Utah Spousal Elective Share

Langdon T. Owen, Jr.[1]
Parsons Kinghorn Harris, pc
111 East Broadway, 11th Fl.
Salt Lake City, UT 84111
(801) 363-4300
lto@pkhlawyers.com

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Langdon Owen[2]
Parsons Kinghorn Harris
801-363-4300

The Utah Spousal Elective Share

I. **Overview of Utah's Spousal Protection System**. Every state provides some level of protection for spouses who are cut out of the estate of the deceased spouse. Utah's way is a hybrid of sorts, so it is helpful to first put it in context.

A. **Context**. The two major property law systems in the United States each provide spousal protection by their own methods. The two systems are the community property system and the common law system. The rules in each jurisdiction provide a unique application of the system it uses, but in very general terms, the thrust of the two systems are as described below.

1. **Community Property**. The community property states (Washington, California, Nevada, Idaho, Arizona, New Mexico, Texas, Louisiana, and Wisconsin, and sometimes Alaska where a couple may opt in to a community property system) accomplish spousal protection by an up-front creation of an actual property interest in each spouse in certain kinds of property, typically earnings from personal services during the marriage and property derived from such earnings. Thus, each spouse will generally have an interest in two classes of property, separate property (held before marriage or derived from gifts, inheritances, spousal agreement, etc.) generally not protected for the other spouse, and community property in which each spouse will own an equal interest. Community property provides protection on death, but also in the event of divorce. Also, for spouses from common-law jurisdictions, such as those who move into the community property jurisdiction late in the marriage, to the extent real community property is not built up, a quasi-community property mechanism or constructive trust may be applied to accomplish a protective result similar to a back-end property allocation.

2. **Common-law Property**. Common-law jurisdictions provide spousal protection differently. They use a back-end property adjustment in the event of death or divorce. Each spouse separately owns his or her own property, but on death, a certain minimal spousal share may be required by statute where elected by the surviving spouse. The protection can be measured by a percentage of the decedent's property or certain types of property (the old dower and curtsey rules related to a percentage of real property, for example), or may be measured by the combined property of the spouses to prevent unfairness where the richer spouse is the survivor. On divorce, an equitable allocation is made usually pursuant to a combination of statutory and case law. Community property is a true property interest and remains community property when brought into a common law jurisdiction, and is dealt with on community property principles, absent an intention to convert the nature of the property. See generally the Utah Uniform Disposition of Community Property Rights at Death Act, UCA §§ 75-2b-101 *et seq.*

3. **Utah's Hybrid**. Utah is a common-law jurisdiction and has by statute defined in a rather unique way the elective share of a surviving spouse, taking the community property concept of separate property and applying it as part of a back-end property allocation system derived from a nationally-promulgated Uniform Probate Code. (Utah's provisions

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constitute Part 2 of the Utah Uniform Probate Code, UCA § 75-2-201 *et seq.*) There are three key steps in the system: (i) calculate the gross family augmented estate taking into account the equity value property and deemed property of each of the spouses, (ii) remove from this amount an amount treated as the separate property of each of the spouses and divide the result by three to obtain the gross spousal entitlement, and (iii) apply separate and nonseparate amounts passing to the survivor from decedent, including exempt property, homestead, and allowances, and apply the amounts of nonseparate property held by the survivor, as payments toward the survivor's entitlement in order to reach the amount remaining payable by the decedent's estate. We will find that this structure creates a number of serious problems.

B. **Share of Augmented Estate**. To qualify as a surviving spouse, the spouse must survive the decedent by 120 hours. UCA § 75-2-702. When the statute speaks of transfers during marriage, it includes any marriage between decedent and the surviving spouse where there has been more than one marriage; however, the separate property provisions deal with the most recent marriage. UCA § 75-2-201(3); UCA § 75-2-208. In determining the family augmented estate from which the survivor's elective share will in turn be determined, a variety of different rights and interests are taken into account, and for any single asset a number of different rights and interests may be included in the augmented estate under a number of different code sections. If, however, a right or interest would be included more than once, there are rules to set priorities about which inclusion provision applies in order to prevent double counting. In general, the surviving spouse's elective share in the deceased spouse's augmented estate (UCA § 75-2-203) is calculated this way:

1. **Probate Estate**. Start with the decedent's net probate estate. UCA § 75-2-204. This is the probate estate less funeral expenses, administrative expenses, homestead and family allowances, exempt property, and allowable creditor claims. Claims, as defined in the Utah Uniform Probate Code, do not include estate or inheritance taxes or title disputes over potentially includable property. UCA § 75-1-201(6). The probate estate will include the property owned by decedent in decedent's name alone at death, such as full interests or tenancy-in-common interests in real estate, bank accounts, etc., vested remainder interests, continuing term interests (at commuted value), and so on. (As discussed below, the surviving spouse may well be entitled to homestead, family allowance, and exempt property.) Community property is not taken into account in determining the elective share since it has its own division rules. See generally the Utah Uniform Disposition of Community Property Rights at Death Act, UCA §§ 75-2b-101 *et seq.,* particularly UCA § 75-2b-104.

2. **Nonprobate Transfers**. Add in the decedent's nonprobate transfers to others. UCA § 75-2-205. This would include such things as:

a. Owned in Substance. Property passing at death other than to the estate or surviving spouse, which was owned or owned in substance by decedent just before death, including:

i. General Power. Property subject to a presently exercisable general power of appointment exercisable alone. A general power is one exercisable in favor of self, estate, or creditors of self or estate. See definition at UCA § 75-2-201(6). A general power includes a power to revoke or to invade principal. Any power of appointment includes the power to change a beneficiary. UCA § 75-2-201(5)).

(a) The power may be a general power whether or not the decedent had capacity to actually exercise it, and regardless of who else granted the power;

(b) A "5 and 5" power (withdrawal power up to $5,000 or 5% of corpus) granted to decedent by another would be a general power up to the amount subject to it at death. Prior lapses would not be included because not presently exercisable. Official Comment to 2-205, Example 2.

(c) A presently exercisable general power does not include a testamentary power created by someone else. Official Comment to 2-205, Example 1.

(d) Limited or special powers of appointment granted to decedent by another are not includable. Official Comment to 2-205, Example 2.

(e) A revocable trust created any time (*i.e.*, during or before marriage) is included (but only once where created during marriage and thus includable under two sections). Official Comment to 2-205, Example 3.

ii. Joint Tenancy. The decedent's fractional share (see definition at UCA § 75-2-201(2); 1 over the number of joint tenants, which would be the decedent plus others or just the others where decedent is not a joint tenant) of joint tenancy property. This applies whether or not the arrangement provides a unilateral right to severance. This would include a typical real property joint tenancy interest. Official Comment to 2-205, Example 4. If the decedent paid more than his or her fractional interest for a joint tenant's interest with others, the excess would be a gift, so that if the purchase occurred during marriage in the two years before death, it could be recovered under the gift rules described at c. below. Official Comment to 2-205, Example 19.

iii. POD or Joint Accounts. The value of decedent's ownership interest in payable on death property or accounts, etc. (*i.e.*, typically at full value; see UCA § 75-6-103(2)) or as registered co-owner in an account with rights of survivorship (*e.g.*, a bank joint account, includable in the amount contributed by the decedent, as provided in UCA § 75-6-103(1) defining ownership in accounts (a term defined at 75-6-101(1)). Official Comment to 2-205, Examples 6.

(a) A joint bank account as to which decedent was a joint tenant but into which decedent contributed nothing, would not be included. Official Comment to 2-205, Example 7.

(b) Query: shouldn't more of the joint bank account possibly be included to the extent the creditors of decedent can be benefitted by it under UCA § 75-6-107 in the event the estate is inadequate? See UCA § 75-2-205(2)(b) (described at b, below) relating to powers which may benefit the estate or creditors created by decedent exercisable by a nonadverse party (defined at UCA § 75-2-201(4) to require a substantial beneficial interest), where the surviving spouse, a creditor, or one acting for a minor or dependant child can trigger the exercise by the personal representative of the right to invade the joint account. The matter generally should be moot as to the probate estate because nothing of it will be left, but such

inclusion could affect the elective share in nonprobate transfers, such as those not subject to creditor claims through the probate estate.

iv. Life Insurance. Life insurance proceeds (up to cash value or premiums paid on the policy during the decedent's life, a very significant limitation added to the Utah version) where the policies or proceeds are subject to a general power of appointment exercisable alone. This is quite limited; it is also ambiguous, particularly as to term policies and group policies of any type.

(a) What is "the policy"? If a group term life insurance policy has been in effect for the 20 years of the decedent's employment, but the carrier was changed 5 years ago by the employer, are premiums for only 5 years at issue? Presumably a term policy in effect for a long time is "the policy" for that time and not just for the last year and premiums during life include all premiums on that policy even though the premium may increase annually and the policy may be subject to possible termination annually.

(b) What are "premiums paid"? Assume a group life policy (term or permanent) where the employer writes the check for the premiums; are these premiums paid included, or is it necessary for the decedent to write the check? Does it make any difference if the policy is held by a company as part of an entity buy-sell agreement (*e.g.*, a redemption funded by insurance on death)?

b. Retained Rights. Property transferred during marriage with retained rights by the decedent to possession, enjoyment, or income during life (terminating at death or continuing), or transferred subject to powers exercisable by decedent alone or with others, or as to which the decedent gave someone else either acting with decedent or, if not an adverse party, acting without decedent, the power to use it for decedent, including for decedent's estate or creditors. The amount included is the fraction subject to the right or power (but passing outside the estate to someone else other than the spouse or the estate, thus avoiding double inclusion). UCA § 75-2-205(2)(a) and (b).

i. Comparison. If decedent granted the requisite power, the power will cause property to be includable even if had the power been created in decedent by another it would not be. For example, a general testamentary power created by the decedent during marriage may be includable if otherwise meeting the requirements of UCA § 75-2-205(2)(a)(ii). Official Comment to 2-205, Example 1.

ii. Asset Protection Trusts. Asset protection trusts described in UCA § 25-6-14 would be included by a specific provision relating to inclusion by reason of the restriction on transfer of the decedent's interest. UCA § 75-2-205(2)(a)(ii).

iii. Life Interests. Retained income interests for life in trusts are included (under UCA § 75-2-205) at the full value of corpus subject to them, as are retained unitrust and annuity interests for life (under UCA § 75-2-205 because a right to income is defined (at UCA § 75-2-201(9) to include annuities and unitrusts), where the remainder passes to someone other than the estate or surviving spouse. Official Comment to 2-205, Example 9. With commercial single life annuities, nothing is left to pass to someone else, so nothing is included. Official Comment to 2-205, Example 13.

iv. Term Interests. Retained income, annuity, and unitrust interests for a term, and personal residence trusts, which must be for a term (see IRC § 2702(a)(3)(A) and Treas. Reg. § 25.2702-5(c) as to qualified personal residence trusts), are included at commuted values of the unexpired terms under UCA § 75-2-204, which relates to the probate estate. Reversions, if any, also would be includable (at commuted values) under UCA § 75-2-204. Remainders to others would be included at their commuted value at the time of death (not at the time of the creation of the interest) under the income interest provisions of UCA § 75-2-205(2)(a) because the term interest relates to the remainder portion and the remainder passes to some one other than the estate or surviving spouse. The inclusion is the commuted value because the amount included is "the value of the fraction of the property to which the right or restriction related" to the extent it passes outside probate to some one other than the estate or surviving spouse, and under UCA § 75-2-208(7)(b) with respect to any present or future interest, the value is commuted value. The result will generally be the inclusion of the full value of the corpus under the combination of sections; as of the decedent's death, remainders contingent on decedent's life will be fixed and will be 100% of value less the commuted value of the continuing term interest, which is also included under the other section. See Official Comment to 2-205, Examples 9-12.

c. Gifts in Two Years. Certain property which was transferred to others (such as gifts over $10,000 per donee per year, insurance related amounts which would otherwise have been includable), or powers or retained rights described above which terminated (by transfer, release, lapse, exercise, default, etc.), in the two years of the marriage before death. The inclusion is the amount not passing to the decedent, the decedent's estate, the spouse, or the surviving spouse. UCA § 75-2-205(3).

i. Disguised. The gifts subject to this section can include amounts in excess of the return received by the decedent for a transfer, such as bargain sale or other disguised gifts. See Official Comment to 2-205, Example 19 (relating to the excess paid for a joint interest). See also UCA § 75-2-208(6)(a) (relating to the exclusion of transfers for "adequate and full consideration in money or money's worth").

ii. Termination. Termination of retained income, annuity, or unitrust or similar interests in the two year period could bring back the entire corpus for inclusion. Official Comment to 2-205, Example 16.

iii. Broad Definition of Transfer. The term transfer includes exercises, releases, lapses either of a general power created by decedent for himself or herself, or of a power to benefit decedent granted by decedent to a nonadverse party as described in UCA § 75-2-205(2)(b). UCA § 75-2-201(10)(c). See also b. above. Thus, if these things occur in the two year period, property could be included in the augmented estate as a result.

d. Special Issues. Certain nonprobate transfers can raise some side issues which may be important.

i. Fraudulent Transfer. If a transfer constitutes a fraudulent conveyance, it might be possible to set the transfer aside under the Utah Uniform Fraudulent Transfer Act, even where the fraudulent transfer occurred before two years before death, so long as it is within the limitations period of the Fraudulent Transfer Act. UCA § 25-6-1 *et seq.* See

also UCA § 75-3-709 on the Personal Representative's power to avoid transfers. Presumably the recovered asset would be included in the probate estate, at least in most cases where the transfer was from the decedent. If a transferee from decedent makes a further transfer which is covered by the Fraudulent Transfer Act, the recovered asset might alight somewhere else (*e.g.*, in a trust) and be treated as part of some other item includable for the elective share determination; this may cause the transfer within two years rule to apply.

(a) A creditor is a person who has a claim, and a claim is broadly defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." UCA § 25-6-2(3). Threats of divorce are sufficient to make one a creditor, for example. *Bradford v. Bradford*, 993 P.2d 887 (Ut. App. 1999).

(b) The rule used by the *Bradford* court has been referred to as a claim notice theory, under which the actual accrual of a claim is not always necessary.

ii. Charitable Trust Issue. Where the ability of a spouse to recover a gift pursuant to a spousal election could cause tax problems, obtaining a spousal consent at the time of the gift may be advisable. For example, if charitable gifts or trusts are subject to being reclaimed, this may raise a question as to the availability of the charitable deduction (see Internal Revenue Code ("IRC") §§ 170 and 2055(e)), or if the spouse's power is deemed held by the giving spouse, there may be issues as to the taxability of the income to the giving spouse under the grantor trust rules (see IRC § 672(e)).

e. Reference. The tests as to transfers with retained rights and so on are rather technical and are intended to broadly apply to interests in trusts and other devices used in transferring property. The examples in the official comments to the Uniform Probate Code are very helpful in applying these provisions and the other provisions relating to inclusion in the augmented estate. The comments are included in West's Utah Code Annotated, but are not included in Lexis' version of the Utah Code. See part I. at I. below.

3. **Spousal Transfers at Death**. Add in the decedent's nonprobate transfers at death to the surviving spouse (not including social security). UCA § 75-2-206. This would include property passing by rights of survivorship, payable on death accounts, or property or rights like the items described in I.B.2. above, but passing to the surviving spouse instead of to others, for example, an income interest in a trust (at commuted value) or corpus from a trust. It does not include community property. UCA § 75-2b-104.

4. **Spouse's Property**. Add in the surviving spouse's own property at the time of the decedent's death. UCA § 75-2-207. This would include the spouse's share of co-owned property or accounts, insurance proceeds or trust proceeds or other property passing to the survivor on decedent's death (including through trusts or transfers from third persons), and property or rights transferred away by the surviving spouse like the items described in I.B.2. above (*e.g.*, transfers with retained rights and so on) but would not include property already included as a spousal transfer at death under UCA § 75-2-206 or by inclusion in the probate estate. It does not include community property. UCA § 75-2b-104.

a. Fractional share values where decedent owns a share (such as a joint tenancy) are determined just before decedent's death. Also, insurance on decedent's life where the proceeds pass to a third party from a policy owned by the survivor is valued by its interpolated terminal reserve value or similar method, not by the amount of proceeds.

b. Other than this, the property under this section is valued taking into account that decedent died before the survivor; for example, a trust providing an interest for decedent and survivor would be valued taking into account matters triggered by decedent's death, such as the termination of an interest held by the decedent.

5. **Consideration or Consent**. Take out nonprobate transfers to others to the extent the transferring person received adequate and full consideration in money or money's worth, or if the transfer to others was consented to in writing by the other spouse. UCA § 75-2-208(6). A consent to a split gift for obtaining an annual exclusion for federal gift tax purposes (see IRC § 2513) is not a consent to the transfer. A valid spousal consent to a beneficiary designation under ERISA (Employee Retirement Income Security Act of 1974) will be a valid consent for this purpose, as well. UPC Official Comment to 2-208.

6. **Claims**. Take out of each includable class (*i.e.*, items 1 through 4 above) the value of enforceable claims against includable property. UCA § 75-2-208(7). This would include the unsecured debts of the surviving spouse as to the class for the survivor's property and those of the decedent as to the probate estate. UCA §§ 75-2-204, 75-2-207(3). Remember that claims don't include death taxes. UCA § 75-1-201(6).

Query: Is the elective share itself a claim? It seems to meet the definition of UCA § 75-1-201(6) as a claim against the estate arising after death. It certainly isn't a donative transfer since the surviving spouse making the election has been cut out of gifts to some extent and is forcing funds out of the estate or other recipients. The elective share is not like an intestate share since it does not exist to create a dispositive scheme where some or all of an estate does not pass by will (or dispositive instrument) but exists to override any such will or dispositive instrument which may exist. Is it similar enough to an intestate share not to be a claim? Is it something else altogether but not a claim? However, if the elective share is a claim, it would not be appropriate to deduct the elective share in determining the elective share. Nevertheless, it is arguable that the elective share may be treated as a claim for the limited purpose of being entitled to interest on claims under UCA § 75-3-806(4), commencing 6 months after decedent's death.

At this point, the equity value of the gross family augmented estate of the two spouses has been determined.

7. **Separate Property**. Then subtract out the value of the separate property of the deceased and of the surviving spouse. UCA § 75-2-208(1) through (5). Separate property would include property owned at or before the marriage, acquired by gift or death transfer from someone else other than the other spouse, paid for with separate property, designated as separate by spousal agreement, or acquired as a recovery for certain personal injury claims.

a. Income and appreciation of separate property during the marriage is separate property.

b. Improvements to, or a debt reduction on, separate property is also separate, but with some important exceptions: if the amount paid for the improvement or debt reduction is from joint or commingled funds or is from the separate funds of the surviving spouse, such property interest is then not the deceased's separate property, but not over the value of the affected separate property interest itself.

c. There is a general presumption that property is not separate, but this presumption can be rebutted by proof to the contrary.

This is the category likely to create the most disputes. We will deal with it much further in Part II below.

8. **Presumption for Inclusion**. The presumption that property is not separate has the same effect of the presumption of inclusion in the augmented estate under the Uniform Code. The effect of this presumption can be quite strong. See *Estate of Luken*, 551 N.W. 2d 794 (N.D. 1996) (burden is on the party opposing the presumption of inclusion in the augmented estate under an earlier version of the Uniform Probate Code; to meet the burden the party must demonstrate the source of the resources which are part of the asset (a business) and not just that the business was started before the marriage); see also Utah Rule of Evidence 301(a) (". . . a presumption imposes on the party against whom it is directed the burden of proving the nonexistence of the presumed fact is more probable than its existence") and *Robertson v. Campbell*, 674 P.2d 1226 (Ut. 1983) (presumption of continued undue influence as to purported trust ratification).

9. **Augmented Estate**. What is left is, essentially, the assets after debt of both spouses acquired during the marriage (other than by gifts or inheritances), and either remaining at the time of death (directly or through retained rights, etc.) or given away or sold for less than full value within two years of death. This amount is the family augmented estate. It is divided by three to arrive at a gross survivor's entitlement share of the augmented estate. UCA § 75-2-202(1).

C. **Allowances and Exemptions**. Another important factor to take into account is that a surviving spouse, may be entitled to claim family allowance (up to $1,500 a month, $18,000 lump sum for 2009 and earlier, $2,250 and $27,000 respectively for 2010, indexed after that) for a year may be set and paid by the personal representative without court approval; this benefits the surviving spouse or supported minor children not residing with the surviving spouse), homestead ($15,000 for 2009 and earlier, $22,500 for 2010 and indexed after that; this benefits the surviving spouse and if none minor children or other dependant children), and exempt property (assets up to $10,000 for 2009 and earlier, $15,000 for 2010 and indexed after that; this benefits the surviving spouse and if none, children even if adults), in that order, as priority amounts from the decedent's estate. UCA § 75-2-401 *et seq*.; indexing at UCA § 75-1-110.

1. **Effect**. These could be asserted by the surviving spouse right away in the probate process, even though the augmented estate is yet to be determined. However, ultimately these amounts will be treated as part of the payment of the surviving spouse's share of the augmented estate and, unlike the Uniform Code's treatment, will not be on top of such share. UCA § 75-2-209(1)(d). Nevertheless, the priority of these amounts over estate debts and other

items, and over other benefits for estate beneficiaries should be maintained; thus it may be useful to claim them even if later offset against the elective share.

2. **Priority and Recovery**. The family allowance and property exemptions are treated as close to absolute and are given priority over claims against the estate (claims include funeral and administrative expenses under UCA § 72-1-201(6)) and over beneficiary rights. UCA §§ 75-2-401 *et seq.*, 75-3-807, 75-3-101; *In re Estate of Wagley*, 760 P.2d 316 (Ut. 1988). On the other hand, the court has discretion in determining the amount of family allowance. See *In re Estate of Hamilton*, 869 P.2d 971 (Ut. App. 1994) (reviewed for abuse of discretion; factors to consider include spouse's age, health, standard of living, property and resources, and the value of the decedent's estate). These exemptions and allowances are not reduced by reason of certain probate or nonprobate assets against which they may be collected being deemed separate property or otherwise not included in the augmented estate. Also, where the estate is insufficient to pay them, these exemptions and allowances may be recovered against multiple party accounts (UCA § 75-6-107 and *Wagley* case cited above) and revocable trusts (UCA § 75-7-505(1)(c)). See also, with respect to certain claims, UCA §§ 75-6-310(2) (securities), 75-6-201(2) (nontestatmentary provisions for transfer at death), and 31A-22-413(1)(b) (beneficiary designations).

D. **Separate and Nonseparate Property Application**. The nonseparate property of or allocable (through retained interests, etc.) to the survivor is applied as a payment of the survivor's share of the augmented estate. UCA § 75-2-209(1)(b). Also, any separate property or nonseparate property of the decedent passing to the survivor at decedent's death is treated as such a payment. UCA § 75-2-209(1)(a) and (c). Community property, however, does not reduce the elective share. UCA § 75-2b-104 (community property "may not reduce, be subject to, or be used in calculating, the surviving spouse's elective share").

Any balance left is payable to the survivor by the decedent's estate or property recipients. UCA §§ 75-2-209(2) and (3), and 75-2-210.

E. **Minimum Amount**. Also, if the surviving spouse's share of the augmented estate, payable from the probate estate (including through homestead, family allowance, and exempt property) or from others (see UCA § 75-2-209(1)(a) through (d)), is less than $25,000 for 2009 and earlier, $75,000 for 2010 and indexed after that, the surviving spouse would be entitled to the "supplemental" minimum amount of $25,000 for 2009 and earlier, $75,000 for 2010 and indexed after that, from the estate, less those other payment amounts. UCA § 75-2-202(2). The source of payment priorities are described in UCA § 75-2-209(2). Certain nonprobate transfers may be required to contribute.

If an augmented estate is so small that use of the minimum share is contemplated, the decedent's estate may also be too small to pay more than the homestead, exempt property, and family allowance to the surviving spouse. For 2009 and before, exempt property and homestead equaled $25,000 and the surviving spouse's share of these will be the full amount because children only take these if there is no surviving spouse. UCA §§ 75-2-402 and 403. Further, these amounts together with any family allowance for the surviving spouse will reduce the supplemental minimum under UCA § 75-2-209(1)(d). Thus where a decedent died in those years the supplemental minimum will generally be illusory. On the other hand, the homestead, exempt property, and family allowance are not subject to the augmented estate or separate

property concepts and thus would be payable even if the probate estate or other payment sources for them (*e.g.*, revocable trusts, multiparty accounts - see I.C.2. above; see also UCA § 75-2-405(1)) contained nothing but separate property. For the years 2010 and later with the increases in dollar amounts, the minimum share may provide some further benefit because homestead and exempt property will amount to a total of $37,500, and even with family allowance added the total will amount to $64,500, potentially leaving $10,500 for the surviving spouse over these other benefits.

F. **Payment Provisions**. If the elective share is applicable, how is it to be funded? In other words, who will lose out in the face of the election?

1. **Allocation to Assets**. Where the property passing to the surviving spouse and described in UCA § 75-2-209(1) is insufficient to offset the elective share amount (note this provision on its face applies only to the elective share not to the supplemental share because the supplemental share is already defined by these offsetting amounts being insufficient to achieve the dollar amount of the supplemental share; however under UCA § 75-2-202(3), a Utah specific variation, the homestead, exempt property, and family allowance offset not only the elective share, but also the supplemental elective share because, unlike the uniform act, these allowances and exempt property are not on top of the elective share in Utah), other property is applied under UCA § 75-2-209(2) and (3) to the elective share and the supplemental share, too, first from the probate estate or from property deemed the decedent's under the retained rights provisions, then from gifts to others within two years of death (UCA § 75-2-205(3)(a) or (c), but not including insurance amounts under (b)); the responsibility is allocated proportionately among the recipients at each level affected. If such amounts are still insufficient any other nonprobate transfers to others are applied, which would, among other things, include the insurance item left out in the first round, allocated equitably.

2. **Personal Liability**. The first transferees and their donees (if the donees have the property or its proceeds) of the value of property transferred by decedent and brought back into the augmented estate may be personally liable to return the property or pay its value. UCA § 75-2-210. They are the only ones so liable, at least absent some other basis of liability. See UCA § 75-1-103 (supplemental principles of law and equity apply). With some split interests (term or life and remainder) or other transfers, property may be included at full value with portions coming in under more than one section. In such cases, the property's value may have to be allocated between the inclusion provisions in order to apply the priority for liability for the contributions toward the elective share payable.

3. **Special Issues for Qualified Plans**. With ERISA qualified plans, the anti assignment and related rules may preempt to some extent the probate code rules relating to spousal rights. Thus the plan under its terms may need to deliver the benefit to someone other than the person entitled under the probate code. The probate code recognizes this possibility and requires a return of the benefit by such a recipient to the person who is entitled under the probate code. UCA § 75-2-210(b). The U.S. Supreme Court has left open the possibility that such a requirement may work. *Kennedy v. Plan Administrator for DuPont Sav. and Invest. Plan*, 129 S.Ct. 865 (2009).

a. Anti-assignment. Not all plans subject to ERISA are subject to the anti-assignment rules, however. Such plans include top hat unfunded plans, excess benefit plans,

SEP (simplified employee pension), Roth IRA contributions through 401(k) plans, and welfare benefit plans (such as life or health insurance plans). See ERISA § 201(2), (6), and (7); 29 USC § 1051(2), (6), and (7); and also ERISA § 3(36); 29 USC § 1002(36); and IRC §§ 402A(b)(2) and 408(k) and (p). There are also exceptions to the antiassignment rules, the most notable of which is the exception for Qualified Domestic Relations Orders or QDROs.

b. Preemption. On the other hand, all plans subject to ERISA are subject to the federal law preemption of state law rules by ERISA, which generally provides that anything in state law either contrary to ERISA or, more importantly, relating to an ERISA plan, is preempted. See U.S. Const. Art. VI, cl. 2, ERISA § 514(a), 29 USC § 1144(a), *Shaw v. Delta Airways*, 463 U.S. 85 (1983). A major effect of the preemption is that state domestic relations law or other law such as community property or passage on death law may not govern who is entitled to benefits; rather the plan administrator need only look to the plan document itself, and beneficiary designations under it. See ERISA § 502(a)(1)(B), 29 USC § 1132(a)(1)(B).

c. *Kennedy* Case. The U.S. Supreme Court in *Kennedy v. Plan Administrator for DuPont Sav. and Invest. Plan*, 129 S.Ct. 865 (2009) affirmed the court of appeals (497 F.3d 426 (5th Cir. 2007)), on a different basis than used by the court of appeals, and in an unanimous opinion strongly supported the concept that the plan administrator must look only to the plan provisions, but left open many issues. The *Kennedy* case involved the issue of whether a waiver of all rights under any retirement plan in a non-QDRO domestic relations order can be effective where the actual beneficiary was not changed prior to death. The Court found that the waiver was not a nullity and said it had some sort of validity, apparently under federal common law, and thus may not have been preempted just because it was contained in a state divorce decree. However, the principle that the plan administrator is to follow the plan document controlled, and the claim against the plan administrator failed. The Court expressly left open, without deciding, the possibility of a suit by the plan participant's estate to recover benefits (after distribution by the plan) against the former wife who was the named beneficiary under an unchanged beneficiary designation dating from before the divorce and still in effect at the time of death. See *Estate of William E. Kensinger, Jr. v. URL Pharma, Inc.*, __ F.3d __, 2012 WL 917582 (3d Cir. 2012) (allows suit against ex-wife distributee to enforce divorce waiver of plan benefits). More litigation and divided authority can be expected.

G. **Payors and Third Parties**. The surviving spouse may give a notice to third parties and payors relating to amounts or property from which the elective share may be paid in order to render them liable for the share if they pay or transfer such property to others. Until the notice is given such payors and third parties are protected while acting in good faith. After receiving the notice, they may be liable, but if they do not wish to hold the property, there is a statutory process for delivery to court. UCA § 75-2-214.

H. **Election**. The election is made by filing with the court and mailing or delivering to the personal representative and petition within 9 months of death or 6 months of the probate of a will, which ever is later. UCA § 75-2-211(1). If there is no will, the petition may still be filed (*e.g.*, where the decedent attempted to dispose of substantially all property during life and left no will), but presumably the 9 month limit would apply. If the 6 month period expires after the 9 month period, nonprobate transfers to others are not included in the augmented estate. An extension of time may be requested within 9 months from date of death (*e.g.*, where the filing of

a will is anticipated) and if granted, the nonprobate transfers are still included in the augmented estate. UCA § 75-2-211(2).

1. **Alternative Relief**. The election may be withdrawn any time before final determination by the court. UCA § 75-2-211(3). The withdrawal of the election does not prejudice other rights and the election is in the alternative to such other rights, and this should be the case even if the election does not explicitly say so; see UCA § 75-2-213(1) (waiver of spousal rights requires writing signed by surviving spouse) and UCA § 75-2-801(1) (disclaimer requires writing), and see also Utah Rules Civ. Proc. 81(b) (rules of procedure apply after joinder of the issue (note that issues are typically joined separately by petition as they arise, assuming they are not time barred, and are not subject to the claim joinder rules of the Ut. Ruls. Civ. Proc.)) and 8(a) (alternative relief may be requested (*i.e.*, as to issues joined)).

2. **Notice and Fixing Liability**. Notice of the elective share petition needs to be given to all with an interest in the estate or recipients of property subject to the election. UCA § 75-2-211(1). The court may fix liability against those with the assets from which the share is to be paid. UCA § 75-2-211(4).

I. **Interpretive Aid**. As mentioned earlier, the official comments to the Uniform Probate Code are very helpful, particularly as to the inclusion of various property rights and interests (under trusts, annuities, insurance, and so on) in the augmented estate. However, such comments do not deal with Utah's modifications to the Uniform Code and thus do not help on separate property issues, and because Utah's changes are so profound, the comments will be more confusing than helpful in the treatment of the proportion of the augmented estate to which the survivor will be entitled.

Although the main code sections are parallel in the Uniform Code and in Part 2 of the Utah Code, the subsection numbering is different but can be traced. Where there is lead-in language, the Uniform Code starts subpart numbering with (1), otherwise, it starts with (a), but the Utah Code (UCA) always starts with (1). For example, Uniform Code 2-205(2)(ii) equates to UCA § 75-2-205(2)(b), while Uniform Code 2-207(a)(1) equates to UCA § 75-2-207(1)(a).

J. **Native American Tribes**. Other elective share regimes may apply to decedents who are members of American Indian tribes. Tribal probate codes may provide an elective share as to property on or connected with an Indian Reservation. See, *e.g.*, Ute Indian Probate Code (Title VI of the Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation) Section 6-1-1 *et seq.*, the elective share provisions of which are at § 6-6-1 *et seq.* (basically, one-third of estate, including assets in excess of $1,000 transferred to others by decedent during life within three years of death). As to Indian Trust property held or controlled by the Federal Bureau of Indian Affairs, there is a separate probate process independent of state and tribal processes. 25 USC § 2206. If a tribe wants its probate code to apply, there is a process to submit it for federal approval. 25 USC § 2205. For such trust property, there is a spousal share for a spouse omitted from a will (basically, the intestate share), but it is limited by, among other things, a requirement that the surviving spouse must have been the spouse for five years or had a surviving child with the decedent. 25 USC § 2206(j)(A)(iii). The potential applicability of state, federal, and tribal elective shares can lead to complex interactions, and to complex choice of law issues, among these provisions.

II. **Separate Property Problems**. Let's explore further some of the aspects of the elective share of a surviving spouse (UCA § 75-2-201, *et seq.*) relating to the concept of separate property. We will look at general issues and then turn attention in particular to the treatment of property enhancement payments with respect to improvements to, or debt service on, the decedent's separate property ("enhancement contributions"), especially those made with the surviving spouse's separate funds or with joint or commingled funds. (UCA § 75-2-208(4)). The approach will be to discuss generally the issues raised by Utah's elective share statute, then go into hypothetical examples to help solidify our understanding of all the elective share rules, but particularly the separate property aspects of them, and finally in part III to provide some suggestions relating to enhancement contributions which may be useful in dealing with what we will find is a deeply-flawed piece of legislation.

A. **Genesis of the Problem**. The provisions dealing with the exclusion from the augmented estate of the separate property of the decedent and of the surviving spouse, which became effective in 1998, are a peculiar Utah modification of the 1993 spousal share provisions of the nationally promulgated Uniform Probate Code, which provided the basis for the Utah Uniform Probate Code. Utah has adopted some version of the Uniform Probate Code since 1975 (first effective, however, in 1977). The Uniform Code elective share provisions were fundamentally revised by provisions drafted first in 1990 and then reorganized and clarified in 1993. The Uniform Code was drafted for adoption by the states by a highly-respected group of Commissioners for Uniform State Laws.

1. **Uniform Probate Code - Background**. The nationally-recommended Uniform Probate Code uses a sliding scale of percentages of the augmented estate for the spousal share, with a smaller percentage for shorter marriages and a higher percentage for long-term marriages, leveling off at 50%. The surviving spouse's property, as well as the decedent's property, is taken into account in calculating the augmented estate. The applicable percentage is applied to the combined assets to arrive at an entitlement amount. Under the non-Utah version of the Uniform Probate Code, the amount of the entitlement, which the survivor is treated as already having received toward satisfaction of the entitlement amount, is double this percentage. Thus, if a short marriage was subject to a 15% percentage level, 30% of the surviving spouse's property would count toward satisfying the survivor's entitlement derived from the augmented estate, and for a long-term marriage subject to a 50% percentage level, all the surviving spouse's property is used in the calculation of the amount already satisfied.

The idea is that as a marriage progresses, more of the couple's assets are deemed to arise from the joint contribution of the spouses (without any need for tracing and without giving significance to who holds title), and such deemed joint portion is always divided equally where the poorer spouse survives, in keeping with a partnership theory of marriage. Thus, if a decedent's property is $100,000 and the survivor's property is also $100,000, where the applicable percentage is 15%, the entitlement will be $30,000 and the survivor will be treated as having already received 30% of the survivor's assets ($30,000), and thus nothing new is payable to the survivor. If decedent's property were $300,000 while the survivor's were $100,000, the 15% would amount to $60,000, of which $30,000 would be treated as already received, and the survivor would be owed $30,000 more. If the poorer spouse died first, the survivor's 30% treated as already received would be $90,000, and the survivor would receive no payment from the poorer spouse's estate.

2. **The Utah Modification**. However, in Utah, this procedure has been dramatically altered. The percentage level is in all marriages 33 1/3% (*i.e.*, one-third). Rather than treating two-thirds of the survivor's property as having already been received, an entirely different procedure is used. The augmented estate is calculated substantially as under the Uniform Code (except as to insurance). Then, under Utah's version, the "separate property" of the surviving spouse and of the decedent is taken back out of the augmented estate. The one-third is then applied to what is left and all (not two-thirds) of the survivor's nonseparate property is treated as having been already received.

Instead of a statutorily-presumed joint contribution, the Utah version tries to exclude nonjoint contributions by using a separate property concept. It also applies much more of the survivor's joint contribution (*i.e.*, nonseparate assets) to offset the survivor's "entitlement" so that the poorer survivor ends up with less than an equal share of the nonseparate family assets. The poorer survivor who has title (or deemed ownership) to less than one-third of the nonseparate assets does not get the difference up to half the nonseparate value, but only one-third. If a survivor has more than one-third of the nonseparate assets, the survivor keeps them but without an equalization if less than half.

The Uniform Probate Code was designed not to need to trace back any assets as separate property or as a nonseparate marital contribution. When Utah adopted the separate-nonseparate property distinction (contained in UCA § 75-2-208(1) through (5), which were not part of the Uniform Probate Code), and the source tracing rules associated with the distinction, it created a great deal of complexity. These differences in Utah's statute from the Uniform Code become very troublesome when applied to contributions of separate property between the spouses. There are important ambiguities and consequences, particularly where one spouse contributes separate property toward what would otherwise be separate property of the other spouse.

The Utah elective share provisions were analyzed in the article Kogan and Thompson, Piercing the Facade of Utah's "Improved" Elective Share Statute, 1999 Ut. L. Rev. 677, which discusses in considerable depth the history of the elective share provisions and strongly criticizes them, because they "emasculate the protections afforded surviving spouses by the uniform law" by providing simple mechanisms for disinheriting a spouse. In particular, the provisions are criticized for (i) including only nonseparate property, (ii) providing only a one-third share (the combination of (i) and (ii) provide "the poorest of all alternatives"), and (iii) eliminating insurance proceeds payable to others (UCA § 75-2-205) by limiting the includable amount to cash surrender value or premiums paid (very bad for a poorer survivor under UCA § 75-2-205, very good for a richer survivor under UCA § 75-2-207). The criticisms stated in that article are well founded, and as we will see, other criticisms may be leveled at the elective share provisions, as well.

B. **Separate - Nonseparate Distinction**. The key to understanding Utah's elective share is in understanding what "separate property" means and how it functions.

1. **Separate Property**. The distinction between separate and nonseparate is dominated by what counts as separate. This is the side of the distinction defined by statute, and nonseparate is any other value not derived from separate property.

a. Statutory Definition. The base definition of separate property in UCA § 75-2-208(1) is:

> (1) . . . Property is separate if:
>
> (a) owned at the date of the most recent marriage of the decedent and the decedent's surviving spouse;
>
> (b) acquired by gift or disposition at death from a person other than the decedent or the decedent's surviving spouse;
>
> (c) acquired in exchange for or with the proceeds of other separate property;
>
> (d) designated as separate by written waiver under Section 75-2-213; or
>
> (e) acquired as a recovery for personal injury, but only to the extent attributable to expenses paid or otherwise satisfied from separate property.
>
> This same Section goes on to tell us some more about what separate property is:
>
> (2) Income attributable to investment, rental, licensing, or other use of separate property during the most recent marriage of the decedent and the decedent's surviving spouse is separate property.
>
> (3) Appreciation in the value of separate property during the most recent marriage of decedent and decedent's surviving spouse is separate property.
>
> (4) [This paragraph deals with enhancement contributions for debt service on or improvements to decedent's separate property from joint or commingled property or from the separate property of the surviving spouse; these are not decedent's separate property. (This paragraph is treated further below, at II.B.3.)]
>
> (5) All property of decedent or the decedent's surviving spouse, whether or not commingled, is rebuttably presumed not to be separate property.

b. Retroactive Effect of Characterization. A separate property transfer is a transfer made by a spouse from what was then the spouse's separate property (see UCA §§ 75-2-208(1) and 75-2-208(4), second sentence). Indeed, on one point of view, it may be that it could be from nothing else, because in noncommunity property jurisdictions, a "marital" or "spousal" property concept does not apply to distinguish any property from separate property, except on death or divorce. See General Uniform Law Comments to UPC Revised Article II, Part 2. The provisions of UCA § 75-2-208 relating to defining separate property apply at the death of the first spouse to die, but not earlier when the contribution was made. On the other hand, the provision is intended to be applied as if there was some class of property other than separate property at the time of the transfer, distinguishing between classes by limiting separate property to the specified types (owned at marriage, received by gift, etc.) for purposes of the provision.

c. The Need to Trace. To be separate, a property interest must have as its source property meeting the base definition. From there, the original separate interest may be divided into or conjoined with other interests and may generate income or increase in value which also may be divided into or conjoined with other interests.

Unless the character of interests in an asset otherwise would change to nonseparate with the addition of any nonseparate (even traceable) component however small, then each contribution would need to be classified as to source and allocated between the separate component and the nonseparate component of the interests.

If an asset or an interest always must be either all separate or nonseparate, then anything coming into a separate interest from any source for the property interest other than the particular items meeting the "separate" definition, would reduce separate property treatment to the vanishing point. This is not what the statute is trying to do. It uses a concept of separate property derived from community property where mixtures of separate and community interests are common. Each individual interest of the myriad types and varieties in any of the includable classes of interests are required to be tested for whether they qualify as separate (UCA § 75-2-208(1)), and some such interests in a given asset may qualify for inclusion in the family augmented estate, and some may not, based on the inclusion definitions and on whether or not they meet the definition of separate property.

There is not in the statute anything to indicate that any interest must be all of one inclusion class and none of another or that any interest must be all separate or all nonseparate. UCA § 75-2-208(4) itself contemplates that the enhanced separate property will have a separate and nonseparate component, and nothing indicates that such allocation into separate and nonseparate components is unique to this Section. The word "property" is used in the Section and throughout the statute to indicate a property interest of a person, not a given asset or trust or other property device in which there may be numerous interests of many kinds. Also, the provision in UCA § 75-2-208(5) that property, whether or not commingled is rebuttably presumed not to be separate, would hardly have any function if an interest had to be all separate just to meet the base definition of separate. Further, UCA § 75-2-208(1)(e) contemplates that a personal injury recovery is separate only to the extent attributable to expenses paid from separate property and thus will have a separate and nonseparate component.

Each interest of either spouse must be traced to its source or sources to determine to what extent it meets the definition of separate property. This will be complicated, but it is unavoidable.

2. **The Problem of Personal Injury Recoveries**. Let's look deeper into how personal injury recoveries are treated. There is a mysterious provision (UCA § 75-2-208(1)(e)) which directly addresses the allocation of such recoveries. It is trying to define the separate property which will not be part of the augmented estate for purposes of the spousal election (*i.e.*, where the surviving spouse elects against a will which disinherits or substantially disinherits the surviving spouse). Overall, the statute mandates a lot of tracing; it seems to be keeping to this tracing approach here in the language "to the extent attributable". What I take it to mean is that the property derived from a personal injury recovery is to be allocated between separate (which will not be subject to the augmented estate election) and nonseparate (which may become part of the augmented estate for the 1/3 election) based on the source of funds (separate or nonseparate)

used to pay the "expenses paid or otherwise satisfied" somehow related to the recovery. If, say, 20% of the expenses were separate property, then 20% of the recovery would be separate property.

Nevertheless, this is not a complete solution to the mystery, but just pushes the analysis back to the issue of what is the source of the expenses, and further, to the issue of what are the expenses to be taken into account at all. For example, if the recovery is $100,000, subject to a 40% contingency fee, is the fee an expense? It would seem to be. Is it to be deemed separate or nonseparate? Perhaps the UCA § 75-2-208(5) nonseparate presumption indicates this fee is not separate; on the other hand, it could be allocable to the source of recovery. If medical expenses of $30,000 are included in the recovery, and these were paid half by separate funds and half by nonseparate funds, it is easy to say that $15,000 should be treated as a separate expense because this replaces separate property. However what happens with the pain and suffering award of $70,000? Is it split in the same proportion? Or is it not split at all because no expense relates to pain itself (as opposed to its treatment, which is covered by the $30,000)? This latter seems to be the better interpretation. The contingency fee could be allocated accordingly: 30% ($30,000/$100,000) of the $40,000 fee (*i.e.*, $12,000) could be allocable to the medical recovery, and 70% of the fee could be allocable to the pain and suffering recovery.

However, 60% of the judgment or settlement (*i.e.*, after fees) is actually recovered in reality. The net $60,000 recovery would be part separate and part nonseparate. The total of all expenses related to the recovery are $30,000 + $40,000 = $70,000, of which $15,000 + (1/2 of the $12,000 = $6,000) or $21,000 is treated as separate, and the rest is treated as nonseparate. Thus, 21/70 or 30% may be the separate recovery, making $60,000 x 30%, or $18,000 separate and not subject to the spousal election, and $42,000 would be in the augmented estate; so potentially up to 1/3 of the $42,000, or $14,000, could go the surviving spouse. The final result is deceased's estate $46,000, surviving spouse $14,000.

3. **Enhancement Contributions**. We will deal even more with enhancement contributions later, but let's start now looking at them more closely. As we will use the term an "enhancement contribution" is a contribution to make debt service payments on, or improvements to, decedent's separate property. The enhancement contributions which will be of particular concern will be those by the surviving spouse through the use of that spouse's separate property or by either spouse through the use of "joint or commingled funds" of the spouses.

a. Statutory Provision. These enhancement contributions are described in and receive some special treatment under UCA § 75-2-208(4), which provides:

> (4) Except as provided in this Subsection (4), any increase in the value of separate property due to improvements to or the reduction in debt owed against separate property during the most recent marriage of the decedent and the decedent's surviving spouse is separate property. An amount equal to any payment for improvements to or the reduction in debt owed against separate property of the decedent made during the most recent marriage of the decedent and the decedent's surviving spouse from the joint or commingled funds of the decedent and the decedent's surviving spouse, or from the separate property of the surviving spouse, shall not be separate property to the extent of the amount actually paid for the improvements or the amount actually paid for the reduction in debt, including principal, interest, and other payments under the note, owed

against separate property. The amount that is determined not to be separate property may not exceed the value of the separate property.

b. Qualifying as an Enhancement Contribution. In order to be an enhancement contribution covered by UCA § 75-2-208(4), a contribution must meet these conditions:

i. it must be used to pay for an improvement (an undefined term) to separate property of decedent (this seems to contemplate improvements to real property or tangible personal property), or to pay debt (principle, interest, or other amounts under the note) owed against separate property (*i.e.*, the debt must be secured by separate property, whether or not real or tangible) of decedent during the most recent marriage of decedent and the surviving spouse;

ii. the payment must come from either the joint (*i.e.*, even if not commingled) or commingled funds (this does not seem to contemplate a payment in kind from joint or commingled property) of the spouses or from the separate property of the surviving spouse (this seems to allow payments in kind from the survivor); and

iii. the property enhanced by the contribution must be decedent's separate property (which is to say, the property must qualify as separate property under the definition of separate property).

Separate property of the survivor used to benefit the decedent's separate property in any way other than debt payment or improvements (an undefined term) would not be an enhancement contribution, and nonseparate property even if used for such debt payments or improvements would also not be an enhancement contribution.

As with any other contribution, an enhancement contribution needs to be allocated as part of the property interest enhanced, as either part of the separate component or the nonseparate component of that interest. This section and UCA § 75-2-208(1)(b), as well, make it clear that the enhancement contribution will not be treated as part of the decedent's separate property component in the property interest enhanced.

c. The Function of the Enhancement Contribution Characterization. Once the decedent's interest has been traced to its sources and the various components determined to be separate or nonseparate, the effect of UCA § 75-2-208(4) on the interest must be determined.

i. Nonseparate Treatment. The first thing to notice is that this Section does not treat as decedent's nonseparate property any enhancement contributions property derived from the surviving spouse which would not already be nonseparate property for the decedent. The separate property definition can never be met on receipt of a transfer from the spouse unless designated as separate by the transferring spouse in writing. Whether or not the spouse intended a gift, the transfer is nevertheless not a gift from a third party as required under the definition. See UCA § 75-2-208(1)(b) and (d). So characterizing the enhancement contribution as to decedent is not the function of UCA § 75-2-208(4).

ii. Enhancement Growth. The first sentence of UCA § 75-2-208(4) is applicable to either spouse. The sentence reiterates that growth in value of separate property remains separate property, but the wording arguably could be read more broadly. The matter of the treatment of growth arising from enhancement contributions may be ambiguous in this sentence. Does that first sentence go beyond a mere reiteration as to growth in what has always been decedent's separate property in order to create separate property for the decedent out of growth to property which has never been, and under the definition never could be, the decedent's separate property? Such an interpretation would reduce the augmented estate to the benefit of decedent and to the detriment of the survivor. The issue here is very important, because it may profoundly affect the size of the family augmented estate from which the survivor's share will be drawn.

(a) Growth from Enhancements Not Separate. That first sentence also expressly excepts from such separate treatment for growth, the nonseparate property of decedent described in the rest of the paragraph. Growth to separate property would be separate property, anyway, under UCA § 75-2-208(3), but that result is here reiterated, perhaps for emphasis or clarification, with respect to debt reduction and improvements. If a contribution has its source in separate property of the owner of the enhanced separate property, it would be separate property, and "any increase in value to separate property" due to such debt reduction or improvements would be separate property, too.

However, under the exception clause in the first sentence, where the survivor's separate contribution becomes nonseparate as to decedent when made, as is specified in the rest of the paragraph (as well as UCA § 75-2-208(1)), the contribution clearly was not, and would not become, the owner's separate property. The same would apply to a joint or commingled contribution. Thus, neither would any increase allocable to the contribution become decedent's separate property, because the increase could not be "any increase in value to separate property" when it is an increase to nonseparate property.

(b) Growth From Enhancements Separate. It could be argued, on the other hand, that the first sentence of UCA § 75-2-208(4) was intended to somehow create separate property out of contributions which would not otherwise be separate. Under this view, so long as the contributions were for debt reduction or improvements allocable to enhance separate property, they could be from any source of either spouse and still be turned into separate property of the owner of the enhanced separate property interest, along with any further growth in value attributable to them. Under the second sentence, the survivor's separate property contributions and joint or commingled contributions would be backed out again and not be treated as the decedent's separate property, but the growth from these contributions would be left behind as decedent's separate property and so would all nonseparate enhancement contributions from either spouse and the growth attributable to them.

Separate or nonseparate (but nonenhancement) contributions by the survivor to benefit decedent's property would become nonseparate property in decedent's hands.

Under this view, the decedent could invest wages and other nonseparate property to enhance separate property by debt reduction or improvements and thus magically transform nonseparate into separate property to the unlimited detriment of the surviving spouse, who at

most would be entitled to only a third of the enhancement payments themselves (without growth) made by the survivor or made with joint or commingled funds.

Even more strangely, nonseparate enhancement contributions by the survivor would become separate property of the decedent, both as to the contribution and as to growth from it, in direct contradiction to UCA § 75-2-208(1)(b) which requires for transfers to become separate, they must be gifts from someone other than a spouse. Compared to a separate property contribution by the survivor (whether an enhancement contribution or not) and a nonenhancement nonseparate property contribution by the survivor (which contributions themselves are nonseparate in decedent's hands), the detriment would be much worse for the survivor on an enhancement contribution from nonseparate property by decedent or the survivor, because the survivor is entitled to no part of the decedent's separate property into which such contributions would be inexplicably transformed.

(c) Enhancements not Survivor's Separate Property. Let's pursue a red herring for a moment. Although the assumption should not be accurate as argued above, the statute appears to assume that absent the statutory exclusion under the second sentence of UCA § 75-2-208(4) from decedent's separate property, any enhancement contribution from the survivor's separate or nonseparate property would have been the decedent's separate property (see the first sentence of that Section). Consistent with this assumption, it might be argued that spousal separate property enhancement contributions and nonseparate enhancement contributions were not intended to be in the same class as spousal gifts or transfers to the deceased, which can never meet the definition of deceased's separate property under UCA § 75-2-208(1)(b); but in that case, it is not at all clear what else the enhancement contribution would be. The enhancement contributions of either kind still don't meet the definition of decedent's separate property, and to treat them instead as the survivor's separate property would be contradictory to the assumption that they somehow would otherwise be decedent's separate property. Thus, even the erroneous assumption would not lead to the property's being the survivor's separate property; the definition of separate property just is not met for the survivor any more after the transfer.

In any event, with or without such an assumption, although the separate enhancement contributions were the survivor's separate property at the time made, at the time of decedent's death, they aren't the survivor's any more, whether subject to UCA § 75-2-208(1)(b) or not. The nonseparate enhancement contributions never were the survivor's separate property before, and this does not change on transfer.

(d) Evaluation. Although such an interpretation making growth from enhancements decedent's separate property may fit some of the language of UCA § 75-2-208(4), it is inconsistent with the rest of the separate property provisions, especially the UCA § 75-2-208(1) definition of separate property. The nonseparate presumption of UCA § 75-2-208(5) would be dramatically weakened if all the decedent needed to show in order to create new separate property is that an enhancement contribution from any source at all was made.

Further, such an interpretation does not give full effect to the exception clause of the first sentence of UCA § 75-2-208(4), which appears to except from any separate property growth

treatment under the first sentence all enhancement contributions discussed in the rest of the paragraph.

Any asset can have both separate property and nonseparate property components and can have two separate property components, one derived from each spouse. It is notable that the statute does not say to start with the enhanced value of an asset, including all separate property and nonseparate property components, and then subtract only the enhancement contribution amount. Rather, and more reasonably, it starts with a particular property component (which may be all or part of an asset), the separate property of decedent, and then deals with increases in value only to that separate property component.

The first and third sentences of UCA § 75-2-208(4) are not limited to decedent but on their face, apply to any separate property of either spouse. On the other hand, the second sentence of the paragraph is expressly limited to enhancement contributions to "separate property of the decedent." The second sentence says that enhancement contributions toward decedent's separate property by the surviving spouse or from joint or commingled property will not be separate property. There is no similar provision for enhancements to the survivor's separate property. Under the interpretation of the first sentence that allows the creation of new separate property by reason of enhancements from any source, are we to understand that any enhancement contributions to the survivor's separate property from any source are always for the sole benefit of the survivor (and excludable from the augmented estate), including those from the decedent or those from the survivor's wage savings? There does not appear to be any policy reason to give a poorer spouse either an incentive to pour all that spouse's wages into enhancing that spouse's separate property in order to prevent the reduction of the elective share payable by reason of holding nonseparate property treated under UCA § 75-2-209 as a payment toward the elective share at full value, or a unilateral benefit in preventing decedent's enhancement contributions from offsetting the elective share entitlement when the same result would not apply to decedent's other transfers to the survivor. There is even less policy reason to give a richer spouse, who may or may not end up as the survivor, any such incentive.

Looked at from the perspective of either spouse, the interpretation is contrary to the overall thrust of the elective share rules to treat only property from certain sources (inheritances, etc.) as separate and to have property from all other sources treated as nonseparate and includable in the family augmented estate.

If the interpretation creating separate property for the decedent is accepted as being the intention of the legislature, it would indicate a mean spiritedness on the part of the legislature that would be surprising. (<u>See</u> discussion of intention in III.A. below.) It would stand the purpose of the elective share on its head by turning a minimal benefit for the surviving spouse into a windfall for the decedent.

(e) <u>Presumption</u>. The first view, that growth from enhancements contributions is nonseparate, is the better view. It is consistent with the remainder of the statute, where the second view is not. If there is an ambiguity about the operation of UCA § 75-2-208(4), the solution may be found in the policy behind the presumption of nonseparate treatment under UCA § 75-2-208(5) and the application of the clear nonseparate treatment under UCA § 75-2-208(1)(b).

As we proceed to analyze how the elective share and the tracing and allocations required by it work, we will generally assume that this issue will be resolved in favor of the better view. However, if the matter is resolved the other way, the allocations would still be done in the manner discussed below, but the amounts allocated to decedent's separate property would increase, often dramatically. If this were to occur, the grounds for an unjust enrichment claim would be even stronger. See III.C. below.

iii. Joint Property Distinction. Another thing to notice is that there is a new distinction made in UCA § 75-2-208(4), the distinction between "joint" or "commingled." The word commingled is also used in the rebuttable presumption that property, whether or not commingled, is not separate; the word "joint" is not used in the presumption. Thus, property that is not commingled, but are joint funds, would be treated as not being the decedent's separate property even if some part of the joint funds used for enhancement would be traceable to decedent's separate property. The reason for this is not apparent.

A change in characterization does not, however, apply for the survivor's traceable separate property funds held in a joint account with decedent. Those funds are unaffected by treating them as not the decedent's separate property, because they never were the decedent's separate property. The provision does not purport to change the character of the survivor's funds added to the joint account, so to the extent the joint funds are traceable to the survivor's separate property, they would count as a separate property enhancement contribution from the survivor. Although this won't make a difference in the elective share, it may make a difference with respect to an unjust enrichment claim. (See III.C below.)

For either spouse, joint funds not used for enhancement contributions or some other purpose would remain the separate property of each to the extent the source is traceable to such separate property.

iv. Limit on Effect of Enhancements. Beyond the function of changing the character of decedent's portion of joint funds when used for property enhancements, UCA § 75-2-208(4) also functions to put a limit on the effect that enhancement contributions, whether the source is characterized as joint, commingled, or the survivor's separate property, will have on the decedent's separate property interest which was enhanced.

(a) The Compare and Cap Limit. UCA § 75-2-208(4), last sentence, provides that the amount determined not to be separate property may not exceed the value of the separate property. The nonseparate property referred to is not just any nonseparate property component, but is the particular property determined under the prior sentence, which is to say, "the amount actually paid for the improvements or the amount actually paid for the reduction in debt." Thus, these particular items of contribution which are nonseparate for decedent must be compared to the contributions which are separate for the decedent, and if the particular nonseparate items would exceed in value the separate items, these nonseparate items will not be allowed to increase further to cause the separate items to be less than equal with them. In decedent's hands, other nonseparate components are not so limited, but the nonseparate enhancement components from the particular items cannot exceed the decedent's separate component.

(b) Compare Including Increases. Includable interests and the portion of them that derive from separate or nonseparate sources are determined by looking at what interests there are at the time of decedent's death and then looking backward from there to see where they came from. In doing so, increases allocable to separate property would also be separate, and increases allocable to nonseparate property would also be nonseparate (they couldn't't possibly be separate under the definition of separate). Thus, in applying UCA § 75-2-208(4), there is the question: in comparing the specified enhancement items against the decedent's separate property items, are the bare contributions compared, or are such increases compared, as well? Depending on when the contributions were made, the answer can be significant. There is no particular reason not to treat all of decedent's separate property component in the interest, both contributions and increases, as separate and to treat all nonseparate property attributable to the particular items, both contributions and increases, as nonseparate for purposes of making the comparison. To do otherwise could cut the decedent's separate component being compared down to a fraction of what it would otherwise be where, for example, the decedent held the property for a considerable time before marriage during which time it enjoyed substantial appreciation.

d. Community Property. Enhancements related to community property including any held in Utah are outside this regime because under UCA § 75-2b-104 community property "may not reduce, be subject to, or be used in calculating, the surviving spouse's elective share."

C. **An Example**. Let's try an example to see where it takes us.

1. **The Assumptions**. Let's first assume that H died in 2009 specifically leaving nothing for his wife W under his will and having given her nothing during his lifetime. H owned at death real estate valued at $800,000, for which he paid $200,000 prior to the marriage and for which W contributed $100,000 out of inherited funds for improvements and debt service payments and for which another $100,000 was contributed for such purposes out of the joint bank account in which both spouses deposited at various times in various amounts funds from their separate investments (some from before the marriage, others acquired afterwards), business income, wages, and so on, and from which both spouses used funds for various purposes, but which account was closed before death, and few records of it remain. The increase in real estate value attributable to the $200,000 of contributions was $100,000 based on improvements made, debt paid, and a proportionate share of the income and appreciation on the property. H also owned a separate bank account of $200,000 derived $100,000 from his wages and $100,000 from farm operations on the real estate, including payments for not growing crops for certain years, but less amounts shown to be reasonable rental value. H transferred (by gift, sale for less than full consideration, etc.) during the marriage and within two years of death to children from a prior marriage and others $200,000 of which $100,000 derives from property owned before marriage, gifts, and inheritances (and appreciation and income on it, including rental value), and $100,000 derived from earnings, etc., during marriage. His estate paid $75,000 of funeral and administrative expenses and $25,000 to W as homestead, exempt property, and family allowance. W owned $350,000 of which $300,000 was from an inheritance and $50,000 was from saving wages. W made no gifts or other transfers, except for the contribution to benefit H's real property. Neither spouse had debts.

2. **The Calculations**. In overview and subject to important refinements we will get to later, the elective share would presumably be calculated like this:

1.	H's net probate estate: real estate bank account funeral and admin. expenses homestead & allowances	 $800,000 $200,000 ($75,000) ($25,000)	$900,000
2.	H's nonprobate transfers to others		$200,000
3.	H's nonprobate transfers to W		-0-
4.	W's property: investments probate & nonprobate transfers from H nonprobate transfers to others	 $350,000 -0- -0-	$350,000
(The total family wealth taken into account would be $1,450,000.)			

5.	H's separate property: probate real estate-separate W's contribution commingled contributions share of probate expense & allowance income, appreciation, increase on W's and commingled contributions farm operation-separate nonprobate transfer-separate	 $800,000 ($100,000) ($100,000) ($80,000) ($100,000) -0- $100,000	($520,000)
6.	W's separate property inherited Investments	 $300,000	($300,000)
7.	Augmented Estate		$630,000
8.	Spousal Elective Share one-third Augmented Estate homestead &allowances W's nonseparate property Remainder payable	 $210,000 ($25,000) ($50,000) $135,000	
Now let's make some further calculations to compare some results.			

9.	Spousal Worth of W after election W property elective share payable homestead & allowances	 $350,000 $135,000 $ 25,000	 $510,000
10.	H's estate worth before and after elective share: probate estate less admin. expense nonprobate transfers worth before homestead & allowances elective share payable worth after Asset Shift	 $ 925,000 200,000 $1,125,000 ($ 25,000) (135,000) $ 965,000	 $160,000

11.	Result if W made no contribution to H's separate property: a. H estate gross worth with contribution W separate property contribution increase in H's real estate value from appreciation, etc., allocable to the contribution H estate gross worth without contribution funeral and admin. expense homestead and allowances Net worth without contribution b. W estate worth with contribution contribution retained assumed return on contribution W estate worth without contribution c. Family worth taken into account (smaller growth, smaller probate expense) d. H's separate property and reductions:	 $1,200,000 (100,000) (50,000) $1,050,000 (60,000) (25,000) $ 965,000 $ 350,000 100,000 25,000 $ 475,000	 $1,440,000

	real property commingled contributions share probate expense & allow growth from commingled contributions nonprobate transfer H's separate property: W's separate property: Augmented estate	$ 650,000 (100,000) (60,000) (50,000) 100,000	 (540,000) (425,000) $ 475,000
	e. One-third of augmented estate W nonseparate property homestead and allowances remainder payable	$ 158,333 (50,000) (25,000) $ 83,333	
	f. Spousal worth of W property allowances elective share payable	 $ 475,000 25,000 83,333 $ 583,333	
	g. Compare H's worth and W's worth before and after elective share in both contribution and noncontribution situations: contribution situation: H before - $1,125,000 W before - $350,000 H after - $965,000 W after - $510,000 asset shift - $160,000 noncontribution situation: H before - $990,000 W before - $475,000 H after - $881,666 W after - $583,333 asset shift - $108,334 differences in results after election: H - $83,334 W - ($73,333)		

Thus, H's estate has been unjustly enriched at least by an amount between $83,334 (H's estate is greater after the election where W has made the contribution than when she has not) and $73,333

(W's estate is less after the election where W has made the contribution than when she has not). W has not fully recovered her contribution or a return on it.

D. **Separate-Nonseparate Asset Allocation**. Each asset in each class of assets includable in the augmented estate will need to be allocated as between separate and nonseparate property for each spouse. Then debt and expenses relating to each class of assets will need to be allocated as separate or nonseparate. This process was not shown in the prior example in order to simplify the example, so that the overall method of the statutory calculation could be demonstrated. We will go into the process now.

1. **General Allocation Mechanics**. Let's start with some observations on making the asset allocations. We will treat issues for enhancement contributions next, but for now, let's focus on general source allocations between separate and nonseparate components and the statutory and practical steps necessary to make them.

a. The sources of contributions toward each asset need to be traced and the contributions valued as of the date contributed. The spouse who is the owner of an asset (whether denominated separate or nonseparate) should not be treated as having contributed toward it normal, noncapital expenses, which are an owner's own normal responsibility, such as annual property tax, normal repairs and maintenance, property insurance, investment trading expenses, etc. If these were provided by the nonowner spouse, they would be a contribution because the amount relieved the owner spouse of the owner's ordinary responsibility.

b. It may be best that where the source, time, and value of a contribution are not clear, the burden of demonstrating these matters (to the extent not covered by the nonseparate presumption) should be on the party primarily benefitting from the item. Thus, the burden would be on the decedent's estate as to contributions asserted to be excludable from the augmented estate (such as the separate property of decedent) (see also the nonseparate presumption of UCA § 75-2-208(5)) or asserted to be treated as having been already received by the survivor toward the elective share amount (such as transfers to the survivor on decedent's death or the survivor's nonseparate property), and the burden would be on the survivor as to contributions asserted to be included in the augmented estate, but not treated as already paid toward the elective share (such as property enhancement contributions made with separate property by the survivor or nonseparate property held by decedent at death). Since the survivor benefits most from survivor's separate property (as to decedent, it does not increase the augmented estate; as to the survivor, it does not get treated as a prepayment of benefits out of the augmented estate), the burden under this principle and under the nonseparate presumption, would be on the survivor.

c. An initial determination will be needed whether the asset has appreciated in value beyond the total of all contributions toward it.

d. Where an asset has appreciated in value, the appreciation needs to be allocated to the various contributions and prorated over time. Typically, the longer a property interest has been held, the more appreciation to it will accrue over time. It would be best to assume, in the absence of specific contrary evidence, that appreciation has been consistent over

time and is proportionate to the value of contributions made from time to time. If a party can show otherwise, and it makes some important difference, perhaps appraiser testimony would be needed as to the source and timing of appreciation. However, starting with an assumption of a constant rate of appreciation over time will help reduce the disputes over appreciation and the costs of determination. Analogously, in a divorce context, Utah courts have used a coviture formula approach to allocate retirement plan accounts with equal weight for each year of service over the life of the marriage. See *Oliekan v. Oliekan*, 147 P.3d 464 (Ut. App. 2006); *Woodward v. Woodward*, 656 P.2d 431 (Ut. 1982).)

e. In applying the time element, a reasonable timing convention will be needed. The convention could be in any unit of time from a second to a century, but the realistic range of choice would be from a day to a year. A monthly convention may be best to simplify calculations, yet not stretch matters out too far. This is consistent with bank and investment industry practices of sending monthly statements. However, in a long marriage where records are sparse and closer timing is not practical, a yearly convention could be appropriate as to at least some items. The monthly convention would be that any contribution made in a month would be treated as made on the last day of the month, and each month would be treated as made up of 30 days, with each year consisting of 12 months, totaling 360 days.

f. Appreciation would be allocated each time a contribution is made based on the proportions of the types of contributions made earlier. The appreciation to be allocated would be established, where the monthly convention is used, by first dividing the total appreciation (date of death value less all contributions) by the number of months from the month of the first contribution (*e.g.*, the receipt of a nonspousal gift) to the month of decedent's death. This provides a monthly appreciation figure. This figure would be multiplied by the number of months between contributions, and the result would be allocated proportionately by value among the separate and nonseparate contributions of each spouse as of the prior contribution.

g. Consistent with the statute, all debt service payments would be allocated as a contribution without regard to how much is principal or interest. See UCA § 75-2-208(4). Although some portion of such payments (*e.g.*, interest) may be seen as the normal responsibility of the owner (for these purposes, typically the decedent), consistency between the decedent and the survivor on this matter may be a more important consideration. Also, the procedure of allocating the entire debt service payment is analytically much simpler to apply.

h. For some assets, there will be not only contributions but also reductions by transfers or withdrawals, perhaps to add to other assets, to transfer to other people, or to spend. These reductions would need to be taken into account as of the dates they occur (using the monthly or other applicable convention). If there are lots of transfers in and out involving a mix of items traceable to separate and nonseparate property, the entire asset may be treat as nonseparate.

If the transfers in and out don't reach this level, it may be appropriate to presume that, absent contrary proof, transfers to others or used for spending (other than for family expenses) are first made out of the separate component allocable to the transferring spouse. This

presumption is consistent with the presumption of nonseparate property of UCA § 75-2-208(5) and the general policy of preventing spousal disinheritance.

Amounts spent for family living expenses should be treated as paid from commingled or nonseparate components first. Separate components spent on such items should be treated as simply spent and not be recovered from any later nonseparate addition to the fund. *See v. See*, 415 P.2d 776 (Cal. 1966) provides a community property analog.

Transfers from one asset of a spouse to another asset of that spouse would be treated as made proportionately from the separate and nonseparate components in the first asset allocable to the transferring spouse.

i. It may be that the total of all contributions toward an asset (net of withdrawals and other reductions) will exceed the value of the asset as of the decedent's death. The date of death value would then be allocated proportionately among the types of contributions; there would be no need to allocate the difference over time.

j. Also, where assets are so commingled between the spouses that tracing is out of the question, allocation of appreciation over time would not be needed. Presumably, these interests would be allocated evenly between the spouses as nonseparate property. The problem for a surviving spouse will be that the survivor only benefits up to one-third of such nonseparate assets but is credited as being prepaid on the elective share at 100% of the value allocated as the survivor's. Thus, if the survivor can show that although commingled, it is clear that not more than a proportion less than half could have been derived from the survivor, the survivor should be able to make such a showing to limit the prepayment effect.

k. The allocations to separate property must meet the definition of separate property under UCA § 75-2-208(1) and must not be subject to the special exclusion from decedent's separate property of enhancement contributions from "joint or commingled funds" under UCA § 75-2-208(4), second sentence. To be separate, the source must be one specified in the definition (*e.g.*, inheritances, property acquired for separate property).

l. Assets may have their source in either separate or nonseparate property or in a combination. Assets, the sources of which are both separate and nonseparate property, so far commingled as to cease to be traceable, would cease to have a separate property component, and thus the entire asset would be nonseparate. This would be the case regardless of whether contributions to the commingled asset came entirely from one spouse or came some from one spouse and some from the other.

m. Where contributions from one property interest of a spouse remain traceable in another property interest of that spouse, they apparently would retain their character as separate or nonseparate in the property interest benefitted. Thus, a separate component in one interest would build the separate component in another interest of the same spouse to which it was contributed; the same would be true for a nonseparate component , as well. The alternative of treating any combination of separate and nonseparate sources, however small, as creating a

commingled nonseparate asset does not fit either the separate-nonseparate treatment of interests under UCA § 75-2-208(1) through (5) or the different treatment of various interests in an asset under the asset inclusion provisions UCA §§ 75-2-204 through 75-2-207. Each property interest in each asset is treated individually and thus each property interest may contain components of separate property or nonseparate property or a traceable mix, in the same way any asset may be a combination of interests under different inclusion provisions.

n. An amount contributed should not be treated as becoming part of an item of separate property of decedent to be treated as if it were such separate property (and thus removed from the family augmented estate), where the amount derives from either the nonseparate property of either spouse, or from the separate property of the survivor, including from debt against the nonseparate property of either spouse or against the separate property of survivor, except to the extent the debt is paid with decedent's separate property. Thus, wage savings or other nonseparate property will not be transformed into inherited or other separate property but will remain part of the family augmented estate as a nonseparate or commingled asset. The separate property component of a spouse should only be property that has always been (or has always been directly traceable to) the inherited or other statutorily defined type of separate property of that very spouse. That definition of separate property does not include anything else and specifically does not include transfers from the other spouse.

o. The treatment of contributions toward the recipient's separate property (or toward nonseparate property, for that matter) from either spouse's nonseparate property, or from the transferor's separate property, would thus be the same; such contributions do not become separate property of the recipient. The definition of separate property would simply not be met. The definition in UCA § 75-2-208(1) of separate property creates separate property only if it comes from certain sources. A gift is one source, but not a gift from a spouse. A gift or a nongift transfer from a spouse, either way, would not meet the definition of separate property for the other recipient spouse unless the UCA § 75-2-208(1)(d) waiver to change it to separate property were signed by the transferring spouse, or unless the recipient acquired the transferred asset by purchase for full consideration paid with separate property under UCA § 75-2-208(1)(c).

This treatment helps resolve the problem of how to treat a survivor's nonenhancement separate property transfer to decedent, because separate or nonseparate property from one spouse on transfer to the other spouse would consistently be treated as the nonseparate property of the recipient spouse, whether or not the separate property of the recipient is enhanced. The separate character of the property would be destroyed for the transferor, however.

p. One item of a spouse's separate property transferred to another item of that same spouse's separate property would, of course, remain separate property. This is the only kind of transfer by a spouse which will build the separate property component in an asset.

2. **Allocation Results**. The following chart summarizes how the general source allocations are ultimately treated in the determination of the surviving spouse's elective

share entitlement. The intersections between where an asset contribution comes from and where it goes to, have been numbered. Each numbered intersection has a top box and a bottom box. The top box shows whether the contribution is included in the family augmented estate, and the maximum proportion of the contribution by which the surviving spouse may benefit. The bottom box shows whether the contribution is treated as a payment towards the survivor's entitlement, and the proportion of the contribution offsetting the entitlement.

	Contribution To:			
Asset From:	Decedent's Separate	Decedent's Nonseparate & ½ Commingled	Survivor's Separate	Survivor's Nonseparate & ½ Commingled
Decedent's Separate	**1** Retained and not in augmented estate – benefit 0/0	**2** Presumed included in augmented estate – benefit 1/3	**3** Included in augmented estate – benefit 1/3	**4** Included in augmented estate – benefit 1/3
	Not treated as prepaid share – offset 0/0	Not treated as prepaid share – offset 0/0	Treated as prepaid share – offset 3/3	Treated as prepaid share – offset 3/3
Decedent's Nonseparate or ½ Commingled	**5** Included in augmented estate – benefit 1/3	**6** Included in augmented estate – benefit 1/3	**7** Included in augmented estate – benefit 1/3	**8** Included in augmented estate – benefit 1/3
	Not treated as prepaid share – offset 0/0	Not treated as prepaid share – offset 0/0	Treated as prepaid share – offset 3/3	Treated as prepaid share – offset 3/3
Survivor's Separate	**9** Included in augmented estate – benefit 1/3	**10** Included in augmented estate – benefit 1/3	**11** Retained and not in augmented estate – benefit 3/3	**12** Presumed included in augmented estate – benefit 1/3
	Not treated as prepaid share – offset 0/0	Not treated as prepaid share – offset 0/0	Not treated as prepaid share – offset 0/0	Treated as prepaid share – offset 3/3
	13 Included or	**14** Included in	**15** Included in	**16** Included in

Survivor's Nonseparate or ½ Commingled	in augmented estate – benefit 1/3	augmented estate – benefit 1/3	augmented estate – benefit 1/3	augmented estate – benefit 1/3
	Not treated as prepaid share – offset 0/0	Not treated as prepaid share – offset 0/0	Treated as prepaid share – offset 3/3	Treated as prepaid share – offset 3/3

Compare items 4, 7, 10, and 13 (separate-nonseparate), where any contributions to the survivor come from any assets of the decedent, the decedent obtains favorable treatment. Transfers from the survivor (items 13 and 10) may be under something of a cloud, because UCA § 75-2-208(4) only specifically discusses survivor separate to decedent separate enhancement contributions, but nevertheless they should be included in the augmented estate simply because they don't meet the definition of separate property. Next compare items 3 and 9 (separate-separate); decedent's treatment is again better, with the survivor's separate contributions receiving no better treatment than nonseparate property held by decedent (compare item 6 with item 9). Also compare items 14 and 16 (survivor's nonseparate property held or transferred to decedent); strangely, under the structure of the statute, the survivor would be treated better contributing to the decedent than holding the property.

3. **Enhancement Mechanics**. Let's now explore the statutory mechanics as to separate property enhancement contributions by the survivor to benefit the decedent's separate property. We discussed earlier the interpretation of UCA § 75-2-208(4), which is poorly written. (<u>See</u> II.B.3. above.) The mechanism under the statute appears to work this way:

a. The increase in value to separate property (whether the decedent's or survivor's) from improvements or debt reduction is separate property (UCA § 75-2-208(4), first sentence), subject to an exception for contributions to decedent's separate property for such property enhancements made from "joint or commingled" funds or from the separate property of the survivor (UCA § 75-2-208(4), second sentence). The exception for joint funds indicates that even to the extent the joint funds could be traced to the separate property of the decedent, those funds will nevertheless not be separate property of the decedent, nor will any increase based on those funds.

b. The property enhancement contribution from joint or commingled funds or from the survivor's separate property is not the decedent's separate property (UCA §§ 75-2-208(4), second sentence, and 75-2-208(1)(b)). The amounts treated as nonseparate property from such enhancement contributions or amounts allocable to them cannot exceed the value of the separate property enhanced. UCA § 75-2-208(4), last sentence. Thus, amounts allocable to the decedent's unenhanced separate contributions are protected from being proportionately diluted by amounts allocable to enhancement contributions. Other contributions, *e.g.*, from the survivor's nonseparate property, could still have a dilutive effect.

c. Income attributable to, or appreciation in, separate property is separate property (UCA § 75-2-208(2) and (3)).

d. The augmented estate includes (among other things) all property of (or attributable to) the decedent and the surviving spouse (UCA §§ 75-2-203 to 207); it would thus include all income, appreciation, or increase whether attributable to the decedent's separate property or to commingled or spousal contributions.

e. The augmented estate is reduced by the decedent's separate property (UCA § 75-2-208(1)), and decedent's nonseparate component attributable to enhancement contributions is capped by decedent's separate property (UCA § 75-2-208(4), last sentence).

Such separate property itself should be reduced by at least its proportion of estate debts, administrative expenses, and payments of homestead and allowances based on gross value (*i.e.*, the value is not reduced by the survivor's enhancement contribution or gain allocable to it), since the entire property belongs to decedent's estate. As discussed further below (at II.D.6.) in connection with an analysis of debt and expense allocations, such separate property should also be reduced by additional amounts of such items where debts benefit such separate property, where the survivor's share not actually paid from the estate has received no benefit from the administration expenses, or where the exempt property, homestead, and allowances for the survivor would otherwise be treated worse than a probate transfer to the survivor or where necessary to preserve the priority of the homestead, exempt property, and family allowance over estate debts and other items, and over the benefits of other estate beneficiaries. See UCA § 75-2-401, *et seq.*

f. As we have seen above, enhancement contributions to benefit decedent's property from joint or commingled funds or from the separate property of the survivor are not the decedent's separate property to be removed from the family augmented estate. However, although retained in the family augmented estate, any gain attributable to the enhancement contributions will benefit the survivor, if at all, only up to one-third of it.

g. As discussed earlier, where the enhancement contribution is not decedent's separate property, the provisions treating income, etc., of separate property as separate property would not apply to these contributions to benefit decedent; thus decedent's separate property would not include any income or appreciation attributable to such enhancement contributions, and under the first and second sentences of UCA § 75-2-208(4), would not include any increase in value from the contributions themselves.

First, enhancement contributions from the survivor do not meet the definition of separate property under UCA § 75-2-208(1); they are not inheritances, gifts from someone other than a spouse, etc. Furthermore, the second sentence of UCA § 75-2-208(4) is quite clear that enhancement contributions for decedent are not, and (bearing in mind the statute's retroactive application of the separate-nonseparate concept) have never been, decedent's separate property (except possibly some joint funds clearly no longer to be treated as separate). The "Except as provided in this subsection (4)" initial clause of the first sentence indicates that in applying the first sentence, such contributions, which, under the second sentence, are not decedent's separate property, are not dealt with in or subject to the first sentence, so that "any increase in value of

separate property" cannot include any increase in value on the portion which is and has always been nonseparate property as to the decedent, the portion derived from the enhancement contribution of the survivor or from joint or commingled property. (See II.B.3. above.)

h. The augmented estate would thus not be reduced as being decedent's separate property by any such income, appreciation, or increase attributable to the property enhancement contributions or by such contributions themselves; rather, these items of gain need to be allocated between the decedent's separate property and the enhancement contributions and other nonseparate property.

None of the joint or commingled property enhancement contributions and none of the income, appreciation, or increase either attributable to any such joint or commingled contributions or attributable to contributions from the survivor's former separate property, is the separate property of the surviving spouse either (UCA § 75-2-208(1)(b)); indeed, they are not treated as property of that spouse at all under UCA § 75-2-208(4) as of decedent's death.

i. This same treatment would apply to the survivor's separate property enhancement contributions themselves. Such contributions would not be the survivor's separate property either, since they were transferred and are not titled to the survivor, and the survivor does not appear to have "acquired" anything in exchange for the transfer of separate property within the meaning of UCA § 75-2-208(1)(c).

The augmented estate is not reduced by any such enhancement items, since they are not the separate property of either spouse. (If this were not the case, that is, if the enhancement contributions were the separate property of either spouse, then the contributions would not be in the augmented estate at all, which is quite contrary to the intention of the provision.)

Enhancement contributions would need to be tracked. Enhancement contributions treatment can only apply with respect to tangible real or personal property, which was originally acquired by decedent as decedent's separate property, and can only apply to joint or commingled funds or separate property from the survivor (the survivor's separate and traceable contribution to joint funds would be the survivor's separate enhancement contribution) and can only apply to secured debt service payments or to improvements. Over time, the asset may have a nonseparate component (*e.g.*, from nonseparate property contributed by the survivor or by the decedent). Where this is the case, a new contribution from the allowable source toward debt service or improvements would be allocated proportionately between, on the one hand, the decedent's separate component as an enhancement contribution to it (thus adding to the separately-tracked survivor's enhancement contributions which are treated as nonseparate in decedent's hands) and, on the other hand, the general and enhancement nonseparate components, because the contribution benefits the entire property interest, including both the separate and the nonseparate components.

Where a separate property interest of the decedent has been enhanced by contributions from the survivor's separate property or from joint or commingled funds, the compare and cap provision of UCA § 75-2-208(4), last sentence, would be applied as of the date of decedent's

death. The provision would not be applicable prior to then. However, at death, the provision would shore up the proportion of an affected asset treated as decedent's separate property. The result is that the survivor's share of the augmented estate derived from the other components in the asset will be less than one-third.

4. **Debt Allocations**. The mechanics of allocating and characterizing contributions to property interests with the proceeds of debt, appear to work this way:

a. The statute at UCA § 75-2-208(4), second sentence, requires debt service payments on secured loans to be treated as contributions toward an interest in property for enhancement contribution purposes. This methodology should be used as to any other secured debt, as well, in order to maintain consistency. Thus, debt service payments on secured loans would be treated as contributions out of the various separate or nonseparate sources of the payments and would be allocated to the various separate or nonseparate components of the interests in the pledged asset.

b. If the proceeds of a secured loan are used as a contribution toward another property interest, those proceeds would be allocated among the various interests in the benefitted property, and the separate or nonseparate character of the proceeds would be treated as being derived proportionately from the various contributions earlier made by those with an interest in the pledged property.

c. The contributions earlier made toward the pledged asset presumably would not be treated as reduced at the time of the loan. Until a foreclosure or similar event, the full asset is still operating to produce revenue or otherwise provide use. As of decedent's death, however, the balance of the debt would be appropriately allocated to arrive at the equity value of the various separate or nonseparate contributions toward interests in the pledged asset. Where the statute does not allocate debt service between principal and interest, the amount of contributions toward an asset may be somewhat overstated in favor of a spouse making disproportionate loan service payments; however, this is how the statute seems to work and in many cases, won't be too significant.

d. Proceeds from an unsecured loan used as a contribution toward a property interest would be treated as a contribution by the spouse who borrowed the funds. There is no separate property source, so it should be treated as a nonseparate contribution. At the time of decedent's death the balance remaining would be allocated among the various separate and nonseparate components of the property interests which then support the credit of the borrowing spouse (*i.e.*, owned interests, rather than retained rights, etc., used to calculate the augmented estate but beyond the reach of creditors). Debt service payments on an unsecured loan would not be a contribution toward any property interest.

5. **Allocation Procedure**. With these principles in mind, let's turn to a procedure for making the allocation of assets. The steps would be:

a. Categorize Assets by Class. The assets are first categorized by inclusion class: probate estate, nonprobate transfers, and so forth. This is done for each spouse.

b. Determine Appreciation. Each asset in a given inclusion class is then examined asset by asset. All contributions toward an asset are added up and compared to the value of the asset at decedent's death. If such value is more than the contributions, the appreciation will need to be allocated to the contributions over time, but if the contributions equal or exceed the value, this is not needed.

c. Classifying Contributions. Using the mechanics described above, the contributions need to be classified and characterized as to their source and type, either as separate or else as nonseparate or as joint or commingled. Contributions from a spouse toward an asset would include amounts inherited or received as gifts (other than from the other spouse) by that spouse (*i.e.*, the initial acquisition of the asset), debt service paid with respect to the asset, improvements paid for with respect to the asset, transfers from other assets, and so forth. Contributions may themselves need to be traced: to the extent not from the spouse's own traceable separate property, it is nonseparate property.

Enhancement contributions get special treatment. For example, under UCA § 75-2-208(4), an enhancement contribution to decedent's separate property from "joint" funds will be treated as a nonseparate contribution to the extent traceable to decedent, even if some of or all the funds would be traceable to the decedent's separate property; thus, joint account contributions to decedent's separate property will be treated as nonseparate, whether traceable to decedent's separate or nonseparate property, but such contributions from the survivor may be separate or nonseparate, depending on their source.

The limitation of UCA § 75-2-208(4) which prevents enhancement contributions allocated to decedent's separate property interest from exceeding the decedent's separate contributions would need to be applied, but this will happen later after remaining debts and expenses and allowances have been allocated. However, the enhancement contributions need to be tracked and traced as separate categories for this purpose. This will affect the tracking and tracing only for decedent's property interests.

In addition to classifications as to sources of contributions, the contributions will also need to be allocated as to the type and character of the existing components of the interest benefitted by the contribution.

These classifications and allocations relating to separate and nonseparate components need to be made on two levels, one as among the components of the spouse in that spouse's own property interests where assets are shifted, and the other as among the components of the other spouse in that other spouse's interests where property has been transferred between spouses. They also apply not only to assets actually owned by a spouse as of decedent's death, but also to any interests deemed owned for purposes of calculating the family augmented estate.

d. Format. A format for an analysis of an asset of the surviving spouse combining steps b. and c. could look like this:

Inclusion Category X of Surviving Spouse S-1: Asset A is valued at $VAL at decedent's date of death with appreciation over all contributions of $APP, which is $MAP per month from month of Date (1) to month of date of death ($MAP = $APP ÷ number of months).

Source of Contributions for Asset A

Contribution Time and Type	**S-1 Separate**	**S-1 Nonseparate or Commingled**	**S-2 Separate**	**S-2 Nonseparate or Commingled**
Month x -- Gift on Date (1) Interim Total Interim %age	 $100X $100X 100%	 -0- -0-	 -0- -0-	 -0- -0-
Month x+n -- Payment for Improvement			$50X	
-- Allocated appreciation from month x	$50X [100% of $MAP x elapsed months]			
-- Interim Total -- Interim %age	$150X 75%	-0- -0-	$50X 25%	-0- -0-
Month x+n+m -- Payments for improvements	$20X	$100X	$40X	
-- Allocated appreciation from month x+n	$30X (75%)		$10X (25%)	
-- Interim Total -- Interim %age	$200 X 50%	$100X 25%	$100X 25%	-0- -0-
…and so on through date of death.				
-- Final Total -- Final %age -- Value Allocation	$AX A% $WX [$VAL x A%]	$BX B% $XX [$VAL x B%]	$CX C% $YX [$VAL x C%]	$DX D% $ZX [$VAL x D%]

In using this format, contributions would be entered as positive amounts, but any reductions would be entered as negative amounts.

e. Use of Format for Decedent. In using the format for a property interest of the decedent, two more columns would be added, one for the survivor's separate property enhancement contributions to decedent's separate property, and the other for joint or commingled enhancement contributions to such property. These columns are needed to provide the information to apply the enhancement comparison to decedent's separate component of the interest under UCA § 75-2-208(4), last sentence; such comparison may cap the final proportion of the asset from the enhancements. The two additional columns would keep track of any enhancement contributions by an entry of the amount of a contribution which meets the requirement for an enhancement by being allocable as a benefit to decedent's separate component in the proportion which decedent's separate component in the interest at the time, as shown in the column for decedent's separate component, bears to all other components (nonseparate in the hands of decedent), as shown in all the other columns. This amount would be added to the survivor's enhancement column or to the joint or commingled enhancement column, as appropriate. These columns would each also receive their own proportions of the new contribution. The appropriate proportion (which would be the rest of the new contribution) would be allocable to the general nonseparate components and added to its column. Appreciation would be allocated to the amounts in each of these columns in the usual way.

f. Obtain Class Results. When the procedure has been used on each asset in each inclusion class, the overall results for each class can then be easily determined so that we will know how much and in what proportions property has been contributed to each class out of the separate and nonseparate property of each spouse. Then debts, allowances, and expenses can be allocated, and then the equity of separate property net of allowances and expenses as so allocated can be removed from the augmented estate so the survivor's elective share entitlement can be determined.

6. **Debt, Expense, and Allowance Allocation**. In the earlier example (II. C. 1. and 2.), there were no debts, and the expense and allowance amounts were just arbitrarily deemed allocated to simplify the example. Let's look more closely at how debt, expense, and allowance allocations for separate and nonseparate property should work as of decedent's death, taking into account statutory provisions and practical problems likely to arise but not dealt with in the statute.

a. Mechanics. Let's start with some observations about the mechanics of these allocations.

i. The debt of the spouses is not only allocated under UCA § 75-2-208(7), among the statutory inclusion classes of probate transfers, nonprobate transfers, etc., subject to the debt as of decedent's death, but (as we have seen) in order to keep an interest in property at its "equity" value, debt also needs to be traced from separate or nonseparate sources to reduce the value of the property subject to the debt. This principle should apply to transfers by a spouse among that spouse's assets or to transfers between spouses. Proceeds from

debt and payments on debt will have been allocated as contributions to any separate or nonseparate property components that the loan proceeds benefitted, as described above. At decedent's death, the balances of remaining debt will need to be allocated similarly among the property interests subject to the debts and among the separate or nonseparate components of those interests.

ii. On decedent's death, the balance of the debt of a spouse to the extent secured by that spouse's separate property would be allocated to reduce the equity value of the separate property component of the property interests securing the debt. Debt against separate property used to enhance nonseparate property has in effect changed some separate property by voluntary act of the spouse into nonseparate property. The presumption under UCA § 75-2-208(5) that property is to be treated as nonseparate may apply, and accordingly, the separate property may be reduced and the nonseparate property increased. If the presumption is overcome, the separate component of the asset securing the debt would be reduced by the balance of the debt, but the contribution would have already been traced through to increase the separate component of the property interest benefitted where another asset of the same spouse is involved. However, on a transfer to the benefit of a property interest of the other spouse, even without the benefit of the presumption, it could never be separate property of the other spouse under the separate property definition. UCA § 75-2-208(1)(b).

iii. On decedent's death, the balance of debt to the extent secured by the nonseparate component of property should be allocated against the nonseparate component of the property of the borrowing spouse securing the loan, provided the proceeds used toward an asset in which that borrowing spouse has a separate property interest, have been treated as a nonseparate component derived from that spouse in the property benefitted. Using the proceeds of debt against nonseparate property to enhance separate property should never be allowed to create separate property from what was never itself separate property. It is actually a nonseparate contribution and should be treated as such at the time the contribution was made, so that separate property will not include the contribution or gain attributable to it. Thus, the debt should be allocated to reduce the proportion of the separate property component. If intermixed beyond traceability, the entire asset may become nonseparate.

iv. The unsecured debt of one spouse only should be allocated to that spouse only and then allocated between that spouse's separate and nonseparate property components proportionately with the value of such components in property interests owned by that spouse which support the credit; interests deemed held by a spouse for augmented estate calculations but not actually owned, would be unaffected. In the usual case, any and all such owned interests would support the credit. Thus, the debt balance will reduce the owned separate and nonseparate components proportionately. Joint unsecured obligations cannot be presumptively allocated to some sort of "family" or "community" assets first (as is done in some community property states) because the concept doesn't apply either for the spouses or the creditor when the debt is undertaken or when it is enforced. Absent a reason to do otherwise, such debt should be split evenly between the spouses and each spouse's share allocated proportionately by value to that spouse's owned separate and nonseparate interests which would support the credit.

v. Security interests in foreclosure prior to decedent's death which were granted as a credit enhancement for third-party obligations are essentially like transfers with retained rights to be included in the augmented estate prior to removing separate property. See UCA §§ 75-2-205 and 75-2-207. Prior to foreclosure, the security interest is not a debt or claim (see definition of claim at 75-1-201(6)). Thus, the value of any property interest, or any separate or nonseparate component in the interest would not be reduced by the full amount of the obligation secured; however, the existence of the security interest may need to be taken into account as an encumbrance on the property pledged in valuing that property, but the value difference may also be included in the augmented estate as a retained right or prior transfer item. If the pledged asset contained a separate property component, that component would remain separate property.

vi. Also, unsecured guarantees for third-party obligations not in default prior to decedent's death should not arise to the dignity of true debt and would not be a claim to be used to offset any of a spouse's assets includable in the augmented estate. If these guarantees are called because of decedent's death or after decedent's death, they should not reduce the values of property interests or their components for elective share calculations, except possibly where the inclusion class to which they belong is valued at, and not just before, decedent's death (see UCA §§ 75-2-204 through 75-2-207), or the obligation constitutes a claim under UCA § 75-1-201(6); but the value difference may also be included in the augmented estate as a retained right or prior transfer item.

vii. It is appropriate to first allocate the administrative expenses of the decedent's estate against decedent's separate property to the extent the expense relates to separate property. Further, if there is another expense which cannot possibly benefit the survivor, it should not be allocated against the nonseparate property going into the augmented estate but should be set aside and later allocated pro rata among the decedent's probate assets not paid to the survivor (*i.e.*, to decedent's separate property and the decedent's two-thirds share of nonseparate property from the family augmented estate).

viii. Expenses in defending against a surviving spouse's claim to an elective share (such as attorney's and accountant's fees) are not to be treated as administrative expenses; they are for the benefit of other beneficiaries and not to preserve, protect, and defend the estate against dissipation. *Estate of Smith*, 718 P.2d 1069 (Colo. App. 1986).

ix. Also, under UCA § 75-1-201(6), a claim does not include "demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate."

x. Homestead, family allowance, and exempt property for the survivor should be allocated first against the decedent's separate property. The result would be to put exempt property, homestead, and allowances in no worse a position for the survivor than a probate transfer from separate property, which in effect is what they are. This would prevent a double recovery for the decedent by the undue reduction of the augmented estate by such items

coming out of the decedent's includable probate estate, while the survivor's share of the augmented estate is nevertheless treated as paid to the full amount of such items.

Under the statute, transfers from separate property are not treated the same as transfers from nonseparate property. The augmented estate is reduced by exempt property, homestead, and allowances (UCA § 75-2-204) but the elective share is nevertheless treated as paid out of such items; this is the very same treatment which applies for probate transfers from the decedent's separate property. Assuming a level of consistency and fairness for the treatment of separate property (*i.e.*, if treated like separate for one purpose beneficial to decedent, it ought to be treated as separate for other purposes, as well, absent a strong contrary policy reason), the inherent implication is that exempt property, homestead, and allowances, which are treated the same as transfers from separate property, are also to be deemed paid out of such separate property first. More importantly, this treatment is also consistent with, and may be necessary for, maintaining the statutory priority of exempt property, homestead, and allowances over estate debts and over benefits for other beneficiaries. UCA § 75-2-401, *et seq.* It is inconsistent with the nature of these benefits that they should be diluted.

b. Example. Now let's turn to an example of an allocation. Assume, as above, that the $1,000,000 of H's probate estate consists of $800,000 of separate real property (gross value including the effect of the survivor, W's, enhancement contribution) and $200,000 of nonseparate investment personal property, that $75,000 in administrative expense is paid, and that $25,000 (for a death in 2009) of homestead, exempt property, and family allowance is paid. (The administrative expense amounts are itemized in the chart below.) This time, however, let's also assume H's estate has this debt: $100,000 of long-term amortized mortgage debt against the separate real estate, of which $85,000 was used to improve the real estate, $10,000 was used for vacations and recreational activities not creating an asset, and $5,000 was used for acquiring some of the nonseparate investment assets; $50,000 of long-term installment debt secured by the nonseparate investments, of which $25,000 was used to improve the separate real estate, and $25,000 relates to the acquisition of some of the nonseparate investment assets; $10,000 of short-term unsecured credit card debt used for a variety of things unrelated to the separate property; and $5,000 of funeral expense. We will assume the $25,000 used to enhance the separate real estate did not create additional gain. The allocation could work like this:

i. Probate Allocations. The first step is to allocate items to arrive at the net probate estate and the separate and nonseparate shares of it.

Item	H Separate	H Nonseparate
$1,000,000 Probate Estate	$800,000 80% of gross value	$200,000 20% of gross value
Debt: $100,000 Mortgage $50,000 Investment $10,000 Unsecured (paid by estate) $5,000 Funeral (paid by estate)	 $100,000 (100%) $25,000 (50%) $8,000 (80%) $4,000 (80%)	 -0- $25,000 (50%) $2,000 (20%) $1,000 (20%)

$165,000 Total Debt	$137,000	$28,000
Total Equity: $835,000	H Separate Equity $663,000 (78.5%)	H Nonseparate Equity $172,000 (21.5%)
Administrative Expenses: -- Probate filing and legal fees for petition and general administration, totaling $10,000	$7,850 (78.5%)	$2,150 (21.5%)
-- Personal Representative's fees, totaling $20,000	$15,700 (78.5%)	$4,300 (21.5%)
-- Accountant's fees for estate's income tax returns and general estate matters totaling $5,000	$3,925 (78.5%)	$1,075 (21.5%)
-- Real estate debt service payments, totaling $20,000	$20,000 (100%)	-0-
-- Real estate taxes, insurance, repair, and maintenance, totaling $10,000	$10,000 (100%)	-0-
-- Investment debt service payments, totaling $10,000	$5,000 (50%)	$5,000 (50%)
$75,000 Total Expense	$62,475	$12,525
Homestead and Allowances: Paid to W	$25,000 (100%)	-0-
$735,000 Remaining Equity Value (approx)	$575,525	$159,475

ii. Elective Share Determination. The amounts determined by the allocation are then used to determine the spousal share using the method shown in the example above (II.C.2.). We will discuss more about these steps below, but here is how the example plays out.

(a)	H Net Probate Estate	$735,000
(b)	H Nonprobate Transfers to Others	200,000
(c)	W Property	350,000

(The family property taken into account is $1,285,000.)

(d)	H Separate Property		
	Probate	$575,525	
	W Contribution	(100,000)	
	Commingled Contribution	(100,000)	
	Increase on Contributions	(100,000)	
	Nonprobate Transfer	100,000	
			($375,525)
(e)	W Separate Property		(300,000)
(f)	Augmented Estate		$609,475
(g)	Spousal Elective Share		
	1/3 augmented estate	$203,158	
	homestead & allowances	(25,000)	
	W nonseparate property	(50,000)	
	Remainder Payable	$128,158	

7. **Determining the Elective Share Payable**. Now that allocations have all been made as to transfers and contributions prior to decedent's death and as to debts, expenses, and allowances remaining at such death, there are still a few steps left to determining the actual amount of the elective share payable to the surviving spouse.

a. Apply Contribution Cap. After all the allocations have been made with respect to a property interest of decedent which has benefitted from enhancement contributions, the amounts allocated to decedent's separate contributions would be compared to the sum of the amounts allocated to joint or commingled enhancement contributions and to the survivor's separate property enhancement contributions. If the enhancement total is greater than the decedent's separate total, the proportions would be adjusted so that the final enhancement amount used to determine its proportion would equal the amount used to determine the decedent's separate proportion.

For example, with respect to allocations by contribution toward such an asset of decedent valued at $1,750,000, assume the decedent's amount was $500,000 (28.57%), the combined enhancement amount was $750,000 (42.06%), the decedent's nonseparate amount was $250,000 (14.29%), the survivor's separate (nonenhancement) amount was $100,000 (5.71%), and the survivor's nonseparate amount was $150,000 (8.57%). The respective proportions would not be those specified above, but would change by reducing the total to $1,500,000 (by the $250,000 difference between decedent's separate amount and the enhancement amounts), and by reducing for this purpose the enhancement amount to $500,000 (to equal decedent's separate amount). The resulting percentages would then be: 33.33% decedent's separate, 33.33% enhancements, 16.67% decedent's nonseparate, 6.67% survivor's separate (nonenhancement), and 10% survivor's nonseparate.

After the cap has been applied, the three key classifications will be decedent's separate property, the survivor's separate property, and everything else, which will be treated as nonseparate. Of the nonseparate components, the portion which is the survivor's will eventually be treated as a payment toward the elective share, so this amount needs to be tracked.

b. Calculate Gross Entitlement. The augmented estate is calculated including all separate or nonseparate components in all includable items at equity value after appropriately allocated debts, expenses, and allowances have been applied as of decedent's death; the equity value of separate property of both spouses is then removed. One-third of the result provides the gross elective share entitlement amount (UCA § 75-2-202(1)).

c. Apply Amounts as Already Paid. The priorities of UCA § 75-2-209 are then applied to offset or pay the gross elective share entitlement amount. Amounts which pass to survivor on death from probate or nonprobate transfers of interests included in the augmented estate or of interests in decedent's separate property need to be determined from the will, trust, or other transfer instruments of decedent and others. The amounts of nonseparate property of the survivor and the amounts of exempt property, homestead, and allowances will be known from the allocation analysis. These items will be treated as payments to offset the survivor's elective share entitlement. Where decedent gave nothing and leaves nothing to the survivor, the result under UCA § 75-2-209(1) is:

i. Apply transfers to the survivor from amounts included in the augmented estate which are not excluded as decedent's or the survivor's separate property. Nothing passed to the survivor under § 75-2-204 (probate transfers), and there are no nonprobate transfers to the survivor included under § 75-2-206; there is nothing transferred to the survivor to apply against the elective share amount in this situation.

ii. Determine the amount of the surviving spouse's property under § 75-2-207 which is not excluded under § 75-2-208 as the survivor's separate property. If there is any such nonseparate property, it is applied against the elective share amount.

iii. Apply decedent's separate property passing at death to the survivor. Decedent's separate property as defined in § 75-2-208 does not pass to the survivor in this situation.

iv. The survivor's homestead, exempt property, and family allowance are applied to the elective share amount. (This is another Utah change from the Uniform Probate Code, which would provide these benefits on top of the elective share.)

v. To the extent the elective share has not been satisfied, apply other property available and seek the return of property from others. UCA §§ 75-2-209 and 210. See part I, F above.

E. **The Flaws**. The analysis in this outline and the above examples demonstrate that the Utah version of the spousal elective share is a flawed statute. It is difficult to understand and

even harder to apply. Going beyond the small nominal share of one-third (particularly compared to the intestate share or what could be obtained in a divorce), the unfair treatment of insurance proceeds payable to others, the use of homestead, exempt property, and allowances to offset the share (a double dip, since the probate estate for inclusion in the augmented estate has already been reduced by these items) rather than to supplement it (all of which were intentional on the part of the legislature), the statute demonstrates these additional serious flaws, at least some of which may not have been intentional:

1. **Tracing**. Its first big flaw is that it has introduced a very difficult trace-to-source process of the sort the drafters of the Uniform Probate Code had carefully avoided. This makes settling estates where a spousal election is made expensive, time consuming, and often quite adversarial.

2. **Not Clear**. The tracing process is not fully clear in its operation, another big flaw. In particular, the role of separate property and the extent of its protection have not been sufficiently thought through and have not been clearly expressed. Although solutions to interpretive issues may with considerable effort be found in the statute in some cases, in other cases one needs to go outside the statute to reason through to appropriate treatment. In either event, disputes may well develop. For example:

a. The statute is not clear on how to deal with the business use of property. It provides that separate property includes "income attributable to investment, rental, licensing, or other use of separate property" (UCA § 75-2-208(2)) but does not specifically break out the personal service or noninvestment operational part of the business income from use of the property. It should be interpreted to do so by, for example, using a rental value test for the separate property part of the income (as has been done in the above example at II.C.1. and 2.). For a community property analog, see *Pereira v. Pereira*, 103 P.488 (Ca. 1909) (allocating a fair return on the separate investment as separate property) and *Hybarger v. Hybarger*, 737 P.2d 889 (Nev. 1987) (the *Pereira* method is the preferred method), and compare these to *Van Camp v. Van Camp*, 199 P. 885 (Cal. App. 1921) (allocating amount attributable to spouse's labor to community, remainder to separate property).

b. The statute is also not clear on its face on whether funds, once "commingled," can be further traced by reasonable tracing methods to uncommingle them to some extent; perhaps "commingled" can be interpreted as "can't be uncommingled." This is the only interpretation that makes sense under the statutory treatment of a variety of property interests. In a divorce context, Utah courts have treated "commingled" to mean that the identity of separate funds is lost where marital and premarital funds cannot be separately identified. See *Oliekan v. Oliekan*, 147 P.3d 464 (Ut. App. 2006). The community property rule is also to this effect. See *Robles v. Robles*, 965 S.W. 2d 605 (Tx. App. 1998) and *Bowlden v. Bowlden*, 794 P.2d 1140 (Id. 1990). The term "joint" as used in the statute (UCA § 75-2-408(4), second sentence) would not change this result as to the meaning of "commingled." There the phrase "joint or commingled" is used, and it is clear that joint property can be traceable. This, however, is the only section using the phrase "joint or commingled," and it relates only to enhancement contributions to decedent's separate property. Thus, the word "joint" is intended to add a

limitation on decedent's separate property in this situation in addition to "commingled," not to modify the meaning of "commingled."

c. It is not clear on the face of the statute whether or how the proceeds of debt are to be traced to different properties and their separate and nonseparate components, or how administrative expenses and exempt property, homestead, and allowances are to be allocated to separate and nonseparate components of assets. Much is left unsaid. Such tracing is, however, very important to maintaining the "net equity" value concept used in the statute in the determination of inclusion class amounts. Community property debt tracing analogs are less useful here, because they relate to actual present property rights and rely on separate or community liability concepts which won't apply in Utah, and on rules relating to whether separate or community-classed assets can be seized to satisfy liabilities of the other class, which also won't apply in Utah.

d. It is not clear what constitutes an "improvement" to separate property. Building additions are likely included, but what else may be included is unknown. In community property jurisdictions, such things as repairs, property taxes, and insurance would generally be included in perhaps most such jurisdictions. In the context of divorce proceedings, Utah courts have been willing to recognize efforts or expense contributed to the enhancement, maintenance, or protection of premarital property. <u>See</u> *Mortensen v. Mortensen*, 760 P.2d 304 (Ut. 1988).

e. The treatment of survivor transfers to the decedent, including those for property enhancement or which go beyond property enhancement, is also not clear from the face of the statute, particularly under the poorly-worded UCA § 75-2-208(4). Also, the treatment of interspousal transfers is uneven as between decedents and surviving spouses to no clear purpose.

f. The limited inclusion of insurance is also ambiguous, particularly as to term policies and as to group policies or those held by others. It is not clear what constitutes a policy where a term policy (such as typical group term life) has been in effect a long time but the carrier changed one or more times, or what constitutes premiums paid during decedent's life on such a policy, and it is not clear what constitutes premiums paid where someone other than decedent wrote the check.

3. **<u>Unintended Unfairness on Interspousal Transfers</u>**. However, the statute's most significant flaw is that it is so poorly structured that without an equitable adjustment, it produces very unfair and apparently quite unintended results for any poorer spouse who has made transfers, including of separate property, to a wealthier spouse. These results seem particularly inequitable in the case of a surviving spouse who has contributed inherited and other separate property to improve the value of the deceased spouse's separate property from which the survivor has been intentionally cut off. As will be discussed in Part III below, it is not clear that this result was intended.

4. **Payment to Benefit Ratio**. The surviving spouse receives as a benefit at most only one-third of the value of a property interest included in the augmented estate, whether from that spouse's property interests derived from that spouse's own earnings or from the decedent's interests, yet is charged with receipt of 100% of the value of that spouse's nonseparate property (not one-third, not one-half, not two-thirds) with the result of lowering the survivor's share as to other property interests based on the survivor's own earned contributions to the family, or of the survivor watching as some or all of the survivor's earned contributions to the family pass to someone else. This problem is based on an inconsistent use of the separate – nonseparate property distinction.

The Utah spousal elective share scheme uses a community property based separate v. nonseparate property calculation. Thus, where under the community property 50-50 scheme, 50% of earnings would remain the share of the earning spouse, here, under the Utah 1/3-2/3 scheme, two-thirds of the earnings should remain the share of the earning spouse.

Let's look at an example. Prince Not-so-Charming inherits $1 Million from King Dad and never works. Cinderella inherits nothing from her evil stepmother but works and earns during marriage everything that, with her scrimping and saving and doing without, is left for inclusion in the augmented estate after Prince Not-so-Charming's separate property is removed. The augmented estate is, say, $300,000, titled so that $30,000 passes to Cinderella, for example, by means of a joint tenancy bank account. Under existing law, Cinderella's one-third of the augmented estate is $100,000 of which she is treated as already receiving $30,000 of it, and thus gets $70,000 new. $200,000 (*i.e.*, 2/3) of her earnings enhances the share of Rumplestiltskin, to whom Prince Not-so-Charming has left his entire estate. Cinderella is at risk of ending up back among the cinders (unless the state's welfare agencies act as her fairy godmother to help her out at taxpayer expense). This is an erroneous and unbalanced calculation because it does not consistently apply the separate-nonseparate property distinction, which distinction turns on personal service income, as recognized in all community property states.

To maintain consistency, there should at least be no offset against the already low one-third share for anything passing to the surviving spouse to the extent allocable to the surviving spouse's own earnings, up to two-thirds of the augmented estate. To accomplish this, the formula would be that there is no offset for the amounts attributable to the earnings of the surviving spouse up to first one-third of the augmented estate, but after that, the offset against the one-third augmented estate share applies, with the result that unless the decedent leaves more to the survivor, the survivor does not receive more than two-thirds, even if the entire augmented estate is attributable to the survivor's earnings. There is a full offset for anything not derived from the surviving spouse's own earnings during marriage but which passes to the surviving spouse through the augmented estate. Although this suggested formula would make the system more consistent, it still would not achieve the sort of fairness the system should be designed for.

Cinderella may still see significant amounts of (up to 2/3) of the value she contributed to the family from her earnings, passing to Rumpelstiltskin, but if she is lucky enough that property is titled properly, she would have under the suggested formula some chance of recovering more (up to two-thirds) of her earned contribution to the family. Under this suggested modification

the result in our example is that Cinderella gets $100,000 without offset, keeps the $30,000, too, and thus ends up with $130,000 of her earnings (but loses the rest to Rumpelstiltskin).

Varying the example, if augmented estate property passed to Cinderella by joint tenancy in the amount of $200,000 (or any amount over $100,000), she would, under existing law, keep all of it, but no more by way of the elective share. If no augmented estate property at all passed to Cinderella, her elective share would be $100,000, as under existing law. The difference under the proposed formula that should have been used to keep the system consistent, comes where less than one-third of the augmented estate passes to Cinderella outside the elective share, and where value attributable to her earnings make up more than one-third of the augmented estate, in which event, without an offset, she could pick up additional value.

If Cinderella died first, with no contributions to the augmented estate from earnings of Prince Not-so-Charming and if Cinderella left her entire estate to her fairy godmother, Prince Not-so-Charming (and subsequently Rumplestiltskin) would get one-third of the augmented estate of Cinderella, even though Prince Not-so-Charming holds plenty of other property.

Yes, you guessed it, this is all rather Grimm.

F. **Community Property Comparison**. Community property jurisdictions have had to deal with similar issues as to what is separate property and what is not. In those states, the community and separate characterization is not a retroactive analytical device, but relates to actual present property rights with consequences not only between the spouses but also for third-party creditor rights, taxation, and other purposes for which an actual present property right is relevant. Thus, the community property approaches will not always be fitting for Utah; nevertheless, a look at such approaches will provide an idea of how certain issues might be treated in Utah.

These jurisdictions all start with a presumption that property is community property. See *Estate of Hall v. Williams*, 885 P.2d 1153 (Id. App. 1994) (characterization as separate property depends on the source of the assets or proceeds used to acquire the interest; the community property presumption places the burden of persuasion on the party contending for separate treatment, and that party must prove "with reasonable certainty and particularity" that the property is separate); *Ripatti v. Ripatti*, 494 P.2d 1025 (Id. 1972) ("The quantum of proof required to rebut the presumption in favor of the community has been variously described as clear and satisfactory, clear and convincing, or simply a preponderance"). See *Armer v. Armer*, 463 P.2d 818 (Az. 1970) (clear and convincing standard applies). The presumption applies regardless of how title is held and holding title in the name of one spouse does not rebut the presumption. See *Burdick v. Pope*, 518 P.2d 146 (Nev. 1974).

1. **Acquisition**. Let's first review issues arising on acquisition of a property interest with a mixture of separate property, community property, and debt, and then turn to improvements to a property interest.

a. Proportionate Interest. In some states where a spouse acquires an interest with both community (*e.g.*, postmarriage earnings) and separate (*e.g.*, premarriage earnings) property, a proportionate allocation will be applied. See *Kirkham v. Kirkham*, 335 S.W. 2d 393 (Tx Civ. App. 1960); *Gapsch v. Gapsch*, 277 P.2d 278 (Id. 1954); *In re Galstine's Estate*, 6 P.2d 628 (Wash. 1932). Where mortgaged property is acquired over time with a mix of separate and community funds, the character of the asset is proportionately separate and community based on contributions. See *In re Marriage of Zahm*, 978 P.2d 498 (Wa. 1999*); In re Marriage of Lucas*, 614 P.2d 285 (Cal. 1980).

b. Community Property with Reimbursement. Some other states classify the mixed asset as community and require the separate property to be reimbursed. See *Baker v. Baker*, 26 So. 2d 132 (La. 1946).

c. Acquisition Characterization with Right of Reimbursement. In other states, a property's character (especially as to real estate) will be determined at acquisition as either separate or community and contributions to it from the other kind of property will give rise to a right of reimbursement for that other kind of property.

i. Acquisition Timing. Where a transaction is spread over a time before marriage and after marriage, characterization will be different in different states, depending on when acquisition is deemed to occur.

(a) Initiation. Some states look to the initiation of the transaction and treat the property as separate, with a right to the community for reimbursement of any community property later contribution.

(b) Close of Vesting. Other states look to the close of the title vesting so that where vesting is after marriage, the property will be presumed community, and separate property used will give rise to a reimbursement right. See *Baker v. Baker*, 26 So. 2d 132 (La. 1946). If all contributions are separate, the community presumption would be overcome. *Barrett v. Franke*, 208 P.435 (Nev. 1922).

ii. Use of Debt. Similarly, the use of loan proceeds on a joint obligation or on an individual obligation to acquire an asset gives rise to community property with a reimbursement right for the separate contribution, regardless of whether the loan is paid by the debtor spouse with separate or community funds, at least where not all security and contributions for the acquisition are separate property and the creditor does not have a right to go against community assets or the borrowing spouse has sufficient separate assets to make the payments. See *Finley v. Finley*, 287 P.2d 475 (Wa. 1955) (proceeds of joint note secured with separate property are community property); *Walker v. Fowler*, 285 P. 649 (Wa. 1930) (separate down payment, joint note, payment of note from separate property, created community property on acquisition); *Succession of Milton*, 278 So. 2d 159 (La. App. 1973) (requires separate assets sufficient to pay obligation).

d. Utah Application of Reimbursement. A reimbursement rule would not be appropriate in Utah where no actual "marital" or "nonseparate" property interest exists at acquisition or any other time, these concepts applying, if at all, only as analytical tools for a division on divorce or on death where the surviving spouse has been cut out of the estate. In the latter situation, the Utah elective share rules do not authorize any reimbursement and are inconsistent with the possibility.

e. Unsecured Debt. In a number of community property states, the proceeds of unsecured loans on the personal credit of one spouse are presumed to be community, but the presumption can be overcome where the creditor relies for repayment primarily on the separate property of the borrowing spouse. See *Shovlain v. Shovlain*, 305 P.2d 737 (Ida. 1956). Joint obligations are community obligations. With respect to the foregoing matters, see Status of Property as Separate, 20 Am. Jur. Proof of Facts 2d 321 (updated July 2006).

2. **Improvements**. With respect to improvements, where community assets are used to improve one spouse's separate property, that spouse keeps the improvement as separate property but must reimburse the community. In some states, however, if one spouse, acting with community management authority, uses the community property to improve the separate property of the other spouse, then a gift may be presumed of the community interest of the spouse so using the property to benefit the other, absent a contrary agreement. See *Bank of Orofino v. Wellman*, 143 P. 1169 (Id. 1914); *In re Hickman's Estate*, 250 P.2d 524 (Wa. 1952).

a. Nature of Reimbursement. The reimbursement right generally does not mature until the dissolution of the community. The right is equitable in nature and may be limited to the extent expenditures exceed benefits received by the community (such as where the husband-wife community occupies separate property of one of them as the family home without rent). See Annotation, Use of Community Funds in Improving or Discharging Encumbrances on Separate Property as Grounding Right to Reimbursement, Lien, or Charge, 54 ALR 2d 429 and supplement (originally published 1957).

b. Amount of Reimbursement. The amount to be reimbursed for such improvements has split the courts among four alternatives: (i) the lesser of community funds used or the value at dissolution of the community (*Edsall v. Edsall*, 240 S.W. 2d 424 (Tx. App. 1951)); (ii) the greater of community funds used or the value at such dissolution (*Marriage of Warren*, 104 Cal. Rptr. 860 (Cal. App. 1972)); (iii) the community funds used (*Pekola v. Strand*, 168 P.2d 407 (Wa. 1946)); or (iv) the enhanced value at the dissolution (*Hiatt v. Hiatt*, 487 P. 2d 1121 (Ida. 1971)).

c. No Reimbursement to Separate Property. On the flip side, where separate property is used to improve a community asset, there is no right to reimbursement, because a gift to the community is presumed absent a contrary agreement. See *In re Marriage of Lucas*, 614 P.2d 285 (Cal. 1980).

d. Items for Reimbursement. In addition to building additions and the like, improvements for these purposes may include labor and the payment of encumbrances,

repairs and upkeep, property taxes and assessments, or insurance. See *Conley v. Moe*, 110 P.2d 172 (Wa. 1941); *McElyea v. McElyea*, 163 P.2d 635 (N.M. 1945) (noting the need for reimbursement from husband's separate property to prevent making "the surviving widow a beggar at his grave").

e. Utah Reimbursement Application. As already noted, the reimbursement concept will not work with Utah's elective share rules. Also, there is no community management authority in Utah, because there is nothing like community property; rather, each spouse controls that spouse's own property, whether it later is treated as separate or nonseparate. Under the elective share rules, no gift by a spouse to the other spouse becomes separate property of that other spouse receiving the gift. Separate and nonseparate components will need to be allocated without a shortcut.

3. **Mixed Components - Family Expense Doctrine**. Where separate and community components have both been contributed toward a property interest, the presumption in favor of the community is triggered. See *Fisher v. Fisher*, 383 P.2d 840 (Ida. 1963). In some jurisdictions, clear and convincing evidence is required to overcome the presumption. Where records have not been carefully maintained about which component has been withdrawn, but total withdrawals at the time of testing do not exceed the separate property contribution component, there will be some separate property component remaining. See *Succession of Sonnier*, 208 So. 2d 562 (La. App. 1968). However, a family expense doctrine is used to presume that community funds were used first to pay family living expenses. *See v. See*, 415 P.2d 776 (Cal. 1966).

a. End Term Application. This doctrine is sometimes applied at the time of testing over the life of the property interest to compare total family expense withdrawal to the total community property component. See *Houska v. Houska*, 512 P.2d 1317 (Id. 1973) and later appeal 543 P.2d 869 (Id. 1975).

b. Daily Reconstruction. Other times a daily reconstruction approach is used to see when the community component has been exhausted. Separate property used after such exhaustion to pay living expenses is a gift to the community, not reimbursed when additional community funds are later deposited. *See v. See* cited above. However, assets acquired with separate funds (when only separate funds are in the account) will be separate.

III. **Dealing With Enhancement Contributions**. Let's look further at some problems raised by enhancement contributions and at some interpretive possibilities and some traditional remedies which may help with the problem.

A. **The Hunt for Intention**. The provisions dealing with separate property are strange, but the part of them dealing with enhancement contributions is stranger still. Nevertheless, we should make the attempt to analyze them for any discernable intentions with which to guide an interpretation of them. Although attempts to find legislative intent are inherently risky, let's do it anyway.

1. **What the Statute Does Not Tell Us About Survivor Enhancement Contributions**. The Utah spousal share provision (at UCA § 75-2-208(4)) deals with the survivor's separate property enhancement contributions toward debt service on or improvements to the decedent's separate property by treating such property enhancement contributions as not being part of the decedent's separate property (see also UCA § 75-2-208(1)(b)) and provides similar treatment for joint or commingled contributions. However, the characterization of the survivor's enhancement contributions is not specifically dealt with; the statute tells us very specifically what the contribution is not but does not with any specificity tell us what it is. Although we can figure out what it is, the statutory intent behind its treatment is left hazy.

Thus, we know from the statute that the survivor's enhancement contributions are not the decedent's separate property to be removed from the augmented estate for the sole benefit of decedent's other beneficiaries, but we don't know much else clearly from the statute. It appears that a commingled contribution itself is supposed to stay in the augmented estate, subject to the percentage of the elective share. However, the treatment of a noncommingled separate property enhancement contribution is not so clear on an initial reading of these provisions. Is the separate contribution to be treated in a manner similar to commingled contributions, or is it to be treated as if it is the survivor's separate property to be fully recovered by the survivor? Compare UCA § 75-2-208(1)(c) (property acquired in exchange for or with proceeds of separate property is separate property; does this make the enhancement contribution the survivor's separate property?) with UCA § 75-2-208(4), second sentence (spousal property enhancement contributions "shall not be separate property;" but does this apply only to decedent, not to both spouses?) and with UCA § 75-2-208(1)(b) (separate property of the decedent or of the surviving spouse from gifts or inheritances does not include property acquired from the decedent or the surviving spouse). In a similar situation, in community property jurisdictions, property enhancement contributions from a spouse's separate property or community property share for the benefit of the other spouse's separate property gives rise to a right to reimbursement in favor of the contributing spouse, at least unless an intention to make a gift is shown. See *Dakan v. Dakan*, 83 S.W. 2d 620 (Tx. 1935). If the enhancement contribution is to be recovered, it is not at all clear how this is to occur; there simply is no clear mechanism to deal with the loss to the survivor of the survivor's separate property used to enhance the decedent's separate property.

As we have seen already, there are strong reasons to conclude that enhancement contributions end up not being the separate property of either spouse. However, let's follow up on how the loss of separate property for the survivor fits with other provisions to see if that provides some clues to intent.

2. **What the Statute Tells Us About Decedent Contributions**. Let's look at the matter from the other direction. Perhaps looking at spousal gifts from the decedent's perspective will be helpful in determining the intent behind the treatment of contributions from the survivor to enhance the decedent's property. The decedent's contributions toward the survivor's separate property are not specifically dealt with in the same place (UCA § 75-2-208(4)) which deals with the survivor's property enhancement contribution. However, we do know, and clearly, from a different section of the statute, UCA § 75-2-208(1)(b), that any separate property contributions by the decedent toward the surviving spouse's property (or any

other transfers, for that matter) are not to be treated as part of the survivor's separate property (and thus are not removed from the augmented estate for the survivor's sole benefit). Rather, such contributions are to be treated as property of the survivor which stay in the augmented estate (UCA § 75-2-207); they are further treated as already received by the survivor out of the survivor's share (UCA § 75-2-209(1)(a) and (b)).

Such gifts to the survivor are treated as nonseparate and are not treated as truly the survivor's for purposes of determining the augmented estate; the survivor does not get to just keep them without detriment. Rather, they are treated as the survivor's for applying against the survivor's entitlement and thus may be recovered by the decedent's estate, up to the full amount in a number of circumstances. Such recovery by the decedent's estate applies to all separate or nonseparate transfers to the survivor, not just separate property contributions to enhance property (gifts are separate property only if not from the other spouse). The gifts will increase the survivor's entitlement by only up to one-third of the gift, but that entitlement will be deemed satisfied by the full amount of the gift, reducing the amount payable from other sources by up to the other two-thirds of the amount of the gift. Such gifts are fully recoverable against the survivor's share and are not left with the survivor in addition to the elective share.

3. **An Intended Balance**? We first see that the statute in its clear provisions is to be applied to any separate contributions by the decedent to the survivor's property so that they are recovered for decedent's other beneficiaries by being treated as part of the augmented estate already received by the survivor as part of the elective share (under UCA § 75-2-209 as described above), and if we next assume that the statute is not intended to create an inequality of treatment between spouses depending on which one dies first, then the result is that in applying other statutory provisions, gifts by one spouse to the other should receive similar treatment to that provided for decedent's separate property gifts to the survivor. This indicates that the statute should be interpreted so that commingled or nonseparate contributions to each other's property should remain in the augmented estate subject to the one-third share rule, but separate contributions should be recoverable to a significant extent by the party making the contribution, not subject to the one-third rule.

Based on how the decedent is treated, one would expect something like this in a balanced treatment of the spouses: The decedent's contributions to the survivor are particularly treated and stay in the augmented estate and are not removed before the one-third is applied. Similarly, the enhancement contributions of the survivor to benefit the decedent's separate property should also stay in the augmented estate and not be removed before the one-third is applied. Further, if the wealthier decedent's estate can recover against the elective share all gift contributions to the survivor (through the 100% deemed payment provision as to the survivor's nonseparate property) on top of the decedent's already larger share of the family augmented estate, the poorer survivor should similarly be able to recover at least property enhancement contributions in addition to a share of the family augmented estate. However, this does not occur for a poorer surviving spouse. Has an intention of the legislation been destroyed in the drafting process? Is the treatment of enhancement contributions under UCA § 75-2-208(4) an ineffectual attempt at some equalization?

4. **The Statutory Imbalance**. The elective share statute leaves each spouse, whether decedent or survivor, at risk of losing some or all of his or her separate property contributed to the improvement of or debt reduction on the other's separate property. The decedent's estate can fully offset the separate enhancement contribution, and other gifts, too, against the elective share, but that share may be too small to fully recover the contribution; thus, the decedent's estate may or may not fully recover them. On the other hand, the survivor can never fully recover through the elective share any separate or nonseparate contribution benefitting the decedent spouse, whether it was a property enhancement contribution or another gift. This violates what the legislature may have intended: to leave with each spouse an equivalent opportunity to recover that spouse's "separate" property so that the other spouse does not get it on top of a share of the augmented estate.

a. Enhancement Comparisons. The imbalance on enhancement contributions becomes clearer when we compare what will happen in a number of situations.

i. For example, assume a surviving spouse (S-1) has contributed all that spouse's separate property (*e.g.*, an inheritance) to improve the property of decedent (S-2) and that the contribution is included in the augmented estate. That surviving contributing spouse can, at best, recover only one-third of the separate property contributed and could easily get back less than that depending other circumstances such as the effect of the enhancement cap (UCA § 75-2-208(4)) or on the amount of nonseparate property (from, *e.g.*, the survivor's wages) held by the survivor.

ii. Property attributable to the survivor's own earnings can offset the return to the survivor of the property enhancement contribution for the decedent's separate property (which enhancement is kept by the decedent). Where the survivor from separate property makes a property enhancement contribution of $100,000 and has savings from wages of $100,000, while decedent has inherited property of $200,000 (after the enhancement) and has savings from wages of $100,000, the family augmented estate would be $300,000 (the enhancement contribution plus both sets of wage savings), and the survivor's share would be one-third or $100,000, all of which will be treated as already received based on the survivor's saved wages. None of the enhancement contribution is recovered by the survivor.

iii. If the decedent, S-2, had borrowed against the decedent's wage savings (*i.e.*, nonseparate property) and used the proceeds to enhance the value of the decedent's separate property (*e.g.*, inherited real property), unless the loan proceeds are traced through and allocated solely as the decedent's nonseparate property contribution (reducing the proportion of separate property equity taken into account and then removed from the augmented estate for the sole benefit of the decedent's estate), the result would be a reduction in the augmented estate and thus the surviving spouse's share. Thus, if decedent borrowed $100,000 against the decedent's $100,000 of wage savings, then instead of a $300,000 augmented estate, there would only be a $200,000 augmented estate (the enhancement contribution plus the survivor's wage savings), and the survivor's one-third would be $66,666, all of which will be deemed already paid. Survivor gets nothing from the decedent's estate. The miracle of debt will

have magically transformed nonseparate earnings during marriage into inherited separate property.

iv. If in our example the nonseparate property of the decedent, S-2, which is not derived from the survivor's inherited $100,000 enhancement contribution, were $200,000 and S-1, the survivor, had no saved wages as nonseparate property, then the family augmented estate is $300,000 (the enhancement contribution plus S-2's nonseparate property). The poorer survivor's $100,000 contribution is included as decedent's property in the $300,000 and is not excluded as the survivor's or the decedent's separate property. The survivor's share is $100,000 (one-third), of which $33,333 derives from the survivor's separate contribution to the decedent's property. For a true net worth decrease of $100,000 to the survivor, the survivor receives only one-third ($33,333) or less in elective share benefit. Even if all $100,000 of the share is payable to S-1, only $66,666 of it will be based on assets other than those contributed by the survivor, while the full $100,000 of benefit is retained by the decedent's estate along with $200,000 (two-thirds) of the family augmented estate. The decedent has given up nothing. Although the amount payable to S-1 happens to cover S-1's enhancement contribution, the net result is that S-1 receives none of the family augmented estate S-1 helped accumulate.

v. In our next example, let's flip the order of deaths and assume the survivor in the last example, S-1, was instead the spouse who died first. The $100,000 enhancement contribution would be included in the augmented estate as a gift to the other wealthier spouse, S-2, and with S-2's nonseparate property of $200,000, the family augmented estate would be $300,000, of which S-2's share would be one-third or $100,000. This $100,000 would be treated as already paid out of the gift from S-1 or out of the nonseparate property held by S-2. S-1's estate owes nothing to S-2 but has nothing to leave to S-1's beneficiaries, either. S-2 keeps all the $200,000 family nonseparate property from the augmented estate, and, as an overlapping benefit, keeps the $100,000 property enhancement contribution, too.

vi. Taking our example another step further, assume S-2, the wealthier spouse, is again the decedent and has made a gift of $100,000 to the survivor, S-1. The family augmented estate will again be $300,000. The poorer survivor's share will be $100,000, all of which will be treated as already paid, fully offsetting the survivor's share. The survivor has been benefitted by the gift, but gets no overlapping benefit from the nonseparate family augmented estate.

b. Other Transfers Problem. The problem of what may have been intended for a poorer survivor contributing to a wealthier spouse decedent is actually broader, because it is not clear from the statute what happens to any other transfers of separate property by the survivor to the decedent which do not fit into the property enhancement category of debt payments on or improvements to the separate property of the decedent. This property enhancement category is the only type of survivor's transfer specifically dealt with in the separate property provisions (UCA § 75-2-408(1) through (5)) by which provisions it is excluded from decedent's separate property for elective share calculations. Where does that leave other transfers?

There are three alternatives: First, are these other transfers to be treated as the decedent's separate property? If so, this would make the disadvantage to the survivor even worse and is clearly out of line with the treatment of decedent's transfers to the survivor. This alternative is clearly excluded as to enhancement contributions. Further, UCA § 75-2-208(1)(b) does not include in separate property any transfers from a spouse. The first alternative can probably be safely written off. <u>See</u>, however, II.B.3.c.(ii) above as to possible ambiguity. Second, even if the transfer is not the separate property of the deceased, does it remain separate property of the survivor or not? (<u>See</u> UCA § 75-2-208(1)(c) on separate property, including property "acquired" with separate property.) If not separate, it goes into the augmented estate of which the survivor ends up entitled to but one-third. Third, if it is the survivor's separate property, it is excluded from the augmented estate with no mechanism for its recovery by the survivor in any part. Although the second alternative is the one which ends up applying, is it plausible that any of the alternatives may have been considered and the result intended by the legislature?

c. <u>How Much Intention Can Be Discerned</u>? There are different considerations applicable to enhancement contributions than to other transfers of separate property. Enhancement contributions are for the ongoing benefit of the spouses and from which the contributing spouse does not expect to be intentionally cut off, at least so long as the contributing spouse survives. Other transfers may or may not be subject to such considerations. The legislature made at least some weak effort to try to deal with enhancement contributions in the separate property provisions but did nothing similar to deal with other separate property transfers by the survivor. If two-thirds to all of the survivor's other separate gifts to the spouse are to be lost to the survivor, perhaps based on an assumption that they were freely given expecting them to be irretrievable, then why have the separate gifts from the decedent not been treated similarly so that the elective share would be in addition to one-third or all of such presumably freely-given irretrievable transfers, rather than being treated as paid out of them? Although an intent of the legislature might be discerned as to property enhancement contributions based on its inadequate attempt to deal with them, it may be that there was no particular intention as to other separate property transfers. Nevertheless, under any of the alternatives, if the separate property transfer leaves the disinherited survivor in a position to claim unjust enrichment, there may be a remedy outside of the elective share for the survivor.

Even without considering further the legislature's intentions (or lack of intentions) for other separate property transfers, the statute is plainly out of balance in ways the legislature perhaps did not intend with respect to its provisions for protecting the survivor's separate property enhancement contributions.

d. <u>Are Measures Needed to Accomplish Legislative Intent</u>? The statute on its face just is not alone up to the task of correcting the imbalanced situation as to enhancement contributions. The problem does not exist for the Uniform Code approach, since all property of both spouses, whether received from the other spouse or elsewhere, without any exclusion for "separate property," is taken into account, and thus prior gifts from the decedent are the only interspousal gifts which need to be considered and then only in treating the survivor as having already received a portion of the elective share amount. The Utah version left alone the treatment of gifts from the decedent as payment toward the elective share but did not make

appropriate provision for transfers from the survivor to the decedent in determining Utah's unique separate property treatment, nor provide specifically for allocating debts and expenses with respect to separate property. The result is that a decedent's estate keeps the larger share of the family property and benefits from gifts to the survivor on top of this through reduction of the elective share, while on the other hand, the survivor does not recover spousal gifts on top of the smaller share of the family property.

There may be ways to correct matters. One possible approach for corrective measures, from the survivor's point of view, would be to cause enhancement contributions by the surviving spouse to enlarge the elective share beyond what it would otherwise be. This would mean that the augmented estate should increase and the surviving spouse should not be treated as having received anything toward the elective share amount until the allowable contribution amount (not in excess of the then value of the property benefitting from the contribution (UCA § 75-2-208(4), last sentence) has been sufficiently recovered to provide the survivor the same amount of elective share as if the contribution had not been made. Another possible approach, from the survivor's point of view (and possibly from both a poorer decedent's and a poorer survivor's points of view), would be to provide relief in the nature of a claim for unjust enrichment to the extent the contribution for improvements or debt service on decedent's separate property is not recovered from the elective share calculations. Corrective measures of some kind look quite possible.

More fundamentally, however, are any such measures needed to meet the intent of the statute? Given the dramatic change made in Utah to the Uniform Probate Code, the rather modest level of protection provided by the Utah elective share for surviving spouses (such protection is nowhere near the same level as in a Utah divorce or on intestacy (see UCA §§ 75-2-102 and 75-2-301), not to mention the protective spousal shares on death in some of the other states), and the limited attempted treatment of survivor's gifts to the decedent which takes account only of property enhancement contributions, it may be argued with at least some small cogency that no such corrective measures are needed, because the legislature actually intended the disparity that occurs when a richer spouse dies, intentionally cutting a poorer survivor out of the family patrimony even where the survivor's separate property enhanced the decedent's separate property.

Nevertheless, we should hesitate to assume an intention to produce such unfairness. The purpose of this kind of statute is to protect surviving spouses against being cut out of family property; even though the protection level is not great in Utah, it need not be unfairly provided. Further, the internal ambiguities and interpretive problems contained in the statute are more indicative of insufficient analysis and of poor draftsmanship than of an intentional plan.

The overall scheme of the statute shows a strong concern for crediting what is or had been separate property to each spouse and specifically made an unsuccessful attempt at giving protection of some kind to the separate property which the survivor contributed to enhance the separate property of the decedent. It may not have been done very well, but that it was done at all indicates a protective policy behind the statute on which a court, if so inclined, could base an application of the statute or provide another form of relief designed to better meet the policy goal.

B. **Possible Statute-based Corrective Measures**. As already mentioned, the equitable adjustment might be accomplished by means of a separate claim for the unjust enrichment. We will come back to this. On the other hand, a court may be more inclined to interpret or apply the statute to help internally ameliorate the problem where there may be a reasonable way to do so. Thus, it is appropriate to first consider whether statutory options are realistically available. The bottom line is that interpretive options probably won't work. (If you would rather not witness the beating up of this straw man, please go directly to the common law alternative discussed at part III.C. below.)

1. **Interpretive Options**. The available statutory possibilities may include interpreting and applying the statute under some combination of the following, so that:

a. The enhancement contribution is simply treated as the "acquired" separate property of the survivor (capped at the value of the asset enhanced) and is required to be returned to the survivor, based on what may be seen as the dominant policies of the statute to trace and protect separate property and to protect surviving spouses. The augmented estate will consequently be lowered, but the survivor will come out net ahead. However, the statute doesn't provide for any such return, and this approach appears to make UCA § 75-2-408(4) rather useless, except to confirm that the survivor's separate property is not the decedent's separate property.

b. The decedent's separate property not only does not include the survivor's contribution and the increase allocable to it, but is also equitably charged with the amount of the contribution or such further amount as may be necessary to prevent reduction of the augmented estate to the extent necessary to eliminate unjust enrichment. Such a charge would go beyond the asset enhanced and extend to any separate property of decedent, but not beyond. There is no specific statutory provision allowing such a charge which would need to be based on the overall structure and intent of the statute to protect surviving spouses and separate property.

c. The augmented estate, which already includes the enchanced value of the decedent's property, is also further increased by the amount of the survivor's contributions based on a combination of UCA §§ 75-2-207(1)(b) and 75-2-206. The first provision tells us to include nonprobate transfers as if the surviving spouse were the deceased, and the second provision tells us that if that were the case, the augmented estate would have included the contribution as a transfer to the spouse (*i.e.*, the actual decedent), if it passed by reason of death (*i.e.*, of the actual survivor). Thus, a hypothetical death of the survivor as of the decedent's death and either actual or hypothetical passage at that death to the decedent would be required. If actual passage at death would be required, then where the property was contributed some years earlier, the passage at death requirement would either have to be ignored in the interests of fairness, or would have to be deemed to apply to a release of a claim for unjust enrichment or some similar right. Assuming this is acceptable to the court (a big assumption), this interpretation may result in a double inclusion in the augmented estate; normally the statute would likely be interpreted to avoid a double inclusion, but the double inclusion might be justified as necessary to prevent an unjust result. If, however, decedent's enhanced property

went down in value, or otherwise is of insufficient value to cover the enhancement, there would be no double inclusion to begin with. As an aside: The provisions of UCA § 75-2-208(8) intended to avoid the overlapping of certain inclusion provisions do not apply beyond UCA §§ 75-2-205, 206, and 207 (the three of which relate to nonprobate transfers and property of the surviving spouse); the double inclusion here, however, would result from an application of UCA §§ 75-2-207 (which relates to the survivor's property) and 204 (which relates to decedent's probate estate).

d. If such double inclusion occurs, or if a charge on decedent's separate property is made, unless separate assets are simply going to be returned to the surviving spouse (as in the first suggestion), the separate assets of the surviving spouse should not be increased (and thus the augmented estate will not again be reduced in these amounts), because the property at the time of death simply is not then the property of the surviving spouse . Such an increase might also be prevented by reason of UCA § 75-2-208(1)(b), excluding spousal gifts from separate property, or UCA § 75-2-208(4), second sentence, which provides such contributions (and presumably any equitable charge based on them) "shall not be separate property," might be interpreted to apply to either the decedent or the surviving spouse, "to the extent of the amount actually paid."

e. Any such return, charge, or inclusion must not be treated like a predeath claim against decedent's assets, which would result in a reduction of the augmented estate under UCA § 75-2-208(7)(a), but should be treated as arising from the statutory provisions themselves after death.

f. The foregoing would also require that amounts deemed paid to the survivor from the survivor's nonseparate assets are not increased (under UCA § 75-2-209(1)), either because (i) the increased share results from the charge on decedent's separate property rather than actual nonseparate property held by the surviving spouse or (ii) the double inclusion does not pass to the survivor outside the operation of the elective share, and the double inclusion is not only not the separate property of the survivor, but is not really nonseparate property of the survivor, either, since it does not actually belong to the surviving spouse or to persons (other than the decedent spouse) to whom the survivor made transfers brought back into the augmented estate.

In essence, based on a reading of the unclear statute in light of its presumed dominant purposes, an exception to the results which might otherwise be expected where separate property enhancement contributions are not an issue would be being made to prevent the unjust result.

2. **Is Balance Established**? This interpretive approach might be criticized on the ground that it does not appropriately take into account the risk where a wealthier decedent has made lifetime spousal gifts (not limited to contributions for property improvement or debt service on property) that the elective share may be too small to offset the gifts. Essentially, this view would be that the corrective interpretation is not properly balanced between wealthier decedents and poorer survivors. However, is this a fair criticism? I don't think so.

a. It may be argued that to the extent the transfers are other gifts and not contributions to the improvement of or debt service on the survivor's property, both spouses may be in roughly-equivalent risk situations. Even in the best such situation, there is no real equivalence, even rough. Although the poorer survivor never can recover such other gifts beyond the range of zero to one-third and often to the lower extreme due to deemed payment offsets, the wealthier decedent may often be able to recover within the range of two-thirds to all; thus, there is no rough risk equivalence, rather, the situation still is fundamentally more favorable to such a decedent.

b. Also, in a proper case, a court could provide some similar relief with respect to contributions by a decedent which enhance the survivor's assets, where the decedent is the poorer spouse and it is deemed fair to do so, at least where the separate property provisions create an anomaly. Such relief for a poorer deceased spouse may not be as clearly justifiable as relief for a poorer surviving spouse where the statutory purpose is to protect the living, *i.e.*, the surviving spouse. Nevertheless, in a proper situation, a balance can be achieved for poorer decedents like that for poorer survivors.

c. Wealthier decedents are different. It would not be at all unfair that a wealthier decedent, who is generally at an advantage under the statute, can't always fully recover amounts freely given to the survivor to improve property also enjoyed by the decedent during life and from which the decedent has not been cut off by a spouse. The wealthier decedent simply doesn't need the relief. The poorer survivor, in contrast, will have a need for resources and will not be able to enjoy further the separate property of the decedent enhanced by the contribution made, but has instead been intentionally cut out of the family property under the decedent's estate plan, either entirely or almost entirely and needs the protection provided by a corrective elective share adjustment to prevent unjust enrichment, to recognize the survivor's contributions to the accumulation of family property, and to provide for the support of the survivor. It is not very plausible that the survivor enchanced decedent's property with a view to irrecoverably losing the benefit during the survivor's life, not only of the property enhanced but also of the enhancement.

Furthermore, other than with the approach of simply treating the enhancement contributions as the survivor's and requiring them to be repaid, the poorer survivor has no guarantee that even with the corrective adjustments proposed, the contributions made will be fully recovered; the adjustments just provide a chance where otherwise there would be none. For example, there may be insufficient separate property of decedent to equitably charge, and double inclusion alone will never make up the full difference.

3. **Effectiveness**. The interpretive approach posited above could use both a charge against separate property and double inclusion in the augmented estate (the combination essentially having the effect of a triple inclusion), yet such an approach would only partly accomplish the desired equitable result where the charge is only equal to the contribution. However, it would reduce the amount of the unjust enrichment, and could get pretty close to the amount shown in step 11(g) of the example above (II.C.1. and 2.) as if the contribution had not been made. If, however, the charge were greater, for example, by being specifically calculated to

eliminate the unjust enrichment, or if estate administrative expenses and homestead and allowances had been properly allocated (as described above at II.D.6.) so as not to unduly reduce the augmented estate, a better result could be obtained.

Unless a court used the combination of interpretations described, or treated the enhancement contribution as simply returnable to the survivor, the balance will not be effectively redressed. If a court were willing to apply the statute in accordance with such interpretations, which are neither easy nor obvious, a level of protection for the survivor to redress the balance possibly intended by the legislature may be provided. It would recover the enhancement but would not, however, recover more than the one-third share as to any value increase due to the enhancement contribution.

More importantly, however, the statutory interpretations proposed may all boil down to the need to create something that is actually a judicial exception to a statute. Yes, the statute is badly drawn and at best ambiguous, and, yes, courts have done similar things with other badly-written statutes in the past just to get them to make sense, particularly where no other option is apparent. However, such an action is not taken easily (nor should it be). The big question is whether there is a compelling-enough need and a clean-enough method to entice a court to take such an action as to this statute. The need is there, but the statute does not allow for a truly clean interpretive solution; even the simpler approach of just treating the enhancement as the survivor's separate property returnable to the survivor requires a significant analytical jump. The problem with interpretations or exceptions involving analytical jumps to solve a particular problem is that they can lead to unintended consequences in surprising ways. A court, particularly one sensitive to judicial activism or to unintended policy consequences, may well struggle with the matter and if the statutory approach does not seem appropriate, the court may (and probably should) instead go with the alternative of an unjust enrichment claim, which at least has the merit of a long jurisprudential pedigree and the relief for which can be tailored to the case at hand.

Further, with respect to the treatment of other (*i.e.*, nonenhancement) transfers of separate property by a surviving spouse to the decedent, an interpretive approach does not seem appropriate at all. The statutory intent is even less clear, and the circumstances and intentions behind the gifts will be much more various. Thus, a hardwired interpretation should not be used to solve any problems from such transfers, rather, the unjust enrichment rules may be the most appropriate tool to use.

C. **Unjust Enrichment Claim**. A successful restitution or quantum meruit claim by the survivor, perhaps coupled with a remedy such as a constructive trust or equitable lien, or a resulting trust, might be possible to bring against the decedent's estate based on unjust enrichment, with respect to enhancement contributions at least to the extent the survivor cannot recover through the elective share the contribution which enhanced the decedent's separate property by improving it or paying debt service on it, or with respect to other separate property transfers in appropriate cases.

1. **Elements**. The elements of a claim for unjust enrichment are:

> There must be (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.

Berrett v. Stevens, 690 P.2d 553, 557 (Ut. 1984); *Concrete Products Co. v. Salt Lake County*, 734 P.2d 910, 911 (Ut. 1987); *Alpha Partners, Inc. v. Transamerica Investment Management*, LLC, 153 P.3d 714, 723 (Ut. Ct. App. 2006) (which also notes that "an action in quantum meruit, such as unjust enrichment, is typically applied in instances where no enforceable written or oral contract exists").

a. Benefit and Awareness. The first two elements of the claim should generally exist: the survivor will have benefitted decedent, and the decedent will be well aware of the benefit. For purposes of meeting the benefit element, separate property enhancement contributions by the survivor, as used in the elective share provisions, are not the only consideration. Any contribution by the surviving spouse from "separate" or "nonseparate" sources, including the survivor's personal services, may be considered, and the tracing features of the elective share, which are designed to segregate separate from nonseparate components and prevent dilution of decedent's separate property by enhancement contributions, would not be applicable. Rather, there will need to be proof of the benefits provided by the surviving spouse and tracing would help with this and may be necessary, but it need not be the same as that used in the elective share determination.

b. Inequitable. The third element should also be met in the typical case of the decedent spouse trying to cut the surviving spouse out of all or most of the family estate and successfully cutting the spouse out of at least most the family estate by a secret will made by the decedent spouse, who dominated the family finances, while nevertheless keeping the benefit conferred and transferring it to someone else by the will. This is inequitable, especially where the survivor conferred the benefit as part of the close and confidential marital relationship for the common good of the spouses and where the survivor is the less propertied spouse and the survivor's separate assets otherwise available for maintaining the survivor's standard of living have been reduced without any other possibility of recovery.

2. **Constructive Trust**. The Restatement (First) of Restitution § 160 (American Law Institute 1937) describes the remedy of a constructive trust this way:

> Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

The reporter for the Restatement quotes these statements by the highly-regarded Chief Judge Cardozo of the Court of Appeals of New York about the remedial character of the constructive trust:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circum- stances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. *Beatty v. Guggenheim Exploration Co*., 122 N.E. 398 (NY 1919).
>
> A constructive trust is then the remedial device through which preference of self is made subordinate to loyalty to others. *Meinhard v. Salmon*, 164 N.E. 545 (NY 1928).

A four year limitations period applies for the breach of a constructive trust, but in special circumstances, such as close familial relationship, an equitable tolling until discovery rule may apply as well. Estate of Davis v. Davis, ___ P.3d ___, 2011 UT App 343, 2011 WL 4862950 (Ut App. 2011) (involving brothers).

3. **Effect of Spousal Relationship**. The spousal relationship adds a special twist to unjust enrichment claims and the use of constructive trusts.

a. Use of Constructive Trust for Spousal Protection. Consider the case of *Parks v. Zions First National Bank*, 673 P.2d 590 (Ut. 1983). There a constructive trust (as described in the Restatement of Restitution § 160) in favor of a surviving husband was imposed against the wife's estate where the husband's earnings as sole wage earner and efforts in repairs and improvements had helped to accumulate real property, but the wife used a secret will to transfer the property to others. An oral agreement was not required for this remedy to apply, and neither was any intent required. The court also pointed out that a resulting trust as described in the Restatement of Trusts § 442 may also be an appropriate remedy, but does not displace the constructive trust remedy, where one spouse pays for property which is titled in the name of the other spouse. See also *Hawkins v. Perry*, 253 P.2d 372 (Ut. 1953) (a constructive trust was granted for nephew who gave money to uncle for purchase of home in uncle's name until nephew came of age, where uncle's wife received the property in divorce); *Rawlings v. Rawlings*, 240 P.3d 754 (Ut. 2010) (constructive trust imposed where father transferred property to son to hold for family, and where family contributed toward taxes and other aspects in operation of farm, including labor and participation in settling a boundary dispute).

In the *Parks* case, the contributions made by the husband which made it inequitable for the wife to retain title were not limited to money or property contributions derive from "separate" property. The "separate" property concept would not apply; the issue is more fundamental: unfairness, good conscience, and unjust enrichment. The inequity can arise by reason of contributions derived from any number of sources, including from the spouse's services, from wages disproportionately supporting the acquisitions by the other spouse, property contributions derived from wages or any other source which would be treated as "nonseparate" under the elective share provisions, or property contributions from inheritances or other sources which would be treated as "separate" under the elective share provisions, and so on. Thus, all relevant transfers or benefits to the spouse can be taken into account in applying unjust enrichment principles. However, the loss of inherited or other "separate" property by the surviving spouse may be seen as one of the more inequitable results which would make a constructive trust appropriate.

b. Confidential Relationship. Certain relationships are presumed to be confidential. See *Baker v. Pattee*, 684 P.2d 632 (Ut. 1984) and *Blodgett v. Martsch*, 590 P.2d 298 (Ut. 1978) (presumption of confidential relationship between parent and child and between trustee and cestui que trust).

Further, as noted in *Parks* and in other cases, unfairness can be presumed in a confidential relationship, such as a marital relationship, at least where there is an inequality in the relationship and the dominant party benefitted. See *Ashton v. Ashton*, 733 P.2d 148 (Utah 1987) (confidential relationship between brothers required return of property*); In Re Hock's Estate*, 655 P.2d 1111 (Ut. 1982) (constructive trust for brother of decedent under Restatement of Restitution § 160); *Mattes v. Olearian*, 759 P.2d 1177 (Ut. App. 1988) (discusses confidential relationship between spouses, although parties in case found not to be common-law spouses); *Pierce v. Pierce*, 994 P.2d 193 (Ut. 2000) (high duty of spouses; there was a written agreement in this case); *Beesley v. Harris*, 883 P.2d 1343 (Ut. 1994) (fiduciary duty of good faith and fair dealing between spouses). See also *Meitke v. Meitke*, 101 N.E. 2d 571 (Ill. 1951) (right of one party to assume other party in confidential relationship will act in manner consistent with welfare of first party; constructive trust against wife for husband in half of family real estate where wife was responsible for family financial affairs and used husband's wages to buy, renovate, and manage real estate).

c. Burden on Issue of Unfairness. The burden with respect to the issue of unfairness may shift in such a case to the party benefitted. See *Baker v. Pattee*, 684 P.2d 632 (Utah 1984) (in some cases, but not this case, a confidential relationship is presumed; however, if a confidential relationship exists, "a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant [the party to the confidential relationship] to prove absence of unfairness by a preponderance of the evidence"). See also *Robertson v. Campbell*, 674 P.2d 1226 (Ut. 1983) (finding of undue influence invalidating a trust shifts the burden to the wrongdoer to prove absence of continued undue influence on purported later ratification of the trust) and *Jones v. Jones*, 759 P.2d 345 (Ut. App. 1988) (no confidential relationship). See further, Utah Rule of Evidence 301(a) relating to the effect of a presumption.

d. Expectation of Continued Benefit. The nature of the marital relationship also indicates that benefits conferred by a contribution by one spouse to the property of the other is for the mutual benefit of the spouses as a family and is not gratuitously provided as if by an outside intermeddler. See *Jeffs v. Stubbs*, 970 P.2d 1234 (Ut. 1998) (on benefits to property by resident not gratuitously conferred where there was an expectation of continued use).

e. Inequitable Conduct. Inequitable conduct in a confidential relationship can also be a factor. See *In re Marriage of Frederick*, 578 N.E.2d 612 (Ill. App. 1991) (wife's execution of letter agreeing to husband's transfer of assets to trust was a sham to defraud her of marital rights where husband did not disclose consultation with divorce lawyer). Also, in *Parks v. Zions First National Bank* (cited above), the Utah Supreme Court found that a transfer by use of a secret, undisclosed will by a spouse can violate a constructive trust and make

that spouse a "conscious wrongdoer," giving the other spouse a choice of the measure for the remedy between the value of property transferred or the value of property acquired.

f. Evidentiary Standard. In the *Parks* case, the court applied a clear and convincing evidence standard.

4. **Recovery**. In a case where the elements are shown, the recovery is:

> The benefit conferred on the defendant, and not the plaintiff's detriment or the reasonable value of its services, is the measure of recovery.

Bailey-Allen Co. v. Kurzet, 876 P.2d 421, 425-26 (Ut. Ct. App. 1994). Thus, the base recovery by the surviving spouse would be for the additional value of the property enhanced; this may be more or less than the amount of the actual contribution itself. The base recovery would then likely be reduced (presumably by dollar amount but possibly proportionately) to the extent the contribution amount is actually recovered through the spousal elective share. Where a small contribution leads to a large increase in value, unless limited by the court in some way, the net recovery could well exceed the contribution amount. If the enchanced property does not increase in value by at least the amount contributed, the recovery will not fully return the contribution amount, or any recovery may not be available at all.

The claim should not be treated as a claim to which decedent's property is subject under either UCA §§ 75-2-204 (net probate estate) or 75-2-208(7)(a) (other includable items net of debt) if the court does not want the circular problems that arise where the amount to be recovered will be increased as the augmented estate is reduced by the claim. The claim should be seen as arising at death where the survivor has been cut off despite enhancing decedent's property, not as arising during the decedent's lifetime, as with the standard claims against decedent's property. The inequity occurs at death when the transfer occurs because at any time before death, the decedent could have done better for the surviving spouse. The dispute relates to the determination of interests among beneficiaries and does not affect estate preservation or administration and does not affect the legal title held by decedent at death. Thus, it is not a "claim" under the definition of UCA § 75-1-201(6)).

5. **Discretion**. The issue will present a mixed question of law and fact. Findings of fact by the trial court not clearly erroneous will be upheld and broad discretion will be granted to the trial court in applying the law of unjust enrichment to the facts. See *Alpha Partners,* 153 P.3d 714 at headnote 5; *Groberg v. Housing Opportunities, Inc.*, 68 P.3d 1015 (Ut. App. 2003) (quoting *Desert Miriah, Inc. v. B & L Auto, Inc.*, 12 P.3d 580 (Ut 2000)).

6. **Probate Code Effect**. The Utah Uniform Probate Code, which includes the elective share provisions, provides:

> Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions. UCA § 75-1-103.

See also *In re Estate of Wagley*, 760 P.2d 316 (Utah 1988) (recognizes the appropriateness of equitable principles supplementing the probate code under UCA § 75-1-103, although quantum meruit was not granted in that case; also discusses that exempt property is nearly absolute to the surviving spouse, except for funeral expense, and is intended to help protect spouse from disinheritance).

Where the elective share rules are as poorly conceived as they are, being silent or ambiguous on key matters, there may well not be any "particular provisions" to displace general principles of law and equity, such as the rules relating to unjust enrichment. Rather, although the elective share rules provide the backdrop for the inequity created by the decedent, they should not be interpreted to prevent the use of other general principles of law or equity to remedy the inequity. The elective share rules do not purport to provide the exclusive means for protecting a surviving spouse from injustice, and the application of equitable principles will not prevent the surviving spouse from receiving the benefits the elective share is meant to confer. Unless the elective share is not really to benefit the survivor but is a disguised benefit for the decedent and the decedent's other beneficiaries, there is no reason to conclude that any provision of the elective share rules displaces the longstanding principles of equity jurisprudence.

The use of supplemental equitable principles related to unjust enrichment has a long and respected history and is wholly consistent with the purpose of the statute to protect surviving spouses. It is also wholly consistent with the separate property methodology of the statute, because it protects inherited and other separate property where it is just to do so, and it only applies to change the results which would otherwise occur under the statute where there exists an injustice that the decedent should not have created. It is now, as in the past, the nature of equitable remedies that they will sometimes change a result under otherwise applicable legal principles in the interest of justice and fairness, particularly in the face of disloyalty and particularly in the area of estates and trusts, which have always been of great importance to courts in equity.

The narrow focus and application of an unjust enrichment claim to cases where the elements of the claim are met makes it an appropriate supplemental protection for a surviving spouse in cases involving separate property enhancement contributions and other benefits to decedent's property.

D. **Conclusion**. Mixing common-law property and community property concepts was an idea poorly conceived and poorly implemented, resulting in unfairness, which in at least some important aspects appears to have been unintended. Even if possible corrective measures for the interpretation and application of the statute proved successful, the result will still be unfair where the survivor's election only produces a one-third share which does not equalize the spousal family contributions, especially in long-term marriages. This reflects poor legislative judgment and the courts are not likely to do anything about this. On the other hand, the best the suggested interpretive measures could accomplish is to allow the survivor to recover more of the survivor's contribution to the decedent's separate assets where poor legislative drafting appears to have defeated legislative intent. On this, the courts might possibly act, although the prospects don't appear favorable, given the inherent drawbacks of such interpretive measures.

The statutory corrective arguments that can be made based on the analysis set forth in this outline in an attempt to right an unfair result may come down to asking a court to make an exception to the law, which is always, and appropriately, an uphill battle. A court may, however, find in this situation where the decedent has intentionally cut off a surviving spouse, the classic elements of an unjust enrichment claim. Where a corrective interpretation of the statute (which will have significant problems of its own to overcome) is not worthy to present or is not accepted, the analysis in this outline should show that there is an inequity and that allowing an unjust enrichment claim to correct it is consistent with the apparent intention of the statutory scheme, to the extent one can be discerned, and does not violate any policy considerations.

The willingness of the court to make an equitable adjustment, whether by allowing a separate claim for unjust enrichment, or by creating exceptions to prevent unjust enrichment in calculating the elective share, will depend on the court's view on a number of policy factors, including such things as whether it is desirable: to attempt to discern the legislative intentions in this statute, to further protect poorer surviving spouses, to correct flawed legislative work product in order to accomplish its presumed intentions, to defer to the legislature even where its draftsmanship may be particularly poor, to apply the statute as not having preempted the field in order to leave common-law remedies for unjust enrichment available, and so on. Unfortunately for the client, whether survivor or decedent's estate, this is the stuff of which appeals are made.