

# FAMILY CAREGIVING AND THE LAW OF SUCCESSION: A PROPOSAL<sup>†</sup>

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*As the American population ages, the need for long-term care, already great, will become even greater. Some of this care is paid for by government programs, such as Medicaid, and by individual long-term care insurance policies. But the combination of the public fisc and private insurance are, and will continue to be, insufficient to pay for all of the care our seniors and adults with disabilities need. The provision of care in a family residence by one or more family members is an important component of our health care delivery system and must be supported and encouraged by public policy and law. As experts in the law of estate planning and health care, respectively, we address in this Article the following question: How might the American law of succession realistically recognize, support, and promote family caregiving? Our answer is a pragmatic proposal that can be adopted into the Uniform Probate Code (UPC). We propose a modified elective share for a family member who has provided the decedent with substantial uncompensated care in a family residence. (In this context, “family member” excludes the decedent’s surviving spouse, because the UPC already provides a spousal share.) Our approach contrasts with the prevailing law in the U.S., which treats personal services rendered by family members as gratuitous, hence not compensable. The scope and amount of the caregiver’s elective share can be structured by way of analogy to the surviving spouse’s elective share, though with important differences, as we discuss herein.*

## INTRODUCTION

As the American population ages, the need for family caregiving, already great, will become even greater. This Article addresses the following question: How might the American law of

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\* N. William Hines Chair in Law, University of Iowa; Associate Executive Director, Joint Editorial Board for Uniform Trust and Estate Acts. In this Article, I am speaking in my individual capacity only. It is a special pleasure to participate in this symposium honoring Professor Lawrence Waggoner, my teacher and mentor.

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succession realistically recognize and promote family caregiving? Current American succession law, we argue, is not the regime best designed to achieve this purpose. The current law amended by our reform proposal—protection of a family caregiver against disinheritance, modeled on a spousal elective share—will more effectively recognize and promote the family caregiving needed by the elderly and disabled.<sup>1</sup>

Part I of this Article describes the aging of the American population and the need for and contribution of family caregiving. Part II explains aspects of current succession law that are directly relevant to our proposal. Part III presents the details of our proposal and explores how it might be structured.

## I. THE AGING POPULATION AND FAMILY CAREGIVING

The aging of the American population has serious implications for family caregiving for older persons—those aged sixty-five and older. In 2009, they numbered nearly 39.6 million (12.9% of the total population).<sup>2</sup> The U.S. Census Bureau projects that from 2010 to 2050, their number will more than double, from 40.2 million (13% of the total population) to 88.5 million (20.2% of the total population).<sup>3</sup> The “oldest old,” those aged eighty-five and older, are the most likely to require family caregiving and are the fastest growing segment of the elderly population.<sup>4</sup> The U.S. Census Bureau projects that from 2010 to 2050, the “oldest old” will more than triple, from 5.7 million (14% of the total older population) to 19 million (21% of the total older population).<sup>5</sup>

The aging of the population is driven by members of the post-World War II baby-boom generation, those born between 1946 and 1964, who began to turn age sixty-five in 2011.<sup>6</sup> It is also at-

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1. Although family caregiving is sometimes needed by children who die before reaching adulthood, most decedents receiving family caregiving shortly before death are elderly adults. See Part I, *infra*.

2. ADMIN. ON AGING, U.S. DEP'T OF HEALTH AND HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2010 2-3 (n.d.), available at [http://www.aoa.gov/aoaroot/aging\\_statistics/Profile/2010/docs/2010profile.pdf](http://www.aoa.gov/aoaroot/aging_statistics/Profile/2010/docs/2010profile.pdf).

3. GRAYSON K. VINCENT & VICTORIA A. VELKOFF, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, THE NEXT FOUR DECADES, THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050 1, 10 (2010).

4. *Id.*

5. *Id.* at 4, 10.

6. *Id.* at 2.

tributable to a sharp rise in life expectancy since the beginning of the twentieth century.<sup>7</sup>

Chronic disease and disability take a disproportionate toll on the elderly.<sup>8</sup> Most elders have at least one chronic disease, such as heart disease, cancer, or diabetes.<sup>9</sup> Physical disabilities, such as vision, hearing, and mobility impairments, increase with age and are especially frequent in the “oldest old.”<sup>10</sup> The elderly are particularly at risk for Alzheimer’s Disease and other forms of dementia, which are characterized by a progressive decline in memory and impairment of cognitive function severe enough to interfere with daily life.<sup>11</sup> The prevalence of dementia increases exponentially from ages sixty-five to eighty-five.<sup>12</sup>

Chronic diseases and disabilities may be accompanied by functional and cognitive limitations that result in an inability to perform, or difficulty in performing, the activities of daily living (ADLs) necessary for personal care or the instrumental activities of daily living (IADLs) necessary for independent living.<sup>13</sup> A substantial proportion of the elderly population, especially the “oldest old,” have such functional and cognitive limitations.<sup>14</sup>

Older persons with functional and cognitive limitations frequently need some type of long-term care (LTC), which includes

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7. In 1900, the average life expectancy at birth was 47.3 years, whereas in 2009 it was 78.2 years. See LAURA B. SHRESTHA, CONG. RESEARCH SERV., RL32792, LIFE EXPECTANCY IN THE UNITED STATES 1–2, 29 (2006); KENNETH D. KOCHANEK ET AL., CENTS. FOR DISEASE CONTROL AND PREVENTION, NAT’L VITAL STATISTICS REPORTS, VOL. 59, NO. 4, DEATHS: PRELIMINARY DATA FOR 2009 3 (2011).

8. INST. OF MED., COMM. ON THE FUTURE HEALTH CARE WORKFORCE FOR OLDER AMERICANS, RETOOLING FOR AN AGING AMERICA: BUILDING THE HEALTH CARE WORKFORCE 40, 42–45 (2008).

9. See ADMIN. ON AGING, *supra* note 2, at 12; FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, OLDER AMERICANS 2010: KEY INDICATORS OF WELL-BEING 27, 100 (2011).

10. FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, *supra* note 9, at 28, 100; see also ADMIN. ON AGING, *supra* note 2, at 14.

11. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISION 147–51 (4th ed. 2000).

12. See Brenda L. Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 125, 128–29 (2007); ALZHEIMER’S ASS’N, 2011 ALZHEIMER’S DISEASE FACTS AND FIGURES 12 (2011).

13. NAT’L CTR. FOR HEALTH STATISTICS, HEALTH UNITED STATES, 2010, 473, 505 (2011). ADLs include personal care activities, such as bathing, dressing, eating, getting in or out of chairs, and toileting. IADLs include independent living activities, such as using the telephone, doing housework, preparing meals, shopping for groceries or personal items, and managing money. *Id.*

14. According to a 2007 survey of Medicare beneficiaries aged sixty-five and older, 42% had limitations on ADLs or IADLs. ADMIN. ON AGING, *supra* note 2, at 14; FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, *supra* note 9, at 32.

a wide range of services and supports<sup>15</sup> and is provided in home, community, and facility-based settings.<sup>16</sup> Approximately 70% of those reaching age sixty-five will need LTC for an average of three years at some time during their lifetimes.<sup>17</sup> This need is greatest among the “oldest old”; persons aged eighty-five and older are almost four times as likely to need LTC as persons aged sixty-five to eighty-four.<sup>18</sup>

Formal paid LTC, especially nursing home and other facility-based care, can be costly.<sup>19</sup> Current national expenditures for such care are large and growing.<sup>20</sup>

The federal/state Medicaid program is the single biggest source of LTC financing, and it—together with the federal Medicare program—accounts for the majority of LTC expenditures.<sup>21</sup>

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15. See ADMIN. ON AGING, NIH SENIOR HEALTH: LONG TERM CARE 1 (2011), available at <http://nihseniorhealth.gov/longtermcare/selectPrint.html>; NAT'L CTR. ON CAREGIVING, FAMILY CAREGIVER ALLIANCE, FACT SHEET: SELECTED LONG-TERM CARE STATISTICS 1 (2005).

16. LTC provided in the home may include personal care, home health care, homemaker services, friendly visitor/companion services, and emergency response services. Community-based LTC may include adult day care, senior centers, meal programs, and transportation services. Facility-based services may include nursing homes, assisted living facilities, board and care homes, continuing care communities, and adult foster care. See ADMIN. ON AGING, *supra* note 15, at 3–10.

17. H. Stephan Kaye et al., *Long-Term Care: Who Gets It, Who Provides It, Who Pays, and How Much?* 29 HEALTH AFF. 11, 11 (2010).

18. See AVALERE HEALTH LLC, LONG-TERM CARE: AN ESSENTIAL ELEMENT OF HEALTHCARE REFORM 7 (2008), available at [http://www.avalerehealth.net/research/docs/SCAN\\_Healthcare\\_Reform.pdf](http://www.avalerehealth.net/research/docs/SCAN_Healthcare_Reform.pdf); see also ADMIN. ON AGING, *supra* note 2, at 15–16.

19. A 2011 Genworth Financial survey found that the median annual rate was \$77,745 for a private nursing home room, \$70,445 for a semiprivate nursing home room, \$39,135 for an assisted living facility, \$43,472 for home health-aide services, \$41,184 for homemaker services, and \$15,600 for adult day care. GENWORTH FIN., GENWORTH 2011 COST OF CARE SURVEY 23 (2011); see also METLIFE MATURE MKT. INST., MARKET SURVEY OF LONG TERM Costs 4–5 (2011), available at <http://www.metlife.com/mmi/research/2011-market-survey-long-term-care-costs.html#findings>.

20. National health expenditures for care in nursing facilities and other facilities rose from \$85.1 billion in 2000 to \$137 billion in 2009 and are projected to reach \$218 billion by 2020. National health expenditures for home health care rose from \$32.4 billion in 2000 to \$68.3 billion in 2009 and are projected to reach \$136.1 billion by 2020. See Sean P. Keehan et al., *National Health Spending Projections Through 2020*, 30 HEALTH AFF. 1, 2 (2011); Anne Martin et al., *Recession Contributes to Slowest Annual Rate of Increase in Health Spending in Five Decades*, 30 HEALTH AFF. 11, 12 (2011).

21. Medicaid is a health insurance program for low-income individuals and the disabled. It is state-administered but funded jointly by the federal government and state governments. Older persons generally must meet income and asset eligibility requirements in order to qualify for Medicaid. For a concise overview of the Medicaid program, see KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID MATTERS, UNDERSTANDING MEDICAID'S ROLE IN THE HEALTH CARE SYSTEM (2011), available at <http://www.kff.org/medicaid/upload/8165.pdf>.

In 2010, Medicaid accounted for 40% of total LTC expenditures. KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID AND LONG-TERM SERVICES AND SUPPORTS 1 (2011), available at <http://www.kff.org/medicaid/2186.cfm>. Medicaid provides comprehensive LTC

Health insurance policies rarely cover LTC.<sup>22</sup> Although insurance specifically for LTC can be purchased, it accounts for only a small portion of LTC expenditures.<sup>23</sup> Persons who lack Medicaid or Medicare coverage for LTC, or private LTC insurance, must pay directly for such care.<sup>24</sup>

Informal caregivers, who furnish care without pay, are the most important source of LTC for elders in home and community settings.<sup>25</sup> Informal caregivers are predominantly family

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coverage. The majority of Medicaid LTC spending historically has been for nursing home and other institutional care, but there has been a shift towards more LTC spending for home and community-based care. *See, e.g.,* STEVE EIKEN ET AL., MEDICAID LONG-TERM CARE EXPENDITURES IN FY 2009 1-3 (2010), available at <http://www.hcbs.org/files/193/9639/2009LTCExpenditures.pdf>.

Medicare is a federal health insurance program for which all persons aged sixty-five and older are eligible. For a concise overview of the Medicare program, see HENRY J. KAISER FOUND., MEDICARE FACT SHEET, MEDICARE AT A GLANCE (2010), available at <http://www.kff.org/medicare/upload/1066-14.pdf>.

In 2010, Medicare accounted for 23% of LTC expenditures. KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra*, at 1. Medicare, unlike Medicaid, does not provide comprehensive LTC coverage. It covers limited post-acute care in skilled nursing facilities and home health care. *See* JANEMARIE MULVEY ET AL., CONG. RESEARCH SERV., R40842, COMMUNITY LIVING ASSISTANCE SERVICES AND SUPPORTS (CLASS) PROVISIONS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA) 2 (2010).

22. *See* Kaye et al., *supra* note 17, at 15.

23. In 2010, LTC insurance accounted for only 9% of total LTC expenditures. KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 21, at 1. For a discussion of the issues and problems with respect to such insurance, see generally Richard L. Kaplan, *Retirement Planning's Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407 (2007).

The Patient Protection and Affordable Care Act (P.L. 111-148), enacted in 2010, incorporated the Community Living Assistance Services and Supports (CLASS) program. This program contemplated that employed adults would voluntarily enroll in the program and, after paying premiums for a specified period, would receive a cash benefit to help pay for LTC services and support. For a detailed description of the program, see generally MULVEY ET AL., *supra* note 21. In October 2011, however, the Secretary of Health and Human Services (HHS) notified Congress that HHS could not proceed with the Act's implementation because it could not design a program that would be financially solvent and comply with the Act's requirements. Letter from Kathleen Sebelius, Sec'y, Health & Human Servs., to Cong. (Oct. 14, 2011), available at <http://www.hhs.gov/secretary/letter10142011.html>; *see* U.S. DEP'T OF HEALTH & HUMAN SERVS., A REPORT ON THE ACTUARIAL, MARKETING, AND LEGAL ANALYSES OF THE CLASS PROGRAM (October 2011), available at <http://aspe.hhs.gov/daltcp/reports/2011/class/index.pdf>.

24. In 2010, out-of-pocket payments accounted for 22% of total LTC expenditures. KAISER COMM'N ON MEDICAID & THE UNINSURED, *supra* note 21, at 1.

25. Kaye et al. *supra* note 17, at 15. National estimates of the number of informal caregivers vary. Based on an analysis of 2009 data from a large telephone health survey, conducted by the Centers for Disease Control and Prevention and state health departments, it was estimated that the number of caregivers providing regular care to predominantly older adult family members or friends was 46.9 million at any given time. LYNN FEINBERG ET AL., AARP POLICY INST., VALUING THE INVALUABLE: 2011 UPDATE, THE GROWING CONTRIBUTIONS AND COSTS OF FAMILY CAREGIVING 23-24 (2011). Based on 2009 data from a nationally representative survey of caregivers conducted by the National Alliance for Caregiving and the AARP, it was estimated that the number of caregivers providing unpaid care to predominantly older adult relatives or friends was 37.3 million at any given time and 54.6

members.<sup>26</sup> They primarily provide assistance with ADLs and IADLs.<sup>27</sup> They also increasingly provide nursing care.<sup>28</sup> They usually spend a significant amount of time, over a significant period of time, on care activities.<sup>29</sup> The majority of elderly individuals receiving family caregiving live in their own homes, although some live in the homes of their caregivers.<sup>30</sup>

The burden of family caregiving can be considerable. In a 2009 national survey of caregivers, over one-half of the caregivers re-

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million at any time during the year. *Id.* Based on a 2010 national survey of adults employed full-time, conducted by Gallup and Healthways, one in six of such adults are caregivers for an elderly or disabled family member or friend. Dan Witters, *In U.S., Working Caregivers Face Wellbeing Challenges*, GALLUP WELLBEING (Dec. 8, 2010), <http://www.gallup.com/poll/145115/working-caregivers-face-wellbeing-challenges.aspx>.

26. Extensive data about the characteristics of caregivers and care recipients is available from an in-depth survey of a nationally weighted sample of caregivers providing assistance to persons aged fifty and older conducted in 2009 by the National Alliance for Caregiving and the AARP, NAT'L ALLIANCE FOR CAREGIVING, CAREGIVING IN THE U.S. 2009: A FOCUSED LOOK AT THOSE CARING FOR THE 50+ (2009) [hereinafter NAC/AARP 2009 REPORT]. According to the survey, 89% of caregivers were providing care to a relative, while only 11% were providing care to a non-relative. *Id.* at 20–21. According to the National Alliance for Caregiving: “the typical family caregiver is a 49-year-old woman caring for her widowed 69-year-old mother who does not live with her” and who is “married and employed.” NAT'L FAMILY CAREGIVERS ASSOCIATION, Caregiving Statistics, [http://www.nfcacares.org/who\\_are\\_family\\_caregivers/care\\_giving\\_stats.cfm](http://www.nfcacares.org/who_are_family_caregivers/care_giving_stats.cfm) (last visited Mar. 28, 2012). See generally NAC/AARP 2009 Report, *supra*.

27. See FEINBERG ET AL., *supra* note 25, at 4–5; NAC/AARP 2009 REPORT, *supra* note 26, at 27–32; NAT'L ALLIANCE FOR CAREGIVING, WHAT MADE YOU THINK MOM HAD ALZHEIMER'S? 25–27 (2011), available at [www.caregiving.org/data/NAC%20Alzheimers0411.pdf](http://www.caregiving.org/data/NAC%20Alzheimers0411.pdf).

28. See FEINBERG ET AL., *supra* note 25, at 4–5; K. DONELAN ET AL., CHALLENGED TO CARE: INFORMAL CAREGIVERS IN A CHANGING HEALTH SYSTEM 21 HEALTH AFF. 222, 225–27 (2002); NAC/AARP 2009 REPORT, *supra* note 26, at 32–33. Family caregivers perform nursing tasks such as administering medication, operating medical equipment, and providing physical and medical therapies and treatments. FEINBERG ET AL., *supra* note 25, at 5; NAC/AARP 2009 REPORT, *supra* note 26, at 32–33.

29. See, e.g., FEINBERG ET AL., *supra* note 25, at 24 (basing on a 2009 national survey that it is estimated that caregivers provide an average of 17.9 hours of care per week); NAC/AARP 2009 REPORT, *supra* note 26, at 24, 26 (noting that in response to a 2009 national survey, caregivers reported providing an average of 19 hours of care per week to adults for an average period of 4 years); NAT'L ALLIANCE FOR CAREGIVING, *supra* note 27, at 22–23, 25 (stating how in response to a 2011 national survey, 45% of caregivers reported providing eight hours of care per week to adults with Alzheimer's or dementia; 23% reported providing more than twenty hours of care per week, and 50% reported providing care for three years or more); see also EVERCARE & NAT'L ALLIANCE FOR CAREGIVING, FAMILY CAREGIVERS—WHAT THEY SPEND, WHAT THEY SACRIFICE 15 (2007), available at [http://www.caregiving.org/data/Evercare\\_NAC\\_CaregiverCostStudyFINAL20111907.pdf](http://www.caregiving.org/data/Evercare_NAC_CaregiverCostStudyFINAL20111907.pdf) (noting that, in response to a 2004 survey, family caregivers reported providing an average of 35.4 hours of care per week with a median of twenty hours of care; 52% reported providing care for three or more years, and 32% reported providing care for more than five years).

30. See, e.g., NAC/AARP 2009 REPORT, *supra* note 26, at 42 (noting in response to a 2009 national survey, caregivers reported that 47% of care recipients lived alone, 28% lived with a spouse, 13% lived with grown children, and 8% lived with other family members).

ported a medium to high level of burden.<sup>31</sup> A 2010 national survey of the full-time workforce likewise found that those employed full-time who had caregiving responsibilities suffered from lower well-being than those without such responsibilities.<sup>32</sup>

Caregiving may have detrimental economic consequences for caregivers. It often has a negative impact on the employment status of caregivers, the majority of whom work at some point while providing care.<sup>33</sup> Due to caregiving burdens, many take actions such as quitting work entirely or retiring early,<sup>34</sup> leading to lost earnings and diminished Social Security benefits, pension benefits, and retirement savings.<sup>35</sup> Among caregivers who continue to work, many find that the demands of caregiving adversely affect their work performance.<sup>36</sup> Moreover, caregivers typically incur considerable out-of-pocket expenses in connection with caregiving.<sup>37</sup>

Caregiving also may have detrimental health and psychosocial consequences for caregivers. Caregivers are more likely to suffer from poorer physical and mental health than non-caregivers.<sup>38</sup> In

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31. NAC/AARP 2009 REPORT, *supra* note 26, at 35. Surveyed caregivers were more likely to report a high level of burden if they were primary caregivers, they were older, they were in fair or poor health, they were not employed, they had lower incomes, or the care recipient lived with them. *Id.* The survey, conducted by the National Alliance for Caregiving and the AARP, used an index to measure the burden of care based on the number of hours of care per week provided and the number of IADLs performed. *Id.* at 109.

32. Witters, *supra* note 25. The survey, conducted by Gallup and Healthways, used an index consisting of six areas—life evaluation, emotional health, physical health, healthy behavior, work environment, and basic access to necessities—to measure overall well-being.

33. METLIFE MATURE MKT. INST., CAREGIVING COSTS TO WORKING CAREGIVERS, DOUBLE JEOPARDY FOR BABY BOOMERS CARING FOR THEIR PARENTS 7 (2011); NAC/AARP 2009 REPORT, *supra* note 26, at 56–57; NAT'L ALLIANCE FOR CAREGIVING, THE EVERCARE SURVEY OF THE ECONOMIC DOWNTURN AND ITS IMPACT ON FAMILY CAREGIVING 5, 34 (2009).

34. See EVERCARE & NAT'L ALLIANCE FOR CAREGIVING, *supra* note 29, at 22; GENWORTH FIN., BEYOND DOLLARS, THE TRUE IMPACT OF LONG TERM CARING 12 (2010); METLIFE MATURE MKT. INST., *supra* note 33, at 10–12; NAC/AARP 2009 REPORT, *supra* note 26, at 58.

35. A Metlife Mature Market Institute study concluded: "Total wage, Social Security and private pension losses due to caregiving could range from \$283,716 for men to \$324,044 for women, or \$303,880 on average for a typical caregiver. When this . . . amount is multiplied by the 9.7 million people age 50+ caring for their parents, the amount lost is . . . nearly \$3 trillion." METLIFE MATURE MKT. INST., *supra* note 33, at 14.

36. See NAC/AARP 2009 REPORT, *supra* note 26, at 58 (caregivers surveyed typically reported going in late, leaving early, or taking time off from work because of caregiving responsibilities); Dan Witters, *Caregiving Costs U.S. Economy \$25.2 Billion in Lost Productivity*, GALLUP WELLBEING (July 27, 2011), <http://www.gallup.com/poll/148670/caregiving-costs-economy-billion-lost-productivity.aspx> (stating that 36% of working caregivers reported missing one to five days of work and 30% reported missing six or more days of work because of caregiving responsibilities).

37. See, e.g., EVERCARE & NAT'L CAREGIVER ALLIANCE, *supra* note 29, at 20; GENWORTH FIN., *supra* note 34, at 8, 11 (stating that primary caregivers contributed an average of \$8,800 for out-of-pocket care expenses, excluding cost of facility care, for care recipients).

38. See, e.g., EVERCARE & NAT'L ALLIANCE FOR CAREGIVING, CAREGIVERS IN DECLINE: FINDINGS FROM A NATIONAL SURVEY 5–7, 11–25 (2006); FAMILY CAREGIVER ALLIANCE, FACT

addition, caregiving responsibilities may adversely affect caregivers' relationships with other family members and may lead to their social isolation.<sup>39</sup>

Estimates of the economic value of unpaid care provided by caregivers to family and friends range from \$199 billion to \$450 billion in 2009.<sup>40</sup> Even with all of this unpaid family caregiving, overall Medicaid spending—of which LTC spending is a major component—is currently “growing at an annual rate that exceeds state revenues or national economic growth, which leads to budget pressures at both the federal and state level of government.”<sup>41</sup> Without unpaid family caregiving, federal and state budgets, already strained, would have to increase enormously in order to cover the costs of LTC for the elderly.<sup>42</sup> And in the absence of either unpaid family caregiving or government-funded care, many of the elderly would have difficulty obtaining LTC, because they lack the personal financial resources to pay for such care.<sup>43</sup>

Given the contribution that families make to meeting the growing need for LTC, it is important that public policies and laws support family members in their caregiving role. Our proposal,

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SHEET: CAREGIVER HEALTH (2006), available at [http://www.caregiver.org/caregiver/jsp/print\\_friendly.jsp?nodeid=1822](http://www.caregiver.org/caregiver/jsp/print_friendly.jsp?nodeid=1822); Dan Witters, *In U.S., Caregivers' Emotional Health Often Suffers*, Gallup Wellbeing (May 27, 2011), <http://www.gallup.com/poll/147815/caregivers-emotional-health-often-suffers.aspx>; Dan Witters, *In U.S., Caregivers Suffer from Poorer Physical Health*, Gallup Wellbeing, (Feb. 4, 2011), available at <http://www.gallup.com/poll/145940/caregivers-suffer-poorer-physical-health.aspx>.

39. See, e.g., EVERCARE & NAT'L ALLIANCE FOR CAREGIVING, *supra* note 38, at 5–7, 11–25; GENWORTH FIN., *supra* note 34, at 12.

40. DELOITTE CTR. FOR HEALTH SOLUTIONS & DELOITTE CTR. FOR FIN. SERVS., *THE HIDDEN COSTS OF U.S. HEALTH CARE FOR CONSUMERS* 8, 10 (2011); FEINBERG ET AL., *supra* note 25, at 2–3.

41. NAT'L ASS'N OF STATE BUDGET OFFICERS, *BACKGROUND INFORMATION ON THE MEDICAID PORTION OF STATE GOVERNMENT SPENDING 1* (2011). In fiscal year (FY) 2011, Medicaid expenditures constituted an estimated 23.6% of total spending by the states. *Id.* at 1. The recent economic downturn and the concomitant high unemployment led to more demand for Medicaid services while producing a decline in the state revenues available for Medicaid spending. *Id.* at 1, 2; see also NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, *THE FISCAL SURVEY OF STATES 1* (Spring 2011).

42. The average annual growth rate of total federal and state Medicaid expenditures was 14.7% from FY 1966 to FY 2009; total expenditures were \$378.6 billion in FY 2009. It is projected that the average annual growth rate of expenditures will be 8.3% starting in FY 2009, and that expenditures will reach \$840.4 billion by FY 2019. CHRISTOPHER J. TRUFFER, ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., *CENTS. FOR MEDICARE & MEDICAID SERVS., OFFICE OF THE ACTUARY, 2010 ACTUARIAL REPORT ON THE FINANCIAL OUTLOOK FOR MEDICAID 15, 18–19* (2010). In FY 2009, Medicaid LTC expenditures were \$111.2 billion, or 31% of total Medicaid expenditures, and are projected to grow by an average annual rate of 7.5% for FY 2010 through FY 2019. *Id.* at 11, 21.

43. See Jack Vanderhei & Craig Copeland, *Can America Afford Tomorrow's Retirees?: Results from the EBRI-EFRI Retirement Security Projection Model 1* (EBRI Issue Brief No. 263) (2003), available at [http://www.pensioncoverage.org/studies\\_and\\_statistics/can\\_america\\_afford\\_tomorrows\\_retirees.pdf](http://www.pensioncoverage.org/studies_and_statistics/can_america_afford_tomorrows_retirees.pdf).

described in Part III, is an effort to achieve this objective in the context of American succession law.<sup>44</sup>

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44. Our proposal is intended to contribute to the ongoing, broader debate over whether and how public policies and laws should support family caregiving. See generally Janice Keefe & Beth Rajnovich, *To Pay or Not to Pay: Examining Underlying Principles in the Debate on Financial Support for Family Caregivers*, 26 CAN. J. ON AGING 77 (2007). Adult children historically have been viewed as having an obligation to care for their parents. For a discussion of the justifications for assigning the care of the elderly to adult children, see Lee E. Teitelbaum, *Intergovernmental Responsibility and Family Obligation on Sharing*, 1992 UTAH L. REV. 765 (1992); Katie Wise, *Caring for our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 563 (2002). Filial-responsibility laws requiring adult children to support their needy parents reflect this view. These laws exist in a significant number of states, but are rarely enforced. See KATHERINE PEARSON, *FILIAL RESPONSIBILITY AND SUPPORT STATUTES IN THE U.S.* (2008), available at <http://law.psu.edu/file/Pearson/FilialResponsibilityStatutes.pdf>; Wise, *supra* at 573–75. Beginning in the 1930s, the federal and state governments increasingly assumed responsibility for the care of the elderly through programs such as Social Security, Medicare, and Medicaid. Today, the care of the elderly is viewed as a responsibility shared between the family and the public. Thus, family members are the largest source of LTC for older persons, while the Medicaid and Medicare programs pay for the majority of LTC from formal caregivers. See *supra* notes 21–23 and accompanying text.

Although public programs generally have not provided financial support to family caregivers, some have begun to do so. For different public policy options with respect to financial support for family caregivers, see B.C. LAW INST. & CAN. CTR. FOR ELDER LAW, *CARE/WORK: LAW REFORM TO SUPPORT FAMILY CAREGIVERS TO BALANCE PAID WORK & UNPAID CAREGIVING* (2010); Janice Keefe et al., *Financial Payments for Family Carers: Public Policy and Debates*, in *AGING AND CARING AT THE INTERSECTION OF WORK AND HOME LIFE: BLURRING THE BOUNDARIES* 185–206 (A. Martin-Matthews & J. Phillips eds., 2008); LARRY POLIVKA, *PROVIDING FAMILY MEMBERS TO PROVIDE CARE: POLICY CONSIDERATIONS FOR STATES* (2001). For a description of the Medicaid Cash and Counseling Demonstration program, which permits adults receiving Medicaid-funded personal-assistance services to select persons, including relatives, to provide and receive compensation for these services, see STACY DALE & RANDALL BROWN, *THE EFFECT OF CASH AND COUNSELING ON MEDICAID AND MEDICARE COSTS: FINDINGS FOR ADULTS IN THREE STATES* (2005); CHRISTINA KENT, *NAT'L CONFERENCE OF STATE LEGISLATURES, CASH & COUNSELING PROGRAMS GIVEN MAJOR BOOST* (2007), available at <http://www.ncsl.org/issues-research/health/cash-counseling-programs-given-major-boost.aspx>.

The use of public funds to pay family members to provide care is controversial. See Keefe & Rajnovich *supra*. The main arguments in favor of such use have been summarized as follows:

[A]n opportunity to be paid for some of their caregiving labor (the same wage level as unrelated workers) could allow . . . [low-wage minority] women to provide needed care . . . while addressing their current and future financial needs . . . . Paying family caregivers will attract some relatives who are outside the workforce, not currently assisting their needy family, and draw them into regular paid employment. For those family members who are employed, paying them . . . will make it easier for them to make a commitment to that work, decrease the financial penalty associated with it, and legitimize their work at a modest public cost.

Lori Simon-Rusinowitz et. al, *Payments to Families Who Provide Care: An Option That Should Be Available*, 22 GENERATIONS 69, 70 (1998).

The main arguments against paying family caregivers have been summarized as follows:

## II. CURRENT AMERICAN SUCCESSION LAW

To understand our proposal, it is necessary first to understand two relevant aspects of current American succession law: (1) the treatment of probate claims for personal services rendered by family members, and (2) the elective share of a decedent's surviving spouse.

*A. Family Personal Services Claims*

One of the principal functions of probate and estate administration is creditor protection—discharging the decedent's debts.<sup>45</sup> The longstanding rule of law is that the decedent's debts must be discharged before the satisfaction of devises.<sup>46</sup> The creditor of the decedent ranks ahead of the beneficiary, as long as the creditor has an allowed claim.<sup>47</sup>

A family member who rendered services to the decedent faces an uphill battle in establishing his or her status as a creditor with an allowed claim. In the absence of an express written contract, the family member's claim will be precluded in some states by the so-called dead man's statute, which renders inadmissible any testimony showing that the decedent entered into an express oral contract.<sup>48</sup> Absent an express contract, written or oral, a contract with the decedent can be implied,<sup>49</sup> but here too there is a formidable obstacle: a common-law presumption that services by the dece-

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If informal caregivers are paid . . . there would be a major shift away from caring as part of normal family responsibility . . . [I]n this and other ways, payment would decrease the quality of the caregiving experience for care recipient and caregiver, with paid services substituting for unpaid care now provided. Because family care is the dominant mode of provision in long-term care, such a shift would place tremendous burdens on public expenditures.

Suzanne R. Kukel et al., *For Love and Money: Paying Family Caregivers*, 27 GENERATIONS 74, 75 (2004).

45. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1117 (1984).

46. See WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS, AND ESTATES 626 (4th ed. 2010).

47. See UNIF. PROBATE CODE § 3-805 (2011), 8 U.L.A. pt. II, at 240–42 (1998) (priority of probate claims); § 3-807 (2011), 8 U.L.A. pt. II, at 256–58 (1998) (payment of probate claims); § 3-902 (2011), 8 U.L.A. pt. II, at 268–70 (1998) (abatment); § 6-102(b) (2011), 8 U.L.A. pt. II, at 241 (1998) (creditors' rights in nonprobate transfers).

48. On dead man's statutes, see 1 MCCORMICK ON EVIDENCE 276–79 (5th ed. 1999); *Recent Development, Evidence—The Dead Man's Statute: State Legislatures and Courts Conflict*, 25 AM. J. TRIAL ADVOC. 213 (2001).

49. See generally CORBIN ON CONTRACTS § 1.20 (rev. ed. 1993 & Supp. 2011).

dent's family<sup>50</sup> were rendered gratuitously, hence are noncompensable.<sup>51</sup> Rebutting this presumption is possible, but difficult, and requires an investigation into the facts of the particular case.<sup>52</sup>

A relatively recent Illinois statute on family claims departs from the common-law approach and is pertinent to our proposal. This statute, which is part of the state's Probate Act, allows family members who reside with and care for a "disabled person" to file a claim for reimbursement in probate court after the disabled person's death.<sup>53</sup> The term "disabled person" is defined in the state's Probate Act as:

a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects.<sup>54</sup>

The statute applies to "[a]ny spouse, parent, brother, sister, or child of a disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least 3 years."<sup>55</sup> A family member satisfying this description is "entitled to a claim against the estate upon the

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50. The definition of "family" for this purpose is often flexible and fact-based. *See, e.g.,* Estate of Marks, 187 S.W.3d 21, 30 (Tenn. Ct. App. 2005) (describing "family" for this purpose as a concept related to "mutual dependence and 'reciprocal kindness'" even in the absence of "ties of consanguinity or affinity"); Gibson v. McCraw, 332 S.E.2d 269, 275 (W. Va. 1985) ("Relationship by blood or marriage is . . . a factor bearing on the question of whether a family relation existed . . .").

51. For cases affirming the existence of the presumption, *see, e.g.,* Worley v. Worley, 388 So.2d 502, 507 (Ala. 1980); Brown v. Brown, 524 A.2d 1184, 1187 (D.C. 1987); Stafford v. Stafford, 402 S.E.2d 71, 72 (Ga. Ct. App. 1991); *In re* Estate of Raketti, 340 N.W.2d 894, 901 (N.D. 1983). In Louisiana, the presumption applies as long as a parent "[or] other ascendant[]" is not "in need." *See* LA. CIV. CODE ANN. art. 229 (2009); Succession of Francke, 52 So.2d 855, 857 (La. 1951).

In some states, the presumption relates to family members in the same household. *See, e.g.,* Riddle v. Edwards, No. S-9706, 2001 WL 34818270, at \*2 (Alaska Oct. 10, 2001); Sullivan v. Delisa, 923 A.2d 760, 769-70 (Conn. App. Ct. 2007); Della Ratta v. Della Ratta, 927 So.2d 1055, 1059 (Fla. Dist. Ct. App. 2006); *In re* Estate of Keeven, 882 P.2d 457, 464 (Idaho Ct. App. 1994); Prickett v. Womersley, 905 N.E.2d 1008, 1012 (Ind. 2009).

52. *See* cases cited in note 51, *supra*.

53. 755 ILL. COMP. STAT. 5/18-1.1 (2011).

54. 5/11a-2.

55. 5/18-1.1.

death of the disabled person.”<sup>56</sup> The statute provides that the claim “shall take into consideration the claimant’s lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person.”<sup>57</sup>

The statute establishes a “minimum” amount the claimant should receive depending on the extent of the decedent’s disability: \$45,000 in the case of “25% disability,” \$90,000 for “50% disability,” \$135,000 for “75% disability,” and \$180,000 for “100% disability.”<sup>58</sup> However, a court can reduce the amount of an award “to the extent that the living arrangements were intended to and did in fact also provide a physical or financial benefit to the claimant.”<sup>59</sup> In making this determination, the court is authorized to consider the following factors, among others:

- (i) the free or low cost of housing provided to the claimant;
- (ii) the alleviation of the need for the claimant to be employed full time;
- (iii) any financial benefit provided to the claimant;
- (iv) the personal care received by the claimant from the decedent or others; and
- (v) the proximity of the care provided by the claimant to the decedent to the time of the decedent’s death.<sup>60</sup>

The statute was enacted in 1988<sup>61</sup> with subsequent amendments effective in 1992<sup>62</sup> and 2008;<sup>63</sup> but the statute raised constitutional concerns, and lawyers hesitated to use it.<sup>64</sup> In 2002, the Illinois Supreme Court resolved the concerns by declaring the statute constitutional.<sup>65</sup>

The statute is far from perfect. For example, it gives no guidance on how to determine whether the decedent’s disability was “25%,”

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. 755 ILL. COMP. STAT. 5/18-1.1 (2011).

61. Ill. Pub. Act 85-1417, § 4 (effective Jan. 1, 1989).

62. Ill. Pub. Act 87-908, § 1 (effective Aug. 14, 1992).

63. Ill. Pub. Act 95-315, § 5 (effective Jan. 1, 2008).

64. See Margot Gordon, *Custodial Claims: Compensation for Family Caregivers*, 98 ILL. B.J. 256, 257 (2010).

65. *In re Estate of Jolliff*, 771 N.E.2d 346, 350–57 (Ill. 2002).

“50%,” or “75%.”<sup>66</sup> Nevertheless, the statute furnishes a partial platform for our proposal.

### *B. The Surviving Spouse’s Elective Share*

Prevailing American law limits the decedent’s testamentary freedom in order to ensure, by statute, that the decedent’s surviving spouse receives at least a specified portion of the decedent’s estate.<sup>67</sup> These statutes, known as elective-share statutes, answer two principal questions: first, what property of the decedent is included in the decedent’s “estate” and, hence, is subject to the elective share? Second, of the property to which the elective share applies, to what portion is the surviving spouse entitled?

Let us address the first question first. Under traditional law<sup>68</sup>—and still in some states<sup>69</sup>—the elective share applies only to the decedent’s probate estate, meaning property that would ordinarily pass according to the terms of the decedent’s will or—to the extent the will is ineffective or the decedent died without a will—the law of intestate succession.<sup>70</sup> Such an elective share works well for the

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66. This point was made by then-Governor James R. Thompson when he issued an amendatory veto directed at section 4 of the legislation. See 1988 Ill. House J. 7524–25. The statute was enacted over the governor’s veto. 1988 Ill. House J. 7585–86; 1988 Ill. Senate J. 6140.

67. See John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse’s Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 304 (1987) (purpose of elective share). Forty states and the District of Columbia provide protection to the decedent’s spouse through the law of succession by providing a surviving spouse with a statutory elective share, also known as a forced share. Nine states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin) provide analogous protection during the marriage through the law of marital property, also known as community property. See RESTATEMENT THIRD OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 9.1-2 (2002) (elective share); see generally THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 350–51 (5th ed. 2011). Alaska is an optional community-property state; married persons resident in Alaska may elect to classify some or all of their assets as community property. See Jonathan G. Blattmachr et al., *Tax Planning with Consensual Community Property: Alaska’s New Community Property Law*, 33 REAL PROP. PROB. & TR. J. 615, 617 (1999). Georgia is the only separate property state without an elective share statute. See Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year’s Support and Intestate Succession*, 10 GA. L. REV. 447 (1976) (arguing that elective-share statutes are unnecessary). For the opposite view, see generally Peter H. Strott, Note, *Preventing Spousal Disinheritance in Georgia*, 19 GA. L. REV. 427 (1985).

68. On the traditional law, see Sheldon F. Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981, 990 (1977).

69. See, e.g., ALA. CODE § 43-8-70 (LexisNexis 1991 & Supp. 2011); 755 ILL. COMP. STAT. 5/2-8 (2011); N.H. STAT. § 560.10 (2007); OHIO REV. CODE § 2106.01 (West 2011) WYO. STAT. ANN. § 2-5-101 (2011).

70. On the probate estate as governed by “[t]he law of wills and the rules of descent,” see Langbein, *supra* note 45, at 1108.

surviving spouse when the decedent's property is wholly or mostly in the probate estate. In the modern era, however, a significant part (sometimes even all) of a decedent's wealth is in the form of so-called will substitutes, such as life insurance policies, pension plan accounts, joint bank accounts, pay-on-death (POD) bank accounts, securities registered in transfer-on-death (TOD) form, TOD deeds, and revocable trusts.<sup>71</sup> These forms of property typically pass directly, and outside of probate, to the designated beneficiaries. Such "nonprobate" transfers are not part of the decedent's probate estate and, therefore, are not subject to the surviving spouse's elective share when the elective share applies only to the probate estate.<sup>72</sup> The availability of will substitutes presents an opportunity for a decedent to circumvent the traditional probate-centered elective share—unless a court determines (and some have) that the decedent's transfer of the property into a will substitute was illusory<sup>73</sup> or fraudulent,<sup>74</sup> and thereby void, at least for the purpose of the elective share.<sup>75</sup>

Responding to the rise of will substitutes, modern elective-share statutes, such as Article II, Part 2, of the Uniform Probate Code (UPC),<sup>76</sup> include both probate and nonprobate transfers in the decedent's "augmented estate,"<sup>77</sup> and it is the property in the augmented estate—not just in the probate estate—to which the elective share applies.<sup>78</sup> Jurisdictions with an augmented estate concept vary by how comprehensively they reach nonprobate transfers. Some jurisdictions, for instance, exclude life insurance proceeds from the augmented estate (hence rendering them ex-

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71. *Id.* at 1109–15.

72. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 cmt. i (2002) (describing the "evasion" invited by a regime in which the elective share applies only to the decedent's probate estate).

73. For cases articulating the "illusory transfer" doctrine, see *Newman v. Dore*, 9 N.E.2d 966, 969 (N.Y. 1937); *Seifert v. Southern Nat'l Bank of South Carolina*, 409 S.E.2d 337, 338–39 (S.C. 1991).

74. For a case articulating the "fraudulent transfer" doctrine, see *In re Froman*, 803 S.W.2d 176, 179 (Mo. Ct. App. 1991); *Hanke v. Hanke*, 459 A.2d 246, 249 (N.H. 1983).

75. *See, e.g., Taliaferro v. Taliaferro*, 843 P.2d 240, 248 (Kan. 1992) (making the assets of a revocable trust available for purpose of the elective share without entirely invalidating the trust).

76. UNIF. PROBATE CODE §§ 2-201 to -214 (2011), 8 U.L.A. pt. I, at 73–95 (Supp. 2011).

77. *See, e.g.,* § 2-204, 8 U.L.A. pt. I, at 104 (1998) (including in the augmented estate "the value of decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims"); § 2-205, 8 U.L.A. pt. I, at 105 (1998) (including in the augmented estate "the value of the decedent's nonprobate transfers to others").

78. *See, e.g.,* §§ 2-202(a), 8 U.L.A. pt. I, at 76 (Supp. 2011) ("The surviving spouse of a decedent who dies domiciled in this State has a right of election . . . to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.").

empt from the spouse's elective share).<sup>79</sup> The UPC's elective-share provisions, however, apply broadly to nonprobate transfers of property "owned or owned in substance by the decedent immediately before death."<sup>80</sup> The UPC also includes in the augmented estate certain nonprobate transfers made by a decedent during his lifetime to a third party (such as an irrevocable transfer of property in which the decedent retained a life estate).<sup>81</sup> The UPC's aim is to include in the augmented estate all of the decedent's relevant property without regard to whether the decedent arranged to transfer it inside or outside of probate.<sup>82</sup>

We now turn to the second question addressed by elective-share statutes: To what portion of the decedent's estate is the surviving spouse entitled? Traditional elective-share statutes<sup>83</sup> provide that the surviving spouse is entitled to one-third (sometimes one-half) of the property to which the elective share applies.<sup>84</sup> Thus, if the decedent died owning property worth \$300,000, the surviving spouse would be entitled to \$100,000 (or perhaps \$150,000) as an elective share. Some states still take this approach.<sup>85</sup> The modern view, however, is that the elective share should reflect the duration of the marriage.<sup>86</sup> A surviving spouse of a long-term marriage should receive a greater portion of the decedent's estate than the surviving spouse of a short-term marriage. The UPC exemplifies this modern approach. It provides that the surviving spouse is entitled to one-half of the "marital-property portion of the augmented estate,"<sup>87</sup> with that phrase defined according to a sliding percentage.<sup>88</sup> If the

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79. See, e.g., MONT. CODE ANN. § 72-2-222 (2011); NEB. REV. STAT. § 30-2314 (2008); N.D. CENT. CODE § 30.1-05-02 (2010).

80. UNIF. PROBATE CODE § 2-205(1) (2011), 8 U.L.A. pt. I, at 80 (Supp. 2011). Note the issue of federal preemption with respect to will substitutes governed by ERISA. For a discussion, see Thomas P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185 (2004).

81. UNIF. PROBATE CODE § 2-205(1)-(2) (2011), 8 U.L.A. pt. I, at 80-81 (Supp. 2011).

82. The UPC also includes in the augmented estate the decedent's transfers to the surviving spouse, plus the surviving spouse's property and transfers to third parties. UNIF. PROBATE CODE §§ 2-206 to -207 (2011), 8 U.L.A. pt. I, at 115-18 (1998).

83. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.1, cmt. c (2002) (describing dower and its role as an "antecedent" of the elective share).

84. Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 2 (2003).

85. See, e.g., 755 ILL. COMP. STAT. 5/2-8 (entitling the surviving spouse to one-third of the estate if the testator leaves a descendant, or one-half of the estate if the testator leaves no descendants).

86. See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 247-48 (1991).

87. UNIF. PROBATE CODE § 2-202(a) (2011), 8 U.L.A. pt. I, at 76 (Supp. 2011).

88. § 2-203(b), 8 U.L.A. pt. I, at 79 (Supp. 2011).

decedent and spouse were married for fifteen years or more, the marital-property portion of the augmented estate is 100 percent,<sup>89</sup> with the surviving spouse entitled to half (50 percent).<sup>90</sup> If the decedent and spouse were married for less than fifteen years, the marital-property portion of the augmented estate is reduced from 100 percent on a sliding scale (the portion is 92 percent for a marriage lasting at least fourteen but less than fifteen years, 84 percent for a marriage lasting at least thirteen but less than fourteen years, 76 percent for a marriage lasting at least twelve but less than thirteen years, and so on),<sup>91</sup> with the surviving spouse entitled to half of that portion.<sup>92</sup> The aim of the UPC's sliding scale is to approximate the accumulation of marital property in a community-property regime while keeping the percentages straightforward and manageable.<sup>93</sup> Thus, with respect to a marriage lasting fifteen years or more, the UPC presumes that all (100 percent) of the property owned by either spouse will have been the fruit of their marital partnership,<sup>94</sup> hence the UPC provides that the surviving spouse should get half of this (or 50 percent) as an elective share.<sup>95</sup> With respect to a contrasting example of a marriage lasting less than a year, the UPC presumes that very little (only 3 percent) of the property owned by either spouse will have been the fruit of the marital partnership,<sup>96</sup> hence the UPC provides that the surviving spouse should get half of this (or 1.5 percent) as an elective share.<sup>97</sup>

The traditional rationale for the elective share is support. Spouses owe each other a duty of support and care during the marriage, and the central idea behind the traditional elective share is that the support obligation should continue despite the decedent's death.<sup>98</sup> Put differently: The decedent should not be able to disinherit the surviving spouse because to do so would wrongly deprive the surviving spouse of support.

The principal modern rationale for the elective share is marital partnership.<sup>99</sup> Each spouse is a partner in the marital enterprise and contributes to it; one spouse should not be allowed to with-

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89. *Id.*

90. UNIF. PROBATE CODE § 2-202(a), 8 U.L.A. pt. I, at 76 (Supp. 2011).

91. § 2-203(b), 8 U.L.A. pt. I, at 79 (Supp. 2011).

92. § 2-202(a), 8 U.L.A. pt. I, at 76 (Supp. 2011).

93. For discussions by the principal drafter of these provisions, see Waggoner, *supra* note 86, at 247–51; Waggoner, *supra* note 84, at 9–11.

94. UNIF. PROBATE CODE § 2-203(b) (2011), 8 U.L.A. pt. I, at 79 (Supp. 2011).

95. § 2-202(a), 8 U.L.A. pt. I, at 76 (Supp. 2011).

96. § 2-203(b), 8 U.L.A. pt. I, at 79 (Supp. 2011).

97. § 2-202(a), 8 U.L.A. pt. I, at 76 (Supp. 2011).

98. See Waggoner, *supra* note 86, at 251 (describing the support theory of the elective share).

99. See *id.* at 236–42 (describing the partnership theory of the elective share).

draw from the partnership—in other words, to divert—the other’s contributions.

Even in modern elective-share statutes, however, there is also an element of support.<sup>100</sup> Indeed, it is fair to say that ideas of marital partnership and support taken together, albeit with more emphasis on the former, provide the theoretical basis for the modern elective share.<sup>101</sup> And underlying both of these concepts is the bedrock understanding that spouses have reciprocal obligations of care and concern.<sup>102</sup>

### III. OUR PROPOSAL

In this Part, we explain our proposal and place it within its scholarly and legal context.

#### A. *The Scholarly and Legal Context*

In his recent article, *Caregiving and the Case for Testamentary Freedom*,<sup>103</sup> Professor Joshua Tate compared the American tradition of testamentary freedom<sup>104</sup>—meaning, the freedom to transmit property at death to whom, and in the manner, one wishes<sup>105</sup>—to two of its international alternatives: the “family maintenance”<sup>106</sup> systems in

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100. See, e.g., UNIF. PROBATE CODE § 2-202(b) (2011), 8 U.L.A. pt. I, at 76 (Supp. 2011) (providing a supplemental share to bring the surviving spouse up to \$75,000).

101. See *id.* art. 2, pt. 2, gen. cmt. (2011), 8 U.L.A. pt. I, at 67–74 (Supp. 2011) (drawing on the partnership and support theories to explain the UPC’s elective-share provisions).

102. Wedding vows often refer to these reciprocal obligations. See generally NOAH BENSHEA & JORDAN BENSHEA, *A WORLD OF WAYS TO SAY “I DO”* 69–90 (2004).

103. Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129 (2008).

104. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) (“The organizing principle of the American law of donative transfers is freedom of disposition.”).

105. Donative freedom (of which testamentary freedom is a component) can be described as follows:

Freedom of disposition, or donative freedom, encompasses several distinct yet related ideas—the right to give property away during life and to pass it on at death, the right to choose who gets it, the right to choose the form in which they get it, and the right to give another person the right to make those choices even after your death.

GALLANIS, *supra* note 67, at 9.

106. For scholarly commentary on testator’s family maintenance (TFM), see Rosalind F. Atherton, *Family Provision Legislation in Common Law Jurisdictions*, in INTERNATIONAL ACADEMY OF ESTATE AND TRUST LAW: SELECTED PAPERS 1997–1999 (Rosalind F. Atherton ed., 2001); Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1 (1998); Mary Ann Glendon, *Fixed Rules and Discretion in*

England<sup>107</sup> and the Commonwealth<sup>108</sup> (which grant judges the flexibility to alter the terms of the decedent's will in order to provide additional support for the decedent's surviving family members), and the "forced heirship" regimes in Louisiana<sup>109</sup> and Continental Europe<sup>110</sup> (which prevent the disinheritance of children by mandating that they receive at least a fixed percentage of the parent's estate). Professor Tate argued that the American tradition of testamentary freedom has a modern justification: the promotion and reward of caregiving within the family.<sup>111</sup> By allowing the testator full discretion to reward a child who provides care for an elderly or infirm parent more than other siblings (by giving the caregiving child a greater portion of the testator's estate), Professor Tate argued, the American law of succession is superior to its Anglo-Commonwealth and civilian counterparts.<sup>112</sup>

We agree with Professor Tate that the law of succession should encourage family members to provide care for elderly and infirm parents and relatives. Lacking empirical data, however, we are not certain that the traditional American approach to the law of succession is the one best suited to support and promote family caregiving. Some scholars, most recently Professor Frances Foster, have argued for a behavior-based approach to succession, linking inheritance rights to the beneficiary's conduct toward the decedent during the decedent's life. Professor Foster's insightful

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*Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); Helene S. Shapo, *A Tale of Two Systems: Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707 (1993).

107. See generally Inheritance (Provision for Family and Dependants) Act, 1975 (U.K.). For discussion, see U.K. LAW COMMISSION, CONSULTATION PAPER NO. 191, *INTESTACY AND FAMILY PROVISION CLAIMS ON DEATH 15-37* (2009), available at [http://www.justice.gov.uk/lawcommission/docs/cp191\\_Intestacy\\_Consultation.pdf](http://www.justice.gov.uk/lawcommission/docs/cp191_Intestacy_Consultation.pdf).

108. See Karl Heinz, *Intestate Succession*, in 5 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 44 (Konrad Zweigert & Ulrich Drobnig eds., 1981).

109. Louisiana amended its forced-heir provisions in 1995 to apply only to children aged twenty-three or younger and to adult children "who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent." See 1995 La. Acts 3368 (codified as amended at LA. CIV. CODE ANN. art. 1493(A) (West 2012)). The latter category is defined to include "descendants who, at the time of death of the decedent, have, according to medical documentation, an inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future." LA. CIV. CODE ANN. art. 1493(E) (West 2012). For discussion, see Katharine Shaw Spaht, *Forced Heirship Changes: The Regrettable "Revolution" Completed*, 57 LA. L. REV. 55 (1996).

110. For discussion, see Michael McAuley, *Forced Heirship Redux: A Review of Common Approaches and Values in Civil Law Jurisdictions*, 43 LOY. L. REV. 53 (1997).

111. See *id.*, *supra* note 103, at 170.

112. See *id.* at 192-93. Scholars taking a different view include Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for a Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994); Chester, *supra* note 106.

analyses draw on her knowledge of the behavior-based law of succession in China, which is designed in part to encourage the care of one's parents and elders.<sup>113</sup> Professor Foster has also powerfully critiqued the extent to which American inheritance law focuses on traditional family categories (e.g., spouse, child, and parent) with little or no accommodation for the many other, and diverse, bonds of love, care, and concern routinely formed in the modern era.<sup>114</sup> We find this observation significant, because uncompensated care is sometimes rendered by individuals outside the traditional family.<sup>115</sup>

Other scholars tout the benefits of the "family maintenance" systems in use in England and many parts of the Commonwealth that give probate judges more discretion than their American counterparts to vary the distribution of the decedent's estate.<sup>116</sup> Like these scholars, we are intrigued by the idea of judicial discretion as a means to tailor the law to the circumstances of the particular case. The distrust of American probate judges that animates some aspects of current succession law<sup>117</sup> is warranted in some states,<sup>118</sup> but not in all.

Still, we are realists. Reforms of the American law of succession are most effectively realized through the Uniform Law Commission and its UPC.<sup>119</sup> The UPC has been, in recent decades, the most prominent vehicle of innovation in American succession law. This is why working within the Commission's process of law reform is so important. A plan radically to restructure the American law of succession into a behavior-based model or, alternatively, into an English-style "family maintenance" system would be a dead letter. Our task in this Article is to devise a realistic proposal to amend the UPC in order to recognize and promote caregiving within the

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113. See generally Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1202 (1999); Frances H. Foster, *Toward a Behavior-Based Model of Inheritance: The Chinese Experiment*, U.C. DAVIS L. REV. 77 (1998). For an earlier critique along the same lines, see John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497 (1977).

114. See generally Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001); Thomas P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55 (2004).

115. See *infra* note 126.

116. See, e.g., Chester, *supra* note 106, at 3; Shapo, *supra* note 106, at 780–81.

117. See Tate, *supra* note 103, at 167 (describing the judges handling probate matters in Commonwealth jurisdictions, but not in the U.S., as "more or less uniformly competent").

118. See, e.g., *Connecticut Probate Court System: Public Hearing Before the Legis. Program Review and Investigations Comm.*, 2005–2006 Leg. Gen. Sess. (statement of John H. Langbein, Sterling Professor of Law and Legal History, Yale Law School), available at <http://www.law.yale.edu/faculty/1766.htm>.

119. For background on the Uniform Probate Code, see GALLANIS, *supra* note 67, at 21–22.

family. In so doing, we are mindful of the fundamental structure of American succession law and, specifically, two of the law's core features: an emphasis on fixed rules over judicial discretion<sup>120</sup> and a deep commitment to donative freedom.<sup>121</sup>

Donative freedom is not unfettered, however. As observed in Part II, the provisions of a decedent's will are given effect only after the decedent's debts are paid.<sup>122</sup> The decedent's obligations have priority over the decedent's whims.<sup>123</sup> Moreover, American succession law protects at least one member of the decedent's family against disinheritance at the decedent's whim—namely, the surviving spouse.<sup>124</sup>

With these observations in mind, and with the goal of recognizing and promoting caregiving within the family, we propose that the UPC should be amended to enable a family member who provided the decedent with substantial uncompensated care in a family residence to elect a share of the decedent's estate. (In this context, "family member" means an individual other than the decedent's surviving spouse, because the UPC already provides a spousal elective share.) Our approach contrasts with the prevailing law in the U.S., which views personal services rendered by family members as gratuitous, hence not compensable. The scope and amount of the caregiver's elective share can be structured by way of analogy to the surviving spouse's elective share, though with important differences.

### B. Specific Proposal

Our specific proposal is to provide an elective share to a family member who provided substantial uncompensated care in a family residence to the decedent. Five features of the proposal should be noted. First, the proposal is directed at *family* caregiving. This accords with the emphasis in the UPC, and in American succession

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120. See Glendon, *supra* note 106, at 1185 (describing U.S. succession law as "the traditional stronghold of fixed rules").

121. See GALLANIS, *supra* note 67, at 9 (observing that "[d]onative freedom has a strong cultural tradition in Anglo-American law").

122. See MCGOVERN ET AL., *supra* note 46, at 626.

123. *Id.* The rights of the decedent's creditors against property passing through so-called will substitutes are more complex and vary from one U.S. jurisdiction to another. See generally CALIFORNIA LAW REVISION COMM'N, MEMORANDUM 2010-27, NONPROBATE TRANSFERS: CREDITOR CLAIMS AND FAMILY PROTECTION (BACKGROUND STUDY) (2010), available at <http://www.clrc.ca.gov/pub/2010/MM10-27.pdf>.

124. For analysis, see Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 Mo. L. Rev. 21 (1994).

law generally,<sup>125</sup> on the family unit. We recognize that friends and neighbors can and do provide uncompensated care, but the burden of such caregiving is borne primarily by family members.<sup>126</sup> They are the focus of our proposal.

Second (but connected with the first), our definition of who counts as a “family member” for purposes of the family caregiver’s elective share is designed to be as broad as feasible while remaining largely consistent with the thrust of other UPC provisions. Accordingly, we define a “family member” as a grandparent, a descendant of a grandparent, a stepchild of the decedent, or a spouse of one of these relatives. This is slightly more expansive than the UPC’s provisions on intestacy<sup>127</sup> and antilapse for wills<sup>128</sup> and certain nonprobate transfers.<sup>129</sup> The inclusion of spouses has precedent in the 2008 UPC amendments on the parent-child relationship.<sup>130</sup> Also applicable to our definition of a “family member” are (1) the UPC’s thoughtful and up-to-date provisions on the definition of parent and child, including the 2008 and 2010 amendments covering children of assisted reproduction<sup>131</sup> and (2) the UPC’s wise and helpful Legislative Note (at the beginning of Article II) on the recognition of civil unions, domestic partnerships, and “similar relationships between unmarried individuals.”<sup>132</sup>

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125. See Foster, *supra* note 114, at 200–01.

126. See NAC/AARP 2009 REPORT, *supra* note 26, at fig. 12 (reporting that the caregiver is a relative in 86 percent of the cases, and a nonrelative (friend, neighbor, or foster child) in 14 percent of the cases).

127. U.P.C. § 2-103(a) provides inheritance rights to descendants, parents, descendants of parents, grandparents, and descendants of grandparents. UNIF. PROBATE CODE § 2-103 (2011), 8 U.L.A. pt. I, at 40–41 (Supp. 2011). § 2-103(b), added in 2008, provides inheritance rights to some—but not all—stepchildren: to descendants of deceased spouse(s). 8 U.L.A. pt. I, at 40 (Supp. 2011).

128. See § 2-603(b), 8 U.L.A. pt. I, at 121 (Supp. 2011) (“If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild . . .”).

129. See § 2-706(b), 8 U.L.A. pt. I, at 149–50 (Supp. 2011) (“If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent . . .”).

130. See § 2-119(c), 8 U.L.A. pt. I, at 55 (Supp. 2011) (“A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent . . .”).

131. §§ 2-114 to -122, 8 U.L.A. pt. I, at 50–66 (Supp. 2011).

132. *Id.* Legis. Note to Art. II. Pref. Note, 8 U.L.A. pt. I, at 33–34 (Supp. 2011) (“References to spouse or marriage appear throughout Article II. States that recognize civil unions, domestic partnerships, or similar relationships between unmarried individuals should add appropriate language wherever such references or similar references appear. States that do not recognize such relationships between unmarried individuals, or marriages between same-sex partners, are urged to consider whether to recognize the spousal-type rights that partners acquired under the law of another jurisdiction in which the relationship was formed but who die domiciled in this state. Doing so would not be the equivalent of recognizing such relationships in this state but simply allowing those who move to and die in this state to retain the rights they previously acquired elsewhere.”).

Third, our proposal is crafted by analogy to the surviving spouse's elective share. An alternative reform—which we rejected—would have been simply to repeal the presumption that family care is rendered gratuitously, thus opening the door to claims against the decedent's estate for the market value of the services rendered. But this approach has two serious downsides. First, the market value of the care could readily consume all or most of a small or medium-sized estate, leaving little or nothing for the decedent's other beneficiaries. Second, such a market-oriented view (in which the decedent and the family caregiver are treated as fundamentally *economic* actors, with the caregiver-as-creditor seeking compensation for services rendered) does not recognize, and indeed may corrode, the love and affection between family members that the law of succession should reflect and encourage. Our proposal aims to recognize and support caregiving without substituting economic self-interest for love and affection as the motivating impulses.<sup>133</sup> Spouses care for each other for reasons independent of (but bolstered by) the spousal elective share. In the same way, we hope and expect family members to continue to care for each other for reasons independent of (but bolstered by) this elective share. Our elective share is designed to recognize and support familial bonds of love and concern, not to turn family members into economic actors whose main impulse is to seek compensation.

Fourth, we require the family member to have been the primary caregiver<sup>134</sup> and to have provided care in a family residence to the decedent for a specified minimum time—in our draft, at least two years out of the three years preceding the decedent's death<sup>135</sup> (to allow for some episodes of hospitalization or skilled nursing care, or—at the end of life—hospice care). To avoid problems of evidence, to limit the extent of judicial discretion, and to reduce the likelihood of an attempted unjustified claim, we require the family

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133. For a thoughtful analysis of these issues, see EVELYN NAKANO GLENN, *FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 197–98* (2010) (rejecting the false dichotomy that “people work either for money or for love” and observing with regret that “low wages for care workers are rationalized on the grounds that care work offers intrinsic rewards . . . or even, especially in the case of family caregivers, that too much monetary compensation would undermine altruistic feelings”).

134. An alternative, which we rejected, would have been to open the elective share to multiple family caregivers, with the elective-share amount apportioned among them in proportion to the care each provided. But implementing this would be extremely difficult. We are mindful that, in legislative reform, the perfect is sometimes the enemy of the good.

135. We base this type of provision on Professor Lawrence Waggoner's working draft of an intestacy statute for unmarried partners, reproduced in Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 *LAW & INEQ.* 1, 92–94 (1998); see also Gallanis, *supra* note 114, at 86–91 (further refining the draft).

member to establish the entitlement to an elective share by clear and convincing evidence. The UPC takes a similar approach to the standard of proof in its provisions governing survival and harmless error.<sup>136</sup>

Fifth, the architecture of the family caregiver's elective share is modeled somewhat on the innovative structure of the UPC's spousal elective share. The caregiver's share (akin to the spouse's) applies to the decedent's probate and nonprobate transfers alike,<sup>137</sup> in accordance with the UPC's policy and practice of applying the same substantive rules to wills and will substitutes.<sup>138</sup> And just as the spouse's share increases with the duration of the marriage, the caregiver's share increases on a monthly basis, to reflect the duration of the care provided—but in no event does the caregiver's share exceed 25 percent of the augmented estate.<sup>139</sup> In our proposal, we have placed both the dollar figure and the maximum percentage in brackets because we have no firm view on the precise figures; however, the dollar amount should be well below market rates and the maximum elective-share percentage should be substantially lower for a family caregiver than for a spouse.

Translating all of this into statutory language, we propose amending the UPC by adding a new Article II, Part 2A:

## PART 2A

### ELECTIVE SHARE OF SURVIVING FAMILY CAREGIVER

#### § 2-2A01. DEFINITIONS.

(a) In this [part]:

(1) "Care" means services of the kind provided by a home health aide or a personal care aide.<sup>140</sup>

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136. See UNIF. PROBATE CODE § 2-104 (2011), 8 U.L.A. pt. I, at 42 (Supp. 2011) (survival); § 2-503, 8 U.L.A. pt. I, at 108 (Supp. 2011) (harmless error); § 2-702, 8 U.L.A. pt. I, at 182–84 (1998) (survival).

137. Cf. § 2-203(a), 8 U.L.A. pt. I, at 78–79 (Supp. 2011) (providing that the surviving spouse's elective-share rights extend not only to "the decedent's net probate estate" but also to "the decedent's nonprobate transfers").

138. See *id.* art. II, pref. note (2011), 8 U.L.A. pt. I, at 34 (Supp. 2011) ("The proliferation of will substitutes and other inter-vivos transfers was recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison.").

139. Cf. § 2-203(b), 8 U.L.A. pt. I, at 79 (Supp. 2011) (using a sliding scale, based on the duration of the marriage, for the surviving spouse's elective share).

140. The terms "home health aide" and "personal care aide" are occupational classifications used by the Bureau of Labor Statistics. The description of a "home health aide" is provided by *Occupational Employment Statistics*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/oes/current/oes311011.htm> (last visited Feb. 25, 2012) ("Provide[s] routine individualized healthcare such as . . . bathing, dressing, or grooming" to "elderly, convalescents, or persons with disabilities . . ."). The description of a "personal care aide" is available at *id.* at <http://www.bls.gov/oes/current/oes399021.htm> (last visited Feb. 25,

(2) “Family member” means a grandparent, a descendant of a grandparent, a stepchild, a spouse of a grandparent, a spouse of a descendant of a grandparent, or a spouse of a stepchild of the decedent.

§ 2-2A02. RIGHT OF ELECTIVE SHARE.

(a) [RIGHT OF ELECTION; ELECTIVE-SHARE AMOUNT]. A surviving family member who establishes by clear and convincing evidence that

(1) the family member was the primary provider of care

(A) to a decedent dying domiciled in this [state],

(B) in the decedent’s residence or in the family member’s residence, and

(C) during the [three-year] period immediately preceding the decedent’s death for periods totaling at least [two years], and

(2) the value of the uncompensated care provided by the family member to the decedent exceeded [\$1,500] per month of care,

has a right of election, under the limitations and conditions stated in this [part], to take an elective-share amount equal to [\$1,500] per month of care but in no event to exceed [25] percent of the value of the decedent’s augmented estate.

(b) [EFFECT OF ELECTION ON STATUTORY BENEFITS.] If the right of election is exercised by or on behalf of a surviving family member of the decedent, the family member’s homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share amount.

(c) [NON-DOMICILIARY.] The right, if any, of a surviving family member of a decedent who dies domiciled outside this [state] to take an elective share in property in this [state] is governed by the law of the decedent’s domicile at death.

§ 2-2A03. COMPOSITION OF AUGMENTED ESTATE. In this [part]: “Augmented estate” means the sum of the values of all property,

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2012) (“Assist[s] the elderly, convalescents, or persons with disabilities with daily living activities . . . [including] keeping house (making beds, doing laundry, washing dishes) and preparing meals.”).

whether real or personal, moveable or immovable, tangible or intangible, wherever situated, that constitute

- (1) the decedent's net probate estate as defined in Section 2-204,<sup>141</sup> and
- (2) the decedent's nonprobate transfers to others, not included within the definition of Section 2-204, as defined in Section 2-205(1), reduced by exclusions as provided in Section 2-208(a) and (c) (substituting "family member" for "spouse" in the last sentence of Section 2-208(a)), and valued as provided in Section 2-208(b).

§ 2-2A04. SOURCES FROM WHICH ELECTIVE SHARE PAYABLE.

- (a) In a proceeding for an elective share under this [part], amounts included in the augmented estate which pass or have passed to the surviving family member are applied first to satisfy the elective-share amount.<sup>142</sup>
- (b) If, after the application of subsection (a), the elective-share amount is not fully satisfied, liability for the unsatisfied balance is apportioned among the recipients (other than the family member) of property included in the augmented estate in proportion to the value of their interests therein.<sup>143</sup>
- (c) The unsatisfied balance of the surviving family member's elective share is treated as a general pecuniary devise for purposes of Section 3-904.<sup>144</sup>

§ 2-2A05. OTHER ELECTIVE-SHARE PROVISIONS.

The provisions of Sections 2-210, 2-211, 2-212(a), and 2-214 apply to this [part], substituting "family member" for "spouse" and ignoring references to a "supplemental elective-share amount."

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141. Here, as elsewhere in this Section, we incorporate current provisions of the UPC in order to minimize redundancy.

142. Thus, if the decedent's probate and nonprobate transfers are more generous to the caregiving child than the elective share, the child will decline the elective share. *Cf.* UNIF. PROBATE CODE § 2-209(a)(1) (2011), 8 U.L.A. pt. I, at 86 (Supp. 2011) (containing a similar provision regarding the surviving spouse's elective share).

143. *Cf.* § 2-209(c)-(d), 8 U.L.A. pt. I, at 88 (Supp. 2011) (containing similar provisions).

144. This section provides: "General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will." § 3-904, 8 U.L.A. pt. II, at 271 (1998).

## CONCLUSION

Our law and public policy must grapple with the aging of the population. The need for long-term care is increasingly urgent. The law of succession cannot, by itself, solve the problem, but it can contribute to a solution by recognizing and promoting family caregiving.

This Article offers a proposal that builds on existing law. It changes the law, but does so within its fundamental framework, by creating an elective share for a family caregiver. Just as the spouse's elective share is based on norms of reciprocal care and concern, so too is the elective share for the family caregiver. In a sense, the family caregiver is a partial substitute for the spouse—who, if alive and able, would have acted instead. We encourage the Uniform Law Commission and state legislatures to consider this proposal.