Community Property v. The Elective Share

Terry L. Turnipseed

Repository Citation
Terry L. Turnipseed, Community Property v. The Elective Share, 72 La. L. Rev. (2011)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol72/iss1/8

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
Community Property v. The Elective Share

Terry L. Turnipseed

I. INTRODUCTION

There is certainly no doubt that community property has its faults. But, as with any flawed thing, one must look at it in comparison with the alternatives: separate property and its companion, the elective share. This Article argues that the elective share is so flawed that it should be jettisoned in favor of community property.1

The elective share can trace its ancestry to dower and curtesy, with the concept of dower dating to ancient times.2 In old England, a widowed woman was given a life estate in one-third of certain of her husband’s real property—property in which the husband held an inheritable or devisable interest during the marriage.3 Once dower attached to a parcel of land at the inception of the marriage, the husband could not unilaterally terminate it by transferring the land.4 The right would spring to life upon the husband’s death unless the wife had also consented to the transfer by signing the deed, even if title were held in only the husband’s name.5

Copyright 2011, by TERRY L. TURNIPSEED.

* Associate Professor of Law and Associate Professor of Engineering and Computer Sciences (by courtesy appointment), Syracuse University. The author received a J.D. and an L.L.M. in Taxation at the Georgetown University Law Center, two Master of Science degrees at the Massachusetts Institute of Technology, and a Bachelor of Science degree at Mississippi State University.

1. A separate property jurisdiction does not follow the rules of a community property state that “recognizes the mutuality of marital relationships.” ROGER W. ANDERSEN & IRA MARK BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 246 (2d. ed. 2002). Community property is property held jointly between husband and wife, including: “property acquired through the efforts of either spouse during the marriage and while domiciled in a community property jurisdiction . . . and income or proceeds from the sale of community property.” Id. “Separate property in a community property state [is] property that a spouse owned before marriage or acquired during marriage by inheritance or by gift from a third party . . . .” BLACK’S LAW DICTIONARY 1369 (7th ed. 2001). Husband and wife each hold one-half ownership in the community property and 100% ownership in their separate property. ANDERSEN & BLOOM, supra, at 246. “At death, both spouses usually have the power to dispose of their own separate property and half of the community property.” Id.


3. Id. at 422–23.

4. Id. at 423.

5. Id.
Curtesy provided a surviving husband with a life estate in all the wife's qualifying real property, but only if children were born to the couple. The type of real property that was subject to curtesy was the same as with dower, as were the rules that related to when the right attached and when it could be terminated.

Virtually all United States jurisdictions have abolished dower and curtesy in favor of the elective share. Georgia is the only state which does not have a statutory elective share or community property concepts. In modern America, then, 49 of the 50 states and the District of Columbia limit freedom of testation vis-à-vis surviving spouses.

More than in any other area of wills and trusts, state laws differ over the exact details of their respective elective share doctrines. For example, state law varies widely in the amount to which the surviving spouse is entitled, the variables that determine the amount (length of marriage, family situation, surviving spouse's net worth, etc.), and the property that is subject to the elective share. Typically, the surviving spouse is allowed to elect one-third of the decedent's property if the decedent had surviving issue or one-half if there are no surviving issue.

In some states, a testator can easily avoid subjecting her assets to the elective share upon death simply by placing assets into one or more types of trusts. Other more sophisticated elective share statutes bring back most *inter vivos* transfers into the pool of assets from which the elective share is taken, including those *inter vivos* transfers made to trusts.

All elective share statutes, however, can be defeated by transferring assets to an offshore asset protection trust. Once the transferor-decedent has died, it is, in reality, impossible for a

---

6. *Id.*
7. *Id.*
11. See generally discussion infra Part III.
12. See generally discussion infra Part III.
13. See discussion infra Part IV.B.1.a.
United States court to force the transfer of such assets back into the hands of the surviving spouse.15

While there may or may not have been valid grounds for separate property systems with elective share concepts when they were originally adopted by most U.S. states, we are long overdue for a total review of separate property and whether a systematic switch to community property should be undertaken. The primary purpose of this Article is to stimulate such discussions, with the hopeful result that state legislatures will at least address the issue of switching to community property. Separate share systems can easily be defeated by the wealthy who can afford expensive counsel fees to configure assets in needless, wasteful and complex arrangements specifically designed to defeat the elective share. As discussed in more detail below, there is increasingly a distinction between those who can afford testamentary freedom in separate property jurisdictions (through the high fees of competent advisors) and those who cannot. This distinction is shameful and should be eliminated.

Absent converting to community property concepts, there is no way to produce an effective elective share law.16

II. HISTORY OF DOWER, CURTESY, AND THE ELECTIVE SHARE

A. Dower and Curtesy Generally

_In approaching the history of compulsory shares accorded by the common law to a decedent’s widow... one finds that the tale is discontinuous, the moral correspondingly recondite._17

For a long time in this country, and still in some separate property states today, a widow had a dower interest in the lands of her deceased husband which were inheritable by the husband and wife’s issue.18 Widows received a life estate—not outright ownership—in one-third of her deceased husband’s qualifying land.19

Unlike modern elective share rights, common law dower attached at the later of the moment of marriage or acquisition of

16. See discussion _infra_ Part IV.
18. DUKeminier et al., _supra_ note 2, at 422–23.
19. Id.
the qualifying land. This aspect of dower is much more similar to the modern system of community property, where rights attach before death. Because of this inter vivos attachment of rights (albeit a right to a future interest), land subject to dower was not alienable at the sole discretion of the husband-owner. Indeed, in jurisdictions where common law dower and a statutory elective share exist together, one of dower’s only practical applications is to force the owner-spouse of real property to obtain the signature of the nonowner-spouse to sell or encumber the land in certain situations. In addition, widows of insolvent decedents received dower before debts were paid (unlike bequests, which could be claimed by creditors). Dower made women “necessary players in men’s economic transactions.”

Curtesy was the widower equivalent of dower, with a couple key differences: (1) the widower was given a life estate in the entire land holdings of the decedent wife (instead of one-third as in the case of dower); and (2) nothing flowed to the widower unless the marriage bore children. In all states that retain the concepts of dower and curtesy, the rights embraced by both are identical; and in some jurisdictions, curtesy has been abolished and dower rights are afforded to widows and widowers equally.

B. Ancient History of Dower and Curtesy

Limitations upon free testation are at least as old as the Code of Hammurabi [circa 2084 B.C].

20. Id. at 423.
21. See id.
22. See id.
25. DUKEMINIER ET AL., supra note 2, at 423.
26. Id. In Michigan, dower-type rights are given to the wife but not the husband. Id. Commentators note that this difference is likely unconstitutional. Id.
27. See Cahn, supra note 17, at 139 (citing R. HARPER, THE CODE OF HAMMURABI §§ 168–172 (1904)); see also Rick Geddes & Paul J. Zak, The Rule of One-Third, 31 J. LEGAL STUD. 119, 123 Table 1 (2002) (describing women’s property rights at marital dissolution from the Code of Hammurabi to 1977). Geddes and Zak detail the very first known dower-type code language from the original Code of Hammurabi:

In the case of either a private soldier or a commissary, who was carried off while in the armed service of the king, if his son is able to look after the feudal obligations, the field and orchard shall be given to him and he
During the early times in England, when land holdings virtually equaled wealth, the land passed to blood relatives and not to surviving spouses—"[n]either husband nor wife was an heir of the other . . . ."\textsuperscript{29} Widows and widowers of decedent landholders were not left penniless, however, as dower and curtesy provided some support for their lifetime.\textsuperscript{30} These income rights in land "developed in medieval times to compensate women for loss of control over their real property during marriage and, especially, to make provision for widows after their husbands' property had passed to the legal heirs."\textsuperscript{31}

Dower was originally a private contractual matter between the families of the groom and bride.\textsuperscript{32} Thirteenth-century common law recognized and enforced an early version of dower.\textsuperscript{33} The dower of

\begin{quote}
shall look after the feudal obligations of his father. If his son is so young that he is not able to look after the feudal obligations of his father, one-third of the field and orchard shall be given to his mother in order that his mother may rear him. If a man should decide to divorce a sugitu who bore him children, or a naditu who provided him with children, they shall return to that woman her dowry and they shall give her one half of (her husband's) field, orchard, and property, and she shall raise her children; after she has raised her children, they shall give her a share comparable in value to that of one heir from whatever properties are given to her sons, and a husband of her choice may marry her.
\end{quote}

\textit{Id.} at 134–35 (quoting JAMES B. PRITCHARD, ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 16 (1969); MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 107, par. 137 (1995)). Sugitu is defined as a "member of a group or class of temple dedicatees, with special privileges, but always inferior to a naditu." \textit{Id.} at 134 n.48 (quoting ROTH, supra, at 273 (1995)). Naditu is defined as a "member of a group or class of Old Babylonian temple dedicatees, with special inheritance privileges and economic freedoms; some groups lived in cloisters or compounds, others married but were not permitted to bear children; Sumerian lukur." \textit{Id.} at 134 n.49 (quoting ROTH, supra, at 271). Lukur is a Sumerian term meaning priestess or nun. Ancestral and Extinct Language Translations: Nun, WEBSTER'S ONLINE DICTIONARY, http://www.websters-online-dictionary.org/Nu/Nun.html (last visited Sept. 1, 2011).

30. See id.
32. \textit{Id.}
33. \textit{Id.}
a one-third fixed interest in the decedent husband's lands likely came about during the early 15th century. (This rather arbitrary one-third interest was, oddly, carried all the way to the dower and curtesy laws of early America and is inherent in many elective share laws today.) The widow lost her dower interest, however, if the husband-decedent had been guilty of treason or if the widow herself had been guilty of a felony, adultery, or treason.

Much like community property laws today, the wife was granted a property interest in any real property received by the husband during marriage, even though her husband had legal title to the land. The husband could not defeat her dower right without her consent; though, if his wife agreed, he could bar dower by levying a fine when he conveyed his land to a third party without restrictions. The Statute of Uses of 1535 gave a married couple the right to enter into an antenuptial agreement whereby the wife would give up her right to dower in exchange for a jointure—a "settlement of land upon her at least for her own lifetime."

Because of the two distinct types of court systems which existed during this era—law courts and ecclesiastical courts—the manner used to determine the recipient of the tangible personal

34. Speculation exists that early dower may have been the origin of the husband's promise during a traditional marriage service: "With all my worldly goods I thee endow." Id.


36. Id.

37. HOLCOMBE, supra note 31, at 22.

38. Brashier, supra note 35, at 90 n.20 (1994). Brashier states:

The wife's expectant or contingent interest in the lands of which her husband was seised in fee simple and fee tail at any time during the marriage was known as dower inchoate. If the dower right had not been barred and the contingency of survival had been fulfilled, her inchoate right became dower consummate upon her husband's death. Until her dower was actually assigned, however, she had no right to enter upon the lands except under her right of quarantine.

Id. (citing George L. Haskins, Estates Arising from the Marriage Relationship and Their Characteristics, in 1 AMERICAN LAW OF PROPERTY §§ 5.1, 5.31–5.49 (A. James Casner ed., 1952)) (emphasis omitted); see also Statute of Uses of 1535, 27 Hen. 8, ch. 10 (Eng.) (repealed).

39. Brashier, supra note 35, at 91. "Neither the testator's will nor his inter vivos transactions could unilaterally defeat the dower right once the required elements were met." Id.

40. HOLCOMBE, supra note 31, at 22.

41. Id.

42. Plager, supra note 29, at 698 (citing 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 625 (1922); Thomas E. Atkinson, Brief History of English Testamentary Jurisdiction, 8 Mo. L. Rev. 107 (1943)).
property varied widely. The Statute of Distribution of 1670 set the widow’s intestate share of tangible personal property: one-third if the decedent husband left descendants and one-half if there were no descendants.

Chattels, however, were never subject to dower. Once married, a wife’s tangible personal property became the property of her husband. If the husband predeceased his wife, the tangible personal property that belonged to the widow before her marriage was “kindly” returned to her, but only if the decedent husband had not alienated the items before death.

Dower was necessary during this time because “[t]he extreme subordination of the wife at common law required that some form of protection from disinheritance be given to her upon the death of her husband, for often she was deemed unable or unqualified to venture from the home into a world run almost exclusively by men.” As Blackstone summarized: “The husband and wife are one, and the husband is that one.”

Early English lawyers referred to the husband’s life estate as “a tenant ‘by the curtesy of England,’ to emphasize the liberality of the law as opposed to its Norman counterpart.” Curtesy operated a little differently than dower under English common law:

Upon entering into a legally cognizable marriage, the husband acquired a marital tenancy in his wife’s inheritable freehold estates known as *jure uxoris* [“by right of the wife”] for the joint lives of the couple. He acquired his curtesy interest only upon the birth of issue capable of inheriting, at which time his interest was converted into an estate for his life known as curtesy initiate. Upon the wife’s death, the husband’s life estate was known as curtesy consummate. Because curtesy was limited to a life estate in the wife’s interests of which she was seised in possession at the time of her death, the husband could not enjoy curtesy.

---

43. *Id.* (citing Statute of Distribution of 1670, 22 & 23 Car. 2, ch. 10 (Eng.)).
44. *Id.* at 699
47. *Id.* (citing Haskins, *supra* note 46, at 345 n.1).
48. *Id.* at 90–91.
as to reversionary or remainder interests she owned at the time of her death.\footnote{51}

While men received a 100% interest in the wife’s lands, as opposed to the wife’s one-third interest in the husband’s lands, the husband was required to have issue who could inherit to obtain the curtesy interest.\footnote{52} No such requirement existed for a surviving wife to receive dower.\footnote{53} As noted by commentators, this prerequisite of a male heir may help explain “the eagerness with which the first heir was awaited, even by men with few of the normal fatherly characteristics.”\footnote{54}

The wide grant of the right of curtesy dates at least to the end of the 12th century.\footnote{55} This early right “was enlarged over the course of the thirteenth century.”\footnote{56} After 1833, dower and curtesy were abolished in England.\footnote{57} For 105 years thereafter, there was complete testamentary freedom in England.\footnote{58} Between 1938 and 1975, an English statute provided that a court could in its discretion award maintenance to a surviving spouse and other specified descendants where the testator deprived them of a “reasonable share” of the property.\footnote{59} From 1975 forward, the surviving spouse’s claim was not limited to maintenance. Instead, a court had the same discretion afforded in a divorce situation to award “reasonable financial provision” taking into account all circumstances including conduct of the parties.\footnote{60}

\footnote{51. Id. at 90 n.20 (citing 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 210, at 15–93 (Patrick J. Rohan rev. ed., 1993)) (emphasis omitted).}
\footnote{52. Id. at 91–92 & n.28. There were several elements of the issue requirement of old common law curtesy. Id. at 92 n.28. First, the mother and child must have survived childbirth. Id. Second, the husband might not receive curtesy if the marriage only bore daughters. Id. Finally, if the real property had been conveyed to the wife “in special tail” during a former marriage, the current husband would have no curtesy interest. Id.}
\footnote{53. Brashier, supra note 35, at 92.}
\footnote{54. Id. at 92 n.29 (citing JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 90 (3d ed. 1989)).}
\footnote{55. Id. at 91 n.27 (citing Haskins, supra note 50, at 228).}
\footnote{56. Id. (citing Haskins, supra note 50, at 228–29).}
\footnote{57. GLENDON, supra note 10, at 241.}
\footnote{58. Id.}
\footnote{59. Id.}
\footnote{60. Id. at 241–42.}
C. History of Dower and Curtesy in America

Borrowed from England, these estates represent the earliest form of protection from spousal disinheritance established in the United States.\(^{61}\)

Like much of early American property law, dower and curtesy were imported from England.\(^{62}\) Today, the difference between the laws in England and America are dramatic.\(^{63}\) At first, dower and curtesy rights varied quite a bit between the colonies and later between the states.\(^{64}\) Early dower and curtesy statutes also varied from their English roots.\(^{65}\)

In jolly old England, when land was the major source of wealth for most well-off families, the dower system actually worked well in terms of adequacy of support.\(^{66}\) Nevertheless, in the modern era of intangible wealth, dower makes very little sense and often results in little or no support at all.\(^{67}\) Because of this, dower (and curtesy) has been abolished in a large majority of separate property jurisdictions.\(^{68}\) Dower survives alongside elective share statutes in four states: Arkansas, Kentucky, Michigan, and Ohio;\(^{69}\) though there are substantial differences between modern-day dower and traditional English dower.\(^{70}\) In Michigan and Ohio, a surviving spouse must choose either dower or an elective share.\(^{71}\) As

---

62. See Geddes & Zak, supra note 27, at 122 ("This right was considered so important that it was included in the Magna Carta by King Henry III . . . ").
63. GLENDON, supra note 10, at 244.
65. Id. at 92 n.30 (citing George L. Haskins, Curtesy in the United States, 100 U. PA. L. REV. 196, 197). For example, the old English curtesy requirements of actual seisin and birth of issue were not present in most American versions. See generally id.
66. DUKEMINIER ET AL., supra note 2, at 423. Of course, the widows did not own any of the land in fee simple.
67. Id.
68. Id. Dower inchoate, i.e., the vested expectation of a dower interest during the life of both husband and wife, acted as a restraint on alienability of real property. Brashier, supra note 35, at 93 n.32. This was another reason for its decline in America. Id.
69. DUKEMINIER ET AL., supra note 2, at 423.
70. See Brashier, supra note 35, at 93 n.35 (providing a full discussion of the differences).
71. DUKEMINIER ET AL., supra note 2, at 423.
discussed, elective share laws usually yield more assets; consequently, dower in this country is effectively moot.\footnote{Id. One could imagine that in unusual situations, dower could yield the surviving spouse better financial results. The two most prevalent benefits of dower over an elective share law are: (1) the inchoate rights inherent in dower that may lessen the ability of the spouse to transfer real property \textit{inter vivos}; and (2) dower is given priority over creditors, which may protect the surviving spouse if the estate is insolvent.}

\section*{III. Description of Elective Share Statutes}

\textit{Caution. There is no subject in this book on which there is more statutory variation than the surviving spouse's elective share.}\footnote{\textit{Id. at 425. For an overview of the variations, Dukeminier references Jeffrey A. Schoenblum, 2004 \textsc{Multistate Guide to Estate Planning} Tables at 6-1–6-125 (2004). \textsc{Dukeminier et al.}, \textit{supra} note 2, at 425–26.}}

Unfortunately for the goal of simplicity, the elective share statutes vary widely,\footnote{The history of the development of the myriad elective share laws in America is beyond the scope of this Article. As one scholar noted, "It would require a volume of some size, and more research than the subject is worth, to recount all the developments of the rules permitting a surviving spouse to elect against the will of the deceased spouse." \textsc{Lewis M. Simes, Public Policy and the Dead Hand} 16 (1955).} and have been described as:

[A] jungle, with hardly two states to be found that are exactly alike, and there exists in reality 50 different schemes most of which, when analyzed, are not built upon a single, adequate interest given the surviving spouse; but instead give her a bit of homestead, a bit of widow's allowance, and in addition a bit of dower or some statutory substitute therefore.\footnote{\textsc{William J. Bowe et al.}, \textsc{Page on the Law of Wills} § 3.13 (2003).}

Every separate property jurisdiction except Georgia gives a surviving spouse an elective share or forced share of the decedent-spouse's property.\footnote{\textsc{Dukeminier et al.}, \textit{supra} note 2, at 425.} The elective share is just that—an election: the surviving spouse has the right to take any property left to him or her under the will or elect against the will and take the amount specified by the elective share law instead.\footnote{\textit{Id. Note that, as discussed below, in some states, the election is to take the elective share or the property left to the surviving spouse by all sources, whether via the will or outside the will (e.g., life insurance proceeds, qualified retirement plans, joint property, etc.). \textit{See, e.g.}, \textsc{Unif. Probate Code} §§ 2-204 to 2-207 (amended 1993).}
A. Traditional Probate-Only Statutes

Simply put, the conventional forced share is highly arbitrary and may in some instances work more harm than good.78

Starting in the 1930s, state-by-state transitions from dower to elective share laws took place over several decades.79 New York state enacted the first elective share statute in this country.80 Legislators did so, it appears, based solely on anecdotal evidence of two instances of disinheritance; no disinheritance studies had been conducted at that time.81

Some states retain what was originally the norm in this country—an elective share statute giving the surviving spouse a share (usually one-third to one-half) of the property in the decedent—spouse's probate estate only.82 Planning around a probate-only type of law became so easy, and non-probate transfers83 became so common, that most states now have toughened their laws to include, to some extent or another, non-probate assets.84 However, probate-only elective share laws still exist today.85

The probate-estate-only elective share laws have the advantage of simplicity. As one commentator noted:

The probate court need only know the total value of the estate to which the forced share applies and the applicable proportion of the estate (as set out in the statute) to which the surviving spouse is entitled. There is usually no occasion for the taking of testimony about family relationships and history, and no need for the application of judicial discretion.86

Simplicity, however, has its disadvantages: "its total insensitivity to the surviving spouse's actual need, the contribution

78. Brashier, supra note 35, at 102.
79. Id. at 99 n.51.
80. Id. Brashier also points to In re Estate of Rieffberg, for a chronology of how the New York state legislature went about enacting the first elective share law. Id. (citing In re Estate of Rieffberg, 446 N.E.2d 424, 427 (N.Y. 1983)).
81. See Plager, supra note 29, at 685–86 (explaining that no empirical data supported the findings "as to the frequency, and thus the social significance, of disinheritance . . . ").
82. DUKEMINIER ET AL., supra note 2, at 438 (emphasis added).
83. For example, life insurance, joint tenancies, qualified retirement plans, joint accounts and the like.
84. See generally discussion infra Part III.B.
85. See, e.g., Brashier, supra note 35, at 102.
86. Plager, supra note 29, at 682.
the survivor may have made to the estate, and the reason why the testator, who presumably knew his family situation as well as anyone, preferred his particular dispository plan. The probate-only type of elective share laws have been subject to stiff criticism.

B. Modern Trend: Augmented Share

The forced share system, as it currently exists in most states, is difficult to justify. Recent societal changes have undermined whatever usefulness the system might have had.

As previously noted, New York was the first state to make a statutory attempt to deal with the issue of non-probate transfers subject to the elective share. This larger pie is, in most state statutes, called the "augmented share" or "augmented estate." The augmented share provides the asset pool from which the surviving spouse's percentage is taken.

Other states soon followed New York's lead. Today, most separate property jurisdictions have some version of an augmented share concept. Because of the extreme variation among states, a survey of exactly what types of property are included in the augmented share is beyond the scope of this Article. However, suffice it to say, most of these augmented estate laws still have loopholes that good (read "expensive") planners can take advantage of if a client has a need to plan around the elective share.


If the goal is a partnership theory of marriage... it must be recognized that while the revised UPC is certainly better than the pre-1990 UPC and a step in the right direction, it is not a very large step.

87. Id.
88. See, e.g., Brashier, supra note 35, at 102; see also Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984) (reaching beyond probate estate to include assets held in inter vivos trust).
90. DUKEMINIER ET AL., supra note 2, at 446; see also N.Y. EST. POWERS & TRUSTS LAW ch. 952 (Consol. 1966), amended by N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2005).
The Uniform Probate Code incorporates the most inclusive and detailed augmented share concept, leaving few, but still important, loopholes. The goal of the UPC drafters was to approximate as best as possible the division of property at death in a community property jurisdiction. Important differences remain, however. One key difference is that the UPC augmented share embraces all the property owned by both spouses, including property acquired by gift and inheritance, as well as pre-marriage property. In contrast, community property does not include property owned by the spouses before marriage or property acquired by gift or inheritance. Because the augmented share (from which the surviving spouse’s share is calculated) is artificially increased by inheritance and gifts, this can increase quite dramatically (and quite unfairly) the share of the surviving spouse if the decedent spouse had a great deal of inherited wealth. If, in addition, the surviving spouse is wealthy in her own right, then she may not receive any share of the marital property because the charge for her wealth will offset the elective share amount she would otherwise receive.

For various reasons, the most recent version of the UPC elective share provisions has been adopted in only eight states.

IV. MOVING AWAY FROM THE ELECTIVE SHARE AND SEPARATE PROPERTY

Forced-share law is the law of the second best. It undertakes upon death to correct the failure of a separate-property state to create the appropriate lifetime rights for spouses in each other’s earnings.

Legislatures need to directly address the goals of their marital property systems. The goals of elective share statutes in separate property states are based on one or more of the following: the

---

93. DUKEMINIER ET AL., supra note 2, at 449–50.
94. Id.
95. Id. Note, however, that a couple may agree to characterize premarital property, gifts and inheritances as community property. Id. at 456.
96. Id. at 449. These states, as Dukeminier points out, are mainly in the Great Plains. Id. at 450. See JEFFREY A. SCHÖNBLUM, 2004 MULTISTATE GUIDE TO ESTATE PLANNING Table 6.03 (2004).
support theory, the marital partnership theory, or the contract theory. The situation is currently a confused jumble:

As it is, both the policy justifications and the effect of these rules are flawed, confused, or conflicted. To illustrate simply, most statutes cannot even choose whether they are based on a support theory (that is, the surviving spouse should not be left destitute and therefore a ward of the state) or an economic partnership theory (that is, everything acquired by investment or industry by either spouse during the marriage should belong to them equally, as in community property). This easily is shown by the vast divergence in the size of the share from state to state. For example, the surviving spouse's share can range from a low of 0% to a high of 50% under the new Uniform Probate Code accrual share regime (indicating a marital partnership approach, based on the length of the marriage) but with a support allowance in all cases (the Uniform Probate Code § 2-202(b) Supplemental Elective Share Amount, based on the spouse's other property and property received outside of probate). In some states the share can be as high as 100% in certain cases. And those states that still reflect a one-third share presumably are attributable to the dower/curtesy origins of elective share statutes, which arguably are not informed by either the support or the marital partnership theories. . . .

The conflicted underpinnings of these statutes is especially well illustrated by the fact that, in virtually all states, the election is denied if the spouse has died before an election is made. Quaere how to justify a marital partnership theory underlying these statutes if the surviving spouse's property

---

98. The support theory of marital property states that all property is considered marital property except for “property acquired by means of gift or inheritance.” HARRY D. KRAUSE & DAVID D. MEYER, FAMILY LAW IN A NUTSHELL § 22.2 (4th ed. 2003). The surviving spouse has an interest in the property according to title, and the marital property is divided. Id.

99. Under the marital partnership theory, “all property owned by the parties, even if acquired before the marriage and held separately ever since, may be reallocated . . . .” Id.

100. The contract theory of marital property allows “one or both parties to waive their spousal rights” altogether. ANDERSEN & BLOOM, supra note 1, § 6.01[E]. Note that if one espouses the contract theory of marriage, i.e., marriage as a contract between competent adults, “then neither the arbitrary elective share nor community property is necessary because the spouses may protect themselves before and during the marriage without state intrusion.” Brashier, supra note 35, at 88.
right substitute is defeated merely by the accident of dying before making the claim. This bespeaks a support theory, but it should not inform an accrual entitlement that increases with the length of the marriage. The conflict also is illustrated almost everywhere by the fact that an election made on behalf of an incapacitated surviving spouse must be justified on the basis of need. Again, if the statutes reflect a marital partnership surrogate for community property, why should need or death of the spouse before completion of the election process be critical at all?  

Another example of this confused identity is that some jurisdictions allow the elective share to be satisfied by life interests in property held in trust or otherwise, while other jurisdictions do not. In the former, the support theory can be seen, whereas the latter suggests the partnership theory.  

Finally, in most states, a surviving spouse that has abandoned a decedent spouse is still entitled to his or her elective share. Again, does this really comport with the notions of partnership theory? All of this can get confusing for even the most respected scholars.

101. Pennell, supra note 9, at § 905 (citing Oldham, supra note 89, at 223); see also DUKEMINIER ET AL., supra note 2, at 425, 432; see generally American College of Trust and Estate Counsel ("ACTEC"), Study 10: Surviving Spouse's Rights to Share in Deceased Spouse's Estate (1994); UNIF. PROBATE CODE § 2-212(a) (amended 2003); In re Estate of Crane, 649 N.Y.S.2d 1006 (N.Y. Sur. Ct., 1996).
102. DUKEMINIER ET AL., supra note 2, at 425.
103. Id.
104. Id. at 433.
105. Id. (suggesting that perhaps the elective share should only apply to the property owned by the decedent-spouse at the time the surviving spouse abandoned the decedent-spouse, an arrangement that can be compared to the California community property laws that deem earnings acquired after separation not to be community property).
106. For example, in one edition of his classic book, Jesse Dukeminier seemingly states the elective share purpose to be based on the support theory. JESSE DUKEMINIER, JR. & STANLEY M. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, FUTURE INTERESTS, AND ESTATE PLANNING 461–63 (1st ed. 1972) (noting that the "forced share was [a] result of concern for wife's possible disinheritation and the limited protection afforded by dower"). However, in a later version, he states the elective share purpose to be based on the marital partnership theory. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES, 377–78 (4th ed. 1990) (policy underlying elective share is the same as that underlying community property—to recognize the spouse's contribution to the economic success of the marriage). See also Brashier, supra note 35, at 151 n.255.
The Uniform Probate Code's elective share provisions go the farthest in attempting to implement the partnership theory. With a sliding percentage ranging from 0–50%, the UPC awards the surviving spouse a higher percentage of the decedent-spouse's assets the longer the marriage lasts on the theory that the longer the marriage, the greater the amount of property acquired through marriage partnership efforts.

But even this seems like the poor man's community property system. As the epigram under the heading of this section indicates, the 1990 UPC drafters concur: "Forced-share law is the law of the second best. It undertakes upon death to correct the failure of a separate-property state to create the appropriate lifetime rights for spouses in each other's earnings."

A. Like in Community Property Jurisdictions, Distribution at Death Should Be More Consistent With Distribution upon Divorce

In the past few decades, a consensus has developed regarding the method of property distribution at divorce. Both separate and community property jurisdictions are moving in the direction of equitable distribution, i.e., family law courts can divide property accumulated by either spouse if acquired through that spouse's efforts. This type of division best reflects the marital partnership view of marriage—that the spouses should share the fruits of the marital effort, no more and no less.

Neither the partnership nor the support theory of marriage would allow a surviving spouse to have any interest, either at divorce or at death, in property received by the decedent-spouse through inheritance and gifts or from property owned before marriage. Clearly, these assets are not derived from a marital partnership and support should come, if at all, from assets earned during the marriage. Today, many separate property jurisdictions, as well as the Uniform Probate Code, give the surviving spouse a share of total assets (including inheritance and premarital assets); therefore, there is decidedly less consensus between community and separate property states regarding division of property at death. This is an important issue given the very large sums

108. Dukeminier et al., supra note 2, at 427.
110. Oldham, supra note 89, at 223.
111. Id. at 223–24.
112. Id. at 223.
113. Id. at 224.
expected to be passed from one generation to the next via inheritance over the next few decades. This is just one of many examples where the two schemes of distribution in separate property states are fundamentally different. But should they be? The laws governing the distribution of property at divorce and at death in community property jurisdictions are quite similar, which is the way it ought to be.

B. There Is Fundamental Inequity with Current Elective Share Schemes: Those Who Can Afford Sophisticated Legal Advisors Can Usually Plan Around the Laws

Only the poor and the stupid need conform [to the elective share laws].

Separate property systems are too flawed to save.

If the statutes creating such valuable rights for widows . . . are subject to easy evasion by transfers inter vivos, their utility is slight indeed. . . . In view of the jurisprudence in some states, the question may well be put whether these statutes have been placed on our books for any sincere enforcement. Or do they simply represent a sort of sentimental desire of the community which must be formally registered but need not inconvenience those with means to consult competent counsel? Are these laws a mere pious wish, a sort of sanctimonious recital of what we should prefer but will not insist upon?

As seen below, in any elective share jurisdiction, if one pays a high enough price to a good estate planning attorney, and is willing to accept at least some amount of hassle, then the elective share laws can be circumvented, and a spouse disinherited. For those individuals, however, who are unable to engage in this type of planning for financial reasons, it is most certainly not a level

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, 517 (2000) ("According to a relatively recent study, the generation commonly referred to as the 'Baby Boomers' can expect to inherit some $10.4 trillion over the fifty-year period from 1990 to 2040, with the average size of each of the projected 115 million bequests being slightly more than $90,000 (both amounts stated in 1989 dollars). ").

115. Cahn, supra note 17, at 150.

116. Id.
These individuals have no choice but to accept the spousal forced heirship regimes. Since there is no way to tighten the laws enough to keep high net worth individuals from exploiting the system, separate property jurisdictions should move to community property because of this fundamental unfairness embedded in separate property systems. As one commentator noted:

A more reasonable surmise about the porous nature of these statutes is that legislatures are not totally committed to the concept of an elective share: to the extent they retain escape hatches the legislature may be indicating that those who want to engage in this planning badly enough to hire competent counsel ought to have the opportunity. Thus, freedom of testation remains available to those decedents with enough wealth to be well-advised. This last response may suggest that these laws ought to be repealed and, if appropriate in the first instance, replaced with rules that are effective to protect the policies underlying these statutes. As it is, any approach that is circumventable—and every elective share statute is more easily avoided than community property—merely creates unjustified expectations and reliance by the nonpropertied spouse.

117. See, e.g., Tanya K. Hernandez, The Property of Death, 60 U. PITT. L. REV. 971, 988 (1999) (arguing that “only the wealthy have expansive testamentary freedom because their resources are extensive enough to fulfill societal expectations of support to biological family members and simultaneously include bequests to others” (citing MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 6 (1970))); see also Lawrence M. Friedman, The Law of the Living, the Law of the Dead: Property, Succession, and Society, 1966 WIS. L. REV. 340, 377:

Freedom of testation, then, is most truly a working reality for the upper classes, but even for them it is hedged about with restrictions. The lower down the economic scale one goes, the higher the likelihood that assets will largely be bound assets outside the system of testation or subject to levy by the nuclear family.

118. Testators in separate property states with large estates have the testamentary freedom to choose how and to whom the estate shall be distributed. SUSSMAN ET AL., supra note 117, at 5. Note, however, that the testator of a small estate, i.e., an estate under the statutory mandatory allowance amount, has essentially no testamentary freedom—his or her will is basically of no use vis-à-vis its dispositive provisions. See id. (“Limited assets induce forced succession even though the testator might have had other things in mind.”) The assets in a small estate will most likely “be consumed entirely in payment of debts or by the exemption, year’s allowance, and other provisions . . . .” Id.

119. Pennell, supra note 9, § 905. Pennell goes on to say:

So, for example, if it is correct to say that “[t]he presumed intent of husbands and wives [is] to pool their fortunes . . . an unspoken or imputed marital bargain . . . that each is to enjoy a half interest in the
COMMUNITY PROPERTY V. ELECTIVE SHARE

1. Planning Around Separate Property Elective Share Laws

The beauty of the forced share . . . is only skin deep; protection is announced, but it is not given. \(^{120}\)

a. Simple Probate Avoidance Techniques that Retain Grantor Control

A substantial minority of states still allow a grantor to establish a simple revocable inter vivos trust that will not be subject to the elective share at death. \(^{121}\) Revocable trusts are very common, and are as easy to prepare as a will. Once executed, a grantor must only rettitle his or her property into the name of the revocable trust, and that property so retitled is no longer subject to probate at the grantor's death. There are many legitimate reasons for wanting to avoid probate (such as eliminating potentially costly and lengthy court proceedings at death, privacy, and immediate access to assets by beneficiaries at death, among others) such that this cannot be labeled a "disinheritance technique."

As trustee of the revocable trust, a grantor can retain virtually the same control that he or she would have if the property were held outright. This leads to a form-over-substance argument that, in theory, elective share laws should treat assets held in revocable trusts the same as assets held outright by a decedent.

Anyone who wants to disinherit their spouse can do so very easily in one of the jurisdictions that follows the traditional elective share-type laws. This leads to a dichotomy between those who engage in some modest amount of estate planning and those who

---

\(^{121}\) See Pennell, supra note 9, § 904.1; BOWE ET AL., supra note 75, § 3.20.
simply have wills prepared. In these jurisdictions, legislatures should switch to community property because it is so easy to avoid being subject to the elective share laws.

b. Other Elective Share Avoidance Techniques

There are a wide variety of elective share laws, from the substantial minority of jurisdictions that allow assets placed in revocable trusts to avoid claims by a surviving spouse, to those jurisdictions that have incorporated the Uniform Probate Code's very tough elective share provisions.

Although difficult to summarize, there are several techniques that someone who engages in some level of planning could utilize to avoid being subject to elective share laws. One technique is outright gifts. The simplest measure, one which works in any jurisdiction, is to simply give away property to someone other than your spouse with no strings attached. In most jurisdictions, this works immediately (even on your death bed), and in Uniform Probate Code states, this works as long as the grantor lives two years after the gift. A second technique includes most non-probate transfers. Many states allow some or all non-probate transfers to be outside the elective share system. This would include life insurance, qualified retirement plans, joint tenancies, joint accounts, most irrevocable trusts, etc. A third technique is pre- or postnuptial agreements. If the spouses agree to opt out of the elective share system in a separate property state, they can do so by contractual agreement. A fourth option is to change domicile. One could move away from a strict jurisdiction to one that has more loopholes; or to Georgia, which has eliminated the elective share altogether. The situs of the property itself could also be moved to a more favorable jurisdiction. There are, of course, choice-of-law considerations in play with these tactics, and careful

122. See discussion supra Part IV.B.1.a.

123. See Pennell, supra note 9, § 904.3; see also DUKEMINIER ET AL., supra note 2, at 445 (Connecticut and Ohio are two states in which non-probate transfers are not subject to the elective share).

124. See Pennell, supra note 9, § 904.3B n.80; UNIF. PROBATE CODE § 2-205(3)(C) (West, Westlaw through 2010 Annual Meeting of the National Conference of Commissioners on Uniform State Law).

125. Neither the states nor the federal government interfere with one's right to designate whomever he wishes to receive life insurance proceeds. Why have we chosen this path with insurance but not, for example, with ERISA retirement plans? In theory, one could easily invest quite a large portion of his assets into life insurance policies designated to go to one or more non-spousal beneficiaries.

126. See Pennell, supra note 9, § 904.3F n.91 (citing ACTEC, supra note 101).

127. Pennell, supra note 9, § 904.3A.
planning should occur before any such move. Fifth, many states have favorable laws that allow individuals with incompetent spouses to structure, at a minimum, any marital devices such that the decedent retains control over the ultimate disposition of that property after the death of the incompetent spouse. Older versions of the Uniform Probate Code, in fact, allow an elective share only if "necessary to provide adequate support" for the actuarial life expectancy of the incompetent surviving spouse. Sixth, spouses may purchase treasury obligations. New York law exempts U.S. savings bonds and Treasury bills from its elective share regime based on perceived Constitutional conflicts. Even if one is not a New York resident, it may be possible to take advantage of this aspect of New York law by locating these assets in New York. Lastly, for short-term marriages, spouses may utilize the Uniform Probate Code. As discussed above, the Uniform Probate Code provisions set up a sliding scale, starting at zero percent for shorter-term marriages. Thus, establishing domicile in a Uniform Probate Code state would effectively disinherit a spouse in a short-term marriage.

c. Planning Around the Uniform Probate Code Elective Share Provision

The relatively new elective share provisions of the Uniform Probate Code are the toughest in the country to avoid. There are, however, a few ways to plan around even these laws. First, one could set up an irrevocable life insurance trust and have the trustee purchase a life insurance policy; or, one could even transfer an existing policy to a new trust with a two-year waiting period. Second, gifts given more than two years before death also escape the Uniform Probate Code provisions. Third, one could provide all the consideration for a joint purchase of property with a non-spouse, with the result that only 50% of the value will be subject to

128. Id. §§ 904.3C–3D.
129. Id. § 904.3N.
130. Id. (citing UNIF. PROBATE CODE § 2-203 (amended 2006)); see also DUKEMINIER ET AL., supra note 2, at 425-28.
131. Pennell, supra note 9, § 904.3E (citing N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(2)(C) (McKinney 1997)).
132. See id.
133. See id. § 904.3M (citing UNIF. PROBATE CODE § 2-202 (amended 2006)).
134. See id. § 904.3G (citing UNIF. PROBATE CODE § 2-205(2)(i) (amended 2006)).
135. Id. (citing UNIF. PROBATE CODE § 2-205(3) (amended 2006)).
the elective share. Finally, annual exclusion gifts (currently $13,000/person/year) are exempted.

2. Establishing an Offshore Trust

Foreign jurisdictions don’t recognize a spouse’s right to an elective share against the estate. Therefore, assets that are transferred to an offshore jurisdiction will not be subject to the claims of a surviving spouse.

Commentators do not seem to be discussing what may be the surest way around the elective share laws while still allowing the grantor to remain a discretionary beneficiary: offshore asset protection trusts. If prepared and implemented properly, these trusts—set up in the modern era in the Cook Islands and similar jurisdictions—allow a great deal of flexibility while keeping the trust assets beyond the reach of American courts. Therefore, no matter what the state elective share legislation reads, if the money is offshore, it is not coming back.

This type of planning is becoming more commonplace and much easier to implement than a couple of decades ago. Anecdotal evidence suggests that, recently, people are generally much more worried about asset protection and are more often setting up offshore trusts for asset protection reasons, not necessarily to get around the elective share laws. No matter the motivation, however, make no mistake that these trusts are very much dodging the elective share laws. Offshore asset protection planning tops the debate between “haves and have-nots,” with this “nuclear option” unavailable to ordinary citizens who cannot afford the relatively large fees associated with this type of planning.

V. MOVING TOWARD COMMUNITY PROPERTY

Resolved, [t]hat the laws of property, as affecting married parties, demand a thorough revisal, so that all rights may be equal between them; that the wife may have, during life, an

136. Id. (citing UNIF. PROBATE CODE § 2-205(1)(i)).
138. Pennell, supra note 9, § 904.3G (citing UNIF. PROBATE CODE § 2-205(3)).
139. Brinker & Langdon, supra note 15, at 32.
140. See DUKEMINIER ET AL., supra note 2, at 557–60 (discussing self-settled asset protection trusts). Note that I am not discussing fraudulent conveyances, but rather legal offshore transfers. “Fraud is so old a villain that courts should find little difficulty in recognizing his face.” Cahn, supra note 17, at 153.
equal control over the property gained by their mutual toil and sacrifices, be heir to her husband precisely to the extent that he is heir to her, and entitled, at her death, to dispose by will of the same share of the joint property as he is.  

This resolution could have been passed yesterday. Sadly, though, it was proclaimed in 1850. As a society, we have not made much headway in implementing community property laws, but in my view we absolutely should. Limiting a decedent's control over his property is a right with no force if there is no parallel limit on property transfers during lifetime.

"How can a restraint on testamentary power be made effective without a corresponding restraint on the inter vivos power of disposition?" If a separate property jurisdiction is really interested in implementing a system that tracks most closely the marital partnership theory of marriage, then there is no question that it should simply switch to a community property theory of marriage and property disposition.


142. Id.

143. SIMES, supra note 74, at 25; see also GLENDON, supra note 10, at 245 (arguing that the principal weakness of the American forced share “is that it can be defeated by lifetime transfers that deplete the estate”).

144. See Brashier, supra note 35, at 88. Note that only nine states currently have a system of community property: Arizona (ARIZ. REV. STAT. ANN. § 25-211 West, Westlaw current through the First Regular Session and Third Special Session of the Fiftieth Legislature (2011)), California (CAL. FAM. CODE § 760 (West 2004)), Idaho (IDAHO CODE ANN. § 32-906 (West, Westlaw current through (2011) Chs. 1-335 that are effective on or before July 1, 2011)), Louisiana (LA. CIV. CODE ANN. art. 2338 (2009)), Nevada (NEV. REV. STAT. ANN. § 123.220 (West, Westlaw current through the 2009 75th Regular Session and the 2010 26th Special Session of the Nevada Legislature and technical corrections received from the Legislative Counsel Bureau (2010))), New Mexico (N.M. STAT. ANN. § 40-3-2 (West, Westlaw current through the First Regular Session of the 50th Legislature (2011))), Texas (TEX. FAM. CODE ANN. § 3.002 (West 2006)), Washington (WASH. REV. CODE ANN. § 26.16.030 (West, Westlaw current through August 1, 2011)), and Wisconsin (WIS. STAT. ANN. § 766.001 (West, Westlaw current through 2011 Act 31, published 07/11/2011)). Alaska allows spouses to choose whether to be subject to community or separate property (ALASKA STAT. § 34.77.030 (West, Westlaw current through the 2010 Second Regular Session of the 26th Legislature)). DUKEMINIER ET AL., supra note 2, at 455. These states, however, represent over one-fourth of the U.S. population. Id. As summarized by Dukeminier:

Community property in the United States is a community of acquests:

Husband and wife own the earnings and acquisitions from earnings of both spouses during marriage in undivided equal shares. Whatever is
The community property theory of asset distribution is much more effective at protecting the non-wage-earning spouse, especially during life, as he or she has an immediate property interest in any property deemed earnings during the marriage. There are significant limitations on the rights of one spouse to transfer community property without spousal consent. If implemented properly, this would close most of the loopholes inherent in even the best separate property elective share law. Prohibiting a person from disposing of his or her property in the manner of his or her choice at death will lead only to a bizarre race against the clock to give away property as death approaches, and who knows when that will be? This approach requires individuals to be both psychic and quick in order to fulfill their wishes. Most likely, they will not be both, thus frustrating a primary tenet of both property law (the right to do with your property what you choose) and decedents’ estates law (that the testator’s intent is bought with earnings is community property. All property that is not community property is the separate property of one spouse or the other or, in the case of a tenancy in common or joint tenancy, of both. Separate property includes property acquired before marriage and property acquired during marriage by gift or inheritance. In Idaho, Louisiana, and Texas, income from separate property is community property. In the other community property states, income from separate property retains its separate character.

Almost all community property states follow the theory that husband and wife own equal shares in each item of community property at death.

Id. at 455, 457.

145. To be clear, there are two types of community property utilized in the world: the Spanish system in use in America today and the universal community system, of Germanic origin, used in Roman–Dutch law. In the Germanic system, “all property owned by either spouse at the time of the marriage becomes community property when the marriage is entered into,” and any property, regardless of source, obtained during marriage becomes community property. Brashier, supra note 35, at 95 n.38. The current UPC elective share provisions purport to employ this universal community approach at the death of a spouse, despite the fact that no American jurisdiction utilizes the universal community property system during life. Id. As John Lennon might say, “Strange days indeed; strange days indeed.” JOHN LENNON, NOBODY TOLD ME (Polydor Records 1984).

146. See Oldham, supra note 89, at 229; Kathy T. Graham, The Uniform Marital Property Act: A Solution for Common Law Property Systems?, 48 S.D. L. REV. 455, 464 (2003) (For example, § 6 of the Uniform Marital Property Act, which seeks to implement community property concepts on a uniform basis, “restricts the ability of a spouse to gift marital property valued in excess of five hundred dollars.”).

147. DUKEMINIER ET AL., supra note 2, at 456–57.
As one scholar notes, "If we prevented them from bestowing it in the open and explicit mode of bequest, we could not prevent them from transferring it before the close of their lives, and we should open a door to vexatious and perpetual litigation."\textsuperscript{148}

Commentators have agreed with this view, noting, for example, that "eventually all states will have to abandon elective or forced share law and adopt some sort of community property system" if the partnership theory of marriage is to be implemented nationwide,\textsuperscript{149} and that:

To the extent that the elective share is now being recharacterized as a posthumous means of correcting deficiencies in the common law system of ownership of marital property, legislatures should instead focus their attention on correcting that system during the marriage, not at its end. If states wish to view marriage as an economic partnership in which contributions of each spouse should be recognized, then they must adopt community property principles, not forced share statutes that provide recognition of spousal contributions only to the survivor when the marriage is terminated by death.\textsuperscript{150}

In addition, feminist scholars have heaped quite harsh criticism on the continued separate property regimes in most jurisdictions.\textsuperscript{151}

The greatest injustice associated with separate property systems (even with the newest elective share statute) is the situation where the non-earning spouse dies first.\textsuperscript{152} In that case, he

\textsuperscript{148} Adam J. Hirsch \& William K.S. Wang, \textit{A Qualitative Theory of the Dead Hand}, 68 IND. L.J. 1, 11 (1992) (quoting \textsc{William Godwin}, \textit{Enquiry Concerning Political Justice} 718–19 (Penguin Classics 1985) (1793)); see also \textsc{Francis Hutcheson}, \textit{A System of Moral Philosophy} 352 (Augustus M. Kelley Publishers 1968) (1755) ("Take away this right and . . . men must be forced into a pretty hazardous conduct by actually giving away during life whatever they acquire beyond their own probable consumption.").

\textsuperscript{149} Brashier, \textit{supra} note 35, at 152 n.226 (quoting Whitebread, \textit{supra} note 91, at 142).

\textsuperscript{150} Id. at 152 (citations omitted).

\textsuperscript{151} See, e.g., Mary Louise Fellows, \textit{Wills and Trusts: The Kingdom of the Fathers}, 10 LAW \& INEQ. 137, 150–51 (1991) (arguing that modern estate planning, from the female viewpoint, has not progressed much past the fourteenth century). Fellows notes: "How else can we explain the continuing reliance in the majority of states on inheritance and forced share rights, rather than the community-property system, to acknowledge the contribution and support needs of spouses?" Id.

\textsuperscript{152} Id. at 151 ("Recognizing a wife's claim to the marital estate only if she survives is wholly consistent with the maintenance (or vessel) ideology of the
or she would have no ability to devise any property that the earning spouse accumulated during the marriage to his or her children.\footnote{See Oldham, supra note 89, at 229.} With multiple marriages (perhaps each with children) becoming more commonplace, society can no longer assume that both spouses have identical testamentary intentions.\footnote{Id. at 235.} Thus, the UPC’s promise of implementing the marital partnership theory becomes increasingly irrelevant.\footnote{DUKEMINIER ET AL., supra note 2, at 427; see also Whitebread, supra note 91, at 140–44 (discussing the benefits of converting to community property, and noting that the conversion to the Uniform Marital Property Act would be easier than most believe and that it has gone well in the one state that has adopted it (i.e., Wisconsin)).}

VI. CONCLUSION

If, as a policymaker, one believes the marital partnership theory of marriage to be gospel, then, by goodness, change to community property and be done with it. Do not, as many states have done, choose separate property (an inherently non-partnership, eat-what-you-kill philosophy) and then try to graft some back-end sorry excuse for community property at death. As LBJ\footnote{Lyndon B. Johnson, Master of the Senate, Texan extraordinaire, and U.S. President.} would say, “That dog won’t hunt.”

The fact the privileged can pay their way out of any elective share law and the less financially fortunate cannot, is a real injustice which must be rectified. Elective share laws have been around since the 1930s in this country; and, even with seventy-plus years of tinkering, these laws are still too easy for a good enough attorney to bypass.

Elective share laws seem like some school child’s Rube Goldberg machine\footnote{A Rube Goldberg machine “takes a simple task and makes it extraordinarily complicated.” Biography, RUBE GOLDBERG.COM, http://www.rubegoldberg.com/?page=bio (last visited August 21, 2011).} trying, in as complex a manner as humanly possible, to solve a problem which community property already solves. Every few years, law professors huddle to build a better elective share mousetrap, but it still does not work.

Let us stop this costly arms race and simplify by implementing community property: it is the only logical outcome.

fourteenth century. It denies the wife the right to testamentary control over capital except, and only reluctantly, when practicality demands this solution.”).