
NOTE

**Marital Property Reform in
Massachusetts: A Choice for the New
Millennium**

I. INTRODUCTION

Resolved, That the laws of property, as affecting married parties, demand a thorough revival, so that all rights may be equal between them; — that the wife may have, during life, an equal control over the property gained by their mutual toil and sacrifices, be heir to her husband precisely to the extent that he is heir to her, and entitled, at her death, to dispose by will of the same share of the joint property as he is.¹

Although a lengthy paper discussing the reformation of an elective share statute may show promise at first only as a cure for insomnia, it actually is an intriguing account of human struggles over the status of marriage and women, the control of property, the machinations of legislatures, and the struggles to achieve justice and fairness.

This Note is an analysis of the options available to Massachusetts as it responds to the Supreme Judicial Court's call to the legislature, following its decision in *Sullivan v. Burkin*,² to reform the elective share statute in Massachusetts.³ The available options reflect the evolutionary, and in some ways revolutionary, changes that have occurred to the concept of marriage as seen through the legal prisms of status, contract and partnership.

Part II of this Note will discuss the background that led to the current legislative proposals.⁴ The reform of this statute represents a unique opportunity for Massachusetts to remedy, in a very proactive and progressive manner, a system of laws that represents an outdated and narrow way of thinking about the ancient and honorable state of marriage.

¹ . PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23rd & 24th, 1850, cited in Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1113 (1994).

² . 460 N.E.2d 572 (Mass. 1984).

³ . See MASS. GEN. LAWS ch. 191, § 15 (1992).

⁴ . See *infra* notes 43-67 and accompanying text.

Using the elective share statute as a focal point, Part III of this Note explores the development of the rights of married women under the law.⁵ These rights, indeed the rights of all women, have changed radically in just the last 150 years. One hundred and fifty years ago, women of color were slaves, married women were generally precluded from owning property,⁶ a husband had the legal right to beat his wife,⁷ women were precluded from all but a handful of occupations,⁸ and when women were employed, they were paid significantly less than men.⁹ Most importantly, women were legally precluded from active participation in the very political processes that wrote, enacted, implemented, and interpreted the laws that governed their lives from birth to death — and beyond.¹⁰

Although this Note is not an analysis on marriage, per se, it is impossible to analyze the effect of a statute, without first reflecting on our views of marriage and how those views are then embodied in the law. Since a majority of women marry at some point or points in their lives, the laws and customs surrounding this institution are particularly critical to understand — and to understand on more than a superficial basis. Part IV of this Note will briefly discuss the contemporary view of marriage, women, and property to analyze the impact of statutory reforms on a surviving spouse's rights.¹¹

What, in fact, does it really mean to be married in the eyes of the law? What rights and privileges attach to the status of being married? What are spousal responsibilities and burdens?

[M]arriage, — that is, the relation or condition of husband and wife, — while it originates in a contract, is not itself a contract, but a *status*. This distinction is of the highest importance. It is characteristic of the contract of marriage, that when a man and a woman do by mutual and lawful agreement become husband and wife, they thereby enter into and create for themselves a civil and political *status* which the State controls, and the rights,

⁵ . See *infra* notes 68-253 and accompanying text.

⁶ . See Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 385-86 (1994).

⁷ . See Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137, 141-42 (1991). See generally Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1990).

⁸ . See LAURA A. OTTEN, *WOMEN'S RIGHTS AND THE LAW* 43 (1993); see also Richard Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1414 (1983).

⁹ . See *infra* note 211 and accompanying text.

¹⁰ . See U.S. CONST. amend. XIX, § 1. The amendment giving women the right to vote was not passed until 1920, a mere 79 years ago.

¹¹ . See *infra* notes 254-77 and accompanying text.

duties and liabilities growing out of which the State, not the contracting parties, prescribes and regulates.¹²

There is good reason to believe that those entering marriage have, at the very least, ill informed and unrealistic expectations of marriage and divorce.¹³ In a recent survey, two groups — marriage license applicants and law students — were asked a number of questions about their knowledge of divorce statutes, the demographics of divorce, and their expectations for their own marriage.¹⁴ Although both groups had relatively accurate perceptions of the likelihood of divorce and the effect on the larger population, both groups scored poorly when it came to actual and accurate knowledge of the legal terms of the marriage contract as defined by statute, and reflected wildly idealistic expectations of their own marriages.¹⁵ Although both groups knew, at least objectively, that there was statistically a fifty-percent chance of a marriage ending in divorce, not one believed that it would happen in their own individual situation.¹⁶ Even a formal law school course on family law did little to change individual's perceptions of his or her own situation, although there was, at least, an increase in the actual knowledge of the content of the divorce statutes.¹⁷

The negative impact of divorce on society, as well as the particularly heavy economic burden that almost invariably falls on women as a result of a divorce, is well documented.¹⁸ What may be less well known, however, are some of the historical and legal roots of gender bias that have lead to a mass impoverization of women and their children.¹⁹ Specifically, as this

¹² . See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2183 n.210 (1994) (quoting Henry Hitchcock, *Modern Legislation Touching Marital Property Rights*, 13 J. SOC. SCI. 12, 16 (1981)) [hereinafter Siegel, *Modernization*]. This article by Professor Siegel is a continuation of, and should be read in conjunction with, her companion work *Home As Work*. See Siegel, *supra* note 1.

¹³ . See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 439 (1993).

¹⁴ . See *id.*

¹⁵ . See *id.*

¹⁶ . See *id.* at 448.

¹⁷ . See *id.* In addition, only 1.5% of marriage applicants expressed any interest in entering into a prenuptial agreement and none were interested in considering a post-divorce childrearing agreement. See *id.* The law student group rate was slightly higher at 11%. See *id.* If this study reflects the knowledge of the laws governing marriage and divorce, there is at least as much reason to believe that any negative implications of a spouse's death would be contemplated.

¹⁸ . See, e.g., Williams, *supra* note 6; Barbara Ann Kulzer, *Law and the Housewife: Property, Divorce, and Death*, 28 U. FLA. L. REV. 1 (1975); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994) [hereinafter Williams, *Coverture*].

¹⁹ . See Williams, *supra* note 6, at 383.

Sixty percent of all people in poverty and two-thirds of the elderly poor are women. Female-headed households are five times more likely to be poor and up to ten times more likely to stay poor than are households with a male present. [T]wenty percent of all families and more than forty percent of African-American families are headed by women.

Note will document, the laws surrounding the acquisition and ownership of property were radically discriminatory towards women in general and married women in particular.²⁰ Given the historical state of the laws, it was only logical to expect that if a woman were legally precluded from owning even the “fruits of her [own] labor”²¹ she would not be able to accumulate enough wealth to get her out of or keep her out of poverty. If a woman was legally denied equal educational and employment opportunities,²² then her right to keep property in her own name, even once it was secured, was to a large extent a very hollow right.²³ What may be the real surprise is not how many women suffered and suffer the economic consequences of systematic gender discrimination, but how many succeeded and continue to succeed in spite of it.

Women’s rights continue to evolve and reflect the changing perceptions of society and the economic demands on today’s family. This evolution has also affected our perceptions of marriage and the division of responsibilities within the home. These changes not only increase the choices that women

Id.

²⁰ . See *infra* notes 68-244 and accompanying text.

²¹ . Dianne Avery & Alfred S. Konefsky, *The Daughters of Job: Property Rights and Women’s Lives in Mid-Nineteenth-Century Massachusetts*, 10 LAW & HIST. REV. 323, 336 (1992).

²² . See Chused, *supra* note 8, at 1416; see also, Douglas Lamar Jones, *Leila J. Robinson’s Case and the Entry of Women into the Legal Profession in Massachusetts*, in THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992, 241 (Russell K. Osgood ed., 1992). In 1881, the Supreme Judicial Court ruled that “[u]nder the law of the Commonwealth a woman is not entitled to be admitted as an attorney.” *Id.*

Although the SJC reversed its decision the following year, the ability of women to enter the legal profession was restricted until well into the twentieth century. See *id.* at 242; see also MARY JOE FRUG, WOMEN AND THE LAW 16-17 (1992). Law schools were not fully integrated until even later and women were precluded from entering the venerable Harvard Law School until 1950. See Jones, *supra*, at 244. Even Supreme Court Justice Sandra Day O’Connor, upon graduation near the top of her class from Stanford and as a member of the Order of the Coif, could only find a job as a legal secretary. See FRUG, *supra*, at 17 n.14.

²³ . See Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present, and Future*, WIS. L. REV. 807, 816-18 (1990).

In retrospect, it seems odd that the economics of marriage and divorce have been so neglected in the legal literature and that the feminist movement did not carry through the nineteenth century reform to its logical conclusion. Achievement of capacity to own property is relatively meaningless if the typical wife has little if any property to own—it is comparable to the equal right of the rich and poor to sleep under bridges.

Id. at 818 n.42, citing Foster, *Preface* to BAXTER, MARITAL PROPERTY vi (1973).

have but also increase the choices that men have in response.²⁴ There has been, for example, a small but notable increase in the number of men who are now taking primary responsibility for child-rearing and the who have also increased participation in the daily lives and activities of their children.²⁵ The fact remains, however, that women still bear the overwhelming majority of responsibility for childcare and housework, in addition to employment obligations, and the total weight of these responsibilities can be difficult if not impossible to carry.²⁶

By carrying the primary responsibility for the physical needs of the family, many women make economic sacrifices that can make them vulnerable when marriage ends either by divorce or by death.²⁷ The economic consequences of the “choice”²⁸ women make to put family responsibilities

²⁴ . See Kulzer, *supra* note 18, at 3. “A tolerant society should not think ill of a woman who finds contentment in sexual intercourse, child-bearing, child-rearing, physical adornment and administration of consumption. But it should certainly think ill of a society that offers no alternative.” *Id.* at n.10 (citing J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 235 (1973)). “Indeed, [a] tolerant society should not think ill of a man who would like to live and work at home and be with his children. In this respect, men too have had little choice. Women, however, have usually been confined to but one occupation, while men have been precluded from only one.” Kulzer, *supra* note 18, at 3 n.11.

²⁵ . Compare Williams, *supra* note 6, at 391 n.51.

²⁶ . See Williams, *supra* note 6, at 391. See, e.g., Nancy Rollins Ahlander & Kathleen Slauch Bahr, *Beyond Drudgery, Power, and Equity: Toward an Expanded Discourse on the Moral Dimensions of Housework in Families*, 54 J. MARRIAGE & FAM. 57 (1995); Joe F. Pittman & David Blanchard, *The Effects of Work History and Timing of Marriage on the Division of Household Labor: A Life-Course Perspective*, 58 J. MARRIAGE & FAM. 78 (1996); Anisa M. Zvonkovic, et al., *The Marital Construction of Gender Through Work and Family Decisions: A Qualitative Analysis*, 58 J. MARRIAGE & FAM. 91 (1996); Esther S. Kluwer, et al., *The Marital Dynamics of Conflict over the Division of Labor*, 59 J. MARRIAGE & FAM. 635 (1997); Hiromi Ono, *Husbands' and Wives' Resources and Marital Dissolution*, 60 J. MARRIAGE & FAM. 674 (1998).

²⁷ . Being married and a parent has a direct impact on women's earning capacity. See MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 508 (1994). At least three factors can be identified which help explain this phenomenon: 1) marriage can limit both job options and earnings which are then reflected in diminished earnings-based retirement benefits from social security and pensions; 2) based on the disparate division of labor within a family, women spend approximately twice as much time as men per day doing housework and caring for children; and 3) when family responsibility is associated with reductions in market work it is usually the women who withdraw from the labor force. See *id.* “Taken together, it is difficult to escape . . . the association between . . . women's economic insecurity [and] the fact that parenthood's costs are disproportionately borne by women even long after the children leave home.” *Id.* at 509.

²⁸ . I use the word “choice” in quotes because it is not clear that it is the deliberative act that the word implies. There are, for example, studies that show that while couples verbally express a belief in and desire for equality in marriage, “[i]t is usually the woman who raises equality issues, but because the man has the more dominant position in the relationship, he has to be open to negotiation and committed to the goal of actually practicing equality before the couple can progress in this direction.” Carmen Knudson-Martin & Anne Rankin Mahoney,

ahead of their financial well-being, has been softened somewhat by the adoption of laws in all non-community property states to provide for an equitable distribution of assets when a marriage ends in divorce.²⁹ Yet, despite the equitable theory embodied in these divorce statutes, the reality remains dismal for women and their children, especially in Massachusetts.³⁰

When marriage ends on death, however, our current law in Massachusetts does not embody an equitable distribution theory.³¹ The statute is, in fact, a direct descendent of the common law principles of dower.³² The importance of this statute — and the thesis of this Note — is in how it manifests an attitude toward women, marriage, and rights to property that is predicated on a gendered and antediluvian philosophy. The mere existence of an elective share statute reflects society's attitude that as a matter of public policy one should not be able to disinherit a spouse and, at least in the instance of a spousal share, that the testator's wishes can and should be statutorily defeated or modified.³³ It should be noted that the overwhelming majority of

Language and Processes in the Construction of Equality in New Marriages, 47 FAM. REL. 81, 89 (1998); see also Aafke Komter, *Hidden Power in Marriage*, 3 GENDER & SOC'Y 187 (1989).

²⁹ . See MASS. GEN. LAWS ch. 208, § 34 (1998); see also Monroe Inker et al., *Alimony and Assignment of Property: A Survey of the Last Decade of Massachusetts Law*, 26 SUFFOLK U. L. REV. 21, 21 (1992).

³⁰ . See SUP. JUD. CT., REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT COMMONWEALTH OF MASSACHUSETTS 19-77 (1989) [hereinafter GENDER BIAS STUDY]. The Family Law chapter recounts statistics gathered for the Gender Bias Study that show that Massachusetts ranks fifth in the nation for the percentage of families headed by women, behind only the District of Columbia, New York, Georgia, and Mississippi; the feminization of poverty is more acute in Massachusetts than anywhere else, because 68% of its poor are mothers and children compared to 48% elsewhere in the country; households headed by women in Massachusetts are eleven times more likely to be in poverty than two-parent families which is more than twice the national average; and in 1984, 70% of the households headed by women had incomes below \$20,000 compared to only 20% of two-parent households. See *id.* at 19. One of the major reasons for such atrocious statistics is that after a divorce "women are left with a disproportionately large share of the cost of raising children and a disproportionately small share of the marriage's wealth and earning power." *Id.* This result remains, despite twenty-five years of "equitable distribution" principles embodied in our divorce law.

³¹ . See *infra* notes 250-53 and accompanying text.

³² . See *infra* notes 68-89 and accompanying text.

³³ . See Leslie Kloville Plimpton & Linda G. Bauer, *The Massachusetts Spousal Elective Share: Dealing with Uncertainty*, in ESTATE PLANNING AND FAMILY LAW: PERSPECTIVES ON THE CROSSOVER ISSUES 9 (MCLE 1995). Elective share statutes were adopted over time to reflect statutory modifications to the common law restrictions and to modify the inherent inequalities of dower. However, most of these statutes, enacted in the nineteenth century, still reflect the fundamental principles of dower — that women cannot or should not be entrusted with the outright ownership of property.

spouses leave all or the majority of their estates to their surviving spouse.³⁴ However, the basic premise behind the statute remains flawed: “that the property being distributed is, insofar as the surviving spouse — generally assumed to be the wife — is concerned, a share of *someone else’s* property.”³⁵ A woman who makes the necessary family and career sacrifices which allow her husband to perform as an “ideal worker”³⁶ can be left with little or nothing when her husband dies because of the structure of the current statute and the way in which title to property is held in non-community property states.³⁷ “The fact that most property owners do indeed provide for their spouses is no answer to the basic question of *legal entitlement*. Only the continued good will and moral sense of their husbands stand between many wives and penury.”³⁸

The adoption of equitable distribution principals by non-community property states in divorce reflected a marked *legal* shift in attitude towards women, marriage and property.³⁹ The contemporary view of marriage is one of partnership and the model for that view is the community property system.⁴⁰ It is only logical, then, that when a marriage ends in death, rather than

³⁴ . See LAWRENCE WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 38 n.13 (2d ed. 1997) [hereinafter WAGGONER ET AL.].

³⁵ . Kulzer, *supra* note 18, at 37 (emphasis added).

³⁶ . See Williams, *supra* note 6, at 390. Williams uses the term “ideal worker” to describe

[m]en of all classes and races [who] typically feel obliged, and entitled, to perform as ‘ideal workers’, away from home nine or more hours a day, with no time off for childbearing or rearing. Often ideal workers are expected to have geographical mobility and the ability to work overtime on short notice. In practice, men who are fathers cannot perform as ideal workers without a flow of domestic services, typically delivered by their wives. This pattern holds true whether or not the wife is employed. Because of the assumption that the husband is entitled to perform as an ideal worker, wives ordinarily subordinate their own careers to their husbands’. . . [As a result] this arrangement leaves wives out of the work force, on the ‘mommy track,’ or in sex-segregated (and relatively low-paid) women’s work that is conceived of as more ‘flexible.’

Id. at 390-92.

³⁷ . See *infra* notes 68-84, 245-53 and accompanying text.

³⁸ . Kulzer, *supra* note 18, at 38 (emphasis added).

³⁹ . See *infra* notes 254-77 and accompanying text.

⁴⁰ . See generally Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1996); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990). Merely identifying the community property system as “the model” to adopt does not ignore the fact that there are ongoing inequities in the practical application of the model. Nor does the adoption of equitable distribution principles in common law states sidestep the incredible chasm that exists between theory and practice. The recommendation that we look toward the community property states or the Uniform Marital Property Act as models to base our *statutes* on, comes with the understanding that no system is ever perfect and it must always be conscious of injustices and inequities that arise as a result. Rather, it should be viewed as a basic legal principle and a base on which to build a system of laws that reflect our contemporary views of marriage.

divorce, the same principles should apply. Part V of this Note will discuss various alternatives that Massachusetts currently has available in modifying the elective share statute.⁴¹ Although the alternatives differ in detail — including the three proposals that are currently under consideration in the Massachusetts legislature — they all attempt to replicate in some manner both the theory and practice found in community property states.⁴² Thus, this Note will show that the choice for the new millennium, if Massachusetts truly wishes its laws to embrace and reflect legal equality, must necessarily lead to the formal adoption of a community property system as the correct alternative to an elective share statute.

II. MASSACHUSETTS BACKGROUND

In 1984, at the end of its decision in *Sullivan v. Burkin*,⁴³ the Supreme Judicial Court issued a call to the Massachusetts state legislature to address “the question of the rights of a surviving spouse in the estate of a deceased spouse.”⁴⁴

In *Sullivan*, the decedent husband had set up an inter vivos trust naming himself as sole trustee and transferring a house as the sole asset of the trust.⁴⁵ He directed that, on his death, the successor trustee pay the principal to the defendants, George F. Cronin, Sr., and Harold J. Cronin.⁴⁶ When Ernest Sullivan died on April 27, 1981, he left a will which stated that he was deliberate in his intent to not make any provision for either his wife Mary, from whom he had been separated since 1962, nor his grandson Mark.⁴⁷ Mary filed suit in Probate Court to exercise her right under chapter 191, section 15, of the Massachusetts General Laws, to take her statutory forced share of her husband’s estate which consisted entirely of the trust.⁴⁸ The court denied Mary any remedy but, “cit[ing] significant changes since 1945 in public policy limitations placed on a spouse’s right to dispose of property during marriage,”⁴⁹ took the opportunity to overrule its forty year-old holding in *Kerwin v. Donaghy*.⁵⁰ The *Kerwin* holding denied the surviving spouse any claim against an inter vivos trust created by a deceased spouse, even when the deceased spouse retained the sole control over the

⁴¹ . See *infra* notes 278-454 and accompanying text.

⁴² . See *infra* notes 90-126 and accompanying text.

⁴³ . 460 N.E.2d 572 (Mass. 1984).

⁴⁴ . *Id.* at 578.

⁴⁵ . See *id.* at 573-74.

⁴⁶ . See *id.*

⁴⁷ . See *id.*

⁴⁸ . 460 N.E.2d at 573.

⁴⁹ . John H. Henn, *Estate Administration — Surviving Spouse’s Statutory Rights in Trust Property*, 69 MASS. L. REV. 139, 143 (1984).

⁵⁰ . 59 N.E.2d 299 (Mass. 1945); see *Sullivan*, 460 N.E.2d at 574.

trust.⁵¹ The *Sullivan* court reversed that decision, holding that for the future, and for the purposes of Massachusetts General Laws, chapter 191, section 15, the estate assets that could be reached by a surviving spouse would include inter vivos trusts

created by the deceased spouse [and over] which the deceased spouse alone retained the power during his or her life to direct the disposition of those trust assets for his or her benefit . . . by the exercise of a power of appointment or by revocation of the trust. Such power would be a general power of appointment for Federal estate tax purposes and a 'general power' as defined by the Restatement (Second) of Property.⁵²

The court specifically noted that "[it was] neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an inter vivos trust created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her spouse."⁵³

As guidelines for making such a reform, the court pointed to the Uniform Probate Code (UPC) and to the Uniform Marital Property Act (UMPA), both of which adopt the concept of community property as a foundation for the treatment of marital property.⁵⁴ In response to the court, the Joint Massachusetts Bar Association/Boston Bar Association Uniform Probate Code Committee was convened in October 1990 to study the Uniform Probate Code and draft appropriate legislation for adoption in Massachusetts.⁵⁵ Although the bill drafted by the Committee involved sweeping proposals to replace most of the statutory law in the state and codify the state's probate case law, the one area of reform that was not resolved was the issue of the spousal elective share reform.⁵⁶

This lack of resolution over the spousal elective share by the Committee is particularly interesting in light of the fact that the previous probate reform in Massachusetts, The Omnibus Probate Act of 1976, was based on the 1969

⁵¹ . See *Sullivan*, 460 N.E.2d at 574.

⁵² . *Id.* at 574-75.

⁵³ . *Id.* at 577.

⁵⁴ . See *id.* *Sullivan* was decided prior to the 1990 reforms adopted by the National Conference on Uniform State Laws. The main purpose of the 1990 reforms and the 1993 revisions was to "bring elective-share law into line with the contemporary view of marriage as an economic partnership." See UNIF. PROB. CODE, art. II, pt. 2, gen. cmt. 57 (amended 1993) [All references to the Uniform Probate Code in this Note will be to the 1993 revisions and comments]. The UPC was modified to replicate as closely as possible the community property system that exists in nine states and that had also been promulgated under the Uniform Marital Property Act of 1983. See *id.* at cmt. 58. Technical amendments added in 1993 reorganized and renumbered the 1990 version and made a number of significant changes. See LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL 78-79 (3d ed. 1993).

⁵⁵ . See Mary K. Ryan, Testimony Before the Joint Committee on the Judiciary in Support of House Bill 5049, An Act Relative to the Uniform Probate Code (Feb. 11, 1998) (transcript available at the Boston Bar Ass'n).

⁵⁶ . See *id.*

version of the UPC.⁵⁷ It would seem, therefore, that there was adequate familiarity with both the philosophy and the methodology of the UPC to allow the bar associations to develop a suitable version for Massachusetts. The Committee filed its first proposal in 1991, followed by a separate proposal filed by the Women's Bar Association (WBA) in 1992.⁵⁸ A Spousal Share Committee was formed in 1993 by the Trust and Estates Section of the Boston Bar Association (BBA) in an attempt to resolve the differences in the two proposals.⁵⁹ Between 1995 and 1997, the BBA and the WBA collaborated in their efforts and the compromise bill was submitted to the Judiciary Committee for its consideration during the 1997-1998 legislative session.⁶⁰ When the joint BBA/WBA bill was submitted to the Judiciary Committee it was apparently without the direct involvement of the Massachusetts Bar Association (MBA).⁶¹ Upon review of the draft legislation, the MBA Probate Section Council raised some concerns it had with the bill, and as a result, legislative action on the BBA/WBA bill was deferred pending review and discussions between the three groups.⁶² In December of 1997, the MBA endorsed its own version of a spousal elective share bill that differed significantly in several key areas from the BBA/WBA bill.⁶³ Since that time there has been no definitive resolution of the outstanding issues between the MBA and the BBA/WBA and a third bill, authored by former Judiciary Chairman, John Rogers, which is under review by the MBA.⁶⁴ All three bills are currently in the Judiciary Committee for review and debate.

All of the parties currently engaged in this debate agree that the current spousal elective share, as defined by chapter 191, section 15, of the Massachusetts General Laws, is "out of date, full of loopholes, and difficult to claim."⁶⁵ Although the statute intends to protect either spouse, the

⁵⁷ . See Marilyn Beck, Testimony Before the Joint Committee on the Judiciary in Support of House Bill 5049, An Act Relative to the Uniform Probate Code (Feb. 11, 1998) (transcript available at the Boston Bar Ass'n).

⁵⁸ . See Joel M. Reck, Testimony Before the Joint Committee on the Judiciary in Support of Senate Bill 799 and House Bill 3375, An Act Improving the Spousal Elective Share (May 14, 1997) (transcript available at the Boston Bar Ass'n).

⁵⁹ . See *id.*

⁶⁰ . See *id.* The joint bill is H.R. 3375 and S. 799, 180th Leg., 1st Session (Mass. 1997).

⁶¹ . See Memorandum from Mary K. Ryan to the MBA Board of Delegates Regarding the Spousal Elective Share Legislation (Nov. 21, 1997) (transcript available at the Boston Bar Ass'n).

⁶² . See *id.*

⁶³ . See Paul J. Martinek & Mark A. Cohen, *MBA Endorses Overhaul to Spousal-Elective Share Law: While BBA, WBA Push Competing Legislation*, MASS. LAW. WKLY., Dec. 22, 1997, at 1.

⁶⁴ . See letter from Lee Ann Iannacchino, Legislative Coordinator of the Mass. Bar Ass'n, to the author, (Feb. 8, 1999).

⁶⁵ . Reck, *supra* note 58, at 24.

testimony before the House Judiciary Committee clearly indicated that the current statute disproportionately affects older women.⁶⁶

So, why is this legislation so important? What, exactly, does it all mean when applied to actual situations and who is most affected? Why is there such a raging debate over a piece of legislation that is, admittedly, rarely elected?⁶⁷ How did Massachusetts wind up with the current statute and what social policies and legal theories are really embodied in this seemingly innocuous piece of legislation? To answer these and other questions it is important to see how the existing statute developed.

A. *Historical Developments*

This section will discuss the development of the two systems of property — separate and community — that currently co-exist in the United States as well as highlight some of the major differences between the two systems. This is followed by a look into the American Colonial Period and how the attitudes toward married women and property rights, imported principally from our English heritage, were incorporated into and expressed in the law in the early years of this country. The next section evaluates the development of equity as an important, albeit limited, recourse for married women to secure some rights in property. The penultimate section explores some of the statutory developments, starting in the mid-nineteenth century, which helped secure a married woman's legal rights to retain legal ownership of her own property and keep her own earnings, thereby escaping some of the most debilitating burdens of coverture. This section also includes a discussion on the influence of nineteenth century feminism on securing these statutory changes and the importance of the arguments that were articulated regarding the place of married women in the eyes of the law. Finally, the last section reviews the laws in Massachusetts affecting women's property rights and adds a brief review of the current statutes.

1. Coverture, Dower and the Common Law Property System

⁶⁶ . See Susan D. Tatelman, Testimony Given Before the House Judiciary Committee (May 14, 1997) (transcript available at the Boston Bar Ass'n).

⁶⁷ . See Michael H. Riley, Testimony Before the Joint Committee on the Judiciary in Support of Senate Bill 799 and House Bill 3375, An Act Improving the Spousal Elective Share (May 14, 1997) (transcript available at the Boston Bar Ass'n). Mr. Riley also pointed out in this testimony that Massachusetts and Connecticut are the only remaining states to have an income-only spousal share. *See id.* New York, which previously had an income-only statute, changed its statute to an outright share in 1991. *See id.* Mr. Riley further testified that one reason that the elective share right may be so infrequently exercised is because estate planners "routinely encourage a client who for some reason wishes to leave a minimal amount to his or her spouse, to give the spouse the equivalent of the spousal share in the estate plan so that the spouse will not be tempted to seek a larger inheritance by electing the spousal share." *Id.*

The current elective share system utilized by Massachusetts and the other separate property states⁶⁸ has its legal and historical roots in the common law property concept of dower developed during the medieval period in England.⁶⁹ During medieval times, land was the primary source of wealth and the center of an agrarian based society that depended on land as a source of livelihood.⁷⁰ The marital property system that developed reflected the need of the propertied class to control the disposition of this primary source of wealth by keeping their estates intact while under the control of a single male.⁷¹ In return for the husband's legal ownership of all his wife's real and personal property, except for clothes and miscellaneous paraphernalia, the wife was promised material support and protection for life under a system called coverture or femme covert.⁷²

Under the system of femme covert, the husband and wife merged into a single legal identity that was described by Blackstone, the renowned English legal scholar, as a transformation by which "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated

⁶⁸ . Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin are community property states. *See* WAGGONER, ET AL., *supra* note 34, at 519; *see also* WILLIAM Q. DEFUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §§ 37-53 (2d ed. 1971). The forty-one other states and the District of Columbia are referred to as separate property states. *See* Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 569 (1995).

⁶⁹ . *See* Gary, *supra* note 68, at 575. Dower gave a widow a life estate in one-third of all the inheritable real property owned by her husband at any time during their marriage. *See id.* at 571 n.19. This right to her dower share was inchoate while the husband was alive and became consummate upon his death. *See id.* Although the right was consummate, it was not self-executing and "[t]o obtain it, the widow had to sue out a writ against her husband's eldest son who was otherwise owner." Fellows, *supra* note 7, at 146; *see also* LEE HOLCOMBE, *WIVES AND PROPERTY REFORM OF THE MARRIED WOMEN'S PROPERTY LAW IN NINETEENTH-CENTURY ENGLAND* 21, 18-36 (1983) (Holcombe's chapter, titled "*The Virtual Slavery of Marriage*": The Common Law and Married Women," offers a succinct view of some of the realities of married life for women under the auspices of the common law.).

⁷⁰ . *See* HOLCOMBE, *supra* note 69, at 20.

⁷¹ . *See* JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 367 (3d ed. 1993). This system, called primogeniture, of leaving land to a single male, usually the eldest son, originated in England following the Norman Conquest of 1066 and continued until 1925. Under this system, the eldest son or his issue inherited the land. Only if there were no sons, or other male heirs, would daughters be able to inherit. Once reserved only for the descendants of the warriors who supported William of Normandy (thus the Norman Conquest) in his defeat of Edward the Confessor for the English throne, it eventually became the law for all. The practice was originally imported in some American states before the Revolution but was eventually abolished. *See id.* at 193, 209-10.

⁷² . *See id.* at 367.

and consolidated into that of the husband, under whose wing, protection, and *cover* she performs everything and is therefore . . . called a *femme-covert*; and her condition during marriage is called her *coverture*.”⁷³ The reality of this system could be very harsh as, under the law of coverture,

[w]hen a woman married, she could no longer own anything. All of her personal property — including money, clothes, furniture, jewelry, china and silverware — became her husband’s property. If she had a job, all of her earnings belonged to her husband . . . [I]n return for the relinquishment of all her property and earnings, the wife acquired the right to be supported by her husband.⁷⁴

Coverture was thought by some to be necessary because “women would run amok if they could own their own property. [If women owned property, it] ‘would lead to perpetual discord,’ [causing] the ‘breakdown of . . . the love of home, the purity of husband and wife, and the union of one family.’”⁷⁵

In return for his wife relinquishing control over all of her property, the law of dower developed which required the husband to provide his wife with support and maintenance, especially during her widowhood.⁷⁶ These dower rights attached to the land at the moment of marriage.⁷⁷ Usually the wife was allowed a one-third share in a life estate,⁷⁸ in all freehold land which the husband owned during the marriage and which was inheritable by the legal

⁷³ . LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT*, 1 n.1 (1981) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *442). Ms. Weitzman also makes note of a comment by U.S. Supreme Court Justice Black who observed that “this rule has worked out in reality to mean that though the husband and wife are one, the one is the husband.” *Id.* at n.2 (quoting from Justice Black’s dissenting opinion in *United States v. Yazell*, 382 U.S. 341, 359 (1966)).

⁷⁴ . Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN’S L.J. 179, 180-81 (1998) (citations omitted). *See* BECKER ET AL., *supra* note 27, at 501. “Although wives have never been able to enforce the husband’s traditional support obligation during marriage, and still are not, creditors have been able to enforce the obligation after extending credit to the wife for ‘necessities.’” *Id.* With regard to a woman’s paraphernalia, clothing and personal ornaments that she possessed at the time of marriage, or that her husband gave to her during their marriage, the husband could dispose of these and any other items of personal property during his lifetime. *See* HOLCOMBE, *supra* note 69, at 23. If her paraphernalia remained in the husband’s possession, then only after his death would they revert to the wife’s legal possession. *See id.* However, she could still ultimately lose possession to her husband’s creditors who could seize her personal property in settlement of her husband’s debts remaining after his death. *See id.* Needless to say, the law allowed no such access by the wife to the husband’s personal property, including any he had acquired from her, unless specifically bequeathed to her in his will. *See id.* This freedom of testation by the husband to dispose of his personal property has survived well into the twentieth century. *See id.* at 24.

⁷⁵ . Turano, *supra* note 74, at 185.

⁷⁶ . *See* HOLCOMBE, *supra* note 69, at 21.

⁷⁷ . *See id.*

⁷⁸ . A life estate is defined as “a legal arrangement whereby the beneficiary (*i.e.*, the life tenant) is entitled to the income from the property for his or her life. Upon the death of the life tenant, the property will go to the holder of the remainder interest or to the grantor by reversion.” BLACK’S LAW DICTIONARY 924 (6th ed. 1990).

heirs of the husband and wife.⁷⁹ Accordingly, the husband could sell or otherwise alienate any land owned by or acquired by the wife during the marriage, while the wife could not sell her land without his permission and approval.⁸⁰ Because dower was considered a restraint on the land, and thus on the economy, one of the devices developed to bypass or defeat the encumbrance was to have the wife exchange her dower rights in return for a jointure, a settlement of a specific piece of land for her lifetime use.⁸¹ The designated piece of land would be transferred to a third party, generally by the husband's father, who would then hold the property for the joint lives of the couple.⁸² Upon the death of both parties, the land would then pass free of dower rights to the couple's male heirs.⁸³

In stark contrast to adult single women and widows, married women were, both by and through the law, denied the right to own or devise real property, sue or be sued, enter into contracts, retain control over any property that a woman might bring to or acquire during marriage — stocks and bonds, bank accounts, houses, farms, carriages, cattle, and even her wages, rents, interest, and profits from that same property.⁸⁴ Because other careers were not open to women, marriage was usually the only option available, and thus

⁷⁹ . See HOLCOMBE, *supra* note 69, at 21. Under the common law, wives were not considered legal heirs of the husband and were legally barred from devising any real property by will. See *id.* Any land that passed to her through her bloodline and controlled by her husband during marriage, would revert to her family should she die without issue. See *id.* at 22. However, if the wife died and there was issue, the husband had the right to curtesy in all her land — not merely an interest in one-third of the property as she had in his — for his lifetime as guardian for the “child of the marriage capable of inheriting” (generally a male). *Id.* Unlike the husband who was in possession of the land and considered lord and master by the law, the widow who wished to exercise her dower rights could only do so by taking out a writ against her husband's eldest son, the new legal heir. Thus, the wife and mother had to take *legal action* against her own family in order to secure her rights. See Fellows, *supra* note 7, at 146.

⁸⁰ . See Wenig, *supra* note 23, at 813.

⁸¹ . See Fellows, *supra* note 7, at 148.

⁸² . See *id.*

⁸³ . See *id.*

⁸⁴ . See Avery & Konefsky, *supra* note 21, at 326. Although the legal lot of single women and widows was significantly less constrained than that of a married woman, it was by no means a life free from the shackles imposed by male-ordained laws. Girls and women were eventually given some level of education and allowed to engage in professions, trade, and business, but they were in essence “trained” to enter only the profession of marriage. See Siegel, *supra* note 1, at 1121. Indeed, it is estimated that during the period between 1780 and 1835, more than 90% of American women eventually married. See Avery & Konefsky, *supra* note 21, at 340 n.97. Although even as late as 1890, less than 5% of all married women worked outside the home. See Chused, *supra* note 8, at 1363. Studies estimate that of the 2% of the population that were considered wealth holders, less than 10% of these were white women. See *id.* at 1363-64; see also *infra* notes 173-244 and accompanying text.

became a source of economic necessity and survival for many women.⁸⁵ Since the husband was recognized as the master of the household, a wife had a duty to obey and serve her husband and he could compel her obedience, subjecting her to corporal punishment if she defied his authority.⁸⁶ If she ran away he could have her forcibly returned,⁸⁷ and if the couple separated, the husband invariably gained custody of the children.⁸⁸ Ultimately, under this common law system there was a total domination of the wife by the husband.⁸⁹

B. *The Community Property System*

⁸⁵ . See OTTEN, *supra* note 8, at 43.

⁸⁶ . See Siegel, *supra* note 7, at 2123.

⁸⁷ . See WEITZMAN, *supra* note 73, at 2 n.5. In exchange for all her worldly possessions and the promise of support from her husband, a wife also surrendered control over her person. *See id.* She was subject to both physical restraint and his sexual advances — whether forced or friendly. *See id.* In fact, a woman could not bring charges against her husband “for rape or assault and battery because she could not sue in her own name and because rape was defined as forcible intercourse by a man with a ‘woman not his wife.’” *Id.* at n.5. A man’s right to chastise members of his household also extended to his children and servants. *See Siegel, supra* note 7, at 2123.

⁸⁸ . See WEITZMAN, *supra* note 73, at 2. In the event of his death, the husband could also name a person other than the mother as the guardian for their children and it was that guardian’s consent, not the mother’s, that was required should the minor child wish to marry. *See Turano, supra* note 74, at 183.

⁸⁹ . See Scott Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 77 (1979). Greene also points out several origins and justifications for the overwhelming domination of women by men. *See id.* Among the explanations were: “the husband was merely serving as legal guardian for his wife and her property.” *Id.* at n.24 (citing 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 406 (2d ed. 1968)); the wife, as part of the marriage contract, bargained away her property and independence in consideration for her husband’s protection. *See id.* (citing J. BISHOP, *LAW OF MARRIED WOMEN* 26-29 (1875)); and that “there could only be one head of household and that the husband, because of his superior physical strength, experience and business aptitude, was the natural choice.” *Id.*; *see also* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1047 (1972). Professor Johnston makes a telling remark about at least one of these theories. That is, the problem with the guardianship analogy is explaining how “every single woman, who was a fully competent legal entity the instant before her marriage, suddenly came to *require* a guardian immediately after saying her vows. . . . [T]he notion that every married woman needs a guardian—and that every husband is fit to act as his wife’s guardian—is simply absurd.” Professor Johnston footnotes this statement with the additional comment that “[g]uardianship of wives by husbands cannot be rationalized on the basis that the former are generally weaker and less powerful than the latter. If they really *need* protection against this superior strength, then it is totally illogical to designate the one to be guarded against as the guardian.” *Id.* at n.52. *See generally*, HOLCOMBE, *supra* note 69, 19-47 (outlining the hardships created and enforced by the common law on women in general and married women in particular).

At the same time that the common law property system was developing in England, a system of community property was emerging in continental Europe's civil law countries, such as France and Spain.⁹⁰ Until the thirteenth century, the property systems developing in England and on the European continent were similar in nature.⁹¹ Like the common law property system, the general antecedents of the community property system were economic in nature.⁹² As with the common law system, only males were able to inherit property and the community property system of law gave the same type of almost unlimited control to the husband over the wife and her property.⁹³ The community property system, like the common law property system, was designed to prevent the "creat[ion] [of] . . . marital property rights in inherited property and served to maintain inheritance of real property by blood line."⁹⁴ Over time, under the community property regime, women were eventually allowed to own and inherit property and ultimately to bring more property into the marriage.⁹⁵ The fact that both of the spouses were contributing property and services to the marriage resulted in a slight increase in the equality of the spouses.⁹⁶

At some point after the thirteenth century, the two systems began developing differently and while there is no consensus as to the cause, there are some interesting explanations as to why these systems diverged.⁹⁷ One possible explanation is that England lacked a strong tradition of community outside of the immediate nuclear family.⁹⁸ Other explanations include the fact that England gave jurisdiction over succession to property to the ecclesiastical courts, which followed canon law, and these courts viewed a husband's absolute control over the wife's property as appropriate.⁹⁹ In addition, there was a tendency to view community property as a development of the

⁹⁰ . See Charles Donahue, Jr., *What Causes Fundamental Legal Ideas?: Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 61 (1979).

⁹¹ . See Wenig, *supra* note 23, at 813.

⁹² . See Greene, *supra* note 89, at 75.

⁹³ . See *id.*

⁹⁴ . Gary, *supra* note 68, at 571 (citing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 239 (1989)).

⁹⁵ . See Greene, *supra* note 89, at 75.

⁹⁶ . See *id.* Although ownership rules were slightly loosened, giving women some property in their own right, management and control — even of community property, remained with the husband well into the twentieth century. See *id.* at 88-90.

⁹⁷ . See Wenig, *supra* note 23, at 815. Professor Wenig refers to this divergence as one of the "forks in the road" in the historical development between the two marital property regimes: common law and community property systems. See *id.* at 810-11.

⁹⁸ . See *id.* at 815 (citing Donahue, *supra* note 90, at 74-88).

⁹⁹ . See Greene, *supra* note 89, at 76 n.23 (citing 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 402-03 (2d ed. 1968)).

common people that was incompatible with the English view that prized the law of the king.¹⁰⁰

Regardless of the root cause or causes of the divergence, the fundamental difference between these two systems after the thirteenth century, is that under the common law system marital status does not affect the *titled* ownership of property.¹⁰¹ Whoever earns it owns it.¹⁰² In contrast, the community property regime holds that property *brought into* the marriage — or acquired by virtue of gift, bequest or inheritance — belongs separately to each spouse.¹⁰³ Any property *acquired* during the course of the marriage, regardless of whether one or both of the spouses are wage earners, becomes community property and each spouse acquires an immediate, vested present ownership interest in one half of that property.¹⁰⁴

¹⁰⁰ . See *id.*

¹⁰¹ . See Lawrence W. Waggoner, *Marital Property Rights in Transition*, in WOMEN AND THE LAW, Chapter 3A, § 3A.02 (Carol H. Lefcourt & David Frazee eds., 11th ed. 1997) [hereinafter Waggoner in WOMEN IN THE LAW]. This chapter represents the most updated version of Professor Waggoner's article that appeared in the MISSOURI LAW REVIEW, Vol. 59, 21-87. The MISSOURI LAW REVIEW article was an updated and expanded version of Professor Waggoner's Joseph Trachtman Lecture with the same title that appeared in 18 PROBATE LAW 1 (1992). Portions of this chapter are also drawn from WAGGONER, LAWRENCE ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS (1991). See *supra* note 34, for reference to the Second Edition. Professor Waggoner also drew on his articles: *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991) [hereinafter Waggoner, IOWA] and *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP., PROB. & TR. J. 683 (1992) for portions of this chapter. Professor Waggoner is one of the leading commentators in the area of wills and trusts reform. One or more of the various articles on which he draws are invariably cited by other authors in this field. As such, I will primarily be using this particular version of his comments since it is the most recently published. See Waggoner in WOMEN IN THE LAW.

¹⁰² . See Waggoner in WOMEN IN THE LAW, *supra* note 101, at § 3A.02[2].

¹⁰³ . See *id.*

¹⁰⁴ . See Greene, *supra* note 89, at 87. Because ownership is immediately vested in each spouse, there are some interesting ramifications that will be discussed more fully later in this Note. For example, and most important to the thesis of this Note, the surviving spouse can devise his or her share of the community property. See J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?* 38 CASE W. RES. L. REV. 223, 229 (1987). Because the right to inherit or take a forced share never vests prior to the death of the spouse holding title to the property, this important ability is not replicated by common law elective share statutes or in the revised version of the UPC. See *id.* at 227-35. Instead, the augmented estate approach makes an attempt to equitably divide property using either the economic partnership or support theory underlying the UPC, but this attempt is still a poor substitute for vesting the right at the time the property is acquired. See *id.* Another distinction is that a non-propertied spouse's share of the community property is protected in a community property state from attachment by creditors for debts incurred by the propertied spouse. See *id.* In a common law state, where one spouse, traditionally the wife, does not work outside the home, the title and ownership vests in the husband and can be attached by creditors. See *id.* In this type of case, one of the only protections the non-propertied wife may have is in the state's homestead

The concepts behind community property can be traced to their development on the European continent, most notably in France and Spain,¹⁰⁵ and although some of the states that adopted these property systems trace their cultural and political roots to these same countries, the adoption of these property regimes by any of the American states was not a foregone conclusion.¹⁰⁶

Louisiana is unique among both the common law and community property states because it retained, and still follows, the civil law system derived from its French and Spanish heritage.¹⁰⁷ New Mexico, with its strong Spanish heritage, used the laws of Spain and Mexico to determine its community property laws.¹⁰⁸ Of the six remaining community property states with a prior history of a civil law system, Texas, California and Arizona specifically adopted the common law and subsequently adopted, by statute, community property systems.¹⁰⁹ Nevada, Washington and Idaho had no cultural connection with community property and imported it as a deliberate legislative act.¹¹⁰ To date, Wisconsin stands alone as the only state with a

protection act. *See id.* There are, however, no guarantees even in these more “liberated” days. *See, e.g., Bankruptcy: Homestead — Tenancy by the Entirety*, MASS. LAW. WKLY., Sept. 14, 1998, at 8 (summarizing *In re Conroy*, 224 B.R. 314 (Bankr. D. Mass. 1998), holding that under the common law of tenancy by the entirety, the debtor husband has rights in their home — the right to possession, control and survivorship — that are superior to those of his wife, who has only the right of survivorship).

¹⁰⁵ . *See supra* note 90 and accompanying text.

¹⁰⁶ . *See Wenig, supra* note 23, at 819.

¹⁰⁷ . *See id.*

¹⁰⁸ . *See id.*

¹⁰⁹ . *See id.* at 819-20. At the California Constitutional Convention in 1849, during the debate over whether or not to adopt the common-law system or continue with the community property system, the following arguments were put forth in favor of a community property system: (1) the protection of legitimate interests of long time residents; (2) protection of wives and families from the idleness, misconduct and misfortune of the husband; (3) a community property system would attract women to California; (4) it was already working well; and (5) the common law system was introduced at a time when the wife was in an inferior position compared to the 1840’s and it was the common law property system that had failed to keep pace with advances made in civilization. *See Greene, supra* note 89, at n.21. Conversely, the arguments put forth in favor of converting to a common law property system were: (1) nine-tenths of the people in California had immigrated from a common law property state and keeping the community system would drastically alter the legal effects of the common law system on the property in California; (2) the community system would cause significant marital difficulties between husband and wife and be destructive of the real interests of the marriage relationship; and (3) “it was better to put the wife under the protection of the husband, as the common law system did, than to put her under the protection of the law, as the community system did because a husband was better able to care for his wife than [was] the law.” *Id.*

¹¹⁰ . *See Wenig, supra* note 23, at 820.

common law legal system and a common law property system that was then converted to a community property system.¹¹¹

The basic principle of community property — that all property acquired by spouses during their marriage, other than property acquired by gift or inheritance, is community property — remains unchanged.¹¹² However, the details regarding management of the property, as well as the types of property involved, have evolved significantly.¹¹³ Primarily in response to social changes, especially in the area of divorce, the community property system underwent sweeping reforms in the 1970's.¹¹⁴ Beginning with Texas in 1967 and ending with Louisiana in 1980, the statutes governing the management and control of community property in these states were modified to provide for more equality between the spouses.¹¹⁵ None of the systems that the nine community property jurisdictions adopted are exactly alike in their definitions of marital property or the rights each spouse may have in the property.¹¹⁶ Differences also exist within each system that affect what happens to the property during marriage, divorce, and determinations of intestacy and inheritance.¹¹⁷

¹¹¹ . See *id.* at 831; see *infra* notes 335-81 and accompanying text for a detailed discussion of Wisconsin's transition. The system that Wisconsin adopted in 1986 is also unique in that it is based on the Uniform Marital Property Act (UMPA).

¹¹² . See DEFUNIAK, *supra* note 68, at 57.

¹¹³ . See Greene, *supra* note 89, at 88-90.

¹¹⁴ . See Ronald R. Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95, 105 (1983).

¹¹⁵ . See Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769, 773 (1990). Until these changes were adopted, all of the community property states provided for the husband's legal right to manage the community property which seriously undermined the legal equality that women enjoyed in these states. See Greene, *supra* note 89, at 88-97. Professor Greene also includes a detailed description of, and cites to, the statutes passed in the community property states during this period. See *generally* Judith T. Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U. L. REV. 211, 214-19 (1973) (discussing the history of community property in the United States and its historical antecedents).

¹¹⁶ . See *generally* DEFUNIAK, *supra* note 68, at §§ 93-186; W.S. McCLANAHAN, *COMMUNITY PROPERTY LAW IN THE UNITED STATES* (1982); Judith R. Seligman et al., *A Guide to Community Property*, in 3 FAMILY LAW AND PRACTICE § 38A (Arnold H. Rutkin ed., 1995).

¹¹⁷ . See Gary, *supra* note 68, at 570. The fact that differences within the overall system called community property exist should be no more surprising than the fact that differences exist among the common law property systems. However, the generalizations that can be made about community property include the basic premise that "all property earned by either spouse during a marriage is marital property and is owned in equal shares by each spouse." *Id.* Property brought into the marriage is considered separate property but *income* earned on that separate property, without additional support or contribution by the non-titled spouse, is treated in some states using the Spanish rule as community property (Idaho, Louisiana, Texas, and Puerto Rico) and in the other states using the California rule, it is treated as separate property (Arizona, California, Nevada, New Mexico, and Washington). See *id.* at nn.13 & 14.

Although differing in details from state to state, there is sufficient similarity in the treatment of marital property that can be summarized.¹¹⁸ Essentially, a married couple is, absent an agreement to the contrary, presumed to hold all their property as community property.¹¹⁹ Each is entitled to dispose of one-half of the community property at death and there are restrictions governing the disposition of community property assets during life, absent the other spouse's consent.¹²⁰ Since there is a presumption that property is community property, how title to the property is held is not determinative of whether the property is community or individual.¹²¹ All earned income of both spouses, including salaries, bonuses, wages and fees, are community property and all of the income generated from such property becomes community property.¹²² Further, any property acquired using community

¹¹⁸ . See generally W.S. McCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES (1982 & Supp. 1989); W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES (2d ed. 1982); and DEFUNIAK, *supra* note 68 (discussing the historical and current differences in treatment).

¹¹⁹ . See MALCOLM A. MOORE, MALCOLM MOORE ON COMMUNITY PROPERTY 4 (MCLE 1993).

¹²⁰ . See *id.* at 3-4. This ability is particularly important in two different respects. First, it is one of the primary difficulties with the UPC scheme, regardless of whether the partnership or support theory is asserted, since the ultimate disposition of "marital property" becomes a game of chance. If the propertied spouse dies first, the non-propertied spouse has access to at least some of the assets, depending on how the augmented estate is ultimately classified and how long the marriage lasted. However, if the non-propertied spouse dies first, there is no separate right to dispose of one-half of the marital property assets. See *supra* note 103 and accompanying text. Second, there is a significant federal tax difference in the treatment of community and separate property on the death of a spouse. See John G. Brant, *Colorado: Now a Community Property State?*, 25 COLO. LAW. 55, 55 (1996). In a community property state all of the community property receives a stepped-up basis. See *id.* Since the title to property is not presumptively determinative of ownership, this tax benefit can significantly effect property held solely by the surviving spouse. See *id.* In separate property states only one-half of any joint tenancy property is eligible for any stepped-up basis for tax purposes. See *id.* This assumes that at least some of the marital property is jointly held and, obviously, any property titled in the surviving spouse's name would not receive any stepped-up basis benefit. See *id.*

¹²¹ . See MOORE, *supra* note 119, at 5. Generally, titled property only refers to real property and vehicles. There is no title system for personal property (i.e., furniture, clothing, etc.). Although there are exceptions, community property states do not generally recognize property held as tenants by the entirety or as joint tenants with the rights of survivorship since it would interfere with the ability of each spouse to dispose of his or her one-half interest upon death. See *id.* at 5-6.

¹²² . See David W. Reinecke, et al., *Community Property Issues for Noncommunity Property Practitioners*, SC75 A.L.I.-A.B.A. 1251, 1258 (1998).

property assets is then considered community property.¹²³ Two other commonly held assets, life insurance and employee benefits, are specially characterized.¹²⁴ Life insurance ownership is generally determined by the source of payment for the premium in the year the insured died.¹²⁵ In all community property states, employee benefits, usually in the form of retirement accounts, are considered part separate and part community in direct proportion to the amount contributed before marriage and the amount accumulated during the marriage.¹²⁶

C. The Colonial Era

Because the English constituted the principal group of settlers in America, they brought with them the common law system of property, including those affecting marital property rights, to their new habitat.¹²⁷ However, the founding fathers, in carrying out the revolution and “casting off the shackles of a hereditary monarchy,”¹²⁸ chose a different philosophical approach to the laws of inheritance and property than they left behind in England.¹²⁹ Following Thomas Jefferson’s reasoning, America adopted the view that inheritance and property rights were not a natural right, but were a creation of a civil society, subject to modification and change at society’s convenience.¹³⁰ “The Jeffersonians argued that any rights to transmit or to

¹²³ . *See id.* This is true even if separate property was used to fund a purchase. For example, one spouse owns a piece of property which is sold in order to finance the purchase of another piece of property, and to which are added some relatively smaller amounts of savings accumulated by both spouses for the purchase of the new piece of property. Absent an express agreement to the contrary or unless the non-community property can be traced, the separate property becomes characterized as community property. *See id.* at 1259-60.

¹²⁴ . *See id.*

¹²⁵ . *See id.*

¹²⁶ . *See id.* The distribution of retirement assets is particularly important for the spouse who forgoes marketplace employment, whether for short or long periods of time, and the independent acquisition of retirement benefits in his or her own name. In a very real sense, it protects the spouse who makes the choice to engage in either full-time childcare or who takes a part-time or self-employment position and trades off salary and benefits for the advantages of a more flexible schedule.

¹²⁷ . *See Johnston, supra* note 89, at 1058; *see also Chused, supra* note 8, at 1389-97.

¹²⁸ . Ronald Chester, *Inheritance in American Legal Thought*, in *INHERITANCE AND WEALTH IN AMERICA* 23, 24 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

¹²⁹ . *See id.*

¹³⁰ . *See id.*; *see also* John V. Orth, *After the Revolution: “Reform” of the Law of Inheritance*, 10 *LAW & HIST. REV.* 33 (1992). Apparently, “Thomas Jefferson ranked reform of the law of inheritance even above the statute on religious freedom in his list of the ‘most remarkable alterations’ needed in the common law.” *Id.* at 33 (citing THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 137 (W. Peden ed., 1954) (1787)). But Jefferson’s idea of reforming the law of inheritance was focused on such rules as primogeniture (the law of descent in which the eldest son takes all of the father’s real property) and fee tail (a conveyance created by a deed or will to a person “and the heirs of his body”). A

receive property at an owner's death were 'civil' not 'natural rights': rights created by our society for its own convenience."¹³¹

The Jeffersonians believed "that every human possessed natural reason and when properly cultivated, this capability would manifest itself in logical, common sense decisions."¹³² In contrast to the Jeffersonians was a group of "rational jurists" who were less than confident about the power or presence of reason in the common man.¹³³ Among this group was James Kent, one of the preeminent American adherents to the philosophy embodied by Blackstone¹³⁴ who had given us the infamous concept, that "in law husband and wife are one person, and the husband is that person."¹³⁵ Kent believed that the right to property ownership was a natural right that preceded the Constitution and felt that right was threatened by the power inherent in a system of popular legislation.¹³⁶ Kent deviated somewhat from his adherence to Blackstone's philosophy when it came to the notion that property should revert back to society for the common good upon the death

fee tail establishes a fixed line of inheritable succession and cuts off the regular succession of heirs at law. A statement such as this only makes the lack of regard for the rights of women during the revolutionary era, when the possibility to truly recreate a social order based on real egalitarian principles, even more disconcerting.¹³¹ . Chester, *supra* note 128, at 4. In this essay, Professor Chester describes the British roots to the American view of inheritance law. He discusses the term "positivistic" to refer to those early Americans who believed that law originates in the sovereign and not in the individual. *See id.* at 25 & n.1. Consequently, there are no natural rights, only those decreed by the government. Within this group of positivistic adherents are Blackstone, whose work was grounded in the English philosophers John Locke and Thomas Hobbes. Chester identifies the views of the Jeffersonians as heirs of the British utilitarians Jeremy Bentham and John Stuart Mill. *See id.* at 25; *see also* RONALD CHESTER, INHERITANCE, WEALTH AND SOCIETY 11-33 (1982) (discussing these and other philosophers who influenced our concept of inheritance in western European thought). It should be noted that, with the exception of Mill, none of these philosophers and legal scholars were particularly supportive of women's rights, especially property and inheritance rights, and those like Blackstone were fairly hostile toward anything that would threaten or undermine the existing patriarchal system. *See* Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth Century America*, FEMINIST STUD. 5, no. 2 (Summer 1979), *reprinted in* GENDER AND AMERICAN LAW: THE IMPACT OF THE LAW ON THE LIVES OF WOMEN 46-47 (Karen J. Maschke ed., 1997). Mill, on the other hand, was an early, strong, and vocal supporter of women's political and economic equality and specifically championed both property and voting rights. *See generally* ESSAYS ON EQUALITY, LAW AND EDUCATION (John M. Robson ed., 1984). As an early feminist, he became an icon for the women's rights movement in the nineteenth century in America.

¹³² . Chester, *supra* note 128, at 25.

¹³³ . *See id.*

¹³⁴ . *See id.* at 26.

¹³⁵ . *See* HOLCOMBE, *supra* note 69, at 18.

¹³⁶ . *See* Chester, *supra* note 128, at 26.

of the occupant.¹³⁷ Kent believed that the “‘voice of nature’ dictated that the property owner’s children ‘by their association and labor’ in relation to the property should have better title to it than ‘the passing stranger.’”¹³⁸ Although he may have championed the rights of children of property owners, Kent continued to adhere to the Blackstonian philosophy toward marriage and women and “[i]dealiz[ed] the institution of marriage . . . elevating it to heights far beyond Blackstone’s simple civil contract.”¹³⁹ Kent viewed the husband as “the natural guardian of the wife [and] reasoned [that] ‘the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty.’”¹⁴⁰

If this then was the primary philosophical heritage that the new republic inherited, then it is not surprising that, despite their egalitarian, anti-patriarchal rhetoric, the founding fathers did not extend substantial new rights to married women.¹⁴¹ Massachusetts, the seat of the revolution against the oppressive monarchical system, adopted the common law doctrines governing relations between husbands and wives — coverture, dower, and curtesy — virtually intact.¹⁴² Despite the establishment of a “new” republic, the “old” patrimony was deeply entrenched and readily adopted by these same founding fathers.¹⁴³ Although they claimed to be acting in the name of all Americans, only propertied white men had any

¹³⁷ . See *id.*

¹³⁸ . *Id.*

¹³⁹ . Basch, *supra* note 131, at 49.

¹⁴⁰ . *Id.* (citing 2 KENT, COMMENTARIES *157-58). Blackstone is also credited as the origin of the phrase “rule of thumb” since a husband was allowed to beat his wife but could not use a stick bigger than his thumb. See HOLCOMBE, *supra* note 69, at 30.

As master of the household, a husband could command his wife’s obedience, and subject her to corporal punishment or ‘chastisement’ if she defied his authority. . . . Blackstone explained that a husband could ‘give his wife moderate correction, [f]or, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer.

Reva B. Siegel, “*The Rule Of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123 (1996) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *444); see also Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband’s Stick*, 44 J. LEGAL EDUC. 341, 353 (1994).

¹⁴¹ . See Linda K. Kerber, *The Paradox of Women’s Citizenship in the Early Republic: The Case of Martin v. Massachusetts, 1805*, 97 AM. HIST. REV. 349, 351 (1992); see also Peter Dobkin Hall & George E. Marcus, *Why Should Men Leave Great Fortunes to Their Children? Dynasty and Inheritance in America*, in INHERITANCE AND WEALTH IN AMERICA 139 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1997) (analyzing the shifts in attitudes and practices of wealth transmission in America, starting with the “Boston Brahmins,” a term coined by Oliver Wendell Holmes).

¹⁴² . See Kerber, *supra* note 141, at 351-52. Other states besides Massachusetts took a similar stance toward the property rights of women. Essentially, all states in the new republic adopted a version of the common law tradition in order to govern the relationship between men and women and women and society. See *id.* at 353; see also Johnston, *supra* note 89, at 1058 n.103.

¹⁴³ . See Kerber, *supra* note 141, at 349-50.

actual voice in the establishment of the new republic.¹⁴⁴ Citizenship for property-less white men, blacks, Native Americans, and women — regardless of their race or class — was never seriously contemplated, except perhaps to dismiss the idea as untenable.¹⁴⁵

A famous series of letters between one of the preeminent founding fathers, John Adams, and his wife, Abigail, encapsulates the interests of women to participate more fully in their newly established country as well as the attitude of the new patriarchs, who were incredulous at the suggestion.¹⁴⁶ On March 31, 1776, Abigail wrote to her husband in Philadelphia — busy with the affairs of state — from her home in Braintree, Massachusetts — managing the family's affairs — that she wished him to:

Remember the Ladies, and be more generous and favourable [sic] to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticular [sic] care and attention is not paid to the Laidies [sic] we are determined to foment a Rebelion [sic], and will not hold ourselves bound by any Laws in which we have no voice, or Representation.

That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute . . . [w]hy then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity. Men of Sense of all Ages abhor those customs which treat us only as vassals of your Sex.¹⁴⁷

¹⁴⁴ . See *id.* at 350.

¹⁴⁵ . See *id.* Although these groups were excluded, property-less white men, however, at least had the hope that by virtue of their own hard work and resourcefulness they too could be considered a full-fledged voting member of the Republic. See *id.* at 349-53. Kerber also discusses a different perception of citizenship that relates to the lack of political dialog, or virtual silence, regarding women's participation in the public arena during the post-revolutionary era. See *id.* at 354. As an historian, she finds that the "silence itself is a social construction, related to an ability to verbalize and a control of access to the forums of discussion." *Id.* If the definition of citizenship is limited to women's voting rights and ability to hold public office, then she finds a pervasive silence in the early republic. See *id.* But, if the definition is broadened to include claims to a wide range of rights and political behavior, including allegiance, support and analysis, then the voice of women is more clearly heard. See *id.* With an even more inclusive definition, and an understanding that citizenship as a concept undergoes a continual reinvention, she sees an ideology that, in fact, took great pains to silence and exclude women and strongly reflected the gender dynamics at play during the post-revolutionary era. See *id.* at 354-55. This approach taken by Kerber is very much in keeping with the postmodern feminist doctrine approach to analyzing legal discourse in a way that focuses on the interpretation of the text of an event rather than the event itself. See generally MARY JOE FRUG, POSTMODERN LEGAL FEMINISM (1992).

¹⁴⁶ . See OTTEN, *supra* note 8, at 37-42.

¹⁴⁷ . *Id.* at 38.

To which her husband, having recently fomented his own revolution to fight against the implementation and execution of laws in which he had no voice or representation, replied:

As to your extraordinary Code of Laws, I cannot but laugh. We have been told that our Struggle has loosened the bands of Government every where [sic]. That Children and Apprentices were disobedient — that schools and Colledges [sic] were grown turbulent — that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your letter was the first Intimation that another Tribe more numerous and powerfull [sic] than all the rest were grown discontented. — This is rather too coarse a Compliment but you are so saucy, I wont blot it out.

Depend upon it, We know better than to repeal our Masculine systems. Altho [sic] they are in full Force . . . rather than give up this, which would completely subject Us to the Despotism of the Peticoat [sic], I hope General Washington, and all our brave Heroes would fight. I am sure every good Politician would plot, as long as he would against Despotism, Empire, Monarchy, Aristocracy, Oligarchy, or Ochlocracy.¹⁴⁸

Overall, the changes that occurred during the revolution served to actually reduce women's inheritances.¹⁴⁹ These changes included the erosion of the limited protection afforded by dower on inherited property, the change in a widow's claim to personal property from an outright ownership to a life estate, and an increase in bequeathing women certain forms of property which then passed immediately to the husband but without any dower protection.¹⁵⁰ In fact, the only substantive change that worked to increase women's inheritance was the extension of some inheritance rights to children born outside of wedlock.¹⁵¹

¹⁴⁸ . *Id.* at 39. Ochlocracy is a form of government in which the multitude or common people rule; otherwise defined as "mob rule." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1238 (2d ed. 1968). In a subsequent letter dated May 26, 1776, Adams wrote to James Sullivan, a prominent Boston lawyer who (among other Colonial roles served in the Provincial Congress and as Attorney General for Massachusetts) was a strong supporter of the equality of "every person out of Wardship" — including women — to participate in the elective process. Kerber, *supra* note 141, at 367-68. Of Sullivan, Adams raised the query: "Whence arises the right of the men to govern women, without their consent?" and, in response to his own question, stated that "it [wa]s dangerous to open so fruitfull a source of controversy and altercation, as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise. Women will demand a vote" *Id.*; see also OTTEN, *supra* note 8, at 40-42. This, it seems, is not so much an answer but an excuse to avoid disturbing the status quo.

¹⁴⁹ . See Joan R. Gundersen, *Women and Inheritance in America: Virginia and New York as a Case Study, 1700-1860*, in INHERITANCE AND WEALTH IN AMERICA 113 (Robert K. Miller, Jr. & Stephen J. McNamee, eds., 1998).

¹⁵⁰ . See *id.* at 113-14. The form of property left to women, both daughters and wives, tended to be in the form of slaves, which were actually considered personal property not real property and therefore dower did not attach. The emancipation of slaves paradoxically created individuals who had the legal right to inherit while simultaneously reducing a woman's inheritable share of property. See *id.*

¹⁵¹ . See *id.* Under common law, illegitimate children could inherit from neither the father nor the mother. See *id.* at 106-07.

D. Equity

Prior to the passage of Married Women's Property Acts,¹⁵² the development of equity in America was an important component of women's ability, albeit limited, to own and control property.¹⁵³ The principal concepts of the law of equity developed in England during the sixteenth century, partly in response to what was considered the harsh and unyielding rules of the common law regarding ownership of property and the state of married women.¹⁵⁴ An equitable separate estate was the "one limited escape route from common law property rules [and by which a] male property owner could convey assets to a married woman."¹⁵⁵ To accomplish this, a system of alternative private trust arrangements developed which initially was neither recognized nor enforced by common law courts.¹⁵⁶ By the

¹⁵² . See *infra* notes 173-244 and accompanying text.

¹⁵³ . See Johnston, *supra* note 89, at 1057-61; Chused, *supra* note 8, at 1368-72; see also William J. Curran, *The Struggle for Equity Jurisdiction in Massachusetts*, 31 B.U. L. REV. 269 (1951) (development of equity courts in Massachusetts).

¹⁵⁴ . See HOLCOMBE, *supra* note 69, at 37. The roots of equity go much further back than the sixteenth century and grew out of the existence of the Court of Chancery, also referred to as the Court of Equity. See DUKEMINIER, *supra* note 71, at 274-75. The common law courts could adjudicate title to the land and legal rights but the Chancellor, sitting in the equity court, could act as the crown's conscience and punish those who insisted upon enforcing their legal rights. See *id.* The need to punish those who insisted upon enforcing their legal rights often arose in the practice of "uses" which enabled property holders to avoid paying feudal dues to the crown and make provisions for his widow and children. See HOLCOMBE, *supra* note 69, at 38. Property would be legally conveyed to a friend as trustee to hold for the benefit of the widow and children. The trustee, who had legally enforceable title, would renege on the "gentleman's agreement" and ignore his trustee obligations. See *id.* The common-law courts, which were limited to recognizing the legal owner, could offer no relief and claimants then turned to the Chancery Court, who could offer justice by refusing to enforce the rights of the legal owner. See *id.* Eventually the Statute of Uses (1535) barred courts of equity from enforcing these "uses" primarily because it interfered with clear title to the land. See *id.*

¹⁵⁵ . Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 GEO. L.J. 2213, 2215 (1994) [hereinafter Chused, *Comment*].

¹⁵⁶ . See HOLCOMBE, *supra* note 69, at 37. In the fourteenth century one custom developed whereby the bride's father paid a "portion" of his estate to the husband. See Fellows, *supra* note 7, at 147. Another device to avoid dower, which was perceived to be a restraint on the alienability of the land, was the custom of "jointure." See *id.* at 148. For jointure, the groom's father would transfer land to a third party to hold for the joint lives of the couple which then passed to the couple's eldest son in entail. See *id.* In return for signing away her dower rights, the bride was promised the right to maintenance — assuming she survived her husband. See *id.* Eventually, fathers also became concerned about

seventeenth century, the body of equitable doctrines and procedures relating to trust property had developed and the Court of Chancery allowed the creation of a special category of separate property or separate estates specifically for married women.¹⁵⁷ The rules that developed over time in chancery courts allowed the use of trust instruments to give married women access to — but not ownership of — property that was usually devised or gifted to them by their fathers.¹⁵⁸ Property owners who made marriage settlements on their daughters also wished to protect these settlements from the common law rights of the new husbands, and to ensure that if no children, especially male children, were born to their daughters that the property, either real or personal, would return to their families.¹⁵⁹ Thus, while the common law considered the husband the guardian of the wife and legal possessor of her property, equity viewed the husband as the person from whom the wife and her property needed protection — the enemy.¹⁶⁰

Although there was a substantial body of law that had developed in England governing equity and a married woman's right to property, its transplantation to and adoption by the individual colonies was inconsistent.¹⁶¹ It was not until well into the nineteenth century that most of the states and territories finally established chancery courts.¹⁶² While the rules varied from

the preservation of their holdings for future male generations and preventing their sons from alienating the land. These constraints eventually gave rise to the infamous Rule Against Perpetuities. *See id.* at 147-48. “Notably, by allowing the use (or trust) to continue, the court assured that the wife of the son of the next generation could claim no dower rights.” *Id.* Viewed as a social commentary,

[d]ower, jointure, portions — the property rights associated with married women or women about to be married — had one common feature. They were all designed to provide maintenance for women during their widowhood, without any right to the ownership of capital It was not her due that she received maintenance, rather it was the family's generosity for which she was trained to be grateful.

Fellows, *supra* note 7, at 149-50.

¹⁵⁷ . *See* HOLCOMBE, *supra* note 69, at 39. While these developments allowed married women access to property outside of the common law, they still did not own the property. A trustee, almost invariably a male since women, at least married women, were also precluded from acting as a trustee, would control the property on her behalf. *See* Chused, *supra* note 8, at 1409-12. In the United States, the need for a trustee was still considered a necessary ingredient until 1860 in the North and 1870 in the South after the Civil War. *See id.* at 1410. Massachusetts did not allow married women to act in a fiduciary capacity until 1837. *See* MASS. GEN. LAWS ch. 209 § 5.

¹⁵⁸ . *See* Siegel: *Modernization*, *supra* note 12, at 2135.

¹⁵⁹ . *See* HOLCOMBE, *supra* note 69, at 38.

¹⁶⁰ . *See id.* at 37. Originally, the court required a showing of good reason, such as separation from the husband or that he was a spendthrift, for establishing the trust, but eventually trusts could be established without inquiry and any kind of property could be used to establish the trust. *See id.* at 39. However, the need for separate property settlements in equity only existed during her marriage in order to protect the property — not the wife — from the common law rights of the husband. *See id.*

¹⁶¹ . *See* Chused, *supra* note 8, at 1368.

¹⁶² . *See id.* at 1368-69. Massachusetts was particularly resistant to the concept of equity courts viewing them as “inextricably bound to monarchy and tyranny” and unsuitable for a democratic state. Curran, *supra* note 153, at 272. It

jurisdiction to jurisdiction, there were some general remedies that could be accessed through the equity courts.¹⁶³ Married women could obtain decrees from equity courts to enforce pre-nuptial and post-nuptial agreements.¹⁶⁴ With such a contract in her possession, “the wife could keep control of her own property, manage it, convey it and dispose of it by will.”¹⁶⁵ Equity also prevented the husband from evicting her from her real property even though common law gave him control of the property.¹⁶⁶ When a separate equitable estate was created for the married woman, the donor would place the property in a trust for her “sole and separate use” and she was then entitled to the income, rents and profits from the property.¹⁶⁷ The trust instrument creating the separate estate would determine whether she could dispose of the property during her lifetime or by will, just like a single woman.¹⁶⁸ The fact that a separate trustee — usually a man since women were legally prevented from acting as a trustee or executrix even for a family member — managed the estate prevented a husband in debt from completely disposing of his wife’s property over which he otherwise had complete control under common law.¹⁶⁹ Although the new statutes could have dispensed with the need for a trustee and allowed a married woman to hold property outright, these statutes only prohibited the husband from disposing of the separate estate and did not change the management authority that the husband maintained under common law principles.¹⁷⁰ In addition, although the husband had legal title to all his wife’s personal property, if he needed the assistance of a court of equity to take possession of it, the court would first ensure that he had made a provision for his wife’s

was not until 1857 that Massachusetts finally gave its courts “full equity jurisdiction according to the usage and practice of chancery in all cases where there is not a plain, adequate and complete remedy at law.” *Id.* at 287. Without access to chancery courts, those who sought equitable relief were forced to submit separate bills to the legislature petitioning for specific relief. *See Chused, supra* note 8, at 1369-70 nn.44-50.

¹⁶³ . *See* Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983, 991-92 (1992).

¹⁶⁴ . *See id.* at 991.

¹⁶⁵ . *Id.*

¹⁶⁶ . *See id.*

¹⁶⁷ . *See id.* It should also be noted that even when recourse to equity courts was available, access was really limited to the rich and well-educated, those who not only had money or property to protect but the wherewithal to master the system. *See Johnston, supra* note 89, at 1060.

¹⁶⁸ . *See* Turano, *supra* note 163, at 991.

¹⁶⁹ . *See* Chused, *supra* note 8, at 1411. In Massachusetts, the statute allowing married women to act in these capacities was not enacted until 1837. *See* MASS. GEN. LAWS ch. 209, § 5 (1837).

¹⁷⁰ . *See* Chused, *supra* note 8, at 1411.

support — out of her own property — before he would be allowed access to the property.¹⁷¹

These equity provisions, although an improvement over the rigidity of the common law, were nonetheless inherently inadequate and untenable. Women continued to attempt to assert their rights and the law continued to evolve.¹⁷²

III. MARRIED WOMEN'S PROPERTY ACTS, EARNINGS STATUTES AND NINETEENTH CENTURY FEMINISM

At the beginning of the nineteenth century in America, any real property owned by a married woman was still “subject to the management and control of her husband.”¹⁷³ In addition, any “[p]ersonal property of a wife became the property of her husband as soon as he reduced it to possession.”¹⁷⁴ For the most part, whatever changes in the various roles filled by “most early nineteenth-century married women involved increased family responsibilities, not greater participation in the larger commercial and political world.”¹⁷⁵ It was not until the mid-nineteenth century that any significant developments began to occur that would change the status of women in the eyes of the law.¹⁷⁶ The changes that did occur were enacted on a piecemeal basis and did not necessarily improve women's condition or rectify the deeply engrained discrimination existing toward women in general and married women in particular.¹⁷⁷

Passage of married women's property acts in the common law property states began in Mississippi in 1839¹⁷⁸ and occurred in three “waves,” each driven by a different reason.¹⁷⁹ The first wave of statutes, passed during the

¹⁷¹ . See Turano, *supra* note 163, at 991-92. The need to access the wife's property was often times due to the hot pursuit of creditors who were looking for satisfaction on the husband's debts. See Chused, *supra* note 8, at 1409. Following the economic panic of 1837, states (and husbands) had significant impetus to finally enact substantive legislation protecting a wife's property from her husband's debts from both creditors and bankruptcy courts. See *id.* at 1400-02.

¹⁷² . See generally Gundersen, *supra* note 149 (providing a detailed account of the treatment of married women in Virginia and New York as well as a more detailed description of life in those colonies); see also Chused, *supra* note 8 (providing a detailed analysis of his study of wills and trust deeds in Dukes County, Massachusetts and Baltimore City and County, Maryland).

¹⁷³ . Chused, *supra* note 8, at 1361.

¹⁷⁴ . *Id.*

¹⁷⁵ . *Id.* at 1360.

¹⁷⁶ . See *id.* at 1398.

¹⁷⁷ . See Johnston, *supra* note 89, at 1059. The reluctance of equity courts, as well as the common law, to allow married women to control their own property is an indication of the continuing perception of the role of the wife as submissive and subservient to the husband. See *id.* at 1060. The chancellors' interest was not to “vindicate the right of married women to power and independence” but to maintain the status quo and respond to the interests of “dissolute husband[s] and . . . wealthy father[s] . . .” *Id.*; see also Williams, *supra* note 6, at 389.

¹⁷⁸ . See Chused, *supra* note 8, at 1398.

¹⁷⁹ . See *id.*

1840s, was primarily motivated by the depression which followed the Panic of 1837 and dealt with the need to free married women's estates from the debts of their husbands.¹⁸⁰ Although historically viewed as improving women's access to property, the acts "were designed to protect family property from husbands' creditors, not to achieve gender equality."¹⁸¹ These statutes left the traditional marital estate and coverture rules essentially untouched.¹⁸² In fact, the statutes did nothing to alter the common law right of the husband to manage and control the property. Instead, they were met with judicial hostility and narrowly construed.¹⁸³

The second wave of legislation, beginning in the 1840s and ending after the Civil War,¹⁸⁴ dealt with the ability of married women to hold separate estates.¹⁸⁵ The statutes enacted during this period were, in some instances, an attempt to eradicate the inconsistencies that had arisen between common law and equity.¹⁸⁶

The acts in many jurisdictions entitled the wife to a legal separate estate which included generally all property, real or personal, owned by the wife at the time of the marriage, all property acquired during the marriage by gift, devise or descent, the mutations of property previously part of her separate estate, income, profits, and increases from her separate estate and her earnings. The acts authorized the wife to hold her separate estate apart from her husband. She had the power of control and possession of her separate estate, including the power of alienation. The wife also had full testamentary control over her separate estate.¹⁸⁷

While the creation of these legally recognized property rights was an important step in undermining the common law fiction of the unity of the husband and wife in the person of the husband, it was, nonetheless, a small and uneven step.¹⁸⁸ It was a small step because the common law doctrine of male dominance continued unchecked, except where specific legislation was enacted to curtail it.¹⁸⁹ And it was an uneven step because the legal changes ignored the reality that the wife had little real opportunity to acquire property by which she might exercise her rights under these new, albeit limited, statutes.¹⁹⁰

¹⁸⁰ . *See id.* at 1398-1400.

¹⁸¹ . Williams, *supra* note 6, at 389.

¹⁸² . *See Chused, supra* note 8, at 1398.

¹⁸³ . *See id.* at 1400 n.211, 1403 n.235.

¹⁸⁴ . *See id.* at 1398.

¹⁸⁵ . *See id.* and 1409-12.

¹⁸⁶ . *See Turano, supra* note 163, at 994; *see also* Greene, *supra* note 89, at

79.

¹⁸⁷ . Greene, *supra* note 89, at 79 n.43.

¹⁸⁸ . *See id.* at 80.

¹⁸⁹ . *See id.*

¹⁹⁰ . *See id.*

The third and final wave of statutory reform, designed to protect women's earnings from coverture, began with Massachusetts in 1855¹⁹¹ Unfortunately and tellingly, this wave of reform was not completed until Georgia finally allowed wives to "own" their own wages in 1943.¹⁹² These reforms were closely tied to and driven by the antebellum feminist movement of the nineteenth century.¹⁹³ Although the nineteenth century feminist movement is probably best known with regard to the movements for emancipation and suffrage rights, the movement also articulated a call for joint marital property rights that was radical, insightful and prescient.¹⁹⁴

Under the common law, a wife was not entitled to own any salary, wages, or compensation that she earned or to control any of the income or property that came into the marriage.¹⁹⁵ In addition to having her wages legally expropriated,¹⁹⁶ a wife under the law was "obligated to perform household services, for which her only quid pro quo is her husband's duty of support."¹⁹⁷ The movement to emancipate women from these household

¹⁹¹ . See Chused, *supra* note 8, at 1398.

¹⁹² . See Williams, *supra* note 6, at 389. Georgia, it seems, is also the only common law state without an elective share statute, instead providing a "year's support" to the surviving spouse. See WAGGONER, ET AL., *supra* note 34, at 526 n.11. See generally Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447 (1976) (discussing why elective-share statutes are generally unnecessary); Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427 (1985) (arguing that elective-share statutes are necessary).

¹⁹³ . See Siegel, *supra* note 1, at 1075; see also Siegel, *Modernization*, *supra* note 12. Professor Siegel's two papers on the earnings statutes are the first in-depth analyses of the connections between the earnings statutes, suffrage claims, family law and nineteenth century feminist theories about property. See Chused, *Comment*, *supra* note 155, at 2214.

¹⁹⁴ . See Siegel, *supra* note 1, at 1078. I had come across these articles fairly late in my research for this Note and was both delighted and shocked. Delighted because Professor Siegel's description of the women's movement's goal of joint property rights paralleled what I had already decided on for my thesis, but from the perspective at the end of the twentieth century. Shocked because the movement's arguments and goals still sit dormant and unrealized more than 150 years later. Professor Siegel points out that during the nineteenth century the women's rights movement was actually called the "woman's rights movement." *Id.* at 1075 n.2. I will follow her lead. Professor Siegel also notes that, to her knowledge, the only historian to date to discuss the joint property concept is William Leach in WILLIAM LEACH, *TRUE LOVE AND PERFECT UNION: THE FEMINIST REFORM OF SEX AND SOCIETY* (1980). See Siegel, *supra* note 1, at 1077 n.6.

¹⁹⁵ . See Turano, *supra* note 163, at 989. As a typical example of this view of a woman's right to her own earnings as taken by a court, Turano cites *Kleinert v. Hutchinson*, 121 A. 742 (N.J. 1923) in which the court held that it was the husband who was entitled to recover the wife's earnings from the estate of an elderly neighbor even though it was only the wife who did all of the work which included the "cooking, laundry, and mending, cleaning his house, mowing his lawn, and carrying his coal and ashes . . ." *Id.* at n.47.

¹⁹⁶ . See Siegel, *Modernization*, *supra* note 12, at 2143.

¹⁹⁷ . Johnston, *supra* note 89, at 1071. This concept was rooted in and strictly enforced under the common law. The statutory codifications that finally allowed women to keep some separate property, still did nothing to relieve the rigid judicial

services manifested itself in relatively strong lobbying and petitioning campaigns that precipitated the enactment of earnings statutes that were, in fact, successful at achieving some modifications to the debilitating manifestations of marital status laws.¹⁹⁸ Although the reforms achieved were not as far-reaching as originally sought, “early feminists protested the material and dignitary injuries inflicted on married women by the common law, and legislatures responded to feminist demands for gender equality, . . . [and] some of the more hierarchical features of the marriage relation” were eventually modified.¹⁹⁹

The philosophical cornerstone of the woman’s rights agenda was that married women were entitled to joint rights in marital property by reason of the labor that they contributed to the family economy, and by extension, to the general economy.²⁰⁰ These feminists also recognized that, within the social and economic reality of the times and regardless of the achievements to date, the earnings statutes did not emancipate the most common forms of work done by wives — that is, work done in and around the home — and consequently, this most significant base of economic activity was left subject to the doctrine of marital service.²⁰¹ In fact, to understand the importance of the movement for joint property rights, it is important to understand the greater social and economic environments within which women lived, worked, married, and died.

The Revolutionary Era, dominated by an economy grounded in subsistence farming, had given way to a growing market economy and manufacturing as a base for commercial productivity and was rapidly growing, especially throughout the Northeastern and Mid-Atlantic states.²⁰² “[B]y midcentury, on and off the farm, it seems likely that the proportion of productively engaged Americans employed by others — about one-third in 1820—had increased to about one-half. In the Eastern industrializing states

enforcement of a wife’s duty and husband’s right.

In the main the courts have jealously guarded the right of the husband to the wife’s services in the household. Even in jurisdictions in which the spouses may freely contract inter se, the wife cannot contract for services to which the husband is entitled as implied in the marital relation Whether the wife may recover from third parties for services performed in the household also presents a distinct problem. There is a considerable authority to the effect that even under modern statutes she cannot do so in the absence of a renunciation on the part of the husband.

Id. at 1070-71 (quoting 3 C. VERNIER, AMERICAN FAMILY LAWS § 173, at 195).

¹⁹⁸ . See Siegel, *Modernization*, *supra* note 12, at 2137.

¹⁹⁹ . *Id.* at 2137-38.

²⁰⁰ . See *id.* at 2138.

²⁰¹ . See Siegel, *supra* note 1, at 1084.

²⁰² . See *id.* at 1086. These were also the areas where woman’s rights conventions first appeared in the late 1840s and early 1850s and the political culture of the Northeast was critical in the development of the feminist movement. See *id.*

(Massachusetts, Pennsylvania, New York) the proportion was probably closer to three-fourths.”²⁰³ As growing numbers of men began to work outside of the house and moved into an industrial setting for cash wages, women’s work became increasingly invisible and indistinguishable from the family setting and gave rise to the “cult of domesticity.”²⁰⁴

Although the type of labor engaged in by wives varied by region and class, wives in fact, spent a considerable portion of their time earning wage income for their family.²⁰⁵ In urban areas, earnings were often generated through such activities as taking in boarders, washing, domestic service or the piece-work of sewing, weaving, hatmaking, and shoe-binding done in the home on behalf of individuals or small manufacturing companies.²⁰⁶ In rural areas, the conventional work that wives performed — spinning, weaving, milking, foraging, gardening, and producing cheese and butter — continued with traditional gardening and dairying activities producing a significant economic impact for the region in general.²⁰⁷

In fact, the economic value of domestically centered labor that was *compensated* was critical to the preservation of many working-class and farm families and, the work done by wives in middle-class families allowed

²⁰³ . CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 259 (1993), in Siegel, *supra* note 1 at 1086, n.37.

²⁰⁴ . See Siegel, *supra* note 1, at 1092-93. The growth of a market economy began to transform women’s work in the household into a separate sphere and the “cult of domesticity” was a reflection of these separate spheres — men in the competitive self-seeking marketplace, women in the house offering a site of spiritual uplift to relieve the vicissitudes of the struggle in the market — in the everyday language. See *id.* “With the spheres of work and family gendered male and female, marriage was redefined as an exchange of material sustenance for spiritual sustenance, and wives were in turn defined as economic dependents of their husbands.” *Id.* at 1093.

²⁰⁵ . See Siegel, *supra* note 1, at 1086.

²⁰⁶ . See *id.* In 1810, according to a government report, approximately two-thirds of all clothing, hosiery, and linen was produced at home by women. See 9 REPORT ON CONDITION OF WOMEN AND CHILD WAGE-EARNERS IN THE UNITED STATES 37-50 (1810 & photo. reprint 1974), in Chused, *supra* note 8, at 1362 n.5. According to the 1870 census, which did not provide specific data on a woman’s marital status, 70% of women wage earners working in non-farm occupations were domestic servants and approximately 10% were manual workers in the clothing industry. See Siegel, *supra* note 1, at 1086 n.38. Black women battled a triple burden because, in addition to gender restrictions, prejudice kept them out of factories and steady employment for husbands was rare. See *id.* at 1086-87 & n.40. Consequently, the economic need to earn wages in the remaining venue was particularly pressing for the free black wife, who often had to accept live-in employment as a cook, or a maid, but also found employment as a washerwoman or by taking in boarders. See *id.* & n.40-41.

²⁰⁷ . See Siegel, *supra* note 1, at 1088. By 1860, the income from America’s dairy production was “almost equal to the value-added produced by the nation’s textile (cottons and woolens) industry.” JEREMY ATACK & FRED BATEMAN, TO THEIR OWN SOIL: AGRICULTURE IN THE ANTEBELLUM NORTH 151 (1987), in Siegel, *supra* note 1, at 1088 n.45. “By 1840, 14 to 23 percent of agricultural income in New England and 5 to 17 percent in Middle Atlantic states came from dairy products, many of them produced by women.” Joan M. Jensen, *Cloth, Butter, and Boarders: Women’s Household Production for the Market*, REV. RADICAL POL. ECON., Summer 1980, at 17, in Siegel, *supra* note 1, at 1088 n.45.

for the purchase of market goods and services that would otherwise be beyond the means of the family.²⁰⁸ Yet, because the compensated work done by many women was so inexorably tied with her uncompensated labor — the work of childcare, cooking, sewing, washing, marketing, and house maintenance²⁰⁹ — the law was reluctant, if not downright hostile, to the right of the woman to own the fruits of her labor.²¹⁰ It was still, by law, the property of her husband.²¹¹

²⁰⁸ . See Siegel, *supra* note 1, at 1088. Professor Siegel offers examples from the lives of the leaders of the woman's rights movement as illustrations that being considered middle-class was not meant to correlate with leisure time. *See id.* at 1089-91. Elizabeth Cady Stanton, one of the foremost leaders of the movement, may have had help with the cooking, cleaning, washing, baking, preserving, sewing, gardening, and care of her seven children, but nevertheless found it a struggle to find the requisite time to do the research and writing essential to the furtherance of her political activities and the woman's rights movement. *See id.* In a letter to Susan B. Anthony, Stanton bemoaned her inability to find the time to research the details of some laws and noted that she "seldom ha[d] one hour undisturbed in which to sit down and write. Men who can, when they wish to write a document, shut themselves up for days with their thoughts and their books, know little of what difficulties a woman must surmount to get off a tolerable production." *Id.* Middle-class households that could afford to hire domestic help did not do so to relieve the wife of domestic responsibilities but, rather, to assist with specific tasks that were particularly noxious or insuperably large. *See id.* at n.51. It took, for example, both the wife and the laundress working for a full day to do the family laundry. *See id.*

²⁰⁹ . See Siegel, *supra* note 1, at 1088.

²¹⁰ . Using 1860 wages in the Northeast for cooking, laundry, sewing, and childcare services, the price of a wife's basic housework was about three dollars per week, about \$150 above the cost of maintenance. See JEANNE BOYDSTON, HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC 132 (1990), in Siegel, *supra* note 1, at 1088 n.46. During the antebellum period a married woman's labor, both paid and unpaid, was valued at approximately \$250 per year beyond maintenance, or about \$400 per year. The amount increased to \$600 or \$700, including maintenance, in working class households where there was more income and the wife could focus on frugal means to save money and even take on a full-time boarder. *See id.* at n.47. "Because many working-class men did not earn sufficient wages to pay for their own subsistence expenses, securing the domestic labor of a wife might prove crucial in meeting their daily needs." *Id.*

²¹¹ . See Siegel, *Modernization*, *supra* note 12, at 2176-77. The work done by a wife for a husband that was outside of what she could be legally compensated for extended well beyond the domestic sphere, even long after earnings statutes had been passed. *See id.* In 1900, for example, a federal court sitting in New York was asked to rule on a wife's claim to recover wages earned in her husband's business. *See id.* Despite legislation in New York recognizing the ability of spouses to contract with each other, the court insisted that, regardless of the character of the labor involved, a wife was absolutely prohibited from contracting with her husband for services. *See id.* The court stated that:

The statute obviously intends to enable the wife to contract with the husband

If industrialization shaped and formed the work and home life of both men and women, and reinforced and reconceptualized the gendered roles that were wrought, it also transformed the law of marital status.²¹² On the one hand, the earning statutes gave some property rights in her “personal” labor to a married woman yet on the other hand, because of the way in which the statutes were both drafted and construed, the statutes continued to protect a husband’s right to her “wifely” labor by defining it as household labor a married woman performed for her husband or family.²¹³ According to Professor Siegel, it was in this way that, through the law of marital status, “the evolution of the modern labor market shaped the law of marriage, [and] the law of marriage shaped the evolution of the modern labor market.”²¹⁴ Professor Siegel further argues that “the doctrine of marital service, as reformed by the earnings statutes . . . is thus properly understood as an integral part of an industrial capitalist economy, [and] not an archaic remnant of ancient feudal society.”²¹⁵

Feminists saw the common law as the vehicle by which economically productive women were turned into economic dependants²¹⁶ or even worse, into legally domestic slaves.²¹⁷ Indeed, the woman’s rights movement that grew, in part, out of the movement to abolish slavery²¹⁸ and called for

respecting the acquisition of property, but does it enable the wife to acquire property by agreeing to render him a service outside of her domestic duty? If so, it would enable her to acquire property by contracting with him respecting her domestic service. *There is a wide distinction between a power to acquire property by a contract with the husband and a power to create property, which shall be her own, by an agreement that she shall be paid for services that the law intends that she shall render gratuitously, if at all.* In other words, a contract with the husband for the acquisition of property does not include a contract to convert her personal service to her husband into property.

Id. at 2177 (quoting *In re Kaufmann*, 104 F. 768, 769 (E.D.N.Y. 1900) (emphasis added)). The court had characterized the question in terms of her capacity to contract with her husband and found that a wife’s labor could not be the legitimate subject of an interspousal contract. *See id.*

[A] wife’s labor was unitary, the property of her husband wherever he might see fit to employ it. If a wife worked with her husband, she labored for him. An arrangement contemplating wages for a wife’s labor in the family business was thus an impermissible ‘contract to convert her persona service to her husband into property.’

Id. By the early part of the twentieth century, the claim to earnings in family businesses acquired legitimacy and wives did begin to prevail. *See id.* at 2180. Yet, the change in legitimacy stemmed more from a change in the perception of what a wife’s normal duties were rather than any recognition of a wife’s economic autonomy. *See id.* It was the content of what constituted a wife’s duty that evolved while leaving the common law premise that a wife was obligated to serve her husband intact. *See id.* at 2181.

²¹² . *See Siegel, Modernization, supra* note 12, at 2139-40.

²¹³ . *See id.*

²¹⁴ . *Id.*

²¹⁵ . *Id.*

²¹⁶ . *See Siegel, Modernization, supra* note 12, at 2143.

²¹⁷ . *See generally Siegel, supra* note 1, at 1098-1108.

²¹⁸ . *See id.* at 1098.

“universal emancipation,” recognized and embraced the need to redeem women, as well as slaves, from a servile position to one of equality.²¹⁹

In an era where judges were endorsing freedom of contract to preserve the “ability of the laborer to support himself and his family” and to safeguard the “patrimony of the poor man [and] the property which every man has in his own labor”²²⁰ the reality of the laws and daily life reflected the fact that this noble concept did not, as a general rule, apply to male slaves and women of any color.²²¹ The rhetoric of the anti-slavery movement became infused with the competing images of the forced labor institutions in the South and the free labor ethic of the North.²²² The irony, that the discourse of free labor did not pertain to women in the same way that it pertained to men, was not lost on the leadership of the antebellum woman’s movement.²²³ Congressional hearings on the passage of the Thirteenth Amendment made it clear that there were members who strongly believed that “[a] husband has a right of property in the service of his wife[,] . . . a master has a right of property in the service of his apprentice, [and] [a]ll these rights rest upon the same basis as a man’s right of property in the service of slaves.”²²⁴

²¹⁹ . *Id.* at 1098-99.

²²⁰ . Siegel, *Modernization*, *supra* note 12, at 2147. The origin of the judges’ notions lay in Adam Smith, who had argued that:

The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of a poor man lies in the strength and dexterity of his hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper without injury to his neighbour, is a plain violation of this most sacred property.

ADAMSMITH, *THE WEALTH OF NATIONS* 121-22 (Edwin Cannan ed., Modern Library 1937) (1776), in Siegel, *supra* note 1, at 1103 n.104.

²²¹ . See *supra* notes 142-51 and accompanying text.

²²² . See Siegel, *supra* note 1, at 1099. These sentiments were readily appropriated by the woman’s movement and turned around to support fundamental changes in the laws concerning women. See *id.* at 1103. The discourse invoking the right to self ownership and economic independence had its philosophical roots in John Locke and Adam Smith. See *id.* Whether feminists utilized these arguments in the republican tradition of the Revolutionary era as meaning “economic independence, ownership of productive property—not as an end in itself primarily, but because such independence was essential to participating freely in the public realm” or as used in classical political economy where “free labor” meant the right to sell one’s labor power, it was a powerful and ironic argument. *Id.* at 1103 n.105.

²²³ . See Siegel, *supra* note 1, at 1101.

²²⁴ . CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. Chilton White), in Siegel, *supra* note 1, at 1100 n.95. After the Civil War, Congress struggled, when drafting the constitutional amendments and civil rights legislation, to differentiate between racial and gender distinctions on the premise “that when a measure went far enough to limit a state’s freedom to legislate on married women’s property, family law, marriage, or divorce it went too far in altering the balance between the federal government and the states.” Patricia Lucie, *On Being a Free*

“[F]eminists used the marriage-as-slavery argument to expose contradictions between the ideology of domesticity and the institution of marriage, to pierce the veil of sentimentality shrouding the relation and to reveal its economic logic.”²²⁵ To a large extent in articulating their arguments, the woman’s movement needed to demonstrate that “women’s work was treated like *women’s* work — dispossessed and devalued, like their bodies and property in marriage, and their voice in affairs of state.”²²⁶ This marriage-as-slavery argument offered feminists the ability to dramatize, in a compelling form and with wide popular appeal, the role that the law played in perpetuating women’s economically dependent position.²²⁷ The analogy between marriage and slavery drawn by the feminists was, in very consequential ways, highly accurate.²²⁸

Although the woman’s rights movement made the assumption that eventually most women would marry, it sought to enhance education and employment opportunities so that women had greater freedom of choice in deciding when to marry.²²⁹ The goal of the feminists was to emancipate women from pecuniary dependence on men without necessarily changing the work married women performed and to redress women’s economic subordination by reforming the institution of marriage.²³⁰

Person and a Citizen by Constitutional Amendment, 12 J. AM. STUD. 343, 350 (1978), in Siegel, *supra* note 1, at 1100 n.95. Congress has, however, passed numerous laws — those embodied, for example, in the tax code — which directly and indirectly affect married women’s property, family law, marriages, and divorces without incurring any constitutional crises. See *infra* notes 382-95 and accompanying text.

²²⁵ . Siegel, *supra* note 1, at 1101.

²²⁶ . *Id.* at 1079.

²²⁷ . See *id.* at 1101.

²²⁸ . See *id.* at 1100.

²²⁹ . See Siegel, *supra* note 1, at 1122. Although still limited in employment opportunities, single women by the mid-nineteenth century were beginning to leave home for reasons other than apprenticeship or marriage. See Chused, *supra* note 8, at 1414. Employment opportunities in teaching, domestic service, and some industries gave single women greater options. See *id.* Although it was unlikely that a woman’s labor produced much wealth, wages for single women increased steadily between 1820 and 1850 when they reached approximately 50% of a comparable man’s wage and, as of 1970, remained at about 59% of a male’s wage. See *id.* at 1363 nn.10-11 and accompanying text. During the nineteenth century, the gendered disparity of wages was not solely attributable to occupational segregation, but in fact, reflected a practice of arbitrarily paying women a fixed percentage of a man’s wage. See Siegel, *supra* note 1, at 1128 n.186. This practice was documented in part in a report “To the Committee of the Massachusetts Legislature, on the eight hour movement” and contained information on women’s wages paid in various towns, with many of the towns reporting the wages as a fixed percentage of men’s wages for comparable work. See *id.* For example, Holyoke reported that “its paper mills, offers one-third to one-half [of men’s wages]”; North Becket “pays to women one-third the wages of men”; South Yarmouth pays “half the wages of men, or less”; Taunton pays “one-third to two-thirds the wages of men.” *Id.*

²³⁰ . See Siegel, *supra* note 1, at 1122. The movement’s resolve concerning pecuniary independence was inclusive of both married and single women. See *id.* at 1121 n.166. Without equal opportunities, wages, or legal and political rights, women were left with few options but to marry. See *id.* One of the leaders,

One basic premise of the joint property claim was that husbands and wives had different, but equally valuable, roles in the family economy and the division of labor within the family was neither attacked nor defended.²³¹ Rather, the movement argued that wives were entitled to joint rights in marital property by reason of the labor they contributed to the household economy.²³² What they were asking for was *not* to have their labor compensated by a wage or even in a separate property right, but rather to have the law reflect their equal contribution to the success of the marriage and the acquisition of property.²³³

From the time of the First National Woman's Rights Convention, held in Worcester, Massachusetts in 1850, the movement called for the right of married women to jointly own marital property.²³⁴ Not only was the premise of joint ownership antithetical to the common law regime under which most

Ernestine Rose, put this sentiment in rather crude but effective terms by insisting that because women were paid so much less than men for performing the same work that she was forced to marry and, under those circumstances, marriage was tantamount to prostitution: "What was left for her but to sell herself for food and clothing either in matrimony or out of it; and it would require a wise head to determine which was the worse." *Women's Rights Convention in New York*, THE LIBERATOR, Dec. 5, 1856, at 196, quoted in Siegel, *supra* note 1, at 1121 n.166.

²³¹ . See Siegel, *supra* note 1, at 1122-23.

²³² . See Siegel, *supra* note 1, at 1097. During the 1851 Worcester Convention, one of the resolutions passed stated:

That since the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore, the wife should, during life, have the same control over the joint earnings as her husband, and the right to dispose at her death of the same proportion of it as he.

Id. at 1115.

²³³ . See *id.* at 1112. Professor Siegel identifies two concerns underlying the movement's decision to pursue a joint property right as the appropriate means to emancipate the labor that wives produced. See *id.* at 1125. The first was that joint property reflected a view of equality in marriage that was based on community and sharing and reinforced this view with religious precepts. See *id.* The second motive came from "pragmatic concerns about securing economic justice for women." *Id.* at 1127. The movement recognized that using a market-based method to value the work done by wives would not only be unnecessarily complicated and impractical, but the market significantly and arbitrarily undervalued the work that women did and was not, therefore, truly reflective of the worth of a woman's work. See *id.* at 1124 n.172, 1129-30. The use of religious precepts as justification for a particular viewpoint is also very interesting. While the leadership of the woman's movement relied on the Bible to endorse the view of partnership and equality between the sexes, biblical passages were also used with great regularity to assert a belief that women's subservience to men was divinely ordained. See *id.* at 1125 n.174. See generally Avery & Konefsky, *supra* note 21, at 347-56.

²³⁴ . See Siegel, *supra* note 1, at 1113.

women lived, but the movement also advocated for the joint management of marital property — a change that would not come even to community property states until the 1970s.²³⁵ What the movement recognized was that women's economic dependence on men was not a natural occurrence, but rather a condition imposed and enforced by law.²³⁶ The motivation to reform the laws governing marital property was not about protecting women but “was about empowering economically productive women to participate equally with men in managing assets both had helped to accumulate.”²³⁷

Thus, while the movement's strategy for reforming marriage did not challenge wives' role in the relations of production, its demand for joint property rights was an ambitious effort to reform “the laws and social usages which regulate the distribution of property as between men and women, [which] have produced a pecuniary dependence of woman upon man.”²³⁸

The woman's movement was equally vocal when discussing the rights of women to inherit property that women themselves had helped acquire.²³⁹ Some changes in probate codes in the nineteenth century allowed widows to reject their husbands' wills in favor of a mandated statutory share.²⁴⁰ Other statutes permitted a widow access to a share in the husband's personal property when claiming her dower rights.²⁴¹ However, “[i]f all went well financially during the marriage, [] the probate reforms . . . entitled widows to receive a segment of their husbands' personal estates, *perhaps regaining some of what they had lost upon marriage.*”²⁴² As viewed by the woman's movement, this “legal and customary allocation of title in a separate property system left a wife who spent her life working for the family unable to ‘call a dollar her own’ — holding nothing but a paltry life-interest in dower at her husband's death This is the law, but where is the justice of it?”²⁴³

Wives who had spent their whole lives working for their families, helping to acquire and build capital, could be grateful if their husbands left them that

²³⁵ . See *id.* at 1115.

²³⁶ . See *id.* at 1078.

²³⁷ . *Id.* at 1116.

²³⁸ . Siegel, *supra* note 1, at 1123 & n.170.

²³⁹ . See Siegel, *supra* note 1, at 1119-20.

²⁴⁰ . See Chused, *supra* note 8, at 1404.

²⁴¹ . See *id.* at 1405. Under traditional common law, dower was a life-estate that applied to all real land held in fee simple during coverture. See *supra* notes 68-88 and accompanying text. This was modified in many states to cover only land held at death. See Chused, *supra* note 8, at 1393-95. Generally, these statutes had little impact when husbands disposed of their estates, including that which he held from his wife by virtue of the marital status laws, before death either by giving it away, selling it, or otherwise dissipating the marital assets. See *id.* at 1405 n.242.

²⁴² . *Id.* at 1405 (emphasis added). With a few exceptions, the husband's estate was subject to creditor's claims that had to be satisfied *before* a widow could claim her right to dower or a statutory share. See *id.* at 1405 n.241.

²⁴³ . Siegel, *supra* note 1, at 1119-20 & n.159.

same property upon his death and if he did not, they had little recourse under the law.²⁴⁴ The question remains whether much has really changed.

A. Massachusetts: A Historical Perspective and Modern Appraisal

Regardless of any piecemeal achievements obtained by individual women, it was not until 1845 that women in Massachusetts were first able to legally keep and manage as “sole and separate” property which women brought to, or acquired after marriage by gift, inheritance, bequest, or devise.²⁴⁵ Starting in 1855, Massachusetts began revising its statutes and women were finally allowed to make legally binding contracts with their husbands or with third parties,²⁴⁶ transfer to or receive from their husband title to real or personal property (i.e., receive gifts),²⁴⁷ and keep the proceeds of any work or labor performed “for a person other than her husband and children.”²⁴⁸ Finally, and most importantly, women were not entitled to vote in Massachusetts on the passage of, or reforms to, legislation affecting their daily lives — much as Abigail Adams had requested of her husband John in 1776 — until 1924, almost 150 years later.²⁴⁹

Today, the current Massachusetts elective share statute,²⁵⁰ with its complex, deeply rooted common law assumptions and gendered history, allows a surviving spouse, after waiving the provisions of the will, to take one-third of the personal and real property if the deceased left issue.²⁵¹ If the deceased left kindred but no issue, the spouse is entitled to take the first \$25,000 and

²⁴⁴ . See *id.* at n.159.

²⁴⁵ . See 1845 Mass Acts ch. 208, § 3, reprinted in MASS. GEN. LAWS ch. 209, § 1 (1998); see also Avery & Konefsky, *supra* note 21, at 326-27 n.18. These authors make a distinction between statutes passed in 1845 and 1855. They cite an 1845 statute, Mass. Acts, ch. 208, as the statute that “gave women the right to enter into written premarital agreements regarding their separate property, and to hold and manage that property after marriage without a trustee.” *Id.*; see also Chused, *supra* note 8, at 1398-99 n.203 & n.209.

²⁴⁶ . See MASS. GEN. LAWS ch. 209, § 2 (1855).

²⁴⁷ . See MASS. GEN. LAWS ch. 209, § 3 (1857). At common law, since women were legally incorporated into the identity of the husband, women could not receive gifts from their husbands since it would be the legal equivalent of the husband giving a gift to himself. See HOLCOMBE, *supra* note 69, at 40.

²⁴⁸ . MASS. GEN. LAWS ch. 209, § 4 (1855); see also Siegel, *supra* note 1, at 1117 n.149.

²⁴⁹ . MASS. CONST. amend. LXVIII; see also *In re Municipal Suffrage to Women*, 36 N.E. 488 (Mass. 1894) in which the Supreme Judicial Court rendered an advisory opinion on whether it was constitutional to allow women the right to vote in town and city elections. Not surprisingly, they decided that it was not.

²⁵⁰ . See MASS. GEN. LAWS ch. 191, § 15 (1998).

²⁵¹ . See *Rosenberg v. Lipnick*, 389 N.E.2d 385, 388-89 (Mass. 1979) (addressing the validity of a premarital agreement which included a waiver of property rights by the wife and a determination of what constitutes full and adequate disclosure in order to ensure that the waiver is free from fraud, imposition, deception or overreaching).

one-half of the remaining property.²⁵² Anything exceeding the \$25,000 can only be taken as a *life estate* unless the deceased left no issue and no kindred.²⁵³

IV. MARRIAGE, WOMEN AND PROPERTY: A CONTEMPORARY PERSPECTIVE

“The evolution of the institution of marriage in Western culture has been a response, in large part, to society’s need to allocate property and fix the laws of inheritance.”²⁵⁴

Of underlying import in shaping changes in the area of marital property reform is the question of how society views marriage²⁵⁵ and even more importantly, how do the individuals within the marriage itself view the institution and their roles in fulfilling the marriage contract.²⁵⁶

“Early efforts to identify the nature of the marriage relationship focused on whether marriage is a contract or a status. At the heart of this dispute lay the very practical question of who should fix the terms of the relationship — the parties, the church, or the state.”²⁵⁷ In terms of an individual’s rights or

²⁵² . See MASS. GEN. LAWS ch. 191, § 15 (1998).

²⁵³ . See *id.* Under section 16 of the Massachusetts statute, the probate court may appoint a trustee(s) to hold the property of the deceased that, on the election of the surviving spouse, is now subject to a life estate. See *id.* at § 16. It should be noted that a life estate carries with it some significant disabilities that do not work well in practical terms. Since the premise behind a life estate is that the property is being held in trust for the remaindermen (or remainderman as the case may be), then in general terms, the tenant with a life estate cannot sell the property, borrow money against the property, lease the property, or “waste” the property. Questions arise over who is to pay the taxes and upkeep of the property; if the property is sold, who gets the proceeds and when; what happens if the life tenant goes into debt and creditors seize the life estate and sell it; and who is responsible if someone is injured on the property. These are generally estate planning issues that can be resolved by the use of a trust but require thoughtful planning. Even if the law converts an equitable life estate into a trust in fee simple, it still cannot replicate the property rights that come with a fully vested right to title in fee simple. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 572-75 (5th ed. 1995).

²⁵⁴ . BECKER ET AL., *supra* note 27, at 471.

²⁵⁵ . See generally Volkmer, *supra* note 114. In his article, Professor Volkmer juxtaposes the views of Professor Mary Ann Glendon and Dean Susan Westerberg Prager in the context of whether the sharing concept (the partnership theory of marriage) can be equated with equality. See *id.* at 108-09. Professor Glendon asserted that there are many different conceptions of marriage in society and it is not necessarily possible to determine which is the dominant perception and the equality conception may or may not be it. See *id.* Dean Prager, on the other hand, viewed equality as a motivating force behind the majority of functioning marriages and that the result was a renewed interest in sharing theories of marital property ownership. See *id.*

²⁵⁶ . See *supra* notes 12-17 and accompanying text.

²⁵⁷ . Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 106-07 (1993) (citations omitted). Initially, formal marriages were only common for the upper classes — presumably, to give a legally enforceable imprimatur to the passing on of property. See

even ability to fix or exercise legal rights, clearly the state won the dispute.²⁵⁸ In 1888, the United States Supreme Court weighed in on the issue by stating that:

[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. The marriage contract remains as it has been for centuries, *a contract of adhesion*. Marriage remains largely a matter of status, although that status is today more ambiguous than in the past.²⁵⁹

This view of marriage, as something more than a purely consensual relationship, provided the necessary basis for extensive state regulations.²⁶⁰ These regulations stipulate the “age, race, sex, and number of marital

BECKER ET AL., *supra* note 27, at 471. In ancient Rome, formal marriages were represented by the codification of contractual protections demanded by the bride’s family to protect her and her children’s superior rights to property and inheritance rights relative to the groom’s “concubines” and other children. *See id.* These protections were transformed into a formalized and structured practice under the canon law of marriage prior to the Reformation. *See id.* Eventually, the state took over the regulation of marriage, but with remarkably little change from the rules developed under canon law. *See id.* With the advent of the Reformation and Enlightenment periods, however, the idea of marriage as a contract changed. *See* MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 32 (1989). Consent was the essence of marriage in ecclesiastical law. *See id.* As the emphasis changed to marriage as a civil contract, it laid the

groundwork for divorce by mutual consent and for state regulation not only of the formation and dissolution of the marriage contract, but of its very content . . . [giving] the spouses in a network of legal rights and duties . . . a full set of claims . . . that could be made the basis of [a] legal action before a judge.

Id.

²⁵⁸ . *See* Starnes, *supra* note 257, at 107.

²⁵⁹ . Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 *IND. L.J.* 453, 454-55 (1998) *citing* Maynard v. Hill, 125 U.S. 190, 210-11 (1888) (emphasis added). The use by the Court of both contract and status does little to clarify the debate. In addition, the schizophrenic use of the phrase “contract of adhesion” is both disturbing and telling. A contract of adhesion can be defined as one that is “so heavily restrictive of one party, while so non-restrictive of another, that doubts arise as to its representation as a voluntary and un-coerced agreement; implies a grave inequality of bargaining power.” *BARRON’S LAW DICTIONARY* 11 (3d ed. 1996). Are the parties to the contract the individuals, and if so which party suffers the inequality and coercion? Or is the Court implying that the contract is between the couple and the state, in which case what “overriding state interest” justifies, constitutionally, such a grossly and obviously unfair “bargain”? It is not clear.

²⁶⁰ . *See* Starnes, *supra* note 257, at 107.

partners, the incidents of solemnization and licensing, and the rights and obligations of the parties” as well as the terms of dissolution.²⁶¹ The state retains control as the final arbiter of the disposition of marital property, whether by judicial decree or by ratification of any agreement the parties arrive at on their own.²⁶²

In essence, the traditional marriage contract — which underlies much of both common and statutory law — embodies four provisions:

1. The husband is head of the household.
2. The husband is responsible for support.
3. The wife is responsible for domestic services.
4. The wife is responsible for child care, the husband for child support.²⁶³

In significant and unspoken ways, the common law view of marriage remains intact and this traditional pattern forces married women into a subservient, supportive role that is inherently unequal and unfair.²⁶⁴ Despite the fact that our definition and expectations of marriage as an institution have changed significantly, it must continue to exist within the confines and constraints of the construct of common law marriage. If equality is the objective, and if marital property rights are, in fact, a function of state-defined status, then “equality must be substituted for male dominance as the first principle of marital status Defining the state’s proper role in determining the incidents of the marital relationship is undoubtedly the most fundamental and difficult of all the unresolved legal issues in the area of sex discrimination.”²⁶⁵

Eventually, women began to emerge as separate legal entities and acquire rights to own and control property independent of their husbands, and there gradually emerged a shift in the role of the family and marriage in society as the final determinant of an individual’s social and economic status.²⁶⁶ The change in emphasis for entering a marriage, from one of economic necessity to a means of achieving personal fulfillment, rapidly accelerated in the first half of the twentieth century.²⁶⁷ The decision to end a marriage also began to evolve as a choice that should be determined by the individuals rather than by statutory decree.²⁶⁸ Thus, marriage changed in significant ways from status to contract, whereby one of the models for the contract was the

²⁶¹ . *Id.*

²⁶² . See GENDER BIAS STUDY, *supra* note 30, at 22-27 (discussing the high incidences’ of the coercion of women — especially those with young children —through the mediation process utilized extensively in divorce settlements in Massachusetts). “Mediation, as it is currently practiced in the probate court, disadvantages women because of their unequal bargaining power.” *Id.* at 23.

²⁶³ . WEITZMAN, *supra* note 73, at 2.

²⁶⁴ . See Johnston, *supra* note 89, at 1071.

²⁶⁵ . *Id.* at 1072-73.

²⁶⁶ . See Kornhauser, *supra* note 40, at 1415.

²⁶⁷ . See *id.*; see *supra* notes 225-44 and accompanying text.

²⁶⁸ . See Kornhauser, *supra* note 40, at 1415.

commercial partnership.²⁶⁹ Unlike its commercial counterpart, the partnership model of marriage used only one description of its substance — equal contributions by equal partners with equal say who receive equal distributions of the assets on the termination of the partnership.²⁷⁰ Three very significant changes with profound effects on society emerged in both the marriage relationship and in the law as a result of the development and application of this model: 1) the development of “no-fault” rules allowed for the marital partners to more readily dissolve the marriage partnership; 2) the division of the property, despite title generally being held only in one partner’s name, changed with the application of equitable distribution principles; and 3) the concept of alimony as a continuing obligation by a partner to the now-dissolved partnership gave way to short-term rehabilitative awards.²⁷¹

The other marriage-as-partnership model came with the development of the Uniform Marriage and Divorce Act (UMDA).²⁷² The UMDA’s response to the ongoing debate of marriage as contract or status was to define marriage as a “personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential.”²⁷³

The partnership concepts embodied under UMDA were further refined and advanced in the process of developing the final 1983 draft of the Uniform

²⁶⁹ . *See id.* Although the community property model was certainly available, prior to the 1970s it had not undergone the changes in equality of management and, compared to the partnership model, it suffered similar disabilities in its practical application which made it an inadequate basis for comparison at the time. *See id.* at 1415-16; *see also* Greene, *supra* note 89, at 88-90.

²⁷⁰ . *See* Kornhauser, *supra* note 40, at 1416-17. The commercial partnership, as codified in the Uniform Partnership Act, allows the individual partners to negotiate and make trade-offs in the specific details of the partnership. *See id.* The total equality of partners is only one version that is available. *See id.*

²⁷¹ . *See id.* at 1417. Each of these changes that occurred had both positive and negative aspects, some of which did not emerge for many years. For example, the idea of “no-fault” divorce has been strongly criticized as perpetuating the feminization of poverty.

²⁷² . *See infra* notes 282-88 and accompanying text.

²⁷³ . Starnes, *supra* note 257, at 108. The section of UMDA referenced is § 201, which goes on to say that a “marriage licensed, solemnized, and registered as provided in this Act is valid in this State. A marriage may be contracted, maintained, invalidated, or dissolved only as provided by law.” *Id.* at n.188. Professor Starnes opines that the definition used by UMDA of “marriage as a status arising out of a contract seems to incorporate rather than resolve the contract-status debate.” *Id.* at 108. She goes on to note that the language in UMDA suggests a view of marriage as a consensual relationship and, absent any agreement to the contrary, the partnership model is the default provision for the dissolution of the marriage to be governed by the legislative rules of the state. *See id.*

Marital Property Act (UMPA).²⁷⁴ The UMPA, by utilizing the terms “marital property” and “individual property,” attempts to integrate concepts from both community property and common law.²⁷⁵ What is important, according to one commentator,²⁷⁶ in assessing the UMPA is not necessarily its views of property per se, but “the societal attitudes and views toward marriage and the societal attitudes and views toward women. [Any] debate over the UMPA is likely to center on the conflicting views of marriage and the extent to which co-equality exists between husband and wife.”²⁷⁷

Essentially the issue of whether marriage is a contract, a status, or a partnership, has not been and perhaps cannot be definitively resolved. The conception of marriage, as an integral part of our social fabric, continues to evolve, as do our perceptions and expectations. Given the complex nature of the institution and the multiple roles which it plays in society, marriage cannot be reduced to a single legal theory, but rather incorporates all three notions of contract, status and partnership into indispensable parts of the whole. Even more important, is how the recognition of these societal changes will now inform the decision-making process in reforming the elective share statute. How the statute is ultimately revised will, by definition, incorporate a particular view of marriage, and a woman’s place within marriage and society, into a fundamental law affecting property rights.

V. NEW SOLUTIONS

²⁷⁴ . See Volkmer, *supra* note 114, at 111. UMPA was a property act, not a divorce act — a distinction that may not always be clearly understood. See Erlanger & Weisberger, *supra* note 115, at 782-87.

²⁷⁵ . See Volkmer, *supra* note 114, at 111.

²⁷⁶ . See *id.* Professor Mary Moers Wenig, serving as the UMPA Committee Advisor, believes that the sharing principle incorporated into the UMPA is a concept that is accepted at both ends of the political spectrum — from William F. Buckley, Jr. to the National Organization of Women. See *id.* at 112.

²⁷⁷ . *Id.* at 113. Professor Volkmer believes that any debate over UMPA has to be something more than a comparison of the relative virtues of community property and common law property systems. See *id.* Primarily, it has to include an understanding of the profound effects that have been effectuated by the feminist movement. See *id.* In debating the relative merits of the UMPA in light of the feminist movement, he notes that:

In the society at large a choice for equality necessarily entailed greater intervention in the distribution of resources and power in order to make more feasible the creation of equal opportunity. *No longer was it possible to affirm the value of equality of opportunity, literally translated, without recognizing the need to guarantee greater substantive sharing of resources so that equal status represented a condition as well as a legal category.* Similarly, within personal relationships a choice for equality presupposed a mutual desire to give up some individual preferences for the purpose of realizing that ‘shared vision of the way things could be.’ A decision of one person to set aside his or her personal aspirations for a time so that the other could engage in full-time career preparation presumed that at another time the sacrifice would be reciprocated. Without a commitment to such reciprocity, formal or informal, the norm of equality would remain an empty shell within which exploitation and an imbalance of power could continue.

Id. at 118 (citing W. CHAFE, *WOMEN AND EQUALITY* 166 (1977)) (emphasis in original).

Determining how Massachusetts' current statute evolved and uncovering some of the social policies and legal theories that are embedded in this statute provides a deeper understanding of why the current debate over revising the statute represents such a critical turning point in our political and social evolution. Merely recognizing the inherent discrimination embodied by the existing law does not answer the next, and fundamentally more important, question of where Massachusetts will go from here in revising the statute.

This section of the Note will discuss the details of some of the options that are available to the legislature in revising the elective share statute. These options include adopting the Uniform Probate Code (UPC), the Uniform Marital Property Act ("the Wisconsin solution"), or a modified version of the UPC based on the federal estate tax structure. In addition, this section presents a brief discussion of a significant experiment that occurred in the 1930s and 1940s involving a number of states that adopted community property laws in order to gain certain tax advantages. The final section discusses the three proposals to revise the existing elective share statute which are currently before the Massachusetts state legislature.

A. The Uniform Probate Code Solution

The drafters of the revised 1990 UPC state that "the main purpose of the revisions is to bring elective-share laws in line with the contemporary view of marriage as an economic partnership."²⁷⁸ Essentially, the partnership theory of marriage is described "as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike."²⁷⁹

Under this approach, the economic rights of each spouse are seen as deriving from an unspoken or imputed marital bargain under which the partners agree that each is to enjoy a half interest in the economic production of marriage, that is, in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain.²⁸⁰

[In addition, a] partnership model can cushion the impact of persistent gender biases in couples' private allocation of homemaking tasks and in the public allocation of salaries and benefits. By sharing their total resources, families can spread the risks and benefits of sex-linked roles, the remnants of a socioeconomic

²⁷⁸ . UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt. (amended 1993).

²⁷⁹ . MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 131 (1989),
in UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt.

²⁸⁰ . Waggoner in *WOMEN AND THE LAW*, *supra* note 101, at § 3A.04 [1].

system that makes it difficult for any one individual to accommodate a full work and family life.²⁸¹

The UMDA, originally promulgated in 1970, was the first attempt by the common law property states to replicate, through an equitable distribution system, the marital property system enjoyed by the community property states.²⁸² This was followed in 1983 by the UMPA, which adopted a view that both husband and wife would share equally from the economic activities of either.²⁸³ The drafters of the UPC note that not only is the economic partnership theory of marriage the fundamental theory underlying the community property system, but it also embodies the philosophy implemented by all of the common law property states when a marriage ends in divorce.²⁸⁴ In following this equitable-distribution system, the common law property states give:

broad discretion . . . to trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute — directly and indirectly, financially and nonfinancially — the fruits of which are distributable at divorce.²⁸⁵

Almost by definition, the Joint Editorial Board for the Uniform Probate Code shows how the forced share approach to the distribution of property upon the death of a spouse is the rule of second best, undertaking at death the necessary steps “to correct the failure of a separate property state to create the appropriate lifetime rights for spouses in each other’s earnings.”²⁸⁶

Since marriages that do not end in divorce will by default end in death, it is important to remember that in both community property states and under the

²⁸¹ . Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 198-99 (Stephen D. Sugarman & Herma Hill Kay, eds., 1990), in Waggoner in *WOMEN AND THE LAW*, *supra* note 101, at § 3A.04[1], n.59. A very important additional benefit to embracing partnership principles noted by the authors is that it supports caretaking commitments toward children and elderly dependents. *See id.*

²⁸² . *See* Waggoner in *WOMEN AND THE LAW*, *supra* note 101, at § 3A.04[2]. Professor Waggoner notes that, whether or not the UMDA is formally adopted by a common law property state, nearly all separate property states, through this equitable distribution system, have adopted the partnership theory when a marriage ends in divorce. *See id.*

²⁸³ . *See* WAGGONER ET AL., *supra* note 34, at 519-20.

²⁸⁴ . *See* UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt. (amended 1993).

²⁸⁵ . J. GREGORY, *THE LAW OF EQUITABLE DISTRIBUTION* ¶ 1.03, 1-6 (1989), in UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt.

²⁸⁶ . John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse’s Forced Share*, 22 *REAL PROP., PROB. & TR. J.* 303, 306 (1987). “Professor Langbein is a member of, and Professor Waggoner is Director of Research for, the Joint Editorial Board for the Uniform Probate Code.” *Id.* at 303.

UMPA each spouse acquires a present, vested ownership right in all the assets acquired by the economic activity of either spouse during the marriage.²⁸⁷ A present, a vested ownership right does not depend on the survival of a non-working spouse in order for that spouse to control the disposition of his or her share of the property, because he or she is already considered the legal owner of the property.²⁸⁸ Unfortunately, the UPC falls short of achieving this outcome since title to property remains presently held by the spouses until one of them dies. Therefore, in order for a non-propertied spouse to obtain his or her “fair share” she or he must survive the

²⁸⁷ . See WAGGONER ET AL., *supra* note 34, at 520. This approach to ownership of marital property has a profound impact in the traditional, and still dominant, marital situation where the husband is the primary wage earner and the wife is a full-time homemaker and primary caretaker for the children. See Langbein & Waggoner, *supra* note 286, at 306-07. It is also significant in circumstances where the wife works outside the home but either takes a part-time position in order to also fulfill domestic responsibilities or takes time off from a full-time position or career during her child-bearing times. See *id.* at 306. A woman’s acquiescence to this secondary economic role in the family ultimately results in a loss of real and current wages as well as retirement, social security, and long-term health care benefits. In community property states, the fact that she enjoys a present, vested interest in marital assets means that she is being compensated, at least from family funds, for her non-economic contributions. In common law property states, such as Massachusetts, which adhere to the principal of whoever earns it owns it, the wife in these circumstances “owns” either nothing or, at least significantly less than the full-time employed and compensated husband. See generally Turano, *supra* note 163, at 997-1004.

²⁸⁸ . See WAGGONER ET AL., *supra* note 34, at 520. One of the primary distinctions between the community and separate property states is the reliance by separate property states on the elective share statutes. See *id.* In community property states, a homemaker spouse is free to devise her share of the community property to the surviving spouse or directly to her children or to anyone else she cares to. See Oldham, *supra* note 104, at 229. Conversely, the homemaker spouse who dies in a separate property state has no legal title to property and has, therefore, nothing to dispose of. See *id.* It becomes an issue of who dies first: if the non-propertied spouse survives, she stands a chance of becoming the legal titleholder of property. See *id.* at 232-33.

This, of course, assumes that the husband has not managed to evade the present loopholes in the spousal elective share statutes and give away title to his property before he died through an inter vivos transfer or even outright gift without his wife’s knowledge. This was the situation faced by Mary Sullivan and the statute remains the same. The SJC stated in *Sullivan*, with no notable embarrassment, that:

[i]n this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions, . . . under his will, or by virtue of a waiver of his will. That is true, even though his sole purpose was to disinherit her.

Sullivan v. Burkin, 460 N.E.2d 572, 576 (Mass. 1984) (quoting *Kerwin v. Donaghy*, 59 N.E.2d 299, 306 (1945)).

propertied spouse.²⁸⁹ To have a right to an elective share at all, the decedent's spouse must survive the decedent — a game of winners and losers.²⁹⁰

While the partnership model of marriage is the primary theoretical basis behind the UPC, it is not the only one. Alternatively, the UPC also articulates a support theory that essentially holds that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death.²⁹¹ This theory is more reflective of the traditional contract theory of marriage that exchanges domestic services on the part of the wife, for support on the part of the husband.²⁹² Other reasons which support this needs-based theory include: (1) the expectation of the surviving spouse that he or she will be supported; and (2) the public policy expectation that the state will not have to support a surviving spouse when there are other financial resources available to do so.²⁹³ Regardless of the motivation, a conventional elective share statute does a poor job of satisfying the duty-of-support theory.²⁹⁴ The primary criticism is that because the elective share statutes are generally a fixed fraction (typically one-third), there is generally no consideration of the actual needs of the surviving spouse.²⁹⁵ The UPC

²⁸⁹ . See UNIF. PROBATE CODE, § 2-202, cmt. (amended 1993).

²⁹⁰ . See *id.* at art. II, pt. 2, gen. cmt.

²⁹¹ . See *id.* at art. II, pt. 2 (The Support Theory).

²⁹² . See *supra* notes 263-65 and accompanying text.

²⁹³ . See Gary, *supra* note 69, at 577.

²⁹⁴ . See UNIF. PROBATE CODE, § 2-114, art. II, pt.2 (amended 1993). "To the extent that this [elective share] system provides the surviving with reasonable support, this result is fortuitous." Oldham, *supra* note 104, at 229. Fulfilling the support theory is also particularly difficult, if not impossible, "if the . . . estate is small, one-third of the small estate will not provide adequate support for the surviving spouse, if the surviving spouse has little other property and no earning capacity." *Id.* Conversely, if the decedent left a large estate, a one-third share could be excessive, particularly if the surviving spouse has significant property or earning capacity. See *id.* By not taking the surviving spouse's assets and earning capacity into consideration, the forced share system undermines the legitimacy of a public policy justification for interfering with a decedent's testamentary freedom. See *id.* at 230.

²⁹⁵ . See UNIF. PROBATE CODE, § 2-114, art. II, pt.2. Thirty-four common law jurisdictions have fixed-fractional elective share systems. See ALA. CODE § 43-8-70 (1991); ALASKA STAT. § 13.12.202 (Michie 1996); ARK. CODE ANN. § 28-39-401 (Michie 1987); CONN. GEN. STAT. ANN. § 45a-436 (West 1993); DEL. CODE ANN. tit. 12, § 901 (1995); D.C. CODE ANN. § 19-113 (1981); FLA. STAT. ANN. § 732.207 (West 1995); HAW. REV. STAT. § 560:2-201 (1985); 755 ILL. COMP. STAT. ANN. 5/2-8 (West 1992 & Supp. 1997); IND. CODE ANN. § 29-1-3-1 (Michie 1989); IOWA CODE ANN. § 633.238 (West 1992); KY. REV. STAT. ANN. § 392.080 (Michie 1984); ME. REV. STAT. ANN. tit. 18-A, § 2-201 (West 1998); MD. CODE ANN., EST. & TRUSTS § 3-203 (1991); MASS. GEN. LAWS ANN. ch. 191, § 15 (West 1990 & Supp. 1997); MISS. CODE ANN. § 91-5-25 (1994); MO. ANN. STAT. § 474.160 (West 1992); NEB. REV. STAT. § 30-2313 (1995); N.H. REV. STAT. ANN. § 560:10 (1997); N.J. STAT. ANN. § 3B:8-1 (West 1983); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 1981 & Supp. 1997); N.C. GEN. STAT. § 30-3 (1992); N.D. CENT. CODE § 30.1-05-01 (1996); OHIO REV. CODE ANN. § 2106.01 (Anderson 1994 & Supp. 1996); OKLA. STAT. ANN. tit. 84, § 44 (West 1990); OR. REV. STAT. § 114.105 (1990); 20 PA. CONS. STAT. ANN. § 2203 (West Supp. 1997); R.I. GEN. LAWS § 33-25-4 (1995); UTAH CODE ANN. § 75-2-202 (1993); VT. STAT. ANN. tit.

does, however, make provision for implementing this theory as well by providing for a “Supplemental Elective-Share Amount” of \$50,000.²⁹⁶

One of the most valuable features of UPC is its attempt to minimize the administrative aspect of probating an estate²⁹⁷ and assure predictability of results.²⁹⁸ To implement the partnership theory, the drafters looked at the equitable system of property division used by common law property states — when marriages ended in divorce, and at the community property system that allocated ownership of marital property between the spouses upon acquisition.²⁹⁹ Neither system was satisfactory as a basis for adapting a forced-share law in common law property states.³⁰⁰ The most promising

14, § 401 (1989); VA. CODE ANN. § 64.1-16 (Michie 1995); WYO. STAT. ANN. § 2-5-101 (Michie 1997). The failure of the Massachusetts statute to fulfill the support theory is further evidenced by the fact that any forced share elected by the surviving spouse will only come in the form of a life-estate. Thus, the surviving spouse is allowed an income-only share of the decedent’s estate with the principal or asset being transferred to a trust. *See* MASS GEN. LAWS ch. 191, § 16 (1998).

²⁹⁶ . *See* UNIF. PROBATE CODE § 2-202(b). In making up this amount, UPC first looks to the surviving spouse’s *own* assets, including any assets that are transferred from the decedent to the surviving spouse and amounts owed to the survivor under other provisions of UPC. *See id.* at art. II, pt.2 (The Support Theory). Only if those assets are less than \$50,000 will the survivor be entitled to any additional portions of the decedent’s assets until the \$50,000 amount is reached. *See id.*

²⁹⁷ . *See* Waggoner, IOWA, *supra* note 101, at 242. Because the surviving spouse is electing against the will — thus the elective share — the estate necessarily must go through probate. It is not required that the proceeds of an estate pass through probate and there are many ways to avoid the process altogether. *See* Waggoner in WOMEN IN THE LAW, *supra* note 101, at § 3A.04[3][d]. Generally, each state has its own rules covering probate administration and the rest of the Uniform Probate Code is designed to streamline the system and minimize the costs. *See generally* AVERILL, *supra* note 54.

²⁹⁸ . *See* UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt. (amended 1993).

²⁹⁹ . *See* Waggoner, IOWA, *supra* note 101, at 242.

³⁰⁰ . *See id.* The equitable distribution system was rejected because there was no uniformity among the states in how they determined the type of property and the discretionary factors that were taken into account to determine what was equitable. *See id.* at 242-43. Three types of systems were identified: 1) the “kitchen sink system” where all the property was included; 2) the “marital property system” which excluded property that was acquired before marriage or by gift or inheritance; and 3) the “hybrid system” which presumptively excluded “marital property” unless doing so would be “unfair.” *Id.* at 243.

The other model was the community property system which, while injected into a common law property system, resulted in two approaches. First, the “strict deferred-community approach” automatically re-titled the couple’s property upon the death of the first spouse and gave half to the surviving spouse and half to the deceased spouse’s estate. Second, the “elective-share deferred-community approach,” gave the surviving spouse, but not the deceased spouse’s estate, the right to elect a half portion of the combined estate. *See id.* at 245.

model was the elective-share deferred-community approach.³⁰¹ In community property states, which recognize a difference between a marriage that ended in divorce and one that ended in death, there was an equitable distribution that was implemented for divorce and a mechanical split used at death.³⁰² At death, all of the couple's property except that which is acquired by gift or inheritance, is split according to a strict fifty-fifty ratio and other factors are not considered.³⁰³ The primary problem with this approach was the tracing-to-source and other classification problems.³⁰⁴ Generally, the deferred-community approach would require that those assets that were brought into the marriage or acquired by gift or inheritance be identified or classified.³⁰⁵ However, the UPC drafters were concerned that implementing a deferred-community approach in non-community property states could disadvantage couples who were not given adequate notice for record keeping purposes and commingled their assets.³⁰⁶

The drafters finally settled on a system that they labeled an accrual-type elective share that has three essential features.³⁰⁷ First, unlike the community property system, under the accrual-type elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during

³⁰¹ . See *id.*

³⁰² . See *id.*

³⁰³ . See *id.* at 246. This system uses an irrebuttable presumption of an equal contribution and "the analysis is that the couple's implied bargain upon entering marriage is one of equal splitting of the proceeds of the marriage, unless the couple opts out of the implied bargain by entering into a premarital or post-marital agreement." *Id.* at n.65.

³⁰⁴ . See Waggoner, IOWA, *supra* note 101, at 247.

³⁰⁵ . See *id.* at 247.

³⁰⁶ . See *id.* at 247 & n.69; see *infra* notes 373-80 and accompanying text for an explanation of how Wisconsin avoided this difficulty.

³⁰⁷ . See *id.* at 248; see also Langbein & Waggoner, *supra* note 286, at 314-17.

The solution chosen was a reflection of the decision to avoid the tracing problem altogether. See *id.* at 319. Essentially, the justification was that the individuation of allowing or requiring tracing was not worth the cost. See *id.* at 309. The cost identified was the "clumsiness and unfairness of trying to reconstruct a species of post-mortem community of acquets when the decedent is no longer alive to participate in the proofs." *Id.* Currently, only Colorado, Kansas, Minnesota, Montana, South Dakota, Tennessee, and West Virginia have adopted the accrual-type structure outlined in the 1990 Code. See COLO. REV. STAT. § 15-11-201 (Supp. 1996); KAN. STAT. ANN. § 59-6a202 (1994); MINN. STAT. ANN. § 524.2-202 (Supp. 1998); MONT. CODE ANN. § 72-2-221 (1997); S.D. CODIFIED LAWS § 29A-2-202 (Michie 1997); TENN. CODE ANN. § 31-4-101 (Supp. 1998); W. VA. CODE § 42-3-1 (1997). Only Tennessee failed to adopt the 1990 UPC approach in its entirety. See Andra J. Hedrick, *Protection Against Spousal Disinheritance: A Critical Analysis of Tennessee's New Forced Share System*, 28 U. MEM. L. REV. 561 & nn.125-29 (1998) (discussing the primary differences between the accrual-type system of the 1990 UPC and Tennessee's new accrual-type system).

the marriage by gift or inheritance.³⁰⁸ Instead, all of the property, regardless of source or title, is considered “universal” property.³⁰⁹

A second feature first counts the surviving spouse’s own assets in determining what the spouse is entitled to before assessing the decedent’s assets in making up any “deficiency.”³¹⁰ The final feature is the development of a schedule that incrementally increases the “elective share percentage,” which the surviving spouse would be entitled to receive with the maximum entitlement reaching fifty percent after fifteen years of marriage.³¹¹ The current schedule provides for three-percent increments starting in the second year of marriage, which essentially is the amount that the UPC dictates represents the increase in value acquired by the couple in the time allotted.³¹²

³⁰⁸ . See UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt. (amended 1993).

³⁰⁹ . Charles H. Whitebread, *The Uniform Probate Code’s Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 PROB. L.J. 125, 134 (1992). Professor Whitebread identifies three problems with the universal community approach chosen by the drafters. *See id.* First, the universal community approach is in philosophical conflict with the partnership theory espoused by the UPC and Langbein and Waggoner, who were both directly involved in the drafting of the revised elective share provisions. *See id.* at 135. However, Langbein and Waggoner had also identified three general factors that would tend to mitigate this discrepancy: 1) a spouse does not usually bring significant property into a long term first marriage; 2) people tend to marry into the same socio-economic classes; and 3) couples can opt out of the default rules through the use of premarital contracts. *See id.* Second, the estate of the deceased spouse has no claim against the surviving spouse’s estate. This is a problem when the spouse to die was the one without title, or title to less than half of the estate is in his or her name. The deceased spouse cannot, therefore, devise his or her half of the estate as would occur in a community property state. This provision, according to Professor Whitebread, focuses on the support theory in the UPC and not the marital partnership theory. *See id.* at 136-37. Finally, the mechanical, statistical model employed by the UPC is inflexible and does not account for scenarios other than long-term marriages or short-term, late-in-life marriages. *See id.* at 138. In fact, the two scenarios that he uses as examples: short-term, early-in-life marriages (where there are likely to be small children involved); and long, late-in-life marriages are not addressed by the UPC. *See id.*

³¹⁰ . *See* Waggoner, IOWA, *supra* note 101, at 248-49. For example, if title to the spouses’ universal assets, valued at \$600,000 were nominally held in the deceased spouse’s name then, they would all be available to make up the deficiency of the surviving spouse’s fifty percent share of \$300,000. *See id.* at 249.

³¹¹ . *See id.* at 248. This schedule is contained in § 2-202(a) of the Uniform Probate Code. *See* UNIF. PROBATE CODE § 2-202(a). Should the spouse die within the first year of marriage, § 2-202(b) provides for the right to elect the “supplemental elective-share amount” only. *See* UNIF. PROBATE CODE § 2-202(b).

³¹² . *See* Whitebread, *supra* note 309, at 128; *see also* UNIF. PROBATE CODE § 2-202(a).

Once the elective share percent is determined using section 2-202(a), it is then applied to the “augmented estate.”³¹³ The augmented estate consists of the sum of: a) the decedent’s net probate estate;³¹⁴ b) the decedent’s non-probate transfers to persons other than the surviving spouse;³¹⁵ c) the decedent’s non-probate transfers to the surviving spouse;³¹⁶ and d) the surviving spouse’s net assets and the surviving spouse’s non-probate transfers to others.³¹⁷ Thus, for example, if the universal assets of the couple is \$600,000 and the couple was married for five years, the elective share percentage would be 15% of the augmented estate, or \$90,000 (which represents 15% of the \$600,000).³¹⁸ The key is that only \$180,000 would be considered marital assets subject to equalization, regardless of any proof to the contrary held by the surviving spouse.³¹⁹ The remaining \$420,000 would be exempted.³²⁰ The UPC then doubles the elective share to 30% to determine the percent of marital assets and the percent of individual assets.³²¹ How the couple actually held title to these assets would determine whether or not the surviving spouse had a claim against assets held in the decedent’s name.³²² If for example, the deceased spouse held \$400,000 worth of the assets then 30 % of those assets, or \$120,000 would be considered marital assets subject to division and 70 % would be considered exempt as individual property.³²³ The same formula would apply to the remaining \$200,000 held by the surviving spouse, or \$60,000 would be marital

³¹³ . UNIF. PROBATE CODE § 2-203 (amended 1993). *See generally* Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code’s Redesignated Elective Share — Why the Partnership is Not Yet Complete*, 25 IND. L. REV. 1 (1991) (discussing through the use of specific and common examples, some inherent problems with the structure of UPC’s elective share system).

³¹⁴ . *See* UNIF. PROBATE CODE § 2-204. This amount is the value of the estate minus funeral and administration expenses, homestead allowances (§ 2-402), family allowances (§ 2-404), exempt property (§ 2-403), and enforceable claims (§ 1-201). *See* UNIF. PROBATE CODE § 2-204.

³¹⁵ . *See* UNIF. PROBATE CODE § 2-205. This section covers three basic categories: 1) property owned or owned in substance by the decedent immediately before death that passed outside of probate to persons other than the surviving spouse; 2) property transferred during the marriage; and 3) property transferred by the decedent during marriage and during the two-year period preceding the decedent’s death. *See* UNIF. PROBATE CODE, § 2-205, cmt.

³¹⁶ . *See* UNIF. PROBATE CODE § 2-206. This section covers all property that passed outside of probate at the decedent’s death and basically includes joint property interests and, if it had passed to someone else under § 2-205, would have been included. *See* UNIF. PROBATE CODE § 2-206, cmt.

³¹⁷ . *See* UNIF. PROBATE CODE § 2-207. This section basically covers all property that would be included had the surviving spouse been the one to die first. *See id.*

³¹⁸ . *See* UNIF. PROBATE CODE, art. II, pt. 2., gen. cmt. (Features of the Redesignated Elective Share).

³¹⁹ . *See id.*

³²⁰ . *See id.*

³²¹ . *See id.*

³²² . *See id.*

³²³ . *See* UNIF. PROBATE CODE, art. II, pt. 2, gen. cmt. (Features of the Redesignated Elective Share).

property and \$120,000 individual.³²⁴ The surviving spouse's own assets then account for \$60,000 of his or her "entitlement" and only the remaining \$30,000 need come out of the assets held by the deceased.³²⁵

This scheme is ostensibly designed to avoid asset tracing problems, the problems associated with poor record keeping, commingling and wasteful litigation.³²⁶ One criticism of this provision is that the drafters did not believe that spouses could ever ascertain what constituted marital property and therefore the right of couples "to keep their separate property separate and marital property within the partnership agreement" had to be forfeited.³²⁷

Even one of the primary architects of the accrual system, Professor Lawrence Waggoner, has also identified and expressed some fundamental criticisms, including the recognition that although the system has the "advantage of mechanical application . . . mechanistic justice is rough justice, and in most areas of the law we aspire to more than rough justice."³²⁸ Indeed, Professor Waggoner has expressed that he the now believes that the accrual system should have been structured differently.³²⁹ He states that the basic premise of the elective share is to implement the partnership theory of marriage, under which each spouse is entitled to fifty percent of property acquired during marriage and the purpose of the vesting schedule was to separate the marital from the non-marital property by approximation.³³⁰ Under his revised scheme, instead of using the vesting schedule to ensure that the surviving spouse receives fifty percent of the marital property, he would have the elective-share percentage *always* equal fifty percent of the augmented estate and rename the augmented estate the marital estate.³³¹

We would then have provided that the marital estate in a marriage that has lasted 15 years or more is 100 percent of the sum of (1) the decedent's net probate estate, (2) the decedent's nonprobate transfers to others, (3) the decedent's nonprobate transfers to the surviving spouse, and (4) the surviving spouse's net worth. But in a marriage that has lasted less than 15 years, the marital estate is a percentage of the

³²⁴ . *See id.*

³²⁵ . *See id.*

³²⁶ . *See Whitebread, supra* note 309, at 142.

³²⁷ . *Id.* at 143.

³²⁸ . Langbein & Waggoner, *supra* note 286, at 320. *See generally* Sepowitz, *supra* note 313.

³²⁹ . The author has a one-page memo from Lawrence Waggoner to the members of the Joint Editorial Board for the Uniform Probate Code, dated April 14, 1998 discussing a different method of calculating the elective share. Professor Waggoner has given permission to use this memo in preparing this Note [hereinafter Waggoner, Memo].

³³⁰ . *See* Waggoner, Memo.

³³¹ . *See id.*

sum of these amounts, scaled down so that the percentage in each category is twice the percentage we now provide for in the vesting schedule.³³²

Even if this modification were adopted, the underlying problem with the UPC's accrual type elective share remains — that is, it is the law of second best.³³³ “If America is really looking for a uniform system of marital property rights that completely incorporates the partnership theory of marriage, eventually all states will have to abandon elective or forced share law and adopt some sort of community property system.”³³⁴

B. The Wisconsin Solution

In 1984, Wisconsin enacted the Wisconsin Marital Property Act (WMPA) that was based in substantial part on the Uniform Marital Property Act.³³⁵ Wisconsin is now counted as the ninth community property state and the first common law property state to successfully make the transition to a community property state.³³⁶ There were six factors identified as contributing significantly to the ability of Wisconsin to pass and implement this sweeping change: 1) the need for reform had been recognized and was part of public and legislative debate for a number of years;³³⁷ 2) Wisconsin was able to use other jurisdictions as models in adopting community property principles, including the reforms enacted between 1967 and 1980 giving equal management and control to both spouses;³³⁸ 3) the adoption of the UMPA by the National Commissioners of Uniform State Laws in July 1983 gave additional legitimacy to the need for fundamental changes in common

³³² . *Id.* Professor Waggoner also gave the following illustration: “in a marriage of 5 but less than 6 years, the elective share percentage is 15 percent of the augmented estate. We should have provided that the elective share percentage is 50 percent of the marital estate, and further provided that in a marriage of 5 but less than 6 years, the marital estate is 30 percent of the sum of the above four components.” *Id.* These changes could be accomplished by shifting the schedule from § 2-202 to § 2-203 and doubling the percentages. *See id.*

³³³ . *See* Langbein & Waggoner, *supra* note 286, at 306.

³³⁴ . Whitebread, *supra* note 309, at 142.

³³⁵ . *See* Erlanger & Weisberger, *supra* note 115, at 769. In adopting the new marital property system, the legislature made some significant changes to the UMPA, and therefore, “believe it to be *incorrect* to say that ‘Wisconsin adopted the UMPA.’” *Id.* at 776. Instead, the drafters refer to the legislation as the “WMPA.” *See id.*

³³⁶ . *See infra* notes 382-95 and accompanying text.

³³⁷ . *See* Erlanger & Weisberger, *supra* note 115, at 771. As early as 1974 there was a Governor’s Commission on the Status of Women that held a series of meetings at which a number of issues regarding rights at marriage and death were articulated and discussed. In 1977, Wisconsin also reformed its divorce laws and formally adopted laws founded on the concept of marriage as a partnership. *See id.*

³³⁸ . *See id.* at 773.

law property rules;³³⁹ 4) there was bipartisan support in the legislature;³⁴⁰ 5) there was strong support and active lobbying from the Wisconsin Women's Network and the League of Women Voters;³⁴¹ and 6) the major Wisconsin protagonists, especially the State Bar, recognized that significant changes were necessary in order to make property rights more equitable during marriage and at death.³⁴²

The Wisconsin legislature did not adopt the UMPA in its entirety.³⁴³ Rather, it analyzed the various provisions and significantly modified several of them according to what the drafters believed to be in the best interests of the state and its citizens.³⁴⁴ For example, under the UMPA when one spouse causes the value of non-marital property to appreciate substantially, either through substantial labor or effort, it is recognized as marital property only when the property is owned by the *other* spouse.³⁴⁵ The WMPA broadened the rule to include the property as marital property where the active appreciation was the result of efforts by *either* spouse.³⁴⁶ The approach taken by Wisconsin similarly maintained the general rule followed in other community property states.³⁴⁷

Another modification in Wisconsin law allows a spouse to unilaterally execute a written statement that reclassifies the "fruits" of the owning spouse's individual property as non-marital property.³⁴⁸ The general rule followed by the UMPA and several of the community property states is that the "fruits" from separate property (for example, rents from real estate,

³³⁹ . See *id.* at 773-74. See generally William P. Cantwell, *Drafting the Uniform Marital Property Act: The Issues and Debate*, 21 HOUS. L. REV. 669 (1984); William P. Cantwell, *The Uniform Marital Property Act: Origin and Intent*, 68 MARQ. L. REV. 383 (1985).

³⁴⁰ . See Erlanger & Weisberger, *supra* note 115, at 774. The main opponent in the Assembly was Tommy Thompson, who was then elected Governor in 1987. Also elected that year was the former state Senator, Donald Hanaway, as Attorney General who was one of WMPA's strongest supporters. See *id.* at 774 & n.24.

³⁴¹ . See *id.* at 775.

³⁴² . See *id.*

³⁴³ . See *id.* at 776.

³⁴⁴ . See *id.* at 776-82. See generally Carl J. Rasmussen, *The Sexual Politics of Estate Planning in Wisconsin: An Introduction to the Marital Property Act*, 21 REAL PROP. PROB. & TR. J. 485 (1986) (comparing the UMPA with the provisions of the WMPA including a discussion of the potential effect of the WPMA on some of the estate planning details that commonly arise).

³⁴⁵ . See Erlanger & Weisberger, *supra* note 115, at 776 n.30 (referencing UMPA § 14(b), 9A U.L.A. (1983)).

³⁴⁶ . See *id.* at 776.

³⁴⁷ . See *id.*

³⁴⁸ . See *id.* at 777. The Wisconsin provision is prospective and only current spouses can exercise this option. Failure to notify the other spouse within five days is considered a breach of the good faith management-and-control duty. See *id.* at n.34.

dividends from stocks, interests on bank accounts) are considered marital property.³⁴⁹

Wisconsin also adopted a “terminable interest rule” which affects a spouse’s rights in deferred employment benefits when a non-employee spouse dies first.³⁵⁰ The WPMA terminates any marital property interest that the deceased non-employed spouse had in any applicable employee benefit plan acquired through the employment of the surviving spouse.³⁵¹ This provision was enacted in order to prevent any hardship on the surviving spouse if the non-employee spouse could will away the surviving spouse’s deferred employment benefits to third parties.³⁵²

The WMPA also adopted stricter enforcement standards for marital property agreements.³⁵³ Under the WMPA, spouses are allowed to contract a wide range of issues affecting property rights during marriage, at death or after death.³⁵⁴ According to the provisions of the WMPA, the party resisting enforcement of a marital property agreement carries the burden to prove that the agreement was either “unconscionable when made,” not “voluntarily executed,” or made without reasonable financial disclosure “under the circumstances.”³⁵⁵ In an effort to assist couples regarding their rights under marital property agreements, Wisconsin provided three statutory agreement forms.³⁵⁶ First, the Statutory Individual Property Classification Agreement (SIPCA), was essentially an interim form which allowed spouses to classify their property during the transitional phase between common law property rules and community property rules.³⁵⁷ The other two agreements: the Statutory Terminable Marital Property Classification Agreement

³⁴⁹ . See *id.* at 777. The UMPA, Louisiana, Idaho, and Texas all follow the “traditional rule.” See *id.* Arizona, California, New Mexico, Nevada, and Washington follow the “American rule” that rents and profits from separate property are also separate property. See *id.* at 777 n.33.

³⁵⁰ . Erlanger & Weisberger, *supra* note 115, at 777.

³⁵¹ . See *id.*

³⁵² . See *id.* at 777-78 & n.37. Under the UMPA, each spouse continues to own a one-half vested interest, during life and at either spouse’s death, in the marital property component of the deferred benefits of either spouse. See UNIF. MARITAL PROPERTY ACT § 4 (c) § 13 (a) (amended 1983), 9A U.L.A. 116, 139 (Supp. 1998).

³⁵³ . See *id.* at 778. The UMPA allows for different standards depending on whether the agreement was entered into prior to the marriage or during the marriage. See generally UNIF. MARITAL PROPERTY ACT § 4 (amended 1983), 9A U.L.A. 116, 139 (Supp. 1998).

³⁵⁴ . See Erlanger & Weisberger, *supra* note 115, at 794.

³⁵⁵ . *Id.* at 795. “Each of these standards has been the subject of litigation in Wisconsin” and is still not a settled area of law. *Id.* “[T]he defenses of undue influence, fraud, misrepresentation, mutual mistake and the existence of substantial and unforeseeable change” in circumstances are still available. *Id.* “The ‘substantial and unforeseeable’ defense is especially important, because it allows examination of the circumstances of the spouses at the time of enforcement, in contrast to the statute’s focus on unconscionability at the time of execution.” *Id.*

³⁵⁶ . See *id.* at 796.

³⁵⁷ . See *id.* Using this form did not allow the spouses to evade the “elective rights to property that would have been marital property under WMPA but for the statutory agreement.” *Id.* The availability of the agreement was also limited to the first year after the effective date of the statute. See *id.*

(STMPCA), and the Statutory Terminable Individual Property Classification Agreement (STIPCA), were adopted by the Wisconsin legislature in 1988.³⁵⁸ The STMPCA is “fairly comprehensive in its scope,” and classifies all property, including future property, as marital property.³⁵⁹ The STIPCA, on the other hand, is title based and reclassifies what would otherwise be marital property as the individual property of the titled owner.³⁶⁰

The WMPA also adds some specific rules beyond what the UMPA provides for³⁶¹ to include “access to credit based on ‘family assets [marital property owned by the spouses] and income [marital property generated by one or both spouses],’ regardless of which spouse applies for the extension of credit.”³⁶² Under the WMPA, the practice of granting credit is affected in two important ways: 1) indirectly by providing that, for purposes of applying for credit, either spouse is considered to manage and control all of the marital property, regardless of how the property is titled; and 2) directly by requiring the creditor to grant a married person credit based on consideration of the couple’s marital property.³⁶³

Finally, the major “difference between the UMPA and the WMPA concerns the status of joint tenancy [provisions] under the marital property system.”³⁶⁴ The UMPA and the WMPA both allow all property acquired by the spouses

³⁵⁸ . *See id.* That is, any alteration of the language in the forms as dictated by the statute would invalidate the document as a statutory agreement. *See id.*

³⁵⁹ . *Id.* at 798.

³⁶⁰ . *See Erlanger & Weisberger, supra* note 115, at 798.

³⁶¹ . *See id.* at 787.

³⁶² . *Id.* This is particularly important because prior to the adoption of the WMPA, creditors relied on the title-based system of property ownership to determine whether or not to extend credit to an individual. *See id.* Even though under the Equal Credit Opportunity Act creditors were not supposed to discriminate on the basis of sex or marital status, it was not considered to be discriminatory to grant credit to the wage earning spouse and deny it to the homemaking spouse who did not own property, or to extend greater credit to the spouse with the greater income and less, or none, to the spouse with a reduced income. *See id.* Again, the effects of life under a common law property system can result in discrimination specifically against women who do not have some independent economic means and may serve to keep them economically dependent.

³⁶³ . *See id.* at 787-88. “Except for the purpose of obtaining credit, management and control of marital property in Wisconsin is generally determined by title or possession.” *Id.* at 788 n.73.

³⁶⁴ . *Id.* at 779 & n.43 (for examples of some of the minor differences between the UMPA and the WMPA). Consideration of the “determination date” is important in ascertaining how the status of any jointly held properties will be interpreted. *See id.* at n.44. The determination date triggers coverage by the WMPA. *See id.* Wisconsin decided that a couple’s determination date would be as of the last of three events to occur: “1) marriage or 2) 12:01 a.m. on the date of establishment of a ‘marital domicile’ in the state or 3) the effective date of the Act” (January 1, 1986, although the Act was actually passed on April 4, 1984). *Id.*

before the determination date to remain as is.³⁶⁵ Both acts “recognize survivorship marital property as a special form of marital property holding which vests complete ownership in the asset in the surviving spouse without probate.”³⁶⁶ Generally, the WMPA stipulates three rules governing property owned exclusively by the spouses: 1) any property which the spouses attempt to acquire while the WMPA applies to their marriage is considered survivorship marital property;³⁶⁷ 2) to the extent pre-WMPA joint tenancy and marital property laws conflict, the WMPA allows the incidents of joint tenancy, including survivorship provisions, to prevail;³⁶⁸ and 3) under the WMPA, if both spouses’ names are on the title, and there is no indication to the contrary, then as long as the property is the couple’s homestead at the time of the acquisition, the title will be held as survivorship marital property.³⁶⁹

In order to ensure a smooth transition to the new property system, Wisconsin commissioned a Special Legislative Council Committee on Marital Property Implementation to determine if there were any provisions of the Act that needed clarification prior to its effective date.³⁷⁰ The Special Committee, combined with subsequent trailer bills, proved to be another integral part of ensuring that the process allowed for a thorough, nonpartisan review of

³⁶⁵ . See *id.* at 779-80.

³⁶⁶ . *Id.* at 780. “This form of holding must be created by title; testamentary formalities are not required.” *Id.* at n.45.

³⁶⁷ . See Erlanger & Weisberger, *supra* note 115, at 780.

³⁶⁸ . See *id.* at 780-81.

³⁶⁹ . See *id.* at 781. As a general rule under the UMPA, if both spouses’ names are on the title, the presumption is that the property is to be held as marital property *without* survivorship. See *id.* If the tenancy was created prior to February 11, 1980, Massachusetts did not grant women an equal right to “the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.” MASS. GEN. LAWS ch. 209, § 1 (1998). For interesting applications of this legal wrinkle and an historic overview of this common law rule, see generally Coraccio v. Lowell Five Cents Savings Bank, 612 N.E.2d 650 (Mass. 1993) and *In Re Conroy Paul*, 224 B.R. 282, 283 (Bankr. D. Mass. 1998). Conroy involved a bankruptcy petition and the protections afforded by homestead exemption provisions. See *id.* Following the holding of *In re Coombs*, 86 B.R. 314 (Bankr. D. Mass. 1988), the judge held that under common law tenancy by the entirety, the husband has “superior rights” in the residence and therefore, the value of his interest is greater than one-half. *Id.* Using the common law doctrine as applied by Massachusetts, the judge listed the legally prescribed advantages enjoyed by a husband as: “the exclusive right to income, possession and control of the property during his lifetime” and the ability to “alienate the property” without his wife’s knowledge. *Id.* Alternatively, since “the right of the right of survivorship was the wife’s only interest in the property, . . . and she had no right to possess the property, she could not alienate her interest without her husband’s [knowledge and] consent” — the judge found, even in 1998, that the husband’s interests remained superior. *Id.* See generally Janet D. Ritsko, *Lien Times in Massachusetts: Tenancy by the Entirety After Coraccio v. Lowell Five Cents Savings Bank*, 30 NEW ENG. L. REV. 85 (1995) (providing a detailed analysis of the application of the common law rule in Massachusetts as well as the meaning and effect of the 1980 legislation giving wives equal rights).

³⁷⁰ . See Erlanger & Weisberger, *supra* note 115, at 781. One of the members of the Committee was Professor Weisberger. See *id.* at n.50.

proposed amendments to the Act.³⁷¹ Also of inestimable value was the fact that the Internal Revenue Service shortly thereafter recognized Wisconsin's new marital property system as a community property system for tax treatment purposes.³⁷²

Effective January 1, 1999, Wisconsin also passed a new law governing an "Elective Share in Deferred Marital Property."³⁷³ The Wisconsin legislature sought to address a "major wrinkle" that occurs in community or marital property systems by proscribing the appropriate "treatment of property acquired by spouses during a period when they were not subject to community property rules."³⁷⁴ This new statute is essentially a quasi-community property statute, designed to cover property that would have been marital property, but for the fact that it was acquired at a time or in a place where community property laws did not apply.³⁷⁵ Because this unclassified property is treated as the individual property of the "titled" spouse, there is no vested interest obtained by the surviving spouse.³⁷⁶

For property that would have been marital property, the result is to deny the surviving spouse the ownership benefits of the property, while also failing to provide him or her the protection of the spousal election available in common law property regimes. Therefore, unclassified property that would have been marital

³⁷¹ . See *id.* at 782.

³⁷² . See Rev. Rul. 87-13, 1987-1 C.B. 20.

For tax purposes, the implication of this ruling is that the basis in both halves of marital property is stepped up to its value at the date of the decedent's death under IRC § 1014(b)(6). If marital property had been treated for tax purposes as tenancy-in-common property, *only the decedent's half* would have received a step-up in basis.

Waggoner *in* WOMEN AND THE LAW, *supra* note 101, at § 3A.02[3] n.13 (emphasis added). Wisconsin's status as a community property state was also recognized by the Federal Reserve Board. See, e.g., Equal Credit Opportunity; Intent to Preempt Wisconsin Law, 12 C.F.R. Part 202 (1986); Equal Credit Opportunity Determination of Effect of State Laws (Wisconsin), 12 C.F.R. Part 202 (1987). Conversely, for property held as a tenancy by the entirety in Massachusetts, only one-half receives the stepped up basis (as described above), which results in significant tax consequences for the surviving spouse. See William V. Hovey, *Tenancies by the Entirety: Past and Present*, MASS. LAW. WKLY., Sept. 27, 1993, at 39.

³⁷³ . WIS. STAT. § 861.01-18 (1998).

³⁷⁴ . HOWARD S. ERLANGER, THE NEW WISCONSIN PROBATE CODE — A HANDBOOK FOR PRACTITIONERS 140 (1998).

³⁷⁵ . See *id.* In order to avoid any concerns regarding unconstitutional "takings" both the UMPA and the WMPA have determined that "neither adoption of the act nor spouses' change of domicile from a common law property state to a marital property state should cause their property to be classified under the marital property system [and] both acts treat all unclassified property as individual property during the marriage." *Id.*

³⁷⁶ . See *id.*

property — termed *deferred marital property* in Wisconsin — requires a special rule to prevent disinheritance of the surviving spouse.³⁷⁷

The deferred marital property statute tracks the augmented estate method outlined in the UPC.³⁷⁸ It is believed that the deferred marital property elective share will be taken care of during lifetime transfers between spouses or at the death of the first spouse.³⁷⁹ If not, the statute makes additional provisions for how the balance of the share is to be satisfied, including the ability of a court to make an equitable adjustment of the shares if a proportionate share is uncollectible.³⁸⁰

Wisconsin provides all of the common law states with a working model that could be replicated in each of the states that still utilize an elective share approach to the division of marital property upon the death of a spouse. Wisconsin's success seems to be based on a combination of foresight, planning, public support, and a recognition of and commitment to achieving an equitable system for all of its married and potentially married citizens. Unlike the UPC's alternative to the traditional elective share, which even among its greatest supporters and proponents is still considered the second-best choice, the available literature concerning Wisconsin's decision to convert to a community property system concedes that it is the best choice for a common law property state to make, and that it can be done.³⁸¹

C. The Great American Tax Experiment

Although Wisconsin is thus far the only state to adopt UMPA and move from a common law property system to a community property system, it is not the first state to experiment with such a statute.³⁸² Between 1939 and

³⁷⁷ . *Id.*

³⁷⁸ . See WIS. STAT. § 861.03 (1998). The sections tracked in the UPC are §§ 2-204, 2-205, and 2-206; see also ERLANGER, *supra* note 374, at 151-56 (depicting specific details and explanations of the new elective share for deferred marital property).

³⁷⁹ . See ERLANGER, *supra* note 374, at 156-57.

³⁸⁰ . See *id.* The equitable adjustment provision is not part of the UPC. See *id.*

³⁸¹ . See Whitebread, *supra* note 309, at 141. Professor Whitebread notes most of the criticism of Wisconsin's version of the UMPA came shortly after the WMPA was enacted. See *id.* It appears that the concerns "raised by these profound changes have largely been settled and that [the] problems were minimal." *Id.*; see also Palma M. Forte, *The Wisconsin Marital Property Act: Sections in Need of Reform*, 79 MARQ. L. REV. 859, 859 (1996) (approving of Wisconsin's accomplishments in making marriage more like a partnership and discussing some of the remaining adjustments that Wisconsin should consider, mostly in the area of credit, by comparing the WMPA to the community property system in Arizona).

³⁸² . See Jonathan G. Blattmacher et al., *Tax Planning With Consensual Community Property: Alaska's New Community Property Law*, 33 REAL PROP. PROB. & TR. J. 615, 615 (1999). Based in part on UMPA, Alaska has now adopted the Alaska Community Property Act, effective May 23, 1998. See *id.* at 617. This act has two objectives: 1) allow residents, "many of whom have roots in community property states," to classify all or part of their property as community property; and 2) "to give both residents and non-residents who

1949, six states: Hawaii, Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania made the transition from common law property to community property states in order to take advantage of a significant tax benefit.³⁸³ The impetus for this incredible movement came in 1930 from the Supreme Court in the case *Poe v. Seaborn*,³⁸⁴ which settled a debate that had been simmering for at least the prior decade concerning the proper allocation of income in community property states.³⁸⁵ Unlike tax laws affecting couples in common law property states, the Court in *Poe* held that married couples in community property states could split both investment and earned income reported on their tax returns.³⁸⁶ In a series of companion cases decided the same year as *Poe*,³⁸⁷ the Court “conferred upon the wife a proprietary, vested interest in the community as opposed to a mere expectancy.”³⁸⁸

establish community property trusts the ability to take advantage of the double basis step-up available to community property under [I.R.C.] § 1041(b)(6).” *Id.* Unlike other community property states, where applicable property rules are mandatory unless a couple modified them by agreement, this statute allows couples an opportunity to opt-in to a community property regime. *See id.* at 616. The most amazing part of this statute is that it allows non-Alaska citizens to also opt-in to this property regime simply by creating an Alaska Community Property Trust. *See id.* at 633. For a valid trust to exist, the statute requires that 1) one or both spouses transfer property to a trust; 2) the trust expressly reference the statute; and 3) at least one trustee is a “qualified person.” *Id.* The key is that the statute defines a qualified person to include “an individual Alaska domiciliary, an Alaska trust company, or an Alaska bank.” *Id.*

³⁸³ . *See* DEFUNIAK, *supra* note 68, at § 53.1.

³⁸⁴ . 282 U.S. 101 (1930).

³⁸⁵ . *See* Susan Kalinka, *Federal Taxation of Community Income: A Simpler and More Equitable Approach*, 1990 WIS. L. REV. 633, 639 (1990).
³⁸⁶ . *See* Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 266 (1988); *see also* John A. Miller, *Federal Income Taxation and Community Property Law: The Case for Divorce*, 44 SW. L.J. 1087, 1087 (1990). The Supreme Court decided *Poe* the same year that it decided *Lucas v. Earl*, 281 U.S. 111, 114-15 (1930). *See Poe*, 282 U.S. 101. Because the Court asserted the principle that income is to be taxed to the person who earned it, *Lucas* is considered to be the definitive assignment of income case. *See Lucas*, 281 U.S. at 114-15. Thus, *Poe*, by allowing couples to reduce their income tax burden by splitting the total between spouses regardless of which one actually “earned” it, was a significant exception to the rule in *Lucas*. *See Poe*, 282 U.S. at 117-18.

³⁸⁷ . *See* Kalinka, *supra* note 385, at 640 & nn.30-32. These cases are: *Goodell v. Koch*, 282 U.S. 118, 121 (1930); *Hopkins v. Bacon*, 282 U.S. 122, 126 (1930); *Bender v. Pfaff*, 282 U.S. 127, 129 (1930). *See id.*

³⁸⁸ . Kalinka, *supra* note 385, at 640. This right was extended to apply to the last of the community property states, California, in 1931. *See id.* This “proprietary, vested interest” represents a significant difference from a dower or elective share interest as found in common law property states. *Id.* Dower, which arose upon the act of marriage, has been held to represent only an inchoate right that was contingent on survivorship of the wife before it could be exercised. *See Mason v. Mason*, 3 N.E. 19, 20 (Mass. 1885). Dower is not such separate

Initially, because the tax rates at that time were relatively low, the impact of *Poe* was not widely felt.³⁸⁹ However, the advantages of living in a community property state, at least from a tax perspective, began to add up to considerable savings³⁹⁰ and the common law property states quickly began to join the bandwagon.³⁹¹ In addition to the five states that formally adopted community property laws, ten other states were in the process of debating or adopting the switch to a community property system.³⁹² In 1948, Congress abruptly stopped this trend by adopting the income-splitting joint tax return³⁹³ and the great American tax experiment came to a crashing halt. Unfortunately, the five states that had enacted community property laws

property that could be disposed of by the wife by conveyance or contract during her husband's lifetime. *See id.* Unlike the present vested interest found to exist in community property states, dower could only be exercised if the husband died actually seized of land. If not, the wife's claim to dower is a hollow "right." *See Matthews v. Matthews*, 6 N.E. 776, 778 (Mass. 1886); *see also* Opinion of the Justices, 151 N.E.2d 475, 480 (1958) (rendering an advisory opinion to the legislature to determine whether the legislature could place statutory limitations on dower and curtesy claims in the Commonwealth). The Supreme Judicial Court held that because the right is not a natural right, but one wholly created in the law, thus "the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away." *Id.* at 477.

³⁸⁹ . *See Kalinka, supra* note 385, at 640.

³⁹⁰ . *See id.* Professor Kalinka notes that in 1946, an estimated \$344 million in taxes were saved by married couples living in the eight community property states. *See id.* Compared to a couple earning \$25,000 in 1946, living in a community property state, a couple in a common law state, where only one spouse was employed, paid 41% more in income tax. *See id.*

³⁹¹ . *See Wenig, supra* note 23, at 821.

³⁹² . *See Kalinka, supra* note 385, at 641. The ten other states were: Alabama, Colorado, Illinois, Indiana, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Wisconsin. *See id.*

³⁹³ . *See Jones, supra* note 386, at 259. Professor Jones notes that although casebooks, treatises, and law review articles contained descriptions of the cases, legislative actions and adoption of the joint return by Congress, there was little analysis given to why these events occurred and, even more importantly, the impact of societal assumptions regarding women, property, family, and marriage on these events. *See id.* at 260. She makes a persuasive argument that one of the primary reasons for "the failure of more states to switch to a community-property system was a hostility toward a wife's present interest in community earnings and property, which were usually thought of as being the product of the husband's labors." *Id.* at 270. Professor Jones also notes that despite the vast and essential contributions that women were making toward the success of the war effort, they were nevertheless expected to relinquish their new economic and social freedoms and quietly return home to their stereotypical paradigm of wife and mother. *See id.* at 263-64.

subsequently repealed them and until Wisconsin's conversion in 1986,³⁹⁴ no other state made a switch.³⁹⁵

However, this does not mean that all is lost. Given the lessons of history and a clearer understanding of what constitutes an equal and equitable partnership in marriage, common law states have an increased chance to make a successful conversion to a community property system.

D. The Federal Tax Code: Solution or Complication?

A statute, which allows a surviving spouse to take a life interest in one-third of the decedent's estate, may appear to be fairly simple and straightforward to apply. However, hidden beneath the statute's surface lies a labyrinth-like maze of social policies and laws — not the least of which are our tax laws and their attendant social and political policies — that are not readily resolvable. Indeed, “[m]arital property laws, like systems of taxation, are part of the social relations of distribution; marriage laws allocate wealth in a fashion that is distinct from, although entangled with, social relations in which wealth is produced.”³⁹⁶

Contemporary estate planning practices rely heavily on the use of existing federal estate and gift taxation codes and non-probate transfer devices to minimize tax consequences. The reliance on these tax measures and transfer devices also maximizes the use, conservation, and transfer of assets and wealth in keeping with the estate owner's wishes.³⁹⁷ Consequently, one of the primary criticisms of a traditional elective share statute is that it is only applied to property that is subject to a probate disposition.³⁹⁸ The increased availability and popularity of will substitutes enhance a decedent's ability to

³⁹⁴ . See WAGGONER ET AL., *supra* note 34, at 519. The authors note that the return to a separate property regime “had the effect of conserving traditional gender roles and power relationships within the marriage.” *Id.*; see also *supra* notes 334-380 and accompanying text for a detailed discussion of the Wisconsin conversion.

³⁹⁵ . See Brant, *supra* note 120, at 55. Despite the lack of formalistic adoption of community property laws, Mr. Brant makes the argument that Colorado's combination of statutory and case law make Colorado a pseudo-community property state. See *id.* at 55-56. He notes that the most significant difference between Colorado and a “true” community property state is the inability of a Colorado decedent to dispose of assets titled solely in the surviving spouse's name. See *id.* at 56.

³⁹⁶ . Siegel, *supra* note 1, at 1123.

³⁹⁷ . See generally HAROLD WEINSTOCK, *PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES* (4th ed. 1997).

³⁹⁸ . See Susan N. Gary, *Share and Share Alike?*, *PROB. & PROP.*, Mar.-Apr. 1998, at 19.

pass property outside of the probate system and either significantly reduce or completely defeat the surviving spouse's right to an elective share.³⁹⁹

1. The QTIP Option

One of the most popular will substitutes currently available to married couples for their estate planning purposes is the qualified terminable interest property (QTIP).⁴⁰⁰ Passed by Congress in 1981, the QTIP quickly gained wide usage as a popular method of gaining the marital deduction in estate-planning practice.⁴⁰¹ However, the QTIP has been characterized as the new federal law of dower.⁴⁰² The QTIP allows the entire estate, regardless of its size, to be put into a trust that is exempt from all estate taxes at the time that the first spouse dies.⁴⁰³ Unlike the marital deduction, which

³⁹⁹ . *See id.* Examples of non-probate transfers include gifts, revocable or irrevocable inter-vivos trusts, life insurance policies and joint property holdings. These are legitimate estate planning devices that are also highly effective in minimizing taxes and probate expenses, as well as providing adequate support for a spouse or other legitimate beneficiaries. However, it is these very same legitimate devices that represent some of the major difficulties encountered in developing an alternative piece of legislation in Massachusetts. *See* Martinek & Cohen, *supra* note 63, at 36 (highlighting in a chart format the pros and cons of including various testamentary substitutes in the bills proposed by the MBA and the BBA/WBA).
⁴⁰⁰ . *See* I.R.C. § 2056(b)(7) (1981) (officially titled the "Election With Respect to Life Estate for Surviving Spouse"). Congress first enacted the unlimited marital deduction in 1981 as well. *See* Mary Moers Wenig, *Taxing Women: Thought on a Gendered Economy Symposium Beyond the Income Tax*, 6 S. CAL. REV. L. & WOMEN'S STUD. 561, 571 (1997) [hereinafter Wenig, *Taxing*]. In the years between 1948, when the joint income tax return and the fifty percent marital deduction allowance was first enacted, and 1981, with the passage of the full marital deduction, Congress struggled with the difficulty of having two marital property systems that treated spouses, and the attendant tax issues, differently. *See id.* at 569. In community property states, both spouses receive a step-up in the basis of their community property when the first spouse dies. *See id.* at 570. In common law property states, fifty percent of the estate received the marital deduction treatment that could be left in a marital deduction trust going to the surviving spouse outright without estate tax consequences until the surviving spouse died, but only to the extent that there were any assets remaining that exceeded the surviving spouse's own exemption. *See id.* To qualify for the beneficial tax treatment, the marital deduction trust had to give the surviving spouse the right to dispose of any remaining assets without restriction. *See id.* The remaining fifty percent could go into a bypass trust subject to an estate tax only when the first spouse died. *See id.*

⁴⁰¹ . *See* WAGGONER ET AL., *supra* note 34, at 573. Prior to 1981, "the only methods available for qualifying for the marital deduction required the surviving spouse to be given testamentary control over the property, either through outright ownership of that property or under a general power of appointment." *Id.* at n.37.

⁴⁰² . *See* Wenig, *Taxing*, *supra* note 400, at 572. Professor Wenig notes that she was told about the passage of the QTIP option by a banker friend who had been in Washington D.C. the summer before the passage of the bill counting marriages and divorces. *See id.* Apparently, it was believed that once the number of Congressmen in second marriages exceeded the number still in first marriages, the passage of the QTIP was assured. *See id.*

⁴⁰³ . *See id.*

requires the surviving spouse to have a general power of appointment,⁴⁰⁴ the surviving spouse whose inheritance is subject to the QTIP is entitled to receive *only* an interest in the income from the property and has no power of final disposition over the assets in the trust.⁴⁰⁵ The ability to elect a QTIP on behalf of the estate resides with the executor of the estate who is appointed by the deceased. Furthermore, the QTIP can be made applicable to all or a portion of the estate assets and once made the election is irrevocable.⁴⁰⁶

Because a QTIP only allows for a life estate in the property, surviving spouses can take a statutory share against a QTIP and obtain absolute ownership and control over that share only in states that allow for absolute ownership of the statutory amount.⁴⁰⁷ There are, however, several non-obvious but significant economic consequences to taking an elective share, whether against a QTIP or merely against the provisions of the decedent's will, that have yet to be consistently resolved in the separate property states.⁴⁰⁸

One of the problems in calculating the elective share is whether the federal estate tax is subtracted or apportioned, before or after the elective share is applied.⁴⁰⁹ If a state has enacted a tax apportionment statute, then the amount of the elective share is calculated on the basis of the estate before

⁴⁰⁴ . See I.R.C. § 2056(b)(5).

⁴⁰⁵ . See WAGGONER ET AL., *supra* note 34, at 573. There is no requirement in I.R.C. § 2056(b)(7) that any distribution of principal to the surviving spouse *ever* be made — the trust will stand so long as at least one annual distribution of the income is made by the trustee. See I.R.C. § 2056(b)(7)(B)(ii)(I) (1981) (emphasis added). Although the tax code language is gender-neutral, it is interesting to note that the regulations covering I.R.C. § 2056 employ a gendered use of pronouns to reflect the “assumption” that the surviving spouse is the wife. See Treas. Reg. § 20-2056 (1997).

⁴⁰⁶ . See I.R.C. § 2056(b)(7)(B)(v). The requirement that the election is made after the decedent's death when important facts about the estate are better known, also has important estate planning implications. See Wenig, *Taxing*, *supra* note 400, at 573. From a post-mortem perspective, it is easier to assess:

the size of the deceased spouse's estate; whether the QTIP trust includable in the surviving spouse's gross estate is likely to be aggregated with the surviving spouse's own wealth; what the surviving spouse's health is; and whether the calculations play better with the election to take the marital deduction and defer the estate tax until the surviving spouse's death or to forego the marital deduction and use the property-previously-taxed credit available under I.R.C. § 2013 for the surviving spouse's estate.

Id.

⁴⁰⁷ . See WAGGONER ET AL., *supra* note 34, at 573. Thus, a surviving spouse in Massachusetts will only obtain a life estate, whether in a QTIP or in a trust established by the existing state statute. See *id.*

⁴⁰⁸ . See *id.* at 574. Some of these same issues also apply to intestate transfers.

See *id.*

⁴⁰⁹ . See *id.*

estate taxes have been subtracted.⁴¹⁰ Therefore, whatever estate taxes are due to the federal government are apportioned or subtracted only among the recipients of taxable transfers, a category which has been held to not include surviving spouses.⁴¹¹ In states that have not enacted tax apportionment statutes, the court decisions are divided as to whether the federal taxes or the elective share come out first.⁴¹²

Two recent cases highlight the hidden tax consequences for widows who opted for their statutory share instead of settling for what they were left in their deceased husband's will. The first, *Deutsch v. Commissioner*,⁴¹³ involved a Florida woman whose husband of nine years died leaving a net estate of \$3,361,683.⁴¹⁴ The widow was left with the "decedent's interests in two country clubs . . . furnishings and other tangible personal property located at his residence,"⁴¹⁵ while the residuary estate went in equal shares to the husband's three children from his first marriage.⁴¹⁶ The widow, who was left with considerably less than her statutory share of \$1,008,504, decided to elect against her husband's will.⁴¹⁷ When the dust finally settled, the issue left for the Tax Court to decide was whether the widow, by electing against the will and receiving a statutory share of the estate, was liable for \$201,825 in income tax incurred as a result of receiving her forced share.⁴¹⁸ In deciding the issue, the Tax Court first extensively analyzed the concept of dower and the relevant elective share.⁴¹⁹ Relying on rulings of both the Florida Supreme Court and lower Florida courts, as well as "the effect of those legal rights and interests for Federal income tax purposes in accordance with Federal income tax principles and rules,"⁴²⁰ the Tax Court ultimately held that the widow was not liable for the taxes.⁴²¹ In reaching its decision, the Tax Court reasoned that:

⁴¹⁰ . See *id.* "The UPC incorporates [this] as § 3-916 the Uniform Estate Tax Apportionment Act." *Id.*

⁴¹¹ . See *id.* Tax apportionment statutes provide that any "deduction allowed by reason of the relationship of any person to the decedent . . . inures to the benefit of the person bearing such relationship. . . . [Therefore,] transfers that qualify for the marital deduction are not taxable transfers under the federal estate tax." *Id.*

⁴¹² . See WAGGONER ET AL., *supra* note 34, at 574.

⁴¹³ . 74 T.C.M. (CCH) 935 (1997).

⁴¹⁴ . See *id.* at 936.

⁴¹⁵ . *Id.*

⁴¹⁶ . See *id.*

⁴¹⁷ . See *Deutsch*, 74 T.C.M. (CCH), at 936.

⁴¹⁸ . See *id.* at 936-37. Normally, because of the marital deduction and other tax code provisions, the amount received from a deceased spouse is not taxed. The debate in this case was whether or not the amount of the elective share was taxable as distributable net income (DNI). When an estate has income that is distributed to a beneficiary there is a tax liability that is incurred and non-probate assets will generally escape the DNI problem because it is not part of the estate. See Kenneth M. Hart, *Electing Against the Will — The DNI Problem for Spousal Shares*, 88 J. TAX'N 164, 164 (1998); see *infra* note 422 for an explanation of the workings of Subchapter J and DNI.

⁴¹⁹ . See *Deutsch*, 74 T.C.M. (CCH), at 939-40.

⁴²⁰ . *Id.* at 939.

⁴²¹ . See *Deutsch*, 74 T.C.M. (CCH), at 944-45.

[T]he elective share under Florida law was not part of the Subchapter J estate that was subject to administration by the estate's personal representative. . . . [T]he elective share vested at death by operation of local law and was [] analogous to jointly owned property, life insurance, real property that directly vests in the devisee, and similar property that is not includable in the Subchapter J estate. . . . [T]he elective share does not participate in the income of the estate or any profits that arise from growth in principal, and is not even entitled to interest from the date of death to the date of payment.⁴²²

The second case, *Brigham v. United States*,⁴²³ decided within a few days of *Deutsch*, reached the opposite conclusion.⁴²⁴ In *Brigham*, the New Hampshire widow had also elected against the will and received her share of the estate, as well as an allocation of the estate's DNI, which she then included in her income.⁴²⁵ She later filed for a refund, the IRS denied the claim and she sued.⁴²⁶ The District Court held for the government, relying primarily on the decision in *Lemle v. United States*.⁴²⁷ However, unlike *Deutsch* the opinions in both *Lemle* and *Brigham* were conclusory and neither analyzed the specific characteristics of the state's law that allowed

⁴²² . Hart, *supra* note 418, at 165. For an understanding of the import of Subchapter J, which is the portion of the tax code dealing with Estates, Trusts, Beneficiaries and Decedents, the following may be helpful: Property received as a gift or inheritance under I.R.C. § 102 is excluded from a recipient's gross income although any income subsequently generated by that property is includable as gross income. *See Deutsch v. United States*, 1997-470 T.C.M. (CCH) 935, 940 (1997). On the other hand, gifts of income *from* property are included in the recipient's gross income and the DNI mechanism allows the distribution of the income to be tracked from the estate to the beneficiary. *See id.* (emphasis added). The DNI mechanism is the conduit for tracking distributions under Subchapter J of income from property retained by the estate. *See id.* Estates, which are not required to distribute all current income received, are taxed only on income not actually distributed or required to be distributed to beneficiaries (I.R.C. § 641(a), 661). *See id.* at 941. Income is distributed to a beneficiary at either the "first tier" (income from the estate required to be distributed currently under I.R.C. § 662(a)(1)) or at the "second tier" (all other distributions properly paid, credited, or required to be distributed under I.R.C. § 662(a)(2)(B)). *See id.* With either of these distributions a prorated portion of the tax that would otherwise be attributable to the estate is also passed on to the beneficiary who must then pay the tax as part of his or her gross income. *See id.* Distributions made in excess of the DNI are deemed to be distributions of the corpus or principal and are received as tax-free by the beneficiary. *See id.* I.R.C. § 663 then excludes payments of specific sums of money or property from the taxable portion of a Subchapter J estate, which are also excludable from the taxable income of the recipient under I.R.C. § 102 as gifts or inheritances. *See id.*

⁴²³ . 983 F. Supp. 46 (D. Mass. 1997).

⁴²⁴ . *See Hart, supra* note 418, at 165.

⁴²⁵ . *See id.*

⁴²⁶ . *See id.*

⁴²⁷ . 419 F. Supp. 68 (S.D.N.Y. 1976), *aff'd* 579 F.2d 185 (2nd Cir. 1978).

the assessment of the DNI to the widows.⁴²⁸ On appeal, the *Brigham* court⁴²⁹ relied primarily on the language of 26 U.S.C. § 662 to find that the widow was a beneficiary within the meaning of the statute and was, therefore, liable for the DNI assessed on her portion of the estate.⁴³⁰ The court did not analyze the New Hampshire statute and dismissed the reasoning of the *Deutsch* court out of hand.⁴³¹ Since there was no apparent difference between the New Hampshire and Florida statutes or in the essence of the claims made by the widows, the decisions remain in direct conflict.⁴³² Until additional court cases offer further clarification, the election of a statutory share, at least in the First Circuit, will be an expensive proposition for a surviving spouse.

Unfortunately, unintended tax consequences have not been eliminated by adopting the UPC. While the UPC's augmented estate methodology does offer a reasonable solution to the decedent's use of non-probate transfers to bypass the surviving spouse's statutory share it does so by creating its own set of tax complications.⁴³³ As a result of adopting the Uniform Probate approach to a spousal elective share, one of the difficulties that has been identified is the issue of the appropriate way to value partial interests existing in the augmented estate.⁴³⁴ The augmented estate, as defined by the UPC, requires the inclusion of all property interests of both spouses, including the value of any life estates or other partial interests held by the surviving spouse.⁴³⁵ Although the UPC is silent on how exactly to determine the value

⁴²⁸ . See Hart, *supra* note 418, at 166. The *Deutsch* court distinguished *Lemle* based on the existence of a prior order by the New York court. See *id.* Since the estate was required to distribute the income to the widow, she could not then re-characterize it as principal and the DNI assessment was appropriate. See *Deutsch v. Commissioner*, 74 T.C.M. (CCH), 943 n.19 (1997).

⁴²⁹ . 160 F.3d 759 (1st Cir. 1998).

⁴³⁰ . See *id.*

⁴³¹ . See *id.*

⁴³² . See Hart, *supra* note 418, at 165.

⁴³³ . See WAGGONER ET AL., *supra* note 34, at 573; see also Ira Mark Bloom, *The Treatment of Trust and Other Partial Interests of the Surviving Spouse Under the Redesigned Elective-Share System: Some Concerns and Suggestions*, 55 ALB. L. REV. 941 (1992).

⁴³⁴ . See Bloom, *supra* note 433, at 950.

⁴³⁵ . See UNIF. PROBATE CODE §§ 2-206 and 2-207 and comments. To determine the value of the augmented estate, the Uniform Probate Code also includes the value of life estates and other partial interests held by the decedent. See UNIF. PROBATE CODE § 2-205. Although the UPC does not specify, the value of any life estate interests held by the decedent is calculated in accordance with applicable tax codes. See, e.g., I.R.C. § 2036 (1997). One change to the UPC in 1993 did have a significant substantive effect. Previously, § 2-207(a)(3) of the UPC:

charged the surviving spouse's elective share with any amounts the surviving spouse would have received from the decedent, but instead disclaimed. This provision had the effect of forcing a spouse to accept an income interest in a trust, instead of taking her or his share of the marital property outright. The spouse's partnership right to control a share of the marital property was reduced to a support right.

of the interest, it is not unreasonable to assume that “the value of the life interest will be determined by the valuation method used for federal tax purposes.”⁴³⁶ However, the methods used for federal tax purposes were “adopted as an administrative convenience for both government and taxpayers and were designed to avoid the expense and delay which would result if every case were resolved on an ad hoc basis . . . and can seldom predict accurately the value of an income interest in a particular case.”⁴³⁷ Thus, valuations of any partial interest that is held by the surviving spouse is at best speculative, uncertain and inaccurate.⁴³⁸ Once the value is determined, it will be applied to the calculation of the final value of the elected share.

One commentator, Professor Susan Gary has suggested that “[o]ne alternative to the UPC definition of the augmented estate is to define the augmented estate with reference to the decedent’s gross estate as determined for federal estate tax purposes.”⁴³⁹ Professor Gary uses a combination of the 1990 UPC and a proposal developed by the Chicago Bar Association’s Probate Practice Committee as a foundation for her recommendations.⁴⁴⁰ While both of these documents have significant flaws, they represent a vast improvement over either the pre-1990 version of the Code or traditional elective share law.⁴⁴¹ Although her ultimate

⁴³⁶ . Bloom, *supra* note 433, at 952. Comments to § 2-209 of the UPC reflect that prior to the availability of the QTIP provisions, most devises to the surviving spouse were outright and did not require actuarial computation. Since the introduction of the QTIP, however, the reverse is now true. *See id.*

I.R.C. § 7520 “mandates valuation under tables prescribed by the Treasury Department based on the applicable interest rates.” Bloom, *supra* note 433, at 952. The tables used by the Treasury Department are actuarial tables containing “factors for valuing annuities, life estates, and remainders at varying interest rates.” *Id.* The problem with using an actuarial table is that:

[i]t merely represents the (arithmetic) average future lifetime of a large number of individuals of a given age. It takes no precise account of the annual rates of deaths beginning presently and ending with the death of the oldest member of the group. A nicer calculation is therefore required and is available by the use of the mortality tables — one that will . . . reveal the probability that the annuitant will die within each successive year . . . [and] the income [tax] for each year is discounted for this varying risk factor.

Id. at 962 n.88.

⁴³⁷ . Bloom, *supra* note 433, at 963 (quoting Rev. Rul. 77-195, 1977-1 C.B. 296-97).

⁴³⁸ . *See* Bloom, *supra* note 433, at 962-63. Added to the problem of arriving at a fair market value of the life estate is the potential conflict of interest of the trustee, between the income beneficiary and the remainderman, that can dramatically affect the income that is available to the surviving spouse. *See id.* at 963-68.

⁴³⁹ . Gary, *supra* note 68, at 589.

⁴⁴⁰ . *See id.* at 596-604.

⁴⁴¹ . *See id.* at 596.

recommendation for any separate property state interested in adopting the marital partnership theory is to adopt the UMPA, she recognizes that this may not be feasible and offers her alternative recommendation designed to achieve the theory to the extent possible within the existing structure of an elective share statute.

In order for this alternative to work, in contrast to both the UPC and the Illinois proposal, the elective share can only apply to marital property.⁴⁴² Her proposal also utilizes the elective share percentage, the augmented estate, and any available offsets against the elective share amount.⁴⁴³ However, because the augmented estate is limited to marital property, the elective share percentage is always fifty percent, which reflects more accurately the marital partnership theory.⁴⁴⁴

To arrive at a just composition of the augmented estate, the starting point is the federal gross estate and includes all property held in the name of the spouses, both individually and jointly.⁴⁴⁵ The gross estate is then reduced by enforceable claims,⁴⁴⁶ funeral expenses, administration expenses, family allowances, exemptions, homestead rights, spouses' awards and the decedent's separate property.⁴⁴⁷ Although the rebuttable presumption would be that all property included in the augmented estate is marital property, the proposal allows for the exclusion of property that either the decedent's estate or the surviving spouse can show is not marital property.⁴⁴⁸

After making the appropriate exclusions, this proposal would then add back certain categories of property to arrive at the appropriate composition of an augmented estate.⁴⁴⁹ Added back would be certain gift transfers made within three years before death, insurance proceeds paid to any person, tort claims related to the decedent's death and payable to the surviving spouse, and all marital property held or controlled by the surviving spouse.⁴⁵⁰

The above possibilities represent alternative approaches to consider in determining the best way to revise the elective share in Massachusetts. Each proposal has its own strength and weakness. However, the utility of each of these alternatives shifts without an overarching theme to weigh

⁴⁴² . See *id.* at 597.

⁴⁴³ . See *id.*

⁴⁴⁴ . See *id.* at 597-98.

⁴⁴⁵ . See Gary, *supra* note 68, at 598.

⁴⁴⁶ . See *id.* Enforceable claims are debts of the marital community and must be included but do not include death taxes. See *id.*

⁴⁴⁷ . See *id.* at 598-99. Separate property, as identified with reference to the federal estate tax code includes property under I.R.C. § 2141 (a general power of appointment received from a third party); § 2044 (a QTIP from a former spouse); §§ 2035, 2036, 2037 and 2038 (transfers with retained interests). See *id.* These transfers would only be to the extent that they were either made before the marriage or with the prior or subsequent written consent of the surviving spouse. See *id.*

⁴⁴⁸ . See Gary, *supra* note 68, at 600. This rebuttable presumption and a requirement of a substantial burden of proof would reduce litigation and the trace-to-source problems and address other inequities, such as when one spouse has substantial inherited property. See *id.* at 601.

⁴⁴⁹ . See *id.* at 601-02.

⁴⁵⁰ . See *id.* at 602-03.

against them. Ultimately, the question that first must be addressed is: what principle of marriage and property should the statute embody?

E. A Solution for Massachusetts

There are currently three separate proposals before the state legislature offering different versions of a reformed elective share statute. They all reflect, to some extent, the provisions in the UPC.

Of the three, the joint Boston Bar Association/Women's Bar Association (BBA/WBA) proposal is the most unique, progressive, and "generous" of the three.⁴⁵¹ This proposal tracks the federal tax code as a basis for defining the "elective estate" and defers to the tax code for purposes of making any necessary valuations to estate assets.⁴⁵² The BBA/WBA version provides the longest time for a surviving spouse to make the election — up to six months after receiving notice of the right to elect from the executor of the estate, or one year after death.⁴⁵³ The BBA/WBA proposal also has the most generous share of the three — 40% of the value of the elective estate without regard to the length of marriage, or fifty thousand dollars — whichever is greater.⁴⁵⁴ This version also recaptures transfers made by the decedent up to two years before death.⁴⁵⁵ However, some of these very provisions — that the elective share is too inclusive, reaches too far back in time, vests immediately, and bequests to charities are the last provisions used to satisfy the elective share — have also been the source of criticism of this version.⁴⁵⁶

The proposal submitted by the Massachusetts Bar Association (MBA)⁴⁵⁷ provides, that if the deceased had issue, an elective share would be limited to an outright share of one-third of the elective estate as long as the estate is valued at less than one million dollars.⁴⁵⁸ For estates larger than one million dollars, the proposal provides for a one-third life estate.⁴⁵⁹ If the deceased had no issue, the surviving spouse would get one-half, but only if the estate is worth less than one million dollars.⁴⁶⁰ Otherwise the surviving spouse is only entitled to one-third in a life-estate for estates over one million dollars.⁴⁶¹ The MBA version adopts a modified elective share percent so that the

i. 799, 180th Leg., 1st Session (Mass. 1997).

See id. at § 1(c)(2)(iv).

See id. at § 7(a).

See id. at § 2(a).

See id. at § f(1).

See Martinek & Cohen, *supra* note 63, at 26.

. 5530, 181st Leg., 1st Session (Mass. 1997).

See id. at § 4(a).

See id.

See id. at § 4(b).

See id.

couple had to have been married for fifteen years in order for the surviving spouse to take the full provisions.⁴⁶² For marriages of one year or less, the percentage is 16% of the “elective share amount”⁴⁶³ and adds an additional 6% thereafter.⁴⁶⁴ The right to elect a share is more limited: six months after notice from the executor, but only nine months from the date of death.⁴⁶⁵ The elective estate does not include most gifts or other lifetime transfers unless the decedent retained some type of interest in the property.⁴⁶⁶ This version has been criticized as under-inclusive⁴⁶⁷ due to the vesting provision which is complicated and retains the “antiquated” life-estate, and the waiver provision which lacks reasonableness and does not adequately protect the surviving spouses.⁴⁶⁸

The final proposal drafted by John Rogers, the former chair of the Judiciary Committee, falls somewhere between the BBA/WBA and the MBA proposal. It provides for the use of a graduated vesting of the elective share.⁴⁶⁹ For marriages under five years, the share is 15%; between five and ten years, the share is 25%; between ten and fifteen years, the share is 35%; and over fifteen years the maximum amount is 40%.⁴⁷⁰ The period to elect is six months after notice or one year after death⁴⁷¹ and includes a reach back provision of eighteen months for gifts made by the decedent.⁴⁷²

What seems to be missing from all of these proposals is any discernible rationale for the choices made. Although all three proposals contain elements of the UPC to some extent, they each vary from it in such significant ways as to make them nearly unrecognizable philosophically from the UPC. Nor do any of the proposals seem to directly address the underlying reasons for trying to change the statute in the first place. Unlike Wisconsin, which recognized significant changes were necessary in order to make property rights more equitable during marriage and at death,⁴⁷³ there does not seem to be the same deliberate correlation made between the property rights a spouse will have under any of the current proposals and the rights of spouses to property when the marriage ends in divorce. In other words, as the Supreme Judicial Court originally pointed out in *Sullivan v. Burkin*, none of the proposals actually resolve the lack of equity and logic

See id. at §24(c).

Id. at § 4(c)(1).

See id.

See id. at §56(a).

or property excluded from the elective⁴⁶⁶state.

See Martinek & Cohen, *supra* note 63⁴ at 26.

⁴⁶⁸ *See id.*; *see* Rosenberg v. Lipnick, 389 N.E.2d 385 (1979) (establishing new requirements in order to have antenuptial agreements upheld in Massachusetts, including a “fair and reasonable” provision).

30, 181st Leg., 1st Session § 2 (Mass. 1997).

See id.

See id. at §.7.

See id. at § 1(c)(2)(iii).

⁴⁷³ *See supra* notes 335-81 and accompanying text.

between how a spouse is treated when the marriage ends in divorce and how a spouse is treated when the marriage ends in death.⁴⁷⁴

Perhaps one of the principal problems with trying to reform the statute, and which distinguishes it from similar efforts to reform the divorce statutes, may be the lack of a natural constituency. Unlike a marriage that ends in divorce, a marriage that ends in death is a single and conclusive event. There is no ongoing relationship between the spouses, and there is no recourse to the courts for redistribution of property based in changed circumstances. There is no legal right to an equitable distribution based on need or on contribution. There is only the finality of death and the harsh formula of the elective share statute.

Assuming that the surviving spouse is even aware of the right to contest the provisions of a will, the prospect of disinheritance remains. Then there is the need to make the immediate decision — during an emotionally difficult time — to contest the will. Provided that the surviving spouse has the emotional and financial resources to do so, and the desire to follow through. None of these are easy and, indeed, each phase can be a most painful and difficult prospect to face. Given the infrequency of challenges and the lack of an identifiable constituency, it is easy to see why reforming the elective share may not be at the top of a legislator's list of causes to champion. Yet, despite its superficially innocuous nature, reforming the statute is in fact the potential vehicle for profoundly affecting the lives and property rights of every married person in the state.

VI. CONCLUSION

As this Note has shown, there is a long history of gender discrimination embodied in the elective share statute that the use of gender-neutral language does not disguise. It is this hidden language and its effect that finally needs to be confronted and addressed in changing the elective share statute. Starting with any of the proposals currently under consideration would be a significant improvement on the existing structure, but they fail to go far enough. The changes in our perception of marriage, the legal rights of women and the socioeconomic changes that have occurred in just the last twenty-five years demand a better response to a fundamentally unjust concept.

Much of this Note also addressed the status of women, specifically married women, in society and the significant ways in which that status has changed in the last 150 years. The history of the laws of coverture and dower, and their philosophical embodiment in the elective share statute, have had a well-documented impact on the lives of women and both the cases and recent testimony before the state legislature support the conclusion that this statute

⁴⁷⁴ . 460 N.E.2d 572 (Mass. 1984).

overwhelmingly, almost exclusively, affects women.⁴⁷⁵ But focusing the justification for the elective share statute reform on the rhetoric of correcting prior and ongoing injustices to widows is too limiting as a rationale — more importantly, it is the legal equality of the partners in a marriage and whether the laws reflect the predominant view towards marriage that is at issue.

Relative to the status and condition of women in the mid-nineteenth century when the reform movements were becoming more active, the socioeconomic status and conditions of women have vastly improved. Some of the most consequential changes, which have occurred primarily in the last twenty-five years, have had a significant impact on the daily lives of women and families and on certain fundamental structures in society, including marriage and childcare. There continues to be awareness that further improvements are still needed to provide for authentic equality under the law and women continue to make significant achievements in spite of the intractable existence of wide spread gender discrimination.

Nevertheless, gender discrimination, coupled with the low socioeconomic value assigned to those who act as primary caregivers for children, remains one of the most significant obstacles to a woman's ability to achieve economic equality.⁴⁷⁶ Women who forgo careers to have children, who take significant periods off from the marketplace to have children, or who take less demanding or part-time work to provide for their families — both children and husbands⁴⁷⁷ — place themselves at economic risk in common law property states with elective share statutes. They must rely on “the continued good will and moral sense of their husbands”⁴⁷⁸ as the legally

⁴⁷⁵ . Although they may exist, a search of the databases for cases with a plaintiff husband claiming his elective share did not turn up any results.

⁴⁷⁶ . See Natalie Angier, *Men, Women, Sex and Darwin*, N.Y. TIMES, February 21, 1999, (Magazine), at 48, 50. Between 1978 and 1996 the number of women heading Fortune 1000 companies had doubled: from two to four! See *id.* The number of senior-level executives in the same Fortune 1000 companies went from 2% in 1985 to a whopping 3% by 1992. See *id.* A 1990 survey of the salary and compensation at 799 major companies showed that less than one-half of 1% of the highest paid individuals were women. See *id.* Moreover, the possession of a bachelor's degree by a woman added \$9,000 to her salary compared with \$28,000 for a man. See *id.* Finally, a degree from a prestigious school contributed \$11,500 to a man's income but actually subtracted \$2,400 from a woman's. See *id.*; see also Mary Leonard, *Labor and Women Push for Equal Pay for Equivalent Work*, BOSTON GLOBE, February 25, 1999, at A1. Nationwide, women still only earn 74 cents for each dollar earned by men. See *id.* at A22. In Massachusetts, the discrepancy is 80 cents earned by women for each dollar earned by men. See *id.* (citing AFL-CIO Working Women's Dept., Institute for Women's Policy Research); Jennifer Steinhauer, *For Women in Medicine, a Road to Compromise, Not Perks*, N.Y. TIMES, March 1, 1999, at A1. The number of women in medicine has tripled in the last twenty years but the pay rate, on average \$155,590, is still one-third less than for her male counterpart, on average \$273,690. See *id.* at A21. This discrepancy is due, in significant part, because women still are primarily responsible for child rearing. See *id.* Although “[m]edicine is fairly egalitarian in that a woman who chooses to rise to the top . . . can do so now, the issue of how to bring women to parity with men in the workplace is [dependant upon] finding ways to relieve women as primary care givers to children.” *Id.*

⁴⁷⁷ . See Knudson-Martin, *supra* note 28 and accompanying text.

⁴⁷⁸ . Kulzer, *supra* note 18, at 38.

recognized property owner if they wish to receive the economic reward for their efforts. She cannot rely on the law for justice because the law continues to view her as seeking a share of someone else's property.⁴⁷⁹

In addition to the three proposals before the state legislature, other options, not covered in this Note, have also been proposed for rectifying or modifying the elective share statute. One alternative, for example, seeks to remedy the injustices that occur using judicial relief.⁴⁸⁰ Yet resolving the "fair share" of a spouse on a case-by-case basis at the discretion of a judge is designing the system to expend additional amounts of already strained judicial resources. Passing statutes designed to force litigation is not ultimately in anyone's best interest. In addition, such a solution is in a sense, the equivalent of conducting a divorce trial without one of the participants. Certainly, as the statute currently stands, and even under the new proposals, the spouse who remains in the marriage is potentially worse off than the one whose marriage is dissolved by the divorce court, with statutory authority to make an equitable distribution of marital property.

Of overarching import to any reform, however, is a recognition of how the laws manifest and reflect the attitudes of society toward marriage. As this Note has outlined, the predominant contemporary view of marriage is that of a partnership. That is also the view the courts use when a marriage ends in divorce.⁴⁸¹ It is both equitable and logical that it should also be the

⁴⁷⁹ . See *id.* at 37.

⁴⁸⁰ . See generally Ronald Chester, *Should American Children Be Protected Against Disinheritance*, 32 REAL PROP. PROB. & TR. J. 405 (1997); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); Helene S. Shapo, *A Tale of Two Systems: Anglo American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707 (1993); S.M. Cretney, *Reform of Intestacy: The Best We Can Do?*, 111 LAW QUARTERLY REV. 77 (1995). Each of these articles discuss the system, employed in England and the Commonwealth countries, which allows family members — specifically, spouses but occasionally children — to petition the court to vary the testator's will and to make reasonable financial provisions for the surviving spouse. See Langbein & Waggoner, *supra* note 286, at 314. The court takes into consideration such factors as the adequacy of the spouse's own resources, the spouse's age and the duration of the marriage. See *id.* The two primary drawbacks to reforming the elective share statute in this particular manner is: (1) the potential for litigation exists for every estate probated, and passing statutes that are designed to increase litigation is not, on the surface, the best use of judicial resources; and (2) the underlying premise that the spouse is getting a share of someone else's property remains as the underlying, and inaccurate, philosophy. See *id.*

⁴⁸¹ . The Gender Bias Study conducted by the Supreme Judicial Court should serve as a wake-up call that the hidden biases — and the not so hidden — serve as a destructive force, even when our laws are gender-neutral on their face. These gendered results should not be conveniently overlooked. However, when a marriage ends in divorce, at least both parties are available to protect their interests, both at the time of the divorce and in light of subsequent changes. But,

philosophical motivation behind our laws when the marriage ends in death. It is our concept of marriage and our commitment to equalize the economic impact of choices that individuals make for and on behalf of their family that is ultimately at issue in determining the best way to revise the statute.

To truly rectify the situation and address the hidden gender biases in the laws, Massachusetts must directly and forthrightly address its past as it plans for the future. Given the level of success achieved in Wisconsin in making the change from a common law property state to a community property state, Massachusetts has a model upon which to base comparable efforts. Adopting the UMPA, or an individualized version of it, is clearly an achievable goal in Massachusetts that will result in a legal system that recognizes the contemporary view of marriage as a partnership of legal equals, in name and in property. It is the choice for the new millennium.

Kathleen M. O'Connor

when the marriage ends in death rather than divorce, a judge does not enjoy the same discretion to equitably distribute assets, but is confined by the preset statutory share, regardless of the actual circumstances. Public policy has dictated that it is acceptable to modify the dead hand control of testators in this particular instance and the reasons for that policy should not be lost in the debate over the minutiae. Public policy would also seem to be served if our priority is to ensure that adequate resources are available to provide for the surviving spouses who have also worked to secure the marital assets, and that those who find themselves emotionally challenged over the death of a spouse, should not receive a double-blow in the form of an attempted disinheritance.