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Estate Planning

The Elective Share: An Often Illusory Right

An attorney must consider all the issues before advising a client to accept, or waive, the statutory share

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The Elective Share Statute, enacted in New Jersey in 1980, was meant to provide a measure of protection for a surviving spouse. The statute provides the spouse an “elective share” — a one-third interest in the decedent’s “augmented estate” — in the event of disinheritance. N.J.S.A. 3B:8-1 et seq.

While at first blush this may appear to be a right of some significance, a closer examination of the Elective Share Statute reveals that the converse is true in many instances. This fact underscores the need for a hard look at this statute with an eye toward whether it is worth risking the “protection” promised by the statute, or whether practitioners would be well-advised to consider suggesting to their clients a waiver of rights under the statute in exchange for other defined consideration.

This should provoke thought as to whether modifications to the statute are in order, a suggestion that is particularly timely since amendments to the Probate Code are currently being considered, but without any proposals to

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modify the elective share provisions.¹

Issues Inherent in the Statute

The entitlement under the statute is a fixed percentage — an elective share of “one-third” of the augmented estate. N.J.S.A. 3B:8-1. Yet, this fixed-fraction approach is inconsistent with the contemporary view of marriage as an economic partnership that New Jersey (and most other jurisdictions) has adopted, as demonstrated by our equitable distribution statute governing the division of assets upon divorce (N.J.S.A. 2A:34-23) and related cases.

The fixed-fraction approach has been criticized as failing to provide fair recognition to the contributions of a spouse to the marriage — the basic premise of the marital partnership theory. If the marital assets were disproportionately titled in the decedent’s name, the one-third statutory distribution would be significantly less than what would be required to equalize the assets. And if the assets were titled equally in both spouses’ names or titled disproportionately in the surviving spouse’s name, the one-third distribution would be significantly more.

It is for this reason that the Uniform Probate Code (UPC) employs a graduated percentage scale, with the percentage increasing annually based upon the length of the marriage until it reaches a maximum of 50 percent based on a mar-

riage of 15 years or more. See UPC at Section 2-202(a).²

Additionally, because it is a “need-based” statute, it allows for an elective share only to the extent needed to support the surviving spouse. Therefore, a surviving spouse may take one-third of the augmented estate only to the extent that his or her own assets do not satisfy the elective share (N.J.S.A. 3B:8-18(a)); (*In the Matter of the Estate of Bilsle*, 329 N.J. Super. 158, 161-62 (Ch. Div. 1999); *Aragon v. Estate of Snyder*, 314 N.J. Super. 635, 640 (Ch. Div. 1998)).

Calculation of the statutory share may yield only minimal, if any, entitlement to the surviving spouse’s estate. *In the Matter of the Estate of Ray D. Post*, 282 N.J. Super. 59, 78 (App. Div. 1995). This is in contrast to the UPC and statutes of other jurisdictions that satisfy the goal of spousal support by mandating that the surviving spouse receive a predetermined minimum amount (for example, \$50,000 in the UPC) through a “supplemental elective share.”³

Finally, entitlement under the Elective Share Statute is conditioned upon the amorphous requirement that, at the time of death, the decedent and the surviving spouse “had not ceased to cohabit as man and wife, either as the result of judgment of divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce or nullity of mar-

riage to a decedent prior to his death under the laws of this State.” N.J.S.A. 3B:8-1.

This provision leaves the right of election open to another layer of challenge by requiring inquiry, after a decedent’s death, into whether a cause of action for divorce existed — regardless of fault and even if a divorce complaint had not been filed prior to decedent’s death. See *In the Matter of the Estate of Herbert Hersh, Deceased*, 195 N.J. Super. 74 (App. Div. 1984) (existence of no-fault ground for divorce barred surviving spouse’s right to statutory elective share); *McKay v. Estate of Louis McKay*, 205 N.J. Super. 609 (Law Div. 1984) (after inquiry into statutory grounds for divorce, court concluded that plaintiff not barred from elective share).

A further anomaly is that an outsider to the marital relationship will press this “marital disqualification” defense. See, e.g., *In the Matter of the Estate of Ray D. Post*, 282 N.J. Super. 59 (App. Div. 1995) (defense raised by decedent’s granddaughter as executrix of the estate).

Whether the surviving spouse actually receives any assets as a result of a decision to exercise the elective share involves immensely complicated issues, calculations and proofs in determining what constitutes the “augmented estate” (see N.J.S.A. 3B:8-3, 3B:8-5, 3B:8-6, 3B:8-7), and the manner in which the interest is to be satisfied (N.J.S.A. 3B:8-18).

For example, the value of certain inter-vivos and nonprobate transfers of property made by the decedent is included in fixing the augmented estate. Property transfers made by the decedent years earlier must therefore be identified and, if they are within the scope of the statute, a determination must be made whether “adequate and full consideration” had been received for each transfer.

If such consideration had not been received, then the value of the property is included in the augmented estate (N.J.S.A. 3B:8-3), requiring a determination of value for some transfers “as of the date the donee came into possession or enjoyment of the property.” N.J.S.A. 3B:8-4.

The same is true of certain transfers made by the surviving spouse to any person other than the decedent at any time during the marriage. N.J.S.A. 3B:8-6(b). While the value of such transfers are to be included once they are determined, the statute then allows substantial value to be placed beyond the reach of the surviving spouse by excluding the value of life insurance, accident insurance, joint annuity or pension payable to a person other than the surviving spouse from the augmented estate (N.J.S.A. 3B:8-5), further eroding the protective purpose of the statute.

Additionally, it is the surviving spouse’s own property, including that inherited from the decedent, which is first applied toward satisfaction of the elective share (N.J.S.A. 3B:8-18(a)), thereby often eliminating any elective share distribution to the surviving spouse from the deceased spouse’s estate.

The Waiver Option

The concerns presented by the statute in its current form should prompt serious consideration when counseling a client on the ability of a spouse to waive the elective share in exchange for other more definite value or assets.

Such a waiver, expressly permitted by the statute (N.J.S.A. 3B:8-10), would eliminate the uncertainties inherent in the statute and avoid the expense and complexity of lengthy litigation — considerations which are significant since probate matters often require expeditious resolution in the interests of the decedent’s surviving spouse and beneficiaries.

But, before a waiver is obtained, counsel should pay particular attention to the disclosures required in connection with the waiver, lest the waiver fall as unenforceable.

The statute permits waiver of the right to an elective share before or during marriage “by a written contract, agreement or waiver, signed by the party waiving *after fair disclosure*.” (N.J.S.A. 3B:8-10). Unfortunately, the statute does not define what is meant by “fair disclosure.”

Significantly, the elective share

waiver standard appears to conflict with the standard for waiver of rights (including rights upon death of a spouse) through an antenuptial agreement under the Uniform Premarital Agreement Act. That Act requires “full and fair disclosure of the earnings, property and financial obligations of the parties” prior to execution of the agreement (N.J.S.A. 37:2-38(e)(1)), and also requires that a statement of assets be attached to the agreement. N.J.S.A. 37:2-33.

The distinction is important because, in contrast to the “full disclosure” standard, “fair disclosure” has been held to require only approximation or general knowledge of the nonwaiving spouse’s assets. For example, in *In Re Estate of Lopata*, 641 P.2d 952 (Colo. 1982), the Court stated that “fair disclosure” does not contemplate detailed disclosures such as financial statements of net worth or information regarding the nature, extent and value of the property, but requires only that each spouse be given information of a general nature concerning the other’s net worth. See also *In re Estate of Hill*, 335 N.W.2d 750 (Neb. 1983). See also *Ruzic v. Ruzic*, 549 So.2d 72 (Ala. 1989) (“fair disclosure” requirement of elective share waiver under Probate Code is synonymous with “approximate value” requirement of antenuptial agreement under matrimonial law).

If waiver of the elective share is considered an option, practitioners should be aware of the possibility that a seemingly valid waiver may be invalidated if “full and fair disclosure” of assets was required and was not provided.⁴ This is not a fanciful suggestion, for a persuasive argument can be made that the standard for waiver under the elective share provision of the Probate Code should be the same as that governing antenuptial agreements which often contain a waiver of the elective share.⁵

Although this issue has not been definitively resolved in New Jersey, it was pressed before the trial court in *Chrisomalis v. Chrisomalis*, 260 N.J. Super. 50 (App. Div. 1992). In an unreported decision, the trial court found that the “fair disclosure” standard of the UPC applied, and on other grounds held

the antenuptial agreement unenforceable. The appellate division affirmed without addressing the appropriate standard of disclosure. The issue of the appropriate standard and nature of disclosure for a waiver of the elective share was vigorously pursued recently in *In the Matter of the Probate of the Will of Charles Kruvant, Deceased* in the Superior Court, Probate Part, Essex County (Docket No. CP-0171-2002), which settled before the court rendered a decision.

Courts in other jurisdictions have emphasized the importance of consistency in applying the same disclosure standard to both probate matters and prenuptial agreements that include a waiver of an elective share.⁶ Moreover, even before enactment of the Uniform Premarital Agreement Act, New Jersey had a strong policy favoring full financial disclosure with respect to waivers of financial rights in premarital agreements. See, e.g., *Marschall v. Marschall*, 195 N.J. Super. 16 (Ch. Div. 1984).

In short, these issues demonstrate

only that the Elective Share Statute in its present form should trigger much thought and preparation: should it remain as an option for a client? Should it be waived? What disclosures should be made for an enforceable waiver? ■

Footnotes

1. See Assembly Bill A-2046, introduced Feb. 5, 2004.

2. This graduated-scale approach is viewed as more accurately reflecting the long-term spouse's contributions, both monetarily and nonmonetarily, to the marital estate. See Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. Miami L. Rev. 567, 586 (1995)

3. See UPC 2-202(b). The supplemental elective share is the amount required to bring a surviving spouse's entitlement to \$50,000 when added to the elective share entitlement.

4. The issue raised clearly impacts waivers of the elective share contained in antenuptial agreements entered before

Nov. 3, 1988 (the effective date of the Premarital Agreement Act) as well as waivers not contained in such agreements. A waiver contained in an Agreement entered after the Act became effective but held invalid on other grounds may also raise the issue.

5. Indeed, in adopting the elective share statute, the New Jersey Legislature relied in part on the Uniform Probate Code of 1969 (Historical Note to N.J.S.A. 3B:8-10). The Comments to the Uniform Probate Code indicate that the "fair and reasonable disclosure" standard contained in the Uniform Probate Code was derived from Section 6 of the Uniform Premarital Agreement Act that also requires "fair and reasonable disclosure." The Uniform Probate Code thus simply mirrored the disclosure requirements set forth in the Uniform Premarital Agreement Act.

6. See, e.g., *Dematteo v. Dematteo*, 762 N.E.2d 797 (Mass. 2002); *In re Lutz*, 563 N.W.2d 90 (N.D. 1997); *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990); *In re Estate of Beesley*, 883 P.2d 1343 (Ut. 1994).