

# Report of the Ad Hoc Elective Share Committee

## PROPOSED AMENDMENTS TO THE MASSACHUSETTS UNIFORM PROBATE CODE

### Introduction

In *Sullivan v. Burkin*<sup>1</sup> the Supreme Judicial Court extended the reach of the spousal elective share, G.L. c. 191, §15, to include “assets of an inter vivos trust created during the marriage by a deceased spouse over which he or she alone had a general power of appointment, exercisable of deed or by will.”<sup>2</sup> The SJC used the *Sullivan* case as an opportunity to issue its clarion call to the Massachusetts Legislature to update the state’s spousal elective share declaring that it was “neither equitable nor logical to extend to a divorced spouse greater rights in the [marital] assets...than are extended to a spouse who remains married until the death of his or her spouse.”<sup>3</sup>

Notwithstanding this “expansion” of rights to include assets that the deceased spouse may have transferred to a trust, there is general consensus that the current statute remains antiquated, inequitable and relatively easy to maneuver around.

During the 28 years since the decision in *Sullivan*, a number of individuals and organizations have worked to answer the call of the SJC and update the spousal elective share to bring it in line with the laws governing the division and disposition of assets on a divorce. Despite best efforts and a number of proposals for a new statute, attempts to reach agreement on a new statute stalled. Beginning in 2004 representatives from the Boston Bar Association, the Massachusetts Bar Association, and the Women’s Bar Association formed an *Ad Hoc* Committee (“Committee”) in an effort see if progress toward new legislation could be made.<sup>4</sup> A fresh look and an in-depth analysis of the then pending bills, the options available under the various iterations of the Uniform Probate Code (“UPC”), variations of the UPC considered or adopted by other states, relevant law review articles and discussions with several individuals intimately connected with drafting both the UPC and the Massachusetts Uniform Probate Code (“MUPC”)<sup>5</sup> ensued. In the midst of this in-depth analysis, the Executive Committee of the National Conference of Commissioners on Uniform State Laws adopted amendments to the Spousal Elective Share section of the UPC (“Amendments of

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<sup>1</sup> 390 Mass. 864 (1984)

<sup>2</sup> *Id.* at 873.

<sup>3</sup> *Id.*

<sup>4</sup> Colin Korzec, of U.S. Trust, Bank of America Private Wealth Management, and Deborah Manus, of Nutter McClennen & Fish, LLP, are representing the BBA, Elizabeth Sillin, of Bulkley, Richardson & Gelinas, is representing the MBA, and Kathleen M. O’Connor, of Eckel, Morgan & O’Connor, is representing the WBA. The Committee received the invaluable assistance of Sara Goldman Curley, of Nutter McClennen & Fish, in helping us work through the innumerable and voluminous statutes, proposed statutes, law review papers, etc. during the years that we have been working on this project.

<sup>5</sup> M.G.L. c. 190B.

2008”), providing the Committee with a number of additional options to consider for adoption in Massachusetts. And, of course, while the Committee’s analysis was on-going, Massachusetts adopted the MUPC, which made sweeping changes to the statutory framework governing estates in Massachusetts and under which the intestate share of a surviving spouse is considerably enlarged over what it had been under prior law.

The end of this lengthy journey has led the Committee to the conclusion that the current UPC, as amended in 2008 (“UPC”), model produced the most fair and equitable results.<sup>6</sup>

To understand the changes that might occur if the spousal elective share provisions of the UPC are adopted, it is helpful to understand what happens under our current statute if a spouse elects against the will.

### **Current Massachusetts Law**

Under the current spousal elective share statute<sup>7</sup> in Massachusetts, a surviving spouse, in cases where the decedent left issue, can elect against the decedent’s probate estate and receive a life interest in one-third of the decedent’s personal and real property, and is only entitled to receive the first \$25,000 of that portion outright. If the deceased left kindred but no issue, the life interest in the balance increases to one-half. Other than transfers that fall under the *Sullivan* doctrine, the estate of the deceased does not include non-probate transfers or assets that the decedent may have transferred at any point during the marriage, including deathbed transfers, which are made to either the surviving spouse or to any other beneficiaries.<sup>8</sup>

To understand the proposed change, it is also helpful to understand why we have a spousal elective share in the first place.<sup>9</sup>

“The organizing principle of Anglo-American law is freedom of disposition: the donor’s intention is given effect except as it contravenes public policy”<sup>10</sup> and public policy has long dictated that a spouse cannot be disinherited. The protections against disinheritance of a spouse at early common law were the precursors to today’s spousal elective share: dower and curtesy. Dower gave a surviving widow a life estate in one-third of the inheritable freehold land that her husband may have owned during the marriage. Curtesy gave the husband the same life estate in the inheritable freehold land that his wife held during the marriage - but it was in the entire property, not just a one-

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<sup>6</sup> See Table 1 for an illustration of calculations for four different scenarios under the various proposals.

<sup>7</sup> G.L. c. 191, §15.

<sup>8</sup> In *Bongaards v. Millen*, 440 Mass. 10 (2003), the SJC declined to further expand the right of a surviving spouse to make a claim over property “owned in substance” by the deceased spouse to the elective share “estate” under G.L. c. 191, §15. The Court again noted the lack of progress by the legislature in updating the spousal elective share and the consensus that the existing statute was both outdated and inadequate. The Court stated that the existing statute continues to fail “to provide sufficient support for disinherited spouses and that it has failed to keep pace with the changing principles on which the property rights of married couples are now based.” *Id.* at 34.

<sup>9</sup> For an in-depth analysis of the history of the spousal elective share, the development of the rights of married women under the law, and various alternative proposals to updating the spousal elective share in Massachusetts, see Note, *Marital Property Reform in Massachusetts: A Choice for the New Millennium*, 34 New Eng. L.Rev. 261 (1999). This Note was specifically discussed and analyzed by the Court in *Bongaards*.

<sup>10</sup> See Lawrence W. Waggoner, *The Uniform Probate Code’s Elective Share: Time for a Reassessment*, 37 U. Mich. J.L. Reform 1, 2 (2003).

third interest. Although the antecedents of the spousal elective share did not include rights to personal property<sup>11</sup> the current iterations of spousal elective share include a right, albeit still limited, in both the real and personal property of the decedent.

It is important to note that the need for a spousal elective share is *only* applicable in common law property states. The protection against disinheritance is built into community property state laws which afford the citizens of those states an immediate, vested, legal ownership in all marital property. Thus, there is no legal need or basis for redistributing assets from a deceased spouse's estate to the surviving spouse because he or she already owns an equal share of the marital property.<sup>12</sup>

The current spousal elective share law in Massachusetts continues to reflect this centuries-old public policy which precludes the disinheritance of a spouse. But the rationale for the specific provisions of the current statute is less than clear. Traditionally, there are two organizing principles or theories that have evolved to try to explain why we might want to protect surviving spouses from disinheritance.

The first theory is the support or need theory. This theory holds that a surviving spouse has ongoing financial needs and is entitled to a share of the decedent's estate in order to meet those needs. By necessity, this will provide a surviving spouse a share of a deceased spouse's estate regardless of whether he or she actually needs it and the formulaic approach may provide more or less than is required to meet this theory.

The second theory that has evolved to explain the necessity for a spousal elective share is that there is a need to protect of the rights of the surviving spouse in the property that was acquired during the marriage based on the evolving view that marriage is an economic partnership and that both spouses are entitled to reap the rewards of their joint partnership – regardless of how title is held. However, because the spousal elective share applies only to the deceased spouse's probate estate, plus the narrow expansion afforded under *Sullivan* to certain limited transfers made by the decedent, it is virtually impossible that the surviving spouse's election would apply to the whole of the marital property accumulated during marriage. The surviving spouse might receive non-probate property in joint assets, insurance policies, pension plans, trusts, etc., or may have marital property titled in his or her name already. In these cases, the surviving spouse can receive a disproportionate share of the marital property and still receive an additional share by electing against the will. Conversely, the decedent may have named someone other than the surviving spouse to receive many or all of his or her assets via non-probate methods and the surviving spouse's ability to reach those marital assets can or will be defeated.

Both of the theories underlying traditional spousal elective share laws have long been incorporated into the laws governing the distribution of property when a marriage ends in divorce. Divorcing spouses are entitled first to some basic support and secondly to an equitable share of the marital property.

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<sup>11</sup> Rights in personal property were governed by the English Statute of Distribution of 1670.

<sup>12</sup> Nine states have community property regimes: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

## **The Proposed UPC Spousal Elective Share**

Unlike our current spousal elective share, there is a clear organizing principle governing the spousal elective share section of the UPC: it is specifically designed to reflect the same economic partnership theory of marriage that is in place under the equitable distributions system that is applied when a marriage ends in divorce.

The proposed UPC spousal elective share is also designed to support the dual goals of ease of administration and predictability of result by means of a mechanically determined approximation system. Under the proposed spousal elective share, there is no need to identify the source of the marital property (brought into the marriage, acquired by gift or inheritance, etc.). In essence, the elective share statute simply adds up both parties' properties and multiplies it by a percentage based on the years of marriage and divides the total in half. The elective share is satisfied first with probate<sup>13</sup> or non-probate assets<sup>14</sup> passing from the decedent to the surviving spouse and the marital property portion of the surviving spouse's assets.<sup>15</sup>

The first step in calculating the spousal elective share is to determine the augmented estate. The augmented estate<sup>16</sup> consists of the sum of four types of property:

- 1) the decedent's net probate estate;
- 2) the decedent's non-probate transfers to others;
- 3) the decedent's non-probate transfers to the surviving spouse; and
- 4) the surviving spouse's property and non-probate transfers to others.<sup>17</sup>

The proposed UPC spousal elective share defines the elective share amount as "50 percent of the value of the marital property portion of the augmented estate."<sup>18</sup>

The marital property portion of the augmented estate is the sum of the values of the four types of property multiplied by a percentage that is based on the length of the marriage. The percentages start at 3% for marriages of less than one year and caps at 100% for marriages lasting 15 years or more.<sup>19</sup>

An illustration of how this works:<sup>20</sup> A and B are married for more than five years but less than six years. A dies with a net probate estate of \$300,000 and was the beneficiary of an inter vivos revocable trust that A had established with a corpus at death of \$100,000. The beneficiaries of the

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<sup>13</sup> Section 2-204

<sup>14</sup> Section 2-206

<sup>15</sup> Section 2-207

<sup>16</sup> Section 2-203(a). There are presently eleven states that have adopted the Code's elective share based on this definition of the augmented estate: Alaska, Colorado, Hawaii, Kansas, Minnesota, Montana, North Dakota, South Dakota, Utah, and West Virginia. Nine other states have adopted the Code's elective share but with a modified definition of augmented estate: Connecticut, Delaware, Florida, Maine, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, and Virginia.

<sup>17</sup> These are defined in sections 2-204, 2-205, 2-206, and 2-207, respectively.

<sup>18</sup> Section 2-202(a).

<sup>19</sup> Section 2-203(b).

<sup>20</sup> See Waggoner at 6.

trust and A's Will are A's adult children from an earlier marriage. B's assets were \$200,000. Neither made any other transfers.

1. The augmented estate is \$600,000 (A's \$400,000 and B's \$200,000);
2. Based on the length of the marriage, the marital property portion of the augmented estate is 30% (\$180,000);
3. The elective share amount is 50% of the marital property portion (\$180,000 ÷ 2) or \$90,000;
4. Apply voluntary transfers made by A to B (\$0);
5. Calculate the marital portion that is satisfied by B's assets and non-probate transfers to others (\$200,000 x 30% = \$60,000);
6. Subtract B's portion from the total of the elective share amount (\$90,000 - \$60,000 = \$30,000)
7. The amount to be satisfied from A's assets is \$30,000

Reversing the owner of the assets (B has \$400,000 and A had \$200,000), illustrates how a wealthier spouse, in this case B, is precluded from taking a share from A's estate, which B could do under the present law. The calculations in steps 1 – 4 remain identical. In step 5, B's marital portion is \$400,000 x 30% = \$120,000. Thus B would have the full elective share amount already and A's testamentary disposition would remain undisturbed.

In sharp contrast, under the existing spousal elective share law, B would receive a life estate interest in one-third of A's probate assets (plus any assets in A's revocable trust). After payment to B of the first \$25,000, B would have the life estate interest in \$108,333 of A's estate (\$400,000 ÷ 3 = \$133,333 - \$25,000 = \$108,333).<sup>21</sup>

Applying the above steps to a comparison of current spousal elective share in Massachusetts with the UPC's spousal elective share in 4 cases illustrates the radically different results that occur. In each case, A is the decedent who leaves issue, B is the surviving spouse, and the chart reflects the value of each of their respective estates as of the decedent's date of death:

<b>Years married:</b>	<b>A: \$5,000,000 B: \$10,000,000</b>	<b>A: \$100,000 B: \$25,000</b>	<b>A: \$5,000,000 B: \$250,000</b>	<b>A: \$250,000 B: \$5,000,000</b>
<b>1-2 years</b>				
Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$25,000	\$142,500	\$0
<b>5-6 years</b>				
Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$25,000	\$712,500	\$0
<b>10-11 years</b>				
Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$25,000	\$1,425,000	\$0
<b>15+ years</b>				

<sup>21</sup> Even if the \$108,333 is held in a life estate, as is contemplated by G.L. c. 191, §16, rather than paid out as a lump sum, the disruption to A's estate plan can go on for years, or decades depending on how long the surviving spouse lives. If the total property is in the marital residence, B can effectively tie up the entire estate until B's own death.

Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$37,500	\$2,375,000	\$0

### **Satisfying of the Elective Share**

After calculating the value of the augmented estate and the applicable percentage, the next step is to determine how to satisfy the elective share amount. The first category of property to be used to satisfy the elective share is the property that the decedent transferred to the surviving spouse, whether by will, intestate succession, or non-probate transfers. The second category to apply is the marital assets that are owned by the surviving spouse. Finally, if the sum of those two categories falls short of the elective share amount, then other assets of the decedent are tapped to satisfy the deficiency. Section 2-209(c) of the UPC apportions the amount among the recipients of the deceased spouse's net probate estate and recipients' of nonprobate transfers proportionately to the value of the interest received.

### **Conclusion and General Comments of the Committee**

The Committee recommends the adoption of the Uniform Probate Code elective share and its official comments as approved by the National Conference of Commissioners on Uniform State Laws in 1990, as revised in 1993, and as further revised and amended in 2008<sup>22</sup>, with the following proposed modifications. The Committee recommends incorporating the revisions proposed by the Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) to section 2-213 and its official comments regarding waiver. The Committee also recommends minor modifications for consistency with Massachusetts law.

The Elective Share Ad Hoc Committee  
March 2012

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<sup>22</sup> HISTORY OF REVISIONS AND AMENDMENTS: On January 12, 2008, technical amendments to the UPC were adopted which, among other things, revised the elective share provisions of the UPC (referred to herein as either the 2008 Revisions or the 2008 Amendments). At the annual conference held on July 18-25, 2008, the UPC was again amended. These amendments changed 2-202 by increasing the Supplemental Elective-Share Amount to \$75,000 from \$50,000 to reflect increased cost-of-living but made no other changes to the elective share. A version of the UPC incorporating both the above amendments has been enacted in Colorado, New Mexico, North Dakota, Utah and the U.S. Virgin Islands.

*The Committee recommends the adoption of the text of the following official comments to the UPC Elective Share*

## **UNIFORM PROBATE CODE**

### **Official Text and Comments Approved by the National Conference of Commissioners On Uniform State Laws**

#### **Article II INTESTACY, WILLS, AND DONATIVE TRANSFERS**

##### **PART 2**

##### **ELECTIVE SHARE OF SURVIVING SPOUSE**

###### **GENERAL COMMENT**

The elective share of the surviving spouse was fundamentally revised in 1990 and was reorganized and clarified in 1993 and 2008. The main purpose of the revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable-distribution system applied in both the common-law and community-property states when a marriage ends in divorce. When a marriage ends in death, that theory is also already implemented under the community-property system and under the system promulgated in the Model Marital Property Act. In the common-law states, however, elective-share law has not caught up to the partnership theory of marriage.

The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage (typically a post-widowhood remarriage) in which neither spouse contributed much, if anything, to the acquisition of the other's wealth, except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.

#### **The Partnership Theory of Marriage**

The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of as an expression of the presumed intent of

husbands and wives to pool their fortunes on an equal basis, share and share alike.” M. Glendon, *The Transformation of Family Law* 131 (1989). Under this approach, the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage, i.e., in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance). A decedent who disinherits his or her surviving spouse is seen as having reneged on the bargain. Sometimes the theory is expressed in restitutionary terms, a return-of-contribution notion. Under this approach, the law grants each spouse an entitlement to compensation for non-monetary contributions to the marital enterprise, as “recognition of the activity of one spouse in the home and to compensate not only for this activity but for opportunities lost.” *Id.* See also American Law Institute, *Principles of Family Dissolution* § 4.09 Comment c (2002).

No matter how the rationale is expressed, the community-property system, including that version of community law promulgated in the Model Marital Property Act, recognizes the partnership theory, but it is sometimes thought that the common-law system denies it. In the ongoing marriage, it is true that the basic principle in the common-law (title-based) states is that marital status does not affect the ownership of property. The regime is one of separate property. Each spouse owns all that he or she earns. By contrast, in the community-property states, each spouse acquires an ownership interest in half the property the other earns during the marriage. By granting each spouse upon acquisition an immediate half interest in the earnings of the other, the community-property regimes directly recognize that the couple’s enterprise is in essence collaborative.

The common-law states, however, also give effect or purport to give effect to the partnership theory when a marriage is dissolved by divorce. If the marriage ends in divorce, a spouse who sacrificed his or her financial-earning opportunities to contribute so-called domestic services to the marital enterprise (such as child-rearing and homemaking) stands to be recompensed. All states now follow the equitable-distribution system upon divorce, under which “broad discretion [is given to] trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property. Simply stated, the system of equitable distribution views marriage as essentially a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute-directly and indirectly, financially and nonfinancially-the fruits of which are distributable at divorce.” J. Gregory, *The Law of Equitable Distribution* ¶ 1.03, at p. 1-6 (1989).

The other situation in which spousal property rights figure prominently is disinheritance at death. The original (pre-1990) Uniform Probate Code, along with almost all other non-UPC common-law states, treats this as one of the few instances in American law where the decedent’s testamentary freedom with respect to his or her title-based ownership interests must be curtailed. No matter what the decedent’s intent, the original Uniform Probate Code and almost all of the non-UPC common-law states recognize that the surviving spouse does have some claim to a portion of the decedent’s estate. These statutes provide the spouse a so-called forced share. The forced share is expressed as an option that the survivor can elect or let lapse during the administration of the decedent’s estate, hence in the UPC the forced share is termed the ‘elective’ share.

Elective-share law in the common-law states, however, has not caught up to the partnership

theory of marriage. Under typical American elective-share law, including the elective share provided by the original Uniform Probate Code, a surviving spouse may claim a one-third share of the decedent's estate-not the 50 percent share of the couple's combined assets that the partnership theory would imply.

**Long-term Marriages.** To illustrate the discrepancy between the partnership theory and conventional elective-share law, consider first a long-term marriage, in which the couple's combined assets were accumulated mostly during the course of the marriage. The elective-share fraction of one-third of the decedent's estate plainly does not implement a partnership principle. The actual result depends on which spouse happens to die first and on how the property accumulated during the marriage was nominally titled.

**Example 1-Long-term Marriage under Conventional Forced-share Law.** Consider A and B, who were married in their twenties or early thirties; they never divorced, and A died at age, say, 70, survived by B. For whatever reason, A left a will entirely disinheriting B.

Throughout their long life together, the couple managed to accumulate assets worth \$600,000, marking them as a somewhat affluent but hardly wealthy couple.

Under conventional elective-share law, B's ultimate entitlement depends on the manner in which these \$600,000 in assets were nominally titled as between them. B could end up much poorer or much richer than a 50/50 partnership principle would suggest. The reason is that under conventional elective-share law, B has a claim to one-third of A's "estate."

**Marital Assets Disproportionately Titled in Decedent's Name; Conventional Elective-share Law Frequently Entitles Survivor to Less Than Equal Share of Marital Assets.** If all the marital assets were titled in A's name, B's claim against A's estate would only be for \$200,000-well below B's \$300,000 entitlement produced by the partnership/marital-sharing principle.

If \$500,000 of the marital assets were titled in A's name, B's claim against A's estate would still only be for \$166,500 (1/3 of \$500,000), which when combined with B's "own" \$100,000 yields a \$266,500 cut for B-still below the \$300,000 figure produced by the partnership/marital-sharing principle.

**Marital Assets Equally Titled; Conventional Elective-share Law Entitles Survivor to Disproportionately Large Share.** If \$300,000 of the marital assets were titled in A's name, B would still have a claim against A's estate for \$100,000, which when combined with B's "own" \$300,000 yields a \$400,000 cut for B-well above the \$300,000 amount to which the partnership/marital-sharing principle would lead.

**Marital Assets Disproportionately Titled in Survivor's Name; Conventional Elective-share Law Entitles Survivor to Magnify the Disproportion.** If only \$200,000 were titled in A's name, B would still have a claim against A's estate for \$66,667 (1/3 of \$200,000), even though B was already overcompensated as judged by the partnership/marital-sharing theory.

**Short-term, Later-in-Life Marriages.** Short-term marriages, particularly the post-

widowhood remarriage occurring later in life, present different considerations. Because each spouse in this type of marriage typically comes into the marriage owning assets derived from a former marriage, the one-third fraction of the decedent's estate far exceeds a 50/50 division of assets acquired during the marriage.

**Example 2-Short-term, Later-in-Life Marriage under Conventional Elective-share Law.** Consider B and C. A year or so after A's death, B married C. Both B and C are in their seventies, and after five years of marriage, B dies survived by C. Both B and C have adult children and a few grandchildren by their prior marriages, and each naturally would prefer to leave most or all of his or her property to those children.

The value of the couple's combined assets is \$600,000, \$300,000 of which is titled in B's name (the decedent) and \$300,000 of which is titled in C's name (the survivor).

For reasons that are not immediately apparent, conventional elective-share law gives the survivor, C, a right to claim one-third of B's estate, thereby shrinking B's estate (and hence the share of B's children by B's prior marriage to A) by \$100,000 (reducing it to \$200,000) while supplementing C's assets (which will likely go to C's children by C's prior marriage) by \$100,000 (increasing their value to \$400,000).

Conventional elective-share law, in other words, basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the "loser's" estate. The "winning" spouse who chanced to survive gains a windfall, for this "winner" is unlikely to have made a contribution, monetary or otherwise, to the "loser's" wealth remotely worth one-third.

### **The Redesigned Elective Share**

The redesigned elective share is intended to bring elective-share law into line with the partnership theory of marriage.

In the long-term marriage illustrated in Example 1, the effect of implementing a partnership theory is to increase the entitlement of the surviving spouse when the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of the surviving spouse when the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. Put differently, the effect is both to reward the surviving spouse who sacrificed his or her financial-earning opportunities in order to contribute so-called domestic services to the marital enterprise and to deny an additional windfall to the surviving spouse in whose name the fruits of a long-term marriage were mostly titled.

In the short-term, later-in-life marriage illustrated in Example 2, the effect of implementing a partnership theory is to decrease or even eliminate the entitlement of the surviving spouse because in such a marriage neither spouse is likely to have contributed much, if anything, to the acquisition of the other's wealth. Put differently, the effect is to deny a windfall to the survivor who contributed little to the decedent's wealth, and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage. Bear in mind that in such a

marriage, which produces no children, a decedent who disinherits or largely disinherits the surviving spouse may not be acting so much from malice or spite toward the surviving spouse, but from a natural instinct to want to leave most or all of his or her property to the children of his or her former, long-term marriage. In hardship cases, however, as explained later, a special supplemental elective-share amount is provided when the surviving spouse would otherwise be left without sufficient funds for support.

*2008 Revisions.* When first promulgated in the early 1990s, the statute provided that the “elective-share percentage” increased annually according to a graduated schedule. The “elective-share percentage” ranged from a low of 0 percent for a marriage of less than one year to a high of 50 percent for a marriage of fifteen years or more. The “elective-share percentage” did double duty. The system equated the “elective-share percentage” of the couple’s combined assets with 50 percent of the marital-property portion of the couple’s assets—the assets that are subject to equalization under the partnership theory of marriage. Consequently, the elective share effected the partnership theory rather indirectly. Although the schedule was designed to represent by approximation a constant fifty percent of the marital-property portion of the couple’s assets (the augmented estate), it did not say so explicitly.

The 2008 revisions are designed to present the system in a more direct form, one that makes the system more transparent and therefore more understandable. The 2008 revisions disentangle the elective-share percentage from the system that approximates the marital-property portion of the augmented estate. As revised, the statute provides that the “elective-share percentage” is always 50 percent, but it is not 50 percent of the augmented estate but 50 percent of the “marital-property portion” of the augmented estate. The marital-property portion of the augmented estate is computed by approximation—by applying the percentages set forth in a graduated schedule that increases annually with the length of the marriage (each “marital-portion percentage” being double the percentage previously set forth in the “elective-share percentage” schedule). Thus, for example, under the former system, the elective-share amount in a marriage of ten years was 30 percent of the augmented estate. Under the revised system, the elective-share amount is 50 percent of the marital-property portion of the augmented estate, the marital-property portion of the augmented estate being 60 percent of the augmented estate.

The primary benefit of these changes is that the statute, as revised, presents the elective-share’s implementation of the partnership theory of marriage in a direct rather than indirect form, adding clarity and transparency to the system. An important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that want to implement the partnership theory of marriage but prefer not to define the marital-property portion by approximation but by classification. Under the deferred marital-property approach, the marital-property portion consists of the value of the couple’s property that was acquired during the marriage other than by gift or inheritance. (See below.)

The 2008 revisions are based on a proposal presented in Waggoner, “The Uniform Probate Code’s Elective Share: Time for a Reassessment,” 37 U. Mich. J. L. Reform 1 (2003), an article that gives a more extensive explanation of the rationale of the 2008 revisions.

## Specific Features of the Redesigned Elective Share

Because ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-partnership theory by means of a mechanically determined approximation system. Under the redesigned elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance. For further discussion of the reasons for choosing this method, see Waggoner, "Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code," 26 Real Prop. Prob. & Tr. J. 683 (1992).

**Section 2-202(a)-the "Elective-share Amount."** Under Section 2-202(a), the elective-share amount is equal to 50 percent of the value of the "marital-property portion of the augmented estate." The marital-property portion of the augmented estate, which is determined under Section 2-203(b), increases with the length of the marriage. The longer the marriage, the larger the "marital-property portion of the augmented estate." The sliding scale adjusts for the correspondingly greater contribution to the acquisition of the couple's marital property in a marriage of 15 years than in a marriage of 15 days. Specifically, the marital property portion of the augmented estate starts low and increases annually according to a graduated schedule until it reaches 100 percent. After one year of marriage, the marital-property portion of the augmented estate is six percent of the augmented estate and it increases with each additional year of marriage until it reaches the maximum 100 percent level after 15 years of marriage.

**Section 2-203(a)-the "Augmented Estate."** The elective-share percentage of 50 percent is applied to the value of the "marital-property portion of the augmented estate." As defined in Section 2-203, the "augmented estate" equals the value of the couple's *combined* assets, not merely the value of the assets nominally titled in the decedent's name.

More specifically, the "augmented estate" is composed of the sum of four elements:

Section 2-204-the value of the decedent's net probate estate;

Section 2-205-the value of the decedent's nonprobate transfers to others, consisting of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse;

Section 2-206-the value of the decedent's nonprobate transfers to the surviving spouse, consisting of will-substitute-type inter-vivos transfers made by the decedent to the surviving spouse; and

Section 2-207-the value of the surviving spouse's net assets at the decedent's death, plus any property that would have been in the surviving spouse's nonprobate transfers to others under Section 2-205 had the surviving spouse been the decedent.

**Section 2-203(b) the "Marital-property portion" of the Augmented Estate.** Section 2-203(b) defines the marital-property portion of the augmented estate.

**Section 2-202(a) the "Elective-share Amount."** Section 2-202(a) requires the elective-

share percentage of 50 percent to be applied to the value of the marital-property portion of the augmented estate. This calculation yields the “elective-share amount” the amount to which the surviving spouse is entitled. If the elective-share percentage were to be applied only to the marital-property portion of the decedent’s assets, a surviving spouse who has already been overcompensated in terms of the way the marital-property portion of the couple’s assets have been nominally titled would receive a further windfall under the elective-share system. The marital-property portion of the couple’s assets, in other words, would not be equalized. By applying the elective-share percentage of 50 percent to the marital-property portion of the augmented estate (the couple’s combined assets), the redesigned system denies any significance to how the spouses took title to particular assets.

**Section 2-209-Satisfying the Elective-share Amount.** Section 2-209 determines how the elective-share amount is to be satisfied. Under Section 2-209, the decedent’s net probate estate and nonprobate transfers to others are liable to contribute to the satisfaction of the elective-share amount only to the extent the elective-share amount is not fully satisfied by the sum of the following amounts:

Subsection (a)(1)-amounts that pass or have passed from the decedent to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent’s nonprobate transfers to the surviving spouse; and

Subsection (a)(2) the marital-property portion of amounts included in the augmented estate under Section 2-207.

If the combined value of these amounts equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from recipients of the decedent’s net probate estate or nonprobate transfers to others, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-202(b).

**Example 3-15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent’s Name.** A and B were married to each other more than 15 years. A died, survived by B. A’s will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of \$100,000 as defined in Section 2-205.

	Augmented Estate	Marital-Property Portion (100%)
A’s net probate estate	\$300,000	\$300,000
A’s nonprobate transfers to others	\$100,000	\$100,000
A’s nonprobate transfers to B	\$0	\$0
B’s net assets and nonprobate transfers to others	\$200,000	\$200,000
Augmented Estate	\$600,000	\$600,000
Elective-Share Amount (50 % of Marital-property portion) .....		\$300,000
Less Amount Already Satisfied .....		\$200,000
Unsatisfied Balance .....		\$100,000

Under Section 2-209(a)(2), the full value of B’s assets (\$200,000) counts first toward satisfying B’s entitlement. B, therefore, is treated as already having received \$200,000 of B’s ultimate entitlement of \$300,000. Section 2-209(c) makes A’s net probate estate and nonprobate transfers to others liable for the unsatisfied balance of the elective-share amount, \$100,000, which is the amount needed to bring B’s own \$200,000 up to \$300,000.

**Example 4-15-Year or Longer Marriage under Redesigned Elective Share; Marital Assets Disproportionately Titled in Survivor’s Name.** As in Example 3, A and B were married to each other more than 15 years. A died, survived by B. A’s will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of \$50,000 as defined in Section 2-205.

	Augmented Estate	Marital- Property Portion (100%)
A’s net probate estate	\$150,000	\$150,000
A’s nonprobate transfers to others	\$50,000	\$50,000
A’s nonprobate transfers to B	\$0	\$0
B’s assets and nonprobate transfers to others	\$400,000	\$400,000
Augmented Estate	\$600,000	\$600,000
Elective-Share Amount (50% of Marital-property portion) .....\$300,000		
Less Amount Already Satisfied .....\$400,000		
Unsatisfied Balance .....\$0		

Under Section 2-209(a)(2), the full value of B’s assets (\$400,000) counts first toward satisfying B’s entitlement. B, therefore, is treated as already having received more than B’s ultimate entitlement of \$300,000. B has no claim on A’s net probate estate or nonprobate transfers to others.

In a marriage that has lasted less than 15 years, only a portion of the survivor’s assets-not all-count toward making up the elective-share amount. This is because, in these shorter-term marriages, the marital-property portion of the survivor’s assets under Section 2-203(b) is less than 100% and, under Section 2-209(a)(2), the portion of the survivor’s assets that count toward making up the elective-share amount is limited to the marital-property portion of those assets.

To explain why this is appropriate requires further elaboration of the underlying theory of the redesigned system. The system avoids the classification and tracing-to-source problems in determining the marital-property portion of the couple’s assets. This is accomplished under Section 2-203(b) by applying an ever-increasing percentage, as the length of the marriage increases, to the couple’s combined assets without regard to when or how those assets were acquired. By approximation, the redesigned system equates the marital-property portion of the couple’s combined assets with the couple’s marital assets-assets subject to equalization under the partnership/marital-sharing theory. Thus, in a marriage that has endured long enough for the marital-property portion of

their assets to be 60% under Section 2-203(b), 60% of each spouse's assets are treated as marital assets. Section 2-209(a)(2) therefore counts only 60% of the survivor's assets toward making up the elective-share amount.

**Example 5-Under 15-Year Marriage under the Redesigned Elective Share; Marital Assets Disproportionately Titled in Decedent's Name.** A and B were married to each other more than 5 but less than 6 years. A died, survived by B. A's will left nothing to B, and A made no nonprobate transfers to B. A made nonprobate transfers to others in the amount of \$100,000 as defined in Section 2-205.

	Augmented Estate	Marital-Property Portion (30%)
A's net probate estate	\$300,000	\$90,000
A's nonprobate transfers to others	\$100,000	\$30,000
A's nonprobate transfers to B	\$0	\$0
B's assets and nonprobate transfers to others	\$200,000	\$60,000
Augmented Estate	\$600,000	\$180,000

Elective-Share Amount (50% of Marital-property portion) .....	\$90,000
Less Amount Already Satisfied .....	\$60,000
Unsatisfied Balance .....	\$30,000

Under Section 2-209(a)(2), the marital-property portion of B's assets (30% of \$200,000, or \$60,000) counts first toward satisfying B's entitlement. B, therefore, is treated as already having received \$60,000 of B's ultimate entitlement of \$90,000. Under Section 2-209(c), B has a claim on A's net probate estate and nonprobate transfers to others of \$30,000.

### **Deferred Marital-Property Alternative**

By making the elective share percentage a flat 50 percent of the marital-property portion of the augmented estate, the 2008 revision disentangles the elective share percentage from the approximation schedule, thus allowing the marital-property portion of the augmented estate to be defined either by the approximation schedule or by the deferred-marital-property approach. Although one of the benefits of the 2008 revision is added clarity, an important byproduct of the revision is that it facilitates the inclusion of an alternative provision for enacting states that prefer a deferred marital-property approach. See Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: the Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 Emory L.J. 487 (2000).

### **The Support Theory**

The partnership/marital-sharing theory is not the only driving force behind elective-share

law. Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate. Current elective-share law implements this theory poorly. The fixed fraction, whether it is the typical one-third or some other fraction, disregards the survivor's actual need. A one-third share may be inadequate to the surviving spouse's needs, especially in a modest estate. On the other hand, in a very large estate, it may go far beyond the survivor's needs. In either a modest or a large estate, the survivor may or may not have ample independent means, and this factor, too, is disregarded in conventional elective-share law. The redesigned elective share system implements the support theory by granting the survivor a supplemental elective-share amount related to the survivor's actual needs. In implementing a support rationale, the length of the marriage is quite irrelevant. Because the duty of support is founded upon status, it arises at the time of the marriage.

**Section 2-202(b)-the-Supplemental Elective-share Amount.** Section 2-202(b) is the provision that implements the support theory by providing a supplemental elective-share amount of \$75,000. The \$75,000 figure is bracketed to indicate that individual states may wish to select a higher or lower amount.

In satisfying this \$75,000 amount, the surviving spouse's own titled-based ownership interests count first toward making up this supplemental amount; included in the survivor's assets for this purpose are amounts shifting to the survivor at the decedent's death and amounts owing to the survivor from the decedent's estate under the accrual-type elective-share apparatus discussed above, but excluded are (1) amounts going to the survivor under the Code's probate exemptions and allowances and (2) the survivor's Social Security benefits (and other governmental benefits, such as Medicare insurance coverage). If the survivor's assets are less than the \$75,000 minimum, then the survivor is entitled to whatever additional portion of the decedent's estate is necessary, up to 100 percent of it, to bring the survivor's assets up to that minimum level. In the case of a late marriage, in which the survivor is perhaps aged in the mid-seventies, the minimum figure plus the probate exemptions and allowances (which under the Code amount to a minimum of another \$64,500) is pretty much on target-in conjunction with Social Security payments and other governmental benefits-to provide the survivor with a fairly adequate means of support.

**Example 6-Supplemental Elective-share Amount.** After A's death in Example 1, B married C. Five years later, B died, survived by C. B's will left nothing to C, and B made no nonprobate transfers to C. B made no nonprobate transfers to others as defined in Section 2-205.

	Augmented Estate	Marital-Property Portion (30%)
B's net probate estate	\$ 90,000	\$27,000
B's nonprobate transfers to others	\$0	\$0
B's nonprobate transfers to C	\$0	\$0
C's assets and nonprobate transfers to others	\$10,000	\$3,000
Augmented Estate	\$100,000	\$30,000

Elective-Share Amount (50% of Marital-property portion) .....	\$15,000
Less Amount Already Satisfied .....	\$3,000
Unsatisfied Balance .....	\$12,000

**Solution under Redesigned Elective Share.** Under Section 2-209(a)(2), \$3,000 (30%) of C’s assets count first toward making up C’s elective-share amount; under Section 2-209(c), the remaining \$12,000 elective-share amount would come from B’s net probate estate.

Application of Section 2-202(b) shows that C is entitled to a supplemental elective-share amount. The calculation of C’s supplemental elective-share amount begins by determining the sum of the amounts described in sections:

2-207 .....	\$10,000
2-209(a)(1) .....	0
Elective-share amount payable from decedent’s probate estate under Section 2-209(c).....	\$12,000
Total .....	\$22,000

The above calculation shows that C is entitled to a supplemental elective-share amount under Section 2-202(b) of \$53,000 (\$75,000 minus \$22,000). The supplemental elective-share amount is payable entirely from B’s net probate estate, as prescribed in Section 2-209(c).

The end result is that C is entitled to \$65,000 (\$12,000 + \$53,000) by way of elective share from B’s net probate estate (and nonprobate transfers to others, had there been any). Sixty-five thousand dollars is the amount necessary to bring C’s \$10,000 in assets up to \$75,000.

**Decedent’s Nonprobate Transfers to Others**

The original Code made great strides toward preventing “fraud on the spouse’s share.” The problem of “fraud on the spouse’s share” arises when the decedent seeks to evade the spouse’s elective share by engaging in various kinds of nominal inter-vivos transfers. To render that type of behavior ineffective, the original Code adopted the augmented-estate concept, which extended the elective-share entitlement to property that was the subject of specified types of inter-vivos transfer, such as revocable inter-vivos trusts.

In the redesign of the elective share, the augmented-estate concept has been strengthened. The pre-1990 Code left several loopholes ajar in the augmented estate—a notable one being life insurance the decedent buys, naming someone other than his or her surviving spouse as the beneficiary. With appropriate protection for the insurance company that pays off before receiving notice of an elective-share claim, the redesigned elective-share system includes these types of insurance policies in the augmented estate as part of the decedent’s nonprobate transfers to others under Section 2-205.

**Historical Note.** This General Comment was revised in 1993 and in 2008.

**Legislative Note.** States that have previously enacted the UPC elective share need not amend their enactment, except that (1) the supplemental elective-share amount should be increased to \$75,000, (2) the amendment to Section 2-205(3) relating to gifts within two years of death should be adopted, (3) Section 2-209(e) should be added so that the unsatisfied balance of the elective-share or supplemental elective-share amount is treated as a general pecuniary devise for purposes of Section 3-904, and (4) the amendments to Section 2-213 relating to spousal waiver should be adopted.

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**Article II**  
**INTESTACY, WILLS, AND DONATIVE TRANSFERS**

**PART 2**

**ELECTIVE SHARE OF SURVIVING SPOUSE**

**Section 2-201. Definitions.**

In this Part:

- (1) As used in sections other than Section 2-205, “decedent’s nonprobate transfers to others” means the amounts that are included in the augmented estate under Section 2-205.
- (2) “Fractional interest in property held in joint tenancy with the right of survivorship” whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.
- (3) “Marriage” as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent’s surviving spouse.
- (4) “Nonadverse party” means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he or she possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.
- (5) “Power” or “power of appointment” includes a power to designate the beneficiary of a beneficiary designation.
- (6) “Presently exercisable general power of appointment” means a power of appointment under which, at the time in question, the decedent, whether or not he or she then had the capacity to exercise the power, held a power to create a present or future interest in himself or herself, his or her creditors, his or her estate, or creditors of his or her estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.
- (7) “Probate estate” means property that would pass by intestate succession if the decedent died without a valid will.
- (8) “Property” includes values subject to a beneficiary designation.
- (9) “Right to income” includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.

(10) “Transfer” as it relates to a transfer by or of the decedent, includes (i) an exercise or release of a presently exercisable general power of appointment held by the decedent, (ii) a lapse at death of a presently exercisable general power of appointment held by the decedent, and (iii) an exercise, release, or lapse of a general power of appointment that the decedent created in himself or herself and of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party.

(11) For purposes of Sections 2-201 through 2-214 of this Part, ownership interests of a party during lifetime shall be determined in accordance with the following rules:

(a) “Net contribution” of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied for the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance.

(b) An account belongs to the parties in proportion to the net contribution of each to the sums of deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

(c) A beneficiary in an account having a POD (pay on death) designation has no right to sums on deposit during the lifetime of any party.

(d) An agent in an account with an agency designation has no beneficial right to sums on deposit.

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### ***Committee Comments:***

*This section tracks, with two exceptions, the language of 2-201 of the UPC. First, the 2008 Amendments to the UPC deleted the definition of “probate estate” contained at 2-201(7) that had been contained in the prior version. The expression “probate estate” is not defined in either the UPC or the MUPC, therefore the Committee decided not to follow the 2008 Amendment to 2-201 and included the definition of “probate estate” in 2-201(7). Second, the comments under 2-205, Example 6 indicate that ownership interests would be determined under UPC 6-211. Massachusetts did not adopt 6-211 of the UPC. Therefore, the rule under UPC 6-211 is incorporated into 2-201(11) to provide rules of construction for purposes of the spousal elective share only.*

*The Committee notes that the phrase “fractional interest in property held in joint tenancy with the right of survivorship” contained in 2-201(2) is not defined in MUPC 1-201. However, 190B § 1-201(26) defines joint tenants with the right of survivorship to include “co-owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party’s contribution.” This section has no apparent analogue in the UPC.*

## **Section 2-202. Elective Share.**

(a) **[Elective-Share Amount.]** Except as provided in section thirty-six of chapter two hundred and nine, the surviving spouse of a decedent who dies domiciled in the Commonwealth has a right of election, under the limitations and conditions stated in this Part, to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.

(b) **[Supplemental Elective-Share Amount.]** If the sum of the amounts described in Sections 2-207, 2-209(a)(1), and that part of the elective-share amount payable from the decedent's net probate estate and nonprobate transfers to others under Section 2-209(c) and (d) is less than \$75,000, the surviving spouse is entitled to a supplemental elective-share amount equal to \$75,000, minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's net probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in Section 2-209(c) and (d).

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

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

### **Comment**

**Pre-1990 Provision.** The pre-1990 provisions granted the surviving spouse a one-third share of the augmented estate. The one-third fraction was largely a carry over from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband's land.

**Purpose and Scope of Revisions.** The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up.

**Subsection (a).** Subsection (a) implements the partnership theory by providing that the elective-share amount is 50 percent of the value of the marital-property portion of the augmented estate. The augmented estate is defined in Section 2-203(a) and the marital-property portion of the augmented estate is defined in Section 2-203(b).

**Subsection (b).** Subsection (b) implements the support theory of the elective share by providing a \$75,000 supplemental elective-share amount, in case the surviving spouse's assets and other entitlements are below this figure.

**2008 Cost-of-Living Adjustments.** As originally promulgated in 1990, the dollar amount in

subsection (b) was \$50,000. To adjust for inflation, this amount was increased in 2008 to \$75,000.

**Subsection (c).** The exempt property and family allowances provided by Article II, Part 4, are not charged to the electing spouse as a part of the elective share. Consequently, these allowances may be distributed from the probate estate without reference to whether an elective share right is asserted.

**Cross Reference.** To have the right to an elective share under subsection (a), the decedent’s spouse must survive the decedent as provided under Section 2-702(a).

**Historical Note.** This Comment was revised in 1993 and 2008.

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***Committee Comments:***

*This section tracks, with minor exceptions, the language of 2-202 of the UPC. This section excludes references to the homestead allowance, uses “Commonwealth” in place of “State” and changes the cross reference regarding survivorship to reference the appropriate section of the MUPC. The section also references chapter 209, section 36, dealing with a spouse’s desertion or living apart for justifiable cause to make it clear that the right of election would no longer exist following an abandonment proceeding.*

**Section 2-203. Composition of the Augmented Estate; Marital-Property Portion.**

(a) Subject to Section 2-208, the value of the augmented estate, to the extent provided in Sections 2-204, 2-205, 2-206, and 2-207, consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute:

- (1) the decedent’s net probate estate;
- (2) the decedent’s nonprobate transfers to others;
- (3) the decedent’s nonprobate transfers to the surviving spouse; and
- (4) the surviving spouse’s property and nonprobate transfers to others.

(b) The value of the marital-property portion of the augmented estate consists of the sum of the values of the four components of the augmented estate as determined under subsection (a) multiplied by the following percentage:

**If the decedent and the spouse  
were married to each other:**

**The percentage is:**

Less than 1 year .....	3%
1 year but less than 2 years .....	6%
2 years but less than 3 years.....	12%
3 years but less than 4 years.....	18%

4 years but less than 5 years.....	24%
5 years but less than 6 years.....	30%
6 years but less than 7 years.....	36%
7 years but less than 8 years.....	42%
8 years but less than 9 years.....	48%
9 years but less than 10 years.....	54%
10 years but less than 11 years.....	60%
11 years but less than 12 years.....	68%
12 years but less than 13 years.....	76%
13 years but less than 14 years.....	84%
14 years but less than 15 years.....	92%
15 years or more.....	100%

**Comment**

Subsection (a) operates as an umbrella section identifying the augmented estate as consisting of the sum of the values of four components. On the decedent’s side are the values of (1) the decedent’s net probate estate (Section 2-204) and (2) the decedent’s nonprobate transfers to others (Section 2-205). Straddling between the decedent’s side and the surviving spouse’s side is the value of (3) the decedent’s nonprobate transfers to the surviving spouse (Section 2-206). On the surviving spouse’s side are the values of (4) the surviving spouse’s net assets and the surviving spouse’s nonprobate transfers to others (Section 2-207).

Under Section 2-202(a), the elective-share percentage is 50 percent of the value of the marital-property portion of the augmented estate. Section 2-203(b) provides the schedule for determining the marital-property portion of the value of the four components of the augmented estate. The schedule deems by approximation that 100 percent of the components of the augmented estate is marital property after 15 years of marriage. Government data indicate that the median length of a first marriage that does not end in divorce is 46.3 years, the median length of a post-divorce remarriage that does not end in divorce is 35.1 years, and the median length of a post-widowhood remarriage that does not end in divorce is 14.4 years. Enacting states may determine that this data supports lengthening the schedule in subsection (b) to 20 or even 25 years. See Lawrence W. Waggoner, *The Uniform Probate Code’s Elective Share: Time for a Reassessment*, 37 U. Mich. J. L. Reform 1, 11-29 (2003).

**Historical Note.** This Comment was added in 1993 and revised in 2008.

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***Committee Comments:***

*This section tracks, without change, the language of 2-203 of the UPC.*

## **Section 2-204. Decedent's Net Probate Estate.**

The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses and family allowances, exempt property, and enforceable claims.

### **Comment**

This section, which in the 1990 version appeared as a paragraph of a single, long section defining the augmented estate, establishes as the first component of the augmented estate the value of the decedent's probate estate, reduced by funeral and administration expenses, family allowances (Section 2-404), exempt property (Section 2-403), and enforceable claims. The term "claims" is defined in Section 1-201 as including "liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term shall not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate."

Various aspects of Section 2-204 are illustrated by Examples 10, 11, and 12 in the Comment to Section 2-205, below.

**Historical Note.** This Comment was added in 1993.

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### ***Committee Comments:***

*This section tracks, without change, the language of 2-204 of the UPC.*

## **Section 2-205. Decedent's Nonprobate Transfers to Others.**

The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under Section 2-204, of any of the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

(i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(iii) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iv) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(2) Property transferred in any of the following forms by the decedent during marriage:

(i) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a

power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1)(i), (ii), or (iii), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph, "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(i), "termination" occurs when the power terminated by exercise or release, but not otherwise.

(ii) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under paragraph (1)(iv) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iii) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the transfers to any one donee in either of the two years exceeded the amount excludable from taxable gifts under 26 U.S.C. Section 2503(b) or its successor on the date next preceding the date of the decedent's death.

### **Comment**

This section, which in the 1990 version appeared in substance as a paragraph of a single, long section defining the augmented estate, establishes as the second component of the augmented estate the value of the decedent's nonprobate transfers to others. In the 1990 version, the term "reclaimable estate" was used rather than the term "nonprobate transfers to others".

This component is divided into three basic categories: (1) property owned or owned in substance by the decedent immediately before death that passed outside probate to persons other than the surviving spouse; (2) property transferred by the decedent during marriage that passed outside probate to persons other than the surviving spouse; and (3) property transferred by the decedent during marriage and during the two-year period next preceding the decedent's death. Various aspects of each category and each subdivision within each category are discussed and illustrated below.

**Paragraph (1)-Property Owned or Owned in Substance by the Decedent.** This category covers property that the decedent owned or owned in substance immediately before death and that passed outside probate at the decedent's death to a person or persons other than the surviving spouse.

Paragraph (1) subdivides this category into four specific components:

(i) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

(iii) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iv) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

With one exception for nonseverable joint tenancies (*see* Example 4 of this Section), each of the above components covers a type of asset of which the decedent could have become the full, technical owner by merely exercising his or her power of appointment, incident of ownership, or right of severance or withdrawal. Had the decedent exercised these powers or rights to become the full, technical owner, the decedent could have controlled the devolution of these assets by his or her will; by not exercising these powers or rights, the decedent allowed the assets to pass outside probate to persons other than the surviving spouse. Thus, *in effect*, property covered by these components passes at the decedent's death by nonprobate transfer from the decedent to others. This is what justifies including these components in the augmented estate without regard to the person who

*created* the decedent's substantive ownership interest, whether the decedent or someone else, and without regard to *when* it was created, whether before or after the decedent's marriage.

Although the augmented estate under the pre-1990 Code did not include life insurance, annuities, etc., payable to other persons, the revisions do include their value; this move recognizes that such arrangements were, under the pre-1990 Code, used to deplete the estate and reduce the spouse's elective-share entitlement.

Various aspects of paragraph (1) are illustrated by the following examples. Other examples illustrating various aspects of this paragraph are Example 19 in this Comment, below, and Examples 20 and 21 in the Comment to Section 2-206, below. In each of the following examples, G is the decedent and is the decedent's surviving spouse.

*Example 1-General Testamentary Power.* G's mother, M, created a testamentary trust, providing for the income to go to G for life, remainder in corpus to such persons, including G, G's creditors, G's estate, or the creditors of G's estate, as G by will appoints; in default of appointment, to X. G died, survived by S and X. G's will did not exercise his power in favor of S.

The value of the corpus of the trust at G's death is not included in the augmented estate under paragraph (1)(i), regardless of whether G exercised the power in favor of someone other than S or let the power lapse, so that the trust corpus passed in default of appointment to X. Section 2-205(1)(i) only applies to *presently exercisable* general powers; G's power was a general *testamentary* power. (Note that paragraph (2)(ii) does cover property subject to a general *testamentary* power, but only if the power was created by G during marriage. G's general testamentary power was created by M and hence not covered by paragraph (2)(ii).)

*Example 2-Nongeneral Power and "5-and-5" Power.* G's father, F, created a testamentary trust, providing for the income to go to G for life, remainder in corpus to such persons, except G, G's creditors, G's estate, or the creditors of G's estate, as G by will appoints; in default of appointment, to X. G was also given a noncumulative annual power to withdraw an amount equal to the greater of \$5,000 or five percent of the trust corpus. G died, survived by S and X. G did not exercise her power in favor of S.

G's power over the remainder interest does not cause inclusion of the value of the full corpus in the augmented estate under paragraph (1)(i) because that power was a *nongeneral* power.

The value of the greater of \$5,000 or five percent of the corpus of the trust *at G's death* is included in the augmented estate under paragraph (1)(i), to the extent that that property passed at G's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse, because that portion of the trust corpus was subject to a *presently exercisable general* power of appointment held by G immediately before G's death. No additional amount is included, however, whether G exercised the withdrawal power or allowed it to lapse in the years prior to G's death. (Note that paragraph (3)(i) is inapplicable to this case. That paragraph only applies to property subject to powers *created by the decedent during marriage* that lapse within the two-year period next preceding the decedent's death.)

*Example 3-Revocable Inter-Vivos Trust.* G created a revocable inter-vivos trust, providing for the income to go to G for life, remainder in corpus to such persons, except G, G's creditors, G's estate, or the creditors of G's estate, as G by will appoints; in default of appointment, to X. G died, survived by S and X. G never exercised his power to revoke, and the corpus of the trust passed at G's death to X.

Regardless of whether G created the trust before or after marrying S, the value of the corpus of the trust at G's death is included in the augmented estate under paragraph (1)(i) because, immediately before G's death, the trust corpus was subject to a presently exercisable general power of appointment (the power to revoke: see Section 2-201(6)) held by G).

(Note that if G created the trust during marriage, paragraph (2)(ii) also requires inclusion of the value of the trust corpus. Because these two subparagraphs overlap, and because both subparagraphs include the same value, Section 2-208(c) provides that the value of the trust corpus is included under one but not both subparagraphs.)

*Example 4-Joint Tenancy.* G, X, and Y owned property in joint tenancy. G died, survived by S, X, and Y.

Because G's fractional interest in the property immediately before death was one-third, and because that one-third fractional interest passed by right of survivorship to X and Y at G's death, one-third of the value of the property at G's death is included in the augmented estate under paragraph (1)(ii). This is the result whether or not under local law G had the unilateral right to sever her fractional interest. See Section 2-201(2).

*Example 5-TOD Registered Securities and POD Account.* G registered securities that G owned in TOD form. G also contributed all the funds in a savings account that G registered in POD Form. X was designated to take the securities and Y was designated to take the savings account on G's death. G died, survived by S, X, and Y.

Because G was the sole owner of the securities immediately before death (see Sections 6-302 and 6-306), and because ownership of the securities passed to X upon G's death (see Section 6-307), the full value of the securities at G's death is included in the augmented estate under paragraph (1)(iii). Because G contributed all the funds in the savings account, G's ownership interest in the savings account immediately before death was 100 percent. See Section 6-211. Because that 100 percentage ownership interest passed by right of survivorship to Y at G's death, the full value of the account at G's death is included in the augmented estate under paragraph (1)(iii).

*Example 6-Joint Checking Account.* G, X, and Y were registered as co-owners of a joint checking account. G contributed 75 percent of the funds in the account. G died, survived by S, X, and Y.

G's ownership interest in the account immediately before death, determined under Section 6-211, was 75 percent of the account. Because that percentage ownership interest passed by right of survivorship to X and Y at G's death, 75 percent of the value of the account at G's death is included in the augmented estate under paragraph (1)(iii).

*Example 7-Joint Checking Account.* G's mother, M, added G's name to her checking account so that G could pay her bills for her. M contributed all the funds in the account. The account was registered in co-ownership form with right of survivorship. G died, survived by S and M.

Because G had contributed none of his own funds to the account, G's ownership interest in the account immediately before death, determined under Section 6-211, was zero. Consequently, no part of the value of the account at G's death is included in the augmented estate under paragraph (1)(iii).

*Example 8-Life Insurance.* G, as owner of a life-insurance policy insuring her life, designated X and Y as the beneficiaries of that policy. G died owning the policy, survived by S, X, and Y.

The full value of the proceeds of that policy is included in the augmented estate under paragraph (1)(iv).

**Paragraph (2)-Property Transferred by the Decedent During Marriage.** This category covers property that the decedent transferred in specified forms during "marriage" (defined in Section 2-201(3) as "any marriage of the decedent to the decedent's surviving spouse"). If the decedent and the surviving spouse were married to each other more than once, transfers that took place during any of their marriages to each other count as transfers during marriage.

The word "transfer," as it relates to a transfer by or of the decedent, is defined in Section 2-201(10), as including "(A) an exercise or release of a presently exercisable general power of appointment held by the decedent, (B) a lapse at death of a presently exercisable general power of appointment held by the decedent, and (C) an exercise, release, or lapse of a general power of appointment that the decedent created in himself or herself and of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party."

Paragraph (2) covers the following specific forms of transfer:

(i) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

(ii) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence

produces different amounts, the amount included is the greater amount.

Various aspects of paragraph (2) are illustrated by the following examples. Other examples illustrating various aspects of this paragraph are Examples 1 and 3, above, and Example 22 in the Comment to Section 2-206, below. In the following examples, as in the examples above, G is the decedent and S is the decedent's surviving spouse.

*Example 9-Retained Income Interest for Life.* Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to be paid annually to G for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The value of the corpus of the trust at G's death is included in the augmented estate under paragraph (2)(i). This paragraph applies to a retained income interest that terminates at the decedent's death, as here. The amount included is the value of the property that passes outside probate to any person other than the decedent's estate or surviving spouse, which in this case is the full value of the corpus that passes outside probate to X.

Had G retained the right to only one-half of the income, with the other half payable to Y for G's lifetime, only one half of the value of the corpus at G's death would have been included under paragraph (2)(i) because that paragraph specifies that "the amount included is the value of the fraction of the property to which the decedent's right related." Note, however, that if G had created the trust within two years before death, paragraph (3)(iii) would require the inclusion of the value at the date the trust was established of the other half of the income interest for G's life and of the remainder interest in the other half of the corpus, each value to be reduced by as much as \$10,000 as appropriate under the facts, taking into account other gifts made to Y and to X in the same year, if any.

*Example 10-Retained Unitrust Interest for a Term.* Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for a fixed percentage of the value of the corpus of the trust (determined annually) to be paid annually to G for ten years, then for the corpus of the trust (and any accumulated income) to go to X. G died six years after the trust was created, survived by S and X.

The full value of the corpus at G's death is included in the augmented estate under a combination of Sections 2-204 and 2-205(2)(i).

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest at G's death. This paragraph applies to a retained income interest, which under Section 2-201(9) includes a unitrust interest. Moreover, Section 2-205(2)(i) not only applies to a retained income interest that terminates at the decedent's death, but also applies to a retained income interest that continues beyond the decedent's death, as here. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's remainder interest at G's death.

Section 2-204 requires the inclusion of the commuted value of the remaining four years of G's unitrust interest because that interest passes through G's probate estate to G's devisees or heirs.

Because both the four-year unitrust interest and the remainder interest that directly succeeds it are included in the augmented estate, there is no need to derive separate values for X's remainder interest and for G's remaining unitrust interest. The sum of the two values will equal the full value of the corpus, and that is the value that is included in the augmented estate. (Note, however, that *for purposes of Section 2-209 (Sources from Which Elective Share Payable)*, it might become necessary to derive separate values for these two interests.)

Had the trust been revocable, the end-result would have been the same. The only difference would be that the revocability of the trust would cause paragraph (2)(i) to be inapplicable, but would also cause overlapping application of paragraphs (1)(i) and (2)(ii) to X's remainder interest. Because each of these paragraphs yields the same value, Section 2-208(c) would require the commuted value of X's remainder interest to be included in the augmented estate under any one, but only one, of them. Note that neither paragraphs (1)(i) nor (2)(ii) would apply to G's remaining four-year term because that four-year term would have passed to G's estate by lapse of G's power to revoke. As above, the commuted value of G's remaining four-year term would be included in the augmented estate under Section 2-204, obviating the need to derive separate valuations of G's four-year term and X's remainder interest.

*Example 11-Personal Residence Trust.* Before death, and during marriage, G created an irrevocable inter-vivos trust of G's personal residence, retaining the right to occupy the residence for ten years, then for the residence to go to X. G died six years after the trust was created, survived by S and X.

The full value of the residence at G's death is included in the augmented estate under a combination of Sections 2-204 and 2-205(2)(i).

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest at G's death. This paragraph applies to a retained right to possession that continues beyond the decedent's death, as here. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's remainder interest at G's death.

Section 2-204 requires the inclusion of the commuted value of G's remaining four-year term because that interest passes through G's probate estate to G's devisees or heirs.

As in Example 10, there is no need to derive separate valuations of the remaining four-year term and the remainder interest that directly succeeds it. The sum of the two values will equal the full value of the residence at G's death, and that is the amount included in the augmented estate. (Note, however, that *for purposes of Section 2-209 (Sources from Which Elective Share Payable)*, it might become necessary to derive separate values for these two interests.)

*Example 12-Retained Annuity Interest for a Term.* Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for a fixed dollar amount to be paid annually to G for ten years, then for half of the corpus of the trust to go to X; the other half was to remain in trust for an additional five years, after which time the remaining corpus was to go to X. G died fourteen years after the trust was created, survived by S and X.

The value of the one-half of the corpus of the trust remaining at G's death is included in the augmented estate under a combination of Sections 2-204 and 2-205(2)(i). The other one-half of the corpus of the trust that was distributed to X four years before G's death is not included in the augmented estate.

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest in half of the corpus of the trust. This section applies to a retained income interest, which under Section 2-201(9), includes an annuity interest that continues beyond the decedent's death, as here. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's remainder interest at G's death.

Section 2-204 requires the inclusion of the commuted value of the remaining one year of G's annuity interest in half of the corpus of the trust, which passed through G's probate estate to G's devisees of heirs.

There is no need to derive separate valuations of G's remaining annuity interest and X's remainder interest that directly succeeds it. The sum of the two values will equal the full value of the remaining one-half of the corpus of the trust at G's death, and that is the amount included in the augmented estate. (Note, however, that *for purposes of Section 2-209 (Sources from Which Elective Share Payable)*, it might become necessary to derive separate values for these two interests.)

Had G died eleven years after the trust was created, so that the termination of half of the trust would have occurred within the two-year period next preceding G's death, the value of the half of the corpus of the trust that was distributed to X ten years after the trust was created would also have been included in the augmented estate under Section 2-205(3)(i).

*Example 13-Commercial Annuity.* Before G's death, and during marriage, G purchased three commercial annuities from an insurance company. Annuity One was a single-life annuity that paid a fixed sum to G annually and that contained a refund feature payable to X if G died within ten years. Annuity Two was a single-life annuity that paid a fixed sum to G annually, but contained no refund feature. Annuity Three was a self and survivor annuity that paid a fixed sum to G annually for life, and then paid a fixed sum annually to X for life. G died six years after purchasing the annuities, survived by S and X.

*Annuity One:* The value of the refund payable to X at G's death under Annuity One is included in the augmented estate under paragraph (2)(i). G retained an income interest, as defined in Section 2-201(9), that terminated at G's death. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the refund amount to which X is entitled.

*Annuity Two:* Annuity Two does not cause any value to be included in the augmented estate because it expired at G's death; although G retained an income interest, as defined in Section 2-201(9), that terminated at G's death, nothing passed outside probate to any person other than G's estate or surviving spouse.

*Annuity Three:* The commuted value at G's death of the annuity payable to X under Annuity Three is included in the augmented estate under paragraph (2)(i). G retained an income interest, as defined in Section 2-201(9), that terminated at G's death. The amount included is the value of the interest that passes outside probate to a person other than the decedent's estate or surviving spouse, which in this case is the commuted value of X's right to the annuity payments for X's lifetime.

*Example 14-Joint Power.* Before death, and during marriage, G created an inter-vivos trust, providing for the income to go to X for life, remainder in corpus at X's death to X's then-living descendants, by representation; if none, to a specified charity. G retained a power, exercisable only with the consent of X, allowing G to withdraw all or any portion of the corpus at any time during G's lifetime. G died without exercising the power, survived by S and X.

The value of the corpus of the trust at G's death is included in the augmented estate under paragraph (2)(ii). This paragraph applies to a power created by the decedent over the corpus of the trust that is exercisable by the decedent "in conjunction with any other person," who in this case is X. Note that the fact that X has an interest in the trust that would be adversely affected by the exercise of the power in favor of G is irrelevant. The amount included is the full value of the corpus of the trust at G's death because the power related to the full corpus of the trust and the full corpus passed at the decedent's death, by lapse or default of the power, to a person other than the decedent's estate or surviving spouse-X, X's descendants, and the specified charity.

*Example 15-Power in Nonadverse Party.* Before death, and during marriage, G created an inter-vivos trust, providing for the income to go to X for life, remainder in corpus to X's then-living descendants, by representation; if none, to a specified charity. G conferred a power on the trustee, a bank, to distribute, in the trustee's complete and uncontrolled discretion, all or any portion of the trust corpus to G or to X. One year before G's death, the trustee distributed \$50,000 of trust corpus to G and \$40,000 of trust corpus to X. G died, survived by S and X.

The full value of the portion of the corpus of the trust remaining at G's death is included in the augmented estate under paragraph (2)(ii). This paragraph applies to a power created by the decedent over the corpus of the trust that is exercisable by a "nonadverse party." As defined in Section 2-201(4), the term "nonadverse party" is a "person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he or she possesses respecting the trust or other property arrangement." The trustee in this case is a nonadverse party. The amount included is the full value of the corpus of the trust at G's death because the trustee's power related to the full corpus of the trust and the full corpus passed at the decedent's death, by lapse or default of the power, to a person other than the decedent's estate or surviving spouse-X, X's descendants, and the specified charity.

In addition to the full value of the remaining corpus at G's death, an additional amount is included in the augmented estate because of the \$40,000 distribution of corpus to X within two years before G's death. As defined in Section 2-201(10), a transfer of the decedent includes the exercise "of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party." Consequently, the \$40,000 distribution to X is considered to be a transfer of the decedent within two years before death, and is included in the augmented estate under paragraph (3)(iii) to the extent it exceeded \$10,000 of the aggregate gifts to X that year. If no other gifts were made to X in that year, the

amount included would be \$30,000 (\$40,000 minus \$10,000).

**Paragraph (3)-Property Transferred by the Decedent During Marriage and During the Two-Year Period Next Preceding the Decedent's Death.** This paragraph-called the two-year rule-requires inclusion in the augmented estate of the value of property that the decedent transferred in specified forms during marriage and within two years of death. The word "transfer," as it relates to a transfer by or of the decedent, is defined in Section 2-201(10), as including "(A) an exercise or release of a presently exercisable general power of appointment held by the decedent, (B) a lapse at death of a presently exercisable general power of appointment held by the decedent, and (C) an exercise, release, or lapse of a general power of appointment that the decedent created in himself [or herself] and of a power described in Section 2-205(2)(ii) that the decedent conferred on a nonadverse party."

The two-year rule of paragraph (3) covers the following specific forms of transfer:

(i) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1)(i), (ii), or (iii), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(i), "termination" occurs when the power terminated by exercise or release, but not otherwise.

(ii) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under paragraph (1)(iv) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

(iii) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in either of the two years exceeded \$10,000.

Various aspects of paragraph (3) are illustrated by the following examples. Other examples illustrating various aspects of this paragraph are Examples 2, 9, 12, 14, and 15, above, and Examples 33 and 34 in the Comment to Section 2-207, below. In the following examples, as in the examples above, G is the decedent and S is the decedent's surviving spouse.

*Example 16-Retained Income Interest Terminating Within Two Years Before Death.* Before death,

and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to G for ten years, then for the corpus of the trust to go to X. G died 11 years after the trust was created, survived by S and X. G was married to S when the trust terminated.

The full value of the corpus of the trust at the date of its termination is included in the augmented estate under paragraph (3)(i). The full value of the corpus at death would have been included in the augmented estate under paragraph (2)(i) had G's income interest not terminated until death; G's income interest terminated within the two-year period next preceding G's death; G was married to S when the trust was created and when the income interest terminated; and the trust corpus upon termination passed to a person other than S, G, or G's estate.

*Example 17-Personal Residence Trust Terminating Within Two Years Before Death.* Before death, and during marriage, G created an irrevocable inter-vivos trust of G's personal residence, retaining the right to occupy the residence for ten years, then for the residence to go to X. G died eleven years after the trust was created, survived by S and X. G was married to S when the right to possession terminated.

The full value of the residence at the date the trust terminated is included in the augmented estate under paragraph (3)(i). The full value of the residence would have been included in the augmented estate under paragraph (2)(i) had G's right to possession not terminated until death; G's right to possession terminated within the two-year period next preceding G's death; G was married to S when the trust was created and when the right to possession terminated; and the residence passed upon termination to a person other than S, G, or G's estate.

*Example 18-Irrevocable Assignment of Life-Insurance Policy Within Two Years Before Death.* In Example 8, G irrevocably assigned the life-insurance policy to X and Y within two years preceding G's death. G was married to S when the policy was assigned. G died, survived by S, X, and Y.

The full value of the proceeds are included in the augmented estate under paragraph (3)(ii). The full value of the proceeds would have been included in the augmented estate under paragraph (1)(iv) had G owned the policy at death; G assigned the policy within the two-year period next preceding G's death; G was married to S when the policy was assigned; and the proceeds were payable to a person other than S or G's estate.

*Example 19-Property Purchased in Joint Tenancy Within Two Years Before Death.* Within two years before death, and during marriage, G and X purchased property in joint tenancy; G contributed \$75,000 of the \$100,000 purchase price and X contributed \$25,000. G died, survived by S and X.

Regardless of when or by whom the property was purchased, the value at G's death of G's fractional interest of one-half is included in the augmented estate under paragraph (1)(ii) because G's half passed to X as surviving joint tenant. Because the property was purchased within two years before death, and during marriage, and because G's contribution exceeded the value of G's fractional interest in the property, the excess contribution of \$25,000 constitutes a gift to X within the two-year period next preceding G's death. Consequently, an additional \$15,000 (\$25,000 minus \$10,000) is included in the augmented estate under paragraph (3)(iii) as a gift to X.

Had G provided all of the \$100,000 purchase price, then paragraph (3)(iii) would require \$40,000 (\$50,000 minus \$10,000) to be included in the augmented estate (in addition to the inclusion of one-half the value of the property at G's death under paragraph (1)(ii)).

Had G provided one-half or less of the \$100,000 purchase price, then G would not have made a gift to X within the two-year period next preceding G's death. Half the value of the property at G's death would still be included in the augmented estate under paragraph (1)(ii), however.

**Cross Reference.** On obtaining written spousal consent to assure qualification for the charitable deduction for charitable remainder trusts or outright charitable donations, see the Comment to Section 2-208.

**Historical Note.** This Comment was added in 1993.

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### ***Committee Comments:***

*This section tracks, without change, the language of 2-205 of the UPC.*

*The Committee spent considerable time on the interpretation of 2-205(1)(ii) and 2-205(1)(iii). These sections deal with property held jointly or in a “co-ownership” arrangement. Under 2-205(1)(ii), the outcome for property held in joint tenancy with right of survivorship is based upon the number of other joint tenants. Under 2-205(1)(iii), the outcome for, among other things, “co-ownership registration with right of survivorship” is based on contribution rules. The Committee interprets 2-205(1)(iii) as dealing with co-ownership arrangements where there was no completed gift upon creation. By contrast, 2-205(1)(ii), covers circumstances in which completed gifts were made upon creation of the interest.*

*The language in 2-205(1)(iii) about “co-ownership registration with the right of survivorship” may include community property interests that retain their character as such even when the parties move to a non-community property jurisdiction.*

*Example 6 of the Comment indicates that the “ownership interest” would be determined under the UPC Section 6-211. The MUPC reserved Section 6-211. It is the view of the Committee that a Massachusetts UPC based elective share should provide guidance as to how the decedent’s ownership interest is to be determined. See Committee Comments to Section 2-201.*

### **Section 2-206. Decedent's Nonprobate Transfers to the Surviving Spouse.**

Excluding property passing to the surviving spouse under the federal Social Security system, the value of the augmented estate includes the value of the decedent's nonprobate transfers to the decedent's surviving spouse, which consist of all property that passed outside probate at the

decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

- (1) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant,
- (2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner, and
- (3) all other property that would have been included in the augmented estate under Section 2-205(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

### **Comment**

This section, which in the 1990 version appeared in substance as a paragraph of a single, long section defining the augmented estate, establishes as the third component of the augmented estate the value of the decedent's nonprobate transfers to the decedent's surviving spouse. Under this section, the decedent's nonprobate transfers to the decedent's surviving spouse:

consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

- (1) the decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant,
- (2) the decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner, and
- (3) all other property that would have been included in the augmented estate under Section 2-205(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

Property passing to the surviving spouse under the federal Social Security system is excluded.

Various aspects of Section 2-206 are illustrated by the following examples. In these examples, as in the examples in the Comment to Section 2-205, above, G is the decedent and S is the decedent's surviving spouse.

*Example 20-Tenancy by the Entirety.* G and S own property in tenancy by the entirety. G died, survived by S.

Because the definition in Section 1-201 of "joint tenants with the right of survivorship" includes

tenants by the entirety, the provisions of Section 2-206 relating to joint tenancies with right of survivorship apply to tenancies by the entirety.

In total, therefore, the full value of the property is included in the augmented estate-G's one-half under Section 2-206(1) and S's one-half under Section 2-207(a)(1)(i).

Section 2-206(1) requires the inclusion of the value of G's one-half fractional interest because it passed to S as surviving joint tenant.

Section 2-207(a)(1)(i) requires the inclusion of S's one-half fractional interest. Because G was a joint tenant immediately before G's death, S's fractional interest, for purposes of Section 2-207, is determined immediately before G's death, disregarding the fact that G predeceased S. Immediately before G's death, S's fractional interest was then a one-half fractional interest. Despite Section 2-205(1)(ii), none of S's fractional interest is included under Section 2-207(a)(2) because that provision does not apply to fractional interests that are included under Section 2-207(a)(1)(i). Consequently, the value of S's one-half interest is included under Section 2-207(a)(1)(i) but not under Section 2-207(a)(2).

*Example 21-Joint Tenancy.* G, S, and X own property in joint tenancy. G died more than two years after the property was titled in that form, survived by S and X.

In total, two-thirds of the value of the property at G's death is included in the augmented estate-one-sixth under Section 2-205, one-sixth under Section 2-206, and one-third under Section 2-207.

Section 2-205(1)(ii) requires the inclusion of half of the value of G's one-third fractional interest because that half passed by right of survivorship to X.

Section 2-206(1) requires the inclusion of the value of the other half of G's one-third fractional interest because that half passed to S as surviving joint tenant.

Section 2-207(a)(1)(i) requires the inclusion of the value of S's one-third interest. Because G was a joint tenant immediately before G's death, S's fractional interest, for purposes of Section 2-207, is determined immediately before G's death, disregarding the fact that G predeceased S. Immediately before G's death, S's fractional interest was then a one-third fractional interest. Despite Section 2-205(1)(ii), none of S's fractional interest is included under Section 2-207(a)(2) because that provision does not apply to fractional interests that are included under Section 2-207(a)(1)(i). Consequently, the value of S's one-third fractional interest is included in the augmented estate under Section 2-207(a)(1)(i) but not under Section 2-207(a)(2).

*Example 22-Income Interest Passing to Surviving Spouse.* Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the income to go to S for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The full value of the corpus of the trust at G's death is included in the augmented estate under a combination of Sections 2-205 and 2-206.

Section 2-206(3) requires the inclusion of the commuted value of S's income interest. Note that, although S owns the income interest as of G's death, the value of S's income interest is not included under Section 2-207 because Section 2-207 only includes property interests that are not included under Section 2-206.

Section 2-205(2)(i) requires the inclusion of the commuted value of X's remainder interest.

*Example 23-Corpus Passing to Surviving Spouse.* Before death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the corpus of the trust to go to S. G died, survived by S.

The value of the corpus of the trust at G's death is included in the augmented estate under Section 2-206(3). Note that, although S owns the corpus as of G's death, the value of S's ownership interest in the corpus is not included under Section 2-207 because Section 2-207 only includes property interests that are not included under Section 2-206.

*Example 24-TOD Registered Securities, POD Account, and Life Insurance Payable to Surviving Spouse.* In Examples 5 and 8 in the Comment to Section 2-205, G designated S to take the securities on death, registered S as the beneficiary of the POD savings account, and named S as the beneficiary of the life-insurance policy.

The same values that were included in the augmented estate under Section 2-205(1) in those examples are included in the augmented estate under Section 2-206.

*Example 25-Joint Checking Account.* G and S were registered as co-owners of a joint checking account. G contributed 75 percent of the funds in the account and S contributed 25 percent of the funds. G died, survived by S.

G's ownership interest in the account immediately before death, determined under Section 6-211, was 75 percent of the account. Because that percentage ownership interest passed by right of survivorship to S at G's death, 75 percent of the value of the account at G's death is included in the augmented estate under Section 2-206. The remaining 25 percent of the account is included in the augmented estate under Section 2-207.

**Historical Note.** This Comment was added in 1993.

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***Committee Comments:***

*This section tracks, without change, the language of 2-206 of the UPC.*

## **Section 2-207. Surviving Spouse's Property and Nonprobate Transfers to Others.**

(a) **[Included Property.]** Except to the extent included in the augmented estate under Section 2-204 or 2-206, the value of the augmented estate includes the value of:

(1) property that was owned by the decedent's surviving spouse at the decedent's death, including:

(i) the surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship,

(ii) the surviving spouse's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, and

(iii) property that passed to the surviving spouse by reason of the decedent's death, but not including the spouse's right to family allowance, exempt property, or payments under the federal Social Security system; and

(2) property that would have been included in the surviving spouse's nonprobate transfers to others, other than the spouse's fractional and ownership interests included under subsection (a)(1)(i) or (ii), had the spouse been the decedent.

(b) **[Time of Valuation.]** Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of subsection (a)(1)(i) and (ii), the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of subsection (a)(2), proceeds of insurance that would have been included in the spouse's nonprobate transfers to others under Section 2-205(1)(iv) are not valued as if he or she were deceased.

(c) **[Reduction for Enforceable Claims.]** The value of property included under this section is reduced by enforceable claims against the surviving spouse.

### **Comment**

This section, which in the 1990 version appeared in substance as a paragraph of a single, long section defining the augmented estate, establishes as the fourth component of the augmented estate the value of property owned by the surviving spouse at the decedent's death plus the value of amounts that would have been includible in the surviving spouse's nonprobate transfers to others had the spouse been the decedent, reduced by enforceable claims against that property or that spouse, as provided in Sections 2-207(c) and 2-208(b)(1). Property owned by the decedent's surviving spouse does not include the value of enhancements to the surviving spouse's earning capacity (e.g., the value of a law, medical, or business degree).

Note that amounts that would have been includible in the surviving spouse's nonprobate transfers to others under Section 2-205(1)(iv) are not valued as if he or she were deceased. Thus, if, at the decedent's death, the surviving spouse owns a \$1 million life-insurance policy on his or her life,

payable to his or her sister, that policy would not be valued at its face value of \$1 million, but rather could be valued under the method used in the federal estate tax under Treas. Reg. § 20.2031-8.

The purpose of combining the estates and nonprobate transfers of both spouses is to implement a partnership or marital-sharing theory. Under that theory, there is a fifty/fifty split of the property acquired by *both* spouses. Hence the redesigned elective share includes the survivor's net assets in the augmented-estate entity. (Under a different rationale, no longer appropriate under the redesigned system, the pre-1990 version of Section 2-202 also added the value of property owned by the surviving spouse, but only to the extent the owned property had been derived from the decedent. An incidental benefit of the redesigned system is that this tracing-to-source feature of the pre-1990 version is eliminated.)

Various aspects of Section 2-207 are illustrated by the following examples. Other examples illustrating various aspects of this section are Examples 20, 21, 22, 23, and 25 in the Comment to Section 2-206. In the following examples, as in the examples in the Comments to Sections 2-205 and 2-206, above, G is the decedent and S is the decedent's surviving spouse.

*Example 26-Inter-Vivos Trust Created by Surviving Spouse; Corpus Payable to Spouse at Decedent's Death.* Before G's death, and during marriage, S created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the corpus of the trust to go to S. G died, survived by S.

The value of the corpus of the trust at G's death is included in the augmented estate under Section 2-207(a)(1) as either an interest owned by S at G's death or as an interest that passed to the spouse by reason of G's death.

*Example 27-Inter-Vivos Trust Created by Another; Income Payable to Spouse for Life.* Before G's death, X created an irrevocable inter-vivos trust, providing for the income to go to S for life, then for the income to go to G for life, then for the corpus of the trust to go to Y. G died, survived by S and Y.

The commuted value of S's income interest as of G's death is included in the augmented estate under Section 2-207(a), as a property interest owned by the surviving spouse at the decedent's death.

*Example 28-Inter-Vivos Trust Created by Another; Income Payable to Spouse for Life.* Before G's death, X created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the income to go to S for life, then for the corpus of the trust to go to Y. G died, survived by S and Y.

The commuted value of S's income interest at the decedent's death is included in the augmented estate under Section 2-207(a)(1), as either a property interest owned by the surviving spouse at the decedent's death or a property interest that passed to the surviving spouse by reason of the decedent's death.

*Example 29-Life Insurance on Decedent's Life Owned by Surviving Spouse; Proceeds Payable to Spouse.* Before G's death, S bought a life-insurance policy on G's life, naming S as the beneficiary. G died, survived by S.

The value of the proceeds of the life-insurance policy is included in the augmented estate under Section 2-207(a)(1), as property owned by the surviving spouse at the decedent's death.

*Example 30-Life Insurance on Decedent's Life Owned by Another; Proceeds Payable to Spouse.* Before G's death, X brought a life-insurance policy on G's life, naming S as the beneficiary. G died, survived by S.

The value of the proceeds of the life-insurance policy is included in the augmented estate under Section 2-207(a)(1)(iii), as property that passed to the surviving by reason of the decedent's death.

*Example 31-Joint Tenancy Between Spouse and Another.* S and Y own property in joint tenancy. G died, survived by S and Y.

The value of S's one-half fractional interest at G's death is included in the augmented estate under Section 2-207(a)(1)(i). Despite Section 2-205(1)(ii), none of S's fractional interest is included under Section 2-207(a)(2) because that provision does not apply to fractional interests required to be included under Section 2-207(a)(1)(i). Consequently, the value of S's one-half is included under Section 2-207(a)(1)(i) but not under Section 2-207(a)(2).

*Example 32-Inter-Vivos Trust with Retained Income interest Created by Surviving Spouse.* Before G's death, and during marriage, S created an irrevocable inter-vivos trust, providing for the income to go to S for life, then for the income to go to G for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The value of the trust corpus at G's death is included in the augmented estate under Section 2-207(a)(2) because, if S were the decedent, that value would be included in the spouse's nonprobate transfers to others under Section 2-205(2)(i). Note that property included under Section 2-207 is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account.

Thus, G's remainder in income for life is extinguished, and the full value of the corpus is included in the augmented estate under Section 2-207(a)(2). The commuted value of S's income interest would also be included under Section 2-207(a)(1) but for the fact that Section 2-208(c) provides that when two provisions apply to the same property interest, the interest is not included under both provisions, but is included under the provision yielding the highest value. Consequently, since Section 2-207(a)(2) yields a higher value (the full corpus) than Section 2-207(a)(1) (the income interest), and since the income interest is part of the value of the corpus, and hence both provisions apply to the same property interest, the full corpus is included under Section 2-207(a)(2) and nothing is included under Section 2-207(a)(1).

*Example 33-Inter-Vivos Trust Created by Decedent; Income to Surviving Spouse.* More than two years before G's death, and during marriage, G created an irrevocable inter-vivos trust, providing for the income to go to S for life, then for the corpus of the trust to go to X. G died, survived by S and X.

The commuted value of S's income interest as of G's death is included in the augmented estate under Section 2-207. If G had created the trust within the two-year period next preceding G's death, the commuted value of X's remainder interest as of the date of the creation of the trust (less \$10,000, assuming G made no other gifts to X in that year) would also have been included in the augmented estate under Section 2-205(3)(iii).

*Example 34-Inter-Vivos Trust Created by Surviving Spouse; No Retained Interest or Power.* More than two years before G's death, and during marriage, S created an irrevocable inter-vivos trust, providing for the income to go to G for life, then for the corpus of the trust to go to Y. G died, survived by S and Y.

The value of the trust is not included in the augmented estate. If S had created the trust within the two-year period next preceding G's death, the commuted value of Y's remainder interest as of the date of the creation of the trust (less \$10,000, assuming no other gifts to Y in that year) would have been included in the augmented estate under Section 2-207(a)(2) because if S were the decedent, the value of the remainder interest would have been included in S's nonprobate transfers to others under Section 2-205(3)(iii).

**Historical Note.** This Comment was added in 1993.

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### ***Committee Comments:***

*This section tracks, without change, the language of 2-207 of the UPC, except that the reference to the homestead allowance was deleted from 2-207(a)(1)(iii). While the MUPC does provide for Exempt Property (2-403) and Family Allowance (2-404) the MUPC reserved Section 2-402 which provides for the homestead allowance.*

*Section 2-207(c) provides that the value of property included under this section is reduced by enforceable "claims" against the surviving spouse. MUPC 1-201(6) defines "claims" but only in respect to estates and protected persons as liabilities including funeral and administration but excluding estate taxes or demands regarding title of assets alleged to belong to the estate. There is no formal definition of what would constitute a claim against the surviving spouse.*

### **Section 2-208. Exclusions, Valuation, and Overlapping Application.**

(a) **[Exclusions.]** The value of any property is excluded from the decedent's nonprobate transfers to others (i) to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property or (ii) if the property was transferred with the written joinder of, or if the transfer was consented to in writing before or after the transfer by, the surviving spouse.

(b) **[Valuation.]** The value of property:

- (1) included in the augmented estate under Section 2-205, 2-206, or 2-207 is reduced in each category by enforceable claims against the included property; and
- (2) includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system.

**(c) [Overlapping Application; No Double Inclusion.]** In case of overlapping application to the same property of the paragraphs or subparagraphs of Section 2-205, 2-206, or 2-207, the property is included in the augmented estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value.

### **Comment**

**Subsection (a).** This subsection excludes from the decedent's nonprobate transfers to others the value of any property (i) to the extent that the decedent received adequate and full consideration in money or money's worth for a transfer of the property or (ii) if the property was transferred with the written joinder of, or if the transfer was consented to in writing before or after the transfer by, the surviving spouse.

**Consenting to Split-Gift Treatment Not Consent to the Transfer.** Spousal consent to split-gift treatment under I.R.C. § 2513 does not constitute written joinder of or consent to the transfer by the spouse for purposes of subsection (a).

**Obtaining the Charitable Deduction for Transfers Coming Within Section 2-205(2) or (3).** Because, under Section 2-201(9), the term "right to income" includes a right to payments under an annuity trust or a unitrust, the value of a charitable remainder trust established by a married grantor without written spousal consent or joinder would be included in the decedent's nonprobate transfers to others under Section 2-205(2)(i). Consequently, a married grantor planning to establish a charitable remainder trust is advised to obtain the written consent of his or her spouse to the transfer, as provided in Section 2-208(a), in order to be assured of qualifying for the charitable deduction.

Similarly, outright gifts made by a married donor within two years preceding death are included in the augmented estate under Section 2-205(3)(iii) to the extent that the aggregate gifts to any one donee exceed the amount excludable from taxable gifts under 26 U.S.C. Section 2503(b) or its successor on the date next preceding the date of the decedent's death (or, if referring to federal law is considered an unlawful delegation of legislative power, \$12,000) in either of the two years. Consequently, a married donor planning to donate more than that amount to any charitable organization within a twelve-month period is advised to obtain the written consent of his or her spouse to the transfer, as provided in Section 2-208(a), in order to be assured of qualifying for the charitable deduction.

**Spousal Waiver of ERISA Benefits.** Under the Employee Retirement Income Security Act (ERISA), death benefits under an employee benefit plan subject to ERISA must be paid in the form

of an annuity to the surviving spouse. A married employee wishing to designate someone other than the spouse must obtain a waiver from the spouse. As amended in 1984 by the Retirement Equity Act, ERISA requires each employee benefit plan subject to its provisions to provide that an election of a waiver shall not take effect unless

- (i) the spouse of the participant consents in writing to such election,
- (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designation by the participant without any requirement of further consent by the spouse), and
- (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

See 29 U.S.C. §1055(c) (1988); Int. Rev. Code § 417(a). Any spousal waiver that complies with these requirements would satisfy Section 2-208(a) and would serve to exclude the value of the death benefits from the decedent's nonprobate transfers to others.

**Cross Reference.** See also Section 2-213 and Comment.

**Subsection (c).** The application of subsection (c) is illustrated in Example 32 in the Comment to Section 2-207.

**Historical Note.** This Comment was added in 1993. Subsection (a) was amended in 2008 by adding the phrase "before or after the transfer."

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### ***Committee Comments:***

*This section tracks, without change, the language of 2-208 of the UPC.*

#### **Section 2-209. Sources from Which Elective Share Payable.**

(a) **[Elective-Share Amount Only.]** In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's net probate estate and recipients of the decedent's nonprobate transfers to others:

- (1) amounts included in the augmented estate under Section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206; and
- (2) the marital-property portion of amounts included in the augmented estate under Section 2-207

(b) **[Marital Property Portion.]** The marital-property portion under subsection (a)(2) is

computed by multiplying the value of the amounts included in the augmented estate under Section 2-207 by the percentage of the augmented estate set forth in the schedule in Section 2-203(b) appropriate to the length of time the spouse and the decedent were married to each other.

**(c) [Unsatisfied Balance of Elective-Share Amount; Supplemental Elective-Share Amount.]**

If, after the application of subsection (a), the elective-share amount is not fully satisfied, or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's net probate estate, other than assets passing to the surviving spouse by testate or intestate succession, and in the decedent's nonprobate transfers to others under Section 2-205(1), (2), and (3)(i) or (iii), are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's net probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is apportioned among the recipients of the decedent's net probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

**(d) [Unsatisfied Balance of Elective-Share and Supplemental Elective-Share Amount.]**

If, after the application of subsections (a) and (c), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is apportioned among the recipients of the remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

**(e) [Unsatisfied Balance Treated as General Pecuniary Devise.]** The unsatisfied balance of the elective-share or supplemental elective-share amount as determined under subsection (c) or (d) is treated as a general pecuniary devise for purposes of Section 3-904.

### **Comment**

Section 2-209 is an integral part of the overall redesign of the elective-share. It establishes the priority to be used in determining the sources from which the elective-share amount is payable.

**Subsection (a).** Subsection (a) applies only to the elective-share amount determined under Section 2-202(a), not to the supplemental elective-share amount determined under Section 2-202(b). Under subsection (a), the following are counted first toward satisfying the elective-share amount (to the extent they are included in the augmented estate):

(1) amounts included in the augmented estate under Section 2-204 which pass or have passed to the surviving spouse by testate or intestate succession and amounts included in the augmented estate under Section 2-206, i.e., the value of the decedent's nonprobate transfers to the surviving spouse, including the proceeds of insurance (including accidental death benefits) on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, but excluding property passing under the Federal Social Security system; and

(2) the marital-property portion of amounts included in the augmented estate under Section 2-207

Under subsection (b), the marital-property portion of amounts included in the augmented estate under Section 2-207 is computed by multiplying the value of the amounts included in the augmented estate under Section 2-207 by the percentage of the augmented estate set forth in the schedule in Section 2-203(b) appropriate to the length of time the spouse and the decedent were married to each other.

If the combined value of the amounts described in subsection (a)(1) and (2) equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from the decedent's probate estate or recipients of the decedent's nonprobate transfers to others, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-202(b).

**Subsections (c) and (d).** Subsections (c) and (d) apply to both the elective-share amount and the supplemental elective-share amount, if any. As to the elective-share amount determined under Section 2-202(a), the decedent's probate estate and nonprobate transfers to others become liable only if and to the extent that the amounts described in subsection (a) are insufficient to satisfy the elective-share amount. The decedent's probate estate and nonprobate transfers to others are fully liable for the supplemental elective-share amount determined under Section 2-202(b), if any.

Subsections (c) and (d) establish a layer of priority within the decedent's net probate estate (other than assets passing to the surviving spouse by testate or intestate succession) and nonprobate transfers to others. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others that was not included in the augmented estate under Section 2-205(3)(i) or (iii) are liable first. Only if and to the extent that those amounts are insufficient does the remaining portion of the decedent's nonprobate transfers to others become liable.

Note that the exempt property and allowances provided by Sections 2-401 and 2-403 are not charged against, but are in addition to, the elective-share and supplemental elective-share amounts.

The provision that the spouse is charged with amounts that would have passed to the spouse but were disclaimed was deleted in 1993. That provision was introduced into the Code in 1975, prior to the addition of the QTIP provisions in the marital deduction of the federal estate tax. At that time, most devises to the surviving spouse were outright devises and did not require actuarial computation. Now, many if not most devises to the surviving spouse are in the form of an income interest that qualifies for the marital deduction under the QTIP provisions, and these devises require actuarial computations that should be avoided whenever possible.

The word "equitably" is eliminated from subsections (c) and (d) because it has caused confusion about whether it grants discretion to the court to apportion liability for the unsatisfied balance among the recipients of the decedent's net probate estate and of that portion of the decedent's nonprobate transfers to others in some proportion other than in proportion to the value of their interests therein. The intent of including that word in the earlier version was merely to describe the prescribed apportionment as "equitable," not to grant authority to vary the prescribed apportionment.

**Historical Note.** This Comment was revised in 1993 and 2008.

### ***Committee Comments:***

*This section tracks, without changes, the language of 2-209.*

#### **Section 2-210. Personal Liability of Recipients.**

(a) Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to him or her or to pay the value of the amount for which he or she is liable.

(b) If any section or part of any section of this Part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in Section 2-209, to the person who would have been entitled to it were that section or part of that section not preempted.

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### ***Committee Comments:***

*Section 2-210 of the proposed legislation tracks 2-210 of the UPC, except that the UPC contains brackets around the words “or her” and “or she” in the second unnumbered sentence of (a).*

*Under Section 2-210, donees of the original recipients, to the extent they have the property or its proceeds, are liable to contribute toward satisfaction of the elective share. The fact that liability belongs to the person receiving the items, rather than attaching to the thing itself in the form of a lien, obviates concerns about the creation of potential liens attaching to property subject to a right of election.*

*Under the UPC definition of “person”, a charitable donee could have liability under Section 2-210. Under the MUPC Section 1-201, a “person” is defined as “an individual or an organization”, with “organization” further defined as “a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.”*

*Section 2-210(b) addresses federal preemption under Treasury regulations dealing with Treasury bills that have a survivorship feature. The relevant regulations are in 31 C.F.R. 315.20, 315.16 and 315.21(a)(1). See also the Matter of Scheiner, 535 N.Y.S. 2d 920 (Sur. Ct. 1988). Section 2-210(b) is intended to give the surviving spouse a remedy even if the decedent spouse has purchased Treasury bills giving someone other than the surviving spouse the right of survivorship.*

## **Section 2-211. Proceeding for Elective Share; Time Limit.**

(a) Except as provided in subsection (b), the election must be made by filing in the Court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse must give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's nonprobate transfers to others are not included within the augmented estate for the purpose of computing the elective-share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's nonprobate transfers to others are not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse may withdraw his or her demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under Sections 2-209 and 2-210. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he or she would have been under Sections 2-209 and 2-210 had relief been secured against all persons subject to contribution.

(e) An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this State or other jurisdictions.

### **Comment**

This section is revised to coordinate the terminology with that used in revised Section 2-205 and with the fact that an election can be made by a conservator, guardian, or agent on behalf of a surviving spouse, as provided in Section 2-212(a).

**Historical Note.** This Comment was revised in 1993. For the prior version, see 8 U.L.A. 98 (Supp. 1992).

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***Committee Comments:***

*This section tracks, without change the language of Section 2-211 of the UPC.*

**Section 2-212. Right of Election Personal to Surviving Spouse; Incapacitated Surviving Spouse.**

(a) **[Surviving Spouse Must Be Living at Time of Election.]** The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under Section 2-211(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his or her conservator, guardian, or agent under the authority of a power of attorney.

(b) **[Incapacitated Surviving Spouse.]** If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under Section 2-209(c) and (d) must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of the Massachusetts Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. For purposes of the custodial trust established by this subsection, (i) the electing guardian, conservator, or agent is the custodial trustee, (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust is deemed to have been created by the decedent spouse by written transfer that takes effect at the decedent spouse's death and that directs the custodial trustee to administer the custodial trust as for an incapacitated beneficiary.

(c) **[Custodial Trust.]** For the purposes of subsection (b), the Massachusetts Uniform Custodial Trust Act must be applied as if Section 6(b) thereof were repealed and Sections 2(e), 9(b), and 17(a) were amended to read as follows:

(1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order but with regard to other support, income, and property of the beneficiary and

benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need.

(3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial trust property in the following order: (i) under the residuary clause, if any, of the will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the beneficiary; or (ii) to that predeceased spouse's heirs under Section 2-711 of Massachusetts Uniform Probate Code.

### Comment

**Subsection (a).** Subsection (a) is revised to make it clear that the right of election may be exercised only by or on behalf of a living surviving spouse. If the election is not made by the surviving spouse personally, it can be made on behalf of the surviving spouse by the spouse's conservator, guardian, or agent. In any case, the surviving spouse must be alive when the election is made. The election cannot be made on behalf of a deceased surviving spouse.

**Subsections (b) and (c).** If the election is made on behalf of a surviving spouse who is an "incapacitated person", as defined in section 5-103(7), that portion of the elective-share and supplemental elective-share amounts which, under Section 2-209(c) and (d), are payable from the decedent's probate estate and nonprobate transfers to others must go into a custodial trust under the Uniform Custodial Trust Act, as adjusted in subsection (c).

If the election is made on behalf of the surviving spouse by his or her guardian or conservator, the surviving spouse is by definition an "incapacitated person." If the election is made by the surviving spouse's agent under a durable power of attorney, the surviving spouse is presumed to be an "incapacitated person"; the presumption is rebuttable.

The terms of the custodial trust are governed by the Uniform Custodial Trust Act, except as adjusted in subsection (c).

The custodial trustee is authorized to expend the custodial trust property for the use and benefit of the surviving spouse to the extent the custodial trustee considers it advisable. In determining the amounts, if any, to be expended for the spouse's benefit, the custodial trustee is directed to take into account the spouse's other support, income, and property; these items would include governmental benefits such as Social Security and Medicare.

At the surviving spouse's death, the remaining custodial trust property does not go to the surviving spouse's estate, but rather under the residuary clause of the will of the predeceased spouse whose probate estate and nonprobate transfers to others were the source of the property in the custodial trust, as if the predeceased spouse died immediately after the surviving spouse. In the absence of a residuary clause, the property goes to the predeceased spouse's heirs. See Section 2-711.

**Planning for an Incapacitated Surviving Spouse Not Disrupted.** Note that the portion of the elective-share or supplemental elective-share amounts that go into the custodial or support trust is

that portion due from the decedent's probate estate and nonprobate transfers to others under Section 2-209(c) and (d). These amounts constitute the involuntary transfers to the surviving spouse under the elective-share system.

Amounts voluntarily transferred to the surviving spouse under the decedent's will, by intestacy, or by nonprobate transfer, if any, do not go into the custodial or support trust. Thus, estate planning measures deliberately established for a surviving spouse who is incapacitated are not disrupted. For example, the decedent's will might establish a trust that qualifies for or that can be elected as qualifying for the federal estate tax marital deduction. Although the value of the surviving spouse's interests in such a trust count toward satisfying the elective-share amount under Section 2-209(a)(1), the trust itself is not dismantled by virtue of Section 2-212(b) in order to force that property into the nonqualifying custodial or support trust.

**Rationale.** The approach of this section is based on a general expectation that most surviving spouses are, at the least, generally aware of and accept their decedents' overall estate plans and are not antagonistic to them. Consequently, to elect the elective share, and not have the disposition of that part of it that is payable from the decedent's probate estate and nonprobate transfers to others under Section 2-209(c) and (d) governed by subsections (b) and (c), the surviving spouse must not be an incapacitated person. When the election is made by or on behalf of a surviving spouse who is not an incapacitated person, the surviving spouse has personally signified his or her opposition to the decedent's overall estate plan.

If the election is made on behalf of a surviving spouse who is an incapacitated person, subsections (b) and (c) control the disposition of that part of the elective-share amount or supplemental elective-share amount payable under Section 2-209(c) and (d) from the decedent's probate estate and nonprobate transfers to others. The purpose of subsections (b) and (c), generally speaking, is to assure that that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse's heirs or devisees.

**Historical Note.** This Comment was revised in 1993 and 2008.

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### ***Committee Comments:***

*This section tracks, without change, the recommended language of the UPC Section 2-212 for states that have adopted the Uniform Custodial Trust Act.*

*Massachusetts has adopted the Uniform Custodial Trust Act. Chapter 203B. Under Section 2-212, the Uniform Custodial Trust Act is applied as if Section 6(b) of 203B were repealed. Section 6(b) of the Uniform Custodial Act provides that: "Custodial trust property held under this chapter by the same custodial trustee for the use and benefit of the same beneficiary may be administered as a single custodial trust." The deemed repeal of this Section prevents elective share property (which is to revert to the family of the predeceased spouse) from being consolidated into custodial trust property that will be differently disposed of on the death of the beneficiary.*

*Section 2(e) of the Uniform Custodial Trust Act provides in substance that the conservator of*

*an incapacitated beneficiary may terminate the custodial trust. Section 2-212(b)1 prevents this result. The custodial trust can only be terminated prior to the beneficiary's death if she/he regains capacity. This is consistent with Section 2-212's approach to election by the incapacitated spouse, which is that the election is made for support and not because the incapacitated person is presumed to be antagonistic to the plan created by the first spouse to die.*

*Section 9(b) of the Uniform Custodial Trust Act establishes the distribution rules for custodial trusts in Massachusetts. This section would permit distributions to or for not only the beneficiary but also "persons who were supported by the beneficiary ..." or were legally entitled to such support. The Uniform Custodial Trust Act further states that the custodial trustee may make distributions "that the custodial trustee determines suitable and proper, without court order and without regard to other support, income or property of the beneficiary". Section 2-212(b)(2) modifies this. Distributions are to be made "with regard to other support, income, and property of the beneficiary and benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need."*

*The custodial trust is not structured to qualify for the marital deduction.*

### **Section 2-213. Waiver of Right to Elect and of Other Rights.**

(a) **[Scope].** A waiver is enforceable against the surviving spouse if it is enforceable under (i) this section or (ii) the law governing the enforceability of the waiver where and when it was executed.

(b) **[Waiver Before or After Marriage].** The right of election of a surviving spouse and the rights of the surviving spouse to exempt property, family allowance, and intestate share, or any of them, may be waived, wholly or partially, before or after marriage, unilaterally or pursuant to an agreement contained in a record signed by the surviving spouse.

(c) **[Consideration Unnecessary].** Consideration is not necessary to the enforcement of a waiver.

(d) **[Requirements for Enforceability; Burden of Persuasion].** For a waiver to be enforceable against the surviving spouse, the spouse's waiver must have been informed and not obtained by fraud, undue influence, or duress. Except as otherwise provided in subsection (e), the enforcing party has the burden of persuasion to establish that the spouse's waiver was informed. The surviving spouse has the burden of persuasion to establish that the waiver was obtained by fraud, undue influence, or duress.

(e) **[Presumption].** A rebuttable presumption arises that the surviving spouse's waiver was informed, shifting the burden of persuasion to the surviving spouse to establish that his or her waiver was not informed, if the enforcing party establishes that:

- (1) before the waiver was executed, (i) the surviving spouse knew, at least approximately, the decedent's assets and asset values, income, and liabilities; or (ii)

the decedent or his or her representative provided in timely fashion to the surviving spouse a written statement accurately disclosing the decedent's significant assets and asset values, income, and liabilities; and either

(2) the surviving spouse was represented by independent legal counsel; or

(3) if the surviving spouse was not represented by independent legal counsel, (i) the decedent or the decedent's representative advised the surviving spouse, in timely fashion, to obtain independent legal counsel, and offered to advance sufficient funds to pay for the reasonable costs of the surviving spouse's representation or to reimburse those costs; and (ii) the waiver stated, in language easily understandable by an adult of ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at death that were altered by the waiver, and the nature of that alteration.

**(f) [Unconscionability].** A waiver is unenforceable if it was unconscionable when it was executed. An issue of unconscionability of a waiver is for decision by the court as a matter of law.

**(g) [Waiver of "All Rights"].** Unless it provides to the contrary, a waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

### **Comment**

This section applies to a waiver, in whole or in part, of elective share rights and rights to homestead allowance, exempt property, family allowance, and intestate share, or any of them. A waiver can be made before or after the marriage and can be unilateral or pursuant to an agreement. A waiver is enforceable against the surviving spouse if it is enforceable under (i) this section or (ii) the law governing the enforceability of the waiver where and when it was executed. Subsection (a) thus makes this section in effect prospective only in the enacting state and to recognize the enforceability of a waiver signed elsewhere, before or after the effective date of this section, if it was enforceable under the governing law of the other place. In the enacting state, a waiver executed before the effective date of this section is enforceable if it is enforceable under this section or under the prior law of the enacting state.

The right to exempt property and family allowance are conferred by the provisions of Part 4. The right to disclaim interests is recognized by Section 2-1105. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property, seem desirable in view of the common desire of parties to second and later marriages to insure that property derived from the prior spouse passes at death to the joint children (or descendants) of the prior marriage instead of to the later spouse. The operation of a property settlement in anticipation of separation or divorce as a waiver and renunciation takes care of most situations arising when a

spouse dies while a divorce suit is pending.

Elective share systems and other statutory rights arising on death protect against unilateral disinheritance of a spouse but do not interfere with genuinely consensual arrangements that waive or reduce such spousal rights. Although protective in purpose, elective share law is default law, which the parties may alter or abrogate. The parties may decline to have an economic partnership of the kind characteristic of most first marriages. It is particularly common, for example, for two previously married older persons contemplating marriage to wish to ensure that on the first spouse's death, all or most of the decedent's property will go to the decedent's children rather than to the surviving spouse (and ultimately, perhaps, to the surviving spouse's children). Freedom to make an enforceable agreement of this character not only facilitates the marriage of such a couple, but may also improve the quality of the marriage, smoothing the spouses' relationship to their respective children by providing assurance that the new marriage will not interfere with the children's expectations.

While there are good reasons to respect such contracts, the relationship between parties contracting in anticipation of marriage, or in the midst of an ongoing marriage, requires legal standards different from ordinary commercial settings. A party negotiating a commercial contract can engage in arms-length dealings to maximize partisan advantage. Parties to a waiver are in a relationship of trust and confidence. Entering into or operating within a marriage, an individual may have expectations about his or her partner that may impair the capacity for self-protective judgment, or the inclination to exercise it. The law reasonably requires greater assurance that the waiving party understand and appreciate the consequences of the waiver.

**Signed Record.** To be enforceable, a waiver covered by this section must be in a record, and must be signed by the surviving spouse. The waiver need not be supported by consideration.

**Burden of Persuasion.** Because the parties to a premarital or a marital agreement or waiver are in a relationship of trust and confidence, subsection (d) places the burden of persuasion on the enforcing party (the party seeking to enforce the waiver against a surviving spouse who claims the elective share or other statutory rights in violation of the waiver). The enforcing party must establish that the surviving spouse's consent was informed. The burden of persuasion shifts to the surviving spouse to establish the opposite, however, if the rebuttable presumption established in subsection (e) applies. The surviving spouse has the burden of persuasion on undue influence, duress, or fraud, in the same manner that a will contestant has the burden on these issues. See Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 (2003).

**Presumption That Surviving Spouse's Consent Was Informed.** If the enforcing party establishes the existence of the circumstances described in subsection (e), the enforcing party benefits from a rebuttable presumption that the requirements of subsection (d) are satisfied, shifting the burden of persuasion to the surviving spouse.

The rebuttable presumption minimizes the risk of the agreement being found defective in circumstances in which, before the waiver's execution, the surviving spouse knew the decedent's financial situation, understood what legal rights or claims he or she might have as the decedent's surviving spouse, understood how the proposed agreement intended to alter those rights, and had (or

had a reasonable opportunity to have) independent legal representation in negotiating the agreement or waiver. The rebuttable presumption is thus designed to increase the predictability and enforceability of premarital and marital agreements and waivers by facilitating planning that minimizes the risk of the agreement or waiver being found defective.

**Knowledge of the Decedent's Financial Situation.** The surviving spouse must be shown to have had knowledge of the decedent's financial situation when the agreement was executed in order for the rebuttable presumption provided in subsection (e) to arise. Such knowledge is crucial to understanding the significance of the agreement or waiver, as the assets are themselves the subject of the agreement or waiver.

To have the benefit of the rebuttable presumption under subsection (e), the enforcing party must establish that, before the execution of the agreement or waiver, (i) the surviving spouse knew, at least approximately, the decedent's assets and asset values, income, and liabilities; or (ii) the decedent or his or her representative provided in timely fashion to the surviving spouse a written statement accurately disclosing the decedent's significant assets and asset values, income, and liabilities. In circumstances in which the decedent's property consisted importantly of assets for which an immediately ascertainable market price is not available, such as close corporation shares or interests in real estate, the duty to disclose asset values requires the decedent to supply suitable appraisals.

If the parties to the agreement were married or lived together for many years and commingled their finances, or had been business partners, they may have had knowledge of each other's financial situation before the negotiations were begun, and such a showing will satisfy the requirements of subsection (e)(1). In the more typical case in which the parties did not have such knowledge, written disclosure in connection with the agreement is required.

**Representation by Independent Legal Counsel.** Showing that the surviving spouse had knowledge of the decedent's financial situation when the agreement or waiver was executed is essential but not sufficient to give rise to the rebuttable presumption provided in subsection (e).

The surviving spouse must also have understood what legal rights or claims that he or she might have as the decedent's surviving spouse and understood how the proposed agreement or waiver intended to alter those rights. Under subsection (e)(2), that requirement can be satisfied by establishing that the surviving spouse was represented by independent legal counsel. An independent counsel can be expected to provide advice that is customized to the client's particular situation, explain the legal rights that would accrue to the client as surviving spouse, and negotiate the terms of the agreement or waiver on behalf of the client.

**Reasonable Opportunity to Obtain Independent Legal Counsel and Clear Explanation of the Import of the Agreement or Waiver.** If the surviving spouse was not represented by independent legal counsel, the enforcing party can obtain the benefit of the rebuttable presumption by making two further showings. First, the enforcing party must establish that the surviving spouse had a reasonable opportunity to obtain independent legal counsel in a timely fashion. That is, the enforcing party must establish that the decedent or the decedent's representative advised the surviving spouse, in timely fashion, to obtain independent legal counsel; and offered to advance the

funds to pay for the reasonable costs of the surviving spouse's representation or reimburse the surviving spouse for those costs.

The enforcing party must also establish that the agreement stated, in language easily understandable by an adult of ordinary intelligence with no legal training, the nature of any rights or claims otherwise arising at death that were altered by the agreement, and the nature of that alteration.

To qualify under subsection (e)(3), the language must be explicit, concrete, and reasonably complete, but need not address every detail of the legal significance of the agreement or waiver. For example, the language need not ordinarily explain the tax consequences of the agreement's or waiver's provisions (although such an explanation would be necessary if tax planning was a primary purpose of the agreement and the tax impact on the surviving spouse is both significant and adverse).

**Unconscionability.** A spousal waiver is unenforceable if it was unconscionable when it was executed. In accordance with general principles of contract law, subsection (f) provides that an issue of unconscionability is for decision by the court as a matter of law.

**Effect of Premarital Agreement or Waiver on ERISA Benefits.** As amended in 1984 by the Retirement Equity Act, ERISA requires each employee benefit plan subject to its provisions to provide that an election of a waiver shall not take effect unless

- (i) the spouse of the participant consents in writing to such election,
- (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designation by the participant without any requirement of further consent by the spouse), and
- (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

See 29 U.S.C. § 1055(c) (1988); Int. Rev. Code § 417(a).

In *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir.1992), the court held that a premarital agreement was not an effective waiver of a wife's claims to spousal death benefits under a qualified profit sharing plan in which the deceased husband was the sole participant. The premarital agreement provided, in part, that "each party hereby waives and releases to the other party and to the other party's heirs, executor, administrators and assigns any and all rights and causes of action which may arise by reason of the marriage between the parties ... with respect to any property, real or personal, tangible or intangible ... now owned or hereafter acquired by the other party, as fully as though the parties had never married..." The court held that the premarital agreement was not an effective waiver because it "did not designate a beneficiary and did not acknowledge the effect of the waiver as required by ERISA." 982 F.2d at 781. Although the district court had held that the premarital agreement was also ineffective because the wife was not married to the participant when she signed the agreement, the Second Circuit "reserve[d] judgment on whether the [premarital] agreement might have operated as an effective waiver if its only deficiency were that it had been entered into before marriage." *Id.* at 781 n. 3. The court did, however, quote *Treas. Reg. § 1.401(a)-20* (1991),

which specifically states that “an agreement entered into prior to marriage does not satisfy the applicable consent requirements...” Id. at 782. Other cases involving the validity of premarital agreements on ERISA benefits include Callahan v. Hutsell, Callahan & Buchino, 813 F.Supp. 541 (W.D.Ky.1992); Zinn v. Donaldson Co., Inc., 799 F.Supp. 69 (D.Minn.1992); Estate of Hopkins, 574 N.E.2d 230 (Ill.App.Ct.1991); see also Howard v. Branham & Baker Coal Co., 1992 U.S.App. LEXIS 16247 (6th Cir.1992).

**Cross Reference.** See also Section 2-208 and Comment.

**Historical Note.** This Comment was revised in 1993. For the prior version, see 8 U.L.A. 97 (Supp. 1992).

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### ***Committee Comments:***

*This section tracks the version of 2-213 proposed by the JEB-UTEA rather than the version included in the 2008 Amendments to the UPC, except that the Committee deleted references to the homestead allowance. It was the consensus of the Committee that the JEB-UTEA version reflected above creates a far clearer road map for the validity of waivers than current 2-213. The Committee also noted that JEB-UTEA 2-213 “no-second-look” approach provided much needed certainty to the enforceability of waivers: if the waiver was not unconscionable when executed, the waiver is valid provided the clearly specified formalities have been met.*

*The Committee believes that revised 2-213 is more consistent with current case law, including Ansin v. Craven-Ansin, 457 Mass. 283 (2010), regarding marital agreements, as opposed to the current UPC version of 2-213, which tracks the Uniform Premarital Agreement Act, which Massachusetts has not adopted.*

*The JEB-UTEA’s comment refers to states having a Dead Man’s Act that might operate to exclude testimony. The relevant Massachusetts statute is MGL chapter 233, Section 65 and provides that in any action or other civil proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as a private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant. The Committee did not make reference to the Massachusetts statute because it perceived no need to negate the evidentiary rule that would apply under existing Massachusetts law.*

### **Section 2-214. Protection of Payors and Other Third Parties.**

(a) Although under Section 2-205 a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other

third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

(b) A written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property, and, upon its determination under Section 2-211(d), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under Section 2-211(a) or, if filed, the demand for an elective share is withdrawn under Section 2-211(c), the court shall order disbursement to the designated beneficiary. Payments or transfers to the court or deposits made into court discharge the payor or other third party from all claims for amounts so paid or the value of property so transferred or deposited.

(c) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this Part.

### **Comment**

This section provides protection to "payors" and other third parties who made payments or took any other action before receiving written notice of the spouse's intention to make an election under this Part or that an election has been made. The term "payor" is defined in Section 1-201 as meaning "trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments."

**Historical Note.** Although this Comment was added in 1993, the substance of the Comment previously appeared as the last paragraph of the Comment to Section 2-202, 8 U.L.A. 92, 93 (Supp. 1992).

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### ***Committee Comments:***

*Section 2-214 tracks, without change, Section 2-214 of the UPC. The MUPC includes the UPC's definition of "payor".*

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