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Partners in Life and at Death: The New Minnesota Elective Share of a Surviving Spouse Statute

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PARTNERS IN LIFE AND AT DEATH:  
THE NEW MINNESOTA ELECTIVE SHARE  
OF A SURVIVING SPOUSE STATUTE

William Forsberg†

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I. INTRODUCTION

On January 1, 1996, Minnesota began operating under a revised elective share statute. Elective share statutes restrict a decedent spouse's freedom to disinherit his or her surviving spouse by entitling a surviving spouse to at least a portion of the decedent spouse's estate.¹ The Minnesota Legislature modeled Minnesota's new elective share statute after Part 2 of Article II of the Uniform Intestacy, Wills and Donative Transfers Act.² With a few exceptions, the 1996 Minnesota elective share statute incorporates the 1993 revisions to Part 2 of the Revised Article II of the Uniform Probate Code (UPC).³ This Article discusses the policy considerations that prompted the 1993 changes to the UPC and illustrates how Minnesota's revised elective share statute incorporates those changes.

II. HISTORICAL PERSPECTIVE OF ELECTIVE SHARE LAWS

Minnesota and other states historically have attempted to protect surviving spouses from disinheritance.⁴ The protections Minnesota and other states provided, however, often failed to protect surviving spouses adequately. Part II of this Article briefly examines these historical protections and shows how Minnesota law often alleviated, but never eliminated, the inadequacies of these protections.

3. See supra note 2.
4. See infra notes 5-29 and accompanying text (discussing historical statutory and common-law protections for surviving spouses).
A. Evolving Protections for Surviving Spouses: The Elective Share Laws

Prior to 1875, Minnesota operated under the common law of dower and curtesy. Dower and curtesy ensured that a surviving spouse retained some assets in the event that the decedent spouse's will inadequately provided for the surviving spouse. The protections of dower and curtesy, however, were limited to certain real property interests of a surviving spouse.

In Minnesota and other states, elective share statutes eventually replaced dower and curtesy. These statutes guaranteed a surviving spouse a fixed percentage of the decedent spouse's real and personal property. Consequently, these statutes thwarted a decedent spouse's attempts to disinherit completely his or her surviving spouse.

Over time, problems of overprotection and underprotection of a surviving spouse and other perceived inequities in the operation of these elective share statutes surfaced. In other words, these statutes

5. See 1875 Minn. Laws, ch. 40 (abolishing dower and curtesy). Although the Minnesota Legislature abolished dower and curtesy, it enacted other statutory measures guaranteeing a surviving spouse a portion of the decedent's estate. See, e.g., 1878 MINN. GEN. STAT. ch. 46, §§ 2-3 (entitling surviving spouse to one-third of lands which the deceased possessed or seized at death).

6. In English and American common law, dower was the term used to describe a surviving widow's interest in land seized by her husband at any time during marriage. See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 2.13, at 69-74 (1984). The dower consisted of a life estate in one-third of the husband's lands, as long as the estate could be inherited by the wife's issue and the wife had not released her dower during marriage. See id.

7. At common law, a husband held an interest in all of the lands in which his wife owned a present legal freehold estate during marriage. See CUNNINGHAM, supra note 6, § 2.14, at 75-76. Specifically, common law gave a husband a "curtesy initiate," which was an interest in all the lands owned by his wife in fee simple or fee tail, once the couple had a child capable of inheriting from the wife. See id. If the husband survived his wife, he acquired a "curtesy consummate," an interest in all the lands previously attached by the curtesy initiate. See id.

8. See supra notes 6-7 (defining dower and curtesy).

9. See CUNNINGHAM, supra note 6, § 2.14, at 75-76 (discussing most states' abolition of dower and curtesy and subsequent enactment of forced share laws).

10. See supra note 1 and accompanying text (explaining the purpose and effect of elective share laws).

allowed surviving spouses to receive either too few or too many of the decedent spouse’s assets. In some states’ statutes, the elective share percentage applied only to the decedent spouse’s probate estate, which generally was limited to assets titled in the decedent’s name.¹² Thus, under many elective share statutes, a decedent spouse still could disinherit his or her surviving spouse by using nonprobate transfers or will substitutes¹³ such as the placement of assets in joint tenancy with right of survivorship.¹⁴ Thus, decedent spouses often avoided the effects of elective share statutes through inter vivos transfers.

In 1969, the Minnesota Legislature enacted legislation to remedy the perceived inequities perpetuated by Minnesota’s elective share statute.¹⁵ Under this legislation, a surviving spouse could defeat certain nonprobate transfers of a decedent spouse, such as a transfer of assets in joint tenancy or a transfer of assets to a revocable trust.¹⁶ To gain these statutory protections, however, the surviving spouse needed to follow certain procedures and elect to take under the statute.¹⁷ Furthermore, although these changes increased protections for surviving spouses, these changes failed to include certain transfers. For example, the statute specifically excluded life insur-

¹². See, e.g., FLA. STAT. ANN. § 732.206 (West 1995) (providing that the elective share shall be computed by taking into account “all property of the decedent wherever located that is subject to administration except real property not located in Florida”).

¹³. A will substitute is an instrument that performs some of the purposes of a will. See 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 6.1, at 219 (1960). Joint tenancies in real or personal property, trusts, deeds that are delivered to a grantee upon the grantor’s death, life insurance contracts, and numerous other instruments can serve as will substitutes. See id.

¹⁴. Cf. In re Estate of Jeruzal, 269 Minn. 183, 195-96, 130 N.W.2d 473, 481 (1964) (holding that a trust established by a decedent could not be taken through a surviving spouse’s election).


¹⁶. See MINN. STAT. § 525.213 (1984) (repealed 1985) (“A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse be treated as a testamentary disposition . . . .”); see also Langbein & Waggoner, supra note 1, at 303 (stating that the need to bring inter vivos transfers within the reach of the elective share statutes was a driving factor behind the 1969 reforms to the Uniform Probate Code).

¹⁷. See MINN. STAT. §§ 525.212-216 (1984) (repealed 1985). The spouse had to refuse and renounce the will in writing within six months after the probate filing. See id. Otherwise, the spouse would be deemed to have accepted the will. See id.
Eventually, Minnesota recognized that surviving spouses required greater protection than existing laws provided.

To strengthen protections for surviving spouses, Minnesota adopted portions of the Uniform Probate Code’s elective share laws in 1985. These new provisions applied a fixed percentage to a larger asset pool than did their predecessors, because they included not only the decedent’s probate estate in the asset pool, but certain nonprobate assets as well. This new asset pool or pot was called the “augmented estate.” The augmented estate included such assets as property transferred by the decedent in joint tenancy during marriage to someone other than the surviving spouse and gifts in excess of $30,000 made during the marriage and within one year of death to the children of the decedent. By establishing the augmented estate, the Minnesota Legislature made it more difficult for decedents to exclude assets from a surviving spouse’s elective share.

Nevertheless, even with the augmented estate concept, inequities in Minnesota’s elective share statute remained. First, the elective share percentage was still a fixed percentage that did not account for the length of the couple’s marriage. Second, the elective share percentage was less than one-half. Third, the augmented estate only included assets of the surviving spouse derived from the decedent during the marriage. Thus, it excluded premarital assets and transfers, whether outright or in the form of testamentary substitutes. Consequently, even with the augmented estate concept, the elective share statute often overprotected or underprotected a surviving spouse.

As a result of weaknesses in elective share statutes like Minnesota’s statute, the drafters of the UPC realized more changes were needed. In 1993, the drafters finished revising the elective share

21. Id.
22. See id.
23. See id. § 524.2-201(a) (allowing the surviving spouse to take one-third of the augmented estate).
24. See id.
25. See id. § 524.2-202.
provisions of the UPC. The Minnesota Legislature adopted most of the 1993 UPC changes, incorporating them into Minnesota’s elective share statute in 1994. These changes affect estates where the decedent died on or after January 1, 1996.

B. Illustration of Inadequacies in Elective Share Statutes

Before discussing the 1996 substantive changes in Minnesota’s elective share statute, it is helpful to have a better understanding of some of the public policy considerations behind the changes. As mentioned above, a recurring problem with elective share statutes was the overprotection or underprotection of certain spouses. To illustrate the problem of overprotection and underprotection, this Article examines the operation of two traditional elective share statutes. These two statutes are Florida’s elective share statute and Minnesota’s pre-1996 elective share statute.

1. Components of Traditional Elective Share Statutes

As previously noted, traditional elective share statutes give a surviving spouse a right to receive a statutorily determined amount or share of the decedent spouse’s estate in lieu of an outright bequest under the decedent spouse’s will. In some states, this amount is called a forced share; in others, such as Florida and Minnesota, it is called an elective share. To gain the protection of these laws, a surviving spouse typically must follow certain procedures and must exercise his or her right to elect against the decedent spouse’s will within a certain time. A two-part formula determines the elective share amount.

marriage as an economic partnership. The drafters of the 1993 amendments recognized that changes were needed to reflect these contemporary views. See id.


30. See Langbein & Waggoner, supra note 1, at 304 (noting that forced shares and elective shares are synonymous).


a. The Elective Share Percentage

The first part of the formula is a fixed fraction or percentage. The fixed fraction or percentage varies from state to state but generally is less than fifty percent. Florida's elective share percentage is thirty percent. Under Minnesota's pre-1996 elective share statute, the elective share percentage was one-third.

b. The Elective Share Asset Pool

The second part of the elective share formula consists of a certain defined pool of assets or property to which the elective share percentage applies. Under a traditional elective share statute, the asset pool generally consists of the decedent spouse's probate estate. This includes, with certain exceptions, assets titled in the decedent spouse's name or assets owned by the decedent spouse at death. Florida's elective share statute falls into this category. Florida's property pool does not include nonprobate inter vivos transfers or transfers of property to joint accounts with rights of survivorship in third parties.

Minnesota's asset pool under its pre-1996 elective share statute was much broader than that provided by Florida's elective share statute. Minnesota's asset pool - called the "augmented estate" - in-
cluded, among other things, certain nonprobate transfers. The augmented estate feature of Minnesota's statute distinguishes it from traditional elective share statutes such as Florida's. The primary advantage of traditional elective share statutes appears to be that surviving spouses' shares are relatively easy to calculate and administer. The primary disadvantage of traditional elective share statutes is that they often overprotect or underprotect a surviving spouse.

2. Inequitable Results: An Illustration of the Operation of Florida's Elective Share Statute and Minnesota's Pre-1996 Elective Share Statute

The following examples use Florida's elective share statute and Minnesota's pre-1996 elective share statute to illustrate the problems of underprotection and overprotection of surviving spouses.

a. Florida's Elective Share Statute: An Example of the Underprotection Problem

A and B married early in life and did not divorce. A died at age sixty-five, survived by B. A and B had assets at A's death as follows:

1. Mutual funds in A’s name $800,000
2. Certificate of deposit in A’s name, held in joint tenancy with A’s daughter C 200,000

Total marital estate $1,000,000

A and B acquired the above assets during their marriage. A's will completely disinherits B. Assume that A's estate has no debts, liens, mortgages, or costs of administration.

Under Florida's elective share statute, the elective share percentage equals thirty percent of the fair market value of the decedent spouse's property subject to administration. B's claim against A's estate is, therefore, $240,000, which is thirty percent of A's estate subject to administration ($800,000).

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41. See supra note 11 (citing articles which analyze weaknesses in elective share laws).
42. Joint tenancy is a type of concurrent ownership in which each joint tenant owns the entire estate in fee simple, in fee tail, or for life. See CUNNINGHAM, supra note 6, § 5.3, at 202. When a joint tenant dies, the survivor becomes the sole owner of the estate. See id. Consequently, the property does not pass through the decedent's probate estate. See id.
43. FLA. STAT. ANN. §§ 732.206-.207 (West 1995).
Yet, B presumably contributed equally, either directly or indirectly, toward the acquisition and accumulation of the $1,000,000 marital estate. B's minimum, fair, or equitable share should be at least fifty percent of the marital estate ($500,000). Consequently, B appears to have been underprotected by at least $260,000, which is one-half of the marital estate ($500,000) minus B's elective share amount ($240,000).

Florida's elective share statute underprotects B for three reasons: 1) the elective share percentage is less than fifty percent; 2) the marital assets are disproportionately titled in A's name; and 3) A died before B. Yet, why should any of these factors matter in determining an equitable and fair elective share amount for a surviving spouse? This seems especially true when it is the couple's first and only marriage and they have been married for a long time. A fair entitlement for B should be at least one-half of the marital assets.

b. Minnesota's Pre-1996 Elective Share Statute

In an attempt to address the underprotection problem, Minnesota adopted the UPC's augmented estate concept in 1985. These 1985 amendments broadened the asset pool to include certain transfers made by the decedent to the surviving spouse and others. Most notably, these amendments changed the augmented estate to include property the decedent transferred in joint tenancy with right of survivorship to someone other than the surviving spouse. In theory, broadening the asset pool to include these types of nonprobate assets and other will-substitute transfers lessened the opportunity for abuse and limited instances of underprotection. To a degree, the augmented estate concept worked. In many situations, it better protected surviving spouses than would a more traditional elective share statute. As illustrated below, the augmented estate concept under Minnesota's pre-1996 elective share statute lessened, but did not eliminate, the problem of underprotection of a surviving spouse.

i. An Example of the Underprotection Problem

A and B were married for thirty years. A died at age sixty-five,
survived by B. A and B had assets at A’s death as follows:

1. Mutual funds in A’s name $600,000
2. Four certificates of deposit in A’s name, held in joint tenancy with C, D, E, and F, who are children of A and B 400,000

Total marital estate $1,000,000

A and B acquired the above assets during their marriage. A’s will completely disinherits B. Assume that A’s estate has no debts, liens, mortgages, or costs of administration.

Under Minnesota’s pre-1996 elective share statute, B’s claim against A’s estate would be $333,333.48 This amount represents one-third of the augmented estate, which consists of A’s probate estate of $600,000 plus the four certificates of deposit with A and B’s children worth $400,000. In contrast to Florida’s elective share statute, Minnesota’s 1985 statute included the joint tenancy property in the augmented estate.49 If the jointly-held property were not included in the augmented estate, B’s elective share claim would amount to $200,000, or one-third of $600,000.

The augmented estate concept increased the surviving spouse’s claim against A’s estate. But is it a fair amount? Again, presumably B contributed equally, either directly or indirectly, toward the acquisition and accumulation of the entire $1,000,000 marital estate. Should not his or her minimum, fair, and equitable share be at least fifty percent of the $1,000,000 marital estate? Arguably, even with provisions for an augmented estate, the elective share statute underprotects B. The primary reason for B’s underprotection is not that the marital assets were disproportionately titled in A’s name. Instead, B’s underprotection results because the elective share percentage under the 1985 statute was less than fifty percent. Merely increasing the elective share percentage to fifty percent, however, does not always provide an equitable result. If Minnesota’s pre-1996 elective share statute were applied to a short-term marriage, an inequitable result would occur because the surviving spouse would be overprotected by the elective share statute. The following example illustrates this result.

49. See id. § 524.2-202(1)(iii).
ii. An Example of the Overprotection Problem

A and B were married for thirty years. A dies. One year later, B marries C. After one month of marriage, B dies, survived by C. Both B and C have adult children. B and C acquired their respective assets during their first marriages. The value of the couple's combined assets is as follows:

1. Mutual funds in B's name, acquired by B during previous marriage $400,000

2. Mutual funds acquired by B during previous marriage. While married to C, B transferred these funds to B's daughter D and held the funds in joint tenancy with D $200,000

3. Mutual funds in C's name, acquired by C during previous marriage $400,000

Total marital estate $1,000,000

B's will completely disinherits C. Assume that B's estate has no debts, liens, mortgages, or costs of administration.

Under Minnesota's pre-1996 elective share statute, C's elective share amount would be $200,000 which is one-third of the augmented estate of $600,000.50 The augmented estate is comprised of the $400,000 of funds in the decedent's name plus the $200,000 of jointly-held property. C's net worth would increase from $400,000 to $600,000 after only one month of marriage to B. C would receive a windfall and, in theory, be overprotected. Further, it could be argued that C's entire elective share amount of $200,000 should go to B's children, not to C or to C's children.

As demonstrated by the examples above, Minnesota's pre-1996 elective share statute operated more equitably than a more traditional elective share statute. Nevertheless, Minnesota's pre-1996 statute overprotected or underprotected surviving spouses in certain situations. Part III of this Article sets out the changes incorporated in Minnesota's revised elective share statute and shows how these changes result in a more equitable elective share for surviving spouses.

50. See id. § 524.2-201(a).
III. MINNESOTA'S NEW ELECTIVE SHARE STATUTE

The 1996 Minnesota elective share statute incorporates the 1993 changes to the UPC, which were designed to alleviate the problems of underprotection and overprotection.\(^{51}\) The amendments to Minnesota's elective share statute redefine the augmented estate so as to include certain assets of the surviving spouse not previously included in the calculation.\(^{52}\) The amendments also increase the total elective share percentage available to surviving spouses.\(^{53}\) Further, the statute now indexes the elective share percentage to the length of the marriage between the decedent and the surviving spouse.\(^{54}\) Moreover, the statute now allows a surviving spouse to take a supplemental amount from the decedent's estate when the elective share would provide too few assets to the surviving spouse.\(^{55}\)

A. Theories Behind the Amendments to Minnesota's Elective Share Statute

Minnesota's recent amendments to the elective share law attempted to remedy the inadequacies found in the previous statute by incorporating two theories: the equal economic partnership theory of marriage and the support theory of marriage.\(^{56}\)

1. The Partnership Theory

The partnership theory suggests that the marriage relationship is an equal economic partnership.\(^{57}\) This theory is reflected in many

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51. MINN. STAT. §§ 524.2-201 to -214 (1996); see also UNIF. PROBATE CODE art. II, pt. 2 general cmt. (amended 1993), 8 U.L.A. 108 (Supp. 1996) (stating that the revisions to the UPC's elective share provisions attempted to remedy the overprotection and underprotection of the earlier provisions).


53. See MINN. STAT. § 524.2-202(a) (1996) (allowing a surviving spouse to take an elective share amount of up to fifty percent of the augmented estate).

54. See id.

55. See id. § 524.2-202(b); see also infra Part III.C. (describing how the supplemental amount provision operates).


57. See UNIF. PROBATE CODE art. II, pt. 2 general cmt. (amended 1993), 8 U.L.A. 108 (Supp. 1996) (stating that "the economic rights of each spouse are seen as deriving from an unspoken marital bargain under which the partners agree that each is to enjoy a half interest in the fruits of the marriage"); see also
existing state divorce laws. Most states, including Minnesota, divide marital property in a roughly equal manner following divorce.\(^{58}\) Under many divorce laws, the marital estate consists of the combined assets of the couple that were acquired during marriage.\(^{59}\) Assets are characterized as marital or nonmarital.\(^{60}\) Marital assets are those that the couple acquired during marriage.\(^{61}\) Assets owned by each spouse before marrying constitute nonmarital assets.\(^{62}\) Each party generally retains his or her nonmarital assets upon divorce. Under certain hardship situations, however, nonmarital property may be awarded to one spouse.\(^{65}\) The issue of which spouse holds title to the property becomes irrelevant in such situations. Further, one spouse’s contribution of time and energy in raising children and being a homemaker is considered coequal with the other spouse’s support from wages and earnings.\(^{64}\) In other words, partnership theory deems marriage an equal economic partnership.

2. The Support Theory

The support theory, though not nearly as influential, joins the partnership theory in providing a philosophical foundation for the

\(^{58}\) See MINN. STAT. § 518.58, subd. 1 (1996) (stating that “[u]pon dissolution of marriage . . . the court shall make a just and equitable division of the marital property”); cf., e.g., WIS. STAT. ANN. § 767.255 (West 1993) (stating that all marital property “is to be divided equally between the parties”).

\(^{59}\) See, e.g., MINN. STAT. § 518.54, subd. 5 (1996) (stating that all property acquired by either spouse after the date of marriage and before the date of the division of the property is presumed to be “marital property”).

\(^{60}\) See id.

\(^{61}\) See id.

\(^{62}\) See id. subd. 5(b).

\(^{63}\) See id. § 518.58, subd. 2 (stating that the court can divide any property following divorce in cases where one spouse will suffer an “unfair hardship”); cf., e.g., WIS. STAT. ANN. § 767.255 (West 1993) (indicating that nonmarital property may be divided in “hardship cases”).

\(^{64}\) See MINN. STAT. § 518.58, subd. 1 (1996) (stating that “the court shall also consider the . . . contribution of a spouse as a homemaker”).
amendments to Minnesota's elective share law. The rationale underlying the support theory is that a spouse owes a duty to support the family while living, and a spouse should not evade this duty upon death. 65

B. Incorporating the Partnership Theory into Minnesota's New Elective Share Statute

1. Expanding the Augmented Estate

The 1996 Minnesota elective share statute broadens the augmented estate by including in the definition of the augmented estate not only the marital property of the surviving spouse, but also the nonmarital property of the surviving spouse. 66 The inclusion of both the surviving spouse's marital and nonmarital assets attempts to "deny any significance to the possibly fortuitous factor of how the spouses happened to have taken title to particular assets." 67

This expansion of the augmented estate serves to curtail certain abuses that might occur in contemplation of marriage. For example, under Minnesota's pre-1996 elective share statute, if a decedent created a revocable trust 68 before marriage, giving herself a life estate and power to invade the principal, the decedent could ensure that the trust's corpus would not be included in the augmented estate, because the corpus was not transferred during marriage. 69 If created during marriage, however, the trust would fall within the augmented estate and therefore be subject to the surviving spouse's right of election. 70

Under Minnesota's 1996 elective share statute, the revocable trust could be included in the augmented estate whether created before or during the marriage between the decedent and surviving

65. See UNIF. PROBATE CODE art. II, pt. 2 general cmt. (amended 1993), 8 U.L.A. 112-13 (Supp. 1996) (stating that the revisions to the UPC's elective share statute "implement[,] the support theory by granting the survivor a supplemental elective share amount related to the survivor's actual needs").


68. In a revocable trust, the settlor retains the right to revoke the trust. See GEORGE GLEASE BOGERT, TRUSTS & TRUSTEES § 1061, at 217 (1988).


70. See id. § 524.2-202(1)(ii) (stating that property transferred by the decedent at any time during marriage in which the decedent could revoke or invade the principal for personal gain is included in the augmented estate).
spouse.\textsuperscript{71} Thus, by redefining and broadening the definition of the augmented estate, the 1996 statute further diffuses the issue of title to assets and curtails the use of certain premarital transfers used to disinherit or underprotect a surviving spouse.

Four sections of Minnesota’s 1996 elective share statute now define the content of the augmented estate.\textsuperscript{72} They are listed and described below.

\textbf{a. Decedent’s Net Probate Estate}

The augmented estate includes the value of the decedent’s probate estate.\textsuperscript{73} Funeral and administration expenses, the homestead, family allowances and exemptions, liens, mortgages, and enforceable claims are specifically excluded from the augmented estate.\textsuperscript{74}

\textbf{b. Decedent’s Nonprobate Transfers to Others}

The second section provides that the augmented estate includes the value of the decedent’s nonprobate transfers to others.\textsuperscript{75} Three subsections define which types of transfers are included in the augmented estate.

\textit{i. Property Owned by the Decedent Immediately Prior to Death that Passed Outside Probate at the Decedent’s Death}

Property included in this category consists of: 1) property over which the decedent alone held a presently exercisable general power of appointment;\textsuperscript{76} 2) the decedent’s interest in property held with right of survivorship;\textsuperscript{77} 3) the proceeds of life insurance to the extent

\textsuperscript{71} See id. § 524.2-205 (1996); see also Unif. Probate Code § 2-205 cmt. (amended 1993), 8 U.L.A. 120 (Supp. 1996) (illustrating that the UPC’s revised elective share statute includes the corpus of a trust in the augmented estate, whether the trust was created before or during marriage).

\textsuperscript{72} Minn. Stat. § 524.2-203 (1996) (identifying the statutory sections used to calculate the augmented estate).

\textsuperscript{73} Id. § 524.2-204.

\textsuperscript{74} Id.

\textsuperscript{75} Id. § 524.2-205. This section does not include the value of the decedent’s transfer of the homestead to others. Id.

\textsuperscript{76} Id. § 524.2-205(1)(i). The amount included in the augmented estate is the value of the property subject to the power, to the extent the property passed at the decedent’s death, by exercise, release, lapse, or default of the power. See id.

\textsuperscript{77} Id. § 524.2-205 (1)(ii). The amount included in the augmented estate is the value of the decedent’s interest in the property. See id.
the decedent alone held a presently exercisable general power of appointment over the policy or its proceeds; 78 4) annuity contracts under which the decedent was the primary annuitant; 79 and 5) the value of pensions and other retirement accounts. 80

ii. Property Transfers by the Decedent During Marriage

Forms of transfer covered by this subsection include: 1) irrevocable transfers made by the decedent in which the decedent retained an interest that terminated at or continued beyond the decedent's death; 81 and 2) transfers of property in which the decedent created a general power of appointment over income or property exercisable by the decedent alone or in conjunction with any other person. 82

iii. Transfers by the Decedent During Marriage and During the Two-year Period Next Preceding the Decedent's Death

Forms of transfer covered by this subsection include: 1) property that passed because the decedent terminated his or her right or interest in the property; 83 2) transfers of life insurance policies; 84 and

78. Minn. Stat. § 524.2-205(1)(iii) (1996). The amount included in the augmented estate is the value of the insurance proceeds. See id.

79. Id. § 524.2-205(1)(iv). The amount included in the augmented estate is "any amount over which a person [other than the surviving spouse] has an immediate right of withdrawal after the decedent's death plus the commuted value of other amounts payable in the future." Id.

80. Id. § 524.2-205(1)(v). This subsection specifically excludes from the augmented estate benefits from the federal Social Security system. Id. The amount included in the augmented estate is "any amount over which the person [other than the surviving spouse] has an immediate right of withdrawal after the decedent's death plus the commuted value of other amounts payable in the future." Id.

81. Id. § 524.2-205(2)(i). The amount included in the augmented estate is "the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse." Id. See generally Unif. Probate Code § 2-205 cmt., examples 9-12 (amended 1993), 8 U.L.A. 121-22 (Supp. 1996) (illustrating that the UPC includes retained income interests for life, retained unitrust interests for a term, personal residence trusts, and retained annuity interests for a term).

82. Minn. Stat. § 524.2-205(2)(ii) (1996). The amount included in the augmented estate "is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income." Id.

83. Id. § 524.2-205(3)(i). The augmented estate includes the value of property that would have been included in the augmented estate by operation of certain portions of section 524.2-205. Id.

84. Id. § 524.2-205(3)(ii). The amount included in the augmented estate is
3) any transfers of property exceeding $10,000 made to, or for the benefit of, a person other than the decedent’s surviving spouse. 85

c. Decedent’s Nonprobate Transfers to the Surviving Spouse

The third section includes in the augmented estate the decedent’s nonprobate transfers to the surviving spouse. 86 It excludes homestead and social security benefits from the augmented estate. 87

d. Surviving Spouse’s Property and Nonprobate Transfers to Others

The fourth section includes in the augmented estate the surviving spouse’s property and nonprobate transfers. 88 Property included in this category consists of: 1) property, other than the homestead, that the surviving spouse owned at the decedent’s death, including the surviving spouse’s interest in property held with right of survivorship; 89 and 2) property that would have been included in the surviving spouse’s nonprobate transfers to others had the spouse been the decedent. 90

2. Incorporating the Accrual-Type Elective Share Percentage

Another tenet of the partnership theory is the idea that a surviving spouse of a long-term marriage should get fifty percent of the marital estate, and a surviving spouse of a short-term marriage should get something less. 91 In other words, each partner in the
As noted in Part II of this Article, traditional elective share statutes like Florida's statute and Minnesota's pre-1996 statute failed to incorporate this concept. These statutes contain elective share percentages fixed at less than fifty percent, regardless of the marriage's length. Consequently, these laws generally underprotected surviving spouses in a long-term marriage and overprotected surviving spouses in a short-term marriage.

Minnesota’s 1996 elective share statute solves this problem in two ways. First, it allows a surviving spouse to take up to fifty percent of the assets comprising the augmented estate. Second, it increases the amount available depending on the marriage’s length.

Minnesota’s current law incorporates a sliding scale that links the elective share percentage with the length of the marriage. In a short-term marriage, the elective share percentage is small. But as the length of the marriage grows, the elective share increases. For example, a fifteen-year marriage requires an elective share of fifty percent. Thus, the elective share statute implements the equal economic partnership theory by rewarding the surviving spouse in a long-term marriage. A one-year marriage, however, results in a three percent elective share. Thus, the elective share statute denies a windfall to a surviving spouse in a short-term marriage.

The sliding scale under Minnesota’s new elective share statute is set out below.

<table>
<thead>
<tr>
<th>Length of Marriage</th>
<th>Percentage of Elective Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; 1 year</td>
<td>Supplemental amount only</td>
</tr>
<tr>
<td>1 year but &lt; 2 years</td>
<td>3% of the augmented estate</td>
</tr>
<tr>
<td>2 years but &lt; 3 years</td>
<td>6% of the augmented estate</td>
</tr>
<tr>
<td>3 years but &lt; 4 years</td>
<td>9% of the augmented estate</td>
</tr>
<tr>
<td>4 years but &lt; 5 years</td>
<td>12% of the augmented estate</td>
</tr>
<tr>
<td>5 years but &lt; 6 years</td>
<td>15% of the augmented estate</td>
</tr>
</tbody>
</table>

92. Id.
94. See supra Part II.B. (illustrating the problems of overprotection and underprotection).
95. MINN. STAT. § 524.2-202(a) (1996).
96. Id.
97. Id.
98. See id.
99. See id.
100. See id.
<table>
<thead>
<tr>
<th>Length of Marriage</th>
<th>Percentage of Elective Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 years but &lt; 7 years</td>
<td>18% of the augmented estate</td>
</tr>
<tr>
<td>7 years but &lt; 8 years</td>
<td>21% of the augmented estate</td>
</tr>
<tr>
<td>8 years but &lt; 9 years</td>
<td>24% of the augmented estate</td>
</tr>
<tr>
<td>9 years but &lt; 10 years</td>
<td>27% of the augmented estate</td>
</tr>
<tr>
<td>10 years but &lt; 11 years</td>
<td>30% of the augmented estate</td>
</tr>
<tr>
<td>11 years but &lt; 12 years</td>
<td>34% of the augmented estate</td>
</tr>
<tr>
<td>12 years but &lt; 13 years</td>
<td>38% of the augmented estate</td>
</tr>
<tr>
<td>13 years but &lt; 14 years</td>
<td>42% of the augmented estate</td>
</tr>
<tr>
<td>14 years but &lt; 15 years</td>
<td>46% of the augmented estate</td>
</tr>
<tr>
<td>15 years or more</td>
<td>50% of the augmented estate</td>
</tr>
</tbody>
</table>

3. Putting It All Together: Illustrating the Effect of the Expanded Augmented Estate and the Incorporation of the Accrual-Type Elective Share Percentage

The illustrations below show how Minnesota's expansion of the augmented estate and adoption of the accrual-type elective share method incorporate the economic partnership theory and better protect the surviving spouse in a long-term marriage.

A and B were married for forty years. A died, survived by B. A's will left nothing to B. A and B owned the following assets at A's death:

1. Stocks in A's name $600,000
2. Mutual funds held by A and B as joint tenants $200,000

Total marital estate $800,000

Assume that A's estate has no debts, liens, mortgages, or costs of administration.

Under Minnesota's pre-1996 elective share statute, B's elective share amount is $266,667, which is one-third of $800,000. The augmented estate includes the joint tenancy property. B's elective share amount would first be satisfied with the $200,000 of jointly-held mutual funds. The balance of $66,667 would come from A's probate estate. B's net worth after A's death would be $266,667. B is underprotected.

102. Id.
104. See id. § 524.2-202.
105. See id. § 524.2-207(a) (stating that the "values included in the augmented estate which pass or have passed to the surviving spouse . . . are applied first" when determining the elective share).
106. See id.
Under the 1996 Minnesota statute, however, B's elective share amount would be $400,000, or fifty percent of the augmented estate.\textsuperscript{107} The statute now requires that the elective share amount first be satisfied out of amounts that passed to the surviving spouse through testate or intestate succession. In the above example, that amount consists of the jointly-held mutual funds, valued at $200,000. The amount needed to complete the augmented estate ($200,000) comes from the stocks in A's name. A's net probate estate is thus liable for only $200,000. B is better compensated under the 1996 statute, and arguably more equitably so, than he or she would have been under the prior statute.

Thus, the 1996 Minnesota elective share statute incorporates the economic partnership theory. An equal share of pre-death marital assets goes to the surviving spouse in a long-term marriage, regardless of how the assets are titled. By increasing the elective share percentage from one-third to one-half in a long-term marriage, the statute better compensates the surviving spouse.

Minnesota's 1996 elective share law also avoids overprotecting a surviving spouse in a short-term marriage. As discussed previously, the augmented estate now includes the value of a surviving spouse's property, regardless of whether it was derived from the decedent by gift or otherwise, and regardless of whether it was acquired before or after marriage.\textsuperscript{108} Consequently, it minimizes the element of nominal or bare title as a factor in determining the elective share amount.\textsuperscript{109} By including the surviving spouse's property in the augmented estate\textsuperscript{110} and by adopting an accrual-type system,\textsuperscript{111} the 1996 Minnesota elective share statute addresses the problem of overprotecting a surviving spouse in a short-term marriage. The following example illustrates this point.

A and B were married for forty years. B dies, survived by A. A marries C. A dies just over one year later, survived by C. A's will

\begin{enumerate}
\item \textsuperscript{107} See \textit{Minn. Stat.} \S 524.2-202(a) (1996).
\item \textsuperscript{108} See \textit{id.} \S 524.2-207.
\item \textsuperscript{109} See \textit{id.} \S 524.2-207; see also \textit{Unif. Probate Code} art. II, pt. 2 general cmt. (amended 1993), 8 U.L.A. 111 (Supp. 1996). The UPC states that "[i]f the elective-share percentage were to be applied only to the decedent's assets, a surviving spouse who has already been overcompensated in terms of the way the couple's marital assets have been nominally titled would receive a further windfall under the elective-share system." \textit{Unif. Probate Code} art. II, pt. 2 general cmt. (amended 1993), 8 U.L.A. 111 (Supp. 1996).
\item \textsuperscript{110} See \textit{Minn. Stat.} \S 524.2-207 (1996).
\item \textsuperscript{111} See \textit{id.} \S 524.2-202(a).
\end{enumerate}
leaves nothing to C. A is survived by children of A's first marriage. C also has children from a previous marriage. At A's death, A and C owned the following assets, which were derived from their respective first marriages:

1. Stocks in A's name $600,000
2. Mutual funds in C's name 600,000

Total marital estate $1,200,000

Assume that A's estate has no debts, liens, mortgages, or costs of administration.

Under Minnesota's pre-1996 elective share statute, C's elective share amount would be $200,000 (one-third of $600,000). The augmented estate would not include C's mutual funds, nor would the mutual funds be charged against C's elective share amount. C would receive a windfall: After only one month of marriage to A, C's net worth would increase from $600,000 to $800,000.

Under the 1996 Minnesota elective share statute, C's share would be only $36,000 (three percent of the augmented estate of $1,200,000). However, C would not be entitled to take the $36,000 out of property titled in A's name. Under Minnesota's 1996 elective share statute, the elective share amount must be satisfied first out of amounts included in the augmented estate that the surviving spouse would receive through testate or intestate succession or amounts that the surviving spouse disclaimed. The surviving spouse draws from this portion of the augmented estate at the amount of twice the elective share percentage. Therefore, because C would receive the mutual funds titled in C's name in any case, six percent of C's mutual funds of $600,000, or $36,000, is applied first to satisfy C's elective share amount. Thus, C gets nothing from A's net probate estate.

This result seems fair. C has ample assets from his or her previous marriage, and C's marriage to A lasted a short time. Thus, by in-
including the surviving spouse's assets in the augmented estate and by implementing an accrual-type system that accounts for the length of the couple's marriage, the 1996 Minnesota elective share statute eliminates a windfall to a surviving spouse in a short-term second marriage.

The accrual-type system is not above criticism. Because the system is time-based, a surviving spouse in a fifteen-year marriage receives a greater share of the decedent's augmented estate than a surviving spouse in a one-year marriage. Yet, each marriage is unique. A fifteen-year marriage is not necessarily better than a one-year marriage. The time element of the accrual-type system in a way impels the surviving spouse to serve his or her time out before he or she obtains the right to a fair and equitable elective share amount. Nevertheless, the accrual-type system eliminates some historical inequities and brings an element of predictability and uniformity to the elective share system.

C. Incorporating the Support Theory into Minnesota's Elective Share Statute

The supplemental elective share amount is another important addition to Minnesota's elective share statute. If, after calculating the surviving spouse's elective share, the surviving spouse is left with few assets, the supplemental share provision permits the surviving spouse to take an amount from the probate estate in addition to the elective share. The support theory encourages this result. Because the decedent spouse's obligation to support the surviving spouse continues after death, more resources should be taken from the augmented estate, if necessary, to ensure the surviving spouse's financial security.

In Minnesota, the maximum supplemental elective share amount is $50,000. From that amount, certain items are sub-

120. See id. § 524.2-207.
121. See id. § 524.2-202(a).
122. See MINN. STAT. § 524.2-202(a) (1996).
123. See id. § 524.2-202(b) (providing supplemental elective share amount).
124. See id.
125. See UNIF. PROBATE CODE art. II, pt. 2 general cmt. (amended 1993), 8 U.L.A. 112-13 (Supp. 1996) (stating that the redesigned elective share system implements the support theory by granting a supplemental share according to the surviving spouse's needs).
126. See MINN. STAT. § 524.2-202(b) (1996).
tracted to arrive at the surviving spouse's ultimate entitlement. The calculation is as follows.

First, calculate the value of the surviving spouse's property and nonprobate transfers to others. One must calculate the value of the surviving spouse's property and nonprobate transfers to others, the decedent's net probate estate which passed or will pass to the surviving spouse by testate or intestate succession and the decedent's nonprobate transfers to the surviving spouse, and that part of the elective share amount that is payable from the decedent's probate estate and nonprobate transfers to others.

If the sum of these three components is less than $50,000, then the surviving spouse is entitled to a supplemental elective share consisting of the difference between $50,000 and the amount calculated above. The supplemental amount is payable first from the decedent's probate estate and then from the decedent's nonprobate transfers to others. The application of the supplemental elective share amount can be illustrated as follows.

A and B were married for ten years. B died, survived by A. B's will leaves nothing to A. A and B owned the following assets at B's death:

1. Stocks in B's name $40,000
2. Mutual Funds in A's name 20,000
Total marital estate $60,000

Assume that B's estate has no debts, liens, mortgages, or costs of administration.

B's augmented estate equals $60,000. A's elective share is $18,000, or thirty percent of $60,000. But as shown earlier, sixty percent of A's assets (twice the elective share percentage) which here

127. See id. (stating that the supplemental elective share amount is calculated by subtracting "the sum of the amounts described in sections 524.2-207, 524.209, paragraph (a), clause (1), and that part of the elective share amount payable from the decedent's probate estate and nonprobate transfers to others under section 524.2-209, paragraphs (b) and (c)" from $50,000).
128. See id.
129. See id.
130. See id.
131. See id.
132. See MINN. STAT. §§ 524.2-203 to -207 (1996) (describing the calculations necessary for defining the augmented estate).
133. See id. § 524.2-202(a).
equals $12,000, is counted first toward A's elective share amount. Consequently, the balance of A's elective share amount, $6000, comes from B's net probate estate. But because A's elective share amount is less than the $50,000 threshold amount, A is entitled to an additional supplemental elective share amount of $24,000. The computation is as follows:

1. Threshold Amount $50,000
2. A's Mutual Funds (20,000)
3. Elective share amount from B's estate (6000)

A's supplemental elective share amount $24,000

This example illustrates how the support theory influenced Minnesota's 1996 elective share law. The result under this statute accords with the support theory's notion that one spouse owes a duty to support another, no matter what the cost.

IV. CONCLUSION

By amending Minnesota's elective share statute, the legislature made great strides toward incorporating the economic partnership and support theories into the state's probate law. The amendments resolved some of the historic inequities in traditional elective share statutes as well as some that were present in Minnesota's pre-1996 elective share statute. The statute now takes into account the length of the parties' marriage, diffuses the issue of title to property, and includes the surviving spouse's marital and nonmarital assets in the definition of the augmented estate.

134. See id. § 524.2-209(a)(1)-(3) (1996); see also supra notes 117-18 and accompanying text.
135. See MINN. STAT. § 524.2-202(b) (1996).