

Summer 1987

Homemaker Services and the Elective Share: Out of the Kitchen and into the Money

Elizabeth R. Tyndall

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Elizabeth R. Tyndall, *Homemaker Services and the Elective Share: Out of the Kitchen and into the Money*, 52 MO. L. REV. (1987)

Available at: <https://scholarship.law.missouri.edu/mlr/vol52/iss3/8>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

HOMEMAKER SERVICES AND THE ELECTIVE SHARE: OUT OF THE KITCHEN AND INTO THE MONEY

*Estate of Leve v. Leve*¹

*Estate of Leve v. Leve*² is the first case in the nation to state that homemaking services may constitute a full consideration when calculating the decedent's augmented estate. *Leve* holds that homemaking services may be considered as contribution in money's worth toward the acquisition of jointly held property for the purpose of valuing the decedent's estate from which the surviving spouse may take an elective share.³

Leve addressed the question of the extent to which a surviving wage-earning husband may elect to take a forced share of his deceased wife's separate property. By crediting homemaking services of the wife as a contribution toward the acquisition of joint property, the survivor's elective share to her separate property is reduced. *Leve* is the only case interpreting Missouri statute section 474.163(3), which is patterned after section 2-202 of the Uniform Probate Code (UPC).⁴ Subsection (3), however, contains a special provision not found in the UPC for the treatment of jointly held property.⁵ The court's interpretation of this subsection, and its application in *Leve*, produce a result that is desirable when limited to the facts because homemakers receive credit for monetary contributions in the home, just as wage-earning spouses receive credit for contributions from work outside the home. However, *Leve* highlights inconsistencies in property disposition which have existed for dual wage-earning couples since adoption of section 474.163. Existing vagaries of the common law title system also produce results which are incompatible with the purposes underlying the augmented estate.

The UPC gives the surviving spouse the right to take an elective one-third share of the decedent's "augmented estate."⁶ The one-third fraction corresponds with the prevailing intestate and elective shares in many Amer-

1. 704 S.W.2d 263 (Mo. Ct. App. 1986).

2. *Id.*

3. *Id.*

4. *Id.* at 266.

5. *Id.*

6. U.P.C. § 2-201(a) (1983).

ican jurisdictions⁷ and has its roots in both the civil and the common law.⁸ Under the common law, a widow was entitled to dower, which consisted of a life estate in one-third of all lands in which the deceased husband was seized of an estate of inheritance at any time during marriage.⁹

Common law dower became a part of the received common law in the original American colonies¹⁰ and eventually part of the received common law in most states.¹¹ However, it became clear that dower served as an impediment to alienability and provided inadequate protection to widows in a society which classifies most wealth as personal property.¹²

Legislative response to the inadequacy of dower has been varied.¹³ Many states have substituted a forced share in the whole estate for dower and the widower's analogous right of curtesy.¹⁴ Before adoption of the UPC, however, few forced share statutes made provision for inter vivos and non-

7. Seven states have adopted in some form the Uniform Probate Code [hereinafter UPC] elective share provisions: ALASKA STAT. §§ 13.11.070 to .11.110 (1986); COLO. REV. STAT. §§ 15-11-201 to 11-207 (1973); IDAHO CODE §§ 15-2-201 to 2-209 (1979); MONT. CODE ANN. §§ 72-2-702 to 2-705 (1985); NEB. REV. STAT. §§ 30-2313 to 2319 (1985); N.D. CENT. CODE §§ 30.1-05-01 to 05-07 (1976 & Supp. 1985); UTAH CODE ANN. §§ 75-2-201 to 2-207 (1978).

8. Under Saxon law in the seventh century, a decedent's widow was entitled to a one-third outright share of all lands and personal property held by her deceased husband at death. After the Norman Conquest in 1066 and until the fifteenth century, the widow was entitled variously to an outright one-third share of all lands held at the time of the marriage, but not thereafter; a life estate in one-third of all lands held at the time of marriage but not thereafter; or finally, a life estate in one-third of all lands held at any time during marriage. See C. KENNY, *THE HISTORY OF THE LAW OF ENGLAND AS TO THE EFFECTS OF MARRIAGE ON PROPERTY* 21-36 (1879).

9. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1045 (1966). Similarly, by curtesy, a widower was entitled to an estate for life of all lands which his deceased wife owned in fee, provided however, that a living child was born of the marriage. *Id.*

10. See 1 C. SCRIBNER, *A TREATISE OF THE LAW OF DOWER* 19 (2d ed. 1883); Haskins, *A Problem in the Reception of the Common Law in the Colonial Period*, 97 U. PA. L. REV. 842 (1949).

11. See, e.g., MO. REV. STAT. § 1.010 (1969), which states in part: "The common law of England and all statutes and acts of parliament . . . of a general nature . . . are the rule of action and decision in this state. . . ."

12. Since the United States is no longer a predominately agrarian economy, land is not the principal source of wealth. See Kurtz, *Augmented Estate Concept Under Uniform Probate Code*, 62 IOWA L. REV. 981, 989 (1977); D. PROJECTOR & G. WEISS, *Survey of Financial Characteristics of Consumers* (Federal Reserve Technical Paper No. 10 1966).

13. Dower and curtesy, for example, are irrelevant in community property states and have been completely abolished. Other states have increased the widow's one-third dower interest from a life estate to an outright fee. See Phipps, *Marital Property Interests*, 27 ROCKY MTN. L. REV. 180, 191-208 (1955).

14. W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 21-25 (1960).

testamentary transfers to the surviving spouse and others.¹⁵ Where the forced share statutes measure the surviving spouse's share by the size of the decedent's probate estate, lifetime transfers to third parties by the decedent have the practical effect of disinheriting the surviving spouse.¹⁶ A decedent could totally deplete his or her probate estate by lifetime transfers, leaving the surviving spouse no fund from which a forced share could be taken.¹⁷ This is one situation to which the augmented estate concept is addressed.¹⁸

The need for an augmented estate can best be seen by way of example. The factual situations which follow all assume the applicable forced share statute gives the surviving spouse one-third of the decedent's probate estate.¹⁹

CASE 1: Decedent bequeaths her entire probate estate of \$600,000 to children of a prior marriage. No provision is made for the surviving spouse.

CASE 2: Decedent bequeaths her entire probate estate of \$150,000 to the surviving spouse, her second husband. During the second marriage decedent transferred \$450,000 to her children of a prior marriage.

CASE 3: Decedent bequeaths her entire probate estate of \$400,000 to children of a first marriage. During decedent's lifetime, decedent transferred \$200,000 to her second spouse who survived her.

In case 1, the surviving spouse is entitled to \$200,000, one-third the probate estate. The forced share defeats the testamentary expectation of the decedent and children, but provides for the surviving spouse just as the statute mandates. In case 2, the surviving spouse will presumably take the \$150,000 bequest because the provision of the will is in the spouse's favor. Without the ability to recapture lifetime transfers, the surviving spouse's economic interest in what was once a \$600,000 estate is now limited to \$150,000, a sum less than the \$200,000 a one-third forced share statute considers appropriate.²⁰

15. *Id.*

16. Kurtz, *supra* note 12, at 990.

17. This depletion is avoided in states which have separate statutes dealing with such inter vivos transfers. For example, even before Missouri adopted the UPC model of augmented estates, the Missouri probate code provided that gifts in fraud of marital rights might be recovered from the donee. According to Missouri law:

Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

MO. REV. STAT. § 474.150 (1986).

18. See U.P.C. § 2-201 comment (1983); Kurtz, *supra* note 12, at 989-93.

19. Missouri's elective share statute is an example of such legislation. For the text of Missouri's statute, see *infra* note 47.

20. The UPC avoids this result by recapturing lifetime transfers made by the decedent for which there was no adequate consideration. Thus, the \$450,000 transfer

In case 3, the surviving spouse is able to increase his economic interest by electing one-third of the probate estate, \$400,000, while retaining the \$200,000 inter vivos transfer from the decedent. This brings the spouse's total interest in what was once a personal estate of \$600,000 to \$333,333, more than half the estate. Since no provision is made to credit inter-spousal gifts, this total amount is substantially more than the amount anticipated by the one-third forced share statutes. Moreover, such a statute works to defeat the testamentary plan of the decedent and expectations of the children without any reasonable justification.²¹

These three examples illustrate various situations where the forced share statutes may be applied. Without a way to reach inter vivos transfers to others or to credit non-testamentary transfers to the surviving spouse, rigid application of the elective share statutes can produce results inconsistent with the basic policy underlying the UPC.²²

According to the UPC, there are two purposes behind augmenting the probate estate: to prevent the owner of property from transferring it to others by non-probate means with the intention of defeating the surviving spouse's right to a share; and to prevent the surviving spouse from electing to take a share against the will when the surviving spouse has already received a fair share of the total property through other, non-testamentary means.²³

Essentially, therefore, two groups of property are added back into the net probate estate²⁴ to arrive at the augmented estate from which the surviving

to the decedent's children, if made without adequate consideration, would augment the decedent's estate, thereby increasing the surviving spouse's elective share. The text of this provision is set forth *infra* at note 25.

In Missouri, these transfers are addressed in MO. REV. STAT. § 474.150 (Supp. 1987). If the transfers were without consideration, they may be recaptured and applied to the payment of the spouse's elective share. *See supra* note 17.

21. The foregoing illustrations were developed from examples cited in Kurtz, *supra* note 12, at 991-92.

22. The UPC attempts to balance the need to protect a surviving spouse against disinheritance with the competing interests of other transferees and of the decedent's freedom of testation. The surviving spouse's one-third elective share is not computed against the probate estate, but rather against the augmented estate. The augmented estate includes property of the surviving spouse derived from the decedent, as well as recaptured suspect inter vivos gifts. *See Kurtz, supra* note 12, at 982 n.2.

23. *See U.P.C. § 2-202* comment (1983); Fratcher, *supra* note 9, at 1058-64; Kurtz, *supra* note 12, at 1011-16; *see also In Re Merkel's Estate*, 618 P.2d 872 (Mont. 1980) (purpose of elective share statute is to ensure the surviving spouse's needs are met and that the spouse is not left penniless).

24. The net probate estate is computed as follows:

GROSS PROBATE ESTATE (equals all property and rights to property

spouse's fractional share is calculated. The first group consists of lifetime transfers by the decedent during marriage which are essentially will substitutes, whereby the decedent retained some measure of continued benefit and control of the property.²⁵ The UPC intended to reach those transfers commonly used to defeat the surviving spouse's elective share in the probate estate.²⁶

The second category of property to be added to the net probate estate is property of the surviving spouse which was derived from the decedent by

owned at death)

- LESS: 1. Funeral and Administration Expenses
 2. Homestead Allowance
 3. Family Allowance
 4. Exempt Property
 5. Enforceable Claims

EQUALS: NET PROBATE ESTATE

For definitions of homestead allowance, family allowance and exempt property, see U.P.C. §§ 2-401 to 2-403 (1983). In Missouri, see MO. REV. STAT. §§ 474.250, .260, .290 (Supp. 1987).

25. This property is addressed in U.P.C. § 2-202(1), which provides: The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent detained [sic] at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.00.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

U.P.C. § 2-202(1) (1983). This portion of the UPC was not adopted in Missouri because Missouri statute § 474.150, dealing with gifts in fraud of marital rights, was already in place. See *supra* note 17.

26. See Fratcher, *supra* note 9, at 1062; Kurtz, *supra* note 12, at 1022.

means other than testate or intestate succession, and property which the surviving spouse has, in turn, given away which would have been included in the surviving spouse's augmented estate had the spouse pre-deceased the decedent.²⁷ Such property of the surviving spouse is included to support the policy that where the decedent made adequate provision for the surviving spouse by non-testamentary or inter vivos gifts, there is no compelling reason

27. This category of property is addressed in section 2-202(2) of the UPC, which provides:

The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had pre-deceased the decedent to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this paragraph:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan exclusive of the Federal Social Security system by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

U.P.C. § 2-202(2) (1983). Only this portion of the UPC was adopted in Missouri. See Mo. REV. STAT. § 474.163(2)-(5) (1986) (set forth *infra* note 48). Subsection (3), however, adopts a special provision with respect to survivorship property not found in the UPC. For an interpretation of subsection (3), see *infra* text accompanying notes 48-57.

to permit the spouse to upset other dispositive arrangements of the decedent.²⁸

After including these two types of property in the augmented estate, the UPC entitles the surviving spouse to one-third of the augmented estate. This amount is the surviving spouse's elective share. The full value of property received outside probate is then charged against the elective share for satisfaction purposes.²⁹ For example, recalling case 3 above,³⁰ the \$200,000 lifetime transfer to the surviving spouse would be recaptured and added to the \$400,000 net probate estate to yield an augmented estate of \$600,000. The spouse's right to a one-third forced share of the augmented estate equals \$200,000; since the surviving spouse has already received that amount through non-probate means, the elective share is totally satisfied. As a result, the \$400,000 testamentary disposition remains undisturbed.³¹

28. Kurtz, *supra* note 12, at 1036; see *In re Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982).

29. See Kurtz, *supra* note 12, at 1036; Fratcher, *supra* note 9, at 1062. Note that only the spouse's property *derived from the decedent* is included when computing the augmented estate. If, for example, the spouse has a personal estate of inheritance from his or her parents, that amount is not included, and will not later offset the elective share. However, section 474.163(5) of the Missouri revised statutes, which is identical to section 2-202(2)(iii) of the UPC, requires the surviving spouse to overcome a presumption that such property owned by the surviving spouse was derived from the decedent. See *supra* note 27.

30. See *supra* text accompanying notes 19-21.

31. To further illustrate the calculation of the elective share under the UPC, suppose that Bubba, a widower aged 75, has one daughter by his deceased wife. Bubba owns two farms, Blackacre and Greenacre, each valued at \$90,000, has an insurance policy on his life worth \$100,000, and is the sole depositor of \$10,000 in a checking account. Bubba marries Fluffy, his aerobics instructor, has Blackacre placed in tenancy by the entirety with her, designates her the beneficiary under his life insurance policy, and turns the checking account into a joint account with rights of survivorship.

Three months later Bubba dies of heart failure, leaving a will which bequeaths to Fluffy the household goods and farm equipment on Blackacre, and to his daughter he devises Greenacre. Without an augmented estate provision, Fluffy could keep the \$200,000 worth of assets acquired through non-testamentary means (Blackacre, the life insurance proceeds, and the joint account), *and* take one-third of Greenacre from her stepdaughter by electing against the will. This would bring her acquisition to a total of \$230,000, leaving \$60,000 to her husband's daughter.

Under section 2-202 of the UPC, this result would change. Fluffy's elective share would be calculated by adding to the net probate estate those assets she had received outside probate, as follows:

NET PROBATE ESTATE:	
Greenacre =	90,000
PLUS NON-PROBATE TRANSFERS	
TO SURVIVING SPOUSE:	
Blackacre =	\$90,000
Insurance Proceeds =	\$100,000

In 1980, Missouri adopted section 474.163³² as part of the Missouri Probate Code Revisions.³³ Under subsection (1), only the value of "property derived by the surviving spouse from the decedent by any means other than testate or intestate succession, exempt property or family allowance *without a full consideration in money or money's worth*"³⁴ is added to (i.e., augments) the decedent's net probate estate for purposes of calculating the surviving spouse's elective share.³⁵ The valuation of a decedent's estate is therefore dependent upon whether a certain inter-spousal transfer was made with a full consideration "in money or money's worth" or was in fact gratuitous.³⁶

Leve holds that, to the extent of the value of those services, a spouse's contribution as a homemaker may constitute a full consideration in money's worth.³⁷ Two results follow from this holding.³⁸ First, where the wage earner is the first to die, a homemaker surviving spouse who elects against the will is entitled to a larger portion of the estate, because non-testamentary transfers made from the decedent wage-earner will augment the estate only insofar as they exceed the "money's worth" equivalence of homemaking services.³⁹

Joint Bank Account =	\$10,000
EQUALS AUGMENTED ESTATE:	\$290,000
Statutory one third of Augmented Estate Equals the Elective share:	\$96,666

Since \$200,000 worth of assets were acquired outside of probate, Fluffy's statutory elective share (\$96,666) is more than satisfied. While she is not required to return the excess of her elective share, neither is she entitled to any part of Greenacre. Since the non-probate transfers go to satisfaction of the elective share, the surviving spouse is prevented from defeating the testamentary intent of the decedent because the surviving spouse has been adequately provided for by non-testamentary means. For more complete development of the calculation of augmented estate under the UPC, see Fratcher, *supra* note 9, at 1058-65.

32. Mo. REV. STAT. § 474.163 (Supp. 1987).

33. MISSOURI BAR, MISSOURI PROBATE CODE-1980 158-59 (1980).

34. Mo. REV. STAT. § 474.163(1) (Supp. 1987) (emphasis added); *see infra* note 48.

35. Mo. REV. STAT. § 474.163(1) (Supp. 1987).

36. For example, if a decedent gives his Mercedes Benz to his wife, in exchange for which she gives shares of IBM equal to the value of the car, the stock would constitute full consideration in money's worth. The car would not be included in the decedent's augmented estate. If, on the other hand, the Mercedes was given gratuitously, the decedent's augmented estate would include the car.

37. *Leve*, 704 S.W.2d at 267.

38. Wiedenbeck, *Homemaker Services and the Elective Share*, 22, 25, in ANNUAL SURVEY OF THE LAW, 1986 (paper presented at the Missouri Bar Association Annual Meeting).

39. This result places homemaker spouses in the same position as their wage-earning counterparts, because the value of work done in the home is counted toward the acquisition of jointly held property, just as wages earned outside the home are valued as a contribution.

Second, where a wage-earning surviving spouse chooses to elect against the will of the decedent homemaker, access to property to which the homemaker held separate title may be reduced if the wage earner holds joint property with the homemaker. This is because the probate estate will be augmented by the value of jointly held property acquired through the contribution of homemaking services,⁴⁰ thereby reducing the spouse's interest in the decedent's separate property. In other words, some jointly held property may be deemed as "derived by the surviving [wage-earning] spouse from the [homemaking] decedent."⁴¹

Only the second of these results is directly addressed by *Leve*. Thelma Leve, the deceased homemaker, had been married to the surviving wage-earner husband, Harry Leve, from 1945 until Thelma's death in 1983.⁴² Harry had been employed during the marriage, while Thelma had never worked outside the home.⁴³ Harry's earnings (and later, both spouses' Social Security checks) were placed in accounts and investments jointly held by the couple and these assets were used to support them.⁴⁴ In addition, upon the death of her mother, Thelma received certain real estate and money, to which she retained separate title.⁴⁵ Thelma died leaving no children; her will bequeathed her entire estate to her personal representative to be held in trust for the benefit of her brother, his wife, and certain charities.⁴⁶ Harry subsequently filed his election to take a one-half share against the will.⁴⁷

40. *Leve*, 704 S.W.2d at 267. In domestic law, homemaker services have long been recognized as a source of contribution to the marriage enterprise. In both community property states and those following a system of equitable distribution, homemaking services are recognized as a factor which contributes to the overall productivity of the marriage partnership. See Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 Mo. L. REV. 165 (1976); L. GOLDEN, *EQUITABLE DISTRIBUTION OF PROPERTY* 262 (1983).

Homemaker services are treated in various ways. A majority of states consider non-monetary contributions of the homemaker as a specific statutory factor in making an equitable distribution. See, e.g., COLO. REV. STAT. § 14-10-113 (Supp. 1986); ILL. ANN. STAT. ch. 40, para. 503 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 31-1-11 (Burns Supp. 1986); KY. REV. STAT. ANN. § 403.190 (Michie/Bobbs-Merrill Supp. 1986). Other states have relied on judicial recognition of homemaker services. E.g., *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); *In re Marriage of Patus*, 175 Ind. App. 459, 372 N.E.2d 493, 495-96 (1978); *Parrot v. Parrot*, 278 S.C. 60, 292 S.E.2d 182 (1982); see also *In re Marriage of Grey*, 422 N.E.2d 696 (Ind. Ct. App. 1981) (holding that homemaking supportive services are a very valuable indirect contribution to the employee spouse's productivity in business enterprises, and may also directly affect the employee's success such as by entertaining clients).

41. Mo. REV. STAT. § 474.163(1) (Supp. 1987); see *infra* note 48.

42. *Leve*, 704 S.W.2d at 264.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 265.

47. *Id.* Section 474.160(1) of the Missouri Revised Statutes provides:

According to section 474.163(3), a testator's estate is to be increased by the whole value of property passing to the surviving spouse by rights of survivorship, except as to the proportion of the property that was "derived from contributions . . . made by the surviving spouse or ascendant or collateral blood relatives of the surviving spouse"48 Because there were

When a married person dies testate as to any part of his estate, a right of election is given to the surviving spouse solely under the limitations and conditions herein stated:

(1) The surviving spouse, upon election to take against the will, shall receive in addition to exempt property and allowance under section 474.260 one-half of the estate, subject to the payment of claims, if there are no lineal descendants of the testator; or, if there are lineal descendants of the testator, the surviving spouse shall receive one-third of the estate subject to the payment of claims. . . .

Mo. REV. STAT. § 474.160(1) (1986).

48. The method used for calculating the value of the estate for purposes of electing against the will under Missouri law is as follows:

1. For the purposes of section 474.160, the estate consists of all money and property owned by the decedent at his death, reduced by funeral and administration expenses, exempt property, family allowance and enforceable claims, and increased by the aggregate value of all money and property derived by the surviving spouse from the decedent by any means other than testate or intestate succession, exempt property or family allowance without a full consideration in money or money's worth. The aggregate value of money and property so derived by the surviving spouse from the decedent shall be offset against the elective share given by section 474.160.

2. Property derived from the decedent includes, but is not limited to: (1) Any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime; (2) Any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of persons other than the spouse; (3) Any proceeds of insurance, including accidental death benefits, on the life of the decedent attributable to premiums paid by him; (4) Any lump sum immediately payable, and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant, attributable to premiums paid by him; (5) The commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent; and (6) The value of the share of the surviving spouse resulting from rights in community property in any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

3. When immediately before the decedent's death the surviving spouse was a cotenant or remainderman with respect to money, property, a trust fund or an account in a bank or other financial institution and, incident to such death, the surviving spouse became the sole owner thereof or the owner of a life interest therein, the whole value of such sole ownership or life interest shall be deemed to have been received from the decedent, except as

no prior cases interpreting section 474.163(3),⁴⁹ and because subsection (3) is not part of the Uniform Probate Code,⁵⁰ the Missouri Court of Appeals for the Eastern District examined the legislative intent⁵¹ in order to reconcile the special survivorship property rule of subsection (3) with the more general language of subsection (1).⁵² The court concluded that the term "property derived" used in subsection (1) includes the term "received property" as used in subsection (3).⁵³

The court also reconciled the conditions of each subsection by which certain property derived (or received) by the surviving spouse may be excluded from the decedent's augmented estate.⁵⁴ Although subsection (1) augments the estate by the value of property derived by the surviving spouse from the decedent without a "full consideration in money or money's worth,"⁵⁵ subsection (3) states that property may be excepted from the augmented estate to the extent that the property was derived from "contributions toward the acquisition, establishment or creation" of the property made by the surviving spouse.⁵⁶ The court held that "a contribution contemplated by subsection 3 is construed to mean a contribution in money or money's worth."⁵⁷

Under this construction, the statute requires that Thelma's estate be augmented by the value of jointly held property derived by Harry, except to the extent that Harry, as surviving spouse, contributed in "money or money's worth toward the acquisition, establishment or creation" of such property. If such a literal reading of the statute had been employed by the court, then nearly the entire value of the joint property would be attributable to Harry's contribution as wage-earner.⁵⁸ This interpretation would result in virtually no net augmentation of Thelma's estate, thereby increasing the value of Harry's elective share in Thelma's personal estate.

However, instead of examining Harry's contribution toward the acquisition of jointly held property as surviving spouse, the court subtly rephrased

to the proportion of such value, if any, derived from contributions toward the acquisition, establishment or creation or [sic] the money, property, fund or account made by the surviving spouse or ascendant or collateral blood relatives of the surviving spouse, other than the decedent.

MO. REV. STAT. § 474.163 (1986).

49. *Leve*, 704 S.W.2d at 265.

50. *Id.* at 266. Subsection (3) is similar to general language found in section 2-202(2)(i) of the UPC, but is more specific in its treatment of jointly held property. *See supra* notes 27, 48.

51. *Leve*, 704 S.W.2d at 266.

52. *Id.*

53. *Id.*

54. *Id.* at 266-67.

55. *See* MO. REV. STAT. § 474.163(1) (Supp. 1987) (set forth *supra* note 48).

56. *See id.* § 474.163(3) (set forth *supra* note 48).

57. *Leve*, 704 S.W.2d at 267.

58. *Id.* at 266. A small portion of the joint property was derived from Thelma's social security benefits. *See id.* at 267.

the issue by inquiring into the *decedent's* (i.e., Thelma's) contribution.⁵⁹ The court then went on to determine that Thelma's contribution as a homemaker may be considered a contribution in money's worth for the purposes of section 474.163.⁶⁰ This change in focus from the contribution of the surviving spouse to the contribution of the decedent is critical to the court's conclusion.⁶¹

Literally, the statute first assumes that the whole value of survivorship property is derived from the decedent, and then excepts any such property which was acquired by contribution of the surviving spouse.⁶² This means that in calculating the elective share, the net probate estate is first increased by the whole value of such survivorship property and then decreased by the value of the surviving spouse's contribution to the acquisition of such property. The difference which results from this two-step calculation is the augmented estate, from which the fractional share is taken. In *Leve*, since most of the joint property was acquired with Harry's wages, there is arguably a complete offset and no net augmentation. However, the interpretation of the statute given in *Leve* enables the court to avoid a complete offset by figuring the value of the augmented estate by a one-step addition of the value of the decedent's contribution (as homemaker) to the acquisition of joint property.

Theoretically, the one-step addition of decedent's contribution should yield the same result as the two-step computation (i.e., *addition* of the full value of survivorship property *reduced* by the value of survivor's contribution). However, the two-step computation would force the court to openly acknowledge that part of the value of joint property acquired by Harry's wages was being treated as immediately "derived from" Thelma, which is akin to community property concepts.⁶³

59. *Id.* at 267.

60. *Id.* The spouse with the domestic and child rearing responsibilities makes an indirect contribution to the acquisition of property by making it possible for the employed spouse to be employed. In addition, the non-working spouse's contributions provide numerous tangible and intangible benefits to the marriage. Further, the homemaker forgoes the opportunity to earn money and thereby to acquire property so that he or she might perform the domestic and child rearing responsibilities. See Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71 (1979).

61. See Wiedenbeck, *supra* note 38.

62. MO. REV. STAT. § 474.163(3) (Supp. 1987) (set forth *supra* note 48).

63. There are two ways by which property is divided upon dissolution of marriage: the community property system and the system of equitable distribution. Common law division of property at dissolution was based on title of assets. Since title determined who owned and controlled, each spouse was entitled only to property titled in his or her own name. The community property and equitable distribution systems overlook title concepts when dividing property and look instead to contri-

By focusing on the contribution of the decedent Thelma instead of the surviving spouse Harry, and by crediting Thelma's contribution as a homemaker as a contribution in "money's worth," the court increases the value of Thelma's augmented estate by including a substantial portion of the jointly held property, thereby reducing Harry's forced share rights in Thelma's separate property.⁶⁴ The *Leve* holding affords Thelma the same protection of her separate property which would have occurred had she been employed outside the home and made monetary contributions to the acquisition of joint property.

There is only one other reported decision on the issue of whether homemaker services may constitute a consideration for the purposes of calculating the augmented estate. In *In re Estate of Carman*,⁶⁵ the Supreme Court of Nebraska held that no obligation to compensate a spouse for extra and unusual services arises absent an express contract. The result is that a spouse's labor is not a contribution "in money's worth" and the full value of property jointly owned or produced by the couple augments the decedent's estate. The court required that joint property and the increased value of farm land acquired through the contributions of a surviving farm wife augmented the estate of her deceased husband.⁶⁶ Although the wife had conducted a farming operation jointly with her husband for more than twenty years, the full value of the farm's produce and the wife's undivided one-half interest in realty

butions of each spouse toward the acquisition of property.

In community property states, title does not determine ownership. At the time of property acquisition, a present one-half interest vests in each spouse. Under the community property system, since each spouse already has a present one-half interest in property acquired during the marriage, each spouse takes from the marriage his or her own property. This characterization of property also leaves each spouse free to dispose of his or her own property by inter vivos transfers or testamentary design.

The system of equitable distribution is followed in most states, including Missouri. Under this system, upon marriage dissolution the court in its discretion must classify all property as either "marital" or "separate." Marital property in Missouri is defined as property acquired during marriage. Such marital property includes income, earnings and property acquired by labor, efforts, or industry of either spouse. Separate property is property acquired prior to marriage, or property acquired during marriage by gift, devise, bequest, inheritance, or in exchange for other separate property. This classification is determined not by title, but by time of acquisition and intention with which the property is treated after acquisition. *See, e.g.,* MO. REV. STAT. § 452.330 (Supp. 1987). For a complete discussion of the principles of the community property system, see W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971). *See generally* 3 *FAMILY LAW AND PRACTICE* § 37.01 (A. Rutkin ed. 1985) (discussion of the community property system and its effect on property division); Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 *BAYLOR L. REV.* 20, 40 (1967) (recognition of husband and wife as separate, legal entities).

64. *See* Wiedenbeck, *supra* note 38.

65. *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982).

66. *Id.* at —, 327 N.W.2d at 614.

owned as tenants in common augmented her husband's estate.⁶⁷ This thereby reduced her elective share, despite the fact that her chores included raising chickens, selling eggs and fryers, milking cows, separating and selling cream, feeding livestock, driving tractors, and fixing fences, farm machinery and buildings.⁶⁸ It follows that, in Nebraska, homemaker services do not cause non-probate transfers from a decedent wage-earner to a surviving homemaker to be classified as nongratuious.

The *Leve* holding states the proposition that homemaking services are worth valuing in the context of probate law. This holding is consistent with developments in family law, which recognize the value of the homemaker's contribution to the marital partnership.⁶⁹ However, *Leve* leaves many unanswered questions. By recognizing homemaker services when computing the value of a decedent's augmented estate, it is unclear whether the purpose behind the augmented estate can be fully realized.

Family law concepts of community and marital property look behind title; at marriage dissolution, property is divided based upon factors unrelated to the name in which title is held. By applying these principles to probate law, the common law title system is no longer the primary basis for property allocation in the event of an election against the will. Although *Leve* does not specifically address the issue, where positions are reversed and the homemaker-surviving spouse elects against the decedent wage-earner's will, the homemaker is potentially entitled to a greater share of the decedent's estate because non-testamentary transfers made in recognition of homemaker services will not augment the estate.⁷⁰ To the extent of the "money's worth" of those services, all non-probate transfers are made with full consideration, and will not later reduce the homemaker spouse's forced share.

Leve permits a homemaker electing against the will of the deceased wage-earner to argue that a portion of joint property received upon the decedent's death should not augment the estate. Assuming that homemaking services are deemed equal in value to the wage-earner's contribution,⁷¹ the homemaker will be able to except one-half of the joint property from the augmented estate, thereby increasing the elective share. Where the forced share statute gives one-half of the augmented estate, the homemaker ultimately receives three-fourths of the joint property, since one-half of the joint property was initially classified as nongratuious.

For example, prior to *Leve*, if the survivorship property equaled \$500,000 traceable to wages of the decedent, that full value would augment the decedent's estate and offset the homemaker's elective share. Where the value

67. *Id.*

68. *Id.*

69. *See supra* note 60.

70. Wiedenbeck, *supra* note 38.

71. *See infra* notes 79-87 and accompanying text.

of homemaking services is equal to the wage earner's contribution, *Leve* allows the homemaker to set aside 50 per cent of the joint property because it was derived by the homemaker's equal contribution. The estate is then augmented only by the remaining \$250,000, and likewise the elective share is offset only by \$250,000, and not the full value of the joint property. The *Leve* holding equalizes the positions of each spouse in relation to the other, in that both spouses receive credit for their contribution toward the acquisition of joint property, regardless whether the contribution was in money or in money's worth.

Once the homemaker contribution is counted as "contribution" within the meaning of section 474.163,⁷² existing vagaries of the common law title system can also substantially increase the share which may be taken against the will. Suppose, for example, that Lee Wage-earner and Chris Homemaker both recognize the importance of homemaking services and deem the contribution of the homemaker to be equal in value to the contribution of the wage earner. In recognition of this, they agree to title all property acquired during the marriage separately, with each spouse holding a vested one-half interest. Suppose also that upon death, Lee leaves the bulk of his estate to children of a previous marriage. Chris elects to take a forced one-half share against Lee's will.⁷³

If there are no non-probate transfers (and therefore no augmentation), the forced share statute enables Chris Homemaker to take one-half of Lee's probate estate. By claiming one-half of the decedent's one-half of the property, Chris' total share equals three-fourths of the property acquired during marriage.⁷⁴ This share is significantly greater than any forced share provision has considered appropriate.⁷⁵ If, however, wage-earner Lee holds separate title to *all* property acquired during marriage,⁷⁶ the homemaker spouse Chris

72. MO. REV. STAT. § 474.163(3) (Supp. 1987) (set forth *supra* note 48).

73. Assuming Missouri law applies, the elective share is one-half if there are no surviving children. The share would be one-third if children survived. See MO. REV. STAT. § 474.160 (Supp. 1987) (set forth *supra* note 47).

74. Where the elective share is one-third, Lee's share in this situation is two-thirds of the total property acquired during the marriage.

75. See *supra* text accompanying notes 6-9.

76. It is more typical for the wage-earner to hold separate title to property acquired through those efforts:

Most men and women have no property independent of what they earn from their own labor; their capacity to work is the basis of their wealth. Yet, the entire labor of the [homemaker] during the whole period of marriage is still generally of a type which the [wage-earner] owns. If the marriage is based on the model of the husband as breadwinner and primary decision-maker, and the wife in the supportive roles of housekeeper and child-raiser, the wife has no chance to accumulate separate property by her own labor.

Comment, *Marital Property: A New Look at Old Inequities*, 39 ALB. L. REV. 52 (1974); see also Rheinstein, *The Transformation of Marriage and the Law*, 68 NW. U.L. REV. 463 (1973).

takes only one-half of the total. This example highlights an inconsistency of disposition which exists for both wage-earning and homemaking spouses. Note that where each spouse holds separate title, the total share of the surviving spouse could equal three-fourths whether the wage-earner elects or the homemaker elects. The forced share statute entitles the homemaker to varying fractions of the property acquired during marriage, depending on how title is held.

Likewise, it is unclear whether the result in *Leve* would have been the same if Harry, the wage-earning husband, had held *separate* title (as opposed to a joint tenancy with rights of survivorship) to property acquired during the marriage. In that case, Harry would have acquired no property upon Thelma's death, and there arguably would be no augmentation of her estate. Harry's elective share rights to her separate property would therefore be greater. Unless the initial acquisition of separate title is deemed to be a gift from the decedent homemaker to the wage-earner surviving spouse,⁷⁷ the interaction of the common law title system and the *Leve* interpretation of the augmented estate statute again produces anomalous results. It remains for the courts to determine the limits and scope of the *Leve* holding.⁷⁸

Another unanswered question in *Leve* is how to value the homemaker's contribution. The court of appeals in *Leve* reversed and remanded on that point for a determination of the extent to which Thelma Leve had in fact performed homemaking services and for an evaluation of the money's worth of those services.⁷⁹ When the issue is property division upon marriage dissolution, courts have valued homemaking services in various ways. Most courts are in accord that homemaking contributions are as valuable as those of the wage-earning spouse.⁸⁰ Some states have used a community property model and imposed a statutory presumption that homemaker con-

77. Such a transfer without consideration would augment the estate. See Mo. REV. STAT. § 474.163 (Supp. 1987) (set forth *supra* note 48).

78. Mo. REV. STAT. § 474.163(2) (1986) provides a non-exhaustive list of property to be included in the decedent's augmented estate. See *supra* note 48. Since Harry Leve received no property pursuant to subsection (2), the court's holding does not explicitly address how these other types of property are to be treated. See *Leve*, 704 S.W.2d at 266.

Also, section 474.163(5) requires the surviving spouse to overcome a presumption that all property owned by the surviving spouse was derived from the decedent. It is not clear whether the performance of homemaking services by the surviving spouse may rebut this presumption or whether the holding will be limited to joint property. See *supra* note 29.

79. *Leve*, 704 S.W.2d at 268.

80. See, e.g., *In re Marriage of Briggs*, 225 N.W.2d 911, 913 (Iowa 1975) ("[O]ur law does not contemplate a division of property on a price-per-hour basis. . . . While their day-to-day duties differed, we cannot say [the husband] gave more to the ultimate economic success than the [homemaker/wife.]").

tributions are equal to that of the wage-earner.⁸¹ This eliminates the need for valuation.

Without such a presumption, however, courts and commentators⁸² have suggested various methods for valuation of homemaking services, including replacement cost,⁸³ opportunity cost,⁸⁴ or a combination of both.⁸⁵ Although these models appeal to a sense of objectivity, some courts have suggested that it is neither possible nor advisable to attempt to put a price tag on homemaking services.⁸⁶ Rather, it is argued that courts should look to the everyday activities and sacrifices of the homemaker in evaluating homemaker services.⁸⁷

Leve places homemaking spouses on the same footing as their wage-earning counterparts in two-career families. By recognizing the value of homemaking services, it is clear that *Leve* adopts a trend which is fair and consistent with other areas of the law. It is uncertain, however, to what extent courts will be willing to look behind common law title concepts when valuing a decedent's estate for purposes of election against the will. It is unclear whether the augmented estate, which is largely a title-based concept, can logically co-exist with community property-type concepts of marital property. Also, lacking empirical means to value homemaking services, probate courts are left to borrow family law concepts in determining the worth of a spouse's contribution as a homemaker. It is also unclear whether this holding will be extended to apply to all property derived by the surviving spouse, or limited to property acquired by joint tenancy.

With these unanswered questions flowing from the *Leve* opinion, practitioners should be aware that Missouri courts do not have an identifiable standard for computing the augmented estate. Factors such as the order of death and the status of title will also vary results of the *Leve* holding. Until these questions can be answered, the holding that homemaking services may

81. *E.g.*, OR. REV. STAT. § 107.105(1) (1981); *see Coats v. Coats*, 64 Or. App. 594, 669 P.2d 370 (1983) (breadwinner and homemaker contributed equally).

82. *See Hauserman, Homemakers and Divorce: Problems of the Invisible Occupation*, 17 FAM. L.Q. 41, 43-44 (1983).

83. For a detailed discussion and illustration of these methodologies, *see Chastain, Henry & Woodside, Determination of Property Rights Upon Divorce in South Carolina: An Exploration and Recommendation*, 33 S.C.L. REV. 227, 250-60 (1981).

84. *Id.*; *see also Kerr v. Kerr*, 610 P.2d 1380 (Utah 1980) (opportunity foregone by homemaker justified awarding her more than half the assets).

85. Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 47 (1981).

86. *See, e.g., In re Gallagher*, 5 FAM. L. REP. (BNA) 2909, 2910 (Cir. Ct. Cook Cty. 1979) (attempting to place a specific figure on the role of either spouse deemed "fraught with complexities and inequalities"); *In re Marriage of Schulte*, 546 S.W.2d 41 (Mo. Ct. App. 1977) (wife/homemaker need not prove the value of her contributions on a price-per-hour basis).

87. *Homemaker Services*, 1 Eq. DIST. J. 85 (1984).

constitute a full consideration in money's worth toward the acquisition of joint property for the purposes of electing against the will should be accepted with the knowledge that many related issues have yet to be resolved.

ELIZABETH R. TYNDALL