

ANALYSIS OF AN ELECTIVE SHARE AUGMENTED ESTATE CLAIM

By

Jean Galloway Ball

**Jean Galloway Ball, CELA
Jean Galloway Ball, PLC
Suite 150, 10306 Eaton Place
Fairfax, Virginia 22030
Tel: 703/359-9213
Fax: 703/591-0553
jgball@uselderlaw.com**

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This paper will analyze an elective share claim made against an augmented estate by a surviving spouse. The analysis will be in the context of Virginia's augmented estate statute which is attached at Appendix A. The property possibly included in the augmented estate is shown at Appendix B. An analysis of the augmented estate based on the discussion below is shown in an Excel spreadsheet at Appendix C. The purpose of the paper is to provide guidance to a practitioner faced with an elective share claim in how to determine the contents of the augmented estate against which the claim is made. This is based on an actual case currently being litigated.

FACTS

Following is a brief summary of the relevant facts. Relevant details are stated in the discussion of particular issues.

Wilma Green ("Wilma") and Daniel Green ("Dan") were married on July 17, 1993. This was Wilma's fourth marriage. No children were born of the marriage. Wilma died on February 16, 2002. She was survived by her husband Dan and by Loretta Jones (hereinafter "Loretta"), an adult daughter by her first marriage.

Wilma was born and raised in Peru. She had become a naturalized American citizen three years before her death. Her mother was alive and residing in Peru. Her father had predeceased her. Her parents owned 12 pieces of real property in Lima, Peru. Though her father died intestate, under Peru's laws of forced heirship, Wilma inherited a partial interest in her parent's property at her father's death. An additional interest would have passed her as a matter of law at her mother's death. Under the laws of Peru, that interest will pass to her daughter Loretta.

Wilma and Dan had executed a premarital agreement prior to their marriage. Dan is an attorney and prepared the agreement. Though in the initial recitals the agreement states that it is intended to settle the rights and obligations of the parties in the event of death or the dissolution of the marriage, none of the substantive provisions address rights accruing to a surviving spouse under Virginia law. Attached to the agreement were extensive lists of separate property, including real property and tangible and intangible personal property.

Prior to her death Wilma executed various estate planning documents. On February 3, 1999, she executed the Wilma Green Irrevocable Life Insurance Trust (hereinafter, "Insurance Trust"). She funded the trust with two existing term life insurance policies.

On June 25, 2001, Wilma executed the Wilma Green Revocable Trust (hereinafter, "Trust"). She funded the Trust with real property (a residence used as a rental) which she had acquired in the divorce from her third husband. Under the terms of the Trust, Dan had a right to income from the Trust up to \$12,000 per year for the rest of his life as

long as he did not remarry. The remainder beneficiary was Loretta. Wilma also executed a Last Will and Testament in which she left her tangible personal property identified in her Premarital Agreement to her daughter Loretta and her other tangible personal property to Dan. The residue of her estate was left to her trust.

The only asset in Wilma's probate estate was her tangible personal property. The remainder of her assets were either in her trusts or passed by beneficiary designation or right of survivorship to her husband or her daughter.

Dan filed Wilma's Will with the Circuit Court for Arlington County on March 21, 2002. Dissatisfied with the provisions Wilma made for him in her estate planning documents, Dan filed an elective share claim against the augmented estate of Wilma on May 2, 2002. He also filed an election for family allowance and election of exempt property on that date. These elections were not provided to Wilma's daughter Loretta until December 15, 2002. Though named as the Executor of Wilma's estate, Dan did not qualify on the estate until December 27, 2002. Approximately one month later, he filed his petition for determination of elective share with the Arlington County Circuit Court.

LAW

Under Virginia law, a surviving spouse may elect against his deceased spouse's will by filing an elective share claim. The surviving spouse is entitled to one-third of the augmented estate if the decedent left a surviving child or children or their descendants. The surviving spouse is entitled to interest on the elective share at the

legal rate specified in the Virginia Code, currently 8%, from the date of the decedent's death until the share is satisfied.¹

The focus in litigating an elective share claim is the composition and value of the augmented estate. Section 64.1-16.1 of the Virginia Code determines the content of the augmented estate.² Chappell v. Perkins, 266 Va. 413, 587 S.E.2d 584 (2003), "Code §64.1-16.1 does not prescribe a method of enforcing the right to an elective share of an augmented estate, it defines the content of an augmented estate".

There are four parts to 64.1-16.1, subsection A defines what property interests are *included* in the augmented estate, subsection B defines what property interests are *excluded* from the augmented estate, subsection C directs how particular property interests are to be *valued* and subsection D *defines the terms "estate" and "property"* for purposes of the statute by forcing inclusion of property interests usually not included in a testate or intestate estate. In analyzing each property interest of a decedent, one must first determine if it is included under the terms of subsection A or excluded under the

¹ The Virginia Code provision is inflexible on the allowance for interest. Under the facts presented here the surviving spouse has created a nice little investment for himself by delaying determination of his elective share claim. The elective share claim is determined in the context of a probate proceeding. Dan delayed qualifying on the estate and filing his elective share claim for almost a year after Wilma died.

² Section 64.1-16.1 is attached at Appendix A. The Virginia statute is modeled on the pre-1990 Uniform Probate Code, Article II, Part 2. ("UPC"). The UPC was substantially revised in 1990 and 1993, "RUPC". One of the biggest changes made in the RUPC was to alter the elective share amount in accordance with the length of the marriage. The percentage share a surviving spouse could receive of the augmented estate is graduated based on the number of years of marriage, ranging from 3% after the first year of marriage to 50% of the augmented estate for a marriage of fifteen years or more. Virginia has not adopted the 1990 and 1993 revisions to the UPC.

terms of subsection B³, then one looks to subsection C for how to value any property interests determined to be included.

COMPOSITION OF THE AUGMENTED ESTATE

At Appendix B is a list of assets that Dan claims belong in Wilma's augmented estate. Following is an analysis of each item.

A. 10535 Brevity Drive/Rental Income

From the time Wilma became sole owner of Brevity Drive, following her divorce from her third husband in 1990, she maintained the property as her separate property. Title was held by Wilma individually and then by Wilma as trustee of her revocable grantor's trust. Wilma managed the property and signed all leases for the property individually or as trustee of her Trust. The full value of Brevity Drive was included in Wilma's estate on the Federal and Virginia Estate tax returns prepared under the direction of Dan.

Were Wilma and Dan getting a divorce, Dan would have no claim against Wilma's rental property. However, under §64.1-16.1.A.3.b.,⁴ the property is part of Wilma's augmented estate. The only way to exclude the property would be to argue

³ In its recent decision in Chappell v. Perkins, supra, the Supreme Court of Virginia ruled that the party seeking inclusion of a property interest under subsection A of 64.1-16.1 has the burden of proof to establish inclusion, while the party seeking exclusion of a property interest under subsection B of 64.1-16.1 has the burden of proof to establish exclusion.

⁴ Section 64.1-16.1.A.3. b. provides, for the inclusion of property where it was transferred "to the extent that the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit..."

that her complete interest in the property was received without full consideration, perhaps as part of the property settlement agreement with husband number 3.

B. Life Insurance Policies

During her life, and prior to her marriage to Dan, Wilma had taken out two life insurance policies – a policy with Garden State Life Insurance Company with a face value of \$150,000 and a policy with Midland National Life Insurance Company with a face value of \$200,000. The Garden State policy was issued on August 11, 1987. The Midland policy was issued on October 21, 1985. Wilma was the owner and the insured on the policies at the time they were issued. Loretta was the named beneficiary on the policies from the time they were issued.

Wilma transferred the policies to her Life Insurance Trust in April of 1999, which was during her marriage to Dan. The transfer was complete and irrevocable. Following the transfer in April of 1999, only the trustee of the Life Insurance Trust could control the policies, and that control was subject to the terms of the Life Insurance Trust. Loretta was named as Trustee of the Life Insurance Trust. In addition, Loretta was named as the sole beneficiary of the Life Insurance Trust. At the time the policies were transferred to the Life Insurance Trust, neither had any cash value.

At the time the Garden State policy was transferred to the Life Insurance Trust the annual premium on the policy was \$643.20 per year. At the time the Midland policy was transferred to the Life Insurance Trust the annual premium on the policy was \$916.02.

Section 64.1-16.1.D, defines “estate” and “property” for purposes of the statute as including insurance policies. See Felix-Aranibar v. Felix, 59 Va. Cir. 357, 360 (17th Cir. 2002). Section 64.1-16.1.C states that the value of a life insurance policy that “is irrevocably transferred during the lifetime of a decedent is the cost of a comparable policy on the date of transfer or, if such a policy is not readily available, the policy’s interpolated terminal reserve”. Taking this Code provision at face value, one would value the life insurance at the cost of its annual premium at the time of transfer as the policies had no cash value. However, Wilma had had breast cancer three years earlier and may not have been able to obtain a comparable policy and certainly not at the premiums she was paying at the time of transfer. Is the policy valued independent of the insurability of the insured at the time of transfer? The Code does not tell us. Dan is claiming the face value of the policies is their value; Loretta takes the position that the annual premium is the value.⁵

An alternative argument is that the policies are completely excluded under §64.1-16.1A.3.d. The policies were transferred to a person other than a bona fide purchaser, that is, to Loretta as trustee of the Insurance Trust, for the benefit of someone other than the surviving spouse, Loretta is the beneficiary of the Trust, not Dan, without receipt of adequate consideration.⁶ This would pull the policies into the augmented estate, except

⁵ This issue has not been addressed yet in Virginia. It is one of many unresolved issues in the litigation on which this analysis is based.

⁶ Section 64.1-16.1A.3. provides for the inclusion in the augmented estate, “The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during the marriage to the surviving spouse, to or for the benefit of any person other than the surviving spouse, to the extent that

for subsection 3.d, which excludes such transfers if the value of the transfer is less than \$10,000 in any calendar year. Taking the annual premiums as the value of the term insurance in the year of transfer, the policies should be excluded under this provision.

C. Peruvian Property Interest

Under Peruvian law, Wilma acquired a vested interest in her father's interest in real property owned by her parents in Peru. Wilma acquired this interest by intestate succession under the laws of Peru following the death of her father on December 18, 1997. Under §64.1-16.1.B, property received by a decedent by intestate succession is not included in the augmented estate to the extent the decedent maintained the property as separate property. Based on the facts recited, Wilma kept the property as separate property before and after her marriage to Dan, therefore her Peruvian property interests are not part of her estate.

D. Tangible Personal Property

The tangible personal property included in Wilma's probate estate is included in the augmented estate under §64.1-16.1.A, as part of the estate passing by testate or intestate succession.⁷ Also included is tangible personal property acquired during the marriage and deemed jointly held with Dan, §64.1-16.1A.1.

the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types: ...

d. Any transfer made to or for the benefit of a donee within the calendar year of the decedent's death or any of the five preceding calendar years to the extent that the aggregate value of the transfers to the donee exceeds \$10,000 in that calendar year.”

⁷ An argument could be made, and has been made in the actual case, that the tangible personal property identified in the Premarital Agreement is excluded. However, the Premarital Agreement is poorly written

E. Individual Retirement Accounts

Section 64.1-16.1.D. defines “estate” and “property” to include retirement benefits, annuities, pension plans and employee benefit plans. Arguably an IRA is included in this definition. However, the statute defines the augmented estate as the “estate passing by testate or intestate succession”. An IRA does not pass either way, it passes by beneficiary designation. Nonetheless, under Felix-Aranibar v. Felix, 59 Va. Cir. 357, 360 (17th Cir. 2002), it appears the IRA accounts are included in Wilma’s augmented estate.

CALCULATION OF ELECTIVE SHARE CLAIM

Once the augmented estate composition and value is determined, the elective share amount must be calculated. Appendix C contains the calculation of Dan’s elective share based on the facts and law discussed above. The augmented estate consists of those items included pursuant to §64.1-16.1 less the family allowance⁸, the exempt property claim⁹, funeral expense, charges of administration and debts. These deductions are shown on Page 2 of Appendix C. The elective share is one-third of this adjusted estate value.

The final step is to account for assets which have passed to the surviving spouse from the decedent. Joint property passing to the surviving spouse is deducted. In

and question exists whether it effectively waived rights accruing to a surviving spouse. For purposes of this analysis we will assume the tangible personal property is included.

⁸ Virginia law allows payment of a family allowance of up to \$18,000 to a surviving spouse. Sec. 64.1-151.1.

⁹ Virginia law allows the surviving spouse to claim up to \$15,000 in tangible personal property from the deceased spouse’s estate. Sec. 64.1-151.2. The family allowance and the exempt property claim are in addition to the surviving spouse’s elective share claim.

addition, in Dan’s case, there is his \$12,000 per year life estate in Wilma’s Trust. Section 64.1-16.C.1. directs that life estate are to be calculated in accordance with the provisions of the Virginia Code and discounted to a present value. Subsection C of 64.1-16.1 tells how to value Dan’s life estate interest. The life estate interest is to be valued in accordance with §55-269.1, with estates for years discounted to present value using the interest rate specified at Section 55-269.1. The statute states that the life estate can be reduced to a gross value, which can be paid as full and final settlement of the life estate. This gross value is calculated “according to the then value of an annuity of eight percent on the principal sum during the probable life of such person, according to the following table” in the statute. Applying the statute, the calculation of the value of Dan’s life estate interest in the Trust is as follows.

Annual Payment	\$12,000
Annuity Factor ¹	<u>10.018</u>
Present Value of Interest	\$120,216

In summary, Wilma Green had an augmented estate with a gross value of \$644,637 and a net value after deduction of liabilities of \$514,434.53. Dan’s one-third elective share is \$171,478.17. He has already received \$140,306 from Wilma’s estate. The remainder due him, \$31,172.17, is payable from assets received by Loretta from her mother.

§ 64.1-16.1. Augmented estate; exclusions; valuation. —

A. The augmented estate means the estate passing by testate or intestate succession, real and personal, after payment of allowances and exemptions elected under Article 5.1 (§ 64.1-151.1 et seq.) of Chapter 6 of this title, funeral expenses, charges of administration which shall not include federal or state transfer taxes, and debts, and to which is added the sum of the following amounts:

1. The value of property, other than tangible personal property received by gift and the proceeds thereof, owned or acquired by the surviving spouse at the decedent's death, to the extent the property is derived from the decedent, by any means other than testate or intestate succession, without a full consideration in money or money's worth;

2. The value of property, other than tangible personal property received by gift and the proceeds thereof, derived by the surviving spouse from the decedent without a full consideration in money or money's worth, other than by testate or intestate succession, and transferred by the surviving spouse at any time during the marriage to a person other than the decedent, which would have been includible in the surviving spouse's augmented estate if the surviving spouse had predeceased the decedent; and

3. The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during the marriage to the surviving spouse, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

a. Any transfer under which the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, the possession or enjoyment of, or right to income from, the property;

b. Any transfer to the extent that the decedent retained for his life, for any period not ascertainable without reference to his death or for any period which does not in fact end before his death, a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit;

c. Any transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship; or

d. Any transfer made to or for the benefit of a donee within the calendar year of the decedent's death or any of the five preceding calendar years to the extent that the aggregate value of the transfers to the donee exceeds \$10,000 in that calendar year.

B. Nothing herein shall cause to be included in the augmented estate (i) the value of any property transferred by the decedent during marriage with the written consent or joinder of the surviving spouse; (ii) the value of any property, its income or proceeds, received by the decedent by gift, will, intestate succession, or any other method or form of transfer to the extent it is received without full consideration in money or money's worth, before or during the marriage to the surviving spouse, from a person other than the surviving spouse to the extent such property, income, or proceeds were maintained by the decedent as separate property; or (iii) any transfer made to anyone other than the surviving spouse prior to January 1, 1991, to the extent that such transfer is irrevocable on that date.

C. Property is valued as of the decedent's death except that property transferred irrevocably during the lifetime of the decedent is valued as of the date the transferee came into possession or enjoyment if that occurs first.

1. Life estates and remainder interests are valued in the manner prescribed in Article 2 (§ 55-269.1 et seq.) of Chapter 15 of Title 55, and deferred payments and estates for years are discounted to present value using the interest rate specified in § 55-269.1.

2. The value of an insurance policy that is irrevocably transferred during the lifetime of a decedent is the cost of a comparable policy on the date of transfer or, if such a policy is not readily available, the policy's interpolated terminal reserve. The value of any premiums paid on an insurance policy owned by another person is the amount of the premiums only and not the insurance purchased or maintained with such premiums.

3. An initial interest in property owned as a joint tenant with survivorship is valued at the time the interest is acquired, and a further interest received upon the death of a cotenant is valued at the cotenant's death. Property owned jointly by persons married to each other shall be rebuttably presumed to have been acquired with contributions of equal value by each tenant. The mere creation of an indebtedness secured by jointly owned property is not a contribution to its acquisition, but any satisfaction of an indebtedness is a contribution. An interest in a tenancy by the entirety shall be valued as if it were an interest in a joint tenancy with survivorship. Joint accounts in financial institutions shall be valued in accordance with the provisions of Chapter 2.1 (§ 6.1-125.1 et seq.) of Title 6.1.

D. As used in this section, the terms "estate" and "property" shall include insurance policies, retirement benefits exclusive of federal social security benefits, annuities, pension plans, deferred compensation arrangements, and employee benefit plans to the extent owned by, vested in, or subject to the control of the decedent on the date of his death or the date of an irrevocable transfer by him during his lifetime. (1990, c. 831; 1992, cc. 617, 647; 1998, c. 234; 1999, c. 38.)

The 1999 amendments inserted the subsection A through D and the subdivision C 1 and C 2 designators; added subdivision C 3; and *added or deleted* language in clause (ii) of subsection B as follows: "(ii) the value of any property, its income or proceeds, received by the decedent by gift, will, ~~or~~ intestate succession, *or any other method or form of transfer to the extent it is received without full consideration in money or money's worth*, before or during the marriage to the surviving spouse, from a person other than the surviving spouse to the extent such property, income, or proceeds were maintained by the decedent as separate property;"

The 1998 amendments added the last two sentences in the next-to-last paragraph.

Virginia Code § 64.1-16.1

APPENDIX B

ESTATE OF WILMA GREEN

Probate and Non-Probate Assets

Asset Description	Value	Owner of Asset	
10535 Brevity Drive	\$ 385,000.00	RLT	
Accrued Rent 10535 Brevity Drive	\$ 1,420.00	RLT	
Garden State Life Insurance	\$ 150,000.00	ILIT	
Midland Life Insurance	\$ 200,000.00	ILIT	
Premarital Tangible Personal Property	\$ 214,355.00	Loretta	Per LW&T
Joint Tangible Personal Property	\$ 3,025.00	Dan	Per LW&T
Honda automobile	\$ 3,125.00	Dan	JTWROS
Sun Trust IRA	\$ 708.00	Loretta	Beneficiary Designation
Merrill Lynch IRA	\$ 24,504.00	Loretta	Beneficiary Designation
Joint Intangible Personal Property	\$ 12,500.00	Dan	JTWROS
Remainder Interest Peru Property	\$ 185,000.00	RLT	
Total Assets	\$1,179,637.00		

Owner Key:

RLT - Wilma's Trust

ILIT - Wilma's Life Insurance Trust

APPENDIX C

**ESTATE OF WILMA GREEN
Determination of Augmented Estate**

Asset Description	Owner	Augumented Estate Value	Rationale Inclusion/Exclusion
10535 Brevity Drive	RLT	\$ 385,000.00	Sec 64.1-16.1.3.b.
Accrued Rent 10535 Brevity Drive	RLT	\$ 1,420.00	Sec 64.1-16.1.3.b.
Garden State Life Insurance	ILIT	\$ -	Sec 64.1-16.1.A.3.d
Midland Life Insurance	ILIT	\$ -	Sec 64.1-16.1.A.3.d
Premarital Tangible Personal Property	Loretta	\$ 214,355.00	Sec 64.1-16.1.A
Joint Tangible Personal Property	Dan	\$ 3,025.00	Sec 64.1-16.1.A.1
Honda automoblie	Dan	\$ 3,125.00	Sec 64.1-16.1.A.1
Sun Trust IRA	Loretta	\$ 708.00	Sec 64.1-16.1.D
Merrill Lynch IRA	Loretta	\$ 24,504.00	Sec 64.1-16.1.D
Joint Intangible Property	Dan	\$ 12,500.00	Sec 64.1-16.1.A.1
Remainder Interest Peru Property	RLT	\$ -	Sec. 64.1-16.1.B
Total Assets		\$ 644,637.00	

ESTATE OF WILMA GREEN
Liabilities

Expenses	Amount	Rationale for Valuation
Family Allowance	\$ 18,000.00	Sec 64.1-151.1
Exempt Property Allowance	\$ 15,000.00	Sec 64.1-151.2
Deed of Trust on Brevity Drive	\$ 61,438.00	706, Sch K
Medical Expenses	\$ 1,380.00	Invoices
Tenant Security Deposit	\$ 4,050.00	706, Sch K
Funeral Expenses	\$ 15,238.72	Invoices
Estate Administration Expenses		
Legal Expense	\$ 1,500.00	Invoices
Accounting Expense	\$ 6,968.75	Invoices
Executor's Commissions	\$ 1,000.00	
Miscellaneous Expenses	\$ 5,627.00	Invoices
Total Expenses	\$ 130,202.47	
 Augmented Estate Calculation		
Total Assets	\$ 644,637.00	
Less: Total Expenses	\$(130,202.47)	
AUGMENTED ESTATE	\$ 514,434.53	

**Adjustments to Augumented Estate:
Charges Against Daniel Green**

Item acquired by Dan	Augmented Estate Value	Rationale for Valuation Inclusion/Exclusion
Life Estate in RL Joint Tangible Personal Property	\$ 121,656.00	Present Value at Wilma's death
Honda automoblie	\$ 3,025.00	Appraisal
Joint Intangible Personal Property	\$ 3,125.00	706, Sch E and Sch M
	\$ 12,500.00	706, Sch E and Sch M
Total Adjustments	\$ 140,306.00	

CALCULATION OF SHARE

One-third augmented estate	\$ 171,478.17
Less: Total Adjustments	\$(140,306.00)
Elective Share Due Spouse	\$ 31,172.17

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