



GW Law Faculty Publications & Other Works

Faculty Scholarship

2020

What's Wrong About the Elective Share "Right"?

Naomi R. Cahn

George Washington University Law School, ncahn@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

53 U.C. Davis L. Rev. (forthcoming 2020); GWU Law School Public Law Research Paper No. 2020-44; GWU Legal Studies Research Paper No. 2020-44

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

What's Wrong About the Elective Share "Right"?

Naomi Cahn*

This Article examines one form of property rights available to a surviving spouse, the elective share. The elective share serves as an override to a testator's stated intent by allowing the surviving spouse to choose to take a portion of the decedent's estate — even if the will explicitly disinherits the surviving spouse. The Article analyzes a recent five-year period of state cases raising elective share issues with the goal of determining the circumstances under which an elective share is most likely to be contested.

The reported elective share disputes typically involve a subsequent spouse challenging a will that leaves property to an earlier family. The petitioners are almost invariably women. The length of the marriage ranges from a few months to decades, and some of the cases involve waiver of the share, some involve estranged spouses, and a few involve marriage fraud. Disputes over the elective share illustrate family tensions, rarely involving parents against joint children, and more frequently pitting a surviving spouse against the decedent's earlier families.

The Article provides an empirical assessment of the current rationales for the elective share and suggests revisions to existing elective share approaches that reflect both differing theories of what values marriage should represent and the changing demography of marriage and remarriage.

* Copyright © 2020 Naomi Cahn. Naomi Cahn is the Harold H. Greene Chair, George Washington University Law School. Thanks to Mary Kate Hunter, research librarian extraordinaire. I also thank Meredith Condren and Miranda Millerick for research assistance. And much gratitude to Adam Hirsch, David Horton, and everyone involved in the ACTEC/UC Davis Law Review Symposium, *An Empirical Analysis of Wealth Transfer Law*, for which this Article was prepared. I greatly appreciate comments received at a workshop at the University of Virginia Law School. Thanks to Shayak Sarkar for his generous comments and to June Carbone for the joint work reflected in this Article.

102

University of California, Davis

[Vol. 53:nnn]

TABLE OF CONTENTS

INTRODUCTION	103
I. THE DEVELOPMENT AND CELEBRATION OF THE ELECTIVE SHARE	108
II. WHO SEEKS THE ELECTIVE SHARE?	115
III. DEMOGRAPHY AND WEALTH.....	120
IV. NORMATIVE IMPLICATIONS: WHAT DOES THIS ALL MEAN?	122
V. MOVING FORWARD.....	127
A. <i>Potential Reforms</i>	127
B. <i>Moving Forward</i>	132
CONCLUSION.....	136

INTRODUCTION

In August 2019, Ric Ocasek signed a will stating that he had made no provision for his wife, Paulina Porizkova; he explained that they were in the process of divorcing and that “[e]ven if I should die before our divorce is final . . . Paulina is not entitled to any elective share . . . because she has abandoned me.”¹

Ocasek died a few weeks later. Porizkova is the person who found him.² They had been married for almost thirty years, had two children together, and had jointly attended the ceremony marking his band’s induction into the Rock & Roll Hall of Fame in 2018.³ He also had four children from previous relationships,⁴ and the marital home in New York City was on sale at the time of his death.⁵

Is Ocasek’s statement in his will sufficient to ensure that Porizkova receives nothing from his estate? Should it be?

That question goes to the heart of fundamental policies in American trusts and estates law. When one spouse dies, the other spouse is almost invariably entitled to property rights based on the marriage. These rights can occur through intestacy, an omitted spouse statute, election against a will, joint tenancy ownership, or community property principles.⁶ Ensuring some rights for a spouse may result in overriding the vaunted principle of testamentary freedom.

This Article examines one form of the property rights available to the surviving spouse: the system of election. The elective share allows the surviving spouse to choose to take a portion of the decedent’s estate, even if the will explicitly disinherits the surviving spouse.⁷ The Article

¹ Suzy Byrne, *Ric Ocasek Cut Estranged Wife Paulina Porizkova from His Will, Claiming She ‘Abandoned’ Him: Report*, YAHOO (Nov. 8, 2019), <https://www.yahoo.com/entertainment/ric-ocasek-cut-estranged-wife-paulina-porizkova-from-his-will-claiming-she-abandoned-him-report-155623596.html> [https://perma.cc/XF5W-CTWG].

² Claudia Harmata, *Inside the Cars’ Frontman Ric Ocasek and Paulina Porizkova’s Decades-Long Relationship*, PEOPLE (Sept. 16, 2019, 3:07 PM), <https://people.com/music/ric-ocasek-and-paulina-porizkovas-relationship-timeline/> [https://perma.cc/3SND-LFU5].

³ See *Paulina Porizkova and Ric Ocasek Announce Separation After 28 Years Together*, FOX NEWS (May 3, 2018), <https://www.foxnews.com/entertainment/paulina-porizkova-and-ric-ocasek-announce-separation-after-28-years-together> [https://perma.cc/LA3E-JZLJ].

⁴ Harmata, *supra* note 2.

⁵ See Byrne, *supra* note 1.

⁶ See, e.g., NAOMI R. CAHN ET AL., *WILLS, TRUSTS, AND ESTATES IN FOCUS* chs. 1-2, 8 (2019).

⁷ See Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2222-25 (2011). An elective share is a statutorily granted right of a surviving spouse to claim a particular share in the estate of the deceased spouse, with the amount

analyzes a recent five-year period of state cases raising elective share issues reported on either Lexis or Westlaw⁸ with the goal of determining the circumstances under which an elective share is most likely to be contested.

The case analysis in Part II⁹ shows that reported elective share disputes typically involve a subsequent spouse challenging a will that leaves property to an earlier family. The petitioners are almost invariably women. The length of the marriage ranges from a few months to decades. There are various important variations in the cases: some involve premarital agreements, some involve estranged spouses, and a few involve marriage fraud.

Based on this examination of reported cases, in Parts IV and V, the Article questions the current rationales for the elective share and suggests revisions to existing elective share approaches. First, the Article observes that disputes over the elective share illustrate family tensions, rarely involving parents against joint children, and more frequently pitting a surviving spouse against the decedent's earlier families.

Second, it notes the multiple gendered dimensions of the elective share, including questions about both the dependency and the "economic partnership" rationales that are used to justify it.¹⁰ While the elective share developed out of an explicitly gender-based concern for protecting the dependent wife, this study shows a more nuanced reality of who benefits from the elective share.¹¹ It thus provides further questioning of the partnership rationale for the elective share in light of contemporary family demography.¹²

of the share determined according to state law. The surviving spouse can claim a particular amount of the decedent's estate, even if (i) the decedent leaves a will devising property to the surviving spouse (but less than the amount of the elective share), or (ii) the decedent leaves a will that disinherits the surviving spouse (absent a valid and enforceable pre- or post-nuptial agreement). See UNIF. PROBATE CODE art. II, pt. 2 (amended 2010). In some states and under the UPC, an elective share can be claimed when the decedent dies intestate. See, e.g., UNIF. PROBATE CODE § 2-202(a) (amended 2008) (referring to the right of a surviving spouse to take an elective share).

⁸ This was done through separate searches of the systems. For further information, see *infra* Part XYZ.

⁹ See *infra* Part II.

¹⁰ See *infra* Part V.B (noting questions about the partnership rationale).

¹¹ Cf. ELIZABETH R. CARTER, ARE PREMARITAL AGREEMENTS REALLY UNFAIR?: AN EMPIRICAL STUDY OF PREMARITAL AGREEMENTS 5 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436412 [<https://perma.cc/DAA6-BJST>] (suggesting similar questions about stereotypes for those who enter into premarital agreements).

¹² Laura Rosenbury has argued that the partnership theory of marriage "is not a long-term strategy for eliminating gender-role oppression," and "may even play a role

Third, it contrasts the property subject to the elective share to the property available for division at divorce.¹³ For purposes of determining the property subject to the elective share, all of the decedent's property (and today, under the Uniform Probate Code, all of the surviving spouse's property) is included, regardless of when it was acquired.¹⁴ By contrast, in only a minority of non-community property states is all property, whether marital or separate (hotchpot or "kitchen-sink"),¹⁵ available for distribution at divorce;¹⁶ the hotchpot system, however, is the direction in which the Uniform Probate Code ("UPC") has moved, at least for marriages of fifteen years or longer. But if the elective share approach is designed to implement the concept of marriage as a partnership, then it may be overbroad by including what would be termed "separate property" in all community property and most common law title jurisdictions.¹⁷ This, in turn, results in questions about normative goals when a marital relationship ends. That is, in recognition that a relationship is ongoing, perhaps a surviving spouse should receive the same or even more at death, in light of the state's support for marriage; or, perhaps, the partnership rationale should be challenged in both the contexts of divorce and death.¹⁸

The fundamental issue at the core of the Article is the jurisprudential basis for the partnership theory of marriage. Choosing to marry means opting into a series of override and default rules at the state and federal level designed to promote emotional and economic partnership and

in reinforcing traditional gender expectations, including the expectation of wifely sacrifice." Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1289 (2005).

¹³ Cf. *id.* at 1289-90.

¹⁴ See Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 7-9 (2003) [hereinafter *Time for a Reassessment*]. He observes that the goal was "to establish a system that approximates the results that would be achieved by a fifty-fifty split of marital assets," albeit without "the costs and uncertainties associated with post-death classification of the couple's property to determine which is marital (community) and which is individual (separate)." *Id.* at 6.

¹⁵ Even in these states, however, courts "usually award[] most or all preexisting, gifted, and inherited property to the owner spouse." Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1630 (2008). The term "kitchen-sink" may have first appeared here. See J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 219 (1989).

¹⁶ See DOUGLAS ABRAMS ET AL., CONTEMPORARY FAMILY LAW ch. 9 (5th ed. 2019).

¹⁷ For a critique of the analogy to commercial partnership theory, see Shahar Lifshitz, *The Liberal Transformation of Spousal Law: Past, Present and Future*, 13 THEORETICAL INQUIRIES L. 15, 59 (2012).

¹⁸ See Rosenbury, *supra* note 12, at 1274-79.

interdependency. These laws range from assumptions about default health care surrogate decisionmakers during the marriage to the increasingly common presumption of joint custody at divorce to Social Security derivative benefits and include the intestacy presumptions and marital estate tax provisions at death.¹⁹

The conceptual basis for the partnership theory arose at a time when the divorce (and remarriage) rate was low, especially for those over the age of fifty,²⁰ and just as women were moving into the workforce in larger numbers.²¹ The conceptual basis for the elective share is far older, although the share is evolving towards a partnership model; the cases addressed in this Article potentially undermine the goal of full adherence to the partnership theory, at least in subsequent marriages.²²

The Article offers a range of options that could be implemented — if there is clarity on the goals of the elective share override (and if the elective share is retained in some form). One set of reforms might address the composition of the property subject to the elective share. This initial, property-focused set of reforms could mean limiting the assets subject to the elective share to property acquired during the marriage, potentially including the active and passive appreciation of

¹⁹ On the goals of marriage, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015). For a defense of the state's treatment of marriage as imposing obligations and nonmarriage as respecting intent, see June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 57-60, 80-84, 93-94 (2016) [hereinafter *Nonmarriage*]; for challenges, see Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1207-08, 1213-14 (2016) (arguing that *Obergefell* offers a “rose-colored vision” of marriage); Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L.J. 1263, 1265 (2019) (exhorting that *Obergefell*'s “prioritization of marriage and its denigration of life outside of it is cause for serious concern, even alarm”). On income tax and Social Security issues, see, for example, Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 695 (2013); Naomi Cahn, *The Golden Years, Gray Divorce, Pink Caretaking, and Green Money*, 52 FAM. L.Q. 57, 61 (2018) [hereinafter *The Golden Years*]; Naomi Cahn & June Carbone, *Uncoupling* (2020) (unpublished manuscript) (on file with author).

²⁰ See Susan L. Brown et al., *Later Life Marital Dissolution and Repartnership Status: A National Portrait*, 73 J. GERONTOLOGY, SERIES B: PSYCHOL. SCI. & SOC. SCI. 1032, 1032 (2018). See generally Frank Olito, *How the Divorce Rate Has Changed over the Last 150 Years*, INSIDER (Jan. 30, 2019, 6:33 AM), <https://www.insider.com/divorce-rate-changes-over-time-2019-1#since-the-turn-of-the-21st-century-the-divorce-rate-continues-to-decline-rapidly-13> [<https://perma.cc/26MN-PNF2>].

²¹ See, e.g., JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 196 (2014).

²² Moreover, to the extent that the partnership theory of marriage, like the elective share, is premised on dependency, perhaps the continuation of each should be challenged. See Rosenbury, *supra* note 12, at 1288-89; *infra* Part V. This serves, accordingly, as a significant challenge to family law jurisprudence on marriage.

separate property as well.²³ Another option relating to assets subject to the elective share could mean excluding property that would otherwise be left to the decedent's children, joint or otherwise. A second reform might involve decreasing the share available to the surviving spouse in second (or subsequent) marriages. While the UPC, for example, allows for full vesting after fifteen years of marriage, the rising incidence of gray divorce and remarriage means that many new marriages, potentially longer than fifteen years, will be contracted at later stages in life,²⁴ potentially after much of the decedent's wealth has already been accumulated. This reform could be implemented by increasing the amount of time for full vesting for all marriages or, for a subsequent marriage, lengthening the amount of time or decreasing the percentage available. A third reform could be awarding a spouse who has initiated divorce or separation proceedings the lesser — or the greater — of the elective share or divorce property distribution and alimony. A final recommendation concerns coordination of estate planning and family law. The Article concludes by emphasizing the need for reform as the demography of marriage changes.²⁵

²³ Under divorce law, only some forms of appreciation in the value of separate property are typically included. *See, e.g.*, MD. CODE ANN., FAM. LAW § 8-201(e) (2020). That appreciation may result from one spouse's active efforts during the marriage or from passive appreciation; some states include both forms of appreciation, others distinguish between them, and statutes are often unclear as to which is intended. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.05 (AM. LAW INST. 2002) [hereinafter PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION]; *see also* Motro, *supra* note 15, at 1637 ("The treatment of income from and appreciation of separate property is a source of much angst and debate as jurisdictional rules vary dramatically and some are too murky and untested to produce predictable results."). Regardless of that distinction, the change in value of separate property is asymmetric, with only the value of the asset, and depreciation (either active or passive) not typically included. Joint debt, however, is included in property distribution. *See, e.g.*, FAM. LAW § 8-201(e); ABRAMS ET AL., *supra* note 16, at 633 ("Liabilities accumulated during a marriage are also marital property subject to division . . .").

²⁴ *See* Gretchen Livingston, *Chapter 2: The Demographics of Remarriage*, PEW RES. CTR. (Nov. 14, 2014), <http://www.pewsocialtrends.org/2014/11/14/chapter-2-the-demographics-of-remarriage/> [<https://perma.cc/A2EM-MVZY>].

²⁵ While others suggest that the elective share might be made available to nonmarital partners, for example, Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 244 (2016), this Article and others focus on marriage as an appropriate dividing line for such rights. *See, e.g.*, Carbone & Cahn, *Nonmarriage*, *supra* note 19.

I. THE DEVELOPMENT AND CELEBRATION OF THE ELECTIVE SHARE

The elective share only exists in common law title states. Community property states create joint ownership rights in property acquired during marriage, so each spouse is entitled to half of that property at death.²⁶ There is no similar protection in common law title states in the absence of the elective share; parties are free to title property earned during marriage and dispose of it as they wish at death.²⁷ Elective share statutes thus ensure that a surviving spouse can receive something from the decedent, even where there is a will that leaves nothing to the survivor.²⁸

The elective share developed from the English common law concepts of dower and curtesy, with the goal of protecting the wife from disinheritance to ensure her support.²⁹ Dower accorded the widow a life estate in one-third of her husband's lands;³⁰ upon marriage, a husband

²⁶ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 cmt. b (AM. LAW INST. 2003); Richard F. Storrow, *Family Protection in the Law of Succession: The Policy Puzzle*, 11 NE. U. L. REV. 98, 106-07 (2018). Community property states may provide additional forms of protection for a surviving spouse. For example, in Louisiana, a surviving spouse is entitled to a "marital portion" if one "spouse dies rich in comparison with the surviving spouse." LA. CIV. CODE ANN. art. 2432 (2019). This portion cannot be waived. *See id.* art. 2330; CARTER, *supra* note 11, at 13.

²⁷ Ironically, divorce is different. *See* Rosenbury, *supra* note 12, at 1246-47.

²⁸ States vary on whether the elective share is available only when a decedent dies testate or whether an election can be made when the decedent dies intestate. *See, e.g.*, UNIF. PROBATE CODE §§ 2-201 to 2-207 (amended 2010) (testacy not required).

²⁹ *E.g.*, *Spencer v. Williams*, 569 A.2d 1194, 1197 (D.C. 1990) ("It was originally intended to protect the wife from disinheritance and to prevent her from becoming a public charge . . ."); *Boan v. Watson*, 316 S.E.2d 401, 402 (S.C. 1984) (noting that when wives first received the right to dower, they "labored under the many burdens of coverture The law of dower gave a surviving wife a gender-related benefit with no corresponding benefit to surviving husband"); *Thayer v. Thayer*, 14 Vt. 107, 118 (1842) ("It is a right which was instituted for the subsistence of the wife during her life, and the husband is bound, by the law of God and man, to provide for her a support during his own life, and, upon his death, the moral duty does not end. He should provide for her so long as she lives."); *see* Susan N. Gary, *The Oregon Elective Share Statute: Is Reform an Impossible Dream?*, 44 WILLAMETTE L. REV. 337, 339 (2007); Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 982-90 (1977). Dower was addressed in Chapter Seven of the Magna Carta. *Id.* at 983.

³⁰ George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 48-49 (1948). Because dower was designed to support the widow after her husband's death, it "escaped the strictures of coverture because a wife would come into possession of her dower only upon the death of her husband, when she would once again be a feme sole." Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 174 (2014); *see* Bryan v. Bryan, 16 N.C. 47, 53-54 (1827) ("It may be a hardship for a married woman who brings

was entitled to control of his wife's property and, once a child was born, he obtained a life estate in her property.³¹

At a time when married women could not hold property in their own names, dower provided protection at a spouse's death.³² The nineteenth century separate sphere ideology was premised on distinct roles for men and women, and women's intrinsic dependence on men (a father, a husband) because of those roles; married women were responsible for maintaining the home, married men for breadwinning.³³ Women may, according to Blackstone, have been a "favorite,"³⁴ but that protection meant they were subordinated to their husbands during marriage, could not own property in their own names, and were hardly capable of committing their own crimes.³⁵

At death, the disadvantages continued: dower provided fewer rights than curtesy, although it may have provided more substantive economic

a fortune to her husband to find herself and her children reduced to poverty; but she knew when she married him that the law gave him an absolute property in all her personal estate capable of immediate possession, and in all she should afterwards acquire, if reduced by him into possession during coverture. The hardship might have been guarded against by a settlement . . ."). *See generally* *Ferry v. Spokane, P. & S. Ry. Co.*, 258 U.S. 314, 318 (1922) (upholding dower as the prerogative of the States, not a constitutionally protected "privilege and immunity"); LeighAnna C. Cunningham, Note, *Michigan's Elective Share: An EPIC Failure*, 94 U. DET. MERCY L. REV. 273, 275 (2017) (noting that dower predated the Norman Conquest).

³¹ Upon marriage, the husband's estate "by the marital right" meant that he obtained "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." George L. Haskins, *Curtsey in the United States*, 100 U. PA. L. REV. 196, 196 (1951) [hereinafter *Curtsey*]. The husband's estate by the marital right ended upon the wife's death. *Id.* When a child was born into the marriage, then the husband acquired curtesy rights to a life estate in all of her real property that was capable of inheritance by her issue. *Id.*; see Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1661 (2003). For a list of six differences between dower and curtesy, see Haskins, *Curtsey*, *supra* note 31, at 197.

³² See, e.g., Tait, *supra* note 30, at 174.

³³ See, e.g., Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 250, 250 nn. 235-36 (2017). As Eichner notes, this ideology did not describe the lives of a disproportionately high number of black women. See *id.* at 250 n.236.

³⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *433; Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1497 n.161 (2009).

³⁵ See Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, ARIZ. ST. L. REV. 1247, 1249 (2020); see also Dubler, *supra* note 31, at 1667 (arguing that dower defined femininity and extended coverture "beyond the end of a marriage").

rights because women owned comparatively little property.³⁶ Some women also held property in “separate estates,” property that, because it was placed in a trust on her behalf, enabled a woman to hold equitable title but no legal title that would otherwise have been subject to her husband’s control upon marriage.³⁷ Dower, limited as it was, may also have provided more rights to the surviving wife than divorce, which was based on title-based property distribution.³⁸

States that once required dower or curtesy moved towards a gender-neutral elective share,³⁹ although some states retain the terminology.⁴⁰ The New York legislature explained that it was responding to women’s

³⁶ That is, a one-third life estate interest in her husband’s lands may have far exceeded in value his curtesy right in one-third of her property. Cf. Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 74 (2009) (“A widow’s right to dower, traditionally a one-third life interest in land held by her husband, was hardly comparable to the rights of a male widower . . .”). The life estate assured “continuity of the enterprise in the hands of the next generation.” John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 726 (1988). Langbein also suggests that widowhood was less common in the mid-nineteenth century than today, with less disparity in lifespans. See *id.* New York recognized a married woman’s right to protect her dower interest, even while her husband was alive. See, e.g., *Clifford v. Kampfe*, 42 N.E. 1, 2 (N.Y. 1895).

³⁷ A trustee held legal title. Tait, *supra* note 30, at 167. A married woman was even able to devise both real and personal “separate” property. *Id.* at 203.

³⁸ In both contexts, courts developed equitable remedies to ensure the wife received some of the husband-titled property, such as “fraud on the elective share.” See, e.g., *Karsenty v. Schoukroun*, 959 A.2d 1147, 1151, 1165 (Md. 2008); Martin D. Begleiter, *Grim Fairy Tales: Studies of Wicked Stepmothers, Poisoned Apples, and the Elective Share*, 78 ALB. L. REV. 521, 523 n.12, 526 (2015).

³⁹ See, e.g., N.Y. REAL PROP. LAW § 190 (1929) (abolishing dower); *Rubin v. Myrub Realty Co.*, 279 N.Y.S. 867, 870 (N.Y. App. Div. 1935); JAMES A. FOLEY, COMBINED REPORTS OF THE COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES FOR THE YEARS 1928-1929-1930-1931-1932 AND 1933, at 72, 75 (1935) (listing eleven states allowing a wife to take an election and seventeen allowing a husband to make such an election); see also Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 93 (1994); Deborah S. Gordon, *Engendering Trust*, 2019 WIS. L. REV. 213, 216-17 (2019) (“Spousal rights on death have evolved from the demeaning system of dower, which treated women as objects in need of care and ‘vessels’ for the bloodline, to more gender-neutral systems . . .” (footnotes omitted)).

⁴⁰ See, e.g., ARK. CODE ANN. § 28-11-101 (2019). Dower was more likely to be claimed in Arkansas than curtesy. See J. Cliff McKinney, *With All My Worldly Goods I Thee Endow: The Law and Statistics of Dower and Curtesy in Arkansas*, 38 U. ARK. LITTLE ROCK L. REV. 353, 354 (2016) (“[O]nly 80 Arkansas cases include the word ‘curtesy’ and exclude the word ‘dower.’ In other words, nearly 62% of the cases only concern dower and fewer than 6% are just curtesy cases.” (footnote omitted)). Michigan also retains dower. See MICH. COMP. LAWS ANN. § 700.2202 (2019).

dependence on male breadwinners⁴¹ and the privatization of that dependence.⁴² Not all states moved towards the abolition of dower and adoption of a gender-neutral elective share, however, and state courts continued to consider the constitutionality of dower-only statutes until the first decade of the twenty-first century.⁴³

Although married women had been able to own property in their own name since the middle of the nineteenth century, domesticity norms discouraged them from working outside of the home.⁴⁴ By the end of the nineteenth century, all of the American states had adopted some form of the Married Women's Property Act, which allowed women to retain control of their separate property during the marriage and ownership at divorce.⁴⁵ Still, the mothers of young children did not typically work outside the home if their husbands could support them, so they were the needy spouses envisioned by state legislatures (and they were the ones whose husbands had property).

As dower moved towards gender-neutrality, changes in the nature of property ownership and the increasing acceptance of nonprobate

⁴¹ The New York legislative report was concerned both about protecting against the "spendthrift" and protecting the "faithful" wife, and it noted cases where husbands had unjustly disinherited their wives. See FOLEY, *supra* note 39, at 18-20, 166, 257. Although the Commission phrased its work in gender-neutral terms to protect the "widow or surviving husband," it noted that its goal was to "correct the almost entire absence of protection for the widow under the present law." *Id.* at 12. For further analysis of New York's abolition of dower, see Dubler, *supra* note 31, at 1672.

⁴² See Dubler, *supra* note 31, at 1702-03.

⁴³ See, e.g., *In re Estate of Baer*, 562 P.2d 614, 616 (Utah 1977) ("It is a legitimate state purpose to support widows who would have difficulty supporting themselves and therefore does not violate the equal protection clause."); *In re Estate of Miltenberger*, 737 N.W.2d 513, 517 (Mich. Ct. App. 2007). Courts found support in the Supreme Court's 1974 decision in *Kahn v. Shevin*, 416 U.S. 351 (1974), which upheld the conferral of different benefits on widows and widowers (Ruth Bader Ginsburg lost the appeal); cf. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638-39, 643, 648 (1975) (striking down benefit scheme that excluded widowers based on "archaic" generalizations). Michigan continues to use the term dower, and its elective share statute refers to "[t]he surviving widow of a decedent." MICH. COMP. LAWS ANN. § 700.2202 (2020).

⁴⁴ See June Carbone & Naomi Cahn, *Democracy and Family*, in STATING THE FAMILY: NEW DIRECTIONS IN THE STUDY OF AMERICAN POLITICS (Julie Novkov & Carol Nackenoff eds.) (forthcoming 2020). See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 60 (1997) (discussing race, housework, and domesticity norms); Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1086 (1994) ("In households too poor to conform to antebellum norms of domesticity, wives spent significant portions of their time earning income for the family.").

⁴⁵ See June Carbone, *The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 49 (2002).

devices prompted some reforms in the elective share.⁴⁶ While dower applied to all the land the husband owned at any time during the marriage, the elective share applied only to property owned at death. Consequently, a spouse who wanted to bypass an elective share statute only had to “[transfer] the property to other beneficiaries through non-probate means,”⁴⁷ such as revocable trusts.

To address this problem, the UPC uses the concept of the augmented estate, expanding the elective share to include not just nonprobate assets, but also each spouse’s separate property and certain transfers to others.⁴⁸ Throughout, however, the UPC reflects a tension between a support theory — how to ensure that the surviving spouse receives adequate financial payment — and a partnership theory, based on the idea that both spouses equally contribute to property acquisition during the marriage.⁴⁹ The UPC was amended in 1990 in an attempt to better reflect the partnership theory of marriage and respond to the “multiple marriage society.”⁵⁰ The amended UPC included an approximation system, “to reflect the partnership theory and each spouse’s entitlement to one-half of the couple’s marital property.”⁵¹ As the length of the marriage increases, so does the percentage of property subject to the elective share, with the maximum possible election at 50% of all included property after fifteen years of marriage.⁵²

⁴⁶ See UNIF. PROBATE CODE §§ 2-201 to 2-207 (amended 2010); Gary, *supra* note 29, at 339-44. There were other factors as well, including dower’s limits on land inalienability and women’s rights advocacy. See, e.g., Dubler, *supra* note 31, at 1671; Jason C. Kirklín, *Measuring the Testator: An Empirical Study of Probate in Jacksonian America*, 72 OHIO ST. L.J. 479, 492 n.86 (2011).

⁴⁷ Gary, *supra* note 29, at 340; see Angela M. Vallario, *The Elective Share Has No Friends: Creditors Trump Spouse in the Battle over the Revocable Trust*, 45 CAP. U. L. REV. 333, 334 (2017).

⁴⁸ UNIF. PROBATE CODE §§ 2-201 to 2-207 (amended 2010); see Vallario, *supra* note 47, at 346-47.

⁴⁹ See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 269, 269 n.177 (1996).

⁵⁰ See UNIF. PROBATE CODE art. II prefatory note (1990) (amended 1996); Gary, *supra* note 29, at 341-42; Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 439 (2018).

⁵¹ Gary, *supra* note 29, at 342; UNIF. PROBATE CODE §2-203 (amended 2010). The approximation system is designed to separate marital and nonmarital property; for example, it presumes that 30% of the augmented estate is marital property if the decedent died after five, but less than six, years of marriage. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.2 (AM. LAW INST. 2003). The surviving spouse is then entitled to elect to take one-half of the marital property portion.

⁵² RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.2 (AM. LAW INST. 2003).

The UPC was further amended in 2008, increasing the support for the surviving spouse, through the supplemental share, from \$50,000 to \$75,000.⁵³ The 2008 revision also adjusted the approximation system, with the goal of providing an elective share that equals half of the marital property of the augmented estate.⁵⁴

Of course, there is enormous variation between the states as to what property is included in the elective share and the percentage given to the surviving spouse, as shown below in Table 1, and commentators argue that many elective share statutes do not reflect the partnership theory of marriage.⁵⁵ This undoubtedly is the result of states continuing to rely on the historical concepts of dower and curtesy as the basis for the elective share.⁵⁶ In contrast to what happens at divorce, however, in which dependency is reflected through an individualized determination of alimony,⁵⁷ any support at death is available only in a temporary form, typically while the estate is being administered.⁵⁸ Moreover, states apply a standard rule to property distribution that does not consider any of the equitable distribution factors applied in most states' divorce proceeding.⁵⁹

If partnership theory, then it should account for property acquired during the marriage. In hotchpot states, partnership theory takes the

⁵³ Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 706 (2010).

⁵⁴ See *id.* at 707-08.

⁵⁵ See Storrow, *supra* note 26, at 136-37 (“[T]he elective share appears to be more promotive of testamentary freedom. It allows the testator to contradict the assumptions upon which intestacy law is built and then, only if the surviving spouse complains, scales them back to an amount less than what society has deemed she should receive in intestacy. Less support for the theory of marriage as an economic partnership can scarcely be imagined.”).

⁵⁶ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 (AM. LAW INST. 2003).

⁵⁷ See *Orr v. Orr*, 440 U.S. 268, 281 (1979).

⁵⁸ E.g., MO. REV. STAT. § 474.260 (2019) (providing for a “reasonable allowance” for surviving spouse during probate); UNIF. PROBATE CODE § 2-404 (amended 2010) (same). This support is available, regardless of the theory underpinning the elective share.

⁵⁹ See, e.g., VA. CODE ANN. § 20-107.3E (2019). A few of the community property states — California, Louisiana, and New Mexico — require equal division, but the others — Arizona, Idaho, Nevada, Texas, and Washington — allow for equitable distribution. BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 8:1 (4th ed. 2019); see, e.g., *Kelly v. Kelly*, 9 P.3d 1046, 1048 (Ariz. 2000). At death, by sweeping in the surviving spouse's property, the augmented estate approach may account for support needs (as well as the partnership theory); a spouse who is wealthier than the decedent may receive little through the elective share, reflecting less need for support (although, not necessarily recognizing the partnership model).

form of including both separate and marital property as potentially subject to distribution.⁶⁰ By contrast, the partnership theory in community property states takes the form of including only property acquired by the efforts of either spouse during the marriage.

Table 1. Property System Applicable to the Elective Share⁶¹

Property System	No. of Jurisdictions	Jurisdictions
Probate-only	16	Al, AK, CT, DC, IL, IN, KY, MI, MS, NH, OH, OK, RI, TN, VT, WY
Semi-augmented	12	DE, FL, IA, MD, ⁶² MA, MO, NJ, NY, NC, OR, SC
Augmented	13	AK, CO, HI, KS, ME, MN, MO, NB, ND, SD, UT, VA, WV

⁶⁰ The hotchpot alternative emerged during the drafting of the Uniform Marriage and Divorce Act § 307. See UNIF. MARRIAGE & DIVORCE ACT § 307 (amended 1973); Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 828 (1990) (“The American Bar Association’s Family Law Section ‘steadfastly opposed’ UMDA’s marital property provision and fought for and won reversion to hotchpot or kitchen sink equitable distribution . . .”). The American Law Institute recommends a hybrid system, in which individual property is, over time, recharacterized as marital property:

After many years of marriage, spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical property rules. . . . The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses.

PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 23, § 4.12 cmt. a.

⁶¹ Alex S. Tanouye, *Surviving Spouse’s Rights to Share in Deceased Spouse’s Estate*, ACTEC (Aug. 2018), https://www.actec.org/assets/1/6/Surviving_Spouse%E2%80%99s_Rights_to_Share_in_Deceased_Spouse%E2%80%99s_Estate.pdf [https://perma.cc/22TA-RJE4].

⁶² Maryland’s elective share system changed in 2019, and the revised approach is reflected in Table 1. See H.B. 99, Reg. Sess. (Md. 2019). It differs from the UPC in that no spousal assets are included in the augmented estate, and it has a complicated accounting for various kinds of trusts already passing to the spouse. It also permits a judicial override, again unlike the UPC. The state legislature explicitly noted that while one legislative goal was to preserve flexibility for the testator, the other was a support theory. *Id.* § 3-402 (“To ensure that a surviving spouse is reasonably provided for during the surviving spouse’s remaining lifetime . . .”).

Comm. Prop. ⁶³	9	AZ, CA, ID, LA, NV, NM, TX, WI
None	1	GA
Total	51 (DC)	

Finally, the elective share is only available to a spouse, or, in a few states, a domestic partner.⁶⁴ It is thus an example of the law's "channelling function," fostering shared notions of appropriate behavior.⁶⁵ On this theory, the elective share supports the socially-desirable institution of marriage and its associated norm of expected fairness.⁶⁶ The partnership rationale has become integral to the institution.⁶⁷

II. WHO SEEKS THE ELECTIVE SHARE?

To take a step towards understanding who is protected by the elective share, this Article reports on the first study of nationally available

⁶³ Community property states do not provide for an elective share. "In states having the community-property regime of marital property, no provision is made for the surviving spouse to take an elective share because each spouse acquires an undivided ownership interest in half of the property that the couple acquired during the marriage other than by gift, devise, or inheritance. The elective share of the surviving spouse is therefore a feature of non-community-property states. Some community-property states do recognize elective-share-type rights in so-called quasi-community property, however, which is property acquired in a non-community-property state that would have been community property had it been acquired in a community-property state." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9, pt. A, introductory note (AM. LAW INST. 2003).

⁶⁴ Thus, in states that accord legal status to domestic partners, that status typically includes the same rights as marriage, and the elective share is one such right. For example, Hawaii permits a reciprocal beneficiary to claim an elective share. HAW. REV. ST. § 560:2-202 (2019).

⁶⁵ See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 504 (1992) (describing the channelling function of family law as a means for promoting social institutions); cf. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185 (2013) [hereinafter *The Triple System*]; Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2133 (2007). Ariela Dubler has argued that "contemporary inheritance law continues to revolve around a traditional family model, cajoling people into that framework if they want to claim the protections of probate laws." Dubler, *supra* note 31, at 1712.

⁶⁶ See Schneider, *supra* note 65, at 498, 501-02.

⁶⁷ The dependency rationale remains significant. See, e.g., Dubler, *supra* note 31, at 1654 ("[L]awmakers still look to marriage as a public policy tool capable of privatizing women's economic dependency."). On the gendered aspects of the elective share, see Rosenbury, *supra* note 12, at 1289 (arguing that the partnership theory is "not a long-term strategy for eliminating" gendered marital roles).

elective share cases where the decedent died testate⁶⁸ from January 2014 to January 2019.⁶⁹ The search resulted in seventy-six cases that appeared to be relevant; further analysis showed that four of those cases (each involving widows) were duplicates, four concerned an omitted spouse claim⁷⁰ rather than an elective share, one concerned a disputed

⁶⁸ This meant that cases focused solely on whether an elective share could be taken when the decedent died intestate were excluded. *E.g.*, *In re Estate of Rivera*, 194 A.3d 579, 586 (Pa. Super. Ct. 2018) (noting that the husband “appears to conflate the statutes governing spousal share and elective share and his cross-references are confusing and misplaced. Because Decedent died wholly intestate, the spousal share statute controls any claim”). While some states allow a surviving spouse to choose an elective share over an intestate share, cases raising these issues do not present the same tensions between testamentary freedom and surviving spouse protections. The search was done in state courts. Because probate law is state law, elective share cases are most likely to arise in state courts. Moreover, during the nineteenth century, the Supreme Court articulated the “probate exception,” which precluded federal courts from hearing various matters relating to probate. *See, e.g.*, James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 197 (2018). The Court has limited the probate exception to claims brought on the basis of diversity of citizenship. *See, e.g.*, *Marshall v. Marshall*, 547 U.S. 293, 311-12 (2006).

⁶⁹ The search was done on both Lexis and Westlaw. There were two separate searches on Westlaw. The first used the West Key Number System. That approach worked well, but only for those cases that had those West editorial enhancements. That was a search for 409VII(K), which included all cases under the West Key numbers in the category of “election” (Wills 778-803), limited to all dates after 01/01/2014. There were 127 results. The other search was an advanced search using connectors and expanders. A research librarian chatted with a West Reference Attorney to come up with a good advanced search to fill in the holes, after having worked on the search using the West Key Number System. The second search used connectors and expanders: adv: surviv! /5 spous! wife husband /p elect! /s against will estate & DA(aft 12/20/2013). There were 182 results from this search. Of the 309 cases (total), almost 80% were irrelevant; the term “election” was used in contexts such as “elect to take under a will.” Or, a claimant who took under a will claimed she should have been entitled to property that she might have been able to claim had she instead filed for her elective share. *See, e.g.*, *Hayes v. Hayes*, 198 A.3d 1263, 1264 (Vt. 2018). Another case involved an attempt to reopen an estate for procedural irregularities, including a failure to advise the widow of her elective share. *See Jubie v. Dahlke (In re Estate of Dahlke)*, 319 P.3d 116, 118-19 (Wyo. 2014). For Lexis, a similar search of terms and connectors was used for all states and cases from 1/1/2014 through early 2019: surviv! /5 (spous! or wife or husband) /p elect! /s (against or will or estate) to ensure as complete a set of cases as possible. While the databases may not provide all relevant cases, my goal is qualitative, rather than statistically valid claims, particularly because the search included the limited class of reported cases.

⁷⁰ Some states and the UPC include explicit protection for an omitted spouse. *See* UNIF. PROBATE CODE § 2-301 (amended 2010); Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 263 (2018) [hereinafter *Inheritance on the Fringes*] (identifying thirty-three states). Some do not. *See, e.g.*, N.C. GEN. STAT. ANN. § 31-5.3 (2019) (specifying that the omitted spouse can elect against the will); Storrow, *supra*

divorce and not the elective share,⁷¹ and one concerned only intestacy. I did not include the duplicates in overall counts, but did include the four omitted spouse cases in a distinct category; although they do not necessarily show the same deliberateness in leaving out the spouse (simply a failure to update, which may have differing causes),⁷² they do show the general trends of widows in subsequent marriages going to court.⁷³

Before continuing, an important caveat: reported cases provide a limited snapshot of what is actually happening on the ground, so this study has inherent limitations.⁷⁴ The goal was simply to find out what types of disputes are most likely to be litigated to the point of being available through the major online services.⁷⁵ All claims, then, must be placed in that context.

note 26, at 112-13. Unlike the elective share, omitted spouse statutes have been adopted in community property states. *See, e.g.*, CAL. PROB. CODE § 21610 (2019).

⁷¹ *Wilson v. Fisher (In re Estate of Wilson)*, 913 N.W.2d 273 (Iowa Ct. App. 2018).

⁷² *See* JOEL C. DOBRIS ET AL., *ESTATES AND TRUSTS: CASES AND MATERIALS* 193 (2d ed. 2003).

⁷³ One other case involved intestacy, but the lower court had conflated the intestate and elective share. *See In re Estate of Scarpaci*, 176 A.3d 885, 889 (Pa. Super. Ct. 2017).

⁷⁴ Thus, for example, the Article does not calculate the percentage of total probate cases in which a spouse has chosen an elective share. Moreover, the number of reported elective cases is comparatively small, compared to the number of deaths of a married person each year. On the other hand, the comparative rarity of these cases is in accord with other work showing that election is relatively infrequent. *See* Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 53 UC DAVIS L. REV. <starting page>, <PIN, pg. 13 of manuscript> (2020) [hereinafter *Individuated Determination*] (noting that approximately 2% of the cases in which spouses had been disinherited in Georgia resulted in a challenge); Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 U. MIAMI INST. ON EST. PLAN. § 903 (1998) [hereinafter *Minimizing*]. The actual instance of disinheritance may be approximately twenty percent. *See* Pennell, *Individuated Determination*, *supra* note 74, at 12 n.29. But the number of nontraditional dispositions may be higher. *See* David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 630 (2015). As a more general matter, more than 10% of probate cases may result in litigation, albeit not always over the terms of the will. *Id.* at 629-30 (noting that 5% of the wills probated in Alameda County resulted in disputes, with other conflicts concerning issues such as who would be appointed to serve as personal representative).

⁷⁵ For an analysis of the utility of qualitative work, *see, for example*, Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 529-30 (2013). This study does not purport to make statistically valid claims. Reported and unreported cases may differ. Jeffrey Pennell's data on claims in probate records in Georgia (most of which did not result in a reported case), while not directly analogous because there is no elective share, do show some similar patterns concerning the lack of contest concerning disinheritance. *See* Pennell, *Individuated Determination*, *supra* note 74.

I coded each of the cases for a series of variables: which spouse brought the action, was it a first marriage for either, did the court award the elective share, was there a prenuptial or other form of waiver, were the parties estranged, and then a catch-all for other potentially relevant information, such as the size of the estate. When the case itself did not include all of this information, I was sometimes able to find material — particularly the existence of prior children — through a search of obituaries.⁷⁶

The cases included a variety of elective-share-related issues.⁷⁷ Some of the cases did not, for example, concern a disputed attempt to claim the elective share, such as a challenge to the existence of the marriage itself,⁷⁸ but instead a conflict over what was included in the augmented estate or a question of the timeliness of the filing of the claim. One case went to the Minnesota Supreme Court for determination of whether requiring court approval for a conservator's elective share claim unconstitutionally distinguished between protected persons and nonprotected persons.⁷⁹

Of the seventy-one cases shown in the Table 2 below, fifty-six involved a wife claiming, fifteen involved a husband claiming, and one involved a girlfriend claiming against a boyfriend.⁸⁰ There were thirteen first marriages and fifty-eight subsequent marriages.⁸¹ Each of the

⁷⁶ This also often resulted in pictures of the deceased. Although I was able to collect information on gender, I was not able to do so consistently for race.

⁷⁷ Given my goal of focusing on family dynamics, and because cases did not always decide on the ultimate receipt of the elective share, it did not seem productive to code for actual receipt.

⁷⁸ See, e.g., *Brown v. Sojourner (In re Estate of Brown)*, 818 S.E.2d 770 (S.C. Ct. App. 2018) (decendent left his estate to six named children, who then challenged the validity of the marriage between the decendent and the putative surviving widow when she claimed her elective share); *In re Estate of Badruddin*, 60 N.Y.S.3d. 528 (N.Y. App. Div. 2017) (two women claimed to be the surviving spouse). The only same-sex marriage case that turned up involved an “election” to take under the decendent’s will and concerned a question of whether the alleged spouses had been divorced, and it is not included in the seventy-one elective share cases in Table 2 *infra*. See *Wilson v. Fisher (In re Estate of Wilson)*, 913 N.W.2d 273 (Iowa Ct. App. 2018). The court in that case assumed that the couple were validly married at some point before November 1991, and the question was the applicability of a revocation upon divorce statute, not spousal election. *Id.*

⁷⁹ See *In re Guardianship & Conservatorship of Durand*, 859 N.W.2d 780, 782 (Minn. 2015). This was one of the cases that appeared twice. Nonprotected persons (that is, persons not subject to a guardianship) do not need court approval to file.

⁸⁰ See *In re Estate of Tito*, 150 A.3d 464 (Pa. Super. Ct. 2016). The boyfriend had been previously married. See *id.* at 466.

⁸¹ Where I could not determine the existence of a second family, I coded as null. One of the husbands who claimed was in his seventh marriage. See *In re Estate of Meek*,

omitted spouse cases involved a subsequent marriage.⁸² There were twenty-one cases involving some form of waiver; all but one of them occurred in a subsequent marriage.⁸³ Nine cases involved some form of estrangement or the filing of divorce proceeding, and in three of those cases, election was allowed.⁸⁴ Four cases involved questions of whether the election had been filed during the appropriate time period, another two concerned choice of actions (did filing a challenge to a will preclude taking an elective share, and vice versa), and two dealt with the choice between taking as an omitted spouse or claiming an elective share.

Table 2. Elective Share Cases

Characteristics	Number
Total Cases	71
Female Ps	55 (3 omitted spouse)
Male Ps	15 (1 omitted spouse)
First Marriage*	13
Subsequent Marriage	58 (4 omitted spouse)
Prenuptials/Waivers	21 ⁸⁵

*coded as such where uncertain

No. M2013-01070-COA-R3-CV, 2014 WL 2553469, at *5 (Tenn. Ct. App. June 4, 2014).

⁸² In a subsequent project, I hope to analyze omitted spouse cases.

⁸³ See *McNaught v. Johnson* (*In re Estate of McNaught*), No. 4-16-0132, 2016 WL 7118859, at *1 (Ill. App. Ct. Dec. 6, 2016). In the other cases considering the validity of the prenuptial agreement or waiver, the court upheld the agreement to preclude filing for the elective share. (In four cases that included a prenuptial agreement, the dispute concerned another issue altogether, such as the existence of the marriage. See, e.g., *In re Estate of Brown*, 818 S.E.2d at 770).

⁸⁴ Courts carefully examined the facts and circumstances of abandonment. The three cases allowing election, notwithstanding separation, were similar in that the surviving spouse was seen as innocent, or at least as not having wronged the decedent. For example, in *In re Peterson*, the decedent had moved out of the marital home to live with a nonmarital partner. See *Lovett v. Peterson* (*In re Peterson Estate*), 889 N.W.2d 753, 755 (Mich. Ct. App. 2016). When a non-joint daughter sought to preclude the surviving widow from claiming her elective share, the court held that, even though the relevant statute precluded a "willfully absent" spouse from claiming the share, the widow had not caused the separation, so was not willfully absent. *Id.* at 759. "Abandonment" does not require marital misconduct and may involve mutual consent in Missouri. See *Estate of Heil v. Heil*, 538 S.W.3d 382, 389 (Mo. Ct. App. 2018).

⁸⁵ All but one of the prenuptial agreements or waivers were in second marriages. In most of these cases, it was the surviving wife claiming against a deceased husband's estate, and the elective share waivers were typically effective.

Although the cases did not always address whose property would be taken to satisfy the elective share, most of the disputes centered on claims of a spouse against a child from an earlier relationship. In one of the first marriage cases, a surviving spouse was taking at the expense of a joint child, but in most of the subsequent marriage cases, there were pre-existing children of one, or both, spouses.⁸⁶

III. DEMOGRAPHY AND WEALTH

Most of the elective share cases involved widows not in a first marriage. That these cases involve women is not surprising; women's life expectancy at birth is eighty-one years, while for men, it is seventy-six, and even at age sixty-five, life expectancy is two years longer for women.⁸⁷ Moreover, women are typically younger than the men they marry.⁸⁸

The subsequent marriage piece may be a little surprising. The elective share system developed at a time when divorce and remarriage were comparatively rare. Approximately 1-2% of all women were divorced in 1930 while today that is true of 15% of women; approximately 11% of women are widowed, and that proportion has remained comparatively stable over the past century.⁸⁹ An estimated one-quarter of people married today are not in a first marriage, almost double (13%) the rate in 1960.⁹⁰ Moreover, the number of remarriages is increasing, and is now at 40% of new marriages, with half of those involving a remarriage for both spouses.⁹¹

Remarriage is more common among men than women; almost two-thirds (64%) of previously married men remarry compared to just over

⁸⁶ I was able to determine the existence of prior families in many cases either through the reported case or doing a separate search for an online obituary.

⁸⁷ See Sherry L. Murphy et al., *Mortality in the United States, 2017*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 2018), <https://www.cdc.gov/nchs/products/databriefs/db328.htm#fig1> [<https://perma.cc/4T9F-5JVL>].

⁸⁸ The age of first marriage for women in the United States is twenty-eight; for men, it is thirty. See A.W. Geiger & Gretchen Livingston, *8 Facts About Love and Marriage in America*, PEW RES. CTR. (Feb. 13, 2019), <https://www.pewresearch.org/fact-tank/2019/02/13/8-facts-about-love-and-marriage/> [<https://perma.cc/JS8A-XT2T>].

⁸⁹ See JULISSA CRUZ, *MARRIAGE: MORE THAN A CENTURY OF CHANGE 1* (2013), <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-13-13.pdf> [<https://perma.cc/Y38M-4RYZ>].

⁹⁰ See Geiger & Livingston, *supra* note 88.

⁹¹ See *id.* Note that the overall remarriage rate, like the marriage rate, is decreasing. See Krista K. Payne, *Change in the U.S. Remarriage Rate, 2008 and 2016*, BOWLING GREEN ST. U., <https://www.bgsu.edu/ncfmr/resources/data/family-profiles/payne-change-remarriage-rate-fp-18-16.html> (last visited Feb. 8, 2020) [<https://perma.cc/3H6K-WPBP>].

half of comparable women (52%).⁹² And the rate of remarriage is increasing for those aged fifty-five and older: for those between the ages of fifty-five and sixty-four, two-thirds (67%) of those previously married had remarried in 2013, compared to 55% in 1960, and half of those sixty-five and older were remarried, compared to 34% in 1960.⁹³ Remarriages remain more likely than first marriages to dissolve.⁹⁴

Estate planning for a subsequent marriage is typically more complex.⁹⁵ A spouse in a second marriage may be more likely to enter into a prenuptial agreement to preserve existing property.⁹⁶ Moreover, in their empirical study of wills, Danaya Wright and Beth Sterner found different patterns of distribution for testators in a subsequent rather than an initial marriage.⁹⁷ For example, almost 50% more of once-married spouses (58%) left their entire estate to the surviving spouse than did those in multiple marriages (40%), and once-married spouses were half as likely than those in a later marriage to leave nothing to a spouse or to leave property to a surviving spouse and children.⁹⁸

A final demographic issue is the relationship among "first families" and later, or step-, families, particularly as the number of people with

⁹² See Geiger & Livingston, *supra* note 88.

⁹³ See Livingston, *supra* note 24. The overall rate is 57% for those aged fifty-five and older. *Id.*

⁹⁴ See, e.g., JAMIE M. LEWIS & ROSE M. KREIDER, U.S. CENSUS BUREAU, REMARRIAGE IN THE UNITED STATES 1 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/acs/acs-30.pdf> [<https://perma.cc/GRF6-PRB3>]; James Atlas, Opinion, *The Extreme (Existential) Makeover*, N.Y. TIMES (Mar. 22, 2013), <https://www.nytimes.com/2013/03/24/opinion/sunday/the-extreme-existential-makeover.html> [<https://perma.cc/YEB9-N5RH>].

⁹⁵ See STEPHAN R. LEIMBERG ET AL., THE TOOLS & TECHNIQUES OF ESTATE PLANNING FOR MODERN FAMILIES 67 (3d ed. 2019).

⁹⁶ No national data are available on the number, or rate, of prenups, so this is based on matrimonial lawyers' estimates. See, e.g., Jamie Birdwell-Branson, *How to Know If You Need a Prenup*, WEDDING BEE (2019), <https://www.weddingbee.com/married-life/how-to-know-if-you-need-a-prenup/> [<https://perma.cc/Y9FA-KFAD>]; Geoff Williams, *The Pros and Cons of Prenups*, U.S. NEWS (Aug. 3, 2018, 1:06 PM), <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-08-03/the-pros-and-cons-of-prenups> [<https://perma.cc/EMX6-STZZ>] (those in second marriages and millennials are requesting prenups). Elizabeth Carter has collected preliminary data for one parish in Louisiana. See CARTER, *supra* note 11, at 4-5. Louisiana is unusual in recording the existence of a prenuptial agreement. See *id.* at 5.

⁹⁷ See Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 364-66 (2017).

⁹⁸ See *id.* at 365.

stepsiblings and stepparents increases.⁹⁹ In the majority of the elective share cases in this study, the share of the subsequent spouse came at the expense of an earlier family. In *Homeward Bound: Modern Families, Elder Care, and Loss*, our study of how grown children cared for their dying Baby Boomer parents, Amy Zietlow and I heard numerous stories of strained relationships between ex-family members and between former stepparents and stepsiblings.¹⁰⁰

IV. NORMATIVE IMPLICATIONS: WHAT DOES THIS ALL MEAN?

As this analysis shows, disputes over the elective share arise in comparatively few reported cases.¹⁰¹ Such an observation provides the basis for speculation about the function (goal) and actual operation of the elective share. First, the existence of the forced share may have a broader impact on estate planning that guards against litigation. By serving as an override to the decedent's careful planning, it provides a guideline to estate planners to ensure they address the surviving spouse through adequate provision, so there is no reason for election, or by arranging for waiver of the right.¹⁰² The elective share, under this reasoning, continues the privatization of dependency associated with marriage,¹⁰³ and also recognizes marriage as a partnership by

⁹⁹ See Vincent L. Teahan, *Estate Planning to Protect Children of Divorce*, N.Y. ST. B.J., Dec. 2019, at 8, 8, 10 (2019); *A Portrait of Stepfamilies*, PEW RES. CTR. (Jan. 13, 2011), <https://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/> [https://perma.cc/GS2L-AM2X].

¹⁰⁰ Naomi R. Cahn, *Revisiting Revocation upon Divorce?*, 103 IOWA L. REV. 1879, 1895-97 (2018) [hereinafter *Revocation*]; see AMY ZIETLOW & NAOMI CAHN, *HOMeward BOUND: MODERN FAMILIES, ELDER CARE, AND LOSS* 8-9, 35-36, 56-57 (2017). These stories included hurt feelings over seating arrangements at funerals. On the other hand, we also heard stories of closeness between the decedent and a first spouse and between the multiple families.

¹⁰¹ Such disputes are most likely to arise over just what is included in the property subject to the elective share. See Allison Anna Tait, *Corporate Family Law*, 112 NW. U. L. REV. 1, 41 (2017) (noting as well that disputes may arise over whether one spouse has abandoned the other).

¹⁰² States vary on the procedural and substantive standards for a valid waiver. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (e) (2019); UNIF. PROBATE CODE § 2-213 (amended 2010); Andrew F. Gann, Jr., Note, *Prenuptial Agreements and Fraud on the Widow's Share: A Look at Virginia's Law on Premarital Agreement Enforcement at Death*, 23 VA. J. SOC. POL'Y & L. 231, 239 (2016).

¹⁰³ See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 736-37, 743-44 (1996). Judges in the late nineteenth century privatized dependence through the doctrine of common law marriage. See Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1886-87 (1998).

encouraging provision for the surviving spouse (or ensuring the standards for valid waiver).

Second, as Amy Zietlow and I found in our analysis of how families actually distribute property, formal estate planning, including the protections of the elective share, may be functionally irrelevant to many families where there is only a first marriage.¹⁰⁴ We found that the practices of inheritance in only-once-married families generally involved few resentments and conflicts.¹⁰⁵ Given that decedents are three times more likely to be in a first marriage than a subsequent marriage, the lack of litigation is not surprising. By contrast, in remarried families, the elective share may have greater significance. Conflicting family norms profoundly affected experiences and emotions surrounding wealth transmission; those tensions are reflected in the comparatively high number of cases in this study that involve subsequently married families.

Consequently, the relatively few reported cases in first families may show that the elective share is working well: spouses are included in estate planning, or, if an elective share is claimed, the joint children do not oppose its operation, so there is no litigation. In this situation, it may serve its purpose of distributing assets to a spouse who has partnered in creating them.

Or, the relatively few reported cases in first families may show the need for reform of the mechanics of the share to recognize that it serves different purposes in first and subsequent families. Indeed, more generally, disinheritance appears to be relatively infrequent,¹⁰⁶ so the comparatively high number of second marriage elective share cases shows a problem — somewhere. That is, while remarriages are the minority of current marriages, they are the majority of marriages giving rise to reported elected share cases in this sample.

In first marriages, or at least in first marriages of longer duration, particularly where there are children, the elective share may indeed fulfill its goals of, and be appropriate in fostering, partnership and

¹⁰⁴ ZIETLOW & CAHN, *supra* note 100, at 128-29.

¹⁰⁵ *Id.* at 125.

¹⁰⁶ See Pennell, *Individuated Determination*, *supra* note 74. Professor Pennell reports approximately 20% of testate cases in his most recent study of Georgia wills. *Id.* at 12 n.29. But, as he noted in an earlier article, if a “study only considered testate decedents [then] all those who died without a will essentially provided the intestate share for their surviving spouse, making the number of disinheritances out of the total population of all decedents — testate and intestate alike — extraordinarily small.” Pennell, *Minimizing*, *supra* note 74, at § 903 n.17. Moreover, wills only address probate assets, and disinheritance in a will does not necessarily mean total disinheritance, given the number of assets that pass outside of probate.

support. It recognizes that the spouses may have played differing roles and earned unequal amounts during the marriage, typically because of gender expectations. While mothers may face a penalty in the workforce through “lower perceived competence and commitment, and lower recommended salaries,”¹⁰⁷ fathers get a “fatherhood boost,” and may be perceived as even more committed to their jobs once they have children. Surviving ex-spouses are more likely to be women, older women are more likely to be the economically weaker spouse, with fewer assets and less preparation for retirement.¹⁰⁸ And that’s the traditional imagined recipient of an elective share.¹⁰⁹

But with a subsequent marriage, particularly one where all children are adults, the dynamics are different. There is not always the same need for child caretaking (although there may be a need for elder care, similarly unrecognized, and adult children may be disabled or return home).¹¹⁰ It is thus unclear what goals the elective share fulfills — or

¹⁰⁷ NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, *SHAFTED* (forthcoming 2021); see Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1298 (2007). The motherhood penalty is what Stanford sociologist Shelley Correll found when she sent out fictitious resumes to both students and actual employers. *Id.* at 1298, 1309. On the fatherhood “bonus,” see generally MICHELLE J. BUDIG, *THE FATHERHOOD BONUS & THE MOTHERHOOD PENALTY: PARENTHOOD AND THE GENDER GAP IN PAY* (2014), <https://www.thirdway.org/report/the-fatherhood-bonus-and-the-motherhood-penalty-parenthood-and-the-gender-gap-in-pay> [<https://perma.cc/N9DB-S8JS>] (also finding differences by class with respect to the impact of parenthood); Claire Cain Miller, *The Motherhood Penalty vs. the Fatherhood Bonus*, N.Y. TIMES (Sept. 6, 2014), <https://www.nytimes.com/2014/09/07/upshot/a-child-helps-your-career-if-youre-a-man.html> [<https://perma.cc/96NY-NQMR>] (“Ms. Correll found that employers rate fathers as the most desirable employees . . .”).

¹⁰⁸ E.g., Ina Jaffe, *For Women, Income Inequality Continues into Retirement*, NPR (Nov. 17, 2015, 5:46 AM), <http://www.npr.org/2015/11/17/455888062/for-women-income-inequality-continues-into-retirement> [<https://perma.cc/2KAD-E2RS>]; Christian E. Weller & Michele E. Tolson, *Women’s Economic Risk Exposure and Savings*, CTR. FOR AM. PROGRESS (Apr. 27, 2017, 9:05 AM), <https://www.americanprogress.org/issues/economy/reports/2017/04/27/431228/womens-economic-risk-exposure-savings/> [<https://perma.cc/9JB6-S2B>]; see Paula A. Monopoli, *Marriage, Property and [In]Equality: Remediating ERISA’s Disparate Impact on Spousal Wealth*, 119 YALE L.J. ONLINE 61, 63 (2009) (“Federal retirement and tax policy has effectively concentrated the power to control the family’s financial future in the hands of one spouse.”).

¹⁰⁹ For example, in one of the cases in the study, the husband left his wife to live with his girlfriend; the court held that the wife had not abandoned the husband and was entitled to the elective share. See *Lovett v. Peterson (In re Estate of Peterson)*, 889 N.W.2d 753, 759 (Mich. Ct. App. 2016) (finding that the surviving spouse did not “willfully cause her” absence).

¹¹⁰ See Richard Fry, *The Number of People in the Average U.S. Household Is Going Up for the First Time in over 160 Years*, PEW RES. CTR. (Oct. 1, 2019), <https://www.pewresearch.org/fact-tank/2019/10/01/the-number-of-people-in-the-average-u-s-household-is-going-up-for-the-first-time-in-over-160-years/> [<https://perma.cc/EBU6->

should fulfill — in later marriages.¹¹¹ To be sure, partnership theories remain foundational to marriage, but, particularly for later-in-life subsequent marriages, that partnership builds on earlier partnership acquisitions of economic and human capital.

Ultimately, the elective share reflects policy choices concerning partnership, dependency, and testator intent. Implementing the override system ensures certain policy goals are promoted, and it does offer administrative convenience.¹¹² Yet the elective share may do more than override the testator's apparent intent. First, it might actually undo estate planning that both spouses may have agreed to when they were alive.¹¹³ Second, the UPC approach — which does not distinguish between marital and individual property, and includes all such property in what is subject to the elective share — may be overinclusive if the end result is a potential windfall for the surviving spouse based on non-marital partnership property.¹¹⁴ This is particularly problematic in

GVU6] (adult children living with parents); Jonathan Vespa, *Jobs, Marriage and Kids Come Later in Life*, U.S. CENSUS BUREAU (Aug. 9, 2017), <https://www.census.gov/library/stories/2017/08/young-adults.html> [<https://perma.cc/5JED-RQ7P>]. A spouse may need to care for the other spouse or for parents. See Cahn, *The Golden Years*, *supra* note 19, at 60; Nina A. Kohn, *For Love and Affection: Elder Care and the Law's Denial of Intra-Family Contracts*, 54 HARV. C.R.-C.L. L. REV. 211, 215 (2019); Paola Scommegna, *Family Caregiving for Older People*, PRB (Feb. 24, 2016), <https://www.prb.org/todays-research-aging-caregiving/> [<https://perma.cc/6F6F-79SD>]. Of course, many remarried couples do care for their own separate and joint children together. I-Fen Lin et al., *A National Portrait of Stepfamilies in Later Life*, 73 J. GERONTOLOGY, SERIES B: PSYCHOL. SCI. & SOC. SCI. 1043, 1043 (2018).

¹¹¹ States have continued to experiment with approaches to elective share reform over the last fifty years. See Vallario, *supra* note 47, at 334-35. Maryland, for example, ultimately adopted the concept of the augmented estate and then “reduced that amount by a series of complex exclusions,” and it also permits a judicial override. Angela M. Vallario, *Maryland Treads Water over Elective Share Reform: The Spouse's Desperate Cry for the Court's Intervention with a Bright-line Rule for Revocable Trusts*, 49 U. BALT. L.F. 1, 15 (2018); see MD. CODE ANN., EST. & TRUSTS § 3-404 (2020). Florida's elective share was also revised within the past few years, including through procedural reforms that extend the time a surviving spouse has to file the elective share and granting courts the power to award attorney's fees for elective share litigation. See generally Lauren Y. Detzel & Brian M. Malec, *Recent Amendments Bring Important Changes to Florida's Elective Share*, 91 FLA. B.J. 24 (2017).

¹¹² The “augmented estate” concept is complicated and includes the property of each spouse. See, e.g., UNIF. PROBATE CODE § 2-203 (amended 2010); Waggoner, *Time for a Reassessment*, *supra* note 14, at 7-8. For a history of the changes in the augmented estate, beginning with the 1969 UPC, see O'Brien, *supra* note 53, at 658-68.

¹¹³ See Gary, *supra* note 29, at 343.

¹¹⁴ See Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 522-23 (2000).

marriages later in life, where each partner is likely to come into the marriage with their own property/human capital.¹¹⁵

Third, the UPC may be underinclusive and not adequately recognize marital labor, at least compared to divorce. Consider the following:

Suppose Spouse A has substantial separate assets at the time of the marriage, and Spouse B does not. Both spouses then — through marital efforts — earn significant amounts during the marriage, although Spouse B earns more.

If Spouse B dies first, Spouse A may be entitled to nothing under the UPC,¹¹⁶ while a divorce court would equitably distribute the property earned during the marriage.

If Spouse A dies first, then, depending on the size of their comparative estates, Spouse B might get a larger share than at divorce in a marital property state.

The results under the elective share are inconsistent with the results of property division at divorce; a spouse in a couple that has stayed together until death may get more or less than if the relationship had ended in divorce, depending on whether the couple lives in a marital property, hotchpot, or augmented estate state.¹¹⁷

And finally, as the cases discussed in this Article show, most contemporary forms of the elective share may privilege a subsequent spouse over an earlier family. To be sure, the drafters of the UPC were

¹¹⁵ See Waggoner, *Time for a Reassessment*, *supra* note 14, at 20. In most states, upon divorce, tracing precludes separate property from becoming marital:

In one case, a spouse we represented needed to prove a \$16 million brokerage account was their separate property. This account was opened before the marriage in the early 1990s with a balance of about \$500,000. Fortunately, our client had saved every brokerage statement and all the paperwork related to the investments, which enabled us to prove the account was separate property. Unfortunately, this level of record-keeping is rare.

Ekaterina Klimentova, *Why Couples Should Prepare for Divorce Before the Wedding*, MKT. WATCH (Sept. 26, 2019, 9:51 AM), <https://www.marketwatch.com/story/why-couples-should-prepare-for-divorce-before-the-wedding-2019-09-26> [https://perma.cc/L9BV-72UR].

¹¹⁶ See Ellen J. Beardsley, *The Revised UPC Elective Share: Missing Essential Partnership Principles*, 13 QUINNIPIAC PROB. L.J. 225, 258 (1998) (arguing that the UPC is flawed because it “assumes that if the surviving spouse is wealthy in her own right, then she is not entitled to an elective share of the decedent’s estate”).

¹¹⁷ See Rosenbury, *supra* note 12; cf. Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 531 (2003).

aware of potential inequitable results in a subsequent marriage.¹¹⁸ Yet they anticipated such situations would be infrequent enough so as not to undercut the general goals and approach.¹¹⁹

V. MOVING FORWARD

The various policy challenges accompanying elective share statutes have inspired numerous law reform proposals from scholars and states along a continuum from minor revision to abolition. This Section evaluates potential policy reforms and then suggests future directions.

A. Potential Reforms

The elective share has certainly been subject to criticism, along with proposed reforms. The reforms fall on a continuum from relatively minor changes to abolition.

1. *Lengthen the Approximation Schedule:* Lengthening the approximation schedule is one approach to addressing the problems associated with the current elective share statutes. While the current schedule (full vesting in one-half of the augmented estate after fifteen years of marriage under the UPC) may be appropriate for first marriages, the problem comes, as shown in this study, with subsequent marriages.¹²⁰ In later marriages, the parties may not accumulate

¹¹⁸ See Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 742-46 (1992) [hereinafter *Rights in Multiple-Marriage Society*].

¹¹⁹ See Newman, *supra* note 114, at 522; Waggoner, *Rights in Multiple-Marriage Society*, *supra* note 118, at 742-46. In 2003, Professor Waggoner, the Reporter for revisions to the UPC, expressed concern about the treatment of remarriages after widowhood, but suggested that first marriages and remarriages following divorce were adequately represented by the approximation system. See Waggoner, *Time for a Reassessment*, *supra* note 14, at 20-22.

¹²⁰ See Waggoner, *Time for a Reassessment*, *supra* note 14, at 19. The median length of a marriage is nineteen years. *Median Duration of Current Marriage in Years by Sex by Marital Status for the Married Population 15 Years and over*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_B12504&prodType=table (last visited Feb. 7, 2020) [<https://perma.cc/7DJB-CY9Y>] (the data are not broken down by first or subsequent marriage). See generally *Marriage and Divorce: Patterns by Gender, Race, and Educational Attainment*, BUREAU OF LAB. STAT. (Oct. 2013), <https://www.bls.gov/opub/mlr/2013/article/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment.htm> [<https://perma.cc/24BN-C2GS>] (not full lifespan). In 2017, more than 40% of those aged sixty were divorced, separated, or in a subsequent marriage. See Andy Kiersz, *Here's When You're Probably Getting Divorced*, BUS. INSIDER (Feb. 8, 2019, 5:55 AM), <https://www.businessinsider.com>.

significant amounts of property through their efforts during the marriage, as they may be close to retirement;¹²¹ or this may be the time in life when not only earnings increase, but so does the value of investments based on the parties' premarital human capital and financial assets. The current approximation schedule, of course, does not distinguish between property acquired before and after the marriage.¹²²

In recognition of the subsequent marriage problem, particularly with respect to such a marriage post-widowhood, Lawrence Waggoner proposes lengthening the approximation schedule to twenty or twenty-five years.¹²³ His focus is on addressing "the problem of the post-widowhood remarriage without shortchanging the surviving spouse in the other types of marriages."¹²⁴ Lengthening the approximation schedule ensures that more of the property subject to the elective share was acquired during the subsequent marriage, rather than the earlier one and that the spouses have become accustomed to treating that property as marital.

Waggoner identifies a potential problem to lengthening the approximation schedule in that it will still overestimate the amount of marital property "in the median post-widowhood remarriage."¹²⁵ That issue does suggest, at the least, that lengthening the schedule is inadequate on its own to "approximate" the partnership rationale because of this potential for sweeping in too much property.

2. *Revise type of property in the elective share "pot"*: A second reform is changing the type of property in the pot subject to allocation under the elective share, limiting it to property acquired during the marriage. Whether this is conceptualized as a deferred community property or "equitable division" system, the goal is to provide to surviving spouses with an elective share comparable to the amount to which they would be entitled at divorce under either a community property or marital property (non-hotchpot) system.¹²⁶ In one form, the deferred

com/divorce-statistics-when-americans-get-divorced-2019-2 [https://perma.cc/JD9A-W3RC].

¹²¹ Waggoner, *Time for a Reassessment*, *supra* note 14, at 22 ("These are the near- or post-retirement years when the parties use the bulk or perhaps all of their assets or the income produced by their assets for living expenses.").

¹²² *See id.* at 21 n.36.

¹²³ *See id.* at 23 (discussing potential lengthening of approximation schedule).

¹²⁴ *Id.*

¹²⁵ *Id.* at 26.

¹²⁶ *See* Vallario, *supra* note 117, at 521; Waggoner, *Time for a Reassessment*, *supra* note 14, at 30; *see also* Newman, *supra* note 114, at 488. States might simply use the

community property approach would award the surviving spouse half of the couple's marital property.¹²⁷ This is similar to the type of division in some community property, and some common law property, states currently presumed at divorce.¹²⁸ An alternative is to take that same pot of marital, or community, property and divide it equitably, which might be appropriate in the majority of states that take this approach at divorce.

As an example, the equitable elective share statute proposed by Angela Vallario "pools the decedent and the surviving spouse's probate and non-probate properties, which were accumulated during marriage, and entitles the surviving spouse to one half of that amount."¹²⁹ Under this proposal, all marital assets of both individuals are subject to the elective share.¹³⁰ Vallario's equitable division proposal also provides for the consideration of equitable factors, giving courts discretion to take steps to protect the surviving spouse where an equal division is inadequate.¹³¹

This system has both similarities and differences to the UPC approach. While the elective share under the UPC includes each spouse's separate property in the augmented estate, and while this separate property might then be subject to distribution (depending on the length of the marriage and the amount of each spouse's property), the marital property pot approach only includes property acquired during the marriage for purposes of calculating the elective share.¹³² Like the UPC system, it includes both spouses' probate and nonprobate assets.

Revising the form of property subject to the elective share pot eliminates some of the inequities of the current system: it focuses on property acquired during the marriage rather than both marital and separate property.¹³³ This approach would, however, require the classification of property as marital and separate, as well as investigation

divorce classification system for property at death, relying on longstanding precedent concerning, for example, whether to include the passive appreciation in value of separate property.

¹²⁷ See Newman, *supra* note 114, at 523-24. An alternative is simply to impose the community property ownership system at divorce in all states. See *id.* at 558. This would eliminate the need for an elective share.

¹²⁸ See ABRAMS ET AL., *supra* note 16.

¹²⁹ Vallario, *supra* note 117, at 562.

¹³⁰ See *id.* at 568. However, the decedent may exclude any of their assets by overcoming statutory presumptions that assume all property to be marital. *Id.*

¹³¹ See *id.* at 569-570.

¹³² See *id.* at 532.

¹³³ See *id.*

into nonprobate transfers, incurring significant administrative costs for the executor.¹³⁴ While that process already occurs in divorce proceedings,¹³⁵ it can be bitterly fought.¹³⁶

Yet the difficulties of tracing are balanced by the greater potential for equitable results.¹³⁷ This approach may more accurately reflect the partnership theory of marriage, as well as bring elective share law in line with the division of property at divorce.¹³⁸ Moreover, while property division is integral to any divorce, the calculations for the elective share are relevant to a minority of probate cases, because most spouses receive either an intestate share or adequate provision under a will or stay out of court entirely.¹³⁹

The marital property pot system inherently accounts for the length of the marriage; the longer the marriage, then, presumably, the more marital property accumulated. It thus respects both the partnership and support theory of the elective share. It does not, however, provide any further protection for a pre-existing family.

3. *Abolish the Elective Share*: Others have advocated for abolishing the elective share using a number of justifications.¹⁴⁰ First, elective share

¹³⁴ See Waggoner, *Time for a Reassessment*, *supra* note 14, at 30. The state would also need to determine whether to include active and passive increases in the value of separate property.

¹³⁵ Newman, *supra* note 114, at 553-54.

¹³⁶ The simplicity of the elective share system is that it includes all property, without any need to classify when and how it was acquired.

¹³⁷ Newman, *supra* note 114, at 553-54. States have developed various doctrines and presumptions to address the complexities of property tracing at divorce, such as transmutation and commingling, as well as differing presumptions about the appreciation in value of separate property. See ABRAMS ET AL., *supra* note 16; Oldham, *supra* note 15. For the American Law Institute's presumptions, see PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 23, § 4.06.

¹³⁸ Newman, *supra* note 114, at 492 (“[A] deferred-community-property elective-share system would more fairly and accurately achieve the partnership-theory-of-marriage objective — equally dividing the fruits of the spouses’ efforts during the marriage without subjecting the separate property of the deceased spouse to the survivor’s elective-share claim . . .”). In hotchpot states, of course, such a system would provide less at death than on divorce; an alternative approach, as discussed *infra*, might mandate that property subject to distribution at divorce also be included in the elective share pot. This property approach includes nonprobate assets, of course, although not all other assets in the augmented estate.

¹³⁹ This may be because an estate is settled harmoniously or through small estate procedures, or because there are inadequate assets. See ZIETTLOW & CAHN, *supra* note 100, at 122.

¹⁴⁰ See, e.g., Brashier, *supra* note 39, at 88 (arguing that spouses can protect themselves by contract before or during the marriage); Pennell, *Minimizing*, *supra* note 74, § 903 (noting that Georgia, a common law property state, has no elective share

statutes interfere with testamentary freedom, hampering an individual's right to transfer property without any restrictions.¹⁴¹ For example, Joshua Tate argues that broad testamentary freedom should be allowed in order to permit decedents to reward caregivers.¹⁴² Second, the elective share seems to presume that the decedent irrationally or unjustifiably disinherited the surviving spouse;¹⁴³ yet, as Terry Turnipseed argues, there are multiple valid reasons to disinherit a spouse that are ignored by the current elective share system.¹⁴⁴ A decedent may, for example, deliberately disinherit a spouse in an attempt to ensure the surviving spouse qualifies for Medicaid benefits.¹⁴⁵ Or, there may be hidden abuse in the marriage.¹⁴⁶

Third, as a jurisprudential matter, elective share statutes may have less justification in today's society. Elective share statutes were originally designed to protect women after their husbands died,¹⁴⁷ and, while the statutes are gender-neutral, they have not strayed too far from their origins and remain more likely to protect women. Consequently,

statute); Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 682 (1966).

¹⁴¹ See Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 751 (2006). Turnipseed colorfully suggests: "elective share laws seem like some ridiculous school child's Rube Goldberg machine trying to solve in as complex a manner as humanly possible a problem that really does not exist." *Id.* at 793-94 (footnote omitted).

¹⁴² Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 UC DAVIS L. REV. 129, 129 (2008); cf. Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J.L. REFORM 761, 762 (proposing to recognize caregiving, albeit by restricting testamentary freedom, by creating an elective share-type approach for a family caregiver).

¹⁴³ See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 236-37 (1991) (noting that the testator is "seen as having reneged on the bargain").

¹⁴⁴ See Turnipseed, *supra* note 141, at 774.

¹⁴⁵ *Id.* at 776. On the other hand, states vary as to whether property available through exercise of the elective share counts as an asset for Medicaid qualification purposes. See, e.g., *In re Estate of Brown*, 153 A.3d 242, 255 (N.J. Super. Ct. App. Div. 2017) (yes in New Jersey); see also Gary, *supra* note 29, at 370-72 (discussing various approaches); Pennell, *Minimizing*, *supra* note 74, § 903.3 (noting that "[t]he law regarding Medicaid qualification is in significant turmoil").

¹⁴⁶ On inheritance and abuse, see, for example, Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 302 (2011). Elder abuse and exploitation are growing concerns.

¹⁴⁷ Turnipseed, *supra* note 141, at 770 ("It seems that the rhetoric associated with forced spousal heirship is premised on a number of myths that simply are not true in today's society."). Turnipseed notes that "the need to protect surviving spouses . . . has decreased dramatically in modern times." *Id.* at 751.

they may further gendered norms in today's society, perpetuating "the mythical image of women as the 'weaker sex' in need of protection, and further[] harmful gender stereotypes by relegating women to an inferior position."¹⁴⁸

Potential abolition of the elective share system might still leave in place other protections for the surviving spouse, such as the homestead allowance.¹⁴⁹

Nonetheless, while complete abolition would protect testator freedom and previous families, it would undercut the partnership theory of marriage. It would deny any recognition to contributions during the marriage that do not take conventional economic forms, such as home-work and other aspects of care that cannot be separately titled.¹⁵⁰ Moreover, it would continue the different treatment of divorce and death, allowing a divorcing spouse to receive more than a surviving spouse.¹⁵¹

B. Moving Forward

The core issues remain the goal of elective share statutes and the relationship of that goal to the institution of marriage in a world of rising remarriage rates and stepfamilies and of changes in women's status. Given that the decision to get married indicates a choice to opt into a particular status,¹⁵² the elective share does operate within the

¹⁴⁸ *Id.* at 787 (capitalization omitted); see also Rosenbury, *supra* note 12.

¹⁴⁹ Turnipseed, *supra* note 141, at 780 ("These include: a one hundred percent estate tax deduction for transfers to U.S.-citizen spouses; ERISA protection for qualified retirement plans . . . ; the family allowance amount (generally a fixed amount or the amount necessary to support the surviving family members for a year); Social Security spousal survivor benefits; placing valuable property in a tenancy by the entirety or, at a minimum, a joint tenancy with right of survivorship; the homestead allowance (to ensure the family home flows to the surviving spouse free of encumbrances); the exempt personal property set-aside (to ensure certain tangible personal property flows to the surviving spouse); the availability of life insurance; the avoidance of will contests; the availability of antenuptial and post-nuptial agreements; and the 'normal affection of spouses who choose to remain married.'" (footnotes omitted)).

¹⁵⁰ See Gordon, *supra* note 39, at 219 ("[T]he non-propertied, electing spouse [is viewed as] the *disruptor* of donative freedom rather than an owner of the property in her own right.").

¹⁵¹ Again, in non-hotchpot states, the amount available at divorce is limited to marital property, so the amount available at death might be more in those states because all property is subject to the elective share. To the extent that the partnership theory of marriage should be reconsidered, that should be true for both divorce and death.

¹⁵² Albeit with the option of opting out. See Carbone & Cahn, *The Triple System*, *supra* note 65, at 1186; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 298-317

"shadow" of that status.¹⁵³ It celebrates a marital partnership. Partnership may, at least in the short term, be an appropriate assumption — and attribute — for at least some marriages, notwithstanding its own potential presumptions.¹⁵⁴

Yet remarriage calls into question this partnership model as a spouse undertakes a new partnership, particularly when either spouse has prior children. This is not an argument for customized marriage,¹⁵⁵ but may support a more tailored elective share that explicitly accounts for multi-family partners and changes the focus from the surviving spouse alone to the family more generally.

Some of the proposals discussed above might be an appropriate means to recognize changes in the family and the changing status of women, and there are others that would accomplish similar goals.

First, the marital property approach, of limiting the augmented estate to property acquired during the marriage and potentially including the appreciation of separate property as well, is promising in recognizing that marriage is a partnership. There is no need for an approximation schedule based on numbers of years of marriage, as the amount of property is tied to the length of the marriage. This approach would not require major changes in the UPC approach, which already includes non-probate assets and certain *inter vivos* transfer; focusing only on property owned at death would be underinclusive, as sophisticated estate planning would remove assets from the probate estate.¹⁵⁶

A second reform might focus on acknowledging the potential tension when a decedent has more than one family. This could take several different forms. One possibility is excluding property from the elective share pot that would otherwise be devised to the decedent's children, joint or otherwise. That is the approach of the UPC for the omitted

(1964) (discussing the distinction between "civil family law" and the mandatory "family law of the poor"); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1460 (1992) ("[S]pouses today have considerable freedom to alter . . . background obligations by private contract, either before or during marriage.").

¹⁵³ See Dubler, *supra* note 31, at 1647.

¹⁵⁴ Rosenbury, *supra* note 12, at 1286 ("The partnership theory of marriage is thus not free from the expectation of women's sacrifice within marriage, but rather could be seen as reinforcing it."). While women still experience a gender and wealth gap, that may not be the result of the marriage; marriage continues to privatize dependence, even if that dependence results from outside of marriage. On the other hand, during a marriage, for example, women's dependence may result from child care or mobility choices.

¹⁵⁵ See James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 958 (2000) ("The promises made at the altar are better understood as moral obligations rather than contractual undertakings.").

¹⁵⁶ The augmented estate concept has tried to counter these efforts.

spouse share,¹⁵⁷ which includes in the estate available to the omitted spouse only “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” along with issue.¹⁵⁸ An alternative might be including all property in the augmented estate, but precluding the surviving spouse from satisfying any deficits in the elective share through any of the property left to the children.¹⁵⁹

An alternative might involve changing the fraction of the decedent’s estate to which the surviving spouse is entitled where there are preexisting children (of either spouse, perhaps). For example, until it enacted a new approach in 2013 that has a sliding scale for years of marriage adapted from the UPC,¹⁶⁰ North Carolina reduced the elective share amount available to a subsequent spouse.¹⁶¹ The UPC’s approach to intestacy provides a potential guide on how to allocate property when either the decedent or the surviving spouse has another family.¹⁶²

A third option could be more careful consideration of the situation of a spouse who has filed for divorce or who has been separated for a substantial period of time. Although many states do not consider separation relevant to claiming the elective share, there are some exceptions.¹⁶³ Precluding an elective share would mean the surviving

¹⁵⁷ Thirteen jurisdictions also protect the share for the preexisting child. See Hirsch, *Inheritance on the Fringes*, *supra* note 70, at 241 n.32.

¹⁵⁸ UNIF. PROBATE CODE § 2-301(a) (amended 2010).

¹⁵⁹ If all of the property has been left to the non-joint children, the risk is that the surviving spouse receives nothing, as is true with the current omitted spouse share. This effectively denies the existence of a marital partnership.

¹⁶⁰ See *North Carolina Ties Surviving Spouses’ Rights to the Length of the Marriage*, MCGUIREWOODS LLP (Nov. 20, 2013), <https://www.mcguirewoods.com/client-resources/Alerts/2013/11/North-Carolina-Surviving-Spouses-Rights> [<https://perma.cc/P5K3-CQFE>].

¹⁶¹ The “applicable share” of the decedent’s assets to which a surviving spouse was entitled depended on whether the decedent had a prior spouse and whether the decedent was survived by lineal descendants. N.C. GEN. STAT. § 30-3.1(b) (repealed 2013).

¹⁶² See UNIF. PROBATE CODE § 2-102 (amended 2010) (the surviving spouse receives the entire estate if there are only joint descendants, but the least amount where the decedent is survived by non-joint descendants).

¹⁶³ See, e.g., N.J. STAT. ANN. 3B:8-1 (2019); Hirsch, *Inheritance on the Fringes*, *supra* note 70, at 269 (noting that separation and misconduct affect the availability of the elective share in several states). Oregon’s statute permits a court to deny the elective share if the spouses are separated by giving the court discretion to “consider whether the marriage was a first or subsequent marriage for either or both of the spouses, the contribution of the surviving spouse to the property of the decedent in the form of services or transfers of property, the length and cause of the separation and any other

spouse in that situation would get nothing;¹⁶⁴ by contrast, had a divorce been finalized, the surviving spouse would have received an equitable distribution of the property.¹⁶⁵ It might then be appropriate for the spouse to receive the lesser of a divorce or elective share amount.¹⁶⁶ An alternative is to decrease the amount of the elective share based on the number of years of separation as a recognition that property during that time period was not acquired through marital efforts.¹⁶⁷

A fourth issue concerns increased integration of estate planning and family law. The two come together in this context — the potential inclusion, or at least counselling concerning the issue, in prenuptial or

relevant circumstances.” OR. REV. STAT. § 114.725 (2019). The statute specifies that “separation” means living apart, regardless of the filing of a legal action. *Id.* New York precludes election by a spouse who has “abandoned” the decedent, if “such abandonment continued until the time of death.” N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(5) (McKinney 2019). This provision was at issue in one of the cases in the study, in which a 23-year separation did not preclude the surviving spouse from seeking an elective share. *See In re Duplessis*, 1 N.Y.S.3d 128, 130 (N.Y. App. Div. 2014) (executor failed to establish that decedent opposed the parties’ separation). In most of the community property states, a legal separation prevents the accumulation of additional community assets and may dissolve the estate. *See Hirsch, Inheritance on the Fringes*, *supra* note 70, at 266. The UPC does not address separation.

¹⁶⁴ When a spouse dies during the pendency of a divorce proceeding, the court no longer has jurisdiction over the divorce action. *See, e.g., Sperber v. Schwartz*, 527 N.Y.S.2d 279, 281 (N.Y. App. Div. 1988); *A.V.B. v. D.B.*, 985 N.Y.S.2d 840, 844 (N.Y. Sup. Ct. 2014). As a result of the abatement of the divorce, the surviving spouse is left to pursue an elective share. *See Brett R. Turner, Equitable Distribution, Elective Shares, and Abatement of Divorce Actions*, DIVORCE LITIG., Feb. 2007, at 17 (just before Part III).

¹⁶⁵ Unlike at death, alimony is available at divorce. Alimony is, however, rarely awarded. *See, e.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*, *supra* note 23, at § 5.07; Laura Hamister, *Til Death or Irreconcilable Differences Do Us Part: Comparison of Support Obligations at Death and Divorce*, 22 J. CONTEMP. LEGAL ISSUES 29, 35 (2015) (noting the availability of a support allowance at death); Hirsch, *Inheritance on the Fringes*, *supra* note 70, at 256 (only divorce addresses both property distribution and need, and some divorce courts now require the obligor spouse to purchase life insurance to benefit an ex-spouse).

¹⁶⁶ As a New Jersey court noted, “[W]e hold that marital property does not lose its essential and distinctive nature as property arising from the joint contributions of both spouses during marriage because of the death of one spouse during the pendency of divorce proceedings.” *Carr v. Carr*, 576 A.2d 872, 879 (N.J. 1990).

¹⁶⁷ Indeed, “the fact that spouses choose to live apart has no apparent impact either on society’s interest in ensuring that they receive private support or on the equities of recognizing their respective contributions to each other’s wealth.” Hirsch, *Inheritance on the Fringes*, *supra* note 70, at 267. Identifying just what types of “separation” qualify would require difficult line-drawing.

postmarital agreements¹⁶⁸ of an elective share waiver ensures awareness that a decedent's wishes are subject to state override and, in a subsequent marriage, that a first family is protected (if that's what the decedent wishes).

While family lawyers typically see clients at the beginning or end of a marriage, estate planners are more likely to counsel clients during an ongoing and harmonious marriage. Yet they too can discuss waiver through a marital agreement. Of course, just as people are reluctant to plan for death, they are reluctant to plan for divorce;¹⁶⁹ nonetheless, coherent estate planning and domestic relations counselling involve planning for the end of a marriage.

A series of other options might include the individualized determinations suggested by Jeffrey Pennell, which are comparable to property distribution procedures in divorce,¹⁷⁰ or following Florida's lead in extending the time for filing for the elective share¹⁷¹ or permitting judicial override of the elective share statutory amount based on a showing of inequity.¹⁷²

CONCLUSION

The elective share, which began as an attempt to support women upon the death of their husbands, has moved towards a partnership rationale, rather than its original dependency theory. The partnership rationale, as discussed earlier, recognizes each spouse's investment in the accumulation of property during the marriage, rather than focusing on the surviving spouse's need for ongoing support.¹⁷³ But current

¹⁶⁸ See generally UNIF. PREMARITAL & MARITAL AGREEMENTS ACT (UNIF. LAW COMM'N 2012). For further discussion of the interrelationship between family law and trusts and estates, see, for example, Cahn, *Revocation*, *supra* note 100, at 1895.

¹⁶⁹ Cf. Cahn, *Revocation*, *supra* note 100, at 1906 (addressing the need for post-divorce planning to include a first spouse).

¹⁷⁰ See Pennell, *Individuated Determination*, *supra* note 74.

¹⁷¹ Certainly, for unsophisticated surviving spouses, strict time limits, as some of the cases in this study show, can be a stringent bar.

¹⁷² This is similar to the approach in Maryland's revised elective share, although the applicable provision allows for deviation based on "clear and convincing evidence," without specifying just what the evidence must show. MD. CODE ANN., EST. & TRUSTS § 3-413(1) (2020).

¹⁷³ Arguably, the partnership theory is most likely to "compensate[] wives who forego wage work in order to focus on care work." Rosenbury, *supra* note 12, at 1290. The support rationale, by contrast, accounts for the impact of caretaking on both the caretaker's income and family well-being. Both recognize the ongoing lack of gender equality in either the workplace or the assumption of family responsibilities; a primary

formulations of the elective share fall short in their failure to acknowledge the increasing complexity of families¹⁷⁴ and to consider what happens at the dissolution of a relationship by divorce or by death.

Based on the reported cases in this study, the elective share is most likely to be contested in subsequent marriages by women; and the elective share privileges the interests of the surviving spouse over children from earlier relationships. Because of the comparative paucity of reported cases concerning first marriages, the legal right of a surviving spouse to claim an elective share may be serving as an incentive for testators to provide adequately for those spouses, or for potentially warring family members to settle before going to court.¹⁷⁵

The current construction of the elective share may be a deliberate policy choice, reflecting the state's strong interest in encouraging marriage by ensuring partnership interests to a surviving spouse.¹⁷⁶ Or it may be an unintended consequence of a policy decision that was originally designed to privilege a dependent spouse (and privatize that dependency) in a single-marriage society, or another policy choice altogether.

Consideration of any reforms to the elective share should be tied to a reconsideration of the justification for the share and its goals, and that should include a recognition of the increasing number of multiple marriages. Assuming that elective share theory is premised on a marital partnership, then it could also be better aligned with family law: notwithstanding the differing developments of property distribution principles in family law and family protection at death, each indubitably

breadwinner or the survivor of two equal earners is unlikely to receive much beyond their own property under the UPC, for example.

¹⁷⁴ It also fails fundamentally, to explore fully the question of whether, as a society, we really wish to encourage *anyone* to take on the homemaking role with the vulnerability that it entails.

¹⁷⁵ Of course, there are other reasons for the lack of reported cases, including that most estates will have comparatively low levels of assets. Only 0.1% of decedents will have paid an estate tax in 2018. See *Key Elements of the U.S. Tax System*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax> (last visited Feb. 8, 2020) [<https://perma.cc/LU4A-MEP2>].

¹⁷⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599-2605 (2015) (celebrating marriage). Moreover, unlike a spouse, a child, outside the state of Louisiana, is not entitled to an elective share. See Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 *FORDHAM L. REV.* 1125, 1181 (2013); Phyllis C. Taite, *Freedom of Disposition v. Duty of Support: What's a Child Worth?*, 2019 *WIS. L. REV.* 325, 333-34 (2019) ("The legitime provides a forced share for children under the age of twenty three and for mental or physically disabled children at any age.").

138

University of California, Davis

[Vol. 53:nnn]

occurs as a marriage is ending,¹⁷⁷ and each is currently premised on comparable conceptions of marriage.

¹⁷⁷ Similarly, property distribution law could look at elective share laws' inclusion of various types of gifts, such as those made within the last two years of the marriage.