Application

for the 2010

Kansas City Estate Planning Symposium Prize

Four Awards given in two tracks:
Track One: papers focusing on tax related topics
Myron E. Sildon Excellence in Tax Related Estate Planning Award
$2,000
Second place award $1,500

Track Two: papers focusing on non-tax related topics
First place award $2,000
Second place award $1,500

An annual award which recognizes UMKC law students of superior character, academic achievement, and potential who have an interest in a career in estate planning law upon graduation.

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Date: 04/05/2010 Applications must be submitted to Kassandra Smith in the Continuing Legal Education office, 5301 Holmes by 3 p.m. Monday, April 5, 2010.

To: The Kansas City Estate Planning Symposium Prize Selection Committee

From: Andrea Ridlen
(Name of student)

Subject: Application

I am a UMKC law student and, hereby, apply for The Kansas City Estate Planning Symposium Prize in the following Track:

_____ Tax related paper

__X__ Non-tax related paper

In support, I have attached the following:

1. A copy of my resume;
2. A summary statement of those academic and extracurricular achievements and honors that I consider to be particularly relevant in assessing my academic and leadership potential, as well as my sensitivity to high ethical standards;
3. A brief statement of my motivation towards pursuing a career in estate planning law; and
4. A sample of my writing on a tax or non-tax related estate planning law-related subject. This writing sample may be papers previously written for class, law review articles, or other purposes.

Signature

Andrea Ridler

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Note:

1. Candidates will be asked to interview with the Selection Committee in April 2010 (date to be determined).
2. All four award recipients will be asked to make brief presentations from their papers to the Kansas City Estate Planning Society following a luncheon in their honor on Wednesday, April 21, 2010 at the Carriage Club in Kansas City, Missouri.
3. All award recipients will be invited to attend as a guest of the Planning committee the Annual Kansas City Estate Planning Symposium *Thursday-Friday, April 29-30, 2010* at Overland Park Convention Center in Overland Park, Kansas.

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ANDREA LEIGH RIDLEN

EDUCATION

University of Missouri – Kansas City School of Law, Kansas City, MO
J.D. (Candidate, May 2010)
GPA: 3.12/4.0
UMKC Trial Advocacy Team Member

University of Missouri – Kansas City, Kansas City, MO
B.A., Political Science
Mock Trial – Team Captain 2003-2006

JOURNAL EXPERIENCE and PUBLICATIONS

- UMKC LAW REVIEW, Note and Comment Editor, 2008 — present

PROFESSIONAL EXPERIENCE

- The Wirken Law Group
  - Law Clerk, December 2009 – present
    - Commercial Real Estate
    - Estate Planning
    - Commercial Litigation

- Platte County Prosecutor's Office
  - Rule 13 Intern, August 2009 – December 2009
    - Handle traffic docket
    - Litigation support

- Law Clerk, January 2009—present
  - Attorney Rick Vandever
  - Attorney Wm. Dick Fickle

- Thompson Reuters
  - Westlaw Student Representative, July 2008 – present
    - Teach classes on researching with Westlaw

- Professor Patrick Randolph
  - Research Assistant for treatise Friedman on Leases, July 2008 – present
    - Research and summarize the law pertaining to commercial leases
    - Edit treatise supplements

- Law Offices of Charlie Dickman, Kansas City, MO
  - Law Clerk, May 2008 – 2009
    - Wrote appellate brief to the Missouri Court of Appeals Western Dist.
    - Drafted pleadings, motions, demand letters and discovery requests
    - Met with clients, drafted correspondence, and attended mediation

PUBLICATION

- Andrea Ridlen, *Closing Pandora's Box: Putting an End to Credit Card Companies' Windfall Profits from Penalty Fees*, LUCERNA (Publication in progress) 2009.

Andrea Ridlen

Academic and Leadership Potential

Of the many activities I have participated in during law school, I believe that being a Note and Comment Editor for the Law Review and being a member of the UMKC Trial Advocacy Team best demonstrate my academic achievements and abilities as a leader. Being selected as a Note and Comment Editor on the UMKC Law Review and being a member of the board has given me the opportunity to use my writing skills to help other Law Review members improve their own work and realize their true potential. In this position, I have been personally responsible for assisting seventeen members of the Law Review in the writing process from the topic selection stage through putting the finishing touches on their final drafts. This included meeting with the members one-on-one to provide guidance as well as reviewing, editing, and giving feedback on the members' writing for three drafts of their Law Review notes and comments. As a board member, I also had an active role in leading our student-run publication.

I was also very honored to be selected as a member of the UMKC Trial Advocacy Team. To become a member of the team, I had to compete against more than eighty of my peers and was one of twelve students invited onto the team after demonstrating my trial advocacy skills in two separate rounds of competition. Once on the team, I assumed a leadership position in helping prepare my fellow teammates for competition.

Andrea Ridlen

Interest in Estate Planning

To be honest, before law school I would never have imagined that I would want to practice estate planning. Upon first impression, it seemed very mundane and as if it could only benefit those who were already wealthy.

However, after my grandmother and her second husband passed away, there was a great dispute over who would receive my grandmother's home—my mother and her sisters or the second husband's children. I felt that it was a great injustice that the law would defeat my grandmother's estate plan and allow my grandmother's second husband—and, by extension, his children—to receive my grandmother's home where my mother and her sisters had grown up. (This was the basis of the paper I am submitting). This long and drawn out dispute created a lot of stress on my family and made me realize the true importance of careful estate planning and what is truly at stake.

Keeping it in the Family: The Obstacles to Transferring Property at Death to Children of First Marriages

By: Andrea Leigh Ridlen

I. Introduction[1]

A. Margaret was an independent yet vulnerable woman. Her first marriage was not short lived, and she bore three children before the marriage ended in divorce. In the divorce proceedings, Margaret was awarded the marital home. Margaret worked hard to support her young family. A few years after her divorce, Margaret met Harold who was himself a recent divorcee and had children of his own—though Harold's children lived with their mother. After a short courtship, Margaret and Harold married. Other than a few personal belongings, Margaret's only significant asset going into her second marriage was the home from her first marriage. Harold made a good wage and the couple decided Margaret should become a homemaker. Margaret worked hard caring for her children, tending a sizable fruit and vegetable garden, and keeping an impeccable home. With Margaret at home, Harold began paying all of the bills. As the primary wage earner, Harold titled all bank accounts and assets in his name save the home which remained titled in Margaret's name alone.

By the time Margaret's children left the home, the children's relationship with Harold had degraded and it was clear that Harold cared mainly for the wellbeing of his own children. Though she did not want Harold left out on the street if she predeceased him, Margaret consulted an attorney about how she could leave her home—which by this time had been paid off—to her children.

[1] Based on a true story. The names have been changed to maintain the parties' anonymity.

As is typical of most grown children, Margaret's children needed financial help from time to time and Margaret always gave what she could from the small reserve she managed to keep. Margaret soon realized that if she died before Harold, Harold would not be inclined to provide for her children if they ever needed some help. Knowing this, Margaret resolved to figure out some way to provide for her children once she died.

Margaret's attorney advised her to convey her home to her children while retaining a life estate for Harold and herself. Margaret soon deeded the property to her children as described for nominal consideration but withheld the transaction from Harold as he had become bitter and abusive in his old age.

When Margaret passed away, Harold assumed Margaret left the house to him and never looked into the matter. Years later, in hopes of salvaging his strained relationship with his own children, Harold promised his children he would leave the home to them—whereby leaving Margaret's children with nothing. It was not until Harold's health was quickly fading and he was preparing his affairs that he discovered Margaret had deeded the home to her children some years before she died. Harold's children felt cheated upon learning of the situation and urged their father to uphold his promise, despite the fact that he was already leaving them his significant financial holdings. Undeterred, Harold's children insisted their father seek legal counsel to void Margaret's conveyance to her children as a transfer in fraud of their father's marital rights. Harold complied, feeling his renewed relationship with his children was in jeopardy.

Harold passed away long before the matter was ever resolved, and Harold's children continued the battle through their father's estate. Given the home's modesty and the landscape

of the housing market, the property only had a value of about $100,000. Margaret's children were not of great means and struggled to defend against the suit while Harold's children used Harold's savings as a war chest. Margaret's children soon realized they could not go on litigating forever, and even if they were successful, there was a concerning risk they would spend everything they stood to gain if they did not settle. Margaret's children felt compelled to accept Harold's children's offer to sell the property and divide the proceeds down the middle rather than risk ending up with nothing.

B. Statement of the Issue

The landscape of American society has changed drastically in the last fifty years. Just as feudal England outgrew the marital estates of curtesy and dower in the eighteenth and nineteenth centuries, America's cultural paradigm shift has created a need for reexamination of statutorily created marital property rights at death.

It was once the tradition for Americans to marry at a young age and stay married to the same person for rest of their lives. Once married, men and women very often adhered to traditionally defined gender roles: the husband worked outside the home and supported the family solely on his income, while the wife would generally stay at home to do housework and care for the children. As a practical result, most of the couple's property was titled in the name of the husband/wage-earner who supplied the funds to purchase most major items of property.

Fast forward to modern America. Now, the average marriage only lasts eight years, with the average person marrying at least once, and twenty-one percent of the population marrying

two or more times.[2] In 2004, 63% of males ages twenty-five to twenty-nine had already been divorced.[3] This may be attributable in part to the relaxation or redefinition of society's moral standards or perhaps to the increase in the average lifespan. It is now commonplace for at least one spouse to have children from another relationship when entering into a marriage. People are also now more likely to re-marry post-retirement. This is significant because the later in life a marriage occurs, the more likely it is one or both spouses have accumulated significant assets prior to marriage.

In a time when increasingly more people are re-marrying later in life and/or bringing children into the marriage, the ability to transfer property to their children from relationships prior to the marriage has become an important consideration. However, it is exceedingly difficult for people who re-marry to transfer property to children of first marriages due to a surviving spouse's ability to elect against a decedent spouse's will[4] and state statutes which presume that any transfer of property without the other spouse's consent is an invalid conveyance in fraud of the other spouse's marital rights.[5] These statutes apply not only to jointly-titled property, but to property titled individually as well. Under these statutes, the decedent spouse's pre-marital property that has been in the family for generations may end up going to the surviving spouse's heirs.

C. Scope

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[2] U.S. Census Bureau, Marital History for People 15 Years and Over, by Age and Sex: 2004. Available at: http://www.census.gov/population/www/socdemo/marr-div/2004detailed_tables.html.
[3] U.S. Census Bureau, Marital History for People 15 Years and Over, by Age and Sex: 2004. Available at: http://www.census.gov/population/www/socdemo/marr-div/2004detailed_tables.html.
[4] *See, e.g.*, MO. REV. STAT. § 474.160.
[5] *See, e.g.*, MO. REV. STAT. § 474.150.

The barriers to passing family property to one's children are usually only present in cases where the decedent had children from another relationship before entering into the marriage at issue. One may assume that if all the decedent's children were also children of the surviving spouse, the surviving spouse would provide for the children upon the decedent's death, and that the surviving spouse would ultimately pass along the family property to the couple's children. At the very least, one would expect that the surviving spouse would not object to the children receiving the decedent's property in an inter vivos transfer.[6] It is also assumed that property held by husband and wife in tenancy by the entireties or joint tenancy with the right of survivorship will not be subject to dispute, since in either case the property would pass to the surviving spouse by operation of law upon decedent's death. Therefore, this Comment will focus on transfers of separately-titled real property by the decedent to her children from a prior marriage or relationship.

Due to the inability of married persons to singly transfer family property to children of a prior relationship, Missouri should update its Transfer in Fraud of Marital Rights statute to permit gratuitous inter vivos transfers to a spouse's children. Part II of this Comment will briefly describe the evolution of marital property rights from early English Common Law to modern American statutes and the different societal interests these laws have served. Part III will explain the impact of property characterization on a married person's right to alienate real property both during the marriage and at death. Part IV will illustrate the effects of statutes such as Missouri's that restrict a spouse's inter vivos alienation of real property during the marriage. Part V will

[6] It would also seem unnecessary for a testator to make such transfers, as the testator is likely to assume that her husband will take care of and will ultimately pass the family property on to the
the couple's mutual children after she dies.

propose changes to Missouri's marital rights statutes that will allow married persons to transfer family property to their children more easily.

II. The Evolution of Marital Rights and the Public Policies behind Them

Without a proper understanding of the history and principles behind marital rights, Missouri's modern spousal election and the marital rights statutes may seem inexplicably archaic. After considering the evolution these statutes have undergone since feudal common law, their modern incarnations will seem only slightly less paternalistic and antiquated by comparison. Nonetheless, a brief history will be helpful.

A. Curtesy and Dower

Since feudal times, it has been the common law tradition for a decedent's property to pass to his heirs upon his death.[7] This began with feudal lords regranting the land to the tenant's heirs after the tenant died, then later evolved into the creation of the feodum, which was a grant of land to a feudal tenant "and his heirs."[8] By the end of the twelfth century, the decedent's heirs developed a legal entitlement to possession of the decedent's real property through the "common law right of inheritance."[9] At the time, spouses were not heirs; the property would only pass through inheritance to direct lineal descendents, such as one's children or grandchildren, and

[7] EUNICE L. ROSS AND THOMAS J. REED, § 2:2 WILL CONTESTS (2009).
[8] William E. Stoebuck and Dale A. Whitman, THE LAW OF PROPERTY § 1.6 at 17 (3rd ed. 2000).
[9] *Id.*

collateral relatives.[10] Inheritance remained the sole means of passing property at death until the enactment of the Statute of Wills in 1540.[11]

Although a spouse was not an heir at common law, a surviving spouse did have marital rights to a life estate in the lands of the deceased spouse.[12] The wife's dower was a life estate in one-third of her husband's lands.[13] During her husband's life, the wife had inchoate dower—a protected expectancy—which barred the husband from conveying the subject lands without the wife's consent and prevented creditors from levying against the land to satisfy the husband's debts.[14] Since the underlying principle was to provide for the wife upon the husband's death,[15] if the wife predeceased her husband, her dower right was extinguished; she could not pass her interest in the lands to her heirs.[16] In furtherance of this public policy, the wife had an equitable right to choose between her dower and what the husband provided for her in his will if his testamentary provisions ran afoul of her dower rights.[17]

While it would seem that the wife was well provided for under this system, her rights paled in comparison to those of her husband.[18] During a couple's joint lives, the husband had an estate jure uxoris in all of his wife's lands, entitling him to all the rents and profits from the lands as well as the right to exclusive possession.[19] He could sell, convey, or even mortgage his wife's lands without even accounting to her for the proceeds.[20] However, since the husband could not convey an interest greater than he possessed, the wife's land was returned to her free of

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[10] *Id.*
[11] *Id.* at 19.
[12] *Id.*, § 2.13 at 64.
[13] *Id.* at 65.
[14] *Id.* at 65.
[15] Charles P. Dribben, Comment, *Dower, Homestead Estate, Homestead Allowance, and Release of Marital Rights under the New Missouri Probate Code*, 21 MO. L. REV. 151, 152 (1956).
[16] Steadman v. Steadman, 41 Ala. 473 (1868)(The wife's dower is an inchoate interest that is not vested in her until her husband's death).
[17] Noel v. Ewing, 9 Ind. 37 (Ind. 1857).
[18] Stoebuck and Whitman, *supra* note 8, § 2.13 at 67.
[19] Cummins v. Wond, 6 Haw. 69 (1872).
[20] Stoebuck and Whitman, *supra* note 8, § 2.13 at 65.

encumbrances upon her husband's death as long as there were no children born of the marriage.[21] "If the wife died first, the property passed immediately to her heirs or devisees, likewise free of all claims of the husband, unless by birth of issue alive his estate had been elongated."[22] When children were born of the marriage, the husband's estate in his wife's lands sprung to an estate by the curtesy initiate, giving him an interest that would outlast his wife's death.[23]

B. *Abolition of Curtesy and Dower*

In both English and early American societies, where land was the principal form of wealth, dower seemed justified as a way of providing widows with a means of survival after the family wage earner passed away.[24] Dower was also necessary to provide at least modest protection to women in a time when all property acquired during the marriage was titled in the husband's name. At common law, "the husband and wife [were] one, and the husband [was] that one."[25] Curtesy on the other hand "seems never to have had any justification other than that it served the interests of males in a male-dominated society."[26]

As personal property began to comprise a greater proportion of personal wealth and spouses became heirs through intestate succession statutes, the number of jurisdictions granting estates curtesy and dower slowly diminished.[27] Curtesy and dower have now been abolished in

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[21] George L. Haskins, *The Estate by the Marital Right*, 97 U. PA. L. REV. 345, 348 (1949).
[22] *Id.*
[23] *Id.*
[24] Stoebuck and Whitman, *supra* note 8, § 2.13 at 64.
[25] Terry L. Turnipseed, *Why Shouldn't I be able to Leave my Property to Whomever I Choose at Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 745 (2006).
[26] Stoebuck and Whitman, *supra* note 8, at 69.
[27] *Id.*

England and in most of the United States.[28] The few states that do recognize dower or curtesy usually only recognize a modified form of them.[29]

In an effort to restore to women the right to control their own property during the marriage and to help close the gap in rights between married women and their single counterparts, England passed The Married Women's Property Act in 1833. Most states, including Missouri, now recognize a woman's right to exercise control over her separate property during the marriage and forbid creditors of one spouse to levy against the other spouse's property.[30]

C. *Modern Rights of Surviving Spouses*

Although curtesy and dower have largely been abolished,[31] remnants of these old property systems are alive and well, surviving within the probate statutes in a majority of states.[32] Most, if not all states give a surviving spouse the lion's share of an intestate decedent's property.[33] The share is often greatest when there are no children from other relationships, but even where the decedent has children by someone other than the surviving spouse, the surviving spouse's share may range between one-half and all of the decedent's estate.[34]

Where the decedent spouse disposes of her property in a will, she cannot wholly disinherit the surviving spouse, even if the surviving spouse is vastly wealthier.[35] Even if the

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[28] *Id.* at 70.
[29] *Id.* at 70.
[30] MO. REV. STAT. § 451.250.
[31] Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 Cath. U. L. Rev. 519, 528, Spring 2003.
[32] Nearly all states that have abolished dower and curtesy have substituted for them a surviving spouse's right to elect against the decedent-spouse's will. Vallario at 530.
[33] UPC § 2-102
[34] This may also depend on the value of the decedent's estate. See, e.g. UPC § 2-102A.
[35] Missouri's elective share statute does not take into consideration the amount of other property a surviving spouse in relation to the value of the decedent's estate.

decedent intentionally omits her spouse from her will, the surviving spouse may elect against the will and take a forced share, equal to at least one-third of decedent's estate.[36]

In separate property states such as Missouri, similar to restrictions under the common law estates of curtesy and dower, a spouse cannot alienate even separately-titled property during the marriage without the written consent of the other spouse.[37] Of course, this issue is not reached at all in community property states where all property becomes the joint property of both spouses upon marriage.[38]

1. Surviving Spouse's Right to Elect against the Will

If a decedent either intentionally omits her spouse or leaves her spouse less than what he would have received under the laws of intestacy, the surviving spouse has the right to elect against the decedent's will, which will allow him to take a share of the estate determined by statute; usually, the share ranges from one-third to one-half the decedent's estate.[39] For example, in Missouri, the surviving spouse is entitled to one-third of the decedent's estate where the decedent has lineal descendants and one-half of the estate if the decedent has no lineal descendants.[40] If the decedent dies intestate—leaving an invalid will or no will at all—the same widower would receive one-half of his wife's estate.[41] The surviving spouse, whether he is electing against the will or taking under intestacy, receives this statutory share in addition to the homestead allowance, one year maintenance and support allowance, and the "exempt property"

[36] MO. REV. STAT. § 474.150.
[37] MO. REV. STAT. § 474.150.
[38] Vallario, *supra* note 31, at 532.
[39] UPC § 2-102.
[40] MO. REV. STAT. § 474.160.
[41] MO. REV. STAT. § 474.010

that he receives off the top.[42] This is true even if the decedent died with relatively modest assets and the surviving spouse is independently wealthy.[43]

It is interesting to note that the Missouri statute does not take the length of the marriage into account in determining the amount of a surviving spouse's forced share. In Missouri, like many other states, if a decedent with children intentionally omits her spouse from her will, the widower will receive one-third of his wife's estate even if the couple had been married less than a month.[44]

Furthermore, the elective share statutes do not take into account the decedent's non-probate transfers to his spouse in determining the amount of the widow's elective share.[45] "[I]f the deceased spouse uses non-probate arrangements to provide for his or her surviving spouse, the surviving spouse is nonetheless entitled to the fixed percentage of probate assets."[46] Thus, where the decedent primarily uses non-probate transfer in his estate plan, the elective share statutes may result in a windfall to the surviving spouse.[47]

Despite these statutes' shortcomings, the somewhat paternalistic policy behind allowing the surviving spouse to elect against the decedent's will is to make sure that the widows are not left out on the streets after the death of the family bread-winner.[48] One may argue that there are also equitable considerations, where the surviving spouse had made contributions of various sorts toward purchasing, maintaining, or improving the property. Each of these considerations will be addressed below.

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[42] MO. REV. STAT. § 474.260.
[43] *Id.* The statute does not consider these factors.
[44] *Id.*
[45] Gallagher v. Evert, 577 S.E.2d 217, 221 (S.C. Ct. App.2002)("Any benefits the surviving spouse may obtain through non-probate assets of the deceased spouse's estate are immaterial to the surviving spouse's right to seek an elective share of the [probate] estate.").
[46] Vallario, *supra* note 31, at 541.
[47] *Id.*
[48] *Id.*

2. Prohibitions on Transfers in Fraud of Marital Rights

Transfer in Fraud of Marital Rights statutes are designed to prevent married persons from effectively disinheriting their spouses through non-probate transfers that a spouse's forced share could not otherwise reach. Once a court finds that a transfer in fraud of marital rights has taken place, the court can pull the transferred property back into the decedent's estate, and the surviving spouse may use that property toward satisfaction of his elective share.[49] While this undoubtedly protects the surviving spouse, it is also a significant restraint on alienation and a very potent method of defeating the transferor's intent regarding the distribution of her individual property.

A. Prohibited Transfers

In many states, including Missouri, transfers of property by one spouse during a marriage without the consent of the other spouse are susceptible to claims of fraud on marital rights, which allow courts to invalidate the transfer.[50] Missouri's statute provides that:

> Any conveyance of real estate made by a married person at any time without the joinder or other written express assent of his spouse, made at any time, duly acknowledged, is deemed to be in fraud of the marital rights of his spouse, if the spouse becomes a surviving spouse, unless the contrary is shown.[51]

Missouri courts use the following factors in determining whether a transfer by one spouse individually was a transfer in fraud of marital rights under the statute: lack of consideration for the transfer;[52]the transferor-spouse's retention of control over the property;[53] proportionality of

[49] MO. REV. STAT. § 474.150.1.
[50] MO. REV. STAT. § 474.150.
[51] MO. REV. STAT. § 474.150.2
[52] Nelson v. Nelson, 512 S.W.2d 455,459 (Mo.Ct. App., 1974).
[53] *Id.*

the value of the property transferred to the value of the decedent's estate as a whole;[54] "whether the transferor-spouse made the transfer openly and with frank disclosure;"[55] whether the transferor made the transfer in contemplation of death;[56] and the effect of the transfer on the other spouse's reasonable expectations.[57]

Missouri's transfer in fraud of marital rights statute[58] can be used to void transfers regardless of whether the transfer is made into joint tenancies[59], tenancies in common,[60] or trusts.[61] In *Haushalter v. Crawford*, the Missouri Court of Appeals for the Southern District affirmed a lower court's finding of a transfer in fraud of marital rights for property titled to husband and paramour, during husband's marriage to wife, which husband later conveyed to paramour without estranged wife's statutory "express assent."[62]

In *Rose v. St. Louis Union Trust Co.*, the Supreme Court of Illinois, applying Missouri law, considered whether a transfer to an inter vivos trust constituted a transfer in fraud of marital rights.[63] Testator's will provided for 40% of testator's assets to be held in trust for his wife and testator separately executed an irrevocable, inter vivos trust which was to pay 60% of testator's assets to his two children equally upon testator's death.[64] Testator later executed a codicil to his will excising the testamentary trust for his wife, comprising 40% of his assets, and substituting a pourover of the 40% to the inter vivos trust for his children.[65] The Supreme Court of Illinois declined to affirm the lower court's holding that the inter vivos trust was a fraud on the wife's

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[54] *Id.* at 460.
[55] *Id.*
[56] However, this factor is not indispensible. Matter of LaGarce's Estate, 532 S.W.2d 511,516 (Mo.Ct. App., 1975).
[57] *Id.* at 517.
[58] MO. REV. STAT. § 474.150
[59] In Re Lowe's Estate, 573 S.W.2d 373 (Mo.Ct. App., 1975)(Court set aside husband's transfer of funds into a joint bank account).
[60]Haushalter v. Crawford, 498 S.W.2d 811, 811 (Mo. App. S.D. 1973).
[61] Rose v. St. Louis Union Trust Co., 253 N.E.2d 417, 418-19 (Ill. 1969).
[62] Haushalter v. Crawford, 498 S.W.2d 811, 811 (Mo. App. S.D. 1973).
[63] Rose v. St. Louis Union Trust Co., 253 N.E.2d 417, 418-19 (Ill. 1969).
[64] *Id.*
[65] *Id.*

marital rights because the record was devoid of evidence as to, inter alia, the amount of property the wife received by virtue of joint tenancy and how much of testator's total assets were placed in the trust.[66] In ordering a remand for a hearing on these issues, the Supreme Court of Illinois stated that the lower court could deem the trust voidable by the wife as a fraud upon her marital rights after considering the above factors.[67]

B. A Rebuttable Presumption

In Missouri, when the property being transferred is real estate, the transfer by one spouse without consent of the other creates a rebuttable presumption of fraud.[68] This is true regardless of when or how the property was originally acquired, even when the property is titled individually in the transferor-spouse's name.[69] The shifting of the burden of proof to the transferee when real estate is concerned was a deliberate change by the Missouri legislature from the old statute which required the spouse claiming marital rights to prove the fraud.[70] The burden of proof remains on the widow where all other property is concerned.[71]

Although the presumption of fraud is rebuttable,[72] the transferee of real estate can only defeat the statutory presumption of fraud by clear and convincing evidence.[73] The presumption is difficult for the transferee to defeat using Missouri's factors, especially when the transferor-spouse is no longer alive to explain his intent and describe the circumstances of the transfer. Consider the following scenario: A widowed father of two remarries at the age of sixty-five to a widow who has already been provided for by her late husband. The father's only real asset is a

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[66] *Id.* at 420.
[67] *Id.*
[68] McDonald v. McDonald, 814 S.W.2d 939, 945 (Mo.Ct. App.,1991).
[69] In fact, it is the testator's separate property that is solely at issue in transfers in fraud of marital rights cases since all property that is jointly titled in the names of both spouses will automatically pass to the surviving spouse upon the testator's death.
[70] Nelson v. Nelson, 512 S.W.2d 455,459 (Mo.Ct. App., 1974).
[71] *Id.*
[72] MO. REV. STAT. § 474.150.2.
[73] Reinheimer v. Rhedans, 27 S.W.2d 823, 829 -830 (Mo.1959).

farm that has been in his family for five generations, which he hopes to pass on to his children at his death. If the father gifts the farm to his children, whether through an inter vivos gift or testamentary transfer, and remains on the farm until his death, his transfer of the family farm could be defeated by his spouse after his death, forcing a sale of the farm.

In the above scenario, the children did not pay sufficient consideration for the farm, the father retained control by living on the farm until his death, the farm was the only real asset of value in the estate, and even if the father did tell his spouse about the transfer, he will not be alive to tell about it. Furthermore, although this is but one factor for the court's consideration, the children will have a hard time proving that the transfer was not made in contemplation of death if the father dies within a few years after the transfer.[74] Not to mention that estate planning by its very nature is often done in contemplation of death.

Despite its good-natured intent, the presumption of fraud where one spouse is not a party to the conveyance under Missouri's Transfers in Fraud of Marital Rights[75] statute is problematic in several respects. First, the decedent-spouse is not alive to testify as to his intent in making the transfer. The only parties with first-hand knowledge of the transaction—usually the transferee and the decedent's spouse—both have a vested interest in the outcome. This makes it very difficult for a transferee to rebut a presumption of fraud.

B. Restraints on Alienation, Policy Considerations

Statutes prohibiting transfers in fraud of marital rights create a juxtaposition of two important competing public policy interests. On one hand, society values the individual's ability

[74] See *supra* note 36.
[75] MO. REV. STAT. § 474.150.

to transfer property freely to who he wishes; on the other hand, society wants to be sure that widowed spouses and minor children have adequate support when the family breadwinner dies.[76]

The right of to alienate property as one chooses is a very big stick in the bundle of property rights and is closely guarded.[77] As such, courts have consistently held that restraints on alienation are disfavored as against public policy, and, under most circumstances, one is free to transfer his property as she chooses.[78] Courts are even more skeptical of absolute restrictions on the transfer of property.[79] Although courts will usually uphold reasonable restraints on alienation, unless there is an express statutory authorization for the restraint, blanket prohibitions on the transfer of property held in fee simple without limit as to duration are generally invalid.[80]

Of course, statutes that prohibit transfers in fraud of marital rights are not *absolute* restraints on alienation of property—one can still convey his property with his spouse's consent.[81] However, they do create a substantial burden on the property owner when her spouse is not amenable to the transfer.

Another closely related and highly esteemed stick in the bundle of property rights is the right to transfer property at death. For centuries, scholars and philosophers such as John Locke and Hugo Grotius have believed that it was inherent in the natural law that one should be able to freely dispose of her property at death, as the testator's possessions represented the fruits of her

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[76] Dribben, *supra* note 15, at 152.
[77] Gangemi v. Zoning Bd. of Appeals of Town of Fairfield, 763 A.2d 1011, 1015 (Conn., 2001) ("[i]t is the policy of the law not to uphold restrictions upon the free and unrestricted alienation of property unless they serve a legal and useful purpose.")
[78] Tovrea v. Umphress, 556 P.2d 814, 818 (Ariz. Ct. App., 1976), Bruno v. First Fed. Sav. & Loan Ass'n of Boise, 788 P.2d 1289, 1290 (Idaho 1989), Methodist Episcopal Church of Emory Chapel of Ellicotts Mills in Anne Arundel County v. Hadfield, 53 A.2d 145, 148 (Md.App., 1982), Cole v. Peters, 3 S.W.3d 846, 851 (Mo. Ct. App., 1999), Sonny Arnold, Inc. v. Sentry Sav. Ass'n, 615 S.W.2d 333, 338 (Tex.Civ.App., 1981).
[79] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § I, II (2010 Pkt. Pt.).
[80] RESTATEMENT (SECOND) OF PROP.:DONATIVE TRANSFERS § 4.2 (1983), Page v. Page, 394 P.2d 612, 613 (Utah 1964), Smith v. Mitchell, 269 S.E.2d 608, 611 (N.C., 1980), Lohmann v. Adams, 540 P.2d 552, 555-56 (Okl. 1975), Fisher v. City of Berkeley, 693 P.2d 261, 300 (Cal.,1984).
[81] MO. REV. STAT. § 474.150.

own labor.[82] Some would even argue that "[t]here would be no incentive to ingenuity, productiveness and thrift unless a man could direct the enjoyment of his property after his death."[83]

Besides the fact that controlling who gets your property when you die is a God-given[84]—though often trampled on and not Constitutionally protected[85]—right, it makes sense as a practical matter from a societal standpoint as well. It would seem to be common wisdom that of all people, the testator herself would be in the best position to assess the needs of her family members and thus where her property would serve the greatest use.[86] After all, it is not always the widows who need protecting. "Testamentary freedom helps to reduce the necessity of governmental support systems for the poor because a testator can direct property to those family members, close or distant in relation, that have the greatest need once immediate family members have enough property."[87]

III. Whose Property is it Anyway?

Missouri's statute prohibiting transfers in fraud of marital rights is only enforceable by the non-transferring spouse when the couple is seeking a divorce or when the transferor spouse dies.[88] In the context of divorce, the policy behind the statute is obvious; if one spouse were able to transfer away all of the property by gifting it to his desired beneficiaries, this would defeat the

[82] Turnipseed, *supra* note 25, at 756.
[83] *Id.*
[84] *Id.* ("It is a widely-held tenet of natural law that a person has a property interest in the fruits of her labor.").
[85] Courts have created a distinction between the right to control one's property during life and the right to pass one's property as he chooses at death. "The distinction those courts have drawn is that property rights are inalienable rights grounded in natural law, whereas freedom of testation is purely a creation of statute that did not exist at common law." In re Estate of Magee, 988 So.2d 1, 3 (Fla.App. 2 Dist.,2007). *See also*, U.S. v. Fox, 94 U.S. 315, 320-321 (U.S. 1876), Epperson v. White, 299 S.W. 812, 815 (Tenn. 1927), Matter of Patrick, 402 S.E.2d 664, 666 (S.C., 1991)(holding that the elective share does not violate the Equal Protection Clause of the United States Constitution).
[86] Turnipseed, *supra* note 25, at 756.
[87] *Id.* at 760.
[88] MO. REV. STAT. § 474.150.

courts' power to make an equitable division of the marital property which would be considered the joint property of both spouses (regardless of whose name is on the title) during the divorce proceedings.[89] Although, notably, the statute on transfers in fraud of marital rights does not distinguish between marital and non-marital property,[90] so it also effectively forbids non-consensual transfers of what would be separate (non-marital) property that the court does not have jurisdiction to divide during the divorce.[91]

It is important to remember that in common law states such as Missouri, the characterizations of property at divorce do not necessarily apply when one spouse dies.[92] During the life of the couple, property ownership is determined based on who is the named owner on the title to the property; property is not characterized as marital or non-marital until divorce.[93] These property characterization statutes do not apply at death. Instead of redistributing the separately titled property equitably between the spouses, the law distributes all of the decedent's property not jointly held according to the provisions of the decedent's will or through the state laws of intestacy.[94]

A. Division of Property at Divorce

There are several salient reasons why the marital dissolution property division system does not and should not apply when one spouse dies. Public policy concerning property characterization upon separation is different at divorce than at death. The public policy interest at divorce is to create a clean break between the former spouses so that they can move on with

[89] MO. REV. STAT. § 452.330.
[90] MO. REV. STAT. § 474.150.
[91] *Id.*
[92] Vallario, *supra* note 31, at 531-532.
[93] Vallario, *supra* note 31, at 523.
[94] MO. REV. STAT. § 474.010.

their lives.[95] The division of property between spouses at divorce is often hotly contested during an adversarial process. In determining whether property is marital property, and therefore divisible by the court, the court generally looks to see whether the property was acquired during the marriage; if so, the property is characterized as marital unless acquired through non-marital funds, subject to a few exceptions.[96] Missouri courts do not have jurisdiction to divide a spouse's non-marital property.[97] Then, when dividing a couple's marital property, the court will consider factors such as the economic circumstances of each spouse; the contributions of each spouse to acquiring the property, including the homemaker's contributions; conduct during the marriage; custodial arrangements of the minor children, etc.[98]

One benefit of this type of division of property is its consideration of equitable factors such as the non-wage earning spouse's contributions, such as provision of caretaking and homemaking services, toward acquiring property.[99] This is especially important because otherwise, where the default rule is that the person whose name is on the title owns the property, the wage-earner would presumably own a vastly disproportionate share of the couple's assets.[100] However, it is important to remember that in Missouri, real property acquired during the marriage is presumed to be taken in tenancy by the entireties, thus giving both spouses an equal claim to the property.[101] Therefore, it is generally only property acquired by one spouse prior to marriage or by gift, devise, or inheritance that is titled separately.

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[95] In Re the Marriage of Neubern, 535 S.W.2d 499, 502 (Mo. Ct. App., 1976).
[96] MO. REV. STAT. § 452.330.
[97] MO. REV. STAT. § 452.330.1(Court shall set apart to each spouse such spouse's nonmarital property).
[98] *Id.*
[99] *Id.*
[100] Vallario, *supra* note 31, at 523.
[101] Nelson v. Hotchkiss, 601 S.W.2d 614, 619 (Mo. 1980).

Given the shortcomings of the spousal election statutes and divorce statutes' provisions for equitable considerations in distributing spouses' property at separation, it is not surprising that some scholars have advocated for the use of the principles contained in divorce statutes to divide property upon one spouse's death.[102] However, such a scheme would be undesirable. The last thing grieving family members should have to endure is an adversarial process to divide the decedent's property. Even if such a process was not so socially repugnant, such a contest would be overwhelmingly one-sided, as the surviving spouse is likely to have the most personal knowledge about the acquisition of the assets and the decedent is unable to contradict the surviving spouse's assertions.

B. Division of Property at Death

At death, the public policy interest is to provide support for widows and minor children, so that they are not thrown out on the street when their loved one dies.[103] To achieve this goal, the state provides for the surviving spouse's support whether the decedent dies testate or intestate by declaring that the decedent's spouse or minor children are absolutely entitled to certain property of the decedent.[104] Under Missouri's exempt property statutes, the surviving spouse receives a one year maintenance allowance,[105] homestead[106], and all of the household goods and furnishings[107] before the rest of the estate is ever divvied up.[108]

In Missouri, if the decedent spouse dies without a valid will, the surviving spouse usually receives between 50% and 100% of the decedent's estate, depending on whether or not the

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[102] *See, e.g.*, Vallario, *supra* note 25.
[103] Dribben, *supra* note 15, at 152.
[104] MO. REV. STAT. §§ 474.250, 474.260, 474.290.
[105] MO. REV. STAT. § 474.260.
[106] MO. REV. STAT. § 474.290.
[107] MO. REV. STAT. § 474.250.
[108] MO. REV. STAT. § 474.260.

decedent had children.[109] If the decedent died with a valid will, the surviving spouse is entitled to elect against the will[110] and even have assets pulled back into the estate if he can prove that transfer was made to defraud him of his marital rights.[111] In Missouri, the surviving spouse's forced share is equal to one-third of the decedent's estate if the decedent has no lineal descendants, and one-half the estate if the decedent has no descendants.[112] This is true regardless of whether or not the decedent spouse owned the assets prior to marriage, and irrespective of non-probate transfers the decedent may have used to provide for the surviving spouse.[113]

There is no question that providing for a surviving spouse after the decedent spouse's death serves a useful purpose in most circumstances. It would be highly undesirable from a societal standpoint to allow one spouse to transfer away all of the couple's assets during life, condemning his widow and minor children to a life of poverty where the state would have to step in and provide for their basic needs. It would also seem highly inequitable, even reminiscent of the days of curtesy, to allow the husband to completely dispose of assets acquired by both parties during the marriage without any consent from the wife.[114]

However, the idea that the surviving spouse always needs and deserves the state's protection has become somewhat outdated in modern times as the role of women in society has shifted and the nature of marital relationships has evolved. A vastly greater percentage of

[109] MO. REV. STAT. § 474.010.
[110] MO. REV. STAT. § 474.160.
[111] MO. REV. STAT. § 474.150.
[112] MO. REV. STAT. § 474.160.
[113] Gallagher v. Evert, 577 S.E.2d 217, 221 (S.C. Ct. App., 2002) ("Any benefits the surviving spouse may obtain through non-probate assets of the deceased spouse's estate are immaterial to the surviving spouse's right to seek an elective share of the [probate] estate.").
[114] Stoebuck and Whitman, *supra* note 8, § 2.13 at 68.

women are now wage-earners, with 60% of married women working outside the home.[115] Although there is still a long way to go before women reach parity with men in earning power, there has been a tremendous advancement toward equality of wages, with women now earning on average approximately 78% of the median wage for men.[116] The average first marriage now lasts only eight years,[117] and approximately 30% of people re-marry at least once.[118] Given that not all marriages are created equally, and that a family's wealth is no longer necessarily concentrated in the patriarch, it would seem that statutes forcing one spouse's absolute providence for the other may have outlived their usefulness.

IV. The Effects of Statutes that Prohibit Transfer of Property without Spousal Consent and a Proposed Solution

Missouri's Transfers in Fraud of Marital Rights statute is not only misguided and unnecessarily paternalistic, but it may also be inadvertently prejudicial to the poor and harmful to the decedent's children from prior relationships. The poor may be paying a disproportionate

A. Disproportionately Harmful to the Poor

It is important to keep in mind that even if wealth is concentrated in one spouse to the exclusion of the other, it is not always the wealthier spouse whose inter vivos transfers come into question under marital rights statutes. If the poorer spouse dies first, the wealthy surviving-spouse is equally able to invalidate the poor decedent-spouse's inter vivos gifts. In such a situation, the wealthy surviving-spouse could have the poor decedent-spouse's gifts be declared

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[115] Bureau of Labor Statistics, Women in the Labor Force: A Data Book (2009 Edition). Available at: http://www.bls.gov/cps/wlftable4.htm.
[116] U.S. Census Bureau, Men's and Women's Earnings by State: 2008 American Community Survey, Issued September 2009. available at: http://www.census.gov/hhes/www/income/income.html.
[117] U.S. Census Bureau, Median Duration of Marriages for People 15 Years and Over by Sex, Race, and Hispanic Origin: 2004. Available at: http://www.census.gov/population/www/socdemo/marr-div/2004detailed_tables.html.
[118] U.S. Census Bureau, Marital History for People 15 Years and Over, by Age and Sex: 2004. Available at: http://www.census.gov/population/www/socdemo/marr-div/2004detailed_tables.html.

as transfers in fraud of marital rights. If the decedent spouse was of modest means, and those assets were pulled back into the decedent's estate so that the surviving spouse may force his elective share, this could easily result in a forced sale of the decedent's assets to satisfy the wealthy surviving spouse's claim.

By considering the value of the asset transferred in proportion to the value of the spouse's total assets,[119] the courts give the statute an opportunity to work mischief disproportionately against poorer spouses. If a poor spouse gives the family farm to his three children without his spouse's consent, and the farm is the poor spouse's only real asset of value, this factors strongly in favor a transfer in fraud of marital rights, as it would arguably be unfair to the richer spouse in that the asset pool against which the spousal share can be levied has been significantly reduced. When real property such as the family home is the only real asset in the estate, this effectively forces the sale of that property. On the other hand, if a wealthier spouse transferred the exact same family farm to his children, this would not tend to evidence a transfer in fraud of marital rights, as the wealthy spouse has plenty of other assets in his estate for the widow to use to satisfy her elective share, even though the proverbial pie would nonetheless be smaller after the transfer.

Furthermore, the statute's *presumption* of fraud when there is a transfer of real estate by only one spouse creates a greater hardship on the poor. Not only is a poor person's estate more likely to consist exclusively of the family home, but that family home probably has a relatively low value. The smaller the estate, the greater the percentage of the value of the estate will be consumed by the cost of litigation, making it seem less attractive for the recipients of the family home to see the matter through to the end of litigation. In fact, litigation over the property may

[119] Nelson v. Nelson, 512 S.W.2d 455,460 (Mo.Ct. App., 1974).

not even be an option to a transferee that has no independent wealth. As such, a poor transferee is much more likely to settle without going to court, no matter how meritous his claim to the property.

Some argue that the elective share statutes, including the Transfer in Fraud of Marital Rights statute, are *only* effective against the poor. As one scholar points out, through clever estate planning techniques, it may be possible to defeat the elective share.[120] Through devices such as offshore asset protection trusts and irrevocable life insurance trusts a spouse may be able to shield his assets from the spousal elective share and the supplementary marital rights statute.[121] However, such means are generally only an option for those who are able to invest in a good estate planning attorney—those who cannot afford such services remain subject to the whims of the legislature.[122]

B. *What About the Children?*

This restraint on alienation also has an adverse impact on a spouse's ability to transfer separate property to her children, who were the natural heirs of real property at common law,[123] and are otherwise inadequately provided for. As noted previously, the laws of primogeniture, wherein property passed to the eldest son, predated the surviving spouse's ability to receive any of a decedent's real property at death.[124] Although spouses were granted life estates, it was presumed that the land should ultimately stay in the family and be used to support future

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[120] Turnipseed, *supra* note 25, at 783-787.
[121] *Id.* However, these clever estate planning methods are not foolproof. If the courts feel that the decedent has transferred assets fraudulently, they could still impose a constructive or resulting trust, depending on the circumstances. MO. REV. STAT. § 473.013.
[122] See Turnipseed, *supra* note, at 782 for a discussion of what a difference a good estate planning attorney can make in the outcome of whether or not a testator may defeat the elective share.
[123] ROSS AND REED, *supra* note 7.
[124] Id.

generations of the property owner's descendants.[125] However, under Missouri's Transfers in Fraud of Marital Rights Statute (working in tandem with the spouse's right to elect against the decedent's will), one becomes virtually powerless to gift his property to his lineal descendants, especially when the property transferred makes up a substantial portion of her estate.[126]

Ironically, the decedent's spouse now enjoys the state's protection at the expense of the decedent's children. While the surviving spouse is given a right to one year of spousal support,[127] a homestead allowance,[128] all of the household furnishings,[129] and the ability to get a minimum of an additional one-third of the decedent's state,[130] the decedent's children are guaranteed nothing. Plus, if the decedent, knowing that her spouse is already provided for through other means, attempts to secure support for her children through inter vivos gifts that represent the majority of her estate, those transfers will be struck down by the state as invalid. While this may not be troubling at all from a social welfare standpoint if the decedent's children are self-sufficient adults or if they are children of both the surviving-spouse and the decedent spouse, such a system becomes less supportable when the decedent's children still rely on her for support and there is no guarantee that that the children's step-parent will continue to subsidize the children's needs.

Regardless of the children's needs or relations with step-parents, Missouri should recognize that it is a perfectly legitimate estate planning goal for a decedent to want to transfer some or all of her property to her children through inter vivos gifts to provide for their support after her death or merely to keep the family legacy alive and keep it out of the clutches of the

[125] Primogeniture was abolished by the Statute of Wills, 1540, 32 Hen. 8, c. 1.
[126] Nelson v. Nelson, 512 S.W.2d 455,460 (Mo.Ct. App., 1974).
[127] MO. REV. STAT. § 474.260
[128] MO. REV. STAT. § 474.290
[129] MO. REV. STAT. § 474.250
[130] MO. REV. STAT. § 474.160

spousal elective share. It is at least equally as venerable as providing for a surviving spouse who may already be well provided for and who may not have even contributed anything to the acquisition of the property, such as in cases of post-retirement second marriages. Furthermore, states seem to have no qualms about allowing parents to disinherit their children,[131] why do spouses need the legislature's special protection?

Admittedly, every family situation is different, and there are still many traditional marriages that are alive and well, where both spouses have made significant contributions toward acquiring and maintaining the property and where the majority of property is titled in the name of a single wage earner. However, there does not seem to be any reason to believe that spouses everywhere are constantly scheming to disinherit their widows. "Indeed, it is probable that through the centuries freedom of testation has been used more as an instrument of family protection than as a weapon of disinheritance."[132] In any event, the testator is in the best position to determine the needs of her family and should be given discretion to distribute her assets accordingly.

C. *Defining "Marital Rights"*

What are a spouse's "marital rights"? Does each spouse have a fee simple absolute expectation in the other's separately-titled real property, or is a life estate sufficient? The answers to these questions vary by state.

Even under dower and curtesy, the spouse only had the right to a life estate, not a fee simple absolute expectation, in the other spouse's property, and it was only a life estate in one-third of his or her property at that.[133] Not to mention that the wife claiming dower had to identify

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[131] LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 4 (1955).
[132] Turnipseed, *supra* note 25, at 760 (quoting W.D. MacDonald, Fraud on the Widow's Share 40 (1960).
[133] Stoebuck and Whitman, *supra* note 8, at 64-65.

the lands that she wanted to satisfy her dower rights in advance.[134] Under Missouri's homestead law, prior to 1956, "the widow and minor children were vested with a homestead estate, consisting of the right of occupancy during widowhood and minority."[135] However, homestead only entitled the widow to a life estate, not a fee simple interest in her husband's property.[136] The husband was thus free to bequest his property to his widow for her life with a remainder in his children.[137]

To hold the opposite, and say that a spouse's marital rights are not limited to a life estate, merely transfers the right of testamentary disposition to the surviving spouse. Missouri's current elective share statute does just that. Instead of receiving a life estate in one-third of the decedent spouse's estate, a surviving spouse is entitled to a fee simple interest in the same property.[138] If a decedent-transferor's conveyance of her property to her own children with a life estate reserved in her husband is invalidated by the courts as fraud on the husband's marital rights, this creates in the husband an absolute right to transfer the same property to his own children instead (or at least one-third of the property).

D. Proposed Solutions

Since the testator is in a much better position to judge the needs of his family than the state government, many would argue that it is time for the states to allow complete testamentary freedom and call for the abolition of the spousal elective share.[139] However, since forty-nine of the fifty states have statutes allowing a surviving spouse to elect against the decedent's will in

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[134] *Id.*
[135] David Y. Campbell, *Marital Rights under the Missouri Probate Code of 1955*, 1961 WASH U. L.Q. 43, 44 (1961).
[136] Regan v. Ensley, 222 S.W. 773, 774 (Mo. 1920).
[137] *Id.*
[138] § 474.160 MO. REV. STAT. states that "When a married person dies testate as to any part of his estate, a right of election is given to the surviving spouse solely under the limitations and conditions herein stated . . . ." The statute in no way limits the surviving spouse's share to a life estate.

[139] See, e.g., Turnipseed, *supra* note 25.

some form or another, one would be well-advised not to hold his breath waiting for such a revolution.[140] Proposed below are several less drastic measures Missouri could take to offset the inequities inherent in its Transfer in Fraud of Marital Rights statute.

Missouri could meet its perceived need to provide support for surviving spouses by guaranteeing the spouses a life estate in the primary residence[141] instead of effectively barring the transfer of property without spousal consent. Some states already hold that a surviving spouse's marital right is limited to a life estate,[142] and this was once the law in Missouri under the old homestead statute.[143] If Missouri limited a surviving spouse's marital rights to a life estate, this would still not guarantee support of the decedent's minor children from prior relationships, but it would at least prevent the surviving spouse from forever excluding the decedent's children from the estate by preventing the surviving spouse from passing the decedent's property to the surviving spouse's own children.

One option that would meet the public policy objectives of providing for a decedent's dependants, while also allowing the decedent to pass her family property to her descendants would be to create an exception to Missouri's Transfers in Fraud of Marital Rights statutes for inter vivos gifts made to lineal descendants.[144] In a society where the decedent's children may not be the offspring of the surviving spouse and there is no guarantee that the children will be provided for upon decedent's death, making provisions for the well-being of the decedent's children is an increasingly important estate planning goal deserving of reverence by the state of

[140] Georgia is the only state that does not have an elective share statute.
[141] Of course, such protection is superfluous where the residence is titled jointly in the names of the husband and wife, since the property would automatically pass to the surviving spouse upon the decedent's death.
[142] R.I. Gen. Laws § 33-25-2 (1956), N.C. GEN. STAT. § 29-30 (2001).
[143] MO. REV. STAT. § 513.495 (1949) (repealed).
[144] Of course, one may also argue that testator's should be equally able to gift their property to elderly parents in need of support. However, there is more justification for treating gifts to children on par with distributions to spouses due to the similar duties of support one has during life toward one's spouse and children.

Missouri. It would also allow testators to keep their family property in the bloodline by passing it gratuitously to the testator's children.

Implementing such a statute will not necessarily leave widows out on the street; it will merely substitute the wisdom of the legislature with the wisdom of the testator, allowing the testator to decide where her assets are needed most. There is no reason to believe that testators will suddenly begin disinheriting their poor, needy, dependent spouses.[145] Furthermore, such an exception to the marital rights statutes for lineal descendants will only affect separately titled property; property acquired during the marriage and jointly titled will still automatically pass to the surviving spouse upon the testator's death.

Short of creating an outright exemption for transfers to lineal descendants, the Missouri legislature could at least eliminate the *presumption* of fraud for conveyances of real estate[146] to lineal descendants and force the spouse to affirmatively prove the fraud, as he already has to do for transfers of personal property.[147] The legislature could also statutorily create definitive factors that the courts are to consider in evaluating whether such transfers are fraudulent in nature.[148] This author would suggest that considering the value of the property transferred in relation to the value of the transferor-spouse's total estate works a de facto discrimination against those with few valuable possessions and should not be given considerable weight in the determination. Nonetheless, if Missouri's legislators believe this is a necessary factor to consider in making an equitable determination, they could at least include non-probate transfers to the decedent's spouse in the equation of the value of the decedent's total estate.[149] Other

[145] *See* Turnipseed, *supra* note 25.
[146] MO. REV. STAT. 474.150.2.
[147] MO. REV. STAT. 474.150.1.
[148] The factors courts now use are judicially-created.
[149] This is already being done in states that use an augmented share model to determine the spouse's elective share. Turnipseed, *supra* note ????, at 739.

factors that Missouri may wish to consider which other states with similar statutes already take into account are the length of the marriage and the relative wealth of the parties.[150]

V. Conclusion

Gone are the days when the husband is the sole wage-earner and all of a couple's property is possessed by the husband. Women are no longer—if they ever were—helpless needy creatures wholly dependent on their husbands for survival. Due to society's evolution in property distribution and family structure, it is time again for states to re-evaluate their spousal election and marital rights statutes to give testator's greater freedom in distributing their estates. If Missouri insists on maintaining a veto power over a testator's testamentary dispositions, it should re-consider its statutes to allow testator's to provide support for and pass their family property to their children from prior relationships.

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[150] *Id.*