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Inequities, unintended consequences of spousal elective share

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In its recent decision in *Ciani v. MacGrath*, 481 Mass. 174 (2019), the Supreme Judicial Court both settles the meaning of an ambiguous and outdated probate law as it relates to real estate and, for the third time in as many decades, implores the Legislature to update the statute.

At issue in *Ciani* is the surviving spouse's interest in real estate under the "spousal elective share" statute, the law governing the right of a living spouse of a deceased person to waive provisions of a will and receive a statutory share, regardless of what is (or is not) provided for in the deceased's written will.

The question of how to revise this law has long divided the Massachusetts legal community, and bills attempting to amend it have died in legislative committee on no fewer than four occasions. Thus, the recent SJC interpretation may provide the last word on the matter for some time to come.

But in an attempt to protect one surviving spouse, the decision creates a mechanism that may hinder the ability to remain in the home for the surviving spouse's lifetime over the objections of the decedent's issue.

The Massachusetts spousal elective share statute, G.L.c. 191, §15, allows a surviving spouse to waive the provisions of a will and receive from the estate one-third of the personal and one-third of the real property if the deceased left issue.

However, if the value of the share of personal and real property exceeds $25,000, the surviving spouse "shall receive in addition to that amount, only the income during … her life of the excess of … her share of such estate above that amount, the personal property to be held in trust and the real property vested in … her for life, from the death of the deceased."

A surviving spouse's share of the estate would increase from this amount from one-third to one-half if the decedent died without issue but had kindred, again with the provision that if the share is greater than $25,000, it is subject to limitations. If there were no issue or kindred, a surviving spouse's share would increase to take $25,000, plus one-half of the personal and real estate absolutely.

Not all property in which a decedent had an interest is subject to the spousal elective share. Only the probate estate is subject to the terms of the statute. In *Sullivan v. Burkin*, 390 Mass. 864 (1984), the SJC expanded the reach of the statute to include inter vivos revocable trusts settled by the decedent. In the subsequent case of *Bongaards v. Millen*, 440 Mass. 10 (2003), the SJC declined to expand the reach of the statute when it excluded trusts settled by third parties.

Though not often applied in practice, the spousal elective share doctrine raises a critically important point of public policy: To what extent will the law interfere with a deceased person's written will to provide a living spouse with more inheritance than (s)he would otherwise receive? Public policy prevents the disinheritance of a spouse to protect a surviving spouse's right to support and property acquired during the marriage.

However, the statute fails to consider property owned by the surviving spouse individually or received by a surviving spouse outside of the probate estate that may provide substantial benefits and certainly should not be considered a disinheritance.

With respect to short-term marriages, the implementation of the statute produces windfalls for the surviving spouses who are not in need of support nor did they make significant contributions, if any, to the acquisition of the property.

However, in long-term marriages, as noted by the SJC, the statute is "woefully inadequate."

In long-term marriages, application of the statute for a surviving spouse often results in substantially less property than what would otherwise be received as a divorcing spouse pursuant to an equitable division of the marital estate under G.L.c. 208, §34.

The definition of marital estate is quite expansive. For example, the court has authority to divide all vested and unvested benefits, rights and funds in a divorce regardless of which spouse holds title. Often, in long-term marriages of greater than 20 years, a spouse will receive approximately one-half of the marital estate and an indefinite alimony award not subject to durational limits.

The *Ciani* decision interprets the law to permit a surviving spouse to receive an unrestricted, vested life estate in one-third of any real property conveyed under the will (inclusive of the power to force the partition of that real estate) where the decedent leaves issue and the one-third share is greater than $25,000.

In so deciding, the SJC has reaffirmed the importance of positive planning to remove any incentive for a surviving spouse to elect against the will and to throw a monkey wrench into the administration of the estate. This decision empowered a surviving spouse of less than two years to force the partition of real estate held by the deceased spouse for decades and that had been acquired with his deceased first wife.

In 2012, proposed legislation would have altered the spousal elective share to implement a more equitable statutory formula that would increase the share of a surviving spouse in a long-term marriage and decrease (or even eliminate) the share of a surviving spouse in a short-term marriage.

Essentially, a surviving spouse would receive one-half of the value of the marital property portion of the augmented estate, which would more closely approximate the equitable distribution statute in divorces.

The proposed changes did not limit the surviving spouse's interest to the decedent's probate estate, as the assets of the surviving spouse were a part of the calculation, as well as the receipt of death benefits that are not currently part of the elective share, including but not limited to, life insurance, pensions, retirement plans, trusts and jointly held property. This approach recognized the contributions of the spouses to the acquisition of assets during the marriage, which was more in line with modern notions of property, as opposed to obtaining a set portion of an estate.

Because factors like the length of a marriage or the provenance of accumulated wealth are not considered in computing the elective share under current law, the issue is particularly important in a case like this, in which all the estate assets were accumulated prior to the marriage, the duration of the decedent's second marriage was less than two years, and the decedent is survived by children from his first marriage.

With this decision the surviving spouse will be entitled to claim her elective share and then preserve that portion of the estate for children unrelated to the decedent — disrupting decades or even centuries of family property. A surviving spouse now holds the power to force the division or sale of real estate that has been in the family's name for decades over the objection of the decedent's children.

Though the surviving spouse in *Ciani* wished to force the sale of the real estate by partition, the decision severely undermines the right of a surviving spouse who wishes to remain in the marital home for life.

As declared by the SJC, a surviving spouse holds a one-third possessory life estate while the decedent's children hold a possessory two-thirds absolute interest in the property. As both the surviving spouse and the children have a possessory interest in the real estate, they hold a tenancy in common.

In so holding, the SJC has not only granted the surviving spouse the right to partition, but a decedent's issue also enjoys the absolute right to partition. It is this holding that serves to severely undermine the right of a surviving spouse to remain in the home for life.

Unlike *Ciani,* where there were multiple parcels of real estate, a more typical estate consists of a home, personal property, and banking or investment accounts. If a surviving spouse claimed the spousal elective share and sought to remain in the home, that right could be disrupted by the children. As they all hold a tenancy in common, if the children seek partition of the real estate, a sale would be likely, as an advantageous, physical division of the home would be impracticable. As a result, despite holding a life estate in one-third of the real estate, a surviving spouse could be forced out of the marital home by the children because a sale would be required to make partition.

Given the increase in the number of blended families, it is not unusual for spouses who have children from prior relationships to evidence a desire that they receive all or the bulk of the assets amassed prior to the marriage.

It is in these circumstances that it is essential to understand the nature and application of the spousal elective share. If a testator names a spouse as beneficiary of retirement accounts and life insurance policies but the will leaves the probate estate to the children, under current law the surviving spouse can still waive the provisions of the will in favor of the spousal share, disrupting the entire estate plan.

In determining the spousal share, the court is precluded from considering what the testator provided for the surviving spouse outside of the probate estate or the origin of the assets in the probate estate.

Certainly, individuals seeking to protect their intended dispositions should consider obtaining a valid waiver of the right to assert the spousal elective share by way of a prenuptial or postnuptial agreement. Such waivers may serve as a protection against the disruption of a testator's estate plan and prevent the liquidation of family property.

In lieu of such agreements, alternate distributions could be considered, such as naming the children as beneficiaries of the non-probate assets or conveying real estate to the children while retaining a life estate to limit the scope of the statute.

Until the Legislature hears the calls of the judiciary and the bar, practitioners will continue to deal with this gendered, "unwieldy" and obsolete statute that fails to comport with "modern notions of marital property."

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