

***The Massachusetts Spousal Elective Share***

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Friday, February 1, 2019  
Presidents Conference Room at REBA  
295 Devonshire Street, Sixth Floor  
Boston

This presentation will also be webcast.

A. Spouse's Right To Waive A Will – No Change

The surviving spouse who is unhappy with the bequests under the terms of a Will has an absolute right to waive the Will without notice or adjudicatory proceedings and take a statutory share of the estate. G.L. c.191, § 15. The statutory share depends on the size of the estate and the existence of heirs and next of kin. While historically it was understood that the statutory share related to the decedent's probate assets only, *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E. 2d 572 (1984) held that for purposes of computing the spouse's share, the value of assets held in an intervivos trust created or amended by the deceased spouse after January 23, 1984, wherein the deceased spouse alone retained the power during his or her lifetime to direct the disposition of the assets will be included in the computation. The statutory shares are as follows:

1. If the decedent has issue, the surviving spouse takes one-third of the personal and real property, but if the value of the personal and real property exceeds \$25,000, the spouse takes the first \$25,000 and income interest for life in the balance. (This will mean that the estate must remain open.)
2. If the decedent left no issue, but the decedent had kindred, the spouse takes \$25,000 outright plus a life estate in one-half of the excess of the estate over \$25,000.
3. If there are no issue and no kindred, the surviving spouse takes \$25,000 outright and one-half of the balance outright.

In electing the statutory share, the surviving spouse must file a written waiver of the Will and claim the statutory share within six months from the date of the probate of the Will. The six month period cannot be extended. G.L. c.191, § 15.

A surviving spouse who is incompetent may waive the Will by her guardian subject to the approval of the Probate Court. *Dolbeare v. Bowser*, 254 Mass 57 (1925).

In the recent case of *Ciani v. MacGrath*, SJC-12531 (January 8, 2019), the Supreme Judicial Court ruled that the elective share at least in so far as real estate owned by the decedent is concerned, is a life estate in the property to the extent that the property exceeds \$25,000 in value and the electing spouse have the right to partition. Perhaps more significantly, the court gave a shout out to the legislature to fix the antiquated and somewhat incomprehensible spousal elective share.

**PLANNING NOTE:**

*A new statutory share provision is making its way through the legislature.*

B. The Proposed UPC Spousal Elective Share and the following is from the Summary Sheet of the Elective Share Ad Hoc Committee dated March, 2012

Unlike our current spousal elective share, there is a clear organizing principle governing the spousal elective share section of the UPC: it is specifically designed to reflect the same economic partnership theory of marriage that is in place under the equitable distributions system that is applied when a marriage ends in divorce.

The proposed UPC spousal elective share is also designed to support the dual goals of ease of administration and predictability of result by means of a mechanically determined approximation system. Under the proposed spousal elective share, there is no need to identify the source of the marital property (brought into the marriage, acquired by gift or inheritance, etc.). In essence, the elective share statute simply adds up both parties' properties and multiplies it by a percentage based on the years of marriage and divides the total in half. The elective share is satisfied first with probate or non-probate assets passing from the decedent to the surviving spouse and the marital property portion of the surviving spouse's assets.

The first step in calculating the spousal elective share is to determine the augmented estate. The augmented estate consists of the sum of four types of property:

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.

These items are defined more particularly in the statute as follows:

INSERT

The proposed UPC spousal elective share defines the elective share amount as "50 percent of the value of the marital property portion of the augmented estate."

The marital property portion of the augmented estate is the sum of the values of the four types of property multiplied by a percentage that is based on the length of the marriage. The percentages start at 3% for marriages of less than one year and caps at 100% for marriages lasting 15 years or more.

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%

There are presently eleven states that have adopted the Code's elective share based on this definition of the augmented estate: Alaska, Colorado, Hawaii, Kansas, Minnesota, Montana, North Dakota, South Dakota, Utah, and West Virginia. Nine other states have adopted the Code's elective share but with a modified definition of augmented estate: Connecticut, Delaware, Florida, Maine, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, and Virginia.

An illustration of how this works: A and B are married for more than five years but less than six years. A dies with a net probate estate of \$300,000 and was the beneficiary of an inter vivos revocable trust that A had established with a corpus at death of \$ 1 00,000. The beneficiaries of the trust and A's Will are A's adult children from an earlier marriage. B's assets were \$200,000. Neither made any other transfers.

1. The augmented estate is \$600,000 (A's \$400,000 and B's \$200,000);
2. Based on the length of the marriage, the marital property portion of the augmented estate is 30% (\$180,000);
3. The elective share amount is 50% of the marital property portion (\$180,000 + 2) or \$90,000;

4. Apply voluntary transfers made by A to B (\$0);
5. Calculate the marital portion that is satisfied by B's assets and non-probate transfers to others ( $\$200,000 \times 30\% = \$60,000$ );
6. Subtract B's portion from the total of the elective share amount ( $\$90,000 - \$60,000 = \$30,000$ )
7. The amount to be satisfied from A's assets is \$30,000

Reversing the owner of the assets (B has \$400,000 and A had \$200,000), illustrates how a wealthier spouse, in this case B, is precluded from taking a share from A's estate, which B could do under the present law. The calculations in steps 1-4 remain identical. In step 5, B's marital portion is  $\$400,000 \times 30\% = \$120,000$ . Thus B would have the full elective share amount already and A's testamentary disposition would remain undisturbed.

In sharp contrast, under the existing spousal elective share law, B would receive a life estate interest in one-third of A's probate assets (plus any assets in A's revocable trust). After payment to B of the first \$25,000, B would have the life estate interest in \$108,333 of A's estate ( $\$400,000 \div 3 = \$133,333 - \$25,000 = \$108,333$ ).

\*Even if the \$108,333 is held in a life estate, as is contemplated by G.L. c. 191, §16, rather than paid out as a lump sum, the disruption to A's estate plan can go on for years, or decades depending on how long the surviving spouse lives. If the total property is in the marital residence, B can effectively tie up the entire estate until B's own death.

Applying the above steps to a comparison of current spousal elective share in Massachusetts with the UPC's spousal elective share in 4 cases illustrates the radically different results that occur. In each case, A is the decedent who leaves issue, B is the surviving spouse, and the chart reflects the value of each of their respective estates as of the decedent's date of death:

Years	A: \$5,000,000	A: \$100,000	A: \$5,000,000	A: \$250,000
married:	B: \$10,000,000	B: \$25,000	B: \$250,000	B: \$5,000,000
<b>1-2 years</b>				
Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$25,000	\$142,500	\$0
<b>5-6 years</b>				
Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$25,000	\$712,500	\$0
<b>10-11 years</b>				
Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$25,000	\$1,425,000	\$0
<b>15+ years</b>				
Current	\$1,666,666	\$33,333	\$1,666,666	\$83,333
UPC	\$0	\$37,500	\$2,375,000	\$0

C. Satisfying of the Elective Share

After calculating the value of the augmented estate and the applicable percentage, the next step is to determine how to satisfy the elective share amount. The first category of property to be used to satisfy the elective share is the property that the decedent transferred to the surviving spouse, whether by will, intestate succession, or non-probate transfers. The second category to apply is the marital assets that are owned by the surviving spouse. Finally, if the sum of those two categories falls short of the elective share amount, then other assets of the decedent are tapped to satisfy the deficiency. Section 2-209(c) of the UPC apportions the amount among the recipients of the deceased spouse's net probate estate and recipients' of nonprobate transfers proportionately to the value of the interest received.