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ARTICLES

Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share—Why the Partnership is Not Yet Complete

RENA C. SEFLOWITZ*

INTRODUCTION

Elective share statutes have recently attracted attention from state legislatures, law revision commissions, model code drafters, and commentators.¹ Most notable is the 1990 revision of Article II of the

* Associate Professor of Law, Touro College, Jacob D. Fuchsberg Law Center. A.B., 1973, Barnard College; J.D., 1975, Columbia University. The author gratefully acknowledges the valuable comments of Professors Dan Subotnik and Sidney Kwestel and the contribution of her research assistants, David Desmond, Michael Wasserman, Lainie Dolinger, Murray Bach, Diedre Yablon, Michael Beer, and Denise Saggio.

1. See, e.g., S.C. CODE ANN. §§ 62-2-201, -202, -205 (Law Co-op. Supp. 1990) (the Reporter's Comments to the 1987 version of § 62-2-202 note that the section "rejects the 'augmented estate' concept promulgated by the drafters of the Uniform Probate Code as unnecessarily complex," although this approach was recommended in LeBlanc, *The Proposed South Carolina Probate Code*, 36 S.C.L. REV. 511 (1985)); 20 PA. CONS. STAT. ANN. § 2203 (Purdon Supp. 1991); WIS. STAT. ANN. § 861.17 (West 1991); UNIF. PROB. CODE art. II, pt. 2, 8 U.L.A. 78 (Supp. 1991) [hereinafter U.P.C.]; FIRST REPORT OF THE NEW YORK ESTATES POWERS AND TRUSTS LAW ADVISORY COMMITTEE (1991) [hereinafter ADVISORY COMMITTEE REPORT]; NEW YORK LEGIS. COMM'N REPORTS AND NEW YORK STATE BAR ASSOCIATION REPORT ON NEW YORK EST. POWERS AND TRUSTS LAW § 5-1.1 (1990) [hereinafter N.Y. BAR REPORT]; Kwestel & Sepowitz, *Testamentary Substitutes: Retained Interests, Custodial Accounts and Contractual Transactions — A New Approach*, 38 AM. U.L. REV. 1 (1988); Langbein & Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TRUST J. 303 (1987); Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223 (1987); Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991); Waggoner, *Spousal Probate Rights in a Multiple-Marriage Society*, 45 REC. A.B. CITY N.Y. 339, 340 & n.6 (1990) [hereinafter Waggoner, *Spousal Probate Rights*]; Note, *Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate*, 74 CORNELL L. REV. 511 (1989).

Uniform Probate Code (UPC)² which embodies a profound philosophical change in the concept and structure of the elective share in common-law jurisdictions. Virtually alone among elective share statutes, the UPC grapples with the elusive nature of marriage and takes into account equitable distribution and community property models.³ No longer are the rationales of the elective share system, marriage as an economic partnership, and support of the surviving spouse,⁴ divorced from the specific provisions of a forced share statute. In particular, the partnership, or marital-sharing theory of marriage, which is increasingly the primary justification for the elective share (as well as for equitable distribution and community property), underlies the redesign of the UPC.⁵

In a revolutionary move for an elective share statute, the UPC combines the assets of both spouses in computing the augmented estate⁶ against which the survivor's right of election is measured.⁷ To achieve a more equitable result, particularly with respect to late-in-life multiple marriages, the UPC bases the surviving spouse's fractional share on the length of the marriage.⁸ These features are designed to recognize

2. U.P.C. art. II, pt. 2 (Supp. 1991) (revised Article II was drafted by the National Conference of Commissioners on Uniform State Laws and was approved in July, 1990).

3. See WIS. STAT. ANN. §§ 861.01 to -.13 (West 1991) (adopting a modified form of the Uniform Marital Property Act); Oldham, *supra* note 1, at 245-46 (recommending basing the elective share on a concept of marital partnership that looks to divorce law to determine marital property or replacing the elective share with the Uniform Marital Property Act); Comment, *Spousal Disinheritance: The New York Solution — A Critique of Forced Share Legislation*, 7 W. NEW ENG. L. REV. 881, 905-07 (1985) (arguing for equitable distribution in cases of disinheritance); Apfel, *Divorce and Death: Disparity in Economic Rights of Spouse*, N.Y.L.J., Jan. 28, 1988, at 1, col. 3 (advocating use of equitable distribution as a model for forced share legislation).

4. See Carr v. Carr, 120 N.J. 336, 349-50, 576 A.2d 872, 879 (1990) (the principle behind both the probate and equitable distribution statutes is that each spouse's efforts during marriage contribute to and create marital assets); Bialczak v. Moniak, 373 Pa. Super. 251, 255, 540 A.2d 962, 965 (1988) (Pennsylvania legislature "intended to establish a comprehensive statutory system of providing a measure of economic security for surviving spouses"); U.P.C. art. II, pt. 2 general comment (Supp. 1991); Kwestel & Sepowitz, *supra* note 1, at 3 & n.5.

5. See U.P.C. art. II, pt. 2 general comment (Supp. 1991); Waggoner, *Spousal Probate Rights*, *supra* note 1, at 349. The 1990 UPC is also referred to as the "redesigned" UPC.

6. U.P.C. § 2-202 (Supp. 1991).

7. Waggoner, *Spousal Probate Rights*, *supra* note 1, at 361.

8. U.P.C. § 2-201(a) (Supp. 1991); Waggoner, *Spousal Probate Rights*, *supra* note 1, at 360. See also Langbein & Waggoner, *supra* note 1, at 314-21 (advocating that the pre-1990 UPC be modified to base the elective share on the length of the marriage and the amount of property owned by the surviving spouse). The UPC avoids the difficult administrative problems of tracing assets by applying a percentage based on the length of the marriage to the spouse's combined assets. For a discussion of the UPC's accrual system, see *infra* notes 194-96 and accompanying text.

each spouse's pecuniary and nonpecuniary contributions⁹ to the marriage, the expectation that marital assets will be shared regardless of the name in which they are titled, and lost opportunities.¹⁰ The pre-1990 UPC focused on an elective share that was based on the decedent's estate augmented by certain inter vivos transfers received by the surviving spouse from the decedent.¹¹ By combining the estates of both spouses, the redesigned UPC rejects the traditional elective share scheme and incorporates significant features of community property systems. In so doing, it seeks to avoid some of the inequities inherent in the forced share in many common-law jurisdictions and to minimize disturbances of the decedent's estate plan. Because a traditional elective share statute does not recognize that property frequently is titled arbitrarily in one spouse's name, the survivor may be undercompensated or overcompensated.¹² The UPC, in effect, casts off the shackles of dower and the forced share that generally give the surviving spouse a one-third interest in some or all of the decedent's property regardless of the extent of the survivor's own estate and the proportion it bears to the decedent's estate.

In addition to implementing the policy of marital-sharing, redesigned Article II, even more than its predecessor, is concerned with preventing circumvention of the surviving spouse's right of election.¹³ The inclusion in the reclaimable estate¹⁴ of certain property arrangements that were formerly excluded from the right of election, principally

9. Nonpecuniary contributions include care of the children and the house.

10. See U.P.C. art. II, pt. 2 general comment (Supp. 1991); Waggoner, *Spousal Probate Rights*, *supra* note 1, at 349-50.

11. The pre-1990 UPC included probate assets and testamentary substitutes such as revocable trusts and joint tenancies with right of survivorship in the decedent's estate. U.P.C. § 2-202(1) (1983).

12. Undercompensation occurs if most of the marital assets are titled in the decedent's name. Overcompensation occurs if the majority of the assets are titled in the surviving spouse's name. Overcompensation may also occur if the surviving spouse is the beneficiary of will substitutes that cannot be included in the elective share. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(2) (McKinney 1981) (excluding insurance proceeds even if payable to the surviving spouse); 20 PA. CONS. STAT. ANN. § 2203(b)(2) (Purdon Supp. 1991) (excluding insurance proceeds even if payable to the surviving spouse). The Advisory Committee Report recommended amending § 5-1.1 to include insurance proceeds in the net estate if the decedent retained the incidents of ownership. ADVISORY COMMITTEE REPORT, *supra* note 1, at 15.

13. Compare U.P.C. § 2-202 & comment (Supp. 1991) with U.P.C. § 2-202(1) (1983).

14. U.P.C. § 2-202(b)(2) defines the reclaimable estate as the value of certain inter vivos property arrangements made or held by the decedent. For a discussion of testamentary substitutes includible regardless of when created, see *infra* notes 203-13 and accompanying text.

insurance proceeds payable to persons other than the surviving spouse and property subject to a presently exercisable general power of appointment, represents a significant step in limiting the types of evasive devices a decedent may use to disinherit a spouse.¹⁵

For the most part, the modifications wrought by the UPC are positive. Nevertheless, problems remain. In its embrace of the concept of marriage as an economic partnership, the UPC raises, but does not always respond to, several critical issues. Some of these questions relate to the nature of the marital partnership and the definition of partnership assets. Others involve the classification of property acquired prior to the formation of the partnership or marriage (although not technically made part of the partnership's assets by being titled in both names or explicitly used for maintenance and support of the partnership unit, *i.e.*, the family). Resolution of these issues requires an analysis of: (1) whether spousal rights after dissolution of the marriage by divorce or by death should be treated differently; (2) whether the notion of separate property¹⁶ should be rejected in defining the scope of the right of election, a result that would promote the concept of marriage as a total partnership;¹⁷ and (3) whether the legitimate interests of children from a prior marriage¹⁸ can be accommodated in a total partnership model. The UPC, in accord with the predominant equitable distribution and community property models, appears to endorse the view that marriage is a limited partnership with separate property theoretically excluded from the partnership.

Another problem area in the revised UPC is the continued opportunity for spousal disinheritance as a result of statutory omissions. For example, a decedent, during life, may enjoy the benefits of property either by consumption or by economic control over its disposition.

15. See U.P.C. § 2-202(b)(2) (Supp. 1991) (including insurance proceeds, annuities, and other transfers in the augmented estate); Kwestel & Sepowitz, *supra* note 1 (analyzing the types of retained interest transfers, contractual arrangements, and custodial accounts that should be subject to the right of election); Note, *supra* note 1 (advocating the includibility of insurance proceeds in the elective share).

16. The concept of separate property, embodied in community property and equitable distribution systems, generally refers to property acquired prior to marriage or during marriage by gift or inheritance.

17. The view of marriage as a complete partnership in which all assets of both spouses are combined at termination, known as the "deferred community," has been adopted in the Nordic countries, Israel, Quebec, Germany, and Switzerland. See M. GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 131-34 (1989).

18. The UPC is concerned with preserving the interests of children from a prior marriage in property acquired during that marriage. See U.P.C. art. II, pt. 2 general comment (Supp. 1991); Waggoner, *Spousal Probate Rights*, *supra* note 1, at 354. A decedent may also have an interest in not allowing a subsequent spouse to disturb property arrangements for the benefit of elderly parents.

Under both versions of the Code, testamentary substitutes¹⁹ are generally only subject to the right of election if the decedent has a beneficial interest in the property.²⁰ This allows a decedent to create a trust and reserve a power to invade the corpus for the benefit of a person other than the spouse. The decedent has retained economic control over the principal of the trust and sheltered unneeded assets from the claims of the surviving spouse. To the extent that the UPC characterizes the principal as marital partnership assets, that is, property acquired during marriage, this result does not promote the stated goals of the redesigned elective share.

Contrary to the marital-sharing theory, this framework enables a decedent to prevent the surviving spouse from sharing in partnership property at the decedent's death and to remove assets necessary for the survivor's support. In addition, a statute that requires the retention of a beneficial interest disregards the idea that ownership of property not only means having the power to consume or enjoy its benefits, but also connotes an ability to determine the beneficiaries of the property and the timing and amounts of its distribution.²¹ Thus, the ability to dispose of property should be as significant a characteristic for purposes of the elective share as it is for federal estate tax purposes.²²

In addition, the UPC largely ignores transfers prior to marriage, whether outright or in the form of testamentary substitutes.²³ Insulation

19. In this Article, the term "testamentary substitute" refers to an inter vivos transfer made without full and adequate consideration that may be subject to the surviving spouse's right of election.

20. U.P.C. § 2-202(b)(2)(iv) (Supp. 1991); U.P.C. § 2-202(1) (1983). Under the pre-1990 Code, the decedent must have retained a beneficial interest in the principal. The 1990 version includes beneficial interests in income or principal. U.P.C. § 2-202(b)(2)(iv)(B) (Supp. 1991). Under the pre-1990 UPC, however, testamentary substitutes were includible in the augmented estate only if they were created during marriage. U.P.C. § 2-202(1)(ii) (1983). This continues to be true under the new Code except for certain insurance policies, unilaterally severable jointly held property with right of survivorship, and property subject to a general presently exercisable power of appointment. These property arrangements are includible regardless of when they were created. U.P.C. § 2-202(b)(2) (Supp. 1991).

21. This is the premise underlying the recommendations for statutory change in Kwestel & Sepowitz, *supra* note 1, at 57-66.

22. The ability to dispose of and enjoy property provides the basis for including certain transfers in the gross estate for federal estate tax purposes. See I.R.C. §§ 2036-38, 2040-42 (1986). For an elective share statute based on the federal estate tax approach, see DEL. CODE ANN. tit. 12, §§ 901-02 (1987 & Supp. 1990). See also Kwestel & Sepowitz, *supra* note 1, at 6 n.17 (discussing authorities that suggest using federal estate tax law as a basis for forced share statutes); Waggoner, *Spousal Probate Rights*, *supra* note 1, at 378 n.68.

23. Wisconsin and Missouri, which codified the common-law doctrine of transfers in fraud of marital rights, are the exceptions to the approach used by other elective share

of these transfers, particularly those that are will substitutes, creates a significant opportunity for abuse. For example, prior to marriage and possibly in contemplation of marriage, a decedent may create a revocable trust or an irrevocable trust, reserving a life estate and a power to invade the principal for the decedent's support and maintenance. The surviving spouse will be unable to elect against either of them. Both trusts, however, will be subject to the surviving spouse's right of election if created during marriage. When the decedent's property interests in the trusts are the same during marriage, the trust property, to the extent of the decedent's power, constitutes assets of the marital partnership. Fairness mandates identical treatment of the trusts regardless of whether the spouse was a first or subsequent spouse.

Sheltering these dispositions from the elective share may encourage some individuals to create will substitutes prior to marriage to the detriment of their spouses without serious detriment to themselves. The UPC's continued failure to deal with this possibility frustrates an avowed purpose of both versions (and any other progressive elective share statute) to "protect the surviving spouse against so-called 'fraud on the spouse's share.'"²⁴ In fact, this treatment of premarriage will substitutes also ignores an entire body of law that gives a spouse an interest in many of these transfers and that could have served as a model for the redesigned UPC. Under the doctrine of antenuptial transfers in fraud of marital rights, certain premarital conveyances, both outright and in the form of will substitutes, have been invalidated in whole or in part to prevent spousal disinheritance. The consequences of excluding these transfers and ignoring this doctrine are illustrated by the following three hypotheticals that serve as focal points throughout this Article.

Case 1

Horace had a first wife, Fran, who died when he was sixty years old. During their thirty-five year marriage, they held most of their assets jointly. After Fran died, Horace made several substantial dispositions of his property. His main purpose in making these transfers was to provide for himself for the remainder of his life and for his children after death without having most of his assets pass through his probate estate. Horace transferred \$350,000 to an irrevocable inter vivos trust pursuant to which he was to receive the income for life and such sums from the principal as he and his son, Sam, deemed

statutes, including the UPC. See MO. ANN. STAT. § 474.150(1) (Vernon Supp. 1990); WIS. STAT. ANN. § 861.17 (West 1991). In addition, the redesigned UPC includes certain inter vivos property arrangements in the elective share regardless of when they were created. U.P.C. § 2-202(b)(2)(i)-(iii) (Supp. 1991).

24. U.P.C. § 2-202 comment (Supp. 1991).

necessary for his support and maintenance. Upon his death, the remaining principal was to be paid to his daughter, Doris, if living, or if not, to her surviving issue. He transferred his house, previously owned with Fran as tenants by the entirety and appraised at her death at \$350,000, to his son, Sam, reserving a life estate for himself.

Three years after Horace made these transfers, he married Wanda. Up to the time of his marriage, Horace periodically transferred money to the trust. Horace and Wanda lived in his house during their marriage. Wanda did not know that Horace owned only a life estate. She was also unaware of the trust's existence. At Horace's death fifteen years later, he was survived by Wanda and his two children. He left a probate estate of \$20,000 and assets held jointly with Wanda with right of survivorship of \$100,000. The real property and trust principal were worth \$900,000. In his will, Horace left one-half of his estate to Wanda, who had approximately \$50,000 of her own assets.

Case 2

Consider the case of Wilma who was sixty years old at the death of her first husband, Felix. They were married for thirty years and had two children. Felix left all of his property to Wilma in his will. After his death, Wilma kept most of her assets (worth approximately \$800,000) in her own name. At age sixty-five, Wilma married Hubert and subsequently executed a will leaving one-half of her estate to him and the other half to her surviving issue. She frequently stated that she would like her children to be well provided for after her death. Following a fifteen year marriage, Wilma died, leaving Hubert, her two children, and a probate estate valued at \$1,000,000. At Wilma's death, Hubert had approximately \$50,000 titled in his name and no property in the form of will substitutes.

Case 3

Winnifred and Fred were married for thirty-three years and had two children. When Winnifred was sixty-two years old, Fred died, leaving her \$400,000 in cash and securities and a house worth \$350,000. At Fred's death, Winnifred had approximately \$200,000 in her own name. Five years later, Winnifred married Horatio. After their marriage, Winnifred transferred the house to her daughter, Dorothy, reserving a life estate. She also created an irrevocable inter vivos trust with a corpus of \$400,000, naming herself and Dorothy as trustees. Pursuant to the trust, the trustees were to pay Winnifred the income for life and at her death, the principal to her son, Steven. During Winnifred's life, the trustees had the power to make discretionary principal payments to Winnifred and Steven. Winnifred's motives in making these transfers were to provide for her children and to reduce the size of her probate estate. Horatio and Winnifred were married for fifteen years when Winnifred died. She left her entire probate estate of \$50,000 to Horatio who had approximately \$50,000 of his own assets.

Despite the fact that in each of these three cases the decedent's estate planning goal was to provide for children of a prior marriage and not to disinherit the subsequent spouse, the UPC does not treat these cases consistently. Their treatment is different because the UPC includes certain will substitutes in the elective share only if they are created during marriage. In the first case, under the UPC's elective share provisions, Wanda would receive virtually nothing as a consequence of Horace's death.²⁵ Horace had a small probate estate, a modest amount of property held jointly with Wanda with a right of survivorship, and a large amount of property in the form of will substitutes created prior to marriage. In the second case, however, Hubert was comfortably provided for because Wilma did not create any will substitutes. Even if Wilma left Hubert nothing in her will, he would receive approximately fifty percent of her large probate estate by exercising his right of election. In Case 3, the UPC grants Horatio a right of election because of the testamentary substitutes established by Winnifred during their marriage.

These results appear contradictory because Horace, Wilma, and Winnifred had essentially the same power over and interest in the property during life and at death. In each case, the decedent's economic power over or use of the property was equivalent to ownership.²⁶ Furthermore, their family situations were comparable: Horace, Wilma, and Winnifred were primarily concerned with providing for the children of their first marriage and did not have the express intention of disinheriting his or her surviving spouse. Thus, there seems to be no reason for an elective share statute to distinguish among the three cases.

In its emphasis on the interests of the children from a prior marriage, the UPC overlooks the contribution of the late-in-life surviving spouse and the fact that the property used to support the older couple is income frequently derived from premarriage property. The rights of the beneficiaries of the transferred property, often children from a prior marriage, can still be protected under an approach that balances the interests of the surviving spouse and the children.²⁷ As with testamentary substitutes created during marriage, their interest will be subject to diminution, not elimination, by the exercise of a right

25. This would not be true if the will substitutes were created during marriage as in Case 3. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203 (Purdon Supp. 1991); U.P.C. § 2-202(b)(2)(iv) (Supp. 1991).

26. See *supra* notes 21-22 and accompanying text.

27. *But cf.* WIS. STAT. ANN. § 861.17(2) (repealed 1985) (providing that "fraudulent" premarriage transfers for the benefit of children of a former marriage are not subject to the right of election). For the text of this section, see *infra* note 129.

of election. Furthermore, the children's interests in premarriage (or post-wedding) transfers can be secured if, after disclosure by Horace (or Winnifred), Wanda (or Horatio) consents to them and waives the right of election.²⁸ The UPC is not alone in this inconsistent treatment of testamentary substitutes. Many elective share statutes either ignore testamentary substitutes entirely or include only a limited number in the augmented estate.

Case 1 involves transfers prior to the contemplation of marriage or engagement. Assume for a moment that in Case 1, Horace created the will substitutes after his engagement, but before his marriage to Wanda. Would the proximity of the transfers to the upcoming marriage produce a different result under the UPC? Are Horace's additions to the irrevocable trust during the engagement relevant? Nothing in the UPC or its comments suggests that transfers in contemplation of marriage are subject to the right of election. Nevertheless, under the common-law doctrine of antenuptial transfers in fraud of marital rights, these transfers could be invalidated under the appropriate circumstances. For example, if Horace made these transfers for the express purpose of defrauding Wanda of her right to an elective share, the transfers are voidable. Although the doctrine is antithetical to the UPC's objective approach to testamentary substitutes, it deals with an important area ignored by the UPC and most elective share statutes.

A principal premise of this Article is that any elective share system designed to prevent or to deter spousal disinheritance must critically examine the appropriate treatment of antenuptial conveyances. Its endorsement of the UPC's inclusion of testamentary substitutes based on objective criteria precludes support for a doctrine grounded on a decedent's subjective intent. Because an elective share statute should focus on the decedent's power over and interest in property at death, the time of the creation of a testamentary substitute should be immaterial.²⁹ Regardless of whether Horace created the trust and life estate either before he met Wanda or on the eve of marriage, this author takes the position that the UPC (or any other elective share statute) should give Wanda a right to elect against these transfers. Due to the special nature of the life estate, subjecting the principal to the right of election may not be desirable when a decedent created the life estate prior to marriage. Instead, consideration should be given to granting the sur-

28. See U.P.C. § 2-204 (Supp. 1991) (allowing written waiver of right of election). Disclosure of antenuptial transfers without the prospective spouse's written consent is arguably sufficient to bar a right of election. Requiring a written waiver would seem preferable because it should produce less litigation and a clearer indication of the surviving spouse's understanding.

29. *But see* U.P.C. § 2-202 comment (1983).

viving spouse a right to elect against the income interest for the remainder of the spouse's life.³⁰

This Article begins with an examination of the historical background of the common-law doctrine of antenuptial transfers in fraud of marital rights and its relationship to the elective share. Although this Article rejects the specific approach of this doctrine, the author finds that it provides invaluable insights into both intentional and unintentional spousal disinheritance and serves as an important guide in correcting a serious omission in the UPC and other elective share statutes. In the majority of cases invalidating an antenuptial conveyance, the decedent retained an interest in or power over the transferred property, although this element was never a formal requirement of the doctrine. Surprisingly, many courts are often more sensitive to the retention of interests and powers in premarriage than in marital transfers. Next, the Article examines several statutory approaches, including certain prenuptial transfers in the forced share, that may serve as alternative models to the common-law doctrine.

The Article will then analyze and evaluate the UPC's adoption of the marital-sharing theory of marriage, discuss a total partnership theory as an alternative, and examine the UPC's treatment of prenuptial transfers of property. Specifically, it will focus on whether the exclusion of these prenuptial transfers promotes the goals of marital partnership or support. In the course of its examination of the common-law doctrine and the statutory approaches, the Article will analyze the deficiencies of each model in light of the policies of the elective share. Finally, it will propose guidelines that better accomplish these goals and close a significant loophole in the UPC and other statutory and common-law schemes. The guidelines used should effectively and equitably protect the surviving spouse, produce greater certainty in property arrangements for the benefit of the decedent's family, and reduce the likelihood of litigation.

I. THE PROBLEM PRESENTED—TOWARD AN INTEGRATED TREATMENT OF TRANSFERS PRIOR TO AND DURING MARRIAGE

Transfers of property by prospective spouses to third persons have long been a concern of legal systems.³¹ Originally, a woman was

30. For a discussion of three approaches to the includibility of retained life estates created prior to marriage, see *infra* pages 60-61.

31. For example, under Jewish law, a woman may generally dispose of her property before marriage. If she misrepresents what she has done to her intended husband, however, her fraud may provide a basis for annulling the marriage on the theory that she entered the marriage with a concealed defect. The transfer itself, on the other hand, is valid. See

motivated to make such transfers because her husband acquired the right to manage and consume her property upon marriage.³² For the prospective husband and wife, the transfer was generally designed to prevent the spouse from realizing any interest in his or her property upon death. If the transfer in either case was a fraud on the spouse's marital rights, regardless of the decedent's retention of any interest in or control over the property, it could be invalidated in whole or in part under the doctrine of antenuptial transfers in fraud of marital rights.³³ This doctrine, which originated in England to protect husbands from transfers of property made by their prospective wives,³⁴ was applied in the United States³⁵ largely against husbands who transferred

BABYLONIAN TALMUD, SEDER NASHIM II: TRACTATE KETHUBOTH 78a (Soncino ed. 1936). As a general rule, misrepresentation of one's financial condition does not furnish a ground for annulment in this country. *See, e.g.*, *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*, 303 N.Y. 506, 104 N.E.2d 877 (1952); *Francis v. Francis*, 21 V.I. 263, 264-65, 11 F.L.R. 1269 (1985). To annul a marriage based on fraud, courts generally require misrepresentation with respect to: (1) pregnancy (*Reynolds v. Reynolds*, 3 Allen 605 (Mass. 1862)); (2) physical or mental health (*Stone v. Stone*, 136 F.2d 761 (D.C. Cir. 1943)); or (3) intent to consummate the marriage (*Marshall v. Marshall*, 212 Cal. 736, 300 P. 816 (1931); *Security-First Nat'l Bank v. Schaub*, 71 Cal. App. 2d 467, 162 P.2d 966 (1945); *Chipman v. Johnston*, 237 Mass. 502, 130 N.E. 65 (1921); *Anders v. Anders*, 224 Mass. 438, 113 N.E. 203 (1916); *Schonfeld v. Schonfeld*, 260 N.Y. 477, 184 N.E. 60 (1933); *Avnery v. Avnery*, 50 A.D.2d 806, 375 N.Y.S.2d 888 (1975)). *But see* Comment, *Husband and Wife—Conveyances Before Marriage as Fraud on Wife*, 8 ILL. L. REV. 500 (1913) (suggesting that annulment is the proper remedy for an antenuptial transfer in fraud of marital rights).

32. *See infra* text accompanying notes 73-75.

33. For a discussion of this doctrine, see W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 354-65 (1960); Bregy & Wilkinson, *Antenuptial Transfers as Frauds on Marital Rights in Pennsylvania*, 90 U. PA. L. REV. 62 (1941); Lowe, *Transfers in Fraud of Marital Rights*, 26 MO. L. REV. 1 (1960) (discussing the doctrine's application in Missouri); Vaughan, *Antenuptial Conveyance or Agreement Intended to Defeat Right of Election*, 32 ST. JOHN'S L. REV. 174 (1958) (discussing the doctrine's application in New York).

34. *See, e.g.*, *St. George v. Wake*, 1 My. & K. 610, 39 Eng. Rep. 812 (1833); *Goddard v. Snow*, 1 Russ. 485, 38 Eng. Rep. 187 (1826); *DeManneville v. Crompton*, 1 V. & B. 354, 35 Eng. Rep. 138 (1813); *Strathmore v. Bowes*, 1 Ves. jun. 22, 30 Eng. Rep. 211 (1789), *aff'd sub nom. Bowes v. Bowes*, 6 Brown 427, 2 Eng. Rep. 1178 (1797); *King v. Cotton*, 2 P. Wms. 674, 24 Eng. Rep. 912 (1732); *Carlton v. Earl of Dorset*, 2 Vern. 17, 23 Eng. Rep. 622 (1686); *Hunt v. Matthews*, 1 Vern. 408, 23 Eng. Rep. 549 (1686); *Howard v. Hooker*, 2 Chan. Rep. 81 (1672-73).

35. Historically, in the United States, the doctrine was applied to invalidate transfers by both prospective husbands and wives. *See, e.g.*, *Swaine v. Perine*, 5 Johns. Ch. 482 (N.Y. 1821) (prospective husband's transfer to daughter of a deed fraudulent as to wife's dower rights and as to subsequent creditors); *Littleton v. Littleton*, 18 N.C. 327, 330 (1835) (invalidating deed that was made 15 days before marriage for the benefit of the children of a prior marriage to the extent of the widow's dower interest based on a statute providing that "conveyances made fraudulently . . . with the intention to defeat the widow of her dower . . . shall be held and deemed void"). At least one case, however, indicated

their real property,³⁶ and sometimes their personalty, prior to marriage.³⁷ Thus, although the doctrine was initially used in the United States to safeguard the husband's rights in his wife's property,³⁸ it was applied in most instances to preserve the wife's inchoate right of dower.³⁹ Subsequently, the doctrine was expanded in a number of jurisdictions to protect the surviving spouse's forced share in the decedent's real and personal property.⁴⁰

The elements of fraud required by the doctrine differed markedly from those comprising the usual fraud case.⁴¹ Because the rights protected by the common-law doctrine did not arise until marriage or death, the prospective spouse did not have any existing property interests of which he or she could be defrauded.⁴² In effect, any misrepresentation or non-

in dicta that the doctrine only applied to prenuptial transfers by women. *See* Peay v. Peay, 2 S.C. 409 (1844). This statement was harshly criticized in Brooks v. McMeekin, 37 S.C. 285, 304-05 (1892), on the ground of safeguarding a woman's right to be supported by her husband.

36. *See, e.g.*, Chandler v. Hollingsworth, 3 Del. Ch. 99 (1867).

37. *See, e.g.*, LeStrange v. LeStrange, 242 A.D. 74, 273 N.Y.S. 21 (1934).

38. *See, e.g.*, Poston v. Gillespie, 58 N.C. 258 (1859); Ramsay v. Joyce, 1 McMul. Eq. 236 (S.C. 1841).

39. *See, e.g.*, Chandler, 3 Del. Ch. at 99 (applying the doctrine only to antenuptial transfers of realty).

40. *See, e.g.*, LeStrange, 242 A.D. at 74, 273 N.Y.S. at 21.

41. Actual fraud has been defined as an "intentional deception to induce another to part with property or to surrender some legal right, and which accomplishes the end designed." Stanley v. Sewell Coal Co., 169 W. Va. 72, 76, 285 S.E.2d 679, 683 (1981). Actual fraud differs from constructive fraud which does not require proof of a fraudulent intent to protect important societal interests. *Id.* *See also* Perlberg v. Perlberg, 18 Ohio St. 2d 55, 247 N.E.2d 306 (1969). Many courts that applied the doctrine of transfers in fraud of marital rights to invalidate a prenuptial conveyance did so on a finding of constructive fraud. *See, e.g.*, Chandler v. Hollingsworth, 3 Del. Ch. 99, 113 (1867) (in the absence of misrepresentation, nondisclosure of an antenuptial conveyance will support a finding of constructive fraud and will invalidate the portion of the transfer that is necessary to protect the wife's dower rights); Cranson v. Cranson, 4 Mich. 230 (1856) (invalidating a prospective husband's transfer of realty to his children prior to marriage on the ground that he did not deliver the deed until after the marriage, but even if he had delivered it before marriage, it would have been fraudulent because it was executed secretly for the purpose of cutting off her dower); Arnegaard v. Arnegaard, 7 N.D. 475, 75 N.W. 797 (1898) (invalidating a husband's transfer of real estate with a reserved life estate two months before marriage to the extent of the wife's homestead right on the ground that the husband failed to disclose the transfer); Ward v. Ward, 63 Ohio St. 125, 57 N.E. 1095 (1900) (invalidating a prospective husband's transfers of land to three of his children within a week of marriage as a fraud on his prospective wife's dower rights because he failed to disclose the transfer).

42. *Compare* Perlberg v. Perlberg, 18 Ohio St. 2d 55, 247 N.E.2d 306 (1969) (in the absence of a right to dower existing prior to marriage and a showing of actual fraud, nondisclosure of a transfer of real property one day before marriage will not constitute

disclosure could be viewed as a fraudulent inducement to marry.⁴³ The appropriate remedy was an annulment.⁴⁴ The doctrine, however, did not develop in this way. Instead, the remedy focused on undoing the transfer instead of the marriage. The doctrine developed independently of common-law dower and the elective share system and frequently failed to be integrated into elective share law. Consequently, the relief granted was sometimes broader than that given by the forced share.⁴⁵

As a rule, elective or forced share statutes guarantee the surviving spouse a portion of the property owned by the decedent at death regardless of when it was acquired.⁴⁶ The majority of forced share statutes do not reach property that the decedent transferred without consideration to a third person either before or during marriage,⁴⁷ even if the decedent retained

constructive fraud) with *Chandler v. Hollingsworth*, 3 Del. Ch. 99, 111, 119 (1867) (stating that “[t]he true ground of relief is not *the disappointment of an expectation*, but *fraud upon a legal right*, that is, the right to a marriage without any secret alteration of the circumstances of the parties as they stood at the time of the engagement,” and indicating that only courts of law require legal seisin for the protection of dower).

43. Initially, courts found that constructive fraud based on a failure to disclose was sufficient to invalidate the transfer in whole or in part. Later courts, however, required an actual misrepresentation or a material omission with an intent to deceive and reliance by the other spouse. *See supra* note 41.

44. For a discussion of misrepresentation as a basis for annulment, see Bregy & Wilkinson, *supra* note 33, at 75 (concluding, without explanation, that an “annulment of the marriage would . . . be inappropriate even if annulments or divorces could be granted on this ground, which, of course, they cannot”).

45. Dower and the forced share would only give the surviving spouse a fractional interest in the property. *See* Vaughan, *supra* note 33, at 182 (with respect to “voidable transfers of property, it may be that the rights of a person not yet married but engaged to be married are superior to the rights possessed as against property transactions occurring after marriage”).

46. Georgia is the only noncommunity property state that does not provide for common-law dower or a forced share. The sole protection afforded the surviving spouse is a year’s support. GA. CODE ANN. § 53-5-1 (1982 & Supp. 1988). *See* Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427 (1985) (urging extension of the equitable property division concept to Georgia probate law in order to recognize each spouse’s presumed contribution to the family wealth); Note, *The Protection of the Surviving Spouse Against Disinheritance: A Search for Georgia Reform*, 9 GA. L. REV. 946 (1975) (providing history and policy of protection against disinheritance). As a rule, community property systems provide the surviving spouse with one-half of the decedent’s property acquired during marriage irrespective of the name in which it is titled. Therefore, antenuptial transfers of nonmarital property are generally not a concern in community property jurisdictions. Consequently, this Article will deal primarily with the rights of surviving spouses in noncommunity property jurisdictions.

47. This was not completely true under common-law dower which generally gave the widow a life interest in one-third of any property of which her husband was seised of an inheritable estate at any time during their marriage. Thus, during marriage, the husband had no power to transfer real property to a third party free of his wife’s dower rights. *See* W. MACDONALD, *supra* note 33, at 59-64.

certain interests in the property.⁴⁸ Consequently, these statutes enable the decedent effectively to disinherit the surviving spouse and to enjoy economic control over the property. To avoid this circumvention of elective share statutes, courts in some jurisdictions adopted common-law rules that invalidated certain transfers as fraudulent or illusory.⁴⁹ This case-by-case approach frequently produced confusion and inequitable results. In response, some states enacted legislation that subjected certain types of transfers to the right of election based on objective criteria.⁵⁰ These transfers generally involve either a retention of control over the disposition of the transferred property or a beneficial interest in it. Principal among these arrangements are joint tenancies,⁵¹ Totten trusts,⁵² revocable trusts,⁵³ and retained life interests.⁵⁴ This approach was also adopted by the Uniform

48. See, e.g., S.C. CODE ANN. §§ 62-2-201, -202, -205 (Law. Co-op. Supp. 1990) (giving the surviving spouse a right to elect one-third of the property passing under the decedent's will and by intestacy).

49. The history of judicial attempts to prevent disinheritance of the surviving spouse has been discussed extensively. See, e.g., W. MACDONALD, *supra* note 33, at 67-144; Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 518-22 (1970); Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 993-1006 (1977); Powers, *Illusory Transfers and Section 18*, 32 ST. JOHN'S L. REV. 193 (1958).

50. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1), (c) (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203 (a) (Purdon Supp. 1991). These statutes served as models for the formulation of the pre-1990 UPC. See U.P.C. § 2-202 comment (1983). The original version of the UPC was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1969. Nine states have enacted all or part of pre-1990 UPC § 2-202. See ALASKA STAT. § 13.11.075 (1985); COLO. REV. STAT. § 15-11-202 (1987); IDAHO CODE § 15-2-202 (1979); ME. REV. STAT. ANN. tit. 18-A, § 2-202 (1964 & Supp. 1990); MONT. CODE ANN. § 72-2-705 (1989); NEB. REV. STAT. § 30-2314 (1989); N.D. CENT. CODE § 30.1-05-02 (Supp. 1989); S.D. CODIFIED LAWS ANN. § 30-5A-2 (1984 & Supp. 1991); UTAH CODE ANN. § 75-2-202 (1978).

51. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(D) (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203(a)(4) (Purdon Supp. 1991); U.P.C. § 2-202(b)(2)(ii), (iv)(C) (Supp. 1991); U.P.C. § 2-202(1)(iii) (1983).

52. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(B) (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203(a)(3) (Purdon Supp. 1991); U.P.C. § 2-202(b)(2)(iv)(B) (Supp. 1991); U.P.C. § 2-202(1)(ii) (1983).

53. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(E) (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203(a)(3) (Purdon Supp. 1991); U.P.C. § 2-202(b)(2)(iv)(B) (Supp. 1991); U.P.C. § 2-202(1)(ii) (1983).

54. See, e.g., 20 PA. CONS. STAT. ANN. § 2203(a)(2) (Purdon Supp. 1991); U.P.C. § 2-202(b)(2)(iv)(A) (Supp. 1991). The New York statute does not include transfers with retained life interests in the net estate although these dispositions were discussed by the Bennett Commission which drafted EPTL § 5-1.1. See GOVERNOR AND LEGISLATURE OF NEW YORK, THIRD REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES: RIGHT OF THE SURVIVING SPOUSE

Probate Code.⁵⁵

Testamentary substitutes, with some exceptions, must be created while the decedent is married to the surviving spouse to be subject to the surviving spouse's right of election under these statutory schemes.⁵⁶ A surviving spouse generally has no right to elect against assets that the decedent transferred to a third person prior to marriage.⁵⁷ Thus, under these statutes, a decedent, whether or not in contemplation of a future marriage, may disinherit a surviving spouse by transferring property to third parties prior to marriage while retaining a beneficial interest in or control over the property until death.

The only restriction on these retained interests or outright transfers prior to marriage was the transfer in fraud of marital rights doctrine. The doctrine frequently prevented the disinheritance of the surviving spouse in situations in which dower and the forced share were inapplicable. However, the difficulties of proving when a transfer was made in contemplation of marriage,⁵⁸ the elements constituting fraud, including

WITH REFERENCE TO NON-TESTAMENTARY TRANSFERS (1964) [hereinafter THIRD REPORT] (Report No. 1.5C). The Third Report expressed its concern "with the situation where . . . the settlor reserves to himself either a *life estate* or a power of revocation or power of control or any combination of these." *Id.* at 124 (emphasis added). In this report, the New York State Bar Association Committee on Trusts and Estates contended that a transfer pursuant to which "practical control of the beneficial enjoyment of the property has been retained during the transferor's lifetime" should be "considered subject to the elective rights of the surviving spouse." *Id.* at 138. Ultimately, the Bennett Commission summarily rejected that view, asserting that "the surviving spouse should *not* be given a right of election merely because 'practical control of the beneficial enjoyment of the property has been retained during the transferor's lifetime.'" *Id.* at 138-39 (emphasis added). This author believes that these transfers should be included in the net estate for elective share purposes. *See also* Kwestel & Sepowitz, *supra* note 1, at 57-59 (arguing that property transferred subject to a retained life interest should be subject to the right of election). The Advisory Committee Report recommended including transfers subject to retained life interests in the net estate if the transfer was effected during marriage. ADVISORY COMMITTEE REPORT, *supra* note 1, at 15-16.

55. U.P.C. § 2-202(b)(2)(ii), (iv)(A)-(C) (Supp. 1991).

56. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203(a)(2), (4)-(6) (Purdon Supp. 1991); U.P.C. § 2-202(b)(2)(iv) (Supp. 1991). *But see* MO. ANN. STAT. § 474.150(1) (Vernon Supp. 1990); WIS. STAT. ANN. § 861.17(1)(a) (West 1991); U.P.C. § 2-202(b)(2)(i)-(iii) (Supp. 1991).

57. *See, e.g.*, *In re Estate of Scheiner*, 141 Misc. 2d 1037, 1038, 535 N.Y.S.2d 920, 921 (1988) (stating that United States Treasury bonds were exempt from the right of election because they were purchased before marriage and also fell within the exclusion of EPTL § 5-1.1(b)(2)).

58. For a discussion of whether a decedent was required to consider the possibility of marriage at some future time or to be engaged to a specific person, see *Higgins v. Higgins*, 219 Ill. 146, 76 N.E. 86 (1905). Most jurisdictions required an actual engagement. *Jarvis v. Jarvis*, 286 Ill. 478, 122 N.E. 121 (1919); *Beechley v. Beechley*, 134 Iowa 75, 108 N.W. 762 (1906).

whether reliance on the prospective spouse's statements and misrepresentation or merely a failure to disclose were necessary,⁵⁹ and any exceptions to the rule,⁶⁰ produced inconsistent results and much litigation. For the same reasons that the fraud on the surviving spouse test used to evaluate transfers made during marriage proved ineffective and unsatisfactory in the elective share area,⁶¹ the doctrine as applied to premarital transfers also has serious defects. The doctrine certainly is not based on the objective criteria that are the product of the more progressive elective share statutes such as the UPC, as well as the Pennsylvania Estates Act and the New York Estates, Powers and Trusts Law (EPTL).⁶² Despite its shortcomings, the doctrine in its modern incarnations has been codified in several states⁶³ and continues to be applied under the common law in numerous jurisdictions. Theoretically, whether the decedent retained any control over or interest in the property at death

59. Courts disagreed as to whether reliance and actual misrepresentation, rather than nondisclosure, were necessary elements of this cause of action. *See infra* note 123.

60. Some courts upheld transfers if the beneficiaries were children of a prior marriage. *See, e.g.,* *Trabbic v. Trabbic*, 142 Mich. 387, 105 N.W. 876 (1905) (commending prospective husband for providing for children where antenuptial transfers consisted of part of a large estate); *Perlberg v. Perlberg*, 18 Ohio St. 55, 247 N.E.2d 306 (1969) (recognizing that transferring real property to children of a prior marriage may be morally and socially meritorious); *King v. Cotton*, 2 P. Wms. 674, 24 Eng. Rep. 912 (1732); *Hunt v. Matthews*, 1 Vern. 408, 23 Eng. Rep. 549 (1686).

61. *See* THIRD REPORT, *supra* note 54, at 123 (finding "that the case law has been confusing and that the expectancy of the surviving spouse has not been adequately protected"); W. MACDONALD, *supra* note 33, at 3-19, 67-144 (discussing judicial confusion, increased litigation, and tests applied by the courts to inter vivos transfers).

62. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203 (Purdon Supp. 1991); U.P.C. § 2-202 (Supp. 1991); U.P.C. § 2-202 (1983).

63. *See, e.g.,* MO. ANN. STAT. § 474.150(1) (Vernon Supp. (1990) (subjecting "[a]ny gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse" to the right of election); WIS. STAT. ANN. § 861.17(1)(a) (West 1991). Wisconsin codified the transfer in fraud of marital rights doctrine in 1969 to apply to dispositions of property both during marriage and "in anticipation of marriage for the primary purpose of defeating the rights of the surviving spouse." Originally, the statute insulated transfers for the benefit of issue by a prior marriage that were made before marriage or within one year after marriage from attack as a fraudulent property arrangement. WIS. STAT. ANN. § 861.17(2) (repealed 1985). The statute did not define "anticipation of marriage;" therefore, it was unclear whether pre-engagement transfers were subject to challenge. The purpose of the statute was "to prevent depletion of the probate estate at the expense of the surviving spouse." *Id.* § 861.17 comment. In noting that the committee proposing the legislation considered and rejected the Pennsylvania and New York approaches, the comment recognized that "the test of 'primary purpose' [may be] . . . difficult of proof, [but] it has the advantage of being familiar." *Id.* *See infra* notes 129-30.

under a fraud doctrine is largely immaterial.⁶⁴ In this way, the doctrine is also inconsistent with the approach of the UPC, the EPTL, and the Pennsylvania statute which include, for the most part, only testamentary substitutes in the augmented or net estate.⁶⁵

New York, Pennsylvania, and UPC states, although enacting objective criteria to determine the includibility of testamentary substitutes created during marriage in the net estate, have not dealt explicitly with whether transfers (outright or otherwise) made prior to marriage and in fraud of marital rights are valid.⁶⁶ Clarification is therefore needed to determine the validity of such premarriage fraudulent transfers under these statutory schemes and to determine whether the doctrine, if still viable, applies to outright as well as retained interest transfers. More importantly, analysis of whether the standards formulated by these statutes should apply to all antenuptial transfers, such as the situation presented by Case 1, regardless of whether they were made in contemplation of marriage, is critical. As the UPC and state elective share statutes extend the protection given to the surviving spouse by including more post-wedding transfers within the net estate,⁶⁷ decedents will have an incentive to make such conveyances prior to marriage.⁶⁸ State legislatures, model codes, and commentators have not dealt with this problem in a comprehensive or objective way.⁶⁹ Many antenuptial transfers

64. Nevertheless, a review of the cases applying the doctrine reveals that the vast majority involve some form of retained interest in or power over the transferred property.

65. As used in this Article, the terms "augmented estate" and "net estate" refer to property that is subject to the surviving spouse's right of election.

66. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981); 20 PA. CONS. STAT. ANN. § 2203 (Purdon Supp. 1991); U.P.C. § 2-202 (1983). This is also true with respect to the testamentary substitutes enumerated in § 2-202(b)(2)(iv) of the revised UPC.

67. The trend in the law has been to expand the protection afforded to the surviving spouse. See *supra* note 50 and accompanying text.

68. Compare the discussion relating to the motives in acquiring insurance in U.P.C. § 2-202 comment (Supp. 1991) with U.P.C. § 2-202 comment (1983).

69. The articles dealing with the doctrine of antenuptial transfers in fraud of marital rights have examined its application critically, but have not suggested replacing it with a more objective approach as is recommended here. See, e.g., W. MACDONALD, *supra* note 33, at 354-65 (recognizing antenuptial transfers as a separate category); Bregy & Wilkinson, *supra* note 33, at 62-63, 74-76 (approving the decision in *Kirk v. Kirk*, 340 Pa. 203, 16 A.2d 47 (1940), which made the requirements for proving fraud more stringent); Lowe, *supra* note 33 (discussing the doctrine in Missouri); Vaughan, *supra* note 33 (discussing the doctrine in New York). Macdonald urged applying a "reasonableness" test to determine whether a prenuptial transfer is subject to the right of election. See W. MACDONALD, *supra* note 33, at 364-65. Recently, however, the Advisory Committee recommended the inclusion of revocable testamentary substitutes in the net estate regardless of whether they were created before or during marriage. ADVISORY COMMITTEE REPORT, *supra* note 1, at 15-16.

continue to be evaluated independently of marital transfers on the assumption that different standards are appropriate to determine whether such dispositions should be subject to dower or the right of election.⁷⁰

Separate treatment of testamentary substitutes created before and during marriage does not promote the policies of elective share statutes. To the extent the surviving spouse requires property for support, whether the testamentary substitute was created prior to marriage should be immaterial. The other justification for the elective share, the partnership theory of marriage, should not produce a different conclusion. Antenuptial testamentary substitutes should be considered partnership assets as long as the decedent's economic control over or benefit from the property continued until or close to death.⁷¹ These assets were just as available to the decedent in terms of disposition and benefit during marriage as they would have been if the decedent created them during the marriage. In effect, by reserving an interest in or power over the transferred property, the decedent brought the property into the partnership. This view accords with the total partnership theory of marriage.

The fact that property conveyed prior to marriage may have been derived from a prior spouse or have been intended for the children of a prior marriage does not justify immunizing it from any claim by the surviving spouse. It merely means that in Case 1, Horace's children may take less from the trust and the house subject to a retained life estate in recognition of Wanda's contribution to the second marriage. (If Horace

70. See, e.g., *Hoeffner v. Hoeffner*, 389 Ill. 253, 59 N.E.2d 684 (1945) (indicating that premarriage transfers are scrutinized more strictly); *Toman v. Svoboda*, 4 Ill. App. 3d 148, 280 N.E.2d 499 (1972) (articulating a different rule for premarriage and marital transfers); *Holmes v. Holmes*, 3 Paige Ch. 363, 364 (N.Y. Ch. 1832) (distinguishing "cases of underhand dealing and secret conveyances made in contemplation of marriage [as] depend[ing] upon an entirely different principle"); W. MACDONALD, *supra* note 33, at 181 (stating that "separate treatment seems warranted" for antenuptial transfers). Support also exists for limiting the surviving spouse's right of election not only to testamentary substitutes created during marriage, but also to property owned by the decedent that was acquired during marriage. See, e.g., OKLA. STAT. ANN. tit. 84, § 44(B) (West 1990) (providing for a right of election in one-half of the "property acquired by joint industry of the husband and wife during coverture"); UTAH CODE ANN. §§ 75-2-201, -202 (1978 & Supp. 1990); Oldham, *supra* note 1, at 246. This view seems to reflect the influence of those who favor applying an equitable distribution approach to the elective share area.

71. See, e.g., I.R.C. § 2036(a)(1) (1986) (including property in the gross estate for estate tax purposes where the decedent transferred property for less than adequate and full consideration in money or money's worth and retained "for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death — (1) the possession or enjoyment of, or the right to income from, the property"); U.P.C. § 2-202(b)(2)(iv) (Supp. 1991) (including property transferred subject to a retained interest or power held within two years of death).

and Fran wanted their children to receive the full amount, then Fran should have left her property to Horace in trust, Horace should have made outright gifts to the children, and Wanda should have waived her right to elect against the antenuptial transfers.) The traditional approach ignores Wanda's contribution to her marriage with Horace because the bulk of Horace's assets were held as premarriage testamentary substitutes. There is no evidence to indicate that Wanda's performance in Case 1 was any less valuable than Hubert's in Case 2 or Horatio's in Case 3. Furthermore, assuming that Wanda has not consented to the transfers, the legitimate expectations of these three surviving spouses do not differ. The proper approach is to balance the interests of the surviving spouse and the children of a prior marriage in testamentary substitutes created prior to marriage, rather than using an exclusionary approach against the spouse.⁷²

II. THE ORIGINS OF THE DOCTRINE IN ENGLISH LAW

The doctrine that invalidated antenuptial transfers in fraud of marital rights originally arose in England where it was applied solely to transfers by prospective wives.⁷³ The justification for the doctrine was twofold: to compensate the husband for his obligation to assume his wife's debts and to support his wife during marriage. Thus, the legal rights protected by this doctrine were primarily rights that existed during the wife's life rather than in her estate.⁷⁴ As the doctrine developed in England, it was not applied to prenuptial transfers by the prospective husband.⁷⁵

The apparent reason for the nonapplicability of the doctrine to antenuptial conveyances by a prospective husband was that a wife had no legal rights to her husband's property during his life and as a practical matter, none at his death. First, a woman had no right to enjoy or control her husband's property during marriage although she certainly had a right to be supported by him. The right of support was never recognized by the English courts as providing a sufficient basis for invalidating an antenuptial transfer by the husband. Second, a wife had

72. This balancing test was also recognized in cases applying the doctrine of antenuptial conveyances prior to marriage. For example, in *Ward v. Ward*, 63 Ohio St. 125, 57 N.E. 1095 (1900), the court recognized a father's obligation to his children, but held that he was not allowed to transfer property during his engagement without notice to his prospective wife.

73. See *infra* note 80.

74. Consequently, a husband was generally required to bring an action to set aside the conveyance during marriage, rather than after his wife's death. See, e.g., *Loader v. Clarke*, 2 Mac. & G. 384, 42 Eng. Rep. 148 (1850).

75. See *Chandler v. Hollingsworth*, 3 Del. Ch. 99, 106 (1867) (discussing the development of the doctrine in England).

an inchoate dower interest in her husband's real property which he owned as an inheritable estate during marriage. As a general rule, however, a woman waived her dower interest before marriage by jointure in which the prospective husband agreed to a property settlement for the benefit of his intended wife. Due to the widespread practice of jointure, premarriage transfers by the husband did not deprive the woman of any legal rights because she essentially did not acquire any by marriage.⁷⁶ This was not the case for the husband.

As formulated by the English courts, the doctrine of antenuptial transfers in fraud of marital rights invalidated conveyances made by a woman with the intent to keep her assets from her prospective husband after a treaty of marriage or an engagement and before the actual marriage. In some cases, the motive for the transfer was to prevent the prospective husband from obtaining control of the property. In other situations, the primary purpose was to provide for the children of a prior marriage. Thus, the timing of the transfer, the woman's intent, and the husband's knowledge of the conveyance⁷⁷ were critical in determining whether the transfer was fraudulent.

Misrepresentation or failure to disclose a property disposition is an understandable element in an action for actual or constructive fraud. Yet, why was the timing such a critical factor both in England and later in the United States? Theoretically, a woman should have been able to give her property away prior to the wedding without infringing on her husband's rights because a man had no legal interest in a woman's property until marriage. Nevertheless, a man often relied on the extent of his intended wife's assets in agreeing to the marriage,⁷⁸ as well as relying on property settlements that accompanied a treaty of marriage. A man might decide not to go through with the marriage or might agree to a less generous property settlement if he knew of the antenuptial conveyance. In addition, a transfer that occurred prior to an engagement generally would not violate a spouse's dower or other marital rights on the theory that no imminently prospective rights existed that would allow an inference of fraudulent intent.⁷⁹

76. *Id.* at 116 (noting the practice in England of jointure in which a husband would make a settlement upon his intended wife that, if reasonable, was the equivalent of and would bar dower).

77. Knowledge on the part of the husband could be found if he had reason to know that his wife transferred property. See *Wrigley v. Swainson*, 3 De G. & Sm. 458, 64 Eng. Rep. 560 (1859). In contrast, some United States courts required that the husband not only know, but also consent to the transfer. See *infra* note 89.

78. An extreme example of a case in which the husband married his wife solely for her property can be found in *Strathmore v. Bowes*, 1 Ves. jun. 22, 30 Eng. Rep. 211 (1789), *aff'd sub nom.* *Bowes v. Bowes*, 6 Brown 427, 2 Eng. Rep. 1178 (1797).

79. See *Melenky v. Melen*, 233 N.Y. 19, 134 N.E. 822 (1922) (upholding the transfer

The English courts showed a marked reluctance to apply the doctrine to invalidate a woman's antenuptial transfers despite a strong endorsement of the doctrine in theory.⁸⁰ In the leading case of *Strath-*

of property to a son because it was made before the second marriage was contemplated and for adequate business considerations); *Bliss v. West*, 58 A.D. 71, 11 N.Y.S. 374 (1890) (upholding a transfer of real estate in trust for the benefit of the children of a prior marriage with a reserved life estate made before the engagement and possibly before the grantor met his future wife, although he represented to her that he owned the property). In addition, an engaged couple is considered to be in a confidential relationship that may provide a basis for a duty to disclose. *See Pierce v. Pierce*, 71 N.Y. 154, 157 (1877).

80. A survey of a large number of English cases involving antenuptial transfers indicated that generally, the prospective wife retained an interest and the court upheld the transfer. *See Downes v. Jennings*, 32 Beav. 290, 297, 55 Eng. Rep. 114, 117 (1863) (holding that a wife's transfer of a long-term leasehold seven weeks before marriage for her benefit for life and then for the benefit of other relatives was invalid as a fraud on the husband's marital rights because he believed that "this property of his intended wife would enable him to support her"); *Loader v. Clarke*, 2 Mac. & G. 382, 387, 42 Eng. Rep. 148, 150 (1850) (stating the general rule that if the wife's antenuptial transfer of her annuity to trustees for her benefit for life and then to her children had been concealed from her husband it would have been fraudulent, but because the husband must have known of the trust, waiting until his wife's death to recover stock constituted a waiver); *Grazebrook v. Percival*, 14 The Jurist 1103 (1850) (dicta that if the husband had been alive, he could have recovered possession of stock that his wife, shortly before marriage, had transferred in trust for herself without his knowledge); *Wrigley v. Swainson*, 3 De G. & Sm. 458, 64 Eng. Rep. 560 (1849) (upholding a wife's transfer of money during the engagement to trustees for her benefit for life, remainder to her children or, if none, as she appointed, when her husband knew before the marriage that his wife intended to dispose of the bulk of her property despite his ignorance of the terms of the actual trust and had not consented to any settlement); *Griggs v. Staplee*, 2 De G. & Sm. 572, 64 Eng. Rep. 255 (1848) (upholding a wife's prenuptial transfer of money in trust for her benefit in the absence of evidence that a transfer occurred after the engagement and that the husband did not know of the disposition); *Taylor v. Pugh*, 1 Hare 608, 66 Eng. Rep. 1173 (1842) (upholding a wife's transfer of property in trust for the benefit of herself and her children because her husband persuaded her to live with him before marriage, thereby precluding her from obtaining a settlement from him); *England v. Downs*, 2 Beav. 522, 48 Eng. Rep. 1284 (1840) (stating the general rule and rejecting the exception when property is derived from a prior husband and given to the children, but upholding the wife's transfer two months prior to marriage of all of her property in trust for herself and her children because of insufficient evidence to show that the transfer occurred after a treaty of marriage or that the husband had no notice); *St. George v. Wake*, 1 My. & K. 610, 39 Eng. Rep. 812 (1833) (upholding a wife's transfer of a small portion of her property to her sister one month before marriage because the evidence indicated that her husband had knowledge of the transfer prior to the marriage, he had no money of his own, and he did not make a settlement with his prospective wife); *Goddard v. Snow*, 1 Russ. 485, 494-95, 38 Eng. Rep. 187, 191 (1826) (invalidating a wife's transfer of property 10 months before marriage to a trust for her benefit on the basis of the rule that "if a woman, after contemplating marriage with an individual, make a settlement which she conceals from her intended husband, that settlement is not good as against him"); *De Manneville v. Crompton*, 1 V. & B. 354, 35 Eng. Rep. 138 (1813) (upholding a wife's

more v. Bowes,⁸¹ the court upheld a transfer made days before the wedding on the ground that the woman was engaged to another man at the time of the transfer and had informed him of the conveyance. Despite the woman's failure to disclose the disposition of her property to the man she actually married and the fact that he married her solely for her property, the court found that the disposition was not a fraud on his marital rights because he was not engaged to her at the time of the transfer. Thus, the statement of the rule was essentially dicta. Nevertheless, *Strathmore* has been cited repeatedly in support of this doctrine both in England and in the United States, particularly its justification as articulated by Lord Thurlow:

The law conveys the marital rights to the husband, because it charges him with all the burdens, which are the consideration, he pays for them; therefore it is a right, upon which fraud may be committed. Out of this right arises a rule of law, that the

transfer of property to a trust for her benefit in which her husband took a partial contingent interest without her prospective husband's knowledge because the wife never represented to him that the note would not be canceled); *Ball v. Montgomery*, 2 Ves. jun. 191, 194, 30 Eng. Rep. 588, 590 (1793) (dicta that "[i]f a woman previously to marriage conveys her property without the privity of the intended husband, it will be fraud"); *Strathmore v. Bowes*, 1 Ves. jun. 22, 30 Eng. Rep. 211 (1789), (upholding transfer by a wife 10 days prior to marriage while engaged to another man to whom she disclosed a settlement for the benefit of herself and her children), *aff'd sub nom.* *Bowes v. Bowes*, 6 Brown 427, 2 Eng. Rep. 1178 (1797); *Blanchet v. Foster*, 2 Ves. sen. 265, 28 Eng. Rep. 171 (1751) (upholding a wife's transfer of a bond to her aunt just before the marriage because she gave it for valuable consideration); *King v. Cotton*, 2 P. Wms. 674, 24 Eng. Rep. 912 (1732) (upholding transfer by a wife for the benefit of herself and her children by a former marriage because her husband did not make a jointure for the benefit of his prospective wife, the transfer occurred before the engagement, and it was reasonable for her to want to provide for her children); *Carleton v. Earl of Dorset*, 2 Vern. 17, 23 Eng. Rep. 622 (1686) (invalidating transfer by a wife prior to marriage because the wife was allegedly in debt and told creditors to sue her prospective husband); *Hunt v. Matthews*, 1 Vern. 408, 23 Eng. Rep. 549 (1686) (upholding an antenuptial transfer of most of a wife's assets to a trustee for the benefit of her daughter because the husband suppressed it after marriage and the desire to provide for children of a prior marriage was justifiable); *Thomas v. Williams*, 2 Ch. Rep. 79 (1672-73) (no fraud on marital rights when during her engagement, a wife assigned to her brother money her mother had promised her from her father's estate which belonged to her brother); *Lance v. Norman*, 2 Ch. Rep. 79 (1672-73) (invalidating the transfer of money by a wife to her brother one day before marriage without her husband's knowledge, but ordering the husband to pay the wife an annuity for her separate maintenance); *Howard v. Hooker*, 2 Ch. Rep. 81 (1672-73) (setting aside a wife's transfer of her interest in her first husband's estate to her daughter because her husband relied on her ownership of the property in agreeing to jointure).

81. 1 Ves. jun. 22, 30 Eng. Rep. 211 (1789), *aff'd sub nom.* *Bowes v. Bowes*, 6 Brown 427, 2 Eng. Rep. 1178 (1797).

husband shall not be cheated, on account of his consideration. . . . A conveyance by a wife, whatsoever may be the circumstances, and even upon the moment before the marriage, is *prima facie* good; and becomes bad only upon the imputation of fraud. If a woman during the course of a treaty of marriage with her makes without notice to the intended husband a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud.⁸²

As this excerpt from *Strathmore* indicates, a woman's fraudulent intent could be gleaned from the circumstances: if the transfer occurred during the engagement and the prospective husband did not have notice, the transfer theoretically would be fraudulent on a constructive fraud theory.⁸³

III. THE DOCTRINE IN THE UNITED STATES

A. *The Early Period*

A broad interpretation of the doctrine took root early in the United States. In *Manes v. Durant*,⁸⁴ the court stated that “[i]n general, it is not questioned that a voluntary conveyance made by a woman in contemplation of marriage, without the knowledge of the intended husband, will be set aside as a fraud on the marital rights.”⁸⁵ By invalidating a woman's antenuptial transfer of her slaves and personalty in trust for the benefit of various relatives including her surviving children, the court rejected any exception to the doctrine when the disposition favored children.⁸⁶ The expansive scope of this doctrine was reached by likening

82. *Id.* at 28, 30 Eng. Rep. at 214. The court, in *Goddard v. Snow*, 1 Russ. 495, 38 Eng. Rep. 191 (1826), interpreted Lord Thurlow's opinion in *Strathmore v. Bowes* to apply to settlements of property by a woman in which she “reserv[es] to herself the dominion over it.”

83. Nevertheless, despite this broad statement of the general rule, most of the English courts found the antenuptial transfers in question to be valid. Parenthetically, the court in *Ward v. Ward*, 63 Ohio St. 125, 127, 57 N.E. 1095, 1096 (1900), misstated the actual practice in England when it observed that antenuptial “conveyances by the wife are uniformly held invalid.”

84. 2 Rich. Eq. 404 (S.C. 1842).

85. *Id.* at 405-06. Thus, an undisclosed transfer made for valuable consideration will not be deemed to be fraudulent. *See, e.g., Gregory v. Winston's Adm'r*, 64 Va. 102, 123 (1873) (citing *Blanchet v. Foster*, 2 Ves. sen. 265, 28 Eng. Rep. 171 (1751)); *Fletcher v. Ashley*, 47 Va. 332, 338 (1849).

86. *Manes*, 2 Rich. Eq. at 406. Some courts recognized, at least in theory, that a premarriage transfer for the benefit of children of a prior marriage could vitiate the fraud. *See supra* note 60.

a prospective husband to a bona fide purchaser for value. As in England, the justifications for the doctrine in the early cases in the United States were the husband's obligation to support his wife and to assume her pre-existing debts.⁸⁷ The liability for these debts, it was believed, gave him an interest in his wife's property.⁸⁸ Transfers of property by a prospective wife without the intended husband's knowledge or consent⁸⁹ deprived him of more than an expectancy in her property.⁹⁰ This purported justification for the doctrine is subject to question. If the intended

87. See, e.g., *Arnegard v. Arnegard*, 7 N.D. 475, 480, 75 N.W. 797, 798 (1898) ("An agreement for marriage at common law was, in effect, an agreement for a sale by the prospective wife to the prospective husband of all her personal property, and the transfer to him of her right to possession of all her real estate, on condition of the assumption by him of all her debts."); *Gregory v. Winston's Adm'r*, 64 Va. 102, 123-24 (1873). The husband's acquisition of his wife's property upon marriage, however, was also justified by his obligation to maintain her. See *Chandler v. Hollingsworth*, 3 Del. Ch. 99, 106 (1867). In such a case, it could be argued that the husband should be able to reach the transferred property to the extent needed to maintain his wife.

88. See *Ramsay v. Joyce*, 1 McM. Eq. 236, 252 (S.C. 1841) ("it is the familiar law, that the husband is regarded as a purchaser of the wife's property, and that marriage is a valuable consideration"). See also *Manes v. Durant*, 2 Rich. Eq. 404 (S.C. 1842).

89. Courts disagreed as to whether constructive knowledge, actual knowledge, or consent was necessary to prevent an antenuptial transfer from being fraudulent. See *Spencer v. Spencer*, 56 N.C. 404, 409 (1857) ("[t]here must be a knowledge of and assent to the particular deed to give it the effect of barring the rights of the husband"). Compare *Fletcher v. Ashley*, 47 Va. 332, 339 (1849) (Brooks, J., concurring) (knowledge is a sufficient bar) with *Johnson v. Peterson*, 59 N.C. 12, 14 (1860) (conveyance by woman on the eve of her marriage constitutes fraud upon intended husband's rights unless he had full knowledge of the transaction and freely assented to it). Of course, establishing knowledge or consent many years after a transfer or after the grantor's death was extremely difficult and was responsible for many lawsuits yielding frequently inconsistent results. See also *Poston v. Gillespie*, 58 N.C. 258 (1859), in which the court invalidated a woman's transfer of land, a slave, and personalty for the benefit of herself and her son from a prior marriage on the ground that he did not consent even though she notified her intended husband of the transfer. The court indicated, in dicta, that a transfer is not fraudulent if it is made by a woman before the engagement and if the man has notice at the time of the transfer because a contract to marry did not exist at that time. The court noted that any property transferred without consent will breach the contract, although equity will not specifically enforce a contract to marry. Prior to courtship or contemplation of marriage, a woman was free to dispose of her property without informing the man she later married. *Id.* at 262. The controversy over whether knowledge or consent is necessary to sustain the transfer continued after the passage of the Married Women's Property Acts. See *Taylor v. Taylor*, 199 N.C. 197, 148 S.E. 171 (1929). For a case finding constructive notice sufficient to prevent fraud, see *McClure v. Miller*, 1 Bail. Eq. 107, 109 (S.C. 1830) ("There was at least enough to put [the husband] upon inquiry."). In *Moore v. Moore*, 15 Ill. 2d 239, 243, 154 N.E.2d 256, 258 (1958), however, the court held that recording a deed prior to marriage does not constitute constructive notice to a prospective wife.

90. *McClure*, 1 Bail. Eq. at 109 (invalidating a wife's transfer prior to marriage for the benefit of a child when her husband, during marriage, satisfied a premarriage debt incurred by his wife for part of the conveyed property).

husband's interest in the property was based on his liability for the woman's debts, then the prospective wife's transfers of property should have been overturned only to the extent of her debts.⁹¹ The husband's interest in the transferred property, however, was generally either total or equal to the share that he could expect if his wife owned the property at her death. His share could also be justified on the ground that the husband was obligated to support his wife. Generally, no correlation was made between a husband's interest in the transferred property and the amount needed for support.

Strictly speaking, none of these reasons adequately supports an action for fraud because the property was conveyed in fraud of future property rights.⁹² Nevertheless, the view of marriage as a sales contract pursuant to which the husband undertakes onerous obligations in exchange for the purchase of his wife's property explains why equity afforded a remedy to what otherwise would appear to be the loss of a mere expectation. The basis for finding fraud in the case of a disappointed expectation was elucidated by Chief Judge Ruffin in *Logan v. Simmons*:⁹³

[T]he husband shall not be cheated, on account of his consideration. Now, the rights . . . are not present rights, that is, existing at the time of the conveyance; for, a fraud on rights of that kind, the common law would redress. They are prospective rights — those that the husband expects to enjoy upon the contemplated marriage by the law of the land. A husband, being bound to pay his wife's debts and to maintain her during coverture, and being chargeable by the law with the support of the issue of the marriage, and bound by the ties of natural affection also to make provision for the issue, it is in the nature of things, as a matter of common discretion, that a woman's apparent property should enter materially, if not essentially, into his inducements for contracting the marriage, and incurring those onerous obligations.⁹⁴

91. *See id.* (dicta that if a woman fraudulently concealed a debt and voluntarily conveyed "her whole property, or so much of it as to leave her unable to satisfy the debt, the husband, if he should be compelled to pay the debt, might be allowed to stand in the place of the creditors and avoid the conveyance, although he knew of it before the marriage;" in that case, "the actual fraudulent intention must be established").

92. An analogy can be drawn to a transfer in fraud of future creditors; however, this should only apply if the prospective spouse is insolvent at the time of the transfer. *See Rivers v. Thayer*, 7 Rich Eq. 136, 156-57 (S.C. 1855).

93. 38 N.C. 487 (1845).

94. *Id.* at 495. This was also the case in *Spencer v. Spencer*, 56 N.C. 404 (1857), in which an engaged woman transferred her slaves a few days before her marriage, reserving a life estate. Although her husband had the right to possess the slaves by virtue

In *Logan*, on the day before her second marriage and without informing her prospective husband, a woman deeded two slaves to her son, reserving the first living child one of them might have. After the marriage, the slaves, who represented the bulk of the woman's property, resided with the couple until the wife's death ten years later. At that time, the son claimed them based on the deed. There was no evidence that the wife incurred any debts prior to her second marriage. Indeed, the evidence indicated that her husband, who was somewhat impecunious, married her for her modest property.⁹⁵ The husband did not have any prospective rights of which he was defrauded. Because his intended wife was solvent, he did not need her property to discharge her debts. She essentially retained a de facto life estate in the transferred slaves during their marriage. The husband consequently enjoyed the benefits of her property and presumably could have used the slaves to discharge his support obligation.⁹⁶ Nevertheless, the court invalidated the earlier transfer as a fraud on the husband's marital rights. The court did not include inheritance rights among the rights of which his prospective wife allegedly defrauded him.⁹⁷ Thus, the analytical difficulty in supporting this result is apparent. The court was so offended by the prospective wife's concealment of the transfer from her intended husband who relied on her apparent ownership of the slaves in proceeding with the marriage that it was not troubled by reaching a result that could not be supported by its articulated justifications.⁹⁸

A line of cases that impressed a constructive trust to remedy fraud in preventing a decedent from executing a will and thereby protecting the expectancy interest of the beneficiary provides a useful analogy. In

of the life estate, the court invalidated the transfer as fraudulent on behalf of the deceased husband's creditors. The court did not appear troubled by the fact that the wife's property was used to discharge the husband's debts and was also employed for the couple's support during their marriage.

95. *Logan*, 38 N.C. at 488. It appeared that the husband, whose older wife was in failing health, owned one mare.

96. See *Waller v. Armistead's Adm'rs*, 29 Va. 11, 14 (1830) (prospective wife transferred slaves and the proceeds of a sale of real estate to her brother and his infant son on the morning of her marriage without the knowledge of her fiancé; however, the husband lost his rights because he died during his wife's lifetime).

97. See *supra* note 94 and accompanying text.

98. Interestingly, the court noted that, unlike the situation in England, jointure was not common in the United States and in fact, the man had not settled any property on his prospective wife. The court concluded that a more stringent rule of concealment should apply in the United States because settlements in England are preceded by investigations and the expectations of the parties are limited to the property secured by the agreement. *Logan v. Simmons*, 38 N.C. 487, 497, 501 (1845). This, of course, does not necessarily follow because a greater expectation may exist that property will not be transferred without notice when a settlement has, in fact, been made.

Pope v. Garrett,⁹⁹ the court imposed a constructive trust on property that passed by intestacy to the decedent's heirs in favor of the beneficiary named in an unexecuted will. The actions of several of the presumptive heirs prevented the decedent from executing the will. Despite the fact that the beneficiary had only an expectancy and no existing property rights of which she could be defrauded at the time of the heirs' acts, the court held that a constructive trust was appropriate to remedy the wrongful act and to prevent unjust enrichment.¹⁰⁰ Thus, the heirs were found to have defrauded the intended beneficiary of an expectancy in the decedent's estate, just as the decedent, in a case applying the doctrine of antenuptial transfers in fraud of marital rights, was found to have violated an expectancy of the prospective spouse. Interestingly, marital rights cases generally do not speak in terms of preventing unjust enrichment. In the premarital transfer cases, the decedent was unjustly enriched by the benefits obtained from the marriage (for which the appropriate remedy should be annulment) or by a benefit in the unrestricted disposition of property.

B. The Period Following the Passage of the Married Women's Property Acts

The major justifications for the common-law doctrine disappeared after the passage of the Married Women's Property Acts in the mid-nineteenth century.¹⁰¹ The doctrine, however, did not die, but was transformed to protect the rights of the surviving spouse in the deceased spouse's estate.¹⁰² Thus, the focus of the doctrine changed markedly in this country, although this change is frequently not acknowledged by the courts. Protection of the surviving spouse's rights meant that the doctrine could apply equally to men and women. Suits challenging the conveyance could be brought after the transferor's death without being subject to the defense of laches.¹⁰³

99. 147 Tex. 18, 211 S.W.2d 559 (1948).

100. *Id.* at 23, 211 S.W.2d at 561. In reaching its decision, the court relied on Professor Scott's treatise on trusts which notes a conflict of authority on this point.

101. One commentator argues that the general rule enunciated in *Strathmore v. Bowes*, which invalidated a settlement of property as a fraud on marital rights, is "obsolete in consequence of the Married Women's Property Acts." Shannon, *The Countess of Strathmore versus Bowes*, 1 CANADIAN B. REV. 425, 427 (1923). *But see* *Youngs v. Carter*, 10 Hun. 194, 198 (N.Y. 1877) (disagreeing with the principle that applied the doctrine only to transfers by prospective wives).

102. The transformation of the doctrine into a rule preventing spousal disinheritance was facilitated by earlier American courts applying it to invalidate transfers by a prospective husband in fraud of his wife's dower rights. For a discussion of the doctrine's history in the United States, see *supra* note 35.

103. If the husband was defrauded of the right to possess his wife's personalty and

The transformation of the doctrine rendered its theoretical underpinnings more problematic. The rationale articulated by the English and early American courts, namely, the right of the husband to manage his wife's realty and dispose of her personalty in return for his obligation to support her and pay her debts, was no longer relevant. What supported the application of the doctrine to antenuptial transfers of the wife as well as the husband? What marital rights were defrauded?¹⁰⁴ Initially, some courts spoke of the woman's justifiable expectation of support from her husband that required some assurance that he actually owned property with which to fulfill this obligation. In essence, this expectation is the counterpart of the argument used to justify the application of the doctrine to a woman's antenuptial transfers prior to the passage of the Married Women's Property Acts.¹⁰⁵ Formerly, the husband had the right to consume and manage his wife's property to discharge his obligation to support her. After the passage of the Married Women's Property Acts, each spouse had a reciprocal duty of support. Thus, the wife had the right to expect her husband to use his own funds to support her. As stated by the court in *Brooks v. McMeekin*:¹⁰⁶

[D]oes not the wife have a right to look carefully, to see if he who would wed her has the means essential to support herself and such offspring as a kind Providence may give her? In England, is it not a matter of every-day occurrence that the husband makes settlements upon the intended wife often at the instance of his intended wife's family or friends? . . . If a man cannot be charged with indelicacy in looking into his wife's estate, surely the woman, who at best is so unprotected, may consider, when she is asked to marry a man, whether he has the means to provide for her.¹⁰⁷

to manage her realty during marriage and learned of the transfer after the wedding, but did not challenge it until his wife's death, the defense of laches could apply. *See, e.g., Loader v. Clarke*, 2 Mac. & G. 384, 42 Eng. Rep. 148 (1850). *Cf. Babcock v. Babcock*, 53 How. Pr. 97 (N.Y. 1876) (allowing a wife to sue before her husband's death to protect inchoate dower rights where the prospective husband transferred property to his children three days before the marriage).

104. Even before the passage of the Married Women's Property Acts, use of the doctrine to protect a woman's dower rights was rejected in an action at law in *Baker v. Chase*, 6 Hill 482, 483 (N.Y. 1843), because the "husband was not seised at any time during the coverture." The court also questioned the doctrine's application by a court of equity in *Swaine v. Perine*, 5 Johns. Ch. 482 (N.Y. 1821).

105. The husband's obligation to support his wife and assume her debts gave him a right to her property during marriage. *See supra* text accompanying notes 73-74.

106. 37 S.C. 285, 15 S.E. 1019 (1892).

107. *Id.* at 305, 15 S.E. at 1024.

Like its counterpart, this rationale was often untenable. If the husband retained a life estate, which was frequently the case, the property could be utilized to support his wife; therefore, any antenuptial conveyance generally would not have deprived her of her right to maintenance. Consequently, she could not have been the victim of fraud.

The justification for this doctrine was not limited to the duty of support even in *Brooks v. McMeekin*. The court recognized that, for women as well as men, “marriage is a valuable consideration” pursuant to which she acquires not only the right to comfortable maintenance, but also the right to share in her husband’s intestate estate and the right to dower.¹⁰⁸ In invalidating the transfer, the court found that the wife was defrauded of an expectancy much like the expectancy the beneficiary was deprived of in *Pope v. Garrett*.

As the doctrine evolved, the central rights protected were principally those relating to a surviving spouse’s interest in the deceased spouse’s estate. These rights, for the most part, did not involve either spouse’s enjoyment of any property owned by the other during marriage, but rather a dower interest or the expectation of receiving a forced share of the decedent’s property at death. With respect to antenuptial transfers of personalty, the doctrine presented real problems because each spouse generally had the right during marriage to transfer personal property free of the other spouse’s claim. At common law and under the typical forced share statute, neither spouse had a property interest in the other spouse’s personal estate during marriage. If a spouse was free to transfer personalty during marriage, it would seem that the spouse could make such transfers prior to marriage. Nevertheless, the doctrine was applied to prenuptial transfers of personalty in some jurisdictions.¹⁰⁹

The application of the doctrine to antenuptial transfers of realty was less problematic, particularly with respect to transfers by prospective

108. *Id.* at 304, 15 S.E. at 1023. Indeed, the court in *Chandler v. Hollingsworth*, 3 Del. Ch. 99 (1827), found that the wife’s right to dower in the United States was extremely critical to her because of the absence of jointure. In fact, the court stated, if anything, the woman, as “the weaker sex,” needed greater protection than the man under the doctrine because in return for dower she “surrender[ed] her person, her services, her self-control, her means of self-support; and as to property, far more than the interest she acquires.” Although the court indicated that the existence of a marital right in dower obviated any need to value the consideration furnished by the wife, its characterization of the detriment suffered by the woman upon marriage influenced other courts in applying a rule that was protective of the surviving spouse. *See, e.g., Ward v. Ward*, 63 Ohio St. 125, 57 N.E. 1095 (1900). Nevertheless, courts in some jurisdictions began to cut back on the scope of the doctrine by requiring a showing of actual fraud. *See, e.g., Perlberg v. Perlberg*, 18 Ohio St. 55, 247 N.E.2d 306 (1969) (overruling *Ward*); *Kirk v. Kirk*, 340 Pa. 203, 16 A.2d 47 (1940); *Dudley v. Dudley*, 76 Wis. 567, 45 N.W. 602 (1890).

109. *See, e.g., LeStrange v. LeStrange*, 242 A.D. 74, 273 N.Y.S. 21 (1934).

husbands. Although a woman had no interest in a man's property prior to marriage, she did have rights in the form of inchoate dower during marriage. While she could not prevent her husband from transferring his personal property during marriage, any transfer of realty by him without her consent was subject to her dower right. An antenuptial transfer of realty deprived the wife of her inchoate dower interest which attached at the time of coverture. Of course, in jurisdictions that abolished dower and replaced it with a forced share, allowing the overturn of antenuptial transfers of realty raised the same conceptual problems that existed in the case of personalty.

Generally, the development of common-law doctrines that invalidated certain transfers during marriage did not make the doctrine any more justifiable. First, the illusory transfer and the reality of the transfer tests only applied to dispositions in which the spouse retained significant powers or did not make a real transfer.¹¹⁰ Particularly in its earlier stages, the antenuptial transfer in fraud of marital rights doctrine invalidated many retained interest transfers that would have been valid under either the illusory transfer or reality of the transfer test.¹¹¹ Curiously, in some jurisdictions, such as Pennsylvania and Ohio, as the protection afforded to the surviving spouse increased under elective share statutes, the scope of the doctrine became more limited with little recognition of the trend in either area or the relationship between the two bodies of law.¹¹² Nevertheless, in many jurisdictions, a premarital transfer often involved a retained life estate which, standing alone, would be valid under the illusory transfer and the reality of the transfer tests.¹¹³ Only the motive for the transfer test, which applied to outright as well as retained interest transfers, was somewhat consistent with the test applied to judge the validity of premarriage dispositions.¹¹⁴ In view of the fact that inheritance rights were protected in both premarriage and marital transfer cases, it is difficult to comprehend these divergent approaches.

110. See *supra* note 49 and accompanying text.

111. See, e.g., *Spencer v. Spencer*, 56 N.C. 404 (1857); *Arnegard v. Arnegard*, 7 N.D. 475, 75 N.W. 797 (1898).

112. For example, in Pennsylvania, the court in *Kirk v. Kirk*, 340 Pa. 203, 16 A.2d 47 (1940), overruled prior decisions that utilized a constructive fraud test to determine the validity of antenuptial transfers. *Kirk* imposed an actual fraud test that required an intent to disinherit the surviving spouse. The decision in *Kirk* was applauded in an article by Bregy & Wilkinson. See Bregy & Wilkinson, *supra* note 33. See also *infra* notes 158-59 (discussing Pennsylvania decisions) and *supra* note 108 (discussing Ohio decisions).

113. See, e.g., *LeStrange*, 242 A.D. at 74, 273 N.Y.S. at 21.

114. Compare *Bodner v. Feit*, 247 A.D. 119, 286 N.Y.S. 814 (1936) with MO. ANN. STAT. § 474.150 (Vernon Supp. 1990) (transfers made with the purpose of destroying the spouse's right of inheritance deemed to be in fraud of the marital rights of the surviving spouse).

The doctrine of antenuptial transfers in fraud of marital rights protects a prospective spouse from duplicitous, nonconsensual transfers that interfere with inheritance rights, but it has serious limitations as a prototype for an elective share statute. Aside from the difficulties associated with a subjective test and its questionable theoretical foundations, the doctrine generally would not provide Wanda (Case 1) with a remedy because Horace transferred his property prior to their engagement. The only relief it might provide would be with respect to the additions Horace made to the trust after the engagement.

Secondly, the question arises whether the doctrine provides a satisfactory remedy if Horace made the transfers while he was engaged to Wanda. Under a constructive fraud approach in a jurisdiction that recognizes dower, a court would probably invalidate the transfer of the house at least to the extent of Wanda's dower rights. As previously discussed, inchoate dower is considered a right that vests upon marriage.¹¹⁵ If Wanda's interest in the corpus of the trust, absent a transfer, was an expectancy during marriage, she could only invalidate the trust in a jurisdiction that recognized marital rights in the expectation of inheritance.¹¹⁶ With respect to either the transfer of the house alone or both the house and the personalty in trust, a court would presume fraud absent any misrepresentation by Horace. Under a constructive fraud theory, the existence of these marital rights would impose a duty on Horace to disclose the dispositions to Wanda during their engagement. This duty particularly existed when Horace transferred almost all of his property even though his children were the beneficiaries.¹¹⁷ A duty to disclose makes sense from a moral viewpoint because it fosters honesty between prospective spouses. Yet, is this duty legally tenable?

First, consider the situation in which Wanda knew that Horace resided in the house and appeared to have some property interest in it. Wanda also knew that Horace received income on a regular basis. Is it reasonable to place on her the burden of ascertaining whether Horace owned the house in fee or whether he received the income from a trust rather than from an account titled in his name? The majority of courts applying a constructive fraud test would probably not impose such a burden on Wanda in the absence of any disclosure by Horace. Instead, they would likely find that she justifiably relied on his apparent property ownership.¹¹⁸ This would seem to be the correct result because it avoids the arguably undesirable result of requiring a prospective spouse to

115. See *supra* note 108 and accompanying text.

116. See *supra* note 109 and accompanying text.

117. See *supra* note 60 and accompanying text.

118. Courts frequently did not require a showing of actual reliance in the constructive fraud area. See, e.g., *Chandler v. Hollingsworth*, 3 Del. Ch. 99 (1867).

scrutinize the partner's property holdings in the absence of a prenuptial agreement. This approach would encourage Horace, who made the transfers, to avoid the application of the doctrine by giving notice to Wanda, who would then be bound even absent a written waiver.¹¹⁹

A more difficult case is presented if Wanda lacked knowledge of the existence of the house and the trust and Horace had no plans of using them as marital property, but intended to keep his retained interest in them solely for his personal benefit. Although Wanda clearly could not have relied on this property in marrying Horace, her ignorance is not necessarily fatal to a claim for constructive fraud.

Interestingly, the court in *Chandler v. Hollingsworth*¹²⁰ was not perturbed by a prospective spouse's lack of knowledge of the assets transferred because she was still entitled to a property right in the real estate upon marriage.¹²¹ This reasoning is problematic. A person can have a property right without knowledge of it. Defrauding a prospective spouse of a future property right that may never become possessory, and is really nothing more than an expectation, however, reveals a logical weakness requiring some reliance. A better approach is to dispense with the fiction of the existence of protectable rights during engagement and the problem of reliance and recognize that Horace's retention of an interest in or power over the property means that he has not cut the strings connecting him to the property. Under this theory, which is based on an estate tax analogy,¹²² Horace's retention of a lifetime ownership interest in the property gives Wanda a right to elect against these existing interests, thereby avoiding the machinations associated with the doctrine.

Wanda would have a much more difficult time recovering in a jurisdiction that requires actual fraud. First, she would have to show that she owned a property interest during the engagement. This would be particularly difficult in a jurisdiction like Ohio after *Perlberg v. Perlberg*.¹²³ Second, after overcoming this hurdle, she would have to prove that Horace transferred the property with an intent to disinherit her. In this case, she would rely on Horace's transfer of virtually all of his assets and his retention of a life estate and power over the principal. Nevertheless, she would have to deal with the issue of whether Horace's primary motive was disinheritance or a desire to benefit his

119. This assumes that the action would be brought in a jurisdiction that does not require consent. See *supra* note 89.

120. 3 Del. Ch. 99 (1867).

121. *Id.* at 110-11.

122. See *supra* notes 21-22 and accompanying text.

123. 18 Ohio St. 2d 55, 247 N.E.2d 306 (1969) (in the absence of a right to dower existing prior to marriage and a showing of actual fraud, nondisclosure of a transfer of real property one day before marriage will not constitute constructive fraud).

children even though the latter incorporates an intent to diminish Wanda's share. Lastly, Wanda would have to demonstrate that Horace misrepresented the title to the property and that she relied on that misrepresentation. Of course, Wanda would fail if she lacked knowledge of the property's existence.

The actual fraud test is analytically more tenable than the constructive fraud approach.¹²⁴ The disadvantage is that unless Horace misrepresents his property interests, Wanda will be precluded from acquiring an interest in his estate. This result allows Horace to disinherit Wanda rather easily and neither balances the competing interests of the surviving spouse and children from a prior marriage nor promotes the goals of an elective share system. Next, it is necessary to examine statutory models and to analyze whether they provide a better framework for resolving Wanda's problems in the two alternatives posited: when Horace transfers his property before he contemplates marriage and when he makes the conveyances during engagement.

IV. THE STATUTORY MODELS

The vast majority of elective share statutes do not provide for a right of election against testamentary substitutes created prior to marriage or antenuptial transfers made in fraud of marital rights. These statutes are silent as to whether the common-law doctrine has been statutorily overruled or whether it co-exists with the statutory schemes. Several states have addressed, explicitly or indirectly, the issue of the includibility of transfers prior to marriage in the surviving spouse's elective share. There are basically two approaches. One, exemplified by the Wisconsin and Missouri statutes, codifies the common-law rule.¹²⁵ The other establishes objective criteria to determine when a transfer will be deemed a testamentary substitute. The subjective approach embodied in the Wisconsin statute will be considered first.

A. Wisconsin

The Wisconsin elective share statute grants the surviving spouse a right of election against marital and deferred marital property owned at death as well as transfers of property that are included in the augmented marital property estate based on objective criteria.¹²⁶ In addition, section

124. See Bregy & Wilkinson, *supra* note 33, at 76.

125. MO. ANN. STAT. § 474.150 (Vernon Supp. 1990); WIS. STAT. ANN. § 861.17(1) (West 1991).

126. WIS. STAT. ANN. §§ 861.01-.07 (West 1991). Wisconsin's augmented estate concept resembles the UPC model in that it includes retained interest transfers. Like the redesigned UPC, it also "applies to life insurance, accident insurance, joint annuities, pensions and other arrangements under which property is payable to a person other than the surviving spouse or the estate of the decedent spouse." *Id.* § 861.05 comment. Pre-1990 UPC § 2-202(1) excluded such arrangements when the beneficiary was not the spouse.

861.17 of the Wisconsin code authorizes a surviving spouse to elect against "property arrangement[s] in fraud of the rights of the surviving spouse."¹²⁷ Such arrangements include "[a]ny transfer or acquisition of property, regardless of the form or type of property rights involved, made by the decedent during marriage or *in anticipation of marriage for the primary purpose of defeating the rights of the surviving spouse.*"¹²⁸

Unlike most elective share schemes, Wisconsin's statute, which is based on the Uniform Marital Property Act, limits the right of election to property acquired during marriage except to the extent the property was transferred in fraud of the right of election either before or during marriage. In such cases, the transferred property will be subject to the right of election whether the decedent conveyed it outright or retained an interest in it.

As originally adopted, section 861.17 provided for an exception to the fraud rule if the decedent transferred property prior to or within one year of marriage for the benefit of children from a prior marriage.¹²⁹ Historically, this exception to the common-law doctrine was recognized by a minority of jurisdictions if the children's parents agreed that the surviving parent would bequeath property generated by their marriage to their children and the amount of property transferred to the children was not disproportionately large. The repeal of this section, however, does not mean that such transfers are necessarily fraudulent. Under section 861.17(1)(a), the court has the discretion to determine whether the "primary purpose" of the transfer was to disinherit the surviving spouse or to provide for the children. Assuming that the main purpose of the disposition was to confer a benefit on children from a prior marriage, such an arrangement may be valid.

Of course, determining the decedent's primary purpose in making the property disposition will present the same problems under the current Wisconsin statute as existed at common law. Although the legislative committee that drafted the section recognized these difficulties and considered the objective approaches of New York and Pennsylvania, it

127. WIS. STAT. ANN. § 861.17(1) (West 1991).

128. *Id.* § 861.17(1)(a) (emphasis added). Chapter 852 of the Wisconsin statute deals with intestacy. Chapter 861 relates to the forced share.

129. Section 861.17(2) originally provided: "An arrangement made before marriage, or within one year after marriage, or prior to April 1, 1971, to provide for issue by a prior marriage is not a fraudulent property arrangement within the meaning of this section." This subsection was repealed in 1985. The comment to this section merely indicates that "[b]ecause persons now married may have intended to provide for issue by a prior marriage, they are able to do so within a year after the effective date of this Code without danger of having such arrangements challenged as a fraud on the rights of the spouse." *Id.* comment.

decided to recommend a codification of the common-law approach that “has the advantage of being familiar.”¹³⁰

A justification based on familiarity is questionable particularly because, commencing with its frequently cited decision of *Sederlund v. Sederlund*¹³¹ in 1922, the Wisconsin Supreme Court has apparently never invalidated a prenuptial transfer of property. The actual protection af-

130. The legislature reviewed and specifically rejected the approach used in New York and Pennsylvania. STATE OF WISCONSIN SENATE BILL 5, at 162 (1969). The legislative history also indicates that the section’s “interest is to fortify [the] judicial doctrine and give it procedural shape” particularly “in light of the abolition of inchoate dower by 861.03.” *Id.* Thus, the section would reach “deliberate plans to deplete the probate estate in order to defeat election by the surviving spouse” regardless of whether the transfer was of real or personal property. *Id.*

A report of the Wisconsin Bar Association explained the purpose of the proposed statute:

The third preliminary draft of Sec. 6 . . . was an attempt to preserve the existing law regarding the right of the surviving spouse to reach various kinds of transfers made by a decedent during lifetime in the extreme case where the transfer was deliberately made to put the property out of reach of the spouse and any right to elect.

PROBATE CODE COMMITTEE, STATE BAR OF WISCONSIN, REAL PROPERTY, PROBATE AND TRUST LAW SECTION WORKING PAPERS, at 170 (1962-66) [hereinafter WISCONSIN BAR REPORT]. The Report criticized the decision in *In re Estate of Mayer*, 26 Wis. 2d 671, 133 N.W.2d 322 (1965), which reaffirmed that right, but indicated that the challenge must be part of an exercise of the right of election, must make the property part of the estate for all purposes, and must not merely be to reach the statutory share. *Id.* Section 6 was redrafted to avoid requiring the widow to elect against the will in order to recover a share of fraudulent transfers on the theory that the surviving spouse might not learn of the fraud until after the time to file a notice of election expired. *Id.* at 181.

In its explanation of § 6, which applies to personalty and realty, the Wisconsin Bar Report noted that although the Wisconsin common-law approach has been criticized by legal scholars, the “present flexible test seems to have worked satisfactorily to reach the exceptional cases where one spouse has sought deliberately to defeat the rights of the other by transferring personalty during lifetime.” *Id.* at 179. The types of transactions were intentionally not enumerated. This conclusion is subject to question because, as the Report noted, “case law is extremely meager.” *Id.* at 192. No Wisconsin case was found in which a surviving spouse was successful in invalidating a transfer in whole or in part as fraudulent. The burden of proving fraud in all cases is on the surviving spouse. The new section also gives the court discretion to “reduce or eliminate any share for the survivor if the decedent had reason to disinherit the surviving spouse, as where the couple have separated.” WISCONSIN SENATE BILL 5, at 147 (1969).

The State Bar of Wisconsin recommended that “[t]he court’s power to provide for the deserving spouse . . . should extend to any assets transferred gratuitously by the husband during lifetime . . . under circumstances which would include such assets within the taxable estate for federal estate tax purposes.” WISCONSIN BAR REPORT, *supra*, at 106. This recommendation was not accepted.

131. 176 Wis. 627, 187 N.W. 750 (1922) (upholding the transfer of real estate to the children of a first marriage made before the husband met his second wife). *See also* WISCONSIN SENATE BILL 5, at 147 (1969).

forded to a surviving spouse in view of the legislative adoption of this judicial doctrine seems more theoretical than real. Furthermore, the adoption of a subjective fraud doctrine to determine the validity of antenuptial conveyances appears to contradict the objective approach¹³² adopted by the Wisconsin legislature in deciding whether post-marriage testamentary substitutes are includible in the augmented estate.¹³³

Application of the Wisconsin statute to Case 1 would result in the excludibility of the transferred property from the augmented estate. Horace did not create the testamentary substitutes in Case 1 for the primary purpose of defeating Wanda's marital rights. Indeed, he was not contemplating marriage at the time of the transfer. He was motivated by a desire to benefit his children. Accordingly, Wanda would have no claim against the transferred property despite Horace's retention, during their marriage, of a life estate and a power to dispose of the transferred property until his death. If the transfers were made during marriage, the property would have been included in the augmented estate to the extent it constituted marital or deferred marital property. If, however, Horace made the transfers after his engagement to Wanda without notice to her, a court would have to resolve the difficult question of whether Horace's primary motivation was to disinherit Wanda or to provide for his children. Certainly, any argument by Horace that the substantial post-engagement transfers to his children were not made for the primary purpose of defeating Wanda's rights as a surviving spouse is disingenuous.

B. *The Objective Models*

The appropriate treatment of Horace's premarriage transfers will now be examined in the context of elective share statutes adopting objective criteria.

1. *Pennsylvania*.—The Pennsylvania statute formulates an objective standard for including a conveyance of property in the augmented estate. On its face, section 2203 ignores whether the transfer occurred before or during marriage, only with respect to "[p]roperty conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit."¹³⁴ The other

132. Some would argue that while an objective approach is more appropriate for marital transfers, a subjective approach is desirable for antenuptial conveyances. This rationale suggests that only those transfers made with an intent to disinherit and without notice to the intended spouse should be subject to the right of election. The author rejects this view. See *infra* text accompanying notes 256-60.

133. WIS. STAT. ANN. § 861.05 (West 1991).

134. 20 PA. CONS. STAT. ANN. § 2203(a)(3) (Purdon Supp. 1991).

categories of testamentary substitutes include retained life interests, joint tenancies, annuities, and transfers in contemplation of death that were created during marriage.¹³⁵

Why does the Pennsylvania statute seem to treat property conveyed subject to a power to revoke or consume, invade or dispose of the principal more inclusively? Neither the statute itself nor the official comment is illuminating. The comment merely indicates that section 2203 was influenced by the UPC.¹³⁶ The pre-1990 UPC, however, pointed to section 2203's predecessor, section 11 of the Pennsylvania Estates Act¹³⁷ as a model.¹³⁸ The influence of the pre-1990 UPC helps to explain why the other categories of testamentary substitutes are limited to post-marriage transfers.¹³⁹ Nevertheless, the comment to section 2203 does not expressly adopt the UPC's rationale for excluding premarital transfers from the right of election.¹⁴⁰ Furthermore, the pre-1990 UPC included transfers of property subject to a power to revoke or invade, or dispose of the principal in the augmented estate only if made during marriage.

The answer appears to lie in the fact that section 2203(a)(3) is the direct successor to section 11,¹⁴¹ while the other subsections of the

135. *Id.* § 2203(a)(2), (4)-(6).

136. *Id.* § 2203 comment.

137. 20 PA. CONS. STAT. ANN. § 2203(a)(2)-(6) was originally enacted in 1947 as § 11 of the Estates Act and was adopted in 1978 as the successor to 20 PA. STAT. ANN. § 6111 and 20 PA. STAT. ANN. § 301.11(a).

138. U.P.C. § 2-202 comment (1983).

139. U.P.C. § 2-202(1) included only testamentary substitutes created during marriage in the augmented estate. *See infra* note 218 and accompanying text.

140. *See* 20 PA. CONS. STAT. ANN. § 2203 comment (Purdon Supp. 1991).

141. Section 11 of the Estates Act provided in pertinent part:

A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved.

20 PA. CONS. STAT. § 301.11 (Supp. 1971). Parenthetically, § 2203(a)(3) is more limited than § 11 because it does not "include property which the decedent has given away absolutely and cannot recapture for his own benefit, even though he has retained a power of appointment which cannot be exercised in his favor during his life." 20 PA. CONS. STAT. § 2203 (Purdon Supp. 1991) (quoting Official Comment 1978). *See In re Estate of Behan*, 399 Pa. 314, 160 A.2d 209 (1960) (property subject to the decedent's special power of appointment is includible in the net estate when the decedent is also the donor of the power). Furthermore, unlike § 11, § 2203(a)(3) explicitly requires that the decedent's retained power be exercisable for the decedent's benefit. The words "power of consumption" in § 11, however, have been interpreted to mean a power to consume for the decedent's benefit. *See In re Estate of Schwartz*, 449 Pa. 112, 116, 295 A.2d 600, 603 (1972) (plurality opinion) (indicating that prior decisions under § 11 "involved situations where the interest retained by the decedent could be exercised to his own advantage"); *Longacre v. Hornblower*

Pennsylvania statute were added later, apparently in response to the UPC.¹⁴² When adopted, section 11 did not expressly exclude antenuptial transfers from the forced share on the theory that the critical factor in including transfers of property in the augmented estate is the nature of the decedent's power over the property and not the time of transfer. According to Professor Bregy, a leading commentator on and drafter of the Pennsylvania Estates Act, the legislature was advised to focus on the extent to which a decedent retained attributes of ownership over the transferred property at death and not the donor's intent in making the transfer.¹⁴³

& Weeks, 83 Pa. D. & C. 259, 262 (1952) (stating that "the legislature was using the word 'consumption' according to its common meaning, and intended to apply the act to all conveyances of assets subject to a power in the transferor to reacquire beneficially the property conveyed").

Minnesota, until recently, had a statute that appeared to have been modeled on § 11 of the Pennsylvania statute. See MINN. STAT. § 525.213 (1969). Without limiting its coverage to transfers during marriage, the elective share statute included transfers of property pursuant to which the decedent retained a testamentary power of appointment or a power of disposition or consumption at death. Thus, the time of the transfer and the intent with which it was made should have been irrelevant with respect to the includibility of the transfer. See Note, *The Minnesota Legislature, 1969 Regular Session*, 54 MINN. L. REV. 1029, 1033 (1969) (concluding that under the Minnesota statute, the decedent's control over the property at death is determinative). Unlike § 11, which was interpreted to include joint tenancies, the Minnesota statute was held to exclude such dispositions of property. *In re Estate of O'Brien*, No. C7-87-1718 (Minn. Ct. App., Jan. 5, 1988). However, the court's reasoning appears to be questionable. First, the court stated that a joint tenancy was not a testamentary power of appointment, but did not discuss whether it was subject to a power of consumption or disposition. Cf. *O'Connell Estate*, 16 Pa. Fiduc. Rep. 491, 493 (Orphan's Ct. 1966) (holding that a joint tenancy with right of survivorship created prior to, but not in contemplation of marriage was subject to a right of election because "it was entirely within the [husband's] power . . . during his lifetime to consume his undivided one-third interest, including his right of survivorship"). Second, the court seemed to be influenced by the particular facts, rather than a proper analysis of the statutory language. In *O'Brien*, the decedent husband and the surviving spouse, although not legally separated, maintained separate residences for 15 years and made separate property arrangements. All of the husband's property was in joint tenancies with his daughters and sister with whom he had close relationships; they had frequently played the role of care-givers. In addition, the widow had sufficient independent means. Thus, in the absence of policy reasons supporting the right of election, the court found that their post-wedding joint tenancies were justifiable property dispositions.

The repeal of § 525.213 in 1985 was effective for estates of decedents dying after December 31, 1986. This section was replaced by provisions modeled on the UPC. See MINN. STAT. ANN. § 524.2-201 (West Supp. 1991). Thus, joint tenancies, like other testamentary substitutes, are subject to the right of election only if they are created during marriage. *Id.* § 524.2-202(1)(iii).

142. See 20 PA. CONS. STAT. ANN. § 2203 comment (Purdon Supp. 1991).

143. See B. BREGY, PENNSYLVANIA INTTESTATE, WILLS AND ESTATES ACT OF 1947 5867 (1949). Bregy, who played a significant role in drafting the Estates Act, concluded

Consistent with this commentary, the lower courts in Pennsylvania interpreted section 11 to apply to all conveyances subject to retained powers, regardless of whether they were made before or during marriage. This construction was based on the statutory language that did “not limit itself to the conveyances made by a married person.”¹⁴⁴ For the most part, the cases decided under section 11 ignored the fraud on marital rights decisions. Therefore, under these cases, it was immaterial whether the conveyance was made prior to the engagement or even before the couple met. Instead, the courts focused on the decedent’s retention of a power of consumption over the assets transferred until death and not on any actual fraud committed against the surviving spouse.

The lower court decisions appear to have reached the correct result both in their interpretation of section 11 and in their failure to rely on the doctrine of antenuptial transfers in fraud of marital rights. As the court in *Blair Estate*¹⁴⁵ indicated, section 11 applied to “a person,” not to a married person. In addition, it did not require that the transfer occur during marriage. The omission of the words “married” or “during marriage” should be material in an elective share statute that defines the parameters of a right of election.¹⁴⁶

Such an interpretation also accords with the policy behind the statute. To the extent that the goal of the legislature was to include conveyances of property in the augmented estate if the decedent retained a power to revoke the disposition or consume the principal (*i.e.*, retained economic control over the property), then the time the decedent made the disposition is immaterial. In essence, retention of this kind of control over the

that “an antenuptial transfer could be attacked under the present provision, and it probably would make no difference how long before the marriage the transfer was made.” *Id. But cf. Smigell v. Brod*, 366 Pa. 612, 79 A.2d 411 (1951) (where the decedent conveyed real property subject to a retained life estate prior to an engagement to marry, the transferred property was not subject to the surviving spouse’s share).

144. *Blair Estate*, 42 Pa. D. & C.2d 223, 228 (1967). In *Blair*, the court subjected funds included in a pension plan to the wife’s right of election because the decedent contributed the funds prior to their marriage. The court held that the decedent retained a power of consumption over the contributions to the pension fund up to his death “even though it would require that he terminate his employment to do so.” *Id.* at 227. Although the court did not refer to the federal estate tax cases, the same argument was used to include retirement benefits in the decedent’s estate under Internal Revenue Code § 2038. See *Estate of Tully*, 528 F.2d 1401 (Ct. Cl. 1976).

145. 42 Pa. D. & C.2d 223 (1967).

146. See MO. ANN. STAT. § 474.150(2) (Vernon Supp. 1990) (“Any conveyance of real estate made by a *married* person . . . is deemed to be in fraud of the marital rights of his spouse”); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981) (including as testamentary substitutes those dispositions “effected . . . *after the date of the marriage*”); 20 PA. STAT. ANN § 2203(a)(2) (Purdon Supp. 1991) (“Income . . . of property conveyed by the decedent *during the marriage*” subject to right of election).

property is tantamount to property ownership; therefore, any conveyance by the decedent that involves the retention of control over the principal at the time of death and that removes property from the probate estate should be a fraud on the marital rights of the surviving spouse in the objective sense.

Because the theory behind section 11 was to treat assets that the decedent was able to dispose of or enjoy during marriage the same as property that was titled in the decedent's name, both types of conveyances should be subject to the elective right. Consequently, under section 11, testamentary substitutes were presumptively fraudulent and could be reached by the surviving spouse without requiring proof of actual fraud by the decedent. In the absence of an actual fraud requirement, the timing of the conveyance was immaterial. This fact was recognized by the lower courts, but not by the Pennsylvania Supreme Court in *Estate of Kotz*.¹⁴⁷

If not for *Estate of Kotz*, this analysis would apply with equal force to the interpretation of "[p]roperty conveyed by the decedent during his lifetime" under section 2203(a)(3). Despite the absence of language in section 11 restricting its applicability to conveyances during marriage, the Pennsylvania Supreme Court in 1979 limited the application of section 6111, the successor to section 11 and the predecessor of section 2203, to "conveyances during marriage."¹⁴⁸ In reaching its decision, the court was influenced by the heading of section 6111: "Conveyances to Defeat Marital Rights." The court interpreted this section to exclude premarital conveyances. This interpretation has no support in the legislative history of either section 11 or section 6111. As Bregy indicated, section 11 reached antenuptial transfers of property that otherwise met the requirements of the statute.¹⁴⁹ Furthermore, it ignored the possibility that certain prenuptial transfers are made to defeat marital rights.

Nevertheless, in view of the gloss imposed by the Pennsylvania Supreme Court's decision in *Estate of Kotz*, it is reasonable to ask whether a similar interpretation would be placed on section 2203(a)(3), which was enacted in 1978, prior to the *Kotz* decision.¹⁵⁰ If the legislature wanted to limit testamentary substitutes to those created during marriage, it would have used identical language for subsections 2203(a)(2) to

147. 486 Pa. 444, 406 A.2d 524 (1979).

148. *Id.* at 451, 406 A.2d at 531 (joint tenancy with a right of survivorship created eight years before marriage is not subject to the right of election).

149. B. BREGY, *supra* note 143, at 5867.

150. As Justice Roberts pointed out in his concurrence, § 2203(a)(4) applies to joint tenancies with a right of survivorship created by the decedent after marriage and therefore, *Kotz* would have been decided the same way under the current statute. *Kotz*, 486 Pa. at 459, 406 A.2d at 532.

2203(a)(6), particularly in view of the more expansive interpretation of section 11 by Bregy and several lower court decisions.¹⁵¹ On the other hand, the legislature has not amended the statute since *Estate of Kotz*, which may indicate its agreement with the decision.

Given the legislature's rejection of the intent test and its reliance on objective criteria to evaluate inter vivos transfers, an expansive interpretation of section 11, as opposed to the limited reading by *Estate of Kotz*, seems preferable and more consistent with the goals of Pennsylvania's elective share statute. In fact, the legislature should reconsider section 2203's inclusion of other testamentary substitutes in the augmented estate only if created during marriage. Certainly, a decedent retains no greater power over a revocable trust or property transferred subject to a retained power to invade the principal than over a joint tenancy with a right of survivorship. In addition, the beneficial interest is not necessarily greater when the decedent retains a power to invade the corpus for his or her benefit rather than a life estate. In each case, the focus should only be on the extent of the decedent's power over or interest in the transferred property at death and not on whether the transfer preceded or followed marriage.¹⁵² This rationale applies with equal force to gifts in contemplation of death.¹⁵³ Although the decedent's legitimate estate and tax planning objectives should be safeguarded, an individual should not be able to deplete the augmented estate by making large antenuptial gifts even if death follows within a year of marriage.¹⁵⁴

151. B. BREGY, *supra* note 143, at 5867. See *O'Connell Estate*, 16 Pa. Fiduc. Rep. 491, 492-93 (1966) (where joint tenancy with a right of survivorship was created before the marriage was contemplated and was not for the purpose of defrauding the widow, the surviving spouse could elect against the property under § 11 because the decedent had a lifetime power to *consume* his interest); *Clephane Trust*, 36 Pa. D. & C.2d 386 (1965) (allowing a right of election against a revocable trust created more than two years before the marriage and without intent to defraud later wife); *Hagy Estate*, 15 Pa. Fiduc. Rep. 456, 461 (1964).

152. The only relevance that a premarriage transfer should have is if policy dictates that the surviving spouse receive a lesser fraction of the augmented estate; in that event, the fraction should relate to the length of the marriage and not the time the testamentary substitute was created. *Cf.* Langbein & Waggoner, *supra* note 1 (advocating adjustments to the forced share based on duration of marriage). Another relevant factor might be whether the decedent had children from a prior marriage.

153. 20 PA. CONS. STAT. ANN. § 2203(a)(6) (Purdon Supp. 1991).

154. Because § 2203(a)(6) only captures gifts made within one year of death and then only if "the aggregate amount so conveyed to each donee exceeds \$3,000," if it applied to antenuptial transfers, the marriage could only have lasted less than one year. *Id.* In cases of such a short marriage, some have argued that it is inequitable to give the surviving spouse the same portion of the decedent's estate as the survivor would have been entitled to had the marriage lasted 30 years. See, e.g., Langbein & Waggoner, *supra* note 1, at 314-21 & n.8. This objection can best be dealt with, if it should be at all, by adjusting the fractional share rather than excluding premarriage transfers. See U.P.C. § 2-201(a) (Supp. 1991).

The other rationale for excluding antenuptial transfers from the augmented estate, that is, preserving dispositions of property for the benefit of children from a prior marriage,¹⁵⁵ does not support the distinction made by the Pennsylvania statute if the limitation in *Estate of Kotz* does not apply to section 2203(a)(3). No logical reason exists to suppose that a parent will be less likely to use a retained power to benefit a child rather than a life estate or joint tenancy.¹⁵⁶

More troubling is the silence in the legislative history of section 11 and its successors concerning the interplay, if any, between the elective share statute and the transfer in fraud of marital rights doctrine.¹⁵⁷ Assuming that section 2203(a)(3) applies to prenuptial transfers, conveyances subject to retained powers of revocation or invasion for the decedent's benefit should no longer be subject to the doctrine because this section makes the existence of fraud irrelevant to the includibility of the transferred property in the augmented estate. Conveyances covered by section 2203(a)(2), (4), (5), and (6) would still be subject to the common-law doctrine.¹⁵⁸ Of course, the doctrine presumably applies to outright conveyances in which the decedent retained no interests or powers exercisable for his or her own benefit. These transfers are not testamentary substitutes even if created during marriage.

The cases decided subsequent to the adoption of section 11 involving the antenuptial transfer in fraud of marital rights doctrine shed no light

155. See, e.g., U.P.C. § 2-202 comment (1983). *But see* WIS. STAT. ANN. § 861.17(2) (repealed 1985). There is, however, no evidence that in Pennsylvania, antenuptial transfers in fraud of marriage for the benefit of a child were not subject to attack. This exception was originally enunciated in the English cases. See *supra* note 80.

156. This author's review indicates, however, that a majority of cases dealing with transfers in fraud of marriage involved retained life interests. This should not be determinative because most of the cases dealt with transfers of land in fraud of dower where the most common type of retained interest would probably be a life estate or a joint tenancy.

157. See, e.g., *O'Connell Estate*, 16 Pa. Fiduc. Rep. 491 (Orphan's Ct. 1966). The court found that a joint tenancy with right of survivorship held by the decedent with his sisters was subject to the widow's right of election pursuant to § 11 despite its creation prior to marriage and merely noted that "[t]here is no claim that the deed was made for the purpose of defrauding the rights of the widow . . . or that the decedent had any intention of marriage at the time the deed was executed." *Id.* at 492-93. The court seemed to assume that because the deed was not executed in contemplation of marriage, it was valid. The court neglected to indicate, however, that as the doctrine was applied in Pennsylvania, it only invalidated a transfer to the extent of the surviving spouse's rights in the property. Thus, assuming the requirements of the doctrine of antenuptial transfers in fraud of marital rights and § 11 were met, the results should not have been different.

158. Commencing with *Kirk v. Kirk*, the Pennsylvania Supreme Court, in imposing an actual fraud requirement, took a more stringent view of the requirements necessary to invalidate a transfer as a fraud on marital rights. For a discussion of the evolution of this doctrine in Pennsylvania, see *Bregy & Wilkinson*, *supra* note 33.

on the relationship between this rule and the elective share statute.¹⁵⁹ They only demonstrate that the doctrine continues to be applied without regard to the elective share statute. The surviving spouse, however, will have greater difficulty proving fraud now than in the period preceding the Pennsylvania Supreme Court's decision in *Kirk v. Kirk*,¹⁶⁰ which imposed an actual fraud test.

2. *New York*.—A different approach is followed by New York's Estates, Powers & Trusts Law (EPTL),¹⁶¹ which explicitly includes in the net estate only those testamentary substitutes created during marriage.¹⁶² Like the Pennsylvania statute and the UPC,¹⁶³ the EPTL adopts objective criteria to determine the includibility of inter vivos transfers in the elective share, but does not limit transfers subject to retained powers to dispositions for the decedent's benefit.¹⁶⁴ The EPTL is silent as to the treatment of antenuptial transfers made in fraud of marital rights.

The legislative history of the EPTL is not helpful in determining whether the common-law doctrine of antenuptial transfers in fraud of marital rights survives the enactment of the objective standards adopted in section 5-1.1(b)(1). A legislative report of the Temporary State Commission merely notes that section 18-a (enacted as EPTL section 5-1.1)

159. See, e.g., *Brinko v. Redden*, 402 Pa. 408, 167 A.2d 467 (1961) (where a decedent transferred real property apparently reserving a life estate during his first marriage and two years before his second marriage, the conveyance was not in fraud of the second wife's marital rights); *Smigell v. Brod*, 366 Pa. 612, 79 A.2d 411 (1951) (enunciating the rule that when a husband transferred property subject to a retained life estate prior to engagement, the surviving spouse could not acquire an equitable interest in the property and therefore, could not set aside the conveyance as fraudulent); *Durant v. Durant*, 294 Pa. Super. 202, 439 A.2d 821 (1982) (upholding the decedent's transfer of a tavern to his brother six months prior to marriage because the wife could not sustain the burden of proof that she knew of and relied on her husband's possession of property, the husband received \$10,000, and the transfer may have occurred prior to the engagement). Cf. *Andrikanics v. Andrikanics*, 371 Pa. 222, 223, 89 A.2d 792, 793 (1952) (where a wife challenged her husband's transfer of property to the children of his first marriage two weeks before the marriage on the ground of undue influence, the court, in upholding the transfer, stated that "[a] question might be raised as to whether . . . the wife-plaintiff has the status in this proceeding to demand relief inasmuch as she was not married to the husband-plaintiff at the time the conveyance in question was made"). The *Andrikanics* court's reliance on *Smigell* appears to be misplaced because *Smigell*, like *Brinko*, involved a transfer prior to the engagement.

160. 340 Pa. 203, 16 A.2d 47 (1940). It should be noted that *Kirk v. Kirk* was decided seven years before the adoption of § 11. For further discussion of this case, see *supra* note 112.

161. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981).

162. *Id.*

163. U.P.C. § 2-202(b)(2) (Supp. 1991).

164. N.Y. EST. POWERS & TRUST LAW § 5-1.1(b)(1) (McKinney 1981).

applies to “[o]nly such transactions effected by the decedent after the marriage and after the effective date of the bill.”¹⁶⁵ The Commission enumerated “areas of related subjects which are not covered herein but which could be profitably studied”¹⁶⁶ and asked whether “the present law with respect to transfers made between the engagement and the marriage [should] be changed.”¹⁶⁷ This question was never answered and it leaves open the possibility that a subjective test incorporating the common-law doctrine may be applied to testamentary substitutes created during the engagement period. The vehement rejection by the Bennett Commission, which drafted section 5-1.1 and the legislative reports, of applying a subjective test to testamentary substitutes created during marriage casts doubt on the doctrine’s continued viability.¹⁶⁸ This is particularly true with respect to outright transfers.¹⁶⁹ In addition, the report’s query assumes that transfers made prior to an engagement will be excluded from the right of election. Most troublesome is the implicit assumption that testamentary substitutes created prior to marriage should be regarded differently for elective share purposes than assets that are acquired before marriage and titled in the decedent’s name at death. The reports accompanying the EPTL give no rationale for this distinction.¹⁷⁰

165. THIRD REPORT, *supra* note 54, at 24.

166. *Id.* at 118.

167. *Id.* at 118-19 n.14(e) (citing W. MACDONALD, *supra* note 33, at 354 app. C); Vaughan, *supra* note 33, at 178.

168. In a note to the proposed statute, the Report indicates that the “act . . . is intended to provide a comprehensive statement as to the rights of a surviving spouse with respect to inter vivos transactions made by the decedent, as well as property disposed of by will.” THIRD REPORT, *supra* note 54, at 116.

169. *Id.* at 138 (“It is submitted that to protect freedom of alienation of property every outright and absolute transaction should be immune from the attack of the surviving spouse even if it is gratuitous.”).

170. In 1985, a proposed amendment to EPTL § 5-1.1(b)(1) included testamentary substitutes created prior to marriage in the net estate. The report, in support of the proposal introduced as Senate Bill No. 5058, explained that the appropriate test for inclusion as a testamentary substitute is revocability, not whether it is created before or during marriage. See LEGISLATURE OF NEW YORK, MEMORANDUM OF THE LAW REVISION COMMISSION RELATING TO THE RIGHT OF ELECTION OF A SURVIVING SPOUSE, LEGIS. DOC. No. 65[D], at 2 (1985); LEGISLATURE OF NEW YORK, RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE 1985 LEGISLATURE RELATING TO THE RIGHT OF ELECTION OF A SURVIVING SPOUSE, at 3 (1985). This amendment was never adopted by the legislature. Last year, a proposal and memorandum in support of the proposal submitted by the Trusts and Estates Section of the New York State Bar Association recommended changes in EPTL § 5-1.1 that generally broadened the rights of the surviving spouse. See N.Y. BAR REPORT, *supra* note 1. These changes, however, did not include subjecting premarriage testamentary substitutes to the right of election. Most recently, the Advisory Committee Report made broad recommendations to revise both the New York elective share and

The few cases involving premarriage transfers decided after the enactment of EPTL section 5-1.1¹⁷¹ shed no light on the continued viability of the doctrine of antenuptial transfers in fraud of marital rights.¹⁷² *In re Scheiner*¹⁷³ is a recent example. In *Scheiner*, the decedent, prior to marriage, purchased Treasury bills registered in the names of the decedent and his sister, payable to the survivor. The court held that the surviving spouse could not elect against the Treasury bills, even though they rolled over during marriage, because the decedent purchased them before marriage.¹⁷⁴ The court did not discuss whether the decedent purchased them in contemplation of marriage, but applied a mechanical test to determine whether the inter vivos transfers met the requirements of a testamentary substitute.¹⁷⁵

The paucity of cases in the post-EPTL section 5-1.1 era is surprising in light of the comparatively large number of cases that applied the doctrine to premarriage transfers made before the effective date of the act. This is particularly striking in light of New York's liberal interpretation of the doctrine covering premarriage transfers of personalty as well as real estate. To the extent that section 5-1.1 restricts a spouse's

intestacy statutes. Among its recommendations regarding the elective share was a proposal to include as testamentary substitutes: (a) insurance policies on the decedent's life if the decedent retained any incidents of ownership or transferred them within one year of death; (b) pension, profit sharing, and deferred compensation plans and IRAs; (c) United States government bonds payable on the decedent's death to a third party; (d) dispositions made during marriage subject to retained life interests; (e) revocable transfers; (f) general lifetime powers of appointment; and (g) certain inter vivos transfers made within one year of death that exceed the gift tax exclusion under I.R.C. § 2503(b) and (e) to the extent that the "decedent did not receive full and adequate consideration in money or money's worth for such transfers." ADVISORY COMMITTEE REPORT, *supra* note 1, at 15-16 & app. C. The Report rejected modeling the elective share statute on either the community property or the equitable distribution models. *Id.* at 8-9.

171. EPTL § 5-1.1 became effective in 1967 and applied to testamentary substitutes created on or after September 1, 1966 if the decedent and the surviving spouse were married prior to their establishment and the decedent executed a will or died intestate on or after that date. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 app. (McKinney 1981).

172. At least one commentator appears to assume that the doctrine is still valid. See Note, *EPTL § 5-1.1; Buy and Sell Agreement Directing Payment to Third Party Upon Death of Testator Held a Testamentary Substitute*, 58 ST. JOHN'S L. REV. 219, 223 n.166 (1983) (indicating that a transfer of realty while engaged would be void to the extent of a widow's dower rights).

173. 141 Misc. 2d 1037, 535 N.Y.S.2d 920 (1988). For a commentary on *Scheiner*, see Gibbs & Ordovery, *Right of Election by Surviving Spouse*, N.Y.L.J., Sept. 13, 1989, at 3, col. 4.

174. *Scheiner*, 141 Misc. 2d at 1038, 535 N.Y.S.2d at 921. The surrogate determined that Treasury bills could never be testamentary substitutes because of the exemption in EPTL § 5-1.1(b)(2)(C) excluding "United States savings bonds payable to a designated person." *Id.*

175. *Cf.* Estate of Walton, 56 A.D.2d 436, 392 N.Y.S.2d 621 (1977).

ability to challenge prenuptial conveyances of property, this result is undesirable.

*LeStrange v. LeStrange*¹⁷⁶ crystallized the inherent dangers to a spouse in a multiple marriage society in which the surviving spouse's interest may be completely sacrificed to the legitimate interests of children from a prior marriage.¹⁷⁷ *LeStrange* involved a husband and wife who married late in life and had children from prior marriages. After their engagement, Mr. LeStrange represented to his fiancée that he owned real property and a substantial sum of money. At the urging of his children, and without informing his prospective wife, he transferred all of his property to a trust approximately six weeks before his marriage. The trust directed Mr. LeStrange, as trustee, to pay himself the income for life with the remainder to be divided among his children. The trustee had the power to withdraw the principal only with the consent of his sons.¹⁷⁸ The court stated that the "transfers were made in contemplation of the marriage

176. 242 A.D. 74, 273 N.Y.S. 21 (1934). Prior to the *LeStrange* decision, the doctrine was apparently only applied to antenuptial conveyances of real property.

177. Protecting the interests of children in a multiple marriage society is a central concern of the redesigned elective share provisions of the UPC. See U.P.C. art. II, pt. 2 general comment (Supp. 1991); Waggoner, *Spousal Probate Rights*, *supra* note 1. Securing the children's interest is accomplished at the surviving spouse's expense when accommodation of both parties' interests is possible.

178. Assuming that this trust was created during marriage and after the effective date of EPTL § 5-1.1, it arguably would not have been considered a testamentary substitute. Reservation of a life estate under the EPTL (unlike the Pennsylvania statute or the UPC) does not render either the life estate or the underlying transfer includible in the net estate. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1) (McKinney 1981). *But see supra* note 170 (recommendation of the Advisory Committee Report). Generally, a power granted by the express provisions of the instrument to invade the principal held by the decedent at death in conjunction with another person results in the includibility of the principal to the extent of the power in the net estate. In this situation, the husband held that power with the beneficiaries. See *LeStrange*, 242 A.D. at 75, 273 N.Y.S. at 23. In such a case, the trust was terminable and therefore invadable as a matter of law (under EPTL § 7-1.9(a) (McKinney 1967)), not by virtue of the "express provisions of the disposing instrument." N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(E). The Report makes clear that a power of the decedent to terminate in conjunction with the beneficiaries is not a power within the elective share provision. See THIRD REPORT, *supra* note 54, at 130; Kwestel & Sepowitz, *supra* note 1, at 18. *But see In re Estate of Riefberg*, 58 N.Y.2d 134, 446 N.E.2d 424, 459 N.Y.S.2d 739 (1983) (finding a power to revoke under § 5-1.1(b)(1)(E) where a contract provided that it could be terminated upon the mutual agreement of the parties). A conclusion that the *LeStrange* trust would not be a testamentary substitute even if created during marriage would point to a serious deficiency in the New York statute. This deficiency could be remedied easily by amending the statute to provide that a transfer with a retained life estate constitutes a testamentary substitute or by eliminating the distinction between a power to revoke or terminate retained by the express provisions of the disposing instrument and such power arising by operation of law. See Kwestel & Sepowitz, *supra* note 1, at 24-27, 60.

and with intent to defraud the plaintiff and deprive her of her prospective rights as a surviving spouse”¹⁷⁹ without notice to her and held the transfers void under the following rule:

A man cannot deliberately, by his own purpose or through the inducement of other interested persons, strip himself of all inheritable property in fraud of his prospective wife, to whom he has represented that he has sufficient property for their comfortable support and maintenance and in which she will be entitled to share upon his decease.¹⁸⁰

Although the right to support and maintenance exists during marriage, the court explicitly recognized an inheritance right which is a mere expectancy until death.¹⁸¹ Thus, to reach an equitable result, the court essentially held that Mr. LeStrange defrauded his prospective wife of an expectancy that would not ripen into a right until death. Application of this rule, however, does not produce the most desirable result. If Mr. LeStrange had created the trust prior to his engagement (the situation in Case 1), the transfer would not have implicated the doctrine and would have been valid. At her husband’s death, Mrs. LeStrange would be left with virtually no interest in his estate, although the children’s interests would be secure.¹⁸² From a support and marital-sharing viewpoint, this does not promote the goals of an elective share system. On the other hand, giving the surviving spouse a right to elect against the trust property by virtue of the reserved life estate and power to invade the principal would recognize her support needs and her contribution to the marriage. This would decrease, but certainly not eliminate, the children’s shares. In short, incorporating the doctrine of antenuptial transfers in fraud of marital rights into the New York elective share statute would not produce the most favorable result.¹⁸³

3. *The Uniform Probate Code.*

a. *The marital partnership theory*

The recent revisions of the UPC’s elective share provisions embody a view of marriage and spousal rights at death that is dramatically

179. *LeStrange*, 242 A.D. at 76, 273 N.Y.S. at 24.

180. *Id.* In *LeStrange*, unlike many of the constructive fraud cases, the decedent engaged in actual misrepresentation with ensuing reliance by his prospective wife.

181. *Lestrangle v. Lestrangle*, 242 A.D. 74, 76, 273 N.Y.S. 23, 24 (1934). *See also* *Rubin v. Myrub Realty Co.*, 244 A.D. 541, 279 N.Y.S. 867 (1935).

182. This assumes that, as an older couple, significant assets were not accumulated during marriage.

183. This is independent of all other problems associated with the doctrine.

different from its predecessor. Redesigned Article II explicitly adopts the “contemporary view of marriage . . . [as] an economic partnership.”¹⁸⁴ According to Professor Lawrence Waggoner, who was primarily responsible for the reformulation of Article II, two rationales support this view. As the UPC indicates, the sharing theory derives from “an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, *i.e.*, in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than property acquired by gift or inheritance).”¹⁸⁵ Pursuant to this theory, property produced before the creation of the partnership or acquired gratuitously, and therefore not generated with the other partner’s support, is not part of the bargain and can be disposed of freely. A decedent who disinherits a surviving spouse by leaving marital property to third parties breaches the implied agreement between the spouses, and the decedent’s estate is subject to the survivor’s elective right.¹⁸⁶ A second theory incorporates a restitution concept. This theory recognizes the surviving spouse’s contribution to the marriage, whether pecuniary or nonpecuniary, and compensates the survivor for lost opportunities.¹⁸⁷

In a community property system, a marital-sharing theory results in a fifty percent spousal ownership of the marital property produced at any time during marriage. The UPC rejected this approach for administrative reasons and instead, implemented the accrual system proposed by Professors Langbein and Waggoner.¹⁸⁸ This system bases the elective share on the length of the marriage and assumes that the percentage of marital property increases with the length of the marriage.¹⁸⁹ The surviving spouse of a short-term marriage of one to two years receives three percent of the decedent’s property titled in the decedent’s name,

184. U.P.C. § 2-202 art. II, pt. 2 general comment (Supp. 1991); Waggoner, *Spousal Probate Rights*, *supra* note 1, at 349-51.

185. U.P.C. art. II, pt. 2 general comment (Supp. 1991). *See* M. GLENDON, *supra* note 17, at 131. This, of course, assumes that the parties did not enter into an antenuptial agreement.

186. Waggoner, *Spousal Probate Rights*, *supra* note 1, at 349.

187. *Id.* at 349-350. *See* M. GLENDON, *supra* note 17, at 131.

188. *See* Langbein & Waggoner, *supra* note 1, at 314-21.

189. The accrual system can be problematic. For instance, a surviving spouse who has been married for less than a year, and who buys a lottery ticket with marital assets, wins, puts the money in his or her own name and then dies, will be disadvantaged. The Advisory Committee Report specifically rejected the accrual system. It found this feature “undesirable” because it “essentially valued spousal rights by reference only to the length of a marriage, ignoring both the source of the marital assets and the fact that even in marriages of short duration a surviving spouse may have contributed substantially to the acquisition of family assets.” ADVISORY COMMITTEE REPORT, *supra* note 1, at 9.

augmented by certain testamentary substitutes. This share increases with each year of marriage to a maximum of fifty percent of the property.¹⁹⁰ By the end of fifteen years, virtually all of the decedent's property, the drafters of the UPC posit, will be generated by partnership efforts.¹⁹¹ At the heart of the UPC's accrual system is the premise that only property acquired by the marital partnership, absent some need of the surviving spouse that would implicate the support mechanism,¹⁹² should be includible in the augmented estate.¹⁹³ Under this theory, property acquired prior to marriage should not be subject to the right of election.

This approach reflects the concern for ease of administration and predictability in probate matters. The accrual method seeks to avoid the difficult problems frequently associated with equitable distribution and community property systems.¹⁹⁴ For example, the accrual system eliminates the need to trace the source of the assets to determine whether they were acquired before or during the marriage or by gift or inheritance.¹⁹⁵ Thus, the difficulties encountered in a community property jurisdiction or under an equitable distribution system differentiating between marital and separate property are dispensed with "by applying an ever-increasing percentage to the couple's combined assets without regard to when or how those assets were acquired, rather than applying a constant percentage (50%) to an ever-growing accumulation of assets."¹⁹⁶ Another rationale for the accrual system, although not artic-

190. U.P.C. § 2-201(a) (Supp. 1991).

191. *Id.*

192. *Id.* § 2-201(b).

193. *Id.* art. II, pt. 2 general comment.

194. See Kwestel & Sepowitz, *supra* note 1, at 8 n.23; Waggoner, *Spousal Probate Rights*, *supra* note 1, at 355-58. Professor Waggoner also notes that because a goal of the redesigned UPC is to achieve uniform state probate laws, the UPC could not incorporate the equitable distribution system that varies among the states. See J. OLDHAM, *DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY* (1989). In its rejection of an equitable distribution model, the Advisory Committee Report stated that the use of discretionary factors and the difficulty of tracing assets are undesirable. ADVISORY COMMITTEE REPORT, *supra* note 1, at 8-9.

195. U.P.C. art. II, pt. 2 general comment (Supp. 1991).

196. *Id.* The comment explains that the elective share percentage of the couple's combined property is equated with 50% of their marital assets. It gives an example of a marriage lasting between 10 and 11 years. Under § 2-201(a), the elective share percentage is 30% and under § 2-207(a)(4), 30% of the couple's combined assets are equated with 50% of the assets acquired during the marriage (other than by gift or inheritance). Section 2-207 specifies the procedure for satisfaction of the elective share and subsection (a)(4) provides:

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

ulated, is that the commitment to the marriage arguably increases with its length. A surviving spouse of a longer marriage should receive a greater percentage of the decedent's estate. Basing the fractional share on a commitment theory seems to accord with the justifiable expectations of the surviving spouse.

The augmented estate against which the elective share percentage is applied also includes the value of the property owned by the surviving spouse at the decedent's death and the value of the surviving spouse's reclaimable estate.¹⁹⁷ The purpose of combining both spouses' estates is to "implement a partnership or marital-sharing theory"¹⁹⁸ as well as to ensure that the surviving spouse does not receive a windfall. Under the pre-1990 UPC, the surviving spouse's property was included in the augmented estate, but only to the extent that it was titled in the survivor's name or in the form of testamentary substitutes and was derived from the decedent.¹⁹⁹ Although the comment to redesigned section 2-202 does not specify the rationale for the prior version,²⁰⁰ a reading of the pre-1990 section and its comment indicates that the policy was to include property given to the surviving spouse by the decedent during the latter's

(4) Amounts included in the augmented estate under Section 2-202(b)(4) up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in Section 2-201(a) appropriate to the length of time the spouse and the decedent were married to each other.

Id. § 2-207(a)(4).

197. *Id.* § 2-202(b)(4). This subsection includes:

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

Subsection (b)(2)(iii) refers to the proceeds of insurance and retirement benefits other than Social Security.

198. *Id.* § 2-202 comment. The Advisory Committee Report rejected the UPC's distinction between assets acquired before marriage and assets acquired during marriage and its inclusion of the surviving spouse's estate in the augmented estate. The Report noted, however, that some members of the Committee were troubled by its position. ADVISORY COMMITTEE REPORT, *supra* note 1, at 8.

199. U.P.C. § 2-202(2) (1983). Of course, the consequence of including lifetime transfers to the surviving spouse is a reduction of the spouse's right of election because these transfers are credited against the elective share.

200. The comment to the redesigned UPC notes that pre-1990 § 2-202(2) included those assets of the surviving spouse derived from the surviving spouse "[u]nder a different rationale, no longer appropriate under the redesigned system." U.P.C. § 2-202 comment (Supp. 1991).

lifetime in the augmented estate.²⁰¹ Thus, the focus of the pre-1990 UPC was on the decedent's property. Its goal was not the sharing of marital property at death, which can be effected by pooling the property of both spouses regardless of its source, but rather on preventing the survivor from realizing a windfall at the decedent's death by considering the extent to which the decedent made provisions for the survivor during life. In addition to implementing the marital partnership theory, this feature of redesigned section 2-202 eliminates the need to trace the source of the survivor's property which can be an extremely arduous task, particularly in the case of a long marriage.²⁰²

b. Testamentary substitutes includible regardless of when created

Redesigned section 2-202 manifests an enhanced concern with preventing spousal disinheritance by broadening the surviving spouse's right of election against nonprobate transfers. For the first time, it extends the right of election to certain nonprobate property transferred prior to marriage or property over which the decedent acquired a power prior to marriage and "owned in substance as well as in form."²⁰³ Three categories of property fall within this group: (1) property subject to a presently exercisable general power of appointment held by the decedent; (2) property subject to the decedent's unilaterally severable right of

201. U.P.C. § 2-202(2) & comment (1983). The pre-1990 UPC included transferred property in the augmented estate when the beneficiary was the surviving spouse. Property derived from the decedent, whether from inter vivos gifts or insurance benefits paid at death, was credited against the surviving spouse's right of election under pre-1990 UPC § 2-202(2) regardless of "whether the transfers [were] made before or after marriage." *Id.* Although not explicitly articulated, the reason for including transfers prior to marriage in the augmented estate when they benefit the surviving spouse appears to have been the section's policy of protecting the surviving spouse while preventing the receipt of a windfall. In all likelihood, most of these transfers to the surviving spouse probably occurred after marriage; therefore, the distinction, from a practical viewpoint, may not have been significant. The comment explained:

[T]hus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. . . . [I]t is obvious that this section will operate in the long run to decrease substantially the number of elections. This is . . . because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate arrangements by which wealth is today transferred.

Id. § 2-202 comment.

202. This advantage is explicitly recognized in the comment. U.P.C. § 2-202 comment (Supp. 1991).

203. *Id.*

survivorship; and (3) proceeds of insurance policies in which the decedent retained certain incidents of ownership.²⁰⁴

In the first category, property is includible in the reclaimable estate as long as the decedent held the power alone immediately before death or if not, released the power or exercised it in favor of anyone other than the decedent or the decedent's estate, spouse, or surviving spouse while married to the surviving spouse and within two years of death.²⁰⁵ The property is includible regardless of whether the decedent was also the donor of the power and whether the power was created before or during marriage.²⁰⁶ The comment explains the reason for this departure from the prior Code:

The general theory of revised Section 2-202(b)(2)(i) is that a decedent who, during life, alone had a power to make himself or herself the full technical owner of property was in substance the owner of that property for purposes of the elective share. Whether the decedent created that power or it was created by another, and whether that power was created before or after the marriage, are irrelevant. The only relevant criteria are whether the decedent held that power at (or immediately before) death or (while married and during the two-year period prior to the decedent's death) irrevocably exercised or released it.²⁰⁷

Unlike the time at which the general power of appointment is created, the time of exercise or release is important for purposes of the elective

204. *Id.* § 2-202(b)(2)(i)-(iii).

205. *Id.* § 2-202(b)(2)(i). This subsection includes in the reclaimable estate: [P]roperty to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent's surviving spouse, was subject to a presently exercisable general power of appointment held by the decedent alone, if the decedent held that power immediately before his death or if and to the extent the decedent, while married to his surviving spouse and during the two-year period next preceding the decedent's death, released that power or exercised that power in favor of any person other than the decedent or the decedent's estate, spouse, or surviving spouse.

Interestingly, property subject to a power of appointment exercisable in favor of creditors of the decedent's estate would not be includible in the reclaimable estate under this paragraph. *See* I.R.C. § 2041(b)(1) (1986).

206. The pre-1990 UPC did not explicitly mention powers of appointment. Under former section 2-202(1)(ii), property subject to the decedent's presently exercisable general power of appointment would presumably have been includible in the augmented estate if the decedent created the power while married to the surviving spouse. U.P.C. § 2-202(1)(ii) (1983).

207. U.P.C. § 2-202 comment (Supp. 1991). The stated theory for including property subject to powers of appointment created prior to marriage should apply with equal force to any testamentary substitute and, in particular, to revocable trusts. *See infra* text following note 238.

share. When the decedent exercises or releases a general power of appointment, the property subject to the power will be includible in the reclaimable estate only if the decedent was married to the surviving spouse at the time of the exercise or release. This distinction makes sense for an elective share statute. If outright transfers of property are subject to the right of election,²⁰⁸ the motive for those transfers should be disinheritance. Inclusion of such property based upon this theory does not, however, mandate the use of a subjective approach. The UPC accomplishes this result by an objective scheme that includes only outright transfers made during marriage and within two years of death. This section makes the justifiable assumption that a married decedent who exercises or releases a general power of appointment (or who transfers an insurance policy or other property) in contemplation of death does so to ensure that the surviving spouse will not receive the property at death. The UPC adopts a blanket two year rule, thereby avoiding unnecessary and difficult litigation regarding the decedent's motive in making the transfer and whether it was made in contemplation of death.²⁰⁹ Essentially, the UPC adopts a per se rule throughout section 2-202 that any transfer or release of a power or beneficial interest in a substantial gift of property made while married and within two years of death is in fraud of the augmented estate rights of the surviving spouse and includible in the reclaimable estate.

The revised UPC takes a similar approach toward the decedent's unilaterally severable interest in property held by the decedent and someone other than a spouse with a right of survivorship.²¹⁰ As long as the decedent held an interest in the property with a right of survivorship immediately before his or her death, the decedent's interest is includible in the reclaimable estate regardless of whether the right of survivorship was created prior to marriage. Inclusion of this interest conforms to the

208. As the comment recognizes, a release of a power of appointment (or allowing it to lapse at death) is in effect a transfer of "the property subject to the power to the persons who benefit from a nonexercise of the power." U.P.C. § 202 comment (Supp. 1991). *See also* I.R.C. § 2041 (1986).

209. This approach is consistent with the prior section that included in the augmented estate certain outright transfers made within two years of death. *See* U.P.C. § 2-202(1)(iv) (1983).

210. U.P.C. § 2-202(b)(2)(ii) (Supp. 1991). This subsection includes in the reclaimable estate:

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

policy of the elective share because the decedent had unfettered access to the property during marriage. If the decedent transferred an interest to another person within two years of death, as with the release or exercise of a general power of appointment, the property will be includible only if the decedent was married at the time of the transfer.²¹¹

In a dramatic change from the original version, the reclaimable estate of redesigned section 2-202 includes insurance proceeds payable to a person other than the surviving spouse to the extent that the decedent retained certain incidents of ownership.²¹² The exclusion of such proceeds from the augmented estate is frequently criticized on the ground that it provides an easy vehicle to disinherit a surviving spouse completely or in part.²¹³ Under the current version, the right of election extends to insurance proceeds if the decedent owned the policy, held one of the prohibited powers immediately before death, or transferred the policy to a person other than the decedent's spouse while married and within the two year period prior to death.²¹⁴ Thus, if the decedent owned the policy or held a prohibited power at death, then it is immaterial whether the decedent acquired the policy or any of the powers before or during marriage. If the decedent transferred the policy within two years of death, the proceeds will be subject to the surviving spouse's right of election only if the decedent was married to the surviving spouse at the time of transfer.

Inclusion of insurance proceeds, regardless of when the policy was acquired, represents a positive change in the UPC. The comment ac-

211. See *supra* note 208.

212. Compare U.P.C. § 2-202(1) (1983) with U.P.C. § 2-202(b)(2)(iii) (Supp. 1991). Under the latter subsection, the reclaimable estate includes:

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

Retention of the incidents of ownership with respect to an insurance policy would render the proceeds includible in the gross estate for federal estate tax purposes under Internal Revenue Code § 2042(2). Macdonald advocates a more inclusive policy toward insurance, contending that "the surviving spouse should have a stronger claim against the husband's life insurance than she would under the present estate tax provisions." W. MACDONALD, *supra* note 33, at 278. His position imposes an undue restraint on alienation and may interfere with legitimate estate planning when the decedent has relinquished control over the property. See Kwestel & Sepowitz, *supra* note 1, at 63 n.290.

213. See, e.g., Kwestel & Sepowitz, *supra* note 1, at 63-65.

214. U.P.C. § 2-202(b)(2)(iii) (Supp. 1991).

knowledges that “such arrangements could, under the pre-1990 Code, have been used to deplete the estate and reduce the spouse’s elective-share entitlement.”²¹⁵ This is in stark contrast to the rationale for excluding insurance proceeds payable to a nonspouse under the prior Code. The former comment explained that insurance “is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse.”²¹⁶ This about-face is telling not because it represents an inconsistency or contradiction, but because it indicates that as the types of nonprobate devices that may be used to disinherit a surviving spouse contract, ingenious decedents who wish to disinherit a spouse may begin to employ will substitutes that have not been used invidiously in the past. This danger is clearly visible in the redesigned UPC’s treatment of other testamentary substitutes.

c. Testamentary substitutes includible if created during marriage

With respect to other testamentary substitutes, the revised UPC does not fully promote the policies of the elective share. Section 2-202(b)(2)(iv),²¹⁷ with some modifications, follows the scheme of former section 2-202(l) which included in the augmented estate a number of

215. *Id.* § 2-202 comment.

216. U.P.C. § 2-202 comment (1983).

217. This subsection includes within the reclaimable estate:

[P]roperty transferred by the decedent to any person other than a bona fide purchaser at any time during the decedent’s marriage to the surviving spouse, to or for the benefit of any person, other than the decedent’s surviving spouse, if the transfer is of any of the following types:

- (A) any transfer to the extent that the decedent retained at the time of or during the two-year period next preceding his death the possession or enjoyment of, or right to income from, the property;
- (B) any transfer to the extent that, at the time of or during the two-year period next preceding the decedent’s death, the income or principal was subject to a power, exercisable by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party, for the benefit of the decedent or the decedent’s estate;
- (C) any transfer of property, to the extent the decedent’s contribution to it, as a percentage of the whole, was made within two years before the decedent’s death, by which the property is held, at the time of or during the two-year period next preceding the decedent’s death, by the decedent and another, other than the decedent’s surviving spouse, with right of survivorship; or
- (D) any transfer made to a donee within two years before the decedent’s death to the extent that the aggregate transfers to any one donee in either of the years exceed \$10,000.

U.P.C. § 2-202(b)(2)(iv) (Supp. 1991).

transfers in the form of testamentary substitutes made during the decedent's marriage to the surviving spouse and for the decedent's benefit.²¹⁸

The first type of transfer is a retained life estate or the right to receive income or to possess or enjoy the transferred property within two years of death.²¹⁹ The next category includes any transfer in which the decedent retained a power in conjunction with another or in which a nonadverse party held a power over the income or principal for the decedent's benefit.²²⁰ This section includes a transfer in trust if the decedent retained a power to revoke or a power to invade the income or principal for his or her benefit. The third group includes a transfer in which the property is held within two years of the decedent's death by the decedent and a person other than the surviving spouse with a right of survivorship.²²¹ The last category consists of all gifts in excess of \$10,000 per donee per year made by the decedent within two years of death.²²² Like its predecessor, this section seeks to capture outright

218. This was true although the pre-1990 UPC, like the EPTL, included property owned outright by the decedent that was acquired prior to marriage in the augmented estate. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(c) (McKinney 1981); U.P.C. § 1-201(11) (1983) (definition of "estate").

219. U.P.C. § 2-202(b)(2)(iv)(A) (Supp. 1991). The prior provision included only those transfers pursuant to which the decedent retained possession or enjoyment of or the right to income from the property at death. U.P.C. § 2-202(1)(i) (1983). This change closes a loophole that would have allowed a decedent to immunize a transfer by reserving the right to receive income until one month before death. See I.R.C. § 2036(a)(1) (1986); Kwestel & Sepowitz, *supra* note 1, at 58-59.

220. U.P.C. § 2-202(b)(2)(iv)(B) (Supp. 1991). Under the prior section, only those transfers were included in which the decedent retained a power over the principal at death. This section also did not explicitly include transfers if the power was held only by a nonadverse party. U.P.C. § 2-202(1)(ii) (1983). Thus, the revised version broadens and clarifies its predecessor. Nevertheless, whether this section includes transfers in which the decedent retained a power subject to an external standard (such as Horace's power in the trust he created in Case 1) is unclear. See Kwestel & Sepowitz, *supra* note 1, at 60-62 (arguing that transfers pursuant to which the decedent retained a power to invade should be includible in the augmented estate regardless of the existence of an external standard). Rejection of the external standard principle would accord with the UPC's policy of focusing on the decedent's benefit in the transferred property.

221. U.P.C. § 2-202(b)(2)(iv)(C) (Supp. 1991). The prior section applied to any transfer of property held at the decedent's death by the decedent and another with a right of survivorship. U.P.C. § 2-202(1)(iii) (1983). Thus, it was narrower than the current version because it did not contain the two year provision. It was also broader because it did not restrict the time of transfer to two years before the decedent's death. The more limited scope of the current provision can be explained by the addition of § 2-202(b)(2)(ii). See *supra* note 210.

222. U.P.C. § 2-202(b)(2)(iv)(D) (Supp. 1991). The prior section captured gifts in excess of \$3,000 per donee per year within two years of death. U.P.C. § 2-202(1)(iv) (1983). Excluding gifts below \$10,000 could potentially damage a surviving spouse in a less wealthy family. Some might argue that a better approach would be to include outright

gifts made in contemplation of death,²²³ but improves upon it by allowing a decedent to utilize the gift tax annual exclusion of section 2503(b) of the Internal Revenue Code without subjecting the gift to the right of election.²²⁴ Because the last category applies to outright gifts rather than testamentary substitutes with retained interests or powers, its restriction to transfers during marriage should not promote disinheritance. Although some applications of the doctrine of transfers in fraud of marital rights to antenuptial conveyances involve outright gifts,²²⁵ individuals are generally reluctant to dispose of property, even shortly before death, without retaining some power over or interest in the property.²²⁶

The comment to revised section 2-202 does not explain why testamentary substitutes, primarily life estates and transfers subject to retained powers, are includible only if created during marriage. It merely states that the purpose of including such transfers under the pre-1990 Code was "to protect the surviving spouse against so-called 'fraud on the spouse's share.'"²²⁷ Although it notes that the revisions "strengthen this feature of the pre-1990 Code," it refers only to general powers of appointment and life insurance.²²⁸ The comment's silence with respect to these testamentary substitutes suggests its endorsement of the prior rationale.

The justification given for this provision is to enable "a person to provide for children by a prior marriage, as by a revocable living trust,

transfers that exceed a given percentage, for example, five percent of the estate, but the author does not endorse this position. *See also* MINN. STAT. ANN. § 524.2-202(1)(iv) (West Supp. 1991) (the augmented estate includes any transfer by the decedent "made within one year of death of the decedent to the extent that the aggregate transfers to any one donee in the year exceeds \$30,000"); 20 PA. CONS. STAT. ANN. § 2203(a)(6) (Purdon Supp. 1991) (including property conveyed during marriage and within one year of death "to the extent that the aggregate amount so conveyed to each donee exceeds \$3,000").

223. This section appears to have been based upon I.R.C. § 2035 (1954), which included in the federal gross estate all of the decedent's gifts made within three years of death. The Economic Recovery Tax Act of 1981 substantially narrowed the scope of this section which, for the purposes of this Article, applies to the relinquishment within three years of death of powers retained pursuant to Internal Revenue Code §§ 2036, 2037, and 2038 and transfers of life insurance during that three year period. *See* I.R.C. § 2035 (1986).

224. The prior version captured gifts in excess of \$3,000 which negatively impacted on legitimate tax and estate planning. U.P.C. § 2-202(1)(iv) (1983). *See* Kwestel & Sepowitz, *supra* note 1, at 65-66.

225. In a significant number of cases involving what appeared to be an outright transfer, the decedent retained use of the property for life.

226. *See, e.g., In re Estate of Riefberg*, 58 N.Y.2d 134, 446 N.E.2d 424, 459 N.Y.S.2d 739 (1983) (amended shareholders agreement one day before death); *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937) (decedent transferred all of his real and personal property into a revocable trust three days before death).

227. U.P.C. § 2-202 comment (Supp. 1991).

228. *Id.* *See supra* notes 205, 212 and accompanying text.

without concern that such provisions will be upset by later marriage.’’²²⁹ This rationale is untenable in light of the stated purpose of the prior section to capture in the augmented estate “transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property.’’²³⁰ To the extent that a retained interest or power, such as the right to receive income from a trust or a power to revoke a trust, is equivalent to ownership of the property, this distinction does not fulfill the purpose of either the prior or current section.

Arguably, upsetting property arrangements made when the decedent did not contemplate marriage is unfair, particularly with respect to retained life estates. To give a surviving spouse a fractional share of the corpus and to diminish the share of the remaindermen (perhaps children from a prior marriage) may constitute too great a benefit to the spouse and too great a detriment to the children. After all, absent a power to invade the principal or a general presently exercisable power of appointment, a decedent with a reserved life estate has no lifetime interest in the principal, cannot undo the disposition unless all of the beneficiaries consent, and has no expectation at the time of the transfer that anyone other than the taxing authorities will be able to reach the corpus. Despite these objections, including reserved life estates in some manner in the elective share is the desirable approach and seems more consistent with the policy of marriage as a total partnership. By bringing the life estate into the marriage when a couple, such as Horace and Wanda, may enjoy its benefits, a spouse should be deemed to have converted it into partnership property. The right to enjoy possession of or the income from the property is so significant that the Internal Revenue Code approach equating this right with ownership should be followed with some modification.

In addition to the estate tax analogy, a creditor’s rights approach can be used to analyze the rights of a surviving spouse. Analogizing the survivor’s rights to those of a creditor of the decedent’s estate

229. U.P.C. § 2-202 comment (1983). The comment also indicates that “[t]he limitation to transfers during marriage reflects some of the policy underlying community property.” *Id.* This policy is also reflected in the following statutes: MO. ANN. STAT. § 474.150(2) (Vernon Supp. 1990) (“Any conveyance of real estate made by a *married* person at any time without the joinder . . . of his spouse . . . is deemed to be in fraud of the marital rights of his spouse.”); VT. STAT. ANN. tit. 14, § 473 (1989 & Supp. 1991) (right of election includes “voluntary conveyance by a husband of any of his real estate made during coverture and not to take effect until after his decease, and made with intent to defeat his widow in her claim to her share”); MODEL PROBATE CODE § 33(b) (1946) (“Any gift made by a *married* person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.”).

230. U.P.C. § 2-202 comment (1983).

produces a different result with respect to retained life estates. The estate tax analogy includes the property subject to the retained life estate as long as the decedent enjoyed it close to or until death. A creditor's rights analogy will require the creation of the life estate during marriage. Indeed, the UPC's scheme of including marital transfers of property subject to reserved life estates in the reclaimable estate can be justified by analogizing the surviving spouse to a creditor of the decedent's estate. At the time of such a transfer, a spouse knows that the surviving partner has a potential claim in the form of a right of election against the transferor's estate. Therefore, a spouse is on notice that any property transferred, particularly in the form of a testamentary substitute, may be subject to diminution to satisfy the elective share. This rationale should apply even though the surviving spouse is not technically the decedent's creditor during marriage. The surviving spouse, under the UPC or other elective share statutes, does not have a recognizable property interest in the decedent's assets before death, unlike common-law dower and community property systems.

The same analysis appears to be valid with respect to similar types of transfers in contemplation of marriage, yet it is not as compelling as if the prospective spouse had notice, but did not consent to the transfer. In that case, the individual who was unhappy with the disposition could decide not to marry. If the transfer occurred during the engagement period and the prospective spouse did not have notice, then this transfer can also be analogized to a transfer in fraud of creditor's rights. In both the engagement and marriage transfer cases, the decedent's motive for making the transfer may be questionable. Despite the rejection by the UPC and other progressive elective share statutes of the motive for the transfer in assessing the validity of the disposition, the underlying intent of these statutory schemes is to capture, in an objective sense, those devices that decedents can use for purposes of disinheritance.

Does this analysis mean that the UPC is correct in insulating from the right of election transfers of property subject to a retained life estate not made in contemplation of marriage, namely, the situation in Case 1? For the reasons already discussed, the UPC and similar elective share statutes should include such transfers because of the important benefits enjoyed by the decedent up to death. A partnership model focuses not on the time of transfer, but on the decedent's rights in the property existing during marriage and continuing immediately prior to death. Stated otherwise, property interests available to the partnership, as opposed to being generated during the partnership, should continue their characteristic as partnership property at death. Furthermore, the argument that a person, like Horace, who creates a reserved life estate prior to engagement, is not on notice of his future wife's (Wanda's) interest because he has not yet met her or contemplated marriage, is not per-

suasive. In this era of multiple marriages, the possibility of a future spouse should not be speculative.

Assuming that the partnership or marital-sharing theory is the correct or desirable model²³¹ does not mandate the exclusion of premarriage assets from the augmented estate. In a number of jurisdictions, all of a spouse's assets, regardless of when or how they were acquired, are subject to division in case of dissolution of the marriage by divorce.²³² Without incorporating the specific features of a particular equitable distribution system, this approach is equally reasonable in the elective share area and does not conflict with any of the justifications for the partnership theory of marriage.

This expansive view of partnership property does not mean that an elective share system such as the UPC must ignore the pre-existing property interests of the remaindermen, such as Doris and Sam in Case 1. Several alternatives exist to safeguard their interests in varying degrees. The approach that is potentially most detrimental to the remainder interests will embrace the federal estate tax model and give the surviving spouse the appropriate percentage of the principal under the UPC's accrual system or a fractional share under a more traditional elective share statute such as the EPTL or the Pennsylvania statute. A federal estate tax approach has the drawback of giving the surviving spouse an interest in the principal that the decedent lacked during life.

231. Some courts continue to view the elective share as principally serving the support needs of the surviving spouse. *See, e.g., In re Merkel's Estate*, 190 Mont. 78, 82, 618 P.2d 872, 875 (1980) ("The primary purpose of the elective share statutes is to insure that the surviving spouse's needs are met, and that the spouse is not left penniless.").

232. *See, e.g.,* CONN. GEN. STAT. ANN. § 46b-81(c) (1986) (in *McPhee v. MCPhee*, 186 Conn. 167, 440 A.2d 274 (1982), the court recognized the Connecticut statute subjecting premarital property to equitable distribution); IND. CODE § 31-1-11.5-11(b) (1988); KAN. STAT. ANN. §§ 23.201, 60.1610(b) (1988 & Supp. 1990) (upon dissolution, the court "shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by spouse's joint efforts"); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1991); MICH. COMP. LAWS ANN. §§ 552.19, 552.23(1) (West 1988 & Supp. 1991); MONT. CODE ANN. § 40-4-202 (1989); N.H. REV. STAT. ANN. § 458: 16(a)(II)(m) (Supp. 1990); N.D. CENT. CODE § 14-05-24 (1981 & Supp. 1989) (in *Fine v. Fine*, 248 N.W.2d 838 (N.D. 1976), the equitable distribution statute allowed award of a spouse's separate property even if it was acquired before marriage, and the period when the property was acquired was only one factor to consider); S.D. CODIFIED LAWS ANN. § 25-4-44 (1984 & Supp. 1991); VT. STAT. ANN. tit. 15, § 751 (1989); WYO. STAT. § 20-2-114 (1977 & Supp. 1990). Despite the language in these statutes and the cases authorizing a division of property acquired before marriage or by gift or inheritance, commentators have noted a judicial reluctance to subject such property to equitable distribution "unless the circumstances warrant." *See* J. OLDHAM, *supra* note 194, at § 13.02[1][i]; Waggoner, *Spousal Probate Rights*, *supra* note 1, at 356 & n.41.

The second alternative would give the surviving spouse the same interest possessed by the decedent. Thus, in Case 1, Wanda would have the right to remain in the house for the rest of her life. This model is attractive, particularly with respect to the family residence, because it avoids displacing the survivor from the family home. Nevertheless, depending on the life expectancy of the surviving spouse, this alternative may seriously disadvantage the remaindermen's interests. Certainly, it would impinge on Horace's intent to provide for his children after his death. Under this alternative, Horace and his children might have been better off if he had not transferred the property, but had kept it in his probate estate.

The last alternative would give the surviving spouse a fractional share in the same property interest possessed by the decedent, an approach that follows section 2203(a)(2) of the Pennsylvania statute. Thus, in Case 1, Wanda would receive a fifty percent life interest in the house under the UPC's accrual system. This alternative has the advantage of benefiting the surviving spouse by recognizing the partnership nature of the life estate and giving the remaindermen an immediate interest in the property as well as leaving their interest in the corpus intact. The disadvantage would be to deprive the spouse of full enjoyment of the property which is a potentially serious detriment in the case of a family residence.

Of course, the easiest way for a decedent to avoid disadvantaging the remaindermen, who are frequently children from a prior marriage, is to disclose the existence of the arrangement to the prospective spouse who can then waive the right of election against such property or agree to a property settlement. This solution is also attractive because it encourages honesty between parties prior to marriage and avoids the troublesome issues associated with the doctrine of antenuptial transfers in fraud of marital rights regarding the sufficiency of notice to the prospective spouse.

If includibility of antenuptial transfers in the augmented estate is to be judged by whether the surviving spouse had notice of the property arrangement prior to marriage, then unless the decedent informed the intended spouse of his or her possession of a life estate, the survivor should not be on inquiry notice. To the external world, the enjoyment of a life estate has many of the characteristics of full ownership. Consequently, the prospective spouse may not know whether the decedent's residence was owned as a life estate or in fee or whether an income stream was derived from a trust or an investment in the decedent's name. These reasons, coupled with the fact that in a substantial number of cases involving retained interests or powers, the decedent retained a life estate, suggest that an actual waiver requirement is desirable. Thus, if protection of the surviving spouse is a goal of the elective share, life

estates should be includible in the augmented estate regardless of when created unless the surviving spouse consented to the transfer.

Different considerations, however, are involved if the decedent retained a power to reach the transferred property. With respect to such transfers, the stated justification for former section 2-202 (which appears to have been adopted by the 1990 UPC) is also open to question.²³³ A person can provide for children of a prior marriage,²³⁴ insulated from any claim by a surviving spouse, by making an irrevocable gift or a transfer in trust without retaining any prohibited powers.²³⁵ If the individual has, as the comment to pre-1990 section 2-202 indicated, kept a power to invade the corpus, he or she has demonstrated an intent to retain substantial control over the property, including the power to "upset" the arrangement. Furthermore, because the inter vivos property arrangements and testamentary substitutes included in the reclaimable estate under section 2-202(b)(2)(iv) (or in the augmented estate under former section 2-202(1)) are primarily for the benefit of the decedent, the UPC's rationale for including only marital transfers is even more untenable. Therefore, such provisions should be subject to the right of election by a later spouse. To protect a trust with a retained power from the right of election in the event of a subsequent marriage, the settlor could relinquish the prohibited power prior to the marriage.²³⁶ The settlor would then be treated as making an irrevocable gift, and the transferred property would belong to the children free of the surviving spouse's claim under an elective share statute.²³⁷ Protecting children of

233. For views that the elective share should only reach property acquired during marriage, see OKLA. STAT. ANN. tit. 84, § 44(B) (West 1990) (elective share limited to property acquired by joint efforts after marriage); UTAH CODE ANN. §§ 75-2-201, -202 (1978 & Supp. 1991); Oldham, *supra* note 1, at 246 ("the forced share should be limited to the acquisitions of the decedent during marriage, other than gratuitous transfers from third parties").

234. The comment does not address the case of prenuptial testamentary substitutes for the benefit of people other than children or why such transfers should be excluded.

235. An example of this includes a power to revoke or invade the principal.

236. If the settlor dies within two years after the gift was made, the transferred property (even if in excess of \$10,000 "to any one donee in either of the years") is not subject to a right of election in a UPC jurisdiction. U.P.C. § 2-202(b)(2)(iv)(D) (Supp. 1991). Although the gift would be deemed to have been made in contemplation of death, it was not made during marriage. See 20 PA. CONS. STAT. ANN. § 2203(a)(6) (Purdon Supp. 1991) (gifts made during marriage and within one year of death are subject to the right of election). The same rationale applies to a release of a life estate or a prohibited power. See U.P.C. § 2-202(b)(2)(iv) (Supp. 1991). To the extent that gifts in contemplation of death are includible in the net estate for elective share purposes, property subject to prohibited powers which have been relinquished within one or two years of death should also be included. See I.R.C. §§ 2035(d)(2), 2038(a)(1) (1986).

237. See IND. CODE § 29-1-3-1 (1988) (adjusting the elective share where there are

a prior marriage can be accomplished by giving a surviving spouse the right to a smaller fractional interest in testamentary substitutes created prior to marriage. The decedent could also have entered into an agreement with the intended spouse that provides for a waiver of the right of election over such property.²³⁸

The retained powers section of UPC section 2-202 includes revocable trusts created by the decedent. Thus, the principal is includible in the augmented estate only if the trust was created during marriage. To be internally consistent, the UPC should add the principal of the trust to the augmented estate regardless of when the decedent established it. A trust subject to a power of revocation is similar to the property arrangements set forth in subsections (b)(2)(i), (ii), and (iii). The decedent who had the ability during life to obtain full ownership over property, has the same power under a revocable trust. A simple exercise of the power recaptures the principal. The same approach can be taken toward transfers of property when the decedent possessed a power to revoke or terminate because he or she was the only person with an interest in the property. Under the UPC's framework, if the decedent retained a power to revoke or terminate with an adverse party, the trust would then be a transfer of the type covered by subsection (b)(2)(iv) and would be includible only if created during marriage.

Ideally, trust property in which the decedent retained a power, either alone or in conjunction with another person, to revoke or consume the principal for his or her benefit should be includible in the augmented estate to the extent of the power. Regardless of whether the trust was created during the marriage, during the engagement, or before the engagement, the decedent had the ability to regain full ownership of all or part of the property. This same conclusion is reached by applying an estate tax analogy that examines the decedent's economic power over property at death.²³⁹ If the surviving spouse is viewed as a creditor, the spouse should be able to elect against the property if the decedent retained a power to revoke until death.²⁴⁰

d. Implications of the UPC's treatment of antenuptial transfers

A recent Arkansas case presents a stark illustration of the inequity that can be created under the UPC's scheme of excluding testamentary

children from a prior marriage); WYO. STAT. ANN. tit. 2, § 2-5-101 (1980) (adjusting the elective share where there are children from a prior marriage). *See also* WIS. STAT. ANN. § 861.17(2)(West 1991) (an arrangement before or within one year of marriage to provide for issue of a prior marriage is not fraudulent).

238. The validity of these waivers is recognized in redesigned U.P.C. § 2-204.

239. *See* I.R.C. § 2038(a)(1) (1986).

240. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 10-10.6 (McKinney 1967) (treating settlor who reserved "an unqualified power of revocation" as "the absolute owner" of the transferred property for creditors' rights purposes).

substitutes created prior to marriage even if for the benefit of children from a previous marriage. In *Efird v. Efird*,²⁴¹ a man conveyed four lots to his children from a prior marriage and reserved a life estate. The transfer occurred two days before his second marriage without consideration or notice to his prospective wife.²⁴² Fourteen years after the transfer and one year after she learned of the conveyance, the wife sought the cancellation of the deeds as fraudulently denying her rights to the property. At trial, the wife testified that she and her husband were married and lived in the home that her husband built on the transferred property and that she decorated.²⁴³ When her husband became ill, she asked him “if she would have a place to live if something happened to him, and he said: ‘No, you’ll have to get on welfare, or your son’ll have to take care of you.’”²⁴⁴ The wife was told that she had no interest in the house.

The appellate court held that the wife was entitled to a life estate in the property.²⁴⁵ It relied on a long line of Arkansas cases that applied the general rule:

[I]f a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife.²⁴⁶

241. 31 Ark. App. 190, 791 S.W.2d 713 (1990).

242. In fact, the prospective husband executed a quitclaim deed the following day (one day prior to the marriage) to correct the earlier warranty deed. *Id.* at 191, 791 S.W.2d at 713.

243. The husband died following the chancellor’s dismissal of the wife’s complaint; however, the case, which was also brought against the children, proceeded to appeal. *Id.*

244. *Id.* at 192, 791 S.W.2d at 714. Following this conversation, the wife checked the courthouse records and confirmed that she had no interest in the house. Evidently, the court assumed that by recording the deeds, the husband did not place his wife on constructive notice.

245. *Id.* at 195, 791 S.W.2d at 716. Because the wife testified at trial that she only wanted a life estate in the property, the trial court, on the defendant’s motion, conformed the pleadings to her testimony.

246. *Id.* at 192, 791 S.W.2d at 714 (quoting *West v. West*, 120 Ark. 500, 504, 179 S.W. 1017, 1018 (1915)). Except for *West*, in which the transfer was upheld because the man apparently conveyed the property prior to his engagement, all other cited cases applying the rule held the transfer to be fraudulent. See *Wilhite v. Wilhite*, 242 Ark. 705, 415 S.W.2d 44 (1967); *Harrison v. Harrison*, 198 Ark. 64, 127 S.W.2d 270 (1939); *Roberts v. Roberts* 131 Ark. 90, 198 S.W. 697 (1917). The *Efird* court did not state what rights were defrauded, but presumably the court was referring to rights of dower, homestead, and a forced share. See also 20 ARK. STAT. ANN. §§ 28-11-301, 28-11-305, 28-11-307, 28-39-102, 28-39-401 (1987).

Although the husband appeared to be motivated by a desire to protect his children,²⁴⁷ the court stated that the wife need only establish constructive fraud which did not require an actual intent to deceive.²⁴⁸ Based on the evidence, the court had no difficulty finding constructive fraud.

The court in *Efird* did not justify its result based upon the nature of the marital relationship. The court was swayed by the short period of time between the transfer and the marriage as well as the fact that the wife lived on the property with her husband for thirteen years.²⁴⁹ The court also considered that the husband did not want her to have any interest in the property, but it did not discuss whether the house should be considered assets of the marital partnership.²⁵⁰ Such an analysis would, however, produce an affirmative response. Although the husband purchased the property with his own funds, his wife contributed to its furnishing and maintenance. In addition, the husband made mortgage payments during the marriage with funds that may have constituted marital assets.²⁵¹ Based on a marital-sharing or a return-of-contribution theory (both of which would recognize the wife's justifiable expectations), the property should be subject to the wife's right of election.²⁵² The same result would be reached under a commitment theory.

247. In each of the cases cited by the court, the husband transferred property to his children from a prior marriage or, as in *Roberts*, to a foster child, and reserved an actual or de facto life estate in himself. Except for *West v. West*, in which the court intimated that a provision for children might mitigate against finding a fraudulent intent, none of the cases recognized the exception that a transfer for the benefit of children is not fraudulent. See also *Barnett v. Barnett*, 209 Ark. 973, 193 S.W.2d 319 (1946) (invalidating a deed executed three days before a five week marriage which reserved a de facto life estate in favor of a nonmarital child insofar as dower and homestead rights were concerned). Apparently, only one reported Arkansas case involving the application of the doctrine to an antenuptial transfer made after an engagement failed to invalidate the conveyance. In *O'Connor v. Patton*, 171 Ark. 626, 286 S.W. 822 (1926), a man transferred real estate to a friend 11 days before marriage. The deed was absolute on its face, but the evidence indicated that the grantee held it on an oral trust for the husband's benefit. Although his motive was to prevent his future wife from acquiring any rights to the property, the court refused to set aside the deed because of equitable considerations. The wife was married at the time of her engagement and a few days after the wedding she refused to live with her new husband, indicating that she married solely for financial gain.

248. *Efird v. Efird*, 31 Ark. App. 190, 192, 791 S.W. 713, 715 (1990). See *Barnett*, 209 Ark. at 974, 193 S.W.2d at 319-20 (antenuptial deed is fraudulent even if the prospective husband lacked intent to disinherit his future wife). But see *West v. West*, 120 Ark. 500, 504, 179 S.W. 1017, 1018 (1915) ("Fraud is never presumed, but must be proved.").

249. *Efird*, 31 Ark. App. at 195, 791 S.W. at 715.

250. *Id.*

251. See *Wilhite v. Wilhite*, 242 Ark. 705, 707, 415 S.W.2d 44, 45 (1967) (a deed executed by a prospective husband 10 days before marriage held to be fraudulent because the wife "worked and helped to pay off a mortgage on the land after they were married").

252. These two notions underlie the partnership theory of marriage propounded by

Most importantly, the husband, in effect, transformed the property into marital property by making it the family home.²⁵³ In reality, he was no less the owner than if he had not transferred the property to his children because his lifetime enjoyment of it was basically comparable to full ownership. He reaped the same lifetime benefits from the property regardless of whether he transferred the remainder interest before or after his marriage or whether he made the transfer. Indeed, the husband's enjoyment of the property would not have been diminished if he executed the deed prior to his engagement or prior to meeting his second wife. In addition, his wife's contribution to the maintenance of the house in any of these cases would not have been substantially different. Based on a partnership theory of marriage, a determination of the includibility of the property in the elective share should focus on the decedent's lifetime interest, not on the date a transfer may have occurred. Neither the doctrine of antenuptial transfers in fraud of marital rights nor the UPC produces an equitable or desirable result.

Despite the compelling reasons for giving the wife in *Efird* an interest in the house after her husband's death, under UPC section 2-202(b)(2)(iv)(A), she could not elect against it solely because the life estate was created before marriage. This result is untenable under either a partnership or support theory of the elective share. This transfer cannot be upheld as a conveyance designed to enable children from a prior marriage to enjoy the fruits of premarriage assets. The judgment in *Efird* protected the children from a prior marriage and the surviving spouse. Granted, the children will have to wait longer for their remainders to become possessory, but they have not lost their property interests. Furthermore, if the court awarded the widow an elective share, presumably she would have received only a fraction of the value of the property or the life estate. This result is preferable to the totally exclusionary system of the UPC and other elective share statutes such as the Pennsylvania and New York statutes. With the availability of the life estate (or any other testamentary substitutes) to the husband during marriage, the property begins to lose its characteristic of premarital or separate property, thereby diminishing the children's equities in it. As the length of the marriage increases and the commitment of the spouses

the UPC. See U.P.C. art. II, pt. 2 general comment (Supp. 1991). See also *supra* notes 184-87 and accompanying text.

253. This case demonstrates the continuing importance of the support justification for the elective share. See U.P.C. art. II, pt. 2 general comment (Supp. 1991). The importance of the family home to the surviving spouse and dependent children is also recognized in some jurisdictions (including Arkansas) by the homestead allowance. Presumably, if the husband had not transferred the property reserving a life estate, his surviving spouse could have claimed a homestead allowance.

to each other presumably increases, the children's claims decrease and the UPC's accrual system appropriately accommodates the competing interests of the surviving spouse and children from a prior marriage.

The equities of the children or other third parties are much greater when the decedent makes an outright transfer prior to marriage. For example, if Mr. Efird (or Horace, in Case 1) transferred the real property outright to his children, the UPC correctly excludes that property from the augmented estate. Property that was not brought into the partnership does not become partnership property. This situation, however, points to a serious shortcoming of the common-law doctrine applicable to outright as well as retained interest transfers. The common-law doctrine was only applicable to transfers in contemplation of marriage. Otherwise, the undesirable result of making outright transfers susceptible to challenge would ensue.²⁵⁴ Although outright transfers may on rare occasions pose a threat to the surviving spouse, they can best be dealt with under the applicable law of fraud.

V. RECOMMENDATIONS FOR CHANGE

Analysis of the common-law doctrine of antenuptial transfers in fraud of marital rights and several of the more progressive statutory elective share schemes indicates that integration of the two systems is necessary to promote the goals of marital partnership and support of the surviving spouse. To achieve more predictable results, consistency among the jurisdictions, and certainty in legitimate estate planning, it is desirable to abolish the common-law doctrine and amend the elective share statutes to take antenuptial transfers into account.²⁵⁵ Specifically, the following guidelines for statutory change are proposed.

254. *But see* Patecky v. Friend, 220 Or. 612, 350 P.2d 170 (1960) (granting a second wife a forced share despite a will contract requiring the decedent to leave his property to his first wife when the second wife did not have notice of the will contract or existing mutual wills).

255. The Advisory Committee Report reflects a step in this direction with respect to revocable testamentary substitutes. Macdonald's Suggested Model Decedent's Family Maintenance Act applies only to postnuptial transfers, "but the underlying policy applies also to antenuptial transfers." W. MACDONALD, *supra* note 33, at 359. This proposed legislation, which is concerned with providing sufficient maintenance for the surviving spouse, supports an inquiry into the size of the transfer prior to marriage. Macdonald believed that many cases show that courts applied the same illusory transfer doctrine used to test the validity of postnuptial transfers to prenuptial transfers. *Id.* at 360 n.25. This is particularly true with personalty because the right to dower supported actions to set aside conveyances of realty. To determine whether a prenuptial transfer should be subject to the surviving spouse's right of election, he proposed using a "reasonableness" test. *Id.* at 363-64. "Recovery would not hinge on the state of mind of either the man or the woman at the time of transfer, or whether the husband is alive or dead at the time of the litigation, on the fortuitous nature of the wife's 'interest' during coverture, or on the type of property that is involved." *Id.* at 364-65.

A. *Outright Transfers Before Marriage*

Under the common-law doctrine or its codifications, outright transfers can be divided into two types: those that occur during the engagement period or in contemplation of marriage and those that precede marriage plans. As a general rule, the doctrine only applies to the first category. Under the statutory approaches utilizing objective criteria to determine the includibility of inter vivos dispositions in the elective share, outright transfers of either type are excluded. In Pennsylvania or a UPC jurisdiction, only outright transfers in contemplation of death and during marriage constitute testamentary substitutes. New York excludes outright transfers from the net estate, but even revocable gifts *causa mortis* may be excluded if given before marriage.²⁵⁶

In contemporary society, couples generally do not enter into property settlements upon engagement. Abolishing the distinction between transfers before and after engagement is recommended because the actual date of the engagement may be uncertain.²⁵⁷ (This also eliminates the need to determine if a person transferred property in contemplation of an engagement.) Dispensing with this distinction produces an analytically correct result because it no longer requires a finding of marital rights prior to marriage when none exist. Particularly in jurisdictions that no longer recognize common-law dower or that have not adopted a community property system, it is clear that inheritance is not a vested or contingent property right. A spouse may make large outright gifts of property during marriage²⁵⁸ free from any claim of the surviving spouse.²⁵⁹ The only exceptions are transfers or gifts made in contemplation

256. See *supra* note 170 (changes recommended by the Advisory Committee Report).

257. Uncertainty as to whether the transfer occurred before or after the engagement was a factor in the court's decision to order a remand in *Papouchis v. Papouchis*, 28 A.D.2d 554, 280 N.Y.S.2d 160 (1967). See WIS. STAT. ANN. § 861.17 (West 1991) (applying to transfers in contemplation of marriage).

258. An argument can be made that all post-marriage transfers to nonfamily members without adequate consideration, regardless of whether they are outright, should be included in the augmented estate. This approach is a modification of the community property model.

259. The only exception is for outright gifts made in contemplation of death. Under the UPC, the surviving spouse has a right to elect against any transfers made by the decedent within two years of death "to the extent that the aggregate transfers to any one donee in either of the years exceeded \$10,000." U.P.C. § 2-202(b)(2)(iv)(D) (Supp. 1991). Pennsylvania's analogous provision applies only to transfers made within one year of death. 20 PA. CONS. STAT. ANN. § 2203(a)(6) (Purdon Supp. 1991). In New York, a surviving spouse may elect against a lifetime gift only if it is a gift *causa mortis*. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(b)(1)(A) (McKinney 1981). But see *supra* note 170 (recommendation of the Advisory Committee Report).

of death under a statute like the UPC or the Pennsylvania estates law. Finally, elimination of the doctrine of antenuptial transfers in fraud of marital rights should not decrease the level of protection afforded to the surviving spouse or increase the number of cases of spousal disinheritance. It is unlikely that a decedent will give away all or a significant part of his property prior to death,²⁶⁰ albeit prior to marriage.

The vast majority of cases dealing with premarriage transfers involve a retained interest or power, generally a reserved life estate. Therefore, without significantly harming a surviving spouse, an elective share statute should exclude outright transfers from the right of election unless they are made in contemplation of death. To avoid upsetting outright gifts, an elective share statute should consider shortening the period within which such gifts are captured to one year. Any transfer in excess of \$10,000 to any donee within one year of death would be includible in the augmented estate, regardless of whether it preceded or followed marriage. Such measures cover transfers motivated by a desire to disinherit a surviving spouse or that unfairly benefit children from a prior marriage. Under this approach, difficult tracing problems are avoided, and legitimate estate and tax plans remain intact.

B. Will Substitutes

For the foregoing reasons, the distinction between will substitutes made during the engagement period and those not made in contemplation of marriage should be abolished. Any will substitute created by a decedent that confers a substantial benefit or gives the grantor significant economic control should be subject to the right of election whether made before or during marriage. The UPC's reclaimable estate should be amended to include not only property over which a decedent holds a presently exercisable power of appointment, unilaterally severable interests held by a decedent with right of survivorship, and life insurance regardless of when these interests arose, but also the other categories of will substitutes enumerated in section 2-202(b)(2)(iv). The surviving spouse should have, at a minimum, a fractional share of retained life estates created prior to marriage either by the enjoyment of the property or an income stream for life. A similar approach should be taken with respect to the Pennsylvania and New York elective share statutes. This yields a consistent result in Cases 1, 2, and 3 and equitably accommodates the interests of the surviving spouse and any children from a prior marriage.

260. See *supra* note 226 and accompanying text.

VI. CONCLUSION

The proposed guidelines, if adopted, advance fairness, predictability, and consistency of elective share statutes by promoting the goal of marriage as a total partnership. The doctrine of antenuptial transfers prior to marriage is rejected. However, the guidelines incorporate the underlying theory of the doctrine by recognizing and counteracting the detrimental effect many premarriage transfers have on the rights of the surviving spouse.