REIMAGINING MARITAL PROPERTY AT DEATH

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This Article argues that death should not automatically terminate the marital partnership, and it suggests a novel and comprehensive model for the regulation of marital property upon death. According to the conventional view, the idea of marital partnership implies an equal division of the marital assets upon dissolution. Thus, in the event of death, just as in the event of divorce, the marital partnership comes to an end, and half of the marital property must be allocated to the surviving spouse, while the other half is distributed to the deceased's heirs. Contrary to this conventional view, this Article develops a new theory based on the term "surviving partnership." According to this approach, the economic partnership survives the death of one spouse. We justify our theory by focusing on the interests and desires of the spouses as individuals, as well as on the continuity of the familial unit. The theory has three main legal implications. First, as a default rule, upon the death of one spouse, the entire marital property should be left in the hands of the survivor, necessitating a clear distinction between marital and separate property. Second, wills, as expressions of the couple's autonomy in redefining their partnership, should be subject to safeguards ensuring fairness and reciprocity. Third, special attention should be devoted to the management of marital property by the surviving spouse and its eventual disposition upon their death.

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Introduction

The theory of marriage as a partnership has become the leading theory of marital property law.[1] According to this theory, marital life establishes an economic partnership between the spouses, leading to the equal division of the marital assets between the spouses upon dissolution.[2] Since death has always been perceived as an event that terminates a marriage, it is reasonable to assume that in the event of death, just as in the event of divorce, the marital partnership comes to an end, and the property is allocated similarly.[3] In other words, both the surviving spouse and the deceased are entitled to receive their share of the partnership, regardless of formal title.[4]

1. Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1254–55 (1998); Bea Ann Smith, *Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696 (1990) ("Nearly every state currently embraces the community-property concept of marriage as a partnership."); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1413–16 (1996) (noting acceptance of partnership theory in both family and tax law). For a list of cases that explicitly treat marriage as a partnership or shared enterprise, *see* Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R.4th 481.

2. Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. L. REV. 1623, 1633–36.

3. Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1244 (2005) ("The death of a spouse dissolves the community just like a divorce would dissolve the community."). *See generally* Richard Gershon, *"Till Death Do Us Part"? Why Does Mississippi Value the Spouse Breaking that Vow More Than the Spouse Keeping It?: A Proposal to Reform Mississippi's Surviving Spouse Protections*, 91 MISS. L.J. 547, 564 (2023) ("Adopting the partnership model would move Mississippi closer to at least equalizing the treatment of a surviving spouse with that of a former spouse in divorce.").

4. Thomas Oldham, *You Can't Take It with You, and Maybe You Can't Even Give It Away: The Case of Elizabeth Baldwin Rice*, 41 U. MEM. L. REV. 95, 120 (2010) [hereinafter Oldham, *You Can't*] ("[T]his compromise . . . . creates a mechanism to implement the philosophy that spouses are equal economic partners for purposes of marital rights at death."); Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 544 (2000) ("Consistent with the marital partnership theory, when the marriage terminates—whether by divorce or by death—the couple's marital property should be divided between them."); Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2182 (2011) [hereinafter Hirsch, *Freedom of Testation*] (presenting the dissolution of the partnership as a common explanation for the spousal share upon death); Naomi Cahn, *What's Wrong About the Elective Share "Right"?*, 53 UC DAVIS L. REV. 2087, 2114 (2020) ("[T]he goal is to provide to surviving spouses with an elective share comparable to the amount to which they would be entitled at divorce under either a community property or marital property . . . system."). *Cf.* Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 53 U.C. DAVIS L. REV.

Accordingly, one should expect two practical results: First, the surviving spouse is entitled to at least half of the marital property. Second, regardless of title, the deceased is also entitled to half of the marital property, which then becomes part of her estate, subject to her will. Indeed, norms in community property states reflect both of these features. As for common law states, only the first result is achieved, at least approximately, by the "elective share" right, which is perceived in the modern versions of the Uniform Probate Code (UPC) as derived from the partnership theory. In other words, it seems that common law states respect the idea of partnership only when dealing with the rights of the survivor. The conventional view in the legal literature explains this result as a flaw, while anyone truly committed to the partnership theory should call for symmetry between the allocation of property upon divorce and its distribution upon death.

Contrary to the conventional view, this Article offers a surprising and novel theory according to which death does not automatically terminate the financial aspects of the marital partnership, and it suggests further that partnership theory allows for giving priority to the surviving spouse over the deceased. According to this view, which this Article terms "the surviving partnership," at the time of death, all of the marital property should be left to the surviving spouse, since—in a way—the partnership should be seen as surviving its members. Second, this Article proposes seeing wills as expressions of the couple's autonomy in redefining their partnership, resulting in a need to ensure their conformity with principles of fairness and reciprocity. Finally, the theory highlights the challenges of regulating the management of the marital property by the surviving spouse, and its eventual disposition upon their death, when the partnership is finally fully dissolved.

This is a novel theory of marital property law, but some of its practical implications are similar to those that stem from current law, as becomes clear when broadening one's view and accounting for the operation of other branches of law. This includes the norms of intestate succession, as well as general property law norms that enable parties to hold their property in a manner that includes a survivorship right through joint tenancy, tenancy by the entirety, or even community property with the right of survivorship. This Article thus offers a close analysis of current norms, demonstrating where the proposed theory

2473, 2506 (2021) (demonstrating differences between the rationale for property division upon divorce and at death).

better explains the law, elucidates the modus operandi of the existing law, and functions as a standard for evaluating the law.

Part I provides background regarding the partnership theory of marriage and its common application upon divorce (I.A), and upon death (I.B), in both community property and common law states. Against this backdrop, *Part II* presents the argument that fundamental tenets of the partnership theory should imply that the financial partnership between spouses survives the death of one of them. This Part then analyzes the legal consequences of this claim. *First* (in II.A), this Article will assert that it is appropriate to leave the entire marital property in the hands of the survivor upon the death of one spouse. *Second* (II.B), this Article will explain how the principle of freedom of exit, which allows each partner to demand the dissolution of the partnership at any time, entails the right of each partner to determine that death will terminate the partnership. *Third* (II.C), this Article will discuss the implications that stem from the proposed approach with regard to the disposition of the marital property after the subsequent death of the surviving spouse, when the family unit is finally fully dissolved. *Part III* then compares the proposed theory and its ramifications to the prevailing norms, including those drawn from other branches of law. *First* (III.A), this Article will juxtapose the surviving partnership model with the results arising from the rules of both intestate succession and wills, demonstrating how the proposed model may elucidate the modus operandi of the existing law and reveal the need for amendments, especially in the law of will-making. *Second* (III.B), this Article will compare the surviving partnership model to the results that obtain under general property laws when partners hold their property in a way that includes a survivorship right by way of joint tenancy, tenancy by the entirety, or community property with the right of survivorship. *Third* (III.C), this Article will review and analyze existing mechanisms (such as trusts, mutual wills, and life tenancy) that regulate the management and distribution of the property after the death of a partner—and even more importantly, after the death of the survivor. This Article will show how conceptualizing the survivor's share in terms of a surviving partnership both creates challenges and provides a north star for evaluating possible solutions for such regulations. The last Part (IV) summarizes the conclusions of this Article and demonstrates how the surviving

partnership model is better equipped to deal with the modern challenges of succession law, as it adapts the spousal share to a contemporary reality characterized by diverse family patterns.

I. Background: Current Marital Property Law

A. Marital Property upon Divorce: The Partnership Theory

Traditionally, the legal regulation of spousal law in the Western world perceived the family as a hierarchical unit headed by the husband.[5] It was only in the last decades of the twentieth century that a significant transformation of family law within the Anglo-American tradition took place, resulting in the recognition of both spouses as individuals[6] and equal partners.[7] Seemingly, this should have led to a regime of property separation in which the marital property would be divided upon separation according to the formal title.[8] Yet most Western countries rejected this view.[9] In the United States, a distinction evolved between two major approaches to marital property.[10] Most

5. WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 189 (Bernard C. Gavit ed., 1941) (English law stipulates that by marriage, the husband and wife are one person in law—that is, the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 103–06, 115–17 (2000); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 10–25 (1989) [hereinafter Glendon, *The Transformation*] (describing the hierarchical aspects of the traditional family).

6. Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, UTAH. L. REV. 687, 687 (1994) ("[T]he law increasingly has come to deal with the family not as an organic unit bound by ties of relationship, but as loose association of separate individuals.").

7. HARTOG, *supra* note 5, at 3 ("The legal history of marriage, often imagined as the evolution from 'feudal' husband-headed households to 'modern' companionate, relatively egalitarian, marriages, is a very old scholarly chestnut.").

8. Mary Ann Glendon, *Is There a Future for Separate Property*, 8 FAM. L.Q. 315, 315 (1974) [hereinafter Glendon, *Is There a Future*] (claiming that individualistic and egalitarian conceptions ultimately seek to establish a property separation regime). *See also* Patrick N. Parkinson, *Who Needs the Uniform Marital Property Act?*, 55 U. CIN. L. REV. 677, 699–702 (1987) (describing the tension between personal autonomy and partnership theory).

9. Glendon, *The Transformation*, *supra* note 5, at 234–35.

10 AM. L. INST, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 19 (2002) [hereinafter ALI] ("At one time there was a sharp division between most American states, which followed traditional common-law principles in the allocation of property at divorce, and the eight states that followed

American states follow common-law principles in the allocation of property at divorce, respecting the separate ownership of each partner, yet dividing the property between the partners upon divorce, based on the court's equitable judgment in view of their respective contributions and need.[11] A minority of states follow community property principles that originated in the civil law tradition, according to which all property acquired during the marital relationship—excluding pre-marital assets, inheritance, and gifts—is considered to be the common property of both spouses.[12] With time, however, the gap between common law and community property states has narrowed:[13] While formally, equitable distribution does not imply equal distribution, the clear trend in most common law states today is towards a default of equal distribution of the marital property upon divorce, regardless of the formal title of the property.[14] The main distinctions between common law states and community property states relate to questions of management and control during the intact marriage[15] and the extent to which the court is allowed to deviate from equal division of the property.[16] Upon divorce,

community property principles."); Motro, *supra* note 2, at 1633 ("[T]wo approaches generally govern the eventual distribution of this marital property. One divides the property based on a case-by-case calculus of the parties' relative contributions and needs; the other requires an equal division of allmartial property without further inquiry.").

11. ALI, *supra* note 10, at 19 ("The common law treated property owned by the spouses during their marriage as the individual property of one of them unless, as to a particular piece of property, they had acted to create joint ownership."); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 124 (2004) [hereinafter Frantz & Dagan].

12. *Id.* at 20 (stating that in community-property states, "[p]roperty acquired with spousal earnings is therefore also owned equally by the spouses, regardless of whether purchased with funds earned by the husband, the wife, or both, unless the parties change the character of the property by agreement or gift.").

13. *Id.* ("This sharp dichotomy between common law and community property traditions no longer prevails in the United States.").

14. Frantz & Dagan, *supra* note 11, at 126; *cf.* ALI, *supra* note 10, at 70 (positing equal division as the default). For an extensive review of the law in force in various states in the United States, *see* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY Ch. 3 (2022).

15. Frantz & Dagan, *supra* note 11, at 124 (claiming that in equitable division states, title theory still governs property questions during an intact marriage, while the community property regime provides for joint ownership during marriage). For more details, *see id.* at 124–31.

16. *Id.* at 100–02; Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 411–17 (1996) (providing empirical analysis of judicial discretion regarding equitable distribution). Community property regimes also do not necessarily divide the property

both legal regimes are committed to equal division of property defined as marital property, regardless of its formal title.[17]

The equal division rule is often justified in the legal literature through the metaphor of partnership.[18] It comes in several versions: One suggested rationale is rooted in the idea of an implied contract, building on the parties' hypothetical agreement,[19] as such a scheme of allocation creates positive incentives for fair and cooperative behavior throughout the marriage and lowers the chances of opportunistic behavior on the part of either spouse.[20] Another version is based on a "contribution theory," whereby both partners are seen as contributing to the wellbeing of the family, within their respective roles, even if one is focused on the job market while the other assumes the bulk of the burden associated with housework (with or without another day job).[21] The contribution is not limited to accumulating economic assets and income: it refers to contributions to the relationship as a whole.[22] As such contributions are hard to quantify, an equal division rule generally approximates the couple's respective contributions to the relationship[23] and takes gender equality considerations into account.[24] At all events,

equally at divorce (*see, e.g.*, ARIZ. REV. STAT. ANN. § 25-318 (2022)), but equality is always the starting point.

17. Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law when There is No Standard Family*, 2012 U. ILL. L. REV. 319, 322–35 (2012).

18. *Id.* at 348.

19. *See, e.g.*, Motro, *supra* note 2, at 1632 ("The contract-based version of the partnership theory applies a retroactive assumption that if the parties had explicitly delineated the terms of their union at the outset, they would have agreed that the fruits of both spouses' labor would accrue to the marriage as a unit."); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 24 (1994) [hereinafter Waggoner, *Marital Property Rights*].

20. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1271 (1998).

21. Motro, *supra* note 2, at 1624, 1633.

22. *Id.*

23. ALI, *supra* note 10, at 733.

24. Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1557 (1984) ("The separate property systems were perceived as unfair, especially to women who had stayed home to raise children and who had no income or property of their own."); *id.* at 1556 (claiming that the default of equal division may be rooted in a concern for gender equality); Regina Graycar, *Matrimonial Property Law Reform and Equality for Women: Discourses in Discord*, 25 VICTORIA U. WELLINGTON L. REV. 9 (1995) (claiming that *Matrimonial Property Law Reforms* should focus on gender equality); Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988); Motro, *supra*

the partnership metaphor relates to the assets the parties gained through joint effort.[25] Accordingly, it well explains the law's tendency to distinguish between assets that are the product of the parties' efforts during the marriage, on the one hand, and other assets, such as premarital acquisitions and property that one spouse acquired during marriage through gratuitous transfers such as gifts or inheritance, on the other.[26]

Alongside this version of the partnership theory, which stresses the individualistic and even commercial nature of the spousal relationship, is another approach that emphasizes the communal nature of the family, which is inherently distinct from commercial relationships.[27] In the commercial context, each partner is an individual whose concerns about the partnership's losses and gains derive exclusively from concerns for that partner's own personal losses and gains.[28] By contrast, within a family, and particularly in the case of a long-term relationship, the partners cease to think of themselves only as individuals, and see themselves also as part of a familial community.[29] Therefore, the familial partnership reflects the creation of a new entity that comprises its members and also supersedes them, creating a shared life and shared goals that are not reducible to the sum of two individuals.[30] Within such

note 2, at 1635 ("[W]hile the fifty-fifty rule may overcompensate or undercompensate spouses in different scenarios, faced with the difficulties in measuring true contribution, equal division functions as an appealing default, reflecting and reinforcing the ideal of equality in marriage.").

25. Scott & Scott, *supra* note 20, at 1271.

26. J. Thomas Oldham, *Should the Surviving Spouse's Forced Share be Retained*, 38 CASE W. RES. L. REV. 223, 232 (1987) [hereinafter Oldham, *Should the Surviving Spouse's*] ("[N]o effort is necessary to acquire a gift or an inheritance, such acquisitions are not considered true partnership acquisitions.").

27. June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359, 397–98 (1994) ("The family, as communitarians recognize, is perhaps the quintessential institution characterized by interdependence and shared pursuits. Nonetheless, invoking the need for a communitarian perspective does little to indicate what type of community the family should involve.").

28. *See id.*

29. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY, 1–3 (New York University Press 1993) (holding that the personal identity of people is formed in a social and familial context, hence . . . .). *See also* Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV 865, 893–96 (1989) (drawing a distinction between relationships of strangers, which are usually conducted through contractual norms that stress autonomy, short term relationships, and egoism, and relationships of family members, which until recently were conducted via norms that emphasized solidarity, intimacy, and long-term interests, creating a shared identity).

30. Hafen, *supra* note 29, at 893–96.

a unit, there is no place for quantifying the exact contribution, or the exact consumption, of each family member.[31] Alternatively, the equal division rule can be understood as a norm that shapes the nature of the familial community, expresses and promotes the ideal of an egalitarian and non-hierarchical relationship,[32] or ensures an equal opportunity to leave the marriage.[33]

Despite these conceptual differences, both versions reflect the following fundamental principles. First, marriage can be seen as a partnership of equals, so in the event of separation, each spouse should be entitled to half of its assets.[34] Second, there is no need for quantification and calculation of each spouse's specific contribution to the accumulation of these assets.[35] Finally, even if the partnership includes communal assets, the partnership preserves and respects the autonomy and separateness of the partners.[36] Hence, there is a distinction between marital assets and separate, personal assets.[37] On top of that, both the commercial and the communal partnership approaches are committed to the liberal view of marriage and insist on the right of each partner to demand, unilaterally, the dissolution of the partnership.[38]

31. *See id.*

32. Frantz & Dagan, *supra* note 11, at 103 ("[W]e propose a justification for the equal division rule based on the ideal of marriage as an egalitarian liberal community.").

33. *Id.* at 86 ("While each spouse in a communal marriage is in part constituted by her relationship with the other, she should be able to choose to abandon, through divorce, this part of her identity.").

34. Scott & Scott, *supra* note 20, at 1309.

35. Frantz & Dagan, *supra* note 11, at 79.

36. *Id.* at 78.

37. *Id.* at 113 ("[S]pouses should be expected to share the benefits and burdens of their life together, not those of their lives before (or after) the existence of the marital community."). *See also id.* at 112 ("The vast majority of American states . . . generally do not make premarital assets subject to division on divorce."). Both Frantz & Dagan, *supra* note 11, and Motro, *supra* note 2, advocate a rule that might take separate property into account in the allocation of the property, yet they do not deny the basic distinction between marital and separate property.

38. Frantz & Dagan, *supra* note 11, at 85–86 ("[L]aw should secure the ability of each spouse to decide whether or not, and for how long, to participate in the institution.").

B. The Partnership Theory and Marital Property upon Death

The partnership theory sees each of the spouses as the owner of half of the property accumulated through a joint effort.[39] Yet what if the marriage ends in the death of a spouse, rather than in divorce? If, upon death, each spouse is similarly regarded as the owner of half of the marital property, it should follow that half of the property becomes subject to the deceased's will or to the laws of succession, while the remaining half becomes the property of the surviving spouse by operation of the norms of marital property law. Indeed, such a view is reflected in the laws of community property states.[40] For example, section 100 of the California Family Code states:

> § 100. Community property
> (a) Upon the death of a person who is married or in a registered domestic partnership, one-half of the community property belongs to the surviving spouse and the other one-half belongs to the decedent.[41]

In contrast, in equitable distribution states, death triggers only the activation of succession law, without any resort to the norms of marital property law, which apply solely in the event of divorce.[42] In these jurisdictions, the surviving spouse is protected only by her entitlement to an "elective share," meaning that she may choose to receive a specific portion of the decedent's total estate, thus protecting her from disinheritance.[43] This provision was designed to provide surviving spouses with reasonable support, preventing them from losing all at the death of their partners.[44] In recent decades, however, the idea behind the elective share has come to be perceived as related to the principles of partnership theory.[45] In that spirit, the UPC reform of 1990 suggested enlarging the elective share to half of the estate in attempt to give the surviving spouse a fair share of the marital property at death, explicitly

39. Scott & Scott, *supra* note 20, at 1321.
40. *See, e.g.*, CAL. FAM. CODE § 100 (2023).
41. *Id.*
42. Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 224.
43. *Id.*
44. *Id.* at 234.
45. Angela Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 546 (2003) ("[T]he primary purpose for the 1990 UPC revision . . . was 'to implement the concept of marriage as a partnership.'").

referring to the partnership theory as the justification.[46] While half of the estate does not necessarily equal the surviving spouse's right under marital property law (which usually refers only to the property accumulated during the marriage), the differences between the results of succession law and those of marital property laws are perceived as stemming from practical considerations.[47]

From the partnership point of view, while the UPC reform is a step in the right direction, there is still a long way to go. The most prominent problem with the elective share arrangement is its one-sided nature: it protects the surviving spouse but does not protect the interests of the deceased spouse.[48] Thus, if the less wealthy spouse predeceases the wealthier spouse, the former cannot realize her presumed share in the marital property and leave her interest in half of the property to her heirs.[49] The extent to which the right to an elective share indeed reflects and protects the idea of partnership "depends on a coin flip of who survived whom."[50] Accordingly, the common view in the academic literature is that this is a flaw in the law that reveals a weak commitment to the principles of partnership theory.[51] According to this view, an approach to marital property law that internalizes the idea of partnership

46. UNIF. PROB. CODE § 2-202 cmt. (UNIF. L. COMM'N 2019); Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 661 (2010) ("The 1990 revised version of the elective-share statute retained the augmented-estate concept, but implemented significant revisions. The idea of an economic partnership . . . became more of the basis for determining the augmented estate."); *id.* at 713 ("[T]he goal of the 1990 and 2008 revisions to the elective-share provision of the UPC was to conjoin distribution of marital property at divorce with distribution of marital property at death. Both distribution schemes should be viewed within the same construct: an economic partnership.").

47. Lawrence W Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 725–734 (1992) [hereinafter Waggoner, *Spousal Rights*] ("Given the inescapable problems associated with classification, the UPC drafters decided to implement the marital-partnership theory by means of a mechanically determined approximation system, which the drafters call an accrual-type elective share.").

48. Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 234–35; Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 101, 105 (2018) [hereinafter Hirsch, *Inheritance*].

49. Waggoner, *Spousal Rights*, *supra* note 47, at 725–34; Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 232. *See also* Oldham, *You Can't*, *supra* note 4, at 105–06.

50. Hirsch, *Inheritance*, *supra* note 48, at 105.

51. Howard S. Erlanger & Gregory F. Monday, *The Surviving Spouse's Right to Quasi-Community Property: A Proposal Based on the Uniform Probate Code*, 30 IDAHO L.

should not distinguish between the partners' rights at divorce and at death.[52] By failing to reflect this symmetry, the law turns its back on its putative commitment to partnership and incoherently rejects the logic it applies in cases of divorce.[53] If the law takes partnership principles seriously, it should recognize each spouse's right to half of the marital property at divorce and at death alike.[54]

Essentially, the common view is that a commitment to the idea of partnership, which sees both partners as entitled to an equal share of the property they have accumulated in a joint effort, should entail commitment to two principles: First, the principle of *symmetry* between divorce and death, insofar as death, like divorce, ends the partnership, holds that the same basic norm of equal allocation of property should apply in both divorce and death. Second, the principle of *mutuality* between the deceased and the surviving spouse holds that since both partners should be seen as holding equal interest in the property, each should be able to devise his or her share in the marital property, regardless of whether the wealthier or less wealthy spouse dies first. While community property states do adhere to these principles, common law states lag behind, approximately accepting *symmetry* (by designing the elective share to roughly mimic equal division) but rejecting *mutuality*. Against the backdrop of this common wisdom, this Article wishes to argue for another possible way in which the norms of marital property should apply upon death. According to this view, one can adhere to the idea of partnership, yet distinguish between divorce and death by rejecting the principle of *symmetry*. The next Part is devoted to the articulation of this view.

REV. 671 (1994); Oldham, *You Can't*, *supra* note 4, at 109. *See also* Charles H. Whitebread, *The Uniform Probate Code's Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 PROB. L.J. 125, 135 (1992); Richard F. Storrow, *Family Protection in the Law of Succession: The Policy Puzzle*, 11 NE. U. L. REV. 98, 131–34 (2019)

52. Storrow, *supra* note 51, at 154.
53. *See* Hirsch, *Freedom of Testation*, *supra* note 4, at 2193.
54. *See* Whitebread, *supra* note 51, at 136.

II. Till Death Do Us Part? Marital Property and The Surviving Partnership

A. The Theoretical Model: The Surviving Partnership

Until this stage, this Article has assumed, as a matter of course, that the death of one spouse breaks up the partnership and calls for a division of the property accumulated during the marriage.[55] However, unlike divorce, in which one or both parties initiate the dissolution of the family, death is an event imposed on the family unit. Death is indeed the end of *one partner*, but it should not necessarily be seen as the end of the *family partnership*. After all, unlike divorce, the death of a spouse symbolizes the success of the marital partnership in that the spouses remained together as long as possible. Accordingly, the spousal partnership can be viewed as one that does not end in the event of death, meaning that the death of a spouse does not dissolve the partnership. This idea will be referred to as a "*surviving partnership*."

The idea that a family partnership continues even after the death of a spouse can be understood in several ways. In one understanding, it derives from the interests of the spouses as rational individuals, concentrating on the difference between divorce and death. One widowed person's relationship to his or her deceased spouse is not the same as a divorcee's relationship to his or her ex, since there is no rivalry between the individual partners in the death of one of them. On the contrary, in some respects, the surviving spouse remains in contact with the memory of the deceased spouse. Similarly, the deceased spouse would have wanted to protect the interests of the surviving spouse.[56] More importantly—unlike divorce, where both spouses have future ongoing material needs, so the partnership's resources must be dissolved in order to provide for those needs—in the case of death, the deceased no longer has any needs.[57] Thus, division of the family's resources is not required: the family property can still satisfy the needs of the spouses, even though only the surviving spouse has ongoing, material needs. One can liken this situation to the result of a hypothetical, an insurance-like deal; although the spouses do not know which partner will predecease the other, both wish for the survivor to continue to enjoy the fruits

55. Rosenbury, *supra* note 3, at 1228.
56. *See* O'Brien, *supra* note 46, at 627.
57. *See* Reynolds, *supra* note 24, at 830 (addressing the role of need in marital property distribution upon divorce).

of the partnership.[58] In this scenario, each spouse places greater weight on the need to provide for the surviving spouse during the survivor's lifetime than on the distribution of the deceased's assets to his heirs or devisees—that is, on providing for the post-mortem interests of the deceased.[59] This is because being left without enough resources (especially given the rise in life-expectancy and the costs of elder care[60]) is significantly worse than giving up one's bequeathing plans or post-mortem projects.[61] Thus, from the perspective of loss-aversion, it is plausible for both spouses to determine that death does not require the distribution of the marital property, but instead leaves the property accumulated during the marriage in the hands of the surviving spouse.

The idea that the family property is intended to satisfy the ongoing needs of the survivor might also stem from another angle, which relates to the basic nature of the marital partnership.[62] Unlike a commercial partnership, in which the partners must account for both their relative contributions and their relative withdrawals and expenses, a marital partnership is based on a much less supervised scheme.[63] Neither the contributions of the spouses nor their expenses or the way they have used the family resources over the years is measured or quantified on an ongoing basis.[64] Thus, during divorce, the law is hostile to attempts to account for past expenses and to examine which of the parties consumed more of the shared resources.[65] This principle, which can be termed the principle of "non-accounting,"[66] should not stop upon death.[67] The fact that a spouse remains alive places her in greater need than the other in relation to the marital property.[68] This situation differs quantitatively, but not qualitatively, from other situations in which

58. Pennel, *supra* note 4, at 2485 n.20. *See generally* Eyal Zamir, *Loss Aversion and the Law*, 65(3) VAND. L. REV. 829 (2012) (discussing loss aversion as a legal concept).

59. O'Brien, *supra* note 46, at 661 n.222.

60. Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, 132 YALE L.J. 1691, 1716–18 (2023) (stressing the costs and special care needs of being old).

61. *See* Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 245.

62. *See* Cahn, *supra* note 4, at 2091.

63. *See, e.g.*, MILTON C. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 22–23 (1999) [hereinafter Regan, Jr., ALONE TOGETHER] (discussing the scene from The Joy Luck Club, where the couple calculates each household expenditure to ensure that each one's contribution matches his or her expenses).

64. *Id.*

65. Hafen, *supra* note 29, at 893–96.

66. *See* Regan, Jr., ALONE TOGETHER, *supra* note 63, at 22–23.

67. *See* Reynolds, *supra* note 24, at 849.

68. *See* Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 239.

there is a gap between the needs of the spouses.[69] The resources that the spouses have accumulated through a joint effort are designed to serve the needs of both spouses, even in periods when one has greater needs than the other, or when one contributes more than the other to the accumulation of the funds.[70] The fact that, after death, there are no future contributions or withdrawals by the deceased does not change the nature of the partnership.[71] As long as one spouse is alive, she may use the marital property according to her needs, while the deceased spouse neither contributes to nor withdraws from the joint fund.[72] Leaving the marital property in the hands of the surviving spouse, therefore, derives from the principle of "non-accounting."[73] Partnership should not imply full symmetry between life and death, namely between the interests of the survivor and those of the deceased.

Another way to understand the idea of surviving partnership is more communal, seeing the partnership between the spouses as more than merely the self-oriented individuals it comprises.[74] When one spouse dies, there is a sense in which the family still survives, represented by the surviving spouse, who continues to run the family and pursue the projects the couple undertook together, such as—paradigmatically—raising the couple's children.[75] Unlike divorce, which represents a failure of the familial bond, the death of a spouse represents its success and thus the realization of the partnership, not its termination. Although the surviving partner is no longer considered married, one should not regard this partner as separated, but rather as an individual who carries on the joint venture of the partners. The family home continues to be the family home, and the family's assets that were accumulated together during the partnership continue to be the family's assets. There is no cause to take them out of the surviving spouse's hands or to see them as subject to distribution to the deceased's heirs or devisees, since these heirs are not partners in the partnership.

69. *See* Regan, Jr., ALONE TOGETHER, *supra* note 63, at 149.
70. *See id*. at 149–51.
71. Cahn, *supra* note 4, at 2091.
72. *See* O'Brien, *supra* note 46, at 705.
73. Indeed, unlike a living spouse, the dead cannot protect his or her assets and enforce the other's fiduciary duties. Yet such protection is less needed once the deceased has no personal needs. On the other hand, the survivor might still have fiduciary duties towards the deceased during the survival period. We discuss this point and its ramifications below. *See infra* Section II.C.
74. *See* Regan, Jr., ALONE TOGETHER, *supra* note 63, at 189.
75. *See id.*

What follows is that whether the focus is on satisfying the ongoing material needs of the spouses as individuals or on the idea of a continuing joint venture, it is reasonable to expect asymmetry between how marital property norms function upon divorce and how they operate upon death, or more broadly—asymmetry between life and death.[76] If, as this Article argues, the marital partnership should survive the death of one partner, there should be no place for a claim by the deceased's estate against the surviving spouse for the deceased's part in the marital property.[77] This is either because the partnership was not dissolved, or because the parties intended the family property to satisfy their own needs, rather than the demands of their heirs.[78] Asymmetry between divorce and death, which leads to leaving the marital property in the hands of the surviving spouse, thus expresses a stronger commitment to the values of marital partnership.[79] What follows is quite radical: the deceased's estate should not be able to assert a claim to the portion of the marital property to which the deceased would have been entitled had the partners divorced. Understanding the conjugal partnership as one that does not dissolve at death leads to the conclusion that the entire marital property will be left in the hands of the surviving spouse, regardless of the question of formal title.[80] In other words, even the marital property owned by the deceased is shielded from probate transfers, regardless of whether the survivor is the wealthier or less wealthy spouse.[81]

It is important to clarify that leaving the entire marital property in the hands of the surviving spouse is not a matter of the spouse's inheritance rights. Rather, it arises from the logic of matrimonial partnership. Thus, the claim applies only to the marital property, that is—paradigmatically—the property that was accumulated during the marriage through a joint effort rather than the separate property of the deceased.[82] But grounding this conclusion in marital property norms also raises two issues: (1) how should such an understanding affect the way in which the parties can deviate from the surviving partnership model

76. O'Brien, *supra* note 46, at 705; Cahn, *supra* note 4, at 2098.
77. Hirsch, *Inheritance*, *supra* note 48, at 121.
78. *See id.* at 123.
79. *See id.*
80. *See* Newman, *supra* note 4, at 540.
81. *See id.*
82. As to the extent to which separate property can also be included in our scheme, *see* discussion *infra* Part III.

and express their separateness or their intent to use their funds for their descendants (given that generally deviating from marital property norms requires an agreement) and (2) as long as the spouses did not choose to dissolve their partnership, should the idea of surviving partnership impose any limits or ramifications on the way the property will be handled during the life of the survivor (the "survival period"), or is distributed after the survivor's death. The next two subsections will be devoted to these issues.

B. Unilateral Termination of the Surviving Partnership

Under the proposed surviving partnership model, the partnership between the spouses continues despite the death of one of them. The reason is grounded either in the view that the family assets are intended to serve the needs of the spouses before the needs of their heirs, or the view that the partnership survives and is represented by the surviving spouse. However, this default regime does not suit every couple. The spousal relationship intertwines trust and sometimes distrust, and involves both common and separate, conflicting projects.[83] One might prioritize one's own projects, including providing for one's heirs, over providing for the needs of the other spouse, especially when the other spouse's own resources suffice for those needs.[84] Additionally, the idea of the surviving partnership requires a certain level of trust and reliance, which might vary from couple to couple, depending on the character, plans, needs, and familial obligation of the spouses.[85] Therefore, the spouses might see the surviving partnership model as ill-suited to their particular situation or relationship.

83. Frantz & Dagan, *supra* note 11, at 82 ("Spouses typically engage in a variety of collective projects . . . . This ever-increasing number of projects requires daily interactions that in turn produce an intensive, long-term fusion. It is this intensity (and its continuity) that stimulates closeness, interdependency, and mutual trust."). *But see* Nancy Burrell & Mary Fitzpatrick, *The Psychological Reality of Marital Conflict*, *in* INTIMATES IN CONFLICT: A COMMUNICATION PERSPECTIVE (Dudley D. Cahn ed., 1990) (discussing how conflict arises in marriage by definition through the perception of incompatible goals and suggesting the inverse relationship between conflict and trust).

84. *See generally* Kornhauser, *supra* note 1, at 1424–34 (discussing the partnership model and its application to typical marriages).

85. *See*, *e.g.*, Ceren D. Yilmaz, Timo Lajunen & Mark J. M. Sullman, *Trust in Relationships: A Preliminary Investigation of the Influence of Parental Divorce, Breakup Experiences, Adult Attachment Style, and Close Relationship Beliefs on Dyadic Trust*, 14 FRONTIER PSYCH. 1 (2023) (investigating the effects of various experiences, characteristics, and beliefs on trust in marriage and other romantic relationships).

A retreat from the surviving partnership changes the marital property scheme that applies to the parties and turns them into "regular" marital partners, who are entitled to half of the marital property upon separation.[86] However, unlike under conventional marital property regimes, where deviation from the default rules requires an agreement, retreating from the surviving partnership need not be consensual.[87] From a pragmatic angle, without an option of unilateral retreat other than through initiating divorce, a dying partner has a perverse incentive to seek divorce at death's door. On a deeper level, the right to dissolve the partnership can be seen as among the characteristics of the family unit, which can be unilaterally dissolved at the election of either spouse,[88] either by a total separation (in the case of divorce) or by withdrawing from the idea of a surviving partnership and reaffirming instead the ordinary partnership model in which the partnership disintegrates at death.[89] Given the possibility of divorce, neither of the spouses may legitimately rely on more than half of the marital property. A spouse should be able to decide that the relationship does not involve the level of trust that is required for the surviving partnership model. Likewise, a spouse might feel that his or her own projects, as providing for a family member in need or supporting a personal project, are important enough to outweigh the hypothetical insurance-like bargain this Article presented earlier. Thus, the idea of the surviving partnership must include the availability of a unilateral termination device, enabling each party to turn the couple's partnership into a traditional one, which dissolves upon death.

A will is exactly this kind of device.[90] Within the proposed model, a will should be understood to concern not only how the testator wishes to dispose of his or her property, but also how he or she perceives the

86. Baker, *supra* note 17, at 332–36 (Currently, across jurisdictions, "there is striking conformity around the idea that all property produced by marital labor . . . should be split equally at divorce.").

87. Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 N.Y.U. REV. L. & SOC. CHANGE 1, 3 (2017) ("[S]tates generally allow couples to alter the default rules by entering into a prenuptial (and in some states, postnuptial) agreement . . . .").

88. *See* Frantz & Dagan, *supra* note 11, at 85–86.

89. *See generally* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 214–215 (2001) (discussing ways in which partnerships can be dissolved in marriage).

90. Gary Spitko, *The Will as an Implied Unilateral Contract*, 68 FLA. L. REV. 49, 55 (2016).

marital partnership.[91] This would be expressed in two different senses. The *first* sees the will as a declaration of concern for the testator's relatives and descendants, marking that in the testator's eyes, his or her needs do not cease upon death.[92] Thus, for example, if a spouse supports a relative in need during his lifetime, he might see this goal as a project that will continue to require funding from the family fund. In that sense, the partnership between the spouses continues, and both spouses continue to consume from the family fund: the survivor by means of regular, ongoing consumption, and the deceased through the future consumption of his or her heirs. In this way, each spouse consumes half of the resources they have accumulated together according to their needs, which—in this case—continue beyond one spouse's death. The *second* sense sees the decision to dispose of the property upon death as a disavowal of the idea of the surviving family partnership and a preference to see death as a dissolution of the marital bond. It signifies the separateness of the spouses and the fact that the testator does not rely on the surviving spouse to carry out the goals and wishes of the testator.[93] Construed in this way, a will has two main effects: as to the testator's separate property, it is a disposition device;[94] as to the testator's right in the marital property, the will is first and foremost a termination device, changing the property regime from a surviving partnership to a regular partnership.

This is not merely a semantic change. Understood as a termination device, the power to terminate the surviving partnership and dispose of half of the marital property should be given to both spouses. In the same way that either spouse can initiate a divorce and trigger the equal division of property,[95] both spouses—regardless of whether the assets are titled in their names or whether they are entitled to them by virtue of marital property laws—can sever the surviving partnership (e.g., by writing a will) and enable their estate to claim their half of the family

91. *See generally* Glendon, *Is There a Future*, *supra* note 8, at 315 (discussing different considerations that are posed when contemplating perception of the partnership).

92. Marla Lyn Mitchell-Cichon, *What Mom Would Have Wanted: Lessons Learned from an Elder Law Clinic About Achieving Clients' Estate-Planning Goals*, 10 ELDER L.J. 289, 299–301 (2002).

93. *Id.* at 227 (discussing testators' intent as it relates to spouses).

94. *See id.* at 289.

95. Baker, *supra* note 17, at 332–36.

property.[96] Thus, under the surviving partnership model, and unlike the prevailing law in common law states, even the spouse without formal ownership of the assets is entitled to write a will that enables her estate to claim her half of the family property if she predeceases her spouse. The termination device restores the symmetry between divorce and death, and respects the symmetry between the deceased and the survivor. Moreover, since severing the surviving partnership changes the couple's marital property regime, this change should conform with the requirements of reciprocity and fairness, ensuring that one spouse will not be able to terminate the partnership, yet still enjoy its fruits if he or she happens to outlive the other.

C. What Happens to the Assets When the Survivor Dies?

According to the surviving partnership model, in the absence of termination by either party, the entire marital property should be left in the hands of the surviving spouse. This view raises questions about the fate of the property upon the eventual death of the surviving spouse. After all, even if the partnership survives the death of the first spouse, it clearly ends upon the death of the second. What should the implications of the surviving partnership model be when both spouses have died? At the survivor's death, should the heirs, wishes, and preferences of the first deceased be considered, or is the inheritance at this stage entirely subject to the determination of the survivor?

The issues are heightened when, after the first spouse dies, a conflict arises between the needs and desires of the surviving spouse and the assumed or even explicit intentions of the deceased.[97] This may be the case when many years pass between the death of the first spouse and the death of the second; when each of the spouses has descendants who are not in common; or when the surviving spouse enters into a new spousal relationship or even has new children.[98] As this Article presents below, a similar issue also arises under existing law in cases where, under succession laws, the surviving spouse inherits the entire

96. *See* Storrow, *supra* note 51, at 110 (discussing options for a spouse to elect a one-half interest in property).

97. *See* Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1, 60 (2015).

98. *See id.* (discussing inheritance issues in nontraditional families, particularly households beyond the typical nuclear family structure of a married heterosexual couple and their biological children).

intestate estate of the deceased.[99] However, the surviving partnership model underscores this point: if the survivor's entitlement to the marital property reflects the survival and continuity of the partnership, then the eventual death of the surviving spouse marks the dissolution of the partnership. Accordingly, it seems that at this stage, the rules of succession should reflect the wishes of both partners rather than the wishes of only the surviving spouse. Where there is a significant gap between the expressed or assumed wishes of the first deceased and the expressed or presumed wishes of the second, the family property should apparently be divided into its original parts, such that half of it will be available to the heirs of each spouse. From another angle, since neither spouse has living needs after the death of the second, there is no apparent reason to give the longer-surviving spouse any advantage over the first deceased when dividing the remaining family property.[100]

In fact, a further look reveals that the challenge is even deeper. Thinking of the family unit as surviving throughout the life of the surviving spouse may also entail limits on how the survivor manages the assets to preserve them until the real dissolution of the partnership at the survivor's death. According to this position, the ability of the surviving spouse to consume the assets by way of waste or transfer to another must be limited. Moreover, to the extent that the survivor's rights are rooted in her ongoing material needs, there is no reason to give her any priority regarding any resources beyond those that are required for satisfying these needs. Likewise, if the property still belongs to the family community that accumulated it, there might also be a requirement to manage the property in accordance with the family vision that was shared by the deceased spouse, rather than according to the sole discretion of the surviving spouse. Accordingly, there should be limits not only on how property is allocated upon the survivor's death, but also on how it is handled during the survival period. There is a need to establish norms and mechanisms to determine both the preservation of the property (vis-à-vis the ongoing consumption to meet the surviving spouse's needs), and the way it is used in fulfilling the family's goals, projects, and vision. Thus, for example, beyond serving the survivor's needs, any further transfer or disposition should reflect the views and preferences of both spouses, even after the death of one. In this respect, the idea of surviving partnership not only grants the surviving partner

99. *See infra* Section III.C.
100. *See* Hirsch, *Inheritance*, *supra* note 48, at 122.

a greater share, but it may also impose restrictions on the surviving partner's own share.

It is important to note, though, that the nature of familial goals makes their discernment more complex than it may appear at first glance. Even if one believes that the surviving spouse should continue to realize the values of the original family unit, it is not possible to rely simply on the wishes of the first deceased as determined at the time of death. First, the family goals themselves may be sensitive to changing circumstances. After the death of the first spouse, for example, special needs may arise for one of the children, or the needs of the family members may otherwise change.[101] Similarly, social changes may alter or modify the way the deceased's position is perceived.[102] For example, a deceased who expressed a firm objection to bequeathing property to his unmarried children may have supported inheritance for a descendant in a domestic partnership in light of social changes in the prevailing spousal structures.[103] Second, and no less importantly, the family goals themselves may involve the happiness of the surviving partner and the right and ability of the survivor to move on in his or her life.[104] This includes a right to remarry and establish a new family.[105] Placing the surviving partner in a position that requires her to discriminate between children from different spousal relationships is in tension with respect for the freedom to continue her life.[106] As stated above, meeting the ongoing needs of the survivor is not a flaw in the family unit but part of its logic.[107] Therefore, the familial vision itself may be at odds with imposing a restrictive regime upon the surviving spouse. Finally, the realization of the couple's shared goals is a matter of discretion.[108]

101. *See id.*
102. *See* Pennell, *supra* note 4, at 2482.
103. In that sense, it is parallel to the application of the cy-près doctrine. *See* Andrew Rodheim, *Class Action Settlements, Cy Pres Awards, and the Erie Doctrine*, 111 NW. U. L. REV. 1097, 1101 (2017) ("The doctrine of cy pres has a long, historical background. It originated as a tool used in trust law to honor a testator's charitable gift as best as possible when it was impossible to honor the testator's specific intent.").
104. *See generally* Kornhauser, *supra* note 1, at 1424–34 (discussing the partnership model and its application to typical marriages).
105. *See* Lawrence Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 234–35 (1991).
106. Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 243.
107. *See* Hirsch, *Inheritance*, *supra* note 48, at 122.
108. Angela Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 520 (2003).

It is plausible to allow the surviving spouse to exercise discretion in realizing these goals when it is no longer possible to consult with the other spouse.[109] The challenge of fulfilling familial goals exists at the moral level in terms of the surviving spouse's obligations to the deceased, but it is obviously exacerbated where legal coercive intervention and judicial supervision are required to determine the appropriate ways of realizing family goals.[110] Consequently, burdensome restrictions on the surviving spouse's management of the property do not seem to be an attractive legal arrangement.[111]

In light of this conclusion, this Article asserts that the concept of surviving partnership is best understood to imply granting full responsibility and authority to the survivor regarding the management of marital resources during the survival period. Furthermore, an attempt to monitor or limit the survivor's freedom of disposition will lead to a series of burdensome practical problems.[112] Among these are the need to distinguish between assets that originated with both spouses and assets accumulated after the death of the first deceased.[113] In addition, such limitations inefficiently impose restrictions on the consumption of the property during the survival period[114] to avoid circumvention of the limits on testation upon the survivor's death.[115] For this reason, the survivor's full authority should include the right to control the disposition of the property after the survivor's own death.

This conclusion stems not only from practical considerations. It is also justified, at least presumptively, on the basis of the relationship of mutual respect between spouses who shared their lives with each other until death.[116] It reflects the idea of managing the joint property together, relying on the power of the surviving spouse to continue to bear the burden of representing the family even after the death of the other

109. *Id.*
110. Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 243.
111. *See, e.g.*, Wright, *supra* note 97, at 65 (discussing theory about giving the decedent more control over their property).
112. *See id.* (discussing the challenges of giving the decedent more control over their property).
113. *See infra* notes 316–20 and accompanying text.
114. *See, e.g.*, Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095, 1096 (2011) (arguing that the law of waste is an inefficient method for administering property).
115. *See id.*
116. *See* Frantz & Dagan, *supra* note 11, at 81, 83.

and adapting to the changes that occur during the survival period.[117] It is rooted in the idea of a presumed quasi-insurance agreement; as neither spouse knows, ex ante, which spouse will outlive the other, each prefers to surrender the property entirely to the other upon his own death, so long as his needs are secured during his own lifetime without burdensome limitations, reflecting the priority of life over death.[118] It derives from a relationship in which each spouse would wish the other to be able to continue his or her life after becoming widowed, benevolently hoping for the best for the survivor, including the possibility of establishing a new family. It hinges on granting the survivor the power to use the familial resources not only for ongoing material needs (such as food, clothes, or medical treatment) but also as a basis for supporting one's relationships (through the power to bequeath or disinherit) or establishing new ones.[119] What follows from this view is that once either spouse dies, the survivor should be entitled to act as the absolute owner of all the marital property and subject this property to his or her discretion.[120]

Admittedly, however, this conclusion is not free from doubt, and it does not necessarily fit all relationships and life circumstances. Even if justified as the default regime, it is still subject to each spouse's right to stipulate otherwise and express the ideas of independence and freedom of exit from the surviving partnership. One may not only dissolve the partnership but should also be able to define one's wishes regarding how the surviving partnership will operate. Therefore, alongside the default that leaves full decision-making power in the hands of the survivor and the possibility of dissolving the partnership immediately upon the death of the first spouse, the spouses must be allowed to determine, in a specified manner that fits their own circumstances, how the survivor will handle the marital property during the survival period or bear the burden of executing their joint projects.

117. *See* R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 4 (1998) (discussing surviving spouse owning all rights to property).

118. *See* Megan D. Randolph, *Let No Man Put Asunder: Divorce, Joint Tenancy, and Notices of Severance*, 47 U. LOUISVILLE L. REV. 607, 614 (2009) (discussing unpredictability of knowing who will die first).

119. *Id.*

120. *See* James R. Ratner, *Community Property, Right of Survivorship, and Separate Property Contributions to Marital Assets: An Interplay*, 41 ARIZ. L. REV. 993, 998 (1999).

Therefore, a significant feature of the surviving partnership model is the wide spectrum between immediate dissolution that leaves the survivor with no access to the deceased's share in the marital property, and absolute authority that grants the survivor full and unlimited ownership. The exact balance between protecting the ability of the survivor to satisfy her needs and protecting the deceased's interests, requires an ability to tailor a more nuanced legal arrangement. In this spirit, the next Part presents a number of additional practical tools that may provide more subtle and complex alternatives, both regarding the management of the property during the survival period and its distribution after the death of the survivor, allowing for an intermediate position that does not entrust the survivor with unlimited power, but still respects the principles of surviving partnership proposed in this section.

III. The Surviving Partnership Model and Current Law: Gaps, Similarities, and Implications

A. Taking Succession Law into Account

1. INTESTATE SUCCESSION

The gap between the results of the proposal and the practical allocations that result under the existing legal framework is actually quite small. This is because in many states, succession laws grant the surviving spouse broad rights to the deceased's estate.[121] In fact, when a spouse dies intestate, as long as all descendants of the spouses are common, the proposed UPC grants full rights in the estate to the surviving spouse.[122] In other words, the practical result of leaving all marital property in the hands of the surviving spouse is common to the proposal and to the existing law, both in community property states and in states that adhere to the common law system.[123] What appears to be a radical

121. *E.g.*, ALA. CODE § 43-8-41 (1975); IDAHO CODE § 15-2-102 (2001); VT. STAT. ANN. tit. 14 § 311 (2018).

122. UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 2019) ("The intestate share of a decedent's surviving spouse is: (1) the entire intestate estate if: (A) no descendant or parent of the decedent survives the decedent; or (B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent . . . .").

123. *See id.*

proposal, then, turns out to be consistent with the practical results under existing law and the intuitions that underlie it, even if it dresses these same results in new theoretical clothing.

Nevertheless, it is important to note that there are still a number of significant differences between the surviving partnership model, which derives from marital property norms, and the conventional model, which views the survivor's share as deriving from norms of succession.[124] *First*, succession law ignores the partnership between the parties, focusing instead on the presumed wishes of the deceased.[125] In common law states, marital property norms do not apply at death, and in community property states, they fulfill their role in turning half of the marital property into separate property, which becomes part of the deceased's estate as if it had been the deceased's separate property to begin with.[126] Thus, the arrangement resulting from succession laws applies to the entire estate of the deceased.[127] In contrast, the results under the surviving partnership model should apply only to the marital property, that is, to that part of the property that would be divided between the parties in the event of divorce.[128] Typically, this is the property accumulated during the marriage in a joint effort, as opposed to property that one spouse owned before the marriage or received as a gift or inheritance before or during the marriage, which is not divided between the spouses upon divorce.[129] Accordingly, in cases where the deceased has a lot of separate (non-marital) property, existing succession laws will pass it into the hands of the surviving spouse, while the logic of the surviving partnership model does not apply at all to this property.[130] The surviving spouse's share stems from the spousal partnership; hence, the distinction between the fruits of the partnership and the spouses' own resources is influential in determining the survivor's share upon death.[131]

124. *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 774 n.55 (2009).

125. *See id*.

126. Karen S. Gerstner, *The Killing of Community Property*, EST. PLAN. & CMTY. PROP. L.J. 1, 60–1 (2019).

127. *Id*.

128. *See generally* Frantz & Dagan, *supra* note 11, at 84–86 (2004). The theory of the surviving partnership model applies to marital property, i.e., property accumulated during the marriage through the joint effort of both partners.

129. *See id.*

130. *See id.*

131. *See generally* J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 248–252 (1989) [hereinafter Oldham, *Tracing*].

Second, succession laws give the surviving spouse full rights to the estate in only some cases.[132] A common pattern limits the survivor's right to the full estate to cases in which the deceased has no surviving parent[133] or—more commonly—cases in which neither spouse has a descendant who is not also a descendant of the other, i.e., where their only children are in common.[134] In other words, it seems that this outcome applies only in cases where the presumed inheritance plans of the spouses are close or identical, such that the deceased can trust the surviving spouse to transfer the property, when the time comes, to the same descendants whom the deceased would have given the property to as a testator.[135] In contrast, the logic of the marital property laws implies that the survivor's rights are not at all related either to the testamentary plans of the deceased, or to the deceased's descendants. Rather, it derives from the couple's shared understanding and plans for how to use their resources. Therefore, it seems that there should be a real difference in the scope of application of these two arrangements.

132. *See* UNIF. PROB. CODE § 2-102 (1)(A); *see also* NEV. REV. STAT. § 134.050 ("If the decedent leaves no issue, the estate goes one-half to the surviving spouse, one-fourth to one parent of the decedent and one-fourth to the other parent of the decedent, if both are living."); CONN. GEN. STAT. § 45a-437.

133. Mary Louise Fellows, Rita J. Simon, & William Rau, *Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 358 (1978)

134. *E.g.*, UNIF. PROB. CODE § 2-102(1)(B); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2024); WIS. STAT. § 852.01 (2024).

135. Default inheritance laws are commonly understood as reflecting the way most people would like to bequeath their property. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. b. (AM. L. INST. 2003). *See also* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1061 (2004) [hereinafter Hirsch, *Default Rules*] ("That leaves majoritarian defaults as the exclusive means of achieving public policy within the arena of gratuitous transfers."). For other views regarding the underlying rationale of succession law, *see* Fellows et al., *supra* note 133 (analyzing the interactions between social norms and presumed intention); *see also* Shelly Kreiczer-Levy, *The Mandatory Nature of Inheritance*, 53 AM. J. JURIS. 105 (2008) (claiming that to the underlying rationale is to create intergenerational continuity through property).

Highlighting these two differences sheds new and important light on the legal arrangement of several community property states,[136] including California,[137] which was suggested as a possible alternative in the UPC.[138] The model in these states appears to derive directly from the considerations this Article mentioned: Marital property laws hold that, at the time of death, the surviving spouse receives half of the property, while the other half becomes part of the deceased's estate and subject to the deceased's will in the same manner as her separate property.[139] Meanwhile, the laws of intestate succession in these states distinguish—within the deceased's estate itself—between the part that was the deceased's share of the community property and the part that was her separate property.[140] In the absence of a will, property of the first type passes to the surviving spouse in its entirety, so that the surviving spouse actually gains all of the community property.[141] The deceased's separate property, however, does not pass to the spouse in full; instead, it is divided among the surviving spouse and other relatives of the deceased according to the strength of their kinship.[142] The deceased spouse's share at the time of death should, therefore, be understood as consisting of two layers: one layer concerns the deceased's share in the community property and remains in the hands of the surviving spouse

136. Such as the legal arrangement codified in the laws of Nevada (NEV. REV. STAT. § 123.250); Washington (WASH. REV. CODE § 11.02.070); Idaho (IDAHO CODE § 15-2-102); Wisconsin (WIS. STAT. § 861.01); Arizona (ARIZ. REV. STAT. § 14-2102); and New Mexico (N.M. STAT. § 45-2-807). New Mexico's regime is particularly interesting with regard to private property, as the spouse receives only a quarter when the couple has children. A moderate version exists in Louisiana (LA. CIV. CODE ANN. ART. 889-94), where the survivor does not receive ownership of the deceased's share but rather a type of usufruct right (on a social rationale), yet there is still a distinction between the community property and the separate property.

137. CAL. PROB. CODE § 6401 ("Intestate share of surviving spouse. (a) As to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100 . . . . (c) As to separate property, the intestate share of the surviving spouse is as follows: (1) The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister. (2) One-half of the intestate estate in the following cases: (A) Where the decedent leaves only one child or the issue of one deceased child . . . .").

138. UNIF. PROB. CODE § 2-102(1)(A) (UNIF. L. COMM'N 2019). This alternative also includes a distinction regarding whether the other descendants are joint or not, a subject to which we will return below.

139. Gerstner, *supra* note 126, at 16–20.

140. *Id.*

141. *See* Yale B. Griffith, *Joint Tenancy and Community Property*, 37 WASH. L. REV. 30, 34 (1962).

142. Rosenbury, *supra* note 3, at 1262.

due to the logic of marital property laws and the idea of surviving partnership. The second layer concerns the deceased's separate property and is transferred by virtue of succession laws, subject to the terms of the deceased's will. This model perfectly reflects the logic of the surviving partnership.

Moreover, many states distinguish between cases in which all of the spouses' descendants are in common and cases in which one or both of them have children not in common with the other, since in the latter scenario, the bequeathing plans of the spouses likely are not identical.[143] According to the rationale this Article has proposed, this distinction is relevant only to the second layer, which is focused on the deceased's preferences, and does not apply to the first layer, which derives from the logic of the conjugal partnership. This understanding can explain one of the alternative proposals of the UPC, which states that the deceased's half of the marital property passes entirely to the spouse regardless of the existence or identity of other descendants, while the deceased's separate property is allocated in accordance with the identity of the descendants and transferred to the spouse only when all of the couple's children are in common. Thus, the surviving partnership model offers a novel explanation and justification for some conventional inheritance regimes whose conceptional underpinnings are not obvious, untangling their structure and explaining their rationale.

The proposed theory thus demonstrates the superiority of inheritance schemes that distinguish between the portion of the deceased's estate that amounts to the deceased's share in the marital property and the portion that was the deceased's separate property. One might see the proposed theory as a basis for criticizing schemes that do not make this distinction and calling for their change. Upon examination through the lens of marital property law, however, one sees an explanation for these apparently inferior schemes. Indeed, such legal regimes do not distinguish between assets accumulated during the marriage through a joint effort and assets that the parties brought into the relationship or received as an inheritance or a gift. As a result, the surviving spouse receives portions of the deceased's estate to which he or she has no valid claim. Yet, marital property laws themselves sometimes expand their boundaries and apply to separate property as well, granting broader rights in cases involving long and stable relationships.[144] In this

143. Fellows et al., *supra* note 133, at 358 n.129.
144. Motro, *supra* note 2, at 1636–37.

spirit, scholars have suggested that separate property should be transmuted and assimilated into marital property in proper cases.[145] Provided the marriage is long and the separate property is not substantial, the logic of transmutation might lead to the inclusion of the deceased's separate property in the survivor's share, leaving the entire estate of the deceased in the hands of the surviving partnership, especially since doing so avoids excessive complexity in the application of the law.[146] Anchoring the survivor's share in the logic of marital property thus serves as a criterion for determining and confining the survivor's share.

A similar line of reasoning can also be applied to another possible criterion for determining the spouses' respective shares: whether either has children not in common with the other.[147] At first glance, as observed above, it seems that this consideration reflects a logic that derives from the presumed wishes of the decedent, namely, the logic of inheritance rather than the logic of marital property law reflected in the surviving partnership model. Accordingly, where the spouses have children not in common, it leads to a reduction in the surviving spouse's share even with regard to the portion of the estate that originated in the couple's joint effort, since having non-shared children presumably affects the decedent's wishes with respect to her half of the marital property.[148] Here too, one might see the proposed theory as a basis for criticizing these legal regimes and calling for their change. However, in this case too, looking at the norm through the lens of marital property laws and logic might shed new light on their rationale. After all, the nature and scope of the marital partnership itself might be

145. *Id.* at 1647; *see, e.g.*, ALI, *supra* note 10, at § 4.12; Oldham, *Tracing*, *supra* note 131, at 248–52 (1989).

146. For these kinds of considerations in shaping the spouse's share upon death, *see* UNIF. PROB. CODE cmt. part 2 (UNIF. L. COMM'N 2019):

> [B]ecause ease of administration and predictability of result are prized features of the probate system, the redesigned elective share implements the marital-partnership theory by means of a mechanically determined approximation system. Under the redesigned elective share, there is no need to identify which of the couple's property was earned during the marriage and which was acquired prior to the marriage or acquired during the marriage by gift or inheritance.

147. *See* the first alternative offered in UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 2019). This criterion is codified in the law of Wisconsin (WIS. STAT. § 852.01) (ignoring the distinction between separate and joint property).

148. *See*, *e.g.*, Newman, *supra* note 4, at 521 n.150 (presenting studies on cases of spousal disinheritance by spouses with children from prior marriages, which may suggest that "[a] choice between the children and the second wife usually favors the children.").

sensitive to differences among distinct marital relationships, granting broad rights in cases of long, close, and stable relationships, while providing more limited rights with respect to relationships that lack these qualities.[149] One might suggest that the idea of surviving partnership, which is not dissolved at death, fits only those long and stable relationships, where it is clear that the main commitment of both partners is to each other and to the joint unit they created together.[150] Similarly, the existence of a separate child might affect the perception of death as the end of the deceased's consumption and needs, given the marital relationship as a system of shared income and consumption.[151] The surviving partnership model itself might be sensitive to the existence of children from other relationships. Yet, instead of focusing on the deceased's presumed bequeathing wishes ("What should I do with my money upon my death?"), the right question is, "Do I need to continue drawing on our family's joint resources when I am no longer here to provide for my offspring?"[152] Here again, the rationale of marital property laws can explain the prevailing norms of succession law in many cases, while confining their application and providing a better explanation for the way they function.

What the discussion above reveals is that the surviving partnership model, which is rooted in the logic of marital partnership, offers a new theory that conceptualizes and explains existing law. The allocation of assets upon death should be understood mainly as arising from marital property laws rather than from inheritance laws. This theory neatly explains the prevailing law in major community property states and the UPC's suggestion for community property states. It is flexible enough to explain the possibility of expanding the allocated property to include the deceased's separate property, as well as the possible effect of children not in common. Moreover, the new conceptualization enables us to shape the scope of such expansion or reduction in a more

149. *See* Motro, *supra* note 2; *cf.* Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 232.

150. *E.g.*, ARIZ. REV. STAT. § 14-2102 (1995) (providing that the spousal share, as to both separate property and community property, passes to the surviving spouse only if there is no surviving issue or if the only surviving issue are also related to the surviving spouse).

151. Newman, *supra* note 4, at 539 n.221 (collecting cases where the presence of separate children did or did not affect the surviving spouse's right to an elective share).

152. From this perspective, if the other spouse has a child out of wedlock of whom the deceased is not aware, it might call for different judgments.

precise way using the logic of partnership, and to provide criteria for analyzing and criticizing possible changes in succession laws. The spousal share does not reflect only the presumed wishes of the deceased.[153] It is designed to reflect the nature of the deceased's marital relationship and familial commitments.

Viewing the survivor's rights through the lens of marital property norms can open the door for other possibilities. Relying on the transmutation and commingling tests recognized in marital property law,[154] it is possible to adopt a non-binary procedure for commingling separate property.[155] Similarly, it is possible to distinguish between different types of property according to their nature as related to the household or to a business. Moreover, issues such as whether the couple's children are all in common; the length of the marriage; whether it is a first, second, or successive union; and the nature of the assets, taken together, influence how property rights are allocated.[156] For example, the idea of asymmetry between divorce and death regarding the scope of the assets subject to allocation is sensitive to the length and characteristics of the marriage. Therefore, the deceased's full half in the community property will pass to the survivor in any case, but the separate property might pass only in the case of a long and stable marriage or a marriage without non-common offspring.[157] Similarly, the application of the transmutation doctrine can be more expansive the longer the marriage lasts.[158] In this way, the laws that govern the spousal share upon death will distinguish between, for example, the share of a widow from a first and long marriage in the marital residence (even if it was acquired before the marriage and titled by the deceased), and the share of a spouse in a second marriage, in which each spouse has children from a previous relationship, in the deceased's business property.[159] The logic and language of marital property law can better shape the adequate share of the surviving spouse.

153. Waggoner, *Marital Property Rights*, *supra* note 19, at 24.
154. *E.g.*, Oldham, *Tracing*, *supra* note 131, at 219–22.
155. *E.g.*, UNIF. PROB. CODE § 2-102A (UNIF. L. COMM'N 2019).
156. Waggoner, *Spousal Rights*, *supra* note 47, at 685–87.
157. *See, e.g.*, CAL. PROB. CODE § 6401 (Deering 2024).
158. *See, e.g.*, Oldham, *Tracing*, *supra* note 131, at 155 (When discerning what property has been transmuted to marital property, "[j]udicial creativity . . . seems particularly warranted in marriages of short duration . . . .").
159. *See* Cahn, *supra* note 4, at 2116.

2. WILLS

Based on the commitment to the parties' freedom of exit from the surviving partnership, this Article claimed that making a will might be seen as a termination device.[160] In other words, the will can serve as a tool that turns the surviving partnership into a regular partnership, that breaks up upon death, allowing the deceased to distribute his or her share of the family property. The commitment to partnership implies that this right should be available to each of the spouses, regardless of questions of title. It is time to compare this idea to existing law.

It is easy to perceive a substantial gap between the proposed model and the result arising from the law in common law states, including those that are fully committed to the partnership theory and its implications for the elective share rule, in accordance with the UPC proposal (henceforth, the law of these states will be referred to as CLUPC).[161] In these states, each of the spouses may make a will to determine how his or her property will be distributed upon death.[162] The other spouse is protected from disinheritance by the right to an elective share that might amount to half of the deceased's estate.[163] Unlike the proposed model, however, under CLUPC only the wealthier spouse can decide to leave the other spouse half of the family property rather than all of it.[164] In contrast, the poorer spouse (in terms of title to the assets) cannot control the fate of the property accumulated during the marriage.[165] Poorer spouses who survive their wealthier partners can choose whether to exercise their elective share right, but those who predecease their partner have no power to influence the part owned by the survivor.[166] In other words, only the titled owners can choose to transfer half of the marital property to whomever they wish, while the other spouse cannot bequeath his or her share in the partnership should he or she predecease the titled owner.[167] This result is incompatible with

160. *See* the text accompanying *supra* notes 90-91.
161. We are less concerned here with those states that rejected the UPC view of the elective share. Our model is designed for those that are committed to the principle of partnership.
162. Oldham, *You Can't*, *supra* note 4, at 105–06.
163. UNIF. PROB. CODE § 2-202 (UNIF. L. COMM'N 2019).
164. Oldham, *You Can't*, *supra* note 4, at 105–06.
165. *Id.*
166. Rosenbury, *supra* note 3, at 1239.
167. *See* Newman, *supra* note 4, at 556–57.

the principle of partnership.[168] The surviving partnership model offers an alternative to this result.[169]

In this respect, the proposed model is more similar to the law of community property states, under which the marital property is divided between the spouses in the event of death, enabling each spouse to make a will and distribute his or her half of the property to whomever they wish.[170] Again, the surviving partnership model offers a different conceptual basis for the same legal result. Under the regular community property model, the right of testation follows the logic of inheritance laws, which allow each spouse to command his or her share after the dissolution of the partnership by death.[171] The proposed model, however, does not see death as necessarily triggering dissolution of the partnership. Accordingly, the role of the will is not only to dictate what will happen to the estate, but also to change the marital property regime from a surviving partnership into a regular partnership that dissolves at death. The will thus not only determines how the family's assets are distributed; it also provides for the dissolution of the familial economic unit. A spouse's decision to make a personal will defines the marital property as consisting of different parts that belong to each of the spouses separately.

Moreover, prevailing law allows each of the spouses to make a will while keeping it a *secret* from the other spouse.[172] In this way, even a spouse who disinherits the other may nevertheless inherit the entire estate of the other in the event that the dispossessed spouse dies first, intestate.[173] This result follows the logic of succession laws, which focus on the testator's freedom of disposition, as the testator is free to dispose

168. *See* Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 235–36; Hirsch, *Inheritance*, *supra* note 48, at 104.

169. *See* discussion *supra* Section II.B.

170. *See, e.g.*, CAL. PROB. CODE § 6401a (Deering 2024).

171. *See* Nathaniel Sterling, *Joint Tenancy and Community Property in California*, 14 PAC. L. J. 927, 940–41 (1983).

172. *See* Oldham, *You Can't*, *supra* note 4, at 101–04.

173. Storrow, *supra* note 51, at 104.

of his or her property without having to disclose to anyone the existence or contents of a will.[174] From this perspective, the rights of the testator's spouse are protected only as to half of the marital property.[175] Under this Article's conceptualization, this result can be justified by a commitment to the principle of freedom of exit, which sees the partnership between the spouses as subject to the ongoing decision of each of the individuals. In light of this principle, since each of the spouses has the right to dissolve the marital bond at any time by way of divorce, which would trigger a division of the property into two halves, neither of the spouses can rely on entitlement to a share exceeding half of the family property at any stage of the relationship.

However, a further look reveals that this Article's suggested conceptualization may have deeper implications, including a direct effect on the way testacy laws should function. If drafting a will is an action that implicates the laws of marital property, and not merely an independent action affecting the testator's own share, then considerations about fairness and reciprocity become central to the law of wills. In terms of *fairness*, if the will changes the nature of the property regime applicable to the couple, it is plausible to consider requiring the bequeathing spouse to inform the other of the existence of the will.[176] In terms of *reciprocity*, one spouse's drafting of a will should arguably change the result of the partnership's dissolution, even in the event the non-testator spouse predeceases the testator.[177] It is not appropriate to allow the spouse who wished to dissolve the surviving partnership to enjoy the fruits of this partnership if this spouse happens to outlive the other.[178]

174. *See* UNIF. PROB. CODE § 1-102 (UNIF. L. COMM'N 2019) (explaining that "[t]he underlying purposes and policies of this Code are: . . . (2) to discover and make effective the intent of a decedent in distribution of the decedent's property . . . ."); JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES, Ch. 1 (11th ed. 2022).

175. *See* Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 525 (2003).

176. A "penalty theory" developed in the context of contracts law posits that defaults can serve as an information forcing "mechanism." *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 123 (1989). The conventional view rejects the applicability of this theory to succession law. *See, e.g.*, Hirsch, *Default Rules*, *supra* note 135, at 1059–61. In contrast, our fairness requirement illustrates how lawmakers can integrate an "information forcing" mechanism into the law of wills.

177. *See* Hirsch, *Inheritance*, *supra* note 48, at 130.

178. *See* Adam J. Hirsch, *A Battle of Wills: The Uniform Probate Code Versus Empirical Evidence*, 33 S. CAL. INTERDISC. L.J., 278, 293 (2024).

Therefore, there are three possible alternative arrangements each of which deviates from the existing rule that respects a unilateral and undisclosed will. A *first* option would satisfy both *fairness* and *reciprocity* by requiring a testator spouse to notify the other of the existence of a will,[179] with this notification automatically leading to the dissolution of the surviving partnership. That is, the notification itself yields the result that each spouse will own only half of the marital property at the time of either spouse's death. A *second* option is more committed to the autonomy and freedom of exit of the spouses in that it would not require notice of a will, but it would still satisfy *reciprocity*. In this scenario, if either spouse drafts a will, then the partnership dissolves at death, even in the event the non-testator dies first, intestate. The reasoning here is that it would be inappropriate for the testator-survivor to enjoy a right he sought to withhold from his spouse.[180] Such a rule would require a practical mechanism to ensure that upon the death of the non-testator, the probate administrator would be informed of the existence of the will of the survivor. Possible mechanisms include, among others, a requirement to deposit or register the will as a condition for its validity.[181] In this way, reciprocity would be guaranteed while the testator's autonomy is protected, even at the expense of the non-testator spouse's right to know the testator's inheritance plans. Finally, a *third* option would require notification to ensure *fairness*, but without the automatic dissolution of the partnership upon the death of the non-testator spouse.[182] This alternative allows the non-testator to decide whether to "retaliate" and write a will as well; to leave things as they are; or maybe even to discuss with the testator the possibility of joint planning by way of mutual wills or other arrangements. Such a rule would require a practical mechanism to enable the non-testator

179. Similar arrangements, which do not require the consent of both spouses but require a public action or notification to the spouse for their validity, can be found in other contexts. *See, e.g.*, ALI, *supra* note 10, § 4.12(4). *See also* WIS. STAT. § 766.59(2)(b) (2023) ("Within 5 days after the statement is signed, the executing spouse shall notify the other spouse of the statement's contents . . . ."); *infra* discussion accompanying notes 433–48.

180. Rosenbury, *supra* note 3, at 1244.

181. *See, e.g.*, IDAHO CODE § 15-6-402.

182. *See* Scales v. Scales, 297 F.2d 219 (5th Cir. 1961); Portmann v. Herard, 2 Wn. App. 2d 452, 461 (Wash. Ct. App. 2018); Triplett v. Perry (In re Leix Estate), 289 Mich. App. 574 (Mich. Ct. App. 2010). *See also* discussion *infra* Section III.B.

spouse to react through—for example—a waiting period before the testator's will becomes valid, which will commence at the time of notice to the other spouse.[183]

Choosing among these alternatives may depend, again, on the rationale behind the surviving partnership model. Focusing on the nature of the partnership as an ongoing and enduring entity leads to an emphasis on the principle of reciprocity, holding that once one spouse has decided to dissolve the spousal unit, it no longer exists, regardless of which spouse dies first. On the other hand, focusing on the question of posthumous needs, the fact that one spouse wishes to continue using family resources to provide for a relative does not necessarily mean that the other spouse should do the same. After all, within a marital relationship, the spouses' respective consumption need not be balanced (this is the above-mentioned principle of *non-accounting*).[184] Likewise, the spouses might not be equal in their resources (as earning capacity or pensions), making one of them more concerned with providing to one's spouse than the other. Yet, the same point of view also stresses the duty of fairness between the spouses by preventing one spouse from acting behind the other's back and giving both the right and opportunity to react to the other's intentions with respect to the disposition of family assets. For that reason, the testator spouse should be required to give notice to the non-testator spouse about the will and its content. Finally, a commitment to both fairness and reciprocity will yield an arrangement that guarantees both that the spouses have complete information about the other's inheritance plans and the reciprocity of their decisions. Conceptualizing will-making as an act of changing the marital property regime thus reveals the need to amend the law in a way that meets the requirements of reciprocity and fairness.

B. Taking Property Law into Account: Survivorship Rights

A complete picture of the effect of the surviving partnership model on prevailing law should consider additional areas of law that affect the distribution of property upon death, both within and outside the family context. This includes several sorts of title in general property law, which may grant a spouse who owns property a right of sur-

183. *See, e.g.*, ALI, *supra* note 10, § 4.12(4).
184. *See supra* text accompanying note 70.

vivorship, meaning that the surviving co-owner of the property receives the remaining interest in the property upon the death of the other co-owner. This right is generally recognized in property held in joint tenancy (JT), available in all states, including in those that regulate marital property through the common law system.[185] Additionally, in some community property states such as California, the law allows the spouses to establish community property with a right of survivorship (CPRS), according to which upon the death of one of the spouses, the community property (or a designated part of it) passes to the surviving spouse, without the need for probate administration.[186] Utilizing these forms of title, spouses can determine that substantial parts of their marital property will be subject to the right of survivorship (in CPRS); or even add separate property to this pool by way of a deed that turns this property into one held in JT.[187] Similarly, many states allow spouses to own assets through tenancy by the entirety (TBE), allowing married couples to hold equal interest in a property as well as survivorship rights, which keeps their property out of probate.[188] While generally

185. All 50 states in the U.S. recognize joint tenancy (JT). However, the specifics of how JT operates can vary from state to state. Some states require all tenants to own an equal interest in the property, while other states allow unequal interests. Additionally, some states require tenants to have equal rights of survivorship, while other states allow tenants to have different rights of survivorship. *See* CAL. CIV. CODE § 683(a) (West 2023) ("A joint interest is one owned by two or more persons in equal shares . . . ."); COLO. REV. STAT. § 38-31-101 ("The interests in a joint tenancy may be equal or unequal."). *See also* 765 ILL. COMP. STAT. ANN. 1005/2 (JT does not include a right of survivorship, unless explicitly stated); GA. CODE ANN. § 44-6-190 (2024) (defining JT as including the right of survivorship); WASH. REV. CODE ANN. § 64.28.010 (2008); HAW. REV. STAT. ANN. § 509-2 (2023). For an overview regarding JT, *see* Randolph *supra* note 118, at 607 (describing the general principles underlying JT).

186. CAL. FAM. CODE § 750 (2015) (the normative source for community property with a right of survivorship); CAL. CIV. CODE § 682.1(West 2023) (distribution of community property with a right of survivorship); ALA. CODE § 35-4-7 (2024); 765 ILL. COMP. STAT. ANN. 1005/1b (West 2024).

187. Robert L. Mennell, *Community Property with Right of Survivorship*, 20 SAN DIEGO L. REV. 779, 779 (1983) (explaining the rationale underlying community property with a right of survivorship); Ratner, *supra* note 120, at 998 (explaining community property with a right of survivorship and analysis of its difficulties).

188. TBE is recognized in 25 states and Washington, D.C. Some states allow TBE for real estate or homestead property only. There are states that also recognize TBE for domestic partnerships. *See* D.C. CODE § 42-516(c) (2023) ("A tenancy by the entirety may be created in any conveyance of real property to spouses or to domestic partners."); N.C. GEN. STAT. § 41-56 (2021) (stating that tenancy by the entirety is the default for married couples); 765 ILL. COMP. STAT. 1005/1c (2022) (stating that tenancy by the entirety should be explicitly declared); OKLA. STAT. tit. 60, § 74 (2023).

seen as an archaic institution,[189] it may offer unique advantages from the point of view of the ideas embodied in marital property law.[190]

Therefore, by taking a broad view of property relations between spouses that goes beyond the basic description of marital property norms,[191] it becomes clear that there is nothing unusual or odd about a norm that allocates the property to the surviving spouse.[192] It is important to stress: traditionally, depictions of US marital property regimes have focused on the differences between the community property regime and the "common law with equitable distribution" regime.[193] Yet, the prevalence of joint property rights, which include survivorship rights, among various modes of possession of family property suggests a different property regime than that characterized

See also Traders Travel Int'l v. Howser, 753 P.2d 244, 247 (Haw. 1988) ("[A] tenancy by the entirety must be held exclusively by married spouses who alone possess the mutual right of survivorship."); Conn. Fire Ins. Co. v. McNeil, 35 F.2d 675, 675 (6th Cir. 1929) (finding tenancy by the entirety still exists with all its common-law attributes); Sawada v. Endo, 57 Haw. 608, 611 (Haw. 1977); In re Gibbons, 52 B.R. 861, 861 (Bankr. D.R.I. 1985) (enumerating the countries that have tenancy by the entirety and identifying the normative source of tenancy by the entirety in each country); Sterling, *supra* note 171, at 927 (describing the countries that have tenancy by the entirety and the historical foundations of this matter); Alan N. Resnick & Wendy Finkel, *A Tenant by the Entirety in Liquidation under the Bankruptcy Code: When a House May Not Be a Home*, 86 COM. L.J. 286 (1981) (normative review of tenancy by the entirety).

189. Anne L. Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 Tex. Tech. L. Rev. 629, 632 (1985); Armstrong v. Hellwig, 70 S.D. 406, 18 N.W.2d 284, 285 (S.D. 1945) (In prior ages, "[t]he law favored joint tenancy rather than tenancy in common, because the latter estate tended to split up feudal services and hence to disorganize the feudal military system."). *See also* John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35 (1997) (describing the history of tenancy by the entirety while noting that the rationale behind it is no longer relevant); United States v. Craft, 535 U.S. 274, 281 (2002) ("With the passage of the Married Women's Property Acts in the late 19th century granting women distinct rights with respect to marital property, most States either abolished the tenancy by the entirety or altered it significantly."). *Cf.* Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 432–436 (2001); Damaris Rosich-Schwartz, *Tenancy by the Entirety: The Traditional Version of the Tenancy Is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships*, 84 N.D. L. REV. 23 (2008).

190. *See* Rosich-Schwartz, *supra* note 189, at 51.

191. Traditionally, this branch of law is not part of the usual depiction of marital property law, even though part of it is unique to marital relationships. This may relate to the division of labor between the Property Law, the Family Law, and the Wills, Trusts, and Estates classes.

192. John H. Martin, *The Joint Trust: Estate Planning in a New Environment*, 39 REAL PROP. PROB. & TR. J. 275, 277–78 (2004).

193. Waggoner, *Marital Property Rights*, *supra* note 19, at 25.

in the literature. These joint property rights with survivorship norms are, in a broad sense, a part of marital property law, rather than simply a matter of general property law or estate planning.[194] Ignoring them leads to an incomplete description of the norms of marital property and provides a misleading picture of the common law regime upon death, as well as only a partial understanding of the structure of the law even in community property states.[195]

The right of survivorship under property law is not just another form of regime that leaves the property in the hands of the survivor.[196] It offers a number of advantages as compared to achieving the same result by virtue of succession law.[197] Beyond practical considerations, such as the ability to avoid probate proceedings, an approach grounded in property law is broader in its application, since it safeguards the partners from unfair unilateral termination.[198] As aforementioned, prevailing succession law fails to adequately protect spouses from concealed unilateral disinheritance. According to this Article's conceptualization, such disinheritance reflects a change in the marital property regime, transforming it from a surviving partnership to an ordinary partnership that dissolves upon death. Transformation in the couple's marital property regime, if not consensual, should at least conform to norms of reciprocity and fairness.[199] This desired result can be achieved under property law: While either spouse can, in most states, sever a JT by a unilateral action,[200] such a severance generally requires notice to all

194. Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 FORDHAM L. REV. 173, 173 (1986).

195. *See id.*

196. *See* Mennell, *supra* note 187, at 782.

197. *See id.*; W.D. Rollison, *Principles of the Law of Succession of Intestate Property*, 11 NOTRE DAME L. REV. 14, 16 (1935).

198. Sterling, *supra* note 171, at 953.

199. Carolyn J. Frants, *Should the Rules of Marital Property be Normative?*, 2004 U. CHI. LEGAL F. 265, 266 (2004).

200. CAL. CIV. CODE § 683.2(a)(1)–(2) (Deering 2024) (It is possible to sever a JT through a deed that transfers the property to a "straw man," or a deed that declares the severance of the JT). *See* also COLO. REV. STAT. § 38-31-101(5)(a) (2024) ("[A] joint tenant may sever the joint tenancy between himself or herself and all remaining joint tenants by unilaterally executing and recording an instrument conveying his or her interest in real property to himself or herself as a tenant in common."); Wood v. Pavlin, 467 S.W.3d 323, 324 (Mo. Ct. App. 2015) ("Any joint tenant may unilaterally sever his or her joint tenancy interests, and the consent of the other tenants to the severance or termination is not required."); Taylor v. Canterbury, 92 P.3d 961, 965 (Colo. 2004) ("[A] joint tenant has the absolute right to terminate a joint tenancy

joint tenants in writing,[201] or transferal through a deed that must be registered,[202] and cannot be done by the deceased's secret will.[203] In these

unilaterally."); Bryant v. Bryant, 522 S.W.3d 392, 408 (Tenn. 2017) ("In the vast majority of jurisdictions, either by statute, by common law, or a combination thereof, a party to a joint tenancy with an express right of survivorship may sever the tenancy by unilateral action and destroy the survivorship interest and thereby convert the estate into a tenancy in common."). For community property with a right of survivorship, *see* CAL. CIV. CODE § 682.1(a)(1) (Deering 2024) (noting that "the right of survivorship may be terminated pursuant to the same procedures by which a joint tenancy may be severed"); NEV. REV. STAT. § 123.250 (2024) (ownership of survivor upon death of spouse; disposal by will of decedent); Byrd v. Lanahan, 783 P.2d 426, 429 (Nev. 1989) ("[E]ach spouse has the power of testamentary disposition over his or her interest in the community property, with or without the other spouse's consent.").

201. CAL. CIV. CODE § 683.2(C)(1)–(2) (Deering 2024) (severance of joint tenant's interest in real property without consent of other joint tenants). *See also* Edwin Smith, L.L.C. v. Synergy Operating, L.L.C., 2012-NMSC-034, 285 P.3d 656, 666–67 (N.M. 2012) (explaining that other states have a registration requirement for severing a JT). *See, e.g.*, In re Estate of Johnson, 739 N.W.2d 493, 498–99 (Iowa 2007). Rather, registration is intended to serve as clear and unequivocal proof of the partner's unilateral intention to terminate the JT. However, courts have viewed registration as providing constructive notice of the severance. *Taylor*, 92 P.3d, at 965 n.2 ("Specifically, California passed legislation requiring that all instruments purporting to unilaterally sever a joint tenancy be recorded for purposes of providing other joint tenants with constructive notice of the severance."); Est. of Eng., 284 Cal. Rptr. 361, 363 (Cal. Ct. App. 1991) ("Subdivision (c) was added in 1985 to require at least the constructive notice provided by recordation of the severing instrument."). *See also* Randolph, *supra* note 118, at 614.

202. Krause v. Crossley, 277 N.W.2d 242, 246 (Neb. 1979) (noting that it is possible to sever a JT by transferring unilaterally, but the transfer must be to a third party to have proof); *Taylor*, 92 P.3d at 961–68 (review of the transfer issue to a third party); CONN. GEN. STAT. § 47-14j (registration is required); Pearce v. Briggs, 283 Cal.Rptr.3d 608, 618–19. (Cal. Ct App. 2021). *See also* Patience v. Snyder, 93 Cal. Rptr. 2d 265, 269 (Cal. Ct. App. 2000) ("The purpose of Civil Code section 683.2 is to 'prevent fraud' or to prevent secret suppression of what would otherwise be actual severance, and not to provide record notice to purchasers of the state of title."); *Edwin Smith, L.L.C.*, 285 P.3d at 667 (discussing whether the parties' actions proved their mutual understanding and intent to sever a JT).

203. Matter of Est. of Steed, 521 N.W.2d 675, 681 (S.D. 1994) ("[I]t is a well-established principle that the assets of a joint tenancy with rights of survivorship do not pass under a testamentary instrument, but rather pass directly upon death to the surviving joint tenants."); *Est. of Eng.*, 284 Cal. Rptr. at 361 (secret will that seeks to sever JT upon death does not affect the survivor's share); *Pearce*, 283 Cal. Rptr. 3d at 620; Khiaban v. Madani, 2010 Cal. App. Unpub. LEXIS 6706, *1, *11 (a secret will, given to the spouse after death, does not affect the survivor's share); Dorn v. Solomon, 67 Cal. Rptr. 2d 311, 311 (Cal. Ct. App. 1997) (invalidation of a secret will of which spouse was notified one month after the death); Harbin v. Harbin, 582 S.E.2d 131, 132 (Ga. Ct. App. 2003) ("A will transfers property interests only when it has been probated after the testator's death, so it cannot qualify as an instrument making a lifetime transfer capable of severing a joint tenancy.").

ways, reciprocity or notice is secured.[204] Accordingly, a survivorship mechanism grounded in property law appears to serve the idea of the surviving partnership in a better way than current succession law.

Nevertheless, there is still a significant difference between survivorship rights under property law and the surviving partnership model. The proprietary model applies only to those spouses who have affirmatively chosen it, either by holding a certain asset in JT or by opting for the CPRS arrangement.[205] This Article's position, by contrast, is that the surviving partnership model should apply as a matter of default to all property accumulated within the partnership, namely in a joint effort. In other words, current law offers the functional equivalent of a surviving partnership as an opt-in arrangement available to spouses who do not see death as dissolving their partnership, or who wish particular assets at the core of the couple's partnership to be governed by such a regime. Typically, this will be the homestead, or the assets used by the family, but not business or other assets not typically held in JT.[206] The proposed model, however, assumes broad application that does not distinguish among types of assets.

Moreover, the mechanisms available to create a proprietary survivorship with respect to a particular asset entail consequences the partners may not desire and are otherwise imperfect solutions.[207] Indeed, utilizing proprietary tools such as JT or TBE necessarily affects the couple's management rights during their lifetimes as well as the rights of third parties.[208] Therefore, couples who wish to have survivorship rights but not to manage the asset jointly cannot utilize these tools.[209] Conversely, however, if the partners wish to manage the asset jointly during their lifetimes, but wish to bequeath their respective shares to their heirs, the law provides no mechanism for triggering dissolution of the partnership later, at the time of death.[210] Instead, the partners must dissolve the partnership immediately, which also affects

204. Randolph, *supra* note 118, at 63.
205. Ratner, *supra* note 120, at 998.
206. *Id.* at 1037.
207. Randolph, *supra* note 118, at 608–13.
208. *Id*.
209. *Id*.
210. Pearce v. Briggs, 283 Cal. Rptr. 3d 608, 617–19 (Cal. Ct. App. 2021) (noting that a will can be a severance of the JT only if it takes effect immediately; if it is conditioned to be activated in death—this opens the door to cheating and is not valid).

their management rights during their lifetimes.[211] At all events, proprietary survivorship mechanisms do not guarantee reciprocity or fairness given the availability of practical ways to bypass these requirements and sever the JT secretly and unilaterally.[212]

211. Meyer v. Wall, 75 Cal. Rptr. 236, 236 (Cal. Ct. App. 1969) (A deed that becomes effective only on death is invalid as a severance of the JT); *Pearce*, 283 Cal. Rptr. 3d. at 617–19. *But cf.* WASH. REV. CODE § 26.16.120 (2009); Norris v. Norris, 605 P.2d 1296, 1299 (Wash. Ct. App. 1980) (analyzing a contractual mechanism that addresses the severance of marital property upon death under Washington law). In any case, it is important to note that the reference here to the will is actually related to it being a deed, and not directly related to the laws of wills. Thus, even those who recognize a secret will as a way to sever JT, are not making a normative statement regarding the severance of relations upon death but are referring to the contractual aspect of the issue. For a good example of this, *see* Placencia v. Strazicich, 255 Cal. Rptr. 3d 729, 737–38.(Cal. Ct. App. 2019) ("[W]hile a will cannot change a right of survivorship as a testamentary act, it may, nonetheless, provide evidence of the account holder's intent during his lifetime."); *Norris*, 605 P.2d at 1299 ("A community property agreement under RCW 26.16.120 is not a will . . . .").

212. Burke v. Stevens, 70 Cal. Rptr. 87, 87 (Cal. Ct. App. 1968) (It is possible to disconnect JT without giving notice and without registration, using a sophisticated mechanism); Est. of Eng., 284 Cal. Rptr. 361, 362–3 (Cal. Ct. App. 1991). *See also* In re Est. of Wittman, 365 P.2d 17, 20 (Wash. 1961) (where a secret will is evidence of a change in the wishes of the parties, it can sever a JT); Reicherter v. McCauley, 283 P.3d 219, 223 (Kan. Ct. App. 2012) (respecting the deed dissolving JT given to the lawyer before death, although there was no registration, because the deed served as a notice). On the general problem, *see* Fetters, *supra* note 194 (observing that when one joint tenant secretly severs the JT by transferring it by deed to a third party, he is free to treat the tenancy as a tenancy in common for his own purposes, and if the other tenant dies first, he may destroy any evidence of the severance transaction and become the sole owner of the property). *See also* Rosich-Schwartz, *supra* note 189, at 43 ("Joint tenancy, the other favored concurrent interest utilized by married couples, is also ineffective for several reasons. In a joint tenancy, each joint tenant has the right to unilaterally sever the tenancy without the other's knowledge or consent. This presents opportunities for fraud and other actions adverse to the other tenant's survivorship rights."); R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 4 (1998). For recent rulings and legislation that offer a solution to the problem, *see* Knickerbocker v. Cannon (In re Estate of Knickerbocker), 912 P.2d 969 (Utah 1996) (solving the problem through registration or recording); Sheridan v. Lucey, 149 A.2d 444, 446 (Pa. 1959) ("[A]lthough a voluntary act on the part of one of the joint tenants is adequate to work a severance, that act must be of sufficient manifestation that the actor is unable to retreat from his position of creating a severance of the joint tenancy."); K. Laeticia Mukala, 2013 Arizona Legislative Update: 51st Legislature, 1st Regular Session: *Termination of Joint Tenancies with Right of Survivorship: The Effect of H.B. 2143*, 7 PHOENIX L. REV. 836, 840 (2014) ("Recordation in the county recorder's office in the county or counties where the real property is located of an affidavit entitled *Affidavit Terminating Right of Survivorship* executed by any joint tenant under oath that sets forth a stated intent to terminate the survivorship right . . . ."); Potthoff v. Potthoff (In re Estate of Potthoff), 733 N.W.2d 860, 866 (Neb. 2007) ("[M]ere expression of intent to sever without a legally sufficient act does not effectuate a severance."); *Est. of Eng.*, 284 Cal. Rptr.

The last of these problems can be solved by means of a contractual limitation on the severance of JT, which is available under CPRS. According to § 683.2(b) of the Civil Code of California, for example, severance of a JT contrary to the parties' written agreement is invalid.[213] Other states require mutual consent for such severance, even by default.[214] Similarly, TBE can be dissolved only by divorce or by mutual agreement, leaving a spouse who cannot secure the other's consent with divorce as the only option to achieve dissolution.[215] The advantage of such a rule is the barrier it places to unilateral and concealed dissolution.[216] Yet, this barrier is in tension with the principle of the right to exit or might push the interested party into an actual divorce.[217] This alternative thus seems to be overly strict in terms of the requirements it places on the dissolution of the surviving partnership.[218]

Upon further scrutiny, however, the surviving partnership model might be compatible with this type of barrier, so long as it is not the default rule. Alongside the general partnership regime, which is subject to a unilateral (yet reciprocal and informed) right to exit, it might be reasonable to enable the parties to create an additional layer by way of

361, 363 (Cal. Ct. App. 1991) ("The purpose of section 683.2, subdivision (c), is to avoid potentially fraudulent behavior by the party who executes a document severing the joint tenancy.").

213. CAL. CIV. CODE § 683.2(b).

214. MINN. STAT. § 507.02 (severance of a JT shall be invalid without the signatures of both spouses); MICH. COMP. LAWS § 554.32 (2024) (severamce of a JT cannot occur unilaterally); Halleck v. Halleck, 337 P.2d 330, 338 (Or. 1959) ("[T]his power to defeat the survivorship interest does not extend to co-tenants who hold concurrent life estates with contingent remainders. The contingent remainder which each co-tenant has cannot be defeated by any act of his co-tenant."); Albro v. Allen, 454 N.W.2d 85, 88 (Mich. 1990) ("While the survivorship feature of the ordinary joint tenancy may be defeated by the act of a cotenant, the dual contingent remainders of the 'joint tenancy with full rights of survivorship' are indestructible. A cotenant's contingent remainder cannot be destroyed by an act of the other cotenant."). *See also* Bryant v. Bryant, 522 S.W.3d 392, 414–17 (Tenn. 2017) (Lee, J., dissenting) (noting the court's decision to allow unilateral severance of a JT impairs a co-tenant's ability to protect his or her investment).

215. Carrozzo, *supra* note 189, at 432.

216. *Id*.

217. *See supra* Section II.B (explaining how the principle of right to exit entails the right of each partner to dissolve the partnership).

218. *See id*. *But cf*. Rosich-Schwartz, *supra* note 189 (explaining the benefits of TBE).

TBE or a similar regime.[219] This might suit domestic assets that the parties acquired together, such as their residence.[220] In this manner, the parties add to their partnership, through an explicit, voluntary, and mutual decision (rather than by default), a narrow category of household assets for which the partnership is even stronger and cannot be dissolved unilaterally at all, except by divorce.[221] In this respect, the flaws of the tool described above also provide a cure: a limitation on the power to sever the surviving partnership unilaterally (even on conditions of notice and reciprocity) is more legitimate when it is based on an affirmative choice and is confined to a narrow category of assets.[222] This possibility is again best understood as stemming from the logic of the theory of marital partnership, in which the familial partnership can subject the assets at its core, such as the family residence, to an even stronger unitary regime, which ends only with a joint marital decision, so long as the partnership remains valid.[223] If this is true, then TBE is not only an archaic remnant of outdated concepts about the family unit.[224] Rather, it might function as a legal tool that reflects a deep perception of the surviving partnership idea, applied to the core assets of the family.[225]

C. Trusts, Mutual Wills and Life Tenancy: The Survival Period and the Final Disposition

The discussion above demonstrated that a legal structure in which the surviving spouse is entitled to all of the family property is in fact fairly common, as a practical matter, under both the laws of intestate succession and in various sorts of survivorship rights under property law. As noted, however, this Article's theoretical framework, which

219. *See* Rosich-Schwartz, *supra* note 189, at 23–25.
220. In Idaho, the law distinguishes between real property and personal property. For real property, the document must be registered and each spouse must separately express consent (IDAHO CODE § 15-6-402). For personal property, a document from one of the spouses is sufficient and there is no obligation to register (IDAHO CODE § 15-6-404).
221. *See* Andrea B. Caroll, *Incentivizing Divorce*, 30 CARDOZO L. REV. 1925, 1941 (2009).
222. *See supra* Section II.B; Randolph, *supra* note 118, at 608–13.
223. In that sense, to the extent that the dissolution of CPRS can also be contractually limited, regarding all the marital property, we believe such a limit is too broad.
224. *See* Rosich-Schwartz, *supra* note 189, at 24 (introducing TBE as a traditional model).
225. *See id*. at 32–34.

sees this result as arising from the logic of marital property laws and the surviving partnership model, raises two questions: The first concerns the disposition of the marital property after the death of the originally surviving spouse. This issue is important in particular when there is a conflict between the bequeathing wishes of the original survivor and the presumed bequeathing wishes of the first deceased, for example, if one of them has a child not in common, or if the surviving spouse enters into a new relationship and maybe even has new children after the death of the deceased. The second relates to the disposition of property during the survival period, that is, the question of how to protect the assets from the survivor's opportunity to totally consume or transfer the assets to another person, potentially depriving the deceased spouse's heirs who are not among the surviving spouse's heirs, or diluting their share where the survivor has a new relationship or offspring.[226] After all, at the death of the survivor, when no partner has any ongoing needs, the surviving partnership comes to its end. At this stage, it seems to be no reason to prefer the survivor's heirs over the heirs of the first deceased partner.

Despite these concerns, the discussion above led to the conclusion that, by default, the law should allow the survivor full freedom to manage the property as she wishes and to pass it on to her heirs according to her own preferences. This conclusion stems from practical considerations relating to the difficulties in tracing the origin of the survivor's property and in the need for strict, incontrovertible limits on the consumption of the property during the survival period. No less importantly, this conclusion is based on substantive considerations regarding the trust between the spouses and the ability to rely on the survivor to represent the interests of the deceased; the dynamic nature of needs and desires; and the importance of ensuring the survivor's ability to continue in life and to pursue happiness. Extensive survivor's rights arise also from the basic lack of symmetry between the partners; after all, while the first deceased considers, throughout her lifetime, the interests and needs of the surviving spouse, the survivor's concern for his spouse's material needs ends with that spouse's death.[227] As the survivor no longer has a partner with ongoing needs, it is reasonable to

226. *See* Reynolds, *supra* note 24, at 830.
227. *See supra* notes 205–08.

give the survivor full ownership of the marital property, both for its management and for its disposition.[228]

Admittedly, this approach comes at a price. One can imagine circumstances in which the weight placed on the shoulders of the trust between the spouses is too heavy to bear.[229] This may be a case where, after the first spouse's death, the surviving spouse remarries, raising the suspicion that the property of the deceased first spouse will be transferred to the new spouse at the expense of the deceased's heirs.[230] Such cases raise the concern that leaving the property to the management and control of the surviving spouse not only fails to correspond to the presumed wishes of the deceased, but also seems far afield of the logic of continuity of the surviving partnership. It is not fair for the marital property to pass exclusively to the heirs of the spouse who happened, by chance, to outlive the other.[231] Likewise, the greater the time between the death of the first spouse and the death of the second, the greater the challenge of leaving all of the marital property under the survivor's management and disposition.[232] Therefore, the surviving partnership model seems to raise real difficulty.

Further examination reveals, however, that this difficulty is not insurmountable. First, it bears repeating that what this Article proposes is only a default rule. Each spouse remains free to draft a will that dissolves the partnership and disposes of her estate to her own heirs immediately upon her death.[233] Thus, a spouse who does not wish her spouse to manage or distribute the property after her death can avoid that result.[234] Recall further that this outcome is not unique to the model proposed in this Article. This is the exact practical result that stems from existing law, in the case of intestate succession or survivorship rights under property law.[235] In both cases, the surviving spouse gains

228. *See supra* Section II.A

229. *Id*. *See* Ceren D. Yilmaz, Timo Lajunen & Mark J. M. Sullman, *Trust in Relationships: A Preliminary Investigation of the Influence of Parental Divorce, Breakup Experiences, Adult Attachment Style, and Close Relationship Beliefs on Dyadic Trust*, 14 Frontier Psych. 1 (2023); Burrell, *supra* note 83.

230. *See* Wright, *supra* note 97, at 60.

231. *See* Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 234–35.

232. *Id.*

233. Storrow, *supra* note 51, at 110.

234. *See id.*

235. *E.g.*, ALA. CODE § 43-8-41 (1975); IDAHO CODE § 15-2-102 (2001); VT. STAT. ANN. tit. 14 § 311 (2018); UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 2019) ("The intestate share of a decedent's surviving spouse is: (1) the entire intestate estate if:

the entire entitlement in the deceased's property and might dispose of it as she wishes, with no limit on its management or transfer.[236] Moreover, while some alternatives suggest that the surviving spouse gains only half of the estate in the presence of children not in common,[237] in an attempt to protect the interests of the first deceased, even those schemes do not provide proper protection for the first deceased, as they do not account for the possibility of a future spouse or children.[238] Thus, if a spouse dies leaving the other spouse and their common children, and the survivor remarries and subsequently dies, the first deceased's estate will end up in the hands of the new spouse of the survivor, rather than the deceased's heirs.[239] In other words, the challenge of handling the first spouse's property is common to any scheme of allocating the property in one phase, either at the death of the first deceased or at the death of the survivor.[240] The proposed model merely highlights the difficulty that arises from this situation by focusing the attention on the survival period.

By confronting this challenge and conceptualizing it in terms of the surviving partnership model, intermediate solutions can be constructed. Even when entrusting the survivor with complete authority and discretion over the marital assets is not suitable, one should not renounce the idea of the surviving partnership altogether. The alternatives facing the couple are not only the two extremes, namely, full surviving partnership or immediate dissolution of the partnership upon the first spouse's death. Rather, there is a spectrum of alternatives for balancing the freedom of the surviving spouse with maintaining the common goals of both partners and protecting the interests of the deceased and his heirs.

Recall the distinction between the problem of disposing of the property after the death of the original survivor and the problem of the

(A) no descendant or parent of the decedent survives the decedent; or (B) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent . . . .").

236. *See* UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 2019).

237. *E.g.*, UNIF. PROB. CODE § 2-102(1)(B); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2024); WIS. STAT. § 852.01 (2024).

238. Wright, *supra* note 97, at 60.

239. *See id.*

240. *Id.*

management and consumption of the property during the survival period.[241] With respect to the first, such a concern may be resolved by way of testamentary provisions that do not dissolve the partnership and leave the entire property in the hands of the surviving spouse, while including a "heir by heir" provision stipulating that after the death of the original survivor, the property will be transferred to the heirs designated by the first deceased.[242] With respect to the second concern, there is a need to meet the ongoing needs of the survivor and allow for the ongoing consumption of marital assets for joint goals, such as taking care of the couple's children.[243] To the extent that the deceased wishes to preserve the resources accumulated together for the sake of common goals only (including the survivor's living expenses), and not transfer them to others, this concern may be addressed by establishing a trust that will limit the use of the family property by the surviving spouse.[244] A similar result might be achieved through granting the survivor only a life tenancy in the property, limiting the survivor's power to transfer the property to others.[245] To conclude, spouses can invoke existing legal tools to mitigate the concerns that may arise under the surviving partnership model, without relinquishing the idea of the surviving partnership and dissolving their partnership already upon the first death. Through the lens of the surviving partnership model, such tools are not reflecting the notorious dead hand control. Rather, they reflect the idea of the surviving partnership, and the way to fine-tune the balance between trust and protection between the partners. According to the surviving partnership model, however, these existing tools

241. *See supra* Section III.A.1.

242. Interestingly, in 1851, the Supreme Court of California construed Regarding Husband and Wife § 11 (1850) to include an "heir by heir" provision. *See* Panaud v. Jones, 1 Cal. 488 (1851) (holding the share of the heirs belongs to the surviving spouse, until his death). Texas took a different approach in Thompson v. Cragg, 24 Tex. 582, 604 (1859) ("[T]he community of acquests and gains, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it.").

243. *See* Waggoner, *Marital Property Rights, supra* note 19, at 24–25.

244. *See* Mennell, *supra* note 187, at 779; Ratner, *supra* note 120, at 998.

245. *See* LA. CIV. CODE art. 890 (2023) ("If the deceased spouse is survived by descendants, the surviving spouse shall have a usufruct over the decedent's share of the community property to the extent that the decedent has not disposed of it by testament. This usufruct terminates when the surviving spouse dies or remarries, whichever occurs first."). For more on this issue, *see* Diane M. Lloyd, *New Hope for the Survivor: The Changes in the Usufruct of the Surviving Spouse*, 28 LOY. L. REV. 1095, 1098-1102 (1982) (describing the legislative history of this Section and the rationale behind it).

should be modified in two respects. First, restricting the survivor's use or disposition of marital property should be limited only to half of that property belonging to the deceased spouse. One's ability to impose such restrictions seems to derive from the power of each spouse to dissolve the partnership by making a will, which presumably includes the power to transfer her own property subject to caveats or conditions.[246] Neither spouse should be able to determine, unilaterally, the fate of the entire joint property, including the part to which the other spouse is entitled. Second, even unilateral action by a spouse that affects only her own half should be required to conform with the principle of reciprocity to avoid a situation in which only one spouse's authority over the property is limited (contingently, depending on the order of death). In the current context, this seems to require a mandatory notice provision requiring each spouse to inform the other about any unilateral action[247] to enable the other to respond if she so desires, and to subject the first spouse to the same (or different) limitations and reservations.[248] In any case, if one spouse wishes to restrict the disposition of the entire joint property in a manner that would require it to be consumed only to further the joint goals of both spouses and transferred pursuant to their joint inheritance plans, the way to do that is through a consensual arrangement, agreed upon in advance by *both* parties.[249] This can be achieved through a mutual will[250] or a joint trust[251] in which the two

246. For more on the extent to which a right to do something implies the right to condition the action, *see generally* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at the Greater Includes the Lesser*, 55 VAND. L. REV. 693, 726–734 (2002) (articulating the "greater-includes-the-lesser" inference); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2002).

247. *See* Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 234–35.

248. *See, e.g.*, Frantz & Dagan, *supra* note 11, at 82; Kornhauser, *supra* note 1, at 1424–34.

249. T. G. Youdan, *The Mutual Wills Doctrine*, 29 U. TORONTO L.J. 390, 394–95 (1979).

250. Scales v. Scales, 297 F.2d 219, 225 (5th Cir. 1961) ("Death of one of the parties to a mutual will, or mutual wills, will put effective revocation thereof beyond the legal right and power of the survivor."); Portmann v. Herard, 2 Wn. App. 2d 452, 461 (Wash. Ct. App. 2018) ("[U]pon the death of the testator of one mutual will, the agreed distribution in the second mutual will becomes irrevocable."); Triplett v. Perry (In re Leix Estate), 289 Mich. App. 574, 578 (Mich. Ct. App. 2010).

251. Youdan, *supra* note 249; John H. Martin, *The Joint Trust: Estate Planning in a New Environment*, 39 REAL PROP. PROB. & TR. J. 275, 277–78 (2004) (explaining the possible planning benefits of joint trusts); Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 REAL PROP. PROB. & TR. J. 345 (1997) (discussing the advantages and disadvantages of joint revocable trusts).

spouses will determine in advance the disposition of their property after their death.[252] Such a restriction on the freedom of disposition, which is generally seen as foreign to the world of wills, seems appropriate under the proposed surviving partnership model, as it allows both spouses to determine together the disposition of the property they have accumulated together, in partnership.[253] Such legal instruments may complement the option, discussed in the previous section, of allowing spouses to subject a special asset to a rigid structure that fortifies the agreement during life (by way of creating a TBE or contractually hardening the JT).[254]

Up to this point, this Article has considered a default rule that gives the survivor full authority to consume and bequeath the family property as she wishes, while each spouse holds the option to restrict that authority by requiring either notice of unilateral action or mutual agreement. However, full authority should not necessarily be the default regime. Absent contrary stipulation by the first deceased, at the time of the survivor's death, the property goes to the survivor's heirs.[255] If the first deceased had a child not in common, this child will be totally excluded.[256] Likewise, even the shares of common children will be diluted where the survivor has a new spouse or new descendants who were not part of the original partnership.[257] The logic of the surviving partnership seems to imply another legal regime: giving the survivor the right to manage and consume the property while stipulating as a default that at the time of the survivor's death, the marital property is distributed to the legal heirs of *both* spouses.[258] Under such a rule, upon the death of the first spouse, all of the couple's property is transferred to the surviving spouse, but upon the death of the original survivor, the partnership is dissolved and each partner bequeaths half of the property to his or her own heirs.[259] Thus, for example, if the first deceased

252. *See* John H. Martin, *The Joint Trust: Estate Planning in a New Environment*, 39 REAL PROP. PROB. & TR. J. 275 (2004).
253. Merk, *supra* note 251, at 346–48.
254. *Id.* at 349.
255. *See* Wright, *supra* note 97, at 60.
256. *See id.*
257. *Id.*
258. James T.R. Jones, *Interstate Inheritance and Stepparent Adoption: A Reappraisal*, 48 REAL PROP. PROB. & TR. J. 328, 330 (2013).
259. Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 100 (1996).

had a separate child, the couple has two common children and the survivor remarries, then upon the death of the survivor the first deceased's half of the remaining property would be allocated to his three children while the survivor's half would be allocated between her children and her new spouse. Within this proposed model, the bequeathing wishes of the deceased are respected, yet their implementation is postponed until the death of the original survivor.[260] Such a default includes two stages: a transfer to the survivor at the death of the deceased (t_1) and a distribution of the remaining marital property into two halves, allocated to each partner's heirs, at the survivor's death (t_2). This rule seems to be the default regime that follows from the idea of a surviving partnership.

Nevertheless, this Article still asserts that a one-stage default is superior, even from the perspective of the surviving partnership model. The reason is not a majoritarian default striving to imitate the wishes of the ordinary person in order to reduce transaction costs, or a normative default trying to channel families into a structure that reflects values of partnership. In contrast, this Article suggests upholding such a default as a kind of a penalty default, encouraging parties to stipulate their own desires facing the vast variety of possible preferences and familial structures.[261] The relationship between the parties and their stepchildren, the age of death and chances for future procreation, the level of trust between the spouses, and the relative weight they ascribe to their own ongoing needs relatively to their bequeathing interest, are so diversified, that a single default rule can hardly do justice to any concrete circumstances.[262] Similarly, the practical challenges of tracing the marital property and distinguishing it from the survivor's separate property, and the nature of the survivor's foreseen needs and available resources,

260. *Cf. supra* the text accompanying note 148. Such a rule reflects the intuition underlying the laws of intestate succession, according to which, in the case of descendants not in common, part of the estate is distributed to the deceased's descendants immediately upon the first death.

261. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989) ("If it is costly for the courts to determine what the parties would have wanted, it may be efficient to choose a default rule that induces the parties to contract explicitly."). *But cf.* Hirsch, *Default Rules*, *supra* note 135, at 1061 ("At the end of the day, penalty defaults have no place in our inheritance law.").

262. James T.R. Jones, *Interstate Inheritance and Stepparent Adoption: A Reappraisal*, 48 REAL PROP. PROB. & TR. J. 328, 328 (2013).

are also sensitive to the concrete circumstances of the parties.[263] The parties themselves are best situated to regulate the terms of the survivor's authority and the exact nature of the allocation at the survivor's death (t_2).[264] For that reason, devising these mechanisms on an opt-in basis is better suited for the realization of the surviving partnership view.[265] Therefore, the default rule should still allocate the couple's marital property at t_1 only, leaving it to the couple to stipulate otherwise in a way that is sensitive to their own needs and circumstances, based on their detailed knowledge and acquaintance.

In light of the above, it seems that, while it is more theoretically coherent to structure the default model as a two-phased allocation (in both t_1 and t_2), there are firm practical considerations in favor of a one-phased allocation. However, this is not to say that one has to entirely give up on limiting the survivor. A one-phased model which is more restricting can still be constructed, for example, in cases where there are children not in common. Above, this Article has considered the option of rejecting the surviving partnership model in those cases. Now, a more moderate possibility can be proposed, which does not involve giving up on the surviving partnership altogether, yet preserves the idea of a one-phase allocation that protects the heirs of the first deceased. According to such a model, as a matter of default, the surviving spouse does not become the full owner of all the couple's property. Rather, she will own only her half while holding only a life tenancy in the deceased's half, which expires with her own death and passes to the heirs of the first deceased. Arrangements such as this can be found in the existing law of some states.[266] The conventional view sees these arrangements as ensuring the welfare of the widowed spouse, while transferring real ownership of the property to the deceased's heirs. This Article suggests conceptualizing these arrangements as a moderate realization of the idea of the surviving partnership, which respects the surviving spouse's right to control the entire property while limiting

263. Merk, *supra* note 251, at 353.

264. *See id.*

265. *See id.*

266. *See* Lloyd, *supra* note 245, at 1098-1102. Some of these arrangements are designed to expire upon the remarriage of the survivor. Even beyond the outdated focus on marriage (facing the possibility of non-marital relationships), the idea of surviving partnership should include possible remarriage within the ongoing needs of the survivor. Therefore, we are not committed to all the details of the prevailing life tenancy arrangements.

her power to determine its disposition unilaterally after her own death. They grant the survivor broad access to the consumption of the partnership's assets for her own ongoing needs, while protecting the right of the first deceased to influence the distribution of the property upon the final dissolution of the partnership, i.e., the death of the surviving spouse, when there are no more needs of any partner. Such a default leaves again to the partners the opportunity to tailor themselves, for themselves, the exact scope of rights and powers given to the surviving spouse with regard to the assets they have accumulated jointly, in light of their circumstances, preferences, and expectations.[267]

IV. Conclusion

The partnership theory of marriage is the common theory for explaining and justifying marital property laws upon divorce.[268] This Article sought to focus the spotlight on a more neglected aspect of the theory that deals with its application upon the death of a spouse. The conventional view, based on the perception of death as the end of a marriage, requires full symmetry between the economic results of the dissolution of a marriage by divorce and its termination due to death, as well as full symmetry between the survivor and the deceased. According to this perception, deviations from symmetry observed in existing law are distortions in need of correction.

Contrary to this conventional view, this Article presented a theory that is committed to the idea of marriage as a partnership and adds another layer: the idea of the surviving partnership. The theory is based both on a presumed agreement between the spouses that applies the principles of maintenance and non-accounting, and on the nature of the family partnership as a community that survives the death of one of its members. Therefore, this Article advocated for a default marital property regime that, upon death, grants the surviving spouse the ownership, control, management power, and right to consume all of the assets of the partnership, which is to say, all of the marital property. At the same time, this Article proposed the creation of mechanisms that allow for unilateral termination of this surviving partnership, turning it—upon death—into a regular partnership, while securing reciprocity and

267. Obviously, if this is the default, the parties can contractually agree to broaden the power and authority of the survivor.

268. *See* Newman, *supra* note 4, at 488–89.

fairness between the partners. Moreover, this Article proposed diverse tools to enable the parties to determine the scope of the survivor's control of the property, with regard to both its consumption and disposition during the survivorship period and its allocation after the survivor's own death.

Although at first glance the default regime deviates from familiar understandings of marital property law, the analysis in this Article revealed that it is compatible with the practical results of existing succession laws, which, under certain conditions, grant the surviving spouse the entire estate. However, the rights of the survivor under succession law stem from the deceased's presumed wishes.[269] Hence, these rights depend on the deceased's family structure (such as the presence or absence of separate children); apply to the deceased's share in the marital property as well as to his separate property; and are vulnerable to unilateral and concealed revocation.[270] In contrast, the surviving partnership theory is not focused on the presumed wishes of the deceased, but rather on the shared understanding of both parties and partnership values with respect to the marital property that was acquired together through joint effort. This Article demonstrated how current property law, which includes survivorship rights, might mimic this result, and how conceptualizing current law under the surviving partnership model might help in understanding, evaluating, and amending the law.[271]

This understanding of the law and its proper application equips the surviving partnership model with tools for confronting a major weak spot in modern succession laws. As the literature reveals, succession laws evolved in the context of nuclear families consisting of married couples and their biological children. Applying these norms to the modern reality, characterized by an increase in divorce, blended families, and out-of-wedlock births, might misfire. Indeed, these and other circumstances have made it increasingly common for one's spouse at the time of one's death to be different from the partner with whom one raised children and accumulated assets over the course of many years. The laws of succession fail to account for these circumstances in two ways: First, they enlarge the spouse's share of the estate (in intestate

269. *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 781 (2009).
270. *See supra* notes 126-131 and accompanying text [Section III.A.1].
271. *See supra* Part III.

succession), despite the decrease in the strength of marital relationships. Second, they fail to distinguish correctly between different types of spouses, giving the same share to those who became widows or widowers after decades of living and raising children together, and those who were widowed after a short second (or successive) marriage in later years.[272] Looking at the partner's share in the light of marital property laws provides an answer to both challenges. The scope of the spouse's right is both proportionate to the length of the marriage and sensitive to whether the property was accumulated during the marriage. It is precisely in a world where marriages are not as stable as they once were that it makes sense to distinguish between the part of the property that was created by both spouses as partners in a joint effort and property that was accumulated by only one of them. A deceased spouse's interest in her share of property of the first type should be better protected than it is under current law. Focusing on the years of accumulation when determining the spousal share creates a self-sorting mechanism that distinguishes among couples based on the length of their marriage. This approach not only allows each couple to achieve a result that suits them, but also recognizes the plurality of marital arrangements and respects relationships with different characteristics. Adopting the proposed model, which allows the scope of the spouse's share to reflect the length and nature of the marriage, would increase the law's ability to tailor the surviving spouse's share to diverse lifestyles and circumstances.

The surviving partnership theory thus succeeds in combining two modern ideals that existing law struggles to address coherently. On the one hand, marital property laws governing divorce are committed to the theory of marriage as a partnership, which reflects a social ethos about the strength and uniqueness of the marital bond and the partnership created between the spouses during the marriage.[273] For the same reason, modern succession law has strengthened and broadened the spousal share, at the expense of the couple's descendants.[274] On the other hand, different marital relationships call for different forms of financial partnership. In a world of high divorce rates and multiple marriages, the law enables spouses to shape their financial relations via enforceable contracts and opt for different sorts of marital property

272. *See* Oldham, *Should the Surviving Spouse's*, *supra* note 26, at 232.
273. *See supra* Section I.A.
274. *See* Wright, *supra* note 97, at 9.

regimes.[275] At the same time, succession law respects an individual's freedom of disposition as well as perceptions of continuity and intergenerational bonds, which are ordinarily realized through one's descendants.[276] Granting the surviving spouse an elective share right to half of the entire estate, even where the couple separated their finances in a prenuptial agreement, seems inadequate. The proposed model, which distinguishes between the assets of the partnership and the respective spouses' private assets, furthers both sets of interests and creates a link between the marital property regime picked by the couple and the scope of the spousal share.

Through the lens of marital property law and the idea of surviving partnership, this Article thus provides a unified framework for analyzing the financial rights of the surviving spouse. One can embrace a view that is committed to true partnership without subscribing to symmetry between divorce and death and between the deceased and the survivor. The idea of surviving partnership leads to a better understanding of the relationship between different branches of current law and their functions, and offers criteria for evaluating current norms and pointing out needed amendments. Finally, it provides a conceptual basis for balancing autonomy and partnership while celebrating the triumph of life over death.

275. *Cf.* Baker, *supra* note 17, at 325.

276. *See* Shelly Kreiczer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. PROB. & TRUST L.J. 496, 498 (2012).