"TILL DEATH DO US PART"? WHY DOES MISSISSIPPI VALUE THE SPOUSE BREAKING THAT VOW MORE THAN THE SPOUSE KEEPING IT?: A PROPOSAL TO REFORM MISSISSIPPI'S SURVIVING SPOUSE PROTECTIONS

I. Richard Gershon[*]

INTRODUCTION

Consider the following scenarios:

Scenario 1: Jan and Charlie Smith, Mississippi residents, have been married for twenty-six years. They have four children, ages thirteen through twenty-one. Jan dies without a will. Jan owns stock as a joint tenant with rights of survivorship with someone

[*] Professor of Law, University of Mississippi School of Law. Professor Gershon is grateful to Jessi Simon for her work as his research assistant on this Article. He also thanks the outstanding *Mississippi Law Journal* editors for their great work.

other than Charlie. Jan is the insured under a life insurance policy paying $600,000 to Fran who is a business partner of Jan. Under Mississippi law, Charlie will be entitled to a child's share of Jan's probate estate,[1] which is one-fifth of the estate since Jan had four children. This share is not dependent upon whether all four children are also children of Charlie. Since the stock and insurance are not part of Jan's probate estate, Charlie's intestate share will not include the value of those non-probate assets.

Scenario 2: Same facts, except Jan has a will that leaves nothing to Charlie. In that case, under Mississippi law, Charlie will still be entitled to the same child's share (one-fifth) of Jan's probate estate, which, again, will not include the stock and insurance since they are non-probate assets.

Scenario 3: Jan and Charlie were happily married for two years. Unfortunately, those were only the first two years of their marriage. The other twenty-four years were miserable, so they have now decided to get a divorce. Sadly, as this Article will explain, Charlie will likely receive a much larger share of Jan's property[2] as a former spouse under Mississippi's domestic relations statutes[3] than as a surviving spouse under Mississippi's probate statutes.[4]

Why does Mississippi law treat surviving spouses less favorably than it treats former spouses in divorce? A spouse who "kept the vow" should be given at least equal treatment as a divorcing spouse. This Article will discuss the current protections for surviving spouses under Mississippi's probate statutes and will propose changes to the laws of intestacy and spousal protection provisions that would ensure equal distribution of assets. In making a proposal for reform in Mississippi, this Article will explore reform measures taken by other jurisdictions to address the

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[1] *See* MISS. CODE ANN. § 91-1-7 (West, Westlaw through 2023 Reg. Sess.).

[2] Lewis Grizzard was a noted southern humorist and writer, and he was married multiple times. Brian B. Carpenter, *Grizzard, Lewis McDonald, Jr.*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/grizzard-lewis-mcdonald-jr [https://perma.cc/K4XU-KRRH] (last visited July 4, 2023). He once remarked, "Instead of getting married again, I'm just going to find a woman I don't like and give her a house." Leon F. Seltzer, *The Wittiest Quotes on Divorce*, PSYCH. TODAY (Nov. 16, 2012), https://www.psychologytoday.com/us/blog/evolution-the-self/201211/the-wittiest-quotes-divorce [https://perma.cc/6JJL-YMVG].

[3] *See generally* MISS. CODE ANN. tit. 93.

[4] *See generally* MISS. CODE ANN. tit. 91.

disparity of treatment between former spouses in divorce and surviving spouses.

I. HISTORY AND PURPOSE OF THE SPOUSAL PROTECTION PROVISIONS

The *Restatement (Third) of Property: Wills & Other Donative Transfers* states that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention," which "is given effect to the maximum extent allowed by law."[5] In essence, the state gives a testator almost absolute power to decide how they wish to dispose of their property at death.

Yet, this dispositive power is somewhat diminished in the context of marriage, and overriding provisions, theoretically, protect a spouse from disinheritance.[6] One of the theories behind these protections is the view of marriage as an economic partnership.[7] Another theory takes the view that "a spouse owes a duty to support the family while living, and a spouse should not evade this duty upon death."[8] The more cynical idea is that the state does not want to be in the position of providing for a disinherited spouse when their deceased spouse gave assets—that could have supported the survivor—to someone else.

Historically, spousal protections against inheritance came in the form of dower and curtesy.[9] These were gender-based and gave more to the surviving husband than the surviving wife.[10] As noted in the *Restatement (Third) of Property*, "Dower gave a surviving widow a life estate in one-third of the inheritable freehold land that her husband held during the marriage. Curtesy gave a surviving widower a life estate in all the inheritable freehold land that his wife held at any time during coverture."[11]

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[5] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (AM. L. INST. 2003).

[6] *See* William Forsberg, *Partners in Life and at Death: The New Minnesota Elective Share of a Surviving Spouse Statute*, 23 WM. MITCHELL L. REV. 377, 388-90 (1997).

[7] *See id.* at 388-89.

[8] *See id.* at 389-90.

[9] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 9.1 cmt. c (AM. L. INST. 2003).

[10] *See id.*

[11] *Id.*

Dower and curtesy have been replaced by a spousal election in non-community property states,[12] except for Georgia, which provides for a year's support for a surviving spouse and minor children who are left out of a decedent's will.[13] In Georgia, a surviving spouse who is provided for in the deceased spouse's will may still elect to take a year's support in lieu of taking anything from the will.[14]

Rather than protecting the surviving spouse from disinheritance at death, community property states treat property coming into the marriage as being owned equally by both spouses, irrespective of how the property is titled.[15] Therefore, those states do not need spousal election provisions.

For spouses dying without a will, every state provides that a surviving spouse will get a percentage of the deceased spouse's intestate estate.[16] Intestacy laws are default provisions based upon the best guess of the state legislature about what a person's intent would have been had they created a will.[17] The intestacy laws[18] all favor spouses and lineal descendants.[19]

II. THE SURVIVING SPOUSE AND MISSISSIPPI'S INTESTACY LAWS

Mississippi stands alone in its treatment of surviving spouses in intestacy.[20] While uniqueness can be a good thing, this Article asserts that Mississippi's current law is antiquated and does not consider the complexities of modern marriages.

Under Mississippi's intestacy laws, the surviving spouse of a person dying without a will takes a child's share of the estate.[21] If

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[12] *See id.*

[13] GA. CODE ANN. § 53-3-1(c) (West, Westlaw through 2023 Reg. Sess.).

[14] *Id.* § 53-3-3.

[15] *See* discussion *infra* Section IV.C.

[16] *See* SHELDON F. KURTZ ET AL., WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 2.1, at 53-55 (6th ed. 2021).

[17] *See id.*

[18] The variations in intestacy provisions will be discussed in greater detail in Part II of this Article.

[19] A lineal descendant is someone who would not have existed had the decedent never existed. *See* KURTZ ET AL., *supra* note 16, § 2.2, at 57. Thus, lineal descendants include children, grandchildren, and great-grandchildren. *Id.* Adopted children are also considered to be lineal descendants. *Id.* § 2.10, at 106-07.

[20] *See* MISS. CODE ANN. § 91-1-7 (West, Westlaw through 2023 Reg. Sess.).

[21] *Id.*

the decedent had no children, then the spouse takes the entire estate.[22] On the other hand, if the decedent had ten children, the surviving spouse would only take one-eleventh of the estate.[23]

Many non-community property states' intestacy laws provide a percentage of the estate that does not depend upon the number of children of the decedent. Tennessee does give the surviving spouse a child's share if the decedent had children but provides that the minimum percentage of the probate estate passing to the surviving spouse is one-third.[24] Florida more firmly disregards the number of the decedent's children, providing that the surviving spouse will inherit the entire estate if there are no surviving descendants of the decedent.[25] If the Florida decedent had lineal descendants who were all also lineal descendants of the surviving spouse, then the surviving spouse will still take the entire estate.[26] Even if the decedent had surviving lineal descendants who were not the surviving spouse's lineal descendants, the surviving spouse will still take one-half of the estate.[27]

Intestacy statutes of other common law states have more complex approaches to the intestacy protections for surviving spouses.[28] For example, Alabama considers the value of the estate

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[22] *Id.*

[23] *See id.*

[24] TENN. CODE ANN. § 31-2-104(a)(2) (West, Westlaw through 2023 Reg. Sess.).

[25] FLA. STAT. ANN. § 732.102(1) (West, Westlaw through 2023 Spec. Sess. B and 2023 First Reg. Sess.).

[26] *Id.* § 732.102(2).

[27] *Id.* § 732.102(3).

[28] *See, e.g.*, CAL. PROB. CODE §§ 6401-6402 (West, Westlaw through ch. 1 of 2023-2024 First Extraordinary Sess.); COLO. REV. STAT. ANN. §§ 15-11-102, -103 (West, Westlaw through First Reg. Sess. of the 74th Gen. Assemb.); CONN. GEN. STAT. ANN. §§ 45a-437, -439 (West, Westlaw through 2023 Reg. Sess.); DEL. CODE ANN. tit. 12, §§ 502-503 (West, Westlaw through ch. 54 of 152nd Gen. Assemb.); IND. CODE ANN. § 29-1-2-1 (West, Westlaw through 2023 First Reg. Sess. of 123rd Gen. Assemb.); 2023 Md. Laws ch. 647, § 1 (to be codified at MD. CODE ANN., EST. & TRUSTS § 3-102); MICH. COMP. LAWS ANN. §§ 700.2102-.2103 (West, Westlaw through Pub. Acts of 2023, No. 45); N.C. GEN. STAT. ANN. §§ 29-14 to -15 (West, Westlaw through Sess. Law 2023-34 of 2023 Reg. Sess.); OKLA. STAT. ANN. tit. 84, § 213 (West, Westlaw through First Reg. Sess. and First Extraordinary Sess. of 59th Leg.); 20 PA. STAT. AND CONS. STAT. ANN. §§ 2102-2103 (West, Westlaw through 2023 Reg. Sess. Act 3); TEX. EST. CODE ANN. § 201.002 (West, Westlaw through legislation effective June 18, 2023 of the 2023 Reg. Sess. of the 88th Leg.).

In Arkansas, the surviving spouse takes one-half of the estate if there are no surviving descendants of the decedent and she was married to the decedent for less

and whether there are children from the marriage or from the decedent's previous marriage(s).[29] The Alabama statute also assumes that a decedent would want their surviving parent(s) to take a share of the estate if there were no surviving lineal descendants.[30] Furthermore, the Alabama intestacy law provides that the first $100,000 will go to the surviving spouse in an estate with surviving parent(s) but no issue, and the first $50,000 will be distributed to the spouse if there are surviving issue who are also issue of the surviving spouse.[31] This ensures that the surviving spouse is prioritized if the estate is relatively small.[32] In any event, the surviving spouse's estate will be at least fifty percent of the total net probate estate.[33]

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than three years at the time of his death. ARK. CODE ANN. § 28-9-214(2) (West, Westlaw through 2023 Reg. Sess.). In such cases, she shares the estate with the decedent's parents. *Id.* § 28-9-214(4). In Rhode Island, if there is a surviving spouse but no children, the decedent's parents take the decedent's real estate subject to the spouse's life estate and also share in the decedent's personal property. 33 R.I. GEN. LAWS ANN. §§ 33-1-1, -5, -10 (West, Westlaw through ch. 78 of 2023 Reg. Sess.); *see also* Jerome v. Prob. Ct. of Barrington, 922 A.2d 119, 122 (R.I. 2007) ("In most states, statutory substitutions for dower and curtesy dictate that when a decedent dies intestate and without issue, the surviving spouse receives the entire estate; in Rhode Island, however, the surviving spouse receives only a life estate in the real property, along with $50,000 and one-half of the personal property.").

[29] *See* ALA. CODE § 43-8-41 (Westlaw through Act 2023-3 of the 2023 First Spec. Sess.).

[30] *See id.* § 43-8-41(2).

[31] *See id.* § 43-8-41(2) to (3).

[32] The Alabama intestacy statute provides:

> The intestate share of the surviving spouse is as follows:
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> (1) If there is no surviving issue or parent of the decedent, the entire intestate estate;
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> (2) If there is no surviving issue but the decedent is survived by a parent or parents, the first $100,000.00 in value, plus one-half of the balance of the intestate estate;
>
> (3) If there are surviving issue all of whom are issue of the surviving spouse also, the first $50,000.00 in value, plus one-half of the balance of the intestate estate;
>
> (4) If there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate;
>
> (5) If the estate is located in two or more states, the share shall not exceed in the aggregate the allowable amounts under this chapter.

Id. § 43-8-41.

[33] *See id.*

In addition to ignoring the variability of marital relationships contemplated by other jurisdictions,[34] Mississippi's intestacy laws also fail to account for non-probate assets[35] and how they might impact spousal protections. For example, if a spouse died intestate

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[34] An example of the complexity of the marital relationship can be found in the interesting case of *In re Peterson Estate*, where the decedent had had an open affair for many years. 889 N.W.2d 753, 754-55 (Mich. Ct. App. 2016), *overruled by In re* Est. of Erwin, 921 N.W.2d 308 (Mich. 2018). The surviving spouse refused to divorce him. *Id.* at 755. The probate court held that she could make the spousal election because she had not manifested an intent to relinquish her marital rights. *Id.* at 755-56. The Michigan Court of Appeals affirmed the allowance of the spousal election, but it also held that the probate court erred in stating that an intention to relinquish marital rights must be found for a surviving spouse to forfeit the election. *Id.* at 758-59. The court stated that the correct standard was whether the surviving spouse was willfully physically absent from the decedent, holding:

> In this case, there is no evidence that Arbutus took some act or failed to act with the intent to cause her physical separation from Lyle—that is, there was no evidence that she "[w]as willfully absent" from him during the year preceding his death. There is no evidence that she forced Lyle from the marital home or that she removed herself from his presence. All the evidence showed that Lyle absented himself from Arbutus and that Arbutus remained faithful to the marriage. She continued to interact with Lyle when he came around the store, she prepared him meals, operated the store, and used her own funds to maintain the marital property. As Lahti testified at the hearing, Arbutus was always there for Lyle . . . .

Id. at 757-59 (alteration in original) (citation omitted).

The Michigan Supreme Court, however, overruled the court's reasoning in *Peterson*, holding that "willfully absent" applies to both physical and emotional absence and stating:

> We hold that an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death. Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes. The burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent," physically and emotionally, from the decedent spouse.

Erwin, 921 N.W.2d at 321 (footnote omitted).

[35] Non-probate assets are those that will not be administered as part of a decedent's estate. John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 AM. COLL. TR. & EST. COUNS. L.J. 1, 10 (2012). They include joint tenancies with rights of survivorship, third-party beneficiary designations, and life insurance benefits paid directly to a beneficiary and not to the estate. *See id.* Mississippi's intestacy and elective share spousal protections only apply to probate assets. *See* MISS. CODE ANN. §§ 91-1-7, 91-5-25 to 91-5-27 (West, Westlaw through 2023 Reg. Sess.).

with four children in Mississippi, the surviving spouse would be entitled to take one-fifth of the probate estate.[36] If the decedent's probate estate included land worth $200,000 and $50,000 worth of stock, after satisfying any amounts owed to creditors who filed appropriate claims, the surviving spouse would be entitled to one-fifth of the $250,000 probate assets, or $50,000. But what if the deceased spouse also owned a $500,000 life insurance policy payable to someone other than the surviving spouse and a $200,000 joint bank account with survivorship rights shared with someone other than the surviving spouse?

Since non-probate assets are not part of the intestate estate, the surviving spouse would not be entitled to any of the life insurance proceeds or joint bank account funds.[37] The total wealth of the deceased spouse's estate was $950,000, meaning that the surviving spouse would receive twenty percent (one-fifth) of the net probate assets but only about five percent of the total wealth passing at the deceased spouse's death.[38]

Mississippi's intestacy laws do not adequately protect the surviving spouse in many circumstances. Unfortunately, those same inadequacies apply to situations where the decedent died with a valid will. The next Part of this Article describes the current spousal election in Mississippi.

III. THE CURRENT MISSISSIPPI ELECTIVE SHARE PROVISIONS

In Mississippi, the surviving spouse's elective share falls under two different statutes.[39] The first statute gives the surviving

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[36] *See* MISS. CODE ANN. § 91-1-7.

[37] *See* Langbein, *supra* note 35, at 10.

[38] The surviving spouse would take $50,000 of the total $950,000 of wealth distributed at their spouse's death, or about 5.3% of that wealth.

[39] It should be noted that there are other spousal and family protections in Mississippi besides the spousal renunciation that serves as Mississippi's election provision. For example, while a decedent may leave their primary residence to someone other than the surviving spouse, the surviving spouse will retain the right to live in that home until their death or remarriage. *See* MISS. CODE ANN. § 91-1-23; *see also* Cheeks v. Herrington, 523 So. 2d 1033, 1035 (Miss. 1988) ("Upon remarriage of a widow, her rights under [section 91-1-23] (preventing partition of homestead property) are terminated and the entire property becomes subject to partition by any and all of the other joint owners."). In addition to homestead, Mississippi also provides that certain property of the decedent passing to the spouse is exempt from the debts of the decedent and that the decedent's spouse and children are entitled to a year of support determined by the

spouse automatic protections when the surviving spouse is completely left out of the decedent's will.[40] In the event that the surviving spouse is a beneficiary under the will but is not satisfied with their share of the deceased spouse's estate, the spouse can elect to renounce the will.[41] If the surviving spouse renounces the will, the Mississippi Code overrides the will to give the dissatisfied spouse the same amount they would have received in intestacy.[42] Accordingly, the same inadequacies that apply to Mississippi's intestacy laws regarding surviving spouses are repeated in relation to the spousal election. In intestacy, the spouse is entitled to a child's share of the probate estate, and a surviving spouse would be entitled to the entire estate if the decedent left no surviving lineal descendants.[43] In the case of the spousal election, the spouse receives a maximum of one-half of the probate estate.[44]

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chancellor. *See* MISS. CODE ANN. § 91-1-19; *id.* § 91-7-135 ("It shall be the duty of the court or the chancellor to set apart out of the effects of the decedent, for the spouse and children who were being supported by the decedent, or for the spouse if there be no such children, or for such children if there be no spouse, one (1) year's provision, including such provision as may be embraced in the exempt property set apart. If there be no provisions, or an insufficient amount, the court or the chancellor shall determine the sum necessary for the comfortable support of the spouse and children, or spouse or children, as the case may be, for one (1) year."). Of course, section 91-7-135 assumes that the decedent owned property subject to probate at death. *See id.*

[40] MISS. CODE ANN. § 91-5-27 ("If the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in case of unsatisfactory provision in the will of the husband or wife for the other of them. In such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory and it had been renounced.").

[41] *Id.* § 91-5-25 ("When a husband makes his last will and testament and does not make satisfactory provision therein for his wife, she may, at any time within ninety (90) days after the probate of the will, file in the office where probated a renunciation to the following effect, viz.: 'I, A B, the widow of C D, hereby renounce the provision made for me by the will of my deceased husband, and elect to take in lieu thereof my legal share of his estate.'").

[42] *Id.* ("Thereupon she shall be entitled to such part of his estate, real and personal, as she would have been entitled to if he had died intestate . . . . The husband may renounce the will of his deceased wife under the same circumstances, in the same time and manner, and with the same effect upon his right to share in her estate as herein provided for the widow.").

[43] *Id.* § 91-1-7.

[44] *Id.* § 91-5-25 ("[E]ven if the husband left no child nor descendant of such, the widow, upon renouncing, shall be entitled to only one-half (1/2) of the real and personal estate of her deceased husband.").

Again, Mississippi is the only jurisdiction in which the value of the elective share varies depending upon the number of surviving lineal descendants, irrespective of whether the deceased spouse's children are also the children of the surviving spouse.[45] Furthermore, because the election is limited to probate assets, the state further diminishes the amount that is available to the surviving spouse who is either left out of the estate or who is dissatisfied with the share they received in the will. In fact, a spouse can plan to disinherit their husband or wife by simply creating an estate plan where their assets pass completely outside of probate. If there are no probate assets, the surviving spouse's renunciation has the effect of electing to take a percentage of zero, which will be zero.

For example, suppose Jan and Charlie have been married for many years, but Jan is having an extramarital affair with Stevie. Jan owns many millions of dollars of real estate as a joint tenant with rights of survivorship with Stevie. Jan also has a joint bank account with Stevie, and that bank account has $200,000 in it at the time of Jan's death. Jan's will provides nothing for Charlie, and she has no other assets.

Charlie will have a right of automatic renunciation in Mississippi because there is no provision for Charlie in the will.[46] When Jan dies, however, none of her assets will pass through the probate estate, so Charlie will take a child's share of nothing! Accordingly, Mississippi's renunciation provision is easily avoidable by a spouse who wants to disinherit their spouse.

If Charlie had divorced Jan, all assets acquired during the marriage, irrespective of how they were titled, would be subject to equitable distribution. In *Ferguson v. Ferguson*, the Mississippi Supreme Court set forth eight factors, appropriately called the "*Ferguson* factors," that must be evaluated in assessing the share of the marital property of each spouse in a divorce.[47] As stated by the court, chancery courts should "consider the following guidelines, where applicable, when attempting to effect an equitable division of marital property": (1) "[s]ubstantial contribution to the accumulation of the property," including direct

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[45] *See id.* § 91-1-7.

[46] *See id.* § 91-5-27.

[47] 639 So. 2d 921, 928 (Miss. 1994).

or indirect economic contributions, contributions to "the stability and harmony of the marital and family relationships," and contributions to "the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets"; (2) "[t]he degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets"; (3) "[t]he market value and the emotional value of the assets"; (4) "[t]he value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift"; (5) "[t]ax and other economic consequences, and contractual or legal consequences to third parties"; (6) "[t]he extent to which property division may . . . be utilized to eliminate periodic payments and other potential sources of future friction between the parties"; (7) "[t]he needs of the parties for financial security"; and (8) "[a]ny other factor which in equity should be considered."[48]

No similar factors apply to assets subject to the spousal election provisions. Accordingly, the divorcing spouse is afforded much greater protection than the surviving spouse. If Mississippi values the sanctity of marriage, why is the spouse who left the marriage provided with greater financial protection than the spouse who made it "till death do us part"? The next Part of this Article will discuss attempts by other jurisdictions to alleviate the difference between the financial protections for a divorcing spouse and a surviving spouse.

IV. REFORMS ADOPTED BY OTHER STATES

A. The Augmented Estate

The Uniform Probate Code (the "UPC") was "first created in 1969 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and was amended in 1990 as a model code that states could adopt to standardize probate law. The entire Uniform Probate Code has been adopted by eighteen states."[49]

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[48] *Id.*

[49] Sarah Fisher, *All About Uniform Probate Code*, SMARTASSET (Dec. 17, 2019), https://smartasset.com/financial-advisor/uniform-probate-code [https://perma.cc/54FJ-EWXM]. Although the article includes Florida in its list of states that have adopted the UPC, *see id.*, the Uniform Law Commission no longer recognizes Florida as a UPC state;

Those states are Alaska,[50] Arizona,[51] Colorado,[52] Hawaii,[53] Idaho,[54] Maine,[55] Massachusetts,[56] Michigan,[57] Minnesota,[58] Montana,[59] Nebraska,[60] New Jersey,[61] New Mexico,[62] North Dakota,[63] Pennsylvania,[64] South Carolina,[65] South Dakota,[66] and Utah.[67] "Other states have adopted parts of the Uniform Probate Code, but it has not become a standardized law across all fifty states."[68]

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it does, however, additionally recognize that Pennsylvania has enacted legislation substantially similar to the UPC. *See Probate Code (2019): Enactment History*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3 [https://perma.cc/ED87-NWW8] (last visited July 4, 2023).

[50] *See* ALASKA STAT. ANN. §§ 13.06.005-13.36.390 (West, Westlaw through ch. 13 of the 2023 First Reg. Sess. of the 33rd Leg.).

[51] *See* ARIZ. REV. STAT. ANN. §§ 14-1101 to 14-7671 (Westlaw through the First Reg. Sess. of the 56th Leg.).

[52] *See* COLO. REV. STAT. ANN. §§ 15-10-101 to 15-17-103 (West, Westlaw through First Reg. Sess. of the 74th Gen. Assemb.).

[53] *See* HAW. REV. STAT. ANN. §§ 560:1-101 to 560:8-301 (West, Westlaw through Act 108 of the 2023 Reg. Sess.).

[54] *See* IDAHO CODE ANN. §§ 15-1-101 to 15-15-110 (West, Westlaw through chs. 1 to 314 of the First Reg. Sess. of the 67th Leg.).

[55] *See* ME. REV. STAT. ANN. tit. 18-C, §§ 1-101 to 10-118 (West, Westlaw through 2023 First Reg. Sess. and ch. 407 of the First Spec. Sess. of the 131st Leg.).

[56] *See* MASS. GEN. LAWS ANN. ch. 190B, §§ 1-101 to 7-503 (West, Westlaw through ch. 6 of the 2023 First Ann. Sess.).

[57] *See* MICH. COMP. LAWS ANN. §§ 700.1101-.8206 (West, Westlaw through P.A. 2023, No. 80, of the 2023 Reg. Sess.).

[58] *See* MINN. STAT. ANN. §§ 524.1-100 to 524.8-103 (West, Westlaw through 2023 Reg. Sess.).

[59] *See* MONT. CODE ANN. §§ 72-1-101 to 72-5-638, 72-16-601 to 72-16-612 (West, Westlaw through 2023 Sess.).

[60] *See* NEB. REV. STAT. ANN. §§ 30-2201 to 30-2902 (West, Westlaw through First Reg. Sess. of the 108th Leg.).

[61] *See* N.J. STAT. ANN. §§ 3B:1-1 to 3B:31-84 (West, Westlaw through L.2023, c. 64 and J.R. No. 10).

[62] *See* N.M. STAT. ANN. §§ 45-1-101 to 45-9a-11 (West, Westlaw through 2023 First Reg. Sess. of the 56th Leg.).

[63] *See* N.D. CENT. CODE ANN. §§ 30.1-01-01 to 30.1-37-07 (West, Westlaw through 2023 Reg. Sess.).

[64] *See* 20 PA. STAT. AND CONS. STAT. ANN. §§ 101 to 8815 (West, Westlaw through 2023 Reg. Sess. Act 3).

[65] *See* S.C. CODE ANN. §§ 62-1-100 to 62-8-403 (Westlaw through 2023 Act No. 102).

[66] *See* S.D. CODIFIED LAWS §§ 29A-1-101 to 29A-8-101 (Westlaw through 2023 Reg. Sess.).

[67] *See* UTAH CODE ANN. §§ 75-1-101 to 75-12-118 (West, Westlaw through 2023 Gen. Sess.).

[68] Fisher, *supra* note 49.

In 1990, a major revision was made to the UPC, and this included a change to the spousal election that took into account the financial partnership-like aspects of marriage.[69] The prior version of the UPC "granted the surviving spouse a one-third share of the augmented estate," and "[t]he one-third fraction was largely a carry over from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband's land."[70]

The current version of the UPC establishes the spousal election amount as "50 percent of the value of the marital-property portion of the augmented estate."[71] The "augmented estate" includes non-probate as well as probate assets.[72] Specifically, the UPC provides that the spousal election applies to four categories of property, rather than just the traditional probate estate: "(1) the decedent's net probate estate; (2) the decedent's nonprobate transfers to others; (3) the decedent's nonprobate transfers to the surviving spouse; and (4) the surviving spouse's property and nonprobate transfers to others."[73]

By including non-probate transfers, the UPC made disinheritance of a surviving spouse much more difficult. Take, for example, Jan who is married to Charlie. Jan has land owned as a joint tenant with rights of survivorship with a person other than Charlie. The land is valued at $800,000, but it will not be subject to probate at Jan's death because it will automatically pass by operation of law to the surviving joint tenant at death. Charlie's elective share in Mississippi will not include any rights to the land because it was not a probate asset,[74] but in a jurisdiction adopting the UPC, Charlie would have been able to take one-half of the value of Jan's share of the joint-tenancy.[75] Thus, the surviving spouse is

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[69] *See* UNIF. PROB. CODE § 2-202 cmt. on purpose and scope of revisions (UNIF. L. COMM'N, amended 2019).

[70] *Id.* § 2-202 cmt. on pre-1990 provision.

[71] *Id.* § 2-202(a).

[72] *Id.* § 2-203(a).

[73] *Id.*

[74] *See* MISS. CODE ANN. §§ 91-5-25 to 91-5-27 (West, Westlaw through 2023 Reg. Sess.).

[75] *See* UNIF. PROB. CODE § 2-202(a).

afforded much stronger protection under the augmented estate concept.[76]

In creating the augmented estate, the UPC seems to borrow concepts from the calculation of a decedent's gross estate under federal estate tax provisions.[77] Property that is part of a decedent's estate for estate tax purposes includes assets in the probate estate, as well as non-probate transfers over which the decedent retained control until their death.[78] For example, assets in a trust created by the decedent "under which he has 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 . . . the possession or enjoyment of, or the right to the income from, the property" will be part of the decedent's estate for federal estate tax purposes, even though the property will not be included in the decedent's probate estate.[79] Therefore, if our friend Jan, from the previous example, transferred apartment buildings into trust for the benefit of Jan's four children but she retained the power to alter, amend, revoke, or terminate the trust until her death, the property value of the apartment buildings would be included in Jan's estate for federal tax purposes.[80] The key question for estate tax purposes is control over the disposition of the property until death rather than ownership of the property at death.

Similarly, the UPC's augmented estate considers wealth that passes due to the decedent's death rather than focusing solely on ownership at death.[81] The original UPC was adopted in 1969 to

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[76] The UPC provides an optional provision to take into account the length of the marriage—the longer the marriage, the greater the percentage of the spouse's share of the augmented estate. *See id.* § 2-203(b). Mississippi does not consider length of marriage in the renunciation provisions for spouses. *See* MISS. CODE ANN. §§ 91-5-25 to 91-5-27.

[77] *See generally* I.R.C. §§ 2031-2046 (determining the gross estate for estate tax purposes).

[78] *See id.* § 2033.

[79] *Id.* § 2036(a)(1). The trustee of a trust created by the decedent owns the property rather than the decedent. *See* KURTZ ET AL., *supra* note 16, § 10.3, at 406-07. The property will pass according to the terms of the trust at the grantor's death, so there is no need for probate administration. *See id.* § 10.1, at 401-02. § 2036, nonetheless, includes in the gross estate the value of the property subject to the decedent's control until death. I.R.C. § 2036.

[80] *See id.* § 2038.

[81] *See* UNIF. PROB. CODE § 2-203(a).

clarify the treatment of certain limited non-probate transfers.[82] "Revocable trusts, joint-and-survivor or pay-on-death ('POD') bank accounts, transfer-on-death ('TOD') security registrations [have become] successful competitors of the probate system."[83] That concern echoed caselaw that held "[i]f no interest passed to [a beneficiary] before the death of [the grantor], the intended trusts are testamentary and hence invalid for failure to comply with the statute on wills."[84] Those cases came under strong criticism, and states began to recognize a revocable trust as a valid probate-avoidance mechanism.[85]

The UPC's augmented estate recognizes the growth of probate avoidance and the broader acceptance by states of will substitutes. "Will substitutes are modes of transfer that operate outside the state-operated transfer system of probate administration, hence largely outside the law of wills and intestacy."[86] Today, will substitutes fall into five main categories: (1) revocable inter vivos trusts;[87] (2) life insurance policies;[88] (3) pay-on-death bank

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[82] *See id.* § 6-101 cmt. The 1969 UPC "authorized a variety of contractual arrangements that had sometimes been treated as testamentary in prior law." *Id.*

> For example, most courts treated as testamentary a provision in a promissory note that if the payee died before making payment, the note should be paid to another named person; or a provision in a land contract that if the seller died before completing payment, the balance should be canceled and the property should belong to the vendee. These provisions often occurred in family arrangements. The result of holding such provisions testamentary was usually to invalidate them because not executed in accordance with the statute of wills.

Id.

[83] Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1123 (1993).

[84] Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955).

[85] *See, e.g.*, MISS. CODE ANN. § 91-8-402(b) (West, Westlaw through 2023 Reg. Sess.) ("A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.").

[86] Langbein, *supra* note 35, at 10.

[87] *Cf. id.* § 91-8-402.

[88] *See, e.g.*, May v. Ellis, 92 P.3d 859, 861 (Ariz. 2004) ("Thus, § 14-6102(A), which allows a decedent's creditors to look to non-probate transfers to satisfy their claims, only applies when there is no other 'law' to the contrary. Section 20-1131(A) is precisely such a 'law.' It expressly provides that life insurance proceeds are not subject to creditors' claims. Therefore, life insurance proceeds are not among the non-probate transfers available to satisfy the claims of creditors under § 14-6102(A).").

accounts;[89] (4) transfer-on-death securities accounts;[90] and (5) pension accounts.[91]

> Each of these types is associated with and supported by its own industry—respectively, the trust industry, which is composed of trust companies and trust and estate lawyers; the insurance industry; the commercial banking industry; the securities industry; and the various financial-service providers who have come to constitute the pension industry.[92]

Notice that the UPC's augmented estate takes into account the decedent's non-probate transfers to the surviving spouse.[93] This is an important balancing provision because the spouse may have been the beneficiary of the bulk of the non-probate transfers. For example, using Jan and Charlie again, Jan has joint bank accounts, joint stock accounts, and life insurance policies totaling over $1,000,000 in value. This time, Charlie is the joint owner on all of those accounts and policies and will receive them when Jan dies. Jan has a will leaving only her baseball card collection, worth $5,000, to her neighbor, Sam, a non-relative who has always appreciated them. Under the UPC, Charlie will not be able to elect against the will to take a portion of the value of the baseball cards since Charlie has already benefitted from the non-probate assets that were worth over $1,000,000.[94] Compare that to Mississippi's renunciation provision.[95] Since Charlie was not named in the will, Charlie will automatically be entitled to a child's share of the

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[89] *See, e.g.*, MISS. CODE ANN. § 81-5-62.

[90] *Cf. id.* § 91-21-15 ("On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.").

[91] Langbein, *supra* note 35, at 10.

[92] *Id.*

[93] UNIF. PROB. CODE § 2-203(a)(3) (UNIF. L. COMM'N, amended 2019).

[94] *See id.* § 2-202(a).

[95] *See* MISS. CODE ANN. § 91-5-27.

baseball cards, irrespective of the fact that Charlie has enjoyed the bulk of the estate through the non-probate transfers.[96]

Since Mississippi has followed other states in allowing a greater number of financial vehicles to avoid probate, it would seem that the spousal election provisions should be amended to reflect those changes rather than continuing with the archaic child's-share-of-the-decedent's-estate model currently in place. Adopting the UPC's augmented estate system would certainly be a step in the right direction in addressing the inadequacies of the current elective share system. There are, however, other approaches the state could adopt.

B. The Partnership Model

The partnership model[97] of the spousal election views the marital relationship as a financial partnership.[98] As stated by one commentator:

> The partnership view of marriage is less evident in common law states than it is in community property states because common law property rights vest only in the spouse who has title to the property. It has long been recognized that community property law "directly recognize[s] that spouses are partners" since community property law views contributions to

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[96] *See id.*

[97] In my religious tradition, one of the people being married recites the Hebrew phrase, "*Ani le dodi ve dodi li*." That translates as, "I am my beloved's, and my beloved is mine." *Song of Songs* 6:3. This vow emphasizes the bonding of the couple as a partnership.

[98] *See* UNIF. PROB. CODE art. II, pt. 2, general cmt. ("[T]he economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage . . . ."); *see also* Forsberg, *supra* note 6, at 400; Rena C. Seplowitz, *Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share—Why the Partnership Is Not Yet Complete*, 25 IND. L. REV. 1, 48 (1991) (stating that the implied agreement between the spouses that each enjoys a half-interest in the fruits of marriage is breached when a decedent disinherits his or her spouse of marital property); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 236-37 (1991) (stating that the partnership theory can be "couched in restitutionary terms" because it recognizes the nonmonetary contributions to the marriage that a spouse might make by staying at home and the concomitant economic opportunities that the spouse loses by so doing); Terry S. Kogan & Michael F. Thomson, *Piercing the Facade of Utah's "Improved" Elective Share Statute*, 1999 UTAH L. REV. 677, 678.

> the marriage as equal even if the contribution of one spouse was non-economic. Common law states, on the other hand, must enact statutes that recognize that each spouse has some legal right to the assets accumulated during the marriage regardless of which spouse holds title in order to implement the community property view in common law states.[99]

Adopting the partnership model would move Mississippi closer to at least equalizing the treatment of a surviving spouse with that of a former spouse in divorce.[100] In both cases, each member of the couple would be considered an equal financial partner who would have an equal stake in the marital assets.[101] The current Mississippi spousal election statute does not get close to the outcome suggested by the partnership model for a surviving spouse's share at death. Rather, in many cases, the election can have the effect of a consolation prize. That is assuming that the testator died with any probate assets. If there are no probate assets, as mentioned earlier, the spouse's election results in taking a child's share of nothing.[102]

C. Community Property

Community property laws are the true embodiment of the financial partnership model of marriage. Currently, nine states

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[99] Ellen J. Beardsley, Note, *The Revised UPC Elective Share: Missing Essential Partnership Principles*, 13 QUINNIPIAC PROB. L.J. 225, 226 (1998) (alteration in original) (footnotes omitted) (quoting Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 24 (1994)).

[100] Of course, a testator always has the option of providing more for the surviving spouse than would be provided for in any elective share system.

[101] The marital estate would include all assets acquired by either spouse during the marriage. As stated in *Ferguson v. Ferguson*:

> This Court concludes that the chancellor had the authority to order a fair division of the Bell South benefits because they were marital assets accumulated through the joint contributions and efforts of the parties during the duration of this twenty-four year marriage. A spouse who has made a material contribution toward the acquisition of an asset titled in the name of the other spouse may claim an equitable interest in such jointly accumulated property.

639 So. 2d 921, 934 (Miss. 1994).

[102] *See* discussion *supra* Part III.

have community property laws.[103] Those states are Arizona,[104] California,[105] Idaho,[106] Louisiana,[107] Nevada,[108] New Mexico,[109] Texas,[110] Washington,[111] and Wisconsin.[112] In these states, all property of a married person is classified as either community property (owned jointly by both spouses) or the separate property of one spouse.[113] One state, Alaska, allows the couple to choose whether they want their property to be treated as community property.[114]

Separate property "include[s] property that a spouse acquired before the marriage, or by gift or inheritance."[115] An example of separate property in a community property state would be a hunting cabin given to one spouse by their parent prior to the marriage. If the person owning the cabin never shared it with their spouse, it would remain separate property and would not be included in the communal estate. If, on the other hand, a spouse inherited $10,000 from their grandfather and commingled that money in a bank account shared by the spouses, the inheritance would lose its character as separate property.[116]

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[103] Kimberlee Leonard, *Community Property States in 2023*, FORBES, https://www.forbes.com/advisor/legal/divorce/community-property-states/ [https://perma.cc/P8ML-R7HC] (Aug. 23, 2022, 11:42 AM).

[104] *See* ARIZ. REV. STAT. ANN. § 25-211(A) (Westlaw through the First Reg. Sess. of the 56th Leg.).

[105] *See* CAL. FAM. CODE § 760 (West, Westlaw through ch. 1 of 2023-2024 First Extraordinary Sess.).

[106] *See* IDAHO CODE ANN. § 32-906(1) (West, Westlaw through chs. 1 to 314 of the First Reg. Sess. of the 67th Leg.).

[107] *See* LA. CIV. CODE ANN. art. 2338 (Westlaw through 2023 First Extraordinary Sess.).

[108] *See* NEV. REV. STAT. ANN. § 123.220 (West, Westlaw through 82nd Reg. Sess.).

[109] *See* N.M. STAT. ANN. § 40-3-2 (West, Westlaw through 2023 First Reg. Sess. of the 56th Leg.).

[110] *See* TEX. FAM. CODE ANN. § 3.002 (West, Westlaw through legislation effective June 18, 2023 of the 2023 Reg. Sess. of the 88th Leg.).

[111] *See* WASH. REV. CODE ANN. § 26.16.030 (West, Westlaw through 2023 Reg. Sess. and First Spec. Sess.).

[112] *See* WIS. STAT. ANN. § 766.001(2) (West, Westlaw through 2023 Act 10).

[113] Leonard, *supra* note 103.

[114] *See* ALASKA STAT. ANN. § 34.77.030(a) (West, Westlaw through ch. 13 of the 2023 First Reg. Sess. of the 33rd Leg.).

[115] Burcham v. Burcham, 886 N.W.2d 536, 555 (Neb. Ct. App. 2016).

[116] *See* Brozek v. Brozek, 874 N.W.2d 17, 31 (Neb. 2016) ("Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.").

One of the compelling attributes of community property laws is that they treat the divorcing spouse and the surviving spouse equally by codifying the partnership theory of marriage. A surviving spouse in a community property state already owns one-half of the marital property, irrespective of whether that property would be in the probate estate or would pass outside of probate. Thus, it is impossible to disinherit a surviving spouse in a community property state.

V. PROPOSAL TO USE THE DIVORCE MODEL OF EQUITABLE DISTRIBUTION FOR DISINHERITED SPOUSES

While Mississippi is not a community property state, the chancery courts apply community property principles in determining equitable division in divorce actions.[117] Marital property is treated as belonging equally to the spouses, and the court applies the factors enumerated by the Mississippi Supreme Court in *Ferguson v. Ferguson* to divide property in the marital estate.[118] Those factors are:

> 1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
>
> a. Direct or indirect economic contribution to the acquisition of the property;
>
> b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity

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[117] *See* Lauro v. Lauro, 847 So. 2d 843, 847 (Miss. 2003) ("Assets accumulated during the course of a marriage are subject to equitable division unless they are characterized as separate property."). "Mississippi courts 'assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic, or otherwise are of equal value.'" *Id.* (quoting Johnson v. Johnson, 823 So. 2d 1156, 1161 (Miss. 2002)).

[118] 639 So. 2d 921, 925 (Miss. 1994) ("With adoption of guidelines to aid chancellors in division of marital property under the equitable property division method, this Court reverses the award of marital assets and remands to the chancery court to re-evaluate the marital division in light of these guidelines.").

> of time spent on family duties and duration of the marriage; and
>
> c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
>
> 2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
>
> 3. The market value and the emotional value of the assets subject to distribution.
>
> 4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
>
> 5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;
>
> 6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
>
> 7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
>
> 8. Any other factor which in equity should be considered.[119]

On the other hand, Mississippi applies no such factors to property distributions to a surviving spouse, and the differences in protections of surviving spouses versus divorcing spouses provide a stark contrast. The divorcing spouse is considered to possess almost partnership-type rights in all of the marital, non-separate assets, while the disinherited surviving spouse is given a child's share of only the probate assets.[120] The chancellor in a divorce action is

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[119] *Id.* at 928.

[120] *See* MISS. CODE ANN. §§ 91-1-7, 91-5-25 to 91-5-27 (West, Westlaw through 2023 Reg. Sess.). It should be noted that the surviving spouse who is the beneficiary of the

required to consider the factors adopted by the Mississippi Supreme Court to ensure that the property settlement is equitable.[121] There is no similar consideration given when a distribution is made to someone who stayed the course of the marriage.

Applying appropriate factors to determine an equitable distribution to a surviving spouse would allow the chancellor to consider the complexities of modern marriage. Factors that could impact the surviving spouse's share might include the length of the marriage[122] and whether there were children from the decedent's earlier marriage who were not also children of the decedent. For example, if Jan had two children from a previous marriage before marrying Charlie, Jan might be concerned that Charlie would not provide for those children at Jan's death. In that case, the chancellor could take the approach taken by the federal estate tax provisions used to deal with blended families.

The Internal Revenue Code provides for a marital deduction for the value of all assets passing to a surviving spouse.[123] The deduction does not apply, however, to assets that would never be included in the surviving spouse's estate at their death.[124] These are called "terminable interests."[125] Fortunately, Congress recognized that someone like Jan might want to provide for Charlie, while also assuring that her children were taken care of at Charlie's death. For this purpose, Congress created a Qualified Terminable Interest Property ("QTIP") election to allow the property to qualify for the marital deduction, even though Charlie would be given a terminable interest.[126] To qualify for the deduction, Charlie must be entitled to all of the income generated by the property, payable at least annually,[127] and the surviving spouse must elect to include the value of the remaining assets in their estate at their death.[128]

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non-probate assets of their spouse could be overly enriched under Mississippi law because the spousal election would still be available against the probate assets.

[121] *Ferguson*, 639 So. 2d at 928.

[122] This is the statutory approach already taken by some states. *See, e.g.*, TENN. CODE ANN. § 31-4-101(a)(1) (West, Westlaw through 2023 Reg. Sess.).

[123] I.R.C. § 2056(a).

[124] *See id.* § 2056(b).

[125] *See id.*

[126] *See id.* § 2056(b)(7).

[127] *Id.* § 2056(b)(7)(B)(ii)(I).

[128] *Id.* § 2056(b)(7)(B)(v). The incentive for the surviving spouse to make the QTIP election would be that they would be able to have the income from the full value of assets

A Mississippi chancellor could use a QTIP-like approach if there was a concern that a step-parent surviving spouse might not pass the property to the step-children when that surviving spouse died.

Another issue that could be resolved on an individual basis similar to the considerations in equitable distribution would be what property should be included in the calculation of the spouse's share.[129] The chancellor could consider each of the spouses' assets and needs in making that determination, just as they would do in a property settlement in divorce.

Other authors have considered the merits of a case-by-case determination of the spousal share, including Professor Jeffrey N. Pennell who wrote:

> The question made relevant by the empirical evidence described in this summary is whether it would be administratively feasible for courts to make an inquiry into the most appropriate division of a decedent's estate, taking into consideration factors such as the needs and equity of various claimants or objects of a decedent's bounty.[130]

It should be noted that in his article, Professor Pennell made the valid point that, sometimes, disinheritance of a spouse is absolutely appropriate to effectuate the intent of the decedent or to best meet the needs of both spouses.[131] The individual situations of both spouses could be considered by the chancellor, who could determine that disinheritance of the surviving spouse was appropriate. Mississippi's current election provision gives the

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passing at the other spouse's death without diminishment by the estate tax. The tax burden, while payable by the surviving spouse's estate, would really only have an impact on the beneficiaries of that estate who would only get the net assets after any estate tax is paid.

[129] Again, some states already apply this mechanism. *See, e.g.*, ALA. CODE § 43-8-70(b) (Westlaw through Act 2023-3 of the 2023 First Spec. Sess.).

[130] Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 53 U.C. DAVIS L. REV. 2473, 2475 (2020).

[131] *See id.* at 2499-2500 ("One case involved a surviving spouse who died thirty-five days after the decedent, in another the will revealed that the survivor was in hospice care, another stated that the surviving husband had Alzheimer's, and yet another revealed that his surviving spouse was living in a nursing home. It may have been known that each survivor would not live long and disinheritance was a method to avoid having to probate the same assets in two estates.").

spouse the right to renounce the will, even if such renunciation negatively impacts the couple's estate goals.

One commentator put it best in saying:

> To the extent that the elective share is now being recharacterized as a posthumous means of correcting deficiencies in the common law system of ownership of marital property, legislatures should instead focus their attention on correcting that system during the marriage, not at its end. If states wish to view marriage as an economic partnership in which contributions of each spouse should be recognized, then they must adopt community property principles, not forced share statutes that provide recognition of spousal contributions only to the survivor when the marriage is terminated by death.[132]

While it is unlikely that Mississippi will join the ranks of the community property states, some promising changes to Mississippi family law have been recommended by a task force created by the Mississippi Legislature.[133] A similar task force to study needed changes to Mississippi's probate laws would be welcome.[134]

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[132] Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RSRV. L. REV. 83, 152 (1994) (footnotes omitted).

[133] During the 2021 Regular Session, the Mississippi Legislature passed Senate Bill No. 2621, creating the "Task Force to Study Mississippi's Laws Regarding the Awarding and Calculating of Child Support, Alimony and Other Related Matters in Domestic Law" (the "Task Force"). S. 2621, 2021 Leg., Reg. Sess. (Miss. 2021). The Task Force consisted of fifteen members and was comprised of judges, attorneys, child advocates, and law professors. *See id.* The Task Force's recommendations were to be made to the Mississippi Legislature and Mississippi Supreme Court on or before December 1, 2021. *Id.* Recommendations included changes to Mississippi's fault-based divorce system. *See* Geoff Pender, *Mississippi Divorce Laws Are Irrevocably Broken. This Senate Bill Would Help.*, MISS. TODAY (Feb. 15, 2022), https://mississippitoday.org/2022/02/15/mississippi-divorce-laws-are-irrevocably-broken-senate-bill-would-help/ [https://perma.cc/Z6YL-EMR6]. For a podcast episode detailing the work of the Task Force, see *In Legal Terms: Family Law Task Force*, IN LEGAL TERMS (Nov. 30, 2021), http://inlegalterms.mpbonline.org/episodes/in-legal-terms-family-law-task-force [https://perma.cc/HXW9-F98N].

[134] Some welcome reform to Mississippi's trusts and estates laws has already occurred. In 2014, an enactment brought Mississippi's trust laws in line with most jurisdictions, providing a great step forward. *See* S. 2727, 2014 Leg., Reg. Sess. (Miss. 2014).

This Article recommends that such a task force would consider at least adding the UPC's augmented estate concept to better protect surviving spouses. That said, the best model would equalize treatment of surviving spouses with those of divorcing spouses in cases where the surviving spouse is either left out of the will or inadequately provided for by the will. Rather than looking only at the probate estate, the chancellor could apply factors—like the *Ferguson* factors—to ensure an equitable distribution to the surviving spouse. That would also allow the court to consider all marital assets rather than just probate assets.

CONCLUSION

Mississippi's current probate laws provide inadequate protection for surviving spouses who are either left out of a will or who receive unsatisfactory benefits from the deceased spouse's estate. In fact, Mississippi is alone in limiting the spousal election and the rights of the spouse in intestacy to a child's share of the probate estate. As discussed in this Article, there are good reform options adopted by other states that better equalize the treatment of surviving spouses with divorcing spouses. It is time for the spouses who keep the vow of "till death do us part" to be treated as well as those who break it.