

‘TIL DEATH DO WE PART(NER): A NEW LOOK FOR THE ELECTIVE SHARE CLAIM

John T. Midgett
Midgett Preti Olansen PC
Virginia Beach, VA

I. Introduction.

A. History of the Elective Share in Virginia

1. On January 1, 1991, the concept of the "augmented estate" became effective as the basis for measuring the forced or Elective Share of a surviving spouse in the estate of a deceased spouse. Prior to January 1, 1991, the forced share was limited to a fraction¹ of the decedent's net probate estate with respect to personal property plus whatever rights the surviving spouse's dower or curtesy interest gave him or her in the deceased spouse's real estate. Today the same fractions apply, but to the statutorily defined augmented estate.

Non-vested rights of dower and curtesy as well as existing separate equitable estates were abolished effective January 1, 1991.

Under prior law of dower and curtesy, many practitioners felt that the surviving spouse's forced share was not adequately defined and there were numerous ways to defeat or minimize the election of a forced share and disinherit the surviving spouse.

1. Non-probate transactions such as insurance, joint property, and *inter vivos* trusts were not included in the spouse's forced share;
2. Separate equitable estates in both real estate and personal property were outside the scope of the spouse's forced share;
3. There was no way to make a forced share election in intestacy;
4. Gifts could be used to reduce the decedent's estate and frustrate the surviving spouse's claim;
5. A spouse who had been adequately provided for during lifetime could "double dip" by adding forced share property to property acquired during lifetime, or non-probate property acquired at death;

The concept of the augmented estate was taken from the pre-1990 version of the Uniform Probate Code (UPC). It incorporated concepts from the federal estate and gift tax

¹ One-half (1/2) if the decedent was not survived by descendants and one-third (1/3) if the decedent was survived by descendants.

law in defining the size of the spouse's Elective Share. Virginia did not adopt the UPC in whole, and instead adapted parts to existing laws, creating a fairly unique application of "uniform" concepts.

2. The common law, in Virginia, based on decisions of the Supreme Court since 1991, is sparse:

a. *Flanary v. Milton*, 263 Va. 20 (2002). An oral agreement in a divorce proceeding to waive rights to assets of a decedent will not serve to waive the right to claim the Elective Share of decedent's augmented estate.

b. *Pysell v. Keck*, 263 Va. 457, 559 S.E. 2d 677 (2002). A pre-marital agreement to keep property "separate" does not constitute a waiver of the Elective Share rights.

c. *Chappell v. Perkins*, 266 Va. 413, 587 S.E. 2d 584 (2003). Noting that the augmented estate statutes are silent as to burdens of proof, the Virginia Supreme Court held that regardless of who files the complaint to determine the Elective Share, the party seeking the inclusion of property has the burden of proof and the party seeking exclusion of property carries the burden of establishing such exclusion.

d. *Jones v. Peacock*, 267 Va. 16 (2004). Defines the capacity needed to make an Elective Share Claim.

e. *Dowling v. Rowan*, 270 Va. 510, 621 S.E. 2d 397 (2005). The word "maintain" as used in Va. Code §64.1-16.1(B)(ii) does not refer to physical maintenance or the property, income of proceeds, but rather to keeping a legal interest in the property separate.

f. *Sexton v. Cornett*, 271 Va. 251 (2006). VRS life insurance, exempt from levy, garnishment and legal process under Va. Code §51.1-124.4, are treated as separate property, unaffected by the augmented estate laws.

g. *Haley v. Haley*, 272 Va. 703 (2006). Time limits for filing the Elective Share claim will be strictly enforced.

h. *Purce v. Patterson*, 275 Va. 190, 654 S.E. 2d 885 (2008). While an agreed separation or petition for divorce is relevant evidence of the termination of co-habitation, it is not evidence which defeats a finding of willful abandonment, and that relevant evidence is the surviving spouse's conduct and his or her intent.

i. *Tuttle v. Webb*, 731 S.E. 2d 909 (Va. 2012). Endorsement of a check by surviving spouse, later converted by decedent into two cashier's checks payable to a third party, does not equate to consent to the subsequent gift, as the endorsement did not consent to the removal of those funds to diminish the value of the decedent's estate.

3. Virginia's current Elective Share statutes are based on a "support" based theory.

a. Closely resembles intestate succession in Virginia. Elective Share is:

1. One-third if children of decedent survive; or
2. One-half if decedent had no children.

b. Extends these percentages to certain non-probate assets as well as probate assets.

c. Looks only at assets of the decedent in determining the Elective Share due to the surviving spouse, including:

1. Decedent's Probate assets;
2. Transfers of decedent's assets to the surviving spouse during life and at death; and
3. Transfer of decedent's assets to others.

B. Virginia adopted variations of the UPC Elective Share Claim that make it unique among all states having adopted the uniform law. These variations include:

1. Interest on the unsatisfied portion at rate of 6% (Va. Code §64.2-304).
2. Extends gifting "look back" to 5 years instead of 2 (Va. Code §64.2-305(A)(3)(d)).
3. Excludes tangible personal property from the calculations (Va. Code §64.2-305(A)).

II. The Revised Uniform Probate Code.

A. History.

1. The Revised Uniform Probate Code (RUPC) version of the Elective Share was first proposed in 1990 (coincidentally, the year before Virginia's version first enacted).

2. The RUPC Elective Share provisions were revised again in 1993 and 2008.

B. Purpose.

1. The main purpose of the revisions to the UPC version of the Elective Share was to bring Elective Share law in line with the contemporary view of marriage as an economic partnership.

2. The economic theory of partnership dealing with property at death is similar to the equitable distribution system of dividing property when a marriage is terminated by divorce. *See, Va Code §20-103 et seq.* All states have adopted the equitable distribution of marital assets upon divorce, allowing courts to divide such assets, irrespective of how they are titled. The equitable distribution theory treats the marriage as a partnership of sorts and takes into account the contributions of both parties, whether monetary or not, in the division of property upon divorce.

3. The nine (9) community property states (California, Texas, New Mexico, Arizona, Idaho, Washington, Nevada, Louisiana and Wisconsin²) implement “partnership” theory when marriage terminates by death.

4. The RUPC Elective Share applies economic partnership theory for common law states adopting the RUPC language, allowing these states to bring division of property at death, in line with division upon divorce. Essentially, it treats the disinheritance of a spouse, whether partial or complete, as a breach of the implied formation of an economic partnership upon marriage.

5. The RUPC Elective Share provisions recognize increases in shorter term, later in life marriages and decreases the impact an Elective Share claim can have on a decedent’s estate plan.

C. The “Economic Partnership” Theory.

1. The implementation of the economic partnership theory in Elective Share claims will increase the entitlement of the surviving spouse in long-term marriages where assets were disproportionately titled in the decedent’s name. Conversely, the entitlement of the surviving spouse owning a disproportionate amount of the assets will be reduced.

2. The RUPC Elective Share counts the decedent’s assets and the surviving spouse’s assets in determining the pool of assets from which an Elective

² Alaska allows citizens to opt in to community property treatment and could be considered the tenth community property state).

Share claim is satisfied. This is a major departure from Virginia's current system.

3. The RUPC theory presumes Marital Property is equal to 50 percent of the combined assets. But, recognizing the effort needed within a partnership to build wealth, the surviving spouse's share of the Marital Property will increase as the length of the marriage increases.

D. Eliminates "Windfalls" for shorter term and later in life marriages.

1. The 15 year "earn-in" period provides the surviving spouse with a gradually increasing portion of the Marital Property, beginning with a 3% share for marriages less than 1 year in duration to 100% for marriages lasting 15 years or more.

2. Provisions for an incapacitated surviving spouse prevent disinheritance of the decedent's family by actions taken by the incapacitated spouse's agents, whether under a durable power of attorney or a court appointed conservatorship.

3. Virginia's current Elective Share laws can reward the children of the spouse who has the good fortune to live longer, and penalize the estate plan, and the children of the deceased spouse.

III. Virginia's Adoption of the Revised Uniform Probate Code Elective Share.

A. History.

1. SB 181– *See* Appendix A

2. HB 231– *See* Appendix B

3. HB 231 was signed into law March 1, 2016 and SB 181 was signed into law March 7 by Governor McAuliffe.

4. The new augmented estate provisions are effective for Decedents dying after January 1, 2017. Va. Code §64.2-308.1(A).

B. Something Old, Something New, Something Borrowed and Something Blue.

1. The new Virginia Elective Share statutes generally follow the RUPC partnership theory, but incorporate some provisions of current Virginia law. Valuation guidelines similar to those in effect in North Carolina (NCGS 3.38-3.3A) will aid in the valuation of partial interests and interests left in trust. Waivers by way of desertion and abandonment are retained.

IV. A look at the Virginia Version of the RUPC.

A. §64.1-308.1. Applicability; Definitions.

1. Effective for decedents dying on or after January 1, 2017.
2. Defines terms used throughout the following statutory provisions.

B. §64.1-308.2. Dower or Curtesy Abolished.

1. Nothing new here; this is merely a continuation of current §64.2-301.
2. Vested rights of dower or curtesy established prior to January 1, 1991 are not changed or diminished.

C. §64.1-308.3. Elective Share Amount; effect of election on statutory benefits; non-domicilliary.

1. Sets the Elective Share amount at 50% of the marital property portion of the augmented estate. The variance in percentages based on whether the decedent is survived by descendants is now eliminated. This is the first major change in our Elective Share laws.
3. Modifies current Virginia law by providing that the family allowance, exempt property allowance and homestead allowance are in addition to, and not charged against, the Elective Share amount due to the surviving spouse.
4. As does our current Elective Share statues, provides that real property located in Virginia, owned by a non-domiciled decedent, will be governed by the law of the decedent's domicile.

D. §64.2-308.4. Composition of the augmented estate; marital property portion.

1. Continues the current law which includes the decedent's net probate estate and certain non-probate transfers to others, and to the surviving spouse.
2. In the second major change from current law, adds to the augmented estate the surviving spouse's property and certain of the surviving spouse's non-probate transfers to others. This is consistent with the economic partnership theory.
3. Consistent with the notion that a partnership builds wealth over time, this statute introduces an increasing percentage of entitlement for the surviving spouse, ranging from 3% for marriages of less than 1 year to 100% for marriages of 15 years or more. This recognizes the contributions of the

surviving spouse, both monetarily and otherwise, to the creation of wealth within the marital relationship.

4. By including the surviving spouse's property, the new statute mitigates the effect of how assets in the marriage are titled.

E. §64.2-308.5. Decedent's net probate estate.

1. Defines decedent's net probate estate in similar fashion as current law.
2. In addition to the net probate estate under current law, the homestead allowance, exempt property allowance and family allowance amounts are added to the decedent's net probate estate.
3. Substitutes the term "enforceable claims" for debts. Claims are liabilities of the decedent whether arising in contract, tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent. *See*, Section 1-201 of the Revised Uniform Probate Code.

F. §64.2-308.6. Decedent's Non-Probate Transfers to Others.

1. Similar in scope to current Va. Code §64.2-305. The retained interest provisions of §64.2-308.6(2)(a), and (b) are nearly identical to Va. Code §64.2-305(3)(a) and (b).
2. The provisions of this statute include in explicit terms certain transfers outside the probate process:
 - a. Property subject to a general power of appointment held by the decedent is included in the augmented estate if it passes to anyone other than surviving spouse or decedent's estate by:
 1. exercise;
 2. release;
 3. lapse; or
 4. in default or otherwise.
 - b. Fractional interests in property in joint tenancy with right of survivorship with anyone other than surviving spouse.
 1. Values only the decedent's fractional interest
 2. *See* Va. Code §64.2-308.9 for valuation rules for fractional interests.
 - c. Decedent's interest in TOD and POD accounts or any co-ownership registration with right of survivorship, if passing to any one other than surviving spouse.

d. Proceeds of life insurance on the life of the decedent, including accidental death benefits if:

1. Decedent owned the policy at death; or
2. Decedent held a general power of appointment over the policy or proceeds; and
3. The proceeds were payable to anyone other than surviving spouse.
4. Value included in the decedent's augmented estate is the amount of proceeds payable at death.

e. Property transferred by the decedent during marriage.

1. Transfer with retained right of possession or enjoyment or right to income from the property (similar to current Va. Code §64.2-305 (A)(3)(a));
2. Any transfer with retained power over income or property.

(a) Similar to Va. Code current §64.2-305(A)(3)(b))

(b) Expands current law by expressly including valuation principles (based on North Carolina G. S. 30-3.3A):

1. Power over property is valued at the value of property subject to power;
2. Power over income is the value of the property that produced the income;
3. If power is over both property and income and the valuation of either separately is different, the value is the greater of the two valuation methods,

3. Property passing to anyone other than the surviving spouse:

- a. by termination of a power of appointment prior to decedent's death;
- b. by termination of right of possession; or
- c. by termination of right to income.

4. Transfer of life insurance if the proceeds would be included if the transfer had not occurred.

5. Transfers by gift in excess of the federal gift tax annual exclusion amount (\$14,000 under 2016 limits), limited to the 2 year period preceding the date of decedent's death. This change severely shrinks the current 5 year look back on gifts.

G. §64.2-308.7. Non-Probate Transfers to the Surviving Spouse.

1. Similar to current Va. Code §64.2-305(A)(1). The decedent's non-probate transfers to the surviving spouse are measured as follows:
2. Continues the exclusion from the augmented estate of the decedent's social security benefits.
3. For survivorship real property, only the decedent's fractional interest in property is included in the value transferred.
4. For POD, TOD or Co-Ownership with right of survivorship, these interests are valued only to the extent of decedent's ownership.
5. Any other property that would have been included in Va. Code §64.2-308.6 had it passed to or for the benefit of a person other than the surviving spouse, the decedent or the decedent's creditors, estate or estate creditors, will be included if it passes to the surviving spouse at the decedent's death.

H. §64.2-308.8. Surviving Spouse's property and non-probate transfers to others.

1. This is the third major change to existing Virginia law.
2. Adds to the calculations of the augmented estate, in addition to the decedent's probate estate, non-probate transfers to the surviving spouse and non-probate transfers to the surviving spouse and non-probate transfers to others, the value of the surviving spouse's assets, including:
 - a. Fractional interests in joint tenancy property with right of survivorship;
 - b. Fractional interests in POD, TOD or other Co-Ownership property with right of survivorship;
 - c. Property that passed to surviving spouse by reason of decedent's death (excluding allowances);
 - d. Property that would have been designated as non-probate transfers to others had the spouse been the decedent, including
 - i. general powers of appointment;
 - ii. transfers of life insurance; and

iii. gifts, made within two years of the decedent's death, in excess of the annual exclusion amount.

e. Enforceable claims against the surviving spouse are deducted from the value of property included under this section.

I. §64.2-308.9 Exclusions, Valuation and overlapping application.

a. Excludes from the augmented estate calculations (similar to current §64.2-305(B)):

1. transfers for adequate and full consideration;
2. transfers with the written joinder by surviving spouse; and
3. transfers with the written consent of the surviving spouse before or after the transfer.

b. Continues the Virginia exception to the Uniform Probate Code (Va. Code §64.2-305(B)) by excluding property transferred to decedent before or during marriage by:

1. gift;
2. will;
3. transfer in trust;
4. intestate succession; or
5. any other form or method of transfer without full consideration from anyone other than surviving spouse if maintained by the decedent as separate property.

c. Excludes property transferred to the surviving spouse before or during marriage by:

1. gift;
2. will;
3. transfer in trust;
4. intestate succession; or

5. any other form or method of transfer without full consideration from anyone other than the decedent if maintained as the surviving spouse's separate property.

6. The addition of this exclusion, new to Virginia law, became necessary when the surviving spouse's property became a part of the augmented estate calculation.

d. Valuation.

1. continues the valuation of life estates and remainder interests under the manner described in Va. Code §55-269.1 *et seq.* This is a carryover from Va. Code §64.2-305(c)(1).

2. Adds provisions for valuation of other interests:

Trusts created by the decedent for the surviving spouse's exclusive benefit are valued at the full value of property held in trust if:

a) the trust is controlled by the surviving spouse or one or more non-adverse parties;

b) the entire net income of the trust must be distributed at least annually to spouse (i.e., QTIP trusts and other mandatory distribution trusts);

c) the Trustee may distribute to the spouse out of the Trust principal amounts in Trustee's discretion for the health, maintenance or support of the surviving spouse;

d) the full value of the trust property is included even if the Trustee be authorized to take into account income or assets available to spouse before making distributions.

3. Partial or contingent interests depending on events not under spouse's control (and not otherwise subject to valuation under Virginia's mortality or annuity tables in Va. Code §55-271 to §55-277) will be conclusively presumed to cause the lowest possible value passing to the spouse.

4. Any interest which can be valued under multiple provisions will be deemed to be included in the augmented estate yielding the highest value to the surviving spouse.

5. If property valued under multiple provisions result in the same value, property is only included under one provision.

J. §64.2-308.10. Sources from which Elective Share Payable.

1. The Surviving spouse's share of the augmented estate is satisfied first from any property excluded from the augmented estate that passed or passes to the spouse. This is new to Virginia law. Following these amounts, satisfaction is achieved from:

a. amounts passing to the spouse by testate or intestate succession and all amounts included in the augmented estate under Va. Code §64.2-308.7; and finally

b. the marital property portion of the surviving spouse's property. This provision will cause no or very little payment to the surviving spouse having a disproportionate amount of marital property titled in his or her name.

2. The marital property portion is computed at 50 percent of the value of the amounts included in the augmented estate by the percentage appropriate for length of marriage, ranging from 3% to 100%.

1) Example 1. If the total value of the decedent's assets and surviving spouse's assets equal \$1,000,000, the marital property portion is 50% or \$500,000. If the duration of the marriage is less than one year, $3\% \times \$500,000 = \$15,000$, the augmented estate value due to the surviving spouse (in addition to the family, exempt property and homestead allowances).

2) Example 2. Under same asset scenario, a marriage of 15 years or greater values the augmented estate at $\$500,000 \times 100\% = \$500,000$.

3) More detailed examples of calculating the Elective Share are found in Article V of this Outline.

3. If property attributable to the surviving spouse is not sufficient to fully satisfy the Elective Share (*i.e.* is less than the Elective Share amount) the Elective Share amount is satisfied by:

a) amounts included in the decedent's net probate estate (other than assets passing to the surviving spouse);

b) the decedent's non-probate transfers to others under Va. Code §64.2-308.6(1), (2) and (3)(b).

c) Liability is apportioned among the recipient of both probate and non-probate transfers.

d) If not fully satisfied, then from all other non-probate transfers to others in proportion to the value of interests conveyed.

4. The unsatisfied portion of the augmented estate due to the surviving spouse is treated as a general pecuniary bequest. As such it

a) does not share in gain or loss of the estate;

b) bears interest at legal rate of interest (6%) only if not satisfied within one year of the decedent's death (see Va. Code §64.2-425);

c) eliminates current statute's imposition of 6% risk free interest on the unsatisfied portion of the augmented estate from date of death.

K. §64.2-308.11 Personal Liability of Recipients.

1. Section (A) is a carryover of existing law under Va. Code §64.2-306 regarding who is liable and how a proportionate share may be satisfied.

2. Section (B) deals with federal law preempting portions of the elective claim statutes, imposing what amounts to a constructive trust over property received under the federal presumption.

a. This has been a source of contention in the past regarding federal group life insurance benefits.

b. *See*, for example, *Maretta v. Hillman*, 283 Va. 34 (Va. 2012) Re: FEGLI Insurance proceeds.

c. *See, Sexton v. Cornett*, 271 Va. 251 (2006) regarding VRS Insurance.

L. §64.2-308.12 Proceeding for Elective Share; time limit.

1. Similar to current statute (Va. Code §64.2-303) in that 6 month statute of limitations is imposed on filing of the later of the

- a. time of the admission of decedent's will to probate; or
 - b. qualification of an Administrator on decedent's intestate estate
2. The claim for the Elective Share must either be in person before Clerk or by writing recorded in the Clerk's Office upon such acknowledgment or proof as would authorize a writing to be admitted to record under Va. Code §55-106, *et. seq.* This is unchanged from current statutory requirements.
 3. Requires the surviving spouse to give Notice of Filing for the Elective Share claim by mail or hand delivery to Executor or Administrator, if any, within 30 days of filing. The new notice requirement will protect the personal representative of the decedent's estate from liability for any distributions made without actual notice of the surviving spouse's claim.
 4. Imposes a new time limit for filing a complaint to determine the Elective Share claim. The Complaint must be filed no later than 6 months after date of the filing of the Elective Share claim. It is expected that this filing deadline will be strictly enforced under the reasoning set forth in *Haley v. Haley*, 272 Va. 703 (2006).
 5. Requires the surviving spouse to provide a copy of the complaint, no later than 30 days after filing, to all known persons interested in the decedent's estate or whose interests in the decedent's augmented estate will be adversely affected by the taking of the Elective Share. Again, it is expected that this deadline will also be strictly enforced under the reasoning in *Haley, supra*.
 6. Excludes from the augmented estate computation non-probate transfers to others if the complaint is filed more than 12 months after the decedent's death. This new provision provides a measure of protection to non-probate transferees.
 7. Allows the Elective Share claim to be withdrawn at any time before the entry of a final determination by the Court. The withdrawal extinguishes the claim. There is no statutory prescribed form for withdrawal of the Elective Share claim. This author's presumption is that the withdrawal of a claim may be accomplished in same fashion as filing the claim, or by a dismissal order after the complaint has been filed. Currently, no withdrawal of a claim is possible, and a claim may only be extinguished by the filing of a complaint and entry of a dismissal order.

M. §64.2-308.13. Rights of Election.

1. The Elective Share claim may be made by or on behalf of a spouse who is living on the date the election is filed. This is identical to existing law.

2. Expressly provides that the election may be made on behalf of an incapacitated spouse by a conservator or agent under durable power of attorney. This is a new declaration by the legislature.

a. One case involving powers of an agent to renounce a will on behalf of an incapacitated spouse was decided under law prior to the first enactment of the Elective Share in 1991. In *First Nat'l Exch. Bank v. Hughson*, 194 Va. 736 (1953), the Supreme Court held that a guardian or committee was conferred no power to renounce a decedent's will, but that a Circuit Court could, after consideration of certain factors, renounce a will on behalf of an incapacitated surviving spouse.

In *Hughson*, Nellie Stone was the incompetent widow of Dr. Eustace B. Stone, deceased. First National Exchange Bank of Roanoke, as Nellie's guardian, sought to renounce the provisions made in Dr. Stone's will for his widow and to deliver unto her the portion of her husband's estate to which she was entitled under the law of Virginia then in effect. In response, parties interested in Dr. Stone's estate proposed alternative plans to establish a special trust for Nellie which would pay to the Bank, as guardian, so much of the principal as needed for Nellie's support, with the remainder to pass to four legatees as nearly in accordance with the terms of the will as possible. When the trial court approved and adopted one of the alternative plans, the Bank, as Nellie's guardian, appealed.

The guardian contended that it possessed the power to renounce the will on behalf of Nellie, the surviving spouse. The executor and legatee of the estate maintained that such right of renunciation is personal to the spouse, and the guardian could neither exercise the power nor demand as of right renunciation of the court.

The Supreme Court of Virginia, after review of the history of the statutory spousal renunciation rights found "no purpose or interest to give the guardian or committee of an insane widow or widower the power to renounce the provisions of a will made for her or him, and thus, clearly there is no implication that can be justly drawn from the language that would confer such a power" (*Id at 805*)

The Court found that the power to renounce provisions of a will made for an incompetent spouse must be exercised on behalf of the incompetent spouse by a court of equity, taking into account what is in the best interests of the incompetent spouse.

b. A conservator is specifically authorized to make an augmented estate claim on behalf of an incapacitated ward under the provisions of Va. Code §37.2-1023(A)(6). The Uniform Power of Attorney Act

includes a provision in Va. Code §64.2-1624(1) that allows an Agent to: “Demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of the fund, by litigation or otherwise.”

3. When an Elective Share claim is made for an incapacitated spouse, the Court is required, in any order determining the amount due to the surviving spouse, to impose a trust over the Elective Share claim amount due from decedent’s net probate estate and transfers to others. *See, Jones v. Peacock*, 267 Va. 16 (2004) for capacity needed to make an Elective Share claim.

a. The Trustee of the claim amount must be appointed by the Court to administer the fund for the incapacitated spouse.

b. An election for the augmented estate made by conservator or agent for the spouse creates a presumption of incapacity on the part of the surviving spouse.

c. The trust must be administered for the support of the surviving spouse:

i. Income and principal may be administered as the Trustee deems proper for the surviving spouse’s support, without Court order;

ii. A Trustee may consider other income and resources available to the incapacitated spouse, including Medicaid, or other government need based programs in making decisions to expend income or principal;

iii. During incapacity, neither the spouse or the agents for the spouse may terminate the trust;

iv. Spouse may terminate the trust and acquire trust property outright if capacity is regained. The spouse may terminate the trust by delivering to the Trustee a signed writing declaring the termination. Presumably, the Trustee may desire the entry of an Order terminating the trust and releasing the Trustee from further fiduciary duty.

v. At the death of an incapacitated spouse, the Trustee shall convey any unexpended trust property in the following order:

a) under the residuary clause of the decedent’s will, if any; or

b) to decedent's heirs at law under laws of intestacy (Va. Code §64.2-200 *et. seq.*)

vi. A trust for the incapacitated spouse is treated as a testamentary trust and governed by all applicable Virginia laws.

N. §64.2-308.14. Waiver; defenses.

1. These provisions are a carryover from current Virginia law, but with enhancements

2. The Elective Share claim may be waived, similar to Va. Code §64.2-30, but under the new statute, a waiver is not enforceable if the surviving spouse can prove:

a. the waiver was not executed voluntarily; or

b. the waiver was unconscionable by reason that

i. fair and reasonable disclosure of property or financial obligations was not provided by the decedent, or

ii. any right to disclosure beyond the property or financial obligations provided by the decedent was not voluntarily and expressly waived in writing and

iii. the surviving spouse could not have or had an adequate knowledge of the decedent's property or financial obligations.

c. The issue of unconscionability of a waiver is an issue for the Court as a matter of law.

d. Domestic Relations lawyers will need to address these new provisions in premarital and marital agreements drafted after the enactment of the statute.

3. Defenses of willful desertion or abandonment are carryovers from existing law (Va. Code §64.2-308) and are not found in the RUPC.

O. §64.2-308.15. Protection of Payors and Third Parties.

1. Requires the surviving spouse to give notice to all potential payors that the Elective Share claim has been filed.

2. Payor has no liability for transfers made in good faith reliance on decedent's will, trust or other transferring instrument prior to receipt of written notice of the Elective Share claim.

3. Requires the surviving spouse to provide notice that the Elective Share claim has been filed, by registered or certified mail, or served (as if a civil summons) to potential payors.

P. §64.2-308.16. Rights in Family Residence.

1. The rights of the surviving spouse in the family residence following the filing of the Elective Share claim are a carryover of the quarantine rights found in Va. Code §64.2-307.

2. The rights are peculiar to Virginia and are not found in the RUPC.

V. Comparison of the Augmented Estate Claim Now and After January 1, 2017.

A. Example 1. Bree and Rex are married for 16 years, when Rex dies suddenly, from poisoning.

Rex, a successful physician, has accumulated the following assets in his name:

401k plan	\$1,200,000	(Beneficiary 50% to each of his children)
LLC interest	400,000	(Payable to Bree by his Will)
Savings Account	<u>50,000</u>	(Payable to Bree by his Will)
	\$1,650,000	

Rex and Bree have the following assets in their joint names with survivorship:

Residence on 4354 Wisteria Lane, Fairview	\$600,000
Investments: Stocks and Bonds	400,000
Joint Banking accounts	100,000
Personal Property	<u>75,000</u>
TOTAL:	\$1,175,000

Bree owns the following assets in her name:

Timeshare, Aspen, Co.	25,000
Checking Account	20,000
I.R.A.	85,000
4 handguns	<u>1,500</u>
TOTAL:	\$131,500

None of the parties' assets are from gifts or inheritances.

Upon Rex's death, Bree timely files an Elective Share claim, and a claim for her family allowance and her exempt property allowance.

Assume funeral expenses of \$15,000 and estate administration expenses of \$30,000.

Under 2016 law, Rex's augmented estate equals \$2,237,500, less \$45,000 for funeral and administrative expenses, or \$2,192,500.

Less Family Allowance	24,000
Less Exempt Property Allowance	<u>20,000</u>
	\$2,148,500

Bree's Elective Share equals 50% = \$1,074,250

Less assets received from Rex:

LLC interest	<400,000>
Savings Account	<50,000>
(net after administration expenses)	

One-half residence	<300,000>
One-half investments	<200,000>
One-half joint accounts	<50,000>
One-half TPP	<37,500>

Total deductions: <1,037,500>

Balance due:	36,750
Interest at 6% until	
Satisfied (1 year from death)	<u>2,205</u>
	38,955
Plus allowances	<u>44,000</u>

Total Due to Bree: \$82,955
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Under 2017 law, Rex's augmented estate will be calculated differently.

Rex's Assets:	1,650,000
Joint Assets:	1,175,000
Bree's Assets:	<u>131,500</u>
Total:	2,956,500

Marital Share = 50% or \$1,478,250

15 year Marriage = 100% of Marital Share = \$1,478,250

Less Bree's assets	<131,500>
50% Joint Assets	<587,500>
Assets acquired from Rex	<450,000>
Joint assets acquired from Rex	<u><587,500></u>
TOTAL	<1,756,500>
Balance Due to Bree:	0

B. Example 2. Gabrielle is married to Victor. It is a second marriage for both and each have children from a prior relationship. They have been married for less than one year. Victor is killed when he is impaled by a section of picket fence during a freak tornado.

Victor is the son of a successful politician and has inherited \$4,000,000, which he maintains in a revocable living trust created and funded prior to marriage. He also owns the following assets in his own name:

Bank accounts	\$ 25,000
Real estate investments	875,000
Automobile	<u>75,000</u>
TOTAL	\$975,000

All of these assets pass by his pour-over Will to his Trust. Gabrielle is not a beneficiary of either his will or trust. Gabrielle, by reason of her divorce from Carlos, owns the residence at 4349 Wisteria Lane, valued at \$550,000. Due to her spending habits, she has no other assets.

Victor's cremation expenses were \$8,000 and his administrative expenses were \$17,000.

Gabrielle files her Elective Share claim, as well as a claim for the family and exempt property allowances.

Under 2016 law, Victor's augmented estate consists of the following:

Probate estate	\$975,000
Less: funeral/cremation expenses:	<8,000>
Administration expenses	<u><17,000></u>
TOTAL	\$950,000
Less Family Allowance:	<24,000>
Exempt property Allowance:	<u><20,000></u>
	\$906,000
Gabrielle's share:	
One-third	\$302,000
Interest at 6%	

(settled one year after death)	<u>18,120</u>
	\$320,120

Plus Family Allowance	24,000
Plus Exempt Property Allowance	<u>20,000</u>
	\$364,120

Under 2017 law, Victor's trust remains outside the augmented estate realm.

Victor's probate assets equal	\$975,000
Less: funeral/cremation expenses	<8,000>
Less: administration expenses	<17,000>
Less: Family Allowance	<24,000>
Less Exempt Property Allowance	<u><20,000></u>
TOTAL:	\$906,000

Gabrielle's assets equal	<u>\$550,000</u>
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Total Augmented Estate	\$1,456,000
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50% Marital Share =	\$728,000
For marriage under 1 year	<u>x .03</u>
	\$ 21,840

Gabrielle's assets:	\$550,000
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Amount due:	
Augmented Estate	0
Family Allowance	24,000
Exempt Property Allowance	20,000
Homestead Allowance	<u>20,000</u>
(if timely filed)	
Total Due to Gabrielle:	\$ 64,000

C. Example 3. Mary Alice Young has been married to Paul Young for 10 years. Mary Alice and Paul resided at 4352 Wisteria Lane, Fairview, which is owned jointly. When Mary Alice took her life she owned the following assets:

Retirement Plan	\$135,000 (Beneficiary is Paul)
Personal bank accounts	35,000 (left to their child, Dana)
Tangible personal property	<u>30,000</u> (left to their child, Dana)
	\$200,000

Mary Alice and Paul have the following joint assets:

4532 Wisteria Lane	\$540,000
Investments-stocks & bonds	60,000
Tangible personal property	<u>50,000</u>

Total	\$650,000
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Paul owns the following assets:

Retirement plans	\$270,000
Personal bank account	30,000
Automobile	40,000
Partnership	<u>10,000</u>
	\$350,000

Mary Alice had funeral expenses of \$10,000 and administration expenses of \$5,000. Paul files his claims for the Elective Share, family and exempt property allowances.

Under 2016 law, the augmented estate calculations are as follows:

Personal property	\$35,000
Bank accounts	<u>30,000</u>
	\$65,000
Less:	
Funeral expenses	<10,000>
Administrative expenses	<5,000>
Allowances	<u><44,000></u>
	6,000
Plus 50% joint assets	\$325,000
Retirement Plan	<u>135,000</u>
	<u>\$466,000</u>
Paul's share at 50%=	\$233,000
Less 50% joint assets	<325,000>
Less Retirement Plan	<135,000>
Balance due:	0
Plus Family Allowance	24,000
Exempt Property Allowance	<u>20,000</u>
Total Due to Paul:	44,000
Plus Homestead Allowance if claimed	<u>20,000</u>
	\$64,000

Under 2017 law, Mary Alice's augmented estate consists of her

Net probate assets:	\$ 6,000
Retirement Plan	135,000
50% joint assets (MAY)	325,000
50% joint assets (PY)	325,000
Paul's Assets	<u>350,000</u>

TOTAL	\$1,141,000
Marital Assets = 50%	570,500
x 60% (10 year marriage)	342,300
Less Paul's assets	<350,000>
MAY Retirement	<135,000>
50% Joint Assets	<325,000>
Net Augmented Estate due	0
Plus Family Allowance	24,000
Exempt Property Allowance	20,000
Homestead Allowance	<u>20,000</u>
(if timely filed)	
Total Due to Paul:	\$64,000

The result for Paul would be the same under either version of the augmented estate.

VI. Conclusion.

1. Considering the initial version of the UPC dealing with the augmented estate, even its proponents have recognized its complexity and controversial nature.
2. Virginia's several modifications to the UPC approach in 1991 left Virginia courts without much help from other jurisdictions on important issues of construction and interpretation.
3. As noted above, the UPC has evolved into the RUPC. While the RUPC addresses many of the technical problems that arose under the UPC, it also provides a fundamental redefinition of the entire concept of the forced share. Prior to 2016, Virginia had not adopted this view, also leaving Virginia courts without help from other jurisdictions which have adopted the RUPC. Virginia's adoption of most of the modifications brought about by the RUPC appear to be more consistent with the partnership theory of asset division, a theory that is more in line with the equitable distribution laws in effect at divorce.
4. As the new law becomes effective for persons dying on or after January 1, 2017, we, as practitioners, have ample time to familiarize ourselves with the modern partnership theory of marriage and the effect on planning for marriages of any duration.

