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Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to *Leazenby*

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In Indiana, at least in theory, a surviving spouse may not be disinherited by his or her deceased wife or husband. The surviving spouse is entitled to a survivor's allowance of \$8,500 from the assets in the decedent's estate and, in addition, may ignore the provisions of the decedent's will and elect to take a statutory share of the estate.¹ These estate-based protective provisions may result in either overprotection² or underprotection³ of a surviving spouse. If

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¹IND. CODE §§ 29-1-3-1, -4-1 (1976 & Supp. 1978). These provisions are explained in detail in the text accompanying notes 8-32 *infra*.

²The term "overprotection," as used throughout this discussion, refers to any situation in which the spouse is unnecessarily able to interfere with the decedent's free disposition of property. "Unnecessarily" is the key word. "Unnecessarily" is not used in the sense of actual need, but is used to suggest that freedom of alienation is a treasured incident of the ownership of property. Assuming, arbitrarily, that a spouse is adequately protected from disinheritance by receipt of one-third of the accumulated family wealth (the one-third being derived from the fact that the spouse's statutory forced share typically is one-third), overprotection occurs if the decedent has seen to it, by inter vivos, extra-estate arrangements such as life insurance, pension funds, trusts, gifts, or joint survivorship ownership of real and personal property, that the spouse will receive at least one-third of the wealth at the decedent's death. The spouse is unnecessarily protected (overprotected) by a right to receive more than one-third of the wealth when the decedent's intent is that the excess be distributed in another manner. Assume, for example, that *H*, on July 1, 1977, owned net assets of \$100,000 in his name alone. If *H* died on July 1, his wife, *W*, would be entitled to \$8,500 (the survivor's allowance) plus one-third (the statutory elective share) of the remaining \$91,500 (\$100,000 less \$8,500), a total of \$39,000, no matter what provision *H* made for *W* in his will. IND. CODE §§ 29-1-3-1, -4-1 (1976 & Supp. 1978). If *H* decided to share legal ownership of his property with *W* during his lifetime, for example, by putting \$50,000 in a joint savings account in his and his wife's name, then at *H*'s death (still assuming a total of \$100,000 in assets), *W* could take not only the \$50,000 in the savings account by survivorship, but also the survivor's allowance of \$8,500 plus an elective share of one-third of the remaining \$41,500 (\$50,000 less \$8,500), a total of \$72,333, no matter what provision *H* made for *W* in his will. *Id.* If *H* intended that the \$50,000 remaining in his estate after the inter vivos transfer to *W* pass by will to persons other than *W*, *W* has been overprotected—that is, allowed to unnecessarily interfere with *H*'s right to freely dispose of his property.

³The term "underprotection," as used throughout this discussion, refers to a

the decedent has depleted his or her estate by inter vivos transfers to third parties, the protection afforded by the statutory provisions may be insignificant. On the other hand, if the decedent has adequately, or even abundantly, provided for the surviving spouse by inter vivos transfers and arrangements, the spouse may still disrupt the decedent's estate distribution scheme by asserting his or her statutory rights.

The primary purpose of this discussion is to review recent legislative enactments in other jurisdictions to see how those states have attempted to avoid the underprotective and overprotective inadequacies inherent in an estate-based protective scheme and to see if there are statutes that could serve as models if the Indiana legislature should choose to address the underprotection/overprotection problem. First the stage must be set by reviewing the present state of law and policy in Indiana regarding the right of a surviving spouse to a share of the deceased spouse's estate.

It is assumed throughout this discussion that forced protection of the surviving spouse is a justifiable infringement upon a testator's freedom of alienation.⁴ It is also assumed that "economy of judicial

situation in which the spouse is deprived of a share of property that the decedent owns in substance, but not in form. For example, if *H* placed his entire \$100,000 (*see* note 2 *supra*) in a joint bank account in his and another's name, no assets would be in *H*'s estate at his death, and *W* would be entitled only to an \$8,500 survivor's allowance from the funds in the joint account at *H*'s death. IND. CODE §§ 29-1-4-1, 32-4-1.5-3, -4, -6, -7 (1976 & Supp. 1978). Underprotection occurs when the spouse's statutory share does not reflect the extent of assets over which the decedent has essentially all the incidents of ownership at death. Underprotection is societally objectionable if the surviving spouse is left without any means of support.

'Some authors have suggested that there is no need for a nonbarrable share for surviving spouses because the surviving spouse is given much more than the statutory one-third in a very high percentage of the wills. *See* Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963). *See also* Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966). Until reliable empirical data unquestionably support the conclusion that a nonbarrable share is unnecessary, it is reasonable to rely upon the collective wisdom of the legislatures of the 50 states. In only two states, Georgia and South Dakota, is the testator's freedom of alienation unfettered. *See* GA. CODE ANN. § 113-106 (1975), which provides: "A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the State; he may bequeath his entire estate to strangers, to the exclusion of his wife and children, but . . . the will should be closely scrutinized . . ." For a variety of reasons, such as the presumption that the spouse has contributed to the accumulation of the family wealth and will pass this wealth along to other family members, coupled with the concern of the state regarding the burden of indigent spouses, the remaining states have chosen to protect the spouse by some form of forced ownership of the other spouse's property. Many non-community property states have traditional estate-based schemes. *E.g.*, ILL. ANN. STAT. ch. 110½ § 2-8 (Smith-Hurd 1978); MISS. CODE ANN. § 91-5-25 (Supp. 1977); OHIO REV. CODE ANN. § 2107.39 (Page 1976); WYO. STAT. ANN. § 2-4-101 (1977). Com-

effort" does not require that an inflexible, but easily calculated, forced-share alternative be retained.⁵ The former assumption is supported by the existence of some form of forced protection for surviving spouses in the vast majority of jurisdictions.⁶ The latter assumption is supported by the conclusion reached in a 1966 accumulation of available data on patterns of wealth transmission at death:

[T]he need for a surviving spouse's choice between the deceased spouse's testamentary largess and the legislatively-decreed share is not a need of massive proportions. The machinery designed to satisfy this need need not be massive and insensitive; on the contrary, the dimensions of need are such as to compel the conclusion that the machinery should be keyed to individuation and able to adjust its impact to the circumstances calling it into play.⁷

I. PRESENT STATE OF LAW AND POLICY IN INDIANA

A. *Statutory Provisions*

The Indiana Probate Code contains three separate but related protective provisions⁸ for surviving spouses: A survivor's allowance

munity property states and Louisiana protect the spouse by a form of shared inter vivos ownership of material property, with or without provisions allowing the spouse a share of the decedent's separate property. *E.g.*, NEV. REV. STAT. § 134.010 (1973); WASH. REV. CODE ANN. § 11.52.010 (1967). Variations on the traditional estate based schemes will be discussed in text accompanying notes 95-185 *infra*.

⁵If the need is widespread and protection of the surviving spouse is a substantial activity of the courts, then economy of judicial effort alone may require that the forced share alternative be retained . . . [R]ough justice may be the best that can be hoped for.

On the other hand, if the need is great for the individual, but small in number of cases involved and in total individuals affected, rough justice may be poorer justice than the situation requires. We may be able to afford the luxury of individuation; to protect the surviving spouse who has genuine need, protect the testator's dispositive plan when there is no such need, and do it all without an undue burden on the courts.

Plager, *supra* note 4, at 683.

⁶See note 4 *supra*.

⁷Plager, *supra* note 4, at 715.

⁸For purposes of this discussion, a protective provision is one which gives the spouse a share of the decedent's property despite the decedent's expressed contrary intent. Provisions that establish presumptions about the decedent's intent when the decedent fails to express that intent, *e.g.*, IND. CODE § 29-1-2-1 (1976) (intestate succession laws), *id.* § 32-4-1.5-15 (presumptions regarding survivorship ownership of goods and choses in action acquired during coverture), *id.* §§ 32-1-2-7, -2-8 (presumptions regarding survivorship ownership of real estate by husband and wife), are not considered protective, although in practice such provisions do serve to protect spouses from disinheritance.

for widows and widowers,⁹ an elective forced heir share for widows and widowers,¹⁰ and a creditor protection provision for widows only.¹¹

1. *Survivor's Allowance.*—A surviving spouse is entitled to an allowance of \$8,500 in personal property from the estate of the decedent.¹² A second or subsequent spouse has the same rights as a first spouse. If there is less than \$8,500 worth of personal property in the decedent's estate, the spouse is entitled to a lien on the decedent's real property to the extent of the deficiency.¹³ The survivor's allowance is a high priority claim¹⁴ against decedent's estate, subject only to costs and expenses of administration and reasonable funeral expenses, and prior to all other claims including debts, taxes, and medical expenses.¹⁵

The survivor's allowance is, in effect, a nonbarrable interest and will not be defeated except to the extent that the value of the decedent's estate plus funds in multi-party bank accounts¹⁶ is less than \$8,500 plus costs and expenses of administration and reasonable funeral expenses. Under the prior, but similar, widow's allowance statute,¹⁷ it was held that the widow could not take the statutory

⁹IND. CODE § 29-1-4-1 (Supp. 1978).

¹⁰*Id.* § 29-1-3-1 (1976).

¹¹*Id.* § 29-1-2-2.

¹²*Id.* § 29-1-4-1 (Supp. 1978). If there is no surviving spouse, the decedent's minor children are entitled to divide the \$8,500 allowance equally among themselves.

¹³*Id.*

¹⁴The question of whether the survivor's allowance is a claim that must be timely filed or forever barred under IND. CODE § 29-1-14-1 (1976) or whether it is payable as a matter of right regardless of the spouse's failure to file a timely claim has been resolved by one authority in favor of the conclusion that it is a claim. 2 G. HENRY, *THE PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA* 240-41 (6th ed. J. Grimes Supp. 1975).

¹⁵IND. CODE § 29-1-14-9 (1976).

¹⁶The spouse may reach "amounts the decedent owned beneficially" in multi-party bank accounts to satisfy the survivor's allowance claim if the assets in the decedent's estate are insufficient. IND. CODE § 32-4-1.5-7 (Supp. 1978). See notes 86-92 *infra* and accompanying text.

¹⁷Act of Mar. 9, 1953, ch. 112, § 402, 1953 Ind. Acts 295, as amended by Act of Mar. 11, 1955, ch. 258, § 2, 1955 Ind. Acts 667; Act of Mar. 12, 1965, ch. 379, § 1965 Ind. Acts 1171; Act of Apr. 1, 1971, Pub. L. No. 403, § 1, 1971 Ind. Acts 1892 (repealed 1975). The statute provided that the widow was entitled to select \$3,000 worth of inventoried property from the decedent's estate. If the widow failed to select the desired property, she was entitled to the amount of the deficiency in cash from decedent's personal estate, or, if the personal estate was insufficient, the deficit was a lien on decedent's real estate. In addition to the widow's allowance, the statutes provided for a limited homestead right for surviving widows, widowers, and minor children, Act of Mar. 9, 1953, ch. 112, § 401, 1953 Ind. Acts 295, and a discretionary family allowance for surviving widows and minor children, Act of Mar. 9, 1953, ch. 112, § 403, 1953 Ind.

allowance if she took under the will and the provisions of the will were expressly or impliedly inconsistent with her taking both the allowance and the benefits under the will.¹⁸ If the current survivor's allowance statute is similarly interpreted, the decedent could force the survivor who accepts benefits of the will to forego the statutory allowance.¹⁹ The spouse, however, may always renounce the will benefits and take under the law.²⁰

2. *Elective Forced Heir Share.*—If the decedent dies testate, his or her surviving spouse may elect to take against the will one-third of the decedent's net personal and real estate.²¹ If the spouse is a "second or other subsequent spouse who did not at any time have children by the decedent and the decedent left surviving him a child or children or the descendants of a child or children by a previous spouse,"²² then the elective share is one-third of the decedent's net personal property, but only a life estate in one-third of the decedent's lands.²³ A spouse, presumably, may receive both the survivor's allowance and the forced heir share.²⁴

Acts 295, as amended by Act of Apr. 1, 1971, Pub. L. No. 403, § 2, 1971 Ind. Acts 1892. All three provisions were repealed when the survivor's allowance statute was enacted.

¹⁸*E.g.*, *Barker v. Barker*, 116 Ind. App. 265, 63 N.E.2d 429 (1945); *Snodgrass v. Meeks*, 12 Ind. App. 70, 38 N.E. 833 (1894).

¹⁹IND. CODE § 29-1-3-7 (Supp. 1978) provides in part: "By taking under the will or consenting thereto, [the surviving spouse] does not waive his right to the allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of that right."

²⁰Any beneficiary may renounce in whole or in part the succession to any property. IND. CODE § 29-1-6-4 (1976). If the beneficiary renounces his interest under the will, provisions of the will requiring an election between taking under the will and under the law are ineffective. *See* discussion of election in note 25 *infra*.

²¹IND. CODE § 29-1-3-1(a) (1976).

²²*Id.* Such a spouse is referred to as a subsequent childless spouse.

²³The elective share provision tracks the intestate succession provision for first and subsequent childless surviving spouses, except that the elective share of one-third is the spouse's minimum intestate share. Depending on whether and how many children or parents survive the decedent, the spouse of an intestate decedent may receive more than one-third of the intestate estate. *Id.* § 29-1-2-1(a), (b).

²⁴"Net estate" is defined as "the real and personal property of a decedent exclusive of homestead rights, the widow's and family allowance and enforceable claims against the estate." *Id.* § 29-1-1-3. Presumably, the survivor's allowance is a claim against the estate. *See* note 14 *supra*. If so, then clearly the elective share is not computed until after the spouse's survivor's allowance claim has been deducted from the total estate. If the survivor's allowance is not a claim, or until the legislators do some housekeeping and replace the obsolete language referring to homestead rights and the widow's and family allowances with language referring to the survivor's allowance, the specific language of the survivor's allowance provision must alone be relied upon to indicate that the survivor's allowance may be claimed in addition to the elective share. The survivor's allowance statute provides: "An allowance under this section is not

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The spouse's elective share is a nonbarrable interest. Any spouse who is dissatisfied with the provisions made in the deceased spouse's will may assert the status of a forced heir without regard to whether the spouse is, in fact, in need of the protection afforded and without regard to whether the spouse has, in fact, received the equivalent of, or more than, the elective share by extra-testamentary means. A decedent, who has generously shared the family wealth with the spouse by inter vivos transfers and arrangements, may intend that the assets remaining in his or her estate at death pass to persons other than his or her spouse. The decedent may attempt in the will to force the spouse to elect between taking under the will and retaining inter vivos benefits,²⁵ but if the spouse elects against the will, the will provisions will not operate to reduce the statutory share. In effect, the spouse renounces the will and takes as if the decedent died intestate.²⁶ Conversely, although the elective share is nonbarrable in the sense that the decedent may not prevent the spouse from taking one-third of the net estate, the electing spouse is not assured that the interest will be of any value. If there are no assets in the estate, the elective share will afford the spouse no protection against actual disinheritance.

The elective share statute expresses the legislature's lack of concern about the possibility that the estate-based elective share may overprotect or underprotect the surviving spouse: "In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the will, the court shall consider only such property as would have passed under the laws of descent and distribution."²⁷ Overprotection

chargeable against the distributive shares of either the surviving spouse or the children." IND. CODE § 29-1-4-1 (Supp. 1978). Unfortunately, the issue is complicated by the broad language of section 29-1-3-1(c): "In electing to take against the will, the surviving spouse is deemed to renounce all rights and interest of every kind and character in the personal and real property of the deceased spouse, and to accept such elected award in lieu thereof."

²⁵See, e.g., *Young v. Biehl*, 166 Ind. 357, 77 N.E. 406, (1906), wherein the decedent owned one parcel of land in fee and another with his wife as tenants by the entirety. The decedent devised both parcels to his wife for life, remainder to his children. The wife did not elect to take against the will. The court stated:

It is well settled that where it is reasonably clear that the provisions of a will were intended to be in lieu of the widow's interest in her husband's estate under the law, she cannot have the benefit of both, and by the acceptance of one she waives all right to the other.

Id. at 359, 77 N.E. at 406 (citations omitted).

²⁶IND. CODE § 29-1-3-1(c), (d) (1976). Detrimental as well as beneficial will provisions are inoperative insofar as the electing spouse is concerned. See *Salvation Army, Inc. v. Hart*, 239 Ind. 1, 13-14, 154 N.E.2d 487, 493 (1958).

²⁷IND. CODE § 29-1-3-1(a) (1976).

is clearly sanctioned. The comments to this section state that the quoted paragraph

was inserted in order to make clear that real estate held jointly by entreties, joint bank accounts, income from inter vivos trusts, etc., are not to be considered in computing the amount due the surviving spouse. The surviving spouse takes such jointly held property by virtue of contract and not by virtue of the laws of descent and distribution.²⁸

Underprotection is clearly not prevented. The only property that passes by the laws of descent and distribution is property that the decedent owns at death. The legislative policy is: "[I]f a man or woman retains ownership of his or her property until death, then a portion of it must be shared with the surviving spouse."²⁹ Legislative policy, however, does not require that the decedent retain ownership of any property until death. In fact, a decedent may retain a substantial interest in, or substantial control over, property that will not be included in his or her estate. A decedent may in substance "own" property that is not required to be shared with the surviving spouse.

3. *Creditor Protection for Widows.*—Indiana Code section 29-1-2-2(a) provides:

Any interest acquired by a widow in the decedent's real estate, including contracts for the purchase of real estate, whether by descent or devise, not exceeding one-third (1/3) of said decedent's real estate, shall be received by her, free from all demands of creditors: Provided, however, that where the real estate exceeds in value ten thousand dollars (\$10,000), the widow shall have one-fourth (1/4) only and where the real estate exceeds twenty thousand dollars (\$20,000) one-fifth (1/5) only, as against creditors.³⁰

²⁸IND. CODE ANN. § 29-1-3-1, Commission Comments at 86 (Burns 1972). See the explanation of the term "overprotection" in note 2 *supra*.

²⁹*Leazenby v. Clinton County Bank & Trust Co.*, 355 N.E.2d 861, 867 (Ind. Ct. App. 1976).

³⁰IND. CODE § 29-1-2-2(a) (1976). This section is the last vestige of statutory dower in Indiana. Taken literally, the language is unworkable when applied to an intestate or an elective share acquired by the widow. Both the intestate succession and the elective share provisions state that the spouse's distributive share is a portion of the decedent's net estate, which is the decedent's real and personal property exclusive of enforceable creditor's claims. *Id.* §§ 29-1-1-3, -2-1, -3-1 (1976). Section 29-1-2-2 protects from creditor's claims only the "interest acquired by a widow in the decedent's real estate." The literal language of section 29-1-2-2, thus, results in a "Catch 22." However, because section 29-1-2-2 states that the interest acquired "whether by descent or devise" is protected, it must be construed to have some effect when applied to the

This section gives widows³¹ some protection against claims of creditors, although the full one-third elective share will rarely be entirely protected. The statute protects the widow's acquired interest in decedent's real estate only, not in personalty, and only the full one-third interest in the real estate to the extent that its value does not exceed \$10,000. Another limitation upon the protection afforded is the fact that "[t]he interest of a purchase-money mortgagee, of a mortgagee under a mortgage executed prior to the marriage, or of a person holding a mortgage in which said widow has joined, shall take precedence over the interest of the widow."³²

4. *Protective Provisions and Waiver.*—The spouse may waive his or her statutory right to a share of the decedent's estate. The requirements for an effective contractual waiver are codified; the waiver must be in writing, after "full disclosure of the nature and extent of such right," and is binding only "if the thing or promise given . . . is a fair consideration under all the circumstances."³³

There are statutory provisions precluding a taking by an undeserving spouse. Any person who has been legally convicted of "murder, causing suicide, or voluntary manslaughter shall . . . become a constructive trustee of any property acquired by him from the decedent or his estate because of the offense, for the sole use and benefit of those persons legally entitled thereto other than such guilty person . . ."³⁴ If one spouse has left the other and is living in adultery at the time of the other spouse's death, the adulterous

widow of an intestate decedent who takes "by descent." See generally G. HENRY, THE PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA 1536-39 (6th ed. J. Grimes 1954); *id.* at 252-59 (Supp. 1977).

³¹IND. CODE § 29-1-1-3 (1976) provides that "the masculine gender includes the feminine and neuter." However, there is no provision that the feminine includes the masculine.

³²*Id.* § 29-1-2-2(b).

³³IND. CODE §§ 29-1-2-13, -3-6 (1976). Both sections are to be read together. IND. CODE ANN. § 29-1-2-13 Commission Comments (Burns 1972).

³⁴IND. CODE § 29-1-2-12 (Supp. 1978). Under a prior version of this statute, which provided: "[N]o person who unlawfully causes the death of another and shall have been convicted thereof . . . shall take by devise or descent any part of the property, real or personal, owned by the decedent at the time of his or her death," Act of Mar. 2, 1907, ch. 95, § 1, 1907 Ind. Acts 136, (current version at IND. CODE § 29-1-2-12 (Supp. 1978)); it was held that a widow convicted of causing the death of her husband was not, by the statute, deprived of her right to claim a widow's allowance because the statutory widow's allowance, being a preferred claim, did not pass by devise or descent. *In re Estate of Mertes*, 181 Ind. 478, 104 N.E. 753 (1914). Under the present version of the statute, however, it seems that a person convicted of murdering his or her spouse would be denied the survivor's allowance because the allowance is acquired from the decedent's estate because of the offense. See also *National City Bank v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710 (1957) (murderer becomes constructive trustee of victim's one-half tenancy by the entirety interest).

spouse "shall take no part of the estate of the deceased husband or wife."³⁵ If one spouse has abandoned the other "without just cause, he or she shall take no part in his or her estate."³⁶

B. *Leazenby and Its Implications*

With one exception, the only source of funds available to satisfy the statutory allowance and the elective share is the estate of the decedent.³⁷ Before the decedent's death, neither the elective share nor the survivor's allowance is a vested interest. Each is "only an expectant interest, determined at the time of death, and dependent upon the contingency that the property to which the interest attaches becomes part of the decedent's estate."³⁸ Property will not become a part of the decedent's estate if the decedent made a valid inter vivos gratuitous transfer of that property.³⁹ For purposes of this discussion, gratuitous inter vivos transfers are divided into two categories: (1) Absolute transfers, where the transferor retains no control over, or interest in, the subject matter of the transfer; and (2) non-absolute transfers, where the transferor retains some control over, or interest in, the transferred property. In the former category would be, for example, an inter vivos gift by which the transferor divests himself of all interest in and control over the subject matter of the gift or a transfer into an irrevocable trust in which the transferor-settlor is neither a beneficiary nor a trustee. In the latter category, the types of transfers may be arranged on a continuum, depending on the degree of control or the extent of the interest retained by the transferor. At one end of the continuum, the closest to the absolute transfer category, would be a transfer into an irrevocable trust in which the transferor retains a defined and limited interest, for example, the right to the income for life. The settlor-transferor might even be the trustee or co-trustee.⁴⁰ Pro-

³⁵IND. CODE § 29-1-2-14 (1976).

³⁶*Id.* § 29-1-2-15.

³⁷The exception is discussed in text accompanying notes 86-92 *infra*.

³⁸*Leazenby v. Clinton County Bank & Trust Co.*, 355 N.E.2d 861, 863 (Ind. Ct. App. 1976).

³⁹Only to the extent that a transfer is gratuitous will the transfer remove value from the decedent's estate. If the transfer is for consideration, to the extent that the consideration is paid to the transferor and reflects the fair value of the property, no value is removed from the transferor's estate. Only the character of the property changes.

⁴⁰*See generally* 1 A. SCOTT, THE LAW OF TRUSTS § 57.6, at 517-18 (3d ed. 1967) wherein the author states:

The owner of property may create a trust not only by transferring the property to another person as trustee, but also by declaring himself trustee. Such a declaration of trust, although gratuitous, is valid. . . . Suppose, however, that the settlor reserves not only a beneficial life interest but also a power of

gressing across the continuum toward the category of no transfer would be a transfer of a remainder interest following the transferor's retained life estate; a transfer into a revocable trust, with or without a right in the transferor to income or principal, or with or without a right in the transferor to control the trustee; a transfer into a bank account in the joint names of the transferor and another; a transfer into a trust account with the transferor as trustee for another—the so-called Totten trust; and a gift causa mortis.⁴¹ When gratuitous transfers are made to third parties other than the transferor's spouse, the greater the control reserved and the interest retained by the transferor, the more suspect the transaction becomes when viewed from the eyes of the spouse who is entitled to a forced share of the assets decedent owns at death. The more control the transferor retains until death, the more it looks as if he or she owns the property at death and should share it with his or her spouse.

In other jurisdictions where the spouse's statutory elective share is a share of the deceased spouse's estate, courts have attempted to counteract the underprotective inadequacies of the legislative scheme. In response to a variety of arguments made by underprotected spouses, many courts have set aside the decedent's otherwise valid inter vivos transfers to the extent necessary to satisfy the spouse's elective claim if the transfers were, by various tests, "colorable,"⁴²

revocation. Such a trust is not necessarily testamentary. The declaration of trust immediately creates an equitable interest in the beneficiaries, although the enjoyment of the interest is postponed until the death of the settlor, and although the interest may be divested by the exercise of the power of revocation. The disposition is not essentially different from that which is made where the settlor transfers the property to another person as trustee. It is true that where the settlor declares himself trustee he controls the administration of the trust. As has been stated, if the settlor transfers property upon trust and reserves not only a power of revocation but also power to control the administration of the trust, the trust may be held to be testamentary. There is this difference, however: the power of control which the settlor has as trustee is not an irresponsible power and can be exercised only in accordance with the terms of the trust.

See also, e.g., *Farkas v. Williams*, 5 Ill. 2d 417, 432, 125 N.E.2d 600, 608 (1955) (power reserved to settlor as trustee not as great as power reserved to settlor as settlor, because "as trustee he must so conduct himself in accordance with standards applicable to trustees generally").

⁴¹This list does not purport to be exhaustive. The varieties of non-absolute transfers are limited only by the imagination of the transaction's draftsmen.

⁴²"Colorable" has been used to mean many things:

It has been used to connote shams; it may signify 'real' transfers that are made without the knowledge of the surviving spouse; it may be a synonym for 'illusory,' as used with reference to 'real' transfers in which the decedent retained undue control, or merely the power to revoke; and oftentimes [*sic*] it is tossed in for make weight effect, with no ascertainable meaning—a bit of harmless garbage from the law digests.

"illusory,"⁴³ or "in fraud of"⁴⁴ or made with the "intent to defeat"⁴⁵ the spouse's statutory share.⁴⁶ The Indiana Court of Appeals, in *Leazenby v. Clinton County Bank & Trust Co.*,⁴⁷ was asked by a surviving spouse to apply one or more of these tests to set aside an inter vivos trust into which the deceased spouse had transferred all her property. In *Leazenby*, however, the surviving spouse did not prevail. A review of the *Leazenby* decision, its ramifications upon the question of what types of absolute and non-absolute transfers will withstand attack by deprived surviving

W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 132-33 (1960) (footnotes omitted). See, e.g., *Thuet v. Thuet*, 128 Colo. 54, 260 P.2d 604 (1953); *Blevins v. Pittman*, 189 Ga. 789, 7 S.E.2d 662 (1940); *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944); *Osborn v. Osborn*, 102 Kan. 890, 172 P. 23 (1918); *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945); *In re Halpern*, 303 N.Y. 33, 37, 100 N.E.2d 120, 122 (1951); *Hayes v. Lindquist*, 22 Ohio App. 58, 153 N.E. 269 (1926). Macdonald cites *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049 (1913), as an example of the use of the term "colorable" for make weight effect. In *Ramsey* the court held: "[The] donor who makes a gift causa mortis remains seised or possessed of the property until death within the meaning of a statute giving dower in personal property of which he dies seised." *Id.* at 70, 100 N.E. at 1060. The gift was described as "colorably absolute." *Id.* at 71, 100 N.E. at 1061. See generally W. MACDONALD, *supra*, at 120-44; see also *Stroup v. Stroup*, 140 Ind. 179, 189, 39 N.E. 864, 867 (1895) (dicta) (husband secured a conveyance "to be made but colorably to another").

⁴³The illusory transfer test is a test based on the transferor's retention of control over the transferred property. E.g., *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937) (discussed in text accompanying notes 58-61 *infra*); *Montgomery v. Michaels*, 54 Ill. 2d 532, 301 N.E.2d 465 (1973) (Totten trust); *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944); *Hayes v. Lindquist*, 22 Ohio App. 58, 153 N.E. 269 (1926). See generally W. MACDONALD, *supra* note 42, at 67-97; see also *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968) (illusory trust doctrine applied in community property jurisdiction).

⁴⁴E.g., *Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611 (1939) (statute speaks of fraud); *In re Sides' Estate*, 119 Neb. 314, 228 N.W. 619 (1930); *In re Rynier's Estate*, 347 Pa. 471, 32 A.2d 736 (1943). See generally MACDONALD, *supra* note 42, at 98-119. Both *Stroup v. Stroup*, 140 Ind. 179, 39 N.E. 864 (1895), and *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049 (1913), speak of fraud on marital rights. See note 67 *infra*.

⁴⁵E.g., *Mushaw v. Mushaw*, 183 Md. 511, 39 A.2d 465 (1944); *Jaworski v. Wisniewski*, 149 Md. 109, 131 A. 40 (1925); *Malone v. Walsh*, 315 Mass. 484, 53 N.E.2d 126 (1944); *Brewer v. Connell*, 30 Tenn. 500 (1851); *In re Hummel's Estate*, 161 Pa. 215, 28 A. 1113 (1894). See generally W. MACDONALD, *supra* note 42, at 98-119.

⁴⁶"Sham" is another term that might be used as a reason for setting aside a transaction in favor of the surviving spouse's claim. If, however, a transaction is a sham, it is a contradiction in terms to say that the transaction was otherwise valid. A "sham" transfer does not involve the requisite donative intent. Often courts use other terms, such as colorable, fraudulent, or illusory, to indicate that the purported transfer was, in fact, a sham—that is, no transfer at all. See generally W. MACDONALD, *supra* note 42, at 132-33, 136, 190, 210.

⁴⁷355 N.E.2d 861 (Ind. Ct. App. 1976).

spouses, and the propriety of the court's interpretation of the intent of the Indiana legislature will conclude the discussion of the present state of law and policy in Indiana.

In *Leazenby*, a surviving husband was completely disinherited by his spouse. Three years before her death, Elsie Leazenby established a revocable inter vivos trust by the terms of which she retained, in addition to the power to revoke, the right to the income for life. She gave the trustee, Clinton County Bank and Trust Company, the discretionary power to "expend the income or corpus for her 'care, use, maintenance, and/or benefit,'" ⁴⁸ but she retained some power to control the trustee in the exercise of its discretion. ⁴⁹ The remainder beneficiaries of the trust were Elsie's children, a grandchild, and her husband, Cloyd, who was given only the right to reside in Elsie's home for six months after her death. ⁵⁰

Before her death, Elsie transferred all of her property into the trust. By her will, she made no provision for Cloyd, but directed that any property remaining in her estate be added to the trust. Cloyd was dissatisfied with the will provisions, but, because there were no assets in Elsie's estate, his elective right to take against the will consisted of a right to take one-third of nothing. ⁵¹ Thus, the case presented a perfect example of the underprotective potential of an estate-based protective scheme.

Cloyd argued that the trust should be set aside on the grounds that it was "colorable and illusory and a fraud upon him because it defeated his statutory [elective] right to share in his spouse's estate." ⁵² The trial court found, however, that Elsie's trust "was a valid inter vivos trust which acquired title to all of decedent's property . . . whereby the same is not subject to administration in her estate" and, therefore, not subject to Cloyd's elective claim. ⁵³ The

⁴⁸*Id.* at 862.

⁴⁹The provision by which Elsie retained control over the trustee was broadly worded: "It is the intent of the parties that this trust be run as a convenience for the Settlor, and that the Trustee, in the absence of directions from Settlor, may exercise the broad discretion given it herein." *Id.*

⁵⁰*Id.* Cloyd and Elsie had both been married before, and throughout their marriage they kept their accounts separately.

⁵¹Actually, Cloyd was a second childless spouse, and his elective share would have been one-third of Elsie's net personal estate and a life estate in one-third of Elsie's lands. IND. CODE § 29-1-3-1(a) (1976) (quoted in text at note 22 *supra*).

⁵²355 N.E.2d at 863. It is irrelevant whether Cloyd asked that the trust be set aside only to the extent necessary to satisfy his elective share or for all purposes, in which case the excess over the amount needed to satisfy Cloyd's elective share would pass to the trust by the terms of Elsie's will.

⁵³*Id.*

administrator of Cloyd's estate appealed the adverse ruling on the ground that it was contrary to the law and the evidence.⁵⁴

The appellate court recognized that the question raised in the appeal—that is, to what extent may a transferor retain control over or an interest in property transferred inter vivos and nonetheless deprive his or her surviving spouse of a statutory elective share of the property—involved “a conflict between two public policy considerations, one of which favors a provision for support of a surviving spouse in case of disinheritance by the deceased spouse, and the other which favors unfettered inter vivos alienability of one's real or personal property.”⁵⁵ The court concluded that legislative intent is to strike a balance in favor of the policy of unfettered alienability even though, as a consequence, the elective share may not accurately reflect the extent of property actually controlled by the decedent at death. The elective share statute clearly provides that, in computing the elective share, “the court shall consider only such property as would have passed under the laws of descent and distribution.”⁵⁶ If the transferor established a valid inter vivos trust, the assets in the trust would not pass by the laws of descent and distribution and would not be available to satisfy the elective claim of the transferor's surviving spouse.

The *Leazenby* court chose not to follow the lead of other courts that have examined the substance of, or the motive for, otherwise valid inter vivos transfers to determine if the surviving spouse is equitably entitled to an elective share of the transferred property. In some states, an otherwise valid inter vivos trust may be invalid as against the settlor's electing spouse if the settlor retains too much dominion and control over the trust.⁵⁷ In the leading case, *Newman v. Dore*,⁵⁸ three days before his death, a husband-settlor transferred all his property into an inter vivos trust in which his widow was given no beneficial interest. The settlor retained the power to revoke and the right to the income for life; in addition, the powers granted to the trustees were “subject to the settlor's control during his life,” and could be exercised “in such manner only as the

⁵⁴*Id.* Cloyd died on February 27, 1974, after he had filed his petition to set aside the trust and his election to take against the will. Although the right to elect is personal and cannot be exercised subsequent to the spouse's death, IND. CODE § 29-1-3-4 (1976), once the right is exercised, nothing precludes prosecution of the right by the electing spouse's personal representative.

⁵⁵355 N.E.2d at 863.

⁵⁶IND. CODE § 29-1-3-1(a) (1976).

⁵⁷See authorities cited at note 43 *supra*.

⁵⁸275 N.Y. 371, 9 N.E.2d 966 (1937) (changed by statute). See the discussion of New York's statutory scheme at notes 127-34 *infra* and accompanying text.

settlor shall from time to time direct in writing."⁵⁹ The *Newman* court, assuming without deciding that the trust would be valid except for the existence of the surviving spouse's elective right, stated the so-called illusory transfer test: whether the spouse has "in good faith divested himself of ownership of his property or has made an illusory transfer."⁶⁰ The apparent rationale for the illusory transfer test is that, if a spouse in substance "owns," controls and enjoys his or her property until death, there is a moral obligation to let the survivor share.⁶¹

Other courts have purportedly focused on the decedent's motive or intent in making the inter vivos transfer.⁶² In motive jurisdictions, one finds such statements as:

The general rule of law . . . is that a conveyance of property by the husband without consideration and with the intent and purpose to defeat his widow's marital rights in his property, is a fraud upon such widow and she may sue in her own right, and set aside such fraudulent conveyance, and recover the property so fraudulently transferred, to the extent of her interest therein.⁶³

A few courts do not limit themselves to a single test, but look at all the circumstances surrounding the transaction to determine its fairness, including

the completeness of the transfer and the extent of control retained by the transferor, the motive of the transferor, par-

⁵⁹*Id.* at 377, 9 N.E.2d at 968.

⁶⁰*Id.* at 379, 9 N.E.2d at 969.

⁶¹W. MACDONALD, *supra* note 42, at 87-88 (footnotes omitted), states:

The illusory transfer test, based on excessive control, is not without merit. The widow's concern is with testamentary transfers, since the election statutes restrict her to the property comprising the decedent's estate. Testamentary transfers are tested in terms of control. On this criterion, if the widow is to be permitted to reach other than testamentary transfers, it would have to be transfers which are quasi-testamentary, i.e., in which an unreasonable (albeit not such as to require the "testamentary" label) degree of control was retained. The reason is simple: if a husband in substance enjoys and "owns" his property until he dies, he is under a moral if not a legal obligation to let the widow share. Put in other words, if the widow can participate in that property which the husband owned "in the eyes of the law," so should she be entitled to that which he owned in substance, or the eyes of the law should be opened wider.

⁶²*See* authorities cited in notes 44 & 45 *supra*.

⁶³*Merz v. Tower Grove Bank & Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611, 617 (1939). The Missouri statute, MO. ANN. STAT. § 474.150 (1955), provided that any gift "in fraud of the marital rights" of the transferor's surviving spouse may be recovered from the donee and applied to the payment of the spouse's elective share. A conveyance of real estate without the express assent of the spouse was by this statute presumptively in fraud of the spouse's marital rights. *See* notes 153-55 *infra* and accompanying text.

ticipation by the transferee in the alleged fraud and the degree to which the surviving spouse is stripped of his or her interest in the estate of the decedent spouse . . . [and] several other factors . . . , such as the relative moral claims of the surviving spouse and of the transferees, other provisions for the surviving spouse, whether or not he or she has independent means and the interval of time between the transfer and the death of the transferor.⁶⁴

The *Leazenby* court specifically rejected the illusory transfer test as being so vague and uncertain as to impose "a hardship on conscientious settlors and beneficiaries who cannot be certain which good faith arrangements will be upheld."⁶⁵ Although the court did not discuss the last-mentioned general fairness test, it obviously would have rejected such a test on the grounds of vagueness and uncertainty.⁶⁶ Even though the idea of fraud on marital rights has been mentioned before in Indiana cases,⁶⁷ the *Leazenby* court re-

⁶⁴*Whittington v. Whittington*, 205 Md. 1, 12, 106 A.2d 72, 77 (1954) (Totten trust).

⁶⁵355 N.E.2d at 864. Others disagree. See, e.g., *Montgomery v. Michaels*, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); *Land v. Marshall*, 426 S.W.2d 841 (Tex. 1968). See generally W. MACDONALD, *supra* note 42, at 87-88 (quoted at note 61 *supra*).

⁶⁶Even though the general fairness test is commendable because it requires the court to examine all the equities, it involves the greatest uncertainty for donors and donees because a case-by-case determination is essential. While under the illusory transfer test, the transferor could be certain that a transfer into a revocable trust with a retained life estate, but no power to control the trustee, would be upheld against the claim of the spouse, even this certainty is lost under the general fairness test.

⁶⁷In *Stroup v. Stroup*, 140 Ind. 179, 39 N.E. 864 (1895), Daniel Stroup paid the entire consideration for a conveyance of real property by a deed in which a trust was established. The court held that, because the trustee possessed only a nominal title and no interest was created in anyone other than Stroup, the deed was in essence a direct conveyance to Stroup. Thus, Stroup was seised of real property to which his wife's dower interest attached. In dicta, the court stated:

[W]e may add that while the authorities are in conflict, the weight of authority is certainly in support of the conclusion that where the husband, intending to defeat the claim of his wife to dower, secures a conveyance of lands, purchased by him, to be made but colorably to another, and securing to himself the full use, control and disposition of the property, such conveyance is fraudulent as against the wife, and she may, before or after his death, recover that part of the lands which, under the law, would have fallen to her in case the conveyance had been to her husband instead of by the colorable device which held the actual seizin from him.

Id. at 189-90, 39 N.E. at 867-68. See also *Kratli v. Booth*, 99 Ind. App. 178, 191 N.E. 180 (1934) (wife's execution of a deed procured by fraud practiced upon her by her husband); *Schmeling v. Esch*, 84 Ind. App. 247, 147 N.E. 734 (1925) (in divorce action, the wife may contest as fraudulent a conveyance made by the husband with intent to place the property beyond her reach); *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049 (1913) (husband's gift of personal property made in expectation of death and with intent to defeat widow's dower intent is fraudulent as to widow and is subject to her dower claim).

jected the fraud/intent/motive tests. The court stated that the phrase "fraud on the marital rights" is "so often used in a manner devoid of meaning that it presents an unsatisfactory test."⁶⁸ If a spouse has no interest in the decedent's property during the decedent's lifetime, then a valid trust agreement dealing with that property "could not be fraudulent, actually or constructively, as to [that spouse]. 'One cannot be defrauded of that to which he has no right.'"⁶⁹ The *Leazenby* court concluded: "[T]he legislation granting an elective share . . . [proscribes] only dispositions of a testamentary character which disinherit a surviving spouse."⁷⁰

The trial court had found that Elsie's trust was a valid, non-testamentary inter vivos disposition and, therefore, was not subject to Cloyd's elective claim. The appellate court affirmed the trial court's judgment after reviewing the facts of the case in light of circumstances that might have rendered the trust invalid. The only provision that brought the validity of Elsie's trust into question was a provision describing Elsie's retained control over the trustee. The trust provided that "the Trustee, in the absence of directions from [the] Settlor, may exercise the broad discretion given it herein."⁷¹

Elsie's retained control might have rendered the trust invalid in two separate but related ways. First, if Elsie's control over the disposition and management of the trust property was so great that the trustee possessed only a nominal title, with "neither a power nor a duty related to the administration of the trust," then, by statute, the "title to the trust property will be treated as having vested directly in the beneficiary on the date of delivery to the trustee."⁷² If the trust had failed on this ground, title to the trust property would have remained vested in Elsie, the beneficiary of

⁶⁸355 N.E.2d at 864, (citing Power, *The Law and the Surviving Spouse: A Comparative Study*, 39 IND. L.J. 262, 263 n.6 (1964)).

⁶⁹355 N.E.2d at 865, (quoting from *Cherniack v. Home Nat'l Bank & Trust Co. of Meriden*, 151 Conn. 367, 371, 198 A.2d 58, 60 (1964)). *Accord, e.g.*, *Ellis v. Jones*, 73 Colo. 516, 216 P. 257 (1923). Other objections are that intent is difficult to prove after the transferor is dead, that the test involves too much uncertainty for donors and donees, and that in fact the actual intent to avoid the spouse's share may arise from a praiseworthy motive, for example, an intent to benefit the donor's children by a previous marriage. *See* W. MACDONALD, *supra* note 42, at 117-19.

⁷⁰355 N.E.2d at 865.

⁷¹*Id.* at 862. The entire control paragraph is reprinted at note 49 *supra*. The phrase that the trust was to be "run as a convenience for the Settlor" was construed by the court to mean that it would be a convenience for Elsie not to be bothered with management of the trust property. The court did not read the phrase to mean that "the trust be run *at* the convenience of the Settlor." *Id.* at 866.

⁷²IND. CODE § 30-4-2-9 (1976) which is subject to the exception stated in §§ 30-4-2-13 for passive land trusts.

the trust, despite the delivery of the property to the trustee. On her death, Elsie would have been the owner of the trust property, and the property would have been in her estate, subject to Cloyd's elective claim.

Second, and similarly, Elsie's retention of control over the trustee may have been so great as to render the trustee merely her agent. According to the *Restatement (Second) of Trusts*, quoted with approval by the *Leazenby* court,

where the owner of property delivers possession of it to a person as his agent directing him to deliver the property to a third person on the owner's death, a mere agency is created which terminates on the death of the principal. The disposition in favor of the third person is testamentary and invalid unless the requirements of the Statute of Wills are complied with.⁷³

If Elsie's trustee were merely her agent, then Cloyd's elective right would extend to the property remaining in the possession of the trustee at Elsie's death, whether or not there was compliance with the requirements of the Statute of Wills.⁷⁴

The *Restatement* provides that a trustee is not an agent of the settlor "merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust."⁷⁵ Whether the settlor has retained more than the permissible power to control the trustee regarding administrative details is not an easy question to answer in many cases. The settlor's intent is the primary consideration. If the settlor intended to give the trustee title to the trust property and intended to create interests in the third-party beneficiaries of the trust upon delivery to the trustee, then the trustee is not merely the settlor's agent and the disposition in favor of the third parties is not testamentary.⁷⁶

⁷³RESTATEMENT (SECOND) OF TRUSTS, § 57 (1959), *quoted in Leazenby v. Clinton County Bank & Trust Co.*, 355 N.E.2d at 864.

⁷⁴If the requirements of the Statute of Wills, IND. CODE § 29-1-5-3 (1976), had not been met, then the attempted testamentary transfer to the third party beneficiaries would have been ineffective to divest Elsie of ownership of the property. If the requirements of the Statute of Wills had been met, then Cloyd could have elected against the testamentary transfer because he could have elected against the provisions of any validly executed will.

⁷⁵RESTATEMENT (SECOND) OF TRUSTS, § 57 (1959).

⁷⁶Even the *Restatement* descriptions of the distinctions between an agent and a trustee are filled with conclusory statements. *E.g.*, "A trustee has title to the trust property; an agent as such does not have title to the property of his principal,

The *Leazenby* court struggled, but only slightly, with the potential breadth of Elsie's retained control. The court concluded that Elsie intended to create "vested beneficial interests in her daughters, granddaughter, and husband, [and] that she intended to transfer the legal title to her property to the trustee."⁷⁷ Despite the unfortunately broad language of the problematical trust provision, the court concluded that Elsie's conduct after the creation of the trust indicated that she did not intend to retain excessive control over the trustee.⁷⁸ She never exercised her power to direct the trustee and she never "acted in any manner that would be inconsistent with, or divest the remainder beneficiaries of, their interests."⁷⁹ Thus, given the trial court's conclusion that the trust was valid, and given a policy that favors construction of a trust to uphold its validity,⁸⁰ the appellate court could not state that the judgment of the trial court was clearly erroneous.

Although it is impossible to determine how much the *Leazenby* court was affected by the equities of the case, it should be pointed out that the court was not confronted with an equitably difficult underprotection situation. Cloyd and Elsie had both been married before and had kept their pre-marital property interests separate. The remainder beneficiaries of Elsie's trust were her own children and grandchild, the natural objects of her bounty. In a sense, Cloyd benefited from the trust because the trust paid for Elsie's nursing home care and medical bills. Cloyd, apparently, was not left desti-

although he may have powers with respect to it"; An agent undertakes to act on behalf of his principal and subject to his control . . . ; a trustee as such is not subject to the control of the beneficiary . . ." *Id.* § 8, Comments a & b. In *Stroup v. Stroup*, 140 Ind. 179, 187, 39 N.E. 864, 867 (1895), the court stated, in discussing whether or not a deed was testamentary: "[T]he pivotal question is the intention of the grantor. If to postpone title and enjoyment until after his death, it is testamentary; if to confer title and postpone the enjoyment thereof, it is a deed." On the characteristics of a testamentary transaction, see *Ritchie, What is a Will?*, 49 VA. L. REV. 759 (1963). The amount of control that may be retained by transferor without running the risk of testamentary classification depends on the type of transfer. For example, the settlor of a trust may reserve a power to revoke the trust without the risk of testamentary classification, RESTATEMENT (SECOND) OF TRUSTS, § 57 (1959), while the grantor under a deed runs a greater risk if he or she reserves a power to revoke the deed. See *Garvey, Gifts of Legal Interests in Land*, 54 KY. L.J. 19 (1965).

⁷⁷*Id.* at 866. It is not necessary that the settlor intend to create vested interests in the beneficiaries in order to avoid testamentary characterization. It is only necessary that the settlor intend to presently create an interest in the beneficiaries, whether a vested or a contingent interest.

⁷⁸*Id.* at 866 (citing 2 A. SCOTT, THE LAW OF TRUSTS, § 164.1 (3d ed. 1967), for the proposition that subsequent conduct is evidence of the settlor's intent at the creation of the trust).

⁷⁹355 N.E.2d at 866.

⁸⁰*Id.* (citing *Warner v. Keiser*, 93 Ind. App. 547, 177 N.E. 369 (1931)).

tute, without "a minimal means of sustenance," or "unable to provide his . . . own support."⁸¹ The trust was created three years before Elsie's death.⁸² There was no secret motive on Elsie's part to establish the trust in order to deprive Cloyd of wealth that he had helped accumulate.⁸³ Cloyd died soon after Elsie and would not have benefited if the trial court's decision had been reversed. Thus, the equities were not so clearly in Cloyd's favor as they might have been had Cloyd been left destitute by a substantial transfer three days before Elsie's death.

Leazenby involved a revocable inter vivos trust, which is only one of the several varieties of non-absolute transfers mentioned above. However, since *Leazenby* is the only appellate decision in Indiana in the last sixty-five years to discuss the relationship between a decedent's inter vivos transfers and his or her spouse's statutory right,⁸⁴ *Leazenby's* strict interpretation of legislative intent has important ramifications. *Leazenby's* conclusion that inter vivos validity is the only test to be applied to determine if property transferred by the decedent must be shared with the decedent's surviving spouse is relevant in all inter vivos transfer situations. Under the *Leazenby* test, a surviving spouse has no claim to property completely and openly transferred by the decedent to third parties, whether the transfer was made three years, three months, or three days before the transferor's death.⁸⁵ As far as non-absolute transfers are concerned, *Leazenby* holds that any nontestamentary transfer would pass muster and by-pass the surviving spouse's claim.

Consider, for example, a non-absolute inter vivos transfer by the decedent into a bank account in the joint names of himself and

⁸¹355 N.E.2d at 867.

⁸²*Id.* at 862. It is not clear, from the facts given, when the bulk of Elsie's property was transferred to the trust. The more contemporaneous the transfer and the decedent's death, it would seem that the more suspect is the decedent's intent, especially when the transfer is of a large portion of the decedent's estate. *But see* W. MACDONALD, *supra* note 42, at 149-54, noting that proximity of the transfer to the decedent's death does not seem to be determinative.

⁸³355 N.E.2d at 866. The court pointed out that there was no conclusive evidence of a secreting of real ownership of Elsie's property, and no conclusive evidence that Cloyd did not know and approve of the trust. Cloyd must have been aware of the trust because the trust paid Elsie's nursing home and medical bills. However, why is Cloyd's awareness relevant if the test is whether or not the transfer was testamentary? Is the court suggesting that a secreting of ownership might call into play a different test for validity of the transfer? *See* note 94 *infra*.

⁸⁴*See* *Stroup v. Stroup*, 140 Ind. 179, 39 N.E. 864 (1895); *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049 (1913).

⁸⁵The only argument that the survivor might make to set aside an ostensibly absolute transfer is that there was, in fact, no intended transfer. For example, the spouse might argue that undue influence, mistake, duress, or a secret agreement between the transferor and the transferee negated an ostensibly donative intent.

another or into a Totten trust account in which the transferor is trustee for another. These transfers will avoid the surviving spouse's elective claim. This is clear from the *Leazenby* test read in conjunction with the recently enacted "Non-probate Transfers" statute, which establishes presumptions regarding inter vivos and after death ownership of the funds in such accounts.⁸⁶ In fact, a review of this statute supports *Leazenby's* conclusion that legislative intent favors the policy of free alienability over a policy for support of surviving spouses from assets gratuitously transferred, but substantially controlled, by the decedent at death.

Section three of the "Non-probate Transfers" statute provides that, during the lifetime of the parties, a joint account⁸⁷ belongs to the parties in proportion to the net contributions by each, and a trust account⁸⁸ belongs beneficially to the trustee, unless there is clear and convincing evidence of a contrary intent.⁸⁹ Section four provides in part:

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. . . .

. . . .

(c) If the account is a trust account, on the death of the trustee or the survivor of two [2] or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent⁹⁰

⁸⁶IND. CODE §§ 32-4-1.5-1 to 15 (1976 & Supp. 1978).

⁸⁷A joint account is "an account payable on request to one [1] or more of two [2] or more parties whether or not mention is made of any right of survivorship." *Id.* § 32-4-1.5(4). A party is a "person who, by the terms of the account, has a present right, subject to request, to payment" from multiple party account. *Id.* § 32-4-1.5-1(7).

⁸⁸A trust account is:

[A]n account in the name of one [1] or more parties as trustees for one [1] or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

Id. § 32-4-1.5-1(14).

⁸⁹*Id.* § 32-4-1.5-3(a), (c).

⁹⁰*Id.* § 32-4-1.5-4.

Section six provides: "Any transfers resulting from the application of section 4 [32-4-1.5-4] are effective by reason of the account contracts involved and this chapter [32-4-1.5-1 to 32-4-1.5-15] and are not to be considered as testamentary or subject to Indiana Code title 29 [29-1-1-1 to 29-2-18-2]." ⁹¹ Section seven, however, provides in part: "No multiple-party account is effective against an estate of a deceased party to transfer to a survivor sums needed to pay claims, taxes, and expenses of administration, *including the statutory allowance to the surviving spouse* or dependent children, if other assets of the estate are insufficient." ⁹² Thus, by statute, joint bank accounts and Totten trusts are not testamentary, and, further, by statute, they are not to be considered a part of the decedent's estate except as necessary to satisfy claims of decedent's creditors or the survivor's allowance claim.

Although the Indiana legislature has provided a statutory elective share to protect surviving spouses from disinheritance, both the legislature and the courts, at present, allow a spouse to retain substantial inter vivos ownership rights over transferred assets and avoid a forced sharing of those assets with a surviving spouse at death. ⁹³ Indiana law does not permit a court to view the substance of an otherwise valid inter vivos transaction to determine whether a surviving spouse is morally or equitably entitled to a share of the transferred assets at the transferor's death. ⁹⁴ Neither may a court

⁹¹*Id.* § 32-4-1.5-6.

⁹²*Id.* § 32-4-1.5-7 (emphasis added).

⁹³*See id.* §§ 32-4-1.5-3, -4, -6, -7.

⁹⁴Even a gift causa mortis, the lowest on the continuum of non-absolute transfers mentioned above because it is, perhaps, the most testamentary in appearance and effect, may avoid the survivor's allowance and spouse's elective claims in Indiana. In *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049 (1913), the court held that a gift causa mortis, made with an intent to defeat the donor's wife's dower interest in the transferred property, was nonetheless subject to the wife's dower claim. However, the court apparently did not consider a gift causa mortis to be testamentary. The court stated: "But whether said gift be held to be a gift causa mortis or testamentary in effect, it is clear under the authorities that, when made under the circumstances and conditions disclosed by the finding in this case it will not operate to defeat the widow's interest in the property so given." *Id.* at 71-72, 100 N.E. at 1061 (emphasis added). If a gift causa mortis is nontestamentary, then under the *Leazenby* test, the surviving spouse may not reach the subject matter of the gift to satisfy the elective share. Further, because the subject matter of the gift will not pass as part of the decedent's estate, the gift may not be reached to satisfy the spouse's survivor's allowance claim. It should be noted that a gift causa mortis is considered nontestamentary in the majority of jurisdictions, on the theory that an interest is created immediately in the transferee, subject to divestment by revocation of the gift. *See, e.g.*, *McDonough v. Portland Sav. Bank*, 136 Me. 71, 1 A.2d 768 (1938); *Stradcutler v. Stradcutler*, 151 Minn. 80, 185 N.W. 1016 (1921); *Van Pelt v. King*, 22 Ohio App. 295, 154 N.E. 163 (1926); *In re White's Estate*, 129 Wash. 544, 225 P. 415 (1924). *Contra, e.g.*,

question the survivor's need for a share of the decedent's estate. Underprotection and overprotection are both very real possibilities.

II. STATUTORY PROTECTIVE PROVISIONS IN OTHER JURISDICTIONS

Various statutory schemes have been devised in other jurisdictions in an attempt to achieve some degree of equitable protection of the surviving spouse—that is, protection which takes into account inter vivos arrangements made by the decedent in favor of the spouse (to prevent overprotection) and protection which takes into account property transferred to others, but substantially controlled, by the decedent at death (to prevent underprotection). Some of the legislative attempts to counteract the underprotective and overprotective potentialities of the traditional estate-based protective scheme are far-reaching; others are more limited in scope and effect.

A. *Statutory Allowances and Other Provisions*

Nearly every statutory protective scheme includes some type of provision in which certain limited rights of the surviving spouse are equated with or made superior to the rights of unsecured creditors of the decedent. A homestead statute may protect a home or residence from creditors' claims.⁹⁵ Various types of personal property exemption statutes may enumerate specific items of exempt property⁹⁶ or set forth a value which the spouse may take in property or in cash.⁹⁷ Often family allowance provisions empower the court to authorize payments for the support of the spouse during administration of the decedent's estate.⁹⁸ The Uniform Probate Code's allowance and exempt property provisions are typical.

The Uniform Probate Code provides that the surviving spouse is entitled to: (1) A homestead allowance of \$5,000;⁹⁹ (2) exempt prop-

McAdeo v. Dickson, 23 Tenn. App. 74, 126 S.W.2d 393 (1939). Another possible interpretation of *Ramsey*, however, is that the court was pronouncing a public policy that the surviving spouse's statutory dower claim may not be defeated by a transfer so tenuous as a gift causa mortis, especially one made with a questionable intent. See G. HENRY, *supra* note 30, at 1481. See also *Devol v. Dye*, 123 Ind. 321, 24 N.E. 246 (1889) (gift causa mortis subject to deceased donor's debts). If so, arguably, the elective share and survivor's allowance provisions might be construed, despite *Leazenby's* broad language, to reflect this public policy when a case involving a gift causa mortis arises.

⁹⁵See, e.g., FLA. STAT. ANN. §§ 732.401, .4015 (West 1976).

⁹⁶See, e.g., GA. CODE ANN. §§ 51-1301, -1504 (Harrison 1974).

⁹⁷See, e.g., PA. STAT. ANN. tit. 20, §§ 3121, 3122 (Purdon 1975).

⁹⁸See, e.g., FLA. STAT. ANN. § 732.403 (West 1976); ILL. ANN. STAT., ch. 110½, §§ 15-1, -2, -3 (Smith-Hurd 1978).

⁹⁹UNIFORM PROBATE CODE § 2-401 (1975 version) [hereinafter cited as UPC]. If there is no surviving spouse, the decedent's surviving minor and dependent children are entitled to divide the \$5,000 allowance.

erty, consisting of household furniture, automobiles, furnishings, appliances, and personal effects, of a value not exceeding \$3,500 in excess of security interests in the property, and the right to any deficiency from other assets of the estate;¹⁰⁰ and (3) a family allowance in any reasonable amount for maintenance during administration of the estate if the decedent was obligated to support the spouse.¹⁰¹ The allowance and exempt property rights are cumulative and have priority over all claims against the estate.¹⁰² A surviving spouse is entitled to the homestead allowance, exempt property, and the family allowance in addition to the spouse's intestate share, elective share, or share under the will.¹⁰³

Generally, either by statute or by case law, a spouse may voluntarily waive any rights to share in the deceased spouse's estate.¹⁰⁴ Also, either by statute or by case law, an unworthy spouse may be denied a share of the decedent's estate.¹⁰⁵ Each of these provisions in a limited way, prevents underprotection or overprotection of surviv-

¹⁰⁰UPC § 2-402. If there is no surviving spouse, the decedent's children are entitled jointly to the same value.

¹⁰¹UPC § 2-403. Minor children whom the decedent was, in fact, supporting are also entitled to the family allowance. The allowance may be paid in a lump sum or in periodic installments. *See also* UPC § 2-404.

¹⁰²UPC §§ 2-401, -402, -403.

¹⁰³UPC §§ 2-206, -401, -402, -403. By express provisions in the will, the testator may put the spouse to an election between devises under the will or benefits under the law. *See* UPC § 2-206, Commission Comments.

¹⁰⁴Typical statutory provisions are, *e.g.*, DEL. CODE tit. 12, § 905 (Supp. 1977); IND. CODE §§ 29-1-2-13, -3-6 (1976) (discussed in text at note 33 *supra*); MD. EST. & TRUSTS CODE ANN. § 3-205 (1974); UPC § 2-204. Representative cases recognizing the enforceability of contractual arrangements whereby one spouse waives rights to share in the estate of the other spouse include, *e.g.*, *In re* Estate of Steven, 155 Colo. 1, 392 P.2d 286 (1964); *Johnston v. Johnston*, 134 Ind. App. 351, 184 N.E.2d 651 (1962); *In re* Estate of Pollack, 28 Ill. App. 3d 987, 329 N.E.2d 553 (1975).

¹⁰⁵Statutory provisions may bar a person who intentionally kills another from taking a share of the slain person's estate. *E.g.*, CAL. PROB. CODE § 258 (West Supp. 1978); ILL. ANN. STAT. ch. 110½, § 2-6 (Smith-Hurd 1978); IND. CODE § 29-1-2-12 (1976) (discussed at note 34 *supra*); KAN. STAT. § 59-513 (1976); OHIO REV. CODE ANN. § 2105.19 (Page 1976); PA. STAT. ANN. tit. 20, §§ 2106(c), 2509(c) (Purdon 1975). In the absence of a statute, courts exercising equity jurisdiction may hold the slayer to be a constructive trustee of any property he acquires from the slain person or by reason of the offense. *See, e.g.* *National City Bank v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710 (1957); *In re* Estate of Mahoney, 126 Vt. 31, 220 A.2d 475 (1966). *See also* 5 A. SCOTT, TRUSTS §§ 492-492.6 (3d ed. 1967); RESTATEMENT OF RESTITUTION § 187 (1937). Marital misconduct, such as desertion or adultery, may bar a spouse from participation in the decedent's estate. *See, e.g.*, IND. CODE §§ 29-1-2-14, -15 (1976) (discussed at notes 35-36 *supra*); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 1967); PA. STAT. ANN. tit. 20, §§ 2106(a), 2509(a) (Purdon Supp. 1978). The UPC takes the position that some definitive legal act, normally divorce, is necessary to bar the spouse's share. *See* UPC § 2-802 & Commission Comments.

ing spouses. The limited nature of the prevention is apparent from the fact that underprotection and overprotection are very possible in Indiana, as pointed out in Section I, despite the existence of the survivor's allowance, waiver, and unworthy spouse provisions. Because thoughtfully drafted elective share provisions have the greatest potential for guarding against both overprotection and underprotection, the remainder of the discussion of statutory protective schemes in other jurisdictions will focus on the provisions relating to the spouse's elective right.

B. *Variations on the Elective Share Theme*

The Uniform Probate Code's elective share provision is unique and the most far-reaching of all American statutory schemes. The surviving spouse is entitled to elect to take one-third of the decedent's augmented estate.¹⁰⁶ The basis of the augmented estate is the decedent's net estate.¹⁰⁷ The net estate is increased by the value of two categories of gratuitous transfers—transfers to third parties and transfers to the spouse. The value of property gratuitously transferred by the decedent during the marriage to persons other than the surviving spouse without the spouse's consent¹⁰⁸ is added to

¹⁰⁶UPC § 2-201(a) provides: "[T]he surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated." For a comprehensive discussion of the UPC augmented estate concept, see Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977).

¹⁰⁷The augmented estate is defined in UPC § 2-202. This section begins: "The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims . . ."

¹⁰⁸UPC § 2-202 begins:

[The augmented estate includes the] value of property transferred to anyone other than a bona fide purchaser 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 . . .

. . . .

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first.

A bona fide purchaser is defined in UPC § 2-202(3) as a "purchaser for value in good faith and without notice of any adverse claim." It may be that a purchaser would be held to have notice of an adverse claim, or at least a potential adverse claim, if the purchaser took from a married person, or from one whose marital status was unknown, without the joinder of the spouse. An amendment indicating that nonjoinder of a known or unknown spouse is not notice to the purchaser of any adverse claim could easily solve this problem. See WIS. STAT. ANN. § 861.17(4) (West 1971).

the net estate if the transfer was made within two years of death¹⁰⁹ or if, but only to the extent that, the decedent retained at his death some control over¹¹⁰ or some interest in¹¹¹ the transferred property. The net estate is also increased by the value of property owned by the surviving spouse at the decedent's death, or transferred by the surviving spouse to a person other than the decedent if the transferred property "would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent,"¹¹² to the extent that the property "is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth."¹¹³ Property derived from the decedent is broadly defined to include "any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime," proceeds of insurance on the decedent's life and proceeds of annuity contracts under which the decedent was the primary annuitant if the proceeds are "attributable to premiums paid by him."¹¹⁴ Additionally, "property held at the time of the decedent's death by decedent and the surviving spouse with right of sur-

¹⁰⁹"[A]ny transfer made to a donee 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 \$3,000.00" is included in this first category. UPC § 2-202(1)(iv). Decedent's retention of control or an interest in the property is irrelevant. This subsection does not raise a presumption of fraud on the spouse; the only way to avoid inclusion of transfers within two years of death is by obtaining the consent or joinder of the spouse. *Cf.* Model Probate Code § 33(a), (b) (gift in fraud of marital rights may be applied to payment of the spouse's share; gift by married person within two years of death is presumptively in fraud of marital rights).

¹¹⁰"[A]ny 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" is another type of transfer included in the first category. UPC § 2-202(1)(ii).

¹¹¹Transfers "whereby property is held at the time of decedent's death by decedent and another with right of survivorship," UPC § 2-202(1)(iii), or "under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property," UPC § 2-202(1)(i), are included.

¹¹²UPC § 2-202(2). This phrase refers to any property transferred by the surviving spouse which would have been included in that spouse's augmented estate by the first category, quoted in part in notes 108-11 *supra*. UPC § 2-202(2)(ii) provides: "Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent."

¹¹³UPC § 2-202(2).

¹¹⁴UPC § 2-202(2)(i). Federal Social Security System benefits are excluded. "Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent." *Id.*

vivorship," and "amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan . . . by reason of service performed or disabilities incurred by the decedent" is property derived from the decedent.¹¹⁵ The surviving spouse's owned or transferred property "is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source."¹¹⁶

The inclusion in the augmented estate of property gratuitously transferred to third persons is intended to avoid underprotection of the spouse, which occurs when the decedent used various will substitutes to transfer ownership of property while the decedent retained continued benefits or controls during his or her lifetime. The category is "intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate."¹¹⁷ Because the provision is comprehensive, the surviving spouse's right to share the family wealth will be defeated only to the extent that the decedent made absolute transfers of property more than two years before death.

The inclusion in the augmented estate of property that the spouse derived from the decedent is intended to avoid overprotection—that is, "to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other non-probate arrangements."¹¹⁸ The spouse may be overprotected only to the extent that the spouse is entitled to the homestead allowance, exempt property, and the family allowance, which are given without regard to other provisions made *inter vivos* or at death.

When the surviving spouse takes an elective share of the augmented estate,

values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate.¹¹⁹

¹¹⁵UPC § 2-202(2)(i).

¹¹⁶UPC § 2-202(2)(iii).

¹¹⁷UPC § 2-202, Commission Comments.

¹¹⁸*Id.*

¹¹⁹UPC § 2-207(a). The Comments to this section state that the effect is to protect the decedent's estate plan so far as it provides value for the surviving spouse. The spouse need not accept benefits devised by the decedent, but if the benefits are not

Then, "[r]emaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein."¹²⁰

The Uniform Probate Code's augmented estate provision is complex¹²¹ and goes far in setting aside otherwise valid inter vivos transfers of the decedent.¹²² Of the twelve states that have to date

accepted, the values are charged against the spouse's elective share as if the benefits were accepted. *Id.*, Commission Comments.

¹²⁰UPC § 2-207(b). Subsection (c) provides: "Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse." By way of example, assume that the decedent's net estate before augmentation is \$110,000, that by his will the decedent devised \$30,000 to his spouse and the residue to *A*, that in his lifetime the decedent transferred \$200,000 to *B*, \$160,000 to *C*, and \$40,000 to *D* with sufficient retained control in all cases so that the transfers are included in the augmented estate by § 2-202(1) (discussed in notes 8-11 *supra* and accompanying text), and that the spouse derived a total of \$150,000 from the decedent under § 2-202(2) (discussed in notes 11-15 *supra* and accompanying text). Although the property transferred to *B* and *C* is still intact, *D* used the \$40,000 in an unsuccessful business venture and lost it to his creditors. Under these assumed facts, the decedent's augmented estate is \$660,000 (\$110,000 net estate plus \$400,000 in § 2-202(1) transfers plus \$150,000 in § 2-202(2) property), and the spouse's elective share is \$220,000 (or one-third of the augmented estate). The elective share is made up of the \$150,000 in § 2-202(2) property and \$30,000 in value of the net estate, pursuant to § 2-207(a). The remaining \$40,000 of the elective share comes proportionately from the \$80,000 remaining in the net estate and the \$360,000 given to § 2-202(1) transferees who must contribute. (Note that the transfer to *D* is included in the augmented estate by § 2-202(1), but presumably, under § 2-207(c), *D* need not contribute if *D* no longer has the property or its proceeds. Section 2-207(c) is unclear. Perhaps *D*, as the original transferee is obligated to contribute whether he has the property or not, because the language regarding contribution "to the extent . . . [one has] the property or its proceeds" arguably applies only to donees of the original transferee. If *D* need not contribute, the donees *A*, *B*, and *C* suffer; if *D* is required to contribute, then the spouse may suffer if the spouse is unable to collect from a judgment-proof transferee.) Thus, \$7,273 will come from the decedent's net estate, \$18,182 from *B*, and \$14,545 from *C*.

¹²¹The drafters recognized that the complexity of the augmented estate concept may be a drawback and that litigation may be required when an elective share is asserted. The UPC § 2-202, Commission Comments state: "Some legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act provision [PA. STAT. ANN. tit. 20, §§ 2508, 6111 (Purdon 1975) (discussed at notes 139-43 *infra*)]"

¹²²The most far-reaching provisions are those that bring into the augmented estate the value of absolute gratuitous transfers made within two years of death, UPC § 2-202(1)(iv), and the value of gratuitous transfers under which the decedent retained possession or enjoyment of, or the right to income from, the property, UPC § 2-202(1)(i), whether or not the transfer was in all other respects a completed inter vivos gift.

enacted substantial portions of the Uniform Probate Code,¹²³ only seven have included the augmented estate provision.¹²⁴ Two of the remaining five are community property jurisdictions.¹²⁵ The other three states have retained more traditional estate-based protective schemes.¹²⁶

Other states have approached the underprotection and overprotection problems without using the foreign concept of the augmented estate. In New York, if the surviving spouse is entitled to elect to take against the decedent's will,¹²⁷ the spouse's share is a portion of what is essentially a modified augmented net estate.¹²⁸

¹²³Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. The UPC, including the augmented estate provision, was in effect in South Dakota for six months in 1976, but was repealed. Ch. 196, 1974 S.D. Sess. Laws; chs. 175, 177, §§ 2, 3, 1976 S.D. Sess. Laws. The Wyoming legislature enacted the UPC, but the bill was vetoed by the Governor. Indiana seems to be enacting the UPC in a piecemeal fashion. *E.g.*, IND. CODE §§ 32-4-1.5-1 to 15 (1976), the "Non-probate Transfers" provisions, are taken from UPC §§ 6-101 to 113; IND. CODE §§ 29-1-8-1 to 9 (1976), provisions for dispensing with administration of small estates, are taken from UPC §§ 3-1201 to 1204.

¹²⁴Alaska, Colorado, Idaho (with modifications to reflect the fact that Idaho is a community property jurisdiction), Montana, Nebraska, North Dakota, and Utah. Colorado added a subsection to the elective share provision of the UPC, creating a possibility that a surviving spouse may be overprotected. *See* COLO. REV. STAT. § 15-11-201 (1973), whereby the surviving spouse is given the option of taking either one-half of the augmented estate or one-half of the inventoried estate.

¹²⁵Arizona and New Mexico.

¹²⁶*See* FLA. STAT. ANN. §§ 732.201, .206, .207 (West 1976) (elective share of 30 percent of decedent's net estate); HAW. REV. STAT. §§ 560:2-201, -202 (1976) (elective share of one-third of decedent's net estate). Minnesota's provisions strike a compromise. The surviving spouse is entitled to the homestead and one-third (or one-half if the decedent left only one child or the issue of one child surviving) of the remainder of decedent's net estate regardless of provisions in the decedent's will. MINN. STAT. ANN. §§ 525.145, .16, .212 (West 1975). The spouse may also elect to take one-third or one-half against certain "testamentary" conveyances:

A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of conveyor.

Id. §§ 525.213, .214. *See* the discussion of the similar Pennsylvania statute at notes 135-39 *infra* and accompanying text.

¹²⁷The surviving spouse is precluded from claiming an elective share when the decedent leaves by will an absolute gift of \$10,000 or more and also grants the surviving spouse income for life from a trust when the value of such life interest is equal to or in excess of the difference between the testamentary provision and the value of the elective share. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(c) (McKinney 1967).

¹²⁸*Id.* § 5-1.1(b).

Certain inter vivos dispositions, if effected by the decedent after the date of the marriage, are treated as testamentary substitutes and, whether made to the spouse or to any other person, are included in the net estate subject to the spouse's elective claim.¹²⁹ The list of testamentary substitutes includes gifts causa mortis,¹³⁰ and money deposited and remaining on deposit at the date of the decedent's death in a Totten trust account or a joint savings account payable on death to the survivor.¹³¹ Further, the list includes dispositions where the property is held at death by the decedent and another as joint tenants with right of survivorship or as tenants by the entirety,¹³² and dispositions "to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof."¹³³ Certain other dispositions are specifically excluded from the net estate subject to the surviving spouse's claim. These include payments under "thrift, savings, pension, retirement, death benefit, stock bonus or profit-sharing" plans; insurance proceeds; and United States savings bonds payable to a designated person.¹³⁴

The New York scheme is comprehensive, but not so comprehensive as the Uniform Probate Code. For example, in New York, a life income interest standing alone is not sufficient control to subject the property to the spouse's elective claim, and there is no two-year transfer provision. In New York, there is more potential for both overprotection and underprotection than under the Uniform Probate Code. Underprotection may occur if the decedent is careful to dispose of his or her wealth by one of the excluded arrangements or by establishing a trust without an express reservation of a power of revocation or a power to consume, invade, or dispose of principal. Overprotection will occur to the extent that the decedent has provided for his or her spouse by using one of the excluded dispositive arrangements, such as life insurance. No other non-Uniform Probate Code statutory scheme, however, goes so far to counteract overprotection and underprotection.

In Pennsylvania, a surviving spouse may elect to take one-half of the net real and personal estate of the testator.¹³⁵ If the spouse

¹²⁹*Id.* § 5-1.1(b)(1).

¹³⁰*Id.* § 5-1.1(b)(1)(A).

¹³¹*Id.* § 5-1.1(b)(1)(B) & (C).

¹³²*Id.* § 5-1.1(b)(1)(D).

¹³³*Id.* § 5-1.1(b)(1)(E).

¹³⁴*Id.* § 5-1.1(b)(2).

¹³⁵PA. STAT. ANN. tit. 20, § 2508 (Purdon 1975). If the decedent is survived by more than one child, by one child and the descendants of a deceased child, or by the descen-

elects to take against the will, the spouse may also elect to take one-half of the decedent's inter vivos conveyances if the decedent retained a power of appointment by will or a power of revocation or consumption over the principal; however, "the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor."¹³⁶ An electing spouse must account for all conveyances within the above inter vivos conveyance description of which the spouse is a beneficiary.¹³⁷ Proceeds of life insurance purchased by the decedent and employee death benefits are specifically excluded from the operation of this inter vivos conveyance election provision.¹³⁸

Underprotection and overprotection are both possible under the Pennsylvania scheme. One spouse may disinherit the other while living in comfort during his or her lifetime, for example, by creating an irrevocable inter vivos trust under which the settlor is entitled to the income for life and an independent trustee has the power to invade principal for the settlor's benefit. Furthermore, since the rights of an income beneficiary cannot be tampered with, the settlor could effectively disinherit an older spouse by creating a revocable inter vivos trust with a young life income beneficiary. On the other hand, the spouse may be amply provided for by life insurance, pension plan funds, right of survivorship assets, or assets in an irrevocable trust of which the spouse is a beneficiary, and nonetheless the spouse may elect to take against the decedent's will and against the described inter vivos conveyances without accounting for these gratuitous transfers.¹³⁹

Delaware's attempt to prevent both overprotection and underprotection is less far-reaching than either the New York or the Pennsylvania scheme. In Delaware, the surviving spouse is entitled

dants of more than one deceased child, the surviving spouse is entitled to only one-third of the estate. *Id.* § 2508(b).

¹³⁶*Id.* § 6111. If the spouse's elective share is one-third, *see* note 135 *supra*, then the spouse may take only one-third of the inter vivos conveyances. The UPC § 2-202 Commission Comments recommend the Pennsylvania statute as a simpler approach to accomplish the augmented estate result.

¹³⁷PA. STAT. ANN. tit. 20, §§ 2508, 6111(c) (Purdon 1975). Minnesota's spousal protective provisions are similar to the Pennsylvania provisions, except that in Minnesota the surviving spouse is not required to account for any beneficial inter vivos conveyances. MINN. STAT. ANN. § 525.213 (West Supp. 1978). Thus, in Minnesota, a spouse may easily be overcompensated by the right to elect against the will and to elect against inter vivos conveyances.

¹³⁸PA. STAT. ANN. tit. 20, § 6111(a) (Purdon 1975).

¹³⁹*See* Note, *Spouse's Rights in Non-Probate Assets Expanded*, 54 MINN. L. REV. 1029, 1051-52 (1970) (discussing a similar Minnesota statute).

to "an elective share of \$20,000 or one-third of the elective estate, whichever is less, less the amount of all transfers to the surviving spouse by the decedent."¹⁴⁰ The elective estate is defined as

the amount of the decedent's adjusted gross estate for federal estate tax purposes, . . . from which is subtracted the sum of all transfers made by the decedent during his lifetime which are included for purposes of determining his federal adjusted gross estate and which were made with the written consent or joinder of the surviving spouse.¹⁴¹

The amount of "transfers to the surviving spouse by the decedent" is defined as the "amount which equals the value of the property derived from the decedent by virtue of his death."¹⁴² The property derived from the decedent includes jointly owned property to the extent the spouse did not contribute to its value, a beneficial interest in a trust created by the decedent in his lifetime, proceeds of insurance or annuity contracts attributable to premiums paid by the decedent, and property appointed to the spouse by the decedent's exercise of a power of appointment.¹⁴³

Disinheritance of the surviving spouse is easily accomplished under the Delaware scheme. The only assets that may be reached to satisfy the spouse's elective share are assets in the decedent's "contributing estate."¹⁴⁴ The "contributing estate" includes only the "portion of the elective estate of which the decedent was the sole legal owner at his death, and does not include any property of which he was a joint owner, any insurance proceeds which are payable other than to his estate, or any property held in trust."¹⁴⁵ Thus, even if the spouse is entitled to the maximum \$20,000 share, if the decedent was not the sole legal owner of net assets valued at \$20,000, the spouse has nowhere to turn for satisfaction of the elective claim. Further, because the statute sets a \$20,000 maximum elective share, a spouse of a wealthy decedent may not be protected in the sense of being afforded a fair share of the total family wealth.

The Delaware scheme, however, effectively prevents overprotection of surviving spouses. Whether \$20,000 or the elective estate base is used, the amount of all transfers to the surviving spouse by

¹⁴⁰DEL. CODE ANN. tit. 12, § 901(a) (Supp. 1977).

¹⁴¹*Id.* § 902.

¹⁴²*Id.* § 903.

¹⁴³*Id.* § 903(1). The description of property derived from the decedent by virtue of his death is similar to and as broad as the description in UPC § 2-202(2).

¹⁴⁴DEL. CODE ANN. tit. 12, § 908(a) (Supp. 1977).

¹⁴⁵*Id.* § 908(b).

the decedent, which transfers are broadly described, is subtracted from the spouse's elective share.

In North Carolina, preventing overprotection of surviving spouses seems to be the only objective of the protective scheme. If the surviving spouse dissents from the decedent's will, the spouse is entitled to his or her intestate share of the decedent's net probate estate.¹⁴⁶ The spouse is not entitled to dissent from the will unless the value of the will provisions benefiting the spouse plus the value of "property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator" is less than the value of the share of the net estate that the spouse would receive if the spouse dissented.¹⁴⁷ Property passing to the spouse as a result of the testator's death is generally defined to include legal or beneficial life interests, insurance or annuity proceeds, survivorship property, and the value of trust principal if the spouse has a general power of appointment over the principal.¹⁴⁸

No attempt is made to recover for the spouse assets which the decedent transferred inter vivos but retained control over, or an interest in, until death. The North Carolina scheme is a traditional estate-based protective scheme with a twist preventing dissent, and preserving the decedent's estate distribution plan, if the spouse has received a share of the family wealth by extra-estate arrangements. Disinheritance of the spouse is easily accomplished by depleting the probate estate.¹⁴⁹ Despite the obvious statutory attempt to prevent

¹⁴⁶N.C. GEN. STAT. § 30-3 (1976). Section 29-14 describes the intestate share of the surviving spouse, which is one-half of the net estate if one line of descendants survives the decedent, one-third of the net estate if two or more lines of descendants survive, all the net estate if no descendants and no parents survive, and \$10,000 plus one-half the remaining real and personal net estate if no descendants, but one or more parents, survive. *See also* § 29-21 for the share of the spouse of an illegitimate decedent. The spouse's elective share is not always the same as the intestate share. The spouse's elective share is limited to one-half of the net estate if no descendants and no parents survive the decedent and to one-half of the intestate share if the spouse is a second or successive spouse and decedent left surviving descendants by a former marriage and no surviving descendants by the second or successive marriage. *Id.* § 30-3(a), (b).

¹⁴⁷*Id.* § 30-1(a).

¹⁴⁸*Id.* § 30-1(b). All property is valued at date of death. *Id.* § 30-1(c).

¹⁴⁹In fact, underprotection, in the sense that the spouse is deprived of a fair share of the family wealth, may be more pronounced under the North Carolina scheme than under a forced share provision without limitations on the right to dissent from (elect against) the will. For example, assume that the decedent left \$30,000 in assets in the net probate estate, although he controlled \$500,000 of trust and joint bank account funds at death. Assume that the surviving spouse received nothing under decedent's will, but received \$15,000 from a life insurance policy purchased by the decedent. In a forced share scheme without limitations, the spouse could take the \$15,000 in life insurance in addition to a forced share of the decedent's estate, thereby counteracting the extent of the spouse's actual disinheritance. However, in North Carolina, because

it, overprotection of the spouse is a very real possibility. The only extra-estate arrangements that are involved in the computation to determine if the spouse is entitled to dissent are property interests passing to the spouse "as a result of the death of the testator."¹⁵⁰ Absolute inter vivos gifts to the spouse, in trust or outright, apparently are not considered in determining whether the spouse may dissent from the decedent's will.¹⁵¹

In other jurisdictions that have legislatively attempted to prevent underprotection or overprotection of surviving spouses,¹⁵² the statutes refer to conveyances in fraud of, or made with the intent to defeat, the surviving spouse's marital rights. In Missouri, the spouse may elect to take one-half or one-third of the decedent's net estate against the decedent's will.¹⁵³ The spouse may also elect to treat as testamentary . . . "[a]ny gift made by a person in fraud of the marital rights of his surviving spouse to share in his estate" and may recover the gift from "the donee or persons taking from him without adequate consideration" and apply it to the payment of the spouse's share.¹⁵⁴ The burden of proving the donor's fraudulent in-

the spouse received the equivalent of the intestate share of the net estate by the extra-probate life insurance contract, the spouse has no right to dissent. *Id.* § 30-1(a). Note that in North Carolina, extra-estate arrangements for the surviving spouse are considered only in determining whether or not the spouse is entitled to dissent. If the spouse has received one dollar less than the intestate share by extra-probate arrangements and by the will, the spouse is entitled to the full elective share upon dissent.

¹⁵⁰*Id.* § 30-1(a).

¹⁵¹The spouse may be overprotected. Assume that the decedent placed \$600,000 in a revocable or irrevocable inter vivos trust with income to the spouse for life, remainder to the decedent's child. Assume also that the decedent's net probate estate of \$400,000 was devised entirely to his only child. If the spouse received less than \$200,000 (one-half of \$400,000) by extra-probate arrangements, the spouse could dissent from the will and take one-half of the net estate. The spouse's right to income from the trust is not considered in determining the right to dissent because the income interest does not pass to the spouse by reason of the decedent's death.

¹⁵²One other provision for protection of spouses should be mentioned. In California, in addition to the protection afforded by the community property laws, the spouse may elect against the decedent's will a share of the decedent's separate property and may recover one-half the value of any transfer made by the decedent to someone other than the spouse without full consideration if the spouse had an expectancy as defined by statute and if the decedent had "a substantial quantum of ownership or control of the property at death." CAL. PROB. CODE §§ 201.5, 201.8 (West Supp. 1978).

¹⁵³MO. ANN. STAT. § 474.160 (Vernon Supp. 1977). The spouse's share is one-half of the net estate if no lineal descendants survive the decedent, and one-third if lineal descendants survive.

¹⁵⁴*Id.* § 474.150(1). The surviving spouse may recover gifts in fraud of the marital rights whether the decedent dies testate or intestate. *Id.* The spouse of an intestate decedent is apparently entitled to recover the spouse's full intestate share of the fraudulent conveyances, and the spouse who elects against the will is apparently entitl-

tent is on his or her spouse when personal property is involved; but a presumption of fraud is raised if a married person conveys real estate without the joinder or consent of the spouse.¹⁵⁵

Vermont's fraudulent conveyance provision lacks the statutory presumption of fraud¹⁵⁶ and is otherwise more restrictive than the Missouri provision. Only widows may set aside fraudulent transfers, and the only transfers that may be set aside are conveyances of real estate made by the husband during coverture, not to take effect until after the husband's death, and made with the intent to defeat the widow's marital share.¹⁵⁷ The scope of the similarly worded Tennessee provision is broader than that of the Vermont provision. In Tennessee, any conveyance made with the intent to defeat the surviving spouse's elective or distributive share is voidable at the surviving spouse's election.¹⁵⁸ Either a surviving husband or a surviving wife may attempt to void a fraudulent conveyance. Conveyances of real or personal property may be attacked, and there is no limitation requiring that the conveyance be one that is not to take effect until after the transferor-spouse's death.

In none of these three fraud-oriented legislative schemes, is there any provision precluding the possibility that the spouse may be overprotected by receipt of a statutory elective share and a share of the decedent's fraudulent conveyances. The fraudulent conveyance provisions are designed only to prevent underprotection, and the details of the protection are left for the courts to establish on a case-by-case basis. The factors considered by the courts¹⁵⁹ in determining whether the decedent's intent at the time of the transfer was fraudulent include: (1) Lack of consideration for the transfer, (2) retention of control by the transferor over the transferred assets, (3) the amount of the transfer compared to the value of the transferor's total estate, (4) whether the transfer was made

ed to one-half or one-third of such conveyances. The election to recover fraudulent gifts must be made "as in the case of [the spouse's] election to take against the will." *Id.*

¹⁵⁵*Id.* § 474.150(2) (presumption of fraud in conveyance of real property); see *In re La Garce*, 532 S.W.2d 511 (Mo. Ct. App. 1975) (burden of proof as to fraud on spouse when conveyance is of personal property).

¹⁵⁶An early Vermont case, *Nichols v. Nichols*, 61 Vt. 426, 18A. 153 (1889), indicated that fraud would be presumed from knowledge that marital rights would be defeated by a conveyance, but later cases rejected the *Nichols* presumption. See *Patch v. Squires*, 105 Vt. 405, 165 A. 919 (1933); *Dunnett v. Shields*, 97 Vt. 419, 123 A. 626 (1924).

¹⁵⁷Vt. STAT. ANN. tit. 14, § 473 (1974).

¹⁵⁸TENN. CODE ANN. § 31-105 (Supp. 1977).

¹⁵⁹See, e.g., *Nelson v. Nelson*, 512 S.W.2d 455 (Mo. Ct. App. 1974); *Edgar v. Fitzpatrick*, 369 S.W.2d 592 (Mo. Ct. App. 1963), *modified*, 377 S.W.2d 314 (Mo. 1964).

openly or surreptitiously, and (5) whether the transfer was made in contemplation of imminent death. The lack of consideration and retention of control factors are the same factors that are included in statutory provisions listing the types of transfers that may be recovered by the surviving spouse to satisfy his or her elective claim. Even the contemplation of imminent death factor has received legislative approval in the Uniform Probate Code's two-year gift provision. Considerations as to whether the transfer was made openly or surreptitiously and as to whether the amount of the transfer was disproportionate in light of the total value of the decedent's estate are unique to fraud-oriented and intent-oriented jurisdictions.¹⁶⁰ In fact, one of the drawbacks of a fraud-oriented protective scheme is that consideration of such things as openness and disproportionateness of the transfer results in too much uncertainty for transferees and often depends on proof that is only within the knowledge of the transferor's spouse.¹⁶¹

Wisconsin's protective scheme also relies on a fraudulent transfer provision to prevent underprotection of surviving spouses. Wisconsin's statutes, however, go farther than those of Missouri, Vermont, and Tennessee because Wisconsin makes an effort to prevent overprotection. The surviving spouse is entitled to elect to take one-third of decedent's net estate against decedent's will.¹⁶² The surviving spouse is also entitled to recover a portion of any property arrangement made in fraud of the spouse's statutory rights,¹⁶³ whether or not the spouse elects to take against the will.¹⁶⁴ The

¹⁶⁰In a sense, the statutes recognize the openness of the transfer factor in provisions regarding the spouse's waiver of rights by consent or joinder. Macdonald proposed a protective scheme, in which transfers unreasonably larger under the circumstances may be reached to satisfy the spouse's claim. W. MACDONALD, *supra* note 42, at 299-327, discussed in notes 185-89 *infra*.

¹⁶¹*See, e.g.*, W. MACDONALD, *supra* note 42, at 117-19.

¹⁶²WISC. STAT. ANN. § 861.05 (West Supp. 1977). The elective share of one-third of the decedent's net estate is reduced by any outright property given to the spouse by decedent's will. This property passes to the spouse as part of the elective share so that the decedent's estate distribution plan is preserved as much as possible. An interesting feature of the Wisconsin elective share statute is that, if the spouse requests, the court will assign to the spouse the home in satisfaction of the elective share, "unless the court finds that such an assignment would unduly disrupt the testator's plan for disposition of his estate." *Id.* § 861.13 (West 1971).

¹⁶³The courts are statutorily authorized to subject "to the rights of the surviving spouse . . . any property arrangement made by the decedent in fraud of [the spouse's rights to an elective share, statutory allowances, and exempt property]." *Id.* § 861.17(1) (West 1971).

¹⁶⁴*Id.* § 861.17(3). Recovery in the action is limited, however, to one-third of the total of the net probate estate and the fraudulently arranged property, less any property that the spouse received out of the probate estate or under the fraudulent arrangement. *Id.*

rights to elect against the will and to maintain an action to recover fraudulent property arrangements are barred, however, if the surviving spouse receives at least one-half of the total value of the following property:

(a) the net estate; (b) joint annuities furnished by the decedent; (c) proceeds of life insurance as to which decedent had any of the incidents of ownership at death; (d) transfers within 2 years of death to the extent to which decedent did not receive consideration in money or money's worth; (e) transfers by decedent during lifetime as to which the decedent has retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary; (f) payments from decedent's employer or from a plan created by the employer or under a contract between the decedent and the decedent's employer (but excluding worker's compensation and social security payments); (g) property appointed by the decedent by will or by deed executed within 2 years of death (whether the power is general or special) but only if the property is effectively appointed in favor of the surviving spouse; (h) property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by the persons other than the decedent.¹⁶⁵

This effort to prevent overprotection is similar to the North Carolina approach, but is more effective because of the breadth of the description of property included in the computation.¹⁶⁶

C. Other Suggested Statutory Provisions

Some suggestions for revising statutory spousal protective provisions are not embodied in any of the statutes here reviewed,¹⁶⁷ but

¹⁶⁵*Id.* § 861.07(2) (West Supp. 1977).

¹⁶⁶The North Carolina provisions are discussed at notes 146-51 *supra* and accompanying text.

¹⁶⁷Professors Haskell and Simes propose that the federal adjusted gross estate be used as the basis for determining the spouse's elective share. L. SIMES, PUBLIC POLICY AND THE DEAD HAND (1955); Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964). Because this idea is embodied, to a limited extent, in the Delaware scheme, discussed at notes 140-45 *supra* and accompanying text, it is not further expounded upon here. The federal adjusted gross estate would be a comprehensive basis for the spouse's elective share. However, because the federal tax laws may frequently be amended, it seems preferable to describe elective estate property within a state statute enacted for the purpose of protecting surviving spouses.

must be mentioned before any conclusions can be reached as to the relative merits of a particular statutory scheme. One suggestion is reminiscent of common law inchoate dower. Professor Spies proposes that one-third of all real and personal property owned by a married person be subject to a nonassignable statutory trust in favor of his or her spouse.¹⁶⁸ The spouse's equitable interest in the property would be cut off by a conveyance to a bona fide purchaser, but would attach to the proceeds of the sale,¹⁶⁹ and would remain attached to all property gratuitously transferred by the spouse holding legal title. This statutory trust proposal would go far to prevent underprotection of surviving spouses, but the price for this prevention of underprotection is potential interference with the free alienability of the property of married persons and their donees.¹⁷⁰ Further, because the spouse's equitable interest in property gratuitously transferred could only be asserted after the donor spouse's death, underprotection could still occur if, for example, during the time between the transfer and the transferor's death, the donee conveyed the property to a bona fide purchaser and consumed the proceeds or made tracing of them impossible. In addition, the statutory trust concept as proposed would not prevent, and might frequently result in, overprotection of the surviving spouse, unless statutory provisions were included requiring the spouse to account for gratuitous transfers received from the decedent.

Another proposal is that the protection afforded the spouse should reflect the spouse's financial need.¹⁷¹ Schemes based on need have apparently worked well in England and other British Commonwealth countries for many years.¹⁷² Under England's Inheritance

¹⁶⁸Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157, 183 (1960). The spouse's equitable interest would be nonassignable unless transferred at the same time as the other spouse's legal title and would be cut off by divorce or death.

¹⁶⁹Apparently, even if the spouse joined in or consented to the transfer, the spouse's equitable interest would attach to the proceeds. Professor Spies does not specifically discuss waiver of the right to the equitable interest except to say that "the interest could not be released to the trustee." *Id.*

¹⁷⁰Professor Haskell states: "The [statutory trust] proposal does have the disadvantage . . . of placing under a cloud all donative transfers of property, and undoubtedly many transfers for consideration, by a married person, unless the spouse joins in the transfer." Haskell, *supra* note 167, at 512-13.

¹⁷¹See, e.g., W. MACDONALD, *supra* note 42, at 299-327 (1960) (discussed in notes 181-85 *infra* and accompanying text); Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936); L. SIMES, PUBLIC POLICY AND THE DEAD HAND 29-30 (1955) (need is here suggested as the basis for awarding a share to family members other than the surviving spouse).

¹⁷²New Zealand was the first to adopt maintenance legislation in 1900. Similar legislation has been in effect in Australia since 1920 and in several Canadian provinces. England adopted maintenance legislation in 1938. See W. MACDONALD, *supra* note 42,

(Provision for Family and Dependents) Act,¹⁷³ courts are authorized to order periodic or lump sum payments for the surviving spouse of a testator who did not make "reasonable financial provision for the applicant" in his or her will, or by the intestacy laws.¹⁷⁴ When awarding payments to the spouse, the court is directed to consider the "financial resources and financial needs" of the applicant and of any beneficiary of the estate in the foreseeable future,¹⁷⁵ the size and nature of the property in the decedent's net estate,¹⁷⁶ the obligations and responsibilities of the decedent toward the applicant or any beneficiary of the estate,¹⁷⁷ the conduct of the applicant in his or her relations with the decedent,¹⁷⁸ and any other circumstances that the court deems relevant.¹⁷⁹ The award may be satisfied only from assets in the decedent's net estate and assets transferred *causa mortis*.¹⁸⁰ Thus, although overprotection will always be prevented, underprotection may occur, as in any estate-based protective scheme, if the decedent has depleted his or her estate.

Macdonald has proposed a similar maintenance scheme, "buttressed with anti-evasion provisions."¹⁸¹ Under Macdonald's proposal, a court may award the spouse any amount it deems just "if it determines that under the circumstances prevailing at the date of decedent's death the petitioner has not received a reasonable provision from the decedent by way of testamentary or inter vivos disposition or under the laws dealing with intestacy."¹⁸² The court may satisfy

at 290 n.3; Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107 (1938).

¹⁷³Inheritance (Provision for Family and Dependents) Act, 1975, c. 63.

¹⁷⁴*Id.* §§ 1, 2. Former spouses of a decedent who have not remarried, children of the decedent, persons treated as children by the decedent, and persons maintained by the decedent immediately prior to his death may also apply for an award. *Id.* § 1(1).

¹⁷⁵*Id.* § 3(1)(a), (c).

¹⁷⁶*Id.* § 3(1)(e).

¹⁷⁷*Id.* § 3(1)(d).

¹⁷⁸*Id.* § 3(1)(g).

¹⁷⁹*Id.*

¹⁸⁰*Id.* § 8(2).

¹⁸¹*Id.* W. MACDONALD, *supra* note 42, at 299.

¹⁸²*Id.* at 308. The quotation in the text is taken from § 3 of Macdonald's "Suggested Model Decedent's Family Maintenance Act." The criteria to guide the court in determining whether decedent has made a reasonable provision for the petitioner are listed in § 4 of the Suggested Model Act. The primary criterion is the "petitioner's present and future financial need," but the court is also directed to consider the value of the decedent's present and future financial need," but the court is also directed to consider the value of the decedent's estate, the amount that the decedent transferred to persons other than the petitioner, the "petitioner's conduct toward the decedent," and any other circumstances deemed relevant by the court. *Id.* at 308-09. These are the same considerations as listed in the English statute, discussed in the text accompanying notes 175-79 *supra*.

the award from the assets in the decedent's estate and, if these assets are insufficient, require contribution from inter vivos transferees who received from the decedent transfers "unreasonably large under the circumstances at the time of the transfer."¹⁸³ As under any provision based on need, overprotection would never occur. Because the scheme is not entirely estate-based, underprotection is also prevented, at least to the extent that the decedent depleted his or her estate by unreasonably large transfers to a transferee who can be brought within the jurisdiction of the court.

If a share based upon need, and such other criteria as the conduct of the spouse toward the decedent, is statutorily adopted, it is impossible to predict the effect of this legislation on the courts. Whenever a spouse petitions for a maintenance award, the court would be required to hear evidence bearing upon the spouse's financial situation and conduct, as well as evidence of any other relevant circumstances, in a potentially lengthy and complex fact-finding proceeding. Perhaps, if undeserving spouses frequently petitioned the court, such a scheme would involve an inordinate amount of judicial time and effort.¹⁸⁴ On the other hand, perhaps, deserving spouses would be discouraged from requesting needed protection because evidence concerning their financial position and marital conduct would become a matter of public record.¹⁸⁵ This latter effect could result in egregious underprotection of spouses who might at least be somewhat protected under a fixed share scheme.

III. CONCLUDING OBSERVATIONS

At the present time, the Indiana courts and legislature are committed to a policy favoring the free inter vivos alienability of prop-

¹⁸³Section 6(b) of the Suggested Model Act, W. MACDONALD, *supra* note 42, at 310-11. Section 7 of the Suggested Model Act, *id.* at 312, lists the factors to be considered in determining whether the transfer was unreasonably large under the circumstances. The factors include the relative size of the transfer compared to the wealth retained by the decedent, moral or legal obligations of the decedent to make the transfer, the amount of any consideration paid by the transferee to the decedent, and any other circumstances deemed relevant by the court. Professor Haskell states: "[A] weakness in the proposed act is the absence of any objective standard for the determination of the unreasonableness of the inter vivos transfer" and suggests that the "question of the size of the permissible inter vivos transfer might better be treated with some specificity." Haskell, *supra* note 167, at 516.

¹⁸⁴Dean Plager concluded in 1966 that protection of surviving spouses would probably not become a substantial activity of the courts if a scheme more sensitive to the spouse's actual needs were adopted. Plager, *supra* note 4, at 715.

¹⁸⁵One should not too readily conclude that because spouses in divorce proceedings are willing to make their finances and marital disharmony a matter of public record, spouses in probate proceedings would be similarly willing to place all relevant circumstances on the record.

erty rather than a policy favoring equitable protection of surviving spouses from disinheritance. Under Indiana's fixed share, estate-based election statute, underprotection and overprotection of surviving spouses are very real possibilities. Although courts in other jurisdictions have done so, the *Leazenby* court was unwilling to adopt one of the various judicial tests that have been used to counteract the underprotective aspects of this type of protective scheme. The *Leazenby* court was correctly concerned with the vagueness of the various tests and the hardship that uncertainty imposes upon "conscientious settlors and beneficiaries who cannot be certain which good faith arrangements will be upheld."¹⁸⁸ Furthermore, even if the *Leazenby* court had decided to take some action to counteract the underprotective aspects of the scheme, the overprotective aspects would remain. The overprotective aspects cannot be dealt with judicially: No one can complain if a spouse takes advantage of the unconditional elective right.

The purpose of this discussion has been to illustrate that underprotection and overprotection may occur under the present statutory scheme and to review other legislative responses to the problem. Because the underprotective and overprotective features of each scheme have already been presented, only a few observations are in order.

The provision that most effectively prevents overprotection of surviving spouses is one based upon the spouse's need. Next in efficacy is the comprehensive augmented estate provision of the Uniform Probate Code. The augmented estate provision does not prevent overprotection as well as a need provision does because an independently wealthy spouse who received few inter vivos gifts from the decedent might elect a substantial share of the decedent's augmented estate, while that same spouse would not be permitted to interfere with the decedent's estate plan in a need jurisdiction. This points out a question that must be faced before determining what kind of protective scheme to adopt: Is a spouse entitled to a share of the family wealth solely because of the marriage relationship, or should spouses be forced heirs only if they need money for their support? Closely related to this question is the question of whether to adopt a scheme which gives the trial court great discretion in making protective awards or to adopt one where a presumably adequate share is spelled out in the statute. In the United States, the first question has been answered in favor of the position that the marital relationship is sufficient justification for a

¹⁸⁸355 N.E.2d at 864.

claim to some portion of the decedent's estate.¹⁸⁷ The second question has been answered in favor of spelling out the share (typically one-third or one-half) in the statute.

Once a choice is made between a fixed share scheme and a discretionary share scheme, the next consideration is the definition of the estate of the decedent upon which the fixed share will be based and from which the fixed or the discretionary share may be satisfied.¹⁸⁸ Defining the estate to prevent overprotection is necessary only under a fixed share scheme and is easy as a policy

¹⁸⁷See Haskell, *supra* note 167, at 525:

My proposed revision of the law on the subject disinheritance of close family adopts a form of limited forced share for children, accepts the present forced share for the spouse, adopts a form of restraint based on need for parents, and adopts devices to protect the beneficiaries from disinheritance by inter vivos disposition.

Why do I emphasize the forced share approach, rather than the flexible restraint based on need, proposed by others? To begin with, I do not believe that need should necessarily be the exclusive criterion for the determination of the claims of spouse or children. I believe that consanguinity may be justification in and of itself for claim to some portion of the property of the decedent. I would not attempt to offer a reasoned justification for this position, since it involves considerations which I do not believe have their roots in reason. I believe, however, that it is a view widely held, albeit inadequately articulated.

¹⁸⁸Two other considerations, although beyond the scope of this discussion, are appropriate for legislative analysis in connection with a rethinking of the elective share statute. First, should the legislature deal with underprotection of spouses of an intestate decedent? If provisions defining an augmented elective estate are applicable only when the spouse elects to take a share against the decedent's will, then the decedent might easily avoid augmentation of his estate for elective share purposes by dying intestate after having depleted his net estate by inter vivos dispositions. Second, should children and parents be potential recipients of protection provisions? At present, children receive limited protection against disinheritance in Indiana. Children who are under 18 years of age at the time of the decedent's death are entitled to share the \$8,500 survivor's allowance if there is no surviving spouse. IND. CODE § 29-1-4-1 (Supp. 1978). Children born or adopted after the decedent made his will and not provided for in the will may receive their intestate share of the decedent's estate, "unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to the spouse who survives him." *Id.* § 29-1-3-8(a) (1976). See also *id.* § 29-1-3-8(b) regarding children believed to be dead. Parents are not protected from disinheritance. Several proposals for reform of protective provisions include protection against disinheritance for the children and sometimes the parents of the decedent. See, e.g., W. MACDONALD, *supra* note 42, at 299-327 (children under 18 at the time of decedent's death and children 18 or over but who are physically or mentally incapable of maintaining themselves may petition for maintenance under the proposed maintenance statute); Cahn, *supra* note 171 (proposes a compulsory share of the decedent's estate for dependent widow or children based on need); Haskell, *supra* note 167 (proposes a variable forced share for children and a share based on need for parents).

matter because no third parties are involved. The likelihood that overprotection will occur diminishes as the definition of property for which the spouse must account becomes more inclusive.

Defining the estate to prevent underprotection is more difficult as a policy matter because third-party donees will be involved. The legislature must determine to what extent it is willing to force *inter vivos* donees to contribute to the spouse's elective share.¹⁸⁹ The Uniform Probate Code's augmented estate provision is the most effective in preventing underprotection, because it specifically delineates the types of transfers subject to the spouse's elective claim and also includes all varieties of transfers that might be used to defeat a spouse's claim. Specificity is important if certainty and predictability for transferors and transferees are to be achieved.¹⁹⁰ Yet, if the statutory definition is specific but not as inclusive as the Uniform Probate Code provisions, underprotection may occur. Once there is a loophole, transferors desiring to exclude their surviving spouses may make use of it.

One thing is clear, especially after *Leazenby*: The legislature must act if anything is to be done to prevent overprotection and underprotection of surviving spouses in Indiana. The *Leazenby* court should not be criticized for refusing to assume the responsibility for counteracting underprotection. The responsibility for counteracting both underprotection and overprotection is that of the legislature.

¹⁸⁹It must be remembered that whenever third party transferees are to be called upon to contribute to the spouse's elective share, sales to bona fide purchasers and tracing problems may diminish the protection afforded.

¹⁹⁰Schemes under which the spouse's protection depends upon such things as the transferor's fraudulent intent or the unreasonableness of the transfer are inadequate because they are too vague and uncertain.