THE COMPLICATED WORLD OF THE ELECTING SPOUSE: IN RE ESTATE OF MYERS AND RECENT STATUTORY DEVELOPMENTS

RONALD R. VOLKMER†

I. INTRODUCTION

The Supreme Court of Nebraska, in its unanimous decision in In re Estate of Myers,¹ has given to Nebraska lawyers an authoritative and instructive interpretation of the Nebraska elective share statutes.² While the decision of the court in Myers on the particular issues raised may not appear to be of national significance, a more detailed review of these issues suggests otherwise. Discussion of the Myers litigation conveniently sets the stage for an extended analysis and provides the backdrop for two elective share problems, one of which is of fairly recent vintage, the other a long standing, recurrent issue.

The first elective share issue, sometimes referred to by such terms as "charging" or "offsetting," is not easily captured in a single sentence. At the heart of this first issue is the following: What effect, if

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† Professor of Law, Creighton University School of Law. This article was written while the author served as the D & L Straus Distinguished Visiting Professor at Pepperdine University School of Law in the fall of 1999. Grateful appreciation is expressed to the Pepperdine law school community for their gracious hospitality and supportive environment. Professors Susan Gary, Ira Mark Bloom, and Patricia Roberts contributed greatly to this article by their helpful and insightful scholarship. All errors and omissions are solely those of the author.

3. "Elective share" appears to be the modern term of art preferred over the older term "forced share." This article does not contain a review of the history and purpose of elective share legislation, presuming that the reader is at least somewhat familiar with the progress that has been made from the common law marital estates of dower and curtesy, designed to protect a surviving spouse against disinheritance, to modern day statutory schemes in the common law states. The community property states have worked out the problem of spousal disinheritance far better, in my opinion, but that story is another article. See Ronald R. Volkmer, Spousal Property Rights at Death: Reevaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act, 17 CREIGHTON L. REV. 95 (1983).

Elective share statutes in the common law states are not susceptible of easy generalization. It is difficult to find any overview of them that does the topic justice. Perhaps the best treatments are contained in recently revised trusts and estates casebooks. See, e.g., JOEL C. DOBRIS & STEWART E. STERN, RITCHIE, ALFORD & EFFLAND'S ESTATES AND TRUSTS CASES AND MATERIALS ch. 3 (1998). An excellent effort to summarize the history and purpose of elective share legislation is contained in a 1995 article by Professor Susan Gary. Susan N. Gary, Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution, 49 MIAMI L. REV. 567-89 (1995).
any, does spousal election have upon the inter vivos and testamentary transfers, both probate and non-probate, that have been made to the surviving spouse by the decedent spouse? The questions that will need to be addressed more particularly in this context are: (1) whether the surviving spouse is deemed to have either accepted or rejected these transfers; and (2) if these benefits are accepted, are they “charged” against the elective share? Following these fairly generic questions is a more particular one that I first addressed in this review some sixteen years ago: To what extent is an electing spouse charged with assets that would have otherwise passed to the surviving spouse, but were renounced? This brings into play what might be called the “disclaimer-is-charged” rule.

The second issue is a perennial one that has arisen in many legal contexts: What is the value to be placed upon the interests, particularly life estates and future interests, that have passed to the surviving spouse? (The less than absolute interests given to the surviving spouse will be referred to as “partial interests.”)

The Myers case, the springboard for an extended discussion of the charging and valuation issues, will be examined in detail in the first part of this article. The focus then shifts to the national level, with particular emphasis on the Uniform Probate Code (“UPC”) and how the issues discussed have played out at the national level. In this section other recent relevant cases will be dissected to see what the recent case law developments reveal. This will be followed by a selective examination of the most recent statutory developments, with emphasis on those states having made the significant statutory changes. The conclusion will offer some of the author’s own perspectives as to the issues discussed and will attempt to draw some lessons that might be learned from the materials previously discussed.

II. THE MYERS CASE EXAMINED

A. THE COUNTY COURT LITIGATION

When Harold S. Myers died on December 26, 1996, his survivors included his forty-four year old widow, Lesley, and five children. The

three younger children, born of Harold's union with Lesley, were all minors at the time of their father's death. The two older children, born of a previous marriage, were not parties to the litigation because they were not included as beneficiaries of the will and trusts in question.\(^8\)

Harold Myers had died testate and his will was admitted to probate, with Lesley qualifying as the personal representative.\(^9\) The Harold Myers will was of the "pour-over" variety, with the residuary clause devising his six million dollar residuary estate to the Harold S. Myers Trust, an inter vivos trust with a bank named as trustee. The terms of the inter vivos trust are significant: The trust corpus was to be divided into two shares, referred to by the court as the "marital share" and the "family share." The allocation of assets between the two shares was to be determined by the trustee, based upon a formula that would minimize payment of federal estate taxes. As to the marital share, the trustee was to pay the income from the share to Lesley during her lifetime, and, in addition, the trustee was given the power to invade the trust corpus for Lesley's support. Upon Lesley's death, any unexpended portion of the marital share was to be added to the family share.\(^10\)

During Lesley's lifetime, she was to receive all the income from the family share. The family share was to be held intact until Lesley's death, and, if the three younger children of Harold were all over the age of 22 at Lesley's death, the trustee was to divide the family share into equal shares for the benefit of Myers' then living children. The trustee was then given instructions regarding distributions to the Myers' children's separate share trusts.\(^11\) It will be noted that the Harold Myers estate plan utilized a fairly standard method of minimizing federal estate taxation.\(^12\)

As a surviving spouse of Harold, Lesley was entitled to assert her right to take her "elective" share under Nebraska law.\(^13\) Lesley timely filed her petition for "elective" share, which under applicable Ne-
nebraska law, would be calculated as 50% of the “augmented estate.”

It was at that point that the contested legal issues began arising in the county court, the court of probate.

After Lesley filed her petition for elective share, the trustee bank, alleging a conflict of interest, filed a motion asking the court to appoint a guardian ad litem to represent the interests of minor children. The motion was granted and a guardian for the minor children was appointed.

It was then the parties began in earnest their efforts to determine the amount of the augmented estate, which calculation in turn would determine the amount of the elective share. From there it would be a matter of determining what amounts were to be “charged” to Lesley as required under applicable Nebraska law. By the time the issues were sorted out and presented to the county court judge, three issues were before the county court: (1) whether Lesley’s interest in the Harold Myers trust “passed to her subject to the provisions of section 30-2319;” (2) whether the elective share should be “offset” by the “value” of Lesley’s interests in the trusts; and (3) if an “offset” is appropriate, how is the value of Lesley’s interest to be determined.

Lancaster County Court Judge John Hendry, construing Nebraska Revised Statute section 30-2319, ruled against Lesley on the first two issues. He found that the statutory language clearly dictated the finding that Lesley’s interest in the trust did “pass” to her under the statute and that this interest be “applied first to satisfy the elective share.” As to the third issue, Judge Hendry ruled against Leslie once more, finding that the method of valuation proposed by the guardian ad litem, relying upon standard mortality tables and the “IRS regulations and State Inheritance Tax Regulations,” was appropriate. Using this method, the court found that the “spouse’s elective share has been fully funded by the surviving spouse’s interest in the [trust].” Finally, Judge Hendry rejected the argument that the valuation method was improper in light of the fact that five-sixths

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14. Myers, 256 Neb. at 819, 594 N.W.2d at 565.
15. Id.
16. The augmented estate calculation derives from the statutory definition of “augmented estate” contained in Nebraska Revised Statute section 30-2314.
19. Later to be named the Chief Justice of Nebraska and a member of the court at the time the Myers case was decided in the supreme court. Obviously Chief Justice Hendry recused himself when the case reached the supreme court.
20. Findings and Order at 1-3, Myers (No. E-45620).
21. Id. at 4.
22. Id. at 5.
of the property payable to the trust was "unproductive." The "unpro-
ductive" nature of the property was due to the fact that the property
consisted of stock of a company that was "paying no dividends." Les-
ley Myers appealed the Lancaster County Court's ruling to the Ne-
braska Court of Appeals; the Supreme Court of Nebraska subsequently removed the case to its own docket, thereby bypassing
the Court of Appeals.

B. THE RULINGS AND RATIONALES OF THE NEBRASKA SUPREME
COURT

According to the Nebraska Supreme Court's opinion, written by
Judge Gerrard, Lesley Myers assigned as error the following rulings of
the county court: "(1) in determining that her elective share should be
offset by the value of her interest in the trust; and (2) in determining
the value of her interest in the trust." The court's analysis, rulings,
and conclusions on the two issues presented will be undertaken under
the headings utilized by the court: "Offset of Elective Share" and "Val-
uation of Trust Interest."

1. Offset of Elective Share

Judge Gerrard began the analysis of this topic by referencing two
sections of the Nebraska Probate Code, section 30-2313(a),26 the sec-
tion granting to a surviving spouse the right of election, and section
30-2314,27 the section defining the "augmented estate." The over-all
purposes of these sections, according to the court, are two-fold: (1) to
protect a surviving spouse against transfers by the decedent spouse
that would deprive the surviving spouse of a "fair share" of the dec-
dent's estate; and (2) to prevent a surviving spouse from receiving
more than his or her fair share.28 The court then noted that in the
instant case the parties had agreed that the residual estate of Harold
Myers, devised to the trust, was part of the augmented estate.29

Turning to the first assigned error relating to the issue of "offset,"
the court viewed the problem as a statutory one, to be decided by the
interpretation of the governing statute, section 30-2319(a) of the Ne-
braska Probate Code. This section states:

23. Id.
25. Myers, 256 Neb. at 821, 594 N.W.2d at 566.
26. NEB. REV. STAT. § 30-2313 (Reissue 1995).
27. NEB. REV. STAT. § 30-2314 (Reissue 1995).
28. Myers, 256 Neb. at 821-22, 594 N.W.2d at 566-67 (quoting the comment to sec-
tion 2314 and also quoting from Estate of Carman v. Carman, 213 Neb. 98, 100, 327
N.W.2d 611, 613 (1982)).
29. Myers, 256 Neb. at 822, 594 N.W.2d at 567.
In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced, including that described in section 30-2314, is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.\(^\text{30}\)

The question whether Myers' "present interest in the trust" is property which "has passed to the surviving spouse by testate or intestate succession or other means" presented to the court "an issue of first impression."\(^\text{31}\)

After quoting two sentences from a 1976 article published in this review,\(^\text{32}\) which commented on the "general effect" of this section 30-2319, the court stated its conclusion at the very beginning of its analysis:

We believe that the better interpretation of § 30-2319 requires the present value of inter vivos trust benefits to be charged against a surviving spouse's elective share. This interpretation is consistent with the function of § 30-2319 and the language and purpose of the elective share statutes.\(^\text{33}\)

As to why the court's interpretation was the "better" one, the court offered the following reasons in support of its conclusion: (1) the purposes served by the elective share statute; (2) the other provisions of the Nebraska Probate Code; and (3) the decision of the Maine Supreme Court in Estate of Fisher,\(^\text{34}\) referred to by the court as a "helpful" authority. These reasons will now be examined.

The court repeated the "dual purposes" of the elective share, referred to previously, and noted that, "[t]o allow a surviving spouse to elect against the will and still retain the benefit of a trust interest that was clearly intended as a testamentary substitute would frustrate the purpose of the elective share statutes."\(^\text{35}\) It is a fundamental rule of statutory construction that a court should look to the statutory objective to be accomplished, the "evils and mischiefs sought to be remedied, and the purpose to be served," and then place on the statute a "reasonable construction," one that will accomplish the legislative objective, rather than defeating it.\(^\text{36}\)

\(^{30}\) NEB. REV. STAT. § 30-2319 (Reissue 1995).

\(^{31}\) Myers, 256 Neb. at 822-23, 594 N.W.2d at 567.

\(^{32}\) Thomas M. Davies & William E. Olson, Jr., Interspousal Transfers and Augmented Estate, 9 CREIGHTON L. REV. 481, 486 (1976).

\(^{33}\) Myers, 256 Neb. at 823, 594 N.W.2d at 567.

\(^{34}\) 545 A.2d 1266 (Me. 1988).

\(^{35}\) Myers, 256 Neb. at 823, 594 N.W.2d at 567.

\(^{36}\) Id. at 823, 594 N.W.2d at 567-68.
The "other provisions of the Nebraska Probate Code" referred to by the court as supportive of its conclusion were section 30-2209(36), defining "property," and section 30-2314(2)(i), part of the statute defining the augmented estate. According to section 30-2209(36), "property includes both real and personal property, or any interest therein and means anything that may be the subject of ownership." The court concluded that a trust beneficiary's interest is clearly an "interest" within the meaning of this statute. Section 30-2314(2)(i) includes within the augmented estate "[a]ny property derived from the decedent including, without limitation to, any beneficial interest of the surviving spouse in a trust created by the decedent during his or her lifetime . . . ." The court reasoned that the term "property," contained within sections 30-2319(a) and 30-2314, should be given a consistent interpretation.

In Fisher, the Maine Supreme Court, interpreting a statute comparable to section 30-2319(a), held that a surviving spouse's trust interest "passed" to the surviving spouse making it chargeable against the electing spouse. The Nebraska Supreme Court agreed with the Fisher court's interpretation of the statute and found the ruling a "helpful" authority. After restating its holding as to the "offset" issue, the court turned to the second issue.

2. Valuation of Trust Interest

The second issue reviewed by the Myers court was the county court's utilization of regulations "that would be used to calculate, for tax purposes, the present value of a life estate in the trust property." To determine the correctness of this approach, the court felt it necessary to "conduct a comprehensive examination" of the trial court's methodology.

The tax valuation method that the court examined is the method set forth in the Internal Revenue Code and Regulations, a method also used in the Nebraska inheritance tax system. Without going into the fine details of this method, the calculation is the standard one for

38. Myers, 256 Neb. at 824, 594 N.W.2d at 568.
40. Myers, 256 Neb. at 824, 594 N.W.2d at 568.
41. In re Estate of Fisher, 545 A.2d 1266, 1272 (Me. 1988) (interpreting ME. REV. STAT. ANN. tit. 18-A, § 2-207 (West 1988)).
42. Myers, 256 Neb. at 825, 594 N.W.2d at 568.
43. Id. at 825, 594 N.W.2d at 569.
44. Id. at 825-26, 594 N.W.2d at 569 (referencing NEB. REV. STAT. § 77-2208 (Reissue 1996) and [NEB. ADMIN. R. & REGS. Reg-17-001, § 001.01 (1984)]).
ascertaining the present worth of a life estate.\textsuperscript{45} To make such a calculation, the following assumptions have to be made: (1) the duration of the life estate; and (2) since a life tenant's interest is an income interest, an assumed rate of return. Actuarial tables are employed to calculate the duration of the life estate and the rate of return is ascertained by referencing the applicable tables published by the Internal Revenue Service. Applying the formula yields a percentage – the “actuarial factor.” This factor is then multiplied by the value of the property and thus the “present value” of the life estate is ascertained.\textsuperscript{46} In the instant case, the actuarial factor was determined to be .86127, and when applied to the value of the trust corpus, netted a figure of $5,230,546.11 – determined to be the value of Lesley's interest in the trust.\textsuperscript{47} Since this figure exceeded the stipulated amount of the elective share ($3,289,356.48), the county court ruled that the elective share “had been fully satisfied by Myers’ interest in the trust and that she was entitled to no further compensation.”\textsuperscript{48}

In reviewing this issue, the supreme court noted that Lesley did not contest the calculations, but rather her lawyers objected to the “method of calculation.” Her lawyer further alleged that the method of calculation produced an “overvaluation” of her interest in the trust. The supreme court rejected the contentions, noting that the appellant did not propose to the court an alternative method of valuing her interest or of predicting the actual income of the trust. The court relied on the \textit{Fisher} case, which utilized a similar approach in resorting to the appropriate federal tax regulations.\textsuperscript{49}

Utilizing the federal tables for the appropriate interest rate produced a return rate of 7.6%, which was factored in the formula. Appellant argued that the assumed return rate of 7.6% dramatically overstated the actual return because “much of the trust principal consisted of Transcrypt stock, which at the time was paying no dividends and generating no income.”\textsuperscript{50} The court replied that even if this was the case, Lesley did not satisfy the burden of showing error because she did not offer an alternative method of valuing her interest. Furthermore, the court noted that while the standard tax valuation method might “carry the risk of overvaluation . . . the surviving spouse

\textsuperscript{45} For an excellent brief discussion of the valuation of a life estate and a remainder, see \textit{Jesse Dukeminier \& James Krier, Property} 218-19 (4th ed. 1998).
\textsuperscript{46} \textit{Dukeminier \& Krier, supra} note 45, at 218-19.
\textsuperscript{47} \textit{Myers}, 256 Neb. at 826, 594 N.W.2d at 569.
\textsuperscript{48} \textit{Id.} at 826-27, 594 N.W.2d at 569.
\textsuperscript{49} \textit{Id.} at 827, 594 N.W.2d at 570.
\textsuperscript{50} \textit{Id.}. 
has the option of avoiding that risk by renouncing the benefit of the trust."\textsuperscript{51}

After having earlier quoted from a federal case which provided that valuation of life estates by reference to mortality tables is "at best a matter of educated guesswork," the court concluded that while the method utilized by the county court may not have been "perfect," the method utilized "is grounded in well-reasoned authority and provides for sensible and consistent results under these circumstances."\textsuperscript{52}

Thus, the second assignment of error was found to be without merit.

C. \textsc{Commentary on the Myers case}

More will be said later in regard to the \textit{Myers} case, its place in the larger scheme of trusts and estates law, the possible implications of the ruling as it relates to the practice, and a re-examination of the approach taken by the Nebraska Supreme Court in its unanimous opinion. In concluding the present discussion, I would like to make a few observations on the case that come from reading the opinion of the trial court and the briefs of counsel. I believe the picture is not dramatically changed, but subtle differences do emerge.

As noted above, Judge Hendry interpreted the facts as presenting three issues,\textsuperscript{53} which were duly noted in the appellant's brief.\textsuperscript{54} When it came to assigning error, the appellant listed four: (1) the interest in the trust did not "pass" to appellant pursuant to section 30-2319; (2) appellant's interest in the trust should not be offset against her elective share; (3) the trial court erred in the method used to determine the value of appellant's interest in the trust; and (4) the trial court erred in its determination of the value of appellant's interest in the trust.\textsuperscript{55} It is certainly possible to combine the first two stated assigned errors into the first issue postulated by the supreme court\textsuperscript{56} and to combine the third and fourth assigned errors into the second issue postulated by the court.\textsuperscript{57}

Appellant's brief did in fact combine the assigned errors into two legal arguments, the first relating to "offset"\textsuperscript{58} and the second relating

\textsuperscript{51} \textit{Id}. at 828, 594 N.W.2d at 570.
\textsuperscript{52} \textit{Id}.
\textsuperscript{53} \textit{See supra} note 18 and accompanying text.
\textsuperscript{55} Brief of Appellant at 3, \textit{Myers} (No. A-98-0340).
\textsuperscript{56} \textit{See supra} note 25 and accompanying text.
\textsuperscript{57} \textit{See supra} note 25 and accompanying text.
\textsuperscript{58} Brief of Appellant at 9, \textit{Myers} (No. A-98-0340) (stating "[t]he interest of Lesley Myers should not be offset against her elective share.").
As to "offset" issue, the appellant's brief stated the issue was "whether the interest of Lesley Myers in the [trust constitutes property which has passed to her for the purposes of [section 30-2319(a)]." While the supreme court did take note of appellant's main argument relating to the critical "pass or have passed" language of section 30-2319(a), the court did not mention appellant's argument that under section 30-2318, a surviving spouse's election "does not affect the share of a surviving spouse under the provisions of the decedent's will."

The appellee's brief presented in its first argument the "offset" issue and addressed the critical language, "pass or have passed," contained in section 30-2319(a). In its second argument, the appellee touched upon the valuation issue by addressing a topic that was discussed in the trial court opinion, but not discussed by the supreme court: Whether and to what extent the trustee's power of invasion of principal for the support of the appellant should affect the valuation issue.

In addressing the issue raised by appellant as to the "unproductive" nature of the property, Judge Hendry referred to the fact that the stock in question was a "publicly traded stock" and then referenced the Nebraska Prudent Investor Act. The appellant's brief duly noted that the Nebraska Prudent Investor Act was cited by the trial court and brought into question the issue of diversification of the trust portfolio. The fourth argument of the appellee's brief responded to the diversification issue by contending that the "purposes of the trust are better served without diversifying." There is no mention in the supreme court opinion of the Nebraska Prudent Investor Rule nor diversification.

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59. Id. at 14 (stating that "[t]he court overvalued appellant's interest in the trust.").
60. Id. at 9-10.
61. Id. at 12. More will be said later about this section.
63. Brief of Guardian ad Litem at 15-17, Myers (No. A-98-0340). The guardian ad litem's brief, in its second argument, stated:
For purposes of an elective share computation under Neb. Rev. Stat. section 30-2319 (Reissue 1995), where a surviving spouse is entitled to receive the income from a trust together with principal for care, support, maintenance and education, it is proper to value the interest of the surviving spouse as if the surviving spouse will receive a life estate only, unless there is evidence to the contrary.

Id.

While the topic of diversification was totally ignored as being irrelevant to the issues being contested, Judge Gerrard's opinion does, in one sentence, mention the topic of renunciation. In responding to the appellant's claim of "overvaluation," Judge Gerrard stated that:

While the tax valuation method of valuing the present interest of a beneficial interest in a trust may carry the risk of overvaluation of the trust interest, under § 30-2319 the surviving spouse has the option of avoiding that risk by renouncing the benefit of the trust. See Neb. Rev. Stat. § 30-2352(c)(Reissue 1995). Valuation only becomes necessary when the surviving spouse attempts to claim both an elective share and the benefit of a trust, at which point the risk of overvaluation is properly borne by the surviving spouse.67

Lesley Myers did file a petition for an elective share, but she did not renounce the benefit of her trust interest by complying with the renunciation statute.68 The quoted language is, for purposes of this article, as significant as anything stated in the court's opinion because it provides the point of departure for placing the Myers scenario in the context of a much bigger and broader, and unfortunately, a much more complicated world of spousal election.

III. SPOUSAL ELECTION: THE LACK OF UNIFORMITY AND THE CHANGING "UNIFORM" LAW

The attempt to place the Myers scenario in the context of the big picture69 is complicated enormously by what Ira Mark Bloom has referred to as the "incredible lack of uniformity among the forty-one jurisdictions which have not adopted a community property system, but have some form of an elective share system . . . ."70 In the beginning there was dower and curtesy, the marital common law estates designed to protect a surviving spouse against disinheritance.71 What has taken the place of these common law estates in the forty-one "separate property" jurisdictions72 are statutes generally described as

69. The "big picture" reference for anyone who attended the University of Illinois College of Law inevitably brings to mind the spirit of Dean John Cribbet, a giant in legal education and the world of property law. See John Cribbet, Principles of the Law of Property vii-viii (1962).
71. See Dukeminier & Krier, supra note 45, at 393-94.
72. The other nine states are the historic eight "community property" jurisdictions (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington), and the recent convert, the state of Wisconsin (by virtue of adoption of the Uniform Marital Property Act in 1984). See id. at 397. The "General Comment" to the elective provisions of the 1969 Uniform Probate Code referred to a "system for common law states." Unif. Probate Code at 29 (West 1971).
“elective share” statutes. These statutes have the general purpose and goal of protecting a surviving spouse against disinheri-

citation omitted). While I am sympathetic to the goal of national uniformity (having gone on record as favoring the Uniform Marital Property Act) and have seen the dangers of “tinkering” with uniform acts (as the article in the previous note documents), I see little danger in “letting a thousand flowers bloom.” As a matter of fact, if the recently-enacted Florida legislation,
tain rules as "UPC" rules, there must be adjectives to describe the UPC that is being referred to. The statutory basis of elective share legislation and the "not-so-Uniform" Probate Code result makes it almost impossible for any writer to generalize. It is, to be sure, a burden for a writer to reference the discussion of any elective share issue to a particular state's law or a particular version of the UPC, but accuracy should not be sacrificed for the sake of expediency. With that caveat in mind, the stage is set for exploring the complicated world of the electing spouse.

IV. MYERS AND BEYOND

A. "CHARGING" THE ELECTING SPOUSE

1. Under the 1969 Uniform Probate Code

The problem of determining the effect of a surviving spouse's exercise of an elective share right upon the benefits conferred upon the surviving spouse by testate or intestate succession, as well as nonprobate transfers, is a long-standing one. As the common law states moved away from the dower model to the traditional forced share statute, the prevailing statutory model was that of an election against the will, or as some statutory schemes put it, a "dissent." By electing against the will it was assumed that by this action the electing spouse was rejecting the benefits conferred by the will, or otherwise put, that the statutory scheme required the surviving spouse to choose between the benefits conferred by will or the benefits conferred by the statute. Furthermore, it did not generally make any difference whether the benefits conferred by will were in the form of an absolute interest or some partial interest, such as a life estate.

The UPC, as introduced in 1969, chose an entirely different approach: The election by a surviving spouse was not treated as a rejection of the decedent spouse's will. In other words, by filing for an elective share, the surviving spouse was not deemed to have "renounced" any of the will provisions for the surviving spouse's benefit. The drafters' intention was made crystal clear in the 1969 version by the first sentence of section 2-206(a):

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to be discussed in section V(B) and (C) infra, is an example of what can occur in departing from the UPC model, I am even more sympathetic to letting the individual state flowers bloom.

80. For an example of the "dissenting" widow, see Clark v. Board of Trustees, 596 S.W.2d 804 (Tenn. 1980).


82. THOMAS E. ATKINSON, LAW OF WILLS 118 (2d ed. 1953) ("The surviving spouse must elect between testamentary provisions for him and dower or statutory forced share when it was intended that he should not have both.").
The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for elective share the benefit of the provisions.  

For the purposes of present analysis, let us assume that the electing spouse has not included in the electing petition any language indicating an intention to renounce any benefits. The next question that arises is how the benefits passing to the surviving spouse will be treated in the context of the determination of the amount of the elective share.

The determination of the amount of the elective share, in the 1969 version of the UPC, was governed by sections 2-201 and 2-202. As originally drafted, section 2-201 provided that the surviving spouse was granted a right "to take an elective share of one-third of the augmented estate . . . ." Section 2-202, the very heart of the UPC elective share scheme, provided a complex formula for determining what assets, or more precisely, what values are to be included in the augmented estate. Section 2-202's elaborate scheme has been explained in great detail by others. For purposes of the present inquiry, the focus is on the inter-spousal transfers—from the decedent spouse to the surviving spouse.

Section 2-202 begins by including in the augmented estate the "estate" assets. The term "estate," defined by the UPC, means "probate estate," and thus, all assets in the probate estate are part of the augmented estate. Thus, to the extent that the decedent spouse's will provides benefits for the surviving spouse, the value of that property is included in the augmented estate.

In an attempt to remedy the problem of what I have previously characterized as the "greedy spouse," the 1969 UPC included within the augmented estate inter vivos and nonprobate transfers from the decedent spouse to the survivor spouse so long as the transferred property was derived from the decedent spouse. The term "property derived from the decedent," as used in section 2-202, specifically in-

83. Unif. Probate Code § 2-206(a) (West 1971) (emphasis added). See also 1 Richard Wellman, The Uniform Probate Code Practice Manual 110 (1977) ("Unlike the rule existing in some jurisdictions, assertion of an elective share remedy under the Code does not involve a rejection of the decedent's will.").
84. Unif. Probate Code § 2-201(a) (West 1971).
85. The benchmark article is that of Professor Sheldon Kurtz. See generally Kurtz, 62 Iowa L. Rev. 981.
88. See Volkmer, 17 Creighton L. Rev. at 101. The problem here is "overprotection" of the surviving spouse.
cluded "any beneficial interest of the surviving spouse in any interest created by the decedent during his lifetime." The issue of valuation of the interests included was addressed by a subsection of section 2-202 dealing with timing – when the interest was to be valued. The computation of the augmented estate, when coupled with the fractional share specified in section 2-201, provides the basis for determining the amount of property that the UPC elective share statutes set as the minimal amount.

The next step is to determine whether that minimal amount of property has been received by the surviving spouse by way of probate and nonprobate transfers – including gifts – which have been included in the augmented estate. If the amount received by the surviving spouse exceeds the elective share amount, the elective share has been "satisfied" and there will be no need for the estate to seek "contribution" from third parties. The UPC section on point is section 2-207, entitled "Charging Spouse with Gifts Received; Liability for Others For Balance of Elective Share." Subsection (a) of section 2-207 states:

In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession, or other means and which has not been renounced, including that described in section 2-202(3), is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

The official comment to this section sheds little light on subsection (a). It is the comment to section 2-206, not section 2-207, that is most revelatory: "The election does not result in loss of benefits under the will (in the absence of renunciation) because those benefits are charged against the elective share under sections 2-201, 2-202, and 2-207(a)." The drafters of the 1969 UPC seem to have provided a clear statutory blueprint for dealing with the issue of "charging" in the inter-related provisions of sections 2-201, 2-202, 2-206 and 2-207(a).

90. See id. § 2-202(3)(i).
91. See id. § 2-202(3)(ii).
93. The whole purpose of forced share legislation, as a rule of law, is to compel the decedent spouse to make "adequate provision" for the survivor spouse. While some have argued that the "adequate support" amount should be a flexible standard, the legislatures in this country have consistently clung to a "crystal rule" – a fixed amount. See generally Mary Anne Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165 (1986).
94. UNIF. PROBATE CODE § 2-207(a) (West 1971).
95. See supra note 83 and accompanying text.
96. UNIF. PROBATE CODE § 2-206 cmt. (West 1971).
The Nebraska Probate Code statutes under discussion in Myers essentially mirror the provisions of sections 2-201, 2-202, 2-206, and 2-207 in the 1969 UPC. The county court Myers opinion referred to the comment to section 2-206 quoted above and found that this comment supported the interpretation that he gave to section 2-207. Although Judge Gerrard's opinion for the supreme court in Myers referred to the "offset" issue as one involving "statutory interpretation," one could argue that the controlling statute was clear in its application and thus "interpretation" was not necessary.

2. The Uniform Probate Code as Revised in the 1990's

Although the drafters of the UPC revised sections 2-206 and 2-207 in 1975, these amendments, while extremely significant in the context of the topic next to be discussed, did not change the critical language of section 2-207(a) relating to "charging." Although the Maine Supreme Court in Fisher was reviewing the 1975 revised version of section 2-206, the Myers court was correct in concluding that the Fisher court's interpretation was "helpful" because the critical statutory language in the Maine statute relating to "charging" mirrors that of section 30-2319(a) of the Nebraska Revised Statutes.

In 1990 the elective share provisions of the UPC were substantially revised and more revisions were made in 1993. The initial two step process described supra remains essentially unchanged. The first step is to determine the assets includible in the augmented estate. The latest UPC version utilizes the term "probate estate" and it also contains a new section narrowly focusing upon the "Decedent's

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98. It is well settled in Nebraska law that "[a] statute, rule, or regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous." Kimball v. Nebraska Dept. of Motor Vehicles, 255 Neb. 430, 586 N.W.2d 439, 441 (1998) (syllabus 5). The "offset" issue in Myers, at least at first glance, appears as a relatively straight-forward interpretation of an unambiguous statute, producing a result consistent with the goals of the statutory scheme. But as the continuing discussion will attempt to illustrate, the Myers factual situation gives rise to a potential Pandora's box.

99. The section heading, referring to "charging," remained unchanged.


102. There is a new definitions section in the elective share statutes, section 2-201, containing ten definitions. Under subsection (7) of section 2-201, the term "probate estate" is defined as "property that would pass by intestate succession if the decedent died without a valid will." UNIF. PROBATE CODE § 2-201(10) (amended 1993).
Nonprobate Transfers to the Surviving Spouse." There is no longer any need to "trace" the assets as being "derived from the decedent spouse." All of the surviving spouse's property, from whatever source, is now includible in the augmented estate.

Section 2-209 of the revised UPC is the counterpart of the pre-1990 UPC section 2-207 relating to charging. According to the official comment, section 2-209 "establishes the priority to be used in determining the sources from which the elective share amount is payable." Section 2-209(a) requires that the "amounts included in the augmented estate under section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession . . . must be applied first to satisfy the elective-share amount." The reference to section 2-204 is to the "Decedent's Net Probate Estate." And so the UPC treatment of the surviving spouse who accepts property includible in the augmented estate has remained consistent in that the spouse will be charged with having received those benefits and the amounts involved will operate as an offset or credit. The 1990 UPC version likewise continues the original UPC position that election, in and of itself, is not an act of renunciation.

And so it appears that under any version of the UPC, the Myers ruling relating to the "offset" issue would be the same. No commentator has questioned this approach and, as the Myers court properly emphasized, the conclusion reached carries out the purposes behind the elective share statute. This is not to say, however, that the second ruling in the Myers case is just as easily defended. Before tackling that thorny issue, I return to a topic addressed in this journal over fifteen years ago: The surviving spouse who both elects and disclaims.

B. ELECTING AND DISCLAIMING

As noted above, under the traditional forced statutes, the electing spouse was treated as a disclaiming spouse, and the surviving spouse was treated as rejecting those provisions of the decedent's will benefitting the electing spouse. The original UPC approach, as noted above, was quite to the contrary. Section 2-206(a) specifically stated that the spouse's election is not a rejection of benefits conferred under

108. As will be pointed out infra, see text following note 116, what was explicit in the 1969 UPC is implicit in the 1990 UPC.
109. See supra note 82 and accompanying text.
the will "unless the surviving spouse also expressly renounces in the petition for elective share the benefit of all or any of the provisions." 110

But this significant provision lasted only for six years because in 1975, section 2-206 and section 2-207 were radically revised under the guise of "technical amendments." 111 According to the comment to revised section 2-206, "[t]he new language in this section . . . does not mention renunciation of transfers which is now dealt with in section 2-207." 112 Section 2-207(a), as will be recalled, dealt with the topic of "charging" renounced assets against the electing spouse's share. 113 Whereas the heading for section 2-206 remained the same -- "Effect of Election on Benefits by Will or Statute" -- the altered text of section 2-206 did not address the topic of election of benefits by will. It addressed only the latter topic -- the effect of election on statutory benefits, namely, homestead allowance, exempt property, and family allowance. 114 Thus, the 1975 changes to sections 2-206 and 2-207 had the effect of truncating the issue of renunciation into a "charging" issue -- to be addressed in section 2-207(a).

It appears that something significant got lost in this process: (1) the UPC elective share provisions no longer have an explicit statutory rule as to the effect of election on will benefits; and (2) the UPC no longer exactly states how the renunciation must be filed.

Revised section 2-206 was carried over into the 1990 revision under a new heading: "Effect of Election on Statutory Benefits." 115 The substance of the provision remained the same. In a further revision to the elective share provisions in 1993, what was section 2-206 got folded into the new section 2-202 ("Elective Share") in subsection (c). 116 Thus, the UPC went from having a separate specific section dealing with the topic of "Effect of Election on Benefits by Will or Statute" to no separate section, and finally, to a one sentence statement regarding the effect of election on statutory benefits. In other words, when it comes to the effect of election on benefits received by the spouse by inter vivos or testamentary transfers (both probate and non-probate), the latest approach of the UPC drafters is to treat this matter as a "charging" issue.

110. See supra note 83 and accompanying text.
111. The longer version of this story is contained in Volkmer, 17 CREIGHTON L. REV. at 143-44.
113. See id. § 2-207(a).
114. UNIF. PROBATE CODE § 2-206 (West. 5th ed. 1977) ([a] surviving spouse is entitled to homestead allowance, exempt property, and family allowance, whether or not he elects to take an elective share.).
116. UNIF. PROBATE CODE § 2-202(c) (amended 1993).
IN RE ESTATE OF MYERS

The surviving spouse who wishes to both elect and to renounce brings us back to the questions raised at the beginning of this article. The question comes down to whether the so-called "disclaimer-is-charged" rule will be followed. Under that rule, the surviving spouse is charged with the value of the assets renounced, even though the spouse never receives those assets. Since the focus heretofore has been upon the UPC, let us track the status of this rule over the course of the history of the UPC. This story has been told by several authors, but let us turn to Professor Susan Gary's version of the story.

In her 1995 article, Professor Gary accurately summarized the UPC's zig-zag path relating to the "disclaimer-is-charged" rule:

Under the original UPC, certain assets of the surviving spouse were offset against the elective share to reduce the amount she or he would receive. The surviving spouse's share was charged with all amounts included in the augmented estate that the spouse had received from the decedent during the decedent's life or upon the decedent's death.

The surviving spouse's share was also charged with any property disclaimed by the surviving spouse. This provision, added in

117. See supra notes 4-5 and accompanying text.
118. Most notably in the leading trusts and estates casebooks. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS & ESTATES 517-519 (5th ed. 1995) (under the heading of "Who contributes to the Elective Share"). These authors state that "[i]n making the election, the spouse must disclaim the property devised to her by will." Id. at 517. This statement reflects the older thinking in regard to the effect of filing a petition for a forced share. It does not accurately reflect the UPC approach. See supra note 83 and accompanying text. The danger of making general statements in this area is exemplified by this quotation from an otherwise excellent discussion of the topic. See also DOBRIS & STERK, supra note 3, at 166-67 (Note: Protecting the Spouse with Life Interests in Trust (With an Aside on Disclaimer)). In a follow-up problem, these authors hypothesize a deceased husband with a probate estate of $300,000, a testamentary trust leaving to the widow a life estate in the trust, and an elective share percentage (under the current version of the UPC) of 30%. Thus the widow's elective share amount is $90,000 under the UPC.

According to the authors, section 2-209 of the UPC does not instruct us as to what amounts are applied to satisfy the elective share amount. And continuing, "the underlying assumption of the drafters is that to take her elective share, W has to disclaim her interest under the will. As a result, W can elect to take $90,000, but would have to give up her life interest in the trust." JOEL C. DOBRIS & STUART E. STERK, TEACHER'S MANUAL — RITCHIE, ALFORD & EFFLAND'S ESTATES AND TRUSTS CASES AND MATERIALS 57 (1998). If the widow wants to take $90,000 in cash, she should elect and disclaim, as she is allowed to do under the latest version of the UPC. So it is technically true that the widow "has to disclaim" on these facts to take her $90,000 since otherwise she would be charged with the value of her life estate. But only if the "disclaimer-is-charged" rule is in effect is the widow "forced" into doing anything.

Consider a third casebook editors' comment on the topic: "To minimize disruption of the decedent's dispositive scheme, the UPC does not require any renunciation by a surviving spouse who claims an elective share." E. CLARK ET AL., GRATUITOUS TRANSFERS WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION 140 (4th ed. 1999). The statement quoted is correct, but there is nothing further to illustrate the perils of the "disclaimer-is-charged" rule.
1975 as a technical correction to Section 2-207, effectively prevented the surviving spouse from taking against the will. In other words, because the elective share amount was automatically reduced by the amount of any devise regardless of disclaimers, the surviving spouse had to first take the property under the will, and then take any additional amounts due under the elective share statute. This enabled the decedent to retain control of the eventual disposition of the property while providing for the surviving spouse by giving him or her a life estate in an inter vivos or testamentary trust.

Under the new [1990] UPC, the elective share is determined by applying the “elective share percentage” to the augmented estate. Offsets are then taken against that amount, and the surviving spouse is entitled to the remainder.

In 1993, revisions to the UPC “reorganized and clarified” the elective share sections.

Although most of the 1993 revisions did not make substantive changes, one change does have a substantive impact. Since 1975, the UPC, through section 2-207(a)(3), 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 1993 UPC revisions deleted former section 2-207(a)(3).

And, the recent deletion of section 2-207(a)(3) means that a spouse cannot be forced to accept an income interest in a trust as part or all of the elective share.119

And so it appears that the “disclaimer-is-charged” rule has come full circle. The 1993 UPC approach returns to the approach embodied in the UPC from 1969 to 1975. In states that have based their elective share statutes upon the UPC model, the status of the “disclaimer-is-charged” rule depends upon the version of the UPC the particular state has chosen to enact. Not surprisingly, some states, in enacting the UPC elective share provisions, have come up with “charging” statutes that do not fit neatly within the UPC prototypes. States that

have not chosen to follow the UPC elective share model may or may not have statutes addressing the "disclaimer-is-charged" rule.\textsuperscript{120} Later on this article will discuss some of the most recent developments in this area. The UPC experience has been recounted to illustrate that the topic of "electing and disclaiming" is fraught with peril on a number of fronts. The UPC story illustrates, so far I as am concerned, how utterly futile it is to posit "general rules" when it comes to any elective share topic and also how a reference to a "UPC" treatment of the topic must be specific with respect to the version of the UPC.

C. Valuing Partial Interests

The \textit{Myers} case illustrates the other horn of the dilemma to the "charging" process: Valuing the interest which has passed to the surviving spouse. In some ways this problem is more intractable than the previously discussed "disclaimer-is-charged" issue, for the latter appears to be a binary issue because the surviving spouse is either charged or not charged with the value of the renounced property. On the other hand, the valuation problem presents a veritable smorgasbord of variables affecting the determination of that elusive but ever-present quest for the "fair market value." Professor Bloom's 1992 article, focusing on the 1990 UPC article II revisions, is the most complete discussion of the valuation topic, and the reader is referred to that article for an in-depth discussion of valuation issues arising in the context of an elective share computation.\textsuperscript{121}

A thumbnail sketch of the UPC's approach to the valuation problem in elective share computations may be summarized as follows: From 1969 to 1975, the UPC elective share provisions did not contain any specific language relating to valuation of partial interests. In 1975, when the Code drafters changed the "disclaimer-is-charged" rule, section 2-207(a) was amended to include the following sentence:

For purposes of this subsection, the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth one half of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.\textsuperscript{122}

\textsuperscript{120} No attempt will be made in this article to conduct a state by state listing of how each of the common law states deals with the "disclaimer-is-charged" rule. A representative case from a common law state that does not follow the UPC and applies a "disclaimer-is-charged" rule is \textit{In re Estate of Finch}, 389 S.E.2d 126 (N.C. Ct. App. 1990) (widow's income interest in trust sufficient to defeat spouse's right of dissent under N.C. GEN. STAT. § 30-1(b) (1992)).

\textsuperscript{121} \textit{See generally} Bloom, 55 ALB. L. REV. at 941-82.

\textsuperscript{122} \textit{Unif. Probate Code} § 2-207(a) (amended 1977).
Under the 1990 redesigned elective share provisions, this sentence was deleted and thus the UPC approach has, once again, come full circle. There are no provisions in the 1990 redesigned UPC elective share provisions articulating a valuation standard for partial interests, other than a reference to "commuted value."\textsuperscript{123} How that "commuted value" is to be computed is the question.

As to life estates, Professor Bloom stated that the "commuted values" will likely be determined by the valuation method used for federal tax purposes.\textsuperscript{124} Utilizing this method, according to Professor Bloom, presents risks that "overvaluation of partial interests will occur, resulting in adverse consequences to the surviving spouse."\textsuperscript{125} The chief architects of the 1990 redesigned elective share provisions of the UPC, Professors Langbein and Waggoner, regard the overvaluation potential as "minimal."\textsuperscript{126} According to these gentlemen, the code drafters deliberately omitted any reference to tax tables utilized by the federal government for valuation of partial interests.\textsuperscript{127} They further explained their rationale as follows:

Nothing in the UPC grants the tables mandatory or presumptive status. In a valuation dispute, we would expect the party who would benefit from the tables to argue for their use. We would also expect the party who would be disadvantaged by the tables — presumably the surviving spouse — to resist their use, by citing many of the arguments put forward by Professor Bloom. In the end, valuation of income and other partial interests will be resolved by negotiation and agreement or by the trier of fact on the basis of the evidence. There is no reason to expect surviving spouses to be the persistent victim of inaccurate valuation. Valuation issues are endemic to any elective-share system and are not restricted to income and other partial interests. They can arise with regard to partnership interests, closely held corporate stock, land, and jewelry, to give just a few examples. Nearly all of them will be resolved at the pretrial or trial stage and not be the subject of appellate argument.\textsuperscript{128}

Later in this article the UPC's position, or more accurately, the UPC's non-position, on the valuation issue will be re-examined.

If the only interest that is in question is an equitable life estate — the right to receive income from a trust for the duration of the benefi-

\textsuperscript{123} \textit{Unif. Probate Code} § 2-208(b) (amended 1993) ("value of property" includes "the commuted value of any present or future interest . . . ").
\textsuperscript{124} Bloom, 55 Alb. L. Rev. at 952.
\textsuperscript{125} Id. at 960 (citation omitted).
\textsuperscript{127} Langbein & Waggoner, 55 Alb. L. Rev. at 883.
\textsuperscript{128} Id.
ciary’s life – the tax valuation method has the virtue of being easily applied, once the value of the underlying interest has been stipulated to. Even less problematic is the value of an annuity or so-called “unitrust” amount. In these instances, the trustee must pay to the beneficiary either: (a) a sum certain; or (b) a percentage of the fair market value of the trust corpus. Suppose that in addition to the required distributions just listed, the trustee was authorized to either pay, out of principal, to the beneficiary: (a) such sums as the trustee, in the trustee’s sole discretion, shall deem advisable, or (b) such sums as the trustee shall determine as necessary for the support of the beneficiary. To what extent, if any, would a trustee’s power to allocate principal to a beneficiary based upon a discretionary or support standard, create a “property” interest in the beneficiary? If a property interest has been created, what is the value of that interest?

Going back to Myers once again, the second assigned error by the appellant was in regard to the county’s court action “in determining the value of her interest in the trust.” According to the supreme court, “[t]he county court valued Myers’ interest in the trust according to the regulations that would be used to calculate, for tax purposes, the present value of a life estate in the trust property.” In upholding the county court’s resort to the tax valuation method, it was unnecessary for the supreme court to go into the question raised by the appellee’s brief, whether the trustee’s power to invade the principal of the trust for the benefit of Lesley Myers resulted in an interest passing to Lesley greater than a life estate. Marital deduction tax planning has the effect of making it highly likely that the surviving spouse will be given either an income interest or a fee simple interest. But for some, the marital deduction qualifications may not be the driving force. Although the Myers court was able to conveniently overlook the valuation issue presented in the context of a support trust, not all courts have been so fortunate.

The 1988 Fisher case from Maine, previously mentioned in the context of the “offset” issue, is relevant. In Fisher, the deceased wife’s testamentary trust provided that:

129. The facts of Myers are illustrative.
130. Tax planners are well aware that in order to create a valid charitable remainder trust, section 664 of the Internal Revenue Code requires that the noncharitable beneficiary’s interest be structured in the form of “charitable remainder annuity trust,” or a “charitable remainder unitrust” or a “pooled income fund.” CLARK ET AL., supra note 118, at 896.
131. See supra note 25 and accompanying text.
133. See supra note 63 and accompanying text.
134. See supra notes 41-42 and accompanying text.
A. Said Trustee shall distribute out of the trust net income and, insofar as necessary, out of the trust principal, the sum of three hundred fifty dollars ($350.00) per month to my husband, said WILLIAM P. FISHER SR., so long as he shall live.

B. Additionally said Trustee shall pay to or use for the benefit of my husband, WILLIAM P. FISHER SR., so much of the net income and principal of the Trust as the Trustee, in the Trustee's sole discretion, shall deem necessary or advisable for the welfare and support of my husband, taking into consideration all other means known to the Trustee, and available to my said husband, WILLIAM P. FISHER SR.  

Mr. Fisher filed a petition for an elective share under the UPC-based Maine elective share statute and the question of “charging” Mr. Fisher with assets received inexorably caused the court to face the valuation issue.

The Maine version of the UPC was the official version in force from 1975 to 1990 which contained a statement regarding the presumption that “the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth \( \frac{1}{2} \) of the total value of... the trust estate...”  

The lower court failed to value the trust interests of Mr. Fisher and because this issue “would be certain to arise again upon remand,” the Maine court took up the task of valuing Mr. Fisher's annuity interest and the interest he held as the beneficiary of a support trust.

It was a relatively simple matter for the court to employ the tax tables in determining the value of the annuity, which turned out to be worth a little over $32,000. But Mr. Fisher's elective share amount was a little over $100,000. The personal representative argued on appeal that the one-half presumption rule was not rebutted by Mr. Fisher in regard to the “present value of the discretionary payments.” As to the “discretionary payments,” the court had this to say:

The disbursement of any additional income is within the sole discretion of the trustee. Although we find no decisional law concerning a person's beneficial interest in this type of potential income in the context of the Probate Code, we look to the analogue provided by the law of federal estate and gift taxation. In that context, the applicable approach for evaluating the discretion of the trustee to pay funds to a beneficiary is to determine whether the trustee is governed by ascertainable

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137. Fisher, 545 A.2d at 1271.
138. Id. at 1272.
external standards such that a beneficiary could request a court of equity to apply and compel compliance by the trustees. *Jennings v. Smith*, 161 F.2d 74, 77-78 (2d Cir. 1947). See also e.g., R. Stephens, G. Maxfield and S. Lund, *Federal Estate and Gift Taxation* ¶4.10[5] at 4-186-87 (5th ed. 1983); C. Lowndes, R. Kramer and J. McCord, *Federal Estate and Gift Taxes* § 8.9 at 156-57 (3d ed. 1974). Examining the terms of the trust before us, we conclude that the trustee's standard for disbursement of funds for Mr. Fisher's welfare and support is not ascertainable. Because the potential interest is too remote and tenuous to place a present value upon it, the interest is not included in computing the charge against the elective share. Thus, the personal representative's challenge fails.139

With due respect to the court and the difficult task that faced them, the analogue is misplaced. It is clear from the court's citations that it utilized section 2038 of the Internal Revenue Code, a section dealing with the computation of the gross estate for federal estate tax purposes, as the appropriate analogue. As the court acknowledged in a footnote, the section 2038 analogy is strained because "the emphasis is usually on the decedent who is also the trustee to determine whether as trustee he has control over the funds."140 Since section 2038 is an estate tax provision, the question of what is includible necessarily focuses upon "the decedent."141 So if the analogy to section 2038 is to fit, the appropriate analogy would have to be to Mr. Fisher's death and whether his "property interest" would be includible under section 2038. If it is the decedent-trustee's powers that the court wants to examine in the context of the federal estate and gift tax law, the obvious candidate is section 2041, dealing with powers of appointment. Under this section the determinative issue would be whether the decedent possessed a "general power of appointment" or whether that power was limited by an "ascertainable standard relating to the health, education, support, or maintenance of the decedent . . . ."142 Both sections 2038 and 2041 of the federal estate and gift tax law deal with the question of whether an interest is includible in the gross estate. These sections do not address the question of valuation as such; they provide standards for determining whether a property interest is deemed to exist so as to cause inclusion in the gross estate. The court's conclusion that the property is "too remote and tenuous to

139. *Id.* at 1273 (citation omitted) (footnote omitted).
140. *Id.* at 1273 n.7.
141. "I.R.C. § 2038 deals with transfers as to which the decedent reserved a power affecting beneficial enjoyment." CLARK ET AL., supra note 118, at 870.
142. CLARK ET AL., supra note 118, at 889-94.
place a present value upon it" is a conclusion that does not follow from the section 2038 analogue.\textsuperscript{143}

Now to stir the pot of valuation of future interests a bit more. Let us examine the case of \textit{In re Estate of Post},\textsuperscript{144} a 1995 decision from the Superior Court of New Jersey, Appellate Division [hereinafter "\textit{Post}"

In \textit{Post}, the New Jersey court was called upon to review a valuation ruling of a trial court judge in the context of a valuation statute in New Jersey that differed markedly from the UPC statute construed in \textit{Fisher}.

In computing the elective share in the \textit{Post} estate, the court had to ascertain the value of property owned by the electing spouse (the plaintiff in the instant case).\textsuperscript{145} The plaintiff was the beneficiary of a trust established by her father many years earlier (the "Brix trust") and the \textit{Post} court had this to say about that trust:

Evidence at trial revealed that the Brix trust provides that income is to be paid to plaintiff's mother for her life, and upon her death, the corpus is to be divided into two equal parts and held in trust for the benefit of plaintiff and her sister. The trust also authorizes the plaintiff's mother's trustee to invade the corpus for her support; upon the death of plaintiff's mother, plaintiff may also invade the corpus for an aggregate amount not to exceed $20,000 \textit{in toto}. The parties stipulated that at decedent's death, plaintiff's mother was still alive (age 85) and the value of the corpus of the Brix Trust was $710,654. The trial judge found that the trust could not be properly valued because of insufficient evidence, and he thus attributed no value to it.\textsuperscript{146}

Continuing the discussion relating to the trial court's finding, the appellate court stated:

As noted, the trial judge found that plaintiff had a "vested but non-possessory interest" in the Brix trust at decedent's death because plaintiff's mother was still alive. She also had no present right to invade the corpus. Plaintiff acknowledges that the judge ruled that her "interest" in the Brix Trust "did constitute property owned by the surviving spouse in accordance with N.J.S.A. 3B:8-18," and therefore, this interest was

\begin{footnotesize}
\begin{enumerate}
\item[143.] The conclusion may ring true but, as will be suggested later, more appropriate analogies might have been made.
\item[145.] The New Jersey elective share statute includes the value of the surviving spouse's property "from whatever source acquired." N.J. STAT. ANN. § 3B:8-18(a) (West 1983). I took note of this unusual statute in my earlier article. See Volkmer, 17 CREIGHTON L. REV. at 140-41. As will be shown later, this statute was ahead of its time.
\item[146.] \textit{In re Estate of Post}, 659 A.2d 500, 503-04 (N.J. Super. Ct. App. Div. 1995) (citation omitted) (footnote omitted). The omitted footnote stated that plaintiff's mother was still living at the date of oral argument of the case.
\end{enumerate}
\end{footnotesize}
“required to be applied in satisfaction of her elective share pursuant to N.J.S.A. 3B:8-18.” The estate correctly notes that because plaintiff has not appealed from this ruling, the only related issue for us to decide on this appeal is how plaintiff’s interest in the Brix Trust should have been valued in satisfaction of plaintiff’s elective share.\textsuperscript{147}

According to the court majority in Post, the valuation of plaintiff’s interest in the Brix trust was controlled by the following New Jersey statute:

In an action for an elective share, the electing spouse’s total or proportional beneficial interest in any life estate in real or personal property or in any trust \textit{shall} be valued at one-half of the total value of the property or trust or of the portion of the property or trust subject to the life estate.\textsuperscript{148}

The Post majority found the “valuation methodology” outlined in this statute to be “clear,” and thus, required that the plaintiff’s interest in the Brix Trust be valued at 50% of the value of the trust corpus.\textsuperscript{149}

There was a vigorous dissent by Judge Brochin, who summarized the relevant facts and majority holding as follows:

In the present case, plaintiff holds a life estate in half the assets of the Brix Trust. This trust was created by her father during his lifetime. He retained a life estate and gave successive life estates to plaintiff’s mother and then to plaintiff and her sister equally. Plaintiff’s mother has the right to invade corpus. She was eighty-five years old when the plaintiff’s husband died, and we were informed that she was alive on the date this case was argued. Plaintiff was sixty-five years old when her husband died. Nonetheless, the majority opinion in the present case holds that the plaintiff’s life estate in the Brix Trust must be valued by the literal application of N.J.S.A.3B:8-17. In other words, since she has a life interest in half the trust corpus, the majority opinion values her interest as if it were worth one-fourth the value of the corpus, even though plaintiff will have no right to receive trust income until after her mother’s death.\textsuperscript{150}

According to Judge Brochin, the majority’s literal application of the statute produced not only an arbitrary and irrational result, but an unconstitutional one as well. Judge Brochin emphasized that it was wholly unreasonable to treat the plaintiff as the current recipient

\begin{footnotes}
\item[147] Post, 659 A.2d at 506 (citation omitted) (footnote omitted). The omitted footnote stated that “there is the possibility that the corpus might be substantially or wholly depleted by her mother.” \textit{Id.}
\item[148] N.J. STAT. ANN. § 3B:8-17 (West 1983) (emphasis added).
\item[149] Post, 659 A.2d at 507.
\item[150] Id. at 511.
\end{footnotes}
of income when in fact she was not a current recipient of income. Judge Brochin's search for a reasonable interpretation of the elective share and valuation statutes, one which would avoid potential claims of unconstitutionality, led him to the following conclusion:

In order to achieve an interpretation of the elective share statute which produces reasonable results and which avoids doubts about its constitutionality, I would hold that a life estate which is not yet vested in enjoyment at the time of the deceased spouse's death is not "property, estate or [an] interest therein, owned by the surviving spouse in his own right at the time of the decedent's death." 

The approach of the New Jersey statute as to the valuation of a life estate (as construed by the Post majority) certainly has the virtue of simplicity. Whether that virtue should trump other claimed virtues is a delicate question and will be deferred for the time being.

D. Other Valuation Issues

As Professors Langbein and Waggoner duly noted above, "valuation issues are endemic to the elective-share system and are not restricted to income and other partial interests." True enough, but the valuation issue, which seems to arise with a fair degree of frequency in tax cases, rarely occurs in the elective share context and hardly at all when it comes to valuation of the entire interest. Perhaps this is so, as Langbein and Waggoner state, because valuation issues are fact questions and very difficult to challenge on appeal.

Likewise, in the listing of assets given above by Professors Langbein and Waggoner — "partnership interests, closely held corporate stock, land, and jewelry" — the problem of valuation is no different than in non elective-share contexts, wherein valuations of these types of assets have been required for a variety of purposes over many years.

One category of assets that deserves a closer look in the elective share context is closely held corporate stock. In the Myers case, the allegation was that the stock in the augmented estate, which passed to the trust, was non-income producing, i.e., paying no dividends. The ruling in the trial court resulted in a valuation of the life estate based upon an expected return of 7.6%. It was argued that the reliance upon the tax valuation tables resulted in an overvaluation of the life estate, because the assumed rate of return was not justified given

151. Id. at 511-12.
152. Id. at 512.
153. See supra note 128 and accompanying text.
154. See supra note 23 and accompanying text.
the nature of the asset. Both the probate court and the Nebraska Supreme Court rejected the appellant's argument on this point. The court indicated that the appellant had the burden to suggest or offer to the court an alternative valuation method, which she failed to do.\textsuperscript{166} While the probate court judge saw the non-income producing stock as a trustee investment issue, not properly before him, the supreme court chose not to even mention the issue of compliance with the Nebraska Prudent Investor Act. Given the assigned errors,\textsuperscript{157} the supreme court response does make a great deal of sense.

Whereas the issue of a "minority discount" for closely held corporate stock often arises in tax valuation cases, the issue of a "minority discount" in a valuation context for elective share seems to have not been litigated at the appellate levels. However, in the \textit{Post} case cited above, the New Jersey court confronted this very issue.

Included in the decedent's augmented estate in the \textit{Post} case were 97 of the 100 outstanding shares of the decedent's home heating oil distribution company.\textsuperscript{158} The decedent transferred 34\% of these shares to his wife, the plaintiff, by inter vivos and testamentary transfers.\textsuperscript{159} The probate court had to value the shares of the stock included in the augmented estate and to value the shares owned by the plaintiff. As to the issues, expert testimony was received. The plaintiff's expert witness, in valuing the plaintiff's stock, applied a minority discount. The estate's expert did not apply a minority discount, believing that such a discount was "inappropriate in a liquidation analysis."\textsuperscript{160} Ultimately, the trial court judge sided with the plaintiff's expert witness testimony and applied a 50\% discount.\textsuperscript{161}

The majority opinion held that the trial court judge committed error in applying the minority discount, stating:

\begin{quote}
The elective share statute does not recognize a surviving spouse's right to claim discounts or seek reductions in value for assets which the spouse receives under decedent's will so as to artificially inflate his or her entitlement to additional assets.\textsuperscript{162}
\end{quote}

\ldots

We are satisfied that discounts are not permissible when a liquidation approach is used because in such a case no

\begin{footnotes}
\item[156.] \textit{Myers}, 256 Neb. at 827, 594 N.W.2d at 569-70.
\item[157.] \textit{See supra} note 25 and accompanying text.
\item[159.] \textit{Post}, 659 A.2d at 503.
\item[160.] \textit{Id.}
\item[161.] \textit{Id.} at 504. This was a modification of a prior order, the parties having filed cross-motions for reconsideration.
\item[162.] \textit{Post}, 659 A.2d at 509.
\end{footnotes}
shareholder receives a discount or premium in relation to any other shareholder. 163

In his dissent, Judge Brochin focused upon the question of what was the fair market value of the shares owned by the plaintiff at her husband's death. According to Judge Brochin, since prompt liquidation of the plaintiff's shares "was not in the offing, the shares in plaintiff's hands could have been worth more or less than her pro rata share of their liquidation value." 164 It was therefore proper, and indeed necessary, to receive expert testimony as to the amount of the discount. 165 Judge Brochin compared the fair market values of plaintiff's shares offered by the two expert witnesses and the actual selling price of the shares with the trial court's ruling. This comparison led Judge Brochin to conclude that the trial court's ruling as to the value of plaintiff's shares was not an abuse of discretion. 166

Another type of discount that is invoked in the valuation of corporate stock is the so-called "blockage discount." In the 1984 Florida appellate case of Williams v. Harrington, 167 the question presented on appeal was whether the personal representative was correct in applying the same blockage discount for two different purposes: (1) the valuation of the stock, as of the decedent's date of death, for elective share purposes; and (2) the valuation of the stock as of the date the stock was distributed to fund the elective share. 168 In reversing the lower court, the Florida District Court of Appeal held that the utilization of one blockage discount for the two purposes was incorrect because the record revealed a changing stock market. 169

E. Acceleration and Contribution

A surviving spouse's filing of a petition for elective share may or, as Myers illustrates, may not result in a disruption of the testator's testamentary plan. Once the "charging" process is completed and the calculation reveals that the surviving spouse's elective share has not been "satisfied," the probate court may be called upon to rule upon two very different property issues: (1) what effect does the election have on the decedent's testamentary trust (or inter-vivos trust receiving assets from the residue of decedent's probate estate)?; and (2) who has to "contribute" to the estate, and in what amount, in order to insure that

163. Id. at 510.
164. Id. at 513.
165. Id.
166. Id.
169. Williams, 460 So. 2d at 535.
the electing spouse has received the amount to which that spouse is entitled?

As to the first issue, if the decedent's testamentary plan included the fairly standard marital trust, with an income interest to the surviving spouse and a remainder to the decedent's children, a major salvage operation might have to be undertaken. In the language of the law of future interests, the question of "acceleration" would arise – a decision would have to made as to whether the interests of the remaindermen of the trust are "accelerated," such that these interests now become possessory.\footnote{170}{For a general introduction to the doctrine of acceleration, see Lewis M. Simes, \textit{Handbook of the Law of Future Interests} 228-33 (2d ed. 1966).}

In an article discussing recent cases and the acceleration doctrine, Professor Patricia Roberts has written of the "manipulation" of the identity of the remaindermen.\footnote{171}{Patricia J. Roberts, \textit{The Acceleration of Remainders: Manipulating the Identity of the Remaindermen}, 42 S.C. L. Rev. 295 (1991).} Interestingly enough, one topic addressed by Professor Roberts was that of "Spousal Dissents from the Will."\footnote{172}{Id. at 306-07.} There are, she reported, cases to the effect that equate "spousal dissent" as tantamount to death, and acceleration takes place as a matter of course.\footnote{173}{Id. at 306-07 nn. 51-52.} Professor Roberts does not cite any cases involving both an electing spouse under the UPC and the acceleration issue. And there are no cases, apparently, involving a surviving spouse who both elects and disclaims.

Going back to the \textit{Myers} case once again, suppose Lesley Myers had elected and disclaimed. Nebraska law would not charge her with the value of the assets disclaimed. What would have then happened to the trust? Would the future interests have been accelerated? Since Nebraska is a state having an elective share system based upon the original UPC, one would not find anything in the elective share statutes treating an election as tantamount to death.\footnote{174}{Under the UPC, the electing spouse is deemed to have accepted benefits conferred by the deceased spouse's will or trust. \textit{See supra} note 83 and accompanying text.} However, if the surviving spouse has elected \textit{and} disclaimed, the disclaimer statute based upon a UPC model would treat the person disclaiming "as if" the person renouncing has predeceased the decedent and acceleration is presumed.\footnote{175}{UNIF. PROBATE CODE § 2-801(c) (West 1971) (treating person disclaiming "as if the person renouncing had predeceased the decedent."). The official comment to subsection (c), appearing in 1973 after the section was re-written, states that disclaimer raises the issue of whether the "succeeding interests or estates accelerate in possession or enjoyment or whether the disclaimed interest must be marshalled to await the actual happening of the contingency." UNIF. PROBATE CODE § 2-801(c) cmt. (West 1971). According to the comment, the remainder interests "are accelerated." \textit{Id}.}
At this point, the concerns that Professor Roberts has addressed in her article would be present. To the extent that remainder interests are accelerated, the identity of remaindermen may be affected. Questions of who is entitled to the income from the now changed trust might also arise. These problems are not the surviving spouse's responsibility; however, trustees and personal representatives now have to apply a body of future interests law that few lawyers have ever even heard of.

And then there is the contribution issue. Assuming that the surviving spouse is entitled to property devised or given to others, how should the various takers be assessed their fair share? From the dawn of the UPC to the present version of the UPC, there has always been a contribution formula contained in the elective share provisions of the UPC. Professor Roberts, writing before the UPC changed the "disclaimer-is-charged" rule in 1993, questioned whether changing that rule was wise. In her view the change could result not only in the surviving spouse manipulating what he or she takes, but also manipulating the shares of others. At least one other authority appears to share her concerns. New York, a state which has an elective share statute not based upon the UPC model, appears to allow the surviving spouse to alter the contribution scheme, but the surviving spouse personally bears the cost of changing the contribution scheme.

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176. These are the points raised by Professor Roberts in her article. See generally Roberts, 42 S.C. L. Rev. at 295-322.
177. The judgment embodied in the statement may be a bit harsh. If the lawyers are specialists in estate planning, there is at least a chance the lawyers have some knowledge of this doctrine.
178. In the original version of the UPC, the contribution issue was addressed in subsections (b) and (c) of section 2-207. Unif. Probate Code § 2-207 (West 1971). In the most recent version of the UPC, the contribution issue is addressed in subsections (b) and (c) of section 2-209 and section 2-210. Unif. Probate Code §§ 2-209 to 2-210 (amended 1993).
179. Professor Roberts utilizes an illustrative example to make her point. See Roberts, 95 W. Va. L. Rev. at 72-73 n.36.
180. See Dobris & Sterk, supra note 3, at 167 ("[b]ut if a surviving spouse can disclaim an absolute interest, and thereby assure that the interest does not count against her elective share, the surviving spouse may upset the testator's testamentary scheme for no good reason."). These authors then follow this statement with an example that concludes with the question: "But did the elimination of the disclaimer provision in the 1990 version throw out the baby with bathwater?" Id.
The preceding discussion has assumed that the applicable elective share law is one based upon a UPC model. In other words, the elective share statutes heretofore discussed have incorporated the two main features of the UPC augmented estate: (1) inclusion of assets beyond the decedent's probate estate, including gratuitous transfers to third parties and inter-spousal transfers; and (2) requiring that the assets transferred by the decedent spouse to the survivor spouse, whether inter vivos or testamentary, be "credited" against the surviving spouse's elective share. However, if a state's protection against disinheritance is based upon the older "forced share" model, that state's statutory scheme typically: (1) restricts the survivor spouse to assets in the decedent's probate estate; and (2) does not take into account inter-spousal transfers. It is fair to state that statutory schemes of this variety, once the norm, are now the exception. It is for that reason that only a brief look at the non-UPC world is necessary. To see how the Myers-type scenario might play out in that non-UPC world, let us consider a recent case from the Florida District Court of Appeal, Bravo v. Sauter.

The Bravo facts fit neatly within the Myers prototype. In Bravo, the decedent husband's estate plan consisted of an inter vivos trust and a pour-over will. The residuary clause of the husband's will devised the property to the trustee of the inter vivos trust. This trust provided that the trustee would pay the income to the widow for her life, with remainder to the decedent's children. The widow was the decedent's second wife; the children were the issue of decedent's marriage to his first wife. As in Myers, the widow filed a petition for an elective share. Florida law at this time limited the elective estate to assets in the decedent's probate estate.

According to the Bravo court the appeal raised the following issue: In brief, the question raised is does the surviving spouse forego her right to trust income where a decedent leaves an estate plan consisting of a pour-over will and a partially funded revocable inter vivos trust, but the surviving spouse takes an elective share in the estate?

182. The comment to section 2-202 of the original UPC (relating to the "augmented estate") contained an excellent explanation as to why these additional assets needed to be included within the augmented estate. See UNIF. PROBATE CODE § 2-202 cmt. (West 1971).
186. Bravo, 727 So. 2d at 1104.
The appellate court concluded that the widow did not "lose her interest in the trust even though that interest may be paid from assets that pour over from the estate." It was argued that the Florida statute that treated an electing spouse as having predeceased the decedent spouse should be applied to "terminate the spouse's interest" in the inter vivos trust. The Florida court discussed the doctrines of "incorporation by reference" and "events of independent significance" in reasoning that the inter vivos trust was independent of the will, since the testator had not incorporated the trust as part of the will so as to make it a testamentary trust. In short the Bravo court concluded that the filing of the petition for an elective share did not result in the loss of her interest in the inter vivos trust because: (1) the Florida statute deeming the surviving spouse to have predeceased applied only to testamentary transfers; and (2) neither the will nor the trust put the widow to an election — forcing her to choose between what the will and trust gave to her and the elective share.

The Florida court relied heavily upon a 1983 decision of the Missouri Court of Appeals, Lorch v. Mercantile Trust Co. National Association, a case said to be "on all fours." In Lorch, the surviving widow elected against her husband's will and was not deemed to have forfeited any rights as an income beneficiary of an inter vivos trust. As in Bravo, the will was of the pour-over variety, devising assets to the trust.

The Bravo court quoted the following language from Lorch, which language in turn came from a 1972 law review article:

If . . . the trust, at least when it is funded, has significance independently of the will, then so does the trust provision for the surviving spouse, and the spouse could not be viewed to take entirely by virtue of the will. The devise or bequest would seem to be to the trustee in his fiduciary capacity, not to the spouse. Breaking the chain of events down into steps, the will only goes so far as to give the trustee the devise or bequest; the trustee then, on his own, pays over what the trust instrument provides for the spouse. Professor Robert Lynn was critical of the rationale in the Lorch case, writing that:

187. Id.
188. Id. at 1105-06.
189. 651 S.W.2d 540 (Mo. Ct. App. 1983).
190. Bravo, 727 So. 2d at 1105.
In sum, when a surviving spouse elects to take against a will with a pour-over provision, if the court awards an elective share and gives effect to the pour-over provision of the will, it should not blind itself to the identity of the beneficiaries of the pour-over. It is not the trustee receiving the pour-over who is an object of the testator's bounty; the beneficiaries of the receptacle trust are the donees of the testamentary gift. The trustee is a mere conduit. If the surviving spouse is a beneficiary of the receptacle trust, the spouse might benefit from the pour-over, and the court must take account of that possibility in awarding an elective share from probate assets.192

The type of issue presented in Bravo and Lorch, one endemic to the older forced share legislation schemes, cries out for a statutory solution. And while the particular issue presented in the two cases is no longer at issue by virtue of statutory changes in Missouri193 and Florida,194 there are overtones of these cases that might be relevant in a UPC-based jurisdiction.

Recall that in Myers, the Nebraska court was essentially asked to disregard the surviving spouse's income interest in the trust for purposes of computing the elective share. The argument could be structured along the lines suggested by the Lorch analysis, that the residuary estate under the husband's will did not pass to the widow, it passed to the trustee of the inter vivos trust. This is not a frivolous argument, given the fact that the Nebraska definition of "devisee" states that in the case of a devise to "an existing trust or trustee, the trustee is the devisee."195 While Professor Lynn's point is certainly well-taken in regard to his emphasis on the potential contingent nature of the surviving spouse's interest, his remarks overlook the statutory nature of this problem.

Elective share rights are statutory in origin and whether courts are equipped to repair defective forced share statutes has been a subject of debate at least since the now infamous Newman v. Dore,196 and its legacy. The particular statutory problem, as the Myers court phrased it, was a "charging" problem; whether the widow Lesley

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193. As noted by the court in Bravo, the Missouri statute was subsequently amended to deal specifically with the Lorch-type problem. Bravo, 727 So. 2d at 1107.
194. The recent Florida changes will be discussed in the subsequent sections of this article.
195. NEB. REV. STAT. § 30-2209(9) (Reissue 1995).
196. 9 N.E.2d 966 (1937). Newman fueled the fires of the "fraud on the widow share" controversy with its opaque opinion. Other courts have not been quite so bold in dealing with supine legislatures. The Massachusetts high court has indicated that it prefers a legislative repair of a defective forced share statute, but if the legislature won't act, then the court will! See generally Sullivan v. Burkin, 460 N.E.2d 572 (1984).
would be "charged" with the value of her income interest in the trust.\textsuperscript{197} The critical statutory language applied by the \textit{Myers} court was: "\textit{[P]}roperty . . . part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means."\textsuperscript{198} There are two property interests that the statute refers to: (1) the decedent's residual estate, which is surely part of the augmented estate; and (2) the survivor's spouse's interest in the trust, which is not exactly the same property interest that is the "property . . . part of the augmented estate."\textsuperscript{199} For charging purposes, what the statute focuses upon is the property interest received and whether or not it passed to the surviving spouse "by any means." Along the lines of what Professor Lynn suggested, it is a fair reading of this statute for the court to conclude in \textit{Myers} that a property interest did "pass" to the spouse "by any means," given the underlying policies of why inter-spousal transfers are included in the augmented estate.

But the problem under the UPC-based structure is still not wholly resolved. Whatever interest has passed to the spouse must be examined carefully for it might either be a relatively fixed interest or one that is uncertain. In other words, in the case of a trust, we should look to see what in fact the trustee is "paying over to the spouse." If, as in the \textit{Myers} case, the trustee is not going to be paying out any income to the spouse (by virtue of the non-income producing nature of the property), should a court, such as in \textit{Myers}, more or less ignore the non-income producing nature of the property? It may well be that at this point we have come full circle and, by another route, come face-to-face with the valuation issue once again.

G. Tax Issues

It is not the purpose of this article to delve into the substantive tax aspects of the effect of electing against a surviving spouse's estate. But it has been the one of the major purposes of this article to alert the reader as to the possibility of the "elect and disclaim" phenomenon. Apparently tax lawyers have followed this bouncing ball quite well and have figured out that the "disclaimer" of the electing spouse should be tailored to fit the requirements of section 2518 of the Inter-

\footnotesize{\textsuperscript{197} "Charged" is the author's term. The court used the term "offset." See supra note 25 and accompanying text.}

\footnotesize{\textsuperscript{198} \textit{In re Estate of Myers}, 256 Neb. 817, 822, 594 N.W.2d 563, 567 (1999) (citation omitted).}

\footnotesize{\textsuperscript{199} The property in the estate and received by the trustee is the fee simple; what the widow received was a life estate in the trust.}
nal Revenue Code relating to a "qualified disclaimer." Revenue Ruling 90-45 states that a spouse who elects and disclaims has not "accepted" the property so as to run afoul of section 2518.\(^2\)

Whether or not the spouse's elective share "carries out" distributable net income under Subchapter J of the Internal Revenue Code is an issue that has arisen infrequently. In a discussion of a Florida case involving that issue, a commentator has recently noted that a recent United States Tax Court decision "should provide long-overdue guidance to tax practitioners in jurisdictions which have enacted the elective share provisions of the Uniform Probate Code."\(^2\)

The United States Tax Court has also grappled with the problem identified in the \textit{Bravo} and \textit{Lorch} cases discussed above, the effect of a surviving spouse's election against the will on the income interest given the spouse under an inter vivos trust. In \textit{Estate of Harper v. Commissioner},\(^2\) the factual scenario resembled the \textit{Bravo/Lorch} factual patterns in that the decedent husband created an unfunded inter vivos trust and funded it at death via a pour-over will devising the residue of his estate to the trustee of the inter vivos trust. The decedent's widow was to be paid income annually from the trust with authority given the trustee to invade the corpus for support. The widow elected against her husband's will and took a share of the probate assets outright, property clearly qualifying for the marital deduction. The husband's estate also claimed "a marital deduction of $1,263,726.07, representing the property distributed by the estate to the trust... by virtue of an election to treat this property as qualified terminable interest property under section 2056(b)(7)."\(^2\)

The Internal Revenue Service ["IRS"] sought to disallow the claimed QTIP deduction.\(^2\) First the IRS argued that under state law (Ohio and Kentucky), the widow relinquished her interest in the trust by claiming a forced share.\(^2\) Looking to the substantive law of Ohio and Kentucky, the tax court found this precise issue had been decided in an Ohio Court of Appeals decision, \textit{Carnahan v. Stallman}.\(^2\) According to the court in \textit{Carnahan},\(^2\) citing the \textit{Lorch} decision from...

\(^{200}\) For an abbreviated look at the qualified disclaimer under the federal taxes laws, see \textit{Clark et al.}, supra note 118, at 864-66.
\(^{202}\) On Subchapter J, see Jeffery G. Sherman, \textit{All You Really Needed to Know About Subchapter J You Learned From this Article}, 63 Mo. L. Rev. 1 (1998).
\(^{204}\) 93 T.C. 368 (1989).
\(^{206}\) As to QTIP, see \textit{Clark et al.}, supra note 118, at 903.
\(^{207}\) Harper, 93 T.C. at 371.
\(^{208}\) 29 Ohio App. 3d 293, 504 N.E.2d 1218 (1986).
Missouri, the widow’s filing of a petition for a forced share had no effect on the inter vivos trust.\textsuperscript{210} It was argued in \textit{Harper} that the \textit{Lorch} precedent was inapplicable because of the unfunded nature of the trust involved in the \textit{Harper} case. The tax court rejected this argument, stating that neither \textit{Lorch} nor \textit{Carnahan} were distinguishable on the grounds that the \textit{Harper} trust was unfunded.\textsuperscript{211}

The second argument of the IRS was that the widow “did not receive property that ‘passed from the decedent’ within the meaning of section 2056 and the regulations thereunder.”\textsuperscript{212} After quoting the Estate Tax Regulation cited by the IRS, the tax court replied that the regulation did not apply because the regulation quoted “clearly refers to property interests devised or bequeathed to the surviving spouse \textit{by the will}.”\textsuperscript{213} The interest received by the widow, said the tax court, “passed from the decedent pursuant to the valid separate trust instrument. Consequently, the regulation relied upon by respondent does not apply.”\textsuperscript{214}

Once again the similarity to the \textit{Myers} court analysis should be noted. In the context of the question of the marital deduction, the tax court in \textit{Harper} had to determine whether or not the income interest under the inter vivos trust “passed from the decedent.” In \textit{Myers}, the question was whether the widow’s interest in the trust “passes or has passed” to the surviving spouse. In \textit{Harper}, the federal tax issue and the state property issue converged. It is not surprising that a question under the federal tax law, whether an interest has “passed” to the surviving spouse, is determined by state law. It is somewhat surprising that the term “pass” or “has passed” are the critical words of both the state statute and the applicable federal statute. Another area where there can be the overlapping of state property law and federal law in the context of the elective share is the esoteric world of “equitable adjustments.”\textsuperscript{215} The “blockage discount” case, mentioned previously in the context of valuation,\textsuperscript{216} presented an “equitable adjustment” issue as well.

\textsuperscript{211} \textit{Harper}, 93 T.C. at 376-76.
\textsuperscript{212} Id. at 376-77.
\textsuperscript{213} Id. at 377 (emphasis added).
\textsuperscript{214} Id.
\textsuperscript{216} See \textit{supra} notes 167-169 and accompanying text. The court in \textit{Williams} felt that taking “equitable adjustments” into consideration would not be a proper judicial role. One more thing about \textit{Williams}: The acceleration issue was addressed by the lower court even though no one had requested the court to do so. This appellate court held this was improper since this issue was not properly raised in the trial court.
V. RECENT STATUTORY DEVELOPMENTS

A. THE UPC STATES

As noted earlier in this article, it is not easy to categorize jurisdictions as "UPC states."\(^{217}\) The latest listing of states in the authoritative source includes sixteen jurisdictions: Alaska; Arizona; Colorado; Florida; Hawaii; Idaho; Maine; Michigan; Minnesota; Montana; Nebraska; New Mexico; North Dakota; South Carolina; South Dakota; and Utah.\(^{218}\) With the emphasis of this article on the elective share provisions, the foregoing list might be expanded to include states which have based their elective share systems upon the UPC model, namely, New Jersey, Tennessee, Virginia, and West Virginia.\(^{219}\) Arizona, Idaho, and New Mexico, might be omitted from the list because community property jurisdictions are literally in another world when it comes to the elective share.\(^{220}\) The Michigan elective share statutes bear little resemblance to the UPC model so this state, too, may be crossed off the list.\(^{221}\) That leaves sixteen states as that have elective share statutes based upon the UPC model. How these states have dealt with the "disclaimer-is-charged" rule is the next topic of discussion.

The Nebraska charging statute, based upon the original version of the UPC, does not charge the surviving spouse with the value of assets renounced.\(^{222}\) The Maine,\(^{223}\) New Jersey,\(^{224}\) South Carolina,\(^{225}\) and

\(^{217}\) See discussion in Section III supra.


\(^{219}\) The inclusion of Virginia may be disputed. However, in the author's view, the augmented estate statute of that state is close enough to the UPC model as to justify inclusion on the list. See Va. Code Ann. §§ 64.1-16.1 (Michie 1995). As to the other three, I believe there can be no doubt. As to Tennessee, see Susan N. Gary, Share and Share Alike? The UPC's Elective Share, Probate and Property 18, 22 (Mar/Apr. 1998) ("A law adopted in Tennessee in 1997 borrows concepts from the UPC . . . "). With regard to New Jersey, see the Post case. See supra note 144 and accompanying text. See generally Roberts, 95 W. Va. L. Rev. 55, as to the West Virginia elective share statute based on the UPC.

\(^{220}\) See supra note 72 and accompanying text and the explicit statement of the UPC drafters that the elective share provisions were designed for the "common law states."

\(^{221}\) Even the new version of the Michigan elective share law does not go far enough in defining the augmented estate to justify designating Michigan's elective share laws as "UPC-based." See Mich. Comp. Laws Ann. § 700.2202 (eff. 4/1/00) (West Supp. 1999).

\(^{222}\) Neb. Rev. Stat. § 30-2319(a) (Reissue 1995). Although the Myers court did not have before it the status of the "disclaimer-is-charged" rule, Judge Gerrard's statement that the widow could have avoided the valuation issue "by renouncing the benefit of the trust" indicates that the "disclaimer-is-charged" rule does not exist in Nebraska. This
Virginia statutes, based upon the UPC as it existed from 1975 to 1990, follow the "disclaimer-is-charged" rule.

As stated above, the 1990 revised UPC Article II followed the "disclaimer-is-charged" rule, adhering to the rule that it adopted in 1975. In 1993, this "disclaimer-is-charged" rule was changed back to the original UPC position of 1969 and the "disclaimer-is-charged" rule was abandoned. The ten states that have revised their elective share statutes to conform generally to the 1990 revised UPC elective share scheme have taken differing approaches to the "disclaimer-is-charged" rule.

One group of states – Minnesota, Montana, South Dakota, West Virginia – have enacted the 1990 revision of Article II as first promulgated and follow the "disclaimer-is-charged" rule. Another group of states – Alaska, Hawaii, North Dakota, Utah – enacted the 1993 version of revised Article II that deleted the "disclaimer-is-charged" rule. Kansas and Colorado enacted their own unique versions of the UPC prototype. The Colorado statute on point does not charge the surviving spouse with the value of the renounced property if the property goes to someone other than the surviving spouse. The Kansas modification to the charging statute states that the surviving spouse will be charged only if the disclaimed property passes to issue of the surviving spouse that are not issue of the decedent. The Tennessee statute, while borrowing the UPC model, appears to follow the "disclaimer-is-charged" rule. The latest state to revise its elective share statutes is Florida, and the approach it has taken is deserving of separate comment.

inference is correct, of course, but this is not a holding; it is dicta. See In re Estate of Myers, 256 Neb. 817, 828, 594 N.W.2d 563, 570 (1999).

223. ME. REV. STAT. ANN. tit. 18-A, § 2-207(a) (West 1998).

See also In re Estate of Fisher, 545 A.2d 1266, 1274 n.10 (Me. 1988) ("Under section 2-207, however, the value of the items to which Mr. Fisher was entitled under the will, but chose not to accept, must be charged against his elective share.").


226. VA. CODE ANN. § 64.1-16.2 (Michie 1995).

227. See supra note 119 and accompanying text.

228. MINN. STAT. ANN. § 524.2-209 (West Supp. 1999).


235. UTAH CODE ANN. § 75-2-209 (Supp. 1998).


238. TENN. CODE ANN. § 31-4-101(c) (Supp. 1998) ("deemed transferred").
Thus, the eleven UPC-based elective share states that have enacted legislation in the 1990's have roughly split down the middle on the question of whether to follow the "disclaimer-is-charged" rule. Moreover, the legislatures in Colorado and Kansas have come up with their own versions of rejecting the "disclaimer-is-charged" rule. So, the relatively obscure topic of charging an elective spouse with assets disclaimed has become a topic of conversation and debate, and a more nuanced debate at that. No longer is it solely a question of whether "to charge" or "not to charge" the surviving spouse with assets renounced. The emerging trend is to ask a different question: Under what circumstances should the surviving spouse be charged with disclaimed assets?

B. THE NEW YORK RULE

Although the New York elective share statute is not based upon a UPC model, the 1992 changes made to its elective share scheme illustrate further the manner in which a legislature might fashion a "disclaimer-is-charged" rule. Although the statutory change is not easily summarized, it is accurate to state that prior to 1992, the decedent could satisfy the surviving spouse's elective share by creating a testamentary trust of the elective share amount and restricting the surviving spouse to the income from that trust.\(^239\) After the 1992 amendment, dispositions of at least a third of the decedent's net estate must be made "absolutely" or the survivor spouse will be able to elect against the will.\(^240\) Thus, the prototypical QTIP trust, providing an income interest only, may not be used to satisfy the elective share statute in New York. In applying its version of the "disclaimer-is-charged" rule, New York charges the surviving spouse with the value of assets renounced that are absolute interests, but is not charged with the value of interests that are less than absolute. This approach might be contrasted with that of Florida, which is considered next.

C. THE 1999 FLORIDA REVISION

Although Florida is listed by authorities as a "UPC" state,\(^241\) it should probably not have been so classified as a UPC-based elective share state until 1999. Florida's new elective share system bears more similarities to the 1990 UPC elective share scheme than its old

\(^{239}\) See N.Y. EST. POWERS & TRUSTS § 5-1.1-A (McKinney 1999), Practice Commentaries at 200 (M. Turano).

\(^{240}\) Id. (discussing the effect of subparagraph (a)(4) of § 5-1.1-A).

\(^{241}\) See, e.g., LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL 9 (4th ed. 1996). The cited reference would lead one to believe that Florida enacted the UPC "in full."
The Florida legislation, the end product of a long-standing effort to revise the Florida elective share statutes, is complex and detailed. Not only is the Florida statute noteworthy in regard to the “disclaimer-is-charged” issue, it is also a fairly revolutionary approach to the topic of valuation, to be addressed in the next section.

The Florida legislature rejected the “phase-in” approach of the 1990 UPC with regard to the computation of the amount of the elective share and continued with its fixed percentage approach of thirty per cent of the “elective estate.” As the augmented estate calculation is the heart of the UPC elective share scheme, the new Florida statute listing the property “entering into the elective share” is the centerpiece of the Florida legislation. The relevant section includes many of the assets that would be included under a UPC-based approach, however, the terminology is quite different. Relevant for purposes of this article is the last category listed in the statute for inclusion in the elective estates: “Property transferred in satisfaction of the elective share.” This generic phrase is one of the terms contained in the “definitions” section of the new legislation.

The term “transfer in satisfaction of the elective share” is defined to mean “an irrevocable transfer by the decedent to an elective share trust.” “Elective share trust,” in turn, is defined as:

[A] trust where:

(a) the surviving spouse is entitled for life to the use of the property or to all of the income payable at least as often as annually;

(b) The trust is subject to the provision of § 738.12 or the surviving spouse has the right under the terms of the trust or state law to require the trustee either to make the property productive or to convert it within a reasonable time; and

(c) During the spouse’s life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse.


244. Ch. 99-343, supra note 243, § 3 (to be codified as FLA. STAT. ANN. § 732.2035).

245. Ch. 99-343, supra note 243, § 3(9).

246. Ch. 99-343, supra note 243, § 2 (to be codified as FLA. STAT. ANN. § 732.2025).

247. Ch. 99-343, supra note 243, § 2(9).

248. Ch. 99-343, supra note 243, (2).
If the elective share trust definition fits, the property is includible in the "elective estate." Now let us turn to see how the Florida statutes deal with the "disclaimer-is-charged" rule and valuation.

The Florida statute that deals with the "charging" or "offset" calculations states:

Unless otherwise provided in the decedent's will or, in the absence of a provision in the decedent's will, in a trust referred to in the decedent's will, the following are applied first to satisfy the elective share:

- Property held for the benefit of the surviving spouse in a qualifying special needs trust;
- Property interests included in the elective estate that pass or have passed to or for the benefit of the surviving spouse;
- Property interests that would have satisfied the elective share under any preceding paragraph of this subsection but were disclaimed.  

It is not unusual that the "disclaimer-is-charged" rule is followed, but note that the introductory portion of the statute makes the rule a rule of construction rather than a rule of law. Another unusual feature of the Florida charging statute is that it refers to the surviving spouse's interest in a "qualifying special needs trust," a defined term of art that has no counterpart in any other state's elective share scheme. But it is the Florida approach to valuation of interests that is the most thought-provoking and to that topic we now turn.

250. Ch. 99-343, supra note 243, § 2(8). This subsection states that:
"Qualifying special needs trust" or "supplemental needs trust" means a trust established for an ill or disabled surviving spouse with court approval before or after the decedent's death for such incapacitated surviving spouse, if, commencing on the decedent's death:

- The income and principal are distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are ineligible family trustees. For purposes of this paragraph, ineligible family trustees include the decedent's grandparents and any descendants of the decedent's grandparents who are not also descendants of the surviving spouse; and
- During the spouse's life, no person other than the spouse has the power to distribute income or principal to anyone other than the spouse;
- The requirement for court approval and the limitation on ineligible family trustees shall not apply if the aggregate of the trust property as of the applicable valuation date in a qualifying special needs trust is less than $100,000.
D. Valuation.

The states basing their elective statutes upon the UPC model have generally followed the UPC model in regard to the valuation issue, particularly in regard to life estates.251 The Tennessee approach appears distinctive, because its governing statute provides that, for elective share purposes, inheritance tax values control "except that the value of any life estate or trust for the lifetime benefit of the surviving spouse shall be actuarially determined."252 In substance this approach is likely to mirror the UPC approach with its emphasis on "commuted values." The South Carolina approach, on the other hand, departs radically from the UPC model. After stating the "disclaimer-is-charged" rule, the relevant statute continues:

For purposes of this subsection, the value of the electing spouse's beneficial interest in any property which would qualify for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, shall be computed at the full value of any such qualifying property (qualifying for these purposes to be determined without regard to whether an election has been made to treat the property as qualified terminal interest property).253

The South Carolina approach is similar to that of New Jersey,254 except that South Carolina values the partial interest at one hundred per cent rather than at fifty per cent.

The Florida approach to the valuation problem generally is the most creative and nuanced that has yet been devised in the elective share arena. What follows is an abbreviated summary of the Florida statute that is entitled "Valuation of property used to satisfy the elective share."255

The Florida valuation statute begins with a series of definitions beginning with "applicable valuation date." The next two definitions in this section are:

(b) "Qualifying power of appointment" means a general power of appointment that is exercisable alone and in all events by the decedent's spouse in favor of the spouse or the spouse's estate. For this purpose, a general power to appoint by will is a qualifying power of appointment if the power may be exercised by the spouse in favor of the spouse's estate with the consent of any person.

251. See supra note 122 and accompanying text.
254. See supra note 148 and accompanying text.
(c) "Qualifying invasion power" means a power held by the surviving spouse or the trustee of an elective share trust to invade trust principal for the health, support, and maintenance of the spouse. The power may, but need not, provide that the other resources of the spouse are to be taken into account in any exercise of the power.\textsuperscript{256}

What follows next are the applicable valuation rules for the various types of partial and trust interests:

(2) Except as provided in this subsection, the value of property for purposes of \$ 732.2075 [the charging statute] is the fair market value of the property on the applicable valuation date.

(a) If the surviving spouse has a life estate in property not in trust that entitles the spouse to the use of the property, the value of the spouse's interest is one-half of the value of the property on the applicable valuation date.

(b) If the surviving spouse has an interest in a trust, or portion of a trust, which meets the requirement of an elective share trust, the value of the spouse's interest is a percentage of the value of the principal of the trust, or trust portion, on the applicable valuation date as follows:

1. One hundred percent if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment.

2. Eighty percent if the trust instrument includes a qualifying invasion power but no qualifying power of appointment.

3. Fifty percent in all other cases.

(c) If the surviving spouse is a beneficiary of a trust, or portion of a trust, which meets the requirements of a qualifying special needs trust, the value of the principal of the trust, or trust portion, on the applicable valuation date.

(d) If the surviving spouse has an interest in a trust that does not meet the requirements of an elective share trust, the value of the spouse's interest is the transfer tax value of the interest on the applicable valuation date; however, the aggregate value of all of the spouse's interests in the trust shall not exceed one-half of the value of the trust principal on the applicable valuation date.\textsuperscript{257}

No state has gone to the lengths that the Florida legislature has gone to in dealing with the valuation of partial interests in the context of the calculation of what amounts the surviving spouse is to be charged

\begin{footnotes}
\item[256] Ch. 99-343, \textit{supra} note 243, \$ 9(1)(b)-(c).
\item[257] Ch. 99-343, \textit{supra} note 243, \$ 9(2)(a)-(d).
\end{footnotes}
with in an elective share computation. In the next and concluding section I will offer some comments on this unique approach.

V. OBSERVATIONS AND CONCLUSION

A. DEALING WITH THE LAW AS IT IS

Estate planning lawyers entering the complicated world of the electing spouse may be viewing it from far different perspectives. On the one hand, there is the drafting lawyer who is attempting to implement a plan that the surviving spouse will not be able to disrupt, or if the plan is going to be disrupted, to minimize the disruption. How the plan might be structured and how drafting might play a role in minimizing the disruption are key factors for that estate planning lawyer.

On the other hand, there is the lawyer representing the surviving spouse, who, by virtue of being the surviving spouse, has certain statutory rights granted by law. When that surviving spouse is dissatisfied with the estate plan established by the decedent spouse, the lawyer representing the surviving spouse has to be acutely aware of what options are available and how they are to be implemented. For the two lawyers just described it is absolutely critical that these lawyers have a clear understanding of what the law is – what mandatory rules of law apply and what constructional rules apply. There are, of course, lurking tax issues that may in some instances be driving the decisions.258

Before the advent of the QTIP into the tax code in 1981,259 the sole exception to the long-standing terminable interest rule, barring the marital deduction under the federal estate tax law, was the section 2056(b)(5) life estate-general power of appointment combination.260 The general power of appointment could be restricted to exercise by will, but it had to be exercisable “alone and in all events.”261 It was in this context that drafting lawyers sought to make it more difficult for a surviving spouse to exercise the testamentary general power of appointment by including so-called “specific ref-

258. The phenomenon of what one of my former students called “the tax tail wagging the property dog.”
259. See supra reference cited in note 206.
260. See CLARK ET AL., supra note 118, at 901.
261. Id.
One court referred to this practice as “laying a trap” for the surviving spouse.

So, too, today those seeking to protect the decedent’s testamentary plan from being disrupted by a spousal election are being encouraged to utilize subtle ways of discouraging spousal election, if the more straightforward waiver procedure is not available. If the state law is such so as to force the surviving spouse to accept a marital trust, then the decedent’s plan is free from disruption. If, on the other hand, state law allows the surviving spouse to reject a marital trust, then the lawyer seeking to protect the decedent’s estate plan must think more creatively.

If the state law does not have a “disclaimer-is-charged” rule, the lawyer for the surviving spouse still has to be ever vigilant. Not only must the petition for elective share be filed timely, the requirements of the applicable disclaimer statute must be met. Here is where problems may lurk. Suppose, for instance, in a Myers-type case, the decedent husband had established an irrevocable inter vivos trust, funding it with a modest amount of property. The surviving spouse, the income beneficiary of the trust, does not disclaim the life estate within the time period allowed for a disclaimer under state law. One year after establishment of the inter vivos trust, the husband dies and his pour-over will devises five million dollars worth of property to the

262. See generally Restatement (Second) of Property: Donative Transfers § 17.1 notes at 204-10 (1985). An illustrative case is Estate of Stobel v. Peterson, 717 P.2d 892 (Ariz. 1986) where the court explained the underlying background and motivation of the use of specific reference clauses:

The facts in other cases have lent themselves to the interpretation that the specific reference requirement expressed in the donor's intent to restrict the wife's interest in the trust as much as possible, in order to gain benefit of the marital deduction and yet control who ultimately would receive the corpus after the wife's death. In this view, the donor hopes the spouse will fail to comply with the requirement, and the specific reference requirement is a means of foiling the spouse's exercise of the power.

Stobel, 717 P.2d at 898.


Appellant suggests that donor's motive was to qualify his estate for the tax deduction but, at the same time, to “lay a trap for an unwary donee,” hoping that, for want of a “specific reference ... in her will,” donee’s attempt to appoint would fail and his estate would pass to beneficiaries of his choice rather than to donee’s appointee.

Holzbach, 219 S.E.2d at 872.

264. See Howard M. Zaritsky, Attack of the Surviving Spouse: The Evolving Problems of the Elective Share, 23 UNIV. OF MIAMI HECKERLING INST. ON EST. PLAN. ch. 5 (1989). In particular I would call attention to the author's introduction that states: “Understanding of the elective share requires that one consider both the surviving spouse's rights in a decedent's estate, as well as the testator's ability to insulate his or her estate from the claims of the surviving spouse.” Id. at ¶500.2 (emphasis added). See also Jeffrey N. Pennell, Minimizing the Surviving Spouse's Elective Share, 32 UNIV. OF MIAMI HECKERLING INST. ON EST. PLAN. ch. 9, ¶904.3 (1998) (satisfy elective share entitlement in ways your client prefers) (emphasis added).
inter vivos trust. The widow now wishes to elect and to disclaim. While her elective share election may be timely, she may or may not be entitled to disclaim because of the time limit in the disclaimer statute. Or, suppose instead, the decedent's husband had purchased an annuity for his wife a year before his death. Would the widow be compelled to accept that annuity in satisfaction of her elective share? Lurking beneath the surface of these property-based issues are the issues relating to the marital deduction under the federal estate and gift tax laws. Of course, the lawyer representing the propertied spouse who is attempting to force the surviving spouse to accept the estate plan of the propertied spouse wants the best of both worlds: Forcing the surviving spouse to accept the decedent's plan while at the same time securing the maximum tax advantage.265

B. WHAT THE LAW SHOULD BE

Experience would suggest that the goal of having a uniform law addressing the topics discussed herein is a bit unrealistic, to put it mildly. One could hope that the various state statutes, regardless of how they come down on the various issues discussed herein, would state rules that are clear and relatively simple. But, that, too, may be wishful thinking. The most recent statutory forays into this area evidence the complexity of the topic. From day one of the UPC, the drafters were concerned with the complexity of the elective share provisions.266

In the 1990 revision of the elective share provisions, and the 1993 mini-revision, the drafters of the UPC have attempted to eliminate some of that complexity by doing away with the tracing rule. On the whole, however, the UPC elective share approach is both detailed and complex. On the other hand, the UPC drafters have shied away from developing nuanced rules in two problematic areas; the "disclaimer-is-charged" rule and valuation issues. Mindful of the saying about fools rushing in where angels fear to tread, the article concludes with some thoughts on the "disclaimer-is-charged" rule and valuation issues.

1. The "Disclaimer-is-Charged" Rule

Having gone on record some years ago as opposed to the "disclaimer-is-charged" rule, I continue to oppose it as a general princi-

265. The more things change, the more they remain the same. See Volkmer, 17 CREIGHTON L. REV. at 146-48.

266. UNIF. PROBATE CODE pt. 2 (Elective Share of Surviving Spouse – General Comment) (Although the system described herein may seem complex . . . *) (West 1971).
ple. In 1996, commenting upon the UPC's change in position that resulted in the deletion of the "disclaimer-is-charged" rule, Professor Averill wrote that this change "alters the emphasis of the Code's elective share provisions from protection from disinheritance to a form of community property ownership." Accepting that characterization as accurate, I plead guilty to favoring community property principles and support changes in the common law states that, sub silentio, incorporate community property principles.

On the other hand, rejection of the "disclaimer-is-charged" rule might possibly allow for "manipulation" in certain instances. Looking to the New York statute, I find that the New York approach to the "disclaimer-is-charged" rule more nuanced and substantially reduces the possibility for manipulation. An additional advantage of the New York approach is that the need to evaluate the income interest of the surviving spouse would be eliminated. On the other hand, if the surviving spouse accepts the income interest and its value is charged against the elective share, the valuation issue is once again front and center.

2. Valuation of Partial and Other Interests

The UPC drafters, in the 1990 revised version of the elective share, chose not to provide any guidelines as to the valuation of partial interests other than to refer to the "commuted value of any present or future interest." The concern expressed by Professor Bloom regarding overvaluation of life estates by reliance upon tax tables is borne out, I believe, by the facts in the Myers case. Professor Roberts' call for a "more realistic system of valuation" indicates that she shares some of the concerns of Professor Bloom.

A state legislature can arbitrarily assign a value to any life estate or any trust interest, be it fifty per cent or one hundred per cent, as a review of New Jersey and South Carolina law has illustrated. Underlying this approach is the necessity to have a "crystal rule" that is easily applied. The danger, of course, is that whatever figure is chosen may turn out to be, in the individual case, totally unrelated to reality. A state legislature can adopt the approach taken by the UPC from 1975 to 1990 in assigning a presumptive value to the income interest or, for that matter, any interest in any trust. The burden of proof

267. My dissatisfaction with the change in the Uniform Probate Code approach to the "disclaimer-is-charged" rule is what originally prompted me to take pen in hand in 1983.
268. AVERILL, supra note 241, at 101.
269. See supra notes 178-178 and accompanying text.
270. See supra note 240 and accompanying text.
shifts to that person who would challenge the presumptive value established by the statute. This approach offers the opportunity of providing a starting point for valuation, which could be overridden by the tax valuation tables as the Fisher case illustrated. In the absence of any statutory guidelines, as in Myers, it appears that the tax valuation tables now provide the presumptive rule as the valuation of an income interest.

The Florida approach to valuation should be seriously considered with its categories of trusts: (1) elective share trusts; (2) elective share trust with both a “qualifying invasion power” and “qualifying power of appointment;” (3) elective share trusts with a “qualifying invasion power” only; (4) “special needs trusts;” and (5) non-elective share trusts. Once placed into one of these categories, the valuation is either 100%, 80%, or 50%. As to non-trust partial interests, the presumptive rule is that the life estate is valued at 50% of the corpus.\(^\text{272}\)

As a matter of personal preference I favor the approach of the pre-1990 UPC and assign a presumptive, not conclusive, value to an income or other partial interest. On the other hand, there is a case to be made that the crystal rules of the Florida statute avoid litigation, and if that need is driving the agenda, then the Florida approach has merit because the Florida statute at least \textit{attempts} to provide what I would consider to be a more realistic method of valuation.

All of the concerns expressed for developing an appropriate valuation rule for life estates may be a bit overstated. It is a fact of life that most valuation issues regarding life estates are in the context of equitable life estates – those arising in the context of a trust. With the acceptance of the new Prudent Investor Rule, it may well be that the “income” interest will be on the wane as drafters utilize a different method of structuring trust benefits.\(^\text{273}\) If these “total return” trusts provide for the trust beneficiary a guaranteed amount, as opposed to an “income” interest, the valuation issue becomes simplified as the Fisher case illustrates.

If the interest sought to be valued is a right to receive property in the future based upon dubious and uncertain conditions, it may well be that, as Professor Bloom stated, the problems are “insoluble.” It is as if the valuation problem overwhelms the rational capabilities of our logical reasoned-based system of laws. The futility of valuation has produced an \textit{a priori} method of logic: If it can’t be valued, it isn’t property and will not be considered as such.


\(^\text{273}\) \textit{See generally} Volkmer, 31 \textit{Creighton L. Rev.} at 253-54.
Lawyers and judges will continue to deal with these difficult valuation problems as it is unlikely that the Florida approach will sweep the country. Many states will continue to follow the UPC lead by “punting” when it comes to the valuation problem. So the final thoughts that are offered here are to those lawyers and judges who have to grapple with “endemic” “insoluble” problems.

For the time being let us move out of the elective share arena into other areas of law. Imagine that the person in question is the beneficiary of a discretionary or support trust established by someone else. Now consider the following scenarios that might befall that trust beneficiary:

(a) the trust beneficiary applies for Medicaid;
(b) the trust beneficiary is the defendant in a marital dissolution action;
(c) the trust beneficiary is fending off creditors who have judgments and meanwhile the trustee is served with process by those creditors having judgments.

In each of the foregoing instances the legal system will initially have to face the questions of whether that trust beneficiary has a property interest and how that property interest is to be valued. On one end of the spectrum the legal system might say, in the case of the beneficiary of a discretionary trust, that the trust beneficiary's interest is not “property” – it need not be listed as an asset for Medicaid purposes, it need not be listed as an asset in the marital dissolution proceedings, and no creditor may levy upon this interest. The obvious virtue of this approach is that the valuation issue disappears. At the other end of the spectrum, the legal system might say, in the case of a support trust, that the interest is a “property” interest that must be listed as an “available resource” on a Medicaid application, must be listed as an asset in the marital dissolution proceedings, and is reachable by creditors. As might be expected, the legal system has reacted to some of these issues with a fair degree of consistency and with a fair degree of inconsistency as to some others. In some instances the legislatures have assisted with statutory rules, but most often it is the

274. For simplicity sake, I adopt the commonly accepted definitions of these two types of trusts: “A support trust requires distributions to the extent necessary for the beneficiary’s support. A discretionary trust authorizes distributions, in the trustee’s discretion.” CLARK ET AL., supra note 118, at 522.

275. Other questions may subsequently arise such as in the creditors’ rights area where the court may have to deal with the validity of a so-called “spendthrift” provision. The analogue to valuation for tax purposes has been deliberately omitted as that analogy is all too obvious.

276. The standard trusts and estates casebooks provide adequate discussion of at least two of the three topics mentioned, namely, the Medicaid and creditors’ rights issues. The problem of valuing an asset in the context of a marital dissolution is typically
courts, in the grand tradition of the common law, that have muddled through as best they can, unaided by the legislature. This is particularly true in the third arena of valuation of future interests and other partial interests - marital dissolution proceedings. The issues arising in divorce proceedings have a familiar ring: (1) is the interest of the trust beneficiary (usually vested, sometimes contingent) "property" so as to be "divisible" in the divorce proceeding; and (2) what is the value to be placed upon that interest? The recent cases in this field might provide that useful analogue that lawyers and judges can profitably turn to.\textsuperscript{277} Now back to the case law for one last fleeting glance.

not brought up in a trusts and estates casebook. Here is how one casebook deals with the creditors' rights issue:

"The beneficiary of a support trust 'cannot transfer his interest, and his creditors cannot reach it.'" (citing \textit{Restatement (Second) of Trusts} § 154). "In contrast, neither the beneficiary nor the beneficiary's assignees and creditors can compel the trustee of a discretionary trust to distribute anything." (citing \textit{Restatement (Second) of Trusts} § 155).

\textsc{Clark et al.}, \textit{supra} note 118, at 522. Now as everyone presumably knows, these general rules are simply the starting point for all rules have exceptions and the above quoted rules have exceptions. Nevertheless, the two statements indicate that the types of trust created do make a legal difference.

Here is how another casebook deals with the Medicaid issue: Under the heading of "trusts established by third persons for the benefit of a Medicaid applicant," the authors state:

Thus if a mandatory or support trust is created, wherein the beneficiary has the legal right to income, such income is treated as a resource available to the beneficiary. But if a discretionary trust is created, giving the individual no legal right to trust income or principal, the trust is not considered a resource available to the individual in applying for Medicaid unless it was intended to be used for the applicant's support.

\textsc{Dukeminier & Johanson}, \textit{supra} note 118, at 644. These general rules are likewise appropriate starting points but obviously do not do justice to a complex topic that is constantly changing. But once more the approach from this perspective suggests that the types of trusts are legally different.

Finally, as to the valuation of an interest for marital dissolution purposes, see the succeeding note.

\textsuperscript{277} The topic of valuation of future interests in the context of marital dissolution proceedings is broad enough to be the basis for a separate law review article. What follows here are some of the more recent rulings in the marital dissolution arena that bear resemblance to some of the valuation issues raised in this article:

\textit{The purely discretionary trust:} \textit{In re Marriage of Jones}, 812 P.2d 1152 (Colo. 1991) (discretionary trust corpus cannot be considered "separate property" of trust beneficiary for division of property purposes in marital dissolution proceeding).

\textit{Indefeasibly vested remainder:} Moyars v. Moyars, No. 04A03-9904-CV-134, 1999 WL 956496 (Ind. Ct. App. Oct. 20, 1999) (indefeasibly vested remainder, as a tenant in common, subject to division; "[r]emainder interests, like fee simple interests, are capable of valuation."); Lauricella v. Lauricella, 409 Mass. 211, 565 N.E.2d 436 (1991) (remainder divisible in divorce proceedings, citing cases from other jurisdictions, noting that these decisions "turn more on the attributes of the respected disputed interests than on principles of general application").

\textit{Vested remainder; power to invade for support of income beneficiary:} Van Oosting v. Van Oosting, 521 N.W.2d 93 (N.D. 1994) (remainder interest subject
First, in *Myers*, Nebraska did not have the "disclaimer-is-charged" rule and the Nebraska court had to face the valuation issue. Fortunately for that court, the fact that Lesley Myers had more than an income interest never became an issue for the court, and thus, the court's valuation problem was a standard one, how to value an income interest.

Second, in *Fisher*, the Maine court, on the one hand, had an easy valuation issue, the value of the annuity given to the trust beneficiary. On the other hand, the court had a horribly difficult valuation issue, how to value the future interest. Mr. Fisher was the beneficiary of a trust in which the trustee had discretionary power to pay to him "additional funds for his welfare and support." The court struggled mightily for the apropos analogy and, in my judgment, missed the mark by a long shot.

Third, and finally, there is the *Post* case from New Jersey. On the one hand the appeal presented a classic valuation issue (minority discount for closely held stock) and, on the other hand, the most difficult of valuation issues – a la *Fisher* – the value of a future interest that was not certain to vest in possession. The New Jersey statute saved the day for the majority, but there is something surreal in the manner in which the New Jersey statute operated. The *Post* case reinforces my concern over the conclusive statutory valuation approach.

If Professors Averill and Bloom are correct, there will be more litigation. One additional reason for this trend is the change in the revised 1990 UPC elective share provisions. Under the new UPC, the surviving spouse is charged with the value of all assets owned, regardless of the source. So while the change eliminates the troublesome

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278. UNIF. PROBATE CODE § 2-207 (amended 1993).
tracing problem, it may have exacerbated another.\textsuperscript{279} It is probably true, as Professors Langbein and Waggoner state, that most of these issues will be resolved at the trial stage. But the lawyers arguing valuation issues at that level might profitably do what lawyers have classically done—argue by analogy. As indicated above, in other contexts, the legal system has had to make difficult decisions relating to the nature and value of property interests that are dubious and uncertain. Surely these other areas of law might provide some helpful guidance in the elective share area, where statutory guidelines are generally lacking.

Estate planners are generally desirous of "crystal rules" and "safe harbors," so that the drafting lawyer can confidently tell the client that, unless the law changes, the property in question will be disposed of in accordance with the client's wishes. Elective share statutes should provide those safe harbors and the UPC model is to be commended for its sensitivity to that concern. At the same time, however, no statutory scheme will ever provide the desired amount of certainty that the drafting lawyers desire. State legislatures, in revising their elective share schemes in the past ten years, have grappled with the "disclaimer-is-charged" rule with a variety of responses. No doubt this march of legislation will continue. Valuation issues are "endemic to any elective share system" and since the legislatures have generally not chosen to enter this virtual morass, lawyers and judges are going to have to use whatever tools are at their disposal.

It is hoped that the foregoing discussion has provided some insights as to how the valuation process in elective share cases involving future interests might be handled. Even though the UPC drafters consciously refrained from entering into the perilous valuation world, other state legislatures might look to the Florida approach as a model for providing the crystal rules that some believe are necessary. About the only certainty that exists is that debate over the "disclaimer-is-charged" rule and the valuation of partial interests is likely to continue. It is hoped that the present article has provided some information and ideas on the nature of the problems and how they might be addressed. If it has done that, the author's modest goals will have been achieved.

\textsuperscript{279} In other words, those states adopting the 1990 version of the UPC will have to face the exact type of issue presented in the \textit{Post} case as it related to the Brix trust.