Inequities, unintended consequences of spousal elective share

By Maria L. Remillard

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in Ciani v. MacGrath, 481 Mass. 174 (2019), the Supreme Judicial Court both settles the meaning of an ambiguous and outdated probate law as it relates to real estate and, for the third time in as many decades, implores the Legislature to update the statute.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 surviving spouse to receive one-third of a deceased person’s estate plus one-half of the personal and real estate absolutely. In long-term marriages, the application of the statute produces windfalls for the surviving spouse, who sometimes receive all of the estate.

This decision empowers a surviving spouse of less 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. Barkin, 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 Bonva-gards v. Mollen, 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 disinheriting of a spouse to protect a surviving spouse’s right to support

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