Widow's Election under the Augmented Estate

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Comment

Widow's Election Under The Augmented Estate

I. INTRODUCTION

The Nebraska version of the Uniform Probate Code gives the surviving spouse a right of election to one-third of the augmented estate.\(^1\) The augmented estate concept is a new addition to the laws of succession in Nebraska. At common law, the widow was entitled to her dower estate to the use for life of one-third of the lands and tenements of which her husband was seised at any time during coverture in fee simple or in fee tail. The purpose of dower was to provide for the widow's support after her husband's death.\(^2\) The prior statutes of Nebraska provided dower rights similar to those of the common law.\(^3\) At common law, following the birth of issue, the husband had a right as tenant by the curtesy in all the lands and tenements of which the wife was seised at any time during coverture.\(^4\) Here again, Nebraska provided similar statutory rights.\(^5\)

Dower and curtesy were abolished long ago in Nebraska.\(^6\) Statutory dower and curtesy were thought to not be adequate because: (1) they impeded the transferability of real property, (2) an urban society is based more upon a residence and personalty than upon real estate, and (3) protection against the deceased's creditors might be unfair.\(^7\) In its place, the surviving husband or wife could elect to take a share of the estate as determined under the intestacy statutes.\(^8\) This applied to real estate\(^9\) and personal property.\(^10\) At common law there was no problem with the wife's personalty, since it became the husband's upon marriage, and the wife had nothing to dispose of either inter vivos or by will. After the Married

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2. 3 C. Vernier, American Family Laws § 188 (1935).
4. 3 C. Vernier, supra note 2, § 215.
10. Id. § 30-103(b) (1943) (repealed 1974).
Women's Act, the same result applied to the husband's personality. The statutory forced share determined under the intestacy statutes proved to be vulnerable to inter vivos depletion of the decedent's estate. Devices were available whereby a husband could disinherit his wife without pauperizing himself by the use of various will substitutes. Once it has been decided that as a matter of public policy a surviving spouse needs protection from the caprice or waywardness of a pre-deceasing spouse, by the right to a minimum share of the decedent's estate, the question then arises whether there is any limitation upon the freedom to substantially reduce the size of the estate at death.

The purpose of the augmented estate concept is premised upon two policy considerations. First, the forced share is ineffective. Under the forced share a wealthy spouse, by making various arrangements during his lifetime, could deliberately defeat the right of the surviving spouse to a reasonable share of the estate. Second, it is unfair to allow a surviving spouse to disturb the decedent's estate plan when the surviving spouse has already received more than the statutory share through non-probate arrangements. It should be noted that the elective share of the augmented estate is not the same as the intestate share of the surviving spouse.

II. THE AUGMENTED ESTATE MECHANICS

It is first necessary to understand the mechanics of the augmented estate concept. The computation of the augmented estate is the sum of three distinct elements. The first element is the probate estate reduced by funeral and administrative expenses, homestead allowance, family allowances, exemptions, and enforce-

13. See W. MacDonald, Fraud on the Widow's Share (1960).
14. Policy considerations surrounding the protection of the family unit include: (1) the obligation of support, (2) the presumed contribution of the survivor's family, (3) the state's interest in protection from the burdens of indigents, (4) equality of the sexes, and (5) fairness among beneficiaries. Plager, The Spouse's Nonbarrable Share: A Solution in Search of a Problem, 33 U. Chi. L. Rev. 681 (1966).
18. Id. § 30-2322.
19. Id. § 30-2324.
20. Id. § 30-2323.
The owned or transferred property which the surviving spouse must account for in determining the size of the augmented estate is applied as a set-off to the elective share to satisfy it. This set-off can reduce or completely abolish the elective share.

Primarily because a clever estate planner could defeat the right
of the forced share by resort to various non-probate ownership arrangements and also because the elective share was well established with a deterrent effect upon those who might otherwise disinherit, the drafters of the Uniform Probate Code adopted the policy decision of retaining the familiar elective share, but applying it through the concept of the augmented estate. The purpose of this comment is to examine whether the various methods used to defeat the elective share are substantially reduced and what methods still retain a potential for disinheriting the surviving spouse.

III. EXISTING WILL SUBSTITUTE AND PRACTICES TO DISINHERIT

As a general rule, the husband's property is free of any vested interest of his wife and the wife's property is free of any vested interest of the husband. One of the incidents of ownership of property is the right to convey it without consent of another party, including the right to deplete one's estate at death. The augmented estate brings back into the decedent's estate certain transfers made during the marriage for purposes of determining the surviving spouse's elective share.

To apply the transfer provisions of section 2314(1) of the Nebraska Revised Statutes, a transfer of property must be found. The statute fails to specify in many situations what constitutes such a transfer. If a transfer is found, the transferred property is not

32. "Scheming wives, if such there be, have attracted so little attention to date. It would appear, however, that they have at least equal opportunity to avail themselves of these devices." Polster, supra note 15, at 674 n.5.


34. The augmented estate will reduce substantially the number of elections because (1) the Uniform Probate Code will encourage and provide a legal basis for counseling testators against schemes to disinherit the surviving spouse and (2) the surviving spouse will not be able to elect if the decedent has already made adequate provision for her. NEB. REV. STAT. § 30-2314 comment (Reissue 1975).


36. NEB. REV. STAT. § 2314(1) (Reissue 1975).

37. Additions have been recommended by the Joint Editorial Board of a reference to a bona fide purchaser in paragraph one, to a donee in paragraph (1)(iv) and the addition of a definition of a bona fide purchaser. The additions are intended to cure the problem that since any transfer might be found to be for less than adequate and full consideration in money or money's worth, all deeds from married persons had to be joined in by both spouses, because if the grantor dies within
included in the augmented estate to the extent that the decedent received full and adequate consideration. A transfer for partial consideration will only be included to the extent that the property transferred exceeds the value of consideration received by the transferor. In general, adequate and full consideration is a consideration which is the economic equivalent of the transferred interest.\textsuperscript{38} The consideration must be in money or money's worth; that is, either money or something capable of being valued in terms of money.\textsuperscript{39} Property transferred by the spouse is valued at the date of decedent's death or the date the transfer became irrevocable, whichever occurred first.\textsuperscript{40}

A. Antenuptial and Postnuptial Agreements

The rights of election of a surviving spouse and the surviving spouse's rights to allowances and exemptions may be waived, in whole or part, before or after marriage, by a written contract, agreement, or waiver signed after fair disclosure.\textsuperscript{41} Antenuptial agreements have previously been held to be valid in Nebraska.\textsuperscript{42} The theory was that they were generally enforceable on the basis of contractual principles.\textsuperscript{43} They have been found to be voidable on grounds of fraud in the inducement,\textsuperscript{44} overreaching, undue influence, failure of full disclosure,\textsuperscript{45} or because they fell within the statute of frauds.\textsuperscript{46}

Postnuptial agreements are valid under the Nebraska Probate Code which changed the prior Nebraska law.\textsuperscript{47} This is in conformity with the Married Women's Act\textsuperscript{48} which permits the wife to contract after marriage. Under the Married Women's Act, a majority of the states gave effect to postnuptial agreements where the right

\textsuperscript{39} Id. § 14.3, at 355.
\textsuperscript{40} NEB. REV. STAT. § 30-2314(2) (ii) (Reissue 1975).
\textsuperscript{41} Id. § 30-2316.
\textsuperscript{42} NEB. REV. STAT. § 30-106 (1943) (repealed 1974); Tavlin v. Tavlin, 194 Neb. 98, 230 N.W.2d 108 (1975).
\textsuperscript{43} T. ATKINSON, supra note 7, § 31.
\textsuperscript{44} Estate of Grassman v. Jensen, 183 Neb. 147, 155 N.W.2d 673 (1968).
\textsuperscript{45} W. MACDONALD, supra note 13, at 356.
\textsuperscript{46} 2 A. CORBIN, CONTRACTS § 462 (1950).
\textsuperscript{48} NEB. REV. STAT. §§ 42-201 to 207 (Reissue 1974).
to the marital portion was surrendered, provided the contract is fair and not made under duress. 49 This takes care of the situation in which a spouse dies while a divorce suit is pending. 50

A waiver of the surviving spouse's rights to the allowances and exemptions would do nothing to reduce the size of the elective share since allowances and exemptions are not included in the augmented estate in the first place; 51 however, the surviving spouse could lose these rights. The statute of frauds problem is taken care of by the requirement of a written contract. However, problems of proof may arise regarding fair disclosure, especially after years have passed and memories have faded. Further, the property may have appreciated substantially in value since the time of the waiver.

B. Gifts

Completed inter vivos gifts by the decedent deplete the probate estate. The Nebraska Probate Code includes in the augmented estate all transfers made within two years of death of the decedent in excess of three thousand dollars to any one donee in either of the years. 52 This means that within two years of death, six thousand dollars may be given away to each donee and still not be included in the augmented estate. The potential for disinheritance by inter vivos transfers appears to be limited only by the number of potential donees. Gifts made with the intent to defraud the surviving spouse, under circumstances amounting to fraud, actual or constructive are invalid, 53 but fraudulent intent is not presumed. The burden of proof is on the surviving spouse to establish by a preponderance of the evidence that the gifts were made with a bad motive and fraudulent intent. 54 The general rule regarding inter vivos gifts is that an absolute inter vivos gift is not a fraud on the surviving spouse to the elective share unless the device is merely colorable—enabling the donor to use and enjoy the property during his lifetime, yet deprive the spouse of rights in it at his death—or if the gift is made with a fraudulent intent. 55 The Nebraska Probate Code should not be interpreted as changing the common law of Nebraska regarding inclusion of fraudulent conveyances in the probate estate. Even gifts under three thousand dollars in ei-

49. T. ATKINSON, supra note 7, § 31.
50. NEB. REV. STAT. § 30-2316 comment (Reissue 1975).
51. Id. § 30-2314.
52. Id. § 30-2314(1) (iv).
54. Id. at 323, 228 N.W. at 622.
ther of the two years prior to death should be included in the aug-
mented estate if made with fraudulent intent. However, because of
the normal exclusion now allowed for gifts under three thousand
dollars, proof problems will be encountered, and the de minimis
rule may apply.

The inclusion of gifts by a proximity of time factor has been
criticized as playing a relatively minor role in case law. The gen-
eral criticism has been that two years is irrelevant. A donee
is prejudiced merely because the gift occurred within two years
of the donor's death. Such would be the case in a transfer other
than in contemplation of death. The spouse is prejudiced with re-
spect to transfers occurring prior to the two year period. Time
should be of relatively minor importance in determining liability
for an elective share. However, it can also be argued that the
time proximity factor is not entirely irrelevant because large trans-
fers have more serious consequences to the surviving spouse if made
close to death rather than at an earlier time. The greater the lapse
of time, the more a donee should be justified in relying on his secur-
ity of title without liability to account. The Model Probate Code
recognized the reliance factor by adopting a three year cut off pe-
riod. The Nebraska Probate Code adopts a two year rule.

A possibility for disinheritance by gift exists in the transfer of
a residence to a third party with continued occupancy by the donor
until death. Where the donor had exclusive occupancy, the Internal
Revenue Service has been successful in finding that an understand-
ing existed in reserving a life estate in the donor, resulting in the
inclusion of the life estate in the donor's gross estate. But where
the donor lived in the residence with the transferees, the Internal
Revenue Service has been unable to include the residence in his
gross estate. Exclusive occupancy has been a significant factor.
The language of the augmented estate is borrowed from the federal
estate tax law. To the extent that the language of the augmented
estate should be given an interpretation similar to that of the fed-
eral estate tax law, it follows that a spouse could transfer his
residence to his children and continue to reside in it if the trans-
ferees resided there also. If there is an understanding that the oc-
cupancy would be turned over to the grantor, the property will
be included in his gross estate for estate tax purposes, irrespective

56. W. MacDonALD, supra note 13, at 150.
57. Id. at 153-54.
59. ASSOCIA TION OF CONTINUING LEGAL EDUCATION ADMINISTRATORS, supra
note 29, § 4.4.
of whether or not the understanding is enforceable. The same reasoning should apply to the augmented estate.

C. Gifts Causa Mortis

Gifts causa mortis are testamentary under prior Nebraska law and subject to the surviving spouse's right of election. Furthermore, gifts causa mortis are made with the intent that title should vest only in case of death and are revocable while the donor lives. It is doubtful that the Nebraska Probate Code changes the rule that gifts causa mortis are testamentary. If testamentary, gifts causa mortis are therefore included in the probate estate. Even if gifts causa mortis under three thousand dollars per year would not be included within the language of section 30-2314(1)(iv), they would be included in the augmented estate as a transfer where the decedent retained possession at the time of his death, or would be included as a transfer which the decedent retained the right to revoke for his own benefit.

D. Joint Tenancy Property

The Nebraska Probate Code includes in the augmented estate property transferred by the decedent during the marriage to another and held at the time of death with right of survivorship. Property owned in joint tenancy passes to the joint tenant by virtue of the tenancy and not under the laws of descent and distribution. The jointly owned property does not become a part of the assets of the estate and the decedent's personal representative has no interest in the proceeds. Under the Nebraska Probate Code, property owned jointly with another will be included in the computation of the surviving spouse's elective share, if transferred for less than full and adequate consideration.

To exclude transferred joint tenancy property from the aug-

63. Id. at 713, 235 N.W. at 91.
64. NEB. REV. STAT. § 30-2314 (1)(i) (Reissue 1975).
65. Id. § 30-2314 (i) and (ii).
66. NEB. REV. STAT. § 30-2314 (1)(iii) (Reissue 1975).
67. See Anson v. Murphy, 149 Neb. 716, 32 N.W.2d 271 (1948).
mented estate, the joint tenancy must be severed. An existing estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with the joint tenancy. Such an act has the effect of destroying the right of survivorship because one or more of the necessary coexistent unities of possession, interest, time, and title are destroyed.\(^7\) After the destruction of a joint tenancy nothing more than a tenancy in common remains.\(^7\) The spouse who is seeking to disinherit will have created a cotenancy in common. The augmented estate’s inclusion of transferred property held with right of survivorship should have no application to the undivided interest held by the other cotenants in common.\(^7\) Property held by a tenant in common passes to the tenant’s heirs\(^7\) and will be part of his estate. If the surviving spouse is the sole joint tenant, very little will be achieved by simply severing the joint tenancy—the surviving spouse would own an undivided half interest which must be included in the augmented estate as property owned by the surviving spouse derived from the decedent, and the remaining half interest would be in the decedent’s estate and therefore subject to the right of election. But after severance, the disinheriting spouse can successfully disinherit by conveying his undivided half interest if he can successfully avoid the other transfer provisions which cause inclusion in the augmented estate, e.g., by a gift. If, however, the joint tenant was one other than the surviving spouse, severance of the transferred property held in joint tenancy will immediately put a fractional share forever out of reach; only the deceased spouse’s undivided interest will be included in his estate and subject to the right of election.

Nebraska recognizes a form of ownership where the right of survivorship is attached to a tenancy in common.\(^7\) A survivorship attached to a tenancy in common is indestructible except by either the voluntary action of all the tenants or a partition action.\(^7\) The right of survivorship of this form of ownership will cause its inclusion in the augmented estate.

It seems that the principles for avoiding other transfers as fraud-

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71. Anson v. Murphy, 149 Neb. 716, 32 N.W.2d 271 (1948).
72. See Treas. Reg. § 20.2040-1 (b) (1958). The section (I.R.C. § 2040) has no application to property held by the decedent and any other person (or persons) as tenants in common.
73. 2 American Law of Property, supra note 35, § 6.5.
74. Anson v. Murphy, 149 Neb. 716, 32 N.W.2d 271 (1948).
75. Id.
ulent or illusory transfers should be applied to the destruction of survivorship interests. The Nebraska Probate Code includes the entire property held in joint tenancy in the augmented estate. To avoid the severance on a fraud basis, actual fraud must be shown, with the burden of proof on the surviving spouse. But because of adverse federal estate tax consequences resulting from the use of joint tenancies in estate planning, joint tenancies are not favorable devices. There is a ready-made estate planning argument to counter a surviving spouse's claim of actual fraud. But if the transfer was illusory, estate planning or business purpose notwithstanding, it appears that the transfer should be set aside.

E. Multiple Party Accounts

There are three varieties of multiple party accounts: (1) joint bank accounts in which deposits are in the name of the depositor and/or in the name of the intended beneficiary, with or without explicit mention of right of survivorship, (2) accounts in the name of one person as an apparent trustee for a disclosed beneficiary—the so called "Totten" trusts, and (3) pay on death accounts where a deposit is payable to one person on demand during his lifetime, with the balance remaining at death to be paid according to the express terms of the account.

Prior Nebraska law recognized the validity of a deposit in a bank account in the name of two or more persons with delivery to either of the survivors as a joint account of the payees with right of survivorship. The rule remains unchanged under the Nebraska Probate Code. Joint bank accounts pass to the survivor by virtue of the contractual arrangement and are not to be considered testamentary. At the death of a party of a joint bank account, the balance of the account is not included in his probate estate. However, the account will be included in the augmented estate as property held with another with right of survivorship. For federal estate tax purposes, joint bank accounts are treated just like joint

77. In re Estate of Sides, 119 Neb. 314, 228 N.W. 619 (1930).
82. Id. § 30-2706; W. MacDonald, supra note 13, ch. 14 § 2.
Furthermore, a joint bank account may be included in the augmented estate as property in which the decedent retained at the time of his death the right to revoke, consume, invade, or dispose thereof for his own benefit. This is because the depositor can ordinarily revoke a joint bank account by simply withdrawing funds. Any sums in a joint bank account may be paid, on request, to any party. Even though the bank account passes to the survivors of the joint account, the surviving spouse may claim an elective share of the deposits to satisfy the elective share, if the deposit falls within the augmented estate, even though the estate is solvent. Thus, to defeat a spouse's right of election in a bank account, the funds must be withdrawn and placed in some other medium or the form of the account must be altered by a written notice given by a party to the financial institution under section 30-2705 of the Nebraska Revised Statutes.

A person may make a savings deposit in his own name "as trustee" for another person. The mere fact of a deposit in the name of a depositor as trustee for another is sufficient to show an intention to create a revocable trust. Such a trust is called a tentative trust or a "Totten" trust. The depositor of a Totten trust may withdraw the whole or any part of the deposit at any time. The Nebraska Supreme Court has not previously ruled upon the validity of a Totten trust; however, the Nebraska Probate Code establishes the validity of a Totten trust in Nebraska as a nontestamentary device. The rights of a surviving spouse in a Totten trust prior to the Nebraska Probate Code are unclear. There is a difference of opinion as to whether a spouse could create a Totten trust to avoid the claim of a surviving spouse to an elective share. The

86. Id. § 30-2709.
87. Id. § 30-2707 comment.
88. Id. § 30-2705.
89. Restatement (Second) of Trusts § 58 comment(a) (1959).
90. The leading case establishing its validity is In re Totten, 179 N.Y. 112, 71 N.E. 748 (1904).
91. Restatement (Second) of Trusts § 58 (1959).
92. See Fasan, The One-Party Trust For Nebraskans, 6 Creighton L. Rev. 156, 171 (1972), for a discussion of an unreported decision in the District Court of Dodge County, Nebraska, upholding the validity of a Totten trust account.
94. Id. § 30-2706.
Second Restatement of Trusts takes the position that the surviving spouse can include the deposit in computing the elective share. But In re Halpern’s Estate established the validity of a Totten trust as a weapon of disinheriting.

Under the Nebraska Probate Code the augmented estate includes transfers of property held with right of survivorship and revocable transfers. The Totten trust under the Nebraska Probate Code is a survivorship arrangement where the depositor also reserves power to withdraw in whole or part at any time. The surviving spouse can include the Totten trust account in the augmented estate under these provisions.

The third form of multiple party accounts is the pay on death account. The ordinary pay on death account takes the form of “A, payable at death to B.” A pay on death account takes effect only after the death of the maker, vesting no present interest, only appointing what is to be done after death of the maker. Pay on death accounts were previously held to be testamentary. The Nebraska Probate Code recognizes the right of survivorship in pay on death accounts and establishes their validity as a nontestamentary device. As in the case of other multiple party accounts, the pay on death account is a survivorship scheme and will be included in the augmented estate. Because a pay on death account may be paid, on request, to any original party to the account, this satisfies the requirement of a power to revoke, consume, invade, or dispose of the property for the donor’s benefit which would also cause inclusion in the augmented estate.

To claim an elective share of a multiple party account, the surviving spouse must proceed under section 30-2319 of the Nebraska Revised Statutes to claim the elective share. The portion charged against the account will be “equitably apportioned” among the beneficiaries of the multiple party accounts according to their interest therein. The surviving spouse may claim the elective

95. Restatement (Second) of Trusts § 58 comment (e) (1959).
99. Id. at 141, 40 N.W.2d at 542.
101. Id. § 30-2706.
102. Id. § 30-2319.
103. Id. § 30-2319(b).
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share in the accounts even though the estate is otherwise solvent. When so electing the spouse is not proceeding as a creditor.104

F. Revocable Trusts

The revocable trust is an extremely useful estate planning tool. In the typical revocable trust, the grantor retains the income for life with an absolute unrestricted power to withdraw the principal and terminate the trust at any time. If the grantor does not exercise the power, the trust property will pass to the beneficiaries who are designated to share in the trust fund at the grantor's death. The grantor of a revocable trust is in much the same position as a testator, i.e., he may change or revoke the instrument at any time, and add or remove beneficiaries. Technically, the remaindermen of a revocable trust legally own the property subject only to divestment by exercise of the power, while a legatee under a will has a mere expectancy.105

The reservation by the settlor of a life estate, a power to revoke the trust in whole or in part, a power to modify the trust, and a power to control the trustee in the administration of the trust does not make the trust testamentary and invalid for failure to comply with the Statute of Wills.106 Revocable trusts have been used to successfully defeat the statutory share of a surviving spouse.107 Under the prior elective share statutes where a surviving spouse was entitled to a portion of the estate of which the surviving spouse would not be deprived by will, a spouse could nevertheless transfer property inter vivos in trust to the decedent for life, and the surviving spouse would not be entitled to a share of the property so transferred.108 The argument against this result is that even though a revocable trust is not so much testamentary as to be invalid under the Statute of Wills, it is enough testamentary that it is against the policy of the elective share statutes.109 However, in some instances revocable trusts have been unsuccessful in defeating the spouse's elective share where the trust was not merely revocable, but illu-

104. Id. § 30-2707 comment.
107. See RESTATEMENT (SECOND) OF TRUSTS § 57 comment (c) (1959); 1 A. SCOTT, supra note 106, § 57.5.
108. RESTATEMENT (SECOND) OF TRUSTS § 57 comment (c) (1959).
109. 1 A. SCOTT, supra note 106, § 57.5, at 511.
sory, and where the disposition in trust would have been a fraud on the surviving spouse.

The Nebraska Probate Code reaches gratuitous transfers during the decedent's lifetime where the decedent retained at his death a power, either alone or with another person, to revoke, consume, invade, or dispose of the transferred property for his own benefit. The language of the augmented estate here differs from the comparable estate tax provisions where lesser powers may cause inclusion of the property in decedent's estate for estate tax purposes. The typical revocable trust set up by the decedent during his lifetime will be included in the augmented estate. Therefore, the method of defeating the share of the surviving spouse by revocable trusts is closed by the Nebraska Probate Code. This result appears to be sound.

Powers exercisable by one other than the decedent will not cause inclusion of the trust property in the augmented estate. A transfer revocable by one other than the decedent, without the decedent's concurrence, is not taxable under the comparable estate tax provisions. The same result has been reached even where the power to revoke the transfer is vested in one who lacks a substantial adverse interest, such as a trustee. A power vested in a trustee, other than the settlor, to alter or revoke is not a taxable power, but the power must be one which gives the trustee a genuine discretion. If the settlor can remove the trustee and appoint himself as trustee, the transferred property is taxable to his gross estate on the theory that the settlor retained the power. It follows that an independent trustee possessing the power to alter or revoke the trust will not cause inclusion of the trust in the decedent's augmented estate.

G. Irrevocable Trusts

When the settlor of the trust did not expressly or impliedly re-


111. 1 A. SCOTT, supra note 106, § 57.5 at 512, § 63 at 627; see, e.g., RESTATEMENT (SECOND) OF TRUSTS § 57 comment (c) (1959); Annot. 39 A.L.R. 3d 14 (1971).

112. NEB. REV. STAT. § 30-2314(1) (ii) (Reissue 1975).

113. ASSOCIATION OF CONTINUING LEGAL EDUCATION ADMINISTRATORS, supra note 59.

114. C. LOWNDES, R. KRAMER & J. McCORD, supra note 38, § 8.4, at 147.

115. Id. at 148.
serve a power to revoke the trust, the trust is irrevocable. Irrevocable trusts are not included in the decedent's gross estate for federal estate tax purposes, unless they are made in contemplation of death. If the trust is irrevocable, the surviving spouse is not entitled to a distributive share of the property transferred by the decedent in trust. The Nebraska Probate Code does not change this result if the transfer is made more than two years prior to death.

An irrevocable trust may be terminated if the settlor of the trust and all the beneficiaries of the trust consent to the termination. In the estate tax area, the termination of an irrevocable trust by the settlor and all the beneficiaries does not make the trust a revocable trust subject to estate tax. The same result should follow under the Nebraska Probate Code; that is, an irrevocable trust is not within the reach of the augmented estate.

The augmented estate includes transfers in trust with the power retained in the settlor to revoke, consume, invade, or dispose of the principal for his own benefit. If the decedent set up a trust during his lifetime and neither retained the income nor a power to revoke the trust, he could retain the powers to amend and powers to control both income and principal, provided that such powers did not allow him to benefit himself. The Nebraska augmented estate statute does not contain the "alter or amend" language of section 2038 of the Internal Revenue Code; however, if the grantor of the trust retained or reserved the right to apply the income toward the discharge of a legal obligation, the property would be included in his gross estate. The same result should follow for inclusion in the augmented estate.

As noted, the retained power to revoke a trust will cause inclusion in the augmented estate, and a power to revoke exercisable by one other than the settlor will not cause its inclusion. Under section 30-2314(1) (i) of the Nebraska Revised Statutes, retention by the transferor of possession, enjoyment, or right to income from the property will cause inclusion of the property in the augmented estate.

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116. 4 A. Scott, supra note 106, § 330.1.
117. 1 A. Scott, supra note 106, § 57.5, at 509.
118. 4 A. Scott, supra note 106, § 337, at 2688.
121. Association of Continuing Legal Education Administrators, supra note 59.
122. I.R.C. § 2038.
estate. A different situation exists when the grantor transfers the property to an independent trustee who has power to distribute income during the grantor's lifetime. Under the federal estate tax law, if there were an implied or express agreement that the income from the trust property would be turned over to the grantor, the property would be included in his gross estate, irrespective of whether the agreement was enforceable. Similarly, an express or implied agreement with an independent trustee should result in inclusion of the property in the augmented estate under the Nebraska Probate Code on the theory that the decedent did not give up the right to income from the property.

It is a different case when the independent trustee has uncontrolled discretion. If the trustee has uncontrolled discretion over paying the income from the trust to the settlor, the power does not constitute a retention of the right to income by the settlor. In the absence of an understanding between the parties that the income would be so distributed, it is reasonably certain that distribution of all the income from the property to the settlor during his life will not cause inclusion of the property in his gross estate for estate tax purposes. If the probate code is given an interpretation comparable to the federal estate tax law, the same result will follow in determining whether the trust property is included in the augmented estate.

The comment to section 30-2314 of the Nebraska Revised Statutes states that the "finespun" tests of the federal estate tax might be utilized, but that the objectives of the tax laws are different and more limited than the objective of the augmented estate of reaching "those kinds of transfers readily usable to defeat an elective share in only the probate estate." Prior to the Uniform Probate Code, irrevocable transfers were infrequently used to defeat the elective share of the surviving spouse when other will substitutes were available. But because the language of the augmented estate is borrowed from the federal estate tax law, it would appear that it should be given the same interpretation.

H. Life Insurance

Life insurance is probably the most common and most effective

128. NEB. REV. STAT. § 30-2314 comment (Reissue 1975).
129. ASSOCIATION OF CONTINUING LEGAL EDUCATION ADMINISTRATORS, supra note 59.
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will substitute. The proceeds of the policy pass directly to the beneficiary according to the terms of the insurance contract. A policy of life insurance is not testamentary and does not need to be executed with the formalities necessary for execution of a will. Therefore, by investing in life insurance, one can reduce his estate which is subject to probate administration. Within the limits of a feasible amount of investment, life insurance is probably the most satisfactory way to limit one’s estate. Life insurance is an effective, although limited, tool for disinheriting because it reduces the size of the probate estate from which a share is elected.

Under the Nebraska Probate Code, life insurance remains a valid non-testamentary arrangement. Life insurance, accident insurance, joint annuities, and pensions payable to one other than the surviving spouse are exempted from inclusion as transfers where the decedent has retained a life income, power to revoke, right of survivorship, or made a transfer in contemplation of death. Life insurance is not included in the first category of transfers to other persons, which are included in the augmented estate because life insurance is not ordinarily purchased as a way of depleting the probate estate to avoid the elective share.

But the rule has been changed regarding insurance payable to the surviving spouse. Life insurance and accident insurance proceeds attributable to premiums paid by the decedent are included in the augmented estate as property derived from the decedent. The surviving spouse must first take credit for the insurance proceeds received when taking the elective share. The purpose of including life insurance in the augmented estate is to prevent overcompensation to the electing spouse by forcing a deduction for insurance received. The policy reason is that a surviving spouse who has received ample provision ought not be able to upset the decedent’s estate plan. If assets outside of probate administration are not taken into account, the surviving spouse can collect all the life insurance, all the joint property, etc., and then come in and defeat the testator’s estate plan by taking a share of the estate controlled by the will. This should reduce the incentive to take an elective share.

133. Id. comment.
134. Id. § 30-2314(2) (i).
135. Id. § 30-2319(a).
136. Id. § 30-2314 comment.
137. Wellman, The Uniform Probate Code—Questions and Answers, in 3
Potential for disinheritance still remains. If the testator retains the power to change the beneficiary, a non-testamentary disinheritance transfer can be made by simply making the insurance payable to a named beneficiary other than the estate or spouse. A testator can invest in single premium insurance policies payable to a beneficiary other than his spouse and successfully defeat the spouse's elective share. It would appear that this type of a transfer would be open to attack on a fraud theory. However, courts seem to take it for granted that life insurance is immune to the surviving spouse's attack. As a practical matter, investing in life insurance is not the best method of disinheritance because it involves an immediate loss of income, but one may purchase a combination annuity-insurance package. Insurance companies are willing to insure the elderly, regardless of health, when an annuity is purchased as part of a package. Both the insurance proceeds and annuity payments to a joint annuitant other than the surviving spouse are excluded from the augmented estate. Under the comparable federal estate tax provisions, the proceeds cannot be taxed as a retained life estate. Similarly, the insurance proceeds would not be includable in the decedent's augmented estate.

I. Life Insurance Trusts

A life insurance trust is created when a person takes out a policy of insurance upon his life and creates a trust of the policy and its proceeds. The trust may arise: (1) when the policy is payable to a person designated in the policy as trustee, (2) when the policy is payable to the beneficiary absolutely with an agreement between the insured and beneficiary to hold it in trust, or (3) when there is an assignment to a person as trustee. Life insurance trusts may be funded or unfunded, revocable or irrevocable. The unfunded life insurance trust contains no assets other than the insurance policy itself or the trustee's expectancy as beneficiary of the policy. A funded insurance trust includes money or other property from which premiums may be paid, in addition to the policy and

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139. W. MacDONALD, supra note 13, at 235-42.
140. Id. at 238.
142. See In re Estate of Reynolds, 131 Neb. 557, 268 N.W. 480 (1936).
143. 1 A. Scott, supra note 106, § 57.3.
rights under the policy. Ordinarily, the proceeds are payable to the trustee whose right to the proceeds depends upon the contract with the insurance company rather than on the terms of the trust agreement. As in the case of an ordinary life insurance transaction, the insurance is not deemed to be an asset of the insured’s estate. Not being included in the estate, the proceeds are not subject to the surviving spouse’s elective share.

Under Nebraska law, a revocable insurance trust is not testamentary even though the insured reserves the power to change the beneficiary and the power to revoke or modify the trust. Under the Nebraska Probate Code a revocable life insurance trust falls within the class of revocable transfers includable in the augmented estate. Including a revocable insurance trust in the augmented estate as a revocable transfer conflicts with the explicit exclusion of all life insurance payable to a person other than the surviving spouse. This is a specific exclusion to assets otherwise included in the augmented estate. Where there is a “conflict between specific provisions relating to a particular subject and general provisions for the class to which the subject belongs, the specific provision will be taken as creating an exception to the general rule.” The comment to the Nebraska augmented estate statute states that life insurance is not included because it is not ordinarily purchased as a way to deplete the estate. If the reason for not including life insurance is its nondepleting use, it should make no difference whether the life insurance is in a revocable trust or not. Because of the policy reasons for non-inclusion of life insurance and the rules of statutory construction, revocable life insurance trusts should not be included in the augmented estate.

If the trust is irrevocable, the same principles applicable to other irrevocable trusts will be generally applicable. If not transferred in contemplation of death, the proceeds of an irrevocable life insurance trust will not be included in the augmented estate under any

145. Rea, supra note 138, at 537.
146. See T. ATKINSON, supra note 7, at § 39 (1953); In re Estate of Reynolds, 131 Neb. 557, 268 N.W. 480 (1936).
147. In re Estate of Reynolds, 131 Neb. 557, 268 N.W. 480 (1936); RESTATEMENT (SECOND) OF TRUSTS § 57 comment (f) (1959); T. ATKINSON, supra note 7, § 39.
149. H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 103, at 325 (2d ed. 1911).
150. NEB. REV. STAT. § 30-2314 comment (Reissue 1975).
151. See text accompanying notes 116-29 supra.
of the four types of transfers under section 30-2314(1) of the Nebraskan Revised Statutes.\textsuperscript{152} The reasons for excluding revocable life insurance trusts apply equally to irrevocable trusts.

\section*{J. Partnership Survivor Agreements}

Dissolution of a partnership occurs on the death of any partner.\textsuperscript{153} Unless otherwise agreed upon, if a business is continued after the death of a partner, the value of the deceased partner's interest in the dissolved partnership, plus interest, or in lieu of interest, profits from the use of his interest in the business, is included in the deceased partner's estate.\textsuperscript{154} The estate's interest in a business which is not continued is the deceased partner's share of the surplus after the partnership liabilities are discharged.\textsuperscript{155}

Generally, it is undesirable to liquidate the partnership. When the surviving partners desire to continue the business after the death of one partner, a continuation agreement may be embodied in the partnership agreement.\textsuperscript{156} Continuation agreements are valid on ordinary contract principles\textsuperscript{157} and are not regarded as testamentary, or requiring execution in conformance with the procedure for a will.\textsuperscript{158} Normally to avoid being testamentary, the continuation agreement requires consideration which can easily be found in the various promises of the partners.\textsuperscript{159}

Upon the death of a partner, disposition of his interest may be made in several ways. If the partnership is dissolved, the value of the deceased partner's interest is included in his probate estate.\textsuperscript{160} The partners may agree with one another to bequeath their interest to the survivors, the consideration being the reciprocal promises. A continuation agreement may provide that the surviving partners purchase the decedent's interest. Insurance may be used to fund the purchases, and options may be granted to the survivors to purchase the interest at each partner's death. There may also be an

\textsuperscript{152} Neb. Rev. Stat. § 30-2314(1) (Reissue 1975).
\textsuperscript{154} Id. § 67-342.
\textsuperscript{155} Id. § 67-338.
\textsuperscript{156} Fuller, Partnership Agreements For The Continuation Of An Enterprise After The Death Of A Partner, 50 Yale L.J. 202 (1940).
\textsuperscript{157} See generally id.; see also Note, 20 Okla. L. Rev. 456 (1967).
\textsuperscript{158} See Note, supra note 157, at 457; T. Atkinson, supra note 7, § 40 at 166; Annot., 1 A.L.R.2d 1176, § 36 (1948).
\textsuperscript{159} See Bromberg, Partnership Dissolution—Causes, Consequences, and Cures, 43 Tex. L. Rev. 631, 655 (1965). For the various kinds of continuation agreements upheld as non-testamentary, see id. at 655 n.141.
\textsuperscript{160} Thorin v. Kurkowski, 192 Neb. 701, 224 N.W.2d 173 (1974).
installment purchase, with the installment amounts determined by profits over a fixed period. The partners may agree that on the death of a partner, the surviving partners become the sole owners, legally and equitably, of the entire partnership property without any payment or liability to the decedent's estate.

Available means to disinherit a spouse by use of a partnership continuation agreement include a partnership in joint tenancy with right of survivorship in the beneficial interests of a partner, or a gratuitous or near gratuitous transfer to the surviving partners. Joint tenancy partnerships may run afoul of the augmented estate's inclusion of transfers of property held with right of survivorship. Transfers are included in the augmented estate only if made for less than full and adequate consideration, and it would appear that each partner's contribution to the partnership would be adequate consideration.

In other situations, a business purchase agreement may provide that upon the death of a partner, his associates will carry on the business and pay the deceased partner's estate a fixed share of the profits for a stated period of time, rather than a sale and purchase of his interest. It has been held that under a profit sharing arrangement, the profits are income, not a capital asset, and therefore not includable in the gross estate for federal estate tax purposes. Other cases have held the right to share in profits to be a valuable asset which is included in his federal estate tax gross estate. The reasoning is that a right to future income is a valuable property interest. If the person dies owning this right to the profits, this is a valuable right, and it is difficult to see why the result should be different depending on whether the right is regarded as a purchase price or as a share of future profits. As a valuable property right, it should be included in the decedent's federal estate tax gross estate, and in his probate estate as property owned at

163. Note, supra note 161, at 1304-06; W. MacDonald, supra note 13, at 232.
164. Gratuitous transfers are rarely advisable, and then only if it is within the close family, or if the close family is otherwise adequately provided for or is non-existent. The absence of consideration makes the continuation agreement more difficult to enforce. Bromberg, supra note 159, at 656-57.
166. McClennen v. Comm'r, 131 F.2d 165 (1st Cir. 1942); Estate of Hull v. Comm'r, 38 T.C. 512 (1962), rev'd on other grounds, 325 F.2d 367 (3d Cir. 1963).
death. Property of the probate estate is included in the augmented estate.

K. United States Savings Bonds

The ownership of United States bonds is solely a subject of federal regulation.\textsuperscript{168} The form of registration must express the actual ownership of the bond and will be considered as conclusive of ownership and interests in the bond.\textsuperscript{169} Savings bonds are not transferable except as specifically provided in the federal regulations.\textsuperscript{170} To be transferred, the bond must be surrendered and re-registered. Savings bonds cannot be the subject of a gift, either inter vivos or causa mortis, by manual delivery to a donee unless the bonds are also surrendered and reissued in accordance with the treasury regulations.\textsuperscript{171}

The estate created in a bond is a matter of contract between the purchaser of the bonds and the United States. The treasury regulations govern, even if state law is to the contrary.\textsuperscript{172} The regulations override or pre-empt inconsistent state law. A contrary result would fail to give effect to a term or condition under which a federal bond is issued.\textsuperscript{173}

The treasury regulations under which bonds are issued also create a right of survivorship.\textsuperscript{174} The Nebraska Probate Code brings into the augmented estate any transfer, without adequate consideration, of property which is held at the decedent’s death by another with a right of survivorship. Under the treasury regulations, bonds in co-ownership pass to the co-owner at death. If the bond is included in the augmented estate, liability for the elective share is equitably apportioned among recipients of the property included in the augmented estate.\textsuperscript{175} This means that where the determination of ownership rights is pre-empted by federal law under the supremacy clause, state law may charge the owners of the bonds with liability for a surviving spouse’s elective share. In New York, the transfer of bonds to a designated beneficiary on the purchaser’s

\textsuperscript{169} 31 C.F.R. § 315.5 (1976).
\textsuperscript{170} Id. § 315.15.
\textsuperscript{171} Estate of Curry v. United States, 409 F.2d 671 (6th Cir. 1969); 31 C.F.R. § 315.45 (1976).
\textsuperscript{174} 31 C.F.R. § 315.60 (1976).
\textsuperscript{175} NEB. REV. STAT. § 30-2319(b) (Reissue 1975).
death has been held effective against the objection that the act constitutes fraud on the widow's share.\textsuperscript{176} The reasons which have been advanced for the federal pre-emption survivorship rule—the requirement of government uniformity and for proper record keeping demanding something less than absolute freedom of transfer—hardly seem to justify a result that a co-owner takes free and clear of any liability for the surviving spouse's elective share. Any other result would permit unlimited opportunity to disinherit by simply investing in bonds.

Despite the fact that federal regulations are conclusive in regard to the ownership and interest in the bond, Series E bonds have been subjected to levy,\textsuperscript{177} a legal representative can pursue the proceeds of a fraudulent transfer for benefit of creditors,\textsuperscript{178} a judgment creditor can subject the bond purchaser's interest to payment of purchaser's debts,\textsuperscript{179} the bankrupt must surrender bonds to the trustee in bankruptcy,\textsuperscript{180} and a widow under an elective share statute is allowed to pursue what she lost when the bond passed to the co-owner.\textsuperscript{181} Government savings bonds held in co-ownership should not be excluded from the augmented estate solely because federal law fixes ownership in bonds. Based upon the express intent of the Nebraska Probate Code that all forms of transferred property held with right of survivorship are included in the augmented estate, savings bonds should not be excluded. The policy reasons for pre-emption by federal regulations do not justify the result that bonds are exempt from inclusion in the augmented estate as transfers intended to defeat the rights of a surviving spouse.

L. Deeds

"It is no objection to a deed that it is used as a substitution for a will . . . ."\textsuperscript{182} The distinction between a deed and a will is that a deed passes a present interest in property to the grantee in the grantor's lifetime and is not revocable, while a will passes no interest prior to the death of the testator and is freely revocable prior to death.\textsuperscript{183} If the instrument purporting to be a deed is held

\textsuperscript{176} In re Will of Kalina, 184 Misc. 367, 53 N.Y.S.2d 775 (1945).
\textsuperscript{177} Guldager v. United States, 294 F.2d 467 (6th Cir. 1963).
\textsuperscript{179} Ex parte Little, 259 Ala. 532, 67 So. 2d 618 (1953).
\textsuperscript{180} In re Bartlett, 71 F. Supp. 514 (N.D.N.Y. 1947).
\textsuperscript{181} Ivey v. Ivey, 93 N.H. 434, 43 A.2d 157 (1945).
\textsuperscript{183} T. Atkinson, \textit{supra} note 7, § 43; 1 W. Page, \textit{supra} note 130, § 6.9.
to be testamentary, the property will be included in the decedent's estate regardless of any invalidity such as fraud or colorable transfers. Purported transfers of property at death, reservation of a right of revocation, failure to deliver, or delivery to a third person for delivery to the grantee upon the happening of an uncertain event, will make the conveyance testamentary.\(^{184}\)

The most interesting question arises when the instrument is not testamentary: Is the surviving spouse's right of election extinguished in the deeded realty? Under the prior dower statutes, alienation of property by the husband without the wife's consent did not extinguish her dower rights.\(^{185}\) Under the former elective share statutes, one spouse could give away real estate within the state during his life without his spouse's consent. Uncompensated transfers of real property have been sustained on a number of grounds as not a fraud on the spouse's rights—e.g., irrevocable, non-illusory transfers, protection of children of prior marriage—but have also been attacked successfully, at least to the extent of the spouse's rights.\(^{186}\) As in the case of inter vivos gifts, transfers of real estate by deed could be attacked on grounds of whether the transfer was absolute, merely a colorable transaction, or fraudulent. However, a condition precedent upon delivery of a deed to a third person that the grantee should survive the grantor does not affect the validity of the deed as a conveyance. Nothing more is required than

that the deed [create] an irrevocable possibility of executory interest in the grantee, which renders the title of the grantor subject to be drawn out of him at a future time, and gives the grantee a right which will vest in the event designated according to the terms of the deed.\(^{187}\)

Generally a conveyance which reserves a life estate to the grantor also passes a present interest to the grantee subject to such life estate in the deed.\(^{188}\)

In Nebraska, a conveyance in which title does not pass until the maker's death, is testamentary.\(^{189}\) The property in such a case is included in the decedent's probate estate and augmented estate. This result is not changed by the Nebraska Probate Code because

\(^{184}\) T. Atkinson, supra note 7, § 43. See generally Ballantine, supra note 182.

\(^{185}\) Keegan, Deeds in Lieu of Wills, 16 A.B.A. J. 779, 781 (1930).

\(^{186}\) See cases collected in Annot., 49 A.L.R.2d 521, § 15 (1956).

\(^{187}\) Ballantine, supra note 182, at 480.

\(^{188}\) 1 W. Page, supra note 130, § 6.10, at 247.

\(^{189}\) Neylon v. Parker, 177 Neb. 187, 128 N.W.2d 690 (1964) (deeds not delivered to a third party).
of the testamentary character. In conveyances to take effect upon the grantor's death, the fact of delivery is an argument in finding the instrument to be a deed. Undelivered deeds have no effect as a conveyance. However if the deed is delivered, a conveyance where title does not pass until the grantor's death, would fall within the augmented estate's inclusion of transfers where the decedent retained at the time of his death the possession or enjoyment of the property.

Under prior Nebraska law, a warranty deed subject to the reservation of a life estate in real property, executed and delivered, but not recorded until after the death of the grantor, was legal, effective, and nontestamentary. In such a case a surviving spouse would not have a right of election in the deeded property. Under the Nebraska Probate Code a transfer reserving a life estate will be included in the augmented estate. Thus, the use of a warranty deed with a reserved life estate in the grantor will not avoid the surviving spouse's right of election in the transferred property.

M. Annuity Contracts and Retirement Programs

A specific exclusion from the augmented estate is made for the transfer of joint annuities and pensions payable to a person other than the surviving spouse. Similar to insurance, the commuted value of the annuity contract proceeds and amounts under pension plans, both private and public, or retirement plans payable to the surviving spouse, are included in the augmented estate as property owned by the surviving spouse derived from the decedent. The surviving spouse must take credit for this property against the elective share. The reason for excluding joint annuities and pensions payable to one other than the surviving spouse is the same as for excluding insurance, i.e., it is not ordinarily purchased as a way to deplete the probate estate. At least in the case of employer funded pension and profit sharing plans, this policy reason seems correct. For qualified plans under section 401(a) of the Internal Revenue Code, the funding level must satisfy the funding requirements in order to maintain its qualified status. Thus, the opportunity to empty the estate is not present.

190. T. ATKINSON, supra note 7, § 43.
192. NEB. REV. STAT. § 30-2314(1) (Reissue 1975).
193. Id. § 30-2314(2).
194. Id. § 30-2319(a).
Purchase of a commercial annuity would escape the surviving spouse's right of election because the transfer is for full and adequate consideration. Under a life only annuity option, any interest the decedent has in the annuity ceases at his death.\textsuperscript{196} If a joint and survivor option is elected, payments will continue to the joint annuitant on an uninterrupted basis after the primary annuitant's death. The drawback of a joint and survivor annuity is that the co-annuitant cannot be changed once the annuity is purchased. The specific exclusion from the augmented estate of joint annuities is a wise policy decision. Since payments continue on an uninterrupted basis after the primary annuitant's death, to subject such payments to the right of election would create complex tracing problems and liability problems for both the joint annuitant and the insurance company. The other alternative would be to tie up the payments at least until the period for election has lapsed; therefore, no payments could safely be made during this period without possible liability.

The drawback of a commercial annuity is that the annuitant loses his investment in the annuity and cannot transfer the amount paid for the annuity to his family. This can be overcome by transferring the property during their lives to members of the family whom they wish to inherit their estate in return for the transferee's promise to pay the transferor an annuity.\textsuperscript{197} A private annuity is an arrangement whereby an individual transfers cash or other property to another individual, corporation, or entity in exchange for the transferee's promise to make periodic payments in fixed amounts to the transferor for the remainder of his life, the transferee being someone who is not in the business of selling annuities.\textsuperscript{198} Private annuities are similar to, but not the same as, retained life estates. If the annuity payments are approximately the same as those which would be made by a commercial company for similar premiums, the transferor retains no interest in the transferred property.\textsuperscript{199}

The essential difference between the commercial and private annuity is that the purchaser of a private annuity does not actually part with his property, but passes it along to the person to whom


\textsuperscript{197} Id.

\textsuperscript{198} Weinberg, \textit{The New Case For Private Annuities}, 51 Neb. L. Rev. 9, 10 (1971).

\textsuperscript{199} Lowndes, \textit{supra} note 196, at 65.
he wishes to give it at death. In substance, he makes a gift of the property to the transferee who promises to pay the annuity. Private annuity arrangements are scrutinized to determine whether the transaction really represents the purchase of an annuity for an adequate consideration. If the transferor receives nothing more than income from the property transferred as the annuity, the transaction is nothing more than the reservation of a life estate. The test to determine whether the transferor has a life estate for federal estate tax purposes, is whether he can legally control the income of the property. If so, the property is included in his federal estate tax gross estate. It should also be included in his augmented estate as a transfer with a retained right to income.

What constitutes adequate consideration for estate tax purposes is determined by the treasury regulations. If the transferor pays more for the annuity than the value established under the tables, there is a gift for federal gift tax purposes. Under the Nebraska Probate Code, if the transferor lives more than two years after the transfer, the property is not included in the augmented estate. However, if made in contemplation of death, the whole value of the property, less the present value of the annuity, is included in the federal estate tax gross estate. This reaches only the gift element and appreciation. This appears to be a correct calculation of the gift. The Nebraska Probate Code should follow this result, despite the comment that the finespun tests of the federal estate tax might be used, but that the objectives are different. In this case, the objectives are the same, i.e., to reach a gift made in contemplation of death.

IV. CONCLUSION

The traditions of the common law and later statutory substitutes provided for some protection of the surviving spouse's interest. Protection is found by the statutory procedure whereby the surviving spouse has the power to elect a share of the decedent's estate rather than relying upon the will. The questions have arisen as to the proper size of the protected interest. The augmented estate is the latest attempt at setting the statutory rights of a surviving spouse. Even under the augmented estate, the following methods may still allow a testator to defeat the statutory right:

200. Id. at 66.
201. See Estate of Moreno v. Comm'r, 260 F.2d 389 (8th Cir. 1958); Toeller's Estate v. Comm'r, 165 F.2d 665 (7th Cir. 1948). But see Estate of Becklenberg v. Comm'r, 278 F.2d 297 (7th Cir. 1959).
204. Weinberg, supra note 198, at 27-29.
1. Absolute gifts will defeat the statutory rights if made more than two years prior to death. For each of the two years immediately prior to death, gifts under $3,000 will also defeat the statutory right.

2. A gift of the testator's residence may defeat the statutory right as long as the testator continues to reside in a non-exclusive occupancy with the donee.

3. A testator should not use joint tenancies. All joint tenancies held with persons other than the spouse should be severed. The surviving spouse will have to account for property received by right of survivorship when electing a share.

4. The use of irrevocable trusts with an independent trustee having the absolute discretion to pay income to the grantor may defeat the statutory right.

5. The investment by the testator in commercial life insurance-annuity contract arrangements may defeat the statutory right.

6. The purchase of a private annuity from an intended beneficiary may defeat the statutory right.

7. The testator should change life insurance beneficiary designations to persons other than the testator or the testator's estate. The testator should consider changing beneficiary designations under group life insurance and retirement programs to the spouse because these amounts do not deplete the estate while the surviving spouse must first account for such amounts.

It is correct that the revocable living trust offered the most benefits and freedom of control while still keeping the property out of the spouse's reach. The augmented estate offers more protection for the surviving spouse's right of election; however, the augmented estate also takes away by forcing the surviving spouse to account for property received from the decedent while at the same time presuming that all property owned by the surviving spouse is derived from the decedent. While more adequate than the intestate share, the augmented estate still provides some loopholes, but the biggest avoidance devices are now closed.

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