Land & Water Law Review

Volume 29 | Issue 1 Article 11

1994

Trusts & (and) Estates - Spousal Disinheritance - Inter vivos Trusts and Wyoming's Spousal Elective Share - Briggs v. Wyoming National Bank

G. Bryan Ulmer III

TRUSTS & ESTATES—SPOUSAL DISINHERITANCE—Inter vivos Trusts and Wyoming's Spousal Elective Share. *Briggs v. Wyoming National Bank*, 836 P.2d 263 (Wyo. 1992).

On April 2, 1985, Eva Briggs placed nearly all of her personal and real property into the Eva G. Topping Briggs Living Trust. The transfer was accomplished by execution of a will, a living trust agreement and a warranty deed conveying her real property into the trust.[1] Under the trust agreement Eva named herself as principle trustee and retained the right to alter, amend or revoke the trust agreement during her lifetime.[2] The trust provided that Eva's husband, William Briggs,[3] would receive a one-seventeenth share of the "Family Share" assets.[4]

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1. Briggs v. Wyoming Nat'l Bank, 836 P.2d 263, 264 (Wyo. 1992). Under the will, Eva's husband, William Briggs, received various items of personal property consisting of minor household furniture, goods and appliances. *Id.* at 265. The will provided that personal property remaining in Eva's probate estate be gifted to the Eva G. Topping Briggs Living Trust. Appellant's Opening Brief at 4, Briggs v. Wyoming Nat'l Bank, 836 P.2d 263 (Wyo. 1992)(No. 91-106).

The Eva G. Topping Briggs Living Trust was a revocable inter vivos trust. Appellant's Opening Brief at app. D, *Briggs* (No. 91-106) [hereinafter *Eva Briggs Living Trust*]. A revocable inter vivos trust is created by written instrument during the settlor's lifetime and may be revoked by the settlor during his or her lifetime. Revocable inter vivos trusts are generally used for: 1) management of property during the settlor's lifetime, 2) transmission of property to designated beneficiaries at the death of the settlor without probate, and 3) management of the property after the settlor's death. COHAN & HEMMERLING, INTER VIVOS TRUSTS, PLANNING, DRAFTING AND TAXATION, §§ 2.1-.2 (1975).

2. *Briggs*, 836 P.2d at 264.

3. Eva Topping Briggs and William G. Briggs were married to each other for approximately twenty years before Eva Briggs' death in July of 1988. Appellant's Opening Brief, *supra* note 1, at 3. The marriage was the second for both Eva and William. *Id.* William Briggs had four children from his previous marriage while Eva had no children of her own. *Briggs*, 836 P.2d at 264.

Eva and William maintained separate ownership and control of the property each had acquired before their marriage. *Id.* Although both Eva and William kept individual bank accounts, they shared expenses and filed joint tax returns. Appellant's Opening Brief, *supra* note 1, at 3.

4. *Briggs*, 836 P.2d at 265. The trust named as beneficiaries seventeen individuals and twenty seven charitable organizations. *Eva Briggs Living Trust, supra* note 1, app. D at 4-5. The "Family Share" assets consisted of assets to be divided equally and paid to the individual beneficiaries. *Id.* at 4 [hereinafter Family Share beneficiaries]. Assets remaining after the distribution of the Family Share comprised the Remaining Charitable Trust which was to be held in a separate trust by the trustee. *Id.* Income from the trust was to be paid to the twenty-seven charitable beneficiaries with the principle and undistributed income allocated to the charities ten years after Eva's death. *Id.* at 3-7. "The gross value of the total estate, including the Eva G. Topping Briggs Living Trust was reported to be $898,903.00 as of October 5, 1989." Appellant's Opening Brief, *supra* note 1, at 5.

Eva Briggs and her attorney asked William to join in the establishment of the trust[5] which included a waiver and a no-contest clause restricting challenges to the validity of the trust or any allocations under the trust.[6] Eva and her attorney advised William to review the proposal with another attorney before signing the agreement. William stated that he did not want to see another attorney and consented to whatever Eva wished to do. He voluntarily signed both the trust agreement and the warranty deed conveying Eva's real property into the trust.[7]

During the probate proceedings for Eva's estate, William received notice of his right to an election and filed a petition with the court to take his elective share.[8] He stated that he did not read or understand the trust documents and that he signed them without being advised of the consequences of his signature.[9] William also stated that he was assured Mrs. Briggs was leaving everything to him.[10]

William filed a declaratory judgment action in the Teton County District Court to declare the Eva Briggs Living Trust invalid, to include the trust assets in Eva's probate estate and to declare the rights of the beneficiaries under the trust and will.[11] The district court en-

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5. Opening Brief of Cross-Appellant at 6, Briggs v. Wyoming Nat'l Bank, 836 P.2d 263 (Wyo. 1992)(No. 91-107).

6. The trust's no-contest clause provided that:

> William G. "Bud" Briggs, for and in consideration of the gift set forth herein to him and for and in consideration of the natural love and affection for his wife, Eva Topping Briggs, Settlor herein, hereby joins in the establishment of this Trust for the purpose of waiving any and all right he may have to contest the establishment of this trust or the transfer of any property of his wife as Settlor to the trust.

Eva Briggs Living Trust, supra note 1, app. D at 12-13.

7. *Briggs*, 836 P.2d at 265.

8. Brief of Appellee Wyoming National Bank of Casper at 10-11, Briggs v. Wyoming Nat'l Bank, 836 P.2d 263 (Wyo. 1992)(No. 91-107). WYO. STAT. § 2-5-101(a) provides:

> (a) If a married person domiciled in this state shall by will deprive the surviving spouse of more than the elective share, as hereafter set forth, of the property which is subject to disposition under the will, reduced by funeral and administration expenses, homestead allowance, family allowances and exemption, and enforceable claims, the surviving spouse has a right of election to take an elective share of the property as follows:
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> (i) One-half (1/2) if there are no surviving issue of the decedent, or if the surviving spouse is also a parent of any of the surviving issue of the decedent; or
>
> (ii) One-Fourth (1/4), if the surviving spouse is not the parent of any surviving issue of the decedent.

WYO. STAT. § 2-5-101(a) (1980).

9. *Briggs*, 836 P.2d at 265.

10. *Id.*

11. *Id.* at 264. The complaint named as defendants the trustee, Wyoming National Bank, and the beneficiaries under the trust. Brief of Appellee Wyoming National Bank of Casper, *supra* note 8, at 3-5. Eva Briggs was the named trustee under the Eva Briggs Living Trust as executed on April 2,

tered summary judgment for the trustee and the Family Share beneficiaries declaring the trust agreement and waiver valid and enforceable.[12] The court refused on public policy grounds, however, to enforce the no-contest provision.[13] William appealed the summary judgment decision to the Wyoming Supreme Court contending that the Eva Briggs Living Trust violated the elective share provisions of WYO. STAT. § 2-5-101 *et seq.*[14] On cross appeal, the Family Share beneficiaries sought to reverse the district court's decision declaring the no-contest clause unenforceable.[15] The Wyoming Supreme Court affirmed the order granting summary judgment, reversed the order declaring the no-contest provision unenforceable and remanded the case for judgment in favor of the Family Share beneficiaries.[16]

This casenote examines the effect of Wyoming's elective share statute on inter-vivos trusts and other will substitutes. It discusses the policy supporting the elective share and analyzes the implications of the *Briggs* decision in light of Wyoming's failure to adopt the augmented estate concept utilized under the Uniform Probate Code. Finally, this casenote discusses the potential effects of the *Briggs* decision on estate planning practice in Wyoming.

BACKGROUND

The concept of spousal protection embodied in elective share statutes is deeply rooted in the history of the law.[17] Early English law

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1985. *Eva Briggs Living Trust supra* note 1, app. D at 1. A subsequent amendment to the trust changed the trustee to the Wyoming National Bank of Casper, now known as Norwest Bank Wyoming Casper, N.A. Brief of Cross-Appellant, *supra* note 5, at 7 n.2.

In response to the complaint, Wyoming National Bank and the Family Share beneficiaries asserted several affirmative defenses, including the defense that William had waived his right to contest the trust. Brief of Appellee Wyoming National Bank, *supra* note 8, at 4. Additionally, the Family Share beneficiaries asserted that William forfeited his share by contesting the trust in violation of the no-contest provision included with the trust agreement. *Id.* at 5.

The no-contest provision provided that the assets of the Family Share were to be distributed equally to the Family Share beneficiaries provided that they did not contest the establishment of the trust, or the distribution under the trust. In the event that a beneficiary did contest the trust, his or her share was to be revoked and divided among the remaining beneficiaries. *Briggs*, 836 P.2d at 265-66.

12. *Briggs*, 836 P.2d at 264.

13. *Id.* at 266.

14. *Id.* at 264. *See supra* text accompanying note 8.

15. *Id.*

16. *Id.* at 266.

17. Early Roman, Germanic, Scandinavian and Saxon law typically allowed a widow an outright share or a life estate in her husband's lands. Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 983 (1977).

assured the wife certain "dower" rights in her husband's property if she outlived him.[18] The right of dower at common law was the right of a surviving wife[19] to a life interest in one third of the lands her husband owned at his death.[20] Dower provided the widow with economic and social security in a time when land was the chief source of subsistence.[21] Dower also acted to protect younger children who, because of the law of primogeniture,[22] acquired no interest in their father's land.[23]

The principle features of common law dower were adopted as part of the law of the early American colonies and remained the primary means of spousal protection in this country through most of the nineteenth century.[24] Over time many states began to recognize that dower placed burdensome restrictions on the alienability of land, and legislatures began to abolish the common law doctrines of dower and curtesy.[25]

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18. 1 THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY § 5.2, at 618 (A. James Casner ed., 1952).

19. Much of the information concerning the history of the elective share is framed in terms of the wife's rather than the husband's share. As one commentator suggested, this is likely because the husband was the primary income earner and property owner, a situation which often fostered dependency in the wife. Gerald F. Pierce, Note, *The Protection of A Surviving Spouse Against Disinheritance: A Search for Georgia Reform*, 9 GA. L. REV. 946 n.1 (1975). Modern statutes providing for spousal elective shares do not distinguish between husbands and wives, but rather address the share of the surviving *spouse*. *See, e.g.*, WYO. STAT. § 2-5-101(a)(1980).

20. 5 WILLIAM J. BOWE ET AL., PAGE ON THE LAW OF WILLS § 47.4, at 605 (3d ed. 1962). Dower attached to lands which the husband held in fee simple or fee simple conditional, but because of the requirements of seisin, dower did not attach to land held for a term of years or to remainder and reversionary interests unless the husband acquired seisin of the interest before his death. 1 ATKINSON et al., *supra* note 18, § 5.3. The dower right arose at the time of the marriage and existed as an inchoate interest until the husband's death at which time it became consummate. Pierce, *supra* note 19, at 948.

21. 1 ATKINSON et al., *supra* note 18, § 5.3. A husband could dispose of personal property by will, and even if he died intestate the husband's personal property was subject to the claims of creditors. A wife's dower interest, however, was not subject to creditor claims and remained exclusively hers for life.

22. The law of primogeniture awarded the eldest son the right, by seniority in birth, to succeed to the estate of his father to the exclusion of younger siblings. BLACK'S LAW DICTIONARY 1191 (6th ed. 1990).

23. 1 ATKINSON et al., *supra* note 18, § 5.3.

24. For an excellent discussion of the history and development of dower *see id.* §§ 5.1-49. For a more brief discussion *see* Kurtz, *supra* note 17, at 982-88.

25. As the American economy shifted from an agricultural to an industrial base, the inadequacies of dower became increasingly apparent. For many families, wealth was invested in securities and a one-third life interest in land was of little value. Additionally, the inchoate dower veto which the wife maintained over all her husband's transactions was a serious impediment to the alienability of land. Elias Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513, 516-17 (1970). *But cf.* Kurtz, *supra* note 17, at 989 n.55 (indicating that holdings in land remain a primary source of wealth).

Elective Share Statutes

With the abolition of the common law doctrines of dower and curtesy, states did not abandon the concept of spousal protection. Some states simply extended the common law life estate into an outright fee while other states enacted homestead legislation and exempt property statutes to benefit the surviving spouse.[26] Many states adopted forced or elective share statutes intended to ensure the surviving spouse a fixed share of the decedent's estate notwithstanding provisions of the deceased spouse's will.

Unlike dower, the elective share typically afforded a surviving spouse a share of the decedent's personal as well as real property.[27] The elective share did not vest until death, so the alienability of land was no longer restrained. Nearly every non-community property state[28] has enacted some type of legislation aimed at protecting the surviving spouse from disinheritance.[29]

Wyoming abolished the common law doctrines of dower and curtesy in 1877.[30] The Wyoming legislature did not leave the decedent's family without support for very long, however, and in 1890 enacted provisions for a homestead allowance.[31] Wyoming's first elective share provision appeared in the statutes in 1915.[32] In 1980 the

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26. Kurtz, *supra* note 17, at 989.

27. *See infra* note 32.

28. The community property system is followed in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and the commonwealth of Puerto Rico. Stephan S. Case, *Community Property*, C318 ALI-ABA 139, 141 (1988). In the community property states, spousal disinheritance is less of a concern. Under community property law, the surviving spouse is absolutely entitled to one-half of the community property. The other half is passed in accord with the decedent's will. 2 THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY § 7.1, at 122 (A. James Casner ed., 1952).

29. With the exception of the community property states, Georgia is the only state that has not yet enacted an elective share statute or otherwise acted to protect the surviving spouse from disinheritance. Georgia does, however, provide that the surviving spouse receive support for one year to be paid out of the decedent's estate. GA. CODE ANN. § 53-5-4 (1991). For a discussion of Georgia law concerning spousal disinheritance *see* Pierce, *supra* note 19.

30. WYO. STAT. § 2-4-101(b) (1980), reads: "[d]ower and the tenancy by the curtesy are abolished and neither the husband or wife shall have any share in the estate of the other dying intestate, save as is herein provided."

31. WYO. STAT. §§ 2-7-501, 2-7-506, 2-7-508 (1980). Wyoming's homestead allowance allows the decedent's spouse and minor children to retain the homestead, household furniture and clothes. The statute also states that the widow or minor children are entitled to a reasonable provision for their support as determined by the court. WYO. STAT. § 2-7-501 (1980). The statute has changed little since it was originally enacted in 1890.

32. Senate File No. 32, approved March 4, 1915 provides that if a married person deprives his or her surviving spouse of over one-half of his or her property, it is the option of the surviving

Wyoming legislature adopted the present version of the elective share statute.[33] The statute provides that the surviving spouse receive one-half of the decedent's probate estate if there are no surviving issue of the decedent or if the surviving spouse is also a parent of any of the decedent's issue. The surviving spouse is entitled to one-fourth of the probate estate if not a parent of any of the decedent's living issue.[34] The current statutes also contain provisions regulating waiver of the elective share[35] and procedures for exercising the right of election.[36]

Elective share statutes typically embody a number of policy considerations. Commentators have suggested that elective share statutes are based on the policies of protecting the family as a productive and social unit,[37] furthering the spousal obligation of support,[38] protecting the surviving spouse from disinheritance,[39] protecting the state from the burden of supporting indigent persons[40] and enhancing the alienability of land.[41] Elective share statutes are often labeled, however, as contrary to the policy of free testamentary disposition of property.[42] Elective share statutes have also been criticized because they do not take into account the size of the decedent's estate, the needs of the surviving spouse or the financial resources of the surviving spouse independent of the decedent's estate.[43] Possibly the most notable criticism is that under many elective share statutes the spouse is not protected against disinheritance because much of what would have been the probate estate can be removed via inter vivos transfers.[44]

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spouse to either accept the terms under the will or take one-half of the estate "*real and personal of the deceased spouse.*" 1915 Wyo. Sess. Laws 230 (emphasis added).

33. WYO. STAT. § 2-5-101 (1980).

34. *Id.* The statute reduces the elective share by funeral and administration expenses, homestead allowance, family allowances and exemption, and enforceable claims against the estate. *Id.*

35. WYO. STAT. § 2-5-102 (1980).

36. WYO. STAT. § 2-5-105 (1980).

37. Eugene F. Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 U. FLA. L. REV. 151, 156 (1955).

38. W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 24 (1960).

39. J. Thomas Oldham, *Should The Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 224, 227 (1987).

40. Scoles, *supra* note 37, at 157.

41. Clark, *supra* note 25, at 517.

42. LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 1-31 (1955).

43. Kurtz, *supra* note 17, at 991.

44. Oldham, *supra* note 39, at 227. For suggestions that Wyoming's elective share statute could be avoided through use of inter vivos transfers *see* Lawrence H. Averill, Jr., *The Wyoming Probate Code of 1980: An Analysis And Critique*, 16 LAND & WATER L. REV. 103 (1981); John A. Warnick, *The Ungrateful Living: An Estate Planner's Nightmare - The Trial Attorney's Dream*, 24 LAND & WATER L. REV. 401 (1989).

Inter Vivos Transfers and the Elective Share

Where an elective share statute is inadequate to protect against spousal disinheritance, courts often employ judicially imposed protections. In his dissent to *Briggs*, Justice Urbigkit briefly discussed two of these judicial safeguards—the "retention of control" test and the "intent to defraud" test.[45] The majority of courts employing judicial

45. *Briggs*, 836 P.2d at 275-77. In addition to the "retention of control," or "illusory transfer" test and the "intent to defraud" test mentioned by Justice Urbigkit, courts have developed the "reality" test and the "present donative intent" test.

In some jurisdictions courts apply the "reality" test to set aside inter vivos transfers. The leading case involving the "reality" test is *In re* Estate of Halpern, 100 N.E.2d 120 (N.Y. 1951). In *Halpern*, the decedent had established four Totten trusts naming his granddaughter as beneficiary. The decedent left his entire estate to his wife who was appointed executrix of the will. In her capacity as executrix, the decedent's wife challenged the validity of the Totten trusts in an attempt to have them included as part of the probate estate. The court voided the challenged transfers to the extent that the wife received what she would have received had the decedent died intestate. The court refused, however, to invalidate the remainder of the transfers so as to give effect to the decedent's intent to benefit his granddaughter. *Id.* For a more detailed discussion of *Halpern*, *see* William M. Speiller, Note, *Disinheritance of a Surviving Spouse - Illusory Transfers*, 3 SYRACUSE L. REV. 129 (1951). For an explanation of Totten trusts *see* DENNIS R. HOWER, WILLS, TRUSTS AND ESTATE ADMINISTRATION FOR THE PARALEGAL 301 (1979). "Totten" refers to the case establishing this type of trust. *See In re* Estate of Totten, 71 N.E. 748 (N.Y. 1904).

Courts applying the "reality" test will find an inter vivos transfer invalid if the transferor had no intent to depart with the property. MACDONALD, *supra* note 38, at 125. The only transfers susceptible to attack under the "reality" test are sham or testamentary transfers. In the reality test, the focus is not on the degree of control retained by the transferor. Rather, the "reality" test focuses on the transferor's lack of intent to divest himself of his property and does not consider whether the transfer was intended to deprive the surviving spouse of an elective share. Norman Penney, Comment, *Illusory Transfers In New York*, 37 CORNELL L.Q. 258, 259 (1950).

One commentator has noted that the "present donative intent" test has come into recent use. Jean Garret Pherigo, Comment, *Estate Planning: Validity of Inter Vivos Transfers Which Reduce or Defeat the Surviving Spouse's Statutory Share in Decedent's Estate*, 32 OKLA. L. REV. 837, 843 (1979). The Illinois Court of Appeals developed this test in Toman v. Svaboda, 349 N.E.2d 668 (Ill. App. Ct. 1976). In *Toman*, the widow sought to invalidate a transfer of stock made by the decedent eleven years prior to his death. The stock was placed in joint tenancy with the decedent's mother and the transfer severely depleted the probate estate. The widow challenged the transfer as a fraud on her marital rights. The court upheld the validity of the transfer stating that the only way to defeat the statutory share is by "making a *real* inter vivos *gift* to another." *Id.* at 672-3. The court went on to say that a transfer would be invalid if it were a sham or colorable because it lacked the essential element of present donative intent. *Id.* at 673.

The "present donative intent" test may be distinguished from the "reality" test in that, in the former test, the essential element of a valid inter vivos gift is irrevocability. The "reality" test does not invalidate gifts where the transferor has a right to revoke unless it appears that the transferor will, in fact, exercise this right.

It should be noted that the court in *Toman* stated that a gift reserving a life estate in the grantor might be considered valid if the transferor had the requisite present donative intent to part with the remaining fee. *Id.* at 677. So, under the "present donative intent" test the transferor can retain substantial control over the property during his or her life. Arguably, the Totten trusts in *Halpern* would fail under the "present donative intent" test because the transferor had the right to revoke or disclaim the trusts during his lifetime.

safeguards use the "retention of control" test.[46] This test provides that an inter vivos transfer is invalid if the transferor retained such control over the "transferred" assets that he or she had effectively not parted with the property.[47] Such a transfer will be deemed illusory by the court applying the "retention of control" test and the transfer will be held invalid. Assets transferred in this illusory fashion are added back into the decedent's probate estate and are considered when determining the surviving spouse's elective share.

While the "retention of control" test specifically rejects the decedent's intent as irrelevant,[48] a minority of courts have used the "intent to defraud" test to invalidate inter vivos transfers.[49] Under this test, an inter vivos transfer is invalid if it was intended to deprive the surviving spouse of his or her elective share.[50] Courts that have adopted the intent test either void the lifetime transfer in whole or in part.[51] While some courts follow an actual intent approach,[52] the majority of courts recognize that specific intent is nearly impossible to

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46. Pherigo, *supra* note 45, at 840. For cases demonstrating the "retention of control" test *see* Moore v. Jones, 261 S.E.2d 289 (N.C. Ct. App. 1980); Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937); Seifert v. Southern Nat'l. Bank of South Carolina, 409 S.E.2d 337, 338 (S.C. 1991); *In re* Estate of Puetz, 521 N.E.2d 1277 (Ill. App. Ct. 1988); Newman *ex rel.* Ausemus v. George, 755 P.2d 18, 22 (Kan. 1988).

47. The "retention of control" or "illusory transfer" test was established by the New York Court of Appeals in the leading case of Newman v. Dore, 9 N.E.2d 966 (N.Y. 1937). In *Newman*, the decedent transferred his property into an inter vivos trust three days before his death, retaining the income for life, the power to revoke the trust, and substantial managerial powers. The trust did not name decedent's wife as beneficiary and the transfer of property into the trust depleted the probate estate, leaving the decedent's wife disinherited. *Id.*

The court held the trust illusory because the decedent had not in good faith divested himself of the ownership of his property. In reaching its result the court rejected the argument that the trust was testamentary in nature, and deemed the trial court's finding that the decedent had intended to disinherit his wife irrelevant. *Id.*

It is important to note that the court in *Newman* assumed the transfer to be valid aside from the surviving spouse's right to an elective share. *Id.* at 969. This statement was interpreted to mean that the trust was both valid and illusory at the same time; invalid as to the surviving spouse's elective share, and valid as to the trustee. This concept has been criticized as an "illogical impossibility." L.G. Colton Tibbits, Note, *Attempt to Defeat A Statutory Distributive Share by an Antemortem Trust*, 23 CORNELL L.Q. 457, 458 (1938).

48. *See supra* note 47 and accompanying text.

49. *See* Estate of Bernskoetter, 693 S.W.2d 249 (Mo. Ct. App. 1985); *In re* Estate of LaGarce, 532 S.W.2d 511 (Mo. Ct. App. 1975); *In re* Estate of Froman, 803 S.W.2d 176 (Mo. Ct. App. 1991); Stoxen v. Stoxen 285 N.E.2d 198 (Ill. App. Ct. 1972); McCarty v. State Bank of Fredonia, 795 P.2d 940 (Kan. Ct. App. 1990); Riggio v. Southwest Bank of St. Louis, 815 S.W.2d 51 (Mo. Ct. App. 1991). *But see* Richards v. Worthen Bank and Trust Co., 552 S.W.2d 238 (Ark. 1977); McDonald v. McDonald, 814 S.W.2d 939 (Mo. Ct. App. 1991); Hanke v. Hanke, 459 A.2d 246 (N.H. 1983).

50. Pherigo, *supra* note 45, at 838-39.

51. *See* Ackers v. First Nat. Bank, 387 P.2d 840 (Kan. 1963).

52. *See* Patch v. Squires, 165 A. 919 (Vt. 1933).

prove without the decedent's express statements, and only require proof of subjective intent.[53] This approach increases the surviving spouse's likelihood of success.[54]

The Augmented Estate Concept

In addition to judicial responses aimed at preventing spousal disinheritance through inter vivos transfers, a number of state legislatures have enacted statutory measures to preserve the integrity of the elective share.[55] While some states have enacted their own versions of the augmented estate,[56] many states have adopted the augmented estate concept utilized by the Uniform Probate Code.[57]

The augmented estate was adopted as part of the Uniform Probate Code's elective share provisions in 1969.[58] The augmented estate concept was included in the UPC's spousal protection scheme in an attempt to 1) prevent will substitutes from defeating the elective share, and 2) prevent the surviving spouse from taking the elective share when adequately provided for by the decedent's estate plan.[59]

Under the 1969 UPC provisions, the surviving spouse may elect to take one-third of the decedent's augmented estate.[60] The augmented estate is comprised of the decedent's net probate estate[61] plus certain

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53. *See In re* Estate of Sides, 228 N.W. 619 (Neb. 1930).

54. Kurtz, *supra* note 17, at 1001.

55. *Id.* at 1006.

56. The New York and Pennsylvania legislatures have adopted statutory provisions which include some inter vivos transfers as part of the decedent's estate for calculating the surviving spouse's elective share. In determining the net estate from which a surviving spouse may claim an elective share, New York includes: gifts causa mortis; Totten trusts; joint savings accounts plus dividends credited to the accounts at death; property in joint tenancy or tenancy in common with rights of survivorship; and property placed in trust where the decedent has retained the power to revoke or dispose of the principle. N.Y. ESTATES, POWERS AND TRUSTS LAW § 5-1.1(b) (McKinney 1981).

Pennsylvania's statute allows the surviving spouse to treat as testamentary any conveyance where the decedent had retained a power of appointment, revocation, or consumption over the principal. 20 PA. CONS. STAT. ANN. § 6111(a) (1972). This expands the scope of the estate against which the spouse can claim an elective share. For a discussion of the Pennsylvania and New York statutes including court interpretations *see* Clark, *supra* note 25.

57. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 30-5A-2 (1980); COLO. REV. STAT. § 15-11-202 (1976); UTAH CODE ANN. § 75-2-202 (1975); NEB. REV. STAT. § 30-2314 (1974); ALASKA STAT. § 13.11.075 (1976); ME. REV. STAT. ANN. tit. 18-A § 2-202 (1981); MONT. CODE ANN. § 72-2-222 (1993) *See infra* note 65; N.J. STAT. ANN. § 3B:8-3 (West 1982); N.D. CENT. CODE § 30.1-05-2 (1973).

58. UNIFORM PROBATE CODE §§ 2-201 to 2-207 (1969) [hereinafter UPC].

59. UPC § 2-202 (1969) 1983 main volume comment.

60. UPC § 2-201(a) (1969).

61. The net probate estate is the gross probate estate less funeral and administration expenses, homestead allowance, family allowance, exempt property, and enforceable claims. Kurtz, *supra* note

inter vivos transfers to both third parties and the surviving spouse. Including third party transfers decreases the decedent's ability to remove potential probate assets from the spouse's elective share. Only assets which were transferred for adequate consideration are not included as part of the augmented estate.[62] The augmented estate also includes some of the property which the surviving spouse received from the decedent.[63] This provision reduces the likelihood that a surviving spouse will elect against the augmented estate when adequately provided for by the decedent.[64]

In 1990, the National Conference of Commissioners on Uniform State Laws amended the elective share and augmented estate provisions of the UPC.[65] The amendments were adopted to reflect changing marital patterns and to incorporate the economic partnership theory of marriage into the UPC.[66] Under the revised provisions, the surviving spouse is entitled to a percentage of the augmented estate which varies according to the length of the marriage.[67] The effect of the changes is

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17, at 1015.

62. UPC § 2-202 (1969). Transferred assets considered as part of the augmented estate include: transfers with a retained life estate (UPC § 2-202(1)(i)); revocable transfers (UPC § 2-202(1)(ii)); joint tenancies with rights of survivorship (UPC § 2-202(1)(iii)); and transfers to a donee in excess of $3,000 in each of the two years preceding decedent's death (UPC § 2-202(1)(iiii)).

63. UPC § 2-202(2) (1969). Property owned by the surviving spouse at the time of the decedent's death is included in the augmented estate to the extent that such property was derived from the decedent other than by testate or intestate succession. Property transferred by the surviving spouse during marriage to donees other than the decedent is included to the extent that such property was derived from the decedent and would have been included in the surviving spouse's augmented estate had he or she predeceased the decedent.

64. The comment to § 2-202 states that the purpose of including property of the surviving spouse as part of the augmented estate is to prevent the surviving spouse from electing against the probate estate when adequately provided for by other means. UPC § 2-202 (1969) comment. For example, assume Dick takes out a $300,000 dollar life insurance policy naming his wife, Jane, beneficiary. Dick dies with a $300,000 net probate estate. During probate, Jane discovers that she received nothing under the will and she considers taking an elective share. Upon investigation, Jane discovers that the proceeds from the life insurance policy would be added to the net probate estate for computing the elective share. Her one-third share would be $200,000 and she would not benefit by election.

65. UPC §§ 2-201 to 2-202 (1990). For an excellent discussion of the revised elective share provisions *see*, Lawrence W. Waggoner, *Spousal Rights In Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683 (1992). Montana is the only state yet to adopt the 1990 amendments to the UPC. MONT. CODE ANN. §§ 72-2-221 to 222 (1993).

66. The 1990 revisions to the UPC recognize that increasing divorce rates and multiple marriages have transformed society's concept of marriage relationships from what it was in 1969. The drafters of the revised elective share provisions describe the contemporary view of marriage as an economic partnership. Under the economic partnership theory, the rights of the surviving spouse derive from an unwritten agreement that each spouse is entitled to one-half of the assets of the marriage, regardless of how the property is nominally titled between the spouses. Abraham M. Mora, *Uniform Probate Code Revises Spouse's Rights*, 19 EST. PLAN. 143, 145 (1992).

67. UPC § 2-201(a) (1990), reads in part:

twofold. First, the new elective share increases the reward to the surviving spouse who, through a long marriage, contributed more to the economic success of the decedent. Second, the changes prevent a windfall entitlement to the spouse who chanced to survive a short marriage.[68]

Wyoming adopted its present probate code in 1980.[69] While Wyoming's Probate Code is similar to the UPC in many respects, the legislature did not adopt the augmented estate concept utilized under the UPC.[70] Wyoming's elective share statute does not address inter vivos transfers acting to defeat the elective share. When Wyoming revised its probate code, the legislature did not have the opportunity to consider the 1990 amendments to the UPC's elective share provisions.

PRINCIPAL CASE

The majority opinion in *Briggs* upheld the validity of the Eva Briggs Living Trust and found that it did not violate Wyoming's elective share statute.[71] Justice Thomas concurred specially, agreeing with the result,[72] while Chief Justice Urbigkit[73] dissented.[74]

> (a) [Elective Share Amount.] The surviving spouse of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule . . . .

Id.

The schedule utilizes a sliding scale which increases the percentage of the augmented estate available for election based on the length of the marriage. The schedule gives a percentage of the augmented estate available for each year of marriage between one and fifteen years. The percentages range from a supplemental amount for marriages lasting less than one year to a maximum of fifty percent of the augmented estate for marriages lasting more than fifteen years.

The new UPC provisions maintain the general augmented estate concept advanced by the 1969 UPC. The revisions supplement the traditional augmented estate by adding life insurance that the decedent purchased, which names someone other than the decedent's surviving spouse as beneficiary. UPC § 2-202(2)(b)(2)(iii) (1990). The new augmented estate also includes the value of property that is subject to a presently exercisable power of appointment held solely by the decedent. UPC § 2-202(2)(b)(2)(i) (1990). These provisions were added to secure loopholes existing in the 1969 UPC. Waggoner, *supra* note 65, at 748. One of the most notable changes in the new augmented estate provisions is that all of the spouse's property is added into the augmented estate rather than just property acquired from the decedent. UPC § 2-202(2)(b)(4) (1990). This implements the marital-sharing theory and el iminates the tracing to source feature of the 1969 augmented estate. UPC § 2-202 (1990) comment.

68. Waggoner, *supra* note 65, at 724-25.

69. WYO. STAT. §§ 2-1-101 to 2-15-107 (1980).

70. Warnick, *supra* note 44, at 407.

71. *Briggs*, 836 P.2d at 263-66. Justice Macy wrote the majority opinion and was joined by Justices Cardine and Golden.

72. *Id.* at 266-67.

In upholding the district court's order granting summary judgment in favor of the trustee and Family Share beneficiaries, the Wyoming Supreme Court relied upon the language in *Ranger Insurance Company v. Cates*[75] stating that a waiver must be manifested in some unequivocal manner.[76] The court relied exclusively on the fact that Mr. Briggs voluntarily signed the waiver despite advice to review the trust agreement with another lawyer.[77]

The majority asserted that Mr. Briggs could not effectively complain that he did not read the agreement or have the advice of an attorney.[78] The court stated that:

> [O]ne who signs a paper, without reading it, if he is able to read and understand, is guilty of such negligence in failing to inform himself of its nature that he cannot relieve himself from the obligation contained in the paper thus signed, unless there was something more than mere reliance upon the statements of another as to its contents.[79]

The majority held that, because Mr. Briggs was bound by the waiver, it was unnecessary to address Mr. Briggs' contest to the validity of the trust.[80]

The court relied on *Dainton v. Watson*[81] in reversing the district court's decision that enforcement of the no-contest provision would violate public policy. Mr. Briggs attempted to distinguish *Dainton* from situations where the challenged will or trust provision violates the law or public policy,[82] and asserted that Wyoming should refuse to

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73. Chief Justice Urbigkit retired from the Wyoming Supreme Court on December 31, 1992. He was succeeded by Justice Macy as Chief Justice.

74. *Briggs*, 836 P.2d at 267-78.

75. Ranger Insurance Company v. Cates, 501 P.2d 1255 (Wyo. 1972).

76. *Id.* at 1259.

77. *Briggs*, 836 P.2d at 265.

78. *Id.*

79. *Id.* at 265. Laird v. Laird, 597 P.2d 463, 467 (Wyo. 1979) (quoting Sanger v. Yellow Cab Co., Inc., 486 S.W.2d 477, 481 (Mo. 1972)).

80. *Briggs*, 836 P.2d at 265.

81. Dainton v. Watson, 658 P.2d 79 (Wyo. 1983). In *Dainton* a sister contested her brother's will on the grounds of improper execution, incompetency, and undue influence. In holding against the sister, the court joined a majority of states upholding the validity of a no-contest clause even when the contest was made in good faith and with probable cause. In a special concurrence, Justice Rose stated that a court has a duty to determine the facts and circumstances surrounding the validity of a will before admitting the will to probate. Justice Rose asserted that a will contest made in good faith and upon probable cause *should not* be penalized. *Id.* at 83 (emphasis added).

82. Brief of Appellee at 10, Briggs v. Wyoming Nat'l Bank, 836 P.2d 263 (Wyo. 1992)(No.

enforce such violative no-contest provisions.[83] Mr. Briggs argued that the trust violated Wyoming's elective share statute,[84] and stated that he should have been allowed to contest his disinheritance through the trust without fear of reprisal under the no-contest provision. Mr. Briggs contended that he would not violate a no-contest provision by claiming his elective share contrary to the terms of the will, so he should likewise be able to challenge the trust agreement.[85]

The majority disagreed that the trust violated Wyoming's elective share statute.[86] Relying on WYO. STAT. § 2-5-102 (1980), the court stated that the waiver provision contained in the trust agreement satisfied the statute.[87] The court found it unecessary to decide whether it would enforce an allegedly unlawful no-contest clause.[88]

In a special concurrence, Justice Thomas agreed with the majority's decision.[89] Justice Thomas was concerned, however, with

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91-107) [hereinafter *Brief of Appellee William Briggs*].

83. *Briggs*, 836 P.2d at 266. The *Brief of Appellee William Briggs* cited authority from several states standing generally for the proposition that the court will not enforce a no-contest provision if the provision is in contravention of the law or public policy. *See, e.g.*, Burtman v. Butman, 85 A.2d 892 (N.H. 1952) (upholding validity of no-contest clause but stating that good faith and probable cause will be considered to avoid a forfeiture when will contest is based upon a violation of public policy); Larson v. Naslund, 700 P.2d 276 (Or. Ct. App. 1985) (no-contest clause will be enforced unless will contestant could show the clause was unlawful or in contravention of some specific public policy); Matter of Westfahl, 674 P.2d 21 (Okla. 1983) (including a forfeiture clause is within the province of the testator if it does not contravene policy or a rule of law); 80 AM. JUR. 2D *Wills* § 1141 (testatorial intent must yield to an established rule of law or public policy if it is in conflict therewith); 76 AM. JUR. 2D *Trusts* § 20 (where circumvention of a statutory prohibition or the defeating of a public policy is the object of a trust, the trust is void and of no effect); *Cf.* Matter of Estate of Seymour, 600 P.2d 274 (N.M. 1979) (recognizing validity of no-contest clauses to the greatest extent possible within the bounds of the law) *Brief of Appellee William Briggs, supra* note 82, at 10-14.

84. *Briggs*, 836 P.2d at 266.

85. *Id.*

86. *Id.*

87. *Id.* WYO. STAT. § 2-5-102 (1980), provides:

> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived totally or partially before or after marriage, by a written contract, agreement or waiver signed by the party waiving, after fair disclosure. Unless it provides to the contrary a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or divorce, is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to one from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

WYO. STAT. § 2-5-102 (1980).

88. *Briggs*, 836 P.2d at 266.

89. *Id.*

the majority's implication that the statutory right of election is available with respect to an inter vivos trust.[90] Justice Thomas argued that the statutory provision relating to waivers is limited to the statutory right of election to take against the provisions of a *will* that has been admitted to probate, and that it would be illogical to apply the provisions to a valid trust.[91] He asserted that the trust could violate the elective share statute only if viewed as a will substitute, and contended that in this case there was no implication that the trust was such a substitute.[92] Justice Thomas opined that the majority would agree with this position if the issue were presented directly.[93]

In his dissent, Chief Justice Urbigkit asserted that, by upholding the trust as a means to thwart Wyoming's elective share statute, the majority established precedent which contradicted legislative intent and general case law.[94] Justice Urbigkit divided his dissent into five discussions including an introduction,[95] and analyses of the waiver provision,[96] the validity of the trust,[97] Wyoming's elective share statute,[98] and the no contest clause.[99]

Chief Justice Urbigkit disagreed with the majority's application of the *Laird* test[100] as a means to find the waiver valid and enforceable.[101] He stressed that the *Laird* test may be an appropriate measure of waiver under some circumstances, but that the facts in *Briggs* required a departure from the test.[102] The dissent criticized the majority for using

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90. *Id.*

91. *Id.* at 267 (emphasis added). *See supra* text accompanying note 8.

92. *Id.* Although he found the Eva Briggs Living Trust *not* to be testamentary in nature, Justice Thomas stated that the same rules respecting the validity of waiver and no-contest provisions for wills should, by analogy, apply to an inter vivos trust acting as a testamentary document.

93. *Id.*

94. *Briggs*, 836 P.2d at 267-78 (Urbigkit, C.J., dissenting).

95. *Id.* at 267.

96. *Id.* at 268.

97. *Id.* at 273.

98. *Id.* at 275.

99. *Id.* at 278.

100. *See supra* note 79 and accompanying text.

101. *Briggs*, 836 P.2d at 268.

102. *Id.* The dissent stated that the departure is required when the assumptions mandated by the *Laird* test are not satisfied, and asserted that it was innapropriate to assume that Briggs understood the document or that signing the document would have the effect of waiving his elective share. Justice Urbigkit contended that the available information painted two different pictures. In his deposition, William Briggs stated that he only received three sheets of the trust agreement for review and that he was never provided the entire document. Justice Urbigkit stated that had Mr. Briggs received only the last three pages of the trust agreement he would not have been able to read the entire waiver clause. However, Eva Briggs' attorney testified in his deposition that William received a complete copy of the trust agreement. Justice Urbigkit stated that the conflicting testimony clearly demonstrated that

a general waiver rule when the legislature had provided a specific waiver provision for elective shares.[103] Justice Urbigkit stated that the waiver statute required the party to sign the waiver after fair disclosure.[104] In Justice Urbigkit's opinion, William Briggs had not received fair disclosure as required by the statute.[105]

Justice Urbigkit asserted that the majority's assumption that the trust was valid was not supported by the trust agreement.[106] He found that the elements necessary to differentiate the trust from a will were not present.[107] Relying primarily on Eva Briggs' powers as settlor and trustee, the dissent cited the proposition that a trust may not be valid if the settlor has not truly parted with the trust corpus.[108] Although he did not expressly state that William Briggs should have been allowed to reach the trust assets, Justice Urbigkit argued that the question was one of first impression in Wyoming and, presenting unresolved questions of fact and law, should not have been dismissed on summary judgment.[109]

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there were disputed questions of material fact making summary judgment improper. *Id.* at 269.

The dissent also stressed that Eva Briggs' attorney had represented William in the past. Justice Urbigkit contended that, due to this prior representation, Mr. Briggs may have believed that the attorney was acting in his best interests amounting to "something more than mere reliance upon the statements of another" and satisfying the exception within the *Laird* test. *Id.* at 270.

103. *Id.* at 272. Justice Urbigkit was referring to WYO. STAT. § 2-5-102 (1980), which reads in pertinent part:

> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived totally or partially before or after marriage, by a written contract, agreement or waiver signed by the party waiving, *after fair disclosure* . . . .

WYO. STAT. § 2-5-102 (1980)(emphasis added).

104. *Id.*

105. *Id.* Justice Urbigkit did not discuss what "fair disclosure" requires but referred to WILLIAM M. MCGOVERN JR., ET AL., WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS § 3.9 (1988).

106. *Briggs*, 836 P.2d at 273.

107. *Id.*

108. *Id.* at 273-74. RESTATEMENT (SECOND) OF TRUSTS § 26 (1959) states that "[a] manifestation of intention to create a trust inter vivos at some time subsequent to the time of manifestation does not create a trust." RESTATEMENT (SECOND) OF TRUSTS § 26 cmt. a (1959) provides:

> The rule stated in this Section is applicable whether the settlor manifests an intention to create a trust by transferring property to another person as trustee or by declaring himself trustee. In both cases there is a question whether a trust immediately arises, and, if not, whether a trust subsequently arises.

Id.

Justice Urbigkit also noted *Staples v. King*, in which the Maine Supreme Court found that where the effect of an inter vivos trust was to remove assets from the decedent's estate which would otherwise have been available for the surviving spouse's distributive share, and the decedent had reserved the practical attributes of ownership in himself for life, then the trust property may be subject to claims made by the surviving spouse under the laws regulating succession to decedents' estates. Staples v. King, 433 A.2d 407, 410 (Me. 1981).

109. *Briggs*, 836 P.2d at 275. Justice Urbigkit discussed varying court decisions regarding the

In his analysis of Wyoming's elective share statute, Justice Urbigkit began with a discussion of the augmented estate concept utilized by the Uniform Probate Code.[110] Justice Urbigkit noted Wyoming's failure to adopt the augmented estate concept,[111] and discussed how other courts have equitably allowed testators to freely gift property during their lives while protecting spouses from disinheritance.[112] The dissent noted that the "retention of control"[113] and the "intent to defraud"[114] tests are frequently employed by courts to balance the competing policies, and stated that in his view Eva Briggs' trust would fail under either approach.[115]

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effect of revocable, inter vivos trusts on a spouse's elective share and noted the legislative trend to permit the survivor to reach trust assets whenever the settlor retained the power to revoke. *Id.* at 274. Presumably the information was included to demonstrate the importance of the issue, and to support Justice Urbigkit's contention that the Wyoming Supreme Court should not dismiss the opportunity to address the issue by upholding summary judgment.

Justice Urbigkit noted that in some states the survivor can reach trust assets by statute (New York, Pennsylvania), but in others, rights may extend only to probate assets (Connecticut, Illinois). The dissent also pointed out that some states permit the survivor to reach the trust assets only if the transfer was made with intent to defeat the survivor's rights (Missouri), or was illusory because the settlor retained substantial control over the trustee or trust assets (Illinois). Justice Urbigkit also noted that some states (Florida) permit the survivor to recover only if he or she was not adequately provided for by other means such as insurance. *Id.* at 274.

110. *Id* at 275. *See supra* notes 55-69 and accompanying text.

111. *Id. See* Averill, *supra* note 44, at 391.

112. *Briggs*, 836 P.2d at 275.

113. *See supra* notes 45-54 and accompanying text.

114. *Id.*

115. *Briggs*, 836 P.2d at 276-77. In Justice Urbigkit's opinion, the trust failed under the "retention of control" test due to the degree of control Eva maintained over the property. *Id.* at 276. Additionally, Justice Urbigkit would have found the trust invalid under the "intent to defraud" test because Eva Briggs intentionally avoided the elective share statute by creating a revocable trust. *Id.* at 277.

Justice Urbigkit relied on the statements of Mrs. Briggs' attorney in support of his contention that Mrs. Briggs had the express and explicit intent to avoid the elective share statute by creating a revocable trust. These statements, in relevant part, are:

> Q. [Counsel] And if I understand your testimony correctly her concern was that she did not want [Mr. Briggs] to have the half that the Wyoming statutes would provide if there were no transfer of the ownership of her assets?
>
> A. [Attorney Who Prepared the Trust] Yes.
>
> Q. So one of your objectives in drafting the will and the trust pursuant to Mrs. Briggs' instruction was to draft them in such a way that Mr. Briggs would not receive half; is that correct?
>
> A. Half of all Mrs. Briggs' property; that's correct.
>
> * * * * * *
>
> Q. But she was concerned about the fact that he could elect against one half of her probate estate; was she not?
>
> A. If she left it in her name and if all she had was a will, yes.
>
> Q. And she didn't want that, did she?
>
> A. No, she didn't.

Id. at 277.

Justice Urbigkit disagreed with the majority's decision finding the no-contest clause enforceable,[116] and asserted that the majority had inappropriately relied upon *Dainton*.[117] The dissent distinguished *Dainton* from *Briggs* because Mr. Briggs' challenge addressed the legality of the trust in light of the elective share statute, and was not a challenge based on improper execution, incompetency or undue influence.[118] Justice Urbigkit agreed with Justice Rose's special concurrence in *Dainton* stating that a will contest made in good faith and upon probable cause should not be penalized.[119]

ANALYSIS

Protecting the surviving spouse from disinheritance while preserving free testamentary disposition of property presents a potentially irreconcilable conflict. The Wyoming Supreme Court's treatment of this conflict in *Briggs* leaves Wyoming's estate planning practitioners guessing as to the present state of the law. The *Briggs* decision creates new questions about elective share waivers while preserving older questions concerning the ability to defeat the elective share through inter vivos transfers and other will substitutes. *Briggs* should cause the legislature to reevaluate the policy supporting the elective share and should ultimately lead to new legislation which answers questions that have now gone unanswered for too long.

Elective Share Waivers

The majority's treatment of the waiver clause in the trust agreement presents new questions concerning the scope of WYO. STAT. § 2-5-102. As noted by Justice Thomas in his concurrence, the waiver provisions of WYO. STAT. § 2-5-102 apply to the statutory right of election to take against a *will* that has been admitted to probate.[120] The majority's application of the waiver statute to a trust implies that an inter vivos trust may be subject to the spouse's claim for an elective share.[121] This implication is not without merit. Including trust assets as

116. *Id.* at 278.

117. *Id.*

118. *Briggs*, 836 P.2d at 278. *See supra* note 81 and accompanying text.

119. *Briggs*, 836 P.2d at 278. *See supra* note 81 and accompanying text.

120. *Briggs*, 836 P.2d at 267.

121. This implication was criticized in Justice Thomas's concurrence. Justice Thomas stated that the statutory right of election afforded to a surviving spouse in a probate proceeding is not available to a trust beneficiary. *Briggs*, 836 P.2d at 266. Justice Thomas offered no support for this contention beyond a strict interpretation of the elective share statute. It appears that many states are willing to

part of the estate from which an elective share is claimed is consistent with statutory and case law in other jurisdictions.[122] Application of the waiver statute in this instance does, however, amount to a "mixing of apples and oranges" which confuses the present state of the law in Wyoming.[123] The confusion does not emanate from the validity of the trust as Justice Thomas suggests.[124] Facially valid inter vivos transfers can be added to the probate estate for purposes of determining a surviving spouse's elective share.[125] Rather, the confusion results from the majority's failure to announce whether the trust would have been subject to an elective share claim absent the waiver clause. Such an announcement would have been dicta given the court's determination that the waiver was effective, but would have gone a long way to explain the present state of the law in Wyoming.

The majority's determination that the waiver clause satisfied the elective share waiver provision involves an extended interpretation of WYO. STAT. § 2-5-102, which states that "[u]nless it provides to the contrary, a waiver of 'all rights' in the property or estate" of a spouse will act to waive the surviving spouse's right to election.[126] The waiver included in the trust agreement was a waiver of "all right [Mr. Briggs] may have to contest the establishment of the trust or the transfer of any property of his wife as Settlor to the trust."[127]

This was not a waiver of Mr. Briggs' rights to Mrs. Briggs' property or estate. It was a waiver of all right to *contest the establishment* of the trust and the subsequent transfer of property into the trust. The majority's decision creates the inference that waiving a right to contest the establishment of the trust is analogous to waiving all rights in the property.[128] This requires the reader to make an extended inter-

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forego a strict interpretation of statutory language in favor of supporting the policy behind the elective share. *See supra* notes 45-54 and accompanying text.

122. *See supra* notes 45-65 and accompanying text.

123. In his concurrence, Justice Thomas referred to Mr. Briggs' argument that the trust violated Wyoming's elective share statute as a "mixture of apples and oranges." *Briggs*, 836 P.2d at 266-67. The author of this casenote contends that application of the elective share statute to a trust amounts to a "mixture of apples and oranges" given the Wyoming Supreme Court's failure to indicate whether inter vivos transfers and other will substitutes are subject to the surviving spouse's claim to an elective share.

124. *Id.* at 267.

125. *See supra* note 47, where the N.Y. Court of Appeals found the suspect trust valid aside from the surviving spouse's right to an elective share. Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937). *See also* the discussion of the "intent to defraud" test, *supra* notes 49-54 and accompanying text, which goes beyond an examination of the facial validity of the trust to a determination of the decedent's intent.

126. WYO. STAT. § 2-5-102 (1980).

127. *Briggs*, 836 P.2d at 265.

128. Query whether waiving a right to contest does, in effect, act as a waiver to all rights in the

pretation of the waiver clause; an interpretation which is noticeably absent from the opinion.[129]

The majority's determination that the waiver clause contained in the trust agreement satisfies WYO. STAT. § 2-5-102 also dilutes the statute's "fair disclosure" requirement.[130] Evidence indicates that the waiver clause was not explained to Mr. Briggs and that Mr. Briggs was not made aware of the waiver's existence. Mr. Briggs asserted that he thought Eva Briggs was leaving him everything.[131] Mrs. Briggs and her attorney advised Mr. Briggs to consult another lawyer, and Mr. Briggs arguably had the opportunity to read the waiver before signing the agreement.[132] In light of the history surrounding Wyoming's elective share provision, these opportunities are not sufficient.

The legislature's admonition that the surviving spouse be fully informed of his or her right of election was in response to the substantial disinheritance of the widow in *Hartt v. Brimmer*.[133] By requiring that the judge fully explain the right of election to the surviving spouse, the legislature clearly established that it wished to "eliminate any unknowledgeable imposition of a waiver on a surviving spouse."[134] It does not follow that one spouse may impose a waiver on an unknowing

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property? The inference may be justified if one considers that nearly all of Mrs. Briggs' property was placed in the trust. While Mr. Briggs' did not explicitly waive "all rights" to Mrs. Briggs' "property or estate," it may be inferred that by waiving his right to contest the establishment of the trust and the transfer of nearly all of Mrs. Briggs' assets into the trust, Mr. Briggs effectively waived his rights to Mrs. Briggs' property.

129. Colorado would prohibit such an extension. In Colorado, "waiver cannot arise by assumption, presumption or construction. It must be in terms that do not admit of a doubt and clearly and definitely indicate a purpose to waive this specific statutory right." *In re* Bradley's Estate, 106 P.2d 1063, 1064 (Colo. 1940).

130. In other jurisdictions "fair disclosure" contemplates that each spouse should be given general information concerning the net worth of the other. *In re* Estate of Hill, 335 N.W.2d 750, 753 (Neb. 1983); *In re* Estate of Gab, 364 N.W.2d 924 (S.D. 1985); *In re* Estate of Lopata, 641 P.2d 952, 955 (Colo. 1982). Justice Urbigkit presumably refers to "fair disclosure" in the more basic sense that the surviving spouse was aware of what he or she was signing. This position is supported by New York and Missouri law discussed *infra* notes 135 and 136.

131. *Brief of Appellee William Briggs, supra* note 82, at 7.

132. *Briggs*, 836 P.2d at 268-70.

133. *Id.* at 272-73. Hartt v. Brimmer, 287 P.2d 645 (Wyo. 1955). In *Hartt* a widow was substantially disinherited when she received unrealistic advice concerning her right of election. In the legislative term following the *Hartt* decision, the Wyoming legislature adopted WYO. STAT. § 6-301 directing that "the judge of the probate court shall advise the surviving spouse of his or her right of election and shall explain fully such right and the consequence thereof." 1957 Wyo. Sess. Laws 329. This language is nearly identical to current WYO. STAT. § 2-5-104(a). WYO. STAT. § 2-5-104(a) (1980) provides that "the court advise the surviving spouse of his right of election and explain fully the right[.]"

134. *Briggs*, 836 P.2d at 273.

spouse during life when the court precludes third parties from imposing a waiver on the unknowing surviving spouse after the decedent's death. Other states prevent this occurrence through strict disclosure requirements. New York requires that a waiver of the spouse's elective share be acknowledged like a recording or conveyance of real property.[135] Missouri requires "full disclosure of the nature and extent of the right of election."[136] Wyoming would be wise to follow suit and require more than mere advice to consult an attorney.[137] At a minimum, Wyoming should require that a spouse be made aware that he or she is waiving the elective share and have the consequences of signing the waiver explained.[138]

Another potential problem with the court's decision concerns the document containing the waiver. The court may be setting harmful precedent by holding that a waiver of rights contained in a trust agreement satisfies the waiver requirements of WYO. STAT. § 2-5-102.[139] A spouse desiring to disinherit his or her partner may attempt to place such a waiver in an insurance contract, pay on death account, or any number of other documents. This may result in elective share waivers appearing in many unanticipated and unforeseeable locations. If the "fair disclosure" requirement is to be given effect, the legislature or the judiciary should take precautions to prevent such an occurrence. If Wyoming adopts stringent disclosure requirements as suggested above, the document in which the waiver is contained will be of little consequence because the waiving spouse will be aware of what he or she is signing and will be aware of the consequences.

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135. New York requires that "a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property." N.Y. ESTATE, POWERS AND TRUSTS LAW § 5-1.1(f)(2) (McKinney 1981).

136. Estate of Tegeler, 688 S.W.2d 794, 799 (Mo. Ct. App. 1985). The purpose of the full disclosure requirement is to insure that the surviving spouse is able to make an informed election. *Id.*

137. The author is not advocating that legal counsel be provided to the waiving spouse in order for the other spouse to execute a valid elective share waiver. This would be ineffective because the waiving spouse could refuse counsel. *See In re* Estate of H. Lewin, 595 P.2d 1055 (Colo. 1979) (refusing assistance of counsel before signing agreement is not fatal to its validity).

138. This should be required regardless of whether the surviving spouse was given the opportunity to read the waiver. The facts in *Briggs* do not indicate that Mr. Briggs was made aware that he was signing a waiver. Even if he was made aware, it is questionable whether Mr. Briggs would have understood that he was waiving his right of election.

139. "The waiver contained in the trust satisfied [the elective share] statute." *Briggs*, 836 P.2d at 266.

Defeating The Elective Share Through Will Substitutes

The *Briggs* decision also perpetuates existing questions concerning the ability to defeat the elective share through inter vivos transfers and other will substitutes. The *Briggs* decision may, at first glance, appear to legitimize the practice of spousal disinheritance through use of inter vivos transfers. The court did not clearly indicate, however, that nonprobate assets are either immune from or subject to a surviving spouse's elective share claim. By finding the waiver enforceable the court apparently felt that it obviated the need to address that issue. A strict interpretation of the elective share statute supports the conclusion that the court intended to exclude inter vivos transfers from the elective share—the statute refers only to property which is subject to disposition under a *will*.[140] However, the majority's treatment of the waiver clause implies that the court intended to include such transfers. Furthermore, the viability of the elective share as a means of spousal protection in a growing nonprobate society[141] demands an inclusive interpretation.

The augmented estate concept proposed by the UPC was specifically intended to prevent spousal disinheritance through the use of will substitutes.[142] Wyoming refused to adopt the augmented estate concept proposed by the UPC when it revised the probate code in 1980.[143] Whether the legislature anticipated judicial remedies or rejected the concept for policy reasons cannot be ascertained.[144] It appears, however, that with increasing use of will substitutes, Wyoming will face increasing incidents of spousal disinheritance. Fundamental changes in the nature of wealth and the relative ease with which nonprobate transfers can be accomplished are creating a popular demand for probate avoidance.[145] Life insurance, pension accounts, joint accounts and revocable trusts are disabling disinheritance protections which anticipate disposition by will.[146] An elective share of the probate estate can no longer ensure spousal protection. The need for spousal protection,

140. WYO. STAT. § 2-5-101(a) (1980).

141. *See infra* note 145 and accompanying text.

142. UPC § 2-202 (1969) 1983 main volume comment.

143. Wyoming Probate Code, WYO. STAT. §§ 2-5-101 to 2-15-107 (1980). *See* Warnick, *supra* note 44, at 407.

144. Wyoming does not compile official legislative histories of its statutory enactments. Indeed, Wyoming functionally has no legislative history at all.

145. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

146. Professor Langbein lists life insurance, pension accounts, joint accounts and revocable trusts as the four main will substitutes. *Id.* at 1109.

however, may still exist. Many states have recognized this by augmenting the probate estate with nonprobate assets for purposes of calculating the elective share.[147] When the legislature fails to act, many courts employ judicial remedies to protect the surviving spouse.[148]

It appears from the cursory manner in which the court treated the Eva Briggs Living Trust that it did not consider employing a judicial test to determine the trust's validity. As Justice Urbigkit indicated in his dissent, the trust probably would have been ruled invalid under both the "retention of control" test and the "intent to defraud" test. In the absence of legislative protection, the court should act to protect the policies embodied by Wyoming's elective share statute.[149]

Inherent inadequacies in each of the judicial tests, however, may put the court in the unfortunate position of choosing between the lesser of several evils. The "retention of control" test does not protect the surviving spouse from transfers by gift or deed in which the transferor relinquishes all control over the transferred property.[150] It has also been criticized as illogical[151] and too narrow.[152] Factors other than control often dictate the outcome.[153] The "intent to defraud" test creates complicated proof problems and creates the possibility that an analysis of subjective intent will invalidate legitimate transfers.[154] Additionally, the intent test often leads to unpredictable results.[155] Courts frequently arrive at a result inconsistent with the anticipated outcome because other considerations affect the court's decision.[156]

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147. *See, e.g.*, N.Y. ESTATES, POWERS AND TRUSTS LAW § 5-1.1(b) (McKinney 1981); 20 PA. CONS. STAT. ANN. § 6111(a) (1972); S.D. CODIFIED LAWS ANN. § 30-5A-2 (1980); COLO. REV. STAT. § 15-11-202 (1976); UTAH CODE ANN. § 75-2-202 (1975); NEB. REV. STAT. § 30-2314 (1974).

148. *See supra* notes 45-54 and accompanying text.

149. An inter vivos transaction which does not infringe on the letter of the law may still be invalidated because it is repugnant to the basic legislative policy supporting the law. MCDONALD, supra note 38, at 97.

150. Because the test turns on the retention of control it cannot protect against an outright transfer to a third party intended to defeat the surviving spouse's elective share. Under the "retention of control" test a decedent could deplete his or her entire estate by gift or deed and the surviving spouse would have no recourse.

151. MACDONALD, *supra* note 38, at 90-96. MacDonald considers the test illogical because it underplays the importance of revocability, where the settlor can attain complete ownership "by a stroke of his own pen." *Id.* at 92. *See also* Tibbits, *supra* note 47, at 458 (criticizing the "illogical impossibility" that a transfer can be both valid and invalid at the same time).

152. MACDONALD, *supra* note 38, at 96. The sole criterion of excessive control suggests that the other circumstances in the case must be ignored. *Id.*

153. *Id.* at 93.

154. *Id.* at 117.

155. Kurtz, supra note 17, at 1002.

156. *Id.* at 1000. The "present donative intent" test and the "reality" test, discussed *supra* note

These shortcomings can be avoided through specific legislation augmenting the probate estate. The UPC's revised elective share provisions provide a logical starting point for this endeavor.[157]

The Elective Share and Augmented Estate Under The UPC

The UPC's elective share provisions, while not perfect, provide an appealing alternative to Wyoming's elective share statutes. The UPC's sliding scale approach to determining the elective share is appealing first, because it prevents windfall inheritances where the surviving spouse had little to do with the accumulation of the decedent's wealth,[158] and second, because it recognizes that the surviving spouse in a longer marriage likely did more to contribute to the marital assets.[159] Recognition of the economic partnership theory of marriage rewards the surviving spouse who sacrificed money-making opportunities in order to contribute domestic services to the marital enterprise and provides just compensation to the surviving spouse regardless of the name in which the marital property was titled.[160] Additionally, the UPC provisions deter election where the spouse has been adequately provided for by other means.[161]

However, the Wyoming legislature should note that the new UPC provisions fall prey to some of the same weaknesses that plague other elective share statutes. Most notable is that UPC § 2-201 *et seq.* fails to consider the actual needs of the surviving spouse.[162] This is espe-

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45, suffer from similar shortcomings. Like the "retention of control" test, the "present donative intent" test does not protect against transfers by gift or deed. Because the test hinges on the revocability of the transfer it cannot protect against a transfer in which the transferor relinquishes all control, even if the transfer was maliciously intended to defeat the elective share. The "reality" test has been criticized as precluding any judicial assistance to the surviving spouse. MACDONALD, *supra* note 38, at 127. Relief is only available to the surviving spouse if he or she can show that the transfer was improperly executed, that it was a sham, or that it was testamentary. *Id.*

157. A complete analysis of the UPC's new elective share provisions is beyond the scope of this casenote, but a brief discussion of some of the benefits is warranted. For a detailed discussion of the 1990 amendments to the UPC elective share provisions *see* Waggoner, *supra* note 65. For a more brief discussion *see* Mora, *supra* note 66.

158. This feature also denies a windfall entitlement to the surviving spouse's children from a prior marriage at the expense of the decedent's children by a prior marriage. Waggoner, *supra* note 65, at 725. An interesting case supporting the need to prevent windfall inheritances is Neiderhiser Estate, 2 Pa.D.&C.3d 302 (1977), *cited in* Laura Schmitt Moore, Comment, *Oregon's Elective Share in a Nonprobate World: The Surviving Spouse's Demand for Statutory Reform*, 29 WILLAMETTE L. REV. 73, 91 (1993), where the groom died at the wedding ceremony and the surviving spouse was still allowed to take her elective share.

159. *See supra* note 67.

160. UPC Article II 1993 pocket part comment.

161. Waggoner, *supra* note 65, at 737-38.

162. Query whether considering the needs of the surviving spouse is inappropriate under the

cially troublesome when a financially secure surviving spouse elects against the augmented estate to the detriment of other, more needy, beneficiaries. The UPC provisions do not completely ignore this possibility. The UPC attempts to dilute the effects of election by providing that the elective share will first be subtracted from that portion of the augmented estate comprising the surviving spouse's property.[163] This has the effect of reducing or perhaps eliminating taking from the shares of other beneficiaries. It also acts to preserve testamentary intent to the greatest extent possible while ensuring spousal support. Another potential problem is that utilizing an augmented estate concept may complicate the probate process and nullify the benefits of nonprobate wealth.

Is The Elective Share Still Necessary?

The elective share evolved from the dower concept during a period when women were largely dependent on their husbands for support. The policies supporting dower and specific protections for the widow are rapidly becoming outdated as the number of women in the workforce continues to increase.[164] A wife is typically no longer dependent on her husband for support, and many families consist of two working adults.[165] Does this signal a declining need for spousal protection? Probably not. Not every family consists of two working adults and the law should protect the surviving spouse who has sacrificed his or her economic opportunities to pursue a role as homemaker. While

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economic partnership theory of marriage? The economic partnership theory assumes that both spouses intend to share their profits and expenses equally. UPC Article II 1993 Pocket Part Comment. Under this approach, the spouses' actual needs may be irrelevant and the elective share should be viewed as providing the surviving spouse with his or her just reward.

163. UPC § 2-207(a) (1990) provides that the elective share will first be satisfied out of the spouse's assets in order to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's reclaimable estate.

164. Oldham, *supra* note 39, at 234 n.53 (citing Shellenbarger, *Societal Shift: As More Women Take Jobs They Affect Ads, Politics, Family Life*, Wall St. J., June 29, 1982 at 1, col. 1, for the proposition that by 1995 two-thirds of all women will be in the workforce). Continued wage discrimination, however, may make women more dependent than the above statistic would suggest. Average full-time earnings of women are 60% less than men's earnings. Phillip Mitchell Woolery, Note, *Death Before Comparable Worth: The Limited Utility of Comparable Worth Evidence in a Title VII Cause of Action*, 51 MO. L. REV. 811 n.2 (1986) (citing Goldin, *The Earnings Gap in Perspective*, 1 COMPARABLE WORTH: ISSUE FOR THE 80'S 3, 9-12 (U.S. Comm'n on Civil Rights June 6-7, 1984)). *See also* Mary Ann Mason, *Beyond New Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393 n.4 (1992).

165. Oldmam, *supra* note 39, at 243 n.53 (citing Hacker, *Where Have The Jobs Gone?*, N.Y. Rev. of Books, June 30, 1983, at 29, col. 1, for the results of a census study finding that of the 40.9 million married couples in which the husband was employed, 26.2 million (64%) of the wives also worked).

one spouse supports the family as the principle wage earner, the other spouse often contributes valuable services in the home.[166] The labors of the homemaker should be recognized as an equally important contribution to the wealth of the family. While the need to protect the surviving spouse may not be as great as it once was, certain situations justify continued protection, such as a situation where both spouses work but disproportionately title assets in the name of one spouse.[167]

Foresight on the part of the UPC drafters may act to preserve the elective share concept despite the possible erosion of the traditional policies supporting spousal protection. By adopting the economic partnership theory of marriage, the drafters of the UPC have justified the preservation of the elective share statute as providing the surviving spouse his or her appropriate share of the fruits of the marriage.

CONCLUSION

The *Briggs* decision does not provide a firm foundation on which Wyoming estate planners can build an estate free of elective share constraints. The court did not clearly indicate whether nonprobate assets are immune from or subject to a surviving spouse's elective share claim. Wyoming's estate planning practitioners should proceed with caution when attempting to use inter vivos trusts and other will substitutes as a means to avoid the elective share. The court did make it clear, however, that an elective share waiver may restrict election against nonprobate assets. The elective share waiver is potentially the most effective tool available to the estate planner for ensuring that the client's disposition will be protected. A valid waiver can eliminate the surviving spouse's right to elect and protect free testamentary disposition of property.

Fundamental changes in the nature of wealth and society's view of marriage obligations requires legislative reformation of the elective share statute. The judiciary should not be left to choose from inadequate judicial safeguards and run the risk of contradicting legislative intent. Only legislative action can adequately answer the questions

166. Alfred C. Emery, *The Utah Uniform Probate Code-Protection of the Surviving Spouse-The Elective Share*, 1976 UTAH L. REV. 771, 772 (1976).

167. If the elective share were not available in this situation, the surviving spouse who did not record assets in his or her own name could be completely disinherited and prevented from realizing the fruits of his or her own labor. Conversely, if the majority of marital assets were disproportionately titled in the surviving spouse, retaining the elective share in its present state would allow the surviving spouse an unjust reward.

posed by the *Briggs* decision. Wyoming must take affirmative action to balance the policy of protecting the surviving spouse with the policy of free testamentary disposition of property or the right to an elective share will become obsolete.

G. BRYAN ULMER III