# Individuated Determination of a Surviving Spouse's Elective Share

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*The statutory right of a surviving spouse to elect against a decedent's estate plan is a blunt instrument that addresses ill-defined goals. Elective shares are not based on an evaluation of the facts and circumstances of a particular marriage, such as the relative wealth of the spouses or the relative needs of other objects of the decedent's bounty. This Essay describes two empirical studies of decedents who disfranchised their surviving spouses and concludes that courts could address the modest number of controversial cases and make individuated determinations regarding devolution of a married decedent's wealth, much the same as marital property is divided in divorce.*

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The Uniform Probate Code ("UPC") is the most robust elective share legislation in America, but it (like the law elsewhere) is not an "individuated determination" of the elective share entitlement for a surviving spouse. Although the UPC views probate and nonprobate dispositions both to and away from a surviving spouse, and it considers the surviving spouse's own wealth, it does not seek to establish whether a surviving spouse is more or less deserving than other objects of a decedent's bounty. For example, a decedent's survivors might be a spouse who is not wealthy and a dependent or disabled child (whether an offspring of both spouses or from a prior relationship). A trust might be created for the support of both, with distributions made in the discretion of a disinterested fiduciary. But the spouse could interfere with this plan, notwithstanding the decedent's intentions or the needs of the child.

The question made relevant by the empirical evidence described in this summary is whether it would be administratively feasible for courts to make an inquiry into the most appropriate division of a decedent's estate, taking into consideration factors such as the needs and equity of various claimants or objects of a decedent's bounty. This discussion proceeds in three broad steps. Part I describes the notion of making individuated determinations. Part II is about the elective share. Part III presents empirical data about the incidence of disinheritance, showing in five parts that, in the vast majority of cases, the decedent's dispositive scheme was appropriate (and acceptable to the surviving spouse) and that there was no need for the surviving spouse to disrupt the decedent's estate plan with a statutory election.

## I. INDIVIDUATED DETERMINATIONS

The idea of an individuated, case-by-case evaluation of the most appropriate division of a decedent's wealth is not new. For example, Professor John Gaubatz advocated "increasing the flexibility of inheritance laws by providing for investigation into individual cases to ascertain the extent to which underlying succession law policy is fulfilled."[1] He also opined that:

> It is a commonly accepted belief that the present protections against disinheritance provided spouses are inadequate. . . . Many proposals for reform have reflected the view that the spouse needs greater protection, and that view has

[1] John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 497 (1977).

> been adopted by the Uniform Probate Code. . . . Not all spouses deserve protection against disinheritance. Some are independently wealthy and need nothing. Others have provided adequate cause to be disinherited by any but the most saintly and forgiving decedent.
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> . . . In a desire to protect spouses, courts have been forced to consider inappropriate theories such as "fraud" to invalidate . . . inter vivos transfers [away from the spouse]. Such concepts, however, are difficult to apply to the typical disinheritance . . . .
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> . . . The [Uniform Probate] Code operates on the principle that the spouse ought to have a right in all cases to take an absolute share of the estate. The spouse has, of course, been protected against disinheritance for centuries. . . . [This] protection violates [a] decedent's intent and may not significantly further other goals. Indeed, the automatic nature of the forced share can occasionally decrease family protection. Where the spouse does not need the assets for support, but children or other family members (for example, parents) do, the protective sections of the Code may effectively deny the assistance where it is needed. Under the Code, as in pre-existing law, presumed need is recognized rather than need in fact.
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> The flaws in the system stem from the fact that it postulates a mythical "normal" family situation and tailors the law to fit this norm. This practice may be tolerable because the "abnormal" cases are few. It is, however, unnecessary and unwise. There are many common fact patterns where the decedent and his family do not fit the normal family model. In these situations the law is at best inadequate and at worst unjust. The end result is that the system only partially does its job.
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> . . . [M]ost estates are left in a manner that is acceptable to the survivors. . . . An actual need for investigation therefore should arise in only a small minority of cases.
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> Such investigations should not present the courts with factual determinations which they are unequipped to handle. Similar determinations are presently made regularly by courts (although usually not by probate courts) in every state in determining child support, alimony, and property division in

> divorce hearings, and in custody and support proceedings. Probate courts, based upon their jurisdiction over testamentary support trusts, regularly determine what constitutes reasonable support or maintenance. This familiarity with family investigations coupled with the fact that probate courts are made courts of broad jurisdiction by the Uniform [Probate] Code, should allay fears about the competence or ability of the courts to handle such determinations.[2]

The results of the studies reported below support Professor Gaubatz's notion that individuated determinations would be required in only a tiny number of cases in which a decedent's disposition is controversial. As a result, making determinations like those in marital property divisions incident to divorce could be administratively manageable. Indeed, the number of such cases would be exceptionally small, relative to the number of divorce property settlements adjudicated annually. This assessment is thought to be true because the spouses chose to remain married until one of them died. That conscious choice implies that, in the vast majority of cases, the spouses were not at odds with each other. More important, in the context of the elective share, remaining married also likely means that, in the same vast majority of cases, the decedent's plan was not improper and will not be contested, even if the surviving spouse receives less than the elective share entitlement.

To the complaint that only the surviving spouse is heard in a postmortem division of property, our studies also confirm that many decedents articulate their goals or concerns in their will. Because this issue arises almost entirely in testate estates,[3] decedents could reasonably be relied upon to say via their wills, and courts to weigh, a decedent's intent in any postmortem division of the decedent's wealth.

As articulated in a study addressing *intestate* distributions (but still relevant in this testate context):[4]

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[2] *Id.* at 520-21, 539, 555-56, 558.

[3] *See* Estate of Hall v. McLaen, 931 N.W.2d 482, 485 (N.D. 2019) (surviving spouse's right to elect against a decedent's *estate* may be claimed in lieu of an intestate share; it may exceed an intestate share because property passing outside of probate would not inform the intestate entitlement but would inflate the augmented estate calculation). Just as a will may disinherit a surviving spouse, so too might nonprobate transfers; the elective share protects a surviving spouse from the consequences of disinheritance in either form.

[4] Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1120-23 (1978) [hereinafter *Iowa Study*].

> [M]any Commonwealth nations have adopted an approach for the distribution of intestate estates that is sufficiently flexible to allow for distributions of estates other than as provided by an inflexible intestacy formula when unusual circumstances are present. [Citing New Zealand, beginning in 1900, Australia between 1906 and 1920, British Columbia and Ontario beginning in the 1920s, Alberta, Saskatchewan, and Manitoba beginning in the 1940s, and England beginning in 1938.] . . . If the probate court finds that a distribution in accordance with the intestacy formula is contrary to a distribution that would have been preferred by the intestate, the court has the authority to redistribute the estate to further the intestate's discerned preference, or to achieve a more socially equitable result.
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> The major objection to an implementation of a flexible intestate succession option is the expected increase in costs, including administration time, additional court personnel, and lawyer fees. The experience of those countries that have incorporated the flexible option into their probate statutes, however, demonstrates that this objection is largely unfounded, largely because only a small number of estates actually require a redistribution. . . . [Citing New Zealand, in which the yearly average percentage of applications for redistribution out of the total number of wills presented for probate was 1.75% — which doesn't differ much from the number of will contests found in the Georgia studies reported herein, entailing disinheritance that led to a surviving spouse's challenge.]
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> A second objection to the flexible option is the amount of discretion that must be lodged in a probate judge . . . .

When asked about "a choice between laws which would be more flexible or laws which would be fixed as they are now, which would you prefer?" the respondents to this study preferred flexibility (44% choosing it "for fairness" and another 18% "if costs not excessive").[5] Married women preferred these options 63% over married men 60%.[6]

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[5] *Iowa Study*, *supra* note 4, at 1129-30.

[6] *See id.* at 1147. Marriage has changed in some respects but the elective share has not. The gender-based differences in these and other numbers in these studies might cause readers to question whether they feel differently about notions of the elective share entitlement in same sex marriages. *Id.*

The Iowa Study[7] concludes that "most modern intestacy statutes are based on historical tradition rather than on empirically substantiated individual dispositive preferences. Thus, the traditional notions of property disposition that govern many intestate succession statutes may be obsolete." The data collected herein also supports this suggestion.

## II. ELECTIONS AGAINST ESTATE PLANS

To consider the notion of an individuated determination of the proper division of marital property when one spouse dies, it is necessary to understand the need for an elective share itself. Just over two decades ago we conducted a study in Georgia relating to the rights of a surviving spouse who is unhappy with the estate plan of his or her predeceased spouse.[8] That study was done in Georgia because it is the only jurisdiction in the United States in which there is neither an elective share for a surviving spouse, nor community property.[9] That made Georgia a logical jurisdiction in which to conduct this study, because planning to disfranchise a surviving spouse can be done out in the open, without artifice to evade a statutory entitlement. Devices that hide the decedent's planning can be used in Georgia, but they are unnecessary (because the planning is not in any legal sense improper). Our goal was to determine, where it is legal, who engages in this planning, and for what reasons. This article reflects a 2019 update to that study, done in part to discover whether changes in the law or demographics have had any impact on this planning.[10]

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[7] *See* Iowa Study, *supra* note 4, at 1047.

[8] Utilizing data from a study (conducted with my deep gratitude by Emory Law School research assistant Grace Goodheart) in Summer 2019, this work updates an empirical study originally published as Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 U. MIAMI INST. EST. PLAN. Ch. 9 (1998).

A more detailed discussion of the substantive law underlying this topic can be found in Christopher P. Cline, Jeffrey N. Pennell & Terry L. Turnipseed, *Spouse's Elective Share*, 841 Tax Mgmt. Estate, Gifts, & Trusts Portfolios (BNA) No. 841, at A-31 (2012).

[9] This topic is not about community property, nor about the quasi-community property entitlement of a surviving spouse that operates in some community property jurisdictions like the elective share entitlement provided in a noncommunity property state. *See, e.g.*, WIS. STAT. §§ 851.055, 861.02 (2019).

[10] Unfortunate about using Georgia as the laboratory regarding use of the elective share is that death certificates are not a public record and the online probate court records do not necessarily contain information that lends to a study of race or (surprisingly) relative wealth. As a result, this study does not evaluate whether patterns of inheritance or disinheritance show wealth or racial trends. It does, however, reveal gender and gender-based factors that may be relevant. It also confirms the notion that this planning is far less controversial than legislators and law reformers may have assumed.

The prediction in the study done two decades ago was that the number of surviving spouses who would be dissatisfied with a decedent's estate plan would increase in the future. In particular, that seemed likely because of the popularity among decedents of the qualified terminable interest property ("QTIP") marital deduction trust, in which a surviving spouse's hands can be tied by provisions that deny the spouse any meaningful degree of control over the trust assets or their devolution after the surviving spouse's death.[11] Specifically, the estate tax marital deduction can be generated even though the surviving spouse's enjoyment may be limited in a QTIP trust to just an income interest for life. It also seemed likely to become more prevalent as increases in the federal estate tax unified credit made it possible to shelter larger amounts of a decedent's wealth in a nonmarital or "family" trust. Today, for example (and until 2026 if Congress does not change the increases it enacted late in 2017), the basic exclusion amount is $10 million, plus an inflation-indexed amount. In 2020 a decedent may leave as much as $11.58 million to a family trust and pay no federal estate tax (known as "sheltering the unified credit"). In such a family

[11] QTIP trusts are authorized under Internal Revenue Code ("IRC") 26 U.S.C. § 2056(b)(7). Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 354 (2017), make the assertion that "the rise of the QTIP trust . . . reflects a move back to the support theory of marriage."

QTIP was enacted in 1981 when Congress replaced the then 50% maximum marital deduction with an unlimited marital deduction. The deduction itself was enacted in 1948 to provide equality with community property, in which only the decedent's half of the community estate was includible in the decedent's gross estate, meaning that the other half — already owned by the surviving spouse — essentially passed tax free, all based on the then-assumption that the first spouse to die was the bread-winner. That legislation had nothing to do with gender equality.

Prior to 1981, a trust could qualify for the marital deduction only if the surviving spouse was given control over devolution of the entire corpus — either as a so-called "estate trust" (passing to the estate of the surviving spouse) or as an IRC § 2056(b)(5) all-income, general-power-of-appointment variety. When Congress increased the deduction from 50% to 100% it also added § 2056(b)(7) to allow the decedent to retain control over the remainder in that trust. That decision was not motivated by a support theory of marriage. Rather, it was about allowing the decedent to maintain control.

Since its enactment, QTIP has become the favored form of marital transfer for various other reasons, especially including the ability to make partial QTIP elections (as part of post-mortem planning), reverse-QTIP elections (for generation-skipping transfer tax purposes), and decoupled elections (to qualify a different amount for state death tax purposes than is elected for federal estate tax purposes). Control can be granted in a QTIP if the decedent's intent is to garner these forms of flexibility without handcuffing the surviving spouse. *See infra* notes 15–16 and accompanying text. At its best, QTIP reflects the same temporal sharing of benefits found in any trust using life estate and remainder interests to bifurcate and satisfy the needs of successive beneficiaries.

trust the surviving spouse may receive even less enjoyment or control than in a typical QTIP marital deduction trust.

In a sense, sheltering the unified credit is a form of institutionalized disinheritance of surviving spouses. "Institutionalized" because it is the traditional standard for many estate plans. This especially was true prior to enactment in 2010 of the IRC § 2010(c)(4) concept known as "portability" of the deceased spouse's unused exclusion amount (the DSUE amount). Today it is not necessary to create a family trust to take advantage of a decedent's unified credit, because the unused exclusion amount can be transferred to the surviving spouse and used at the spouse's subsequent death. Nevertheless, many tax-conscious estate plans still take full advantage of a decedent's unified credit by using the shelter benefits of a family trust *and* qualifying for the marital deduction by placing the balance of a decedent's wealth in a QTIP trust for the lifetime enjoyment of the surviving spouse. For many clients this is favorable because the decedent may control where the remainder in both trusts goes after the spouse dies. Alternatively, in smaller estates, the plan may utilize just a family trust and the decedent's estate may elect portability of any unused exclusion amount. In either case, these uses of trusts are the best of all worlds for everyone *except* the surviving spouse who may not be happy with receiving only a life estate in a trust that may be managed by a third-party trustee. As a result, the earlier study predicted that elections against these plans would increase.[12] This is not, however, what the updated survey reported herein reveals.

We also expected that the occurrence of "blended families" (spouses with children from prior relationships) would exacerbate the potential conflict caused by some decedents who deny control to a surviving spouse to provide with certainty for the decedent's children from a prior relationship. Meanwhile, the surviving spouse may want to govern what the survivor regards as the survivor's share of the spouses' collective wealth to provide for the survivor's descendants by a prior relationship. This also led to our prediction in the prior study that plans limiting the

[12] The survey reported in Wright & Sterner, *supra* note 11, at 363 calculated the use of trusts by married decedents in their sample as between 25% and 33% of their smaller sample (493 wills were studied in total). In the 2017 study reported below the use of trusts in wills that were regarded as disinheritance was just over 57%. Usually the terms of the trust were not known (most involved pour-over wills to trusts that were not included in the probate record), and this statistic is circular, in the sense that we counted as disinheritance any disposition that was less than 100% of the estate outright to the surviving spouse. Even if some portion of those trusts actually provided for the surviving spouse, this statistic still suggests that some portion of the cases that we called disinheritance provided even fewer benefits to the spouse than an interest (such as a life estate) in trust.

control of a surviving spouse would be more common, and that they would generate more use of state laws designed to protect the inheritance rights of a surviving spouse. This, too, does not appear to have occurred.

In addition, we anticipated an increase in the number of couples with two working spouses who each are competent to manage their own finances and affairs and we predicted that the number of surviving spouses who will passively accept a trust that insulates the spouse from control over the corpus might decline. On the other hand, if the number of surviving spouses with their own accumulated wealth and continuing earning potential is greater, it seemed possible that dependence on an inheritance from a deceased spouse also may become less common.

Other demographic changes also might be expected to have an impact. For example, if the number of surviving husbands increases (with the increasing mortality of women in general),[13] it might seem likely that traditionally gendered notions of a passive surviving spouse (a woman who was the bread-server) who accepts whatever plan the decedent (a man who was the bread-winner) provided would be less realistic. Further, because surviving spouses are living longer, there will be more time to "dislike" a plan that ties the survivor's hands, or that otherwise is distasteful.[14] It might be less common for a surviving spouse to just accept the decedent's plan as written on the notion that it just doesn't matter much because it isn't going to last very long. Moreover, in some cases larger amounts of wealth might be involved, which could increase the perceived need for expert management and the use of trusts but also boost the stakes to a surviving spouse. On balance, the prediction in the prior study was that more surviving spouses would exercise the degree of self-reliance and independence evident in an election against a decedent's estate plan.

The natural upshot of all of this disaffection and change might be a mantra for the new millennium: "You can take this QTIP and shove it," as more surviving spouses assert their freedom from the tyranny of the dead hand of their deceased spouse by electing to take their statutory

[13] See generally tables available at *LEWK3 Revised United States Life Tables, 2001-2011*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/nvss/mortality/lewk3.htm (last visited Mar. 18, 2020) [https://perma.cc/EWD2-4KCQ], showing that, although women have a longer life expectancy than men, the difference in life expectancy for males and females has declined over time. Notwithstanding that demographic trend, the number of men with a surviving spouse increased by 3% in the later study reported below.

[14] This may be true notwithstanding that a longer life expectancy increases the actuarial value of such a life estate, which may make an election more difficult on economic terms or if the life estate counts in satisfaction of the elective share.

forced heir share outright. Consider, in this respect, just the title of a 1996 law review article: *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*.[15] A good guess is that QTIPs may be unpalatable to both surviving widows and widowers, who may dislike being hobbled and therefore elect against the decedent's estate plan in states in which this is possible.

All of this potential for tension could be minimized if estate planners could persuade their clients to create more flexibility in the QTIP trusts that they create (or to avoid using QTIPs entirely as the document of choice for marital deduction planning), such that the "handcuff" nature of a bare-bones QTIP was avoided. There is, for example, no reason why a surviving spouse cannot be the trustee of a QTIP.[16] If denial of control is not the reason for using the QTIP, the spouse also may be given an unlimited inter vivos power of withdrawal,[17] and a testamentary non-general power of appointment, in each case to provide a degree of control that may dissuade the surviving spouse from electing against the plan. And if the income interest in such a trust is too uncertain in actual value, a life estate providing the larger of all of the income or a unitrust payment also may provide more certain benefits and reduce concerns about enjoyment. None of this, however, deals with the effects of a larger exclusion amount, allowing more wealth to be settled in family trusts, as to which the degree of flexibility and control that can be given to a surviving spouse without tax consequence is more limited.

More significant is the concept of "portability" of the unified credit, particularly for spouses who are "middle-rich" — those who have enough wealth to be cognizant of the wealth transfer tax laws, but who

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[15] Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995); *see also* Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313, 313 (1996).

[16] Subject to a caution if the reason for using the QTIP in the first instance was to provide the postmortem benefits of partial elections and reverse generation-skipping exemption allocation for tax purposes, in which case the powers of the spouse as trustee should not rise to the level of a general power of appointment that would make the trust an automatically-qualified § 2056(b)(5) all-income, general-power-of-appointment variety because it might thereby fail to qualify for these QTIP trust benefits.

[17] Exercisable after some delay so that it flunks as an all-events general power of appointment and cannot convert the trust into an unwanted § 2056(b)(5) automatically-qualifying marital deduction trust. Note, however, that adding such a power may defeat some discount planning that takes advantage of fractional discounts, as in Estate of Bonner v. United States, 84 F.3d 196, 198-99 (5th Cir. 1996), followed in Estate of Mellinger v. Comm'r, 112 T.C. 26, 36-37 (1999), Estate of Lopes v. Comm'r, 78 T.C.M. (CCH) 46 (1999), and Estate of Nowell v. Comm'r, 77 T.C.M. (CCH) 1239 (1999). *See also* Estate of Fontana v. Comm'r, 118 T.C. 318, 320-21 (2002).

have less than double the exclusion amount of the unified credit ($23.16 million in 2020). It works in the opposite direction of the increased unified credit. With the portability election a deceased spouse's entire estate can be left to the survivor, along with an election transferring the decedent's unused exclusion amount to the survivor. Qualifying the decedent's entire estate for the marital deduction would allow the couple to delay all tax in the estate of the first to die, and similarly delay the use of both spouses' unified credits until the survivor's later death. Portability of the credit makes credit shelter planning using traditional family trusts unnecessary and can allow the survivor to have more control (if desired). This planning does not alter the alternatives for marital deduction qualification, nor decrease the attraction to some of the QTIP marital deduction trust, but it presents more options to a married couple. Most of these planning options were uncommon when the prior study of this topic was conducted over two decades ago.[18] But none of them seem to have altered the updated study results, either.

Planning that relies on making trusts more palatable to the surviving spouse could reduce the incentive for the survivor to assert the elective share. In addition, a QTIP or other trust income interest may be more valuable than the elective share (as determined for actuarial purposes). Nevertheless, the statutory election against the decedent's estate plan allows a surviving spouse to take a share of the decedent's estate *outright*,[19] which may be more desirable overall to a surviving spouse. The expectation in the study two decades ago was that a natural upshot of insensitive planning would be an explosion in the number of surviving spouses who would disrupt the decedent's estate plan by making the statutory forced heir share election. Notwithstanding these expectations, not any have proven to be prescient. Indeed, the results reported below confirm the notion that the elective share is an unnecessary complication that generates far more angst than is warranted. Especially because, as the next part explains, disinheritance of a surviving spouse in favor of other beneficiaries may be the more appropriate disposition of a decedent's wealth.

[18] Another useful empirical study would entail gathering data about the dispositive vehicles that planners currently craft for married couple clients.

For significantly more detail about marital deduction planning in general, see Jeffrey Pennell, Estate Tax Marital Deduction, 843 Tax Mgmt. Estates, Gifts, & Trusts Portfolio (BNA) No. 843 (2012), or A. JAMES CASNER & JEFFREY N. PENNELL, ESTATE PLANNING ch. 13 (8th ed. 2020) (both updated annually).

[19] As opposed to the trust interest being counted first against the elective share, which may occur under the law of some states.

## III. DISINHERITANCE MAY BE THE RIGHT THING TO DO

This update does not focus on the numerous methods by which a client may disfranchise a surviving spouse. Nor is it a critique of the vast diversity among state laws that provide an elective share without preventing planning that circumvents the elective share. It neither focuses on the ethics of doing that planning nor on gender, specific rights, or oppression of either women or men.

It is appropriate, however, to note that the empirics gleaned from this study reveal that, in the majority of cases, this is a "women's issue," but not in the sense that many people may assume. This is because the spouse who is cut out, and therefore is likely to elect against a plan, may be a surviving *husband*, not a surviving wife as the historic or presumed paradigm in this context traditionally predicts. In fact, because the elective share is the modern vestige of dower (which explains why the most common elective share is one-third of a decedent's probate estate), its historic rationale was to protect women. But it is no longer, and numerous states have increased their share to half, reflecting an "economic partnership" view of marriage.[20] So, in a number of respects, it is wise not to assume that this is a politically incorrect topic. Those who reserve judgment for a few moments of reading may discover that the empirical information presented next below is a surprise. *That* is the point of this exercise: in the law, especially in the historical development of legal principles, often it is anecdotal rather than empirical evidence that is relied upon for support. And today the empirics may show that the principle itself (in this case, the elective share) is flawed.

Also, please note that this discussion does not advocate cutting out rogue surviving spouses who may have the "temerity" to exercise their legal rights. It does, however, advance the proposition that planning that disfranchises a surviving spouse is, in the vast majority of cases, often done for "right" reasons. Experience shows — and ethical and sensitive estate planners realize — that the planning discussed in these materials may be the proper tax-sensitive or family-sensitive thing to do, and that there was nothing morally repugnant about the estate plan.

[20] One study states that "[t]he partnership theory of marriage, which holds that couples work together to amass wealth and intend to jointly benefit from that wealth, supports the current practice of giving the surviving spouse most if not all of a decedent spouse's wealth." *See* Wright & Sterner, *supra* note 11, at 353. More accurately stated, the economic partnership theory reflects the community property notion of *equal* ownership or entitlement to the fruits of the labor of both spouses during the marriage. This is a tenancy in common concept that does not espouse 100% ownership for the survivor, as if the partnership was akin to joint tenancy with the right of survivorship.

A stark illustration of that notion is the estate of Susan Buffett, whose surviving husband Warren is one of the richest individuals in America. Few would argue that he needed the protection of an elective share of her estate, yet typical state laws would provide for him without regard to his resources or need or, for that matter, without inquiry into why they lived apart for decades but did not legally separate or divorce.

In many cases the plan that does not provide for a surviving spouse is so normal that the notion of a spousal election may not have entered a client (or their drafter's) mind, and therefore no special planning in anticipation of an election was considered. In Georgia, many of the wills that we reviewed suggest that no attorney (or certainly no specialist) was involved, a reality that is sure to increase as do-it-yourself planning with the assistance of online resources becomes even more common. Meaning that an elective share that allows a surviving spouse to disrupt the plan can be a landmine that would frustrate decedent intent that often is not inappropriate.

By way of illustration, imagine that your clients are a married couple whose plan is typical, in that the younger of them is a woman whose personal wealth is smaller because she was out of the workforce while raising their children. Because of its size, they regard it as uneconomical to create a trust for his benefit in the less likely event that he survives her. But she has concerns that, if he *is* the survivor, he may be preyed upon or otherwise do something irrational or stupid with their property after her death.

So, she explains her fears about his proclivities and inclinations with money or predators and articulates her desire that all of her wealth be preserved for their children, all of them common to this one, long-term marriage. In response to inquiries about his likely reaction to this proposed restriction on his freedom to dispose of the marital bequest as he deems appropriate, and the psychological and emotional aspects of her death before him, she agrees that perhaps there is a need to protect against an angry or irrational reaction leading to his election against her plan in favor of his elective share entitlement. This is the kind of case in which protective planning against such an election would be prudent and appropriate. The study of wills in Georgia reveals that it is very common, especially for a woman who dies first, to hobble or protect the surviving spouse. Indeed, it appears to be more common than any other situation.

### *A. Just the Facts, Please*

As an initial proposition, elective share statutes arose in response to the demise of dower, which was appropriate at a time when a married

woman was not allowed to own property, meaning that the death of her husband would leave her destitute. The elective share did not exist because of empirical evidence regarding the extent of the need for it (although it likely was appropriate in all but a very small number of cases). Nor was it crafted to address the more modern assumption that a dastardly decedent may disinherit a devoted and deserving Penelope[21] (which is the paradigm presumed case involving a paramour or other undeserving or less worthy beneficiaries). We read about these cases in law school texts,[22] or in the tabloid press. But how common are those cases that form the presumed rationale for modern elective share statutes? As we will see immediately, these cases are rare — relative to the number of cases in which cutting out or minimizing the entitlement of a surviving spouse is proper (by any measure) — to say nothing of cases in which the surviving spouse is well provided for without an inheritance from the deceased spouse.

It especially bears noting that, with the exception of the most recent changes to the Uniform Probate Code, state law generally does not consider the wealth of the surviving spouse (or the source thereof) in fixing the size of an elective share. Indeed, most statutes do not consider nonprobate dispositions *in favor of* the spouse in determining the probate estate entitlement of the spouse.[23] The odd thing about the incredible amount of effort that has been devoted to designing an effective and efficient elective share regime is that there is virtually *no* collected data about the *need* for this endeavor. It is, as one

[21] "[T]he wife of Odysseus who waits faithfully for him during his 20 years' absence." *Penelope*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Penelope (last visited Mar. 18, 2020) [https://perma.cc/28QW-UUU6].

[22] Several trusts and estates casebooks published in the 1980s included cases in which a woman disinherited her surviving husband. The current edition of the Dukeminier text includes one such case. But several of the most current texts present only cases that reflect a traditional notion that the elective share is a "women's issue," about men who disinherited deserving, devoted, and dependent surviving widows.

[23] *See generally* Cline et al., *supra* note 8. The closest the law in states that have not adopted the Uniform Probate Code comes to considering the relative need or wealth of the surviving spouse is in those few states that still employ the intent or motive test for determining the validity of a funded inter vivos trust as against the challenge of a surviving spouse. This evaluation is only for purposes of determining whether the trust will be respected, and it affects the spouse's entitlement only indirectly by determining whether trust assets will be regarded as probate property; it is not a direct factor in establishing the size of the spouse's entitlement. *See* CASNER & PENNELL, *supra* note 18, at § 4.3.1.

commentator once suggested, an extreme example of "a solution in search of a problem."[24]

To consider that assertion, we did two empirical studies in Georgia, which is the sole U.S. noncommunity-property jurisdiction in which it is legal to disinherit a surviving spouse, meaning that there is need for resort to contrivance. The planning that results in disinheritance can be totally above board, not hidden behind any of the many devices that most elective share statutes do not disqualify. In Georgia it is both easy and legal to engage in planning that elective share statutes or community property regimes elsewhere are designed to preclude. So, the questions that our studies sought to answer were: where it can be done without reservation, how often do deceased spouses disinherit or substantially minimize the benefit left to their surviving spouse? And, in those cases in which it occurs, is it possible to ascertain the surrounding circumstances to a sufficient degree to draw any conclusions regarding whether the elective share is a necessary protective device for a wronged survivor? Alternatively, is the elective share just a disruption to planning that even the most sensitive observer would agree was legitimate and proper?

During the Fall of 1996 and Summer of 1997 Emory Law School research assistants did the first of two studies of probate court records in various Georgia counties, tabulating the number of wills probated in a variety of years, the number in which it appeared that there was a surviving spouse of the decedent, and the number of those decedents who left a surviving spouse but who disinherited or substantially restricted the inheritance of that spouse. Then, in the summer of 2019, another Emory Law School research assistant did the same study, with a goal of seeing whether attitudes and practices had changed with the advent of the QTIP marital deduction trust, changes in the exclusion amount, and the concept of portability of a deceased spouse's unused exclusion amount (the DSUE amount). In those cases in which the surviving spouse was disinherited in whole or in part, these researchers tried to ascertain the circumstances from the probate record, including whether there was any indication in the will itself or postmortem legal wrangling that explained the decedent's action.

Particular attention was paid to whether a petition for "year's support"[25] was filed. The researchers also cross-referenced files showing

[24] *See* Sheldon J. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681, 681 (1966).

[25] A monetary award of limited utility that can be used to garner some benefit for a surviving spouse in Georgia; it is designed to support the spouse during each year that

whether a will contest action was brought in any of these cases. The notion was that a surviving spouse who was aggrieved by disinheritance could have sought year's support or brought a will contest action to gain at least some portion of a deceased spouse's estate, so the study tabulated situations in which the spouse was excluded and year's support was sought or a will contest action was prosecuted.

Most important to the numbers reflected in this summary, the researchers guaranteed error on the side of validating the need for elective share statutes by overcounting the number of plans that minimize the entitlement of the surviving spouse — even those that provided for the surviving spouse to receive substantially all of the decedent's property in trust or as a legal life estate. They intentionally overcounted "disinheritance" by including — for example — family and marital deduction trusts, notwithstanding that a trust interest held for the benefit of a surviving spouse would not be regarded by most observers as a "disinheritance plan." Nevertheless, because the surviving spouse might elect against such a plan in a state with an elective share, they counted as providing substantially for the spouse only those plans that left the bulk of the estate *outright* to the surviving spouse.

As the subject for each survey, two of the five counties that make up metropolitan Atlanta were selected, plus three others that were common to both collections of data. Two of those three are among the fastest growing counties outside the Atlanta metro region, and the third is a county that is exurban to Atlanta: close enough to Atlanta that it is a bedroom community for many commuters, but far enough away that many people still live on working farms.[26] In the first survey, four other counties were selected as a means of discovering whether there were regional variations of note.[27] In the updated study twenty-three counties

the decedent's estate is under administration and often is used in pale substitute for an elective share.

[26] Including the former dean of the Emory Law School, who maintained a horse farm.

[27] The two Atlanta municipal counties are bustling and dynamic jurisdictions with citizens who range from the lowest economic strata living in housing projects (or worse) to middle- and upper-class individuals living and working in the heart of metropolitan Atlanta. Fulton County includes probably the two richest residential neighborhoods in metropolitan Atlanta, along with many of the city's poorest neighborhoods. Dekalb County includes the tony Druid Hills neighborhood in which Emory University is located, the City of Decatur (with its old-time square and residents who live close-in but choose to maintain some of the flavor of the old South), as well as modern developments such as both of the first-ever and the most modern versions of Home Depot and Waffle House. Newton County is more of a throwback to an earlier rural existence, now in the path of urban development as the city of Atlanta sprawls farther

in total were surveyed, five in common with the prior study and eighteen others, again giving a wide diversity within the state.[28] A selection of years were surveyed to give a sufficient number of wills, in the first study at a time just before or after dower and curtesy were abolished in Georgia in 1969.[29] The more recent survey looked at 2017

into the region. It is not atypical of hometown America and, presumably, reflects its values and lifestyles. In addition, we surveyed Muscogee County (in which the sizeable city of Columbus is located) and Carroll County — both located west of Atlanta on the Alabama state line, Clarke County (in which Athens, the home of the University of Georgia, is located) — east of Atlanta near the South Carolina state line, Hall County (northeast of Atlanta, in which the city of Gainesville and a good bit of gated-community development is located but also many chicken-processing plants and a sizeable immigrant community of workers employed in those facilities), Floyd County (northwest of Atlanta, in which Rome is located), and Bibb County (south of Atlanta, in which the sizeable city of Macon is located).

[28] A map showing the location of the various counties is appended to this Article. Colors indicate the counties surveyed in the earlier study (blue), those studied in the latest survey (red), and those studied in both (purple).

A prime rationale for the study of 2017 decedents in select counties outside metropolitan Atlanta was the existence of their probate records online, meaning that travel to the courthouse and physical review of hard-copy records was not necessary. This provided a much wider selection of counties and data to analyze. Georgia is the third largest land-mass state east of the Mississippi and is second in all of America in number of counties (159) only to Texas (259), making it difficult to do a full-scale review of the probate records in the entire state, and thus making a wide diversity of counties significant.

[29] Relative to repeal in 1969 of dower and curtesy in Georgia, the percentages (found in the table of collected data in Appendix A) of decedents who did or did not provide substantially for their surviving spouse changed as follows:

| | Female Decedent | | | Male Decedent | | | Combined | | |
|---|---|---|---|---|---|---|---|---|---|
| | Did | Not | % Not | Did | Not | % Not | Did | Not | % Not |
| Pre-Repeal of Dower | 64 | 35 | **35.35%** | 332 | 73 | **18.02%** | 396 | 108 | **21.43%** |
| 1969-1996 | 404 | 126 | **23.77%** | 1297 | 198 | **13.24%** | 1401 | 324 | **16.00%** |
| 2017 | 344 | 149 | **30.22%** | 1020 | 330 | **24.44%** | 1364 | 479 | **25.99%** |
| Total Post-Repeal | 812 | 310 | **27.63%** | 2649 | 601 | **18.49%** | 3161 | 811 | **20.42%** |

Looking at these statistics for the years most immediately after repeal, it might be tempting to conclude that the repeal of dower and curtesy caused a decline in the incidence of disinheritance. That would not be intuitive — because repeal facilitated disinheritance — and the overall numbers (especially for male decedents) suggests that there was no decline following repeal. The steady overall incidence shown in this table before and after repeal seems to confirm that dower and curtesy were not driving factors in prior years. It seems more likely that changing demographics and attitudes go farther to explain the shift in women providing for their surviving spouse.

decedents, in part to determine whether attitudes and planning had changed over time and in part because those were the most complete records available, in most cases entirely via an online resource.[30]

A table of the results of those testate decedents who did and who did not provide for the surviving spouse appears in Appendix A. Remember that the "did not" columns include those decedents who employed trusts or legal life estates for the benefit of the surviving spouse, along with those who completely disinherited the surviving spouse. The results are broken down by gender and reflect percentages of those who did not provide the bulk of the estate outright for the spouse.

The earlier study totals revealed that of 2,529 wills examined in which it was possible to identify whether there was a surviving spouse (and in most cases that fact was easy to establish), the surviving spouse was not provided for with an outright entitlement to the bulk of the decedent's estate in 432 cases (this number includes those cases in which the spouse received a life estate or an interest in trust). This computed to 17.08% of the testate decedents who died with a surviving spouse.

The later study examined 1843 wills of decedents with surviving spouses. The surviving spouse was counted as disinherited in 479 cases, which computed to 25.99% of the testate decedents who died with a surviving spouse. In a country in which testamentary freedom is valued, just over one in four married decedents (in 2017) seized it to provide less than an outright benefit in the bulk of their estate to their surviving spouse.[31]

[30] The 1986, 1996, and 2017 disinheritance percentages changed as follows:

| | Female Decedent | | | Male Decedent | | | Combined | | |
|---|---|---|---|---|---|---|---|---|---|
| | Did | Not | % Not | Did | Not | % Not | Did | Not | % Not |
| 1986 | 186 | 56 | **23.15%** | 695 | 79 | **10.21%** | 881 | 135 | **13.29%** |
| 1996 | 169 | 37 | **17.96%** | 382 | 72 | **15.86%** | 551 | 109 | **16.52%** |
| 2017 | 344 | 149 | **30.22%** | 1020 | 330 | **24.44%** | 1364 | 479 | **25.99%** |

[31] With respect to notions of testamentary freedom, see generally Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 84, 85 (1994). Regarding these figures and their comparability to results gleaned in the very few prior studies, conducted in states in which disinheritance is not unrestricted as it is in Georgia, see generally RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 2.1 Reporter's Note (AM. LAW INST. 1983). For example, in the early 1980s, in a much smaller sample (449 wills), the disinheritance percentage was 18.2%. *See* Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 417 (1987). The 2013 decedent sample studied in Wright & Starner, *supra* note 11, at 357, was 493 records, in Florida, which is a state in which disinheriting a spouse without challenge must be more discrete than in Georgia — utilizing devices that entail nonprobate dispositions. The authors there concluded that, in the observed probate estate cases, "the vast majority of decedents benefitted their spouses with all or a lion's share of their estates." *Id.* at 368. Further, "[o]ur research suggests that most

Most important about all of these figures is that, in the prior study, there were only nine situations out of the 2,529 wills examined in which it appeared that the provisions were objected to by the surviving spouse through a year's support petition, will contest, or a "widow's election" (under the law prior to 1969 when dower was repealed in Georgia). This computes to just 0.36% of the total married decedents whose wills were studied and just 2.1% of the 432 cases involving what we counted as substantial disinheritance.[32] There was not a single will contest filed to defeat the estate plan and take an intestate share.

decedents want their surviving spouse to take most of their estates, even when the spouse is a second or third spouse and there are children and stepchildren." *Id.* at 373. These conclusions are confirmed by other studies that sought to determine whether statutes of descent and distribution (intestate division) conform to the intent of a majority of individuals. *See, e.g.*, Mary Louise Fellows et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717, 744 ("Most [respondents] want to leave everything to their spouse."); Iowa Study, *supra* note 4, at 1085 (concluding that 61% of respondents allocated 100% of their estates to their spouses); Joel R. Glucksman, Note, *Intestate Succession in New Jersey: Does it Conform to Popular Expectations?* , 12 COLUM. J.L. & SOC. PROBS. 253, 274, 278 (1976) ("Eighty percent of these testates gave their entire estates to their spouses.").

[32] Note also that this study only considered *testate* decedents; all those who died without a will essentially provided the intestate share for their surviving spouse, making the number of disinheritances out of the total population of all decedents — testate and intestate alike — even more extraordinarily small. We did not, however, tabulate the number of intestate decedents, nor did we use that number to reach the percentages reported.

A 1978 survey by Mary Louise Fellows for the American Bar Foundation, reported in Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 29 n.17 (1994), showed that the percentage of intestate decedents varies by age and size of estate. For example, 88% of the surveyed decedents seventeen to thirty years of age were intestate, but only 15% of those over the age of sixty-four. *See id.* In only 15% of the estates of $200,000 to $1 million (using dollar values at that time) was the decedent intestate, but this number grew to 72% of estates under $100,000. *See id.* at 29-30. Also note that the elective share can be claimed by a surviving spouse in lieu of an intestate entitlement. *See, e.g.*, Estate of Hall v. McLaen, 931 N.W.2d 482, 485 (N.D. 2019) (noting that property passing outside of probate would not inform the spouse's intestate entitlement but that it would inflate the augmented estate against which the elective share was calculated in this jurisdiction).

Note, too, that we did not seek to tally nonprobate transfers, either to or away from a surviving spouse, because use of nonprobate transfers is not needed to avoid the statutory entitlement of a surviving spouse in Georgia. Meaning that there is no special reason for any decedent to select nonprobate transfers as an affirmative device to minimize the entitlement of a surviving spouse. But we have no idea whether surviving spouses fare better or worse when nonprobate transfers to or away from the spouse are considered.

In the 2017 study there were ten will contests and twelve petitions for year's support.[33] Looked at separately, in 2017 these nearly equal numbers compute to 0.54% and 0.65% of the total married decedents whose wills were studied and just 2.09% and 2.5% of the 479 cases involving what were counted as substantial disinheritance. Compared to the earlier study numbers these are remarkably similar — particularly the percentage of disinheritance cases that spawned any form of challenge. Just over two percent of the disinheritance cohort.

One added fact that was tabulated in 2017 relates to QTIP marital deduction trusts. Our goal was to determine whether the opportunity to provide for a surviving spouse without giving the spouse control to alter the ultimate disposition of the decedent's wealth made any difference in these numbers. For example, are decedents more likely to disinherit their spouse by using a QTIP trust? In the first study we surmised that QTIP was relatively new, in the sense that many decedents died before the use of QTIP became common and not as many decedents might have incorporated it into their plans. For 2017 its use would more likely be routine. And the numbers bear out the hypothesis that disinheritance (as we defined it) would rise because decedents could qualify for the marital deduction and still control ultimate disposition of their wealth, as shown next:

[33] There was not a perfect overlap of these. In only four cases were *both* a contest action and a claim for year's support involved. Nor were these actions gender based: seven (out of ten) decedents were men and eight out of twelve claimants for year's support were women. For what it is worth, two women and two men who contested their decedent's will were either separated or in the process of divorcing when the decedent died. And not all of the contest actions were brought by the surviving spouse. Also of interest is that none of the contest actions involved a decedent who made use of a QTIP marital trust, nor did it appear that marital deduction formula planning was involved in any of those cases.

| Marital Deduction Planning | Female Decedent | | | Male Decedent | | | Combined | | |
|---|---|---|---|---|---|---|---|---|---|
| | Did | Not | % Not | Did | Not | % Not | Did | Not | % Not |
| 1st Study: Pre-QTIP | 113 | 68 | 37.57% | 552 | 120 | 17.86% | 665 | 188 | 22.04% |
| 1st Study: Post-QTIP | 355 | 93 | 20.76% | 1077 | 151 | 12.30% | 1432 | 244 | 14.56% |
| 2017 Study: Post-QTIP | 344 | 149 | 30.22% | 1020 | 330 | 24.44% | 1364 | 479 | 25.99% |
| Aggregate all studies | 912 | 300 | 24.75% | 2649 | 601 | 18.49% | 3461 | 911 | 20.83% |

In terms of decedents using QTIP trusts, the 2017 study found that 119 of 479 (24.84%) disinheritance plans that we could identify appeared to use a QTIP trust as the means of guaranteeing the decedent's ultimate goals while providing lifetime enjoyment for the surviving spouse.[34] Breaking that number down for 2017, twenty-eight women and ninety-one men used QTIP, which translates into 18.8% of women and 27.6% of men who we counted as disinheriting their surviving spouse (meaning that they did not leave the bulk of their estate outright to the survivor). The study also found that, of the 479 disinheritance plans in total with wills that we could analyze, 110 appeared in one way or another to be crafted with the marital deduction in mind (usually revealed by use of a formula provision that referenced either the unified credit, the "exemption equivalent" of the unified credit, or the marital deduction itself). This was 22.96% of the disinheritance cohort and broke down as thirty-two women (21.47%) and seventy-eight men (23.63%) of the disinheriting decedents. Curiously, men and women did marital deduction planning in close percentages, but a larger percentage of men used QTIP trusts. When looking at the use of trusts in general, women and men also differed,

[34] It seldom is possible to determine the size of a decedent's gross estate for federal estate tax purposes from information in Georgia probate court records. Of the 2017 estates that we counted as disinheritance, 110 (22.96% of the 479 that we so regarded) included formula marital deduction/credit shelter provisions in the will. That does not mean, however, that the estate was large enough to be taxable; a reasonable surmise is that most estates studied in 2017 were too small to need to qualify for the marital deduction, given the size of the basic exclusion amount (in that year $5.49 million). Many of these plans may have been executed when the basic exclusion amount was much smaller and were not revised as Congress changed that dynamic. Instead, the formula provision would have allocated the entire residuary estate to the nonmarital/family trust, of which the surviving spouse typically is one (and sometimes the only) beneficiary during the spouse's overlife.

with 48.3% of the women who disinherited and 60.3% of men using a trust.

The first conclusion to be considered, then, is that disinheritance or minimization of a surviving spouse's entitlement happens far less often than many observers might expect (one in four probably is not as high a number as most observers might anticipate, given that QTIP, other marital deduction trusts, family trusts that substantially benefit the surviving spouse, and legal life estates all are counted in the number of "disinheritances"). Far more revealing, however, is the fact that the number of actions or other facts indicating an improper motive or result was so low: information harvested from the files of the decedents who disinherited or minimized their surviving spouse's entitlement indicate that it almost *always* occurs for reasons that all would accept as reflecting proper estate- or family-planning objectives or criteria. These are articulated next below.

### *B. Reasons for Disinheritance*

One prediction, made decades ago, was that the two most common incentives for disinheriting a surviving spouse were (1) children of either the decedent or of the surviving spouse, in either case by a former relationship, or (2) because the decedent was separated from or in the process of divorcing the surviving spouse.[35] Today, with the unlimited marital deduction and the QTIP form of qualifying for the marital deduction, it is less common to disinherit the spouse to prevent the survivor from disinheriting the decedent's children. And disinheritance in the case of a failed marriage has *never* been the classic illustration supporting the need for an elective share statute.

Instead, the predominant justification for this statutory entitlement appears to be to protect the dutiful spouse who was loyal to the end, only to be left destitute and denied a rightful share of the marital property. In this respect, then, it was even more significant that 75% of the cases collected in the first study involving disinherited or minimized rights for a surviving spouse involved trusts or a legal life estate[36] for the benefit of the surviving spouse. That number dropped to 68.3% among the 2017 decedents. Within that portion of the population of

[35] *See* William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1056-57 (1966).

[36] Actually, there were a significant number of legal life estates, which is disturbing because of problems that can arise under that technique. Many of those were dwellings; some in outlying counties may have involved farmland — with which the technique is more common.

decedents who die with a taxable estate, this use of marital and family trusts is exactly what we would expect. And, notwithstanding that some observers are critical of overuse of such planning, few experienced estate planners would accuse a decedent who used this form of plan of "cutting out" the surviving spouse.[37] Certainly not with mala fides. We included it in the disinheritance count only because of the potential for the survivor to elect against it (and disrupt the overall plan as a consequence) in states in which the elective share is available as an outright entitlement.

As articulated by Professor Waggoner, reporter for the Restatement (Third) of Property (Wills and Other Donative Transfers) and for the revised Uniform Probate Code (both of which sustain the elective share system of state law):

> Sound public policy . . . requires that we assume that the marriage is solid . . . and that the decedent has . . . "just" motives. After all, the marriage[] . . . ended in death, not divorce . . . . Included within the assumption that decedents have "just" motives are that decedents mean to be generous to their surviving spouses, mean to strike a fair balance between their surviving spouses and children . . . but . . . mean at the very least to provide economic security for their surviving spouses.[38]

The survey results confirm that this is the case in the overwhelming number of cases, without the need in Georgia for (or coercion with or correction by) an elective share statute.

Among the remaining minority of the cases in which disinheritance was substantial (that is, not involving an estate held in a QTIP or other trust, or as a legal life estate), we found facts such as the following:

- Statements indicating that the spouses were in the process of divorcing when the will was executed, or they had been separated for some time.[39]

Our favorites among a number of wills that left the surviving spouse a nominal amount (usually one dollar, in one case one dollar and a truck)

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[37] *But see* Gerzog, *supra* note 15 and accompanying text.

[38] Waggoner, *supra* note 32, at 34. Numerous studies affirm this notion. *See, e.g.*, Schneider, *supra* note 31, at 419 ("The substantial majority of testators who are married want to leave all of their estate to their surviving spouse."); Wright & Sterner, *supra* note 11, at 379 ("Our key findings in this study show that most decedents want to benefit their surviving spouse . . . .").

[39] In 4.6% of the cases that we characterized as a disinheritance the spouses were separated or in the process of divorce.

were one that stated that the decedent was leaving his surviving wife nothing because she was living with another man. Another will provided: "I all so [sic] leave . . . $1.04 to my husband, whom I have not seen in 20 years." Another said simply that her husband's whereabouts were unknown. Our first guess was that those wills leaving a nominal amount, such as one dollar, to the surviving spouse were designed to prevent pretermission,[40] but the $1.04 gem was a holograph and this kind of planning would likely require some knowledge of the law. It does not seem likely that a home-drawn will would reflect this degree of planning sophistication.

- "My husband has a home purchased through my efforts . . . [and] has no further claims on my estate . . . ." Another stated that her husband automatically would receive her interest in ranch property so she did not leave him anything else. A third specifically requested that her husband repay money that the decedent advanced to him during life to pay for cars and a residence.

Among those decedents who did not leave a trust or legal life estate in the bulk of the decedent's wealth for the surviving spouse, approximately one-third in both studies involved either a fee simple interest or a legal life estate in the spouses' residence. Although not confirmable by the terms of the will, this alone may have represented the bulk of those decedents' estates.[41] In some cases the will made it clear that the home was in the survivor's name and there essentially was nothing else to leave, other than personalty that went to other family members.

- In several cases the notation in the will was that the surviving spouse was the beneficiary of insurance or retirement benefits that would suffice to provide for the survivor, and therefore the will was providing for other family members. "I am intentionally making no bequest to my wife in this will as I have already made provisions for her otherwise in the form of certain death benefits through my employment . . . ."

[40] Pretermitted heir statutes entitle the surviving spouse to a share equal in most states to the intestate share (which could exceed the elective share entitlement in states — unlike Georgia — that have both). *E.g.*, UNIF. PROB. CODE § 2-301(a) (UNIF. LAW COMM'N 2010) (intestate entitlement of a spouse in a premarital will). *Compare id.* § 2-102 (intestate share of spouse), *with id.* § 2-202 (spouse's elective share).

[41] See Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 UC DAVIS L. REV. 2603, 2607 (2020) for data regarding home ownership by Florida decedents represented in that study.

- Other wills made it clear that the surviving spouse did not need the decedent's estate or that the decedent's plan was agreed upon between them. "I have not made any bequest to my husband . . . [because he has] been blessed and [is] financially sufficient." Another stated that her husband was "fully capable of self support." A third provided for children, saying that her husband has "substantial assets and means of his own."

It often is the case that intentional disinheritance is merely credit shelter planning by the less-propertied spouse, whose estate does not exceed the basic exclusion amount and the surviving spouse therefore receives only an interest in a family trust or its equivalent.[42] With the advent of portability this may be a less common approach in the future (although portability requires planning by an expert, and the decedent's estate must file a federal estate tax return to make the portability election).

- One decedent left her entire estate to a niece, with whom the surviving widower (aged ninety-four) was living. In other cases notations indicated that the surviving spouse was incapable of caring for himself or herself and the bequest was to others, without imposition of a trust, but with the clear expectation that the beneficiary would care for the surviving spouse. "I anticipate that the residue of my estate will be very small, and . . . that my husband would have difficulty managing any property or investments. Therefore I am making the provisions for my children . . . assuming that [they] will take care of the needs of my husband to the best of their ability."

- In many cases children (and in a few cases grandchildren) were the primary beneficiaries, in most cases with no indication that they were from a prior relationship (although in some cases it was clear that the surviving spouse was left nothing because the spouses had an agreement that descendants from a prior relationship would benefit instead).[43] In several cases the children who benefitted were

[42] Of nearly 500 estates that we characterized as disinheritance, over 20% entailed some form of marital deduction and credit shelter planning, many using a QTIP marital deduction trust. *See supra* text accompanying note 34.

[43] "[A] decedent who . . . disinherits the surviving spouse may not be so much motivated by malice or spite toward the surviving spouse, but by a felt higher obligation to the children of his or her former, longer-term marriage." Waggoner, *supra* note 32, at 50. In the Iowa Study, *supra* note 4, at 1127, a surprising finding was that, when respondents allocated a larger amount to a "meritorious child" (e.g., to reward them for service to the decedent or, potentially, to the surviving spouse), that increase "was taken

> "requested" to use their inheritance to support the surviving spouse.

Georgia intestate law provides a surviving spouse with a share that is the same size as a child's share — but not less than one-third.[44] Many wills reflected this oddity (but a lack of knowledge about the minimum entitlement) by leaving the estate in fractional shares to the spouse and children.[45]

- In a good number of cases the surviving spouse was not a beneficiary but was named as executor or trustee and the spouse assented to probate, giving the unmistakable indication that the disinheritance was agreed upon and not a product of animosity or mala fides. Five wills (all made by men) made it clear that there was a prenuptial agreement, and one woman stated that the spouses had an "understanding" and that her husband would receive nothing but that she "loves him dearly." In another case the will showed that the "disinheritance" was more than agreed upon:

  > My beloved wife has been my constant companion and source of comfort and inspiration. All my earthly possessions would never repay her love and devotion. It is therefore through no lack of affection that I bequeath the residue of my estate in the manner herein provided. Rather, it is because both she and I believe that her needs and comforts have been amply provided for by me outside of this Will and through a substantial estate of her own.

One case involved a surviving spouse who died thirty-five days after the decedent, in another the will revealed that the survivor was in hospice care, another stated that the surviving husband had Alzheimer's, and yet another revealed that his surviving spouse was living in a nursing home. It may have been known that each survivor

from the amount allocated to the spouse, rather than from the share allocated to [a less meritorious] child."

[44] *See* GA. CODE ANN. § 53-2-1(c)(1) (2019) (not less than one-fourth under pre-1997 law).

[45] Over 7% of our sample of 479 "disinheritances" gave a fractional share of the estate to the surviving spouse and children. One used the 30% portion that is the elective share entitlement under Florida law, raising the suspicion that this decedent's plan was drafted with Florida law in mind, not the law in Georgia. Our favorite fractional entitlement was one decedent who left the surviving widow a pick-up truck, a fishing boat and extra motor, the home for life, and a one-fifth interest in the residue of the decedent's estate.

would not live long and disinheritance was a method to avoid having to probate the same assets in two estates.

Other reasons that might explain disinheritance by placing property in trust for the surviving spouse for life (but that would not be revealed by the probate court file) would include all the traditional reasons for using trusts, which might include the desire to protect the spouse from predators (for example, one will stated that the surviving spouse "has had trouble with the law"), the need for expert property management, the desire to use the decedent's unified credit, and denial of control over the decedent's wealth because it was a short term marriage, there were children from a prior relationship, or a business agreement. As viewed in several cases discovered in the Georgia studies, in some estates the spouse's disinheritance was in favor of a trust or other arrangement that is designed as a safety net for the surviving spouse and is not designed to disinherit at all; there are no mala fides in any of this planning.

### *C. Disinheritance Is a Women's Issue*

The figures also show an important factor to consider: in all years except 1996, women were more likely to disinherit husbands than vice versa.[46] In these cases of women disinheriting their surviving husbands,

[46] These figures were 25.6% of women versus 14.3% of men in the overall tabulation — a 11.3% spread — for the earlier study. In the 2017 results the gap narrowed to 30.2% for women and 24.4% for men — a 5.8% differential. Note that the proper comparison is with the *percentage* of wills of women married at death who disinherit their husbands, rather than just the total *number* of women who disinherit their husbands, because women survive their husbands by a substantial margin and, therefore, most do not get the *opportunity* to disinherit a widower. Men were over 70% of the decedents surveyed in the first study who died with a surviving spouse. Somewhat surprisingly, this increased to 73.3% in 2017, even though demographic data shows that the mortality gap between women and men is getting smaller, not larger. *See supra* note 13.

In the 1978 *Iowa Study*, 43% of women and 35% of men did not allocate 100% of their estate to the surviving spouse. Iowa Study, *supra* note 4, at 1085 (based on telephone interviews that entailed hypothetical estates). The 8% differential is smaller and the statistic is not entirely comparable because the elective share in Iowa (which is a UPC jurisdiction) may skew the results. Nevertheless, even where a married decedent must consider the right of election, disinheritance as we describe it remains greater for women than for men.

Another interesting statistic from the *Iowa Study* was that women provided a smaller portion of their estate to their surviving husbands (75%) than vice versa (82%). *See id.* And that the spouses provided more for each other if they had children (63% overall) than if not (54%), which suggests other natural objects of their bounty (or an assumption that the surviving spouse could be relied upon to provide for the children at the second death). "When presented with a question that included as survivors a spouse and adult biological children of both the intestate and the surviving spouse, a majority of the respondents, 59 percent, allocated all of the estate to the spouse." *Id.* at 1094.

it generally is easy to agree that their reasons reflect legitimate estate- and family-planning criteria. For example, husbands still own more wealth, and usually have a shorter life expectancy, making disinheritance the appropriate tax plan in those relatively few cases in which the wealth transfer tax is a motivation.[47] In addition, as revealed in both studies, if the surviving spouse already is well provided for, the decedent is more likely to provide for other objects of their mutual bounty and not feel constrained to leave property to the surviving spouse. Few observers are likely to criticize that planning decision either. Further, husbands also tend to be older than their wives, often making planning to take advantage of the federal estate tax § 2013 previously-taxed-property credit important when the wife is the first to die of a couple with enough wealth to consider wealth transfer tax planning.

Moreover, as confirmed by statistics (and probably also undeniable in practice), the likelihood of a surviving widow remarrying and disinheriting children by a prior marriage that ended in death is far less than the likelihood of a surviving widower remarrying and disinheriting those same children.[48] A 1989 study revealed that only 8% of all

Finally of interest in the *Iowa Study* is that a higher percentage of men (56%) died testate than women (44%). *See id.* at 1062 n.108. Undifferentiated by gender, the *Iowa Study* also found that allocations to a surviving spouse declined in larger estates: "As the size of the imaginary estate was increased from $10,000 to $500,000, the percentage of the respondents who would give all of the estate to the surviving spouse decreased from 68 percent to 44 percent." *Id.* at 1089. In the Georgia study, size of the estate was not reliably disclosed in the probate record. And Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WIS. L. REV. 295, 318 tbl.5 (2019), reflecting much more recent evidence, reports that 57% of testate decedents in that survey were women and only 43% were male. Because more married men die than married women, this may confirm that the percentage of married women who disinherit their husbands is statistically significant because they are less likely to die first. Are they more likely to die testate because there is a reason for married women to have a will that is more compelling than a married man to have a will? If that is because of concerns about how a surviving husband will manage or preserve the couple's wealth, then the elective share may indeed be a women's issue, in the sense that it can hobble the planning that women do with more frequency than men.

[47] As properly understood, the time-value notion of deferring tax in the estate of the first to die by claiming the marital deduction is exactly backwards. *See* Jeffrey N. Pennell & R. Mark Williamson, *The Economics of Prepaying Wealth Transfer Tax*, 136 TRS. & ESTS. 49-60 (June 1997), 40-51 (July 1997), 52-56 (August 1997). Even without that knowledge, most planners understand that, in most cases, adding the smaller estate on top of the larger estate is not very wise for tax planning purposes.

[48] *See* Naomi Cahn, *What's Wrong About the Elective Share "Right"?* , 53 UC DAVIS L. REV. 2087, 2106-07 (2020) (reporting statistics regarding remarriage by men and women). With 64% of previously married men but only 52% of previously married

surviving widows remarry and that they wait an average of eight years before doing so, whereas over 20% of all widowers remarry and in less than four years on average.[49] In the years since, the incidence of remarriage among older Americans has increased, and men still remarry at a higher rate than women.[50] The available studies do not show how

women remarrying, with a notable increase in remarriage by surviving spouses older than fifty-five.

[49] *See* Waggoner, *supra* note 32, at 49 n.71.

[50] The study reported in Wright & Sterner, *supra* note 11, at 366 found that, of the 35 decedents who were identified as having remarried prior to death, 77% were men. A 2014 Pew Research Center study, GRETCHEN LIVINGSTON, FOUR-IN-TEN COUPLES ARE SAYING "I DO," AGAIN: GROWING NUMBER OF ADULTS HAVE REMARRIED 5 (2014), www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again [https://perma.cc/3E6D-H9M5], found that 54% of women say that they are not interested in remarriage but only 30% of men say the same. Although this finding reflects remarriage after *either* divorce or the death of a spouse, the results are consistent with other studies, such as Danielle S. Schneider et al., *Dating and Remarriage Over the First Two Years of Widowhood*, ANNALS CLINICAL PSYCHIATRY, June 1996, at 51, 51-57 (a study of 249 widows and 101 widowers finding 61% of men and 19% of women were remarried or in a romantic relationship by twenty-five months after a spouse's death). Pew reports that the gap between male and female attitudes has narrowed in recent years, but also that the desire to remarry has *increased* for older Americans at the same time that the desire to marry has declined among younger Americans.

> In 2013, two-thirds (67%) of previously married adults ages 55 to 64 had remarried, up from 55% in 1960. And 50% of adults ages 65 and older had remarried, up from just 34% in 1960. . . . Among those eligible to remarry — adults whose first marriage ended in divorce or widowhood — men are much more likely than women to have taken the plunge again. In 2013, some 64% of eligible men had remarried, compared with 52% of women. . . . While the gender gap in the likelihood to marry again is notable, it has narrowed over time, as men have become somewhat less likely to remarry, and women have become somewhat more likely to do so. Today's 12-point gap was a 20-point gap in 1980, when 66% of eligible men and 46% of women had remarried. In 1960, the gap was even larger — 70% of eligible men had remarried, compared with 48% of women.

LIVINGSTON, *supra* note 50, at 10-11. The phenomenon is most notable among white, college-educated individuals, which also is the cohort most likely to have an estate plan and higher wealth than the balance of the population. *See id.* at 12-13. Further, it is "more common for the husband to be older than the wife in both first-time marriages and remarriages. In about one-third (32%) of remarriages, the husband is at least six years older than his wife, and in 16% of remarriages, the husband is at least 10 years older. Just 14% of new first-time marriages involve a husband who is at least six years older than his wife, and just 4% involve cases where the husband is 10 or more years older." *Id.* at 19. Further, the gender gap is greatest for respondents aged sixty-five or older, see *id.* at 12, which most likely reflects a widower who remarries a younger woman, perhaps because he doesn't want to survive another spouse or perhaps because she was looking (in part, at least?) for an inheritance. In these cases, an estate plan that provides even just a life estate for a new bride can effectively disinherit his own children.

often remarried spouses disinherit their children by former marriages in favor of new spouses,[51] but most observers with any experience in this regard will confirm that surviving remarried widows engage in this planning far less often than surviving remarried widowers.[52] Which is to say that wives are wise to think about holding their surviving husband's inheritance in a manner that precludes disinheritance of their children. Note, however, that often it is the *husband* who worries that the widow will remarry and disinherit their children. The majority of wills that specifically mentioned a concern about remarriage of the surviving spouse were a male decedent's will. In reality, it seldom happens that the widow remarries; this probably means that husbands impute to their wives the activity that the *men* would engage in if they were the survivor. And their wives know it and plan accordingly.

Finally, it likely also is true that there are some decedents who were women who could not afford to divorce their husbands when they were alive (but would have, if they had been able to — and should have — given the nature of the relationship). If their estate plans cutting out the surviving husband reflect this surmise, not many observers would suggest that those wives who disinherited those widowers did an evil thing that should subject their estates to the disruption of a forced share election (although — equality aside — some observers would argue for the converse if the husband was the first to die). Given the dynamics of the situation, it may be less likely that the converse situation would

Which can explain why that remarried male would not provide a full, outright disposition to his new spouse, which in turn would result in that estate plan being counted in our study as a disinheritance of the spouse.

[51] The study in Wright & Sterner, *supra* note 11, at 364-65, gives some flavor of the opposite: the number of disinheritances of surviving second or third spouses. Our study could not determine whether a surviving spouse was a first marriage or a remarriage but the study showed that, in remarriage situations, the surviving spouse was excluded or provided with fewer benefits in 18% more cases than in first marriage situations. *See id.* Nevertheless, total disinheritance increased only 5%, suggesting that a sharing of benefits with other objects of the decedent's bounty explained the difference (an explanation that the authors of that study regarded as "to be expected"). Caution is appropriate, however, because the sample size in that study was very small (just thirty-five decedents known to be in a second or third marriage).

[52] The study reported in Wright & Sterner, *supra* note 11, at 365 tbl.5, notes that men who were remarried provided 100% of their estate to their surviving widow in 37% of the studied cases; remarried women did so in 50% of their cases. More telling is that 34% of these remarried decedents left their estate entirely to a trust, which we would count as a disinheritance but in reality might entail a sharing of benefits among multiple objects of the decedent's bounty. Of that 34%, all but one was a male decedent. *See id.*

occur, although we did find cases in which a separation or divorce was in progress when a husband died.[53]

Looked at from this perspective, it may be fair to guess that — contrary to most initial assumptions — the elective share statutes do more to benefit undeserving surviving husbands than they do to protect deserving surviving wives. The study figures bear out the fact that a higher percentage of women disinherit their husbands, for good reason in the vast majority of cases. Finding ways to permit this might impress policymakers as a good thing, considering the empirical results as opposed to the common misperception of the nature and scope of the situation.

### *D. Medicaid Qualification Issues*

Another factor relating to the propriety of disinheritance is whether it makes sense for a propertied decedent to disinherit a less propertied surviving spouse because the decedent's disposition is not a prohibited transfer and will allow the survivor to qualify for governmental benefits, like Medicaid. There is limited authority on point but what there is tends to support the proposition that the surviving spouse's failure to assert a right of election may be a disqualifying transfer for Medicaid qualification purposes.[54] The law regarding Medicaid qualification is in

[53] Indeed, two of the most notable cases in this area of the law involved just that situation. *See* Dumas v. Estate of Dumas, 627 N.E.2d 978, 979 (Ohio 1994); Sullivan v. Burkin, 460 N.E.2d 572, 574 (Mass. 1984). A third notorious case, Newman v. Dore, 9 N.E.2d 966 (N.Y. 1936), involved sordid facts that can be gleaned from the New York Supreme Court Appellate Division Index No. 33380, *available at* https://www.google.com/Search?q=%22Ferdinand+Straus%22+%22Emma+Straus%22&client=firefox-b-1-d&ei=bD5cXviMNK6b_Qa78ZsoCw&start=0&sa=N&ved=2ahUKEwj48qG8sPrnAhWuTd8KHbs4BbU4ChDx0wN6BAgIECw&biw=1361&bih=762 (last visited Feb. 29. 2020), which reveals (at pages 2 and 16 in the document titled Brief for Respondents) that the spouses were separated when the decedent died and that they had filed cross petitions for divorce or annulment. A dissenting opinion in the case can be found separate from the index, but not the majority decision itself (which is both baffling and odd, and may reflect the court seeking to protect the parties from public scrutiny or judgment).

[54] Case law varies from state to state on the issue whether the elective share is an available asset for Medicaid qualification purposes. *Miller v. State of Kansas Dep't of Soc. & Rehabilitation Servs.*, 64 P.3d 395, 397, 403 (Kan. 2003), held that a surviving spouse's consent to the decedent's estate plan in lieu of the elective share essentially made the spouse the settlor of a trust consisting of that entitlement and causing the trust to be a countable resource for Medicaid eligibility disqualification; *Tannler v. Wisconsin Dep't of Health and Soc. Servs.*, 564 N.W.2d 735, 737 (Wis. 1997), held that failure of an institutionalized surviving spouse to assert a claim against the decedent's estate constituted a disqualifying divestment under 42 U.S.C. § 1396p(e)(1); *Estate of Dionisio v. Westchester County Dep't of Soc. Servs.*, 665 N.Y.S.2d 904, 905 (N.Y. Sup. Ct.

significant turmoil, although it is clear that, if elected, the share will count against eligibility. Thus, if it is undecided in a given jurisdiction whether the share will be charged as a countable asset, even if not elected, the wise approach may be to forgo the election in hopes that

1997), regarded a spouse's anticipatory waiver of the elective share right as a disqualifying transfer for look back period calculation purposes; and *In re Mattei*, 647 N.Y.S.2d 415, 420 (N.Y. Sup. Ct. 1996), held that Medicaid countable resources included the spouse's elective share; the court required appointment of a guardian to exercise the right to the extent necessary to support the spouse for the period of ineligibility attributable to the right of election.

*Bezzini v. Department of Soc. Servs.*, 715 A.2d 791, 796 (Conn. App. Ct. 1998), was different, treating the settlor of an inter vivos trust as having made a disqualifying transfer at death, when the disinheriting trust became irrevocable, rather than treating the survivor's failure to elect a share of the estate as the disqualifying transfer, but the effect essentially was the same. Curiously, in the domiciliary state the settlor's testamentary transfer would not have been a disqualifying transfer and the surviving spouse was unable to defeat the trust or reach trust assets for elective share purposes. *See* Skindzier v. Comm'r of Soc. Servs., 784 A.2d 323, 331, 335 (Conn. 2001) (only trusts created other than by will are subject to the disqualifying transfer rules). *Estate of Wyinegar*, 711 A.2d 492, 494-96 (Pa. 1998), treated the elective share as countable notwithstanding that the survivor had been counseled by the Department to convey assets to the decedent while they both were alive, to qualify the survivor for benefits. Similarly, *Hinschberger v. Griggs County Soc. Servs.*, 499 N.W.2d 876, 882 (N.D. 1993), and *Flynn v. Bates*, 413 N.Y.S.2d 446, 446 (N.Y. App. Div. 1979), charged the elective share against the spouse even though it was not asserted, but *Bradley v. Hill*, 457 S.W.2d 212, 217 (Mo. Ct. App. 1970), held that the unexercised right to elect the share would not count against the spouse.

Further, although New York law is clear that a *competent* surviving spouse's failure to elect the statutory share will be reflected in a Medicaid disqualification determination, *In re Street*, 616 N.Y.S.2d 455, 457 (N.Y. Surr. Ct. 1994), declined to extend that rule to an *incompetent* surviving spouse. Thus, the court rejected a request by the Department of Social Services to order the spouse's guardian to make the election, holding that state law would not disqualify the spouse or otherwise affect qualification for Medicaid benefits if the election was not made, nor would the care and treatment, lifestyle, and environment of the spouse be improved or altered, and nothing in the record indicated that the election otherwise would benefit the spouse or that the failure to elect would injure the spouse. *See id.* at 456-57. On the other hand, *In re Estate of Cross*, 664 N.E.2d 905, 907 (Ohio 1996), involved a determination that, notwithstanding the surviving spouse's incapacity (and, indeed, death before prosecution of the appeal), the probate court was required to assert the elective share on behalf of the surviving spouse because otherwise the spouse would have been disqualified for Medicaid payment of nursing home costs for failing to utilize a resource in which the spouse had a legal interest and the ability to use or dispose of it. Similarly, *I.G. v. Dep't of Human Servs.*, 900 A.2d 840, 843 (N.J. Super. Ct. App. Div. 2006), held that failure of an incompetent surviving spouse to elect the statutory share constituted a disqualifying disposition under state regulations providing that "all . . . resources . . . the individual . . . is entitled to but does not receive because of . . . inaction" constitute available assets and specifically identifying waiver of the "spousal elective share" as a disqualifying transfer. *See* CASNER & PENNELL, *supra* note 18, at § 3.4.7.

the elective share entitlement will not be treated as owned property for qualification purposes (which would be consistent with the treatment for gift tax purposes). More importantly, even in states that regard the elective share as an available resource, and the failure to elect as a disposition, the value of the deemed transfer should reflect what the spouse would have received if the election was successful. If that is true, then it recommends planning that will succeed under state law to minimize the elective share.[55]

The planning needle being threaded here is to create a special needs trust for the benefit of the surviving spouse,[56] or to disinherit the surviving spouse entirely — to permit the spouse to qualify for Medicaid — without the decedent's transfers being disqualifying dispositions in their own right. Wisconsin Supreme Court Chief Justice Abrahamson opined that "[u]nder the court's interpretation the [deceased] community spouse retains the freedom to make testamentary gifts" away from the institutionalized surviving spouse, without affecting the surviving spouse's qualification.[57] This was true notwithstanding that gifts by the community spouse during the spouses' joint lives would have constituted disqualifying dispositions. Thus, it may be that testamentary or effective-at-death distributions by the community spouse may accomplish a disinheritance that will not disqualify or preclude qualification by the surviving spouse.[58] And this planning can hardly be characterized as improper conduct for spouses. It may be improper for Medicaid qualification purposes, but it does not entail conduct that the elective share was designed to restrict.

## CONCLUSION

What conclusion does this empirical data inform? Perhaps a call for more empirical study. And, based thereon, a call to consider adapting state law to an individuated determination rather than a fixed formula approach. Based on the reality that we have laws that make assumptions

[55] *See, e.g.*, *In re* Estate of Cross, 664 N.E.2d 905, at 907 (Ohio 1996).

[56] In the later study we found just seven cases in which the decedent (six men and one woman) created a special needs trust for a surviving spouse whom we counted as disinherited.

[57] *Tannler*, 564 N.W.2d at 742 (Abrahamson, C.J., concurring).

[58] *Cf.* Cantor v. Comm'r of Pub. Welfare, 668 N.E.2d 783, 789 (Mass. 1996) (reversing the state's conclusion that amendment by applicant's spouse of an inter vivos trust to delete the applicant as a beneficiary constituted a disqualifying disposition when the applicant applied for benefits within the thirty-month lookback period; the court remanded for a determination whether the spouse's transfer at death was a disqualifying disposition).

about behavior or that reflect expectations that may not be well-informed, or at least that have not developed as rapidly as has society. There should be no surprise in that. The other reality is that the number of cases in which a surviving spouse is treated inappropriately is so small that an individuated determination easily could be performed, postmortem, without a meaningful burden on the courts that would conduct that evaluation. As Gaubatz recommended,[59] state law could allow the courts to make a division at death much in the same way that they do when a marriage ends in the only other manner possible — by divorce.

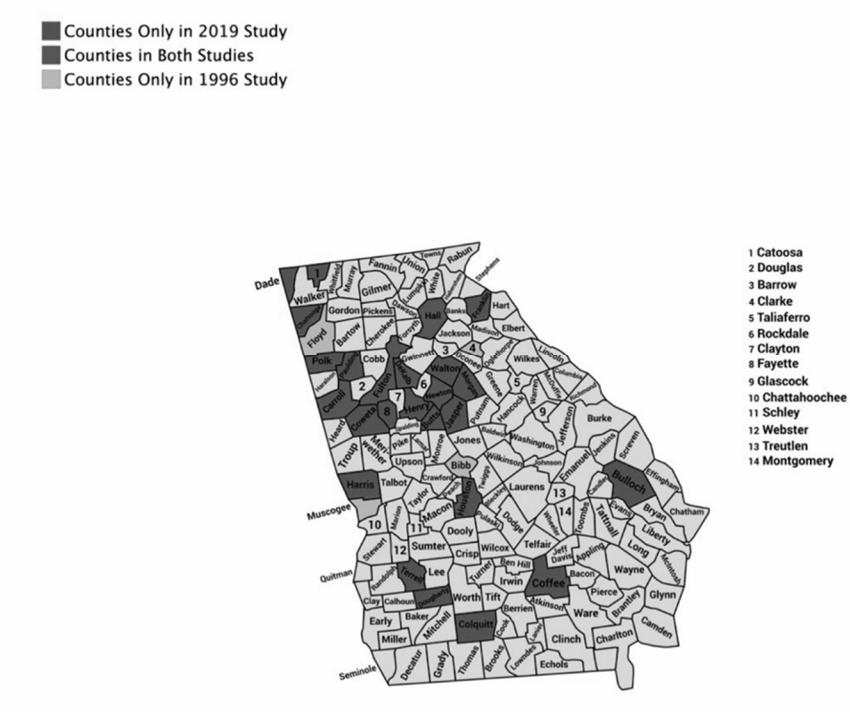
[59] *See* Gaubatz, *supra* note 1, at 558.

APPENDIX A

| | Female Decedent | | | Male Decedent | | | Combined | | |
|---|---|---|---|---|---|---|---|---|---|
| | Did | Not | % Not | Did | Not | % Not | Did | Not | % Not |
| Bibb 1996 | 33 | 7 | 17.50% | 117 | 24 | 17.02% | 150 | 31 | 17.13% |
| Bibb 1976 | 30 | 22 | 42.31% | 141 | 17 | 10.76% | 171 | 39 | 18.57% |
| Bullock 2017 | 12 | 7 | 36.84% | 43 | 7 | 14.0% | 55 | 14 | 20.29% |
| Butts 2017 | 3 | 4 | 57.14% | 6 | 1 | 14.29 | 9 | 5 | 35.71% |
| Carroll 1986 | 16 | 8 | 33.34% | 69 | 14 | 16.87% | 85 | 22 | 20.56% |
| Carroll 1966 | 0 | 0 | 0% | 21 | 14 | 40.00% | 21 | 14 | 40.00% |
| Carroll 2017 | 15 | 4 | 21.05% | 54 | 8 | 12.90% | 69 | 12 | 14.81% |
| Catoosa 2017 | 7 | 2 | 22.22% | 17 | 3 | 15.0% | 24 | 5 | 17.24% |
| Clarke 1986 | 18 | 4 | 18.18% | 57 | 7 | 10.94% | 75 | 11 | 12.79% |
| Clarke 1966 | 3 | 3 | 50.00% | 24 | 7 | 22.58% | 27 | 10 | 27.02% |
| Coffee 2017 | 1 | 4 | 80.00% | 9 | 3 | 25.00% | 10 | 7 | 41.17% |
| Colquitt 2017 | 4 | 2 | 33.33% | 17 | 4 | 19.05% | 21 | 6 | 22.22% |
| Coweta 2017 | 22 | 6 | 21.43% | 71 | 16 | 18.39% | 93 | 22 | 19.13% |
| Dade 2017 | 0 | 1 | 100.00% | 2 | 2 | 50.00% | 2 | 3 | 60.00% |
| DeKalb 1996 | 90 | 21 | 18.92% | 178 | 30 | 14.42% | 268 | 51 | 15.99% |
| Dekalb 2017 | 71 | 27 | 27.55% | 195 | 60 | 23.53% | 266 | 87 | 24.65% |
| Dougherty 2017 | 6 | 4 | 40.00% | 25 | 2 | 7.41% | 31 | 6 | 16.22% |
| Fayette 2017 | 8 | 7 | 46.67% | 49 | 15 | 23.44% | 57 | 22 | 27.85% |
| Floyd 1986 | 17 | 5 | 22.73% | 91 | 10 | 9.99% | 108 | 15 | 12.20% |
| Floyd 1966 | 10 | 5 | 33.33% | 30 | 8 | 21.05% | 40 | 13 | 24.53% |
| Franklin 2017 | 3 | 1 | 25.00% | 8 | 4 | 33.33% | 11 | 5 | 31.25% |
| Fulton 1986 | 60 | 16 | 21.05% | 189 | 14 | 6.90% | 249 | 30 | 10.75% |
| Fulton 1966 | 30 | 9 | 23.08% | 119 | 12 | 9.16% | 149 | 21 | 12.35% |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Fulton 2017 | 82 | 46 | 35.66% | 192 | 127 | 39.81% | 274 | 173 | 38.62% |
| Hall 1976 | 12 | 5 | 29.41% | 61 | 22 | 26.51% | 73 | 27 | 27.00% |
| Hall 1996 | 46 | 9 | 16.36% | 87 | 18 | 17.14% | 133 | 27 | 16.87% |
| Hall 2017 | 11 | 3 | 20.00% | 44 | 11 | 20.00% | 55 | 14 | 20.00% |
| Harris 2017 | 10 | 0 | 0% | 12 | 1 | 7.69% | 22 | 1 | 4.35% |
| Henry 2017 | 15 | 6 | 28.57% | 49 | 18 | 26.87% | 64 | 24 | 27.27% |
| Houston 2017 | 16 | 4 | 20.00% | 49 | 8 | 14.04% | 65 | 12 | 15.58% |
| Jackson 2017 | 2 | 0 | 0% | 7 | 3 | 30.00% | 9 | 3 | 25.00% |
| Morgan 2017 | 6 | 2 | 25.00% | 16 | 2 | 11.11% | 22 | 4 | 15.38% |
| Muscogee 1986 | 54 | 16 | 22.86% | 184 | 13 | 6.60% | 238 | 29 | 10.86% |
| Muscogee 1966 | 13 | 4 | 23.53% | 69 | 5 | 6.76% | 82 | 9 | 9.89% |
| Newton 1966 | 4 | 8 | 66.66% | 36 | 16 | 30.76% | 40 | 24 | 37.50% |
| Newton 1967 | 2 | 2 | 50.00% | 12 | 4 | 25.00% | 14 | 6 | 30.00% |
| Newton 1968 | 2 | 4 | 66.66% | 21 | 7 | 25.00% | 23 | 11 | 32.30% |
| Newton 1970 | 4 | 2 | 33.33% | 6 | 6 | 50.00% | 10 | 8 | 44.44% |
| Newton 1971 | 3 | 4 | 57.14% | 12 | 2 | 14.29% | 15 | 6 | 28.57% |
| Newton 1986 | 21 | 7 | 25.00% | 105 | 21 | 9.48% | 126 | 18 | 18.18% |
| Newton 2017 | 16 | 3 | 15.79% | 48 | 7 | 12.73% | 64 | 10 | 13.51% |
| Paulding 2017 | 6 | 2 | 25.0% | 22 | 6 | 21.43% | 28 | 8 | 22.22% |
| Polk 2017 | 6 | 4 | 40.00% | 18 | 5 | 21.74% | 24 | 9 | 27.27% |
| Terrell 2017 | 0 | 1 | 100% | 7 | 2 | 22.22% | 7 | 3 | 30.00% |
| Walton 2017 | 13 | 5 | 27.78% | 41 | 12 | 22.64% | 54 | 17 | 23.94% |
| Totals: 1st study | 468 | 161 | 25.60% | 1629 | 271 | 14.26% | 2097 | 432 | 17.08% |
| Totals: 2d study | 344 | 149 | 30.22% | 1020 | 330 | 24.44% | 1364 | 479 | 25.99% |

APPENDIX B


Counties Only in 2019 Study
Counties in Both Studies
Counties Only in 1996 Study
1 Catoosa
2 Douglas
3 Barrow
4 Clarke
5 Taliaferro
6 Rockdale
7 Clayton
8 Fayette
9 Glascock
10 Chattahoochee
11 Schley
12 Webster
13 Treutlen
14 Montgomery