

**EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE ELECTIVE SHARE  
(BUT DIDN'T REALIZE YOU NEEDED TO ASK.)**

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June 15, 2001

I. WHAT IS THE ELECTIVE SHARE?

A. In General. The elective share is a statutorily-created interest of a surviving spouse in a decedent estate. The elective share has replaced the common law principles of dower and curtesy, which were found unconstitutional in Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984). The legislative purpose behind the elective share statute is to protect the family unit from becoming society's ward by preventing impoverishment of the surviving spouse. Williams v. Williams, 335 S.C. 386, 517 S.E.2d 68 (1999).

B. Applicable Statutes.

§ 62-2-201. Right of elective share.

(a) If a married person domiciled in this State dies, the surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate, as computed under § 62-2-202, the share to be satisfied as detailed in §§ 62-2-206 and 62-2-207 and, generally, under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this State dies, the right, if any, of the surviving spouse to take an elective share in the property in this State is governed by the law of the decedent's domicile at death.

(c) "Surviving Spouse", as used in this part, is as defined in § 62-2-802.

S.C. Code ANN. § 62-2-201(c) incorporates the definition of surviving spouse in S.C. Code ANN. § 62-2-802.

§ 62-2-802. Effect of divorce; annulment; decree of separate maintenance; order terminating marital property rights.

(a) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separate maintenance which does not terminate the status of husband and wife is not a divorce for purposes of this section.

(b) For purposes of Parts 1, 2, 3, and 4 of Article 2 [§§ 62-2-101 et seq., 62-2-201 et

seq., 62-2-301 et seq., and 62-2-401 et seq.] and of § 62-3-203, a surviving spouse does not include:

(1) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as husband and wife;

(2) a person who following a decree or judgment of divorce or annulment obtained by decedent, participates in a marriage ceremony with a third person; or

(3) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights or confirming equitable distribution between spouses.

(4) a person claiming to be a common law spouse who has not been established to be a common law spouse by an adjudication commenced before the death of the decedent or within the later of eight months after the death of the decedent or six months after the initial appointment of a personal representative; if the action is commenced after the death of the decedent, proof must be by clear and convincing evidence.

(c) A divorce or annulment is not final until signed by the court and filed in the office of the clerk of court.

C. Applicable Case Law. In Patrick v. Parris, 303 S.C. 559, 402 S.E.2d 664 (1991), the children challenged the elective share claim of the husband on the grounds that his marriage to their mother was invalid because the marriage ceremony took place prior to finalizing his divorce from a prior spouse. Apparently, they married after the husband's divorce decree was signed by the judge and filed in the Family Court, but before the order was filed in the Circuit Court (to which jurisdiction had been transferred). The Supreme Court held that for purposes of the elective share, the divorce was final when the "order was signed by the judge and filed with the Family Court."

In Lovett v. Lovett, 329, S.C. 426, 494 S.E.2d 823 (S.C. Ct. App. 1997), the Court of Appeals held that the "wife" was not entitled to an elective share due to the invalidity of her marriage to the decedent. She had been married eight times prior to her marriage to the decedent, but forgot to obtain divorces for her first, fifth, sixth, seventh or eighth marriage. The more interesting issue raised by the Lovett court is whether the "putative marriage doctrine" might be applied to obtain an elective share. The court noted that other jurisdictions have adopted the putative marriage doctrine whereby a spouse who believes in good faith that he or she was validly married, and who had participated in a ceremonial marriage, is allowed the civil effects of a valid marriage even though the marriage is found to be void due to an impediment. The court declined to address this issue because it was not raised in the lower court, and because no finding had been made as to the good faith belief of the surviving

spouse. The Fourth Circuit Court of Appeals in an unpublished opinion noted that South Carolina has not adopted the putative marriage doctrine. See Boyd v. Waterfront Employers ILA Pension Plan, 182 F.3d 907 (1998). This is an open issue to be decided by the courts.

In Hatchell-Freeman v. Freeman, 340 S.C. 552, 532 S.E.2d 299 (S.C. Ct. App. 2000), the wife initiated a divorce action against the husband. The hearing granting the divorce took place on September 27, 1996. The husband died on October 7, 1996, three days before the Family Court signed the Order granting the divorce. The Court of Appeals found the wife was the "surviving spouse", holding that § 62-2-802(c) is clear that a divorce is not final until it is signed by the court and filed in the office of the Clerk of Court.

In the case of Hodge v. Hodge, 305 S.C. 521, 409 S.E.2d 436 (S.C. Ct. App. 1991), the Court of Appeals held that upon the institution of marital litigation, the property acquired by a husband and wife during the marriage becomes vested in an estate called marital property in which the parties have a vested interest subject to equitable distribution. The Hodge court also held that ". . .with respect to the equitable division of marital property, marital litigation is not abated by the death of a spouse." If a person dies in the process of filing for divorce (or being sued for divorce), there may be room for maneuvering on the issue of what constitutes "the institution of marital litigation" and the value of an elective share claim should be compared with the potential recovery under an action for equitable distribution.

If the decedent is not domiciled in South Carolina, the law of the jurisdiction of domicile will apply to determine how South Carolina property is devised. See S.C. Code ANN. § 62-2-201(b). This is in stark contradiction to the general rule that you look to the law of the situs state to determine property rights. Prudence dictates that an attorney in the situs state should be retained to assist in the ancillary administration and to review "choice of law" issues.

## II. FILING THE ELECTIVE SHARE CLAIM

### A. Applicable Statutes.

§ 62-2-203. Exercise of Right of Election by surviving spouse.

The right of election of the surviving spouse may be exercised only during his lifetime by him or by his duly appointed attorney in fact. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending.

§ 62-2-204. Waiver of right to elect and of other rights.

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance and exempt property, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the parties waiving after fair disclosure. Unless it provides to the contrary, a waiver of all rights 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 to elective share, homestead allowance, and exempt property by each spouse in the property of the other and a disclaimer by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

§ 62-2-205. Proceedings for elective share; time limit.

(a) The surviving spouse may elect to take his elective share in the probate estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within eight months after the date of death, or within six months after the probate of the decedent's will, whichever limitation last expires.

(b) The surviving spouse shall give notice of the time and place set for hearing to the personal representative and to distributees and recipients of portions of the probate estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw or reduce his demand for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the probate estate or by contribution as set out in §§ 62-2-206 and 62-2-207.

(e) The order or judgment of the court for payment or contribution may be enforced as necessary in other courts of this State or other jurisdictions.

B. Applicable Case Law. In Simpson v. Sanders, 314 S.C. 413, 445 S.E.2d 93 (1994), the Supreme Court found that “§ 62-2-205 is a statute of creation and strict compliance with its terms is necessary to exercise the right to an elective share.” An elective share claim must be filed in court, or “delivered to the personal representative” within eight months after the death of the decedent or six months after the probate of the will, whichever last expires. In that case, the PR denied ever receiving the elective share claim. The case was remanded for a factual finding on actual delivery to the Personal Representative. The better practice appears to be to either mail the claim to the PR by certified mail return receipt requested, or to have the claim hand-delivered to the

PR by a process server. In Williams v. Williams, 335 S.C. 386, 517 S.E.2d 689 (1999), the Supreme Court reversed the Court of Appeals, holding that delivery of the claim to the PR's attorney was tantamount to delivery to the PR, and was therefore properly filed.

If the surviving spouse who is entitled to an elective share dies before the claim is filed, the answer under S.C. Code ANN. § 62-2-203 appears clear that the elective share claim fails. If the surviving spouse dies after timely filing his claim for the elective share, but before the claim is funded, the answer is unclear. If the institution of marriage is viewed as an economic partnership, the elective share should pass to the heirs or devisees of the surviving spouse entitled to such a claim (similar to any other devise, inheritance or economic interest). On the other hand, if the institution of marriage is viewed in the traditional, paternalist sense, there would no longer be a need for the elective share. The legislative purpose of the elective share statute noted in Williams v. Williams, *supra*, (i.e., to keep the spouse from becoming society's ward) would support this result. The fact that the claim must be filed during the surviving spouse's lifetime also supports this argument. This is an open issue to be decided by the courts.

In Geddings v. Geddings, 319 S.C. 213, 460 S.E.2d 376 (1995), the surviving spouse, Pinkie, filed an elective share claim even though she had signed a written waiver agreement. The Supreme Court affirmed the probate court's factual finding that Pinkie did not have any real or general knowledge of the value of her husband's estate, and therefore she did not receive the "fair disclosure" required by § 62-2-204 to create a valid waiver. The prudent approach would be to attach a list of assets to the waiver to militate against this potential outcome.

In Lafaye v. Timmerman, 331 S.C. 455, 502 S.E.2d 920 (S.C. Ct. App. 1998), the Court of Appeals ruled that the surviving spouse was not entitled to an omitted spouse's share, but was entitled to her elective share. In this case, the surviving spouse filed a claim for the omitted spouse's share, but did not file a separate elective share claim. Under S.C. Code ANN. §§ 62-2-301 and -302, the spouse is not entitled to an omitted spouse's share if: ". . . (1) it appears from the Will that the omission was intentional; or (2) the testator provided for the spouse by transfer outside the Will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence." The probate court found that the total transfers outside of the Will were such that the surviving spouse did not qualify as an "omitted spouse" under the statute. Nevertheless, because the spouse's petition contained a request for "such other relief as may be appropriate", the probate court, without hearing any arguments, granted the surviving spouse an elective share in the estate. On procedural grounds, the Court of Appeals upheld the probate court's ruling. Because the decedent did not have any children, the omitted spouse's share would have been the entire estate. By "giving" the surviving spouse the elective share, the court found a way to split the baby. This case highlights the fact that in cases where an omitted spouse's claim is filed, prudence dictates filing an alternative elective share claim.

### III. DUE DILIGENCE OF PERSONAL REPRESENTATIVE

A. The Personal Representative has a fiduciary duty to uphold the testator's Will. See S.C. Code § 62-3-703(a). The PR also has a fiduciary duty to the devisees under the Will. The steps that the Personal Representative need take in a given situation will vary highly based on the facts. Given that elective share claims are generally adversarial in nature and involve conflicts with the heirs and/or devisees, the prudent practice would be to independently verify the validity of the marriage, investigate any potential waiver of the elective share, and otherwise investigate the viability of an elective share claim. If there are any questionable issues which cannot be determined, prudence would dictate a hearing on the elective share, in which all interested parties have the opportunity to participate and the court can make findings on the validity of the marriage, waiver of any rights, etc.

B. The attorney for an estate generally does not have a duty to inform the surviving spouse of the right to file an elective share claim. The South Carolina Ethics Advisory Committee states, "in the absence of a present or past attorney client relationship with the surviving spouse, the attorney for an estate in probate has no ethical duty to inform the surviving spouse of the right to claim an elective share." *South Carolina Bar: Ethics Advisory Opinion 93-34*. The opinion further states, "the attorney for an estate in probate is retained by, and owes a duty to the personal representative, who is fiduciary for the estate and its beneficiaries." The attorney for the estate should take care to see that the spouse does not rely on him for legal advice and is informed of the right to independent counsel." This opinion indicated the analysis is highly fact specific and looks to the true identity of the client.

Would the result differ if the attorney were acting as personal representative of the estate? The South Carolina Ethics Advisory Committee states, "the attorney acting as personal representative has no ethical duty to inform the surviving spouse of the right to claim an elective share, because the attorney has the same fiduciary duty as any personal representative to beneficiaries of the estate." *South Carolina Bar: Ethics Advisory Opinion 93-34*.

§ 62-1-109. Duties and Obligations of Lawyer Arising out of Relationship between Lawyer and Person Serving as a Fiduciary.

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is declared to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

Based on Ethics Advisory Opinion 93-34 and S.C. Code ANN. § 62-1-109, the better practice appears to be for the attorney to represent the PR as fiduciary of the estate and to establish this attorney-client relationship in a written fee agreement.

#### IV. HOW MUCH IS THE GREEDY \*\*\*%!\*!!!## GOING TO GET?

A. Applicable Statutes. The Code provides that the elective share is calculated as follows:

##### § 62-2-202. Probate Estate.

For purposes of this part, probate estate means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administration expenses and enforceable claims.

S.C. Code ANN. § 62-1-201(12A) defines "Expenses of administration" as including "commissions of personal representatives, fees and disbursements of attorneys, fees of appraisers, and such other expenses that are reasonably incurred in the administration of the estate."

S.C. Code ANN. § 62-1-201(4) defines "Claims" ". . . in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The terms does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate."

##### § 62-2-206. Effect of election on benefits by will or statute.

A surviving spouse is entitled to benefits provided under or outside of the decedent's will, by any homestead allowance, by Section 62-2-401, whether or not he elects to take an elective share, but such amounts as pass under the will or by intestacy, by any homestead allowance, and by Section 62-2-401 are to be charged against the elective share pursuant to § 62-2-207 (a).

§ 62-2-207. Charging the spouse with gifts received; liability of others for balance of elective share.

(a) In the proceeding for an elective share, all property (including beneficial interests) which passes or has passed to the surviving spouse under the decedents will or by intestacy, by any homestead allowance, and by Section 62-2-401, or which would have passed to the spouse but was renounced, is applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the probate estate. For purposes of this subsection, the value of the electing spouse's beneficial interest in any property which would qualify for the federal estate tax marital deduction, pursuant to Section 2056 of the Internal Revenue Code, as amended, shall be computed at the full value of any such qualifying property (qualifying for these

purposes to be determined without regard to whether an election has been made to treat the property as qualified terminable interest property).

(b) Remaining property of the probate estate is so applied that liability for the balance of the elective share of the surviving spouse shall be satisfied from the probate estate with devises abating in accordance with Section 62-3-902.

1. Gifts in trust that qualify for the federal estate tax marital deduction count at their full value to reduce the elective share to which the surviving spouse is entitled. A discussion of the requirements of § 2056 is beyond the scope of this outline. However, a copy of Section 2056 of the Internal Revenue Code of 1986 is attached as Appendix 1.
2. If the surviving spouse is to receive property under the will in a trust that does not qualify for the federal estate tax marital deduction (for example, if the trust terminates upon the earlier of the death or remarriage of the surviving spouse), it is unclear how such a beneficial interest should be charged against the elective share.

B. Applicable Case Law. In Seifert v. Southern National Bank of South Carolina, 305 S.C. 353, 409 S.E.2d 337(1991), the Supreme Court held that where a spouse seeks to avoid payment of the elective share by creating a trust over which he or she exercises substantial control, the trust may be declared invalid as illusory, and the trust assets will be included in the decedent's estate for purposes of calculating the elective share. The court defined "substantial control" as meaning that a settlor has retained such extensive powers over the assets of the trust that he has until death the same rights in the assets after creation of the trust that he had before its creation. In Seifert, the decedent established a revocable inter vivos trust for estate planning purposes. This is a very common practice in South Carolina and practitioners were highly critical of this decision. The legislature subsequently adopted S.C. Code ANN. § 62-7-112 to clarify the validity of revocable inter vivos trusts.

S.C. Code ANN. § 62-7-112. Revocable inter vivos trust; creation; effect.

A revocable inter vivos trust may be created either by declaration of trust or by a transfer of property and is not rendered invalid because the trust creator retains substantial control over the trust including, but not limited to, (1) a right of revocation, (2) substantial beneficial interests in the trust, or (3) the power to control investments or reinvestments. Nothing herein, however, shall prevent a finding that a revocable inter vivos trust, enforceable for other purposes, is illusory for purposes of determining a spouse's elective share rights under Section 62-2-201 et seq. A finding that a revocable inter vivos trust is illusory and thus invalid for purposes of determining a spouse's elective share rights under Section 62-2-201 et seq. shall not render that revocable inter vivos trust invalid, but would allow inclusion of the trust assets as part of the probate estate of the trust creator only for the purpose of

calculating the elective share and would make available the trust assets for satisfaction of the elective share only to the extent necessary under Section 62-2-207.

Based on the ruling in Seifert, trusts remain a viable option to reduce the elective share, however, the settlor must have substantially limited control over the trust assets in order to avoid inclusion in the "probate estate" for purposes of the elective share. Prudence would also dictate that a trust that does not fall squarely within the Seifert facts may necessitate a court proceeding to determine to what extent, if any, the assets should be included in the estate for purposes of calculating the elective share.

In Smith v. McCall, 324 S.C. 356, 477 S.E.2d 475 (S.C. Ct. App. 1996), the Court of Appeals refused to extend the Seifert reasoning to joint bank accounts over which the decedent retained control. The court ruled against the surviving spouse, who was seeking to bring the joint accounts into the probate estate for purposes of calculating his elective share.

C. Entitlement of the elective share to post-death income and post-death appreciation (or depreciation)— Fractional or pecuniary? It is unclear under South Carolina law whether the elective share is calculated as a fractional portion of the estate or a pecuniary amount. On the one hand, the elective share is expressed in terms of a fraction (1/3) and therefore would seem to be a fractional amount. If the courts determine that in fact it is a fractional amount, the surviving spouse should also be entitled to a fractional amount of the post-death income and post-death appreciation (or depreciation). On the other hand, S.C. Code ANN. § 62-2-207(b) provides that the elective share is to be satisfied under the abatement statute in S.C. Code ANN. § 62-3-902 in the same manner as a pecuniary devise. Because it is treated like a pecuniary devise under the statute which provides for how it is to be paid, the better argument would appear to be that it is a pecuniary amount. If so, S.C. Code ANN. Section 62-7-408 provides that the elective share claim will be entitled to post-death income beginning one year after the first appointment of a PR. The only South Carolina case to come close to addressing this issue is the case of Woodward v. Woodward, 19 S.C. Eq. 23 (1 Rich. Eq. 1845). In that case, the South Carolina Supreme Court ruled that the widow was entitled to "mesne profits from the death of her husband until the return of the commissioners is confirmed; and to interest, on the sum assessed, from the time the return is confirmed, until the money is paid." This case involved the old common law principle of dower. It is unclear what weight, if any, a court would give this case in interpreting the elective share statutes.

## V. WHEN AND HOW DOES THE ELECTIVE SHARE GET PAID?

A. Timing. A creditor who is known or reasonably ascertainable but has not received actual notice of the decedent's death has until one year from date of death to present its claim. S.C. Code ANN. § 62-3-803. South Carolina law imposes no duty on a PR to provide actual notice to known or reasonably ascertainable creditors. S.C. Code ANN. § 62-3-801(c). Therefore, it is only after one year from date of death that the Probate Court can be certain that the time for presenting claims has expired for all creditors. Because the definition of "probate estate" in S.C. Code ANN. § 62-2-202 reduces the probate estate by "enforceable claims", the elective share calculation cannot be completed until after the creditors' claims period expires.

The definition of "probate estate" under S.C. Code ANN. § 62-2-202 also reduces the probate estate by "funeral and administration expenses." The final administration expenses are clearly known when the estate is closed and the final distributions are made. It is unclear whether the surviving spouse can force the elective share to be paid prior to the closing of the estate.

B. Individual liability of the Personal Representative. If a PR makes a distribution to a beneficiary before the assessment and payment of all claims, taxes, and expenses, the Personal Representative can be personally liable for the premature distribution. S.C. Code ANN. § 62-3-712. Because the PR could be personally liable for the distribution of estate assets before final resolution of all transfer tax matters with the taxing authorities, it would seem that the elective share should not be distributed until after the estate tax closing letter is received.

C. Cash or in-kind distribution?

1. The Probate Code prefers in-kind distribution (see S.C. Code Section 62-3-906).
2. The distribution can be handled by agreement or by proposal for distribution pursuant to § 62-3-906(a) with notice to all interested parties. In practice, this is typically where the horse-trading occurs. For example, the surviving spouse may prefer to receive cash instead of shares in the family business in which he would be a minority shareholder with his wife's children (who would love to see him disappear off the face of the earth). As everyone knows, two appraisers can come up with widely disparate valuations of closely held business interests.

## VI. SELECT TAX ISSUES

A. Distributable net income. Under prior law, it was possible to make a distribution to the surviving spouse in satisfaction of his elective share and have the entire distribution carry out distributable net income ("DNI") for which the surviving spouse would be liable for income taxes. The courts previously split over the issue of whether distributions in satisfaction of the elective share carried out DNI. In Deutsch v. Commissioner, T.C. Memo 1997 470, the Tax Court examined Florida's elective share statutes and ruled that a distribution in satisfaction of the elective share did not carry out DNI. The federal district court in Brigham v. United States, 983 F.Supp. 46 (D.Mass. 1997), aff'd 160 F.3d 759 (1<sup>st</sup> Cir. 1998), reached a contrary result and held that the Massachusetts elective share distribution did carry out DNI. The separate share rules of § 663(c) of the Internal Revenue Code of 1986 were amended to apply not only to trusts but also to estates of decedents dying after August 5, 1997. Under the separate share regulations (Treas. Reg. § 1.663(c)-1 through -6), a surviving spouse's elective share is a separate share for purposes of determining DNI, whether or not state law allows the surviving spouse to share in estate income or in appreciation and depreciation in estate assets. See Treas. Reg. § 1.663(c)-5, example 7.

B. Kenan Gain. An estate recognizes gain or loss on most distributions to a beneficiary who is entitled, under the terms of state law, to a specific dollar amount. See Kenan v. Commissioner, 114 F.2d 217 (2<sup>nd</sup> Cir. 1940). Because the elective share in South Carolina is probably a pecuniary amount, the PR should be aware of potential "Kenan gain" in funding the elective share with appreciated property.

## VII. CONCLUSION

With the substantial transfer of wealth that will occur over the next 20 years, coupled with the increased number of second marriages, the elective share should continue to be an important issue in many estates. Given the adversarial relationships present in most elective share situations, it is likely that the courts will be required to address many of the open issues discussed in this outline.