

Subsequent Marriages and the Elective Share

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Naomi Cahn, [What's Wrong About the Elective Share "Right"?](#), 53 **U.C. Davis L. Rev.** 2087 (2020).

I have long been perplexed by the inconsistency between the rights of divorcing spouses which are governed by family law rules and the rights of surviving spouses which are governed by trusts and estates law. While the rules governing the distribution of property at divorce and the elective share right both claim to reflect a partnership theory of marriage, Naomi Cahn's article, *What's Wrong About the Elective Share "Right"?*, demonstrates that the elective share does not further a partnership theory, at least not in cases involving subsequent marriages, and further fails to recognize and adequately balance the interests of multiple families.

Cahn analyzed all of the elective share cases from January 2014 through January 2019 available on Westlaw and Lexis. Although the number of cases was relatively small (71 cases), the results are illuminating. First, they suggest that the overwhelming majority of surviving spouses who seek an elective share are women. Seventy-eight percent (56/71) of the claimants in Cahn's study were women. This is not surprising because, as Cahn explains, women tend to live longer than men and to marry men who are older than they, especially in subsequent marriages (marriages other than first marriages). I was, however, intrigued by Cahn's findings that the typical elective share case pits a stepmother against her stepchildren, or, more precisely, against her former stepchildren. Eighty percent of the cases in Cahn's study involve subsequent spouses who challenged a will that left most of the property to the decedent's children from a prior relationship.

In addition to its empirical findings, the article reveals the problems with including non-marital property—which is not available for distribution at divorce in the majority of states—is the augmented estate used to calculate the elective share. Cahn demonstrates that by including non-marital property in the augmented estate, trusts and estates law strays from the conception of marriage as a partnership. After all, if decedent acquired particular property before the marriage and the surviving spouse never had the opportunity to make any contributions to its acquisition or maintenance, then the property is not the result of marital efforts—it is not the result of a partnership. Thus, the rationale for the elective share would appear to depend on its original purpose—to provide support for needy wives—rather than the partnership rationale.

Cahn's conclusions are nuanced. She acknowledges that in first marriages, especially those of long duration, the elective share likely reflects and furthers the notion of marriage as a partnership. She explains that in those marriages, especially if the couple raised children together, each spouse might have assumed a different role in the marriage which impacted their earnings during the marriage as well as their earning capacity. The surviving spouse in those cases, who is typically a woman and has fewer assets for retirement, is the traditional claimant that many, if not most, would agree should benefit from the elective share.

In contrast, Cahn demonstrates, these justifications for the elective share are less likely to be present in subsequent marriages, especially in later-in-life marriages where there are no young children that need caretaking, and where the spouses bring with them economic and human capital that they may have built in an earlier marriage with another partner. Although Cahn does not put it quite so bluntly, I quickly

came to the conclusion that the subsequent spouse who is seeking an elective share may stand to benefit from the investments and sacrifices made by the decedent's prior spouse(s) to the detriment of decedent's children from a prior family. Thus, the elective share may result in a windfall to the subsequent spouse.

Cahn further reminds us that the way a marriage ends—either through death or divorce—affects the way property is distributed even though there is no justification for this distinction. She points out that in some states, a spouse who stays in the marriage until death may receive more property than one who divorced, but in other states she may receive less depending on the state's approach to division of property at divorce and what property is included in the augmented estate. Despite these inconsistent approaches, all claim to honor a partnership theory of marriage.

In Cahn's view, we need an elective share that "explicitly accounts for multifamily partners and changes the focus from the surviving spouse alone to the family more generally." (P. 2119.). Family law scholars and practitioners would agree and note that family law takes into account the complexity of families and obligations to multiple members. For example, child support guidelines in some states expressly consider a parent's financial obligations—alimony and child support obligations to a prior family—when calculating a child support award for a subsequent child. In addition, at divorce, most states consider the contributions that each spouse made to the acquisition and maintenance of property, thereby recognizing a partnership theory of marriage and limiting the likelihood that a subsequent spouse will unfairly benefit from the contributions of a prior spouse.

Cahn proposes several reforms to account for the interests of both first and subsequent families. I will focus on two. First, similar to the approach followed by the majority of states at divorce, she proposes excluding non-marital property and including only property acquired during the marriage in the augmented estate. She explains that this approach is in line with a partnership theory of marriage and will allow spouses in longer marriages to receive more property than spouses in shorter marriages. Cahn acknowledges the administrative costs and disputes that will likely result when property must be classified as marital and non-marital. I was persuaded, however, by her argument that these challenges are outweighed by the benefits of having the elective share reflect the partnership theory and mirror the approach that most jurisdictions follow when dividing property at divorce. Moreover, given the small number of cases involving a claim for an elective share, as shown by Cahn's study, these costs and disputes would arise in a relatively low number of cases.

Second, Cahn grapples with the challenges raised when the decedent has more than one family such as a subsequent spouse and children from a prior relationship. In these cases, the will may have left most of the property to the children from the prior relationship but if the subsequent spouse seeks an elective share, the children receive less than the decedent intended. Cahn suggests that one way to protect the children's interest is to exclude from the elective share pot any property that the decedent left to the children. While this is the approach followed by the Uniform Probate when calculating a share for an omitted spouse, I fear that in cases in which the decedent leaves most of the property to the children from a prior relationship, this approach would completely disinherit a subsequent spouse, including one in a long marriage that resulted in the accumulation of substantial marital property, thereby depriving the spouse of the fruits of the marital partnership. Cahn acknowledges this inequitable result, noting that is the result in cases involving an omitted spouse. She does not provide a solution, however.

This tension between the interests of multiple families brings me back to the reasons this short piece is so valuable. Cahn does not pretend to have all the answers; rather, she is challenging us to consider the inconsistencies, inequities, and justifications for rules that do not reflect the realities and complexities of families in the 21st century. I hope some of us will take on these intractable questions.

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