

# THE ELECTIVE SHARE HAS NO FRIENDS: CREDITORS TRUMP SPOUSE IN THE BATTLE OVER THE REVOCABLE TRUST

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## I. INTRODUCTION

A revocable trust is a popular estate planning tool used to disinherit a spouse in sixteen jurisdictions.<sup>1</sup> In common law jurisdictions, a surviving spouse, who is dissatisfied with his or her inheritance, has the right to receive an elective share of the decedent's estate regardless of the decedent's estate plan.<sup>2</sup> However, sixteen jurisdictions have defined a dissatisfied spouse's rights with a fractional share of the deceased spouse's "net probate estate," allowing one spouse to disinherit the other, by single-handedly transferring his or her assets to a revocable trust.<sup>3</sup> To add insult to injury seven of these common law jurisdictions have recently codified trust law making it seamless for the decedent's creditor to be paid from revocable trust assets.<sup>4</sup> The elective share is one of few limitations imposed on testamentary freedom.<sup>5</sup> Common law property jurisdictions have created a public policy-based statute for married persons that prohibit the first-to-die spouse from disinheriting his or her surviving spouse.<sup>6</sup> To avoid disinheritance, common law jurisdictions statutorily protect a surviving spouse (spouse) with an elective share.<sup>7</sup> The elective share arose in the early nineteenth century as a

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<sup>1</sup> See Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 LA. L. REV. 161, 179 (2011).

<sup>2</sup> *Id.* at 161.

<sup>3</sup> *Id.* at 162.

<sup>4</sup> See *infra* note 19.

<sup>5</sup> Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 644 (2014) (recognizing that there are some limitations on testamentary freedom, which include those testamentary provisions that violate public policy as well as the Rule Against Perpetuities).

<sup>6</sup> See John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 874 (1992); Melvin J. Sykes, *Inter Vivos Transfers in Violation of the Rights of Surviving Spouses*, 10 MD. L. REV. 1, 2 (1949).

<sup>7</sup> Sykes, *supra* note 6, at 2.

replacement of dower and curtesy rights.<sup>8</sup> At that time the nature of wealth shifting from real to personal property made dower and curtesy obsolete.<sup>9</sup>

The elective share protected the spouse from disinheritance by guaranteeing him or her with a fractional share of the deceased spouse's net probate estate, a method known as the traditional elective share.<sup>10</sup> However, like the shift from real to personal property there has been a subsequent shift in wealth from probate to non-probate assets (like revocable trusts) making the traditional elective share equally obsolete and inadequate to protect a spouse from disinheritance.

A revocable trust is an arrangement created during the decedent/settlor's lifetime whereby the decedent/settlor transfers trust assets to himself, herself, or a third party as trustee but maintains control by its trust terms giving the decedent/settlor the ability to revoke, alter, or amend.<sup>11</sup> The titling of the assets in the name of the trustee (even if it is the decedent/settlor) is what converts the asset from probate to non-probate and outside the reach of the traditional elective share statute.<sup>12</sup>

It has been recognized for many years that the traditional elective share is inadequate to protect a spouse from disinheritance by a revocable trust.<sup>13</sup> At first, courts created equitable common law modifications in response to the ineffective traditional elective share to protect the spouse from being disinherited with a revocable trust.<sup>14</sup> The inequities of the traditional elective share and common law modifications mandated reform.

Reform efforts in Pennsylvania and New York inspired the National Conference Commissioners on Uniform State Laws to draft the Uniform Probate Code (UPC) introducing the "augmented estate" concept.<sup>15</sup> The thrust of the UPC's augmented estate was to include non-probate assets (like revocable trusts) into the spouse's elective share calculation.<sup>16</sup> The UPC promulgated an augmented estate model for other jurisdictions to follow.<sup>17</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Turnipseed, *supra* note 1, at 162.

<sup>11</sup> Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J., 523, 524 (2008).

<sup>12</sup> See Turnipseed, *supra* note 1, at 179.

<sup>13</sup> See *Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1937). In *Newman*, the testator transferred his entire property into a revocable trust for the purpose of diminishing his estate and reducing the surviving spouse's elective share amount. *Id.* at 968. Finding this to be a contrivance upon the rights of the surviving spouse, the court held that the trusts were subject to the spouse's elective share. *Id.* at 969.

<sup>14</sup> See, e.g., *id.* at 966.

<sup>15</sup> See Langbein & Waggoner, *supra* note 6, at 872.

<sup>16</sup> See *id.* at 881.

<sup>17</sup> See *infra* Section IV.A. The Uniform Probate Code introduced the "augmented estate" elective share approach in 1969, which statutorily includes both probate and non-probate

Yet more than fifty years after reform efforts began, sixteen jurisdictions have not garnered enough support to pass elective share reform (holdout jurisdictions).<sup>18</sup> Although elective share reform has stalled in the holdout jurisdictions, seven of these jurisdictions have codified trust law, making the revocable trust statutorily available to the decedent's creditors (trust reform).<sup>19</sup>

A consequence of the trust reform in seven of the holdout jurisdictions is dramatically unfair because at the death of a decedent/settlor, a creditor is preferred over the decedent's spouse.<sup>20</sup> This Article identifies the great unfairness with the legislation in the seven holdout jurisdictions, and recommends that holdout jurisdictions promptly revive elective share reform to resolve the problem.

The following hypothetical of Dana Decedent (Dana) and Sam Spouse (Sam) will be used to illustrate the various rights to Dana's revocable trust throughout this Article. Dana and Sam have been married for twenty years, both having worked and contributed to their marital home worth \$520,000 owned as tenants by the entireties. Dana decides to implement a revocable trust and transfers \$2,000,000 to a revocable trust, maintaining complete control and access to the assets during his lifetime, and designates Dana's Law School alma mater to receive the trust balance at Dana's death. Dana's will leaves everything to Sam. Dana has a car, valued at \$30,000 which is not transferred to the trust, and owes a credit card company \$50,000.

To provide some context as to the problem, the first section of this Article will address the historical development of the traditional elective

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assets in calculating the spouse's elective share. *See* UNIF. PROBATE CODE §§ 2-202, 2-203 (amended 2010).

<sup>18</sup> The sixteen holdout jurisdictions that have failed to enact elective share reform: Alabama, ALA. CODE § 43-8-70 (2010); Arkansas, ARK. CODE ANN. § 28-39-401 (Supp. 2015); Connecticut, CONN. GEN. STAT. § 45a-436 (2013); District of Columbia, D.C. CODE § 19-113 (2015); Illinois, 755 ILL. COMP. STAT. 5/2-8 (2015); Indiana, IND. CODE § 29-1-3-1 (2010); Kentucky, KY. REV. STAT. ANN. § 392.080 (LexisNexis 2010); Maryland, MD. CODE ANN., EST. & TRUSTS § 3-203 (LexisNexis 2011); Mississippi, MISS. CODE ANN. § 91-5-25 (West 2010); New Hampshire, N.H. REV. STAT. ANN. § 560:10 (2014); Ohio, OHIO REV. CODE ANN. § 2106.01 (West 2014); Oklahoma, OKLA. STAT. ANN. tit. 84, § 44 (West 2010); Rhode Island, 33 R.I. GEN. LAWS § 33-25-2 (2011); TENN. CODE ANN. § 31-4-101 (2015); Vermont, VT. STAT. ANN. tit. 14, § 311 (2010); and Wyoming, WYO. STAT. ANN. § 2-5-101 (2015).

<sup>19</sup> Seven of the sixteen holdout jurisdictions have trust reform: Alabama, ALA. CODE § 19-3B-505 (LexisNexis 2015); District of Columbia, D.C. CODE § 19-1305.05 (2013); Kentucky, KY. REV. STAT. ANN. § 386B.5-040 (LexisNexis Supp. 2015); Maryland, MD. CODE ANN., EST. & TRUSTS § 14.5-508 (LexisNexis Supp. 2015); New Hampshire, N.H. REV. STAT. ANN. § 564-B:5-505 (Supp. 2015); Vermont, VT. STAT. ANN. tit. 14A, § 505 (2010); and Wyoming, WYO. STAT. ANN. § 4-10-506 (2015).

<sup>20</sup> *Supra* note 19.

share and the underlying public policy supporting the statute.<sup>21</sup> Secondly, the Article examines the traditional approach, consisting of the traditional elective share and common law modifications in the holdout jurisdictions.<sup>22</sup> Thirdly, the Article provides an overview of the elective share reform among the twenty-five reform states and trust reform in seven of the holdout jurisdictions.<sup>23</sup> Finally, the Article takes a closer look at who is to blame for the unfair consequences in the holdout jurisdictions, and urges the immediate revival of elective share reform.<sup>24</sup>

## II. HISTORY AND POLICY SUPPORTING THE ELECTIVE SHARE

There are two marital property systems in the United States, the common law system<sup>25</sup> and the community property system.<sup>26</sup>

A married person in common law jurisdictions may accumulate and title property in each spouse's separate name.<sup>27</sup> Historically, upon the death of one spouse, the economic protection for the surviving spouse, who might otherwise be left without support, was dower and curtesy.<sup>28</sup> By the early

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<sup>21</sup> See *infra* Section III.A.

<sup>22</sup> See *infra* Section III.B.

<sup>23</sup> See *infra* Sections IV.A–IV.C.

<sup>24</sup> See *infra* Part V.

<sup>25</sup> See Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 523 (2003) (noting that the common law system allows a husband and wife to separately acquire and title property solely in his or her own name). There are forty-two common law property jurisdictions; these states that have retained the common law property system are: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. See *id.* at 525.

<sup>26</sup> See *id.* at 524–25 (explaining that the community property system protects a surviving spouse against disinheritance because at death, by virtue of collective ownership, a deceased spouse can only dispose of one half of the property thus leaving the surviving spouse with the other half). There are nine community property jurisdictions: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. *Id.* at 525 n.27. The elective share is not applicable in community property jurisdictions, so these jurisdictions will not be examined in this Article.

<sup>27</sup> *Id.* at 523.

<sup>28</sup> See *id.* at 526–27 (noting that dower provided legal protection to a widow because it gave her a life estate in one-third of her husband's real property which could not be eliminated by her husband upon his death, while curtesy extended protection to the husband by providing him with a life estate in all his wife's property if a child was born to the marriage); Helen S. Shapo, "A Tale of Two Systems": *Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707 (1993) (tracing the evolution of marital

part of the twentieth-century, the common law protections provided by dower and curtesy were replaced with the traditional elective share,<sup>29</sup> which was initially designed to provide the spouse with some support upon the death of the decedent.<sup>30</sup> The traditional elective share was adopted in all common law jurisdictions except Georgia.<sup>31</sup> The elective share is unnecessary in community property states because these jurisdictions give each spouse the power to dispose of only one-half of the community property at death, thereby ensuring that the surviving spouse will be entitled to the remaining one-half.<sup>32</sup> Protecting a spouse against disinheritance raises many important policy issues. On one hand, a decedent should have liberal discretion in the disposition of his or her wealth at death,<sup>33</sup> yet on the other, a decedent should not be allowed to disinherit his or her spouse.<sup>34</sup> Although there is friction between testamentary freedom and society's interest in protecting a spouse, the existence of an elective share statute, enacted by the legislature, shows public policy favors protecting a spouse.<sup>35</sup>

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property systems and assessing the strengths and weakness of modern inheritance legislation in the United States).

<sup>29</sup> See Vallario, *supra* note 25, at 528–29 nn. 41 & 45 (noting the reasons for the abolishment of dower and curtesy and identifying the thirty-six jurisdictions that abolished it).

<sup>30</sup> See *id.* at 531 n.49 (asserting that the incorporation of the support duty is founded upon the notion of status that “arises at the time of marriage,” and that some support should continue after the death of the decedent “in favor of the survivor”).

<sup>31</sup> Turnipseed, *supra* note 1, at 162 (“Georgia is the only state which does not have a statutory elective share or community property concepts.”). As this Article’s focus is on elective share reform, Georgia will not be addressed because it is the only common law state without an elective share. Thus, this Article will only address forty-one common law jurisdictions. See Vallario, *supra* note 25.

<sup>32</sup> *Supra* note 26.

<sup>33</sup> See Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–9 (1992) (contending that a testator should be able to do what he or she pleases with the wealth he or she created based on the theory that “freedom of testation creates an incentive to industry and saving”).

<sup>34</sup> Susan N. Gary, *The Oregon Elective Share Statute: Is Reform an Impossible Dream?*, 44 WILLAMETTE L. REV. 337, 338 (2007) (confirming that elective share reform is necessary in order to provide spouses with protection against disinheritance).

<sup>35</sup> See *id.* at 351 (noting that the historical policy of the elective share was to provide the widow with support, a policy which evolved over time in recognition of the notion that marriage should be treated like a partnership whereby both spouses contribute equally, albeit in different ways, and deserve to share equally); Martin D. Begleiter, *Grim Fairy Tales: Studies of Wicked Stepmothers, Poisoned Apples, and the Elective Share*, 78 ALB. L. REV. 521, 528 (2015) (suggesting the existence of a statute is the primary source of public policy as declared by the legislature).

Society favors marriage and significant rights and entitlements attach upon marriage.<sup>36</sup> Recently the Supreme Court of the United States recognized once again, that marriage, a fundamental right, cannot be denied by states of its enjoyment and protections.<sup>37</sup> Consistently, public policy discourages divorce<sup>38</sup> and “anything which tends to prevent marriage, or to disturb the marriage state, is viewed by the law with suspicion and disfavor.”<sup>39</sup> If a marriage ends at divorce (as opposed to death), there is an equitable distribution of marital assets.<sup>40</sup> Marital assets are accumulated during the marriage regardless of title, and include both probate and non-probate assets.<sup>41</sup> Therefore, protecting a spouse with a fractional share of the decedent’s net probate estate does not fairly or equitably protect a spouse.<sup>42</sup> In *Sullivan v. Burkin* the court stated “[i]t is neither equitable nor logical to extend to a divorced spouse greater rights in the [revocable trust] assets . . . than are extended to a spouse who remains married until the [decedent’s death].”<sup>43</sup> In holdout jurisdictions, where the traditional elective share is narrowly defined as a fraction of probate assets, a surviving spouse

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<sup>36</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (“[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.”); *Turner v. Safley*, 482 U.S. 78, 96 (1978) (“[M]arital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock).”).

<sup>37</sup> See *Obergefell*, 135 S. Ct. at 2589 (“[M]arriage is fundamental under the Constitution [and] apply with equal force to same-sex couples.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

<sup>38</sup> See Gary, *supra* note 34, at 351 (affirming that divorce and dissolution statutes, which mandate an equitable division of marital property, reflect that public policy encourages spouses to stay married and, in turn, discourages divorce).

<sup>39</sup> *Shimp v. Huff*, 556 A.2d 252, 261 (Md. 1989) (quoting *Owens v. McNally*, 45 P. 710, 713 (Cal. 1896)). Furthermore, the *Shimp* court emphasized that there is a “strong public policy interest in protecting the surviving spouse’s elective share” and that “the surviving spouse’s claim to an elective share should be afforded priority over the claims of beneficiaries of a contract to make a will.” *Id.* at 263.

<sup>40</sup> See Vallario, *supra* note 25, at 523–24 (describing the fair and equitable distribution of property at divorce).

<sup>41</sup> See *id.* at 521. Dana and Sam, having accumulated their wealth during marriage, have \$2,500,000 of marital assets. The marital assets would include the revocable trust, car and home less the debt. An equitable distribution would result in each party receiving one-half of that amount, \$1,250,000.

<sup>42</sup> See *id.* at 521, 532, 568.

<sup>43</sup> 460 N.E.2d 572, 577 (Mass. 1984).

could be financially worse off than had the spouse and the decedent divorced.<sup>44</sup>

### III. TRADITIONAL APPROACH TO THE REVOCABLE TRUST

#### A. *Traditional Elective Share*

Depending on the decedent's domicile at the time of death, common law jurisdictions protect a spouse with an elective share statute.<sup>45</sup> The elective share statute protects a spouse by entitling him or her to an amount defined by the common law jurisdiction's statute.<sup>46</sup> The traditional elective share statute, defines the election as a fractional share (one-half or one-third) of the decedent's net probate estate.<sup>47</sup> Net probate assets are assets titled in the decedent's sole name less legally enforceable claims. Net probate assets do not include a revocable trust.<sup>48</sup> In the hypothetical Sam's elective share is zero. Dana's net probate estate is zero. The car (\$30,000) is depleted by the creditor claim (\$50,000) and Sam receives no statutory protection from disinheritance under the traditional elective share. Dana's revocable trust is not within the reach of the elective share unless Sam is ready, willing, and able to litigate the matter.

The revocable trust is a widely used vehicle for the transfer of wealth.<sup>49</sup> Most jurisdictions have modified the traditional elective share to account for the revocable trust and other changes in society.<sup>50</sup> The traditional elective share, by not including non-probate transfers of wealth, like the revocable trust, in its elective share calculation, fails to adequately protect the

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<sup>44</sup> See *id.* at 577 n.6. The corollary of this contravenes public policy in that it could encourage divorce because a spouse could be entitled to a more favorable disposition of property through divorce than the traditional elective share. See, e.g., Gary, *supra* note 34, at 351; Vallario, *supra* note 25, at 559. But see *In re Estate of George*, 265 P.3d 222, 230 (Wyo. 2011) (quoting *Bongaards v. Millen*, 793 N.E.2d 335, 345 (Mass. 2003) (denying husband access to wife's revocable trust, stating that "[d]eath is not divorce . . . [and] the Legislature has adopted quite differing rules governing the disposition of property following those two events")).

<sup>45</sup> See, e.g., 33 R.I. GEN. LAWS ANN. § 33-28-1 (West 2017); WYO. STAT. ANN. § 2-5-101 (West 2017).

<sup>46</sup> 33 R.I. GEN. LAWS ANN. § 33-28-1 (West 2017); WYO. STAT. ANN. § 2-5-101 (West 2017).

<sup>47</sup> 33 R.I. GEN. LAWS ANN. § 33-28-1 (West 2017); WYO. STAT. ANN. § 2-5-101 (West 2017).

<sup>48</sup> See *supra* Part I (defining revocable trust and how legal title is held by trustee not in the decedent's sole name).

<sup>49</sup> See Alex M. Johnson, Jr., *Is it Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393, 396 (2016).

<sup>50</sup> Turnipseed, *supra* note 1, at 179 (noting that a substantial minority of states allow the elective share to be avoided with a revocable trust). See *infra* note 91.

surviving spouse against disinheritance.<sup>51</sup> “Any crafty testator who wished to disinherit a spouse” can simply transfer assets from his or her sole name, to a revocable trust, to avoid the elective share.<sup>52</sup> The revocable trust as an estate planning device, used to avoid the elective share, was used nearly a century ago in the pioneering case of *Newman v. Dore*.<sup>53</sup> In *Newman*, the decedent established a revocable trust “with the intention and for the purpose of diminishing his estate and . . . to deprive . . . his widow of any rights in and to his property upon his death.”<sup>54</sup> The court held the transfers to the decedent’s revocable trust were illusory and invalid for purposes of the elective share.<sup>55</sup>

The ineffective traditional elective share required courts to step in to alleviate the disinheritance problem by creating various equitable doctrines.<sup>56</sup> The elective share law in the holdout jurisdictions is a combination of the traditional elective share statute with common law modifications (traditional approach).<sup>57</sup>

#### B. Common Law Modifications

For many years courts have expanded the traditional elective share with common law modifications to impose “correct policy” on spousal protection.<sup>58</sup> Two of the judicial solutions used by the courts in holdout jurisdictions are the illusory transfer doctrine and fraud on marital rights.<sup>59</sup>

##### 1. Illusory Transfer Doctrine

The illusory transfer doctrine declares the transfer from decedent’s probate estate to the revocable trust (non-probate) as invalid for purposes of defeating the elective share.<sup>60</sup> *Newman* considered whether the

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<sup>51</sup> Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 576 (1995) (explaining that under the traditional elective share, revocable trusts serve as an “easy vehicle[] for defeating a spouse’s elective share rights”).

<sup>52</sup> STEWART E. STERK & MELANIE B. LESLIE, *ESTATES AND TRUSTS* 157 (5th ed. 2015).

<sup>53</sup> 9 N.E.2d 966 (N.Y. 1937).

<sup>54</sup> *Id.* at 968 (alteration to original).

<sup>55</sup> *See id.* at 969.

<sup>56</sup> *See infra* Section III.B.

<sup>57</sup> *See infra* Section III.B; Gary, *supra* note 34, at 567.

<sup>58</sup> *See* Gary, *supra* note 34, at 351 (recognizing that the elective share should provide spouses with protection against disinheritance). *But see* Begleiter, *supra* note 35, at 524 (arguing that extending the traditional elective share statutes under equitable principles takes the court beyond its permissible judicial functions).

<sup>59</sup> *Newman*, 9 N.E.2d at 969; *see also* Begleiter, *supra* note 35, at 535.

<sup>60</sup> Finding that “motive or intent is an unsatisfactory test of the validity of a transfer of property[,]” the Court of Appeals of New York in *Newman* adopted the illusory transfer doctrine and invalidated the trust for purposes of defeating the elective share primarily on

decedent/settlor had in good faith divested himself from his property.<sup>61</sup> The decedent/spouse's retention of control over the revocable trust was sufficient to bring it within the reach of the spouse to prevent her disinheritance.<sup>62</sup> Many courts adopted the illusory trust doctrine,<sup>63</sup> and South Carolina codified the illusory trust doctrine as it relates to the revocable trust.<sup>64</sup> All reform states include the revocable trust within the reach of the spouse to prevent his or her disinheritance.<sup>65</sup> Another common law doctrine frequently relied on in the holdout jurisdictions is a fraud on marital rights test.<sup>66</sup> This theory has different names amongst the holdout jurisdictions but for purposes of this Article it will be referred to as the fraud on marital rights test.<sup>67</sup>

## 2. *Fraud on Marital Rights*

The fraud on marital rights theory uses a series of factors to determine, if when the decedent made the transfer to the revocable trust, he or she did so with the intent to defraud a spouse of his or her elective share.<sup>68</sup> This

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that basis of control retained by the decedent. *Newman*, 9 N.E.2d at 969. This test of control was accepted by many courts and became the test in a majority of jurisdictions. See J.R. Kemper, Annotation, *Validity of Inter Vivos Trust Established by One Spouse Which Impairs the Other Spouse's Distributive Share or Other Statutory Rights in Property*, 39 A.L.R.3d 14 (1971).

<sup>61</sup> See *Newman*, 9 N.E.2d at 969.

<sup>62</sup> *Id.*; see generally *Dreher v. Dreher*, 634 S.E.2d 646, 650 (S.C. 2006) (holding that a revocable trust was illusory for elective share purposes under the test of control as pronounced in *Newman* "but remains valid for all other purposes").

<sup>63</sup> See Begleiter, *supra* note 35, at 526–27.

<sup>64</sup> See S.C. CODE ANN. § 62-7-401(c) (2013) (expressing that a revocable trust is illusory and thus invalid for purposes of determining a spouse's elective share rights).

<sup>65</sup> See *infra* note 91 and accompanying text.

<sup>66</sup> See Begleiter, *supra* note 35, at 534–35 (citing *White v. Sargent*, 875 A.2d 658 (D.C. 2005), the District of Columbia Court of Appeals' decision to use a five-factor test to evaluate fraud on a spouse's marital rights).

<sup>67</sup> See *id.* at 535 (citing the various approaches used by the traditional elective share jurisdictions and noting that some courts have embraced a multi-factor approach, or a functional equivalent test, for finding fraud on marital rights and thereby modifying the traditional elective share to include the transferred property for the purpose of the elective share).

<sup>68</sup> See *id.* Factors vary from jurisdiction to jurisdiction, and are only provided as guidance and never all-inclusive, thus allowing the court to modify the list at a moment's notice based on the facts before it. See, e.g., *Karsenty v. Schoukroun*, 959 A.2d 1147, 1180 (Md. 2008) (identifying five factors to consider for fraud on marital rights determinations but noting, "[t]hese factors are by no means an exhaustive list" and "they often may overlap"); *In re Estate of Thompson*, 434 S.W.3d 877, 884 (Ark. 2014) (approving the adoption of the fraud on the marital rights theory which purports "that the settlor's intent should be evaluated on a case-by-case basis considering all relevant facts and circumstances"). The District of Columbia also has enumerated five factors that are evaluated under the totality of the

doctrine does not require the spouse prove fraud but instead generally looks for the decedent's intent in making the transfer.<sup>69</sup> In *Karsenty v. Schoukroun*, the Court of Appeals of Maryland adopted a fraud on marital rights test that recognized the following factors for guidance: (1) the extent of control retained by the decedent; (2) the decedent's motives; (3) the degree to which the *inter vivos* transfer deprives the surviving spouse of property that she or he would otherwise have taken as part of the decedent's estate; (4) whether the decedent actually exercised the retained control or otherwise enjoyed the property at issue; and (5) the familial relationship between the decedent and the person or persons who benefit from the transfer at issue.<sup>70</sup> In *Karsenty*, the court reversed the judgment of the intermediate appellate court and concluded the decedent/settlor's revocable trust was not within the reach of the spouse's elective share.<sup>71</sup> Although the decedent/settlor retained an interest and continued to enjoy the transferred property throughout his lifetime, the court refused to employ its equitable powers to second-guess reasonable and legitimate estate planning arrangements.<sup>72</sup> Acknowledging "that a surviving spouse has a high hurdle to overcome," the court rejected the spouse's claim that the decedent/settlor's dominion and control was *per se* fraud.<sup>73</sup> The court

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circumstances for determining whether an *inter vivos* transfer was made with the intent to defraud a spouse of his or her elective share, and they are:

- (1) the "completeness" of the transfer; (2) the motive for the transfer;
- (3) participation by the transferee in the alleged fraud on the surviving spouse; (4) the amount of time between the transfer and the decedent's death; and (5) the degree to which the surviving spouse is left without an interest in the decedent's property or other means of support.

*White v. Sargent*, 875 A.2d 658, 664–65 (D.C. 2005) (quoting *Windsor v. Leonard*, 475 F.2d 932, 934 (D.C. Cir. 1973)). Moreover, in identifying these five factors for determining whether an *inter vivos* transfer constitutes a fraud on marital rights, each factor is to be independently demonstrated. *See id.* at 664 n.13.

<sup>69</sup> *See Begleiter, supra* note 35, at 524 (explaining that the validity of the decedent's transfer under the fraud on marital rights doctrine required the surviving spouse to prove that the "decedent's intent or motive in making the transfer was to deny the surviving spouse the right to the property on the transferor's death"). Recognizing that the invalidation of a decedent's transfer under this doctrine is justified and necessary in order to prevent transfers made with a bad motive and fraudulent intent to the detriment of the surviving spouse, it is a subjective test that is difficult to prove. *See id.* at 525 (discussing the early adoption and application of the fraud on marital rights theory in *In re Sides' Estate*, 228 N.W. 619 (Neb. 1930)).

<sup>70</sup> *Karsenty*, 959 A.2d at 1174–79.

<sup>71</sup> *Id.* at 1179–80.

<sup>72</sup> *Id.* at 1174.

<sup>73</sup> *Id.*

declared if they were to hold as such, it would be imposing by “judicial fiat” a kind of augmented estate model eschewed by the legislature.<sup>74</sup>

### 3. *Criticisms of Judicial Solutions*

These common law doctrines speculate as to a deceased person’s motive, lack certainty, are fact specific, allow courts to do whatever they want, and can easily be resolved in favor of the side best able to litigate.<sup>75</sup> The fraud on marital rights theory, requiring a spouse to demonstrate bad motive on the part of a decedent, puts the disinherited spouse at an unrealistic disadvantage if he or she is unrepresented.<sup>76</sup> Additionally, in the event the spouse is financially able to retain counsel, the spouse will be out-of-pocket with respect to legal fees and litigation costs, whereas in defending the decedent’s estate plan, estate assets will be available to fund the litigation for the other side.<sup>77</sup> Although some courts have rescued the spouse using the illusory trust doctrine or fraud on marital rights theories, these are Band-Aid approaches with significant risks and heavy financial burdens placed on the very person the traditional elective share is designed to protect.<sup>78</sup> The spouse is forced to litigate and oftentimes exhaust all appeal efforts in an attempt to receive alleged statutory protection.<sup>79</sup> To the contrary, courts unwilling to correct the policy of an ineffective traditional elective share may simply interpret the words of the statute, leaving the spouse with no remedy at all.<sup>80</sup> For this reason, the legislature should act to provide an equitable remedy. “The question of the rights of a surviving spouse in the estate of a deceased spouse, using the word ‘estate’ in its broad sense, is one that can best be handled by legislation.”<sup>81</sup>

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<sup>74</sup> *Id.* at 1159.

<sup>75</sup> See Begleiter, *supra* note 35, at 534 (criticizing the fraud on marital rights doctrine for “[e]numerating so [m]any [f]actors for [f]raud on the [s]pouse’s [s]hare that a [c]ourt [c]an [d]o [a]nything [i]t [w]ants”).

<sup>76</sup> See *id.* at 535.

<sup>77</sup> A majority of jurisdictions have provided by statute that estate assets may be used to pay attorney’s fees and expenses incurred for the purpose of defending actions brought against a decedent’s estate. See, e.g., N.D. CENT. CODE § 30.1-18-20 (2010); NEB. REV. STAT. ANN. § 30-2481 (LexisNexis 2010); ARIZ. REV. STAT. ANN. § 14-3720 (2012); MO. REV. STAT. § 473.270 (2007); MISS. CODE ANN. § 91-7-281 (West 2013).

<sup>78</sup> See Begleiter, *supra* note 35, at 525.

<sup>79</sup> See, e.g., *Karsenty v. Schoukroun*, 959 A.2d 1147, 1151 (Md. 2008); *Knell v. Price*, 569 A.2d 636, 638 (Md. 1990).

<sup>80</sup> See *infra* Section III.C.

<sup>81</sup> *Sullivan v. Burkin*, 460 N.E.2d 572, 578 (Mass. 1984).

*C. Statutory Construction*

The court's alternative to applying equitable doctrines is to interpret the traditional elective share using the plain meaning rule, which is far worse.<sup>82</sup> Applying principles of statutory construction in this context, which defines spousal protection in terms of net probate estate, leaves a spouse victim to the political process.<sup>83</sup> The courts often note the legislature has had ample time to adopt elective share reform, and in some cases reject elective share reform.<sup>84</sup> Courts have begun to ignore the inequities of the traditional elective share and looked the other way, noting "[r]egardless whether changing times and the modern array of possible will substitutes may make it advisable to expand the term beyond the mere probate estate, we are not at liberty to update statutes merely because, in our view, they no longer suffice to serve their intended purpose."<sup>85</sup> In Illinois, a holdout jurisdiction, the court refused to expand the traditional elective share, finding the revocable trust was not within the reach of the spouse because the Illinois legislature had enacted a statute making "intent to defraud" a necessary

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<sup>82</sup> See Begleiter, *supra* note 35, at 532 (concluding that courts must interpret a statute in accordance with its policy and expanding the traditional elective share statutes to non-probate property exceeds the judicial functions of the court).

<sup>83</sup> See *infra* Section V.A (noting the difficulties of reform and legitimate reasons for various bar sections not being motivated to seek elective share reform). But see Begleiter, *supra* note 35, at 532.

<sup>84</sup> The Maryland General Assembly has been unsuccessful to bring about legislative change despite repeated efforts over the years. See S.B. 913, 2016 Gen. Assemb., Reg. Sess. (Md. 2016); H.B. 281, 2015 Gen. Assemb., Reg. Sess. (Md. 2015); S.B. 621 and H.B. 570, 2014 Gen. Assemb. Reg. Sess. (Md. 2014); S.B. 633, 2012 Gen. Assemb., Reg. Sess. (Md. 2012); S.B. 338, 2010 Gen. Assemb., Reg. Sess. (Md. 2010); H.B. 645, 2009 Gen. Assemb., Reg. Sess. (Md. 2009); H.B. 265, 2000 Gen. Assemb., Reg. Sess. (Md. 2000); H.B. 665, 1997 Gen. Assemb., Reg. Sess. (Md. 1997).

Ohio has also considered revision of its elective share statute several times without success. See H.B. 439, 126th Gen. Assemb., Reg. Sess. (Ohio 2005); S.B. 152, 123d Gen. Assemb., Reg. Sess. (Ohio 1999). The 2005 attempt stalled and was then revised by the Estate Planning Trust and Probate Law Section Council and the Executive Committee of the Ohio Association of Probate Judges to create an augmented estate but the revised bill does not seem to have ever been introduced. Gary, *supra* note 34, at 348. In 2012, Ohio enacted sweeping revisions to its Probate Code but neglected to reform its elective share statute. See S.B. 124, 129th Gen. Assemb., Reg. Sess. (Ohio 2012).

<sup>85</sup> *Bongaards v. Millen*, 793 N.E.2d 335, 343 (Mass. 2003). The *Bongaards* court clearly acknowledged that the flaws and inequities of its traditional elective share warranted reform but took a hands-off approach, noting, "[i]t is up to the Legislature to choose between the complex—and apparently controversial—options for modernizing *this outdated scheme*." *Id.* at 343–44 (emphasis added).

element in including a lifetime transfer.<sup>86</sup> Further, in the holdout jurisdiction of Wyoming, the court found a revocable trust used to disinherit the spouse was not part of the elective share because the plain language of the statute did not include the non-probate transfer.<sup>87</sup>

The traditional elective share provides no protection from the revocable trust. Although courts have employed equitable theories in the past to correct the inequities of the traditional elective share, more recent decisions among these holdout jurisdictions are reluctant to adopt elective share reform by “judicial fiat.”<sup>88</sup>

#### IV. LEGISLATIVE REFORM

##### A. Elective Share Reform

State legislatures who are able to hold hearings, gather information, and draft bills, are in the best position to protect the interest of the surviving spouse.<sup>89</sup> The inequities created with the traditional approach mandated elective share reform.<sup>90</sup> Twenty-five of the forty-one common law jurisdictions have enacted elective share reform, which extends to a revocable trust.<sup>91</sup> Elective share reform has spanned over fifty years with Oregon being the last jurisdiction to reform in 2009.<sup>92</sup>

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<sup>86</sup> Begleiter, *supra* note 35, at 536 (discussing *Johnson v. La Grange State Bank*, 383 N.E.2d 185, 197 (Ill. 1978), which held that a joint account was outside the reach of the spouse because the transfer was not made with “an intent to defraud”).

<sup>87</sup> *In re Estate of George*, 265 P.3d 222, 231 (Wyo. 2011).

<sup>88</sup> *Karsenty v. Schoukroun*, 959 A.2d 1147, 1159 (Md. 2008) (declining to impose per se fraud rule on the decedent/settlor’s revocable trust because of dominion and control).

<sup>89</sup> *Dumas v. Estate of Dumas*, 627 N.E.2d 978, 986 (Ohio 1994) (Resnick, J., dissenting) (noting that the impetus is on state legislatures to enact reform).

<sup>90</sup> See *supra* Section III.B.3–III.C.

<sup>91</sup> See ALASKA STAT. § 13.12.203 (2014); COLO. REV. STAT. § 15-11-203 (2016); DEL. CODE ANN. tit. 12, § 901 (2007); FLA. STAT. ANN. § 732.2035 (West 2007); HAW. REV. STAT. ANN. § 560:2-203 (West 2015); IOWA CODE ANN. § 633.238 (West 2015) (modifying to take into consideration trusts); KAN. STAT. ANN. § 59-6a202 (West 2008); ME. STAT. tit. 18-A, § 2-202 (2012); MICH. COMP. LAWS ANN. § 700.2202 (West 2002); MINN. STAT. ANN. § 524.2-203 (West 2012); MO. REV. STAT. § 474.163 (2009); MONT. CODE ANN. § 72-2-221 (2015); NEB. REV. STAT. § 30-2313 (LexisNexis 2010); N.J. STAT. ANN. § 3B:8-1 (West 2007); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 2013); N.C. GEN. STAT. § 30-3.1 (2015); N.D. CENT. CODE § 30.1-05-01 (2010); OR. REV. STAT. § 114.600 (2015); 20 PA. CONS. STAT. § 2203 (2016); S.C. CODE ANN. § 62-2-201 (2007) (modifying S.C. CODE ANN. § 62-7-401 to include trusts); S.D. CODIFIED LAWS § 29A-2-202 (2013); UTAH CODE ANN. § 75-2-203 (West 2015); VA. CODE ANN. § 64.2-302 (2012); W. VA. CODE § 42-3-1 (2014); *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984) (holding that revocable trusts were part of the elective share).

<sup>92</sup> OR. REV. STAT. § 114.600 (2015).

Unfortunately, elective share reform has stalled in sixteen holdout jurisdictions despite the obvious criticisms of the traditional approach,<sup>93</sup> and this Article's focus is to examine why, but before doing so will discuss generally how elective share reform unfolded across the United States.<sup>94</sup> The 1947 Pennsylvania legislature was the first state to recognize and enact elective share reform in order to prevent the surviving spouse from being disinherited.<sup>95</sup> The Pennsylvania statute, however, did not trigger widespread change in other jurisdictions. Instead, in 1965, the New York legislature, in recognition that the existing traditional elective share did not provide adequate protection to the surviving spouse, "authorized a study of the matter for the purpose of drafting new legislation."<sup>96</sup> Influenced by the elective share reform efforts in New York, the National Conference of Commissioners on Uniform State Law (Uniform Law Commission) drafted the Uniform Probate Code (1969 UPC).<sup>97</sup> The 1969 UPC promulgated the augmented estate model for other jurisdictions to follow.<sup>98</sup> The augmented estate model took into consideration non-probate assets (including the revocable trust) for purposes of calculating the surviving spouse's elective share, and unlike the traditional elective share, entitled the spouse to a fractional share of the "augmented estate."<sup>99</sup> The 1969 UPC defined "augmented estate" to include certain property transfers (like the revocable trust) by the decedent during the marriage for the benefit of someone other than the surviving spouse for which the surviving spouse did not receive adequate compensation.<sup>100</sup> The intent behind the augmented estate model

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<sup>93</sup> See *infra* Section III.B.3.

<sup>94</sup> See *supra* note 91; Gary, *supra* note 34; Bruce L. Stout & Audy M. Perry, Jr., *West Virginia Takes a Step Backward in Elective Share Law*, 99 W. VA. L. REV. 679, 681–84 (1997) (analyzing the reform adopted by specific jurisdiction); Bradley B. Wrightsel, *A Proposed Solution to Spousal Disinheritance in Ohio: The Uniform Probate Code's Elective Share Revision*, 19 OHIO N.U. L. REV. 951, 963–66 (1993) (discussing the emergence of different jurisdictional approaches to the elective share).

<sup>95</sup> See Gary, *supra* note 51, at 576.

<sup>96</sup> *In re Estate of Agioritis*, 357 N.E.2d 979, 981 (N.Y. 1976) ("As a result of this decision and the cases following *Halpern*, the Legislature, recognizing that existing law was inadequate to protect the surviving spouse, authorized a study of the matter for the purpose of drafting new legislation.").

<sup>97</sup> See UNIF. PROBATE CODE § 1-101 (amended 2010).

<sup>98</sup> *Id.* § 1-101(5).

<sup>99</sup> *Id.* § 2-201.

<sup>100</sup> *Id.* § 2-202. The following is to be added:

(1) The value of property transferred by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

was to prevent a spouse from being disinherited while simultaneously preventing the surviving spouse from obtaining more than his/her equitable share of the estate.<sup>101</sup> Although elective share reform may revive, this section is intended to provide a chronological progression of elective share reform among the twenty-five states (reform states).<sup>102</sup>

After the 1969 UPC, other states began to join the bandwagon of elective share reform, some adopting the 1969 UPC and others modifying the augmented estate model.<sup>103</sup> Over time, the 1969 UPC augmented estate model received criticism for its failure to take into consideration the length

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- (i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;
  - (ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;
  - (iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;
  - (iv) any transfer made within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

UNIF. PROBATE CODE § 2-202(1) (amended 2010).

<sup>101</sup> *Id.* § 2-202. This Article's focus is on the reform's goal to prevent the disinheritance of the spouse, although elective share reform also remedies the potential of overfunding of the elective share.

<sup>102</sup> *Supra* note 91 (listing the twenty-five reform states).

<sup>103</sup> In 1973, North Dakota adopted the UPC. N.D. CENT. CODE § 30.1-05-01 (2010); *In re Estate of Knudsen*, 322 N.W.2d 454, 455 (N.D. 1982) (noting that the UPC was enacted in North Dakota in 1973 and became effective July 1, 1975). In 1974, Colorado, Montana, and Nebraska adopted the 1969 UPC. *See* COLO. REV. STAT. § 15-11-202 (2016); MONT. CODE ANN. § 72-2-221 (2015); NEB. REV. STAT. ANN. § 30-2313 (LexisNexis 2010); *Beren v. Beren*, 349 P.3d 233, 239 (Colo. 2015) ("The Colorado Probate Code . . . is modeled on the Uniform Law Commissioners' Uniform Probate Code (UPC), which Colorado originally adopted in 1974 . . . [and] grants a surviving spouse the right to elect against the decedent's will and claim an elective share."); *In re Estate of Chrisp*, 759 N.W.2d 87, 95 (Neb. 2009) ("Nebraska adopted the original 1969 Uniform Probate Code (UPC) in 1974" and its elective share statute "tracks the language of the original UPC."). In 1976, Hawaii adopted the elective share provisions set forth in the UPC. *In re Estate of Searl*, 811 P.2d 828, 830 (Haw. 1991) ("The UPC was adopted by Hawaii in 1976 and provides that a surviving spouse is entitled to take an elective one-third share of the decedent spouse's net estate."). The amounts transferred under certain trusts are included in the combined estate of the husband and wife to calculate the augmented estate because "[t]he value of the augmented estate includes the value of the decedent's nonprobate transfers to others." § 29A-2-205; HAW. REV. STAT. ANN. § 560:2-205 (West 2015). A spouse of more than fifteen years is entitled to obtain half the augmented estate of the deceased spouse, even when the deceased made provisions to the contrary. *See* S.D. CODIFIED LAWS § 29A-2-202 (2013). In 1975, Utah enacted a modified version of the 1969 UPC, which was subsequently amended in 1977. UTAH CODE ANN. § 75-1-101 (West 2015).

of the marriage when assessing the surviving spouse's elective share and its resemblance to dower and curtesy rights.<sup>104</sup> These criticisms resulted in the augmented estate model being "fundamentally revised in 1990" (1990 UPC revisions).<sup>105</sup> The 1990 UPC revisions were made for the purpose of bringing "elective-share law into line with the contemporary view of marriage as an economic partnership" by adding a fifteen-year phase-in provision under which the length of the marriage is considered when calculating the spouse's elective share.<sup>106</sup> The phase-in treated short-term and long-term marriages differently and was proposed to account for the number of second marriages throughout the United States.<sup>107</sup> The 1990 UPC revisions prompted additional elective share reform among reform states.<sup>108</sup>

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<sup>104</sup> See J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 224–25 (1988) (purporting that the fractional one-third share derived from the common law protections of dower and curtesy was not consistent with the view of marriage as a partnership).

<sup>105</sup> The UPC was "substantially revised in 1975, 1982, 1987, 1989, 1990, 1991, 1997, 1998, 2002, 2003, 2008, and 2010." *Legislative Fact Sheet—Probate Code*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code> [https://perma.cc/XP46-DBPE].

<sup>106</sup> UNIF. PROBATE CODE §§ 2-201–2-214 (amended 2010). In the 1990 revisions, the sections regarding the elective share were renumbered and former section 2-202 (the section creating the augmented estate), was divided and became sections 2-203 through 2-207 with comments and examples added to clarify how the augmented estate approach was to apply in practice. UNIF. PROBATE CODE Part 2 (amended 2010) (general cmt.).

<sup>107</sup> *Id.* §§ 2-201–2-214.

<sup>108</sup> In 1992, West Virginia became the first state to enact the 1990 revisions to the UPC's elective share provisions. See Stout & Perry, *supra* note 94, at 679. However, arguments exist that subsequent revisions to the West Virginia elective share statute effectively destroyed the accomplishments of its 1992 revisions. *Id.* at 680. In 1995, South Dakota adopted the UPC, however, South Dakota modeled its statute on the revised UPC statute. See S.D. CODIFIED LAWS § 29A-2-202 (2013); *In re Estate of Amundson*, 621 N.W.2d 882, 886 (S.D. 2001) ("South Dakota's version of the UPC, adopted in 1995, allows a spouse of more than fifteen years to obtain half the augmented estate of the deceased spouse, even when the deceased made provisions to the contrary."). The amounts transferred under certain trusts are included in the combined estate of the husband and wife to calculate the augmented estate because the value of the augmented estate includes the value of the decedent's nonprobate transfers to others. See S.D. CODIFIED LAWS § 29A-2-202 (2013). In 1996, Alaska adopted the UPC. ALASKA STAT. § 13.12.202 (2014). See generally *In re Estate of Maldonado*, 117 P.3d 720 (Alaska 2005).

In 1996 the Alaska legislature adopted some of the revisions to the UPC's elective share law, while specifically rejecting others. The legislature followed the revised UPC by including within the augmented estate certain nonprobate assets, such as life insurance payable to third parties, as well as the spouse's property owned at the decedent's death regardless of whether the property was derived from the decedent.

The UPC was modified in 1993 and further in 2008, but those changes were not important for purpose of elective share reform.<sup>109</sup> Although the Uniform Law Commissioners promulgated a model for reform, most elective share reform is heavily vetted and modified to include local variations.<sup>110</sup> There are differences between the reform states but the pith is that a spouse's elective share is calculated including non-probate assets like the revocable trust and assets over which the decedent had dominion and control.<sup>111</sup> The following is a discussion of the augmented estate model.

### *B. Augmented Estate Model*

There are several steps in calculating the elective share with the augmented estate model.<sup>112</sup>

#### *1. Augmented Estate*

The first step is to pool all the assets of the decedent and the spouse.<sup>113</sup> Section 2-203 states the augmented estate consists of the sum of the decedent's probate assets,<sup>114</sup> the decedent's non-probate transfers passing to someone other than the spouse,<sup>115</sup> the decedent's non-probate transfers passing to the spouse,<sup>116</sup> and the spouse's probate and non-probate assets.<sup>117</sup>

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*Id.* at 723–24.

In 1998, Michigan adopted the UPC; however, Michigan did not adopt the augmented estate provisions. *See* MICH. COMP. LAWS § 700.2202 (West 2002). In 1994, Minnesota adopted its current elective share statute modeled off of the UPC. *See* MINN. STAT. § 524.2-203 (West 2012); *see generally* William Forsberg, *Partners in Life and at Death: The New Minnesota Elective Share of a Surviving Spouse Statute*, 23 WM. MITCHELL L. REV. 377 (1997) (asserting that Minnesota began reform efforts of its elective share statute in 1969). Oregon is the most recent state to recognize the need to reform its elective share statute so as to look beyond and adopt an augmented approach that takes into consideration nonprobate assets. As a result of its recognition that reform was necessary, in 2009, the Oregon legislature made significant revisions to its elective share law which used to only look to probate assets but now looks outside of probate when determining the surviving spouse's elective share. Changes went into effect in 2011. *See* OR. REV. STAT. § 114.600 (2015).

<sup>109</sup> *See* UNIF. PROBATE CODE §§ 2-201–2-214 (amended 2010) (“The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993 and 2008.”) (general cmt.).

<sup>110</sup> Vallario, *supra* note 25, at 544 (describing the variety of reform statutes among the reform states as UPC Elective Share Approach, Modified UPC Elective Share Approach, and the Federal Estate Tax Approach).

<sup>111</sup> *Karsenty v. Schoukroun*, 959 A.2d 1147, 1158 (Md. 2008) (noting the control retained by the decedent as one of the factors considered in evaluating the fraud on marital rights test).

<sup>112</sup> UNIF. PROBATE CODE § 2-203 (amended 2010).

<sup>113</sup> *Id.* § 2-203.

<sup>114</sup> *Id.* § 2-204.

<sup>115</sup> *Id.* § 2-205.

<sup>116</sup> *Id.* § 2-206.

<sup>117</sup> *Id.* § 2-207.

Unless excluded, the augmented estate calculation starts with looking at the total assets of both parties.<sup>118</sup>

To arrive at the augmented estate combine Dana's net probate estate (30,000); non-probate asset passing to someone other than the spouse (revocable trust \$2,000,000); non-probate asset passing to spouse (one-half interest in house \$260,000); and spouse's property (spouse's one-half interest in house \$260,000) for a total of \$2,550,000.

VISA is a creditor of Dana's estate, whose claim would be satisfied first from the probate estate, making the net probate estate zero, and the \$20,000 balance due the creditor would be satisfied against the revocable trust in a jurisdiction with trust reform. Thus the net augmented estate would be \$2,500,000.

### 2. Marital Portion of the Augmented Estate

The next step is to calculate the marital portion of the augmented estate.<sup>119</sup> It was the rise in second marriages across the United States that prompted the marital portion of the augmented estate calculation with a sliding percentage based on years of marriage.<sup>120</sup> The idea is the longer the marriage, the more likely the augmented estate was accumulated during the marriage and the greater the share in the augmented estate.<sup>121</sup> The augmented estate's marital portion calculation treats short-term and long-term marriages differently.<sup>122</sup> Since Dana and Sam have been married for more than fifteen years, Sam's marital portion of the augmented estate is 100% of \$2,500,000.

### 3. Elective Share Amount

This calculation requires the marital portion of the augmented estate to be multiplied times 50%.<sup>123</sup> Fifty percent of \$2,500,000 is \$1,250,000. This is the amount that Sam is entitled to based on the assets that Sam and Dana accumulated during their marriage.

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<sup>118</sup> *Id.* § 2-203(a).

<sup>119</sup> *See id.*

<sup>120</sup> *Id.* § 2-203(b); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 223–24 (1991).

<sup>121</sup> *See* UNIF. PROBATE CODE § 2-203 (amended 2010); Waggoner, *supra* note 120, at 247–48.

<sup>122</sup> UNIF. PROBATE CODE § 2-203(b) (amended 2010).

<sup>123</sup> *Id.* § 2-202(a).

#### 4. *Offset with Amounts Received by Spouse*

Once the marital portion of the augmented estate is calculated, the amount is reduced by amounts that satisfy the elective share.<sup>124</sup> Any amount the spouse received by will, non-probate transfers, and the spouse's own property to the extent included in the "augmented estate" is used to offset the marital portion of the augmented estate.<sup>125</sup> Only amounts that the spouse is entitled to receive outright (not interests in trust) are considered for purposes of offset.<sup>126</sup>

Sam is entitled to \$1,250,000 and receives as a non-probate asset \$260,000 (Dana's one-half of the house) and spouse's asset \$260,000 (Sam's one-half of the house). This leaves a deficit of \$730,000, which must be satisfied from the revocable trust, the only other asset available to offset the unsatisfied balance.

#### 5. *Contributions*

To the extent there is an amount owed to the spouse, non-spouse probate and non-probate beneficiaries must contribute proportionately to the amounts they are receiving.<sup>127</sup> This would require revocable trust beneficiaries to contribute proportionately. Although the augmented estate model is complex, it serves as a model for elective share reform and alleviates the problem of spousal disinheritance.

#### C. *Trust Reform in Holdout Jurisdictions*

In an effort to codify trust law amongst American jurisdictions the Uniform Law Commissioners have promulgated the Uniform Trust Code (UTC) as a model for trust reform like the augmented estate model.<sup>128</sup> This

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<sup>124</sup> *Id.* § 2-209(a).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* § 2-210(a).

<sup>128</sup> *Legislative Fact Sheet—Trust Code*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trust%20Code> [http://perma.cc/3RAX-FP5E]. Despite the UTC's lack of explanation for its pro-creditor policy, out of the thirty-two states that have adopted the UTC, Arkansas and Ohio are the only states that have declined to both: (1) codify the UTC's specific provision allowing creditors access to revocable trust assets at the settlor's death and (2) to engage in elective share reform. See Isabelle V. Taylor, *Creditor Rights and the Missing Link in the Arkansas Trust Code: Is Death Strong Enough to "Break the Chain?"*, 65 ARK. L. REV. 433, 466 (2012). The UTC Section 505(a)(3) was omitted from section 28-73-505 of the Arkansas Code and section 5805.06 of the Ohio Revised Code. *Id.* at 438–39. However, despite not codifying the specific language, Ohio case law leaves it unclear what a creditor's rights to revocable trust assets are. See *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119, 122 (Ohio 1939); *Sowers v. Luginbill*, 889 N.E.2d 172, 179–80 (Ohio Ct. App. 2008).

Article's discussion of the UTC is limited in scope to the codification of the creditor's rights to a revocable trust after the settlor's death in the seven holdout jurisdictions.<sup>129</sup> To understand the way in which trust reform addressed the rights of the decedent's creditor after the death of the settlor, it is important to recognize that during the settlor's life, his or her creditors may reach assets in a revocable trust in order to satisfy claims.<sup>130</sup> However, after the death of the settlor, absent trust reform, the ability of a creditor to reach revocable trust assets is uncertain.<sup>131</sup>

Subsection 505(a)(3) of the UTC model specifically provides that revocable trust assets are available to satisfy the claims of creditors even after the settlor's death.<sup>132</sup> The UTC model effectively codifies creditors' rights as they pertain to assets of a revocable trust.<sup>133</sup> However, while the trust reform grants creditors newly found access to revocable trust assets after a settlor's death, it also statutorily shortens the period of time for a creditor to make their claims or forever be barred.<sup>134</sup>

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<sup>129</sup> See *supra* note 19.

<sup>130</sup> See RESTATEMENT (SECOND) OF TRUSTS § 156 cmt. a (AM. LAW INST. 1959) ("The interest of the settlor-beneficiary can be reached by subsequent creditors as well as by those who were creditors at the time of the creation of the trust, and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors.").

<sup>131</sup> See Lauren Ashley Gribble, *Justice Before Generosity: Creditor's Claim to Assets of a Revocable Trust After the Death of the Settlor*, 48 AKRON L. REV. 383, 396 (2015) (discussing the uncertainty in Ohio, "Even under the recently enacted Ohio Trust Code, Ohio law remains undecided regarding whether the assets of a revocable trust are subject to creditors' claims filed after the death of the settlor"). Moreover, "creditors find themselves in a difficult position, uncertain of their rights or hurrying to file their claims before an unexpected death." UNIF. PROBATE CODE § 2-210(a) (amended 2010).

<sup>132</sup> UNIF. TRUST CODE § 505(a)(3) (amended 2010):

After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].

<sup>133</sup> See Taylor, *supra* note 128, at 466 (discussing how most states have statutorily provided rights to creditors against a settlor's revocable-trust assets during the settlor's lifetime, but that the UTC's trust reform that allows creditors to reach revocable-trust assets after settlor's death is an expansion on creditor's rights). "Thus it appears the UTC has wholeheartedly adopted the creditor-favored approach of the UPC without giving much explanation." *Id.*

<sup>134</sup> Absent trust reform, creditors' claims are possibly subject to a normal three-year statute of limitations, MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (LexisNexis Supp. 2015), and have been statutorily shortened in many jurisdictions. MD. CODE ANN., EST. & TRUSTS § 8-103 (LexisNexis 2011).

The comments of the UTC model suggest that this change to creditors' rights is in part a reactionary response to the modern trend of the "revocable trust [being] employed as a will substitute."<sup>135</sup> As it relates to creditor's rights, the UTC model arguably shifts towards treating revocable trusts more like the probate assets they commonly substitute.<sup>136</sup> Ironically, while trust reform refuses to let creditors' claims go unanswered, it neglects to identify issues of spousal protection concerning revocable trusts. In the hypothetical, the revocable trust is available to satisfy the balance due to VISA of \$20,000 (after depleting Dana's probate assets). VISA would file a claim against the revocable trust and follow the same procedure required to collect against Dana's probate estate.

Identical to the probate procedures, the holdout jurisdictions statutorily allow the decedent's creditor to file a claim against the revocable trust generally within six months from the settlor/decedent's date of death, or within another specifically defined period.<sup>137</sup> Trust reform as it relates to creditors' rights against revocable trusts adds insult to injury in those holdout jurisdictions. In these jurisdictions creditors have gained statutory access to revocable trusts through states' adoption of trust reform, while spouses are left with the only remedy being litigation and the burdens thereof.<sup>138</sup> Although a spouse would be required to litigate for spousal protection as to

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<sup>135</sup> UNIF. TRUST CODE § 505 (amended 2010) cmt. "Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges." *Id.*

<sup>136</sup> See MD. CODE ANN., EST. & TRUSTS § 8-103 (LexisNexis 2011) (cross referencing from MD. CODE ANN., EST & TRUSTS § 14.5-508(b)(1) (LexisNexis Supp. 2015)).

<sup>137</sup> See, e.g., *id.* § 14.5-508(b)(1).

[P]roperty of a trust that was revocable at the death of the settlor is not subject to, and the trustee and beneficiaries of that trust may not be held liable for, claims of the creditors of the settlor that are not properly presented in the estate proceeding within the time periods specified in § 8-103 of this article . . . .

*Id.*; ALA. CODE § 19-3B-505(b)(2) (LexisNexis 2015):

A trustee at any time may give notice to any person the trustee has reason to believe may have a claim against the settlor at death. The notice shall contain the name and address of the trustee to whom the claim must be presented. If the person fails to present the claim in writing within 90 days from the date of the notice, then the person shall be forever barred . . . .

<sup>138</sup> See *supra* Part III.

a revocable trust, it is within the reach of a creditor by filing a form.<sup>139</sup> The policy against disinheritance of a spouse remains a highly viable concern among all jurisdictions. Despite strong policy supporting the elective share in connection to spousal protection and a lack of similarly positioned policy favoring creditors, in seven jurisdictions a spouse is entitled to less statutory protection to the revocable trust than a creditor.<sup>140</sup> The final section of this Article will address how a legislature could ignore twentieth century elective share reform, yet enact twenty-first century trust reform and why elective share reform has no friends.

#### V. REASONS FOR INADEQUATE ELECTIVE SHARE REFORM IN HOLDOUT JURISDICTIONS

Any legislative reform requires an important justification, so when jurisdictions adhere to the traditional approach and opt not to reform, it is likely because the reform is unnecessary or not popular. In sixteen jurisdictions elective share legislative efforts have failed, but certainly not because reform is unnecessary.<sup>141</sup> The existence of the traditional elective share statute,<sup>142</sup> as a limitation on testamentary freedom supports the legislature's policy by statute; a decedent should not be able to disinherit a

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<sup>139</sup> Using Maryland as an example, a creditor can successfully present a claim against a revocable trust after a settlor's death in one of two ways by complying. MD. CODE ANN., EST & TRUSTS § 14.5-508 (LexisNexis Supp. 2015). (1) If an estate has been opened, creditor may file a claim in the estate proceeding either within six months from date of death or two months from date of proper notice; or (2) If no estate has been opened creditor must file an action against the trustee within six months of the date of proper notice and serve a copy of the complaint on the trustee within thirty days of the filing. *Id.* In both manners, a valid claim must contain the following information: a verified written statement of the claim indicating its basis; the name and address of the claimant; if the claim is not yet due, the date on which it will become due; if the claim is contingent, the nature of the contingency. *See id.*

<sup>140</sup> *Supra* note 19.

<sup>141</sup> The Vermont Legislature has tried and failed to adopt the augmented estate approach. *See* S. 193, 80th Gen. Assemb., Reg. Sess. (Vt. 2016). However, in 2009 the legislature was successful in adopting significant revisions to probate laws by enacting S. 26, which revised the traditional approach to increase the share of the surviving spouse from one-third to one-half. *See* S. 26, 67th Gen. Assemb., Reg. Sess. (Vt. 2009) (codified as VT. STAT. ANN. tit. 14, §§ 301–338 (2010)). “Although S.26 greatly improves the elective share . . . a more comprehensive and nuanced approach to the problem could be considered in the future.” Stephanie J. Willbanks & Jonathan D. Secrest, *Changes to Vermont's Probate Law: Increasing the Surviving Spouse's Share and Other Measures*, 35 VT. B.J. 26, 28 (2009); *see also supra* note 18.

<sup>142</sup> *See* *Chrisp v. Chrisp*, 759 N.W. 2d 87, 97 (Neb. 2009) (holding “it is the legislature's function through the enactment of statutes to declare what is law and public policy”).

spouse.<sup>143</sup> Yet the traditional approach in the holdout jurisdictions fails to protect a spouse from disinheritance without significant burdens placed on the person the elective share is designed to protect. A decedent should not be able to single-handedly, without the consent or knowledge of the spouse, disinherit his or her spouse. Marriage is a “keystone of the Nation’s social order” and it should not be more financially advantageous for spouses to divorce than to stay married and file an elective share.<sup>144</sup> Reform remains necessary in the holdout jurisdictions.

#### A. *Impetus Required*

If reform is necessary, likely it has not occurred because it is not popular among the movers and shakers of elective share reform in the holdout jurisdictions. Elective share reform requires an impetus. An obvious catalyst for elective share reform would be the disinherited spouse who directly benefits therefrom.

##### 1. *Disinherited Spouse*

Elective share reform benefits the spouse who discovers after the decedent’s death, that he or she has been disinherited as a result of the decedent’s revocable trust that has provided for someone else.<sup>145</sup> The disinherited spouse is perhaps ignorant of the revocable trust, elective share statute, or litigation remedy, when he or she is a victim of the circumstances. Disinherited spouses of the holdout jurisdictions are not organized to seek reform, and there is not likely to be a critical mass of such spouses, therefore this group is an unlikely catalyst.<sup>146</sup> Sometimes legislatures re-act in response to some horrible anecdote that grabs headlines.<sup>147</sup> Maybe if Bernie Sanders’ spouse is left homeless and on welfare, legislatures of Vermont will respond. Since a disinherited spouse is not likely to seek reform and

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<sup>143</sup> Without elective share reform, “[a] clever decedent may . . . disinherit his spouse through non-probate transfers such as trusts . . . .” Willbanks & Secrest, *supra* note 141, at 28.

<sup>144</sup> *Supra* Part II.

<sup>145</sup> See Gary, *supra* note 34, at 343.

<sup>146</sup> See *id.* at 348.

<sup>147</sup> See Bethany Rodgers, *Bill Signed into Md. Law Protects Victims’ Estates*, FREDERICK NEWS-POST (Jan. 1, 2013, 10:43 AM), <http://baltimore.cbslocal.com/2013/06/01/bill-signed-into-md-law-protects-victims-estates> [<https://perma.cc/U4V4-X6C8>]. Maryland was compelled to act in response to the case of Ann Sue Metz who was killed by her husband who then inherited the jointly held assets. *Id.* The common law, piece meal approach was too slow to prevent this and it took her family member’s involvement and two years of lobbying to pass Maryland’s slayer statute. *Id.* Maryland enacted the slayer statute in 2013 and was one of only four states failing to have enacted a slayer statute. See MD. CODE ANN., EST. & TRUSTS § 11-112 (LexisNexis 2011).

will not serve as the sufficient impetus, other groups like the representatives of the state bar must be considered for the role.<sup>148</sup>

## 2. State Bar Representatives

Elective share reform impacts various sections of the state bar.<sup>149</sup> Reform requires members of estates and trust, elder law, bankers, probate judges, family law, and litigation to work together, make concessions, and compromise.<sup>150</sup> Legislative efforts rely heavily on volunteers, generally from larger law firms, whose clients may not favor elective share reform.<sup>151</sup> Without a victim of the circumstances willing to participate, elective share reform must be objectively sought by state bar representatives because the existing law is obsolete and woefully unfair. There are legitimate reasons for not wanting elective share reform. However, elective share reform is necessary for the protection of the unrepresented in holdout jurisdictions and state bar representatives must serve as the impetus to improve the law regardless of whether it is beneficial to their respective practice areas.

### a. Estates and Trusts Section

For the members of the Estates and Trusts section, who often represent wealthy clients, elective share reform geared towards extending the elective share to the revocable trust does not advance the interests of their clients. In fact, the elective share status quo permits estate planners to provide the revocable trust as a will substitute for a client who wishes to disinherit a spouse.<sup>152</sup> Although the spouse could litigate the matter, the litigation hurdle

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<sup>148</sup> *In re Estate of Agioritis*, 357 N.E.2d 979, 981 (N.Y. 1976) (expressing that the New York legislature authorized an in-depth study on elective share reform).

<sup>149</sup> Stephanie J. Willbanks, *Parting is Such Sweet Sorrow, but Does It Have to Be so Complicated? Transmission of Property at Death in Vermont*, 29 VT. L. REV. 895, 898 (2005).

<sup>150</sup> When the Vermont Legislature considered adoption of the UPC a committee was formed consisting of two probate judges, a member of the judiciary, the director of judicial education, and representatives of the court administrator's office, the Vermont Bar Association, the Probate and Trust Law Committee of the Vermont Bar Association, Vermont Legal Aid, the Community of Vermont Elders, and the Agency of Human Services. They reached no conclusion and made no recommendation in regard to adopting the UPC but did recommend "[t]hat the legislature change the law of intestate succession and spousal rights to an understandable system reflecting the complexities of modern family configurations." *Id.* at 898–99 (citing S. 26, 67th Gen. Assemb., Reg. Sess. (Vt. 2009) (codified as VT. STAT. ANN. tit. 14, §§ 301–338 (2010))).

<sup>151</sup> *See id.*

<sup>152</sup> This may explain why Ohio's statute remains unchanged even after the Estate Planning Trust and Probate Law Section Council and the Executive Committee of the Ohio Association of Probate Judges revised a 2005 bill proposing reform; the revised bill was never introduced. *See Gary, supra* note 34, at 348.

is high, difficult and will deter the spouse from doing so. The Estates and Trusts section is best positioned and needs to serve as the driving force for elective share reform in an organized and aggressive manner similar to that used for trust reform.

*b. Elder Law Section*

Additionally, the members of the Elder Law section, who typically assist clients qualifying for Medical Assistance (Medicaid), may lack the impetus to seek reform.<sup>153</sup> Their clients' interests are better served with the traditional approach, which places a revocable trust outside the reach of the spouse without litigation.<sup>154</sup> Elder law lawyers engaged in long-term care planning under Medicaid, which involves transferring assets to the community spouse so the institutionalized spouse will meet Medicaid qualifications, prefer the status quo.<sup>155</sup> In this practice area, a revocable trust is routinely recommended, because if the community spouse predeceases the institutionalized spouse, Medicaid will treat the elective share as a countable resource.<sup>156</sup> Although the traditional approach is within the reach of a spouse with litigation, no Medicaid Assistance Recovery Officer has the resources to shoulder the burden of necessary litigation.<sup>157</sup>

Unless elective share reform includes a special needs trust exception,<sup>158</sup> the Elder Law section would prefer the traditional approach in promoting their clients' interests.<sup>159</sup> However, the Elder Law section must work with the Estates and Trusts section to obtain the necessary modifications to the augmented estate model and support elective share reform.

*c. Bankers*

The bankers and their paid lobbyists likely prefer the traditional approach because reform would prohibit rich clients from doing what they want with their money. Reform might impose more work without additional

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<sup>153</sup> *Id.* at 370–71 (noting that an elder lawyer may advise the community spouse to transfer assets at death to family members rather than giving assets to the spouse in a way that avoids the traditional elective share).

<sup>154</sup> *Supra* Section III.A.

<sup>155</sup> Gary, *supra* note 34, at 370–71.

<sup>156</sup> *See id.* at 371 (explaining the right to elect, even if a spouse does not make the election, constitutes a resource).

<sup>157</sup> *See id.* at 373–74.

<sup>158</sup> FLA. STAT. ANN. § 732.2075(1) (West 2010). Florida's statutory reform provides for a "qualifying special needs trust." *Id.* § 732.2025(2), (8); *see* OR. REV. STAT. § 114.600 (2015); Gary, *supra* note 34, at 367.

<sup>159</sup> Elder Law communities like the National Elder Law Association have modified the UPC augmented estate model to carve-out special needs trusts which would allow benefits of the institutionalized spouse to stay intact. NELA opposed H.B. 281, Gen. Assemb., Reg. Sess. (Md. 2015).

compensation and in general does not promote their client's interests. Although this Article's focus is on the revocable trust, elective share reform based on the augmented estate model will include other non-probate assets such as joint accounts, established at banks, passing by operation of law to the survivor. Elective share reform, as it relates to those assets, would place the banks as the gatekeeper for a potentially disinherited spouse, a role the banking industry would prefer to avoid. Although more may be required of banks, this group must support reform and make concessions like what was done for successful trust reform.

*d. Probate Judges*

Probate Judges may prefer the traditional approach because elective share reform would require more work on their offices and likely delay the goal of administrative convenience in the winding up of the decedent's affairs.<sup>160</sup> The elective share reform is complicated and may not be favored by the probate judges, who have limited jurisdiction, or are non-lawyers on the probate court.<sup>161</sup> The congestion and delay hinders the administrative convenience of the probate process due to the inclusion of non-probate assets.<sup>162</sup> Although these participants will be forced outside of their comfort-zone, probate judges will soon be required to look outside the gates of probate for purposes of the elective share and should support and participate in reform efforts.

*e. Family Law Section*

The Family Law section is likely to prefer the traditional approach because the only legitimate way to disinherit a spouse is with a marital contract.<sup>163</sup> Although the traditional approach encourages marital contracts, which generates more work for the Family Law section members, this Section recognizes the inequities of the traditional approach and is more familiar with the rules of an equitable division of assets at divorce should support elective share reform.<sup>164</sup> Although not the driving force for elective share reform, the Family Law section should support reform.

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<sup>160</sup> See Turnipseed, *supra* note 1, at 171.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

<sup>163</sup> Marital assets include both probate and non-probate assets of both spouses accumulated during the marriage. See Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 638 (2010). Although there is an equitable division of marital assets at divorce, valid marital contracts would be enforceable. *Id.* at 680. Marital contracts or "waivers" are a legitimate way around the elective share after disclosure, negotiation and agreement. *Id.* at 635 n.76 (citing UNIF. PROBATE CODE § 2-213(a) (amended 2010)).

<sup>164</sup> Vallario, *supra* note 25, at 521.

*f. Litigation Section*

For obvious reasons, the traditional approach is preferred by the Litigation section, which will generate more business for litigators. If every revocable trust case turns on fact-specific litigation, spousal protection will hinge on the spouse's ability or inability to retain counsel. The litigation outcomes are unpredictable, likely having a chilling effect on the spouse's decision to proceed.<sup>165</sup> Financial burdens further hinder the spouse's decision to litigate these matters and are unlikely to be taken on a contingency basis because of the risks associated therewith.<sup>166</sup> The Litigation section, although the status quo is good for business, will likely remain neutral in the reform movement.

There are numerous legitimate reasons for state bar representatives to ignore elective share reform.<sup>167</sup> However, it is undeniable that the traditional approach does not fairly protect a spouse from disinheritance.<sup>168</sup> State bar representatives must serve as the impetus and lobby for elective share reform, using similar tactics and efforts that were successful in achieving trust reform.

## VI. CONCLUSION

Elective share reform has no friends and lacks an impetus for change in the holdout jurisdictions. There is no question that statutory reform is a job for the legislature.<sup>169</sup> However, the legislative body is not likely to reform its law without constituents bringing elective share reform to its attention, like what was done for trust reform and other complicated reform efforts. In light of the trust reform, the time has come to remove the inequities of the twentieth century traditional elective share statute and join the reform states, acknowledging the importance of marriage and the protections that naturally follow.

Like the abolishment of dower and curtesy due to the nature of wealth changing from real to personal property, the change in wealth today from probate to non-probate has made the traditional elective share obsolete.<sup>170</sup> The common law modifications, although better than statutory construction, do not resolve the inadequacies of the traditional approach. An interesting twist caused by the trust reform in seven of the holdout jurisdictions is a

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<sup>165</sup> *Id.* at 569.

<sup>166</sup> *Id.* at 540.

<sup>167</sup> Turnipseed, *supra* note 1, at 179.

<sup>168</sup> Vallario, *supra* note 25, at 535.

<sup>169</sup> *See supra* Section IV.A.

<sup>170</sup> *Dower and Courtesy*, USLEGAL, <https://dowerandcourtesy.uslegal.com> [<https://perma.cc/WRX3-YSLJ>]. *See also* Sykes, *supra* note 6, at 2.

creditor has an easier path to payment than a spouse, a dramatically unfair consequence mandating immediate attention.

