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TESTAMENTARY SUBSTITUTES— A TIME FOR STATUTORY CLARIFICATION

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EDITORS' SYNOPSIS: Elective share statutes subjecting inter vivos transfers with retained powers or interests to the surviving spouse's right of election are deceptively simple and frequently do not adequately protect the spouse from disinheritance. This article discusses the application of these statutes to trusts, contracts and custodian accounts. Statutory intricacies are examined and guidelines for legislative reform to correct fundamental deficiencies and clarify ambiguities are proposed. Relevant portions of the federal estate tax law that have objectives in common with elective share statutes are also analyzed. The article offers meaningful ideas that will prove helpful in dealing with testamentary substitutes.

Most legal systems have provided a degree of economic protection for a surviving spouse in the face of a decedent's efforts at disinheritance.¹ In the United States today, virtually every noncommunity

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¹History shows that, at least as early as the Talmudic period, Jewish law provided a widow with an indefeasible right to continued maintenance and payment of the amount provided in the "ketubah." See 16 Encyclopaedia Judaica 491-495 (1971). The ketubah guarantees a wife upon her husband's death a minimum of two hundred "zuz" if she had not been married previously and one hundred "zuz" if she had been widowed or divorced. See Babylonian Talmud, Seder Nashim II: Tractate Kethuboth 51a at 293 (Soncino ed. 1936); 10 Encyclopaedia Judaica 927 (1971). Civil law systems generally protect the surviving spouse, as well as children and sometimes even parents from disinheritance. For example, in France, the doctrine of "legitime," which originated during the thirteenth century, gives the surviving spouse, issue and parents an interest in inter vivos and testamentary transfers of property. 3 J. Brissaud, A History of French Private Law § 516 (1968). See Simes, Protecting the Surviving Spouse by Restraints on the Dead Hand, 26 U. Cin. L. Rev. 1, 2 (1957) (hereafter cited as Simes). Dower, which provided some protection for the widow, is known to have

property state has forced share or similar legislation² that guarantees a surviving spouse a share in the assets owned by the deceased spouse at death.³ Adoption of such legislation during the past century was motivated by a desire to provide greater financial security for surviving spouses and to compensate spouses for their contributions to their marriage.⁴

As a general rule, however, forced share legislation can be circumvented because spouses have the right until death to transfer property to a third person as a gift, usually free of any claim by their mates. Thus, for example, a husband⁵ may transfer by lifetime gift all of his assets to another person, effectively disinheriting his widow.⁶ Courts have at-

existed in England in Anglo-Saxon times when it was considered a gift and developed into an estate arising by operation of law during the twelfth century. See generally W. Macdonald, *Fraud on the Widow's Share* 279-289 (hereafter cited as Macdonald) (1960); Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 Iowa L. Rev. 981, 982-988 (1977) (hereafter cited as Kurtz); Cox, *The Right of Election*, 32 St. John's L. Rev. 164 (1958); Cahn, *Restraints on Disinheritance*, 85 U. Pa. L. Rev. 139, 139-141 (1936).

²See Unif. Probate Code (UPC) art. 2, pt. 2, 8 U.L.A. 73 general comment (1983); R. Campfield, *Estate Planning and Drafting* § 2525, at 85 (1984); E. Clark, L. Lusky & A. Murphy, *Gratuitous Transfers: Wills, Intestate Succession, Trusts, Gifts, Future Interests, and Estate and Gift Taxation* 122 (3d ed. 1985); Kurtz at 988-990 (cited in note 1). These statutes—as well as legislation in community property states—protect both husbands and wives. This article will deal with the rights of the surviving spouse only in noncommunity property states.

³The only jurisdiction that allows a decedent to disinherit a surviving spouse is Georgia, under Ga. Code Ann. § 53-2-9 (1982). Instead of a statutory entitlement, Georgia only affords a surviving spouse "one year's maintenance." Ga. Code Ann. § 53-5-2 (1982 & Supp. 1987). See generally Note, *Preventing Spousal Disinheritance in Georgia*, 19 Ga. L. Rev. 427 (1985); Note, *The Protection of the Surviving Spouse against Disinheritance: A Search for Georgia Reform*, 9 Ga. L. Rev. 946 (1975). The Supreme Court of South Carolina recently declared that state's dower statute unconstitutional in *Boan v. Watson*, 316 S.E.2d 401 (1984); the legislature subsequently repealed that provision. S.C. Code Ann. §§ 21-5-110 to 190 (Law. Co-op. Supp. 1987) (repealed 1985). Instead of adopting the augmented estate concept of the UPC as had been recommended, see LeBlanc, *The Proposed South Carolina Probate Code*, 36 S. C. L. Rev. 511 (1985), it enacted new legislation, effective July 1, 1987, giving the surviving spouse a right to elect one-third of the decedent's probate estate, which includes property passing under the decedent's will and by intestacy. S.C. Code Ann. §§ 62-2-201, -202, -205 (Law. Co-op. Supp. 1987).

⁴For example, in New York the forced share statute became effective on September 1, 1930, and replaced dower prospectively in order to provide greater protection for widows. N.Y. Dec. Est. Law § 18, N.Y. Sess. Laws 1929, Ch. 229, § 21. As the report of the Foley Commission, which recommended the forced share legislation, stated: "There is a glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death." N.Y. Legis. Doc. No. 70, *Combined Reports of the Commission to Investigate Defects in the Laws of Estates* 12 (1928). And Governor Franklin D. Roosevelt hailed section 18 as "a new charter of women's rights." See Third Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates (hereafter cited as Report), *Right of the Surviving Spouse with Reference to Non-Testamentary Transfers*, N.Y. Rept. No. 1.5C, at 117 (1964). For a discussion of the background of the adoption of N.Y. Dec. Est. Law § 18, see Barry, *Modernizing the Law of Decedents' Estates*, 16 Va. L. Rev. 107 (1929); Twyeffort, *The New Decedent Estate Law of New York*, 6 N.Y.U. L. Rev. 377 (1929). The Report, which recommended the replacement of

tempted to deal with such evasion under a variety of legal theories by including certain lifetime transfers—such as Totten trusts, revocable trusts and joint tenancies—as part of a decedent's estate for purposes of the surviving spouse's right of election.⁷ These judicial efforts, however, have proved to be unsatisfactory,⁸ as have kindred legislative attempts

Dec. Est. Law § 18, was "made upon the assumption that the policy of the State of New York continues to be to protect the surviving spouse—especially the surviving widow." Report at 118 n.13. Only recently did New York expand the surviving spouse's forced share by granting a right to elect against foreign as well as New York real property. N.Y. Est. Powers & Trusts Law (EPTL) § 5-1.1(d)(8) (McKinney Supp. 1988). See also W. Macdonald at 24-25, 161-162 (cited in note 1); Langbein & Waggoner, Redesigning the Spouse's Forced Share, 22 Real Prop. Prob. & Tr. J. 303, 306-310 (1987) (hereafter cited as Langbein & Waggoner). However, not all commentators agree that expansion of the surviving spouse's right of election is necessary or desirable. See, for example, Clark, The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms, 2 Conn. L. Rev. 513 (1970) (hereafter cited as Clark); Plager, The Spouse's Nonbarrable Share: A Solution in Search of a Problem, 33 U. Chi. L. Rev. 681 (1966).

⁵Because women historically have been the focus of protection and because statistically wives more often survive their husbands, the masculine pronoun is sometimes used herein to refer to the first spouse to die and the feminine to refer to the surviving spouse.

⁶This was not true under common law dower, which generally gave the widow a life interest in one-third of any real property of which her husband was seized at any time during their marriage. Thus, the husband had no power to transfer real property to a third party free of his wife's dower rights. See Kurtz at 982-988 (cited in note 1). Common law dower, however, provides the major form of protection in only seven states and has largely been replaced with forced or elective share legislation that gives the surviving spouse a right to a fractional share of the decedent's estate, both real and personal. Thirty-four states and the District of Columbia have enacted such forced share legislation. See 7 R. Powell & P. Rohan, Powell on Real Property ¶ 971.9 (1988) (hereafter cited as Powell & Rohan) (inclusion of South Carolina as a state that provides dower appears to be erroneous because its dower law was declared unconstitutional and was subsequently repealed (see note 3)). Today, under the Uniform Probate Code, some restrictions have been imposed on certain outright lifetime gifts of property that are viewed as transfers in contemplation of death. The surviving spouse has a right to elect against any transfers made by the decedent within two years of death "to the extent that the aggregate transfers to any one donee in either of the years exceeded \$3,000." UPC § 2-202(1)(iv), 8 U.L.A. 76 (1983). Pennsylvania has an analogous provision except that it applies only to transfers made within one year of death. 20 Pa. Cons. Stat. Ann. § 2203(a)(6) (Purdon Supp. 1988). In New York, the surviving spouse may elect against a lifetime gift only if it is a gift causa mortis. See EPTL § 5-1.1(b)(1)(A) (McKinney 1981).

⁷The history of judicial attempts to protect the surviving spouse from disinheritance by lifetime transfers and the failure of the vast majority of these judicial efforts to accomplish the desired result have been discussed extensively. See, for example, Report at 119-130 (cited in note 4); W. Macdonald at 67-144 (cited in note 1); Kurtz at 993-1006 (cited in note 1); Clark at 518-522 (cited in note 4); Powers, Illusory Transfers and Section 18, 32 St. John's L. Rev. 193 (1958).

⁸The experience in New York is representative. The original forced share statutes, such as New York's Decedent Estate Law § 18 (1929) (the predecessor to EPTL § 5-1.1), provided for a right of election only against property in decedent's probate estate—property to which the decedent alone held legal title—and not against any inter vivos transfers, such as revocable trusts or joint tenancies, over which the decedent retained certain powers or control. The dilemma often confronting the courts was how to extend the surviving spouse's right of election to such transfers without invalidating inter vivos dispositions that did not violate the Statute of Wills. See Report at 118-122 (cited in note 4); Arenson, Surviving Spouse's

based on subjective tests.⁹ As a result, some states have enacted statutes that establish objective standards to determine whether a lifetime transfer will be deemed a testamentary substitute¹⁰ and therefore includible in the estate for purposes of the surviving spouse's right to elect a forced share.¹¹ Pennsylvania¹² and New York¹³ were among the earliest states to provide such statutory protection, and their legislation¹⁴ served as models for the Uniform Probate Code.¹⁵

Right of Election and Its Application to Testamentary Substitutes, 20 N.Y.L.F. 1, 4-7 (1974); Schneider & Landesman, "Life, Liberty—and Dower" Disinheritance of the Spouse in New York, 19 N.Y.U. L. Rev. 343 (1941-42). The courts in New York suggested three different tests to determine whether a lifetime transfer was subject to the right of election: (i) the retention of control test, in *Newman v. Dore*, 9 N.E.2d 966 (NY 1937); (ii) the motive for the transfer test, in *Bodner v. Feit*, 286 N.Y.S. 814 (NY App. Div. 1936); and (iii) the reality of the transfer test, in *In re Halpern*, 100 N.E.2d 120 (NY 1951)—with each test requiring a subjective evaluation of the facts to determine whether it was satisfied. The inconsistency of these approaches combined with frequently inequitable results spurred the New York legislature to seek statutory reform. See Report at 122 (cited in note 4). As the Bennett Commission—the body appointed to propose a new statutory solution—stated: "The individual decision reached in the individual state is not important. What is important is . . . that the case law has been confusing and that the expectancy of the surviving spouse has not been adequately protected." Report at 123 (cited in note 4).

⁹Report at 130-131 (cited in note 4); Kurtz at 1006-1011 (cited in note 1).

¹⁰As used in this article, the term "testamentary substitute" refers to any lifetime transfer that is subject to the surviving spouse's right of election.

¹¹See, for example, Report, Recommendations to the Legislature, at 24 (the proposed statute "is intended to substitute the objective standards of the provisions of section 18-a [enacted as EPTL § 5-1.1] for the vague and indefinite standards imposed by" case law) and at 132-138 (cited in note 4).

¹²20 Pa. Cons. Stat. Ann. § 2203 (a)(2)-(6) (Purdon Supp. 1988), the successor to 20 Pa. Stat. Ann. § 6111 and 20 Pa. Stat. Ann. § 301.11(a), was originally enacted in 1947 as section 11 of the Estates Act (hereinafter section 11). The full text of section 2203 is reproduced in the Appendix.

¹³EPTL § 5-1.1, which became effective in 1967, applied to testamentary substitutes created on or after September 1, 1966, if the decedent and the surviving spouse were married on or before that date and the decedent executed a will or died intestate on or after that date. The relevant portion of the text of EPTL § 5-1.1 is reproduced in the Appendix.

¹⁴For extensive writings on the historical background that led New York and other states to subject certain lifetime transfers to the surviving spouse's right of election, see Report at 119-23 (cited in note 4); W. Macdonald at 3-19, 67-144 (cited in note 1); Kurtz at 993-1011 (cited in note 1); Clark at 516 (cited in note 4); and Amend, *The Surviving Spouse and the Estates, Powers and Trusts Law*, 33 Bklyn. L. Rev. 530 (1967).

¹⁵UPC § 2-202, 8 U.L.A. 79 (1983). The UPC was approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1969. The Comments to UPC § 2-202 state that "[s]ome legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act [§ 301.11(a)]" and that the EPTL "may be suggested as a model." *Id.* comment. Nine states have enacted UPC § 2-202 into law in full or in significant part. UPC § 2-202, 8 U.L.A. 75-77 (1983 & Supp. 1986). See Alaska Stat. § 13.11.075 (1985); Colo. Rev. Stat. § 15-11-202 (1987); Idaho Code § 15-2-202 (1979); Me. Rev. Stat. Ann. tit. 18A, § 2-202 (1981 & Supp. 1987); Mont. Code Ann. § 72-2-705 (1987); Neb. Rev. Stat. § 30-2314 (1985); N.D. Cent. Code § 30.1-05-02 (1976 & Supp. 1988); S.D.

The UPC and the New York and Pennsylvania elective share statutes cover, at a minimum, lifetime transfers of property over which the decedent retained certain powers at the time of death. This article analyzes various aspects of such transfers under these statutory schemes as well as under the analogous federal estate tax statutes.¹⁶ Discussed at the outset is *In re Estate of Riefberg*,¹⁷ the most recent decision of New York's highest court arising under EPTL section 5-1.1(b)(1)(E), in which the issue was whether a buy-sell provision in a shareholders agreement was

Codified Laws Ann. § 30-5A-2 (1984 & Supp. 1987); Utah Code Ann. § 75-2-202 (1978). The full text of UPC § 2-202 is reproduced in the Appendix.

¹⁶Use of the federal estate tax statutes as a model for elective share statutes has been suggested. See Report at 134 & n.142 (cited in note 4); Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 Geo. L.J. 499, 518 (1964); Garland, *The "Non-Barrable" Share: Some Comments Regarding a Reappraisal*, 32 St. John's L. Rev. 218, 224-227 (1958); Simes at 15-16 (cited in note 1); Note, *Decedent's Estates—Aftermath of Halpern—Suggestions Concerning Statutory Reform*, 27 N.Y.U. L. Rev. 306, 312-316 (1952). But only Delaware has enacted forced share legislation providing for a right of election based upon the federal gross estate, and apparently no cases have been reported under this provision. Del. Code Ann. tit. 12, §§ 901, 902 (1979 & Supp. 1986). Parenthetically, the Restatement of Property (Second) § 13.7 statutory note (1986) lists Maryland as also providing for a right of election based upon the federal gross estate, but this appears to be an error. See Md. Est. & Trusts Code Ann. §§ 1-101(n) and (p) (1974) and 3-203 (Supp. 1987).

The drafters of the UPC rejected the "finespun tests of the Federal Estate Tax Law" because "the objectives of a tax law are different from those involved in the [UPC]." UPC § 2-202, 8 U.L.A. 78 comment (1983). Thus, the UPC is more limited and is "intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate." *Id.* In New York the Bennett Commission noted that the tax provisions could not "easily be lifted bodily" into the estates statute because of their detail and the manner in which they were written and believed it would be difficult to obtain support for "such a detailed proposal." Report at 134 (cited in note 4). In the Report's conclusion, the Commission rejected the federal tax approach in part because "it is too inclusive" (for example, life insurance proceeds would be subject to inclusion) and "it would tend to generate additional litigation and delay the termination of the estate administration." *Id.* at 138. Macdonald also rejected the estate tax law as a model because its primary goal of minimizing concentrations of wealth has "regard neither to the claimant's need nor the equities of the donee" and "is the antithesis of the maintenance and contribution formula" that he proposed. W. Macdonald at 277 (cited in note 1).

The New York, Pennsylvania and UPC statutory schemes are too restrictive and, unlike the federal estate tax scheme, unwisely exclude insurance and retirement plans that can be used to disinherit a surviving spouse. See UPC § 2-202(1), 8 U.L.A. 75-76 (1983) (insurance proceeds payable to a person other than the surviving spouse are not subject to the right of election); EPTL § 5-1.1(b)(2) (McKinney 1981) (insurance proceeds not subject to right of election); 20 Pa. Cons. Stat. Ann. § 2203(b)(2) (Purdon Supp. 1988) (same). This is true with respect to qualified employee benefit plans notwithstanding the "spousal annuity rules" adopted as part of the Retirement Equity Act of 1984 because the mandated annuity for a surviving spouse may not equal the value of an elective share in the participant spouse's benefit. See I.R.C. §§ 401(a)(11) and 417(b) & (c)(2). Furthermore, inclusion of insurance and employee death benefits, regardless of who is the beneficiary, would prevent the surviving spouse from receiving too much in an election situation if, as is often the case, the spouse is designated as the beneficiary. See notes 27 and 273-281 and accompanying text.

¹⁷446 N.E.2d 424 (NY 1983).

a "testamentary substitute" within the meaning of that statute.¹⁸ The ramifications of that decision are analyzed with respect to contractual arrangements and, more importantly, with respect to transfers in trust, in situations in which the decedent's power to terminate is retained by operation of law regardless of an express provision in the trust instrument.¹⁹ Next addressed is *Helvering v. Helmholtz*,²⁰ a United States Supreme Court decision interpreting an analogous federal estate tax statute,²¹ with an analysis of the effect of its approach—as compared with the approach taken by *Riefberg*—on transfers pursuant to a contract and transfers in trust. The article then considers several fundamental issues that *Riefberg* did not raise, involving the interpretation of elective share statutes that subject lifetime transfers pursuant to which the decedent retained certain powers to the surviving spouse's right of election. These issues include the meaning of the term "transfer," "disposition," or conveyance and the treatment to be accorded transfers made for "consideration." Finally examined are some basic questions concerning the retention of a power, focusing particularly on the question of whether a transfer with a retained power, the exercise of which is subject to an external standard, is covered by these elective share statutes.

The analysis herein reveals that these statutes have neither produced predictable results nor eliminated confusion. Clarification is therefore needed. Accordingly, guidelines are proposed to resolve the ambiguities and eliminate deficiencies in these elective share statutes.²² These

¹⁸Id. at 426. Whether a buy-sell provision in a stockholders agreement "can be a testamentary substitute" was a matter of "first impression" in New York's appellate courts. Id. at 425.

¹⁹EPTL § 5-1.1(b)(1)(E) (McKinney 1981) includes transfers in which the decedent retains a power to revoke "by the express provisions of the disposing instrument." See note 30 and accompanying text.

²⁰296 U.S. 93 (1935).

²¹Revenue Act of 1926, § 302(d) (predecessor of I.R.C. § 2038 (1986)).

²²Most recently, Professors Langbein and Waggoner advocated that the UPC be modified to provide for, among other things, an elective share based upon the length of the marriage and the amount of property owned by the surviving spouse. Langbein & Waggoner at 314-321 (cited in note 4). They do not, however, discuss the types of inter vivos transfers that should constitute testamentary substitutes. See also Apfel, *Divorce and Death: Disparity in Economic Rights of Spouse*, N.Y. L.J., Jan. 28, 1988, at 1, col. 3 (use of equitable distribution as a model for elective share legislation); Comment, *Spousal Disinheritance: The New York Solution—A Critique of Forced Share Legislation*, 7 W. New Eng. L. Rev. 881 (1985) (same). Adjusting the fractional share of the surviving spouse based upon the length of the marriage may be more fair than the current scheme, but an equitable distribution model, which entails a case-by-case determination based upon more subjective criteria, is not appropriate in the elective share area, which has traditionally involved different concerns and in which predictability and ease of administration are important goals. Furthermore, use of an equitable distribution model would significantly impede the development of a comprehensive estate plan and, more importantly, would probably provide no greater protection for the surviving spouse than do the guidelines advocated in this article. For a recent critique of the forced share and a proposal to base the right of election upon the length of the marriage, the extent of the surviving spouse's assets, and property acquired during marriage, see Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 Case W. Res. L. Rev. 223 (1987).

guidelines²³ should, if implemented, result in enlarging the net estate²⁴ subject to the right of election while diminishing a decedent's ability to disinherit a surviving spouse. With the increasing use of testamentary substitutes and other lifetime conveyances and contractual devices in estate planning, the distinction—which has been effectively abolished by the Internal Revenue Code²⁵—between the probate estate and other property passing outside the estate at death over which the decedent has retained a measure of control is artificial and unworkable²⁶ in the elective share area. While advocating a greater financial security for the surviving spouse, this proposal would also ensure that the survivor does not receive an economic windfall.²⁷

RIEFBERG

*In re Estate of Riefberg*²⁸ is the initial focus of this analysis. *Riefberg* held that a buy-sell provision in a shareholders agreement,²⁹ in which the shareholders expressly reserved the right to terminate the agreement by mutual consent, was a testamentary substitute. The pertinent statute—EPTL section 5-1.1(b)(1)(E)—provides that

[a]ny disposition of property made by the decedent . . . in trust or otherwise, to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof

²³See notes 247–292 and accompanying text for a discussion of these guidelines.

²⁴The net estate, as used in EPTL § 5–1.1, includes the probate or intestate estate, plus the capital value (as of the date of death) of testamentary substitutes, less debts, administration expenses and reasonable funeral expenses. EPTL § 5–1.1(c) (McKinney 1981). The UPC uses the term “augmented estate.” UPC § 2–202, 8 U.L.A. 75 (1983).

²⁵See, for example, I.R.C. §§ 2031, 2033, 2036–2038, and 2040–2042 (1986).

²⁶See Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1984).

²⁷See notes 273–280 and accompanying text.

²⁸446 N.E.2d 424 (NY 1983), *aff'g* 449 N.Y.S.2d 371 (App. Div. 1982), *aff'g* 433 N.Y.S.2d 374 (Sur. Ct. 1980). For comments on *Riefberg*, see Schreiber, *Estates Powers & Trusts Law: The Survey of New York Practice*, 58 St. John's L. Rev. 219 (1983); Shaw & Reich, *Corporate Buy-Sell Pacts—Testamentary Substitutes?*, N.Y. L.J., May 27, 1983, at 1, col. 3 (hereafter cited as Shaw & Reich); Dean, *Estates and Trusts*, 33 Syr. L. Rev. 237, 242–243 (1982) (discussing lower court opinion).

²⁹Buy-sell provisions are commonly used in shareholders agreements in closely held corporations to prevent unwanted third parties from obtaining a stock interest in the corporation. See *In re Estate of Brown*, 289 A.2d 77, 81 (PA 1972) (“[T]he primary purpose of such ‘buy-sell’ agreements [is] to prevent outsiders from entering the business”). See generally 2 F. O’Neal & R. Thompson, *O’Neal’s Close Corporations* § 7.02 (3d ed. 1987); Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision-Making*, 54 Va. L. Rev. 1164, 1184 (1968). Upon a shareholder’s death, such provisions generally either (1) require the surviving shareholders or the corporation to purchase the shares; (2) give the corporation or the surviving shareholders an option to purchase; or (3) give the corporation or the surviving shareholders a right of first refusal. 2 F. O’Neal & R. Thompson, *O’Neal’s Close Corporations* § 7.05 (3d ed. 1987).

is a testamentary substitute and its capital value, as of the decedent's death, must be included in the net estate subject to the surviving spouse's elective right.³⁰

In *Riefberg*, the decedent's disinherited second wife elected to take her statutory share under EPTL section 5-1.1. She claimed that, under section 5-1.1(b)(1)(E), the purchase price paid after the decedent's death for his stock interest in a family-owned corporation pursuant to a shareholders agreement should be included in the net estate for purposes of determining her elective share. The decedent and his brother each owned one-half of the corporation's stock. They entered into the shareholders agreement with the corporation, initially providing that the corporation would purchase a deceased shareholder's stock and pay the purchase price to the decedent's personal representative.³¹ However, one day before the decedent's death the parties amended the agreement to obligate the corporation to pay the purchase price directly to specified individuals, among whom was the decedent's first wife but not his surviving spouse.³² In addition, the agreement provided that (1) either shareholder could transfer his stock by inter vivos gift to his wife or any member of his immediate family, subject to the terms of the shareholders agreement; (2) either shareholder could withdraw as a stockholder by offering his shares to the corporation, which would then have a 30 day option to purchase them; (3) if the corporation did not purchase the shares, the remaining shareholder had a 45 day option to do so; (4) if neither the corporation nor the remaining shareholder purchased the shares, the corporation was to be liquidated; and (5) the agreement would remain in effect until "terminated by mutual agreement of the parties"³³

In concluding that the buy-sell provision in the agreement was covered by section 5-1.1(b)(1)(E), the *Riefberg* court relied on the Bennett Commission Report³⁴ which, the court said, analogized "stock pur-

³⁰EPTL § 5-1.1(b)(1)(E) (McKinney 1981).

³¹446 N.E.2d at 426.

³²*Id.*

³³433 N.Y.S.2d at 377. The lower court held that the agreement was a testamentary substitute within the meaning of section 5-1.1(b)(1)(E). *Id.* It equated the termination "by mutual agreement" provision with "an express power of revocation under the statute" and it considered the gift and the withdrawal and sale provisions as "the equivalents of a power to dispose or consume the principal, both covered by the statute." *Id.*

³⁴Cited in note 4. Inasmuch as the EPTL "reshape [d] principles," the court believed that "an historical survey would illumine [the legislature's] intention" and, therefore, the court focused on the Report as "instructive." 446 N.E.2d at 427. The court was also influenced by *In re Burk*, 37 Pa. D. & C.2d 528 (1965) which, according to *Riefberg*, construed section 11 of the Pennsylvania Estates Act as permitting a right of election against a stock purchase agreement. The court's reliance on *Burk* was misplaced. First, it is unclear whether *Burk* found for the surviving spouse based on section 8 of the Wills Act, which provided that a surviving spouse is entitled to one-half or one-third of the "real and personal estate of the testator," 20 Pa. Cons. Stat. § 180.8 (Supp. 1971)—in which event the case was entirely

chase agreements" to trusts in which the decedent retained a life interest.³⁵ To be sure, insofar as section 5-1.1(b)(1)(E) applies to any disposition "in trust or otherwise,"³⁶ the Report plainly supports the court's view that the words "or otherwise" can, under certain circumstances, encompass contractual devices.³⁷ However, the court's further observation that the Report concluded that stock purchase agreements should be regarded as testamentary substitutes because it analogized them to retained life interests³⁸ is questionable.³⁹ Moreover, the statute itself specifies those transfers that constitute testamentary substitutes and

irrelevant—or on section 11 of the Estates Act, which provided in pertinent part:

A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved

20 Pa. Cons. Stat. § 301.11 (Supp. 1971).

See *In re Estate of Brown*, 289 A.2d 77, 82–83 (PA 1972). Furthermore, the court in *Burk* made no in-depth analysis of the issue under section 11. For example, it never addressed the basic question of whether the agreement constituted a "conveyance of assets" within the meaning of section 11. See notes 136 and 141 and accompanying text. More importantly, *Burk* was effectively overruled by the Pennsylvania Supreme Court in 1972, eleven years prior to *Riefberg's* reliance on *Burk*. See *In re Estate of Brown*, 289 A.2d at 82. For comments on *Burk*, see Shaiman, *The Widow's Election—Tax and Fiduciary Considerations*, 40 Temp. L.Q. 1, 26–27 (1966) (criticizes reasoning but not result); Comment, *Buy and Sell Agreements and the Widow's Rights*, 114 U. Pa. L. Rev. 1006 (1966) (criticizes reasoning and result insofar as right of election against shares of stock is allowed). Significantly, neither the parties nor the court in *Riefberg* made mention of *Brown*.

³⁵446 N.E.2d at 427.

³⁶EPTL § 5-1.1(b)(1)(E) (McKinney 1981).

³⁷A contractual device whereby the beneficiary received property from the decedent during the decedent's lifetime, but "where the decedent has retained a life estate or a power to control . . . would be analogous [sic]," the Report states, "to a trust in which the decedent retained a life estate or control." Report at 129 & n.97 (cited in note 4).

³⁸446 N.E.2d at 427.

³⁹The portion of the Report cited by the court simply asks: "[S]hould the surviving spouse have any right to elect" against contractual transactions "in which technical consideration is present and yet the decedent has not received his money's worth." Report at 129 (cited in note 4). The Report provides no answer; it only indicates that "[t]here are many facets to the problem" and notes that another portion of the Report contains a discussion of "some of the solutions" to this question that have been offered in various jurisdictions. *Id.* Earlier in the Report, the Bennett Commission merely noted its concern "with the situation where . . . the settlor reserves to himself either a life estate or a power of revocation or power of control or any combination of these." *Id.* at 124. The New York State Bar Association Committee on Trusts and Estates took the position that a transfer by which "practical control of the beneficial enjoyment of the property has been retained during the transferor's lifetime" should be "considered subject to the elective rights of the surviving spouse." *Id.* at 138. However, without any discussion or analysis, the Bennett Commission rejected that position, stating: "the surviving spouse should *not* be given a right of election merely because 'practical control of the beneficial enjoyment of the property has been retained during the transferor's lifetime.'" *Id.* at 138–139 (emphasis added).

nowhere does section 5-1.1(b)(1)(E) mention or even hint at a transfer in which the decedent retained only a life interest.⁴⁰

The real question presented in *Riefberg* was whether, by virtue of the express provision in the shareholders agreement for termination by mutual consent,⁴¹ the decedent—in the words of the statute—“retained . . . by the express provisions of the disposing instrument, a power to revoke”⁴² The court answered this question in the affirmative: “[by] expressly providing for the manner of its termination,” the agreement “fell squarely within the express statutory definition [EPTL section 5-1.1(b)(1)(E)] of the category of testamentary substitute[s]” in which the decedent retains certain powers.⁴³ Thus, in the court’s view, the decedent

⁴⁰See Appendix. The court also implicitly assumed that the Report’s reference to “stock purchase agreements” is a reference to buy-sell provisions in a shareholders agreement such as the one involved in *Riefberg*. From a fair reading of the Report, it would appear that, in using the phrase “stock purchase agreement,” the Report was *not* referring either to buy-sell agreements per se or to those included as part of an overall agreement between shareholders of a closely held corporation. Rather, it was referring to a type of employee benefit plan under which an employee is permitted to purchase stock in the employer. Thus, in discussing “Other Contract Devices” (id. at 128–129), the Report states that most of the cases would involve a contract pursuant to which the “beneficiary . . . is to receive benefits after the death of the decedent.” Id. at 129. In a footnote (id. at 129 n.96) to this statement, the Report quotes verbatim from Macdonald’s section on contractual devices, which significantly is entitled “Employee Death Benefits,” and which reads, in pertinent part:

There is very little authority on the power of a surviving spouse to set aside or invade beneficiary rights under retirement plans, pension schemes, profit-sharing and stock-purchase agreements, and other types of employee benefits. These devices originated, for all practical purposes, with the entry of the insurance companies into the employee benefit field in the last few decades; and they have achieved enormous popularity in the last few years.

W. Macdonald at 244 (cited in note 1). It would therefore be fair to say that the Report did not consider shareholders agreements or buy-sell provisions of the type involved in *Riefberg* and commonly in use by shareholders in closely held corporations.

To emphasize its point that the statute was intended to include shareholders agreements, the court further notes that, while section 5–1.1(b)(1)(E) was still in legislative committee, a proposal was adopted—EPTL section 5–1.1(b)(2)—that “excluded ‘pension plans’, ‘insurance proceeds’, ‘profit sharing plans’, ‘stock options’, ‘stock bonuses’, and ‘deferred compensation plans’.” 446 N.E.2d at 427. “[I]t is telling,” the court says, “that, in stark contrast to this enumeration of exceptions to [EPTL 5–1.1(b)(1)(E)], none was made for stockholders agreements (Fourth Report of Temp.Comm.on Modernization, Revision and Simplification of the Law of Estates [“Fourth Report”], N.Y. Legis. Doc., 1965, No. 19, pp. 148–150).” 446 N.E.2d at 427. However, it is only “telling” if, as the court assumes, section 5–1.1(b)(1)(E) included shareholders agreements. Because such agreements were not included in this section, as explained above, their omission from section 5–1.1(b)(2) is *not* “telling.” Parenthetically, also note that section 5–1.1(b)(2) does *not* mention stock options, as the court states.

⁴¹See note 33 and accompanying text.

⁴²EPTL § 5–1.1(b)(1)(E) (McKinney 1981) (emphasis added).

⁴³446 N.E.2d at 428. The opinion does not identify the precise “express provision” by which *Riefberg* retained a power to revoke, consume, invade or otherwise dispose of the stock. Thus, the court simply says:

(in conjunction with the other shareholder), by the express terms of the agreement retained at the time of death a power to revoke the disposition, or more specifically, a power to revoke the shareholders agreement.⁴⁴

In making this determination, the court brushed aside the argument that, because every contract may be terminated by mutual consent, the express termination provision in the shareholders agreement added nothing to the rights conferred by law and, accordingly, the agreement did not meet the statutory requisites.⁴⁵ Logically this argument has appeal. If the contracting parties have the right to terminate (absent any express termination provision) by virtue of local law, it cannot be said that the right to terminate was retained by an express provision of the disposing instrument as required by section 5-1.1(b)(1). Rather, the power to revoke was established and retained by local law and the express termination provision in the contract is surplusage.

[I]ts "express provisions" enabled the decedent, in terms of an appropriate use of *ejusdem generis*, to retain a power to "revoke", "consume", "invade", or otherwise "dispose" of the corpus. Thus, the agreement itself, by expressly providing for the manner of its termination, fell squarely within the express statutory definition of the category of testamentary substitute which here has been our concern (EPTL 5-1.1, subd [b], par [1], cl [E]).

Id. at 428. A fair reading of the quotation would lead to the conclusion that the only express term in the shareholders agreement to which the court was referring is the provision for termination by mutual agreement and not the additional provisions on which the lower court also relied. See note 33.

⁴⁴Independent of its reliance on the express terms of the agreement, the *Riefberg* court emphasized that the shareholders agreement not only permitted the decedent to control the beneficial enjoyment of the stock interest but also "was the means by which the decedent . . . stripped the estate of assets which should have been subject to his surviving spouse's right to her elective share." 446 N.E.2d at 428. Stated otherwise, the agreement should be deemed a testamentary substitute in part because such a lifetime transaction would deprive the surviving spouse of having the decedent's stock included in the net estate for elective share purposes. The court's emphasis on this point is reminiscent of pre-EPTL cases that employed the "motive" test—a subjective test that has no place under EPTL § 5-1.1(b)(1) and its objective criteria. See, for example, *Bodner v. Feit*, 286 N.Y.S. 814, 817 (App. Div. 1936) and note 8 and accompanying text. Indeed, it is implicit from the statute that, unless the lifetime disposition falls within one of the specific and limited categories listed in section 5-1.1(b)(1), a person has every right to strip the estate of all of its assets through lifetime transfers. See *In re Zeigher*, 406 N.Y.S.2d 977 (Sur. Ct. 1978).

⁴⁵As the court noted (446 N.E.2d at 428), this argument was predicated on, and discussed in, P. Rohan, Practice Commentary to 17B McKinney's Consolidated Laws of New York Annotated § 5-1.1 at 41-42 (1981) (hereafter cited as Rohan). In particular, Rohan was commenting on the lower court's statement that the provision for termination by mutual agreement "is equivalent to an express power of revocation" under EPTL section 5-1.1(b)(1)(E). 433 N.Y.S.2d at 374. This "reasoning," Rohan said, "is open to serious doubt" because "any contract can be abrogated by mutual consent of adverse parties." He concluded—without any explanation or citation of authority—that "this fact [an express provision for termination by mutual consent], without more, should not lead to classification as a 'testamentary substitute.'" Rohan at 42.

Acceptance of this argument would not, however, necessarily have led to a different conclusion in *Riefberg*. Neither the court nor the parties considered whether there were third party beneficiaries of the shareholders agreement.⁴⁶ The persons to whom the proceeds from a sale of the decedent's stock were to be paid were not parties to the agreement; only the decedent and his brother were parties to the agreement.⁴⁷ If the beneficiaries of the sale proceeds had been intended beneficiaries,⁴⁸ however, then the power to revoke would not necessarily be established and retained by local law absent an express provision, and an express reservation of that power would not necessarily be surplusage. The general rule is that the parties to an agreement have the power to modify or terminate it, even without a provision in the contract reserving such a power.⁴⁹ This is not true of a third party beneficiary contract, however, if the rights of the beneficiary have vested.⁵⁰ In such a case, the contracting parties may not terminate or modify the contract unless they have reserved such a power in the contract itself.⁵¹ Thus, in *Riefberg*, if the beneficiaries' rights would have vested in the absence of the termination provision,⁵² then the express termination clause in the shareholders

⁴⁶See Shaw & Reich (cited in note 28).

⁴⁷See notes 31 and 32 and accompanying text.

⁴⁸The Restatement (Second) of Contracts section 302 (1979) refers to beneficiaries who have rights under the contract as "intended beneficiaries" and New York has expressly adopted this terminology and formulation regarding the classification of beneficiaries. See *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 485 N.E.2d 208, 211-212 (NY 1985) (decided after *Riefberg*).

⁴⁹Restatement (Second) of Contracts § 311 comment a (1979) ("The parties to a contract cannot by agreement preclude themselves from varying their duties to each other by subsequent agreement"); J. Calamari & J. Perillo, *The Law of Contracts* 863-864 (3d ed. 1987).

⁵⁰The First Restatement of Contracts, which classified contract beneficiaries as either "donee" or "creditor" beneficiaries, Restatement of Contracts § 133 (1932), treats the rights of a donee beneficiary as being vested at the time the contract is made and those rights are thus indefeasible unless a power to modify them is reserved. *Id.* at § 143. The rights of a creditor beneficiary, however, first vest when the beneficiary brings an action to enforce the contract or otherwise materially changes position before learning of a modification or termination. *Id.* Most courts have been opposed to discriminating between the rights of donee and creditor beneficiaries. Restatement (Second) of Contracts § 311, reporter's note at 469 (1979); Note, *The Third Party Beneficiary Concept: A Proposal*, 57 Colum. L. Rev. 406, 418-419 (1957).

Restatement (Second) of Contracts section 311 (1979) espouses the view that, absent a contract term to the contrary, a duty to an intended beneficiary may be modified or discharged without the beneficiary's consent unless the intended beneficiary prior to "notification of the discharge or modification materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee." Accord, *Detroit Bank & Trust Co. v. Chicago Flame Hardening Co.*, 541 F. Supp. 1278, 1283 (N.D. IN 1982).

⁵¹See J. Calamari & J. Perillo, *The Law of Contracts* 714-715 (3d ed. 1987); E. Farnsworth, *Contracts* 740 (1982).

⁵²Prior to *Riefberg* New York courts had neither adopted nor rejected the position of the Second Restatement. See *Salesky v. Hat Corp. of America*, 244 N.Y.S.2d 965, 968 (App. Div.

agreement added something to the rights conferred by law and the decedent clearly retained an express power to revoke the disposition as required by EPTL section 5-1.1(b)(1). On the other hand, if (absent the termination clause) the beneficiaries' rights at the decedent's death were subject to modification without their consent, then the termination clause in the agreement added nothing to the decedent's rights granted by local law, meaning that the statutory requisite of a reservation of a power by the express provisions of the disposing instrument was not met.⁵³

IMPLICATIONS OF *RIEFBERG* FOR TRANSFERS IN TRUST

Most transfers with retained powers that constitute testamentary substitutes are transfers in trust. *Riefberg's* implications are most signif-

1963) ("While it would appear that the state of our law is such that we would be free to adopt the view of the jurisdictions which find no vesting even absent any retention of control," the court declined to decide whether to adopt the view ultimately espoused by the Second Restatement because the death benefits agreement at issue expressly permitted either of the contracting parties to terminate upon notice). New York cases decided prior to *Riefberg* are consistent with the view of the First Restatement. See *Knowles v. Erwin*, 50 N.Y. Sup. Ct. 150, 153 (5th Dep't 1887), aff'd mem., 26 N.E. 759 (1891)(distinguished, albeit unsatisfactorily, in *Salesky*, 244 N.Y.S.2d at 967 n.*); *In re Estate of Fairbairn*, 40 N.Y.S.2d 280, 282 (App. Div. 1943) (relying in part on *Knowles*, the court held that the third party beneficiary's "rights accrued and were indefeasible upon the making of the . . . contract"). However, these cases were decided prior to adoption of the Second Restatement and it seems that New York is heading in the direction of adopting all the Second Restatement concepts regarding third party beneficiaries. See *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 485 N.E.2d 208 (NY 1985).

⁵³As discussed in note 50, under the Second Restatement, unless there were a contrary contract term, the duty to these beneficiaries—who, clearly, are intended beneficiaries—could have been modified or discharged in the absence of assent, bringing of an action or a material change in their position in justifiable reliance on the promise. There is no indication in *Riefberg* that, prior to the decedent's death, the beneficiaries either materially changed their position, brought an action or assented to the promise. Nor did the agreement apparently contain a provision precluding modification or discharge. But compare Restatement (Second) of Contracts § 311 comment b (1979). Thus, under the Second Restatement approach, it would appear that the express termination clause did not add to the right conferred by local law on the contracting parties to terminate under the circumstances existing at the decedent's death. Accordingly, it would follow that decedent did not retain at death the requisite power to revoke, within the meaning of EPTL section 5-1.1(b)(1)(E). But see *Estate of Siegel v. Commissioner*, 74 T.C. 613 (1980), which takes the position that an express reservation by the parties to a contract of a power to modify it forecloses the beneficiaries from taking the steps required by the Second Restatement to vest their rights as third-party beneficiaries and, thus, the retained power "appears to be greater than the rights of the parties under local law." 74 T.C. at 630. This position seems untenable because, under the Second Restatement, if the intended beneficiary's rights have not vested, the parties to the contract may foreclose the vesting of these rights, even in the absence of an express provision to modify. Once these rights have vested, however, the original parties can modify them only if they reserved a right to do so, meaning that an express provision adds to the rights of third parties under local law only if their rights have already vested. This was not the case in *Siegel*.

icant in this area because application of *Riefberg* to trusts produces anomalous results.⁵⁴ To illustrate, compare two hypothetical inter vivos trusts: Trust 1 provides: "This trust may be revoked or terminated by the settlor together with the consent of all living beneficiaries;"⁵⁵ Trust 2 does not contain a revocation or a termination provision.⁵⁶

Trust 1 would be revocable even absent its express provision for termination by the settlor in conjunction with all the living beneficiaries because, by statute, any trust may be revoked by the settlor with the consent of all living beneficiaries.⁵⁷ The express provision in Trust 1 for termination, therefore, adds nothing to the power to revoke that a settlor otherwise possesses.⁵⁸ Applying *Riefberg*, however, Trust 1 should be deemed a testamentary substitute for purposes of EPTL section 5-1.1(b)(1) simply because the trust instrument contains an express provision for termination by the settlor in conjunction with another (the beneficiaries)—the precise situation presented in *Riefberg* in the context of the shareholders agreement. *Riefberg* would compel the conclusion that the power to revoke Trust 1 was retained "by the express terms of the disposing

⁵⁴See notes 55–61 and accompanying text.

⁵⁵Although this termination provision may not be too common it is appropriate for illustration purposes because it is coextensive with New York's statutory power of termination, thus demonstrating the application of *Riefberg* in the trust area. See note 57. If the consent of unascertainable as well as living beneficiaries were required, then under the majority rule the trust could not be terminated because their agreement could not be secured. See notes 57 and 77.

⁵⁶In most states, including New York, a trust is irrevocable unless a power of revocation has been reserved. Restatement (Second) of Trusts § 330 (1959); G. Bogert, Trusts § 148, at 527–530 (6th ed. 1987); 4 A. Scott, Trusts § 330 (3d ed. 1967) (hereafter cited as Scott); EPTL § 10–10.8 (McKinney 1967).

⁵⁷EPTL § 7-1.9(a) (McKinney 1967). Although the statute on its face refers to "persons beneficially interested," courts have held that the consent of only the *living* beneficiaries is necessary. See, for example, *Roth v. Lipton*, 423 N.Y.S.2d 25 (App. Div. 1979). This does not comport with general law requiring the consent of *all* beneficiaries. See note 77; 4 A. Scott at § 338 (cited in note 56); Restatement (Second) of Trusts § 338 comment f (1959).

Under EPTL § 7-1.9(b), the settlor alone can revoke the trust without the consent of the beneficiaries if the beneficiaries are designated by such terms as "heirs" or "next of kin." This statutory codification of the doctrine of worthier title is limited in New York to the area of trust termination. See EPTL § 6-5.9 (McKinney 1967) and note 108 and accompanying text.

⁵⁸Other termination provisions in which the settlor retained a power in conjunction with another would render the general rule inapplicable. See 4 A. Scott at §§ 330.9 (reservation of power to revoke only with consent of trustee) and 330.10 (reservation of power to revoke with consent of a third person who is neither a beneficiary nor a trustee) (cited in note 56). Also see *In re Dodge's Trust*, 250 N.E.2d 849, 856 (1969) (dicta that the terms of the trust requiring the trustee's consent to revocation "must be complied with before [EPTL § 7-1.9(a)] comes into play"). Cf. *In re Mordecai's Trust*, 201 N.Y.S.2d 899 (Sup. Ct.), *aff'd* mem., 210 N.Y.S.2d 478 (App. Div. 1960) (settlor, who was the sole beneficiary of a trust, reserved the power to revoke with the consent of the trustees; trust could not be revoked without their consent, notwithstanding the statutory rule). However, the transfers subject to these termination provisions should be includible in the net estate for elective share purposes.

instrument”⁵⁹ even though the law confers such a right of revocation without a provision in the trust instrument. Thus, although the express provision for termination is superfluous—it adds nothing to the rights conferred by law—and notwithstanding that the beneficiaries would not likely consent to termination, presumably Trust 1 would be includible in the net estate for elective share purposes.

On the other hand, Trust 2 would not be deemed a testamentary substitute for purposes of section 5-1.1(b)(1) because the power to revoke was not retained by the express terms of the trust instrument.⁶⁰ Nevertheless, like Trust 1, under state law⁶¹ this trust—even in the absence of an express provision—may be revoked by the settlor in conjunction with all the living beneficiaries. Thus, despite the settlor’s retained power to revoke each trust, *Riefberg* would appear to dictate different results in these two cases. The consequence that Trust 1 would be deemed a testamentary substitute, includible in the net estate, while Trust 2 would not, makes no sense.

Legislative Intent

Significantly, *Riefberg* did not inquire why the legislature included the phrase “by the express provisions” of the disposing instrument in EPTL section 5-1.1(b)(1)(E). Was the phrase included to limit or expand the scope of the statute, and can legislative intent justify this dichotomous result?

In its Report—which *Riefberg* said is instructive⁶²—the Bennett Commission proposed that the legislation apply to “any transfer or conveyance . . . to the extent that the decedent at the date of his death retained . . . a power to revoke such transfer or conveyance”;⁶³ significantly, the

⁵⁹EPTL § 5-1.1(b)(1)(E) (McKinney 1981).

⁶⁰In construing the phrase “arising by the express terms of the instrument of transfer and not by operation of law” contained in a predecessor of Code section 2037(a)(2) (1986) (I.R.C. § 811(c), as amended, that was applicable to pre-October 8, 1949 transfers), the Court of Appeals for the Third Circuit (after noting that statutory language should be given its common meaning) stated that “[t]he word ‘express’ means ‘directly and distinctly stated; expressed, not merely implied or left to inference’ [citing Webster’s Third New International Dictionary 803 (1981)]” *Commissioner v. Marshall’s Estate*, 203 F.2d 534, 537 (3d Cir. 1953). See also *Estate of Keiffer v. Commissioner*, 44 B.T.A. 1265, 1267 (1941) (by implication); *Longacre v. Hornblower & Weeks*, 83 Pa. D. & C. 259, 262 (1952) (declaration of joint tenancy gives joint tenants “by operation of law all the rights . . . and powers of joint tenants,” which includes the “power of revocation pro tanto” (emphasis added)). Cf. *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 705–706, 731 (1949); I.R.C. § 2037 (1986); 5 B. Bittker, *Federal Taxation of Income, Estates and Gifts* § 126.7.6 (1984) (hereafter cited as Bittker). However, one commentator has argued that the language “by the express provisions” in EPTL section 5-1.1(b)(1)(E) adds nothing to the statute and does not differentiate it from the UPC. See Kurtz at 1027 n.224 (cited in note 1).

⁶¹EPTL § 7-1.9(a) (McKinney 1967).

⁶²See note 34 and accompanying text.

⁶³Report at 139 (cited in note 4).

Report did not use the "by the express provisions" phrase eventually found in the statute. Moreover, without any explanation, the Report hastened to add that "[a] trust which is irrevocable by its terms but subject to revocation under [EPTL section 7-1.9(a)] would not be deemed a revocable trust for this purpose."⁶⁴ Thus, the Report made it clear that a transfer subject only to a section 7-1.9(a) power of termination by the settlor in conjunction with all the living beneficiaries was not to be covered by the proposed testamentary substitute legislation of section 5-1.1(b)(1), even in the absence of a specific statutory requirement that the power be retained "by the express provisions"⁶⁵ of the disposing instrument.

The Report, as noted, speaks of a trust that is "irrevocable by its terms."⁶⁶ It does not address a fact pattern like Trust 1, which expressly provides that the trust can be revoked by the settlor with the consent of all living beneficiaries (the same power of revocation provided by local law).⁶⁷ However, the Report can reasonably be construed as conveying the idea that a power to terminate conferred by EPTL section 7-1.9(a) is not a retained power to revoke within the meaning of the proposed elective share statute. Thus, even if the legislators had not added the phrase "by the express provisions of the disposing instrument," the most reasonable interpretation of the statute, in light of the Report, is to exclude from its coverage a trust that expressly reserves no more than the same power to revoke conferred by EPTL section 7-1.9(a).⁶⁸

In view of the Report's position that a power to revoke retained by operation of law should not be deemed a power to revoke for purposes of the elective share statute,⁶⁹ the phrase "by the express provisions" of the disposing instrument was probably added only to underscore the intent that powers granted by operation of law be excluded. Otherwise, absent that phrase, it could be argued that powers granted by operation of local law were covered by the plain language of section 5-1.1(b)(1). By

⁶⁴Id.

⁶⁵EPTL § 5-1.1(b)(1)(E) (McKinney 1981) (emphasis added). See note 30 and accompanying text.

⁶⁶The language of the Report—"irrevocable by its terms"—is not very meaningful. In New York, every trust is irrevocable unless the trust expressly provides otherwise. EPTL § 10-10.8 (McKinney 1967). See note 56. Is the Report referring only to a trust that expressly provides that it is irrevocable, thereby excluding any trust that does not so state? If it were making such a distinction, presumably it would have done so in clear language. Furthermore, there is no reasonable basis on which to make such a distinction.

⁶⁷This is the situation presented in *Helvering v. Helmholz*, 296 U.S. 93 (1935), discussed at notes 70–80 and accompanying text.

⁶⁸Because the settlor manifests an intent to retain a power to revoke by expressly providing for a method of termination, even if coextensive with state law, some might argue that the expressed intent should subject the transferred property to the right of election. This argument should be rejected because it substitutes a subjective intent test for objective standards and could penalize a decedent who obtained poor legal advice or no advice at all.

⁶⁹See note 64 and accompanying text.

all accounts, the phrase was apparently included to limit—not expand—the scope of section 5-1.1(b)(1) as proposed in the Report. In contrast to *Riefberg*, therefore, the legislative history would not justify treating Trusts 1 and 2 differently under the current language of EPTL section 5-1.1(b)(1)(E). Indeed, in light of the Report, neither trust should be includible in the net estate under section 5-1.1(b)(1)(E). Had *Riefberg* considered this history it might have reached a different result.

A FEDERAL ESTATE TAX ANALOGY

Significantly, the *Riefberg* court missed an opportunity to apply, or at least to consider whether to apply, an entire body of federal estate tax law that appears to have a direct bearing on the interpretation of EPTL section 5-1.1, the UPC and similar elective share statutes. The language of these elective share statutes is similar to the following portion of section 2038 of the Internal Revenue Code⁷⁰ of 1986:⁷¹

The value of the gross estate shall include the value of all property . . . [t]o the extent of any interest therein of which the decedent has at any time made a transfer . . . by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate

Although not binding, interpretations accorded this provision may be instructive in interpreting the analogous elective share statutes.⁷²

The United States Supreme Court decision of *Helvering v. Helmholtz*⁷³ is a case in point. In *Helmholtz* the decedent and others conveyed shares of stock to a trustee pursuant to a trust instrument that named the decedent as a life beneficiary and expressly provided that the trust could be terminated upon written declaration of all the then beneficiaries.⁷⁴ The government claimed that the express termination provision was equivalent to a power to revoke or amend retained by the decedent in conjunction with the other beneficiaries—the precise argument accepted in *Riefberg*. It therefore sought to include the trust principal—the value of the transferred stock—in the decedent's gross estate pursuant to the predecessor of current section 2038. That provision—like EPTL section 5-1.1(b)(1)(E)—applied to any lifetime transfer that was subject at the decedent's death "to any change through the exercise of a power, either

⁷⁰I.R.C. § 2038(a)(1)(1986).

⁷¹This section was previously contained in the Internal Revenue Code of 1954, the predecessor of the 1986 Code.

⁷²See notes 80-88 and accompanying text.

⁷³296 U.S. 93 (1935).

⁷⁴*Id.* at 94-96.

by the decedent alone or in conjunction with any person, to alter, amend or revoke"⁷⁵ In rejecting the government's argument, the Supreme Court concluded that the trust agreement contained "no such power" within the meaning of the tax statute;⁷⁶ in words directly applicable to the *Riefberg* situation, the Court stated:⁷⁷

This argument overlooks the essential difference between a power to revoke, alter or amend, and a condition which the law imposes. *The general rule is that all parties in interest may terminate the trust. The clause in question added nothing to the rights which the law conferred.* Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.

Accordingly, although a clause in the trust instrument expressly provided for termination by all the living beneficiaries (including the settlor, who was a life beneficiary), *Helmholz* concluded that there was no

⁷⁵Revenue Act of 1926, § 302(d). Unlike EPTL section 5-1.1(b)(1)(E), none of sections 2038, 302(d), 20 Pa. Cons. Stat. Ann. § 2203 (Purdon Supp. 1988) or UPC § 2-202, 8 U.L.A. 75-77 (1983), states that the power be retained by an express provision of the instrument.

⁷⁶296 U.S. at 96. In so holding, the *Helmholz* Court did not consider whether a power to terminate is the equivalent of a power to revoke. However, in a subsequent decision, the Court held that a power to terminate is anticipated by the statutory words "alter, amend, or revoke." See *Commissioner v. Estate of Holmes*, 326 U.S. 480, 487-488 (1946). A power to terminate is the equivalent of a power to revoke if the property interest transferred will revert to the decedent; however, if only "exercisable as to effect a change in enjoyment," a power to terminate is the equivalent of a power to alter. See *Treas. Reg. 105, § 81.20* (predecessor of *Treas. Reg. § 20.2038-1(a)(2)* (as amended in 1962)).

⁷⁷296 U.S. at 97 (emphasis added). The Court cited *Restatement of Trusts* §§ 337 (termination by consent of the beneficiaries) and 338 (termination by consent of the settlor and the beneficiaries) (1935). As these sections reveal, the Court's reference to "all parties in interest" must include the settlor. Under the general rule, the settlor's consent is indispensable to termination of a trust if continuance of the trust is necessary to carry out a material purpose of the trust. Thus, only if the settlor consents can all the beneficiaries (assuming they do not lack capacity) compel a termination of the trust, "although the purposes of the trust have not been accomplished." See *Restatement of Trusts* § 337 comment a and § 338(1) (1935). The *Restatement (Second) of Trusts* §§ 337 and 338 (1959) are to the same effect.

The Court may have overstated the general rule, which applies only if all parties in interest are not under an incapacity. *Restatement of Trusts* § 337 (1935); *Restatement (Second) of Trusts* § 337 (1959). Interestingly, the Court appears to have erred in equating the general rule with the trust provision inasmuch as the trust provision apparently permitted termination by all the then living beneficiaries without the consent of unborn beneficiaries. See 5 B. Bittker at 126-169 (cited in note 60); Note, Recent Cases, 53 Harv. L. Rev. 690, 691 (1940). If so, then the termination clause *did* add to the rights of the parties under local law because the general rule requires the consent of all beneficiaries, even those not yet ascertainable. 5 B. Bittker at 126-169 (cited in note 60). New York does not follow the general rule. See note 57 and accompanying text. The fact that the decedent retained a life interest with a general testamentary power of appointment did not make her the equivalent of a sole beneficiary. See 2 A. Scott & W. Fratcher, *Scott on Trusts* § 127.1 (4th ed. 1987) (hereafter cited as *Scott and Fratcher*).

reserved power to revoke within the meaning of the statute because the termination clause "added nothing to the rights which the law conferred."⁷⁸ Thus, although the trust literally was subject to the exercise of a power to revoke in conjunction with the other beneficiaries, the trust

⁷⁸296 U.S. at 97. This interpretation of *Helmholz* appears to be the most reasonable and has wide support. See, for example, Treas. Reg. § 20.2038-1(a) (2) (as amended in 1962) (section 2038 does not apply "[i]f the decedent's power could be exercised only with the consent of all [interested parties,] . . . and if the power adds nothing to the rights of the parties under local law"); *Hauptfuhrer's Estate v. Commissioner*, 195 F.2d 548, 551 (3d Cir.) ("[t]he rule of [*Helmholz*] has been incorporated into Treasury Regulation 105, § 81.20 [predecessor of Treas. Reg. § 20.2038-1(a)(2)(as amended in 1962)]"); *Estate of Siegel v. Commissioner*, 74 T.C. 613, 628 (1980); *Houghteling v. Commissioner*, 40 B.T.A. 508, 513-514 (1939); *B. Bittker & E. Clark, Federal Estate and Gift Taxation* 202 (5th ed. 1984); *Wolk, The Pure Death Benefit: An Estate and Gift Tax Anomaly*, 66 Minn. L. Rev. 229, 260 n.167 (1982); *1 R. Paul, Federal Estate and Gift Taxation* 1078-1079 (1942); *R. Paul, Selected Studies in Federal Taxation* 10 n.16 (2d ser. 1938). The meaning of *Helmholz* is not entirely free from doubt. In *Commissioner v. Allen*, 108 F.2d 961, 965 (3d Cir. 1939), the court interpreted *Helmholz* as holding that "the case was not within the intent of the statute" because the decedent-settlor's power to terminate in conjunction with others "came to her as one of the beneficiaries and not as the settlor." As explained by the *Allen* court, the settlor in *Helmholz* "had irrevocably parted in his [sic] lifetime, so far as any power, on his part as settlor, to terminate the trust was concerned." 108 F.2d at 965. Moreover, the court reasoned that the power in the beneficiaries could not be a power contemplated by the statute because, otherwise, Congress would be violating the Fifth Amendment. Thus, according to *Allen*, "[t]he thing of importance in the *Helmholz* case was that the power of revocation there rested with the beneficiaries and not with the settlor as such." 108 F.2d at 965. Viewing *Helmholz* in this light, *Allen* concluded that *Helmholz* did not distinguish "between a settlor's power to revoke when imposed by law and a settlor's like power when reserved by his trust indenture." 108 F.2d at 965. See also *Howard v. United States*, 125 F.2d 986, 989 (5th Cir. 1942) (apparently relying on *Allen*, the court refused to construe the *Helmholz* case as holding that "Section 302(d) distinguishes between a power to revoke derived from the donor's own act, and an identical power vested in him by state law;" it simply stated that *Helmholz* involved a trust terminable by all beneficiaries, overlooking the point that the settlor was a beneficiary).

Allen's explanation of *Helmholz* appears to miss the mark. *Helmholz* never addressed the question whether the decedent's power of termination, in conjunction with the other beneficiaries, was a power she retained in her capacity as a beneficiary and not in her capacity as settlor. Indeed, if the capacity in which the decedent retained the power was decisive, the Court could have said that the statute requires the decedent to retain it in her capacity as settlor and does not apply to a power retained in any other capacity. Instead, in responding to the government's argument, the Court implicitly assumed that the capacity in which the power was held was irrelevant. Furthermore, after the *Helmholz* decision courts have indicated with respect to transfers covered by section 302(d) that the capacity in which a decedent retained the power to terminate is immaterial. See *Du Charme's Estate v. Commissioner*, 164 F.2d 959, 963 (6th Cir. 1947), modified, 169 F.2d 76 (6th Cir. 1948) (decedent's reserved power exercisable in capacity as trustee); *Jennings v. Smith*, 161 F.2d 74 (2d Cir. 1947) (same); *Union Trust Co. v. Driscoll*, 138 F.2d 152 (3d Cir. 1943), *Welch v. Terhune*, 126 F.2d 695, 697 (1st Cir. 1942) ("Nor does it matter that the trust instrument vested the power in [the settlor] in his capacity as a trustee named in the instrument rather than in his capacity as grantor. As previously noted, § 302(d) refers to the existence of the power in

was considered irrevocable for estate tax purposes because the decedent, together with the beneficiaries, possessed that power under state law.⁷⁹

Neither the parties nor the court in *Riefberg* cited *Helmholz*.⁸⁰ An opportunity was thus lost to consider not only this specifically analogous case but also the broader issue of whether federal estate tax decisions should be relied upon in interpreting elective share statutes. There is a legitimate argument that decisions under the federal estate tax, such as *Helmholz*, should be extended to similarly worded statutes governing a surviving spouse's right of election. To be sure, the often stated objectives of the estate tax—to raise revenue⁸¹ and prevent large accumulations of wealth—are different from elective share statutes—to protect the surviving spouse and recognize the economic partnership aspects of marriage; consequently, depending on the issue involved, there may be reasons not to utilize tax oriented approaches in the elective share area.⁸² But to the extent the specific objective of tax and elective share statutes is the same—to capture transfers of property pursuant to which certain powers or interests are retained—cases in one area are pertinent in the other. For example, the objective of section 2038, according to the Tax Court, “is to include in a decedent's gross estate the value of transferred property over which the decedent has retained a prohibited degree of control.”⁸³ This is precisely the objective of EPTL section 5-1.1(b)(1)(E) and

the decedent, not to the capacity in which it is to be exercised”). See also Treas. Reg. 105, § 81.20(a)(2) (as amended in 1954) (the addition to section 302(d)(1) of the Revenue Act of 1926, as amended, “of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent . . . is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase”). Accord, *Jennings v. Smith*, 161 F.2d 74, 77 (2d Cir. 1947); *Commissioner v. Newbold's Estate*, 158 F.2d 694 (2d Cir. 1946). Cf. Treas. Reg. § 20.2036-1(b)(3) (as amended in 1960) (absence of language “in whatever capacity exercisable” in section 2036 is immaterial and this provision reaches powers retained by the settlor in the capacity of trustee).

⁷⁹But if a trust is revocable under state law unless the settlor expressly provides that it is irrevocable, as in California, Texas and Oklahoma, the corpus is includible under I.R.C. section 2038 (1986). See Treas. Reg. § 20.2038-1(d) (as amended in 1962); *Hill's Estate v. Commissioner*, 64 T.C. 867 (1975) (Texas law) and note 130. See also note 93 and accompanying text.

⁸⁰A second ground for the Court's decision in *Helmholz*, not to apply section 302(d)—and, in the words of Mr. Justice Roberts, the “more serious objection”—was that any retroactive application of this section would violate the Fifth Amendment. Three Justices (Brandeis, Stone and Cardozo) concurred in the result only on this ground. 296 U.S. at 97–98. There is nothing to indicate that this second ground affected the *Riefberg* court or influenced its failure to cite *Helmholz*.

⁸¹The federal estate tax was originally enacted in 1916 to raise money to prepare the military for World War I. See 5 B. Bittker at 120-1 to 120-2 & n.1 (cited in note 60).

⁸²See, for example, UPC § 2-202, 8 U.L.A. 77–79 comment and note 16.

⁸³See *Estate of Bell v. Commissioner*, 66 T.C. 729, 736 (1976).

UPC section 2-202.⁸⁴ Thus, case law interpreting the federal estate tax is relevant in interpreting similarly worded state elective share statutes.⁸⁵ The fact that certain lifetime transfers are not taxable for estate tax purposes because they are taxable as gifts⁸⁶ militates against wholesale acceptance of tax decisions in the elective share area.⁸⁷ Additionally, because of the public policy reflected by elective share statutes—protection of the surviving spouse and recognition of marriage as an economic partnership⁸⁸—close cases should be resolved in favor of inclusion—a choice that may not be as important in the tax area because of the interplay between the estate and gift taxes.

APPLICATION OF *HELMHOLZ* TO ELECTIVE SHARE STATUTES

Trusts

The rationale in *Helmholz*⁸⁹ can be used to determine the scope of elective share statutes. For example, if the *Helmholz* approach were applied, neither hypothetical trust⁹⁰ would be includible under the New York statute, the UPC or other similar state elective share statutes. Thus, unlike the *Riefberg* approach, the *Helmholz* rationale would not produce inconsistent results in the hypothetical trust cases. The relevant question, therefore, is whether the rationale of *Helmholz* should be applied in the elective share area; is it analytically sound or desirable?

Helmholz offers no detailed explanation for its decision to exclude a transfer if the expressed power to terminate was coextensive with the power conferred by local law. After indicating that there is an essential difference between “a condition which the law imposes” and a “power to revoke,” the opinion simply says that “Congress cannot tax as a transfer intended to take effect in possession or enjoyment at the death

⁸⁴See Report at 117–118, 124 (cited in note 4), and UPC § 2-202, 8 U.L.A. 77–79 comment (1983).

⁸⁵See Kurtz at 1028 & n.229 (cited in note 1) (applying Treas. Reg. § 20.2038-1(a)(2) (as amended in 1962) and *Helmholz* to an analysis of UPC § 202(1)(ii)(1983)). It is noteworthy that New York also has followed *Helmholz* in interpreting New York’s estate tax, which is patterned after the federal law. See *In re Falconer’s Estate*, 47 N.Y.S.2d 35, 37 (Sur. Ct. 1944) (stating that *Helmholz* “is directly controlling,” the court held that a trust that was revocable only upon consent of all the beneficiaries was not includible in the New York State gross estate under the section of New York’s law that was derived from former I.R.C. section 302(d)).

⁸⁶Transfers by which a taxpayer relinquished sufficient control and did not retain certain prohibited powers normally are taxable as a gift. For example, had the trust in *Helmholz* been created after enactment of the gift tax, the remainder interest in the beneficiaries would have been taxable as a gift.

⁸⁷Inter vivos and testamentary transfers made after 1976 are now taxed at the same rate under the unified tax structure of I.R.C. section 2001. Prior to 1977 they were taxed at different rates.

⁸⁸See note 4 and accompanying text.

⁸⁹See notes 73–80 and accompanying text.

⁹⁰See text accompanying notes 55–56.

of the settlor a trust created in a state whose law permits all the beneficiaries to terminate the trust.”⁹¹ The Court seems to be saying that a power of the settlor with all the beneficiaries to terminate, granted by operation of local law, is not the type of power to which section 2038(a)(1) (or section 302(d) before it) is addressed. Rather—to cull from the *Helmholz* opinion—it is “a condition which the law imposes.” Thus, if the settlor, by the trust instrument, has made what is on its face a complete and irrevocable transfer, the trust will not be taxed as a revocable transfer merely because local law steps in and confers a power of termination. Implicit in the Court’s decision appears to be the idea that the settlor is unable—by inserting language in the trust instrument or in any other way—to prevent such a power from being conferred. If the settlor, by inserting appropriate language in the trust instrument, could preclude the law from conferring a power to terminate the trust, it would seem that the power is not “a condition which the law imposes.”⁹² Only if it is the settlor’s deliberate choice of omitting language that would be effective to make the trust revocable without his participation should the corpus of the trust be includible in the net estate for elective share purposes.⁹³

The relevant question, therefore, in determining whether Trusts 1 and 2 should be included in the net estate under an elective share statute such as EPTL section 5-1.1(b)(1) or the UPC is whether the settlor can insert in the trust instrument an enforceable provision that prevents termination of the trust under any circumstances, or permits its termination with the consent of all beneficiaries but without the settlor’s consent. One obvious possibility is expressly to provide that the trust is irrevocable, but the law is well settled that a provision stating “this trust is irrevocable” will not suffice to strip the settlor of the right conferred by local law to terminate the trust with the trust beneficiaries’ consent.⁹⁴ Another possibility is to include a provision in the trust instrument that, for purposes of terminating the trust, the settlor should be regarded as deceased. At first blush, this might appear to render the trust irrevocable because all trust beneficiaries cannot by their consent terminate a trust if the settlor is deceased and a material purpose of the trust remains to be

⁹¹296 U.S. 93, 97 (1935). See note 77 and accompanying text.

⁹²*Id.* at 97.

⁹³In such a case, the corpus should also be includible in the settlor’s gross estate for federal estate tax purposes under I.R.C. section 2038 (1986). See notes 79 and 130.

⁹⁴4 A. Scott at § 338 (cited in note 56); Restatement (Second) of Trusts § 338 comment a (1959) (the general rule is applicable even if the trust provides that it is irrevocable). See *In re Schroll*, 297 N.W.2d 282, 283–284 (MN 1980) (trust instrument provided that “[g]rantor has carefully considered the desirability of reserving the right to modify, amend or revoke . . . and now declares that such trust shall not be subject to revocation or amendment”; nevertheless, trust could be “modified where the settlor and all beneficiaries agree”) (citations omitted).

accomplished.⁹⁵ Because the settlor is in fact alive, however, consent to terminate can still be secured, which would not be the case if the settlor actually were dead. In all likelihood, such a provision would not render the trust irrevocable because courts have no interest in maintaining a trust if all interested parties wish to terminate it.⁹⁶

More successful would be for the settlor to relinquish all control over the trust property by simply providing in the trust instrument that the trust may be terminated with the consent of only the beneficiaries. In such a case, the settlor would not retain a power to terminate in conjunction with the beneficiaries because, by the express terms of the trust, the beneficiaries would not need the settlor's consent to terminate. And if, as in *Helmholz*, the settlor is also a beneficiary, the trust instrument should expressly provide that it is revocable by all beneficiaries other than the settlor. If this is done, then the settlor's consent to termination is superfluous.⁹⁷

If this approach is available, meaning that the settlor *can* insert a provision in the trust that would preclude a power to terminate from arising by operation of local law, the *Helmholz* rationale should not apply to either hypothetical trust situation.⁹⁸ Instead, if the settlor chooses to retain—by failing to negate the operation of local law—what amounts to a veto power over termination by the beneficiaries, there is no justification for applying the *Helmholz* approach to the elective share statutes. Thus, both Trusts 1 and 2 should be subject to inclusion.

Apart from the reasons discussed above, no logical explanation exists to differentiate between Trusts 1 and 2. After all, in both cases the settlor retains the *identical* power—the power in conjunction with the beneficiaries—to terminate the trust. In both cases the decedent has made the same lifetime disposition of assets, and the same result should obtain in each case.⁹⁹ Similar reasoning has been used by the Supreme Court¹⁰⁰ to

⁹⁵4 A. Scott at § 337 (cited in note 56); Restatement (Second) of Trusts § 338 comment a (1959). See note 77.

⁹⁶See P. Haskell, Preface to Wills, Trusts & Administration 227 & n.11 (1987); 4 A. Scott at § 338 (cited in note 56). See also note 94 and accompanying text.

⁹⁷In such a case, the general rule—or a statute such as EPTL section 7-1.9(a)—would not apply.

⁹⁸Based on this analysis, *Helmholz* should have been decided differently. It was the settlor's failure to eliminate the power to terminate that arises by operation of law that resulted in the settlor's retention of a power to terminate in concert with the beneficiaries. Under these circumstances, the power should have been considered a retained power within the meaning of the statute and not a "condition which the law imposes." 296 U.S. at 97. See also note 77.

⁹⁹The same question can be posed regarding two contracts—one containing a provision for termination by mutual consent (the *Riefberg* case)—and one that does not but, nevertheless, can be terminated by mutual consent because the law confers this right. See note 49 and accompanying text.

¹⁰⁰*Estate of Spiegel v. Commissioner*, 335 U.S. 701 (1949).

interpret a federal estate tax statute—a predecessor of section 2037—that taxed transfers taking effect at death,¹⁰¹ and treat a reversionary interest arising by operation of law the same as a reversionary interest that the decedent “deliberately reserves”¹⁰² by the express terms of the instrument. “In either event, the settlor has not parted with all of his . . . interests in the property transferred.”¹⁰³ In both instances the settlor retained precisely the same legal interest. As a consequence:¹⁰⁴

[O]ne can hardly quarrel with the conclusion that an interest arising by “operation of law” is no less significant than one expressly reserved. Both “types” of reversionary interests are created by the words used in the trust instrument and both are legally effective only by “operation of law,” i.e., because a court will attach legal consequences to the words used in the instrument and enforce the grantor’s claim. Restated, the distinction is between rights which are conferred by a court because the grantor has used well-chosen words and those which are conferred because the grantor has combined well-chosen words with judicious silence. So restated, the distinction reflects no difference.

Because there appears to be no legitimate reason to differentiate between a transfer with a power to terminate retained by operation of local law and a transfer with a power to terminate that is reserved by the express terms of the instrument, they should produce identical results under an estate tax statute¹⁰⁵ or an elective share statute, such as the Uniform Probate Code. The New York elective share statute, however, appears to require a different result¹⁰⁶ because a power to terminate arising by operation of local law is not a power retained “by

¹⁰¹Int. Rev. Act of 1939, § 811(c).

¹⁰²335 U.S. at 705.

¹⁰³*Id.*

¹⁰⁴Bittker, *The Church and Spiegel Cases: Section 811(c) Gets a New Lease on Life*, 58 Yale L.J. 825, 834 (1949). Section 2037 no longer distinguishes between a transfer in which a reversionary interest is retained by operation of law or by the express terms of the instrument. Both are specifically included if the value of the reversionary interest immediately before death exceeds five percent of the value of the property transferred.

¹⁰⁵If not for the fact that the *Helmholz* decision—limited to its facts—has been codified in Treasury Regulations since 1939, the decision should not be followed for the reasons explained in text. Today the *Helmholz* approach is not very meaningful in the tax area because, if *Helmholz* is followed, the transfer will be taxed under the gift tax and not under the estate tax. See note 86 and accompanying text. If *Helmholz* is not followed, then the transfer would be taxed under the estate tax and not under the gift tax. In either event, the transfer is taxed at some point and, were it not for the “tax exclusive” nature of the gift tax computation, at essentially the same rates. See note 87 and accompanying text. It should also be noted that the Regulations codifying *Helmholz* as to post-June 22, 1936 transfers are apparently in conflict with the express language of section 2038 that applies to a transfer subject to decedent’s power to terminate “without regard to when or from what source the decedent acquired such power” (emphasis added). See note 71 and accompanying text.

¹⁰⁶The guidelines, appearing at text following note 245, recommend that the New York statute be amended to cover all transfers in which the settlor retains a power to terminate either by the express terms of the instrument or by operation of law.

the express provisions" of the disposing instrument. This result is inappropriate.¹⁰⁷

Now consider a slightly different situation. Assume that A transfers property to B in trust to pay the income to A for life and the remainder to A's heirs under a trust instrument which provides that it is irrevocable. If A is considered the sole beneficiary,¹⁰⁸ most jurisdictions would permit A to terminate the trust.¹⁰⁹ For reasons explained earlier,¹¹⁰ under the UPC and the Pennsylvania statute the decedent should be deemed to have retained a power of termination, thereby subjecting the transfer to the surviving spouse's right of election. However, under the New York elective share statute, which requires the decedent to retain the power by the express terms of the disposing instrument, the opposite result would be reached. Because this outcome is senseless, New York courts should take the position that in light of EPTL § 10-10.6 the decedent never disposed of the remainder interest for purposes of the elective share statute.¹¹¹ Such a trust should not be viewed as a transfer with a retained power but, instead, simply as a transfer in trust with both a retained life estate and a retained reversion that is subject to the elective share statute.¹¹²

¹⁰⁷See note 60 and accompanying text.

¹⁰⁸This would be the case in jurisdictions that apply the doctrine of worthier title. See 2 Scott & Fratcher at § 127 (cited in note 77); Restatement (Second) of Trusts § 127 (1957). Interestingly, New York has codified the doctrine with respect to termination of a trust under EPTL section 7-1.9(a). Thus, for purposes of such termination, a disposition to the settlor's "heirs" or "next of kin" does not create in those classes of persons a beneficial interest. EPTL § 7-1.9(b) (McKinney Supp. 1988). For all other purposes the "heirs" of the settlor take by purchase. EPTL § 6-5.9 (McKinney 1967). See note 57.

¹⁰⁹4 A. Scott at § 339 (cited in note 56); Restatement (Second) of Trusts § 339 (1959).

¹¹⁰See text accompanying note 105.

¹¹¹EPTL section 10-10.6 (McKinney 1967) treats a settlor with a power to terminate as the owner of the transferred property for creditors' rights purposes. Section 10-10.6 applies if the settlor merely "reserved" the power to terminate, without requiring a reservation by the express terms of the disposing instrument. Thus, a power reserved by operation of local law may be deemed a power reserved by the settlor if the settlor, by appropriate language, could have precluded such a power. In the hypothetical trust, the settlor perhaps could avoid the effect of EPTL section 7-1.9(b) by providing that the "heirs" shall be deemed to have a beneficial interest for all purposes, including termination. Even if the settlor is powerless to make the disposition irrevocable, it can be argued that the settlor reserves a power to terminate anytime a disposition is made in any manner that gives rise to such a power. See notes 130 and 131 and accompanying text.

¹¹²A good argument can be made that a surviving spouse should have at least the same rights as a creditor in any property the decedent transferred during life. In Rohan's view a court might rule that "the right to revoke is contained in the agreement itself because the settlor is put on notice of the effect of such a provision [EPTL § 7-1.9(b)] and therefore the right to revoke is, in reality, an express provision in the disposing instrument; the latter would appear to be the better view." 9A P. Rohan, *New York Civil Practice—EPTL § 5-1.1(7)b*, at 5-124 (1986). However, Rohan cites no support for "the better view" and, in fact, his view would render ineffective the statutory words "by the express provisions of the disposing instrument" (emphasis added). But compare P. Rohan, *Practice Commentary to 17B McKinney's Consolidated Laws of New York Annotated § 7-1.9* at 110 (Supp. 1988) ("The two

Contracts

Moving now from transfers in trust to contractual transactions, the question arises whether the *Helmholz* approach should apply in the area of contracts. Interestingly, this approach has not been employed in determining whether a contractual transaction creates an asset that is includible in a decedent's gross estate for federal estate tax purposes. *Estate of Tully v. United States*¹¹³ is illustrative. Tully and his employer entered into a contract that obligated the employer to pay certain death benefits to Tully's widow. Although there was no express reservation of a power to revoke this death benefit contract, the government claimed that the death benefits were includible in Tully's estate under section 2038.¹¹⁴ In rejecting the government's position, the court said that the possibility that Tully "might" have revoked the death benefit contract in conjunction with his employer was not determinative because the word "power" as used in section 2038(a)(1) "does not extend to powers of persuasion."¹¹⁵ The court, expressing what appears to be the true basis for its decision, also noted its concern that extending the statute to such a possibility would mean that all death benefit plans would be includible in the federal gross estate.¹¹⁶ It concluded, in light of the numerous cases excluding death benefit plans, that "Congress did not intend the 'in conjunction' language of section 2038(a)(1) to extend to the mere possibility of bilateral contract modification."¹¹⁷

sections [EPTL §§ 7-1.9(b) and 6-5.9], read together, then abolish the doctrine of Worthier Title and vest a remainder in the grantor or settlor's heirs, subject to the caveat that (if the interest created in them is equitable) the settlor can nevertheless revoke the trust without their consent, *even without having reserved such power.*") (emphasis added). Indeed, the cases indicate that such a right to revoke would be characterized as arising by operation of law and not by the express provisions of the instrument. See notes 130 and 131 and accompanying text.

¹¹³528 F.2d 1401 (Ct. Cl. 1976).

¹¹⁴Id. at 1402. The opinion does not state the grounds for the government's claim, but apparently the government argued that, as a matter of general contract law, Tully "kept a power" in conjunction with the employer to "alter, amend, revoke or terminate" . . . Id. at 1404, 1405. Nor did the court consider whether the general rule was inapplicable because Tully's widow might have been an intended beneficiary of the death benefits. See *Estate of Siegel v. Commissioner*, 74 T.C. 613 (1980) and notes 50 and 53. The government also argued that the death benefits were includible in Tully's gross estate under section 2033 as a general asset owned at death.

¹¹⁵528 F.2d at 1404 (emphasis in original). The court reasoned that, if the word "power" included the possibility that Tully could convince his employer to change the contract, the statute would apply to "speculative powers." Id. at 1404-1405 (emphasis in original).

¹¹⁶528 F.2d at 1405. This would have been contrary to the general exclusion of such benefits under section 2039 as it was then written.

¹¹⁷Id. The court cited no legislative history to support its conclusions. See also Tech. Adv. Mem. 8701003.

Parenthetically, the death benefits contract was amended once by the parties. The court noted that there was no evidence to show that Tully had the power to coerce this modification but, rather, at best it seemed "that the parties were mutually convinced that the clarification was desirable." 528 F.2d at 1405 n.9.

Tully's rationale should not be employed either for purposes of the right of election or section 2038. If that rationale were correct, then every trust in which the decedent reserved a power to revoke in conjunction with another person¹¹⁸ would fall beyond the reach of section 2038 and of the elective share statutes because it could be said that the decedent reserved only a "power of persuasion"—whether or not the other person is an adverse party.¹¹⁹ This result would fly in the face of the express language of section 2038 and elective share statutes that cover transfers in which a power is retained "in conjunction with another." Simply put, *Tully's* approach is untenable, because section 2038 and the elective share statutes clearly extend to powers that *Tully* calls "powers of persuasion" or "speculative powers"—that is, the mere possibility of bilateral change.¹²⁰

Indeed, section 2038 applies to powers retained by the settlor in conjunction with another, even if the other person is an adverse party.¹²¹ This approach should be utilized in the elective share area because, as in the estate tax area, adoption of an adverse party exception in the elective share area could easily lead to subterfuges that would frustrate the purposes of the statute. For example, if an adverse party exception were applicable, a decedent could retain a power to revoke with a sympathetic beneficiary, such as a child or a sibling, and insulate transferred property from the surviving spouse's right of election. Because of the possibility that "a beneficiary who was of the grantor's immediate family might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate," an

¹¹⁸The *Tully* reasoning should apply with equal force even if the death benefit plan expressly granted *Tully* a power to revoke the plan, exercisable only in conjunction with the employer. This was the case in *Tech. Adv. Mem. 8701003*. But see *Estate of Siegel v. Commissioner*, 74 T.C. 613 (1980). Applying the *Tully* rationale to *Riefberg* would mean that the shareholders agreement should not be included because the reserved power was no more than a "power of persuasion." The *Riefberg* court did not consider this approach, nor was it called to its attention.

¹¹⁹For example, as defined in I.R.C. section 672(a) (1986).

¹²⁰For example, a transfer in which the settlor, as a trustee, retains a power in conjunction with a cotrustee is clearly includible under section 2038. See *Treas. Reg. § 20.2038-1(a)* (as amended in 1962); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89-90 (1935) (decided under section 302(d) of the Revenue Act of 1926, predecessor of section 2038 (1986)); *Estate of Farrel v. United States*, 553 F.2d 637, 642-643 (Ct. Cl. 1977); *Wolk* at 259-60; (cited in note 78). *Tully* has also been explained as involving "powers that become operational as a mere by-product of events of [independent significance], such as decedent's quitting his job or divorcing his wife." 5 B. Bittker at 126-167 and n.61 (cited in note 60). This explanation, however, focuses on actions the decedent could have taken unilaterally and thus overlooks the decedent's power to alter the death benefits contract by agreement with his employer.

¹²¹See note 120. This should also be true in the case of a limitation of a power with a consent requirement, such as a power exercisable by a trustee only with the settlor's consent.

adverse party exception was rejected for estate tax purposes.¹²² This reasoning applies with equal force in the elective share area.

The *Helmholz* "operation of law" rationale provides a more persuasive justification for the result in *Tully*.¹²³ Tully's power in conjunction with his employer to terminate the death benefit contract arose by operation of contract law, which gives the contracting parties the right to terminate or modify their agreement.¹²⁴ Because the parties cannot, either in the contract or otherwise, negate that power, it can truly be characterized as a condition imposed by law, and accordingly, the *Helmholz* rationale should apply. Otherwise, if such a power were within the scope of section 2038 or an elective share statute, then every contract would be deemed a transfer in which the decedent reserved a power to revoke in conjunction with another party¹²⁵—a result probably not contemplated under either the tax or elective share statutes.¹²⁶

An interesting estate tax decision points, however, to a different conclusion. In *Howard v. United States*¹²⁷ the decedent made certain lifetime gifts to his wife prior to 1926 that, under the then Louisiana state law, were revocable during the marriage (notwithstanding the fact that the donor did not expressly reserve a power to revoke). When the decedent died in 1937 the estate tax included all transfers as to which enjoyment at the decedent's death was subject to change through the decedent's exercise of a power to revoke or terminate.¹²⁸ In holding that the transferred property was includible for estate tax purposes,¹²⁹ even though the power to revoke was conferred only by operation of local law, the court rejected the argument that exclusion was appropriate because the settlor was powerless to make the transfer truly irrevocable, stating¹³⁰

¹²²*Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 90 (1935).

¹²³*Tully* neither mentioned *Helmholz* nor considered its rationale.

¹²⁴See note 49.

¹²⁵Under an elective share statute (like EPTL section 5-1.1(b)(1)) requiring retention of the power by an express provision in the instrument, the problem would most likely never arise.

¹²⁶See, for example, text accompanying note 65.

¹²⁷125 F.2d 986 (5th Cir. 1942).

¹²⁸Revenue Act of 1926, § 302(d)(1) (as amended in 1934) (predecessor of section 2038). The statute also applied to retained powers to alter or amend.

¹²⁹The court considered *Helmholz* to be irrelevant. It refused to construe *Helmholz* as holding that section 302(d)(1) distinguished between a power derived from the settlor's own act and the same power conferred by state law. The only "explanation" it offered was that "[t]he *Helmholz* case involved a gift in trust that, under the state law and the provisions of the trust indenture, was terminable by the joint act of all the beneficiaries." 125 F.2d at 989. See also note 60 and accompanying text.

¹³⁰125 F.2d at 990. Accord, *Vaccaro v. United States*, 149 F.2d 1014 (5th Cir. 1945) (under Louisiana Civil Code 1749, which was repealed in 1942, decedent's inter vivos gifts to his wife were automatically revocable and, thus, includible in his gross estate under section 302(d) of the Revenue Act of 1926, as amended by section 811(d) (predecessor of section 2038); *Estate of Keiffer v. Commissioner*, 44 B.T.A. 1265, 1266 (1941) (under Louisiana law decedent had the "absolute right to revoke" a gift she made to her husband in 1930 and,

We have been cited no authority, and we are aware of none, to the effect that the Revenue Act has no application to property otherwise subject to the tax because the taxpayer is powerless to deal therewith in a manner that will place it beyond the coverage of the Act.

Nevertheless, in the contract area the *Howard* approach is not feasible because by operation of law each party to a contract automatically possesses a power to amend or terminate in conjunction with the other party.¹³¹ Under *Howard*, no contract would be exempt unless the elective share statute contained a phrase such as that in New York ("retained . . . by the express provisions of the disposing instrument").¹³² Naturally, it is fair and reasonable to construe the statute to cover the *Howard* transfer in trust even though the decedent was powerless to make it irrevocable, because the decedent in *Howard* retained total and absolute control over recapturing the transferred property—the decedent required no consent to revoke the transfer. In the contract area, however, the decedent does not by operation of law retain a *unilateral* power to terminate; the consent of another party is necessary to terminate the contract. Under these circumstances, it would be neither fair nor reasonable to include property subject to a contract in the net estate if the decedent is, for all practical purposes, powerless to make the transfer irrevocable.¹³³ Thus, if property subject to a contract is to be

thus, the transfer was includible under section 302(d)(1) of the Revenue Act of 1926); but cf. *Newhall v. Casey*, 18 F.2d 447, 447 (D. MA 1927) (under Massachusetts law, husband's absolute gift was revocable; "[t]he mere fact that by operation of [the] law [then in effect] the gift might be revoked by the husband during his lifetime would not be sufficient . . . to bring the gift within section 202(b) [of the Revenue Act of 1916], as a transfer intended to take effect in possession or enjoyment after death").

¹³¹Even with a third party beneficiary contract under either the First Restatement of Contracts or the Second Restatement, if the rights of the third parties have vested (see notes 50–51), each party would have the power to terminate in conjunction with the other party and the beneficiaries.

¹³²See EPTL § 5–1.1(b)(1)(E) (McKinney 1981). Even if a contract, such as a shareholders agreement, provided that it may be terminated only by the other party, the contract still could be amended by mutual consent. See note 49. Such a power may be treated as a power to dispose retained by the decedent in conjunction with another. It is less than realistic to require either party to a contract—particularly one that is part of a business transaction—to give the other party *carte blanche* to amend the terms of the contract to avoid including property subject to a contract in the net estate. The guidelines at text accompanying notes 252–254 recommend that all contracts should be subject to the elective share except to the extent they are made for full and adequate consideration in money or money's worth.

¹³³See note 132. If the *Howard* rationale were applied to contracts, it might be argued that it also applies to an absolute gift of property, on the theory that the donor retains a power to revoke the gift in conjunction with the donee. This theory seems untenable. A contract involves an ongoing relationship in which each party has a degree of control over the other—each needs the other to consent to any change in their relationship with respect to the subject matter of the contract. In contrast, once an absolute gift is made, the donor has no relationship to the property and no control over the donee's disposition of it. Indeed, the donor's relationship to the property after the gift is made is no different from

includible in the net estate for elective share purposes, it should not be based solely on the unavoidable power to terminate held by the contracting parties in conjunction with each other.

UNANSWERED FUNDAMENTAL QUESTIONS OF ELECTIVE SHARE STATUTES

Several questions relating to the scope of the elective share statutes have not previously been addressed. To analyze these unanswered questions, interpretations of analogous provisions and concepts in other areas of law may prove useful.

The Required Transfer, Disposition or Conveyance

The first question involves the meaning of the words "transfer" in the UPC, "disposition" in the EPTL, and "conveyance" in the Pennsylvania statute. *Riefberg* did not address the threshold issue of whether the decedent, by entering into the shareholders agreement, made a "disposition of property" within the meaning of EPTL section 5-1.1(b)(1)(E).¹³⁴ The only definition of the word "disposition" is found in the general provisions of the EPTL, which define it as "a transfer of property by a person during his lifetime or by will."¹³⁵ However, no definition is given for the word "transfer." The same definitional problem exists under the UPC, which uses the word "transfer" without defining it.¹³⁶

any stranger's relationship to the property. It therefore seems inappropriate to speak of a retained power of revocation in conjunction with the donee. If the donee decides to give the property to the donor, this transaction should properly be characterized as a new gift, not as a revocation of the donor's gift. Thus, even if the *Howard* rationale were applied to contracts—and it seems that it should not (as discussed in text)—there appears to be no real justification to apply it to absolute gifts.

¹³⁴See text accompanying note 30.

¹³⁵EPTL § 1-2.4 (McKinney 1981). This definition is applicable to section 5-1.1 "unless the context otherwise requires" EPTL Art. 1, Part 2, at 8. The Practice Commentary and the Revisers' notes to EPTL § 1-2.4 add nothing to an understanding of the definition, stating only that the term "disposition" is a comprehensive one and includes any transfer whether testamentary or lifetime. P. Rohan, Practice Commentary to 17B McKinney's Consolidated Laws of New York Annotated at 12-13 (1981), and Reviser's Notes, *id.* at 13. The Report sheds no light on the definition of "disposition" and, while it uses the terms "conveyance" and "transfer," it does not define them. See, for example, Report at 110, 139 (cited in note 4).

Interestingly, the section on renunciation of property interests, EPTL section 2-1.11, contains, for purposes of that section, a statement illustrating the types of transactions included in the term "disposition," but those illustrations are not enlightening for purposes of section 5-1.1(b)(1)(E).

¹³⁶See UPC § 2-202, 8 U.L.A. 75-77 (1983). Pennsylvania's statute, which covers "property conveyed by the decedent," does not present this definitional issue to the same extent because the word "conveyance" is expressly defined: "unless the context clearly indicates otherwise, 'conveyance' means an act . . . which . . . is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation." 20 Pa. Cons. Stat. Ann. § 2201 (Purdon Supp. 1988). This definition was adopted from section 1 of the Uniform Property Act and section 11 of the Restatement of Property. See section 11 of the Estates Act, Commissioner's Comments; P. Bregy, *Intestate, Wills and*

The Restatement of Property defines "transfer" as "the extinguishment of such interests [in land or in a thing other than land] existing in one person and the creation of such interests in another person."¹³⁷ If this definition were applied to the words "transfer" and "disposition" in the UPC and EPTL, these elective share statutes would cover lifetime transactions by which a decedent's existing interest in property is extinguished and the identical interest in that property is created in the transferee.¹³⁸

This requirement is readily satisfied by any transfer in trust¹³⁹ because such transaction involves existing property in which the decedent's interest is extinguished and the identical interest is created in others—legal title in the trustee and equitable title in the beneficiary.¹⁴⁰ If the transaction does not involve existing property but the creation of new property interests, would such a transaction fall within this definition of "transfer?" For example, if the decedent entered into a contract, can that act constitute a "disposition" of property under section 5-1.1(b)(1)(E), a "conveyance" under the Pennsylvania statute¹⁴¹ or a transfer under UPC

Estates Acts of 1947 5051-5052 (1949) (hereafter cited as Bregy). Bregy states that the word "conveyance" is used in the Estates Act for the same reason it was utilized by the Restatement and the Uniform Property Act. He explains that the Restatement arbitrarily chose this word because, at the time, "[t]here was need for a term which could be used as to both real and personal property and would include inter vivos transfers as well as devises and bequests" and there was "no such generic legal term with a long settled artistic meaning." P. Bregy at 5051. The Suggested Model Decedent's Family Maintenance Act contains the following somewhat restrictive definition of the word transfer:

"Transfer" includes, but is not restricted to, a transmission of the decedent's property effected by such methods as gift, gift causa mortis, revocable or irrevocable trust, creation of any joint interest, contract to make a will, and any contract, such as life insurance, under which the decedent purchased benefits payable at his death.

See Report at 161 (cited in note 4).

¹³⁷Restatement of Property § 13(1) (1936).

¹³⁸This seems to be the plain import of the phrase "any disposition of property made by the decedent," which appears to contemplate any transaction by which the decedent transfers ownership of existing property. EPTL § 5-1.1(b)(1)(E).

¹³⁹The term is used here to mean a transfer in trust that is valid for purposes of property law even if it is illusory for purposes of the elective share because of the extent of any control or other interests that the settlor retained. See, for example, *Newman v. Dore*, 9 N.E.2d 966, 968-969 (NY 1937) (decided prior to passage of EPTL). But see *Johnson v. LaGrange State Bank*, 383 N.E.2d 185 (IL 1978) (decedent retained income from trust for life and power to revoke and invade the principal; nevertheless, the trust was not illusory for elective share purposes).

¹⁴⁰See Restatement (Second) of Trusts § 2 comment h and § 17 (1959).

¹⁴¹It is unclear whether the Pennsylvania statute applies to contracts. Section 2201 does not expressly include contracts in the definition of the word "conveyance." Section 2203 refers only to "property conveyed" and does not mention contracts. Additionally, the language of section 2205 provides that "conveyances and contracts made by the decedent [for money value] are excluded from the provisions of Section 2203" (emphasis added) implying that conveyances and contracts are two different things. Nevertheless, if the phrase "property conveyed" in section 2203 is construed literally to exclude contracts, then the language of section 2205 excluding contracts for value from the provisions of section 2203 is meaningless. Parenthetically, in *Estate of Brown*, the Pennsylvania Supreme Court assumed *arguendo* that the "buy-sell" agreement involved was a "'conveyance' within the

section 2-202?¹⁴² Consider, for instance, a contract for the sale of land. Such a contract extinguishes an interest of the contract-seller in the land and creates that identical interest in the contract-purchaser.¹⁴³ The contract-purchaser acquires from the contract-seller an equitable interest in the land from the moment the contract becomes effective.¹⁴⁴ Because a contract for the sale of land creates an equitable interest in the purchaser and simultaneously extinguishes that interest in the seller, it should constitute a conveyance under section 2201 of the Pennsylvania

meaning of Section 11." 289 A.2d 77, 82 (PA 1972) (footnote omitted). See also *Estate of Korn*, 480 A.2d 1233 (PA Super. 1984), in which the court, in holding that a deferred compensation plan that gave the employee the right to change the beneficiary was not a "conveyance" within the meaning of 20 Pa. Cons. Stat. Ann. § 2201, narrowly construed this section as requiring "either an inter vivos or testamentary operation in the creation of the property interest" *Id.* at 1238. The majority reasoned that, because the beneficiary designation was revocable, the designation "did not create an inter vivos or testamentary interest." *Id.* (citation omitted). This reasoning is unsound because, if it were accepted, then every conveyance in which the decedent reserved a power to revoke would not constitute a "conveyance" under section 2201—a result precluded by section 2203(a)(3), which plainly contemplates that the word "conveyance" will include conveyances with a reserved power to revoke. Interestingly, the concurring opinion took the position that the designation "could only give rise to an expectancy." 480 A.2d at 1239 (Spaeth, J., concurring). See P. Bregy at 5864–5865 (cited in note 136); Comment, *Buy and Sell Agreements and the Widow's Rights*, 114 U. Pa. L. Rev. 1006 (1966); Spouse's Election—Stock Subject to Buy-Sell Agreement, *Fiduciary Review*, Sept. 1965, at 3.

¹⁴²UPC section 2-202 appears to distinguish between "transfer" and "transfer[] by contract." Compare UPC §§ 2-202(1) and 2-202(2)(i), 8 U.L.A. 75–78 (1983). Neither the Code nor the Comments indicate whether the term "transfer" includes a "transfer by contract." Parenthetically, the first tentative draft of the UPC included "property transferred by the decedent . . . by . . . contract or other device under which the transfer became effective at or after decedent's death." Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. Rev. 1037, 1059 (1966). In addition, Article VI, Part 2 of the UPC, entitled "Non-Probate Transfers, Provisions Relating to Effect of Death"—which does not mention shareholders agreements or buy-sell provisions—is designed to "authorize[] a variety of contractual arrangements which have in the past been treated as testamentary . . . [and] does not invalidate other arrangements by negative implication." UPC § 6-201, 8 U.L.A. 534–535 comment (1983).

¹⁴³See Restatement of Property § 6 comment b, illustration 3 (1936). The illustration is somewhat confusing because it states that the contract buyer "immediately acquires an equitable interest but does not acquire a legal interest [in the land] until [the land] is *transferred* to him." *Id.* (emphasis added). Most probably it should have said that the buyer does not acquire the legal interest until the deed is *delivered* to him.

¹⁴⁴This assumes that the contract is specifically enforceable. If it is—and generally land contracts are specifically enforceable (see 6A Powell & Rohan ¶ 925[1] (cited in note 6))—then an equitable conversion occurs and, in equity, the buyer is considered the owner of the land—holding the purchase price for the seller—and the seller is viewed as holding legal title for the buyer with a claim for the purchase price secured by a lien. See *Panushka v. Panushka*, 349 P.2d 450, 452–453 (OR 1960); *In re Governor Mifflin Joint School Auth.*, 164 A.2d 221 (PA 1960); 3 American Law of Property § 11.22 (A. Casner ed. 1952); Stone, *Equitable Conversion by Contract*, 13 Colum. L. Rev. 369 (1913). This result is generally assumed to be based on the maxim that equity regards as done that which ought to be done.

statute¹⁴⁵ and—utilizing the Restatement's definition—a disposition under the EPTL and a transfer under the UPC.

Turning now to a buy-sell provision in a shareholders agreement, does each party to the agreement acquire an equitable interest in the stock of the other party from the moment the parties enter into the agreement? First consider the buy-sell provision in a shareholders agreement that gives each party only an option—as distinguished from a contract to purchase that imposes a duty—to purchase the stock of a deceased shareholder.¹⁴⁶ Here, no definitive answer can be given. Even option contracts relating to land may create an equitable interest in the holder for one purpose—such as the application of the statute of frauds¹⁴⁷—but not for another—such as the application of the Rule Against Perpetuities¹⁴⁸ or the devolution of property.¹⁴⁹

¹⁴⁵See note 136.

¹⁴⁶Until the purchaser exercises the option by accepting the offer, no contract to purchase exists. See *Lord Ranelagh v. Melton*, 2 Drewry & Smale's 278 (Ch. 1864); E. Farnsworth, *Contracts* § 8.7, at 572 (1982).

¹⁴⁷2 A. Corbin, *Contracts* § 418 (1950 & Supp. 1984).

¹⁴⁸*Id.* In order to avoid holding that a long term lease with an option to buy does not violate the Rule Against Perpetuities, at least one court has held, according to Corbin, that the option creates no interest in the land. See *Keogh v. Peck*, 147 N.E. 266 (IL 1925). But cf. *Morgan v. Griffith Realty Co.*, 192 F.2d 597, 599–600 (10th Cir. 1951) (although option to purchase or repurchase property only “creates rights in personam,” it encumbered the land and the general rule is that an option that extends beyond the perpetuities period is void for remoteness); *Gange v. Hayes*, 237 P.2d 196, 201–202 (OR 1951) (same). The result in *Keogh* can also be explained by the Restatement of Property section 395, which excludes an option to purchase the lease premises from the Rule, as long as the option is exercisable prior to or at the end of the lease term. Such options are not subject to the Rule Against Perpetuities in order to enable the lessee “so to plan for the future as to get the benefits of the full utilization of the land during his lease-term.” Restatement of Property § 395 comment a (1944). Accord, 6 *American Law of Property* § 24.57 (A. Casner ed. 1952 & Supp. 1977). The general rule stated by section 393 of the Restatement is that options that “would create an interest in land, or in some unique thing other than land” are subject to the Rule. The rationale for excluding transactions that are “exclusively contractual” is that they do not involve the “fettering of any property.” Restatement of Property § 401 and comment a (1944).

¹⁴⁹Many courts have held that an option contract relating to land does not result in an equitable conversion prior to the time the option is exercised. See, for example, *Brooks v. Yawkey*, 200 F.2d 663, 665 (1st Cir. 1953); *Eddington v. Turner*, 38 A.2d 738, 742 (DE 1944) (equitable conversion does not apply because, until the option is exercised, “no duty rested on anyone in connection with the land”); *Rockland-Rockport Lime Co. v. Leary*, 97 N.E. 43 (NY 1911); *Simpson*, *Legislative Changes in the Law of Equitable Conversion by Contract*, 44 *Yale L.J.* 559, 564 (1935). In England and some American jurisdictions, courts have held that the equitable conversion relates back to and takes effect from the date the option was granted. *Id.* at 564. But cf. *Cobb v. Commissioner*, 49 T.C.M. (CCH) 1364, 1369, 1372 (1985) (although option agreement between decedent and Cobb with respect to decedent's farm gave Cobb no interest in the land under state law, the court held that the contract right to purchase the farm was “‘property’ within the meaning of the gift tax statute, sections 2501 [imposing a gift tax on the “transfer of property by gift”] and 2511 [gift tax applies whether “transfer is in trust or otherwise”], and could be the proper subject of a taxable gift when

Nor is there a simple answer if the shareholders agreement contains a buy-sell provision that *requires* the sale of the deceased shareholder's stock. Here, notwithstanding the duty to sell, it is impossible to know during the parties' joint lives who will die first and, thus, who will be the seller and who will be the buyer. Because the obligation to purchase is conditional during the parties' joint lives, arguably no equitable interest is created despite the fact that—in contrast to the option contract—the obligation to sell ultimately becomes unconditional when one party predeceases another. Or perhaps it can be argued that each party should be deemed to have an equitable interest in the stock of the other party, subject to defeasance of that interest upon death. These different questions can easily be resolved by amending the statutes to define transfer, disposition and conveyance to include contracts¹⁵⁰ or by the courts' broadly construing such statutory terms.¹⁵¹

Regardless of whether a shareholders agreement technically constitutes a transfer, disposition, or conveyance of property, it is possible to take the approach of *Brodrick v. Gore*¹⁵² in the estate tax area and conclude that a shareholders agreement is still not a transfer, disposition or conveyance within the meaning of the elective share statutes.¹⁵³ In

transferred;" the gift tax regulations—which were cited by the court—provided that the tax was "applicable only to a transfer of a beneficial interest in property." Treas. Reg. § 25.2511-1(g)(1) (as amended in 1986)). In essence, the court said that conferring a contract right on another—or creation of a contract right in another—is a "transfer of property by gift" under section 2501(a). The Senate Hearings concerning the 1932 Act indicate that the gift statute covers "transactions . . . whereby . . . property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." S. Rep. No. 665, 72d Cong., 1st Sess. (1932), reprinted in 1939-1 (Part 2) C.B. 496, 524 (emphasis added).

Both *In re Burk*, 37 Pa. D. & C.2d 528 (1965), which was relied on by *In re Estate of Riefberg*, 446 N.E.2d 424, 427 (NY 1983), and *In re Estate of Brown*, 289 A.2d 77 (PA 1972), involved shareholders agreements in which each shareholder had only an option to purchase the deceased shareholder's stock. Neither case passed on the question of whether the agreement was a conveyance within the meaning of section 11 (see notes 34 and 141). *Brown* noted that specific performance was a proper remedy to enforce buy-sell agreements for shares in closely held corporations. 289 A.2d at 81. However, in view of the decisions mentioned above concerning option contracts relating to land, an equitable conversion would most likely not occur prior to exercise of the option in a shareholders agreement.

¹⁵⁰This is the approach suggested in the guidelines. See text accompanying notes 252-253.

¹⁵¹This is what *Riefberg* implicitly did when it held that the shareholders agreement was covered by EPTL section 5-1.1(b)(1)(E). Similarly, in considering whether execution of a buy-sell agreement resulted in a taxable "transfer of property by gift" under section 2501, Tech. Adv. Mem. 8612001, without analysis, stated that the mutual promises of the shareholders constitute a transfer of legally enforceable contract rights. Compare *Cobb v. Commissioner*, 49 T.C.M. (CCH) 1364 (1985) (cited in note 149).

¹⁵²224 F.2d 892 (10th Cir. 1955).

¹⁵³Like the UPC, the Internal Revenue Code does not define the word "transfer" although it uses it throughout the Code, most relevantly for purposes of this article in sections 2036 and 2038.

Brodrick a partnership agreement for the conduct of an oil and gas business provided that, upon the death of a partner, his interest in the partnership should be sold to the surviving partners for the book value of the interest. The court rejected the concept that, by entering into the agreement, each partner made a transfer of his interest within the meaning of Internal Revenue Code section 811¹⁵⁴ other than by a bona fide sale for an adequate and full consideration. It explained that the agreement was made to provide for the operation of the business and not to¹⁵⁵

make any transfer of property in contemplation of death, revocable, or otherwise, within the intent and meaning of the statute. He entered into a partnership agreement with his sons providing for the operation and conduct of a partnership business. The agreement was by its clear terms enforceable in favor of and against the estate of the first copartner to die and the two surviving copartners, whether the first to die was the decedent or one of the sons. It was specifically enforceable regardless of which copartner should die first. It was not known whether the decedent would outlive one or both of the sons. And it was supported by an adequate and full consideration, within the intent and meaning of the statute.

Although *Brodrick* says that no "transfer of property in contemplation of death" was made—as distinguished from no "transfer,"—the meaning is clear. In the court's view, such an agreement is not the type of transfer encompassed within the statute because it was entered into by the shareholders in order to regulate the conduct of a business. A similar approach can be used under an elective share statute aimed at transfers designed to defeat the rights of a surviving spouse. Thus, it could be argued that, even if a technical transfer of an equitable interest occurs when the parties enter into a shareholders agreement, such an agreement does not constitute a disposition—to quote from *Brodrick*—"within the intent and meaning of the statute."¹⁵⁶ The buy-sell provision should be viewed not as independent of the shareholders agreement but, rather, as an integral part of an overall agreement for the operation of a business¹⁵⁷ and, therefore, the stock—or its value—would not be includible in the net estate for elective share purposes.

It is obvious that clarification of elective share statutes concerning contracts is necessary. If protection of the surviving spouse is not to be whittled away, technical definitions should not be employed in instances in which benefits—such as the proceeds from a sale of stock—are derived

¹⁵⁴The predecessor of I.R.C. §§ 2035–2038 (1986).

¹⁵⁵224 F.2d at 897. Accord, *Estate of Littick v. Commissioner*, 31 T.C. 181, 186 (1958) (shareholders agreement containing buy-sell provision requiring decedent's stock to be sold to corporation did not effectuate a "transfer" within the meaning of section 811 [of the Internal Revenue Act of 1939]).

¹⁵⁶224 F.2d at 897.

¹⁵⁷See note 29.

from a contract right created by the decedent during life.¹⁵⁸ Similarly, the underlying business reasons for the contract should be irrelevant. Creation of a contract right in another ought to be considered a transfer of existing property for elective share purposes. In both cases, the decedent has granted a property right to another—in the case of the transfer of property by extinguishing rights in the property and in the case of the contract by creating an obligation to another. Nevertheless, even if a contract is considered a transfer or disposition of existing property, the other conditions of an elective share statute must be satisfied before a contract will be considered a testamentary substitute for elective share purposes.

Transfers for Value

In determining the size of the net estate for elective share purposes, both the UPC¹⁵⁹ and the Pennsylvania statute¹⁶⁰ exclude transfers for a full consideration in money or money's worth.¹⁶¹ In contrast, EPTL section

¹⁵⁸The courts have generally avoided a technical approach in the tax area in determining whether a given transaction constitutes a transfer of property. See *Chase National Bank v. United States*, 278 U.S. 327, 337 (1929) ("Obviously, the word 'transfer' . . . or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another"); *Estate of Porter v. Commissioner*, 442 F.2d 915, 919 (1st Cir. 1971); *Kramer v. United States*, 406 F.2d 1363, 1369 (Ct. Cl. 1969); *Worthen v. United States*, 192 F. Supp. 727, 733-734 (D. MA 1961). See also note 149. But cf. *Hinze v. United States*, 29 A.F.T.R.2d (P-H) 72-1553, 72-1557 (C.D. CA 1972) (decedent agreed with corporation to provide annuity to his widow; court concluded that decedent never "had an 'interest in property' and therefore could not have made a transfer as contemplated by sections 2036 and 2038").

¹⁵⁹UPC § 2-202(1), 8 U.L.A. 75, 76 (1983 & Supp. 1986) includes in the augmented estate: The value of property transferred to anyone other than a bona fide purchaser . . . to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer

Interestingly, the UPC does not include transfers to bona fide purchasers, even if made for less than adequate and full consideration. See UPC § 2-202(1) comment.

¹⁶⁰20 Pa. Cons. Stat. Ann. § 2205 (Purdon Supp. 1988) provides in pertinent part:

Conveyances and contracts made by the decedent are excluded from the provisions of section 2203 (relating to right of election . . .) . . . to the extent that the decedent received adequate consideration therefore in money or money's worth.

In contrast, section 11 of the Pennsylvania Estates Act, as enacted in 1947, did not expressly exclude transfers for value. One commentator believes that this section "is not limited to voluntary transfers." See P. Bregy at 5861 (cited in note 136). According to Bregy, the inclusion of transfers for value would not cause hardship except in unusual cases because no one would give value for property subject to one of the enumerated powers. *Id.* at 5861-5862. The mere fact that a statute does not expressly exclude transfers for value, he says, should not automatically mean they are included. This is a matter of statutory interpretation. *Id.* at 5864-5865.

¹⁶¹Presumably "adequate consideration," the term used in the Pennsylvania statute, and "adequate and full consideration," the term used in UPC section 2-202(1), have the same meaning, notwithstanding that the word "adequate" may connote something less than "full" consideration.

5-1.1(b)(1)(E) simply refers to "any disposition." On its face the New York statute would include transfers for a full consideration in money or money's worth as well as gratuitous transfers because section 5-1.1(b)(1) does not expressly limit its application to transfers to the extent made for less than a full consideration. It would be reasonable, however, to construe the term "disposition of property" in the New York statute as excluding any transfer to the extent value in money or money's worth is received. For example, if the decedent disposed of \$300 in assets in exchange for \$200 in money or money's worth, it could be held that the decedent only disposed of \$100 worth of property; the word "disposition" would be construed to mean the "net disposition."¹⁶² Such a construction would (1) comport with the Report, which concludes that any transaction "made for full consideration in money or money's worth" should not be subject to the right of election,¹⁶³ and (2) would be consistent with the federal estate tax scheme¹⁶⁴ and the UPC and Pennsylvania elective share statutory schemes.¹⁶⁵

Interestingly, *Riefberg* did not address this issue with respect to the shareholders agreement—and the parties did not raise it. If the court had considered the issue and determined that the statute did not apply to transfers for value, it might have concluded that such an agreement was supported by adequate and full consideration¹⁶⁶ and, thus, would not have been includible in the net estate for elective share purposes.¹⁶⁷

¹⁶²But cf. comments by Bregy in note 136.

¹⁶³Report at 138 (cited in note 4). There is no indication why an express provision to this effect was not included in the draft or final legislation. Parenthetically, there are statutory models, such as a North Carolina statute, that only cover "gratuitous transfers." Such statutes, however, should also extend to transfers for nominal consideration, at least in non-business contexts. Otherwise, as pointed out in the Report at 128–129, virtually every transfer could be excluded simply by providing minimal consideration, regardless of its adequacy. Moreover, respectable authority exists for the proposition that no consideration exists "where the purported consideration is merely nominal." Restatement (Second) of Contracts § 71 comment b and illustration 5 (1979).

¹⁶⁴I.R.C. §§ 2036 and 2038 (1986). Both sections exclude "a bona fide sale for an adequate and full consideration in money or money's worth."

¹⁶⁵Unlike the federal estate tax and the Pennsylvania statute, the UPC does not include a bona fide sale, even if made for less than adequate and full consideration. UPC § 2–202(1) (1983) (augmented estate includes "the value of property transferred to anyone *other than* a bona fide purchaser . . . to the extent that the decedent did not receive adequate and full consideration . . .") (emphasis added). See also UPC § 2–202 comment (1983).

¹⁶⁶See notes 31–33 and accompanying text. See Model Probate Code, discussed in the Report at 130–131 (cited in note 4), which provides that "a transmission of property in a genuine business transaction will be considered as made for an adequate and full consideration in money or money's worth." Cf. *Brodrick v. Gore*, 224 F.2d 892, 897 (10th Cir. 1955) and text accompanying note 155.

¹⁶⁷This conclusion has been reached in the gift tax area. See Tech. Adv. Mem. 8612001 (shareholders agreement was not subject to gift tax statute because each shareholder owned one-half of the corporation and, therefore, the contract rights transferred by each to the other were deemed to be equal in value).

Such a conclusion would not be justifiable, however, unless the overall transaction were examined. Generally, in entering into a shareholders agreement containing a buy-sell provision, each party receives valuable contract rights. But such a transaction also anticipates the future sale of the stock of a deceased shareholder and payment of the purchase price for that stock by the surviving shareholder. In determining whether the decedent made a transfer for full consideration under an elective share statute that does not include transfers made for a full and adequate consideration, a court should focus on the value to be received by the deceased shareholder for the ultimate sale of that decedent's stock and not simply on the value of the contract rights that the decedent shareholder received from the other shareholder under the agreement.

Indeed, any transfer of property by contract in which a decedent has a life interest or a reserved power should be deemed made for full and adequate consideration under an elective share statute¹⁶⁸ only if full value is received for the underlying property transferred and not simply for the retained interests or powers.¹⁶⁹ In the area of contracts, full consideration should be interpreted to mean that the decedent received full consideration for any property actually transferred pursuant to the contract rights, and not just for the contract rights alone.¹⁷⁰

¹⁶⁸This assumes that the statute reaches the value of the property transferred if the decedent reserved a life interest, such as under UPC section 2-202(1)(i).

¹⁶⁹Although addressing a different issue, the concurring opinion in *United States v. Allen*, 293 F.2d 916, 918 (10th Cir. 1961), is instructive. The court held that the principal of a trust was includible in the decedent's gross estate under I.R.C. section 811 (1939) [currently IRC § 2036(a)(1) (1986)] even though the decedent, as settlor of the trust, made a bona fide sale of her reserved life estate for the full value of that life interest. The concurring opinion explained:

The fact that full and adequate consideration was paid for the transfer of the retained life estate is immaterial. To remove the trust property from inclusion in decedent's estate there must be full and adequate consideration paid for the interest which would be taxed. That interest is not the right to income for life but the right to the property which was placed in the trust and from which the income is produced.

Similarly, to preclude inclusion of the shares in the decedent's estate for elective share purposes, full and adequate consideration should be paid not only for the retained life interest but also for the shares that were the subject of the agreement.

¹⁷⁰Relinquishment of a retained interest or power in contemplation of death presents a somewhat similar situation. Thus, in determining whether the relinquishment was made for full and adequate consideration, should the value received for the transfer of the underlying property be considered in addition to the value received for the relinquishment of the power or interest? It can be argued that, unless full consideration is received for the property in which the decedent reserved that interest or power, the decedent could, after enjoying the benefits of the property almost until death, sell the reserved interest or power for a full consideration measured against only the short remaining term of that interest, or the period during which the power may be exercised, thereby depriving the surviving spouse of an opportunity to share in that property. The underlying property might nevertheless be includible if the statute also covers transfers in contemplation of death. See note 287 and cf. *United States v. Allen*, 293 F.2d at 917-918.

Retention of a Power

Another unanswered fundamental question concerning the scope of the elective share statutes under discussion is the meaning of the word "power" as used in the phrases "power to revoke" or "power to consume, invade or dispose."¹⁷¹ Does the word "power" include a mandatory power, a discretionary power,¹⁷² or does it cover both? *Estate of Twersky*¹⁷³ addressed this question under the EPTL. There, the decedent created an irrevocable trust, naming himself and two others as trustees. Pursuant to the trust instrument, Twersky was to receive each year of his life a \$50,000 annuity, payable quarterly from income and, if the quarterly income was less than \$12,500, the trust instrument *required* the trustees to invade principal to make up the deficiency.¹⁷⁴ The court was "convinced" that the word "power" implies "control or authority" and concluded that the nondiscretionary quarterly payments of the fixed annuity was not a power to invade the principal within the scope of EPTL section 5-1.1(b)(1)(E).¹⁷⁵

Although the court's reasoning may be subject to question,¹⁷⁶ the conclusion in *Twersky* is sound.¹⁷⁷ It seems that, absent an unequivocal

¹⁷¹See UPC § 2-202(1)(ii); EPTL § 5-1.1(b)(1)(E); 20 Pa. Cons. Stat. Ann. § 2203(a)(3).

¹⁷²A mandatory power refers to a purely ministerial duty, such as the obligation of a trustee to pay \$10,000 per year to a beneficiary. A discretionary power involves the exercise of some judgment, such as a trustee's power to distribute principal as the trustee deems desirable.

¹⁷³N.Y.L.J., Sept. 16, 1982, at 10, col. 7 (Sur. Ct. 1982), *aff'd mem.* No. 178-83 slip op. (App. Div. Dec. 1, 1983). In this litigation, the Twersky estate was represented by Kaye, Scholer, Fierman, Hays & Handler and Professor Kwestel, a former partner in the firm, handled the litigation in the Surrogate's Court. Professor Seplowitz participated in the appeal when she was associated with the firm.

¹⁷⁴At decedent's death, the principal was to be paid to a charitable foundation. *Id.*

¹⁷⁵*Id.*

¹⁷⁶After noting that neither the case law—there appears to be none in point—nor the legislative history was illuminating, the court stated that the Report defines the word "power" as "the ability possessed by any person to extinguish legal relations in property, real or personal, and to create new relations therein." *Id.* See Report at 129-130 (cited in note 4). This definition, according to the court, seemed "to import a requirement that some authority or control be retained by the possessor of the power." N.Y. L.J., Sept. 16, 1982, at 10, col. 7. However, the definition appears in the Report under the heading "Powers of Appointment," a section that addresses elective share rights against property subject to a power of appointment. Report at 129-130 (cited in note 4). It has nothing to do with EPTL section 5-1.1(b)(1)(E) and, more importantly, a person can have the requisite ability to extinguish or create relations without the kind of authority or control the court envisioned (for example, through the exercise of a mandatory nondiscretionary power).

Parenthetically, *Twersky* did not refer to EPTL section 10-2.1 (McKinney 1967), which defines the word "power" as "an authority to do any act in relation to property." However, this definition implicitly seems to relate only to Article 10, which deals in part with powers of appointment, including imperative powers of appointment. See EPTL § 10-3.4 (b) (McKinney 1967).

¹⁷⁷If the power to invade principal for the benefit of the settlor were regarded as discretionary, the settlor, in his capacity as trustee, still should not be deemed to have

expression to the contrary, the word "power" in an elective share statute should not extend to a trust provision directing a trustee to invade principal under an objective standard that grants the trustee absolutely no discretion.¹⁷⁸ In such a case, no matter who is trustee—the decedent or anyone else—the power must be exercised in the same manner. Accordingly, if the element of discretion or control is completely absent, it can scarcely be said that a "power" was retained¹⁷⁹ unless the statute makes it clear that the legislature intended to cover both discretionary and mandatory powers.

This approach is consistent with estate tax section 2038 under which, if the exercise of the settlor-trustee's power to "alter, amend, revoke or terminate" the enjoyment of transferred property is governed by an "external standard"—a standard capable of enforcement by a court of equity—then the transferred property is not includible in the gross estate under section 2038.¹⁸⁰ In such a case, enjoyment of the property is

retained a power because, under New York law, a trustee is prohibited from participating in the exercise of a discretionary power to make distributions to himself as beneficiary. EPTL § 10-10.1 (McKinney 1967).

¹⁷⁸This presents a slightly different situation from a power to invade governed by an external standard under which the trustee still has some degree of discretion in the extent to which the power is exercised. See text accompanying note 180.

¹⁷⁹Analysis of the EPTL and its history confirms that the New York concept of a "testamentary substitute" is designed to encompass property transfers as to which the decedent retained a "string" during life, permitting a recapture or disposition of the property. The key under this statutory scheme—and the same is true of UPC section 2-202—is the decedent's retention of control—a "string"—over the property until death. In essence, the property is disposed of upon the decedent's death and not during life. Thus, each of the testamentary substitutes enumerated in EPTL section 5-1.1(b)(1)(A) through (D) involves transfers over which the decedent retained some control. Apart from gifts causa mortis and Totten trusts, which are revocable, the statute covers tenancies by the entirety and joint tenancies by which each joint tenant enjoys the power, either alone or in conjunction with the other joint tenant, to sever the tenancy. Although the decedent would have control over only one-half the property jointly held, the statute nevertheless includes the value of the jointly held property to the extent of the decedent's capital contribution. See also I.R.C. § 2040(a) (1986) (inclusion in the gross estate of that portion of property held jointly with a nonspouse that was contributed by the decedent).

¹⁸⁰*Old Colony Trust Co. v. United States*, 423 F.2d 601, 603 (1st Cir. 1970); *Jennings v. Smith*, 161 F.2d 74 (2d Cir. 1947); *Carpenter's Estate v. United States*, 45 A.F.T.R.2d (P-H) ¶148,392 at 1784 (W.D. WI 1980) ("The trustee's role is limited to the ministerial task of discovering, as contrasted with deciding, whether to distribute or accumulate. This is neither power to designate [under section 2036] nor power to alter, amend, revoke or terminate [under section 2038]"); *Estate of Budlong v. Commissioner*, 7 T.C. 756, 762 (1946), *aff'd in part and rev'd in part sub nom., Industrial Trust Co. v. Commissioner*, 165 F.2d 142 (1st Cir. 1947). Although *Jennings v. Smith* is cited repeatedly for this proposition, the decision is not clear. To be sure, the settlor-trustee's power to invade was exercisable only if the decedent's son suffered prolonged illness or financial misfortune deemed extraordinary by the trustees—a standard considered "sufficiently definite to be capable of determination by a court of equity." 161 F.2d at 77. Neither contingency had occurred prior to the decedent's death, and the court seems to have based its conclusions on the fact that the trustee's power to invade, "conditioned on contingencies which had not happened,"

deemed to be controlled by the external standard rather than by the discretion of the decedent-trustee.

Pennsylvania's elective share statute, however, takes a different approach from the estate tax cases. First, the statute expressly applies to transfers as to which the retained power to withdraw principal or income is subject to an external standard, such as a power that may be exercised "only for support or other particular purpose or only in limited periodic amounts."¹⁸¹ Second, a transfer with a retained power to revoke, consume, invoke or dispose is includible only if the retained power is for the decedent's "own benefit."¹⁸² The key to the Pennsylvania statute seems to be the decedent's enjoyment or possibility of enjoyment of the transferred property and not merely the exercise of a degree of control over such property.¹⁸³

The UPC also includes transferred property only if the retained power is for the decedent's benefit.¹⁸⁴ However, it does not, as does the Pennsylvania statute, expressly include property transferred with a re-

was insufficient to make the transfer subject to section 811(d)(2) (currently section 2038). *Id.* at 78. Similarly, in discussing the settlor-trustee's power to disburse income if he and his cotrustees determined it was necessary to enable the beneficiary to maintain himself in accordance with his "station in life," the court reasoned that, because the contingency that would justify exercise of the power had not occurred, the trust was not subject to any change through the exercise of a power and thus was not includible under section 811(d). *Id.* Thus, insofar as section 2038 is concerned, the non-occurrence of the contingency appears to have been the determining factor—and not the fact that the exercise of the power was subject to "determinable standards." Indeed, in *Estate of Yawkey v. Commissioner*, 12 T.C. 1164, 1170 (1949), the court cited *Jennings* for the proposition that "a power based on such a future contingency [the beneficiary's reaching 30] does not suffice to bring the situation within section 811(d)." Nevertheless, the *Jennings* court emphasized the external standard concept in its discussion of whether the trustee's powers constituted a right under section 811(c) (currently section 2036) to designate the persons who will enjoy the trust principal or income:

But for the reasons that moved us when considering the applicability of § 811(d) we think the decedent effectively put that "right" beyond his own control or retention by imposing conditions upon the exercise of it. A "right" so qualified that it becomes a duty enforceable in a court of equity on petition by the beneficiaries does not circumvent the obvious purpose of § 811(c) to prevent transfers akin to testamentary dispositions from escaping taxation.

161 F.2d at 78–79.

¹⁸¹20 Pa. Cons. Stat. Ann. § 2203(a) and official comment (Purdon Supp. 1988). Because the statute appears to equate "beneficial powers" with "beneficial interests," it is likely that the statute would be construed to reach mandatory invasions for the decedent's benefit. See *id.* official comment.

¹⁸²*Id.* § 2203(a)(3).

¹⁸³Thus, unlike the UPC and EPTL, it is not surprising that the Pennsylvania statute—which focuses on benefit to the decedent—provides that a power to withdraw "in any person whose interest is not adverse to the decedent" is deemed a power in the decedent. *Id.* An analog to this concept is found in the federal income tax laws concerning the taxability of trust income. See I.R.C. §§ 674(a), 675(1), (2) & (4), 676(a) and 677(a) (1986).

¹⁸⁴UPC § 2–202(1)(ii) (1983).

tained power subject to an external standard. Nevertheless, the failure expressly to cover such transfers does not mean that they are not includible under UPC section 2-202; the UPC simply does not address the issue.¹⁸⁵

In this connection, the estate tax cases under section 2038 provide no useful guidance. Significantly, these cases, which exclude from the scope of section 2038 transfers with a retained power to invade subject to an external standard, involve a power exercisable by the settlor in any capacity but only for the benefit of another person. Thus, the estate tax cases under section 2038 are not instructive on the question of whether a transfer with a retained power to invade subject to an external standard should be includible under UPC section 2-202, which includes the transferred property only if the retained power is for the decedent's own benefit.

Given the rationale of the estate tax cases for excluding transfers subject to an external standard, the person for whose benefit the power is exercisable should be irrelevant. In focusing on the settlor as trustee, it is correct to say that an external standard imposes a *duty* to invade that is enforceable in equity; in such a case the settlor-trustee's *power* to invade is in reality only a *duty*. However, in focusing on a decedent who is also a beneficiary of the power to invade, it might be argued that, as a beneficiary, the decedent has retained a power to invade through the right to enforce the trustee's duty to exercise the power and, thus, the transfer should be includible under UPC section 2-202.¹⁸⁶ This argument, however, makes a distinction without a difference. In the final analysis, the power to compel distributions—which could only exist to the extent the trustee has failed to exercise the invasion power—is no more extensive than—and is governed by—the trustee's correlative duty.

¹⁸⁵The guidelines at text accompanying notes 261–267 recommend that transfers subject to an external standard should be includible under elective share statutes.

¹⁸⁶Such an argument would be equally applicable to an elective share statute based on the federal estate tax statute—such as the Delaware elective share statute. See note 16. In fact, two commentators have asked whether a power, the exercise of which is subject to an external standard, would be covered by section 2038 if the decedent is the beneficiary, on the ground that the decedent's "power to compel the third person to distribute income or corpus to him when the contingency occurs is a power to 'alter, amend or revoke'." See B. Bittker and E. Clark, *Federal Estate and Gift Taxation* 204 (5th ed. 1984).

Interestingly, under section 811(c) of the Internal Revenue Code of 1939—which taxed transfers intended to take effect in possession or enjoyment at or after the transferor's death—a transfer in trust by which the "trustees were under an enforceable fiduciary obligation, in the exercise of their discretion, to pay the principal of the trusts to the grantors according to fixed standards" was includible in the gross estate. *Estate of Rosenwasser v. Commissioner*, 5 T.C. 1043, 1046 (1945). See *Blunt v. Kelly*, 131 F.2d 632, 634–635 (3d Cir. 1942) (decided under section 302(c) of the Revenue Act of 1926, the predecessor of section 811(c)); B. Bittker & E. Clark at 204. Presumably this argument is not applicable to EPTL section 5-1.1(b)(1)(E) because a power to enforce the duty of the trustee is not a power retained by the express provisions of the trust instrument.

Exercise of both powers is circumscribed by the same external standard; thus, the power of a decedent as beneficiary to enforce the trustee's duty is no more of a "power" than is the trustee's duty itself—and should be treated the same as any power that is subject to an external standard.¹⁸⁷

Gifts to Minors

Transfers under a state's Uniform Gifts to Minors Act (UGMA)¹⁸⁸ or Uniform Transfers to Minors Act (UTMA)¹⁸⁹ present an interesting situation under all elective share statutes that reach lifetime transfers with certain reserved powers. Assume that Parent transfers funds into a bank account, naming Parent as custodian for Child, a minor, under the state's UGMA. The gift is irrevocable and legal title is "indefeasibly vested" in Child.¹⁹⁰ However, Parent as custodian has the power to pay to Child or expend for Child's benefit so much of the property as Parent "deems advisable for the support, maintenance, education and benefit of the minor."¹⁹¹ Under these circumstances, if Parent died before the custodianship terminated, would the custodial funds be includible in Parent's estate for elective share purposes? More specifically, under UPC section 2-202(1) and the Pennsylvania elective share statute, would such a gift constitute a transfer pursuant to which Parent retained, to any extent, a power exercisable "for his own benefit"?¹⁹² And under EPTL section 5-1.1(b)(1)(E), can it be said that Parent's powers as custodian were retained by the express provisions of the disposing instrument? Finally, is

¹⁸⁷The guideline at text accompanying note 264 recommends that such a power render the property includible in the net estate.

¹⁸⁸Unif. Gifts to Minors Act (1966 UGMA), 8A U.L.A. 328 (1966); Unif. Gifts to Minors Act (1956 UGMA), 8A U.L.A. 412 (1956) (revised 1966). The 1956 UGMA is currently in effect in two states and the Virgin Islands (8A U.L.A. 90 (Supp. 1988)); the 1966 UGMA is currently in effect in twenty-one states. *Id.* at 75.

¹⁸⁹Unif. Transfers to Minors Act (UTMA), 8A U.L.A. 176 (Supp. 1988). Twenty-seven states and the District of Columbia have adopted the UTMA, which was approved by the National Conference of Commissioners on Uniform State Laws in 1983 and which revised and restated UGMA. 8A U.L.A. 75 (Supp. 1988).

¹⁹⁰See 1966 UGMA § 3(a), 8A U.L.A. 366 (1983); 1956 UGMA § 3(a), 8A U.L.A. 421 (1983); EPTL § 7-4.3(a) (McKinney Supp. 1988).

¹⁹¹UGMA § 4(b), 8A U.L.A. 369 (1966):

The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose. Any unexpended funds must be paid to the minor no later than the age of twenty-one or if the minor dies prior to such age to his estate.

¹⁹²Both statutes require that the power be exercisable for the decedent's benefit. See note 182 and accompanying text.

exercise of Parent's power as custodian subject to an external standard? Based on existing authority, it is difficult to give definitive answers.

Retained Power for Parent's Benefit

In *Estate of Schwartz*,¹⁹³ the Pennsylvania Supreme Court held that a corporate bond that the decedent purchased for his son (by a prior marriage) under Pennsylvania's UGMA¹⁹⁴ was not subject to his surviving spouse's right of election under section 11, which reached transfers with a retained testamentary power of appointment or a power to revoke or consume. It noted that, under Pennsylvania's UGMA, the gift was irrevocable and title was indefeasibly vested in the minor. Consequently, the court concluded that the custodian "cannot consume the principal for his own benefit."¹⁹⁵ In so doing, the court rejected the argument that, because application of the custodial property might have relieved the decedent of his parental support obligation, a limited power of consumption was retained. The court explained:¹⁹⁶

[T]his argument presupposes the existence of a support obligation on the part of the custodian that can be met by payments from the custodial fund and falls apart whenever a custodian owes no duty of support to the minor. Additionally, we believe the advantage to the present decedent, if there was any advantage, was too indirect and remote and cannot be classified as a power of consumption under Section 11. It appears to be impossible for the custodian to have used his statutory authority to his own advantage; his power of consumption could *only* be exercised to benefit the minor and the existence of such power of consumption has not been demonstrated on this record to have relieved, actually or potentially, the donor-decedent of his support obligation.

This explanation is difficult to understand in light of the court's basic premises. The court had already accepted the fact that the donee's father had a pre-existing duty of support,¹⁹⁷ and assumed for purposes of the decision that "the donor-custodian could in fact substitute custodial funds for his legal obligation to support."¹⁹⁸ If so, why did the court say that the surviving spouse did not demonstrate that the donor-decedent

¹⁹³295 A.2d 600 (PA 1972).

¹⁹⁴20 Pa. Cons. Stat. Ann. §§ 5301-5310 (Purdon Supp. 1988).

¹⁹⁵295 A.2d at 603. The court interpreted the words "power of consumption" in section 11 (quoted in note 34) to mean a power to consume in favor of the decedent. It based its interpretation on the fact that prior decisions under section 11 "involved situations where the interest retained by the decedent could be exercised to his own advantage." *Id.* See also *Longacre v. Hornblower & Weeks*, 83 Pa. D. & C. 259, 262 (1952), in which the court stated:

The phrase "power of consumption" does not have a settled meaning in the law, and it appears to us that the legislature was using the word "consumption" according to its common meaning, and intended to apply the act to all conveyances of assets subject to a power in the transferor to reacquire beneficially the property conveyed.

¹⁹⁶295 A.2d at 603-604 (emphasis in original).

¹⁹⁷*Id.* at 602.

¹⁹⁸*Id.* at 603 n.2.

was relieved either “actually or *potentially*”¹⁹⁹ of his support obligation?²⁰⁰ If, as the court explicitly assumed for purposes of the decision, the decedent had retained a power to substitute custodial funds for his legal obligation to support his child, what additional showing could have been made? It seems that, under these circumstances, the decedent is at least “potentially” relieved of his support obligation—and thus benefited—by virtue of the power he had (as the court assumed) as an UGMA custodian.²⁰¹ Indeed, the dissent took the position that once a parent designates himself as custodian “he *could* utilize the custodial proceeds, *instead* of his personal assets, to satisfy *his* parental obligation to support his minor son.”²⁰² Accordingly, the dissent observed, the decedent retained “the exclusive right to decide whether to satisfy his support obligation from his personal assets *or* from the custodial assets”—a right that, according to the dissent, constituted a power of consumption under section 11.²⁰³

Tax cases under section 2036(a) of the Internal Revenue Code support the dissent in *Schwartz*. In *Estate of Chrysler v. Commissioner*,²⁰⁴ the

¹⁹⁹Id. at 604 (emphasis added).

²⁰⁰The most plausible explanation is that the court ignored—and reached a conclusion that is irreconcilable with—the premises it had assumed for purposes of the decision. But see *Sutliff v. Sutliff*, 528 A.2d 1318, 1323 (PA 1987) (“We have stated that a custodian may not use UGMA property to benefit himself [citing *Schwartz*] and suggested that a custodian may not use it to fulfill an existing support obligation.” 295 A.2d at 603 n.2).

²⁰¹In discussing *Schwartz*, the Pennsylvania Superior Court explained that the majority in *Schwartz* believed that, even if it were permissible for a parent as custodian to use custodial funds to satisfy his legal obligation to support his minor child, such a right would not constitute a power of consumption. *Sutliff v. Sutliff*, 489 A.2d 764, 770 (PA Super. 1985), *aff’d* in part and remanded in part, 528 A.2d 1318 (PA 1987). This is probably a correct interpretation. Unfortunately, the majority opinion in *Schwartz* did not make this clear but, rather, provided a confusing and questionable explanation for its decision. Even if *Sutliff* correctly states the conclusion of the *Schwartz* majority, however, the underpinnings for the conclusion remain obscure. Logically, the retention of a power to use income or principal to discharge a legal obligation seems to be the equivalent of retaining to some extent a power to consume for the decedent’s benefit. Perhaps the *Schwartz* majority recognized this possibility and accordingly added the comment that such an “advantage [relief of support obligation] was too indirect and remote and cannot be classified as a power of consumption under Section 11.” 295 A.2d at 603.

²⁰²295 A.2d at 606 (Roberts, J., dissenting) (emphasis in original). The majority opinion assumed for purposes of the decision that the custodian had a right to use custodial funds to satisfy his legal obligation of support. See note 198 and accompanying text. However, the author of the majority opinion thought that it was “less than clear” that UGMA section 5(b) conferred such a right. 295 A.2d at 603 n.2. The concurring opinion stated that the parent as custodian only had the right to “claim” that the use of the custodial funds extinguished his obligation to support his son but that, in fact, such use could not satisfy the parent’s obligation of support. Id. at 608 (Manderino, J., concurring).

²⁰³Id. at 606 (Roberts, J., dissenting) (emphasis in original).

²⁰⁴44 T.C. 55 (1965), *rev’d* on other grounds, 361 F.2d 508 (2d Cir. 1966). *Accord*, *Estate of Prudowsky v. Commissioner*, 55 T.C. 890 (1971), *aff’d*, 465 F.2d 62 (7th Cir. 1972) (gift under Wisconsin UGMA).

decedent made a gift to his daughter under New York's Model Gifts of Securities to Minors Act.²⁰⁵ Because the tax court construed the Act as giving the decedent the right, as custodian, to apply so much of the income as he deemed advisable for the support, maintenance, education and benefit of his daughter, the court concluded that "he had made a transfer under which he had in effect retained the right to use the income from the property to discharge his legal obligation to support [his daughter]." ²⁰⁶ This right, the court held,²⁰⁷ required that the custodial property be included in the gross estate under section 2036(a).²⁰⁸ Put somewhat differently, the reason the Tax Court held the transfer includible under section 2036(a)—to quote from a subsequent Tax Court case—"was that the decedent had a legal obligation to support his daughter and as custodian he retained the right to use the income from the custodial property to discharge his legal obligation to support her."²⁰⁹

In contrast to the federal estate tax decisions, state cases that have construed UGMA in the context of court ordered support generally

²⁰⁵The Model Gifts of Securities to Minors Act was originally enacted in 1956 as an amendment to the Personal Property Law. N.Y. Pers. Prop. Law § 265.71 (McKinney 1976). In 1959, this act was replaced by the UGMA, which in turn was replaced by the revised UGMA in 1967 and was subsequently amended. EPTL §§ 7-4.1 to 7-4.13 (McKinney Supp. 1988).

²⁰⁶44 T.C. at 68.

²⁰⁷Alternatively the court held that the transfer was includible under section 2038(a)(1). *Id.*

²⁰⁸*Id.* Sec. 2036. Transfers With Retained Life Estate.

(a) General Rule. – The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property, or
(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

²⁰⁹*Stuit v. Commissioner*, 54 T.C. 580, 581 (1970), *aff'd*, 452 F.2d 190 (7th Cir. 1971). *Accord*, *Estate of Prudowsky v. Commissioner*, 55 T.C. 890, 894–895 (1971), *aff'd*, 465 F.2d 62 (7th Cir. 1972) (gift under Wisconsin UGMA); *Crocker Citizens Nat'l Bank v. United States*, 75–2 U.S. Tax Cas. (CCH) ¶ 13,106 (N.D. CA 1975) (transfer under California UGMA). See also *Korschun v. Clayton*, 185 S.E.2d 417, 419–420 (NC Ct. App. 1971) (in holding that custodial funds were taxable under an inheritance tax statute comparable to section 2036(a), the court said: "the Uniform Act permits [the parent-custodian] in his discretion to use the principal and income of the custodial gift for [his duty of support] and thereby retain the full possession and enjoyment of his own estate without diminution by expenditures of funds for the support of his child, the donee"). Cf. *Commissioner v. Dwight's Estate*, 205 F.2d 298, 301 (2d Cir. 1953) (where trust income could be used for support and maintenance of wife, settlor-husband "had in part at least discharged his legal obligation of supporting her" and 40% of trust corpus was includible in husband's gross estate under I.R.C. section 811(c)(1)(b), predecessor of I.R.C. section 2036(a)(1) (1986)); *Helvering v. Mercantile-Commerce Bank & Trust Co.*, 111 F.2d 224 (8th Cir. 1940) (same); *Estate of Cokey v. Commissioner*, 72 T.C. 721 (1979) (support trust for children includible in parent-settlor's estate under section 2036).

conclude that UGMA does not permit a parent as custodian to use custodial funds to satisfy any legal obligation to a minor child.²¹⁰ The effect of these cases is somewhat unclear. Absent explicit language as contained in *Sutliff*,²¹¹ they should not be construed as prohibiting a custodian-parent who is not subject to a court order from exercising the power to use custodial funds for the support of a minor child, because UGMA section 4(b) expressly authorizes such a use.²¹² However, these cases may furnish the basis for an argument that the parent as custodian who uses custodial funds for such support may be liable to the minor to that extent; in that event, the retained power would be of no monetary benefit to the custodian-parent. Thus, although the custodian-parent may have the power under UGMA section 4(b) to use custodial funds for such support, it can be argued plausibly that such use does not discharge the parent's primary duty of support of the child in whom title to the custodial funds is indefeasibly vested²¹³ and that the minor should be permitted to enforce this obligation and recover the expended custodial funds.²¹⁴

²¹⁰See, for example, *Sutliff v. Sutliff*, 528 A.2d 1318, 1320 (PA 1987) (footnote omitted) (in an action to remove and surcharge custodian-parent for using custodial funds to make court ordered support payments for his minor children, the court held, "on the merits, . . . a parent's obligation to support minor children is independent of the minor's assets. UGMA funds may not be used to fulfill the parent's support obligation where the parent has sufficient means to discharge it himself"); *In re Marriage of Wolfert*, 598 P.2d 524, 526 (CO Ct. App. 1979) (dicta); *Gold v. Gold*, 409 N.Y.S.2d 114, 116 (NY Sup. Ct. 1978) (custodian "is barred from using the children's money for their support, since by reducing her child care obligations, she would receive an indirect financial advantage"); *Erdmann v. Erdmann*, 226 N.W.2d 439 (WI 1975) (parent-custodian could not use court-created fund established under divorce decree for support and maintenance of children); cf. *Tharp v. Blackwell*, 570 S.W.2d 154, 159 (TX Civ. App. 1978) ("The law of this state imposes upon a parent who has resources of his own sufficient to maintain his children, and who is also guardian of their estates, to support them out of his own means and he may not have recourse to the estates of the wards").

²¹¹See notes 210 and 214. *Sutliff*, however, does not explain how its decision squares with the express language of UGMA section 4(b).

²¹²This section authorizes the custodian to pay or expend funds to or for the minor's support "with or without regard to the duty of himself or of any other person to support the minor." See note 191.

²¹³UGMA § 3(a). The Prefatory Note to the 1966 UGMA seems to disagree with including custodial funds in the custodian's gross estate under section 2038 and, accordingly, lends support to the view that the parent's primary duty of support would not be discharged by the use of custodial funds. Thus, in critically commenting on Revenue Ruling 57-366, which would include the value of custodial property in the gross estate of the donor because the donor was custodian, the Note states that "the Internal Revenue Service refused to recognize that the clear intent of these statutes was to indefeasibly vest title in the minor." 8A U.L.A. at 320 (1983).

²¹⁴Cf. *Sutliff v. Sutliff*, 528 A.2d at 1324-1325 ("If a parent did refuse to fulfill his support obligation, a custodian acting in good faith could make interim expenditures for the children's necessary support. Thereafter, he could seek to recover any distributions he made on behalf of the children from the responsible parent . . ."); *Erdmann v. Erdmann*, 226 N.W.2d 439 (WI 1975). Indeed, custodian accounts in states taking the approach in the text should not be subject to I.R.C. section 2036(a)(1) (1986) if the parent creating the

Under these circumstances, the custodial funds might not be includible in the custodian-parent's estate for elective share purposes under the UPC or the current Pennsylvania statute.²¹⁵

It is even less likely that, under UTMA, a court would hold that a custodian-parent retained a power that could be exercised for the parent's benefit. Section 14(a) of UTMA—like UGMA section 4(a)—empowers the custodian to expend for the minor's benefit so much of the custodial property as the custodian deems advisable for the minor's use and benefit, without regard to any person's obligation to support the minor.²¹⁶ Moreover, UTMA section 14(c) expressly provides that such an expenditure is "in addition to, not in substitution for, and does not affect any obligation of a person to support the minor."²¹⁷ On first impression it seems that, under the express language of UTMA section 14(c), an enforceable debtor-creditor relationship arises each time a parent as custodian expends custodial funds for the support of the minor, if the parent has a legal obligation of support. Indeed, this section appears to provide the basis for a claim by the minor against the parent for any amounts the custodian expends for the minor's support because, under section 14(c), these expenditures will not relieve the parent of the primary duty of support. If the minor has such a claim, then for purposes of an elective share statute, the parent as custodian would not have retained a power that is exercisable for the parent's benefit.²¹⁸

Based on the comment to UTMA section 14(c), however, this approach may be subject to question. The drafters apparently included section 14(c) to prevent the attribution of income to the parent for

account is the custodian. But see *Weisbaum v. Weisbaum*, 477 A.2d 690, 693 (CT Ct. App. 1984) ("The purpose of general statutes § 45-104(b) [UGMA § 4(b)] is to insulate the custodian from claims, by the minor . . . of . . . unauthorized disbursements"); *In re Levy*, 412 N.Y.S.2d 285, 291 (Sur. Ct. 1978).

²¹⁵Even assuming that legally the parent as custodian may not benefit from an exercise of this power, nevertheless, as a practical matter, the power will be exercisable for the custodian-parent's benefit because it is unlikely that a child will enforce the parent's primary duty through litigation or otherwise. Perhaps this is sufficient to justify inclusion of the value of the custodial funds in the estate for elective share purposes. Cases arising in the divorce and child support context illustrate, however, that the child's other parent or guardian may seek to enforce the custodian-parent's duties on behalf of the child.

²¹⁶UTMA section 14(a) provides:

A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

8A U.L.A. at 197 (Supp. 1988).

²¹⁷*Id.* at 198. UGMA does not contain a comparable provision.

²¹⁸In addition, the value of the fund should not be includible in the gross estate under section 2036(a)(1). See note 208.

income tax purposes.²¹⁹ Although the drafters recognized that this could have been accomplished by expressly providing that the use of custodial income for the minor's support would give the minor a cause of action "against his parent to the extent that custodial property or income is . . . used" to satisfy the parent's legal obligation of support, they rejected this approach as "too cumbersome."²²⁰ Nevertheless, the fact that the drafters did not expressly provide that the minor has a cause of action against the parent as custodian who uses custodial funds—whether income or principal—to support the minor should not be decisive. Regardless of the drafter's intent, the effect of the express language of section 14(c) seems clear—such use "does not affect any obligation of a person to support the minor." Under these circumstances, the minor should be entitled to enforce this obligation and be reimbursed for the amount of custodial funds so used, and the parent should not be deemed to have retained any power over the account for the parent's benefit.²²¹ In this event, the value of the funds would not be includible in the parent's estate for elective share purposes under the UPC or the Pennsylvania statute.²²²

Retained Power for Minor's Benefit

Now consider, however, the consequences of a gift to a minor under New York's elective share statute if the donor is the custodian.²²³ The

²¹⁹UTMA § 14, 8A U.L.A. at 198 comment (Supp. 1988). Income from custodial property used for the minor's support is taxable to any person who is legally obligated to support the minor. Rev. Rul. 59-357, 1959-2 C.B. 212; Rev. Rul. 56-484, 1956-2 C.B. 23; 3 B. Bittker at 75-50 (cited in note 60). This is true even if the parent is not the custodian.

The Comment's explanation for the addition of subsection (c) is somewhat confusing. The second paragraph of the Comment indicates the Internal Revenue Service's position that the amount of custodial income used to support a minor is includible in the gross income of the individual legally obligated to support the minor. In the very same paragraph, based on Treasury Regulation Section 1.662(a)-4 concerning the term "legal obligation," the Comment explains that a parent is not legally obligated if the child's own resources are adequate and if, under state law, a parent can use the child's resources to support the child instead of the parent's own funds. The first sentence of the next paragraph causes the confusion because it states that, "[f]or this reason, new subsection (c) has been added" If the phrase "[f]or this reason" refers to the preceding paragraph—as it seems to do—it would mean that section 14(c) was added in order to preclude a legal obligation from arising by permitting the parent to use custodial income for the child's support instead of the parent's own funds. But neither the remaining language of the first sentence nor the language of section 14(c) bears this out as the reason for adding this section. In fact, it is difficult to discern from the Comment the reason why section 14(c) was added.

²²⁰UTMA § 14, 8A U.L.A. at 198 comment (Supp. 1988).

²²¹Based on this position, a custodian account established under UTMA should not be includible in the gross estate for federal estate tax purposes under section 2036.

²²²UPC § 2-202(1)(ii); 20 Pa. Cons. Stat. Ann. § 2203(a)(3) (Purdon Supp. 1988).

²²³With respect to the Delaware elective share statute, which adopts the federal estate tax approach (see note 16)—and based on the existing federal estate tax cases—the custodial funds would be includible regardless of whether the donor as custodian were also the parent. This is because the courts have held that, if a donor retains the powers as custodian

custodian's power under UGMA section 4(b)—EPTL section 7-4.4(b)—to distribute custodial property to the minor or for the minor's benefit would constitute a power to invade or dispose under EPTL section 5-1.1(b)(1)(E), which does not require that the power be exercisable for the decedent's benefit. But can it be said that the decedent retained such a power by the express terms of the disposing instrument, meaning the express terms of the gift? The power should be so retained because UGMA section 3(b) provides that the donor "incorporates in his gift all the provisions" of UGMA and grants the custodian all the powers provided in UGMA, which include the custodian's power to make distributions.²²⁴ Thus, a gift to a minor under any state's UGMA should fall within the scope of EPTL section 5-1.1(b)(1)(E) if the custodian died before the custodianship terminated.

The only directly pertinent New York decision has held that UGMA custodial accounts are not testamentary substitutes under EPTL section 5-1.1(b)(1).²²⁵ The court reasoned that, because the only gifts included under section 5-1.1(b)—specifically subdivision 1(A)—are gifts *causa mortis*, "it can be inferred that all inter vivos gifts are excluded."²²⁶ In so doing, the court overlooked EPTL section 5-1.1(b)(1)(E), which covers any disposition "in trust or *otherwise*" if the decedent retains a power to invade or dispose. This is precisely what occurs if an inter vivos gift is made under UGMA; there is a disposition by which the donor as custodian retains the equivalent of a power to invade or dispose. It is

over UGMA property, the custodial property is includible in the donor's gross estate under section 2038(a)(1). See, for example, *Stuit v. Commissioner*, 452 F.2d 190 (7th Cir. 1971) (decedent's gifts to her minor grandchildren, naming herself as custodian under Illinois' UGMA, were includible under section 2038 because her powers as custodian under UGMA section 4(b) to pay over to the minor so much or all of the custodial property as she deemed advisable in her sole discretion constituted a power to terminate). See also *Eichstedt v. United States*, 354 F. Supp. 484, 487-488 (N.D. CA 1972) (transfers to daughters under California UGMA and its predecessor); *Estate of Jacoby v. Commissioner*, 29 T.C.M. (CCH) 737, 738-739 (1970) (gift to grandchild under Missouri UGMA).

²²⁴See, for example, EPTL § 7-4.3(b) (McKinney Supp. 1988). This section provides:

By making a gift in a manner prescribed by this part, the donor incorporates in his gift all the provisions of this part and grants to the custodian . . . the respective powers, rights and immunities provided in this part.

²²⁵In *re Estate of Zeigher*, 406 N.Y.S.2d 977, 978 (Sur. Ct. 1978). The court also mistakenly relied on *Estate of Schwartz*, 295 A.2d 600 (PA 1972). The Pennsylvania statute involved—section 11—as construed by Pennsylvania's Supreme Court, applied only to a transfer with a retained power to consume, exercisable in the decedent's favor. EPTL section 5-1.1(b)(1)(E) applies to a retained power to dispose or invade, *regardless* of whether it is exercisable in favor of the decedent, and there is no authority to indicate that it was intended to be limited to powers exercisable only for the decedent's benefit. For analogous federal tax cases, see *Commissioner v. Estate of Holmes*, 326 U.S. 480, 489 (1946) ("[d]ecedent's failure to reserve for himself any beneficial interest or power to recapture one is not controlling [under section 811(d), predecessor of section 2038]"); *Estate of Porter v. Commissioner*, 288 U.S. 436, 443 (1933); *Florida National Bank v. United States*, 336 F.2d 598, 601 (3d Cir. 1964) (under section 2038, power need not be exercisable for decedent's benefit).

²²⁶406 N.Y.S.2d at 978.

true, as the court stated, that with an inter vivos gift under UGMA, the "full ownership vests in the donee."²²⁷ However, the key to EPTL section 5-1.1(b)(1)(E)—like estate tax section 2038(a)—is neither ownership nor benefit to the decedent but, rather, retention by the decedent of a certain degree of control over the gift, which the donor as custodian possesses. Accordingly, if the decedent's power as custodian is properly regarded as retained by the express provisions of the disposing instrument, a question discussed above (and if its exercise is not subject to an external standard—a question discussed below), then the custodial property should be includible for elective share purposes under section 5-1.1(b)(1)(E).

Finally, is the custodian's power to invade or dispose subject to an external standard? In *Stuit v. Commissioner*,²²⁸ the decedent made a gift of stock to her minor grandchildren, naming herself as custodian under Illinois' UGMA.²²⁹ In holding that the retained power to distribute the custodial property to the minor was a power to terminate within the meaning of section 2038(a)(1) and, accordingly, holding that the value of the custodial property was includible in the decedent's gross estate,²³⁰ the Tax Court concluded that the word "benefit" does not constitute an external standard as do the words "support, maintenance [and] education."²³¹ The Tax Court reached this result first by comparing UGMA section 4(b) with section 4(c),²³² which empowers the court to direct the custodian to expend funds for "the minor's support, maintenance or education." Because the word "benefit" is omitted from section 4(c),²³³

²²⁷*Id.*

²²⁸54 T.C. 580 (1970), *aff'd*, 452 F.2d 190 (7th Cir. 1971).

²²⁹Ill. Rev. Stat. ch. 110 1/2, para. 201-11 (repealed by L. 1985, P.A. 84-915 and replaced by UTMA, effective July 1, 1986).

²³⁰Accord, *Estate of Prudowsky v. Commissioner*, 55 T.C. 890, 892-894 (1971), *aff'd*, 465 F.2d 62 (7th Cir. 1972); *Estate of Jacoby v. Commissioner*, 29 T.C.M. (CCH) 737 (1970); cf. *Lober v. United States*, 346 U.S. 335 (1953) (decedent irrevocably transferred property to himself as trustee for the benefit of his minor children, reserving to himself a power at any time to turn over any part of the principal to his children; value of trust held includible under section 811(d)(2) (currently section 2038) for estate tax purposes).

²³¹54 T.C. at 583. Accord, *Estate of Jacoby*, 29 T.C.M. (CCH) at 738 (on basis of *Stuit*, court rejected application of the doctrine of *ejusdem generis* to the words "support, maintenance, education and benefit" under section 404.040 of the Missouri UGMA and concluded that the word "benefit" does not provide "an independent ascertainable standard"); cf. *Estate of Bell v. Commissioner*, 66 T.C. 729, 736 (1976) ("the term 'benefit,'" the court said, "standing alone does not establish an objective standard" under a trust that permitted distributions for beneficiary's benefit).

²³²54 T.C. at 583. UGMA section 4(c) (1966) provides:

The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.

8A U.L.A. at 369 (1983).

²³³The purpose of section 4(c), according to the Tax Court in *Stuit*, "is to assure the minor a minimum standard of living." 54 T.C. at 583.

the Tax Court reasoned that it must have "a meaning separate from the words 'support, maintenance, [and] education.'" ²³⁴ The court then stated that, as an independent word, "benefit" is interchangeable or synonymous with "happiness"—a word that has been found "not to create an external standard."²³⁵ Although *Stuit's* conclusion that the word "happiness" is not an external standard may be questioned,²³⁶ and an argument may be made that the word "benefit" is synonymous with "welfare"²³⁷ and thus creates an external standard,²³⁸ the likelihood is that *Stuit's* view would prevail.

In contrast to UGMA sections 4(b) and (c), UTMA contains a single standard (the "use and benefit" of the minor) governing the powers of the custodian²³⁹ and the courts²⁴⁰ over custodial property. The change from UGMA sections 4(b) and (c) was, according to the comment, "intended to avoid the implication that the custodial property can be used only for the required support of the minor."²⁴¹ It is improbable, however, that the drafters intended that the words "use and benefit" would have no limitations or restraint. Here, too, it seems that the words "for the 'use and benefit' " might be construed to be the equivalent of the words "for the minor's 'welfare,' " which some might argue creates an external standard.²⁴²

Each state must interpret its Uniform Act to determine whether the word "benefit" under UGMA or the words "use and benefit" under UTMA constitute an objective standard.²⁴³ Even if they do, however, because the decedent's exercise of a reserved power may benefit the

²³⁴*Id.*

²³⁵*Id.* (citations omitted).

²³⁶*See United States v. Powell*, 307 F.2d 821, 828 (10th Cir. 1962).

²³⁷Random House College Dictionary 1493 (rev. ed. 1975).

²³⁸*United States v. Powell*, 307 F.2d at 828. Cf. *Brantingham v. United States*, 631 F.2d 542, 543 (7th Cir. 1980) (power given to wife to invade corpus "as in her judgment is necessary for her maintenance, comfort and happiness" constituted an ascertainable standard under I.R.C. section 2041(b)(1)(A)).

²³⁹UTMA section 14(b) provides as follows:

On petition of an interested person or the minor if the minor has attained the age of 14 years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

8A U.L.A. at 197 (Supp. 1988).

²⁴⁰*See* note 216 for the full text of UTMA section 14(a).

²⁴¹UTMA § 14, 8A U.L.A. at 198 comment.

²⁴²*See* note 236 and accompanying text.

²⁴³*See In re Muller*, 235 N.Y.S.2d 125, 128–129 (Sup. Ct. 1962) (court construed the word "benefit" in N.Y. Personal Property Law section 266(2) (predecessor of EPTL § 7–4.4(b) (McKinney Supp. 1988) in a narrow sense; without explanation, court did not view use of funds for children "for travel expense to Europe and for school purposes" as falling within purview of word "benefit"), *aff'd*, 239 N.Y.S.2d 519 (App. Div. 1963).

decedent,²⁴⁴ the fact that it is governed by an external standard should not alone justify excluding the transfer for elective share purposes.²⁴⁵

Regardless of the precise answers to the questions here discussed, a legislature should make a policy decision as to whether the value of gifts to minors under the Uniform Acts should be excluded from the net estate for elective share purposes. If a parent–donor chooses to retain the power, as custodian, to use custodial funds to support a child rather than using the parent's own funds, then it seems reasonable, on this basis alone, to treat such a transfer the same as a transfer in trust. Including custodial property for elective share purposes to the same extent as any lifetime transfer in trust would not be a harsh result, because the decedent can easily avoid inclusion of any custodial funds by naming any trustworthy third person as custodian.²⁴⁶

RECOMMENDATIONS FOR CLOSING LOOPHOLES

To ensure that surviving spouses will receive the full protection that elective share statutes are designed to provide and to recognize spouses' contributions to marriage, the various elective share statutes discussed in this article need to be amended. More specifically, the testamentary substitute provisions should be changed, as appropriate, in conformance with the following guidelines.

Life Estates

Currently, EPTL section 5–1.1(b)(1) does not confer a right of election against a transfer in which the decedent has retained only a life estate—a significant economic benefit—but no power over the principal. For example, if A transfers \$500,000 in trust to T to pay the income to A for life with remainder to B, the transferred property is not includible in A's net estate under section 5–1.1(b)(1). In contrast, if A deposits the same \$500,000 in an interest bearing account or invests it and retains ownership until death, it will be includible in A's estate for elective share purposes.

The omission of transfers with a retained life interest can frustrate the purpose of the statute because by making such transfers a decedent may thereby enjoy significant benefits until death and still prevent the surviving spouse from sharing in any part of the transferred property. In addition to the fact that a retained life interest may give the decedent the same lifetime enjoyment as outright ownership, as the example above demonstrates, the decedent has determined (by the quasi-testamentary

²⁴⁴See, for example, note 215.

²⁴⁵See text accompanying notes 261–64.

²⁴⁶Note that, in this case, the surviving spouse may be deemed to possess a general power of appointment for federal estate tax purposes. See I.R.C. § 2041(a)(2) (1986); Treas. Reg. § 20.2041–1(c)(1) (as amended in 1961); Pennell, *Custodians, Incompetents, Trustees and Others: Taxable Powers of Appointment?*, 15 U. Miami Inst. on Est. Plan. ¶¶ 1600, 1602 (1981).

gift of the remainder) who shall own the property after the decedent's death.²⁴⁷ This interest may well be more significant to the decedent than a retained power in conjunction with another, or even a retained power to dispose of the principal to third parties.²⁴⁸ For these reasons, a transfer with a retained life interest should be treated the same for elective share purposes as property owned or controlled in certain respects by the decedent at death, and the New York statute should be amended to include such transfers as well as any transfer under which the decedent retains the possession or enjoyment of, or the right to the income from, the property for any period not ascertainable without reference to the decedent's death, or for any period that does not end before the decedent's death.²⁴⁹

²⁴⁷Cf. 5 B. Bittker at 126-74 to 126-75 (cited in note 60) (explanation of rationale for I.R.C. § 2036(a)(1) (1986)).

²⁴⁸A retained power to invade principal for the benefit of third parties is relevant only to the EPTL and not to the UPC or the Pennsylvania statute. See text accompanying notes 183 and 184.

²⁴⁹This provision would be similar to I.R.C. section 2036(a)(1) (1986), which includes transfers with a retained life estate in the federal gross estate. See note 208. Assuming that the statute applies to transfers pursuant to a contract, the proposed amendment should cover a shareholders agreement with a buy-sell provision because the decedent would have retained a life interest in the stock that is subject to the agreement. If the buy-sell provision requires payment of the purchase price fixed in the shareholders agreement to the decedent's estate, this proposal would benefit the surviving spouse only to the extent this provision requires inclusion in the estate of the amount by which the actual value of the stock exceeds the agreed upon purchase price. Under present law the purchase price itself would be includible in the net estate as a probate asset under EPTL section 5-1.1(c)(1), just as it is includible in the gross estate for federal estate tax purposes as property owned by the decedent at death. I.R.C. § 2033 (1986). However, in many cases the purchase price is only a fraction of the stock's true value. See, for example, *In re Estate of Brown*, 289 A.2d 77, 78-79 (PA 1972) (surviving shareholder had the option to purchase the stock at \$1 per share whereas the lowest fair market value figure submitted at trial was \$76 per share). To make the proposed provision reasonably meaningful, the stock should be valued as determined for federal estate tax purposes. See I.R.C. § 2036(c); Treas. Reg. § 20.2031-2(f) (1976); Rev. Rul. 59-60, 1959-1 C.B. 237, § 4.01. Cf. *Amodio v. Amodio*, 509 N.E.2d 936 (NY 1987) (value of stock under shareholders agreement that met requirements of estate tax regulations was binding for purposes of equitable distribution). This valuation principle is particularly important because, in many cases, the stock may constitute the bulk of the decedent's assets. Parenthetically, New York does not now permit a challenge to "the adequacy of consideration under . . . a buy-sell provision when said consideration passes through the estate." See *Isaacson v. Beau Label Corp.*, 461 N.Y.S.2d 420, 421 (App. Div. 1983). To the extent there are monetary proceeds available from the sale of the shares, the surviving spouse should not obtain an elective share of any part of the stock of the company, as was suggested by *In re Burk*, 37 Pa. D. & C.2d 528 (1965) and *In re Estate of Brown*. See 289 A.2d at 80 (discussing Orphans' Court opinion). To do so would frustrate important purposes of a shareholders agreement, such as to ensure continuous management of and exclude outsiders from the company. See notes 29 and 34. To the fullest extent possible, the elective share should be satisfied using proceeds from a sale of the stock.

The UPC and the Pennsylvania statute already include dispositions of property pursuant to which the decedent "retained at the time of his death the possession or enjoyment of, or right to income from, the property."²⁵⁰ However, such a provision can easily be circumvented because it does not include a transfer that reserves the right to receive income until, for example, one month prior to the decedent's death. To close this loophole, these statutes should be amended to include the same language proposed above.²⁵¹

Contracts

The elective share statutes should also be clarified explicitly to include transfers, dispositions or conveyances pursuant to contractual transactions such as the sale of shares under a buy-sell provision in a shareholders agreement.²⁵² It seems obvious that if the transmission of any of a decedent's assets is governed by a contract—even if the contract does not technically constitute a transfer, disposition or conveyance—the surviving spouse should be able to reach these assets under an elective share statute to the same extent as with any lifetime transfer, disposition or conveyance of a decedent's property.²⁵³

Transfers for Value

Elective share statutes should exempt transfers with retained interests made for "full and adequate consideration in money or money's worth." Thus, to the extent that the decedent has not received full value

²⁵⁰UPC § 2-202(1)(i)(1983); 20 Pa. Stat. Ann. § 2203(a)(2) (Purdon Supp. 1988). The Pennsylvania statute gives the surviving spouse a life estate in one-third of any property in which the decedent "had the use of the property or an interest in or power to withdraw the income thereof."

Pennsylvania's section 11 did not cover a reservation of income for life. See note 34. The probable explanation for this omission, according to Bregy, is that "the spouse's rights arise only on the donor's death" and, accordingly, "the disposition of income before that time is a matter of no concern." "This concept," he explained, "was favored over the philosophy that the spouse is entitled to a share of the property actually being enjoyed by the decedent during his life." P. Bregy at 5862 (cited in note 136).

²⁵¹See note 249 and accompanying text. Alternatively, if "time of death" is retained in the statute, a provision stating that a transfer subject to a retained power the exercise of which is contingent on notice should be subject to the surviving spouse's right of election. Such a notice provision would render the transfer includible in the federal gross estate by virtue of I.R.C. section 2038(b) (1986). Cf. *In re Kohut*, 519 N.Y.S.2d 858, 859 (App. Div. 1987) (decedent's retained power to invade any contribution to the principal of the trust lapsed 30 days after receipt of notice from the trustee of such contribution; because decedent died more than 30 days after her contribution, she did not retain a "power to invade the trust at the date of her death" and the trust was not a testamentary substitute).

²⁵²Inasmuch as *Riefberg* considered contracts to be subject to EPTL section 5-1.1(b)(1)(E), it may be unnecessary to amend that statute.

²⁵³Thus, contractual transactions should be subject to the elective share to the extent that they are not made for full value. See text accompanying note 254.

for the property transferred pursuant to a contract or by conveyance, the value of the property transferred should be included in the net estate for elective share purposes, to the extent that value exceeds the value of the consideration received. This would prevent disinheritance of the surviving spouse even if the transfer was part of a business transaction but full value was not received.²⁵⁴

Retained Powers

By Operation of Law

As discussed previously,²⁵⁵ no reason exists to differentiate between a power to revoke or terminate reserved by the terms of the disposing instrument and such a power arising by operation of law, and elective share statutes should be amended to remove any distinction or doubt. Because parties to a contract cannot make the contract irrevocable, however, such amendments should exclude contracts made in the ordinary course of business, to the extent they are made for an adequate and full consideration in money or money's worth.²⁵⁶

For Benefit of Decedent or a Third Party

Property transfers as to which the decedent has retained a power to invade, consume or dispose should be includible in the net estate regardless of whether the decedent is a beneficiary of the power. This proposal departs from the UPC and the Pennsylvania statutes,²⁵⁷ which reach only those transfers as to which the decedent retained a power to invade for decedent's own benefit.²⁵⁸ Their approach is too restrictive because it allows a decedent to retain significant economic control over the disposition of property transferred during life while disinheriting the surviving spouse.²⁵⁹ The consequence of decedent's retention of substantial economic control over transferred property should be to treat the property for elective share purposes as if it had not been transferred.²⁶⁰ Otherwise, a decedent who wants to disinherit a surviving spouse without relinquishing substantial economic control would have a relatively easy and effective avenue, significantly reducing the protection that these statutes are designed to afford the surviving spouse.

²⁵⁴See notes 169–171 and accompanying text.

²⁵⁵See text accompanying notes 89–105.

²⁵⁶See text accompanying note 254.

²⁵⁷See notes 182–184 and accompanying text.

²⁵⁸EPTL section 5–1.1(b)(1)(E) does not contain the words “for his own benefit,” and an interested trustee may not exercise a discretionary power that benefits the trustee personally. See note 177.

²⁵⁹For example, the decedent can create an irrevocable trust and retain the power to invade or dispose in favor of anyone other than the decedent and that trust would not be includible under the UPC or Pennsylvania statutes.

²⁶⁰This approach accords with the federal estate tax scheme.

*Subject to External Standard***Retained Powers Exercisable For Decedent's Benefit**

Transfers as to which the decedent retains a power of invasion for his own benefit should be subject to the elective share statute regardless of the existence of an external standard or a mandatory power.²⁶¹ Otherwise the decedent, through such a transfer, can retain virtually the same economic benefits as a reserved life estate while defeating the surviving spouse's elective share rights.²⁶² Such transfers should be includible in the net estate for the same reasons that justify inclusion of transfers with retained life interests.²⁶³ No distinction should exist if the decedent is a beneficiary but not the trustee, if the trustee's power is mandatory or its exercise is subject to an external standard because, in these cases, the trustee is under a duty to exercise the power and the decedent could have enforced that duty effectively to enjoy the transferred property.²⁶⁴ In these situations, the decedent has, in effect, retained some form of a life interest.

**Retained Powers Exercisable for
Benefit of a Third Party**

Transferred property subject to a retained power exercisable in favor of a third party in the discretion of the decedent also should be includible in the net estate to the extent of the retained power, regardless of whether the decedent's discretion is unlimited or subject to an external standard.²⁶⁵ Even if there is an external standard, the decedent enjoys a degree of control over disposition of the property, notwithstanding imposition of specified parameters. While there may be circumstances in which application of an external standard might appropriately preclude inclusion, such as for invasions to meet the costs of a medical emergency, in many cases external standards provide an inappropriate degree of discretion in which to operate—such as invasions for support and maintenance. The federal estate tax external standard approach should be inapplicable here²⁶⁶ because it does not promote the purposes of an elective share statute.²⁶⁷

²⁶¹See notes 172–175 and accompanying text.

²⁶²See UPC § 2–202 comment (1983).

²⁶³See notes 249–251 and accompanying text.

²⁶⁴See note 186 and accompanying text. The property should be included only to the extent the power is exercisable.

²⁶⁵Interestingly, Pennsylvania's current statute is narrower in this respect than its predecessor, section 11. The current section only applies to powers exercisable for the decedent's personal benefit, whereas section 11 covered testamentary powers of appointment exercisable in favor of third parties. See *In re Estate of Behan*, 160 A.2d 209 (PA 1960).

²⁶⁶It has also been criticized for these reasons in the estate tax area. See Pedrick, *Grantor Powers and Estate Taxation: The Ties That Bind*, 54 Nw. U.L. Rev. 527, 539–545 (1959).

²⁶⁷Currently, because of the unified rate structure for estate and gift taxes, the external standard doctrine does not substantially affect the amount of revenue collected. A transfer with a retained power limited by an external standard would escape estate tax but be treated

Only if the decedent has made a transfer for the benefit of a third person and retained no more than a mandatory power—as in *Twersky*²⁶⁸—should the transferred property be excluded from the net estate. In this case, the decedent has only ministerial duties and has retained neither a benefit nor any meaningful opportunity to exercise discretion or judgment.²⁶⁹ Because the same distributions of trust corpus would be made by a third party as trustee, such transfers should not be subject to the surviving spouse's right of election.

Time of Exercise

For the same basic reasons applicable with respect to retained income interests,²⁷⁰ property transferred subject to retained powers should be included in the net estate, even if exercise of the powers is subject at the decedent's death to a notice provision or contingency relating to the decedent's death.

Gifts to Minors

No legitimate reason exists to differentiate under EPTL section 5-1.1(b)(1)(E) between a transfer in trust for the support of a minor child and establishment of a custodial account for a minor child if the decedent's retained powers are the same.²⁷¹ A donor who wishes to exclude such an account from the net estate for elective share purposes should simply not serve as custodian.

A custodial account established by a parent also should be subject to the right of election under the UPC and the Pennsylvania statute. This should certainly be the case if the custodian-parent has the legal right under state law to use custodial funds to discharge the parent's legal obligation of support. But regardless of whether a parent-donor has the legal right, as custodian, to use custodial property for the minor's support, as a practical matter it is likely that the custodian-parent will do so with impunity. Accordingly, a donor-parent's retained powers over a custodial account should be deemed to be for the decedent parent's benefit and the custodial account should be included in the net estate for elective share purposes.²⁷²

as a completed transfer for gift tax purposes. This is not the case under an elective share statute because the surviving spouse is not able to elect against the decedent's "completed transfers," except to the extent that they were made in contemplation of death in Pennsylvania or in a UPC jurisdiction. See note 6.

²⁶⁸See notes 173-175 and accompanying text.

²⁶⁹See notes 178-179 and accompanying text.

²⁷⁰See text accompanying notes 247-251.

²⁷¹See text following note 245.

²⁷²If the minor child successfully asserts a claim against the decedent's estate for improper use of custodial assets for the child's support, then inclusion of the custodial funds would not increase the value of the estate for elective share purposes.

Life Insurance and Retirement Benefits

Contrary to the position taken by the UPC,²⁷³ the EPTL²⁷⁴ and the Pennsylvania statute,²⁷⁵ insurance proceeds and retirement benefits should be included in the augmented or net estate²⁷⁶ to the same extent as any other transfer with reserved rights or interests.²⁷⁷ Currently, these payments are excluded from the net estate by EPTL section 5-1.1(b)(2) regardless of the beneficiary, while they are included in the augmented estate by the UPC only if the surviving spouse is the beneficiary.²⁷⁸ Insurance and retirement funds are major assets in many decedents' estates. Depriving the spouse of a share in such property could, in many cases, work a significant disinheritance.²⁷⁹ Furthermore, insurance and retirement plans commonly constitute an important element of a savings

²⁷³UPC § 2-202(1), 8 U.L.A. 77 comment (1983). The purpose of this section was to include those "kinds of transfers readily usable to defeat an elective share." *Id.* at 78. For this reason life insurance was excluded "because it is not ordinarily purchased as a way of depleting the probate estate and avoiding the elective share of the spouse . . ." *Id.*

²⁷⁴EPTL § 5-1.1(b)(2) (McKinney 1981). *Estate of Hildebrand*, N.Y. L.J., May 6, 1983, at 18, col. 1 (Sur. Ct.) (death benefits excluded from net estate).

²⁷⁵20 Pa. Cons. Stat. Ann. § 2203(b) (Purdon Supp. 1988).

²⁷⁶Also included in this category would be deferred compensation plans that have been held to be covered by the New York statute. See *In re Estate of Devita*, 503 N.Y.S.2d 267, 269 (Sur. Ct. 1986). Interestingly, in the Fourth Report, the Bennett Commission recommended that EPTL section 5-1.1(b)(1)(E) be amended "to exclude contributory pensions, profit-sharing plans, stock options, stock bonus and deferred compensation plans, as well as insurance proceeds." Fourth Report at 148 (cited in note 40). It expressly commented "that *none* of these transactions were intended to be included [in subdivision E]." *Id.* The legislature enacted section 5-1.1(b)(2), which excludes insurance proceeds and pension and profit-sharing plans from subdivision (b)(1)(E) but does not mention deferred compensation plans. *In re Devita* held that "[t]he failure to exclude deferred compensation plans [from the coverage of EPTL section 5-1.1(b)(1)(E)] must be deemed" deliberate because of "[i]ts inclusion in an early version of the proposed statute [section 5-1.1(b)(2)] and its later omission in the legislation that was enacted into law . . ." 503 N.Y.S.2d at 269. The court's reference to "an early version of the proposed statute" is apparently a reference to the Fourth Report because there appears to be no proposed statute that mentioned deferred compensation.

²⁷⁷Macdonald contended that "the surviving spouse should have a stronger claim against the husband's life insurance than she would under the present estate tax provisions." Macdonald at 278 (cited in note 1). This position would subject property over which the decedent relinquished control to the right of election, which would unreasonably restrict the decedent's right unqualifiedly to dispose of property. To the extent the decedent retained incidents of ownership with respect to an insurance policy, however, sufficient to trigger I.R.C. section 2042(2), the insurance proceeds should be includible in the net estate for elective share purposes.

²⁷⁸UPC § 2-202(2), 8 U.L.A. 76-77 (1983).

²⁷⁹Although there is also the danger that a decedent may use significant wealth to purchase insurance policies, the drafters of the UPC did not view this as a major problem because insurance "is not ordinarily purchased as a way of depleting the probate estate." See note 273.

plan. For example, a person frequently will give up present income in order to invest in a retirement plan, or will use income to purchase insurance. These substituted savings should be subject to the right of election if the decedent retained a beneficial interest or a prohibited power.²⁸⁰ There is no reason to treat insurance proceeds and retirement benefits differently from other types of will substitutes. Indeed, the justification for excluding insurance proceeds from the elective share has been largely historical²⁸¹ and is untenable today, given the fact that, for many people, insurance constitutes the bulk of a decedent's estate as well as a valuable lifetime asset.

The central role in estate planning played by insurance policies and retirement plans also should result in their includibility in the net estate if the surviving spouse is the beneficiary. The UPC position²⁸² prevents the surviving spouse from receiving a windfall²⁸³ and promotes a decedent's legitimate estate plan. The possibility of a windfall is particularly evident with respect to retirement benefits governed by the Retirement Equity Act of 1984.²⁸⁴ Therefore, elective share statutes should take into account

²⁸⁰For example, retention of a power to revoke, consume, invade or dispose.

²⁸¹New York, Pennsylvania and the UPC all appear to have excluded insurance proceeds—the UPC excluding them only when payable to a third party—from the net or augmented estate out of deference to tradition. Although the Report noted that life insurance is “a potential weapon of evasion,” it observed that “[o]n the whole the courts appear to assume that life insurance is immune to the widow's attack.” Report at 128 (cited in note 4). In its conclusion, the Report summarily states that “[t]he surviving spouse will not be permitted to attack insurance policies or annuities.” *Id.* at 139. See note 279. In Pennsylvania, the Supreme Court allowed a widow to elect against the proceeds of an insurance trust under section 11. *In re Estate of Brown*, 119 A.2d 513 (PA 1956). However, the statute was amended in 1956 in response to this decision specifically to exclude insurance policies from the right of election. 20 Pa. Stat. Ann., tit. 20, § 301.11(a) (predecessor of 20 Pa. Cons. Stat. Ann. § 2203(a)) (Purdon Supp. 1988).

²⁸²The Comments to UPC section 2-202 advocate inclusion of insurance proceeds payable to the surviving spouse “because it seems unfair to allow a surviving spouse to disturb the decedent's estate plan if the spouse has received ample provision from life insurance.” 8 U.L.A. 78 (1983).

²⁸³This possibility exists in New York where a spouse could receive significant amounts of insurance and still elect against a will that gives the balance of the decedent's probate estate to others. The danger of a windfall is particularly great with respect to benefits governed by the Retirement Equity Act of 1984 (REA), which essentially requires that the surviving spouse be entitled to receive at least half of the decedent's account balance if the spouses were married for at least one year prior to the annuity starting date or the decedent's death. I.R.C. §§ 401(a)(11), (13) and 417(d) (1986). REA may preempt any state law that would include qualified retirement benefits in the surviving spouse's elective share. See S. Rep. No. 575, 98th Cong., 2d Sess. 16-17, reprinted in 1984 U.S. Code Cong. & Admin. News 2547, 2562-2563. Consequently, in some cases, the surviving spouse may receive too great a share of the decedent's estate, and REA should be amended to guarantee the surviving spouse only a fractional share in the decedent's retirement benefits that is properly integrated with state law.

²⁸⁴*Id.*

retirement benefits paid to the surviving spouse in determining whether the spouse is entitled to any additional property from the decedent's estate.

Gifts in Contemplation of Death

Neither the New York nor the UPC approach to gifts in contemplation of death is effective. EPTL section 5-1.1 includes gifts *causa mortis*²⁸⁵ in the net estate, most likely on the theory that such gifts are revocable up to the time of death and, therefore, are subject to the decedent's control during life.²⁸⁶ From a theoretical viewpoint such transfers should be includible in the net estate for elective share purposes, but the evidentiary problems associated with proving whether a gift has, in fact, been made *causa mortis* make this approach undesirable.

The UPC approach, which avoids these difficulties by including all substantial gifts made by the decedent within two years of death,²⁸⁷ extends too far. Subjecting such transfers to the right of election may interfere with legitimate tax planning,²⁸⁸ impose restraints on alienation, and generate difficult tracing problems. An elective share statute should choose a shorter time period (such as one year) within which to capture gifts made in contemplation of death. This length of time should suffice to capture most gifts made by a seriously ill individual who is seeking to disinherit a surviving spouse while allowing flexibility in estate tax planning by individuals seeking to minimize their taxable estates.²⁸⁹

²⁸⁵EPTL § 5-1.1(b)(1)(A) (McKinney 1981).

²⁸⁶The Report gives virtually no explanation of why such gifts should be included in the net estate, but merely states that "[c]ertainly the gift *causa mortis*, of all transfers, should not be immune to the widow's claim." Report at 126 (cited in note 4) (quoting from Macdonald at 197 (cited in note 1)).

²⁸⁷UPC § 2-202(1)(iv), 8 U.L.A. 76 (1983). See note 6. This section is "designed to prevent a person from depleting his estate in contemplation of death." *Id.*, 8 U.L.A. 78 comment. It appears to have been influenced by I.R.C. section 2035, which included all gifts made by the decedent within three years of death in the federal gross estate before being substantially cut back by the Economic Recovery Tax Act of 1981. Insofar as is relevant here, section 2035 now applies only to the relinquishment within three years of death of powers retained pursuant to sections 2036, 2037 and 2038, and transfers of life insurance during that three-year period. See also 20 Pa. Cons. Stat. Ann. § 2203(a)(6) (Purdon Supp. 1988) (one year provision).

²⁸⁸For example, consider an individual who is otherwise healthy and wishes to minimize estate taxes by utilizing the gift tax annual exclusion of section 2503(b) by giving \$10,000 to each of three children. Although not taxable as gifts or includible in the individual's gross estate, if death occurs within two years these transfers will be includible in the augmented estate under the UPC to the extent they exceed \$3,000 per donee and would thereby inhibit legitimate estate planning.

²⁸⁹It would be highly unlikely for a decedent irrevocably to transfer significant wealth prior to death even if death is certain. See, for example, *In re Estate of Riefberg*, 446 N.E.2d 424 (NY 1983) (amendment to shareholders agreement entered into one day prior to death); *Newman v. Dore*, 9 N.E.2d 966 (NY 1937) (revocable trust consisting of all of decedent's real and personal property created three days prior to death).

A related UPC provision includes in the augmented estate all transfers from the decedent to the surviving spouse, regardless of when made, to the extent the property is owned by the surviving spouse at the decedent's death or was given by the spouse to third persons (if the property would have been included in the spouse's augmented estate).²⁹⁰ This provision is objectionable because it presumes that all such outright transfers to the spouse should, in effect, be viewed as advancements and credited against the surviving spouse's inheritance. This property should only be includible in the augmented estate if the transfer was substantial (such as in excess of \$10,000 in any year) or was accompanied by a contemporaneous writing signed by the decedent expressing an advancement intent.²⁹¹

Joinder of Surviving Spouse in Lifetime Transfers

The UPC approach that excludes from the augmented estate "[a]ny transfer . . . if made with the written consent or joinder of the surviving spouse"²⁹² should be incorporated into any revised elective share statute. Consent of the surviving spouse permits estate planning with greater certainty and, if the surviving spouse's consent has been freely given, it should preclude an election against the transferred property after the decedent's death.

CONCLUSION

These proposed guidelines, if adopted, would significantly clarify the elective share statutes discussed in this article while ensuring that surviving spouses are afforded the protection these statutes are designed to provide. In addition, they should facilitate estate planning for individuals who want to give their spouses no more than the statutory elective share, they should substantially reduce the amount of litigation in this area by better delineating—particularly in the areas of transfers by contract and transfers with retained interests—precisely which types of dispositions are includible in the net estate, and they should prevent surviving spouses from receiving unjustified economic windfalls.

²⁹⁰UPC § 2-202(2), 8 U.L.A. 76 (1983). This section includes such property "to the extent [it] . . . is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth."

²⁹¹Cf. EPTL § 2-1.5 (McKinney 1981) (advancements); UPC § 2-110, 8 U.L.A. 69 (1983) (same).

²⁹²UPC § 2-202(1), 8 U.L.A. 76 (1983). Accord, EPTL § 5-1.1(f) (McKinney 1981).

Appendix

20 Pa. Stat. Ann. § 2203 (Purdon Supp. 1988)

§ 2203. Right of election; resident decedent

(a) Property subject to election.—When a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of the following property:

(1) Property passing from the decedent by will or intestacy.

(2) Income or use for the remaining life of the spouse of property conveyed by the decedent during the marriage to the extent that the decedent at the time of his death had the use of the property or an interest in or power to withdraw the income thereof.

(3) Property conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit.

(4) Property conveyed by the decedent during the marriage to himself and another or others with right of survivorship to the extent of any interest in the property that the decedent had the power at the time of his death unilaterally to convey absolutely or in fee.

(5) Survivorship rights conveyed to a beneficiary of an annuity contract to the extent it was purchased by the decedent during the marriage and the decedent was receiving annuity payments therefrom at the time of his death.

(6) Property conveyed by the decedent during the marriage and within one year of his death to the extent that the aggregate amount so conveyed to each donee exceeds \$3,000, valued at the time of conveyance.

In construing this subsection, a power in the decedent to withdraw income or principal, or a power in any person whose interest is not adverse to the decedent to distribute to or use for the benefit of the decedent any income or principal, shall be deemed to be a power in the decedent to withdraw so much of the income or principal as is subject to such power, even though such income or principal may be distributed only for support or other particular purpose or only in limited periodic amounts.

(b) Property not subject to election.—The provisions of subsection (a) shall not be construed to include any of the following except to the extent that they pass as part of the decedent's estate to his personal representative, heirs, legatees or devisees:

(1) Any conveyance made with the express consent or joinder of the surviving spouse.

(2) The proceeds of insurance, including accidental death benefits, on the life of the decedent.

(3) Interests under any broad-based nondiscriminatory pension, profit-sharing, stock bonus, deferred compensation, disability, death benefit or other such plan established by an employer for the benefit of its employees and their beneficiaries.

(4) Property passing by the decedent's exercise or nonexercise of any power of appointment given by someone other than the decedent.

N.Y. Estates Powers & Trusts Law § 5-1.1 (McKinney 1981)
(selected portions)

...

(b) Inter vivos dispositions treated as testamentary substitutes for the purpose of election by surviving spouse.

(1) Where a person dies after August thirty-first, nineteen hundred sixty-six and is survived by a spouse who exercises a right of election under paragraph (c), the following transactions effected by such decedent at any time after the date of the marriage and after August thirty-first, nineteen hundred sixty-six, whether benefiting the surviving spouse or any other person, shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, included in the net estate subject to the surviving spouse's elective right:

(A) Gifts causa mortis.

(B) Money deposited, after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in a savings account in the name of the decedent in trust for another person, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(C) Money deposited, after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in the name of the decedent and another person and payable on death, pursuant to the terms of the deposit or by operation of law, to the survivor, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(D) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six, whereby property is held, at the date of his death, by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety.

(E) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six, in trust or otherwise, to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person, by the express

provisions of disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof. The provisions of this paragraph shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death.

(2) Nothing in this paragraph shall affect, impair or defeat the right of any person entitled to receive (A) payment in money, securities or other property under a thrift, savings, pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust, (B) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract, a policy of life, group life, industrial life or accident and health insurance or a contract by such insurer relating to the payment of proceeds or avails thereof or (C) payment of any United States savings bond payable to a designated person, and such transactions are not testamentary substitutes within the meaning of this paragraph.

(3) Transactions described in subparagraphs (C) or (D) shall be treated as testamentary substitutes in the proportion that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entirety was furnished by the decedent. The surviving spouse shall have the burden of establishing the proportion of the decedent's contribution. Where the other party to a transaction described in subparagraphs (C) or (D) is a surviving spouse, such spouse shall have the burden of establishing the proportion of his contribution, if any. For the purpose of this subparagraph, the surrogate's court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

(4) The provisions of this paragraph shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having jurisdiction of the decedent's estate or by another court of competent jurisdiction. Such order may be made, on notice to such persons and in such manner as the court may direct, upon application of the surviving spouse or any other interested party and on proof that the surviving spouse has exercised his right of election under paragraph (c). Service of a certified copy of such order on the corporation or other person holding such fund or property shall be a defense to it, during the effective period of the order, in any action or proceeding brought against it which involves such fund or property.

(5) This paragraph shall not impair or defeat the rights of creditors of the decedent with respect to any matter as to which any such creditor has rights.

(6) In case of a conflict between this paragraph and any other provision of law affecting the transactions described in subparagraph (1), this paragraph controls.

(c) Election by surviving spouse against wills executed and testamentary provisions made after August thirty-first, nineteen hundred sixty-six; election where decedent dies intestate as to all or any part of his estate.

(1) Where, after August thirty-first, nineteen hundred sixty-six, a testator executes a will disposing of his entire estate, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(A) For the purposes of this paragraph, the decedent's estate includes the capital value, as of the decedent's death, of any property described in subparagraph (b)(1).

(B) The elective share, as used in this paragraph, is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate. In computing the net estate, debts, administration and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him under 2-1.8.

(C) The term "testamentary provision," as used in this paragraph, includes, in addition to dispositions made by the decedent's will, any transaction described as a testamentary substitute in subparagraph (b)(1).

...

(2) Where, after August thirty-first, nineteen hundred sixty-six, a person dies intestate as to all or any part of his estate, and, in the case of part intestacy, executes a will after such date, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the testamentary provisions made by the decedent, as such provisions are defined in subparagraph (1)(C), subject to the following:

(A) The share of the testamentary provisions to which the surviving spouse is entitled hereunder is his elective share, as defined in subparagraphs (1)(A) and (B), reduced by the capital value of all property passing to such spouse (i) in intestacy under 4-1.1, (ii) by testamentary substitute as described in subparagraph (b)(1) and (iii) by disposition under the decedent's last will.

(B) The satisfaction of such elective share shall not reduce the intestate share of any other distributee of the decedent.

(C) Whenever a testamentary provision for the surviving spouse takes the form of income payable for his life: (i) The surviving spouse has the limited right to elect to take, absolutely, the sum of ten thousand dollars or the share to which he is entitled hereunder, whichever is less. Such sum, however, is inclusive of any absolute testamentary provision, as described in subparagraph (1)(C), and any amount to which the surviving spouse is entitled in intestacy and

4-1.1, and is payable from the principal of any trust, legal life estate or annuity created by such testamentary provision, the terms of which remain otherwise effective.

. . .

UPC Section 2-202 [Augmented Estate]

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) Any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) Any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) Any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) Any transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(2) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this Paragraph:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust

created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

(3) For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.