Michigan’s Elective Share: An EPIC Failure

INTRODUCTION

Michigan’s elective share stands out as singular in the landscape of current probate law, because Michigan’s elective share still allows a spouse to completely disinherit the surviving spouse.1 The history behind the current law reveals no justification to explain the rationale behind its approach, which remains unchanged since its original enactment in 1979.2 To be sure, it provides strong protection of testamentary freedom but at the cost of allowing testators to ignore spouse’s contributions to marital wealth,3 contributions that are otherwise recognized in Michigan Law.4 The historical reasons for such disregard of the surviving spouse are now outdated. When the elective share’s ancestor, dower, first developed, it struck a balance between the obligations owed to those related by affinity and the need or desire to consolidate and maintain wealth for the continued status of the family, i.e. those related by consanguinity.5 Under traditional dower and elective share law, a husband, the presumed decedent, was obligated to provide resources, in the form of land, to protect the widow financially and to avoid making her survival someone else’s (another man’s) problem.6 Times have clearly changed, and many of the social forces that once justified the balance achieved by dower have since disappeared.7 Michigan’s elective share statute, however, clings to the past in a century where marriage is commonly understood as an economic partnership and where marital obligations are no longer in competition with a need to consolidate wealth for descendants.8 Michigan’s elective share needs to catch up to the times.

This Note explores dower from its roots to present day, with a particular emphasis on Michigan’s elective share. Part I traces the history of the elective share and its predecessor, dower, and the policy reasons underpinning this common-law concept, which was brought from England to the colonies in the early 17th century. Part II describes the evolution of

1. See infra Section II.F. An EPIC Failure.
2. See infra Section II.D.2. The Michigan Legislature Offers No Reason for Not Adopting the Proposed Elective Share Featuring the Augmented Estate.
4. See MICH. COMP. LAWS § 552.401 (2016) (The court may award one spouse property owned by the other spouse if it appears “equitable under all the circumstances of the case” and the claiming spouse contributed to its “acquisition, improvement, or accumulation.”).
5. See infra Section I.A. Dower’s Early History.
6. See infra Section I.A. Dower’s Early History.
7. See infra Section I.H. A New View of Marriage.
8. See infra Section I.H. A New View of Marriage.
dower to the 1990 Uniform Probate Code’s (“UPC”) elective share and its adoption of the partnership theory of marriage and analyzes the policy goals that shaped that evolution. Part III traces the history of the current elective share under Michigan’s Estates and Protected Individual’s Code (“EPIC”), and suggests that Michigan’s approach is outdated in its provisions and should be amended to bring Michigan law in line with contemporary views on marriage, property, and the relationship between the two.

I. ELECTIVE SHARE HISTORY

An elective share or forced share statute allows a surviving spouse the right to elect against the will and take a statutory minimum amount. If the surviving spouse elects against the will, the elective share statute sets out what portion of the estate the surviving spouse may take by right. The elective share’s roots are grounded in the common-law concept of dower, which “developed in medieval times to compensate women for loss of control over their real property during marriage and, especially, to make provision for widows after their husbands’ property had passed to the legal heirs.”

A. Dower’s Early History

Dower has evolved significantly over the past thousand years, but always in response to society’s needs. Dower and the ways of enforcing dower have changed as society has changed, particularly society’s views of marriage and property. It is difficult to determine precisely when dower first developed, but it clearly predates the Norman Conquest of 1066.

9. See Terry L. Turnipseed, Why Shouldn’t I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French), 44 BRANDEIS L.J. 737, 748 (2006); see also Julia Belian, Medicaid, Elective Shares, and the Ghosts of Tenures Past, 38 CREIGHTON L. REV. 1111, 1129 (2005) (“The elective share was formerly known in many jurisdictions as the ‘forced’ share because the spouse could force that share out of the estate in contravention of the decedent’s wishes. . . .”).


11. See Turnipseed, supra note 9.


14. See SUE SHERIDAN WALKER, WIFE AND WIDOW IN MEDIEVAL ENGLAND 8 (Sue Sheridan Walker ed. 1993). “[D]ower was not a static concept but, rather, evolved over time . . . .”

The earliest available evidence of dower describes it as the right of a widow to one-third of the lands her husband acquired during the marriage. Dower functioned as “the medieval woman’s insurance policy” in that the land set aside to satisfy her dower right provided some support for her after her husband died, protecting her from falling into poverty in a world where wealth was controlled predominantly by men. In addition, dower provided a method by which landed families could negotiate marriages that provided maximum advantage to all involved. Marriage was not just between the man and woman getting married, but between the families of the couple, and both families used marriage to benefit politically, militarily, and commercially. The father of the bride wanted to ensure that his daughter’s needs were met throughout her life.

beginnings are lost in the dim antiquities of the Germanic law which prevailed in England before the Conquest.” See also Turnipseed supra note 9, at 742 (explaining “[l]imitations upon free testation are at least as old as the Code of Hammurabi [circa 2084 B.C.]”) (citing Edmond N. Cahn, Restraints on Disinheritance, 85 U. PA. L. REV. 139, 139 (1936). See also Turnipseed, supra note 9, at 742 n.33 (citing Rick Geddes & Paul J. Zak, The Rule of One-Third, 31 J. LEGAL STUD. 119, 123 (2002) (explaining “the very first known dower-type code language from the original Code of Hammurabi”)).

In the case of either a private soldier of a commissary, who was carried off while in the armed service of the king, if his son is able to look after the feudal obligations, the field and orchard shall be given to him and he shall look after the feudal obligations of his father. If his son is so young that he is not able to look after the feudal obligations of his father, field and orchard shall be given to his mother in order that his mother may rear him. If a man should decide to divorce a sugitu who bore him children, or a naditu who provided him with children, they shall return to that woman her dowry and they shall give her one half of (her husband’s) field, orchard, and property, and she shall raise her children; after she has raised her children, they shall give her a share comparable in value to that of one heir from whatever properties are given to her sons, and a husband of her choice may marry her.

Id. (quoting Rick Geddes & Paul J. Zak, The Rule of One-Third, 31 J. LEGAL STUD. 119, 134–35 (2002)).


18. Turnipseed, supra note 9, at 743.


21. Id. “Throughout history, marriage has involved transfers of money and property between families . . . .” Id.

22. Ernest Young, The Anglo-Saxon Family Law, in ESSAYS IN ANGLO-SAXON LAW 121, 148 (1876).
(and not by him), and the father of the groom wanted to be sure that his wealth, in the form of land, would not be diverted away from his bloodline. Dower arbitrated the tension between the two goals of providing for the widow and consolidating wealth to pass down to heirs and to preserve the social status of the family. Dower started as a spoken covenant between two intimately involved parties trying to balance their obligations to those related by affinity and those obligations of marriage that society demanded. In its earliest days, dower resulted from a private contract negotiated by two families, each bargaining for terms that would provide mutual benefit. During Teutonic times, a bridegroom traditionally made a payment to the kinsmen of the bride. In return for the bridegroom’s consideration, he obtained the rights over the woman through the marriage. Following the consummation of the marriage, the groom gave his wife a “morning gift[,] morgen-gifu,] for her support if she outlived him.” This gift was a gift of land. Though dower developed into a well-established custom, records show that the amount and value of lands promised in dower could vary dramatically, so that the transaction lacked the predictability and stability desired by both the widows and heirs of decedents. In response, around 1030, the morning gift evolved into “a gift for the widow’s maintenance; consisting as a rule of realty . . . with a written document to be used as proof after her husband’s death.”

As property ownership developed in England, landowners repeatedly attempted to defeat any effort by the crown to limit their power and wealth, whether through taxes or through the enforcement of social obligations,

23. See Loengard, supra note 17, at 60 (Explaining “Dower was the medieval woman’s insurance policy; what father would permit his daughter to marry without providing her with some security in the event of widowhood? Fathers bargained, drafted charters, and caused witnesses to be present at weddings in an attempt to protect their daughters’ futures.”).
24. Id. at 61.
25. Id.
26. Id. at 60–61.
27. See generally Biancalana, supra note 16, at 255; see also Holcombe, supra note 13; see also Turnipseed, supra note 9, at 743.
28. Haskins, supra note 15. “[A]lthough the amount of dower which the bride was to have after her husband’s death continued to be a matter of bargain between the spouses and their kinsmen before the marriage, it is stated that a man was not free to marry without naming a dower.” Id. at 43 (citing Glanville, De Legibus VI, 1; Bracton, De Legibus 92a).
29. Id. at 42.
30. Id.
31. Id. at 42–43.
33. Young, supra note 22, at 174. There are early reported events of the exchange of dower that were not written. See also Biancalana, supra note 16, at 260.
such as dower. Over and over, landholders invented new schemes or demanded more rights to do with their land whatever they wished, even to the detriment of their wives and their King. Each of these developments was in turn balanced by greater enforcement of those obligations. In short, dower evolved to meet the challenges it faced and to continue society’s demand that husbands support their wives for life—the wives’ life.

1. The Consequences of the Norman Conquest for Dower

After the Norman Conquest of 1066, King William asserted royal power over land that eliminated the landholder’s right to convey real property. By asserting himself as the only “owner” of land, King William claimed a right of reversion in every estate he granted. Dower rights in land were among the few exceptions, because of their deeply rooted custom in society. But, to be granted, dower had to be gifted before the marriage and under the supervision of the Church, because the royal courts desired that all acts which conveyed “rights in land to be open and notorious,” and “refused to recognize an endowment which had not been made publicly.” Therefore, it was paramount that dower, the so-called “gift,” be made at the time of the marriage, because feudal law prohibited the transfer of any real property. Essentially, a failure of a husband to “gift” a dower right to his wife publically, at the marriage, resulted in the land reverting back to the King should her husband predecease her, leaving the widow in the dark, without the security of dower.

2. The Magna Carta Codifies Dower, 1215–1225

As royal power grew in England, the King asserted more and more rights in land than the estate holders believed proper, claiming lands the

34. See infra footnotes 37–96 and accompanying text.
35. Id.
36. Id.
38. See id.
39. See id.
42. Id. (citing Bracton, De Legibus 302–04). “In the case of the widow’s election[., specifically dower[,] the changes in the rules of proof were the result of a fundamental conceptual reorganization of the entitlements enforced in the King’s court.” Biancalana, supra note 16, at 258.
43. Haskins, supra note 15, at 43.
44. Id.
landowners thought should continue to remain in their family. King John, in particular, increased the burdens on landholders to the point of prompting rebellion, threatening him with the loss of his crown altogether. In compromise, the King acceded to the barons’ demand that the King publicly acknowledge certain limits to royal power, as set forth in the Magna Carta. Among these limits was an acknowledgment that the crown could not defeat a widow’s dower rights. As a result, Magna Carta protected the widow’s dower as gifted to her at the commencement of the marriage and if the widow was not given dower at the outset of the marriage it gave her a one-third right to the land her husband held during his life. Thus, Magna Carta elevated dower beyond a mere custom of society and gave it the status of law.

3. The Statute of Merton, 1235

Royal interference was not the only worry facing a widow. Although a widow had a right to her dower, she came into actual possession of it only upon assignment by her deceased husband’s heir. While the Magna Carta enforced and protected dower from interference by the King, no such law warded off heirs. A widow should not have required court action to take
possession of her dower, but historical records show significant numbers of women in court advocating for just that.\textsuperscript{54} The Statute of Merton, created in 1235, helped to solve the problem of the odious heir or lord.\textsuperscript{55} It provided protection for widows wrongfully deforced of their dower.\textsuperscript{56} The Statute of Merton provided a legal remedy for the widow,\textsuperscript{57} allowing her to gain possession of her dower lands. The widow could also be given damages starting from the time that dower should have been given to her until she actually took possession.\textsuperscript{58} Lastly, the Statute of Merton allowed for the possibilities of a fine or punitive damages, “at the king’s pleasure,” on those who refused to give widows their dower, which provided incentive for the heir to assign dower as required, if only to avoid such fines.\textsuperscript{59} The Statute of Merton thus enhanced the estate of dower and furthered the principle that marriage created an obligation of support that continued beyond the grave.

4. \textit{Statute De Donis, 1285}

In the thirteenth century, the desire of landed families to ensure land given in marriage remained in the family led to the practice of making such grants in the form of such limited estates as frankmarriage\textsuperscript{60} and conditional fees.\textsuperscript{61} Such estates reverted to the grantor upon the failure of descendants in the grantee.\textsuperscript{62} Even the birth of descendants vested such interests only temporarily; the estate could be divested if the descendant failed to survive the grantee, in which case it would again revert to the grantor.\textsuperscript{63} Grantees found clever ways to thwart these intentions, primarily

\textsuperscript{54}. See Loengard, \textit{supra} note 17, at 59 (explaining the king’s court records show more than 250 entries related to dower from 1209 and 1210–1212 and approximately 500 entries related to dower from 1227–1230).
\textsuperscript{55}. See Loengard, \textit{supra} note 17, at 61.
\textsuperscript{56}. See id.
\textsuperscript{57}. \textit{Id.} at 67.
\textsuperscript{58}. \textit{Id.} at 67.
\textsuperscript{59}. \textit{Id.} at 67 (citing Statute of Merton 1235, 20 Henry III, c. 1 (Eng.)).
\textsuperscript{60}. An entailed estate in which the donor retains control of the land by refusing to accept feudal services from the donee (usu. the donor’s daughter) for three generations. If the donee’s issue fail in that time, the land returns to the donor. A donor who accepted homage (and the corresponding services arising from it) from the donee risked losing control of the land to a collateral heir. After three generations—a time considered sufficient to demonstrate that the line was well established—the donee’s heir could insist on paying homage; doing so transformed the estate into a fee simple. \textit{Frankmarriage}, \textit{BLACK’S LAW DICTIONARY} (10\textsuperscript{th} ed. 2014).
\textsuperscript{62}. \textit{Id.} at 132.
\textsuperscript{63}. \textit{Id.}; see also Haskins, \textit{supra} note 15, at 53–54.
by conveying the fee, once vested, by bargain and sale to a straw man, which destroyed the condition, and then immediately repurchasing it, absolutely free of the destroyed condition. This strategy was not without its costs, however; once the husband sold and repurchased the fee, dower would attach, where it could not attach to a conditional fee, which might still revert to the grantor. The compromise in this dispute came by way of the Statute De Donis Conditionalibus, which confirmed that a grant to A and the heirs of A’s body created a condition that could not disappear. Such a grant did not create a conditional fee, but a fee tail, in which the grantor retained a reversion in perpetuity. The state also, however, guaranteed a widow a dower interest in the land held in fee tail, despite its apparently conditional nature.

The enactment of the Statute De Donis clarified that a landholder’s intent to keep the land within his immediate bloodline manifested through utilizing the fee tail could not evade the land’s subjection to the widow’s dower right. As with the Magna Carta, landholders gained more control and power but increased their social obligations at the same time to ensure that the husband provided support for his widow.

5. The Statute of Uses, 1535

With the protection of dower codified under the Magna Carta and the interpretation and application of fee tails pursuant to Statute De Donis, the law of dower remained rather stable throughout the fourteenth and fifteenth century, as did much of English land law. Within that stability, however, innovation continued. Landowners wanted ever-greater control over who could hold family land in the future, and the legal system of land tenure (fee tail included) was simply too inflexible to provide it. Chancery, however, offered more sympathy, and under its jurisdiction, landowners developed “the use,” a conveyance that had the desired features of greater grantor control and less duties and taxes owed to the Crown. In particular, landowners utilized the use to permit the transfer of interests in land by will, which had never been permitted at law. This practice complicated and often frustrated the widow’s rights to dower in the land so

65. See BIANCALANA, supra note 40, at 53.
66. Id. at 54–60.
67. De Donis Conditionalibus 1285, 13 Edw. I, c. 1 (Eng.).
68. See Haskins, supra note 15, at 54.
69. See id. at 54.
70. Id.; see also Loengard, supra note 17, at 59.
71. See Haskins, supra note 15, at 55.
72. Id. at 54.
73. See FRANK GOODWIN, A TREATISE ON THE LAW OF REAL PROPERTY 125–27 (1905).
74. Id. at 130; see also Haskins, supra note 15, at 54 n.63.
If the husband held only a use in land, the widow could not take her dower from the use, because dower rights attached only to land of which the husband had been seized, and “seisin” was, by its very definition, a feature only of land to which the husband held legal title. In addition, if a husband held only a use, then someone else held the legal title; if that legal title-holder predeceased his own wife, then she would take dower in the lands in defiance of the widow of the holder of the use. A court would go to the legal title-holder after the death of the husband and require that the legal title-holder give the widow her rightful share to satisfy her dower, but while this action seemed consistent with dower and was clearly within the court’s power, it actually raised, for the first time, the possibility of the opposite problem. There were times when a husband might create a use for the benefit of his wife as well as himself. Under such a use, the widow remained a beneficiary of the use even after her husband died. If she also were able to recover dower from the legal title-holder, the consequences of a use had the ability to undermine the whole function of the use.

To plug the hole draining taxes from his coffer, Henry VIII enacted the Statute of Uses in 1535. First and foremost, the Statute of Uses eliminated the nominal transfer of legal title. Thus, if A conveyed Blackacre to B for the use of A and his heirs, then B’s interest went away and the equitable estate or the use, which was at one point protected by the courts of equity, merged with the legal estate A held. By merging the equitable title with the legal title, the Statute of Uses made land inalienable. Further, the merging of the title did not allow any landowner to escape the taxes imposed by the government.

But while the Statute of Uses had obviously profound consequences for landholders generally, it also changed some of the rights of married (or soon to be married) people. The Statute of Uses allowed spouses to enter into an antenuptial agreement called a “jointure,” which was a “settlement

75. See Emory Washburn, A Treatise on the American Law of Real Property 386 (3d ed. 1868). Also, this is to say nothing of the right that the feoffer’s widow had in the land to satisfy her dower. See also Goodwin, supra note 73, at 131.
76. See Washburn, supra note 75, at 369; see also Goodwin, supra note 73. “It [was] one of the complaints contained in the preamble to the Statute of Uses that by the operation of a use . . . wives [were deprived] of their dower.” Id.
77. See Washburn, supra note 75.
78. See Washburn, supra note 75 (explaining this is to say nothing of the right that the feoffer’s widow had in the land to satisfy her dower).
79. See Goodwin, supra note 73, at 131.
80. See Goodwin, supra note 73, at 130–33.
81. See generally Statute of Uses 1535, 27 Hen. VIII, c.10 (Eng.).
82. See Holcombe, supra note 13, at 11.
83. See Goodwin, supra note 73, at 132.
84. Id.
85. See Levin & Mulroney, supra note 64, at 340.
86. See Goodwin, supra note 73, at 130–31.
of land upon her at least for her own lifetime.” Jointure gave a wife immediate legal title in specified lands in the future and was a good deal for all parties involved. Unlike dower, jointure gave a wife the rights to the land for her lifetime rather than merely for her widowhood. Thus, jointure could be seen as a balancing of the status quo of the parties. The husband and his family wanted him to get married in order to have legitimate heirs; the wife’s family wanted to ensure that she was provided for and by agreeing to a certain portion of land for a lifetime, she likely agreed to less land than the one-third dower in exchange for the security that land for a lifetime brings. Further, the husband did not have to worry about the land he later acquired being part of dower, but he could focus on building wealth for his heirs. By the same token, the wife knew that she owned land for the rest of her life, regardless of whether she remarried or not.

Although the Statute of Uses abolished uses, it also gave bargaining power to the husband, wife, and their families. By codifying jointure and making it an alternative to dower, the Statute of Uses clothed the wife with the security of a life-long estate and the husband knowing he could consolidate his wealth for his heirs, because his responsibility beyond the grave was satisfied.

6. *The Statute of Wills, 1540*

The Statute of Uses was met with an uproar of protest from landowners, who once again found themselves unable to direct land where they wished after their death. Henry VIII therefore enacted the Statute of Wills five years later, finally permitting landowners to devise real property. This new testamentary power did not affect jointure. Though the Statute of Wills allowed a tenant in fee simple absolute to disinherit his

87. Turnipseed, *supra* note 9, at 744 (citing Holcombe, *supra* note 13, at 22); see also Jennifer Drobac, *The ‘Perfect’ Jointure: Its Formulation After the Statute of Uses*, 19 Cambrian L. Rev. 26, 26 (1988). According to the Statute of Uses, if the jointure was made on a woman during and not before the marriage, then the widow could elect whether to have her dower or her jointure. See Susan Staves, *Married Women’s Separate Property in England, 1660–1834*, at 104 (1990).


89. See id.

90. See generally id.

91. See generally id.

92. See generally id.

93. See id.


95. See id. at 21; see also A.R. Buck, *The Politics of Land Law in Tudor England, 1529–1540*, 11 J. of Legal Hist. 200, 212 (1990) (explaining the testamentary power over two-thirds of the land was given to those in knight service and full testamentary power over all land in socage).

heirs, “he could not prevent [his widow] from claiming her dower in all land of which he was seised at any time during coverture.”

The only way to bar a widow of her dower was by agreeing, and gaining her agreement, to a jointure. Despite the development of testamentary freedom under the law of England, the idea that such freedom included the freedom to leave a widow with nothing was never entertained. A married man has never had unlimited testamentary freedom; whether it was burdened by the king, his lord, or his wife, it has always been restricted as a matter of public policy. A married man was expected to support his wife during his lifetime and beyond the grave.

7. **The Statute of Distribution, 1670**

Through this time, the descriptions of what was owed to the widow, regardless of whether there was a will, addressed only her dower rights. The Statute of Distribution created an intestate share of the decedent’s personal property for the widow. If the decedent had descendants, then the widow received a one-third share of his tangible personal property; if the decedent did not have descendants, then the widow received a one-half share of his tangible personal property. Even though the Statute of Distribution did not apply if the decedent had written a will, it reflected the expectation that a certain portion of a decedent’s estate—real or personal—should go to his widow.


99. See Dubler, supra note 19.

100. See supra note 19 and accompanying text.

101. Id.

102. However, if she waived dower for jointure prior to the marriage, then she was only given those lands described in the jointure. See supra Sections I.A.5 The Statute of Uses, 1535 – I.A.6 The Statute of Wills.


B. Dower in America:

Dower came to America by way of the English colonies. In the late 1600s, most of the colonies “granted widows dower rights in personal[ property] as well as real[ property].” From the 17th century to the early 19th century, dower served its purpose, because land remained the primary way people held their wealth.

1. Married Women Exercise Property Rights During Lifetime

However, beginning in 1835, states began adopting Married Women’s Property Acts, which allowed married women to enter into contracts and control real and personal property. The notion that a husband was a woman’s keeper and that a woman did not have property rights was fading away. One implication of Married Women’s Property Acts was that dower was further protected, because married women had to waive their dower rights to the land—as selling land directly affected their dower. If a husband sold the land without the wife’s waiver of dower rights, the widow could come back years later and upset the sale. A widow’s signature on the deed to a bona fide purchaser protected that purchaser from a widow coming to him to claim her dower in the land sold.

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106. See Turnipseed, supra note 9, at 746 & n.68 (“This right was considered so important that it was included in the Magna Carta by King Henry III . . .”) (quoting Rick Geddes & Paul J. Zak, The Rule of One-Third, 31 J. LEGAL STUD. 119, 122 (2002)).


108. See Turnipseed, supra note 9, at 746 (citing MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 241 (1989)).


111. See id. & n.40; see also Richard H. Chused, Married Women’s Property Law: 1800–1850, 71 GEO. L. J. 1359, 1367 (1982–1983) (explaining unlike previously under coverture, when “a married woman’s real estate was subject to the management and control of her husband, and her personal property, once in the possession of her spouse, was permanently lost by the wife.”).

112. See Chused, supra note 111, at 1367–70.

113. See Vallario, supra note 110, at 528 n.41.

114. Dubler, supra note 19. Though, “[t]he ‘real fly in the ointment’ leading to dower’s decline, the story goes, was the specter that ‘[l]ong years after a transaction was over, the widow of some previous owner might rise up to haunt a buyer in good faith.’” Id. at 1671 (quoting LAWRENCE M. FREIDMAN, A HISTORY OF AMERICAN LAW 431 (2d ed. 1985)).

115. See id.
The right and power of the wife to say “no” to a husband’s unilateral conveyance of property titled in his name was paramount to protecting survivorship rights when the bulk of wealth in America was held as land.

2. The Industrial Revolution Brought Revolutionary Changes to Forms of Asset Holding

A husband’s testamentary freedom was limited with regard to his real property, but not his personal property. The Industrial Revolution in America, however, completely changed the landscape of wealth holding. It transitioned the country “from an agrarian society to an industrial nation, [and] the principal form of wealth changed from real property to other forms,” given the rise of industry and commerce. A reduction in the amount of wealth held as real property, however, meant a reduction in the security that dower once provided.

C. Traditional Elective Share Statutes

As society’s patterns of asset holding changed, dower became inadequate. As less and less wealth was held as real property, dower

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116. See id.

117. 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) (“[T]he inchoate veto which the wife maintained over all her husband’s transactions involving his real property was described as an impediment which ‘seriously complicate[d] the sale of realty.’”).

118. See Richard T. Bower & James B. McLaughlin, Jr., 1 WIGGINS WILLS & ADMINISTRATION OF ESTATES IN N.C. § 1.6 (4th ed. 2016) (explaining the historical understanding of man being able to dispose of his property as an inherent right, but there always being some government oversight of the freedom of testation).

119. See id. (“During the eighteenth and nineteenth centuries complete freedom of testamentary power was accepted, with few exceptions, as a basic principle of the common law.”).

120. See Vallario, supra note 110, at 527; see also Chused, supra note 111, at 1362 (explaining, “[d]uring the late eighteenth century subsistence farming was giving way to commercial production and home industry . . . .”); see also Clark, supra note 117, at 516.

121. See Chused, supra note 111, at 1362.

122. See Vallario, supra note 110, at 527; see Chused, supra note 111, at 1362; see also Clark, supra note 117, at 516.

123. See Alan Newman, Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative, 49 EMORY L. J. 487, 493–94 (2000) (“Prior to the advent of elective share statutes, the means by which that policy was implemented were the rights of dower and curtesy, under which a widow or widower generally was entitled to a life estate in part or all of the deceased spouse’s land. Because those rights encumbered titles and interfered with alienability of land, and failed to provide adequate protection to a
offered less security for the widow and therefore became less able to fulfill its purpose of providing financial security for the widow.124 Beginning in the 1930s, state legislatures took notice of husbands disinheriting their wives and responded by enacting what is now referred to as “Traditional Elective Share statutes” or “forced shares.” These early elective share statutes gave a surviving spouse an inchoate right to a share, usually one-third, of the decedent’s probate estate.126 Elective share statutes reached far beyond dower.127 By giving a surviving spouse a right not only to real property but to all of the decedent’s probate assets, these statutes ensured that widows got their fair share of all the decedent’s assets, whether real or personal property.128 A right that once attached only to land now expanded to all probate assets and better reflected the forms of asset holding in America.129

I. New York Takes a Stand

In 1929, New York was the first state to enact an elective share right that benefitted all surviving spouses, not just widows.130 The law went into effect in 1930,131 and then-Governor Franklin D. Roosevelt referred to it as a “new chapter in women’s rights.”132 New York’s elective share statute allowed a surviving spouse to elect against a decedent’s will and force the widow or widower whose deceased spouse’s wealth consisted in large part of personal property, most noncommunity-property states abolished dower and curtesy and replaced them with elective share statutes.

125. See Turnipseed, supra note 9, at 748.
126. Id.
128. See id.
129. See id.
130. See Dubler, supra note 19, at 1672 (showing that the New York law was known as the “Fearon Bill,” and the bill was signed into law by Governor Franklin Delano Roosevelt); see also Testatrix’s Devise of Husband’s Property Under the New York Decedent Estate Law, 45 YALE L. J. 1147, 1148 (1936) (“Section 18 of the N.Y. Decedent Estate Law, under which the husband in the instant case elected to take, was expressly passed to prevent disinheritance of a surviving spouse, a frequent occurrence under the prior system of dower . . . . [The statute] provides that where there is a will, a surviving spouse may take his or her intestate share up to one-half of the estate.”).
131. See Ariela R. Dubler, Wifely Behavior: A Legal History of Acting Married, 100 COLUM. L. REV. 957, 1001 (2002). “Legislatures did so, it appears, based solely on anecdotal evidence of two instances of disinheritance; no disinheritance studies had been conduct at that time.” Turnipseed, supra note 9, at 748.
132. Clark, supra note 117, at 517–18. Also, “the chairman of the drafting commission, Surrogate James A. Foley, [referred to it] ‘as the greatest form in the law of property of New York State in one hundred years.’” (citing Joseph A. Cox, The Right of Election, 32 ST. JOHN’S L. REV. 164, 171 (1958)).
estate to give him or her a fixed portion of the estate, mirroring the survivor’s rights to an intestate estate.\footnote{133} Although the New York statute was a step forward and other states followed suit by adopting elective share statutes that included all property in the decedent’s probate estate, the forms in which property was held in America began to change, yet again. The newer forms of holding were not part of any probate estate; instead property was often held in contract-based forms such as trusts, “life insurance [policies], retirement plans, bank accounts, and stock accounts,” all of which were held with the direction to pay the proceeds of the accounts to a beneficiary at death.\footnote{134} Because of this change of asset holding, the traditional elective share statutes no longer encompassed all of a decedent’s wealth.\footnote{135} These non-probate assets gave husbands the ability to “disinherit” wives in ways the law could do nothing about, without elaborate theories and fictions.\footnote{136} Indeed, “[t]he determined wife-hater [could] disinherit his spouse by making sure that there [was] no property in his probate estate against which her right of election [could] attach.”\footnote{137} Then, a widow would be “left holding an empty bag” with no financial means to help her survive.\footnote{138}

\textit{a. The Effects of Assets Held In Non-Probate Form on the Surviving Spouse’s Elective Share & the Judiciary’s “Fixes”}

Though states responded to changing asset patterns, such responses were slow to develop and often provided only partial solutions, leaving courts to hear the facts of more and more cases.\footnote{139} Even then, ensuring the fair distribution of assets was never certain and always inefficient, because cases were decided on a case-by-case basis.\footnote{140} In some states, courts took it upon themselves to save the surviving spouse, usually the woman, from complete disinheritance.\footnote{141} Courts used theories of illusory transfer or fraud to apply the elective share to property the decedent held in a revocable trust or had transferred by other means.\footnote{142} Generally, whether a

\begin{itemize}
\item \textit{See Dubler, supra note 19, at 1672.}
\item \textit{Clark, supra note 117, at 514.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See Gary, supra note 124, at 341.}
\item \textit{Unif. Probate Code § 2 refs. & annos. (amended 2010); see also Gary, supra note 10, at 19–20 (explaining, briefly, that “courts developed doctrines based on fraudulent or illusory transfers to subject a decedent’s nonprobate assets to the surviving spouse’s elective share rights”).}
\item \textit{See Gary, supra note 124, at 341.}
\item \textit{See id. at 340–41; see also Clark, supra note 117, at 518–19.}
\end{itemize}
court found a trust to be real or illusory depended on whether or not the settlor had made a good-faith divestment of his property. If the husband, the settlor, “had retained control, a good faith divestment had not occurred,” and then the trust was held to be illusory. By doing this, courts were simply enforcing the limits on a husband’s testamentary freedom that had always existed. Attempting to “right the wrong” of the husband, now deceased, required enormous judicial time and resources, because courts had to do it on a case-by-case basis. Judicial fixes also “lacked predictability and breadth,” because they “turn[ed] on the specific facts of each individual case.” By the late 1930s and early 1940s, changes in methods of wealth transfer at death had again left statutes inadequately protecting the surviving spouse by failing to include assets outside of the decedent’s probate estate.

D. 1946 Model Probate Code

In 1940, Professor Thomas E. Atkinson proposed that the Real Property, Probate, and Trust Law Section of the American Bar Association (“ABA”) create “uniformity in the law of succession.” In 1946, the Model Probate Code (“MPC”) was published by the ABA in an effort to create the desired uniformity.

1. The 1946 Model Probate Code’s Elective Share

The drafters of the MPC completely redesigned the elective share to include more than the probate estate to calculate the amount of the surviving spouse’s election against the decedent’s assets. This was much different than most states, which, up until then, chiefly limited the surviving spouse’s elective share to only probate assets. If the surviving spouse was “dissatisfied” with the devises in the will or the intestacy share, the surviving spouse could assert her right to the elective share.

143. Clark, supra note 117, at 519.
144. Id.
145. See Dubler, supra note 19, at 1667; see also Fredric L. Smith, Trusts—Descent and Distribution—Wife’s Forced Share and an Inter Vivos Trust, 60 Mich. L. Rev. 1197, 1198 (1962).
146. See Dubler, supra note 19, at 1667, 1708.
147. See Vallario, supra note 110, at 539.
148. See Clark, supra note 117, at 514.
150. Id. at 1038–39.
151. See infra Section I.D.1. The Model Probate Code’s Elective Share.
152. See generally Fratcher, supra note 149.
153. See id. at 1058.
The MPC included the first proposed elective share to be calculated against more than the decedent’s probate estate.\textsuperscript{154} The MPC introduced the concept of the “augmented net estate.”\textsuperscript{155} The augmented net estate included the value of the traditional probate estate in addition to all of the following that were given, without adequate consideration, to the surviving spouse or anyone else by the decedent: inter vivos gifts, gifts causa mortis, devises under the will, contracts that were triggered by the death of the decedent (payable on death accounts), life insurance proceeds, and annuities.\textsuperscript{156} The surviving spouse’s elective share percentage was based upon this total—the decedent’s augmented net estate.\textsuperscript{157}

After calculating the decedent’s augmented net estate, the surviving spouse’s percentage of the augmented net estate had to be determined by the prescribing provisions of the MPC’s elective share framework.\textsuperscript{158} The MPC elective share was a two-category system.\textsuperscript{159} Under the first category, the principal amount of the elective share was one-half of the decedent’s augmented net estate.\textsuperscript{160} The surviving spouse was in this category if any of the following were true: (1) the marriage produced a live child, (2) the marriage began before the decedent turned forty and lasted at least ten years, or (3) “the marriage lasted at least twenty years.”\textsuperscript{161} Under the second category, the principal amount of the elective share was one-third of the decedent’s augmented net estate.\textsuperscript{162} The surviving spouse was in this category “if the decedent [was] not survived by more than two children or their issue and an equal share with the children if he is.”\textsuperscript{163}

Additionally, in the event that the surviving spouse was devised any property in the will, electing her elective share did not automatically waive those devises, but the surviving spouse could renounce the provisions.\textsuperscript{164} However, if the surviving spouse did not renounce the provision, the value of the assets devised to her in those provisions was counted towards satisfying her elective share.\textsuperscript{165} Lastly, an inter vivos trust created by a decedent for the benefit of his surviving spouse was accounted for in determining whether the elective share was satisfied in order to ensure that the widow did not take a windfall.\textsuperscript{166}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{154} See id. at 1058–59.
\item \textsuperscript{155} See id. at 1059.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} See id. at 1059–60.
\item \textsuperscript{158} See Fratcher, supra note 149, at 1060.
\item \textsuperscript{159} Id. at 1058–59.
\item \textsuperscript{160} See id. at 1058.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} See id. at 1058–59.
\item \textsuperscript{164} See Fratcher, supra note 149, at 1060.
\item \textsuperscript{165} See id.
\item \textsuperscript{166} See id.
\end{itemize}
\end{footnotesize}
2. The 1946 Model Probate Code’s Elective Share Missed the Mark

The MPC was revolutionary in its elective share calculation.\footnote{167} Though some states had similar statutes to the MPC, no state actually adopted the MPC’s elective share.\footnote{168} The lack of adoption was due to the lack of clarity in the elective share, specifically, the judicial oversight that was required to decide whether there were “fraudulent transfers.”\footnote{169} The language was too vague, which would have required judicial interpretation.\footnote{170} Additionally, the ability of the surviving spouse to reclaim property that was given to a donee would have “impede[d] the marketability of property” similarly to dower.\footnote{171}

E. States Expanded Their Elective Share Statutes to Include Nonprobate Assets

Though no state adopted the MPC’s elective share, a few state legislatures began adopting more expansive elective share statutes, which better encompassed all of the decedent’s assets.\footnote{172} In 1947, the Pennsylvania legislature responded to the problem of husbands disinheriting their wives,\footnote{173} making it one of the first states to expand its elective share statute to include property outside the probate estate.\footnote{174} In 1965, New York followed suit and adopted a similar statute.\footnote{175} Under the Pennsylvania and New York statutes, if the decedent created a revocable or irrevocable trust in which he “retained a power of appointment, revocation, or consumption over the principal” then it could be treated as a part of the probate estate.\footnote{176} This gave the widow significant ability to claim her elective share against her late husband’s assets, regardless of whether her husband attempted to disinherit her by using nonprobate tools.\footnote{177}

\footnote{167} See supra Section I.D.1. The Model Probate Code’s Elective Share.
\footnote{169} See id. at 1008.
\footnote{170} See id.
\footnote{171} See id.
\footnote{172} See infra notes 173–77 and accompanying text.
\footnote{173} See Clark, supra note 117, at 525.
\footnote{174} See generally 20 PA. STAT. ANN. § 301.11 (1947)(2016).
\footnote{175} Clark, supra note 117, at 526–27; see also Gary, supra note 124, at 340–41 (explaining that the New York legislature was responding to the cases of decedents finding ways of disinheriting their surviving spouses).
\footnote{176} Clark, supra note 117, at 525–26.
\footnote{177} See id.
F. Critique of Early 1900s Elective Shares

While some states addressed the conflicts of the elective share in their own legislatures, others did not. Over time, concerns developed regarding the kinds of outcomes possible. The problems included both the possibility that the elective share could allow the surviving spouse too much, and that under other facts it might permit the surviving spouse too little. Attention to these concerns led to the realization that there were two separate categories of elective share problems. First, the state-by-state approach to elective share reform led to piecemeal solutions and to wide disparity among the states. The other major category of problems arose from the reliance on the probate estate as the basis for calculation of the share.

1. The State-By-State Approach

Some legislatures led efforts to create adequate elective shares, such as New York and Pennsylvania, while other legislatures were not as proactive. The lack of uniformity left scholars only to wonder and judges to create as they went along. The diversity among the states left questions unanswered, such as whether, under Pennsylvania law, a widow has any right regarding nonprobate transfers that took place prior to her marriage to the decedent, or, whether funds, held in contract form with a joint account holder other than the wife, could and should be accounted for purposes of calculating the elective share. The lack of uniformity among the states did not help to solve any of these problems but only led to more questions and confusion as many states handled probate, and specifically

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178. See supra Section I.E. States Expanded Their Elective Share Statutes to Include Nonprobate Assets.

179. See generally Eugene F. Scoles, Conflict of Laws and Nonbarrable Interests in Administration of Decedents’ Estates, 8 U. Fla. L. Rev. 151 (1955). “In the United States the nonbarrable interests vary widely among the states in regard to the methods used to give family protection, the amounts given, and the names employed to designate these interests.” Id. at 151.

180. See Framer supra note 149, at 1058.


182. See Gary, supra note 124, at 341; see also Vallario, supra note 110, at 536–37.

183. See Gary, supra note 124, at 340.

184. See supra Section I.E. States Expanded Their Elective Share Statutes to Include Nonprobate Assets.

185. See infra Part II Michigan Elective Share.

186. See supra Section II.C.1.a. The Effects of Assets Held In Non-Probate Form on the Surviving Spouse’s Elective Share & the Judiciary’s “Fixes,” (discussing illusory transfers).


188. Id. at 358.
the elective share, differently. The probate law, in general and the elective share, in particular, needed uniformity where “diversity [among the states] persist[ed].”

2. The Inaccurate Calculations as a Result of Using Only the Probate Estate

Insofar as the goal of the elective share was to guarantee the surviving spouse a percentage of all the decedent’s assets, then the “typical American forced-share statute[s],” which used only the probate estate to calculate the amount due, did not always yield accurate results, because the probate estate was rarely all of the decedent’s property. In any number of situations, using only the probate estate to calculate the elective share could allow the surviving spouse to take too much or take too little of the decedent’s property.

Under circumstances in which the husband did make necessary provisions for his wife in the form of a nonprobate transfer, such as naming her the beneficiary of a trust, the surviving spouse was more likely to be over-compensated as a result of the elective share being calculated only from the probate estate. Thus, the elective share would give the widow a windfall and thereby likely upset some of the decedent’s devises in his will, if he had one, to satisfy her elective share. In other words, the decedent’s testamentary intent would be wrongly undermined because, from a snapshot of his probate estate, it looked as if he disinherited his widow. However, a look at the big picture might make clear that the decedent had provided for her “adequately” (or better) in the nonprobate transfer, the trust.

Of course, the other side of the coin was possible, too. During his lifetime, the decedent could have wrapped all of his assets up in nonprobate transfers, and, in a state that did not have judicial doctrines such as illusory transfers, could leave the probate estate empty, which would, in turn, gut

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189. Fratcher, supra note 149, at 1038.
191. See Fratcher supra note 149, at 1058. Fratcher argued that “typical American force share statute[s] . . . fail[] to take account of the fact that husbands often make adequate provision[s] for their wives by nontestamentary means . . . .” Those “adequate provision[s]” were “tenancy by the entirety, inter vivos trusts, and life insurance.” Id. Fratcher was worried about the situations in which the surviving spouse, widow to be exact, was adequately provided for by nonprobate asset transfers, but could still assert her elective share right. Id.
192. See Fratcher, supra note 149, at 1058.
193. See id.
194. See id.
195. See id.
the elective share.\textsuperscript{196} The surviving spouse would be left pennies because of the way the assets were held.\textsuperscript{197} Regardless of whether the decedent provided for the surviving spouse in nonprobate transfers, not including such transfers in the calculation resulted in skewed results that left one side detrimentally affected to the other’s unjust enrichment.\textsuperscript{198}

The basic problem was that calculating the elective share using only the probate estate left out other paramount assets of the decedent.\textsuperscript{199} In the late 1950s and early 1960s, “a substantial number of married persons dispose[d] of their assets through will substitutes.”\textsuperscript{200} Those will substitutes included “joint ownership of realty, survivorship bank accounts, inter vivos trusts, . . . gifts causa mortis, contracts to will, [and] informal ‘escrow’ arrangements,”\textsuperscript{201} as well as life insurance, the most widely used will substitute.\textsuperscript{202} A national consumer survey from 1960 found that, “71% of all the men and 57% of all the women had some type of life insurance,”\textsuperscript{203} with the surviving spouse the party “most clearly benefit[ing]” from the life insurance.\textsuperscript{204} Given the change in asset holding, and specifically the prominent use of life insurance, using only the probate estate to calculate the elective share could potentially handicap the testamentary intent of the decedent for no reason, because the surviving spouse was adequately provided for by the life insurance policy that named her as the beneficiary.\textsuperscript{205} Failing to take into account one of the most widely used nonprobate assets, life insurance, painted an inaccurate picture of the assets of both the decedent and the surviving spouse.\textsuperscript{206} This allowed

\begin{thebibliography}{193}
\bibitem{196} See generally W.D. McDonald, 	extit{Fraud on the Widow’s Share} 10–15, 22 (1960).
\bibitem{197} See generally id.
\bibitem{198} See supra notes 190–97 and accompanying text.
\bibitem{200} Id. at 690.
\bibitem{201} Id. Plager explains that estates and trusts casebooks began emphasizing the significance of inter vivos arrangements rather than traditional probate transfers at death. \textit{Id.} n.38.
\bibitem{202} Plager, supra note 199, at 697 (“Of all the will substitutes, life insurance, with husbands providing 77% of the total benefits paid and wives receiving between 80% and 97% of these benefits, seems to be the most widely used and the one from which the surviving spouse most clearly benefits.”).
\bibitem{203} Id. at 695.
\bibitem{204} Id. at 697 (“Of all the will substitutes, life insurance, with husbands providing 77% of the total benefits paid and wives receiving between 80% and 97% of these benefits, seems to be the most widely used and the one from which the surviving spouse most clearly benefits.”).
\bibitem{205} See id.
\bibitem{206} Plager, supra note 199, at 690.
\end{thebibliography}
either the surviving spouse to take a windfall to the detriment of others or for the surviving spouse to be disinherited. 207

To be sure, in the 1950s and 1960s, most elective share statutes were not drafted adequately to navigate the waters of asset holding and ensure that the surviving spouse was given his or her fair share while also maintaining some degree of the decedent’s testamentary freedom. 208 Although a fundamental understanding in society existed that required the decedent, historically the husband, to provide support for the surviving spouse, historically the wife, the concept of testamentary freedom was a part of that balance. 209 Therefore, the exclusion of nonprobate assets undermined the historical balance governments tried to find, that perfect equilibrium of providing for the surviving spouse beyond the grave and some degree of testamentary freedom for the decedent. 210

G. The 1969 Uniform Probate Code

The original Uniform Probate Code (“1969 UPC”) was drafted to create a unified approach to probate law, and to encourage state probate codes to “reflect the normal desire of the owner of the wealth as to disposition of his property at death.” 211 The 1969 UPC drafters relied on “prevailing patterns in wills” to identify what most decedents—testate or not—“would probably want.” 212 As just one example, the commentary to § 2-102A: Share of the Spouse states, “[t]his section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed.” 213

The 1969 UPC had its origins in the Model Probate Code (“MPC”), which was created in 1946. 214 In response to the wide variety of probate laws in the 1960s, both the American Bar Association of Real Property, Probate, and Trust Law and the National Conference of Commissioners of Uniform State Laws (“ULC” or “Uniform Law Commission”) appointed the Special Committee on Revision of the Model Code and a Special Committee on the Uniform Probate Code, respectively, which together drafted the 1969 UPC. 215 The heavy revision of the MPC that resulted was

207. See supra notes 199–206 and accompanying text.
208. See supra notes 199–206 and accompanying text.
209. See supra Section LA.6. The Statute of Wills.
212. Id.
215. See id.; see also Fratcher, supra note 149, at 1039.
deemed appropriate and necessary due to the “widespread public demand for the modernization of [the] probate laws.”

1. The 1969 UPC Elective Share

At the very heart of the elective share lies the same purpose as lied behind its predecessor, dower: to protect a decedent’s surviving spouse from impoverishment, whether that impoverishment results from all property descending to the decedent’s heir, from the decedent conveying or devising property to others, or from the decedent holding the bulk of assets in nonprobate form. The 1969 UPC’s treatment of the elective share was highly influenced by elective share statutes in New York and Pennsylvania. As with forced-share regimes, the 1969 UPC defined the elective share as the right of the surviving spouse to elect against the will and to take a prescribed share of the decedent’s estate in lieu or in addition to the devises under the will. The 1969 UPC elective share entitled the surviving spouse to claim a traditional one-third, but it was calculated against the “augmented estate,” rather than the traditional net probate estate. Like its common law ancestor, dower, the surviving spouse’s right to the elective share arose at the commencement of the marriage. The surviving spouse was entitled to one-third of the augmented estate, regardless of whether a husband and a wife were married for one day or fifty years.

2. The 1969 UPC’s Augmented Estate

The 1969 UPC resolved problems regarding the proper share of the estate by using the “augmented estate,” a concept borrowed and revised

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216. See Uniform Probate Code Approved by Council, supra note 214, at 207.
217. See generally Langbein and Waggoner, supra note 190, at 303; see also Kurtz, supra note 168, at 982; Newman, supra note 123.
218. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 2014); 20 PA. CONS. STAT. § 2203 (2014); see also supra Section I.C. Traditional Elective Share Statutes.
219. See Ronald R. Volkmer, The Complicated World of the Electing Spouse: In re Estate of Myers and Recent Statutory Developments, 33 CREIGHTON L. REV. 121, 134 (1999) (explaining, “[t]he 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”) (some emphasis omitted) (citing Unif. Probate Code § 2-206(a)); 1 AMERICAN LAW INSTITUTE & AMERICAN BAR ASSOCIATION, UNIFORM PROBATE CODE PRACTICE MANUAL 110 (Richard V. Wellman ed., 2d ed. 1977) (“Unlike the rule existing in some jurisdictions, assertion of an elective share remedy under the Code does not involve the rejection of the decedent’s will.”).
221. See supra Section I.A. Dower’s Early History.
The 1969 UPC’s augmented estate concept was designed for two purposes: to protect a surviving spouse from disinheritance and to prevent the surviving spouse from taking an election when the surviving spouse received a “fair share” of decedent’s total wealth during decedent’s life or by nonprobate asset transfers upon the death of the decedent. It accomplished these goals by adding together the decedent’s net probate estate, “the value of certain lifetime transfers of property by the decedent during marriage to donees other than the surviving spouse,” and “the value of all property owned by the surviving spouse at decedent’s death and certain lifetime transfers of property by the surviving spouse during marriage to donees other than the decedent, to the extent the owned or transferred property [was] derived from the decedent.”

Essentially, the augmented estate included:

1. the decedent’s net probate estate;
2. the decedent’s nonprobate transfers during the marriage to persons other than the surviving spouse;
3. all property owned by the surviving spouse at the time of the decedent’s death; and
4. the surviving spouse’s nonprobate transfers made during the marriage to the extent that the transferred property derived from the decedent.

Through a complex formula, the augmented estate established both a floor-and-ceiling framework that included the value of nonprobate assets both as part of the value against which the share was calculated and as a way of accounting for whatever nonprobate assets the spouse already had received, whether inter vivos or by way of nonprobate transfers on death.

The goal was that the augmented estate put sufficient limits on both ends of the spectrum. By accounting for all of the assets included in the augmented estate, the 1969 UPC drafters aimed to strike the perfect balance between allowing the decedent to completely disinherit the surviving spouse and allowing the surviving spouse to take a windfall at the expense of the decedent’s testamentary freedom and the decedent’s other intended beneficiaries. The 1969 UPC’s augmented estate addressed the policy concern of “fraud on the spouse’s share” by including those nonprobate transfers made by the decedent during the marriage to

224. See supra Section I.D. 1946 Model Probate Code.
225. See Kurtz, supra note 168, at 1011.
226. Id. at 981.
227. Id. at 981–82.
230. See id.
231. See Kurtz, supra note 168, at 1015.
232. See id.
beneficiaries other than the spouse.\textsuperscript{233} By accounting for those nonprobate transfers, the augmented estate better encompassed all of the decedent’s assets to calculate the augmented estate of which the surviving spouse was entitled to a one-third share.\textsuperscript{234} In addition, the augmented estate addressed the policy concern of the surviving spouse taking a windfall by including those nonprobate transfers received by the spouse.\textsuperscript{235} For example, if the surviving spouse was the beneficiary of a life insurance policy, then that counted towards satisfying her elective share because it was a nonprobate transfer the surviving spouse acquired due to the decedent’s death.\textsuperscript{236} By including the surviving spouse’s assets and transfers of any property that the surviving spouse derived from the decedent, the augmented estate concept protects against the surviving spouse taking a windfall.\textsuperscript{237}

3. \textit{The 1969 UPC’s Augmented Estate’s Adoption}

The 1969 UPC’s augmented estate caught more traction than its predecessor, the MPC. The concept was adopted by seven of the forty-one common law states.\textsuperscript{238} Although New York and Pennsylvania did not adopt the 1969 UPC’s augmented estate, their elective share statutes were similar.\textsuperscript{239} Both of their statutes included nonprobate assets in the calculation for the surviving spouse’s elective share.

4. \textit{Critique of 1969 Elective Share}

The 1969 UPC expanded the assets included in the calculation of the elective share by creating the augmented estate, but failed to recognize fully a partnership theory of marriage\textsuperscript{240} by failing to include all nonprobate transfers\textsuperscript{241} and by calculating the elective share solely on how property was nominally titled.\textsuperscript{242} Thus, the decedent was still able to transfer assets outside the reach of the elective share and the surviving spouse was still able to collect more than her “fair share.”\textsuperscript{243}

\begin{itemize}
  \item \textsuperscript{234} \textit{Id}.
  \item \textsuperscript{236} \textit{Id}.
  \item \textsuperscript{237} \textit{Id}.
  \item \textsuperscript{239} \textit{Id.} at n.56.
  \item \textsuperscript{240} \textit{See infra} Section I.H. A New View of Marriage.
  \item \textsuperscript{242} \textit{Id}.
  \item \textsuperscript{243} \textit{Id}.
\end{itemize}
a. Assets Outside the Reach of the Augmented Estate

If a husband (later the decedent) wanted to disinherit his soon to be wife, he could. The 1969 augmented estate failed to include nonprobate transfers prior to the marriage and nonprobate transfers that were not in the form of a trust during the marriage.\footnote{244} Assets could be shielded from the elective share by both timing and by continued manipulation of asset forms.\footnote{245}

Only transfers during the marriage were included in the assets transferred by will substitutes to create the augmented estate.\footnote{246} As commentary to the 1969 UPC explains, this approach allowed a person to create a trust to benefit his children from his previous marriage.\footnote{247} Protecting these assets from a second spouse’s elective share required only that the trust be created before marriage.\footnote{248} Though the UPC commentary focused on the example of a father who is providing for his children, allowing the exclusion of nonprobate assets that were created prior to the marriage allowed for any person to disinherit a spouse simply by setting up any revocable trust prior to the marriage.\footnote{249} because this exemption did not require the beneficiaries of the exempted will substitutes to be descendants of the husband, decedent.\footnote{250} As long as the nonprobate transfer occurred before the marriage, the augmented estate did not calculate it as a part of the decedent’s assets, and its value therefore could not be used to augment the surviving spouse’s elective share.\footnote{251} As a result, a husband could still disinherit his wife.

Second, the augmented estate failed to include “any life insurance, accident insurance, joint annuit[ies], [and] pension [benefits] payable to a person other than the surviving spouse” in the decedent’s nonprobate assets.\footnote{252} The augmented estate’s failure to include these assets, specifically life insurance, left ample room for a decedent to disinherit a surviving spouse.\footnote{253} Although the 1969 UPC drafters included life insurance proceeds as a part of the amount that could satisfy the elective share, it did not count such proceeds as a part of the decedent’s assets if the

\footnote{244}{See Unif. Probate Code pt. 2, general cmt. at 30 (amended 2010).}
\footnote{245}{Id.}
\footnote{247}{Unif. Probate Code § 2-202 cmt. (amended 2010) (1969) (explaining that “[t]his makes it possible for a person to provide for children by a prior marriage, as by a revocable living trust, without concern that such provisions will be upset by later marriage”).}
\footnote{248}{Id.}
\footnote{249}{Id.}
\footnote{250}{Id.}
\footnote{251}{Id.}
\footnote{253}{See G. Michael Bridge, Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate, 74 Cornell L. Rev. 511, 512 (1989).}
life insurance policy beneficiary was someone other than the surviving spouse.\textsuperscript{254} UPC drafters explained that life insurance was not included in the decedent’s asset calculation “because it [was] not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse . . . .”\textsuperscript{255} However, by leaving this loophole open, drafters left a way for a spouse to substantially disinherit his surviving spouse.\textsuperscript{256} Life insurance policies, similar to wills, are revocable and ambulatory.\textsuperscript{257} As long as the decedent is paying the premiums for the life insurance policy, the asset is in the decedent’s control and in that sense, it is similar to a revocable trust.\textsuperscript{258} Generally, life insurance premiums are paid over a long period of time, but a husband could “purchas[e] a substantial single premium life insurance policy in favor of donees other than his spouse.”\textsuperscript{259} Thus, although the 1969 UPC commentary under § 2-202 observes that people did not normally purchase a life insurance policy to disinherit their spouses, the augmented estate’s inclusion of revocable trusts served as an encouragement to use life insurance for just that purpose.\textsuperscript{260} By excluding life insurance, the UPC drafters failed to fully protect the surviving spouse from disinheritance.\textsuperscript{261}

\textbf{b. Disproportionally Titled Assets}

Another weakness of the 1969 UPC augmented estate was that it took no account of how assets were acquired, only of how they were titled.\textsuperscript{262} For example, if the family home, worth $300,000, were titled in only the husband’s name, the surviving spouse, the widow, is entitled to only one-third of its worth, $100,000.\textsuperscript{265} The fact that both husband and wife worked

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\textsuperscript{254} Unif. Probate Code § 2-202 cmt.; see also Kurtz, supra note 168, at 1034–35.
\textsuperscript{256} See Bridge, supra note 253, at 512.
\textsuperscript{258} Bridge, supra note 253, at 523.
\textsuperscript{259} Bridge, supra note 253, at 524–25.
\textsuperscript{260} See c.f. Martin D. Begleiter, Grim Fairy Tales: Studies of Wicked Stepmothers, Poisoned Apples, and the Elective Share, 78 Alb. L. Rev. 521, 536–37, 545 (2014). The author explains that courts were not likely to go against a legislature that did not include the life insurance policy in the calculation of the augmented estate. Life insurance was a contract governed by the terms of the agreement. Thus, the 1969 UPC left a window open for spouses to disinherit the other spouse through the vehicle of life insurance policies.
\textsuperscript{261} “History proves that a person predisposed to disinherit his or her spouse will exploit even the smallest of loopholes.” Jeffrey S. Kinsler, The Unmerry Widow: Spousal Disinheritance and Life Insurance in North Carolina, 87 N.C. L. Rev. 1869, 1874 (2009).
\textsuperscript{262} See Waggoner, supra note 241, at 239.
in the marriage to pay for that home would not matter under the 1969-augmented estate.\textsuperscript{264}

The problem of disproportionately titled assets was exacerbated by the 1969 UPC’s required presumption that all property owned by the spouse at decedent’s death was derived from the decedent.\textsuperscript{265} The surviving spouse had the burden of proving that such property—even property titled entirely in her own name—was derived from “another source.”\textsuperscript{266} In both cases, the 1969 UPC’s augmented estate ignored the fact that property acquired during marriage could have derived from the spouse’s labor, independent wealth, or even at least partially from supportive home labor, such as raising children or managing the household.\textsuperscript{267}

\textbf{H. A New View of Marriage}

The 1969 augmented estate clearly presumed that the first spouse to die—statistically, usually the husband—was the “real” owner of all assets held by either spouse, regardless of title or how the assets were acquired.\textsuperscript{268} That view was consistent with general societal views of the time.\textsuperscript{269} Over the next few decades, however, those views changed dramatically. Civil rights movements reached deeply into the homes and personal lives of Americans, and the nation as a whole began to consider and recognize—however reluctantly—that women constituted a major component of family asset building.\textsuperscript{270} When wives took jobs outside the home themselves, their contribution to family wealth became directly measurable; but the increase in wives working outside the home also served to highlight the real economic value of the work done within the home, whether done by the wife, the husband, or by hired help.\textsuperscript{271} A new view of marriage arose, one

\textsuperscript{264} Id. See also infra Section I.H. A New View of Marriage.


\textsuperscript{266} See id. § 2-202(3)(iii).


\textsuperscript{268} Id.

\textsuperscript{269} See c.f. Gary D. Brown, Discrimination and Pay Disparities between White Men and Women, 101 Monthly Lab. Rev. 17 (1978) (The article by Brown describes the various ways that white men discriminated against women in both the workplace and the home. This discrimination of which Brown writes went beyond interaction and into the laws that shaped society, and the 1969 UPC echoed this societal understanding.).


\textsuperscript{271} Id. “The pre-1990 version of the elective share statute was inadequate to react to the changing structure of the American family. The family was no longer the traditional ‘Leave It To Beaver family.’ The modern family now consists of both spouses working. This demonstrates that the non-wage earning or the lesser wage earning spouse is as much of a contributor to the financial status of the marriage as is the higher wage earning spouse. This dual contributory nature gives rise to the increase in dual decision making, and the expectation that both the assets and responsibilities of the marriage will be shared.” Id. (internal citations omitted).
in which both spouses contributed—perhaps in very different ways, but still genuinely contributed—to the family’s wealth, as economic partners.  

As society changes so must the laws. Between 1969 and 1990, the Uniform Law Commissioners revised the UPC substantially, including the elective share. Changes were made to the elective share in response to a newly predominate view of marriage as a partnership. The redesigned elective share “sought the best of all worlds,” attempting to bring elective share law into line with the contemporary view of marriage as an economic partnership.

1. The Origin of the Partnership Theory of Marriage

The partnership theory of marriage has its roots in the principles of community property. Community property regimes understand that both partners, husband and wife, have an equal interest in both the real and personal property of the marriage. Both share the property, and when one dies the property is split in half between the heirs of the deceased and the surviving spouse. The partnership theory of marriage, while not the same as community property, recognizes that both husband and wife have rights to the property of the other as a product of their contributions to the marriage.

“Marriage as a partnership” is a modern concept born out of the community property framework. It first appeared in the 1963 Report of the Committee on Civil and Political Rights to the President’s Commission on the Status of Women, which was later published in a report to President Kennedy called, American Women (“The Report”). The Report featured statistical data regarding the status of American women in the early

274. Waggoner, supra note 241, at 224–25. “One of the main objectives of the project was to develop sensible probate rules for the altered and ever-changing climate of marital behavior.” Id. at 224–25. See also Newman, supra note 123, at 488–89.
276. Waggoner, supra note 241, at 236.
278. See id.
279. See Waggoner, supra note 241, at 236.
280. See generally Donahue, Jr., supra note 277. Community property is an ancient property system that developed in France and other parts of Europe. Id. at 61.
281. See UNIF. MARITAL PROP. ACT prefatory note (1984); see also Waggoner, supra note 241, at 236 n.38.
282. See Newman, supra note 123.
1960s. Relying on the findings, its drafters, prominent women, advocated for change to better women’s education, legal rights in society, and overall equality. Specifically, The Report called for equality in personal and property rights among married women. It addressed the National Conference of Commissioners on Uniform State Laws and others and advised them to “eliminate laws which impose legal disabilities on women” in an effort for equality. In the section explaining the landscape of the legal disabilities put on women, The Report referred to “[m]arriage as a partnership.” The Report stated further, “[d]uring marriage, each spouse should have a legally defined substantial right in the earnings of the other, in the real and personal property acquired through those earnings” and that “[s]uch a right should be legally recognized as surviving the marriage in the event of its termination by divorce, annulment, or death.” Lastly, The Report called for “[a]ppropriate legislation” to “protect the surviving spouse against improper alienation of property by the other.” What the women who wrote The Report advocated for was to change the very meaning of what it meant to be a married woman. Seeking to break down the walls between men and married women was seeking to change the very paradigm of marriage in America.

2. Theory of Partnership Theory of Marriage

Under partnership theory of marriage, each person in the marriage is considered an equal partner in the marital relationship. At its core, the partnership theory of marriage can be thought of as the “presumed intent of husbands and wives to pool their fortunes on an equal basis, [to] share and

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284. See id.
285. Among the women who were on the Commission was Eleanor Roosevelt. Id. at 85.
286. See id.
287. Id. at 47.
288. The Report also addressed State legislatures, the Council of State Governments, the American Law Institute, and State Commissions on the Status of Women. Id.
289. See The President’s Comm’n on the Status of Women, supra note 283, at 47.
290. See id.
291. See id.
292. Though written in the 1960s, the 1969 UPC elective share failed to adequately take into account the partnership theory of marriage and instead carried on the concept of dower as a one-third share in separate property.
293. The President’s Comm’n on the Status of Women, supra note 283, at 47.
294. See generally id.
296. Bloom, supra note 275, at 944.
The cornerstone of the “share and share alike” is that the “economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage,” including the “property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance).” The partnership theory of marriage was also “expressed in restitutionary terms, a return-of-contribution notion.” In a sense, it compensates the spouse for sacrifices that inure to the benefit of the relationship, i.e., “a recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost.”

3. The Rise of Partnership Theory of Marriage

Recognition of changes in the social construct of marriage led to significant changes and innovations in Uniform Laws. The Uniform Marital Property Act of 1983 (“UMPA”) was “a major vehicle for reform” toward better sharing of marital assets. It bolstered the concept of marriage as a partnership and the UMPA “function[ed] to recognize the respective contributions made by men and women during a marriage.” The drafters of the UMPA reiterated the change recognized in 1963 by quoting one paramount section of American Women in 1963,

Marriage is a partnership to which each spouse makes a different but equally important contribution. This fact has become increasingly recognized in the realities of American family living. While laws of other countries have reflected this trend, family laws in the United States have lagged behind. Accordingly, the Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and in the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive the marriage and [be] legally recognized in the event of its termination by annulment, divorce, or death. This policy should be appropriately
implemented by legislation which would safeguard either spouse against improper alienation of property by the other. The drafters of the UMPA observed that people and their marriages were more in line with this understanding of marriage — marriage as a partnership.

a. Divorce Law Recognizes Marriage as a Partnership

In the 1970s, divorce rates were on the rise, and a revolutionary change in divorce law emerged. Divorce evolved from a support-based economic resolution to a division-of-assets-based economic resolution. Both spouses came to be viewed as equal contributors to the marriage and to be seen as having ownership rights to the property. In lieu of alimony, which only provided an income stream to the spouse who relied upon the “breadwinner” during the marriage, the property was divided, and husband and wife each received ownership rights of various assets obtained throughout the marriage. Moving away from a support-based economic resolution to a division-of-assets-based economic resolution stressed the social change that had occurred, the new understanding of marriage being about two people contributing equally to the marriage.

b. Better Off Getting Divorced than Surviving Your Husband and Being Disinherited

By 1981, thirty-nine of the forty-two common law states had adopted partnership or “sharing principles into their divorce laws.” However, most states’ elective shares including the 1969 UPC’s augmented estate continued to be based on the model of one spouse, the husband, having to provide support for the other, the wife, after he died. The Uniform Marital Property Act (“UMPA”) called the UPC’s bluff. Though the 1969 UPC’s augmented estate “transform[ed] assets into a sharing mode in a meaningful way,” the UPC did not “go far enough to accommodate the perception of most laymen.” The 1969 augmented estate concept gave a

306. Id. (citing THE PRESIDENT’S COMM’N ON THE STATUS OF WOMEN, supra note 283, at 47).
307. “In the twenty years after those words much has changed regarding the institution of marriage . . .” Id.
308. “By 1979, only 42.77% [of marriages] terminated by death, while 57.23% ended [in divorce].” Id.
309. Id.
310. See Cheadle, supra note 304, at 1308–11.
311. Id.
313. Cheadle, supra note 304, at 1280 & n.63, 1284.
314. See supra Section I.G.3. The 1969 UPC’s Augmented Estate’s Adoption.
315. See supra Section I.H.3.a. Divorce Law Recognizes Marriage as a Partnership.
316. UNIF. MARITAL PROP. ACT prefatory note (1983).
widow the right to only one-third of the value of the augmented estate to satisfy her elective share, and it was calculate in a way that continued to presume the first spouse to die was the “real” property owner. In 1978, an empirical study indicated a widespread public preference for a distribution of an entire intestate estate to be given to the surviving spouse. Though this study asked the question only with regard to intestacy, it was colored by the undertone presumption that all the decedent owned, was, at some fundamental level, obtained only by virtue of the spouses’ mutual efforts and joint contributions. The elective share was out of touch with Americans’ understanding of marriage and what dying married meant.

As a result of these changing views of marriage, and particularly the changes in laws governing property at divorce, the UPC’s 1969 augmented estate came, by 1983, to leave a surviving spouse with fewer property rights by law than if the couple divorced. The UMPA aimed to establish shared property rights during the marriage, and in its trail, the drafters of the UPC finally restructured the surviving spouse’s elective share.

I. The 1990 UPC Incorporates the Partnership Theory of Marriage

When society’s core understanding of marriage and the implications of being married changed from one of the husband supporting the wife to one in which both contributed as equal partners, the way assets were categorized and divided upon death had to be re-tooled to align with the new views. The partnership theory of marriage ushered in a new framework for the surviving spouse’s elective share—a framework built on the concept of “marriage as a partnership,” in which both participants contributed to the accrual of wealth during the marriage.

319. See id.
320. See supra Section I.H. A New View of Marriage.
322. UNIF. MARITAL PROP. ACT prefatory note (1983).
323. See infra Section I.I.1. A New Calculation for the Surviving Spouse’s Elective Share.
drafters of the 1990 UPC expanded the assets of the augmented estate to better include all assets acquired during the marriage. 326

1. A New Calculation for the Surviving Spouse’s Elective Share

The new elective share, under the 1990 UPC, transformed the way the surviving spouse’s share was calculated and brought it up to date with the modern view of marriage. 327 Throwing traditional calculations aside 328 to reflect the contemporary view of marriage and property holding during marriage, the drafters of the UPC adopted the underlying principles of the partnership theory of marriage. 329 The drafters considered adopting a community property approach, but eventually decided to retain the more traditional framework in which the elective share is a percentage of the augmented estate the surviving spouse has a right to elect regardless of whether the decedent dies intestate or testate. 330

a. The 1990 Augmented Estate’s Sliding Scale to Determine the Elective Share

In lieu of adopting a complete community property approach, the drafters adopted an “accrual system” 331 or “approximation system” 332 based on a sliding scale. 333 Using the 1990 UPC’s sliding scale, the percentage of the augmented estate the surviving spouse was entitled to increased as the length of the marriage increased. 334 The scale reflected the idea that the longer a couple is married, the more likely their assets become intertwined and interdependent on one another. 335 Ergo, the scale, by increasing the size of the elective share based on the years married, reflects that the assets, though nominally titled in one spouse’s name, become more likely over time to have been procured as a result of both partners’ contributions. 336 As a result, the scale functions to balance the contributions of both partners

327. Id.
328. See supra Section I.A.2. The Magna Carta Codifies Dower, 1215–1225.
330. Id.
331. Waggoner, supra note 324, at 734–35.
332. Newman, supra note 123, at 491 (explaining that rather than actually accounting for all of the finances and how they were acquired throughout the marriage, which would take ample time and money, the 1990 UPC’s elective share assumes the longer the marriage, the more interrelated the spouses’ finances are).
335. See Waggoner, supra note 324, at 734–35.
in accruing the marital wealth.

The scale ranges from less than one year in which the surviving spouse is entitled to only the supplemental amount to fifteen years or greater in which the surviving spouse is entitled to one-half of the augmented estate. As a result, the surviving spouse was no longer shackled by the one-third provision of the elective share based upon an ancient support-based theory to save her from falling into poverty. Rather, the surviving spouse was seen to have contributed to and acquired property rights in the assets of the marriage, and, therefore, had a right to a portion of the marital estate.

b. The Expanded Augmented Estate

The paramount feature of the 1990 UPC augmented estate was its expansion to include assets that, under the 1969 UPC, had been expressly excluded from the calculation. Under the 1969 UPC, the augmented estate did not include any assets transferred before the marriage, regardless of what rights the decedent may have retained to distributions of income, or principal, to appoint to others, or to revoke entirely. Life and accident insurance policy proceeds, annuities, and pensions were excluded even if those rights were transferred during the marriage. By contrast, the property deemed to satisfy the elective share on the surviving spouse’s side included most of these same assets, which created a potential imbalance between the two sides of the ledger.

337. See Seidman, supra note 325, at 225.
338. See Waggoner, supra note 324, at 735 (citing Unif. Probate Code § 2-202 (amended 2010) (1990)) (explaining the supplemental amount of the 1990 elective share is $50,000. After calculating the assets in the surviving spouse’s possession and those that derived from the decedent but were gifted, the supplemental amount requires that the decedent’s estate give the difference between $50,000 and the surviving spouse’s assets. At its foundation, the supplemental amount has the historical underpinnings of dower as well as traditional elective share statutes by requiring the decedent’s assets to provide at least some support to the surviving spouse, but only if the surviving spouse’s assets do not amount to the UPC’s prescribed amount. Id. at 743.).
340. See supra Section I.A, Dower’s Early History.
341. See Unif. Probate Code art. II, pt. 2, general cmt (amended 2010) (1990) (explaining that “the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute—directly and indirectly, financially and nonfinancially—the fruits of which are distributable at divorce”) (internal citations omitted).
342. See Waggoner, supra note 324, at 735–37.
343. Id.
345. See id. at § 2-202.
346. See id.
The 1990 UPC cut through all of that by comprehending the augmented estate itself as composing all of both spouses’ assets. The augmented estate includes:

1. decedent’s net probate estate,
2. decedent’s nonprobate transfers to others,
3. decedent’s nonprobate transfers to spouse,
4. and surviving spouse’s property and nonprobate transfers to others.

The 1990 UPC is clear that transfers excepted from the augmented estate in 1969 were no longer included. Once this augmented estate “pot” is filled by all the assets derived from either spouse, the percentage due to the surviving spouse can be calculated. If both spouses held title to equivalent assets—or transferred sufficient assets to each other to equalize their estate—the maximum percentage of fifty percent would happen to reflect precisely the way the assets already were held at the death of the first to die. In a case like that, the elective share would be fifty percent, but it already would be satisfied because the surviving spouse would clearly already own that very fifty percent. In all other situations, the combination of the expanded augmented estate and the sliding scale would work to equalize the spouses’ estates post-mortem. In the event the surviving spouse was the wealthier, there is no requirement that any of those assets be surrendered to the estate of the first to die (to be distributed to other beneficiaries, for example); thus, although the 1990 UPC works as an estate equalization scheme, it errs, if at all, to the benefit of the surviving spouse.

Though the drafters have revised the surviving spouse’s elective share since its revolutionary restructuring in the 1990 UPC, those changes have only been to better tailor the partnership theory of marriage into its provisions of the surviving spouse’s elective share. While some advocate that the UPC’s elective share does not go far enough, the 1990

347. See id. at § 2-201.
348. See id. at § 2-202.
351. See id.
352. See id.
353. See id.
354. See id.
UPC elective share approach framework strives to echo the contemporary view of marriage. Marriage is no longer about a husband supporting his wife during his life and beyond the grave, but marriage is a partnership in which both partners own the fruit of the labor.

II. MICHIGAN ELECTIVE SHARE HISTORY

Michigan’s elective share reigns from another era. Unlike the Uniform Probate Code, Michigan’s elective share has not evolved or changed as society’s understanding of marriage has changed. Michigan’s elective share reflects a time when the country was still mostly an agrarian society and when marriage was not viewed as an equal economic partnership.

A. The Ordinance of the Northwest Territory, 1787

Michigan was formed out of the Northwest Territory. When the Northwest Territory was created in 1787, the laws of the territory were created by the Ordinance of the Northwest Territory (the “Ordinance”). Dower, under the Ordinance, was identical to traditional dower, a widow’s right to a one-third share in the real property for life, but also a one-third interest in the personal property of the decedent.

B. Limits Put on Dower, 1846

In 1846, the Michigan legislature limited dower to a one-third share of the real property of which the husband was seized during the marriage. Limits on dower were also enacted, including bans on dower if a wife joining in a conveyance with her husband, agreed to a jointure, or consented to a prenuptial agreement for pecuniary gain.

359. See id.
360. See supra Section I. The 1990 UPC Incorporates the Partnership Theory of Marriage.
361. Northwest Territory Ordinance (1787).
362. Id.
363. Id.; see also Debra A. Viles, Disabilities of Marriage: Gender and Law in Antebellum Michigan, 28 MICH. HIST. REV. 1, 17 (2002). This one-third share of the personal property is consistent with the 1670 Statute of Wills.
364. MICH. COMP. LAWS § 558.1 (1846).
365. Id. at § 558.13.
366. Id. at § 558.14. Jointure is the husband and the wife, prior to marriage, make an agreement that should the husband die first, the widow will have a life estate in those particular lands. See id.
367. Id. at § 558.16.
C. Probate Code of 1939

Unlike other states, Michigan did not respond to the gradual change in forms of asset holding from predominantly land to mostly personal property. In 1939, the Michigan legislature passed Act 288, the Probate Code of 1939. The Probate Code of 1939 mostly addressed procedure and made few substantive changes to Michigan law. The only changes to dower were procedural, including requirements for filing for dower and the effect of failing to file for dower. Neither of the changes altered the substantive law of dower.


The Revised Probate Code of 1979 (“RPC”), Public Act 642, was intended to reflect the UPC and substantial probate reform. Though the RPC did so with regard to much of Michigan’s probate law, the legislature failed to adopt the 1969 UPC’s augmented share concept when calculating the elective share. The Michigan legislature did adopt some of the 1969 UPC regarding sources by which the elective share could be satisfied, but did not expand the set of assets against which it could be calculated in the first place. Insofar as the 1969 UPC already tipped the balance slightly in favor of testamentary freedom (even while expanding the estate subject to the elective share), Michigan’s decision to adopt the provisions that limited the share, without also adopting the provisions that expanded the share, worked a double hardship on the surviving spouse.

1. The Michigan Legislature Failed to Adopt an Elective Share that Adequately Protected the Surviving Spouse from Disinheritance

First, Michigan did expand the elective to both widows and widowers. The new elective share allowed the surviving spouse to elect from one of three options: (1) abide by the will; (2) take a certain amount of the probate estate reduced by the value of property derived from any

371. Id. at § 558.92.
376. See id. at § 700.281.
nonprobate transfers or instruments as a result of the decedent’s death, \(^{379}\) or (3) if a widow and she had not given up her right to dower, then she could take her dower. \(^{380}\) Options (1) and (3) are straightforward, but option (2) requires calculations and an understanding of how the intestate share was calculated for the surviving spouse. \(^{381}\) Under the RPC, Option 2, it was necessary to calculate the surviving spouse’s intestate share. \(^{382}\) The intestate share ranged from the first $60,000 of the estate and one-half of the remainder to all of the probate estate. \(^{383}\) The numbers depended on whether the decedent died with any surviving parents or descendants. \(^{384}\)

The RPC’s elective share only partially protected the surviving spouse. \(^{385}\) While the RPC’s elective share certainly broadened the spousal elective share from just the widow to include the widower and allowed for the surviving spouse to elect a statutory share and not just dower, the RPC’s elective share still did not parallel the revolutionary concept of the augmented estate in the 1969 UPC. \(^{386}\) Michigan was not the only state to hesitate adopting the augmented estate, but there is no question that, in Michigan, none of the 1969 UPC’s protections for the surviving spouse were adopted. \(^{387}\) A party in Michigan who wished to disinherit his or her spouse could still do so through nonprobate transfers such as trusts, life insurance, or payable on death bank accounts. \(^{388}\)

2. The Michigan Legislature Offered No Reason for Its Failure to Adopt an Elective Share that Protected Its Citizens from Disinheritance

The Michigan legislature’s record keeping was not robust in 1979. It appears there were no records kept by the Michigan legislature throughout the process of adopting the RPC or, more specifically, drafting the elective share. \(^{389}\) Thus, scholars are left only to speculate about the policy reasons behind the RPC’s unique and arcane elective share, which appears to change only enough of the elective share calculations to punish the

\(^{379}\) Id. at § 700.282(b).

\(^{380}\) Id. at § 700.282(c).

\(^{381}\) See id. at § 700.282(b).

\(^{382}\) See id.

\(^{383}\) Id.


\(^{385}\) See id. at § 700.281.


\(^{387}\) L. William Schmidt, Jr., *Family Protection Under the Uniform Probate Code*, 50 Denv. L. J. 137, 146 (1973). It is especially interesting that Michigan dismissed the augmented estate completely, because Professor Richard V. Wellman, Chief Reporter for the UPC, was a professor at the University of Michigan Law School, and he was an essential part to the Michigan probate revision. Id. at 146 n.62.


\(^{389}\) See infra Section II.E.2. The Michigan Legislature Offers No Reason for Not Adopting the Proposed Elective Share Featuring the Augmented Estate.
surviving spouse for electing against the will.\textsuperscript{390} Indeed, a surviving spouse left out of a will would do far better never to offer the will for probate as required, because she then would at least receive her intestate share.\textsuperscript{391} To elect against the will would leave her with only one-half her intestate share, and that half would be further reduced by the value of any nonprobate transfers she did receive from the decedent.\textsuperscript{392} In light of the fact that the share itself was calculated only against the net probate estate, it is difficult to imagine a situation in which it would be to the spouse’s benefit to elect against the will.

\textbf{E. The Proposed Estate Settlement Act}

In 1988, the Probate and Estate Planning Section of the State Bar of Michigan attempted to rewrite Michigan’s probate code.\textsuperscript{393} The Estate Settlement Act ("ESA") was the result of seven years of drafting.\textsuperscript{394} The ESA attempted to bring Michigan probate law up to date.\textsuperscript{395} Robin D. Ferriby, the author of the introduction of the Estate Settlement Act and leader of efforts to push the bill through the legislature, explained, in the Michigan Bar Journal, the details of the ESA as passed by the Michigan legislature.\textsuperscript{396} Ferriby’s article makes clear that the Michigan legislature failed, much to his chagrin, to pass what he considered an essential part of the ESA, a revision of the elective share.\textsuperscript{397}

The Estate Settlement Act ("ESA") was proposed to replace the RPC in 1995.\textsuperscript{398} The Standing Committee on Code Procedure and Rules ("SCOCPAR")\textsuperscript{399} proposed the ESA after a year-long study of whether it was best to amend the RPC or "undertake a complete revision of the probate code."\textsuperscript{400} SCOCPAR decided to create a new probate code that was influenced by the 1990 UPC but also reflected “Michigan public policies reflected by the RPC that had been eroded due to modern estate planning techniques and forms of wealth transfer.”\textsuperscript{401} The subcommittees that led the efforts to compose the ESA with the 1990 UPC decided which,
if either, “accurately reflected Michigan public policy.”  

In the end, the 1990 UPC was highly favored, because it brought uniformity to Michigan probate practice.  

1. The Proposed Elective Share Included the Predominant Features of the 1990 UPC’s Elective Share, which Incorporated Partnership Theory of Marriage  

In lieu of preserving the RPC version of the elective share, the drafters proposed an elective share substantially similar to the 1990 UPC’s, including the introduction of an augmented estate to calculate the elective share. Further, the limited literature about the ESA focused extensively on the importance of the proposed elective share and its paramount role in the revision proposed by the ESA. The lead article of Michigan Probate and Estate Journal in the summer of 1995, stated that the most important change to Michigan’s probate code was the “adoption of an augmented estate approach [to] continue Michigan’s longstanding policy of protecting the surviving spouse.” Much like the drafters of the 1990 UPC, SCOCPAR proposed the augmented estate because it wanted the probate code to reflect the current understanding of marriage in society as a partnership. Quite simply, the RPC’s elective share was out of date because a will was not the only, let alone the predominant, tool used in estate planning. Thus, it was not enough to have an elective share that addressed only the hazard a surviving spouse being left out of a decedent’s will, but also of inter vivos trusts and other nonprobate transfers. The drafters of the ESA realized that modern estate planning now included the use of “life insurance, living trusts[,] and other estate planning vehicles,” and the new elective share, in order to fulfill its purpose, required careful consideration of all estate planning tools.  

The proposed elective share took into consideration all of the aforementioned tools individuals used to plan for the distribution of their 

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402. *Id.*  
403. *Id.*  
409. Benko & Schoder, *supra* note 398, at 8; *see also supra* Section I.H. Partnership Theory of Marriage.  
411. *Id.*  
412. *Id.*
The proposed elective share functioned exactly as 1990 UPC elective share.\textsuperscript{413} The ESA elective share was designed to balance two rights: the right of the surviving spouse to be protected from disinheritance and the right of testamentary freedom for the decedent.\textsuperscript{415} Under the ESA elective share, the surviving spouse would have a right to an amount equal to a percentage of the augmented estate.\textsuperscript{416} That percentage increased as the length of the marriage increased.\textsuperscript{417} Exactly the same as the 1990 UPC elective share, the amount of the augmented estate to which the surviving spouse had a right was based upon the years married.\textsuperscript{418} The sliding scale that was used to calculate the elective share reflected that the longer the marriage lasted, the more the marital assets are intertwined and both partners have a property right in property titled in the other’s name.\textsuperscript{419} Like the 1990 UPC elective share, at fifteen years, the surviving spouse’s amount to the elective share maxed out at fifty percent of the augmented estate.\textsuperscript{420} This fifty percent by the fifteenth year of marriage represents that, at this time, both partners were understood to have an equal property interest in all of the marital assets—which created the augmented estate.\textsuperscript{421}

Exactly the same as the 1990 UPC augmented estate, the ESA augmented estate adopted and manifested the modern view of marriage. As the 1990 UPC augmented estate included more than just probate assets, so did the ESA.\textsuperscript{422} A replica of the 1990 UPC augmented estate, the ESA augmented estate included:

1. decedent’s net probate estate,
2. decedent’s nonprobate transfers to others,
3. decedent’s nonprobate transfers to spouse,
4. and surviving spouse’s property and nonprobate transfers to others.\textsuperscript{424}

\textsuperscript{413} Id.
\textsuperscript{415} Ferriby, supra note 393, at 1305.
\textsuperscript{416} Id.
\textsuperscript{417} Id.; see also UNIF. PROBATE CODE § 2-202 (amended 2010) (1990).
\textsuperscript{418} Ferriby, supra note 393, at 1305; see also UNIF. PROBATE CODE § 2-202 (amended 2010) (1990).
\textsuperscript{419} Ferriby, supra note 393, at 1305; see also UNIF. PROBATE CODE § 2-202 (amended 2010) (1990).
\textsuperscript{421} See id. at § 2-203 (1990).
\textsuperscript{422} See supra Section I.H. A New View of Marriage (discussing partnership theory of marriage); see also supra Section I.I.1. A New Calculation for the Surviving Spouse’s Elective Share (discussing UPC Augmented estate).
\textsuperscript{423} Ferriby, supra note 393, at 1305; see also UNIF. PROBATE CODE § 2-202 (amended 2010) (1990).
\textsuperscript{424} Ferriby, supra note 393, at 1305; see also UNIF. PROBATE CODE § 2-202 (amended 2010) (1990).
This expansive and all-encompassing augmented estate better reflected all of the assets of the marriage. As discussed above in the 1990 UPC augmented estate, this augmented estate framework would have drastically helped to better protect the surviving spouse from disinheriance.\(^{425}\)

2. The Michigan Legislature Offers No Reason for Not Adopting the Proposed Elective Share Featuring the Augmented Estate.

The Senate Bill Analysis does not offer any reason, explanation, or policy to justify its decision to postpone the experts’ proposal of the new elective share, for what was thought to be the most essential part of the whole rewrite of the probate code.\(^{426}\) Oddly, perhaps ironically, but certainly sadly, the Senate Bill Analysis does note “contemporary estate planning techniques rely heavily on the use of revocable trusts, rather than wills.”\(^{427}\) Based upon this comment, the Senate was aware of the importance of revising and extending the Michigan’s probate laws to address the changed landscape of estate planning, but the Senate failed to pass a law that would better protect its citizens. What is more disconcerting than the decision to not include the proposed elective share is the lack of reasoning or explanation given by the legislature.\(^{428}\) The only thing that the people of Michigan were left and continue to have is a new probate code with a flashy acronym as a name, but with no substantial protections for a surviving spouse who is clearly disinherited by his or her deceased spouse.\(^{429}\)

F. An EPIC Failure

The proposed Estate Settlement Act was adopted, as amended by the Senate,\(^{430}\) and named the Estates and Protected Individuals Code (“EPIC”) in 1998 and went into effect in April 2000.\(^{431}\) In respect to the surviving spouse’s elective share, EPIC is misnamed; the legislature utterly failed to protect a particular class of citizens in a way that it is disheartening and irresponsible.

\(^{425}\) See supra Section I.1.1. A New Calculation for the Surviving Spouse’s Elective Share (discussing 1990 UPC Augmented Estate).

\(^{426}\) See supra Section II.E.1. The Proposed Elective Share Included the Predominant Features of the 1990 UPC’s Elective Share, which Incorporated Partnership Theory of Marriage.


\(^{428}\) See infra note 430 and accompanying text.


\(^{430}\) See id.

Surprisingly, very few scholars have discussed Michigan’s horrendous elective share or its failure to protect the surviving spouse from complete disinherita...n. As noted above, after the Legislature deferred consideration of the proposed elective share, Robin D. Ferriby noted the importance of the augmented estate in order to address the public policy concern that the 1979 elective share no longer fulfilled one of its main purposes: to protect the surviving spouse from disinherita...n. Essentially, the Michigan’s elective share, he argues, is “based on the false assumption that probate proceedings are the common method of transferring wealth at death.” Other...n’s elective share, have advocated for Michigan to adopt the UPC’s augmented estate approach.

Perhaps the reason so few scholars have written about Michigan’s arcane elective share is because the Michigan Legislature has not provided any explanation for retaining the 1979 version, which was not consistent with any state when it was created. Furthermore, the lack of explanation from the Michigan Legislature goes beyond the 1979 version: there is no comment, legislative history, or report that offers any explanation of the changes or lack of changes to dower and the elective share.

Even when the Michigan Court of Appeals heard Soltis v. First of America Bank-Muskegon, a case in which the petitioner alleged he was wrongly withheld from being the beneficiary of an inter vivos trust, no policy rationale for Michigan’s system was offered. At one point, petitioner was named the beneficiary, but his late wife switched the beneficiary prior to her death without telling him. Grasping for straws in Michigan probate court, petitioner argued that the trust should be included in the decedent’s estate in order to satisfy his election as surviving spouse. After the court explained the surviving spouse’s election options from the statute, the court rejected petitioner’s argument, explaining that the Legislature could have included the augmented estate when it revised...n.

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433. Ferriby, supra note 393.
434. Ferriby, supra note 393, at 1305.
436. There is no Bill Analysis or Legislative minutes that explain why the Legislature decided to act against its citizens’ best interest.
438. See id. at 149.
439. See id. at 149.
440. See id. at 150.
the probate code, but it chose not to. If it had, the augmented estate would have included the inter vivos trust, because the decedent had control of it up until her death. After explaining the ability of an inter vivos trust to “circumvent[] the purpose of the spousal election provision,” the court does not even try to explain the legislature’s policy for retaining the outdated spousal share, one that allows decedents to circumvent the system.

The court simply states, “we must . . . follow the dictates of our Legislature . . .” The court may as well have said, “It is what it is.”

When the Michigan Legislature has failed to give a policy reason, the Michigan Court of Appeals cannot point to or speculate to any policy reason, and scholars can only regret the Legislature’s decision and discuss what the Legislature should have done. Any quest for a “reason” ends only with more questions and a lack of confidence in the Legislature. One is left to wonder what Michigan’s public policy is when it comes to the elective share. One fears it may be the “Tradesman’s classic reply, ‘There’s no reason for it, it’s just our policy.’” By its lack of action, and its lack of explanation, not only has the Michigan Legislature failed to pass laws to protect its citizens, but it has failed to explain its refusal to accept progressive changes that are clearly consistent with public policy.

G. Bye-Bye, Dower

Finally, dower was abolished in Michigan. In a lame duck session, the Michigan Legislature finally passed a bill to abolish dower; Governor Rick Snyder signed the bill into law on December 28, 2016. It was not because the Michigan Legislature woke up and saw what a terrible elective share the state had. The change was a consequence of the landmark United States Supreme Court decision, Obergefell v. Hodges, which states that a prohibition on same-sex marriage is unconstitutional because it violates Equal Protection and the Due Process Clause. As a result of Obergefell, Michigan’s dower statute would have been deemed

442.  Soltis, 513 N.W.2d at 151.
443.  See id. at 151.
444.  Id.
445.  Id.
446.  See id.
448.  See supra Section II.E. The Proposed Estate Settlement Act.
451.  See supra Section II.F. An EPIC Failure.
unconstitutional because it allowed dower for a surviving female spouse and not a surviving male spouse.⁴⁵³ Dower was abolished for a great reason,⁴⁵⁴ but the reason for its abolishment still does not address what is wrong with Michigan’s abysmal elective share and its lack of sound policy.⁴⁵⁵

CONCLUSION

Being unique is not always a good thing. Michigan’s elective share is unique, but it signifies only a singular refusal to respond to societal changes⁴⁵⁶ that should have served as a catalyst to adopt a better elective share. Historically, and specifically to dower, as society changes, it is the duty of the law to adapt to those changes.⁴⁵⁷ This paradigm flows throughout the history of the elective share, and before that, dower.⁴⁵⁸ The history of dower tells the story of the struggle and the search for balance between the duty owed to make good on a marital obligation and the decedent’s testamentary freedom.⁴⁵⁹ The quest for balancing these two, despite the struggle, is still the job of the lawmakers.

The Michigan Legislature not only should act, but must act, in order to fulfill its responsibilities to the citizens of Michigan.

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