

INHERITANCE ON THE FRINGES OF MARRIAGE

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This Article explores the inheritance rights of individuals situated at the fringes of marital relationships—fiancés, spouses who are in the process of divorcing, and permanently separated spouses. The Article examines whether these categories of individuals ought to enjoy rights to forced shares of an estate comparable to those that ordinary spouses can claim by assaying the rationales for a forced share in relation to these fringe categories. The Article also considers whether lawmakers should infer that the typical decedent would wish to provide at death for individuals falling into these categories. The Article conducts the first-ever empirical study of this question by recourse to an internet survey of fiancés, spouses in the midst of divorcing, and permanently separated spouses. The Article proposes changes in intestacy law, the law of implied bequests, and implied revocation of bequests on the basis of this survey. Finally, the Article seeks to locate the issue of fringe categories of beneficiaries within the broader context of relationship theory.

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I. INTRODUCTION

Blood goes to the heart of inheritance law. So, too, does marriage. The presence or absence of a marital relationship dictates outcomes in any number

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of situations within the inheritance realm—when a decedent executed no will, when a decedent executed a will that preceded marriage, when a decedent executed a postmarital will that nonetheless fails to provide for a spouse, and more. Marriage changes one’s life; it also changes one’s *death*.

Of late, buckets of ink have been spilled over whether some or all of the rules of inheritance concerning married individuals should carry over to non-marital partners.¹ Such an extension, if pursued comprehensively, would effectively redefine marriage from a formal institution into a functional one, gauging wedlock and emotional commitment as jurisprudential equivalents. The Reporter for the Uniform Probate Code has introduced a succession of proposals along these lines.² Thus far, states have taken more tentative steps, extending rules of marriage to semi-formalized civil unions, a legislative initiative that has been largely, but not entirely, transcended by the advent of same-sex marriage in the United States.³

Lost in the bargain has been another set of problems concerning the bounds of traditional marriage—problems that are not definitional so much as they are marginal. Of course, the span of a marriage is demarcated by the moments when a knot is tied and untied. But neither of these events—like most other ones involving human volition—unfolds in an instant. Matrimony is a process, not an event. The exchange of vows typically caps a period when parties are engaged to be married. Likewise, divorce culminates after a filing, negotiation, and in some cases litigation over its terms. In addition, a qualitative alternative to divorce exists that we can conceptualize as the mirror image of a marriage-like relationship between committed partners—to wit, a divorce-like relationship between uncommitted spouses, sometimes semi-formalized by a decree of legal separation or a property settlement. Some knots are loosened rather than untied.

Lawmakers are not blind to these incipient or twilight states—almost married, almost divorced—as we shall see. But their place within the system of inheritance law remains underdeveloped. Commentators have never delved in-

1. *E.g.*, Thomas P. Gallanis, *The Flexible Family in Three Dimensions*, 28 LAW & INEQ. 291 (2010); E. Gary Spitko, *Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience*, 103 IOWA L. REV. (forthcoming 2018); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255 (2002). The idea has roots in common-law marriage, which has waned in the United States. *See infra* note 56. For a discussion of the general theory of nonmarital relationships, arguing for their differentiation from marital relationships within family law, see June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016).

2. Lawrence Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 239–40 (2016) [hereinafter Waggoner, *Marriage*]; Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 81–93 (2015) [hereinafter Waggoner, *Decline*]; Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 78–86 (1994) [hereinafter Waggoner, *Property Rights*]. The Reporter’s more recent proposal is currently under consideration by the Commissioners. Minutes of the Joint Editorial Board for Uniform Trust and Estate Acts 2 (April 29, 2016), <http://www.uniformlaws.org/shared/docs/jebutea/JEB-UTEA%20April%202016%20Minutes%20-%20FINAL.pdf>; *id.* at 4 (Dec. 2, 2016), http://www.uniformlaws.org/shared/docs/jebutea/2016dec_JEBUTEA_Mtg%20Minutes.pdf.

3. *See* Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395, 404–05 (2017) (noting uncertainties about the status of civil union statutes in the wake of *Obergefell*); Wendy S. Goffe & Stoel Rives, *Estate Planning for Unmarried Couples*, pt. III.A–B. (ALI-CLE Course Materials, Jun. 25–30, 2017) (cataloging the statutes).

to their policy ramifications. This Article is the first to examine any of these fringe categories from the vantage of inheritance law.

The problems raised in the course of their exploration are both theoretical and empirical. Some rights that attend marriage are mandatory. Parties can avoid those rights, if at all, only by entering into pre- or post-nuptial agreements. Whether the same or similar rights should adhere to individuals who are almost married, or almost divorced, is a question that remains unexplored and unanswered. Other rights comprise default rules. Lawmakers assume, with good reason, that the commencement or termination of marriage affects donative intent. Whether they have equally good reason to infer changes of intent as a consequence of engagement, separation, or the initiation of divorce proceedings represents another overlooked question. The only way to treat those issues judiciously is through quantitative investigation. This Article undertakes the inaugural investigation of this question.

Our analysis shall progress in stages. In Part II, we review the inheritance laws pertaining to marriage and the rationales that underlie them, as a frame of reference from which to contemplate the treatment of fringe categories. In the next three parts, we proceed to address those categories substantively: Part III focuses on engagement, Part IV on divorce proceedings, and Part V on permanent separation. We conclude by seeking to tease out larger lessons from this exercise.

II. THE LEGACIES OF MARRIAGE

Rules specific to spouses appear at several junctures within inheritance law, and the rationales for those rules provide a context for analysis of the fringe categories that this Article highlights. Of course, we need not confine ourselves to accepted rationales for the significance of marriage. Doubtless, analyses of the central problem will continue to proliferate and evolve.⁴ For present purposes, though, we shall not endeavor to rethink marriage. We will strive simply to take account of prevailing theory at the peripheries. Let us begin, then, by rehearsing the rules of marriage within inheritance law and the accepted justifications for those rules.

In all but one jurisdiction in the United States, a surviving spouse becomes entitled to a share of the decedent spouse's estate whether the decedent wishes to provide it or not.⁵ These statutes take either of two forms. In community-property jurisdictions, the right is reciprocal. Each spouse is entitled to one half of the earnings of the other spouse accrued during the marriage; the first spouse to die can bequeath half of the community, and the survivor can claim the other half.⁶ By contrast, in common-law jurisdictions, the first spouse

4. For a summary and analysis of recent feminist critiques of forced shares for spouses, citing to discussions, see Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2230–32 (2011).

5. The exception is Georgia, which provides only a one-year family allowance for a surviving spouse. GA. CODE ANN. §§ 53-3-1 to -20 (2016). For a defense of this atypical system, see Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 INST. ON EST. PLAN. ¶ 900, at 1 (1998).

6. W.S. McCLANAHAN, *COMMUNITY PROPERTY LAW IN THE UNITED STATES* §§ 11:1–:5 (1982 & Supp. 1992).

to die has no right to bequeath any part of the survivor's property; only the surviving spouse can claim a statutory fraction of the decedent spouse's estate (whenever and however acquired), known as the elective share, if he or she is dissatisfied with the decedent spouse's estate plan.⁷

Traditionally, commentators have justified forced-share rules in either of two ways. Under the partnership (or spousal contribution) theory, spouses derive an interest in each other's wealth through a division of labor. The idea is an old one, although in times past it was shaped more broadly to reflect life in an agrarian society. In the nineteenth century, John Stuart Mill harked back to an antiquity when "cattle or moveable goods" were "probably . . . acquired, and . . . certainly . . . protected and defended, by the united efforts of all members of the family who were of any age to work or fight."⁸ In such circumstances, "when the first magistrate of the association died, he really left nothing vacant but his own share in the division, which devolved on the members of the family who succeeded to his authority. To have disposed of the property otherwise," Mill added metaphorically, "would have been to break up a little commonwealth."⁹

In modern civil and urban societies, economists offer more limited variants of this idea. A spouse who performs household services frees up the other spouse to generate wages; or both may participate in a joint enterprise held in the name of only one of them; or one may provide eldercare for the other, allowing the more elderly spouse to conserve wealth that would otherwise have to be spent on nursing.¹⁰ Of course, the contribution made by one spouse may correspond inexactly with a statutory forced share. In community-property states, the size of the community estate grows over the course of a marriage on the theory that the contribution is accretive.¹¹ The elective share in most common-law states comprises a fixed fraction that does not depend on the duration of the marriage.¹² In eleven states, though, following the Uniform Probate Code either closely or loosely, the elective share likewise grows over time.¹³

The community-property system embodies the partnership theory more fully than the elective share, in that it offers reciprocal rights to spouses. A surviving spouse and a decedent spouse can each claim, or bequeath, his or her half of the community. By contrast, the elective share is confined to the surviving spouse; the decedent spouse has no claim to property in the survivor's name, despite the decedent's indirect role in its accumulation. That is also true

7. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 (AM. LAW INST. 2003).

8. 1 JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 282 (5th ed. D. Appleton & Co. 1895) (1848).

9. *Id.*

10. WILLIAM A. LORD, HOUSEHOLD DYNAMICS 288–90 (2002). For an early articulation, see N.C. ACTS OF 1784, ch. 10, *quoted in* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 13 (1955) ("[I]t is highly just and reasonable that those who by their Prudence, Economy and Industry, have contributed to raise up an estate to their Husbands, should be entitled to share in it" via the right to dower).

11. *See supra* note 6. Under this system, the contribution of a non-earning spouse to the wealth of a family is assumed to equal that of an income-earning spouse. RICHARD R. POWELL, POWELL ON REAL PROPERTY §53.01[1] (Michael A. Wolf ed. 2000).

12. *E.g.*, FLA. STAT. ANN. § 732.2065 (2017).

13. *See infra* note 209 and accompanying text.

under the Uniform Probate Code,¹⁴ notwithstanding the Commissioners' stated ambition to "[catch] up to partnership theory of marriage."¹⁵ The relevance of that theory appears attenuated when the right to an elective share depends on a coin-flip of who survived whom. This incongruity has not stopped courts from invoking the partnership theory in defense of the elective share, however.¹⁶

The alternative justification for a forced share is efficient allocation of the costs of dependency. During their lifetimes, spouses enjoy rights of mutual support,¹⁷ and we can conceptualize the forced share as a continuation of that right.¹⁸ If a decedent spouse makes no provision for a surviving dependent spouse, then he or she must look to the welfare state for sustenance. This support mechanism requires maintenance of a state bureaucracy. Plainly, private individuals comprise better cost bearers, able to dole out care directly or via a trust intermediary. Surely, the support obligation that exists during spouses' lifetimes is similarly motivated, and its extension to subsequent years advances the same economy.

Once again, forced share laws fit this rationale imperfectly, although the elective share better suits the theory than community property. Only a surviving spouse can claim the elective share, and only a surviving spouse may need support; a decedent spouse never does. A second, little-noticed attribute of the elective share reinforces this tilt of policy. Under the Uniform Probate Code, and in most states, only a *living* surviving spouse can elect against a will. If a surviving spouse dies before exercising a right of election, his or her executor cannot elect on the spouse's behalf.¹⁹ Again, this rule is out of step with any sort of contribution theory but accords with a support rationale; a surviving spouse who dies on the heels of the other spouse may have helped to boost the wealth of the first to die but no longer faces material needs.

At the same time, neither community property nor the elective share traditionally takes account of the resources of spouses when setting the forced share. If the amount exceeds a sum necessary to ensure that surviving spouses escape the state's welfare rolls, the forced share under both systems is not adjusted downward on that account. The Uniform Probate Code's version of the elective share does, however, adjust the forced share upward, if necessary; it sets a minimum threshold of \$75,000 for the elective share, reduced for those surviving spouses with independent means.²⁰ The fact that the elective share covers the entire estate of the first to die at least provides some reassurance of the adequacy of support, even if its level is not fine-tuned. Community-

14. UNIF. PROBATE CODE § 2-202(a) (amended 2010), 8 pt. 1 U.L.A. 149 (2013).

15. *Id.* art. 2, pt. 2, general cmt., 8 pt. 1 U.L.A. 141 (2013).

16. *E.g.*, Carr v. Carr, 576 A.2d 872, 879 (N.J. 1990).

17. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 6.1 (2d ed. 1988).

18. *See, e.g.*, Mongold v. Mayle, 452 S.E.2d 444, 447 (W. Va. 1994) ("[T]he purpose behind the elective-share provision . . . [is] to ensure that the surviving spouse has continuing financial support after the death of his or her spouse.").

19. UNIF. PROBATE CODE § 2-212(a) & cmt. (amended 2010), 8 pt. 1 U.L.A. 183 (2013). *But see, e.g.*, S.D. CODIFIED LAWS § 29A-2-212 (1995) (preserving an elective share for the estate of a surviving spouse).

20. UNIF. PROBATE CODE § 2-202(b) & cmt. (amended 2010), 8 pt. 1 U.L.A. 149 (2013) (designating this protection as the "supplemental elective-share amount").

property law is wholly insensitive to such considerations. Following a short marriage, where little community property accumulates, the surviving spouse of a wealthy decedent could, in theory, be left destitute.

Other rules are designed not to require bequests, but to carry out what lawmakers infer spouses to intend. Around half of all Americans die without a will.²¹ In that event, lawmakers create for decedents an off-the-rack estate plan based on variables of survivorship by blood relatives—and by spouses. These statutory rules of intestacy set out “the will which the law makes” whenever decedents fail to make their own.²²

Intestacy statutes establish default rules that a party is free to override by executing a will that supersedes them. Default-rule theory suggests that intestacy variables should ideally correspond with the intent of the typical decedent, making the rules of intestacy majoritarian defaults.²³ The virtue of a majoritarian default is that it minimizes transaction costs. Rules of intestacy that match the preferences of individuals save them the trouble and expense of executing wills that would merely duplicate the results achieved by statute in the absence of a will.²⁴

With this end in view, lawmakers have every reason to consider ties of affinity, along with those of consanguinity, when formulating rules of intestacy. A surfeit of empirical evidence confirms that the typical decedent intends to provide at death for his or her spouse—in fact, probate records suggest a trend in favor of increasing provision for spouses.²⁵ This proclivity has influenced intestacy statutes, which steadily have upped the share allocated to a surviving spouse in many states, as under the Uniform Probate Code, mirroring the evolution of social mores.²⁶

Of course, many individuals do choose to execute wills. Yet, even the intent of active testators may lie in doubt if they fail to keep their estate plans

21. The latest study, conducted in December 2016 and based on a sample of 1,008 American respondents (aged 18 and older), found an intestacy rate of 52%. BMO WEALTH MANAGEMENT, ESTATE PLANNING FOR COMPLEX FAMILY DYNAMICS 6, 14 n.7 (2017), https://wealth.bmoharris.com/media/resource_pdf/17-0311_BWI_Report_Family_Dynamics_US.pdf. For earlier studies, see Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (finding an intestacy rate of 68%); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1051 n.73 (2004) (citing to earlier empirical studies). For statistics reported in a recent British study, see NATCEN SOCIAL RESEARCH, BRITISH SOCIAL ATTITUDES 30: DYING 15 (2012), http://www.dyingmatters.org/sites/default/files/BSA30_Full_Report.pdf.

22. PETER LOVELASS, *THE WILL WHICH THE LAW MAKES* (London, W. Strahan & M. Woodfall 1785) (retitled *The Law's Disposal of a Person's Estate Who Dies Without Will or Testament* in subsequent editions).

23. For a further discussion and references, see Hirsch, *supra* note 21, at 1039–42.

24. For an early illustration, see *Nichols v. Nichols* (1814) 161 Eng. Rep. 1113, 1115–16; 2 Phill. Ecc. 180, 188 (“[the testator] said he had no will, that the law would make a good will for him—so that it was his intention that his widow should possess, after his death, the provision which the law would give her”); see also *Cleveland v. Thomas (In re Estate of Cleveland)*, 22 Cal. Rptr. 2d 590, 599 (Ct. App. 1993) (“Many persons intentionally die intestate because the statutory scheme satisfies the basic goal of allowing their closest kin to succeed to their estates,” thereby saving them “time and expense.”).

25. For collected references, see UNIF. PROBATE CODE § 2-102 cmt. (amended 2010), 8 pt. 1 U.L.A. 100 (2013).

26. Compare *id.* § 2-102, 8 pt. 1 U.L.A. 100 (2013), with *id.* 2-102 (pre-1990 art. 2), 8 pt. 1 U.L.A. 419 (2013).

current. Testamentary obsolescence appears a widespread problem.²⁷ Lawmakers offer an array of solutions, which in turn have excited controversy.²⁸

In situations where a will cannot take effect as executed due to changed circumstances (as when a beneficiary has predeceased the testator), lawmakers have no choice but to substitute a new estate plan they deem calculated to effectuate intent. In other situations, however, when an estate plan seems to have been overtaken by events but remains possible to fulfill, a case can be made for eschewing legal intervention and holding testators responsible for updating their own wills. “A will may be so easily revoked by the testator in his lifetime” one judge observed, “that the courts have been slow in permitting changes in circumstances to do by implication what the testator may so readily do for himself.”²⁹ Were a court to intervene under these circumstances, it would risk getting matters wrong, inferring changes of intent that a decedent cannot disavow. Cognizant of this danger, lawmakers have shrunk from giving probate courts broad license to rewrite wills.³⁰ Courts themselves have recoiled from the idea.³¹

Yet, when it comes to marriage, lawmakers have made an exception. In a majority of jurisdictions today, under what are called “rules of pretermission,” statutory law grants a surviving spouse an intestate share of the estate of a decedent spouse whose will was executed prior to marriage.³² Likewise, forty-

27. “If truth were known, I believe we would be aghast at the number of outstanding wills of living persons in this country which are obsolete, as far as reflecting the present wishes of the testator.” Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L. REV. 179, 190 (1963); see also Rosie Ifould, *Last Orders: What Do Our Wills Say About Us?*, GUARDIAN (U.K.) (June 12, 2015, 1:00 PM), <https://www.theguardian.com/lifeandstyle/2015/jun/12/last-orders-what-do-our-wills-say-about-us> (reporting a finding by the British Ministry of Justice that a “third [of testators] have failed to update their will to reflect major life changes.”).

28. For an attempt to create a theoretical framework for analysis of this problem, see Adam J. Hirsch, *Time and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 *passim* (2009).

29. *In re Jones’ Estate*, 60 A. 915, 922 (Pa. 1905).

30. *E.g.*, UNIF. PROBATE CODE § 2-804(f) (amended 2010), 8 pt. 1 U.L.A. 330 (2013) (expressly denying courts authority to revise wills on the basis of changed circumstances other than those specifically enumerated).

31. As one court put the matter:

If the changes relied upon by the respondents were held to achieve a revocation implied in law, other changes can be imagined which with equal plausibility might be urged to have similar effect. Persons who have drawn wills or who are to draw wills are not now to be exposed to the risk that, in the present circumstances and perhaps others, the courts might decree revocation notwithstanding that such persons do not avail themselves of the easy means afforded by statute for accomplishing revocation by their own intentional acts.

Hertrais v. Moore, 88 N.E.2d 909, 912 (Mass. 1949). For further references, see Hirsch, *supra* note 28, at 631 n.107.

32. *E.g.*, UNIF. PROBATE CODE § 2-301 (amended 2010), 8 pt. 1 U.L.A. 192 (2013). Thirty-three states currently have statutes of this kind: Ala., Alaska, Ariz., Cal., Colo., Conn., Del., Fla., Ga., Haw., Idaho, Maine, Mass., Mich., Minn., Mo., Mont., Neb., Nev., N.J., N.M., N.Y., N.D., Or., Pa., R.I., S.C., S.D., Utah, Va., Wash., W. Va., and Wis. In one of these states, marriage revokes a premarital will in its entirety. OR. REV. STAT. § 112.305 (2015). *Cf.* N.C. GEN. STAT. § 31-5.3 (2016) (expressly providing that a premarital will is not revoked by marriage); OHIO REV. CODE ANN. § 2107.37 (2017) (same). The Uniform Probate Code fails to extend its rule for spouses omitted from a premarital will to any premarital will substitute, see UNIF. PROBATE CODE § 2-301(a) (amended 2010), 8 pt. 1 U.L.A. 192 (2013), and thus far only a single state has done so by express provision. CAL. PROB. CODE §§ 21601, 21610 (2015) (applying the same rule to wills and living trusts). *Cf.* MO. REV. STAT. § 461.059(1) (2016) (providing expressly that the rules of pretermission are confined to wills). Nevertheless, the Uniform Trust Code includes an optional provision, importing the rules of construction applicable to wills into the law of trusts “as appropriate.” UNIF. TRUST CODE § 112 (amended

nine jurisdictions today revoke by implication bequests to former spouses under wills executed prior to divorce.³³ The theory underlying both of these rules is that marriage and its dissolution comprise events of such magnitude that premarital and pre-dissolution wills are especially unlikely to reflect a testator's evolving intent.³⁴ Lawmakers make another such assumption, incidentally, in connection with changing blood relationships. The birth of a child similarly constitutes a major life event; once again, in practically every state, lawmakers infer that prenatal wills are probably obsolescent and update them by implication.³⁵

There is a further consideration operating here as well. Events such as marriage, divorce, and childbirth are often all-consuming and distracting, increasing the likelihood that the failure of a spouse, divorcee, or parent to update his or her estate plan in light of the event was inadvertent. As a Florida court put the case in 2015:

It is an understatement to say that animosities arise in divorce proceedings which are inconsistent with wills executed when everything was rosy in the marriage. Divorce attorneys typically advise clients to revise their estate plans for the post-divorce world. However, with all the stress of divorce litigation, it is not uncommon for people to . . . procrastinate

2005), 7C U.L.A. 453 (2006). When the two provisions (which co-exist in sixteen states: Ala., Ariz., Kan., Maine, Mass., N.M., Mich., Minn., Mont., N.J., N.M., N.D., Pa., S.C., Utah, and W. Va.) are read *in pari materia*, a court could find the pretermitted spouse statute applicable to living trusts. So held an appellate court in Pennsylvania. *In re Tr. Under Deed of Kulig*, 131 A.3d 494, 497–501 (Pa. Super. Ct. 2015), *appeal docketed*, No. 217 MAL 2016 (Pa. 2016). *But cf.* *Bell v. Estate of Bell*, 181 P.3d 708, 713–17 (N.M. Ct. App. 2008) (construing the statute as exclusive to wills without addressing the significance of the Uniform Trust Code provision). Under the Uniform Probate Code, notwithstanding these rules, the share going to the spouse does not supersede any share created under a premarital will for a child of the testator who is not also a child of the surviving spouse. UNIF. PROBATE CODE § 2-301(a) (amended 2010), 8 pt. 1 U.L.A. 192 (2013). This caveat currently exists in thirteen jurisdictions: Alaska, Ariz., Colo., Haw., Mass., Mich., Minn., Mont., N.M., N.D., Utah, W. Va., and Wis.

33. *E.g.*, UNIF. PROBATE CODE § 2-804, 8 pt. 1 U.L.A. 330 (amended 2013); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1(b) (AM. LAW INST. 2003). Vermont was the last state to adopt this rule, in 2009. VT. STAT. ANN. tit. 14, § 320 (2017). The outlier is Mississippi, where courts can find an implied revocation upon divorce only if the circumstances afford “unequivocal” evidence of intent. *Hinders v. Hinders*, 828 So. 2d 1235, 1245 (Miss. 2002); *Chaney v. Chaney (In re Estate of Chaney)*, No. 2015-CA-01613-COA, 2017 WL 2123982, at *3 (Miss. Ct. App. May 16, 2017). Under the Uniform Probate Code, and under non-uniform legislation in some states, rules of implied revocation carry over to some or all will substitutes, including living trusts. UNIF. PROBATE CODE §§ 1-201(18), 2-804(b) (amended 2010), 8 pt. 1 U.L.A. 46, 330 (2013); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 reporter’s note 11 (AM. LAW INST. 2003). *Cf. supra* note 32. For an examination of rules of implied revocation from the perspective comparative law, see Naomi Cahn, *Revisiting Revocation Upon Divorce?*, 103 IOWA L. REV. (forthcoming 2018).

34. *E.g.*, UNIF. PROBATE CODE § 2-301 cmt. (amended 2010), 8 pt. 1 U.L.A. 192 (2013); *Luff v. Luff*, 359 F.2d 235, 238 (D.C. Cir. 1966). For an early discussion, see *In re Mosher’s Will*, 256 N.Y.S. 235, 239 (Sur. Ct. 1932).

35. *E.g.*, UNIF. PROBATE CODE § 2-302 (amended 2010), 8 pt. 1 U.L.A. 194 (2013). For a review of these statutes, see Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAL PROP., TR. & EST. L.J. 175, 180–82 (2015). Under the common law, a will that predates both marriage and birth of a child revokes a premarital-*cum*-prenatal will in its entirety. *Id.* at 179–80. This rule has been codified in three states, see KAN. STAT. ANN. § 59-610 (2013); MD. CODE ANN., EST. & TRUSTS § 4-105(3) (2017); TENN. CODE ANN. § 32-1-201(4) (2016), and may continue in the absence of any statute on point in a fourth. See *Burns v. Burns*, 224 P.2d 178, 184–90 (Wyo. 1950) (observing that the common law governs pretermis- sion in Wyoming without clarifying what the state common-law rule is); see also *Barringer v. Ray (In re Estate of Ray)*, 287 P.2d 629, 635 (Wyo. 1955) (reaffirming *Burns*).

their post-divorce estate planning. And then they die with a will in place that provides for the former spouse. [Implied revocation] protects divorced persons from their inattention to estate planning details.³⁶

Doctrines of pretermission and implied revocation nonetheless merit qualification. Marriage, divorce, and childbirth do not invariably alter a testator's donative preferences. A testator might, for example, continue to enjoy a close relationship with a former spouse.³⁷ An inference of testamentary obsolescence appears most compelling if death follows hard on a life-changing event, leaving the testator insufficient time to revise his or her estate plan in light of the distracting aspects of the event itself.³⁸ Where, however, the testator survives a life-changing event by a long while and continues to leave the original will in place, the prospect grows stronger that it reflects his or her intent despite the change of circumstances.³⁹ It stands to reason that when a testator has taken the trouble to execute a will in the first place, he or she will revise it eventually if that is the testator's preference.⁴⁰ Despite this logic, statutes of pretermission and implied revocation create permanent, rather than temporary, presumptions of changed intent.⁴¹

With all of this in mind, let us venture from the nucleus of marriage to its outer reaches. By viewing fringe relationships through the lens of inheritance policies operating at the core, we can illuminate, and perhaps resurvey, the perimeters of marriage with respect to this area of law.

III. ENGAGEMENT

A. *Fiancés*

A large majority of American couples become engaged before they wed.⁴² Periods of engagement vary, averaging around one year in the United States.⁴³ If a member of the pair dies before the marriage takes place, what rights does the surviving fiancé have against the estate of his or her betrothed?

36. *Carroll v. Israelson*, 169 So. 3d 239, 242–43 (Fla. Dist. Ct. App. 2015). Other courts have offered similar observations. *E.g.*, *Russell v. Johnston*, 327 N.W.2d 226, 229 (Iowa 1982) (suggesting that “due to the turmoil of a dissolution an automatic revocation is in the best interest of the testator”). A practitioner offers a social perspective on the problem: “[R]ecently divorced clients have often had their fill of attorneys and are not particularly eager to talk with an estate planning attorney . . .” John J. Scroggin, *Divorce Planning from a Tax and Estate Planner Perspective*, EST. PLAN., Nov. 2016, at 29, 40.

37. For a judicial recognition, see *Hinders*, 828 So. 2d at 1244–45; see also *infra* note 262.

38. For a further discussion, see Hirsch, *supra* note 28, at 618–23.

39. For a further discussion, see *id.* at 639–43.

40. Dozens of courts have made the point in dicta. See, e.g., *In re Arnold's Estate*, 110 P.2d 204, 205 (Nev. 1941) (“Any considerable lapse of time from divorce to the death of the testator, without change in a will executed prior to the divorce, is stressed by annotators as of great weight against any presumption of altered intention on his part.”).

41. *E.g.*, UNIF. PROBATE CODE §§ 2-301(a), 2-302(a), 2-804(b) (amended 2010), 8 pt. 1 U.L.A. 192, 194, 330 (2013).

42. MARTIN KING WHYTE, *DATING, MATING, AND MARRIAGE* 36–37 (1990) (reporting an engagement rate of 90%).

43. The average period of engagement in the United States appears to be lengthening. *Id.*; August B. Hollingshead, *Marital Status and Wedding Behavior*, 17 AM. SOC. REV. 308, 310 (1952); *Average Engagement Length, and Other Wedding Planning Statistics*, HUFFINGTON POST (Jan. 4, 2013, 3:58 PM), http://www.huffingtonpost.com/2013/01/04/average-engagement-length_n_2411353.html.

The answer is: *none*. A “widowed” fiancé fails to qualify as an heir under any state intestacy statute.⁴⁴ Nor do existing pretermission statutes in any state apply to this scenario. Pre-engagement wills remain effective despite the change in circumstances that engagement represents.⁴⁵ Likewise, forced share rules apply only to married couples, not to ones who are engaged.⁴⁶ Under so-called heartbalm laws, now largely abolished in the United States,⁴⁷ jilted fiancées could sue for damages, including “the disappointment of her reasonable expectations of material and social advantages resulting from the intended marriage.”⁴⁸ If a fiancé died before reaching the altar, however, courts allowed no damages for the survivor—agreements to marry thwarted by death were discharged on the principle of supervening frustration.⁴⁹

We can reject immediately the notion of a forced share for surviving fiancés. The length of time that parties remain engaged is typically too brief for one to contribute indirectly a significant sum to the wealth of the other.⁵⁰ Fiancés might, of course, qualify for state support if not provided for privately, but until marriage fiancés have no obligation of mutual support. Whereas a forced share for spouses extends a preexisting obligation, a forced share for fiancés would create a new obligation triggered by death—an asymmetry justified by no apparent policy.

Whether fiancés would wish to provide for each other at death is another matter. We have some reason to predict the existence of such intent. Empirical evidence from one study suggests that committed partners out of wedlock prefer to share property upon their demise.⁵¹ Fiancés have made an explicit commitment to one another, rather than an implicit one formed over time. Psychologically, we might expect the initial commitment of engagement to escalate when a fiancé makes subsequent decisions, such as estate planning. People tend to reinforce commitments they have made, desiring to confirm to themselves that their initial decisions were sound, both in respect of their relationships,⁵² and as a general tropism.⁵³

At the same time, we might expect fiancés who intend to provide for each other at death to delay executing wills (or new wills) until after they marry. Preparations for a wedding could prove just as distracting as the wedding itself, leading fiancés to neglect estate planning. And if a testator intends to provide

44. See, e.g., UNIF. PROBATE CODE §§ 2-102 to -103 (amended 2010), 8 pt. 1 U.L.A. 100, 104 (2013) (confining heirship to a “surviving spouse”).

45. See, e.g., *id.* § 2-301, 8 pt. 1 U.L.A. 192 (2013) (confining rules of pretermission to “premarital” wills).

46. E.g., *Denison v. Denison*, 35 Md. 361, 373–75, 378–79 (1872).

47. Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 364, 406–30 (2008).

48. *Hahn v. Bettingen*, 83 N.W. 467, 467 (Minn. 1900).

49. *Allen v. Baker*, 86 N.C. 91, 95–97 (1882); see also *Wade v. Kalbfleisch*, 58 N.Y. 282, 286–87 (1874) (concerning a suit for a breach of promise confined to “pecuniary loss, for a support, dower, etc” brought before, but still pending at, the defendant’s death).

50. See *supra* note 43 and accompanying text.

51. Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 LAW & HUM. BEHAV. 479, 490–96 (1998).

52. Jennifer Wieselquist et al., *Commitment, Pro-Relationship Behavior, and Trust in Close Relationships*, 77 J. PERSONALITY & SOC. PSYCHOL. 942 *passim* (1999).

53. JONATHAN BARON, *THINKING AND DECIDING* 468–70 (3d ed. 2000) (describing this “commitment effect”).

even more for a fiancé following marriage, then he or she might understandably choose to consolidate estate planning into a single step, dispensing with an interim estate plan that he or she would intend to revise again in short order. The fact of delay would then fail to demonstrate a want of testamentary intent; rather, the testator might have discounted the risk of an untimely death during the hiatus between engagement and marriage.⁵⁴

To be sure, granting inheritance rights to fiancés would implicate evidentiary problems that lawmakers might find troublesome. Courts can determine who is married to whom by reference to objective facts. In contrast, parties can become engaged without participating in any ritual or legally performative act. The shift in status could result not from an exchange of vows, but of whispers.⁵⁵

The fact remains that lawmakers operating in other contexts have seen fit to create rules dependent on findings of engagement, notwithstanding hurdles of proof.⁵⁶ In most states, donors of engagement rings can recover them in the event of a broken engagement on the theory that those gifts were implicitly conditioned on marriage; donors of friendship rings enjoy no equivalent right.⁵⁷ These cases occasionally arise following the death of a fiancé, when only the survivor can testify.⁵⁸ In some states, fiancés—like spouses, but unlike couples who are just linked romantically—owe fiduciary duties to one another.⁵⁹ And whereas courts traditionally confined suits by bystanders for negligent infliction of emotional distress to close relatives of victims, many states today allow fiancés to bring suit, a move endorsed by the Restatement of Torts.⁶⁰ Establishing standing in all of these cases implicates difficulties of proof.

54. For a further discussion of this structural impediment to estate planning, see Hirsch, *supra* note 28, at 635–39.

55. See *Service Life Ins. Co. of Fort Worth v. Davis*, 466 S.W.2d 190, 192 (Mo. Ct. App. 1971) (observing that a couple “exchanged endearments and avowals of love and came to an understanding they would marry ‘some day.’”); *In re Oglilvie’s Estate*, 139 A. 826, 826 (Pa. 1927) (“the appellant, . . . not a relative of the soldier, but alleged to have been his fiancée . . .”).

56. Courts in states that continue to acknowledge common-law marriage face similar challenges, but recognition of those challenges contributed to the rollback of common-law marriage in the United States. Eleven states currently permit common-law marriage (and four more acknowledge common-law marriages created prior to a specified date). Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MARTRIM. LAW. 151, 151 (2009). Lawmakers have identified several rationales for abolishing the doctrine, among them “fear of fraudulent claims.” *Id.* at 160–62.

57. *E.g.*, *Lindh v. Surman*, 742 A.2d 643, 644–47 (Pa. 1999) (observing competing lines of case law on the terms of the implicit condition); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 6.2 cmt. m (AM. LAW INST. 2003) (same). *But see* *Albinger v. Harris*, 48 P.3d 711, 720 (Mont. 2002) (rejecting the doctrine of implied conditions for all gifts). For a collection of cases, see Elaine M. Tomko, *Rights in Respect of Engagement and Courtship Presents When Marriage Does Not Ensue*, 44 A.L.R.5th 1 (1996). For a policy analysis, see Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L.J. 2583 (1998).

58. *E.g.*, *Hahn v. United States*, 535 F. Supp. 132, 137–39 (D.S.D. 1982); cases cited *infra* notes 65–66.

59. *E.g.*, *Squibb v. Catching*, 264 Ill. App. 499, 502 (1932); *Fick v. Fick*, 851 P.2d 445, 449–50 (Nev. 1993); *In re Marriage of Coward*, 582 P.2d 834, 836 (Or. Ct. App. 1978). *But cf.* *Bonds v. Bonds (In re Marriage of Bonds)*, 5 P.3d 815, 831 (Cal. 2000) (distinguishing the fiduciary duties attendant to marriage from engagement under statutory law); *McKeown v. Frederick*, No. 12/5505, 2013 WL 3068697, at *5 (N.Y. App. Div. June 18, 2013) (detailing conflicting cases in N.Y., including cases finding fiduciary relationships among couples who are not engaged).

60. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 48(b) & cmt. f (2012). A fiancé cannot, however, sue in tort for loss of consortium, one outlier opinion to the contrary. *E.g.*,

Courts in tort cases have addressed the issue directly. Some have shrunk before the evidentiary obstacle, however reluctantly. Although “engaged persons may feel as much emotional trauma from witnessing the injury of their partner as would a spouse,” one court acknowledged, the fact of “[e]ngagement is not always easily and credibly established, and even if it is, it can be . . . revoked without any formal process.”⁶¹ But other courts maintain that the risk of “fraudulent and meretricious claims . . . does not outweigh the need to recognize claims that are legitimate and just.”⁶² As several courts favoring the extension have hinted, engagements are typically memorialized by acts, easing the evidentiary task—the giving of a ring, publication of an engagement announcement and, nowadays, statements of relationship status on social media⁶³—even though none is obligatory.⁶⁴ In the engagement ring cases, courts have felt confident in finding “competent evidence to establish” whether parties were engaged, even when one party has died.⁶⁵ Often, the fact of the engagement is not in dispute, even in these cases.⁶⁶

Lawmakers have also taken account of engagement in another connection. As noted earlier, legislation in most states presumes that a decedent spouse intended to provide a share for the survivor where the decedent executed a will prior to marriage but failed thereafter to update it.⁶⁷ Lawmakers perceive this inaction as more likely to have followed from neglect than volition.⁶⁸ The Uniform Probate Code carves out an exception from this presumption: if the decedent spouse executed a premarital will “in contemplation of the testa-

Mueller v. Tepler, 33 A.3d 814, 817–18 (Conn. App. Ct. 2011); Childers v. Shannon, 444 A.2d 1141, 1141 (N.J. Super. Ct. Law Div. 1982) (“[T]o . . . allow an unmarried partner to recover for loss of consortium would indicate that our society now virtually equates fiancés . . . with married couples. The distinctions between them are not yet quite so blurred.”). *But see* Sutherland v. Auch Inter-Borough Transit Co., 366 F. Supp. 127, 133–34 (E.D. Pa. 1973) (holding to the contrary). Nor can a fiancé sue for wrongful death of a decedent fiancé. *E.g.*, Manczunski v. Frye, 689 N.E.2d 473, 474 (Ind. Ct. App. 1997); Aita v. Dey, No. L-4281-05, 2006 WL 3299876, at *3 (N.J. Super. Ct. App. Div. Nov. 15, 2006).

61. Smith v. Toney, 862 N.E.2d 656, 661 (Ind. 2007).

62. Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994).

63. See McKinney v. Pedery, 749 S.E.2d 119, 123 (S.C. Ct. App. 2013) (noting in an alimony case that a party’s “relationship status was listed as ‘engaged’ on Facebook”). For a discussion of the seriousness with which many people take this matter, see Claire Suddath, *Your Facebook Relationship Status: It’s Complicated*, TIME (May 8, 2009), <http://content.time.com/time/business/article/0,8816,1895694,00.html>. Social media may be supplanting traditional media in this regard. See Alessandra Stanley, *When Engagement Notices Went Away*, N.Y. TIMES, Apr. 16, 2017, at ST14.

64. See Elden v. Sheldon, 758 P.2d 582, 593 (Cal. 1988) (Broussard, J., dissenting) (“The court might . . . consider how the couple represent[ed] their relationship to family, friends, neighbors, and coworkers . . .”); Graves v. Estabrook, 818 A.2d 1255, 1260 (N.H. 2003) (“[W]e agree with the New Jersey Supreme Court, which noted that ‘[o]ur courts have shown that the sound assessment of the quality of interpersonal relationships is not beyond a jury’s ken and that courts are capable of dealing with the realities, and not simply the legalities, of relationships . . .’”) (quoting *Dunphy*, 642 A.2d at 378). Data suggest that a large and growing majority of couples (around three-fourths today) celebrate engagement with the gift of a ring. WHYTE, *supra* note 42, at 36–37; Hollingshead, *supra* note 43, at 310.

65. Urbanus v. Burns, 20 N.E.2d 869, 869 (Ill. App. Ct. 1939); see also Ruehling v. Hornung, 98 Pa. Super. 535, 536–38 (1930) (finding sufficient evidence of engagement despite donee’s denial by affidavit prior to her death that she had ever agreed to marry donor).

66. See Bohn v. Lowe (*In re Estate of Lowe*), 379 N.W.2d 485, 485–86 (Mich. Ct. App. 1985); Cohen v. Bayside Fed. Sav. & Loan Ass’n, 309 N.Y.S.2d 980, 980 (App. Div. 1970). *But cf.* Fortenberry v. Ellis, 217 So. 2d 792, 793 (La. Ct. App. 1969) (featuring conflicting testimony by parties, both of whom survived, concerning whether they were engaged).

67. See *supra* note 32 and accompanying text.

68. See *supra* note 34 and accompanying text.

tor's marriage to the surviving spouse" as shown by "the will *or other evidence*," then the Code assumes that the premarital will remains up-to-date.⁶⁹ The rationale for this rule is obvious—wills made in contemplation of marriage anticipate the change of circumstances that would otherwise render a will obsolescent.⁷⁰ Still, the drafters of the Code might have barred resort to extrinsic evidence to identify these wills, had they considered the factual inquiry too error-prone; and wills made in contemplation of marriage are not even confined to (although they include) ones made during an engagement—the exception encompasses a still broader, fuzzier category of fact patterns.⁷¹

In sum, were lawmakers inclined to create inheritance rights for fiancés, they could do so in relative safety, confident in evidence that—be it digital or worn on a digit—has satisfied prior lawmakers. And they could further limit the risk of fraud by legally confining inheritance rights to couples who have announced their engagements. In fact, this restriction would likely make substantive as well as evidentiary sense, in that an announced engagement signals a stronger commitment than a secret one. In the words of Dear Abby, "an engagement with no ring and no announcement hardly seems like an engagement at all."⁷²

The question remains whether fiancés typically wish to provide for each other in the event that one suffers a premature death. We can look to countless cases in which testators have taken the initiative to provide large portions or the whole of their estates to their fiancés under premarital wills.⁷³ Taken alone,

69. UNIF. PROBATE CODE § 2-301(a)(1) (amended 2010), 8 pt. 1 U.L.A. 192 (2013) (emphasis added). Among the thirty-three states that have enacted statutes of this type, *see supra* note 32, seventeen include some version of this qualification: Alaska., Ariz., Colo. Haw., Mich., Minn., Mont., Nev., N.J., N.M., N.D., Or., S.D., Utah, Wash., W. Va., and Wis.

70. *See* Erickson v. Erickson, No. CV 960387780S, 1997 WL 356047, at *1, *4 (Conn. Super. Ct. June 18, 1997) ("The purpose of the statute, prevention of inadvertent failure to take into account the fact that the testator has a spouse at the time of death . . . would be ill served by interpreting it to revoke provisions plainly and advertently made because of and to provide for a marriage. . . ."). This exception assumes that even an abstract provision for the disinheritance of any potential future spouse qualifies to override the presumption of changed intent, *see e.g.*, Contreras-Cisneros v. Cisneros-Saenz (*In re* Estate of Cisneros), A146735, 2017 WL 2953678, at **3–4 (Cal. Ct. App. July 11, 2017) (concerning a living trust created a decade before the decedent's marriage, and holding that the disinheritance clause for a future spouse was effective even though the decedent did not have "a particular person" in mind), an assumption we might question once a flesh-and-blood spouse materializes.

71. *See* Contreras-Cisneros, 2017 WL 2953678, at *4 (finding that a will executed two days before testator's wedding, without reference to engagement, was made in contemplation of marriage); Day v. Day (*In re* Estate of Day), 131 N.E.2d 50, 51, 53 (Ill. 1956) (same, concerning a will executed several days before beneficiary went to Reno to seek a divorce from her then husband and who married the testator on the same day she obtained her divorce); *In re* Reiss, 249 N.Y.S. 683, 684–86 (App. Div. 1931), *aff'd*, 178 N.E. 785, 786 (N.Y. 1931) (same, concerning a will executed four days before testator's wedding and referring to his fiancée); Green *ex rel.* Estate of Cottrell v. Cottrell *ex rel.* Estate of Cottrell, 550 S.E.2d 324, 325–27, 329–31 (S.C. Ct. App. 2001) (holding that a will executed four and a half months before wedding, describing testator's future wife as his "special friend," was made in contemplation of marriage); *cf.* Miles v. Miles, 440 S.E.2d 882, 883 (S.C. 1994) (finding that a will executed after beneficiary rejected testator's repeated marriage proposals and one year before she accepted a subsequent proposal was not made in contemplation of marriage). Testimony by an attorney scrivener can be crucial in these cases. *See* Green, 550 S.E.2d at 330–31 (citing attorney's affidavit as probative).

72. Jeanne Phillips, *Engagement Should Stay Secret a While*, NAPLES DAILY NEWS (Naples, Fla.), July 17, 2015, 2015 WLNR 21191026.

73. *E.g.*, Mallarino v. Hammersmith (*In re* Estate of Kearns), 278 P.2d 85, 86 (Cal. Dist. Ct. App. 1955); Lee v. Estate of Payne, 148 So. 3d 776, 776–77 (Fla. Dist. Ct. App. 2013); Edwards v. Pratt, 335 So. 2d

though, this data point is meaningless—we do not know how many testators have purposefully failed to provide for their fiancés by comparison.

Nor do we know how many testators who have provided for their fiancés under premarital wills did so on the assumption that they would live to see their wedding day. Conceivably, in those instances where parties are prudent enough to plan their estates before marriage—particularly when they do so on the eve of the ceremony—they actually intend to create an estate plan *upon* marriage.⁷⁴ Here, though, we can point to any number of contrary cases where testators took the occasion of impending surgeries or combat to execute estate plans benefitting their fiancés.⁷⁵ Manifestly, those bequests contemplated—in fact, were inspired by—the risk of a premature death. Once again, though, this data point is meaningless out of empirical context. It fails to reveal how many testators have felt differently and took no steps to provide for fiancés under such circumstances.

To glean insight into fiancés' donative commitments to one another, I have undertaken the first-ever survey of the testamentary preferences of engaged persons. Such a poll presented practical difficulties. Only a small fraction of the population falls into the category of persons currently engaged, making a random survey impossible at manageable cost. Although a poll of married persons about their preferences at the time when they were engaged would have been feasible, I rejected it as unreliable, given retrospective biases.⁷⁶

Instead, I have conducted an online poll of currently engaged persons through Qualtrics, a firm specializing in market research that has partnered with the University of San Diego to facilitate empirical studies.⁷⁷ Although online polling is now an accepted tool for research in the social sciences, this Article is the first to employ the technology in an inheritance study to pinpoint narrow sets of respondents.⁷⁸

Like other means of data collection, online polling has advantages and disadvantages. Its overarching benefit is that internet panels are large enough

597, 597 (Fla. Dist. Ct. App. 1976); *Britt v. Sands*, 754 S.E.2d 58, 59 (Ga. 2014); *Gibeaut v. Rabuck* (*In re Estate of Arnold*), No. 2013AP2007, 2014 WL 2524851, at *1 (Wis. Ct. App. June 5, 2014).

74. See, e.g., *In re Will of Reilly*, 493 A.2d 32, 32–33 (N.J. Super. Ct. App. Div. 1985) (concerning a will executed one day before wedding); see cases cited *supra* note 71.

75. See, e.g., *Succession of Montero*, 365 So. 2d 929, 930–31 (La. Ct. App. 1978) (concerning a will executed while testator awaited surgery); *In re Dumont's Will*, 13 N.Y.S.2d 289, 290 (App. Div. 1939) (concerning a soldier's will); *Kellner v. Hagood*, 177 N.E. 637, 637–38 (Ohio Ct. App. 1930) (concerning a will executed while testator was gravely ill); *Kerckhof v. Horrigan* (*In re Kerckhof's Estate*), 125 P.2d 284, 284 (Wash. 1942) (concerning a will executed while testator awaited surgery); see also *In re Simon's Estate*, 247 N.Y.S. 216, 218 (Sur. Ct. 1930) (concerning a will executed four days before wedding providing that “I make the bequests . . . knowing that I am about to be married . . . and desire that [they] . . . shall be in force . . . after my marriage as well as at the present time”) (emphasis added).

76. Experimental evidence demonstrates that memory is “reconstructive,” affected by later events or memories. For a survey, see SCOT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 31–34 (1993).

77. The poll was conducted with a total of 1,000 respondents in November of 2016. Five additional respondents failed to complete the survey and their partial responses are excluded from the data. The raw data are available on request from the author.

78. For the one prior inheritance study to conduct an internet survey, but for purposes of general population polling, see DiRusso, *supra* note 21, at 38–39.

to generate samples of small segments of the population efficiently.⁷⁹ Because online surveys are self-administered and anonymous, they also appear less susceptible to response biases associated with telephonic polling; and because they are interactive, they maintain attention more effectively than a paper questionnaire.⁸⁰ Online surveys nevertheless feature an epistemic limitation that bears noting—they are nonrandom and therefore fail to generate a probability sample, even for high-quality panels of the sort that Qualtrics provides. Studies consistently show that internet samples are less accurate than random samples—trading response biases for other biases.⁸¹ And because an internet sample is nonrandom, we cannot assign to the data a confidence level and margin of error. The data are suggestive, rather than assuredly reflective, of the preferences of the larger population.

Through these means, I have polled 334 Americans who identified themselves as engaged to be married. Women were overrepresented within the group (237, versus 97 men). Most of the respondents had announced their engagements (282, versus 52 unannounced ones). An unexpectedly large segment of the group had descendants (199, versus 135 childless fiancés). Among them, 117 had wills, 111 had living trusts, and 106 were intestate.

The question posed to the group read: “In the unlikely event you were to die before the wedding, how much of your estate would you want to go to your fiancé?” Respondents could choose between (1) all, (2) half, (3) less than half, (4) none, and (5) not sure. Among the full set of respondents, minus twenty-seven who were unsure of their wishes, 79.5% preferred to leave the other fiancé either all (43.3%) or half (36.2%) of their estates, versus 20.5% who preferred that their fiancé receive either less than half (12.0%) or zero (8.5%). Whereas a majority of both men and women wished to provide all or half of their estates to their fiancé, this preference was stronger among men (90.9%, versus 74.9% of women).

I predicted that respondents who had announced their engagements would more often exhibit donative intent than ones who had not, and the data confirm this hypothesis: among fiancés who had announced their engagements, 81.0% preferred that all or half of their estates go to the other fiancé. Among those who had not announced their engagements, that number fell to 70.4%. I also predicted that fewer respondents who had descendants would prefer that their fiancés receive all or half of their estates. The data again confirm the hypothesis, but the result is not robust. Among fiancés without children, 82.0% preferred that all or half of their estates go to the other fiancé. Among fiancés with descendants, that fraction dipped to 77.8%. One possible explanation (which I should have controlled for) is that some of the reported descendants are children the engaged couple had out of wedlock with each other.

79. For an observation, see Sara Kiesler & Lee S. Sproull, *Response Effects in the Electronic Survey*, 50 PUB. OPINION Q. 402, 403–04 (1986).

80. *Id.* at 404–05, 408–12.

81. David Dutwin & Trent D. Buskirk, *Apples to Oranges or Gala Versus Golden Delicious? Comparing Data Quality of Nonprobability Internet Samples to Low Response Rate Probability Samples*, 81 PUB. OPINION Q. 213, 214–15, 232–36 (2017).

Finally, a comparison of preferences among testators, settlors of living trusts, and intestate individuals is relevant. The rules of intestacy need not correspond with the rules of pretermission, nor need the law of wills correspond with that of trusts. Statistically, persons who have wills tend to be richer than those without, and persons who have living trusts are apt to be still more affluent.⁸² If donative preferences vary by wealth, as they sometimes do, then distinct default rules for testators, settlors, and intestates would become theoretically justified.⁸³

The data again reveal a majority of respondents in each category to prefer that either all or half of their estates go to their fiancés—but with small variations. The majority among intestates was 77.3%. The majority among testators rose to 79.3%. The majority of settlors of living trusts climbed again to 81.5%. These data suggest that the more affluent the individual, the more likely he or she is to wish to provide upon premature death for a fiancé.

These data support the creation of an intestate share for fiancés with announced engagements as a majoritarian default, even if the decedent leaves surviving descendants. The data likewise support the creation of a “pretermitted fiancé” statute, granting a share for fiancés omitted from pre-engagement wills or living trusts, assuming rules of pretermission extend to either or both forms of donative transfer.⁸⁴ What fraction of the estate lawmakers should assign to a fiancé under such rules merits further study; given gradations of commitment, the fraction should probably fall below the one a surviving spouse receives in like circumstances. At any rate, such a differential might prove a political necessity, whatever the typical decedent wants.⁸⁵

B. Broken Engagements

Then there is the reverse scenario to consider. Suppose a testator provides for a fiancé under a premarital will and either the testator or the fiancé breaks the engagement. Whereas divorce operates by implication to revoke pre-dissolution bequests to a former spouse in virtually every state,⁸⁶ no analogous statute impliedly revokes pre-*disengagement* bequests to a former fiancé. In some cases, contestants have challenged these bequests on a theory of construction, arguing that courts should read language within wills describing beneficiaries as fiancés as creating a condition precedent that the wedding ensues; these suits have failed without exception.⁸⁷ Alternatively, contestants have

82. DiRusso, *supra* note 21, at 50–51; Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1429 nn.25–27 (2013) (citing to studies); Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & COMMUNITY PROP. L.J. 1, 25–29 (2015).

83. For a discussion in a different context, see Hirsch, *supra* note 35, at 194–95.

84. See *supra* note 32.

85. I have elsewhere condemned setting default rules by reference to social norms, as opposed to intent, see Hirsch, *supra* note 21, at 1042–58, but there is no denying the possibility of political constraints on inheritance legislation.

86. See *supra* note 33 and accompanying text.

87. *Nolan v. Humphries (In re Nolan's Estate)*, 108 P.2d 385, 386–87 (Ariz. 1940) (holding the description of beneficiary as “my future wife” failed to create a condition); *Brown v. Cronin*, 470 S.E.2d 682, 683–84 (Ga. 1996) (holding the same for a description of beneficiary as “Wife to Be”); *Banker's Life Ins. Co. of Neb. v. Eaton*, 430 A.2d 833, 834–35 (Me. 1981) (holding the same for description of beneficiary as “Fiancee”);

sometimes sought relief in equity, seeking to impose an equitable constructive trust upon bequests to former fiancés; those suits, too, have invariably failed.⁸⁸

These outcomes contrast with the familiar rule applicable to engagement rings delivered *inter vivos*. If a donor gives a fiancée an engagement ring, it comes with strings attached—to wit, an implied condition of marriage, although the exact terms of the condition varies among jurisdictions.⁸⁹ Traditionally, the donee of the ring had to return it only if she bore responsibility for breaking the engagement.⁹⁰ Today, quite a few jurisdictions have shifted to a “no fault” rule requiring the donee to return the ring irrespective of who called off the engagement.⁹¹

Of course, a fiancé could make any gift—or bequest—expressly conditioned upon marriage. The usual justification for making the gift condition implicit is that an express statement of it—the usual requirement for making a gift condition legally operative—would be functionally impossible in this setting.⁹² But that difficulty fails to arise in connection with bequests. A testator can add conditions to a bequest to a fiancé without a trace of social awkwardness because a will remains a private document until the day it matures.

Yet, a testator is unlikely to do so for the same reason that a testator is unlikely to condition bequests to a spouse on the continuation of their marriage. People simply do not think in those terms—they are, to put the matter clinically, unrealistic optimists.⁹³ Studies find that couples systematically underestimate their risk of divorce,⁹⁴ and only a small fraction of them enter into prenuptial agreements reflecting a more accurate appraisal of that risk.⁹⁵ We

Serv. Life Ins. Co. of Fort Worth v. Davis, 466 S.W.2d 190, 192, 194–95 (Mo. Ct. App. 1971) (same); N.Y. Life Ins. Co. v. Estate of Hunt, 375 A.2d 672, 673–75 (N.J. Super. Ct. App. Div. 1977) (holding the same for description of beneficiary as “intended wife”); Paulson v. Risovi (*In re Estate of Paulson*), 812 N.W.2d 476, 477–80 (N.D. 2012) (holding the same for description of fiancée-beneficiary as “my wife”); Charleton v. Miller, 27 Ohio St. 298, 298, 304 (1875) (holding the same for description of beneficiary as “intended wife”); Scherer v. Wahlstrom, 318 S.W.2d 456, 457–59 (Tex. Civ. App. 1958) (holding the same for description of beneficiary as “Finacee” [sic]).

88. *Serv. Life Ins. Co. of Fort Worth*, 466 S.W.2d at 198; *N.Y. Life Ins. Co.*, 375 A.2d at 675; *Scherer*, 318 S.W.2d at 459.

89. *See supra* note 57.

90. *E.g.*, *Simonian v. Donoian*, 215 P.2d 119, 120–21 (Cal. Ct. App. 1950) (applying statutory law).

91. *See, e.g.*, *Lindh v. Surman*, 742 A.2d 643, 646 (Pa. 1999) (describing the no-fault rule as the “modern trend”); *Campbell v. Robinson*, 726 S.E. 2d 221, 226 (S.C. Ct. App. 2012) (adopting the no-fault rule in the most recent American case to address the issue).

92. *See Cooper v. Smith*, 800 N.E.2d 372, 378 (Ohio Ct. App. 2003) (“[W]e realize that a donor proposing to his or her beloved is unlikely to expressly condition the gift of the engagement ring on the occurrence of the marriage . . . [and] how unromantic such a requirement would be.”).

93. For a classic study, see Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980). For a review essay, see Neil D. Weinstein & William M. Klein, *Unrealistic Optimism: Present and Future*, 15 J. SOC. & CLINICAL PSYCHOL. 1 (1996).

94. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 440–44 (1993) (finding that couples have a relatively accurate understanding of average divorce rates but radically understate their own risk of divorce); Heather Mahar, *Why Are There So Few Prenuptial Agreements?*, 2, 12–30 (Harv. Law Sch. John M. Olin Ctr. For Law, Econ., & Bus. Discussion Paper Ser., Paper No. 436, 2003), lsr.nellco.org/cgi/viewcontent.cgi?article=1224&context=harvard_olin.

95. Mahar, *supra* note 94, at 1 (reporting that 5–10% of couples enter into prenuptial agreements, whereas approximately 50% of first marriages end in divorce).

have no reason to expect engaged couples to react any differently.⁹⁶ Although not unheard-of, bequests to fiancés contingent on marriage are a rarity.⁹⁷

The justification for impliedly revoking bequests to former spouses under marital wills—namely, that the event of divorce distracts attention from estate planning⁹⁸—translates readily to bequests to former fiancés under premarital wills. Sociological evidence confirms that broken engagements are seismic events in the lives of fiancés.⁹⁹ In fact, we have some reason to fear greater neglect in connection with broken engagements than in respect of broken marriages: at least when a marriage unravels, couples ordinarily consult divorce attorneys who remind them routinely of the need to update their estate plans.¹⁰⁰ Attorneys are less likely to become involved in a broken engagement, leaving parties to their own devices.

I have made no attempt to study empirically whether fiancés who have bequeathed to each other intend to continue to do so after their engagements end. Such a survey is impractical even via an internet sample because the number of persons actually in this predicament is minute.¹⁰¹ The ease with which formerly engaged persons can uncouple their lives, combined with anecdotal evidence of acrimonious broken engagements suggests the unlikelihood of intent to continue these bequests.¹⁰² The case law also furnishes anecdotal evidence of this preference.¹⁰³

Two more, related problems deserve mention. It could happen that a testator had provided for a fiancé under an estate plan executed before their engagement when the two were just friends. If the engagement ends, should lawmakers still deem the bequest or other provision to be revoked by implication? This issue has arisen, by analogy, in connection with pre-dissolution wills executed before marriage, and the case law is divided. Some courts reason that divorce restores the premarital status quo; hence, wills made prior to (and not

96. Hardly any data on broken engagements are extant. An online poll of 565 single adults conducted for Time Magazine found that 20% of respondents had broken an engagement within the previous three years. Pamela Paul, *Calling It Off*, TIME (Oct. 1, 2003), <http://content.time.com/time/printout/0,8816,490683,00.html>. One student of broken engagements observes that an insurance company had offered insurance against “change of heart.” RACHEL SAFIER WITH WENDY ROBERTS, *THERE GOES THE BRIDE* 72–73 (2003). But, she added, “who thinks of insurance back when they’re forking over thousands to vendors? It’s like a prenuptial agreement: Who wants to think so unromantically when it’s never going to happen to you?” *Id.* at 74.

97. Occasional examples appear in the case law. *In re Estate of Marshall*, 92 So. 2d 185, 185 (Fla. 1957); *Ford v. Greenawalt*, 126 N.E. 555, 556 (Ill. 1920); *In re Kessler’s Will*, 203 N.Y.S.2d 803, 804 (N.Y. Sur. Ct. 1960).

98. See *supra* note 36 and accompanying text.

99. SAFIER WITH ROBERTS, *supra* note 96, at 71–96 (observing that “[t]here’s a lot of doing to un-do a wedding”).

100. E.g., Paula G. Kirby, *In Tomorrow We Trust: Take a Fresh Look at Your Future and Implement a New Estate Plan*, FAM. ADVOC., Summer 2009, at 31; *supra* note 36 and accompanying text.

101. That, of course, is no reason to ignore the issue from the standpoint of lawmaking.

102. SAFIER WITH ROBERTS, *supra* note 96, at 42–59.

103. See *Service Life Ins. Co. of Fort Worth v. Davis*, 466 S.W.2d 190, 192, 197 (Mo. Ct. App. 1971) (finding that insured believed he had discontinued an insurance policy naming his former fiancée as beneficiary); *Scherer v. Wahlstrom*, 318 S.W.2d 456, 458 (Tex. Civ. App. 1958) (finding that insured notified insurance company that he wished to remove his former fiancée as beneficiary of a life insurance policy but failed to do so formally).

in anticipation of) marriage remain effective following a divorce.¹⁰⁴ Other courts posit that divorce tends to poison relationships between former spouses to the point that it will ordinarily wipe out whatever bond of friendship they once had; accordingly, bequests to a former spouse under a pre-dissolution will are impliedly revoked whether executed before or during marriage.¹⁰⁵ The Uniform Probate Code appears to take the second approach by drawing no express distinction between the two scenarios.¹⁰⁶ Either theory could apply by logical extension to estate plans created prior to engagement, were lawmakers to revoke by implication bequests to fiancés under pre-disengagement wills.

Another problem is posed by on-again-off-again engagements. Suppose a couple becomes engaged, disengaged, and then reengaged. What implications should lawmakers draw from such a sequence of events?

Again, we can look to the inheritance laws of marriage by way of analogy. Under the Uniform Probate Code, and in most states today, marriage, followed by divorce, followed by remarriage to the same spouse, revives a preexisting marital will on the assumption that it reflects the intent of the testator under conditions that remarriage has restored.¹⁰⁷ The same rule of revival could reasonably apply to re-engagement if the testator happens to have executed a will during the original period of engagement; that earlier will likewise discloses the testator's intent under conditions that re-engagement has restored.¹⁰⁸

IV. DIVORCE PROCEEDINGS

The process of dissolving a marriage is no less drawn out than the process of forming one. Before they can terminate a marriage, spouses must file for divorce. The suit takes time—typically three to six months for an uncontested divorce, or nine to twelve months if the case goes to trial.¹⁰⁹

104. *E.g.*, *Codner v. Caldwell*, 101 N.E.2d 901, 904–05 (Ohio 1951); *Jones v. Carroll* (*In re Estate of Carroll*), 749 P.2d 571, 574–75 (Okla. Ct. App. 1988).

105. *E.g.*, *In re Estate of Forrest*, 706 N.E.2d 1043, 1047 (Ill. App. Ct. 1999); *In re Estate of Knospe*, 626 N.Y.S.2d 701, 704 (Sur. Ct. 1995).

106. UNIF. PROBATE CODE § 2-804(b)(1) (amended 2010), 8 pt. 1 U.L.A. 330 (2013). The accompanying comment fails to address the issue. *See id.* cmt.

107. *Id.* § 2-804(e) (applicable also to living trusts); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 4.2(c) & cmt. j (AM. LAW INST. 2003). The thirty-six states with statutes on point are: Ala., Alaska, Ariz., Cal., Colo., Conn., Del., Ga., Haw., Idaho, Iowa, Ky., La., Maine, Mass., Mich., Minn., Mont., Neb., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., S.C., S.D., Tenn., Utah, Va., Wash., W. Va., Wis., and Wyo. Courts have reached this result even in the absence of statutory warrant. *Blanchard v. Blanchard*, 218 N.W.2d 37, 39–40 (Mich. 1974); *Smith v. Smith*, 519 S.W.2d 152, 154–55 (Tex. Ct. App. 1974).

108. This tweak becomes necessary only if disengagement operates to revoke a will made during a period of engagement, as this Article urges. Under existing law, the will would stay in effect in any event.

109. *How Long Does it Take to Get a Divorce*, DIVORCE STATISTICS, <http://www.divorcestatistics.info/how-long-does-it-take-to-get-a-divorce.html> (last visited Nov. 16, 2017). Under early English customary law, divorce could be instantaneous, eliminating the issue. *See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 148* (1989) (noting the ritual dissolution ceremony of “jumping the broom”). For a streamlined divorce procedure under Islamic law abolished in most Muslim-majority countries but practiced in India until 2017, when the country's Supreme Court held the practice unconstitutional, see Narendra Subramanian, *Legal Change and Gender Equality: Changes in Muslim Family Law in India*, 33 LAW & SOC. INQUIRY 631, 641 (2008) (describing the “triple talaq”); M.J. Antony & Aditi

What happens if a spouse dies during the hiatus between filing and a decree of dissolution? Spouses remain married until a court declares otherwise. The action of divorce is said to be “personal”—just a manner of speaking, by which lawmakers mean that when a spouse dies before entry of a final decree of divorce, the action abates.¹¹⁰

Abatement of a divorce suit could affect parties’ rights of inheritance. Consider first the matter of forced shares for disinherited spouses. In common-law jurisdictions, when a married person dies, the surviving spouse is entitled to an elective share, which in most states comprises a fixed fraction (in the neighborhood of one-third) of the net estate of the decedent spouse, whenever and however acquired.¹¹¹ By comparison, when spouses divorce and a *marriage* dies, their collective property is equitably distributed between them. Courts have discretion to make the allocation; they also have discretion to award an income stream of alimony to the needier spouse.¹¹² Thereafter, former spouses can no longer demand an elective share, which has been superseded by the remedy of divorce.¹¹³ In community-property states, when a spouse dies, both the survivor and the decedent are entitled to one-half of their collective property accumulated from earnings during the marriage; if they instead divorce, depending on the state, either the same is true, or community (but not separate) property is equitably distributed between them¹¹⁴—and in either event, the needier spouse can also claim alimony.¹¹⁵

Spouses who die in the midst of a divorce straddle these two systems of marital termination. Lawmakers might assign them to either one, and because rights under the systems differ, the assignment matters.¹¹⁶ The general rule that divorce actions abate upon the death of a party deprives disinherited spouses of divorce remedies, although they can still have recourse to probate remedies.¹¹⁷ Nonetheless, statutes or judicial doctrines in some states give courts power to divide property equitably following the death of a party, either by allowing a court to issue a judgment of divorce retroactively (typically only if the case

Phadnis, *SC Sets Aside Instant Triple Talaq in Split Verdict*, BUS. STANDARD, Aug. 23, 2017, 2017 WLNR 25841179.

110. For recent examples, see *In re Estate of Boyd*, 798 S.E.2d 330, 334 (Ga. Ct. App. 2017); *Albrecht v. Albrecht*, 856 N.W.2d 755, 755–60 (N.D. 2014). For collections of cases, see Anthony Bologna, Comment, *The Impact of the Death of a Party to a Dissolution Proceeding on a Court’s Jurisdiction over Property Rights*, 16 J. AM. ACAD. MATRIM. L. 507, 507–22 (2000); P.H.V., Annotation, *Effect of Death of Party to Divorce or Annulment Suit Before Final Decree*, 158 A.L.R. 1205 (1945).

111. See *supra* note 7.

112. CLARK, *supra* note 17, §§ 15.1–16.5.

113. *E.g.*, UNIF. PROBATE CODE § 2-802 (a) & (b)(1) (amended 2010), 8 pt. 1 U.L.A. 322 (2013); *Kilgough v. Flowers*, 843 So. 2d 770, 772–74 (Ala. Civ. App. 2002) (holding that where parts of a judgment of divorce relating only to alimony and division of property were on appeal at the death of a spouse, the marriage was already dissolved, and therefore the survivor could not claim an elective share of the decedent’s estate).

114. MCCLANAHAN, *supra* note 6, §§ 12:4–5; UNIF. MARRIAGE AND DIVORCE ACT § 307 (Alternative B) (amended 1973), 9A pt. 1 U.L.A. 288 (1998). In one state, the community estate freezes from the time of a divorce petition rather than divorce, assuming divorce follows. ARIZ. REV. STAT. ANN. § 25-211(A)(2) (2008).

115. MCCLANAHAN, *supra* note 6, § 12:4, at 530; *e.g.*, CAL. FAM. CODE § 4330 (2016). Prior to 1997, Texas deemed alimony inconsistent with the community-property system. See James W. Paulsen, *The History of Alimony in Texas and the New “Spousal Maintenance” Statute*, 7 TEX. J. WOMEN & L. 151, 151–56 (1998).

116. For a recognition, see *Brown v. Brown*, 524 S.E.2d 89, 94–95 (N.C. Ct. App. 2000) (Lewis, J., dissenting).

117. *E.g.*, *Hamilton v. Hamilton*, 879 S.W.2d 416, 418–19 (Ark. 1994).

was fully adjudicated during life, missing just the decree), or by bifurcating the issue of divorce and property settlement and allowing the latter part of the case to continue, or by creating a constructive trust over a party's property (where relief is "thinly disguised as something other than equitable distribution").¹¹⁸

As a matter of policy, which is the better approach? Judicial economy might appear to dictate continuation of the action in the divorce court. Were the case removed to a probate court following the death of a party, property issues would have to be relitigated. Still, a probate court can resolve those issues with dispatch because forced share rules implicate no discretion. Evidence already presented at a divorce proceeding would become moot and no duplication of effort would follow.

The issue turns rather on the comparative virtues of divorce and probate remedies. In point of fact, there seems no reason to distinguish those remedies. Whether brought about by death or irreconcilable differences, the breakup of a marriage is what induces a court to allocate property—and the manner of marital end appears irrelevant to the law's ends. In want of unification, we can only contrast the current remedies to assess which one merits extension into the borderland that divides them.¹¹⁹

Here, we must remark that only divorce accounts for both the policies of fair division and mitigation of dependency. Because community property in probate is a right that the estates of deceased spouses as well as surviving spouses can claim, it attends to the first policy. But community property in probate has no alimony component and thus neglects the second policy. By contrast, the elective share is not limited to marital assets but is limited to a surviving spouse; its focus is the second policy, subordinating the first. By combining equitable distribution (or division of the community) and alimony, divorce courts are uniquely equipped to allocate on the basis of fairness *and* need. This opportunity ought to extend as far as possible, and retention of jurisdiction by divorce courts over parties' estates would maximize its reach.

Assuming a divorce court does retain jurisdiction following the death of a party, what sorts of relief could it provide? Historically, courts terminated alimony upon the death of either party.¹²⁰ Extrapolating this rule forward to postmortem divorces would preclude an award of alimony to a surviving

118. *Kruzdlo v. Kruzdlo*, 596 A.2d 1098, 1099 (N.J. Super. Ct. Ch. Div. 1990); *see, e.g.*, N.M. STAT ANN. §§ 40-4-20(B), 45-2-802(B)(3) (2017) (bifurcating the actions); *O'Hara v. O'Hara*, No. FM-13-844-13, 2016 WL 731863, at *3-4 (N.J. Super. Ct. App. Div. Feb. 25, 2016) (finding cause for a constructive trust); *see also Kay v. Kay*, 985 A.2d 1223, 1223-25 (N.J. 2010) (granting relief in equity to the *estate* of the spouse who had who died prior to a decree of dissolution, but only for wrongful diversion of marital assets). For additional cases, see CLARK, *supra* note 17, § 14.2, at 535-36; Bologna, *supra* note 110, at 522-26; Brandon Carney, Comment, *Till Death Do Us Part—and Then Some: The Effect of a Party's Death During Dissolution*, 25 J. AM. ACAD. MATRIM. L. 153 (2012); P.H.V., *supra* note 110.

119. For proposals to narrow the gap between divorce remedies and probate remedies, see J. Thomas Oldham, *Should the Surviving Spouse's Forced Share Be Retained?*, 38 CASE W. RES. L. REV. 223, 245-54 (1987); Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 521, 562-70 (2003). For a recent case suggesting that courts can use equity powers to vary from the statutory elective share in "exceptional" cases, which would effectively give the elective share characteristics of equitable distribution, see *Beren v. Beren*, 349 P.3d 233, 242 (Colo. 2015).

120. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.07 cmt. b (AM. LAW INST. 2002).

spouse. Modern statutes have begun relaxing this rule, however. In many states today, divorce courts can mandate purchase of life insurance benefitting former spouses as an aspect of alimony awards.¹²¹ But that option would not lie open to a court when a spouse dies in the midst of a divorce because insurance providers never offer coverage retroactively.

The justification for a rule terminating alimony upon the death of the recipient is obvious. A decedent former spouse no longer has material needs. Likewise, if the needier spouse dies in the midst of a divorce, his or her estate should receive no alimony either.

The rationale for a rule terminating alimony upon the death of the payer is less apparent. His or her death fails to alter the needfulness of a surviving former spouse—or, by extension, a surviving almost-divorced spouse. The principal argument for the rule is that a decedent's estate cannot respond to the needs of a surviving spouse with sufficient flexibility to protect him or her in a calculated manner. Ordinarily paid out of a living former spouse's income, alimony is subject to modification as the needs and resources of the recipient evolve.¹²² To maintain the same sort of flexibility—necessary to respond accurately to dependency—with respect to alimony paid by a decedent, his or her estate ostensibly would have to be left open indefinitely, placing a burden on the decedent's would-be beneficiaries.¹²³

This argument fails to withstand analysis. Decedents who wish to make allowances for the changing needs of survivors can do so via familiar estate planning strategies, including the creation of discretionary trusts. The settlor sets aside a corpus and grants the trustee discretion to allocate income or principal over time. By logical extension, a court could order a spouse's estate to fund an "alimony trust,"¹²⁴ out of which the court would allocate a modifiable or terminable stream of payments to the survivor, any residue flowing back into that estate. Such a trust would make possible the expeditious closure of a spouse's estate in probate. In a handful of states, divorce courts can already order a living spouse to create a trust, in lieu of life insurance, as an element of alimony awards designed to outlast a payer's death.¹²⁵ An alimony trust would

121. *Id.* § 5.07(1) & cmt. b; CLARK, *supra* note 17, § 16.5, at 669–70; Gavin L. Phillips, Annotation, *Death of Obligor Spouse as Affecting Alimony*, 79 A.L.R.4th 10 (1990).

122. UNIF. MARRIAGE AND DIVORCE ACT § 316 (amended 1973), 9A pt. 2 U.L.A. 102 (1998); CLARK, *supra* note 17, § 16.4, at 653. For an early judicial discussion, see *Brinn v. Brinn*, 137 S.E. 503, 505–06 (Va. 1927).

123. CLARK, *supra* note 17, § 16.5, at 670; *see also id.* § 16.5, at 669 (remarking an argument found in the case law that because a married person's obligation of support ends upon death, no such obligation should apply to a formerly married person, which neglects the right of a married person's survivor to claim a forced share of the decedent's estate); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION § 5.07 cmt. b (AM. LAW INST. 2002) (arguing that "[t]o continue the award after the obligor's death would give the obligee a claim on the obligor's accumulated assets rather than on his post-marital earnings. Any claim on these assets will already have been satisfied by the property division made at divorce . . . [.]" which unnecessarily ties a type of resource to a type of relief).

124. The term appears in a few cases. *Koblitz v. Koblitz*, No. 86131, 2005 WL 3475771, at *4 (Ohio Ct. App. Dec. 20, 2005); *see cases cited infra* note 125.

125. CAL. FAM. CODE § 4360 (2016). Courts have also created alimony trusts in Iowa and Tennessee, although no statute expressly authorizes them. *In re Marriage of Mann*, No. 01-1514, 2002 WL 31310022, at *1 (Iowa Ct. App. Oct. 16, 2002); *King v. King*, No. M1999-02556-COA-R3-CV, 2001 WL 950194, at *1

elegantly solve the flexibility problem of remediation if and when death aborts a divorce.

The problem of inheritance in the midst of divorce changes when we turn to spouses who die intestate or who have bequeathed to each other under existing wills. As a doctrinal matter, spouses remain heirs of each other under laws of intestacy irrespective of whether a divorce is in progress.¹²⁶ Once a court issues a decree of dissolution, of course, they each forfeit the status of heir.¹²⁷ Likewise, surviving spouses remain entitled to any property bequeathed to them by one who dies during divorce proceedings.¹²⁸ The presumption of revocation of bequests to spouses under pre-dissolution wills comes into play only after a decree—not after filing for—divorce under statutory language in almost every state.¹²⁹

Unlike rules allocating a forced share, intestacy laws and presumptions of revocation comprise default rules that parties remain free to override. Both are grounded in assumptions about intent—in this context, an assumption that most spouses wish to provide for each other, and that most former spouses do not.¹³⁰ When, though, should we expect donative intent to change? Only when a divorce becomes final, as lawmakers now assume—or earlier in time?

Evidence from sociological studies offers indirect support for the hypothesis that testamentary intent will change sooner rather than later. Doomed marriages typically deteriorate over time,¹³¹ and separation usually precedes a petition for divorce.¹³² Once underway, the divorce process itself can magnify disaffection. Parties must now negotiate over things. Division of property, to which spouses may have overlapping attachments,¹³³ represents one source of

(Tenn. Ct. App. Aug. 22, 2001). *But see* Wooten v. Wooten, 615 S.E.2d 98, 107–08 (S.C. 2005) (construing the S.C. statute to preclude court-ordered alimony trusts, reaffirming earlier case law).

126. *In re Seiler's Estate*, 128 P. 334, 334–35 (Cal. 1912); *In re Estate of Goick*, 909 P.2d 1165, 1170 (Mont. 1996); *Bassett v. First Nat'l Bank & Tr. Co. (In re Estate of Bassett)*, 201 N.W.2d 848, 851 (Neb. 1972) (dicta); *Brown v. Brown*, 524 S.E.2d 89, 94–95 (N.C. Ct. App. 2000) (Lewis, J., dissenting) (dicta); *Hempe v. Hempe*, 635 P.2d 403, 405–06 (Or. Ct. App. 1981).

127. *E.g.*, *Raynor v. Stockton Sav. & Loan Bank*, 332 P.2d 416, 422 (Cal. Ct. App. 1958).

128. *See Crist v. Nesbit*, 352 S.W.2d 53, 57 (Mo. Ct. App. 1961) (concerning a couple that had agreed on a property settlement and submitted a petition for divorce but immediately withdrew it upon the husband's death); *Brown*, 524 S.E.2d at 95 (Lewis, J., dissenting) (dicta).

129. *E.g.*, CAL. PROB. CODE § 6122(a) (2015) (“if after executing a will the testator's marriage is dissolved or annulled. . .”). *But see infra* notes 153–55 and accompanying text.

130. *See supra* note 34 and accompanying text.

131. One sociological survey of divorced couples found that “[t]he mean length of time for which marriages were reported to have been bad was 4.1 years, with a median of 2.7 years and a range of less than one year to 29 years.” GAY C. KITSON WITH WILLIAM M. HOLMES, *PORTRAIT OF DIVORCE: ADJUSTMENT TO MARITAL BREAKDOWN* 98 (1992).

132. *See infra* note 177.

133. *See Hament v. Baker*, 97 A.3d 461, 462, 464 (Vt. 2014) (“The only issue in this contested divorce was which spouse should receive the family dog. . . . [B]oth parties had a strong emotional connection with the dog.”). Even inanimate objects could hold sentimental value for both spouses, or could form part of their mutual self-image. For discussions, see Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RES. 139 (1988); Anthony Hatzimoysis, *Sentimental Value*, 53 PHIL. Q. 373 (2003). More generally, studies suggest a tendency by owners to overvalue all their property, a bias known as the endowment effect, which might affect both parties within a collective household. For a survey and references, see PLOUS, *supra* note 76, at 96–97. *But see* Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2, 30–53 (2013) (questioning the phenomenon). The presence of overlapping attachments could help to explain cases—commonly reported by attorneys—where divorcing spouses wage war over property of trivial objective value. For anecdotal examples, see Mat Camp, *Divorce Attorney*

conflict, and alimony, a second. The presence of minor children adds issues of custody, support, and visitation into the mix.¹³⁴ Unlike business deals, from which all parties can profit, divorce negotiations occur within a zero-sum game—what one spouse gains, the other loses.¹³⁵ Such a milieu is bound to foment animosity, which litigation (should it ensue) can only exacerbate.

One can identify any number of cases where testators have jumped the gun, amending their wills to disinherit spouses prior to finalizing a divorce.¹³⁶ Such evidence is merely anecdotal. For an empirical overview, I polled 333 persons via Qualtrics who were in the midst of divorcing in order to assess their testamentary preferences.¹³⁷ 123 of those were men and 210 women. Among them, 132 had wills, 78 had living trusts, and 123 were intestate.

The data support the proposition that divorcing, and not merely divorced, spouses prefer to disinherit each other. Among the 333, I eliminated twenty-four who were unsure about their preferences. Of the remainder, 17.5% wished to leave all of their estate to their spouse in the event that they died before the divorce was final, 23.3% wished to leave half of their estate to their spouse, 21.3% wished to leave less than half of their estate to their spouse, and the plurality, 37.9%, wished to leave no part of their estate to their spouse. All told, divorcing spouses who wished to leave the other spouse nothing or less than half of their estates outnumbered those who wished to leave the other all or half by 59.2% to 40.8%.

Among respondents who were intestate and expressed a preference, 35.2% wished to leave all or half of their estates to their spouse, and 64.8% wished to leave nothing or less than half to their spouse. For respondents with wills who expressed a preference, 46.0% wished to leave all or half to their spouse, and 54.0% wished to leave nothing or less than half to their spouse. For respondents with living trusts who expressed a preference, 40.3% wished to leave all or half to their spouse, and 59.7% wished to leave nothing or less than half to their spouse. Although the preference for disinheritance appeared strongest among intestate spouses, these data failed to exhibit a consistent pattern by wealth (assuming settlors are wealthier than testators, who in turn are wealthier than intestates¹³⁸).

Tips: Fighting over the Little Things, MEN'S DIVORCE, <http://mensdivorce.com/divorce-attorney-tips/fighting-over-little-things>. (last visited Nov. 16, 2017). For one court's creative solution to the problem of overlapping attachments, improvised in the course of dividing a probate estate, see *In re Estate of McDowell*, 345 N.Y.S.2d 828, 830 (Sur. Ct. 1973).

134. One study found that the presence of children increases *post-divorce* conflict, a pattern that might predictably extend backward to the negotiations phase of divorce. Carol Masheter, *Postdivorce Relationships Between Ex-Spouses: The Roles of Attachment and Interpersonal Conflict*, 53 J. MARRIAGE & FAM. 103, 106 (1991).

135. Robert S. Weiss, *The Emotional Impact of Marital Separation*, 32 J. SOC. ISSUES 135, 142 (1976).

136. See, e.g., *In re Estate of Thompson*, 475 N.E.2d 1135, 1136 (Ill. App. Ct. 1985); *In re Marriage of Lawrence*, 687 P.2d 1026, 1027 (Mont. 1984); *Bassett v. First Nat'l Bank & Tr. Co.* (*In re Estate of Bassett*), 201 N.W.2d 848, 849 (Neb. 1972); *Kruzdlo v. Kruzdlo*, 596 A.2d 1098, 1098 (N.J. Super. Ct. Ch. Div. 1990). But one can also point to counter-examples. See *infra* note 171.

137. Respondents were asked: "In the unlikely event you were to die before your divorce is final, how much of your estate would you want to go to the spouse you are divorcing?"

138. See *supra* note 82.

Divorcing spouses with children outnumbered divorcing spouses who were childless in this data set by 294 to 39. The presence or absence of children had no marked impact on their preferences. Among parental spouses, 41.2% wished to leave all or half to their spouse, and 58.8% wished to leave nothing or less than half to their spouse. Among childless spouses, the comparable fractions were 37.8% and 62.2%.

More dramatically, and unexpectedly, a gender divide appeared within the data. Among women who reported a preference, 35.2% wished to leave all or half to their spouse, and 64.8% preferred to leave nothing or less than half to their spouse. By comparison, among men who reported a preference, fully 50.0% wished to leave all or half to their spouse, and 50.0% wished to leave nothing or less than half to their spouse. These data complement a Georgia study of probate records finding that wives disinherit their husbands nearly twice as often as husbands disinherit their wives.¹³⁹ More generally, the data correspond with sociological studies finding that men and women react to divorce in differing ways.¹⁴⁰

Considered overall, the data suggest that dialing back divorce to the time of the petition would accord with majority preferences both as concerns rules governing intestate inheritance and implied revocation of bequests. What is more, the distracting aspects of the process of divorce obviously begin immediately upon filing (if not before), which could preoccupy spouses, holding up estate planning to reflect changes of testamentary intent that rules of implied revocation serve to impute.¹⁴¹

To be sure, some parties initiate divorce proceedings impulsively, hoping to reconcile,¹⁴² and this prospect could affect testamentary intent. In fact, reconciliations and withdrawal of divorce petitions occur with some frequency—far more frequently than marriages are restored after couples formally divorce.¹⁴³ This datum alone fails to justify leaving the current lines in place. If a majority of spouses would rather disinherit each other prior to any reconciliation, then lawmakers should respect that intent. If some of them subsequently surmount their marital difficulties and withdraw their petitions, that action

139. Pennell, *supra* note 5, at 16–18.

140. *E.g.*, Stan L. Albrecht, *Reaction and Adjustments to Divorce: Differences in the Experiences of Males and Females*, 29 *FAMILY RELATIONS* 59 *passim* (1980); Bernard L. Bloom & Robert A. Caldwell, *Sex Differences in Adjustment During the Process of Marital Separation*, 43 *J. MARRIAGE & FAM.* 693 *passim* (1981). Other research suggests that divorcing spouses may view each other asymmetrically, depending on who instigated the divorce. “Initiators, or leavers, identify their predominant emotion as guilt. . . . The assenters, or left, most usually feel anger and often want to punish the spouse.” CONSTANCE R. AHRONS & ROY H. RODGERS, *DIVORCED FAMILIES* 62 (1987). Although more wives than husbands suggest and file for divorce, it is unclear whether wives or husbands are more instrumental in bringing about divorce by virtue of their behavior. KITSON WITH HOLMES, *supra* note 131, at 93, 106–10.

141. *See supra* note 36 and accompanying text.

142. JOSEPH GUTTMANN, *DIVORCE IN PSYCHOSOCIAL PERSPECTIVE: THEORY AND RESEARCH* 62–63 (1993); JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP* 21 (1980).

143. Gay C. Kitson et al., *Withdrawing Divorce Petitions: A Predictive Test of the Exchange Model of Divorce*, 7 *J. DIVORCE* 51, 52–55 (1983) (finding a withdrawal rate of 22.7% and reporting prior studies finding withdrawal rates between 23% and 37%). Although no empirical data exist on the fraction of divorced spouses who subsequently remarry each other, the frequency—celebrity examples notwithstanding—is almost certainly minute. Abby Ellin, *Love the One You Were With (All Over Again)*, *N.Y. TIMES*, Mar. 6, 2016, at ST14.

would represent a further change of circumstance which lawmakers can easily take into account.

Still and all, the data offer less than overwhelming support for shifting these lines, and the gender divide gives added cause for caution.¹⁴⁴ In light of uncertainty, lawmakers have reason to admit extrinsic evidence in these cases, making the relevant presumptions rebuttable. That is contrary to the usual pattern for implied revocation. In most states, the presumption of revocation of bequests to spouses under pre-dissolution wills is conclusive.¹⁴⁵ One can question the soundness of this policy.¹⁴⁶ Be that as it may, the policy surely attenuates as we approach the fringe, where testamentary intent grows less assured.

Legislative drafters in New York are showing the way. In New York, only an express statement in a pre-dissolution will can overcome the presumption of revocation of bequests to a former spouse.¹⁴⁷ Proposed legislation in the state would extend this presumption to bequests to relatives of the former spouse—another fringe category where a change of intent might appear probable but less certain. As concerns these—and only these—bequests, the proposed legislation makes the presumption of revocation rebuttable upon “substantial evidence of the divorced individual’s contrary intention,” including hearsay evidence of communications with the decedent.¹⁴⁸ The New Yorkers view this approach as appropriate because “probable intent [in connection with bequests to relatives of a divorced spouse] is more problematic than the probable intention of such decedents with respect to dispositions to divorced spouses themselves.”¹⁴⁹

144. Needless to say, a gender-specific statute on revocation by implication of divorce would be politically unthinkable today, even assuming it could withstand constitutional scrutiny.

145. Only one state expressly allows extrinsic evidence to overcome the presumption of revocation by virtue of divorce for wills. WIS. STAT. ANN. § 854.15(5)(bm) (2017); *see also* CAL. PROB. CODE §§ 5040(b)(2), 6122(a) (2015) (admitting extrinsic evidence to overcome the presumption of revocation by virtue of divorce for nonprobate will substitutes, but not for wills); VA. CODE ANN. § 64.2-412(A) (2017) (revoking powers of appointment and nominations of a former spouse as executor, trustee, conservator, or guardian “[u]nless the will expressly provides otherwise,” while also revoking bequests to a former spouse without stating this qualification); *Hinders v. Hinders*, 828 So. 2d 1235, 1245 (Miss. 2002) (revoking wills by implication of divorce only if extrinsic evidence provides supporting evidence of intent); *Chaney v. Chaney* (*In re Estate of Chaney*), No. 2015-CA-01613-COA, 2017 WL 2123982, at *3 (Miss. Ct. App. May 16, 2017) (same). Statutes are silent on the issue in seven other states: Ark., Ga., Ill., Ind., Kan., Mo., and Okla. And in the remaining states, most forms of extrinsic evidence are inadmissible to rebut the presumption.

146. For discussions, see Hirsch, *supra* note 28, at 644–66; Hirsch, *supra* note 35, at 244–45. One can point to examples of cases where courts have followed the rule of implied revocation despite extrinsic evidence demonstrating decedents’ express intent to continue to provide death benefits to former spouses following divorce. *E.g.*, *Metro. Life Ins. Co. v. Gorman-Hubka*, 159 F. Supp.3d 668, 671, 677 (E.D. Va. 2016). At the same time, a rule barring such evidence can reflect a state’s “interest . . . not merely to effectuate a donor’s probable intent, but also to provide clarity and avoid litigation.” *Lazar v. Kroncke*, 862 F.3d 1186, 1195 (9th Cir. 2017); *see also* Hirsch, *supra* note 28, at 645 n.154 (citing to similar judicial discussions).

147. N.Y. EST. POWERS & TRUSTS LAW § 5-1.4(a) (McKinney 2017).

148. S.B. 6503, 2017 Leg., 239th Sess. (N.Y. 2017); Assemb. B. 6229, 2017 Leg., 239th Sess. (N.Y. 2017); *cf.* UNIF. PROBATE CODE § 2-804(b)(1) (amended 2010), 8 pt. 1 U.L.A. 330 (2013) (revoking by implication bequests under pre-dissolution wills to former spouses and their relatives and barring extrinsic evidence in all cases).

149. REPORT OF THE SURROGATE’S COURT ADVISORY COMMITTEE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 23 (Jan. 2017), <https://www.nycourts.gov/ip/judiciary/legislative/pdfs/2017-Surrogate'sCourt-ADV-Report.pdf>. The proposed legislation “leaves room for the varieties of human experience which might include a contrary intention . . . such as, for example, a continuing relationship with a step child.” *Id.*

In like fashion, lawmakers could retain without amendment rules revoking by implication bequests to former spouses. Statutory extensions of those rules to cover cases where decedents were in the process of divorcing could create a presumption of revocation that is rebuttable only where the divorce was not yet final. Alternatively, legislators could presume that decedents in the process of divorcing wished to leave standing bequests to spouses but make *that* presumption rebuttable, allowing in extrinsic evidence of unconsummated intent to revoke those bequests.¹⁵⁰

The Uniform Probate Code takes a traditional approach: bequests to a spouse are revoked by implication only upon “divorce or annulment of a marriage,” and the presumption of revocation is rebuttable only by the “express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate.”¹⁵¹ Nonetheless, the Commissioners fail to treat the issue consistently. Another, more obscure section of the Code creates a presumption that an intestate decedent intends to make a posthumously conceived child an heir if, at the intestate’s death, he was married to the birth mother and “no divorce proceeding was pending.”¹⁵² If, by hypothesis, intent to provide for a posthumously conceived child hinges on whether the decedent and his spouse were divorced *or were divorcing*, then, *a fortiori*, should not a decedent’s intent to provide for the spouse herself hinge on the same criteria?

Thus far, only one state has moved in this direction. Under a statute that heretofore has escaped notice in the scholarly literature, Pennsylvania revokes by implication bequests to a former spouse, and also to an existing spouse if the testator “dies . . . during the course of divorce proceedings” and statutory “grounds have been established” for the court to grant a divorce.¹⁵³ Under the Pennsylvania statute, the presumption is conclusive unless countermanded by the will itself—a rule of evidence that arguably goes farther than is safe to assume, evincing overconfidence in the fringe presumption.¹⁵⁴ The Pennsylvanians extend these rules of implied revocation to will substitutes.¹⁵⁵ But they do not quite go the distance, for the Pennsylvanians treat intestate estates conventionally. In Pennsylvania, a surviving spouse inherits by right of intestacy regardless of whether divorce proceedings were underway.¹⁵⁶

150. By analogy, that is the rule in Mississippi applicable to pre-dissolution wills. *See* cases cited *supra* note 33.

151. UNIF. PROBATE CODE § 2-804(b) (amended 2010), 8 pt. 1 U.L.A. 330 (2013). The original version of the Code was even more restrictive, allowing only a will to override the presumption. *Id.* § 2-508 (pre-1990 art. 2), 8 pt.1 U.L.A. 535 (2013).

152. *Id.* § 2-120(h) (amended 2010), 8 pt.1 U.L.A. 129 (2013); *see also id.* § 2-121(f), 8 pt. 1 U.L.A. 135 (2013) (creating an analogous presumption for children born to gestational carriers). These sections were added to the Code in 2008, and there is no indication that the Commissioners noticed, let alone considered, their relationship to the pre-existing section covering revocation by implication of divorce. None of these sections cross-reference each other. *See id.* §§ 2-120 cmt., 2-121 cmt., 2-804 cmt. (amended 2010), 8 pt. 1 U.L.A. 129, 135, 330 (2013).

153. 20 PA. CONS. STAT. § 2507(2)(ii) (2017).

154. *Id.* at § 2507(2).

155. *Id.* §§ 6111.1–2 (covering all revocable beneficiary designations, including life insurance); *see also id.* § 5838 (covering health care powers of attorney).

156. *See id.* § 2102 (expressing no comparable caveat). *Cf. McDaniel v. McDaniel (In re Estate of McDaniel)*, 73 Cal. Rptr. 3d 907, 910 (Ct. App. 2008) (deeming a spouse to forfeit intestacy rights following a judgment of divorce even though the decedent spouse died before the effective date of the judgment).

It bears noting that the problem of intestacy is complicated by another consideration. Rules of intestacy are mechanical—they do not yield to extrinsic evidence of contradictory intent.¹⁵⁷ Given the Pennsylvanians' conclusive presumption of revocation of bequests to spouses once a divorce is in progress, their similarly conclusive rule that divorcing spouses inherit from each other in the absence of a will is evidentially consistent while substantively incongruous. But if lawmakers chose instead to follow the New Yorkers' lead and admit extrinsic evidence to override a presumption of revocation for fringe categories—here, spouses in the midst of a divorce—then they could maintain evidentiary consistency with intestacy only by deviating from the usual pattern and admitting extrinsic evidence of intent to alter the rights of a spousal heir. That would not be unprecedented, in Pennsylvania and elsewhere,¹⁵⁸ but it would defy tradition. Of course, in the event lawmakers decline such a move, they need not impose conclusive presumptions of implied revocation merely to harmonize with the mores of intestacy. Although both are premised on assumption about intent, these two bodies of law are structurally distinct.

And there is another side of this coin. Suppose after filing for divorce spouses reconcile and withdraw their petitions—a common occurrence, as we previously observed.¹⁵⁹ Surely, any presumption of revocation that arose out of the petition should now disappear—pre-petition wills should be revived, just as pre-dissolution wills revoked solely by implication of divorce are revived in most states if divorced spouses renew their vows.¹⁶⁰ In either case, these wills reflect the status quo ante, which parties have restored.

It could happen, though, that spouses affirmatively revise their estate plans while divorce is pending, anticipating dissolution of their marriage.¹⁶¹ If they subsequently reconcile and withdraw their petition, this change of circumstance suggests that their wills providing for spousal disinheritance are obsolete. Under the Uniform Probate Code, and in most states, a surviving spouse not provided for under a premarital will can claim an intestate share on a theory of imputed intent.¹⁶² Yet, no state today, including Pennsylvania, extends this principle of imputed intent to a pre-reconciliation will.¹⁶³ Should not lawmakers treat as obsolete in like manner a will executed on account of impending divorce if thereafter the spouses avert the divorce?¹⁶⁴

157. *E.g.*, UNIF. PROBATE CODE § 2-101(a) (amended 2010), 8 pt. 1 U.L.A. 98 (2013).

158. *See id.* §§ 2-120(f), (h), 2-121(e)–(f) (amended 2010), 8 pt. 1 U.L.A. 129, 135 (2013) (admitting extrinsic evidence of intent to override presumptions of intestate succession by a posthumously conceived child or a child born to a gestational carrier); 20 PA. CONS. STAT. § 2108 (2017) (admitting extrinsic evidence of whether natural family members “maintained a family relationship” with a child given up for adoption in order to establish heirship).

159. *See supra* note 143 and accompanying text.

160. *See supra* note 107 and accompanying text.

161. *See cases cited supra* note 136.

162. UNIF. PROBATE CODE § 2-301 (amended 2010), 8 pt. 1 U.L.A. 192 (2013).

163. *See id.*; 20 PA. CONS. STAT. § 2507 (2017).

164. The same difficulty can arise in connection with wills or living trusts created during informal periods of marital disharmony. *See, e.g.*, *Kerwin v. Donaghy*, 59 N.E.2d 299, 302–03 (Mass. 1945) (concerning a living trust disinheriting the settlor's spouse, executed “as a result of a temporary disagreement” between the spouses, that failed to reflect the settlor's subsequent intent) (internal quotation marks omitted). At least in connection with a withdrawn divorce petition, courts can look to a tangible act marking the restoration of marital harmony.

And there is more. Suppose a testator executed a will while a divorce was pending, providing only a token bequest for a soon-to-be former spouse, and divorce followed. If the testator and former spouse subsequently remarry each other, the will executed in anticipation of divorce does not reflect the status quo ante of marital harmony, now restored. Statutes operating to revive pre-dissolution wills upon a remarriage of former spouses should carve out an exception for this scenario and provide the spouse an intestate share rather than a share that was predicated on imminent dissolution of the marriage.

The Uniform Probate Code fails to do so. Under the Code, “provisions [for a spouse] revoked solely [by implication of divorce] are revived by the divorced individual’s remarriage to the former spouse.”¹⁶⁵ This section includes no qualification for provisions appearing in wills executed during pendency of the divorce. In fact, none of the thirty-six states that have adopted this or a similar provision make allowances for this scenario.¹⁶⁶

Alternatively, if a testator executed a will while a divorce was pending that disinherited his or her spouse altogether, then there are no “provisions” in favor of the spouse to revive should they remarry, and this section of the Code fails to apply.¹⁶⁷ The potentially relevant section now becomes the one granting an intestate share to a spouse omitted from a premarital will.¹⁶⁸ But under the Code, that section is not triggered when former spouses remarry: “If the decedent and the surviving spouse were married to each other more than once, a premarital will is a will executed by the decedent at any time when they were not married to each other but not a will executed during a prior marriage.”¹⁶⁹ Contrary to the usual presumption of changed intent, the spouse receives nothing, even if he or she was disinherited under a will executed while the dissolution of their first marriage was pending. How this issue would be resolved in states with non-uniform statutes, in want of the Code’s misguided guidance, is unclear.¹⁷⁰

And consider one final scenario. Suppose, a testator executed a will while a divorce was pending and nevertheless chose, for whatever reason, to provide for a soon-to-be former spouse—and divorce followed.¹⁷¹ The intent expressed in such a will is not anachronistic.¹⁷² This scenario runs parallel to that of a premarital will made in contemplation of marriage. Whereas the spouse omitted from a premarital will ordinarily receives an intestate share by implication, as earlier noted, the Uniform Probate Code and many states give effect to the will verbatim if “it appears from the will or other evidence that the will was

165. UNIF. PROBATE CODE § 2-804(e) (amended 2010), 8 pt. 1 U.L.A. 330 (2013).

166. See *supra* note 107 and accompanying text.

167. See UNIF. PROBATE CODE § 2-804(e) (amended 2010), 8 pt. 1 U.L.A. 330 (2013).

168. UNIF. PROBATE CODE § 2-301 (amended 2012), 8 pt. 1 U.L.A. 192 (2013).

169. *Id.* § 2-301 cmt.

170. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.3(a) (McKinney 2017) (“If the testator leaves a will . . . and marries at any time after such will was executed, the spouse who survives such testator is entitled to [an intestate share].”).

171. See *Stephens v. Mercure* (*In re Estate of Mercure*), 216 N.W.2d 914, 916 (Mich. 1974) (involving a testator who bequeathed his entire estate to his spouse, “with no reference to her as his wife,” while their divorce was pending).

172. See *id.* at 919 (Mich. 1974) (Coleman, J., concurring) (“In this case, the will was executed after the parties had signed a property settlement agreement. . . . The intent of the testator is clear.”).

made in contemplation of the testator's marriage to the surviving spouse."¹⁷³ Inconsistently, the Code carves out no equivalent exception for pre-dissolution wills executed in contemplation of a testator's divorce: the will is impliedly revoked by the divorce "[e]xcept as provided by the express terms of a governing instrument, or a court order, or a contract relating to the division of the marital estate."¹⁷⁴ Only a few states take account of this possibility under non-uniform legislation, either by explicit exception¹⁷⁵ or, indirectly, by admitting extrinsic evidence to rebut the presumption of revocation upon divorce.¹⁷⁶

Hence, we may observe that were lawmakers to adjust the timing of implied revocation from the decree to the petition for divorce, that adjustment would implicate reciprocal changes in the law. On the one hand, pre-petition bequests to a spouse would be revoked by implication, even if the testator died before a decree of dissolution. On the other hand, bequests to a spouse executed *post*-petition (and not merely post-dissolution) would *not* be revoked. Any such bequests reflect the change of circumstance that implied revocation is supposed to offset.

V. PERMANENT SEPARATION

Filing for divorce begins the formal process of marital dissolution. The social process more typically commences with the separation of the spouses. Few couples divorce without separating first.¹⁷⁷

Separation need not spell the end of a marriage. In a trial separation, spouses continue to try to repair their relationship.¹⁷⁸ Separation may, however, persist for long stretches—even decades¹⁷⁹—if spouses prefer, for religious, financial, or other reasons, not to formalize the close of a relationship with divorce proceedings.¹⁸⁰ In such cases, couples can nonetheless semi-formalize the end of their marriages via either a property settlement or an action for legal separation—also known in older statutes as a divorce *a mensa et thoro* (from

173. UNIF. PROBATE CODE § 2-301(a)(1) (amended 2010), 8 pt. 1 U.L.A. 192 (2013). Seventeen out of the thirty-three states that have enacted statutes of this type include the quoted exception or a variation of it. *See supra* notes 32, 69.

174. UNIF. PROBATE CODE § 2-804(b) (amended 2012), 8 pt. 1 U.L.A. 330 (2013).

175. GA. CODE ANN. § 53-4-4/9 (2016) (“All provisions of a will made prior to a testator's final divorce . . . in which no provision is made in contemplation of such event shall take effect as if the former spouse had predeceased the testator”) (emphasis added).

176. *See supra* note 145.

177. *See* KITSON WITH HOLMES, *supra* note 131, at 99 (finding in an empirical study that 64.5% of couples had separated before filing for divorce); Bernard L. Bloom et al., *Marital Separation: A Community Survey*, 1 J. DIVORCE 7, 8, 15 (1977) (finding in a different study that 160 out of 173 couples (92.5%) separated before divorcing).

178. KITSON WITH HOLMES, *supra* note 131, at 109, 340 (remarking the phenomenon); *see also id.* at 95 (suggesting that some spouses “use separations as a form of ‘time out’ in order to cool off” following arguments—separation then serving as “a way of continuing a relationship that, despite problems, seems worth maintaining.”). Survey evidence finds that one in six married couples separate at some point in their marriages. *Id.* at 93–94.

179. *See, e.g., In re Gluer's Will*, 278 N.Y.S. 994, 995 (Sur. Ct. 1935) (concerning a couple who were separated for twenty years prior to the death of the wife, without a separation agreement or action for divorce).

180. *See, e.g., In re Estate of Robinson*, No. 85 CA 16, 1985 WL 6929, at *2 (Ohio Ct. App. Sept. 19, 1985) (concerning a separated couple who did not divorce so that one spouse could retain the other's health insurance).

bed and board) or as an action for separate maintenance.¹⁸¹ Courts have characterized legal separation as “quasi-dissolution” of marriage,¹⁸² or as “limited divorce.”¹⁸³ Unlike a pending divorce—a transitory state leading toward a decree—legal separation represents a permanent status,¹⁸⁴ continuing until such time as spouses petition either to vacate the order or formally to divorce.¹⁸⁵

The question then arises how permanent separation should affect inheritance. Consider first forced shares. Among common-law states, a large majority treat de facto separation as irrelevant to the exercise of spousal rights.¹⁸⁶ The same is true in community-property jurisdictions.¹⁸⁷ By contrast, a property settlement between spouses (whether or not accompanied by separation) is effective to supersede rights either to an elective share or to community property, assuming the settlement comprises a valid post-nuptial agreement.¹⁸⁸ Under state law, these agreements are often subject to limitations and safeguards not otherwise applicable to garden-variety contracts.¹⁸⁹

The implications of legal separation are more varied. Depending on the state, a court has authority to award alimony or even to divide marital property when ordering a legal separation. Under the Uniform Marriage and Divorce Act, a court can do either.¹⁹⁰ Under existing law in practically every common-law state, legal separation has no impact on the right of a surviving spouse to claim an elective share of a decedent spouse’s estate.¹⁹¹ A majority of community-property states today take the opposite approach; in six out of nine of them, legal separation either freezes or dissolves the community estate.¹⁹²

181. CLARK, *supra* note 17, § 6.4.

182. Buchanan v. Mitchell, 785 S.W.2d 317, 319 (Mo. Ct. App. 1990) (internal quotation marks omitted).

183. Adair v. Adair, 62 So. 2d 437, 443 (Ala. 1953).

184. See UNIF. MARRIAGE & DIVORCE ACT § 314(a) (amended 1973), 9A pt. 2 U.L.A. 75 (1998).

185. See *id.* § 314(b) (allowing spouses to convert a legal separation after six months into a decree of dissolution on motion by either party). The grounds for divorce and legal separation are identical. See *id.* § 302(b), 9A pt. 1 U.L.A. 200 (1998). Of course, only after a divorce do parties regain the right to marry others.

186. *E.g.*, *In re Estate of Kueber*, 390 N.W.2d 22, 23–24 (Minn. Ct. App. 1986). *But see infra* notes 212, 214 and accompanying text.

187. The two exceptions are California and Washington, where de facto separation freezes community property. CAL. FAM. CODE § 771 (2016); WASH. REV. CODE ANN. § 26.16.140 (2016); Etheridge v. Osicka (*In re Estate of Osicka*), 461 P.2d 585, 587–89 (Wash. Ct. App. 1969); *cf.* TEX. FAM. CODE ANN. § 3.301 (2015) (altering management of the community estate upon permanent separation).

188. UNIF. PROBATE CODE § 2-213(a) (amended 2010), 8 pt. 1 U.L.A. 197 (2013); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.4(a) (AM. LAW INST. 2003); MCCLANAHAN, *supra* note 6, §§ 4:19, 8:12–:18.

189. UNIF. MARITAL PROPERTY ACT § 10 (1983), 9A pt. 1 U.L.A. 131 (1998); UNIF. PROBATE CODE § 2-213(b) (amended 2010), 8 pt. 1 U.L.A. 187 (2013); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.4(b)–(c) (AM. LAW INST. 2003).

190. UNIF. MARRIAGE & DIVORCE ACT §§ 307–08 (amended 1973), 9A pt. 1 U.L.A. 288, 446 (1998).

191. *E.g.*, IOWA CODE § 598.20 (2016), *construed in* Carlisle v. Hundoble (*In re Estate of Carlisle*), 653 N.W.2d 368, 369–70 (Iowa 2002). *But see infra* notes 212–14 and accompanying text.

192. ARIZ. REV. STAT. ANN. § 25-211 (2008) (freezing); CAL. FAM. CODE §§ 771, 2550 (2016) (dissolving, and also freezing upon de facto separation); NEV. REV. STAT. § 123.220 (2015) (freezing, if a decree of separate maintenance so provides); N.M. STAT. ANN. §§ 40-3-8, 40-4-3 (2017) (dissolving, unless the decree provides otherwise); WASH. REV. CODE ANN. § 26.16.140 (2016) (freezing, and also covering de facto separations); WIS. STAT. ANN. § 767.61 (2017) (dissolving). In the absence of statutory provision, neither legal nor de facto separation affects community property. See Messer v. Miner (*In re Estate of Messer*), 576 P.2d 150, 152–53 (Ariz. Ct. App. 1978) (decided prior to enactment of the current Arizona statute). That is the rule in the remaining three community-property states (plus two others where community property is optional). Uniquely,

The Uniform Probate Code is less clear on the matter than it could be.¹⁹³ The Code begins by averring that “[a]n individual who is divorced from the decedent . . . is not a surviving spouse” and then states explicitly that “[a] decree of separation . . . is not a divorce.”¹⁹⁴ That would seem to end the matter. Yet, in the next sub-section, the Code continues: “a surviving spouse does not include . . . an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.”¹⁹⁵ What such an order entails, the Code fails to clarify. In the sole case directly to address the meaning of this provision, a husband and wife legally separated and the court ordered a division of property between them “since the parties were not able to agree on the division of property themselves.”¹⁹⁶ Upon the subsequent death of the husband, his surviving, legally-separated spouse sought to invoke her right to an elective share. The court ruled in her favor, observing that:

[w]e find no language in the decree that definitively states that the property awards are not subject to any claim by the other party or that makes mention of the marital interest of either party in the property that was divided. We decline to read any such language into the court’s decree. Since we find no language in the order purporting to terminate all marital property as required by § 30–2353(b)(3) [enacting the instant Code section], we determine that this section is inapplicable to this case.¹⁹⁷

The court rejected an argument by the decedent’s estate that an order dividing marital property upon legal separation, as occurred here, functions per se to terminate inheritance rights.¹⁹⁸

Arizona applies the same principle to divorce petitions, freezing community property upon a petition, but only if divorce follows. ARIZ. REV. STAT. ANN. § 25-211(A)(2) (2008).

193. This provision of the Code is currently in effect without significant modification in thirteen states: Ala., Ariz., Colo., Haw., Idaho, Maine, Mass., Mich., Mont., Neb., N.D., Tenn., and Utah.

194. UNIF. PROBATE CODE § 2-802(a) (amended 2010), 8 pt. 1 U.L.A. 322 (2013).

195. *Id.* § 2-802(b)(3). In a bit of sloppy drafting, the Code states that sub-section (a) operates “for purposes of this section,” whereas sub-section (b) operates “for purposes of [Parts] 1, 2, 3, and 4 of this [article],” which would cover intestacy and the elective share, but not implied revocation, *see id.* § 2-804, 8 pt. 1 U.L.A. 330 (2013), which appears in Part 8 of the Code, although that is where the instant section itself appears. *Id.* § 2-802, 8 pt. 1 U.L.A. 322 (2013). Therefore, by its plain language, but quite arbitrarily, the instant section modifies the Code’s intent-based doctrine of intestacy yet does not modify the Code’s equally intent-based doctrine of implied revocation. For a further discussion, *see infra* notes 219–21 and accompanying text. What it means for sub-section (a) to operate “for purposes of this section” in contradistinction to sub-section (b) is no less baffling, because the instant section includes no substantive provisions. The only conceivable meaning of this language is that sub-section (a) operates upon sub-section (b), which then applies to Parts 1–4 of Article 2. But why, then, did the drafters not simply make *the entire section* applicable to Parts 1–4 of Article 2? Ordinary construction principles might lead us to conclude that because the drafters *did not say that*, they must have meant something different from that. If that is so, then their intended meaning is, to say the least, obscure. Two states omit sub-section (b) from their versions of the Code, including only sub-section (a) along with its “for purposes of this section” limitation. MINN. STAT. ANN. § 524.2-802 (2016); S.D. CODIFIED LAWS § 29A-2-802 (2016). Read strictly, these statutory provisions become meaningless, triggering the canon of construction that allows courts to interpret statutes to avoid absurdity.

196. *Pfeiffer v. Frates (In re Estate of Pfeiffer)*, 658 N.W.2d 14, 16 (Neb. 2003).

197. *Id.* at 18; *see also* *Linson v. Johnson*, 575 P.2d 504, 505–06 (Kan. 1978) (allowing a decree of separation to sever marital inheritance rights if the court order includes a “specific and clear[]” statement to that effect).

198. The accompanying comment of this section of the Code states that “if the separation is accompanied by a complete property settlement, this may operate under Section 2-213 as a waiver . . . of benefits under a prior will and by intestate succession.” UNIF. PROBATE CODE § 2-802 cmt. (amended 2010), 8 pt. 1 U.L.A. 322 (2013). Because the section cited in the comment covers *contractual* waivers, *see id.* § 2-213, 8 pt. 1 U.L.A.

Considered as a matter of policy, the fact that spouses choose to live apart has no apparent impact either on society's interest in ensuring that they receive private support or on the equities of recognizing their respective contributions to each other's wealth. Separation could, however, speak both to the need for support, and to the extent of any such contribution.

A decree of legal separation may come with an assessment of the spouses' relative need for support. Since the elective share serves primarily a support function,¹⁹⁹ lawmakers might deem the particular assessment made in a proceeding for legal separation as one that supersedes the generalized relief that the elective share provides, in the same way that divorce preempts the forced share. So, for example, if a court determined that neither of two spouses needed alimony, or if the spouse who was ordered to pay alimony turned out to be the surviving spouse, then the elective share could be held superfluous in light of the court's prior determination of need.

The counterargument is that dependency fluctuates over time, so that an initial determination of need remains provisional, subject to amendment, for as long as a legal separation continues.²⁰⁰ By granting an elective share notwithstanding a prior determination of self-sufficiency, lawmakers would protect against the danger that a self-sufficient spouse will become needful later and have no nest-egg to fall back on—a risk-averse strategy of lawmaking. At the same time, lawmakers ought to reduce the elective share by the value of alimony awarded upon legal separation, to the extent that it continues post mortem.²⁰¹ Otherwise, alimony would duplicate the elective share. No elective-share statute currently makes such an adjustment.²⁰²

The problem of division of property is another matter. Once spouses are on their own, as a legal separation implies, their individual efforts no longer contribute to each other's wealth. Even if legal separation does not occasion a termination and distribution of the community estate, it should at least freeze the estate. Any further contributions to the estate by either spouse should cease from that moment onward, as is true in a majority of community-property states.²⁰³

Arguably, a division of property should not supersede the elective share since it focuses structurally on the distinct problem of private support of spouses.²⁰⁴ The Uniform Probate Code's elective share is unique, in that it combines elements of both a support structure and a gradually accruing community-property regime.²⁰⁵ If a decree of legal separation includes an equitable distribution of property, this component of the Code's elective share should not apply upon death—only the minimum support obligation (differentiated as the

187 (2013), not court-ordered divisions of property, the court read it as inapplicable to the instant case. *Pfeiffer*, 658 N.W.2d at 18–20.

199. See *supra* text accompanying note 19.

200. E.g., UNIF. MARRIAGE & DIVORCE ACT § 316 (amended 1973), 9A pt. 2 U.L.A. 102 (1998).

201. It rarely does at present, but the rules of alimony are evolving. See *supra* notes 121, 125 and accompanying text.

202. E.g., UNIF. PROBATE CODE § 2-202 (amended 2010), 8 pt. 1 U.L.A. 149 (2013).

203. See *supra* note 192 and accompanying text.

204. See *supra* text accompanying note 19.

205. See *infra* note 209 and accompanying text.

“supplemental amount” under the Code) should apply.²⁰⁶ Thus far, only one state has moved in this direction, barring the Code’s version of the elective share upon an equitable distribution of property but without retaining the minimum support obligation under those circumstances either.²⁰⁷ If, however, no equitable distribution accompanies a decree of legal separation, then the plot thickens.

The Code seeks to replicate in a rough-and-ready way a community-property regime, which by hypothesis, should freeze upon legal separation.²⁰⁸ But the Code’s elective share sidesteps the need for tracing which burdens any system of community property by granting a surviving spouse a fraction of the decedent spouse’s total (and not merely marital) estate. In order to estimate the part of the total estate that equals the marital estate, the fraction rises in increments, reaching 100% after fifteen years of marriage; a surviving spouse can claim half that amount.²⁰⁹ Were the Code to freeze this fraction at the moment of legal separation, it would not replicate the effect of freezing community property because an earning spouse’s total estate will continue to grow following separation. Rather, calculated as a fraction of the earning spouse’s total estate, the effective contributions of a non-earning spouse to an earning one will *shrink* over time, once the two have separated.

Thematically, the Code should account for this shrinkage by reversing its formula. A spouse’s elective-share percentage climbs in steps over the course of a marriage. After spouses have legally separated, they should descend back down the same staircase. For each year of legal separation, the elective-share percentage should fall, reflecting the gradual disaggregation of spouses’ respective estates once they have gone their separate ways. Under this approach, the elective-share percentage would diminish to zero after, at most, fifteen years of legal separation, leaving only the supplemental amount to provide a minimum of support for a surviving spouse. All of this, is contrary to current law, however. As we have noted, a spouse’s claim to the elective share remains unaffected by legal separation under the Code—the fraction of a decedent

206. UNIF. PROBATE CODE § 2-202(b) (amended 2010), 8 pt. 1 U.L.A. 149 (2013).

207. S.C. CODE ANN. § 62-2-802(b)(3) (2017) (“[A] surviving spouse does not include . . . an individual who was a party to a valid proceeding concluded by an order . . . confirming equitable distribution between spouses”); see also N.M. STAT ANN. § 45-2-802(B)(3) (2017) (barring a surviving spouse from an elective share where a court divides property in a separation proceeding interrupted by the death of a spouse). As already remarked, the Uniform Probate Code bars the elective share upon a court order “terminat[ing] all marital property rights,” see UNIF. PROBATE CODE § 2-802(b)(3) (amended 2010), 8 pt. 1 U.L.A. 322 (2013), but this language has been construed as nonsynonymous with an equitable distribution of property. See *supra* note 198.

208. The Reporter describes the Code’s elective share as “a species of *ersatz* marital property . . . imitating key features of community property . . .” John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse’s Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 314–15 (1987). The Code offers as an alternative, which no common-law jurisdiction has adopted, an elective share based on a case-by-case calculation of marital property. UNIF. PROBATE CODE § 2-203 (Alternative B) & cmt. (amended 2010), 8 pt. 1 U.L.A. 154 (2013); cf. OKLA. STAT. tit. 84 § 44(B)(1) (2016) (basing the elective share on the fraction of the decedent’s estate derived from the spouses’ “joint industry” during the marriage).

209. UNIF. PROBATE CODE §§ 2-202(a), 2-203 (Alternative A) (amended 2010), 8 pt. 1 U.L.A. 149, 153 (2013); Langbein & Waggoner, *supra* note 208, at 315–16. Statutes based on the Code currently exist in six jurisdictions (Haw., Kan., Minn., Mont., S.D., and W. Va.). Five more use formulae that vary the elective share by the duration of the marriage but follow the structure of the Code more loosely (Colo., N.C., Or., Tenn., and Va.).

spouse's estate that a surviving spouse can claim under the Code's version of the elective share *can continue to grow* following legal separation.²¹⁰

Not so in two jurisdictions where non-uniform statutes operate.²¹¹ In New Jersey, a surviving spouse forfeits the elective share if, upon the other spouse's death, they have "been living separate and apart . . . either as the result of a judgment of divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce."²¹² Similarly, in Oregon, if the spouses "were living apart at the time of the decedent's death, whether or not there was a judgment of legal separation, the court may deny any right to an elective share or may reduce [it] to such amount as the court determines reasonable and proper."²¹³

Because it is triggered even by de facto separation, New Jersey's provision offers inadequate protection for spouses. They can lose their right to the elective share even if no decree of legal separation has awarded them a substitute means of security.²¹⁴ Oregon's provision, like New Jersey's, pertains to both legal and de facto separation, but at least it leaves courts discretion to pare down the elective share *or not*, as they deem fit. Therefore, in the absence of a family court's assessment of need or equitable distribution occasioned by a legal separation, the probate court can weigh those matters upon death. Under the dictates of the statute, "the court shall consider whether the marriage was a first or subsequent marriage . . . , the contribution of the surviving spouse to the property of the decedent . . . , the length and cause of the separation and any other relevant circumstances."²¹⁵ This flexible approach would appear reasonable even if confined to instances of legal separation, given the variety of possible awards under state law and the potential for evolution in a spouse's need for support.

Statutes in several more states divest a spouse of the elective share in the event of marital misconduct that resulted in legal separation.²¹⁶ These statutes,

210. See *supra* notes 193–98 and accompanying text.

211. In a third state, Ohio, an appellate court has ruled that where a separation order embodied an *agreement* intended fully to dispose of the parties' property rights, the surviving spouse lost the right to an elective share in the absence of an express statement to the contrary. *Dragovich v. Dragovich*, 976 N.E.2d 920, 922–24 (Ohio Ct. App. 2012) (citing earlier conflicting cases). See also *supra* note 198.

212. N.J. STAT. ANN. § 3B:8-1 (2006).

213. OR. REV. STAT. § 114.725 (2015). Several more states deprive a spouse of the elective share upon marital misconduct. These statutes enforce moral policy and do not operate reciprocally, leaving unaffected the rights of an "innocent" spouse. For a survey, see Anne Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N. U. L. REV. 975, 978–79, 982–83 (2007); see also LA. CIV. CODE ANN. art. 2433 (2017) (applicable to community property, causing a separated spouse to forfeit his or her share of the community only upon misconduct).

214. Although a failure of either spouse to seek support via an action for legal separation provides indirect evidence of the absence of need, such inaction is not definitive. For a criticism of the New Jersey statute, see Danielle E. Reid, *Post-Mortem Divorce: Should a Spouse's Statutory Inheritance Rights Depend on Divorce Standards?*, 5 SETON HALL LEGIS. J. 185 (1982). Courts in New Jersey have afforded equitable relief post mortem in such cases. See *Carr v. Carr*, 576 A.2d 872, 877–81 (N.J. 1990).

215. OR. REV. STAT. § 114.725 (2015).

216. N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(4) (McKinney 2017); N.C. GEN. STAT. § 31A-1(a)(1) (2014); see also LA. CIV. CODE ANN. art. 2433 (2017) (causing a separated surviving spouse to forfeit the civil-law "marital portion," but only upon misconduct).

however, do not operate reciprocally, divesting only the offending spouse.²¹⁷ They are premised on moral policy, eclipsing the usual desiderata of forced-share laws.

The question of imputed intent remains to be addressed. In most states, separation has no impact on rules inferring probable intent. Intestacy rights of, and bequests to, a spouse remain effective notwithstanding separation at the time of death.²¹⁸ As already noted, the Uniform Probate Code asserts that “[a] decree of separation . . . does not terminate the status of husband and wife” unless a spouse “was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights”—but only “for purposes of [Parts] 1, 2, 3, and 4 of this [article].”²¹⁹ This provision applies, *inter alia*, to intestacy rights, which appear in Part 1.²²⁰ The provision does *not* apply to the section covering implied revocation, which appears in Part 8. That section again states that “[a] decree of separation . . . is not a divorce” triggering implied revocation without the caveat for orders terminating marital property rights.²²¹ Why the Commissioners chose to distinguish the treatment of legal separation under intestacy and implied revocation—both of which are default rules—goes unexplained, possibly because they were oblivious to having created the distinction at all.

The pertinent question to ask here is whether separated spouses typically wish to provide for each other. We can identify any number of cases in which permanently separated spouses disinherited each other, but that evidence is suggestive at best.²²² The issue demands empirical inquiry. As a window into intent in this situation, I polled 333 persons via Qualtrics who were permanently separated from their spouses and canvassed their donative preferences.²²³ Of the group polled, 173 had a decree of legal separation and the remaining 160 did not. 101 of those polled were men and 232 women. Among them, 114 had wills, 99 had living trusts, and 120 were intestate.

217. The judgment of separation must have been “rendered *against* the spouse.” N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(4) (McKinney 2017) (emphasis added); *see* N.C. GEN. STAT. § 31A-1(a)(1) (2014) (including an equivalent qualification). The act of abandonment in the absence of legal separation can also cause a spouse to forfeit the elective share in these, and several other, states. For a survey, *see* Anne Marie Rhodes, *Consequences of Heirs’ Misconduct: Moving from Rules to Discretion*, 33 OHIO N. U. L. REV. 975, 978–79, 982–83 (2007).

218. *E.g.*, CAL. PROB. CODE § 6122(d) (2015) (“A decree of legal separation . . . is not a dissolution for purposes” of the rules of implied revocation applicable upon divorce); *Kreisel v. Ingham*, 113 So. 2d 205, 211 (Fla. Dist. Ct. App. 1959) (allowing a surviving spouse to inherit by intestacy despite a decree of legal separation issued fourteen years prior to the decedent spouse’s death).

219. UNIF. PROBATE CODE § 2-802(a) & (b)(3) (amended 2010), 8 pt. 1 U.L.A. 322 (2013). For a further discussion, *see supra* note 195.

220. UNIF. PROBATE CODE, pt.1, art. 2, 8 pt. 1 U.L.A. 97 (2013).

221. *Id.* § 2-804(a)(2), 8 pt. 1 U.L.A. 330 (2013).

222. *E.g.*, *Monaghan v. Kennerdell (In re Monaghan’s Estate)*, 137 P.2d 390, 390 (Ariz. 1943); *Girard v. Girard*, 221 P. 801, 802 (N.M. 1923); *In re Stiefel’s Will*, 73 N.Y.S.2d 665, 667 (Sur. Ct. 1947); *In re Gluer’s Will*, 278 N.Y.S. 994, 995 (Sur. Ct. 1935); *Dragovich v. Dragovich*, 976 N.E.2d 920, 921 (Ohio Ct. App. 2012); *In re Estate of Landry*, No. 33632–4–II, 2006 WL 2924486, at *1 (Wash. Ct. App. Oct 10, 2006); *Etheridge v. Osicka (In re Estate of Osicka)*, 461 P.2d 585, 585–86 (Wash. Ct. App. 1969). A Georgia study of probate records discovered further examples. *See Pennell, supra* note 5, at 13–14.

223. The question read: “If you were to die, how much of your estate would you want to go to your permanently separated spouse?”

Eliminating the twenty-five respondents who were unsure about their preferences, 57.8% preferred to leave their separated spouse either less than half (17.2%) or nothing (40.6%), whereas 42.2% wished to leave their separated spouse either all (19.8%) or half (22.4%) of their estate. Of the four options, complete disinheritance was the plurality response. Nor did the absence of a decree of legal separation alter the outcome. On the contrary, the preference for disinheritance was slightly more pronounced among this cohort. Among spouses separated de facto, 60.8% preferred to leave their separated spouse less than half or no part of their estates. Among spouses with a decree of legal separation, the corresponding fraction was 55.2%. Although the sample size was small, these results appear unambiguous.

Permanently separated spouses with children exceeded those without in the data set by 289 to 44. This variable proved insignificant: Among parents, 42.3% wished to leave all or half to their permanently separated spouse, whereas 57.7% wished to leave nothing or less than half to their permanently separated spouse. Among the childless, the commensurate fractions were 41.5% and 58.5%. Yet, as in the case of divorcing spouses, a gender divide yawned within the data.²²⁴ Among women, 61.5% wished to leave their separated husbands less than half or no part of their estates. By comparison, among men, preferences were equally divided—only 49.5% wished to leave their separated wives less than half or no part of their estates. Again, these data confirm the stronger tendency of wives to disinherit husbands than vice versa under similar conditions of alienation that also emerged from a study of probate records in Georgia.²²⁵

Additional interesting patterns appeared when the data were sorted by type of transfer. As concerns separated spouses who are intestate, the variance was greatest: 72.4% preferred to provide nothing or less than half of the estate to the other spouse; 27.6% wished to leave all or half to that spouse. As concerns separated spouses who have a will (generally wealthier than tates²²⁶), the variance was less dramatic: 53.2% preferred to provide nothing or less than half of the estate to the other spouse, and 46.8% wished to leave all or half to that spouse. Finally, as concerns separated spouses who have a living trust (generally the wealthiest group²²⁷), the data reversed themselves: only 46.7% preferred to provide nothing or less than half of the estate to the other spouse, and 53.3% wished to leave all or half to that spouse.

These data support the proposition that permanently separated spouses should forfeit their status as heirs under intestacy statutes and also that permanent separation should operate to revoke a marital will by implication. The data do *not* support the proposition that separation should revoke a living trust by implication. Although the conventional wisdom among legal commentators is that default rules for wills and living trusts should correspond,²²⁸ distinctions

224. See *supra* text above note 139.

225. See *supra* note 139 and accompanying text.

226. See *supra* note 82.

227. See *supra* note 82.

228. E.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 & cmt. a (AM. LAW. INST. 2003).

between those rules may nonetheless find justification in differences of intent between testators and settlors. Those differences could trace in either apparent or obscure ways to the relative affluence of settlors because “[t]he rich are different from you and me.”²²⁹ Here, no obvious explanation for the data exists but, then again, none is needed. Intent effectuation is the be-all and end-all when it comes to default rules.²³⁰

Still, how do we know when a trial separation hardens into a permanent one? Sociological evidence shows that the longer a separation persists, the less likely it becomes that spouses will reconcile.²³¹ This statistical association suggests the possibility of a time-based rule, cutting off a spouse’s intestacy rights and rights to bequests under a pre-separation will only if the separation was prolonged.

One probate judge in New York found this idea appealing enough to raise it in an opinion. Presented with a surviving spouse who had been separated from the intestate decedent for fourteen years, the judge posited that a finding of heirship—unavoidable under existing law—was “neither in accord with the probable wishes of the decedent nor . . . supported by any public policy considerations.”²³² Yet, the rules of intestacy are supposed to comprise “default legislation based on the presumed intent of decedents.”²³³ The judge urged a consultative body, the Surrogate’s Court Advisory Committee, to propose legislation that would disqualify spouses for heirship after some “specific period” of separation, “perhaps somewhere in the range of three to five years.”²³⁴ The Committee took up the idea and offered a legislative initiative,²³⁵ but it fell on deaf ears; the state assembly failed to act on the Committee’s proposal.²³⁶

One obvious difficulty with a time-based rule would be its arbitrariness. But along with that would go evidentiary concerns and other uncertainties. How would lawmakers define a separation—when would the clock begin to tick?²³⁷ If spouses lead separate lives yet continue to live under the same roof,

229. F. SCOTT FITZGERALD, *The Rich Boy*, in *ALL THE SAD YOUNG MEN* 1, 1 (1926).

230. The data raise doubt as to whether provisions for a former spouse under a living trust should be impliedly revoked even by divorce. The inference of intent in this situation has never been tested empirically. Under the Uniform Probate Code, this doctrine of revocation covers wills and living trusts alike, although state laws vary on that point. *See supra* note 33.

231. Bloom et al., *supra* note 177, at 16.

232. Estate of Carmona, N.Y.L.J., May 12, 2000, at 30 (Sur. Ct.) (Holzman, J.).

233. *Id.*

234. *Id.*

235. The Committee began deliberating in 2000 and proposed legislation in 2001 under which a spouse would lose that status for purposes of intestacy, the elective share, and the right to take under a premarital will as an omitted spouse if the couple had been continuously separated both for at least one year, and for more than the total time that the couple cohabited, unless either the separation stemmed from illness or injury, or one spouse had received support from the other. REPORT OF THE SURROGATE’S COURT ADVISORY COMMITTEE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 32 (Dec. 2000) (on file with author); *id.* 7–9 (Dec. 2001) (on file with author).

236. The proposal has remained on the records of the Committee as an endorsed measure continuously since 2001. *See id.* 93 (Jan. 2017), <https://www.nycourts.gov/ip/judiciary/legislative/pdfs/2017-Surrogate'sCourt-ADV-Report.pdf>.

237. *See, e.g., In re Suarez’ Estate*, 114 N.Y.S.2d 194, 195 (Sur. Ct. 1952) (alleging unsuccessfully as a ground for implied revocation that the couple’s relationship had become “strained” prior to the decedent spouse’s death).

are they separated?²³⁸ And what if spouses punctuate separation with efforts to reconcile?²³⁹ Would we subtract those interludes from the statutory time period, or should lawmakers rewind the clock after each such interlude?

And there is another problematic aspect of a time-based rule—it would be inherently double-edged. The longer a separation persists, the less likely it appears that a testator would wish to provide for an absent spouse. At the same time, the longer a testator leaves a will unchanged, the likelier it becomes that the will reflect his or her intent irrespective of the circumstances. As earlier discussed, rules creating presumptions about changed intent that never expire become doubtful tools for effectuating probable intent.²⁴⁰ For lawmakers to *require* a long time to elapse before triggering the presumption flies in the face of this concern.

Given these difficulties and factual uncertainties, lawmakers might reasonably insist on something more concrete than informal separation to alter inheritance rights. The Uniform Probate Code lights on a decree of divorce as the trigger, which thereby provides a “definitive legal act to bar a surviving spouse.”²⁴¹ A decree of separation is definitive as well. Serving much the same function, legal separation and divorce both indicate spouses’ donative intent with some clarity.²⁴² And here, we might also posit, the legal proceeding necessary to obtain the decree could again distract attention from estate planning.²⁴³ Lawmakers could deem a decree of separation to terminate a spouse’s status as heir and likewise to revoke by implication bequests to a spouse under a pre-decree will, preferably admitting extrinsic evidence of intent to rebut the presumption of revocation for reasons already discussed.²⁴⁴

We can carry the analysis a step further. Just as a petition for divorce indicates an anticipatory change of intent, so does a petition for legal separation.²⁴⁵ In the event that a petitioning spouse dies before a legal separation is final, the same rules of implied revocation and loss of status as an heir could fairly apply for the very same reasons.²⁴⁶

Thus far, only a few states have incorporated legal separation into the default rules of inheritance. In California and Louisiana, a decree of legal separa-

238. The phenomenon is noted in the sociological literature and occasionally appears in the case law. *Hawkins v. Hawkins*, 191 F.2d 344, 345 (D.C. Cir. 1951); Gay C. Kitson & Jean K. Langlie, *Couples Who File for Divorce but Change Their Minds*, 54 AM. J. ORTHOPSYCHIATRY 469, 478–80 (1984).

239. Such is common. *See* Kitson & Langlie, *supra* note 238, at 478 (reporting instances of multiple separations).

240. *See supra* note 40 and accompanying text.

241. UNIF. PROBATE CODE § 2-802 cmt. (amended 2010), 8 pt. 1 U.L.A. 322 (2013).

242. Parties sometimes convert petitions for divorce into petitions for legal separation. *See, e.g.,* Dragovich v. Dragovich, 976 N.E.2d 920, 920 (Ohio Ct. App. 2012).

243. *See supra* note 36 and accompanying text.

244. *See supra* notes 144–50 and accompanying text; *see also* *Irvin v. Contra Costa Cty. Employees’ Ret. Ass’n*, 220 Cal. Rptr.3d 510, 514 (Ct. App. 2017) (suggesting that a close relationship existed between spouses despite their legal separation).

245. *See Pfeiffer v. Frates (In re Estate of Pfeiffer)*, 658 N.W.2d 14, 16 (Neb. 2003) (concerning a testator who disinherited his spouse under a will predating a petition for legal separation by three months).

246. This scenario has occasionally appeared in the case law. *In re Estate of Landry*, No. 33632–4–II, 2006 WL 2924486, at *1 (Wash. Ct. App. Oct 10, 2006).

tion blocks a spouse's right to inherit from the other by intestate succession.²⁴⁷ By contrast, in New York, a decree of legal separation also revokes by implication pre-decree (along with pre-dissolution) bequests to a surviving spouse—a rule that California expressly rejects.²⁴⁸ Plainly, no state has felt compelled as of yet to treat this problem comprehensively.

Other elements of analysis pertaining to divorce are also relevant here, by analogy. If statutes provide that petitions or decrees of legal separation operate to revoke pre-petition or pre-decree wills, or if a court expressly terminates inheritance rights in the course of issuing a decree,²⁴⁹ then the withdrawal of such a petition or the vacating of an order for legal separation should revive the former will. Such actions restore the status quo ante, as with a withdrawn divorce petition or a remarriage of divorced spouses. Thus far, only one state has enacted a version of this rule explicitly.²⁵⁰ By the same token, suppose a testator executes a will disinheriting a spouse after filing a petition for legal separation, or following a decree of separation, and the two subsequently reconcile, withdrawing the petition or vacating the decree. These actions as well restore the status quo ante. They should operate as well to grant the spouse an intestate share, as previously discussed in connection with the withdrawal of divorce petitions,²⁵¹ although no state thus far has adopted such a rule.²⁵²

At the same time, if one spouse executes a will benefitting the other following a legal separation, then he or she has manifested an intent to provide for his or her spouse notwithstanding their change of status. A subsequent divorce, merely formalizing that change of status, should not revoke a post-separation bequest by implication, any more than a post-dissolution bequest would. Thus far, this scenario has arisen in only a single published case, in which the court acknowledged that the evidence “may . . . permit an inference as to the testator's intent” to maintain a post-separation bequest to the divorced spouse.²⁵³

247. CAL. PROB. CODE § 78(d) (2015), construed in *Estate of Lahey*, 91 Cal. Rptr.2d 30, 31–34 (Ct. App. 1999); see also *Irvin*, 220 Cal. Rptr.3d at 522–26 (declining to extend this rule by implication to pension benefits controlled by state law); LA. CIV. CODE ANN. arts. 894–96 (2017). Cf. N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(4) (McKinney 2017) (depriving of intestacy rights a spouse guilty of marital misconduct that resulted in legal separation); N.C. GEN. STAT. § 31A-1(a)(1) (2014) (same).

248. N.Y. EST. POWERS & TRUSTS LAW § 5-1.4(f)(3)(a) (McKinney 2017). Cf. the California statute quoted *supra* note 220. At least one Commonwealth jurisdiction had a provision extending the doctrine of implied revocation to legally separated spouses but later abolished implied revocation altogether. Wills Act, R.S.B.C. 1996, c. 489, § 16(2)(b) (Can.) (repealed 2014); cf. Wills, Estates and Succession Act, R.S.B.C. 2014, c. 13, § 55(2) (Can.). In Great Britain, implied revocation covers only divorced spouses. Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 18A (Eng.) (amended 1995).

249. See *supra* note 196 and accompanying text.

250. See S.C. CODE ANN. § 62-2-802(b)(3) (2017) (barring inheritance rights if within any proceeding a court orders all marital property rights terminated or equitably distributes property “unless [the spouses] are living together as husband and wife at the time of the decedent's death.”). Apparently, even an informal reconciliation satisfies this provision, which also functions to restore marital inheritance rights following a divorce.

251. See *supra* notes 161–64 and accompanying text.

252. Notice also that the glitch observed in the Uniform Probate Code's revival of marital wills upon remarriage where the marital will was executed after a petition for divorce reappears in connection with marital wills executed after spouses have separated where divorce and remarriage follows. See *supra* text above note 165 and notes 165–70 and accompanying text.

253. *Nichols v. Suiter*, 78 A.3d 344, 354 (Md. 2013). The surviving former spouse maintained that her change of status from permanently separated to divorced was prompted by her desire to qualify for Medicaid. Brief of Respondent at 6, *Nichols v. Suiter*, 78 A.3d 344 (Md. 2013) (No. 33), 2011 WL 4585686, at *6.

Nevertheless, the court deemed the bequest to be revoked by implication, applying the relevant statute strictly.²⁵⁴

Finally, one other scenario merits consideration. Suppose instead of petitioning for legal separation, spouses enter into a formalized property settlement. Such agreements again perform the function of legal separation—along with divorce, they are all of a piece. A valid property settlement can override rights to a forced share, as earlier remarked.²⁵⁵ Under the Uniform Probate Code, they also speak to the right to take as an heir, or under a will. As a comment to the Code provides, “a *complete* property settlement . . . may operate . . . as a waiver and renunciation of benefits under a prior will and by intestate succession.”²⁵⁶ As a rule of construction applicable to property settlements, the Code adds that “a waiver of ‘all rights,’ or equivalent language, . . . is a waiver of all rights of elective share, . . . [and] all benefits . . . by intestate succession or by virtue of any will executed before the . . . property settlement.”²⁵⁷

Under the Code, then, a property settlement may supersede intestacy rights and the right to take under a will, on a contract theory. Yet, we ought also to address the problem *on an intent theory*. Suppose spouses enter into a property settlement that fails to mention benefits at death and fails to waive generalized rights. Such an *incomplete* property settlement has no contractual implications for the exercise of benefits at death under the Code.²⁵⁸ Notwithstanding that fact, it probably does signal a change of donative intent, in that any property settlement reflects a decision by the spouses to separate permanently. Lawmakers could reasonably infer from an incomplete property settlement intent to disinherit a surviving spouse, even though it fails to disturb inheritance rights contractually. Thus far, only a single dictum in a forgotten opinion by an obscure court has suggested such a result.²⁵⁹ And in the same vein, disentanglement of spouses’ finances following separation, *even if unaccompanied by any formalized property settlement*, is a step spouses appear unlikely to take lightly or tentatively. Such a step suggests permanence and a probable change of donative intent.

VI. CONCLUSION

In law, as in life, lines have to be drawn somewhere. As salient moments in time, marriage and divorce comprise (if naught else) convenient markers for lawmakers to follow as indicia of the presence or absence of commitment. Yet,

254. *Nichols*, 78 A.3d at 340.

255. *See supra* note 188 and accompanying text.

256. UNIF. PROBATE CODE § 2-802 cmt. (amended 2010), 8 pt. 1 U.L.A. 322 (2013) (emphasis added); *see also* OHIO REV. CODE ANN. § 2107.33(D) (2017) (establishing the same rule, but covering only implied revocation of wills).

257. UNIF. PROBATE CODE § 2-213(d) (amended 2010), 8 pt. 1 U.L.A. 187 (2013). This rule of construction is not generally accepted in non-uniform jurisdictions. *E.g.*, *Mauruccia v. Costa* (*In re Estate of Maruccia*), 429 N.E.2d 751, 754–55 (N.Y. 1981).

258. *See supra* note 256 and accompanying text.

259. *See Morris’ Estate*, 22 Pa. D. 466, 468 (Orphans’ Ct. 1912) (observing that an incomplete property settlement is “such a change of circumstances . . . as to bring the case within the equitable doctrine of ademption” to deprive the surviving spouse of additional transfers under a will).

a glance at the social science, the cases, and the empirical data presented in this Article all call into question the precision of those markers. The simple truth is that persons enter and exit our lives at times distinct from crowning acts. It behooves lawmakers to plot out doctrinal lines that take account of this fact, cleaving as closely as possible to probable donative intent.

It bears noting that the law's current lines are hardly sacrosanct. Historically, they have proven more fluid than one might expect. Before the dawn of the modern statutes, the common law deemed wills obsolescent when followed by marriage and birth of a child, not by mere wedlock.²⁶⁰ Likewise, wills were impliedly revoked by divorce (if at all) only when it was accompanied by a property settlement.²⁶¹ The modern statutes shifted those lines; lawmakers can shift them again without upsetting centuries of tradition.

There are other, larger observations to make here. Exploration of the fringe categories highlighted in this Article can help us to illuminate the meta-structure of affinity and, more broadly, of relationships, of which affinity is but a single example.

Affinity can take shape either formally or informally. One can be married in all but name and, by the same token, one can be divorced in all but name. Nor does that exhaust the possibilities: one could also be “technically divorced,” maintaining an informal relationship of affinity following its formal termination.²⁶²

In theory, the same could be true of any relationship. Friendship, for example, is an informal state—exclusively so, under American law.²⁶³ Yet, in some nations, people can formalize their status as friends.²⁶⁴ Caregiving is another example, which under American law can either remain informal or become a formalized relationship via the execution of powers of attorney.²⁶⁵

Status can also evolve in the opposite direction. Relationships that are not merely formal but *factual* may engender informal analogues. Ties of consanguinity are objective facts, yet individuals establish relationships that resemble them even in nomenclature. Within fraternities and sororities, members refer to each other, and may come to conceive of each other, as siblings. So, too, the bands of brothers within military organizations and some religious orders.²⁶⁶

260. For further discussions of the case law, see Elizabeth Durfee, *Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406, 406–07 (1942); Hirsch, *supra* note 35, at 178–80.

261. Durfee, *supra* note 260, at 412–13; Alvin Evans, *Testamentary Revocation by Divorce*, 24 KY. L.J. 1, 1–5 (1935). This rule survives to the present day in the District of Columbia. *Estate of Reap v. Malloy*, 727 A.2d 326, 329–30 (D.C. Ct. App. 1999). The common law of some states fails to revoke a will by operation of law, even when divorce is coupled with a property settlement. *E.g.*, *Hertrais v. Moore*, 88 N.E.2d 909, 911–12 (Mass. 1949).

262. *In re Estate of Pekol*, 499 N.E.2d 88, 90 (Ill. App. Ct. 1986) (internal quotation marks omitted) (describing a husband and wife who continued to cohabit after their divorce). For additional examples of such couples appearing in the case law, see Hirsch, *supra* note 28, at 646 n.159. Thus far, only a single state has enacted a statute to address this scenario. See *supra* note 250.

263. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 203–06 (2007).

264. *Id.* at 221–22.

265. *E.g.*, UNIFORM HEALTH-CARE DECISIONS ACT §2(b) (1993), 9 pt. 1B U.L.A. 93 (2005).

266. See ELAINE J. LAWLESS, *GOD'S PECULIAR PEOPLE* 49 (1988) (“Pentecostals, like some other Christians, call each other *Brother* and *Sister*, but for Pentecostals this tradition has special meaning. . . . [T]hey do

For whatever purpose, lawmakers must decide when to recognize that a given sort of relationship exists. The issue is raised squarely in connection with affinity. At one extreme, lawmakers could focus exclusively on subjective experience—people *commit* and *de-commit*. At the other extreme, lawmakers could define affinity exclusively by final, objective acts—people *marry* and *divorce*. The first approach is open-ended. Any judicial inquiry is usefully expansive but also expensive. The second approach is simpler to enforce and can function to strengthen social institutions but will often fail to capture reality. The same tension could arise—and has—in connection with the legal sequelae of other sorts of relationships. Caregiving again offers an example.²⁶⁷

All the more reason to contemplate approaches in between the extremes. In lieu of formalization, a finding of commitment, or of relationship more generally, could hinge on a catalog of objective badges.²⁶⁸ All proposals for recognizing committed relationships in inheritance law have depended on evidence of such badges—for instance, whether a couple inhabited a common household and intermingled their finances—to streamline the inquiry.²⁶⁹ The one prior iteration of a rule premised on informal commitment, common-law marriage, likewise hinged on objective findings—whether a couple cohabited and held itself out to the public as husband and wife—along with the subjective requirement that they thought of themselves as married.²⁷⁰ And those badges, or rather their mirror image, could likewise serve as objective determinants of de-commitment. Separation from a common household and disaggregation of finances are objective factors suggesting the forsaking of commitment initiated by marriage. There are manifest symmetries here, which law reformers would do well to bear in mind.

This Article has also cast a spotlight on other, neglected intermedia. Human beings have the cognitive capacity to anticipate things. Performance of preliminary acts on the road to formalizing marriage or divorce can thereby disclose donative preferences. Engagement, filing for divorce, and filing for legal separation all fall into this category. Like objective badges of ongoing relationships, or their absence, preliminary acts could again serve usefully to streamline proof, once we determine they are statistically associated with a given donative intent.

Once again, the phenomenon of anticipation transcends affinity. One can imagine other preliminary acts that could likewise function as telltales of donative intent. Consider adoption. Lawmakers traditionally grant adopted children

feel they are literally a family. . . ."); see also *Fender v. Fender* (*In re Estate of Fabian*), 483 S.E.2d 474, 476 (S.C. Ct. App. 1997) (presenting evidence that a testator “regarded [her nephew] as a brother”).

267. By statute in four jurisdictions (Cal., Ill., Maine, and Nev.), an informal caregiving relationship can give rise to a presumption of undue influence if the caregiver benefits under a will executed during the relationship. *E.g.*, CAL. PROB. CODE §§ 21362(a), 21380(a)(3) (2015). In many jurisdictions, only formal fiduciary relationships can have that effect. WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS, AND ESTATES* § 7.3, at 331 (4th ed. 2010).

268. For a jurisprudential discussion, see Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165 (2015).

269. See T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 86–90 (2004); Spitko, *supra* note 1, at 342–49; Waggoner, *Marriage*, *supra* note 2, at 239–40; Waggoner, *Decline*, *supra* note 2, at 87–89; Waggoner, *Property Rights*, *supra* note 2, at 78–80.

270. Thomas, *supra* note 56, at 157–60.

rights of inheritance as heirs or as beneficiaries by implication under pre-adoption wills from the time when adoption occurs. Simultaneously, lawmakers recognize an informal category known as equitable adoption, where a child is *treated* like a natural child.²⁷¹ Yet another indication of intent could be the initiation of adoption proceedings. This act, too, signals a would-be parent's commitment to a child. If the parent dies on the cusp of adoption, he or she might well wish to provide for the child.²⁷²

Of course, no one can deny that actions speak louder than preludes. Even so, when persons begin to do something, they usually mean to carry it through; and the very act of initiating something tends to reinforce resolution.²⁷³ Beyond the realm of inheritance, lawmakers have grasped the insight, however intuitively. Lawmakers take cognizance of preliminary acts in such fields as contracts and criminal law.²⁷⁴ Preliminary acts can function as barometers of intent whenever and wherever we deem intent relevant. But if the inheritance field is any indication, lawmakers' attention to the significance of preliminary acts remains spotty. They merit closer inquiry, not just within one legal category with regard to one discrete problem, but across the board.

271. Although predicated on a theory of promissory estoppel, the doctrine appears in practice to hinge on whether or not a court regards a finding of equitable adoption compatible with donative intent. For an analysis of the case law, see Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 547–51 (2000).

272. For a further discussion, see Hirsch, *supra* note 35, at 203.

273. See *supra* notes 52–53 and accompanying text.

274. See RESTATEMENT (SECOND) OF CONTRACTS § 34(2) (AM. LAW INST. 1981) (addressing the significance of “part performance” of a contract); MODEL PENAL CODE § 5.01(1)(c) (AM. LAW INST. 1962) (criminalizing as an inchoate crime acts “constituting a substantial step in a course of conduct planned to culminate in . . . commission of the crime”).

