**Questioning Protection of the Spouse & Other Anomalies in the Probate Code; Time for a Change Wyoming?**

**Professor James Delaney
University of Wyoming College of Law
Tuesday, April 24, 2012**

1. **General Proposition**
	1. With respect to certain provisions, Wyoming’s current system of probate is arguably outdated and tax inefficient.
		1. In general, Wyoming may wish to consider adopting the Uniform Probate Code (“UPC”)(with relevant local amendments) coupled with the ability to opt into a community property regime.
		2. In the alternative, Wyoming may wish to consider adopting the UPC (with relevant local amendments) or,
		3. At the least, Wyoming should adopt the “augmented estate” provisions of the UPC.
	2. This presentation will address the following subtopics:
		1. A brief examination of some of the important differences between the UPC and Wyoming Probate Code.
		2. Focus on Spousal Protection
			1. An overview of the Wyoming Supreme Court’s opinion in Estate of George, 2011 WY 157 (2011).
			2. Explanation of the background of the current spousal elective share regime under Wyoming Law.
			3. An explanation and comparison of the UPC’s Augmented Estate.
		3. A primer on the tax benefits of community property at death.
		4. Conclusion
2. **Some examples of differences between the UPC and Wyoming Probate Code.**
	1. Intestate Succession – Spouse
		1. In general, if there are children of the decedent, Wyoming intestate succession passes only half to spouse. Only if there are no children, will the spouse take all the property.
			1. With respect to the surviving spouse, Wyo. §2-4-101 provides;
				1. Whenever any person having title to any real or personal property having the nature or legal character of real estate or personal estate undisposed of, and not otherwise limited by marriage settlement, dies intestate, the estate shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts, in the following course and manner:

				   (i) If the intestate leaves husband or wife and children, or the descendents of any children surviving, one-half (1/2) of the estate shall descend to the surviving husband or wife, and the residue thereof to the surviving children and descendents of children, as hereinafter limited;

				   (ii) If the intestate leaves husband or wife and no child nor descendents of any child, then the real and personal estate of the intestate shall descend and vest in the surviving husband or wife…
		2. The UPC generally provides for all of decedent’s assets to be transferred to the surviving spouse when all children are issue of both spouses.
			1. With respect to the spouse, UPC §2-102 provides:
				1. The intestate share of a decedent’s surviving spouse is:

(1) The entire estate if

(A) no descendant or parent of the decedent survives the decedent; or

(B) all of the of the decedent’s surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent’s surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) The first [$100,000], plus one-half of any balance of the intestate estate, if one or more of the decedent’s surviving descendants are not lineal descendants of the surviving spouse.

* 1. Intestate Succession – Children
		1. With respect to Children, Wyoming intestate succession provides for children/descendants through a per stirpes system of descent. Essentially, this means that when there is no surviving spouse, the decedent’s assets pass to children through their parent whether the parent was either living or dead.
		2. With respect to the children, UPC §2-103 provides for children per capita at each generation:
			1. Any part of the estate not passing to the … surviving spouse…, or the entire estate if there is no surviving spouse, passes…:

(1) to the decedent’s descendants…;

(2) if there is no surviving descendant, to the decedent’s parents…:

(3) if there is no surviving descendant, parent, to (collateral heirs).

* + - 1. “Per Capita at Each Generation” UPC: §2-103: Share of Heirs other than Surviving Spouse
				1. Any part of the intestate estate not passing to the decedent’s surviving spouse under §2-102, or the entire estate if there is no surviving spouse, passes in the order to individuals designated below who survive the decedent:

to the decedent’s descendants **by representation**;…

* 1. Succession on presumption of survivorship.
		1. Wyo. § 2-13-103:  Disposition of property based on presumption of survivorship which relies on a medical determination whether a beneficiary survived the decedent.
			1. Meaning, for example, if husband and wife got into a car accident and they were transported to the hospital but died in route, testimony from medical professionals would be required to determine the time of death. Specifically, testimony would be needed to determine whether they died simultaneously. Determination of the exact time of death can be a hard task when two persons die proximate to each other in time. In order to determine the If they cannot prove otherwise, they will be treated as dying simultaneously. Under Wyoming law, if they die simultaneously, they are each treated as having survived the other.
			2. However, if one is determined to have outlived the other (even by a minute), then all the assets of the first to die will go to the second to die and, thereafter to the blood relatives of the second to die. Of course, if the determination had been the other way around, all of both spouses’ assets would have gone to the other side of the family. Very anomalous outcome.
		2. UPC §2-104, Requirement that an heir survive the decedent for 120 Hours (if the individual fails to survive by 120 hours, then deemed to have predeceased). Under the UPC, the issue is generally solved.
			1. Thus, under the UPC, if the two individuals are mortally injured and die proximate to each other in time (e.g. within 120 hours of each other), then they will be treated as having died simultaneously and each will be treated as having survived the other. The assets owned by each will descend to each of their respective blood relatives.
			2. Note, however, that the 120 hour limitation solves the problem of proving who among the two died first when the deaths are almost simultaneous.
	2. UPC’s Elective Share under the “Augmented Estate” versus Wyoming’s Elective Share.
		1. Historical Background – Dower & Curtesy – Common Law
			1. Prior to the 20th century, inheritance between spouses in Western Europe and the United States was rare. In general, marital property law developed at a time when land was the primary source of inheritable wealth. In general, under the common law jurisdictions allowed land owning families to maintain control of their real property.
			2. In common law countries, dower and curtesy gave the surviving spouse a measure of support by providing for a life estate in a portion of the deceased spouse's real property. Upon the surviving spouse's subsequent death, the decedent's family regained fee simple ownership of the property.
		2. Partnership Theory
			1. The idea that each spouse has a right to an equal share of property acquired during the marriage is more of a partnership theory of marriage. Under this theory, marriage is an economic partnership to which both spouses contribute productive effort, and each spouse is entitled to one-half of the economic gains of the marriage. These gains include income earned by both spouses during the marriage but generally exclude property held by either spouse before the marriage or received at any time by gift or inheritance.
			2. Marital partnership theory recognizes that one spouse might make career sacrifices to raise children and may make other unpaid contributions to the marriage. By providing that assets acquired during the marriage should be shared equally, the partnership theory recognizes the nonwage-earning spouse's contributions to the marriage.
			3. Where there is a will in place, an elective share statute should create a more equitable result under as many scenarios as possible. The elective share should protect a spouse who has contributed nonmonetarily to a marriage as well as prevent a spouse from obtaining an economic windfall based on marital status.
		3. Development of the Concept of the Elective Share
			1. As dower and curtesy became outmoded, they were replaced in a majority of states by elective share statutes. An elective share statute gives the surviving spouse the right to claim a share of the decedent spouse's estate if the surviving spouse is dissatisfied with the amount he or she would otherwise receive under the deceased spouse’s will. States define the elective share as a fraction, ranging from one-quarter to one-half, of the decedent's estate. The estate to which the statute applies varies. It may be the probate estate, the federal gross estate for tax purposes, or an augmented estate defined in the statute to include all or most of the assets owned by both spouses.
			2. Early elective share statutes applied the fraction to the decedent's probate estate. As will substitutes became more popular, the amount of the elective share began to depend on the manner in which title to the property was held. As long as the elective share could be taken only from the probate estate, a spouse could effectively prevent his or her surviving spouse from taking an elective share by transferring property outside of the probate estate. Revocable inter vivos trusts and joint and survivor accounts provided easy vehicles for defeating a spouse's elective share rights.
		4. An Explanation of the current spousal elective share regime under Wyoming Law.
			1. Wyoming’s Elective Share § 2-5-101
				1. (a) If a married person domiciled in this state shall by will deprive the surviving spouse of more than the elective share, … ***of the property which is subject to disposition under the will***, reduced by funeral and administration expenses, homestead allowance, family allowances and exemption, and enforceable claims, the surviving spouse has a ***right of election to take an elective share of that property as follows***:

				   (i) One-half ( 1/2) if there are no surviving issue of the decedent, or if the surviving spouse is also a parent of any of the surviving issue of the decedent; or

				   (ii) One-fourth ( 1/4), if the surviving spouse is not the parent of any surviving issue of the decedent.
			2. Briggs v. Wyoming Nat'l Bank, 836 P.2d 263 (1992).
				1. The Husband and the decedent-wife were married to each other for approximately 20 years during their later years in life. The Husband had four children from a previous marriage while the deceased had no children of her own. In late 1984 or early 1985, the deceased executed her will and a living trust agreement, and conveyed most of her property into the trust. The trust agreement provided that the husband would receive a one-seventeenth share of the assets. By declaratory judgment, the Husband asked the district court to declare his deceased wife's trust invalid and to have the trust assets put into her probate estate, making them subject to his right of election under Wyoming's **elective share** statute because the trust contained the lion's share of her assets, nearly $900,000.
				2. Both Mr. Briggs and Mrs. Briggs signed the agreement creating the living trust. Before he signed, Mr. Briggs was advised and encouraged by Mrs. Briggs and her attorney to see his own attorney to review the agreement and the proposal. Mr. Briggs affirmatively stated that he did not want to see another attorney and that he consented to whatever Mrs. Briggs desired to do, and he voluntarily signed the agreement and the deed. Mr. Briggs argued that he did not read or understand the documents, that he signed them without being advised of the consequences of his signature, but that he was assured Mrs. Briggs was leaving everything to him.
				3. On appeal, the court affirmed the trial court's finding that the trust was valid, noting that [Wyo. Stat. § 2-5-102](http://www.lexis.com/research/buttonTFLink?_m=14f89f1b1cac8a59f8926181fd47c152&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b836%20P.2d%20263%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=1&_butInline=1&_butinfo=WYCODE%202-5-102&_fmtstr=FULL&docnum=3&_startdoc=1&wchp=dGLbVzz-zSkAV&_md5=bd650a745f336935e74f5c5dc4d39667) (1980) specifically provided that a surviving spouse's right of election may be waived.
			3. Estate of George, 2011 Wyo. 157 (2011Facts:
				1. In 2004, the Decedent signed a one-page holographic will that, if proven valid, would have entitled Poland, Decedent’s husband, to all of Decedent’s property including the inherited property that Decedent had received in 2003. However, in 2008, the Decedent transferred her property to her own revocable inter vivos Trust, the Deanna B. George Trust. The Decedent emphasized in a painstaking manner, her intent that Poland “… not have and shall not obtain or ever have any interest whatsoever” in the property transferred to the Trust. On April 3, 2008, the Decedent executed the pour-over will and revocable inter vivos Trust with the intended result that the property held in the Trust would not pass to Poland upon her death. The 2008 Trust Agreement provided for Poland in that it expressly states that Poland would receive the jointly-held property accumulated during the marriage and specifically excluded the jointly owned property from the Trust. The Decedent died on November 3, 2009. Poland instituted an action to claim the elective share provided by § 2-5-101 of the Wyoming Probate Code against the property transferred to and held in the Trust.
			4. Relevant Issue at Supreme Court:
				1. Can a revocable inter vivos trust with testamentary provisions be used by one party to a marriage to defeat the elective share of the surviving spouse under the Wyoming Probate Code?
			5. Holding
				1. Yes, one party to a marriage may defeat the elective share of the surviving spouse by contributing assets to an inter vivos trust with testamentary provisions.
			6. Reasoning
1. Wyoming has rejected the UPC’s augmented estate. Under the Revised Uniform Probate Code, the decedent’s surviving spouse is entitled to an elective-share amount calculated by applying a specified percentage to the augmented estate. The Wyoming Probate Code does not incorporate the augmented estate concept and the Wyoming legislature has not adopted this concept.
2. For purposes of applying the augmented estate concept to the elective share of a surviving spouse, some states utilize an “illusory” test and some states use a “fraud” test.
3. Regardless of the many variations used in other states, until the Wyoming legislature adopts a motive-based approach to the elective share, as well as the requirement that non probate assets be added back to the probate estate for purposes of the elective share, the policy adopted by other states is largely irrelevant.
4. It is important to note that Wyoming’s elective share statute is limited to “disposition by will.” The court indicated that this bright-line rule is not dependent on decedent’s intent or retention of control. The Court further reasoned that:
	* 1. Here the surviving spouse was not deprived by will, but rather by the decedent’s transfer of the property to a revocable inter vivos trust prior to death.
		2. Thus, the court found that it had no legal basis, nor ahs Poland cited any basis, such that the Court could AUGMENT the probate estate with the decedent’s non probate property.
	1. UPC’s Augmented Estate.
		1. Augmented Estate
			1. Net Probate Estate
				1. NPE = [Value of all **Probate** Assets] – [ Expenses]

Expenses include: funeral, admin, homestead allowance, family allowances, exempt property, and enforceable claims.

* + - 1. §2-205 Lifetime transfers to people other than the surviving spouse.
				1. The value of the augmented estate also includes the value of the decedent’s **nonprobate transfers** to others, not included under §2-204 of any of the following types:

Property owned …by the decedent immediately before death that passed outside of probate at decedent’s death.

Certain types of property transferred by D during marriage to others.

Other Property transferred during marriage and within the two-year period preceding the date of D’s death.

1. **A Brief Primer on the Tax Treatment of Community Property**.
	1. Community property is everything that a husband and wife own together and this includes all the earned money, incurred debts and property acquired during the marriage. Under community property, spouses own everything equally. This is true irrespective of the fact that the husband or the wife earned or spent the income.
	2. In a state governed by community property law, any assets acquired during a marriage are considered to be community property. Therefore, all assets acquired by either of the spouses during marriage belong to both spouses equally regardless of how much each spouse individually invested in acquiring the property in question.
	3. In other states, varying forms of law govern the distribution of property. For example, in Alaska, parties can opt in to a community property system, but this will not be the default rule for property distribution. Under community property law, some assets acquired after marriage can remain separate if not co-mingled. For example, if one spouse inherits money from his/her parents, that property does not automatically become community property unless s/he co-mingles the funds with other community property.
	4. Upon death of a spouse in a community property state, there is a very important income tax benefit that inures to the surviving spouse.
	5. IRC § 1014(b)(6)
		1. Section 1014(b)(6) applies to all decedents dying after December 31, 1947. In the late 1940s, most marital property was earned by the husband. Thus, in a common law state, nearly all of a couple's property may have legally been the separate property of the husband. If the husband dies first, which is statistically probable, nearly all of the couple's property would receive a basis step up. In a community property state, however, the husband's earnings are community property. Therefore, at death, he could probably bequeath only half of the marital property, and so only half of the couple's property would receive the step up. An inequality thus existed between common law and community property states.
		2. Section 1014(b)(6) was intended to remedy this inequality. In Willging v. United States, 474 F.2d 12 (1973), the Ninth Circuit Court of Appeals noted that IRC § 1014(b)(6) was designed to equalize the incidence of taxation between community property and common law states. Importantly, for our purposes, the court goes on to add that 1014(b)(6) was not designed to provide a special benefit to community-property taxpayers. Clearly, section 1014(b)(6) today acts primarily as a tax advantage for those in community property states, because property is not always so concentrated in the husband's hands as when 1014(b)(6) first became effective. Thus, in this day in age, it is often the case in a separate property state such as Wyoming, that both spouses (as opposed to just the husband) have separate property. And, upon the death of one spouse in a separate property jurisdiction, assets held by the surviving spouse do not get a step up in basis under IRC § 1014.
2. Alaskan Statute
	1. In 1998, Alaska passed the Alaska Community Property Act, which created an elective community property regime in Alaska. The Alaska community property system is similar to community property systems in other states except that residents must choose to opt-in to the system, if they want it to apply. Further, they must choose which of their property will be held as community property. Because of the elective nature of Alaska’s system, debate has ensued over whether Alaska community property will be considered community property for purposes of IRC § 1014(b)(6). As of now, the Service's position on how Alaskan community property will be treated for tax purposes at death is unclear. Nevertheless, it remains an important issue due to the tax benefits that incur under IRC § 1014(b)(6).
	2. Because Alaska's community property laws are derived from the Uniform Marital Property Act and are similar to Wisconsin's community property regime, some believe that Alaska community property will be community property for purposes of 1014(b)(6). But the Alaska Community Property Act is somewhat distinct from Wisconsin's regime. The Alaska act only applies if resident couples opt-in to the system. The imposition of the regime is not automatic as it is in Wisconsin. The elective nature of the Alaskan regime calls into question whether the IRS will allow the full step up for Alaska community property.
3. Conclusion & Questions
	1. Recommend either adopt an Alaskan system or adopt a community property regime with the ability to opt out of CP and into the UPC.
	2. Adopt the UPC (with appropriate Wyoming specific amendments/provisions)
	3. Adopt the UPC’s augmented estate elective share regime.