

Surviving Spouses' Rights Uncertain: *Sullivan v. Burkin*¹ — In Massachusetts, surviving spouses are protected from disinheritance by section 15 of Massachusetts General Laws, chapter 191, which allows a surviving spouse to elect against the decedent's will and receive one-third of the decedent's estate.² Massachusetts testators have been able to circumvent the statute by using inter vivos conveyances to remove property from their estate subject to distribution.³ Traditionally the only limitation placed on inter vivos conveyances by Massachusetts courts had been that such conveyances not be "colorable."⁴ As interpreted by the Massachusetts courts, "not colorable" means that the conveyance must be legally binding on the settlor or donor, accomplished in his or her lifetime and not testamentary in effect.⁵

In 1984, in the case of *Sullivan v. Burkin*,⁶ the Supreme Judicial Court considered whether assets held in a trust over which the decedent alone retained the power to direct disposition of the assets remained part of the decedent's estate subject to distribution.⁷ In *Sullivan*, the decedent, Ernest G. Sullivan, and the plaintiff, Sullivan's wife, Mary, had been separated for many years.⁸ On September 10, 1973, the decedent executed a deed

¹ 390 Mass. 864, 460 N.E.2d 572 (1984).

² MASS. GEN. LAWS ANN. ch. 191, § 15, as appearing in St. 1964, c. 288, § 1 (West Supp. 1981), provides in pertinent part:

The surviving husband or wife of a deceased person . . . within six months after the probate of the will of such deceased, may file in the registry of probate a writing signed by him or by her . . . claiming such portion of the estate of the deceased as he or she is given the right to claim under this section, and if the deceased left issue, he or she shall thereupon take one third of the personal and one third of the real property; . . . except that . . . if he or she would thus take real and personal property to an amount exceeding twenty-five thousand dollars in value, he or she shall receive, in addition to that amount, only the income during his or her life of the excess of his or her share of such estate above that amount, the personal property to be held in trust and the real property vested in him or her for life, from the death of the deceased . . . If the real and personal property of the deceased which the surviving husband or wife takes under the foregoing provisions exceeds twenty-five thousand dollars in value, and the surviving husband or wife is to take only twenty-five thousand dollars absolutely, the twenty-five thousand dollars, above given absolutely, shall be paid out of that part of the personal property in which the husband or wife is interested; and if such part is insufficient the deficiency shall, upon the petition of any person interested, be paid from the sale or mortgage in fee, in the manner provided for the payment of debts or legacies, of that part of the real property in which he or she is interested.

Id.

³ See *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945).

⁴ See, e.g., *Roche v. Brickley*, 254 Mass. 584, 588, 150 N.E. 866, 868 (1926); *Kelley v. Snow*, 185 Mass. 288, 299, 70 N.E. 89, 94 (1904).

⁵ *Kerwin*, 317 Mass. at 572, 59 N.E.2d at 306.

⁶ 390 Mass. 864, 460 N.E.2d 572 (1984).

⁷ *Id.* at 867, 460 N.E.2d at 574.

⁸ *Id.* at 866, 460 N.E.2d at 574. The Sullivans ceased living together as husband and wife in February 1947. Brief of the Appellee at 4, *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572 (1984). Mary Sullivan filed a petition for separate support in 1962 with the Norfolk County Probate Court and was granted an order of temporary support from her husband. *Id.* Mr. Sullivan did not meet his support obligation and the petition was still pending (Docket No. 156,372) at the time of his death. *Id.*

of trust, entitled "the Ernest G. Sullivan Trust," through which he transferred real estate⁹ to himself as sole trustee.¹⁰ During his lifetime, Mr. Sullivan was to receive the net income from the trust and could also receive part of the principal from the trustee upon a request in writing.¹¹ He retained the power to revoke the trust at any time.¹² Upon Sullivan's death, the trust instructed the successor trustee, defendant Charles Burkin, to pay the principal and any undistributed income, in equal shares, to George F. Cronin, Sr. and Harold J. Cronin, the other defendants in the case.¹³

Sullivan remained the trustee until his death on April 27, 1981.¹⁴ He left a will containing a statement that he "intentionally neglected to make any provisions for my wife, Mary A. Sullivan and my grandson, Mark Sullivan."¹⁵ The defendants, George F. Cronin, Sr. and Harold J. Cronin, were named co-executors of the will.¹⁶ The will provided that, after the payment of debts, expenses and estate and death taxes, the residue of the estate should be paid to Burkin, the trustee of the inter vivos trust.¹⁷

On October 20, 1981 the will was allowed,¹⁸ and the next day Mary Sullivan filed a claim under Massachusetts General Laws, chapter 191, section 15 for her distributive share of her husband's estate.¹⁹ Mrs. Sullivan claimed that the trust was an invalid testamentary disposition and, hence, that the trust assets were part of the decedent's probate estate and subject to her election under the statute.²⁰ A judge of the probate court for Suffolk County rejected Mrs. Sullivan's claim and dismissed the complaint.²¹ She appealed the decision and, on July 12, 1983, a panel of the appeals court reported the case to the Massachusetts Supreme Judicial Court.²²

⁹ The transferred property was a house in West Roxbury worth approximately \$80,000-\$85,000 at the time of settlor's death. 390 Mass. at 866, 460 N.E.2d at 574.

¹⁰ *Id.* at 865, 460 N.E.2d at 573.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* Neither the court's opinion nor the parties' briefs discussed the relationship between Ernest Sullivan and the Cronins.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 865-66, 460 N.E.2d at 573-74. At the time of Mr. Sullivan's death, Mary A. Sullivan was unaware of the will and believed that her husband had died intestate. Brief for the Appellant at 7, *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572 (1984). She filed a petition (Petition in the Suffolk County Probate Court Docket No. 514,166) asking to be appointed administratrix of her husband's estate; this petition was allowed on May 7, 1981. Record Appendix and Exhibits at 41. On July 3, 1981, Mrs. Sullivan, as administratrix, brought a complaint (Suffolk Probate Court Docket No. C-2105) seeking a judgment declaring the trust created by her husband void and the trust assets part of his estate. *Id.* at 3.

On May 11, George F. Cronin, Sr. and Harold J. Cronin, the remaindermen of The Ernest G. Sullivan Trust, filed the decedent's will with a petition that they be appointed co-executors of the will. *Id.* at 46. Mary Sullivan opposed the appointment of the Cronins as executors but withdrew her opposition on the condition that she be allowed to continue to prosecute her complaint seeking the invalidation of the trust. Brief for the Appellant at 9, *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572 (1984).

¹⁸ Brief for Appellant at 10, *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572 (1984).

¹⁹ 390 Mass. at 866, 460 N.E.2d at 574.

²⁰ *Id.* at 866-67, 460 N.E.2d at 574.

²¹ *Id.* at 865, 460 N.E.2d at 573.

²² *Id.* The report stated:

The Massachusetts Supreme Judicial Court ruled that the trust was not testamentary and was an effective, valid inter vivos trust.²³ Accordingly, the court held that the assets were outside the decedent's estate and, thus, Mary A. Sullivan had no right to share in the Ernest G. Sullivan Trust assets under Massachusetts General Laws chapter 191, section 15.²⁴ The court, however, ruled prospectively that henceforth a decedent's estate shall include, for the purposes of the elective share statute, the value of assets held in an inter vivos trust created by the deceased spouse as to which the deceased spouse alone retained the power during his or her lifetime to direct the disposition for his or her benefit.²⁵

In *Sullivan*, the Supreme Judicial Court of Massachusetts provided greater protection for surviving spouses by adopting a new rule which allows assets of an inter vivos trust to be considered part of the decedent's estate under the elective share statute. The *Sullivan* court acknowledged, however, that this rule will be of little assistance in cases where the facts are even slightly dissimilar to those in *Sullivan*. The court also refused to address issues which were not expressly necessary to the resolution of the case. Many important issues concerning the effect of inter vivos transfers challenged under elective share laws are, therefore, left unresolved after the court's decision. Thus, while the *Sullivan* decision alerts practitioners that changes in this area are inevitable, the case provides estate planners little basis for predicting these changes. Given the unpredictable nature of a spouse's rights after *Sullivan*, the case will likely necessitate a revision of the current elective share statute by the Massachusetts legislature.

This casenote will begin by discussing the various forms of protection against disinheritance available to surviving spouses under current statutory law.²⁶ The next section will examine the state of a surviving spouse's rights under Massachusetts law prior to *Sullivan*.²⁷ The court's decision in *Sullivan* will then be discussed.²⁸ Finally, the casenote will analyze the resultant problems from the limited applicability of the court's reasoning and will offer suggestions on how those problems could have been avoided and how they may be rectified in the future.²⁹

It appearing to the undersigned justices of the court before whom this case was argued that the case presents a question of unusual public and legal significance (G.L. c. 211A, § 10[B]) and may, in light of the recent discussion within the American Law Institute (see Restatement [Second] of Property — Donative Transfers, § 13.7 [Supp. to Tent. Draft No. 5, August 25, 1982]), raise some question as to the present vitality of such cases as *Kerwin v. Donaghy*, 317 Mass. 559, 572, 59 N.E.2d 299 (1945), the said justices hereby report this case for consideration and determination of the Supreme Judicial Court.

Id. at 865 n.2, 460 N.E.2d at 573 n.2.

²³ *Id.* at 868, 460 N.E.2d at 575 (citing *Ascher v. Cohen*, 333 Mass. 397, 400, 131 N.E.2d 198 (1956); *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 51, 93 N.E.2d 238, 239 (1950); *Kerwin v. Donaghy*, 317 Mass. 559, 567, 59 N.E.2d 299, 304 (1945); *National Shawmut Bank v. Joy*, 315 Mass. 457, 473-75, 53 N.E.2d 113, 123-24 (1944); *Kelley v. Snow*, 185 Mass. 288, 298-99, 70 N.E. 89, 94 (1904)).

²⁴ 390 Mass. at 871, 460 N.E.2d at 577.

²⁵ *Id.* at 867, 460 N.E.2d at 574-75.

²⁶ See *infra* text accompanying notes 30-143.

²⁷ See *infra* text accompanying notes 144-76.

²⁸ See *infra* text accompanying notes 177-212.

²⁹ See *infra* text accompanying notes 213-91.

I. SURVIVING SPOUSE'S PROTECTION FROM DISINHERITANCE

At common law, widows and widowers were protected against disinheritance by the rights of dower and curtesy.³⁰ Dower entitled a wife to a life estate in one-third of the real property held by her husband during marriage and which could have descended to the issue of the marriage.³¹ Curtesy entitled the husband to a life estate in all of the wife's realty if there were issue of the marriage.³²

Today, virtually all states have abolished common-law dower and curtesy³³ for two primary reasons. First, as the American economy changed from an agricultural one to an industrial one, wealth became more concentrated in personality.³⁴ Because dower and curtesy established rights solely in realty, these concepts ceased to provide spouses with adequate protection against disinheritance.³⁵ Second, the wife's expectancy in the husband's estate, "inchoate dower," restricted free alienation of realty.³⁶

As a result of the general abolition of common-law dower and curtesy, nearly every state presently provides protection from disinheritance for a surviving spouse. In community-property states,³⁷ this protection is afforded by the one-half interest each spouse has in marital assets.³⁸ With the exception of Georgia and South Carolina, all of the remaining common-law property states and the District of Columbia protect surviving spouses through elective share statutes.³⁹ These statutes typically guarantee the surviving

³⁰ Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330, 330 (1929).

³¹ 1 AMERICAN LAW OF PROPERTY § 5.1, at 616 (Casner ed. 1952 & Supp. 1977) [hereinafter 1 LAW OF PROPERTY]; 3 C. VERNIER, AMERICAN FAMILY LAW § 188, at 345 (1935).

³² Sayre, *supra* note 30, at 330.

³³ Kurtz, *The Augmented Estate Concept under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 989 (1977).

³⁴ See generally 1 LAW OF PROPERTY, *supra* note 31, § 5.5, at 631; 3 C. VERNIER, *supra* note 31, § 189, 351-54; 1 W. WALSH, LAW OF REAL PROPERTY § 101, at 110 (1947).

³⁵ W. WALSH, *supra* note 34, § 101, at 110.

³⁶ *Id.*

³⁷ The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Washington and Texas. Mahoney, *Elective Share Statutes: The Right to Elect Against Property Subject to a General Power of Appointment in the Decedent*, 55 NOTRE DAME LAW. 99, 100 (1979).

³⁸ See, e.g., 2 AMERICAN LAW OF PROPERTY § 7.1. (Casner ed. 1952 & Supp. 1977) [hereinafter 2 LAW OF PROPERTY]. All property acquired, other than by gift, bequest or devise, by either spouse, comprises the couple's marital assets. *Id.*

³⁹ ALA. CODE § 43, § 43-1-15 (1977); ALASKA STAT. §§ 13.11.070-11.100 (1972 & Supp. 1982); ARK. STAT. ANN. § 60-501 (1971); COLO. REV. STAT. § 15-11-201 (Supp. 1980); CONN. GEN. STAT. ANN. § 45-273a (1981); DEL. CODE ANN. tit. 12, §§ 901, 902 (1979); D.C. CODE ANN. § 19-113 (1973); FLA. STAT. ANN. §§ 732.201, 732.206, 732.207 (West Supp. 1983); HAWAII REV. STAT. § 560:2-201 (1976 & Supp. 1978); IDAHO CODE § 15-2-201 (1979); ILL. ANN. STAT. ch. 3, § 2-8 (Smith-Hurd Supp. 1978); IND. CODE § 29-1-3-1 (1976); IOWA CODE § 633.238 (1981); KAN. STAT. ANN. § 59-603 (1976); KY. REV. STAT. § 392.080 (Supp. 1980); ME. REV. STAT. ANN. tit. 18A, §§ 2-201, 202 (1981); MD. EST. & TRUSTS CODE ANN. § 3-203 (Supp. 1981); MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1981); MICH. COMP. LAWS ANN. § 700.282 (West Supp. 1981); MINN. STAT. ANN. § 525.213 (1980); MISS. CODE ANN. § 91-5-25 (Supp. 1981); MO. ANN. STAT. § 474.160 (Vernon Supp. 1980); MONT. CODE ANN. §§ 72-2-701 to 707 (1981); NEB. REV. STAT. ANN. § 30-2313 (1979); N.H. REV. STAT. ANN. § 560:10 (1974); N.J. REV. STAT. tit. 3B § 8-1 (1983); N.Y. EST. POWERS & TRUSTS LAW, § 5-1.1 (McKinney 1981); N.C. GEN. STAT. § 30-1 (1976); N.D. CENT. CODE § 30.1-05-01 (1976); OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1982); OKLA. STAT. ANN. tit. 84, § 44 (West 1970); OR. REV. STAT. § 114.105 (1979); PA. STAT. ANN. tit. 20, § 2203 (Purdon Supp. 1981); R.I. GEN. LAWS §§ 33-25-1 to 33-25-6 (1978); S.D. COMP. LAWS ANN. § 30-5A-1 (Supp. 1981); TENN. CODE ANN. § 31-1-105 (1984); UTAH CODE ANN. § 75-2-201 (1978); VT.

spouse a stated proportion of the decedent's estate.⁴⁰ The consequent restrictions on freedom of testation result from the states' interest in families and their support,⁴¹ and the recognition of the surviving spouse's contribution to the decedent's estate.⁴² Elective share statutes prevent the testator from avoiding the familial responsibilities he or she faced while still living.⁴³ Thus, through the operation of elective share statutes, the family can remain economically independent and the state avoids any duty to support.⁴⁴

While elective share statutes generally provide the surviving spouse with a share of the property owned by the decedent at the time of death,⁴⁵ a decedent can, through inter vivos transfers, remove assets from his estate and, consequently, from the reach of the statute.⁴⁶ These transfers usually take the form of gifts or trusts. Absent statutory limitation, an inter vivos gift is a valid transfer and cannot be effectively challenged by the disinherited spouse if the requirements for making a valid gift are fulfilled.⁴⁷ Thus, regardless of the decedent's motivation, courts will sustain an inter vivos gift provided there is proper donative intent and delivery of either the asset itself or a deed to the property.⁴⁸

Similar to a gift, an irrevocable inter vivos trust can effectively disinherit a surviving spouse by rendering the trust assets outside a decedent's estate.⁴⁹ The decedent can, therefore, place property in trust for himself for life and, after his death, to a designated beneficiary.⁵⁰ In most states, a spouse will not be entitled to a share of property held in trust at the time of the testator's death.⁵¹

Jurisdictions are split, however, on the question whether the assets in revocable inter vivos trusts constitute part of the decedent's estate subject to a statutory distributive share.⁵² Courts and state legislatures have adopted various approaches to this question and have developed three primary tests in determining whether an inter vivos trust will effectively remove assets from a decedent's estate.⁵³ These tests are generally referred to as the intent, reality, and control tests.⁵⁴ This section of the casenote will outline the elements of the respective tests and demonstrate manners in which certain states have

STAT. ANN. tit. 14, § 402 (1974); VA. CODE tit. 64.1-13, 16 (1980); W. VA. CODE § 42-3-1 (1966); WIS. STAT. ANN. § 861.05 (West 1971 & Supp. 1979-1980); WYO. STAT. § 2-5-101 (1980).

⁴⁰ See, e.g., FLA. STAT. ANN. § 732.207 (West Supp. 1983) (30% of the fair-market value of all decedent's property except real property located out of state); IOWA CODE § 633.238 (1981) (one-third of decedent's real and personal property); KAN. STAT. ANN. §§ 59-504, 59-603 (1976) (all decedent's property if there are no surviving children or grandchildren, one-half of the property if there are surviving children).

⁴¹ See W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 24-25 (1960).

⁴² Kurtz, *supra* note 33, at 1061.

⁴³ Mahoney, *supra* note 37, at 100.

⁴⁴ *Id.*

⁴⁵ Bensing, *Inter Vivos Trusts and the Election Rights of a Surviving Spouse*, 42 KY. L.J. 616 (1954); Note, *Disinheritance of the Widow in New England*, 44 B.U.L. REV. 534, 535 (1964).

⁴⁶ Note, *supra* note 45, at 536.

⁴⁷ MACDONALD, *supra* note 41, at 187.

⁴⁸ *Id.*

⁴⁹ See 1 A. SCOTT, *TRUSTS* § 57.5, 509 (3d ed. 1967 & 1983 Supp.); MACDONALD, *supra* note 41, at 6.

⁵⁰ See A. SCOTT, *supra* note 49, § 57.5, at 509 & n.3.

⁵¹ A. SCOTT, *supra* note 49, at 509.

⁵² *Id.* at 509-11.

⁵³ MACDONALD, *supra* note 41, at 5-6.

⁵⁴ *Id.*

applied them. In addition, two legislative attempts at providing surviving spouses with equitable and effective protection against disinheritance, the Uniform Probate Code and the Uniform Marital Property Act, will be discussed in this section.

A. *The Intent Test*

Under the "intent test,"⁵⁵ a court determines whether assets held in a revocable inter vivos trust constitute part of the decedent's estate for elective share purposes by focusing on the decedent's motive in making a transfer.⁵⁶ The intent test is used to evaluate revocable inter vivos trusts with respect to statutory share claims in, among others, New Hampshire,⁵⁷ Vermont,⁵⁸ Tennessee,⁵⁹ Kentucky,⁶⁰ and Missouri.⁶¹ If a decedent, in disposing of property, intended solely to deprive a surviving spouse of any rights he or she may have obtained in the property through the state's election statute, courts in these jurisdictions will hold the transfer void.⁶² The form of the transfer — whether it be an inter vivos gift, a gift causa mortis, a revocable inter vivos trust, or an irrevocable inter vivos trust — is irrelevant in the court's inquiry into the transferor's subjective intent.⁶³

In the 1890 case of *Walker v. Walker*,⁶⁴ New Hampshire became one of the first states to adopt the intent test. In *Walker*, the New Hampshire Supreme Court held that the sole restraint on a husband's right to dispose of his property was that he could not make conveyances with a view of defeating his wife's marital rights.⁶⁵ In *Ibey v. Ibey*, decided in 1945, the Supreme Court of New Hampshire articulated this intent standard in terms of "good faith"⁶⁶ and analogized the protection afforded widows' distributive share of the estates of their deceased husbands to the statutory protection from fraud given to creditors.⁶⁷ Nineteen years later, in the case of *Hamm v. Piper*, the court ruled that the

⁵⁵ While the intent test is primarily a common-law development, MACDONALD, *supra* note 41, at 103–08, some states have enacted statutory versions of the intent test. For instance, TENN. CODE ANN. § 1-1-105 (1984) states: "Any conveyances made fraudulently to children or others, with an intent to defeat the surviving spouse of his distributive or elective share, is voidable at the election of the surviving spouse." See also WIS. STAT. ANN. § 861.17 (1971) (allowing courts in equitable proceedings to void "any transfer or acquisition of property . . . made by the decedent . . . for the primary purpose of removing the property from the probate estate in order to defeat the rights of the surviving spouse . . .").

⁵⁶ Note, *supra* note 45, at 537; see generally MACDONALD, *supra* note 41, at 98–119.

⁵⁷ See *infra* text accompanying notes 64–75.

⁵⁸ See, e.g., *Patch v. Squires*, 105 Vt. 405, 165 A. 919 (1933); *Dunnett v. Shields*, 97 Vt. 419, 123 A. 626 (1924); *Nichols v. Nichols*, 61 Vt. 426, 18 A. 153 (1889); *Thayer v. Thayer*, 14 Vt. 107 (1842).

⁵⁹ See, e.g., *Reynolds v. Lance*, 48 Tenn. 294 (1870); *McIntosh v. Ladd*, 20 Tenn. 445 (1840).

⁶⁰ See, e.g., *Benge v. Barnett*, 309 Ky. 354, 217 S.W.2d 782 (1949); *Payne v. Tatem*, 236 Ky. 306, 33 S.W.2d 2 (1930); *Murray v. Murray*, 90 Ky. 1, 13 S.W. 244 (1890).

⁶¹ See, e.g., *Potter v. Winter*, 280 S.W.2d 27 (Mo. 1955); *Merz v. Tower Grove Bank and Trust Co.*, 344 Mo. 1150, 130 S.W.2d 611 (1939).

⁶² Note, *supra* note 45, at 537.

⁶³ *Id.*

⁶⁴ 66 N.H. 390, 31 A. 14 (1890).

⁶⁵ *Id.* at 396, 31 A. at 17.

⁶⁶ 93 N.H. 434, 435, 43 A.2d 157, 158 (1945).

⁶⁷ *Id.* at 435–36, 43 A.2d at 158. The New Hampshire court asserted "[j]ust as future creditors are protected by statute from conveyances made with actual intent to defraud, similarly it is held by judicial reasoning that wives should be protected with respect to their distributive shares in the estates of their deceased husbands." *Id.*

deceased spouse's intent is a question of fact to be determined in light of all surrounding circumstances, including the financial situations of the parties at the time of the transfer and the relationship of the parties to the transaction.⁶⁸

This intent test, as the Supreme Court of New Hampshire recently noted in *Hanke v. Hanke*,⁶⁹ has been frequently criticized by scholars⁷⁰ and courts⁷¹ alike. The test, when based strictly on a subjective determination of the decedent's motivation, has been termed unsatisfactory because of the unpredictability and difficulty in making such a determination.⁷² When the test allows a court to look at the objective circumstances surrounding a transfer and to balance the equities involved, however, commentators have characterized the intent test as meritorious and just.⁷³ In specifically addressing these criticisms of the intent test, the *Hanke* court stated that the standard utilized by the New Hampshire courts focuses on the objective manifestations of the transferor's intent.⁷⁴ In addition, according to the court, this form of the test strikes a proper balance between the competing policies of free disposition of property and protection of surviving spouses.⁷⁵

B. The Reality Test

While courts employing the intent test focus on motive, jurisdictions which apply the reality test are concerned solely with the validity of the transfer.⁷⁶ Under the reality test, which is the primary mode of analyzing inter vivos transfers challenged under elective share statutes in states such as Connecticut,⁷⁷ Colorado,⁷⁸ and Pennsylvania,⁷⁹ the motivation of a transferor is immaterial.⁸⁰ Rather, the only grounds on which a surviving spouse can invalidate a transfer is to find a defect in the conveyance, such as a lack of donative intent or a lack of delivery.⁸¹

Since its decision in the 1824 case of *Stewart v. Stewart*,⁸² Connecticut has used this "reality test" to evaluate inter vivos transfers for purposes of statutory distribution. Those Connecticut cases which address widows' claims through the distribution statute to property conveyed by the husband inter vivos have stressed that one spouse does not possess

⁶⁸ *Hamm v. Piper*, 105 N.H. 418, 420-21, 201 A.2d 125, 127 (1964).

⁶⁹ *Hanke v. Hanke*, 123 N.H. 175, 178, 459 A.2d 246, 248 (1983).

⁷⁰ The *Hanke* court cited MACDONALD, *supra* note 41, at 117 and Note, *Estate Planning: Validity of Inter Vivos Transfers Which Reduce or Defeat the Surviving Spouse's Statutory Share in Decedent's Estate*, 32 OKLA. L. REV. 837, 839-40 (1979), as examples of critics of the "intent" test.

⁷¹ The court cited *Newman v. Dore*, 275 N.Y. 371, 379, 9 N.E.2d 966, 968-69 (1937) ("[m]otive or intent is an unsatisfactory test of the validity of a transfer of property"). See also *Leonard v. Leonard*, 181 Mass. 458, 462, 63 N.E. 1068, 1069 (1902) ("the great weight of authority is that the intent to defeat a claim which otherwise a wife might have is not enough to defeat the deed").

⁷² MACDONALD, *supra* note 41, at 118.

⁷³ Note, *supra* note 70, at 840.

⁷⁴ 123 N.H. at 178, 459 A.2d at 248.

⁷⁵ *Id.*

⁷⁶ See generally MACDONALD, *supra* note 41, at 120-44.

⁷⁷ See *infra* text accompanying notes 82-91.

⁷⁸ See, e.g., *Wilson v. Lowrie*, 77 Colo. 427, 236 P. 1004 (1925); *Ellis v. Jones*, 73 Colo. 516, 216 P. 257 (1923).

⁷⁹ See, e.g., *Carcilla v. Bondy*, 353 Pa. 249, 44 A.2d 586 (1945); *In re Rynier's Estate*, 347 Pa. 471, 32 A.2d 736 (1943).

⁸⁰ See generally MACDONALD, *supra* note 41, at 120-44.

⁸¹ *Id.*

⁸² 5 Conn. 317 (1824).

an interest in the property of the other before death.⁸⁵ The Connecticut courts have held that the distribution statute does not prevent a husband or a wife from disposing of property in any lawful way he or she pleases or from incumbering it by any lawful agreement,⁸⁴ regardless of motivation at the time of the conveyance.⁸⁵

In the 1964 case of *Cherniak v. Home National Bank & Trust Co.*,⁸⁶ for example, the donor transferred the bulk of his property into a trust over which he retained the right to income during his life and the power to amend or revoke the trust.⁸⁷ Upon his death, the income was to be paid to the decedent's surviving brothers.⁸⁸ The Connecticut Supreme Court held that the trust was neither testamentary nor a fraud on the widow's rights.⁸⁹ The *Cherniak* court reasoned that since the surviving spouse had no right or interest in the property of the decedent during his lifetime, a valid trust agreement could not be fraudulent as to her.⁹⁰ One cannot be defrauded, the court continued, of that to which he has no right.⁹¹

C. The Control Test

Finally, other courts, including those in Maine,⁹² New York,⁹³ and Ohio,⁹⁴ employ a control test and will invalidate transfers which allow the donor to retain a degree of control over the transferred property so great that the donor, in effect, never parts with ownership of the property.⁹⁵ Thus, although technically valid legal ownership may vest in the trustee and valid equitable ownership in the beneficiary, a transfer may be ineffective in removing the assets from the donor's estate for purposes of distribution.⁹⁶ Like the reality test, the control test is an objective inquiry, and the subjective motivation of the transferor is irrelevant.⁹⁷

The state of Maine is one jurisdiction⁹⁸ which employs a control test. In Maine, a married person has the right to deplete his or her estate, even with the intent to

⁸⁵ See *Cherniak v. Home Nat'l Bank and Trust Co.*, 151 Conn. 367, 371, 198 A.2d 58, 60 (1964); *Stewart v. Stewart*, 5 Conn. 317, 320 (1824).

⁸⁴ *Harris v. Spencer*, 71 Conn. 233, 237, 41 A. 773, 774 (1898).

⁸⁵ *Cherniak*, 151 Conn. at 371, 198 A.2d at 60.

⁸⁶ 151 Conn. 367, 198 A.2d 58 (1964).

⁸⁷ *Id.* at 368, 198 A.2d at 58.

⁸⁸ *Id.*

⁸⁹ *Id.* at 370-71, 198 A.2d at 59-60.

⁹⁰ *Id.* at 371, 198 A.2d at 60.

⁹¹ *Id.*

⁹² See *infra* text accompanying notes 99-102.

⁹³ See, e.g., *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937).

⁹⁴ See, e.g., *Harris v. Harris*, 147 Ohio St. 437, 72 N.E.2d 378 (1948); *Bolles v. Toledo Trust Co.*, 144 Ohio St. 195, 58 N.E.2d 381 (1944).

⁹⁵ See generally MACDONALD, *supra* note 41, at 67-97.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ The leading case in this area is *Newman v. Dore*, 275 N.Y. 371, 9 N.E.2d 966 (1937) (holding that a transfer is void if "[j]udged by the substance, not the form, the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed"). *Id.* at 381, 9 N.E.2d at 969.

circumvent the elective share statutes, provided the depletion is accomplished through complete gifts.⁹⁹ As long ago as 1905, however, in *Wright v. Holmes*, the Supreme Judicial Court of Maine ruled that a transfer will be considered fraudulent to the spouse and void if it "is a mere device or contrivance by which the husband, retaining to himself the use and benefit of the property during his life, and not parting with the absolute dominion over it, seeks at his death to deprive the widow of her distributive share."¹⁰⁰ The court has reasoned in succeeding cases that it is irrational to allow a married person to defeat the statutory share by creating trusts which appear to deplete the probate estate but which reserve all the benefits of ownership.¹⁰¹ Accordingly, a surviving spouse can have a trust declared invalid upon proof that the decedent spouse did not intend to relinquish ownership of the trust property at the time the trust was executed.¹⁰²

D. *The Uniform Probate Code: The Augmented Estate Concept*

In addition to the judicial standards created to effectuate the statutory protection of surviving spouses, a number of states have enacted legislation which broadens the scope of the decedent's estate subject to election, thereby providing greater protection for the surviving spouse.¹⁰³ The most widely adopted example of

⁹⁹ See *Staples v. King*, 433 A.2d 407, 409 (Me. 1981); *Lambert v. Lambert*, 117 Me. 471, 104 A. 820 (1918).

¹⁰⁰ 100 Me. 508, 513, 62 A. 507, 509 (1905).

¹⁰¹ See, e.g., *Staples*, 433 A.2d at 411 (citing *Newman v. Dore*, 275 N.Y. 371, 381, 9 N.E.2d 966, 969 (1937)).

¹⁰² *Staples*, 433 A.2d at 411.

¹⁰³ Legislative definitions of an augmented estate have been enacted by individual states, most notably New York and Pennsylvania. The New York statute lists a number of transactions to be considered as testamentary substitutes and thus included in the net estate subject to the surviving spouse's right of election. N.Y. EST. POWERS & TRUSTS LAW, § 5-1.1(b) (McKinney 1981). Included in the augmented estate are: gifts causa mortis; money deposited in a savings account in a bank or similar institution in the decedent's name in trust for another person remaining on deposit at the date of decedent's death; bank accounts held by the decedent and another person payable on death to the survivor and remaining on deposit at the date of decedent's death; dispositions of property made by decedent whereby the decedent and another held the property as joint tenants with a right of survivorship or as tenants by the entirety; dispositions of property made by the decedent whereby the decedent held the property, in trust or otherwise, to the extent that he expressly retained, at the date of his death, either alone or in conjunction with another person, a power to revoke the disposition or a power to consume, invade or dispose of the principal. *Id.*

The Pennsylvania statute also allows the surviving spouse to reach certain assets held or conveyed inter vivos by the decedent which are normally beyond the scope of election statutes. PENN. STAT. ANN. tit. 20, § 2203 (Purdon Supp. 1981). In addition to the property passing by will or intestacy, the probate estate, in Pennsylvania, includes: property conveyed by the decedent during the marriage over which the decedent reserved the use of the property or an interest in or power to receive income from it; property conveyed by the decedent to the extent the decedent could revoke the conveyance or consume, invade or dispose of the principal for his own benefit; property conveyed during the marriage by the decedent to himself and another with right of survivorship provided that at the time of death decedent had the unilateral power to convey absolutely or in fee; survivorship rights conveyed to a beneficiary of an annuity contract to the extent it was purchased by the decedent during the marriage and the decedent was receiving annuity payments therefrom at the time of death; property conveyed by the decedent during the last year of his life to the extent the aggregate amount conveyed to each donee exceeded \$3,000. *Id.* Explicitly excluded are conveyances made with the express consent or joinder of the surviving spouse, proceeds from

this type of legislation is the "augmented estate"¹⁰⁴ concept of the Uniform Probate Code ("UPC" or "Code").¹⁰⁵

Under the UPC, a surviving spouse has the right to claim an elective share of one-third of the decedent's augmented estate.¹⁰⁶ The augmented estate is comprised of the net probate estate¹⁰⁷ plus the value of certain transfers of property by the decedent to persons other than the surviving spouse.¹⁰⁸ This concept extends the reach of the spouse's elective share beyond the probate estate to include commonly used inter vivos transfers which can be effective means of disinheritance.¹⁰⁹

The UPC stipulates that inter vivos transfers includible in the augmented estate, and thus subject to the elective share, must occur during marriage and must be gratuitous.¹¹⁰ The value of transfers made for full and adequate consideration is, however, not includible. Four such transfers are enumerated in the Code:¹¹¹ transfers under which the decedent retained the right to income from the property;¹¹² transfers under which the decedent retained a power to revoke, consume, invade or dispose of the principal for his own benefit;¹¹³ transfers under which the decedent holds property with another with right of survivorship;¹¹⁴ and transfers made during the last two years of decedent's life to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.¹¹⁵ If the decedent made the transfer with the written consent or joinder of the surviving spouse, it is excluded from the augmented estate.¹¹⁶ The statute also

life insurance, interests under employee pension or death benefit plans, and property passing by the decedent's exercise or non-exercise of any power of appointment given by someone other than the decedent. *Id.*

¹⁰⁴ The UPC has been adopted in Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. *See* 8 U.L.A. 1 (1983). Of these fifteen states, however, six (Florida, Hawaii, Kentucky, Michigan, Minnesota, and Utah) have either significantly changed the augmented estate provisions or declined to enact them at all. Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95, 131-36 (1983). Three other jurisdictions are community-property states (Arizona, Idaho, and New Mexico); thus, there are only six common-law states that have adopted the augmented estate provisions of the UPC. *Id.*

¹⁰⁵ UNIFORM PROBATE CODE § 2-202 (1982).

¹⁰⁶ *Id.* § 2-201.

¹⁰⁷ The statute defines the net probate estate as "the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims . . ." *Id.* § 2-202.

¹⁰⁸ *Id.* § 2-202(1). Also includible in the augmented estate of the UPC is the value of certain property owned or transferred by the surviving spouse. *Id.* § 2-202. Only property derived from the decedent by means other than testate or intestate succession without full consideration is included, *see id.* § 2-202(2)(i), and then only to the extent it is derived from the decedent. *Id.* § 2-202(2). In other words, if, for example, the surviving spouse owned or transferred an asset paid for wholly by the decedent, the entire value of the asset would be included. Conversely, if the couple shared the purchase price equally, only half of the asset's value would fall within the augmented estate. Transferred property is only included if, during the time of the marriage, it was, in addition to being derived from the decedent, transferred to someone other than the decedent. *Id.*

¹⁰⁹ Kurtz, *supra* note 33, at 1012.

¹¹⁰ UNIFORM PROBATE CODE § 2-202(1) (1982).

¹¹¹ *Id.*

¹¹² *Id.* § 2-202(1)(i).

¹¹³ *Id.* § 2-202(1)(ii).

¹¹⁴ *Id.* § 2-202(1)(iii).

¹¹⁵ *Id.* § 2-202(1)(iv).

¹¹⁶ *Id.* § 2-202(1).

explicitly excludes "any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse."¹¹⁷

E. *The Uniform Marital Property Act*

The Uniform Marital Property Act ("UMPA" or "Act") is another legislative effort aimed at providing surviving spouses equitable and effective protection against disinheritance.¹¹⁸ The UMPA drafted by the National Conference of Commissioners on Uniform State Laws in 1983¹¹⁹ seeks to define the property rights of spouses during marriage and upon dissolution or death.¹²⁰ The Act is, essentially, a community-property proposal¹²¹ founded on two basic propositions. The creation of an immediate "sharing mode" of ownership is the first concept the UMPA incorporates.¹²² The second proposition is that the sharing mode during marriage is an ownership right already in existence at the end of a marriage.¹²³

This sharing mode is effectuated through a distinction drawn between "marital property"¹²⁴ and "individual property."¹²⁵ The UMPA treats all property acquired by the personal efforts of either spouse during the marriage as marital property.¹²⁶ Each spouse has a present undivided one-half interest in all marital property.¹²⁷ Property brought into a marriage¹²⁸ or acquired afterward by gift or devise¹²⁹ is classified as individual property. The appreciation of these assets remains individual property but any income received from these assets, or, for that matter from any source whatsoever during the marriage, constitutes marital property.¹³⁰

This distinction between individual and marital property becomes the basis for the disposition of property at the end of a marriage. Section 17 of the Act outlines the means of dividing property upon dissolution.¹³¹ Section 18 deals with the treatment of property upon the death of either spouse.¹³²

¹¹⁷ *Id.*

¹¹⁸ UNIFORM MARITAL PROPERTY ACT (1985).

¹¹⁹ *Id.* historical note.

¹²⁰ *Id.* prefatory note.

¹²¹ *UMPA: The Uniform Marital Property Act*, 10 COMM. PROP. J. 279, 279 (1983).

¹²² UNIFORM MARITAL PROPERTY ACT prefatory note (1982). The drafters stated, "[t]he Uniform Marital Property Act makes its appearance on that stage to offer a means of establishing present shared property rights of spouses *during* the marriage. This approach is bottomed on two propositions. The first is creation of an immediate sharing mode of ownership." *Id.*

¹²³ *Id.* The prefatory note further states, "[t]he second proposition is that the sharing mode during marriage is an ownership right already in existence at the end of a marriage." *Id.*

¹²⁴ *Id.* § 4.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* § 4(c).

¹²⁸ *Id.* § 4(f).

¹²⁹ *Id.* § 4(g).

¹³⁰ *Id.* § 4(d).

¹³¹ *Id.* § 17. Dissolution is defined as "termination of marriage by a decree of dissolution, divorce, annulment, or declaration of invalidity; or entry of a decree of legal separation or separate maintenance." *Id.* § 1(7). "After a dissolution, each former spouse owns an undivided one-half interest in the former marital property as a tenant in common except as provided otherwise in a decree or written consent." *Id.* § 17.

¹³² Section 18 of the UNIFORM MARITAL PROPERTY ACT provides:

At the death of a spouse domiciled in this State, all property then owned by the spouse that was acquired during marriage . . . must be treated as if it were marital property.

Under the UMPA, when one spouse dies the surviving spouse continues to own a one-half undivided interest in the marital property.¹³³ Similarly, the one-half undivided interest in the marital property of the deceased spouse is subject to disposition at death, as is any other property owned by the decedent.¹³⁴ Thus a decedent's marital property interest may pass either through testate or intestate succession.¹³⁵ An attempt to dispose of more than the decedent's property interest would amount to interference with the ownership right of the other spouse and would, therefore, be a nullity.¹³⁶

The authors of the UMPA recommended that states adopting the Act limit or eliminate the elective share rights of the surviving spouse.¹³⁷ The drafters reasoned that the marital property system already establishes effective statutory sharing for the survivor and, thus, a further elective right is neither necessary nor appropriate.¹³⁸ Therefore, if any additional elective rights are to remain, the authors assert that these rights should be restricted to the decedent's individual property or other property in which the surviving spouse acquires no interest under the Act.¹³⁹

F. Summary

A number of measures, then, have been created by both the courts and state legislatures in an attempt to preserve the integrity of surviving spouses' statutory share. In many states, inter vivos transfers are judicially tested for either fraudulent intent,¹⁴⁰ lack of reality,¹⁴¹ or excessive control¹⁴² before being upheld. Other states have enacted more precise legislation which defines the estate subject to distribution to include certain enumerated transfers.¹⁴³

Massachusetts has utilized a variety of these measures in search of the proper balance between the conflicting policies of maintaining free disposition of property and protecting married persons from disinheritance. The law in Massachusetts has, at different times, recognized elements of all three of these tests as influential in statutory share cases. *Sullivan* illustrates that control is now, once again, a primary concern of the Massachusetts Supreme Judicial Court in its construction of the state elective share statute.

At the death of a spouse domiciled in this State, any property of the spouse which can be traced to property received by the spouse . . . as a recovery for a loss of earning capacity during marriage must be treated as if it were marital property.

Id.

¹³³ *Id.* § 18 comment.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* The comment provides that "[a]n attempt to dispose of *more* than the decedent's interest in marital property would be no different from an attempt to dispose of any other property a person did not own — it would be a nullity. It would amount to interference with the ownership right of the other spouse" *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See *supra* text accompanying notes 55–75.

¹⁴¹ See *supra* text accompanying notes 76–91.

¹⁴² See *supra* text accompanying notes 92–102.

¹⁴³ See *supra* text accompanying notes 103–39.

II. THE LAW IN MASSACHUSETTS BEFORE SULLIVAN

Originally, in Massachusetts, the decedent's motive for transferring property as well as the control which he maintained over the property during his life were considerations in the courts' decisions on the validity of inter vivos conveyances.¹⁴⁴ For instance, in the 1899 case of *Brownell v. Briggs*,¹⁴⁵ a husband conveyed all of his real estate to his grandniece but reserved the use of the land for his life, and the power to sell or mortgage the property and to dispose of the proceeds as he saw fit.¹⁴⁶ After the husband died intestate,¹⁴⁷ the wife brought an action claiming the conveyance was void because it deprived her of her statutory rights¹⁴⁸ in her late husband's property. The *Brownell* court held that the conveyance defrauded the widow of her rights in the property.¹⁴⁹ According to the *Brownell* court, "a voluntary transfer or conveyance by which the husband, reserving to himself a benefit from or power of disposal over the property, parts with its ownership for the purpose of defeating his wife's interest in his estate, may be declared void"¹⁵⁰ The court noted that a husband could not, through a will, have deprived his widow of her statutory rights in his property, and reasoned that intestates similarly should be prevented from defeating, through inter vivos conveyances, the property rights of surviving spouses.¹⁵¹ Thus, the court's determination was based on a combination of the control and intent tests.

In succeeding cases, however, Massachusetts courts factually distinguished *Brownell* and emphasized that intent alone was insufficient to invalidate inter vivos transfers.¹⁵² Further, during the next twenty years Massachusetts courts apparently abandoned both control and intent as considerations in determining the validity of inter vivos conveyances. Instead, the courts' focus shifted to the "reality" of the transfer. In the 1904 case of *Kelley v. Snow*,¹⁵³ for example, the Supreme Judicial Court upheld a revocable inter vivos trust despite retention by the donor of the power to use and collect income from the trust corpus and the right to alter the terms of disposition at any time.¹⁵⁴ Moreover, the court ruled in favor of the trust despite the clear intention of the decedent to put the trust property beyond the control of her husband.¹⁵⁵ The *Kelley* court held that a married woman has an absolute right, indefeasible by her husband, over her personal estate.¹⁵⁶ During her lifetime she may, according to the court, convey or give away her

¹⁴⁴ See *Brownell v. Briggs*, 173 Mass. 529, 532, 54 N.E. 251, 252 (1899).

¹⁴⁵ 173 Mass. 529, 54 N.E.2d 251 (1899).

¹⁴⁶ *Id.* at 530, 54 N.E. at 251.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 530, 54 N.E. at 252. The action was brought under St. 1880, c. 211; Pub. St. c. 124, § 3, which gave the widow of an intestate, who leaves no living issue, a right, in addition to her estate in lieu of dower, to take the decedent's realty provided the value of the property did not exceed \$5,000. *Id.* at 531, 54 N.E. at 252.

¹⁴⁹ *Id.* at 532, 54 N.E. at 252.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 533, 54 N.E. at 253.

¹⁵² See, e.g., *Seaman v. Harmon*, 192 Mass. 5, 7, 78 N.E. 301, 301 (1906) (wife had no right to dower in real estate purchased by husband because he never obtained legal seisin of the land); *Leonard v. Leonard*, 181 Mass. 458, 462, 63 N.E. 1068, 1069 (1902) (conveyance of real estate upheld despite the husband's intent to eliminate wife's statutory interest in his estate).

¹⁵³ 185 Mass. 288, 70 N.E. 89 (1904).

¹⁵⁴ *Id.* at 298-99, 70 N.E. at 94.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

property in any manner and upon any terms she pleases, provided the conveyance is real and not "colorable."¹⁵⁷ The court defined "not colorable" as meaning that the conveyance must be legally binding on the settlor or donor, accomplished in his or her lifetime and not testamentary in effect.¹⁵⁸ The "colorable" restriction continued to be the determinative factor in the court's evaluation of the validity of inter vivos transfers relative to statutory distribution, while the donor's subjective intent became increasingly unimportant.¹⁵⁹

Finally, in *Kerwin v. Donaghy*,¹⁶⁰ decided in 1945, the Supreme Judicial Court completely eliminated the subjective intent of the testator as a consideration in evaluating inter vivos conveyances for purposes of statutory share claims. In *Kerwin*, the decedent customarily put his assets in the name of his daughter in order to defraud the government for tax purposes.¹⁶¹ The decedent retained access to these funds at all times.¹⁶² After a disagreement with his wife, the decedent decided that he wanted his daughter to receive these assets after his death.¹⁶³ Accordingly, he set up two trust agreements whereby his daughter was appointed trustee of substantially all of his property with instructions to pay the income of the trust to the decedent for the remainder of his life.¹⁶⁴ Upon his death, the trust assets were to vest in the daughter.¹⁶⁵ Decedent retained the power to "alter, amend or revoke" the trust upon written notice to the daughter.¹⁶⁶

A few years after the creation of these trusts, and shortly before his death, the decedent contacted his daughter to insure that his wife and other children would be protected when he died.¹⁶⁷ The decedent sought an assurance from his daughter that she would do "the 'right thing' by his wife."¹⁶⁸ Despite the daughter's assurances that she would make provisions for her step-mother, her step-mother received virtually nothing upon her husband's death.¹⁶⁹

Decedent's widow brought an action under section 5 of Massachusetts General Laws, chapter 230, seeking to have the trust assets declared part of her husband's estate for purposes of evaluating her statutory share.¹⁷⁰ The probate court ordered the daughter to transfer the assets to the executors of her father's will.¹⁷¹ On appeal, the Massachusetts Supreme Judicial Court upheld the trust agreements, reasoning that all the formal

¹⁵⁷ *Id.*

¹⁵⁸ *Kerwin*, 317 Mass. at 572, 59 N.E.2d at 306.

¹⁵⁹ See *Roche v. Brickley*, 254 Mass. 584, 588, 150 N.E.2d 866, 868 (1926) ("Nor does it render the conveyance invalid that it was made to defeat any interest of the husband in the wife's property upon her death. The right to deal with her personal property in her lifetime was absolute so far as respected her husband, as long as the conveyance was not colorable.").

¹⁶⁰ 317 Mass. 559, 59 N.E.2d 299 (1945).

¹⁶¹ *Id.* at 562, 59 N.E.2d at 301.

¹⁶² *Id.*

¹⁶³ *Id.* at 563, 59 N.E.2d at 302.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 564, 59 N.E.2d at 302-03. The court noted that the decedent apparently forgot he had the power to change or terminate trusts. *Id.* at 565, 59 N.E.2d at 303.

¹⁶⁸ *Id.* at 564-65, 59 N.E.2d at 303.

¹⁶⁹ *Id.* at 565, 59 N.E.2d at 303.

¹⁷⁰ *Id.* at 560, 59 N.E.2d at 301.

¹⁷¹ *Id.*

requirements for the creation of a trust were fulfilled and that the assets in question, therefore, were not part of the decedent's estate.¹⁷² The distribution statute, the court reasoned, "does not extend to personal property that has been conveyed by the husband in his lifetime" and, therefore, the widow had no rights in the trust property.¹⁷³ In reaching this holding, the court expressly overruled its previous position in *Brownell v. Briggs*,¹⁷⁴ that the intent of the donor could control the validity of an inter vivos trust for the purposes of assessing the estate under the Massachusetts elective share statute.¹⁷⁵

The decision of the Supreme Judicial Court in *Kerwin* eliminated any influence of the donor's intent as a factor in evaluating the validity of inter vivos transfers for statutory share purposes in Massachusetts cases. Furthermore, the court removed any doubt concerning the standard to be used in the Commonwealth by enunciating a strict reality test. After the *Kerwin* decision, a spouse's right to disinherit the surviving spouse through an inter vivos transfer was limited solely by the requirement that the conveyance be legally valid. Accordingly, the only grounds available to challenge such a conveyance in Massachusetts were lack of donative intent, or lack of delivery.¹⁷⁶

III. SULLIVAN V. BURKIN: A FURTHER RESTRICTION ON INTER VIVOS CONVEYANCES

In Massachusetts, the legal requirements for making a valid transfer remained the only obstacles in disinheriting one's spouse through a revocable inter vivos trust for nearly forty years until the case of *Sullivan v. Burkin* was decided in 1984.¹⁷⁷ In *Sullivan* the Supreme Judicial Court redefined "estate," for purposes of distribution under the elective share statute,¹⁷⁸ to include assets held in a trust over which the decedent alone retained the power to direct disposition.¹⁷⁹

In a unanimous opinion, the Massachusetts Supreme Judicial Court concluded that the Edward G. Sullivan Trust was not testamentary and was an effective, valid inter vivos trust.¹⁸⁰ The court relied on a long line of Massachusetts cases, which had held that the retention by the settlor of the rights to modify or revoke the trust, or to receive income, or to invade the principal during his lifetime, does not impair the validity of

¹⁷² *Id.* at 566-67, 59 N.E.2d at 303-04.

¹⁷³ *Id.* at 571, 59 N.E.2d at 306.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The court stated that:

[i]n this Commonwealth a husband has an absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions, [predecessor of G.L. c. 191, § 15] under his will, or by virtue of a waiver of his will. That is true even though his sole purpose was to disinherit her. (Citations omitted). So far as it may conflict with the foregoing decisions, the case of *Brownell v. Briggs* (citation omitted) is no longer controlling.

Id.

¹⁷⁶ *Rock v. Rock*, 309 Mass. 44, 47, 33 N.E.2d 973, 975 (1941) (a gift requires proof of an actual or symbolic delivery coupled with a present donative intent).

¹⁷⁷ 390 Mass. 864, 460 N.E.2d 572 (1984).

¹⁷⁸ MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1981). See *supra* note 2.

¹⁷⁹ 390 Mass. at 872, 460 N.E.2d at 577.

¹⁸⁰ *Id.* at 867, 460 N.E.2d at 574.

the trust.¹⁸¹ Similarly, according to the court, the trust was not invalid as a testamentary disposition merely because the settlor was the sole trustee.¹⁸² The court found that the law in Massachusetts was in accord with the Restatement (Second) of Trusts § 57, comment h (1959), which reads:

The [trust] is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor-trustee reserves a beneficial life interest and power to revoke and modify the trust. The fact that as trustee he controls the administration of the trust does not invalidate it.¹⁸³

The court then addressed the question of whether the trust assets were a "portion of the estate of the deceased" in which the widow had a cognizable right under section 15 of Massachusetts General Laws, chapter 191. The longstanding rule in the Commonwealth, the court noted, was that the statutory rights of surviving spouses did "not extend to personal property that has been conveyed by the husband in his lifetime and does not form part of his estate at his death."¹⁸⁴ This rule, the court found, applied regardless of the testator's subjective motivation for the conveyance¹⁸⁵ or of the lack of knowledge or consent to the transfer by the surviving spouse.¹⁸⁶ Accordingly, the court held that Mary A. Sullivan had no right to share in the Ernest G. Sullivan Trust assets under section 15 of Massachusetts General Laws, chapter 191 despite her husband's retention of a general power of appointment.¹⁸⁷

The court, however, prospectively ruled that the rights of surviving spouses would no longer be so restricted.¹⁸⁸ Overruling *Kerwin v. Donaghy*,¹⁸⁹ the court held that henceforth a decedent's estate shall include, for the purposes of the elective share statute, the value of assets held in an inter vivos trust created by the deceased spouse as to which the deceased spouse alone retained the power during his or her life to direct the disposition for his or her benefit.¹⁹⁰ Thus, the court explained, property held in trust

¹⁸¹ *Id.* at 868, 460 N.E.2d at 575 (citing *Ascher v. Cohen*, 333 Mass. 397, 400, 131 N.E.2d 198 (1956); *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 51, 93 N.E.2d 238 (1950); *Kerwin v. Donaghy*, 317 Mass. 559, 567, 59 N.E.2d 299 (1945); *National Shawmut Bank v. Joy*, 315 Mass. 457, 473-75, 53 N.E.2d 113 (1944); *Kelley v. Snow*, 185 Mass. 288, 298-99, 70 N.E. 89 (1904)).

¹⁸² 390 Mass. at 868, 460 N.E.2d at 575 (citing *National Shawmut Bank v. Joy*, 315 Mass. at 476-77, 53 N.E.2d 113 (1944)).

¹⁸³ 390 Mass. at 870, 460 N.E.2d at 575.

¹⁸⁴ *Id.* at 870, 460 N.E.2d at 576 (quoting *Kerwin v. Donaghy*, 317 Mass. at 571, 59 N.E.2d at 299 and citing *Fiske v. Fiske*, 173 Mass. 413, 419, 53 N.E. 916 (1899); *Shelton v. Sears*, 187 Mass. 455, 73 N.E. 666 (1905)).

¹⁸⁵ 390 Mass. at 870, 460 N.E.2d at 576.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 871, 460 N.E.2d at 577.

¹⁸⁸ *Id.* at 872, 460 N.E.2d at 577.

¹⁸⁹ 317 Mass. 559, 59 N.E.2d 299 (1945).

¹⁹⁰ 390 Mass. at 867, 460 N.E.2d at 574-75. Despite holding that the Ernest G. Sullivan Trust assets were beyond the reach of the distribution statute, the court stated that

[f]or the future, however, as to any inter vivos trust created or amended after the date of this opinion, we announce that the estate of a decedent, for the purposes of G.L. c. 191, § 15, shall include the value of assets held in an inter vivos trust created by the deceased spouse as to which the deceased spouse alone retained the power during his or her life to direct the disposition of those trust assets for his or her benefit, as, for

would remain part of the estate, for distribution purposes, if the decedent exercised a power of appointment or revoked the trust.¹⁹¹

In redefining "estate" for purposes of the elective share statute, the court reasoned that public policy considerations bearing on the absoluteness of the right of a spouse to dispose of his or her property had changed significantly since it decided *Kerwin v. Donaghy*¹⁹² in 1945.¹⁹³ The court analogized the property rights of surviving spouses to those of spouses party to a divorce, and noted that the interests of one spouse in the property of another upon divorce has increased substantially under current law.¹⁹⁴ Under the Massachusetts alimony statute, Massachusetts General Laws chapter 208, section 34,¹⁹⁵ a spouse can be awarded all of the estate of the other upon divorce. The court reasoned that it was neither equitable nor logical to extend greater property rights to a divorced spouse than to a widowed one.¹⁹⁶

Accordingly, the court adopted a test which would treat the assets of an inter vivos trust created during the marriage by the deceased spouse as part of the decedent's estate for purposes of the election statute if the deceased spouse alone had a general power of appointment.¹⁹⁷ According to the court, this standard would eliminate the necessity of

example, by the exercise of a power of appointment or by revocation of the trust.

Id.

¹⁹¹ *Id.*

¹⁹² See *supra* text accompanying notes 160-76.

¹⁹³ 390 Mass. at 871-72, 460 N.E.2d at 577.

¹⁹⁴ *Id.* at 872, 460 N.E.2d at 577.

¹⁹⁵ MASS. GEN. LAWS ANN. ch. 208, § 34 (1983) states:

Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid or in fixing the nature and the value of the property, if any, to be so assigned, the court after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, and such spouse is not covered by a private group health insurance plan, said court shall determine whether the obligor under such order has health insurance on a group plan available to him through an employer or organization that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of such spouse.

Id.

¹⁹⁶ 390 Mass. at 872, 460 N.E.2d at 577. The court stated that "it is neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an inter vivos trust created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her spouse." *Id.*

¹⁹⁷ *Id.* at 871, 460 N.E.2d at 577. The court ruled prospectively, stating, "[w]e announce for

making "the rather unsatisfactory" determinations previously made by the Massachusetts courts,¹⁹⁸ and of using the subjective or vague factual tests employed by other jurisdictions.¹⁹⁹

The court pointed out, however, that this standard will be of little help in future cases which are factually dissimilar from *Sullivan*.²⁰⁰ The court suggested that different rules may eventually be needed to resolve other fact situations.²⁰¹ Thus, according to the court, the test enunciated in *Sullivan* might be inapplicable to trust assets conveyed to a trust by a third person,²⁰² or if a decedent holds a power of appointment jointly with another person,²⁰³ or if a surviving spouse has assented to the creation of a given trust.²⁰⁴ Moreover, the *Sullivan* court acknowledged that several important questions, such as the issues of what assets should be used to satisfy the surviving spouse's claim to the value of the transferred property,²⁰⁵ or whether assets held in an inter vivos trust over which a decedent retains a power of appointment should also be considered part of the estate for purposes of intestate succession, were left unanswered by its decision.²⁰⁶ The court also expressly declined to resolve how to deal with trusts created before marriage or with assets that pass through means other than a will,²⁰⁷ such as insurance policies over which a deceased spouse had control.²⁰⁸

The court concluded its opinion by inviting the legislature to resolve the question of the rights of a surviving spouse in the estate of the deceased spouse.²⁰⁹ Following its request for legislative action, the *Sullivan* court cited sections 2-201 and 2-202 of the Uniform Probate Code²¹⁰ and section 18 of the Uniform Marital Property Act.²¹¹ The court's reference to these statutes suggested it would consider similar legislation appropriate in Massachusetts. Pending enactment of such legislation, the court stated that "the answers to these problems will 'be determined in the usual way through the decisional process.'"²¹²

the future that, as to any inter vivos trust created or amended after the date of this opinion, we shall no longer follow the rule announced in *Kerwin v. Donaghy*." *Id.*

¹⁹⁸ *Id.* at 873, 460 N.E.2d at 577. The court stated that it will not "have to participate in the rather unsatisfactory process of determining whether the inter vivos trust was, on some standard, 'colorable,' 'fraudulent,' or 'illusory.'"¹⁹⁹ *Id.*

¹⁹⁹ *Id.* at 872-73, 460 N.E.2d at 577. According to the *Sullivan* court, a court need not engage in a determination of "whether the [spouse] has in good faith divested himself of ownership of his property or has made an illusory transfer" (*Newman v. Dore*, 275 N.Y. 371, 379, 9 N.E.2d 966 [1937]) or with the factual question whether the spouse "intended to surrender complete dominion over the property" (*Staples v. King*, 433 A.2d 407, 411 [Me. 1981]).

Id.

²⁰⁰ *Id.* at 873, 460 N.E.2d at 577.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 873, 460 N.E.2d at 577-78.

²⁰⁵ *Id.* at 873, 460 N.E.2d at 578.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *id.* These sections are discussed *supra* at text accompanying notes 103-17.

²¹¹ See 390 Mass. at 873-74, 460 N.E.2d at 578; this section is discussed *supra* at text accompanying notes 118-39.

²¹² 390 Mass. at 873, 460 N.E.2d at 578.

IV. THE INADEQUACY OF THE SULLIVAN DECISION

In *Sullivan v. Burkin*, the Supreme Judicial Court overruled *Kerwin v. Donaghy* and held that prospectively, for purposes of distribution under the Massachusetts elective share statute, assets held in an inter vivos trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment will constitute part of the decedent's estate.²¹³ The court explicitly stated, however, that this decision might not be applicable in fact situations differing from the one in *Sullivan*.²¹⁴ The court also explicitly left unresolved when other types of inter vivos conveyances are to be considered part of the estate under the Massachusetts elective share statute.²¹⁵

The next section of this casenote will assert that, while it was necessary for the court to overrule *Kerwin v. Donaghy*,²¹⁶ the new rule adopted by the court is incomplete.²¹⁷ The casenote will then discuss the court's recommendations for new legislation and will conclude that the court should not have deferred the resolution of related issues to the legislature.²¹⁸ Next, the casenote will contend that the Supreme Judicial Court should have set forth a widely applicable standard to provide guidance for practitioners.²¹⁹ Finally, the casenote will conclude with legislative suggestions to improve and clarify statutory share law in Massachusetts.²²⁰

A. The Sullivan Court's Resolution of the Problems Resulting from the Kerwin Rule

The Massachusetts elective share statute²²¹ was enacted, as were similar statutes in virtually all other states,²²² to protect surviving spouses from disinheritance.²²³ The major difficulty in enacting an elective share statute is affording surviving spouses adequate protection from disinheritance without overly restricting a settlor's freedom of testation.²²⁴ In *Kerwin v. Donaghy*, the protections contained in the Massachusetts statute were virtually eliminated in favor of allowing unrestricted, absolute freedom of testation.²²⁵ The rule adopted in *Kerwin* in 1945 allowed a spouse to circumvent the elective share statute, and effectively disinherit the surviving spouse, by removing assets from the estate subject to distribution.²²⁶ Thus, the statute, and the protection it afforded, could be rendered totally ineffectual by a spouse's inter vivos transfers. The only restriction on these transfers was that they must have been actual conveyances or gifts.²²⁷ Therefore, the elective share statute was not an obstacle for a married person, with access to a lawyer, who wished to disinherit his or her spouse.

²¹³ *Id.* at 872, 460 N.E.2d at 577.

²¹⁴ *Id.* at 873, 460 N.E.2d at 577.

²¹⁵ *Id.* at 873, 460 N.E.2d at 577-78.

²¹⁶ 371 Mass. 559, 59 N.E.2d 299 (1945). See also discussion *infra* text accompanying notes 221-29.

²¹⁷ See *infra* text accompanying notes 230-38.

²¹⁸ See *infra* text accompanying notes 239-62.

²¹⁹ See *infra* text accompanying notes 263-70.

²²⁰ See *infra* text accompanying notes 271-82.

²²¹ MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1981). See *infra* note 2.

²²² See *supra* text accompanying notes 37-42.

²²³ MACDONALD, *supra* note 41, at 24-25.

²²⁴ See Mahoney, *supra* note 37, at 99-101.

²²⁵ 317 Mass. at 571, 59 N.E.2d at 306.

²²⁶ *Id.*

²²⁷ *Id.*

Moreover, the *Kerwin* court's application of the statute failed to recognize equally the contributions of husbands and wives. A surviving spouse had essentially no property rights, under *Kerwin*, unless he or she held title to that property. In other words, the spouse holding title to the property could dispose of it at death regardless of whether the surviving spouse contributed to the acquisition of the property. Therefore, for example, a wife who throughout the marriage helped accumulate and maintain the couple's assets could, under *Kerwin*, be deprived of the use of those assets upon the death of her husband.

1. The Unresolved Issues

The Supreme Judicial Court correctly realized that *Kerwin v. Donaghy* is incompatible with the current view of the contributions made to a marriage by both husbands and wives. In overruling *Kerwin*, however, the *Sullivan* court left many questions unanswered because its holding was too narrow to replace adequately the previous standard. Although the *Kerwin* decision was not, in hindsight, a very equitable one, it was easily applicable to virtually all similar situations. The standard created in *Kerwin* allowed a married person to dispose of property in any manner he or she chose, provided the disposition was formalistically correct.²²⁸ Thus, in the case of inter vivos trusts, for example, it was largely irrelevant who had a general power of appointment, or whether the surviving spouse assented to the creation of the trust for purposes of the elective share.

The rule adopted in *Sullivan*, unlike that in *Kerwin*, is not universally applicable. In fact, the *Sullivan* court cannot truly be said to have adopted a "standard" or a "test"²²⁹ at all. In essence, the court imposed a rule to govern one, very specific fact situation. The applicability of this rule — that assets held in an inter vivos trust created during the marriage by the deceased spouse over which he or she alone had a general power of appointment — is, by the court's admission, unresolved.²³⁰ Therefore, numerous situations which had previously been governed by *Kerwin* are no longer controlled by any precedent. Consequently, estate planners now must deal with an incomplete body of law.

The *Sullivan* decision thus provides surviving spouses with greater protection than they previously enjoyed by eliminating one of the mechanisms of disinheritance, namely, inter vivos trusts over which the deceased spouse alone had a general power of appointment. As the court pointed out, however, its decision may be factually inapplicable to future situations which vary only slightly from that encountered in *Sullivan*.²³¹ Hence, it is unclear whether other vehicles for disinheritance have survived.

In overruling *Kerwin*, the *Sullivan* court should have either set forth a standard or expanded its reasoning to provide practitioners with a basis for applying the court's decisions to other fact patterns. The court was apparently unsatisfied with the judicial standards which had been used in Massachusetts and in other jurisdictions.²³² The court

²²⁸ *Id.* at 571-72, 59 N.E.2d at 306.

²²⁹ The court claims that it adopted an "objective test" which "would involve no consideration of the motive or intention of the spouse in creating the trust." 390 Mass. at 872, 460 N.E.2d at 577.

²³⁰ *Id.* at 873, 460 N.E.2d at 577.

²³¹ *See id.*

²³² *See id.* at 871-73, 460 N.E.2d at 577.

expressly rejected the reality,²³⁵ intent,²³⁴ and control tests.²³⁵ Since the court was unsatisfied with the existing judicial tests it should have explained the decision reached in *Sullivan* in greater depth.

The reasoning in *Sullivan* is scant. The court tells us that surviving spouses "should not be so restricted as they are by the rule in *Kerwin v. Donaghy*"²³⁶ and that a divorced spouse should not have greater rights than a widowed one²³⁷ and little else. The *Sullivan* opinion provides virtually no guidelines for determining which factors led the court to rule that assets held in inter vivos trusts created by the deceased spouse over which he or she alone had a general power of appointment should be considered part of the decedent's estate. The court's limitation of its rule to situations involving only a sole power of appointment suggests that perhaps the decedent's control over the assets was determinative. This, however, is little more than conjecture, and there is no indication of how much control would be considered excessive by the court. Moreover, the court's reliance on the comparative rights of the spouse in divorce settlements and inheritance claims provides no concrete guideline for estate planners to predict how the court may eventually resolve the questions it left unresolved.²³⁸

2. The Analogy to Divorce

The court's conclusion that it is "neither equitable nor logical" to extend greater property rights to divorced spouses than to surviving spouses suggests that, absent new legislation, the court's determination of whether assets may be reached by a surviving spouse will depend on whether the spouse would have had a right to those assets had he or she divorced the decedent.²³⁹ To determine a surviving spouse's statutory share based on what that spouse may have been awarded in a hypothetical divorce proceeding is, however, neither equitable nor logical. Very different considerations govern the determination of spouses' property rights upon divorce than upon death. The judge in a divorce proceeding has wide discretion over the division of a couple's property.²⁴⁰ He

²³⁵ *Id.* at 871, 460 N.E.2d at 577. The court expressly overruled *Kerwin*, a "reality" test decision, stating, "we shall no longer follow the rule announced in *Kerwin*." *Id.* For a discussion of the reality test, see *supra* text accompanying notes 76-91.

²³⁴ 390 Mass. at 872, 460 N.E.2d at 577. The court stated that it would no longer consider the motive or intention of the spouse. *Id.*

²³⁵ *Id.* at 872-73, 460 N.E.2d at 577. The court stated that it will no longer need to determine whether a spouse "'has made an illusory transfer' ... or ... whether the spouse 'intended to surrender complete dominion over the property.'" *Id.* (quoting *Newman v. Dore*, 275 N.Y. 371, 379 (1937) and *Staples v. King*, 433 A.2d 407, 411 (Me. 1981)).

²³⁶ 390 Mass. at 872, 460 N.E.2d at 577.

²³⁷ *Id.*

²³⁸ See *id.* at 872 n.6, 460 N.E.2d at 577 n.6. On this matter, the court asserted:

Without suggesting the outer limits of the meaning of the word "estate" under G.L. c. 208, § 34, as applied to trust assets over which a spouse has a general power of appointment at the time of a divorce, after this decision there should be no doubt that the "estate" of such a spouse would include trust assets held in a trust created by the other spouse and having provisions such as the trust in the case before us.

Id.

²³⁹ *Id.* at 872, 460 N.E.2d at 577. Effectively, then, the definition of the term "estate" for the purposes of the election statute would be the same as the meaning of "estate" under MASS. GEN. LAWS ANN. ch. 208 § 34 (1983).

²⁴⁰ See MASS. GEN. LAWS ANN. ch. 208 § 34 (1983), which states in part:

must make the decision based on the unique facts of each case before him.²⁴¹ The Massachusetts alimony statute authorizes the judge to consider a number of factors in determining the amount of alimony, including the length of the marriage, the conduct of the parties during the marriage, their respective employability and opportunity for future acquisition of assets and income, and the contribution of each of the parties in the acquisition and preservation of their respective estates.²⁴²

Conversely, a judge in an elective share or intestate succession case does not have this degree of discretion.²⁴³ The present statute does not allow the judge to consider the circumstances of the marriage in establishing the composition of the decedent's estate.²⁴⁴ The assets in question in such a case are either a part of the estate, as a matter of law, and hence subject to the surviving spouse's election, or they are outside both the estate and the reach of the statute.²⁴⁵

Therefore, an attempt to establish property rights of a surviving spouse by reference to a spouse in a hypothetical divorce proceeding forces a judge to consider extrinsic factors which are beyond the scope of inquiry provided for in the authorizing statute. In addition, continued reliance by the courts on the Supreme Judicial Court's analogy to divorce dispositions would provide a surviving spouse with virtually no basis for deciding whether or not to elect against a will. Without some predictable standard for determining which assets will be subject to distribution, surviving spouses may be unable to ascertain whether a successful challenge of the will, under the distribution statute, would result in a larger or smaller share of the decedent's estate than the original testamentary provisions.

In addition, without a predictable standard, estate planners will be unable to structure a couple's estate to ensure that, upon the death of one spouse, the estate will be distributed as the couple wished and intended. The number of questions remaining unresolved following *Sullivan* will, in many instances, prevent estate planners from being able to advise their clients with any certainty. It appears that *Sullivan* may just be the first of a number of very fact specific, prospective rulings by the Supreme Judicial Court. If that is the case, estates may have to be restructured quite often before the court clarifies the state of the law by resolving the issues *Sullivan* raised.

In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid or in fixing the nature and value of the property, if any, to be so assigned, the court after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

Id.

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1981). For the text of this statute see *supra* note 3.

²⁴⁴ See MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1981).

²⁴⁵ See *id.*

3. The Conflicting Results under the Two Recommended Statutes

The *Sullivan* court stated that the definition of "estate" was best left to the legislature²⁴⁶ and recommended, indirectly, that the Uniform Probate Code's statutory treatment of distribution be adopted by the Massachusetts legislature. Under the UPC, the Ernest G. Sullivan Trust would be considered part of the decedent's estate subject to spousal election under section 2-202(1)(i) and 2-202(1)(ii) because he retained both the right to receive income from the trust and the right to revoke it. Moreover, the adoption of sections 2-201 and 2-202 or the enactment of similar legislation would answer many of the questions which the court listed as specifically unanswered by its opinion.²⁴⁷ For instance, the court noted that the situations of trust assets conveyed to the trust by a third person or of assets held in a trust created with the consent of the surviving spouse were unclear under the Massachusetts elective share statute following *Sullivan*.²⁴⁸ Under the UPC both these categories of assets would be outside the estate subject to statutory distribution.²⁴⁹ Adoption of the UPC in Massachusetts would permit ready resolution of several other questions left open by the *Sullivan* court, such as whether trusts created prior to the decedent's marriage to the spouse²⁵⁰ or whether insurance policies payable to a person other than the surviving spouse constitute part of the estate.²⁵¹ Analyzed under the UPC, the value of any assets held in either manner would be excluded from the decedent's augmented estate and would, therefore, be unavailable to a surviving spouse for statutory distribution.²⁵² Similarly, the *Sullivan* Court left unresolved the status of assets held in a trust over which the decedent retained the power of appointment jointly with another person²⁵³ or assets held in a trust created by an intestate decedent who had a general power of appointment in the estate of the deceased spouse.²⁵⁴ Under the UPC, assets so held would be available for spousal distribution.²⁵⁵

The *Sullivan* court also cited section 18 of the Uniform Marital Property Act (UMPA) in its invitation for legislative action;²⁵⁶ the result in *Sullivan*, however, is not consistent with the UMPA. If the Sullivans had been residents of a state governed by the UMPA, virtually all of Ernest Sullivan's personal property, valued at approximately \$15,000,²⁵⁷ would have been marital property because it was acquired during the marriage.²⁵⁸ The realty held in the trust, however, would be individual property because Mr. Sullivan acquired that property as a result of his mother's death.²⁵⁹ Thus, analyzed under the

²⁴⁶ 390 Mass. at 873, 460 N.E.2d at 578.

²⁴⁷ See *Id.* at 873, 460 N.E.2d at 577-78.

²⁴⁸ 390 Mass. at 871, 460 N.E.2d at 577.

²⁴⁹ See UNIFORM PROBATE CODE § 2-202 (1982).

²⁵⁰ See 390 Mass. at 873, 460 N.E.2d at 578.

²⁵¹ See *id.*

²⁵² See UNIFORM PROBATE CODE § 2-202 (1982).

²⁵³ See *id.* The court noted that its opinion left the treatment of this situation unresolved. 390 Mass. at 873, 460 N.E.2d at 578.

²⁵⁴ See UNIFORM PROBATE CODE § 2-202 (1982). The court expressly declined to offer a solution to this situation as well. 390 Mass. at 873, 460 N.E.2d at 578.

²⁵⁵ See UNIFORM PROBATE CODE § 2-202 (1982).

²⁵⁶ See 390 Mass. at 873-74, 460 N.E.2d at 578.

²⁵⁷ *Id.* at 866, 460 N.E.2d at 574.

²⁵⁸ See UNIFORM MARITAL PROPERTY ACT § 4 (1982).

²⁵⁹ See *id.* § 4(g).

UMPA, Mrs. Sullivan would have had a one-half undivided interest in the personalty at issue in *Sullivan* and no interest at all in the house held in trust. Mr. Sullivan would have been free to dispose of both the house and his one-half interest in the personalty in any manner he pleased.

It is apparent that the application of the two statutory schemes referred to by the Massachusetts Supreme Judicial Court to the facts of *Sullivan* would result in conflicting outcomes — under the UPC Mrs. Sullivan would have a right to a statutory share of the value of the entire trust corpus,²⁶⁰ while under the UMPA her interest would be limited to one-half of the personalty held in the Sullivan trust.²⁶¹ In contrast to the outcome under the UPC, Mrs. Sullivan would have no interest in the realty held in trust by her husband under the UMPA.²⁶² Therefore, because the results upon their application differ, these recommended statutes provide little insight into the court's likely resolution of unanswered questions.

Following *Sullivan v. Burkin*, Massachusetts statutory share law is unpredictable and fails to acknowledge the contributions of both husbands and wives. The scope of a decedent's estate needs to be explicitly defined in Massachusetts. The judiciary has declined to formulate a comprehensive definition and has left that task to the state legislature. The *Sullivan* decision left a number of voids — unanswered questions — which need to be filled. Estate planning is not an area of the law in which imprecision can be tolerated. The law needs to be settled, and settled clearly, to allow people to plan for the disposition of their estates.

B. *How Sullivan Should Have Been Decided*

The Supreme Judicial Court had the opportunity to clarify the interpretation of "estate" for purposes of statutory distribution and refused to do so.²⁶³ The court explicitly left the determination of surviving spouses' rights to the legislature.²⁶⁴ The Massachusetts legislature acted in this area by enacting the elective share statute, and can, as it has in the past, amend it as it sees fit.²⁶⁵ The court's function is to interpret the laws promulgated by the legislature.²⁶⁶ The inartful draftsmanship of these laws does not permit the court to decline to answer the issues before it; the court must interpret the statute to best effectuate legislative intent.²⁶⁷ Similarly, the wisdom and policy of a statute are not questions within the court's province; these determinations are solely for the legislature.²⁶⁸

²⁶⁰ See UNIFORM PROBATE CODE § 2-202 (1982).

²⁶¹ See UNIFORM MARITAL PROPERTY ACT § 4 (1982).

²⁶² See *id.* § 4(g).

²⁶³ See *Sullivan*, 390 Mass. at 873, 460 N.E.2d at 578.

²⁶⁴ *Id.*

²⁶⁵ MASS. GEN. LAWS ANN. ch. 191, § 15 was amended in 1964 to increase, in certain situations, the share available to a surviving spouse from \$10,000 to \$25,000.

²⁶⁶ See Mass. Const. art. 30; *Rosenbloom v. Kokofsky*, 373 Mass. 778, 780, 369 N.E.2d 1142, 1143 (1977). The court stated that while "harsh results" were possible under the statute in question, "the question whether an alternative formulation would be more equitable is beyond our authority to decide. The scope of the authority of this court to interpret and apply statutes is limited by its constitutional role as a judicial, rather than a legislative body." *Id.*

²⁶⁷ *Tedford v. Massachusetts Hous. Fin. Agency*, 390 Mass. 688, 696, 459 N.E.2d 780, 785 (1984) (the court must "interpret the statute to best effectuate the legislative intent, viewing the statute as a whole").

²⁶⁸ See, e.g., *Bailey v. Wood*, 202 Mass. 549, 551, 89 N.E. 147, 148 (1909) ("whether the statute

The Supreme Judicial Court fulfilled its role by deciding the issue before it in *Sullivan v. Burkin*, but by adopting an extremely fact-specific rule it confused the future state of Massachusetts statutory share law. It is obvious from the numerous examples of the decision's inapplicability that the court understood that the law would be unsettled after *Sullivan*.²⁶⁹ Moreover, it is clear that the court does not intend to clarify the law in this area in the near future. The court stated that, absent new legislation, it would resolve any unanswered questions "in the usual way, through the decisional process,"²⁷⁰ thus implying these determinations would continue to be made on narrow, case-by-case bases, as *Sullivan* was, until the legislature enacts a new statute or the court judicially creates one.

The court apparently would prefer that the Massachusetts elective share statute contain a very specific enumeration of exactly what assets are subject to distribution. In *Sullivan*, the court attempted to induce the enactment of such legislation by intentionally confusing the definition of "estate" for purposes of statutory distribution. The court therefore allowed its views on the lack of wisdom or utility of the current statute to interfere with its duty to interpret the law in accordance with legislative intent.

Neither the adoption of a standard nor the expansion of its reasoning would have precluded the court from expressing its views on the deficiencies of the Massachusetts elective share statute. Nor would it have precluded the court's recommendations on how to alleviate those deficiencies. The course of action taken by the court showed a legitimate concern for the future of the law in this area but it disregarded the interim between the *Sullivan* decision and the possible enactment of new legislation. Accordingly, the Supreme Judicial Court should have decided *Sullivan v. Burkin* in a manner which clearly illustrated what would be includible within a decedent's estate for purposes of statutory distribution so that practitioners could proceed with certainty regardless of whether a new statute is enacted.

V. OBJECTIVES FOR A NEW ELECTIVE SHARE STATUTE

If the Massachusetts legislature is to enact a new elective share statute, both the UPC and the UMPA provide worthwhile bases for eliminating the problems caused by the current statute. The UPC is a comprehensive piece of legislation designed to reduce imprecision and guesswork in the determination of which of a decedent's assets are subject to distribution. The mechanics and framework of the UPC would be a sound starting point for the Massachusetts legislature. A statute is needed which specifically and completely enumerates the assets subject to statutory distribution.

The Massachusetts legislature should also draw upon the UMPA's recognition of spousal property rights prior to termination of the marriage. In other words, a new statute should provide that one spouse's legal interest in the other spouse's property would not have to be triggered by death — it would exist during the marriage. As under Massachusetts divorce law, legal title to property would not be determinative of its status relative to the distributive share.²⁷¹ Massachusetts divorce laws, to some extent, already

... is a good statute or a bad statute ... is a matter for legislative consideration"); Opinion of the Justices, 165 Mass. 589, 595, 44 N.E. 625, 627 (1896) ("[o]n the wisdom of ... legislation we are not the judges").

²⁶⁹ 390 Mass. at 873, 460 N.E.2d at 578.

²⁷⁰ *Id.* at 874, 460 N.E.2d at 578.

²⁷¹ See MASS. GEN. LAWS ANN. ch. 208, § 34 (1983).

reflect this type of system by considering "the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit"²⁷² in determining the amount of the settlement or alimony, and, also by including all property of a spouse "whenever and however acquired" in the estate subject to distribution upon divorce.²⁷³ A statute embodying this sharing concept would recognize the contributions of respective spouses, without regard to which party holds legal title to given property, and would treat married couples as a unit composed of equal partners.

This concept of equality of ownership as between spouses is one of the major differences between the augmented estate scheme of the UPC and the community property concepts underlying the UMPA. A second difference is that the UMPA takes effect during the life of the marriage²⁷⁴ and operates upon its dissolution.²⁷⁵ Under the UPC, one of the spouses must die for any sharing to occur.²⁷⁶ Furthermore, there is, effectively, only sharing when the spouse who holds legal title to the majority of a couple's property dies first.²⁷⁷

In addition to the UMPA, current scholars also embrace this concept of equality:

[A]ny new system of marital property rights should be based on the presumption that persons entering marriage are doing so on a basis of equality, that their contributions to the marriage are likewise presumed to be equal, and that the distribution of assets at its termination will reflect that presumption.²⁷⁸

In accordance with the presumed equality of spouses, new statutory share legislation should deemphasize, for the purposes of distribution, the importance of which spouse holds title to the property. The fact that an asset is held in one spouse's name is no longer (if, in fact, it ever was) a clear indicium of the contribution to the acquisition of the asset made by the respective spouses. As the Massachusetts divorce statute illustrates, the legal system presently views husbands and wives on a more equal footing than may have been the case in the past. The value of each spouse's role in the acquisition of property and the maintenance of the family cannot be stated in precise monetary terms. Nor can the fruits of a successful marriage be easily classified as "his" or "hers." The divorce laws of Massachusetts, and those of the overwhelming majority of other states,²⁷⁹ recognize this situation.

Finally, a spouse's interests in marital property should be recognized before the marriage terminates. This objective is also clearly at work in current divorce law,²⁸⁰ the

²⁷² *Id.*

²⁷³ See *Rice v. Rice*, 372 Mass. 398, 400, 361 N.E.2d 1035, 1037 (1977).

²⁷⁴ See UNIFORM MARITAL PROPERTY ACT § 4 (1982).

²⁷⁵ See *id.* §§ 17, 18.

²⁷⁶ UNIFORM PROBATE CODE § 2-201(a) (1982).

²⁷⁷ Volkmer, *supra* note 104, at 134.

²⁷⁸ Kulzer, *Law and Housewife: Property, Divorce, and Death*, 28 U. FLA. L. REV. 1, 46 (1975); see also Foster & Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169, 176 (1974) ("We believe that such a system reflects the contemporary understanding of marriage and the reasonable expectations of the parties.").

²⁷⁹ See generally Foster & Freed, *Family Law in the Fifty States: An Overview*, 16 FAM. L.Q. 289 (1983).

²⁸⁰ See, e.g., UNIFORM MARITAL PROPERTY ACT §§ 4, 17 (1982).

Massachusetts divorce statute,²⁸¹ and the Supreme Judicial Court's reliance on that statute in *Sullivan*.²⁸² In broad terms, this recognition could be effectuated easily in Massachusetts through the imposition of a community-property system, but such an option is incompatible with the present state of Massachusetts law.

CONCLUSION

In *Sullivan v. Burkin*, the Massachusetts Supreme Judicial Court rejected the standard established in 1945 which granted a spouse an absolute right to dispose of his or her property and to evade the elective share statute. The *Sullivan* court prospectively adopted a rule which treats assets held in an inter vivos trust created by the deceased spouse during the marriage and over which he or she had a general power of appointment as part of the decedent's estate subject to statutory distribution. The court expressly stated, however, that this rule may be inapplicable to situations factually dissimilar to *Sullivan*.

The narrow holding in *Sullivan* leaves many unanswered questions, which the court apparently intends to resolve on a case-by-case basis. The court intentionally confused the law in this area to induce legislative action. Until the legislature acts, however, *Sullivan* provides an uncertain precedent for estate planners, who need predictable guidelines on which to plan the disposition of their clients' estates.

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²⁸¹ See MASS. GEN. LAWS ANN. ch. 208, § 34 (1983).

²⁸² See 390 Mass. at 872, 460 N.E.2d at 577.