WEST VIRGINIA CODE CHAPTER 42 ARTICLE 3

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§42-3-1. Right to elective share.

(a) The surviving spouse of a decedent who dies domiciled in this state has a right of election, against either the will or the intestate share, under the limitations and conditions stated in this part, to take the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

If the decedent and the spouse were married to each other | The elective-share percentage is:

Less than 1 year | Supplemental Amount Only

1 year but less than 2 years | 3% of the augmented estate.

2 years but less than 3 years | 6% of the augmented estate.

3 years but less than 4 years | 9% of the augmented estate.

4 years but less than 5 years | 12% of the augmented estate.

5 years but less than 6 years | 15% of the augmented estate.

6 years but less than 7 years | 18% of the augmented estate.

7 years but less than 8 years | 21% of the augmented estate.

8 years but less than 9 years | 24% of the augmented estate.

9 years but less than 10 years | 27% of the augmented estate.

10 years but less than 11 years | 30% of the augmented estate.

11 years but less than 12 years | 34% of the augmented estate.

12 years but less than 13 years | 38% of the augmented estate.

13 years but less than 14 years | 42% of the augmented estate.

14 years but less than 15 years | 46% of the augmented estate.

15 years or more | 50% of the augmented estate.

(b) If the sum of the amounts described in subdivisions (3) and (4), subsection (b), section two of this article, and subdivisions (1) and (3), subsection (a), section six of this article, and that part of the elective-share amount payable from the decedent's probate and reclaimable

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estates under subsections (b) and (c), section six of this article, is less than $25,000, the surviving spouse is entitled to a supplemental elective-share amount equal to $25,000, minus the sum of the amounts described in said sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's reclaimable estate in the order of priority set forth in subsections (b) and (c), section six of this article.

(c) The right, if any, of the surviving spouse of a decedent who dies domiciled outside this state to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

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§42-3-2. Augmented estate.

(a) Definitions.

(1) In this section:

(i) "Bona fide purchaser" means a purchaser for value in good faith and without notice of an adverse claim. The notation of a state documentary fee on a recorded instrument is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

(ii) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he or she possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

(iii) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent by an exercise of the power could have created an interest, present or future, in himself or herself or his or her creditors.

(iv) "Probate estate" means property, whether real or personal, movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.

(v) "Right to income" includes a right to payments under an annuity or similar contractual arrangement.

(vi) "Value of property owned by the surviving spouse at the decedent's death" and "value of property to which the surviving spouse succeeds by reason of the decedent's death" include the commuted value of any present or future interest then held by the surviving spouse and the commuted value of amounts payable to the surviving spouse after the decedent's death under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system.

(b) The augmented estate consists of the sum of:

(1) The value of the decedent's probate estate, reduced by funeral and administration expenses, homestead exemption, property exemption and enforceable claims;

(2) The value of the decedent's reclaimable estate. The decedent's reclaimable estate is composed of all property, whether real or personal, movable or immovable, wherever situated, not included in the decedent's probate estate, of any of the following types:

(i) Property to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent's surviving spouse, was subject to a presently exercisable

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general power of appointment created by the decedent during the marriage and held by the decedent alone if the decedent held that power immediately before his or her death;

(ii) Property, to the extent of the decedent's contribution to it during the marriage, as a percentage of the whole, by which the property is held by the decedent and any other person, except the decedent's surviving spouse, with right of survivorship, acquired during the marriage of the decedent and the surviving spouse, if the decedent held that interest immediately before his or her death;

(iii) Property transferred by the decedent to any person other than a bona fide purchaser at any time during the decedent's marriage to the surviving spouse, to or for the benefit of any person, other than the decedent's surviving spouse, if the transfer is of any of the following types:

(A) Any transfer to the extent that the decedent retained at the time of his or her death the possession or enjoyment of, or right to income from the property;

(B) Any transfer to the extent that, at the time of the decedent's death, the income or principal was subject to a power, exercisable by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party, for the benefit of the decedent or the decedent's estate; or

(C) Any transfer made to a donee within two years before the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed $10,000;

(3) The value of property to which the surviving spouse succeeds by reason of the decedent's death, other than by homestead exemption, exempt property, testate succession or intestate succession, including the proceeds of insurance, including accidental death benefits, on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of the federal social security system; and

(4) The value of property owned by the surviving spouse at the decedent's death, reduced by enforceable claims against that property or that spouse, plus the value of amounts that would have been includible in the surviving spouse's reclaimable estate had the spouse predeceased the decedent.

(c) Any transfer is excluded from the decedent's reclaimable estate: (i) To the extent the decedent received adequate and full consideration in money or money's worth for the transfer, exercise or release; or (ii) if irrevocably made with the written consent or joinder of the surviving spouse. Life insurance, accident insurance, pension, profit sharing, retirement and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate is also excluded.

(d) Property is valued as of the decedent's death, but property irrevocably transferred during the two-year period next preceding the decedent's death which is included in the decedent's

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reclaimable estate under paragraph (iii), subdivision (2), subsection (b) of this section is valued as of the time of the transfer. If the terms of more than one of the paragraphs or subparagraphs of subdivision (2), subsection (b) of this section apply, the property is included in the augmented estate under the paragraph or subparagraph that yields the highest value.

(e)(1) Although under this section a payment, item of property or other benefit is included in the decedent's reclaimable estate, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is only liable for actions taken two or more business days after the payor or other third party has actual receipt of such written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

Any form of service of notice other than that described in subdivision (2) of this subsection shall not be sufficient to impose liability on a payor or other third party for actions taken pursuant to the governing instrument.

(2) The written notice shall indicate the name of the decedent, the date of the decedent's death, the name of the person asserting an interest, the nature of the payment or item of property or other benefit and a statement that the spouse intends to file a petition for the elective share or that a petition for the elective share has been filed.

(3) The written notice must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Notice to a sales representative of the payor or other third party shall not constitute notice to the payor or other third party. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The availability of such actions under this section shall not prevent the payor or other third party from taking any other action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payor or other third party shall file with the court a copy of the written notice received by the payor or other third party, with the payment of funds or transfer or deposit of property. The court shall not charge a filing fee to the payor or other third party for any such payment, transfer or deposit with the court, even if no probate proceedings have been commenced before such payment, transfer or deposit. The court shall hold the funds or item of property and, upon its determination under

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subsection (d), section four of this article, shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under subsection (a) of said section or, if filed, the demand for an elective share is withdrawn under subsection (c) of said section, the court shall order disbursement to the designated beneficiary. A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court. Payments, transfers or deposits made to or with the court discharge the payor or other third party from all claims under the governing instrument or applicable law for the value of amounts paid to or items of property transferred to or deposited with the court.

(4) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

(f)(1) A bona fide purchaser who purchases property from a recipient, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this part to return the payment, item or property or benefit nor is liable under this part for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property or any other benefit included in the decedent's reclaimable estate is obligated to return the payment, item of property or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, as provided in section six of this article.

(2) If any section or part of any section of this part is preempted by federal law with respect to a payment, an item of property or any other benefit included in the decedent's reclaimable estate, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in section six of this article to the person who would have been entitled to it were that section or part of that section not preempted.

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§42-3-3. Right of election personal to surviving spouse.

(a) The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under subsection (a), section four of this article. If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his or her conservator, guardian, or agent under the authority of a power of attorney.

(b) If the election is exercised on behalf of a surviving spouse who is an incapacitated person, the court must set aside that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's reclaimable estate under subsections (b) and (c), section six of this article and must appoint a trustee to administer that property for the support of the surviving spouse. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:

(1) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse and benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need;

(2) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination;

(3) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse, or, if there was no residuary clause or no will of that predeceased spouse, to the persons and in such shares as would succeed to that predeceased spouse's intestate estate as if that predeceased spouse died immediately after the surviving spouse.

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§42-3-3a. Waiver of right to elect; other rights.

(a) The right of election of a surviving spouse may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) He or she did not execute the waiver voluntarily; or

(2) The waiver was unconscionable when it was executed and, before execution of the waiver, he or she:

(i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, 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 of elective share by each spouse in the property of the other and renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

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§42-3-4. Proceeding for elective share; time limit.

(a) Except as provided in subsection (b) of this section, the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. The surviving spouse must serve a copy of the petition for the elective share on, and must give written notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests may be adversely affected by the taking of the elective share. The decedent's reclaimable estate, described in subdivision (2), subsection (b), section two of this article, is not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's reclaimable estate, against whom the spouse chooses to proceed under subsection (d) of this section, the court for cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's reclaimable estate, described in subdivision (2), subsection (b), section two of this article, in the hands of those persons against whom the spouse chooses to proceed under subsection (d) of this section, is not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, but is excluded for the purpose of satisfying the elective share amount and the supplemental elective share amount under subsections (b) and (c), section six of this article, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse may withdraw his or her 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 elective share and supplemental elective-share amounts and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under section six of this article. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he or she would have been under section two of this article had relief been secured against all persons subject to contribution.

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

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§42-3-5.

Repealed.

Acts, 1993 Reg. Sess., Ch. 169.

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§42-3-6. Charging spouse with owned assets and gifts received; liability of others for balance of elective share.

(a) In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's reclaimable estate:

(1) Amounts included in the augmented estate which pass or have passed to the surviving spouse by testate or intestate succession;

(2) Amounts included in the augmented estate under subdivision (3), subsection (b), section two of this article;

(3) Amounts included in the augmented estate which would have passed to the spouse but were disclaimed; and

(4) Amounts included in the augmented estate under subdivision (4), subsection (b), section two of this article up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in section one of this article appropriate to the length of time the spouse and the decedent were married to each other.

(b) If, after the application of subsection (a), the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and that portion of the decedent's reclaimable estate other than amounts irrevocably transferred within two years before the decedent's death are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's reclaimable estate are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and that portion of the decedent's reclaimable estate in proportion to the value of their interests therein.

(c) If, after the application of subsections (a) and (b) of this section, the elective share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's reclaimable estate is so applied that liability for the unsatisfied balance of the elective share or supplemental elective-share amount is equitably apportioned among the recipients of that portion of the decedent's reclaimable estate in proportion to the value of their interests therein.

(d) Only original recipients of the reclaimable estate described in subdivision (2), subsection (b), section two of this article, and the donees of the recipients of the reclaimable estate to the extent the original recipients or their donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective share or supplemental elective-share amount. A person liable to make contribution may

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choose to give up the proportional part of the reclaimable estate or to pay the value of the amount for which he or she is liable.

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§42-3-7. Entitlement of spouse; premarital will.

(a) If a testator's surviving spouse married the testator after the testator executed his or her will, the surviving spouse is entitled to receive, as an intestate share no less than the value of the share of the estate he or she would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised or passes to a descendant of such a child, unless:

(1) It appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) 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 the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift to a descendant of such a child, abate.

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