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Trusts & Estates

How Far Should Elective Share Estates Be Augmented?

By Jeffrey A. Baskies

A recent decision by the Supreme Judicial Court highlights a new and potentially far-reaching expansion of the elective share estate.

In the case, *Bongaards v. Millen*, the SJC chose not to augment the elective share, but the implication in the decisions was clear. The SJC encouraged the Legislature to move forward in augmenting the elective share estate and the court may be willing to do it without the Legislature if lawmakers fail to do so soon.

When it comes to elective share laws, the unmistakable trend of the past 20 years has been to enhance the estate subject to the election. While traditional elective share laws provided surviving spouses a share of the probate estate (literally defined), the development of so many non-probate means of passing wealth effectively eroded their authority.

Ultimately, in many states (including Massachusetts), it became exceedingly easy to leave one's surviving spouse virtually penniless.

In response to the development of these non-probate alternatives, many practitioners and many rights groups began calling for elective share reform. There was little disagreement that the public was better served by ensuring surviving spouses were not left destitute.

Thus, a trend emerged to include non-probate assets in the computation of elective shares. The first — and perhaps most obvious target — was including revocable trusts. This trend was codified in the American Law Institute's Restatement (Second) of Property: Donative Transfers Sect. 13.7 (1986). That section of the Restatement (Second) supported state laws that included

revocable trust assets in the elective estates.

As described more below, the SJC adopted the Restatement (Second) position (although at the time it was in draft) in *Sullivan v. Burkin*, 390 Mass. 864 (1984). In that case, the SJC treated assets in a revocable trust created by the decedent as part of the decedent's estate for purposes of computing the elective share estate (under G.L. c. 191, Sect. 15).

Other non-probate assets have also been caught up in these new augmented elective share estates, such as payable on death accounts and accounts with beneficiary designations.

'Bongaards v. Millen'

The quick history of the elective share in Massachusetts was summarized by the SJC in *Bongaards v. Millen*:

"Until 1984, the rule of this Commonwealth was that spouses had an absolute right to dispose of any or all of their personal property in their lifetime, with the result that it would not form part of their 'estate' subject to their spouse's elective share at their death. See *Kerwin v. Donaghy*, 317 Mass. 559, 571 (1945). It was thus possible for a husband effectively to disinherit his wife, without her knowledge or consent, by transferring his property into a trust created for his own benefit during his lifetime, with the sole purpose of removing the property from his estate at death and thereby preventing his wife from asserting her rights under G.L. c. 191, Sect. 15. ... This court's decision in *Sullivan* eliminated this option."

In *Bongaards*, the SJC was asked to include a third-party created trust (the decedent's mother created a trust for the decedent's benefit) in the elective share estate.

Essentially the plaintiff argued the court should extend the *Sullivan* holding. In its decision, the SJC (via rather gratuitous dicta) debated a controversial provision in the Restatement (Third) Property regarding the possibility of extending the elective share estate to include third-party created trusts — such as the one in this case.

While the SJC declined to extend the Massachusetts elective share law, the obviously heated debate and the lengthy dicta highlight what poses to be the next debate in elective share law: Should the elective share estates be augmented further (far enough to include third-party created trusts)?

The Restatement (Third) of Property: Wills and Other Donative Transfers Sect. 9.1 (c) (2003) provides in part that the elective share estate should include "the value of property owned or owned in substance by the decedent immediately before death that passed outside of probate at the decedent's death."

The Comments explain that property is "owned in substance," as described above, if the decedent holds "various powers or rights, such as the power to revoke, withdraw, invade, or sever, or to appoint the decedent or the decedent's estate as beneficiary."

For purposes of determining if property is owned in substance the Comments indicate that it is irrelevant whether or not the decedent created the trust or some third party created it for the benefit of the decedent.

The *Bongaards v. Millen* decision itself is fascinating. The primary dissent argues for adopting the position in Sect. 9.1 of the Restatement (Third), the majority decision criticizes the dissent and Sect. 9.1 of the Restatement (Third) position, and Chief Justice Margaret H. Marshall (writing for herself) wonders aloud what all the fuss is about.

In her concurring in part and dissenting in part opinion, Marshall writes:

"Today, the court undertakes a sweeping criticism of Sect. 9.1 (c) of the Restatement (Third) of Property ... the successor to Sect. 13.7 of the Restatement (Second) the section concerning inter vivos trusts. ...The court does so even as it recognizes that the issue was not raised in the trial court, in the Appeals Court, or in this court, was not briefed by any of the parties, ... and neither the parties nor the sole amicus makes so much as a passing reference to Sect. 9.1 (c), to any other provision of the Restatement (Third), or to any other statement of the ALI, for that matter."

If the SJC is debating the value of Sect. 9.1 (c) of the Restatement (Third) without it so much as being suggested in the pending case, then this must be one controversial issue. Moreover, this must be an issue that will lead to further debates that could impact planning in the commonwealth.

Beyond Closing Loopholes

The issue is indeed a fascinating one. If the elective share estate has been expanded to include non-probate assets, why shouldn't it include third-party trust assets over which the decedent had a great deal of control?

The original policy supporting the position in the Restatement (Second) was closing loopholes. Basically, the position was if elective share laws served a valid public purpose but they were drafted under antiquated rules for wealth transfer (linked to the definitions of probate estates), then fix the rules.

The logical first extension was to transfers made by the decedent to minimize the elective share estate. After all, if funding a revocable trust placed those assets beyond the elective share, then extend the elective share to include revocable trusts. That's what the SJC did in *Sullivan*.

Similarly, if people could so order their affairs via joint accounts or "payable on death" accounts as to avoid leaving any probate assets, then extend the elective share estate to include those too.

The common philosophical (theoretical) thread here — and in the Restatement (Second) — was bringing back into the elective share estate assets removed from the probate estate by the decedent's actions. If the decedent chose to order his affairs in such a manner so as to minimize the size of the elective share estate, then these cases and statutes had the impact of undoing those actions (for purposes of computing elective shares).

But the philosophical (theoretical) position favored in the Restatement (Third) and endorsed by justices John M. Greaney and Francis X. Spina in their dissent in the *Bongaards v. Millen* case, goes much further.

This position does more than undo the actions of willful decedents (excuse the pun). This position advocates including assets never directly owned by the decedent. This position threatens to overturn the express intentions and desires of the parents, siblings, relatives or friends who have left assets in trust for the decedent.

Indeed, they may very well have intended to support the decedent without having any desire at all to see their assets pass to the decedent's spouse (maybe that's exactly why they created a trust in the first place).

Justice Martha B. Sosman's majority opinion asserts this argument exactly.

The majority argues that including third-party created trusts may do an injustice.

"It is one thing for this court to plug loopholes to prevent a spouse's evasion of the elective share statute. It is quite another to expand the reach of the elective share statute itself and, by so

doing, frustrate the intent of a third party who is a stranger to the marriage," Sosman wrote. "A third party has no obligation to support someone else's spouse, and property owned by a third party has never been part of someone else's spouse's elective share 'estate.'"

SJC: Legislature Should Act

While dissenting opinions in the SJC are no longer rare, the tone of this dissent and the acknowledgement of some validity in the majority opinion indicate the SJC wants the Legislature to act.

Greaney in dissent notes that "at least five bills currently are pending before the Legislature to 'modernize' the current elective share statute." However, the dissent bemoans the lack of progress to date on this matter and favors changing the law via judicial action.

Even the majority opinion recognizes a need for legislative change. The majority opinion declares:

"We do, however, agree with the observation that our elective share statute may fail to provide sufficient support for disinherited spouses and that it has failed to keep pace with the changing principles on which the property rights of married couples are now based. ... Now that two members of this court have announced their inclination to revamp the statute, the need for the Legislature to overhaul this statute may appear more pressing than it has to date. If their proposed judicial legislation prompts legislative action in this neglected but important aspect of marital rights and obligations, Justice Greaney's dissent, although ill advised, will have accomplished much good."

On this issue, then, it appears the SJC is unanimous. The commonwealth's current elective share statute is antiquated and outdated and the Legislature should revise it — whether in line with the Restatement (Third), in line with a marital rights scheme advanced by the Women's Bar Association in its amicus brief, or in some other manner.

Conclusion

Here's a proposal. If the Legislature does consider the issue, a logical extension of elective share estates would be to the gross estate for federal estate tax purposes.

Obviously a great deal of thought and energy has been exerted in defining what degree of control and ownership of assets causes them to be included in one's estate for federal estate tax purposes, so why not just piggy-back on their work? Trying to define "owned in substance" under a unique Massachusetts law seems much more difficult than adopting the federal guidelines.

Whichever way you feel on the merits of the issue, the consequences of moving in this direction would be far-reaching. Estate planners should be aware of this trend and should be prepared to deal with the issue in the Legislature (or perhaps again in the SJC).

And while it may be premature to say estate planners have a duty to warn clients creating trusts with broad powers of control (warning them that a court may some day award a portion of the trust property to the beneficiary's surviving spouse), it may nevertheless be prudent to do so.

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