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PROPERTY LAW—UPENDING THE FAMILIAR TOOLS OF ESTATE PLANNING: EQUITY RENDERS REVOCABLE TRUSTS SUBJECT TO THE ARKANSAS SPOUSAL ELECTION. *In re Estate of Thompson*, 2014 Ark. 237, 434 S.W.3d 877.

I. INTRODUCTION

On May 22, 2014, the Supreme Court of Arkansas issued a decision that will "upend the use of familiar tools of estate planning" when it held that a revocable trust can be used to calculate a spousal elective share under certain circumstances.[1] The decision, *In re Estate of Thompson*, grappled with the clashing of two fundamental policies: free alienation and spousal protection via the elective share.

After Anne married Ripley Thompson in 2001, she left her career as a nurse because Ripley promised to provide for her.[2] In 2002, Ripley created a trust that would come to be valued at almost $6,000,000 and designated Anne as a co-trustee and beneficiary.[3] Ripley was the grantor and the trustee, and he retained the power to revoke or amend the trust during his lifetime.[4] After about seven years of marriage, the health of Ripley and Anne declined, and the two became somewhat estranged.[5] Anne eventually filed for separate maintenance, and, less than a year before Ripley died, he amended the trust so that Anne received $100,000 outright, about 1.6% of the trust's value, on the condition that she not contest its provisions.[6] He also revoked her status as co-trustee, and he did not inform her of any of these changes.[7]

Despite the no-contest clause, Anne filed suit after Ripley passed and she learned of her disinheritance; she claimed the circumstances behind her disinheritance amounted to fraud and her elective share should be calculated by including the trust assets, an approach that has never been followed in Arkansas.[8]

1. *In re* Estate of Thompson, 2014 Ark. 237, at 18, 22, 434 S.W.3d 877, 887, 889.
2. *Id.* at 2, 434 S.W.3d at 879.
3. *Id.* at 3, 13, 434 S.W.3d at 879, 884. The provisions of the trust gave the spouse income for life, annual withdrawal rights of $5,000 or 5% of the principal, and the right to invade the principal for extraordinary expenses. *Id.*, 434 S.W.3d at 879, 884.
4. *Id.* at 4, 434 S.W.3d at 880.
5. *Id.* at 14, 434 S.W.3d at 885.
6. *Id.* at 13, 434 S.W.3d at 884.
7. *Thompson*, 2014 Ark. 237, at 14, 434 S.W.3d at 885.
8. *Id.* at 3, 434 S.W.3d at 879.

Ultimately, the Supreme Court of Arkansas agreed with Anne and, in doing so, set precedent.[9] It invalidated Ripley's revocable inter vivos trust for the narrow purpose of crediting it toward the spousal elective share due to a finding of fraudulent intent.[10] The court articulated the fraud as an "improper circumvention of the marital rights of the surviving spouse,"[11] but knowing what this standard entails will be difficult going forward. Although the court highlighted several factors relied on in establishing fraudulent intent, it also provided that "each case must be determined on its own facts and circumstances."[12]

Thompson has launched Arkansas probate law into a gray zone of uncertainty. Before, nonprobate transfers were simply not subject to the elective share. Now, nonprobate transfers may be subject to the elective share if the court thinks it reasonable to do so under the totality of the circumstances. Although the *Thompson* court articulates an intent-based test and applies the holding narrowly to revocable trusts, the decision was actually made on the equities of the case. In these cases, "fraudulent intent" is simply a post-hoc label assigned to an equitable outcome. The factors used are primarily objective, and a synthesis of case law from the jurisdictions cited in *Thompson* sheds significant light on what sorts of circumstances may lead the court to a finding of fraudulent intent.

Part II of this note will begin by discussing nonprobate transfers,[13] the history of the spousal elective share,[14] and efforts to protect against spousal disinheritance that occurs as a result of nonprobate transfers;[15] it will end with a discussion of Arkansas's approach to the problem debuted in *Thompson*.[16] Part III will provide an in-depth analysis of factors used in other jurisdictions to determine whether a nonprobate transfer is subject to the spousal elective share.[17] Although this section will provide some guidance, it will also demonstrate just how malleable the *Thompson* court's intent-based analysis is and how unpredictable Arkansas's estate planning realm is left as a result. Part III will end by offering a practical solution in the form of nuptial agreements,[18] and Part IV will conclude the note.

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9. *See id.* at 18, 434 S.W.3d at 887 (explaining that the court has designated an intent-based test, but has never applied it to facts giving rise to a finding of fraud, and "[a]ccordingly, that is the area of law for this court to develop in this case").
10. *Id.* at 19, 434 S.W.3d at 887.
11. *Id.* at 17, 434 S.W.3d at 886.
12. *Id.* at 12, 434 S.W.3d at 884.
13. *See infra* Part II.A.
14. *See infra* Part II.B.1.
15. *See infra* Part II.B.2.
16. *See infra* Part II.C.
17. *See infra* Part III.A.
18. *See infra* Part III.B.

II. BACKGROUND

A. Nonprobate Transfers

Although the probate system is indispensable, it is not a system that everyone needs to use, and, today, it is a system that is becoming disfavored relative to nonprobate transfers.[19] Four main will substitutes comprise the nonprobate system: life insurance, pension accounts, joint accounts, and revocable trusts.[20] Each is the functional equivalent of a will in that it reserves lifetime control to the owner.[21]

Life insurance is the functional equivalent of a will because generally it is revocable until the death of the testator, and the interests of the beneficiaries are nonexistent until the testator's death.[22] Pension accounts, such as individual retirement accounts, also pass any remaining interest to the beneficiary when the owner dies.[23] Although joint accounts differ from wills theoretically because the donee receives a present interest equal to that of the donor, in practice, they can be manipulated to achieve the same result because a donor need not inform a co-tenant of the assets and may treat the account as his or her own; so, effectively, the transfer is revocable.[24]

Similarly, for revocable trusts, the type of will substitute at issue in *Thompson*, the transferor generally names himself as trustee for the beneficiary but retains lifetime control and the power to revoke.[25] The remainder interest given to the beneficiary is functionally the same as the mere expectancy conveyed through a will in that it is revocable.[26] Because the settlor is divested of all ownership at death, and because the Arkansas elective share statute limits a surviving spouse to property in the settlor's probate estate after death, revocable trusts have not traditionally been subject to the elective share.[27] Revocable trusts are widely used as the central document of an estate plan[28] and have consistently increased in popularity; as their numbers

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19. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984) (stating that the law of wills and rules of descent no longer govern most succession of property).

20. *Id.* at 1109.

21. *Id.*

22. *Id.* at 1110.

23. *Id.* at 1111.

24. *Id.* at 1112.

25. Langbein, *supra* note 19, at 1113.

26. *Id.*

27. *In re* Estate of Thompson, 2014 Ark. 237, at 9, 434 S.W.3d 877, 882 ("As noted, Arkansas law is well settled that the surviving spouse's elective interest can vest only in property that the deceased spouse owned at the time of death.").

28. RESTATEMENT (THIRD) OF TRUSTS: VALIDITY & EFFECT OF REVOCABLE INTER VIVOS TRUST § 25 (2003). Revocable trusts are authorized in every state, by either statute or com-

have continued to increase, so has litigation over their consequences, one of which is spousal disinheritance.[29]

B. The Spousal Elective Share

1. The Traditional Elective Share

The spousal elective share originated in common law dower and curtesy; it had the same purpose then as it has now—to protect against disinheritance when one spouse predeceases another.[30] At its inception, it protected only an interest in a life estate, but the elective share has expanded over time to afford greater protection to surviving spouses.[31] Eventually, it expanded to give an outright interest in real property,[32] and, as wealth accumulation shifted from real to personal property, it expanded to include personal property.[33] Today, the policy behind the spousal elective share presents the most significant limitation on the right to free alienation.[34]

As the predominant method of wealth transmission shifted from probate to nonprobate transfers, many jurisdictions began recognizing that the traditional elective share provided inadequate protection against disinheritance.[35] Because the elective share was calculated from the probate estate, people could easily disinherit their spouses by putting the majority of their assets into a trust, which would become irrevocable upon death of the transferor.[36] A variety of efforts aimed at preventing spousal disinheritance developed in response, and, today, only a minority of jurisdictions follows the traditional elective share approach.[37] The traditional approach calculates the

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mon law. Isabelle V. Taylor, *Creditor Rights and the Missing Link in the Arkansas Trust Code: Is Death Strong Enough "to Break the Chain?"*, 65 ARK. L. REV. 433, 434 (2012).

29. Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191, 240 (2005).

30. Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 575 (1995); Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U.L. REV. 519, 526–27 (2003).

31. Vallario, *supra* note 30, at 526.

32. *Id.*

33. Colby T. Roe, Comment, *Arkansas Marriage: A Partnership Between a Husband and Wife, or a Safety Net for Support?*, 61 ARK. L. REV. 735, 737–38 (2009).

34. *See id.* at 737.

35. Vallario, *supra* note 30, at 521; *see also* RAYMOND C. O'BRIEN & MICHAEL T. FLANNERY, DECEDENTS' ESTATES 430–31 (2d ed. 2011).

36. Gary, *supra* note 30, at 576.

37. Vallario, *supra* note 30, at 535.

elective share according to a fixed percentage of the decedent's net estate, which does not include nonprobate assets such as trusts.[38]

2. Augmenting the Elective Share: A Modern Trend

Broadly speaking, efforts to protect against disinheritance took the form of judicial decisions to allow the elective share to reach nonprobate transfers in certain inequitable circumstances and statutes that expressly make nonprobate transfers subject to the elective share. Common law efforts at preventing spousal disinheritance via nonprobate transfers preceded statutory attempts at achieving the same.[39] Court decisions in jurisdictions attempting to protect spouses revolve around control, intent, or both.[40] Decisions allowing the elective share to reach nonprobate transfers under circumstances where it seems equitable to do so comprise a modern trend.[41]

The Uniform Probate Code (UPC) was the original source of the augmented elective share in statutory form; its purposes were to prevent spousal disinheritance via nonprobate transfers[42] and to increase predictability in terms of property division at death.[43] Augmented elective share statutes generally accomplish this by adding to a decedent's estate all transfers that the decedent made over which he maintained dominion and control during life.[44] Today, a majority of jurisdictions has implemented augmented elective share statutes to more adequately protect spouses against disinheritance.[45]

Similarly to other minority states,[46] the Arkansas General Assembly has declined to adopt the UPC's augmented estate model on several occa-

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38. Angela Vallario & Phyllis A. Book, *Shocked by Schoukroun! Elective Share Statute Needs to Be Fixed*, MD. B.J., Sept.–Oct. 2009, at 40; Vallario, *supra* note 30, at 535.

39. *Compare* Newman v. Dore, 9 N.E.2d 966, 968 (N.Y. 1937) (citing to other cases dealing with the same issue dating back to 1842, for example), *with* Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 487 n.1 (2000) (stating that the Uniform Probate Code (UPC) was first approved by the National Conference of Commissioners on Uniform Laws and the American Bar Association in 1969).

40. RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 9.1 (2003); Roe, *supra* note 33, at 755–57; J.R. Kemper, Annotation, *Validity of Inter Vivos Trust Established by One Spouse Which Impairs the Other Spouse's Distributive Share or Other Statutory Rights in Property*, 39 A.L.R.3d 14 (1971).

41. *See* Langbein, *supra* note 19, at 1132 ("Modern practice supplies only one theory that can reconcile wills and will substitutes in a workable and honest manner: the rule of transferor's intent.").

42. Newman, *supra* note 39, at 496 n.38; Roe, *supra* note 33, at 747.

43. Vallario, *supra* note 30, at 544–45.

44. *Id.*

45. *Id.*

46. *E.g.*, Karsenty v. Schoukroun, 959 A.2d 1147, 1159 n.15 (Md. 2008).

sions.[47] After *Thompson*, however, equity can still avoid the effect of a nonprobate transfer used to disinherit one's spouse in Arkansas.[48]

C. Arkansas Joins the Modern Trend

Arkansas has not adopted the UPC's concept of an augmented elective share statute,[49] which would put the nonprobate transfers within the reach of the elective share, but Arkansas has adopted the Uniform Trust Code (the "Arkansas Trust Code"), which expressly states that it is supplemented by the common law of trusts and principles of equity.[50] The Arkansas Trust Code codifies the common law rules that trusts may not be contrary to public policy and may not be induced by fraud.[51]

Though the Arkansas Trust Code was adopted as a set of default rules to use, subordinate largely to the settlor's intent,[52] it explicitly states that the "terms of a trust prevail over any provision of this chapter except the requirement that the trust have a purpose that is lawful and not contrary to public policy and the power of a court to take such action as may be necessary in the interests of justice."[53] This language carves out an exception for cases like *Thompson* to subject nonprobate transfers to the elective share.

1. Thompson's Foundation

Several Arkansas cases helped lay a foundation for the court's holding in *Thompson*, but two in particular advocated the use of an intent-based test in cases of spousal disinheritance. In the context of a widower with six children who deeded land to his children just before marrying his second wife, *West v. West* provided that "if a man or woman convey away his or her

47. *In re* Estate of Thompson, 2014 Ark. 237, at 21, 434 S.W.3d 877, 889; *see* Foster, *supra* note 29, at 192–93, 201.

48. *Thompson*, 2014 Ark. 237, at 6, 19, 434 S.W.3d at 880, 887 (stating that "the construction, interpretation, and operation of trusts are matters within the jurisdiction of the courts of equity" and holding "that when a settlor creates an inter vivos revocable trust with the intent to deprive his or her surviving spouse of marital rights to property, then the trust assets will be included in the settlor's probate estate for the limited purpose of calculating the elective share").

49. Phillip Carroll, *Uniform Laws in Arkansas*, 52 Ark. L. Rev. 313, 346–47 (1999). The bill introducing the UPC failed the Arkansas General Assembly in 1995 and again in 1997. *Id.*

50. Foster, *supra* note 29, at 192–93, 201.

51. ARK. CODE ANN. §§ 28-73-404, -406 (Repl. 2012) (stating respectively that "[a] trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve" and "[a] trust is void to the extent its creation was induced by fraud, duress, or undue influence").

52. Foster, *supra* note 29, at 200.

53. ARK. CODE ANN. §§ 28-73-105(b)(3), -105(b)(10) (Repl. 2012).

property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance" and "fraud is never presumed."[54]

Later, in *Richards v. Worthen Bank & Trust Co.*, the intent-based test was revived in the specific context of a revocable trust.[55] The settlor retained the power to revoke and income for life in a trust created two years prior to death, but the court held this was not a fraudulent scheme.[56] Because the decedent left his spouse a life estate in his home and about $300 per month, and this amount was not wildly disproportionate to his total assets, the court did not find fraudulent intent.[57] In choosing an intent-based test, the *Richards* court relied on decisions from Missouri, Tennessee, Illinois, and Wisconsin.[58]

Several other Arkansas cases highlighted the general idea that the elective share is an exceedingly important interest that demands substantial protection. *Hamilton v. Hamilton* asserted that the elective share is designed to strike a balance between free alienation and protecting a surviving spouse and confirmed that "the surviving spouse's right to an elective share is inviolate" even if it disrupts the settlor's intent.[59] *Estate of Dahlmann v. Estate of Dahlmann* established that one has the right to exclude a surviving spouse from his or her inheritance subject to the statutory elective share, which prevents injustice.[60]

As important as the elective share is in Arkansas case law, it is not always paramount. *Gregory v. Estate of Gregory* confirmed that the right to an elective share is "firmly entrenched public policy."[61] However, in the context of an irrevocable trust in which the settlor had relinquished control entirely, the settlor had no right to revoke when the trust provided for his children and he had left a life estate in his home to the second wife.[62] The rights of the settlor's six children were favored despite some effect of spousal disinheritance.[63]

54. West v. West, 120 Ark. 500, 504, 179 S.W. 1017, 1018 (1915).

55. Richards v. Worthen Bank & Trust Co., 261 Ark. 890, 894, 552 S.W.2d 228, 230 (1977) ("The important consideration is the settlor's intent.").

56. *Id.*, 552 S.W.2d at 230.

57. *Id.* at 892, 894, 552 S.W.2d at 230–31.

58. *Id.* at 894, 552 S.W.2d at 230.

59. Hamilton v. Hamilton, 317 Ark. 572, 578, 879 S.W.2d 416, 419 (1994).

60. Estate of Dahlmann v. Estate of Dahlmann, 282 Ark. 296, 298, 668 S.W.2d 520, 521 (1984).

61. Gregory v. Estate of Gregory, 315 Ark. 187, 191, 866 S.W.2d 379, 382 (1993).

62. *Id.*, 866 S.W.2d at 381–82.

63. *Id.* at 188, 866 S.W.2d at 380.

2. *In re* Estate of Thompson

The Supreme Court of Arkansas set precedent and joined the modern trend in *Thompson* by affirming the circuit court and holding that "when a settlor creates an inter vivos revocable trust with the intent to deprive his or her surviving spouse of marital rights to property, then the trust assets will be included in the settlor's probate estate for the limited purpose of calculating the elective share."[64] In doing so, the high court left the circuit court's factual findings regarding the settlor's intent to deprive undisturbed.[65] Because the rule adopted in *Thompson* requires a very fact-oriented analysis, these facts are important.[66]

a. The facts

The appellee-widow, Anne, was married to the settlor-decedent, Ripley, from July 15, 2001 until his death on February 20, 2010.[67] Their almost nine years of marriage produced no children, and Ripley had no children from a previous marriage.[68] According to Anne, she quit her successful career as a nurse at her husband's request because he promised to provide for her.[69]

In 2002, after about one year of marriage, Ripley created the H. Ripley Thompson Revocable Trust to which he transferred substantial assets, and he, as grantor and trustee, retained the power to amend or revoke the trust during his lifetime.[70] Subsequent to its creation, Ripley would amend his trust twice, once in 2004 and again in 2009, less than one year before his death.[71] The 2004 trust amendment provided Anne with the right to invade the principal for extraordinary expenses, the right to annual withdrawals of $5,000 or 5% of its net fair-market value of the principal on the date of withdrawal, and income for life from the trust's net income.[72] The 2009 trust, however, significantly curtailed Anne's assets and status: it limited her

64. *In re* Estate of Thompson, 2014 Ark. 237, at 19, 434 S.W.3d 877, 887.

65. *Id.* at 1, 15, 434 S.W.3d at 878, 885 (stating that the circuit court's findings were not clearly erroneous).

66. *Id.* at 12, 434 S.W.3d at 884 (asserting that "the settlor's intent should be evaluated on a case-by-case basis considering all relevant facts and circumstances").

67. *Id.* at 2, 434 S.W.3d at 879.

68. *Id.*, 434 S.W.3d at 879.

69. *Id.*, 434 S.W.3d at 879.

70. *Thompson*, 2014 Ark. 237, at 4, 434 S.W.3d at 879–80 (explaining that the settlor signed a bill of sale transferring investment accounts and stocks including 409.09 shares of his family-owned business common stock from his own name to the trust, indicating that he owned the stock).

71. *Id.* at 2, 14, 434 S.W.3d at 879, 885.

72. *Id.* at 13, 434 S.W.3d at 884.

to an amount of $100,000, conditional upon her not contesting the trust, and revoked her status as co-trustee entirely, naming instead Ripley's nephew, the appellant.[73] Compared to Ripley's trust valued at $6,000,000, the circuit court found that $100,000 "falls woefully short of providing for his wife upon his death."[74]

The circuit court found that the husband's intent to deprive his wife of her marital rights arose sometime in 2008 when they separated.[75] Anne and Ripley discontinued living together in 2008 as a result of a mold infestation in their home; Ripley went to another home in McCrory, and Anne went to Memphis to sell some real property she owned.[76] While she was away, Anne suffered a stroke, and Ripley, whose health was declining as a result of heart disease, diabetes, and dementia, was taken to a nursing home by his nephew.[77] Ripley executed the 2009 trust amendment while he was in the nursing home and remained there until death.[78] Sometime during the separation, Anne had filed for separate maintenance because her husband was no longer providing for her.[79]

In addition to Anne's complete removal from participation in the 2009 amendment and the disparity between her husband's wealth and the amount left to her by the 2009 amendment, the circuit court highlighted two other factors as indicative of Ripley's intent to deprive. First, the time between execution of the 2009 amendment and Ripley's death was short, less than one year.[80] Also, the circuit court found evidence of intent to keep Anne uninformed regarding the 2009 amendment because she was given copies of both the original trust and 2004 trust amendment, but she was not given a copy of the 2009 amendment.[81]

b. The majority opinion

The Supreme Court of Arkansas rejected all four of the appellant's arguments against including the trust in calculating the spousal elective share.

First, the court agreed with the appellant that Arkansas's spousal elective statute limits a spousal election to property owned by a decedent at death, but not as an absolute statement.[82] The appellant asserted that the

73. *Id.* at 14, 434 S.W.3d at 884–85.
74. *Id.*, 434 S.W.3d at 884–85.
75. *Id.*, 434 S.W.3d at 885.
76. *Thompson*, 2014 Ark. 237, at 4, 434 S.W.3d at 880.
77. *Id.* at 4, 434 S.W.3d at 880.
78. *Id.*, 434 S.W.3d at 880.
79. *Id.* at 14, 434 S.W.3d at 885.
80. *Id.*, 434 S.W.3d at 885.
81. *Id.*, 434 S.W.3d at 885.
82. *Thompson*, 2014 Ark. 237, at 9, 434 S.W.3d at 882.

elective share cannot include trust property because a trust settlor is divested of ownership at death and to hold otherwise would be to invalidate the Arkansas Trust Code.[83] The court responded by explaining that the appellant's first argument overlooks the finding of fraud.[84] The lower court did not invalidate the trust for all purposes, but only for the limited purpose of including it in the calculation of the elective share.[85] The court affirmed that the issue was not whether the revocable trust became irrevocable upon Ripley's death; instead, the issue was whether the trust, despite its otherwise irrevocable character that manifested upon Ripley's death, should be included in the estate for the purpose of calculating the spousal elective share when a court finds intent to deprive the spouse.[86]

The court remarked that "Arkansas law has long recognized the concept of fraud on the surviving spouse's marital rights to property and an elective share" and cited *Hamilton* to support the court's historical favoring of zealous protection of those rights even when they are contrary to a decedent's intent.[87] Thus, the court's finding of an exception to the general rule that Arkansas' spousal elective statute limits a spousal election to property owned by a decedent at death was "expressly linked" to a finding of fraudulent intent.[88]

Second, the court rejected the assertion that the evidence did not support a finding that Ripley intended to deprive Anne.[89] In doing so, the court agreed with the lower court's reliance on *Richards* for the use of an intent-based test supplemented with some factors from *Karsenty v. Schoukroun*,[90] a Maryland decision on a similar case.[91] The Maryland decision also supported the idea that there can be no fixed rule for determining intent; instead, these cases "should be evaluated on a case-by-case basis considering all relevant facts and circumstances."[92]

After synthesizing applicable factors from the battery of cases cited in *Richards* (Missouri, Tennessee, Wisconsin, Illinois) and from *Karsenty* (Maryland), the factors the court determined weighed in favor of fraud included the degree of deprivation (Ripley left Anne approximately 1.6% of his total worth); the relationship between the spouses leading up to death; the withdrawal of Anne's participatory status as trustee; the time span be-

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83. *Id.* at 6–7, 434 S.W.3d at 881.
84. *Id.* at 7, 434 S.W.3d at 881.
85. *Id.*, 434 S.W.3d at 881.
86. *Id.* at 7–8, 434 S.W.3d at 881.
87. *Id.* at 10, 434 S.W.3d at 883 (citing Hamilton v. Hamilton, 317 Ark. 572, 578, 879 S.W.2d 416, 419 (1994)).
88. *Thompson*, 2014 Ark. 237, at 7, 434 S.W.3d at 881.
89. *Id.* at 15, 434 S.W.3d at 885.
90. 959 A.2d 1147 (Md. 2008).
91. *Thompson*, 2014 Ark. 237, at 12, 434 S.W.3d at 884.
92. *Id.*, 434 S.W.3d at 884 (citing *Karsenty*, 959 A.2d at 1160).

tween the last amendment and Ripley's death (less than one year); and the lack of notice given to Anne regarding her removal as a beneficiary.[93] Notably, the high court felt that, in addition to the circuit court's findings of fact, fraudulent intent was evident on the face of the documents when considered in whole.[94]

Third, the court disagreed with the appellant's argument that Anne should be required to prove the common law elements of fraud.[95] In addition to a lack of authority for the proposition, the court cited Maryland's *Karsenty* decision and the United States Court of Appeals for the District of Columbia Circuit in noting that other courts have expressly rejected the application of common law fraud doctrine in the context of cases involving fraud on marital rights.[96]

The last argument lost by the appellant was an alternative argument: if the court did find fraudulent intent, then the 2009 trust amendment should be invalidated entirely and the property should be distributed according to the terms of the 2004 amendment.[97] Because the Arkansas General Assembly has not adopted the concept of an augmented estate, judicially imposing it would be inappropriate.[98] In rebuttal, the court pointed out that although the *Richards* court found fraudulent intent lacking, the decision carved out the potential for a future court to invalidate an inter vivos trust if it found that it amounted to a fraudulent scheme to defeat the spouse's marital rights.[99] Furthermore, the court felt that invalidating the trust for the narrow purpose of calculating the elective share was harmonious with the Arkansas Trust Code and the Arkansas Probate Code and cited Illinois Supreme Court common law stating that "merely because a trust is deemed void as to the widow's right does not necessarily make it void as to the rights of other beneficiaries."[100]

c. The dissent

In asserting that the court's decision "rejects black-letter Arkansas probate law," the two-member dissent essentially ignored the finding of fraud

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93. *Id.* at 13–14, 434 S.W.3d at 884–85.

94. *Id.* at 15, 434 S.W.3d at 885.

95. *Id.* at 16, 434 S.W.3d at 886.

96. *Id.* at 17, 434 S.W.3d at 886 (stating that "'fraud in the classic sense' is not at issue and a court should instead look for an 'improper circumvention of marital rights of the surviving spouse'" (citing *Karsenty*, 959 A.2d at 1173)).

97. *Thompson*, 2014 Ark. 237, at 18, 434 S.W.3d at 887.

98. *Id.*, at 17–18, 434 S.W.3d at 887.

99. *Id.* at 18, 434 S.W.3d at 887.

100. *Id.* at 19, 434 S.W.3d at 887 (citing Rose v. St. Louis Union Trust Co., 253 N.E.2d 417, 419 (Ill. 1969)).

and focused on the appellant's first and fourth arguments.[101] The dissent cited the Arkansas elective share statute[102] in opining that the elective share is comprised of dower and dower rights extend only to the decedent's estate.[103]

The dissent also cited *Gregory* in support of the idea that the right to an elective share vests upon death but only in the probate estate of the decedent.[104] Unlike the majority, the dissent insisted this is an absolute rule, subject to no exceptions. To believe thus, as the majority pointed out, ignores *West* and *Richards*, which implicate intent as the appropriate consideration, and ignores *Dahlmann*, *Gregory*, and *Hamilton* for the principle that the "surviving spouse's right to an elective share is inviolate."[105]

The justices further argued that this new law will confuse the realm of estate planning because under this new law "*any* transfer of personalty to a person other than the spouse would compel the conclusion that the spouse was defrauded by the transfer and deprived of her marital rights."[106] Although this articulation of the law ignores most of the majority's analysis regarding fraudulent circumstances, and the court's holding was explicitly limited to revocable inter vivos trusts, denying that *Thompson* will confuse estate planning in Arkansas is difficult.

Indeed, tests based primarily on the intent of the transferor receive much criticism on the ground that they call the validity of any transfer made by a spouse into doubt.[107] In an ominous foreshadowing of things to come, the dissent lamented that "[t]he confusion to follow this opinion is indeed disturbing."[108]

III. ARGUMENT

"In cases of this type there can be no fixed rule of determining when a transfer or gift is fraudulent to a wife; each case must be determined on its own facts and circumstances."[109] *Thompson*'s holding is an explicitly narrow

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101. *Id.* at 23, 434 S.W.3d at 889 (Hart, J., dissenting). Justice Hart wrote the dissent, which was joined by Justice Baker. *Id.*, 434 S.W.3d at 889.

102. ARK. CODE ANN. § 28-39-401 (Repl. 2012).

103. *Thompson*, 2014 Ark. 237, at 20–21, 434 S.W.3d at 888–89 (Hart, J., dissenting).

104. *Id.* at 20, 434 S.W.3d at 888.

105. *See* cases cited *supra* notes 54–63.

106. *Thompson*, 2014 Ark. 237, at 22, 434 S.W.3d at 889 (Hart, J., dissenting). The dissent further went on to speculate that this rule would permit the elective share to reach not only trusts, but payable on death accounts, co-ownership registration with the right of survivorship, and insurance proceeds over which the decedent retained a general power of appointment. *Id.*, 434 S.W.3d at 889.

107. *Id.* at 22, 434 S.W.3d at 889; Hanke v. Hanke, 459 A.2d 246, 248 (N.H. 1983).

108. *Thompson*, 2014 Ark. 237, at 22, 434 S.W.3d at 889 (Hart, J., dissenting).

109. *Id.* at 12, 434 S.W.3d at 884 (majority opinion).

one in that it applies only to revocable inter vivos trusts in the context of fraudulent intent. The court relied on authority from four other courts in expressly adopting a case-by-case approach, and every case cited in *Thompson* gives significant attention to intent.[110] A closer look at *Thompson* and these other decisions shows that a label of fraudulent intent is merely a post-hoc justification for a decision based on what the court thinks is equitable.

The concept of fraudulent intent can be described as nebulous at best. Numerous locutions are used throughout various courts in an effort to conceptually summarize what it is that will render a nonprobate transfer subject to the reach of the elective share. While the *Thompson* court speaks constantly in terms of "the Decedent's intent to deprive Appellee of her marital rights," the Maryland decision it relies upon heavily contradicts this language by stating that "a decedent's intent to defraud her or his surviving spouse is not the proper focus" and "the intent that matters is the decedent's intent to structure a transaction by which she or he parts with ownership of the property in form, but not in substance."[111]

Another decision relied upon by *Thompson* shows a similar discrepancy:

> Intention and purpose are not necessarily the controlling factors in determining whether a transfer is fraudulent. One must take into consideration the effect of the transfer. In other words, if the properties transferred prior to death are of such a quantity in relation to the total estate as the widow is substantially deprived of that which she would otherwise take under our statutes, then from such a transfer fraud may be presumed under certain conditions and circumstances.[112]

Hence, fraudulent intent in the context of these cases has no definite meaning; it is merely a statement of a result rather than a rationale for reaching the result.[113] Consequently, courts that rely on intent as a critical point of the analysis retain vast flexibility in upholding or invalidating a transfer that diminishes the elective share because no single factor controls.[114] The diffi-

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110. Karsenty v. Schoukroun, 959 A.2d 1147, 1170 (Md. 2008); Rose v. St. Louis Union Trust Co., 253 N.E.2d 417, 420 (Ill. 1969); *In re* Estate of Steck, 81 N.W.2d 729, 734 (Wis. 1957); Potter v. Winter, 280 S.W.2d 27, 37 (Mo. 1955).

111. *Compare Thompson*, 2014 Ark. 237, at 14, 434 S.W.3d at 885, *with Karsenty*, 959 A.2d at 1170.

112. Sherrill v. Mallicote, 417 S.W.2d 798, 802–03 (Tenn. Ct. App. 1967).

113. *See* Johnson v. La Grange State Bank, 383 N.E.2d 185, 192 (Ill. 1978) ("The use of the phrase 'intent to defraud' is confusing and carries a connotation not relevant to the question to be resolved."); Melvin J. Sykes, *Inter Vivos Transfers in Violation of the Rights of Surviving Spouses*, 10 MD. L. REV. 1, 7 (1949).

114. Sykes, *supra* note 113, at 7.

culty and variability in applying an intent-based test is undoubtedly why some jurisdictions reject the use of such a standard.[115]

A. Fraudulent Intent: An Exceedingly Malleable Analysis in the Context of Spousal Disinheritance

As the *Thompson* court made clear, "'fraud in the classic sense' is not at issue, and a court should instead look for an 'improper circumvention of marital rights of the surviving spouse.'"[116] Although the *Thompson* court focused on the degree of deprivation and the lack of notice in finding that Ripley intended to deprive Anne of her elective share, it advocates using a totality of the circumstances to determine whether fraudulent intent was present. The following synthesis of factors from other jurisdictions relied upon by the *Thompson* court identifies what other factors, both explicit and implicit, often go into a determination of fraudulent intent.[117] These factors include the degree of control retained; the degree of deprivation; alternative support; the relationship between the settlor and beneficiary; the nature of the spousal relationship; the anticipation of death; the presence of consideration; and consent or waiver. These cases demonstrate that these factors are very malleable, leading ultimately to unpredictable results.

1. Control

Despite the *Thompson* court's almost nonexistent attention to it, the degree of control retained by the settlor over the nonprobate transfer is likely the most significant factor inherent to these analyses.[118] The premise behind using control as a factor is that "a trust settlor should not be allowed to retain all the benefits of ownership without assuming any of the burdens."[119] As important as the policy behind the spousal elective share is, the rival interest of free alienation must be balanced against it.[120]

115. *See* Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984) (stressing that its objective test requires no consideration of motive, intention, good faith, or whether the spouse made an illusory, colorable, or fraudulent transfer).

116. *Thompson*, 2014 Ark. 237, at 17, 434 S.W.3d at 886 (citing *Karsenty*, 959 A.2d at 1173).

117. *Id*. at 11–12, 434 S.W.3d at 883–84. The focus of this note's factors synthesis is on Missouri, Tennessee, Wisconsin, Illinois, and Maryland because the *Thompson* court expressly relied on decisions from these five jurisdictions.

118. *Karsenty*, 959 A.2d at 1174; Roe, *supra* note 33, at 755.

119. Sieh v. Sieh, 713 N.W.2d 194, 198 (Iowa 2006).

120. Hamilton v. Hamilton, 317 Ark. 572, 578, 879 S.W.2d 416, 419 (1994) ("The elective share provisions are designed to strike a balance between a testator's right to control the distribution of his or her property for life, while preserving the State's interest in protecting the surviving spouse.").

Whether the settlor retained excessive control over the nonprobate transfer invariably presents a threshold question, even if an implicit one. Retention of control is so important some jurisdictions advocate a binary, control-based test to the exclusion of other tests; in these jurisdictions, if the settlor retains excessive control, the transfer is held invalid and subject to the elective share.[121] In other jurisdictions, the retention of control does not automatically subject the nonprobate transfer to the elective share.[122] These jurisdictions are similar to the binary jurisdictions in that "[i]f no control is retained, there can be no fraud," but these jurisdictions differ from the binary jurisdictions because "[e]ven if control is retained, the transfer can be technically valid," in which case the court would apply a factors analysis to determine whether the transferred assets are subject to the elective share.[123] This is the category *Thompson* and the decisions it relies upon fall into.

How much control is excessive control? Though the question begs asking, it is difficult to answer because the degree of control that may be considered excessive varies within and between jurisdictions.[124] That is, jurisdictions that allegedly use a binary, control-based test often consider other factors in determining whether the settlor retained excessive control,[125] and

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121. *See, e.g.*, Taliaferro v. Taliaferro, 843 P.2d 240, 245 (Kan. 1992) ("[I]f . . . the [settlor] retains the power of revocation, it is fallacious, illusive and deceiving, and will be considered as fraud on the rights of the widow where she is deprived of her distributive share."); Sullivan v. Burkin, 460 N.E.2d 572, 574–75 (Mass. 1984) (stating that "the estate of a decedent . . . shall include the value of assets held in an inter vivos trust created by the deceased spouse as to which the deceased spouse alone retained the power during his or her life to direct the disposition of those trust assets for his or her benefit, as, for example, by the exercise of a power of appointment or by revocation of the trust"); Dreher v. Dreher, 634 S.E.2d 646, 650 (S.C. 2006) (concluding in regard to a revocable trust that the decedent "retained substantial control because he 'retained such extensive powers over the assets of the trust that he ha[d] until [his] death the same rights in the assets after creation of the trust that he had before its creation'").

122. *See Karsenty*, 959 A.2d at 1174; Knell v. Price, 550 A.2d 413, 416 (Md. 1988).

123. *Karsenty*, 959 A.2d at 1174 (stating that "other considerations must exist concurrently with retained control for a surviving spouse to invalidate the transfer"); *see* Johnson v. La Grange State Bank, 383 N.E.2d 185, 192 (Ill. 1978); Methodist Episcopal Church of Emory Chapel of Ellicotts Mills in Anne Arundel Cnty. v. Hadfield, 453 A.2d 145, 149 (Md. 1982); Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U.L. REV. 617, 650 (2010) ("Like *Newman* and subsequent decisions, the Maryland court does not consider retention of control by the decedent nor intent to defraud as determinative factors.").

124. Hanke v. Hanke, 459 A.2d 246, 249 (N.H. 1983); W.D. MACDONALD, FRAUD ON THE WIDOW'S SHARE 93 (1960) ("Most courts, even in jurisdictions that purport to follow the [control-based] doctrine, do not practice what they preach. . . . In other words, the courts, consciously or otherwise, are influenced by factors other than mere retention of control. But the courts already committed to the 'control' rationale naturally tend to announce the decision in terms of the control factor. In many cases, violence has been done to the doctrine in order to square the result with the doctrine."); *see* Sykes, *supra* note 113, at 4–5.

125. MACDONALD, *supra* note 124, at 94–95.

their holdings may apply so narrowly to a certain set of facts that the benefit of an easy-to-apply, control-based test is obscured.[126]

While some jurisdictions do consider the power to revoke a trust to be excessive control, most courts reject this as a dispositive factor.[127] Instead, the retention of absolute dominion and control by the decedent during life generally does not give rise to per se fraud on marital rights; it simply means the property will be subject to a court's evaluation of the case on its equities.[128]

In addition to the degree of control technically retained, a related factor courts often look to is the degree of control actually exercised and whether the exercise of power was "unfettered."[129] In the case of a settlor who has retained absolute control over a trust, the court might consider the accessibility that the settlor actually enjoys.[130] For instance, funds in an individual retirement account may be technically accessible, but the ease of access relative to a checking or savings account and the accompanying tax consequences of making a withdrawal may weigh in favor of less control retained and more validity.[131] Similarly, if the settlor retains the right to invade the trust, a court may find it somewhat redemptive that the right was never actually exercised.[132]

As the name implies, trusts created as irrevocable trusts are generally accompanied by a relinquishment of power. But, even in the context of an irrevocable trust, the court may still find that the decedent retained substantial control if he was the beneficiary of the trust income for life.[133] Also, if a trust makes use of several different types of nonprobate transfers with varying levels of control retained by the settlor, the court will likely consider

126. *Sullivan*, 460 N.E.2d at 577–78 (stating "[w]hat we have announced as a rule for the future hardly resolves all the problems that may arise" and suggesting that the rule would be different if the power of appointment was held jointly with another person, if some or all of the trust assets were conveyed by a third party, if the trust was made prior to marriage, or if the trust contained insurance policies over which the decedent retained control).

127. *See Hanke*, 459 A.2d at 248–49; MACDONALD, *supra* note 124, at 91–92 (discussing the potentially high cost of revocation and noting of a revocable trust that "complete ownership is at all times attainable by a stroke of [the grantor's] own pen").

128. *Karsenty*, 959 A.2d at 1159–63.

129. *Id.* at 1178.

130. *Id.* at 1175.

131. *Id.*

132. *See* Johnson v. La Grange State Bank, 383 N.E.2d 185, 195 (Ill. 1978) (finding a transfer valid because "[t]here [was] no evidence that Mrs. Johnson made any withdrawals from the principal or otherwise exercised any of her reserved powers to deplete the trust assets").

133. Sherrill v. Mallicote, 417 S.W.2d 798, 802 (Tenn. Ct. App. 1967) (invalidating an irrevocable trust that provided the decedent would receive income for life).

how much control is associated with the assets that comprise the majority of the trust.[134]

Another standard asks whether the control retained was "of such a degree as to reduce the trustees to the status of agents."[135] This same case held that a reservation of a power of appointment did not render the trust invalid.[136] Other jurisdictions, however, disagree with this stance.[137]

Although the *Thompson* court did not acknowledge the degree of control Ripley retained over the trust in the most express of terms, it did consider control in several ways. Most importantly, its holding was expressly limited to revocable trusts, which signals that the court would not be bound by its ruling in the context of a settlor that relinquishes substantially more control over nonprobate assets.[138] Also, the court noted that the trust distributed principal and income to Ripley for his lifetime, which shows that he actually exercised the substantial control he retained.[139]

So, retaining control is necessary, not sufficient, to a finding of fraud. A helpful heuristic in conceptualizing the effect of control in these cases is that retaining control does not necessarily indicate an invalid or fraudulent transfer, but relinquishing control entirely will likely indicate a valid or non-fraudulent transfer.[140]

2. *Degree of Deprivation*

"The degree to which an inter vivos transfer deprives a surviving spouse of property that she or he would otherwise take as part of the decedent's estate is also extremely significant."[141] Every jurisdiction cited in *Thompson* turns largely on the degree of deprivation.[142] In some contexts, it

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134. *Karsenty*, 959 A.2d at 1175.

135. *In re* Estate of Steck, 81 N.W.2d 729, 733 (Wis. 1957).

136. *Id.* at 733–34.

137. *See* Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984).

138. *In re* Estate of Thompson, 2014 Ark. 237, at 19, 434 S.W.3d 877, 887.

139. *Id.* at 21, 434 S.W.3d at 888.

140. *See* Karsenty v. Schoukroun, 959 A.2d 1147, 1173 (Md. 2008) ("[A]n inter vivos transfer in which a decedent gives up all control of the transferred property may not be invalidated by a surviving spouse as an unlawful frustration of the spouse's statutory share.").

141. *Id.* at 1176; Edgar v. Fitzpatrick, 369 S.W.2d 592, 600 (Mo. App. 1963) ("Running through all the cases, whether by express statement or by implication, is the all-important consideration of extent and proportion—that is, the proportion which the property transferred in deprivation of the widow's marital rights bears to the whole of the transferor's assets.").

142. *See Karsenty*, 959 A.2d at 1176 (stating "[t]he degree to which an *inter vivos* transfer deprives a surviving spouse of property that she or he would otherwise take as part of the decedent's estate is also extremely significant"); Potter v. Winter, 280 S.W.2d 27, 37 (Mo. 1955) (stating that net income for life in half of the trust corpus was not indicative of intent to defraud spouse); Sherrill v. Mallicote, 417 S.W.2d 798, 802 (Tenn. Ct. App. 1967) (noting that one factor used in subjecting the trust to the elective share was that "stocks placed in the

may be the decisive factor.[143] In other words, extreme deprivation may allow fraudulent intent to be presumed, especially when the spouse is disinherited completely.[144]

Although previous Arkansas case law has suggested that fraudulent intent must be proven and may never be presumed,[145] the courts seem to be comfortable with the notion that substantial deprivation, in and of itself, gives rise to the presumption of fraudulent intent, especially when the spouse is disinherited completely.[146] In *Thompson*, the court seemed very concerned by the $100,000 left to Anne of Ripley's $6,000,000 estate, a bequest of 1.6% that fell "woefully short" of providing for her and was akin to leaving her "basically nothing."[147]

Notably, the courts may be comfortable with a disinheritance of as much as 40% in certain contexts.[148] Despite the significance of this factor, its wide-ranging parameters make it exceedingly difficult to evaluate and summarize in isolation.

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trust were a large proportion of the settlor's personal property"); *In re* Estate of Steck, 81 N.W.2d 729, 734 (Wis. 1957) (stating that leaving the entire income from the assets of a trust, almost $12,000 yearly, and the right to invade the corpus does not show an intention to deprive spouse).

143. *Karsenty*, 959 A.2d at 1177.

144. *See Sherrill*, 417 S.W.2d at 802–03 (stating that "if the properties transferred prior to death are of such a quantity in relation to the total estate as the widow is substantially deprived of that which she would otherwise take under our statutes, then from such a transfer fraud may be presumed under certain conditions and circumstances"); Simpson v. Fowler, No. W2011-02112-COA-R3CV, 2012 WL 3675321, at *6 (Tenn. Ct. App. Aug. 28, 2012) (applying *Sherrill*). In *Sherrill*, the decedent, who had an estate worth $478,256, left his spouse $2,500 and a life estate in property valued at $196,000. *Sherrill*, 417 S.W.2d at 800–02. Although *Newman v. Dore* was not cited by the *Thompson* court, it is a landmark case and it supports the idea that significant deprivation that occurs without the surviving spouse's knowledge may give rise to the presumption of fraud as well. *See* Newman v. Dore, 9 N.E.2d 966, 968 (N.Y. 1937).

145. West v. West, 120 Ark. 500, 504, 179 S.W. 1017, 1018 (1915) ("Fraud is never presumed, but must be proved, and the burden was on the defendant to show that the deed had been made in fraud of her marital rights.").

146. *See* Whittington v. Whittington, 106 A.2d 72, 78 (Md. 1954) (noting that the distinguishing factor between two past cases with similar facts but dissimilar outcomes was the degree of deprivation). In one of the two cases, *Mushaw v. Mushaw*, in which the decedent left his spouse nothing and created trusts totaling $36,000, the court acknowledged the same in saying that "[t]he salient fact is that the widow is completely stripped of her marital rights in the personal property of her husband. This may be a matter of degree, but it appears to be the only basis on which the decisions can be reconciled." Mushaw v. Mushaw, 39 A.2d 465, 467–68 (Md. 1944).

147. *In re* Estate of Thompson, 2014 Ark. 237, at 13, 434 S.W.3d 877, 884–85.

148. *See Karsenty*, 959 A.2d at 1177; *Whittington*, 106 A.2d at 77 (explaining that the decedent wanted to provide for his sons and did not deprive his wife entirely because, under his arrangements, she would take one-third of his estate, although the trusts resulted in her taking 40% less than she would have had they been invalidated).

3. *Alternative Support*

The court may also analyze alternative support to determine whether the disinheritance was reasonable under the circumstances. Within the context of support provided by the decedent, alternative support may include both probate and nonprobate arrangements and inter vivos gifts left to the surviving spouse by the decedent.[149] If the court believes the decedent made reasonable provisions for the surviving spouse through probate transfers, nonprobate transfers, inter vivos gifts, or a combination thereof, it may weigh against a finding of fraudulent intent.[150] For example, in Maryland, the *Karsenty* court considered a $200,000 life insurance policy that the surviving spouse benefitted from; her inheritance of a vehicle worth $22,000 and a thrift savings plan worth $12,000; and the fact that the decedent paid off a $17,000 balance on the spouse's car loan and paid her $1,200 in monthly rent.[151]

Conversely, alternative means of support from the decedent that benefit someone other than the surviving spouse may weigh in favor of fraudulent intent. If, for example, the decedent has life insurance policies or bonds payable to beneficiaries other than the spouse in addition to a trust that works in derogation of the spouse's elective share, the court is more likely to find that the decedent intended to disinherit the surviving spouse.[152]

In addition to considering alternative means of support provided by the decedent, the surviving spouse's independent wealth may factor into the analysis.[153] The *Karsenty* court went so far as to consider the worth of the surviving spouse's own home, her income, and her pensions.[154] As demonstrated by an Illinois case, a court may have a difficult time finding fraudulent intent when the surviving spouse has a net value in excess of $2,000,000 because the court presumes that the decedent took the surviving spouse's wealth into consideration when making provisions for death.[155] In other words, you may intend to use nonprobate transfers to deprive your spouse of his or her elective share as long as they are rich.[156]

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149. *Karsenty*, 959 A.2d at 1177–78.

150. *Id.* at 1177; Simpson v. Fowler, No. W2013-02109-COA-R3CV, 2014 WL 1601137, at *7 (Tenn. Ct. App. Apr. 22, 2014).

151. *Karsenty*, 959 A.2d at 1178.

152. *See* Sherrill v. Mallicote, 417 S.W.2d 798, 801 (Tenn. Ct. App. 1967) (stating that bonds and insurance policies totaling $11,500 payable to the decedent's sister and niece were evidence of intent to deprive).

153. *Karsenty*, 959 A.2d at 1165.

154. *Id.* at 1154.

155. Johnson v. La Grange State Bank, 383 N.E.2d 185, 195 (Ill. 1978).

156. *See id.*

Interestingly, the *Thompson* court rejected the idea that alternative support weighed against a finding of fraud. The court acknowledged that Ripley showered Anne with gifts of great value while he was alive,[157] and Ripley's nephew, the appellant, argued that the gifts demonstrated Ripley's intent to provide for Anne by other means.[158] Still, because the gifts were made to the spouse prior to Ripley's acts of disinheritance, the court said this factor did not discount a finding of fraudulent intent.[159] Because the gifts were not testamentary in nature, the *Thompson* court found considering them in lieu of an elective share to be inappropriate.[160] According to the *Karsenty* decision, which *Thompson* relied upon, a court should consider inter vivos gifts that the decedent gave to a surviving spouse.[161] Whether the *Thompson* court would embrace this particular facet of *Karsenty* under different factual circumstances is uncertain.

The *Thompson* court gave no attention to the independent wealth of Anne.[162] Although the facts disclose that Anne had left to sell some real estate she owned, this fact was mentioned only in passing and seemingly to explain her absence from Ripley.[163]

4. *The Relationship Between the Settlor and Intended Beneficiary*

Generally speaking and all other factors constant, a nonprobate transfer that works to the derogation of the elective share is more likely to be upheld if the provisions are for the benefit of the decedent's children; the courts seem to be sympathetic to an intent to provide for one's own children, especially if the surviving spouse is not left destitute. In *Karsenty*, the decedent's daughter was the beneficiary of the nonprobate assets that diminished the elective share, and the court remanded the case so the trial court could consider this.[164] In *Whittington*, a case in which the court allowed the surviving spouse to suffer a 40% decrease in her share of the property imposed by a nonprobate transfer, the decedent's sons were the beneficiaries of the assets.[165]

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157. *In re* Estate of Thompson, 2014 Ark. 237, at 13, 434 S.W.3d 877, 885.

158. *Id.* at 16, 434 S.W.3d at 886.

159. *Id.*, 434 S.W.3d at 886.

160. *Id.*, 434 S.W.3d at 886.

161. Karsenty v. Schoukroun, 959 A.2d 1147, 1177 (Md. 2008) ("A scrutinizing court also should consider as part of this factor *inter vivos* gifts that the decedent gave to the surviving spouse.").

162. *Thompson*, 2014 Ark. 237, at 12–16, 434 S.W.3d at 884–86 (failing to discuss the status of Anne Thompson's independent wealth along with the factors used by the circuit court or anywhere else in the opinion).

163. *Id.* at 4, 434 S.W.3d at 880.

164. *Karsenty*, 959 A.2d at 1179–80.

165. Whittington v. Whittington, 106 A.2d 72, 76 (Md. 1954).

This concept may extend not only to children, but dependents generally. In *Johnson v. La Grange State Bank*, the court upheld a revocable trust that benefited the decedent's mother, who was financially dependent on the decedent.[166] However, *Sherrill v. Mallicote*, a case in which the court invalidated an irrevocable trust that benefited the decedent's siblings, demonstrates that disinheriting transfers that benefit someone other than the decedent's children or dependents are less likely to be valid.[167] Notably, in *Thompson*, Ripley had no children or dependents.[168]

Although naming one's children as the beneficiaries of a nonprobate transfer that diminishes the elective share may mitigate a finding of fraudulent intent to some degree, ensuring that the degree of spousal deprivation is not egregious is likely more important.[169] For example, in *White v. Sargent*, the trust's stated purpose was to provide for the long-term care and education of the decedent's children; however, the court found fraudulent intent because the creation of the trust left the surviving spouse with "essentially no means of support."[170] Furthermore, if the court feels that the surviving spouse is adequately provided for, it may even uphold a transfer when the beneficiaries are friends or charity groups.[171]

Another aspect of the relationship between the settlor and beneficiary that the court may analyze is the intent of the transferee.[172] If, for example, a transferee received property under a mutual agreement that the transferor would remain the practical owner, such a sham transfer would weigh in favor of invalidation.[173]

5. *The Nature of the Spousal Relationship*

The nature of the spousal relationship is likely to get some attention whether the factor is explicitly listed in the court's traditional factors test or implicitly considered as one of many factors inherent to analyzing intent.

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166. Johnson v. La Grange State Bank, 383 N.E.2d 185, 195, 197 (Ill. 1978).

167. *See* Sherrill v. Mallicote, 417 S.W.2d 798, 803–04 (Tenn. Ct. App. 1967).

168. *Thompson*, 2014 Ark. 237, at 2, 434 S.W.3d at 879.

169. *See* White v. Sargent, 875 A.2d 658, 668 (D.C. 2005); Rose v. St. Louis Union Trust Co., 253 N.E.2d 417, 420 (Ill. 1969) (remanding a case in which the decedent demonstrated an intent to leave the bulk of his estate (60%) to his children in order to determine what portion of the decedent's total property was available to the surviving spouse).

170. *Sargent*, 875 A.2d at 666.

171. *See* Windsor v. Leonard, 475 F.2d 932, 933–34 (D.C. Cir. 1973) (noting that the surviving spouse was left with a 50% share in an estate exceeding $100,000 in addition to his personal holdings worth some $140,000).

172. *See* Karsenty v. Schoukroun, 959 A.2d 1147, 1175–76 (Md. 2008); Sykes, *supra* note 113, at 15.

173. *Karsenty*, 959 A.2d at 1176.

Tennessee, for example, includes the factor explicitly as part of its factors analysis.[174] In deciding to invalidate the transfer, the *Sherrill* court noted that the decedent feared his wife wanted a divorce as demonstrated by his consistently asking her over the two years leading up to his death whether she was going to file for divorce.[175] And, in *Johnson*, the court mentioned that the spouses had "a warm and loving marriage" in upholding the transfer.[176] Although a court may not include the factor explicitly in its battery of factors, it is a factor that will likely influence the court to some degree; it may weigh strongly or barely be recognized depending on the facts of the case.[177] In *Sargent*, the spouses were separated and seeking a second divorce when the trust was created.[178] The decedent had a history of lying about his finances to escape paying child support and alimony, and the court used this as a factor weighing in favor of fraudulent intent.[179]

Whether the surviving spouse abandoned the decedent is an important consideration.[180] A finding of fraudulent intent may not pose such an unforgiving standard where a deed is made for the purpose of defeating the marital rights of a deserter spouse even though the predeceasing spouse retains practical ownership during life and relinquishes control entirely.[181] A Missouri statute bolsters the idea that one cannot abandon a spouse without cause and expect to receive an elective share,[182] so this issue is obviously implicated, but this question would invite finger-pointing and a troublesome parsing of facts.

Even though the Maryland court in *Karsenty* did not include the nature of the spousal relationship as part of its factors test explicitly, it did indicate that the trial court should consider whether and to what extent the surviving spouse had cared for the decedent during his final illness.[183]

The *Thompson* court gave extensive consideration to Anne and Ripley's spousal relationship in its determination of fraudulent intent. The court found that Ripley's intent to deprive Anne "manifested sometime in 2008 when his health had begun to deteriorate and the parties were no longer liv-

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174. Sherrill v. Mallicote, 417 S.W.2d 798, 802–03 (Tenn. Ct. App. 1967).

175. *Id.* at 802.

176. Johnson v. La Grange State Bank, 383 N.E.2d 185, 195 (Ill. 1978).

177. *See* Potter v. Winter, 280 S.W.2d 27, 36–37 (Mo. 1955) (stating in its final conclusion that "[t]he voluminous record reveals convincing evidence of Mr. Potter's affection and provident consideration for plaintiff" and distinguishing these findings with those from a case in which the decedent was "obsessed" with ensuring his spouse would not receive any more than $200 per month, the sum she earned prior to their marriage).

178. White v. Sargent, 875 A.2d 658, 661 (D.C. 2005).

179. *Id.* at 665.

180. Sykes, *supra* note 113, at 14.

181. *See* Whitehill v. Thiess, 158 A. 347, 347–48 (Md. 1932).

182. *See* MO. REV. STAT. ANN. § 474.140 (1955).

183. Karsenty v. Schoukroun, 959 A.2d 1147, 1180 (Md. 2008).

ing together."[184] Over the course of their relationship, the spouses grew distant. Where once Ripley lavished his wife with gifts and promised to care for her needs, she eventually felt compelled to file for separate maintenance.[185] Instead of using gifts to find alternative support, which would weigh in favor of a valid transfer, the court actually used the gifts Ripley gave his wife to characterize the later years of their relationship as relatively affectionless, which weighs in favor of fraudulent intent.

The court is also more likely to find fraudulent intent when a spouse accrues no assets of his or her own due to raising children and homemaking.[186] As *Thompson* demonstrates, a spouse who operates as a homemaker may compel a court toward a finding of fraudulent intent, even in the absence of children, and especially if the spouse stopped working at the decedent's request because the decedent promised to provide for the spouse.[187]

6. Anticipation of Death

Whether the decedent made the transfer at issue in anticipation of death is commonly considered in a court's determination of fraudulent intent;[188] however, this factor is largely superficial as it is easily manipulated and outweighed by other factors. Generally, the less time between a decedent's disinheriting acts and death, the more suspect his or her intent.[189] The court may also look at the decedent's knowledge as to his or her own state of health.[190]

It is not uncommon for courts to simply ignore time spans that weigh against a finding of fraudulent intent. In *Sargent*, the court said although "twenty-nine months is more than ample time in which to transfer assets to a trust and to do so in good faith, other factors prevent the court from holding that this transfer was in good faith."[191] In Rose v. St. Louis Union Trust Co.,

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184. *In re* Estate of Thompson, 2014 Ark. 237, at 14, 434 S.W.3d 877, 885.

185. *Id.* at 2, 13, 434 S.W.3d at 879, 885.

186. *See* White v. Sargent, 875 A.2d 658, 667 (D.C. 2005) ("The trial court did not err in so finding, particularly in light of the fact that Mrs. Sargent stayed home to care for the children at her husband's insistence and therefore accrued no assets of her own.").

187. *See Thompson*, 2014 Ark. 237, at 2, 434 S.W.3d at 879.

188. *Id.* at 14, 434 S.W.3d at 885; *White*, 875 A.2d at 666; Johnson v. La Grange State Bank, 383 N.E.2d 185, 188 (Ill. 1978); Rose v. St. Louis Union Trust Co., 253 N.E.2d 417, 419 (Ill. 1969); *Karsenty*, 959 A.2d at 1164; Sherrill v. Mallicote, 417 S.W.2d 798, 802 (Tenn. Ct. App. 1967); *In re* Estate of Steck, 81 N.W.2d 729, 734 (Wis. 1957). The *Thompson* court, as well as every opinion cited by the *Thompson* court, considered the decedent's anticipation of death.

189. *See White*, 875 A.2d at 666 (referring to this factor as whether or not there is a "brink of death" transfer).

190. Potter v. Winter, 280 S.W.2d 27, 35–36 (Mo. 1955).

191. *White*, 875 A.2d at 666 (focusing on the decedent's knowledge of his poor health established by a previous medical malpractice complaint filed by the decedent in which he

although the settlor died five years after the creation of the trust that diminished the elective share, the court remanded the case so the trial court could determine other facts, especially the degree to which the surviving spouse was deprived.[192]

Similarly, courts may ignore suspiciously short time spans that would otherwise weigh in favor of fraudulent intent. The *Johnson* court upheld a trust even though it was made only seven months prior to the settlor's death.[193] In *Karsenty*, the decedent died less than four months after creating the trust at issue, and the court acknowledged that the decedent knew he was very sick.[194] The *Karsenty* court went so far as to use the decedent's anticipation of death to affirmatively bolster its argument against a finding of fraudulent intent; the court used the factor to support the idea that the decedent was getting his financial affairs in order to "cover everybody."[195] Similarly, in *Potter v. Winter*, the decedent created the trust just three months before death, and the court acknowledged that the decedent knew he would not live long.[196] Nonetheless, the court did not find fraudulent intent and upheld the trust because it made sense that he "would wish to put his affairs in order."[197]

Although the *Thompson* court could just as easily have used Ripley's anticipation of death to show his intent to "put his affairs in order," the court instead cited Ripley's failing health and the short time span between Ripley's disinheriting acts and his death as evidence of fraudulent intent.[198] But, in *Windsor v. Leonard*, a District of Columbia court found that eighteen months was "hardly the kind of 'brink of death' transfer that might indicate bad faith on the part of the transferor,"[199] most likely because the court felt none of the other factors weighed in favor of fraudulent intent.

The only conclusion that follows from the courts' treatment of the anticipation-of-death analyses is that the factor is somewhat vestigial and relatively unimportant; the courts address it as a matter of tradition, but the

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stated that after suffering a heart attack and two strokes, he was aware that his "current heart failure and disability . . . [was] irreversible, and [he was] now subjected to sudden death").

192. *Rose*, 253 N.E.2d at 420.

193. *Johnson*, 383 N.E.2d at 197.

194. Karsenty v. Schoukroun, 959 A.2d 1147, 1152 (Md. 2008). The decedent made the trust on June 23, 2004, while undergoing chemotherapy, radiation treatment, and a stem cell transplant and died on October 18, 2004. *Id.*

195. *Id.* at 1155.

196. Potter v. Winter, 280 S.W.2d 27, 35–36 (Mo. 1955).

197. *Id.* at 37.

198. *See In re* Estate of Thompson, 2014 Ark. 237, at 2, 14, 434 S.W.3d 877, 879, 885. Ripley amended the trust to disinherit Anne on May 29, 2009, and died on February 20, 2010, so the time span was about nine months. *Id.*, 434 S.W.3d at 879, 885.

199. Windsor v. Leonard, 475 F.2d 932, 934 (D.C. Cir. 1973).

court will either bend the analysis so that it supports the weight of the evidence or dismiss the factor as relatively unimportant.

7. Consideration

Several of the jurisdictions cited in *Thompson* consider whether or not the transfer at issue was made in exchange for valuable consideration.[200] In Missouri, courts seem to find an absence of consideration to be a necessary element in addition to fraudulent intent.[201] The exchange of valuable consideration weighs highly in favor of a valid and complete transfer. Most of the jurisdictions cited in *Thompson* also stand by the belief that a settlor has the right to alienate his or her own property, even if doing so diminishes the elective share, as long as the settlor gives up all control. Notably, cases of nonprobate transfers that disinherit a spouse and make it to court are not those in which significant consideration has been exchanged.

8. Consent or Waiver

Generally, when the decedent has made the transfer at issue surreptitiously, the factors weigh in favor of fraudulent intent, and, when the court finds knowledge or consent by the surviving spouse, the factors weigh in favor of a valid transfer. Although consent can manifest in an express form, such as a prenuptial agreement, the consent required to determine that a transfer was not surreptitious need not be express; in some cases, courts highlight the factors that weigh in favor of implied consent or constructive knowledge.

a. Implied consent

A Missouri case demonstrates that, where a spouse has signed trust documents agreeing to serve as trustee should the settlor become incapacitated, consent and approval has been granted.[202] Similarly, an Illinois court asserted that a finding of fraudulent intent must fail where a surviving

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200. *See* Methodist Episcopal Church of Emory Chapel v. Hadfield, 453 A.2d 145, 147 (Md. 1982); *Potter*, 280 S.W.2d at 35; Edgar v. Fitzpatrick, 369 S.W.2d 592, 600 (Mo. App. 1963); Simpson v. Fowler, No. W2013-02109-COA-R3CV, 2014 WL 1601137, at *3 (Tenn. Ct. App. Apr. 22, 2014).

201. *Potter*, 280 S.W.2d at 35 (stating that the general rule in Missouri is that "a conveyance of property by the husband without consideration and with the intent and purpose to defeat his widow's marital rights in his property, is a fraud upon such widow and she may sue in her own right, and set aside such fraudulent conveyance, and recover the property so fraudulently transferred, to the extent of her interest therein"); *Edgar*, 369 S.W.2d at 600.

202. *Potter*, 280 S.W.2d at 36.

spouse knew that the decedent had been meeting with an attorney to prepare a trust and chose not to get involved.[203]

Even when substantial control is relinquished, disinheritance in the absence of consent or knowledge is frowned upon. In *Sherrill*, the irrevocable trust that ultimately left the surviving spouse with no support was held invalid and, unsurprisingly, was created without the spouse's knowledge.[204]

The facts in *Thompson* also led the court to find a lack of consent; the court cited the fact that Anne had always been a co-trustee to the trust until the last amendment was made, which disinherited her.[205] Additionally, she was not given a copy to inform her of the trust amendments as she had been in the past.[206]

b. Express consent

Couples possessing the requisite legal capacity can contract around property rights that would otherwise arise by operation of law upon marriage.[207] These agreements commonly take the form of prenuptial and postnuptial agreements.

A prenuptial agreement is a contract made between prospective spouses in contemplation of marriage in which they define their property rights and regulate the enjoyment and devolution of their real and personal estates.[208] Prenuptial agreements are presumptively valid and favored by the law as long as they are not contrary to public policy.[209] Prenuptial agreements involving fraud, however, are contrary to public policy, and, where the intent of the parties is not clear on the face of the agreement, a court will look to the circumstances surrounding its execution to determine intent and validity in a manner that very much resembles a *Thompson* standard.[210]

B. Combatting Uncertainty After *Thompson*: Arkansas Nuptial Agreements Can Enhance Predictability

A prenuptial agreement executed upon consideration of marriage must be fair, equitable, and reasonable in view of a totality of the surrounding facts and circumstances.[211] With a standard that so closely mirrors that of

203. Johnson v. La Grange State Bank, 383 N.E.2d 185, 195 (Ill. 1978).
204. Sherrill v. Mallicote, 248, 417 S.W.2d 798, 801 (Tenn. Ct. App. 1967).
205. *In re* Estate of Thompson, 2014 Ark. 237, at 14, 434 S.W.3d 877, 885.
206. *Id.* at 14, 434 S.W.3d at 885.
207. 7 AM. JUR. PROOF OF FACTS 2D *Waiver of Spousal Rights in Estate of Deceased Spouse* § 2 (1975).
208. *Id.*
209. *Id.*
210. *See id.*
211. *Id.*

Thompson, how much protection can a nuptial agreement actually provide against the uncertainty handed down by *Thompson*?

Although a nuptial agreement is not necessarily a fail-safe method of gaining certainty and protection in estate planning post-*Thompson*, it can afford a significant degree of protection. Despite the importance the court gives to the degree of deprivation in cases like *Thompson*, a court will likely uphold a voluntary waiver of spousal rights, even where the degree of deprivation is great, if the surviving spouse is found to clearly and unequivocally waive his or her rights upon being fully informed and advised of the spouse's actual worth.[212]

Arkansas has enacted the Arkansas Premarital Agreement Act (APAA).[213] According to the law, a premarital agreement must be in writing and be signed and acknowledged by both parties.[214] Parties may agree to the elimination or modification of spousal support or any other right not in violation of public policy and, specifically, not in derogation of the rights of a child entitled to support.[215] The APAA took effect on July 20, 1987, and it applies to any prenuptial agreement occurring on or after that date.[216]

The APAA further provides that a prenuptial agreement is not enforceable if it was not executed voluntarily or if it was unconscionable when executed.[217] Here, unconscionability means that a party was not provided a fair and reasonable disclosure of the tentative spouse's property; did not voluntarily and expressly waive, in writing and after consulting with legal counsel, any right to disclosure of the tentative spouse's property beyond that provided; and did not, or reasonably could not, have adequate knowledge of the tentative spouse's property.[218]

Notably, the protection given by a nuptial agreement is tempered by providing that if the agreement causes a party to be eligible for public support, a court may order the other party to provide support despite the agreement's terms to the contrary.[219]

In Arkansas, provisions in a prenuptial agreement that are disproportionate to the financial worth of an intended spouse give rise to a presumption of designed concealment.[220] It then becomes the burden of the party seeking enforcement of the prenuptial to prove that the party seeking rescis-

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212. 7 AM. JUR. PROOF OF FACTS 2D *Waiver of Spousal Rights in Estate of Deceased Spouse* § 7.
213. ARK. CODE ANN. §§ 9-11-401 to -413 (Repl. 2009).
214. *Id.* § 9-11-402 (Repl. 2009).
215. *Id.* § 9-11-403 (Repl. 2009).
216. *Id.* § 9-11-412 (Repl. 2009).
217. *Id.* § 9-11-406 (Repl. 2009).
218. *Id.*
219. ARK. CODE ANN. § 9-11-406(b)(1) (Repl. 2009).
220. Faver v. Faver, 266 Ark. 262, 270, 583 S.W.2d 44, 48 (1979).

sion had full knowledge of all information affecting the agreement.[221] If the party seeking enforcement of the prenuptial can meet the burden of proving that the party seeking rescission had full disclosure, the court will uphold the agreement.[222] Even where a spouse is rushed into signing a prenuptial agreement that he or she did not read an hour prior to being wed, the agreement will be binding where full disclosure of assets is attached and an attorney is provided.[223]

A postnuptial agreement is entered into during marriage to define each spouse's property rights in the event of death or divorce.[224] Although many states apply the same rules regulating both prenuptial and postnuptial agreements, more states impose different standards for finding postnuptial agreements valid, and Arkansas is one such state.[225]

In Arkansas, a postnuptial agreement is analyzed under contract law; marriage is adequate consideration for a prenuptial agreement or an amendment to a prenuptial agreement that occurs after marriage, but it is not adequate consideration for a purely postnuptial agreement—for a purely postnuptial agreement, past consideration in the form of marriage is no consideration at all.[226] Furthermore, under contract law, parties need not be advised of their rights to make a postnuptial agreement valid.[227]

So, a prenuptial may be easier to enforce in some ways because, if you meet the express provisions of the APAA relating to disclosure, legal counsel, and knowledge, the court should uphold the agreement. But, a postnuptial agreement may be easier to enforce in that it does not require legal counseling. Also, because marriage is not adequate consideration for a post-

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221. *Id.*, 583 S.W.2d at 48.

222. Lee v. Lee, 35 Ark. App. 192, 196, 816 S.W.2d 625, 628 (1991).

223. *Id.*, 816 S.W.2d at 628.

224. Simmons v. Simmons, 98 Ark. App. 12, 15, 249 S.W.3d 843, 846 (2007).

225. *See id.* at 15–16, 249 S.W.3d at 846–47 (holding that elements of a contract must be satisfied in order to find a valid postnuptial agreement and, unlike prenuptial agreements, marriage is not sufficient consideration to support a postnuptial agreement); Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 839, 881 (2007).

226. ARK. CODE ANN. § 9-11-405 (Repl. 2009) ("After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration."); *Simmons*, 98 Ark. App. at 15–16, 249 S.W.3d at 846–47 (upholding a postnuptial agreement because twenty-five years of marriage does not constitute consideration).

227. Stewart v. Combs, 368 Ark. 121, 123, 128, 243 S.W.3d 294, 296, 300 (2006) (upholding a postnuptial agreement where the wife had neither been advised by an attorney nor been advised of her right to an attorney because it satisfied the essential elements of a contract: competent parties, subject matter, legal consideration, mutual agreement, and mutual obligations). Although the legal consideration was not equal because the wife was giving up her right to continue living in the marital home in the event of her husband predeceasing her, consideration need not be equal under contract law. *Id.* at 127, 243 S.W.3d at 299.

nuptial, whether there was adequate consideration becomes a relevant issue in a postnuptial where it would not in the context of a prenuptial.

It is also important to note that releasing one's rights to dower or curtesy via contract will not suffice as a release of one's rights to an elective share.[228] Although the spousal elective share is comprised of dower or curtesy, to release one's rights to an elective share, the language of the contract must manifest a clear and specific intent to do so.[229]

IV. CONCLUSION

Although the probate system values "ease of administration and predictability of result,"[230] cases like *Thompson*, which implement an unpredictable factors test turning on fraudulent intent, make estate planning very difficult.[231] This article's synthesis of factors from jurisdictions relied on by the *Thompson* court can shed significant insight as to how a court may interpret factual circumstances. Still, in order to create as strong an estate plan as possible, estate planners going forward must err on the side of caution and assume that *Thompson*'s holding will be extended to any nonprobate transfer where the decedent retains control during life.

Another way to mitigate the unpredictable rule imposed by *Thompson* is to herald the importance of nuptial agreements like never before. Although the enforcement of a nuptial agreement must be fair, equitable, and reasonable under the circumstances, Arkansas courts are willing to enforce them when the APAA's statutory requirements are satisfied. Admittedly, nuptial agreements may be off-putting because they are unromantic, but, in the wake of *Thompson* and during a time when divorce and remarriage is increasingly common, the incentive for considering a nuptial agreement as an effective means of risk management is certainly inflated. Accordingly, practitioners need to make clients aware that, until Arkansas issues badly needed legislation standardizing the law in this area,[232] nuptial agreements

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228. *See* Masterson v. Masterson, 200 Ark. 193, 198, 139 S.W.2d 30, 32 (1940) ("It will be observed that the contract was made in lieu of any right of homestead and dower in the lands then owned by Masterson, and he did not acquire any other lands. But the contract did not require Mrs. Masterson to waive her statutory allowances, which are not dower but are in addition to dower.").

229. *See id.*, 139 S.W.2d at 32.

230. Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TRUST J. 683, 725 (1992).

231. *See* O'Brien, *supra* note 123, at 714; Roe, *supra* note 33, at 756; Vallario, *supra* note 30, at 535 (explaining that "common law modifications to the Traditional Elective Share statutes . . . make estate planning very difficult").

232. Creating this type of standardizing legislation or evaluating the provisions of the UPC is no small task, and a discussion of what such law should look like is outside the scope of this article. Of interest, however, is the fact that the Arkansas Bar Association requested

may be one of a very short list of options that allow predictable management of the devolution of nonprobate transfers.

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two additional years to study the bill after its first introduction in 1995, and, despite the thirteen-member committee unanimously recommending adoption of the bill in its 1996 report, the bill was kept from becoming law. Carroll, *supra* note 49, at 346.

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