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WEST VIRGINIA TAKES A STEP BACKWARD IN ELECTIVE SHARE LAW

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I. INTRODUCTION

In 1992, when West Virginia became the first state to enact the elective share provisions of the 1990 Revised Uniform Probate Code (RUPC), its efforts were applauded for setting the standard in probate reform.¹ The revised elective share provisions were designed to prevent spousal disinheritance, recognize the surviving spouse's contribution to the marriage, and ensure that the surviving spouse has continued financial support after the death of his or her spouse.² The idea of the "augmented estate" was at the heart of accomplishing the statutes' intended purpose. It included all property, real and personal, probate and nonprobate, in which the decedent had an interest.

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¹ Patricia J. Roberts, *The 1990 Uniform Probate Code's Elective-Share Provisions — West Virginia's Enactment Paves the Way*, 95 W. VA. L. REV. 55 (1992).

² *Mongold v. Mayle*, 452 S.E.2d 444, 447 (W. Va. 1994) (holding that premarital will did not preclude surviving spouse from taking elective share).

In 1995, by changing just one provision of West Virginia Code,³ the West Virginia Legislature may have inadvertently destroyed all that it had accomplished. Although Senate Bill 419 was passed as merely a “housekeeping” amendment, it has created a real mess. The definition of “Augmented Estate” was revised so as not to include “[I]ife insurance, accident insurance, pension, profit sharing, retirement and other benefit plans payable to persons other than the decedent’s surviving spouse or the decedent’s estate.”⁴ The exclusion of any one of these from the augmented estate is questionable; however, this article will focus on the most accessible and dangerous of the spousal disinheritance weapons: life insurance.

II. BACKGROUND

A. *Pre-1992 Spousal Rights*

Civilization has confronted spousal disinheritance for centuries.⁵ At common law, widows were protected by dower, a life estate in one-third of all lands in which her deceased husband owned during their marriage.⁶ A widower was protected by curtesy if there was a child born of the marriage. Curtesy consisted of a life estate in all of the wife’s inheritable land. Neither dower nor curtesy could be defeated by will or inter vivos conveyance without the cooperation of the other spouse.⁷

Dower and curtesy worked reasonably well for the agrarian societies where land was the major asset. However, as time passed and economies changed, dower and curtesy did nothing to provide personal property for the surviving spouse and was lamented for interfering with the alienability of land.⁸ Thus, many states abolished dower and curtesy in favor of forced share statutes.

Prior to 1992, West Virginia sought to protect the spouse against disinheritance by providing a fixed share of the decedent’s probate estate in lieu of

³ W.VA. CODE § 42-3-2(c) (Supp. 1996).

⁴ W. VA. CODE § 42-3-2(c) (Supp. 1996).

⁵ John W. Fisher, II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems*, 93 W. VA. L. REV. 61, 101 (1990).

⁶ 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 420-22 (2d ed. 1923).

⁷ *Id.* at 409-11, 424.

⁸ Fisher & Curnutte, *supra* note 5, at 101.

the share provided in the will.⁹ The forced share statute was designed to achieve two purposes: (1) ensure support for the surviving spouse, and (2) recognize the contribution of both spouses to the marital partnership.¹⁰ However, because the statutory scheme could be easily evaded by depleting the probate estate, neither of the purposes for the statute were accomplished. The end result of this forced share statute was court battles over fraudulent and illusory nonprobate transfers.¹¹

B. 1992 Elective Share Law

The RUPC sought to create a system whereby spousal disinheritance was prevented and the uncertainty of ad hoc judicial interpretation was avoided. The primary component of this system is the augmented estate. Essentially, the augmented estate consists of all the property, both real and personal, owned by the spouses.¹² Thus, the RUPC augmented estate prevents disinheritance evasion games, ensures, to the extent possible, support for the surviving spouse, and recognizes the contribution of both spouses to the marriage.

There are four basic steps to the elective share system in West Virginia.¹³ First, all the assets of the decedent and the surviving spouse are added together (augmented estate). Second, the augmented estate is multiplied by a percentage set forth in West Virginia Code Section 42-3-1. This percentage is based upon the length of marriage.¹⁴ The figure obtained by this calculation represents the elective share amount. Third, (the crediting stage) all amounts passing to the surviving spouse by testate or intestate succession or by nonprobate transfers are applied first to satisfy the elective share amount. The surviving spouse is also charged with the

⁹ W. VA. CODE § 42-3-1 (Supp. 1996).

¹⁰ Fisher & Curnutte, *supra* note 5, at 102.

¹¹ See *Davis v. KB & T Co.*, 309 S.E.2d 45 (W. Va. 1983); *Johnson v. Farmers & Merchants Bank*, 379 S.E.2d 752 (W. Va. 1989). For discussion of these cases, see Fisher & Curnutte, *supra* note 5, at 104-107.

¹² For a more complete discussion of the augmented estate, see Roberts, *supra* note 1, at 79.

¹³ This Note will provide only a brief overview of the elective share law. For a more detailed discussion, see Roberts, *supra* note 1.

¹⁴ For example, if the couple had been married for one year, the applicable percentage is only 3%, but if they had been married for 15 or more years, then the surviving spouse is entitled to the highest percentage under the elective share law, 50% of the augmented estate. This idea of "incremental-vesting" allows the RUPC to accomplish the goal of recognizing each spouse's contribution to the marriage. The longer the marriage, the more contribution is recognized.

amount of any property that would have passed to him or her but was disclaimed. Finally, the surviving spouse is credited with a portion (up to 100%) of his or her own assets.¹⁵

If, after the third step, there is no deficit, the process ends.¹⁶ However, if there is a deficit or entitlement to a supplemental elective share, West Virginia Code Section 42-3-6 sets forth a system of contribution. This fourth step prioritizes recovery. If contribution is required, the shares of the other beneficiaries of the decedent's probate estate and reclaims¹⁷ are reduced. The beneficiaries, with the exception of donees of irrevocable transfers made within two years of death, contribute shares proportional to their interest in the decedent's reclaimable estate. If there is still a deficit after all of the shares of the other beneficiaries have been exhausted, then the donees of irrevocable transfers within two years of death are required to contribute.

III. 1995 REVISION AND ITS CONSEQUENCES

The Floor Book Memo on Senate Bill 419 states that the new law was needed to clarify "the rights and liabilit[ies] of payors and third parties with respect[] to proceedings involving a petition for an elective share of an estate."¹⁸ In discussing the list of assets excluded from the augmented estate, the memo states that these were excluded to allow the "intentions of the deceased to control [their] disposition"¹⁹

One argument for the exclusion of life insurance²⁰ from the augmented estate is that if a spouse could challenge the contract by invoking the elective share,

¹⁵ West Virginia Code § 42-3-6(a)(4) credits the surviving spouse with the applicable percentage of property which he or she already owned. The applicable percentage is twice the elective share percentage used from West Virginia Code § 42-3-1.

¹⁶ Note that West Virginia Code § 42-3-1(b) provides for a supplemental elective share amount if, after the deficit is added to the assets owned by the surviving spouse, the sum is less than \$25,000. If this is the case then the surviving spouse is entitled to whatever additional amount is necessary to bring this sum up to \$25,000.

¹⁷ The reclaimable estate consists of the decedent's nonprobate assets. W. VA. CODE § 42-3-2(b)(2) (Supp. 1996).

¹⁸ WEST VIRGINIA SENATE COMMITTEE ON JUDICIARY, FLOOR BOOK MEMO, COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 419, (February 17, 1995).

¹⁹ *Id.*

²⁰ And the other assets excluded in West Virginia Code § 42-3-2(c) (Supp. 1996).

insurers would have to proceed to court to determine who to pay.²¹ The argument is that it is too burdensome on the insurance agencies to determine if they have paid the proper beneficiary or whether they are exposing themselves to potential liability. However, Senate Bill 419 also sets forth elaborate provisions that protect the insurance agency and other third party payors from liability or involvement. Section 42-3-2(e) provides that third party payors (e.g., an insurance company) can, without liability, pay the policy's named beneficiary if the surviving spouse has not given them actual notice of a contrary claim. If the surviving spouse does make a claim prior to payment, the proceeds are simply made to the court with no court costs or proceedings necessary for the insurance company. In either case, the insurer has no further liability and need not expend resources on investigating or litigating potential elective share claims.

With regard to the freedom of disposition argument, state law has long protected surviving spouses from disinheritance by will (probate transfers). If the public policy of this state is to protect surviving spouses from disinheritance by will, why would we allow disinheritance by a will substitute? Recognizing this fact, the federal government protects surviving spouses from being deprived of employee death benefits under plans covered by the Employee Retirement Income Security Act (ERISA), as amended by the Retirement Equity Act of 1984 (REACT).²²

Furthermore, there is a profound parallel between the RUPC augmented estate and the federal estate tax. The federal estate tax includes both probate and nonprobate transfers (including life insurance). The reason is that if the federal government only taxed probate transfers, the tax would be ineffective because people could avoid taxation simply by using nonprobate transfers. Likewise, if the government taxed both probate and nonprobate transfers, but omitted one form of nonprobate transfer—life insurance—then people would use life insurance to avoid the estate tax. The same point is true for the elective share.²³ If life insurance is exempted, then life insurance will be the “estate-depleting transfer of choice” for people wanting to disinherit their surviving spouse.²⁴

The drafters of the RUPC recognized this estate-depleting danger in the comments: “Although the augmented estate under the pre-1990 Code did not

²¹ Jane Bryant Quinn, *Insurance Ploy Can Leave Spouse Penniless*, CHI. TRIB., Nov. 19, 1995, § 5, at 3.

²² Memorandum from the Joint Editorial Board for Uniform Probate Code, *Response to the Life Insurance Lobby*, 2 (1996) (on file with author) [hereinafter “Memorandum”]. For ERISA provision see 29 U.S.C. § 1055 (1994).

²³ *Id.* at 3.

²⁴ *Id.*

include life insurance . . . the revisions do include their value; this move recognizes that such arrangements were, under the pre-1990 Code, used to deplete the estate and reduce the spouse's elective-share entitlement."²⁵ Inclusion of life insurance in the property subject to the elective share is supported by the Uniform Law Conference (in the UPC), the American Law Institute (in the Restatement, Second, of Property: Donative Transfers), the American Association of Retired Persons (AARP), and by the Consumer Federation of America.²⁶

In addition to being contrary to the purpose of the elective share provisions, the 1995 revision to West Virginia law also renews questions that existed prior to the 1992 adoption of the UPC all-inclusive augmented estate. For example, in the pre-1992 days, there was always the looming question of whether the transfer of a probate asset into nonprobate form was fraudulent as to the surviving spouse.²⁷ An illustrative case is *Johnson v. Farmers & Merchants Bank*.²⁸

West Virginia law, at the time of *Johnson*, only allowed the surviving spouse to elect a statutory share of the decedent spouse's *probate* estate. Thus, one could still legally disinherit his spouse as long as he used nonprobate assets. Nevertheless, the Court in *Johnson* allowed nonprobate assets to be counted towards the elective share where such nonprobate transfer was found to be illusory. In *Johnson*, the decedent husband had created an inter vivos trust into which he placed most of his assets. The court, using a "balancing of equities" approach, held that the transfer into trust was illusory and thus ineffective against the surviving spouse's elective share claim because the husband had retained dominion and control over the assets placed in the trust.

Leaving the elective share to ad hoc judicial interpretation is unacceptable. Indeed, West Virginia's adoption of the RUPC was due, in part, to avoid the need for such continual judicial intervention. The elective share laws will now be more complicated than ever. As in the days of *Johnson*, neither the estate planner nor the client will be able to know whether the estate plan they have designed will withstand judicial scrutiny under this new law. Now that life insurance has been exempted,²⁹ how long will it be before counsel for surviving spouses argue that a purchase of life insurance was fraudulent and thereby should be included in the augmented estate?

²⁵ UNIFORM PROBATE CODE § 2-205 cmt. (1993).

²⁶ Memorandum, *supra* note 22.

²⁷ *See supra* note 11.

²⁸ *Johnson*, 379 S.E.2d at 752.

²⁹ And the other assets excluded in West Virginia Code § 42-3-2(c) (Supp. 1996).

IV. CONCLUSION

It took just three years and one sentence for West Virginia to fall from being a national leader in probate reform. Removing life insurance³⁰ from the augmented estate is a step in the wrong direction. The primary reasons West Virginia adopted the RUPC legislation were to prevent spousal disinheritance and to ensure that the surviving spouse has continued financial support after the death of his or her spouse. The exclusion of life insurance contradicts those stated purposes. While Senate Bill 419 painstakingly sets forth new provisions so that payors would not need to be unnecessarily burdened with administrative costs or malpractice liability, it turns around and exempts the third party payors affected by those provisions. The West Virginia Legislature must revisit this matter for they have forgotten the purposes behind this legislation. Maybe in their “housekeeping” rush they overlooked the reasons the “house” was built in the first place.

³⁰ And the other assets excluded in West Virginia Code § 42-3-2(c) (Supp. 1996).

