

## THE INS AND OUTS OF THE ALABAMA ELECTIVE SHARE\*

### I. INTRODUCTION

The spousal elective share, or forced share, is a doctrine designed to protect the rights of a surviving spouse.<sup>1</sup> The basic premise, although it varies wildly in detail across the country, is that a spouse can either choose to take under the decedent's will or choose to take a fractional share (often one-third) of the decedent's estate—but they cannot choose both.<sup>2</sup> It is unclear exactly how often the elective share is used in Alabama since the vast majority of records are only kept at the county level and few cases make it to a court with published opinions.<sup>3</sup> Additionally, most married partners provide substantial portions of their estates to the survivor,<sup>4</sup> and it appears that spousal disinheritance does not occur frequently.<sup>5</sup>

It is important to note that although most statutes dealing with the rights of surviving spouses are now phrased in gender-neutral terms, the effects of these statutes are not always gender-neutral. Women are much more likely to be the surviving spouse due in part to the fact that, on average, women in Alabama live over six years longer than men<sup>6</sup> and tend to marry men older

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1. JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 480 (6th ed. 2000).

2. *Id.*

3. See Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 *FAM. L.Q.* 173, 192 n.68 (1983) (printing a probate case “as a service to the . . . bar because of the unlikelihood that the decision would be officially reported”); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change in Direction in American Law?*, 130 *U. PA. L. REV.* 521, 562 n.152 (1982) (suggesting some probate situations occur more frequently than we realize because of the unreported nature of probate decisions); Richard B. Malamud, *Allocation of the Joint Return Marriage Penalty and Bonus*, 15 *VA. TAX REV.* 489, 498 n.39 (1996) (noting that probate cases are usually not reported); Note, *Psychiatric Assistance in the Determination of Testamentary Capacity*, 66 *HARV. L. REV.* 1116, 1116 n.1 (1953) (“many contests finally decided in the probate courts are not reported, and others are settled out of court”).

4. Cheyanna L. Jaffke, *Death, Taxes, and Now Divorce—The Dyad Expands to a Triad: ERISA's Social Policy Harms Women's Rights*, 35 *U.S.F. L. REV.* 255, 288 n.276 (2001) (reporting one study that found testators bequeathed everything to their surviving spouse over 85% of the time).

5. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 *CASE W. RES. L. REV.* 83, 182 (1994) (“[T]here is little evidence that spousal disinheritance is a problem.”).

6. Alabama Center for Health Statistics, *Life Expectancy at Birth by Race and Sex, Alabama 2000*, [http://ph.state.al.us/Chs/HealthStatistics/Graphs/lifeex\\_bar.PDF](http://ph.state.al.us/Chs/HealthStatistics/Graphs/lifeex_bar.PDF) (last visited Apr. 30, 2007). The Alabama Department of Public Health estimates life expectancy to be 6.4 years greater for white women than white men and 7.7 years greater for minority women than minority men. See *id.*

than themselves.<sup>7</sup> On top of this, men in Alabama earn more than women on average<sup>8</sup> and hold more property titled in their names.<sup>9</sup>

This Comment will trace the development of Alabama's statutory treatment of the rights of the surviving spouse, examine how Alabama courts have construed such statutes, and examine potential mediating doctrines to ameliorate the harsh deficiencies of the elective share in Alabama.

## II. HISTORY OF THE RIGHTS OF SURVIVING SPOUSES

### A. Feudal Origins

Before dissection of the current Alabama spousal elective share begins in earnest, a review of the historical treatment of surviving spouses throughout the centuries will be necessary. Long before the Uniform Probate Code's (UPC's) "augmented estates" and gender neutral language, widows in England were accorded a certain degree of protection under the common law, primarily through the doctrine of dower. Dower, at common law, is defined as "a wife's right, upon her husband's death, to a life estate in one-third of the land that he owned in fee."<sup>10</sup> It was a paternalistic doctrine "highly favored at the common law . . . to guard the weaker sex from imposition, to provide a fund for their maintenance, when they can no longer lean on the protecting arm which had sustained and supported them."<sup>11</sup> The compromise of the one-third division dates at least as far back as 1217,<sup>12</sup> and the Magna Carta of 1225 states "let there be assigned to [the widow] for her dower a third part of all the land of her husband which was his in his life, unless she was endowed of less at the church door."<sup>13</sup> This lack of control that women had over their own property is based on the legal fiction of the unity of person in marriage.<sup>14</sup> It has been said of this doctrine

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7. See, e.g., U.S. CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY tbls. R1204 & R1205, available at [http://factfinder.census.gov/servlet/GRTSelectServlet?ds\\_name=ACS\\_2005\\_EST\\_G00\\_&lang=en&\\_ts=195983831557](http://factfinder.census.gov/servlet/GRTSelectServlet?ds_name=ACS_2005_EST_G00_&lang=en&_ts=195983831557) (last visited Apr. 30, 2007) (estimating the median age at first marriage for men in Alabama to be 26.4 and for women to be 24.9—a difference of 1.5 years).

8. INST. FOR WOMEN'S POLICY RESEARCH, THE STATUS OF WOMEN IN ALABAMA, 2004: HIGHLIGHTS, chart 2 (2004), [http://www.iwpr.org/pdf/AL\\_R304.pdf](http://www.iwpr.org/pdf/AL_R304.pdf) (finding Alabama women average only 54.9% to 71.4% of earnings of white males). This disparity exists throughout the country. Press Release, U.S. Census Bureau, News Conference on 2005 Income and Poverty Estimates from the Current Population Survey and the American Community Survey (Aug. 29, 2006), available at [http://www.census.gov/Press-release/www/2006/djohnson\\_income\\_script.html](http://www.census.gov/Press-release/www/2006/djohnson_income_script.html) ("In each of the 50 states and the District of Columbia, women's median earnings were less than men's median earnings.").

9. DUKEMINIER & JOHANSON, *supra* note 1, at 483.

10. BLACK'S LAW DICTIONARY 529 (8th ed. 2004).

11. Gould v. Womack, 2 Ala. 83, 94 (1841).

12. George L. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42, 49 (1948).

13. Janet Senderowitz Loengard, Rationabilis Dos: *Magna Carta and the Widow's "Fair Share" in the Earlier Thirteenth Century*, in WIFE AND WIDOW IN MEDIEVAL ENGLAND 59, 75 n.13 (Sue Sheridan Walker ed., 1993) (quoting Magna Carta 1225, ch. 7) (internal quotation marks omitted).

14. See Introduction, in WIFE AND WIDOW, *supra* note 13, at 1, 3; see also United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting) ("[Coverture] rests on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband.").

that its origins and “its one-sidedness, may be found in the earlier customary treatment of women as inferiors and the power which social custom gave the husband over his wife.”<sup>15</sup>

The male counterpart to dower was curtesy, which is “a husband’s right, upon his wife’s death, to a life estate in the land that his wife owned during their marriage, assuming that a child was born alive to the couple.”<sup>16</sup> Notice the absence of the fractional share but the additional requirement of children. In Alabama, prior to the reforms of 1982, the “remnant” of curtesy provided the surviving widower with much less protection than that provided to widows.<sup>17</sup>

Dower came to protect widows less and less as society moved away from a land based system of wealth and towards intangible forms of wealth.<sup>18</sup> Additionally, inter vivos transfers were increasingly used in the “evasion” of the widow’s share.<sup>19</sup> Alabama was no stranger to this practice and even had two early cases singled out as examples by one scholar.<sup>20</sup> Now, dower and curtesy are almost totally abolished from the United States.<sup>21</sup> In some instances, they were even struck down as violations of the Equal Protection Clause.<sup>22</sup>

## B. Alabama Origins

### 1. Early Statutes

As to be expected from an area of law with such ancient origins, the widow’s right to dissent from her husband’s will predates Alabama’s statehood. Seven years before Alabama was admitted to the Union, the Mississippi Territory passed the “ACT of December 22, 1812,” which allowed a widow whose husband did not “make any express provision for his wife, by giving and devising unto her such part or parcel of his real and personal estate, as shall be fully satisfactory to her, such widow may signify her dissent . . . and in that case she shall be entitled to dower.”<sup>23</sup> While the Su-

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15. *Introduction*, *supra* note 14, at 3.

16. BLACK’S LAW DICTIONARY 411 (8th ed. 2004).

17. Wythe Holt, *Intestate Succession in Alabama*, in *SELECTED ESSAYS IN THE ALABAMA LAW OF DECEDENTS’ ESTATES AND FUTURE INTERESTS* 3, 26 (1975).

18. *See* DUKEMINIER & JOHANSON, *supra* note 1, at 478-79.

19. W.D. MACDONALD, *FRAUD ON THE WIDOW’S SHARE* ix (1960).

20. *Id.* at 407. The two cited cases are *Ford v. Ford*, 4 Ala. 142 (1842), and *Robertson v. Robertson*, 40 So. 104 (Ala. 1905).

21. DUKEMINIER & JOHANSON, *supra* note 1, at 479.

22. *Id.* (citing *Stokes v. Stokes*, 613 S.W.2d 372 (Ark. 1981), and *Boan v. Watson*, 316 S.E.2d 401 (S.C. 1984)).

23. Dower, Act of Dec. 22, 1812, Statutes of the Mississippi Territory, sec. I provides in full: When any person shall die intestate, or shall make his last will and testament, and not therein make any express provision for his wife, by giving and devising unto her such part or parcel of his real and personal estate, as shall be fully satisfactory to her, such widow may signify her dissent thereto, in the superior or county court of the county wherein she resides, at any time within one year after the probate of such will, and then, and in that case she shall be entitled to dower, in the following manner, to wit: one third part of all the lands tenements and

preme Court of Alabama once stated that the line of widow's dissent statutes, which would later culminate into the present elective share statute, owes its origin to this Act of 1812,<sup>24</sup> there appears to be an even older statute also from the Mississippi Territory.

An "ACT of March 12, 1803, revised and amended, February 10, 1806," provides in Section XI that "[t]he widow may in all cases, waive the provision made for her in the will of her deceased husband, and claim her dower."<sup>25</sup> The 1803 act is much less detailed than the 1812 act and does not spell out the amount of dower. A contemporaneous dower treatise in Alabama confirms the state of the law in this area and describes one of the more unfair aspects of it for women: "But if it should appear to the court, that the whole of the said premises cannot be allotted to the widow, without injustice to the heirs, then the widow must be endowed with such part only, as the court shall deem reasonable."<sup>26</sup>

Alabama first codified its laws in 1852 by copying from the New York code.<sup>27</sup> At this time, the widow's right to dissent, as found in the first section of the 1812 act, was revised and "introduced" by the codifiers as sections 1609 and 1610.<sup>28</sup> Section 1609 states in full:

The widow may in all cases dissent from the will of her deceased husband, and in the place of the provision made for her by such will, take her dower in the lands, and of the personal estate, such portion as she would have been entitled to in case of intestacy.<sup>29</sup>

The purpose of section 1609 was "to place [the widow's] claims entirely beyond her husband's control."<sup>30</sup>

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hereditaments of which her husband died seized and possessed of, or had before conveyed, whereof said widow had not relinquished her right of dower, as heretofore provided for by law, which third part shall be and inure to her proper use, benefit and behoof, in and during the term of her natural life; in which said third part shall be comprehended, the dwelling house in which her husband shall have been accustomed most generally to dwell, next before his death, together with the offices, out-houses, buildings and other improvements thereunto belonging or appertaining: *Provided*, That if it should appear to the judges, or justices of the court to whom application is made, that the whole of the said dwelling-house, out-houses, buildings and other improvements thereunto appertaining cannot be applied to the use of the widow, without manifest injustice to the children or other heirs, then, and in that case, such widow shall be entitled to such part only as the court may deem reasonable and just.

24. *McGhee v. Stephens*, 3 So. 808, 809 (Ala. 1888).

25. Wills, Intestates and Guardians, Act of Mar. 12, 1803, revised and amended, Feb. 10, 1806, Statutes of the Mississippi Territory, sec. XI provides in full:

The widow may in all cases, waive the provision made for her in the will of her deceased husband, and claim her dower, which shall be assigned her accordingly; in which case she shall receive no part of such provision, unless it appears plainly by the will, that the testator intended it, in addition to her dower.

*See also* *Hilliard v. Binford's Heirs*, 10 Ala. 977, 990 (1847).

26. JOHN A. CUTHBERT, COMPENDIUM OF THE LAW OF EXECUTORS, ADMINISTRATORS, GUARDIANS, AND DOWER, IN FORCE IN ALABAMA 149 (1850).

27. *Minge v. Green*, 58 So. 381, 387 (1912) (Mayfield, J., dissenting).

28. *McGhee*, 3 So. at 810.

29. ALA. CODE § 1609 (1852).

30. *McReynolds v. Jones*, 30 Ala. 101, 106 (1857).

As was common during this time, the statute used female gender specific terms, such as “widow” instead of “widower.” This was not mere oversight though. The statute was most certainly not intended to apply to men, as is evidenced by a note following the section in the Alabama Code of 1907. The note indicates that the compiler<sup>31</sup> of the code attempted to rewrite the section so that it also allowed husbands to dissent from the will of their deceased wife.<sup>32</sup> The legislative oversight committee revised the section back to the gender specific way as it appeared at the time of its passage in the legislature.<sup>33</sup>

The official code language remained unchanged until 1923 when the wording was rephrased and an additional sentence added.<sup>34</sup> The section changed once again in 1932 when the legislature added a proviso that:

if there are no children or their descendants and the personal estate exceeds \$50,000.00 in value at the time of the return of the appraisal, the widow upon dissenting *shall* take the first \$50,000.00 of the personal estate and the remainder thereof shall be distributed as provided for in the will.<sup>35</sup>

The statute remained unchanged for thirty-seven years until the legislature made changes in 1969.<sup>36</sup> The proviso requiring children was dropped, and the method of calculating the amount of money provided to the widow was changed so that the widow took the first \$50,000 “regardless of the amount of her separate estate, and without any deduction whatsoever of her separate estate.”<sup>37</sup> This version of the statute remained intact until the adoption of the reformed probate code in 1982.

Up until the reforms of 1982, the predecessor code section of the current elective share statute still used language that was not gender neutral (“Dissent by widow”),<sup>38</sup> was “the greatest area of gender-based law in Alabama,”<sup>39</sup> and was substantially similar to the original widow’s dissent sec-

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31. The compiler was no mere stenographer but none other than code commissioner James Jefferson Mayfield, a law school graduate of the University of Alabama (Class of 1888), former member of the Alabama House of Representatives, and associate justice of the Alabama Supreme Court, 1908-1919. See HENRY S. MARKS, *WHO WAS WHO IN ALABAMA* 113 (1972).

32. The note reads as follows: “The commissioner rewrote this section allowing husband to dissent, but the committee revised it as it here appears.” ALA. CODE § 6168 note (1907).

33. *Id.*

34. ALA. CODE. § 10593 (1923) reads as follows:

The widow may, in all cases, dissent from the will of her deceased husband, and, in lieu of the provision made for her by such will, take her dower in the lands and such portion of the personal estate as she would have been entitled to in case of intestacy. If the will makes no provision for her, she may claim her dower and distributive share without dissenting from the will.

35. Act of Nov. 9, 1932, No. 304, 1932 Ala. Acts 307 (emphasis added).

36. Act of Sept. 12, 1969, No. 747, 1969 Ala. Acts 1325.

37. *Id.*

38. ALA. CODE § 43-1-15 (1975) (repealed in 1982).

39. Marjorie Fine Knowles, *The Legal Status of Women in Alabama, II: A Crazy Quilt Restitched*, 33 ALA. L. REV. 375, 386 (1981).

tion found in the Alabama Code of 1852.<sup>40</sup> In fact, dower protection for a widow, prior to the reforms of 1982, was “essentially the same in Alabama . . . as it was at common law.”<sup>41</sup> The dower protection laws also discriminated in favor of the wealthy so that “a poor widow might find that her meager ‘separate estate’ will bar her taking a needed share in her husband’s equally meager estate, while a rich widow will receive even more wealth from her even richer husband’s estate.”<sup>42</sup>

After a string of early warnings,<sup>43</sup> the disparate practice of not allowing a male to dissent from the will of his wife finally led to the Alabama Supreme Court’s holding in *Hall v. McBride*<sup>44</sup> that it was invalid as an “impermissible gender-based classification.”<sup>45</sup> This invalidation was a case of too little, too late, however: it was decided *after* the Alabama Legislature had already adopted the new probate code in 1982 but before it had been enacted.<sup>46</sup>

## 2. Current Alabama Statute

The Alabama Legislature abolished the ancient common law doctrines of dower and curtesy in the 1982 overhaul of the state probate code.<sup>47</sup> The legislature then adopted the present day right to an elective share for surviving spouses in Alabama.<sup>48</sup> The most prominent feature of the early dower

40. See *supra* text accompanying note 29.

41. Holt, *supra* note 17, at 23.

42. *Id.* at 24-25.

43. See *Barger v. Barger*, 410 So. 2d 17, 18-19 (Ala. 1982); *Lloyd v. Hollins*, 399 So. 2d 237, 239 (Ala. 1981); *Dorough v. Johnson*, 373 So. 2d 1082, 1087 n.3 (Ala. 1979). A much earlier case did not suggest it was unconstitutional but that “the remedy is with the Legislature, not the courts.” *Gray v. Weatherford*, 149 So. 819, 819 (Ala. 1933).

44. 416 So. 2d 986 (Ala. 1982).

45. *Id.* at 990.

46. *Id.* at 991 n.1.

47. ALA. CODE § 43-8-57 (1991).

48. ALA. CODE § 43-8-70 states in full:

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of the estate. The elective share shall be the lesser of:

(1) All of the estate of the deceased reduced by the value of the surviving spouse’s separate estate; or

(2) One-third of the estate of the deceased.

(b) The “separate estate” of the surviving spouse shall include:

(1) All property which immediately after the death of the decedent is owned by the spouse outright or in fee simple absolute;

(2) All legal and equitable interests in property the possession or enjoyment of which are acquired only by surviving the decedent; and

(3) All income and other beneficial interests:

a. Under a trust;

b. In proceeds of insurance on the life of the decedent; and

c. Under any broad-based nondiscriminatory pension, profit-sharing, stock bonus, deferred compensation, disability, death benefit or other such plan established by an employer.

(c) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent’s domicile at death.

statutes, the one-third fractional share, has been retained.<sup>49</sup> The Alabama Supreme Court took a narrow view of the changes wrought by the 1982 overhaul, stating “[t]here is no implication here that the legislature intended to change existing law other than to increase the [intestacy] share and to treat widow and widower equally.”<sup>50</sup>

### 3. Overview of the Uniform Probate Code

The Alabama elective share was written based on ideas taken from several other states and the Uniform Probate Code.<sup>51</sup> For instance, like Alabama,<sup>52</sup> the UPC abolished dower and curtesy.<sup>53</sup> Because of its influence on Alabama elective share law, a brief review of the Uniform Probate Code helps to explain where the Alabama statute came from in part and where it may go in the future.

The UPC’s purposes are many:

- (1) to confer upon married persons broad freedom of disposition;
- (2) to provide a protective monetary safety net against spousal disinheritance;
- (3) to give recognition to the economic partnership of marriage by increasing the protective share for longer marriages than for shorter ones;
- (4) to adjust for the dispositional problems raised by multiple marriages and multi-family descendants;
- (5) to prevent will substitutes from defeating the prior purposes;
- (6) to prevent the surviving spouse from electing the forced share when decedent’s estate plan adequately provides for the spouse or when the spouse’s personal wealth compares to decedent’s wealth;
- (7) to ease administration of the protective share processes; and
- (8) to provide predictability for persons who adequately plan their estates.<sup>54</sup>

The UPC first appeared in 1969 and introduced the concept of the “augmented estate.”<sup>55</sup> The augmented estate is merely the probated estate with the inclusion of the following non-probate and inter vivos transfers made during the marriage:

- 1) any transfer under which the decedent retains the right to possession or income from the property;
- 2) any transfer which the decedent can revoke or invade or dispose of the principal for his own

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49. *See id.*

50. *Moss v. Horton*, 544 So. 2d 898, 900 (Ala. 1989).

51. ALA. CODE § 43-8-70 commentary.

52. *See supra* text accompanying note 47.

53. Sharla K. Raab, *A Comparative Analysis Between the Uniform Probate Code and Michigan’s Estates and Protected Individuals Code*, 79 U. DET. MERCY L. REV. 593, 599 (2002).

54. LAWRENCE H. AVERILL, JR., *UNIFORM PROBATE CODE IN A NUTSHELL* 78 (4th ed. 1996).

55. RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 18 (2004).

benefit; 3) any transfer in joint tenancy with someone other than the spouse; 4) any transfer made within two years before death exceeding \$3,000 per donee per year . . . ; 5) property given to the surviving spouse during life, . . . and property received by the spouse at death derived from the decedent.<sup>56</sup>

The Uniform Probate Code of 1969, § 2-202, was significantly revised in 1990.<sup>57</sup> The 1990 revisions were designed to make the results closer to what would take place in a community property system.<sup>58</sup> One of the most distinguishing aspects of the 1990 amendments was that they shook off the me-

56. DUKEMINIER & JOHANSON, *supra* note 1, at 507-08.

57. UNIF. PROBATE CODE § 2-202 (amended 1993) states in full:

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

<b>If the decedent and the spouse were were married to each other:</b>	<b>The elective-share percentage is:</b>
Less than 1 year .....	Supplemental Amount Only.
1 year but less than 2 years .....	3% of the augmented estate.
2 years but less than 3 years .....	6% of the augmented estate.
3 years but less than 4 years .....	9% of the augmented estate.
4 years but less than 5 years .....	12% of the augmented estate.
5 years but less than 6 years .....	15% of the augmented estate.
6 years but less than 7 years .....	18% of the augmented estate.
7 years but less than 8 years .....	21% of the augmented estate.
8 years but less than 9 years .....	24% of the augmented estate.
9 years but less than 10 years .....	27% of the augmented estate.
10 years but less than 11 years .....	30% of the augmented estate.
11 years but less than 12 years .....	34% of the augmented estate.
12 years but less than 13 years .....	38% of the augmented estate.
13 years but less than 14 years .....	42% of the augmented estate.
14 years but less than 15 years .....	46% of the augmented estate.
15 years or more .....	50% of the augmented estate.

(b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections 2-207, 2-209(a)(1), and that part of the elective-share amount payable from the decedent's probate estate and nonprobate transfers to others under Section 2-209(b) and (c) is less than [\$50,000], the surviving spouse is entitled to a supplemental elective-share amount equal to [\$50,000], minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in Section 2-209(b) and (c).

(c) [Effect of Election on Statutory Benefits.] If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

(d) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death.

58. Brashier, *supra* note 5, at 19-21 (recognizing the drafters' purpose behind the 1990 revisions to be the same as the purpose underlying community property systems, although also noting their differences). For background information on community property systems in general, see 15A AM. JUR. 2D *Community Property* §§ 1-119 (2006).

dieval one-third fraction and adopted an accrual type method that takes into account how many years the couple has been married—adding a dose of rationality to the process of dividing up the surviving spouse’s share.<sup>59</sup> Also, the reason behind the addition of the augmented estate was not to protect against “fraud on the widow’s share[.]” but to now “implement the partnership theory of the elective share.”<sup>60</sup>

### III. HOW ALABAMA COURTS HAVE INTERPRETED THE CURRENT STATUTE

Although there may be much activity under the radar,<sup>61</sup> since the adoption of the elective share in 1982 there have only been four reported cases indicating the surviving spouse taking an elected share was male.<sup>62</sup> While this is certainly a low number, there have been less than twenty-five total reported cases involving the elective share under the present elective share statute.<sup>63</sup> There are two common controversies that dominate the reported cases under the present elective share statute: the effect of waivers and the calculation of the proper share.

#### A. Effect of Waivers on the Elective Share

##### 1. Background

Prior to the elective share, Alabama courts similarly dealt with waivers of a widow’s dower and right to dissent. A high standard was used to protect the widow due to the confidential relationship between husband and wife and because “the husband is presumed to be the dominant party.”<sup>64</sup> Adequate consideration was required,<sup>65</sup> and an agreement would not be en-

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59. See Brashier, *supra* note 5, at 19-21.

60. DUKEMINIER & JOHANSON, *supra* note 1, at 509.

61. See *supra* note 3 and accompanying text.

62. See Kellam v. Dutton, 706 So. 2d 1179 (Ala. 1997); Hellums v. Reinhardt, 567 So. 2d 274 (Ala. 1990); Rickard v. Trousdale, 508 So. 2d 260 (Ala. 1987); Wester v. Baker, 675 So. 2d 447 (Ala. Civ. App. 1996).

63. Although a Westlaw KeyCite of the elective share statute, ALA. CODE § 43-8-70, indicates only 11 cases, there appear to be 23 Alabama cases with some involvement to the elective share. See Baldwin v. Estate of Baldwin, 875 So. 2d 1138 (Ala. 2003); Whited v. Holmes, 816 So. 2d 20 (Ala. 2001); Brakefield v. Hocutt, 779 So. 2d 1165 (Ala. 2000); Russell v. Russell, 758 So. 2d 533 (Ala. 1999); Kellam v. Dutton, 706 So. 2d 1179 (Ala. 1997); Tibbs v. Anderson, 580 So. 2d 1337 (Ala. 1991); Stone v. Sintz, 572 So. 2d 1270 (Ala. 1990); Barksdale v. Barksdale, 567 So. 2d 1295 (Ala. 1990); Hellums v. Reinhardt, 567 So. 2d 274 (Ala. 1990); Sintz v. Stone, 562 So. 2d 228 (Ala. 1990); Barksdale v. Barksdale, 551 So. 2d 1006 (Ala. 1989); Ruzic v. Ruzic, 549 So. 2d 72 (Ala. 1989); Sheffield v. Buxton, 547 So. 2d 432 (Ala. 1989); Moss v. Horton, 544 So. 2d 898 (Ala. 1989); Nichols v. Barnette, 528 So. 2d 322 (Ala. 1988); Garrard v. Lang, 514 So. 2d 933 (Ala. 1987); Rickard v. Trousdale, 508 So. 2d 260 (Ala. 1987); Garrard v. Lang, 489 So. 2d 557 (Ala. 1986); Killough v. Flowers, 843 So. 2d 770 (Ala. Civ. App. 2002); Reynolds v. Reynolds, 837 So. 2d 847 (Ala. Civ. App. 2002); Hudson v. Hudson, 701 So. 2d 13 (Ala. Civ. App. 1997); Kynard v. Norfleet, 681 So. 2d 631 (Ala. Civ. App. 1996); Wester v. Baker, 675 So. 2d 447 (Ala. Civ. App. 1996).

64. Merchants’ Nat’l Bank of Mobile v. Hubbard, 133 So. 723, 728 (Ala. 1931).

65. Crownover v. Crownover, 113 So. 42, 44 (Ala. 1927) (holding an agreement to accept the will in lieu of dower to be a *nudum pactum* because it was without consideration).

forced “if made in ignorance of the circumstances calculated to influence her choice.”<sup>66</sup> Furthermore, as antenuptial and postnuptial agreements are enforced in equity, the value of property given up in lieu of dower could not be so disproportionate as to be “grossly inadequate, unreasonable and unjust.”<sup>67</sup>

Disproportionate value was a key reason for the Alabama Supreme Court to hold in a very early case that an antenuptial contract to accept the provisions of her husband’s will did not bar a widow from dissenting in *Gould v. Womack*.<sup>68</sup> At the time of their marriage, the wealthy husband was “considerably advanced in life,” and his wife was “a young lady just arrived at the age of legal discretion.”<sup>69</sup> The provision in the husband’s will for the widow consisted of an annuity of \$1,500 per year, the use of five slaves, an annual provision for her family, a new house, and the use of a section of land for life.<sup>70</sup> While the court thought this provision to be ample for the support of the wife, the proper test was to compare it to the estate of the husband.<sup>71</sup> For example, the court explained, “One hundred dollars might be more than the value of the legal dower, and yet be inadequate for support. So on the other hand, ten thousand dollars might be ample for support, and yet greatly inferior in value to the legal dower.”<sup>72</sup> Under this rationale, the wife’s take under the agreement was a “mere pittance” compared to her husband’s total estate, which one estimate placed at \$800,000 (including 180 slaves)—an immense sum in Alabama in 1841.<sup>73</sup> The court found this to be “too disproportionate . . . to entitle [the will provision] to the aid of this Court.”<sup>74</sup>

In *Merchants’ National Bank of Mobile v. Hubbard*,<sup>75</sup> it was alleged that the widow was estopped from dissenting from her husband’s will because she had agreed to the provisions of the will during the life of the testator.<sup>76</sup> The court set forth a three-part rule requiring

that [1] the consideration be adequate, and the entire transaction fair, just, and equitable from the wife’s view, or that [2] it was freely and voluntarily entered into with competent independent advice and full knowledge of her interest in the estate and its ap-

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66. *Adams v. Adams*, 39 Ala. 274, 280 (1864).

67. *Gould v. Womack*, 2 Ala. 83, 94 (1841).

68. *Id.* at 98.

69. *Id.* at 93.

70. *Id.* at 95.

71. *Id.* at 94.

72. *Id.* at 96.

73. *Id.* at 94.

74. *Id.* at 98.

75. 133 So. 723 (Ala. 1931).

76. *Id.* at 727.

proximate value, and that [3] the husband or his representatives have the burden in that respect.<sup>77</sup>

The court compared the provisions in the will, which gave the widow an annuity and an insurance provision for her daughter, to what she would receive were she to dissent, which was absolute ownership of all the personalty and income from half the realty.<sup>78</sup> The difference between these two scenarios was “not such a difference as that it can be said to be only ‘a nice comparison,’ but it is greatly disproportionate.”<sup>79</sup>

In *Allison v. Stevens*,<sup>80</sup> the Alabama Supreme Court affirmed the trial court’s annulment of an antenuptial contract.<sup>81</sup> The contract was signed just three days before the wedding and released the widow’s right to dissent from the will, her dower, and other claims against the estate in consideration of the husband purchasing her house and devising it to her in his will.<sup>82</sup> The *Allison* court followed the test of *Merchants’ National Bank* and put great weight in the “disproportionate value” that the widow relinquished under the contract.<sup>83</sup> Furthermore, the court found it significant that, considering the burden was on the estate of the husband, there was no evidence the widow received any competent independent advice or “had full knowledge of her interest in the estate and the approximate value thereof.”<sup>84</sup>

## 2. Current Law

The reforms of 1982 purportedly did not affect the test of validity regarding an agreement to waive the rights of a surviving spouse. In the first elective share case to reach the Alabama Supreme Court after the reforms of 1982, *Garrard v. Lang*,<sup>85</sup> the court stated in a footnote that “the inquiry under prior Alabama law, both statutory law . . . and common law, was whether a waiver was the result of ‘fraud, imposition, or undue advantage,’ and the present inquiry . . . is whether there is ‘fair disclosure.’”<sup>86</sup> These inquiries are “one and the same.”<sup>87</sup> Furthermore, in a slightly modified continuation of *Merchants’ National Bank*, the executor (rather than “husband or his representatives”)<sup>88</sup> had the burden of showing the waiver was made after full disclosure.<sup>89</sup>

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77. *Id.* at 728; *see also* *Barnhill v. Barnhill*, 386 So. 2d 749, 751 (Ala. Civ. App. 1980).

78. *Hubbard*, 133 So. at 728.

79. *Id.* (quoting *Gould*, 2 Ala. at 98).

80. 112 So. 2d 451 (Ala. 1959).

81. *Id.* at 454.

82. *Id.* at 452.

83. *Id.* at 453.

84. *Id.*

85. 489 So. 2d 557 (Ala. 1986).

86. *Id.* at 560 n.3.

87. *Id.*

88. *Merchants’ Nat’l Bank of Mobile v. Hubbard*, 133 So. 723, 728 (Ala. 1931).

89. *Garrard*, 489 So. 2d at 560.

In *Garrard*, the couple had been separated and living apart for almost thirty years, yet they remained married until the husband's death.<sup>90</sup> The widow was only left ten dollars in the will that was paid to her by the executor.<sup>91</sup> In addition to the check for ten dollars, the executor also wrote her a check for \$1,000 that was allegedly in satisfaction for any claims against the estate the widow might bring.<sup>92</sup> The widow testified that she thought she "was supposed to get it all" and that she "hadn't talked to the lawyer."<sup>93</sup> Despite the acceptance of the two checks, this was not sufficient to constitute a valid waiver because the executor did not carry his burden of showing the widow was fully advised of her right to elect against the will.<sup>94</sup> The court went so far as to say that "her actions may be interpreted . . . as indicating a 'simple-minded ignorance of what her rights in fact were.'"<sup>95</sup>

By the early 1990s, the Alabama Supreme Court seemingly relaxed the high standard of the past. In *Tibbs v. Anderson*,<sup>96</sup> the court affirmed the validity of a postnuptial agreement that barred the widow from taking an elective share.<sup>97</sup> The husband first attempted to have the wife sign a prenuptial agreement just one day before their wedding was to occur.<sup>98</sup> She was "highly insulted," refused to sign it, and wanted to postpone the wedding until resolving the matter.<sup>99</sup> Despite this reservation, they went ahead with the marriage ceremony as planned.<sup>100</sup> It appears the husband eventually wore her down and less than two hours after the wedding asked her to sign the agreement again.<sup>101</sup> She finally agreed to it in order to "get some peace and harmony and balance in this relationship."<sup>102</sup> It appears the only discussion the wife had about the agreement outside of her husband was with a "friend" who was present when the husband asked her to sign the agreement.<sup>103</sup>

The *Tibbs* court applied the first prong of the *Merchants' National Bank* test that requires adequate consideration and for the transaction to be fair, just, and equitable<sup>104</sup> and, in doing so, tremendously watered it down from prior decisions. The court deemed marriage itself to be consideration for the agreement even though the contract intentionally was not signed until after the wedding was over.<sup>105</sup> The court appeared to justify its decision in part by

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90. *Id.* at 557.

91. *Id.* at 558.

92. *Id.* at 560.

93. *Id.* at 561.

94. *Id.* at 562.

95. *Id.* (quoting *Richter v. Richter*, 60 So. 880, 884-85 (Ala. 1913)).

96. 580 So. 2d 1337 (Ala. 1991).

97. *Id.* at 1338.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1339.

105. *Id.*

noting that the husband “also relinquished any right to the wife’s estate by this agreement.”<sup>106</sup> Nothing in the record indicates the wife had a substantial estate, and in fact, the opposite may be inferred.<sup>107</sup> This is a far cry from the *Gould* court’s explanation of the importance of comparing the value of that given up with that received.<sup>108</sup> Furthermore, despite the burden being on the executor, nothing in the record shows the wife received any independent legal advice.<sup>109</sup> Considering the timing of the agreement (much closer to the wedding ceremony than in *Allison v. Stevens*),<sup>110</sup> the clear unease which she had for it, and the lack of independent advice, it is hard to understand how this is “fair, just, and equitable from the wife’s point of view.”<sup>111</sup>

### B. Proper Calculation of the Elective Share

As could be expected, the other major common controversy is the proper calculation of the elective share. Almost one-third of the reported elective share cases since the 1982 reforms involve the proper calculation of the elective share.<sup>112</sup> According to the Alabama Supreme Court, the “proper method of calculating the surviving spouse’s elective share is to deduct the homestead allowance, exempt property, family allowance, ‘and allowed claims against the estate’ from the decedent’s total estate, then divide the remaining amount by three.”<sup>113</sup> To this amount is “added the widow’s exemptions, plus interest earned on money to which she was entitled, minus the widow’s share of expenses of administration of the estate and other estate indebtedness for insurance and ‘taxes.’”<sup>114</sup>

The rationale for deducting allowable claims before calculating the elective share is that “[t]o hold otherwise would exempt the surviving spouse’s elective share from, and give it priority over, the claims of creditors and other allowable claims against the estate.”<sup>115</sup> Funeral expenses are also included as an “allowable expense” to be deducted before the elective share is calculated.<sup>116</sup> Support for the rationale of not giving the elective share priority over creditors’ claims comes from the fact that the elective

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106. *Id.*

107. It can be inferred from the record that the wife did not have a substantial estate as compared to the husband since she lived with her sister prior to moving in with her husband and her petition for an elective share would have been pointless if her separate estate had been larger than her husband’s. *See id.* at 1338.

108. *See supra* text accompanying note 72.

109. *See supra* text accompanying note 104.

110. *See supra* text accompanying note 83.

111. *Tibbs*, 580 So. 2d at 1340.

112. *See Whited v. Holmes*, 816 So. 2d 20 (Ala. 2001); *Brakefield v. Hocutt*, 779 So. 2d 1165 (Ala. 2000); *Barksdale v. Barksdale*, 567 So. 2d 1295 (Ala. 1990); *Moss v. Horton*, 544 So. 2d 898 (Ala. 1989); *Garrard v. Lang*, 514 So. 2d 933 (Ala. 1987); *Reynolds v. Reynolds*, 837 So. 2d 847 (Ala. Civ. App. 2002).

113. *Brakefield*, 779 So. 2d at 1166 (quoting *Barksdale v. Barksdale*, 551 So. 2d 1006, 1008 (Ala. 1989)).

114. *Reynolds*, 837 So. 2d at 850 n.1 (citing *Barksdale*, 551 So. 2d at 1008).

115. *Id.*

116. *Whited*, 816 So. 2d at 25.

share statute<sup>117</sup> does not contain an expression of priority, unlike related probate statutes for the homestead allowance,<sup>118</sup> exempt property,<sup>119</sup> and family allowance.<sup>120</sup> The results of this policy may be harsh at times for the surviving spouse, as the Alabama Supreme Court has noted: “the value of the surviving spouse’s elective share can be zero where the estate does not have sufficient assets to satisfy the allowable claims.”<sup>121</sup>

While the surviving spouse’s share does not come before creditors, it has long been held that “the widow, being a purchaser for value by relinquishing her right to dissent, is accorded a priority over all other legatees and devisees, coming immediately behind the claims of creditors.”<sup>122</sup> The widow’s dissent is “treated with greater protection than specific bequests which lapse if necessary when she elects to take against the will.”<sup>123</sup>

Federal estate taxes are not deducted from the estate prior to calculating the elective share.<sup>124</sup> The Fifth Circuit has stated that “[i]t is unthinkable that Alabama which protects specific bequests from reduction due to the estate tax would not also protect the more favored marital share of the widow.”<sup>125</sup> Although there have been claims that the adoption of the new probate code in 1982 changed this long-standing rule, the Alabama Supreme Court rejected them and confirmed that the elective share shall not be burdened with estate taxes in *Moss v. Horton*.<sup>126</sup> The rationale for this rule is that “the estate will be able to take advantage of the maximum marital deduction.”<sup>127</sup> Because the rationale behind the rule remains unchanged, so does the rule itself.<sup>128</sup>

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117. ALA. CODE § 43-8-70 (1991).

118. *Id.* § 43-8-110 (“The homestead allowance is exempt from and has priority over all claims against the estate.”).

119. *Id.* § 43-8-111 (“Rights to exempt property . . . have priority over all claims against the estate, except [for abatement in order] to permit prior payment of homestead allowance and family allowance.”).

120. *Id.* § 43-8-112 (“The family allowance is exempt from and has priority over all claims but does not have priority over the homestead allowance.”).

121. *Brakefield v. Hocutt*, 779 So. 2d 1165, 1166-67 (Ala. 2000).

122. *Davis v. Davis*, 267 So. 2d 158, 165 (Ala. 1972) (citing *Steele v. Steele’s Adm’r*, 64 Ala. 438 (1879)).

123. *Reynolds v. Reynolds*, 837 So. 2d 847, 850 (Ala. Civ. App. 2002) (quoting *Cox v. United States*, 421 F.2d 576, 584-85 (5th Cir. 1970)) (internal quotation marks omitted).

124. *Id.*

125. *Cox*, 421 F.2d at 584.

126. 544 So. 2d 898, 899 (Ala. 1989).

127. *Id.* at 900.

128. *Id.*

#### IV. CURRENT POLICY FLAWS AND NON-LEGISLATIVE SUGGESTIONS FOR IMPROVING ON THE 1982 REFORMS

##### A. Policy Flaws in the Rights of Surviving Spouses

While not a new problem,<sup>129</sup> probably the largest flaw among the rights of surviving spouses concerns the ease with which a decedent may disinherit their surviving spouse through the use of will substitutes.<sup>130</sup> Inter vivos transfers to a trust can reduce the size of an estate from which a surviving spouse may receive an elective share. For example, in *Russell v. Russell*,<sup>131</sup> a husband transferred his majority interest in a family business to a revocable living trust with himself as the initial trustee.<sup>132</sup> The widow argued that the transfers deprived her of her elective share, but the Alabama Supreme Court disagreed.<sup>133</sup> Because Alabama explicitly rejected the augmented estate concept of the UPC from which Alabama's probate overhaul in 1982 was derived, there is "no statutory authority for the proposition that a surviving spouse is entitled to a share of assets that were validly transferred by the decedent during his lifetime."<sup>134</sup>

Similar to transfers to a trust, advancements to children may also reduce the size of the estate available for an elective share. In *Logan v. Logan's Administrator*,<sup>135</sup> the Alabama Supreme Court decided that "the widow is not entitled to the benefit of an advancement made by a father to a child."<sup>136</sup> The rule exists because the purpose behind advancements is "to make an equality among the children, and not to benefit the widow."<sup>137</sup>

##### B. Proposed Expansion of Mediating Doctrines

The Alabama Supreme Court recently opened a potential door for a surviving spouse attempting to claim an elective share of an estate where the assets have been transferred to a trust. In *Baldwin v. Estate of Baldwin*,<sup>138</sup> the husband created a revocable trust and appointed himself as trustee.<sup>139</sup> Additionally, the husband was to receive all net trust income for life, retain

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129. See Thomas L. Jones, *Alabama Probate Law—Need for Revision of Intestate Provisions*, 20 ALA. L. REV. 1, 23-24 (1967).

130. See Leslie Fields, Comment, *Alabama's Elective Share: It's Time to Adopt the Partnership Theory of Marriage*, 46 ALA. L. REV. 797, 802-04 (1995); see also Helene S. Shapo, *The Widow's Mite Gets Smaller: Deficiencies in Illinois Elective Share Law*, 24 S. ILL. U. L.J. 95, 95 (1999). For a very different perspective on this practice and elective share statutes in general, see Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737 (2006).

131. 758 So. 2d 533 (Ala. 1999).

132. *Id.* at 534.

133. *Id.* at 538.

134. *Id.*

135. 13 Ala. 653 (1848).

136. *Id.* at 656.

137. *May v. May*, 15 Ala. 177, 181 (1849).

138. 875 So. 2d 1138 (Ala. 2003).

139. *Id.* at 1139.

the right to remove assets from the trust,<sup>140</sup> and could remove principal from the trust at any time.<sup>141</sup> In a later case, the husband's son even argued that the trust was "conceived as a means to escape probate while retaining all benefits of ownership of the trust assets."<sup>142</sup> After the death of the husband, the widow petitioned for her elective share and challenged the trust on the grounds that it was illusory.<sup>143</sup> Due to the potential intermingling of personal and trust funds and the inconsistencies between the trust declaration's schedule and the conservator's inventory, the court found material issues of fact and reversed the trial court's summary judgment on behalf the estate.<sup>144</sup> While the court did not conclude that the trust was illusory, it did breathe life into a doctrine that has the potential to help curb some of the more egregious evasions of the spousal elective share.

A return to the high standards once applied to waivers of surviving spouse rights, such as that in *Merchants' National Bank*,<sup>145</sup> could be viewed as either progressive or sexist. The protection of surviving spouses who are truly not informed of their rights and perhaps pressured by a dominant partner is certainly a policy worthy of the law's support. A sexist danger lurks down this path, however, when a court invalidates a waiver because the surviving spouse, often a woman, is presumed to be incapable of making her own decision due to "simple-minded ignorance."<sup>146</sup> A strengthening of the standards through the use of objective factors, such as the timing of the waiver request and access to independent legal advice, should help protect surviving spouses without the return of sexist paternalism.

*Kevin R. Garrison*

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140. *Id.*

141. *Id.* at 1143 n.3.

142. *Baldwin v. Branch*, 888 So. 2d 482, 486 (Ala. 2004).

143. *Estate of Baldwin*, 875 So. 2d at 1141.

144. *Id.* at 1142-43.

145. *See supra* text accompanying notes 75-79.

146. *Garrard v. Lang*, 489 So. 2d 557, 562 (Ala. 1986) (quoting *Richter v. Richter*, 180 Ala. 218, 230 (1913)) (internal quotation marks omitted).