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THE INTERPLAY OF PROBATE ASSETS AND NONPROBATE ASSETS IN THE ADMINISTRATION OF A DECEDED'S ESTATE

James J. Carroll*

With increasing frequency, nontestamentary devices are being employed as substitutes for a will in contemporary estate plans. The author explores the interplay of probate and nonprobate assets in two important areas: the surviving spouse's interest, and the apportionment of the federal estate tax. He suggests various approaches that the legislature and courts might adopt in formulating a definitive solution to these current probate problems.

The past century has witnessed significant changes in not only the character of the property comprising a decedent's estate, but also the mode by which property is transferred from one generation to the next. In the agrarian society of the nineteenth century, the primary emphasis of probate law was on the devolution of real estate, then the foundation of the American economy and the principal source of wealth. As society developed to the present highly industrialized and urbanized corporate structure, real estate was displaced from its exalted position in the economic structure and was replaced by intangible personal property, the life blood of modern capitalism. Accordingly, the transmission of intangible personal property has become the focal point of most contemporary estate plans.

This shift in emphasis from real property to intangible personal property has been accompanied by a related phenomenon in the design of estate plans: a marked decline in the reliance on a will as the primary vehicle to dispose of one's estate. With increasing frequency, a variety of nontestamentary devices have been em-

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1. The decline in the use of a will as the primary estate planning tool is due in large part to the public's attitude toward probate proceedings.
   Rightly, or wrongly, the public seems to believe that such mandatory court proceedings generate unnecessary expense and delay in the transmission of the average estate at death. As a result, myriad techniques have developed to avoid probate.

ployed as substitutes for a will in the transmission of property. Those devices most widely used are *inter vivos* trusts, joint tenancy ownership of assets, life insurance policies, joint and survivor annuities, employee benefit plans, "Totten trust" savings accounts, and "payable on death" accounts and bonds.\(^2\) Thus, the typical decedent’s estate, today, is composed of both probate assets, i.e., property which passes under his will or by intestacy, and nonprobate assets, i.e., property which passes by contract, by operation of law, or under the provisions of a trust or other nontestamentary device outside the jurisdiction of a probate court.

The increasing emphasis on nonprobate assets in a decedent’s estate may best be illustrated by a few telling statistics. From 1940 to 1973 the aggregate amount of life insurance in force increased almost sixteenfold, from approximately 115 billion to 1.8 trillion dollars.\(^3\) During the same period the average life insurance coverage per family rose sharply from $2,700 to $24,400.\(^4\) This surge in the use of life insurance can be explained partially by the preferred status afforded it under federal income tax laws,\(^5\) but its increased use is primarily attributable to changing attitudes about its role as an asset of one’s estate. Life insurance is no longer viewed simply as the source of one’s burial expenses, but rather as a means of guaranteeing a continuing source of income to one’s family and of providing liquidity to one’s estate. Death benefits under employee benefit plans have also become an important nonprobate asset, primarily because of the favorable federal estate and income tax treatment of such benefits.\(^6\)

During the period of 1940 to 1970 the coffers of private employee

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2. Although not generally regarded as a means of transmitting wealth, the payment of survivor’s benefits under the Social Security Act is also in substance a nontestamentary disposition of property. The survivor, at least in theory, is receiving the lifetime contributions of the decedent. The amount of survivor’s benefits has greatly increased over recent years. From 1950 to 1971, for example, the average monthly benefit of widows and widowers rose from $36.54 to $113.17. U.S. Bureau of the Census, *Statistical Abstract of the United States* 286, table 464 (1972).


4. *Id.*

5. *See* Int. Rev. Code of 1954 § 101(a) excluding life insurance proceeds from the definition of gross income and Int. Rev. Code of 1954 § 79 excluding the premium paid by an employer up to $50,000 of group term life insurance on his employee’s life from the employee’s gross income.

6. *See* Int. Rev. Code of 1954 § 2039(c) which exempts from federal estate taxation
benefit trusts swelled from 2.4 to 137.1 million dollars, evidencing the dynamic growth of this nonprobate asset.

The use of *inter vivos* trusts, both of the funded and unfunded variety, as a device for transmitting one's estate has also risen dramatically. During the five-year period of 1968 through 1973, the number of personal trusts held by commercial banks increased by fifty percent from 520,376 to 766,337, and, their aggregate asset value rose from 99 billion dollars to 146 billion dollars, despite the stagnation of the securities market. By way of contrast, the number of probate estates administered by commercial banks and their aggregate asset value remained relatively constant during this same period. The growing importance of the *inter vivos* trust as an estate planning device is due to the flexibility which it offers as a vehicle for funneling one's life insurance, employee death benefits and other assets into an integrated dispositive scheme. Perhaps the principal stimulus, however, for the growing use of trusts has been the desire to minimize federal estate taxation. Under the current federal estate tax structure, which has existed since the enactment of the marital deduction, this objective can generally be achieved by splitting one's estate into two trusts: a marital deduction trust and a "nonqualifying" residuary trust.

The aforementioned nontestamentary devices usually pose no problem when they are integrated into a carefully designed dispositive scheme. When, however, such devices are employed qualified employee death benefits attributable to employer contributions and Int. Rev. Code of 1954 §§ 401-03 which permits an employee to defer the taxation of income on qualified employee benefit plans. The Employee Retirement Security Act of 1974, enabling an employed person not covered by a retirement plan to open an individual retirement account, should further increase the significance of this type of nontestamentary disposition. See Int. Rev. Code of 1954 §§ 219, 408-409 (Cum. Supp. 1975).


9. *Id.* From 1968 to 1973, the estates administered by commercial banks increased from 115,008 to 125,719, while their aggregate asset value increased from 14 to 14.8 billion dollars.

10. Int. Rev. Code of 1954 § 2056. The Revenue Act of 1948 introduced the concept of the marital deduction which has since had a dominant role in estate planning.
haphazardly, and, as is usually the case, without proper legal advice, the resulting “do-it-yourself” estate plan can be disastrous.

The interplay of probate and nonprobate assets has caused problems which are neither envisioned nor resolved by the Illinois Probate Act, which has failed to keep pace with the changing nature of the assets comprising decedents’ estates and the modes by which estates are transmitted. It is not surprising, therefore, that the two most significant recent Illinois cases in the probate area have grappled with the relationship of the probate estate vis-à-vis the nonprobate estate, and in so doing have attempted to fill this legislative void. In Montgomery v. Michaels,12 the Illinois Supreme Court examined the extent to which a surviving spouse’s right to an intestate share applies to the deceased spouse’s nonprobate assets. In Estate of Van Duser,13 an Illinois appellate court ruled on the manner in which the federal estate tax should be apportioned between probate and nonprobate assets of a decedent’s estate.

THE SURVIVING SPOUSE’S INTEREST IN NONPROBATE ASSETS

The vulnerable financial position of a spouse who receives no wages for her role as mother and homemaker while her husband accumulates a separate estate through his labors has long been recognized by the law. To accord a spouse a degree of protection

11. By using a marital deduction trust/residuary trust arrangement, a person can prevent the double taxation of the estate. At death, the assets comprising the marital deduction trust are not taxed because they qualify for the marital deduction. On the death of the spouse, the assets comprising the residuary trust escape federal estate taxation because the spouse does not have a general power of appointment over the residuary trust. Thus, each trust is taxed only once. The same favorable tax treatment can, of course be obtained by giving the surviving spouse the marital share outright instead of placing it in a marital deduction trust.

See INT. REV. CODE OF 1954 § 2056(b)(5); Treas. Reg. § 20-2056(b)-(5) (1975). An additional fact which has added to the indigenous popularity of trusts in this state is that Illinois courts do not exercise on-going supervision over the administration of trusts, as is the case in many other jurisdictions. This, of course, saves expensive attorneys’ fees and reduces significantly the paperwork required of a trustee.

12. 54 Ill. 2d 532, 301 N.E. 2d 465 (1973). The assets in question were funds in a Totten trust established by decedent. See note 38 and accompanying text infra. There is an excellent discussion of Montgomery v. Michaels in Note, 23 DePaul L. Rev. 1247 (1974).


13. 19 Ill. App. 3d 1022, 313 N.E. 2d 228 (1st Dist. 1974). The assets in question included approximately $170,000 in nonprobate assets and $65,000 in probate assets.
from total disinheritaee, a variety of property rights have been recognized, among them the rights of dower and courtesy, the surviving spouse's award, the right of homestead, the right to renounce a will, the right to a share of intestate assets, and in some jurisdictions the rights inherent in community property.

Under present Illinois law, a surviving spouse has the right to renounce the decedent spouse's will and take one-third of his probate estate if he leaves descendants, or one-half if he leaves no descendants.4 A surviving spouse also has the right to retain a homestead of $10,00011 and to receive a surviving spouse's award of at least $5,000.16 The rights of dower and courtesy have been abolished.17

Do these provisions in Illinois law accord a surviving spouse sufficient statutory protection against a spouse bent on her disinheritaee? The answer, in this writer's opinion, is no. What statutory protection does a wife have from a husband who places his cash in a joint tenancy savings account with his paramour, designates his children as the beneficiaries of his employee benefit plan and life insurance policies, and transfers his securities to a trust distributable to his Moose Lodge upon his death? Because none of these assets form part of the probate estate, his surviving spouse cannot reach these assets under either her statutory right to renounce or her statutory right to an intestate share.

To remedy this injustice, Illinois courts have attempted to supplement the statutory property rights of a surviving spouse through the judicial doctrine of "transfers in fraud of marital rights:"

14. ILL. REV. STAT. ch. 3, § 16 (1973). The surviving spouse has the right to renounce the will, "whether or not the will contains any provision for the benefit of the surviving spouse . . . ." Id.

15. ILL. REV. STAT. ch. 52, § 1 (1973). The Illinois Probate Act provides, however, that the court has the power to set off the homestead and order the sale of the property or if the property cannot be divided, sell the property free of homestead and pay the person entitled to the exemption the equivalent sum of money. ILL. REV. STAT. ch. 3, § 234 (1973).

16. ILL. REV. STAT. ch. 3, § 178 (1973) reads in part:

The surviving spouse . . . shall be allowed . . . such a sum of money as the court deems reasonable for the proper support of the surviving spouse for the period of 9 months after the death of the decedent in a manner suited to the condition in life of the surviving spouse and to the condition of the estate . . . .

The award shall in no case be less than $5,000 . . . .

17. The estates of dower and courtesy were abolished in Illinois on January 1, 1972. ILL. REV. STAT. ch. 3, § 18 (1973).
If the gift or disposition of the property, however, is but a scheme of the husband to deprive the wife of her property rights, at the same time retaining the benefits of the property himself during his lifetime, the transaction may be set aside.18

Some of the facts considered by the courts in determining whether a particular transfer is a fraud upon the surviving spouse's marital rights, are the decedent's intention,19 the proximity between the date of the transfer and the date of his death, whether the transfer is bona fide or illusory, the fairness of the overall dispositive scheme to the surviving spouse, and the degree of control retained by the decedent.20 An additional but inarticulated consideration is the extent and cause of any marital disharmony between the decedent and the surviving spouse, i.e., was the dispositive scheme reasonable in view of the relative fault of the parties and the duration of their estrangement?21

There are only four reported Illinois cases in which a surviving spouse successfully invoked the fraud of marital rights doctrine as to post-nuptial transfers. In Blankenship v. Hall,22 Mr. Blankenship conveyed substantially all of his real estate to third parties. While Mrs. Blankenship was committed to an insane asylum from 1892 through 1898, the Hall family moved in with Mr. Blankenship. After Mrs. Blankenship was released, Mr. Blankenship did not allow her to live with him, instead purchasing a separate home for her while he continued to reside with the Hall family. In 1903, while incurably ill, Mr. Blankenship conveyed all of his real estate, with the exception of the real estate on which Mrs. Blankenship's separate home was situated, to the Hall children, reserving in himself a life estate. The court had no difficulty in

19. See, e.g., Deke v. Huenkemier, 289 Ill. 148, 124 N.E. 381 (1919). Although the case dealt with an antenuptial transfer, the court held that the rights of dower, homestead, and the widow's award would be protected against a conveyance intended to defraud a future wife. Id. at 155, 124 N.E. at 384.
21. See, e.g., Williams v. Evans, 154 Ill. 98, 39 N.E. 698 (1895) (husband and wife had not resided together for twenty years); Haskell v. Art Institute of Chicago, 304 Ill. App. 393, 26 N.E. 2d 736 (1st Dist. 1940) (husband and wife had not resided together for over four years).
22. 233 Ill. 116, 84 N.E. 192 (1908).
determining the obvious purpose of the conveyances: "Plainly, from the record, Blankenship intended to deprive his wife, so far as he legally could, of all interest in his property." However, the court permitted Mrs. Blankenship to reach the real estate only for purposes of paying her widow's award, but inconsistently and irreconcilably denied her an undivided one-half interest in the real estate as her forced share on renunciation. Thus, despite the unmistakable fraudulent intention of Mr. Blankenship, the court refused to go further than half-way in applying the doctrine of fraud of marital rights.

In Hamilton v. First State Bank of Willow Hills, Mrs. Barton sued to recover $1,500 in certificates of deposit which her husband had purchased one year prior to his death. The certificates were registered in the names of Mr. Barton and his daughter in a purported joint tenancy. After Mr. Barton purchased the certificates, only about $100 remained in his bank accounts, and upon his death there were insufficient assets in his probate estate to pay his debts, funeral and administration expenses, and Mrs. Barton's widow's award of $500. The court found that the transfer was fraudulent, and permitted Mrs. Barton to reach the certificates in satisfaction of her widow's award.

Blodgett v. Blodgett, involved the most egregious instance of fraud of marital rights. After Mrs. Blodgett filed a separate maintenance suit against her husband, Mr. Blodgett and his brother engaged in a scheme involving forged promissory notes purportedly executed by Mr. Blodgett to deprive Mrs. Blodgett of her property rights. The fraudulent scheme was continued after Mr. Blodgett's death by his brother. The court had little difficulty in applying the doctrine to invalidate this scheme.

The most celebrated case in Illinois in which the doctrine of fraud of marital rights was applied is Smith v. Northern Trust Co. Mr. Smith transferred $50,000 of property, substantially all of his estate, to a fully revocable trust. Initially his wife was named as a beneficiary, but after marital discord developed he amended the trust to eliminate her beneficial interest. During his
lifetime, Mr. Smith retained the right to income and principal. The court ruled that the trust was colorable and illusory, and held that Mrs. Smith was entitled to reach the trust corpus both for her widow's award and her forced share on renunciation.

The strength of the fraud of marital rights doctrine, however, is considerably undercut by the more frequent deference to Illinois' strong policy in favor of the free alienability of property by a spouse:

[A] spouse in one's lifetime may dispose of his or her property—both personal and real, and thus deprive a husband or wife of a possible inheritance, and such deed, transfer or gift is not vulnerable to attack unless the transaction is a sham and is "colorable" or "illusory" and is tantamount to fraud [sic].

Illinois courts, on the whole, have been extremely reluctant to characterize post-nuptial transfers as colorable, fraudulent or illusory, and have upheld spousal transfers, even when the explicit purpose of a transfer was to deprive one's spouse of an inheritance.28

Illinois courts, for example, have ruled that the following situations comprise proper dispositions of one's estate without fraud upon the marital rights of one's spouse: a husband's transfer of $60,000 of promissory notes to his son in consideration for his son's promise to pay him $2,000 per year and distribute the promissory notes in a specified manner upon his death;29 a wife's transfer of realty and personalty into a trust under which she retained the right to income with the remainder to be used for religious purposes;30 the conveyance by a husband of substantially all of his real estate to third parties, reserving for himself a life estate;31 the transfer by a husband, during his last illness, of $100,000 worth

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27. Holmes v. Mims, 1 Ill. 2d 274, 279, 115 N.E. 2d 790, 792-93 (1953).
28. There are numerous Illinois cases involving antenuptial transfers which are not within the scope of this Article. See, e.g., Deke v. Huenkemeier, 260 Ill. 131, 102 N.E. 1059 (1913); Higgins v. Higgins, 219 Ill. 146, 76 N.E. 86 (1905); and Jones v. Jones, 213 Ill. 228, 72 N.E. 695 (1904).
29. Padfield v. Padfield, 78 Ill. 16 (1875).
31. Blankenship v. Hall, 233 Ill. 116, 84 N.E. 192 (1908). Although the court permitted the surviving spouse to reach the real estate to pay her widow's award, it denied her the right to take an interest therein as her forced share on renunciation. See text accompanying notes 22-23, supra.
of securities to a trust for the primary benefit of his granddaughter, with certain income rights retained by him; the conveyance by a wife of all of her real estate to a trust under which she retained a life estate; a gift by a husband, while seriously ill, of forty valuable paintings of the Art Institute of Chicago on the understanding that he would retain possession of the paintings for one year; a husband’s conveyance of an apartment building to his daughter and himself as joint tenants; and a husband’s creation of joint tenancy bank accounts with his daughters. In each of these cases the public policy favoring the financial protection of a surviving spouse yielded to the stronger policy favoring the free alienability of a spouse’s property.

The judicial doctrine of fraud of marital rights which emerges from this tortuous line of cases is a confused, nebulous concept, impossible to define and difficult to apply. Perhaps the only generalization which can be drawn from the cases is that the courts tend to apply the doctrine only in situations which smack of the most flagrant fraud, a situation such as the use of forged promissory notes in Blodgett, or one, as in Smith, involving a decedent’s transfer of practically all his assets to an entity in which he retains a substantial interest. With the exception of these extreme circumstances, Illinois courts have been unwilling to apply the doctrine, opting instead for the free alienability of a spouse’s property.

It was against the backdrop of this muddled case law that the Supreme Court of Illinois reached its landmark decision in Montgomery v. Michaels. During her lifetime, Mrs. Montgomery created eight “Totten trust” bank accounts in which she was named as trustee. Upon her death the accounts were to be paid to her two children by an earlier marriage. After Mrs. Montgomery died intestate, Dr. Montgomery filed a citation petition in the probate court, alleging that the Totten trust accounts were

37. See note 26 and accompanying text supra.
38. 54 Ill. 2d 532, 301 N.E. 2d 465 (1973).
illusory and a fraud upon his marital rights. The supreme court, in reaching its decision, completely disregarded the intention of Mrs. Montgomery in creating the accounts, and instead focused on the degree of control retained by her:

In the case at bar the settlor was also the trustee. During her lifetime she retained absolute, unqualified control over the bank accounts, and possessed and exercised all incidents of complete ownership, including the right to receive interest payable thereon and withdraw the principal thereof. The enjoyment of the proceeds of the accounts by the beneficiary or beneficiaries named therein would arise only upon the death of the settlor-trustee with the accounts remaining intact. 39

Because of the virtually absolute control which Mrs. Montgomery retained, the court concluded that the Totten trust accounts, although valid transfers as to third parties, were illusory and ineffective as to Dr. Montgomery, who could reach them both as part of his intestate share and to pay his surviving spouse's award. The intention of Mrs. Montgomery was immaterial to this determination.

Whereas all prior Illinois cases dealing with fraud on marital rights viewed the intention of the spouse as an important, if not the paramount factor in determining whether a transfer is effective against a surviving spouse, the court in Montgomery completely discarded the fraudulent intention test. In its place, the court applied the illusory transfer test, i.e., examining the extent and degree of control retained over the transferred property. Thus, Montgomery marks a sharp departure from established Illinois law in cases involving transfers in fraud of marital rights.

The broad terms in which the illusory transfer doctrine is phrased in Montgomery sent immediate shock waves throughout the Illinois estate planning community. 40 A logical extension of

39. Id. at 536, 301 N.E. 2d at 467.
40. Under one proposal presently under consideration by the Illinois legislature, the fraudulent intention test would be restored:

A transfer of property, in trust or otherwise, by a decedent during his lifetime shall not, in the absence of an intent to defraud the surviving spouse of the spouse's statutory share, be invalid, ineffective or illusory as to the surviving spouse, whether the decedent dies testate or intestate.
the illusory transfer doctrine would entitle a surviving spouse to an intestate share or forced share on renunciation of not only Totten trust accounts, but also of other nonprobate assets over which the deceased spouse retained substantial control, such as joint tenancy and payable-on-death accounts, life insurance and most *inter vivos* trusts. Even in instances in which a spouse had acted in the utmost good faith in transferring property to a non-testamentary entity, and had otherwise provided generously for a spouse's welfare, a spouse could play havoc with an estate plan by invoking the illusory transfer doctrine and claiming a share of "illusory" nonprobate assets.

Because of the element of uncertainty which *Montgomery* injects into the estate plans of Illinois residents, particularly in light of the growing incidence of marital disharmony in recent years, the decision has been met with an understandably high degree of criticism. When viewed from a proper historical perspective, however, it is apparent that the decision was a necessary consequence of the legislature's failure to update spousal property rights in response to the changing nature of the assets comprising a decedent's estate and the means by which they are transmitted.

Because real estate was the principal source of wealth a century ago, it was difficult, if not impossible, to circumvent the statutory rights of dower and renunciation and successfully disinherit a spouse. The changing times have, however, eroded a surviving spouse's statutory property rights to the periphery of obsolescence. Due in part to the fluid nature of intangible personal property, the principal asset of most contemporary estates and non-testamentary dispositions of property, it had become relatively simple to circumvent a surviving spouse's statutory property rights. The nebulous judicial doctrine of fraud of marital rights, which looked primarily to the fraudulent intention of a decedent, did little to supplement these statutory property rights.

The court in *Montgomery* was thus faced with the painful choice of countenancing this historical erosion of a surviving spouse's statutory property rights or of attempting to patch the

42. See notes 1-11 and accompanying text supra.
gaping hole which the legislature had permitted to wear through the fabric of these rights. In adopting the illusory transfer test, the court opted for the latter. Any other ruling would have amounted to a stark admission by the court that a surviving spouse’s property rights had for all intents and purposes become a worthless statutory guarantee. Unfortunately, as is true in most cases in which the judiciary engages in statutory patchwork, the patch that the court applied did not quite cover the hole, and gave rise to as many questions as it attempted to answer.

Since the holding in *Montgomery* is limited to a surviving spouse’s right to take an intestate share of Totten trust accounts, numerous questions remain. Can a surviving spouse also reach Totten trust accounts as part of her forced share on renunciation? Does the *Montgomery* decision extend to payable-on-death bank accounts in which the creator of the account retains the same degree of control? Does it likewise extend to U.S. savings bonds with a payable-on-death designation, over which the degree of control is the same but the property rights of which are determined by federal law? What about a life insurance policy over which the owner has absolute control during his lifetime, including the power to cancel the policy and take its cash surrender value? Does the illusory transfer doctrine encompass employee pension benefits of which the decedent had the power to request a lump sum distribution during his life and the power to designate a beneficiary to receive the benefits upon his death? What, if any, *inter vivos* trusts are illusory transfers? Does it hinge on the grantor’s retention of the right to amend or revoke the trust? His reservation of income or principal rights? Or merely his retention of a testamentary power of appointment? Does it make any difference whether the grantor or some independent third party is the trustee? Finally, has the illusory transfer test supplanted or merely supplemented the fraudulent intention test?

43. Any attempt by a state to modify the U.S. Treasury Regulations governing the disposition of U.S. obligations might be invalid under the supremacy clause of the U.S. Constitution. *See Free v. Bland*, 369 U.S. 663 (1962) in which the Supreme Court held that the treasury regulations creating a right of survivorship in a U.S. savings bond preempt any inconsistent provision of Texas community property law. *But see Labine v. Vincent*, 401 U.S. 532 (1971) which deferred to state law on a probate question; whether an illegitimate could inherit from his natural parent, notwithstanding the apparent equal protection violation.
Although these questions are raised by the *Montgomery* decision, none can be answered by the judiciary except on a case by case basis over an extended period of time. In all probability, however, each new decision would provide as much confusion as clarification, and would raise as many new issues as it attempted to resolve. What is needed in this area is not a further judicial patchwork of outmoded laws, but a major legislative overhauling and updating of the statutory property rights of a surviving spouse. The proposals in this direction range from the extremes of adopting community property law concepts to abolishing spousal property rights altogether.

The community property approach to spousal property rights is, perhaps, the fairest solution in that it measures a spouse's property rights by the duration of the marriage. Thus, the second wife of a widower does not automatically become entitled to a share of his separate estate—property which was accumulated by the joint efforts of the widower and his deceased wife. Because community property is an alien concept in Illinois law, and its adoption would be a radical departure from existing Illinois property law, any hope that the legislature would consider, much less enact, community property law at this time is unrealistic.

In this era of supposed sexual equality, the complete repeal of spousal property rights has some ostensible appeal as a solution. After all, it could be argued, haven't women now attained sufficient economic and social equality so that they no longer need a guaranteed share of their spouses' estates. Moreover, haven't survivor benefits, under the Social Security Act, which are in theory generated by the deceased spouse's contributions, accorded adequate protection to a surviving spouse to render spousal property rights obsolete. These arguments, however, overlook certain facts: sexual equality exists in theory but not in practice: most women continue to raise their children without pay while their husbands provide the principal source of the family's income, and social security benefits are grossly inadequate to maintain a comfortable standard of living.

Between these extremes of adopting community property law

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44. See note 2 supra.
and completely abolishing spousal property rights there is a middle ground—the "augmented estate" approach, under which a surviving spouse is given the right to take a share, by intestacy or renunciation, of both probate and nonprobate assets. Variations on this theme have been adopted by several jurisdictions. In New York, for example, a surviving spouse's statutory property rights have been expanded to include the right to elect to take a share of gifts causa mortis, Totten trusts and payable-on-death accounts, joint tenancy property, and any inter vivos disposition of property in which the decedent retained a power to revoke or to consume, invade or dispose of the principal. The state of Pennsylvania permits a surviving spouse to reach any inter vivos disposition over which the deceased spouse retained "a power of appointment by will, or a power of revocation or consumption over the principal . . . ." Life insurance and employee benefit plans are expressly excluded from the purview of the statute.

The augmented estate of the Uniform Probate Code, which has been enacted by several states, encompasses transfers of property over which the decedent retained the right to income, possession or enjoyment, or the right to revoke or consume, invade or dispose of principal; joint tenancy assets; and gifts within two years of death which exceed $3,000 per donee. Life insurance, joint annuities and pensions are not included in the Code's augmented estate.

The augmented estate concept poses two difficult problems. First, which nonprobate assets are to be included and which are to be excluded from the augmented estate? Second, what assets

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46. N.Y. EST., POWERS & TRUSTS LAW §5-1.1(b)(1) (McKinney 1967).
47. Id. Expressly excluded, however, from the scope of a surviving spouse's rights are employee benefit plans, life insurance, and U.S. Savings Bonds. Id. §5-1.1(b)(2).
49. Id.
51. The Uniform Probate Code has been adopted by Alaska, Arizona, Colorado, Florida, Idaho, Minnesota, Montana, Nebraska, North Dakota and South Dakota. See, e.g., ALASKA REV. STAT. §§ 13,06.005 et seq. (1972) and ARIZONA REV. STAT. §§ 14-1101 et seq. (Supp. 1974).
52. Uniform Probate Code (U.L.A.) § 2-201(1).
53. Id. § 2-201(2). A transfer is also excluded, "if made with the written consent or joinder of the surviving spouse." Id.
are to be used to fund the surviving spouse’s share?

The first problem presents the biggest stumbling block. No two persons, it seems, can agree on what assets should comprise the augmented estate.\textsuperscript{54} Moreover, it has been convincingly argued that if any nonprobate asset is excluded from the augmented estate, a person who is determined to disinherit his spouse will be permitted to do so. Life insurance, for example, has been excluded from the augmented estates of New York, Pennsylvania and the Uniform Probate Code. What, barring poor health, would prevent a person from converting his estate into a large sum of whole life insurance payable to a third person to circumvent his spouse’s rights in his augmented estate? As long as any type of nonprobate property is exempted from the augmented estate, an avenue exists which enables a person to successfully disinherit a spouse.

Perhaps the simplest way to close these avenues would be to base the augmented estate entirely on the deceased spouse’s adjusted gross estate for federal estate tax purposes. Under this approach, the surviving spouse would be entitled to elect to take one-third or one-half, as the case may be, of the deceased spouse’s adjusted gross estate; in effect, a marital deduction formula bequest. This method of determining the augmented estate is attractive for a number of reasons. First, the gross estate for federal estate tax purposes contains the most comprehensive definition of transfers by a decedent.\textsuperscript{55} Second, there is a considerable existing body of law relating to the determination of what transfers are includable in the gross estate.\textsuperscript{56} Third, the federal estate tax provides the framework for modern estate planning, and the settlement of the tax is usually the most important facet of the administration of all but small estates.

There are, however, some drawbacks to relying entirely on the

\textsuperscript{54} See notes 46-48 and accompanying text supra.

\textsuperscript{55} For purposes of the federal estate tax, the definition of the gross estate is as follows:

The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

federal estate tax to define the augmented estate. First of all, certain types of property, such as qualified, noncontributory employee benefit plans are excluded from the gross estate. Second, a decedent who wishes to disinherit his spouse might name as executor a third person who could attempt to limit the spouse’s share by obtaining unrealistically low valuations of property includable in the gross estate. This possibility could be dealt with by providing that values determined for federal estate tax purposes are only prima facie correct, or by entitling the surviving spouse to an in kind rather than in value share of the estate. On balance, however, an augmented estate based upon the gross estate for federal estate tax purposes is probably the simplest and fairest approach, and the one which makes disinherance of one’s spouse the most difficult.

The second problem which the augmented estate concept presents is determining the manner in which the surviving spouse’s share should be funded. The Uniform Probate Code funds the surviving spouse’s elective share first with property which has passed directly to the surviving spouse; the balance of her share is borne prorata by the other recipients of the augmented estate. This approach is conceptually at odds with Illinois law which funds a surviving spouse’s forced share on renunciation first from the residuary estate, next from general bequests and finally from specific bequests and devices. In the recent case of Estate of Brinkman, an Illinois appellate court affirmed the principle that upon renunciation, bequests abate by classes and not on an “across the board” or prorata basis. The Illinois approach makes more sense. It is more feasible to fund the spouse’s forced share with the liquid assets usually contained in the residuary estate, than with the tangible personal property of the decedent, which usually passes under pre-residuary bequests. The folly of funding the surviving spouse’s forced share with an undivided one-third interest in a Picasso print or a diamond ring is readily apparent.

The Illinois method of funding a surviving spouse’s elective

share, however, applies only to the probate estate. If the augmented estate concept were adopted, a method of funding nonprobate assets would also have to be determined. Although there are several approaches to this problem, the following appears to be workable.

The surviving spouse’s share would be satisfied first with property which the deceased spouse had transferred to her. The balance of her share would be provided by giving her a prorata interest in each nonprobate asset, and a prorata interest in the probate estate. However, the surviving spouse’s proportionate share of the probate estate would be funded first from the residuary estate, next from general bequests and finally from the specific bequests and devises. Thus, the probate estate and nonprobate estate would each abate proportionately, but within the probate estate there would be an abatement by classes of bequests and devises.

This method of funding the augmented estate may be illustrated by the following example. Assume a decedent’s estate consists of goods and chattels worth $50,000 specifically bequeathed to his daughter, a net residuary estate of $100,000 bequeathed to his church, a $100,000 life insurance policy payable to his son, and a $50,000 residence held in joint tenancy with his wife. Upon renunciation, his wife would be entitled to one-third of the augmented estate, or $100,000. This amount would be funded first with the $50,000 residence which the decedent transferred to her by joint tenancy. The remaining $50,000 of her share would be borne prorata by the probate and nonprobate estate. Thus, the surviving spouse would be entitled to $20,000 of the life insurance and $30,000 of the probate estate. Her share of the probate estate, however, would be borne entirely by the residuary estate; the goods and chattels would not be abated.

In Montgomery the supreme court recognized something that the legislature has long chosen to ignore: that a surviving spouse’s Illinois statutory property rights, within the context of modern property concepts, are outmoded means of guaranteeing the financial security of a surviving spouse. It is doubtful that anyone can draft a perfect statute which will provide an absolute guarantee against disinheritance. There can be no doubt, however, that the legislature can find a satisfactory solution which will make it extremely difficult for a person to disinherit his spouse by making
nontestamentary dispositions of his estate which are beyond the reach of the present spousal statutory rights.

**APPORTIONMENT OF THE FEDERAL ESTATE TAX BETWEEN PROBATE ASSETS AND NONPROBATE ASSETS**

There exists yet another area where the relationship of the probate estate and the nonprobate estate of a decedent has recently been scrutinized by Illinois courts: the manner in which the federal estate tax should be apportioned among a decedent’s assets. The Internal Revenue Code imposes the federal estate tax on the executor or administrator of the estate but gives little guidance as to the manner in which it should be apportioned. Unless the decedent’s will provides otherwise, the Code gives the personal representative a right of reimbursement from the recipients of two kinds of property for the federal estate tax attributable to such property: (1) life insurance and (2) property over which the decedent had a general power of appointment. Except as to these two categories of property, the Code leaves the apportionment determination solely to state law. In contrast to the majority of states which have apportionment statutes, the Illi-

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60. Unlike the federal estate tax, the Illinois inheritance tax is a tax on the right of a recipient to receive property either by descent or devise and is not a tax on the decedent’s gross estate. Because the Illinois inheritance tax is assessed against the recipient of the decedent’s property and not against the personal representative, there is no problem in apportioning the Illinois inheritance tax. The tax must be paid by the recipient unless the decedent’s will provides otherwise. See Ill.Rev.Stat. ch. 120, § 375 (1973). See First Nat’l Bank v. Hart, 315 Ill. App. 541, 43 N.E.2d 569 aff’d 383 Ill. 489, 50 N.E.2d 461 (1943); In re Johnson’s Estate, 389 Ill. 425, 59 N.E. 2d 825 (1945).


62. Id. § 2206.

63. Id. § 2207.

64. See Riggs v. Del Drago, 317 U.S. 95 (1942), where the issue was the constitutionality of § 124 of the New York Decedent Estate Law, which provided that except as otherwise directed by will, the federal estate tax burden shall be apportioned among the distributees and beneficiaries of the estate. The court said:

[We are of the opinion that Congress intended that the federal estate tax should be paid out of the entire as a whole, and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax; accordingly, §124 is not in conflict with the federal estate tax.]

Id. at 97-98.

nois Probate Act is silent on the subject. The apportionment of federal estate tax has thus been a problem left to the Illinois courts to decide.

Until the recent case of *Estate of Van Duser* in 1974 the rule in Illinois appeared to be that the residuary estate must bear the entire federal estate tax in the absence of any contrary direction by the testator. In 1971, for example, in *Estate of Phillips*, the beneficiary of the residuary estate sought to challenge this judicial rule and apportion the federal estate tax to a specific devise. The decedent's will was silent as to the payment of the federal estate tax. After several small bequests, the will devised a parcel of real estate worth $235,200 to the decedent's stepson and the residuary estate worth $95,000 to the decedent's sister. The federal estate tax of approximately $59,000 significantly reduced the residuary estate to only $26,000. The sister asked the court to require the stepson who received the specific devise to contribute his proportionate share of the federal estate tax. The court refused to do so, affirming the rule that the residue alone must bear the tax.

The rule was again challenged in *Estate of Van Duser*, but under an entirely different factual situation. Because the decedent died intestate, her entire probate estate of $65,000 passed to her sisters, Ethel and Katherine, her heirs-at-law. In addition to her probate estate, the decedent, during her lifetime, transferred about $170,000 of personal property into joint tenancy with her sister Katherine and her sister's children and grandchildren. The administrator charged the federal estate tax of $40,000 entirely to the probate estate, decreasing it to only $25,000 while leaving joint tenancy assets, which generated the largest part of the tax, intact. Ethel asked the court to apply the doctrine of equitable apportionment. Noting the unfairness of the situation, the court required the owners of the joint tenancy property to contribute a proportionate share of the federal estate tax:

[S]ince the amount of the non-probate assets was included in

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66. 19 Ill. App. 3d 1022, 313 N.E. 2d 228 (1st Dist. 1974).
68. Id. at 815, 275 N.E. 2d at 687.
69. 19 Ill. App. 3d 1022, 313 N.E. 2d 228 (1st Dist. 1974).
the gross estate in determining the amount of federal tax liability and thus contributed to the assessment of that tax, impelling justice and fairness dictate, and equity provides, that the recipients of those assets contribute in paying the federal estate tax proportionately to the amount of tax their share generated.70

The court thus departed from the rule requiring the residue to bear the full impact of the federal estate tax, and adopted the doctrine of equitable apportionment.

In the wake of Van Duser, the residuary legatees in Estate of Fairchild,71 asked the appellate court to apportion the federal estate tax and thereby charge the beneficiary of a specific devise. The will was silent as to the payment of the federal estate tax. Noting Phillips, which involved virtually the same facts, the court refused to apportion the tax.

The principle which emerges from this line of cases appears to be that in the absence of a contrary direction by the testator, the residuary estate will bear the entire federal estate tax attributed to the probate estate, but that a recipient of nonprobate property will bear that portion of the federal estate tax generated by his property. The federal estate tax, in other words, will be apportioned between probate and nonprobate property, but will not be apportioned between the residuary estate and specific or general bequests or devises.

The Uniform Probate Code, in contrast to the Phillips—Van Duser—Fairchild approach, requires all assets of the probate and nonprobate estate to bear their proportionate share of the federal estate tax unless the decedent's will provides otherwise or unless it would be inequitable.72 The wisdom of apportioning the tax among specific bequests and devises, such as real estate and tangible personal property, is questionable. In this respect, the Illinois judicial doctrine of the equitable apportionment is the better rule.

In at least one respect, however, the present Illinois apportionment approach is deficient. In Northern Trust Co. v. Wilson,73 an

70. Id. at 1027, 313 N.E. 2d at 231.
Illinois appellate court ruled that a surviving spouse who renounces a will must bear one-third, or one-half as the case may be, of the federal estate tax. The court noted that a surviving spouse who renounces is entitled under the Probate Act to one-third of the estate "after payment of all just claims," and it determined that the federal estate tax is a "just claim." As a result, the surviving spouse's elective share was charged with one-third of the federal estate tax even though the entire share qualified for the marital deduction and did not generate one penny of federal estate tax. In addition, because a portion of the federal estate tax is charged to the elective share, the marital deduction is correspondingly reduced. This reduction of the marital deduction, in turn increases the federal estate tax, which in turn further reduces the marital deduction. Anyone who has attempted to compute the federal estate tax in such a situation will find himself faced with a highly involuted, circular computation, involving three mutually dependent unknowns, i.e., the federal estate tax, the marital deduction and the Illinois inheritance tax. The primary beneficiary of the rule of Northern Trust is the federal government, which receives a greater federal estate tax.

While it may be desirable for the legislature to change the unfortunate result of charging a surviving spouse who renounces with one-third of the federal estate tax, the judicial doctrine of apportionment which has emerged from the Phillips—Van Duser—Fairchild line of cases appears to be a satisfactory approach to the problem. It would be foolhardy, however, for an estate planner to rely entirely on the doctrine of equitable apportionment to control the allocation of the federal estate tax. Every will should contain a tax apportionment clause tailored to the assets comprising the testator's estate and his intentions on the payment of the tax.75

Conclusion

The Illinois Probate Act has not yet come to grips with the problems posed by the changing nature of the assets comprising

a decedent's estate and the means by which the estate is transmitted. As a consequence, the Illinois courts have been forced to find solutions to problems arising from the prevalence of nontestamentary dispositions of property, and the interplay of the probate and nonprobate assets of a decedent's estate. In the case of the apportionment of the federal estate tax between the probate estate and nonprobate estate, the courts have formulated a satisfactory, though incomplete, solution. In the area of a surviving spouse's property rights, however, the courts, using the fraud of marital rights and illusory transfer doctrines, have been unable to breathe new life into antiquated statutes. The judiciary, which is limited by stare decisis and its inability to rule beyond the particular facts of the case before it, cannot be expected to update the Illinois Probate Act. It is time that the legislature reexamine the Probate Act in light of the changes which have affected the administration of a decedent's estate over the past century.