of the balance increased from one-half to three-fourths. Since very few probate estates will exceed the surviving spouse’s minimum share, the surviving spouse will, as a practical matter, receive all of the probate estate in the significant majority of instances. Professor Lawrence W. Waggoner, who served as reporter for the RUPC, explains the reason for this particular distribution:

Why not, then, officially grant the surviving spouse the entire intestate estate when the decedent is childless but leaves a surviving parent? The rationale is that a childless decedent with a surviving spouse and at least one surviving parent and with an estate significantly in excess of $243,000 who dies intestate is likely to have died fairly young and without expecting to have such a large estate. (A decedent who actually accumulated an estate of this size is likely to be older and to have a will. See Fellows, Simon & Rau, supra note 20, at 336-39, reporting that, among those surveyed, 69 percent with estates of $200,000 and over had wills (the $200,000 figure is adjusted for inflation between the time of the publication of this article and today); and further reporting that 61 percent of those 46-54 had wills, 63 percent age 55-64 had wills, and 85 percent of those 65 and over had wills, but only 12 percent of those between the ages of 17 and 34 had wills.)

This particular issue illustrates the type of compromise necessary to draft reasonable and acceptable solutions to complex problems. As discussed above, empirical studies show that when there is a surviving spouse and parent(s) but no descendants, the surviving spouse is generally the preferred taker. If, however, the parents have need or the estate is large (e.g., the result of a tort recovery) then other objects of one’s affections often come into play. In this context, it is important to keep in mind that jointly owned property with rights of survivorship, real or personal, does not pass by intestacy. In addition, it is fairly rare for life insurance proceeds or annuities to pass

54. RUPC § 2-102(2).
as part of an intestate estate. Therefore, the number of instances in which the parent(s) will receive a portion of the estate under this provision will be rare.

Again, the best solution to every situation is a will which expressly carries out the individual’s wishes. However, in the absence of a will, the RUPC strikes a balance between competing interests which should prove acceptable to the substantial majority of our citizens.

The advisory committee supports the adoption of Section 2-102 of the RUPC.

C. Section 2-103 Share of Heirs Other Than Surviving Spouse

The RUPC provides for the distribution of the estate which does not pass to the surviving spouse as follows:

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.\(^5\)

In comparison to the provision of existing West Virginia law,\(^5\) the RUPC is simplified. In order, the estate not received by the

surviving spouse passes to (1) descendants;\(^{58}\) (2) parents, or the surviving parent; (3) descendants of parents; (4) grandparents or descendants of grandparents. In contrast with existing West Virginia law, the RUPC does not provide for a distribution to relatives more remote than descendants of grandparents. The elimination of the more remote relatives as potential takers is the same pattern provided in the original UPC.

A variety of reasons supports the policy decision to eliminate the more remote relatives tracing through great grandparents. As the data presented above reflects, as the size of the estate increases the frequency of intestacy decreases. Second, the mobility of families in today's society makes tracing remote relatives difficult and for all practical purposes such remote relatives are strangers to the decedent. Finally, the cost of tracing, or attempting to trace, the remote relatives is likely to deplete the decedent's estate.

The members of the Advisory Committee found these arguments persuasive and support the adoption of this provision.

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

This section provides a time of survival provision similar in effect to what many attorneys include in wills for their clients. The survival period provided by the RUPC is 120 hours (i.e. 5 days). More specifically this section provides:

Any 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 the time of death of the decedent or of the individual who would otherwise be an heir, or the times of death of both, cannot be determined, and it is not established that the 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

\(^{58}\) RUPC § 2-103 comment:
The word "descendants" replaces the word "issue" in this section and throughout the revisions of Article II. The term issue is a term of art having a biological connotation. Now that inheritance rights, in certain cases, are extended to adopted children, the term descendants is a more appropriate term.
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.\(^9\)

Estate planners frequently include time of survival clauses in wills to prevent multiple administration of the decedent’s assets in the event of a common accident situation in which several members of the same family are injured and die within a few days of each other. The 120 hour period attempts to provide a reasonable survival period without unreasonably delaying the administration of the estate. Additionally, this period of time does not disqualify a spouse’s intestate share for the federal estate-tax marital deduction under the provision of Internal Revenue Code § 2056(b)(3), which allows for a time of survival provision of up to six months.\(^6\)

The time of survival provision has a broader application than the Uniform Simultaneous Death Act,\(^6\) which provides a similar solution only if there is a simultaneous death or no proof that the parties died otherwise than simultaneously. In fact, the comment to a companion provision in Part 7 of Article II, which deals with Rules of Construction Applicable to Donative Dispositions in Wills and Other Governing Instruments, states: “The Joint Editorial Board of the Uniform Probate and the Drafting Committee to Revise Article II recommend that the freestanding Uniform Simultaneous Death Act be revised in accordance with the revisions of this section.”\(^6\)

Finally it should be noted “[t]he last sentence prevents the survivorship requirement from defeating inheritance by the last eligible relative of the intestate who survives him or her for any period.”\(^6\)

The advisory committee supports adoption of this provision.

**E. Section 2-105 No Taker**

As one would expect, if there are no heirs to take under section 2-103, the property “escheats” to the State. The applicable provision is section 2-105 which provides: “If there is no taker under the pro-

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59. *Id.* § 2-104.
62. RUPC § 2-702 comment (section 2-702 parallels section 2-104).
63. *Id.* § 2-104 comment.
vision of this Article, the intestate estate passes to the [state]." Designating the state as the ultimate or default taker is consistent with existing statutory law in West Virginia.

The Advisory Committee supports adoption of this provision.

F. Section 2-106 Representation

One of the refinements of the RUPC is in the provision providing for "representation." For many lawyers this term brings to mind the terms "per stirpes" and "per capita." Under the "per stirpes" system, the initial division of the estate is made at the generation nearest to the decedent regardless of whether there are any members of that generation who are alive. Each living member of that generation (the one closest to the decedent) receives a share and the living descendant(s) of each deceased member are given the deceased members' share. The primary share of the deceased members' share is divided and re-divided at each succeeding generation of descendants in the same way until all the primary shares are distributed among living persons. Under a "per capita" system, the initial division of shares is made at the generational level closest to the intestate where one or more persons are alive. All members at this level receive an equal share, but there is no division to the "representatives" of the deceased members of that generation.

The original UPC adopted what is described as "per capita with representation," or more accurately, "per capita with per stirpes representation." Shortly after the UPC was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, Professor Lawrence W. Waggoner proposed an alternative to the UPC's per capita system. Professor Waggoner

64. Id. § 2-105.

65. W. Va. Code § 37-2-1 (1985) ("Whenever any person shall die intestate and without any heir or next of kin, owning real estate or personal property within this State, the title of such deceased person therein shall escheat to the State.") See also id. § 42-2-2 (1982).


67. See sources cited, supra note 66.

68. Waggoner, supra note 66, at 626.
advocated a system of "per capita at each generation." While there was support for the concept of per capita at each generation, it was not until the current revision of the Uniform Probate Code that it was adopted in section 2-106.69 It provides as follows:

(a) 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 that contains one or more descendants who survive the decedent and (ii) then-deceased descendants in the same generation who left descendants then living, if any. Each then-living descendant in that nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the then-living descendants of the then-deceased descendants as if the descendants already allocated a share and their descendants had predeceased the decedent.

(b) 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 to the deceased parents or either of them or the deceased grandparents or either of them that contains one or more descendants who survive the decedent and (ii) then-deceased descendants in the same generation who left descendants then living, if any. Each then-living descendant in that nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the then-living descendants of the then-deceased descendants as if the descendants already allocated a share and their descendants had predeceased the decedent.70

Since examples are particularly helpful in explaining and comparing these alternative methods, the illustrations contained in the comment are set forth in the footnote.71

69. RUPC § 2-106. See also UPC § 2-103 comment:

The Joint Editorial Board gave careful consideration to a change in the Code's system for distribution among issue as recommended in Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants," 66 NW. U.L. REV. 626 (1971). Though favored as a recommended change in the Code by a majority of the Board, others opposed on the ground that the original text had been enacted already in several states, and that a change in this basic section of the Code would weaken the case for uniformity of probate law in all states. Nonetheless, since some states as of 1975 had adopted versions of the Code containing deviations from the original text of this and related sections, it was the consensus that Prof. Waggoner's recommendation and the statutory changes that would be necessary to implement it, should be described in Code commentary.

70. RUPC § 2-106.

71. Id. comment.
The West Virginia statute essentially provides for a "per capita with representation" system:

To illustrate the differences among the three systems, consider a family, in which G is the intestate. G has 3 children (A, B, and C). Child A has 3 children (U, V, and W). Child B has 1 child (X). Child C has 2 children (Y and Z). Consider four variations.

Variation 1: All three children survive G.

\[
\begin{array}{c}
| & | \\
G & \ \\
| & | \\
A & B & C \\
| & /- - - - - - \\
U & V & W & X & Y & Z
\end{array}
\]

Solution: All three systems reach the same result: A, B, and C take 1/3 each.

Variation 2: One child, A, predeceases G; the other two survive G.

\[
\begin{array}{c}
| & | \\
G & \ \\
| & | \\
[A] & B & C \\
| & /- - - - - - \\
U & V & W & X & Y & Z
\end{array}
\]

Solution: Again, all three systems reach the same result: B and C take 1/3 each; U, V, and W take 1/9 each.

Variation 3: All three children predecease G.

\[
\begin{array}{c}
| & | \\
G & \ \\
| & | \\
| & /- - - - - - \\
U & V & W & X & Y & Z
\end{array}
\]

Solution: The original UPC and the revised UPC systems reach the same result: U, V, W, X, Y, and Z take 1/6 each.

The per stirpes system gives a different result: U, V, and W take 1/9 each; X takes 1/3; and Y and Z take 1/6 each.
Whenever the children of the intestate, or the brothers and sisters of the intestate, or the uncles and aunts of the intestate, or the brothers and sisters of any of the intestate’s lineal ancestors of the same degree, come into partition, they shall take per capita, or by persons; and where, a part of them being dead and a part living, the descendants of those dead have right to partition, such descendants shall take per stirpes, or by stocks, that is to say, the shares of their deceased ancestors; but whenever the persons entitled to partition, other than those whose shares are definitely fixed by the statute of descents, are all in the same degree of kindred to the intestate, they shall take per capita or by persons.72

In Overton v. Heckathorn,73 the court held that in applying this provision the distribution began with the nearest class having one or more living representatives with the descendants of the deceased members of the class taking their ancestor’s share.74 Application of the West Virginia method of distribution to the examples contained in the comment75 produces the same result as reached under the original UPC’s system. Therefore, adoption of the RUPC, which is sup-

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Variation 4: Two of the three children, A and B, predecease G; C survives G.

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/ - - - - - - - - - - 
U  V  W
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/ - - - - - - - - - - 
X  Y  Z
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Solution: In this instance, the revised UPC system (per capita at each generation) departs from the original UPC system. Under the revised UPC system, C takes 1/3 and the other two 1/3 shares are combined into a single share (amounting to 2/3 of the estate) and distributed as if C, Y and Z had predeceased G; the result is that U, V, W, and X take 1/6 each.

Although the original UPC rejected the per-stirpes system, the result reached under the original UPC was aligned with the per-stirpes system in this instance: C would have taken 1/3, X would have taken 1/3, and U, V, and W would have taken 1/9 each.

The revised UPC system furthers the purpose of the original UPC. The original UPC system was premised on a desire to provide equality among those equally related. The original UPC system failed to achieve that objective in this instance. The revised system (per-capita-at-each-generation) remedies that defect in the original system. Comment to Section 2-106.

73. 81 W. Va. 640, 95 S.E. 82 (1918).
74. Id. at 640, 95 S.E. at 82 (syllabus point 3).
75. See supra note 69.
ported by empirical data,\textsuperscript{76} will result in a modification of existing West Virginia law.

The Advisory Committee supports the adoption of the provision of the RUPC.

\textbf{G. Section 2-107 Kindred of Half Blood}

The RUPC, which provides that “\textit{[r]elatives of the half blood inherit the same share they would inherit if they were of the whole blood,”}\textsuperscript{77} remains unchanged from the provision in the original UPC. The RUPC provision is consistent with the modern view of “\textit{family}” that places less emphasis on “\textit{blood}” relationships and more emphasis on the actual family situation.\textsuperscript{78}

Adoption of this section of the RUPC would represent a change in existing West Virginia statutory law.\textsuperscript{79}

The Advisory Committee supports the adoption of the RUPC provision.

\textbf{H. Section 2-108 Afterborn Heirs}

The RUPC definition of afterborn heir, which provides that “\textit{[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth,”}\textsuperscript{80} is similar in purpose to existing West Virginia law.\textsuperscript{81} The use of this term gestation in the RUPC, as compared with “conceived” in the original UPC, and “in the womb of its mother” used in the West Virginia statute is designed to accommodate advances in medical science which

\textsuperscript{76} See generally Young, Meaning of “Issue” and “Descendant,” 13 ACPC Probate Notes 225 (1988) (cited in RUPC § 2-106 comment).

\textsuperscript{77} RUPC § 2-107.


\textsuperscript{79} W. Va. Code § 42-1-2 (1982 & Supp. 1990) (“Collaterals of the half blood shall inherit only half so much as those of the whole blood. But if all the collaterals be of the half blood, the ascending kindred, if any, shall have double portions.”).

\textsuperscript{80} RUPC § 2-108.

\textsuperscript{81} W. Va. Code § 42-1-8 (1982) (“Any child in the womb of its mother at, and which may be born after, the death of the intestate, shall be capable of taking by inheritance in the same manner as if such child were in being at the time of such death.”).
now make possible frozen embryo and in vitro fertilization. The time of survival period in this section, 120 hours, is consistent with other provisions of the RUPC.\textsuperscript{82} Finally, the selection of the word "gestation" demonstrates an intent on the part of the drafters to remain as consistent as possible with the common law's contemplated "nine month" period of time.

The Advisory Committee supports the adoption of this provision.

\textit{I. Section 2-109 Advancements}

The effect of the RUPC provision on advancement is to "revise" the presumption currently existing under West Virginia law which is consistent with the common law. The West Virginia statutes\textsuperscript{83} and the cases decided thereunder, combine to provide a well-developed concept of advancements. As defined by our court, an advancement is an irrevocable gift made to one standing in place of a prospective heir or distributee with the intention on the part of the donor that such gift shall represent a part or whole of the share of his estate to which the donee would be entitled upon the death of the donor intestate.\textsuperscript{84} The case law recognizes a rebuttable presumption that the gift is intended as an advancement.\textsuperscript{85} This presumption may be rebutted by competent proof of facts or circumstances sufficient to establish a different intent on the part of the donor.\textsuperscript{86} The extrinsic evidence to rebut the presumption may be either written or parole.\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{82} See supra note 59.
\item \textsuperscript{83} W. VA. CODE § 42-4-1 (1982): Where any descendant or collateral relative of a person dying intestate as to his estate, or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and such descendant or collateral relative, or any descendant of either, shall come into the partition and distribution of the estate with the other parencers and distributees, such advancement shall be brought into hotchpot with the whole estate, real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, real and personal.
\item \textsuperscript{85} Gaylord, 122 W. Va. 205, 8 S.E.2d 189; In re Boggs Estate, 135 W. Va. 288, 63 S.E.2d 497 (1950).
\item \textsuperscript{86} See Boggs, 135 W. Va. 288, 63 S.E.2d 497.
\item \textsuperscript{87} Bailey v. Banther, 314 S.E.2d 176 (W. Va. 1983).
\end{itemize}
Section 2-109(a) both "reverses" the presumption and deals with the method of proof. It provides:

(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 the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or if the decedent's contemporaneous writing or the heir's written acknowledgement otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.88

As is the case with the present statute in West Virginia,89 the RUPC applies to advances to decedent's collateral relatives as well as descendants. In addition, the comment to this section makes it explicitly clear that "[t]his section applies to advances to the decedent's spouse."90

The application to the spouse becomes significant when combined with the statement that "[t]o be an advancement, the gift need not be an outright gift; it can be in the form of a will substitute, such as designating the donee as the beneficiary of the intestate's life insurance policy or the beneficiary of the remainder interest in a revocable intervivos trust."91 Therefore, under the RUPC, the concept of advancement is consistent with the modern estate planner's use of will substitutes.

As to the valuation of an advancement, subsection (b) provides that, "[f]or 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."92

The time of valuation under the RUPC represents a slight modification of West Virginia law. In West Virginia, absent a contrary

88. RUPC § 2-109(a).
89. The West Virginia statute was amended in 1931 to make it applicable to "collateral relatives" as well as "descendants." This amendment overturned the court's decision in Waldron v. Taylor, 52 W. Va. 284, 45 S.E. 336 (1902), in which the court held the statute did not apply to a decedent's brother. Id. at 288-93, 95 S.E. at 337-40.
90. RUPC § 2-109 comment.
91. Id.
92. Id. § 2-109(b).
intent expressed by the donor, the value of the advancement is ascertained as of the time the advancement is made, if fully effective at that time, and if not, then when use or possession vests in the donee.\textsuperscript{93}

Subsection (c), pertaining to the death of the recipient of the property before the donor, also represents a change in West Virginia law. That subsection provides: "(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."\textsuperscript{94}

The general rule in West Virginia is that an advancement to a child which was received as full satisfaction of the child’s share is binding upon the child, his children and their grantees who are all barred from further participation in the estate.\textsuperscript{95} The rationale for the RUPC position in holding the advancement to a child not binding on the child’s descendants is that "there is no guarantee that the recipient’s descendants received the advanced property or its value from the recipient’s estate."\textsuperscript{96}

Section 2-109 does not specify the method of taking an advancement into account. Therefore, the existing West Virginia approach of bringing the advancement into the "hotchpot" continues. In West Virginia, the donee who brings advanced property into the hotchpot retains title to the property, but is charged with its value.\textsuperscript{97} If a donee comes into the hotchpot and the value of the advanced property exceeds the value of the computed share, the donee is not liable for any excess, but rather is simply excluded from any distribution from the estate.\textsuperscript{98}

The Advisory Committee endorses the adoption of Section 2-109.

\textsuperscript{93} 122 W. Va. 205, 8 S.E.2d 189.
\textsuperscript{94} RUPC § 2-109(c).
\textsuperscript{95} Nel v. Flynn Lumber Co., 82 W. Va. 24, 95 S.E. 523 (1918); Coffman v. Coffman, 41 W. Va. 8, 23 S.E. 523 (1895).
\textsuperscript{96} RUPC § 2-109 comment.
\textsuperscript{97} Roberts v. Coleman, 37 W. Va. 143, 16 S.E. 482 (1892).
\textsuperscript{98} Nel, 82 W. Va. 24, 95 S.E. 523.
J. Section 2-110 Debts to Decedent

This RUPC section, which is essentially the same as the original UPC, provides that "[a] debt owed to the 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."99

The case in West Virginia which most closely resembles the issue of a debt owed the decedent by an heir is In re Bogg's Estate.100 In that case, one of the decedent's sons gave the decedent a note for $2000. The principal was repaid ten years later, but the court found that the son owed the father net interest of $1,233.84. The court noted that a debt is not the same as an advancement; an indebtedness must be repaid in any event while an advancement embraces no obligation to repay. That is, while an heir who has received advancements greater than his intestate share is under no obligation to refund any part of that excess to the estate, an heir who owed the decedent a debt must repay the estate the amount such debt exceeds his intestate share. Apparently there is no West Virginia law directly pertaining to the issue of whether such a debt is taken into account in computing the intestate share of the debtor's descendants. However, since the language concerning the repayment of the debt in Boggs is so definite, it could be argued that the West Virginia Court would require a set off in the share given to the descendants of the indebted heir. Therefore, while the set off provided in the RUPC against the debtor is consistent with the Boggs case, it is assumed that, to the extent this provision restricts the debt to the debtor, it is inconsistent with existing West Virginia law.

The Advisory Committee opposed the adoption of this provision on the basis that once a debt is established, as distinguished from a gift or advancement, it should be viewed as an asset of the decedent's estate for all purposes. If the decedent desired to forgive the debt as against the debtor's descendants, the decedent could take appropriate action to achieve such a result.

99. RUPC § 2-110.
100. 135 W. Va. 288, 63 S.E.2d 497 (1951).
K. Section 2-111 Alienage

Section 2-111 provides that "[n]o 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."101

The purpose of this section is succinctly explained in the comment:

This section eliminates the ancient rule than an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.102

Although the wording of this section is somewhat different, the spirit and purpose of it is the same as found in West Virginia statutes which are designed to remove the barriers from alien ownership or transfer of land.103

The Advisory Committee supports the adoption of this provision.

L. Section 2-112 Dower and Curtesy Abolished

This section succinctly states that "[t]he estates of dower and curtesy are abolished."104 The comment to this section just as concisely reports: "The provision of this Code replaces the common law concepts of dower and curtesy and their statutory counterparts. Those estates provided both a share in intestacy and a protection against disinheriance."105 Except for a renumbering of the section (2-113 to 2-112), the RUPC is exactly the same as the UPC.

An extended discussion of the concepts of curtesy and dower is beyond the scope of this article.106 For present purposes, suffice it

101. RUPC § 2-111.
102. Id. comment.
103. W. VA. CODE § 36-1-21 (1985); Id. § 42-1-4 (1982).
104. RUPC § 2-112.
105. Id. comment.
106. 1 AMERICAN LAW OF PROPERTY § 5.1 (1952) introduced the discussion of dower as follows: Dower at common law was the estate which a widow enjoyed for her life, in one-third of the lands and tenements of which her husband had been seised solely and beneficially at
to say that dower took its shape as a part of the evolution of the property law in feudal England to provide a measure of economic security and dignity for the surviving widows of the landed gentry. Curtesy reflected the preeminence of the husband in common law real property matters. For a little over one half century, a statutory form of curtesy existed in West Virginia. It was not until the general revision of the Code in 1931 that curtesy was entirely abolished in West Virginia.107 Upon abolishing curtesy, the husband was given “dower” rights equal to the wife.108

West Virginia’s statutory dower is essentially common law dower expanded to include dower in equitably owned property.109 In ad-

any time during the marriage, if any, might by a possibility have succeeded. Her interest was ordinarily independent of rights which she might have by testamentary or intestate succession; it arose not by contract but by operation of law. During the subsistence of the marriage the wife had a protected expectancy known as “inchoate” dower, which arose upon marriage and could not be defeated except for certain defined and limited causes and in certain definite ways. Upon the death of the husband, her interest became “consummate” but was not regarded as an estate until actually set off and assigned. After assignment the estate arose by operation of law and was, in general, subject to the usual incidents of life estates; it was not subject to the claims of the husband’s creditors. The term “dower” has frequently been used indiscriminately to describe the widow’s inchoate and consummated interests, as well as the estate of dower after assignment.

In a similar manner, it began its discussion of curtesy as follows:

In England at common a husband acquired upon marriage a right to the rents and profits, together with the use and enjoyment, of all the realty of which his wife was then seised and of which she thereafter became seised during coverture. His interest, as tenant by the marital right, was a life interest, measured by their joint lives, which lasted until the dissolution of the marriage or until the birth of issue, but it entitled him to no rights in her lands after her death. Not until the birth of issue did the husband acquire rights which he might assert in his wife’s lands if he survived her. If issue of the marriage, capable of inheriting her property, were born alive, he then acquired in her inheritable estates of which she had actual seisin an interest known as “curtesy initiate,” a present estate measured by his life alone. If he survived her, that interest became “consummate,” and he was then said to be “tenant by the curtesy” during his lifetime.

*Id.*


A surviving spouse shall be endowed of one third of all the real estate whereof the deceased spouse, or any other to his or her use, or in trust for him or her, was, at any time during the coverture, seised of or entitled to an estate of inheritance, either in possession, reversions, remainders, or otherwise, unless the right of such surviving spouse to such dower shall have been lawfully barred or relinquished.

dition to providing a statutory definition, the West Virginia statute provides for the sale of lands to satisfy an encumbrance; 110 explains how lands may be sold free of inchoate dower; 111 establishes proceedings for the release of dower in real estate which the owner has contracted to sell; 112 codifies the interrelationship between jointure and dower; 113 establishes the rights of the surviving spouse after decedent’s death, but before dower is assigned; 114 codifies the right of the surviving spouse with minor children to the mansion house; 115 explains how dower is assigned and the remedies for recovery of dower; 116 provides for a cash award in lieu of dower; 117 and explains when dower is barred by misconduct. 118 In addition to barring dower for misconduct, the code provides that dower is barred by an annulment 119 and by a divorce. 120

As long as real property was the principal asset of the estate, it is arguable that dower rights afforded adequate financial protection.

111. Id. § 43-1-5 (1982).
112. Id. § 43-1-6 (1982).
113. Id. §§ 43-1-7 to -9 (1982). The West Virginia Supreme Court of Appeals in Jacobs v. Jacobs, 100 W. Va. 585, 131 S.E. 449 (1926), provides a helpful discussion of “jointure.” After tracing its common law origin, the court explains:

Thus “jointure” was evolved, and has come down to us with changes through the act of the Assembly of Virginia of 1785, Chap. 65, and the Codes of 1819 and 1860. Sections 4, 5 and 6 of Chap. 65 are the same as Sections 4, 5 and 6 of Chap. 110, Code of Virginia of 1860. If the estate, real or personal, devised to a widow is intended to be in lieu of her dower she has a legal jointure, and is required to elect. She must either abandon her dower or the provision made for her in the will. [Shuman v. Shuman], 9 W. Va. 50, 54. “The doctrine of election is founded on the same reasons and governed by the same rules when applied to a widow claiming dower, as when applied in any other case.” [Dixon v. McCue], 14 Grat. 540. Pomeroy’s Equity Jur. (4th ed.) Secs. 464-5, says that the true basis of the doctrine of election is founded on the principle that he who seeks equity must do equity.

115. Id. § 43-1-11 (1982).
116. Id. § 43-1-12 to -14 (1982).
117. Id. § 43-1-20 (1982).
118. Id. § 43-1-19 (1982).
119. Id. § 48-2-19 (1986).
120. Id. § 48-2-20 (1986):

When a divorce shall be granted, all rights of either husband or wife to dower shall be thereby barred; but the court when granting any divorce shall, in every proper case, compel the guilty party to compensate the innocent party for any inchoate right of dower, in any then existing property, that may be barred by the divorce; and to secure the payment of such compensation the court may make such compensation a lien upon the real estate of the party liable therefor.
and security for a surviving spouse. Certainly this was true in feudal times when the widow moved into the dower house or cottage located next to the manor house on the larger feudal estate. However, in a society where personal property, life insurance and annuity plans constitute the principal form of a decedent’s wealth, dower represents no more than an empty promise. It cannot be seriously contended that the RUPC is not a significant improvement of estate asset distribution over a system that relies upon the concept of common law dower to define a surviving spouse’s share.

“Not only does dower fail to adequately provide for a surviving spouse in today’s economy, it diminishes the alienability of land and causes nightmares for title examiners.” 121 Another author explained: “Common-Law dower is a serious obstacle for free commerce in land and a grave threat to security of title.” 122 Dower’s mischief to land titles lies in the fact it is a nonrecordable right which arises by the operation of law upon the happening of certain events. The omission of the nonowning spouses’s signature may be the result of an intentional deception or an “honest” mistake.

As the legislature attempted to address the deficiencies of dower as an adequate protection for a surviving spouse, it became customary to abolish the common law dower concept because of its adverse effect upon land titles. In fact, dower in a form which resembles its common law ancestor does not exist in the significant majority of states. 123

As the abolition of dower was discussed within the advisory committee, several members of the committee raised a new concern. While accepting the above reasons as valid for abolishing dower, the question was raised whether the abolition of dower might make it possible for a title holder spouse, anticipating a divorce, to more easily conceal his or her assets from the nontitle holding spouse in hopes of


123. The following states still recognize either common law or statutory dower: Arkansas, Kansas, Kentucky, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Vermont, Virginia and West Virginia; also the District of Columbia.
preventing an equitable distribution of this asset upon divorce. The concern reflects the fact that currently a married title holding spouse needs the signature of the nontitle holding spouse (i.e. release of dower) to convey clear title. However, the existence of inchoate dower does not prevent such a scoundrel spouse, in many situations, from deceiving the innocent purchaser to the detriment of the innocent purchaser without a corresponding benefit to the surviving spouse.

The issue raised is legitimate and the concern is real. It is submitted, however, that the solution is not to perpetuate a concept that has outlived its usefulness in hopes that it may make a small contribution to the solution of an unrelated but very real problem. The issue of concealment of assets in divorce proceedings should be addressed directly. If the current law requiring disclosure of assets\textsuperscript{124} is deficient, it should be amended.\textsuperscript{125} If concealed assets are discovered, the courts equitable powers are clearly sufficient to tailor an appropriate remedy.\textsuperscript{126}

It should not be necessary to unduly complicate the attempt to achieve fair, equitable and reasonable distribution of one's assets at death in order to facilitate a fair distribution of assets if a divorce occurs. The objects of both are compatible.

\textbf{M. Section 2-113 Individuals Related to Decedent Through Two Lines}

The countervailing provision to section 2-107, Kindred of Half Blood, is section 2-113 which prevents "double inheritance." The

\begin{itemize}
\item \textsuperscript{125} At the time that this article is going to press, the West Virginia Law Institute Council is considering a compromise proposal which may satisfy the competing demands in this area. Under this proposal, a new statute to be adopted with the RUPC would require a married individual to notify his or her spouse of the conveyance of any property to which dower would have attached before the adoption of the RUPC. For the purposes of this statute, a Deed of Trust or security arrangement is considered a conveyance. This requirement would be met by the appearance of the spouse's signature on the deed or by similarly competent evidence. If the conveying party fails to notify his spouse of the conveyance, then in the event of a divorce the value of the property so conveyed would be considered marital property for the purposes of equitable distribution, notwithstanding the fact that the value received for the property may already have been included in the marital property. Thus, the conveying party has a strong incentive to notify his or her spouse of such transfers, thereby protecting spouses from efforts to "shed assets" in contemplation of a divorce. Not only would such a statute protect spouses from pre-divorce fraud, it also retains the advantages gained from abolishing dower since it would specifically provide that the statute is not to be construed to constitute a bar to any underlying property which may have been purchased by a bona fide purchaser.
\item \textsuperscript{126} Patterson v. Patterson, 167 W. Va. 1, 277 S.E.2d 709 (1981).
\end{itemize}
section provides: "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." 127

The comment to the section explains this section would prevent a double inheritance in the following type of case. 128 A deceased person's brother or sister marries the spouse of the decedent and adopts a child of the former marriage. In the event the adopting parent dies, this provision would prevent the child from taking as both the natural and adopted grandchild of its grandparents.

While there is apparently no law in West Virginia addressing this specific issue, the Advisory Committee supports the adoption of this section.

N. Section 2-114 Meaning of Child and Related Terms

This provision is discussed in a companion article beginning on page 197 of this issue of the law review.


In addition to the provisions of Part 1 and 2 of Article II of the RUPC discussed herein and Part 3, discussed in a companion article beginning on page 197 of this issue, Article II contains several additional parts not currently under review by the West Virginia Law Institute.

One of the omitted topics, Part 4, provides for exempt property and allowances. In West Virginia, a homestead exemption and an exemption of a limited amount of personal property is provided by a State Constitutional provision 129 which is implemented by sta-

127. RUPC § 2-113.
128. See id. comment.
129. W. VA. CONST. art. VI, § 48:
Any husband or parent, residing in this State, or the infant children of deceased parents, may hold a homestead of the value of five thousand dollars, and personal property to the value of one thousand dollars, exempt from forced sale, subject to such regulations as shall be prescribed by law: Provided, that such homestead exemption shall in no wise affect debts or liabilities existing at the time of the adoption of this Constitution and the increases in such homestead exemption provided by this amendment shall in no wise affect debt or liabilities existing at the time of the ratification of such amendment: Provided, however, that no property shall be exempt from sale for taxes due thereon, or for the payment of purchase money due upon said property, or for debts contracted for the erection of improvements thereon.
tutes. The wording of West Virginia's constitutional provisions impacts the law in West Virginia to the extent that the advisory committee made a policy decision not to consider the provisions of Part 4 as a part of its current effort to achieve legislation reform.

Since the West Virginia Law Institute's project focuses on the revision of intestate succession and elective share law as issues of high priority for legislative attention, some of the companion provisions on other types of donative transactions contained in Article 2 have been omitted from the current proposal.131

III. REVISED UNIFORM PROBATE CODE, PART 2: ELECTIVE SHARE OF SURVIVING SPOUSE132

A. Introduction

For centuries people have wrestled with the problem of spousal disinheritance.133 For every determined effort to devise an equitable and foolproof mechanism to prevent disinheritance, there have been equally determined efforts to disinherit. Separate property jurisdictions like West Virginia typically prevent spousal disinheritance by a statutory forced share which "guarantees" the surviving spouse a share (usually one-third) of the decedent's probate estate.135

131. Part 5, Wills, Wills Contracts and Custody and Deposit of Wills; Part 6, Rules of Construction Applicable Only to Wills; Part 7, Rules of Construction Applicable to Donative Disposition in Wills and Other Governing Instruments; Part 8, General Provision Concerning Probate and Non-probate Transfers; and Part 9, Statutory Rule Against Perpetuities; Time Limit on Options in Gross, Etc.
132. In this discussion of the RUPC elective share provisions, the author relied throughout on the comments to the Tentative Draft of the RUPC.
133. See infra text accompanying notes 145-59.
134. It is important to note that forced share law is a consequence of the concept of separate ownership of marital property. In the community-property states (community of acquests), each spouse has an immediate one-half interest in the fruits of the marriage in recognition of the collaborative nature of marriage, and thus a forced share law is unnecessary (except that California and Idaho have addressed the problem of migratory spouses through the application of a statutory share to quasi-community property — property acquired elsewhere which would have been community property if it had been earned in a community-property state). Langbein & Waggoner, Redesigning the Spouse's Forced Share, 22 Real Prop., Prob. & Tr. J. 303 (1987).
135. Id. at 304.
Because these statutes base the surviving spouse’s share on the size of the probate estate, however, they invite evasion: the testator may simply deplete the probate estate through the use of various “will substitutes.”136 Moreover, these statutory forced share schemes fail to adequately accomplish the purposes for which they were designed: support for the surviving spouse and recognition of the contribution which the surviving spouse made to the decedent’s estate.

There are various approaches to prevent so-called “fraud on the widow’s share,”137 in which the decedent depletes the probate estate through inter vivos transfers. Many states, including West Virginia, retain the traditional forced share statute138 and use a case-by-case judicial inquiry into the testator’s use of various will substitutes: under this approach property transferred out of the estate is considered part of the probate estate if the conveyance is “illusory,”139 or if the decedent “intended to defraud”140 the surviving spouse of his marital right in the estate, or if the decedent lacked “present donative intent”141 with respect to the transfer.142

A more predictable result is achieved by a forced share statute which mechanically takes into account will substitutes. Professors Langbein and Waggoner proposed a statutory system of “incremental vesting” of the spouse’s share of an augmented estate,143 which has now been incorporated into the RUPC. This system increases over time the share the surviving spouse is entitled to, up to a total of half of the augmented estate. The augmented estate concept used

136. Will substitutes are devices used to pass property at death outside of the probate process. Many of them enable the testator to retain a life interest in the property while assuring its exclusion from the probate estate. The will substitutes most frequently employed include life insurance policies, employee benefit plans, joint and survivor annuities, joint bank accounts, joint tenancy, P.O.D. accounts, Totten trusts and revocable inter vivos trusts. See, e.g., Comment, Protection of the Base for the Surviving Spouse’s Election: The Search for an Alternative, 7 CAP. U.L. REV. 423 (1978).
137. See generally W. MacDonald, Fraud on the Widow’s Share (1960).
142. See Note, Preventing Spousal Disinheritance: An Equitable Solution, 92 W. VA. L. REV. 441 (1990) (discussing judicial solutions to the problem of “fraud on the widow’s share”).
143. Langbein & Waggoner, supra note 133, at 314-17.
in this system is derived from that used in the Uniform Probate Code. The surviving spouse’s share is calculated from a combined estate which is augmented to include “recapturables”144 such as will substitutes, thereby preventing the use of these mechanisms to reduce the surviving spouse’s share of the estate. The major advantage of the RUPC over the UPC approach is that it better accomplishes the dual purposes of forced share statutes; (1) support, and (2) recognition of contribution by the surviving spouse to the decedent’s estate.\textsuperscript{145}

No part of the UPC was more controversial than the provisions concerning the elective share, and the same is likely to be true of the RUPC. First, forced share statutes in general encroach on a sensitive area: many people have heard anecdotes wherein a surviving spouse received substantially more than or substantially less than they “deserved” because of the operation of forced share statutes. The augmented estate concept received particular criticism because it was perceived to be complicated.\textsuperscript{146} While many states have simple forced share statutes which provide a flat one-third share of the probate estate, the augmented estate provisions of the RUPC detail which assets are included in calculating the surviving spouse’s share of the estate, and consequently it is much longer than typical forced share statutes.

Likewise, the incremental vesting concept is likely to attract some criticism because it establishes cut-off points which are necessarily arbitrary and because it necessitates a calculation which is not necessary under other forced share statutes. However, the elective share provisions of the RUPC provide such enormous benefits in terms of equity — providing more for the surviving spouse than most forced share statutes would where more is just, and less where less is appropriate\textsuperscript{147} — and predictability that the necessary complexity must be viewed in its proper scope.

\textsuperscript{144}See infra notes 186-88 and accompanying text.
\textsuperscript{145}Langbein \& Waggoner, supra note 131, at 306-10.
\textsuperscript{147}Revised Uniform Probate Code, at 45 (Draft 1990) (Article II, Part 2, general comment).
B. History

The protection of a decedent’s wife from disinheri-tance began as early as the Code of Hammurabi, and can be traced through Roman, Germanic, Scandinavian and Saxon law. At common law, the surviving spouse was not an heir. Instead, widows were protected by the device of dower which was a life estate in one-third of all lands in which her deceased husband was seized of an estate of inheritance at any time during the marriage. A widower, on the other hand, was protected by curtesy if a live child was born of the marriage. Curtesy consisted of a life estate in all of the wife’s inheritable land. Neither dower nor curtesy could be defeated by will or inter vivos conveyance without the cooperation of the other spouse.

In an agrarian society in which the major form of wealth was land, dower worked well to provide economic security for the widow. As time passed, however, land became “more and more an article of commerce and less a symbol of status and power,” and the interference of dower with the alienability of land became less tolerable. Finally, in 1833 England enacted legislation that allowed a husband to defeat his wife’s dower by will or by inter vivos conveyance, leaving dower only in the event of intestacy.

The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent’s name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse’s name. A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term later-in-life marriage in which neither spouse contributed much, if anything, to the acquisition of the other’s wealth, except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.


151. Id. at 414.
152. Id.
153. Id. at 409-11, 424.
155. Id. at 987.
156. Id.
Common-law dower was part of the received common law of the original American colonies and most of the states. As time passed, the same problems that led to the end of dower in England prompted varied legislative responses in America. Often dower and curtesy were abolished in favor of forced share statutes. It is important to note, however, that significant vestiges of common-law dower remain in the probate codes of some states: the different treatment of real and personal property, the one-third share accorded the surviving spouse, the limitation of the interest in real property to a life estate, and indeed the very concept of a fixed share.

C. West Virginia Law

1. The Statutory Forced Share

Many states, including West Virginia, currently protect a spouse against disinheritance by providing the right to a statutorily fixed share of the decedent’s probate estate in lieu of the share provided in the will. There are two purposes which these forced share statutes are designed to achieve. The first is to assure support for the surviving spouse. The second is essentially restitutionary: it is a recognition that marriage is a partnership in which both spouses contribute to the accumulation of the family assets.

Neither of these purposes is well served, however, by a statutory scheme which is easily evaded by depleting the probate estate through nominal inter vivos transfers. Because most forced share statutes calculate the spouse’s share as a fraction of the probate estate, a testator may substantially reduce the amount that the surviving spouse can receive by utilizing various will substitutes such as life insurance policies, employee benefit plans, joint and survivor annuities, joint tenancies, joint bank accounts, Totten trusts, P.O.D. accounts, and revocable inter vivos trusts, in order to deplete the probate estate.

158. C. SCRIBNER, supra note 147, at 23-58.
159. Kurtz, supra note 145, at 988-999.
162. Comment, supra note 152, at 429.
Thus, by failing to take will substitutes into account in the calculation of the surviving spouse’s share, forced share statutes invite attempts at evasion through the use of these devices.

It should also be noted that failure to consider will substitutes in the computation of the forced share can cause problems of the opposite sort: it ignores the fact that spouses often make adequate provision for each other through the use of various will substitutes. An example derived from Professor Fratcher illustrates this point: suppose a man has a farm worth $100,000, a son by his first wife who has helped him work it for years, and a second wife whom he has designated as the beneficiary of a $200,000 life insurance policy. If the man leaves the farm by will to his son, under the typical forced share statute (such as West Virginia’s) the widow can keep all of the life insurance proceeds and also elect to take a forced share of one-third life estate in the farm, notwithstanding the testator’s clear intent and the son’s legitimate expectation.

West Virginia protects the surviving spouse from disinherintance through the use of a forced share statute which provides that if a spouse renounces the share provided in the will or if no provision is made in the will for the surviving spouse:

[S]uch surviving wife or husband shall have such share in the real and personal estate of the decedent as such surviving wife or husband would have taken if the decedent had died intestate leaving children; otherwise the surviving spouse shall have no more of the decedent’s estate than is given by the will.

A spouse who renounces a will, therefore, receives one-third of the decedent’s personalty, and a statutory dower interest in the realty,

163. Fratcher, supra note 148, at 1058.
164. Id.
166. Id. § 42-2-1 (1982):
When any person shall die intestate as to his personal estate or any part thereof, the surplus, after payment of funeral expenses, charges of administration and debts, shall pass and be distributed to and among the same persons, and in the same proportions, that real estate is directed to descend, except as follows:
(a) If the intestate was a married woman, and leave issue surviving, her husband shall be entitled to one third of such surplus, and if she leave no issue, he shall be entitled to the whole thereof;
(b) If the intestate leave a widow and issue by the same or a former marriage, the widow shall be entitled to one third of such surplus, and if he leave no such issue, she shall be entitled to the whole thereof.
which is a life estate in one-third of the lands of which the decedent was seized of an inheritable estate.\textsuperscript{167} The dower interest may be either assigned in kind,\textsuperscript{168} or in a lump sum payment.\textsuperscript{169}

2. Judicial Intervention

As noted above, a forced share statute such as West Virginia’s, which calculates the surviving spouse’s share only from the probate estate, is ineffective in protecting the spouse from disinheritance. Thus, the responsibility of balancing the testator’s right to control his property and the need to protect the surviving spouse from disinheritance through will substitutes has fallen on the courts. In \textit{Davis v. KB & T Co.},\textsuperscript{170} the West Virginia Supreme Court of Appeals addressed the validity of a revocable inter vivos trust which allegedly operated as a fraud upon the surviving spouse’s statutory marital rights. In \textit{Davis}, the decedent, Mr. Farley, established a revocable inter vivos trust shortly after his wife suffered a mental breakdown and he experienced several heart attacks.\textsuperscript{171} The trust instrument provided that the income from the trust was to be paid to Mr. Farley during his lifetime, and thereafter to his wife if she needed it, and upon her death the assets were to be distributed to his relatives as the couple had no children.\textsuperscript{172} Mr. Farley transferred most of his assets to the trust, about $172,000, leaving a probate estate valued at only $12,000.\textsuperscript{173} Mrs. Davis, on behalf of her incompetent sister, renounced the will and brought suit to have the trust invalidated.\textsuperscript{174} After reviewing the various tests mentioned above and noting the lack of a clear majority test, the court decided that the appropriate

\begin{itemize}
\item[\textsuperscript{167}] \textit{Id.} § 43-1-1 (1982) provides:
A surviving spouse shall be endowed of one third of all the real estate whereof the deceased spouse, or any other to his or her use, or in trust for him or her, was, at any time during the coverture, seised of or entitled to an estate of inheritance, either in possession, reversion, remainder, or otherwise, unless the right of such surviving spouse to such dower shall have been lawfully barred or relinquished.
\item[\textsuperscript{168}] \textit{Id.} § 43-1-12 (1982).
\item[\textsuperscript{169}] \textit{Id.} § 43-1-20 (1982).
\item[\textsuperscript{170}] 309 S.E.2d 45 (W. Va. 1983).
\item[\textsuperscript{171}] \textit{Id.} at 47.
\item[\textsuperscript{172}] \textit{Id.}
\item[\textsuperscript{173}] \textit{Id.}
\item[\textsuperscript{174}] \textit{Id.}
\end{itemize}
course was "to adopt a flexible standard which takes into account all of the circumstances and weighs the equities on each side." The court indicated that some circumstances which might be relevant in a given case include: "completeness of the transfer, motive of the transferor, participation by the transferee in alleged fraud on the surviving spouse, amount of time between the transfer and death, degree to which the surviving spouse is left without an interest in the decedent's property or other means of support." In holding the trust in Davis valid, the court considered the discretion given to the trustee in the trust, the decedent's purpose in creating the trust, Mrs. Farley's independent wealth, and Mr. Farley's role in the acquisition of his wife's estate.

The West Virginia Supreme Court of Appeals again addressed the validity of a revocable inter vivos trust in Johnson v. Farmers & Merchants Bank. Once more the court reviewed the bewildering array of tests used in other jurisdictions to decide whether an inter vivos trust is invalid as a fraud upon the marital rights of the surviving spouse and reiterated the test to be used in West Virginia. Fred Johnson and Dorothy Johnson married in 1963 and while there were no children of the marriage, Mr. Johnson had two adopted sons from a previous marriage who were in their early teens at the time of his marriage to Dorothy. Mr. Johnson had accumulated over $1,000,000 in assets comprised mainly of varying degrees of ownership of three closely-held corporations which he managed. In 1982, Mr. Johnson created a revocable trust containing most of his assets, appointing the Farmers and Merchants Bank as trustee, and himself as lifetime beneficiary. Upon Mr. Johnson's death, the trustee was to place $250,000 into a trust for the benefit of his...

175. Id. at 50.
176. Id. at 50 n.3 (quoting Whittington v. Whittington, 205 Md. 1, 12, 106 A.2d 72, 77 (1954)).
177. The court noted that the mere retention of a power of revocation, standing alone, is insufficient to render a trust illusory or testamentary in character. Id. at 51.
178. The court noted that Mr. Farley created the trust in order to provide for himself and his wife in the event that he became further incapacitated. Id.
179. Id.
181. Id. at 754.
182. Id.
183. Id. at 755.
widow for life, and the remainder in a trust for the benefit of his sons. The court noted that Mr. Johnson retained the right to manage the trust property without paying the bank any commission and reserved the stock placed in trust. In fact, the trustee stated to the court that it had no authority with regard to the three corporations noted above. In short, Mr. Johnson retained considerable control over the trust.

Upon his death, Johnson’s probate estate was valued at $158,524 while the trust assets were valued at $1,377,039. Mrs. Johnson renounced the will, under which she was entitled to receive personal property valued at $12,750 and jointly owned assets worth $7,250, and brought suit to have the inter vivos trust set aside as an illusory transfer in fraud upon her marital rights.

The court in Johnson used the test enunciated in Davis: “a flexible standard which takes into account all of the circumstances and weighs the equities on each side.” The court noted that Mrs. Johnson had a very modest estate of her own, and was completely unaware of the creation of the trust. More importantly, the court emphasized the substantial control that Mr. Johnson had retained in the property and concluded that the inter vivos transfer was illusory. Therefore, the court held that the property should have been included in his probate estate so that Mrs. Johnson could receive her fraction.

While most people would agree that the results in the Davis and Johnson cases were equitable, the “balancing the equities” approach

184. Id.
185. Id.
186. Id. at 760-61.
187. Id. at 755.
188. Id. at 756.
189. Id. at 759 (quoting Davis v. KB & T, 309 S.E.2d 45, 50 (W. Va. 1983)).
190. Id. Mrs. Johnson’s estate included an undivided one-half interest in the family residence. The record indicated that about one year after her husband’s death, Mrs. Johnson received a letter from the Farmers & Merchants Bank informing her that Mr. Johnson’s two sons wished to sell their undivided one-half interest in the home because they felt that the real estate should be producing income for their benefit. The letter also indicated that if she did not agree to sell the house, she would be charged a “monthly rental fee of $500 per month, starting with April 1, 1983” (eleven months prior to the letter). Id. at 759-60 n.10.
191. Id. at 759-60.
192. Id. at 769-70.
is unsatisfactory. The lack of a standard could easily lead to inconsistent results and does not provide any clear guidance for someone who wishes to plan an estate using will substitutes. The better solution is to adopt a statutory plan which mechanically prevents the use of will substitutes to cheat the surviving spouse.

D. Revised Uniform Probate Code: Elective Share

1. History

New York was one of the first separate-property states to provide a statutory, mechanical solution to the problems presented by will substitutes, instead of an ad hoc judicial approach. In 1965 the New York legislature amended the forced share statute by enumerating certain inter vivos transfers which were considered "testamentary substitutes" and thus included in the probate estate for the calculation of the surviving spouse's forced share.

Thedrafters of the Uniform Probate Code expanded the New York approach into an "augmented estate" concept. Under the UPC, the surviving spouse is entitled to one-third of the decedent's augmented estate.

Although the augmented estate concept has been effective in the states which have enacted it in preventing the use of will substitutes to reduce the share of the surviving spouse, it has proved somewhat difficult to apply. In particular, the spousal setoff provision has


194. N.Y. DECE DENT ESTATE LAW § 18-1(1)(a)-(e) (1965), treated as testamentary substitutes: (1) causa mortis gifts; (2) joint tenancies and tenancies by the entirety; and (3) "any disposition of property, in trust or otherwise, as to which the deceased spouse retained, by express provision of the disposing instrument either alone or in conjunction with another person, a power to revoke the disposition of the assets thereof." Id. § 18-a(1)(e).

195. One year later, the legislature repealed Section 18 and enacted instead Section 5-1.1 which clarified the statute's purpose and scope. N.Y. Est. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981).

196. UNIFORM PROBATE CODE, Article II, Part 2, general comment.


198. See Langbein & Waggoner, supra note 133, at 303. See also Kurtz, supra note 145.
produced problems akin to the tracing problems faced in community property jurisdictions in trying to decide who owns what and where it came from.\(^{199}\)

The "incremental vesting" scheme contained in the R UPC avoids the tracing problem by using a combined augmented estate which merges both the decedent’s and the surviving spouse’s augmented estates. The combined estate includes the decedent’s net probate estate, the decedent’s reclaimable or recapturable estate, and the value of the surviving spouse’s estate, including the value of the surviving spouse’s reclaimable estate. Thus, the surviving spouse’s share is calculated from the combined augmented estate, but the spouse is charged with receipt of an appropriate amount of his own augmented estate. The share to which the surviving spouse is entitled in this system is one-half of the combined augmented estate, but this share vests incrementally over time.

The major advantage of this approach is that it accomplishes the dual purposes of forced share law — support for the surviving spouse and recognition of the contribution which the spouse made to the decedent’s estate — in a mechanical fashion which does not require judicial intervention to reach an equitable result. In addition, the "incremental vesting" system represents a vast improvement over traditional forced share laws because it is sensitive to the duration of the marriage in the calculation of the forced share.

2. Purpose

There are two basic rationales behind the incremental-vesting elective share provided in the R UPC. First, the use of an augmented estate as the basis for the calculation of the surviving spouse’s share rather than the probate estate is designed to prevent "fraud on the widow’s share." By including the value of "will substitutes" in the augmented estate, these devices cannot be used to defeat the purpose of the elective share. Moreover, by preventing this "fraud" mechanically, the uncertainty produced by a judicial "balancing of the equities" after the fact is avoided. Thus, an individual can use "will

\(^{199}\) Langbein & Waggoner, supra note 133, at 318.
substitutes” to plan his or her estate to take maximum advantage of the benefits of each device and be assured that the outcome is predictable and will not be upset by later judicial intervention. On the other hand, individuals who attempt to use these devices in an improper way will not succeed in defeating the surviving spouse’s elective share.

Second, the incremental vesting concept of the RUPC elective share is designed to bring elective share law into line with the contemporary view of marriage as an economic partnership. The Editors of the Joint Editorial Board for the RUPC note that the economic partnership theory is already applied by the equitable distribution system when a marriage ends in a divorce, and it is applied in community-property states when a marriage ends in death. The typical elective share provided in a common-law state, however, implements this concept very poorly when the marriage ends in death.

3. Calculation

Although the length and detail of the RUPC elective share provisions make them seem complex, in fact a relatively simple (though detailed) four-step process is required to apply the scheme. First, the size and composition of the augmented estate is determined based on § 2-202. Second, the applicable elective-share percentage is obtained from the schedule in § 2-201 according to the length of the marriage. Third, the value of the elective-share amount is calculated by applying the elective-share percentage to the augmented estate. Finally, the satisfaction of the elective share is determined under § 2-207. Under this section, the decedent’s net probate and “reclaimable” estates are liable to the satisfaction of the elective-share amount only to the extent that the elective share amount is not satisfied by the sum of: (1) amounts that pass or have passed from decedent to the surviving spouse by testate or intestate succession; (2) amounts included in the augmented estate under § 2-202(a)(3) (property to which the surviving spouse succeeds by reason of the decedent’s death); (3) amounts which would have passed to the spouse but were disclaimed; and (4) twice the elective-share percentage, determined under § 2-201(a), of the survivor’s assets.
a. Augmented Estate

The augmented estate is defined in § 2-202 of the RUPC. Essentialy, the augmented estate is the sum of four elements: the decedent’s probate estate, the decedent’s “reclaimable” estate, property shifting to the surviving spouse due to the decedent’s death, and the assets of the surviving spouse, including the spouse’s reclaimable estate.

The decedent’s probate estate for purposes of the augmented estate is property which would pass by intestate succession if the decedent died without a valid will, but does not include funeral and administration expenses, enforceable claims, homestead allowances or property exemptions.

The decedent’s “reclaimable” or “recapturable” estate includes: (1) property subject to a presently exercisable general power of appointment held by the decedent; (2) the decedent’s interest in property held immediately before death by the decedent and another (other than the surviving spouse) with right of survivorship, or the decedent’s interest to the extent that while married to the surviving spouse the decedent transferred that interest to any person (other than the surviving spouse) within two years of death; (3) proceeds of insurance on the decedent’s life payable to any person other than the surviving spouse if the decedent owned the policy, had the power to change the beneficiary or held (alone) a presently exercisable general power of appointment, or if the decedent transferred the policy while married to the surviving spouse to another person (other than the surviving spouse) within two years of death; and (4) property transferred by the decedent to anyone other than a bona fide purchaser at any time during the decedent’s marriage to the surviving spouse to or for the benefit of any person (other than the surviving spouse) if the transfer is of a specified type (which generally deal

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201. Id. § 2-202(f)(1)(iv).
202. Id. § 2-202(a)(1). The surviving spouse’s right to homestead, property and family allowances are in addition to elective-share and supplemental elective-share amounts. Id. § 2-206.
203. RUPC § 2-202(a)(2)(i).
204. Id. § 2-202(a)(2)(ii).
205. Id. § 2-202(a)(2)(iii).
with property over which the decedent maintains some degree of control).206

The third element of the augmented estate is the value of property shifting to the surviving spouse because of the decedent’s death, except by testate or intestate succession, homestead allowance or property exemption.207 Thus, the augmented estate includes the value of property shifting to the spouse due to rights of survivorship, proceeds from life insurance on the decedent’s life and benefits payable under a retirement plan in which the decedent was a participant, except for the Federal Social Security System.208

Finally, the augmented estate includes the value of the surviving spouse’s assets at the decedent’s death, including any property which would have been in the surviving spouse’s “reclaimable” estate if the spouse had predeceased the decedent.209

b. Elective-Share Percentage

The elective-share percentage is provided in § 2-201.210 As noted above, the purpose of the incremental vesting system is to mechanically approximate the relative contribution of each spouse to the assets accumulated during the marriage. Thus, the sliding scale in § 2-201 provides a greater elective-share percentage for a marriage which has lasted fifteen years than one which has lasted only two years.

Specifically, the schedule in § 2-201 provides for a surviving spouse whose marriage to the decedent lasted only one year or less to elect a “supplemental elective-share amount” only. If the marriage lasted between one and two years, the applicable elective-share percentage is 3% of the augmented estate. The elective-share percentage which the surviving spouse is entitled to increases with each year of marriage until it reaches the maximum 50% after fifteen years of marriage. Thus, to determine the elective share which a surviving spouse is

206. Id. § 2-202(a)(2)(iv).
207. These allowances are in addition to the elective-share amount. See supra note 201.
208. RUPC § 2-202(a)(3).
209. Id. § 2-202(a)(4).
210. See id. § 2-201.
entitled to, the length of the marriage is used to select the appropriate percentage from the schedule in § 2-201.

c. Elective-Share Amount

The elective-share amount is calculated by applying the elective-share percentage obtained from the schedule in § 2-201 to the augmented estate as defined in § 2-202. The resulting elective-share amount is the amount to which the surviving spouse is entitled. Because an elective share statute is designed to provide support for the surviving spouse as well as to recognize the partnership aspect of marriage, § 2-201(b) provides for a "supplemental elective share amount" if the elective share amount is less than $50,000.211

d. Satisfaction of the Elective-Share Amount

Section 2-207 determines the order in which assets are applied to satisfy the elective-share amount.212 Under this section, the decedent’s probate and "reclaimable" estates are liable to satisfy the elective-share amount only to the extent that it is not satisfied by: (1) amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession, (2) amounts included in the augmented estate under § 2-202(a)(3) (property to which the surviving spouse succeeds by reason of the decedent’s death), (3) amounts which would have passed to the spouse but were disclaimed, and (4) twice the elective-share percentage, determined under § 2-201(a), of the survivor’s assets.213 If the combined value of these amounts equals or exceeds the elective-share amount, then the surviving spouse is not entitled to share any further in the decedent’s estate, unless the surviving spouse is entitled to a supplemental elective share amount under § 2-201(b).

The first three sources of satisfaction for the elective-share amount are relatively self-explanatory, but the fourth may not be quite as obvious. As noted above, the purpose of the incremental-vesting

211. See id. § 2-201(b).
212. RUPC § 2-207.
213. See id.
scheme is to implement the partnership concept of marriage. That is, the purpose is to mechanically approximate the percentage of a couple's total assets which are "fruits of the marriage." The incremental-vesting system avoids the "tracing-to-source" problem by applying an ever-increasing percentage to the couple's assets without regard to how they were derived rather than a flat 50% to an ever-increasing level of the couple's assets. Thus, if a marriage has lasted ten years and the applicable elective-share percentage is 30%, the incremental vesting system equates 30% of the couple's combined assets with 50% of the assets which were acquired during the marriage. This implies, of course, that 60% of the couple's combined assets are assets which were acquired during the marriage. The assets of each party are governed by the same ratio that applies to the couple's combined assets. Thus, each party is treated as if 60% of their individual total assets are actually marital property. Therefore, to determine how much of the surviving spouse's assets are in fact marital property and thus must be set off against the elective-share amount, double the elective percentage contained in the schedule in § 2-201 (which is based on 50% of the total assets) is used.

If the four sources of satisfaction mentioned above are less than the applicable elective-share amount, then the surviving spouse is entitled to satisfaction from the decedent's estate. According to § 2-207(b), amounts included in the decedent's probate estate and the portion of the decedent's reclaimable estate other than property transferred irrevocably two years before the decedent's death are applied first to satisfy the surviving spouse's elective share. These sources are applied so that the burden of satisfaction is equitably apportioned among the beneficiaries of the estate in proportion to their interests in it. If the elective-share amount is still unsatisfied, then § 2-207 provides for the application of property which was transferred within

214. "Tracing-to-source" is a problem encountered in community property states when a marriage ends, either in divorce or death. The problem arises because the American community property states are "community of acquest" jurisdictions rather than "universal community" states. Under a "community of acquest" system, the only property which is "community" property is property which was obtained during the marriage. Property which was obtained by the parties prior to the marriage, and generally the profits from that property, remain the separate property of each party. Thus, determining the source of property becomes important in deciding whether it is separate or community property. See Langbein & Waggoner, supra note 133.
two years of the decedent’s death to non bona fide purchasers. Section 2-207 also provides that only original recipients of the reclaimable estate and their donees are liable to make a contribution toward the surviving spouse’s elective-share amount. Further, it provides that a person liable to make contribution may choose to give up the proportional part of the reclaimable estate, or may pay the value for which he is liable.\textsuperscript{215}

4. Other Provisions of the Revised Uniform Probate Code, Part 2

As noted above, § 2-201(b) provides for a "supplemental elective-share amount" if the calculated elective-share amount is less than $50,000. In satisfying this $50,000, the surviving spouse’s assets count first, including amounts shifting to the surviving spouse at the decedent’s death, and amounts owing to the survivor under the calculated elective-share amount. However, amounts going to the surviving spouse under homestead allowances, property exemptions, and the survivor’s Social Security and other governmental benefits are excluded from satisfaction of the "supplemental elective-share amount."\textsuperscript{216} If the survivor’s assets are less than $50,000, then the survivor is entitled to whatever portion of the decedent’s estate is necessary to satisfy the minimum, up to 100% of the decedent’s estate.

Section 2-202(d) provides protection for payors who make payments to beneficiaries before receipt of notification from the surviving spouse of intent to file a petition for an elective share. Payment made before receipt of such notice discharges the payor, but not the recipient, from all claims for the amounts so paid.\textsuperscript{217}

Section 2-203 states that the right of election may only be exercised by a surviving spouse during his or her lifetime. This section also provides procedures for election by an incapacitated surviving spouse.\textsuperscript{218}

\textsuperscript{215} RUPC § 2-207.
\textsuperscript{216} See supra note 201.
\textsuperscript{217} RUPC § 2-202(d).
\textsuperscript{218} Id.
Under § 2-204, the right of election of a surviving spouse may be waived wholly or partially, before or after marriage, by a written agreement signed by the surviving spouse.\textsuperscript{219} Thus, if the requirements of this provision are met, both pre- and post-nuptial agreements are valid.

The procedure and time limit for exercising the right of election are provided in § 2-205. The surviving spouse must file a petition for the elective share within nine months of probate of the decedent’s will. This time may be extended if the surviving spouse petitions for extra time within nine months of the decedent’s death.\textsuperscript{220}

V. CONCLUSION

The West Virginia Law Institute should be commended for identifying the areas of intestate succession and elective share as deserving of careful study and legislative attention. As noted above, over one-half of all people die intestate. Unquestionably, any subject matter which involves all of the worldly possessions of one-half of the people deserves the careful consideration of the legislature. Since our current statutes do not reflect the “average” citizen’s desires, they should be revised and the RUPC provides a well-reasoned alternative.

While the number of families affected by the elective share statute is significantly less than those affected by intestate succession, the reasons for revising the current law are no less compelling. The policy justification for limiting a decedent’s freedom of testation is to protect a surviving spouse and is based in fairness and equity. If the current statute falls short of achieving fairness and equity, then it should be revised.

Our court in Johnson v. Farmers & Merchants Bank has clearly signaled that a blind adherence to a literal reading of the current statute will no longer suffice. Under certain circumstances, the probate estate will be augmented by other assets to achieve “fairness.” Our court has determined that “equitable” results are more important than simplicity of application. However, the legacy of the John-
son decision is that neither clients nor their attorneys can anticipate what "fairness and equity" will mean at some undetermined time in the future under unknown circumstances. In such a situation, rational estate planning becomes difficult, if not impossible. The RUPC provides a reasonable and responsible solution which is consistent with the judicially endorsed policies of equitable distribution and the fairness sought in Johnson. Perhaps most important, the uncertainty inherent in the case by case approach of Johnson is replaced by understandable and predictable rules capable of administration without active judicial intervention.
Appendix

UNIFORM PROBATE CODE
ARTICLE II - INTESTACY, WILLS, AND DONATIVE TRANSFERS*

Section
1-201 General Definitions
2-101 Intestate Estate
2-102 Share of Spouse
2-103 Share of Heirs Other Than Surviving Spouse
2-104 Requirement That Heir Survive Decedent for 120 Hours
2-105 No Taker
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2-109 Advancements
2-110 Debts To Decedents
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2-113 Individuals Related To Decedent
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2-202 Augmented Estate
2-203 Right of Election Personal To Surviving Spouse
2-204 Waiver of Right To Elect and of Other Rights
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* The following text, approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws, is subject to revision by the Style Committee of the National Conference of Commissioners on Uniform State Laws. Final copies of the Act with style changes and complete Prefatory Note and Comments can be obtained for a nominal charge from the Headquarters Office of the National Conference of Commissioners on Uniform State Laws after November 1, 1990: 676 North St. Clair Street, Suite 1700, Chicago, IL 60611, 312/915-0195.
2-206 Effect of Election on Statutory Benefits
2-207 Charging Spouse With Owned Assets And Gifts Received; Liability Of Others For Balance Of Elective Share
2-301 Entitlement Of Spouse; Premarital Will
2-302 Omitted Children
SECTION 1-201. GENERAL DEFINITIONS.

Subject to additional definitions contained in the subsequent Articles that are applicable to specific Articles, parts, or sections, and unless the context otherwise requires, in this Code:

(1) "Agent" includes an attorney-in-fact under a durable or non-durable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

(2) "Application" means a written request to the Registrar for an order of informal probate or appointment under Part 3 of Article III.

(3) "Beneficiary," as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a beneficiary of a beneficiary designation, refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument" includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, or a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

(4) "Beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

(5) "Child" includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a step-child, a foster child, a grandchild, or any more remote descendant.
(6) "Claims," in respect to estates of decedents and protected persons, includes 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 the 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.

(7) "Courts" means the Court or branch having jurisdiction in matters relating to the affairs of decedents. This Court in this State is known as [...........].

(8) "Conservator" means a person who is appointed by a Court to manage the estate of a protected person.

(9) "Descendant" of an individual means all his [or her] descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this Code.

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

(11) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(12) "Disability" means cause for a protective order as described in Section 5-401.

(13) "Distributee" means any person who has received property of a decedent from his [or her] personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his [or her] hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to
whom assets are transferred by will, to the extent of the devised assets.

(14) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration.

(15) "Exempt property" means that property of a decedent's estate which is described in Section 2-403.

(16) "Fiduciary" includes personal representative, guardian, conservator, and trustee.

(17) "Foreign personal representative" means a personal representative of another jurisdiction.

(18) "Formal proceedings" means those conducted before a judge with notice to interested persons.

(19) "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a donative, appointive, or nominative instrument of any other type.

(20) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

(21) "Heirs," except as controlled by Section 2-711, means those persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.

(22) "Incapacitated person" is as defined in Section 5-103.

(23) "Informal proceedings" mean those conducted without notice to interested persons by an officer of the Court acting as a registrar for probate of a will or appointment of a personal representative.

(24) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or
claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

(25) “Issue” of a person means descendant as defined in subsection (9).

(26) “Joint tenants with the right of survivorship” and “community property with the right of survivorship” includes co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party’s contribution.

(27) “Lease” includes an oil, gas, or other mineral lease.

(28) “Letters” includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(29) “Minor” means a person who is under [21] years of age.

(30) “Mortgage” means any conveyance, agreement, or arrangement in which property is encumbered or used as security.

(31) “Nonresident decedent” means a decedent who was domiciled in another jurisdiction at the time of his [or her] death.

(32) “Organization” includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity.

(33) “Parent” includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

(34) “Payor” means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other per-
son authorized or obligated by law or a governing instrument to make payments.

(35) "Person" means an individual, a corporation, an organization, or other legal entity.

(36) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(37) "Petition" means a written request to the Court for an order after notice.

(38) "Proceeding" includes action at law and suit in equity.

(39) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(40) "Protected person" is as defined in Section 5-103.

(41) "Protective proceeding" is as defined in Section 5-103.

(42) "Registrar" refers to the official of the Court designated to perform the functions of Registrar as provided in Section 1-307.

(43) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(44) "Settlement," in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

(45) "Special administrator" means a personal representative as described by Sections 3-614 through 3-618.

(46) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory
or possession subject to the legislative authority of the United States.

(47) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(48) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this Code.

(49) "Supervised administration" refers to the proceedings described in Article III, Part 5.

(50) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(51) "Testator" includes the female as well as the male.

(52) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article VI, custodial arrangements pursuant to [each state should list its legislation, including that relating to [gifts] [transfers] to minors, dealing with special custodial situations], business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

(53) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(54) "Ward" is as defined in Section 5-103.

(55) "Will" includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.
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 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.

[ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES]

[SECTION 2-102A. SHARE OF SPOUSE.]

(a) The intestate share of a surviving spouse in separate property 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.

(b) The one-half of community property belonging to the decedent passes to the [surviving spouse] as the intestate share.]
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.

Any 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 the time of death of the decedent or of the individual who would otherwise be an heir, or the times of death of both, cannot be determined, and it is not established that the individual who would otherwise be an heir survived the decedent by 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) 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 that contains one or more descendants who survive the decedent and (ii) then-deceased descendants in the same generation who left descendants then living, if any. Each then-living descendant in that nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the then-living descendants of the then-deceased descendants as if the descendants already allocated a share and their descendants had predeceased the decedent.

(b) 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 to the deceased parents or either of them or the deceased grandparents or either of them that contains one or more descendants who survive the decedent and (ii) then-deceased descendants in the same generation who left descendants then living, if any. Each then-living descendant in that nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the then-living descendants of the then-deceased descendants as if the descendants already allocated a share and their descendants had predeceased the decedent.
SECTION 2-107. KINDRED OF HALF BLOOD.

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 the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or if 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 the 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 DECEDEENT 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. MEANING OF CHILD AND RELATED TERMS.

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,

(1) except as provided in paragraph (2), 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].

[Alternative Subjection (1) For States That Have Not Adopted The Uniform Parentage Act

(1) Except as provided in paragraph (2), an individual born of parents not married to each other is a child of the mother and father. Paternity is established [under applicable state law] [insert appropriate statutory reference].]

(2) an adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, except that 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.

(3) Inheritance from or through the 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 SURVIVING SPOUSE

SECTION 2-201. RIGHT TO 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>Time Period</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>

Fisher and Curnutte: Reforming the Law of Interstate Succession and Elective Shares: N
(b) Supplemental Elective-Share Amount. If the sum of the amounts described in Sections 2-202(a)(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) Property Included in the Augmented Estate. The augmented estate means 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 included 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 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
(other than 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 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 of 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 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 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 preceding the
decendent's death by the decedent and another (other than the de-
cedent's surviving spouse) with right of survivorship;

(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 suc-
cceeds by reason of the decedent’s death (other than by homestead
allowance, exempt property allowance, family allowance, testate suc-
cession, or intestate succession), including the proceeds of insurance
(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 spouse’s reclaimable estate if the surviving
spouse had predeceased the decedent.

(b) 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.

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

(d) 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. The protection from liability does not extend to 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 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(c), 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.

(e) Protection of Bona Fide Purchasers; Personal Liability of Recipient.

(1) No 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 obligated under this Part to return that payment, item of property, or benefit or is liable under this Part for the amount of that payment or the value of that item of property or benefit. But a person who, not for value, received a payment, item of property, or any other benefit included in the decedent’s reclaimable estate 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.

(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, received that 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.

(f) Definitions.

(1) For purposes of this section:

   (i) a “bona fide purchaser” is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

   (ii) a “nonadverse party” is 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.

(iii) a "presently exercisable general power of appointment" is 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" is property, whether real or personal, movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.

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

(3) For purposes of subsections (a)(3) and (4), the "value of property owned by the surviving spouse at the decedent's death" and the "value of property to which the surviving spouse succeeds by reason of the decedent's death" includes 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.

SECTION 2-203. RIGHT OF ELECTION PERSONAL TO SURVIVING SPOUSE.

(a) Surviving Spouse Must Be Living at Time of Election. The right of election 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 provisions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For 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; and (iv) the [Enacting state] Uniform Custodial Trust Act is modified as follows:

(1) The first sentence of [Section 2(e)] is replaced by the following sentence: “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.

(2) [Section 6(b)] is deleted.

(3) The last sentence of [Section 9(b)] is replaced by the following sentence: “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.”

(4) [Section 17(a)(3)] is replaced by the following provision: “(3) upon the beneficiary’s death, the remaining custodial trust prop-
erty, 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.

[ALTERNATIVE SUBSECTION (B) FOR STATES THAT HAVE NOT ADOPTED]

THE UNIFORM CUSTODIAL TRUST ACT

[(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 Sections 2-207(b) and (c) and must appoint a trustee to administer that property for the support of the surviving spouse. For 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; or

(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 shall be decided 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 the provisions of any will executed before the waiver or property settlement.

SECTION 2-205. PROCEEDINGS 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 last expires. The surviving spouse shall 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(a)(2), is not included within the augmented estate for the purpose of computing the elective share, if the petition is filed later than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse can 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(a)(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 if relief had been secured against all persons subject to contribution.

(e) 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; LIABILITIES 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 that pass or have passed to the surviving spouse by testate or intestate succession,

(2) Amounts included in the augmented estate under Section 2-202(a)(3),

(3) Amounts included in the augmented estate that would have passed to the spouse but were disclaimed, and

(4) Amounts included in the augmented estate under Section 2-202(a)(4) up to the applicable percentage thereof. For purposes of the preceding sentence, 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, if 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 decedent’s reclaimable estate is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably ap
portioned 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(a)(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 PROVIDED FOR IN WILLS

SECTION 2-301. ENTITLEMENT OF SPOUSE; PREMARRITAL WILL.

(a) If the 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 descendant 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 Sections 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 he [or she] would have received if the testator had 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 he [or she] would have received if the testator had 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 subsections (a)(1) nor (a)(2) apply 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 in value to that which he [or she] would have received if the testator had died intestate.

(d) In satisfying a share provided by subsections (a)(1) or (c), devises made by the will abate under Section 3-902.