GRIM FAIRY TALES: STUDIES OF WICKED STEPMOTHERS, POISONED APPLES, AND THE ELECTIVE SHARE

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ABSTRACT

Ever since the statutory elective share replaced dower and curtesy, courts have been trying to expand the property subject to the spouse’s elective share. The courts have used a number of justifications for their attempts to accomplish this. In a previous article, the author offered an interpretation of the proper use of public policy by courts when a statute on the subject has been enacted by the legislature. This article applies that test to attempts by courts to expand the elective share to will substitutes and finds such attempts to be an impermissible use of public policy by courts.

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I. INTRODUCTION: THE ELECTIVE SHARE STATUTES

As a replacement for the dower protection of the spouse under English and early-American law,1 by the early part of the twentieth-century most states enacted forced share (or elective share) statutes to prevent disinheritance of the spouse.2 The early version of these statutes, sometimes referred to as the “original” elective share statutes, provided that the surviving spouse receives a portion (usually one-third) “of the decedent’s estate.”3 The term “estate” referred to the probate estate.4 This concept excluded nonprobate property (sometimes referred to as “will substitutes”) from the


2 MACDONALD, supra note 1, at 3; see also Edward A. Smith, Comment, The Present Status of “Illusory” Trusts—The Doctrine on Newman v. Dore Brought Down to Date, 44 MICH. L. REV. 151, 151 (1945) (noting the shift in a majority of states away from dower and toward the elective share).


4 Id.
computation of the surviving spouse’s share.\textsuperscript{5} Later legislation, “pioneered by legislation in New York and Pennsylvania”\textsuperscript{6} and brought to fulfillment by the Uniform Probate Code (UPC), developed the concept of the augmented estate,\textsuperscript{7} which rectified the problem by specifying that some, but not all, nonprobate property would be included in the elective share and specifying which types of such property would be included.\textsuperscript{8}

However, even in states that retained traditional elective share statutes, courts found a way to enlarge the elective share of surviving spouses.\textsuperscript{9} These statutes applied to probate property only.\textsuperscript{10} If a nonprobate transfer was ruled ineffective (at least for the purposes of the elective share, even if otherwise valid), it then became part of the probate estate and subject to the elective share statute.\textsuperscript{11} The courts have for many years decided whether particular nonprobate transfers should be subject to the elective share statute under the heading of “fraud on the spousal share.”\textsuperscript{12}

The purpose of this article is to evaluate the court cases attempting to apply traditional elective share statutes to nonprobate property under the “fraud on the spousal share” doctrine. Section II will analyze the early tests: the “intent” test\textsuperscript{13} and the “real vs. illusory” test developed in the early New York case of Newman v. Dore.\textsuperscript{14}

In Section III, I will briefly discuss my previous article,\textsuperscript{15} which developed a useful test to evaluate the extent to which a court should employ policy factors to influence a decision where a statute covers the area.

Section IV will discuss later cases attempting to include nonprobate transfers in the share of the surviving spouse in such statutes under several different theories. The application of the

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\textsuperscript{5} Haskell, supra note 1, at 150–51.
\textsuperscript{6} Thomas P. Gallanis, Family Property Law 364 (5th ed. 2011).
\textsuperscript{8} Haskell, supra note 1, at 151.
\textsuperscript{9} Id. at 150–51.
\textsuperscript{10} Id.
\textsuperscript{11} Id. at 156.
\textsuperscript{12} See, e.g., MacDonald, supra note 1, at 4, 108–16 (describing cases in which state courts applied variations of the intent test to determine if certain nonprobate transfers were fraudulent); see also Gallanis, supra note 6, at 364 (noting that the augmented estate functions to deal with fraud on the elective share of the spouse). As a rule, the use of “fraud” does not indicate actual fraud in the legal sense. See MacDonald, supra note 1, at 101–03.
\textsuperscript{13} MacDonald, supra note 1, at 103–16.
\textsuperscript{14} Newman v. Dore, 9 N.E.2d 966, 969 (N.Y. 1937).
\textsuperscript{15} See generally Martin D. Begleiter, Taming the “Unruly Horse” of Public Policy in Wills and Trusts, 26 Quinnipiac Prob. L.J. 125 (2012).
analysis will show that the attempts of courts to extend a traditional elective share statute to include nonprobate property wrongly allows courts to introduce public policy factors into areas where the legislative decision deserves primacy.

Section V will move to a new test developed by the Restatement (Third) of Trusts to answer the same question, but with different criteria.

Section VI will discuss the court’s treatment of different types of will substitutes for elective share purposes. 

In Section VII, some very recent cases will be discussed that may represent an emerging trend to limit elective share statutes application to nonprobate property to the statute’s terms.

Lastly, the article will conclude that the court should not attempt to expand traditional elective share statutes to nonprobate property because to do so takes the court beyond the permissible judicial function of courts.

Before proceeding, I should note a significant limit on this analysis. This article excludes augmented estate statutes that apply to nonprobate property by the terms of the statute. The article covers only traditional elective share statutes as described in this introduction.

II. ELECTIVE SHARE: THE EARLY TESTS

A. The Intent Theory

Until the late 1930s, courts decided cases attempting to invalidate lifetime transfers for the purpose of the spouse’s statutory share (that is, include the transferred property in the decedent’s estate for the purposes of the spouse’s election) under several different theories. One of these theories was the “intent” or “motive” theory. This theory tested the validity of the transfer for elective share purposes by asking whether the decedent’s intent or motive in making the transfer was to deny the surviving spouse the right to the property on the transferor’s death. Illustrative of the

16 See Sitkoff, supra note 3, at 654–56 (contemplating the various types of will substitutes in the realm of probate succession).
17 See UNIF. PROBATE CODE § 2-205 (amended 2010), 8 U.L.A. 158 (2013). In fact, such statutes reflect the primary argument of this article that it is the function of statutes, not courts, to determine which, if any, nonprobate property is included in the elective share.
18 MacDONALD, supra note 1, at 67.
19 Id. at 98.
20 Id. at 106.
reasoning of such cases is *In re Estate of Sides.* In *Sides,* decedent made gifts during his lifetime to some of the children (and, in one case, his grandchildren) of his first marriage. In some cases, the children executed notes in favor of the decedent with four percent interest. The notes contained a provision that the notes would be cancelled on the death of the decedent. On decedent’s death, his second wife contended that the notes were part of decedent’s estate for the purposes of her statutory share despite the cancellation provision. The court stated its test as follows:

On the question of the effect of the transfer of personal property by a husband during his lifetime which operates to diminish the distributive share the wife would otherwise have in the estate . . . substantially all authority is to the effect that the question of good faith is controlling. If the transfer of personal property by the husband during his lifetime is a mere device and means by which he retains to himself the use and benefit of the property during his lifetime, and at his death seeks to deprive the widow of her distributive share, it is to be regarded as fraudulent as to the wife. . . .

On the issue of fraud presented, the burden of proof is upon the surviving widow to establish by a preponderance of the evidence that, in making these gifts to his children, the father was actuated by bad motive and fraudulent intent, and that the entire transaction was a mere device by which he sought to defraud her.

**B. The Real vs. Illusory Test**

Many courts were dissatisfied with the intent test. In 1937, the New York Court of Appeals considered the question in the leading case of *Newman v. Dore.* Three days prior to his death, Ferdinand Strauss created trusts to which he transferred all his real and personal property, leaving almost no property in his estate to

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21 *In re Estate of Sides,* 228 N.W. 619 (Neb. 1930).
22 *Id.* at 619–620.
23 *Id.* at 620.
24 *Id.*
25 *Id.*
26 *Id.* at 622. After weighing the evidence, the court held there was no fraud in the gifts.
which the elective share could attach. In those trusts, decedent reserved the right to revoke the trusts, the right to receive the income from the trusts, and control over the powers given to the trustees. The court characterized the situation as:

[B]y the trust agreement which transferred to the trustees the settlor’s entire property, the settlor reserved substantially the same rights to enjoy and control the disposition of the property as he previously had possessed, and the inference is inescapable that the trust agreements were executed by the settlor, as the [lower] court has found “with the intention and for the purpose of diminishing his estate and thereby to reduce in amount the share” of his wife in his estate upon his death and as a “contrivance to deprive . . . his widow of any rights in and to his property upon his death.” They had no other purpose and substantially they had no other effect.

In finding that the trusts were subject to the widow’s elective share, the court rejected the intent test:

[In a few states] it is the intent to defeat the wife’s contingent rights which creates the invalidity and it seems that an absolute transfer of all his property by a married man during his life, if made with other purpose and intent than to cut off an unloved wife, is valid even though its effect is to deprive the wife of any share of the property of her husband at his death . . . .

Motive or intent is an unsatisfactory test of the validity of a transfer of property. In most jurisdictions it has been rejected, sometimes for the reason that it would cast doubt upon the validity of all transfers made by a married man . . . sometimes because it is difficult to find a satisfactory logical foundation for it . . . [I]t would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory . . . . The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory

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28 *Id.*
29 *Id.* at 968. The trust provided that the trustees could exercise their powers “in such manner only as the settlor shall from time to time direct in writing.” *Id.*
30 *Id.*
transfer.\footnote{Id. at 968–69. It should be noted that the court refused to formulate a general test of how much control the settlor could retain without including the transfer in the spouse’s elective share. See id. at 969. It remained as such until, in a later case involving “Totten” trusts, the court finally formulated a rule that the control retained by the creator of a “Totten” trust was not sufficient to render the trust subject to the elective share. In re Halpern, 100 N.E.2d 120, 121–22 (N.Y. 1951).}

The importance of the New York decision was that it established a test of control retained by the decedent as an alternative test to the intent or motive test.\footnote{See Robert C. Bensing, \textit{Inter Vivos Trusts and the Election Rights of a Surviving Spouse}, 42 Ky. L.J. 616, 617 (1953/1954).}

C. Status of the Tests

The “control” or “real vs. illusory” test of \textit{Newman v. Dore}, proved so popular and was accepted by so many courts that it quickly became the test of a majority of jurisdictions.\footnote{See \textit{MacDonald}, supra note 1, at 106–07.} The real vs. illusory test was objective.\footnote{Id. at 117.} The motive test was subjective and depended on an inquiry into the intent of a person who was unavailable to testify.\footnote{See Bensing, supra note 33, at 617.} It was no surprise that a majority of the courts adopted the “real vs. illusory” test.\footnote{See, e.g., Bolles v. Toledo Trust Co., 58 N.E.2d 381, 396 (Ohio 1944) (explaining that revocable trusts were voidable by the widow if it appeared to the court that they were designed by the husband to deprive her of statutory rights).}

But some courts were not satisfied. They wanted to include certain transfers (primarily revocable trusts) in the amount subject to the elective share.\footnote{See Bensing, supra note 33, at 623–24.} However, in most cases (as long as the grantor did not retain complete control over the trust administration), the majority rule would not allow the inclusion of the trust in the elective share.\footnote{See supra text accompanying notes 6–8. A discussion of the augmented estate statute is beyond the scope of this article.} Some states turned to statutory solutions, such as the augmented estate.\footnote{See Nanthaniel W. Schwickerath, \textit{Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes}, 48 Drake L. Rev. 769, 798–99 (1999/2000).} But some legislatures proved unwilling to adopt such statutes.\footnote{Id. at 803–04.
by statute, needs a brief exploration.

III. TAMING THE “UNRULY HORSE” OF PUBLIC POLICY

In a previous article, Begleiter, supra note 15, I examined the role of and sources of public policy in wills and trusts. Beginning from the universal recognition that statutes enacted by the legislature of a state are the primary source of public policy, Id. at 141–42, I examined the role of courts in applying public policy when the legislature has enacted a statute on the subject. Id. at 143, 155. In such a case the courts view their role as deciding whether the statute expresses a public policy and determining the substance of the policy. Id. The courts “hesitate to ‘infer a broad public policy from a statute which is limited in its scope . . . .’” Id. The court’s role when a statute exists is quite restricted. See Begleiter, supra note 15, at 143, 148. The court’s job is only to discover the policy of the statute. Id. It should not extend the statute by over generalizing the legislative policy but rather confine its examination to the statute. Id. The court should not declare public policy nor expand the statute to provide protection that the legislature has chosen not to provide in the statute.

In sum, the court’s role in declaring public policy where a statute exists is quite restricted. While a court may discover the policy motivating the enactment of the statute, it should not broaden the statute to encompass situations that the legislature chose not to cover. These decisions are for the legislature, not the courts.

IV. THE ELECTIVE SHARE IN THE COURTS

The courts were responsible for creating the entire issue of whether certain lifetime transactions created will substitutes that could be included in the elective share, until the state legislatures stepped in. See supra Sections I–II.

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42 Begleiter, supra note 15.
43 Id. at 141–42.
44 Id. at 143, 155.
45 Id. at 143.
46 Id. (quoting Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 285 (Iowa 2000)).
47 See Begleiter, supra note 15, at 143, 148.
48 Id.
49 Id.
50 Id. (citing Carl v. Children’s Hosp., 702 A.2d 159, 163 (D.C. 1997)).
51 Begleiter, supra note 15, at 155.
52 See id.
53 See supra Sections I–II.
continue to try to do so even after the “real vs. illusory” test became established in the courts.\textsuperscript{54}

\textbf{A. Totten Trusts: Since the Courts Created the Device, the Courts Can Subject it to the Spousal Elective Share}

In \textit{In re Estate of Jeruzal},\textsuperscript{55} decedent created eleven savings account (Totten) trusts for his relatives or relatives of his first wife.\textsuperscript{56} Decedent had separated from, but never divorced, his first wife but bequeathed her a life estate in his homestead and half of his estate.\textsuperscript{57} The court held that a Totten trust is real and not illusory, and the Totten trusts created by decedent were not included in the amount subject to the spouse’s right of election.\textsuperscript{58} However, in dicta, the court stated:

We are not satisfied that either the New York or Maryland rule should be adopted. While the Maryland rule is more equitable, it provides no clear standard of application. Under both the New York and Maryland rules, the trust is either good against the spouse or void altogether. We would prefer the Restatement rule, by which the beneficiaries receive what the decedent intended them to have except so far as the trust funds are necessary to satisfy the statutory interests of the spouse after the general assets of the estate have been exhausted. However, in view of the widespread use of Totten trusts in the area of testamentary disposition, we do not feel free to adopt the Restatement rule without first giving the legislature an opportunity to provide for it by statute as was done in Pennsylvania.

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However, this court will feel free to follow the Restatement rule hereafter if the legislature declines to act on this matter. The Totten trust itself is a judicial creation, limiting the effect of statutory provisions for the disposition of property by will. \textit{It is therefore our duty} to subject this judicially created doctrine to such limitations as are necessary to prevent the defeat of substantive statutory

\textsuperscript{54} See supra Section II.B–C.
\textsuperscript{55} \textit{In re Estate of Jeruzal}, 130 N.W.2d 473 (Minn. 1964).
\textsuperscript{56} \textit{Id. at} 475.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id. at} 481.
policies.\textsuperscript{59}

So, simply because Totten trusts are a judicial creation, the Minnesota court believes the court has a duty to subject them to a judicially created rule to include them in the elective share if necessary to satisfy the elective share to the extent the estate is insufficient.\textsuperscript{60} Does the court believe the legislature is incapable of accomplishing this?

In addition, not all courts agree with the \textit{Jeruzal} analysis. In \textit{Dalia v. Lawrence},\textsuperscript{61} decedent established two Totten trusts in favor of his children from his first marriage.\textsuperscript{62} The question at issue was whether the creation of these accounts violated the statute of wills because they were not executed with will formalities and were therefore included in the intestate share of the decedent’s widow.\textsuperscript{63} In rejecting this argument, the court said:

We first note that most of the authorities that include such trust accounts in the decedent’s estate... do so on the basis of an unstated premise: that the issue should be decided, not by interpretation of the applicable statutory provisions, but rather as a matter of policy in light of general common law and equitable principles. We do not share that premise. In our view, whether a surviving spouse may treat such a trust as part of his or her intestate share is a question of statutory interpretation: whether such property is within the meaning of the phrase, “the intestate estate of the deceased ...”. That statute is the sole source of, and provides the sole measurement of, the surviving spouse’s right to inherit from the decedent.\textsuperscript{64}

Examining the statute, the court held that “a surviving spouse’s elective share in lieu of what he or she would take under a will does

\textsuperscript{59} Id. (emphasis added); see also Montgomery v. Michaels, 301 N.E.2d 465, 466 (Ill. 1973) (“Some cases suggest that the answer should depend upon the intent of the deceased spouse in creating the trust.”). It should be noted that the Minnesota Legislature adopted the UPC version of the augmented estate so the court’s policy never became effective. See \textsc{Eugene F. Scoles, Edward C. Halbach, Jr., Patricia Gilchrist Roberts & Martin D. Begleiter, Problems and Materials on Decedents’ Estates and Trusts} 518 (7th ed. 2006).

\textsuperscript{60} \textit{Jeruzal}, 130 N.W.2d at 481.

\textsuperscript{61} \textit{Dalia v. Lawrence}, 627 A.2d 392 (Conn. 1993).

\textsuperscript{62} Id. at 394–95.

\textsuperscript{63} Id. at 394, 397. It should be noted that although this is not exactly the same question as whether a Totten trust should be subject to the elective share, the case was argued on the theory that a surviving spouse should be treated as a creditor and as a spouse in a marital dissolution, \textit{id.} at 399–400, and thus the position and arguments are the same as those made in the elective share cases.

\textsuperscript{64} \textit{Id.} at 400 (citation omitted).
not include the proceeds of a [Totten trust] account, because those proceeds cannot be regarded as ‘passing under the will’ within the meaning of [the statute].”

The *Lawrence* opinion correctly recognizes the difference between a court’s function in a case where no statute exists and in a case where a statute is involved. Where no statute is controlling, the court should be careful in declaring public policy (particularly from judicial decisions). If a statute exists, the court is restricted to interpreting the statute and should confine its inquiry to the policy declared by the statute. In the Totten trust cases, the fact that a Totten trust is a judicial creation has caused confusion by the court in evaluating the issue.

### B. Death Should Be Like Divorce, so the Court May Apply “Equitable Distribution” Rules to the Elective Share

The Supreme Judicial Court of Massachusetts took a completely different approach to expanding the property subject to the spouse’s elective share in the celebrated case of *Sullivan v. Burkin*. Mr. Sullivan declared himself trustee of real estate, reserving the income for life plus any of the corpus he requested and the right to revoke the trust. He and his wife had been separated for many years but were not divorced. He explicitly excluded her from his will. The spouse claimed that the trust was part of the estate. The court held, based on precedent in Massachusetts, that the trust was not testamentary but was a valid inter vivos trust, and even where the donor retained substantial rights and powers over the trust, the trust property in this case would not be included in the estate for the purposes of the widow’s elective share. The court then announced that for future cases (for trusts created or amended after the date of the opinion), for the purposes of the elective share, a trust under which the spouse retained a power to revoke or a general lifetime power of appointment would be included.

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65 Id. at 402.
67 Id.
68 See *In re Estate of Jeruzal*, 130 N.W.2d 473, 481 (Minn. 1964).
70 Id. at 573.
71 See id. at 573–74.
72 Id. at 573.
73 Id. at 574.
74 Id.
75 Id. at 574–75.
court explained its rule for future cases as follows:

We announce for the future that, as to any inter vivos trust created or amended after the date of this opinion, we shall no longer follow the rule announced in *Kerwin v. Donaghy* [holding that the right of election does not extend to property given away during lifetime]. There have been significant changes since 1945 in public policy considerations bearing on the right of one spouse to treat his or her property as he or she wishes during marriage. The interests of one spouse in the property of the other have been substantially increased upon the dissolution of a marriage by divorce. . . . It is neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an inter vivos trust created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her spouse.

The rule we now favor would treat as part of “the estate of the deceased” for the purposes of [the elective share statute], assets of an inter vivos trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment, exercisable by deed or by will.

The court then went on to list the questions it left for future resolution.

The difficulty with the court’s decision is that it was the legislature that made the changes in the divorce statute. Had the legislature decided to make similar changes in the elective share statute, it would certainly have done so. It did not. Since the legislature did not make these changes, it was not the right nor the province of the court to do so under the guise of interpreting the word “estate” in the statute. What the court did was enact its own view of public policy in an area where a statute existed, going well beyond the permitted role of courts in this area.

A later Massachusetts decision recognized the flaw in this reasoning and put some limits on *Sullivan*. Josephine D’Amore, Jean Bongaard’s mother, created a trust and conveyed an

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76 Id. at 577. For a detailed explanation of the statutory changes in divorce law in Massachusetts since 1945, see id. at 577 n.6.
77 Id. at 577–78.
78 Id. at 577 n.6.
apartment building to it.81 On her death, Jean became the trustee and life beneficiary.82 “The trust incorporated by reference a schedule of beneficiaries,” providing for the disposition of the trust property after Jean’s death.83 After the mother’s death, Jean had the right to amend or terminate the trust.84 A year after the trust was created, Jean’s mother signed a deed (prepared by another attorney) as an individual, conveying the property outright to Jean and not mentioning the trust.85 After holding that, after the mother’s death in 1979 Jean held the property as trustee and not individually,86 the court took up the question of whether, because of the extensive powers given to Jean in the trust, her husband could include the trust property in his elective share on Jean’s death.87 First, the court held that the trust property was not subject to the elective share of Jean’s husband because it was not created by Jean, but by a third party (Jean’s mother), and the rule in Sullivan applies only to trusts created during the marriage by the decedent.88 However, an amicus brief urged extending Sullivan to include as elective share estate “any property, including any trust assets, that would have been treated as marital property to be divided on divorce.”89 The court refused to do this because to do so “completely ignores basic principles of statutory construction.”90 The court explained:

The question before us is what “estate” the Legislature intended as the “estate” to be divided under that formula. We are not deciding a common-law issue of property rights, which we may update according to our views of the appropriate development of that common law, but are instead interpreting a statute. . . . We see no basis for believing that the Legislature’s use of the term “estate of the deceased,” which has been in the statute in its present form since 1956, somehow intended to incorporate principles of property division upon divorce that were not made part of [that

81 Id. at 337.
82 Id.
83 Id.
84 Id. at 337–38.
85 Id. at 338.
86 Id. at 339.
87 See id. at 340.
88 Id. at 341.
89 Id. at 342. The amicus brief so urging was filed by the Women’s Bar Association of Massachusetts. Id.
90 Id. at 342.
statute] until 1974.\textsuperscript{91} After noting that “estate of the deceased” means the decedent’s probate estate,\textsuperscript{92} the court continued:

Regardless whether changing times and the modern array of possible will substitutes may make it advisable to expand the term beyond the mere probate estate, we are not at liberty to update statutes merely because, in our view, they no longer suffice to serve their intended purpose. This is particularly true when the Legislature itself has recently considered numerous proposals to modernize the elective share statute . . . . That the current version of the statute is woefully inadequate to satisfy modern notions of a decedent spouse’s obligation to support the surviving spouse or modern notions of marital property does not authorize us to tinker with the statute’s provisions in order to remedy those inadequacies. It is up to the Legislature to choose between the complex—and apparently controversial—options for modernizing this outdated scheme . . . .\textsuperscript{93}

The court gets it exactly right. The only regret is that the court did not re-examine \textit{Sullivan v. Burkin} and apply its analysis to that decision. Had it done so, it would have likely found that the decision of whether to extend the statute should also have been done by the legislature.

The decision in \textit{Sullivan} goes far beyond what is permissible for the courts to do in statutory construction. It amounts to judicial legislation and lack of self-restraint by the courts.

Furthermore, in a case decided under a UPC type statute, the North Dakota Supreme Court criticized the reasoning of \textit{Sullivan}: “The policy considerations permitting a surviving spouse to receive an elective share of the decedent’s augmented estate are different than the policy considerations underlying an equitable distribution in a divorce action.”\textsuperscript{94}

\textbf{C. The Multifactor Approach: Enumerating so Many Factors for Fraud on the Spouse’s Share that a Court Can Do Anything It Wants}

Perhaps the case showing most clearly the ability of a court to

\begin{quote}
\textsuperscript{91} Id. at 343 (emphasis added) (citation omitted).
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 343–44.
\textsuperscript{94} Zimmermann v. Zimmerman, 633 N.W.2d 594, 600 (N.D. 2001).
\end{quote}
manipulate the elective share statute is \textit{White v. Sargent}[^95]. The court there, based on \textit{Windsor v. Leonard}[^96], listed five factors which would be evaluated in determining whether a lifetime transfer was a fraud on the spouse’s marital rights and would thus be included in the gross estate for elective share purposes.\textsuperscript{97} The factors listed by the court are:

1. the completeness of the transfer;
2. the motive for the transfer;
3. participation by the transferee in the alleged fraud on the surviving spouse;
4. the amount of time between the transfer and the decedent’s death; and
5. the degree to which the surviving spouse is left without an interest in decedent’s property or other means of support.\textsuperscript{98}

We have previously seen that courts disregarded the motive or intent test because of its subjective nature and the unreliability of the evidence offered in the cases.\textsuperscript{99} The degree to which the spouse is left without support is a circumstance that the legislature can make a part of the elective share if it so desires.\textsuperscript{100} This is a legislative decision.\textsuperscript{101} Assuming Congress did not incorporate this factor into the District of Columbia code, it is not proper for the court to do so. Exactly what the length of time between the transfer and decedent’s death, and participation by the transferee, have to do with whether the transfer should be included in the estate is difficult to understand in any event, but once again these are questions for the legislature. So the only proper factor in this list is the completeness of the transfer. The court’s analysis shows how it manipulates these factors to make the transfer subject to the elective share. This sort of elective share analysis should be called what it is: improper policy making by a court.

[^97]: \textit{White}, 85 A.2d at 664–67 (citing \textit{Windsor}, 475 F.2d at 934).
[^98]: \textit{White}, 85 A.2d at 665–67. In the original case, these factors are rendered in paragraph form. I have changed the form to a list for ease of reading.
[^99]: See supra Section II.C.
D. Courts Refusing to Improperly Extend the Real vs. Illusory Test to Areas Where the Legislature has the Right to Act

The last three subsections have discussed the attempts of various courts to invade the legislative province by inventing new policy tests to subject more lifetime transfers to the elective share. Many other courts have resisted this trend. A brief discussion of a representative sample of these cases will show that most courts resist the temptation to improperly create policy in this area.

In Johnson v. La Grange State Bank, the court held that a revocable trust created by decedent was not part of the elective share. The court noted that the Illinois Legislature had enacted a statute making intent to defraud a necessary element in including a lifetime transfer in the elective share.

In Karsenty v. Schoukroun, the court held that transfer-on-death (TOD) accounts were not included in the spousal share under a statute providing an electing spouse with a “one-third share of the net estate.” The court noted that by statute “net estate [refers to] the property of the decedent passing by testate succession,” and this included only property in which the decedent had an interest at his death. This definition did not include the TOD account. The court noted that it had to respect the model chosen by the legislature, stating that: “In effect, if we were to hold that dominion and control (even absolute control) is per se fraud on marital rights... we would be imposing, by judicial fiat, a kind of augmented estate model eschewed by the Legislature.... This we shall not endorse.”

Similarly, where a statute exempted life insurance and retirement benefits from the estate subject to the elective share, the

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102 Johnson v. La Grange State Bank, 383 N.E.2d 185 (Ill. 1978).
103 Id. at 197.
104 Id. at 192.
105 Karsenty v. Schoukroun, 959 A.2d 1147 (Md. 2008).
106 Id. at 1157 (quoting Md. CODE ANN., EST. & TRUSTS § 3-203(b) (LexisNexis 2014)).
107 Karsenty, 959 A.2d at 1158 (quoting Md. CODE ANN., EST. & TRUSTS § 3-203(a)).
108 Karsenty, 959 A.2d at 1158.
109 Id. at 1159.
110 Id. at 1159. In Dumas v. Estate of Dumas the court reaffirmed, based on a statute, that a valid inter vivos trust bars the settlor’s spouse from claiming an elective share of the trust even though the decedent reserved all the income from the trust, the right to revoke and amend the trust, and the right to withdraw all the assets, Dumas v. Estate of Dumas, 627 N.E.2d 978, 980 (Ohio 1994), over a dissent that wished to impose a rule like the one used in Sullivan v. Burkin, id. at 983–86 (Resnick, J., dissenting) (citing Sullivan v. Burkin, 460 N.E.2d 572, 574–75 (Mass. 1984)).
court refused to nullify the exemption laws and subject the life insurance to the elective share. And in a jurisdiction that had adopted the UPC but had rejected the provision that the augmented estate included premarital transfers to a revocable trust, the court respected the legislative decision by refusing to include the trust assets in the augmented estate, saying: “As we know, however, it is the Legislature’s function through the enactment of statutes to declare what is the law and public policy of this state. And the Legislature has declared its public policy choice by rejecting the revised article II of the UPC.”

In a case involving Totten trusts, the court determined that the question of whether they should be subject to the elective share should not be decided by “policy in light of general common law and equitable principles” but rather the question “is a question of statutory interpretation. . . . That statute is the sole source of, and provides the sole measurement of, the surviving spouse’s right to inherit from the decedent.” Other cases could be cited, but the above-discussed cases show that the vast majority of the courts reject attempts to substitute their own analysis of policy for that of the legislature.

E. Summary

Since the decision in *Neuman v. Dore* solidified that the test for including will substitutes in the spousal elective share amount was the “real vs. illusory” test, some courts have attempted to expand the test of the legislatures to engraft their own policy analysis on the question. On the whole, these attempts have been unsuccessful.

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112 Chrisp v. Chrisp, 759 N.W.2d 87, 95 (Neb. 2009).
113 Id. at 97.
114 Dalia v. Lawrence, 627 A.2d 392, 400 (Conn. 1993).
115 See, e.g., Friedberg v. Sunbank/Miami, N.A., 648 So. 2d 204, 206 (Fla. Dist. Ct. App. 1994) (applying the applicable statute and not the court’s own policy); Soltis v. First of Am. Bank-Muskegon, 513 N.W.2d 148, 151 (Mich. Ct. App. 1994) (ruling in line with the dictates of the legislature); *In re Estate of Francis*, 394 S.E.2d 150, 156 (N.C. 1990) (declining to rule outside the confines of the relevant statute); Barrett v. Barrett, 894 A.2d 891, 898 (R.I. 2006) (“It is not this Court’s place to substitute for the will of the Legislature [our] own ideas as to justice, expediency, or policy of the law.”) (quoting Blais v. Franklin, 77 A. 172, 177 (R.I. 1910) (alteration in original)); Furia v. Furia, 658 A.2d 548, 552 (R.I. 1994) (“It is not the Supreme Court’s function to rewrite or amend statutes that the General Assembly enacted.”). *See also Russell v. Russell*, 758 So. 2d 533, 538 (Ala. 1999) (“[A]labama rejected the UPC’s augmented-estate concept. Thus, we have 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.”), overruled on other grounds by Oliver v. Shealey, 67 So. 3d 73, 76 (Ala. 2011) (overruling *Russell* due to improper notice of appeal).
The analysis of these courts does not comport with the limited role of courts in developing policy where a statute exists, and most courts have rejected these attempts.

V. THE RESTATEMENT: A NEW THEORY

One of the early sections of the new Restatement (Third) of Trusts devised a new approach to the “real vs. illusory” question. While stating that a revocable trust, even one over which the settlor retains extensive rights, is not testamentary (that is, need not be executed with will formalities), such “a trust is ordinarily subject to substantive restrictions on testation,” including the elective share. The Restatement formulates this rule on the ground of treating “functional equivalents similarly” and, while allowing the grantor to choose the form of property disposition, not allowing the grantor “to provide an escape from serious, substantive policies.” The Restatement grounds this rule on policies restricting disposition of property. The comments to the Restatement explain:

Although serious policies restricting disposition of property after the owner’s death would seem to make most sense if expressly made applicable as well to will substitutes, they are often expressed in narrow statutory language referring only to wills or to decedents’ estates. Despite the narrow wording of a relevant statute, however, and although the trust is otherwise valid, a trust may be subject to a restrictive policy and, as appropriate to the circumstances, may be set aside in whole or in part because the trust or part of it involves a disposition that could not effectively have been made by will. Thus, a revocable inter vivos trust generally will not be given effect to the extent the settlor is prohibited from disposing of similar property for a similar purpose by will. This result is not dependent on a finding that the trust is “illusory” or that it was “intended to evade” the restriction on testamentary disposition.

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117 Id. § 25 & cmts. a, d.
118 Id. § 25 cmt. a.
119 Id. at cmt. d.
120 See infra Section VI for a discussion on the extent to which this statement is correct.
121 RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. d (footnote added). It should be noted that in subsection (1) the Restatement states that such an inter vivos trust is valid despite the extent of rights retained by the grantor. Id. § 25(1). This combination of rules is curious
Quite simply, the Restatement promulgates a policy rule, without benefit of legislation, that trusts under which the grantor retains significant rights are subject to the elective share of the spouse.\textsuperscript{122} The “real vs. illusory” test is abrogated.\textsuperscript{123} Except for the word “ordinarily”\textsuperscript{124} (which is not further explained), the rule appears to be invariable and based solely on the Restatement’s view of the desirable policy.\textsuperscript{125} Without expressing disagreement with the policy choice, however, can we not assert that developing such policies is the role of the legislature, not of the courts?\textsuperscript{126}

Almost all states have enacted statutes covering the spousal elective share.\textsuperscript{127} If those statutes are narrowly worded, the legislature has so chosen and, if it desires, can easily change the statute. The point is that one may agree or disagree with the policy of the Restatement, but to formulate and adopt an inflexible rule subjecting revocable trusts to the elective share statute and urging courts to adopt that inflexible rule without legislative sanction goes far beyond what is proper for courts.\textsuperscript{128}

So far, only one case has adopted the Restatement (Third) of Trusts’ rule.\textsuperscript{129} In \textit{Sieh v. Sieh}, decedent husband created an inter

\begin{flushleft}
\textsuperscript{122} \textsc{Restatement (Third) of Trusts} § 25 cmt. a. \\
\textsuperscript{123} \textit{Id.} at cmt. d. \\
\textsuperscript{124} \textit{Id.} § 25(2). \\
\textsuperscript{125} \textit{Id.} § 25 cmt. a. \\
\textsuperscript{126} Begleiter, supra note 15, at 148. \\
\textsuperscript{127} \textsc{Restatement (Third) of Trusts} § 25 cmt. d. \\
\textsuperscript{128} Since the Restatement of Trusts is limited to trusts, it can apply its new rule only to revocable trusts and “Totten” trusts, see \textsc{Restatement (Third) of Trusts} §§ 25, 26, although the comments recommend the rule for all will substitutes, \textit{id.} § 25(1). \\
\textsuperscript{129} \textit{Sieh v. Sieh}, 713 N.W.2d 194, 198 (Iowa 2006), overruled in part by \textit{In re Estate of Myers}, 825 N.W.2d 1 (Iowa 2012). In two other cases, Restatement § 25 is mentioned. Bell v. Estate of Bell, 2008-NMCA-045, ¶ 23, 181 P.3d 708, 722 (“Decedent’s continued control over the assets as Trustee did not make these assets a part of the probate estate” (citing \textsc{Restatement (Third) of Trusts} § 25(1))); Barrett v. Barrett, 894 A.2d 891, 900 n.9 (R.I. 2006) (Robinson, J., dissenting). 
\end{flushleft}
vivos trust prior to his marriage, retaining the power to revoke the trust.\textsuperscript{130} After his death, his wife (whom he married six years after creating the trust)\textsuperscript{131} exercised her election to take her statutory share under Iowa law\textsuperscript{132} and brought an action to include the trust assets in the amount subject to her right of election.\textsuperscript{133} The court held that the trust was to be included in the amount subject to the spouse’s elective share.\textsuperscript{134} The court first noted that it had previously held that a general creditor could collect from the assets of a revocable inter vivos trust following the grantor’s death\textsuperscript{135} and that a surviving spouse should not be in a less favorable position than a general creditor.\textsuperscript{136} Second, after quoting several sections of the Restatement (Third) of Property: Wills and Other Donative Transfers\textsuperscript{137} and the Restatement (Third) of Trusts,\textsuperscript{138} the court adopted the American Law Institute’s view on the question.\textsuperscript{139}

The opinion of the court is short and simple. It contains no other reasoning supporting its decision.\textsuperscript{140}

To evaluate the effect of the Restatement approach to the problem, it is necessary to consider the results of the cases under the “real vs. illusory” test and under the Restatement as applied to various will substitutes. I now turn to that task.

\textsuperscript{130} \textit{Sieh}, 713 N.W.2d at 195.

\textsuperscript{131} \textit{Id}.

\textsuperscript{132} IOWA CODE ANN. § 633.238 (West 2009).

\textsuperscript{133} \textit{Sieh}, 713 N.W.2d at 195–96.

\textsuperscript{134} \textit{Id.} at 198.

\textsuperscript{135} \textit{Id.} (citing Phillips v. Roe, 580 N.W.2d 810, 811 (Iowa 1998)).

\textsuperscript{136} \textit{Sieh}, 713 N.W.2d at 198.

\textsuperscript{137} \textit{Id.} at 196–197 (providing that where the decedent retains extensive rights in an inter vivos trust, the property is “owned in substance” by the decedent and included in the amount subject to the elective share (quoting \textit{RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS} § 9.1(c) & cmt. j (2003)) (internal quotation marks omitted)).

\textsuperscript{138} \textit{Sieh}, 713 N.W.2d at 197 (quoting \textit{RESTATEMENT (THIRD) OF TRUSTS} § 25(2) & cmt. d (2003); see also supra notes 116–125 and accompany text (discussing these same provisions of the Restatement)).

\textsuperscript{139} \textit{Sieh}, 713 N.W.2d at 198.

\textsuperscript{140} Not mentioned by the court, but possibly influencing the decision, was the fact that the Iowa Legislature had added section 633.238(1)(d) to the Code, including revocable trusts in the amount subject to the spouse’s elective share. S.F. 379, § 14, 81st Gen. Assemb., Reg. Sess. (Iowa 2005). That amendment had been enacted prior to the court’s decision in \textit{Sieh}, but was inapplicable to the \textit{Sieh} case because the decedent had died prior to the effective date of the amendment. See \textit{IOWA CODE ANN.} § 633.238 (West 2014); \textit{Sieh}, 713 N.W.2d at 195 (stating that the decedent died on September 25, 2003).
VI. WILL SUBSTITUTES UNDER THE ELECTIVE SHARE: THE VIEWS OF THE COURTS AND THE RESTATEMENT

A. Revocable Trusts

Revocable trust cases constitute the largest class of cases spouses attempt to include in the elective share.\footnote{See infra notes 142–43.} The majority of the cases hold that the surviving spouse may not include the revocable trust in the amount subject to the election, at least where the deceased spouse retained only the right to revoke, the right to income for life, and a power to withdraw principle.\footnote{See, e.g., Russell v. Russell, 758 So. 2d 533, 538 (Ala. 1999) ("[W]e have 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."); Friedberg v. Sunbank/Miami, N.A., 648 So. 2d 204, 205–06 (Fla. Dist. Ct. App. 1994) ("[T]he trial court did not err when it denied the petition for an elective share against the assets of a revocable trust."); Leazenby v. Clinton Cnty. Bank & Trust Co., 355 N.E.2d 861, 866 (Ind. Ct. App. 1976) ("[T]he retention of a life estate in the income from the property transferred to the trust, and the reservation of powers in the trust instrument to revoke, modify, amend, or alter the trust, did not invalidate the trust . . . ."); Johnson v. La Orange State Bank, 383 N.E.2d 185, 197 (Ill. 1978) ("The fact that Mrs. Havey contributed all the funds to the accounts and retained the right to withdraw them does not negate the existence of donative intent required to validate a gift."); Karsenty v. Schoukroun, 959 A.2d 1147, 1165–66 (Md. 2008) (holding that the fact that the decedent retained “absolute control” over the inter vivos trust was not enough to invalidate it); Soltis v. First of Am. Bank-Muskegon, 513 N.W.2d 148, 150–51 (Mich. Ct. App. 1994) ("[T]he fact that the grantor makes certain reservations in creating the trust does not necessarily affect the validity of the trust."); see also Dumas v. Estate of Dumas, 627 N.E.2d 978, 983 (Ohio 1994) ("[A] valid, nontestamentary trust executed by a settlor and in existence at the time of his or her death bars the settlor’s spouse from claiming a distributive share in the trust’s assets . . . even though the spouse is the trustee, derives all income from the trust, reserves the rights to revoke or amend the trust and to withdraw and deposit assets.").} A significant minority of cases hold that the revocable trust is included in the elective share.\footnote{White v. Sargent, 857 A.2d 668 (D.C. 2005); Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984).}

Under the Restatement (Third) of Trusts, of course, such a trust would be includable in the amount subject to the spouse’s elective share.\footnote{RESTATEMENT (THIRD) OF TRUSTS § 25(2) (2003).}

B. Totten Trusts

A “Totten Trust”\footnote{Named after the leading case in the area, In re Totten, 71 N.E. 748 (N.Y. 1904).} is a deposit in a bank in the depositor’s name “as trustee” or “in trust” for another person.\footnote{See RESTATEMENT (THIRD) OF TRUSTS § 26.} The deposit creates, by the weight of authority, a “tentative trust” that is revoked pro
tanto by a withdrawal, and which may be revoked or modified by the depositor’s will.\textsuperscript{147} To the extent not revoked, the beneficiary may enforce the tentative trust on the depositor’s death.\textsuperscript{148}

The cases on whether these court-recognized trusts are subject to the elective share are split.\textsuperscript{149} Under the Restatement, Totten trusts would be subject to the spouse’s elective share.\textsuperscript{150}

C. PODs, TODs, and Similar Registration Forms

This category includes payment-on-death bank accounts, transfer-on-death security registrations, real property transfer-on-death deeds, and similar arrangements. Generalizing, such arrangements provide that the owner/transferor owns all rights to the accounts, security or realty during lifetime, and, at the owner’s death, the property passes to the designated beneficiary.\textsuperscript{151}

Apparently, without benefit of a statute, these will substitutes were recognized in a few states\textsuperscript{152} and rejected in a few others.\textsuperscript{153} However, these will substitutes became widespread only on the development of uniform acts.\textsuperscript{154} The first act was the Uniform Probate Code sections on multiple party accounts\textsuperscript{155} and the separate Uniform Multiple-Persons Accounts Act,\textsuperscript{156} which was

\textsuperscript{147} Id.; see also id. at cmts. c, e (discussing the right of the depositor to revoke or terminate a tentative trust and the statutory protections that exist in most states for financial institutions that make payments in reliance on the deposits made “as trustee” or “in trust”).

\textsuperscript{148} Id. at cmt. c.

\textsuperscript{149} For cases ruling that Totten trusts are not subject to the spouse’s elective share, see Dalia v. Lawrence, 627 A.2d 392, 395–396, 400 (Conn. 1993); In re Halpern’s Estate, 100 N.E.2d 120, 122 (N.Y. 1951), overruled by In re Estate of Agioritis, 357 N.E.2d 979, 981–982 (N.Y. 1976) (basing decision on statute enacted subsequent to the Halpern decision). For cases determining Totten trusts are subject to the spouse’s elective share, see Montgomery v. Michaels, 301 N.E.2d 465, 468 (Ill. 1973); Bongaards v. Millen, 793 N.E.2d 335, 338, 352 (Mass. 2003).

\textsuperscript{151} See Restatement (Third) of Trusts § 26 cmt. d.

\textsuperscript{152} Id. at reporter’s note 10 (citing Macon v. First National Bank of Ashford, 378 So. 2d 1128, 1129, (Ala. Civ. App. 1979); In re Estate of Wright, 308 N.E.2d 319, 320, 324 (Ill. App. Ct. 1974)).

\textsuperscript{153} See Restatement (Third) of Trusts § 7.1 reporter’s note 10 (citing Matter of Collier, 381 So. 2d 1338, 1340, 1343 (Miss. 1980); Blais v. Colebrook Guar. Sav. Bank, 220 A.2d 763–65 (N.H. 1966)).

\textsuperscript{154} See William M. McGovern, Jr., Nonprobate Transfers Under the Revised Uniform Probate Code, 55 Ala. L. Rev. 1299, 1298–1330 (1992) (suggesting that the popularity of UPC article VI reflected a general preference at the time for avoiding probative transfers).


\textsuperscript{156} Unif. MULTIPLE-PERS. ACCOUNTS ACT, 8B U.L.A. 3 (2001). This was drafted as a separate act following its inclusion in the UPC. See John H. Langbein & Lawrence W.
derived from it. This was followed by the Uniform TOD Security Registration Act\(^{157}\) and the recent Uniform Real Property Transfer on Death Act.\(^{158}\)

Without going into detail concerning any of the uniform acts, all provide generally that the transferor possesses all the rights in the account or real property during lifetime, and the beneficiary has rights only following the death of the transferor.\(^{159}\) For the purposes of this Article, the most significant point is that only the Uniform Real Property Transfer on Death Act contains a provision which allows an adopting state to insert a reference to the elective share statute if the state wishes to make the transfer on death subject to that statute.\(^{160}\) The other two acts contain no such provision.\(^{161}\)

The Uniform Real Property Transfer on Death Act clearly chooses the correct route on dealing with whether the will substitute is subject to the elective share by providing for a statutory section to explicitly resolve the question. Why did the other two acts not choose this course? One possibility is that article II of the UPC was substantially altered in 1990 with the intent of including as many nonprobate transfers as possible into the augmented estate.\(^{162}\)

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\(^{158}\) UNIF. REAL PROP. TRANSFER ON DEATH ACT, 8B U.L.A. 139 (Supp. 2014).


\(^{160}\) Section 13(a) of the Real Property Transfer on Death Act, entitled “Effect of Transfer on Death Deed at Transferor’s Death”, provides:

(a) Except as otherwise provided in the transfer on death deed[,] [or in this section[,] [or in [cite state statutes on antilapse, revocation by divorce or homicide, survival and simultaneous death, and elective share, if applicable to nonprobate transfers]], on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death . . .

UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13(a) (alterations in original) (emphasis added).

A Legislative Note following the section encourages states enacting the act to extend the rules mentioned to nonprobate property. See id. § 13 legislative note.

\(^{161}\) The other acts do provide some rules on the extent to which the property covered is subject to statutory allowances. See UNIF. TOD SEC. REGISTRATION ACT § 9, 8B U.L.A. 412 (2001); UNIF. MULTIPLE-PERS. ACCOUNTS ACT § 15, 8B U.L.A. 25 (2001).

\(^{162}\) See UNIF. PROBATE CODE §§ 2-204 to -207 (amended 2010), 8 U.L.A. 156, 158, 169, 171 (2013). This was after the promulgation of the Uniform TOD Security Registration Act and the Uniform Multiple-Persons Accounts Act. Since 1990, the Uniform Law Commission has been more sensitive to making nonprobate transfers subject to the elective share, as was done in the Uniform Real Property Transfers on Death Act. I thank Professor Thomas P. Gallanis of The University of Iowa, Reporter for the Uniform Real Property Transfers on Death Act, for suggesting this explanation. E-mail from Thomas P. Gallanis, N. William Hines Chair in Law, Univ. of Iowa, to Martin D. Begleiter, Ellis and Nelle Levitt Distinguished Professor of
D. Gifts Causa Mortis (in Contemplation of Death)

Gifts causa mortis (in contemplation of death) are gifts given when the donor is in fear of impending death.\textsuperscript{163} The gift is revocable, and in some states revocation is presumed if the donor recovers from the peril.\textsuperscript{164} The presumption of revocation may be overcome by proof that an absolute gift was intended by the donor.\textsuperscript{165} Therefore, the gift causa mortis functions very much as a will, except that delivery of the subject of the gift is required for a gift causa mortis.\textsuperscript{166}

There is a paucity of cases concerning whether gifts causa mortis are included as part of the “estate” subject to the spouse’s elective share.\textsuperscript{167} In dictum, the court in \textit{Dunnewind v. Cook} implied that gifts causa mortis are subject to the spouse’s right of election.\textsuperscript{168} However, another court found a similar transfer, that gave the creating child the passbook to a survivorship account when decedent was dying, was not subject to the spouse’s elective share.\textsuperscript{169} The cases appear to diverge on whether the court finds the donor intended the gift to take effect immediately or not.\textsuperscript{170} The Restatement (Third) of Property: Wills and Other Donative Transfers would, not surprisingly, make such gifts subject to the elective share.\textsuperscript{171}

Once again, the inclusion of such gifts in the elective share is properly a subject for the legislature, rather than for the courts.\textsuperscript{172}

\textsuperscript{163} \textsc{Thomas E. Atkinson}, \textsc{Handbook of the Law of Wills} 200 (2d ed. 1953).
\textsuperscript{164} See id. at 200–01.
\textsuperscript{165} Id. at 201.
\textsuperscript{166} Id. at 204–05. Atkinson specifies some other differences between a will and a gift causa mortis. Id. at 205. For example, a will usually needs to be in writing whereas a gift causa mortis is usually not, a will is not required to be executed in “immediate apprehension” of impending death, and real property cannot be disposed of by a gift causa mortis. Id.
\textsuperscript{168} \textit{Dunnewind}, 697 N.E.2d at 490 (stating that because the grantor had been diagnosed with terminal cancer shortly prior to creating the irrevocable trust at issue, the trust gave a “testamentary character” to the transfer).
\textsuperscript{169} \textit{Dalia}, 627 A.2d at 396–97, 403–04.
\textsuperscript{170} See supra notes 168–69 and accompanying text.
\textsuperscript{171} \textsc{Restatement (Third) of Prop.: Wills and Other Donative Transfers} § 9.1 cmt. k (2003).
\textsuperscript{172} See discussion infra Section VI.G.
E. Joint Bank Accounts with Rights of Survivorship and Joint Tenancies

Joint tenancies grant possession (lifetime rights) to all of the joint tenants. Perhaps due to the lifetime possession aspect of joint tenancies and their feudal, historical origin, most of the cases have held that joint tenancies are not included in the spouse’s elective share absent a statute. The Restatement (Third) of Trusts, being limited to trust issues, does not treat this question. Even the Restatement (Third) of Property: Wills and Other Donative Transfers, although stating that joint tenancy is often used as a will substitute, does not explicitly include joint tenancy property in the nonprobate transfers included in states whose statutes subject the decedent’s “estate” to the elective share.

F. Life Insurance

Life insurance contracts contain numerous lifetime rights and options. The proceeds pass by contract and beneficiary designation outside of probate and are thus not part of decedent’s “estate.” The vast majority of cases hold life insurance proceeds are not subject to a spouse’s elective share.

As in the case of joint tenancy, the Restatement (Third) of Property does not specifically subject life insurance proceeds to the elective share, but if the insured remains the owner of the policy until his or her death, the policy could be considered to be indirectly subject to the elective share under the vague test promulgated in

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174 McGovern et al., supra note 1, at 240–41.
175 Dalia v. Lawrence, 627 A.2d 392, 396, 399–400 (Conn. 1993) (holding that the joint savings account created by the decedent and held in both the decedent and his son’s name was not part of the spouse’s elective share); Johnson v. La Grange State Bank, 383 N.E.2d 185, 197 (Ill. 1978); In re Estate of Francis, 394 S.E.2d 150, 154 (N.C. 1990).
176 Restatement (Third) of Prop.: Wills and Other Donative Transfers § 7.1 cmt. e.
177 Id. §§ 7.2, 9.1; see also id. § 7.2 cmt. g (noting that protective doctrines, such as invalidity due to the donor’s incapacity or another’s wrongdoing, apply fully to will substitutes, while protections against disinherance apply on a selective basis). However, although not directly included, the Restatement may indirectly include joint tenancies because of decedent’s right to “invade, or sever.” Id. § 9.1 cmt. j.
178 See id. § 7.1 cmt. c.
179 Id.
181 See Restatement (Third) of Prop.: Wills and Other Donative Transfers § 9.1 cmt. j.
the comments.\textsuperscript{182}

\textbf{G. Summary}

This section has reviewed the more common types of property alleged to be subject to the spousal share. To summarize, most of the cases have held that the major types of will substitutes are not included in the spousal share in states not having an augmented estate statute or a specific statute applicable to the type of property at issue. This is in accord with the theory advanced in this article that when a statute covering a topic (such as the elective share) exists, the function of the court is to narrowly and within strict bounds construe the statute. Extending the statute to nonprobate property is not the function of the court. Rather, it is a task for the legislature.

On the whole, the courts have been relatively faithful to their task, as evidenced by the above discussion. Some courts have felt it is their duty to impose their own views of public policy on the statute. What remains is a discussion of two recent cases termed by Robert Sitkoff as “reflecting the displacement of purposive interpretation by textualism.”\textsuperscript{183} These cases reflect a decisional policy in line with the theory of this article.

\textbf{VII. THE RECENT TREND OF DEFERRING TO THE LEGISLATURE}

The counterrtrend to the attempt to include will substitutes in the “estate” subject to the spouse’s elective share is exemplified by two significant recent cases. The first is \textit{Poland v. Nalee}\textsuperscript{184} decided by the Supreme Court of Wyoming in 2011. The facts were simple and classic. Donna George died with a pour-over will and a revocable inter vivos trust intended to disinherit her surviving spouse.\textsuperscript{185} About a year before she died, decedent transferred significant

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{182} \textit{Id.} The broad test used in the comment is: Although property owned or owned in substance by the decedent . . . that passed outside of probate at the decedent’s death is not part of the decedent’s probate estate, such property is owned in substance by the decedent through various powers or rights, such as the power to revoke, withdraw, invade, or sever . . . . Consequently, for purposes of calculating the amount of the elective share, the value of property owned or owned in substance by the decedent immediately before death that passed outside of probate at the decedent’s death to donees other than the surviving spouse is counted as part of the decedent’s “estate.”
\item\textsuperscript{183} Sitkoff, \textit{supra} note 3, at 657.
\item\textsuperscript{184} \textit{Poland v. Nalee}, 2011 WY 157, 265 P.3d 222 (Wyo. 2011).
\item\textsuperscript{185} \textit{Id.} at ¶ 1, 265 P.3d at 223.
\end{itemize}
\end{footnotesize}
inherited property to her revocable inter vivos trust.\textsuperscript{186} Joint property held by decedent and her spouse was not included in the trust and was received by the spouse.\textsuperscript{187} In the trust agreement, decedent clearly and specifically stated her intent that her husband should receive none of the trust property.\textsuperscript{188} Decedent’s husband elected against the will and attempted to include the trust assets in the amount subject to the election.\textsuperscript{189} The Supreme Court of Wyoming denied the husband’s arguments.\textsuperscript{190} First, the husband argued that the elective share provisions preclude a spouse from transferring marital property.\textsuperscript{191} The court disagreed, noting that “[d]eath is not divorce . . . the Legislature has adopted quite differing rules governing the disposition of property following those two events.”\textsuperscript{192} Next, the husband argued that the “estate” for elective share purposes should include the revocable trust “as a matter of policy.”\textsuperscript{193} The court disagreed, holding “the Wyoming Probate Code does not incorporate the augmented estate concept.”\textsuperscript{194} The court noted: 

[U]ntil the Wyoming legislature adopts a motive-based approach to the elective share, as well as the requirement that non-probate assets be added back to the probate estate for purposes of the elective share, the policy adopted by other states is largely irrelevant. . . . Under any circumstances this is a policy choice for the Wyoming legislature to consider, and either accept or reject.\textsuperscript{195} 

The court then considered whether nonprobate assets are added to the estate under the Wyoming statute.\textsuperscript{196} Elaborating on the

\textsuperscript{186} \textit{Id.} at ¶ 3–4, 265 P.3d at 224.

\textsuperscript{187} \textit{Id.} at ¶ 8, 265 P.3d at 224. After her death, her spouse instituted an action seeking $125,000 from the trust as a creditor for work he performed on a building owned by the decedent and transferred to the trust. \textit{Id.} at ¶ 8, 265 P.3d at 224. The district court granted summary judgment for the trust on that claim. \textit{Id.} at ¶ 2, 265 P.3d at 223–24.

\textsuperscript{188} \textit{Id.} at ¶ 14–15, 265 P.3d at 225–26.

\textsuperscript{189} \textit{Id.} at ¶ 27, 265 P.3d at 228.

\textsuperscript{190} \textit{Id.} at ¶ 43, 265 P.3d at 230.

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.} (quoting Bongaards v. Millen, 793 N.E.2d 335, 345 (Mass. 2003)).

\textsuperscript{193} \textit{Poland}, 2011 WY 157, ¶ 43, 265 P.3d at 230.

\textsuperscript{194} \textit{Id.} at ¶ 44, 265 P.3d at 230.

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} \textit{Id.} at ¶ 45–46, 265 P.3d at 230–31. The Wyoming Statute, section 2-5-101(a) of \textit{Wyoming Statutes Annotated}, provides in part:

(a) If a married person domiciled in this state shall \textit{by will} deprive the surviving spouse of more than the elective share, as hereafter set forth, of the property \textit{which is subject to disposition under the will}, reduced by funeral and administration expenses, homestead allowance, family allowances and exemption, and enforceable claims, the surviving spouse has a right of election to take an elective share of that property . . . .
statute, the court said:

[T]he plain language of the elective share statute is limited to “disposition by will.” This so-called bright line rule is not dependent on the decedent’s intent or retention of control. Section 2-5-101 begins with the condition, “[i]f a married person domiciled in this state shall by will deprive the surviving spouse of more than the elective share, . . . [.]” Here, the surviving spouse was not deprived by will, but rather by the Decedent’s transfer of property to a revocable inter vivos Trust prior to her death. We have found no legal basis, nor has [the husband] cited any legal basis, for this Court to augment for purposes of the elective share the probate estate of the Decedent with the property transferred to the Trust prior to Decedent’s death or with property transferred by will substitutes at the time of Decedent’s death.197

The court noted that in 2007 the legislature removed language from the code that provided that property in a revocable trust is available to satisfy the elective share and other allowances.198 In addition, the legislature provided that a court shall not consider cases from states that have adopted the UTC.199 From these statutes, the court concluded that the decedent’s husband had no right to augment the decedent’s estate with the assets in decedent’s revocable trust.200

The second such case is In re Estate of Myers. I previously mentioned the Iowa case of Sieh v. Sieh,201 which adopted the rationale of section twenty-five of the Restatement (Third) of Trusts to hold a revocable trust includable in the spouse’s elective share amount.202 I also mentioned that Iowa had adopted a similar rule by statute that was not applicable to Sieh since decedent had died prior to the statute’s effective date.203 Iowa has a traditional statute giving a spouse a percentage of the “estate,” except for a special

\[\text{id. at } \S 45, 265 P.3d at 231 (quoting Wyo. Stat. Ann. } \S 2-5-101(a) (2014)).
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197 Poland, 2011 WY 157, ¶ 45, 265 P.3d at 231 (second alteration in original) (quoting Wyo. Stat. Ann. } \S 2-5-101(a)).

198 Poland, 2011 WY 157, ¶ 52, 265 P.3d at 232.

199 Id. at ¶ 52, 265 P.3d at 232 (quoting Wyo. Stat. Ann. } \S 4-10-1101).

200 Poland, 2011 WY 157, ¶ 57, 265 P.3d at 233.

201 See supra notes 129–40 and accompanying text.


203 See supra note 140.
provision including revocable trusts. Karen Myers died leaving a checking account, a CD, and an annuity in payable-on-death (POD) form. Howard Myers, Karen’s spouse, elected his spousal share and sued to include these assets in the amount subject to his election. Noting that, after the Sieh decision, the issue of whether POD assets (and other will substitutes) should be included in the elective share had divided the trial courts of Iowa, and after reviewing the holding and rationale of Sieh, the court analyzed the effect of adding “limited to” to section 633.238(1) of the Iowa Code, making it read: “[T]he elective share of the surviving spouse shall be limited to all of the following.” The court held that “the 2009 amendment to section 633.238 trumps Sieh.”

The court added:

It is clear that the legislature, by this language, intended to limit the property that would be included in the surviving spouse’s elective share to the four categories of property specifically identified in the statute. This interpretation is consistent with the general assembly’s explanation accompanying the House version of the bill. The explanation states, “The bill limits the elective share of the surviving spouse who elects to take against a decedent’s will to the

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204 Iowa’s statute is as follows:
Elective share of surviving spouse.
1. The elective share of the surviving spouse shall be limited to all of the following: a. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no express written relinquishment of right. b. All personal property that, at the time of death, was in the hands of the decedent as the head of a family, exempt from execution. c. One-third of all personal property of the decedent that is not necessary for the payment of debts and charges. d. One-third in value of the property held in trust not necessary for the payment of debts and charges over which the decedent was a grantor and retained at the time of death the power to alter, amend, or revoke the trust, or over which the decedent waived or rescinded any such power within one year of the date of death, and to which the surviving spouse has not made any express written relinquishment.
2. The elective share described in this section shall be in lieu of any property the spouse would otherwise receive under the last will and testament of the decedent, through intestacy, or under the terms of a revocable trust.

IOWA CODE ANN. § 633.238 (West 2014) (emphasis added). The two words emphasized were added to the statute in 2009, S.F. 365, § 4, 83d Gen. Assemb., 1st Reg. Sess. (Iowa 2009), and are effective as to estates of decedents dying on or after July 1, 2009, id. § 14. These two words form the basis of the Myers decision and will be discussed below.

205 In re Estate of Myers, 825 N.W.2d 1, 2 (Iowa 2012).
206 Id.
207 Id. at 3 n.3.
208 Id. at 4–5.
209 Id. at 6 (quoting IOWA CODE ANN. § 633.238(1)) (internal quotation marks omitted).
210 In re Estate of Myers, 825 N.W.2d at 2.
elective share portions contained in Code section 633.238 and does not include nonprobate or nontrust assets.” We conclude the 2009 amendment legislatively abrogated Sieh in part. Under the controlling language of the amendment, the elective share is limited to those assets specifically enumerated in section 633.238(1) and cannot be judicially expanded.211

Commenting on the court’s role in public policy, the court concluded:

The assignees make a strong public policy argument that elective share rights may be defeated by the use of POD assets if we interpret section 633.238 to omit them. . . . The assignees’ policy argument is properly directed to the legislature.212

Poland and Myers illustrate the recent, restrictive view of the role of courts in interpreting legislation. When a statute exists (as it does in almost all states on the elective share), these two cases view the role of courts as to implement the policy determined by the legislature, rather than to expand that policy into one the courts favor. Whether this view will expand into other states in the future is uncertain.

VIII. CONCLUSION

In declaring public policy, it is clear that the statutes adopted by the legislature are the primary source of public policy.213 In a previous discussion of the role of courts in formulating public policy, I proposed a new test for the court’s exercise of public policy when legislation exists. “When a statute on the subject exists, the court’s only function is to find the policy of the statute. . . . The court must be careful to not over generalize the legislative policy, and it must not void transactions the Legislature has explicitly excluded from the scope of the statute.”214

This article has examined the elective share, an area in which statutes exist in most states. This is also an area in which courts for many years tried to extend the statute to impose their views of “correct policy” on the statute. In so doing such courts distorted the statutes and the legislative policy. The recent countertrend

211 Id. at 6 (emphasis added).
212 Id. at 7–8.
213 Begleiter, supra note 15, at 141.
214 Id. at 155.
exemplified by the *Poland* and *Myers* cases\(^{215}\) reflects an attempt to rein in some courts’ attempts to develop public policy on their own. It remains to be seen if this trend will continue, or if courts will continue to try to formulate public policy in this area.

\(^{215}\) See *supra* Section VII.