

2017 Convention  
**Champions  
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**Family Law Section Luncheon**  
**New Augmented Estate Laws in  
Virginia and Their Intersection with  
Family Law**

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# WHERE FAMILY LAW & TRUSTS & ESTATES COLLIDE:

## THE NEW ELECTIVE SHARE & AUGMENTED ESTATE IN VIRGINIA

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### I. WHAT IS ELECTIVE SHARE?

Generally, prior to 1991 and Virginia's adoption of the spousal elective share, there was dower and curtesy and renunciation. Renunciation of a will was a statutory scheme under which a spouse would essentially renounce a testamentary disposition in favor of a statutory one. If a person made such an election, then the statute would take over, and that would be the case even if the spouse ultimately received less than what the will provided. Essentially, one needed to be certain that one would receive more with renunciation and not less. *See, e.g., First Nat'l Exchange Bank v. Hughson*, 194 Va. 736, 745-747 (1953).

Dower and curtesy were rights conferred upon spouses, particularly as to real estate. Spouses were entitled to fee simple interest in one-third of all real estate owned by the deceased spouse. *See, e.g., Jacobs v. Meade*, 227 Va. 284 (1984). Curtesy was the husband's right to one-third of wife's real estate, and dower was the wife's right to one-third of husband's real estate. *See id.* Virginia has since abolished dower and curtesy. *See* Va. Code §§ 64.2-301 & 64.2-308.2.

In 1991, the General Assembly voted to adopt the elective share, which is a statutorily mandated percentage of a portion of decedent's estate, based upon what is known as the "augmented estate." The "augmented estate" has its roots in the Uniform Probate Code, which at the time, Virginia declined to enact. Instead, Virginia opted to utilize portions of the UPC and formulated its own, unique version of the elective share and augmented estate.

The Supreme Court of Virginia has stated that "the purpose of the augmented estate legislation . . . is to prevent one spouse from disinheriting the other by transferring property prior to the transferor's death and thereby diminishing the transferor's estate." *Chappell v. Perkins*, 266 Va. 413, 421 (2003). Essentially, a spouse is the only person entitled to inherit from an estate.

The right of a surviving spouse to claim an elective share is one conferred by statute, and accrues "by operation of law." *Pysell v. Keck*, 263 Va. 457, 460 (2002). The law has changed since the newly adopted statutes, so let's take a look at the new law and what that means for those of you practicing in the area of family law.

## **II. THE NEW LAW – VIRGINIA'S ADOPTION OF THE UNIFORM PROBATE CODE'S ELECTIVE SHARE PROVISIONS.**

The new law is a deviation from the prior statutes. We will go through an overview first, before diving into the new statute.

### **A. GENERAL OVERVIEW**

One of the first things you will notice about the new law is that there is a graduated scale in terms of benefits accruing to the surviving spouse. Under the old law, a spouse could either receive fifty percent from a decedent with no children or one-third from a decedent with children. *See* Va. Code Ann. § 64.2-304.

Another difference is the statutory filing period. There was a six month period filing period, which remains the same, but under the new law, a spouse has six months to file a suit to enforce the elective share. Under the prior laws, the suit to enforce could be filed by either the estate or the spouse. *See* Va. Code Ann. § 64.2-306(D).

Further, there are a number of defenses to the claim of elective share, and we should definitely take note of those. None of these defenses were codified under the prior laws. Finally, it is clear that a fiduciary acting on the spouse's behalf can make the election. There was a lot of disagreement about this requirement, since under the prior law of renunciation, no one other than the spouse could make the claim. *See, e.g., First Nat'l Exchange Bank v. Hughson*, 194 Va. 736 (1953). *But see Grubb v. Yacoub*, 86 Va. Cir. 503, 507 (Fairfax Co., 2013) (decided under elective share law). When reviewing the analysis employed by the Fairfax County Circuit Court in *Grubb v. Yacoub*, it is clear that there had been no prior holding of whether attorneys-in-fact, guardians, or others could stand in the shoes of the surviving spouse:

The Supreme Court of Virginia specifically stated in a footnote in *Haley* that it was not addressing the issue of whether an attorney can make a claim for elective share under § 64.1-13 for a client. **272 Va. at 708**. This strongly suggests that the *Haley* decision purposefully left the door open for a claim made in writing and signed and acknowledged by another in accordance with § 55-106.

*Grubb v. Yacoub*, 86 Va. Cir. 503, 507 (Fairfax Co., 2013).

The law has now been clarified as to that point.

## **B. SPECIFIC PROVISIONS**

Let's now focus on the 17 subsections.

### 1. The definitions section – where the statute begins:

A. The provisions of this article shall apply to determining the elective share of a surviving spouse for decedents dying on or after January 1, 2017.

B. As used in this article, unless the context requires a different meaning:

*"Decedent's non-probate transfers to others"* means the amounts that are included in the augmented estate under § 64.2-308.6.

*"Fractional interest in property held in joint tenancy with the right of survivorship,"* whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.

*"Marriage,"* as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.

*"Non-adverse party"* means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or non-exercise of the power that he possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

*"Power"* or *"power of appointment"* includes a power to designate the beneficiary of a beneficiary designation.

*"Presently exercisable general power of appointment"* means a power of appointment under which, at the time in question, the decedent, whether or not he then had the capacity to exercise the power, held a power to create a present or future interest in himself, his creditors, his estate, or creditors of his estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.

*"Property"* includes values subject to a beneficiary designation.

*"Right to income"* includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.

*"Transfer,"* as it relates to a transfer by or of the decedent, includes (i) an exercise or release of a presently exercisable general power of appointment held by the decedent, (ii) a lapse at death of a presently exercisable general power of appointment held by the decedent, and (iii) an exercise, release, or lapse of a general power of appointment that the decedent created in himself and of a power described in subdivision 2 b of § 64.2-308.6 that the decedent conferred on a non-adverse party.

Va. Code Ann. § 64.2-308.1 (2017).

## 2. Amount of Elective Share

Next, we have the statute that tells us what the amount of the elective share is.

Remember, the elective share is a fraction of the “augmented estate”:

A. The surviving spouse of a decedent who dies domiciled in this state has a right of election, under the limitations and conditions stated in this article, to take an elective-share amount equal to 50 percent of the value of the marital-property portion of the augmented estate.

B. If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share amount.

C. The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

Va. Code Ann. § 64.2-308.3 (2017).

So, subsection states that an electing spouse may claim a share equal to 50 percent of the value of the marital-property portion of the augmented estate. This is the first time we hear terms that very closely resemble family law. In the prior iteration, there was nothing called the “marital-property portion” (although property owned prior to marriage and maintained separately was not counted in the augmented estate under prior law). You will also note that this term is not defined in the definitions section. Rather, it is defined in the next section, which is the most important when looking at what a spouse could possibly stand to receive.

## 3. Calculating the Elective Share

A. Subject to § 64.2-308.9, the value of the augmented estate, to the extent provided in §§ 64.2-308.5, 64.2-308.6, 64.2-308.7, and 64.2-308.8, consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute:

- 1. The decedent's net probate estate;
- 2. The decedent's non-probate transfers to others;
- 3. The decedent's non-probate transfers to the surviving spouse; and
- 4. The surviving spouse's property and non-probate transfers to others.

B. The value of the marital-property portion of the augmented estate consists of the sum of the values of the four components of the augmented estate as determined under subsection A multiplied by the following percentage:

If the decedent and the spouse were married to each other: The percentage is:

Less than 1 year	3%
1 year but less than 2 years	6%
2 years but less than 3 years	12%
3 years but less than 4 years	18%
4 years but less than 5 years	24%
5 years but less than 6 years	30%
6 years but less than 7 years	36%
7 years but less than 8 years	42%
8 years but less than 9 years	48%
9 years but less than 10 years	54%
10 years but less than 11 years	60%
11 years but less than 12 years	68%
12 years but less than 13 years	76%
13 years but less than 14 years	84%
14 years but less than 15 years	92%
15 years or more	100%

Va. Code Ann. § 64.2-308.4 (2017).

As you can see, marriages less than 15 years, the marital-property portion is calculated on a sliding percentage scale based upon the duration of the marriage. It is incredibly important to identify this issue, particularly early on in the case. If a spouse dies during the course of a

divorce proceeding, and no property settlement agreement is executed, it can mean that the surviving spouse inherits – even if property division has begun.

Remember that in order to waive this inheritance right (and others), you must be certain to waive the claims for homestead, family allowance, exempt property and elective share. A written waiver in the form of a marital or pre-marital agreement is an established rule (although see Va. Code Ann. § 64.2-308.14 for defenses), and such agreements must be in writing and conform to the statutory requirements set forth in Va. Code Ann. § 20-147, *et seq.* See, e.g., *Flanary v. Milton*, 263 Va. 20, 22-24 (2002) (reversing a trial court’s determination that the surviving spouse waived her rights to elective share, family allowance and exempt property due to the enforcement of an oral marital agreement pending divorce); *see also* Va. Code Ann. §§ 20-147 through 20-155.

4. The specifics of the calculation.

a. *Decedent’s net probate estate.*

The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses (excluding federal or state transfer taxes), homestead allowance, family allowances, exempt property, and enforceable claims.

Va. Code Ann. § 64.2-308.5 (2017) .

Remember that is this only applies in a situation in which the spouse is filing on his/her own. If filing through a representative, the homestead allowance, family allowances and exempt property are in addition to the elective share. See Va. Code Ann. § 64.2-308.3(B)(2017).

b. *Decedent’s non-probate transfers to others*

Under the prior law, the calculation was made more difficult by the (i) five year lookback period (as to third party transfers) and (ii) the transfers for no consideration. Joint accounts and

other assets were included, but as you can see, the categories are somewhat easier to recognize (and things for you to note when sitting down to equitably divide the assets). Also, for certain transfers, the duration of the marriage is the limit:

The value of the augmented estate includes the value of the decedent's non-probate transfers to others, not included under § 64.2-308.5, of any of the following types, in the amount provided respectively for each type of transfer:

1. Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Property included under this category consists of:

a. Property over which the decedent, alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse.

b. The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the decedent's surviving spouse.

c. The decedent's ownership interest in property or accounts held in Payable on Death or Transfer on Death designations or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

d. Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the

value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

2. Property transferred in any of the following forms by the decedent during marriage:

a. Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse.

b. Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other person, or exercisable by a non-adverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount.

3. Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

a. Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under subdivision 1 a, b, or c, or under subdivision 2, if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that

would have been included under those subdivisions if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this subdivision, "termination," with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in subdivision 1 a, "termination" occurs when the power terminated by exercise or release, but not otherwise.

b. Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under subdivision 1 d had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

c. Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse. The amount included is the value of the transferred property to the extent the transfers to any one donee in either of the two years next preceding the date of the decedent's death exceeded the amount excludable from taxable gifts under 26 U.S.C. § 2503(b), or its successor, on the date of the gift.

Va. Code Ann. § 64.2-308.6 (2017).

It is very important to understand these categories and to divide the assets upon a signed writing, waiving the spousal elections. Leaving any of these stones unturned, particularly during the pendency of the divorce may be difficult – particularly where it concerns life insurance policies. See, e.g., Va. Code Ann. § 20-111.1. While desertion or abandonment can be a bar to

the spouse's elective share claim (*see* Va. Code Ann. § 64.2-308.14(E)), a pending divorce is not, absent a written waiver of the right to elective share.<sup>1</sup>

Also, the new statutory scheme does not set forth the burden of proving assets, which is it is likely that prior case law will need to be looked to in order to determine who has the burden and when. The burden of proof under the prior law is as follows: “the party seeking inclusion of property under Subsection A of Code § 64.1-16.1 has the burden of proof under that subsection and the party seeking exclusion of property under Subsection B of that section carries the burden of establishing such exclusion.” *Chappell v. Perkins*, 266 Va. 413, 418 (2003). Essentially, those who want to include property into the augmented estate (i.e., the spouse, usually) has the burden of proof, and the party who wants to exclude property out of the augmented estate (i.e., the personal representative or others).

Remembering the goal and purpose of the augmented estate statute, which the Supreme Court of Virginia has applied notwithstanding the wording of the prior statute, one area which will likely be the source of discontent or lawsuits is how to determine the fractional share of joint assets. For instance, the acquisition of a piece of real estate for which the decedent provides the lion's share of the down-payment and titles jointly with a son would need to be reviewed from a number of different angles. *See, e.g.*, Va. Code Ann. § 64.2-308.6(2); *see also Chappell v. Perkins*, 266 Va. 413, 421 (2003) (declaring “The Estate's construction is also inconsistent with the purpose of the augmented estate legislation, which is to prevent one spouse from disinheriting the other by transferring property prior to the transferor's death and thereby

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<sup>1</sup> You should also be aware that desertion of a child also precludes inheritance (although not an elective share right). *See* Va. Code Ann. § 64.2-308.17 (stating, “If a parent willfully deserts or abandons his minor or incapacitated child and such desertion or abandonment continues until the death of the child, the parent shall be barred of all interest in the child's estate by intestate succession.”)

diminishing the transferor's estate. To achieve this purpose, the value of certain property transferred by the decedent during marriage is imputed to the decedent's augmented estate”).

In the *Chappell* opinion, the Court relied upon the article written by J. William Gray, Jr., titled “Virginia’s Augmented Estate System: An Overview”. Professor Gray’s article points out that one of the reasons that dower and curtesy rights were repealed was due to the fact that spouses could defeat dower and curtesy simply by titling property as joint tenants with right of survivorship: “The decedent thus would not have an estate of inheritance to which dower or curtesy rights could attach.” J. William Gray, Jr., *Virginia’s Augmented Estate System: An Overview*, 24 U. Rich. L. Rev. 513, 514 n. 10 (1990).

Why is this important? It is important to understand that the elective share isn’t just about a snapshot of what a person owns now. It is about what he/she has done with property over the course of the marriage. That is why including verbiage about waiver of the elective share and other spousal claims within the Property Settlement Agreement is imperative.

c. *Decedent’s non-probate transfers to the surviving spouse*

Under the prior law, transfers to the surviving spouse were also included in the elective share. The current law makes it very clear that augmented estate includes transfers to the surviving spouse (excluding federal social security benefits).

Excluding property passing to the surviving spouse under the federal social security system, the value of the augmented estate includes the value of the decedent's non-probate transfers to the decedent's surviving spouse, which consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse by reason of the decedent's death, including:

1. The decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as surviving joint tenant;

2. The decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, or with Payable on Death or Transfer on Death designations to the extent the decedent's ownership interest passed to the surviving spouse as surviving co-owner; and

3. All other property that would have been included in the augmented estate under subdivision 1 or 2 of § 64.2-308.6 had it passed to or for the benefit of a person other than the decedent's spouse, surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

Va. Code Ann. § 64.2-308.7 (2017).

d. Surviving Spouse's property and non-probate transfers to others

For the first time, whatever the surviving spouse has transferred and the surviving spouse's property will be taken into account when calculating the augmented estate.

A. Except to the extent included in the augmented estate under § 64.2-308.5 or 64.2-308.7, the value of the augmented estate includes the value of:

1. Property that was owned by the decedent's surviving spouse at the decedent's death, including:

a. The surviving spouse's fractional interest in property held in joint tenancy with the right of survivorship;

b. The surviving spouse's ownership interest in property or accounts held in co-ownership registration with the right of survivorship; and

c. Property that passed to the surviving spouse by reason of the decedent's death, but not including the spouse's right to homestead allowance, family allowance, exempt property, or payments under the federal social security system.

2. Property that would have been included in the surviving spouse's non-probate transfers to others, other than the

spouse's fractional and ownership interests included under subdivision 1 a or b, had the spouse been the decedent.

B. Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of subdivision A 1 a or b, the values of the spouse's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of subdivision A 2, proceeds of insurance that would have been included in the spouse's non-probate transfers to others under subdivision 1 d of § 64.2-308.6 are not valued as if the spouse were deceased.

C. The value of property included under this section is reduced by enforceable claims against the surviving spouse.

Va. Code Ann. § 64.2-308.8 (2017).

e. *Exclusions, valuation, and overlapping application*

Similar to the prior law, the exclusions reduce the augmented estate by certain categories of property:

A. The value of any property is excluded from the decedent's non-probate transfers to others:

1. To the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property; or
2. If the property was transferred with the written joinder of, or if the transfer was consented to in writing before or after the transfer by, the surviving spouse.

B.

1. The value of any property otherwise included under § 64.2-308.5 or 64.2-308.6, and its income or proceeds, is excluded from the decedent's net probate estate and non-probate transfers to others to the extent such property was transferred to or for the benefit of the decedent, before or during the marriage to the surviving spouse, by gift, will,

transfer in trust, intestate succession, or any other method or form of transfer to the extent it was (i) transferred without full consideration in money or money's worth from a person other than the surviving spouse and (ii) maintained by the decedent as separate property.

2. The value of any property otherwise included under § 64.2-308.8, and its income or proceeds, is excluded from the surviving spouse's property and non-probate transfers to others to the extent such property was transferred to or for the benefit of the surviving spouse, before or during the marriage to the decedent, by gift, will, transfer in trust, intestate succession, or any other method or form of transfer to the extent it was (i) transferred without full consideration in money or money's worth from a person other than the decedent and (ii) maintained by the surviving spouse as separate property.

C. 1. The value of property:

1. Included in the augmented estate under § 64.2-308.5, 64.2-308.6, 64.2-308.7, or 64.2-308.8 is reduced in each category by enforceable claims against the included property; and

2. Includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system. Except as provided herein for interests passing to a surviving spouse, life estates and remainder interests are valued in the manner prescribed in Article 2 (§ 55- 269.1 et seq.) of Chapter 15 of Title 55 and deferred payments and estates for years are discounted to present value using the interest rate specified in § 55-269.1. In valuing partial and contingent interests passing to the surviving spouse, and beneficial interests in trust, the following special rules apply:

a. The value of the beneficial interest of a spouse shall be the entire fair market value of any property held in trust if the decedent was the settlor of the trust, if the trust is held for the exclusive benefit of the surviving spouse during the surviving spouse's

lifetime, and if the terms of the trust meet the following requirements:

- (1) During the lifetime of the surviving spouse, the trust is controlled by the surviving spouse or one or more trustees who are non-adverse parties;
- (2) The trustee shall distribute to or for the benefit of the surviving spouse the entire net income of the trust at least annually;
- (3) The trustee is permitted to distribute to or for the benefit of the surviving spouse out of the principal of the trust such amounts and at such times as the trustee, in its discretion, determines for the health, maintenance, and support of the surviving spouse; and
- (4) In exercising discretion, the trustee may be authorized or required to take into consideration all other income assets and other means of support available to the surviving spouse.

b. To the extent that the partial or contingent interest is dependent upon the occurrence of any contingency that is not subject to the control of the surviving spouse and that is not subject to valuation by reference to the mortality and annuity tables set forth in §§ 55-271 through 55-277, the contingency will be conclusively presumed to result in the lowest possible value passing to the surviving spouse.

c. To the extent that the valuation of a partial or contingent interest is dependent upon the life expectancy of the surviving spouse, that life expectancy shall be conclusively presumed to be no less than 10 years, regardless of the actual attained age of the surviving spouse at the decedent's death.

D. In case of overlapping application to the same property of the subsections or subdivisions of § 64.2-308.6, 64.2-308.7, or 64.2-308.8, the property is included in the augmented estate under the provision yielding

the greatest value, and under only one overlapping provision if they all yield the same value.

Va. Code Ann. § 64.2-308.9 (2017)

It is interesting to note that the reduction by enforceable claims is part of the equation.

Again, when drafting the Property Settlement Agreement, it is crucial to include the waiver. Because as you can see, the equation sweeps in many categories of property. In other words – many of these categories are not necessarily going to be part of the discovery in your cases.

f. *Time Limitations*

There is a six month deadline within which to file the election, and another six months to file the complaint to enforce. So, if your client is the surviving spouse, knowledge of this deadline is crucial.

A. The election by the surviving spouse of a decedent who dies domiciled in the Commonwealth must be made no later than six months after the later of (i) the time of the admission of the decedent's will to probate or (ii) the qualification of an administrator on the decedent's intestate estate, by a writing recorded in the court or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record under Chapter 6 (§ 55-106 et seq.) of Title 55. The clerk shall record such election in the will book of the court. A copy of such election shall be provided to the personal representative, if any, by regular U.S. mail or hand delivery within 30 days of filing.

B. The surviving spouse must file the complaint to determine the elective share no later than six months after the filing of the election as set forth in subsection A. No later than 30 days after the filing of the complaint, the surviving spouse must provide a copy of the complaint to all known persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. The decedent's non-probate transfers to others are not included within the augmented estate for the purpose of computing the elective share if the complaint is filed more than 12 months after the decedent's death.

C. Notwithstanding the provisions of § 8.01-380, the election for an elective share may be withdrawn by the surviving spouse at any time before entry of a final determination by the court and such election shall be extinguished.

D. After notice and hearing, the court shall determine the elective share amount, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under §§ 64.2-308.10 and 64.2-308.11. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than such person would have been under §§ 64.2-308.10 and 64.2-308.11 had relief been secured against all persons subject to contribution.

E. An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

Va. Code Ann. § 64.2-308.12 (2017).

g. *Right of Election personal to surviving spouse; incapacitated surviving spouse*

What happens if you're representing an incapacitated spouse? Know that your client can still file the elective share:

A. The right of election may be exercised only by or on behalf of a surviving spouse who is living when the election for the elective share is filed in the court under subsection A of § 64.2-308.12. If the election is not made by the surviving spouse personally, it may be made on the surviving spouse's behalf by his or her conservator or agent under the authority of a durable power of attorney.

B. If the election is made on behalf of a surviving spouse who is an incapacitated person, and the court enters an order determining the amounts due to the surviving spouse, the court must set aside that portion of the elective share amount due from the decedent's probate estate and recipients of the decedent's non-probate transfers to others under

subsections C and D of § 64.2-308.10 and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by a conservator or agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms or such other terms as the court determines appropriate:

1. Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse and benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.
2. During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.
3. Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or (ii) to the predeceased spouse's heirs under Chapter 2 (§ 64.2-200 et seq.).
4. The trust shall be treated as a testamentary trust subject to the provisions governing testamentary trustees under Title 64.2.

Va. Code Ann. § 64.2-308.13 (2017).

Why is the prior law important when looking at this section? Well, because the Supreme Court of Virginia in *Haley v. Haley* held, “To claim an elective share, the claimant must strictly comply with the requirements set forth in the statute.” *Haley v. Haley*, 272 Va. 703, 707 (2006). The *Haley* case involved a surviving spouse whose attorney filed a claim on her behalf, signing the claim. In addition, the document did not contain the spouse’s signature. There was no

acknowledgement of any signature. Thereafter, the spouse filed a bill of complaint to enforce her elective share claim, but the defendant demurred on the basis that the claim did not comply with the provisions of Va. Code § 64.1-13 (now Va. Code § 64.2-302). The trial court granted the spouse leave to file an amended bill of complaint. Almost a month later (and more than a year after the administrator qualified), the spouse filed a new election for elective share, personally signing the document and having it acknowledged by a notary public, and she filed an amended bill of complaint. The defendant filed a second demurrer, which was sustained by the trial court, which held that the first filed claim was “ineffective as a claim to the elective share in that it was neither signed nor acknowledged by [Haley] as required by § 64.1-13 of the Code of Virginia [and, therefore,] no effective claim to the elective share was filed within six months of [Haley's] qualification as administrator of [H.C.'s] estate.” The reason the document in question failed is because it lacked proof or acknowledgement. *See id.* The clear message from the case was this: if you file a document with the court, it must strictly track the statute.

h. *Waiver of right to elect and of other rights; defenses*

Probably one of the most important aspects of the elective share you need to know when drafting a property settlement agreement is this – what are the defenses? There are many. In fact, there were no statutory defenses prior the enactment of this law.

A. The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

B. A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

1. The waiver was not executed voluntarily; or

2. The waiver was unconscionable when it was executed and before execution of the waiver because:

- a. A fair and reasonable disclosure of the property or financial obligations of the decedent was not provided;
- b. Any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided was not voluntarily and expressly waived, in writing; and
- c. The surviving spouse did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

C. An issue of unconscionability of a waiver is for decision by the court as a matter of law.

D. Unless it provides to the contrary, a waiver of all rights, or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to one spouse from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

E. If a spouse willfully deserts or abandons the other spouse and such desertion or abandonment continues until the death of the other spouse, the party who deserted or abandoned the deceased spouse shall be barred of all interest in the decedent's estate by intestate succession, elective share, exempt property, family allowance, and homestead allowance.

Va. Code Ann. § 64.2-308.14 (2017).

It is probably best to make sure there is language about how the waiver is being entered into freely and voluntarily, that the requisite financial disclosures were made (or waived if done without the benefit of discovery) and that the spouse has or reasonably could have had adequate knowledge of the property or financial obligations of the other spouse. If you are waiving discovery, it is critical to add some provision that sets forth the following:

**Discovery Waived.** The Parties agree that this Agreement was negotiated and entered into based on each party's own personal knowledge and with little or no use of any of the discovery procedures available under the law. The Parties further agree that each has considered the discovery procedures available such as written questions to the other party ("Interrogatories"), sworn statements which may be obtained from witnesses, including the other party ("Depositions"), and the availability of process to summon written papers and things ("Request for Production of Documents or Things" and "Subpoena *duces tecum*" by way of example), but the Parties have waived the potential value of the information which might be obtained with the time, effort and costs necessary to obtain such information, and have concluded that use of such discovery procedures is too time-consuming, labor intensive, and costly, and therefore have elected not to use such procedures. Each party is satisfied that he or she has had adequate information on which to base the decision that this Agreement is a fair and adequate settlement of their rights and claims based upon information known to the both of them (or reasonably available to both of them), Wife's Complaint for Divorce and Husband's Cross-Complaint for Divorce, and they are both further satisfied with such disclosures. Accordingly, each party voluntarily waives and relinquishes the right of resort and use of said discovery devices and waives any and all claims to modify or void this Agreement based upon location of evidence subsequent to signing this Agreement disproving, contradicting or otherwise refuting information provided by either party and not fully investigated due to the failure to use said discovery devices.

i. *Other provisions*

Here are some other provisions to be aware of:

**Sources from which elective share payable.**

A. In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's non-probate transfers to others:

1. The value of property excluded from the augmented estate under subsection A of § 64.2-308.9, which passes or has passed to the surviving spouse;
2. Amounts included in the augmented estate under § 64.2-308.5 that pass or have passed to the surviving spouse by testate or

intestate succession and amounts included in the augmented estate under § 64.2-308.7; and

3. The marital property portion of amounts included in the augmented estate under § 64.2-308.8.

B. The marital property portion under subdivision A 3 is computed by multiplying the value of the amounts included in the augmented estate under § 64.2-308.8 by the percentage of the augmented estate set forth in the schedule in subsection B of § 64.2-308.4 appropriate to the length of time the spouse and the decedent were married to each other.

C. If, after the application of subsection A, the elective share amount is not fully satisfied, amounts included in the decedent's net probate estate, other than assets passing to the surviving spouse by testate or intestate succession, and in the decedent's non-probate transfers to others under subdivisions 1, 2, and 3 b of § 64.2-308.6 are applied first to satisfy the unsatisfied balance of the elective share amount. The decedent's net probate estate and that portion of the decedent's non-probate transfers to others are so applied that liability for the unsatisfied balance of the elective share amount is apportioned among the recipients of the decedent's net probate estate and of that portion of the decedent's non-probate transfers to others in proportion to the value of their interests therein.

D. If, after the application of subsections A and C, the elective share amount is not fully satisfied, the remaining portion of the decedent's non-probate transfers to others is so applied that liability for the unsatisfied balance of the elective share amount is apportioned among the recipients of the remaining portion of the decedent's non-probate transfers to others in proportion to the value of their interests therein.

E. The unsatisfied balance of the elective share amount as determined under subsection C or D is treated as a general pecuniary bequest.

Va. Code Ann. § 64.2-308.10 (2017).

### **Personal Liability of recipients**

A. Only original recipients of the decedent's non-probate transfers to others, and the donees of the recipients of the decedent's non-probate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective share amount. A person liable to make contribution may choose to give up the

proportional part of the decedent's non-probate transfers to him or to pay the value of the amount for which he is liable in cash, or, upon agreement of the surviving spouse, other property.

B. If any section or part of any section of this article is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's non-probate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in § 64.2-308.10, to the person who would have been entitled to it were that section or part of that section not preempted.

Va. Code Ann. § 64.2-308.11 (2017).

### **Protection of payors and other third parties**

A. Although under § 64.2-308.6 a payment, item of property, or other benefit is included in the decedent's non-probate transfers to others, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative as required by § 64.2-308.12, that a complaint for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice that a complaint for the elective share has been filed.

B. A written notice that a complaint for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice that a complaint for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate. The court shall hold the funds or item of property, and, upon its determination under subsection D of § 64.2-308.12, shall order disbursement in accordance with the determination. If no complaint is filed in the court within the specified time under subsection A of § 64.2-

308.12 or, if filed, the election for an elective share is withdrawn under subsection C of § 64.2-308.12, the court shall order disbursement to the designated beneficiary. Payments or transfers to the court or deposits made into court discharge the payor or other third party from all claims for amounts so paid or the value of property so transferred or deposited.

C. Upon complaint to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this article.

Va. Code Ann. § 64.2-308.15 (2017).

### **Rights in family residence**

Until the surviving spouse's rights in the principal family residence have been determined and satisfied by an agreement between the parties or a final court decree, in cases (i) where the principal family residence passes under the provisions of § 64.2-200 and the decedent is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, or (ii) where the surviving spouse claims an elective share in the decedent's augmented estate under this article, the surviving spouse may hold, occupy, and enjoy the principal family residence and curtilage without charge for rent, repairs, taxes, or insurance. If the surviving spouse is deprived of possession of the principal family residence and curtilage, upon the filing of a complaint for unlawful entry or detainer, he is entitled to recover possession of such residence and damages sustained by him by reason of such deprivation during the time he was so deprived. Nothing in this section shall be construed to impair the lien or delay the enforcement of such lien of the Commonwealth or any locality for the taxes assessed upon the property.

Va. Code Ann. § 64.2-308.16 (2017).