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SPOUSAL PROPERTY RIGHTS — 'TIL DEATH DO THEY PART

JOHN W. FISHER, II*

I. INTRODUCTION

A marriage ends in one of two ways - either by divorce or by death of a spouse. In each situation, there are important property rights affected by the termination of the marriage relationship. In West Virginia, spousal rights when the marriage is dissolved by divorce have undergone a significant and substantial redefinition during the past decade. In fact, the *LaRue v. LaRue*¹ decision and the subsequent revision of Chapter 48, Article 2 during the 1984 legislative session completely rewrote the law.²

Given these significant changes which have occurred in spousal property rights when the marriage ends in divorce, this article will re-examine the spousal rights when the marriage survives until at death do they part and the possible revision of those rights.

The framework for wealth transmission at death is provided by statutes. The principle provisions include the course of descent for real estate,³ the order of distribution of personal property,⁴ dower

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1. *LaRue v. LaRue*, 304 S.E.2d 312 (W. Va. 1983).

2. H. 1694, Reg. Sess., passed March 20, 1984, amended and reenacted W. VA. CODE §§ 48-2-1, -2, -13, -15, -16, -17, -22 and § 48-3-10, as well as added five new sections, §§ 48-2-32 to -36. The development and analysis of equitable distribution of marital assets has been discussed extensively in the WEST VIRGINIA LAW REVIEW. See Case Comment, *LaRue v. LaRue: Equitable Distribution of Marital Assets Finally Available in West Virginia*, 86 W. VA. L. REV. 251 (1983); Crandall, *Critique of West Virginia's New Equitable Distribution Statute*, 87 W. VA. L. REV. 87 (1984); Note, *Equitable Distribution Approach to Apportionment*, 87 W. VA. L. REV. 95 (1984); Note, *The Need to Value Homemaker Services Upon Divorce*, 87 W. VA. L. REV. 115 (1984). See also Krauskopf, *Classifying Marital and Separate Property - Combination and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997 (1987).

3. W. VA. CODE § 42-1-1 (1982).

4. *Id.* § 42-2-1 (1982).

rights in the surviving spouse,⁵ the statute of wills,⁶ and "the statutory or forced-share" provisions.⁷ There, of course, exists a significant body of case law construing the statutory provisions and resolving issues not covered by the statutes.

II. THE ORIGINS OF WEST VIRGINIA STATUTES

The basic pattern of descent of real property and distribution of personal property for West Virginia was established when Virginia severed its ties with England. The West Virginia statute of descent was later copied from the Virginia statute as it existed at the time of creation of the state of West Virginia.⁸ A concise, but informative, history of Virginia/West Virginia laws of descent is provided by Professor Raleigh Colston Minor.⁹ The author traces the evolution of present law from the English Canons of descent to the original statutes enacted in Virginia following the Declaration of Independence. The task of drafting these new statutes for Virginia fell principally to Thomas Jefferson. As to the work of Mr. Jefferson and his associates, Professor Minor states:

It is worthy of observation, that although this statute *wholly abrogated* the common law canons of descent, and substituted therefore an entirely new system, applicable to every possible case which can happen, and governed by new analogies, yet so clear was its framer's perception of his own scheme, and so lucid his language, that no serious controversy as to its meaning arose for forty years, and the question then raised having been settled. None of consequence has since been suggested until the adoption of the new statute in 1922.¹⁰

5. *Id.* §§ 43-1-1 to -20 (1982). The husband's common law curtesy has been abolished by statute, *id.* § 43-1-18 (1982), and the husband and wife each have identical "dower rights" as defined by statute. *See id.* § 43-1-1 (1982).

6. *Id.* §§ 41-1-1 to -10 (1982).

7. *Id.* §§ 42-3-1 to -3 (1982).

8. 2 F. RIBBLE, *MINOR ON REAL PROPERTY* §§ 909-38 (2d ed. 1928).

9. *Id.* § 922, at 1173.

10. *Id.* § 920, at 1171-72.

Mr. Jefferson's drafting philosophy is contained in the following passage:

In the execution of my part, I thought it material not to vary the diction of the ancient statutes by modernizing it, nor to give rise to new questions by new expressions. The text of these statutes had been so fully explained and defined by numerous adjudications, as scarcely ever now to produce a question in our courts. I thought it would be useful in all new draughts to reform the style of the later British statutes, and of our own acts of Assembly; which from their verbosity, their endless tautologies, their involutions of case

Insight into Mr. Jefferson's thoughts is provided by his own words. After explaining the division of responsibility among the Commission members, he notes:

As the law of descents, and the criminal law fell, of course, within my portion, I wished the committee to settle the leading principles of these, as a guide for me in framing them; and with respect to the first I proposed to abolish the law of primogeniture, and to make real estate descendible in parcenary to the next of kin, as personal property is by the statute of distribution. Mr. Pendleton wished to preserve the right of primogeniture, but seeing at once that that could not prevail, he proposed we should adopt the Hebrew principle, and give a double portion to the elder son. I observed that, if the elder son could eat twice as much, or do double work, it might be a natural evidence of his right to a double portion; but being on a par in his powers and wants with his brothers and sisters, he should be on a par also in the partition of the patrimony; and such was the decision of the other members.¹¹

The general principle of succession established by this commission and adopted by the Virginia legislature in 1785 was: "that first of all the land of a decedent shall go to his *children*, if any, or their descendants; and if there be *no children or descendants* of the decedent, then to his nearest lineal ancestors. . . ."¹²

within case, and parenthesis within parenthesis, and their multiplied efforts at certainty, by *said*s and *aforesaid*s, by *ors* and by *ands*, to make them more plain, are really rendered more perplexed and incomprehensible, not only to common readers, but to lawyers themselves.

Id. at 1170-71.

11. *Id.* § 920, at 1170.

12. *Id.* § 922, at 1173.

'[W]hen any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are *not alien enemies*, in the following course:

First, To his children and their descendants;

Second, If there be no child, nor the descendant of any child, then to his or her father and mother, or the survivor;

Third, If there be neither father nor mother, then to his or her brothers and sisters, and their descendants;

Fourth, If none such, then the whole shall go to the surviving consort of the intestate;

Fifth, If none such, then one moiety shall go to the paternal, the other to the maternal kindred, of the intestate, in the following course;

Sixth, First to the grandfather and grandmother, or the survivor;

Seventh, If none then to the uncles and aunts, and their descendants;

Eighth, If none such, then to the great grandfathers, or great grandfather, and great grandmothers, or great grandmother;

Ninth, If none then to the brothers and sisters of the grandfathers and grandmothers, and their descendants.

Under this statutory pattern, the surviving spouse took the estate only if there were no children, no descendants of children, no mother or father, no brothers or sisters, and no descendants of brothers or sisters.

In a time when the principle asset of an estate was real property, the widow dower rights provided a measure of financial security and proximity to her children who normally inherited, and occupied, the family's lands following the death of her husband. Therefore, as long as real estate constituted the principal asset of an estate, it is arguable that dower rights afforded adequate protection for the surviving spouse.¹³ This statutory scheme established with the birth of our nation remained essentially unchanged until thirty years ago when the West Virginia statute on descent was amended to advance the spouse to its current position of second only to children or descendants of children.¹⁴

Tenth, And so one (on), in other cases, without end, passing to the nearest lineal ancestors, and the descendants of such ancestors.

Eleventh, If there be no paternal kindred the whole shall go to the maternal kindred; and if there be no maternal kindred, the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

Finally, if there be no husband nor wife of the intestate, nor the kindred of either, the inheritance escheats to the Commonwealth for the benefit of the Literary Fund for the use of the public schools.

Id. § 922, at 1173-74.

13. The fact that dower may still afford significant rights to the surviving spouse is illustrated in *Cutone v. Cutone*, 169 W. Va. 79, 285 S.E.2d 905 (1982). In the court's first syllabus, it reaffirmed an earlier holding (*Holt v. Holt*, 96 W. Va. 337, 123 S.E. 53 (1924)) as follows:

After the death of her husband and prior to assignment of dower, a widow is entitled to hold, occupy and enjoy the mansion-house, either by actual occupancy or by renting it to others. If, during such period, the administrator of the deceased husband's estate rents the mansion-house, the widow, in an accounting with him is entitled to receive the rents therefrom, without deduction of taxes or charges for fire insurance upon the mansion-house which have been paid by him; but he may deduct from the rents so collected a reasonable sum necessarily expended by him to keep the premises in repair.

The *Cutone* case was primarily concerned with defining what constituted an abandonment of the legal right of quarantine. See *Cutone*, 169 W. Va. at 79, 285 S.E.2d at 908. The fact that many family residences are owned as joint tenants with right of survivorship has lessened the application of dower.

14. Prior to the 1957 amendment, the statute read in part as follows:

W. VA. CODE § 42-1-4080 (1949).

§ 4080. [1] Course of Descent Generally. —

When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the

III. SHOULD THE STATUTES BE AMENDED?

When one considers the infinite varieties and complexities of the family situations and the protection of spousal rights that must be addressed by the basic statute of descent and distribution, one should gain an appreciation of the difficulty of drafting a set of rules that fairly resolves the myriad of potential issues. Since the statute has endured for all of these years with so few changes, one might assume that the statutory scheme either possesses sufficient flexibility to accommodate the changes that have occurred in our society or demonstrates a remarkable gift of foresight by our forefathers which enabled them to devise a basic pattern for the transmission of wealth at death which has continued to serve the citizens of our state for more than 100 years. As the previous quote from Professor Minor suggests, the statutory scheme was clearly drafted, and it anticipated the eventualities to such a degree that judicial construction was not necessary. Even a cursory reading of the statute establishes that the statute has not endured because of its flexibility or malleability.

following course:

(a) To his children and their descendants;

(b) If there be no child, nor descendant of any child, then moiety each to his father and mother;

(c) If there be no child, nor descendant of any child, nor mother, then one moiety to the father; or if there be no child, nor descendant of any child; nor father, then one moiety to the mother; and in either case the other moiety, or if there be no child, nor descendant of any child, nor father, nor mother, the whole, shall go to the wife or husband of the intestate and to the intestate's brothers and sisters and the descendants of brothers and sisters.

W. VA. CODE § 42-1-4080 (1961) included the following revisions:

Section 4080. [1] Course of Descent Generally. —

When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to his kindred, male and female, in the following course:

(a) To his children and their descendants; (b) If there be no child, nor descendant of any child, then the whole shall go to the wife or husband, as the case may be;

(c) If there be no child, nor descendant of any child, nor wife, nor husband, then one moiety each to the mother and father; or if there be no child, nor descendant of any child, nor wife, nor husband, nor mother, then the whole shall go to the father; or if there be no child, nor any descendant of any child, nor wife, nor husband, nor father, then the whole shall go to the mother;

(d) If there be no child, nor descendant of any child, nor wife, nor husband, nor mother, nor father, the whole shall go to the intestate's brothers and sisters and the descendants of brothers and sisters.

See generally *Legislation*, 60 W. VA. L. REV. 207 (1958).

Unfortunately, neither has the statute survived because it continues to adequately meet our needs. The several major attempts to study the patterns of wealth transmission at death in this century suggest that our statutory pattern does not comport with the "average person's" wishes.

The benchmark study in this area is Professor Allison Dunham's report entitled "Method, Process and Frequency of Wealth Transmission at Death."¹⁵ Professor Dunham examined 97 estates for which probate proceedings were initiated in 1953 and 73 estates for decedents who died in 1957 in Cook County, Illinois. The 1953 samples were obtained by a random selection of estates opened in that year, while the 1957 samples were obtained by utilizing the first 500 death certificates of the Chicagoans to die in that year. It is important to note that this study, as well as the two others which will be discussed, examined a number of questions not relevant to this article. Therefore, only selected portions of the studies will be discussed. It is also noted that since it is difficult to further condense the raw data presented in these studies, it will be necessary to rely principally on the conclusions drawn by the authors.

In regard to the tendency for wills to depart from the distribution rules of intestate succession,¹⁶ Professor Dunham notes that "[w]hen a surviving spouse is involved, the wills analyzed indicate much more of a pattern of expectations as to an appropriate share for the surviving spouse. This pattern, capable of being reduced to statutory language, deviates sharply from the distribution provided by the intestate laws."¹⁷

Later in the study, in discussing reform of statutes of distribution, Professor Dunham notes of testate deaths: "The most obvious conclusion is that the present statutory share of one-third of the estate for the surviving spouse, if there are children, is almost

15. Dunham, *Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963).

16. Illinois law provides that if there were descendants of the deceased, the surviving spouse receives only one third of the estate and the children the remaining two-thirds. If there are no descendants, the surviving spouse is entitled to all of the personal estate and one half of the real estate.

17. Dunham, *supra* note 15, at 254-55.

completely contrary to the expectations of the average testator.”¹⁸ At the end of this lengthy study and analysis of estates in Cook County, the author provides these tentative conclusions:

- 1) The bulk of the wealth that passes through the probate court is distributed pursuant to a will even though almost 50 percent of the estates are intestate.
- 2) Further study is necessary to determine whether the 85 percent of adults who have no probated estate have some other means of passing property from one generation to the next or have in fact no accumulated wealth.
- 3) The intestate succession law concerning the share of the surviving spouse seems to be seriously contrary to the average expectation of the community.
- 4) The estate administration process is as speedy as the statutory 9 month period for creditors claims permits.¹⁹

A second major study was the 1969 report of Professor Olin R. Browden, Jr. entitled “Recent Patterns of Testate Succession in the United States and England.”²⁰ For the American portion of the study, all testate estates for 1963 in Washtenaw County, Michigan were used.²¹

Professor Browder’s study involved 187 estates. (Thirty-six estates were excluded because the estates were without assets and no further administration occurred.) Based on this data, the author concludes, that:

[t]here is evidence here that a majority of testators will in some manner establish a priority of spouses over issue. This finding contrasts sharply with the pattern most commonly prescribed by intestacy statutes. These statutes typically limit a spouse’s share to one third or one half of the estate when issue survive, depending upon whether one or more than one child survives. The empirical evidence would

18. *Id.* at 258.

19. *Id.* at 285.

20. Browden, *Recent Patterns of Testate Succession in the United States and England*, 67 *MICH. L. REV.* 1303 (1969).

21. As to the source of this data base the author said:

[T]he complexion of the population of Washtenaw County does suggest that in some respects it can be regarded as average, despite the presence within it of two universities. The population estimate at the time of this survey was 187,000; two cities, Ann Arbor and Ypsilanti, accounted for over half of this total. Depending on the standards used, twenty to twenty-six percent of the population can be designated as rural. The western part of the country is distinctively rural; the eastern part, which abuts Wayne County where Detroit is situated, is to some degree industrial.

Id. at 1304.

seem to suggest some reason for altering this course of descent to give the entire estate to a dependent spouse when its size does not exceed a minimum which is regarded as adequate to provide for his or her needs.²²

After an analysis of the testamentary disposition in various family situations, the author concludes:

The data . . . shows that most wills do depart to some degree from [statutory] patterns. Only when a decedent is survived by issue but no spouse does his testamentary pattern tend to approximate the pattern set by law. When a testamentary pattern which diverges from the usual patterns of intestate succession appears with some frequency, a basis exists for suggesting amendments to the intestacy statutes.²³

A significant attempt was made in the mid 1970's to compile empirical data relevant to intestate succession.²⁴ The researchers randomly selected 387 telephone numbers, which produced 272 contacts resulting in 182 completed survey responses to the researchers' questionnaire. The study was an attempt to determine the respondents' knowledge of intestate succession laws and to determine to whom the respondent would desire his property to pass under certain hypothetical situations. The authors concluded that:

1) On the matter of parents and siblings, Illinois law has each parent and each sibling receiving an equal share of the decedent's estate, if the decedent is

22. *Id.* at 1308.

23. *Id.* at 1312.

But the desires of normal or average decedents do not provide the sole basis for framing or justifying an intestacy law. Policy considerations are also relevant, particularly with respect to restraints upon testation such as the forced heirship of spouses. Nor can the adequacy of intestate statutes to meet the average donative objectives of decedents be tested merely by referring to what testators in fact do by will. Some attention must also be given to the actual extent of intestate succession. . . . This data would tend to disprove any hypothesis that kinship relationships between a decedent and his survivors is a factor affecting the incidence of wills. It also reveals the significant but unspectacular fact that in all three of the stated categories, slightly less than one half of all decedents leaving estates of sufficient size to be administered by other than summary procedures were content to let the intestate law take its course. Among people who are still largely free to frame their own particular dispositive schemes by will, a willingness by almost half of any group of decedents to allow their property to pass by intestacy does not suggest serious disaffection with the intestacy laws. The basic features of the traditional statutes still seem to be relevant to average needs. Taking all of these factors into account, including appropriate but arguable value judgments on matters of social policy, one can project useful refinements but not revolutionary changes in the law of intestate succession.

Id. at 1313 (footnotes omitted).

24. Fellows, Simon, Snapp & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L. J. 717 (1976).

not survived by a spouse or a direct descendant. The respondent's mean response pattern would provide the parents about twice as much as the siblings. The most frequent response would provide nothing to the siblings.

2) If the survivors are a spouse and parents, Illinois law provides that the entire estate passes to the surviving spouse. A majority of the respondents (59 percent) supported the Illinois statute.

3) Illinois law distributes one-third of the decedent's estate to the spouse and two-thirds to his or her children. Only three percent of the respondents agree with the Illinois statute. Most (but remember the significant men-women differences) want to leave everything to their spouse. The respondents, however, prefer to leave some portion of the estate to the child directly if that child is from a previous marriage or is illegitimate.

4) If the decedent is survived by two or more children but no spouse, Illinois law requires the entire estate to pass to the children in equal shares. The respondents overwhelmingly support this pattern.²⁵

It, therefore, appears that the current statutory scheme enjoys its longevity not so much because it adequately serves citizens' needs, but rather because of a societal inertia in matters of this nature.

IV. AN ATTEMPT AT REFORM — THE UNIFORM PROBATE LAW

The realization that the existing statutory schemes, which West Virginia typifies, did not adequately reflect the desire of the "average decedent" as it related to intestate succession, a concern with deficiencies in the protection of a spouse from disinheritance, a desire for fundamental reform of the probate system, and an interest in greater uniformity in state laws caused the National Conference of Commissioners on Uniform State Laws to turn their attention to this problem.²⁶ In 1969, after extensive studies and numerous drafts, the Commissioner promulgated the Uniform Probate Code (UPC). In that same year, the House of Delegates of the American Bar Association added its stamp of approval to the proposed Uniform Probate Code.²⁷

25. *Id.* at 744. The study revealed that "[o]f the male respondents with children 77.3 percent would give the entire estate to their wife. On the other hand, only 46.7 percent of the female respondents wanted their husbands to receive their entire estate." *Id.* at 730.

26. See generally Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037 (1966).

27. For a comparison of West Virginia law with the Uniform Probate Code see Curry, *West Virginia and the Uniform Probate Code: An Overview*, 76 W. VA. L. REV. 111 (1973) and 77 W. VA. L. REV. 203 (1975). See also Wellman, *Selected Aspects of Uniform Probate Code*, 3 REAL PROP. PROB. & TR. J. 199 (1968).

For whatever reason, probate reform in West Virginia appears to have focused principally on estate administration in contrast to the general areas of substantive law.²⁸ (The substantive areas are found primarily in Article II and the administration of estates mainly in Article III of the UPC.)

The result of "probate reform" in West Virginia was the revision of Chapter 44 of the Code by the 1982 legislature. While the 1982 amendment made significant improvements in the administration of estates, its implementation was made a county option.²⁹

One feature of the Uniform Probate Code is the separation of intestate succession from the issue of "forced or statutory share," which is designed to prevent the disinheritance of a spouse. The bifurcation of these two issues is logical. The problem of intestate succession necessitates an attempt to provide an adequate or acceptable disposition of the deceased's property after death in the absence of a will. While the above studies indicate that intestate succession is more frequent in estates with more limited assets, the intestacy statute must address a full range of estates' values as well as adequately provide for an infinite variety of family situations. While unique family needs should be dealt with in a will or other form of estate planning, all too frequently such testamentary planning does not occur. The Uniform Probate Code represents a reasonable effort to provide a solution to this difficult problem.³⁰

28. There may be those who believe a series of articles published in the Charleston Gazette may have affected the discussion of probate reform.

Between September 1980 and August 1982 approximately 12 articles appeared in the Charleston Gazette relating to probate. Headlines for the articles include *Opinions of Lawyers Vary on Probate Reform*, Nov. 23, 1980, at 3D, col. 1; *Let's Stand up to Lawyers on Estate Fees*, June 11, 1981, at 2E, col. 1; *95 Percent of Estates in State Uncontested, Informal Poll Shows*, May 12, 1981, at 13A, Col. 1; *State Bar Board Backs Changing Probate System*, Jan. 21, 1982, at 13A, col. 5; and an editorial *Robbing the Dead*, May 10, 1981, at 2E, col. 5.

29. W. VA. CODE § 44-3A-1 (1982). See generally Note, *Description of West Virginia's New Probate System*, 85 W. VA. L. REV. 393 (1983).

30. UNIF. PROB. CODE § 2-102 (1982). [Share of the Spouse.]

The intestate share of the surviving spouse is:

- (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
- (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000], plus one-half of the balance of the intestate estate;
- (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [\$50,000], plus one-half of the balance of the intestate estate;

In fact, the empirical data indicates that the Uniform Probate Code is significantly closer to the desire of the populace than our current statutory provisions. While recognizing that the family residence and bank accounts are often owned by joint tenants with right of survivorship,³¹ it is still a tribute to the strength and harmony of the family unit that intestate succession has not produced more practical problems than it has. Although there are no empirical studies to support the assumptions, and it would be difficult if not impossible to conduct a meaningful or reliable study, almost all of us are aware of anecdotal examples of families "doing the right thing" upon the death of a parent to adequately protect the surviving spouse. The "solution" may involve disclaimers of property interest,³² intra family deeds, assignments or transfers, or other informal arrangements. In effect, the surviving family members through their actions are providing a "will" for the deceased.

In contrast to intestate succession where there is a reasonable chance that the family might willingly make adjustment to the statutory disposition, the invocation of the forced-share statute usually presents an adversarial relationship.³³

(4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

UNIF. PROB. CODE § 2-103 (1982). [Shares of Heirs Other Than Surviving Spouse.]

The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;

(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

31. W. VA. CODE §§ 36-1-19, -20, -20A (1985).

32. *Id.* §§ 42-6-1 to -8 (1982).

33. A study by W.D. MacDonald published in 1960 found that of those cases in which he

Typically, the problem of "forced-share" arises when one spouse attempts to disinherit the other. The disinheritance may involve "writing the spouse out of the will" or an *inter vivos* transfer motivated by a desire to remove assets from the estate and thereby deprive the surviving spouse of the assets. Even though the concerns involved in intestate succession and the "forced-share" are inherently different, current West Virginia law equates the two. Our statute provides that:

[a spouse may renounce a will] [w]hen any provision is made in a will for the surviving wife or husband of the testator. . . . If such renunciation be made, or if no provision be made for such surviving wife or husband, such surviving wife or husband shall have such share in the real and personal estate of the decedent as such surviving wife or husband would have taken if the decedent had died intestate leaving children; otherwise, the surviving wife or husband shall have no more of the decedent's estate than is given by the will.³⁴

Thus, in West Virginia, the "forced-share" is determined by the same code sections which provide for descent,³⁵ distribution,³⁶ and dower.³⁷

Given the strain that the renunciation of a will can create within the family, it is fortunate that such disputes do not occur in a significant percentage of cases. In fact, the relative scarcity of attempts to disinherit a spouse was a premise in Professor Sheldon J. Plager's 1966 article entitled "The Spouse's Nonbarrable Share: A Solution in Search of a Problem."³⁸ One of the goals of Professor Plager's empirical analysis was "to bring together in one place the available data on patterns of wealth transmission at death and to relate these data to the special situation of the surviving spouse."³⁹ Professor Plager acknowledges that forced-share statutes are

could identify the relationships, more than half pitted children of a former marriage against a later spouse in forced-share litigation. Langbein & Waggoner, *Redesigning the Spouse's Forced-Share*, 22 REAL PROP. PROB. & TR. J. 303, 311 n.24 (1987) (citing W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960)).

34. W. VA. CODE § 42-3-1 (1982).

35. *Id.* § 42-1-1 (1982).

36. *Id.* § 42-2-1 (1982).

37. *Id.* § 43-1-1 to -20 (1982).

38. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

39. *Id.* at 714.

attributable to a network of policy concerns which surround the protection of the family unit — the obligation of support, the presumed contribution of the survivor's family, and the state's interest in protection from the burden of indigents — as well as to policies favoring economy in transmission of property, equality of sexes, and fairness among beneficiaries.⁴⁰

He notes that the purpose of his study was not to take issue with the policy underlying the decision to protect the surviving spouse, but rather to question the soundness of the means used.

Within his summary, Professor Plager writes:

This leads to the final and perhaps the most significant finding, and here the evidence is strikingly consistent. The married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss. If the balance is struck it is not done so publicly. For the total society this has real meaning: the need for a surviving spouse's choice between the deceased spouse's testamentary largess and the legislatively-decreed share is not a need of massive proportions. The machinery designed to satisfy this need need not be massive and insensitive; on the contrary, the dimensions of need are such as to compel the conclusion that the machinery should be keyed to individuation and able to adjust its impact to the circumstances calling it into play.⁴¹

40. *Id.* at 681.

41. *Id.* at 714-15.

Two decades after this article appeared, Professors Langbein and Waggoner, in their article *Redesigning The Spouse's Forced-Share*, *supra* note 33, at 303, said of Professor Plager's study:

Twenty years ago Sheldon Plager proposed a reform of breathtaking simplicity. He suggested that the forced-share system be abolished. Coining a memorable phrase, Plager called the forced-share 'a solution in search of a problem.' He pointed to a simple truth: Spouses ordinarily need no protection against disinheritance. If you live out a long-duration marriage, you are ordinarily quite devoted to your spouse. Careful empirical investigation has been done on this question, and it shows that, far from trying to disinherit the survivor, the typical spouse strains in the opposite direction: He leaves everything to the surviving spouse, even at the price of disinheriting their children. Plager argued that forced-share law therefore did more harm than good; for every deserving spouse whom forced-share law protected from an unjustified disinheritance, countless unjustified forced-share windfalls were created, primarily in remarriage cases.

The liberalization of divorce law that has mostly occurred since Plager wrote supplies a further ground in support of his argument. Death and divorce are cognate phenomena, they are the two ways to dissolve a marriage. It is odd to think of death and divorce as alternatives, since the spouses in those two modes of dissolution ordinarily have wholly different aspirations for each other. But there is an important connection between the liberalization of divorce and our question of forced-share policy. The relative ease with which an unhappy spouse may now escape a sour marriage means that such a person need no longer feel locked into a bad marriage until death. Accordingly, there is less reason to fear that marital discord will result in the unjustified disinheritance of a spouse. The deserving spouse whose contribution forced-share law is trying to protect now has a realistic lifetime remedy in the property settlement incident to divorce.

A "response" to the empirical analysis approach to the problem was presented a decade later in an article by Professor Sheldon F. Kurtz.⁴² In an extensive article, Professor Kurtz provides a historical perspective of the protection of a surviving spouse from disinheritance and a discussion of American statutes and judicial decision. Within this discussion, Professor Kurtz writes:

The implicit assumption in the preceding discussion has been that interspousal disinheritance, whether through lifetime transfers or by will, does occur and that the remedy of forced-share statutes is not without disadvantages. Forced share statutes have also been attacked from a difficult perspective. A growing body of empirical studies suggests there is little *deathtime* interspousal disinheritance in the wealth transmission process. Consequently, it has been argued that, in effect, forced-share statutes are a response to a fictitious problem.

However, the paucity of empirical evidence suggesting interspousal disinheritance, coupled with the intuitive response that it just is not frequently done, does not mean the problem does not exist or that society, through its courts and legislatures, does not have an interest in protecting a surviving spouse who has in fact been disinherited. Even the empiricists cannot ignore more than two centuries of case law involving interspousal disinheritances, which itself proves that it does happen. Moreover, the growth of legislation evidences both a public awareness of the problem and a public policy that it should be remedied.⁴³

Following a review of a number of statutory provisions Professor Kurtz observes:

Thus, both the increase in divorce and the increase in remarriage that typify late-twentieth-century serial polygamy supply cause for thinking about abolishing the forced-share system. But abolition would work fresh injustice. It would expose the long-duration spouse to the risk of disinheritance. Although cases in which the long-duration spouse is disinherited are exceptionally rare, part of the explanation is that the forced-share system has protected that spouse well. The forced-share entitlement works mainly by deterrent; it encourages the reluctant testator to make provision for his spouse in order to spare his estate the nuisance and notoriety of forced-share proceedings. Furthermore, divorce is not a wholly satisfactory alternative to the forced-share. For people of certain religious persuasions, divorce is not an option; and even within the rest of the populace, divorce offers no remedy in the case of surprise disinheritance.

Thus, it is safe to say that the consensus in favor of having a forced-share system will endure. Indeed, the most recurrent proposal for reforming the forced-share would cut in quite the opposite direction—it would expand the reach of forced-share law. The idea would be to refashion our law in imitation of the system that prevails in England and the Commonwealth, Testator's Family Maintenance (TFM).

Id. at 312-13.

42. Kurtz, *The Augmented Estate Concept Under the Unif. Prob. Code: In Search of An Equitable Elective Share*, 62 IOWA L. REV. 980 (1977).

43. *Id.* at 992-93.

A common failing among all of these foregoing statutory proposals is that the premium paid to the spouse's interest is to the detriment of *inter vivos* donees. While the public policy of protecting the surviving spouse may take precedence, to the extent the statutes ignore the spouse's actual economic needs, arguably they provide unnecessary protection. Statutes that provide the spouse with a fixed percentage elective share against probate assets suffer from a failure to consider the age and health of the surviving spouse, the spouse's accustomed manner of living, the spouse's financial needs, and the number of surviving dependents. Cryptically, they lack flexibility.⁴⁴

The majority of Professor Kurtz's extensive article deals with augmented estate concepts proposed in the Uniform Probate Code.⁴⁵

44. *Id.* at 1009.

45. UNIF. PROB. CODE § 2-202 (1982) [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 \$3,000.00.

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

The fact that he devotes fifty pages to this analysis provides a clue to the provision's complexity. In his conclusion he notes:

Of course, complex problems do not lend themselves readily to simple solutions. The augmented estate provisions of the Uniform Probate Code are proof of the pudding. Unfortunately, their complexity may mask an underlying attitude about the augmented estate provisions that questions the fundamental concept of any legislative protection against disinheritance. After all, attack on the complexity of the Code would be more palatable than public outcries that a husband should be free to completely disinherit his wife, or vice versa. Notwithstanding the complexity of the augmented estate provisions and the construction problems inherent in them, and admitting my own prejudices in favor of providing protection from disinheritance, the Code's provision represents a giant step forward in protecting both decedent's spouse and other objects of decedent's bounty.⁴⁶

The search for a solution to this complex pattern did not end with the work of the Commissioners on Uniform Laws. In 1987, Professors John H. Langbein and Lawrence W. Waggoner published an article entitled "Redesigning the Spouse's Forced-Share".⁴⁷

The authors introduce their article, which proposes a new solution to the forced-share problem, with this observation:

American forced-share laws underwent a major round of reform in the 1960's. The main objective was to prevent the decedent from engaging in "fraud on the

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 established 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.

46. Kurtz, *supra* note 42, at 1062.

47. Langbein & Waggoner, *supra* note 33, at 303.

widows share" that is, using nominal *inter vivos* transfers to evade the surviving spouse's forced-share entitlement. In jurisdictions that follow the Uniform Probate Code of 1969 (UPC), that mischief has been eradicated.⁴⁸

The authors note, however, that with the Uniform Probate Code there is a "serious discrepanc[y] between purpose and practice in the forced-share system" which is the "astonishing insensitivity to the difference in the duration of a marriage."⁴⁹ They point out that the current statute allows the surviving spouse the same entitlement in the decedent's estate whether the marriage lasted for five days or five decades.⁵⁰

More explicitly, the authors state their contention as follows:

Despite its worthy aspiration to redress the inadequacy of our marital property law, modern forced-share law does more harm than good. The problem is — if we may lapse into the jargon of modern constitutional law — that the forced-share is wildly overinclusive. For every rescued survivor who fits the stereotype of a victim being cheated of his or her contribution to the decedent's wealth, the forced-share law sweeps in many spouses — mostly remarried spouses, typically the decedent's second spouse from a late in life marriage of short duration — for whom the forced-share is a windfall.⁵¹

After rejecting the abolition of forced-share statutes⁵² on one end of the spectrum and the English system on the other end,⁵³ the au-

48. *Id.*

49. *Id.*

50. As an illustration of this point, the following note appears in their article:

[T]he notion that serious property consequences attach to marriages of the shortest duration is no figment of the academic imagination. See, e.g. Neiderhiser Estate 2 Pa. D&C 3d 302 (1977), for a case in which the widow received the full intestate share (larger than the forced-share) after her husband collapsed and died during the wedding ceremony. (We owe this reference to Jesse Dukeminier).

Id. at 310, n.23.

51. *Id.* at 310.

52. See *supra* note 41 for the authors' comments on Professor Plager's article.

53. TFM [Testator's Family Maintenance] empowers a judge to vary the testator's will in order 'to make reasonable financial provision' for the surviving spouse. The late-in-life second or third spouse would not fare very well under TFM, because the court can weigh the competing equities of the children of the first marriage; and because the statute directs the court to pay attention to the adequacy of the later spouse's own resources; the spouse's age; and 'the duration of the marriage.'

TFM would, therefore, supply a remedy of sorts for the shortcoming of American forced-share law that we have been discussing, but at a terrible price. TFM remits to judicial discretion every important issue of policy in forced-share law. TFM exposes the estate of every married testator to potential litigation, on an issue of the greatest difficulty. The

thors propose "an accrual-type forced-share" system. The proposal moves toward the community property concept and the Uniform Marital Property Act promulgated in 1983 by the National Conference of Commissioners on Uniform State Laws in that it adjusts the survivor's rights for the duration of the marriage.⁵⁴

Under the authors' proposal, the forced-share would be increased from the one-third, found in many states, to half, "primarily to align the forced-share fraction with the half interest that characterizes the functionally similar community property and UMPA systems."⁵⁵ However, under their proposal, this forced-share vests incrementally across time. An example of this incremented vesting concept would be that as of the date of marriage, 10% of the forced-share vests, and the remaining 90% of the forced-share vests in 5%

statutes do not define the 'reasonable provision' standard because that standard cannot be defined; it means, subject to hazy guidelines, whatever the judge who happens to hear the case happens to think is fair. The late Justice Frank Hutley of the New South Wales Supreme Court once remarked to one of us—only partly in jest—that in New South Wales, as a result of TFM, 'the only thing that a testator can be sure of achieving by will is his choice of an executor.' Disturbing as that prospect is in English and Commonwealth jurisdictions, whose judicial selection procedures have produced a trustworthy and meritocratic bench, it is even more frightening to imagine granting such power to judges in such American venues as Cook County, Illinois, where the very mention of the local bench is cause for alarm. Broad judicial discretion cannot be devolved upon the Greylord judiciary. So long as American judicial selection practices prefer politics over merit, TFM can have no future in the United States, although revivals of interest among academic writers will occur periodically.

Langbein & Waggoner, *supra* note 33, at 314.

54. In considering "forced-share statutes", a point easily overlooked is the fact that forced-share statutes do not exist in community property states. Professors Langbein and Waggoner's bias for the community property as a solution to this problem is reflected in the following quotes:

It is essential to understand that American forced-share is *entirely a consequence of the separate property regime for marital property*. Our community property states do not have forced-share statutes. Forced-share law is the law of the second best. It undertakes upon death to correct the failure of a separate-property state to create the appropriate lifetime rights for spouses in each other's earning.

Id. at 306.

The great attribute of community property law that fits it for modern patterns of marriage behavior is that community property rights are automatically adjusted for the duration of the marriage. The community property right in a spouse's earnings attaches only to the property earned during the persistence of the marriage.

Id. at 315.

See generally Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277 (1975).

55. Langbein & Waggoner, *supra* note 33, at 316.

annual increments. In this example, the full 100 percent "forced-share" interest would vest in 18 years.⁵⁶

The final portion of this "accrual type of forced-share" proposal is to "refine" the method of calculating the forced-share by taking into account the survivor's own property. Again, this portion of the proposal moves toward the community property concept "but in a mechanical fashion."⁵⁷

In support of their proposal, the authors argue that it would eliminate the "windfall problem," would work automatically and

56. As to this example, the authors' note:

We have no strong feelings about the precise period of time that is appropriate for such a forced-share vesting schedule. The idea is to increase the entitlement as the length of the marriage increases; and to do it by a mechanical formula that, while necessarily arbitrary, is simple to calculate and admits no judicial discretion.

Id. at 316-17.

57. Our proposal would make two alterations in the UPC's augmented estate. First, we would substitute for the present entity, which is constructed only on the decedent's augmented estate, a *combined augmented estate* that merges both the decedent's and the surviving spouse's augmented estates. This entity would, in fact, eliminate an administrative complexity inherent in the current UPC augmented-estate entity, which requires that the spousal setoff property be traced. Our proposal entails no tracing of the sources of funds of either spouse. The combined augmented estates would contain: (1) the decedent's augmented estate, now defined as his net probate estate plus the value of any recapturables; plus (2) the surviving spouse's augmented estate, defined to include that spouse's net worth, together with the value of any recapturables stemming from that spouse.

Including the survivor's augmented estate in the entity to which the forced-share attaches requires the second adjustment to the UPC's augmented-estate system: In satisfying the forced-share, *the surviving spouse must be charged with receipt of the survivor's own augmented estate*. That is, the survivor's own augmented estate (and property passing to the survivor as a result of the decedent's death) would be subtracted from the survivor's potential forced-share entitlement. Thus, whereas the UPC scheme currently charges the survivor only with property stemming from the decedent, our notion is to charge the survivor with the whole of the survivor's property. . . . Estate planners familiar with modern drafting techniques responsive to the federal transfer tax will recognize that our proposal would allow the elective share in a long-duration marriage to work in the nature of an equalization clause, hence to duplicate the fifty/fifty split of the community and UMPA regimes.

. . . We recommend, therefore, a minimum share for the impoverished survivor. Fifty thousand dollars is the figure we have in mind. Under our proposal the survivor is charged with receipt of his own net assets plus the amounts shifting to the survivor at the decedent's death. If those sums are less than the \$50,000 minimum, then the survivor should be entitled—at least—to whatever additional portion of the decedent's estate is necessary, up to 100 percent, to bring the survivor's assets up to that \$50,000 level. In the case of a late marriage, in which the survivor is aged in the mid-70's, the \$50,000 figure would be more or less enough to provide the survivor with a straight-life annuity at a minimum subsistence level of approximately \$10,000 per year.

Id. at 318-20 (emphasis in original).

be relatively easy to administer, and would not require the type of judicial intervention necessary in the English system.

V. IS REVISION LIKELY?

The empirical evidence, which is certainly not conclusive, indicates that our current statutory provisions for intestate succession should be revised to more nearly reflect the desire of the "average person." In "theory," unique family needs should be accommodated by a testamentary disposition utilizing a will or some other estate planning device. In reality, there will continue to be many intestate successions for which the statutory distribution is less than satisfactory. While it is not possible for a statutory plan to adequately meet the needs of the decedent's family in every situation, the Uniform Probate Code's provisions represent a reasonable solution to the problem. In addition, as suggested earlier, the harmonious family unit seems capable of an amiable and acceptable division of the property when necessary. However, if a spouse renounces the will in favor of the "forced-share," the family is typically placed in an adversary relationship. While the available data indicates that this does not occur in a substantive percentage of estates, it is likely to generate strong emotional reactions within the family when it does occur. Given the fact that it is unlikely the English system, which contemplates the court's discretionary distribution of the property in each case, will receive widespread acceptance in this country,⁵⁸ the provisions of "non-discretionary" forced-share statutes are obviously important.

Although it is a basic tenet of our legal system that statutory revision is a legislative function, the decisions of the courts may precipitate legislative action. There are several examples in recent years which illustrate this relationship as it relates to property rights. In 1976, a bill was introduced in the House of Delegates which "rewrote" the landlord and tenant law in West Virginia.⁵⁹ One of the central features of the proposed bill was that in residential prem-

58. Langbein & Waggoner, *supra* note 33, at 314.

59. H. 1500, Reg. Sess. (Feb. 14, 1976) (introduced by Mr. Boettner).

ises the landlord had a duty to provide a "habitable" premise.⁶⁰ Even though the bill failed to win passage in the 1976 legislative session, the issue of "habitability" of leased premises did not die. On November 14, 1977, the West Virginia Supreme Court of Appeals docketed *Teller v. McCoy*.⁶¹ The *Teller* case came to the court as certified questions from the Circuit Court of Logan County.⁶² While the *Teller* case was pending, the legislature enacted a provision which required a landlord to provide a habitable residential premise and codified the definition of "habitability."⁶³ In announcing its

60. *Id.* § 37-6A-20.

61. *Teller v. McCoy*, 162 W. Va. 367, 253 S.E.2d 114 (1978).

62. The certified question in *Teller* was:

1. Whether failure of a landlord to maintain rental premises in a habitable condition and otherwise remedy defects to the premises which render the residence uninhabitable is in violation of a landlord's implied warranty of habitability to a tenant? And if so, whether it is subject to waiver?
2. Whether a landlord's warranty of habitability and the tenant's covenant to pay rent are mutually dependent?
3. Whether failure of a landlord to maintain the premises in habitable condition constitutes a failure of consideration and a breach of the rental agreement?
4. Whether a landlord's breach allows to the tenant one or more of the following remedies: (a) a right of action or setoff for the difference between the agreed rent and the fair rental value of the premises in their defective condition; (b) after reasonable notice and opportunity to a landlord to correct the defective conditions, to repair the defects himself and deduct the repair cost from the rent; and (c) vacation of the premises terminating a tenant's obligation to pay rent? (d) what damages, if any, are recoverable by the landlord or tenant in the event of breach of either party.
5. Whether a breach of the implied warranty of habitability is a defense to a landlord's action for rent, damages, or unlawful detainer?

Id. at 369, 253 S.E.2d at 117.

63. W. VA. CODE § 37-6-30 (1985). Landlord to deliver premises in fit and habitable condition; duty to maintain premises. With respect to residential property:

(a) A landlord shall:

(1) At the commencement of a tenancy, deliver the dwelling unit and surrounding premises in a fit and habitable condition, and shall thereafter maintain the leased property in such condition; and

(2) Maintain the leased property in a condition that meets requirements of applicable health, safety, fire and housing codes, unless the failure to meet those requirements is the fault of the tenant, a member of his family or other person on the premises with his consent; and

(3) In multiple housing units, keep clean, safe and in repair all common areas of the premises remaining under his control that are maintained for the use and benefit of his tenants; and (4) Make all repairs necessary to keep the premises in a fit and habitable condition, unless said repairs were necessitated primarily by a lack of reasonable care by the tenant, a member of his family or other person on the premises with his consent; and

(5) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators, supplied

decision on December 12, 1978, the court noted the legislative action as follows:

The legislature's progressive abrogation of the common law no-repair rule was crystallized on March 11, 1978, when it added to our landlord tenant law W. Va. Code § 37-6-30, a new section which requires the landlord to deliver and maintain the rented dwelling unit in a fit and habitable condition.

This court today, by implying a warranty of habitability into residential leases, intends in no way to impose upon the landlord a greater burden than that set forth by the Legislature in our new statute. The landlord's duty under the implied warranty and the statute are identical. That the case at bar arose before the effective date of the new statute is then of little consequence insofar as the landlord's duty is concerned.⁶⁴

In contrast with intestate succession and forced-share statutes, the implied warranty of habitability evolved as a judicial concept.⁶⁵ In the *Teller* situation, the legislature's "anticipatory response" to the pending case was the passage of a statute which adopted habitability but ignored the other provisions in the more comprehensive bills introduced that session.⁶⁶ Therefore, while "habitability" of the leased premises is now the law as a result of both court and legislative action, other provisions of the proposed bills have since been dormant.

In contrast with the *Teller* situation, is the more recent example of a "legislative response" to the court's decision in *LaRue v.*

or required to be supplied by him by written or oral agreement or by law; and

(6) In multiple housing units, provide and maintain appropriate conveniences for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling units; and

(7) With respect to dwelling units supplied by direct public utility connections, supply running water and reasonable amounts of hot water at all times, and reasonable heat between the first day of October and the last day of April, except where the dwelling unit is so constructed that running water, heat or hot water is generated by an installation within the exclusive control of the tenant.

(b) If a landlord's duty under the rental agreement exceeds a duty imposed by this section, that portion of the rental agreement imposing a greater duty shall control.

(c) None of the provisions of this section shall be deemed to require the landlord to make repairs when the tenant is in arrears in payment of rent.

(d) For the purposes of this section, the term "multiple housing unit" shall mean a dwelling which contains a room or group of rooms located within a building or structure forming more than one habitable unit for occupants for living, sleeping, eating and cooking.

64. *Teller*, 162 W. Va. at 381-82, 253 S.E.2d at 123-24.

65. See generally *The Implied Warranty of Habitability in Residential Leases*, 81 W. VA. L. REV. 81 (1978).

66. Committee substitute for House Bill 1368 introduced on February 9, 1978 and Senate Bill 192 introduced on January 24, 1978 by Mr. Nelson.

LaRue,⁶⁷ which recognized equitable distribution at divorce. The *LaRue* decision, like the implied covenant of habitability, represented a "social issue" whose time had come. The inequity of the situation had been identified.⁶⁸ In *LaRue*, after noting that "[t]he concept of equitable distribution of marital property has achieved an almost universal acceptance in the divorce laws of the various states,"⁶⁹ the court said "in those few jurisdictions that have no specific statute on equitable distribution, the courts have continued to evolve their concepts of equitable distribution with a broad interpretation of traditional equity principles. We [West Virginia], along with Florida, Mississippi, and South Carolina, are in this category."⁷⁰

In contrast with the *Teller* case in which there were no applicable statutory provisions, the *LaRue* case dealt with a general statutory framework and a series of decisions construing the statutory provision.⁷¹ Following the court's decision in *LaRue*, the legislature extensively revised Chapter 48, Article 2 of the code during the 1984 session to codify the principles of equitable distribution.

It is difficult to speculate with any degree of certainty whether the Supreme Court of Appeals may exercise its "equitable" powers in the area of spousal rights at death in the future and if it does what the legislative response might be, if any. A review of recent court decisions does not suggest any existing parallels to the *Teller* or *LaRue* situations. In fact, to the extent there may be any hint as to the court's inclination in a reported decision, it suggests a deference to the legislative preeminence. In *Miller v. Sencindiver*,⁷²

67. *LaRue*, 304 S.E.2d 312.

68. See generally *The Distribution of Marital Real Property Upon Divorce in West Virginia: The Need for Legislative Reform*, 82 W. VA. L. REV. 611 (1980).

69. *LaRue*, 304 S.E.2d at 316.

70. *Id.* at 317. Other examples of the court's "equitable powers" to alter a previous holding are "equitable modification" of a will so that a provision does not violate the Rule Against Perpetuities, *Berry v. Union Nat'l Bank*, 164 W. Va. 258, 262 S.E.2d 766 (1980). See Note, *Perpetuities Reform in West Virginia: Berry v. Union Nat'l Bank*, 11 REAL EST. L. J. 116 (1982); and the principle of "equitable adoption" is illustrated by *Wheeling Dollar Sav. & Tr. Co. v. Singer*, 162 W. Va. 502, 250 S.E.2d 369 (1979), *First Nat'l Bank v. Phillips*, 344 S.E.2d 201 (W. Va. 1985).

71. See generally *LaRue*, 304 S.E.2d 326 (Neeley, J., concurring).

72. *Miller v. Sencindiver*, 166 W. Va. 355, 275 S.E.2d 10 (1981).

the court was presented with a question of whether a wife who kills her husband⁷³ is vested with the sole ownership of property which prior to the killing she and her husband owned as joint tenants with the right of survivorship. The court's conclusion that the wife is entitled to the sole ownership of the property places West Virginia in the minority of jurisdictions that have decided this question.⁷⁴

In explaining its decision the court stated:

because by the Legislature's modification of the common law concerning joint tenancies, tenancies by the entireties, and cotenancies which allow creation by the parties of the incident of survivorship when intention to do so has been made clearly evident in a titling document, the Legislature has in effect preempted the matter. And although some courts have held that killings destroy statutorily created survivorship in a joint tenancy, we prefer that the Legislature decide the matter, considering that this particular estate is its creation, and the interposition of equitable doctrine applicable to common law entitlements in real property, although possible, seems to us not appropriate.⁷⁵

Without placing much reliance on the court's self-imposed restraint suggested in *Miller v. Sencindiver*, if significant revisions are to be made in intestate statutes, the task is that of the legislature. This is not to suggest that the court may not exercise its "equitable" powers as to significant issues, which most likely would involve attempts to remove assets from an estate to the detriment of the surviving spouse.⁷⁶ However, it is difficult to see how a court could

73. She was indicted for murder but pled guilty to the lesser included offense of involuntary manslaughter. *Id.* at 355, 275 S.E.2d at 11.

74. See Annotation, *Felonious Killing of One Cotenant or Tenant by the Entireties by the Other as Affecting the Latter's Rights in the Property*, 32 A.L.R.2d 1099, 1107 (1953); 43 A.L.R.3d 1116 (1969).

75. *Miller*, 166 W. Va. at 361, 275 S.E.2d at 14 (citations omitted).

76. As early as 1906, the West Virginia Court held:

A voluntary conveyance made by a man under engagement to marry, made before and in contemplation of marriage, without the knowledge of the intended wife, with intent to free the land of the marital rights of the wife, is void as to her dower rights, and as to the alimony decreed against him in a suit for divorce.

Goff v. Goff, 60 W. Va. 9, 53 S.E. 769 (1906).

A recent example of the application of this principle includes *Wallace v. Wallace*, 291 S.E.2d 386 (W. Va. 1982) in which the syllabus by the court stated: "[s]pouses are protected from acts before, during or after marriage that are intended to deprive them of part of their marital partners' estates upon which to base claims for support." *Id.*

In *Davis v. Kanawha Bank & Tr. Co.*, 309 S.E.2d 45 (W. Va. 1983), the court rejected a claim that a trust was illusory or testamentary in character, or created with an intent to deprive the seller's wife of her statutory share in his estate.

adopt a solution such as proposed in the recent work of Langbein and Waggoner, which suggested a solution to what many perceive as a legitimate concern of the present forced-share statutes' application to late-in-life second marriages.⁷⁷ If the "second spouse" is the primary object of affection, he or she can be accommodated by a will. If the family by the first spouse is the primary object of the decedent's affection, the Langbein and Waggoner proposal provides a solution to the "windfall" feature of forced-share statute while at the same time providing a measure of financial support for the surviving spouse.⁷⁸

VI. CONCLUSION

As noted above, intestate succession and forced-share provisions present complex issues because of the infinite number of variables which must be addressed by the statutory provisions. Because one set of rules cannot meet the needs of everyone and because people who should have wills often die without one, the subject area is replete with "stories" of situations where the statutory scheme failed to adequately meet the needs of a particular family or person. There is, therefore, a temptation to address the legislative shortcomings in a "piecemeal" manner. As was noted in the American Law of Property's discussion of dower,

new statutory schemes have very often built upon common law foundations without adequate examination of the premises which justified the common law rules. To retain in a society which is primarily industrial in character rules which had their origins in the needs of agrarian communities in the middle ages may not only be anomalous but reflect an unwillingness on the part of the legislatures rationally to consider the basic purposes to be served.⁷⁹

To a certain extent, action by the West Virginia senate during the 1987 session illustrates this point. During that session, the senate passed a bill which would have "prevented the forced disposition

77. While the Langbein and Waggoner's proposed combined "augmented estate" does not mark a substantial departure from the augmented estate concept proposed in the Uniform Probate Code, it represents a significant departure from existing West Virginia law.

78. The parties could apparently enter into a prenuptial agreement that incrementally vested rights. *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985), recognized the validity of prenuptial agreements under certain circumstances.

79. 1 AMERICAN LAW OF PROPERTY § 5.5, at 633 (1952).

of a surviving spouse from the mansion-house and provide for the intestate share to include household furnishings."⁸⁰ While the empirical data suggests that the bill represents an improvement upon the current statutory provisions in that it more closely approximates the average person's desires, the amendments build on the existing premise as opposed to reexamining the statutory framework.

For the reasons discussed above, there does not now appear to be significant "social pressures" building on the legislature to change the existing substantive rules. The relative calm which now exists, therefore, provides the legislature the opportunity to address this social issue in a comprehensive manner utilizing the collective wisdom of those who prepared the Uniform Probate Code and suggestions such as those proposed by Professors Langbein and Waggoner. It will be interesting to see if the spirit of reform which led to the modification of the procedures for the administration of estates in 1984 can be rekindled to address the substantive issues of intestate succession and a spouse's "forced-share" rights.

80. S. 75, Reg. Sess. (W. Va. Feb. 10, 1987) which died in the House of Delegates would have amended W. VA. CODE § 42-2-1 (1982) by adding:

Notwithstanding any other provision of this section where the intestate dies on or after the first day of January, one thousand nine hundred eighty-eight, if the intestate was a married person, the surviving spouse shall be entitled to all the household furnishings and household appliances contained within the mansion house and curtilage in which the surviving spouse resided on the date of the death of the decedent, and the said household goods shall not be considered in the distributions described in paragraphs (a) and (b) of this section.

and *id.* § 43-1-12 (1982) by adding:

Provided, That where the dower interest is created on or after the first day of January, one thousand nine hundred eighty-eight, the court shall not order the assignment of dower in the mansion house and curtilage except upon a determination that the interests of all of the parties, including the financial and housing interests of the surviving spouse, will not be prejudiced thereby. But nothing herein contained shall be construed to take away or affect the jurisdiction which courts of chancery now exercise over the subject of dower.