Unfinished Business: Reforming the Elective Share

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Angela Vallario, *The Elective Share Has No Friends: Creditors Trump Spouse in the Battle Over the Revocable Trust*, 45 **Capital U. L. Rev.** (forthcoming, 2017), available at SSRN.

Some of our inheritance laws still seem closer to those existing in 1217 instead of 2017. For example, the elective share statutes in a number of states still echo the old common law doctrine of dower. In her new article, *The Elective Share Has No Friends: Creditors Trump Spouse in the Battle Over the Revocable Trust*, Angela Vallario makes a persuasive case for statutory reform, especially in light of recent trust reform in many of those same states effectively putting creditors in a more favorable position than a surviving spouse.

Professor Vallario begins by describing the current state of the elective share in the United States. She notes that twenty-five of the nation's separate property states have reformed their elective share statutes to more clearly reflect a joint partnership theory of marriage. However, sixteen states have failed to do so and retain what Vallario calls the "traditional" elective share. Vallario reminds readers that the traditional elective share was built on the remnants of dower. Surviving spouses who are disinherited can claim either a one-half or one-third share of the decedent's estate. But the term "estate" under traditional statutes has included only probate assets, not non-probate assets like life insurance, joint tenancy property with third parties and trust property.

Over the years, courts developed equitable doctrines to recapture some of the assets that a decedent may have transferred to third parties through vehicles like joint tenancy or revocable or irrevocable trusts. These common law doctrines, often labeled as "fraud on the spouse," were a cumbersome way to remedy the impact of a transfer intended to end-run the elective share statute. The drafters of the Uniform Probate Code (UPC) developed a model elective share statute that uses what the UPC calls an "augmented estate" framework. In other words, the disinherited spouse may take a share of a larger "augmented" estate that includes certain inter vivos transfers by the decedent and the surviving spouse's own assets. Based a sliding scale tied to length of marriage, the surviving spouse may receive up to fifty-percent of the augmented estate. While a number of states eschewed this approach due to its perceived complexity (even some that adopted the UPC), a large number did reform their elective share statutes to embrace this more modern reflection of what a decedent's wealth consisted of at death. With the advent of an increasing amount of wealth being transferred through non-probate devices, these reform states essentially increased the size of the "pot" against which the surviving spouse's share would be applied.

However, as Vallario points out, sixteen "holdout" states have not brought their statutes into the modern age in this regard. Seven of the holdouts have enacted trust reform which has created the anomalous situation of creditors having more rights against a revocable trust than a surviving spouse. Vallario includes hypotheticals to illustrate what many would think is an odd and inequitable result as a policy matter.

After laying out a useful history of the structure and policy of traditional elective share statutes generally, Vallario delves into the common law exceptions that courts have developed over the years to avoid harsh results by application of the traditional elective share. Her analysis of the Maryland Court of Appeals case, Karsenty v. Schoukroun, 959 A.2d 1147 (Md. 2008), reveals some of the flaws in relying on judicial discretion rather than statutory reform to remedy these results. Such discretion minimizes predictability, yields inconsistent results and deters surviving spouses from exercising their right to elect against the will. These costs, Vallario argues, push toward statutory rather than judicial solutions. In fact, in the *Karsenty* case, the Maryland court noted that other states had adopted an augmented estate model but resisted creating such reform by what it called "judicial fiat."

Vallario is on the same page as the *Karsenty* court. She notes that, “State legislatures who are able to hold hearings, gather information, and draft bills, are in the best position to protect the interest of the surviving spouse.” (P. 13.) She urges the sixteen “holdout” states to reform their statutes but acknowledges the variety of interests that converge to thwart such reform. In addition to Vallario’s insight about the anomaly of creditors being in a better position than surviving spouses vis a vis a revocable trust, this last section of Vallario’s article is a unique and pragmatic addition to the literature on the elective share. Her assessment of the various constituencies, including the various sections of the organized bar, probate judges and creditors, and whether and why they might oppose reform is spot-on. Vallario concludes that surviving spouses are an unlikely constituency to pool their resources to lobby for reform. The organized estate planning bar is in the best position to remedy the inequities inherent in the traditional elective share.

Vallario has written before about elective share reform in *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 **Cath. U. L. Rev.** 519 (2003). That article, cited by the Maryland Court of Appeals in the *Karsenty* case, is also well worth reading. As more states consider reform, I look forward to future scholarship from Professor Vallario on this important statutory protection within marriage.

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