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ABOLITION OF DOWER IN VIRGINIA: THE UNIFORM PROBATE CODE AS AN ALTERNATIVE TO PROPOSED LEGISLATION*

J. Rodney Johnson†

ELSEWHERE in the pages of this issue the reader will find a discussion of some of the more important legislation enacted by the 1972 session of the General Assembly of Virginia.¹ This article is concerned with one of the bills that did not pass—the bill to abolish dower and curtesy.² Why all this concern with a dead bill, especially since the dower problem is one of long standing which has sustained attacks before? The answer is that the forces of opposition have grown stronger each year among Virginia lawyers. The Virginia Advisory Legislative Council has recommended the conversion of dower into a fee simple estate³ and the bill under consideration, which does just that, passed the House by a vote of 95 to 0. It is expected that this bill, or a reasonable facsimile, will be reintroduced next year and, if it clears the Senate committee, Senate passage will be a virtual certainty. Therefore, the purpose of this article is not to argue for the abolition of dower. That has already been done in several of the law reviews of this state.⁴ Rather, it is assumed that dower is to be abolished and the question for discussion is, “What vehicle should we choose to replace dower?”⁵

The original design of dower at common law was to provide for the maintenance of the widow and, through her, the maintenance of the

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¹ See pages 171 through 185.

² COMMITTEE AMENDMENT IN THE NATURE OF A SUBSTITUTE FOR HOUSE BILL NO. 112 (Proposed by the House Committee for Courts of Justice).

³ Report of the VALC to the Governor and the General Assembly of Virginia on Commissioners of Accounts and Fiduciaries (1967).

⁴ Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 U. RICH. L. REV. 299 (1969); Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157 (1960).

⁵ While the question is posed in terms of dower and the following remarks will most often refer to the widow's rights, it should be recognized that curtesy is a similar problem, though not as extensive, and thus what is said hereafter is also applicable, *mutatis mutandis*, to the widower's rights.

decedent's younger children.⁶ This is substantially the American approach to dower today, that is, extending the husband's duty of support to the period following his death.⁷ In addition, there is a growing appreciation of the fact that this property being set off to the widow is not really "from" her deceased husband, even though legal title may have been vested in him. Instead, it is recognized that the widow has been at least in part responsible for the earning of the family fortune and has a right to her fair share therein.⁸ Thus it is suggested that any plan for the widow's provision should pay due attention to three major factors: (1) the provision must be fair under the circumstances, that is, in relation to the particular estate being distributed; (2) the provision must be workable as opposed to a masterpiece of theoretical justice that fails in practical application due to its complexity; and (3) the provision must be designed so as to prevent a scheming husband from defeating it through the variety of will substitutes that are available today. It is in the light of these three factors that the bill will be discussed.

Briefly stated, the bill abolishes the estates of dower and curtesy, eliminates any distinction between real estate and personal property for purposes of determining the surviving spouse's share in the estate of the deceased spouse, and provides that the surviving spouse is a beneficiary in class one of intestate succession receiving one-third of the deceased spouse's entire estate with the other two-thirds going to the decedent's descendants.⁹ Where there are no descendants then the surviving spouse will take all of the decedent's estate if there is no will and is guaranteed at least one-half of it if there is a will.

Leaving factor number one to the side for the moment and examining the bill in light of the second factor—workability—one quickly comes to the conclusion that the provision made by this bill is a model of sim-

⁶ 1 MINOR ON REAL PROPERTY § 250 (2d ed., Ribble).

⁷ 1 AMERICAN LAW OF PROPERTY § 5.5 (Casner ed., 1950).

⁸ This recognition of her right to a share is represented in Virginia by legislation making her an heir of her husband in step number 10 in 1787; advancing her to step number 4 in 1922; and elevating her to step number 2 in 1956.

⁹ The bill accomplishes the foregoing by repealing VA. CODE ANN. § 64.1-19 to -44 (1968) eliminating both exceptions to VA. CODE ANN. § 64.1-11 (1968), striking out the word "personal" in line 3 of VA. CODE ANN. § 64.1-16 (1968) and making class one in VA. CODE ANN. § 64.1-1 (1968) read as follows:

First. One-third to the surviving consort, and the remaining two-thirds to the intestate's children and their descendants; but, if there be no surviving consort, then the whole shall go to the intestate's children and their descendants.

plicity and no problems can be foreseen from the standpoint of practical implementation. Indeed, this is the strongest argument for the bill. But, with the same dispatch that one quickly hails the bill for passing factor number two, one can quickly condemn the bill for failing to meet factor number three—the ability to withstand a scheming husband. In the course on wills here at the University of Richmond, students explore nine different ways for a husband to defeat his wife's dower. These methods are of varying degrees of sophistication and have varying chances of success. However, one thing can be said of them all. Nothing can be done to defeat the wife's inchoate right of dower in real estate once the husband has become beneficially seised of the particular parcel in question. Anything that is to be done must be done prior to acquisition of the parcel by the husband. But if this new bill should pass, instead of eliminating all of the loopholes that now exist, a new one will be created for defeating the wife's rights.

Under the bill, the widow is entitled to one-third of her deceased husband's estate, both real and personal. However, in order for this to have any economic meaning, it assumes that there will be a probate estate. And this does not have to be, even in the case of the most wealthy person.¹⁰ Keeping in mind that all distinctions between realty and personalty that now exist for purposes of determining the widow's share would be abolished by the bill, one notes that, if this bill should be passed, the widow's rights in her husband's real estate will correspond to what her rights have always been in his personal estate. And what are her rights in his personalty under current Virginia law? Virtually none. The Virginia law has been settled since 1813¹¹ that a husband may allow his personal property to go to waste, may destroy it, or may give it away at anytime during his life and his wife has no cause to complain. The reason for this is that she has no rights in the personal property of her husband during his lifetime. It is only when the personalty remains a part of his estate at the time of his death that she becomes entitled to a portion of it. This, then, is just the opposite of real estate, because once the husband becomes seised of realty he cannot defeat his wife's inchoate dower interest by any act of his own. But if dower should be abolished by the present bill, a husband could

¹⁰ For instance one could have a million dollars worth of property held in joint tenancy with survivorship, or in some sort of a trust with a remainder over, and neither of these assets would be a part of his "probate estate" as they pass outside of probate proceedings.

¹¹ *Lightfoot's Ex'rs. v. Colgin*, 19 Va. (5 Munf.) 42 (1813).

defeat his wife's interest in his realty at any time during his life, just as he now can in the case of personalty. A recent case that illustrates this point is *Dillon v. Gow*.¹² In this case Mr. Dillon suffered a coronary thrombosis on Saturday, August 20, 1955, and was immediately admitted to the Medical College of Virginia. The following Monday, August 22, he summoned his attorney to his bedside and thereupon transferred approximately one-half million dollars worth of personal property to a trust. Under the terms of this trust, Mr. Dillon would receive all of the income from this property (corporate stock) for the rest of his life and then, on his death, all of the property would go to his daughter and her family as beneficiaries. Mr. Dillon also retained the power to change the beneficiary designation from his daughter and her family to anyone he might choose (other than to himself, his estate, or his creditors) at anytime during his life. He died twelve days later. The court held that the transfer was effective to defeat the widow's attempt to obtain a portion of this personal property since her husband had parted irrevocably with all but a life estate at the time he executed the trust, and his retained life estate expired with him leaving none of this property in his probate estate.¹³ In this same case, Mr. Dillon tried to prevent his wife from obtaining any interest in their home. He failed because of the law of dower. Had this bill been law, he would have been successful. It is submitted that to place the wife in a position where all of her rights can be cut off by a death-bed transfer is indefensible and makes a mockery of the law since in reality the wife would have no "rights" at all. If any meaning is to be attached to the wife's rights, something must be done to insulate them from the scheming husband.

While still on the subject of protecting the interest given to the widow, it is appropriate to note that there are dangers in addition to that of the scheming husband. For instance, under present law the widow's dower is superior to most creditor's claims. Unless we are talking about an instance of a mortgage being given prior to marriage,

¹² 2 OPINIONS OF BROCKENBROUGH LAMB 78 (Richmond Ch. 1956).

¹³ The one point that worried Judge Lamb in this case—the husband's intent—was laid to rest four years later in *Freed v. Judith Realty Corp.*, 201 Va. 791, 113 S.E.2d 850 (1960). The Supreme Court of Appeals held that "[t]he fact that Freed's purpose in executing the trust . . . may have been to prevent his wife from obtaining any part of the trust fund property at his death through operation of the statute of descent and distribution if he died intestate or through renunciation of his will if he died testate, does not render the trust invalid." *Id.* at 795.

one given to secure the purchase price of a particular parcel, or one given after marriage in which the wife has joined, the widow's dower interest will be set off to her before any of her husband's creditors receive anything.¹⁴ This priority was included in the original formulation of dower law in order to insure that dower's purpose, the support of the widow and minor children, would be achieved and also to close another loophole to the scheming husband.¹⁵ But there is no such protection under the new bill and the widow will take nothing¹⁶ until all of the creditors have been satisfied. Thus, in case of insolvency, although the creditors will be able to share in what assets do remain, the widow will go penniless under the new bill.

The bill would also inadvertently extend the excrescence of *Newton v. Newton*¹⁷ into the area of real estate. This rule is best explained by illustration. Suppose X has an estate consisting of one million dollars in personal property. He bequeaths his estate one-half to his wife and one-half to his church. The bequest to the church is declared void for some reason and the half million intended for it passes by intestate succession. X's nearest blood relative is a fourth cousin. Who takes the intestate half million? The fourth cousin takes due to the wording of Code 64.1-16 which requires a widow either to accept the provision made for her in the will or to renounce that provision and take her forced statutory share. Either way, this widow could take only half of her husband's personalty and the rest would go to the fourth cousin. Is this result really so desirable that we want to extend it into the area of real estate?

Returning to our first factor, we are faced with the question of whether the provision is fair for the widow, keeping in mind her support needs, as well as those of the younger children whose destiny is tied to hers, as well as whether it results in her getting her "fair share" of the estate. At first glance a flat one-third interest in all property (assuming the provision couldn't be easily evaded) does have a ring of apparent fairness—"apparent fairness" because such a fixed

¹⁴ In the three listed cases, these creditors, for reasons of obvious equity, will have a priority over the wife in regard to the specific parcel of realty concerned.

¹⁵ If creditors could defeat dower it would be possible for a husband to evade his wife's rights by mortgaging the realty to the full extent of its value and then disposing of the receipts (personal property) through some form of will substitute.

¹⁶ The widow will take nothing as beneficiary. Her rights to certain exempt property will be noted later.

¹⁷ 199 Va. 785, 102 S.E.2d 312 (1958).

share fails to recognize minimal constant need regardless of the variability of estate size. For example, a widow's share of a \$30,000 estate would be \$10,000, while her share of a \$10,000 estate would be only \$3,333, even though her needs are still the same. This suggests that a successful plan must first address itself to supplying the widow's basic needs and then, after they have been taken care of, address itself to her claim as beneficiary of a portion of the surplus.

This is the approach proposed by the framers of the Uniform Probate Code (UPC)¹⁸ to resolve the complex problem of the widow's rights. While no attempt will be made to explain in detail the far-reaching impact of the UPC,¹⁹ it may be profitable to examine those portions that focus on the problem under consideration. And may it be emphasized that while the UPC is offered to the States as a coordinated package covering the whole of probate law, it has been so designed that it is not necessary for a state wishing to adopt a part of the code to adopt it in its entirety. Rather, the UPC has been structured so that articles or sections of articles can be integrated into existing state statutory schemes, with minor amendments in some cases, or else serve as models for a state's original drafting.²⁰

One of the problems that a new widow must face immediately after her husband's death is the support of herself and the minor children during the period that her husband's affairs are being wound up—the administration period. The UPC provides that the surviving spouse is

¹⁸ The UPC was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August, 1969. In addition to influencing the recent legislation in Maryland and Wisconsin, it has been adopted virtually intact in Idaho and Alaska. The UPC or large portions thereof has been introduced in three additional legislatures, (Arizona, Michigan, and Washington), and it is expected that it will have been introduced in at least five other legislatures, (Colorado, Hawaii, Montana, New Jersey, and Utah), by the end of 1973. There are bar association study committees working on the UPC in a total of 36 states according to the ANNUAL SURVEY OF AMERICAN LAW 1970-71, at 489.

¹⁹ This has already been done in the pages of this review. See Word, *Updating Virginia's Probate Law*, 4 U. RICH. L. REV. 223 (1970). For a Uniform Probate Code Bibliography by the Chief Reporter of the code project, see Wellman, *Law Teachers and The Uniform Probate Code*, 24 J. LEGAL ED. 180 (1972).

²⁰ Remarks of the panelists at the ACLEA National Conference on the Uniform Probate Code, Denver, May 4, 5 and 6, 1972. The official policy statement of the UPC's Joint Editorial Board declares that "[t]he ultimate objective of Uniform Law Commissioners and others who support the Uniform Probate Code is the uniform adoption of the Code in all states. Adoption of parts of the Code is approved in states in which a pragmatic decision suggests that this is a necessary step toward the ultimate goal. 1 UPC Notes 2 (July, 1972).

entitled to a family allowance²¹ during the administration period for the support of herself, the minor children whom the decedent was obligated to support, and the other children who were in fact being supported by the decedent. Instead of fixing a specific amount for the family allowance, the UPC provides that during the first year of the administration period the personal representative may pay out a lump sum not in excess of \$6,000 or monthly payments not over \$500 without any court approval.²² The personal representative's discretion in this matter is not uncontrolled, however, and "[i]n determining the amount of the family allowance, account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed."²³ Provision is also made for the widow's access to a court to request an allowance larger than the one made by the personal representative, to request an extension of the one year period except where the estate is insolvent, as well as for estate claimants to object to the amount of the allowance made by the personal representative.²⁴ While it is possible for litigation to arise under this section, it is believed that the risk is small and far outweighed by the desirability of getting support funds in the widow's hands with dispatch. The UPC also takes the position that the object of supporting the widow and children during this time of need is a sufficient justification for keeping this amount from the husband's general creditors and, accordingly, the family allowance is specifically exempted from and given a priority over all claims against the estate, whether belonging to creditors or beneficiaries.²⁵ It is believed that the creditors, who will in almost every case be businesses, will be better able to absorb what for them will most often be a small loss than will the family of the decedent for whom it may be catastrophic. At this time, the only provision in Virginia law that might be called a family allowance is found in Code § 64.1-126 which requires no comment, only publication, to illustrate its inadequacy.²⁶

²¹ UPC 2-403.

²² UPC 2-404.

²³ Official Comment to UPC 2-403.

²⁴ UPC 2-404.

²⁵ UPC 2-403.

²⁶ "The dead victuals, or as much thereof as may be necessary, which, at the death of any person, shall have been laid in for consumption in his family, shall remain for the use of such family, if the same be desired by any member of it, without account thereof being made. Any livestock necessary for the food of the family may be killed

Next on the list of the widow's needs will be those articles of personal property that are necessary to the maintenance of daily life. Current Virginia law attempts to fill this need by providing that certain enumerated articles vest in the widow, minor children and unmarried daughters still in the decedent's household at the time of his death.²⁷ However, the destiny of any such list is to become outdated with the passage of time and Virginia's statute is no exception. Moreover, it is highly doubtful if a list could be devised that would be fair to all where such opposing groups as rich and poor, owner and renter, urbanite and rural dweller are concerned. The UPC more realistically provides for an allowance of \$3,500²⁸ in exempt property to be selected by the surviving spouse from the household furniture, automobiles, furnishings, appliances and personal effects in the estate. If the value of the exempt property, over any valid security interests therein, is less than \$3,500, the surviving spouse is entitled to other assets to the extent necessary to amount to \$3,500. Here again the UPC, in order to insure attainment of the rather obvious objective, makes this right prior to all claims against the estate. It is believed that a provision of this type has much more potential for coping with the variable needs of a variety of differently situated widows due to its built-in flexibility. In addition, such a provision will be easier to update in the years to come than a list.

Lastly, now that the widow's immediate needs are taken care of during the period of administration, it is felt that she should be provided with a small "nest-egg" to enable her to survive the administration

for that use before the sale or distribution of the estate and the same shall not be taken into account by the administrator or executor of the estate." VA. CODE ANN. § 64.1-127 (1968) also provides for the holding of certain grains, meats, canned goods, and home-prepared food, provided that they are actually in the estate, as well as fifty dollars worth of provisions.

²⁷ VA. CODE ANN. § 64.1-127 (1968) incorporates VA. CODE ANN. § 34-26 to 27 (1970). Space limitations prevent reproduction of this list in its splendor but one can grasp its essence from the following: "(5) All cats, dogs, birds, squirrels, rabbits, and other pets not kept or raised for sale; one cow and her calf until one year old, one horse, six chairs, six plates, one table, twelve knives, twelve forks, two dozen spoons, twelve dishes, or if the family consists of more than twelve, then a plate, knife, fork, and two spoons, and a dish for each member thereof; two basins, one pot, one oven, six pieces of wooden or earthenware; one dining room table, one buffet, china press, one icebox or refrigerator of any construction, one washing machine, one loom and its appurtenances, one kitchen safe or one kitchen cabinet or press, one spinning wheel, one pair of cards, one axe"

²⁸ UPC 2-402.

proceedings with something to fall back on in case of trouble, or to tide her over, or to help her get a new foothold or the like.

The General Assembly of Virginia responded to this need in 1870²⁹ by providing that if the deceased husband had claimed a homestead exemption in his lifetime, it would be continued for the benefit of his widow and minor children after his death. In those cases where the decedent had not claimed such an exemption in his lifetime, provision was made for the homestead exemption to be claimed by his widow and minor children after his death. This exemption, in the amount of \$2,000, could be claimed in any of the realty or personalty in the estate. The same law still exists.³⁰ There is no question as to the adequacy of such a sum in the year 1870, but the inflation of over 100 years has reduced this \$2,000 exemption to a mere shadow of its former size. In addition to this defect, one also notes the following: (1) a widow can assert the homestead exemption against the creditors of her husband only and not against his heirs.³¹ Thus in the case of a decedent dying today with a \$2,000 net personal estate, who is survived by a widow and an adult son, the widow will take \$667 while the remainder goes to the son since the homestead exemption is not available to bar his claim as heir or distributee. (2) Even though the homestead exemption is restricted in application to creditors, it is not applicable to all of them. If the creditor's claim is based on anything other than a contract, the exemption is not applicable³² and the creditor will come in ahead of the widow and the minor children. (3) If any provision is made for the widow in the deceased husband's will, she must elect between this provision and the homestead exemption.³³ She cannot have both. (4) A similar election must be made between her rights as doweress and the homestead exemption³⁴ because again she is not allowed the benefit of both.

The drafters of the UPC have provided for a homestead exemption³⁵ in what they feel is the realistic amount of \$5,000 in order to fill this

²⁹ ACTS OF ASSEMBLY, (1869-70), ch. 157, pp. 198-203.

³⁰ VA. CODE ANN. § 34-11 (1970).

³¹ *Barker v. Jenkins*, 84 Va. 895, 6 S.E. 459 (1888).

³² VA. CODE ANN. § 34-4 (1970).

³³ VA. CODE ANN. § 64.1-29 (1968) provides that such provision will be presumed to be intended as jointure unless the contrary intention plainly appears in the will and then VA. CODE ANN. § 34-12 (1970) requires the widow to elect between jointure and the homestead exemption.

³⁴ VA. CODE ANN. § 34-12 (1970).

³⁵ UPC 2-401.

need. Here again, in order to insure that the purpose of the homestead exemption is accomplished, it is expressly made superior to all claims against the estate.³⁶

This homestead exemption is cumulative with the family allowance and exempt property provisions mentioned earlier and these three combine to provide a well-rounded package for the protection of the widow in an amount ranging from \$8,500 to \$14,500, depending on the amount of the family allowance. Moreover, this basic protection package is in addition to whatever the widow takes under her husband's will or by intestate succession or by her elective share. This is subject to the qualification that if the husband provides for his wife's needs in his will and states that the provision is in lieu of her statutory protection package, she will be put to an election since it would be inequitable to allow her to take both.³⁷ Last, for purposes of estate planning, it should be noted that all of the widow's rights, "or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure."³⁸

Turning our attention to the widow's position as beneficiary, we see that under current Virginia intestate succession law the widow gets dower in the realty and one-third of the personalty if there are children or descendants of deceased children. In case there are no children or descendants of deceased children, she takes all of the realty and personalty. If the husband leaves a will, the wife may take what it gives her or she may renounce it, and take a forced share consisting of dower in the realty and either one-third or one-half of the personalty, depending on whether her husband left children or descendants of deceased children or whether her husband was childless. If the bill under consideration should pass, then the widow would retain her present "rights" in her deceased husband's personalty and would obtain corresponding "rights" in his real property. The word "rights" is put in quotation marks to emphasize that we are not really talking about some-

³⁶ At this point we have noted that the rights to the family allowance, exempt articles, and homestead have a priority over all claims against the estate. If there are insufficient assets to satisfy these three rights, they have the following priority in regard to each other: (1) homestead; (2) family allowance; (3) exempt articles. And, while the children share in the family allowance, they have no interest in the other rights while a parent survives.

³⁷ UPC 2-401, 2-402, and 2-403.

³⁸ UPC 2-204.

thing the widow must get, due to the fact the husband can defeat these "rights" in his property at his whim while still retaining the economic benefit of the property for the duration of his life.

The approach of the UPC is to abolish dower and curtesy,³⁹ to eliminate any distinction between realty and personalty,⁴⁰ and then to draw a line between cases of testacy and intestacy for purposes of determining the surviving spouse's rights. As the UPC is the estate plan for those who die without a will, it is thought desirable to make this estate plan relate to reality. That is, it should duplicate to the extent possible the plan that most people similarly situated would choose if they were given a chance to express a preference. Here one has but to ask any attorney who draws wills about the typical estate plan chosen by a couple with children and a small to moderate size estate. The plan that is almost always adopted is to leave all of the family wealth to the surviving parent, relying on the survivor to care for the children. As a matter of fact, the one factor that influences most couples in this category to make a will is to prevent the family assets from going to the children as opposed to the surviving parent. This is what the UPC does for every estate in this category when it provides for the spouse to take the first \$50,000 worth of assets, after exemptions, and then distributing the excess over \$50,000 one-half to the spouse and the other one-half to be divided among the children and descendants of deceased children of the decedent.⁴¹ Referring to the Probate Fact Sheet attached as an appendix to this article, one can see that the maximum total of exempt property and allowances of \$14,500 exceeds the mean as well as the median intestate estates. Moreover, even if we assume that there will not be a family allowance, the combined homestead and exempt articles allowances (\$8,500) still exceed the median intestate estate. This of course means that the widow will get everything in over one-half of the intestate cases. When we add the \$50,000 that the widow takes as beneficiary to her basic protection package, for a maximum total of \$64,500, one discovers that this amount would

³⁹ UPC 2-113.

⁴⁰ UPC 1-201(33).

⁴¹ UPC 2-102. This priority doesn't exist in the case where, due to several marriages, one or more of the surviving issue are not also issue of the surviving spouse because the assumption that supports the first case is not so strong here. In this case the spouse will get one-half and the issue of the decedent will split the other one-half. If there are no issue but the decedent left one or more parents, the \$50,000 priority is restored and the surviving spouse also gets one-half of all over the first \$50,000. If the decedent left no issue or parents, then all goes to the surviving spouse.

exceed all but four of the intestate cases disclosed in the Richmond survey. Thus the goal of the UPC, to pass everything to the surviving spouse in small or moderate intestate estates, would have been accomplished in 98% of the cases covered by the survey.

A highly desirable spin-off that would be obtained by passing everything to the surviving spouse in these cases would be a decline in guardianships. As nothing will be passing to the minor children, it will not be necessary to appoint a guardian to make up for their legal disability to deal with their own property. It needs no citation of authority to point out that guardianships are perhaps the most cumbersome and expensive property management devices that exist today and thus the prospect of a decline in this area is most welcome.

It may be pointed out that the amount suggested by the UPC is larger than the share given by most state statutes to a surviving spouse. However, it is submitted that the UPC only duplicates what most testators in small and moderate estates choose and, if a particular individual does not want his wife to take this much, he may make a will and cut her share down to the extent permitted by law.

This brings us to a consideration of what we now refer to as the widow's forced share in her husband's estate and which the UPC refers to as the spouse's elective share. This is that portion of her husband's estate that the widow must be allowed to take in any event whether the husband tries to defeat her rights by leaving all of his estate to someone else by will, or by giving all or a portion of it away by some kind of will substitute during his lifetime and then dying either testate or intestate. The UPC provides that, in addition to the basic protection package referred to earlier, a surviving spouse has an elective right to take one-third of the deceased spouse's augmented estate.⁴² As the phrase "augmented estate" naturally suggests, we are talking about giving the widow more than one-third of the probate estate. This is the UPC's answer to the problem of the scheming husband. We simply add to the probate estate the value of those transfers made by the husband during his lifetime that are really in the nature of will substitutes, and then we give the widow one-third of this augmented estate. Tax lawyers will at once recognize that this has long been the law in the case of estate and inheritance taxes. The federal and state govern-

⁴² UPC 2-201. Where one inadvertently omits any provision for the surviving spouse who married the decedent after his will was executed, UPC 2-301 provides for the surviving spouse to get an intestate share.

ments have the concept of "gross estate" which one determines by adding certain tainted transfers⁴³ to the value of what is left in the probate estate in order to fix the amount of taxes due. This approach has long been successful in minimizing estate and inheritance tax avoidance and the framers of the UPC believe that it will also prove effective to minimize the avoidance of the widow's "fair share."

The augmented estate is determined by adding the gratuitous portion of inter vivos transfers to the net probate estate in the following cases, unless the transferee was the decedent's spouse:

- (i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;
- (ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;
- (iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;
- (iv) any transfer made within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.⁴⁴

The web woven by these provisions should result in preventing the husband from defeating his widow's rights in most cases unless he makes an absolute conveyance more than two years prior to his death. But suppose the shoe is on the other foot. Suppose that instead of a scheming husband we have a thoughtful one who has made adequate provisions for his widow and our problem is a scheming widow who is trying to get more than her "fair share." As an answer to this problem, the UPC provides that the gratuitous portion of all inter vivos transfers made by the husband to his wife will be included in his augmented estate if the wife still has the property at the time of her husband's death or if she has transferred it to someone in one of the

⁴³ See, e.g., INT. REV. CODE OF 1954, §§ 2036-38.

⁴⁴ UPC 2-202(1). Life insurance, accident insurance, joint annuities, and pensions are specifically exempted from the augmented estate by 2-202(2) as long as they are payable to a person other than the surviving spouse. This section also provides that any transfer can be excluded if made with the written consent or joinder of the surviving spouse. UPC 2-204 provides for total or partial waiver of the elective right either before or after marriage.

proscribed forms listed above in (i) through (iv).⁴⁵ Then, after the total of the augmented estate is determined, we ascertain the widow's share and charge against it that portion of the augmented estate she has already received—the inter vivos transfers.⁴⁶ This insures that the widow cannot use her right to an elective share to build her portion beyond the one-third interest intended. Where is the burden of the widow's elective share placed? The UPC provides that once we have charged the transfer mentioned above, as well as the value of what the wife receives by testate or intestate succession, against her one-third of the augmented estate, "the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein."⁴⁷

CONCLUSION

This article began by noting that reform was in the air. It is the author's belief that the reform offered is of dubious value to any other than title insurance companies and conveyancers who would no longer have to deal with the problem of dower. It is submitted that the Uniform Probate Code, which "represent[s] the most progressive and scientific thought of the judges, lawyers, and academicians who have worked on it for six years,"⁴⁸ is the best approach to true reform.

⁴⁵ UPC 2-202(3).

⁴⁶ UPC 2-207(a).

⁴⁷ UPC 2-207(b).

⁴⁸ ANNUAL SURVEY OF AMERICAN LAW 1969-70, p. 575.

PROBATE FACT SHEET⁴⁹

Some of the statistical information that follows is derived from a document⁵⁰ distributed to members of the National Conference of Commissioners on Uniform State Laws at their 1969 meeting in Dallas, Texas. The remainder of the data, included in parentheses, is derived from a study of all estates admitted to probate in Richmond, Virginia, from January 1, 1971 through June 30, 1971.⁵¹

Number of Probates		659	(552) ⁵²
Testacy	% of testate estates	60%	(70%)
	% of intestate estates	31%	(30%)
Size of Gross Probate Estate	Mean gross value, all estates	31,097	(57,597)
	Mean gross value, testate estates	41,218	(73,798)
	Mean gross value, intestate estates	8,599	(14,278)
	Median gross value, testate estates	15,000	(20,000)
	Median gross value, intestate estates	6,000	(8,000)

⁴⁹ "For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 187 (1920).

⁵⁰ This document, reproduced in Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970), is a summary of data taken from SUSSMAN, CATES & SMITH, *THE FAMILY AND INHERITANCE*. The authors, a sociology-law team from Case Western Reserve University, Cleveland, Ohio, in a random sample survey sponsored by the Russel Sage Foundation, studied 1 out of every 20 estates released from probate in Cuyahoga County, Ohio (pop. 2 million), from Nov. 9, 1964 to Aug. 8, 1965.

⁵¹ This survey was undertaken by the author in the hope that it would make the Ohio figures more relevant to our time and locale and thus shed more light on the impact of whatever legislation may be passed. It should be noted that the estate values were taken from the Memorandum of Counsel that was filed at the time probate was granted and thus they were estimates as opposed to the more precise values given in the Ohio report.

⁵² It is interesting to note that while 552 estates were admitted to probate in the first half of 1971, the Virginia Bureau of Vital Records and Health Statistics estimates that 1,542 Richmond residents died during this period. Thus, approximately 64% of the estates during this period were settled without any probate proceedings.

Frequency of large (\$60,000) and small (\$2,000) estates 48 (83) estates, or 7.3% (16.4%) of those sampled, grossed over \$60,000. Only 2 (4) of these were intestate. 85 (64) estates, or 13% (12.6%) of those sampled, grossed under \$2,000, and the remaining 526 (405) grossed between \$2,000 and \$60,000.

Survivor Patterns	No.	%
Spouse only	60	9.1
Spouse and lineal heirs	321	48.7
Lineal heirs and no spouse	191	29.0
Collateral kin	75	11.4
No known kin	12	1.8
		<hr/> 100.0

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