January 1990

Preventing Spousal Disinheritance: An Equitable Solution

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I. INTRODUCTION

For centuries men and women have wrestled with the problem of spousal disinheritance.\(^1\) For every determined effort to devise an equitable and foolproof mechanism to prevent disinheritance, there have been equally determined efforts to accomplish exactly that. The approach used most frequently today in the separate property jurisdictions,\(^2\) like West Virginia, is the statutory forced share which

\(^1\) See infra notes 13-25 and accompanying text.
\(^2\) 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 acquired elsewhere which would have been community property if it had been earned in a community-property state). See Langbein & Waggoner, Redesigning the Spouse's Forced Share, 22 REAL PROP., PROB. & TR. J. 303 (1987).
"guarantees" the surviving spouse a share (usually one-third) of the decedent's probate estate. 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." 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," in which the decedent depletes the probate estate through inter vivos transfers. This comment will examine two of the most important. First, many states, like West Virginia, retain the traditional forced share statute (West Virginia also retains a statutory form of dower) 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," if the decedent "intended to defraud" the surviving spouse of his marital right in the estate, or if the decedent lacked "present donative intent" with respect to the transfer.

A more predictable result is achieved by a forced share statute which mechanically takes into account will substitutes. Professors Langbein and Waggoner have proposed a statutory system of "incremental vesting" of the spouse's share of an augmented estate.

4. 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. Comment, Protection of the Base for the Surviving Spouse's Election: The Search for an Alternative, 7 CAP. U. L. REV. 423, 423 (1978).
11. Langbein & Waggoner, supra note 2.
This system increases over time the share the surviving spouse is entitled to, up to a total of one-half of the augmented estate. The augmented estate concept used 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 will substitutes, thereby preventing the use of these mechanisms to reduce the surviving spouse’s share of the estate. The major benefit of this scheme over the Uniform Probate Code approach is that it better accomplishes the dual purposes of forced share statutes: support and recognition of contribution by the surviving spouse to the decedent’s estate.12

II. HISTORICAL BACKGROUND

The protection of a decedent’s wife from disinherition began as early as the Code of Hammurabi, and can be traced through Roman, Germanic, Scandinavian and Saxon law.13 At common law, the surviving spouse was not an heir.14 Instead, widows were protected by the device of dower which created a life estate in one-third of all lands in which a widow’s deceased husband was seised of an estate of inheritance at any time during the marriage.15 A widower, on the other hand, was entitled to curtesy if a live child was born of the marriage.16 Curtesy consisted of a life estate in all of the wife’s inheritable land.17 Neither dower nor curtesy could be defeated by will or inter vivos conveyance without the cooperation of the other spouse.18

In an agrarian society in which the major form of wealth was land, dower worked well to provide economic security for the widow.19 As time passed, however, land became “more and more

12. Id. at 306-10.
16. Id.
17. Id.
18. Id.
an article of commerce and less a symbol of status and power," 20 and the interference of dower with the free alienability of land became less tolerable. 21 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 to operate only in the event of intestacy. 22

Common-law dower was part of the received common law of the original American colonies and most of the states. 23 As time passed, the same problems that led to the end of dower in England prompted varied legislative responses in America, often including the abolition of dower and curtesy and the use of forced share statutes. 24 However, 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, and the limitation of the interest in real property to a life estate. 25

III. "Fraud on the Widow's Share": The Judicial Approach

A. The Problems Presented by Will Substitutes

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. 26 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, a recognition of marriage as a partnership in which both spouses contribute to the accumulation of the family assets. 27

20. Id. at 987.
21. Id.
22. Dower Act, 1833, 3 & 4 Will. 4, c. 105, § 4.
23. C. SCRIBNER, supra note 13, at 23-58.
27. Langbein & Waggoner, supra note 2, at 307.
The problem is that neither of these purposes is well served 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. By failing to take account of will substitutes in the calculation of the surviving spouse’s share, forced share statutes invite attempts at evasion through the use of these devices. As long as the depletion of the probate estate through the use of these will substitutes is accomplished through complete transfers of the property involved, courts generally hold that they are valid. If, however, the transferor retains substantial control over the property during his lifetime, an otherwise valid *inter vivos* transfer may be considered “fraud on the marital property rights.”

It should also be noted that failure to take will substitutes into account in the computation of the forced share can cause problems of the opposite sort by ignoring the fact that spouses often make adequate provision for each other through the use of various will substitutes. Professor Fratcher uses an illustrative example of 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’s will leaves the farm to his son, under the typical forced share statute the widow can keep all of the life insurance proceeds and also elect to take a forced share of one-third of the farm, notwithstanding the testator’s clear intent and the son’s legitimate expectation.

32. *Id.* at 1058.
B. The Judicial Approach

The ineffectiveness of forced share legislation in dealing with the problems generated by will substitutes has prompted varied and confusing judicial approaches. Courts have announced supposedly distinct standards such as the "illusory transfer" or "retention of control" test, the "intent to defraud" test, and the "present donative intent" test to deal with the problems. However, the tests often overlap and the same language is often used to describe different tests.

1. "Illusory Transfer" Test

The "illusory transfer" or "retention of control" test was adopted by the Court of Appeals of New York in Newman v. Dore. In Newman, the court was presented with the issue of whether a husband could defeat his wife's forced share by transferring all of his property into a revocable inter vivos trust for the benefit of his child from a prior marriage. The decedent in Newman left a will which provided a trust for his wife for her life of one-third of his real and personal property (the share she would receive if she elected against the estate, calculated as a fraction of the probate estate), which under New York law precluded her from electing against the will. Three days before his death, however, the decedent established another trust by which he transferred all of his property in trust.

35. The terms are interchangeable because a transfer is considered to be "illusory" if the donor retains substantial control over the property.
37. Id. at 375, 9 N.E.2d at 967. The facts of this famous elective share case do not appear in the court's opinion, but they are rather interesting. The decedent, Mr. Straus, married his second wife Clara when he was 76 years old and she was in her thirties. By the time that Mr. Straus died four years later, their relationship had deteriorated to the point that she had filed for separation with alimony, complaining that his perverted sexual habits made it impossible for her to live with him, and he in turn brought an action for annulment. Both actions were still pending at the time of his death. Mr. Straus had also instructed his attorney to see that that "whore" and "son-of-a-bitch" did not receive any of his estate. E. Clark, L. Lusky & A. Murphy, Cases and Materials on Gratuitous Transfers (3d ed. 1985) [hereinafter E. Clark].
which excluded her, thus leaving no property for his widow to take. The court noted that in the second trust the decedent reserved to himself not only the income from the trust for his life and the right to revoke the trust, but also substantial control over the trustees.

The court in *Newman* rejected the use of motive or intent as a test of the validity of a transfer because the widow had only an expectant interest in the property of her husband and thus the law did not restrict the transfer of property by the husband during his lifetime. Instead, the court applied the test of "whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer." Under this test the court concluded that although the trust would be valid but for the widow's right of election, the testator had made an invalid illusory transfer of the property judged by the substance, not the form, of the conveyance. Thus, the entire trust was held to be invalid.

The *Newman* decision was criticized because in effect it created a preferred status for the spouse regardless of whether the spouse needed or deserved preferential treatment. Moreover, the decision was problematic because it provided no guidance as to the amount of control that could legitimately be retained by a donor.

2. "Intent to Defraud" Test

An example of the application of the "intent to defraud" test is the case of *Warren v. Compton*, in which the Tennessee Court

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39. *Id.* at 375, 9 N.E.2d at 967.
40. *Id.* at 377, 9 N.E.2d at 968.
41. *Id.* at 379, 9 N.E.2d at 968-69.
42. *Id.* at 379, 9 N.E.2d at 969.
43. *Id.* at 380, 9 N.E.2d at 969.
44. *Id.* at 381, 9 N.E.2d at 970. New York abandoned the judicial approach to the problem of "fraud on the widow's share" in 1966 and adopted an augmented estate approach which treats as testamentary dispositions *causa mortis* gifts, Totten trusts, joint bank accounts, joint tenancy property, and transfers by a decedent over which he retained a power to revoke or invade. However, the statute provides that the probate estate does not include insurance or retirement benefits. *N.Y. Est., Powers & Trusts Law S-1.1* (McKinney 1981).
45. E. CLARK, *supra* note 37, at 519.
46. In *Davis v. KB & T*, 309 S.E.2d 45 (W.Va. 1983), the settlor's attorney testified that he recommended to his client that the trust be revocable: "I would never recommend to a person that they execute an irrevocable trust, because he might have very well not liked the way the bank was handling the affair, and I wouldn't under any circumstances want to put someone in that position." *Id.* at 51 n.4.
47. 626 S.W.2d 12 (Tenn. Ct. App.) *cert. denied, id.* (Tenn. 1981).
of Appeals was confronted with the validity of two transfers made by the decedent allegedly with the intent to defeat his widow’s elective share. One of the transfers was a $40,000 certificate of deposit which the decedent purchased for his girlfriend, and the other was the decedent’s delivery of two promissory notes worth $17,300 to his daughter by a previous marriage. The decedent’s will provided his widow with the same share of the estate she would have received if she had elected against the will.

The court in Warren had to deal with a confusing line of precedents because some cases in Tennessee had used the “fraudulent intent” test and some had used the “illusory transfer” test. The court concluded that the appropriate test was whether there was a fraudulent transfer with the intent to deprive the surviving spouse of his share of the decedent’s estate. Although an illusory transfer may be one factor to consider in determining the decedent’s intent, the intent to defeat the surviving spouse’s share must have been present at the time of the transfer in order to invalidate a transfer. The court in Warren also listed other factors to be considered in determining the decedent’s intent: whether the transfer was made without consideration, the relative size of the transfer, the time between the transfer and the decedent’s death, the nature of the marital relationship, the source of the property and whether the decedent made other provisions for the surviving spouse in a will or through gifts. A court should consider “all facts and circumstances surrounding the transfer.” Applying the test that it set forth, the court concluded that both transfers were valid, even though both transfers were gifts without consideration, both were completed within one year of the decedent’s death, and the Warners’ marriage was at best “turbulent.”

48. Id. at 15.
49. Id.
50. Id. at 16.
51. Id. at 17.
52. Id.
53. Id.
54. Id. at 15-18. The decedent had resumed a prior relationship with Ms. Compton (the recipient of the $40,000 CD) soon after his marriage to Mrs. Warren. In fact, the decedent apparently had eaten his dinner at Ms. Compton’s home every night for the fifteen years preceding his death. Id.
Unfortunately, the "intent to defraud" test provides even less guidance than the "illusory transfer" test. Since intent is a difficult thing to prove, courts must rely on equitable factors such as the ones cited by the Warren court, and the test becomes a standardless "balancing of the equities."

3. "Present Donative Intent" Test

In Toman v. Svoboda, the Appellate Court of Illinois discussed at some length the rationale of the "present donative intent" test. The decedent, Mr. Toman, died intestate. The only substantial assets owned by him at that time were his interest as a joint tenant with Mrs. Toman in their marital home and his interest as a joint tenant with the defendant, his sister, in shares of stock which were worth approximately $20,000. About ten years before he died, the decedent transferred shares of stock that he owned in his own name to his mother, his sister and himself as joint tenants with right of survivorship. Shortly thereafter his mother died and the shares were transferred on the respective corporate books to his sister and himself as joint tenants with right of survivorship. During the decedent's lifetime all dividends from the stock were received by him and used as his property, and his widow argued that the decedent had transferred the stock for the sole purpose of defeating her statutory marital rights in the stock.

The court in Toman noted that the Illinois statutory forced share, unlike common-law dower, has no inchoate stage since it applies only to the property which the decedent owns at the time of his death. Thus, the forced share statute could be legitimately defeated by the decedent simply by making real (as opposed to illusory) inter vivos donative transfers of all of his property, even if the decedent's express intent was to defeat his widow's statutory share in the prop-

56. Id. at 396, 349 N.E.2d at 671.
57. Id. at 396, 349 N.E.2d at 670-71.
58. Id. at 396, 349 N.E.2d at 671.
59. Id.
60. Id. at 396, 349 N.E.2d at 670-71.
61. Id. at 397-98, 349 N.E.2d at 672.
tery.\textsuperscript{62} If, however, the gift was not a real gift because there was no present donative intent (or if the donative intent was merely testamentary), then the transfer was illusory and therefore ineffective to defeat the surviving spouse's statutory marital rights in the property.\textsuperscript{63} Thus, the court declared, the appropriate test is whether the decedent intended to make a present gift (even if it is a present gift of a future interest), not whether the decedent intended to minimize the surviving spouse's share of the property.\textsuperscript{64} Factors which the court noted would be relevant in determining the decedent's intent include the secretive manner in which the donor acted as to the surviving spouse, what the donor might have said to others as to his intent in making the apparent gift, the proximity in time between the transfer and the donor's death, and the value of the donor's estate and the value of property left to the surviving spouse.\textsuperscript{65}

Applying the "present donative intent" test, the court concluded that the presumption of a present donative intent was not sufficiently rebutted by evidence that the decedent had apparently retained a life estate in the shares of stock, and therefore the transfer was valid.\textsuperscript{66}

4. Synopsis

Given the myriad competing policy issues encompassed in the concept of spousal protection,\textsuperscript{67} it is not surprising that courts have been unable to arrive at a single standard for the validity of will substitutes. The "intent to defraud" test is problematic because invalidating transfers based on the intent of the donor has the effect

\begin{itemize}
  \item \textsuperscript{62} Id. at 398, 349 N.E.2d at 672-73. Note that the "intent to defraud" test in its purest form would invalidate such a transfer because it would be deemed to have been in fraud of the statutory marital rights. As applied by most of the states which use the "intent to defraud" test, however, the test is effectually a "balancing of the equities" test which considers a number of factors in determining the validity of the transfer. See, e.g., Warren v. Compton, 626 S.W.2d 12 (Tenn. Ct. App.) cert. denied, id. at 12 (Tenn. 1981).
  \item \textsuperscript{63} Toman, 39 Ill. App. 3d at 399, 349 N.E.2d at 673.
  \item \textsuperscript{64} Id. at 399-400, 349 N.E.2d at 674.
  \item \textsuperscript{65} Id. at 399, 349 N.E.2d at 673.
  \item \textsuperscript{66} Id. at 402, 349 N.E.2d at 675.
  \item \textsuperscript{67} These policy issues include recognition of the collaborative nature of marriage, concern that the surviving spouse is adequately provided for, the concept of complete ownership of property, the society's interest in the free alienability of land, etc.
\end{itemize}
of putting the validity of any transfer by a married person in doubt. Thus, this test too often ends up depending simply on whether the judge approves of the way that the decedent handled his family's affairs. The "illusory transfer" or "retention of control" test is the most objective in theory, but it begs the question of why a certain amount of control such as the power of revocation does not invalidate a will substitute, while other indicia of control constitute fraud on the surviving spouse's rights. Finally, the "present donative intent" test is more internally logical than either of the other tests since it addresses the underlying rationale of forced-share statutes. However, in practice it offers almost no intrinsic guidance as to what transfers are legitimate and which are not, and so this test, like the others, ends up as a standardless inquiry into the circumstances surrounding the transfer. Obviously these tests overlap to a great degree in theory and in practice, and courts sometimes feel compelled to reconcile the different tests. In Johnson v. La Grange State Bank,68 the Supreme Court of Illinois made a heroic, if somewhat lengthy, effort to synthesize the various tests:

We conclude that an inter vivos transfer of property is valid as against the marital rights of the surviving spouse unless the transaction is tantamount to a fraud as manifested by the absence of donative intent to make a conveyance of a present interest in the property conveyed. Without such intent the transfer would simply be a sham or merely a colorable or illusory transfer of legal title.69

Unfortunately, when the court applied its new test, it did not specify any particular facts which would indicate the requisite intent. The court considered not only the degree of control over the trust retained by the decedent, but also the wealth of the respective spouses, the felicity of the marital relationship, and the needs of the relatives benefited by the trust.70

Despite the careful enunciation of specific tests by courts, the outcome of these cases depends to a great degree on the subjective opinion of the court as to whether a will substitute should be upheld.

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68. 73 Ill. 2d 342, 383 N.E.2d 185 (1978).
69. Id. at 361, 383 N.E.2d at 194.
70. Id. at 364, 383 N.E.2d at 195. The court considered similar facts in the case of Havey v. Patton which was consolidated on appeal with Johnson.
or invalidated for the benefit of the surviving spouse. While individual justice of this sort is undoubtedly a laudable goal, estate planning is an area in which clear standards are needed so that planning an estate can be more than mere guesswork as to the outcome of a potential challenge.

IV. **West Virginia Forced Share Law**

West Virginia protects the surviving spouse from disinheritance 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.71

A spouse who renounces a will, therefore, receives one-third of the decedent’s personalty,72 and a statutory dower interest in the realty, which is a life estate in one-third of the lands of which the decedent was seised of an inheritable estate.73 The dower interest may be either assigned in kind,74 or in a lump sum payment.75 As noted above, a forced share statute such as West Virginia’s, which

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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.
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.
calculates the surviving spouse’s share only from the probate estate, is ineffective in protecting the spouse from disinheritance.\textsuperscript{76}

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{77} the West Virginia Supreme Court of Appeals addressed the validity of a revocable \textit{inter vivos} trust which allegedly operated as a fraud upon the surviving spouse’s statutory marital rights. In \textit{Davis}, the decedent established a revocable \textit{inter vivos} trust shortly after his wife suffered a mental breakdown and he himself suffered several heart attacks.\textsuperscript{78} The trust instrument provided that the income from the trust was to be paid to himself 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 (the couple had no children).\textsuperscript{79} The decedent transferred most of his assets to the trust, about $172,000, leaving a probate estate valued at only $12,000.\textsuperscript{80} Davis, on behalf of her incompetent sister, renounced the will and brought suit to have the trust invalidated.\textsuperscript{81}

After reviewing the various tests mentioned above and noting the lack of a clear majority test, the court decided that the appropriate course was “to adopt a flexible standard which takes into account all of the circumstances and weighs the equities on each side.”\textsuperscript{82} The court noted 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 the 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, and other means of available support.\textsuperscript{83} In concluding that the trust in this case was valid, the court considered

\textsuperscript{76} See \textit{supra} text accompanying notes 26-32.
\textsuperscript{77} 309 S.E.2d 45 (W. Va. 1983).
\textsuperscript{78} \textit{Id.} at 47.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.} at 50.
\textsuperscript{83} \textit{Id.} at 50 n.3 (quoting Whittington v. Whittington, 205 Md. 1, 12, 106 A.2d 72, 77 (1954)).
the discretion given to the trustee in the trust (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), the decedent’s purpose in creating the trust (to provide for himself and his wife in the event that he became further incapacitated), the surviving spouse’s independent wealth, and the decedent’s role in the acquisition of his wife’s estate. 84

The West Virginia Supreme Court of Appeals again addressed the validity of a revocable inter vivos trust in Johnson v. Farmers and Merchants Bank. 85 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. 86 Mr. Johnson had accumulated over $1,000,000 in assets represented by varying degrees of ownership of three closely-held corporations which he managed. 87 In 1982, Mr. Johnson created a revocable trust containing most of his assets, appointing the Farmers and Merchants Bank as trustee and naming himself as lifetime beneficiary. 88 Upon Mr. Johnson’s death, the trustee was to place $250,000 into a trust for the benefit of his widow for life, and the remainder in a trust for the benefit of his sons. 89 The court noted that Mr. Johnson retained the right to manage the trust property without paying the bank any commission and reserved the voting rights of the stock placed in trust. 90 In fact, the trustee stated to the court that it had no authority with regard to the three corporations noted above. 91 In short, Mr. Johnson retained

84. Id. at 51.
86. Id. at 754.
87. Id.
88. Id. at 755.
89. Id.
90. Id.
91. Id. at 760-61.
considerable control over the trust. Upon his death, Johnson's probate estate was valued at $158,524 while the trust assets were valued at $1,377,039.92 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.93

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."94 The court noted that Mrs. Johnson had a very modest estate of her own,95 and was completely unaware of the creation of the trust.96 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, and the property should be included in his probate estate so that Mrs. Johnson could receive her fraction.97

While most people would agree that the results in the *Davis* and *Johnson* cases were equitable, the "balancing the equities" approach is unsatisfactory. While it may be more straightforward than doing the same thing under the color of an objective test as other courts seem to have done, this 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.

V. STATUTORY ALTERNATIVE

One of the first separate-property states to provide a statutory, mechanical solution to the problems presented by will substitutes,

92. *Id.* at 755.
93. *Id.* at 756.
94. *Id.* at 759 (quoting *Davis* v. KB & T 309 S.E.2d 45, 50 (W. Va. 1983)).
95. *Id.* at 759. 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 n.10.
96. *Id.* at 759-60.
97. *Id.* at 760-62.
instead of an ad hoc judicial approach, was New York. In 1965 the New York legislature amended its 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. One year later, the legislature repealed Section 18 and enacted instead Section 5-1.1 which clarified the statute's purpose and scope.

The drafters 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. The augmented estate includes not only the net probate estate, but also the value of certain will substitutes, sometimes called "recapturables," and the value of property owned by the surviving spouse which was derived from the decedent, called the spousal setoff (property which would have been included in the surviving spouse's augmented estate if the spouse had predeceased the decedent). The surviving spouse is entitled to one-third of this total, but this is offset by the amount already received as represented by the spousal setoff.

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

98. 1965 N.Y. Laws ch. 665, § 1 (amending N.Y. Decedent Estate Law 18). The New York legislature noted that the use of judicially sanctioned *inter vivos* conveysances to deplete the probate estate had the effect of "reducing the surviving spouse's right of election to absurdity." N.Y. Est. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981) (Practice commentary).

99. N.Y. DECEDENT ESTATE LAW § 18-a(1)(a) - (e) (McKinney 1966), treated as testamentary substitutes: *causa mortis* gifts, joint tenancies and tenancies by the entirety, and "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).

100. Id. § 18-a(1).
101. N.Y. EST. POWERS & TRUSTS LAW § 14-1.1 (McKinney 1967).
difficult to apply. In particular, the spousal setoff provision has produced problems akin to the "tracing" problems faced in community property jurisdictions in trying to decide who owns what and where it came from.

The "incremental vesting" scheme 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 would include the decedent's net probate estate plus the value of "recapturables" and the surviving spouse's net worth plus the value of recapturables stemming from that spouse. 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. For example, 10% of the forced share would vest as of the date of the marriage, and the remainder would vest in 5% annual increments.

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 discretion to reach an equitable result. In addition, the "incremental vesting" system represents a vast improvement over traditional forced share laws by being sensitive to the duration of the marriage in the calculation of the forced share.

VI. CONCLUSION

The ad hoc judicial approach adopted by the West Virginia Supreme Court of Appeals in Davis and Johnson does not provide adequate protection of the surviving spouse from disinherance be-

108. See Langbein & Waggoner, supra note 2, at 303. See also Kurtz, supra note 13.
109. Langbein & Waggoner, supra note 2, at 318.
110. Id. at 318-19.
111. The authors note that they do not recommend a specific vesting schedule, the idea is simply to increase the entitlement as the length of the marriage increases. Id. at 316-17.
cause it fails to establish a clear standard; the spouse must be satisfied with a promise to “weigh the equities.” Moreover, the lack of an appropriate standard provides no guidance to estate planners who wish to use will substitutes in an estate plan. West Virginia is not alone in this respect, however, because the judicial approach to this problem produces similar results in the other jurisdictions which use it. The best way to predictably protect the surviving spouse from disinheritance is through the use of a forced share statute which mechanically includes will substitutes in the calculation of the spouse’s forced share. Not only is the “incremental vesting” scheme the best solution because of its application to the problem of “fraud on the widow’s share,” it is the best system to accomplish the purposes of the forced share system.

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