

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN THE MATTER OF: )  
)  
ESTATE OF BARRY BERNSTEIN ) Register of Wills -  
) New Castle County  
) Folio No. 141817  
And )  
)  
OCIE BERNSTEIN, ) C.A. No. 3728-MA  
)  
                  Petitioner, )  
)  
v. )  
)  
CAROL B. LOVETT )  
)  
                  Respondent. )

MASTER'S REPORT

Date Submitted: January 20, 2010  
Final Report: September 1, 2010

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And

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AYVAZIAN, Master

Two cases related to the Estate of Barry S. Bernstein (“decedent”) are currently before the Court. The parties in both the civil action and the Register of Wills matter are the decedent’s surviving spouse, Ocie Lindh Bernstein (“Mrs. Bernstein”) and the personal representative of decedent’s estate, his daughter Carol B. Lovett (“Mrs. Lovett”). Awaiting decision are a Petition for Elective Share filed by Mrs. Bernstein on April 30, 2008, a Motion to Obtain Property filed by Mrs. Lovett on July 1, 2008, and a Petition for Removal of Executrix filed by Mrs. Bernstein on July 8, 2008. A two-day trial on these issues was held in early 2009, and the parties submitted post-trial briefs. A draft report was issued in which: (1) I denied Mrs. Bernstein’s motion to remove Mrs. Lovett as executrix of decedent’s estate; (2) I granted Mrs. Lovett’s motion to obtain three pieces of decedent’s tangible personal property from Mrs. Bernstein’s home; and (3) I found that the calculation of Mrs. Bernstein’s elective share must use the amount which equals the balance, if any, remaining after the net proceeds from the sale of Mrs. Bernstein’s one-third interest in the New Jersey condominium are used to pay the debts of decedent’s estate as the correct value of Mrs. Bernstein’s interest in the real property derived by virtue of decedent’s death pursuant to 12 Del. C. § 903(a). Both parties took exceptions to my draft report. This is my final report after simultaneous briefing on the exceptions.

#### I. Factual and Procedural Background

Decedent and Mrs. Bernstein had been married for seven years when decedent died of metastatic thyroid cancer at age 88 on October 4, 2007.<sup>1</sup> Decedent had been a retired engineer with two children from a previous marriage. His annual pension was \$90,000, and during their seven-year marriage, decedent lived with Mrs. Bernstein in her

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<sup>1</sup> Decedent and Mrs. Bernstein were married on August 30, 2000.

home near Newport, Delaware. During their marriage, decedent and Mrs. Bernstein purchased a time share in Williamsburg, Virginia as tenants by the entireties. Shortly before his marriage to Mrs. Bernstein, decedent had purchased a condominium in New Jersey with his daughter and son-in-law as husband and wife.<sup>2</sup> By the time of decedent's death, Mrs. Lovett owned a two-thirds interest in the condominium, having inherited a one-third interest from her husband upon his death. Decedent also owned bank accounts, mutual fund accounts, life insurance policies, and bonds. His bank accounts were jointly held either with Mrs. Bernstein or with his children. His mutual fund accounts ("TOD accounts") were transferable on death to his children. Mrs. Bernstein and decedent's children were also named as beneficiaries on different insurance policies and bonds. As a result, when decedent died on October 4, 2007, most of his property passed outside of his testamentary estate by operation of law to Mrs. Bernstein and his two children.

Decedent's testamentary estate contained \$2,205 worth of tangible personal property, i.e., car, books, jewelry, clothes, artwork, and furniture. Decedent's Last Will and Testament named his two children as beneficiaries of his residuary estate, and named Mrs. Lovett as Executrix. Filed with the will were two handwritten memoranda of tangible personal property, and a codicil in which decedent left his one-third interest in the New Jersey condominium to Mrs. Bernstein.

Letters testamentary were granted to Mrs. Lovett on November 8, 2007. Even before then, Mrs. Lovett had wanted to retrieve her father's personal property from Mrs. Bernstein's home, but Mrs. Bernstein did not allow Mrs. Lovett to enter her Newport home until November 25, 2007. During that visit, Mrs. Lovett and her brother Hank

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<sup>2</sup> In her Exceptions to Master's Draft Report, Mrs. Lovett pointed out that the New Jersey condominium had been purchased before the decedent's marriage to Mrs. Bernstein. *See* Petitioner's Trial Exhibit No. 3. I have modified the draft report to reflect this fact.

Bernstein (“Hank”) went through Decedent’s personal papers and retrieved a few of his personal possessions. After some further communications with Mrs. Bernstein, Mrs. Lovett and her brother were planning to return to pack the remaining property on December 21, 2007. Mrs. Bernstein, however, was interested in learning more about an offer to purchase the New Jersey condominium that had been communicated to Mrs. Lovett. On December 12<sup>th</sup>, Mrs. Bernstein sent Mrs. Lovett a list containing 12 specific requests for information or copies of documents pertaining to the New Jersey real estate.<sup>3</sup> Mrs. Lovett responded on December 15<sup>th</sup> with information about the \$285,000 offer, the \$315,000 appraisal of the condominium, and upcoming building renovations whose cost to their condominium unit was estimated between \$30,000 and \$35,000. On December 20, 2007, Mrs. Bernstein sent an e-mail to Mrs. Lovett and Hank, informing them that she was reserving the following day to discuss the condominium with Mrs. Lovett, and did not want to “muddy the waters” with other matters. Therefore, she told Hank not to come. Hank, however, replied that he was coming with his sister as scheduled to pack books and pick up his father’s possessions. The following morning, approximately one hour before they were to arrive, Mrs. Bernstein sent another e-mail to Mrs. Lovett and her brother informing them that she was going out.

After more electronic correspondence, it was agreed that Mrs. Lovett and her brother could come to Mrs. Bernstein’s house to do the final packing of their father’s personal property on Sunday, January 13, 2008. On January 11<sup>th</sup>, Mrs. Bernstein received a copy of a *pro se* Petition to Sell Real Estate to Pay Debts filed by Mrs. Lovett

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<sup>3</sup> Mrs. Bernstein communicated by electronic mail with her two stepchildren. Their relationship was cordial but, in Mrs. Bernstein’s opinion, their relationship had deteriorated because she had taken her grandson on a 12-day trip to Greece and had left her husband with a caregiver just a few weeks before his death.

in this Court. The petition alleged that the debts of the estate, including an unpaid mortgage balance (total balance: \$109,000), medical expenses, estimated taxes, and estate expenses (approximately \$12,000) exceeded the value of the personal property, and that Mrs. Bernstein's one-third interest in the New Jersey condominium needed to be sold to pay those debts. Mrs. Bernstein responded by notifying Mrs. Lovett and her brother that she had retained counsel, and that she would not be releasing decedent's personal property:

[Counsel] told me that Barry's personal property includes bank accounts, investments, and tangible personal property which you want to remove from my house. [Counsel] further tells me that all personal property other than real property must be sold before real property can be sold. Therefore, I am retaining such property, even though I would like to be rid of it, so that it can be sold and the proceeds used to pay any debts that might have to be paid from the personal estate.<sup>4</sup>

Mrs. Lovett retained a lawyer, and more litigation ensued. On April 30, 2008, Mrs. Bernstein filed a Petition for Elective Share. On May 13, 2008, the parties stipulated to the dismissal of the Petition to Sell Real Estate to Pay Debts without prejudice to the estate filing a similar petition in New Jersey. On May 14, 2008, this Court granted Mrs. Lovett's Motion to Compel Heir to Cooperate in Estate Administration, and ordered the parties to agree on a date for removing decedent's tangible personal property from Mrs. Bernstein's home, the removal of which was to be overseen by counsel using movers hired by the executrix. The move took place in June 2008. On July 1, 2008, Mrs. Lovett filed a Motion to Obtain Property, alleging that Mrs. Bernstein had refused to allow three specific pieces of decedent's artwork to be removed from her home, and listing numerous other items belonging to the decedent that were not included in the personal property that Mrs. Bernstein had allowed to be moved. On July

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<sup>4</sup> Respondent's Trial Exhibit No. 13.

8, 2008, Mrs. Bernstein filed a Petition for an Order to Show Cause and/or Order for the Removal of Executrix, alleging that Mrs. Lovett had breached her fiduciary duties by failing to account for certain assets, failing to obtain a proper appraisal of personal property, failing to promptly distribute Mrs. Bernstein's share of the real property, and acting punitively and hostilely toward Mrs. Bernstein. Each motion generated a response, further pleadings, discovery, and expense, including attorney fees. Mediation was attempted without success. On November 11, 2008, Mrs. Lovett filed the equivalent of a petition to sell real estate to pay debts in a New Jersey court, requesting that she be allowed to sell the condominium and apply one-third of the net proceeds of the sale to payment of the debts and expenses of the estate.

## II. Analysis

### A. Motion to Obtain Property

At trial, the testimony on this issue primarily focused on Mrs. Bernstein's retention of three pieces of artwork that had belonged to decedent described as "the Horse," "the Collage," and "the Bust of the Black Man." Mrs. Bernstein testified that her husband had brought all these items with him when he moved into her home. Because her husband liked the print that depicted the head of a black man, she had it framed as a wedding gift for him. The picture of the horse she had framed as a gift to her husband for Hanukah. Mrs. Bernstein testified that she also had the large collage cleaned. Mrs. Bernstein testified that she wanted to retain these three items as a connection to her husband who, she claimed, had wanted her to have them. Alternatively, she wanted to retain these items as part of her elective share.

The parties did not dispute the fact that the debts of the estate exceeded its assets. Mrs. Bernstein expressed her opinion that the funeral expenses (approximately \$14,000) were high, the executrix's commission (\$20,000) was a "little breathtaking for something that should have been so simple," and the attorney's fees (estimated as \$44,377.50) were "really out of line," but she did not disagree that the estate contained personal assets worth only \$2205. Mrs. Lovett had paid for the funeral and other debts with her own money, and Mrs. Lovett was continuing to pay the entire mortgage and condominium fees for the New Jersey property to prevent foreclosure because Mrs. Bernstein had told Mrs. Lovett that she could not afford the monthly payments.

It is the duty of the personal representative of the estate to collect the assets, pay the debts of the deceased and to distribute any assets remaining in the estate to the beneficiaries or heirs. *See Theisen v. Hoey*, 51 A.2d 61, 63 (Del. Ch. 1947); *In re Spicer's Estate*, 120 A. 90, 91 (Del. Ch. 1923). There is no dispute that the three pieces of artwork were owned by decedent during his lifetime. As such, these items should have been turned over to the executrix in order for them to be sold and their proceeds applied to pay the estate's creditors. Mrs. Bernstein points to no provision in the elective share statute, 12 Del. C. § 901 et seq., that entitles a surviving spouse to select specific items of tangible personal property as part of the elective share.<sup>5</sup> Therefore, I am granting Mrs. Lovett's Motion to Obtain Property as to these three items.

#### B. Motion to Remove Executrix

As stated above, the first duty of a personal representative is to collect the assets of the estate. Mrs. Lovett attempted to do just that, but was thwarted at almost every step

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<sup>5</sup> Section 901(a) provides in part: "The elective share may be satisfied in cash or in kind, or partly in each."

by Mrs. Bernstein. What should have been a simple matter of obtaining Decedent's books, clothes, and other personal items from his former home became a lengthy, frustrating, and expensive process for the executrix. The record shows that Mrs. Lovett was sensitive to Mrs. Bernstein's desire for privacy. Nonetheless, Mrs. Lovett was aware of her fiduciary duties as personal representative of her father's estate, and her efforts to collect the assets were met with suspicion and hostility by Mrs. Bernstein. Because decedent's bank accounts and mutual fund accounts were not part of his testamentary estate, the only significant asset that was available to pay estate debts – other than \$2,205 worth of tangible personal property -- was decedent's one-third interest in the New Jersey condominium which he devised to Mrs. Bernstein in a codicil to his will. Thus, Mrs. Lovett was placed in the difficult position of administering an estate without sufficient assets to pay its debts at the same time as she found herself a co-owner of a condominium with Mrs. Bernstein in a declining real estate market because title to the one-third interest had immediately passed to Mrs. Bernstein by operation of New Jersey law at decedent's death. *See Egner v. Egner*, 443 A.2d 1104, 1105-06 (N.J. Super., Ch. Div. 1982).

Although Mrs. Bernstein alleges that the executrix has been hostile toward her, and that the executrix's actions were punitive and designed to deprive her of an inheritance, the fact remains that Mrs. Bernstein's title to the real property was immediately defeasible because the decedent had left insufficient assets in his estate to pay his debts. The executrix was doing what was necessary in order to pay her father's debts and estate expenses. There was no evidence that the executrix was motivated by any desire to punish Mrs. Bernstein or to deprive her of an inheritance. There was no evidence that the executrix breached any fiduciary duty to Mrs. Bernstein during her



administration of decedent's estate. Further administration will be necessary to sell the real property, determine the distribution of one-third of the net proceeds to pay debts, determine the elective share, and file a final accounting. Each step will likely be overseen or determined by this Court.<sup>6</sup> The appointment of a neutral successor administrator would only create more unnecessary expense for this estate. Therefore, I am denying Mrs. Bernstein's motion to remove Mrs. Lovett as executrix of decedent's estate.

### C. Elective Share Calculation

On April 30, 2008, Mrs. Bernstein petitioned to take her elective share in the elective estate of Decedent pursuant to 12 Del. C. § 901(a). Under the elective share statute, a surviving spouse in this State has a right to an elective share in the amount equal to one third of the elective estate. *Id.* The elective estate is defined as the amount of the decedent's gross estate for federal estate tax purposes less certain deductions. *See* 12 Del. C. § 902. At trial, both parties presented expert witnesses to demonstrate how Mrs. Bernstein's elective share should be calculated. Mrs. Lovett's expert, Barbara Snapp Danberg, Esquire,<sup>7</sup> had prepared a draft United States Estate Tax Return Form 706 in January 2009 in which she had calculated the total gross elective estate of the Decedent as \$545,771.23, and after subtracting allowable deductions, Danberg calculated the total elective estate as \$408,055.14. One third of this amount - \$136,018.38 –

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<sup>6</sup> By order dated March 5, 2009, the Superior Court of New Jersey Chancery Division allowed the executrix to list the condominium for sale and to sell the property, provided that one-third of the net proceeds of sale will be held in an interest-bearing escrow account pending written agreement of the parties as to the disposition of those proceeds or an order of this Court directing that disposition.

<sup>7</sup> Danberg works for the law firm that is representing Mrs. Lovett and was present as co-counsel during the trial, a conflict to which Mrs. Bernstein's attorney alluded at trial and in post-trial briefing.

constituted the elective share of the surviving spouse. However, since by Danberg's calculation the decedent had already transferred \$139,240.23 to Mrs. Bernstein, her testimony was that Mrs. Bernstein's elective share was effectively zero.

Using the same draft Form 706, Gregory J. Weinig, Esquire, testifying on behalf of Mrs. Bernstein, calculated that Mrs. Bernstein should receive \$101,778.15 as her elective share. Although the two experts quibbled about some minor issues, such as the actual value of the Williamsburg time share and whether the \$7500 spousal allowance should be deducted as a claim against the estate if it had not yet been paid,<sup>8</sup> the main difference between their calculations concerned their treatment of Mrs. Bernstein's one-third interest in the New Jersey condominium. According to Danberg, Mrs. Bernstein received one-third of the value of the condominium upon decedent's death. Since the condominium had been appraised at \$315,000 as of October 4, 2007, Danberg therefore took one-third of the appraised value, or \$105,000, as the value of the real estate interest that Mrs. Bernstein had derived from decedent by virtue of death.<sup>9</sup> Weinig, on the other hand, testified that if Mrs. Bernstein were to receive nothing from the sale of the New

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<sup>8</sup> Danberg used the purchase price of the timeshare in 2005 as its value for calculating the elective share. Mrs. Lovett had attempted to get an appraisal of the time share as of the date of decedent's death, but she was unable to obtain any information about the timeshare from its management because Mrs. Bernstein had transferred title to the timeshare into her name alone within days of decedent's death. Weinig used a lower figure that Mrs. Bernstein had testified was the sales price she was currently asking for the timeshare. Weinig also took issue with the estimated amount of \$44,377.50 for attorney fees, which he testified should be no more than \$10,000, and Weinig saw no justification at all for the executrix's \$20,000 commission.

<sup>9</sup> Section 901(a) provides that "the surviving spouse has a right of election to take an elective share of an amount equal to one third of the elective estate, less the amount of all transfers to the surviving spouse by the decedent, under the limitations and conditions herein stated." Section 903 defines the value of the property transferred to the surviving spouse by the decedent as "an amount which equals the value of the property derived from the decedent by virtue of death." This language in turn is defined in relevant part as "[p]roperty which is part of the decedent's estate which passes to the surviving spouse by testate or intestate succession[.]" 12 Del. C. § 903(1)(a). Although Mrs. Lovett argues that a previous version of section 903(1)(a) is applicable to decedent's estate, the operative language for the purposes of this dispute was not affected by the statutory revision.

Jersey condominium after payment of estate debts, the value of the property interest derived by virtue of decedent's death was zero.

The right to an elective share is a statutory remedy designed to limit the right of a testator to exclude his spouse from his estate. *See Estate of Tinley*, 2002 WL 31112197 (Del. Ch. Sept. 11, 2002) (Master's Report). Although the law allows a competent testator to dispose of his property as he wishes, the legislature has preserved a surviving spouse's right in the deceased spouse's estate in two different ways. *Id.* First, the surviving spouse has a right to a spousal allowance of \$7500, which has priority over all other claims against the estate except administration expenses, fees and commissions. 12 Del. C. §§ 2105, 2308(a). Second, the right of election gives the surviving spouse the right to demand a one-third share of the deceased spouse's elective estate. In this case, the only assets remaining in decedent's testamentary estate were decedent's tangible personal property, which were insufficient to pay the administration expenses, spousal allowance, funeral expenses, mortgage, and other debts of the estate. As a result, the executrix was entitled to petition a court in New Jersey to sell the real estate interest that had passed by testate succession to the surviving spouse in order to pay those expenses and debts. However, these same expenses and debts were deducted from the decedent's gross elective estate on Form 706 to determine the amount of the elective estate. *See* 12 Del. C. § 902(a)(1). If Mrs. Bernstein receives nothing from the sale of her real property interest after payment of decedent's debts and estate expenses, then Danberg's method of calculation would have the effect of reducing both the gross elective estate and the remaining elective share to the detriment of the surviving spouse. Not only would Mrs. Bernstein be excluded from her deceased spouse's testamentary estate, she also would be

excluded from sharing in his elective estate. Offsetting the appraised value of the one-third interest in the New Jersey condominium from Mrs. Bernstein's elective share would lead to substantial unfairness, thereby defeating the very purpose of the elective share statute.

In order to carry out the legislative goal of ensuring that a surviving spouse receives a fair share of the deceased spouse's estate, the calculation of the elective share shall include as the value of the surviving spouse's real property interest derived from the decedent by virtue of death the amount of any proceeds received by Mrs. Bernstein after one-third of the net proceeds from the sale of the New Jersey condominium are applied to pay Decedent's debts and estate expenses. If there are no proceeds remaining after the debts and estate expenses are paid, then the value of the surviving spouse's real estate interest derived by virtue of the decedent's death shall be zero. The value of the Williamsburg timeshare, however, shall remain as currently stated in Form 706 unless Mrs. Bernstein provides Mrs. Lovett with sufficient information to obtain an appraisal of the timeshare's value on the date of decedent's death. The delay in obtaining an appraisal was the result of Mrs. Bernstein immediately transferring title of the timeshare into her own name after the decedent's death. Because she caused this delay, Mrs. Bernstein is not entitled to benefit from any reduced value of the timeshare due to a declining real estate market. *See, e.g., Estate of Tinley*, 2007 WL 2304831 (Del. Ch. July 19, 2007 (Master's Report)).

At trial, both Mrs. Bernstein and her expert witness challenged the estate administration expenses and executrix's commission as excessive. This issue is not ripe for decision because the condominium has yet to be sold and the estate finalized.

Nevertheless, once Mrs. Bernstein's elective share is calculated following the method outlined above, Mrs. Lovett and her brother may have to contribute funds in equal amounts from the TOD accounts that were distributed to them in order to pay Mrs. Bernstein her elective share. *See* 12 Del. C. § 908 (a). Although these TOD accounts are not included in the decedent's testamentary estate, they are included in his elective estate, and thus comprise "the decedent's contributing estate" for purposes of liability for the amount of the elective share.<sup>10</sup> *Id.*

### III. Exceptions to Draft Report

At the conclusion of my draft report, I held that the value of the real property Mrs. Bernstein derived from the decedent by virtue of death must reflect the fact that at the moment of decedent's death, title to the real property passed to Mrs. Bernstein subject to defeasance because the estate lacked sufficient assets to pay its debts. I also found that although this estate was small, the legal issues were novel, and the lack of cooperation from the surviving spouse frustrated the efforts of the executrix to administer the estate in a timely fashion. As a result, I found no reason to remove Mrs. Lovett as executrix of her father's estate. I also found that Mrs. Bernstein was not entitled to retain possession of three pieces of artwork or any other item of tangible personal property that was owned by the decedent during his lifetime. Therefore, I ordered that all such tangible personal

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<sup>10</sup> The decedent's contributing estate is defined as:

only that portion of the elective estate of which the decedent was the sole owner at death and which was not transferred or deemed transferred to a surviving spouse as described in § 903(1) of this title. The decedent's contributing estate does not include any jointly owned property with the right of survivorship of which the decedent was a joint owner, any insurance proceeds which are payable to a beneficiary other than to the estate, or any property held in trust.

12 Del. C. § 908(b).

property in Mrs. Bernstein's possession be delivered to counsel for the executrix within five days after my report became final.

Both parties took timely exceptions to the draft report. Mrs. Bernstein contends that I erred in failing to hold Mrs. Lovett personally liable to pay the elective share as a result of her distribution of the TOD accounts during the pendency of the petition for elective share. Mrs. Lovett contends that I erred in not using the full value of the decedent's one-third interest in the real estate in calculating the elective share.

#### A. Mrs. Bernstein's Exception

Once the amount of the elective share of a surviving spouse is calculated, "liability for the amount of the elective share shall be apportioned among the recipients of 'the decedent's contributing estate.'" 12 Del. C. § 908(a). Mrs. Bernstein argues, however, that Mrs. Lovett, as personal representative of decedent's estate, should be personally liable for the entire elective share because she failed to act on behalf of all beneficiaries of the estate when she distributed the TOD accounts to herself and her brother. According to Mrs. Bernstein, Mrs. Lovett dissipated the contributing estate while enriching herself in the process even though she knew there were insufficient assets in the probate estate to pay any elective share.

The record shows that the decedent owned four "TOD" mutual fund accounts with a combined value of \$371, 796.24 that transferred on death to his two children in equal shares. These four accounts are not part of the decedent's testamentary estate;<sup>11</sup> therefore, title to these accounts did not vest in Mrs. Lovett as personal representative of the decedent's estate, and she had no responsibility to administer them as estate assets.

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<sup>11</sup> 12 Del. C. § 809(a) states: "A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this chapter and is not testamentary."

*See generally Boyer v. Cole*, 143 A. 489 (Del. Ch. 1927); *In re Estate of Spicer*, 120 A. 90 (Del. Ch. 1923); 12 Del. C. § 1901(a). Thus, while Mrs. Lovett’s position as personal representative of decedent’s estate and as a beneficiary of decedent’s TOD accounts appears to create a conflict, it is an illusory one. Moreover, the elective share statute contemplates that by the time the amount of the elective share has been calculated, the decedent’s contributing estate will have been distributed. The statute requires payment of the amount of the elective share to be apportioned among the “recipients” of the decedent’s contributing estate “in the proportion ... that the value of the property of each such recipient bears to the total value of the property received by all such recipients interested in the contributing estate[.]” 12 Del. C. § 908(a). The statute expressly provides that no person shall be liable for contribution in any greater amount than the person would have been if relief had been secured against all persons subject to contribution. *Id.* Under the statute, Mrs. Lovett cannot be held personally liable to pay the entire amount of Mrs. Bernstein’s elective share. Mrs. Bernstein’s exception is therefore denied.

B. Mrs. Lovett’s exception.

Mrs. Lovett takes exception to the phrase “[i]n order to carry out the legislative goal of ensuring that a surviving spouse receives a fair share of the deceased spouse’s estate” that preceded my calculation of the proper amount of Mrs. Bernstein’s elective share. According to Mrs. Lovett, there is neither legislative nor case law support for the calculation of a “fair share” other than in the context of what a will provides and what the elective share statute provides. The elective share statute mandates the use of Form 706 (United States Estate Tax Return), and the instructions on Form 706 (Schedule A - Real

Estate) mandate the use of the full value of the one-third interest in the New Jersey condominium in completing the Form. As a result, Mrs. Lovett argues, my calculation, designed to ensure a surviving spouse a “fair share” of the deceased spouse’s estate, is contrary to the clear language of the statute.

My calculation of the amount of Mrs. Bernstein’s elective share is based upon the elective share statute and Form 706. Pursuant to 12 Del. C. § 902(c), the personal representative of an estate must prepare a Form 706 whenever an elective share petition has been filed. Pursuant to the printed instructions on Form 706, the full value of the decedent’s real estate must be entered in the value column of Schedule A, and the unpaid amount of any mortgage for which the decedent was personally liable may be deducted on Schedule K.<sup>12</sup> In this case, the full value of the decedent’s one-third interest in the New Jersey condominium (\$105,000) was listed on Schedule A of the draft Form 706 that was prepared in January 2009.<sup>13</sup> This value was added to the date-of-death values of the decedent’s stocks and bonds, insurance on the decedent’s life, and jointly-owned property in calculating the decedent’s gross elective estate.<sup>14</sup> The share of the mortgage encumbering the New Jersey condominium for which the decedent was personally liable (\$36,295.24) was listed on Schedule K. Various debts of the decedent, funeral expenses and estate administration expenses were also listed on Schedules J and K.<sup>15</sup> The mortgage, debts and estate expenses were then subtracted from the decedent’s gross elective estate to calculate the decedent’s elective estate.

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<sup>12</sup> Respondent’s Trial Exhibit B, Schedule A-page 5.

<sup>13</sup> Respondent’s Trial Exhibit B. This value was based upon an appraisal that has not been challenged by Mrs. Bernstein.

<sup>14</sup> *Id.*, Schedules A, B, D & E.

<sup>15</sup> *Id.*, Schedules J & K.



Under 12 Del. C. § 901(a), a surviving spouse is entitled to one third of the elective estate, less the amount of all transfers to the surviving spouse by the decedent, under certain limitations and conditions as stated in the statute. The dispute between the parties pertained to the valuation of the decedent's one-third interest in the New Jersey condominium that was transferred to Mrs. Bernstein under the codicil. The full value of the decedent's real property interest (\$105,000) was listed on Schedule M (Bequests, etc. to Surviving Spouse) of the draft Form 706 that was prepared in January 2009, contrary to the Schedule's instruction that "full value of a property interest for which a deduction was claimed on Schedules J through L" should not be listed.<sup>16</sup> The instructions for Schedule M specifically provide that: "[t]he value of the property interest should be reduced by the deductions claimed with respect to it."<sup>17</sup>

The full value of the one-third property interest in the New Jersey condominium was not reduced by \$36,295.24, i.e., the amount of the mortgage that was listed on Schedule K. Nor was its full value reduced by any of the other debts or estate administration expenses listed on Schedules J and K, i.e., those debts and estate administration expenses which are to be paid from the one-third of the net proceeds of the sale of the New Jersey condominium per court order.<sup>18</sup> Per court order, Mrs. Bernstein was divested of her title to the one-third property interest in the New Jersey condominium that had been transferred to her by the decedent because the decedent's probate estate was insufficient to pay these debts. If the instructions for Schedule M had been followed, the full value of Mrs. Bernstein's one-third property interest in the New Jersey condominium would have been reduced to zero because the mortgage, debts and expenses listed on

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<sup>16</sup> *Id.*, Schedule M-page 28.

<sup>17</sup> *Id.*

<sup>18</sup> Petitioner's Trial Exhibit No. 11.

Schedules J and K that are to be paid out of that property interest exceed \$105,000. If the one-third property interest in the New Jersey condominium had been valued on Schedule M at zero dollars, then offsetting the total amount of the remaining property listed on Schedule M against one third of the decedent's elective estate would have resulted in an elective share of approximately \$100,000. Instead, by listing the full value of the one-third property interest in the New Jersey condominium on Schedule M, the above calculation effectively left Mrs. Bernstein with no elective share. Not only was Mrs. Bernstein's elective share computed by reference to the mortgage, debts and estate expenses, it also was charged with paying them. To permit this method of computation would result in a windfall to the recipients of a contributing estate where, as here, a decedent arranged for the bulk of his property to pass outside of his probate estate, and left essentially nothing for the payment of his debts except a real property interest devised to his surviving spouse.

Mrs. Bernstein inherited an interest in real property from the decedent that was encumbered with a mortgage and subject to defeasance to pay the decedent's debts and estate expenses. Form 706 Schedule M requires that the full value of a property interest be reduced by any deductions claimed with respect to the property, including funeral expenses, estate expenses, debts of the decedent, and mortgages. In this case, deductions for the funeral expenses, estate expenses, decedent's debts and outstanding mortgage were claimed, by the estate, but are to be paid out of Mrs. Bernstein's one-third interest in New Jersey condominium. Accordingly, the value of Mrs. Bernstein's real property "derived from the decedent by virtue of the death" under Section 903(1)(a) should be

reduced to reflect that Mrs. Bernstein was divested of the real property interest she had inherited from the decedent. Mrs. Lovett's exception, therefore, is denied.

#### IV. Conclusion

For the reasons stated above, the parties' exceptions are denied. After this report becomes final, counsel should inform the Court whether a hearing should be scheduled regarding the disposition of one-third of the net proceeds of the sale of the real property.