

Massachusetts Needs to Stop Characterizing Women as Dependent on Men: An Evaluation of the Spousal Elective Share

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INTRODUCTION

The spousal elective share is a means by which surviving spouses can take a statutorily-determined share in lieu of whatever disposition they receive through their decedent-spouse's will or to avoid disinheritance altogether.¹ The elective share was created in an effort to support spouses who were not provided for at the death of their partner and to avoid resulting financial instability; this concept was meant to directly target women as they were expected to live longer than their husbands and make less money in their lifetimes.² This underlying purpose perpetuates a stereotype of women that is no longer accurate—that women are meant to remain in the home while their male counterparts are expected to work and make money.³ Marriage in the United States in 2022 is no longer as bifurcated when it comes to the fiscal expectations of men and women and, therefore, the purpose of the elective share is obsolete in most instances.⁴ This Note will discuss the need for Massachusetts to eliminate the spousal elective share by looking to its original underlying principles, which are now antiquated in the wake of modern movements.⁵ It will further

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¹ See Elizabeth Sillin & Colin Korzec, *Until Death Do Us Part(ition)*, 63 BOS. BAR. J., 2019, at 31, 31.

² See Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1555 (2015); Ronald R. Volkmer, *Spousal Property Rights at Death: Re-Evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act*, 17 CREIGHTON L. REV. 95, 98 (1983).

³ See Volkmer, *supra* note 2, at 98–99.

⁴ See Volkmer, *supra* note 2, at 98–99.

⁵ See generally *Then and Now: Goals of the Women's Rights Movements*, POPULATION MEDIA CTR. (Nov. 12, 2020), <https://perma.cc/X2YR-QW8X> (discussing the past century of women's

articulate a proposed solution that focuses on the value of the freedom of disposition in conjunction with the need for modern society to break away from a generalized divide between the roles of men and women.⁶ Part I will detail the history of the elective share and its modern treatment across different states; Part II will showcase the importance of re-evaluating the efficacy of the elective share statute in Massachusetts; and Part III will argue that Massachusetts should fully abolish the elective share option and discuss the viability of this proposition. In sum, this Note will highlight the need for legal policy to continue shifting and changing in the context of the disposition of property upon death to accommodate the modernization of society and its perspective on classifications of individuals.⁷

I. Background

There are two marital property systems in the United States: (1) the community property system and (2) the separate property system.⁸ In a separate property system, spouses own their property individually.⁹ Whatever property a spouse brings with them into a marriage remains their own individual property; only assets owned jointly between a couple will be considered joint property.¹⁰ In a community property system, the property of the two spouses is considered “community” or “marital,” and both spouses are equally entitled to that property.¹¹ States that have a community property system do not have a spousal elective share option because upon the death of one spouse, the other maintains the right to their half of the marital property.¹² In separate property states, this right is non-existent.¹³

movements, fighting for equal treatment by employers, the law, and society).

⁶ See Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 751 (2006).

⁷ See Kenneth Rampino, Note & Comment, *Spousal Disinheritance in Rhode Island: Barrett v. Barrett and the (De)evolution of the Elective Share Law*, 12 ROGER WILLIAMS U. L. REV. 420, 420 (2007); Turnipseed, *supra* note 6, at 767–68.

⁸ See generally Joseph Pandolfi, *Separate and Marital Property: Who Gets What in Divorce?*, NOLO, <https://perma.cc/3FWK-WP6Q> (last visited Sept. 13, 2023) (describing the differences between community and separate property systems).

⁹ *Id.* See generally Patrick Hicks, *Estate Planning for Community Property vs Separate Property*, TRUST & WILL, <https://perma.cc/LT39-AFW2> (last visited Sept. 13, 2023) (describing the key differences between community property systems and separate property systems and what qualifies as “separate” property in separate property states).

¹⁰ Jason Gordon, *Community Property vs Separate Property – Explained*, THE BUS. PROFESSOR, <https://perma.cc/RP6N-EHMG> (last updated Apr. 3, 2023).

¹¹ See Pandolfi, *supra* note 8; see also The Retirement Group, *Surviving Spouse's Elective Share*, TRG (Aug. 21, 2020, 5:39 PM), <https://perma.cc/U7ZW-FLG4>.

¹² See Pandolfi, *supra* note 8.

¹³ See Pandolfi, *supra* note 8.

The spousal elective share exists in separate property system states and serves as a limitation on an individual's ability to disinherit their spouse.¹⁴ The election grants a spouse who was omitted from a will, either intentionally or by accident, a certain amount of the decedent spouse's estate.¹⁵

A. *Definition and History of the Spousal Elective Share*

The spousal elective share has been defined as "a mechanism by which a surviving spouse can waive the provisions of a deceased spouse's will and take instead a statutorily prescribed share of the decedent's estate."¹⁶ In Massachusetts specifically, the elective share serves as a means to prevent an individual from disinheriting his or her spouse, either intentionally or by accident, by providing an option to the surviving spouse to waive the will and instead take a substantial share of the decedent spouse's estate.¹⁷ The Massachusetts spousal elective share statute provides that a surviving husband or wife may file a waiver of the deceased spouse's will, effectively putting aside whatever dispositions were included for the benefit of the surviving spouse, and if the deceased spouse does not have any surviving issue, that surviving spouse will be entitled to one-third of the estate.¹⁸ Massachusetts also has a provision accounting for situations where one of the parties to a marriage "deserted" the other spouse or the couple was living apart from one another "for justifiable cause."¹⁹ Under these circumstances, the deceased spouse is entitled to make death-dispositions as if he or she were not married and the surviving spouse will not have the option of exercising the elective share.²⁰

The elective share traces back to the concepts of dower and curtesy.²¹ Historically, "a widowed woman was given a life estate in one-third of certain of her husband's real property," and "curtesy provided a surviving husband with a life estate in all the wife's qualifying real property, but only if children were born to the couple."²² The main purpose of dower and

¹⁴ Maria L. Remillard, *Inequities, Unintended Consequences of Spousal Elective Share*, MASS. LAWS. WKLY. (Feb. 28, 2019), <https://perma.cc/S5RW-A9G6>.

¹⁵ Sillin & Korzec, *supra* note 1, at 31.

¹⁶ Sillin & Korzec, *supra* note 1, at 31.

¹⁷ 14E MASSACHUSETTS PRACTICE SERIES, SUMMARY OF BASIC LAW § 18:10 (5th ed. 2022).

¹⁸ MASS. GEN. LAWS ANN. ch. 191, § 15 (West 2021).

¹⁹ MASS. GEN. LAWS ANN. ch. 209, § 36 (West 2012).

²⁰ *Id.*

²¹ Martin D. Begleiter, *Grim Fairy Tales: Studies of Wicked Stepmothers, Poisoned Apples, and the Elective Share*, 78 ALB. L. REV. 521, 522 (2015); Terry L. Turnipseed, *Community Property v. the Elective Share*, 72 LA. L. REV. 161, 161 (2011).

²² Turnipseed, *supra* note 21, at 161–62; see George L. Haskins, *Curtesy in the United States*, 100 U. PA. L. REV. 196, 196–97 (1951).

curtesy was to protect a widow and her children from being displaced from their home upon the death of the husband and father.²³ This need developed from the fact that, until the nineteenth century, women who married would immediately lose their rights to control their own property.²⁴ Upon marriage, all of the land a woman owned, including the income that she generated from the use of that land, and her ability to sell the property, was automatically transferred to her husband.²⁵ When the husband subsequently died, the land that was once owned by the woman would transfer to her children rather than reverting back to her.²⁶ Marriage once functioned as a means of depriving women of their individuality in the eyes of the law, and as a result, when a woman's husband died, "it became necessary for the law to protect the widow and her children."²⁷ From the concepts of dower and curtesy, the elective share was conceived to grant the same sort of protection to spouses, but as an adaptation that fit what was then the modern society.²⁸ However, the underlying motivation in providing this tool for omitted spouses remains the belief that husbands should be legally barred from disinherit their wives, and that a safeguard should be in place to prevent the assumed ramifications.²⁹ Over the years, despite legislation attempting to grant women more rights in their own property, the rationales for the elective share "proceeded from a gender-based distinction," focusing on what was perceived as differing capabilities of men and women to earn wages.³⁰

In modern day, the spousal elective share persists in separate property system states; however, the amount of the share offered under the election differs across states.³¹ In Montana, for example, a surviving spouse has the

²³ Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. U. L. REV. 519, 527 (2003).

²⁴ *Id.* See generally Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1982) (reflecting on the history of women's property rights and how in the early 1800's women lost their rights to their individually held property interests upon marriage).

²⁵ Vallario, *supra* note 23, at 527.

²⁶ Vallario, *supra* note 23, at 527.

²⁷ Vallario, *supra* note 23, at 527; see B. Zorina Khan, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790-1895*, 56 J. ECON. HIST. 356, 357 (1996).

²⁸ See Sneddon, *supra* note 2, at 1555; Volkmer, *supra* note 2, at 97; Haskins, *supra* note 22, at 198.

²⁹ Volkmer, *supra* note 2, at 97.

³⁰ Volkmer, *supra* note 2, at 98.

³¹ See, e.g., COLO. REV. STAT. ANN. § 15-11-202 (West 2014); MONT. CODE ANN. § 72-2-232 (West 2019); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2018); OR. REV. STAT. ANN. § 114.600 (West 2011); UTAH CODE ANN. § 75-2-202; WYO. STAT. ANN. § 2-5-101 (West 2004). See generally Elizabeth Pack, *Can My Spouse's Estate Plan Cut Me Out? Understanding the Elective Share*, GREENSFELDER (July 20, 2017, 9:25 AM), <https://perma.cc/3PCA-4HGD> (describing the

right to elect to take a share “equal to 50% of the value of the marital-property portion of the augmented estate.”³² In contrast, Wyoming differentiates the amount of the elective share depending on whether the decedent-spouse had any children.³³ If there are no surviving children of the decedent-spouse, then the surviving spouse is entitled to a one-half share.³⁴ If there are surviving children, however, and the surviving spouse is not a parent to any of those children, then the surviving spouse will only be entitled to a one-fourth share.³⁵ Utah has an elective share statute similar to Massachusetts in that it provides a one-third share to a surviving spouse; however, it also provides a supplemental share if the one-third is less than \$75,000.³⁶ Colorado mirrors this system except for the fact that the initial share granted is one-half and the supplemental share will only be granted if the initial amount is less than \$50,000.³⁷ New York provides that a surviving spouse will be entitled to the greater of either the amount of \$50,000 or one-third of the net estate.³⁸ These differences could be attributed to differing emphases on various theories underlying the spousal elective share.³⁹

B. *Theories Underlying the Spousal Elective Share*

The spousal elective share, and community property systems for that matter, have two motivating theories: the support theory of marriage and the economic partnership theory of marriage.⁴⁰ Under the support theory, marriage is viewed as creating an obligation on both spouses to provide necessary support and resources to the other.⁴¹ Marriage itself involves the union between two individuals that functions as a partnership, and when one party has a weaker capability to generate income, society deems it to be the responsibility of their spouse to provide them the necessary support to

disparities among states regarding what types of assets may be subject to the elective share).

³² MONT. CODE ANN. § 72-2-232 (West 2019).

³³ WYO. STAT. ANN. § 2-5-101 (West 2004).

³⁴ *Id.*

³⁵ *Id.*

³⁶ UTAH CODE ANN. § 75-2-202.

³⁷ COLO. REV. STAT. ANN. § 15-11-202 (West 2014).

³⁸ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 2018).

³⁹ See generally Gerry W. Beyer, *A Reassessment of the UPC's Elective Share*, LAW PROFESSOR BLOGS NETWORK: WILLS, TRS. & EST. PROF BLOG (Oct. 25, 2010), <https://perma.cc/7X8Q-VD2E> (describing the various theories underlying the concept of the elective share option).

⁴⁰ See generally Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIA. L. REV. 567, 567–72 (1995) (describing the partnership theory); Vallario, *supra* note 23, at 531–32 (explaining what the support and partnership theories mean in the context of the elective share and community property systems).

⁴¹ See Vallario, *supra* note 23, at 532.

maintain a comfortable life.⁴² Under this theory, the obligation to support a spouse extends past death, which rationalizes the concept of the elective share.⁴³ If a spouse were to deny continued support to their surviving spouse, the law provides a remedy in order to prevent the surviving spouse from suffering as a result of the discontinued financial assistance.⁴⁴

In contrast, the partnership theory of marriage is rooted in the idea that upon marriage, the two individuals are entering into a partnership with one another and are therefore entitled to reap the benefits of that partnership in equal shares.⁴⁵ This is the preferred theory on which the community property system is based; because a partnership exists within a marriage, the assets accumulated during that marriage are property of both the spouses, regardless of the tangible financial contributions made by either individual spouse.⁴⁶ This theory recognizes that there are sacrifices and contributions made outside of one's participation in the workforce that enable a married couple to acquire assets.⁴⁷ A classic example of this concept is the working husband and the stay-at-home wife; a husband may in fact be the breadwinner in the marriage and provide a consistent income, however a wife may make that possible by her contributions within the home or in the form of child care.⁴⁸ Without the contributions of one partner, the other would not be capable of functioning at the same capacity due to additional burdens.⁴⁹ In the context of the spousal elective share, this theory assumes that each spouse contributes within a marriage, whether it be financially or otherwise, which gives a surviving spouse an entitlement to reap those benefits should they not be provided for in their decedent-spouse's will.⁵⁰

A recent modernization of the spousal elective share focuses on the economic partnership theory of marriage as opposed to the support theory.⁵¹ In 1990, the Uniform Probate Code (UPC) was revised to move away from a set amount that can be received through the election and instead attempts to determine what portion of the estate is truly marital property.⁵² In a

⁴² See Vallario, *supra* note 23, at 532; Gary, *supra* note 40, at 580–81.

⁴³ See Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 3 (2003).

⁴⁴ See Vallario, *supra* note 23, at 532; Gary, *supra* note 40, at 580–81.

⁴⁵ See Vallario, *supra* note 23, at 532; Gary, *supra* note 40, at 581–82.

⁴⁶ See Vallario, *supra* note 23, at 532; Gary, *supra* note 40, at 581–82.

⁴⁷ Vallario, *supra* note 23, at 532.

⁴⁸ See Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 238 (2018).

⁴⁹ See *id.*

⁵⁰ Vallario, *supra* note 23, at 532.

⁵¹ See Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community- Property Alternative*, 49 EMORY L.J. 487, 487–88 (2000).

⁵² *Id.* at 488.

comment following the modification, the UPC elaborated on the purpose of incorporating the economic partnership theory into the policy for determining the assets available for election.⁵³ The comment states that there is an assumed agreement between individuals when they enter into a marriage that the accessions to wealth achieved during the marriage should be shared by both spouses equally.⁵⁴ Similar to the rationale for the community property system, this policy attempts to acknowledge that, regardless of whether the contributions are financial in nature or not, both parties are contributing equal efforts to obtain those accessions.⁵⁵

C. Important Elective Share Cases in Massachusetts

One of the most famous spousal elective share cases in Massachusetts, *Sullivan v. Burkin*, took place in 1984.⁵⁶ This case involved a widow who elected to receive the statutory share of her deceased husband's estate.⁵⁷ The widow brought an action seeking a determination that a trust held by her husband during his lifetime and their marriage should be considered part of the estate in calculating the amount of her elective share.⁵⁸ The court ultimately—and unexpectedly—held that the trust was accessible to a spousal election so long as the deceased spouse maintained the power to dispose of the assets in trust during his lifetime.⁵⁹ To explain this change in policy, the court stated that it was “neither equitable nor logical” to give more rights to a spouse who divorces their partner than to a couple who maintains their marriage until death.⁶⁰ This was a major shift from the prior limitation on the elective share which allowed only probate assets to factor into the election amount.⁶¹

A more recent case in Massachusetts, *Bongaards v. Millen*, reaffirmed the holding of *Sullivan*.⁶² In that case, the surviving spouse brought an action

⁵³ *Id.* at 489 (quoting 1990 Unif. Prob. Code art. 2, pt. 2, general cmt. (amended 1993), 8 U.L.A. 93 (1998)).

⁵⁴ *Id.* at 490–91 (citing 1990 Unif. Prob. Code art. 2, pt. 2, general cmt. (amended 1993), 8 U.L.A. 93 (1998)).

⁵⁵ *See id.*

⁵⁶ 460 N.E.2d 572 (Mass. 1984). *See generally* Emily Beekman et al., *Client Alert: Trust and Estates Case Updates: Ciani v. MacGrath and Leighton v. Hallstrom*, CASNER & EDWARDS (Feb. 12, 2019), <https://perma.cc/85GT-U5VN> (discussing recent cases and evaluating what rights the elective share statute confers to a surviving spouse).

⁵⁷ *Sullivan*, 460 N.E.2d at 573.

⁵⁸ Kathleen M. O'Connor, Note, *Marital Property Reform in Massachusetts: A Choice for the New Millennium*, 34 NEW ENG. L. REV. 261, 269 (1999).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Bongaards v. Millen*, 793 N.E.2d 335, 341 (Mass. 2003).

⁶² *Id.* at 337.

against the decedent spouse's estate for a judgment on whether real property and bank accounts held in trust were includable in the elective share calculation.⁶³ The court held that the trust was a valid inter vivos trust (a trust created during the creator's life) and, as such, fell directly in line with the rationales for the holding in *Sullivan*.⁶⁴ The trust was revocable by the decedent spouse during her lifetime, and she also retained unlimited power to use the trust assets.⁶⁵ Based on the *Sullivan* Court's holding, this type of trust met the standards required to be included in the calculation of the elective share.⁶⁶ These two cases support the conclusion that the most recent policy changes regarding the Massachusetts spousal elective share have bolstered its reach rather than limited its usage.⁶⁷

II. The Importance of Evaluating the Efficacy of the Spousal Elective Share

The modern elective share fails to serve a viable purpose in modern society and its underlying principles conflict with the degradation of stereotypical gender roles over the past fifty years.⁶⁸ Looking around in 2022, women are more empowered than they have ever been, more involved in the workforce than ever before, and far less willing to be placed in a subservient role within their marriage.⁶⁹ Legal policies often change, and rightfully so, to accommodate the evolution of society; 1965 marked the year of a monumental Supreme Court decision prohibiting states from preventing women's usage of contraceptives.⁷⁰ *Phillips v. Martin Marietta*, a 1971 Supreme Court decision, held that employers are not permitted to deny

⁶³ *Id.* at 340.

⁶⁴ *Id.* at 340–41.

⁶⁵ *Id.* at 352.

⁶⁶ See Vallario, *supra* note 23, at 521.

⁶⁷ See generally *Bongaards*, 793 N.E.2d at 335; *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984) (showcasing that in recent years Massachusetts has expanded the reach of the spousal elective share rather than limited it).

⁶⁸ See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RESV. L. REV. 83, 141–42 (1994); Volkmer, *supra* note 2, at 151–55; John J. Scroggin, *What Can Go Wrong with Spousal Rights in Remarriage?*, 43 EST. PLAN., Feb. 2016, at 14, 15. See generally Naomi R. Cahn, *What's Wrong About the Elective Share 'Right'?*, 53 U.C. DAVIS L. REV. 2087, 2117–18 (2020) (describing the gender stereotypes and antiquities underlying the perpetuation of the spousal elective share).

⁶⁹ See, e.g., Rosie Benson, *How Being a Woman Has Changed over 100 Years*, MARIE CLAIRE (Mar. 8, 2017), <https://perma.cc/4KSC-E3ZA>; Marie McKeown, *Women Through History: Women's Experience Through the Ages*, OWLCATION (Feb. 24, 2023, 07:05 PM EDT), <https://perma.cc/TTS6-YEJK>; Janet L. Yellen, *The History of Women's Work and Wages and How it Has Created Success for Us All*, BROOKINGS (May 2020), <https://perma.cc/9NYW-A4KE>.

⁷⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

employment to women with children while granting similarly educated men the same position.⁷¹ In 1973, the Supreme Court recognized the need for granting women access to abortion procedures.⁷² Women's equality is an ongoing fight for modern women, and it is imperative that legislation that is based on, and may serve to perpetuate, antiquated stereotypes be removed, including the spousal elective share.⁷³ Outside of its sexist history, the elective share poses other problems in terms of its possible impact on intended beneficiaries when exercised.⁷⁴

In some instances, the election may be used to "unjustifiably . . . reduce legacies to minor dependents and other needy members of the testator's family."⁷⁵ The spousal elective share functions in the same way that debt does in the sense that an electing spouse will have priority in receiving his or her share, similar to creditors.⁷⁶ This may serve to either limit or fully eliminate other bequests made by the testator in his or her will to their surviving children or to other dependent family members.⁷⁷ *Lufkin v. Caraker*, for example, involved a surviving wife who learned after the death of her husband that he had deeded their shared home to his daughters from a previous marriage.⁷⁸ Following his death, the surviving wife argued that the decedent-spouse's daughters could not claim ownership of the home based on the elective share statute.⁷⁹ The court ultimately found that the election did not bar the daughters from claiming their ownership of the home because the husband held the deed jointly with the daughters prior to his death.⁸⁰ Had the father decided to devise the home to his daughters in his will, however, then the elective share would have precluded them from claiming rightful ownership.⁸¹

The forced share also creates an opportunity for a surviving spouse to

⁷¹ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971).

⁷² See *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973); Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception Right*, CAP (Aug. 8, 2013), <https://perma.cc/26K7-Y5U8>.

⁷³ See generally Tea Trumbic, *How Have Women's Legal Rights Evolved over the Last 50 Years?*, WORLD BANK BLOGS (Mar. 3, 2020), <https://perma.cc/KXX5-ZMLL> (describing how legal policy has changed in accordance with society's perception of women).

⁷⁴ See *infra* pp. 17–20.

⁷⁵ Brashier, *supra* note 68, at 141.

⁷⁶ See Scroggin, *supra* note 68, at 16.

⁷⁷ See *id.* See generally Remillard, *supra* note 14 (describing the different ways in which the spousal elective share fails to take into consideration special circumstances that could unfairly decrease dispositions made to other beneficiaries in the will).

⁷⁸ No. 15-ADMS-10033, 2016 WL 4681127, at *1 (Mass. App. Div. July 28, 2016).

⁷⁹ *Id.*

⁸⁰ *Id.* at *3.

⁸¹ See *id.*

avoid being disinherited for justifiable reasons.⁸² Currently, the elective share system does not account for circumstances in which a spouse is disinherited due to poor conduct during the marriage.⁸³ The statute also fails to consider the possible fairness in a spouse's decision to either decrease or completely eliminate monetary dispositions to a surviving spouse regardless of whether the cause is misconduct or, perhaps the realistic assumption, that the surviving spouse is already independently financially secure.⁸⁴ Furthermore, the elective share, when properly granted to needy and dependent surviving spouses, only temporarily alleviates financial burdens that will continue existing once the provided funds run out.⁸⁵ In addition to providing only a short-term remedy for financial need, the elective share can also serve to "encourage[] irresponsibility and dependence."⁸⁶ These pitfalls of the modern spousal elective share call into question the need and functionality of allowing such a system to be maintained and also the importance of re-evaluating its existence in Massachusetts.⁸⁷

ANALYSIS

III. Massachusetts Should Abolish the Spousal Elective Share

A. Current Suggestions Regarding Amendments to Elective Share Statutes

There have been many suggestions over the years regarding amendments to spousal elective share statutes.⁸⁸ Some sources believe that

⁸² See Brashier, *supra* note 68, at 141–42. See generally Turnipseed, *supra* note 6, at 737–38 (describing the value of the freedom of disposition and allowing a testator to make individual determinations regarding the dispositions made by him or her at death).

⁸³ See Volkmer, *supra* note 2, at 142.

⁸⁴ See Volkmer, *supra* note 2, at 142.

⁸⁵ See Brashier, *supra* note 68, at 148 n.211. See generally Elizabeth Olson, *New Widows Have Another Concern: Their Finances*, N.Y. TIMES (Sept. 4, 2015), <https://perma.cc/EYL3-F5KD> (discussing stories of widows who were left financially insecure upon the deaths of their husbands and how they were prompted to engage more in their own financial planning and get more involved in the workforce).

⁸⁶ Brashier, *supra* note 68, at 148 n.211. See generally Kerry Hannon, *Preparing for the Financial Shocks of Widowhood*, FORBES (Oct. 4, 2018, 12:34 PM EDT), <https://perma.cc/D3YL-QESP> (revealing the findings of a study indicating that only a small percentage of women exercise financial independence prior to the deaths of their husbands).

⁸⁷ See Volkmer, *supra* note 2, at 151.

⁸⁸ See generally Lauren Y. Detzel & Brian M. Malec, *Recent Amendments Bring Important Changes to Florida's Elective Share*, 91 FLA. BAR. J., Sept./Oct. 2017, at 24, 24–31 (articulating changes made to the Florida elective share in recognition of certain deficiencies); Sillin & Korzec, *supra* note 1, at 32 (describing some of the suggested changes made to the elective share that would make it more equitable for a surviving spouse); Samuel E. Sears & Ben Stewart, *Elective Share Work*

the amount of the elective share should be increased to mirror the amount spouses can expect to receive through the equitable division of assets upon divorce.⁸⁹ Other sources attempt to persuade Massachusetts to abandon the separate property system in favor of the community property system, to eliminate the need for the elective share altogether.⁹⁰ Some arguments focus on the downfalls of the spousal elective share including its failure to provide support in circumstances outside of the traditional, heterosexual family arrangement.⁹¹ Conversely, there are some authors who believe that the elective share is too susceptible to misuse by surviving spouses who are not in need of support or who did not equally contribute to the assets acquired by the decedent-spouse.⁹² One question posed in the context of amending the spousal elective share is whether in a modern society, status should remain the dispositive factor in determining who receives protection against disinheritance.⁹³ Because current elective share models are based solely on the requisite of marriage, the status of being a spouse seems to be the only qualifier for whether an individual will be financially protected.⁹⁴

If Massachusetts were to change its elective share policy to account for equitable considerations, the burden on probate courts would become extremely onerous.⁹⁵ Extending the facts relevant to a court's determination of what amount a spouse may be entitled to would make proceedings increasingly adversarial and time-consuming.⁹⁶ If Massachusetts were to abandon the separate property system in favor of the community property system, many of the problems regarding the elective share would remain

Group, OR. L. COMM'N (Feb. 11, 2009), <https://perma.cc/5T4E-DZP7> (describing necessary changes to the Oregon elective share statute).

⁸⁹ See Vallario, *supra* note 23, at 521.

⁹⁰ See O'Connor, *supra* note 58, at 261.

⁹¹ See Cahn, *supra* note 68, at 2090. See generally Talia Lakritz, *Then and Now: How American Families Have Changed Since the Early 1900s*, INSIDER (Mar. 12, 2019, 11:44 AM), <https://perma.cc/R3RV-R5EB> (discussing how the "traditional" family dynamic has changed dramatically in the past one hundred years).

⁹² See Vallario, *supra* note 23, at 521. See generally Tammy LaGorce, *Widows Are Faring Better Financially. Here's Why.*, N.Y. TIMES (Nov. 17, 2018), <https://perma.cc/XWX4-A2ZJ> (stating that women are becoming increasingly more financially independent prior to the deaths of their husbands, leaving them in a better financial position upon the death of their spouses).

⁹³ See Brashier, *supra* note 68, at 141–42; Sarah O'Brien, *Here's What Happens to Your Partner If You're Not Married and You Die*, CNBC (Dec. 16, 2019, 11:49 AM EST), <https://perma.cc/4MSS-KDAA>.

⁹⁴ See Brashier, *supra* note 68, at 139; O'Brien, *supra* note 93.

⁹⁵ See, e.g., Alec Chappell, *An Onerous Burden: The Impact of Nassar upon McDonnell Douglas in the Eleventh Circuit*, 67 MERCER L. REV. 997, 998 (2016) (showing how a change in policy that adds ambiguity or factors for courts to consider in evaluating certain conflicts can unduly burden the judicial system).

⁹⁶ See, e.g., Chappell, *supra* note 95.

unresolved.⁹⁷ Community property systems are rationalized by the same underlying principles as the elective share; in addition, the community property system also benefits individuals engaged in traditional marriages which, as stated above, are no longer very common.⁹⁸ As noted in the subsequent discussion, the rare usage of the elective share and its ineffective application in modern cases shows that abolishing the elective share is the best option for Massachusetts.⁹⁹

B. *Societal Changes Conflict with Stagnant Elective Share Policy*

The “traditional” American family structure has changed dramatically over the past eighty years.¹⁰⁰ Households with two married individuals are declining as the divorce, remarriage, and cohabitation rates rise.¹⁰¹ In the 1960s, the majority of children were born into families which consisted of two married parents who were in their first marriage.¹⁰² By the 1980s, the rate of children born to families with two married parents dropped by twelve percent.¹⁰³ Between 1960 and 2014, the rate of children being raised by one parent grew from nine percent to twenty-six percent.¹⁰⁴

In addition, the participation of women in the workforce has changed dramatically in recent decades.¹⁰⁵ In 1950, only thirty-four percent of women worked consistent, full-time jobs.¹⁰⁶ This number increased to sixty percent by 2000, and it is projected that by the year 2050, women will make up close

⁹⁷ See generally Brittany Brolley, *How Marriages Have Changed over the Last 100 Years*, THE LIST, <https://perma.cc/LF7Q-7XEY> (last updated Mar. 31, 2021, 11:12 PM EST) (describing the changes undergone by the institution of marriage in the United States and how many of those changes were due to the changing perception of women in society).

⁹⁸ See generally Caroline Bermeo Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It, and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE RELIGION GENDER & CLASS 1 (2011) (discussing the purpose and underlying rationale of the community property system specifically in conjunction with how the relationship between men and women within a marriage has changed).

⁹⁹ See *infra* pp. 15–19.

¹⁰⁰ See Brashier, *supra* note 68 at 139; Natalie Angier, *The Changing American Family*, N.Y. TIMES (Nov. 25, 2013), <https://perma.cc/AZ6V-QQW9>; Beth Ann Mayer, *The Changing Face of the American Family*, PARENTS, <https://perma.cc/9ZSZ-C3KG> (last updated Apr. 9, 2023).

¹⁰¹ *The American Family Today*, PEW RSCH. CTR. (Dec. 17, 2015), <https://perma.cc/9J56-BMMK>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.*

¹⁰⁶ Mitra Toossi, *A Century of Change: The U.S. Labor Force, 1950–2050*, MONTHLY LAB. REV., May 2002, at 15, 15. *Contra* Joni Sweet, *History of Women in the Workplace*, STACKER (Oct. 25, 2021), <https://perma.cc/C693-R9DM>.

to half of the workforce.¹⁰⁷ The wage gap between men and women, while it still exists and is a necessary focus for change in modern society, is also slowly decreasing.¹⁰⁸ In the early 1960s, women working full-time made fifty-nine cents on average for every dollar made by men.¹⁰⁹ By 2010, women earned seventy-seven cents for every dollar made by men, representing a decrease in the wage gap by just under half-a-cent per year.¹¹⁰ It is projected that by 2059, there will be no wage gap between men and women.¹¹¹ Within a marriage specifically, the relative incomes of husbands and wives have changed as well.¹¹² In 1970, only four percent of husbands had wives who made a higher income on an annual basis.¹¹³ By 2007, this number had increased to twenty-two percent.¹¹⁴ Researchers discuss these statistical changes in the context of “gender role reversals in both the spousal characteristics and the economic benefits of marriage.”¹¹⁵ Due to these changes, it is clear that marriage no longer benefits women’s economic status to the same extent that it did in the mid-1900s when women had lower education levels and limited participation in the workforce.¹¹⁶ The spousal elective share was created to protect wives from their disparate economic capabilities.¹¹⁷ Not only have women fought for and achieved a more equal standing financially, but they also continue to persist and demand positions quite comparable to men.¹¹⁸ This growth and accession of women, partnered with the changing connotation of the “traditional” family, demands legislative action in combating antiquated legal policy.¹¹⁹ Specifically, these changes showcase the viability of Massachusetts’ abolition of the elective

¹⁰⁷ Toossi, *supra* note 106, at 15.

¹⁰⁸ See Toossi, *supra* note 106, at 25.

¹⁰⁹ *The Wage Gap over Time: In Real Dollars, Women See a Continuing Gap*, NAT’L COMM. ON PAY EQUITY, <https://perma.cc/PK89-QWJD> (last visited Sept. 13, 2023) [hereinafter *The Wage Gap*]. See generally Greg Daugherty & Erika Rasure, *Gender and Income Inequality: History and Statistics*, INVESTOPEEDIA, <https://perma.cc/MV3P-VNYT> (last updated Mar. 1, 2023) (analyzing the history of the gender wage gap and changes that have occurred).

¹¹⁰ *The Wage Gap*, *supra* note 109. See generally Daugherty & Rasure, *supra* note 109.

¹¹¹ *The Wage Gap*, *supra* note 109. See generally Daugherty & Rasure, *supra* note 109.

¹¹² See Richard Fry & D’Vera Cohn, *Women, Men and the New Economics of Marriage*, PEW RSCH. CTR. (Jan. 19, 2010), <https://perma.cc/V5DB-3RA8>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *id.*

¹¹⁷ See Turnipseed, *supra* note 6, at 770–71.

¹¹⁸ See Fry & Cohn, *supra* note 112; see also Toossi, *supra* note 106, at 15.

¹¹⁹ See Juana Christian, *Nontraditional Families*, HOME & FAM. (July 5, 2021), <https://perma.cc/58ZU-45LV> (describing modern trends towards non-traditional family structures including “single parents by choice,” “divorced, cohabitating, and same-sex couples,” etc.); see also Toossi, *supra* note 106, at 15.

share without concern for leaving surviving spouses financially unstable.¹²⁰

C. *The Value of the Freedom of Disposition*

In the specific context of disinheritance, the spousal elective share fails to consider the possibility that the disinheritance of a spouse may not be maliciously motivated.¹²¹ Instead, partners in a marriage may believe that the estate of the deceased-spouse should be disposed of in a way which provides for family and friends who are in need of financial support.¹²² In instances where a surviving spouse is entirely financially independent, or in cases involving a subsequent marriage in which limited marital property was acquired, the spousal elective share allows surviving spouses to act on greed rather than need.¹²³ In addition to the possibility of a non-malicious disinheritance, some spouses may have a legitimate reason for omitting their partner, such as anticipated divorce.¹²⁴ In *Dowd v. Sullivan*, Patricia and Robert Dowd were married for five years before Robert's death.¹²⁵ Only months before his death, Robert discovered that his wife had been consulting lawyers about a possible divorce and decided to remove her as a beneficiary of his inter vivos trust.¹²⁶ Following his death, Patricia sought to gain access to the trust assets via the spousal elective share.¹²⁷ The court conceded that if the trust assets were considered part of Robert's estate at the time of his death, Patricia would have a good argument under the spousal elective share to gain access to those funds.¹²⁸ However, due to only a mere technicality—that Robert did not “retain a general power of appointment over the trust assets”—Patricia was barred access.¹²⁹ Technicalities should not be the only safeguard for enforcing a testator's freedom of disposition.¹³⁰ By allowing freedom of disposition to take the forefront, rather than chasing an arbitrary desire to protect those rarely in need of protection, legislatures would be encouraging financial independence while limiting the needless lack of respect for valid decisions regarding a testator's disposition of property.¹³¹

¹²⁰ See Fry & Cohn, *supra* note 112; see also Toossi, *supra* note 106, at 15.

¹²¹ See Fry & Cohn, *supra* note 112.

¹²² See Volkmer, *supra* note 2, at 142; Brashier, *supra* note 68, at 141–42.

¹²³ See Volkmer, *supra* note 2, at 142; Brashier, *supra* note 68, at 141–42.

¹²⁴ See, e.g., *Dowd v. Sullivan*, 2 Mass. L. Rptr. 392 (Mass. Super. Ct. 1994).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See, e.g., *Dowd*, 2 Mass. L. Rptr. at 392. See generally Brashier, *supra* note 68, at 141–42.

¹³¹ Volkmer, *supra* note 2, at 101; see Brashier, *supra* note 68, at 141–42.

In re Estate of Peck, a New Jersey case, explicitly states that the elective share is not meant to effectuate the intent of the testator, and that the testator's wishes and desires—evidenced in the production of a will—will be ignored in the context of calculating a spousal share.¹³² This case involved a spouse who executed a foreign will in Thailand with the desire of disposing real property she owned there.¹³³ In addition to this foreign will, the testator executed a will in the United States that was meant to provide for her surviving husband.¹³⁴ The testator made it explicitly clear that she did not wish for her husband to have access to her foreign real estate assets upon her death.¹³⁵ The court expressly dismissed the argument that the explicit desires of the testator should be respected, concluding that the purpose of the elective share is to provide support for the surviving spouse and that “the statute may be utilized to circumvent the actual intent” of the testator.¹³⁶

The cases above illustrate that the elective share ignores what should be the substantial power of a testator—to effectuate their wishes in the disposition of their property upon death.¹³⁷ By allowing surviving spouses to circumvent the valid wishes of testators, the legislature actively ignores the intimacy of creating death dispositions and the extensive personal factors that are taken into consideration when planning for death.¹³⁸ Partnered with the blatant dismissal of a decedent's freedom of disposition, the legislature also ignores the fact that the elective share option is rarely exercised or necessary.¹³⁹

D. *The Elective Share Rarely Serves a Purpose in Modern America*

In the United States, Georgia is the only state that allows for intentional spousal disinheritance.¹⁴⁰ Instead of allowing for an elective share option, Georgia's Probate Code provides omitted spouses with a “year's support,” which allows a spouse to petition the court in order to obtain twelve months' worth of “support” in the form of real property the spouse may currently be living in and necessary financial security, which is taken from the decedent-

¹³² 59 A.3d 608, 611 (N.J. Super. Ct. Ch. Div. 2012).

¹³³ *Id.* at 609.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 611.

¹³⁷ See generally Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014) (discussing the value of viewing trusts and estates as centered around the principle of the freedom of disposition).

¹³⁸ See Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 283 (2017).

¹³⁹ See Turnipseed, *supra* note 6, at 770–71.

¹⁴⁰ Kristi L. Barbre, *Death and Disinheritance in Georgia: Reconciling Year's Support and the Elective Share*, 4 J. MARSHALL L.J. 139, 140 (2011); Madalyn Davis, *Disinheriting a Spouse*, GRISSOM L. FIRM (Sept. 14, 2021), <https://perma.cc/F2UV-44JW>.

spouse's estate.¹⁴¹ In evaluating what a year's worth of support looks like for any given surviving spouse, the court takes into consideration the independent financial capabilities of the surviving spouse and other "equitable" factors.¹⁴²

A study published in 2000 by Professor Jeffrey Pennell analyzed over 2,500 wills that were probated in Georgia.¹⁴³ This study was largely prompted by an eagerness to understand the impact of Georgia's decision to refrain from applying limitations on an individual's ability to disinherit their spouse.¹⁴⁴ Less than one percent of the wills analyzed showed any sign that the surviving spouse felt they were treated unfairly based on the dispositions they received.¹⁴⁵ Out of all of the wills that were analyzed by Professor Pennell, not a single one was contested due to a disinheritance.¹⁴⁶

An earlier study conducted in 1960 determined that less than one-tenth of a percent of wills disinherit a spouse and that nearly every will analyzed provided for the spouse to a greater extent than what would be provided under an elective share statute.¹⁴⁷ Additionally, researchers evaluating federal estate tax returns found that men generally devised larger portions of their estates to their wives when compared to women and their dispositions to their husbands by nearly a ten percent margin.¹⁴⁸ This indicates that the elective share is rarely, if ever, used in most states, and it is not generally needed in order to sufficiently provide for a surviving spouse.¹⁴⁹ Although these statistics are unavailable in Massachusetts given its present maintenance of the elective share option, this study does highlight the viability of Massachusetts abolishing this legislation that serves no real purpose.¹⁵⁰ In addition to its lack of use in modern society, the elective share also presents difficulties for planning purposes due to its lack of effectiveness and inflexibility.¹⁵¹

¹⁴¹ Barbre, *supra* note 140, at 156.

¹⁴² Barbre, *supra* note 140, at 156–57.

¹⁴³ Turnipseed, *supra* note 6, at 771.

¹⁴⁴ Turnipseed, *supra* note 6, at 771. *See generally* Brian Douglas, *How to Disinherit Someone in Georgia*, BRIAN M. DOUGLAS & ASSOCS. (Sept. 22, 2021), <https://perma.cc/6GZR-YZLM> (discussing how easy it is for an individual to disinherit their spouse in Georgia, showcasing the novelty of the Georgia policy surrounding disinherited spouses).

¹⁴⁵ *See* Turnipseed, *supra* note 6, at 771; Rampino, *supra* note 7, at 435.

¹⁴⁶ Turnipseed, *supra* note 6, at 772.

¹⁴⁷ Turnipseed, *supra* note 6, at 772.

¹⁴⁸ Turnipseed, *supra* note 6, at 773.

¹⁴⁹ *See* Turnipseed, *supra* note 6, at 773.

¹⁵⁰ *Supra* pp. 15–16.

¹⁵¹ *Infra* pp. 16–19.

E. *The Spousal Elective Share Does Not Function in an Effective Way*

One of the major critiques of the spousal elective share is that it is inflexible and fails to take into account factors including the length of the marriage and the financial need of the surviving spouse.¹⁵² Unlike the equitable division of assets upon a divorce, the spousal elective share does not acknowledge any equitable factors when determining the amount that a surviving spouse is entitled to.¹⁵³ Given this inflexibility, the elective share presents a high risk of either overcompensating a surviving spouse or failing to provide them with sufficient support.¹⁵⁴ Under elective share statutes, the length of the marriage is not taken into consideration, which could allow conflicts to arise between a fairly recent spouse and a decedent's issue from previous marriages.¹⁵⁵ A case from Kansas provides a factual scenario which illustrates this point.¹⁵⁶ *In re Estate of Antonopoulos* is a case involving a decedent, Nick, who was survived by his third wife, Barbara, and five children from prior marriages.¹⁵⁷ Upon Nick's death, Barbara filed a petition to exercise her statutory elective share option and Nick's son, John, was informed of this filing.¹⁵⁸ During his life, Nick made the decision to hold certain properties jointly with his son with rights of survivorship intended to vest in John.¹⁵⁹ Barbara made the argument that she was entitled to portions of these properties through her spousal elective share.¹⁶⁰ The court ultimately held for Barbara, stating that portions of the decedent's interest in property held jointly with a third party can indeed be factored into the amount of the spousal share.¹⁶¹ This decision effectively robbed John, Nick's son, from effectuating his father's intention of John taking full ownership of the properties they held jointly.¹⁶² In states with elective share statutes, there is an unnecessary opportunity for surviving spouses to claim property that their decedent spouse intended to be devised to other, perhaps more deserving, beneficiaries.¹⁶³

An additional example comes from the Superior Court of Pennsylvania in *In re Estate of Rood*, a case involving a surviving wife claiming rights to

¹⁵² See Turnipseed, *supra* note 6, at 770.

¹⁵³ See Turnipseed, *supra* note 6, at 760.

¹⁵⁴ See Turnipseed, *supra* note 6, at 768.

¹⁵⁵ See Rampino, *supra* note 7, at 428.

¹⁵⁶ *In re Est. of Antonopoulos*, 993 P.2d 637, 637 (Kan. 1999).

¹⁵⁷ *Id.* at 640.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 644.

¹⁶² See *In re Est. of Antonopoulos*, 993 P.2d 637, 640 (Kan. 1999).

¹⁶³ See *id.* at 640–41; Rampino, *supra* note 7, at 428.

investment accounts held by her decedent-husband which were intended for his children from a previous marriage.¹⁶⁴ Harold Rood, the decedent-husband, died testate with a will that only provided for his two children and did not account for his spouse whatsoever.¹⁶⁵ The court held that as a matter of public policy, spousal elective share statutes should be read broadly to prevent the ability of spouses to “circumvent” the forced share and leave their surviving spouse with nothing.¹⁶⁶ As a result, the court determined that the surviving wife was entitled to her statutory share at the exclusion of the two surviving children.¹⁶⁷

The rate of multiple marriages in the United States is increasing steadily as time goes on, which also creates a higher frequency of children from multiple marriages.¹⁶⁸ As illustrated above, there is always a possibility that a decedent-spouse may prefer to devise the majority of his or her estate to their children at the exclusion of a recent spouse who is financially independent.¹⁶⁹ This could result in the overcompensation of an undeserving spouse.¹⁷⁰

Additionally, certain spouses may have the ability to position their assets in a way that prevents them from being included in the calculation of the elective share.¹⁷¹ Even in states like Massachusetts, which does not limit the election to probate assets, nothing prevents a spouse from “transferring assets to an offshore asset protection trust,” which effectively removes them from the surviving spouse’s reach.¹⁷² This fact highlights the troubling truth that the freedom of disposition is something that can be bought from a savvy estate planning professional.¹⁷³ If testamentary freedom can only fully exist for individuals financially capable of planning, there is a disadvantage for those spouses who seek to disinherit their spouse for justifiable reasons but are unable to effectively plan around the elective share themselves.¹⁷⁴

Another deficiency of the spousal elective share is that it fails to account for the modernization of marital dynamics and motivations.¹⁷⁵ Today, there

¹⁶⁴ *In re Est. of Rood*, 121 A.3d 1104, 1105 (Pa. Super. Ct. 2015).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1116.

¹⁶⁷ *Id.*

¹⁶⁸ See Rampino, *supra* note 7, at 424.

¹⁶⁹ See Rampino, *supra* note 7, at 428.

¹⁷⁰ See Rampino, *supra* note 7, at 428.

¹⁷¹ See Rampino, *supra* note 7, at 428; Remillard, *supra* note 14.

¹⁷² Turnipseed, *supra* note 6, at 739.

¹⁷³ Turnipseed, *supra* note 6, at 739.

¹⁷⁴ Turnipseed, *supra* note 6, at 761. See generally John J. Scroggin, *Limit Unwanted Spousal Asset Rights in Estate Plans*, EST. PLAN., Apr. 2016, at 30, 30 (listing the various ways in which spouses can plan around the surviving spouse being able to utilize the elective share).

¹⁷⁵ See Brashier, *supra* note 68, at 142.

are plenty of married couples who choose to romantically, but not legally, separate for the purpose of perhaps co-parenting children or avoiding the cost of divorce.¹⁷⁶ Given modern technological improvements in the travel industry, there is also an increased number of individuals agreeing to marry others for citizenship purposes.¹⁷⁷ The maintenance of the elective share option may also serve to encourage entering into marriages with ill intent.¹⁷⁸ People may be incentivized to find older partners with the knowledge that they will be entitled to a hefty percentage of the spouse's estate upon their not-so-distant death.¹⁷⁹ In these circumstances, the elective share would not serve the purpose it was intended to, following either the partnership or support theory.¹⁸⁰ The underlying principles of the spousal elective share are no longer valid given the modernization of the institution of marriage and the decreasing perpetuation of gender stereotypes.¹⁸¹ Additionally, as described above, there are countless opportunities for spouses to either rely on their own wealth in avoiding the implications of the forced share or use its existence to benefit themselves at the expense of alternative and intended heirs.¹⁸²

F. *When and by Whom Are Elections Being Made?*

A national study of case law relating to the spousal elective share showed that the majority of elective share cases are brought by women who are in their second or third marriage.¹⁸³ The study also found that cases concerning the omission of a spouse (either intentionally or by accident) exclusively involved individuals who were not in their first marriage.¹⁸⁴ To

¹⁷⁶ See Jessica Baquet, *Aiding Avarice: The Inequitable Results of Limited Grounds for Spousal Disqualification Under EPTL § 5-1.2*, 23 ST. JOHN'S J. LEGAL COMMENT. 843, 845 (2008).

¹⁷⁷ See generally Kelly Stamper Balistreri et al., *Trading Youth for Citizenship? The Spousal Age Gap in Cross-Border Marriages*, 43 POPULATION AND DEV. REV. 443, 448 (2017) (discussing the increasing rates of marriages between U.S. citizens and non-citizens as a result of "increased globalization"); Baquet, *supra* note 176, at 845–46.

¹⁷⁸ Baquet, *supra* note 176, at 845–46.

¹⁷⁹ Baquet, *supra* note 176, at 846; see Peter Diekmeyer, *For Love or Money: Research Shows How Marriage Is Good for Your Finances*, YOUAREUNLTD (June 26, 2020), <https://perma.cc/TY29-3V3T>; Christian Gollayan, *Marriage Is Still the Main Way for Women to Get Rich: Study*, NY POST, <https://perma.cc/RBX8-HLEE> (last updated Feb. 21, 2019, 3:49 PM) ("A new survey found that most women enter the elusive 1 percent through marrying a rich spouse.").

¹⁸⁰ See Baquet, *supra* note 176, at 846.

¹⁸¹ See Baquet, *supra* note 176, at 846; Alice H. Eagley et al., *Gender Stereotypes Have Changed: A Cross-Temporal Meta-Analysis of U.S. Public Opinion Polls from 1946 to 2018*, 75 AM. PSYCH. 301, 301–15 (2020).

¹⁸² See Cahn, *supra* note 68, at 2122–23.

¹⁸³ Cahn, *supra* note 68, at 2104.

¹⁸⁴ Cahn, *supra* note 68, at 2104–05.

give context to this study, there was a relatively recent analysis of wills that found that the majority of testators who were in their first marriage would leave their entire estate to their surviving spouse.¹⁸⁵ In addition, for individuals married more than once, the rate of disinheritance was substantially higher.¹⁸⁶ Given these statistics, it is not unreasonable that in second or third marriages, a spouse may be more concerned with providing for either children from a previous marriage or other needy family members rather than their most recent spouse.¹⁸⁷

Because the majority of spousal elections are made in the context of a subsequent marriage, the elective share may be failing to serve its purpose by granting dispositions that were not intended by the decedent nor necessary for the financial stability of the surviving spouse.¹⁸⁸ Given subsequent marriages generally happen later in life, it is plausible that the individual property that the two parties are entering into the marriage with is substantial enough without acquiring a portion of whatever accessions to wealth occur for either individual during the marriage.¹⁸⁹ By failing to consider the difference between wealth made within the marriage and assets acquired and kept from a previous marriage, the elective share may cause serious problems in terms of overcompensating subsequent spouses at the expense of intended beneficiaries.¹⁹⁰ These deficiencies of the elective share, partnered with the above-described lack of utilization, should prompt Massachusetts to abolish its elective share option.¹⁹¹

G. *The Legitimacy of Abolishing the Elective Share*

There are several suggestions that advocate for making the elective share applicable only to situations where it serves its originally-intended purpose.¹⁹² One of these suggestions requires that the duration of a marriage must surpass a minimum length in order for a spouse to be eligible to make

¹⁸⁵ See Cahn, *supra* note 68, at 2107.

¹⁸⁶ See Cahn, *supra* note 68, at 2109.

¹⁸⁷ See Cahn, *supra* note 68, at 2110–11.

¹⁸⁸ See Cahn, *supra* note 68, at 2111–12.

¹⁸⁹ See Cahn, *supra* note 68, at 2111–12; Jonathan I. Shenkman, *Second Marriage Financial Checklist: 7 Planning Items to Consider*, FORBES (Aug. 20, 2021, 1:06 PM EDT), <https://perma.cc/W9HJ-9896>.

¹⁹⁰ See Cahn, *supra* note 68, at 2113–14.

¹⁹¹ See Turnipseed, *supra* note 6, at 761; Cahn, *supra* note 68, at 2113.

¹⁹² See Cahn, *supra* note 68, at 2113–14; see, e.g., John W. Fisher II, *Statutory Reform Revisited: Toward a Comprehensive Understanding of the New Law of Intestate Succession and Elective Share*, 96 W. VA. L. REV. 85 (1993); William Forsberg, *Partners in Life and at Death: The New Minnesota Elective Share of a Surviving Spouse Statute*, 23 MITCHELL HAMLINE L. REV. 377, 388 (1997); G. Bryan Ulmer III, *Casenote, Trusts & Estates – Spousal Disinheritance – Inter Vivos Trusts and Wyoming’s Spousal Elective Share – Briggs v. Wyoming National Bank*, 29 WYO. L. REV. 323 (1994).

the election.¹⁹³ The data mentioned in the previous section shows that the majority of elections are made by widows who are in a subsequent marriage, so perhaps a length requirement would be valuable in discouraging financially-motivated marriages.¹⁹⁴ Additionally, this requirement would also allow for a greater amount of time for accumulating wealth within the marriage, rather than allowing a surviving spouse to take large shares of wealth accumulated prior to the marriage.¹⁹⁵ However, considering that the vast majority of these elections are made by individuals in the situation described above, a length-of-marriage requirement could possibly eliminate the utilization of the elective share entirely.¹⁹⁶

Even in situations where the spousal elective share could serve its genuine purpose, parties to a modern marriage have endless opportunities during their lives to take actions that preserve their share of assets accumulated during the marriage.¹⁹⁷ Based on the dramatic positive changes made to the perception of women in society, they now stand on a much more equal economic footing that empowers them to plan for the distribution of assets more effectively and proactively prior to and during a marriage.¹⁹⁸ Women are also no longer barred from owning property in the same capacity as their male counterparts and, in terms of preserving interests in real property, both parties are capable of holding the title equally with rights of survivorship.¹⁹⁹ These options effectively eliminate the need for the spousal election.²⁰⁰ Additionally, the access to planning mechanisms for both husbands and wives establishes that in the absence of the elective share option, resulting financial instability is unlikely.²⁰¹ In sum, there is little to

¹⁹³ Cahn, *supra* note 68, at 2113–14.

¹⁹⁴ See Cahn, *supra* note 68, at 2113–14.

¹⁹⁵ Cahn, *supra* note 68, at 2113–14; see Turnipseed, *supra* note 6, at 771.

¹⁹⁶ See Volkmer, *supra* note 2, at 142.

¹⁹⁷ See Volkmer, *supra* note 2, at 143–46. See generally Lorie Konish, *Joint vs. Separate Accounts: How Couples Choose to Handle Finances Could Impact Their Financial Success*, CNBC (Mar. 7, 2022, 1:39 PM EST), <https://perma.cc/H5R3-2EEF> (stating that recent generations are choosing to keep their assets entirely separate during the course of their marriage); Michelle McGagh, *How Couples Can Protect Their Financial Interests When Cohabiting*, INDEP. (Aug. 16, 2014), <https://perma.cc/2PWZ-GC94> (describing various methods couples can employ to protect their assets in cases of death or divorce).

¹⁹⁸ E.g., Volkmer, *supra* note 2, at 143–46.

¹⁹⁹ See Jone Johnson Lewis, *A Short History of Women's Property Rights in the United States*, THOUGHTCO., <https://perma.cc/9UAH-2JS9> (last updated July 13, 2019).

²⁰⁰ See *supra* Section III.

²⁰¹ See generally Cody Bay, *Women and Financial Independence: A Short History*, GO BANKING RATES (Mar. 31, 2022), <https://perma.cc/3P3Y-67UG> (discussing the ways in which women are becoming more financially independent and stating “millennial women are leading the charge of becoming more engaged in their finances”); Megan Gorman, *Millennial Women Are Poised to Be the Most Financially Independent Women in History*, FORBES (Sept. 9, 2018, 5:11 AM EDT),

no recourse in the event Massachusetts decides to abolish its elective share statute; not only is the option very rarely exercised, but individuals in a marriage are becoming increasingly financially independent from one another, obviating the need for support upon the death of one partner.²⁰² Marriage in modern society is more often viewed as a social benefit rather than an economic one, and it should be treated that way by current legislation.²⁰³ The elective share functions in a way that almost incentivizes women to continue relying economically on men.²⁰⁴ Not only can the election possibly serve as a tool for opportunist women chasing wealth, but it could also perpetuate women's deference to men in financial decision-making within a marriage.²⁰⁵ Massachusetts should care about the continued growth of women and be proactive in eliminating antiquated legislation disguised as a safeguard for women that is instead a crippling obstacle to women's financial independence.²⁰⁶

CONCLUSION

The concept of the elective share came about in an effort to compensate for the limited property rights of women upon the death of their husbands. This good faith intention to protect women is no longer applicable in modern society given the immense changes to women's status, including their ability to own property and become financially independent from their husbands.

Secondary to this original motivation to protect women was the desire to recognize the economic partnership of marriage. This rationalization falls flat when considered in the context of the drastic changes to the "traditional" family, the options couples have in terms of planning around the elective share, as well as the rarity of the disinheritance of spouses in general. In addition, the actual need of surviving spouses to be supported posthumously is waning significantly with the increasing number of families with both parties engaging in wage-earning activities. In the vast majority of modern circumstances, there is no actual need for a spouse to receive a portion of the decedent spouse's estate after death because financial stability has already been achieved independently.

Even beyond the shrinking need to provide financial support after death, the failure of spouses to do so anyways is extremely rare. If the

<https://perma.cc/DT6U-TYH8> (analyzing the changes that have occurred in society that put women today in a better financial position than ever before).

²⁰² See *supra* pp. 16–21.

²⁰³ Juliana Menasce Horowitz et al., *Public Views of Marriage and Cohabitation*, PEW RSCH. CTR. (Nov. 6, 2019), <https://perma.cc/UA4N-FH8N>.

²⁰⁴ See *supra* pp. 16–20.

²⁰⁵ See *supra* pp. 8–10.

²⁰⁶ See *supra* pp. 9–10.

elective share is widely unnecessary and its utilization is largely infrequent, its maintenance in Massachusetts is questionable at the very least. There are so many suggestions regarding different ways the elective share could be made more flexible to account for individual situations that may differ from the traditional marital experience; however, these changes seem obsolete and unnecessary given the rarity of the election's usage. In addition, the risk of incentivizing the misuse of marriage to gain wealth is high. If the sole qualifier for the receipt of an automatic portion of a decedent-spouse's estate at the exclusion of other beneficiaries is marriage alone, then there is a high chance that undeserving spouses will be overcompensated.

The spousal elective share serves no real purpose in modern society and is either obsolete or inapplicable in most cases of the modern family. What the elective share continues to do is perpetuate the stereotype that women are incapable of supporting themselves, are to some level dependent on their male counterparts, and require extensive financial assistance. All of these assumptions that underlie the spousal elective share are not only false, but also offensive to the strides women have taken to occupy their modern position. Therefore, in the interest of promoting financial independence and eliminating an obsolete law that is rarely, if ever, exercised to satisfy a genuine need, Massachusetts should abolish its elective share statute.