BEAL v. BEAL

Supreme Court of Oregon.
282 Or. 115, 577 P.2d 507 (1978).

HOWELL, J. This is an appeal from a decree fixing the interests of the plaintiff, Raymond Beal, and the defendant, Barbara Beal, in a residence in Portland. The trial court found that the parties each owned an undivided one-half interest in the property. The plaintiff appeals.

As the Beals were not husband and wife at any time relevant to this suit, this is the first time this court has been asked to decide the principles to be applied in determining the property rights of the parties in property accumulated while they were living together unmarried.[1]

The parties were divorced in March, 1972. They entered into a land sale contract in April, 1972, to purchase the subject property for $22,500. The contract listed both parties' names as husband and wife. Raymond paid $500 of the $2,000 down payment and Barbara paid the balance of $1,500. The contract required monthly payments of $213.42, which included principal, interest and taxes. Barbara paid the first monthly payment, and Raymond has made all subsequent payments.

After the purchase, the parties lived together in the house. Raymond worked steadily and Barbara was almost constantly employed. They had a joint savings account but maintained separate checking accounts. The parties added shades, storm windows and carpeting, and remodeled the kitchen. Barbara paid some of the costs, and some were paid from the joint savings account. Barbara's income was used for family expenses.

After living together for two years, Barbara moved out and Raymond remained, and he has made all monthly payments on the house.

Historically, courts have been reluctant to grant relief of any kind to a party who was involved in what was termed a "meretricious" relationship. Courts took the position that the parties had entered into a relationship outside the bounds of law, and the courts would not allow themselves to be used to solve the property disputes evolving from that relationship. Generally, the parties were left as they were when they came to court, with ownership resting in whoever happened to have title or possession at the time. The rationale was predicated on public policy or even an invocation of the clean hands doctrine. . . . [p*525]

While a majority of people still follow the marriage practice, many couples, both young and old, are living together without the benefit of a civil marriage.[2] These situations create inheritance problems, questions concerning the relationship between parent and child and, as in the instant case, difficulty in dividing property when the relationship terminates. The problem with the previous judicial approach is well stated by the specially concurring opinion in West v. Knowles, 50 Wash. 2d 311, 311 P.2d 689 (1957): . . .

> "The unannounced but inherent rule is simply that the party who has title, or in some instances who is in possession, will enjoy the rights of ownership of the property concerned. The rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called

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[1] In *Latham and Latham*, 274 Or. 421, 547 P.2d 144 (1976), we held that an express agreement between two unmarried parties to share equally in real and personal property accumulated during the period they were living together as husband and wife was not void as against public policy.

[2] We are compelled to recognize the fact that the number of parties participating in such relationships has increased greatly. It is reported that the number of cohabiting couples increased 700 percent from 1960 to 1970. It is not confined to young couples; many of the elderly are using this form of relationship for economic reasons, including the fact that both may receive social security payments. [Citation omitted.]

meretricious relationship. So, although the courts proclaim that they will have nothing to do with such matters, the proclamation in itself establishes, as to the parties involved, an effective and binding rule of law which tends to operate purely by accident or perhaps by reason of the cunning, anticipatory designs of just one of the parties." *West v. Knowles*, *supra* 50 Wash. 2d at 315–16.

After departing from the position that the courts will not participate in making a division of property acquired during a meretricious relationship, the courts and the legal scholars have adopted or suggested various theories to provide relief.

One approach taken by the Washington Supreme Court in *In re Estate of Thornton*, 81 Wash. 2d 72, 499 P.2d 864 (1972), was to hold that where a man and woman had lived together in a close familial type relationship, their joint operations of a ranch created an implied partnership agreement. Another approach has been to use either a resulting trust, *see, e.g.*, *Sugg v. Morris*, 392 P.2d 313 (Alaska 1964); *Keene v. Keene*, 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962), or a constructive trust, *see, e.g.*, Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 Will. L.J. 453, 472 (1976); Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, Vol. X Fam. L.Q. 101 at 125 (1976), to adjust the rights of the parties.

The authors of *Domestic Partnership*, in 12 Will. L.J. 453, suggest that courts recognize the unique nature of property settlements between unmarried cohabitants and announce a separate set of equitable rules to deal with those problems. They go on to articulate a theory of domestic partnership based largely on principles of equity, which they believe will fairly settle this type of property dispute. Bruch, in *Property Rights of De Facto Spouses*, suggests that the intent of the parties ought to be the guideline for the court in such cases, to the extent that intent is discernible; to the extent it is not, courts should do equity.[3]

Also, the regular rules of cotenancy provide an alternative approach. . . . [p*526]

Using the rules of cotenancy, when the conveyance is taken in both names the parties would be presumed to share equally, or to share based upon the amount contributed, if the contributions were traceable. [Citations omitted.] Such rules of cotenancy could also result in requiring a showing of who paid various items, such as taxes, mortgage payments or repairs. [Citations omitted.] The difficulty with the application of the rules of cotenancy is that their mechanical operation does not consider the nature of the relationship of the parties. While this may be appropriate for commercial investments, a mechanistic application of these rules will not often accurately reflect the expectations of the parties.

We believe a division of property accumulated during a period of cohabitation must be begun by inquiring into the intent of the parties, and if an intent can be found, it should control that property distribution. While this is obviously true when the parties have executed a written agreement, it is just as true if there is no written agreement. The difference is often only the sophistication of the parties. Thus, absent an express agreement, courts should closely examine the facts in evidence to determine what the parties implicitly agreed upon. [Citations omitted.]

More often than not, such an inquiry will produce convincing evidence of an intended division of property, but we recognize that occasionally the record will leave doubt as to the intent of the parties. In such cases, inferences can be drawn from factual settings in which the parties lived. Cohabitation itself can be relevant evidence of an agreement to share incomes during continued cohabitation. Additionally, joint acts of a financial nature can give rise to an inference that the

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[3] In *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 13[4] Cal. Rptr. 815 (1976), the California Supreme Court held that the parties may agree to pool their earnings and hold the property equally, separately, or in any manner they desire. . . .

parties intended to share equally. Such acts might include a joint checking account, a joint savings account, or joint purchases.

Here, the record supports the position that the parties intended to pool their resources for their common benefit during the time they lived together. This conclusion is supported by the defendant's testimony that she contributed her entire income to maintenance of the household. Further, she testified that she gave money on one occasion to the plaintiff to make the house payment. Neither party made any effort to keep separate accounts or to total their respective contributions for reimbursement purposes, and, although they had separate checking accounts, they had a joint savings account. Finally, the living arrangement itself is evidence that the parties intended to share their resources. Since the parties intended to pool their funds for payment of their obligations, they should be considered equal cotenants, except that Barbara is entitled to an offset of $500, representing the amount she paid over and above one-half of the down payment.

In summary, we hold that courts, when dealing with the property disputes of a man and a woman who have been living together in a nonmarital domestic relationship, should distribute the property based upon the express or implied intent of those parties.

In the instant case, the trial court found that both parties should have an undivided interest in the property. We believe that the parties should stand on an equal basis during the time they were living together, except that fairness dictates that Barbara should receive credit for the $500 additional she paid on the down payment.

However, a different situation exists after Barbara moved out of the residence in June, 1974. Raymond has continued to live in the house and has paid $7,469.70 in house payments from then until the time of trial, and he is continuing to make those payments. Since June, 1974, the parties [p*527] have lived apart, maintained independent households, and have not contributed to each other's maintenance.

Since the parties have not lived together since June, 1974, their property rights after that date should be determined by the regular rules of cotenancy. As such, Barbara is obligated to reimburse plaintiff for 50 percent of the house payments made by him after June, 1974. [Citations omitted.]

The question of whether the defendant is entitled to recover the reasonable rental value is also raised. Normally, cotenants cannot charge one another for occupancy of the property in which they are part owners. This rule is subject to an exception when one cotenant's use of the property in fact excludes the other cotenant's use and enjoyment of it. [Citations omitted.] Here, . . . the relationship of the parties was such that it apparently would have been impractical for the defendant to occupy the premises while the plaintiff was living there, and thus she is entitled to one-half of the fair rental value from June 1, 1974. Because the trial court made no findings on the issue of rental value and because no evidence was introduced on that point, we must remand the suit to the trial court.

Affirmed as modified, and remanded.

LINDE, J., concurring in part and dissenting in part.

It should be understood how little is presented in this appeal and how much is not before us. The case does not involve a legal title to the real property but only the determination of the parties' shares in the equity. It does not involve the obligations of each of these parties to continue payments under the purchase contract or other possible rights of third parties. The value of the equity itself is unknown. The questions how it might be divided, whether one party should buy out the interest of the other and if so, at what price, or any other claim for relief were not presented by the pleadings and the trial court declined to anticipate them. On this appeal, we have a 10–page brief by plaintiff, no response by defendant, and no oral argument. The broader issues

were not addressed by the parties or by the trial court and have not had the benefit of briefing and argument even as applied to the present facts, let alone the range of highly diverse situations in which they might arise. Under the circumstances this case cannot be a reliable guide to such other situations.

What the court holds is that the relative rights of the parties in their common interest in this property depends on their intent and that this intent is to be determined from any written instrument or such other evidence of an express or implied agreement as may be available. In this case, both a written instrument and other evidence is available. The parties chose to describe their interest in the purchase contract itself as being that of "husband and wife." Also, plaintiff himself alleged in his complaint that the parties held themselves out to be husband and wife and bought the house as such, though they were divorced. One could hardly ask for stronger evidence of an intent, as between these parties, to acquire this home upon the assumptions and expectations as to their relative rights that apply to a husband and wife, and plaintiff is in no position to complain if the division of their interest upon a separation also takes into account factors similar to those that would be applied between spouses rather than between arm's-length investors in real property.

It is important, however, that this result follows from the well-documented *agreement* of the parties to treat their purchase as one by "husband and wife," rather than as one implied by law from the circumstances of [p*528] cohabitation. The evidence fixes this particular intention of these parties with respect to this property, but there is no reason to believe that the same principles of giving effect to the mutual intention and expectations of the parties would not apply equally between parties who were acquiring and sharing household property without cohabiting sexually or for that matter without living together at all. The court implies as much in recognizing that mechanical application of the rules of cotenancy along purely financial lines may fit commercial investments but often will not reflect accurately the shared expectations of parties in other relationships, and that cohabitation can be one item of evidence (though by itself perhaps too inexplicit) of those shared expectations. Similarly, the titles of articles cited in the opinion refer alternatively to "de facto spouses" and to "domestic partnerships," and the court does not purport to distinguish these. Really the only relevance that the nature of the parties' nonmarital cohabitation has to this decision is the preliminary question of the "nonjusticiability" of disputes in a "meretricious relationship," which we dispose of in the opening pages of the opinion. If it were otherwise and the case involved some special rule for property rights in "nonmarital cohabitation," this decision would come close to backing the state into a version of "commonlaw marriage" that has in the past and should in the future be left to legislation. . . .

Notes and Questions

1. At common law marital property could only exist between people who were married. Indeed in some periods the common law required a higher degree of solemnity for a marriage if the widow was to be entitled to dower than the canon law required for a valid marriage for other purposes. See 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 425 (2d ed. reissue 1968). An illicit sexual relationship did not, however, incapacitate the participants from dealing with each other and to have those dealings, to some extent, legally enforced, as our example of Sir Roger Notsoquick's devise to his mistress shows, *supra*, p. S168. Until quite recently American courts tended to approach the problem in the following ways: (1) Non-marital sexual relationships did not give rise to spousal rights (dower, curtesy, elective or intestate share, Social Security, workmen's compensation, etc.), exceptions being made in a few jurisdictions for "common law" marriages (basically a form of marriage by prescription; see Justice Linde's concurring opinion in the principal case) and/or "putative spouses" (a spouse who in good faith believed himself to be married but was not for some technical reason, frequently the invalidity of a prior divorce). Neither of these exceptions were available to couples of the same sex. (2) An express or implied-in-fact contract between unmarried participants in a sexual relationship was

illegal and unenforceable if all or part of the consideration for the contract was the participation in the relationship. (3) Conveyances from, to, and between unmarried participants in a sexual relationship were valid and enforced in the same manner and to the same extent that conveyances from, to, and between parties that did not have such a relationship. This meant that a jurisdiction which was willing to go behind the legal title and partition jointly held property on the basis of the consideration actually furnished might do so in the case of unmarried participants in a sexual relationship, at least so long as the consideration was not "illegal."

Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), cited in the principal case, cast some doubt on the first proposition and expressly refused to follow the second, except where the explicit consideration for the contract was the furnishing of meretricious sexual services. Since *Marvin* there [p*529] has been a flood of litigation on the topic with judicial reaction ranging from enthusiastic acceptance (*e.g.*, Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979) (woman abandoned by her paramour after long-term marriage-like relationship entitled to enforce oral contract for life-time support in turn for housekeeping and homemaking services)), to partial acceptance (*e.g.*, Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980), *noted in* 45 Albany L. Rev. 1226 (1981) (express contract is enforceable on *Marvin* principles but implied contract is not)), to outright rejection (*e.g.*, Hewitt v. Hewitt, 77 Ill. 2d 49, 31 Ill. Dec. 827, 394 N.E.2d 1204 (1979)) (equal division of couple's property after 15–year marriage-like relationship on basis of implied contract or constructive trust would violate state's policy in favor of legitimate marriage and against common law marriage)). In addition to the literature cited in the principal case, *see generally* M. GLENDON, THE TRANSFORMATION OF FAMILY LAW, ch. 6 (1989); Breech, *Cohabitation in Common Law Countries a Decade After Marvin: Settled In or Moving Ahead?*, 22 U.C. DAVIS L. REV. 717 (1989); Krause, *Legal Position: Unmarried Couples*, 34 AM. J. COMP. L. 533 (Supp. 1986); Hubbard & Larsen, *"Contract Cohabitation": A Jurisprudential Perspective on Common Law Judging*, 19 J. Family L. 655 (1981).

In the rush to take a position on *Marvin* some courts have forgotten the third proposition, that title determines ownership of assets between unmarried cohabitants subject to the usual rules about partition, constructive trusts and resulting trusts. Thus in *Hewitt* the court decided the case without reference to the fact that some of the property (perhaps a large portion of it; the case does not say) was held in the couple's joint names. Division of property held in joint names may be achieved on traditional equitable grounds whether the court accepts *Marvin*, as the court did in Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977) (jointly-held property of unmarried cohabitants divided on 50–50 basis despite the unequal financial contributions of the parties on the basis of the equity power of the partition court to assume a gift), or whether the court avoids taking a position on *Marvin*, as the courts did in Edwards v. Woods, 385 A.2d 780 (D.C. App. 1978), Grishman v. Grishman, 407 A.2d 9 (Me. 1979), and Brooks v. Kunz, 597 S.W.2d 183 (Mo. Ct. App. 1980). *Edwards* and *Grishman* employ resulting trust doctrine (between the parties to the transaction equity will assume that the title is in the person who paid the consideration, not in the person whose name is on the deed (*see* p. S245 *supra*)), and *Brooks* applies the Missouri doctrine that division of partition proceeds will be made on the basis of who furnishes the initial consideration. What is the relevance of *Marvin* to the principal case? How do the majority and the separate opinion differ on this question?

2. In *Jezo v. Jezo*, discussed *supra*, p. S286, the court said:

> The rule is, therefore, that the interests of joint tenants being equal during their lives, a presumption arises that upon dissolution of the joint tenancy during the lives of the cotenants, each is entitled to an equal share of the proceeds. This presumption is subject to rebuttal, however, and does not prevent proof from being introduced that the respective holdings and interests of the parties are unequal. The presumption may be rebutted by evidence showing the

> source of the actual cash outlay at the time of acquisition, the intent of the cotenant creating the joint tenancy to make a gift of the half interest to the other cotenant, unequal contribution by way of money or services, unequal expenditures in improving the property or freeing it from encumbrances and clouds, or other evidence raising inferences contrary to the idea of equal interest in the joint estate.

Jezo v. Jezo, 23 Wis. 2d 399, 406, 127 N.W.2d 246, 250 (1964). In grappling with the application of these principles within a marriage, the Wisconsin court held [p*530] that, except as dower or curtesy rights are involved, the parties should be treated the same as unmarried individuals—using the court's term "strangers."

Compare the results in *Giles*, *Beal* and *Jezo*. In none of the cases is each party going to get what the face of the deed says s/he ought to get; yet there are substantial differences in the principles that each court uses to divide the proceeds of the partition sale. What is the difference between the deed-share-plus-contribution approach of the *Giles* and *Beal* courts and the remake-the-fractions-on-the-basis-of-the-original-contribution approach of *Jezo*? Consider the effect of inflation. Today in Wisconsin Mrs. Jezo would not be able to rely on her inchoate dower. (Today in Wisconsin, too, Mr. Jezo probably would have gotten his divorce, and the property would have been subject to "equitable distribution." *See infra*, p. S313.) If we assume the same rules as the court applies in *Jezo* without the inchoate dower, who is going to get more, Mrs. Jezo or Ms. Beal? Who should get more?

In the principal case the deed was made out to the Beals as husband and wife. If they had been married this probably would have created a tenancy by the entirety. They were not married. What have they got? See *infra*.

Note on Tenancy by the Entirety and the Married Women's Property Acts

1. *Creation and Dissolution of the Tenancy by the Entirety*. Review the material on the entirety, *supra*, § 2F2. Recall that in addition to the unities required to create a joint tenancy, viz., interest, title, time and possession, the tenancy by the entirety requires the unity of marriage at the time of its creation. Therefore, an attempt to create a tenancy by the entirety between two unmarried persons is not effective, and even if the parties later intermarry, no tenancy by the entirety arises. 2 H. TIFFANY, REAL PROPERTY § 431 (3d ed. 1939). Some states hold that an attempt to create an entirety between two unmarried persons will create a joint tenancy, deeming survivorship to be the chief purpose of the attempt. *See* Maxwell v. Saylor, 359 Pa. 94, 58 A.2d 355 (1948), noted in 97 U. PA. L. REV. 132 (1948). Probably more states today hold that a tenancy in common is created. *See Beal v. Beal*, *supra*, p. S290; Kepner, *The Effect of an Attempted Creation of an Estate by the Entirety in Unmarried Grantees*, 6 RUTGERS L. REV. 550 (1952).

The normal method of creating an entirety is by language such as "to *A* and *B*, husband and wife, as tenants by the entirety." But it has been held that neither the phrase "husband and wife" nor "as tenants by the entirety" is necessary. If the grant is "to *A* and *B*" and *A* and *B* were in fact husband and wife, an entirety will arise. *See* Curtis v. Patrick, 237 Ark. 124, 371 S.W.2d 622 (1963); *cf*. Dowling v. Salliotte, 83 Mich. 131, 47 N.W. 225 (1890).

Starting from a law which was less hostile to the creation of tenancies by the entirety than it was to the creation of other forms of concurrent ownership one state has been able to use the entireties concept to create something like community property in household furnishings. In DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174 (1975), the court held that household furnishings are presumptively entireties property. In so holding the court rejected what it called the common-law presumption that household furnishings belong to the husband or the more modern presumption that things belong to the person who pays for them. The rejection of the modern presumption is necessary, the court said, because it unduly favors wage-earning husbands

at the expense of wives who make important non-monetary contributions to the family unit. [p*531]

A final divorce decree terminates the tenancy by the entirety; thereafter the parties hold as tenants in common, normally with each spouse receiving one-half. Bernatavicius v. Bernatavicius, 259 Mass. 486, 156 N.E. 685 (1927). *Contra* Shepherd v. Shepherd, 336 So. 2d 497 (Miss. 1976) (holding joint tenancy created). Many courts today would hold that the entirety is subject to "equitable distribution" by the court in a divorce or separation proceeding. *See* McLaughlin, *Divorce and the Tenancy by the Entirety*, 50 MASS. L.Q. 45 (1965); Note on Equitable Distribution, *infra*, p. S313.

Unlike a joint tenancy a tenancy by the entirety cannot be severed so as partially to defeat the survivorship interest of the other spouse. In order fully to convey entirety property, both spouses must join. *Cf.* Wienke v. Lynch, 407 N.E.2d 280 (Ind. App. 1980) (holding husband barred by laches from asserting interest in entirety property five years after his wife conveyed it with his knowledge). Courts have held as a common-law matter that one spouse's murder of the other severs the tenancy. Preston v. Chabot, 138 Vt. 170, 412 A.2d 930 (1980); Sundin v. Klein, 221 Va. 232, 269 S.E.2d 787 (1980).

Unlike tenancies in common and joint tenancies, tenancies by the entirety normally cannot be partitioned unless both spouses consent. The difficult issues of dividing the proceeds of a partition sale, *supra*, pp. S286–289, do not normally arise in the case of a tenancy by the entirety, at least a tenancy which lasts until the death of one of the spouses. Nonetheless, some of the equitable doctrines and presumptions which we saw above are sometimes applied to tenancies by the entirety when one of the spouses dies, and, in some jurisdictions, on divorce. Principal among these doctrines used to be a gender-based rule that if a husband acquired property with his separate property and put it into a tenancy by the entirety he would be presumed to have made a gift to his wife. If, on the other hand a wife acquired property with her funds and put it into a tenancy by the entireties with her husband, the husband would be presumed to hold title for his wife under the doctrine of resulting trust. Thus, if she predeceased him, her heirs could recover the property. The application of resulting trust doctrine was justified either on the ground that most wives intended simply to have their husbands manage their property, or on the ground that the doctrine was necessary to prevent the wife from being defrauded by her husband. The Pennsylvania Supreme Court held that this gender-based rule violated its state equal rights amendment. Henceforth in Pennsylvania both spouses will be presumed to be making gifts. Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975); *see generally* Note, *Resulting Trusts in Entireties Property When Wife Furnishes Purchase Money*, 17 WAKE FOREST L. REV. 415 (1981).

2. *The Effect of the Married Women's Property Acts*. At common law the tenancy by the entirety was subject to the great power which the husband had over the family's property during coverture. He had the right to possession and to the rents and profits of the entirety property during coverture. If he survived his wife he was entitled to all the entirety property in fee. He could not, however, convey an absolute fee in the property during coverture without his wife's consent, nor could he, because of the fictional unity of husband and wife, sever the tenancy. By the nineteenth century some states were prepared to hold that the husband's sole creditors could execute against entirety property just as they could execute against his estate jure uxoris in his wife's sole property. Some were prepared to go even further and allow the husband's sole creditors to execute against his right of survivorship in the entirety, so that they took the whole estate, subject, however, to losing it if the wife survived the husband. *See* King v. Greene, 30 N.J. 395, 153 A.2d 49 (1959), *noted in* 73 HARV. L. REV. 792; 58 [p*532] MICH. L. REV. 601 (1960); Phipps, *Tenancy by Entireties*, 25 TEMPLE L.Q. 24, 25–6 (1951).

In this state of affairs, the American states began to pass the married women's property acts.

(One of the first to do so seems to have been Mississippi in 1839. See Brown, *Husband and Wife: Memorandum on the Mississippi Woman's Law of 1839*, 42 MICH. L. REV. 1110 (1944).) New Jersey's statute is typical:

> The real and personal property of a woman which she owns at the time of her marriage, and the real and personal property, and the rents, issues and profits thereof, of a married woman, which she receives or obtains in any manner whatever after her marriage, shall be her separate property as if she were a feme sole.

Married Women's Act, 1852 N.J. Laws 407, *as amended*, N.J. STAT. ANN. 37:2–12 (West 1968). It was clear that such statutes were intended to abolish the estate *iure uxoris*, and the courts quickly reached the conclusion that they did. But what of the tenancy by the entirety? Some states held that this too was abolished by the act, since the estate was dependent on the fictional unity of husband and wife which the act had abolished. Other states abolished the tenancy as part of a general legislative reform of the law of concurrent interests or held that the tenancy had not been "received" by the state. At the time Phipps conducted his survey he was able to conclude that 29 out of the then-48 states and D.C. did not have the tenancy. Phipps, *supra*, at 32–3. (Both Alaska and Hawaii recognize the tenancy by the entirety. PAGE ON WILLS §§ 65.4, 65.14 (W. Bowe & D. Parker rev. 1969 & Supp. 1987).) Some of these interpretations are far from certain, however, and recent interest in marital property could lead to the revival of the tenancy in some of these jurisdictions. *See* Comment, *Tenancy by the Entirety in Illinois: A Reexamination*, 1980 SO. ILL. U. L.J. 83. (Illinois revived the tenancy by entirety by statute in 1990. ILL. COMP. STAT. ch. 765, §1005/1c (2012).)

In the 21 jurisdictions in which the tenancy definitely exists (which includes some of the most populous: New York, New Jersey, Pennsylvania, Florida, Massachusetts, Michigan, and, now, Illinois), the problem is to determine the characteristics of the tenancy in the light of the married women's property acts.

Four jurisdictions, Massachusetts, Michigan, Tennessee and North Carolina took the position that the act had changed nothing. Management and control of entireties rested with the husband as at common law. In 1974 the IRS ruled that in these states a gift by a husband to a wife in the form of a tenancy by the entirety in something which he had bought with his money was a gift of a future interest and hence not subject to what was then a $3000 per annum gift tax exclusion of I.R.C. § 2503(b) (1976). Rev. Rul. 74–345, 1974–2 C.B. 323. At this point the "common-law" states (with the apparent exception of North Carolina) fell into line and held that the right to the rents and profits of entirety property belonged to the spouses jointly. *See* Robinson v. Trousdale County, 516 S.W.2d 626 (Tenn. 1974), *noted in* 42 Tenn. L. Rev. 815 (1975) (holding that the line of cases giving "common law" power to the husband was aberrant), MICH. COMP. LAWS ANN. § 557.71 (West 1988); MASS. ANN. LAWS c. 209, § 1 (Michie/Law.Coop. 1986 & Supp. 1991). In addition to tax considerations, the movement for the equal rights amendment probably played some role in these changes. A concurring judge in Robinson was prepared to hold that the "common-law" line of cases was unconstitutional as a denial of due process and equal protection to married women. 516 S.W.2d at 634. The Massachusetts scheme had been challenged as unconstitutional, although the case was dismissed on ripeness grounds. Klein v. Mayo, 367 F. Supp. 583 (D. Mass. 1973) (3–judge). In the interval Massachusetts passed a state equal rights amendment. MASS. CONST. pt. 1, Art. 1, § 2.

3. *Entireties and Creditors*. A basic principle of debtor-creditor law is that a creditor may levy execution on any asset which the debtor could himself [p*533] convey. *See* Note on Family Property and Creditors, *infra*, p. S298. Thus, the initial reaction to the problem of creditors' rights in entireties after the passage of the married women's property acts was to ask what could the husband (or wife) alone have conveyed before the passage of the act. There was no easy answer to that question. Some jurisdictions (including Michigan and North Carolina which gave the

husband "common-law" rights to the possession, rents and profits) held that without his wife's consent the husband at common law could convey no interest in the property; hence his creditors could attach no interest. Others held that at common law the husband could convey the possession but not his right of survivorship; others that he could convey both.

But what of the effect of the married women's property acts? Four states, Arkansas, New York, New Jersey, and Oregon, allow the sole creditors of either the husband or the wife to attach the debtor spouse's share of the tenancy, in essence, an undivided one-half interest in the property during the couple's joint lives plus a contingent remainder in the whole if the debtor spouse survives the non-debtor spouse. The reasoning is that since the purpose of the married women's property acts was to equalize the rights of husband and wife, the wife, to the extent possible, should be able to do everything that her husband could do at common law. Equality is best achieved by giving each spouse the right to convey (and hence to have his creditors levy on) his fractional share. *King v. Greene*, *supra*, p. S296. Can you see the practical difficulties that this position might lead to? *See* Newman v. Chase, 70 N.J. 254, 359 A.2d 474 (1976) (purchaser of bankrupt husband's interest in entirety in the family house not entitled to partitition but is entitled to receive half the rental value of the house from the wife). Can you think of any alternative holding which would also equalize the rights of the spouses?

The majority of the states seem to hold that an estate by the entirety is immune from the claims of the separate creditors of either cotenant. The reasoning of the majority view is that the effect of the married women's property acts is that neither party can transfer his interest in, or receive the income and profits of, the estate without the consent and participation of the other. Should the creditor of the individual spouse, the argument runs, be able to secure a result the tenants are powerless to bring about? Most states also deprive the creditor of the ability to attach the right of survivorship; therefore the debtor and his spouse can transfer jointly the tenancy to another free of the claim of the creditor. Six states, however, permit the right of survivorship to be attached. *See* Phipps, *supra*, at 46–57.

Should there be a limit to the amount of property which may be placed in this form of property-holding? Is the policy of providing a fund for support of the marriage, thus relieving the state of a potential burden, worth the potential disincentive to creditors inherent in this type of tenancy? For a discussion of the policy considerations, *see* Huber, *Creditor's Rights in Tenancies by the Entireties*, 1 B.C. IND. & COM. L. REV. 197, 205–07 (1960); Note on Family Property and Creditors, *infra* p. S298.

4. *Entireties and Planning*. Of late, the tenancy by the entirety has become a subject of increasing criticism by estate planners. The critics question whether the avoidance of probate and the ability to avoid certain types of creditors is not outweighed by several adverse aspects of the tenancy. First, as we shall see (Tax Note, *infra*, p. S300), there may be adverse tax consequences of holding substantial assets in either joint tenancy or tenancy by the entirety. Second, the survivorship feature of the tenancy deprives the original cotenant from exercising control over the management and disposition of the subject of the tenancy after his death. In fact, because a tenancy by the entirety cannot be dissolved by either of the tenants *ex parte*, the tenants are [p*534] deprived of a large measure of control over the subject of the tenancy during their joint lives. See Warner, *Tenancies by the Entirety—An Estate Planner's Dilemma or (A Study of Unintended Result)*, 23 ARK. L. REV. 44 (1969).

Note on Creditors, Family Property and Homestead

Despite the fact that the U.S. Constitution gives Congress the power "to establish . . . uniform laws on the subject of bankruptcies throughout the United States" (U.S. CONST. Art. I, § 8, cl. 4), Congress has traditionally left it to the states not only to provide for exemptions of particular classes of property from execution by judgment creditors but also for exemptions of property

from sale as part of a bankrupt's estate. Thus, in *Newman v. Chase*, *supra*, p. S298, although the trustee in bankruptcy was operating under the supervision of a federal court pursuant to a federal law, state law applied to determine whether Chase's interest in the tenancy by the entirety would be subject to sale for the benefit of his creditors and, if it was, to determine what kind of interest the purchaser would get. Left to their own devices the states have responded with an extraordinary array of exemption provisions. *See, e.g.*, MASS. ANN. LAWS ch. 235, § 34 (Michie/Law.Co-op. 1986); WIS. STAT. ANN. § 815.18 (West Supp. 1991).

Out of all this diversity a number of salient features of state exemption laws appear: (1) Historically, the states west of the Appalachians were "debtor states"; those east of the Appalachians were "creditor states." (2) Exemption legislation tends not to be updated. A state which began as a "debtor state" can become a "creditor state" if it does not update the specific types of exempt property or if it fails to update specific dollar limitations on the value of property which can be taken free of creditors. (3) The existence of a relationship between the favorability of the state's legal climate to creditors and the availability of credit has often been assumed but never seems to have been demonstrated empirically. (4) The most important devices for shielding assets from creditors are: (a) the tenancy by the entirety, (b) the spendthrift trust, and (c) homestead laws.

In the Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 29 Stat. 2549 (codified in 11 U.S.C. §§ 701–706 (1988)), Congress took a first tentative step toward nationalizing the exemption system. The Act applies only to bankruptcy and so does not affect creditor process short of bankruptcy. Section 522 of the Act does, however, establish an up-to-date scheme of exemption designed to preserve for the bankrupt enough property to make a fresh start and to keep out of the bankruptcy sale items which will not bring much money and the loss of which is likely to be painful to the bankrupt. Congress did not, however, complete the job. It allowed the bankrupt to choose between state and federal exemptions (unless the state passed legislation, as a majority now have, specifically requiring him to take the state exemptions). It also provided that property held in tenancy by the entirety and in spendthrift trusts could not be reached in the bankruptcy process if it could not be reached in a nonbankruptcy situation. *See* Vukowich, *Debtor's Exemption Rights Under the Bankruptcy Reform Act*, 58 N. Car. L. Rev. 769 (1980).

We are still a long way from a national system of exemptions: (1) In those jurisdictions which provide that the separate creditors of either spouse cannot reach entirety property and which allow entireties in personal property (about 15 states), a married couple can exempt virtually all of their property from creditor process. (2) The use of the spendthrift trust (*supra*, p. S232) can insure that most property acquired by gift or inheritance is exempt from creditor process. (3) The situation with the homestead laws is less favorable to the debtor. Most states limit the dollar value of homestead property which can be exempt from creditor [p*540] process. While some of these dollar values started out as reasonably generous, most have not been updated recently and are, as a consequence, dramatically low. Vukowich, *supra*, at 780 nn. 94–95. Some states have no dollar limitation but only an acreage limitation, *e.g.*, Florida, Kansas and Minnesota. *Id*. at 780 n. 95; C. BERGER, *supra*, at 284.

The original idea of the homestead exemption seems to have been, as the name implies, to protect the family home from sale for the benefit of creditors. Today, however, most homes are worth more than the dollar value of the exemption, so in most states the creditors will normally get an interest in the home and the debtor his exemption in cash from the proceeds of the partition sale which the creditors then institute. Some states limit the exemption to residences; others permit the debtor to claim the exemption in any kind of real property; a few allow it to be claimed in personal property. Some states require a filing of a declaration of homestead; some do not. *Ibid*.

The homestead concept has uses beyond the area of claims for exemption. We will see *infra*,

p. S305, that in many jurisdictions the homestead or the maximum value fixed by the homestead exemption laws is a preferred charge on the owner's probate estate, for the benefit of the surviving spouse and-or children, or the homestead itself may have to descend to the surviving spouse, either for life or in fee. *See* Haskins, *Homestead Rights of a Surviving Spouse*, 37 IOWA L. REV. 36, 37–38 (1951). Frequently special formalities are required for the conveyance of the homestead, the joinder of the spouse being the most common requirement.

Note on Tax Treatment of Concurrent Interests

Federal Income Tax. For federal income tax purposes, each taxpayer is taxed on the property interests which he owns. I.R.C. §§ 1, 61 (1988); Eisner v. Macomber, 252 U.S. 189 (1920). When two or more persons hold a concurrent interest in income producing property, the federal income tax law looks toward the state law to determine the taxable interest of each. According to B. BITTKER & L. STONE, FEDERAL INCOME, ESTATE AND GIFT TAXATION 419 (5th ed. 1980):

> In common law property states, if the husband makes an outright gift to his wife of property, such as securities or real estate, the income subsequently produced by the property is taxed to her. If he transfers the property into a joint tenancy or a tenancy in common with his wife, the income will be divided between them for tax purposes; and the same result will follow if the property is transferred into a tenancy by the entirety unless under local law the husband is entitled to all the income.

On the other hand, in states having community property arrangements relating to ownership of marital property half the marital income is automatically taxed to the wife and half to the husband, no matter which spouse earns the income.[1] *See, e.g.*, Poe v. Seaborn, 282 U.S. 101, 113 (1930): ". . . [U]nder the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife."

The Supreme Court's rulings concerning community property gave a marked tax advantage to residents of community property states. In the common law states where one spouse earned all or substantially all of the family's income, he was taxed on that income at the same progressive rates as an individual who was [p*541] not married. In the community property states, however, the income-earning spouse shared his income with the non-earning spouse, permitting them to enjoy lower rates on the upper portions of their income. As a result of this, Michigan, Nebraska, Oklahoma, Oregon, Pennsylvania and Hawaii adopted or attempted to adopt[2] the community property system and more were considering it, when Congress in 1948, for all practical purposes, eliminated the discrimination against common law states by permitting a married couple to file a joint return and treat the total marital income as if half had been earned by each spouse. See I.R.C. § 6013 (1988). (At this point all the new converts to the community property system repealed their statutes, leaving only a legacy of headaches for lawyers for many years to come.)

Today, so long as the couple files a joint return, the local law form of marital property is virtually irrelevant for income tax purposes. But if the couple elects to file separate returns, local law will determine the ownership interest of each spouse and consequently tax liability.

[Note: As of this writing (8/29/2012), the Federal Estate Tax does not apply to decededents whose estates (assuming that they have not made major lifetime gifts) are less that $5.12 million. That number is scheduled to return to $1 million on 1 January 2013, unless Congress does something about it.]

Federal Estate Tax. Estate tax liability for an ownership interest in a tenancy in common is

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[1] See p. 442 *supra*, and pp. 557–64 *infra*, for discussions of community property.

[2] Pennsylvania's statute was declared unconstitutional. Willcox v. Penn Mutual Life Ins. Co., 357 Pa. 581, 55 A.2d 521 (1947).

governed by section 2033 of the Internal Revenue Code, which provides:

> The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

In other words, if a tenant in common has two cotenants, each owning one-third of the tenancy, at his death each tenant has one-third of the value of the tenancy included in his taxable estate.

Tenancies by the entirety and joint tenancies are treated alike for estate tax purposes. In United States v. Jacobs, 306 U.S. 363 (1939), the Supreme Court rejected the argument that the severability of a joint tenancy requires treatment similar to a tenancy in common and decided that the survivorship feature of a joint tenancy requires treatment similar to that accorded tenancies by the entirety. Section 2040 governs:

> The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited . . . in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth . . . .

Under this provision the total value of the property is included in the estate of the decedent unless he can show that part or all of the property or funds which make up the tenancy came from someone else. That proportion of the value of the property at the taxpayer's death which is equal to the percent of the original consideration provided by another party may be excluded from the decedent's taxable estate, unless the entire tenancy was created by will or gift from a third party not a tenant, in which case each party to the tenancy is deemed to own an equal interest in the property.

Exempt from this treatment are interests in a tenancy by the entireties or in a joint tenancy so long as the decedent and his spouse were the only joint tenants. In such cases only one-half of the total value is included in estate of the first-dying spouse. I.R.C. § 2040(b) (1988). This provision, coupled with the [p*542] "unified credit," which currently (2012) exempts estates of less than $5,120,000 from estate taxation, and the unlimited marital deduction, whereby no property passing to a spouse by *inter vivos* gift or at death is subject to taxation, means that the tax disadvantage that existed under the former law for most married couples holding property concurrently is largely eliminated. Because this large exemption is scheduled to return to $1,000,000 on 1 January 2012, married couples whose joint estates exceed $1,000,000 and persons who are not married to each other and who are contemplating entering into some form of concurrent interest, still need to engage in careful tax planning.

Federal Gift Tax. Subject to an exclusion of $13,000 per calendar year (I.R.C. § 2503(b) (1988)),[3] and a marital deduction equal to the value of most gifts to spouses (I.R.C. § 2523 (1988)), the creation of a joint tenancy or a tenancy in common is subject to gift tax if one or more of the tenants pays less than his proportional share of the consideration. In the case of joint bank accounts (and U.S. savings bonds), a taxable gift does not occur until the donee tenant actually withdraws the funds from the account. Treas. Reg. § 25.2511–1(h)(4) (1958). The Code generally allows a credit for gift taxes paid if the property ends up in the taxable estate of a decedent donor. I.R.C. § 2012 (1988). Taxable gifts are subject to the unified credit, so that since 1987 tax has had to be paid only by those taxpayers whose lifetime taxable gifts and taxable estate combined exceed the exemption amount. The provisions concerning those who entered into

[3] This amount is indexed for inflation. The current exemption is $13,000.

some form of concurrent ownership prior to 1977 are complicated and will cause headaches for years to come.

C. FAMILY PROPERTY BY OPERATION OF LAW

UNIFORM PROBATE CODE

Revised Article II

Secs 2–102 to 2–103, 2–105, 2–201 to 2–202, 2–204, 2–206, 2–401 to 2–404 (1990).

INTESTATE SUCCESSION

GENERAL COMMENT[1]

Part 1 of Article II contains the basic pattern of intestate succession historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner. The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personalty, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want. . . . [p*543]

Section 2–102. Share of the Spouse.

The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Section 2–103. Share of Heirs Other Than Surviving Spouse.

Any part of the intestate estate not passing to the decedent's surviving spouse under Section 2–102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

(1) to the decedent's descendants by representation;

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[1] [This comment is from the original Article II. Comments on the 1990 revision are quoted in the notes following. Ed.]

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;

(4) if there is no surviving descendant, parent or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

. . .

Section 2–105. No Taker.

If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

. . .

Section 2–112. Dower and Curtesy Abolished.

[The estates of dower and curtesy are abolished.] [p*544]

ELECTIVE SHARE OF SURVIVING SPOUSE

GENERAL COMMENT

The sections of this Part describe a system for common law states designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a "fair share" of the decedent's estate. . . .

Almost every feature of the system described herein is or may be controversial. Some have questioned the need for any legislation checking the power of married persons to transfer their property as they please. See Plager, "The Spouse's Nonbarrable Share: A Solution in Search of a Problem", 33 Chi. L. Rev. 681 (1966). Still, virtually all common law states impose some restriction on the power of a spouse to disinherit the other. In some, the ancient concept of dower continues to prevent free transfer of land by a married person. In most states, including many which have abolished dower, a spouse's protection is found in statutes which give a surviving spouse the power to take a share of the decedent's probate estate upon election rejecting the provisions of the decedent's will. These statutes expand the spouse's protection to all real and personal assets owned by the decedent at death, but usually take no account of various will substitutes which permit an owner to transfer ownership at his death without use of a will. Judicial doctrines identifying certain transfers to be "illusory" or to be in "fraud" of the spouse's share have been evolved in some jurisdictions to offset the problems caused by will substitutes, and in New York and Pennsylvania, statutes have extended the elective share of a surviving spouse to certain non-testamentary transfers.[2] . . .

Section 2–201. Elective Share.

(a) The surviving spouse of a decedent who dies domiciled in this State has a right of election . . . to take an elective-share equal to the value of the elective-share percentages of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

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[2] [Like the prior comments, these are from the original version of the Uniform Probate Code. Ed.]

[The schedule builds in one year increments from less than one year ("supplemental amount only") and 1 year but less than 2 ("3% of the augmented estate") through 10 years but less than 11 ("30% of the augmented estate") to 15 years and more for which the share is ("50% of the augmented estate"). The "supplemental amount" is a minimum share provided in 2–201(b) for spouses with limited separate assets. Set off against it are nonprobate death transfers such as life insurance.]

Section 2–202. Augmented Estate.

. . .

(b) The augmented estate consists of the sum of:

(1) the value of the decedent's probate estate, reduced by funeral and administrative expenses, homestead allowance, family allowances and exemptions, and enforceable claims;

(2) the value of the decedent's reclaimable estate. The decedent's reclaimable estate is composed of all property . . . of the following types: [p*545]

(i) property to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent's surviving spouse, was subject to the presently exercisable general power of appointment held by the decedent . . .;

(ii) property, to the extent of the decedent's unilaterally severable interest therein, held by the decedent and any other person, except the decedent's surviving spouse, with right of survivorship . . .;

(iii) proceeds of insurance, including accidental death benefits, on the life of the decedent payable to any person other than the decedent's surviving spouse, if the decedent owned the insurance policy, had the power to change the beneficiary of the insurance policy, or the insurance policy was subject to a presently exercisable general power of appointment held by the decedent . . .;

(iv) property transferred by the decedent to any person other than a bona fide purchaser at any time during the decedent's marriage to the surviving spouse, to or for the benefit of any person, other than the decedent's surviving spouse, if the transfer is of any of the following types:

(A) any transfer to the extent that the decedent retained . . . the possession or enjoyment of, or right to income from, the property;

(B) any transfer to the extent that . . . the income or principal was subject to a power, exercisable by the decedent . . . for the benefit of the decedent or the decedent's estate;

(C) any transfer of property, to the extent of the decedent's contribution to it, as a percentage of the whole, was made within two years before the decedent's death, by which the property is held . . . by the decedent and another, other than the decedent's surviving spouse, with right of survivorship; or

(D) any transfer made to a donee within two years before the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed $10,000.

(3) the value of property to which the surviving spouse succeeds by reason of the decedent's death, other than by homestead allowance, exempt property, family allowance, testate succession, or intestate succession, including the proceeds of insurance, including accidental death benefits, on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of the federal Social Security system; and

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

Section 2–204. Waiver of Right to Elect and of Other Rights.

(a) The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, [p*546] or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) he [or she] did not execute the waiver voluntarily; or

(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he [or she];

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other . . . .

Section 2–206. Effect of Election on Statutory Benefits.

If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

EXEMPT PROPERTY AND ALLOWANCES

Section 2–402. Homestead Allowance.

A decedent's surviving spouse is entitled to a homestead allowance of [$15,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [$15,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

Section 2–403. Exempt Property.

In addition to the homestead allowance, the decedent's surviving spouse is entitled from the estate to value, not exceeding $10,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value. If encumbered chattels are

selected and if the value in excess of security interests, plus that [p*547] of other exempt property, is less than $10,000, or if there is not $10,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $10,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share.

Section 2–404. Family Allowance.

(a) In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse and minor children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his [or her] guardian or other person having the child's care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance.

(b) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

Section 2–405. Source, Determination and Documentation.

(a) If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to homestead or exempt property. Subject to this restriction, the surviving spouse, guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or if there is no guardian of a minor child. . . .

Notes and Questions on Family Claims Against a Decedent's Estate

1. The Prefatory Note to the 1990 version of Article II explains the reasons for and nature of the revision in these terms:

> In the twenty or so years between the original promulgation of the Code and the 1990 revisions, several developments occurred that prompted the systematic round of review. Three themes were sounded: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission; (3) [p*548] the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages and in the acceptance of the partnership or marital-sharing theory of marriage.
>
> The 1990 revisions respond to these themes. The multiple-marriage society and the partnership-marital-sharing theory are reflected in the revised elective-share provisions of Part 2. . . . [T]he revised elective share grants the surviving spouse a right of election that

> implements the partnership-marital-sharing theory by adjusting the elective share to the length of the marriage.

8 U.L.A. 63 (Supp. 1991).

Can you identify the provisions that most clearly reflect the partnership-marital-sharing view of marriage?

Can you identify the provisions that respond to multiple marriages? What are the problems? *See* Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1990).

2. As of this writing (2012) the Uniform Probate Code (UPC) has been adopted by eighteen states, of which the most populous are Massachusetts, Michigan and Florida. *See* UNIFORM PROBATE CODE, References and Annotations (2012). A number of states have revised their probate codes along the lines suggested by the UPC without adopting the language or all of the provisions of the UPC; the current count appears to be 27, in addition to the 18 mentioned above. *See* Andersen, *Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599 (1985). On the other hand, states which have adopted the UPC have also felt free to make changes in it to preserve continuity with prior law or practice. As indicated above, the Code was revised substantially in 1990 and was revised again in 2010. Not all the adopting states have kept up with the revisions.

3. As we have seen, the common law states began in the nineteenth century to expand the right of the surviving spouse to share in the estate of the deceased spouse. Intestate share statutes were passed which allowed the surviving spouse to inherit from the deceased spouse in the event of the intestacy of the deceased spouse, and many states passed statutes which allowed the surviving widow (and sometimes the widower) to elect to take a share of the deceased spouse's estate in lieu of whatever the deceased spouse's will had provided. By and large, these statutes gave the surviving spouse rights in addition to the dower and curtesy which the common law had provided. While a number of states changed or abolished dower and curtesy over the course of the nineteenth and early twentieth centuries, a number did not, so that as late as 1977 the Committee on Administration and Distribution of Decedents' Estates of Real Property, Probate and Trust Law Section of the American Bar Association could report that "a surprising number" of jurisdictions still had some form of dower and curtesy. *Spouse's Elective Share*, 12 REAL PROP. PROB. & TRUST J. 323, 325 (1977).

Today few if any states have dower and or curtesy exactly as was at common law, but many states still have something which is denominated "dower." The differences between dower and curtesy have tended to fall before the movement for equality of rights for men and women. The "new dower" differs from common law dower or curtesy in one or more of the following characteristics:

(a) Common law dower may be expanded from a life estate to a fee estate. *E.g.*, VT. STAT. ANN., tit. 14, § 461 (1989).

(b) Common law dower may be expanded from one-third to one-half, at least in certain circumstances, such as when there are no surviving children. *E.g.*, [p*549] ARK. CODE ANN. § 28–11–307 (1987). Common law curtesy may be reduced from an interest in all the land to one in one-third or one-half. *E.g.*, MASS. ANN. LAWS ch. 189, § 1 (Michie/Law. Coop. 1981).

(c) The "new dower" may include personalty in the deceased spouse's estate as well as land. *E.g.*, ARK. CODE ANN. § 28–11–305 (1987).

(d) It may be part of the elective system, i.e., the deceased spouse may have to elect among dower, elective share of the estate and taking under the will *(e.g.*, MICH. COMP. LAWS ANN. §§ 700.281–282a (West Supp. 1991), or between dower and an intestate share, with the presence of a

will barring the dower option. *E.g.*, MASS. COMP. LAWS ANN. ch. 189, § 1; ch. 191, §§ 15, 17 (Michie/Law.Coop. 1981).

Obviously these new forms of dower can be far away from the common law institution. Where "dower" applies to both realty and personalty, applies only to assets in the probate estate, and gives an interest in fee which must be elected against the will, it is an elective share in all but name. What arguments can you think of for and against each of the variations listed above?

To get some sense for the kinds of title problems dower and some dower substitutes can cause, *see* Box v. Dudeck, 265 Ark. 165, 578 S.W.2d 567 (1979), *noted in* 3 U. ARK. LITTLE ROCK L.J. 495 (1980); Parrish v. Pancake, 158 W. Va. 842, 215 S.E.2d 659 (1975). In both cases the wife refused to sign the deed. Is the deed valid nonetheless (*Parrish*)? If the purchaser sues for specific performance, how much should be set aside for the inchoate dower interest (*Box*)?

4. In states which do not have dower in a form which applies to land which the deceased spouse conveyed *inter vivos* or where the couple's assets are largely or substantially in personal property, an elective share may not provide much protection for a surviving spouse if the deceased spouse depleted his estate by *inter vivos* conveyance. The "augmented estate" concept of the UPC quoted *supra* is one device designed to ensure that the surviving spouse will have a significant share of the assets of the deceased spouse. An older concept, still in use in some jurisdictions, is "fraud on the widow's share," by which the surviving widow can have a court set aside gratuitous conveyances which reduce the probate estate and hence the amount which the widow can elect against it. *See generally* W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960).

Modern estate planning tends to aggravate this problem because of its emphasis on having assets pass outside of the probate estate so as to avoid having them be "tied up in probate." One common device to achieve this result is the revocable trust whereby the settlor puts all or a substantial part of his assets in trust but retains a life interest in them, the power to remove them from the trust, and the power to change beneficiaries. The assets in the trust will be subject to federal estate tax upon his death, but they will pass automatically to the most recently designated beneficiaries without passing through probate. Most settlors of this type of revocable trust provide for their surviving spouses, but some do not, and many do not give their surviving spouses as much control over the assets in the trust as they would have had had they taken an elective share. The litigation concerning such trusts and similar devices has produced some remarkably divergent opinions. *See, e.g.*, Leazenby v. Clinton County Bank & Trust Co., 171 Ind. App. 243, 355 N.E.2d 861 (1976), *noted in* 11 Ind. L. Rev. 755 (1978) (husband cannot elect against wife's revocable *inter vivos* trust); Horn v. First Security Bank, 548 P.2d 1265 (Utah 1976) (same for wife; trust is not illusory, a fraud on marital rights or an invalid testamentary disposition); Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E.2d 465 (1973) (Totten trust (DKM3, p. 345) is a testamentary substitute which the widow may elect against): [p*550] Johnson v. La Grange State Bank, 73 Ill. 2d 342, 383 N.E.2d 185, 22 Ill. Dec. 709 (1978), *noted in* 1980 U. Ill. L.F. 277 (a revocable trust is not a testamentary substitute and may not be elected against); Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937) (leading case holding that a revocable trust is an illusory transfer).

Here is how the drafters of the 1969 UPC explain their statutory solution to the problem:

> The purpose of the concept of augmenting the probate estate in computing the elective share is twofold: (1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and (2) 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 either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and

other nonprobate arrangements. Thus essentially two separate groups of property are added to the net probate estate to arrive at the augmented net estate which is the basis for computing the . . . share of the surviving spouse. In the first category are transfers by the decedent during his lifetime which are essentially will substitutes, arrangements which give him continued benefits or controls over the property. However, only transfers during the marriage are included in this category. This makes it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by a later marriage. The limitation to transfers during marriage reflects some of the policy underlying community property. What kinds of transfers should be included here is a matter of reasonable difference of opinion. The finespun tests of the Federal Estate Tax Law might be utilized, of course. However, the objectives of a tax law are different from those involved here in the Probate Code, and the present section is therefore more limited. It is intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate.

In the second category of assets, property of the surviving spouse derived from the decedent and property derived from the decedent which the spouse has, in turn, given away in a transaction that is will-like in effect or purpose, the scope is much broader. Thus a person can during his lifetime make outright gifts to relatives and they are not included in this first category unless they are made within two years of death (the exception being designed to prevent a person from depleting his estate in contemplation of death). But the time when the surviving spouse derives her wealth from the decedent is immaterial; thus if a husband has purchased a home in the wife's name and made systematic gifts to the wife over many years, the home and accumulated wealth she owns at his death as a result of such gifts ought to, and under this section do, reduce her share of the augmented estate. Likewise, for policy reasons life insurance is not included in the first category of transfers to other persons, because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse; but life insurance proceeds payable to the surviving spouse are included in the second category, because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance. In this category no distinction is drawn as to whether the transfers are made before or after marriage.

Depending on the circumstances it is obvious that this section will operate in the long run to decrease substantially the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because [p*551] the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate arrangements by which wealth is today transferred. On the other hand the section should provide realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

The augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted. The proposed scheme should not complicate administration in well-planned or routine cases, however, because the spouse's rights are freely releasable . . . and because of the time limits [on exercise]. Some legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act provision reading:

> "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 the conveyor. The provisions of this

> subsection shall not apply to any contract of life insurance purchased by a decedent, whether payable in trust or otherwise."
>
> . . . Penn. Stats. Annot. title 20, § 301.11(a).
>
> The New York Estates, Powers and Trusts Law § 5–1.1(b) also may be suggested as a model. It treats as testamentary dispositions all gifts causa mortis, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by decedent over which he has a power to revoke or invade. The New York law also expressly excludes life insurance, pension plans, and United States savings bonds payable to a designated person. One of the drawbacks of the New York legislation is its complexity, much of which is attributable to the effort to prevent a spouse from taking an elective share when the deceased spouse has followed certain prescribed procedures. The scheme described by Sections 2–201 et seq. of this draft, like that of all states except New York, leaves the question of whether a spouse may or may not elect to be controlled by the economics of the situation, rather than by conditions on the statutory right. Further, the New York system gives the spouse election rights in spite of the possibility that the spouse has been well provided for by insurance or other gifts from the decedent.

The 1990 revision of the UPC elective share provisions added a third category of property to the augmented share discussed in these comments, assets of the surviving spouse that have not come from the decedent. At the same time it adjusted the spouse's elective share from the flat one-third provided for in the 1969 UPC to the sliding scale of § 2–201, *supra*. The drafters explained this combination of changes in terms of the partnership theory of marriage:

> The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. [p*552]

8 U.L.A. 78 (Supp. 1991). *See* Fisher & Curnette, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems*, 93 W. VA. L. REV. 61 (1990).

5. Obviously, change is in the wind. DKM3, pp. 566–67, discuss to what extent change in marital property is necessitated by either Federal or state constitutional provisions. But are there, as well, possible constitutional objections on taking or due process grounds to changing the marital property system? Few would argue that the legislature cannot change the marital property prospectively. Marital property rights for persons who marry after the effective date of the legislation and probably with regard to property acquired by already-married people after the effective date of the legislation can, within broad limits, be changed in any way the legislature chooses. Similarly, few would argue that it is constitutional for the legislature to change the marital property system with respect to the already-accrued possessory interests of one of the spouses. The question of the constitutionality of legislative change in the marital property system has arisen, however, in the context of rights which have in some sense accrued but have not yet become possessory, and, in particular, with regard to inchoate dower and curtesy initiate. By and large the courts have dismissed these constitutional challenges.

In Opinion of the Justices, 331 Mass. 786, 151 N.E.2d 475 (1958), the Massachusetts Supreme Judicial Court gave an advisory opinion to the Massachusetts legislature that it could, consistent with both the federal and Massachusetts constitutions retroactively abolish both inchoate dower and curtesy initiate. As for the federal constitution, the court noted that the U.S. Supreme Court had twice held that inchoate dower was subject to state regulation, once on the ground that it is a "mere expectancy" and not a property right. *See* Randall v. Kreiger, 90 U.S. (23 Wall.) 137, 148

(1874); *cf*. Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922). As for the Massachusetts constitution, the court had some difficulty with prior Massachusetts cases that held that inchoate dower was something more than an expectancy and that stated, at least by way of dictum, that it was not subject to legislative regulation. The court noted, however, that inchoate dower and curtesy initiate were contingent, not vested, and that they arose not by contract but by operation of law. Further, these rights had greatly diminished in value because the legislature had provided alternative rights for surviving spouses. Further still, dower and curtesy had been abolished or were of little practical importance in over half the states, and most courts had allowed the changes to be retroactive. These arguments coupled the legislature's findings that omission of one spouse to sign the deeds of the other and migratory divorce were causing problems with marketability of title seemed sufficient to warrant an opinion that the legislature could constitutionally determine that the benefits of retaining the interests were outweighed by the benefits which would accrue upon their abolition.

Silberman v. Jacobs, 259 Md. 1, 267 A.2d 209 (1970), a declaratory judgment action concerning the constitutionality of the provisions of MD. ANN. CODE art. 93, § 3–202 (1969), which abolished "estates of dower and curtesy" follows the general approach of the Massachusetts Court.

In Walker v. Bennett, 107 N.J. Eq. 151, 152 A. 9 (1930), on the other hand, the court held unconstitutional New Jersey's attempt to abolish what the court called an "inchoate right of curtesy":

> An inchoate right of dower is a valuable interest in land. *Wheeler v. Kirtland*, 27 *N.J. Eq*. 534. It is such a vested interest as cannot be impaired by legislative enactment. *In re Alexander*, 53 *N.J. Eq*. 96. An inchoate right [p*553] of curtesy is also a vested interest in land with practically the same incidental rights, and subject to like defeasance, as inchoate dower. The constitutional inhibition against arbitrary legislative enactment impairing the inchoate right of dower applies with equal force to inchoate rights of curtesy. [Citations omitted.]

Id. at 152, 152 A. at 10. Similar treatment was accorded to inchoate dower under the authority of Wheeler v. Kirtland, 27 N.J. Eq. 534 (Ct. Err. & App. 1875), in *In re* Alexander, 53 N.J. Eq. 96, 30 A. 817 (1894). (New Jersey's most recent attempt to abolish dower and curtesy is expressly made applicable only to property acquired after the effective date of the act. N.J. STAT. ANN. § 3A:35–5 (West Supp. 1980).)

Can *Walker* and *Opinion of the Justices* be reconciled? Consider the legislative findings in Massachusetts and their absence in New Jersey. Are the conclusory terms in which the courts state their reasons persuasive: "valuable," "vested subject to defeasance," "mere expectancy," "contingent not vested," arises "not by contract but by operation of law"? Which court is using these terms more accurately? Are these terms designed to resolve this type of question?

UNIFORM MARRIAGE AND DIVORCE ACT

§ 307 (1987).

Alternative A of § 307

§ 307. [Disposition of Property]

(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or [p*554] legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider the duration of the marriage, and

prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

(b) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

Alternative B of § 307

§ 307. [Disposition of Property]

In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors including:

(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(2) value of the property set apart to each spouse;

(3) duration of the marriage; and

(4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for a reasonable period to the spouse having custody of any children.

Amendments

1973 Amendment. Section 307 made into Alternative A and Alternative B. As originally promulgated, Section 307 read as follows:

§ 307. [Disposition of Property]

[(a)] In a proceeding for dissolution of the marriage, or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(1) contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(2) value of the property set apart to each spouse;

(3) duration of the marriage; and

(4) economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(b) For purposes of this Act, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(1) property acquired by gift, bequest, devise, or descent;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(3) property acquired by a spouse after a decree of legal separation;

(4) property excluded by valid agreement of the parties; and

(5) the increase in value of property acquired before the marriage.

(c) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is [p*555] overcome by a showing that the property was acquired by a method listed in subsection (b).

Commissioners' Comment (1973)

Alternative A, which is the alternative recommended generally for adoption, proceeds upon the principle that all the property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a). It will be noted that among these are health, vocational skills and employability of the respective spouses and these contributions to the acquisition of the assets, including allowance for the contribution thereto of the "homemaker's services to the family unit." This last is a new concept in Anglo-American law.

Subsection (b) affords a way to safeguard the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children.

Alternative B was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A, preferring to adhere to the distinction between community property and separate property, and providing for the distribution of that property alone, in accordance with an enumeration of principles, resemblant, so far as applicable, to those set forth in Alternative A.

Notes and Questions on Equitable Distribution

1. As of this writing the Uniform Marriage and Divorce Act (UMDA) has been adopted in eight states of which the most populous are Colorado and Illinois. The states which have adopted the Act have had a tendency to make changes in § 307, so that it is not really possible to discern a trend as between *Alternative A* and *Alternative B*. *See* UNIFORM MARRIAGE AND DIVORCE ACT, References and Annotations (2012). Be that as it may, the definite trend in recent years has been in the direction of authorizing the divorce court to make some form of "equitable distribution" of the spouses' property upon divorce or separation without regard to "fault" and in addition to the divorce court's traditional power to award maintenance (alimony) and-or child support in appropriate cases. Freed & Foster, *Divorce in the Fifty States. An Overview as of August 1, 1980*, 6 FAMILY L. REP. 4043, 4051 (1980), reports that 37 of the 42 "common law" (as opposed to community property) states authorize some form of equitable distribution. *See generally* J. GREGORY, THE LAW OF EQUITABLE DISTRIBUTION (1989); Annot., 41 A.L.R.4th 481 (1985).

2. A number of the equitable distribution statutes were challenged as an unconstitutional deprivation of property insofar as they applied to property acquired before the passage of the statute. All challenged on this ground have been sustained. The opinion of the Maine Supreme Judicial Court is typical:

> We agree that the right to own property is a constitutionally protected right. We further agree with appellant that a law would be unconstitutional if, when applied retrospectively, it would alter or impair the nature of a person's title in property. [Citation omitted.] However, we do not agree that section 722–A [of title 19 of ME. REV. STATS. ANN. (1981), which is similar to section 307 of the UMDA] has such an effect. [p*556]
>
> In enacting section 722–A, the legislative purpose was to provide a more equitable method of distributing property upon the termination of a marriage and not to affect property titles retrospectively. See Commissioners' Prefatory Note, Uniform Marriage and Divorce Act, 9 Uniform Law Ann. at 457. By its own terms the Act becomes operative when a divorce or separation proceeding is involved. Section 722–A(2) limits the definition of "marital property" to the "purposes of this section only." (Emphasis supplied.) The Act does not prevent married persons from owning property separately during marriage and disposing of it in any fashion either of them may choose, assuming neither a separation nor a divorce intervenes. [Citation omitted.] Viewed in this light, the defendant's claim that section 722–A deprived her of vested property rights without due process of law is without merit.
>
> Furthermore, simply because defendant acquired property during marriage but prior to the effective date of section 722–A, does not mean that she also acquired a vested right in a particular statutory procedure governing the disposition of property upon divorce. Prior to the enactment of section 722–A, a spouse's property rights upon divorce were governed by either 19 M.R.S.A. section 721 or section 723. These statutes conferred no vested rights on a spouse prior to a divorce. Any rights acquired pursuant to either section 721 or section 723 were purely contingent until a divorce had been granted. Statutes providing procedures for the division of property upon divorce are remedial in nature, and the legislature may change those procedures without offending constitutional principles. As we stated in Warren v. Waterville Urban Renewal Auth., 235 A.2d 295, 304 (Me. 1967):
>
> > "There is no such thing as a vested right to a particular remedy."

Fournier v. Fournier, 376 A.2d 100, 102 (Me. 1977). The Maine court also sustained the statute against the challenge that it is unconstitutionally vague. Similar results were reached in Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382, 17 Ill. Dec. 801 (1978), and Ryan v. Ryan, 277 So. 2d 266 (Fla. 1973). The reasoning in all these cases is similar to Opinion of the Justices, *supra*, p. S310.

3. Examine the three versions of section 307 of the Act carefully. In what way are they similar? How do they differ? All equitable distribution provisions raise the issue of what is the "property" subject to distribution. Clearly both real and tangible personal property are included. Few states have difficulty including such intangible personal property as stocks, bonds, brokerage and bank accounts. Pension rights have caused more difficulty, particularly if the right is characterized as "not vested" or is a product of federal legislation. *See* Krauskopf, *Marital Property at Marriage Dissolution*, 43 MO. L. REV. 157, 171–6 (1978) ("not vested"); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (Railroad Retirement Act benefits). Equitable distribution can force courts to consider questions such as whether the good will of a closely-held business or the earning potential of a professional degree may be "property" for these purposes. *See, e.g., In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978), *noted in* 64 Iowa L. Rev. 705 (1979) (holding that a wife's contributions to her husband's obtaining her a law degree authorized the trial court's award of $18,000 to her upon dissolution of the marriage). *See generally* Comment, *A Property Theory of Future Earning Potential in Dissolution Proceedings*, 56 WASH. L. REV. 277 (1981); Comment, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV. 517 (1981).

The second issue that is presented by all three statutes is: assuming it is property, how is it to

be valued? This can be particularly difficult in the case of intangibles such as shares of closely-held businesses or the right to future earnings. See Krauskopf, *supra*, at 161–71. [p*557]

The statutes begin to diverge when we ask what property is subject to division. *Alternative A* brings all property owned by either or both of the spouses within the control of the court. *Alternative B* refers to an existing classification of separate and community property. *See* Note on Community Property, *infra*, p. S315. The preceding version of the Act (which a number of states have adopted) attempts a division between "marital" and "non-marital" property, which is similar to that between community and separate property. As one might imagine, a number of appellate opinions in common law jurisdictions have grappled with the question whether a given asset is marital or nonmarital. The following problem is typical:

H and *W* purchase a house in the first year of their marriage and take title as joint tenants. Ten percent of the down payment comes from *H*'s savings prior to the marriage, the rest from *W*'s. The down payment is twenty percent of the purchase price. The rest is secured by a mortgage on which payments are made from *H*'s income during the marriage. Ten years later *H* and *W* file for divorce. Three-quarters of the mortgage principal is still outstanding, but the house is now worth twice as much as the original purchase price. (The problem is unrealistic because it assumes that accurate figures are available as to all of this.) Thus 70% of the value of the house "belongs" to *H* and *W*. How much of it is subject to equitable distribution under the original § 307 of the UMDA? Can you see an argument for the proposition that it is all separate property belonging 90% to *W* and 10% to *H* with the marital fund being owed a reimbursement for the payments on the principal? That it is all marital property? *See* Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979) (holding that shares must be assigned to separate and to marital, each share being credited with the proportional amount of the appreciation); Kalcheim, *Intention Controls: The Theory of Transmutation—The Effect of Placing Property Which Was Initially Non-Marital Into Joint Tenancy; The Theory of Commingling—The Effect of Intermingling Marital and Non-Marital Funds*, 68 ILL. B.J. 320 (1980) (arguing that under either theory joint-tenancy property is marital); Oldham, *Tracing, Commingling, and Transmutation*, 23 FAMILY L.Q. 219 (1989); Krauskopf, *supra*, at 178–97.

The fascination of what is, at least for common law states, a new theory of marital property should not blind us to the fact that the allocation between marital and non-marital property is only significant in those cases where there are substantial non-marital assets and few marital ones. In all other cases the trial court can redress the balance by changing the allocation of the concededly marital assets. The reported cases, at least so far, rarely address the question of how the trial court's discretion is to be exercised. Indeed, they almost uniformly sustain the trial court's judgment as to how the marital assets are to be allocated. More empirical study will be needed before we can make sound generalizations as to how trial courts' discretion is in fact exercised. In the meantime we might wonder how far away the "common law" states are from the community property states when the assets of either spouse are subject to the elective share of the other upon death and when they are subject to equitable distribution upon divorce.

Note on Community Property

Review the material on community property, *supra*, §2F6. Then consider the following materials: [p*558]

Although the basic ideas of community property are relatively simple, considerable complexity can arise in its administration and the statutory schemes vary in significant detail among those states which have the system. Many law schools in community property states (and some not in such states) have separate courses on the topic. Considerations of space prevent us from providing anything but the simplest of introductions here. The materials which follow this Note are designed to give you just a bit of the flavor of community property problems. First, let

us consider some of the questions which we asked at the beginning of this chapter in the context of community property.

Who owns and administers? The basic notion of community may be stated in common law terms: whatever is acquired by the efforts of either spouse during their joint married lives belongs to both spouses as tenants in common of an undivided one-half interest and without right of partition. Each spouse has full power of testamentary disposition of his interest (modified by statute in some states). Divorce or judicial separation, as well as death, dissolves the community.

As with tenants in common each holder of community property has the right to possess the whole. Unlike tenants in common the right to administer community property belonged, until quite recently, to one of the tenants, the husband. Within the recent past all community property states have abolished this feature of the system and have substituted in its place a system either of joint management (most jurisdictions) or a separate management based on which spouse brought the asset into the community (Texas).

The shift to joint management and control has occasioned considerable commentary. California's scheme is typical: Either spouse may buy, sell or pledge personal property of the community (except for household goods and clothes of the other spouse), and third parties who engage in such transactions with either spouse are protected. Gifts, on the other hand, and land transactions require the signature of both spouses. CAL. CIVIL CODE §§ 5125, 5127 (Deering 1970 & Supp. 1981). *See* Reppy, *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977 (1975); *see also* Bartke, *The Reform of the Community Property System of Louisiana-A Response to its Critics*, 54 TUL. L. REV. 294 (1980). Texas provides for joint management of all assets except personal earnings, recovery for personal injuries, and income and capital appreciation of separate property, but these exceptions swallow up so much that the statement in the text seems more accurate. TEX. FAM. CODE ANN. § 5.22 (Vernon 1975).

To what extent is the surviving spouse protected? Community property states do not give the widow (or surviving spouse) the right to elect against the deceased spouse's will in the way that almost all common law states do. The principal protection of the surviving spouse is the fact that the deceased spouse has testamentary power over one-half, at most, of the community property. Thus each spouse has the equivalent of a one-half ownership in fee of both real and personal community property, and this will normally be far more than dower or curtesy would bring and frequently more than the surviving spouse would be entitled to elect against a deceased spouse's will in a common law state. (We say "normally" and "frequently" because the estate of the deceased spouse may consist of considerably more than his portion of the community property, as the following paragraph serves to show.)

You will recall that community property consists of that property which was acquired by the efforts of either spouse during coverture. This includes the fruits, profits and gains of such property and, in some states, the fruits and profits of separate property as well. All else is separate property of each spouse. Separate property includes property each spouse owned prior to the marriage, and property acquired by gift, succession, and inheritance during the marriage. [p*559] (The community property is protected, however, by a rebuttable presumption that property is community property until proven to be separate property.) Thus, one-half of the community property may be considerably smaller than either one-third of the deceased spouse's estate (a typical elective share) or even a one-third interest for life of all lands of which the deceased spouse was seised during coverture (dower or curtesy).

Further reducing the protection for the surviving spouse is the fact that it is possible to waive community property rights in whole or in part by either ante-nuptial or post-nuptial agreement. It is also possible to waive dower, curtesy, or the elective share, in a common law state, but waiver agreements seem to be more common in community property states and seem to be treated with

less suspicion by the courts in those states than they are in common law states.

The provisions concerning intestate succession in community property states vary greatly. So far as the deceased spouse's separate property is concerned the provisions (except for Louisiana) do not vary greatly from common law states. So far as the deceased spouse's one-half of the community property is concerned some states give it all to the surviving spouse, some divide it between the surviving spouse and descendants, some give it all to the descendants.

Protection from creditors. Community property in the United States today affords relatively little protection against creditors. Theoretically the community property is liable only for those debts contracted on behalf of and for the benefit of the community. Thus, it would not be liable for a spouse's ante-nuptial debts or those debts (such as one arising from an adverse judgment in tort) contracted in the spouse's separate capacity. Suffice it to say: the theoretical principle has been sufficiently eroded by courts and legislatures that the initial sentence of this paragraph is a better statement of the law today.

Taxes. As noted above (Note on Tax Treatment of Concurrent Interests, *supra*, p. S300), the income tax advantages of community property were abolished by Congress' adoption of the joint return. In estate and gift taxes the two systems yield approximately the same tax results because of the unlimited marital deduction.

These then are the sketchy outlines of community property. If you want to know more now, see 2 A.L.P. §§ 7.1–7.36; 4A R. POWELL, REAL PROPERTY §§ 625–30 (P. Rohan ed. 1986); W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971). For a discussion of the interplay between community and common law states, and problems of community property of which common lawyers should be aware, see Clausnitzer, *Property Rights of Surviving Spouses and the Conflict of Laws*, 18 J.FAMILY L. 471 (1980).